IN THE SUPREME COURT OF FLORIDA

GARY FRANCIS CZAJKOWSKI,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC15-2313
4th DCA Case No. 4D13-3693

****

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE

Petitioner was charged by information with one count of conspiracy to commit unlawful compensation and fifteen counts of unlawful compensation (R5 846-49). The trial court granted a motion for judgment of acquittal on one count of unlawful compensation (T8 981). On August 22, 2013, a jury found Petitioner guilty as charged of the remaining fifteen counts (R1 30-31). The trial court adjudicated Petitioner guilty of conspiracy to commit unlawful compensation, withheld adjudication on the fourteen counts of unlawful compensation, and sentenced Petitioner to nine months in jail (R7 1381-83, 1394).

Petitioner pursued a direct appeal. On November 4, 2015, the Fourth District Court of Appeal affirmed Petitioner's convictions. Czajkowski v. State, 178 So. 3d 498 (Fla. 4th DCA 2015). On March 24, 2016, this Court accepted jurisdiction and ordered briefs on the merits.

STATEMENT OF THE FACTS

Petitioner is the owner and president of Chaz Equipment (T19 1033). Petitioner authorized gifts to municipal employees with whom Chaz Equipment was doing business as follows:

- an $8,500 Breitling watch to Anthony Lombardi, the maintenance supervisor for the City of Boynton Beach (T14 500-10; T19

1076);

- hotel accommodations at the Walt Disney Dolphin Resort to James Hartman, a field supervisor for the Palm Beach County Water Utilities (T18 825, 835);
- admission to a NASCAR race and hotel accommodations at the Sonesta Bayfront Hotel in Coconut Grove to Rodney Jones, a project manager for Sarasota County (T16 667, 683);
- hotel accommodations at the Gaylord Palms Hotel to Rodney Jones, a project manager for Sarasota County (T16 667, 683; T18 815);
- a seven-night Holland America cruise to Rodney Jones, a project manager for Sarasota County (T16 667, 685-89; T18 823);
- a $500 gift card to Rodney Jones, a project manager for Sarasota County (T16 667, 692);
- a $500 gift card to James Hartman, a field supervisor for the Palm Beach County Water Utilities (T17, 791; T18 825);
- a $100 gift card to Sean Woods, a field supervisor for the City of Port Saint Lucie (T14 515; T18 901-02, 907)
- a $100 gift card to Anthony Lombardi, the maintenance supervisor for the City of Boynton Beach (T14 515);
- a $500 gift card to Daniel Derringer, superintendent of Water and Wastewater for the City of West Palm Beach (T14 515; T18

944, 951, 955);

- a $500 gift card to Rodney Jones, a project manager for Sarasota County (T16 667, 691);
- a $500 gift card to James Hartman, a field supervisor for the Palm Beach County Water Utilities (T17 791; T18 825);
- a $100 gift card to Sean Woods, a field supervisor for the City of Port Saint Lucie (T14 515; T18 901-02, 908);
- a $500 gift card to Anthony Lombardi, the maintenance supervisor for the City of Boynton Beach (T14 500-15; T19 1081); and
- a $500 gift card to Daniel Derringer, superintendent of Water and Wastewater for the City of West Palm Beach (T14 515; T18 944, 951, 955).

Codefendant Brad Miller and codefendant Kevin Trost worked as sales representatives for Chaz Equipment (T14 464, 480; T16 730-31). Petitioner encouraged codefendant Miller and codefendant Trost to purchase and deliver the gift cards to the municipal employees (T14 494-96; T16 735; T19 1070). The amount of the gift cards was based on the amount of money that Chaz Equipment was earning from the municipality (T14 495; T17 790). After the $8,500 watch was given to Anthony Lombardi, Petitioner instructed codefendant Miller and codefendant Trost to lie about the watch (T15 553; T17 785; T19 1080). When codefendant Miller

refused to lie about the watch, Petitioner became angry and fired him (T17 788-89).

