IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-282

STATE OF FLORIDA,

Petitioner,

vs.

FERNANDO CASTILLO,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

* *

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

Petitioner, STATE OF FLORIDA, was the appellee in the Third District Court of Appeal and the prosecution in the trial court of the Eleventh Judicial Circuit, in and for Miami-Dade County. Respondent, FERNANDO CASTILLO, was the appellant and the defendant, respectively, in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court or by their proper names. The symbol "R." refers to the record on appeal. The symbol "T." refers to the transcripts of the trial, which are numbered sequentially. The symbol "ST." refers to the transcript of the sentencing hearing.

STATEMENT OF THE CASE AND FACTS

Respondent Fernando Castillo, a Miami-Dade County police officer, was charged with unlawful compensation and official misconduct in violation of Sections 838.016 and 839.25, Florida Statutes (2000). (R. 1-2.) The charges stemmed from his encounter with A.S. in the early morning hours of March 9, 2000. The State's theory regarding the unlawful compensation charge was that Respondent requested, solicited, and accepted sex in lieu of arresting A.S. or issuing her a ticket for driving while intoxicated. The official misconduct charge stemmed from Respondent's alleged attempt to cover up his sexual encounter

with A.S. by intentionally falsifying official paperwork. Respondent was convicted of both offenses. (T. 714; R. 146.) He later was adjudicated guilty and sentenced to 56.25 months' imprisonment followed by one year of probation. (ST. 58-59; R. 284-85.)[1]

According to nineteen-year-old A.S.'s trial testimony, she met several friends at a bar on Miami Beach before midnight on March 8, 2000. (T. 315, 317-18, 345.) After a couple of hours, during which time A.S. consumed between seven to eight mixed drinks, and possibly smoked a marijuana cigarette, she testified she was "pretty much drunk." (T. 319-21, 345.)[2] She could not walk or talk properly. (T. 321.) Her friend, Jessie, drove them to Jessie's house. (T. 321-22.) A.S. felt "very bad," and passed out on the way there. (T. 322, 345.) After they arrived, A.S., who had awoken, got in her car and drove home although Jessie tried to dissuade her. (T. 322, 346-47.)

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[1] The district court did not consider the sentencing issues raised below by Respondent, in light of its reversal of Respondent's conviction for unlawful compensation. Accordingly, Petitioner will not be presenting facts that pertain solely to sentencing. Likewise, because the court affirmed the conviction for official misconduct, it is not at issue and facts supporting the offense will be presented only as they relate to the unlawful compensation charge.

[2] Marie Claudia Moran, David Alvarez, and Alexander Russo, who were with A.S. at the bar that night, all testified that A.S. was drunk when they parted company. (T. 251, 254, 384, 599.)

A.S. was driving approximately 55 miles per hour but slowed to about 40 mph when she saw Respondent sitting in his police car at a gas station. (T. 323-24, 347-48.) After she passed him, he illuminated his overhead lights and she pulled over in front of a Burger King restaurant. (T. 323-24, 348.) A.S. thought she was going to "be in a lot of trouble" and "was going to go to jail." (T. 324.) Respondent directed A.S. to get out of her car and produce her driver's license over the car's loudspeaker. (T. 324.) As she walked toward Respondent's car, she slipped and caught herself on her car, to which Respondent remarked that "the party must have been good." (T. 325, 350.) At the time, A.S. was feeling "very bad, very drunk." (T. 325, 344, 349.) She handed Respondent her license, but he grabbed her wallet and began looking through it. (T. 325.) The wallet contained a business card from a police officer, which she said belonged to her boyfriend in order to "deter any bad thing he might have had in his head." (T. 326, 364.) The wallet also contained a condom, which was missing the next day. (T. 327, 335.)

Respondent requested that A.S. follow him into the Burger King parking lot. (T. 328-29.) Once there, they stood in the parking lot and talked. (T. 329.) Respondent stood less than a foot away and was very friendly, smiling and touching her

shoulder. (T. 329-30.) He was in full uniform, with his gun visible in his gun belt. (T. 514.)

