IN THE SUPREME COURT OF FLORIDA

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

PETITIONER'S AMENDED REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

AUTHORITIES CITED iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

JURISDICTION 2

SUMMARY OF THE ARGUMENT 2

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.** 3

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.** 10

CONCLUSION 14

CERTIFICATE OF SERVICE 14

CERTIFICATE OF FONT COMPLIANCE 15

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Allen v. State, 662 So. 2d 323 (Fla. 1995) 11

Bouchard v. State, 556 So. 2d 1215 (Fla. 2d DCA 1990) 11

Conley v. State, 620 So. 2d 180 (Fla. 1993) 11

Dominique v. State, 590 So. 2d 1059 (Fla. 4th DCA 1991) 5

Emerson Elec. Co. v. Garcia, 623 So. 2d 523 (Fla. 3d DCA 1993) 12

Fernandez v. State, 730 So. 2d 277 (Fla. 1999) 11

Fleming v. Albertson's, Inc., 535 So. 2d 682 (Fla. 1st DCA 1988) 12

McLaughlin v. State, 721 So.2d 1170 (Fla. 1998) 7

Nicolosi v. State, 783 So. 2d 1095 (Fla. 5th DCA 2001) 4

Pacifico v. State, 642 So. 2d 1178 (Fla. 1st DCA 1994) 11

Peterson v. Morton F. Plant Hosp. Ass'n, Inc., 656 So. 2d 501 (Fla. 2d DCA 1995) 12

State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) 13

State v. Espinosa, 686 So. 2d 1345
(Fla. 1996) 3

State v. Overstreet, 629 So. 2d 125
(Fla. 1993) 7

Taylor v. State, 740 So. 2d 89
(Fla. 1st DCA 1999) 4

Williams v. State, 117 So. 2d 473
(Fla. 1960) 11

UNITED STATES CONSTITUTION

Fourth Amendment 4
Fourteenth Amendment 4

FLORIDA CONSTITUTION

Article I, Section 12 4

FLORIDA STATUTES

Section 776.051(1) 3-5, 7-11
Section 776.051(2) 8-9
Section 776 7
Section 776.012 8
Section 776.031 8
Section 776.041 8
Section 776.05 8
Section 776.06 8
Section 776.07 8
Section 776.08 8
Section 776.085 8
Section 784.03 9
Section 784.07 9
Section 843.01 3

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 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)

"BM" = Brief on the Merits of Petitioner in the Supreme Court of Florida

"AB" = Answer Brief on the Merits of Respondent in the Supreme Court of Florida

STATEMENT OF THE CASE AND FACTS

Mr. Harris relies on the statement in his brief on the merits. BM2-5.

JURISDICTION

Mr. Harris relies on the statement concerning jurisdiction presented in his brief on the merits. BM6-7.

SUMMARY OF THE ARGUMENT

POINTS I AND II:

Mr. Harris relies on the summary in his brief on the merits. BM8-9.

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.

Mr. Harris, maintains the argument in his brief on the merits, BM10-20, and offers the following reply.

The State reframes this Point by asserting the only issue that needs to be addressed is whether section 776.051(1), Florida Statutes, "should be extended to illegal stops/detentions, because [its] effect [] is to eliminate the need for proof that the officer was engaged in the lawful performance of his or her duties." AB4. Mr. Harris does not agree that this is the effect of section 776.051(1). He maintains, as he has done all along, that the plain language of section 776.051(1) only operates to disqualify him from raising the ***defense*** of justifiable use of force to resist an unlawful arrest, not to obviate any ***elements of the State's case***.[1] See BM17-20.

