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IN THE SUPREME COURT OF FLORIDA  
CASE NO. 84,182  
THIRD DISTRICT CASE NO. 93-981

ROBERT J. ROQUE,  
Petitioner,

vs.

THE STATE OF FLORIDA,  
Respondent.

---

ON PETITION TO INVOKE DISCRETIONARY REVIEW  
OF THE DECISION OF THE DISTRICT COURT OF APPEAL  
OF FLORIDA, THIRD DISTRICT

---

PETITIONER'S BRIEF ON JURISDICTION

✓  
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## STATEMENT OF THE CASE AND FACTS

The petitioner, Robert Roque (hereinafter defendant), was charged by information with, inter alia, thirty-five counts of "commercial bribe receiving," in violation of section 838.15, Florida Statutes (Supp. 1990).<sup>1</sup> Each of the thirty-five counts of the information alleged as follows:

And the aforesaid Assistant State Attorney, under oath, further information makes that ROBERT JOSEPH ROQUE between October 1, 1990, and June 30, 1991, in the County and State aforesaid, did unlawfully and feloniously solicit, accept or agree to accept a benefit, to wit: CASH, good and lawful money of the United States of America, with the intent to violate a statutory or common law duty to which that person is subject, to wit: As an agent and/or employee and/or fiduciary and/or accountant and/or professional andvisor [sic]

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<sup>1</sup>The statute provides:

### 838.15. Commercial bribe receiving

(1) A person commits the crime of commercial bribe receiving if the person solicits, accepts, or agrees to accept a benefit with intent to violate a statutory or common law duty to which that person is subject as:

- (a) An agent or employee of another;
- (b) A trustee, guardian, or other fiduciary;
- (c) A lawyer, physician, accountant, appraiser, or other professional adviser;
- (d) An officer, director, partner, manager, or other participant in the direction of the affairs of an organization; or
- (e) An arbitrator or other purportedly disinterested adjudicator or referee.

(2) Commercial bribe receiving is a third degree felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

and/or other participant in the direction of the affairs of KELLY TRACTOR COMPANY, in violation of s. 838.15 Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

The defendant was a credit manager for Kelly Tractor Company. As part of his job, he extended credit to entities seeking to finance or refinance construction equipment. In locating suitable entities to which to extend credit, the defendant worked with a Mr. Smith, who helped locate suitable candidates. For each suitable candidate that Mr. Smith brought in, he was paid a commission by Kelly Tractor. The State alleged that the defendant entered into an unauthorized side agreement with Mr. Smith, under which Mr. Smith paid the defendant between 33 and 40 percent of each commission as a "kickback." (App.A, Slip Opinion at page 3). The dates alleged in the information, set forth above, were between October 1, 1990, and June 30, 1991, during which the commission arrangement between the defendant and Smith was in operation. It was not until after July 1, 1991, that Smith decided to terminate his arrangement and thus, his dealings with both defendant and Kelly Tractor.<sup>2</sup> (App.B at pages 2-3).

The defendant moved to dismiss the commercial bribery counts

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<sup>2</sup>As the Circuit Court's ORDER found: "During the period alleged, Smith, to whom the defendant owed no fiduciary duty, voluntarily paid the defendant this portion from his commission;\*\*\*The Court finds that the defendant did not serve as Smith's employee, and that during the period of time alleged in the information, KELLY obtained exactly what it bargained for through its financing and refinancing of loans with Mr. Smith. KELLY suffered no harm during the period of time charged in the information, but rather profited through its transactions with Smith in the normal course of business. . .". (App.B, pages 3-4).

on the grounds that section 838.15, Florida Statutes (Supp. 1990), is unconstitutionally vague and susceptible to arbitrary application. The Circuit Court granted the motion and declared the statute unconstitutional. See App.B; R.145-52. The State thereafter timely appealed the order of dismissal and the Third District, on July 12, 1994, issued its decision reversing the Circuit Court's order of dismissal and expressly declaring section 838.15, constitutional. (App.A).

### QUESTIONS PRESENTED

#### POINT I

WHETHER THIS COURT HAS JURISDICTION PURSUANT TO ARTICLE V, SECTION 3(b)(3), FLORIDA CONSTITUTION, WHERE THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, EXPRESSLY DECLARED A FLORIDA STATUTE CONSTITUTIONAL?