Respondent then told A.S., "You are going to follow me." (T. 331.) She complied because "that is what he told me to do. I was scared, I don't know, I didn't know what else to do. . . . I didn't want to know what would happen if I didn't follow him." (T. 330-31, 354.) She followed him to a nearby deserted warehouse area, where they got out of their cars. (T. 332-33, 354.) Respondent leaned A.S. against her car, pulled her pants and panties down, mumbled something like "let me get that thing on," then had vaginal intercourse with her. (T. 334-35.) She did not tell him to stop because she was scared. (T. 336-37, 357.) Afterward, she felt something wet on the lower part of her stomach. (T. 337.) As they got dressed, Respondent "was smiling and said I was lucky he didn't give me a ticket." (T. 338, 355.) He gave her his beeper number and they both drove off. (T. 338-39.) When A.S. got home, she left a phone message for her friend Jessie, that "something fucked up just happened," then she "passed out." (T. 340, 355.)

The next day, A.S. sought treatment at a rape treatment center, and reported the incident to the FBI and Miami-Dade Police Department. (T. 340-42, 363.) A.S. told the FBI that Respondent said she could either get a DUI or follow him. (T.

332.) She later acknowledged this statement was inaccurate;[3] she explained she said it because she "felt that everybody would be on his side," the side of a police officer. (T. 332, 352, 357.) Respondent's semen was later found in A.S.'s panties. (T. 297-98.) Acting at the direction of the police department, A.S. called Respondent and indicated she thought she was pregnant. (T. 342, 459.) Respondent expressed disbelief because he had not ejaculated inside of her. (T. 459.)

Respondent's trial testimony differed from A.S.'s in several material respects. He testified he pulled out of a gas station and into traffic when one of the vehicles near him slowed down, and he saw the driver (A.S.) waving at him as if signaling him to pull over. (T. 435.) They both stopped and Respondent turned on his car's overhead lights for safety purposes. (T. 435.) They exited their cars and A.S. asked for directions to a nearby highway. (T. 438.) Respondent testified that A.S. did not stumble, slur her words, smell of alcohol, or have bloodshot eyes. (T. 439.) He said he never grabbed her wallet, nor did he make any comment about the party. (T. 440.) He was preparing to leave when she asked if they could talk for a few

[3] During cross-examination, A. S. agreed that Respondent never threatened her, never suggested he was going to arrest her for DUI, never said anything along the lines of DUI, and never said that he wouldn't arrest her if she went with him. (T. 352, 357.)

more minutes; he agreed and suggested they drive into the Burger King parking lot. (T. 440.)

Once they began talking in the parking lot, Respondent noticed the smell of alcohol on A.S., but she exhibited no other signs indicating she was intoxicated or that it would be unsafe to drive a car. (T. 443.) They discussed personal matters and exchanged phone numbers. (T. 444.) After a while, they said good night and drove off. (T. 444-45.)

Respondent advised police dispatch he was going to the police shop to refuel. (T. 444-45.) A moment later, he saw A.S., who wanted to continue their conversation. (T. 446-47.) They talked some more, then made arrangements to meet at a park at the end of his shift. (T. 447.) He then drove to a gas station to use the bathroom, get a soda, and begin work on his daily activity worksheet. (T. 450-51, 511.) After his shift was over, he met A.S. at the appointed place. (T. 454-55.) They sat in her car, she masturbated him, and he ejaculated a little on her stomach. (T. 456-57.)

Respondent failed to report the encounter with A.S. in his daily activity worksheet, and his daily log report erroneously indicated he was on patrol during the time he was speaking with A.S. in the parking lot. (T. 478, 489-90.)

Several police officers testified at trial. Detective Hernandez, with the Sexual Crimes Bureau, testified that A.S.'s version of events matched what he observed on the Burger King surveillance tapes. (T. 226, 462.) He also testified that during his interrogation of Respondent, Respondent denied stopping A.S., exiting his vehicle, and having sex with her. (T. 205-210, 226-27, 241-42.) In addition, Hernandez stated that A.S.'s former boyfriend called to say A.S. made up the allegations against Respondent. (T. 217-18.)

Officer Morales, with the Professional Compliance Bureau, testified that the taped communications between Respondent and the police dispatcher reflected a traffic stop was conducted but there was a gap in the transmission. (T. 155-159, 161-63.) Officer Bermudez, also with the Sexual Crimes Bureau, testified there was a discrepancy between Respondent's work sheet, the Burger King surveillance video, and the dispatcher records as to times Respondent conducted the vehicle stop. (T. 301-302.) Both vehicles were videotaped driving to and from the warehouse area. (T. 303-305, 310.) Grant Fredericks, an expert in forensic video analysis, analyzed the Burger King surveillance tapes and determined that 26 minutes and 35 seconds elapsed from the time the Respondent's car and A.S.'s car left the Burger King parking lot, to the time they came back. (T. 564-566.)

