IN THE SUPREME COURT OF FLORIDA

COMMISSION ON ETHICS,

Appellee/Appellant,

vs.

JAMES BARKER,

Appellant/Appellee.

CASE NO. 85,860

INITIAL BRIEF OF APPELLEE/APPELLANT

An Appeal from a Final Order of
the District Court of
Appeal of Florida, Third District

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PRELIMINARY STATEMENT

Appellant/Appellee James Barker, the Appellant before the District Court of Appeal and the Respondent before the Florida Commission on Ethics, will be referred to in this brief as "Barker." The Florida Commission on Ethics, the agency in the underlying administrative proceedings, the Appellee before the District Court of Appeal, and Appellee/Appellant here, will be referred to as "the Commission." The District Court of Appeal of Florida, Third District, will be referred to as "the DCA" or "the District Court." Citations to the record on appeal will be indicated parenthetically as "R." with the appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

The proceedings underlying this matter began with the filing of a sworn complaint (R. 2) with the Commission against Barker on October 11, 1991, and progressed through various administrative stages, terminating with the Commission's entry of its Final Order and Public Report on July 20, 1994 (R. 367). In her Recommended Order, which the Commission adopted in full as to its factual findings, the DOAH Hearing Officer recommended that the Commission enter a final order and public report finding that Barker violated Section 112.313(4), Florida Statutes, by accepting a free membership to the Coral Gables Country Club and by accepting a free membership to the Executive Club, and recommended that the Commission recommend civil penalties and restitution (R. 123). Barker timely filed exceptions to the Recommended Order, chiefly arguing that the Hearing Officer erred in not making certain findings proposed by him, not that the Hearing Officer's factual findings were not based upon competent, substantial evidence (R. 333). In its Final Order and Public Report, the Commission rejected Barker's exceptions, save those going to the recommended penalty, and otherwise adopted the Recommended Order of the Hearing Officer (R. 367). The Commission recommended that the Governor impose restitution penalties of $1,450 ($750 was the annual fee for the Country Club; $700 was the initiation fee for the Executive Club) (R. 375, 377). Thereafter, Barker timely sought review in the DCA, obtaining on May 10, 1995 the opinion that is the subject

of this appeal, the DCA reversing and remanding on the sole ground that Section 112.313(4) is facially unconstitutionally vague and constitutes an unlawful delegation of legislative authority.

The Country Club depended for its very location and existence on its leasing City-owned property. As 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. In addition to its landlord/tenant relationship with the City which dates from 1935 (R. 125), the Country Club in more recent times sought to obtain favorable decisionmaking from the City Commission regarding a number of significant issues. In particular, in 1977, the Country Club requested and obtained from the City Commission a 25-year extension of its 1958 lease, with no change in the rent amount (R. 125). In 1978, the City Commission granted the Country Club's request for rezoning in order to expand its tennis courts (R. 125). In May 1980, the Country Club asked the City Commission for a $23,000 loan to repair its roof (R. 125). In 1981, the Country Club requested and was granted approval to expand its tennis club facilities (R. 125). On November 22, 1983, the Country Club received approval from the City Commission for a plan to restore a burned-out section of the Country Club's facilities (R. 126). In April 1984, the Country Club requested and was granted by the City Commission an extension of its lease with the City to the year 2020 (R. 126). In September 1984, the Country Club was successful in obtaining from the City Commission a rewording of the lease in order to satisfy

lending institutions from which the Country Club was borrowing money (R. 126). In 1987, the Country Club asked the City Commission to assist it, by contributing funds, in overcoming the Club's debt which had resulted from cost overruns, diminishing membership, and other factors associated with the Club's plans to simultaneously remodel and restore its burned-out facilities (R. 126, 127). From November 24, 1987 through March 8, 1988, the City Commission and the Country Club had several meetings or discussions involving the Club's debt problem and possible assistance by the City (R. 127, 128). On June 30, 1988, the Country Club proposed that the City forgive lease payments until the year 2000 (R. 128). On August 30, 1988, the City Commission voted to suspend the Country Club's lease payments, with the funds going instead to the maintenance and reconstruction of the Country Club's facilities (R. 128). Barker, who was elected to the City Commission in 1989, had been a member of the Country Club since 1986, with his dues being paid by his private employer (R. 131). His only vote regarding the Country Club after being elected to the Commission was a vote to postpone action (R. 131).

