IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1401
L.T. CASE NO. 3D03-2819

GARY LAMAR POLITE,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

CHARLES J. CRIST, JR.
Attorney General

RICHARD L. POLIN
Criminal Appeals Bureau Chief, Miami
Florida Bar Number 0230987

LUCRETIA A. PITTS
Assistant Attorney General
Florida Bar Number 0388238

Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, Florida 33131
(305) 377-5441 (o)
(305) 377-5655 (f)

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INTRODUCTION

The Petitioner, GARY LAMAR POLITE, was the defendant at trial, and the Respondent, THE STATE OF FLORIDA, was the prosecution at trial. In this brief, the parties will be referred to as they stood at trial. On September 20, 2006, the clerk of the Third District Court of Appeal forwarded by certified mail that the two volumes of record on appeal and two volumes of transcripts were forwarded to the Florida Supreme Court. The symbols "R." and "T." will refer to the record on appeal and the transcripts, respectively. In addition, the symbol "TAB" will refer to the additional material as indicated in the clerk's index that was submitted to this Court from the Third District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

On January 6, 2003, Defendant was charged by information for tampering with a parking meter and resisting an officer with violence on or about December 16, 2002. (R. 1-4). After a jury trial on June 11, 2003 and June 12, 2003, Defendant was convicted of both charges. (R. 24). On September 18, 2003, Defendant was sentenced to seven and a half years in prison as a prison releasee reoffender and a habitual felony offender. (R. 206-209).

On or about December 16, 2003, Officer Marcos Munoz, a police officer with the Miami-Dade County Police Department for 21 years, was working as an undercover cop in the Miami downtown area. (T. 192). He was dressed in his usual plain-clothes "uniform" of a t-shirt with a pocket, an opened button-down shirt, and pants. (T. 194, 200). Officer Munoz observed Defendant approach on a bicycle. (T. 194). Officer Munoz was eight or nine feet away from Defendant and had a clear view of Defendant at all times. (T. 199). Defendant stopped at a meter, looked at it, and moved on to a second meter and repeated the same pattern. (T. 194). Defendant moved to a third meter. (T. 194). Defendant wrapped his arms around the meter and "inserted something into the meter and was trying to withdraw the coins from the meter." (T. 194, 198, 209).

Officer Munoz removed his badge from his T-shirt pocket and approached Defendant. (T. 194). Officer Munoz stated "Police, you're under arrest." (T. 195)

He proceeded to grab Defendant's wrist to handcuff him but Defendant pulled his arm away. (T. 195). Officer Munoz grabbed Defendant by the shoulder. (T. 195). There was a struggle between Officer Munoz and Defendant. (T. 195). Officer Munoz was able to get Defendant onto one of Defendant's knees in an attempt to handcuff him. (T. 195). Defendant continued to struggle and wriggle and Officer Munoz was unable to put the handcuffs on him. (T. 195). Suddenly, Defendant's "upper clothing just slipped right off of him" and he was released from Officer Munoz's grasp. (T. 195). Defendant attempted to punch Officer Munoz, but Officer Munoz stepped back and no contact was made. (T. 195). Defendant mumbled something and took off on his bicycle. (T. 195).

Officer Munoz took a moment to catch his breath. (T. 196) He grabbed his radio and sent out a "be on the lookout" (BOLO) for Defendant. (T. 196). Officer Munoz ran after Defendant on foot and continued to advise other officers of the directions Defendant was taking. (T. 196). During this pursuit, Defendant did not yell out to anyone to help him or run into a store for assistance. (T. 207, 219-220). On First Avenue, Officer Munoz observed Defendant take "a few steps, like, going, like, towards his right, which would be north and then he backed up and he ran towards the left." (T. 196). After which, Officer Octavio Santiago was "right there and was able to detain him and apprehend him for me." (T. 196). Officer Munoz identified Defendant at that time. (T. 196).

Officer Munoz testified that his plain clothes were his typical uniform for his undercover operations. (T. 200). He always wore T-shirts with pockets and a button-down shirt. (T. 200). His button-down shirt was always worn open to hide his gun and other police "utensils." (T. 201). The T-shirt pocket was utilized to store his badge until he wanted to make it known that he was an officer. (T. 200-201). The badge was a shiny silver police badge attached to a three-by-four inch leather piece that hung from a silver chain around his neck. (T. 179, 203, 218). On the opposite side of the badge was his police identification that was clearly marked with the word "Police." (T. 201). Officer Munoz usually has his badge facing outward when he pulls it from his pocket. (T. 201). The position of the badge is secured by the fact that the badge is worn on a silver chain that does not swivel to permanently display the police ID side. (T. 218). In order to permanently display the police ID side, Officer Munoz would have to pull the chain over his head, turn it around, and place the chain back around his neck. (T. 218). During the jury trial, Officer Munoz demonstrated how he removed his badge from his pocket and informed Defendant that he was a police officer as he was approaching Defendant. (T. 202). Officer Munoz testified that his badge was displayed at all times during his encounter with Defendant. (T. 207).

