9-15

IN THE SUPREME COURT OF FLORIDA

COMMISSION ON ETHICS,

Appellee/Appellant,

CASE NO. 85,860

v.

JAMES BARKER,

Appellant/Appellee.

_____/

ANSWER BRIEF OF APPELLEE

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INTRODUCTION

This is the Answer Brief of Appellee, James Barker. James Barker was the Appellant before the District Court of Appeal and the Respondent before the Commission on Ethics and before the Division of Administrative Hearings. He will be referred to throughout this brief either by name or as "Appellee." Appellant, the Florida Commission on Ethics, Appellee before the District Court of Appeal and the agency in the underlying administrative proceedings, will be referred to throughout this brief as either "Appellant" or the "Commission". The District Court of Appeal of Florida, Third District, will be referred to as "the District Court".

Reference to the record shall be made by the following designation: "(R.)." Reference to the transcript of the hearing before the Division of Administrative Hearings which took place on March 9, 1994, and which is included in the record before this Court as Volume III, will be made by the following designation: "(T.)."

STATEMENT OF THE CASE AND FACTS

Appellee agrees with the statement of the facts set forth by Appellant to the extent that this statement addresses the procedural progress of this case. However, Appellee respectfully submits that several facts set forth by the Appellant are either inaccurate or misleading.

On page 2 of the Appellant's brief, Appellant recites that "[a]s found by the Hearing Officer, the Country Club had repeatedly over a number of years had a business relationship with the City and sought favorable action from the City Commission." The Appellant then recites various matters alleged to have occurred between 1935 and 1988. In this regard, it should be noted that the Hearing Officer devoted a great deal of her findings of fact to matters which occurred between 1977 and 1988 involving the Coral Gables Country Club and the Coral Gables City Commission. (R.123-138). However, Mr. Barker did not become a Coral Gables City Commissioner until 1989. (R.146). There is no evidence in the record that Barker had any knowledge of these facts which occurred prior to his tenure on the City Commission. Accordingly, the recitation of facts commencing at the top of page 2 and carrying over to page 3 of the Appellant's brief is irrelevant to any issue in this case.

Appellant admits on page 3 of its brief that Barker's "only vote regarding the Country Club after being elected to the Commission was a vote to postpone action." (R.131). It is undisputed that no vote concerning the Country Club was pending before the City Commission when Barker received his complimentary membership. (R.130). Moreover, the Hearing Officer found that no one from the Country Club had ever asked Barker for any favor. (R.130).

On page 3 Appellant states that "[t]he Executive Club's owner and the City had had numerous disputes over the years on various issues . . . ." However, there is no evidence whatsoever in the record that Barker had any involvement in or, indeed, any knowledge of, these disputes. More importantly, the Hearing Officer herself found that no vote concerning the Executive Club was pending before the City Commission when Barker received his complimentary membership (R.132) and that Barker never voted on any matter concerning the Executive Club. (R.132).

On the bottom of page 3 Appellant recites a portion of a stipulation in the record which provided that the owner of the Executive Club had stated that the "provision of the free Executive Club memberships was an effort on his part to 'bury the hatchet' between himself and the City." There is absolutely no evidence in the record of there ever being a dispute between Barker and the owner of the Executive Club. There is absolutely no evidence in the record that this so-called "burying of the hatchet" referred to any state of affairs between the owner of the Executive Club and Barker. In this regard, it must be noted that Barker's final hearing was part of a consolidation of three ethics proceedings against three individual Coral Gables officials. (T.1). (Appellee Barker, Coral Gables City Attorney Robert Zahner and Coral Gables City Commissioner Robert Hildreth). This reference to burying the hatchet is therefore so vague as to be meaningless. The State failed to present any evidence as to what "burying the hatchet" referred to when the Executive Club's owner testified in the DOAH proceedings (T.82-102). Accordingly, the State did not meet its burden of proving that the Executive Club's owner was attempting to influence Barker by providing him with a membership.

On page 4 the Appellant notes that the District Court concluded that "[e]vidence showed that the purpose for giving out the complimentary memberships was to increase the prestige of the clubs, not to influence decision-makers." The Appellant states that this "view was not demonstrated or shown to the satisfaction of the DOAH Hearing Officer." The Appellant then notes that the Hearing Officer had determined that:

> "[n]o reasonable person could believe that the free Country Club membership was given to Barker for any reason except to influence him," and she found that "[n]o reasonable person could believe that the free Executive Club membership was given to Barker for any reason except to influence him." (R.376).

The Appellant has failed to provide this Court with the full conclusion of the Hearing Officer with regard to what a reasonable person would have believed about the free memberships. The Hearing Officer actually stated that:

> Barker should have known that there is "no free lunch." No reasonable person could have believed that the free Country Club membership was given to Barker for any reason except to influence him. (R.376).

Thus, the Hearing Officer's reliance on the platitude that "there is no free lunch," formed the basis upon which to predicate the conviction of Appellee, Commissioner Barker.[1] The fact is that there is no evidence in the record to indicate that Mr. Barker had any reason to believe that anybody was trying to influence him with the free memberships. Thus, though the Hearing Officer found that "no reasonable person could believe" that the free memberships were given to Barker for any reason except to influence him, there is absolutely no evidence in the record to sustain this conclusion.

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[1] The Hearing Officer was wrong with regard to her statement that there are no free lunches because Florida Statute §112.312(12)(b)6 provides that "[f]ood or beverage consumed at a single sitting or event," is not a gift. Thus, whereas a gift is something given for free, it does, as a matter of law, seem that, at least for the purposes of Florida Statute Chapter 112, Part III, there is such a thing as a "free lunch."

Finally, Appellee would emphasize that there is uncontroverted evidence that Barker asked the Coral Gables City Attorney if there was any conflict of interest arising from the free memberships and the City Attorney advised Barker that he could accept the memberships. *Barker v. State, Commission on Ethics*, 654 So. 2d 646, 647 (Fla. 3d DCA 1995). (R.367; T.25, 47-50, 54, 118).

