IN THE FLORIDA SUPREME COURT

CASE NO. SC06-1401

GARY LAMAR POLITE,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

Carlos F. Gonzalez, Esq.
Florida Bar No. 0494631
Diaz, Reus, Rolff & Targ, LLP
Counsel For Petitioner
2600 Bank of America Tower
100 S.E. 2nd Street
Miami, Florida 33131
Telephone (305) 375-9220
Telecopier (305) 375-8050
cgonzalez@drrtlaw.com

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2

The Evidence at Trial 2

The State's Closing Argument 4

Polite I 6

Polite II 7

Polite III 8

The Third District Certifies Conflict 9

SUMMARY OF THE ARGUMENT 11

ARGUMENT 14

THIS COURT SHOULD FIND THAT KNOWLEDGE OF A POLICE OFFICER'S OFFICIAL STATUS IS AN ESSENTIAL ELEMENT OF RESISTING AN OFFICER WITH VIOLENCE 14

A. Petitioner's Interpretation Best Accounts for the Legislature's Use of the Term "Knowingly" in Section 843.01 15

B. Only Petitioner's Interpretation is Consistent with the Doctrine of *Scienter* 21

C. Public Policy Will Best Be Served By Requiring Knowledge of A Law Enforcement Officer's Official Status 24

CONCLUSION 28

CERTIFICATE OF SERVICE 29

CERTIFICATE OF COMPLIANCE 29

TABLE OF AUTHORITIES

Cases

A.F. v. State, 905 So. 2d 1010 (Fla. 5th DCA 2005) .....passim

Chicone v. State, 684 So. 2d 736 (Fla. 1996)..... 19, 21,22

Cooper v. State, 742 So. 2d 855 (Fla. 1st DCA 1999). 13, 16, 19

Frey v. State, 708 So. 2d 918 (Fla. 1998) 22

Hechtman, v. Nations Title Ins. of New York, 840 So. 2d 993 (Fla. 2003) 15, 20

Lowery v. State, 356 So. 2d 1325 (Fla. 4th DCA 1978)..... 17

Miller v. State, 748 So. 2d 327 (Fla. 3d DCA 1999) 11

Nesmith v. State, 616 So. 2d 170 (Fla. 2d DCA 1993)..... 17

O'Brien v. State, 771 So. 2d 563 (Fla. 4th DCA 2000) 6

Perry v. State, 846 So. 2d 584 (Fla. 4th DCA 2003) 17

Polite v. State, 933 So. 2d 587 (Fla. 3d DCA 2006),.....passim

Polite v. State, 934 So. 2d 496 (Fla. 3d DCA 2005)..... 7

Polite v. State, Case No. 3D03-2819 (Fla. 3d DCA Aug. 11, 2004)..... 7

Thompson v. State, 695 So. 2d 691 (Fla. 1997).....17, 19

Unruh v. State, 669 So. 2d 242, 245 (Fla. 1996).....15, 20

W.E.P. v. State, 790 So. 2d 1166 (Fla. 4th DCA 2001) 11, 23

Statutes

316.1935 18

776.051 ..... 12, 17, 18

775.082 ..... 12, 17, 18

784.07 ..... passim

812.015 18

843.01 ..... passim

843.02 ..... 16, 17, 18

Other Authorities

Black's Law Dictionary 1599 (6th ed. 1990) 20

INTRODUCTION

This case arises out of the prosecution and conviction of Gary Lamar Polite ("**Polite**" or "**Petitioner**"), a 38-year-old homeless man, whose apparent effort to extract some coins from a parking meter ended in charges of resisting an undercover officer with violence. The legal issue here – first raised at trial and subsequently considered by the Third District Court of Appeal in three opinions, after three oral arguments before the same panel – concerns whether "knowledge" of a police officer's official status is an element of resisting an officer with violence under section 843.01, Florida Statutes.

The Third District ultimately found that the State need not prove that Polite knew of the officer's official status in order to be guilty of resisting with violence. The court erred. Not only is the Third District's construction inconsistent with established canons of statutory construction, it cuts against the well-established rule that statutory offenses should not be read to exclude the *scienter* or *mens rea* element. If this Court affirms the Third District's decision, Florida's citizens will be forced into the untenable position of having to submit to every individual who claims to be a police officer, even if they are not readily identifiable as such, or risk violating section 843.01 and receiving a long prison sentence.