Officer Octavio Santiago took the stand as a defense witness. (T. 169). On December 16, 2002, Officer Santiago was working as a bicycle patrolman in the

Miami downtown area. (T. 169). Officer Santiago wore a white T-shirt with the word "Police" on the back and a shield on the front, dark blue shorts, and his radio, "arms," and badge. (T. 170-171). He did not observe any of the interaction between Officer Munoz and Defendant during the initial attempted arrest. (T. 175). Defendant approached Officer Santiago. (T. 175). He was not asking Officer Santiago to help him or saying that someone was pretending to be a police officer. (T. 179-180). Defendant told Officer Santiago that he was not sure that Officer Munoz was a police officer. (T. 177). Officer Santiago arrested Defendant without any struggle. (T. 177). When Officer Munoz approached, his silver badge was displayed "obviously" in the center of his chest. (T. 179).

Prior to the jury trial, there had been a lengthy discussion about the admission of the statement made by Defendant to Officer Santiago. (T. 134-150). The State argued that the statement was hearsay and did not fit within any of the exceptions. (T. 140-144). The Court agreed that the statement was hearsay, but ruled that it was admissible as a spontaneous statement. (T. 146, 153). The State objected. (T. 153).

At the close of both sides, Defendant moved for a judgment of acquittal on the resisting an officer with violence offense, alleging that Defendant did not know that Officer Munoz was a police officer. (T. 224). Defendant moved for a judgment of acquittal on the tampering with a parking meter offense, alleging that

there was no proof that the meter was broken into by Defendant. (T. 224). The motions were denied. (T. 227). The jury instructions were read and accepted by the State and Defendant. (T. 227-231).

The State gave its closing argument. (T. 233-242). During the closing argument, the State discussed the elements of the charges as they would be restated in the jury instructions and applied the evidence that was presented to the jury to those elements. (T. 237-240). The State then discussed Defendant's defense of resisting arrest but he did not know that Officer Munoz was an officer. (T. 240). The State questioned whether that was an element in the State's burden of proof. (T. 240). Defendant objected and stated that the prosecutor's statement was a misstatement of law. (T. 240). The objection was overruled. (T. 240). The State admonished that the fact was not in its burden of proof. (T. 240). There was no objection. The State went on to state that despite the arguments about Defendant's knowledge, there was enough evidence presented to support that Defendant knew that Officer Munoz was a police officer. (T. 240-241).

At the conclusion of the State's closing argument, a sidebar was taken. (T. 242). Defendant requested that the court instruct the jury that "they do need to find that Mr. Polite actually believed that this person was a police officer." (T. 242). Defendant cited to Cooper v. State, 742 So. 2d 855 (Fla. 1st DCA 1999) and argued that the case held that proof that the defendant knew that he was resisting

an officer was an element of resisting an officer without violence. (T. 243). Although the State had not been given the opportunity to review the case, it noted to the court that the case had a yellow flag. (T. 243). Also, the State argued that the standard jury instructions do not include an element that the defendant had to know the police officer was a police officer. (T. 243). Defendant continued to argue that the jury had to make that finding. (T. 243). The court ruled that the jury instructions covered the knowledge element of the statute and what Defendant was requesting in special instructions. (T. 245).

Defendant began his closing argument with the statement that "knowingly, that is what we are here about today. Knowingly, okay." (T. 246) The Defendant argued to the jury that the evidence supports that Defendant did not know Officer Munoz was an officer. (T. 246-250). The State's rebuttal addressed the issue of "knowing" and explained that knowing went to the acts of resisting, obstructing, and opposing. (T. 251). Defendant objected, which was overruled. (T. 251-252). The State referred to the jury instructions that did not include that Defendant had to know that Officer Munoz was a police officer. (T. 251). Defendant objected. (T. 251). The State reviewed the evidence that established that Defendant knew Officer Munoz was a police officer. (T. 252). The State concluded by stating that "[t]he Judge is going to instruct you what the law is. And if the facts, as you

determine them, are a violation of the law as the Judge instructs you, then this Defendant is guilty." (T. 254-255).

During a sidebar, Defendant once again requested that the court give the jury special instructions that the "knowingly in that instructions includes that he must knowingly resist an officer which includes that he must have known that Mr. - - that Officer Munoz was in fact a police officer." (T. 255-256). The court denied the request and affirmed that the standard jury instructions would be given. (T. 256). Defendant moved for a mistrial, alleging that the failure to give special instructions would lead "the jury astray." (T. 256). The court denied the motion for mistrial. (T. 257).

