IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-282

THE STATE OF FLORIDA,

Petitioner,

-vs-

FERNANDO CASTILLO,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2

QUESTIONS PRESENTED 5

SUMMARY OF ARGUMENTS 6

ARGUMENTS 8

I

THE DECISION ENTERED BY THE THIRD DISTRICT COURT OF APPEAL CORRECTLY HELD THAT ABSENT DIRECT OR SUFFICIENT CIRCUMSTANTIAL EVIDENCE OF AN INTENT TO VIOLATE FLORIDA'S UNLAWFUL COMPENSATION STATUTE, THE STATE FAILED TO ESTABLISH A *PRIMA FACIE* CASE TO OVERCOME A TIMELY AND PROPER MOTION FOR JUDGMENT OF ACQUITTAL.

II

THE DECISION ENTERED BY THE THIRD DISTRICT COURT OF APPEAL ERRED BY FINDING THAT THE PROOF OFFERED IN THIS CASE SATISFIES THE SPECIFIC-INTENT REQUIREMENT OF FLORIDA'S OFFICIAL MISCONDUCT STATUTE.

CONCLUSION 24

CERTIFICATE OF SERVICE 24

CERTIFICATE OF FONT SIZE 25

APPENDIX . . . . . App.

TABLE OF AUTHORITIES

CASES **PAGES**

BARR v. STATE,
507 So. 2d 175 (Fla. 3d DCA 1987) 22

BAUER v. STATE,
609 So. 2d 608 (Fla. 4th DCA 1992), *rev. denied*,
613 So. 2d 1 (Fla. 1993) 18

BROWN v. MIAMI-DADE COUNTY,
837 So. 2d 414 (Fla. 3d DCA 2001), *rev. denied*,
847 So. 2d 977 (Fla. 2003) 9

CALLAWAY v. STATE,
112 Fla. 599, 152 So. 429 (1930); 14

D.R. v. STATE,
734 So. 2d 455 (Fla. 1st DCA 1999) 17

DAVIS v. STATE,
90 So. 2d 629 (Fla. 1956) 15

FOWLER v. STATE,
492 So. 2d 1344 (Fla. 1st DCA 1986), *rev denied*,
503 So. 2d 328 (Fla. 1987) 17

GARRETT v. STATE,
508 So. 2d 427 (Fla. 2d DCA 1987) 13,14

GRADY v. COLEMAN,
183 So. 25 (Fla. 1938) 9,13

HERTZ v. STATE,
803 So. 2d 629 (Fla. 2001) 23

LINEHAN v. STATE,
442 So. 2d 244 (Fla. 2d DCA 1983), *modified on other grounds*,
476 So. 2d 1262 (Fla. 1985) 18

MERCKLE v. STATE,
512 So. 2d 948 (Fla. 2nd DCA 1987), *approved*,
529 So. 2d 269 (Fla. 1988) 9

ORME v. STATE,
677 So. 2d 258 (Fla. 1996) 15

SAVOIE v. STATE,
422 So. 2d 308 (Fla. 1982) 3

SEQUINE v. CITY OF MIAMI,
627 So. 2d 14 (Fla. 3d DCA 1993) 9

STATE v. LAW,
559 So. 2d 187 (Fla. 1989) 15,17

STATE v. MILBRATH,
527 So. 2d 864 (Fla. 5th DCA 1988) 14

STATE v. RILEY,
381 So. 2d 1359 (Fla. 1980) 22

STATE v. SHORT,
483 So. 2d 10 (Fla. 2nd DCA 1985), *rev. denied*,
486 So. 2d 597 (Fla. 1986) 22

STATE v. SMYLY,
646 So. 2d 238 (Fla. 4th DCA 1994) 17

STATE v. T.G.,
800 So. 2d 204 (Fla. 2001) 3

STATE v. WILLIAMS,
742 So. 2d 509 (Fla. 1st DCA 1999) 17,23

THE FLORIDA BAR v. MARABLE,
645 So. 2d 438 (Fla. 1994) 10

OTHER AUTHORITIES

STATUTES

Fla. Stat. 838.014 (6) 11
Fla. Stat. 839.25 (2) 18,23
Chapter 943 23
Section 838.016 13

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INTRODUCTION

This is the Respondent's brief on the merits filed pursuant to this Court's acceptance of discretionary jurisdiction and the merits brief filed by the Petitioner, the State of Florida.

