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 SUPPLEMENTAL INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, David Harris, was the defendant in the trial court and the Appellant in 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 use 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)
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"RA"	=	Record on Appeal Documents from Harris I (4D99-1829)

SUMMARY OF ARGUMENT

Under section 784.07(2)(b), "engaged in the lawful performance of a duty" means exactly what it says: a battery committed against a law enforcement officer can only be enhanced if it occurs while the officer is in the lawful performance of a duty, not just while "on duty," and certainly not while acting unlawfully. Including this phrase in the statute gives officers greater protection than other citizens so long as they are lawfully performing their duties. An officer who is acting unlawfully has no more protection under the criminal statutes than any other citizen: his or her assailant can be charged with battery but not battery on a law enforcement officer.

There are a number of policy reasons for this: the statute deters unlawful police conduct; the effect of the statute mirrors the exclusionary rule so officers need not learn another legal standard; unlawful police conduct more often elicits a violent response than lawful police conduct; requiring officers to be in the lawful performance of a duty limits the potential for abuse by law enforcement officers.

The determination of whether an officer is "engaged in the lawful performance of a duty" is a question of fact and of law. It amounts to a question of fact because the phrase describes an element that must be found beyond a reasonable doubt by the jury. On the other hand, the court makes a legal determination at the close of the State's case and close of evidence as to whether the State has presented sufficient evidence of this element as a matter of law. In this respect, it is a question of law.

SUPPLEMENTAL ISSUE

WHAT IS THE MEANING AND PURPOSE OF THE PHRASE "ENGAGED IN THE LAWFUL PERFORMANCE OF HIS OR HER DUTIES" WITHIN § 784.07(2)(b); AND IS THE DETERMINATION OF WHETHER AN OFFICER IS SO ENGAGED A QUESTION OF LAW OR FACT?

1. The phrase "engaged in the lawful performance of his or her duties" unambiguously means what it says.

Section 784.07(2)(b), Florida Statutes,[1] unambiguously requires as an element of the offense of battery on a law enforcement officer (or other specified officers) that the officer was in the lawful performance of his or her duties at the time of the offense. There is no basis to look any further than the plain language of the statute because the language is clear and unambiguous. McLaughlin v. State, 721 So. 2d 1170, 1172 (Fla. 1998). Moreover, to the degree, if any, that there is ambiguity, the rule of lenity dictates that the statute be construed in favor of the accused. Id.

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[1] (2) Whenever any person is charged with knowingly committing an assault or battery upon a law enforcement officer, a firefighter, an emergency medical care provider, a traffic accident investigation officer as described in s. 316.640, a traffic infraction enforcement officer as described in s. 316.640, a parking enforcement specialist as defined in s. 316.640, or a security officer employed by the board of trustees of a community college, while the officer, firefighter, emergency medical care provider, intake officer, traffic accident investigation officer, traffic infraction enforcement officer, parking enforcement specialist, public transit employee or agent, or security officer is engaged in the lawful performance of his or her duties, the offense for which the person is charged shall be reclassified as follows: . . .
(b) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

The language chosen by the legislature is very precise. Under the statute, a battery is enhanced if an officer is battered "while . . . engaged in the lawful performance of his or her duties." § 784.07(2)(b), Fla. Stat. The legislature could have simply provided, "while . . . engaged in the performance of his or her duties." Or, it could have stated, "while . . . engaged in the good faith performance of his or her duties." Or, the legislature might have said, "while . . . on duty." It did not. Instead, it drafted the statute in such a way that an offense is only enhanced if it occurs "while . . . an officer is in the lawful performance of his or her duties."

When section 784.07 was first enacted, see § 784.07, Fla. Stat. (Supp. 1976),[2] section 776.051 was already on the books. See § 776.051, Fla. Stat. (Supp. 1974).[3] Pursuant to section 776.051(1), persons arrested were already disqualified from "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." This section applied to disqualify persons from using force to resist both lawful and unlawful arrests. Miller v. State, 780 So. 2d 197 (Fla. 2d DCA 2001)(unlawful to resist arrest with violence even if arrest is illegal). The only time the disqualification did not apply was when the person arrested did not reasonably know that he or she was being arrested by a law enforcement officer. See e.g. Langston v. State, 789 So. 2d 1024 (Fla. 1st DCA 2001)

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[2] Enacted by Ch. 76-75, § 1, Laws of Fla.

