

IN THE SUPREME COURT OF THE STATE OF FLORIDA

GARY FRANCIS CZAJKOWSKI,  
Petitioner,

CASE NO: SC-15-2313

L.T. CASE NO: 4D13-3693

vs.

STATE OF FLORIDA,  
Respondent.

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**BRIEF ON JURISDICTION**

On Discretionary Review from the District court of Appeal, Fourth District  
of Florida.

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RECEIVED, 12/28/2015 04:19:20 PM, Clerk, Supreme Court

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## STATEMENT OF THE CASE AND FACTS

Petitioner, the low bid contractor on sewer rehabilitation projects for municipalities in South Florida, appealed his convictions for multiple counts of unlawful compensation to the Fourth District contending that his motion to dismiss challenging section 838.016 as unconstitutionally vague as applied to him was erroneously denied. In its decision of November 4, 2015, the district court expressly declared section 838.016 constitutionally valid even though the statute did not define what is a gift or benefit “not authorized by law.” *Czajkowski v State*, --- So.3d ----2015 WL 6735310, 40 Fla. L. Weekly D2464 (Fla. 4<sup>th</sup> DCA Nov. 4, 2015) (Appendix 1-9). The Fourth District construed that vague element by reference to a civil statute that no previous Florida decision had ever associated with section 838.016. The court expressly declared the statute valid finding:

[W]e conclude that implicit in section 838.016(1) is the fact that the phrase “not authorized by law” refers to state ethics law, section 112.311 et seq., Florida Statutes (2008). Thus, section 838.016(1) was sufficiently definite to inform the defendant that his conduct in providing gifts to influence public employees' official action—which in turn, caused them to violate sections 112.313(2) and 112.313(4) by accepting things of value given to influence their official action—was “not authorized by law.”

*Czajkowski v. State*, --- So.3d --- 2015 WL 6735310, 40 Fla. L. Weekly D2464 (Fla. 4th DCA Nov. 4, 2015) (Appendix 8) The Motion for rehearing filed November 17, 2015, was denied on December 9, 2015. Notice to Invoke this Court’s discretionary jurisdiction was filed December 14, 2015.

## SUMMARY OF THE ARGUMENT

This court has jurisdiction to review the decision in *Czajkowski v State*, because the Fourth District Court of Appeal expressly declared section 838.016, valid against petitioner's challenge that the statute was unconstitutionally vague as applied for failure to define what is a gift "not authorized by law." This court has jurisdiction under Article V, section 3(b)(3), Fla. Const. which provides the Supreme Court may review: "any decision of a district court of appeal that expressly declares valid a state statute." The Fourth District concluded that although a gift or benefit "not authorized by law" was not defined in that criminal statute, the meaning could be found in civil ethics statutes applicable to public employees, relying on the reasoning in *State v. Rodriguez*, 365 So.2d 157 (Fla. 1978).

*Czajkowski* expressly upholds the validity of the statute concluding "implicit in section 838.016(1) is the fact that the phrase 'not authorized by law' refers to state ethics law, section 112.311 et seq. Florida Statutes (2008)" (A-8) when section 112.311 is nowhere mentioned in Chapter 838. Nor may the district court give such a new and different construction upholding the validity of 838.016 based on section 112.313 when that interpretation has not previously been applied to the unlawful compensation statute and conflicts with the construction given that statute by this court in *State v. Castillo*, 877 So.2d 690 (Fla. 2004). Due process

forbids applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. *Marks v. United States*, 430 U.S. 188,191-192 (1997), *Rogers v. Tennessee*, 532 U.S. 451, 951 (2001).

## ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT EXPRESSLY HOLDING SECTION 838.016 VALID AGAINST A DUE PROCESS VAGUENESS CHALLENGE WHEN THE DECISION VIOLATES DUE PROCESS BY APPLYING A NOVEL CONSTRUCTION NOT PREVIOUSLY ATTRIBUTED TO THAT STATUTE

This court has jurisdiction to review the decision in *Czajkowski v State* because the Fourth District Court of Appeal expressly declared section 838.016 valid against petitioner's challenge that the statute was unconstitutionally vague as applied for failure to define what is a gift "not authorized by law." This same jurisdictional basis arose in *Cuda v State*, 639 So.2d 22 (Fla. 1994) where this court reviewed *State v. Cuda*, 622 So.2d 502 (Fla. 5th DCA 1993), in which the Fifth District Court of Appeal expressly declared section 415.111 valid. This court has jurisdiction pursuant to Article V, section 3(b)(3) of the Florida Constitution.

