IN THE SUPREME COURT OF FLORIDA

WILLIE PERRY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO.: SC03-1291
	)	Lower Tribunal No.: 4D01-2049
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Circuit Court of the Fifteenth Judicial Circuit and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and appellee in the lower courts. In this brief the parties will be referred to as they appear before this Court.

The symbol "R" will denote the one-volume record on appeal, which includes relevant documents filed below.

The symbol "SR" will denote the one-volume supplemental record on appeal, which includes additional relevant documents filed below.

The symbol "ST" will denote the four-volume supplemental transcript, which is a transcript of the trial.

The symbol "H" will denote the motion to suppress hearing held on August 11, 2000.

The symbol "S" will denote the sentencing hearing held on May 18, 2001.

STATEMENT OF THE CASE

Petitioner was charged by information with battery on a law enforcement officer,[1] possession of cocaine,[2] and resisting an officer with violence.[3] *SR 47-48.* The information alleged that petitioner unlawfully, knowingly, and willfully obstructed or opposed Deputies Enrique and Anton,

> in the lawful execution of a legal duty then being performed by the said officers, to wit: the detention of [petitioner], by the said [petitioner] offering or doing violence to the person of the said officers, to wit: fighting with and striking [them]....

SR 47.

Prior to trial, petitioner successfully sought suppression of the cocaine on the ground that it was obtained during an unlawful search and seizure. *R 24-28, 32; H 36-37.* Petitioner subsequently proceeded to trial before a jury on the battery and resisting charges.

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[1] §§ 784.03 & 784.07, *Fla. Stat.* (1997).

[2] § 893.13(6)(a), *Fla. Stat.* (1997).

[3] § 843.01, *Fla. Stat.* (1997). Section 843.01 reads in relevant part:

> Whoever knowingly and willfully resists, obstructs, or opposes any officer ... in the lawful execution of any legal duty, by offering or doing violence to the person of such officer ... is guilty of a felony of the third degree ....

Evidence introduced during trial established that petitioner, in the course of being booked into the Broward County jail after arrest, struck two detention deputies while they attempted to perform a strip search upon him. At the conclusion of respondent's case, and again after he rested without presenting evidence, petitioner unsuccessfully moved for a judgment of acquittal arguing that the attempted strip search was not performed in compliance with Florida law and, as a result, the deputies were not *lawfully* executing a legal duty, an essential element of resisting an officer with violence, when he struck them. *ST 197-203, 208-209.*[4] Petitioner's request to incorporate the statute addressing strip searches into the jury charge was denied and, over his objection that it directed a verdict against him on an essential element of the offense charged, the trial court instructed the jury "that the detention of a defendant constitutes lawful execution of a legal duty." *ST 210-211, 214-215, 248, 257.* Petitioner was acquitted of the battery, but convicted of resisting an officer with violence. *SR 57-58; ST 271-272*. The trial court sentenced petitioner to 10 years in prison as a habitual felony offender with a 5 year minimum mandatory as a prison

[4] According to petitioner, the deputies were required to obtain written authorization from the supervisor on duty before performing the strip search, a fact not proven by the evidence. In response to the trial court's question concerning how an illegal strip search would absolve him of liability, petitioner cited *Taylor v. State*, 740 So. 2d 89 (Fla. 1st DCA 1999), asserting that if the charge is forcefully resisting a legal duty other than arrest the state must prove that the duty was being lawfully executed.

releasee reoffender and credit for 530 days time served. *SR 60-61, 65-67; S 35-36*.

Before the Fourth District Court of Appeal petitioner reiterated the argument for acquittal made to the trial court, acknowledging that Courts have eliminated *lawful* execution as an element of resisting an officer with violence where an arrest was the legal duty being performed, but asserting that the principle does not apply where a duty other than arrest is forcefully resisted.[5] The district court rejected petitioner's argument, concluding that when read together sections 776.051[6] and 843.01 preclude the use of force to resist an arrest, notwithstanding the technical illegality of the arrest, and that the prohibition found in section 776.051 is not limited solely to arrests. *Perry v. State,* 846 So. 2d 584, 587 (Fla. 4th DCA 2003).[7]

Petitioner timely filed notice to invoke the discretionary jurisdiction of this

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[5] Petitioner also argued, among other things, that the trial court erred by failing to instruct the jury regarding the requirements for a lawful strip search and by instructing the jury that the detention of a defendant constitutes lawful execution of a legal duty. The district court opinion did not address the additional arguments.

[6] Section 776.051(1) reads:

> 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.

[7] The court did not decide whether the attempted strip search was lawfully executed. 846 So. 2d at 589 n. 2.

Court, asserting that the districts court's opinion was in express and direct conflict with a decision of another district court of appeal. Jurisdictional briefs were subsequently filed by the parties. By order dated February 21, 2005, this Court accepted jurisdiction, dispensed with oral argument, and set a briefing schedule. This brief now follows.