[1]This Court held in State v. Espinosa, 686 So. 2d 1345, 1347 (Fla. 1996), that sections 776.051(1) and 843.01 should be read *in pari materia* to eliminate the requirement of proving a lawful arrest when the charge is resisting arrest with violence. Mr. Harris urges this Court to recede from this holding to the extent that it broadens the effect of section 776.051(1) beyond its plain language: "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. (em-

The State first attempts to distinguish Nicolosi v. State, 783 So. 2d 1095 (Fla. 5th DCA 2001), from the instant case by contending the Nicolosi court never addressed section 776.051(1). AB4-5. The State asserts that in Nicolosi "there was no proof of any activities of an official police nature by the law enforcement officer but instead activities which were exclusively for the interest of the private employer." AB4-5. The State reasons, "Therefore, the court never addressed [section 776.051(1)] because it is not triggered, under any circumstance, unless the law enforcement officer is performing duties in that capacity as a law enforcement officer (arrest or detention)." AB5. What the State overlooks is that, although the instant officer was "on-duty," he was not performing an activity of an official police nature. Instead, he was pulling over a car without reasonable suspicion. Harris I, 761 So. 2d at 1188. This was not an official police duty anymore than issuing a trespass warrant to a person on a public sidewalk was an official police duty in Nicolosi. 783 So.2d at 1097 & n.2. In fact, stopping a person without reasonable suspicion is a practice so reviled that the exclusionary rules of the state and federal constitutions apply to discourage officers from engaging in this sort of illegal conduct. FLA. CONST. Art. I, § 12; U.S. CONST. amends. IV and XIV.

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phasis supplied). Thus, by its plain language, this section only prevents a defendant from raising the defense that his use of force to resist an unlawful arrest was ***justified***.

The State next states that Taylor v. State, 740 So. 2d 89 (Fla. 1st DCA 1999), is inapplicable because the Taylor court never directly addressed the issue of whether section 776.051(1) can be extended to illegal stops or detentions. AB5. Mr. Harris disagrees with this characterization of Taylor. Taylor resisted when an officer entered his house and attempted to grab him by the arm to take him outside without reasonable suspicion. 740 So. 2d at 90. When Taylor resisted being physically removed from his house, he clearly resisted an illegal detention. The Taylor court specifically held that

> Section 776.051(1) does not apply in this case, however, because the statute is limited by its terms to a situation in which the defendant has used force to resist an "***arrest***."

Id. at 91 (emphasis supplied). The court then expressly declined to extend the application of section 776.051(1) to unlawful ***detentions***. Id. Thus, Taylor is applicable.

Next, the State argues that "courts should avoid construing a statute in a manner that produces an unreasonable or absurd result." AB6. The State cites Dominique v. State, 590 So. 2d 1059 (Fla. 4th DCA 1991), for its reasoning that "the use of force would be even less acceptable when a law enforcement officer has merely stopped an individual, since a stop involves less of an invasion of privacy than does an arrest." AB6. While this has a certain logical appeal, this reasoning renders meaningless the language chosen and used by the Legislature in section 776.051(1). Not only do stops involve less of an invasion of privacy than do arrests but so do consensual encounters,

execution of process, and countless other activities. Based on the State's reasoning, section 776.051(1) would disqualify persons from using force to resist officers engaged in any of these countless activities even though the Legislature specifically chose language which only disqualifies persons from using force to resist arrest.

In spite of the State's assertion, it is not absurd for the Legislature to have determined that the use of force to resist arrests is less acceptable than the use of force to resist other police activities including mere detentions. A lawful arrest is supported by probable cause which means a greater likelihood that the person committed a crime than a lawful stop which requires nothing more than reasonable suspicion to investigate further. An arrest, lawful or unlawful, triggers the judicial process during which an accused has safeguards including court-appointed counsel if the person cannot afford counsel. This means that unlawful arrests cannot simply be swept under the carpet. The Legislature may have reasonably determined that persons arrested ought to be required to avail themselves of this legal process. On the other hand, a mere detention does not trigger this legal process. A person whose rights have been violated by an illegal detention must proactively initiate any legal remedies they may have (such as filing a civil lawsuit or making an internal affairs complaint). Although a person unlawfully arrested may also pursue these remedies, even if they do not, they will still have counsel who will assist them in defending their criminal case and in bringing the illegal police conduct into the light of day. Thus, the Legislature may have reasonably

differentiated between disqualifying persons from using force to resist arrest as opposed to using force to resist other police activities including detentions.