#### POINT II

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, EXPRESSLY AND DIRECTLY CONFLICTS WITH SEVERAL DECISIONS OF THE FLORIDA SUPREME COURT?

### SUMMARY OF THE ARGUMENT

The Third District's decision expressly declares section 838.15, Florida Statutes (Supp. 1990), constitutional. This alone affords this Court discretionary review jurisdiction. In addition, the Third District has hopelessly and irreconcilably conflicted with several constitutional adjudications of this Court finding vague and susceptible-to-arbitrary-application several clearly analogous statutes. Because of the seriousness misapplication of this Court's precedents, and the severe criminal penalties imposed

by the statute here at issue, this Court should exercise its discretionary review jurisdiction.

#### ARGUMENT

##### POINT I

THIS COURT HAS JURISDICTION PURSUANT TO ARTICLE V, SECTION 3(b)(3), FLORIDA CONSTITUTION, WHERE THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, EXPRESSLY DECLARED A FLORIDA STATUTE CONSTITUTIONAL.

This Court has discretionary review jurisdiction where the Third District has expressly upheld the constitutional validity of section 838.15, Florida Statutes (Supp. 1990). Cuda v. State, 19 Fla.L.Weekly S346 (Fla. June 30, 1994); E.L. v. State, 619 So.2d 252 (Fla. 1993); Schmitt v. State, 590 So.2d 404 (Fla. 1991); Warren v. State, 572 So.2d 1376 (Fla. 1991). Moreover, where, as here, the Third District has seriously misapplied this Court's precedents in a case involving the substantive, due process rights of an accused, this Court should exercise its discretionary review jurisdiction and determine the constitutional validity of the statute at issue.

##### POINT II

THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, EXPRESSLY AND DIRECTLY CONFLICTS WITH SEVERAL DECISIONS OF THE FLORIDA SUPREME COURT.

Section 838.15, Florida Statutes (Supp. 1990), prohibits a person in the capacity of, inter alia, an agent or employee of another, or a manager in the affairs of an organization, from accepting a thing of benefit "with intent to violate a statutory or common law duty" to which the person in his or her capacity is

subject. It fails to define the nature of the "statutory or common law duty" to which the person is subject,<sup>3</sup> requires no harm to the employer or other fiduciary, and contains no scienter requirement.<sup>4</sup> Similar statutes have been repeatedly condemned on vagueness and susceptibility-to-arbitrary-application grounds by this Court. Locklin v. Pridgeon, 158 Fla. 737, 30 So.2d 102 (1947); State v. DeLeo, 356 So.2d 306 (Fla. 1978); State v. Jenkins, 469 So.2d 733 (Fla. 1985); Cuda v. State, 19 Fla.L.Weekly S346 (Fla. June 30, 1994). The Third District, in expressly declaring this statute to be constitutionally valid, has necessarily and hopelessly conflicted with these decisions of this court. Moreover, the Third District has expressly and directly misapplied this Court's distinguishable decision in State v. Rodriguez, 365 So.2d 157 (Fla. 1978).

The statute here at issue is indistinguishable from others making it criminal for a "public servant" to obtain a benefit for himself and violating "any statute or lawfully adopted regulation or rule relating to his office," State v. DeLeo, *supra*, or "refrain[ing] from performing a duty imposed upon him by law. . .", State v. Jenkins, 469 So.2d 733, 734 (Fla. 1985), or for an agent

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<sup>3</sup>The statute contains no requirement that the "statutory or common law duty" that is violated be a criminal or penal statute or duty. Thus, as in State v. DeLeo, 356 So.2d 306, 308 (Fla. 1978), the statute "is keyed to the violation of any statute, rule or regulation, pertaining to the [agency/employee status] of the accused, whether they contain criminal penalties themselves or not, and no matter how minor or trivial."

<sup>4</sup>The statute simply requires that the accused accept a benefit "with intent to violate a statutory or common law duty. . .", without requiring corrupt intent, or that the accused willfully or knowingly violate the "duty" at issue.

or employee of the state or federal government acting under color of such authority doing "any act. . .not authorized by law," Locklin v. Pridgeon, 158 Fla. 737, 30 So.2d 102, 103 (Fla. 1947), or a person managing the funds of an aged person "by the improper or illegal use" of such funds "for profit." Cuda v. State, 19 Fla.L.Weekly S346 (Fla. June 30, 1994). Yet, this Court, in each of these cases, struck the analogous statutes there at issue on the identical grounds utilized by the trial judge in the case at bar, namely, vagueness and susceptibility to arbitrary application.

