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CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. 84,215

ALLAN GILMAN IACOVONE,

Respondent.

MANDATORY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE NO.</u>
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS.....	3
SUMMARY OF THE ARGUMENT.....	16
ARGUMENT.....	17
ISSUE.....	17
SECTIONS 784.07(3) AND 775.0825, FLORIDA STATUTES (1991), AS APPLIED, FAIL TO VIOLATE EQUAL PROTECTION.	
CONCLUSION.....	20
CERTIFICATE OF SERVICE.....	20
APPENDIX.....	A-1

TABLE OF CITATIONS

	<u>PAGE NO.</u>
<u>Bloodworth v. State</u> 504 So. 2d 495, 498 (Fla. 1st DCA 1987).....	18, 19
<u>Carpentier</u> 587 So. 2d 1355, 1358 (Fla. 1st DCA 1991) (citations omitted).....	18
<u>Hamilton v. State</u> 366 So. 2d 8, 10 (Fla. 1978).....	18
<u>Iacovone v. State</u> 19 Fla. L. Weekly 1569 (Fla. 2d DCA July 22, 1994).....	18
<u>Nephew v. State</u> 580 So. 2d 305, 306 (Fla. 1st DCA 1991).....	18

OTHER AUTHORITIES

Section 775.082(3)(c), Fla. Stat. (1991).....	17
Section 775.0823(3), Fla. Stat. (1991).....	17
Section 775.0825, Fla. Stat. (1991).....	17, 18
Section 777.04, Florida Statutes (1991).....	1
Section 782.04(4), Fla. Stat. (1991).....	17
Section 782.04, Florida Statutes (1991).....	1
Section 784.021, Florida Statutes (1991).....	1
Section 784.07(3), Florida Statutes (1991).....	1, 17, 18
Section 806.13(1)(b)3, Florida Statutes (1991).....	1
Section 810.02(3), Florida Statutes (1991).....	1

STATEMENT OF THE CASE

On January 14, 1992, the State Attorney of the Thirteenth Judicial in Hillsborough County, Florida, filed a five-count information against the Appellant, Allan Gilman Iacovone. (R676-78). The information charged that the following crimes occurred on December 25, 1991: Count I, burglary of a dwelling, in violation of Section 810.02(3), Florida Statutes (1991); Count II, criminal mischief, in violation of Section 806.13(1)(b)3, Florida Statutes (1991); Count III, attempted murder of a law enforcement officer, in violation of Sections 784.07(3) and 777.04, Florida Statutes (1991); Count IV, attempted murder in the first degree, in violation of Sections 782.04 and 777.04, Florida Statutes (1991); and Count V, aggravated assault, in violation of Section 784.021, Florida Statutes (1991). (R676-78).

A jury trial was held on April 20, 21, and 22, 1992. (R687). The defense motion in limine, (R685-86), heard on April 21, 1992, was denied. (R685).

The jury returned guilty verdicts as charged for Count I, burglary; Count II, criminal mischief; and Count V, aggravated assault. (R595-96, 754-57). On Count III, the jury found the Appellant guilty of a lesser charge, attempted third-degree murder, with a finding that the victim, G. Hogsten, was a law

enforcement officer. (R595, 754-55). On Count IV, the jury found the Appellant guilty of a lesser charge of aggravated battery. (R595, 756).

The defense filed a motion for new trial on May 12, 1992. (R724).

On May 15, 1992, the Honorable Diane Allen denied the motion for new trial and sentenced Mr. Iacovone to a total of thirty years in prison with a twenty-five year minimum mandatory. (R617, 662-64, 724). The sentencing guidelines allowed a permitted range sentence of up to nine years. (R662, 735). Mr. Iacovone received the following: for Count I (burglary) nine years in prison; for Count II (criminal mischief) five years in prison concurrent with Count I; for Count III (attempted murder in the third-degree of law enforcement officer) thirty years in prison with a twenty-five year minimum mandatory concurrent with all counts; for Count IV (aggravated battery) nine years concurrent; for Count V (aggravated assault) five years concurrent. (R662-64, 727-34).

STATEMENT OF THE FACTS

The following testimony was adduced at trial:

Lorraine (Lori) Cuervo testified that she began dating the Appellant, Allan Iacovone, in 1985. (R130). They began living together in October, 1985. (R130). They had three children together. (R131). Lori's relationship with Allan became rocky. (R133). They argued weekly. (R134). Lori moved out of the apartment taking the children with her. (R135).

