IN THE SUPREME COURT OF FLORIDA

Case No. SC16-1888

CHARLES N. GANSON, JR.,
as Personal Representative of
the Estate of Molly Beyer,

Petitioner-Appellant,

v.

CITY OF MARATHON, FLORIDA, and the
STATE OF FLORIDA,

Respondents-Appellees.

On Appeal from the District Court of Appeal of the
State of Florida, Third District, Case No. 3D12-777

PETITIONER'S JURISDICTIONAL BRIEF

ANDREW M. TOBIN
Fla. Bar No. 184825
P.O. Box 620
Tavernier, FL 33070
Telephone: (305) 852-3388
Email: tobinlaw@terranova.net
tobinlaw2@gmail.com

MARK MILLER
Fla. Bar No. 0094961
CHRISTINA M. MARTIN
Fla. Bar No. 0100760
Pacific Legal Foundation
8645 N. Military Trail, Suite 511
Palm Beach Gardens, Florida 33410
Telephone: (561) 691-5000
Facsimile: (561) 691-5006
E-mail: mm@pacificlegal.org
cmm@pacificlegal.org

Counsel for Petitioner-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Miscellaneous

STATEMENT OF THE CASE AND FACTS

In 1970, Gordon and Molly Beyer purchased an undeveloped, approximately nine-acre island in Monroe County (County), known as Bamboo Key, for $70,000. The County zoned the island as "General Use" at the time, which allowed for one single-family home per acre. Sixteen years later, the County adopted a Comprehensive Land Use Plan (Plan) that downzoned the island to one unit of development per ten acres. The Beyers did not challenge that plan. In 1996, the County revised its Plan and reclassified the Beyers' property as a "bird rookery." The only permitted use of the property became "temporary primitive camping . . . in which no land clearing or other alteration" occurs. The Beyers challenged this classification in 1997 by submitting a beneficial use application where they properly asserted that the revised Plan effectively denied all economically reasonable use of their property.

Two years later, the City of Marathon (Marathon) incorporated and the Beyers' island became part of Marathon. Neither the County nor Marathon acted on the Beyers' application. Instead, in 2002, Marathon demanded the Beyers submit a new application. They did so. Finally, in 2005, a "Beneficial Use Special Master" finally heard the case. The evidence showed the Plan enacted by Marathon reduced the Beyers' property's value by at least 98.7% from its original purchase price to $900.

Despite concluding that the plan only allowed camping on the island, which did not amount to "reasonable economic value" to the Beyers "in light of their investment

in the property," the Special Master recommended denying them relief because Marathon had "compensated" them by awarding them 16 "ROGO" points. ROGO points—so-called because the names derives from the local "**R**ate **o**f **G**rowth **O**rdinance"—purportedly control growth by allocating "points" toward possible purchase of one of the limited number of development permits available.

In response, the Beyers brought an inverse condemnation action against Marathon. They alleged they had "been deprived of all or substantially all reasonable economic use of the subject property." [1] In the judgment on appeal, the trial court granted summary judgment based on laches and on the notion that the Beyers had no reasonable investment-backed expectations when they purchased the island.

The Third District rejected the conclusion that laches precluded the Beyers' claims. *See Beyer v. City of Marathon*, 197 So. 3d 563, 566-67 (Fla. 3d DCA 2013), *reh'g and reh'g en banc denied*, *Ganson v. City of Marathon*, No. 3D12-777, 2016 WL 5404070 (Sept. 14, 2016) (*Beyer II*). Nevertheless, the court affirmed. Despite the fact that Marathon did not argue the ROGO points amounted to adequate compensation in their motion for summary judgment, the Third DCA held that the Beyers had no reasonable investment-backed expectations for the property, and that the ROGO points award provided adequate compensation. *Id*. Thus, the court

[1] The court granted summary judgment for Marathon previously; that decision was reversed. *Beyer v. City of Marathon*, 37 So. 3d 932 (Fla. 3d DCA 2010) (*Beyer I*).

reasoned, it had sufficient grounds to affirm the trial court on the "right for the wrong reason" theory, also known in Florida courts as the "Tipsy Coachman" doctrine.[2] Both Molly and Gordon Beyer passed away during the long pendency of this case, thus Charles Ganson, Personal Representative for Molly Beyer's Estate (Ganson), brings that decision to this Court for review.

