IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,488

DANIEL McLAUGHLIN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Third District. Petitioner, DANIEL McLAUGHLIN, was the defendant in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stood in the trial court.

STATEMENT OF THE CASE AND FACTS

The State rejects the statement of case and facts contained in the Petitioner's brief because it contains facts that are not included in the district court's opinion.

The facts as contained in the district court's opinion are:

> United States Federal Protection Service officers Keriberto Martinez and Jack Aho were in downtown Miami when they heard shots fired. They investigated the source of the gunfire. Martinez saw the defendant, Daniel McLaughlin, with what looked like a gun sticking out of his waistband. When Martinez asked McLaughlin if he could talk to him, McLaughlin pulled out a gun, pointed it at the officer, and told him that he didn't want to talk to him. McLaughlin eventually fled, but was captured by the officers. The officers turned McLaughlin over to the City of Miami police department. Thereafter, they returned to the area where the shots were fired and recovered shell casings, which they also turned over to the Miami police.
>
> Pursuant to a jury verdict, the trial court entered a judgment adjudicating McLaughlin guilty of: (1) two counts of aggravated assault on a law enforcement officer with a semiautomatic firearm and a high-capacity detachable box magazine; (2) unlawfully discharging a firearm in public; and (3) resisting an officer without violence. At sentencing, McLaughlin pleaded nolo contendere to unlawful possession of a firearm by a convicted felon. The trial court sentenced McLaughlin to one year and a day in state prison on that charge, and credit for time served on the resisting charge. With respect to the aggravated assaults, the trial court sentenced McLaughlin to two eight-year

> minimum mandatory terms pursuant to section 775.087(2), Florida Statutes (1993). The court ordered that all sentences were to be served concurrently.

(App. A)

On appeal, the Defendant argued that the enhancement of his convictions because the victim's were law enforcement officers was error because the officers did not fall within the definition of law enforcement officers. The Third District rejected this claim because the use of the word "includes" in the statute made the list non-exhaustive and under the doctrine of ejusdem generis the officers fell within the class created by the statute. The court also applied this Court decision in *Soverino v. State, 356 So.* 2d 269 (Fla. 1978), which interpreted an earlier version of this statute by reference to §790.001(8), Fla. Stat.

The Third District noted that the including of a conviction for unlawfully discharging a firearm in public in the judgment was a clerical error because the jury had acquitted the Defendant on this count, The court therefore modified the Defendant's conviction and sentence to remove the conviction for discharging a firearm and affirmed them as modified. The District Court denied the Defendant motion for rehearing and alternative motion to certify conflict, (App. B)

QUESTION PRESENTED

WHETHER THE DECISION OF THE LOWER COURT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL?

SUMMARY OF THE ARGUMENT

The decision of the lower court does not conflict with the decision of this Court and other district courts of appeal, All of the decisions that the Defendant claims are in conflict in fact demonstrate that the lower court properly determined that the statute at issue creates a class and that membership in that class should be determined by reference to related statutes under the doctrine of ejusdem generis.

Further, the contention that the legislature has overruled prior decisions of this Court and the district courts of appeal does not create conflict between the consistent decision of the courts of this State and does not serve as a basis for this Court to invoke its jurisdiction.

ARGUMENT

THE LOWER COURT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS.

The Defendant asserts that the lower court's decision conflicts with this Court's decision in Green *v. State*, 604 So. 2d *471* (Fla. 1992). However, the Court was not construing §784.07, Fla. Stat.; it was construing §810.06, Fla. Stat. Further, the language of §810.06, Fla. Stat. did not contain the word "includes." The wording of §810.06 was, "Whoever has in his possession any tool, machine or implement . . . ." This Court found this language created a **class** and that the doctrine of ejusdem generis limited the meaning of these terms to members of that **class**

Section 784.07, Fla. Stat. does use the word "includes." As the lower court found, this word is term of enlargement and is meant to describe a class. (App. A) As such, the doctrine of ejusdem generis is an appropriate method of determining what the membership of that class should be, as this Court stated in *Soverino v. State, 356 So.* 2d 269 (Fla. 1978). Thus, the lower court's decision does not conflict with this Court's decision in *Green.*

The Defendant also contends that the lower court's decision conflicts with the First District's decision in *Hunter* v. State, 376 So. 2d 438 (Fla. 1st DCA 1979). However, in *Hunter,* the First District looked at §784.07(1) (a), Fla. Stat. and then referred to §790.001(8), Fla. Stat. to determine if a county correctional officer fell within the definition of a law enforcement officer. The lower court here applied the exact same analysis to determine whether the officers here were law enforcement officers. As such, there is no conflict between this **case and** *Hunter.*

The Defendant next contends that this **case** conflicts with this Court's decision in *Soverino v. State, 356 So.* 2d 269 (Fla. 1978). However, the lower court applied *Soverino,* which found that the doctrine of ejusdem generis applied to this statute and urged use of §790.001(8), Fla. Stat. in determine who belonged in the class.

The Defendant's real contention with regard to *Hunter* and *Soverino* is not that the cases conflict with this matter but that the legislature overruled these cases when it amended the statute, However, the question of whether the legislature overruled prior precedent is not a basis for discretionary review in this Court. See Fla. R. App. P. 9.030 (a) (2).

The Defendant finally contends that the lower court's decision conflicts with *C.L. v. State, 693 So.* 2d 713 (Fla. 4th DCA 1997).

However, *C.L.* involved a determination of whether a school police officer **was** a law enforcement officer, not whether a federal law enforcement officer was a law enforcement officer. Further, the Fourth District referred to other statutes to determine whether the officers fit within the class of officers established in §784.07, Fla. Stat. As such, *C.L.* supports the lower court's decision that statute created a non-exhaustive list of law enforcement officers and does not conflict.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that the Court deny jurisdiction to review this cause.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee was mailed this 21st day of October, 1997, to Robert Kalter, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125.

SANDRA S. JAGGARD
Assistant Attorney General