IN THE SUPREME COURT OF THE STATE OF FLORIDA

GARY FRANCIS CZAJKOWSKI,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.
_____/

CASE NO: SC-15-2313

L.T. CASE NO: 4D13-3693

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Express Statutory Construction Review from the Fourth District

MARGARET GOOD-EARNEST
Florida Bar No. 192356
CHERRY GRANT
Florida Bar No. 260509
GOOD EARNEST LAW, P.A.
P.O. Box 1161
Lake Worth, Florida 33460
(561) 533-0111
(561) 685-0248 (Cell)
Good2300@BellSouth.net
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes and Other Authorities

STATEMENT OF THE CASE AND FACTS

Petitioner, Gary Czajkowski, was convicted under a 10th amended information for 14 counts of unlawful compensation in violation of section 838.016 and conspiracy to commit unlawful compensation for the gifts he and his business' salesmen, co-defendants Trost and Miller, gave to public employees at the time his business had ongoing contracts with counties and municipalities. Petitioner was the President and owner of Chaz Equipment Co. ("Chaz") in the sewer maintenance and rehabilitation business. Chaz obtained its public works contracts through sealed low bids awarded by vote of city or county commissions. T-402-440, 599-608. Chaz contracts were for one year with provisions for renewal and were considered such a good contract with good prices and excellent performance by Chaz T-591, 1019, that the Delray 2002 line price item sewer rehab contract was frequently used by other municipalities, called piggy-backing.

These working and contractual relationships were ongoing at the time gifts were given to public employees, usually those who reported that the specifications of the contract were met. No one suggested the recipients approved work that did not meet the specifications of the contracts. All of the state witnesses both public employees who received gifts and the co-defendants Kevin Trost and Brad Miller who gave gifts, including Christmas cards with gift cards enclosed, testified they had no corrupt purpose in giving or receiving of the gifts nor did anyone involved

with the gifts think their gifts were unlawful or given with a corrupt intent, a fact the prosecutor acknowledged was "not helpful to his case." T-30-31. Indeed, that lack of corrupt intent and good faith belief that their gifts were lawful and received by public employees without any thought that the gifts were illegal or without expecting some special treatment for Chaz is what the state's evidence and the defense testimony established. T-525, 529, 530, 547, 548, 549-550, 552, 580, 625, 640, 642, 646, 648, 689, 883, 886, 887, 917, 918, 939, 1129, 1130, 1136, 1143.

Petitioner was also charged with co-defendant, Howard Wight, Vice-President of Chaz Equipment, who proceeded to trial in 2011, on the same allegations before the state eliminated some of the charges originally placed against petitioner and Wight. At trial, and eventually on appeal, Wight was acquitted. *Wight v State,* 117 So. 3d 827 (Fla. 4DCA 2013). At that trial the state's interpretation was that Section 838.016 criminalized <u>any gift</u> a business person gave to a public employee and that other co-defendants' guilty pleas were proof that the gifts "were not authorized by law." Vol. 4-R-701, 703.

Because of the state's interpretation of section 838.016 in Wight's case, that all gifts were prohibited by section 838.016 because "all gifts corrupt the system," petitioner moved to dismiss the information anticipating the state would use the same vague unconstitutional reach of the statute in violation of due process of law. Vol. 4-R-684-703. Petitioner objected in his motion to dismiss that the "not

authorized by law" element of the offense was unconstitutionally vague so that the statute was subject to arbitrary prosecutions, that due process forbids the state from using the co-defendants' guilty pleas as evidence of defendant's guilt, R-690. The state's response to the motion was to file a Motion for Special Jury Instructions, Vol 4-R729-731, along with a Motion to Deny Defendant's Motion to Dismiss, Vol 4, R-737-741, which asserted new and different interpretations of the statute than its prior position in the Wight case.

The state did not claim section 838.016 provided an easily understandable standard pertained to what was a gift "not authorized by law" but said that definition was found in sections 112.313(2) and 112.313(4) Florida Statutes (2008), which statute had been found constitutional against a public employee's vagueness challenge in *Commission on Ethics v Barker*, 677 So. 2d 254 (Fla. 1996). The defense argued that case was not applicable in a criminal case and, furthermore, it prohibited the application the state was asserting here since the Court also cautioned: "At the same time, however, we note that proof that something of value was given to a public official who might be in a position to help the donor one day, without more, would not establish a violation of section 112.313(4)." *Id.* at 256. Petitioner's constitutional challenge also attacked the state's interpretation that section 838.016 could be applied to prohibit gifts of gratitude, appreciation or friendship without any expectation of receiving anything

in return. This broad and expansive interpretation ignored the requirements of *State v. Castillo*, 877 So. 2d 690 (Fla 2009), petitioner reasoned.

At the hearing on the motion to dismiss, the defense raised his due process objections to the state's intended application of section 838.016 and asserted that the state cannot refer to a civil ethics statute, section 112.313, to define what gifts a public employee can and cannot accept to define an element of a crime against petitioner who was not a public employee. Petitioner argued and cited case law that policy manuals and civil standards for public employee conduct cannot be used to define elements of a crime. T-15, 12-13.

At the hearing the state maintained its position that the meaning of "not authorized by law" was "obvious" in most cases, T-29, and could also be defined by the civil statutes, sections 112.313(2) and 112.313(4), Fla Stat.(2010), to show what was a gift "not authorized by law under the authority of *State v Rodriguez*, 365 So. 2d 157 (Fla. 1978)(finding food stamp fraud statute constitutional against a claim that "not authorized by law" language in the statue was vague). The order of the trial court denying petitioner's due process challenge to 838.016 as applied did not rely section 112.313 to supply definitions but said:

> The thrust of this motion is that the statute is too vague because the phrase, "not authorized by law" is not defined. Fl. Stat. 838.015 is the bribery statue and immediately proceeds the statute in question (i.e. 838.016) The state in defining "bribery" also uses the phrase "not authorized by law." These are not new statutes. "[N]ot authorized by law is not a new phrase when used in this context. There are instances

> where benefits and compensations from private citizens to public officials are authorized. In such an instance the accused is surely permitted to bring such authorization to the Court and prosecutors' attention. These statutes give an example of one such instance of lawful compensation beyond what the public employee receives in salary and benefits from his employer. The example is where a citizen posts a reward for information about a crime. The Court is familiar with others. The court does not find this statute to be overly vague. Wherefore, the motion is denied.

(R-752)

Even though the order denying the motion to dismiss did not find section 838.016 constitutional because of definitions in section 112.313, later defense counsel renewed the unconstitutional as applied objections and asked for a modification to state's special requested jury instruction. R-891-892, T-37-41, 1310-1312. The trial court overruled the petitioner's objections, T-1312, and instructed the jury on a section 112.313(4) definition, that a gift is "not authorized by law" if a public employee exercising reasonable care would believe that the gift was not authorized by law.

In its decision on November 4, 2015, the Fourth District affirmed the lower court's interpretation of the statute, expressly construed the statute in reference to sections 112.313(2) and (4), and referred the matter to the Jury Instruction in Criminal Cases Committee to update the standard jury instructions in accordance with the decision, even though no prior case law had authorized such a new construction of the statute. *Czajkowski v State*, 178 So.3d 498 (Fla. 4th DCA 2015).

Rehearing again raised the constitutional infirmities in the novel construction of the statute but was denied on December 9, 2015. Notice to Invoke this Court's jurisdiction was timely filed and review was granted on March 24, 2016. 2016 WL 1273464 (Fla. 2016).