SUMMARY OF ARGUMENT

This Court should exercise its jurisdiction over this significant regulatory takings case because the Third District decision creates an express and direct conflict with established state case law on *Lucas* takings and expressly misconstrues the Federal and Florida Constitutions. The lower court holds that a local government can regulate private property to an extent equivalent to a classic physical taking, without just compensation, so long as the taking occurs "incrementally over a period of time." *Ganson*, 2016 WL 5404070 at 1 (Shepherd, J., dissenting from denial of rehearing en banc). That is not the law; this Court should accept jurisdiction to remedy this fundamental constitutional error. Additionally, the decision conflicts with state case law on the Tipsy Coachman doctrine. This issue standing alone provides grounds enough for the Court to accept jurisdiction; when taken together, all the grounds add up to a case demanding this Court's correction.

---

[2] H. Michael Muniz, *Tipping the Ole Tipsy Coachman Over in his Grave*, 81 Fla. B. J. 33 (Aug. 2007).

ARGUMENT

I

DISCRETIONARY JURISDICTION EXISTS BECAUSE THE DECISION BELOW CREATES AN EXPRESS AND DIRECT CONFLICT WITH FLORIDA CASE LAW REGARDING *LUCAS* TAKINGS

The Third District's decision conflicts with Florida case law regarding total takings—also known as *Lucas* Takings, after *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). The lower court held that because the Beyers did not present evidence that they had a plan to develop their property, they could not complain when Marathon's regulations took all economic use of their property from them without just compensation. *Beyer II*, 197 So. 3d 563, 566-67 (citing *Lucas*, 505 U.S. at 1019 n.8) (other citations omitted). That holding confuses *Lucas* takings with *Penn Central* takings, *Penn Central Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978), and confuses the law of *Penn Central* takings, for good measure.

In *Lucas*, the property owner purchased two residential beachfront lots later rendered undevelopable by South Carolina's "Beachfront Management Act." 505 U.S. at 1006. He contended that the law extinguished his property's value, entitling him to compensation, *id*. at 1009, just as the Beyers said about the Plan's effect on their property. The Court in Lucas stated a constitutional rule: "[W]hen the owner

of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good . . . he has suffered a taking." *Id*. at 1019.

The Special Master in this case concluded that "there is absolutely no allowable use of the property under the City of Marathon Land Development Regulations." *Ganson*, 2016 WL 5404070 at 5. That conclusion fits the *Lucas* rule and is no different than the property owners' fate in *Lucas*—the Beyers had no choice but to leave their property in its natural state so that Marathon could use the property as a bird rookery. *Cf. Lucas*, 505 U.S. at 1018 (explaining that a *Lucas* taking occurs when regulations "leave the owner of land without economically beneficial or productive options for its use—typically, as here, [require] land to be left substantially in its natural state"). For the Third District to conclude a total taking did not occur conflicts with *Lucas*. It also conflicts with *Lucas* progeny cases, including *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864 (Fla. 2001), where this Court held that a one-year temporary taking of an apartment complex amounted to a total taking, and *City of St. Petersburg v. Bowen*, 675 So. 2d 626 (Fla. 2d DCA 1996), where the Second District held that a municipal order closing a 15-unit apartment complex for one year as a statutory nuisance amounted to a *Lucas* taking entitling the property owner to compensation.

A comparison of this Court's decision in *Keshbro* to the instant case illustrates the conflict. In *Keshbro*, this Court explained that a total taking under *Lucas* occurred "where the regulation 'denies all economically beneficial or productive use of land.'"