The symbol (App) will be used to refer to portions of the attached appendix.

STATEMENT OF THE CASE AND FACTS

The Respondent, FERNANDO CASTILLO, generally accepts the procedural and factual characterization presented by the State of Florida (Petitioner) and summarizes them as follows:

> in September of 2001, the Respondent was convicted of unlawful compensation and official misconduct; he was sentenced to concurrent terms of 5 years imprisonment
>
> Mr. Castillo was, at the time of the charged incident, an active Miami-Dade County police officer on routine patrol; he was convicted of exacting sexual favors from A.S. and then failing to report his interaction with her, and the time they spent together, in his official police log submitted at the end of his shift
>
> on December 26, 2002, the Third District Court of Appeal reversed the unlawful compensation conviction but affirmed the conviction for official misconduct; the district court denied the state's motion for rehearing and Mr. Castillo's motion for clarification
>
> in its petition, the State of Florida challenges the reversal of the compensation charge, i.e., that the district court erred by holding that the evidence presented at trial was legally insufficient and warranted entry of a judgment of acquittal. Both A.S. and Mr. Castillo testified at trial; their accounts of the interaction differed significantly; however, according to the district court, even if the interaction were as A.S. testified, it did not rise to the level of a *prima facie* case of guilt of unlawful compensation – after all, the court noted, not even was there no evidence of an agreement to offer and accept sexual favors in lieu of foregoing an arrest or traffic ticket, A.S. testified – in no uncertain terms – that the Respondent never said or did anything to suggest an intent to exact compensation from her and that while she may have harbored generalized fears, this did not rise to the level of a *prima facie* case of unlawful compensation

> contrary to the state's characterization of the district court opinion, the decision did *not* say that absent evidence of an agreement ("meeting of the minds"), the charge of unlawful compensation could *never* be proved – instead, the court's decision was grounded on the legal insufficiency of the totality of evidence presented at trial

The Respondent not only argues in support of the unlawful compensation reversal, but challenges the affirmance of the official misconduct conviction.[1] Since those facts are not presented in the state's brief, Mr. Castillo summarizes them below:

> on the night of the charged incident, the Respondent, 12-year veteran of the police force, was on patrol in Kendall; as he prepared to leave a gasoline station, he saw A.S. drive past him; he pulled out in the same direction of traffic and tried to pass her, but she waved him over (T. 435, 472)
>
> the two stopped their cars; A.S. got out of her car and handed him her driver's license; said she was lost and needed directions and thanked him for stopping (T. 438)
>
> acceding to A.S.'s request, the two drove to a nearby Burger King parking lot where they sat and talked – this is the same parking lot where Mr. Castillo often went to complete departmental reports (T. 440-42)
>
> A.S. told him she liked how he looked in his uniform, that she had friends and a former boyfriend who were police officers and asked him personal questions about marriage and families (T. 441, 443-44)

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[1] This Court has jurisdiction to review the issue. *See Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982); *see also State v. T.G.*, 800 So. 2d 204, 210 n. 4 (Fla. 2001).

Mr. Castillo never reported stopping the Petitioner's vehicle (T. 166)

the Respondent did not tell the dispatcher about the time he spent with A.S., (T. 490), and he reported on his daily worksheet that he was conducting an area check at the same time the two sat talking in the restaurant parking lot (T. 481-82)

half way through his shift, the Respondent told his dispatcher that he was going to get gasoline for his car; computer records showed that he bought no gasoline between 3-5 a.m. (T. 190-91, 482-84)