STATEMENT OF THE CASE AND FACTS

The Evidence at Trial

On the evening of December 16, 2002, Officer Marcos Muñoz ("**Muñoz**" or "**Officer Muñoz**") observed Gary Polite, a homeless, thirty-eight-year-old man, shaking and poking a parking meter in downtown Miami in an apparent effort to extract some coins. T.192-94, 197-99, 201-02, 209-11.[1] Tampering with a parking meter is a misdemeanor and Officer Muñoz testified that he moved in for an arrest. T.192-93. Because he was working undercover, the officer wore a t-shirt and a plaid, button-down shirt to conceal his weapon and other "police utensils." T.200.

According to Officer Muñoz, he pulled out his badge, grabbed hold of his handcuffs and seized Polite's wrist while simultaneously identifying himself as a police officer. T.194-95. Polite "pulled away" and the officer grabbed his shoulders and clothing. T.195, 203. Muñoz ordered Polite not to resist. T.195, 203. Polite fell to one knee, and Muñoz tried to handcuff him, but Polite's clothing "slipped away." T.195, 203. Officer Muñoz testified that Polite threw some punches in the air and mumbled something before fleeing the scene. T.195, 205. None of Polite's errant punches struck Muñoz. T.205.

---

[1] References to "R." and "T." followed by a page number refer to the record and transcripts on appeal, respectively.

At some point during their confrontation, Officer Muñoz called for back-up. T.172. Officer Octavio Santiago ("**Santiago**" or "**Officer Santiago**") later observed Polite riding a bicycle. T.176. Unlike the undercover Muñoz, Officer Santiago wore blue shorts and a white shirt which prominently displayed a blue badge and the word "POLICE" across the back. T.170. Handcuffs and a service revolver completed the officer's uniform. *Id.*

Santiago testified that Polite rode a bicycle to within fifteen feet of where he stood, got off, and approached. T. 175-76. The officer identified himself and ordered Polite to stop. T. 176. Polite complied without a struggle. T. 171-72. At several points throughout his direct examination, Officer Santiago remarked that Polite was "very cooperative" at the time of his arrest. T. 171-72, 175, 177.

Officer Santiago further testified that Polite told him he did not know Officer Muñoz was, in fact, a police officer. T. 177-78. This did not surprise Santiago. The officer explained that while it was "obvious" that he was a police officer, Muñoz looked like a "civilian." T. 170-71. As Officer Santiago testified, the "goal of being undercover is to be unidentifiable as a police officer." T. 173. Yet, while such disguises can aid law enforcement, they can also confuse citizens about a police officer's official status. Indeed,

Officer Santiago acknowledged that people have sometimes impersonated police officers. T. 173.

The State's Closing Argument

Polite defended against the charge of resisting an officer with violence on the ground that he did not know Officer Muñoz's official status. T.225. However, during their closing argument, the prosecutors urged the jurors that Polite did not have to know he was resisting an officer to be guilty. Over defense objection, Assistant State Attorney Christina Martyak ("**Martyak**") stated:

> Now, defense counsel called Officer Santiago to the stand. Remember what he told you? They asked, did the defendant say anything and he said, yes. He said that he wasn't sure if Officer Muñoz was a police officer. And you were here. Do I have to prove it to you that the Defendant knows the officer is a police officer?
>
> ***
>
> I don't have to prove that to you.

T. 240.

At the close of Martyak's argument, defense counsel requested a curative instruction advising the jurors "that they do need to find that Mr. Polite actually believed that this person was a police officer." T. 242. Defense counsel stressed that Polite bottomed his defense on the fact that he

"did not believe that [the] person he was resisting was an officer . . . ." T. 243. Assistant State Attorney Barnaby Min ("**Min**") responded that the standard jury instructions for resisting an officer with violence did not require proof that the defendant knew that the victim was a police officer. T. 244. The court denied defense counsel's request for a curative instruction on the basis that "the instructions cover it . . . ." T. 245.

When Min later delivered the State's rebuttal closing argument, he, like Martyak, told jurors that Polite's knowledge of Officer Muñoz's status would not be part of their deliberations:

> [Defense] Counsel refers to this board and points out the word knowingly. What does the defendant on this board have to know? He has to know that he is resisting. He has to know that he is obstructing, and he has to know that he is opposing. That's all he has to know. That word knowingly goes to those accidents where he just all of a sudden moved your arm back.

T. 251. Again, the lower court overruled defense counsel's objection, thus allowing Min to persist in his claim that Polite's knowledge of Officer Muñoz's status would not play a role in the jurors' deliberations:

> That knowingly goes to that element. Knowingly resisted, knowingly obstructed, knowingly opposed. Did he knowingly and willfully swing his arms? Did he knowingly and willfully resist? Did he knowingly and willfully oppose? That's what the word knowingly goes to.

