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IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,488

DANIEL MARCUS MCLAUGHLIN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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A. OFFICERS OF THE FEDERAL PROTECTIVE SERVICE ARE NOT LAW ENFORCEMENT OFFICERS AS DEFINED BY FLORIDA STATUTE 784.07 AND, THEREFORE, IT WAS ERROR TO ENHANCE DEFENDANT'S SENTENCE AND TO IMPOSE A MINIMUM MANDATORY SENTENCE PURSUANT TO THIS STATUTE;

B. THE MINIMUM MANDATORY SECTIONS OF 784.07(3)(B) ONLY APPLY TO BATTERIES AND SINCE DEFENDANT WAS CONVICTED OF AN ASSAULT 784.07(3)(B) DOES NOT APPLY TO HIM; AND

C. THE INFORMATION FAILED TO ALLEGE THAT A SEMIAUTOMATIC FIREARM WAS USED AND, THEREFORE, DEFENDANT COULD NOT RRECEIVE AN EIGHT YEAR MINIMUM MANDATORY SENTENCE UNDER ANY STATUTE.

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INTRODUCTION

The Petitioner, Daniel Marcus McLaughlin , was the defendant in the trial court and the Appellant in the Third District Court of Appeal. The Respondent, the State, was the respondent in the trial court and Appellee below. The parties will be referred to as they stood before the trial court or as they stand before this Court.

STATEMENT OF THE CASE AND FACTS

The State of Florida filed an information charging defendant with unlawful possession of a firearm by a convicted felon, two counts of aggravated assault on a law enforcement officer with a firearm, unlawfully discharging a firearm in public and resisting arrest without violence. (R. 1-5). Count one of the information was severed from the remaining four counts and a jury trial was conducted before the Honorable Leslie Rothenberg as to counts two through five.

Officers Martinez and Officer Aho, police officers for the United States Government with the United States Federal Protective Services were working in downtown Miami when they heard three gunshots. (T. 179). Officer Martinez and Officer Aho decided that rather than call the City of Miami police they would investigate the shooting themselves. Officers Martinez and Aho went in their separate cars and started to look for any suspicious activity. Officer Martinez saw defendant walking in the street with what appeared to be a gun in his waistband. (T. 183). Officer Martinez exited his vehicle and told defendant that he wanted to talk to him for a second. (T. 183). Defendant allegedly pulled out a weapon, pointed it at the officer and stated that he did not want to talk to the officer. (T. 183).

Officer Martinez took cover behind his car, pulled out his weapon and told defendant to drop his weapon. (T. 184). Rather than drop his weapon defendant decided to flee the area. (T. 185). Officers Martinez and Aho began to chase after the defendant. (T. 186). During the chase defendant allegedly pointed his weapon at Officer Aho. (T. 297). Eventually defendant was restrained by the two officers. (T. 190). The officers then called the City of Miami police and defendant was placed under arrest . (T. 191).

At the conclusion of the state's case, defendant moved for a judgement of acquittal as to the

two counts of aggravated assault on a law enforcement officer. Petitioner unsuccessfully argued that Florida Statute 784.07 which reclassifies crimes and penalties when an aggravated assault is committed against a law enforcement officer, as that term is defined in Florida Statute 943.10, does not apply to federal officers since federal officers are not included in the group of law enforcement officers as that term is defined in Florida Statute 943.10. (T. 373-7).

After deliberations the jury found defendant guilty of two counts of aggravated assault on a law enforcement officer and one count of resisting arrest without violence, The jury found defendant not guilty of unlawfully discharging a firearm in public. (R. 46-49).

At the sentencing hearing the trial court reclassified the two aggravated assault charges from third degree felonies to second degree felonies pursuant to Florida Statute 784.087(2)(c) and imposed an eight-year minimum mandatory sentence pursuant to Florida Statute 784.07(3)(b).

On direct appeal defendant argued that the court erred in reclassifying the aggravated assault charges since the victims, who were federal officers, were not included in the statute that enhances assaults committed on law enforcement officers as that term is defined in Florida Statute 943.10 and that the court erred in imposing an eight year minimum mandatory sentence pursuant to Florida Statute 784.07(3)(b) since that statute created minimum mandatory sentences only when a battery was committed against a state law enforcement officer. The Third District Court of Appeal entered an opinion affirming defendant's convictions and sentence. (See Appendix A).

Defendant filed a notice to invoke jurisdiction with this court along with jurisdictional briefs and this court accepted jurisdiction in this matter. This appeal follows.

QUESTIONS PRESENTED

I.