SUMMARY OF ARGUMENT

POINT I—The decision of the Fourth District in petitioner's case authorized a new and novel interpretation of section 838.016, the unlawful compensation statute, under an expansive judicial construction, finding the element of a benefit "not authorized by law" received its definition from a public employee's ethical standards statute, section 112.313, that had never previously applied to interpret section 838.016 in the case law of Florida. *Czajkowski v State,* 178 So.3d 498 (Fla. 4th DCA 2015).

Petitioner, the low bid contractor on sewer rehabilitation projects for municipalities in South Florida, filed a pretrial motion to dismiss contending that statute was unconstitutional as applied to him, based on the manner in which the essential element of a gift or benefit "not authorized by law" received different applications depending on how the state proceeded to prosecute in the Fifteenth Judicial Circuit. The statute was unconstitutionally vague, petitioner claimed, because it did not define an essential element, and that lack of specificity allowed the state to use inconsistent interpretations of what was a gift "not authorized by

law." Vol 4, R-684-703. In response to petitioner's due process fair notice claims that the statute's very vagueness encouraged arbitrary prosecutions, the state proposed, the trial court accepted and the Fourth District affirmed an express construction of the statute utilizing definitions of gifts public employees were not authorized to receive from a civil ethics statute for public employees, section 112.313(4). This application was not previously recognized in the case law of Florida but the Fourth District found it applicable to define an element in section 838.016 under *State v. Rodriguez*, 365 So. 2d 157 (Fla. 1978). The Fourth misapplied *Rodriguez*. Instead the Fourth should have referenced this Court's precedent in *Cuda v State*, 639 So. 2d (Fla 1994), citing *Locklin v. Pridgeon*, 158 Fla. 737, 739, 30 So.2d 102, 103 (1947), where *Cuda* distinguished and limited *Rodriguez'* application.

Petitioner's due process challenges assert he acted in good faith, that under section 838.016 he and his co-defendants were completely authorized to give gifts to public employees as acts of kindness, appreciation and generosity with "no strings attached." R-688. He complained the state was giving the statute a new meaning, applying it to criminalize potential conflicts of interest without the causal connection requirements of *State v Castillo*, 877 So. 2d 690 (Fla. 2009). There the Court said that the benefit given to a public employee must be "in return for performance or non-performance" of official duties, that there must be an

"exchange," a quid pro quo, even though it did not have to be an "agreement." R-691-693. Petitioner also challenged the state's novel interpretation that an unlawful gift was determined by the reasonable public employee standard, whether a public employee exercising reasonable care might think the gift was unlawful, instead of what petitioner and the recipients of his gifts had no idea the gifts were for any purpose but friendship, appreciation and gratitude and they had no intent to accept an illegal gift or thought the gifts given were unauthorized or illegal. Reversal for discharge is required due to the unconstitutional construction and application of the statute.

Point II- Section 90.405, Fla. Statutes and the federal and state constitutions guarantee the defendant the right to produce evidence in his defense that his generosity was part of who he was, that he demonstrated this characteristic congruently and consistently, throughout his life, in business as well as in his personal life. The lower courts erred in refusing to allow the evidence of specific acts of generosity which would reveal petitioner had non-corrupt generous reasons for his actions and undertakings. Production of evidence on the reasons for the petitioner's actions was essential, particularly where the state's evidence was circumstantial and, petitioner was running a legitimate business. After denying the motion for a new trial, the trial court found this an extremely close legal question

and that petitioner would have been acquitted if the jury heard this evidence of specific acts of generosity. T-1536

ARGUMENT

POINT I—THE FOURTH DISTRICT ERRED IN UPHOLDING THE DENIAL OF PETITIONER'S MOTION TO DISMISS THE INFORMATION AS SECTION 838.016 WAS UNCONSTITUTIONALLY APPLIED UNDER THE STATE'S MANY VAGUE AND INCONSISTENT INTERPRETATIONS OF WHAT WAS A GIFT "NOT AUTHORIZED BY LAW." APPLICATION OF SECTION 112.313 TO DEFINE AN ELEMENT OF THIS CRIME VIOLATED PETITIONER'S RIGHTS TO FAIR NOTICE, EXPANDING THE STATUTE TO COVER CONFLICTS OF INTEREST NOT PREVIOUSLY CRIMINALIZED BY THE STATUTES' APPLICATION.

A. The statute expressly construed in the Fourth District's decision, the jury instruction and the standard of review.

The standard of review on the validity of the statute at issue was correctly stated by the district court's decision: the determination of a statute's constitutionality and a trial court's ruling on a motion to dismiss are both legal questions subject to de novo review. *Henry v. State*, 134 So.3d 938, 944–45 (Fla.2014), *Czajkowski v State, supra* at 501.

The unlawful compensation statute under review, Section 838.016(1), Florida Statutes (2008), provides:

> It is unlawful for any person corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept, any pecuniary or other benefit not authorized by law, for the past, present, or future performance,

> nonperformance, or violation of any act or omission which the person believes to have been, or the public servant represents as having been, either within the official discretion of the public servant, in violation of a public duty, or in performance of a public duty...

An essential element of the crime of unlawful compensation is that the benefit or compensation to a public employee was "not authorized by law." *Johnson v. State,* 99 Fla. 711, 127 So. 317 (1930). (Dismissal of information against citrus inspector under the predecessor unlawful compensation statute affirmed for it failed to allege the essential element that compensation "was not authorized by law.") Thus, a violation of this statute requires the state to prove a negative, that a gift or benefit given was "not authorized by law." See also, *Clarke v. McNeil,* 2011 WL 767512 (S.D. Fla. 2011) (magistrate's report recommending grant of habeas for failure to instruct the jury on a contested element of the crime charged); *Gov't of Virgin Islands v. Smith*, 949 F.2d 677 (3d Cir. 1991) (Where absence of self-defense was an element of the offense, court's failure to specifically instruct jury on that element was plain error.) The *Czajkowski* decision acknowledges neither the statute, the jury instructions nor case law define this third element of the offense. *Supra* at 499.

Florida Standard Jury Instruction (Criminal) 19.3 sets out the four elements of an 838.016 offense. Petitioner's jury was instructed on these four elements with

some modifications from the standard 19.3 (over the defense objection)[1] as follows:

> And the State must prove the four elements beyond a reasonable doubt:
>
> 1. (Named public official) was a public servant.
>
> 2. (Defendant) gave to (public official) the thing described in the charge in this case as (named gift).
>
> 3. That the (named gift) was something of value or advantage to (named official) and was not authorized by law.
>
> 4. That the gift was corruptly made, not in good-faith, for the past, present, or future performance, nonperformance, or violation of any act or omission of (named official) that Mr. Czajkowski believed to be within the official discretion of (named official) or in violation of a public duty of [named official] or in performance of a public duty of [named official].

Vol 21, T-1400, passim through 1416.

The *Czajkowski* decision expressly construes the statute, finding its missing definitions are supplied by two ethics code civil statutes applicable to public employee, sections 112.313(2) and (4) which provide:

> Section 112.313(2): No public officer, employee of an agency, local government attorney, or candidate for nomination or election shall solicit or accept anything of value to the recipient, including a gift, loan, reward, promise of future employment, favor, or service, based upon any understanding that the vote, official action, or judgment of the public officer, employee, local government attorney, or candidate would be influenced thereby.

---

[1] Petitioner requested a theory of defense instruction on the definition of good faith but the court denied a separate instruction and added it as an undefined exclusion to the "corruptly made" element 4. Petitioner also objected to the inclusion of what "Mr. Czajkowski believed" portion of the element 4 as outside the charges in the information. These objections were Points 6 and 7 of his initial brief in the Fourth District.

Further, section 112.313(4) provides:

> No public officer, employee of an agency, or local government attorney or his or her spouse or minor child shall, at any time, accept any compensation, payment, or thing of value when such public officer, employee, or local government attorney 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, employee, or local government attorney was expected to participate in his or her official capacity.