SUMMARY OF ARGUMENT

ARGUMENT I

The Opinion of the District Court should be affirmed. Florida Statute §112.313(4) is facially unconstitutionally vague because it fails to give a person of ordinary intelligence fair notice of exactly what conduct is forbidden. In *D'Alemberte v. Anderson*, this Court held that the language "that would cause a reasonably prudent person to be influenced in the discharge of his official duties" was unconstitutionally vague. The present statute embodies the same reasonably prudent person test but has reworded it so that the statute requires the public official to exercise "reasonable care" in determining the intent of third parties. Thus, the present statute is actually more vague than the provision it replaced because the present statute requires two levels of subjective analysis, whereas the former statute required only one.

ARGUMENT II

The reasonable care standard has been historically applied to conduct, but not to determining another person's intent or thought processes. The reasonable care standard has no generally accepted or commonly understood meaning in the context of determining the subjective intent of some other person. Except for a situation where there is an admission by a donor that a gift was intended to influence one's official conduct, a public official can only guess as to what a donor intended due to the vagueness of the term "reasonable care" in the context in which it is used in Florida Statute §112.313(4).

ARGUMENT III

The instant case involves a due process challenge based on the vagueness of Florida Statute §112.313(4). Accordingly, the standard of review is whether the statute forbids or

requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning.

ARGUMENT IV

The issue for determination in this case is whether Florida Statute §112.313(4) is sufficiently precise and definite so as to provide the requisite definite warning of exactly what conduct is prohibited. Cases which deal with constructive notice of the existence of documents are not instructive on the issue presented herein.

ARGUMENT V

Florida Statute §112.313(4) is unconstitutional because it violates the non-delegation doctrine. The statute is so vague that, in order to implement the statute, the Commission on Ethics must actually formulate legislative policy. The result of this lack of specificity in the statute has been that the Commission on Ethics has applied the statute in an arbitrary and capricious manner. Had Appellee read various ethics opinions dealing with the statute in question, he most likely would not have concluded that his acceptance of the memberships was prohibited. Commissioner Barker asked his City Attorney for advice regarding the free memberships. The City Attorney advised Mr. Barker that there was no conflict of interest and that he could accept the memberships. Yet, Mr. Barker was convicted, notwithstanding that he had sought the advice of his City Attorney. The statute has been unconstitutionally applied to Mr. Barker because it has been applied to him in an arbitrary and capricious manner.

ARGUMENT

I

This Court should affirm the decision of the District Court because Florida Statute §112.313(4) is unconstitutionally vague.

In *D'Alemberte v. Anderson*, 349 So. 2d 164 (Fla. 1977), this Court held the former Florida Statute §112.313(2)(a) to be unconstitutional because the language "that would cause a reasonably prudent person to be influenced in the discharge of his official duties" was unconstitutionally vague. The Legislature subsequently enacted the present §112.313(4), the relevant portion of which reads:

> [W]hen such public officer or employee knows, or, with the exercise of reasonable care, should know, that it was given to influence a vote or other action in which the officer or employee was expected to participate in his official capacity.

The change from "reasonably prudent" to "exercise of reasonable care" does not cure the vagueness because each is the functional equivalent of the other. As the District Court of Appeal stated, "[b]y imposing a constructive knowledge requirement as to the intent of a third person on public officials, the statute is unconstitutionally vague and susceptible to the inherent dangers of arbitrary and discriminatory enforcement." *Barker*, 654 So. 2d at 649.

The Commission argued in its brief that the "reasonably prudent person" standard, which was held unconstitutional by this Court in *D'Alemberte*, is not the same as the "exercise of reasonable care" standard embodied in the present statute. The District Court correctly concluded otherwise and should be affirmed.

On page 12 of its Initial Brief, the Appellant states that "[i]n enacting §112.313(4), the Legislature did not revive the ethical embodiment of the hypothetical reasonable person laid to

rest by this Court in *D'Alemberte* but, rather, breathed life into a very different statutory creature." On page 13 the Appellant further states that the District Court's "confusion between the elements of proof and the focus of the two different statutes at issue here and in *D'Alemberte* led to the error of that court's holding . . . ." Notwithstanding the foregoing protestations in the Appellant's brief as to the alleged differences in the two statutes, the Commission has previously during these proceedings treated §112.313(4) as the functional equivalent of the old statute. On page 7 of the Commission's Answer Brief filed with the District Court below, while arguing that Commissioner Barker should have known that the memberships were given to him with the intent to influence him in violation of the present statute, the Commission stated:

> A reasonable person, not turning a blind eye to the totality of the circumstances recounted above, should have known that the free country club membership was given to influence. (emphasis supplied).

The Commission on Ethics used the hypothetical "reasonable person" as its basis for determining what Barker should have known, its present argument before this Court notwithstanding. The Commission clearly believed that the new statute calls for the application of the "reasonably prudent official" test, the very test already determined to be unconstitutional in *D'Alemberte*. Similarly, the Hearing Officer used her own impression of what a "reasonable person" would know as a basis to convict Commissioner Barker. The Hearing Officer concluded that "Barker should have known that there is 'no free lunch.' No reasonable person could believe that the free Country Club membership was given to Barker for any reason except to influence him. . . . No reasonable person could believe that the free Executive Club membership was given to Barker for any reason except to influence him." (emphasis supplied) (R.135). This conclusion was incorporated and approved in the Commission's Final Order and Public Report. (R.376).

Throughout these proceedings, the reasonable person test, already held to be unconstitutional by this Court in 1977, has been expressly applied to Commissioner Barker. This has happened because the present statute is essentially the same as the previous statute. Now the Commission argues that the present statute is different from the previous statute. It is respectfully submitted that the words used by the Commission earlier in these proceedings should speak louder than the words used by the Commission now.[2]

When the Legislature amended the ethics statute, subsequent to this Court's opinion in *D'Alemberte*, it merely shifted the standard by which the public official's conduct would be measured from that of a "reasonably prudent person" to the "exercise of reasonable care." The former statute asked "would a reasonably prudent person be influenced?" The present statute asks "would a person exercising reasonable care know that a third person intended to influence him?" Both statutes use a constructive knowledge requirement and both statutes attempt to measure a subjective mental process by applying a vague and ill-defined objective standard. The former statute required a determination of whether a reasonably prudent person would be influenced. The present statute requires a determination of both (1) the subjective intent of the giver of the gift and (2) a determination of whether the public official should have known, if he used reasonable care, what the giver of the gift was thinking. Thus, the present statute is actually more vague than the provision it replaced because the present statute requires two levels of subjective analysis, whereas the former statute required only one. As the District Court stated:

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[2] The Commission on Ethics utilized the reasonable person test to convict Commissioner Barker. This test was already determined to be unconstitutional in D'Alemberte and, accordingly, this is a separate and independent ground upon which to affirm the District Court's reversal of Commissioner Barker's conviction.