STATEMENT OF THE FACTS

Deputy Enrique was working as a booking deputy in the central intake division of the Broward County main jail on September 17, 1998. *ST 106-107.* Booking an arrested person into the jail entails a search, for weapons or contraband, fingerprinting, and the taking of a photograph. *ST 108-109.* The classification of the person arrested determines whether a pat-down or strip search is conducted. *ST 129.* An individual arrested for a violent felony involving weapons or a narcotics offense is subject to a strip search. *ST 160.* Deputies do not touch the arrested person while performing a strip search, instead directing them to manipulate various body parts, which includes doing a deep knee squat while spreading their buttocks. *ST 109-110, 127-128.*

Petitioner was brought to the county jail that evening and was being escorted through the booking process by Deputy Enrique. *ST 111.* Because he was arrested for a narcotics offense petitioner was subject to a strip search. *ST 159-161.* Once inside the strip search room petitioner disrobed, but refused to comply with additional orders, calling the deputy a "faggot" and announcing that he would not allow inspection of his anal area. *ST 115.* Fearing for his safety, Deputy Enrique called for assistance. *ST 115-116.* Deputy Anton responded to the search cell and found petitioner, undressed and with his back to the wall, flailing his arms about and yelling in a combative manner. *ST 171-172.* The deputies tried to convince petitioner to calm

down and submit to the search, but he remained non-compliant and loudly refused to do so. *ST 116, 172.* Although told several times to stop flailing his arms, petitioner continued to do so in an aggressive manner while he protested, causing Deputy Enrique to attempt to physically restrain him. *ST 116, 173.* When Deputy Enrique grabbed him by the arm, petitioner dropped to the ground, kicking his feet at the deputies and throwing his hands up in a violent manner. *ST 117, 173.* Petitioner struck Deputy Enrique in the face with a closed fist and kicked Deputy Anton in the legs. *ST 117-118, 175-176.* The deputies eventually managed to restrain petitioner. *ST 118, 177.*

Deputy Enrique acknowledged that the altercation did not begin until he sought to inspect petitioner's anal region and was initially limited to petitioner's refusal to assume the inspection position. *ST 126, 129.* Petitioner made no attempt to lunge at Deputy Enrique during the initial stages of the confrontation and, in fact, made no contact with him until the deputy grabbed his arm. *ST 123-124.* Deputy Enrique was aware of section 901.221, *Florida Statutes*, which authorizes strip searches, asserting that while he was not present at the jail that night, Sheriff Jenne, through jail policy, authorized the strip search of petitioner in writing. *ST 142-143, 161.*

SUMMARY OF THE ARGUMENT

POINT I

Petitioner was convicted of obstructing or opposing a law enforcement officer with violence, in violation of section 843.01, *Florida Statutes* (1997), for forcefully resisting an attempted strip search while being booked into the Broward County jail after arrest. Based upon his view that respondent failed to establish that the attempted strip search was being performed in compliance with Florida law, petitioner moved for a judgment of acquittal on the ground that the officer was not executing a legal duty lawfully, an essential element of resisting a law enforcement officer with violence, when obstructed or opposed. Both the trial court and the district court rejected petitioner's argument, concluding that one is not entitled to resist unlawful police activity with force.

Lawful execution of a legal duty is an essential element of resisting an officer with violence. Although section 776.051(1), *Florida Statutes* (1997) prohibits one from using force to resist an arrest, even one that is technically illegal, the statute does not eliminate the lawful execution of a legal duty element of section 843.01, but instead prevents persons accused of violating section 843.01 from asserting, through argument and instruction, the affirmative defense of self-defense. Even if it can be said that section 776.051(1) eliminates the lawful execution of a legal duty element of section 843.01, by its express language it does so only in those cases where the legal duty

being executed is an arrest. Petitioner was not charged with violating an arrest with violence and, as a result, respondent was required to prove that the legal duty obstructed or opposed was being lawfully executed. Respondent failed to prove that the attempted strip search was performed in compliance with Florida law. Because respondent failed to prove the lawful execution of a legal duty element of section 843.01 petitioner's motion for a judgment of acquittal should have been granted. Accordingly, this Court should quash the decision of the Fourth District Court of Appeal.

POINT II

Petitioner was tried before a jury for resisting a law enforcement officer with violence, an essential element of which is that the legal duty obstructed or opposed be executed lawfully. The evidence established that petitioner forcefully resisted the attempt of two detention deputies to perform a strip search upon him while he was being booked into the Broward County jail after arrest. Petitioner's request to incorporate the strip search statute into the charge to the jury was denied and his objection to instructing the jury that the detention of a defendant constitutes the lawful execution of a legal duty overruled. The requested instruction would have assisted the jury in deciding whether the strip search was being performed in compliance with Florida law. The instruction objected to informed the jury that the detention was being

lawfully executed. Taken together, the trial court's rulings deprived petitioner of the right to have the jury determine whether respondent proved each and every element of the offense beyond a reasonable doubt. Accordingly, reversal and remand for a new trial is required.

ARGUMENT

POINT I

PETITIONER'S MOTION FOR A JUDGMENT OF ACQUITTAL TO THE CHARGE OF RESISTING AN OFFICER WITH VIOLENCE SHOULD HAVE BEEN GRANTED WHERE THE EVIDENCE FAILED TO ESTABLISH THAT THE LEGAL DUTY FORCEFULLY OBSTRUCTED OR OPPOSED , AN ATTEMPTED STRIP SEARCH, WAS EXECUTED LAWFULLY.

Petitioner was tried before a jury for obstructing or opposing a law enforcement officer in violation of section 843.01, *Florida Statutes* (1997) based upon his forcefully resisting an attempt by two detention deputies to perform a strip search upon him. At the conclusion of respondent's case, and again after he rested without presenting evidence, petitioner unsuccessfully moved for a judgment of acquittal arguing that the attempted strip search was not performed in compliance with Florida law and, as a result, the legal duty the deputies were performing was not being executed *lawfully*, an essential element of the offense, when he struck them. Petitioner was found guilty as charged. Before the Fourth District Court of Appeal petitioner reiterated his argument, again without success.

