IN THE SUPREME COURT OF FLORIDA

EARNEST TILLMAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	DCA CASE NO. 5D01-83
	)	CASE NO. SC02-717
STATE OF FLORIDA,	)	
	)	
Respondent,	)	
_____	)	

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

PETITIONER'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The Petitioner, Earnest Tillman, had been an invited guest to a party at the home of a neighbor in the Deerfield subdivision of southern Orange County on November 7, 1997. (T II, 141-142, 160) [1] 23-year old Earnest had walked around the block from where he lived to the party at Anella and Hena Askar's house. (T II, 141-142, 160) The Petitioner had been introduced to Hena Askar, by his cousin, Curtis Butler, who was 17. (T II, 141, 160) The party was already going on when Tillman arrived. (T 142) About 40-45 people whom Earnest believed to be younger than he were at the party. (T II, 142)

Tillman was standing in the front yard of the residence after arriving at the party when a uniformed officer walked up and told everyone to leave or go inside. (T II, 143-144) The Petitioner walked down the side yard and into the pool enclosure (T II, 145-146).

Parks Duncan had been working in the Deerfield subdivision Homeowners Association in an off-duty capacity on November 7, 1997. (T I, 17, 29) When Duncan, wearing his Orange County Sheriff's Office standard green uniform with

[1]The record-on-appeal consists of two volumes of the transcript of documents filed with the Clerk (R 50-200; R 201-26); two consecutively-numbered volumes of transcript of the hearings on the motion to dismiss, and sentencing (R 1-17; R18-49); and two volumes of the transcript of trial (T 1-103; T II, 104 -238).

his badge and rank and driving his unmarked Sheriff's Office-issued 1996 Silver Mustang GT, passed by Rolling Brook Drive he had observed a large number of parked vehicles, and between twenty and thirty people standing in the front yards among five or six different houses. (T I, 18-19) Approximately three houses from where Duncan estimated the party to be, Duncan observed two males with open alcoholic beverages. (T I, 18) Duncan also said he had heard loud music playing. (T I, 19) Duncan admitted that there had not been any complaint from anyone concerning the party; his described investigative activity had been "self-initiated." (T I, 23, 31, 35)

After parking at the end of the row of cars and walking back seven or eight houses, Duncan confronted the individuals and told them to return to the party-- he did not want them to be out in the neighborhood. (T I, 20) All the people were Hispanic except five black males in the street who were loud and boisterous. (T I, 21) Duncan approached them directly and asked them to return to the party and they started moving towards the backyard of the house. (T I, 21-22) As the men approached the screened-in pool area at the back of the house they continued to escalate the noise, loudness, yelling and screaming. (T I, 22, 32-33) One did utter a loud obscenities [sic] and made threats to Duncan.[2] (T I, 22) Duncan believed

[2]The threat was to "fuck up" Duncan's Mustang. (T I, 13; T II, 129)

the threat had been made by an individual with whom he was familiar, although he had not seen him. (T I, 23) Duncan testified that Tillman had not been drinking any alcohol, nor was he the person who had threatened the deputy. (T I, 30, 32) Duncan confirmed that the two individuals with alcoholic beverages were juveniles because he had asked them. (T I, 29) Due to the underage drinking, the number of individuals at the party, and the threat made, Duncan called for back-up. (T I, 22-23)

Twelve to 15 deputies initially responded, and then possibly another 5 including supervisors. (T I, 34) One of the officers, Deputy Henriquez, had been working a special traffic detail in the area when he heard Deputy Duncan's request for back-up, upgraded to an emergency back-up. (T I, 39) When he reached the site, lights and sirens on his marked vehicle activated, he saw several young teenagers milling about in the yard. (T I, 39-40) When asked at trial if there was a lot of noise Henriquez responded "there was a party, basically, there was a party going on." (T I, 41) Henriquez noted that there had been a lot of teenagers but he had not really focused on whether or not they were drinking. (T I, 41)

Deputy Duncan flagged down the responding officers from the edge of the street. (T I, 40) Duncan advised the officers that two individuals whom he had recognized as being possible bank robbers or suspects had threatened him. (T I,

41) Duncan led the officers back to the screened porch area where Henriquez claimed to have seen the two men run. (T I, 41) Eight to 10 deputies entered on both sides of the screened-in pool area (T I, 23, 34-35) Duncan asked for quiet and that the 60-or-so people in the that area sit down. (T I, 23) Duncan pointed out the gentleman later identified as Tillman who was beginning to walk out of the screened porch area as one of the men who had threatened him. (T I, 42, 54)

The officers made no announcements and offered no explanations for their presence. (T II, 147-148) When he saw officers beginning to enter the pool area, Tillman attempted to leave to go home. (T II, 147-148). As the Petitioner walked towards the door, one of the officers, Henriquez, stuck his hands inside Earnest's jacket and searched him (T II, 148-151). Although the officer never said that Earnest was under arrest or that he was not free to leave, Earnest assumed that he was not free to leave when the officer would not let him go. (T II, 149) Earnest had never spoken to Deputy Henriquez until the deputy had started searching him; then Earnest asked him what he was doing. (T II, 149) Henriquez said he was searching him. (T II, 149) Earnest did not want the deputy to search him and he never gave his permission for the deputy to do so. (T II, 149-150) Earnest told the deputy that what he was doing was an illegal search and seizure. (T II, 150) Henriquez asked Earnest if he had any weapons, and Earnest told him

that he did not. Earnest had no weapons and no contraband, but still Henriquez continued to search him. (T II, 150-151) When Earnest asked the deputy again what he was doing, Henriquez asked Earnest if he was going to let him search him or not. (T II, 151) Earnest said, "Like I have a choice?" (T II, 151) Henriquez said, "No, you don't." (T II, 151)