The order of the trial court denying petitioner's due process challenge to the statutes as unconstitutional as applied did not rely on section 112.313 to supply definitions. (R-752). Later over defense objection, the trial court instructed the jury only on section 112.313(4) that gift is "not authorized by law" if a public employee exercising reasonable care would believe that the gift was not authorized by law.

B. Due process prohibits vague statutes that encourage arbitrary prosecutions and so prohibits application of novel judicial enlargement of a statute to criminalize conduct not previously within the ambit of the statute.

The Fourth District's *Czajkowski* decision accurately sets out the due process fundamentals applicable when a statute is challenged as unconstitutional due to vagueness. *Id.* at 501-502. Petitioner asserts the construction given section 838.016 by the trial court and the Fourth District's decision violates his rights under the due process clauses of both the Florida Constitution, Article 1, section 2 and the Fifth and Fourteenth Amendments of the United States Constitution.

Statutory vagueness violates due process for either of two independent reasons. *City of Chicago v Morales*, 527 U.S. 41, 56 (1999). First, it may fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. *Id.* at 56. *Perkins v State*, 576 So. 2d 1310 (Fla. 1991), *Maxwell v State*, 110 So.3rd 958 (Fla. 4th DCA 2013). Second, a law may be void for vagueness because it is "so indefinite that it 'encourages arbitrary and erratic arrests and convictions.'" *Coulatti v. Franklin*, 439 U.S. 379, 390 (1979); quoting *Papachristou v Jacksonville*, 405 U.S. 156, 162 (1972) (void for vagueness vagrancy statutes encouraged unfettered discretion in hands of law enforcement); *State v Jenkins*, 469 So. 2d 733, 734 (Fla. 1985)(statute proscribing official misconduct in knowingly refraining or causing another to refrain from performing duty imposed upon him by law is unconstitutionally vague and susceptible to arbitrary application.)

Of extreme importance here is that "statutes creating and determining crimes cannot be extended by construction or interpretation to punish an act, however wrongful, unless clearly within the intent and terms of the statute." *Maxwell v. State*, supra., citing *Hutchinson v. State*, 315 So.2d 546, 547 (Fla. 2d DCA 1975). See also, *Bradley v. State*, 79 Fla. 651, 84 So. 67 (1920). Words in a penal statute must be strictly construed and "shall be strictly construed…most favorably to the accused." Section 775.021(1), Fla. Stat. (2008), *McLaughlin v. State*, 721 So.2d

1170, 1172 (Fla.1998), *Wallace v. State*, 860 So.2d 494, 497 (Fla. 4th DCA 2003). The Fourth District in *Czajkowski* reiterated these principles citing to *State v. Wershow*, 343 So. 2d 605, 607 (Fla. 1977), which invalidated a vague statute for official malpractice because, "reduced to its essential language, the statute says that 'any officer of this state…who is guilty of any malpractice in office not otherwise especially provided for shall be guilty of a misdemeanor of the first degree. '"*Id.* at 607, (quoting the trial judge's order of dismissal).

These principles of statutory construction "rest on the due process requirement that criminal statutes must say with some precision exactly what is prohibited." *Maxwell*, *supra*, citing and quoting *Perkins v. State*, 576 So. 2d 1310, 1312 (Fla.1991). A penal statute must be written in language sufficiently definite, when measured by common understanding and practice, to apprise ordinary persons of common intelligence of what conduct will render them liable to be prosecuted for its violation. *Gluesenkamp v. State*, 391 So.2d 192, 198 (Fla.1980), cert. denied, 454 U.S. 818 (1981).

When vague laws lack explicit standards, the prosecution is left with too much discretion as to how to proceed to interpret that statute. These principles are explained in *Grayned v. City of Rockford*, 408 U.S. 104 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws

> give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108-09. (Emphasis supplied).

Further, 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 (2001). The ex post facto clause does not apply to judicial decisions and case law, only legislation, but when a judicial opinion results in "an unforeseeable enlargement of a criminal statute" the due process clause contains the same limitation on courts. *Marks* at 192, (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 353-54, (1964)); *see also Rogers v. Tennessee*, supra, (holding that *Bouie* only restricted the retroactive application of judicial interpretations of criminal statutes to those that are unexpected and indefensible by reference to prior law.)

This issue was not resolved by *State v Hoberman*, 400 So. 2d 758 (Fla. 1981), finding the bribery and unlawful compensation statutes constitutional on their face against the defendant's vagueness challenge; there, no details of the defendant's vagueness claim were identified. In petitioner's case, the novel

construction given the statute was different than what was at issue in *Hoberman* and the affirmance of a new and novel interpretation of the statute, the state's theory of prosecution against petitioner, was completely unforeseen from the *Hoberman* decision. Because *Hoberman* did not address petitioner's unconstitutional as applied challenges, the Fourth District addressed petitioner's claims de novo and specifically construed the statute against petitioner in its lengthy decision. *Czajkowski v State*, supra. The way in which the district court expressly construed the statute is at odds with petitioner's constitutional guarantees of due process of law.

C. The district court finds a definition of the contested third element of section 838.016 prosecution prohibiting a benefit "not authorized by law" in the civil ethics statutes applicable to public employees.

The decision in petitioner's case acknowledges that neither section 838.016, the jury instructions, nor prior case law, define this third element of the offense, what is a benefit "not authorized by law", and instead resorts to civil ethics statutes applicable to public employees to supply the missing definitions. Petitioner's motion to dismiss in the trial court and argument before the Fourth District raised the radical unfairness in applying section 838.016 to new and different conduct not previously identified as prohibited, and called out the state's intended statutory construction prohibiting any gift to a public employee that might potentially create

a conflict of interest. That interpretation conflicted with the Court's construction of the statute in *State v Castillo,* which requires the state to prove an exchange, a quid quo pro, an intent to influence or affect some specific official act. *Castillo* does **not** address the application of the statute to a potential conflict of interest. The *Castillo* Court pointed out that section 838.016 prohibits "public officials from seeking or accepting unauthorized benefits in return for performance or nonperformance of official duties." *Id.* at 691. In footnotes 4 and 5 in *Castillo,* the Court explains this requirement of an "exchange," a quid pro quo, even though it does not have to be an "agreement." R-692-293.

Because there is no case law or statutory definition of what is a gift "not authorized by law" the state can argue or assume that a gift is unlawful under whatever definition the state wishes to employ. Instead of following the well-defined principles of due process of law, *Czajkowski* reaches a conclusion on case law that is clearly inapplicable. The Fourth District's *Czajkowski* decision denies petitioner's vagueness-as-applied claim relying on *State v Rodriguez,* 365 So.2d 157 (Fla. 1978) which found the term "not authorized by law" in the food stamp fraud statute, section 409.325(2)(a) was not vague when it was read in conjunction with the other sections of Chapter 409. But in *Rodriguez* the challenged food stamp fraud statute itself referred to vast body of federal and state rules on food stamps.

In *Cuda v State,* 639 So. 2d 22, 23 (Fla 1994), the Court explained and

limited the result in *Rodriguez*, finding section 415.111(5), Florida Statutes (1991), prohibiting exploitation of an aged person, contained the unconstitutionally vague terms "illegal" and "improper."

> This Court has approved statutes employing language similar to that used in the statute at issue here. In *State v. Rodriquez*, 365 So.2d 157 (Fla.1978), this Court upheld a statute that contained a broad proscription against acts "not authorized by law." The statute at issue in *Rodriquez* provided that any person who "[u]ses, transfers, acquires, traffics, alters, forges, or possesses ... a food stamp ... in any manner not authorized by law is guilty of a crime." §409.325(2)(a), Fla. Stat. (Supp.1976) (emphasis added). This Court found that "because of the peculiar nature of the food stamp program, because it is a federal program, and because Chapter 409 gives notice that it is a federal program with federal regulations, we conclude that the Legislature, by the use of the language 'not authorized by law' means not authorized by state and federal food stamp law." Thus, the Court concluded that any constitutional notice problems were alleviated when the statute was read in conjunction with the rest of chapter 409, which refers to state and federal food stamp law. *Id*.

