IN THE SUPREME COURT OF FLORIDA

DAVID HARRIS,	)	
	)	
Petitioner / Appellee,	)	
	)	
vs.	)	CASE NO. SC02-219
	)	DCA CASE NO. 4D00-4197
STATE OF FLORIDA,	)	
	)	
Respondent / Appellant.	)	
	)	
	)	

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, David Harris, was the defendant in the trial court and the Appellant the district court of appeal. He will be referred to as Mr. Harris or "Petitioner" in this brief. Respondent was the prosecution in the trial court and the Appellee in the district court and will be referred to as "the State" or "Respondent" in this brief.

The following background information may be useful in understanding the record on appeal. Mr. Harris initially went to trial, was convicted, and appealed. The case was reversed by the Fourth District Court of Appeal in Harris v. State, 761 So. 2d 1186 (Fla. 4th DCA 2000)("Harris I")(appeals case no. 4D99-1829). The district court remanded the case to the trial court, and after the trial court resentenced Mr. Harris, he appealed again. The district court upheld the trial court in Harris v. State, 801 So. 2d 321 (Fla. 4th DCA 2001)("Harris II")(appeals case no. 4D00-4197).

The record on appeal is consecutively numbered. All references to the record will be by the following symbols:

"T" = Record on Appeal Transcript from Harris II (4D00-4197)

"R" = Record on Appeal Documents from Harris II (4D00-4197)

"S" = Supplemental Record on Appeal (from Harris II Motion to Correct Sentencing Error)

"TA" = Record on Appeal Transcript from Harris I (4D99-1829)

"RA" = Record on Appeal Documents from Harris I (4D99-1829)

STATEMENT OF THE CASE AND FACTS

Petitioner, David Harris, was charged with battery on a law enforcement officer, possession of cocaine with intent to sell, and possession of marijuana. R1-2; Harris v. State, 801 So. 2d 321, 322-23 (Fla. 4th DCA 2001)("Harris II"). The case proceeded to a jury trial at which the State presented evidence that Mr. Harris struck a police officer during an investigatory stop, that at the time he possessed cocaine and marijuana, and that he intended to sell the cocaine. TA118-244. Mr. Harris' defense was that he did not batter the police officer but was himself battered. TA130-31, 252-70, 305-06, 309-11, 314, 317. He presented testimony that he tried to run and was beaten in anger when the officers caught him. TA254, 256-64. Mr. Harris was found guilty of battery on a law enforcement officer, the lesser-included charge of possession of cocaine, and possession of marijuana. TA346; RA32-33, 92; R3; Harris II, 801 So. 2d at 322-23.

Before trial, Mr. Harris had moved to suppress evidence of the contraband. TA58-118; RA30-31. He lost this motion in the trial court, TA117-18, but on appeal, the district court reversed holding that the officer had lacked reasonable suspicion for the stop that led to the discovery of the contraband and resulted in the alleged battery on a law enforcement officer. Harris v. State, 761 So. 2d 1186 (Fla. 4th DCA 2000) "Harris I"). The district court summarized the facts leading up to the stop as follows:

> Late one night police officers were conducting surreptitious surveillance of an urban street corner where they suspected narcotics activity. They were hidden some 25-30 feet away behind a wooden fence and green foliage. One officer dispatched another to disperse a crowd boisterously conversing in the area. The people separated and left, and the officer who had dispersed them drove away. One of the men, defendant in this case, entered a nearby auto, did a U-turn, and drove back toward the corner. He halted his car near a building where the group had been gathered, briefly alighting to pick up a 3-inch, yellow-brown pill bottle. As he drove away, the secreted officer radioed other officers not far away, who then stopped him. A search of his vehicle turned up controlled substances.

Id. at 1187.

In reversing, the district court held:

> In our continuing refinement of what constitutes a reasonable search or seizure for Fourth Amendment purposes, we have not yet reached the point where the simple act of retrieving an object from a public street can constitute a founded suspicion of illegal narcotics activity. Thus, while we accept the trial judge's resolution of contested facts at the suppression hearing, we simply disagree with the legal conclusion that those facts as resolved in favor of the state make out a case for any kind of a stop or seizure.