> [T]he imposition of penalties is based on the subjective view of the hearing officer, as to the subjective view of the public official, as to the subjective view of the donor. Absent an admission by the donor that a gift was intended to influence official conduct, the public official can only guess as to what the donor intended.

Barker, 654 So. 2d at 649.

The present statute still applies the "reasonable person" test which has already been held to be too vague as a measure by which to determine the subjective mental processes of a public official. The "reasonably prudent person" from Florida Statute §112.313(2)(a) (1975) is the same vague entity who, "with the exercise of reasonable care, should know" what the donor of a gift is thinking, pursuant to Florida Statute §112.313(4). All the Legislature did when it revised the statute was to alter the definition of the objective standard which was in the former statute from the "reasonably prudent person" to "the exercise of reasonable care." Obviously, the defining quality of a "reasonably prudent person" is the "exercise of reasonable care." That which a reasonably prudent person would do is the same as that which one who exercises reasonable care would do. Indeed, the exercise of reasonable care determines whether one is or is not prudent. The problem is that both terms, in the context of this statute, are entirely undefined and unknown. The Legislature changed the wording of the statute, but did not address this Court's concern as articulated in *D'Alemberte*:

> While the reasonably prudent man doctrine has been applied successfully by the courts, historically it has been employed to measure conduct. In the case *sub judice* we are not measuring conduct. We are gauging a person's mental processes. However, the inquiry is not whether the official would be influenced in the discharge of his official duties, but whether a reasonably prudent official under like circumstances would be influenced. Conceptually, the reasonably prudent man test is an inapposite tool to determine whether a particular official would be influenced in the discharge of his duties by a gift. The statutory language denies appellee due process because the objective standard enunciated

> in the act is inapplicably related to the subjective mental process which the statute seeks to measure.

D'Alemberte, 349 So. 2d at 168. Clearly, the same could be said of §112.313(4) inasmuch as the present statute applies an objective "exercise of reasonable care" test to the subjective mental process which the statute seeks to measure; that is, the present statute seeks to determine whether the public official should have known, with the exercise of reasonable care, what was the subjective intent of the donor. The present statute thus asks what should have been known by a reasonable man acting with prudence about what someone else was thinking.

Essentially, the problem with this statute is that there is no generally accepted or commonly understood meaning of "reasonable care" in the context in which it is used in this statute. Thus, the language of §112.313(4) does not provide the requisite "definite warning" of the conduct which is prohibited. *Brown v. State*, 629 So. 2d 841, 842 (Fla. 1994). This Court has described a vague statute as one which "fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement." *Southeast Fisheries Association v. Department of Natural Resources*, 453 So. 2d 1351, 1353 (Fla. 1984). This is the same problem which this Court addressed in *D'Alemberte*. "[T]he indefinite language in the statute does not employ technical words which have acquired a pellucid connotation to those specific individuals governed by the statute." *D'Alemberte*, 349 So. 2d at 168. Unfortunately, the Legislature has compounded the problem presented by the previous statute by now requiring the public official to measure the subjective mental process of another person.

On page 11 of its Initial Brief the Commission argues that §112.313(4) does not employ a "reasonable person" test, but instead addresses whether the official had actual or constructive

knowledge under the particular circumstances. The Commission fails to understand that the "reasonable person" test which was held to be unconstitutional by this Court in *D'Alemberte* and the "reasonable care" test held unconstitutional by the District Court below, are both constructive knowledge tests. It is respectfully submitted that the Commission does not understand the term "constructive knowledge." Constructive knowledge is proven by an objective test, such as the "reasonable person test" or the "reasonable care" test. BLACK'S LAW DICTIONARY 314 (6th ed. 1990).

In *D'Alemberte* this Court stated that the "reasonably prudent person" doctrine has been employed historically to measure conduct, but not a person's mental processes. 349 So. 2d at 168. The Court went on to state that the reasonably prudent person test is not an appropriate tool to measure subjective mental processes. The District Court below stated that "[b]y imposing a constructive knowledge requirement as to the intent of a third person on public officials, the statute is unconstitutionally vague and susceptible to the inherent dangers of arbitrary and discriminatory enforcement." *Barker*, 654 So. 2d at 649. The Commission acknowledges that the present statute addresses whether a public official had constructive knowledge of the intent of some third party. A constructive knowledge test of some third person's intent is unconstitutional because of the vagueness inherent in such a standard. *D'Alemberte*, 349 So. 2d at 168; *Barker*, 654 So. 2d at 649.

In *D'Alemberte*, this Court held that a constructive knowledge test of a public official's mental process was unconstitutional. This Court is presently confronted with yet another statute

which imposes a constructive knowledge test on a public official.[3] However, this statute measures the public official's subjective impressions of the subjective intent of some third party. Therefore, as the District Court concluded, the statute under review is unconstitutional due to vagueness.

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[3] On page 13 of its brief the Commission argues that the provision of the statute which penalizes one who accepts a gift with actual knowledge of an intent to influence is not unconstitutionally vague. This portion of the statute was not addressed by the District Court below. However, it should be noted that there is at least one constitutional infirmity in the actual knowledge provision of the statute. §112.313(4) provides that "No public officer . . . or his spouse . . . shall . . . accept any compensation, payment, or thing of value. . . ." If a public officer's spouse were to receive a gift from a third party, and the public officer knew that the spouse had been given the gift because the donor intended to influence the public officer, the public officer would be subject to the substantial penalties of Florida's Code of Ethics, notwithstanding the fact that the public officer insisted that the spouse return the gift and the spouse refused to return the gift. This is a violation of due process. Under the United States Constitution, punishment must be predicated only upon personal guilt. Sawyer v. Sandstrom, 615 F.2d 311, 316 (5th Cir. 1980). This also violates Florida Constitution, Article I, §9. The actual knowledge provision in §112.313(4) is unconstitutional at least to the extent it would penalize a public official for a spouse's conduct.

