IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,910

STATE OF FLORIDA,

Petitioner,

vs.

CHARLES BRADFORD,

Respondent.

****
ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL
****

PETITIONER'S REPLY BRIEF

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA TERENZIO
Assistant Attorney General
Bureau Chief
Florida Bar No. 656879

ROBERT R. WHEELER
Assistant Attorney General
Florida Bar No. 0796409
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
Telephone: (561) 688-7759
Fax: (561) 688-7771

Counsel for Petitioner

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Petitioner herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the trial court, Appellee before the Fourth District Court of Appeal, and will be referred to herein as “Petitioner” or the “State”. Respondent was the defendant in the trial court, Appellant on appeal to the Fourth District Court of Appeal, and will be referred to herein as “Respondent” or “Defendant”. Reference to the record on appeal will be by the symbol “R” followed by the appropriate page number. References to appellate documents will be by their title followed by the appropriate page number. Reference to Respondent’s Answer Brief will be by the symbol “AB”.

ARGUMENT

POINT 1

§817.234(8), FLORIDA STATUTE (1997) IS CONSTITUTIONAL AS DRAFTED.

This statute does not criminalize all solicitation where the solicitor knows that the payment may come as a result of a motor vehicle tort claim or personal injury protection benefits (AB 8). The prohibited solicitation is narrowly defined as solicitation "for the purpose of making motor vehicle tort claims or claims for personal injury protection benefits." §817.234(8), Florida Statutes (1997). All solicitation that is not for the intended purpose of making a motor vehicle tort or personal injury protection benefits claim is permissible.

For example, a chiropractor may blindly solicit any and all persons for treatment. This permissible solicitation is for the purpose of obtaining new patients for treatment, regardless of whether a claim for PIP benefits will be made. Indeed, in the course of obtaining new patients, the chiropractor knows that payments from some patients may come from PIP benefits. However, the solicitation is permissible because it encompassed all prospective patients, not just those for the purpose of making a claim for PIP benefits. If in the course of treating this solicited patient the chiropractor learns of and makes a claim for the PIP benefits, the original solicitation was still permissible because it was not for the purpose of making a claim for PIP

benefits, but for rendering treatment to all prospective patients.

In regard to the Central Hudson test, Respondent agrees that the State has a "substantial interest in protecting the public and preventing fraud" (AB 10-1), both of which were the focus of this statute. More specifically, in enacting this statute, the State had a substantial interest in protecting the public from inflated insurance rates, preventing fraud and misrepresentation by professionals, protecting the privacy of citizens involved in motor vehicle accidents, and promoting the ethical standards of professionals.

This statute is not constitutionally infirm (AB 11) simply because the State chose to combat fraud by regulating the means by which one commits the fraud - solicitation. A substantial state interest in enacting this statute was to combat insurance fraud, but that does not mean that "intent to defraud" must be a necessary element of proof. By this section of the statute, the legislature chose to combat fraud by prohibiting certain solicitation - there was no need to prove fraudulent intent. The legislature simply regulated the means, as opposed to the fraud itself. Certainly, it is not "absurd and illogical" (AB 11) to not require proof of fraudulent intent when the State was regulating solicitation, the means of committing the fraud, in order to accomplish the ultimate goal of preventing insurance fraud.

The statute directly advances a governmental interest and it is not more extensive than necessary to serve that interest. It

does not deter legitimate insurance claims or prevent patients from seeking legitimate, needed treatment. It does not prevent solicitation for the purpose of rendering treatment. The only conduct it restricts is solicitation for the purpose of making a motor vehicle tort claim or claim for PIP benefits - what is now unlawful conduct under the statute.

Respondent is mistaken that "[t]o submit a claim after having solicited the patient/client violates the statute" (IB 13). Respondent is free to solicit any patient with the purpose of increasing his business and rendering legitimate treatment. After rendering treatment, Respondent is free to make a claim for the PIP benefits if applicable. Why? - because the original solicitation was not done for the purpose of making this PIP claim, but for increasing the number of patients regardless of whether a claim for PIP benefits would be made. What Respondent cannot do is target prospective patients who have PIP insurance and solicit them for the purpose of making a PIP claim.

POINT 2

§817.234, FLORIDA STATUTE (1997) IS NOT VOID FOR VAGUENESS.

