IN THE SUPREME COURT OF FLORIDA

CASE NO. **SC05-2122**

STATE OF FLORIDA,

Petitioner,

-vs-

BILL MONROE HEARNS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

The Petitioner, State of Florida, was the appellee in the court of appeal and the Respondent, Bill Monroe Hearns, was the appellant. In this brief, the designation "A." refers to the attached appendix, which contains a conformed copy of the decision of the lower court.

POINT ON APPEAL

Whether a conviction for battery on a LEO can serve as a predicate for sentencing as a violent career criminal (VCC) where the conviction would have to be a "forcible felony" as that term is defined in section 776.08, Fla. Stat.; a "forcible felony" is a felony whose statutory elements **necessarily** involve the use or threat of physical force or violence against any individual; and the element of actually and intentionally touching or striking another person found in the battery statute can be accomplished without the use or threat of physical force or violence against another.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the State's statement of facts, except for its truncated description of the decision below.

On rehearing, the Third District acknowledged that for a prior conviction to qualify as a "forcible felony" for VCC sentencing, the crime **must** involve the use or threat of physical force or violence against any individual. (A. 3). Battery on a

LEO can be accomplished through "mere unwanted touching" such as spitting, and so under the statutory elements test set out in *Perkins v. State*, 576 So. 2d 1310, 1313 (Fla. 1991), is not **invariably** a qualifying offense for VCC sentencing. (A. 3-4). The Third District also noted that simple battery is a misdemeanor, which becomes a felony only because the victim is a law enforcement officer. (A. 4). The court further noted that the State had not shown at the 2000 sentencing proceeding whether the battery for which Mr. Hearns was convicted in 1985 had been accomplished by an unwanted touching, *see* section 784.03(1)(a), Fla. Stat. (1985), or by intentionally causing bodily harm, *see* section 784.03(1)(b), Fla. Stat. (1985). Absent "record evidence" that the battery was a forcible felony, it could not serve as a qualifying offense for purposes of VCC sentencing. (A. 4).

SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

At the sentencing hearing, the State showed that Mr. Hearns had been convicted of battery on a LEO. The State did not show that the conviction was obtained under section 784.03(1)(b), Fla. Stat. (1985), which would be a forcible felony. That left open the possibility that the conviction was obtained under 784.03(1)(a), Fla. Stat. (1985), which merely prohibits unwanted touching. Unwanted touching, though, does not invariably involve physical force or violence and so such a battery cannot be a qualifying offense for purposes of VCC sentencing.

The State's brief misreads the decision below. The district court was not engaging in any search for the underlying facts of the 1985 battery conviction; it was simply looking to see whether the record of the sentencing proceeding showed that the conviction was for a forcible felony. As the record did not so show, the district court properly determined that the battery conviction was not a qualifying prior conviction for VCC sentencing.

The State, without any analysis, also summarily asserts that battery is always a forcible felony. The cases the State relies upon likewise engage in no analysis of the issue. As demonstrated by the decision below, however, as well as Judge Ervin's partial dissent in *Jenkins v. State*, 884 So. 2d 1014 (Fla. 1st DCA 2004), and other case law dealing with battery, a battery committed under section 784.03(1)(a) does not **invariably** involve the use or threat of physical force and so, under *Perkins*, cannot serve as a predicate for VCC sentencing.

The issue presented is one of law, so review should be de novo.

ARGUMENT

The issue before this Court is a very narrow one: Whether battery on a law enforcement officer pursuant to Section 784.03(1)(a), Fla. Stat. (1985) [now designated as Section 784.03(1)(a)1.] is a qualifying offense for purposes of the violent career criminal statute. The parties agree that resolution of this issue turns on whether the battery conviction was a "forcible felony" as that term is used in

Section 776.08. The parties also agree that a statutory elements test, as set out in *Perkins v. State*, 576 So. 2d 1310 (Fla. 1991), is the correct way to resolve this issue. The parties disagree on the standard that was used by the Third District, and disagree on the proper resolution of the ultimate issue.