Keshbro, 801 So. 2d at 869 (citing *Lucas*, 505 U.S. at 1015). Applying *Lucas*, this Court concluded that a one-year *temporary* closing of apartment buildings as nuisances amounted to a total (*Lucas*) taking, even though the taking was not permanent. Here, the facts are worse. The Special Master concluded that all economic use of the property was taken permanently. Based on *Lucas* and *Keshbro*, the Third District should have reversed, found a taking, and then remanded the case for a hearing on just compensation, which remains in dispute. This Court should accept jurisdiction to resolve the conflict.

II

THE COURT SHOULD EXERCISE ITS DISCRETION BECAUSE THIS CASE INVOLVES THE TAKING OF PROPERTY WITHOUT JUST COMPENSATION

Nearly one hundred years ago, Justice Oliver Wendell Holmes emphasized that a "strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Here, Marathon attempted a shorter cut toward improving the public condition—in this case, protecting the environment and wildlife—than the Constitution allows. It did so by destroying the Beyers' ability to economically use their property, without just compensation. Besides failing to apply *Lucas* and the Tipsy Coachman doctrine

correctly, the Third District also misconstrued and misapplied *Penn Central*, providing this Court another reason to exercise its jurisdiction.

In *Penn Central*, the Supreme Court of the United States identified several factors that "have served as the principal guidelines for resolving regulatory [Fifth Amendment] takings claims that do not fall within the . . . *Lucas* rules." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). As the Court explained in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), those factors include "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo*, 533 U.S. at 617. And contrary to the Third District's decision, "investment-backed expectations" do not control the outcome of a *Penn Central* case. In *Palazzolo*, Justice O'Connor explained as much when she noted that the lower court "erred [when it elevated] what it believed to be '[petitioner's] lack of reasonable investment-backed expectations' to 'dispositive' status. Investment-backed expectations . . . are not talismanic under *Penn Central*." *Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring).

In improperly elevating the "reasonable investment-backed expectation" factor in a *Penn Central* case, the Court also mistakenly concluded the Beyers needed to produce evidence of their investment-backed expectations at the time of purchase. Not true. One significant factor that shapes a property owner's expectations is "the

regulatory regime in place at the time the claimant acquires the property at issue." *Palazzolo*, 533 U.S. at 633 (O'Connor, concurring). When the Beyers bought the property, they could build one single-family home per acre, and that informs the understanding of what the Beyers' reasonable investment-backed expectations were in 1970. Further, the requirement that "investment-backed expectations" be reasonable requires an *objective*—not subjective—evaluation. *See Lucas*, 505 U.S. at 1035 ("expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved").

And finally, the Third District wrongly asserted that because the Beyers did assert their rights for years, they forfeited those rights. Not so. In *Palazzolo*, the Supreme Court held that even regulations passed before the acquisition of property did not necessarily have a detrimental impact on the reasonable investment-backed expectations of subsequent owners who take title with notice. *Palazzolo*, 533 U.S. at 627. Otherwise, the state could effectively "put an expiration date on the Takings Clause . . . . Future generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Id*. Thus, the Beyers certainly had a right to challenge the unreasonable limitations put on their use of their land *after* their acquisition of the property, and holding otherwise misconstrues the Constitution.

III

THE COURT SHOULD EXERCISE ITS DISCRETION BECAUSE THE DECISION CREATES AN EXPRESS AND DIRECT CONFLICT WITH FLORIDA CASE LAW REGARDING THE TIPSY COACHMAN DOCTRINE

Besides the reasons to take jurisdiction described above, the Court should accept jurisdiction to address another conflict created by the Third District when it explained it would have affirmed the lower court's decision as "right for the wrong reason" because the ROGO points the Special Master awarded the Beyers, combined with the camping rights, amounted to just compensation. *Beyer II*, 197 So. 3d at 566 n.6 ("We affirm, applying the 'tipsy coachman' doctrine, which permits a reviewing court to affirm a decision from a lower tribunal that reaches the right result for the wrong reasons so long as 'there is any basis which would support the judgment in the record.' *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644–45 (Fla.1999)."). The Third District relied upon *Dade County School Board* for its holding, but in doing so misapplied *Dade County Sch. Bd*.