The Third District's purported distinctions between the statute here at issue and those involved in the cited cases, are ephemeral. First, the Third District opined that the "'common law or statutory duties' involved are only those which apply to the professions or legal relationships specifically enumerated in" the statute. For instance, the Third District believed that "a lawyer understands the legal duties of a lawyer. . ., and a manager understands the legal duties of a manager." (App.A, page 4). However, the statute stricken by this Court in Locklin expressly enumerated the specific relationship of "an officer, agent or employee of the United States government, State of Florida, or any political subdivision thereof. . .". 30 So.2d at 103. The statute involved in Cuda expressly enumerated a guardian of an "aged person or disabled adult" and one who "manage[s]. . .the funds, assets," of such person. And the statutes stricken in DeLeo and Jenkins expressly specified "public servants." It is submitted that the government employee in Locklin, the public servant in Jenkins, and the guardian of the aged in Cuda are no more or less "aware of the

duties which are commensurate with that station" than a person in one of the professional or legal relationships set forth in section 838.15, Florida Statutes (Supp. 1990). Far from distinguishing this Court's precedents, the Third District has, on the face of its opinion, collided with them.

Second, the Third District looked to the title of the statute, which includes the word "bribe," and rejected the Circuit Court's finding of vagueness based upon the rationale that "[i]ndividuals of common intelligence know what a 'bribe' is." (App.A, page 5). In so holding, the Third District clearly ignored the fact that the statute stricken by this Court in Cuda on the identical grounds utilized by the Circuit Court below, was "[p]enalties relating to abuse, neglect, or exploitation of aged person or disabled adult." And, of course, the statutes condemned by this Court on vagueness and susceptibility-to-arbitrary-application grounds in DeLeo and Jenkins was "Official misconduct." Thus, resort to the title of the statute does not cure the inherent vagueness within its body.

Next, the Third District finds the statute not susceptible to arbitrary application, again, because of "the finite list of professions/legal relationships to which the statute applies," holding that prosecutorial discretion is thus limited by applying the statute only to those enumerated positions. (App.A, page 6). As previously observed, however, the "relationships" involved in each of the conflict-cases discussed above were also expressly circumscribed by the respective statutes. Yet this Court found, for instance, in Locklin, that notwithstanding the fact that the statute was specifically directed to an agent or employee of the

state or federal government, "the determination of a standard of guilt is left to be supplied by courts or juries." 30 So.2d at 103. And in DeLeo, even though a "public servant" was expressly defined in Chapter 838 as "any public officer, agent or governmental employee, whether elected or appointed," this Court still held that the keying of the prohibited conduct into "violation of any statute, rule or regulation, pertaining to the office of the accused, whether they contain criminal penalties themselves or not, and no matter how minor or trivial," rendered the statute "susceptible to arbitrary application because of its 'catch-all' nature." 356 So.2d at 308.

In addition, the Third District found no arbitrary application problems with the commercial bribe receiving statute because the modifier "commercial" was deemed by the court to "limit[] the realm in which the statute may be applied to that of private industry and commercial transactions." (App.A, page 6). However, the statute in Cuda v. State, supra, a case which the Third District expressly cited in its opinion, (see App.A, page 5, n.1), was aimed at the purely private relationship between an aged person\disabled adult and one who acted as a guardian or manager of his or her funds. For this same reason, the Third District's further rationale that "the commercial bribe receiving statute applies primarily to private, commercial actors, and not public, political officials.", (App.A, page 6), renders its decision in manifest opposition to this Court's Cuda decision.