Mr. Castillo admitted at trial that he made several scrivenors errors on his daily worksheet and log; for example, he did not record all of his patrol time (he customarily didn't account for every minute of patrol time and was never asked about it), (T. 450), and he mistakingly entered the wrong tag number for a car he stopped that night, however, he never intended to lie to his superiors (T. 454, 526-28, 531-32)

a comparison of the Respondent's worksheet with a surveillance video taken by the restaurant shows a 6 minute difference in the time the Respondent made an unrelated traffic stop (he said it occurred at 3:42 a.m., the video said it was at 3:48 a.m.) (there was also a 3-4 minute discrepancy between the times of the video and the dispatcher's records) (T. 302-04)

This was the entirety of the evidence used to support the official misconduct statute. The state argued that the statute was violated by the filing of a false police worksheet. (T. 616-18, 621). The Respondent argued that he had no legal obligation to report the encounter with A.S. (since it was not a traffic stop), that he, in fact, got the gasoline he told the dispatcher about, and that any discrepancies in the report were the result of inadvertent scriveners errors. (T. 641, 649, 658, 660, 664)

QUESTIONS PRESENTED

I

WHETHER THE DECISION ENTERED BY THE THIRD DISTRICT COURT OF APPEAL CORRECTLY HELD THAT ABSENT DIRECT OR SUFFICIENT CIRCUMSTANTIAL EVIDENCE OF AN INTENT TO VIOLATE FLORIDA'S UNLAWFUL COMPENSATION STATUTE, THE STATE FAILED TO ESTABLISH A *PRIMA FACIE* CASE TO OVERCOME A TIMELY AND PROPER MOTION FOR JUDGMENT OF ACQUITTAL?

II

WHETHER THE DECISION ENTERED BY THE THIRD DISTRICT COURT OF APPEAL ERRED BY FINDING THAT THE PROOF OFFERED IN THIS CASE SATISFIES THE SPECIFIC-INTENT REQUIREMENT OF FLORIDA'S OFFICIAL MISCONDUCT STATUTE?

SUMMARY OF THE ARGUMENTS

The Third District Court of Appeal correctly held that, considering the totality of the evidence, the state failed to present a *prima facie* case of unlawful compensation. Contrary to the state's argument herein, the court did not rest its decision solely on the absence of a verbalized agreement between the parties that if the motorist engaged in sexual intercourse, he would refrain from ticketing or arresting her. Instead, the district court looked not only to the absence of direct evidence of a *quid pro quo* relationship, but to the legal insufficiency of the circumstantial evidence put forth. The motorist even testified at trial that no such relationship was suggested or existed. That being so, and consistent with the law in Florida, the district court properly held that in the absence of a *prima facie* case, the trial court should have granted the defense motion for judgment of acquittal.

The district court erred, however, when it found the evidence of official misconduct legally and factually sufficient. The state's case hinged primarily on the Respondent's failure to report the time he spent with the motorist in a restaurant parking lot. The failure to report this time, along with several minor inconsistencies between the Respondent's report and other surveillance or reporting devices (characterized as innocent mistakes or unrelated to the charged incident) , showed – the state argued – his intention to violate the statute.

Significantly, the state failed to show that a reasonable police officer, in the Respondent's shoes, would have entered the time with the motorist on his daily activities worksheet or that he would know that failure to make the entry would result in reprimand – both essential considerations for the specific intent requirement of the official misconduct statute in this case.

As such, the Respondent asks this Court to affirm the decision of the Third District Court of Appeal on the unlawful compensation charge, but reverse it on the official misconduct charge.

ARGUMENTS

I

THE DECISION ENTERED BY THE THIRD DISTRICT COURT OF APPEAL CORRECTLY HELD THAT ABSENT DIRECT OR SUFFICIENT CIRCUMSTANTIAL EVIDENCE OF AN INTENT TO VIOLATE FLORIDA'S UNLAWFUL COMPENSATION STATUTE, THE STATE FAILED TO ESTABLISH A *PRIMA FACIE* CASE TO OVERCOME A TIMELY AND PROPER MOTION FOR JUDGMENT OF ACQUITTAL.

