

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-\_\_\_\_\_

STATE OF FLORIDA,

Petitioner,

vs.

FERNANDO CASTILLO,

Respondent.

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\* \*

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

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PETITIONER'S BRIEF ON JURISDICTION

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## INTRODUCTION

Petitioner, the 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 "A" refers to Petitioner's Appendix attached to this jurisdictional brief, which includes a conformed copy of the district court's opinion.<sup>1</sup>

Unless otherwise indicated, all emphasis has been supplied by Petitioner.

## STATEMENT OF THE CASE AND FACTS

Respondent FERNANDO CASTILLO, a Miami-Dade County police officer, was charged with unlawful compensation and official misconduct stemming from an encounter with nineteen-year old A.S. in the early morning hours of March 9, 2000. The State's theory regarding the unlawful compensation charge was that Castillo accepted sex in lieu of arresting A.S. or issuing her

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<sup>1</sup> Castillo v. State, 28 Fla. L. Weekly D15 (Fla. 3d DCA Dec. 26, 2002), reh'g denied (Jan. 29, 2003).

a ticket for driving while intoxicated. The official misconduct charge stemmed from Castillo's alleged attempt to cover up his sexual encounter with A.S. by intentionally falsifying official paperwork.

At trial, A.S. testified she was driving approximately 55 miles per hour in a 40 mph zone when she passed Castillo in his police car. He illuminated his overhead lights and, over the car's loudspeaker, ordered her to pull over and produce her driver's license. A.S. had been drinking heavily and had smoked a marijuana cigarette, and thought she was going to be arrested. She stopped in front of a Burger King restaurant. As she walked toward Castillo's car, she slipped and caught herself on her car, to which Castillo remarked, "the party must have been good." When she handed Castillo her license, he grabbed her wallet and began to look through it. The wallet contained a business card from a police officer, which she explained belonged to her boyfriend. Castillo was standing less than a foot away from A.S.

Castillo requested that A.S. follow him into the Burger King parking lot. Once there, they stood in the parking lot and talked. Castillo was very friendly, smiling and touching her shoulder. Castillo then told her to follow him in her car, which she did. He led her to a nearby deserted warehouse area

where he had vaginal intercourse with her. During the encounter, A.S. did not say anything to him because she was scared and did not know what to do. He then told her she was lucky he didn't give her a ticket. He gave her his beeper number and they both drove off. Castillo gave A.S. the impression that if she refused to have sex with him, he would either arrest her or ticket her for driving under the influence, but he did not mention anything along the lines of DUI, and she could not recall if the sex-in-lieu-of-DUI idea originated after the fact from her friend or her friend's father.

A.S. subsequently sought treatment at a rape center, and reported the incident to the FBI and Miami-Dade Police Department. Castillo's semen was found in A.S.'s panties. A condom in A.S.'s wallet prior to the sexual encounter was later reported missing.

Castillo testified at trial that A.S. waved him over and they stopped in the median of the road. Castillo exited his car, asked A.S. for her driver's license, reviewed it, then returned it to her. He asked if anything was wrong; she stated she was lost and needed directions to the expressway. Castillo gave directions, and was returning to his car when A.S. stopped him and asked if they could continue talking. They drove to a nearby Burger King restaurant, parked their cars, and spoke

about personal matters. Castillo detected the smell of alcohol on A.S.'s breath but did not notice her walking or speaking as if she were drunk. He said he had to return to work, gave her his beeper number, and arranged to meet her at a park at the end of his shift.

He then drove to a gas station to use the bathroom, purchased a drink, and worked on his activity worksheet. He returned to the police station for the remainder of his shift. When he left the station at the end of his shift, he met A.S. and had masturbatory sex with her. He never discussed DUI charges with her. During the encounter, he was in full uniform, and he wore a gun that was visible.

Castillo did not record the encounter with A.S. in his daily activity work report. He acknowledged that his daily log report mistakenly indicated he was on patrol during the time in which he was speaking with A.S. in the parking lot.

In the police department's taped telephone call between Castillo and A.S., she told him she thought she was pregnant. Respondent expressed disbelief because he had not ejaculated inside of her.

Several police officers testified at trial. Hernandez, with the Sexual Crimes Bureau, testified that A.S.'s former boyfriend called to say A.S. made up the allegations against Castillo.



Hernandez also testified that during his interrogation, Castillo denied stopping A.S.'s car, exiting his patrol car, or having sex with A.S. Morales, with the Professional Compliance Bureau, testified that the taped communications between Castillo and the police dispatcher reflected a traffic stop was conducted but there was a gap in the transmission. Bermudez, also with the Sexual Crimes Bureau, testified there was a discrepancy between Castillo's work sheet, the Burger King surveillance video, and the dispatcher records as to times Castillo conducted the vehicle stop. Both vehicles were videotaped driving to and from the warehouse area.

