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 REPLY 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)

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

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

"SIB" = Supplemental Initial Brief of Petitioner

"SAB" = Supplemental Answer Brief of Respondent

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.

Mr. Harris maintains the argument in his supplemental initial brief, SIB3-9, and offers the following reply to Respondent's supplemental answer brief.

Mr. Harris agrees that the cases cited by Respondent on statutory construction apply to construing section 784.07(2)(b), Florida Statutes. See Capers v. State, 678 So. 2d 330, 332 (Fla. 1996)(plain meaning of statutory language revealed by "textual reading" of statute under review); State v. Harvey, 693 So. 2d 1009, 1011 (Fla. 4th DCA 1997)(application of plain meaning of statute not absurd; state's arguments more appropriately addressed to legislature); Mancini v. Personalized Air Conditioning & Heating, Inc., 702 So. 2d 1376 (Fla. 4th DCA 1997)(refusing to construe statute in limiting manner contrary to plain language); State v. Cohen, 696 So. 2d 435 (Fla. 4th DCA 1997)("When faced with an unambiguous statute, 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. This principle is not a rule of

grammar; it reflects the constitutional obligation of the judiciary to respect the separate powers of the legislature." (citations omitted; emphasis in original)).

Respondent contends that it is essential to differentiate between whether "an officer [is] engaged in legitimate official police activity or criminal investigation" and "whether an officer is legally searching or arresting." SAB4. This distinction is important according to Respondent because "whether an officer is legally searching or arresting" is "a question for the courts." SAB4. To the contrary, this is not just a question for the courts but is a question for law enforcement officers. It is one which officers confront in every citizen encounter, every stop, every arrest, every search, every entry onto private property, including mere citizen encounters on the street, routine traffic stops, investigative stops based on reasonable suspicion, arrests based on probable cause, arrests based on search warrants, and so forth. It is a question on which officers receive extensive and ongoing training. Moreover, it is a question which officers must be able to answer if we are to live in a society that reflects the core values of our state and federal constitutions.

Respondent cites Ivester v. State, 398 So. 2d 926 (Fla. 3d DCA 1981), and Rosenberg v. State, 264 So. 2d 68 (Fla. 1972), for the notion that the proper forum in which to deal with an unlawful arrest is a court of law rather than by self-help forms of resistance. SAB4-5. It argues that the state has a legitimate public policy interest in discouraging citizens from using force against its law enforcement officers. SAB5-6.

Mr. Harris does not dispute this. It is codified in section 776.051(1), Florida Statutes, which disqualifies persons from using force to resist arrests whether lawful or unlawful. However, this is tangential to the primary issue before the Court. The issue before this Court does not simply concern Mr. Harris' privilege to resist an unlawful arrest. Rather, it concerns the "engaged in the lawful performance of his or her duties" element the State must prove before simple battery may be enhanced to battery on a law enforcement officer. Whether Mr. Harris ought to have dealt with his unlawful detention in a court of law is an entirely separate question from whether the instant officer was engaged in the lawful performance of his duties at the time Mr. Harris allegedly struck him.

Respondent asserts that "[t]his Court must evaluate the meaning of the term lawful." SAB5. It cites Webster's Revised Unabridged Dictionary for the definition of "lawful" as meaning "(1) Conformable to law; allowed by law; legitimate; competent; (2) Constituted or authorized by law; rightful; as, the lawful owner of lands."[1] SAB5 n.1. Respondent then turns this definition on its head by asserting that "with respect to Florida Statutes 784.07(2)(b), the legislature clearly meant that an officer was legitimately acting in his or her official capacity when conducting a criminal investigation."

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[1]Webster's lists as synonyms of "lawful": "Legal; constitutional; allowable; regular; rightful." See WEBSTER'S REVISED UNABRIDGED DICTIONARY (1913)(available on line at http://humanities.uchicago.edu/orgs/ARTFL).

The State's argument defies all reason. "Conducting a criminal investigation" whether conducted lawfully or unlawfully is not the equivalent of "legitimately acting in his or her official capacity." More to the point, it is not the equivalent of "engaging in the lawful performance of his or her duties." The State's argument essentially asks for a directed verdict on this element in every case where a battery allegedly occurs during a criminal investigation. Furthermore, under the State's reasoning a government official who acts in violation of the state and federal constitutions would nonetheless be "engaged in the lawful performance of his or her duties." Government officials including law enforcement officers who violate the constitution are ***not*** engaged in the ***lawful*** performance of their duties. To conclude otherwise would require construing the term "lawful" as not synonymous with "constitutional"[2] and the term "law" as not encompassing the state and federal "constitutions."[3] This is nonsense.

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[2]See supra 4 n.1.