Lori acquired a beige 1986 Volkswagon Jetta. (R135). Lori and Allan bought the car in the summer of 1991 while they were living together. (R191, 194). Both Lori and Allan's names were on the title of the car. (R135). The finance man at the car dealership suggested putting Allan's name on the title. (R136). They bought the car with money they had saved together. (R192-193). At least one of Allan's paychecks was used toward the purchase of the car. (R193). On December 25, 1991, the car title was in the names of Allan or Lorraine Iacovone. (R203).

Lori lived with her parents for a month in July 1991. (R137). She saw Allan every couple of weeks. (R137). In August, she moved to Sand Stone Apartments. (R138). Allan visited approximately ten times. (R138). Lori wanted to be friends with Allan for the children's sake. (R138). They both agreed whatever they had between them was over. (R139). Allan displayed anger over this. (R139). Allan threatened Lori's life. (R139). He threatened her the first time in May, 1991.

(R139). He next threatened her life in September, 1991, at Lori's apartment. (R141). He also threatened her a couple of times over the telephone between May and September, calling and saying, "You're going to pay for this." (R141).

Lori testified that Christmas Eve was their daughter's birthday. (R142). She returned to her apartment from her mother's house at about 9:30. (R143). Allan called and threatened her. (R143-44). He was angry about not being able to see the children and he accused Lori of seeing someone else. (R144). After he called she was afraid to stay in her apartment, so she left with the children to spend the night at a friend's house. (R143-44). She went home Christmas morning and her door had been knocked in. (R145). It had been kicked in. (R147). The door was ripped open where the deadbolt was located. (R147). Inside the apartment, she did not notice anything unusual. Lori called her parents and she called 9-1-1 to report the break-in. (R147-48). Later, she found Christmas presents around her tree that she had not bought. (R148).

Lori's parents, Eddie and Evelyn, and her sister, Cindy came to her house at around 9:00. (R149). While Lori was upstairs, she heard her father yell, "Allan is here. Go inside and call the police." (R151). Lori ran to the telephone and called 9-1-1 and asked them to send help fast. (R152). A tape was played at trial of Lori's 9-1-1 call. (R153). Her mother's voice was in the background yelling.

Allan told Lori that he wanted the presents back that he left for the kids and that he wanted the car. (R154). Lori and Allan both went to the kitchen to get the car keys. (R154). They struggled for the car keys. (R154). Allan grabbed Lori by the arm, and Lori's father pulled Allan away from her. (R154). The telephone was pulled out of the wall. (R154).

Allan and Lori's father struggled with each other. (R155). They struggled for a few seconds, than Allan got up and ran out of the apartment. (R155). He picked up a piece of concrete, about a foot high and three inches thick, and ran toward Lori's car. (R162-63). Lori and the family all came outside. (R163). Allan said he was going to destroy the car. (R163). He went to the car and started banging on the windows. He was hitting the car with the concrete and cursing. (R163-64). Lori's father approached Allan, and Allan raised his hand like he was going to hit him. (R164). Allan went to his car and took out a hammer. (R165). When Allan was done hitting the car with the hammer, he threw the hammer at Lori's father, who had to duck. (R169). Lori testified that it cost her \$1300 to replace the windows in her car. (R171). There was also \$3000 worth of body damage. (R171).

While Allan was beating the car, Deputy Hogsten, wearing his uniform, approached on foot. (R171-73). Allan looked at him. (R173). Allan ran to his car, a gray Buick Skylark, and started it. (R174, 176, 178). He pulled out of his parking space, backing up and pulling forward. (R174). Allan drove toward

them. (R174). Deputy Hogsten was standing near the end of Lori's car yelling at Allan to stop. (R174). Lori testified that there was room for Allan to drive out of the parking lot without hitting Deputy Hogsten. (R175). Allan drove forward toward the exit. (R176, 205). There was only one way out of the area. (R205).