The Respondent in this case, a former police officer, was convicted of unlawful compensation by accepting a female motorist's sexual favors in lieu of arresting her or issuing her a traffic ticket for driving under the influence (DUI). There was no direct proof of the charged offense; the motorist (A.S.) testified at trial that Mr. Castillo never said or did anything to force, coerce, entice, or solicit her to do anything sexual. She testified simply that she believed that since he was a police officer, she had to have sex with him. Moreover, she explained, the idea of accusing the Respondent with an offense may have come from her friend or her friend's father. (T. 351-52).

The Third District Court of Appeal found that in the absence of an agreement or other sufficient evidence from which a jury could reasonably find guilt, the trial court should have granted the defense timely and proper motion for

judgment of acquittal.[2] Contrary to the state's reading of this decision, the district court did not focus *exclusively* on the need for an express agreement between the parties. Rather, the court looked to the totality of the evidence (including the lack of an agreement or acknowledgment by the Respondent of a *quid pro quo* relationship between the sex and the decision not to arrest or ticket, as well as to A.S.'s own trial testimony) to hold that the state failed to establish a *prima facie* case of guilt.

There was no direct evidence of the compensation offense. Neither party verbalized their understanding that the sex would influence the (discretionary) decision to ticket or arrest. Not only did the state fail to present testimony showing that a reasonable police officer, in the Respondent's shoes, would have arrested or ticketed A.S. for DUI (i.e., that the Respondent abused his discretion by not charging her)[3/4/5], but it failed to show that the Respondent ever contemplated that

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[2] *See Merckle v. State*, 512 So. 2d 948, 949 (Fla. 2nd DCA 1987) ("Suffice it to say, there was sufficient circumstantial evidence from which the jury could have found that the defendant accepted a bribe in connection with his disposition of the criminal charges against Hope"), *approved*, 529 So. 2d 269 (Fla. 1988).

[3] The decision to ticket or arrest lies squarely within the police officer's discretion; in this sense, it may be contrasted with conduct which is "incumbent upon the officer . . . to perform." *Grady*, 183 So. at 31; *see also Brown v. Miami-Dade County*, 837 So. 2d 414, 418 (Fla. 3d DCA 2001), *rev. denied*, 847 So. 2d 977 (Fla. 2003); *Sequine v. City of Miami*, 627 So. 2d 14, 18 (Fla. 3d DCA 1993). To be liable for not ticketing

her conduct would influence his judgment and actions. After all, it is the

Respondent's intent that is at the core of the unlawful compensation statute.[6]

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or arresting an individual, the state must show that the officer abused his discretion by electing not to perform. The state never suggested, or propounded evidence to show that Mr. Castillo's decision was anything other than a proper and warranted exercise of his discretion.

[4] While there was testimony that A.S. was speeding, stumbled slightly as she exited her car and smelled of alcohol, her walking and speaking were fine and Mr. Castillo did not detect enough indicia of drunkenness to warrant arrest or ticketing. (T. 439, 443, 463-64). Moreover, Metro-Dade police officer Dero, who happened to be driving by the Burger King restaurant at the time the Respondent and A.D. were in the parking lot, stopped and spoke with A.S.; he testified at trial that she did not appear to be upset or intoxicated. (T. 280, 283).

[5] The Respondent calls this Court's attention to a factual error in the district court's decision below. On page 2 of the decision, the court says that "Castillo [Respondent] detected the smell of alcohol on A.S.'s breath." (App. 2). In fact, the Respondent testified that while he was with A.S. in the restaurant parking lot, he detected – for the first time – the odor of alcohol coming either from her clothes or her breath; he couldn't tell which. (T. 443). But, again, she didn't exhibit any signs that she was intoxicated and shouldn't be driving a car. (T. 443).

[6] Intent can be shown through direct evidence (e.g., defendant testimony or statements or an agreement between the defendant and another party) or through circumstantial evidence (e.g., setting characteristics, parties' actions).

Unquestionably, direct evidence provides the best indication of the accused's criminal intent and, in this context, it would be reasonable to look for the existence of an agreement that memorializes the parties' intent. Intent is more commonly shown, however, through the use of circumstantial evidence such as context for the parties' actions. *See The Florida Bar v. Marable*, 645 So. 2d 438 (Fla. 1994).