[3]Respondent cited Webster's for the proposition that "lawful" is defined as "Conformable to law; allowed by law; . . . Constituted or authorized by law. . . ." See supra 4; SAB5 n.1. The term "law" encompasses the state and federal constitutions. See WEBSTER'S REVISED UNABRIDGED DICTIONARY (1913)(defining ***"law"*** in the context of human government as "(a) An organic rule, as a constitution or charter, establishing and defining the conditions of the existence of a state or other organized community. (b) Any edict, decree, order, ordinance, statute, resolution, judicial, decision, usage, etc., or recognized, and enforced, by the controlling authority.") (defining ***"constitution"*** as "The fundamental, organic law or principles of government of men, embodied in written documents, or implied in the institutions and usages of the country or society; also, a written instrument embodying such organic law, and laying down fundamental rules and principles for the conduct of affairs."). Yet, Respondent somehow urges a construction of the term "lawful" that would not

Respondent cites several federal cases in support of the proposition that under federal law "officers engaged in good faith and colorable performance of their duty may not be forcibly resisted, even if the resistor turns out to be correct that the resisted actions should not in fact have been taken." SAB6. However, those cases involved Title 18 U.S.C. § 111, a statute with different language than that used by the Florida Legislature in section 784.07(2)(b), Florida Statutes. See United States v. Heliczer, 373 F.2d 241, 243 n.1 (2d Cir. 1967)(quoting pertinent portion of 18 U.S.C. § 111); United States v. Martinez, 465 F.2d 79, 81 (2d Cir. 1972)(noting that defendant was charged with violation of 18 U.S.C. § 111); see also United States v. Ferrone, 438 F.2d 381 (3d Cir.), cert. denied, 402 U.S. 1008, 91 S.Ct. 2188, 29 L.Ed.2d 430 (1971)(cited by Respondent at SAB7). Title 18 U.S.C. § 111 defines the offense of "assaulting, resisting, or impeding certain officers or employees" as occurring when a person

> forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties . . . .

In contrast to this federal statute, section 784.07(2)(b), requires more than just performance, it requires ***lawful*** performance, of the law enforcement officer's duties before the crime of simple battery can be enhanced to battery on a law enforcement officer.

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encompass "conformable to the constitution; allowed by the constitution; or constituted or authorized by the constitution."

The term "lawful" in the Florida statute immediately precedes and modifies the officer's ***performance*** of his or her duties as opposed to simply denominating that the officer was within the scope of his employment. Thus, the cases cited by Respondent are not on point.

Respondent also cites several Arizona cases in support of its position. SAB6-7. However, those cases are also not on point. In State v. Lockner, 20 Ariz. App. 367, 513 P.2d 374 (Ariz. Ct. App. 1973), the court found the arrest under review to be lawful so it did not need to consider whether one could resist an unlawful arrest. 20 Ariz. App. at 371, 513 P.2d at 378. Nonetheless, the court noted that under Arizona law persons apparently had a right to resist unlawful arrests. Id. In State v. Hatton, 116 Ariz. 142, 568 P.2d 1040 (Ariz. 1977), the pertinent part of the statute under review defined the crime of obstructing justice as occurring when "A person . . . wilfully resists, delays or obstructs a public officer in the discharge or attempt to discharge any duty of his office . . . ." A.R.S. § 13-541(A); see 116 Ariz. at 148, 568 P.2d at 1046. As with Title 18 U.S.C. § 111, the relevant portion of the Arizona statute did not require the officer to be engaged in the ***lawful*** discharge of any duty of his office. Thus, the Arizona statute, like the federal statute, had no added language directing that the officer be engaged in the ***lawful*** performance of his or her duties before a person could be convicted.

Like the federal and Arizona cases cited by Respondent, the Rhode Island case cited by Respondent, SAB7, is not on point because the relevant statute lacked the "***lawful*** performance" component contained in section 784.07(2)(b). See State v. Ramsdell, 285 A.2d 399 (R.I. 1971)(reviewing law which defined offense of "assault of police officers and other officials" as occurring "while the officer or official is engaged in the performance of his or her duty").

Respondent next cites Lamb v. State, 786 A.2d 783 (Md. Ct. Spec. App. 2001), support of its position. In Lamb, the court reviewed a conviction for Maryland's common law crime of "intentionally and knowingly obstructing and hindering a police officer in the performance of his or her duties." Id. at 791. Lamb had been convicted for interfering with an officer's unlawful arrest of two juveniles. Id. at 785-91. In reversing and remanding for a new trial, the Lamb court adopted an objective "good faith" standard for evaluating whether the officer was in the lawful performance of his or her duties. Id. at 795 (measuring officer's good faith belief by objective standard articulated in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)). Unlike the Maryland court which was construing a common law crime, this Court is construing a criminal statute. Thus, it is not free to reconstruct the statute contrary to the plain language used by the legislature. McLaughlin v. State, 721 So. 2d 1170, 1172 (Fla. 1998)(judicial modification of unambiguous statute is "abrogation of legislative power"). Moreover, because section 784.07(2)(b) is a criminal statute

any ambiguity must be strictly construed most favorably to the accused. Id.; see SIB3.