Finally, the Third District's decision here expressly misapplies this Court's decision in State v. Rodriguez, 365 So.2d

157 (Fla. 1978), where this Court in a 4-3 decision, narrowly upheld a statute which prohibited a person from knowingly using or trafficking in food stamps "in any manner not authorized by law. . .". Id. at 158. Rejecting a vagueness attack, this Court reviewed the entire scheme of state and federal statutory and regulatory provisions attendant to the Food Stamp Program, and held 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 can conclude that Legislature, by the use of the language 'not authorized by law,' means not authorized by state and federal food stamp law." Id. at 159. Clearly, the Third District in the case at bar, misapplied Rodriguez to the extent that it applied the complex web of federal and state statutory and regulatory law pertinent to the Food Stamp Program to the commercial bribe receiving statute here at issue. Here, as in Locklin v. Pridgeon, supra, no closely related statutory and regulatory scheme can be read in pari materia with the statute to save it from its inherent vagueness and susceptibility to arbitrary application. Aside from these obvious distinctions, petitioner commends to this Court Justice Sundberg's cogent dissenting opinion in Rodriguez, wherein he observed: "Of course, conduct not authorized by law is not limited to criminal conduct but includes any act in contravention of the common law or statute, civil or criminal." 365 So.2d at 161, Sundberg, J., dissenting. Precisely the same can be said with respect to the statute here at issue, which purports to criminalize violations of any statutory or common law duty, whether or not such

violations contain criminal penalties and no manner how trivial.  
See also State v. DeLeo, supra.

CONCLUSION

This Court should exercise its discretionary review in this case where the Third District has expressly declared a state statute to be constitutionally valid, and where the Third District, in so doing, has expressly and directly conflicted with several of this Court's constitutional adjudications. This Court has a duty to insure that statutes imposing severe criminal penalties upon the citizenry of this state clearly apprise the citizens of what conduct is proscribed, and are not susceptible to arbitrary application by prosecutors, courts, and juries.

Respectfully submitted,

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BY: 

MARK KING LEBAN  
Counsel for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Linda Katz, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 921N, Miami, Florida 33128, this 19th day of August, 1994.

  
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,182

THIRD DISTRICT CASE NO. 93-981

ROBERT J. ROQUE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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APPENDIX TO PETITIONER'S BRIEF ON JURISDICTION

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DECISION OF DISTRICT COURT OF APPEAL,  
THIRD DISTRICT

App. A

CIRCUIT COURT'S ORDER

App. B

NOT FINAL UNTIL TIME EXPIRES  
TO FILE REHEARING MOTION AND,  
IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
THIRD DISTRICT  
JULY TERM, 1994

THE STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 93-981
ROBERT J. ROQUE,	**	
Appellee.	**	

Opinion filed July 12, 1994.

An Appeal from the Circuit Court of Dade County,  
Thomas S. Wilson, Jr., Judge.

Robert A. Butterworth, Attorney General, and Linda S. Katz,  
Assistant Attorney General, for appellant.

Mark King Leban; Arturo Alvarez, for appellee.

Before SCHWARTZ, C.J., and NESBITT and LEVY, JJ.

LEVY, Judge.

The State appeals a trial court order which declared the  
commercial bribe receiving statute, Florida Statutes Section  
838.15 (Supp. 1990), unconstitutionally vague. We reverse.

*App. A*

The State filed an information against Robert J. Roque, the defendant, which alleged the following facts: The defendant was the credit manager for Kelly Tractor Company. As part of his job, the defendant extended credit to entities seeking to finance or refinance construction equipment. In locating suitable entities to which to extend credit, the defendant worked with a Mr. Smith, who helped locate suitable candidates. For each suitable candidate that Mr. Smith brought in, he was paid a commission by Kelly Tractor. The State alleged that the defendant entered into an unauthorized side agreement with Mr. Smith, under which Mr. Smith paid the defendant between 33 and 40 percent of each commission as a "kickback."

The information charged the defendant with 35 counts of "commercial bribe receiving", in violation of Florida Statutes Section 838.15 (Supp. 1990), which states:

(1) A person commits the crime of commercial bribe receiving if the person solicits, accepts, or agrees to accept a benefit with intent to violate a statutory or common law duty to which that person is subject as:

- (a) An agent or employee of another;
- (b) A trustee, guardian, or other fiduciary;
- (c) A lawyer, physician, accountant, appraiser, or other professional adviser;
- (d) An officer, director, partner, manager, or other participant in the direction of the affairs of an organization; or
- (e) An arbitrator or other purportedly disinterested adjudicator or referee.