It was reasonable, then, for the court below to look to *both* forms of intent

Florida Statute 838.016 provides:

> (1) 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.[7]

So, what did the state prove in this case? The evidence showed that A.S. either was stopped by then-police officer Castillo or waved him over. The two stood in a restaurant parking lot and engaged in casual talk before they agreed to go in separate cars to an abandoned warehouse parking lot.[8] A.S. testified that she never asked to leave or go home, that the Respondent never ordered her to follow

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evidence.

[7] Fla. Stat. 838.014 (6) further defines "corruptly" as:

> done with a wrongful intent and for the purpose of obtaining or compensating or receiving compensation for any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.

[8] She described him as "very friendly." (T. 330).

him[9] and he never suggested that if she went with him, he would forego arresting or ticketing her. (T. 331). When they arrived at the warehouse, the two engaged in more casual banter.[10] The Respondent purportedly lowered A.S.'s panties and had vaginal intercourse with her. A.S. testified that she never said "no" or told him to stop. (T. 335-36). The Respondent gave her his beeper number and the two left separately. (T. 338).

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[9]

> Q: What did he tell you before you followed him? In other words, what did he say to make you believe that you had to follow him?
>
> A: He asked me, 'Do you want to follow me,' and I said, 'What,' and he said, 'You are going to follow me.'
>
> Q: Did he say anything else?
>
> A: No.

(T. 331).

[10] For example, A.S. recounted:

> A: I told him I, that he looked like he was married and had like thirteen kids and he said that he wasn't married and didn't have kids.
>
> Q: Why did you ask those questions?
>
> A: Just to see what he was going to say, to let me know exactly what type of person he is.

The state's case centers around three comments Mr. Castillo made to A.S. that night. First, he said "Do you want to follow me . . . [y]ou are going to follow me" as they prepared to leave the restaurant parking lot. Then, he mumbled "let me get that thing on" as they both prepared for intercourse at the warehouse and, finally, "I [A.S.] was lucky he didn't give me a ticket" as they each dressed, following intercourse, and prepared to leave. (T. 331, 335, 338, respectively). *See* Petitioner's brief on the merits at 25-26.[11]

Looking to the totality of the evidence, the district court held that the state failed to present a *prima facie* case of guilt of unlawful compensation. Not only was there no agreement or meeting of the minds (direct evidence), but the circumstantial evidence did not rise to a cause and effect level. According to the decision below, even if A.S. felt compelled to submit to the Respondent's sexual advances, he might well have perceived her actions to be purely voluntary and independent of any concerns for arrest or ticketing. (App. 3).

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[11] Surely, these comments were, in the course of the entire interaction that night, innocuous or, at best, ambiguous. *See Garrett v. State*, 508 So. 2d 427 (Fla. 2d DCA 1987) (unlawful compensation conviction, founded on the accused's ambiguous statements, held legally insufficient).

The district court's analysis and holding are entirely consistent with Florida's unlawful-compensation and general circumstantial-evidence case law.

Section 838.016 implicitly requires that there exist a *quid pro quo* between the request or receipt of pecuniary or other benefit and the performance or non-performance of an official duty. *See, e.g.*, *Grady v. Coleman*, 183 So. 25, 31 (Fla. 1938); *Callaway v. State*, 112 Fla. 599, 601-02, 152 So. 429, 430 (1930); *State v. Milbrath*, 527 So. 2d 864, 865 (Fla. 5th DCA 1988); *Garrett v. State*, 508 So. 2d 427 (Fla. 2nd DCA 1987). That is, in order for the state to put forth a *prima facie* case, it must show – essentially – a cause and effect relationship between the benefit and the accused's conduct. How the state elects to show this relationship is a different matter and shouldn't be confused with the cause and effect nature of the evidence.

The district court correctly understood this. It found that in the absence of direct evidence or sufficient circumstantial evidence, no *quid pro quo* relationship was shown and acquittal was proper.