Codefendant Miller explained Petitioner's motivation for giving gifts to municipal employees:

> Q [prosecutor] And what did Gary Mr. Czajkowski think having invited these people to a NASCAR race what they would be thinking?
>
> A [codefendant Miller] Uh, we were together. It was at the end of a race weekend, and Gary said to Tommy and myself together as we were together that "you know after spending a nice weekend like that with their families and attending a nice race weekend at their drive -- on their drive home they would be thinking about how nice it was, and they would remember that when they you know give us their next PO," or something like that.
>
> Q What does "PO" mean?
>
> A A purchase order.
>
> Q And is that for work that's to be done in the municipality?
>
> A Yes, sir.

(T18 899-900).

Petitioner filed a pretrial motion to dismiss on the grounds that "section 838.016 is unconstitutional as applied in this prosecution" (R4 684-96). The trial court denied the motion as follows:

> 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 statute and immediately proceeds [sic] 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. "Not 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 the 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.

(R4 752).

The State requested a special jury instruction defining "not authorized by law" by referencing prohibitions found in the statutory code of ethics for public employees found in section 112.313 of the Florida Statutes (R4 729-30). The defense "adopted" the State's request (R5 891). The trial court provided the following instruction to the jury:

> The phrase "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 within the exercise of reasonable care he 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 order for the Defendant to be guilty, it is not necessary that the exercise of official discretion or violation of a public duty or performance of a public duty for which the unlawful compensation was given was accomplished or was within the official discretion or public duty of the public servant whose action or omission was sought to be rewarded or compensated.

(T21 1402).

CORRECTIONS TO PETITIONER'S FACTS

1. "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 . . ." (Initial Brief at 1-2).

This statement is false. Codefendant Brad Miller testified that the gifts were given to induce the municipal employees to provide more business to Petitioner's company (T18 899-900). Daniel Derringer, superintendent of Water and Wastewater for the City of West Palm Beach, testified that it was wrong to accept gifts (T18 952-53).

2. "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" (Initial Brief at 2).

This statement is false. Codefendant Brad Miller testified that the gifts were given to induce the municipal employees to give more business to Petitioner's company (T18 899-900). Daniel Derringer, superintendent of Water and Wastewater for the City of West Palm Beach, testified that it was wrong to accept gifts (T18 952-53).

3. "At [the trial of codefendant Howard Wight] 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'" (Initial Brief at 2).

This statement is false and misleading. According to the partial transcript attached to Petitioner's motion, Assistant State Attorney Scott Richardson argued to the co-defendant's jury that the gifts were "[n]ot authorized by law" (R4 701). The prosecutor also argued that "all these gifts, cruises, trips were given for a wrongful purpose" (R4 703). Furthermore, the same assistant state attorney argued that the fact that the employees kept the gifts a secret from their supervisors indicated that the gifts were not authorized by law (R4 701).

SUMMARY OF THE ARGUMENT

POINT I: The unlawful compensation statute is not unconstitutional as applied because Petitioner directed his employees to give gifts to municipal employees in order to obtain more business for his company. The unlawful compensation statute can be fairly used to proscribe Petitioner's conduct in this case.

POINT II: Generosity was not an essential element of Petitioner's defense. Therefore, the trial court did not abuse its discretion in prohibiting Petitioner from presenting specific instances of Petitioner's generosity.

POINT I

SECTION 838.016 OF THE FLORIDA STATUTES IS CONSTITUTIONAL AS APPLIED TO PETITIONER.

A. STANDARD OF REVIEW

"The constitutionality of a statute is a question of law subject to de novo review." Crist v. Ervin, 56 So. 3d 745, 747 (Fla. 2011). In considering a challenge to the constitutionality of a statute, a court is "obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible." Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005) (quoting Fla. Dep't

of Revenue v. Howard, 916 So. 2d 640, 642 (Fla. 2005)).

B. STATUTE AT ISSUE

The unlawful compensation statute 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 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. Nothing herein shall be construed to preclude a public servant from accepting rewards for services performed in apprehending any criminal.

§ 838.016(1), Fla. Stat. (2008).