After the search produced nothing, the officer told Tillman to sit down (T II, 151). Tillman refused and started to turn either to walk away or to begin to sit down (T II, 152; T I, 44). By that time there were more deputies coming behind the first three, and when Henriquez turned to talk to the first two deputies, Earnest was trying to read his name plate to report him to Internal Affairs. (T II, 151) When Henriquez saw Earnest looking at his name plate he became angry and shouted, "Sit down! Sit down!" (T II, 151) Earnest started to tell the deputy that he was not one of these kids, but then turned around to go sit down. (T II, 152) By his own admission, at this point Henriquez grabbed Tillman's right shoulder (T I, 44). The officer claimed that Tillman spun around and put him into a headlock. (T I, 44) Henriquez said that he attempted to remove himself from the headlock by dropping to the ground, but that other deputies had jumped on top of Tillman and him. (T I, 44-45)

Tillman testified that the officer pushed him causing him to stumble towards

the pool. (T II, 152) When he turned around Tillman saw the officer coming at him and so he put his hands up. (T II, 152-153) The officer ran into him, lost his balance and fell to the ground. (T II, 152-153, 160-162) Other officers jumped on top of Tillman and Henriquez. (T I, 45; T II, 154-155) Earnest could not get up off of Henriquez because the officers were jumping on his head and back. (T II, 154) He thought that more than two deputies were on his back. (T II, 155) Earnest did not intentionally put his arm around Henriquez into a headlock; when he had fallen his hands had gone up under his body. (T II, 154) Earnest's right arm was underneath him between his body and Deputy Henriquez. (T II, 155) He could not release his arms until the deputies got off of him. (T II, 162)

Duncan heard a commotion behind him and turned to see 5-6 bodies on the ground in a big struggle. (T I, 24-25) The deputies had to use chemical spray on the individual to get him to stop resisting and fighting. (T I, 25) Most of the juveniles were starting to choke from the spray. Duncan did not see who was involved in the commotion because he wanted to evacuate the juveniles from the area. (T I, 25)

To avoid creating a larger problem due to the size of the crowd, a supervisor directed that the two gentlemen be taken to another location to get the paperwork started. (T I, 46-47) The two black males who were resisting were taken out front.

No one had accused Earnest of any crime, nor had they told him that he was under arrest. (T II, 155) Still they handcuffed Earnest and his eyes were burning as they led him out into the street. (T II, 155) Once there, they threw him up against the back of a police car and started searching him again. (T II, 156) They got his driver's license and asked if he still lived at this address and when Earnest did not answer they screamed at him. (T II, 156) The deputies snatched Earnest off of the car and had him on the ground, beating his head on the concrete. (T II, 163) When the officers hog-tied Earnest he began beating his own head against the ground because he could not take the abuse anymore. (T II, 163) The officers moved Tillman over to the grass from the pavement because he was beating his head on the ground. (T I, 26)

Duncan stated that the officers needed to go into the residence "to conclude any investigation of what I believed to be a felony, at that point in time a determination if the individual I thought was the one that made the threat was indeed there." (T I, 35) However, Duncan admitted that upon entering the door he did not have probable cause to arrest anyone. (T I, 35) Duncan testified that he had not obtained permission to enter the residence, nor did he have a warrant. (T I, 38)

Deputy Carlos Torres testified that while everyone was in the process of sitting down in response to one of the deputies' request, he heard a big

commotion. (T I, 68) When he turned around Deputy Henriquez was telling Tillman to sit down and he refused. (T I, 68) It happened real quick-- the gentleman grabbed the deputy by the neck at the same time they went down to the ground. They just kind of fell down. (T I, 68) After a deputy used chemical spray the deputies were able to secure Tillman. (T I, 69) According to Torres, Tillman was being belligerent when he was being taken away, cursing and pulling away. (T I, 69) When he began to tussle with the officers they put him in a hobble. (T I, 69-70)

By the time Deputy Herrera responded that night he saw a bunch of juveniles-- some crying and hysterical-- exiting from the front door of the residence. (T I, 62) He asked them where the deputies were, and they pointed to the back of the residence. (T I, 62) Herrera entered through the wide-open door and went through the house to the pool area where he found 3-4 deputies on top of a black male. (T I, 62) The deputies were attempting to handcuff the subject but his hands were underneath him. (T I, 63) Herrera got down on his knees and told the man to allow the deputies to cuff him. (T I, 63) When the man refused and responded with profanity, Herrera administered chemical agent and then the subject complied. (T I, 63-64) Herrera had no idea why Tillman was being arrested. (T I, 65)