Id. at 1188. It then issued a mandate ordering the trial court to hold proceedings consistent with its opinion. Id.

On remand, the State nolle prossed the two contraband counts. T2. However, it argued that the battery on a law enforcement officer should remain because Mr. Harris could not justifiably use force to protect himself even if the officers were

engaged in illegal conduct. T10; S6. Based on Taylor v. State, 740 So. 2d 89 (Fla. 1st DCA 1999), Mr. Harris argued that the conviction for battery on a law enforcement officer could not stand because this was an illegal stop and thus the officer was not engaged in the lawful execution of a legal duty. T11-13; S2-3, 55. Alternatively, Mr. Harris asked for a new trial on the count of battery on a law enforcement officer. T15; S2-3, 56. Despite Mr. Harris' argument, the trial court left the adjudication and sentence for battery on a law enforcement officer intact. T15-16; S53-545.

Mr. Harris appealed a second time, contending the trial court could sentence him for simple battery but not battery on a law enforcement officer because the battery occurred during an illegal stop. Harris II, 801 So. 2d at 323. He reasoned that section 784.07 of the Florida Statutes requires that the officer be engaged in the lawful performance of his or her duties at the time of the battery. Id. Thus, Mr. Harris argued, the State failed to prove an essential element of battery on a law enforcement officer. Id. Alternatively, he asserted that even if he could be found guilty of battery on a law enforcement officer, he was entitled to a new trial free of the illegally obtained contraband evidence. Id.

The district court rejected Mr. Harris' argument stating simply that "an illegal stop does not automatically preclude a conviction for battery on a law enforcement officer." Id. (citing Dominique v. State, 590 So. 2d 1059 (Fla. 4th DCA 1991)). As to his alternative argument that he was entitled to a new trial, the district court ruled that

some evidence of the illegal stop was necessary for context and was therefore inextricably intertwined with the battery on a law enforcement officer. Id. Moreover, although it agreed that the "extensive testimony regarding the drugs" and even "a narcotics expert testifying that the quantity was consistent with an intent to sell" was irrelevant and not inextricably intertwined, it determined this error was harmless. Id.

On January 4, 2002, the Fourth District issued its mandate.

Mr. Harris's filed his notice of discretionary review on January 16, 2002. On February 14, 2002, he filed his brief on discretionary jurisdiction along with a motion to accept as timely filed. This Court issued an order accepting it as timely filed on February 15, 2002. In his brief, Mr. Harris asked the Court to accept jurisdiction on the basis of conflict between the Fourth District's decision in Harris II and the decisions of the First and Fifth District Courts in Taylor, 740 So. 2d 89, and Nicolosi v. State, 783 So. 2d 1095 (Fla. 5th DCA 2001).

On September 24, 2002, this Court issued its order accepting jurisdiction, dispensing with oral argument, and setting a briefing schedule. This brief on the merits followed.

JURISDICTION

On September 24, 2002, this Honorable Court properly accepted jurisdiction over this cause.

Pursuant to Article V, Section 3(b)(3) of the Florida Constitution, this Court has the authority to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. See The Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988). The decision below of the Fourth District Court of Appeal, Harris v. State, 801 So. 2d 321 (Fla. 4th DCA 2001)("Harris II"), expressly and directly conflicts with the decisions of the First and Fifth District Courts of Appeal in Taylor v. State, 740 So. 2d 89 (Fla. 1st DCA 1999), and Nicolosi v. State, 783 So. 2d 1095 (Fla. 5th DCA 2001).[1] The Fourth District in Harris II held that Mr. Harris could properly be convicted of battery on a law enforcement officer even where the officer was in the performance of an ***un***lawful duty at the time of the battery. This conflicts with the decision of the First District in Taylor which held the defendant could not be