ARGUMENT

II

Florida Statute §112.313(4) is unconstitutional because the "exercise of reasonable care" has no generally accepted meaning with regard to determining the intent of another person.

Florida Statute §112.313(4) has two prongs. The first prong asks whether the public official used "reasonable care" to determine the donor's intent. The second prong asks what was the donor's intent. The problem with this statute is that it utilizes a reasonable care standard to determine the subjective intent of a third party. Historically, a reasonable care, or constructive knowledge, standard has been used to determine conduct, and not the intent of third parties. *D'Alemberte*, 349 So. 2d at 168; *See also* Oliver W. Holmes, THE COMMON LAW (1881), *infra*. Thus, there is no historical guidance, be it common law, trade usage, or case law, to tell either the hearing officer, the Commission on Ethics, or a public official what constitutes the use of reasonable care in order to determine another person's intent. "The inherent vagueness in the statutory language cannot be sanitized by resort to signification acquired through custom in the trade as in *Rogers*." *D'Alemberte*, 349 So. 2d at 168. This is the defect in the present statute. It is similar to the defect in the previous statute inasmuch as this statute, like the previous statute, utilizes an objective standard to measure subjective mental processes.

Historically, the objective, or reasonable man, standard has been used to measure conduct. *D'Alemberte*, 349 So. 2d at 168. In the instant case, the Commission is not measuring conduct. It is once again measuring a person's mental processes. This is exactly the situation with which this Court was faced in *D'Alemberte v. Anderson*. Here, as in *D'Alemberte*, the reasonable care standard is being utilized to measure one's subjective thought process.

On page 19 of the Appellant's brief the Commission notes that the District Court faulted §112.313(4) because the statute contains an element of constructive knowledge. The Commission then cites the case of *Sapp v. Warner*, 105 Fla. 245, 141 So. 124 (Fla. 1932), which case provides a definition of what constitutes constructive notice in the context of a real estate title dispute. However, the Commission misses the point.

This is the point. In *D'Alemberte* this Court stated:

> What constitutes unconstitutional vagueness is itself vague . . . . [T]his Court has found the same or highly similar statutory language unconstitutionally vague when used in one particular statute, but sufficiently unambiguous when used in a different legislative act.

349 So. 2d at 166. This Court went on to note that in *Department of Legal Affairs v. Rogers*, 329 So. 2d 257 (Fla. 1976), this Court had upheld the constitutionality of Florida Statute §501.204, which prohibited certain "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" because the potentially ambiguous language had acquired a sufficiently well-established meaning in trade usage, the common law, and Federal trade law to meet the constitutional challenge of vagueness. "To those members whose conduct was regulated by the Act, i.e., individuals who trade in the marketplace, the terms were imbued with particular meaning developed from usage in the trade." *D'Alemberte*, 349 So. 2d at 167.

Thus, the inquiry in the instant case should be whether the "reasonable care" standard has acquired any well settled meaning in the context of determining whether a person should have known what another person intended. Indeed, this Court has previously noted that:

> While the reasonably prudent man doctrine has been applied successfully by the courts, historically it has been employed to measure conduct. In the case *sub*

> *judice*, we are not measuring conduct. We are gauging a person's mental processes.

D'Alemberte, 349 So. 2d at 168. The reasonable care standard has its roots in, and has traditionally been applied in, negligence actions. What will be determined to be consistent with reasonable care will depend on the specific circumstances of any given situation. *See, e.g., Green v. Atlantic Company*, 61 So. 2d 185, 186 (Fla. 1952). Justice Holmes, lecturing on the issue of negligence law and the "prudent man" standard, stated that:

> It is not intended that the public force should fall upon an individual accidentally or at the whim of any body of men. The standard . . . must be fixed. . . . The ideal average prudent man, whose equivalent the jury is taken to be in many cases, and whose culpability or innocence is the supposed test, is a constant, and his conduct under given circumstances is theoretically always the same.
>
> . . . [A]ny legal standard must, in theory, be capable of being known.
>
> . . . .
>
> If, when the question of the defendant's negligence is left to a jury, negligence does not mean the actual state of the defendant's mind, but a failure to act as a prudent man of average intelligence would have done, he is required to conform to an objective standard at his peril, even in that case.

Oliver W. Holmes, *Torts - Trespass and Negligence, in* THE COMMON LAW, 77, 110-113 (1881). Justice Holmes went on to explain that the rules of the road and the rules of sailing were adopted from the general rules of negligence. *Id.* at 113. Justice Holmes further explained:

> The question what a prudent man would do under given circumstances is then equivalent to the question what are the teachings of experience as to the dangerous character of this or that conduct under these or those circumstances; and as the teachings of experience are matters of fact, it is easy to see why the jury should be consulted with regard to them. They are, however, facts of a special and peculiar function. Their only bearing is on the question, what ought

> to have been done or omitted under the circumstances of the case, not on what was done. Their function is to suggest a rule of conduct.

Oliver W. Holmes, *Fraud, Malice and Intent - The Theory of Torts, in* THE COMMON LAW 130, 150 (1881). Thus, from Holmes' dissertation it is clear that the reasonably prudent person standard has been historically employed to measure conduct, supporting this Court's prior pronouncement on this issue in *D'Alemberte*, 349 So. 2d at 168. The "exercise of reasonable care" has no generally accepted or commonly understood meaning in the context of determining the intent of some other person.

In 1977 this Court struck down Florida Statute §112.313(2)(a) because the statute used the reasonably prudent person test to determine whether a public official would be influenced in the discharge of his duties by a gift. This Court is now called upon to determine if the "reasonable care" test can be applied to determine whether a public official "should know" that a gift was given with the intent to influence him. The question posed to the Court in the instant case is very similar to the question posed to this Court in 1977. However, rather than determining whether the official accepted a gift which would have influenced a "reasonably prudent person", the Court now must determine whether a public official accepted a gift which, had he exercised "reasonable care," he "should have known" that the gift was given with the intent to influence him. This statute uses a gauge of conduct applicable to negligence actions and applies it to the ability of a public official to determine the personal thoughts of another person.