Henriquez sustained a broken ankle, and ended up having to wear a hard cast

on his foot up to 6 inches from his knee for six weeks. (T I, 48-52) He testified that he had undergone painful therapy and rehabilitation. (T I, 51-52) Henriquez admitted that he has suffered no permanent disability, he retained a small bump on his ankle the size of a marble. (T I, 57-58) He was also back on normal duty without any limitation. (T I, 58)

* * * * *

Petitioner Tillman was charged by information filed by the assistant state attorney with aggravated battery of a law enforcement officer causing great bodily harm, and resisting an officer with violence. (R 55-56) In count one, the Petitioner was charged with having intentionally touched or struck an officer engaged in the lawful performance of a legal duty causing great bodily harm, permanent disability or permanent disfigurement. (R 55) In count two, Tillman was charged with offering or doing violence to an officer conducting an investigation by wrapping his arm around the head of said officer and pulling him to the ground. (R 56) Tillman's motion to dismiss the information was denied. (R 1-17, 81-92, 103-105)

Prior to trial before Judge Maura Smith on November 20-21, 2000, Tillman rejected a plea offer whereby he would plead guilty to one count of battery on a law enforcement officer, the state would nolle pros count two, and the sentence would

be 648 days time served. (T I, 3-4)

After the State rested its case, the defense moved for judgment of acquittal on both counts arguing that there was not one shred of evidence that officers were in the lawful performance of a legal duty, citing *Smith v. State*, 399 So.2d 70 (Fla. 5th DCA 1981). (T II, 135-137) Both the deputies entry of the residence and pat down /search of the Petitioner violated the Constitution and the law. (T II, 135-136) The State cited *State v. Cochran*, 667 So.2d 850 (Fla. 2d DCA 1996) which held that the illegality of a defendant's arrest did not bar his conviction for battery on a law enforcement officer. (T II, 137-139) The court denied the motion. (T II, 139)

The defense requested a special jury instruction based upon *Payton v. New York*, 445 U.S. 573 (1980), that a warrantless, nonconsensual entry of such a home to make a routine felony arrest violates the Fourth Amendment. (T 106) The State argued that *Payton* did not apply because the police were not entering his home to effect an arrest based upon probable cause. (T II, 113, 125) The court determined that it could not give any instruction on the lawful performance of a legal duty because it was disputed, and determined not to give the requested *Payton* instruction. (T II, 167-177)

The jury returned verdicts of guilty as charged on both counts. (R 215-217,

231-236) Consistent with the State's recommendation, Tillman was sentenced to a low-end guidelines sentence of 47.1 prison months with credit for 657 days time served, to be followed by one year supervised probation, (R 40-47; 238-249)

On appeal the Petitioner challenged the convictions because the State had failed to adduce any evidence that the officers had been engaged in the lawful performance of a legal duty, an essential element of both charged crimes. The Fifth District Court issued an opinion which held that (1) even if the warrantless entry into the private residence, the pat down search, and the detention were all illegal, they were less of an intrusion than an arrest, and so the Petitioner was not justified in using force to resist the illegal police conduct, and therefore (2) he could be convicted of violations of Section 784.07(2) and Section 843.01 even absent any proof of the essential element of lawful performance of a legal duty. *Tillman v. State*, 807 So.2d 106 (Fla. 5th DCA 2002). The Fifth District Court attempted to distinguish this case from *Taylor v. State*, 740 So.2d 89 (Fla. 1st DCA 1999) because "the police did not illegally enter Tillman's home," citing to *State v. Suco*, 521 So.2d 1100 (Fla. 1988) and *Rakas v. Illinois*, 439 U.S. 128 (1978). Motion for rehearing and certification was denied on February 22, 2002.

Petitioner Tillman timely filed notice of his intent to invoke the discretionary jurisdiction of this Court to review the District Court's January 18, 2002, decision

in this case, in the Fifth District Court of Appeal, on March 25, 2002. Following the filing of jurisdictional briefs, this Court accepted jurisdiction, but stayed proceedings in this cause, pending disposition of *Harris v. State*, case No. SC02-219. Following briefing and oral argument in that case, this Court discharged jurisdiction and dismissed the review proceeding. *Harris v. State*, 2004 WL 583061 (Fla. March 25, 2004). On March 29, 2004 this Court lifted the stay in the instant case and set briefing on the merits. This brief follows.

SUMMARY OF ARGUMENT

Where the Petitioner was charged with battering and resisting, trespassing officers performing an illegal investigation, and conducting an illegal search and seizure without semblance of probable cause inside a residence– the State and federal law and constitutions require that the charges be vacated. Both the plain meaning of the statutes under which the Petitioner was charged, and the public policy which underpins it, direct that in order for the crimes of battery and resisting to be aggravated by the status of the victim as a law enforcement officer, the officer must be lawfully engaged in the execution of a legal duty.