Lori, Cindy, and their parents, were standing between Lori's parked car and another car. (R176). Cindy was standing by the back of the Jetta. (R208). Allan drove toward Lori's car, striking the car. Lori's car was thrown into an empty space and Cindy was hit and injured. (R176-77). Lori did not know if Allan's car hit Cindy or if Cindy was hit by the Jetta. (R209). Lori did not see Allan hit Deputy Hogsten. (R176, 209). Allan jumped out of his car and ran. (R177). The entire incident occurred very quickly. (R218).

Deputy Casey Powell responded to the Sand Stone Apartments after the incident. (R224). Allan was in custody when he arrived. Powell's job was to preserve evidence. (R225). Powell found a hammer on the ground behind a Volkswagon that had been beaten up. (R225). Powell saw someone attending a woman on the ground. (R227). Deputy Hogsten was there walking with a limp and in pain. (R230).

Cynthia (Cindy) Cuervo testified that she knew Allan for five years through her sister, Lori. (R232). She arrived at Lori's apartment at 9:00 a.m. on Christmas morning. (R232-33). Lori's door was knocked off. (R233). From upstairs in Lori's

apartment, Cindy could hear her father, her mother, and Lori arguing with Allan. (R234-35). Cindy went downstairs to see what was going on. (R235). Cindy saw Allan go out the door. (R235). Cindy and the rest of the family all followed Allan out of the apartment. (R236). They watched Allan hit the Jetta with a concrete drainage block. (R236-238). Cindy saw Allan hit the car with a hammer and throw the hammer at her father. (R239-240). Cindy was standing on the sidewalk. (R239). Cindy saw a deputy approach. (R240). She moved to the front of the Jetta and tried to flag the deputy over. (R240). The deputy parked his car, and walked across the parking lot toward Allan. (R240-242). When the deputy was fifty feet away, Allan got into his car. (R241). Allan accelerated his car, driving toward the deputy. (R242). There was only one exit out of the apartment complex. (R242). Allan was driving toward the exit. (R258). Cindy saw Allan's car strike the deputy. (R244). Then Allan backed up his car and drove into Cindy. (R244). Allan's car hit Cindy's arm and leg. Her arm was broken. Her back was injured also and she had to spend three days in the hospital. (R247-250).

Irvin Bacy testified that he was in his living room on Christmas Day when he heard people arguing or yelling. He looked out his patio door, but he did not see anything. Ten or fifteen minutes later he heard more noises so he looked out and saw the defendant hitting a car and knocking the windows out with a hammer. (R263). A deputy was walking over from another parking

lot and he yelled, "stop right there." The defendant dropped the hammer and ran to his car. He started to drive out. The deputy was standing close to the middle of the road. (R265). The car drove straight, toward the deputy. (R266-67). The deputy dove off the side of the road. (R267). Bacy did not observe the deputy get hit; it looked like the deputy jumped out of the way. (R267). There was no effort to turn the car to avoid the deputy. (R267-68). Bacy then saw the car swerve and hit a woman standing next to another car. (R268). After he hit the woman, the defendant got out of his car and started running. (R269). The deputy started running after him for a moment. (R270, 275).

Eddie Cuervo testified that he has known the defendant for six or seven years. (R280-81). Eddie thought the defendant was married to his daughter, Lori, but he later found out they were not married. (R281). In September of 1991, Lori and Allan were not on friendly terms because of Allan's constant threats. (R282-83). On September 8, 1991, there was an incident between Eddie's wife and the defendant. (R284). According to Eddie, after the incident Allan stated "that he was going to go to the gun show and get a gun and will exterminate each and every one of us, my wife, my two daughters and whoever." (R285). Eddie had no conversations with Allan between September 10 and Christmas day. (R305).

On Christmas day, Eddie arrived at Lori's apartment with his wife, Evelyn, and his daughter, Cindy, at 10:00 in the morning. (R286). The front door was pulled off. (R286). Eddie brought a

gun into the apartment. (R287). He testified he brought the gun, "because due to the threat and the harassment that this man have put my wife and my daughter [sic], I could not live with myself or knowing that this guy was going to carry out his threat." (R287).