While the interface of the affairs of the City and the Executive Club was not of the same duration or frequency as that involving the City and the Country Club, it nevertheless was significant. The Executive Club's owner and the City had had numerous disputes over the years on various issues, and the owner's provision of the free Executive Club memberships was an effort on his part to "bury the hatchet" between himself and the City (R.

130). Notwithstanding that Barker, as an individual member of the City Commission, never voted on any matter concerning the Executive Club, the City Commission as a body, in September 1989, after Barker's assumption of office as a City Commissioner, did vote to lease space in a building owned by the Executive Club's owner (R. 129, 130). Subsequently, when the lease expired, the City did not accept the owner's proposal of a higher lease rate, vacated the building, and rented space elsewhere (R. 131).

The annual fee for Country Club memberships was $750, entitling members to use of the Club's facilities (R. 128-129). The Country Club awarded complimentary memberships to the City Commissioners, including Barker, and other City officials, three University of Miami employees, and the editor of the local social magazine (R. 129). Complimentary memberships in the Country Club ran from year to year and were not renewed after the recipient left his or her office (R. 129).

Membership costs to the Executive Club were $700 for initiation and $50 per month dues (R. 129). Complimentary membership entitled the member to use the dining facilities (R. 130). Complimentary Executive Club memberships were given to the City Commissioners, including Barker, the City Mayor, the City Attorney, and the City Manager, as well as other persons (over 100 free memberships were granted) (R. 130).

In addition to the history of the case set forth above, the Commission feels compelled to point out erroneous statements or observations contained within the DCA's opinion. At page 3 of its

opinion, the DCA states 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." This statement is consistent with Barker's view of the case; however, such a view was not demonstrated or shown to the satisfaction of the DOAH Hearing Officer. The Hearing Officer found only that "[t]he Executive Club and Country Club memberships were given to a variety of private community leaders as well as City officials" (R. 132), she 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." In addition, at page 3 of its opinion, the DCA states that "[e]ven though the evidence was undisputed that Barker never voted on any matter regarding either club, the hearing officer concluded that Barker should have known that the donors of the two memberships intended to influence his vote or official action." This statement by the DCA is contrary to the findings of fact of the Hearing Officer and is contrary to the evidence stipulated to by the parties, as Barker did participate in a vote to postpone action concerning the Country Club. (R. 131, 146)

SUMMARY OF ARGUMENT

The Third District Court of Appeal erred in concluding that Section 112.313(4), Florida Statutes, is unconstitutionally vague. This error apparently stems from the District Court's misreading of the statute, which led it to equate the statutory language with the language declared unduly vague by this Court in D'Alemberte v. Anderson, 349 So. 2d 385 (Fla. 1977).

Unlike the earlier provision, this statute focuses upon the intent of the giver and the knowledge (either actual or constructive) of the real-life public official who is offered a gift. However, the District Court erroneously concluded (1) that Section 112.313(4) addresses a hypothetical, reasonable official, and (2) that the statute seeks to gauge whether an official actually would be influenced. These are not elements of the statute at issue.

No one argues that the statute's prohibition against accepting a gift when the official has actual knowledge that the donor intends to influence is unduly vague. The District Court's opinion indicates that an admission by the donor of the intent to influence would be an acceptable ground for prohibiting acceptance of the gift. The intent of another is neither unknowable nor a particularly unfair basis on which to judge conduct: at the heart of our judicial system juries regularly determine the subjective intent of defendants based upon objective circumstances.

Nor is the statute's element of constructive knowledge of the

donor's intent to influence unduly vague, given the precedent of this Court. Statutes having the element of proof constructive knowledge that property has been stolen have been upheld consistently against constitutional challenges on vagueness grounds. These stolen property cases involve criminal statutes, which are subject to even closer scrutiny than the Code of Ethics provision here. In addition, the same facts or proof that support a finding of constructive knowledge can support a finding of actual knowledge.

Therefore, Barker's vagueness attack on the constitutionality of Section 112.313(4) is flawed. The less stringent standard employed by this Court in examining non-criminal statutes is applicable to Code of Ethics provisions. Based on the precedent of this Court, the statute gives adequate notice of the conduct it proscribes. As a result, Barker has not met his burden of proof beyond all reasonable doubt that Section 112.313(4) is unduly vague or constitutes an unlawful delegation of legislative authority.

A R G U M E N T

I. THE DISTRICT COURT OF APPEAL ERRED IN DECLARING THAT SECTION 112.313(4) FLORIDA STATUTES, IS FACIALLY UNCONSTITUTIONALLY VAGUE AND AN UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY.