When counsel for Respondent moved for judgment of acquittal, he argued the State had failed to prove a quid pro quo, that there was no evidence showing Respondent was going to arrest A.S. for DUI or anything else in lieu of her having sex with him. (T. 392-94.) The prosecutor quoted from the unlawful compensation statute, specifically the language that Respondent would be guilty of the charge if he "did corruptly request, solicit, [a]ccept, or agree to [a]ccept" any unauthorized benefit. (T. 394.) The prosecutor then argued the evidence showed A.S. was drunk and should have been arrested for DUI, yet Respondent received the benefit of a sexual act and allowed A.S. to go on her way. (T. 395.) The trial court denied the motion, noting that A.S. had testified Respondent said she was lucky he didn't give her a ticket. (T. 395-96.)

The jury returned guilty verdicts for both unlawful compensation and official misconduct. (T. 714; R. 146.) He was adjudicated guilty and sentenced to 56.25 months' imprisonment followed by one year of probation. (ST. 58-59; R. 284-85.)

Respondent appealed to the Third District Court of Appeal, which affirmed the official misconduct conviction but reversed the unlawful compensation conviction. Castillo v. State, 835 So. 2d 306 (Fla. 3d DCA 2003). In reversing, the district court determined that a "meeting of the minds" between Respondent and

A.S. was required in order to find a violation of the unlawful compensation statute. Id. at 309. The court concluded the State had failed to show any meeting of the minds because A.S. testified Respondent never said he would accept sex in lieu of issuing her a ticket or arresting her for DUI.

> At best, the prosecution only showed that in the mind of A.S., she thought that Castillo would arrest or ticket her if she did not have intercourse with him. But, in the absence of any spoken understanding, Castillo could simply have thought that A.S. followed him voluntarily.

Id. (emphasis supplied).

After rehearing was denied, the jurisdiction of this Court was timely invoked. Review was granted and the parties were directed to file merits briefs.

POINT ON APPEAL

WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT DIRECT PROOF OF AN EXPLICIT QUID PRO QUO AGREEMENT WAS NECESSARY TO PROVE UNLAWFUL COMPENSATION UNDER SECTION 838.016, FLORIDA STATUTES (2000), AND IN REVERSING RESPONDENT'S CONVICTION FOR THIS OFFENSE WHERE THE CIRCUMSTANTIAL EVIDENCE ADDUCED AT TRIAL WAS INCONSISTENT WITH ANY REASONABLE HYPOTHESIS OF INNOCENCE AND LEGALLY SUFFICIENT TO PROVE THAT RESPONDENT REQUESTED, SOLICITED, OR ACCEPTED SEX FROM A.S. IN LIEU OF ISSUING HER A TICKET OR ARRESTING HER?

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal erred when it ruled that the State was required to prove the existence of an explicit quid pro quo agreement in order to convict a non-elected public official of unlawful compensation under Section 838.016, Florida Statutes (2000). The district court erroneously concluded the State had failed to prove the existence of a "meeting of the minds" between Respondent-police officer and A.S. on the grounds there was no "spoken" understanding that required her to have sex with him in lieu of his issuing her a ticket or arresting her. The ruling effectively requires the State to prove the element of intent in unlawful compensation cases solely through direct evidence of a spoken agreement. This runs counter to the well-established rule in Florida that circumstantial evidence may be used to demonstrate any element of any crime, and particularly intent, since a person's state of mind can seldom be proven by direct evidence.

The facts adduced in this case, though circumstantial in nature, established that Respondent corruptly requested, solicited, or accepted an unauthorized benefit from A.S. The evidence excluded every reasonable hypothesis of innocence and constituted substantial competent evidence of Respondent's guilt. This Court should quash the decision below, approve

State v. Gerren, 604 So. 2d 515 (Fla. 4th DCA 1992), and hold that the State may use circumstantial evidence to establish a violation of the unlawful compensation statute.

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT DIRECT PROOF OF AN EXPLICIT QUID PRO QUO AGREEMENT WAS NECESSARY TO PROVE UNLAWFUL COMPENSATION UNDER SECTION 838.016, FLORIDA STATUTES (2000), AND IN REVERSING RESPONDENT'S CONVICTION FOR THIS OFFENSE WHERE THE CIRCUMSTANTIAL EVIDENCE ADDUCED AT TRIAL WAS INCONSISTENT WITH ANY REASONABLE HYPOTHESIS OF INNOCENCE AND LEGALLY SUFFICIENT TO PROVE THAT RESPONDENT REQUESTED, SOLICITED, OR ACCEPTED SEX FROM A.S. IN LIEU OF ISSUING HER A TICKET OR ARRESTING HER.