In interpreting section 776.051(1), this Court should find that it means exactly what it says: "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." As Mr. Harris noted in his brief on the merits, if the Legislature wanted to disqualify persons from ever using force to resist an officer, then it could have easily omitted the words "an arrest by" from section 776.051(1); if it wanted to disqualify persons from using force to resist arrests and investigative stops, then it could have easily changed "arrest" to "arrest or investigation." See BM14. Instead, the Legislature used language which expressly disqualifies persons from resisting ***arrest***, no more, and no less.

Courts are not free to disregard the language employed by the Legislature in enacting a statute. See McLaughlin v. State, 721 So.2d 1170, 1172 (Fla. 1998). It is a well-settled principle of statutory interpretation that an unambiguous statute is not subject to judicial construction, no matter how wise it may seem to alter the plain language of the statute. State v. Overstreet, 629 So. 2d 125, 126 (Fla. 1993).

In addition, this Court should consider the fact that the Legislature placed section 776.051(1) in Chapter 776 which is entitled "Justifiable Use of Force." This chapter addresses the circumstances under which persons may use force in defense

of persons and property. The first two sections of the chapter, sections 776.012 and 776.031, outline when and how a person may use deadly and non-deadly force in defense of self, others, and property. Section 776.041 immediately follows these two sections and explains when a person who is an aggressor or who commits a forcible felony is disqualified from using force and when that person is no longer disqualified from using force. The next section, section 776.05, describes when and how an officer may use force to make an arrest. Immediately following is section 776.051 which in subsection (1) disqualifies persons from using force to resist an arrest by a known officer, whether lawful or unlawful, and in subsection (2) disqualifies officers and persons summoned for assistance from using force to knowingly make an unlawful arrest.[2] Section 776.07 then specifies when and how an officer may use force to prevent an escape. The remaining sections are sections 776.06 and 776.08 which define the terms "deadly force" and "forcible felony" and section 776.085 which details how a person may defend himself or herself in a civil suit for damages for an injury which was sustained by a participant during the commission of a forcible felony. This entire chapter concerns ***defenses*** based on the use of force. Thus, section 776.051(1) likewise should be interpreted as concerning the ***defense*** of using force to resist arrest. Moreover, if section 776.051(1) is to be read *in pari materia* with

[2] Section 776.051(2) provides, "A law enforcement officer, or any person whom the officer has summoned or directed to assist him or her, is not justified in the use of force if the arrest is unlawful and known by him or her to be unlawful."

sections 784.03 and 784.07, then it should not be read as eliminating the element of proving a lawful arrest because this construction renders section 776.051(2) ineffective. Rather, it should be read to eliminate the ***defense*** of justifiable use of force to resist an unlawful arrest. This preserves the apparent meaning of both subsections 776.051(1) and 776.051(2).

Based on these authorities and reasoning and on the argument presented in his brief on the merits, Mr. Harris should not have been found guilty of battery on a law enforcement officer. Mr. Harris's conviction and sentence for the enhanced crime of 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.

Mr. Harris, maintains the argument in his brief on the merits, BM-25, and offers the following reply.

The State contends that the collateral crimes evidence presented below was admissible as evidence which was "inextricably intertwined with the crime charged." AB7. However, this argument and the argument the State makes in Point I cannot both be correct. If the interpretation of section 776.051(1) urged by the State in Point I is correct, then the State did not need to prove the lawfulness of the investigative detention below.[3] In which case, the State did not need to prove and the jury did not need to hear anything regarding the events leading up to the detention. Further, Mr. Harris did not challenge the lawfulness of the detention at trial. Instead, his defense