Appellant's citation of cases upholding the use of a "knows or should know" standard in the context of dealing in stolen property are inapposite in the current context. The cases cited by Appellant stand only for the proposition that the "should know" standard can be used in a

statute prohibiting the receipt or purchase of stolen property. Whether or not property is stolen is an objectively determinable fact. For example, whether a person who buys a brand new $15,000.00 watch for $1,500.00, or who engages in any suspicious transaction outside of the normal means of commerce, can be held, as a matter of law, to be on notice that they are receiving stolen property, is not analogous to expecting a person to know the subjective intent of another person, especially under circumstances where there is little or no objective evidence of that intent. This is because, absent an admission by a donor of a gift that the intent in making the gift is to influence one in their official conduct, the public official must necessarily guess at what the donor intended.

On page 9 of its brief, in footnote 2, the Commission points out that in *Zerweck v. State, Commission on Ethics*, 409 So. 2d 57 (Fla. 4th DCA 1982), the court concluded that the statute challenged therein was not unconstitutionally vague. The Commission appears to miss a crucial distinction between the statute at issue in *Zerweck* and the statue at issue in the instant case. The statute at issue in the instant case uses the term "reasonable care" in a context such that the term has no generally accepted or commonly understood meaning. The statute does not define "reasonable care." In *Zerweck* the word "conflict" was alleged to be too imprecise to satisfy the notice requirements of due process. 409 So. 2d at 60-61. However, in *Zerweck*, as the court noted, Florida Statute §112.312(6) defined "conflict" and "conflict of interest" with sufficient specificity to give adequate notice of the conduct which the statute prohibited. *Id.* at 60-62.

Florida Statute §112.313(4) cannot possibly satisfy the requirements that the statute give a "definite warning" of the conduct that is prohibited. *D'Alemberte*, 349 So. 2d at 166; *See Brown v. State*, 629 So. 2d at 842 (Fla. 1994). The language of §812.019(1) does give a

definite warning of the conduct which is prohibited because a person of common intelligence can recognize under-priced goods, when offered for sale under suspicious circumstances, as being stolen. However, the cases addressing the possession of stolen goods statute do not support the proposition that the Legislature can constitutionally impose a constructive knowledge requirement as to the subjective intent of another person. In *D'Alemberte* this Court held that §112.313(2) was unconstitutional "because the objective standard enunciated in the act is inapplicably related to the subjective mental process which the statute seeks to measure." *D'Alemberte*, 349 So. 2d at 168. In the instant case, we are faced with a statute which imposes an objective standard on the subjective mental process of the public official who must measure the subjective mental process of a third person. As the District Court below noted, "[a]bsent an admission by the donor that a gift was intended to influence official conduct, the public official can only guess as to what the donor intended." *Barker*, 654 So. 2d at 649.

ARGUMENT

III

Standard of Review

Appellant cites *Metropolitan Dade County v. Bridges*, 402 So. 2d 411 (Fla. 1981) for the proposition that the burden which Appellee must meet in order to prove the statute unconstitutional is a "beyond all reasonable doubt" standard.[4] However, we need look no further than this Court's opinion in *D'Alemberte* in order to determine the standard of review to be applied in the instant case. In *D'Alemberte* this Court stated that:

> An assault on the constitutionality of a 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. . . . Due process of law will not tolerate a statute which "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning."

349 So. 2d at 166 (citations omitted). Florida Statute §112.313(4) uses a "reasonable care" standard to measure a person's subjective thought processes. The "reasonable care" standard has historically been employed to measure conduct. *D'Alemberte*, 349 So. 2d at 168. The objective standard enunciated in the statute is not appropriately related to the subjective mental process which the statute seeks to measure. The language in the statute does not convey sufficiently definite warning of the proscribed conduct when measured by common understanding and practice and, consequently, as the District Court concluded, the Appellee has met his burden of proof that the statute is unconstitutional. *D'Alemberte*, 349 So. 2d at 168.

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[4] It should be noted that in Bridges the court did not address a due process challenge based on the vagueness of a statute. 402 So.2d at 414.

With regard to this issue of the standard of review, Appellee contends that ethics prosecutions are quasi-criminal. Not only does the Ethics Commission have the power to impose a fine and recommend removal of a public official from public office, but the Ethics Commission also has the power to seriously damage, and possibly destroy, a public official's reputation. Because the penalties at stake in a proceeding under Chapter 112, Part III are so significant and substantial, *D'Alemberte*, 349 So. 2d at 168, ethics complaints should be viewed as quasi-criminal in nature, as are other proceedings which result in severe penalties. *See In re Ruffalo*, 390 U.S. 544, 551, 88 S.Ct. 1222, 20 L.Ed. 2d 117 (1968), *reh'g denied*, 391 U.S. 961, 88 S.Ct. 1833, 20 L.Ed.2d 874 (1968) (holding disbarment proceedings to be quasi-criminal); *In re Approximately $48,900.00 in U.S. Currency*, 432 So. 2d 1382, 1385 (Fla. 4th DCA 1983) (characterizing civil forfeiture proceedings as quasi-criminal). Disbarment proceedings are characterized as quasi-criminal, partly because the punishment, including loss of livelihood and professional reputation, is severe. *Erdmann v. Stevens*, 458 F.2d 1205, 1210 (2d Cir. 1972). A prosecution under Chapter 112 is similar to a disbarment proceeding. The potential penalty is similarly severe, particularly in that it may also include loss of livelihood and loss of professional reputation. Accordingly, ethics prosecutions should be treated as quasi-criminal.

Florida courts have held that statutes which are quasi-criminal and penal in nature "are to be strictly construed in favor of those against whom the penalty is to be imposed." *In re Forfeiture of 1969 Piper Navajo*, 570 So. 2d 1357, 1358 (Fla. 4th DCA 1990), *aff'd*, 592 So. 2d 233 (Fla. 1992). Even when construed strictly, however, §112.313(4) cannot be construed so as to avoid arbitrary and discriminatory enforcement simply because there is absolutely no

common understanding as to what the term "reasonable care" means in the context of the statute.

ARGUMENT

IV

The issue before this Court is whether the language of Florida Statute §112.313(4) is sufficiently precise to give fair notice of the exact conduct which is prohibited. Much of the authority cited by Appellant is inapposite to the instant case.