A statute is vague if it fails to notify a person of ordinary intelligence of what constitutes forbidden conduct. Brown v. State, 629 So. 2d 841 (Fla. 1994). Although the legislature did not specifically define the term "solicit" in the statute, lack of a definition is not dispositive of vagueness. State v. Marks, 689 So. 2d 533 (Fla. 1997). Failure to define a statutory term does not necessarily render a statutory provision unconstitutionally vague. Id.

> The legislature's failure to define a statutory term does not in and of itself render a penal provision unconstitutionally vague. **In the absence of a statutory definition, resort may be had to case law or related statutory provisions which define the term**, and where a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense.

State v. Hagan, 387 So. 2d 943, 945 (Fla. 1980)(emphasis added). Blacks Law Dictionary defines "solicit" as:

> Solicit. To appeal for something; to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; to entreat, implore, or importune; to make petition to; to plead for; to try to obtain; and although the word implies a serious request, it requires no particular degree of importunity, entreaty, imploration, or supplication. People v. Phillips, 70 Cal. App. 2d 449, 160 P. 2d 872, 874. To awake or excite to action, or to

> invite. The term implies personal petition and importunity addressed to a particular individual to do some particular thing. As used in the context of solicitation to commit a crime, term means to command, authorize, urge, incite, request, or advise another to commit a crime.

The Florida Administrative Code, Section 59N-15.002 sets forth a detailed definition of solicitation with instructive guidelines related to solicitation, written communications and advertising as it applies to chiropractors. There, "solicit . . . includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes and written form of communication directed to specific recipient." Id. Additionally, other relevant Florida law, namely Florida Statute §501.603(11), (the Florida Telemarketing Act) defines "solicit" as "initiat[ing] contact with a purchaser for the purpose of attempting to sell consumer goods or services, where such purchaser has expressed no previous interest in purchasing, investing in, or obtaining information regarding the property, goods, or services attempted to be sold."

The term "solicit" is commonly used in everyday language and has a readily discernible meaning. It bears a common and certain meaning in plain English. The statute is not void for vagueness because of the use of the term "solicit": a person of ordinary intelligence would have been given fair notice of the proscribed conduct. See State v. Jontiff, Case No.: 94-12579 CF A02 (15th

Judicial Circuit) (Florida Statute §817.234(9) not unconstitutionally vague for failing to define "solicit"); Desnick v. Dept. of Professional Regulation, 665 N.E. 2d 1346, 1361-62 (Ill. 1996) (statute was not unconstitutionally vague for failing to define "solicit"); State v. Manfredonia, 649 So. 2d 1388, 1390 (Fla. 1995)("[L]ack of precision is not itself offensive to the requirements of due process. . . . '[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . .' 'That there may be marginal cases in which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal offense . . . .'").

CONCLUSION

Wherefore, based upon the foregoing arguments and the authorities cited therein, Petitioner respectfully requests that this Court reverse the appellate court's finding that fraud is an element of §817.234(8) Fla. Stat. (1997), and conclude that the statute is constitutional absent the fraud element.

Respectfully submitted,
ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA TERENZIO
Assistant Attorney General
Bureau Chief
Florida Bar No. 656879

ROBERT R. WHEELER
Assistant Attorney General
Florida Bar No. 0796409
1655 Palm Beach Lakes Boulevard,
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759
Fax (561) 688-7771
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner'S Initial Brief on the Merits" has been furnished by U.S. Mail to: **Michael E. Dutko, Esq.**, Attorney for Respondent, Colonial Bank Building, Suite 500, 600 South Andrews Avenue, Fort Lauderdale, FL 33301, **Henry M. Coxe, III, Esq.**, The Bedell Building, 101 East Adams Street, Jacksonville, Florida 32202, **D. Gray Thomas, Esq.**, 215 Washington Street, Jacksonville, FL 32202, **Robert Stuart Willis, Esq.**, 503 East Monroe Street, Jacksonville, Florida 32202, and **Robert A. Ader, Esq.**, NationsBank Tower, Suite 3550, 100 S.E. 2nd Street, Miami, Florida 33131, on June 2, 2000.

_____
ROBERT R. WHEELER
Assistant Attorney General