IN THE SUPREME COURT OF FLORIDA

COMMISSION ON ETHICS,

Appellee/Appellant,

CASE NO. 85,860

v.

JAMES BARKER,

Appellant/Appellee.

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**SUPPLEMENT TO ANSWER BRIEF OF APPELLEE**

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## INTRODUCTION

This is the supplement to the Answer Brief of Appellee, James Barker. This Supplement to Answer Brief is being filed pursuant to this Court's order of August 11, **1995.**

## SUMMARY OF ARGUMENT

The District Court of Appeal in *Goin v. Commission on Ethics,* 20 Fla.L.Weekly D1763 (Fla. August 1, 1995) acknowledged that the *D'Alemberte* Court struck down Florida Statute §112.313(2)(a)(1975) because it gauged the public official's behavior against the standards of a "reasonably prudent man." However, the *Goin* Court failed to comprehend that §112.313(4) gauges the public official's behavior against the standard of the conduct of the reasonably prudent person. That which a reasonably prudent person would do is the same as that which one who exercises reasonable care would do. The exercise of reasonable care is the defining quality of the reasonably prudent man. Thus, the present statute fails to comply with the constitutional requirements set forth by this Court in *D'Alemberte*.

The *Goin* Court apparently believes that the statute is constitutional because "[p]roof of knowledge or intent by circumstantial evidence is widely allowed, even in criminal cases." 20 Fla.L.Weekly at D1765. The Court failed to understand that the present statute is defective not because it relies on circumstantial evidence, but because it forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning. The *Goin* Court failed to consider that the objective standard in Florida Statute §112.313(4) is entirely undefined and unknown. That the Hearing Officer and the Commission in the instant case agreed that Commissioner Barker did not exercise reasonable care, notwithstanding the uncontroverted evidence that Barker had sought his City Attorney's advice, is indicative of the fact that there is no commonly accepted or generally understood meaning to "exercise of reasonable care" in the context of this statute.

## ARGUMENT

In *Goin v. Commission on Ethics,* 20 Fla.L.Weekly D1763 (Fla. August 1, 1995), the District Court misapprehended Florida Statute §112.313(4) in stating that the statute was constitutional.[1] The District Court stated that "[t]he statute does not gauge the public employee's action against some hypothetical third person . . . The focus however, is upon the actual conduct of the charged public employee, and not upon the conduct of a hypothetical reasonable person." 20 Fla.L.Weekly at D1765. The District Court is wrong. Florida Statute §112.313(4) requires the Commission to determine whether the charged public official should have known, had he used reasonable care, that the intent of the donor was to influence him in his official capacity. By focusing the inquiry on what the public official should have known had the public official exercised reasonable care, the statute is actually asking "would a public official exercising reasonable care know that this donor intended to influence him?" The statute is gauging the elected official's conduct against that standard of conduct presumed to be exercised by the hypothetical reasonably prudent public official. The statute thus asks "what should have been known by a reasonable person acting with prudence about what someone else was thinking." In the context of a statute which places upon a public official the obligation to determine what the donor of a gift is thinking, the term "exercise of reasonable care" has no set or commonly understood meaning in law or in common usage. The determination of the

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[1] It should be noted that the District Court reversed Goin's conviction on other grounds. By addressing the issue of the statute's constitutionality, the Court failed to adhere to the time honored doctrine of judicial restraint. Singletary v. State, 322 So. 2d 551 (Fla. 1975); Victer v. State, 174 So. 2d 544 (Fla. 1965); Williston v. Hogue, 277 So. 2d 260 (Fla. 1973); McKibben v. Mallory, 293 So. 2d 48 (Fla. 1974). The District Court itself recently acknowledged that "Florida courts must avoid passing on constitutionality of a statute if it is possible to resolve the case on other grounds." Buckhalt v. McGhee, 632 So. 2d 120 at 121 (Fla. 1st DCA 1994). See also F.H.S.A.A. v. Temple Baptist Church, 509 So. 2d 1381 (Fla. 1st DCA 1987).

applicable standard of guilt cannot be left to be supplied by courts or juries or the Commission on Ethics. *Locklin v. Pridgeon,* 158 Fla. 737, 30 So. 2d 102, 103 (Fla. 1947).

It is most troubling that the *Goin* Court stated that:

> While in the view of some, a bright line test is always desirable, the Legislature may well have decided that in the circumstance of a public official, the existence of a bright line test would tend to facilitate conduct that pushes the envelope of propriety and would serve to erode confidence in governmental officials and others in whom public trust is placed.

20 Fla.L.Weekly at D1766. The *Goin* Court thus acknowledged that §112.313(4) is vague. However, the Court apparently believed that there is no constitutional impediment in imposing a vague statute on public officials because by placing the public officials in a position where they will be forced to act at their peril and be in doubt as to what conduct is acceptable, public officials will be "kept in line". This is constitutionally untenable.