The Commission cites the case of *Sapp v. Warner*, 105 Fla. 245, 141 So. 124 (Fla. 1932), for a definition of actual notice and constructive notice. In *Sapp v. Warner* the Court considered the rights of mortgagees who had claimed an interest in property pursuant to an unrecorded mortgage in contravention to the rights of parties claiming under a deed issued by a guardian. The quote from *Sapp v. Warner* which appears on page 19 of Appellant's brief is part of the court's explanation that the parties claiming under the guardian's deed should, as a matter of law, be determined to have implied actual knowledge of the existence of the two unrecorded mortgages. The court found that the deed in question was executed by a guardian and that "the validity of that deed could only have been determined by examining the records in the office of the county judge, and if such examination had been made, the fact of the probable and likely existence of the two outstanding unrecorded mortgages must necessarily have been noticed." *Sapp*, 141 So. at 129. The case of *Sapp v. Warner*, while it is a most interesting case, which coincidentally involves one of the earliest developments in that part of Dade County which came to be Coral Gables, is totally inapposite to the instant case. The instant case involves an attempt by the Legislature to establish an objective standard by which to measure the subjective mental process of public officials who, at their peril, are required to measure the subjective mental processes of third persons.

The Commission cites *Symons v. State, Department of Banking and Finance*, 490 So. 2d 1322 (Fla. 1st DCA 1986), which case involves a determination of whether a notice sent by certified mail by the Department of Banking and Finance, but which was not delivered to an applicant for securities registration, could be considered to put the applicant on constructive notice as to the running of a time limit within which he was required to file for a formal hearing.

It is curious that the Commission is referring this Court to cases involving disputed titles to real estate and the receipt of notices by mail. The issue before this Court is whether Florida Statute §112.313(4) is sufficiently precise and definite so as to provide the requisite definite warning of exactly what conduct is prohibited. *D'Alemberte*, 349 So. 2d at 166-68; *Barker*, 654 So. 2d at 648; *Brown*, 629 So. 2d at 842; *Southeast Fisheries Association*, 435 So. 2d at 1353. It is respectfully submitted that cases which involve constructive notice of the existence of documents such as deeds, mortgages, and administrative orders, are not relevant to the inquiry presently before this Court, which involves a statute which imposes upon a public official constructive notice of what another person is thinking.

ARGUMENT

V

Florida Statute §112.313(4) is unconstitutional because it violates the non-delegation doctrine. Due to the vagueness and lack of specificity in the statute, the formulation of legislative policy has been consigned to the Ethics Commission, which has applied the statute in an arbitrary and capricious manner.

Florida Statute §112.313(4) is an improper delegation of open-ended authority to the Commission to create law and is unconstitutional for violating both the non-delegation and vagueness doctrines. There is no commonly understood or generally accepted meaning to the "exercise of reasonable care" in the context of determining the subjective intent of some third person. The concept of "reasonable care" in the context of negligence law has become imbued with a particular meaning through literally hundreds of years of gradual definition as part of the development of the common law. *D'Alemberte*, 349 So. 2d at 168; Holmes, *supra*, at 16-17. Section 112.313(4) has no such common law tradition from which a meaning can be gleaned for the term "reasonable care." Nor has "reasonable care" acquired a commonly established meaning in this particular context through trade usage or other common experience. *Rogers*, 329 So. 2d at 257; Holmes, *supra* at 16. Thus, the Commission will determine on its own what constitutes the exercise of "reasonable care" for the purposes of this statute. "[N]o one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law." *Conner v. Joe Hatton, Inc.*, 216 So. 2d 209, 211 (Fla. 1968); *B.H. v. State*, 645 So. 2d 987, 993 (Fla. 1994). "We are not directed to any decisions upholding such a delegation of authority; nor is it suggested what standards, either by common usage or by reference to the purposes of the Act, can be implied in limiting the [Commission's] authority in this respect."

Conner, 216 So. 2d at 213. Florida Statute §112.313(4) provides no definition of "exercise of reasonable care." *Cf. Zerweck*, 409 So. 2d at 60-61.

Whenever a case under this statute is presented to a hearing officer, the hearing officer "writes the statute" based entirely on the hearing officer's own subjective view of what constitutes "reasonable care" in the context of the statute. When the case comes for final hearing before the Commission, the Commission again, based on its own subjective impression of what "reasonable care" in this context should mean, "writes the statute." This is the unlawful delegation of legislative authority referred to by the District Court below. *Barker*, 654 So. 2d at 649. This is similar to the situation in *Robbins v. Webb's Cut Rate Drug Co.*, 153 Fla. 822, 16 So. 2d 121, 122 (Fla. 1944), where the Court determined that a statute which granted to the Barber's Sanitary Commission the authority to prohibit "unfair or unreasonable economic practices among barbers or barber shops" was an unconstitutional delegation of legislative authority because "[t]hese terms or phrases have no set meaning in law or in common usage." The result of this unlawful delegation of legislative authority to the Ethics Commission is, as will be seen, a history of arbitrary and capricious application of the law. For example, in *CEO 92-043* the Commission determined that though a City Councilman's spouse was hired as the executive director of a non-profit corporation contracting with the City, and where most of the Councilman's spouse's salary was to be derived from the City's funding of the contract, there was "no reason to believe that the offer of the executive director position to the Councilman's wife by the corporation's board of directors was contingent upon any action or inaction expected of the Councilman or was offered to influence any action in which he was expected to participate." Thus, the Commission concluded that there did not appear to be any

violation of §112.313(4) in the City Councilman's spouse's accepting a job as Executive Director of an entity doing business with the City.

Thus, the Councilman's wife in *CEO 92-043* made her livelihood from an organization which the City funded while Mr. Barker received two memberships of relatively little value from organizations with far less to lose or gain from the outcome of any vote in which Mr. Barker may have participated. In *CEO 92-043* the Commission found "no reason to believe [the position] was contingent upon any action or inaction expected of the Councilman or was offered to influence any action in which he was expected to participate," yet Mr. Barker "should have known" that his gift, though of much smaller value, was intended to influence him. By virtue of his wife's employment by an agency which was funded by the City, the Councilman in *CEO 92-043* was given a motive to continue voting in favor of providing funding to the agency. The Commission did not find these facts sufficient to put the Councilman on notice that anyone was trying to influence him. It is incomprehensible that in the instant case, in the complete absence of evidence of any such motive, the Commission has found there was an intent to influence Commissioner Barker and that he should have known of this intent. This is an example of arbitrary and capricious, and thus unconstitutional, application of the law. This is the result to be expected from a vague and ill-defined statute. That is, the statute is "rewritten" every time a case arises under it.