[1] Even though the decision below did not explicitly identify Taylor and Nicolosi as direct conflicts, the exercise of conflict jurisdiction is proper. "[D]iscussion, of the legal principles which the [district] court applied supplies a sufficient basis for a petition for conflict review. It is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in order to create an 'express' conflict under section 3(b)(3)." Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981).

convicted of battery on a law enforcement officer where the battery occurred when the officer was in the performance of an ***un***lawful duty. It also conflicts with the decision of the Fifth District in Nicolosi which held the defendant could not be convicted of battery on a law enforcement officer where the officer was acting lawfully but in the performance of ***no*** duty. Therefore, this Honorable Court has properly exercised its discretionary jurisdiction to review this case on the basis of express and direct conflict on the same question of law.

SUMMARY OF THE ARGUMENT

POINT I:

The trial court erred when it convicted and sentenced Mr. Harris for battery on a law enforcement officer for a battery that allegedly occurred during an illegal investigative stop. A conviction for battery on a law enforcement officer requires proof that the officer was engaged in the lawful performance of his or her duties when the battery was committed. Because the officer was not engaged in the lawful performance of his duties when the battery was allegedly committed, Mr. Harris could not be convicted of battery on a law enforcement officer but only of the lesser included charge of battery.

Further, the trial court erred when it concluded section 776.051(1), Florida Statutes, disqualified Mr. Harris from using force to resist the officer. Section 776.051(1) disqualifies persons from using force to resist ***arrest*** by law enforcement officers. However, it did not apply because the alleged battery occurred while the officer was still conducting his illegal investigation and before he attempted to arrest Mr. Harris.

POINT II:

Additionally, the trial court erred when it ruled that Mr. Harris was not entitled to a new trial on the charge of battery on a law enforcement officer even though the jury had heard extensive inadmissible evidence of the collateral crimes of possession of cocaine with the intent to sell and possession of marijuana. This evidence deprived

Mr. Harris of a fair trial and tainted his adjudication and sentence for battery on a law enforcement officer.

ARGUMENT

POINT I

THE TRIAL COURT INCORRECTLY RULED THAT PETITIONER COULD BE CONVICTED OF BATTERY ON A LAW ENFORCEMENT OFFICER WHERE THE EVIDENCE SHOWED THE OFFICER WAS NOT ENGAGED IN THE PERFORMANCE OF A LEGAL DUTY AT THE TIME OF THE ALLEGED BATTERY BUT WAS INSTEAD CONDUCTING AN ILLEGAL STOP.

The trial court violated the due process clauses of the state and federal constitutions when it convicted and sentenced Mr. Harris for battery on a law enforcement officer even though one of the elements of the offense was not proven as a matter of law. FLA. CONST. Art. I, § 9; U.S. CONST. amends. V and XIV; Griffin v. State, ("A conviction is fundamentally erroneous when the facts affirmatively proven by the State simply do not constitute the charged offense as a matter of law."); Troedel v. State, So. 2d (Fla. 1984)("[A] conviction imposed upon a crime totally unsupported by evidence constitutes fundamental error."). See e.g. Burrell v. State, 601 So. 2d 628 (Fla. 2d DCA 1992)(reversing conviction for organizing theft or fencing operation because State could not prove essential element of "no direct contact with the property" by defendant where state's evidence showed defendant had direct contact with property). This ruling by the trial court involves a question of law which should be reviewed *de novo*. Demps v. State, 761 So. 2d 302, 306 (Fla. 2000)("A trial court's ruling on a pure question of law is subject to *de novo* review.").