> Nowhere in this jury instruction or in the instructions that the Judge is going to read to you or in the instructions that you are going to get and take back to the jury room with you nowhere are you going to see the words that he knew he was a police officer.

T. 250-51.

At the close of Min's argument, defense counsel again requested that the jurors be instructed that Polite could not be convicted unless he knew of Officer Muñoz's official status. T. 255-56. The trial court declined to do so, and the defense then moved for a mistrial. T. 256. Defense counsel explained that the State's improper closing argument "led the jury astray" and effectively undermined Polite's sole defense at trial. T. 256. The trial court, again, denied relief. *Id.*

Thirty-seven minutes after beginning their deliberations, the jurors returned a guilty verdict. R. 22-24; T. 273. The trial court sentenced Polite to seven and one half years in prison with a five year minimum mandatory term of incarceration. R. 207-08.

Polite I

In a per curiam decision citing only *O'Brien v. State,* 771 So. 2d 563 (Fla. 4th DCA 2000), the Third District affirmed Polite's conviction and sentence. *Polite v. State,* Case No. 3D03-2819 (Fla. 3d DCA Aug. 11, 2004). Notably, *O'Brien* found that knowledge of an officer's official status

constituted an element of resisting an officer with violence. *Id.* at 565. Because of this finding, the court rejected the defendant's claim that the trial court erred in denying his request for a special jury instruction which would have required jurors to determine whether he knew of the officer's official status. *Id.* at 564-65. As the Fourth District explained, "the instruction advised the jury that they had to find that O'Brien knew that he was resisting an officer." *Id.* at 565.

Polite II

Polite moved for rehearing, after which the Third District reversed his conviction and sentence. *Polite v. State*, 934 So. 2d 496 (Fla. 3d DCA 2005). The majority found that knowledge of a law enforcement officer's official status constituted "an indispensable element of the crime in question." *Id.* at 497. As a consequence, the majority ruled that the prosecution "erroneously informed the jury that it was *not* necessary to establish [the defendant's knowledge] to convict the defendant." *Id.* (emphasis in original). Thus, the court found that the trial judge's "refusal, upon appropriate objections and requests for curative instruction, to disabuse the jury of this erroneous notion and to inform it of the correct law, with the result that it was affirmatively misled as to the only real defense in the case, requires a new trial." *Id.* at 497-98.

The dissent took a different tack, concluding that the State did not have to prove that Polite knew of Officer Muñoz's official status. *Id.* at 498 (Gersten, J., dissenting). Instead, the dissent reasoned, "the State could present circumstantial evidence that the defendant should have reasonably known that Officer Muñoz was an officer." *Id.* at 499 (internal quotation marks omitted).

Polite III

Following the decision in *Polite II,* the State moved for rehearing and the Third District issued a third decision, this time affirming Polite's conviction and sentence. *Polite v. State*, 933 So. 2d 597 (Fla. 3d DCA 2006). The court's unanimous ruling held that "knowledge of the victim's status is not an element of the offense of resisting an officer with violence." *Id.* at 589. Focusing on the statute's plain language, the Third District explained "that the legislature did not include knowledge of the victim's status as an element of the offense." *Id.*

The court reasoned that "knowingly and willfully" were "adverbial terms" that only modified the verbs "resists, obstructs or opposes," and not "law enforcement officer." *Id.* The court justified its about-face by noting that (1) resisting an officer with violence is not a specific intent crime; (2) its holding best comported with section 843.01's goal of "preventing the

hindrance of the government and [in the] protection of individual officers," and (3) if the legislature intended knowledge of an officer's official status to be an element of the offense, it would have said so. *Id.* at 590-93.

Finally, the court addressed the issue of whether the State's comments during closing argument – even if they did not misrepresent the law – undermined Polite's sole defense at trial. *Id.* at 593. Notably, the court wrote:

> Of course, when, as below, the defendant presents evidence that he did not know that the victim was an officer, that the victim did not reasonably appear to be an officer, or that the officer used unlawful or excessive force, he may, as he did here, raise an appropriate defense to that effect.

Id. The court concluded, however, that "the availability of such a defense, which was implicitly rejected by the jury in this case, does not render knowledge an element of the offense itself which must be established by the state." *Id.* Significantly, the court did not reconcile its approval of Polite's theory of defense with its finding that prosecutors could tell jurors to ignore whether Polite knew of the officer's official status.