Indeed, this Court has established the standard for assessing the quality and quantity of circumstantial evidence in the acquittal context:

> "A motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present

> evidence from which the jury can exclude every reasonable hypothesis except guilt . . .
>
> . . . [The court's] view of the evidence must be taken in the light most favorable to the state. The state is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt."
>
> . . .
>
> In sum, the sole function of the trial court on motion for directed verdict in a circumstantial-evidence case is to determine whether there is prima facie inconsistency between (a) the evidence, viewed in a light most favorable to the State and (b) the defense theory or theories. If there is such inconsistency, then the question is for the finder of fact to resolve. The trial court's finding in this regard will be reversed on appeal only where unsupported by competent substantial evidence.

Orme v. State, 677 So. 2d 258, 262 (Fla. 1996) quoting *State v. Law*, 559 So. 2d 187, 188-89 (Fla. 1989); *see also Davis v. State*, 90 So. 2d 629 (Fla. 1956).

In this case, neither A.S. nor Mr. Castillo ever testified that she exchanged sexual favors for the Respondent's decision to forego arresting or ticketing her. At most, she felt compelled to submit to his advances because she feared him (as a

police officer);[12] however, she steadfastly and explicitly proclaimed he never said or did anything to foster a belief that he would alter the performance of his official duties if she had sex with him.[13] As far as he was concerned, her decision to have

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[12] The state never charged the Respondent with sexual assault or battery and never argued that he used his position as a police officer to overbear her desire to resist.

[13]

> Q: Did you ever tell the FBI that he [Respondent] said you can get a DUI or you can follow me or something to that, of that nature?
>
> A [A.S.]: Yes, I did.
>
> Q: Why did you tell her that?
>
> A: I didn't, I don't think that was exactly what I said. Basically, I felt everybody would be on his side – I didn't know what I felt – I was being asked to do.
>
> Q: Did he say that?
>
> A: No. He didn't. But who was going to believe me over a police officer.
>
> . . .
>
> Q: He never suggested he was going to arrest you for DUI?
>
> A: No.
>
> Q: He never said anything about along the lines of DUI, the entire encounter, did he?
>
> A: No.

sex was purely voluntary and independent of arrest or ticketing concerns. This was the finding of the district court below and it is supported by all of the evidence presented.

In short, since there was no inconsistency between the two sets of testimony (they both contradicted the unlawful compensation allegations) and because the

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> Q: It was never a quid pro quo [sic] that he wouldn't arrest you if you come with me, was there?
>
> A: No.

(App. 3).

evidence was consistent with the theories of defense (sex was voluntary and not a form of compensation), acquittal was the proper remedy. *State v. Law*.[14/15]

II

THE DECISION ENTERED BY THE THIRD DISTRICT COURT OF APPEAL ERRED BY FINDING THAT THE PROOF OFFERED IN THIS CASE SATISFIES THE SPECIFIC-INTENT REQUIREMENT OF FLORIDA'S OFFICIAL MISCONDUCT STATUTE.

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[14] We agree with the *Fowler* court that

> it is for the court to determine, as a threshold matter, whether the state has been able to produce competent, substantial evidence to contradict the defendant's story. If the state fails in this initial burden, then it is the court's duty to grant a judgment of acquittal to the defendant as to the charged offense, as well as any lesser-included offenses not supported by the evidence . . . Otherwise, there would be no function or role for the courts in reviewing circumstantial evidence . . .

State v. Law, 559 So. 2d at 189 (quoting *Fowler v. State*, 492 So. 2d 1344, 1347 (Fla. 1st DCA 1986), *rev. denied*, 503 So. 2d 328 (Fla. 1987)).

[15] The correctness of an order granting a motion for judgment of acquittal is subject to the *de novo* standard of review. *See, e.g.*, *State v. Williams*, 742 So. 2d 509 (Fla. 1st DCA 1999); *D.R. v. State*, 734 So. 2d 455 (Fla. 1st DCA 1999); *State v. Smyly*, 646 So. 2d 238 (Fla. 4th DCA 1994).

