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 REPLY BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

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 WITH DECISIONS OF THE UNITED STATES SUPREME COURT, AND THIS COURT.

In its merit brief, the Respondent attempts to recast the State's utter failure to prove the "lawful performance" elements of the two convictions as the imprisoned Petitioner's attempt to "justify" his use of force. The Petitioner replies to the State's brief to sharpen points of difference and clarify the few areas of agreement.

The Respondent persists in its claim that this Court should not have accepted jurisdiction. It misstates the holdings of the authority in conflict, and responds to arguments which have not been made by the Petitioner. The State challenges the Petitioner's standing in an attempt to distinguish the *Taylor* decision and avoid the conflict. Finally, the Respondent argues that public policy considerations should bar any expectation of law-abiding citizens that they have the right to be left alone, because this will lead to the making of subjective determinations about the lawfulness of police behavior which are unfair and

dangerous both to the officers and the public.

The State begins by standing the insufficiency of the evidence argument on its head, to argue that the Petitioner cannot justify his use of force where determinations of the propriety of an officer's actions are made subsequently by the courts. The Respondent borrows language from the inapplicable Section 776.051, Florida Statutes, to define the issue as one where the defense carries the burden of justification.

To the extent that a misdemeanor battery conviction can ever be deemed justification of the use of force, the unfortunate language of Section 776.051, Florida Statutes, excepts situations where a law enforcement officer is making *an arrest* from such justification. In other words, regardless of the lawfulness of the arrest, there are no circumstances under the law which justify the use of force upon a law enforcement officer by a defendant.

Section 776.051 constitutes an exception in the case of *arrests*, to the requirement that the State prove that an officer was lawfully engaged in the performance of a legal duty, as an element of the offenses of resisting an officer with violence, and battery on a law enforcement officer. *Taylor v. State*, 740 So.2d 89, 91 (Fla. 1st DCA 1999); Fla. Stat., Section 784.07(2)(1997), and Section 843.01 (1997). It is not applicable here "...because the statute is limited by its terms to a

situation in which the defendant has used force to 'resist an arrest.'" *Taylor*. The *Taylor* Court explains:

> The effect of section 776.051(1) in a resisting arrest case is to eliminate the need for proof that the officer was engaged in the performance of a lawful duty in making the arrest. [Citations omitted.] Likewise, the state is not required to prove that the officer was engaged in a lawful duty if the defendant has committed a battery on the officer in the course of resisting an arrest. [Citations omitted.] In either case, if the officer reasonably believed that the arrest was lawful, the defendant is not justified in using force. ...[T]his principle applies only if the defendant is charged with resisting arrest. If the defendant is charged under section 843.01 with the crime of resisting or opposing an officer in the performance of some other duty, the state must prove that the duty was lawful. Because the defendant in this case was not accused of resisting arrest, the limitation in section 776.051(1) on the right to use force against an officer is inapplicable.

Taylor, 740 at 91.

Reliance upon this inapplicable section of law[1] tends to mis-characterize the State's failed burden of proof in this case as that of a self-defense claim of

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[1]The Petitioner submits that "justification" is a misnomer even as it is used in Section 776.051 because it is presented as an exception to what is in fact, an imaginary rule. To say that a person is not justified in the use of force against a known law enforcement officer in this instance is to suggest that there are other instances where the use of force is justified. Except possibly for a case wherein force is used as self-defense against a law enforcement officer who is perpetrating a crime against a person, the use of force against an officer is never "justified." Where as here, the State fails to prove that the officers were engaged in the lawful performance of a legal duty, there is no resisting *an officer*, and there is only, at worst, misdemeanor battery.

"justification." The Petitioner in this case has served a five-year prison sentence for unproven convictions because the Fifth District Court of Appeal felt that the illegality of the police actions, did not justify the Petitioner's use of force to resist. *Tillman v. State*, 807 So.2d 106, 110 (Fla. 5th DCA 2002). This holding directly conflicts with that of the *Taylor* Court, that whether or not a defendant is "justified" in using force, the State cannot convict him of a crime absent an essential element:

> We do not suggest that it was appropriate for the defendant to shove the deputy in this case or that it would ever be appropriate for a suspect to use force against an officer. Rather, we hold that this conduct is not sufficient to support the criminal convictions in this case.

Taylor, 740 at 92.