In *In re Charles W. Flanagan*, 13 F.A.L.R. 3247 (Fla. Comm. on Ethics 1989), the Commission determined that the respondent did not violate §112.313(4) by accepting a satellite dish and related equipment from a company which was bidding for the upcoming award of the City's cable television franchise and by having that same company install this satellite dish at

his residence. The Commission approved the recommended order which had determined that "it was not proven that the respondent knew that anything was given to influence his official action" and which also found that "the circumstances surrounding the transaction were not such that the respondent should have known with the exercise of reasonable care that the equipment and installation were provided under the terms offered in order to influence his official action." 13 F.A.L.R. at 3259-60.

Appellee respectfully asks, what facts in the record of the instant case are such that he should have known that the memberships were being offered to influence his official action? Are we to understand that there is no such thing as a free lunch but there is such a thing as a free satellite dish with installation? In the *Flanagan* case the company which gave the satellite dish to the respondent, who was Mayor, actually had a bid pending before the City for the City's cable television contract at the time the gift was made! 13 F.A.L.R. at 3259. In the instant case neither the Coral Gables Country Club nor the Executive Club had any pending business before the Coral Gables City Commission at the time the gift was made.

The thing of value which Mayor Flanagan received, a satellite dish and installation, has a far greater value than the memberships received by Mr. Barker. The donor of this satellite hardware stood to gain a lucrative cable television franchise. It is not even clear from the record of the instant case how or why the donor of either membership was supposed to be attempting to influence Commissioner Barker. There is absolutely no evidence in this record of what either club allegedly wanted from Commissioner Barker. In *In Re Charles Flanagan*, the Commission found no intent to influence the Mayor, notwithstanding that there was a lucrative cable television franchise contract being sought after by the very company which donated and installed

the Mayor's satellite dish. There is absolutely no evidence in the record of the instant case as to the manner in which either donor is alleged to have intended to influence Mr. Barker's official actions. Yet, in the instant case, the Commission found a violation of the statute. This is surely an example of arbitrary and capricious application of the law.

In light of the opinions of the Commission on Ethics in *CEO 92-043* and *In re Flanagan*, how could it possibly be contended that Mr. Barker should have known that the country club memberships were prohibited? If Barker had relied on these decisions to guide his conduct, he could not have reasonably concluded that his acceptance of the memberships would have violated the statute.

In *CEO 83-15* the Commission opined that §112.313(4):

> [P]laces the burden upon a public officer to exercise reasonable care in determining whether a particular payment or thing of value has been given with the intent to influence his or her official action. Assuming the donor is in a position to be benefited by the officer's action, the officer should weigh the value of the thing received against the ostensible purpose for its having been given. The larger its value, the more difficult it should be to justify its having been given for any reason except to influence, assuming that there is some official action on the part of the recipient anticipated in the future which would affect the donor or some other specific person or entity related to the donor.

In the instant case we are to believe that the gift of a complimentary membership in a country club which has a value of approximately $700.00 would be reasonably perceived as intended to influence Mr. Barker, while the public official in *CEO 92-043* did not have reason to believe that there was any intent to influence him on the part of a corporation which did substantial business with the City and which hired the Councilman's spouse as its Executive Director.

In *CEO 83-57* the Commission concluded that there was no prohibited conflict when the City Attorney's spouse had been hired to defend tort claims by an insurance carrier handling

risks for the City. The Commission concluded that "it is apparent that your husband's appointment as defense counsel by the carrier could not have been made in order to influence any official action in which you could be expected to participate." The Commission has thus determined that giving a Commissioner's spouse a job is not sufficient to influence official action. Though the opinion in *CEO 83-57* notes that the City Attorney's spouse was hired by the insurance company on the basis of "competitive bid," it should be noted that Florida Statute §286.011 does not apply to a private insurance company. Moreover, the record does not reflect what weight the insurance company might have given to the fact that the applicant was the spouse of the City Attorney in this "competitive bid" process. In the instant case we are to believe that relatively worthless complimentary memberships are sufficient to give James Barker reason to know that the donor intended to influence him. Had Mr. Barker looked to *CEO 83-57* to guide his conduct, he most likely would not have concluded that his acceptance of the memberships was prohibited. This is another example of arbitrary and capricious application of the law.

In *CEO 85-13* the Commission opined that a City Commissioner could accept a free trip to Israel from a travel agency promoting a tour to Israel which was sponsored by the City as part of its sister city program. The Commission's opinion was based on its determination that the "letter of inquiry contains no indication that the free trip will be offered to Council members based on any understanding that their official action would be influenced. Nor does it appear that the trip would be given to influence any official action in which you are expected to participate." Thus, we learn that a free trip to Israel is not sufficient to influence a City Commissioner, while in the instant case we are told that two country club memberships, with

relatively minimal values, are sufficient to put Mr. Barker on notice that he should have known that the donors intended to influence him.

What evidence is there in the record of the instant case that the donor of either membership intended to influence Mr. Barker? That the Commission found no violation in *CEO 85-13* and found a violation by Mr. Barker is an arbitrary and capricious application of §112.313(4). By making the statute vague and ill-defined, the Legislature has unconstitutionally delegated to the Commission the authority to "rewrite the statute" each time a new case arises under it.

In *CEO 85-50* the Commission on Ethics noted that:

> [W]hether an official may accept such gift depends on the intent of the donor and on the circumstances under which it is given.

What evidence of intent is there in the record of the instant case and what circumstances appearing in the record of the instant case are sufficient to warrant the conviction of James Barker?

In *CEO 85-52* the Commission opined that no prohibited conflict of interest would exist where the spouse of a County Commissioner is a member of a law firm which represents clients before the Board of County Commissioners. The Commission on Ethics stated:

> Unless the Commissioner or her spouse has reason to believe that her spouse's firm was retained for the purpose of influencing her official action . . . §112.313(4) would [not] appear to be at issue here. There may be situations where it is clear that the law firm was retained for a matter to be decided by the Board specifically because the Commissioner's spouse is a partner in the firm.

What facts appear in the record of the instant case which tend to indicate an intent to influence which did not appear in *CEO 85-52*?