BATTERY ON A LAW ENFORCEMENT OFFICER (LEO) IS NOT A "FORCIBLE FELONY" AS THAT TERM IS DEFINED IN SECTION 776.08, FLA. STAT., SINCE THE ELEMENT OF ACTUAL AND INTENTIONAL TOUCHING OR STRIKING FOUND IN SECTION 784.03(1)(a) DOES NOT <u>INVARIABLY</u> INVOLVE THE USE OR THREAT OF PHYSICAL FORCE OR VIOLENCE AS REQUIRED BY SECTION 776.08. A PRIOR CONVICTION FOR BATTERY ON A LEO THUS CANNOT BE A PREDICATE FOR SENTENCING AS A VIOLENT CAREER CRIMINAL

Under section 775.084(1)(c), Fla. Stat. (1998 Supp.)[1], a person qualifies for sentencing as a "violent career criminal" if he has been convicted three or more times for:

a. Any forcible felony, as described in s. 776.08;

b. Aggravated stalking, as described in s. 784.048(3) and (4);

c. Aggravated child abuse, as described in s. 827.03(2);

d. Aggravated abuse of an elderly person or disabled adult, as described in s. 825.102(2);

e. Lewd, lascivious, or indecent conduct, as described in s. 800.04;

[1] The crime for which Mr. Hearns was sentenced as a violent career criminal took place in September, 1998.

f. Escape, as described in s. 944.40; or

g. A felony violation of chapter 790 involving the use or possession of a firearm.

Battery on a law enforcement officer (LEO) is not one of the specifically enumerated felonies. To be a qualifying offense for VCC sentencing, then, battery on a LEO would have to be a "forcible felony, as described in s. 776.08."

Section 776.08 enumerates certain felonies as "forcible" felonies. Those enumerated felonies include sexual battery and aggravated battery, but not battery on a LEO. At the end of the list of enumerated felonies, there is a catch-all provision of "any other felony which involves the use or threat of physical force or violence against any individual." This catch-all provision looks to the elements of the crime, not the facts of a particular case, to determine if the crime is a forcible felony.

> The statute does not say that a forcible felony is any felony that "may sometimes" involve violence, or even a felony that "frequently does" involve violence. Rather, the statute requires that the felony actually "*involves* the use or threat of physical force or violence against any individual" (emphasis added). § 776.08, Fla. Stat. (1987). Taken in its ordinary and plain meaning, the term "involve" means "to contain within itself, to make necessary as a condition or result." *Oxford American Dictionary* 349 (1980). Its general sense is "to include." *Id*.
>
> Thus, in the strict and literal sense required by Florida law, this language can only mean that the statutory elements of the crime itself must include or encompass conduct of the type described. If such conduct is not a necessary element of the crime, then the crime is not

> a forcible felony within the meaning of the final clause of section 776.08.

Perkins v. State, 576 So. 2d 1310, 1313 (Fla. 1991). The *Perkins* statutory elements test was applied in *Hudson v. State*, 800 So. 2d 627 (Fla. 3d DCA 2001), where then-Chief Judge Schwartz explained that the crime of throwing a deadly missile into a building was not a forcible felony as defined by section 776.08 because the crime could be committed by throwing at unoccupied buildings "and thus does not, by statutory definition, necessarily involve physical force or violence against an individual." *Id*. at 628-29 (special concurring opinion adopted as opinion of court).

In *Johnson v. State*, 858 So. 2d 1071 (Fla. 3d DCA 2003), the defendant was convicted of battery on a law enforcement officer and sentenced as a violent career criminal. The district court reversed, holding:

> Johnson's current (battery) offense, spitting on a law enforcement officer, is not one of the forcible felonies enumerated in section 776.08 and does not amount to "the use or threat of use of physical force or violence" as provided by that section. . . . While spitting on a law enforcement officer amounts to an unwanted touching, it does not amount to the use or threat of use of physical force or violence. Johnson's spitting offense is not a qualifying one for sentencing as a violent career criminal.

Id. at 1072. The State now complains about this decision, writing that "the appellate court improperly looked at the **evidence** in the case, i.e., that the defendant spit on the officer, rather than at the **statutory elements** of the battery

offense as required by this Court's decision in *Perkins.*" (State Br. at 13-14).

