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IN THE SUPREME COURT OF THE STATE OF FLORIDA

GARY FRANCIS CZAJKOWSKI,
Petitioner,

CASE NO: SC-15-2313

L.T. CASE NO: 4D13-3693

vs.

STATE OF FLORIDA,
Respondent.
_______________________________/

PETITIONER'S REPLY BRIEF ON THE MERITS

On Express Statutory Construction Review from the Fourth District

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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, EXPANDED THE STATUTE TO COVER CONFLICTS OF INTEREST NOT PREVIOUSLY CRIMINALIZED BY THE STATUTES' APPLICATION

Respondent points out that in 2016 the Legislature "made prosecutions for unlawful compensation easier" by changing the required intent element from "corruptly" to "knowingly and intentionally." (Respondent Brief, pg. 11; emphasis by petitioner.) That change in element is not to the element at issue on this statutory construction constitutional review. Having the legislature change the meaning and elements of the statute would be the correct way to change elements of a crime to comport with due process, *Bouie v. City of Columbia,* 378 U.S. 347, 353, (1964), not by a novel judicial construction as occurred in prosecution of petitioner.

Florida may well have a huge public corruption problem, as respondent points out, (Respondent Brief, pgs. 10-11), but that has nothing to do with the statutory construction issue before this Court. Surely, each party ought to be relying on facts of record supportive to its position. The state's touting Florida's

#1 in nation for public corruption is not a fact of record but offers some explanation of how the constitutional construction error occurred in the first place: the state overreached to meet its perceived need for new and easier ways to prosecute alleged violations of section 838.016. That concern cannot justify relaxing petitioner's due process guarantees.

The majority of respondent's answer focuses on the facts at trial instead of legal issues presented by the Fourth District's decision. Respondent informs the Court that petitioner's statement of facts need corrections as they are "false," particularly in regard to petitioner's assertion that all the witnesses testified to a lack of corrupt intent and a good faith belief their gifts were lawful. Petitioner stands by that statement of fact and the page citations that support it. 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. The only page reference the respondent relies on to call petitioner out on that fact is Vol. 18-T-899-900 (Respondent's Brief, pgs. 4-7) where the respondent concludes the testimony shows that "gifts were given to induce the municipal employees to give more business to petitioner's company." (Respondent's Brief, pg. 7). But that's not what Brad Miller said. At that page Brad Miller recollects an old conversation with petitioner on the return ride home from a NASCAR race, where petitioner said he hoped the public employees would be thinking of what a nice time they had at the races with their

families on their ride home and the next time they drew a purchase order. Vol. 18-T-899-900. That record page does not support respondent's factual characterization and reliance.

Even more skewed is respondent's emphasis, as a supposed fact at trial, that Daniel Derringer, superintendent of Water and Wastewater for WPB, "testified that it was wrong to accept gifts (T. 18-952-53)." Respondent's Brief, pg. 7. But Derringer did not say that; the state posed the question to Derringer, "was it wrong to accept the [gift card]?" T-952. But Derringer did not answer as the defense objection was sustained on the state's pre-trial stipulation about the inadmissibility of public employee policy standards. T. 952-953. Derringer said only that he "shouldn't have accepted [the gift card.] It was policy not to accept gifts." Vol. 18, T. 952-953.

The position by the state before this Court, in reliance on what Derringer did not actually say, is completely at odds with the state's stipulation pre-trial and at trial, and the trial court's ruling sustaining the objection as policy manuals and employee standards do not define state law and are completely irrelevant to proof of a crime. T-952-953. The applicable law on inadmissibility of policy standards was first set out in petitioner's objection and argument about policy manuals in his motion to dismiss for the unconstitutional as applied statutory construction. Vol. 4, R. 689-690. References to employee handbooks or policy manuals do not define

state law. *Dent v State,* 125 So. 3d 205 (Fla. 4th DCA 2013) (employee manuals or policy statements do not define law violations); *Smith v State*, 888 So. 2d 112 (Fla. 3d DCA 2004)(the State cannot introduce employee manual for purpose of arguing to jury that defendant was guilty of grand theft for various reasons, including that defendant violated his employer's conflict-of-interest policy; that defendant might have violated standards promulgated by employer was irrelevant to determination of whether he violated theft statute.) Although introduction of policy manuals is permitted in civil negligence cases, the rule regarding the admissibility of custom in civil cases is not applicable in a criminal case. *Pitts v. State,* 473 So. 2d 1370 (Fla. 1st DCA 1985), *rev. denied*, 484 So. 2d 10 (Fla. 1986*); Gensler v State*, 868 So. 2d 557 (Fla. 3d DCA 2004) (Evidence of police policy protocols and other police department policies were irrelevant and inadmissible in prosecution of defendant, police officer, for vehicular homicide).