The Third District Court of Appeal erroneously concluded that because there was no evidence in the record of a "spoken" understanding between Respondent and A.S. that required her to have sex with him in lieu of his issuing her a ticket or arresting her, the evidence failed to demonstrate a "meeting of the minds" and, therefore, was insufficient to support the conviction under Section 838.016, Florida Statutes (2000). The State submits that this ruling forces the State to prove the existence of an explicit quid pro quo agreement through direct evidence in order to convict a non-elected public official of unlawful compensation, something not required by the statute or caselaw interpreting the statute and directly contrary to the well-established rule that circumstantial evidence may be used to prove issues of intent.

The offense of unlawful compensation is prohibited by Section 838.016, which provides in relevant part:

> (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.

(emphasis supplied). "Corruptly" is defined as being

> 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.

Section 838.014(6), Florida Statutes (2000). To prove unlawful compensation, then, the State was required to show that Respondent, a public servant, requested, solicited, accepted, or agreed to accept some form of unauthorized compensation (sex), and in so doing, wrongfully intended to obtain such compensation in exchange for performing in a manner inconsistent with his public duties (ticketing or arresting A.S. for driving under the influence).

I. Circumstantial Evidence is Sufficient to Establish All Elements of Unlawful Compensation, Including Intent

The district court's ruling requires the State to prove the element of intent in unlawful compensation cases through direct evidence of an explicit agreement. Notwithstanding Respondent's position of authority and his actions under the circumstances,

"in the absence of any spoken understanding, Castillo could simply have thought that A.S. followed him voluntarily." 835 So. 2d at 309. On this basis, the Court held that the jury, as a matter of law, could not have found Respondent to possess the requisite intent. However, it is well-established in Florida that a person's intent can seldom be proven by direct evidence, necessitating the use of circumstantial evidence to demonstrate intent. "Circumstantial evidence is often used to prove intent and is often the only available evidence of a person's mental state." The Florida Bar v. Marable, 645 So. 2d 438, 443 (Fla. 1994) (criminal solicitation). The State "rarely has direct proof as to the accused's exact objectives, motives and intentions," and, consequently, the State's proof "is almost always circumstantial on this point." Perreault v. State, 831 So. 2d 784, 786 (Fla. 5th DCA 2002) (burglary of a dwelling with an assault or battery with a firearm). See also Sewall v. State, 783 So. 2d 1171, 1176 (Fla. 5th DCA 2001) (grand theft). In fact, a person's conduct may directly contradict his or her words; "when the issue of mental intent is involved in a legal action, it is up to the trier of fact to determine whether the words or conduct of a party demonstrates the requisite intent." Webb v. Blancett, 473 So. 2d 1376, 1378 (Fla. 5th DCA 1985) (child adoption proceeding).

Because the district court focused on whether there was a meeting of the minds, i.e., an agreement, between Respondent and A.S., it is useful to examine the crime of conspiracy, which also requires an agreement, express or implied, between two or more persons to commit a criminal offense. Bradley v. State, 787 So. 2d 732, 740 (Fla. 2001) (discussing the 1995 version of the conspiracy statute, Section 777.03(3), now renumbered as Section 777.04(3)). The agreement and the intent to commit the offense are requisite elements of this crime. Herrera v. State, 532 So. 2d 54, 58 (Fla. 3d DCA 1988). However, direct proof of the agreement to commit a crime is not necessary to establish a conspiracy. Id.; Wyant v. State, 659 So. 2d 433, 434 (Fla. 2d DCA 1995); Harris v. State, 450 So. 2d 512, 513-14 (Fla. 4th DCA 1984). Rather, a conspiracy may be proven by circumstantial evidence, and "a jury may infer that an agreement existed to commit a crime from all the surrounding and accompanying circumstances." Bradley, 787 So. 2d at 740; see also Borders v. State, 312 So. 2d 247, 248 (Fla. 3d DCA 1975). If circumstantial evidence is legally sufficient to establish a meeting of the minds in conspiracy cases, it should likewise suffice in unlawful compensation cases.