The prohibition of the use of force *to make or resist* an illegal ***arrest*** in a separate section of the law is a reasonable limitation upon both the privilege to resist unlawful police behavior and the right of citizens to be left alone. This Court is asked to reject the errant line of authority which would blur the plain language and meaning of Sections 784.07(2), 843.01, and 776.051, Florida Statutes. In order to insure uniformity of the law in principle and practice, this Court is respectfully asked to quash *Tillman*, and approve *Taylor*.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL HOLDING THAT A DEFENDANT CAN BE CONVICTED OF BATTERY ON A LAW ENFORCEMENT OFFICER AND RESISTING AN OFFICER WITH VIOLENCE EVEN THOUGH THE OFFICER IN QUESTION WAS NOT ENGAGED IN THE LAWFUL PERFORMANCE OF A LEGAL DUTY IS IN ERROR, AND IN CONFLICT WITH *TAYLOR V. STATE*, 740 SO.2D 89 (FLA. 1ST DCA 1999), AS WELL AS DECISIONS OF THE UNITED STATES SUPREME COURT, AND THIS COURT.

Standard of Review

Trial and appellate courts are on an equal footing to determine the legal sufficiency of the evidence, and this question is subject to de novo review on appeal. *See Tibbs v. State*, 397 so.2d 1120 (Fla. 1981), aff'd, 457 U.S. 31 (1982); *D.R. v. State*, 734 So.2d 455 (Fla. 1st DCA 1999).

Argument

The issue on appeal is whether acquittal of charges of resisting an officer with violence and aggravated battery on a law enforcement officer must be granted where the State failed to present any evidence that the officer was engaged in the lawful performance of a legal duty, an essential element of both crimes. Fla. Stat., Section 784.07(2), and Section 843.01 (1997); *see Taylor*. Although the Fifth District Court of Appeal found that the essential element of lawful performance of a

legal duty was not proven, it determined that the Petitioner should still be convicted of the crimes because he was not "justified" in resisting or battering the officer. The Court misapplied distinguishable case law which holds that a defendant is not privileged to resist an unlawful ***arrest*** with violence as provided under Section 776.051, Florida Statutes, to excuse the State's failure to prove lawful performance of a legal duty as an essential element of the crimes charged under Sections 784.07(2) and 843.01, Florida Statutes. This Court is asked to uphold *Taylor* and quash the decision of the Fifth District Court of Appeal, below. The *Tillman* Court begins its analysis by acknowledging that both the statutes and jury instructions for the charged crimes "...require the state to prove that the officer was lawfully performing or engaged in a duty at the time of the battery or resistance." *Tillman v. State*, 807 at 108. The court cites to its own case authority on this point. *See Nicolosi v. State*, 783 So.2d 1095 (Fla. 5th DCA 2001); *and Smith v. State*, 399 So.2d 70 (Fla. 5th DCA 1981). The court tracks case authority which, effective July 1, 1975, with enactment of the prohibition upon the use of force to resist arrest in Section 776.051, Florida Statutes, determined to read that provision *in pari materia* with Section 843.01. *See State v. Barnard*, 405 So.2d 210 (Fla. 5th DCA 1981); *Lowery v. State*, 356 So.2d 1325 (Fla. 4th DCA 1978). As a result of this construction, the prohibition upon the use of force to resist any arrest– even

an unlawful one– stands as an exception, or limitation upon the reach of the requirement that an officer must have been about the "lawful performance of a legal duty" in order to charge a defendant either with resisting an officer with violence, or battery upon a law enforcement officer. Fla. Stat., Section 776.051 (1974); Section 784.07(2)(1997); and Section 843.01(1997). "[T]he end result [is] that the use of force in resisting an arrest by a person reasonably known to be a law enforcement officer is unlawful notwithstanding the technical illegality of the arrest." *Lowery* [citations omitted].

The court goes on to state:

> We have extended the above rule to cover the crime of battery on a law enforcement officer, and to apply to illegal stops, detentions and even illegal contacts. *See State v. Giddens,* 633 So.2d 503 (Fla. 5th DCA 1994) and *State v. Gilchrist,* 458 So.2d 1200 (Fla. 5th DCA 1984). *See also, State v. Roux,* 702 So.2d 240 (Fla. 5th DCA 1997), and *Jones v. State,* 570 So.2d 433 (Fla. 5th DCA 1990) (no technically illegal arrest in *Roux*--agent simply walked toward Roux).
>
> Despite these cases, Tillman argues that this court should follow *Taylor v. State,* 740 So.2d 89 (Fla. 1st DCA 1999)...

Tillman v. State, 807 at 109. The court seems to be saying that the *in pari materia* rule of statutory construction gives the judicial branch license to extend the plain meaning of different statutes on the same subject. In fact, it means that

statutes on the same matter or subject are to be construed together. *Black's Law Dictionary* 711 (5th ed. 1979). Various provisions on the same subject matter should be harmonized. *See State v. Bodden*, 2004 WL 792826 (Fla. 2004).

The Petitioner notes that the *Giddens*, and *Gilchrist* cases concerned the use of force to resist illegal arrests. The *Roux* case held that "[t]here is no right to commit a battery upon a law enforcement officer ...[e]ven if the agent had illegally detained Roux." *State v. Roux*, 702 at 241. Although this decision sidestepped the lawful performance issue, its holding that there is no "right" to attack a law enforcement officer would be difficult to quarrel with.