Cuda at 23.

Cuda contrasted *Rodriquez* to *Locklin v. Pridgeon*, 158 Fla. 737, 739, 30 So.2d 102, 103 (1947), where the phrase "not authorized by law" was found "too vague, indefinite and uncertain to constitute notice of the crime or crimes or unlawful acts which it purports to prohibit" and "prescribes no ascertainable standard of guilt." The statute at issue in *Locklin* made it unlawful for any officer, agent, or employee of the federal government or the State of Florida to commit any act under color of authority of their position which is "not authorized by law." *Id*.

That statute suffered from unconstitutional vagueness because it required

every government employee and officer "to determine at his peril what specific acts are authorized by law and what are not authorized by law." *Id*., 30 So.2d at 105. The *Cuda* Court determined the circumstances of the exploitation of the aged statues were "more like *Locklin* than *Rodriquez*" which "had the federal laws as a backdrop, thus providing the requisite notice to make the statute constitutional." As to the exploitation of the elderly statute, there were no other statutes to lend meaning to the vague language employed in Section 415.111(5), which purported to criminalize any "illegal" act in using or managing the funds of an aged person. Section 415.111(5), like the statute at issue in *Locklin* was too vague to give notice and unconstitutionally left the "the determination of a standard of guilt…to be supplied by the courts or juries," which is "an unconstitutional delegation of legislative power." 158 Fla. at 739, 30 So.2d at 103.

In order to force a parallel construction of section 838.016 to the statute found constitutional in *Rodriguez*, the prosecutor in petitioner's case argued the definition of "not authorized by law" in section 838.016 could be supplied by two subsections of Chapter 112, sections 112.313(2) and 112.313(4), T-23, in the same way that vagueness in *Rodriguez* was dispelled by reference to the state and federal rules on use of food stamps. But the food stamp rules were specifically referenced elsewhere in Chapter 409, and the statute Rodriguez challenged was found in Chapter 409. Nowhere in Chapter 838 is there a similar reference to Chapter 112

and thus, section 838.016 gives no fair notice to any citizen that the definition of gifts "not authorized by law" are to be found in a civil statute on municipal employees. Nor did the state cite a single appellate case where these two civil statutes under Chapter 112 were used to define what was a gift or benefit "not authorized by law" under section 838.016. Neither has appellate counsel for Mr. Czajkowski found any authority to that effect nor any reported case using section 112.313 to supply statutory definitions during a section 838.016 prosecution.

Like the statute at issue in *Locklin*, which made it unlawful for any officer, agent, or employee of the federal government or the State of Florida to commit any act under color of authority of their position which is "not authorized by law, " the lower courts application of section 112.313 against petitioner results in an unconstitutional application of section 838.016 because it requires not only governmental employees, but also a citizen giving gifts of appreciation to public employees "to determine at his peril what specific acts are authorized by law and what are not authorized by law." *Id*., 30 So.2d at 105. (Emphasis supplied).

Under the state's many and various interpretations of the section 838.016 a citizen must necessarily guess at what gifts are lawful and which are "not authorized by law" because it "prescribes no ascertainable standard of guilt." At one point the state agreed that section 838.016 authorized the gift of a cup of coffee or a lunch to a public employee. T-45, 1338. In another place the state said

a cup of coffee or a lunch could be an unlawful gift. T-356. Under these circumstances, whether a gift of hospitality is lawful or not is a complete coin toss on the part of the citizen.

In a prior prosecution of petitioner by this same prosecutor for an unrelated offense of unlawful compensation (a loan to Palm Beach building inspector Stephen White), petitioner was acquitted by a jury. T-11, 40, 1228. There the jury had been instructed, over the petitioner's objections, on the applicability of sections 112.313(2) and 112.313(4) to define the contested third element of a gift "not authorized by law." T-32-33. Although the state in response to petitioner's Motion to Dismiss in this prosecution said those two statutes saved section 838.016 from a vagueness challenge, and a jury instruction should be given to petitioner's jury on those two sections (as in the prior case), T-11-12, 32-41, the state switched its position on the statute's meaning again before the charge conference. T-738-739. At that time the state dropped its request to instruct on both subsections of Chapter 112.313(2) and (4) and urged that only one of the two statutes was necessary for a jury instruction. Thus, petitioner's jury was not instructed as in the prior case for which he was acquitted of a section 838.016 offense nor was the state required by the lower court to take a consistent position to what the state previously had argued. T-11-12, 32-41, T-729-731.

Where the state takes inconsistent positions on the basics of the defendant's criminal liability between the prosecutions of one co-defendant to another in the same case, the court can treat the inconsistencies as "judicial admissions by a party opponent." See *Hunt v. State*, 613 So. 2d 893, footnote 5 at 898 (Fla. 1992). The state's inconsistent and shifting positions show that the term "not authorized by law" is so vague that in practice the state does not use a consistent interpretation of what that element means. The state's chameleon-like positions on the applicable definition of the statute's terms help prove petitioner's vagueness challenge here where the definition of "not authorized by law" changes when the state decides it should. If the state cannot advance a consistent meaning to the statute, how can it be said the citizen should know?

The absence of a section 112.313(2) instruction that requires the employee and the giver have an "understanding" that the public employee's vote, action or judgment "would" be influenced by the gift (not just "could" be influenced by the gift") allows the state to argue that a gift given, which a public employee might think was unlawful, a potential conflict of interest, is all that is required for a gift to be "not authorized by law." The standards of 112.313(2) and (4) are not definite enough to give fair notice of what is a gift "not authorized by law" and are standards for public employees to avoid the appearance of a conflict of interest. They are too subjective and not definite enough to support criminal liability.

D. The constitutional prohibitions in expanding a statute to cover behavior not previously within its reach for the first time at trial, through jury instructions and on appeal violates due process. The state's suggested remedy to cure the vagueness of the statute by applying the definitions in section 112.313 F.S. was the wrong remedy and violates due process.

The due process prohibitions of *Marks* and *Roberts* are exactly the protections the defense raised at the hearing on the motion to dismiss. The defense complained the state was subjectively using section 112.313 to interpret 838.016 so it became a statute against the appearance of conflicts of interest, an interpretation never previously applied. T-19-20. The state's extreme inconsistent positions of the meaning of a gift or benefit "not authorized by law" demonstrated the statute's vagueness allowed arbitrary prosecutions, petitioner posited. The state responded that section 838.016 was saved from petitioner's challenge because any contractor was put on notice "that municipal employees are not authorized by law to receive personal benefits under circumstances outlined in Florida Statute 112.313(2) and 112.313(4)." R-737. The Fourth District incorrectly accepted that argument and directly construed the statute in a way not supported by prior interpretations of the statute even though petitioner pointed out that section 838.016 contains no reference to the civil statutes in Chapter 112. Because petitioner had no idea that was the definition to be applied at the time the gifts were given (under a good faith

belief they were lawful) due process forbids that newly applied definition, after the fact. Due process forbids applying a novel construction of a criminal statute to conduct that neither the statute not 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).