This body of law prohibiting employee policy standards in a criminal case is an important consideration for this Court in determining whether the civil ethics statute applicable to public employees can define an element of the crime alleged against petitioner. As in his Initial Brief on the Merits, petitioner continues to assert that section 838.016 gives no notice that a civil statute's standards for public employee conduct can provide the meaning and definition of an element of a crime under section 838.016. The use of a section 112.313(4) jury instruction to define

an element of section 838.016 was novel and improper as it includes what a public employee using reasonable care might think, from which the state argued a prohibited "reasonable person" standard. T. 357, 1337, 1338. The state's misuse of the reasonable care standard, relying on what a "reasonable person would believe" subjectively or "should have known" instead of providing a definition of what was an actual objectively ascertainable gift "not authorized by law" violated petitioner's rights to due process

Although the Fourth District's decision and Respondents' Answer Brief discuss both subsections of 112.313, subsections (2) and (4) to define what is a gift not authorized by law, the trial court here did not instruct the jury on section 112.313(2). Petitioner had requested that instruction, in addition to modification to the 112.313(4) instruction, and it was error to omit to instruct on section 112.313(2) as it requires that a gift not authorized by law be "based on any understanding…that the official action…of the public…employee…would be influenced thereby." Petitioner explained in his Initial Brief on the Merits the importance to the defense of this subsection 2, if the civil statutes are to be used at all in this prosecution. (Petitioner's Brief, pg. 22) Respondent does not explain how only one of the two subsections is adequate but that issue should be resolved before any new jury instructions are adopted by this Court. The Supreme Court Committee on Standard Jury Instructions in Criminal Cases has submitted for

comment amended jury instructions on standard 19.5, unlawful compensation or reward to public servant for official behavior-838.016, based on the recommendations of the Fourth District's decision in *Czajkowski v State,* 178 So. 3d 498 (Fla. 4th DCA). The Florida Bar News/May 15, 2016, pg. 31. That proposed amendment instructs trial judges to give the definitions of section 112.313(2) and 112.313(4) to explain "a pecuniary or other benefit which was not authorized by law." Petitioner asserts that the Fourth District's construction using definitions from 112.313 is improper, unconstitutional and without precedent as an authorized definition of a contested element in this 838.016 prosecution.

After further discussion of the facts, respondent concludes the "unlawful compensation statute can be fairly used to proscribe Petitioner's conduct in this case." Respondent's Brief, pg. 16. Petitioner does not doubt that the statute CAN be constitutionally applied, the problem is that in this prosecution the statute was not fairly and constitutionally constructed and applied against petitioner. The instructions given allowed the unconstitutional construction of the statute in violation of petitioner's rights to due process as the foundation of the state's case against him. This Court should reverse the Fourth District's construction of the statute and order petitioner's discharge.

POINT II—PETITIONER'S CONSTITUTIONAL RIGHTS TO PRESENT EVIDENCE IN HIS DEFENSE WERE DENIED WHEN THE COURT PROHIBITED EXCULPATORY EVIDENCE OF HIS SPECIFIC ACTS OF GENEROSITY, PARTICULAY WHERE THE TRIAL COURT FOUND THAT HAD THE JURY HEARD THIS EVIDENCE, CZAJKOWSKI WOULD HAVE BEEN ACQUITTED. T-1536.

Infamous Bernie Madoff and his involvement in charitable organizations, (perhaps to meet the wealthy whom he could bilk in his nefarious Ponzi schemes) has absolutely nothing to do with this legal issue in petitioner's case. A fair prosecutor has no business injecting facts not in the record by comparing a defendant to notorious criminals. See *Brown v. State*, 978 S.W.2d 708, 714 (Tex.App.-Amarillo 1998, pet. ref'd) (comparing defendant to Jeffrey Dahmer, John Wayne Gacy, and Ted Bundy improper); *Gonzalez v. State*, 115 S.W.3d 278, 284–85 (Tex.App.-San Antonio 2003) (comparison between defendant and Osama Bin Laden and Al Qaida harmful); *Stell v. State*, 711 S.W.2d 746, 748 (Tex.App.-Corpus Christi 1986, no pet.) (comparison to Lee Harvey Oswald improper and harmful error).

These types of arguments that reference matters that are not in the record and may not be inferred from the evidence are usually, "designed to arouse the passion and prejudices of the jury and as such are highly inappropriate." *Borjan v. State*, 787 S.W.2d 53, 57 (Tex.Crim.App.1990). Nor should highly improper prosecutorial argument based on "facts" outside the record be considered proper on

appeal. Respondent should be ashamed to make such a worthless and improper argument to this Court.

CONCLUSION

Based on these legal arguments and those advanced in the petitioner's initial brief, 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,

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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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished electronically to Celia Terenzio, Assistant Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401 at crimappwpb@myfloridalegal.com this 3rd day of June, 2016.

/s Margaret Good-Earnest

MARGARET GOOD-EARNEST