IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 87,633
	)	
RICHARD ESPINOSA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

JAMES B. GIBSON
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STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with the statement of the case and facts set out in Petitioner's Initial Brief on the Merits.

SUMMARY OF ARGUMENT

Respondent did not waive the right to challenge his conviction for resisting arrest without violence because the District Court found Petitioner failed to present sufficient evidence such that, as a matter of law, a jury could return a verdict of guilty of resisting arrest without violence. Respondent did not argue that his conviction should be reversed on procedural due process grounds because he was convicted of an uncharged offense. Instead, Respondent argued there was a lack of substantive evidence to sustain a conviction as a matter of law. Respondent in no manner could have waived the right to challenge his conviction on that basis.

Resisting an officer without violence (section 843.02) may, in general, qualify as a permissive lesser included offense of resisting arrest with violence (section 843.01), and, in Respondent's case, did in fact so qualify. Petitioner's claim that by instructing the jury on the lesser offense, Petitioner was unfairly burdened with having to prove the additional element of the legality of the officer's conduct after the close of all evidence is unfounded. Petitioner alleged in the charging document that the officer acted lawfully and evidence going to that element was presented at trial.

Furthermore, such a scenario complained of by Petitioner could never occur when the trial court properly determines whether an instruction on a permissive lesser included offense is appropriate.

A trial court must charge the jury on a requested permissive lesser included offense if the accusatory pleading alleges all the elements of the lesser offense and there exist evidence to support an allegation that the defendant committed the requested lesser offense. If the elements of the requested lesser are not present in the allegations or if the proof presented at trial are such that a jury could not properly consider the requested lesser offense, the trial court must refuse to give the requested instruction.

ARGUMENT

RESPONDENT DID NOT WAIVE THE RIGHT TO CHALLENGE HIS CONVICTION BY REQUESTING AN INSTRUCTION ON RESISTING ARREST WITHOUT VIOLENCE WHEN RESPONDENT CHALLENGED SUFFICIENCY OF THE EVIDENCE; DISTRICT COURT'S DECISION SHOULD BE AFFIRMED

In addition to addressing the question certified to this Court by the Fifth District Court of Appeal, Petitioner argues for the first time that Respondent waived the right to challenge his conviction for resisting arrest without violence because he requested the trial court to instruct the jury on that offense as a lesser included offense of the crime charged of resisting arrest with violence. (Petitioner's Initial Brief on the Merits (IB) at 6) Respondent, therefore, first addresses Petitioner's argument that Respondent waived his right to challenge his conviction on appeal.

Whether or not this Court decides that resisting an officer without violence is a lesser included offense of resisting an office with violence, Respondent did not waive his right to challenge his conviction on appeal. The District Court ruled that Petitioner failed to meet its burden to prove that the officers arresting Respondent were engaged in the lawful performance of their duties. Espinosa v. State, 21 Fla.L.Weekly D600 (Fla. 5th D.C.A. March 8, 1996) Thus, the District Court found Petitioner failed to present sufficient evidence such that, as a matter of law, a jury could return a verdict of guilty of resisting arrest without violence. When every material element of an offense is not

proven, the evidence is insufficient to support conviction. Tibbs v. State, 397 So. 2d 1120,1124 (Fla. 1981) aff'd Tibbs v. Florida, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982) A finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt. Tibbs v. State at 1123. Petitioner argues that Respondent must stand forever convicted of the offense even though Petitioner failed to present sufficient evidence to prove each material element of the crime. Petitioner's argument is without merit.