In petitioner's case, the prosecutor was interpreting the statute to apply to gifts under the subjective definition used in this prosecution, not the same as had been used before, on a suggestion that the statute could be applied to prohibit gifts of appreciation, friendship or gratitude without any expectation of receiving anything in return (quid pro quo). The prior construction of section 838.016 from this Court 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 691. But here the prosecutor employed a different interpretation without any intent for an exchange required in *Castillo*. The state decided the statute prohibited gifts given to a public employee that could potentially influence them in making choices in the future. T-31-32. Thus, the state was construing and arguing the statute prohibited mere conflicts of interest, but this interpretation is not supported by prior judicial decisions on this statute's reach. Just because a more modern-up-to-date-conflict of interest statute has not been enacted by the Legislature to meet the state's theory of what they subjectively

believed should be a prohibited business practice does not give the state license to expand an otherwise valid statue to encompass what the state hoped it could be read as prohibiting.

The most pernicious unconstitutional position the state advanced on the statute's interpretation was that a "reasonable person" standard was to be applied to define a gift or benefit "not authorized by law." What was "not authorized by law" arose from "what a reasonable municipal employee" would know from the gift given that it was given to influence his future performance of his official duties and therefore it was "not authorized by law."

> MR. FUNK [STATE]: "Not authorized by law" is defined by when a municipal employee under the circumstances would understand that a reasonable person would believe that it was being given to influence. And that has nothing to do with the subjective intent of the employee, but rather has to do with the reasonableness which doesn't come from the mindset of the employee but rather from a reasonable person's standpoint. T-357-358.

This state interpretation of a "reasonable employee standard" is unconstitutional and prohibited by this Court's decision in *D'Alemberte v. Anderson*, 349 So.2d 164 (Fla.1977). In that case the Court invalidated an earlier version of section 112.313(4) which was based on a "reasonably prudent person" standard that read:

> No officer or employee of a state agency or of a county, city, or other political subdivision of the state, legislator, or legislative employee shall accept any gift, favor, or service, of value to the recipient, *that*

> *would cause a reasonably prudent person to be influenced* in the discharge of official duties.
>
> Section 112.313(1), Fla.Stat. (Supp.1974)(Emphasis added).

In striking down this statute, the Court reasoned that "'the reasonably prudent person' 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 [public officials] 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.

D'Alemberte condemns the same unconstitutional standard the state convinced the lower court to use here. Petitioner's prosecutor said it did not have to actually prove the gifts given were "not authorized by law" but only that a "reasonable person or a person acting reasonably as a public employee would not believe that they were entitled to receive" the gift. T-1345. Petitioner argued against this interpretation of the statute: the defendant's criminal liability cannot be based on a hypothetical reasonable person standard—on what someone else might reasonably think about a gift. R-891-892, T-37-41.

Petitioner also specifically argued that the third element, "not authorized by law," meant something separate and independent from the fourth element that the gift was "corruptly given." T-39, 355. Petitioner challenged the state's position in co-defendant Wight's case that if a gift was given corrupted then it was "not

authorized by law" as an unconstitutional interpretation of the statute that blended the third and fourth elements into one. The different, though equally vague, standard the state used here, whether the gift's recipient exercised reasonable care to determine if a gift was lawful, was not definite enough to comport with due process and does not put an ordinary citizen on notice as to exactly what conduct in gift giving section 838.016 prohibits.

Manifestly, the state had to come up with some other standard and settled on what a "reasonable employee exercising reasonable care" might believe in order to argue that Chaz gifts were "not authorized by law" and corruptly given because otherwise there was no basis for a conviction. Instead of an easily ascertainable standard that the state had to define and prove, what was a gift "not authorized by law," the state originated what an employee exercising "reasonable care" might believe in order to argue that the gifts were not authorized by law and corruptly given. When all the state's witnesses, municipal employees, and Chaz salesmen Trost and Miller agreed they thought the gifts were lawful at the time they were given and they had no unlawful or corrupt intent in giving or receiving the gifts, no basis for a lawful conviction under section 838.016 could be proven. T-525, 529, 530, 547, 548, 549-550, 552, 580, 625, 640, 642, 646, 648, 689, 883, 886, 887, 917, 918, 939, 1129, 1130, 1136, 1143. Petitioner and his company gave gifts of appreciation and good will, nothing else. The gifts were a nice thing to do.

Lacking evidence of any actual corrupt intent and without any definition in the statute of what was "not authorized law," the state morphed the statute to prohibit conflicts of interest by using a public employee reasonable care standard that is nowhere in section 838.016.

This Court held in *Commision on Ethics v. Barker*, 677 So. 2d 254, 255 (Fla. 1996) that the rewrite of section 112.313(4) did not carry the same infirmities of the "reasonable person standard" invalidated in *D'Alemberte*. The *Barker* court observed that the revised section 112.313(4), focused upon whether the actual public official against whom the ethics complaint was filed knew or should have known that the gift was given to influence that public official—not whether a hypothetical public official, "a reasonably prudent person," would be influenced by the gift. But that erroneous interpretation is exactly what the state was allowed to use here. The state did not focus on the actual intent of the givers and those who received the gifts but instead insisted that "it has nothing to do with the employee subjective intent but has to do with the reasonableness from a reasonable person stand point." T-357. Thus, if some other person with the exercise of reasonable care might think the gifts were not lawful, then petitioner could be convicted. T-1337-1338, 1367, 1401-1402. This "reasonably prudent person" standard condemned in *D'Alemberte* for use in administrative review of ethics complaint should not have been resurrected here for use in a criminal prosecution under such

a novel interpretation of the statute. The state's shifting arguments about the reach and meaning of the statue defy the definiteness constitutionally required. Under a de novo standard of review, this Court should invalidate the statute as applied in this prosecution and order the petitioner's discharge from the state's arbitrary reach to conduct not previously condemned by judicial interpretation of section 838.016. The district court's decision leaves the state too much discretion as to how to seek a conviction. Their interpretation of the statue should be vacated by this Court along with the petitioner's convictions under an unconstitutionally vague application of the statute.

E. The Fourth District's decision erroneously recites that petitioner agreed to instructing the jury on the definition of "not authorized by law" under 112.313(4), implying petitioner agreed to the state's special instruction defining "not authorized by law" under that section of the ethics code. In fact, petitioner did not agree to that instruction and requested an instruction that an illegal gift "cannot be determined by what a hypothetical public official acting reasonably" would believe. The trial court and the district court erred in failing to require a proper instruction informing the jury that a reasonable person standard was improper and that not all gifts to public employees are illegal.

In the Fourth District's decision, the court sets out the procedural history, implying the defense agreed to the state's special jury instruction on section 112.313(4). Here is what the Fourth District's opinion says at pages 500-501:

> At the charge conference, the parties brought to the court's attention that the standard jury instruction for section 838.016 referred to the phrase "not authorized by law," but did not define that phrase. See Fla. Std. Jury Instr. (Crim.) 19.3
>
> To address that issue, the state, consistent with its response to the defendant's motion to dismiss, initially requested a special jury instruction based on sections 112.313(2) and 112.313(4). The state ultimately requested a special jury instruction based on only section 112.313(4). Applying section 112.313(4), the state's proposed instruction defined the phrase "not authorized by law" as follows:
>
> "Not authorized by law" means the following: No public officer or employee of a local government 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 or her official capacity.
>
> In response, the defendant stated that, without waiving his argument that section 838.016's use of the phrase "not authorized by law" was unconstitutionally vague, he agreed with the state that the court should instruct the jury on the element of "not authorized by law" pursuant to section 112.313(4).
>
> Based on the parties' positions, the trial court instructed the jury on all fifteen counts by using the definition of "not authorized by law" pursuant to section 112.313(4) stated above.