In *Dade County Sch. Bd.*, this Court explained that an appellate court can affirm a lower court decision, even if the lower court's rationale was wrong, as long as the ultimate conclusion was correct. This is called being "right for the wrong reason," and is also known as the "Tipsy Coachman Doctrine." *Id*. But, *Dade County Sch. Bd.* does not allow for a summary judgment to be affirmed on grounds not presented to the

lower court. *See Samiian v. First Professionals Ins. Co., Inc.*, 180 So. 3d 190, 194 (Fla. 1st DCA 2016) ("Even summary judgment can be affirmed, if right for the wrong reason, *where the right reason was adequately presented to the trial court in support of the motion*.") (emphasis added and citations omitted).

Loranger v. State Dep't of Transp., 448 So. 2d 1036, 1039 (Fla. 4th DCA 1983), also explains that the "right for the wrong reason" maxim is not available in this context. There, the Fourth District explained that Florida Rule of Civil Procedure 1.510(c) requires the motion for summary judgment must "state with particularity the grounds upon which it is based and the substantial matters of law to be argued." *Loranger*, 448 So. 2d at 1039. The rule prevents surprise. *Id.* Here, Marathon did not argue before the trial court that ROGO points plus camping rights were adequate compensation. The Beyers did not even recognize it as an issue until the Third District first employed this dubious rationale to justify its decision. This is an example of the prejudicial surprise Rule 1.510, and *Dade County Sch. Bd.* and its progeny, forbid. This Court should accept jurisdiction to remedy an error courts will otherwise rely upon to affirm wrongly-decided summary judgments in the future.

CONCLUSION

For all these reasons, Ganson respectfully urges the Court to accept jurisdiction of this case.

DATED: October 31, 2016.

Respectfully submitted,

By: /s/Mark Miller
MARK MILLER
Fla. Bar No. 0094961
CHRISTINA M. MARTIN
Fla. Bar No. 0100760
Pacific Legal Foundation
8645 N. Military Trail, Suite 511
Palm Beach Gardens, Florida 33410
Telephone: (561) 691-5000
Facsimile: (561) 691-5006
E-mail: mm@pacificlegal.org
cmm@pacificlegal.org

ANDREW M. TOBIN
Fla. Bar No. 184825
P.O. Box 620
Tavernier, FL 33070
Telephone: (305) 852-3388
Email: tobinlaw@terranova.net
tobinlaw2@gmail.com

Counsel for Petitioner-Appellant

CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14 point and in compliance with Fla. R. App. P. 9.210(a)(2).

DATED: October 31, 2016.

/s/ Mark Miller
MARK MILLER
Florida Bar No. 0094961

CERTIFICATE OF SERVICE

I hereby certify that the foregoing PETITIONER'S JURISDICTIONAL BRIEF has been electronically filed with the Clerk of Court using the E-Filing Portal on this 31st day of October, 2016, which will send a notice of electronic filing to the following:

John Herin, Esq.
Jeffrey T. Kuntz, Esq.
GrayRobinson, P.A.
401 E. Las Olas Blvd., Suite 1850
Fort Lauderdale, FL 33301
john.herin@gray-robinson.com
jkuntz@gray-robinson.com
rita.boughey@gray-robinson.com

Jonathan A. Glogau, Esq.
Chief, Complex Litigation
Attorney Generals Office, PL-01
The Capitol
Tallahassee, FL 32399-1050
jon.glogau@myfloridalegal.com
chanda.johnson@myfloridalegal.org

/s/ Mark Miller
MARK MILLER
Florida Bar No. 0094961