In *CEO 85-82* the Commission opined that there was no prohibited conflict of interest where a County Attorney and a County Commissioner requested and had been given hunting privileges on land owned by a developer, wherein the developer was in the process of developing a multi-family subdivision in the County. The Commission noted that the County had entered into a development agreement with the prior owner of the property and had issued a development of regional impact order for the current developer only two years prior to the issuance of the opinion. The Commission acknowledged that, as development proceeded, the County would enter into a series of standard agreements with the developer for the maintenance of roads in the development. The Commission also noted that "the County is required to make an annual review of the development; the County Zoning Director is in charge of this review process." The Ethics Commission noted that the value of the hunting privileges was not more than $100.00 per year. The Commission noted that:

> Where the donor is in a position to be benefited by the officer's or employee's action, we advised, the officer or employee should weigh the value of what is received against the ostensible purpose for its being given, with the larger its value, the more difficult to justify its being given for any reason except to influence.
>
> Under the circumstances presented, we do not find that the hunting privileges were given to influence a vote or other official action in which either you or the County Commissioner were expected to participate.

The developer in *CEO 85-82* stood to gain or lose a great deal of money as a result of the project which he was developing. The County had the ability to make the project more or less difficult, and more or less lucrative, for the developer. Yet the Commission found that the County Attorney and the County Commissioner who received the gifts from the developer had no reason to believe that there was any intent to influence them in their official capacities. In

the instant case there is absolutely no evidence of any specific motive for either club to attempt to influence Mr. Barker. Yet, Mr. Barker was convicted. Once again, this graphically depicts the arbitrary and capricious application of Florida Statute §112.313(4).

Appellee, Commissioner James Barker, who is not an attorney (T.121), had asked the Coral Gables City Attorney for advice regarding the memberships. The City Attorney advised Barker that there was no conflict of interest, that the memberships were given out for honorary and public relations purposes, and that he could keep the memberships. *Barker*, 654 So. 2d at 647; (R.367; T.25, 47-50, 54, 118) This clearly negates any claim that Mr. Barker "should have known" that the memberships were given to influence him. One would think that a lay person, such as Jim Barker, being an elected public official and having a question about whether or not he could accept a gift, would be exercising reasonable care by asking the city attorney about the propriety of receiving the gifts in question.

The Commission's conclusion that Mr. Barker "should have known" of an intent to influence him is unsustainable in light of the fact that Mr. Barker, who is not an attorney, disclosed to the City Attorney that he had received the memberships, asked the City Attorney if he could accept both memberships, and was advised that the memberships were given for honorary and public relations purposes and that he could accept both memberships. In essence, the Commission is contending that Mr. Barker "should have known" that the City Attorney was wrong. How can it possibly be contended that Mr. Barker, a layman, "should have known" that

the City Attorney was wrong? Given these facts there is no basis for contending that Barker did not use "reasonable care" by following his City Attorney's advice.[5]

Nowhere within the four corners of Florida Statute §112.313(4) can anyone possibly determine with any certainty whether or not "the exercise of reasonable care" should include inquiring of one's City Attorney whether or not a certain action is prohibited. One Hearing Officer's guess would seem to be as good as another's. On the other hand, one would think that the first action of a City Commissioner using reasonable care would be consultation with an expert in municipal law - - that is, his City Attorney. By using a term as vague as "reasonable care" in a statute which deals with a public official's perception as to the subjective intent of a third party, the Legislature has unlawfully delegated to the Ethics Commission the authority to determine what the law will be. *Conner*, 216 So. 2d at 213.

Referring to this "reasonable care" language, the District Court correctly stated that, "this statutory language improperly delegates to the ethics commission the authority to decide what the law shall be. . . . [T]his nebulous standard leaves the formulation of legislative policy to the unbridled discretion of the body responsible for applying and enforcing the statute, thus constituting an unlawful delegation of legislative authority." *Barker*, 654 So. 2d at 649. The fact that Barker consulted his City Attorney, followed his advice, but was convicted anyway, notwithstanding the other decisions and opinions of the Ethics Commission cited hereinabove, is compelling evidence that the statute was applied to Barker in an arbitrary and capricious

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[5] Mr. Barker's reliance on the City Attorney's legal opinion seems particularly reasonable in light of the fact that the Commission on Ethics has acknowledged that the Code of Ethics: "does not absolutely prohibit a public officer from accepting a gift or other thing of value from a business entity which may be doing business with his agency. Acceptance depends on the intent of the donor and on the circumstances under which it was given. Also, a public official is not prohibited from accepting hospitality within reasonable limits, such as meals . . ." CEO 86-73.

manner.[6] The arbitrary and capricious administration of this statute by the Commission is a consequence of the unconstitutional delegation of unbridled legislative authority. The injustice which was perpetrated on Commissioner Barker is a perfect example of why a "reasonable care" test is inappropriate as a statutory gauge by which to measure subjective mental processes of other people.

In summation, by imposing a constructive knowledge requirement as to the intent of a third person on public officials, the statute is unconstitutionally vague, unlawfully delegates legislative authority, and is susceptible to the inherent dangers of arbitrary and discriminatory enforcement.

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[6] The fact that Florida Statute §112.313(4) was applied to Barker in an arbitrary and capricious manner is a separate and independent ground upon which to affirm the District Court's reversal of Commissioner Barker's conviction. Arbitrary and capricious application of the law violates the equal protection guarantees of both the Florida and United States Constitutions. See Central Florida Regional Hospital v. DHRS, 582 So.2d 1193, 1196 (Fla. 5th DCA 1991) and North Miami General Hospital, Inc. v. Official of Community Medical Facilities, DHRS, 355 So.2d 1272, 1278 (Fla. 1st DCA 1978).

CONCLUSION

Based on the foregoing authorities and argument, the Opinion of the District Court of Appeal, Third District, in *Barker v. State, Commission on Ethics*, 654 So. 2d 646 (Fla. 3d DCA 1995), should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Appellee's Answer Brief was furnished by United States mail to C. Christopher Anderson, III and Philip C. Claypool, State of Florida Commission on Ethics, 2822 Remington Green Circle, Tallahassee, Florida, 32308, this 21st day of July, 1995.

BY: _____
STUART R. MICHELSON