The State entirely misses the important, indeed dispositive, point of *Johnson*: So long as the offense can **somehow** be committed in a manner (such as by spitting) that does not **necessarily** involve "the use or threat of physical force or violence," it is not a forcible felony under the *Perkins* test as force or violence is not a necessary element of the crime. Because battery on a LEO pursuant to section 784.03(1)(a), Fla. Stat. (1985), may be accomplished an unwanted touching that does not necessarily involve the use or threat of physical force or violence (such as by spitting), that offense is never a "forcible felony" as that term is defined in section 776.08 and so is never a qualifying offense for purposes of the violent career criminal statute. Indeed, the Third District has subsequently explained that "the problem with using the offense of battery on a LEO as a qualifying offense is that it might not be a forcible felony: battery can be accomplished by mere touching, without the use or threat of use of physical force or violence." *Graham v. State*, 31 Fla. L. Weekly D743, 2006 WL 547972 (Fla. 3d DCA March 8, 2006).[2]

Common sense also compels the conclusion the battery on a LEO is not a

[2] The State has sought discretionary review of the decision in *Graham.* Proceedings there (Case No. SC06-614) have been stayed pending the disposition of this case.

forcible felony as that term is defined in section 776.08. The crime of simple battery is a misdemeanor. See § 784.03(1)(a). Simple battery, then, can never be a forcible felony. Battery on a LEO is a felony only because of the status of the victim. *See* § 784.07(2)(b). The other elements of the crime are exactly the same as simple battery. It would truly be incongruous, then, for battery on a LEO to be considered a forcible felony when simple battery can never be a forcible felony and the only additional element in the offense of battery on a LEO is the victim's status, which has nothing to do with "the use or threat of physical force or violence."

Rules of statutory construction likewise compel this conclusion. Among the offenses specifically enumerated as forcible felonies in section 776.08 are "sexual battery" and "aggravated battery." Battery on a LEO is not specifically enumerated. "Under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another." *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So.2d 898, 900 (Fla.1996); *Brown v. State*, 672 So. 2d 861, 863 (Fla. 3d DCA 1996) (describing rule as "a firmly established principle of statutory construction"). "Under this doctrine, when a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded." *Gay v. Singletary*, 700 So. 2d 1220, 1221

(Fla. 1997). Because battery on a LEO is not listed as a forcible felony, while sexual battery and aggravated battery are, the inference is that the legislature did not intend battery on a LEO to be a forcible felony.

The State "most fervently disagrees" with the holding of the Third District in *Johnson* and the instant case that an unwanted touching does not necessarily involve the use or threat of physical force or violence against an individual. Rather, the State posits (1) any intentional touching or striking necessarily includes the use of physical force, and (2) "one cannot 'intentionally touch' another person without performing the physical act of having his/her body or a body part make contact with the other person." (State Br. at 12). The State is wrong on both counts.

Based on the plain language of Section 784.03, "it is clear. . . that *any* intentional touching of another person against such person's will is technically a criminal battery." *D.C. v. State*, 436 So. 2d 203, 206 (Fla. 1st DCA 1983) (emphasis in original). The touching does not even have to be of the person, but can be "anything intimately connected with the person." *Malczewski v. State*, 444 So. 2d 1096, 1099 (Fla. 2d DCA 1984) (money bag); *Nash v. State*, 766 So. 2d 310 (Fla. 2d DCA 2000) (purse); *Clark v. State*, 746 So. 2d 1237 (Fla. 1st DCA 1999), *approved*, 783 So. 2d 967 (Fla. 2001) (automobile). The following situations, then, are technically criminal batteries under Florida law as they all involve an

intentional touching against the other person's will:

- Flicking a cigarette at an officer and hitting his clothes. *See Fernandez v. City of Cooper City*, 207 F. Supp. 2d 1371 (S.D. Fla. 2002).

- A man asks a woman to have sex with him and touches her hand while making the request. *See Yarbrough v. State*, 88 S.E. 710 (Ga. App. 1916).

- Shining a laser light into a police officer's eye. *See Adams v. Commonwealth*, 534 S.E. 2d 347 (Va. App. 2000).

- A man asks a woman to kiss him and is rebuffed. He then puts his hand on her shoulder and says "I didn't mean to insult you." *See Lynch v. Commonwealth*, 109 S.E. 427 (Va. 1921).