The jury was read the jury instructions agreed upon by both sides. (T. 256-269). During jury deliberations, the jury submitted questions to the court about the definition of violence and what constitutes violence. (T. 271). The jury was instructed to rely upon the evidence presented and the jury instructions. (T. 271-272). The jury returned with a guilty verdict to both charges. (T. 273). On June 23, 2003, Defendant filed a motion for a new trial based on the State's statements to the jury. (R. 30-44). The motion was denied. (R. 49).

A timely appeal of the judgment and sentence was filed on October 10, 2003. (R. 212). On appeal, Defendant argued that

> The trial court erred in denying the Defendant's motion for a mistrial where the State repeatedly misled jurors as to the knowledge element

> of resisting an officer with violence and where the trial court refused to mitigate the prejudice suffered by the Defendant through a curative instruction regarding the level of knowledge required to violate Section 843.01, Florida Statutes.

(TAB A). The State filed an answer brief. (TAB B). On August 11, 2004, the Third District Court of Appeal per curiam affirmed the case and cited to O'Brien v. State, 771 So. 2d 563 (Fla. 4th DCA 2000). Polite v. State, 2004 Fla. App. LEXIS 11728; 29 Fla. L. Weekly D 1932 (Fla. 3d DCA August 11, 2004).

Upon Defendant's motion for rehearing and certification, on April 13, 2005, the Third District set its Aug. 11, 2004 opinion aside and submitted an opinion in favor of Defendant with a dissenting opinion. Polite v. State 934 So. 2d 496 (Fla. 3d DCA April 13, 2005). The opinion relied upon Cooper v. State, 742 So. 2d 855 (Fla. 1st DCA 1999) in its determination that knowledge of the police officer's status was an "indispensable element of the crime." Id. at 497. The dissenting opinion concluded that the State must prove that the defendant knew or should have reasonably have known; and in the case at bar, the State argued and proved that Defendant should have known that Officer Munoz was a police officer. Id. at 499.

Upon the State's motion for rehearing en banc and certification, the Third District ordered the parties to submit supplemental briefs. Both parties submitted supplemental briefs. (TAB A, B). Thereafter, on June 14, 2006, the Third District set aside its April 13, 2005 opinion, and submitted an opinion in favor of the State.

Polite v. State, 933 So. 2d 587 (Fla. 3d DCA June 14, 2006). The court held that knowledge of the victim's status as a police officer is not an element of the offense of resisting an officer with violence. Id. at 589. The court based its opinion upon the plain language of the resisting an officer with violence statute and that the legislature has always expressly included the condition when it was to be considered an element of the offense. Id. at 589, 591. Also, the court held that resisting an officer with violence is not a specific intent crime and, therefore, did not have a heightened or particularized intent among its elements. Id. at 590. The court recognized the policy considerations of providing protection against violence for undercover officers. Id. The court distinguished resisting arrest without violence, which requires proof of the defendant's knowledge of the officer's status, from resisting arrest with violence. Id. at 592-593. The court recognized that although resisting arrest without violence is silent on the knowledge element, "the requirement must be imposed because the forbidden conduct would not otherwise be necessarily improper." Id. at 593. But resisting with violence is "decisively different," because "the situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected." Id. The court certified conflict with A.F. v. State, 905 So. 2d 1010 (Fla. 5th DCA 2005). Id. at 594.

QUESTION PRESENTED

WHETHER THE OFFENSE OF RESISTING AN OFFICER WITH VIOLENCE INCLUDES KNOWLEDGE OF THE POLICE OFFICER'S STATUS AS AN ESSENTIAL ELEMENT.

SUMMARY OF THE ARGUMENT

The plain language of § 843.01, resisting arrest with violence statute, does not include knowledge of the victim's status as an element. The adverb "knowingly" modifies the verbs "resists, opposes, and obstructs" and does not modify the nouns, including officer, in the statute.

This Court has already held that § 843.01 must be read *in pari materia* with § 776.051, use of force in resisting arrest or making an arrest statute. Section 776.051 is an affirmative defense statute and it includes the knowledge element of the police officer's status; therefore, the legislative intent of the statutory construction is that the knowledge element is an affirmative defense when violence is used to resist arrest. Section 776.051 allows for the alternatives of actual and constructive knowledge to justify the use of force, and in the case at bar, the prosecutors properly argued that the evidence supported the conclusion that Defendant had a constructive knowledge of the officer's status.

This Court has held that § 843.01 is a general intent offense that includes an intent to commit the act performed (actus reus) and does not contain a heightened or particularized intent beyond the act performed. This conclusion is consistent with a conclusion that § 843.01 does not require an offender's knowledge of the victim's status, which would be a heightened or particularized intent on the offender's state of mind at the time of performing an act.