I. INTRODUCTION.

This case involves the construction and application of, and interaction between,

two statutes, sections 776.051(1) and 843.01, *Florida Statutes* (1997).[8] Three recent district court decisions have addressed the issue. Two of those decisions are currently pending before this Court.

A. The Statutes

Section 843.01, *Florida Statutes* (1997), prohibits resisting an officer with violence to his or her person and reads in relevant part:

> Whoever knowingly and willfully resists, obstructs, or opposes any officer ... in the lawful execution of any legal duty, by offering or doing violence to the person of such officer ... is guilty of a felony....

"The elements of resisting an officer with violence are 1) knowingly 2) resisting, obstructing or opposing a law enforcement officer 3) in the lawful execution of any legal duty 4) by offering or doing violence to his person." *State v. Henriquez,* 485 So. 2d 414, 415 (Fla. 1986). Section 776.051(1), *Florida Statutes* (1997), which prohibits the use of force in resisting an arrest, 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.

From the time of its enactment 776.051(1) has been uniformly interpreted to eliminate

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[8] "[J]udicial interpretation of Florida statutes is a purely legal matter and therefore subject to de novo review." *Racetrac Petroleum, Inc. v. Delco Oil, Inc.*, 721 So. 2d 376, 377 (Fla. 5th DCA 1998).

the *lawful* execution of a legal duty element from section 843.01. *See State v. Espinosa*, 686 So. 2d 1345, 1347 & n.4 (Fla. 1996).

B. The Cases.

In *Taylor v. State*, 740 So. 2d 89 (Fla. 1st DCA 1999) the defendant, convicted of battery on a law enforcement officer and resisting an officer with violence based upon his forcefully resisting a police officer who, in the process of investigating a noise complaint, entered his house, in an effort to coax him outside to further the investigation, without consent or probable cause to arrest him, argued that he was entitled to acquittal because the evidence failed to prove that the officer was *lawfully* executing a legal duty, an element of both offenses, when struck. *Id.* at 89-90. Although recognizing that "[t]he effect of section 776.051(1) in a resisting an 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," *id.* at 91, the First District vacated the convictions and rejected the state's argument that illegality of the entry into the defendant's house did not justify his use of force against the officer stating, "[s]ection 776.051(1) does not apply in this case, however, because the statute is limited by its terms to a situation in which the defendant has used force to 'resist an arrest.' Here, the defendant was not charged with resisting arrest." *Id.* The court concluded:

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.

Id.

In *Tillman v. State,* 807 So. 2d 106 (Fla. 5th DCA 2002) *rev. granted,* 835 So. 2d 271 (Fla. 2002) the defendant, convicted of aggravated battery on a law enforcement officer and resisting an officer with violence based upon his forcefully resisting a law enforcement officer who, according to Tillman, illegally entered the screened-in enclosure of a house in which he was a guest, illegally patted him down and illegally detained him after the pat down, argued that he was entitled to acquittal because the evidence failed to prove that the officer was executing a legal duty *lawfully* when struck. *Id.* at 107-108. Relying upon section 776.051(1), previously extended by it to apply to illegal stops, detentions, and even contacts, the Fifth District affirmed the convictions and disagreed with *Taylor* concluding "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. *Id.* at 110.

In *Perry v. State,* 846 So. 2d 584 (Fla. 4th DCA 2003) *rev. granted,* No. SC03-1291 (Fla. Feb. 21, 2005) the defendant, convicted of resisting an officer with violence

based upon his forcefully resisting two detention deputies who were attempting to perform a strip search upon him after he was arrested and as part of the process of booking him into the county jail, argued that he was entitled to acquittal because the evidence failed to prove that the attempted strip search was being *lawfully* executed when he forcefully resisted the detention deputies. Although not deciding whether the attempted strip search was performed in a lawful manner, the court affirmed the conviction concluding that "the use of force or violence to resist an officer during a post-arrest strip search is unlawful, even though the officer improperly performs the search." *Id.* at 588-589. The Fourth District disagreed with *Taylor* "that the rule prohibiting the use of force against a known police officer is limited to an arrest situation. Rather, courts have extended it to apply to illegal stops, searches, and detentions." *Id.* at 587-588. Because the petitioner was not merely stopped or temporarily detained, but was already in custody, undergoing post-arrest procedures, the court determined that the prohibition against forcefully resisting or opposing an officer applied. *Id.* at 588.

II. LAWFUL EXECUTION OF A LEGAL DUTY.

A. Elements of a Crime and Due Process.

The Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution prohibit the State of Florida from depriving a

person of life, liberty, or property without due process of law. *State v. Robinson,* 873 So. 2d 1205, 1212 (Fla. 2004). "'[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Beber v. State,* 887 So. 2d 1248, 1251 (Fla. 2004)(quoting *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970)). Article III, Section 1 of the Florida Constitution vests the legislative power in the legislature. "This grant of power embraces both 'the power to enact laws' and the power 'to declare what the law shall be.'" *B.H. v. State,* 645 So. 2d 987, 992 (Fla. 1994)(citation omitted) *cert. denied,* 515 U.S. 1132, 115 S.Ct. 2559, 132 L.Ed. 2d 812 (1995). The legislature, not the judiciary, is charged with defining the elements of a criminal offense. *See McLaughlin v. State,* 721 So. 2d 1170, 1172 (Fla. 1998). "[W]here the legislature has defined a crime in specific terms, the courts are without authority to define it differently." *State v. Jackson*, 526 So. 2d 58, 59 (Fla. 1988); *See also Mogavero v. State*, 744 So. 2d 1048 (Fla. 4th DCA 1999)(instruction defining knowingly to include constructive knowledge, in addition to actual knowledge, improperly enlarged scope of the crime). The language employed by the legislature in defining a criminal offense must be strictly construed and if any definiteness is lacking must be interpreted most favorably to the accused. *Perkins v. State,* 576 So. 2d 1310, 1312 (Fla. 1991). "Words and meanings beyond

the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute." *Id.* at 1312.