The Third District Certifies Conflict

As part of its decision in *Polite III,* the Third District certified direct conflict with the Fifth District Court of Appeal's decision in *A.F. v. State,* 905 So. 2d 1010 (Fla. 5th DCA 2005). *Polite*, 933 So. 2d at 594. A.F.

concerned a juvenile charged with resisting an officer with violence. *A.F.*, 905 So. 2d at 1011. The charges against A.F. arose when Officer Ronald Kelly responded to a complaint that someone was swimming in a closed and locked apartment complex pool. *Id.*

Kelly arrived at the scene wearing "sweat pants and a T-shirt, with tennis shoes. He was not wearing his badge, or a shirt that said 'Titusville Police Department,' and there was nothing else to indicate he was a police officer." *Id.* Upon arrival, Officer Kelly observed A.F. and her friend walking away from the pool area. *Id.* Although it was not clear whether they had been swimming, Kelly walked over and attempted to question the two. *Id.* According to Kelly, A.F. and her friend were belligerent and rude and a "little confrontation" ensued. *Id.*

At the same time Kelly identified himself as a police officer, A.F. fled the scene. *Id.* Kelly, gave chase, again identifying himself as a police officer and saying, "Stop, police." *Id.* Kelly eventually caught up to A.F., a young, 117-pound female, and tackled her to the ground. *Id.* The officer injured himself in the fall. *Id.* According to Kelly, A.F. kicked, screamed, scratched, and punched. *Id.* Back up officers arrived and took A.F. into custody. *Id.*

On appeal, A.F. maintained that the trial court erred in denying her motion for judgment of acquittal because the State failed to prove that she resisted a person she knew to be a police officer. *Id.* 1011-12. The Fifth District agreed. While "[a] person is not justified in using force to resist a police officer who is known or reasonably appears to be a law enforcement officer," the court explained that "the accused must have reason to know that the victim is an officer." *Id.* at 1012 (internal citations and quotation marks omitted).

The court reasoned that "a citizen should not be required to respond with submission any time someone claims to be a police officer." *Id.* As the court noted, "[i]t is an all too sad fact that persons have been victimized as a result of their trusting criminals who were impersonating police officers to facilitate crimes." *Id.* (quoting, *W.E.P. v. State*, 790 So. 2d 1166, 1172 (Fla. 4th DCA 2001) (citing *Miller v. State*, 748 So. 2d 327 (Fla. 3d DCA 1999))).

SUMMARY OF THE ARGUMENT

Petitioner has demonstrated that knowledge of a police officer's official status is an essential element of resisting an officer with violence. Petitioner's interpretation best accords with established canons of statutory construction. Section 843.01 is part of a comprehensive scheme of statutes, including sections 776.051 (1), 784.07 (2), and 843.02, designed to protect

law enforcement officers and ensure that they are not hindered in the performance of their legal duties. Yet, while these statutes all require knowledge of a law enforcement officer's official status, the Third District has read section 843.01 to not require such proof. This is error. Section 843.01 must be read in *pari materia* with those statutes addressing officer safety and efforts to hinder them in the performance of their duties. In order to harmonize these statutes, section 843.01 must include a similar knowledge element.

Another rule of statutory construction provides that where criminal statutes are subject to varying constructions, they must be read so as to benefit the defendant. As it stands, the Third District's interpretation of section 843.01 is at odds with both the Fifth District's decision in *A.F. v. State*, 995 So. 2d 1010 (Fla. 5th DCA 2005) (with which the Third District certified conflict) and the First District's opinion in *Cooper v. State*, 742 So. 2d 855 (Fla. 1st DCA 1999). The conflict among the districts compels adoption of Petitioner's construction of section 843.01.

The rules of statutory construction also require that each word in a statute be given meaning so as not to be rendered mere surplusage. In its decision, the Third District explained that the phrase "knowingly and willfully" only modified the verbs "resists, obstructs, or opposes," and had

no effect on the term "law enforcement officer." However, the term "willfully" by its own definition includes a knowledge component so that in acting willfully, the actor is already presumed to have a certain level of knowledge regarding their actions. Thus, the term "knowingly" cannot be read in conjunction with the term "willfully," but must be given independent meaning.

Additionally, Petitioner's interpretation of section 843.01 also best comports with the doctrine of *scienter*. By not requiring knowledge of a police officer's official status, the Third District rendered section 843.01 a strict liability offense. Yet, this Court has made it clear that statutory offenses which do not carry a *scienter* or *mens rea* element are rare and disfavored.