The Respondent was convicted of official misconduct by filing a false police report (daily activities worksheet). The state argued that by failing to enter the time he spent with A.S. on his report, he misrepresented his actions and violated Florida Statute 839.25.[16] That section provides:

> (1) "Official misconduct" means the commission of the following act by a public servant, with corrupt intent to obtain a benefit for himself or herself or another or to cause unlawful harm to another: knowingly falsifying, or causing another to falsify, any official record or official document.
>
> (2) "Corrupt" means done with knowledge that the act is wrongful and with improper motives.

Implicit within this statute is the requirement that the state prove beyond a reasonable doubt that the Respondent was aware of his misrepresentation and that he intended to benefit from it. In this sense, the statute has both a general intent and a specific intent component. Discussing the components to the official misconduct statute, the fourth district in *Bauer v. State*, 609 So. 2d 608, 610 (Fla. 4th DCA 1992), *rev. denied*, 613 So. 2d 1 (Fla. 1993) quoted *Linehan v. State*,

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[16] The state argued that there were three errors in the worksheet: the Respondent reported that he was on patrol at the same time that he sat with A.S. in the restaurant parking lot, he reported that he was getting gasoline for his police car when a computer check showed no gasoline was purchased at that time, and there was a discrepancy in the time he made an *unrelated* traffic stop. (T. 617).

442 So. 2d 244, 247-48 (Fla. 2d DCA 1983), *modified on other grounds*, 476 So. 2d 1262 (Fla. 1985):

> "A 'general intent' statute is one that prohibits either a specific voluntary act or something that is substantially certain to result from the act . . . A person's subjective intent to cause the particular result is irrelevant to general intent crimes because the law ascribes to him a presumption that he intended such a result . . . Thus, in general intent statutes words such as 'willfully' or 'intentionally' without more, indicate only that the person must have intended to do the act and serve to distinguish that conduct from accidental (noncriminal) behavior or strict liability terms . . .
>
> Specific intent statutes, on the other hand, prohibit an act when accompanied by some intent other than the intent to do the act itself or the intent (or presumed intent) to cause the natural and necessary consequences of the act . . . Accordingly, a crime encompassing a requirement of a subjective intent to accomplish a statutorily prohibited result may be a specific intent crime . . . Thus, to be a 'specific intent' crime, a criminal statute which contains words of mental condition like 'willfully' or 'intentionally' should include language encompassing a subjective intent, for example, intent to cause a result in addition to that which is substantially certain to result from a statutorily prohibited act."
>
> As it applies to the statute here in question [official misconduct], the statute contains a general intent of knowing the act is unlawful but also requires a specific intent that it be done with the intent to cause a benefit to himself or harm to another. Thus, the focus of our inquiry is whether or not the various elements of intent were proved.

The state's argument hinges on a series of unproven inferences, the existence of which are critical if the state is to satisfy its burden of proof. Chief among the state's assumptions is the claim that the Respondent had an obligation to report his passing contact with a motorist whom he did not arrest or even test for driving under the influence. To prove that he falsified his report, of course, the state must propound evidence that a reasonable police officer in the Respondent's position would know 1) this was the type of activity that had to be reported on the daily worksheet and 2) that reporting it would likely expose him to sanctions. The state submitted *no* evidence of either of these things.

We don't know, for instance, which rule or guideline requires a police officer to report each and every interaction with a motorist. Police, by the very nature of their tasks, come into contact with a variety of people, in a variety of contexts, on each daily shift. Under the state's theory, police must record every single contact they have with a citizen during their shift. The failure to record or accurately represent the most mundane of details would, in turn, expose the officer to criminal liability.

This Court must then face the practical question of whether police officers must record every detail of their shift so as not to run afoul of the official misconduct statute. Such a rule necessarily blurs the distinction between

falsification with the corrupt intent to gain a benefit and the omissions or mistakes which are the natural result of overworked police officers.

The charge here is not whether the Respondent spent time, or engaged in sexual activities, with A.S. The official misconduct charge in this case was specifically that he failed to report any interaction with her in order to avoid reprimand. This would, of course, include sitting in the restaurant parking lot having casual conversation.