B. Lawful Execution Defined.

"Lawful" is defined as "[n]ot contrary to law; permitted by law." *Black's Law Dictionary* 892 (7th ed. 1999). Florida courts have applied the plain and ordinary meaning of the phrase "in the lawful execution of any legal duty" to mean that the legal duty resisted must have been executed in compliance with the requirements of law. *See State v. Saunders,* 339 So. 2d 641, 642 (Fla. 1976); *Phillips v. State,* 314 So. 2d 619, 620 (Fla. 4th DCA 1975); *Rosenberg v. State,* 264 So. 2d 68, 69 (Fla. 4th DCA 1972). As one court has recognized, a strict reading of section 843.01 requires the state to prove that the duty resisted was being executed in a lawful manner. *Tillman,* 807 So. 2d at 108.

C. Is Lawful Execution of a Legal Duty an Element of Section 843.01?

1. Judicial view.

At one time Florida courts recognized that before an accused could be convicted of resisting an officer with violence under section 843.01, for forcefully resisting an arrest, the arrest must have been lawful, *viz,* supported by probable cause. *Saunders,* 339 So. 2d at 642 & n.2; *Phillips,* 314 So. 2d at 620; *Rosenberg,* 264 So.

2d at 69. Effective July 1, 1975, the Florida legislature enacted section 776.051(1), *Florida Statutes* (1975) which read:

> 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.

§§ 13 & 67, Ch. 74-383, *Laws of Fla.* (1974).[9]

From the first case to cite section 776.051(1) through the most recent case in which section 776.051(1) has been cited, the courts of this State have interpreted it to eliminate *lawfulness* of the legal duty being performed as an element of section 843.01. *See K.G. v. State,* 338 So. 2d 72, 74 (Fla. 3rd DCA 1976) *cert. dism'd,* 352 So. 2d 172 (Fla. 1977); *Perry v. State,* 861 So. 2d 462, 465 (Fla. 1st DCA 2003). *State v. Espinosa,* 686 So. 2d 1345 (Fla. 1996) recognized that "courts have consistently read section 776.051(1), *Florida Statutes* (1995), in pari materia with section 843.01 to eliminate that element [legality of the arrest] as to the offense of resisting arrest *with* violence[,]" 686 So. 2d at 1347, and "decline[d] to address this well-settled issue of law." *Id*. at 1347 n.4. Absent from those cases which hold that section 776.051(1) eliminates *lawful* execution of a legal duty as an element of section 843.01 is any

[9] The wording of the 1975 and 1997 statutes are identical.

analysis supporting the proposition.[10] Instead, that proposition was accepted as a legal truism, eventually elevated to the position of well-settled law.

2. Statutory repeal by implication.

The language used in section 843.01 is the same today, in relevant part, as it was prior to the enactment of section 776.051(1). How than can it be that lawful execution of the legal duty forcefully resisted, obstructed or opposed is no longer an element of section 843.01? Prior statutes or portions thereof "may be impliedly as well as expressly repealed...." *State v. Gadsden County*, 58 So. 232, 235 (Fla. 1912).[11] However, "the enactment of a statute does not operate to repeal by implication prior statutes unless such is clearly the legislative intent." *Id.* at 235. In *Gadsden County* this Court said:

> An intent to repeal prior statutes or portions thereof may be made apparent when there is a positive and irreconcilable repugnancy between the provisions of a later enactment and

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[10] Although the cases say that sections 776.051(1) and 843.01 must be read in pari materia, they fail to analyze why doing so eliminates lawful execution of a legal duty as an element of section 843.01 rather than precluding one charged with violating section 843.01 from raising the affirmative defense of justifiable use of force in defense of person. One district court judge has questioned the propriety of this proposition. *See Espinosa v. State,* 668 So. 2d 1116 n.1 (Fla. 5th DCA 1996) *quashed*, 686 So. 2d 1345 (Fla. 1996); *Foreshaw v. State,* 639 So. 2d 683 (Fla. 5th DCA 1994)(Harris, C.J., concurring specially).

[11] Section 776.051(1) does not include language expressly repealing, in whole or in part, section 843.01.

> those of prior existing statutes. But the mere fact that a later statute relates to matters covered in whole or in part by a prior statute does not cause a repeal of the older statute. If the two may operate upon the same subject without positive inconsistency or repugnancy in their practical effect and consequences, they should each be given the effect designed for them unless a contrary intent clearly appears.

Id.

Repeal by implication, a doctrine not favored by the law, is guided by legislative intent. *State v. Dunmann*, 427 So. 2d 166, 168 (Fla. 1983) *receded from on other grounds, Daniels v. State*, 587 So. 2d 460 (Fla. 1991). Courts "must ascertain whether the legislature expressed its intent as to a new statute's preempting an entire area of the law or whether the legislature meant an existing law to remain in effect regardless of a new statute which might appear to infringe on the scope of the former." *Id.* at 168. "There is a general presumption that later statutes are passed with knowledge of existing laws and a construction is favored which gives each one a field of operation, rather than have the former statute repealed by implication." *State v. Vikhlyantsev*, 602 So. 2d 636, 637 (Fla. 2d DCA 1992). Repeal by implication should be analyzed in conjunction with the rule of lenity which holds that ambiguities in the law should be resolved in favor of the accused. *See Wood v. State*, 21 S.E. 2d 915, 918 (Ga. App. 1942).