The unlawful compensation statute included the words "not authorized by law" when the statute was enacted in 1974. Ch. 74-383, § 60, at 1253, Laws of Fla. The previous unlawful compensation statute, enacted in 1905, included similar words: "other than those provided by law." Ch. 5416, Laws of Fla. (1905). The words "not authorized by law" were added to the related crime of bribery in 2003. Ch. 2003-158, § 2, at 1026, Laws of Fla. The words "not authorized by law" also define the crimes of official misconduct, bid tampering, public assistance fraud, unlawful possession of a beverage, and possession of

drugs within 1,000 feet of a place of worship. §§ 414.39(2)(c), 562.02, 838.014(1), 838.022(1), 838.22(2), 893.13(1)(e), Fla. Stat. (2016).

C. DISCUSSION

Petitioner argues that the unlawful compensation statute is unconstitutional as applied to him due because the words "not authorized by law" are not defined by statute. This argument is without merit.

1. Florida's public corruption problem

Florida has a public corruption problem. From 2003-2013, Florida was ranked third in the country for federal public corruption convictions at the local, state, and federal level. Alan Stonecipher and Ben Wilcox, Florida's Path to Ethics Reform, Integrity Florida, available at http://www.integrityflorida.org/wp-content/uploads/2016/01/Floridas-Path-to-Ethics-Reform-final.pdf (last visited May 5, 2016). In 2012, Integrity Florida ranked Florida as number one in government corruption. Id. This year, the Florida Legislature made prosecutions for unlawful compensation easier by changing the required intent from "corruptly" to "knowingly and intentionally." Ch. 2016-151, § 2 Laws of Fla.

2. Decisions finding the statute constitutional

In 1981, this Court decided Hoberman v. State, 400 So. 2d 758 (Fla. 1981). In Hoberman, this Court rejected a vagueness and overbreadth challenge to the same statute:

> Appellant's vagueness challenge fails because sections 838.015(1) and 838.016(1) convey a sufficiently definite warning as to the proscribed conduct, see Faust v. State, 354 So. 2d 866 (Fla. 1978); Zachary v. State, 269 So. 2d 669 (Fla. 1972), and his assertion of overbreadth is unavailing because he has failed to show that the statutes could be applied to constitutionally protected conduct, see Sandstrom v. Leader, 370 So. 2d 3 (Fla. 1979).

Hoberman, 400 So. 2d at 758.

In the decision under review, the Fourth District Court of Appeal conducted a de novo review of the statute, in case the court was not bound by Hoberman due to the lack of detailed reasoning in the Hoberman decision. Czajkowski v. State, 178 So. 3d 498, 501 (Fla. 4th DCA 2015). The Fourth District Court of Appeal concluded that the unlawful compensation statute "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.'"

Id. at 504-05. The Fourth District Court of Appeal found that the phrase "not authorized by law" carries a plain and ordinary meaning of words of common usage. Id. at 505.

3. Decisions examining the same or similar language in other statutes

In State v. Brake, 796 So. 2d 522 (Fla. 2001), this Court addressed the claim that the luring or enticing a child statute was unconstitutionally vague because the statute does not define the term "for other than a lawful purpose." This Court concluded that the term can be defined in a manner that "resolves any vagueness doubts." Id. at 528. This Court found that the dictionary definition of "lawful" i.e., "being in harmony with the law" helped to define the term. Id. at 529. Under this interpretation, the statute provides adequate notice of the conduct it prohibits. Id.

In State v. Rodriguez, 365 So. 2d 157 (Fla. 1978), this Court examined whether the phrase "not authorized by law" rendered a statute regulating the use of food stamps unconstitutionally vague. In Rodriguez, this Court looked to the legislative intent and concluded that the phrase was not unconstitutionally vague: "the words 'in any manner not authorized by law' refer to state and federal food stamp law." Id. at 159.

The only Florida case providing any support to Petitioner's argument is Locklin v. Pridgeon, 30 So. 2d 102 (Fla. 1956). In Locklin this Court found a statute unconstitutionally vague where the statute prohibited a person from committing "any act under color of authority as an officer . . . when such act is not authorized by law." Id. at 741. The statute at issue was extraordinarily broad because the type of act prohibited was not specified and the statute applied to "every officer, agent or employee of the Federal Government, of the State and the political subdivisions of the State." Id. at 741-42. In Rodriguez, this Court found Locklin distinguishable because of the broad nature of the statute invalidated in Locklin. Rodriguez, 365 So. 2d at 159. Likewise, in the instant case, the Fourth District Court of Appeal also examined, but did not follow, the Locklin decision. See Czajkowski, 178 So. 3d at 504.