Other, more extreme, examples that fulfill the elements of battery can easily be imagined as "contact with the plaintiff's clothing, or with a cane, a paper, or any other object held in his hand, will be sufficient." *Malczewski*, 444 So. 2d at 1098 (quoting W. Prosser, *Law of Torts* § 9 at 34 (4th ed. 1971)). Thus, a fashion designer stopped by a trooper who reaches up to adjust the trooper's skewed hat is technically guilty of battery on a LEO. A person who deliberately sprinkles water onto the hat of an officer from a second story window is technically guilty of battery on a LEO. A person who intentionally tickles a law enforcement officer with a feather may be guilty of a battery.

Obviously, none of the foregoing examples "involves the use or threat of physical force or violence against any individual." § 776.08. None of the examples, then, could be a forcible felony so, under the *Perkins* elements test

which looks to whether a crime **necessarily** involves violence, battery on a LEO is not a forcible felony.[3]

The decision by the district court below was squarely based on this Court's decision in *Perkins.* **None of the cases relied upon by the State involve any analysis or even mention of *Perkins.*** Thus, in *Spann v. State*, 772 So. 2d 38 (Fla. 4th DCA 2000), appellant challenged his sentence as a prison releasee reoffender, arguing that there was a double enhancement of his penalty. *Id*. at 39. The holding in *Spann* was as follows:

> In the present case, the legislature made battery, which is ordinarily a misdemeanor, a third degree felony when the victim is a law enforcement officer. § 784.07(2)(b). In section 775.082(8)(a)1.o, the legislature authorized increased sentences for defendants who qualify as prison releasee reoffenders and have committed certain felonies. Absent an ambiguity, and there is none here, the imposition of one sentence under the Prison Releasee Reoffender Act is not improper.

Id. Whether battery on a law enforcement officer was a qualifying offense for PRR sentencing was not an issue in that case, so the portion of the opinion finding battery on a law enforcement officer to be a qualifying offense for PRR sentencing is *dicta*. The holding *Perkins* is never mentioned.

In *Brown v. State*, 789 So. 2d 366 (Fla. 2d DCA 2001), the appellant raised

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[3] The State's "plain language" argument (State Br. at 12-13) fails for the simple reason that "physical force" and "touching" are not synonomous. There is no requirement in the battery statute that the touching be forceful or violent.

several challenges to the Prison Releasee Reoffender Punishment Act, including whether battery on a law enforcement officer was a qualifying offense for PRR sentencing. The holding of the court on this point was as follows:

> The Fourth District recently has held that battery on a law enforcement officer is a qualifying offense for prison releasee reoffender sentencing. *See Spann v. State*, 772 So. 2d 38 (Fla. 4th DCA 2000). We agree, and we reject Brown's argument on that issue.

Id. at 367. The decision does not explain the specifics of appellant's challenge, and the court cited only to *Spann* for support of its holding. Thus, once again, *Perkins* was never mentioned and the holding relies upon *dicta* contained in the earlier decision.

In *Branch v. State*, 790 So. 2d 437 (Fla. 1st DCA 2000), the State cross-appealed a sentence, arguing that the trial had the authority to impose consecutive PRR sentences. *Id*. at 439. The portion of the opinion the State now relies upon (State Br. at 7-8) is as follows:

> The appellant meets the criteria for classification as a prison releasee reoffender, for within three years of his 1996 release from a D.O.C. state correctional facility, he committed battery on a law enforcement officer, a qualifying offense that falls within the ambit of statutory subsection (8)(a)(1)(o), which includes "[a]ny felony that involves the use or threat of physical force or violence against an individual."

Id. While the decision indicates that the defendant made several challenges to the PRR statute, *id*. at 438-39, he did not challenge whether battery on a law

enforcement officer was a qualifying offense. The portion of the opinion just quoted, then, is *dicta*. Also, as in the other cases, *Perkins* is never mentioned in the opinion by the First District in *Branch*.