The most troublesome of the line of cases cited is *Jones v. State*, which found that the defendant's battery upon the law enforcement officer who was about to conduct an illegal search was not justified because "a person is not justified in committing a battery upon a law enforcement officer to resist an unlawful arrest" and " because [the] battery upon [the officer] was illegal, it necessarily follows that the evidence seized was seized incident to a lawful arrest." The *Tillman* Court's opinion fails to distinguish the subject-matter between cases dealing with resisting arrest, as compared with cases where resistance is to other unlawfully performed duties of law enforcement, among the cases upon which it relies. *See e.g., Espiet v. State*, 797 So.2d 598 (Fla. 5th DCA 2001)(defendant was properly

charged with aggravated assault even though the officer illegally entered the defendant's home without exigent circumstances in *attempt to arrest* defendant for misdemeanor battery). [Emphasis added.] To the extent that the Fifth District Court of Appeal has, as it claims, "extended" the plain meaning of Section 776.051 to uphold convictions under Section 784.07(2) and Section 847.01 in lieu of satisfaction of a required statutory element, it has exceeded its authority.

In asserting its right uphold convictions in the absence of a prima facie case because of its view that particular defendants were not justified in their actions, the Tillman Ccourt opined that it was unpersuaded by *Taylor*, and that this case was distinguishable from *Taylor*. The court attempted to distinguish *Taylor* because Tillman was an invited guest in the home in which he was illegally seized as compared to Taylor where the officer had illegally entered that defendant's home. The distinction which the Court drew between this case and *Taylor* is based upon misstatement of the holding in *Rakas v. Illinois*, 439 U.S. 128 (1978) to the effect that invited guests in the homes of others abdicate their constitutional rights proscribing illegal search and/or seizure of their person or property.

In fact the *Rakas* Court held that a casual visitor who has never seen, or been permitted to visit the basement of another's house had no standing to object to a search of the basement if the visitor happened to be in the kitchen of the house at

the time of the search. The Court was careful to note, however, that "this is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search." *Rakas*, 439 at 132. The Court also ignored a more recent United States Supreme Court case which expanded upon the holding in *Rakas*. See *Minnesota v. Olsen*, 495 U.S. 91 (1990)(even if a house guest has no legal interest in the premises and does not have legal authority to determine who can enter the household, he is protected by the Fourth Amendment and thus has a legitimate expectation of privacy in the premises and has standing to challenge the warrantless entry to effect his arrest).

With correction of this misapprehension regarding standing, it becomes apparent that whose home is unlawfully entered is a distinction without a difference where the subject of the challenged "duty" is a defendant's person.

The Court confuses and misapplies cases which concern resisting arrest with this case which concerns resisting *an officer*. The resisting arrest cases are irrelevant to facts where a citizen is not resisting arrest but rather an officer engaged in an unlawful seizure. The conduct for which the Petitioner was charged based upon the information was his resistance to the seizure of his person and the laying of hands upon him to effectuate that illegal purpose. His subsequent arrest cannot sanctify the earlier illegal police conduct to somehow compensate for the missing

elements in the State's case, as the Court's opinion seems to suggest.

The Court is preoccupied with the notion that the Petitioner "was not justified in using force to resist" and that the use of force is not acceptable to resist unlawful police conduct. See *Dominique v. State*, 590 So.2d 1059 (Fla. 4th DCA 1991). The court reasons that if the use of force is unacceptable to resist even a technically illegal arrest, then the use of force would be even less acceptable with "less intrusive" police actions such as an illegal pat down or detention. The court's quantitative analysis would be better directed at assessing the strength of the justification for the police conduct as opposed to foretelling the degree of the intrusion various oversteps will pose. The analysis overlooks that even with technically illegal arrests, the stakes are much higher: the officer has a good faith belief that (s)he possesses ***probable cause*** to make the ***arrest***. Furthermore, "the place to contest the legality of an arrest is in court and not on the streets." *Lowery*. Short of probable cause scenarios, innocent civilians have no reason to expect, nor should they be required to countenance random, unlawful intrusions of whatever degree by law enforcement officers. While the *Tillman* Court fails to consider probable cause as the point of the intrusion in measuring the insult to privacy, it seizes upon it to justify the earlier lawless police behavior with a subsequent [illegal] arrest. *Tillman* ("once Tillman placed Officer Henriquez in a

headlock, Henriquez had probable cause to arrest him").

That an individual's use of force is unjustified does not allow the State to convict him of a crime without presenting proof of all of its elements. The Petitioner may well have committed battery but he cannot lawfully be adjudged to have battered *an officer* where the man he touched offensively was not lawfully engaged in the performance of a legal duty as required by that statute. Fla. Stat., Section 843.01, and Section 784.07(2) (1997).

Even if Section 776.051 could be simply "extended" to cases of other technically-unlawful performed duties apart from arrests to criminalize the forceful resistance of citizens, the Petitioner submits that the facts of his case exceed technical unlawfulness by significant bounds. The police in this case were trampling upon the due process and fundamental, constitutional rights of the young people attending the party in order to conduct an investigation into an alleged threat by one person there that he was going to "fuck up" the deputy's Mustang. Section 776.051(1), Florida Statutes (1997) which provides that a person is not justified to resist an arrest by a law enforcement officer with the use of force, even if the arrest is illegal, does not apply where a defendant is charged under Section 843.01, Florida Statutes with resisting an officer in the lawful execution of a legal duty other than the specifically excepted *arrest*. *Taylor* ; Fla. Stat., Section 784.07(2) and

Section 843.01; Fla. Std. Jury Instr. (Crim.) Battery on a Law Enforcement Officer or Firefighter F.S. 784.07(2)(b) and Resisting Officer with Violence F.S. 843.01.