The enactment of section 776.051(1) did not impliedly repeal the lawful

execution of a legal duty element contained in section 843.01. First, while the legislature expressed its intent that persons being arrested are not justified in using force to resist a law enforcement officer or one reasonably known to be, an intent to eliminate lawful execution of a legal duty as an element of section 843.01 is nowhere expressed in chapter 74-383, *Laws of Florida* (1974). Second, there is not a positive and irreconcilable repugnancy between the provisions of section 776.051(1) and section 843.01. Section 776.051(1) is found in chapter 776 of the *Florida Statutes*, which addresses the justifiable use of force. The justifiable use of force, commonly referred to as self-defense, need not be based upon actual danger; force, even deadly force, can be used if the appearance of danger is so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. § 776.012, *Fla. Stat.* (1997); *Fla. Std. Jury Instr. (Crim.)* 3.04(d) & (e)(1997); *See Pollock v. State*, 818 So. 2d 654, 656 (Fla. 3rd DCA 2002); *Larsen v. State,* 485 So. 2d 1372, 1373 (Fla. 1st DCA 1986) *affm'd,* 492 So. 2d 1333 (Fla. 1986). Accordingly, prior to the enactment of section 776.051(1), it was not necessary that a person be subjected to an arrest that was unlawful in fact in order to assert self-defense, he or she need only reasonably have perceived that the arrest was unlawful and that it could be avoided only through the use of force. It is not unreasonable for the legislature to prohibit an accused from

asserting self-defense, through argument and instruction, to a perceived unlawful arrest thereby dissuading persons in the process of being arrested from engaging in the type of calculus necessary to determine whether force can be used in resistance thereto, an analysis that might ultimately prove more harmful than helpful. However, while it is one thing to say that the accused is not entitled to a self-defense jury instruction based upon his reasonable perception that he was being unlawfully arrested and that the illegality could be avoided only through the force exerted, it is quite another to say that section 776.051(1) relieves the State of proving beyond a reasonable doubt the lawful execution of a legal duty element of section 843.01.[12]

Both statutes can be given a field of operation which is neither inconsistent nor repugnant to the other. Section 776.051(1) can operate to preclude a defendant from raising self-defense, through argument and instruction, to any offense charged as a

[12] By interpreting section 776.051(1) as prohibiting one accused of violating section 843.01 from asserting self-defense, rather than eliminating the lawful execution of a legal duty element of section 843.01, the statute promotes three equally important goals: it encourages unlawfully arrested persons to litigate the matter in court, rather than on the street; it prevents the assertion of self-defense, and acquittal based thereon, in those cases where the arrest was lawful, but could have reasonably been perceived as unlawful; and it prevents conviction where the arrest was unlawful in fact. Interpreting section 776.051(1) as eliminating the lawful execution of a legal duty element of section 843.01 may well promote the first two interests, but it does not protect persons who were unlawfully arrested in fact from conviction.

result of his using force to resist an arrest.[13] Section 843.01 can operate to require the state in a prosecution for resisting, obstructing, or opposing an officer with violence to introduce competent, substantial evidence from which a reasonable juror could find beyond a reasonable doubt that the officer was lawfully executing a legal duty. As a result, there is no basis for applying the doctrine of statutory repeal by implication in this case.

3. Lawful execution of a legal duty is still an element of section 843.01.

Prior to the enactment of section 776.051(1), the legal duty must have been executed lawfully if forceful resistance, obstruction, or opposition was to be considered a violation of section 843.01. *Saunders*, 339 So. 2d at 641-642. Because repeal by implication is not favored, because the legislature has not expressed its intent to repeal the lawful execution of a legal duty element of section 843.01, and because sections 776.051(1) and 843.01 can operate without positive inconsistency and repugnancy, the doctrine of repeal by implication cannot be applied in this case. Therefore, lawful execution of a legal duty remains an element of section 843.01 to this day and this Court should recede from, and disapprove of, any language to the

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[13] Unless the law enforcement officer uses excessive force to effect the arrest. § 776.051(2), *Fla. Stat.* (1997); *Ivester v. State*, 398 So. 2d 926, 930 (Fla. 1st DCA 1981) *rev. denied*, 412 So. 2d 470 (Fla. 1982).

contrary. At the very least, whether lawful execution of a legal duty is no longer an element of section 843.01 is left to uncertainty. In that situation, the rule of lenity requires that section 843.01 be interpreted in the manner most favorable to petitioner. *Perkins,* 576 So. 2d at 1312.

D. Is Lawful Execution an Element of Section 843.01 When a Legal Duty, Other than an Arrest, is Resisted.

Should this Court determine that the enactment of section 776.051(1) impliedly repealed the lawful execution of a legal duty element of section 843.01 it should adopt the holding of *Taylor v. State*, 740 So. 2d 89 (Fla. 1st DCA 1999), limiting the application of 776.051(1) to those situations where the legal duty being executed and resisted, obstructed, or opposed is an arrest.