Petitioner relies primarily on this Court's holding in Ray v. State, 403 So. 2d 956 (Fla. 1981) to support the view that Respondent waived his right to challenge his conviction. Ray differs significantly from Respondent's case and does not support Petitioner's argument. In Ray, the defendant was convicted of an uncharged crime that was determined on appeal not to constitute a lesser included offense. The defendant did not object to the trial court's decision to instruct the jury on the uncharged offense. On appeal, the defendant argued that, "convicting him of a crime not charged constitutes fundamental error which is per se reversible." Id. at 959. Clearly, the issue in Ray was whether the defendant could appeal his conviction based on the specific legal argument that the conviction could not stand because the crime was not charged. In other words, Ray addressed the defendant's claim that the trial court's instruction was a "procedural defect". Id. at 960. The issue in Ray concerned procedural due process and the right of a defendant to be given proper notice of the charges

against him.

Unlike Ray, Respondent is not arguing that his conviction must be reversed because he was not given proper notice of the charge. Respondent's appeal is rooted in the substantive evidence, or lack thereof, presented at trial to prove the offense beyond a reasonable doubt. Ray simply stands for the proposition that a defendant cannot affirmatively request an instruction on an uncharged offense and then, on appeal, argue his conviction should be reversed because the offense was uncharged. This is quite different from a defendant, like Respondent, challenging the sufficiency of the evidence of the uncharged offense. Clearly Respondent did not waive the right to challenge his conviction on this ground.

Petitioner's concern that to affirm the decision of the District Court would allow a defendant to intentionally inject error into the trial and then, if found guilty, have the conviction automatically reversed on appeal, is groundless. Again, Respondent is not arguing that his conviction should be reversed for the simple reason that he was convicted of an uncharged offense (i.e. that he was denied procedural due process). Respondent is attacking the insufficiency of the Petitioner's evidence. Needless to say it would be seemingly impossible for a defendant to "intentionally inject" error relating to the sufficiency of the evidence against him.

Petitioner complains that this Court should hold that Respondent waived his right to challenge his conviction because, by

Respondent asking for the instruction on resisting without violence at the close of all evidence, "the State [was] required to prove a completely new element after all the evidence [had] been presented." (IB 17) This, Petitioner claims, violates a prohibition against the "unfair and not legally permissible" "'gotcha' maneuver." (IB 17) What Petitioner fails to mention is the fact that Petitioner did in fact put forward to the jury evidence of the lawfulness of the officer's conduct and that this issue was explored by both parties. During Petitioner's direct examination of its first witness, Officer Hey, the arresting officer, Petitioner asked:

> Q. Can you tell the jury what led you to come in contact with Mr. Espinosa?
>
> A. I was attempting to arrest Mr. Espinosa.
>
> ...
>
> Q. And on September 20, 1994, were you doing your job?
>
> A. Yes, Ma'am, I was.
>
> Q. And <u>in the lawful execution of your duties?</u>
>
> A. <u>Yes, Ma'am.</u>

(T 20,35)(emph. added) This issue was then explored on cross-examination when Respondent's trial counsel brought out the fact that the person who Hey said gave Hey information establishing probable cause to arrest Respondent had been known by Hey not to tell the truth. (T 38-40) Petitioner further explored the issue of the lawfulness of Respondent's arrest when, during the direct examination of Deputy Stull, the Petitioner asked:

> Q. ...were you dispatched to assist Oakland police officers in making an arrest at [Respondent's residence]?
>
> A. Yes, I was.
>
> Q. Did you have occasion to meet with the officers prior to making the arrest?
>
> A. Yes, I did.
>
> Q. And did you all discuss the circumstances of that case?
>
> A. Yes. I met with the officers, and they, Sergeant Hey, I believe it was, told me that he had probable cause for, I believe it was an aggravated stalking or some other, some charge like that.

(T 88)(emph. added) In response, on cross-examination, Appellant's trial counsel inquired:

> Q. And as a matter of policy, you reviewed the information that [Officer Hey] had regarding probable cause?
>
> A. I didn't actually review his paperwork. He verbally explained to me what he had, that he had probable cause for the charge.
>
> Q. You listened to what he had to say, and you ascertained that indeed he had probable cause?
>
> A. Pretty much, yes.