In *State v. Crenshaw*, 792 So. 2d 582 (Fla. 2d DCA 2001), the State appealed a sentence imposed following a guilty plea, arguing that the trial court had no discretion on whether to impose a PRR sentence once it was shown that the defendant qualified for such sentencing. Crenshaw apparently made alternative arguments to try to uphold his plea, one of which was that the crime of battery on a law enforcement officer was not a qualifying offense for PRR sentencing. The decision on this point was as follows:

> Crenshaw also argues that neither battery on a law enforcement officer nor escape are enumerated offenses under the Act. We disagree. In *Brown v. State*, 789 So. 2d 366 (Fla. 2d DCA 2001), this court held that battery on a law enforcement officer is a qualifying offense for prison releasee reoffender sentencing.

Id. at 583. The decision, then, rested entirely on *Brown*, which, as noted earlier, rested entirely on the *dicta* contained in *Spann*. Again, *Perkins* is never mentioned, much less discussed or applied.

The last case relied upon by the State is *Jenkins v. State*, 884 So. 2d 1014 (Fla. 1st DCA 2004), *review denied*, 898 So. 2d 937 (Fla. 2005) (table) (Case No.

SC04-2088). [4] There, the First District opined as follows:

> Finally, we reject appellant's contention that the Prison Releasee Reoffender Punishment Act does not apply to the battery of a law enforcement officer which was proven in this case. *See Branch v. State*, 790 So. 2d 437, 439 (Fla. 1st DCA 2000). . . . In the present case, whatever the rule when the jury fails to find even threatened violence, appellant's "battery on a law enforcement officer is a qualifying offense for prison releasee reoffender sentencing. *See Spann v. State*, 772 So. 2d 38 (Fla. 4th DCA 2000)." *Brown v. State*, 789 So. 2d 366, 367 (Fla. 2d DCA 2001).

Id. at 1016. The decision in *Jenkins*, then, relies exclusively upon the other decisions already discussed, with no independent analysis. As in those other decisions, there is no mention of *Perkins*.[5] In contrast, the decision below properly analyzed and applied the holding in *Perkins.*

The only relevant **analysis** in the cases relied upon by the State is found in Judge Ervin's partial dissent in *Jenkins.* 884 So. 2d at 1017. The defendant in *Jenkins* was sentenced as a Prison Releasee Reoffender after being convicted of battery on a LEO. The issue in *Jenkins* (and every other case relied upon by the State) was qualification for PRR sentencing, which involves virtually the same

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[4] The State also cites to *Robinson v. State*, 751 So. 2d 737 (Fla. 1st DCA 2000), *approved in part*, 793 So. 2d 891 (Fla. 2001), but that case only involved a challenge to the constitutionality of the PRR Act. Presumably, the State cited to *Robinson* because it appears in Judge Ervin's concurring and dissenting opinion in *Jenkins.*

[5] A review of the jurisdictional briefs submitted in *Jenkins* (Case No. SC04-2088) shows that *Perkins* was not mentioned there, either.

language as is at issue here for VCC sentencing.[6]

Judge Ervin agreed that "battery may consist merely of an unwanted touching and does not necessarily involve either the use or threat of physical force or violence, as required by the catch-all provision of the PRR statute." 884 So. 2d at 1017. He explained that "battery under subsection (1)(a)(1) cannot be considered a qualifying offense, because the statutory definition prohibits acts that do not necessarily involve physical force or violence." *Id*.

> Because the statutory elements of battery under subsection (1)(a)(1) do not require proof that the offensive touching involved "physical force or violence," it cannot be a qualifying offense for PRR sentencing. . . . Under the *Perkins* reasoning, . . . the elements of a qualifying third-degree felony must encompass the use or threat of physical force or violence. Because unwanted touching under section 784.03(1)(a)(1) may not necessarily be a violent act, it cannot be a qualifying offense for PRR sentencing.

Id. at 1017-18. The same analysis applies here.

The State's argument about the standard used by the Third District in deciding this case simply misreads the decision below. According to the State,

> it is clear that the Third District in the instant case used a fact-based approach in reaching its decision that Hearns' prior conviction for battery on a LEO was not a forcible felony for VCC sentencing purposes. Indeed, the district court came to this conclusion due to the fact that the State had not shown whether Respondent's prior conviction for battery on a LEO was a mere unwanted touching or

[6] "'Prison releasee reoffender' means any defendant who commits, or attempts to commit . . . Any felony that involves the use or threat of physical force or violence against an individual." § 775.082(9)(a)1.o. (Fla. Stat. 2002).