[3] The standard instruction for battery on a law enforcement officer provides that the State must prove: (1) the defendant intentionally touched or struck the victim against his or her will or intentionally caused bodily harm to the officer; (2) the victim was a law enforcement officer; (3) the victim knew the victim was a law enforcement officer; and (4) the victim was engaged in the lawful performance of his or her duties when the battery was committed. See Fla. Std. Jury Instructions. Under the State's interpretation of section 776.051(1), element (4) becomes irrelevant where the victim was arresting or detaining the defendant when the battery was committed.

focused on challenging whether the alleged battery had even occurred. TA130-31, 252-70, 305-06, 309-11, 314, 317. Thus, evidence regarding the reason for the stop was largely if not entirely irrelevant. Cf. Conley v. State, 620 So. 2d 180 (Fla. 1993)(holding that contents of police dispatch are inadmissible even though such evidence may be common sense way to explain why officers were at particular place at particular time, their purpose in being there, and what they did as a result).

Next, the State perplexingly asserts that even if the collateral crimes evidence became a feature of the trial, the feature of the trial limitation only applies to Williams[4] rule evidence. AB8. This is simply not so. Although the case law frequently concerns Williams rule evidence which improperly became a feature of the trial, the principle applies just as strongly to improperly highlighting any sort of evidence which is collateral to the issue of guilt or innocence, see, e.g., Pacifico v. State, 642 So. 2d 1178 (Fla. 1st DCA 1994)(improper closing argument by prosecutor including name-calling, giving personal opinion, and referring to facts not in evidence became such feature of trial as to constitute fundamental error); Bouchard v. State, 556 So. 2d 1215 (Fla. 2d DCA 1990) (reversing where evidence of defendant's lack of remorse following accident was made feature of trial); Fernandez v. State, 730 So. 2d 277, 282 (Fla. 1999)(admission of blood stained police shirt was not error were it was relevant and was not made into feature of trial); Allen v. State, 662 So. 2d 323, 327 (Fla.

[4] Williams v. State, 117 So. 2d 473 (Fla. 1960).

1995)(admission of photograph of victim with grandchild on lap not error where otherwise admissible and not made into feature of trial), or collateral to the resolution of the ultimate issue in any trial. See, e.g., Peterson v. Morton F. Plant Hosp. Ass'n, Inc., 656 So. 2d 501 (Fla. 2d DCA 1995)(error where settlement of co-defendant became feature of trial); Emerson Elec. Co. v. Garcia, 623 So. 2d 523 (Fla. 3d DCA 1993)(error to allow improper questioning implying defendants were concealing damaging evidence to became feature of trial); Fleming v. Albertson's, Inc., 535 So. 2d 682 (Fla. 1st DCA 1988)(error to allow evidence of plaintiff's worker's compensation benefits to become feature of trial).

Lastly, the State argues that any collateral crimes evidence "which exceeded the parameters of being inextricably intertwined [] was harmless because appellant never contested that he hit the officer." AB8-9. This reasoning is fundamentally flawed. First, Mr. Harris did contest hitting the officer. See BM23-24 (citing TA130-31, 252-70, 305-06, 309-11, 314, 317). Second, Mr. Harris had ***no burden*** to present evidence contesting that he hit the officer. Therefore, unless Mr. Harris conceded hitting the officer, the fact that he presented no evidence contesting that he hit the officer would be irrelevant. Mr. Harris did not concede hitting the officer, TA1-393, and did present evidence contesting that he hit the officer. See BM23 (citing TA254, 256-64). Hence, the State has not carried its burden of showing that the erroneous

admission of collateral crimes evidence was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Based on these authorities and reasoning and on the argument presented in his brief on the merits, Mr. Harris's conviction and sentence for battery on a law enforcement officer should be reversed, and the case should be remanded for a new trial.

CONCLUSION

Wherefore for the reasons stated herein and in his brief on the merits, Mr. Harris respectfully asks this Honorable Court to accept jurisdiction over this cause, vacate his conviction and sentence for battery on a law enforcement officer, and remand for a new trial on the lesser charge of simple battery.

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, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, this 18th day of December, 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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