1. The common law and statutes in derogation thereof.

At common law an individual was permitted to forcefully resist unlawful police conduct. *See Saunders,* 339 So. 2d at 642 n.2; *Lowery v. State,* 356 So. 2d 1325, 1326 (Fla. 4th DCA 1978). Florida adopted the common law. §§ 2.01 & 775.01, *Fla. Stat.* (1997); *Sowell v. State,* 738 So. 2d 333, 334 (Fla. 1st DCA 1998) *rev. dism'd* 734 So. 2d 421 (Fla. 1999). The enactment of section 776.051(1) modified the common law rule. *Lowery,* 356 So. 2d at 1326. Strict construction of statutes in derogation of the common law is required and it is "presume[d] that such a statute was not intended

to alter the common law other than by what was clearly and plainly specified in the statute." *Ady v. American Honda Finance Corp.*, 675 So. 2d 577, 581 (Fla. 1996). In *Carlile v. Game & Fresh Water Fish Commission,* 354 So. 2d 362 (1978) this Court stated:

> Statutes in derogation of the common law are to be construed strictly, however. They will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced. A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard. 30 Fla. Jur. Statute, Sec. 130.
>
> Inference and implication cannot be substituted for clear expression. Dudley v. Harrison, McCready & Co., 127 Fla. 687, 173 So. 820 (1937)

Id. at 364.

Although the legislature could have drafted section 776.051(1) to apply to all legal duties, section 776.051(1) does not prohibit the use of force to resist any and all legal duties performed by persons reasonably known to be a law enforcement officer. Rather, section 776.051(1) prohibits forceful resistance only to arrests. As a result, the common law rule allowing forceful resistance to unlawful police activity no longer exists only to the extent that what was forcefully resisted was an arrest.

2. The fallacy of the common-sense approach.

In *Dominique v. State,* 590 So. 2d 1059 (Fla. 4th DCA 1991), which involved a conviction for attempted battery on a law enforcement officer[14], the defendant argued that the evidence was insufficient to support his conviction where the temporary detention that he forcefully resisted was not supported by founded suspicion. *Id.* at 1060. The district court agreed that the officer lacked founded suspicion to detain Dominique, but, relying upon section 776.051(1), affirmed his conviction stating:

> The fact of the illegal stop is no defense to the charge of battery of a known police officer engaged in the lawful performance of his duties. The technical illegality of the stop does not give appellant license to batter the officer. Section 776.051, *Florida Statutes* (1987) provides that 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. Appellant violated the statute by striking the officer and it does not suffice him to say that the officer was not engaged in the lawful performance of his duties.

Id.

In a footnote the court added:

> The use of force to resist an arrest is unlawful notwithstanding the technical illegality of the arrest. *Lowery v. State,* 356 So. 2d 1325 (Fla. 4th DCA 1978). It logically

[14] The statute enhancing the crime of battery where a law enforcement officer is the victim requires that the officer be engaged in the lawful performance of his or her duties. § 784.07(2), *Fla. Stat.* (1997).

> 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.

590 So. 2d at 1060 n.1; *accord Tillman*, 807 So. 2d at 109. At first blush, the analysis utilized in *Dominique* may appear persuasive. However, closer consideration reveals it to be faulty. To reach its conclusion the district court relied upon inference and implication, neither of which can be substituted for clear expression in reading statutes that are in derogation of the common law. *Carlile*, 354 So. 2d at 364. In addition, *Dominique* failed to adhere to the rule that penal statutes must be strictly construed.

3. Section 776.051(1) does not apply where the legal duty forcefully resisted is other than an arrest.

Petitioner was not charged with resisting, obstructing, or opposing an arrest with violence. Rather, petitioner was charged with forcefully resisting detention while an inmate in the county jail being subject to a strip search. The common law rule allowing forceful resistance to unlawful police conduct has not been superceded in toto. Rather, the common law rule remains in effect except where the police are making an arrest. While logic may suggest that the derogation of the common law be extended to other forms of police conduct, that is a matter for the legislature, not judicial speculation. *See Carlile*, 354 So. 2d at 364. Section 776.051(1) does not apply to the

case at bar. Accordingly, respondent was required to prove that the legal duty being executed by the detention deputies when respondent forcefully obstructed or opposed them was being lawfully executed. *See Taylor*, 740 So. 2d at 91.

III. LAWLESSNESS OF THE ATTEMPTED STRIP SEARCH.

Strip searches must be performed in compliance with section 901.211, *Florida Statutes* (1997). *D.F. v. State*, 682 So. 2d 149, 151 (Fla. 4th DCA 1996). Subsection (5) of the statute reads:

> No law enforcement officer shall order a strip search within the agency or facility without obtaining the written authorization of the supervising officer on duty.

§ 901.211(5), *Fla. Stat.* (1997).

"A strip search conducted in violation of the statutory requirements set forth in section 901.211, in essence, establishes police misconduct and constitutes a Fourth Amendment violation." *State v. Augustine*, 724 So. 2d 580, 581 (Fla. 2d DCA 1998). All strip searches are constrained by the requirements of subsection (5). *Welch v. State*, 636 So. 2d 172, 174 (Fla. 2d DCA 1994).

Appellee failed to introduce a written document authorizing a strip search of appellant. In addition, while Deputy Enrique testified that agency policy, enacted by the elected sheriff of Broward County, authorized the strip search, he acknowledged that Sheriff Jenne was not the supervising officer on duty that night. Furthermore,

policy and procedure adopted by the Broward County Sheriff's Department does not take precedence over state law. *See State v. Williams*, 623 So. 2d 462 (Fla. 1993)(agency practice of converting powder cocaine into crack-cocaine for use in reverse sting operations was in violation of state statute); *Cf. Smith v. State*, 584 So. 2d 145, 146 (Fla. 2d DCA 1991)(state statute prevails over local ordinance). Therefore, respondent failed to prove that the attempted strip search was conducted in compliance with Florida law.