Czajkowski, *supra* at 500-501. (Emphasis added)

But Petitioner did not agree to the definition from 112.313(4) in the manner the jury was instructed. This state's special jury instruction was the basis for the its

argument in closing on its new interpretation of the statute, an unconstitutional as applied construction of the statute: if under some circumstances some public employee did not exercise reasonable care in receiving a gift and a reasonable person would believe it was given to influence a vote or other action, then the gift was "not authorized by law." T-1337, 1338, 1345. The state emphasized in response to the motion for judgment of acquittal that "'not authorized by law' means "they [public employees] don't exercise reasonable care." T-1294. This argument and interpretation is so vague it allows the jury to find a gift was "not authorized by law" if they think the gift was unreasonably generous for a public employee to receive.

While still maintaining his legal position that section 838.016 was unconstitutionally vague as applied in this prosecution, R-891, the defense objected to the incompleteness of the state's special instruction on authority of *Commission on Ethics v Barker*, 677 So. 2d 254, 256 (Fla 1996), where the court reiterated *D'Alemberte*: section 112.313(4) requires the "actual public official against whom the [ethics] complaint was filed knew or should have known that the gift was given to influence that public official—not whether a hypothetical public official, 'a reasonably prudent person,' would be influenced by the gift. State otherwise, this statute asks whether a public official had actual or constructive

knowledge of a donor's intent to influence that public official's vote or other official action." (Emphasis supplied)

Defense counsel requested any instruction on 112.313(4) be modified to include the clarifying language that what the actual public employee thought or believed had to be shown by the state, not what some hypothetical reasonable employee might think the gift was illegal. T-1310-1312. But the court denied that request from the defense to modify the state's special requested instruction. T-1312. In *Barker*, the court said, "this statute asks whether a public official had actual or constructive knowledge of a donor's intent to influence that public official's vote or other official action." (Emphasis supplied.) Thus, *Barker* prohibited the application of section 112.313(4) to mere conflicts of interest stating "At the same time, however, we note that proof that something of value was given to a public official without more, would not establish a violation of section 112.313(4)."

Under a similar "unlawful gratuities" act, the Court in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999) rejected overbroad jury instructions that allowed conviction for a gratuity given out of appreciation, because of the recipient's official position or "to build a reservoir of good will that might ultimately affect one or more specified acts, now or in the future." *Sun-Diamond* was decided under the rules of statutory construction without reliance on

the due process clause; there the Court required a specific connection between an official act and the gratuities conferred, a quid pro quo, similar to this Court's holding in *Castillo*. The US Supreme Court found the jury instructions utilized in respondent trade associations' trial allowed a sweeping prohibition against gift giving rather that a more narrow interpretation that Congress intended; had Congress wanted to adopt a "broadly prophylactic criminal prohibition upon gift giving" it would have done so in a "more precise and more administrable fashion." *Id*. at 408. If section 838.016 had meant to prohibit all gifts and compensation but for the employee's salary, the Legislature could have said so with precision and clarity. Judging a gift's lawfulness by what some other person exercising reasonable care might think, not the actual person receiving the gift, is hardly a model standard informing the citizen in precise terms what is prohibited.

The Fourth District's decision does not reflect the defense request to modify the 112.313(4) instruction in line with *Barker*. The 112.313(4) instruction as given to the jury was misleading as it assumes the gift was given to influence the public employee and omits the requirements of section 112.313(2) that any no public employee shall accept a benefit or gift "based upon any understanding that the vote, official action, or judgment of the public officer, employee, local government attorney or candidate would be influenced thereby." The unconstitutional construction of the statute and its attendant jury instruction furthering its

unconstitutional application allowed the jury to focus on whether a reasonable public employee might believe the gift was not authorized by law, instead of focusing on whether the state actually proved the gift was one not authorized by law. The difference in the defense written request from the state's request is highlighted in the language italicized here:

> Not authorized by law means the following: no public officer or employee of a local government shall, at any time, accept any compensation, payment, or thing of value when such public official or employee knows, or, with the exercise of reasonable care, *he himself, not what a hypothetical public official or reasonable prudent person* 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.

R-894.

Petitioner's written request is the more narrow instruction given in the state's prior prosecution of petitioner on which he was acquitted. R-892. The instruction as given in this case, (T-1407 passim), does not adequately define what is a benefit or gift "not authorized by law." The jury must be properly instructed on the contested elements of the offense. *Battle v. State*, 911 So.2d 85, 89 (Fla. 2005) (the jury must be given an adequate and clear instruction on the meaning of the disputed elements of the crime), *State v. Delva*, 575 So.2d 643 (Fla. 1991). The *Delva* decision emphasized the defendant's well-known fundamental right "'to have a Court correctly and intelligently instruct the jury on the essential and

material elements of the crime charged and required to be proven by competent evidence.'" *Delva*, 575 So.2d at 644 (quoting *Gerds v. State*, 64 So. 2d 915, 916 (Fla. 1953).

Unless the definition of a gift "not authorized by law" was clearly defined to the jury, any gift could be viewed by the jury as unlawful if a reasonable person (not the actual defendant) could view the gift as unlawful, as the jury was instructed in this case, under a definition rejected by the Court in *Barker*. Obviously, this jury was confused about the definition given and was not adequately informed of the definition of the third element: Petitioner's jury asked a question during deliberations, requesting additional information or clarification of what is a gift that is "not authorized by law." T-1439. The crime charged cannot be left for the jury's conjecture; rather, it is the court's duty to define the essential elements. *Battle*, supra. Failure to adequately define and instruct the jury on the third contested element of the crime requires reversal for a new and fair trial.

There is no evidence that petitioner committed any crime under a proper construction of the statute: that gifts may have given for the purpose of relationships and that some hypothetical public employee might not have exercised reasonable care in accepting large gifts does not prove petitioner violated section 838.016. All of these public employees were honorable men who put the welfare of their municipalities first and always did their best. T-593, 625-626,699-700,

913. The state's suggestion that these particularly, hard working men might have been corrupted by gifts of appreciation and friendship can only be based on distain for public employees. The state is not allowed to substitute its opinion of what might have happened or how public employees might (hypothetically) react to gifts from vendors as proof of petitioner's wrongful intent, when in fact all the evidence is that he had no wrongful intent and there was no proof of the third element that the gifts were not authorized by law. Proof of facts that do not make out a violation of a statute under a limiting construction given by the courts require reversal for discharge. *Avrich v State*, 936 So.2d 739 (Fla. 3rd DCA 2006) Discharge is required here.

POINT II—PETITIONER'S CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE IN HIS DEFENSE WAS DENIED WHEN THE COURT PROHIBITED EXCULPATORY EVIDENCE OF HIS SPECIFIC ACTS OF GENEROSITY, PARTICULARLY WHERE THE TRIAL COURT FOUND THAT HAD THE JURY HEARD THIS EVIDENCE, CZAJKOWSKI WOULD HAVE BEEN ACQUITTED.

Once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal. This authority to consider other issues in addition to those upon which jurisdiction is based is discretionary with this Court and should be exercised only when these other issues have been properly briefed

and argued and are dispositive of the case. *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982).

Petitioner requests this Court exercise that attendant jurisdiction now, in its discretion, due to the magnitude of the denial of the petitioner's right to present relevant evidence in his defense that occurred in the lower courts. Few rights are more fundamental than that of an accused to present witnesses in his own defense. *Chambers v. Mississippi*, 420 U.S. 284, 302 (1973). Where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission. *Rivera v. State*, 561 So.2d 536, 539 (Fla. 1990); *Vannier v. State*, 714 So.2d 470 (Fla. 4th DCA 1998). The relevancy standard is different in the context of proffered defense evidence. See *Neiner v. State*, 875 So.2d 699, 700 (Fla. 4th DCA 2004). What is relevant to show a reasonable doubt may differ from what is relevant to show the commission of a crime. *Id.* "If there is any possibility of a tendency of evidence to create a reasonable doubt, the rules of evidence are usually construed to allow for its admissibility." *Vannier* at 472, citing *Rivera* and *Story v. State*, 589 So.2d 939 (Fla. 2d DCA 1991).