Finally, in an analogous federal statute on forcibly assaulting or resisting a federal officer, the Supreme Court of the United States held that there is no knowledge element of the officer's status. Also, the Court reasoned that undercover and uniformed officers' safety outweighs the needs of the citizenry to commit violence, because violence is wrong all the time no matter the victim's status.

ARGUMENTS

THE THIRD DISTRICT COURT OF APPEAL CORRECTLY HELD THAT KNOWLEDGE OF A POLICE OFFICER'S STATUS IS NOT AN ELEMENT OF RESISTING ARREST WITH VIOLENCE. (Restated)

This Court has long recognized that the legislature has the power to define crimes and to set punishment. Rusaw v. State, 451 So. 2d 469, 470 (Fla. 1984). When the definitions of the laws are challenged, the courts apply the principles of statutory construction to interpret the statutes. Maddox v. State, 923 So. 2d 442 (Fla. 2006). In the case at bar, the Third District Court of Appeal was called upon to interpret the resisting an officer with violence statute. The statute reads as follows:

> Whoever knowingly and willfully resists, obstructs, or opposes any officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); member of the Parole Commission or any administrative aide or supervisor employed by the commission; parole and probation supervisor; county probation officer; personnel or representative of the Department of Law Enforcement; or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 843.01, Fla. Stat. (2002). The Third District correctly determined that resisting an officer with violence does not require as an essential element knowledge of the police officer's status based on (1) the plain language of the statute, including the

failure of the legislature to expressly include the condition, (2) the offense's status as a general intent crime, and (3) policy considerations, including the distinction between resisting without violence and resisting with violence. 933 So. 2d at 587-593. The court also held that when the offense is read *in pari materia* with § 776.051, knowledge of the officer's status is a defense that was rejected by the jury in this case. Id. at 593.

A. The Plain Language of § 843.01 Does Not Include Knowledge of the Victim's Status as an Essential Element.

This Court has "explained that as a fundamental principle of statutory construction, 'legislative intent is the polestar that guides the Court's inquiry' and is derived primarily from the language of the statute." State v. Bodden, 877 So. 2d 680 (Fla. 2004) (quoting McLaughlin v. State, 721 So. 2d 1170, 1172 (Fla. 1998)). This Court further explained that "'[t]he legislature is presumed to know the meaning of words and the rules of grammar, and the only way the court is advised of what the legislature intends is by giving the generally accepted construction, not only to the phraseology of an act, but to the manner in which it is punctuated.'" Id. (citing to Florida State Racing Commission v. Bourquardez, 42 So. 2d 87, 88 (Fla. 1949)).

"It is well settled that adverbs modify only verbs, adjectives, other adverbs, or in some instances entire sentences . . . nouns cannot be modified by adverbs. 'An adverb, an adverbial phrase, or an adverbial clause may qualify several parts of speech, but a noun is not one of them.'" Wausau Insurance Co. v. Haynes, 683 So. 2d 1123, 1126 n. 2 (Fla. 4th DCA 1996) (Farmer, J., concurring specially) (citing to Theodore M. Bernstein, The Careful Writer, 23 (1977)). See also Reynolds v. State, 842 So. 2d 46 (Fla. 2002) (within phrases constructions adjectives modify nouns).[1]

Based upon this grammatic principle, the Third District correctly concluded that "the adverbial terms 'knowingly and willfully' modify the verbs 'resists, obstructs or opposes' rather than the entire phrase." 933 So. 2d at 590. Adverbs do

[1] In Reynolds, the defendant was convicted of felony animal cruelty, which required "a person who intentionally commits an act to any animal which results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering." 842 So. 2d at 47. On appeal, the defendant argued that the word "intentionally" should modify more than the verb "commits," but should also modify the result of cruel death and excessive or repeated infliction of unnecessary pain or suffering. Id. at 48. The court stated that the defendant's reading of the statute would require the statute to state: "a person who intentionally commits an act to any animal which **intentionally** results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering." Id. at 49 n2. The court rejected this construction by stating that "not only would this result in the insertion of a word that is not present, it would also change the meaning of the statute. When construing statutes, courts 'are not at liberty to add words to statutes that were not placed there by the Legislature.'" Id. (citing to Hayes v. State, 750 So. 2d 1, 4 (Fla. 1999)).

not modify nouns; therefore, the adverbs "knowingly and willfully" do not modify the noun "officer," or any of the other listed positions.