IV. STANDARD OF REVIEW FOR JUDGMENTS OF ACQUITTAL.

"The purpose of a motion for judgment of acquittal is to test the legal sufficiency of the evidence presented by the state." *State v. Lalor*, 842 So. 2d 217, 219 (Fla. 5th DCA 2003).

> If the State presents competent evidence to establish each element of the crime, a motion for judgment of acquittal should be denied. The court should not grant a motion for a judgment of acquittal unless the evidence, when viewed in the light most favorable to the State, fails to establish a prima facie case of guilt. In moving for a judgment of acquittal, a defendant admits not only the facts stated in the evidence, but also every reasonable conclusion favorable to the State that the fact-finder might fairly infer from the evidence.

Bufford v. State, 844 So. 2d 812, 813 (Fla. 5th DCA 2003).

Although "[w]hen moving for a judgment of acquittal, the defendant admits the facts

stated, the evidence adduced, and every reasonable inference favorable to the state," *Gant v. State*, 640 So. 2d 1180, 1181 (Fla. 4th DCA 1994) *receded from on other grounds, Norman v. State,* 676 So. 2d 7 (Fla. 4th DCA 1996), "[w]here the state fails to meet its burden of proving each and every necessary element of the offense beyond a reasonable doubt the case should not be submitted to the jury and a judgment of acquittal should be granted." *Ponsell v. State*, 393 So. 2d 635, 636-637 (Fla. 4th DCA 1981). The state's burden is met where the record contains competent substantial evidence supporting each element of the offense. *See Melendez v. State*, 498 So. 2d 1258, 1260-1261 (Fla. 1986) *cert. denied,* 510 U.S. 934, 114 S.Ct. 349, 126 L.Ed. 2d 313 (1993). Evidence is substantial where:

> There [is] some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative, or mere theoretical evidence or hypothetical possibilities) having definite probative value (that is 'tending to prove') as to each essential element of the offense charged.

Rahyns v. State, 752 So. 2d 617, 620 (Fla. 4th DCA 1999)(citation omitted) *rev. denied*, 763 So. 2d 1044 (Fla. 2000); *accord G.C. v. Department of Children and Families,* 791 So. 2d 17, 19 (Fla. 5th DCA 2001). The denial of a motion for a judgment of acquittal is reviewed de novo. *Pagan v. State,* 830 So. 2d 792, 803 (Fla. 2002) *cert. denied*, 539 U.S. 919, 123 S.Ct. 2278, 156 L.Ed. 2d 137 (2003).

Evidence introduced at trial failed to establish that the detention deputies obtained written authorization from the supervising officer on duty at the county jail before attempting to perform a strip search upon petitioner. Absent competent, substantial evidence that written authorization was obtained, respondent failed to prove that the legal duty obstructed or opposed was being executed in a lawful manner. Respondent's failure to prove lawful execution of a legal duty, an essential element of resisting an officer with violence required the granting of petitioner's motion for a judgment of acquittal.

V. CONCLUSION.

At a minimum, because petitioner was charged with forcefully resisting a legal duty other than arrest, respondent was required to prove that the legal duty was executed lawfully. Respondent failed to introduce evidence which would have allowed the jury to find beyond a reasonable doubt that the strip search he forcefully obstructed and opposed was executed in compliance with Florida law. The evidence being insufficient to establish an element of section 843.01, acquittal was required. Accordingly, petitioner requests this Court to vacate the judgment of conviction and sentence imposed by the trial court and remand this cause with directions to discharge.

POINT II

REVERSIBLE ERROR OCCURRED WHEN THE TRIAL COURT DENIED PETITIONER'S REQUEST TO INCORPORATE THE STRIP SEARCH STATUTE INTO THE JURY CHARGE AND OVERRULED HIS OBJECTION TO INSTRUCTING THE JURY THAT THE DETENTION OF A DEFENDANT CONSTITUTES LAWFUL EXECUTION OF A LEGAL DUTY.

Petitioner was tried before a jury for resisting an officer with violence, the information alleging that he obstructed or opposed Deputies Enrique and Anton,

> in the lawful execution of a legal duty then being performed by the said officers, to wit: the detention of [appellant], by the said [appellant] offering or doing violence to the person of the said officers, to wit: fighting with and striking [them]....

SR 47.

Evidence established that petitioner, being booked into the Broward County jail after arrest, struck the detention deputies while they were attempting to perform a strip search upon him. Petitioner contended that the attempted strip search was not being performed in compliance with Florida law and, as a result, the deputies were not lawfully executing a legal duty, an essential element of resisting an officer with violence. The trial court denied petitioner's request to incorporate the statute addressing strip

searches[15] in its charge to the jury. *ST 214-215.*[16] Over petitioner's objection that it directed a verdict against him on an essential element of the offense charged, the trial court instructed the jury "that the detention of a defendant constitutes lawful execution of a legal duty." *ST 210-211, 248, 257.*[17] Petitioner was found guilty of resisting an officer as charged. *SR 57-58; ST 271-272.*[18]

I. THEORY OF DEFENSE.

"A defendant is entitled to have the jury instructed on the law applicable to his

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[15] § 901.211, *Fla. Stat.* (1997).

[16] The denial of a special instruction is reviewed for an abuse of discretion. *Campbell v. State,* 812 So. 2d 540, 543 (Fla. 4th DCA 2002).

[17] Whether an instruction accurately recites the elements of a crime is reviewed de novo. *See United States v. Petrosian,* 126 F. 3rd 1232, 1233 n.1 (9th Cir. 1997) *cert. denied,* 522 U.S. 1138, 118 S.Ct. 1101, 140 L.Ed. 2d 156 (1998); *United States v. King,* 122 F. 3rd 808, 809 (9th Cir. 1997).