It is axiomatic that any element of any criminal offense can be established through circumstantial evidence. "It is too well

settled to require citation of authorities that any material fact may be proved by circumstantial evidence, as well as by direct evidence." Moorman v. State, 25 So. 2d 563, 564 (Fla. 1946). See e.g., D.S.S. v. State, 28 Fla. L. Weekly S449 (Fla. June 12, 2003) (sufficient circumstantial evidence to establish the ownership element for the crime of burglary); Adams v. State, 367 So. 2d 635, 639 (Fla. 2d DCA 1979) (sufficient circumstantial evidence to demonstrate the nature of a substance alleged to be illegally possessed). Thus, there simply is no basis for the district court's conclusion that circumstantial evidence was insufficient to establish one of the elements of the crime of unlawful compensation.

In State v. Gerren, the Fourth District Court of Appeal considered the very issue raised here, and correctly concluded that a violation of the unlawful compensation statute could be proven circumstantially. 605 So. 2d 515, 520-21 (Fla. 4th DCA 1992). The issue in Gerren was "whether the state must show an explicit agreement on the part of the public official or whether the jury could infer, from the totality of the circumstances, that there was an implicit understanding that the official would act or refrain from acting in a particular manner in exchange for certain benefits." Id. at 517.

The Gerren court expressly rejected the defendant's argument that proof of an explicit agreement was required, noting it would be illogical to allow a public official who accepted bribes to avoid prosecution simply because he never expressed out loud a promise to perform his public duties improperly. Id. at 519-20. Thus, the court held, the State should be permitted to prove quid pro quo "indirectly, through the use of circumstantial evidence." Id. at 520-21. See also Merckle v. State, 512 So. 2d 948, 949 (Fla. 2d DCA 1987) (circumstantial evidence was sufficient to exclude every reasonable hypothesis of innocence; convictions for bribery, unlawful compensation, extortion, and misbehavior in office affirmed); Garrett v. State, 508 So. 2d 427, 430 (Fla. 2d DCA 1987) (where State introduced circumstantial evidence to prove unlawful compensation, appellate court's role was to determine whether the jury might have reasonably concluded that the evidence presented to it excluded every reasonable hypothesis of innocence).

Another case in which circumstantial evidence was deemed sufficient to sustain a conviction for accepting authorized compensation is Bias v. State, 118 So. 2d 63 (Fla. 2d DCA 1960). There, a police officer stopped a vehicle with three occupants; based on the driver's failure to possess a driver's license and

for other reasons, the officer fined each of the occupants twenty-five dollars. Id. at 64. When the occupants advised the officer that together they had only twenty-five dollars, he accepted the money, told them to have the remaining fifty dollars the next time he saw them, then released them. Id. Acting in concert with the police chief, one of the occupants gave the officer another twenty-five dollars in marked currency as a settlement for the balance owed. Id. The district court viewed this as sufficient evidence to establish that the $25 in marked currency was a reward for releasing the occupants of the vehicle. Id.

Federal courts also recognize that circumstantial evidence is sufficient to prove the element of intent and the existence of quid pro quo agreements. Two federal bribery cases illustrate this point. In United States v. Jennings, 160 F.3d 1006 (4th Cir. 1997), the defendant housing contractor was convicted of bribing a local government official who administered a city housing program that received federal funds. The evidence showed that the defendant made a series of cash payments to the official, who approved many new housing jobs for the defendant's companies. Id. at 1017-18. Under the relevant federal bribery statute, proof of the defendant's corrupt intent was essential for a conviction. Id. at 1014. The court of

appeals made clear that direct evidence of the defendant's intent was unnecessary. "[T]he government is not required to prove an expressed intention (or agreement) to engage in a quid pro quo. Such an intent may be established by circumstantial evidence." Id. This view was repeated in United States v. Massey, 89 F.3d 1433, 1436-37 (11th Cir. 1996), where a lawyer was charged under the same federal bribery statute for paying a trial judge's meals in exchange for court appointments as a special public defender. The appeals court reiterated that direct evidence of a quid pro quo agreement was not necessary. Id. at 1439.

> [P]roof of such an agreement may rest upon inferences drawn from relevant and competent circumstantial evidence. To hold otherwise 'would allow [defendants] to escape liability . . . with winks and nods, even when the evidence as a whole proves that there has been a meeting of the minds to exchange official action for money.'

Id. (citations omitted).

By contrast, in the decision below, the district court disregarded the aforementioned and well-settled legal principles when it required the State to prove an explicit quid pro quo agreement existed. The district court focused on the fact there had been no "spoken" agreement between the parties and ignored the circumstantial evidence that Respondent requested, solicited, or accepted sex in lieu of issuing A.S. a ticket or

arresting her. The court thus rendered irrelevant the jury's determination of Respondent's intent through examination of his conduct and other evidence adduced at trial.