Throughout his entire life, Mr. Czajkowsi has been known for his generosity with co-workers, friends and even strangers. He is a most unusual businessman with good character for generosity and honesty, T-454, 459, 859, 939, and was extremely hardworking, T-452, 469, 492, 629, 866, 897, day to day in the

enormously difficult, dangerous and dirty sewer maintenance and rehab business. T-469, 1047. Chaz provided impeccable quality and value. T-591. Central to the defense, then, where the state lacked concrete evidence of corruption except for their interpretation that "gifts corrupt the public contract system," T-1387, 1397, or that a reasonable public employee would think the gifts were given for a corrupt purpose, was the petitioner's offer of proof of his specific acts of generosity to show that he is unfailingly generous in his dealings with people.

The defense was entitled to show evidence that Gary Czajkowski is not the sort of businessman portrayed by the state's referential stereotypes—one who must be giving gifts for corrupt purposes because he was "running a business, not a charity." T-1383, 1385, 1390. Here the state could produce no evidence that petitioner had actual corrupt intent but rather argued that a "reasonable municipal employee" receiving his gifts would believe that the gifts were being given with corrupt intent to influence even if there was no subjective corrupt intent by the givers. T-357. In a pre-trial motion hearing, in the midst of the argument on the statutory definition of what was a gift "not authorized by law," the state acknowledged that petitioner's generosity in giving to others without any strings attached was the defense:

> THE COURT: …And I guess the defense would be "heck, I'm a heck of a generous guy. I'm just giving—
> MR. FUNK: I believe that—

THE COURT: -- I'm just giving stuff—
MR. FUNK: -- that would be their defense.
THE COURT: --to everybody, a drop of a hat. And so to me it meant nothing other than hey you're doing a good job, keep it up."

(Emphasis supplied. T-34)

Even though the state knew specific acts of generosity were central to the defense and knew from depositions of the defense witnesses that petitioner was known for his reputation for honesty and generosity, the prosecutor continued to (wrongfully) object that specific acts of generosity were not admissible. T-361-362, 994-1000. The ground for the state objection was that some of the specific generous acts fell outside the charged time period, 2008-2010, and the rules of evidence only allowed a defendant to prove his generous character by reputation evidence and not by specific acts of generosity. T-359-360, 991.

The defense relied on that section of the Evidence Code that specifically applied-under section 90.405, Fla. Stat. where the defendant's character trait for generosity was relevant to his defense, that statute (and case law, as cited and argued in the defendant's memorandum of law and throughout the trial,) permitted the admissibility of specific acts of that character trait. T-360, 657-664, 987-1000; Vol. 5-R-875-878. Section 90.405(2), Fla. Stat. (2010) allows this defensive evidence: "When character or trait of character of a person is an essential element of a charge, claim or defense, proof may be made of specific instances of his

conduct." In support of his right to produce this essential element of his defense, petitioner also argued the authority of The Sixth and Fourteenth Amendments, United States Constitution, and Article I, Section 9, Florida Constitution and case authority: *Beal v State*, 620 So.2d 1015 (Fla. 1st DCA 1993), *Bogren v State*, 611 So.2d 547 (Fla 5th DCA 1992). T-657, 663, 664, 800, 986-1000, 1176-1225.

The trial court struggled with his decision on the admissibility of the petitioner's proffered evidence of specific acts of generosity. The court addressed the issue after Anthony Lombardi's testimony about the watch, and opining that *Beal v State*, 620 So.2d 1015 (Fla. 1st DCA 1993) was not correctly decided but that *Bogren v State*, 611 So.2d 547 (Fla 5th DCA 1992) supported the admissibility of this defensive evidence. T-657. The court wanted to make the correct legal ruling, T-663, and understood the defense wanted to produce witnesses to the gifts they received from petitioner to show that "this was just part of [petitioner's] normal course of doing business and it all goes to that characteristic." T-659, 659-662. Yet, in the face of the defense compelling constitutional argument on the accused's right to produce evidence in his defense, the court ruled that evidence of specific acts of generosity were inadmissible. T-663. The court asked for a proffer, T-663, and took more time to resolve the issue before the defense presented its case. T-800.

Defense counsel explained the proffer, that evidence of specific acts of generosity were necessary to counter the state's circumstantial evidence of corrupt intent-that the state would be arguing "who gives an $8,500 watch to someone who is not his best friend." T-987-988. Bradley Miller had already testified that the giving of that watch to Lombardi "was Gary being spontaneous Gary." T-988, 871. The defense proffered who Gary Czajkowski is would be revealed by evidence of his specific acts of generosity: he does things for people without expecting anything in return, even people with whom he didn't have a long-standing relationship. The defense counsel proffered what the witnesses' testimony would be before the court ruled, T-989-999, 1000, and then the defense witnesses testified to their exculpatory evidence in proffer which the court continued to rule was inadmissible. T-986-1000, 1176-1225. The proffer of specific acts were these:

1) Brian Byron, a hunting guide in Texas, experienced many acts of generosity from petitioner over the years; when he first met petitioner in 2001, Byron's truck broke down and Gary spent a full day of his hunting vacation in the rain and mud fixing Byron's fuel pump; when Byron mentioned in passing to petitioner that Byron's wife had a back problem, suddenly petitioner provided an $14,000 electric cart for the wife to water the trees in her nursery business. Similarly, petitioner gave Brian a truck, a trailer for his horse, a brand new bow for hunting, his "dream bow," worth $1,200, (that he hadn't even mentioned to

petitioner, someone else told Czajkowski). Finally, Byron stopped telling petitioner of any of his needs or dreams because petitioner would buy it for him. T-989; 1208, 1201-1225.

2) Michelle Cobb, the coach of girls' volleyball team at King's academy, on which Czajkowski's daughters played, proffered petitioner was always buying team uniforms, and donating to the team and when a team member's family fell on hard financial times, petitioner anonymously gave her $25,000 tuition to the school so the youngster could continue at King's. T-990.

3) Mary Jane Czajkowski, petitioner s wife, proffered his response when he saw in the local news that a young girl needed a serious operation. He took his family to see the girl and told his wife to write a check for $10,000, but she convinced him to write it for only a few thousand dollars instead. T-990-991, 1190-1191. Mrs. Czajkowski also proffered there were many other instances where her husband heard someone wanted or needed something and he would help them. When people would ask, it is petitioner's character to help them out. T-1192. When she heard he was buying Anthony Lombardi an $8,500 watch she was not surprised. Petitioner was very excited to give it to Anthony. Even though they were not best buddies, they liked each other T-1191-93. Petitioner lived to make dreams of people come true and for that his family would tease him. T-1193-1194.

4) Wayne Berkhofer, a Chaz employee, had a very serious injury to his leg in 2007, and petitioner paid for all of his wages and hospital bills while he was off work, recovering for four months, (T-991, 1196); he also paid for Berkhofer's son to go to a diabetic specialist, put tires on his car and gave him $1,000 for a vacation so he could go see his baby grandchild in Long Island, none of which Berkhofer otherwise could afford. Another time when Wayne was under hard times at Christmas, petitioner gave him $2,500 and once loaned him $3,000 for a lawyer after Berkhofer got in an accident T-1196-1197; petitioner gave him $50,000 over the years as gifts, which he had not repaid. (He only repaid the loan for the lawyer.) T-1199.

5) Leroy Cook, another employee, had two brothers die and petitioner paid $7,000 in two consecutive years for those funerals. T-991, 1256-1261.