Before Mr. Harris could be convicted of battery on a law enforcement officer, the State was required to prove as an element of the offense, "[Victim] was engaged in the lawful performance of [his][her] duties when the battery was committed." See § 784.07(2), Fla. Stat., and Fla. Std. Jury Instructions, Battery on Law Enforcement Officer or Firefighter, F.S. 784.07(2)(b). Yet, the alleged battery in the instant case occurred while the officer was engaged in the ***un***lawful performance of his duties. R14-15; Harris v. State, 761 So. 2d 1186 (Fla. 4th DCA 2000)("Harris I"). The testimony below was that the officers stopped and detained Mr. Harris based on a hunch he was involved in some sort of illegal activity. TA67-70, 147-48, 161. The instant battery allegedly occurred when Mr. Harris attempted to flee from this illegal detention and was grabbed by the officer. TA176-77, 187-88, 209. However, the district court's opinion in Harris I established that the instant officers lacked even reasonable suspicion to stop Mr. Harris. R14-15. This became the law of the case. Florida Dept. of Transp. v. Juliano, 801 So. 2d 101, 106 (Fla. 2001)("Under the law of the case doctrine, a trial court is bound to follow prior rulings of the appellate court as long as the facts on which such decision are based continue to be the facts of the case."). Thus, the required element that the officer "was engaged in the lawful performance of his duties" was lacking. Because the officer was ***not*** engaged in the lawful execution of a legal duty, Mr. Harris could be guilty of no more than simple

battery based on the principles articulated in Taylor v. State, 740 So. 2d 89 (Fla. 1st DCA 1999), and Nicolosi v. State, 783 So. 2d 1095 (Fla. 5th DCA 2001).

The facts under review in Taylor included the following: A deputy was dispatched to Taylor's home to investigate a noise complaint. 740 So. 2d at 89. Taylor lowered the volume at the deputy's request. Id. The deputy asked for Taylor's name and identification, but Taylor did not answer. Id. at 89-90. He also refused to go outside to speak with the deputy. Id. at 90. At that point, the deputy entered Taylor's home. Id. When the deputy tried to take him by the arm, Taylor stood up and pushed him away. Id. The deputy pepper-sprayed him, and a struggle ensued. Id. Taylor was taken into custody and charged with battery on a law enforcement officer and resisting an officer with violence. Id.

In reversing Taylor's convictions for battery on a law enforcement officer and resisting an officer with violence, the First District reasoned that under sections 784.07(2) and 843.01, Florida Statutes, "[a] conviction for either offense requires proof that the officer was engaged in the performance of a lawful duty." Id. at 90. Although the State argued that section 776.051(1),[2] Florida Statutes, made Taylor's use of force unjustified, the court rejected this argument "because the statute is limited by its terms to a situation in which the defendant has used force to 'resist an ***arrest***.'"

[2] Section 776.051(1), Florida Statutes, provides that "[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."

Id. at 91 (emphasis supplied). The Taylor court concluded section 776.051(1) did not apply because the deputy "did not enter the defendant's home to arrest him." Id. In addition, the court declined to extend section 776.051 to unlawful detentions as well as unlawful arrests, stating, "[W]e do not think that section 776.051(1) can be extended to a situation in which an officer has entered someone's house without any arguable legal justification." Id.

In contrast to the First District in Taylor, the Fourth District below held that even though the battery occurred while the officer was ***not*** in the performance of a lawful duty -- he was in the midst of an ***illegal*** stop -- Mr. Harris could be convicted and sentenced for battery on a law enforcement officer. Further, unlike the Taylor court, the Fourth District allowed the conviction for battery on a law enforcement officer even though the battery occurred during an unlawful detention rather than an unlawful arrest. Implicitly, this reasoning was based on section 776.051(1), Florida Statutes, because the court below cited its opinion in Dominique v. State, 590 So. 2d 1059 (Fla. 4th DCA 1991), for the proposition that "an illegal stop does not automatically preclude a conviction for battery on a law enforcement officer." Harris II, 801 So. 2d at 323. In Dominique, the Fourth District had held that, based on section 776.051(1), the defendant was properly convicted of attempted battery on a law enforcement officer even though the battery occurred during an illegal stop. 590 So. 2d at 1060-61.