Lamb is nonetheless instructive in the event the Court determines to construe the "lawful performance" language of section 784.07(2)(b) as meaning "good faith performance." The Maryland court remanded for a new trial because Lamb had been limited in challenging the "lawful performance of his or her duties" element of the offense at trial. Id. at 797. It held that in a new trial Lamb would be permitted to elicit evidence in support of his claim that the officer was not engaged in the lawful performance of his duties at the time of the incident. Id. The court held Lamb should have been allowed to inquire into the officer's training and knowledge of the law in question and any ulterior motive the officer may have had. Id. at 797, 802-03. Unlike Lamb, there is no need to remand for a new trial because the lawfulness of the instant officer's performance of his duties was already assessed by the Fourth District Court of Appeal. It became the law of the case following Harris v. State, 761 So. 2d 1168 (Fla. 4th DCA 2000)(Harris I) (ordering suppression in accordance with exclusionary rule thereby finding that officers were not in lawful performance of duty).

As for the Florida district court cases cited by Respondent, Lowery v. State, 356 So. 2d 1325 (Fla. 4th DCA 1978); Dominique v. State, 590 So. 2d 1059 (Fla. 4th DCA 1991); Jones v. State, 570 So. 2d 470 (Fla. 5th DCA 1990); Rosenberg v. State, 264 So. 2d 68 (Fla. 4th DCA 1972); State v. Gilchrist, 458 So. 2d 1200 (Fla. 5th DCA

1984); State v. Barnard, 405 So. 2d 210 (Fla. 5th DCA 1981); Meeks v. State, 369 So. 2d 109 (Fla. 1st DCA 1979); K.G. v. State, 338 So. 2d 72 (Fla. 3d DCA 1976), see SAB8-9, all of them collapse and confuse the defendant's lack of a ***privilege*** to resist an illegal arrest with the State's burden of proving every ***element*** of the offense including that the law enforcement officer was "engaged in the lawful performance of his or her duties." Not one of them considers that the defendant's ***privilege*** is separate and distinct from the State's burden to prove every ***element*** of the offense.

Citing Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), Respondent first contends the standard used to assess an officer's lawful performance of his or her duties should be that used in section 1983 actions: whether a reasonable officer could have believed a warrantless search was lawful. SAB9-10. Respondent then contradicts itself by arguing that placing such a burden on law enforcement is "absurd" because how are officers to know whether a given detention or arrest is unlawful when even the Justices of this Court disagree at times. SAB10-11. Besides being self-contradictory, Respondent's argument is flawed in several respects. First, what is at issue in section 1983 actions is a police officer's civil liability for damages, not the government's burden of proving every element in a criminal case beyond a reasonable doubt. It is natural and reasonable that an officer is allowed some margin of error before becoming personally liable for damages. Conversely, in a criminal prosecution it is natural and reasonable (and constitutionally mandated) that

any margin of error accrue to the benefit of the accused. Thus, where a criminal conviction cannot be obtained because an officer was engaged in the unlawful performance of his or her duties, the officer may nonetheless be protected from personal liability. Respondent's criticism that officers cannot be expected to know when they are acting lawfully or unlawfully is simply not so. This precise burden is already placed on law enforcement officers. See supra 3. If anything, this burden is lighter on law enforcement officers in Florida than in some other states because what is permissible for law enforcement officers under the state and federal constitutions coincides. FLA. CONST. Art. I § 12.

Respondent concludes that clearly the legislature intended to more harshly punish those who batter law enforcement officers. SAB11. Yet, based on the plain language of the statute the legislature only intended to more harshly punish those who batter law enforcement officers "while [they are] engaged in the lawful performance of [their] duties." See § 784.07(2)(b) Fla. Stat. Respondent's conclusion that "engaged in the lawful performance of his or her duties" means "engaged in legitimate official police activity or criminal investigation" which includes engaged in unlawful searching or arresting does not follow from the plain language of the statute. See SIB4-5.

Lastly, Respondent asserts without citation to the record that the officer was engaged in the lawful performance of his duty at the moment Mr. Harris struck him. SAB11-12. It bases this conclusion on the notion that once Mr. Harris battered the

officer, the officer was then lawfully performing his duties by arresting him. SAB12. However, the question is not whether the arrest ***after*** the battery was lawful but whether the officer was in the lawful performance of his duties ***at the time of*** the battery.

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.

Mr. Harris relies on the argument in his supplemental initial brief. SIB9-11.

CONCLUSION

Wherefore, for the reasons stated herein, in his supplemental initial brief, and in his initial and reply briefs 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 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, this 9th day of February, 2004.

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.

BENJAMIN W. MASERANG
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