Last, public policy compels that Petitioner's interpretation be accepted. The First and Fifth Districts have recognized that individuals often impersonate police officers and use a citizen's natural inclination to obey or cooperate with law enforcement as an opportunity to commit criminal acts. As it stands, the Third District has placed Florida's citizens in the untenable position of having to submit to every person who claims to be a police officer, even if they are not readily identifiable as such, or risk a lengthy prison sentence for violating section 843.01. Accordingly, the Third

District's construction of section 843.01 should be rejected in favor of the Fifth District's decision in *A.F.*

ARGUMENT

THIS COURT SHOULD FIND THAT KNOWLEDGE OF A POLICE OFFICER'S OFFICIAL STATUS IS AN ESSENTIAL ELEMENT OF RESISTING AN OFFICER WITH VIOLENCE

"In resolving the present issue of the proper interpretation of section 843.01, the starting point, as always, is the statute itself." *Polite,* 933 So. 2d at 589. As relevant here, section 843.01 provides:

> Whoever knowingly and willfully resists, obstructs, or opposes any officer as defined in s. 943.10 (1), (2), (3), (6), (7), (8), or (9); . . . by offering or doing violence to the person of such officer . . . is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.093, or s. 775.084.

Because the word "knowingly" appears on the face of the statute, the question below, as before this Court, "is what the word refers to." *Polite,* 933 So. 2d 589.

The Third District found that the "plain language of section 843.01 shows that the legislature did not include knowledge *of the victim's status* as an element of the offense." *Id.* (emphasis in original). According to the court, "the adverbial terms 'knowingly and willfully' modify the verbs 'resists, obstructs or opposes' rather than the entire phrase." *Id.* In support

of this construction, the Third District noted that (1) resisting an officer with violence is not a specific intent crime; (2) its interpretation of the statute best served the goal of "preventing the hindrance of the government and [in the] protection of individual officers"; and (3) the legislature chose to write the statute so as not to require knowledge of an officer's official status. *Id*. at 590-93. The Third District erred.

A. Petitioner's Interpretation Best Accounts for the Legislature's Use of the Term "Knowingly" in Section 843.01

A basic principle of statutory construction requires courts to "construe related[statutory] provisions in harmony with one another." *Hechtman, v. Nations Title Ins. of New York,* 840 So. 2d 993, 996 (Fla. 2003); *accord Unruh v. State,* 669 So. 2d 242, 245 (Fla. 1996). In *Polite III,* the Third District identified the goal of section 843.01 as "preventing the hindrance of the government and [in the] protection of individual officers." 993 So. 2d at 587. Indeed, section 843.01 is part of a comprehensive scheme of statutes designed to protect law enforcement officers and ensure that they are free to perform their legal duties.

Section 843.02 makes it a first degree misdemeanor to "resist, obstruct, or oppose any officer . . . in the lawful execution of any legal duty, without offering or doing violence to the person of the officer . . ." While

section 843.02 does not expressly contain a knowledge element, the First District has held that knowledge of the officer's official status is an element of the offense. *Cooper v. State,* 742 So. 2d 855 (Fla. 1st DCA 1999). The court noted that it had previously found that "knowledge [on the part of the defendant] that the officer intended to detain him or her" was an essential element of resisting without violence. *Id.* at 855. Implicit in such a holding, the court explained, was the additional requirement that "the defendant know that the person effectuating the detention is a police officer." *Id.*

The penalties increase if a person offers to do harm or violence to a law enforcement officer. Thus, section 784.07 (2) provides for increased penalties and minimum mandatory terms of incarceration "[w]henver any person is charged with knowingly committing an assault or battery upon a law enforcement officer . . . while the officer . . . is engaged in the lawful performance of his or her duties . . . ." This Court has held that if a person were charged under subsection (2), "the prosecution would clearly have to prove the defendant knew that his victim was an officer." *Thompson v. State*, 695 So. 2d 691, 692 (Fla. 1997).

Last, and perhaps most significantly, section 776.051 (1) 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." Courts have long recognized that section 776.051 is to be read in *pari materia* with section 843.01. *See e.g. Lowery v. State*, 356 So. 2d 1325, 1326 (Fla. 4th DCA 1978) (explaining that after July 1, 1975 [the effective date of section 776.051] section 843.01 "must be read in *pari materia* with [s]ection 776.051")); *accord Perry v. State*, 846 So. 2d 584, 587 (Fla. 4th DCA 2003); *Nesmith v. State*, 616 So. 2d 170, 171-72 (Fla. 2d DCA 1993).