The decision in Cuda v. State, 639 So. 2d 22 (Fla. 1994) does not support Petitioner's argument because both the language at issue and the statute are completely different. The statute at issue in Cuda prohibited abuse of an aged person by exploitation and used the adjectives "improper or illegal." Id. at 23. The words "improper or illegal" are more vague than the "not authorized by law" language in the instant case.

Furthermore, the statute in Cuda lacked a "clear explanation of the proscribed conduct." Id. at 24. In the instant case, the proscribed conduct is clearly described by the statute (a corrupt conveyance to a public servant) and the "not authorized by law" language merely carves out an exception to the proscribed conduct when the gift is authorized by law. See § 838.016(1), Fla. Stat. (2008).

In United States v. Bryant, 556 F.Supp.2d 378 (D.N.J. 2008), a federal district court in New Jersey rejected an "as applied" vagueness challenge similar to the challenge made in the instant case. The statute at issue in Bryant was a bribery statute that required receipt of "any benefit not authorized by law." Id. at 410. The federal court explained that such a benefit "simply and quite obviously means that if a particular benefit provided to the alleged bribe-taker is authorized by some law, then the payment of the benefit does not violate the bribery statute." Id. The federal court also noted that "[d]efendants have provided no case law for the proposition that a penal law is unconstitutionally vague merely because it states that other laws can carve out exceptions to the conduct it prohibits." Id.

In 1978, the Supreme Court of Arizona rejected a vagueness challenge to a statute that prohibited the use of food stamps

"in any manner not authorized by law." State v. Williams, 583 P.2d 251 (Ariz. 1978). In that case, the court described a hypothetical situation where a due process violation might be found:

> We agree that there would perhaps be due process problems in a case where the prosecutor ferrets out a seldom used provision deep from the recesses of a byzantine regulatory scheme to apply to the actions of a completely unsuspecting defendant. However, it appears that in this case we are dealing with neither an obscure regulation nor an unsuspecting defendant.

Id. at 253.

4. Petitioner's "as applied" challenge is meritless.

There is an important distinction between a challenge to the facial validity of a statute and a challenge to a statute as it applies to a given set of facts. Travis v. State, 700 So. 2d 104, 106 (Fla. 1st DCA 1997). "[W]hen a defendant asserts a challenge to a statute as applied, the court must consider the facts to determine whether the statute can be fairly used to proscribe that defendant's conduct." Id.

In the instant case, Petitioner directed his employees to provide gifts to municipal employees who were in positions to influence contracts provided to Chaz Equipment (T14 505-25; T16 683, 688; T17 791-92; T18 820, 834-37, 907-09). The amount of the gifts depended on the amount of money that Chaz Equipment

was earning from the municipality (T14 495; T17 790). The gifts were given to influence the amount of work given to Chaz Equipment in the future (T18 899-900). Petitioner was a sophisticated businessman who owned Chaz Equipment for twenty-five years (T16 755; T19 1033). Petitioner knew that some municipal workers refused the gifts (T14 521). Petitioner told his employees to lie about an $8,500 watch that he gave to a municipal employee (T15 553; T17 785). Petitioner also became angry and fired one employee for refusing to lie about the watch (T17 788-89). The unlawful compensation statute can be fairly used to proscribe Petitioner's conduct in this case. Thus, both the trial court and the Fourth District Court of Appeal correctly found the unlawful compensation statute constitutional as applied to Petitioner. See Travis, 700 So. 2d at 106 ("when a defendant asserts a challenge to a statute as applied, the court must consider the facts to determine whether the statute can be fairly used to proscribe that defendant's conduct").

5. The special jury instruction was proper.

Petitioner contends that the jury instruction defining "not authorized by law" demonstrates that the unlawful compensation statute was unconstitutional as applied to Petitioner. However, as correctly noted by the Fourth District Court of Appeal, Petitioner agreed that the court should instruct the jury on the

element of "not authorized by law" pursuant to section 112.313 (R5 891).