Did the Respondent have a legal obligation to report the time he spent with A.S. on his daily worksheet? Must a police officer, on routine patrol, report every break that he takes? Supposing that while on patrol, the officer receives a phone call from his elderly mother that she's having chest pains; she lives close to his patrol area, so he drives over to her house; they speak for 15-20 minutes and when he's certain she's alright, he leaves to resume his patrol. Is the officer obligated to include this break on his worksheet? Suppose he parks his police car in a parking lot and completes paperwork during the time he is be patrolling an area. Is he obligated to report the time spent doing paperwork? Under the state's theory, he is. In short, was this particular police officer trained to distinguish which breaks are to be reported and which aren't? We don't know that answer because there was no evidence presented in this regard.

The state continues to pyramid inferences by urging that the Respondent knew that reporting the time with A.S. would expose him to sanctions. While Florida law recognizes the *general* proposition that avoidance of reprimand for filing false police reports satisfies the intent requirement of the official misconduct statute, *see, e.g., State v. Riley*, 381 So. 2d 1359 (Fla. 1980); *Barr v. State*, 507 So. 2d 175 (Fla. 3d DCA 1987);[17] *see also State v. Short*, 483 So. 2d 10 (Fla. 2nd DCA 1985), *rev. denied*, 486 So. 2d 597 (Fla. 1986), none of these cases address whether the officers involved were trained to distinguish between reportable and non-reportable activities, whether the respective police departments disseminated guidelines to help officers make such distinctions and what the likelihood was that erroneous filings would result in sanctions.

In this case, the question remains whether the Respondent's acknowledged contact with A.S., in the absence of any proof that such contact was the proper subject of a report, can expose him to criminal liability. Here, the state assumes that any omission or misstatement of fact is necessarily intended to achieve a benefit otherwise unavailable to the officer.

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[17] In fact, *Barr* did not hold that filing false police reports violates the official misconduct statute. It merely held that recantation of false reports does not serve as a defense to official misconduct charges. 507 So. 2d at 177.

Just as there is no proof that the Respondent was required to report his contact with A.S., there is no evidence that such a report, if it had been made, would have resulted in a reprimand or other sanction. This is an important consideration because the jury was asked to infer how likely it was that the Respondent believed, and the reasonableness of that belief, that his conduct would result in sanctions – making his avoidance that much more urgent. Evidence of the possibility of such sanctions is both the essential and missing component of the state's case with respect to this element of the official misconduct statute.[18]

Because the record is completely devoid of any such showing, or even argument, the evidence was both legally and factually insufficient.[19]

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[18] There was absolutely no testimony about the administrative review process to determine whether the errors were intentional or inadvertent and whether they were made with improper motives. *See* Fla. Stat. 839.25 (2). There was no mention, for example, of the administrative review process outlined in Chapter 943, Florida Statutes, or even by local administrative police review boards.

[19] The standard of review applicable to rulings on motions for judgment of acquittal is *de novo*, *see State v. Williams*, 742 So. 2d 509 (Fla. 1st DCA 1999), and whether the verdict was supported by the evidence (factual sufficiency) is the substantial competent evidence test. *See Hertz v. State*, 803 So. 2d 629 (Fla. 2001).

CONCLUSION

For the foregoing reasons, the Respondent submits that the decision of the Third District Court of Appeal should be affirmed with respect to the unlawful compensation conviction, but reversed as to official misconduct conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Andrea D. England, Assistant Attorney General, Department of Legal Affairs, 110 S.E. 6th Street, 9th Floor, Ft. Lauderdale, Florida 33301, this 25th day of August, 2003.

_____

HARVEY J. SEPLER

Assistant Public Defender

CERTIFICATE OF FONT SIZE

The undersigned certifies that this brief uses only the Times New Roman 14-point type size.

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-282

THE STATE OF FLORIDA,

Petitioner,

-vs-

FERNANDO CASTILLO,

Respondent.

APPENDIX

INDEX

DOCUMENT
PAGES

OPINION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT 1-3