Later that morning, Eddie saw Allan drive into the parking lot. Eddie ran into the apartment and got his gun. (R289). Allan came into the apartment. (R289). Lori went to the phone and called 9-1-1. (R290). Allan had no weapon so Eddie put the gun under a sofa cushion. (R291). Allan was insisting on the keys for the Volkswagon Jetta. (R291). Lori was in the kitchen; Cindy and Mrs. Cuervo (Evelyn) were upstairs. (R291). Allan grabbed Lori by the shoulder and then by the throat. (R292). Eddie jerked Allan away from Lori and they fell. Eddie had Allan down on the floor with his hand over Allan's neck. (R292). Allan got up, called Eddie "a bunch of obscenities," and ran out the door. (R293). Eddie followed Allan out the door, with Cindy, Lori, and Evelyn following. (R293). Outside, Allan grabbed a piece of concrete block and went into an outrage, breaking the windows of the Jetta. (R294). Allan smashed the hood, the fender, and all the glass in the car. (R294).

Allan ran to his car, which was parked on the opposite side from the Jetta, about six or seven cars away. (R294). He opened the door and grabbed a hammer. (R295). He walked up to Eddie with the hammer raised in front of him. (R295). Eddie was afraid and ran away. (R295). Allan broke the rest of the

windows of the Jetta with the hammer and threw the hammer at Eddie. (R296). The hammer landed on the sidewalk a foot away from Eddie. (R296).

The deputy arrived and approached on foot. (R306). Allan got into his car when he saw the deputy. Allan's car accelerated. (R297). The deputy stood in front of the Jetta, in the middle of the street. The deputy held his gun in his hands and yelled, "stop, stop." (R297). Allan drove with the right side of his car headed toward the deputy. (R298). After Allan's car struck the deputy, Allan's car struck Cindy. (R299).

Evelyn Cuervo testified that the defendant was married to Lori and he was the father of her children. (R314). Evelyn had known Allan for five years and her relationship with him was fine. (R314). On September 8, 1991, her relationship with Allan was bad. (R315). The family had no relationship with Allan between September 8, 1991, and Christmas day of 1991. (R315).

Evelyn recounted the events of Christmas day. (R318-322). While Allan was breaking the windows of the Jetta, Evelyn and Lori were standing near the laundry room, while Eddie and Cindy were standing near the Jetta. (R319).

Deputy Gary Hogsten of the Hillsborough County Sheriff's Office testified that he was in uniform and working patrol duty on December 25, 1991. (R327-28). He responded to a burglary call at the Cuervo residence at the Sand Stone Apartments. (R331-33). Sand Stone Apartments are next to another apartment complex, Harbor Walk. (R332). It is easy to miss the Sand Stone

entrance and end up at the Harbor Walk Apartments. (R332). He left his car at the Harbor Walk Apartments. (R334). He saw Allan smashing the windows out of a car as he approached. (R334). Numerous people were around including the Cuervos. (R335). Hogsten drew his gun and ran toward Allan. (R338). Allan dropped the hammer as he was running. (R352).

Allan got into his car, backed out of the parking space and drove straight down the street. (R339). Hogsten was standing in the middle of the street in the path of the car. (R339). The only exit to the parking lot was behind Hogsten. Hogsten testified that there was room for Allan to maneuver the car; however, in a deposition Hogsten had previously testified that there was no room to maneuver. (R353).

Allan's car accelerated. (R340). Hogsten yelled, "stop or I'll shoot." (R340). Allan did not hit the brakes. (R342). Hogsten took a big step to keep from getting hit. (R342). He was struck on the right knee by the car. (R343). Allan's car disappeared to the left and struck Cindy Cuervo who was standing behind a brown Volkswagon. (R344-45). Hogsten called for help over his radio, then started to chase Allan on foot. (R345). Allan ran into the Harbor Walk Apartment Complex. (R346).

Hogsten was treated at the hospital for pain and a lump on his back. (R347). There were cuts and abrasions on his knee. (R355). He was not able to return to work, and he did not know if he could ever return to work. (R347).

Over objection, a tape of Hogsten's radio call was played to the jury. (R349-51, 768-69).

The state rested, (R357), and the defendant's motion for judgment of acquittal was denied. (R358-76, 384-85).

Charlene Pratt, who lived in the Sand Stone apartment complex, testified that she witnessed the incident from her apartment. (R390-403). She testified that the defendant appeared to be about to run down the deputy, but he turned the car to the left. (R402). When he turned the car to the left, he hit a parked car and hit the woman (Cindy) who was standing in back of the parked car. (R403). It did not appear that the defendant hit Cindy on purpose. (R403). She testified:

It appeared to me that he was turning the car to avoid from hitting the police officer, and due to the fact that all of this was obviously in such close proximity that, you know, he simply hit the car and the woman was standing there.