A conclusion that the adverb "knowingly" modified the nouns, including officer, in § 843.01 would be outside the plain language of the statute and would actually be a "recast" of the statute to require a heightened or particularized knowledge element. See Reynolds, 842 So. 2d at 46; Frey v. State, 708 So. 2d 918, 920 n.2 (Fla. 1998) (§ 843.01 could be recast outside of its present plain language to satisfy a heightened or particularized intent if it stated "whoever knowingly and willfully resists, obstructs, or opposes any officer . . . **with the intent of** doing violence to the person of such officer."). The plain language that would require proof that a defendant knew or should have known that he or she was resisting an officer or other qualified position under § 843.01 would read: "whoever knowingly and willfully resists, obstructs, or opposes a **known** officer, [etc.]." If the legislature desired to include knowledge of the victim's status as an element of the offense, it would have expressly included the condition. However, the plain language of § 843.01 does not modify the nouns nor does it expand its knowledge element beyond the knowledge of the defendant's action. See Exposito v. State, 891 So. 2d 525, 528 (Fla. 2004) ("[T]his Court must give the statutory language its plain and ordinary meaning, and is not at liberty to add words . . . that were not placed there by the Legislature.")). Therefore, the State is not required to prove

Defendant's knowledge of the officer's status based on the plain language of the statute.

B. When § 843.01 is Read *In Pari Materia* with the Related Statute, the Interpretation of the Legislative Intent is that Knowledge of the Officer's Status is Not an Essential Element.

"It is a recognized rule of statutory construction that statutes which relate to the same person or thing or to the same class of persons or things, or to the same or a closely allied subject or object, may be regarded as *in pari materia*. Statutes which have a common purpose or the same common purpose, or are parts of the same general scheme or plan or aimed at accomplishing the same results, may be regarded as *in pari materia*." Singleton v. Larson, 46 So. 2d 186, 190 (Fla. 1950). Sections 843.01 and 776.051 are to be read *in pari materia* to each other for cases involving resisting arrest. See State v. Espinosa, 686 So. 2d 1345, 1347 (Fla. 1996); Taylor v. State, 740 So. 2d 89 (Fla. 1st DCA 1999).

On July 1, 1975, the legislature modified the common-law rule on force to resist an unlawful arrest by enacting § 776.051. Lowery v. State, 356 So. 2d 1325 (Fla. 4th DCA 1978). Thereafter, a defendant could not resist **with violence** against a reasonably known police officer notwithstanding the technical illegality of the arrest. Lowery, 356 So. 2d at 1326. The Lowery court explained that a

defendant could no longer contest the illegality of the arrest on the street but would have to do so **in court**. Id. Upon reading § 776.051(1) *in pari materia* with § 843.01, the issues of the legality of the arrest and the knowledge of the police officer's status are removed from § 843.01, the offense, and presented in § 776.051, the defense. Espinosa, 686 So. 2d at 1347.

Section 776.051(1), Fla. Stat. (2002), which is entitled "Use of force in resisting or making an arrest; prohibition," states 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." This statute is found within Chapter 776 of the Florida Statutes entitled "Justifiable Use of Force." The entirety of Chapter 776 of the Florida Statutes includes affirmative defenses that a defendant can raise at trial to justify or defend against the State's charged offense.[2] Therefore, it is reasonable to interpret that by the legislature's inclusion of § 776.051 within a chapter of affirmative defenses, the legislature intended § 776.051 to be an affirmative defense to related statutes and not an essential element of the offense in the related statute.

In addition to the inclusion of § 776.051 within an affirmative defense chapter, this Court has included the language of § 776.051 in the standard jury instructions for justifiable use of nondeadly and deadly force, which are

[2] Chapter 776 includes use of force in defense of person (§776.012), use of force in defense of others (§ 776.031), use of force by the aggressor (§ 776.041), etc.

affirmative defense instructions to the use of force. Fla. Std. Jury Instr. (Crim) 3.94 (d,e) ("A person is not justified in using force to resist an arrest by a law enforcement officer who is known to be or reasonably appears to be a law enforcement officer."). "An affirmative defense is a defense which admits the cause of action, but avoids liability, in whole or in part, by alleging an excuse, justification, or other matter negating or limiting liability." St. Paul Mercury Ins. Co. v. Coucher, 837 So. 2d 483, 487 (Fla. 5th DCA 2003) (citing to Henry P. Trawick, Jr., Florida Practice & Procedure § 11-4, at 205 (2000 ed.)). Based upon the inclusion of the language of § 776.051 in the affirmative defense instructions on the use of force, the State submits that this Court has already determined that the knowledge of the police officer's status is a defense to an offense that includes force, or violence, and is not an essential element to the offense that includes force, or violence, as alleged by Defendant.