The district court relied on this Court's decision in State ex rel. Grady v. Coleman, 133 Fla. 400, 183 So. 25 (1938), to conclude that a spoken agreement between Respondent and A.S. was necessary. Such reliance is misplaced. Grady does not require a spoken agreement. The decision simply states there should be a meeting of the minds between the official demanding or exacting compensation and the party from whom it is exacted or accepted. 133 Fla. at 414-15, 183 So. at 31. The issue in Grady was the legal sufficiency of the information which charged the defendants with unlawful compensation and conspiracy to demand and exact unlawful compensation. In the course of examining the sufficiency of the conspiracy charge, the Court rhetorically asked about the unlawful compensation charge:

> is the exacting by the officer of compensation or extortion practiced by demanding the sum required? If the money is demanded and there is a meeting of the minds on the part of the officer who is to be compensated or rewarded by his exaction or acceptance of the reward other than that allowed by law, and the party from whom it is exacted or accepted, then the statues [] have been violated.

133 Fla. at 414-15, 183 So. at 31. This language does not imply that the agreement between the parties must be explicit or demonstrated by spoken words.

It is one thing to say that evidence of unlawful compensation exists if there is a meeting of the minds between the parties to an exchange. It is another to say that a meeting of the minds is required in order to have sufficient evidence of unlawful compensation. By analogy, a court can hold that an express agreement, established through direct evidence, is sufficient to establish an agreement for a conspiracy. But, as already noted, an express agreement is not required because it is not the only way a conspiracy agreement can be established. Thus, the critical sentence from Grady has been given a meaning by the district court which does not flow from the sentence in Grady itself.

II. A Meeting of the Minds is Not Required to Prove Unlawful Compensation

The district court opinion also requires that A.S. understand that the sexual act was in exchange for the decision not to charge her with any offense. While the circumstantial evidence adduced in the instant case clearly establishes this, the State submits, as an alternative argument, that a meeting of the minds is not a requisite element of the offense of unlawful

compensation under Section 838.016. It is easy to see that Respondent's corrupt intent would exist even if A.S. were unaware of it. That is, if a police officer admitted he pressured a victim into a sexual act and did so with the expectation he would release her without charging her with an offense, direct evidence of the officer's corrupt intent (the officer's admissions) would exist. Clearly, the victim's understanding of the officer's motivation would not be required. Regardless of what the victim understood, the officer still would have requested, solicited, or accepted an unauthorized benefit for the future non-performance of a legal duty. Or, if the victim were mentally incompetent and unable to comprehend the nature of the officer's request and intention, would not the officer still be guilty of the crime of unlawful compensation? Under the district court's analysis, the officer's conduct would not be a crime.

Courts have rejected the notion that a meeting of the minds is necessary to prove bribery. See Commonwealth v. Schauffler, 580 A.2d 314 (Pa. Super. 1990). In Schauffler, a lawyer who represented a client charged with driving under the influence of alcohol attempted to influence the arresting officer in the performance of his official duties. Id. at 317-18. The officer thought the lawyer's comment about having $1,000.00 to spread

around was an attempt to bribe him, so he informed the prosecuting authority. Id. Thereafter, the lawyer handed $1,000.00 cash to the officer and was immediately arrested. Id. Citing to Section 240.1 of the Model Penal Code, from which the state bribery statute was derived, the court explained:

> [I]t is sufficient if the actor believes that he has agreed to confer or agreed to accept a benefit for the proscribed purpose, regardless of whether the other party actually accepts the bargain in any contract sense. . . . The evils of bribery were fully manifested by the actor who *believes* that he is conferring a benefit in exchange for official action, no matter how the recipient views the transaction. . . . Each defendant should be judged by what he thought he was doing and what he meant to do, not by how his actions were received by the other party.

Id. (emphasis supplied). As a federal appeals court in another case succinctly articulated when affirming a defendant's conviction for bribery, "[t]he only intent at issue was [the defendant's]." United States v. Jennings, 160 F.3d 1006, 1016-17 (4th Cir. 1997). So long as the other evidence was sufficient to prove, beyond a reasonable doubt, that the defendant paid a public official with the corrupt intent to influence or reward him, the jury could find the defendant guilty of bribery despite the official's testimony that the cash payments were not bribes. Id. at 1017. Cf. Huitt v. Market Street Hotel Corp., CIV. Action No. 91-1488-MLB, 1993 U.S. Dist. LEXIS 9665, at *7-*10 (D. Kan. June 10, 1993) (in a quid pro quo

sexual harassment action, there is no requirement that the harasser and employee reach some type of agreement about the consequences of the employee's refusal to submit to sexual advances; "despite the contractual overtones of the term 'quid pro quo,' actionable sexual harassment of this variety requires no 'meeting of the minds.'")