The Statute at Issue

Section 112.313(4), Florida Statutes, provides:

> UNAUTHORIZED COMPENSATION.--No public officer or employee of an agency or his spouse or minor child shall, at any time, accept any compensation, payment, or thing of value when 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 Standard of Review

Since 1974, when penalties for violations of the Code of Ethics for Public Officers and Employees[1] were decriminalized, Florida courts have considered vagueness attacks on three provisions of the Code of Ethics. In D'Alemberte v. Anderson, 349 So. 2d 164 (Fla. 1977), this Court declared Section 112.313(1), Florida Statutes (Supp. 1974), unconstitutionally vague, and stated:

> Even though a less stringent examination as to vagueness is utilized in scrutinizing non-criminal statutes, a statute of this nature must nevertheless satisfy minimal constitutional standards for definiteness.

[1]Contained in Part III, Ch. 112, Fla. Stat.

[Id. at 168.]

Regarding the standards for definiteness, this Court stated:

> 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. [Citations omitted.] 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.' [Citations omitted.]
>
> Though easily enunciated, the vagueness test is often difficult to apply. The test is not an inflexible one. . . . What constitutes unconstitutional vagueness is itself vague. [Id. at 166.]

Following D'Alemberte, two other provisions of the Code of Ethics were challenged as unconstitutionally vague. In Zerweck v. State Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982), the court upheld the language of Section 112.313(7)(a), Florida Statutes, that prohibits a public officer or employee from having an employment or contractual relationship "that will create a continuing or frequently recurring conflict between his private interests and the performance of his public duties . . . ."[2] In Tenney v. State Commission on Ethics, 395 So. 2d 1244 (Fla. 2d DCA 1981), the court upheld Section 112.313(6), Florida Statutes, which prohibits an official from corruptly using or attempting to use his official position "to secure a special privilege, benefit, or

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[2]In Zerweck, the court also concluded that the Code's statutory definition of "conflict" or "conflict of interest" (meaning "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest") was not unconstitutionally vague. Id., at 60.

exemption for himself or others."

In each case, the courts agreed that a less stringent standard as to vagueness is used in examining non-criminal statutes such as provisions in the Code of Ethics. Citing D'Alemberte, the court in Zerweck noted that "a less stringent standard as to vagueness is used in examining non-criminal statutes, though minimal constitutional standards for definiteness must still be met." Zerweck, supra, at 60. In Tenney, the court concluded that "a court must impose a higher standard of definiteness where a violation of the statute would bring about a criminal penalty as contrasted to a civil one."[3]

Statutes are presumed constitutional and doubts as to the validity of a statute are to be resolved in favor of a finding of constitutionality. Department of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976).

In that Barker is challenging the constitutionality of Section 112.313(4), he has the burden of proving that it is unconstitutional. Peoples Bank of Indian River Co. v. State, Department of Banking and Finance, 395 So. 2d 521 (Fla. 1981). However, as will be shown below, Barker has not met his burden by proving "beyond all reasonable doubt" that Section 112.313(4) is in conflict with some designated provision of the Constitution. Metropolitan Dade County v. Bridges, 402 So. 2d 411 (Fla. 1981).

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[3]The court in Tenney also relied on the following statement by this Court in State v. Wershow, 343 So. 2d 605, 610 n. 1(Fla. 1977): "[W]e perceive the test to be much less severe where the maximum penalty is loss of an office or position. Penal statutes must meet a higher test of specificity."

The Error of the District Court

The District Court misinterpreted the advice tendered by this Court to the Legislature in D'Alemberte v. Anderson, supra, and misconstrued the language used by the Legislature in Section 112.313(4), Florida Statutes. In D'Alemberte, this Court found that (then) Section 112.313(1) was flawed because it sought to address the mental processes of a hypothetical public official (a "reasonably prudent person"), rather than seeking to address the mental processes of a particular public official under a particular set of circumstances. Conversely, Section 112.313(4) does not employ a "reasonable person" test, but instead addresses whether the real and specific official had actual or constructive knowledge under the particular circumstances.