In arguing the absence of conflict, the Respondent misstates both the facts and the holding of the First District Court of Appeal in *Taylor*. The State first claims that the Court held "...a defendant could resist with violence the illegal entry by law enforcement into the defendant's house if law enforcement lacked probable cause for an arrest." (MB 13, 22) On the contrary, in its recitation of the facts, the Court simply noted that the officer did not have permission to enter the house, nor probable cause to arrest Taylor. *Taylor*, 740 at 90. Nowhere in the opinion does the Court approve resistance of the officer with violence. It simply holds that the charged offenses are not proven.

The State amplifies the facts in *Taylor*, wherein the officer entered that defendant's house and attempted to force him to come outside, and then expresses concern about the additional injuries which might result by allowing people to "subjectively decide" that the officer's actions are illegal and that they can resist those encounters with force. (MB 23) The Respondent writes: "In response to the officer's attempt to get the defendant to go outside, the defendant responded by pushing the officer and then, charging at him." The actual facts within the four corners of that opinion, commended to the Court by the State, present a considerably different picture as concerns the use of force:

> At that point [when Taylor exhibited an unwillingness to go outside and talk to the officer], Deputy Gootee went inside the residence and walked up to the defendant. He touched the defendant's arm to motion him to come outside but the defendant pulled away. Deputy Gootee attempted to take the defendant by the arm, but he stood up and pushed the deputy away. As the deputy was backing up, the defendant started towards him. The deputy then immobilized the defendant by spraying him with pepper spray. A brief struggle ensued. The deputy tried to handcuff the defendant but was unable to do so immediately because the defendant was rubbing his eyes with both hands. Then another officer arrived at the scene, and the defendant was taken into custody

Taylor, 740 at 90. The Petitioner suggests that the State's expressed concern regarding unnecessary injuries which might result from subjective determinations

regarding the lawfulness of police actions and rights to the use of force– cuts both ways. The Petitioner submits that this is likely why police actions and interactions with civilians, short of a an arrest, must be demonstrably lawful in order for the law to command compliance based upon the officer's status. In order to exact the higher penalty of a felony for battering or forcefully resisting a law enforcement officer, it is reasonable to expect that officer to be acting lawfully, i.e., in good faith, under color of law, and in the performance of official duties.

In *Taylor*, as in the instant case, the officers entered a private residence absent exigent circumstances or a warrant, or probable cause, and laid their hands upon a civilian. Although both the Fifth District Court, and the Respondent attempt to distinguish *Taylor* in terms of whose home was illegally entered by the police, it is a distinction without a difference because by any measure both defendants had standing to challenge the unlawful entry of the officers. *Minnesota v. Olsen*, 495 U.S. 91 (1990); *Rakas v. Illinois*, 439 U.S. 128 (1978); *State v. Suco*, 521 So.2d 1100, 1102 (Fla. 1988)(totality of the circumstances must determine whether a defendant has a reasonable expectation of privacy in the premises). In addition to the unlawful entry, the police performed an unlawful search, and unlawfully detained the defendant in *Tillman*.

The Respondent cites authority which asserts that a defendant has no right to

commit a battery on an officer. The Petitioner agrees. The Respondent declares that battery on a law enforcement officer is illegal. The Petitioner agrees. Echoing the same point in the *Tillman* opinion below, the Respondent claims that once a defendant committed a battery on one of the officers, the officers have the lawful right to seize and arrest him. Speaking in general terms, the Petitioner would agree, noting that unless the officers were lawfully performing a legal duty, the pre-arrest charge could only be for misdemeanor battery.

The Petitioner disagrees with the applicability of that maxim to his situation since he had already been illegally searched, seized and grabbed by the officer by the time he raised his hands in defense. The officer's trespass into the residence and thorough search of the Petitioner had produced no contraband and revealed no criminality. *Compare Nicolosi v. State*, 783 So.2d 1095 (Fla. 5th DCA 2001)(conviction for battery on a law enforcement officer was vacated where the officer had not been engaged in activities of an official police nature but rather had been working at an off-duty job, and no criminal activity or investigation of criminal activity on the part of the defendant prior to the battery was proven). While arguably the Petitioner could have been arrested for his battery in response to the officer's battery, any such charge would properly have been subject to dismissal. *Compare J.P. v. State*, 855 So.2d (Fla. 4th DCA 2003). The fact is often

overlooked that subsection (2) of Section 776.051,which the State seeks to expand, provides that neither is a law enforcement officer "justified in the use of force" in making arrests which (s)he knows to be unlawful. Fla. Stat., Section 776.051 (2) (2001).

Continuing its preoccupation with Section 776.051, the Respondent argues that the Petitioner "cannot take advantage of the exception [in *Taylor*] to justify his use of force to resist and batter Officer Henriquez." The Petitioner must insist that if advantage was being taken it was not by him. Defending against lawless police behavior is something less than trumpeting a right to beat on law enforcement officers.