Sections 843.02, 784.07 (2), and 776.051 form part of a comprehensive scheme designed to protect law enforcement officers and ensure that they are able to perform their legal duties. Section 843.01 is clearly part of this scheme. Like its counterparts, section 843.01 proscribes resisting an officer and provides stiff penalties for those who would use force or the threat of force to prevent a police officer from performing his or her legal duties.

In addition to addressing the same subject-matter, sections 843.01 784.07 (2), and 776.051 are similarly written. While section 776.051 punishes "the use of force to ***resist*** an arrest," section 843.01 makes it a crime to "***resist***, obstruct, or oppose . . . ." Further, section 784.07 (2) speaks to "***knowingly*** committing an assault or battery," while section 843.01

punishes "[w]hoever ***knowingly*** and willfully resists, obstructs, or opposes any officer. . . ."

As noted above, the term "knowingly" in sections 776.051 and 784.07 (2) has been read to require evidence that the defendant knew of the officer's official status. Even section 843.02, which does not include an express knowledge requirement, has been construed to require proof that the defendant knew of the officer's official status. The Third District's interpretation of the term "knowingly" in section 843.01 is therefore incongruous. The only way to harmonize section 843.01 with the statutes discussed above is to construe the term "knowingly" to require proof that the defendant knew of the officer's official status.[2]

Another rule of construction provides that where criminal statutes are susceptible to differing interpretations, "they must be construed in favor of the accused." *Thomspon v. State*, 695 So. 2d 691, 693 (Fla. 1997); *see also*

---

[2] In *Polite III*, the Third District cited sections 316.1935 (fleeing or eluding a police officer) and 812.015 (6) (resisting officer's recovery of merchant property) as proof that the legislature did not intend to include knowledge of a law enforcement officer's official status as an element of section 843.01. *Polite*, 933 So. 2d at 591-92. These statutes, like sections 776.051, 784.07 (2), and 843.02, are all designed to aid law enforcement officers in the performance of their legal duties. That some statutes expressly contain a knowledge requirement, while others have had such a knowledge requirement read into them only signals the need to harmonize these various statutes so that the majority view – that knowledge of an officer's official status is an essential element of such statues – is made definitive.

Chicone v. State, 684 So. 2d 736, 741 (Fla. 1996) (noting that "statutes defining crimes are to be strictly construed against the State and most favorably to the accused.").

While the Third District has determined that knowledge of an officer's official status is not an essential element of section 843.01, the First and Fifth Districts have reached the contrary conclusion. *See e.g. A.F.*, 905 So. 2d at 1012 (holding that in a section 843.01 prosecution, "the accused must have reason to know that the 'victim' is an officer); *Cooper*, 742 So. 2d at 855, n.2 (explaining that section 843.01 "which defines the crime of resisting an officer with violence, includes a specific knowledge requirement."). The conflict among the First, Third, and Fifth Districts regarding the meaning of the term "knowingly" in section 843.01 demonstrates that the statute is susceptible to differing interpretations. This conflict, in turn, further weighs in favor of adopting Petitioner's construction requiring knowledge of a police officer's official status.

It is also a rule of statutory construction that "significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." *Hechtman v. Nations Title Ins. of New York*, 840 So. 2d 993, 996 (Fla. 2003); *see also Unruh v. State*, 669 So. 2d 242, 245 (Fla. 1996) (noting that

courts must make an effort to give effect to all statutory provisions and to construe related provisions in harmony).

The Third District's ruling in *Polite III* renders the term "knowingly" meaningless. According to the court, the terms "knowingly and willfully" both refer to the act of "opposing, resisting, or obstructing" a law enforcement officer. Yet, the term "willfully," by its own definition, includes a knowledge component. Black's Law Dictionary 1599 (6th ed. 1990) ("Proceedings from a conscious motion of the will; voluntary; ***knowingly***; deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary) (emphasis added). Thus, unless the term "knowingly" refers to some other word or phrase, it is mere surplusage.

Moreover, the Third District's grammatical construction is at odds with this Court's interpretation of a similar phrase in section 784.07 (2). As noted above, the Third District found that "knowingly and willfully" only modified the verbs "resists, obstruct or opposes," and not "law enforcement officer." *Polite*, 933 So. 2d at 589. A similar construction appears in section 784.07 (2), which criminalizes "knowingly committing an assault or battery upon a law enforcement officer . . ."