The District Court of Appeal in *Barker v. State, Commission on Ethics,* 654 So. 2d 646, 648 (Fla. 3d DCA 1995) was absolutely correct when it concluded that the language in the present statute equates to the "reasonably prudent person" language of the prior statute and is thus too imprecise to provide public officials with a clear warning of what conduct is forbidden. One would think Mr. Barker exercised "reasonable care" by consulting his City Attorney about accepting the memberships. Certainly, if a City Commissioner such as Mr. Barker has a question about whether or not he may accept a gift, the very first step in pursuit of the exercise of reasonable care would seem to be inquiring of one's city attorney as to the propriety of the gift. [2] However, the Hearing Officer determined that there was "some question [in

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[2] It is undisputed that Barker had asked his City Attorney for advice with regard to the propriety of accepting the memberships and was advised that there was no conflict of interest and that the memberships were given out for honorary and public relations purposes. *(T.24, 47-50, 54,* **118).** Barker, *654* So. 2d at *647.*

Commissioner Barker's] mind whether there was a conflict because he sought advice from the City Attorney." **(R.135).** Thus, the Hearing Officer concluded that because Mr. Barker consulted with his City Attorney, Mr. Barker must have known that he should not accept the memberships. The Commission entered a final order and public report which accepted the findings and conclusions of the Hearing Officer. **(R.367).** The Commission and the Hearing Officer did not think that consulting the City Attorney constituted the exercise of reasonable care. Clearly, there is no commonly understood meaning of "reasonable care" in the context of this statute. At the very least, "[h]onest and intelligent men may reasonably have contrary views as to whether or not a specific act" of a public official will be consistent with the exercise of reasonable care, and "therefore, the violation or non-violation of this statute may reasonably depend upon which view the [Commission] may agree with." *Locklin*, 30 So. 2d at **105.**

The Court in *Goin* went on to state that "[m]erely because the statute creates a zone of danger, it does not, in our view, run afoul of the constitution." 20 Fla.L.Weekly at **D1765.** However, the Court failed to ask if the "zone of danger" was one which could be reasonably anticipated by a public official. That is, does the language of the statute convey sufficiently definite warning of the area covered by this "zone of danger" when measured by common understanding and practice. Due process of law will not tolerate a statute which creates a zone of danger which is so vague that men of common intelligence must necessarily guess where the zone begins and where the zone ends. *See D'Alemberte v. Anderson,* **349** So. 2d **164** at **166** (Fla. **1977).** The statute is constitutionally infirm because it does not provide fair notice of the boundary of its "zone of danger."

The *Goin* Court noted that proof of knowledge or intent by circumstantial evidence is allowed in criminal cases. 20 Fla.L.Weekly at D1765. The Court misconstrued or missed the relevant point of most of the cases which it considered. For example, the *Goin* Court cited *Kocol v. State,* 546 So. 2d 1159 (Fla. 5th DCA 1989) for the proposition that a criminal conspiracy may be proven by circumstantial evidence. However, the Court did not consider the *Kocol* 's court's observation that:

> a conspiracy conviction based on circumstantial evidence must not only be consistent with guilt, but also must be inconsistent with any reasonable hypothesis of innocence.

*Kocol,* 546 So. 2d at 1160. It cannot possibly be said that when inferring the intent of the donor of a gift from circumstantial evidence that one can have proof of intent which is inconsistent with any reasonable hypothesis of innocence. After all, many people do give gifts for selfless reasons. It is not infrequent that selfless motives are misconstrued as selfish motives and *vice versa.* Based on the record in the instant case, it is entirely conceivable that the clubs which gave out the memberships to Commissioner Barker, as well as to the many other City officials and personnel and community leaders, did so not to influence decision makers but in order to increase the prestige of the clubs. This is exactly what the District Court below concluded. *Barker,* 654 So. 2d at 647. In *Goin,* the subcontractor may have been a low bidder simply because of the economies of scale, market conditions, choice of materials upon which the bid was based, or other reasons having nothing at all to do with an intent to influence.

In citing *Frank v. State,* 199 So. 2d 117 (Fla. 1st DCA 1967) the *Goin* Court entirely overlooked the fact that the court in *Frank* correctly noted that an inference cannot be based upon an inference when proving the essential elements of an offense. *See Frank,* 199 So. 2d

at 121. Florida Statute §112.313(4) requires a determination of (1) the subjective intent of the giver of the gift and (2) of whether the public official should have known, if he had used reasonable care, what the giver of the gift was thinking. Absent an admission, both parts of this test must be proven by the same circumstantial evidence. Thus, the statute requires the finder of fact to base an inference on an inference. A conviction will necessarily be based on circumstantial evidence of the subjective thought process of the public official about the subjective thought of the donor, as measured by an ill-defined and vague subjective standard. It is fundamental that inferences cannot be laid on inferences as the basis of proof. One of the problems with §112.313(4) is that a conviction will always result from drawing inferences as to both elements of proof from the very same body of circumstantial evidence. This is impermissible. *Voelker v. Combined Insurance Co. of America,* 73 So. 2d 403, 406-407 (Fla. 1954); *Frank,* 199 So. 2d at 121.