Furthermore, in the case at bar, the prosecutors' closing arguments were not improper in light of §§ 843.01 and 776.051 being read *in pari materia*. Section 776.051 states that a defendant should know that an officer was an officer **or** that an officer reasonably appears to be a police officer. The use of the conjunction "or" allows for either option to satisfy the knowledge element. If there was evidence to prove that the officer reasonably appeared to be an officer, the jury can reach the verdict that a defendant is guilty of resisting arrest with violence

regardless of the defendant's subjective belief of the officer's status. Any contrary construction of §§ 776.051 and 843.01 would completely undermine the alternatives of constructive and actual knowledge recognized in § 776.051.

The prosecutors argued during closing arguments that there was sufficient evidence to prove that Defendant knew that Officer Munoz was an officer and that Defendant reasonably should have known that Officer Munoz was an officer. (R. 240-241, 252-254). These arguments do not mislead the jury as to the knowledge element under § 776.051; therefore, the prosecutors' comments were not erroneous and do not constitute reversible error. Also, in the case at bar, the only defense was that Defendant did not know that Officer Munoz was an officer. There was no defense that Defendant should not have reasonably known that Officer Munoz was an officer. Therefore, the jury properly found that Defendant could have reasonably known that Officer Munoz was an officer and rendered the verdict of guilty.

C. The Third District's Opinion that Knowledge of the Victim's Status is Not an Essential Element of the § 843.01 is Consistent with this Court's Opinions that § 843.01 is a General Intent Crime.

In Frey v. State, 708 So. 2d 918 (Fla. 1998), this Court held that resisting arrest with violence is a general intent offense and not a specific intent offense.

This Court explained that "'specific intent' is to designate a special mental element which is required above and beyond any mental state required with respect to the actus reus of the crime." Id. at 919 (citation from Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 3.5(e) (1986)). Under this premise, the Court reasoned that the plain language of resisting with violence "reveals that no heightened or particularized, i.e., no specific, intent is required for the commission of this crime, only a general intent to 'knowingly and willfully' impede an officer in the performance of his or her duties." Id. See also Colson v. State, 73 So. 2d 862 (Fla. 1954) (this Court rejected the defendant's claim of intoxication to negate resisting with violence and stated that "there was competent evidence to prove that resistance to the sheriff was 'knowingly and willfully' done" and that "whether or not defendant had enough left to know what he was doing was a question for the jury"). In other words, resisting with violence requires knowledge of the actus reus, but does not include any special mental element above and beyond committing the act. In particular, this Court stated that the statute must be recast as follows to include a heightened intent beyond the general intent to perform the act: "[w]hoever knowingly and willfully resists . . . an officer . . . in the lawful execution of any legal duty, **with the intent of** doing violence to the person of such officer . . . is guilty of a felony of the third degree." Frey, 708 So. 2d at 920 n2 (emphasis added).

The determination that resisting with violence is a general intent crime based on the plain language of the statute supports the conclusion that the knowledge element of the offense is minimal rather than heightened. The minimal knowledge within the resisting with violence statute is knowledge of the act being done. There is no heightened knowledge element of the officer's status within the plain language of the statute or within the conclusion that resisting with violence is a general intent crime.

Defendant argues that "[t]he fact that resisting an officer with violence is a general intent crime does not affect the analysis," because Frey can be read in harmony with Thompson v. State, 695 So. 2d 691 (Fla. 1997). *Initial Brief, pg. 23.* To the contrary, Frey's conclusion that resisting with violence is a general intent and not a specific intent offense is the controlling law in the issue at bar (as discussed above); and Thompson's holding that an entirely distinguishable statute is a specific intent crime does not affect the controlling nature of Frey to the statute in the case at bar.[3]

[3] It should be noted that this Court issued its opinion in Frey that resisting with violence was a general intent crime nine months after this Court issued its opinion in Thompson that a wholly distinguishable statute was a specific intent crime. Therefore, it can reasonably be assumed that this Court would have had the Thompson analysis for its consideration when it issued its Frey opinion and this Court impliedly rejected following the Thompson holding on the knowledge issue by its holding in Frey.

In Thompson, this Court held that knowledge of a police officer's status is an element under § 784.07(3), Fla. Stat. (1993), which was the assault or battery of law enforcement officers statute. 695 So. 2d at 693. This Court came to this conclusion by analyzing the plain language of subsection (3), analyzing subsection (3) within the context of the entirety of § 784.07, and comparing § 784.07 to the similar offense of attempted first degree murder. Id. Section 784.087(3) stated:

> Notwithstanding the provisions of any other section, any person who is convicted of attempted murder of a law enforcement officer engaged in the lawful performance of his duty or who is convicted of attempted murder of a law enforcement officer **when the motivation for such attempt was related, all or in part, to the lawful duties of the officer**, shall be guilty of a life felony, punishable as provided in s. 775.0825.