The officers conduct in entering the residence without a warrant, probable cause, or consent, and without knocking, announcing their authority and purpose was in violation of the Florida Constitution and Florida laws. Fla. Const., Art. 1, Section 9 and Section 12; *and* Fla. Stat., Section 901.17 (1997); *see also Benefield v. State*, 160 So.2d 706 (Fla. 1964) (officer's warrantless entry of defendant's home without announcement of authority and purpose vitiated lawfulness of arrest which otherwise might have been based upon probable cause with the result that the police were trespassers in total disregard of the responsibility the law imposed upon them; quashed and remanded); *compare State v. Bamber*, 630 So.2d 1048 (Fla. 1994)(no knock search warrant is without legal authority in Florida, and results of search wherein officers failed to knock and announce their authority and purpose were properly suppressed).

The police conduct in this case also violated the federal Constitutional rights of the young people present to privacy, due process of law, fundamental fairness, and freedom from unlawful search and seizure. U.S. Const., Amend. I, IV, V, and XIV; *Payton v. New York* (state statutes which allow police to enter private residences without warrants and with force if necessary to make routine felony

arrests are unconstitutional as inconsistent with the Fourth Amendment); *State v. Santamaria*, 385 so.2d 1130 (Fla. 1st DCA (1980).

Where state officials or private persons acting consciously with state support participate in the interference with the exercise of federal rights, the interference assumes a far graver cast than it otherwise would have, and the authority of the State is brought into conflict with the authority of the Constitution. *See Monroe v. Pape*, 365 U.S. at 238 (1960) (opinion of Frankfurter, J.). Where governmental conduct violates the due process rights of a defendant, dismissal of the criminal charges is required. *State v. Glosson*, 462 So.2d 1082 (Fla 1985). Where as here, the facts of a case show that methods used by law enforcement officials cannot be countenanced with a sense of justice and fairness the protection of due process rights requires that courts refuse to invoke judicial process to obtain a conviction. *State v. Williams*, 623 So.2d 462 (Fla. 1993). This Court is asked to quash the opinion of the Fifth District Court of Appeal in *Tillman*, and approve *Taylor*, or in the alternative, vacate the judgment and sentence based upon the manifestly unjust result on the facts of this case. *Cf. State v. Williams.*

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court approve *Taylor*, quash the decision of the Fifth District Court of Appeal, and remand with directions that the Petitioner's judgment and sentences be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing is being delivered via U.S. Mail to: The Honorable Charles J. Crist, Jr., Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, and Mr. Earnest Tillman, 1322 S.W. 6th Street, Live Oak, Florida, 32064, this 19th day of April, 2004.

ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER

STATEMENT CERTIFYING FONT

I hereby certify that the size and style of type used in this brief is 14 point Times New Roman.

ROSEMARIE FARRELL
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

EARNEST TILLMAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	DCA CASE NO. 5D01-83
	)	CASE NO. SC02-717
STATE OF FLORIDA,	)	
	)	
Respondent,	)	
_____	)	

APPENDIX

807 So.2d 106
27 Fla. L. Weekly D214
(Cite as: 807 So.2d 106)

District Court of Appeal of Florida,
Fifth District.

Ernest TILLMAN, Appellant,
v.
STATE of Florida, Appellee.

No. 5D01-83.

Jan. 18, 2002.
Rehearing Denied Feb. 22, 2002.

Defendant was convicted in the Circuit Court, Orange County, Maura T. Smith, J., of aggravated battery on a law enforcement officer and resisting an officer with violence. Defendant appealed. The District Court of Appeal, Pleus, J., held that (1) defendant, as invitee, did not have standing to challenge alleged illegality of police entry into home; (2) defendant was not justified in using violence to resist pat-down and detention; and (3) officers had probable cause to arrest defendant.

Affirmed.

West Headnotes

[1] Searches and Seizures 164
349k164 Most Cited Cases

Defendant did not have standing to challenge alleged illegality of police entry into screened enclosure of home, where defendant was merely invitee, and did not reside in home.

[2] Assault and Battery 57
37k67 Most Cited Cases

[2] Obstructing Justice 3
282k8 Most Cited Cases

Even if police officers' entry into screened enclosure of residence and subsequent pat-down and detention of defendant were illegal, defendant was not justified in using violence in resisting officer, such that he would not be guilty of aggravated assault on law enforcement officer and resisting arrest with violence. West's F.S.A. § 776.051(1).

[3] Arrest 63.4(15)
35k63.4(15) Most Cited Cases

Even if police officers' entry into screened enclosure of home and subsequent pat-down and detention of defendant were illegal, police officers had probable cause to arrest defendant for aggravated battery on law enforcement officer and resisting an officer with violence, where defendant put police officer in headlock after officer grabbed defendant's shoulder. West's F.S.A. § 776.051.

[4] Assault and Battery 48
37k48 Most Cited Cases

[4] Obstructing Justice 7
282k7 Most Cited Cases

In prosecutions for either aggravated battery on a law enforcement officer or resisting an officer with violence, while the state must prove that the alleged victim was a law enforcement officer who was engaged in the lawful execution or performance of a legal duty, the technical illegality of that action does not justify resisting with violence or battering the officer. West's F.S.A. § 776.051(1).