[18] Should this Court disagree with the arguments made by petitioner in his first point and conclude that lawful execution of a legal duty is not an element of section 843.01 the trial court's rulings in regard to the jury instructions is not relevant to the outcome of this appeal since both arguments directed to the instructions assume that the jury was required to decide if the detention deputies were lawfully executing a legal duty. However, should this Court agree with petitioner that section 776.051(1) does not eliminate the lawful execution of a legal duty element of section 843.01 or, if it does, it only does so in those cases where it is an arrest that is forcefully resisted, and is of the opinion that respondent introduced sufficient evidence to make the issue of whether the detention deputies were lawfully executing a legal duty a question for the jury, the trial court's rulings in regard to the jury instructions become relevant to this appeal. Once this Court accepts a case for review it has jurisdiction over all issues. *Murray v. Reiger,* 872 So. 2d 217, 223 n.5 (Fla. 2002).

theory of defense." *Suarez v. State,* 795 So. 2d 1049, 1053 (Fla. 4th DCA 2001) *rev. denied*, 819 So. 2d 140 (Fla. 2002). In *Langston v. State,* 789 So. 2d 1024 (Fla. 1st DCA 2001) the court articulated the test for reviewing a trial court's denial of a proposed instruction:

> The failure to give a requested jury instruction constitutes reversible error where the complaining party establishes that:
> (1) The requested instruction accurately states the applicable law,
> (2) the facts in the case support giving the instruction, and
> (3) the instruction was necessary to allow the jury to properly resolve all issues in the case.

Id. at 1026; *accord Campbell*, 812 So. 2d at 544.

Petitioner asked the trial court to read the statute addressing strip searches. It cannot be said the statute did not accurately state strip search law. The facts established that petitioner was subject to a strip search and that his resistance to being searched led to the charged offenses. Whether petitioner was properly subjected to a strip search was a genuine issue at trial. A finding that the strip search was unlawful precluded a finding that Deputies Enrique and Anton were lawfully executing the detention at the time petitioner resisted. Absent the requested instruction, the jury was without the means necessary to evaluate the lawfulness of the strip search.

II. DIRECTING VERDICT OF ELEMENT OF OFFENSE.

"The elements of resisting an officer with violence are 1) knowingly 2) resisting,

obstructing or opposing a law enforcement officer 3) in the lawful execution of any legal duty 4) by offering or doing violence to his person." *State v. Henriquez,* 485 So. 2d 414, 415 (Fla. 1986). In *Gerds v. State,* 64 So. 2d 915 (Fla. 1953) this Court said:

> It is an inherent and indispensable requisite of a fair and impartial trial under the protective powers of our Federal and State Constitutions as contained in the due process of law clauses that a defendant be accorded the right to have the Court correctly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proven by competent evidence.

Id. at 916.

An instruction that directs a verdict against the defendant on an essential element of the crime is improper. *Cf. Sigler v. State,* 881 So. 2d 14, 18-20 (Fla. 4th DCA 2004)(appellate court precluded from finding that evidence was sufficient to prove element of a crime that was not submitted to the jury) *appeal pending,* No. SC04-1934. When the defendant asserts that the duty resisted was not being executed lawfully, the jury must be instructed that it is to decide the lawfulness issue. *See State v. Anderson,* 639 So. 2d 609, 610 (Fla. 1994); *Hampton v. State,* 733 So. 2d 1137 (Fla. 4th DCA 1999) *cause dism'd,* 744 So. 2d 454 (Fla. 1999). That directive can be accomplished by inserting the word "lawful" before the duty alleged to have been resisted. *Campbell v. State,* 812 So. 2d 540, 544 (Fla. 4th DCA 2002).

Whether the detention of petitioner was being lawfully executed when he resisted

was at issue and hotly contested. The instruction given by the trial court directed a verdict against petitioner on that issue. At the very least, petitioner's jury should have been instructed that the *lawful* detention of a defendant constitutes lawful execution of a legal duty." *Campbell,* 812 So. 2d at 544; *Hampton*, 733 So. 2d at 1137. Reversible error occurs when the instruction given directs a verdict on an essential element of the offense in favor of the state. *Fescke v. State*, 757 So. 2d 548, 549 (Fla. 4th DCA 2000) *rev. denied,* 776 So. 2d 276 (Fla. 2000).

III. CONCLUSION.

The issue at trial was whether the detention deputies were lawfully executing a legal duty, a strip search, when petitioner forcefully obstructed or opposed them. The instruction petitioner sought would have assisted the jury in evaluating whether the attempted strip search was executed in a lawful manner. The instruction given over petitioner's objection informed the jury that the detention of petitioner, which included the attempted strip search, constituted the lawful execution of a legal duty. Taken together, the trial court's rulings deprived petitioner of his right to have a jury decide whether respondent proved each element of the charged offense beyond a reasonable doubt. Accordingly, reversal and remand for a new trial is required.

CONCLUSION

Based upon the foregoing arguments and the authorities cited therein, petitioner respectfully requests this Honorable Court to quash the decision of the Fourth District Court of Appeal and vacate the judgment of conviction and sentence imposed below and remand this cause with directions to discharge or, in the alternative, for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Petitioner's Initial Brief on the Merits has been furnished by courier to Ms. Claudine M. LaFrance, Assistant Attorney General, 1515 N. Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432 this 18th day of March, 2005.

Attorney for Willie Perry

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY this brief is written in 14 point Times New Roman.

Of Counsel