> caused bodily harm. (A. 4). Additionally, the court noted the absence of "record evidence that Hearns' conduct against a law enforcement officer was a forcible felony." (A. 4).

(State Br. at 10-11). The State then chides what it calls the Third District's "preoccupation with the facts or 'record evidence' (as opposed to merely viewing the statutory elements)." (State Br. at 11).

Contrary to the State's assertion here, the decision below correctly acknowledged and applied the statutory elements test set out in *Perkins.*[7] The Third District noted that *Perkins* requires an offense to include or encompass the use or threat of physical force or violence as a necessary element before it can be considered a "forcible felony." The opinion also correctly acknowledged that "battery on a law enforcement officer" is not <u>invariably</u> a qualified offense for VCC sentencing as it can be accomplished by a mere unwanted touching, in violation of section 784.03(1)(a) [which is not a qualifying offense], or by intentionally causing bodily harm, in violation of section 784.03(1)(b) [which would be a qualifying offense]. (A. 3-4).

The "record evidence" referred to in the decision below is not a delving into

[7] The State's remarks would be properly directed at the opinion in *State v. L.L.*, 31 Fla. L. Weekly D1121, 2006 WL 1041995 (Fla. 2d DCA April 21, 2006) ("The record establishes that L.L. used physical force against a teacher. Indeed, L.L. 'shoved and pushed using his body, pushing [the victim] backwards while [the] victim tried to protect the class from [L.L.].' Thus, L.L.'s offense, to which he pleaded guilty, falls within the ambit of" the definition of forcible felony.).

the facts behind the 1985 conviction of battery on a law enforcement officer as the State seems to think; it is instead a reference to the record evidence **presented at the sentencing hearing in 2000.** If the State had shown through the verdict form, or perhaps through a combination of the verdict form and information and plea colloquy, that the 1985 conviction was obtained under section 784.03(1)(b), then the enhanced VCC sentence would have been proper.[8] However, absent such evidence in the record, it wasn't shown that the statutory elements of the crime necessarily encompassed the use or threat of physical force or violence. Therefore,

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[8] By its reference to the "record evidence," the Third District may have had in mind the procedure followed in federal courts when determing, for sentencing purposes, whether a prior conviction was for a "crime of violence." That procedure is explained in *United States v. Gonzalez-Chavez*, 432 F. 3d 334 (5th Cir. 2005):

> When determining whether a prior offense is a crime of violence because it has as an element the use, attempted use, or threatened use of force, district courts must employ the categorical approach established in *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). Under that approach, courts determine the elements to which a defendant pleaded guilty by analyzing the statutory definition of the defense, not the defendant's underlying conduct. If a statute contains multiple, disjunctive subsections, courts may look beyond the statute to certain "conclusive records made or used in adjudicating guilt" in order to determine which particular statutory alternative applies to the defendant's conviction. These records are generally limited to the "charging document, written plea agreement, transcript of the plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 1257, 161 L.Ed.2d 205 (2005).

Id. at 337-38 (citations omitted).

applying *Perkins*, the Third District correctly held that the sentence had to be reversed.[9]

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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[9] The analysis by the Third District is similar to the analysis by Judge Ervin in *Jenkins*, where he explained that battery on a LEO would be a qualifying offense if committed under the subsection of intentionally causing bodily harm, but is not a qualifying offense if committed under the subsection of actually and intentionally touching or striking another. A general verdict of "guilty of Battery on a Law Enforcement Officer," Judge Ervin opined, was thus insufficient to support a PRR sentence. *Jenkins*, 884 So. 2d at 1017-19 (Ervin, J., concurring in part and dissenting in part).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Petitioner on the Merits was delivered by hand to Richard Polin and Douglas Glaid, Assistant Attorneys General, Office of the Attorney General, Appellate Division, 444 Brickell Avenue, Suite 650, Miami, FL 33131 on July 10, 2006.

_____

Robert Godfrey
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14-point font, and so is in compliance with Rule 9.210(a)(2).

_____

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