The reasoning of the Fourth District below and in Dominique overlooks the plain language of section 776.051(1) which provides, "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." (emphasis supplied). See supra Taylor, 740 So. 2d at 91. This language is clear and unambiguous. It disqualifies a person from using force to resist an ***arrest***; it does not disqualify a person from using force to resist arrests ***or investigative stops*** (or other actions) by law enforcement officers.[3] If the Legislature intended the provision to disqualify persons from using force to resist an arrest or investigation, it could have simply said so by providing, "A person is not justified in the use of force to resist an ***arrest or investigation*** by a law enforcement officer who is known, or reasonably appears, to be a law enforcement officer." Or, if the Legislature intended the provision to disqualify persons from using force to resist law enforcement officers generally, it could have simply omitted the words "an arrest by" so that it merely provided, "A person is not justified in the use of force to resist a law enforcement officer who is known, or reasonably appears, to

[3] Mr. Harris does not remotely suggest that a person is justified in using force to resist a law enforcement officer who is performing a duty other than making an arrest. He simply asserts that in those situations section 776.051(1) does not apply. Nonetheless, so long as an officer is acting lawfully (though not making an arrest), the provisions that prohibit resisting an officer with and without violence apply. §§ 843.01, 843.02, Fla. Stat. Where the officer is not acting lawfully, the provisions that prohibit the use of force by persons against ordinary citizens apply. See e.g. §§ 784.011 (assault), 784.021 (aggravated assault), 784.03 (battery), Fla. Stat.

be a law enforcement officer." However, the Legislature drafted section 776.051(1) with language that limited its application to the use of force to resist ***arrests***. The trial court and district court below were not free to extend the express terms of the statute. They erred to the extent they construed section 776.051(1) as disqualifying persons from using force to resist more than just arrests by law enforcement officers.

This Court explained the construction of criminal statutes in McLaughlin v. State, 721 So.2d 1170 (Fla. 1998):

> When construing a statutory provision, legislative intent is the polestar that guides our inquiry and thus
>
> > [w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.
>
> Holly v. Auld, 450 So. 2d 217, 219 (Fla.1984) (quoting A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 1144, 137 So. 157, 159 (1931)). Further, the courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.
>
> Holly, 450 So. 2d at 219 (emphasis omitted)(quoting American Bankers Life Assurance Co. v. Williams, 212 So.2d 777, 778 (Fla. 1st DCA 1968)).
>
> Where criminal statutes are concerned, the rules are even stricter: "[I]t is a well-established canon of construction that words in a penal statute must be strictly construed. Where words are susceptible of more than one meaning, they must be construed most favorably to the accused." State v. Camp, 596 So.2d 1055, 1056 (Fla.1992) (citation omitted). This principle is codified in Florida Statutes:

> 775.021 Rules of construction.--
> (1) The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.
> § 775.021, Fla. Stat. (1995).

Id. at 1172.

In McLaughlin, this Court applied these principles when construing section 784.07(1)(a), Florida Statutes. At issue was whether the defendant could be convicted of aggravated assault on a law enforcement officer where the victim was a federal officer but not a state officer. Id. The statute under review provided that "'Law enforcement officer' means any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof." Id. (quoting § 943.10, Fla. Stat., which is referenced by § 784.07(1)(a), Fla. Stat.). The McLaughlin Court found, "The meaning of these words cannot be plainer: A 'law enforcement officer' for section 784.07 purposes must be either a state or local officer." Id. at 1172-73. Therefore, the Court reasoned that "[a]lthough [the officers] performed a laudable service for the people of Miami and the State of Florida, they were not law enforcement officers within the orb of section 784.07."[4] Id. at 1173.

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[4] In a concurring opinion, Justice Overton suggested the correct remedy for this situation was for the Legislature to consider including federal law enforcement officers within the definition of "law enforcement officers" under the statute. 801 So. 2d at 1173.