(2) Commercial bribe receiving is a third degree felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The defendant moved to dismiss the commercial bribery counts, and the trial court granted the motion, finding that Section 838.15 was unconstitutionally vague and susceptible to arbitrary

application. The gist of the trial court's opinion was the conclusion that "the commercial bribe receiving statute here at issue suffers the same defects as the official misconduct statutes stricken by the Florida Supreme Court in State v. DeLeo, 356 So. 2d 306 (Fla. 1978), and State v. Jenkins, [4]69 So. 2d 733 (Fla. 1985)." It is from this order that the State appeals. See Fla. R. App. P. 9.140(c)(1)(A). This case presents us with the issue of whether Florida's commercial bribe receiving statute is unconstitutionally vague.

"The vagueness doctrine was developed to insure compliance with the due process clauses of the state and federal constitutions which require that a law be declared void if it is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." State v. Rawlins, 623 So. 2d 598, 600 (Fla. 5th DCA 1993); see Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources, 453 So. 2d 1351, 1353 (Fla. 1984); State v. Hoyt, 609 So. 2d 744, 747 (Fla. 1st DCA 1992); see also State v. Wershow, 343 So. 2d 605, 608 (Fla. 1977)(vagueness doctrine enforces the due process clauses of Article I, Section 9 of the Florida Constitution, and Amendment 14 of the U.S. Constitution); Bertens v. Stewart, 453 So. 2d 92, 93 (Fla. 2d DCA 1984)(same). "The standard for testing vagueness under Florida law is whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct." Brown v. State, 629 So. 2d 841, 842 (Fla. 1994); see State v. Hagan, 387 So. 2d 943, 945 (Fla. 1980); Richards v. State, 608 So. 2d 917, 920 n.1 (Fla. 3d DCA 1992)(collecting

cases), rev'd, 19 Fla. L. Weekly S298 (Fla. June 2, 1994). Additionally, to survive a vagueness challenge, a statute must be specific enough that it is not susceptible to arbitrary and discriminatory enforcement. See Brown, 629 So. 2d at 842; Pallas v. State, 19 Fla. L. Weekly D988, D988-89 (Fla. 3d DCA May 3, 1994); State, Dep't of Health and Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1214 (Fla. 2d DCA 1993), rev. granted, No. 82,967 (Fla. Mar. 31, 1994); see also State v. Moo Young, 566 So. 2d 1380, 1381 (Fla. 1st DCA 1990)(applying vagueness analysis as a two-part test); State v. Deese, 495 So. 2d 286, 287-88 (Fla. 2d DCA 1986)(same).

In arguing that the statute is facially unconstitutional due to vagueness, the defendant focuses in on the phrase "statutory or common law duty." The defendant contends that this phrase does not adequately specify what conduct may lead to a violation of the statute. In making this argument, however, the defendant fails to consider that the "common law or statutory duties" involved are only those which apply to the professions or legal relationships specifically enumerated in subparts (1)(a) through (1)(e) of the statute. A person who fits into one or more of these categories is certainly aware of the duties which are commensurate with that station. In other words, a lawyer understands the legal duties of a lawyer, a trustee understands the legal duties of a trustee, and a manager understands the legal duties of a manager. Thus, when read in its entirety, the statute is not unconstitutionally vague because "the party to whom the law applies has fair notice of what is prohibited . . . ." Southeastern Fisheries, 453 So. 2d at

1353-54; see State v. Hamilton, 388 So. 2d 561, 562 (Fla. 1980)("[A] defendant whose conduct clearly falls within the statutory prohibition may not complain of the absence of notice."); see also People v. Cilento, 138 N.E.2d 137, 140 (N.Y. 1956)(statute making it a crime for a union representative to take a bribe is not vague because "any person in the capacity of labor representative could not but clearly understand that a bribe taken to influence any of his duties is in violation of the section."(emphasis in original)).<sup>1</sup>

The use of the word "bribe" in the statute itself further indicates the nature of the prohibited conduct. "Bribery is a well-known word, used widely and understood generally." King v. State, 271 S.E.2d 630, 632 (Ga. 1980). "Bribe" is defined as "a price, reward, gift, or favor bestowed or promised with a view to pervert the judgment or corrupt the conduct . . . ." Webster's Third New International Dictionary 275 (1986). It is this common usage of the word "bribe", and not a technical, legal usage, that the Legislature employed in labeling the crime. Individuals of common intelligence know what a "bribe" is. Consequently, we find