The Respondent urges this Court to reject *Taylor*, arguing that it constitutes an extremely dangerous public policy. With scenarios far afield from the given set of facts, the Respondent alleges that holding the State to its burden of proving the lawful performance of a legal duty will lead to chaos and pandemonium in law enforcement– defendants will be justified in fleeing illegal traffic stops at high speeds, brandishing and using weapons to defend against warrants they determine to be defective, etc. The Petitioner submits that the State is getting carried away.

Lawlessness and abuse of authority on the part of law enforcement, have implications which are at least as grave as lawlessness on the part of civilians.

Because expectations are higher for law enforcement, arguably, when individual law enforcement officers flout the law and or abuse their authority, even greater damage is done.[2] The present law is clear on its face, reasonable and balanced, deterring excesses on the part of both the citizenry and the police. The Petitioner submits that the events of that night almost seven years ago evinced not only lawlessness, but recklessness on the part of the police. Any of the young persons present even remotely conversant with the Constitution, could have been provoked to resistance by the excesses of the officers.

There is a difference between a law enforcement officer acting in good faith and following standard operating procedure in dealing with the citizenry and a law enforcement officer who flaunts his authority and flouts the law to his own ends. The Criminal Code sanctions interference with an officer engaged in the lawful performance of his or her duties more severely than it otherwise would sanction the same crime against a non-ranking civilian. That the Criminal Code imposes criteria for enhancement of a battery based upon the law enforcement status of the purported victim is not to say that it justifies, excuses or condones violence against a law enforcement officer. Rather, it is to say, if someone is going to be accorded

[2]The cost in pain, suffering and lost good will by the recent revelations of torture and abuse by U.S. personnel at the Abu Ghraib Prison in Iraq, illustrates this point by way of analogy.

the added safeguards and respect commanded by law enforcement officers, that individual will need to be acting as one. No person is "justified' in battering any other person. However, it is eminently reasonable that enhancement of a misdemeanor to a felony based upon law enforcement officer status, require more than the wearing of a departmental uniform and the driving of a department-issued vehicle.

As far as the State's suggestion that the suppression of contraband/evidence, and civil suits stand as deterrents to illegal police conduct, the Petitioner disagrees. First of all, there was no illegality or "fruits" of the illegality to be suppressed in the case of the law-abiding Petitioner. Further, no price can be put upon the horrific and abrupt cancellation of this Petitioner's youthful idealism: his belief that as an American, he had civil rights that would be respected by other Americans, including the police.

In sum, the Petitioner disagrees that the conduct of the responding officers amounted to a limited intrusion. As in *Taylor*, the officers entered the residence "without any arguable legal justification." *Taylor*, 740 at 91. Based upon his status as an invitee and a house guest (*Minnesota v. Olsen*), and the totality of the circumstances (*State v. Suco*), Tillman, no less than Taylor, has standing to challenge the illegal entry of the police into the residence. Even if this were not the

case, Tillman certainly has standing over his own person and effects. *Rakas*. If suppression and civil actions were effective in achieving the required measure of lawfulness in the performance of the legal duties of law enforcement, this patently indefensible action of the part of 15 officers and "five supervisors" would not have occurred. (T I, 34) The law charges the police with the making of good faith determinations regarding the lawfulness of their own conduct. Fla. Stat., Section 776.051(2)(2003). Failing that, and unless the Constitution is added to the list of "banned books," civilians must and will rely upon their own informed judgments of their rights under the law.

The Petitioner rejected a plea to time served, and served five years in prison, to vindicate a principle. The ugly incident in this case has done at least as much damage in its diminishment of the law and law enforcement in the eyes of the young people who bore witness to it, as anything the Respondent might conjure as a hypothetical.

Sections 784.07(2) and 843.01, Florida Statutes, either do, as they clearly state they do, or do not require proof of the lawful execution or performance of a legal duty. The Fifth District Court of Appeal says that this "lawful performance" statutory element of the two crimes can be overlooked, so as not to "justify resisting with violence or battering the officer." *Tillman*, 807 at 110. The First

District Court of Appeal says that "lawful performance" must be proven as an element of both crimes, and that holding the State to its proof in no way suggests that it is appropriate to use force against an officer. *Taylor*, 740 at 91-92. This Court is respectfully urged to quash *Tillman* and approve *Taylor*.

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 in *Tillman*, 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 4th day of June, 2004.

ROSEMARIE FARRELL
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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
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