***107** James B. Gibson, Public Defender, and Rosemarie Farrell, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Alfred Washington, Jr., Assistant Attorney General, Daytona Beach, for Appellee.

PLEUS, J.

Tillman appeals from his convictions and sentences for aggravated battery on a law enforcement officer and resisting an officer with violence. He argues that the trial court erred in denying his judgment of acquittal

motions because the state failed to prove an essential element of each charge, to wit: that the officer was lawfully engaged in performing a legal duty. He also argues that the court's referral of his restitution obligation to collections court was unconstitutional and violated his due process rights. We affirm.

The facts, taken in the light most favorable to the state, are as follows: Deputy Parks Duncan, Jr., was patrolling the Deerfield Subdivision when he observed 20 to 30 people standing in front of five to six houses including two young males with open alcoholic beverages. Among the group of mostly Hispanic people were five black males standing in the street being loud and boisterous. Duncan approached them and asked them to return to the party. As they left, one of the black males uttered loud obscenities and threatened Officer Duncan.

Due to this threat, Duncan called for back-up. After back-up arrived, Duncan and eight to ten other officers entered the screened pool enclosure at the rear of the house where the party was occurring. At that point, Duncan did not know who the owner of the house was, but entered to "see if I could determine who made this threat to me." As Duncan was telling people to turn the music down and sit down, he heard a commotion behind him. He turned around and saw "a big struggle."

Deputy Timothy Henriquez testified that he responded to Duncan's call for backup. Duncan advised him that he had been threatened by two individuals he recognized as possible bank robbers or robbery suspects. Henriquez and other backup officers followed Duncan to the pool enclosure where Henriquez saw the two gentleman run into the pool enclosure. Duncan pointed out Tillman and Henriquez stopped Tillman inside the pool enclosure. Tillman was wearing a "very heavy jacket" which seemed odd to Henriquez because it was not cold. Henriquez asked Tillman if he could pat him down and Tillman refused, but Henriquez patted him down anyway. Henriquez was concerned about finding weapons on Tillman because he understood that Tillman had threatened Duncan and that Duncan recognized Tillman as having "been accused, or charged at one time or another with armed robbery with weapons." Henriquez did not find any weapons on Tillman.

When he finished patting down Tillman, Henriquez noticed that everyone inside the pool enclosure was sitting down talking to deputies. Henriquez asked Tillman to sit down but Tillman refused, stating that he was not a child, and started to walk away. Henriquez grabbed Tillman's right shoulder, ***108** at which point Tillman suddenly spun around and put Henriquez in a headlock. Henriquez attempted to remove himself from Tillman's headlock by dropping to the ground. Just then, other deputies jumped on top of Tillman and Henriquez. Tillman did not release his hold on Henriquez until he was pepper sprayed. When Henriquez stood up, he noticed that his ankle was sore. He later went to the emergency room and had to wear a cast on his leg for six weeks and receive follow-up therapy.

In his defense, Tillman testified that he had been invited to the party by the owner of the house. He was standing in the front yard when a uniformed officer walked up and told everyone to leave or go inside. Tillman walked down the side yard and into the pool enclosure. He did not threaten the officer or hear anyone else do so. Tillman was dancing inside the pool enclosure when he saw three officers enter the pool area. As Tillman attempted to leave, one of the officers stuck his hands inside Tillman's jacket and started to search him. Tillman did not want to be searched and never gave permission to search. However, the officer told Tillman he did not have a choice. After patting him down, Henriquez told Tillman to sit down. Tillman began to tell Henriquez that he was not a kid, but then turned to sit down. As he turned, Henriquez pushed Tillman causing him to stumble. When Tillman turned around, he saw Henriquez coming at him. Tillman put his hands up, Henriquez ran into him, lost his balance and fell to the ground. Two other officers then jumped on top of Tillman and Henriquez. Tillman denied intentionally placing Henriquez into a headlock. Officers handcuffed, pepper sprayed and beat Tillman. The jury convicted Tillman as charged.

[1] Tillman argues that the trial court erred in denying his motion for judgment of acquittal on both counts because the state failed to present prima facie evidence of an essential element of each count, to wit: that the victim was engaged in the lawful execution of a legal duty. Tillman argues that the evidence demonstrated that the officers illegally entered the screened enclosure, illegally patted him down and illegally detained him after the pat down.

The statutes and jury instructions for the crimes charged, battery of a police officer, [FN1] and resisting an officer with violence, [FN2] require the state to prove that the officer was lawfully performing or engaged in

a duty at the time of the battery or resistance. Numerous cases have acknowledged that this element is essential for both crimes. *See, e.g.,* *Nicolosi v. State*, 783 So.2d 1095 (Fla. 5th DCA 2001) (essential element of battery on a law enforcement officer is that officer was engaged the in the performance of a lawful duty); *Smith v. State*, 399 So.2d 70 (Fla. 5th DCA 1981) (essential element of resisting arrest with violence is that officer be engaged in lawful performance of a legal duty).

FN1. § 784.07, Fla. Stat. (1997); Fla. Std. Jury Instr. (Crim). 1412, 1447.