Furthermore, it is important to recognize that the unlawful compensation statute does not require that the benefit be prohibited by law; it requires that the benefit be "not authorized by law." See § 838.016, Fla. Stat. (2008). Since it is not practical for the jury to review the entire Florida Statutes to see that the benefit is not authorized by law, the State sought to inform the jury that the benefit was specifically prohibited by law. Where the benefit is specifically prohibited by law, the logical inference is that the benefit is not authorized by law.

To the extent that there could be any due process problems with the agreed instruction given in this case, the language from the Supreme Court of Arizona would seem to apply:

> there would perhaps be due process problems in a case where the prosecutor ferrets out a seldom used provision deep from the recesses of a byzantine regulatory scheme to apply to the actions of a completely unsuspecting defendant. However, it appears that in this case we are dealing with neither an obscure regulation nor an unsuspecting defendant.

Williams, 583 P.2d at 253.

6. Petitioner's facial challenge to the statute is meritless.

Much of Petitioner's argument on Point I can be categorized as a facial challenge to the statute because it does not depend on the facts of Petitioner's case. For example, Petitioner argues that "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.'" However, Petitioner lacks standing to raise a facial challenge to the statute. "Litigants may not successfully challenge the constitutionality of a statute for vagueness or complain of its vagueness as applied to the hypothetical conduct of others '[i]f the record demonstrates that a defendant has engaged in some conduct clearly proscribed by the plain and ordinary meaning of the statute.'" State v. Catalano, 104 So. 3d 1069, 1075 n.4 (Fla. 2012) (quoting State v. Brake, 796 So. 2d 522, 526-27 (Fla. 2001)). It is clear from the record in the instant case that Petitioner engaged in conduct clearly proscribed by the plain and ordinary meaning of the unlawful compensation statute.

Even assuming *arguendo* that Petitioner has standing to raise a facial vagueness challenge, the challenge is without merit. The words "not authorized by law" have a simple and obvious meaning. The Merriam-Webster Online Dictionary defines "authorize" as "to give legal or official approval to or for

(something)." See www.merriam-webster.com/dictionary/authorized (last checked May 5, 2016). A person of common intelligence would understand that providing a gift to influence a public employee's official action is not authorized by law. Furthermore, the fact that the phrase "not authorized by law" and its similar predecessor have existed without challenge for more than a century implicitly suggests that the phrase carries a "plain and ordinary meaning of [words] of common usage." See Brake, 796 So. 2d at 528.

7. The instruction did not reference a reasonable person.

There is no merit to Petitioner's argument that the prosecutor convinced the trial court to use an unconstitutional standard involving a reasonable person (Initial Brief at 25-36). The instruction provided by the trial court made no reference to any reasonable person standard:

> The phrase "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 within the exercise of reasonable care he 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 order for the Defendant to be guilty, it is not necessary that the exercise of official discretion or violation of a public duty or performance of a public duty for

> which the unlawful compensation was given was accomplished or was within the official discretion or public duty of the public servant whose action or omission was sought to be rewarded or compensated.

(T21 1402). The only use of the word "reasonableness" relates to the exercise of reasonable care, which is properly measured by a reasonableness standard. See D'Alemberte v. Anderson, 349 So. 2d 164 (Fla. 1977) (finding statute unconstitutional where the reasonably prudent person standard was used to measure mental processes rather than conduct). Furthermore, the defense "adopted" the State's request for this instruction (R5 891).

POINT II

THE TRIAL COURT PROPERLY RULED THAT PETITIONER COULD NOT PRESENT EVIDENCE OF SPECIFIC ACTS OF PETITIONER'S GENEROSITY.

A. ADDITIONAL FACTS RELATED TO POINT II

The defense sought to admit specific incidences of Petitioner's generosity (R5 875-77; T14 359-61; T18 987). The trial court prohibited Petitioner from presenting specific acts of generosity, but allowed Petitioner to present reputation testimony of Petitioner's generosity (T18 1000). The defense presented testimony from a number of witnesses that Petitioner has a reputation for generosity (T14 476; T19 1160, 1163, 1167, 1173).