(T 104) The record shows that Petitioner presented evidence relating to the legality of the officer's conduct and the issue was further fleshed out on cross-examination. Furthermore, Petitioner alleged in the charging document that the officer was acting "in the lawful execution of a legal duty, to wit: the arrest of defendant". (R 6) Petitioner cannot now complain it was denied the chance to present evidence on that issue when Petitioner plainly did affirmatively both allege the legality of the officer's conduct

and present evidence to the jury on the issue.

Furthermore, markedly absent from the trial record is an objection by Petitioner to Respondent's request for an instruction on resisting an officer without violence. (T 185-186) Unmentioned by Petitioner is the fact that Petitioner did not object to the instruction and, in fact, gained a tactical benefit from the instruction. If the jury felt Petitioner failed to prove Respondent offered or did violence to the officer, without the instruction on resisting without violence, the jury would have been forced to acquit Respondent. By acquiescing to Respondent's request for the resisting without violence instruction, Petitioner quite possibly obtained a conviction at a trial which otherwise would have resulted in an acquittal. As previously discussed, in view of the fact that Petitioner chose to introduce evidence of the lawfulness of the officer's conduct, (an element of resisting arrest without violence, but not an element of resisting arrest with violence), it appears Petitioner planned on, or at least, anticipated, a resisting without violence instruction. Otherwise, why would Petitioner present evidence of the legality of the arrest when legality of the officer's conduct was not an element of the charged offense?

Petitioner suggests this Court should eliminate the common law right of a person to non-violently resist unlawful police conduct. See Foreshaw v. State, 639 So. 2d 683 (Fla. 5th D.C.A. 1994)(Harris, C.J., concurring)(At common law, a citizen has the right to resist an illegal arrest.) Petitioner admits this right

is "well settled", but argues eliminating the right would, "advance[] the rule of law and protect[] the safety of both law enforcement officers and arrestees." (IB 15) Petitioner cites no authority in support of this proposition. Such a sweeping elimination of a right so deeply rooted in criminal law jurisprudence quite clearly is a purely legislative undertaking. Furthermore, making it a crime for a citizen to non-violently resist illegal police conduct in no manner advances the rule of law. Instead, it would advance and encourage illegal police conduct. Just as this country has adopted the exclusionary rule regarding illegally seized evidence to protect citizens from, and discourage, illegal police conduct, the right to non-violently resist illegal police conduct acts to dissuade police from engaging in illegal conduct.

A comparison of the two statutes reveals that, based purely upon the language of the statutes, resisting arrest without violence is a necessarily included lesser offense of resisting arrest with violence. See §§ 843.01, 843.02, Fla. Stat. (1995) Also plainly revealed in the statutory language is that each statute requires the Petitioner to prove that the officer involved was acting in the lawful execution of his or her duties. Both statutes have the identical language, "in the lawful execution of legal process or in the lawful execution of any legal duty". This phrase modifies the class of persons (law enforcement and other officers) the statute protects. Had the Legislature intended to protect officers regardless of whether or not the officers were

acting lawfully, then it would have not inserted the modifying phrase. Therefore, relying exclusively on the plain language of the statutes, the legality of the officer's conduct is an element of both sections 843.01 and 843.02.

Enter section 776.051(1), enacted in 1974, which reads, "A person is not justified in the use of force to resist an arrest by a law enforcement officer who is known, or reasonably appears to be a law enforcement officer." § 776.051(1) Fla. Stat. (1995) This statute has been judicially interpreted as eliminating only from section 843.01 the element requiring Petitioner to prove the lawfulness of the officer's conduct. White v. State, 618 So. 2d 354 (Fla. 1st D.C.A. 1989); Tice v. State, 569 So. 2d 1327 (Fla. 2d D.C.A. 1990); Ferral v. State, 544 So. 2d 336 (Fla. 1st D.C.A. 1989); Benjamin v. State, 462 So. 2d 110 (Fla. 5th D.C.A. 1985); Lee v. State, 368 So. 2d 395 (Fla. 3d D.C.A. 1979), cert. denied 378 So. 2d 349 (Fla. 1979) Because of the Legislature's enactment of section 776.051(1), 843.02 no longer can be a necessarily included lesser offense of section 843.01 because the elements of 843.02 are not subsumed by the elements of 843.01. See e.g. Nurse v. State, 658 So. 2d 1074 (Fla. 3d D.C.A. 1995) However, 843.02 still may qualify as a permissive lesser included offense of 843.01.