Despite this difference in the two statutes, the DCA found that "this language ['with the exercise of reasonable care, should know'] in effect equates to the 'reasonably prudent person' language of the prior statute . . . ."[4] The DCA also stated, "Whether an official would be influenced under certain circumstances requires a far different analyses than the inquiry as to what a hypothetical official "should know" regarding a donor's intent to influence."[5]

Contrary to the DCA's view, however, Section 112.313(4) is not concerned with how a hypothetical reasonable official would evaluate a factual mix into which such a conjectured creature might

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[4]Opinion of the Third District Court of Appeal, p. 5.

[5]Opinion of the Third District Court of Appeal, p. 5.

be cast. Rather, the statute is concerned with the judgment that was made or that should have been made by a real and actual public official under the totality of circumstances and information available to that official.

Further, unlike the defective statute in D'Alemberte, Section 112.313(4) is not concerned with whether the gift or thing of value actually would result in influencing the official conduct of a public officer or employee. The statute before this Court is entirely preventative, or prophylactic, in nature. Rather than focusing on actual consummated influence, Section 112.313(4) only prohibits the receipt of that which the recipient knows or should know is given to influence.

In enacting Section 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. The "with the exercise of reasonable care should know" language of Section 112.313(4), found by the DCA to equate to the "reasonably prudent person" language of the statute at issue in D'Alemberte, instead describes constructive knowledge that can be imputed to a very real public official in a particular factual context. The language of Section 112.313(4) does not concern whether a hypothetical public official actually would have the objective performance of public duties compromised in that same factual context.

In essence, the DCA erroneously faulted the Legislature for accepting this Court's advice, tendered in D'Alemberte, and

focusing on the intent of the giver or donor rather than on the issue of whether a theoretical public official actually would be influenced. The DCA'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 that the rationale of D'Alemberte applied.

Since Section 112.313(4) does not focus on the effect of a gift upon a hypothetical public official, the true issue presented in this case is whether proof of an official's actual knowledge or constructive knowledge of the intent of a donor, by proof of objective facts within the knowledge of the public official, is an impermissible method of limiting the gifts a public official may accept.

Actual Knowledge of an Intent to Influence is Not Vague

The intention of another is neither unknowable nor a particularly unfair basis on which to judge conduct. If it were, juries would not regularly be asked to judge the intent of the defendants before them, and all criminal laws requiring as an element of proof the intent of an individual would be inherently vague. Our jurisprudence rests on the belief that juries can assess the intent and knowledge of another, in civil cases and even in criminal cases, where the jury must be convinced of its judgment of the intent of another beyond a reasonable doubt. Arguing that the intent of another cannot be known with certainty assails the foundation of our system of justice.

No one has argued in this case that the Legislature cannot prohibit an official from accepting a gift when the official has actual knowledge that the donor intends to influence the official thereby. The DCA apparently was of the view that actual knowledge, at least in the form of an admission, of the intent of a donor is not an unduly vague ground on which to limit the receipt of gifts by public officials.[6]

More specifically, though, this Court addressed the issue of actual knowledge in D'Alemberte v. Anderson, supra, at 169 (footnote 5), where the Court commended to the Florida Legislature a provision in Pennsylvania's code of ethics, and noted:

> By prohibiting receipt of gifts or compensation which is either intended or which would influence the member's public performance, that general assembly avoided some of the vagueness which plagues statutes containing only the "which would" language, while making the section broader in scope than those statutes which only contain the intent element. That statute also adopts a subjective test of knowledge. [E.S.]

The Pennsylvania statute provides as follows:

> No member shall knowingly solicit, accept, or receive any gift or compensation other than that to which he is duly entitled from the Commonwealth which is intended to influence the performance of his official duties or which would influence the performance of his official duties nor shall any member solicit, accept, or receive any such gift or compensation for advocating the passage or defeat of any legislation or for doing any act intended to influence the passage or defeat of legislation including, in the case of a Senator or Representative, his vote thereon.

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[6]Opinion of the Third District Court of Appeal, p. 6.

[E.S.][7]

Clearly, this Court acknowledged that prohibiting the receipt of a gift or compensation "which is intended to influence the official's public performance" satisfies constitutional requirements of due process. Id.

All determinations of intent turn on the facts and circumstances proven in the individual case, but that does not make the requirement of proving intent unconstitutionally vague. It is apparent that the DCA was troubled by what it referred to as the "subjective view" of the hearing officer, the public official, and the donor under Section 112.313(4). However, there is nothing inherently infirm about statutes that contain an element of subjective knowledge. Indeed, the Pennsylvania statute commended by this Court in D'Alemberte "adopts a subjective test of knowledge." D'Alemberte, supra, at 169 (footnote 5).