B. STANDARD OF REVIEW

"A trial court's decision to admit evidence is reviewed under the abuse of discretion standard." Evans v. State, 177 So. 3d 1219, 1229 (Fla. 2015) (citation omitted). "That discretion, however, is limited by the rules of evidence." Id. (citation omitted).

C. LAW

Section 90.404 of the Florida Statutes (2013) allows the defense to present "[e]vidence of a pertinent trait of character" relating to the defendant.

Section 90.405 of the Florida Statutes (2013) specifies the methods of proving character:

> (1) Reputation.--When evidence of the character of a person or of a trait of that person's character is admissible, proof may be made by testimony about that person's reputation.
>
> (2) Specific instances of conduct.--When character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may be made of specific instances of that person's conduct.

The comments to section 90.405 explain that,

> [t]he section [§ 90.405, Methods of proving character] confines the use of specific instances of conduct to cases in which character is in issue; that is, when character is one of the facts necessary to establish a liability or defense or is a factor in the measurement of damages. When

> character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. Of the three methods of proving character provided by this section, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, confuse, surprise, or consume time. Consequently, the use of evidence of this kind is confined to cases in which character is, in the strict sense, in issue, and hence deserving of a searching inquiry. This treatment of specific instance of conduct, as well as the treatment of reputation, follows conventional contemporary common-law doctrine.

The traditional rule is "that specific incidents of misconduct are generally not admissible to prove character." Roebuck v. State, 953 So. 2d 40, 43-44 (Fla. 1st DCA 2007). "It is a rare occurrence that character is an essential element of a claim or defense." Pantjoa v. State, 59 So. 3d 1092, 1097 (Fla. 2011).

D. DISCUSSION

The trial court properly limited Petitioner's presentation of specific acts to prove Petitioner's character.

1. Generosity was not an essential element of Petitioner's defense.

Petitioner's argument fails to grasp a crucial point. A gift to a public official can be both generous and made with the intent to influence the public official. These two concepts are

not mutually exclusive. Generosity only means a "willingness to give money and other valuable things to others." www.merriam-webster.com/dictionary/generosity (site last visited May 5, 2016). Petitioner's generous character was a collateral point that provided a possible motivation for the giving of the gifts; it was not essential to Petitioner's contention that the gifts were not made to influence public officials. This distinction is important because specific instances of conduct are only allowed under section 90.405(2) if the trait of character is "an essential element" of the defense. Petitioner's generosity was not an essential element of Petitioner's defense because the gifts could be both corrupt and generous.[1]

The notes to section 90.405 explain that "[w]hen character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion." However, proof of specific instances of conduct is permissible where "character is, in the strict sense, in issue, and hence deserving of a searching inquiry." In the instant case, Petitioner's character for generosity was merely "a pertinent

[1] The infamous Bernie Madoff was known for his substantial gifts to charitable organizations. See Marianne M. Jennings, Good or Greedy? JPMorgan Chase, Ina Drew, and the Dangers of Misguided Character Measurements, Corporate Finance Review, Nov/Dec 2012, at 37-40 ("the most diabolical among us often use their community and philanthropic generosity and activity as a cover for their business activities").

trait of character," properly limited to proof by reputation testimony. See § 90.404, Fla. Stat. (2013) (providing that evidence of a pertinent trait of character of a defendant is admissible); § 90.405, Fla. Stat. (2013) (providing for proof by reputation testimony when the trait of character is not an essential element of the charge, claim, or defense).

In asking to present specific instances of conduct, Petitioner relied on Beal v. State, 620 So. 2d 1015 (Fla. 1st DCA 1993) (R5 876). The Beal decision concluded that the defendant could provide evidence of specific instances of honest conduct because "dishonesty is an essential element of the crimes" for which the defendant was tried. Id. at 1017. A different situation is presented in the instant case because a lack of generosity is not an essential element of the crimes for which Petitioner was tried. Additionally, the trial court questioned whether Beal was correctly decided (T16 657). The trial court is not alone in questioning the correctness of Beal. See Ehrhardt, 1 Fla. Prac., Evidence § 405.3, n.6 (2014 ed.) ("The opinion confuses the question of whether the act charged was dishonest with the issue of whether an element of the prosecution is whether the defendant is generally a dishonest person. It is in this latter situation, that the defendant's particular character trait is an essential element of the

charge, claim or defense.").