(emphasis added). Under the plain language analysis, this Court determined that the legislature expressly included a condition of the knowledge of the police officer's status in the language "when the motivation for such attempt was related, all or in part, to the lawful duties of the officer." Id. at 692-693. Based on this inclusion, the offense was a specific intent crime. In other words, to require the defendant's motivation (mens rea) for murder (actus reus) to be related to the officer's lawful duties, then it is logical to conclude that the defendant must know of the officer's status to be motivated to murder the officer because of the officer's duties. The same conclusion cannot be drawn from the plain language of § 843.01. As discussed above, the legislature did not expressly indicate that knowledge of the

officer status was necessary for § 843.01, because the legislature did not include the language ". . . opposes a **known** officer" nor the language "**with the intent of** offering or doing violence to the person of such officer." Therefore, the plain language conclusion of § 784.07(3) cannot be the same plain language conclusion of § 843.01.

Secondly, this Court analyzed subsection (3) within the entire context of § 784.07 to determine that knowledge of police officer's status was an element of subsection (3), but the same analysis nor conclusion can be made upon examination of § 843.01. Resisting with violence is the only section of § 843.01 and the conclusion that what-is-good-for-one-part-is-good-for-the-other-part cannot be drawn because there is no other part.

Finally, this Court analyzed attempted murder of a law enforcement officer with the similar offense of attempted first-degree murder to determine the legislative intent of the knowledge element, but the same conclusion cannot be drawn when resisting with violence, § 843.01, is compared to its similar offense of resisting without violence, § 843.02. In Thompson, this Court recognized that the attempted murder of a law enforcement officer and attempted first-degree murder were the same underlying offense and the distinction between the offenses was the police officer's status. Also, this Court recognized that the legislature imposed a greater punishment for attempted murder of a police officer than the attempted

murder offense. 695 So. 2d at 693. Therefore, this Court concluded that the only reasonable conclusion was that the legislature had heightened the punishment of the same underlying offense, i.e., attempted murder, due to the victim's, i.e., a law enforcement officer, status; and the determination that the defendant should know the victim's status as a the law enforcement officer can be implied from this analysis of the legislative intent. Id. The same conclusion cannot be drawn from a comparison of resisting with violence, which is a third-degree felony, and resisting without violence, which is a first-degree misdemeanor. Although there is greater punishment for resisting arrest with violence, the distinction in the two offenses is not the victim's status, but the defendant's act of using violence. Therefore, the reasonable conclusion is that the legislature has heightened the punishment for the defendant's use of violence; and it is the violence that is the distinguishable element and not the law enforcement's status.

In summary, the Third District's holding that resisting with violence does not include an element of knowledge of the officer's status is consistent with this Court's determination that resisting with violence is a general intent crime that does not contain a specialized mens rea. Also, the holding of Thompson does not affect the Third District's holding, because Thompson dealt with a specific intent crime, which is wholly distinguishable from resisting with violence offense.

D. There are Strong Policy Considerations Related to § 843.01 that Support the Determination that Knowledge of the Officer's Status is Not an Essential Element.

Policy considerations regarding an officer's safety are purely a legislative matter. However, one of the primary goals to statutory interpretation by the courts is to interpret the statute consistent to the purpose or public policy of the statute. Tyson v. Lanier, 156 So. 2d 833, 836 (Fla. 1963). The Supreme Court of the United States has already considered the purpose and policy considerations in a similar federal statute and determined that the legislative policy of protecting police officers supported the absence of a knowledge element in the offense of using violence against police officers. United States v. Feola, 420 U.S. 671 (1975). See also Thompson, 695 So. 2d at 693 (Wells, J., dissent) (there is a legislative intent to provide protection to law enforcement officers, uniformed and undercover). The State submits that this Court should thus defer to the Florida legislature's determination regarding the significance of an officer's safety and similarly determine that the policy is supported by the absence of a knowledge element of the officer's status in the offense.

In Feola, the Court considered the issue of whether knowledge that the intended victim is a federal officer is a requirement of the crime of conspiracy[4] to commit forcibly resisting an officer. The relevant federal statute states "[w]hoever **forcibly** assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $ 5,000 or imprisoned not more than three years, or both." 18 U.S.C. § 111 (emphasis added). The Court held that

> We conclude, from all this, that in order to effectuate the congressional purpose of according maximum protection to federal officers by making prosecution for assaults upon them cognizable in the federal courts, § 111 cannot be construed as embodying an unexpressed requirement that an assailant be aware that his victim is a federal officer. All the statute requires is an intent to assault, not an intent to assault a federal officer. A contrary conclusion would give insufficient protection to the agent enforcing an unpopular law, and none to the agent acting under cover.