Permissive lesser included offenses are any offenses the statutory elements of which are entirely subsumed by the greater offense as the greater offense is specifically charged in the information or indictment, whether or not the lesser offense is

also charged and that is not a necessarily lesser included offense. See Nurse; State v. Weller, 590 So. 2d 923, 925-926 (Fla. 1991) As the court explained in Nurse, a permissive lesser included offense is:

> ...the same as a necessarily included offense except that it contains one or more statutory elements which the charged offense does not contain. Consequently, such an offense "may or may not be included in the offense charged, depending upon, (a) the accusatory pleading, and (b) the evidence at trial."[citing Brown v. State, 206 So. 2d at 377,383 (emph. in original)] If (a) the accusatory pleading alleges all the statutory elements of the lesser offense, Brown, and (b) the subject offense "is supported by the evidence," Fla. R.Crim.P. 3.510(a), aside from proof of the charged offense, so that there is, in effect, a rational basis in the evidence upon which the jury could conclude that the lesser offense, rather than the charged offense, was committed--the trial court must charge the jury on the lesser offense.[citing State v. Wimberly, 498 So. 2d 929 (Fla. 1986)] Moreover, the trial court is expressly precluded from instructing the jury on such an offense "as to which there is no evidence," Fla.R.Crim.P. 3.510(b), aside from proof of the charged offense.

Nurse at 1077.

For example, in Respondent's case, if the allegations in the information were such that the elements of section 843.02 were subsumed by the charged offense, and there existed based on the evidence at trial a rational basis to support an allegation that Respondent violated section 843.02 instead of 843.01 (analogous to a probable cause determination), then Respondent was entitled to an instruction on 843.02. An examination of Petitioner's charging document charging reveals that the elements of resisting arrest

without violence were indeed subsumed within the allegations. Petitioner alleged that Respondent did:

> ...unlawfully, willfully, and knowingly resist, obstruct , or oppose T. R. Hey, a law enforcement officer for the Oakland Police Department, in the lawful execution of a legal duty, to wit: the arrest of the defendant, by offering to do violence to the person of the said officer, by hitting, kicking, struggling and resisting the application of handcuffs.

(R 6)(emph. added) All the material elements of 843.02 are subsumed by the allegations in the information.

Secondly, based on the evidence at trial there existed a rational basis which supported an allegation that Respondent violated section 843.02 instead of 843.01. The testimony of Officer Hey and Deputy Stull that they believed they had probable cause to arrest Respondent provided the basis to support a bare allegation that the officers were acting lawfully and thus, that Respondent was guilty of violating section 843.02.

Because the allegations in the information were such that the elements of section 843.02 are subsumed by the charged offense, and because there existed a rational basis to support an allegation that Respondent violated section 843.02 instead of 843.01, Respondent was entitled to an instruction on 843.02 as a permissive lesser included offense. This comports with the previously mentioned district court cases that have treated 843.02 as a permissive lesser included offense of 843.01.

Petitioner argues that treating 843.02 as a permissive lesser of 843.01 can lead to an "unfair" scenario whereby Petitioner charges a defendant with resisting with violence and no evidence

going to the legality of the officer's conduct is presented at trial. After the close of all the evidence, the defendant requests and receives an instruction for resisting without violence. (IB at 17) Petitioner urges this type of scenario is unfair to Petitioner because Petitioner is presented a "new" element to prove (the legality of the officer's conduct) after the close of all evidence. (IB 17) (As previously discussed, this was not the situation in Respondent's case because Petitioner alleged in the information that the officer was acting in the lawful execution of his duties by arresting Respondent and because Petitioner did indeed present evidence at trial going toward that issue.)