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<sup>1</sup> Our reasoning is similar to that employed by the Supreme Court in Cuda v. State, 19 Fla. L. Weekly S346 (Fla. June 30, 1994). In Cuda, the Supreme Court compared State v. Rodriguez, 365 So. 2d 157 (Fla. 1978), to Locklin v. Pridgeon, 158 Fla. 737, 30 So. 2d 102 (1947), and concluded that Section 415.111(5) was unconstitutional because it was more like the statute struck down in Locklin than the statute upheld in Rodriguez. 19 Fla. L. Weekly at S346. However, because the enumerated professions/legal relationships in our statute provide a "backdrop" for the statutory and common law duties referred to in the statute, we find our case to be more akin to Rodriguez than to Locklin.

that the statute adequately advises persons of common intelligence of what conduct is proscribed.

Turning to the second element of the vagueness analysis - arbitrariness - we do not find this statute to be susceptible of arbitrary application so as to violate due process. First, the finite list of professions/legal relationships to which this statute applies limits prosecutorial discretion by applying the statute only to those enumerated positions. Second, the modifier "commercial" in the title "commercial bribe receiving", along with the enumerated positions, clearly limits the realm in which the statute may be applied to that of private industry and commercial transactions.

These important observations distinguish the commercial bribe receiving statute from the official misconduct statute at issue in De Leo and Jenkins. In both of those cases, the Supreme Court used identical language in condemning the official misconduct statute's individual subsections due to the potential for arbitrary application:

The crime defined by the statute, knowing violations of any statute, rule or regulation for an improper motive, is simply too open-ended to limit prosecutorial discretion in any reasonable way. The statute could be used, at best, to prosecute, as a crime, the most insignificant of transgressions or, at worst, to misuse the judicial process for political purposes. We find it susceptible to arbitrary application because of its 'catch-all' nature.

Jenkins, 469 So. 2d at 734 (footnotes omitted)(quoting DeLeo, 356 So. 2d at 308). Unlike the official misconduct statute, the commercial bribe receiving statute applies primarily to private, commercial actors, and not public, political officials. The

absence of this public, political element, which was crucial to the decisions in Jenkins and DeLeo, removes the potential for arbitrariness and political misuse from this statute. For these reasons, we conclude that the statute is not subject to arbitrary application, and the trial court erred in finding Section 838.15 facially unconstitutional.

In this appeal, the defendant has also contended that Section 838.15 is unconstitutional as applied to him. However, the defendant conceded at oral argument that his "as applied" argument fails based upon this Court's holding in Phillips Chemical Co. v. Morgan, 440 So. 2d 1292 (Fla. 3d DCA 1983), rev. denied, 450 So. 2d 486 (Fla. 1984). In Phillips Chemical, which was a civil suit based upon an almost identical fact pattern as is at issue in this case, we held that such kickbacks "were in blatant disregard of the most elemental fiduciary duties owed an employer not to deal in his business for the agent's own benefit." Phillips Chemical, 440 So. 2d at 1294. This holding in Phillips Chemical represents an unequivocal statement of the particular common law duty which the defendant is alleged to have breached in accepting the kickbacks, and which gives rise to the criminal charges herein.

Accordingly, the order dismissing the 35 counts of commercial bribe receiving is reversed, and this case is remanded for further proceedings consistent herewith.

Reversed and remanded.

DHP  
92-2586

IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT IN  
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

MCA #  
CASE NO. 91-0206

(Judge Wilson)

Case # 92-2586

STATE OF FLORIDA, )  
Plaintiff, )  
vs. )  
ROBERT J. ROQUE, )  
Defendant. )  
\_\_\_\_\_ )

10 11 1993  
RECORDED

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNTS  
16 THROUGH 49 OF THE INFORMATION

THIS CAUSE, having come before the Court on defendant's MOTION TO DISMISS COUNTS 16 THROUGH 49 OF THE INFORMATION, predicated upon an attack on the constitutional validity of section 838.15, Florida Statutes (1990), and the Court having considered the memoranda of law and legal argument submitted by the parties, and being otherwise fully advised in the premises, hereby makes the following findings of fact and conclusions of law:

The defendant is charged in a multi-count information, with, inter alia, 35 counts of "commercial bribe receiving," in violation

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JUN 25 1993  
Circuit Court  
& County Courts