The statute here simply requires a responsible public servant to ask one question when provided anything of value: "Why is this being provided to me?" If the answer is that it is being given because the donor has an interest in matters expected to come before the public servant and the donor would like to affect the public servant's judgment in those matters, then the statute prohibits its acceptance. There is nothing particularly difficult or obscure about determining the motivation of another, especially

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[7]Pa. Stat. Ann. Title 46, § 143.5(a) (1969). The citation to this statute in D'Alemberte, which was to § 143.5(b), apparently was erroneous, as subsection (b) contains none of the language referenced in D'Alemberte.

when, as here, one knows that the other's business affairs or concerns depend upon influencing City action. Nor is there any unfairness in expecting our public officials to ask themselves this single question and to exercise some insight into the motivations of others.

Constructive Knowledge of an Intent to Influence is Not Vague

Since D'Alemberte, several Florida cases have held statutory constructive knowledge language similar to that found in Section 112.313(4) to give adequate notice of prohibited conduct. The decisions affirmed the constitutionality of the criminal statute prohibiting dealing in stolen property--a statute subject to a greater level of judicial scrutiny regarding constitutional soundness than the non-criminal provision under review sub judice. The statutory language upheld in these cases is as follows:

> Any person who traffics in, or endeavors to traffic in, property that he knows or should know was stolen shall be guilty of a felony of the second degree, punishable as provided in ss. 775.082, 775.083, and 775.084. [E.S.] [Section 812.019(1), Florida Statutes.]

In State v. Dickinson, 370 So. 2d 762 (Fla. 1979), and State v. Tomas, 370 So. 2d 1142 (Fla. 1979), this Court held that Section 812.019(1) was neither unconstitutionally vague nor overbroad. Further, Tomas found the constructive knowledge language of the statute to be "essentially synonymous" with its statutory predecessor, which provided:

> Whoever intentionally receives, retains, disposes of, or aids in concealment of any stolen property of another without consent of

> the owner or person entitled to possession, knowing that it has been stolen, or under such circumstances as would induce a reasonable man to believe that the property was stolen, commits an offense. [E.S.] [Section 812.031(1), Florida Statutes (1977).]

See also Edwards v. State, 381 So. 2d 696 (Fla. 1980).

Section 112.313(4) and the dealing in stolen property statute also are similar in that proof of their transgression, like that of other statutes requiring proof of an element of constructive knowledge, is not dependent on an express admission but, rather, can be evidenced by showing facts or a situation which would put a person on notice that his conduct comes within the statutory prohibition. See State v. Graham, 238 So. 2d 618 (Fla. 1970), and Johnson v. State, 388 So. 2d 1088 (Fla. 3rd DCA 1980). For example, just as a person should know that a genuine Rolex being offered for sale for $100 by an individual wearing an overcoat and dark glasses in an isolated downtown location in the middle of July is stolen property, so too are there circumstances from which a member of the City Commission (a leadership position) should have known that Club memberships given to him by persons or entities with interests involving the City Commission were given in order to influence his official actions.[8]

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[8]The circumstances sufficient to establish a case under this criminal statute and therefore, by analogy, under the lesser level of scrutiny applicable to a noncriminal statute such as Section 112.313(4) apparently do not have to be of an overwhelming evidential nature. See Hutton v. State, 332 So. 2d 686 (Fla. 1st DCA 1976), in which the court held that the prosecution established a prima facie case of dealing in stolen property by evidence tending to show that approximately $400 worth of tools were stolen from an auto parts store, that the defendant/appellant was shortly thereafter in possession of the stolen tools, and that the

Further, in Barket v. State, 356 So. 2d 263 (Fla. 1978), this Court rejected a defendant's challenge to a portion of a standard jury instruction regarding the offense of dealing in stolen property. The relevant portion of the instruction provided:

> It is not necessary for the state to prove that the defendant knew beyond a reasonable doubt that the property had been stolen. It is sufficient if the circumstances of the transaction were so suspicious as to put a person of ordinary intelligence and caution upon inquiry and, nevertheless, the defendant did buy it, receive it or aid in concealing it. [e.s.] Id. at 264.

This Court's refusal to strike the relevant portion of the instruction buttresses the validity of statutes such as Section 112.313(4), which rely on constructive knowledge as one of their elements.