Id. at 684. This conclusion was drawn even when the facts of the case revealed that the federal officers were acting in an undercover capacity, as purchasers of narcotics, and Feola and his confederates devised and attempted to implement a plan to sell sugar in the place of narcotics or to simply assault and steal the

[4] Although Feola was charged with conspiracy to commit an assault on a federal officer, the Court separately analyzed the knowledge element under the assault of a federal officer statute and the intent element of conspiracy. It is the analysis of the underlying offense of assault of a federal officer that is pertinent to the policy considerations of the similar state statute of resisting with violence.

officers' money. Even within this factual scenario where the federal officers had presented themselves as civilians, the Court held that knowledge of the officers' status was not necessary for the underlying offense of forcible assault on a federal officer.

The Court even addressed the defendant's concerns of balancing the officers' safety with the "needs of the citizenry."

> This interpretation poses no risk of unfairness to defendants. It is no snare for the unsuspecting. Although the perpetrator of a narcotics 'rip-off,' such as the one involved here, may be surprised to find that his intended victim is a federal officer in civilian apparel, **he nonetheless knows from the very outset that his planned course of conduct is wrongful.** The situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected. In a case of this kind the offender takes his victim as he finds him. The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum.
>
> We are not to be understood as implying that the defendant's state of knowledge is never a relevant consideration under § 111. The statute does require a criminal intent, and there may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of *mens rea*. For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent.

Id. at 685-686. In other words, a defendant should not be encouraged in his or her use of violence against a victim even when the victim turns out to be a police

officer. Any defendant's use of violence (the act) against another person is wrong and the defendant will have committed an offense; however, the judicial forum provides for certain justifications, or defenses, for the use of violence. But a justification or defense does not create an element of the offense; it simply accepts the wrong act and provides for a justification.

As to the concern for citizens becoming victims of individuals impersonating a law enforcement officer, the State submits that Florida courts and the legislature have already determined that a citizen cannot choose to use violence on the street to contest a factual issue, which should be litigated in the courts. Lowery, 356 So. 2d at 1326. It is a defendant's use of violence that the legislature and the courts have determined over and over again is the pertinent fact that separates the elements of resisting without violence and resisting with violence in an arrest scenario. Accord Espinosa, 686 So. 2d at 1347.

A defendant does not have a right to use violence to resist arrest based on the defendant's subjective belief that the arrest is unlawful or the officer's status after the enactment of § 776.051. Lowery v. State, 356 So. 2d 1325 (Fla. 4th DCA 1978) ("Under our present law, except for passive nonviolent resistance, the place to contest the legality of an arrest is in court and not on the streets. The defendant had no right to resist arrest by the use of force."). See also Tillman v. State, 934 So. 2d 1263, 1269-1270 (Fla. 2006); State v. Espinosa, 686 So. 2d 1345 (Fla. 1996).

This reasoning does not prevent a defendant from using nonviolent means to resist arrest from a person believed to be impersonating an officer or resist an arrest believed to be unlawful.

Through this same line of cases, the State submits that Florida courts have also already recognized that the elements of resisting without violence are different from elements of resisting with violence. Accord Espinosa, 686 So. 2d 1345. Therefore, this Court should reject any argument that resisting with violence should contain the knowledge of the officer's status as an element because resisting without violence has been determined to contain the knowledge element. Knowledge of the police officer's status in resisting without violence is reasonable, because the defendant has not chosen to do a wrong, e.g., violence against another, in his or her resistance. Such a defendant may simply walk away and there has been no harm done to the officer or the victim. Whereas on the other hand, the legislature has a legitimate concern for an officer's safety when one resists arrest with violence and the exclusion of the officer's status as an element of resisting with violence serves the legitimate concern.

CONCLUSION

Based upon the arguments and authorities cited herein, this Court should affirm Third District Court of Appeal's decision.

Respectfully Submitted,

CHARLES J. CRIST, JR.
Attorney General

RICHARD L. POLIN
Criminal Appeals Bureau Chief, Miami
Florida Bar Number 0230987

LUCRETIA A. PITTS
Assistant Attorney General
Florida Bar Number 0388238

Office of the Attorney General
Department of Legal Affairs
444 Brickell Ave., Suite 650
Miami, Florida 33131
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on the Merits was mailed this 15th day of November, 2006 to Carlos Gonzalez, Esq., Diaz, Reus, Rolff & Targ LLP, 2600 Bank of America Tower, 100 SE 2nd Street, Miami, Florida 33131.

LUCRETIA A. PITTS
Assistant Attorney General

CERTIFICATION OF FONT AND TYPE SIZE

I HEREBY CERTIFY that the font and type size in this Answer Brief on the Merits comply with Florida Rules of Appellate Procedure requirements in that Times New Roman 14-point was utilized.

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LUCRETIA A. PITTS
Assistant Attorney General