Petitioner's reliance on Bogren v. State, 611 So. 2d 547 (Fla. 5th DCA 1992) is misplaced. The defendant in Bogren was charged with theft of advance payments made by customers who had not received the travel arrangements for which they had paid. Id. at 548. The Fifth District Court of Appeal held that the defendant should have been allowed to present testimony of customers who either received the travel arrangements for which they paid or received a refund. Id. at 550. The excluded testimony was "allowable under the umbrella of surrounding circumstances to prove or disprove criminal intent." Id. In contrast, in the instant case, the proffered evidence did not show surrounding circumstances that shed light on Petitioner's intent. None of the proffered evidence involved gifts to municipal employees; the gifts were made in an entirely different context. The trial court observed that the specific instances of conduct that Petitioner wanted to present were "spontaneous acts of generosity to people unconnected with his business" (T18 995). As such, the proffered evidence was not probative of Petitioner's intent when he gave the gifts to municipal employees. In contrast, in the one instance where Petitioner sought to admit evidence of a specific act of generosity made to a municipal employee, the trial court allowed

Petitioner to present that evidence (T18 888-90).

The trial court's decision on this issue was not an abuse of discretion. See White v. State, 817 So. 2d 799, 806 (Fla. 2002) ("Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused where no reasonable person would take the view adopted by the trial court."). It is a rare occurrence that character is an essential element of a claim or defense. Pantjoa, 59 So. 3d 1097. Furthermore, Petitioner failed to cite to any authority for the proposition that a lack of generosity is an essential element to the charge of official misconduct. The trial court's ruling was correct and entirely reasonable.

2. Petitioner was not deprived of his Constitutional right to present evidence.

The Supreme Court of the United States explained that:

> A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. A defendant's interest in presenting such evidence may thus bow to accommodate other legitimate interests in the criminal trial process. As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve.

United States v. Scheffer, 523 U.S. 303, 308 (1998) (citations and internal quotation marks omitted).

Section 90.405 of the Florida Statutes (2013) is not arbitrary or disproportionate to the purpose it is designed to serve. The commentary to the rule explains that evidence of specific instances of conduct "possesses the greatest capacity to arouse prejudice, confuse, surprise, or consume time. Consequently, the use of evidence of this kind is confined to cases in which character is, in the strict sense, in issue, and hence deserving of a searching inquiry." Without such a limitation on the presentation of specific instances of conduct, a defendant charged with shoplifting might attempt to prove he possesses a character trait of paying for groceries when he shops at stores by presenting testimony from 100 witnesses who saw the defendant paying for groceries at various stores. The reasonableness of the Florida rule is further demonstrated by similar restrictions found in the Federal Rules of Evidence and the rules of most states. See Fed. R. Evid. 405; 1 Wharton's Criminal Evidence § 4:19 (15th ed.) (explaining that most jurisdictions "generally limit the methods for proving character to reputation and/or personal opinion evidence").

Petitioner was allowed to present testimony from a number of witnesses that he has a reputation for generosity (T14 476;

T19 1160, 1163, 1167, 1173). Petitioner cites to no cases that hold that the limitation on the presentation of character evidence found in section 90.405 of the Florida Statutes amounts to a violation of a defendant's right to present evidence. Petitioner was not deprived of his Constitutional right to present evidence.

CONCLUSION

The unlawful compensation statute is not unconstitutional as applied to Petitioner. Furthermore, the trial court did not abuse its discretion in prohibiting Petitioner from presenting specific instances of Petitioner's generosity. Therefore, this Court should affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY (1) that this brief was prepared in Courier New font, 12 point, and double spaced and (2) that a true and accurate copy of the foregoing was served on Margaret Good-Earnest, P.O. Box 1161, Lake Worth, Florida 33460 at Good2300@BellSouth.net on May 16, 2016.

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CERTIFICATE OF TYPEFACE COMPLIANCE

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