Under the Third District's analysis, the term "knowingly" would only modify the commission of an "assault or battery." Yet, in *Thompson*, this Court explained that "[b]ecause subsection (2) of the statute is applicable when 'any person is charged with knowingly committing an assault and battery upon a law enforcement officer,' if a defendant was charged under subsection (2), the prosecution would clearly have to prove the defendant knew that his victim was an officer." Accordingly, Polite's interpretation best accords with the legislature's use of the term "knowingly" in section 843.01.

B. Only Petitioner's Interpretation is Consistent with the Doctrine of *Scienter*

If knowledge of a law enforcement officer's official status is not an element of the statute, then section 843.01 becomes a strict liability offense. Upon proof that the defendant resisted, obstructed, or opposed a police officer with violence, the court may impose punishment. At common law, the general rule provided that "scietner or mens rea was a necessary element in the indictment and proof of every crime." *Chicone*, 684 So. 2d at 741. This rule eventually applied to statutory crimes even where the definition of the offense did not expressly include scienter. *Id.* at 741. Consequently, "offenses that require no mens rea generally are disfavored . . . ." *Id.* at 743.

As such, "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-Saxon criminal jurisprudence." *Id.*

The Third District has correctly noted that the legislature has authority to define the elements of a criminal offense. *Polite*, 933 So. 2d at 589. In determining what the legislature intended, particularly with respect to the *scienter* element of any offense, courts have focused on various factors. *Chicone,* 684 So. 2d at 741. In particular, this Court has recognized and approved of interpretations which focus "on the patent inconsistency in the imposition of substantial criminal sanctions to conduct that does not include *scienter.*" *Id.* at 742. Indeed, at least one commentator has written that "[c]rimes punishable with prison sentences . . . ordinarily require proof of a guilty intent." *Id*. (internal citations omitted).

In *Chicone,* the defendant appealed his convictions for possession of cocaine, a third-degree felony, and possession of drug paraphernalia, a first-degree misdemeanor. *Id.* at 737. Chicone claimed that the trial court should have dismissed the information because neither count alleged "the essential element of knowledge." *Id.* The *Chicone* Court concluded that "it was the intent of the legislature to prohibit the knowing possession of illicit items and to prevent persons from doing so by attaching a substantial criminal penalty to such conduct." *Id.* at 743.

Likewise, it can be argued that it was the legislature's intent to punish violent resistance of law enforcement officers and to deter such conduct by imposing stiff penalties. Indeed, in both *Chicone* and *Polite*, the charged felonies were third-degree felonies punishable by up to five years in prison. §775.082(3)(d), Fla. Stat. The *Chicone* Court concluded that "good sense and the background rule of the common law favoring a scienter requirement should govern the interpretation" of the two statutes it considered. *Chicone*, 684 So. 2d at 743. Accordingly, the Court ruled that the State "was required to prove that [the defendant] knew of the illicit nature of the items in his possession." *Id.* at 744. Good sense also requires that section 843.01 be interpreted in the same fashion to likewise require evidence of a police officer's official status.

The fact that resisting an officer with violence is a general intent crime does not affect the analysis here. In *Frey v. State*, 708 So. 2d 918, 919 (Fla. 1998), the Florida Supreme Court explained that "[t]he statute's plain language 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 duties." *Frey* can be read in harmony with *Thompson* and *Cooper*. Regardless of whether it is a general or specific intent crime, resisting an

officer with violence retains the common element that the victim must be an officer, and that the defendant must have knowledge of the victim's official status.

C. Public Policy Will Best Be Served By Requiring Knowledge of A Law Enforcement Officer's Official Status

In *Polite III*, the Third District found that its interpretation of section 843.01 would best serve the goal of "preventing the hindrance of the government and [in the] protection of individual officers." *Polite*, 933 So. 2d at 590. Though the court's concern over a police officer's safety and ability to perform is well-taken, it must be balanced against the needs of the citizenry. While it is one thing to resist, obstruct, or oppose a known police officer with violence, it is an entirely different matter to confront a person who is not readily identifiable as a law enforcement officer.

Unfortunately, it has become an all too common occurrence for law-abiding citizens to be attacked by individuals pretending to be law enforcement officers. At Polite's trial, Officer Santiago testified that people do impersonate police officers. T.173. Indeed, the Fourth District has noted that "[i]t is an all too sad fact that persons have been victimized as a result of their trusting criminals who were impersonating police officers to facilitate crimes." *W.E.P. v. State*, 790 So. 2d 1166, 1172 (Fla. 2001). The First

District has further added that "[c]learly, if [a person] believed he was being detained by a drug dealer, he would have the right to resist detention." *Cooper*, 742 So. 2d at 855.