FN2. § 843.01, Fla. Stat. (1997).

However, section 776.051(1), Florida Statutes, 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.

We have relied on this statute to hold that:

> after July 1, 1975, section 843.01 must be read in pari materia with section 776.051; the end result being that the ***109** use of force in resisting an arrest by a person reasonably known to be a law enforcement officer is unlawful notwithstanding the technical illegality of the arrest.

State v. Barnard, 405 So.2d 210 (Fla. 5th DCA 1981), quoting *Lowery v. State*, 356 So.2d 1325 (Fla. 4th DCA 1978). We have extended the above rule to cover the crime of battery on a law enforcement officer, and to apply to illegal stops, detentions and even illegal contacts. *See* *State v. Giddens*, 633 So.2d 503 (Fla. 5th DCA 1994) and *State v. Gilchrist*, 458 So.2d 1200 (Fla. 5th DCA 1984). *See also,* *State v. Roux*, 702 So.2d 240 (Fla. 5th DCA 1997), and *Jones v. State*, 570 So.2d 433 (Fla. 5th DCA 1990) (no technically illegal arrest in *Roux*--agent simply walked toward Roux).

Despite these cases, Tillman argues that this court should follow *Taylor v. State*, 740 So.2d 89 (Fla. 1st DCA 1999). In *Taylor*, a police officer unlawfully entered the defendant's home to investigate a noise complaint and the defendant shoved him. The defendant was convicted of battery on a law enforcement officer and resisting an officer with violence. Our sister court reversed both convictions, stating that section 776.051(1), Florida Statutes, only applies to cases in which the defendant is charged with resisting arrest, as opposed to resisting some lesser duty, such as a contact, stop or detention. The court acknowledged our prior holdings to the contrary but distinguished its case, stating:

> ... we 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. An unlawful entry to a person's home is a far greater invasion of privacy than an unlawful arrest or detention on the street.

740 So.2d at 91.

We are not persuaded by *Taylor*. First, this case is distinguishable from *Taylor* because the police did not illegally enter Tillman's home; they entered the home of another. Although Tillman was invited to a party at the home, this fact alone does not give him standing to contest the illegality of the police entry. [FN3] *See* *State v. Suco*, 521 So.2d 1100, 1102 (Fla.1988) (distinctions in the law among guests, licensees and invitees ought not to control; rather, the totality of the circumstances must be examined to determine whether a defendant had a reasonable expectation of privacy in the premises searched).

FN3. The concept of standing generally applies to attempts to suppress evidence under the Fourth Amendment. *See* *Rakas v. Illinois*, 439 U.S. 128, 143, 152, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). It is also helpful here. The *Taylor* holding rests on the fact that entry into a defendant's home was a "far greater invasion of privacy" than a stop on the street. It is also a far greater invasion of privacy than this case, where Tillman was a casual visitor, not the owner of the home.

[2] Second, as noted in *Dominique v. State*, 590 So.2d 1059 (Fla. 4th DCA 1991), if the use of force to resist an arrest is unlawful despite the technical illegality of the arrest,

> it logically follows 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 an individual's privacy than does an arrest.

Id. at 1061, fn. 1. In the instant case, Officer Henriquez was not attempting to arrest Tillman; he patted him down and then instructed him to sit down while other officers investigated the threat. Even if the pat down

and detention were technically illegal, they were less of an intrusion than an arrest, so Tillman was not justified in using force to resist.

***110** [3] Third, even if the entry, pat down and detention were illegal, once Tillman placed Officer Henriquez in a headlock, Henriquez had probable cause to arrest him. Thus, Tillman's subsequent actions, which resulted in Henriquez suffering a broken ankle, were sufficient to sustain the conviction for battery on a law enforcement officer. *See* *Lennear v. State*, 784 So.2d 1181, 1182 (Fla. 5th DCA 2001) (even if initial detention illegal, subsequent resistance with violence gave officer probable cause to arrest and search defendant).

[4] Finally, although we have not addressed the issue of unlawful entry into a home in the context of aggravated battery on a law enforcement officer, we recently addressed the issue in the context of aggravated assault on a law enforcement officer. *See* *Espiet v. State*, 797 So.2d 598 (Fla. 5th DCA 2001). In *Espiet*, a police officer lunged through a screened-in window of the defendant's house in an attempt to arrest him for misdemeanor battery. The officer and defendant ended up on the defendant's dining room floor. The defendant broke away from the officer and returned, pointing a shotgun at the officer. In addition to other charges, the defendant was convicted of aggravated assault on a law enforcement officer and resisting without violence. On appeal, we noted that the state failed to make a prima facie case because the officer illegally entered the defendant's home without a warrant or exigent circumstances, citing *Taylor* and *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). Despite this fact, we affirmed the conviction for aggravated assault upon a law enforcement officer following our decision in *Barnard*. Therefore, we hold that while the state must prove that the alleged victim was a law enforcement officer who was engaged in the lawful execution or performance of a legal duty, the technical illegality of that action does not justify resisting with violence or battering the officer.

Tillman's final argument, regarding the imposition of the collections court program, was not preserved for appeal.

AFFIRMED.

PETERSON and GRIFFIN, JJ., concur.

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