Likewise, as noted above, supra pp. 14-15, the meaning of the words in section 776.051(1) could not be plainer. Section 776.051(1) only disqualifies persons from using force to resist arrests, not investigations or other actions, by law enforcement officers. Thus, because the alleged battery occurred during an illegal stop, not an arrest, this section did not apply to Mr. Harris. Based on the testimony presented at trial, the jury could have found that Mr. Harris did not batter the officer but only tried to run and was beaten in anger when the officers caught him. TA254, 256-64. This was not a lawful duty, thus, under at least one version of the evidence, Mr. Harris would not have been precluded from resisting the officer with force.

Even if the Court disagrees with Mr. Harris' construction of section 776.051(1), his argument does not rely on a particular construction of this provision. Rather, his argument centers on the principle that the State was required to prove every element of his offense before he could be convicted. This was so whether Mr. Harris' alleged commission of the battery was justified or not. Section 776.051(1) is irrelevant in determining whether the State has proven its case in chief. When the provision does apply, it only comes into play in excluding potential defenses that would otherwise justify the use of force.[5] Because the officer below was not engaged in the lawful

[5] For example, under a literal construction of 776.051(1) like that employed by the First District in Taylor, even where an officer is not in the lawful performance of a duty, if he or she "is known, or reasonably appears, to be a law enforcement officer," then a person is not justified in the use of force to resist an *arrest*. Under the extended construction of 776.051(1) implicitly employed by the Fourth District below, this

performance of his duties when the battery was committed, Mr. Harris could not be found guilty of the enhanced crime of battery on a law enforcement officer.

This principle is demonstrated by the decision of the Fifth District in Nicolosi, 783 So. 2d 1095, the second case with which the decision below is in conflict. The relevant facts in Nicolosi were described by the court as follows:

> Nicolosi was a college student who was turned away from the nightclub because of her failure to produce adequate identification for admission. Nicolosi's victim was a police officer in uniform who was working at an off-duty job at the nightclub. Among other things, the police officer was responsible for checking identification. Nicolosi repeatedly attempted, on at least ten occasions over a period of about one hour, to obtain admission to the nightclub in spite of the officer's decision to deny her admission. When she still refused to leave, the officer issued her a trespass warrant. She returned again, called the officer names and either slapped or hit him. She was promptly and appropriately arrested. No criminal activity or investigation of criminal activity on the part of Nicolosi prior to the battery was proven, nor was there proof of any other activities of an official police nature, as opposed to activities exclusively for the interest of the private employer.

783 So. 2d at 1096-97 (footnote omitted).

In reversing Nicolosi's conviction and sentence for battery on a law enforcement officer, the court reasoned:

> A conviction for battery on a law enforcement officer requires proof that the officer was "engaged in the performance of a lawful

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would be modified such that a person is not justified in the use of force to resist an *arrest or investigative stop*.

> duty" not just "on the job." A police officer can be engaged in a lawful duty when working an off-duty job, such as where the officer is assisting in the investigation of an alleged shoplifter, where the police officer is assisting other officers who are struggling to maintain custody of a man they had arrested, and where the officer is trying to apprehend a shoplifter. As the court in Robinson[6] aptly noted, an officer's off-duty status is "not a limitation on his right to exercise police authority in the presence of criminal activity." In this case, the State failed to prove that the victim was "engaged in a lawful duty" at the time of the battery.

Id. at 1096 (citations omitted).

Unlike the deputy in Taylor, the officer in Nicolosi was performing a ***lawful*** duty. It was not a police duty, however, it was lawful. In fact, it was much the same as what an officer would do when issuing and enforcing a trespass warning on behalf of any other property owner. Nonetheless, at the time, the officer was not performing a lawful police duty. Because the State failed to prove this element of the offense, Nicolosi could be guilty of no more than simple battery, not battery on a law enforcement officer.

As in Nicolosi, the State failed to prove the officer below was performing a lawful police duty. Though he was on-duty, the officer was not performing a lawful police duty. To the contrary, he was conducting an illegal stop, seizure, and search. Because the State failed to prove this element of battery on a law enforcement officer, Mr. Harris could be found guilty of no more than simple battery.

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[6] State v. Robinson, 379 So. 2d 712 (Fla. 5th DCA 1980).