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App. B

of section 838.15, Florida Statutes (1990).<sup>1</sup> Each of the 35 counts charges, in identical language, that between October 1, 1990, and June 30, 1991, the defendant accepted cash with the intent to violate a statutory or common law duty, as an agent or employee or participant in the direction of the affairs of KELLY TRACTOR COMPANY. The factual scenario set forth in the State's probable cause affidavit and investigative summary is that during the period of time alleged in the information, the defendant was employed as the credit manager for KELLY. As the credit manager for KELLY, the defendant, and one Mark Smith, an independent contractor, sought out individuals or companies in need of financing or refinancing of construction equipment and provided the needed financing for them

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<sup>1</sup>The statute provides:

**838.15. Commercial bribe receiving**

(1) A person commits the crime of commercial bribe receiving if the person solicits, accepts, or agrees to accept a benefit with intent to violate a statutory or common law duty to which that person is subject as:

- (a) An agent or employee of another;
- (b) A trustee, guardian, or other fiduciary;
- (c) A lawyer, physician, accountant, appraiser, or other professional adviser;
- (d) An officer, director, partner, manager, or other participant in the direction of the affairs of an organization; or
- (e) An arbitrator or other purportedly disinterested adjudicator or referee.

(2) Commercial bribe receiving is a third degree felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

with funds from KELLY. For his services in locating customers and helping to arrange the transactions, Mr. Smith would be paid a commission by KELLY that varied according to each transaction. The payment and amount of said commissions was always known and approved by KELLY. The commercial paper generated by these transactions would then either be kept by KELLY or sold to other financial institutions at a profit.

Unbeknownst to KELLY, the defendant, during the period alleged in the information (October 1, 1990 through June 30, 1991), entered into an arms-length arrangement with Mark Smith for Smith to pay the defendant a portion of Smith's commission (paid directly from KELLY to Smith) ranging from 33 to 40 percent of Smith's commission. In other words, the defendant received a "kickback" from Smith, out of Smith's commission from KELLY. During the period alleged, Smith, to whom the defendant owed no fiduciary duty, voluntarily paid the defendant this portion from his commission; however, after July 1, 1991, Smith decided that he would no longer pay the defendant from his commission and after that point, announced that he would no longer conduct further financing transactions with KELLY.

The Court finds that the defendant did not serve as Smith's employee, and that during the period of time alleged in the information, KELLY obtained exactly what it bargained for through its financing and refinancing of loans with Mr. Smith. KELLY suffered no harm during the period of time charged in the information, but rather profited through its transactions with

Smith in the normal course of business, profits which KELLY would not have received were it not for the defendant's bringing Smith to KELLY in the first instance.

The defendant asserts that section 838.15 is unconstitutional, facially and as applied, since its "common law duty" element is vague and susceptible to arbitrary application, the statute neither requires nor defines any corrupt intent to injure or harm the purported victim of the offense (here KELLY), and the statute improperly injects long abrogated common law elements into Florida's bribery law. The State argues that the statute is not vague but rather is directed toward a specific prohibited act, that of soliciting or accepting a bribe, is not open-ended and subject to arbitrary application, and that, although not specifically stated, the statute implies a knowledge requirement.

The Court finds that the commercial bribe receiving statute here at issue suffers the same defects as the official misconduct statutes stricken by the Florida Supreme Court in State v. DeLeo, 356 So.2d 306 (Fla. 1978), and State v. Jenkins, 569 So.2d 733 (Fla. 1985), affirming, 455 So.2d 79 (Fla. 1st DCA 1984). The statute in DeLeo, section 839.25(1)(c), Florida Statutes (1977), prohibited an official (defined as an agent or employee) from, with corrupt intent, obtaining a benefit for himself or causing unlawful harm to another, by violating any regulation, statute, or rule relating to his office. The statute in Jenkins, section 839.25(1)(a), Florida Statutes (1983), prohibited a public official from obtaining a benefit for himself in return for