(R403). At the speed of the defendant's car, there did not appear to be enough room to go around the deputy as there were cars parked on both sides of the street. (R408). Ms. Pratt did not know the defendant or any of the other people outside. (R404).

Sherry Russ, who lived at Sand Stone Apartments, witnessed the incident on Christmas morning. (R410). She also testified that the defendant swerved to avoid hitting the deputy before he

ran into Cindy and hit the car. (R418-19, 423). The defendant was just trying to leave. (R423). Ms. Russ did not know the defendant. (R423).

Deputy David Patterson was called to the scene the morning of the incident. (R428). He received information over his radio advising him that the defendant was at another apartment in the area. (R431). He went to the apartment and saw the defendant lying on the ground being handcuffed by two other deputies. (R431-32). The defendant appeared shaken up and there was blood on his forehead. (R432, 435). The defendant was not belligerent. (R435).

Deputy Ted Fitzpatrick was also called to the scene. (R436-37). Fitzpatrick received a communication advising him that the defendant was at an apartment and wanted to turn himself in. (R437). Fitzpatrick went to the apartment and saw the defendant on the telephone. (R437). He said he wanted to turn himself in. (R437). The defendant was told to lie on the floor, and he did. Deputy Haskle entered the apartment and handcuffed him. (R437). The defendant had blood on his face. (R438).

Catherine Smith lived in the Harbor Walk Apartments. (R44). On Christmas morning, she was sitting in her kitchen with her mother when she heard a commotion and headed toward her door. (R440-41). Allan Iacovone came running in. He was hysterical and screaming. (R441). Allan was a friend of Smith's daughter. (R441). He was bleeding and looked like he had been badly beaten up. (R442). He was screaming, "help me, help me." (R442).

Smith grabbed him and he went down on his knees inside her door. She asked what happened. He was yelling, "I need to call 911. I've beaten with a hammer." (R442). She led him to the phone and dialed 911. (R443). He kept saying, "I didn't mean to hurt anybody. I need to tell my story, so I need 911." (R443). Smith put a wet rag on his face and went to the bedroom to wake up her husband. (R443). She heard Allan say, "the sheriff is coming." When she came out of the bedroom, he was still talking on the telephone. (R444). He was still hysterical. (R445). The trial court disallowed testimony of what Allan was saying on the telephone. (R444-45). The deputies arrived and told Allan to lie down on the floor, which he did. (R446).

Miller Bassline, paramedic, examined Allan Iacovone when he was sitting in the back seat of a police cruiser at the apartment complex. (R456). Allan had an open wound. He told Bassline he was struck with an object, "either a golf club or vase or something." (R457).

Steven Large, dispatcher with the sheriff's department, recorded a 9-1-1 call received on Christmas day 1991 at 10:12 a.m.. The defense attempted to introduce a tape of the 9-1-1 call placed by the defendant. (R507). The state objected on the basis of hearsay. (R511-12). The defense countered that the statement was not hearsay under the excited utterance, spontaneous statement, and state of mind exception. (R512). The trial court heard the tape. (R513-16). The trial court ruled the tape inadmissible hearsay. (R516, 522).

The defense rested and renewed the motion for judgment of acquittal, which was denied. (R527).

SUMMARY OF THE ARGUMENT

Sections 784.07(3) and 775.0825, Fla. Stat. (1991), as applied, fail to violate Equal Protection. Although a sentencing disparity exists between attempted murder of a law enforcement officer and third-degree murder of a law enforcement officer, the State is afforded wide discretion in the exercise of its power to classify in the promulgation of police laws. The legislative intent to deter all lethal attacks against law enforcement, regardless of the circumstances, provides a reasonable basis for the sentencing classification.

ARGUMENT

ISSUE

SECTIONS 784.07(3) AND 775.0825, FLORIDA STATUTES (1991), AS APPLIED, FAIL TO VIOLATE EQUAL PROTECTION.

Defendant Iacovone was charged, inter alia, with attempted murder of a law enforcement officer in violation of Section 784.07(3), Fla. Stat. (1991), which provides:

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.