Based on Petitioner's "unfair" scenario, Petitioner argues that this Court should hold either that 843.02 is not a permissive lesser included offense of 843.01, that the issue of the legality of the officer's conduct should be dropped altogether as an element of 843.02 and treated as an affirmative defense, or that a defendant be prohibited from challenging on appeal the issue of the legality of the officer's conduct if the defendant requests an instruction on 843.02 when only 843.01 was originally charged. None of these alternatives should be adopted, however, because the evil Petitioner seeks to prevent (Petitioner's "unfair" scenario) will NEVER occur when a trial court conducts a proper analysis in deciding whether to instruct the jury on 843.02, or any other offense, as a permissive lesser included offense.

A trial court must charge the jury on a requested permissive lesser included offense if the accusatory pleading alleges all the

elements of the lesser offense and there exist evidence to support an allegation that the defendant committed the requested lesser offense. Nurse at 1077. If the elements of the requested lesser are not present in the allegations or if the proof presented at trial are such that a jury could not properly consider the requested lesser offense, the trial court must refuse to give the requested instruction. See Id.

If, as in Petitioner's "unfair" scenario, there was no evidence presented at trial addressing the legality of the officer's conduct, then the trial court would be required to deny the request for the instruction on 843.02. There would never occur a situation where the trial court gives the requested instruction even though no evidence was presented regarding the issue of the legality of the officer's conduct. Similarly, if the information failed to allege all the elements of 843.02, the trial court would also have to deny the requested instruction. In summary, Petitioner's concern that treating 843.02 as a permissive lesser included offense of 843.01 can lead to an unfair burden on Petitioner is unfounded. This Court should not allow this unfounded concern to be the basis for any of Petitioner's proposed changes as to how trial courts treat the two resisting arrest statutes.

The District Court in its opinion expressed concern about whether or not 843.02 can be a permissive lesser included offense of 843.01. The court asked the question:

> But what happens when the trial court, at the request of the defense, gives a lesser included offense instruction informing the jury that it may convict the defendant for resisting without violence even though this additional essential element has not been proved?

Espinosa at D600. The answer is twofold: 1) If at trial no evidence was presented such that an allegation that the defendant committed the lesser offense could be supported (a probable cause-type standard), it would be error for the trial court to grant the defense's request for the lesser instruction. If the trial court gives the instruction anyway, the defendant's case must be reversed if he is convicted of the lesser offense since, if there is no evidence to support a bare allegation that the defendant was guilty of the lesser offense, then there could not possibly be enough evidence to support a conviction. As long as trial courts understand that a permissive lesser included offense instruction cannot be given unless enough evidence was presented such that there exist facts to support an allegation that the defendant committed the requested lesser offense and the elements of the lesser offense are alleged in the information or indictment, trial courts will prevent defendants from intentionally injecting error by requesting lesser offenses that do not meet these requirements. 2) If at trial enough evidence was presented such that there exist facts to support an allegation that the defendant committed the requested lesser offense, but not enough evidence for the jury to convict the defendant of the lesser offense as a matter of law, then, while the trial court acted properly in giving the lesser

instruction, the conviction is still subject to reversal for insufficient evidence.

Petitioner acknowledges the district court decisions that have held that 843.02 is a permissive lesser included offense of 843.01. (IB at 15-16); See White; Tice; Ferral; Benjamin; Lee. Despite the Fifth District Court of Appeal's expressed reservations, Respondent urges this Court to hold that 843.02 is a permissive lesser included offense of 843.01.

CONCLUSION

For the reasons stated above, Respondent requests this Honorable Court to answer the District Court's certified question in the affirmative and affirm the decision of the District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Mr. Richard Espinosa, 2337 Valley Drive, Apopka, FL 32704, on this 6th day of June, 1996.

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