In accordance with the holdings of Taylor and Nicolosi, because the officer below was not engaged in the lawful performance of his duties when the alleged battery was committed, Mr. Harris could not be found guilty of battery on a law enforcement officer. Mr. Harris's conviction and sentence for battery on a law enforcement officer should be reversed and discharged, and a conviction and sentence for simple battery imposed instead.

POINT II

THE TRIAL COURT INCORRECTLY RULED THAT PETITIONER WAS NOT ENTITLED TO A NEW TRIAL ON THE CHARGE OF BATTERY OF A LAW ENFORCEMENT OFFICER WHERE THE JURY HEARD INADMISSIBLE EVIDENCE THAT PETITIONER COMMITTED THE COLLATERAL CRIMES OF POSSESSING MARIJUANA AND POSSESSING COCAINE WITH THE INTENT TO SELL.

Even if this Court disagrees with the argument in Point I, Mr. Harris is entitled to a new trial free from the prejudicial, irrelevant, and unconstitutionally obtained evidence and testimony that he committed the collateral crimes of possession of marijuana and possession of cocaine with the intent to sell. This evidence impugned Mr. Harris's character as to a character trait which was not at issue by implying he was a drug user and seller, Holloway v. State, 705 So. 2d 646, 648 (Fla. 4th DCA 1998)(evidence implying appellant acted as a prostitute should have been excluded because it is irrelevant and could only impugn appellant's character), and was inadmissible evidence of other crimes. Scott v. State, 559 So. 2d 269, 273 (Fla. 4th DCA 1990)(where appellant was not tried for possession of marijuana or firearm, evidence of such should have been excluded as impermissible *Williams* Rule evidence). Moreover, unless and until Mr. Harris opened the door, this testimony was irrelevant to the charge of battery of a law enforcement officer and highly prejudicial. §§ 90.402, 90.403, Fla. Stat. As in Point I, this ruling by the trial court involves a question of law which should be reviewed *de novo*. See supra Demps v. State, 761

So. 2d 302, 306. Further, although this is not a basis for conflict jurisdiction, this is a proper issue for this Court to consider on appeal. Westerheide v. State, 2002 WL31319386 (Fla. Oct. 17, 2002) ("[O]nce an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case.").

The Fourth District Court of Appeal concluded that the introduction of collateral crimes evidence in Mr. Harris' trial was in part necessary and, in any event, harmless. This conclusion was wrong. The district court first reasoned that "some information about the stop was needed for context" to provide an " explanation of the officer's presence." Harris II, 801 So. 2d at 323. Thus, it found "testimony regarding the unlawful stop is inextricably intertwined with the evidence relevant to the battery on a law enforcement officer." Id. The court's reasoning is flawed. Based on the holding of Harris I, the law of the case was that Mr. Harris was illegally stopped. See supra Juliano, 801 So. 2d 101, 106. Thus, an explanation of the officer's presence should have indicated not only that the officer stopped Mr. Harris because he had a hunch he was involved in criminal activity, but also that stopping Mr. Harris because of this mere hunch was unlawful as a matter of law. Instead, in the trial below, the jurors were free to conclude that Mr. Harris was lawfully stopped for a legitimate police investigation. Surely, if some information about the stop was needed for context, that information should have been accurate and without the potential to mislead the jury to the detriment of the accused. Particularly, when that information

pertained directly to one of the elements of the offense: whether the officer was in the lawful performance of a legal duty. At most, the contextual information presented to the jury about the contraband might have included the officer's observations before the stop (possibly without identifying the object Mr. Harris allegedly retrieved, or by simply identifying it as a container instead of a pill bottle), but definitely not disclosing that there were illegal drugs in the pill bottle or in the car. More than that was not necessary to explain the officer's presence.