A conviction is punishable by a twenty-five year minimum mandatory term. Section 775.0825, Fla. Stat. (1991).

In the instant case, the defendant was specifically found guilty of attempted third-degree murder of a law enforcement officer. Based on the sentencing disparity between attempted murder of a LEO and third-degree murder of a LEO¹, the Second District Court of Appeal held that Sections 784.07(3) and

¹ Murder in the third-degree of a law enforcement officer is punishable by a maximum and mandatory sentence of fifteen years imprisonment. Sections 782.04(4), 775.082(3)(c), and 775.0823(3), Fla. Stat. (1991).

775.0825, as applied, violate the rationality requirement of the Equal Protection Clause. Iacovone v. State, 19 Fla. L. Weekly 1569 (Fla. 2d DCA July 22, 1994).

In contrast, Bloodworth v. State, 504 So. 2d 495, 498 (Fla. 1st DCA 1987), upheld a similar sentencing disparity where a capital felon who receives a life sentence, rather than death, is eligible for parole after twenty five years, but a life felon receives life or a term of years not exceeding forty. The Equal Protection clause admits to a wide discretion in the exercise by the State of its power to classify in the promulgation of police laws, and even though application of such laws may result in some inequality, the law will be sustained where there is some reasonable basis for the classification. Bloodworth, 504 So. 2d 495, 498-499, citing Hamilton v. State, 366 So. 2d 8, 10 (Fla. 1978).

The Legislature obviously chose to address a specific evil in creating the new substantive offense of attempted murder of a law enforcement officer. Since Section 784.07(3) does not limit its application to one particular degree of attempted murder, a conviction, regardless of degree, will be treated as a life felony and punished accordingly. Nephew v. State, 580 So. 2d 305, 306 (Fla. 1st DCA 1991). Although a sentencing disparity does result between attempted murder of a LEO and third-degree murder of a LEO, the legislature is not required to address all related evils simultaneously or to even address all related

evils. Carpentier, 587 So. 2d 1355, 1358 (Fla. 1st DCA 1991)(citations omitted)(upholding sentencing disparity challenged here).

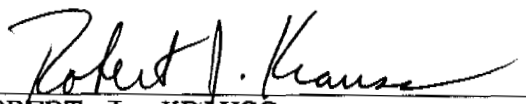
The application of this statute to all degrees of attempted murder of a LEO, even when the perpetrator is unaware of the victim's status, indicates the Legislature intended to deter all lethal attacks against law enforcement, regardless of the circumstances. This legislative intent provides a reasonable basis for the sentencing classification under which all persons are subject to the same range of penalties. See Bloodworth, 504 So. 2d 499. Consequently, no equal protection violation exists.

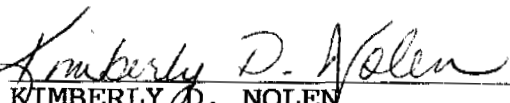
CONCLUSION

Based upon the foregoing arguments and citations of authority, the State urges this Court to affirm the judgment and sentence rendered by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Karen Kinney, Assistant Public Defender, Post Office Box 9000 -- Drawer PD, Bartow, Florida 33830, this 9th day of September, 1994.


KIMBERLY D. NOLEN
COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 84,215

ALLAN GILMAN IACOVONE,

Respondent.

APPENDIX

A-1.....Second District Court's Written
Opinion dated July 22, 1994

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ALAN GILMAN IACOVONE,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

CASE NO. 92-02438

Opinion filed July 22, 1994.

Appeal from the Circuit Court
for Hillsborough County; Diana
M. Allen, Judge.

James Marion Moorman, Public
Defender, Bartow, and Karen
Kinney, Assistant Public
Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and
Kimberly D. Nolen, Assistant
Attorney General, Tampa,
for Appellee.

THREADGILL, Judge.

Alan Gilman Iacovone, appellant, challenges his
judgments and sentences for burglary, criminal mischief,
aggravated assault, aggravated battery, and attempted murder in
the third degree of a law enforcement officer. We reverse the
appellant's judgment and sentence for attempted murder in the

25 1994

third degree of a law enforcement officer on the ground that sections 784.07(3) and 775.0825, Florida Statutes (1991), as applied, violate the Equal Protection Clause.¹ We affirm the remaining convictions.