[3] Enacted by Ch. 74-383, § 13, Laws of Fla.

(appellant entitled to self-defense instruction where there was evidence he did not know person arresting him was officer). Plainly, the legislature knew what language to use if this was the result it wanted. It could have replaced the "while" clause of section 784.07 with the same language used in section 776.051(1) to enhance an offense that is committed against an officer "who is known or reasonably appears, to be a law enforcement officer [or other specified officers]." Or, even simpler, it could have eliminated the "while" clause altogether and provided, "Whenever any person is charged with ***knowingly*** committing an assault or battery upon a law enforcement officer [or other specified officers], the offense shall be reclassified . . ." Although the legislature very obviously could have drafted section 784.07 in either manner, it chose not to do so.

Law enforcement officers are charged with knowing the constitution and laws and are required to act accordingly. See State v. Green, 688 So. 2d 301 (Fla. 1996) (exclusionary rule applied despite officer's good faith but erroneous reliance on facially invalid search warrant); D.F. v. State, 682 So. 2d 149 (Fla. 4th DCA 1996) (exclusionary rule applied where officer violated strip search statute notwithstanding officer's ignorance of law and good faith but erroneous reliance on supervisor's advice). A law enforcement officer who violates the constitution or state or federal law is not lawfully performing his or her duties. Evidence or statements obtained by an officer acting unlawfully are subject to the exclusionary rule. See supra. The purpose

of this rule is to deter police misconduct. United States v. Calandra, 414 U.S. 338, 347, 94 S.Ct. 613, 619-20, 38 L.Ed.2d 561 (1974)("the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures").

As with the exclusionary rule, one obvious purpose for requiring an officer to be "in the lawful performance of his or her duty" to receive the added protection of section 784.07(2)(b) is to deter unlawful police conduct (and to encourage lawful conduct). If an officer wants the benefit of this section, he or she must act lawfully. This seems a small price to ask of those charged with enforcing our laws.

Just as the exclusionary rule excludes evidence or statements obtained by an officer acting unlawfully, so too does section 784.07 exclude from enhancement those batteries committed while an officer is acting unlawfully. Thus, the language chosen by the legislature mirrors the effect of the exclusionary rule. See Art. I § 12, Fla. Const. Because section 784.07 mirrors the exclusionary rule, the statute does not place an added burden on law enforcement officers to learn yet another legal standard. By simply acting in the manner required by our constitution and laws, officers can be assured they will receive the added deterrence provided by the statute. Furthermore, because the statute mirrors a legal standard with which judges are well familiar and for which there is a well established body of case law, the statute does not burden trial and appellate courts with learning another legal standard. The simplicity of using the

same standard in both contexts is a sound policy reason for the legislature to require officers to be engaged in the lawful performance of their duties before gaining the benefit of the statute.

In addition to making the law less complicated for officers by mirroring the exclusionary rule, another policy reason for requiring officers to be engaged in the lawful performance of a duty is to minimize potentially violent police-citizen encounters. The legislature may have reasonably concluded that unlawful police conduct more often elicits a violent response than lawful police conduct.

Also, requiring officers to be in the lawful performance of a duty may limit the potential for abuse by law enforcement officers. An officer who uses excessive force (or fears that he or she has used excessive force) may be tempted to justify that use of force by accusing a defendant of battery on a law enforcement officer (or resisting an officer with violence). Often, the only witnesses to a charge of battery on a law enforcement officer are the officer and the accused, yet the consequences for this charge are extreme. The enhancement elevates the charge from a misdemeanor to a felony. Requiring proof that the officer was engaged in the lawful performance of a duty is a way to limit abuses.

Nor does requiring an officer to be in the lawful performance of a duty deny the deterrent effect of the criminal statutes to an officer who is assaulted or battered while acting unlawfully. Rather, the deterrent effect is the same as it is for any other citizen.

As with any other citizen, the officer's assailant can be prosecuted for assault or battery. §§ 784.011; 784.03, Fla. Stat. In Soverino v. State, 356 So. 2d 259, 271-72 (Fla. 1978), this Court explained:

> The statute reclassifies the offense only if the law enforcement officer or firefighter "is engaged in the lawful performance of his duties." Because the public welfare is protected by the performance of these duties, the legislature in its wisdom has chosen to accord greater protection to one who performs these indispensable public services. When an officer is not performing his official duties, he is no longer protecting the public welfare and, consequently, the statute yields him no greater protection than that accorded to members of the general public.