The district court also reasoned that even though the original trial contained extensive testimony regarding the drugs which was not relevant and was not inextricably intertwined, admission of this evidence was harmless "since the defendant does not contest that he hit the officer." Id. This is wrong for two reasons. First and foremost, Mr. Harris did contest hitting the officer. See e.g. TA130-31, 252-70, 305-06, 309-11, 314, 317. Secondly, this conclusion is based on the faulty premise that section 776.051(1) disqualified Mr. Harris from resisting the officer with force. However, by its plain language, section 776.051(1) only disqualified Mr. Harris from resisting an ***arrest*** with force. It did not disqualify him from resisting some other duty of the officer, other than an arrest, with force. See Taylor v. State, 740 So. 2d at 91. Based on the trial testimony, the jury could have found that Mr. Harris did not batter the officer but only tried to run and was beaten in anger when the officers caught him.

TA254, 256-64. Hence, under his version of the evidence, Mr. Harris would not have been precluded from resisting the officer with force.

Importantly, even if the collateral crime evidence was inextricably intertwined with the evidence concerning the battery on a law enforcement officer, this would not have allowed the State to make it into a feature of the trial. Wallace v. State, 742 So. 2d 529 (Fla. 1st DCA 1999)(granting new trial where evidence of collateral burglary was relevant but where prosecutor's questions and argument were such that burglary became feature of trial to the extent that appellant was deprived of his right to fair trial on charge of dealing in stolen property); State v. Davis, 290 So. 2d 30 (Fla. 1974)(reversing where *Williams* rule evidence became feature of trial). Certainly, the cocaine and marijuana evidence was a feature of the instant trial where Mr. Harris was actually tried for possession of cocaine with intent to sell and possession of marijuana in the same trial as the charge of battery on a law enforcement officer. Thus, these collateral crimes were featured prominently in the prosecutor's opening, TA126-29, closing, TA299-301, 319-22, 324-25, 327-28, voir dire, TA13-14, 24, questioning of witnesses, TA132-33, 144, 147-48, 165-66, 168, 173-76, 185-86, 207, 209, 216-18, and even choice of witnesses, TA194-204 (crime lab chemist), 215-43 (narcotics investigator who testified as expert on drug packaging and quantity), not to mention the verdict form, TA341, RA 32-33, jury instructions, TA330-36, 344, and information, TA4, 121-22. In addition, the verdict form, jury instructions, and

evidence were sent back into the jury room during their deliberations. TA342-44. Under these circumstances, even if the evidence had some relevance, it cannot be said that the prominent presentation of this illegally obtained evidence in Mr. Harris's trial was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). See Lee v. State, 531 So. 2d 133 (Fla. 1988) ("The erroneous admission of collateral crime evidence is subject to harmless error analysis as set forth in *DiGuilio*."). Therefore, the case should be remanded for a new trial free from the taint of this illegally obtained evidence.

CONCLUSION

Based on the lower courts' error in concluding that Mr. Harris could be convicted of battery of a law enforcement officer even where as a matter of law the State did not prove the officer was in the lawful performance of a legal duty, Mr. Harris respectfully asks this Honorable Court to accept jurisdiction over this cause and to reverse Mr. Harris' conviction and sentence. On remand, based on the reasoning in Point I, Mr. Harris should be resentenced to one year in jail with credit for one year time served for simple battery. Alternatively and preferably, based on the reasoning in both Points I and II, he should be acquitted of battery on a law enforcement officer and given a new trial for the offense of simple battery where any mention of the contraband is excluded and where the jury is instructed the officers were not engaged in the lawful performance of a legal duty when they stopped and detained Mr. Harris. Finally, the least appropriate alternative, based solely on the reasoning in Point II, is that Mr. Harris should be given a new trial for the offense of battery on a law enforcement officer where any mention of the contraband is excluded and where the jury is instructed the instant officers were not engaged in the lawful performance of a legal duty when they stopped and detained Mr. Harris.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to David M. Schultz, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 this 21st day of October, 2002.

Attorney for David Harris

CERTIFICATE OF FONT COMPLIANCE

Undersigned counsel hereby certifies that the instant brief has been prepared with 14- point Times New Roman type.

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