The appellant argues that the offense classification and penalty mandated by sections 784.07(3) and 775.0825, violate the rationality requirement of the Equal Protection Clause.

Section 784.07(3) provides:

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.

A conviction is punishable by a twenty-five year minimum mandatory term. § 775.0825, Fla. Stat. (1991). The appellant was sentenced to thirty years, with a twenty-five year minimum mandatory term. By contrast, murder in the third degree of a law enforcement officer is punished much less severely. It carries a maximum and mandatory sentence of fifteen years'

¹ U.S. CONST. amend. XIV; FLA. CONST. art. I, § 2.

imprisonment. §§ 782.04(4), 775.082(3)(c), and 775.0823(3), Fla. Stat. (1991).²

Statutes are presumed to be constitutional. State v. Wilson, 464 So. 2d 667 (Fla. 2d DCA 1985). It is within the legislature's power to prohibit any act, determine the class of an offense, and prescribe punishment. State v. Bailey, 360 So. 2d 772, 773 (Fla. 1978). The test to be used in examining a statutory classification on equal protection grounds is whether the classification rests on a difference bearing a reasonable relation to the object of the legislation. Soverino v. State, 356 So. 2d 269, 271 (Fla. 1978). If there is any reasonable basis for the classification created by the legislature, the law will be sustained. Bloodworth v. State, 504 So. 2d 495 (Fla. 1st DCA 1987).

Persons charged with attempted third-degree murder of a law enforcement officer and those charged with the completed offense of third-degree murder are not similarly situated because they are charged with different offenses. See People v. Suazo, 867 P.2d 161 (Colo. Ct. App. 1993). Thus, the statutory scheme in question in this case resists a traditional equal protection analysis. Nevertheless, irrational classifications may violate fundamental constitutional principles if the

² Section 775.0823(3), Florida Statutes (1991) provides for an increase in penalty for any person convicted of a violent offense against a law enforcement officer, to wit: "[f]or murder in the third degree as described in s. 782.04(4), a sentence of imprisonment for 15 years before eligibility for release shall be imposed."

prescribed penalties are not "rationally related to the recognized legislative objective of establishing 'more severe penalties for acts which it believes have greater social impact and more grave consequences.'" 867 P.2d at 164 (quoting People v. Montoya, 582 P.2d 673, 675 (Colo. 1978)).

The Florida Legislature has expressed an intention to provide law enforcement officers with the greatest protection possible because of their exposure to great risk of violence. See Ch. 89-100, § 2, Laws of Fla. (creating § 775.0823, Fla. Stat.). It is obvious that this intent guided the legislature in enacting sections 784.07(3) and 775.0825. However, we are unable to glean the legislative objective in classifying an attempt to murder more severely than a completed murder and in rewarding the completed murder with a lower sentence than the failed attempt. Such a result is inconsistent with the objective of protecting law enforcement officers.³

Finding no rational basis for the penalty classification, we conclude that sections 784.07(3) and 775.0825 violate the Equal Protection Clause when applied to attempted

³ Although the appellant did not raise a due process argument before the trial court, we note Judge Zehmer's concurring opinion in Carpentier v. State, 587 So. 2d 1355, 1359 (Fla. 1st DCA 1991), that a statutory scheme that provides "for a single level of punishment for an 'attempted murder' of a law enforcement officer while preserving different levels of punishment for the actual murder of such officers . . . and . . . purports to impose a greater penalty for an 'attempted murder in the third degree' than for a consummated killing constituting 'murder in the third degree,' smacks heavily of arbitrary and capricious legislation so vague and uncertain in meaning that it fails to meet constitutional requirements of due process."

third-degree murder of a law enforcement officer. We therefore reverse the appellant's judgment and sentence for attempted third-degree murder of a law enforcement officer. We affirm the convictions on the other offenses. Because the appellant concedes and the record supports the validity of a conviction for attempted third-degree murder, we remand for the trial court to enter a judgment for attempted third-degree murder and to classify this offense as a felony of the third degree pursuant to sections 782.04(4) and 777.04(4)(c), Florida Statutes (1991). The trial court should then resentence the appellant on all offenses after the guidelines scoresheet is recalculated.

Affirmed in part; reversed in part and remanded.

SCHOONOVER, A.C.J., and FULMER, J., Concur.