6) The state requested the defense proffer about the family whose house petitioner saved from foreclosure: The Berster family was about to lose their home in foreclosure when petitioner saw their story on television and decided to help; he bought the house for $160,000 and told the family they could stay, just make their rent payments to him and when their credit recovered, they could get a mortgage and have their house back. T-997-998, 1562.

7) Nicholas Pilan, owner of E & N Construction, told of how petitioner sat down with him and helped him with his business organization and cash flow

problems when he had financial difficulties at the startup of his company in 2007. He proffered that petitioner loaned him money with 0% interest so Pilan could buy heavy paving equipment when Pilan did not qualify for bank financing. Petitioner even forwarded to Pilan the $2,500 rebate that came to Chaz for buying the equipment for Pilan. T-1185-1189.

After hearing the defense proffer of how petitioner would buy gifts for others upon learning of their dreams or need, the court observed that the "the hunting guy story particularly it kind of fits in with the watch story. So it does seem pretty relevant. I'd kind of like to let it in." T-994. Yet, as the state continued to object to any and all of the proffered evidence, the trial court wondered how to "cut it off," how to discern which acts were relevant, and which might not be, listened to the arguments of counsel and ruled that no evidence of petitioner's specific acts of generosity was admissible. T-1000. This was constitutional error of the most prejudicial nature that skewed the entire outcome of the trial. T-1536.

Appellant reiterates here what was argued in the lower courts, both to the trial court and the Fourth District court on direct appeal: a criminal defendant's right to present a viable defense is grounded in the Sixth Amendment. In *Beal v. State*, 620 So.2d 1015, 1016-17 (Fla. 1st DCA 1993) the First District discussed the evidentiary provision under which petitioner sought to admit evidence of his defense by specific acts of generosity: "Where character or a particular character

trait of a person is an essential element of a charge, claim, or defense, proof may be made of specific instances of his or her conduct. Section 90.405(2), Fla. Stat. (1989)" citing *Tallahassee Furniture Co., Inc. v. Harrison*, 583 So.2d 744, 760 (Fla. 1st DCA 1991). (Emphasis supplied.) There the defendant was charged with theft for taking payment on a construction contract without performing the work. Because dishonesty was an essential element of theft charged against Beal and involved allegations of misrepresentation, the district court reversed the defendant's conviction, finding the trial court erred in refusing to admit the proffered testimony of Beal's witnesses who would have testified to specific instances of his honest conduct and faithful performance of a construction contract.

Likewise, in *Bogren v. State*, 611 So.2d 547, 550–51 (Fla. 5th DCA 1992) the court addressed whether the defendant's specific good acts were admissible to counter the state's circumstantial evidence of fraudulent intent in a grand theft prosecution. There the state had no direct evidence of intent and had the "difficult chore of proving Bogren's intent by presenting evidence of surrounding circumstances." The Fifth District chastised the state's position that only fraudulent financial transactions were admissible: "This chore should not be made easier by limiting the evidence to testimony of witnesses who paid for but did not receive their travel arrangements when other witnesses existed who did receive that for which they paid or received a refund." While normally "evidence of good

deeds would be irrelevant in a criminal trial, it may be relevant when the criminal intent of the accused must be shown by circumstantial evidence during the operation of an otherwise legitimate business. " *Id.* at 549. The *Bogren* court said that "one cannot infer that Bogren had a criminal intent simply because he accepted funds from customers for travel while operating a travel business which was experiencing financial difficulties."

In petitioner's case, the prosecution agreed that corrupt intent would have to be shown circumstantially as all of the municipal employees, the gift recipients, would say that they never thought anything of the gifts, they did not think the gifts were improper or illegal and never intended to do something special for petitioner or his business. T-30-31. The state further agreed under the court's questioning that these facts about the municipal employee's intent was not helpful to the state. T-30. As in *Bogren*, the state's difficult "chore" in attempting to prove the petitioner's corrupt intent by circumstantial evidence did not entitle the state to keep out petitioner's exculpatory evidence of specific acts of generosity which were at the heart of his defense. When the state set out on its difficult circumstantial path of proof that difficult highway could not be made smooth by prohibiting defensive roadblocks. Had the state been made to encounter the relevant specific acts of generosity the state would not have been able to clear those defensive hurtles and obtain a conviction. T- 1536. Paying for the Hartman

family hotel bill in Orlando as they gathered to send their son off on a tour of duty in Afghanistan or paying for a cruise and a hotel stay for Rodney Jones who suffered despair after a heart attack are revealed to be nothing unusual or corrupt but the kind of generous, helpful acts petitioner did for many other people in his life, when the proffered specific acts of generosity are considered.

Petitioner does unbelievably generous things for people who need support and help as they go through a hard time; he also takes joy in making people's dreams come true, like gifting them with a specific type of hunting bow, saving a family home from foreclosure and eviction, helping a small child obtain a lifesaving operation, paying tuition anonymously to keep a young athlete in her private school and on the team. Once those facts are considered, why in some ways petitioner does conduct his business like a charity is not hard to understand. The gross state argument for guilt that businesses don't operate like charities would have been exposed as irrelevant hyperbole with no basis in fact if the defensive evidence had been allowed. T-1383, 1385, 1390. Petitioner is so unbelievably charitable and generous, that his business ethic is not ascertained by reference to stereotypes, how just the fact that he gave gifts from a business does not mean that he was corrupt. In fact, he was not corrupt but gave gifts in good faith honestly believing he was allowed to give gifts from his business. The state's attempt to convict on circumstantial evidence flowing from cynical stereotypical references to

how other businesses are run was fatally flawed when petitioner, an unusual human being full of concern for others, was the accused. He had a right to reveal specific acts of his outstanding generous character in his defense.

There can be no doubt that the exclusion of this testimony was harmful and requires reversal. Even though the trial court denied the motion for new trial on this ground, T-1535, at that same hearing the court said the issues in this case were "close" and he knew the outcome of the trial would have been different, the judge was sure, that the verdict would have been "not guilty" had the court "admitted the specific evidence of acts of generosity." T-1536. Where a trial court found exculpatory evidence convincing but technically inadmissible, the trial court's further finding that if the jury had heard the exculpatory testimony then the defendant would have been acquitted, is a finding entitled to great respect from the appellate court. *State v. Glover*, 564 So.2d 191, 192-93 (Fla. 5th DCA 1990) (reversing denial of 3.850 where trial court found that if the defendant's newly discovered evidence had been admissible it would have made a difference in the outcome.) It's hard to imagine on what theory exculpatory defense evidence is not admissible once the trial court finds that petitioner would have been acquitted if the jury had heard that evidence. This Court should reverse for a new trial.

CONCLUSION

Based on these legal arguments and authorities cited, this Court should order petitioner's discharge because the state's unconstitutional as applied prosecution does not make out a violation of section 838.016 Fla. Stat. Alternatively, prejudicial error requires a new trial as the trial court disallowed exculpatory evidence of the defense that was permissible under state and federal constitutional protections on the right to present a defense.

Respectfully Submitted,

/s Margaret Good-Earnest

_____

MARGARET GOOD-EARNEST
Florida Bar No. 192356

/s Cherry Grant

_____

CHERRY GRANT
Florida Bar No. 260509
GOOD EARNEST LAW, P.A.
P.O. Box 1161
Lake Worth, Florida 33460
(561) 533-0111
(561) 685-0248 (Cell)
Good2300@BellSouth.net
Counsel for Appellant

CERTIFICATE OF 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.

/s Margaret Good-Earnest

MARGARET GOOD-EARNEST

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished electronically to Mark J. Hamel, Assistant Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401 at crimappwpb@myfloridalegal.com this 12th day of April, 2016.

/s Margaret Good-Earnest

MARGARET GOOD-EARNEST