"[k]nowingly refraining. . . from performing a duty imposed upon him by law. . .". [Emphasis added]. The Florida Supreme Court struck both statutes finding that the prohibited acts were "keyed into the violation of any. . . rule or regulation. . . whether they contain criminal penalties themselves or not, and no matter how minor or trivial." DeLeo, supra at 308. The Supreme Court found that an "employee could be charged with official misconduct, a felony of the third degree and punishable by up to five years in prison or a fine up to \$5,000, for violating a minor agency rule applicable to him, which might carry no penalty of its own." Id. [Footnotes omitted]. Further, the Supreme Court in DeLeo held that the statutory element of "corrupt intent" did not save the statute from arbitrary application notwithstanding the fact that "corrupt intent" was defined elsewhere in Chapter 839 since that definition did "nothing to cure the statute's susceptibility to arbitrary application." Id.<sup>2</sup> The Supreme Court in DeLeo held that the statute was "simply too open-ended to limit prosecutorial discretion in any reasonable way. The statute could be used, at best, to prosecute, as a crime, the most insignificant of transgressions or, at worst, to misuse the judicial process for political purposes. We find it susceptible to arbitrary application because of its 'catch-all' nature." Id. [Footnote omitted].

Similarly, in Jenkins, the Supreme Court affirmed the First

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<sup>2</sup>The Court observes that the statute here at issue, §838.15(1), Fla.Stat. (1990), contains no "corrupt intent" element at all.

District's decision finding that "the duties addressed in (a) may be those imposed by any source of law, not merely the statutes and rules of (c), found to be overly broad in DeLeo." 454 So.2d at 80. This Court finds that this analysis is directly applicable to the "common law duty" element of the commercial bribe receiving statute in the case at bar. The "statutory or common law duty" whose violation is prohibited may be imposed by any source of law, a standard even more nebulous than that found deficient in DeLeo and Jenkins with regard to the prohibition of the violation of "any regulation or rule relating to [one's] office."

Contrary to the State's argument, the Court finds no material distinction between the DeLeo-Jenkins statutes and the commercial bribe receiving statute in the case at bar. Both statutes prohibited receiving a bribe in exchange for refraining from performing a duty imposed by law; in both cases, the violation of the "duties" may be trivial, carry no penalty of its own, the duty itself may be imposed by any source of law, and enforcement of the respective statutes is "susceptible to arbitrary application." Jenkins, 469 So.2d at 734.

The statute's susceptibility to arbitrary application is best illustrated by the case at bar where the defendant owes no duty under the statute to the independent contractor, Mark Smith, and where KELLY, the entity to whom the defendant purportedly did owe a duty as an employee or agent, suffered no harm whatsoever arising out of the defendant's receiving of "kickbacks" from Smith, during the period alleged in the information. The vagueness of the

statute is demonstrated by the State's assertion that the defendant, as a person of common intelligence, need not have guessed that the term common law duty "includes an employee's [defendant's] obligation to pay a full commission to the person entitled [Smith], rather than keeping a kickback." (State's RESPONSE at page 4; emphasis added). Clearly, the defendant was not Smith's employee, owed no common law duty to Smith under the statute, and thus the statute cannot be constitutionally applied to the defendant.


Moreover, the Court finds that the statute's failure to require any corrupt intent adds to its susceptibility to arbitrary application. State v. DeLeo, supra at 308. It simply will not do for the statute to "imply" a scienter requirement.

Finally, although the term "common law" in a criminal statute does not render the statute unconstitutionally vague, State v. Egan, 287 So.2d 1, 6 (Fla. 1973), the commercial bribe receiving statute's resurrection of a "common law duty" as an essential element of the commercial bribe receiving offense is unconstitutional since "[w]e no longer look to the common law for the crime of bribery. . .". Coleman v. State ex rel. Mitchell, 132 Fla. 845, 182 So. 627, 629 (1938). Even if a common law offense may properly be charged, "it must meet constitutional and statutory requirements." Sullivan v. Leatherman, 48 So.2d 836, 838 (Fla. 1950). "[W]hether common law or statutory, the offense must be charged in direct and specific terms and that it was willfully or corruptly done or omitted." Id. The Court finds that the

commercial bribe receiving statute here under attack fails to meet this constitutional requirement. Accordingly, it is hereby

ORDERED and ADJUDGED that section 838.15(1), Florida Statutes (1990), is unconstitutionally vague and susceptible to arbitrary application, and the defendant's motion to dismiss counts 16 through 49 of the information is GRANTED.

DONE this 19 day of ~~March~~ <sup>April</sup>, 1993, at Miami, Dade County, Florida.

  
CIRCUIT JUDGE  
JUDGE THOMAS S. (TAM) WILSON, JR.

Copies provided to:

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