The problem is magnified by the fact that undercover officers, to be successful, must conceal their true identify. As Officer Santiago testified at Polite's trial, the "goal of being undercover is to be unidentifiable as a police officer." T.173. Because a police officer working undercover will likely only reveal his official identity in the moments leading up to a confrontation or arrest, there will always be the possibility that an unsuspecting citizen will react as Polite did. In some instances, as discussed by the First and Fourth Districts above, resistance will be justified. However, in other instances, such as the present case, resistance will be criminalized as a result of the officer's official status.

Under the Third District's current interpretation of the law, a citizen is placed in the untenable position of submitting to anyone who claims to be a police officer, even if they are not readily identifiable as such, or face the possibility of extended incarceration for violating section 843.01. The State may argue that the situation is not so dire, as citizens can always demand proof of an officer's official status. Yet, what is theoretically possible does not always translate into reality.

As Polite's case demonstrates, a citizen might not have the opportunity to demand proof of the officer's official status. Officer Muñoz testified that after observing Polite commit what he believed to be a second degree misdemeanor, he moved in for an arrest. T.192-93. In what he described as a nearly simultaneous set of actions, Muñoz pulled out his badge, grabbed hold of his handcuffs, seized Polite's wrist, and identified himself as a police officer. T.194-95.

While Polite's case ultimately presents a fairly benign example, one can imagine situations with more negative results. Again, *A.F.* is instructive. There, an otherwise unidentifiable police officer approached A.F., a young, 117-pound female at 2:30 in the morning. *A.F.*, 905 So. 2d at 1012. Rather than submit to the officer's authority, the defendant fled the scene. *Id.* at 1011. When she was chased and later tackled, the defendant kicked, screamed, scratched, and punched. *Id.* Though her "assailant" turned out to be a police officer, one can imagine what could have happened had A.F. run into a less scrupulous individual.

The point is that Florida's citizens should not have to risk great bodily harm or death out of a concern that they may be sentenced to five years in prison for resisting an officer with violence. In *Polite III*, the Third District appeared to recognized as much, noting that "when, as below, the defendant

presents evidence that he did not know that the victim was an officer, that the victim did not reasonably appear to be an officer, or that the officer used unlawful or excessive force, he may, as he did here, raise an appropriate defense to that effect." *Polite*, 933 So. 2d at 593. In the same opinion, however, the court ratified the prosecution's claim that knowledge of an officer's official status need not be considered by the jurors, thereby eviscerating Polite's only defense. While the Third District appears to suggest that section 843.01 should not impose strict liability, it fails to articulate a valid defense.

There is no evidence that this Court, in finding that knowledge of an officer's official status constitutes an essential element of section 843.01, will hinder law enforcement officers in the performance of their legal duties, or endanger their lives. On the other hand, there is ample evidence, as expressed by the First and Fourth Districts that citizens will continue to become victims of police impersonators. By interpreting section 843.01 to require knowledge of an officer's official status, this Court will best balance the needs of law enforcement with the interests of Florida's citizens.

CONCLUSION

Based on the foregoing points and authorities, the petitioner respectfully requests that this Court reverse the Third District Court of Appeal's decision in *Polite v. State,* 933 So. 2d 587 (Fla. 3d DCA 2006), adopt the Fifth District Court of Appeal's ruling in *A.F. v. State,* 905 So. 2d 1010 (Fla. 5th DCA 2005), such that knowledge of an officer's official status is an essential element of the crime of resisting an officer with violence, and remand for further proceedings consistent with this decision.

Respectfully submitted,

/s/

Carlos F. Gonzalez, Esq.
Florida Bar No. 0494631
Diaz, Reus, Rolff & Targ, LLP
Counsel For Petitioner
2600 Bank of America Tower
100 S.E. 2nd Street
Miami, Florida 33131
Telephone (305) 375-9220
Telecopier (305) 375-8050
cgonzalez@drrtlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed by U.S. Mail to Lucretia A. Pitts, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 650, Miami, Florida 33131 this 19th day of September, 2006.

/s/
Carlos F. Gonzalez

CERTIFICATE OF COMPLIANCE

I HEREBY CERIFY that the foregoing complies with the font requirements contained in Florida Rule of Appellate Procedure 9.210(a)(2).

/s/
Carlos F. Gonzalez