Inasmuch as one can receive up to fifteen years imprisonment for transgressing the constitutionally valid constructive knowledge language of Section 812.019(1), Florida Statutes, when the substance of the offense may involve only the receipt of pilfered goods of slight monetary value, then it is appropriate that no

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defendant/appellant transferred them to another as payment on a $200 debt. Further, it is apparent from Hutton that the key factor in establishing the prima facie case against the defendant was that the tools were being sold at less than their value. Id., at 687. If such a set of facts can support a felony conviction based upon an element of constructive knowledge, then the totality of the circumstances present in the instant matter certainly served to put Barker on inquiry as to the Club memberships. See also B. S. v. State, 320 So. 2d 459 (Fla. 3rd DCA 1975), in which charges of buying, receiving, or aiding in concealment of stolen property were found by the court to be properly based upon evidence of constructive knowledge apparently consisting of nothing more than the defendants being observed in the possession of a stolen jewelry box and, while together and in the presence of each other, one of the defendants threw the box into a canal.

greater test be applied to the analogous language of the statute here, the fundamental purpose of which is to prevent the insidious corruption of governmental institutions and processes.

The DCA faults Section 112.313(4) because it contains an element of constructive knowledge. However, it is significant to note that both actual knowledge and constructive knowledge can be proven by circumstantial evidence. See Sapp v. Warner, 105 Fla. 245, 141 So. 124 (Fla. 1932), a matter involving notice of an unrecorded mortgage, in which this Court stated:

> Notice is of two kinds, actual and constructive. 'Constructive notice' has been defined as notice imputed to a person not having actual notice; for example, such as would be imputed under the recording statutes to persons dealing with property subject to those statutes. 'Actual notice' is also said to be of two kinds: (1) Express, which includes what might be called direct information; and (2) implied, which is said to include notice inferred from the fact that the person had means of knowledge, which it was his duty to use and which he did not use, or, as it is sometimes called, 'implied actual notice.' [Citations omitted.] Constructive notice is a legal inference, while implied actual notice is an inference of fact, but the same facts may sometimes be such as to prove both constructive and implied actual notice. [Citation omitted.]
>
> The principle applied in cases of alleged implied actual notice is that a person has no right to shut his eyes or ears to avoid information, and then say that he has no notice; that it will not suffice the law to remain willfully ignorant of a thing readily ascertainable by whatever party puts him on inquiry, when the means of knowledge is at hand. [Id. at 127. Citations omitted.]

For recognition that implied actual notice can be proven by circumstantial evidence in a Chapter 120, Florida Statutes,

administrative context, see Symons v. State Department of Banking and Finance, 490 So. 2d 1322 (Fla. 1st DCA 1986).

The reasoning behind the DCA's holding that Section 112.313(4) is unconstitutionally vague because it does not give adequate notice of the conduct it proscribes is simply not compelling. The words used in the statute convey the simple notion that a public officer should not accept something of value when he knows, or with the exercise of reasonable care should know, that it was given to influence a vote or other action in which he is expected to participate in his official capacity. Clearly, proof of such knowledge can consist of objective facts surrounding the provision of the gift or thing of value and does not require an admission on the part of the donor or provider.

There is No Unlawful Delegation of Legislative Authority

An unlawful delegation of legislative authority follows from the conclusion that a statute is unconstitutionally vague. As this Court stated in Conner v. Joe Hatton, Inc., 216 So. 2d 209 (Fla. 1968),

> When the statute is couched in vague and uncertain terms or is so broad in scope that no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law, it must be held unconstitutional as attempting to grant to the administrative body the power to say *what the law shall be*. [Citations omitted. Emphasis in original.]

Here, however, as shown above, Section 112.313(4) is not unconstitutionally vague and, therefore, does not amount to an

unlawful delegation of legislative authority.

CONCLUSION

The State's interest in preserving the public's trust in a public official's actions justifies a preventative statute which forbids the official from accepting a personal benefit given to him for the purpose of influencing his official actions, when the official has actual or constructive knowledge of that intent to influence. Barker has not met his burden of proving that Section 112.313(4), Florida Statutes, on its face suffers from any constitutional infirmity. Therefore, this Court must find that Section 112.313(4), Florida Statutes, passes constitutional muster.

In view of the foregoing, the Commission respectfully asks this Honorable Court to reverse the final order of the District Court of Appeal and to affirm the Final Order and Public Report of the Commission on Ethics.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 27th day of June, 1995, to: Stuart R. Michelson, Esquire, 1111 Kane Concourse, Suite 517, Bay Harbor Islands, Florida 33154.

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