The language employed by this Court in Grady, relied on by the district court below, does not compel the conclusion that a meeting of the minds must be shown to prevail on an unlawful compensation claim. Grady involved an agreement between three public officials and the president of the electric company. 133 Fla. at 403-405, 183 So. at 26-27. The charging document alleged the officials "did unlawfully and corruptly demand and exact" $250,000 from the president, in consideration for settling various disputes between the city and electric company. 133 Fla. at 404-405, 183 So. at 27. At the time, the unauthorized compensation statute[4] had been interpreted to mean

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[4] Section 7486, Compiled General Laws (1927), which provided in relevant part:

> It shall be unlawful for any officer, . . . , or any public appointee, . . ., to exact or accept any reward, compensation, or other remuneration other than those provided by law, from any person whatsoever for the performance, non-performance or violation of any law, rule or regulation that may be incumbent upon the said officer or appointee to administer, respect, perform, execute or to have

that a violation of the statute could occur only if remuneration were received by the official charged with the violation thereof or made a condition precedent to the performance or nonperformance of a legal duty. 133 Fla. at 413-14, 183 So. at 30-31 (citing State ex rel. Williams v. Coleman, 131 Fla. 872, 879, 180 So. 360, 363 (1938)). Given the facts alleged in Grady -- that a very large amount of money exchanged hands, and specific legal disputes were settled -- there clearly had to be an agreement between the parties; a quid pro quo of this magnitude could not have been achieved without the knowledge and consent of parties on both sides of the transaction. Under the specific facts of the case and the then-existing interpretation of the relevant statute, it was not inappropriate to discuss a meeting of the minds between the parties.

However, the present version of the unlawful compensation statute is broader than it was in the 1920's and 1930's. It prohibits not only accepting, but also requesting, soliciting, and agreeing to accept any unauthorized benefit. Section 838.016(1), Florida Statutes. If Respondent had merely requested or solicited sex from A.S. with the intention of

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executed.

State ex rel. Williams v. Coleman, 131 Fla. 872, 875, 180 So. 360, 363 (1938).

releasing her without arresting her for drunk driving, and no sexual act took place, under the present statute a violation would have occurred. That the sexual act did occur here is immaterial to the charges under the statute.

III. The Circumstantial Evidence Adduced at Trial was Legally Sufficient to Prove Unlawful Compensation

Even if this Court were to conclude that a meeting of the minds between the parties was necessary to satisfy Section 838.016, circumstantial evidence adduced at trial established this fact. In the early morning hours on the date in question, A.S., nineteen years old and under the legal drinking age, was driving under the influence of alcohol when Respondent pulled her over. She thought she was going to be arrested. She exited her car and stumbled, whereupon he remarked, "The party must have been good." A.S. gave him her driver's license, but he grabbed her wallet and looked through it. Respondent requested that A.S. follow him into the Burger King parking lot. They stood talking about personal matters, and Respondent was very friendly, smiling and touching A.S.'s shoulder. He was in full uniform, with his gun visible in his gun belt.

A.S. was scared and believed she had no option but to comply when Respondent stated, "You are going to follow me." The surveillance tapes from Burger King showed Respondent leading

the way as they drove to a deserted warehouse area about a block away. Once out of their cars, Respondent leaned A.S. against her car, pulled her panties down, mumbled something like “let me get that thing on,” and had vaginal intercourse with her. She did not tell him to stop because she was scared. Afterward, she felt something wet on the lower part of her stomach. As they put their clothes back on, Respondent smiled and said she “was lucky he didn’t give me a ticket.” Both cars were videotaped leaving the warehouse area approximately 26 minutes after they first drove into the warehouse area. A.S. drove home and passed out. Respondent’s semen was later found in her panties. Later, Respondent completed official paperwork for his shift but failed to record any contact whatsoever with A.S. Instead, he reported being on patrol during the time he was with A.S.