The authoritative construction given to section 838.016 by the Fourth District in petitioner's case includes definitions and provisions from a civil ethics statute that applies to public employees. Yet, sections 112.313(2) and 112.313(4) have never previously been applied in assessing criminal liability under the unlawful compensation statute. The Fourth District acknowledged that section 838.016 does not define what is a gift "not authorized by law" (A-5), but held the definition is supplied by these civil public employee ethic statutes, sections 112.313(2) and (4) in the same way this Court resolved a vagueness challenge to

the phrase “not authorized by law” prohibiting unlawful use of a food stamp in *State v Rodriquez*, 365 So.2d 157 (Fla. 1978). There the crime established in section 409.325(2)(a) for using a food stamp in any manner “not authorized by law” survived a vagueness challenge because other sections of Chapter 409 explicitly referred to state and federal food stamp law and regulations. A parallel construction in petitioner Czajkowski’s case should not be allowed as nowhere do the criminal statutes in Chapter 838 refer to ethics statutes in Chapter 112.

In relying on the older case of *Rodriquez* to expressly uphold the validity of section 838.016, the district court rejected constitutionally proper analysis based on a more recent decision from this court refusing to extend *Rodriquez* in *Cuda v. State*, 639 So.2d 22, 23 (Fla.1994) (statute held invalid for vagueness which provided that “a person” who “exploits an aged person ... by the improper or illegal use or management of the funds...of such aged person...for profit”). This court also accepted jurisdiction (and reversed) when a district court improperly upheld the validity of a state statute against a vagueness claim in *Roque v. State*, 664 So.2d 928 (Fla. 1995) (Commercial bribe statute, section 838.15, prohibiting an “employee” from accepting a benefit in return for violating “common law duty” to his employer was unconstitutionally vague and did not give sufficient warning of what was corrupt and outlawed.)



This court should accept jurisdiction and reverse because the Fourth District's decision is wrongly decided under a faulty constitutional construction. The Fourth district expressly declared section 838.016 valid by using definitions never previously applied to the statute, converted its meaning from the prior construction from this court that requires a causal (not casual) connection between the gift and an official act; the gift must be given in exchange for some particular official act. *State v Castillo*, 877 So.2d 690 (Fla. 2004) at 694-6 and footnote 5. The express, novel construction of the statute in petitioner's case allows the statute to be applied to prohibit gifts of appreciation, friendship or gratitude without any expectation of receiving anything in return (quid pro quo) or without any intent for an exchange required in *Castillo*. The civil ethics statute applicable to public employees, Section 112.313(4), does not require any quid pro quo before the receiver, public employee, is in violation of the statute for receipt of a gift. Section 112.313 does not criminalize the giving of the gift; it addresses receipt. Thus, it already assumes the gift is given in order to influence and so as applied to the giver in a criminal prosecution relieves the state of its burden of proof on an essential element.

Because Section 838.016 and case law on that statute contain no reference to the civil statutes in Chapter 112 this court should accept jurisdiction to correct the Fourth District's expressly upholding the validity of the statute when it is

unconstitutional as applied: due process forbids applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. *Marks v. United States*, 430 U.S. 188,191-192 (1997), *Rogers v. Tennessee*, 532 U.S. 451, 951 (2001). As the United States Supreme Court explained, “an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law.” *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964). Thus, “[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court [or the Fourth District Court of Appeal] is barred from achieving precisely the same result by judicial construction.” *Id.* at 353-54, 84 S.Ct. at 1702-03.

This court should accept jurisdiction and establish a briefing schedule for briefs on the merits.

## **CONCLUSION**

As the Fourth District expressly upheld the validity of section 838.16 under a novel construction never previously given that statute, this court should accept jurisdiction to review the decision of that court under Article V, section (3)(b)(3) of the Florida Constitution.

Respectfully Submitted,

*/s Margaret Good-Earnest*

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**CERTIFICATE OF TYPEFACE COMPLIANCE**

I **HEREBY CERTIFY** that this brief has been prepared in compliance with the font standards required by Florida Fla. R. App. P. 9.210. The font is Times New Roman, 14 point.

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a copy hereof has been furnished electronically to Celia Terenzio, Assistant Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401 at [crimappwpb@myfloridalegal.com](mailto:crimappwpb@myfloridalegal.com) this day of 28<sup>th</sup> day of December, 2015.

*/s Margaret Good-Earnest*

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