An officer who acts unlawfully is not protecting the public welfare. Moreover, an officer who acts unlawfully does a disservice to all officers and citizens. It is clearly reasonable for the legislature to deny an officer the added deterrence provided by section 784.07 while that officer is engaged in the unlawful performance of his or her duty, cf. Taylor v. State, 740 So. 2d 89 (Fla. 1st DCA 1999)(defendant could not be convicted of battery on law enforcement officer where officer acted unlawfully), or not in the performance of an official duty. Cf. Nicolosi v. State, 783 So. 2d 1095 (Fla. 5th DCA 2001) (defendant could be convicted of battery but not enhanced crime of battery on law enforcement officer where officer was acting lawfully but performing no law enforcement duty). While engaged in the unlawful performance of a duty, an officer should have no greater protection than any other citizen. If anything, the fact

that officers do not receive the enhanced protection of section 784.07 unless the officers are lawfully performing their duties should encourage officers to do exactly that.

2. The determination of whether an officer is "engaged in the lawful performance of his or her duties" is a question of fact and a question of law.

One of the elements of battery on a law enforcement officer is that the offense occurred "while the officer was engaged in the lawful performance of his or her duties." Fla. Std. Jury Instr. § 784.07(2)(b) (Crim.); Taylor, 740 So. 2d at 90-91; State v. Granner, 661 So. 2d 89 (Fla. 5th DCA 1995); see Hierro v. State, 608 So. 2d 912 (Fla. 3d DCA 1992)(reversible error in resisting without violence case where court essentially directed verdict by instructing jury "the arrest and/or a detention of the defendant constitutes a lawful execution of a legal duty"); Perry v. State, 28 Fla. L. Weekly D2545, D2546 & n.4 (Fla. 1st DCA Nov. 6, 2003)(same in resisting with violence case; discusses Taylor, supra). Because this is an element of the offense, this is a question of fact which must be found beyond a reasonable doubt by a jury. Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

In Apprendi, the United States Supreme Court held

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in Jones [v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)]. Other than the fact of a prior conviction, any fact that increases the penalty for

> a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S. at 252-253, 119 S.Ct. 1215 (opinion of Stevens, J.); see also id., at 253, 119 S.Ct. 1215 (opinion of Scalia, J.).

Id. at 2362-63, at 490 (footnote omitted). Pursuant to section 784.07(2)(b), the punishment for battery from a misdemeanor punishable by no more than a year in jail to a felony punishable by up to five years or more if permitted by the guidelines or other laws.[4] Clearly, the fact that a battery was committed "while an officer was engaged in the lawful performance of a duty" increases the penalty for battery beyond the prescribed statutory maximum. Therefore, in accordance with Apprendi, this is a fact that must be submitted to a jury and proven beyond a reasonable doubt. See supra. In this regard, this determination is a question of fact for the jury.

Nonetheless, whether the State has presented sufficient evidence of this element is also a question of law for the court to determine at the close of the State's case and at the close of evidence. The court must determine as a matter of law whether the State has presented sufficient evidence for the jury to conclude that the officer was

[4] In the case at bar, Mr. Harris was sentenced to ten years as a habitual felony offender. R3,7; T15-16; S53-54; RA90,96; TA389-91. See § 775.084, Fla. Stat.

"engaged in the lawful performance of his or her duties." See Rule 3.380(a), Fla. R. Crim. P. (outlining when trial court should enter judgment of acquittal); Morris v. State, 721 So. 2d 725, 727 (Fla.1998)(judge should grant judgment of acquittal where state fails to make prima facie case at close of state's case); Orme v. State, 677 So. 2d 258, 262 (Fla. 1996)(at close of evidence "A motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt."). Where the court determines as a matter of law that a police officer was not "engaged in the lawful performance of his or her duties" but was instead acting unlawfully, then a judgment of acquittal must be entered as to the enhanced charge of battery on a law enforcement officer, leaving no more than the charge of battery for the jury's consideration. Nicolosi, 783 So. 2d 1095; Taylor, 740 So. 2d 89. In this respect, the determination is a question of law.

CONCLUSION

Wherefore for the reasons stated herein and in his brief and reply 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, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 this 17th day of December, 2003.

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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