These facts were legally sufficient to establish a meeting of the minds between Respondent and A.S. When Respondent pulled her over, A.S. thought she would get in trouble for drunk driving. She did not receive a ticket, notwithstanding conduct which reasonably could have been expected to result in a ticket or arrest (underage drinking, driving under the influence). Respondent’s comment, about her being lucky she did not receive a ticket, occurred immediately after the sexual act. The latter statement, by virtue of its timing, clearly showed that

Respondent linked the sexual act and the absence of a ticket in his own mind. Finally, Respondent's failure to report the contact with A.S. suggested wrongful conduct.

The evidence also excludes every reasonable hypothesis of innocence. Respondent's theory was that he and A.S. did not have vaginal intercourse in the warehouse right after leaving the Burger King parking lot; instead, they had masturbatory sex in another location several hours later, after he had completed his work shift. The surveillance tapes, however, flatly contradicted his testimony that they went their separate ways after leaving the Burger King lot. The evidence constituted competent substantial evidence to support the jury findings of guilt as to unlawful compensation (as well as official misconduct).

The district court's decision has significant policy implications in unlawful compensation cases. It would be rare for a public official to explicitly agree to or demand a bribe in exchange for a promise to act in a certain manner. Under the district court's interpretation, a non-elected public official could receive funds or other benefits from interested persons as long as neither party explicitly stated that the payment is for certain official actions or inaction. This interpretation would totally emasculate Section 838.016, which is designed to prevent

"the oppressive misuse of the exceptional power with which the law invests the incumbent of an office." Callaway v. State, 112 Fla. 599, 602, 152 So. 429, 431 (1934) (discussing the goal of Section 7486, C.G.L. (1927), an early version of today's unlawful compensation statute).[5] Respectfully, the district court's interpretation defies logic and permits an official to avoid prosecution simply by refraining from saying out loud that which has been implicitly expressed.

Permitting the prosecution of a public servant on the basis of an implicit agreement would retain sufficient safeguards, as, at the conclusion of trial, the case would be subject to review, on motion for judgment of acquittal, or on appeal, in accordance with standards of review in circumstantial evidence cases – as the quid pro quo, being a state of mind, would have been established by circumstantial evidence. See generally, State v.

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[5] In Richards v. State, 144 Fla. 177, 183, 197 So. 772, 774 (1940), this Court said with respect to Section 7486, C.G.L (1927):

> [I]ts purpose was to impose a uniform standard of moral conduct on all public officials. Certainly nothing could be more desirable in public officers. Inequality of moral standards is one of the greatest obstacles to law enforcement in this country. . . . If permitted to traffic in the trust imposed on [the defendant-city commissioner] in the manner shown here, then all restraint is off and public office is no more a position of trust and confidence, but a sanctuary for the freebooter.

Alexander, 406 So. 2d 1192, 1194 (Fla. 4th DCA 1981); Rose v. State, 425 So. 2d 521 (Fla. 1982). Thus, in such circumstantial cases, the jury and courts would have to conclude that the evidence excludes every reasonable hypothesis of innocence. See Marable, 645 So. 2d at 443. See generally, State v. Law, 559 So. 2d 187 (Fla. 1989). However, legitimate inferences, based upon the evidence, could be drawn to find the existence of a quid pro quo agreement.

The State respectfully requests that this Court quash the decision below, approve State v. Gerren, 604 So. 2d 515 (Fla. 4th DCA 1992), and hold that the State may use circumstantial evidence to establish the quid pro quo necessary to prove a violation of the unlawful compensation statute.[6]

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[6] The State respectfully urges the Court to refrain from considering the second point Respondent raised below regarding alleged sentencing scoresheet error. The district court explicitly declined to consider the issue: "Because we are reversing the conviction on Count I, we need not reach Castillo's claim of error on the sentencing guidelines scoresheet." 835 So. 2d at 309. While this Court has the authority to entertain issues ancillary to the central issue raised herein, it is unnecessary to do so as the scoresheet claim has nothing to do with the unlawful compensation claim and resolution of the sentencing claim will not affect the outcome of the instant appeal. Trushin v. State, 425 So. 2d 1126, 1130 (Fla. 1983).

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Petitioner respectfully requests that this Honorable Court quash the decision of the Third District Court of Appeal below, approve State v. Gerren, 604 So. 2d 515 (Fla. 4th DCA 1992), and remand the case back to the district court to reinstate the jury verdict for unlawful compensation (Count I) and to decide the sentencing issues that were not resolved by the district court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Initial Brief on the Merits was furnished by U.S. Mail to Harvey J. Sepler, Assistant Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida 33125, on this ___ day of August, 2003.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief, submitted in Courier New 12-point font, complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. P.

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