In *Goin,* the first inference is that the subcontractor was trying to influence Goin because Goin had the authority to initiate change orders and arrange for funding with regard to the multi-million dollar facility. The second inference is that Goin should have known that the subcontractor was trying to influence Goin and this is drawn from the very same body of circumstantial evidence from which the first inference is drawn. "[W]e cannot construct a conclusion upon an inference which has been superimposed upon an initial inference supported by circumstantial evidence unless the initial inference can be elevated to the dignity of an established fact because of the presence of no reasonable inference to the contrary." *Commercial Credit Corp. v. Varn*, 108 So. 2d 638, 640 (Fla. 1st **DCA** 1959). As noted above, there are many reasonable inferences contrary to the inference that the subcontractor was trying to

influence Goin. The subcontractor may have simply been a low bidder because of the choice of materials upon which his bid was based, or due to other reasons having nothing at all to do with an intent to influence.

The *Goin* Court also addressed statutes which deal with whether or not one has knowledge of the age of a minor who purchases alcohol. The Court completely overlooked that there is a common understanding of what a minor looks like and that the act of sale to a minor is an objectively determinable fact. Most people can identify whether a person is in their late teens or their early 20's. Certainly, if a would-purchaser has the physical appearance of a minor, the seller should assume that the purchaser is a minor, absent positive identification showing that the person is an adult. To contrast this to the present statute, there is no such generally accepted or commonly understood manner in which to estimate the intent of the giver of a gift. Indeed, it may seriously be contended that reasonably prudent persons never attempt to conjecture as to the unexpressed intentions of third parties.

Similarly, proof of a defendant's knowledge of the presence of drugs sufficient to prove a case of constructive possession is inapposite to the analysis of whether Florida Statute §112.313(4) is constitutional. The Supreme Court stated in *Brown v.* ***State,*** 428 So. 2d 250,252 (Fla. 1983): "[T]he dominion and control element is met because Brown, as resident owner of his home, had control over the common areas. Therefore, the elements of knowledge and control have been satisfied, and . . . the facts presented at trial were sufficient to create a jury question as to constructive possession." Would the statute dealing with the possession of narcotics seem as reasonable if the jury were able to infer the existence of narcotics based entirely on circumstantial evidence that the narcotics existed, without any direct evidence of

narcotics. This would be similar to the statute we have at hand. Florida Statute §112.313(4) applies an objective standard to a public official's subjective knowledge of the donor's subjective intent. The knowledge of the public official and the intent of the donor will always be proven only by circumstantial evidence, absent a confession.

It may be said that the ***corpus delicti*** of a violation of §112.313(4) is the public official's knowledge of the donor's intent and the donor's intent. On the other hand, in a case involving the possession of narcotics, the ***corpus delicti*** is the defendant's possession of the narcotics. This is something which can be observed and tested. The ***corpus delicti*** in a case under §112.313(4) is, by comparison, a ghost. It is something which can be neither seen, felt, nor touched. Rather, the ***corpus delicti*** consists entirely of the Commission's inference as to what the public official should have inferred about what the donor intended. We have a statute which deals solely with subjective mental impressions. In the case involving the possession of narcotics, the State would be required to produce the actual narcotics which the defendant is alleged to have possessed in order to obtain a conviction. If there are no narcotics, there is no conviction. In a stolen goods case, the State is required to prove that the defendant was in possession of goods and that these goods were actually stolen. Whether goods are stolen or whether somebody is in possession of narcotics are objectively determinable facts.

The *Goin* Court stated: "we believe . . . that the statute merely places a duty on the public official to avoid certain dealings and transactions." (emphasis supplied). 20 Fla.L.Weekly at D1766. This is exactly the problem! Which dealings and transactions are to be avoided? Under this statute, one person's guess is as good as another's. As the ***Barker*** Court stated: "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." 654 So. 2d at 649.

The *Goin* Court acknowledged that proof of similar facts might give rise to a finding of a violation in one case but not in another and that such "exactly replicates the every day experience of our criminal courts." 20 Fla.L.Weekly at D1766. This is a very serious indictment of our criminal justice system. While it might be true that proof of similar facts will occasionally give rise to a conviction in one case but not in another, it is certainly hoped that this does not "exactly replicate the every day experience of our criminal courts." In any event, administrative due process requires that people charged under Chapter 112, Part 111, and who are in similar circumstances, be treated in a similar fashion. Arbitrary and capricious application of the law, which the *Goin* Court appears to accept as an everyday occurrence in our system, violates the equal protection guarantees of both the Florida and the 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. Office of Communiîy Medical Facilities, DHRS,* 355 So. 2d 1272, 1278 (Fla. 1st DCA 1978).

The statute under scrutiny in the instant case, with its requirement that a public official's subjective knowledge of the donor's subjective intent be proven by circumstantial evidence and measured by an objective, or constructive, standard, will insure that the occurrence of inconsistent verdicts on similar facts is the rule rather than the exception.

## CONCLUSION

Based on the foregoing authorities and argument, the reasoning of the District Court in *Goin* should be rejected and this Court should affirm 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).

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of Appellee's Supplement to 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 24th day of August, 1995.

BY: _____
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