Castillo was convicted of both charges, unlawful compensation and official misconduct, and sentenced to 56.25 months imprisonment followed by one year of probation.

Castillo appealed to the Third District Court of Appeal, which affirmed the official misconduct conviction but reversed the unlawful compensation conviction. Appendix A. In reversing, the Court determined that a "meeting of the minds" between Castillo and A.S. was required in order to find a violation of the unlawful compensation statute. App. A at \*3. Because A.S. testified Castillo never said he would accept sex in lieu of issuing her a ticket or arresting her for DUI, the

Court concluded the State had failed to show any meeting of the minds.

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 the Court was timely invoked.

### SUMMARY OF THE ARGUMENT

The Third District's decision expressly and directly conflicts with State v. Gerren, 604 So. 2d 515 (Fla. 4th DCA 1992), which holds that the State is entitled to prove unlawful compensation by demonstrating the existence of a quid pro quo agreement indirectly, through the use of circumstantial evidence. The conflict with Gerren has significant and far-reaching policy implications. It would be rare for a public official to state out loud his intention to accept or demand a bribe. Under the standard applied in this case by the Third District, requiring proof of an explicit agreement, an official could avoid prosecution simply by refraining from saying out loud that which has been implicitly expressed. This Court should exercise its discretionary jurisdiction to resolve the inter-district conflict and thereby maintain uniformity of decisions throughout the State, and to provide guidance as to whether circumstantial evidence can be used to prove a violation of the unlawful compensation statute.

## ARGUMENT

THIS COURT SHOULD ACCEPT DISCRETIONARY JURISDICTION IN THIS CAUSE BECAUSE THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH STATE V. GERREN, 604 SO. 2D 515 (FLA. 4TH DCA 1992).

The district court's decision expressly and directly conflicts with State v. Gerren, 604 So. 2d 515 (Fla. 4th DCA 1992), based on the court's misapplication of a principle of law which produced a different result from that reached in Gerren, a case involving substantially the same controlling facts. Ford Motor Co. v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1981); Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975).

Both the case below and the Gerren case involved non-elected public officials who were charged with unlawful compensation for accepting benefits not authorized by law in exchange for the performance or non-performance of an official act or duty. In both cases, the public officials did not expressly promise to act or refrain from acting in a specific manner in exchange for certain benefits. In both cases, the State attempted to prove the charge by way of circumstantial evidence.

The Fourth District in Gerren correctly applied the legal principle that a violation of the unlawful compensation statute may be proven circumstantially. 604 So. 2d at 520-521. See also Merckle v. State, 512 So. 2d 948, 949 (Fla. 2d DCA 1987) (same). Mr. Gerren, executive director of an expressway

authority, was charged with accepting cash, materials, and services from employees of a trucking company in exchange for exercising his official authority on behalf of the trucking company. 604 So. 2d at 515-16. Trucking company employees never asked Mr. Gerren for favors, and he never promised to act in a certain way in his official capacity. Id. at 516. The trial court dismissed the unlawful compensation charge, reasoning that the State had to demonstrate an "explicit quid pro quo" but had failed to do so. Id. at 516.

On appeal, the issue for the district court 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 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. The court concluded a jury could infer Mr.

Gerren's acceptance of various gifts from the trucking company had influenced the performance of his official duties, i.e., his decision on various claims the company had before the expressway authority. Id. at 520. Accordingly, the order dismissing the unlawful compensation count was reversed and the case remanded. Id. at 515.

By contrast, in the decision below, the Third District misapplied the aforementioned legal principle and required the State to prove an explicit quid pro quo agreement existed. The district court ignored the circumstantial evidence that Castillo exacted or accepted sex in lieu of issuing A.S. a ticket or arresting her, and instead focused on the fact that there was no "spoken" understanding between the parties.

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 so long as he never explicitly promised to perform his public duties improperly. Respectfully, this interpretation defies logic and permits an official to avoid prosecution simply by refraining from saying out loud that which has been implicitly

expressed. This Court is respectfully requested to exercise its discretionary jurisdiction to resolve the conflict between the decision below and Gerren, and to provide guidance as to whether circumstantial evidence may be used to prove an unlawful compensation case.

**CONCLUSION**

Wherefore, based upon the foregoing argument and authorities cited herein, Petitioner respectfully requests that this Honorable Court accept discretionary jurisdiction in this cause.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction and attached Appendix was furnished by U.S. Mail to Harvey J. Sepler, Assistant Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14<sup>th</sup> Street, Miami, Florida 33125, on this \_\_\_ day of February, 2003.

\_\_\_\_\_  
**ANDREA D. ENGLAND**  
Assistant Attorney General

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing Petitioner's Brief on Jurisdiction, 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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Assistant Attorney General

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