DEFENDANT'S CONVICTION AND SENTENCE FOR AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER ALONG WITH THE EIGHT YEAR MINIMUM MANDATORY SENTENCE MUST BE VACATED SINCE:

A. OFFICERS OF THE FEDERAL PROTECTIVE SERVICE ARE NOT LAW ENFORCEMENT OFFICERS AS DEFINED BY FLORIDA STATUTE 784.07 AND, THEREFORE, IT WAS ERROR TO ENHANCE DEFENDANT'S SENTENCE AND TO IMPOSE A MINIMUM MANDATORY SENTENCE PURSUANT TO THIS STATUTE;

B. THE MINIMUM MANDATORY SECTIONS OF 784.07(3)(B) ONLY APPLY TO BATTERIES AND SINCE DEFENDANT WAS CONVICTED OF AN ASSAULT 784.07(3)(B) DOES NOT APPLY TO HIM; AND

C. THE INFORMATION FAILED TO ALLEGE THAT A SEMIAUTOMATIC FIREARM WAS USED AND, THEREFORE, DEFENDANT COULD NOT RRECEIVE AN EIGHT YEAR MINIMUM MANDATORY SENTENCE UNDER ANY STATUTE.

SUMMARY OF ARGUMENT

Defendant was convicted of two counts of aggravated assault on a law enforcement officer. The court reclassified defendant's conviction from a third degree felony to a second degree felony and imposed an eight-year minimum mandatory sentence since defendant used a firearm during the commission of the aggravated assault. The trial judge's sentence in this case was improper since the two federal officers, who were the alleged victims, were not law enforcement officers as defined by Florida Statute 784.07 and therefore, the provisions of Florida Statute 784.07 did not apply to defendant. However, even if this court were to conclude that the federal officers were meant to be included in Florida Statute 784.07 the trial judge erred in imposing an eight-year minimum mandatory sentence since defendant was convicted of an aggravated assault and the statute specifically limits the imposition of minimum mandatory sentence to individuals convicted of a battery. Florida Statute 784.07(3)(b). Furthermore, it was error to impose an eight-year minimum mandatory sentence under any statute since the information failed to allege that a semiautomatic weapon was used, Therefore, this case must be remanded back to the trial judge with instructions to resentence defendant after reducing his convictions from aggravated assault on a law enforcement officer to simple aggravated assault and vacating his eight-year minimum mandatory sentence.

ARGUMENT

1.

DEFENDANT'S CONVICTION AND SENTENCE FOR AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER ALONG WITH THE EIGHT YEAR MINIMUM MANDATORY SENTENCE MUST BE VACATED SINCE:

A. OFFICERS OF THE FEDERAL PROTECTIVE SERVICE ARE NOT LAW ENFORCEMENT OFFICERS AS DEFINED BY FLORIDA STATUTE 784.07 AND, THEREFORE, IT WAS ERROR TO ENHANCE DEFENDANT'S SENTENCE AND TO IMPOSE A MINIMUM MANDATORY SENTENCE PURSUANT TO THIS STATUTE;

B. THE MINIMUM MANDATORY SECTIONS OF 784.07(3)(b) ONLY APPLY TO BATTERIES AND SINCE DEFENDANT WAS CONVICTED OF AN ASSAULT 784.07(3)(b) DOES NOT APPLY TO HIM; AND

C. THE INFORMATION FAILED TO ALLEGE THAT A SEMIAUTOMATIC FIREARM WAS USED AND, THEREFORE, DEFENDANT COULD NOT RECEIVE AN EIGHT YEAR MINIMUM MANDATORY SENTENCE UNDER ANY STATUTE.

Defendant was charged with two counts of aggravated assault on a law enforcement officer. (R. 1-5). The two victims were officers employed by the United States Government as Federal Protective Service Officers. (T. 177,284). At the conclusion of the state's case defendant moved for a judgement of acquittal as to the two counts of aggravated assault on a law enforcement charges since federal officers are not included in the definition of law enforcement officers as defined by Florida Statute 784.087, which creates enhanced penalties for committing an assault or battery on a law enforcement officer. (T. 373-7). The trial judge denied the motion. (T. 377). Defendant was

convicted of two counts aggravated assault of a law enforcement officer, The court reclassified the aggravated assault charges from a third degree felony to a second degree felony and imposed an eight-year minimum mandatory sentence pursuant to Florida Statute 784.07 for use of a firearm during the commission of the aggravated assault. (R. 52-60).

The trial judge erred in reclassifying defendant's convictions from a third degree felony to a second degree felony and imposing an eight-year minimum mandatory sentence since the two federal officers were not law enforcement officers as defined by Florida Statute 784.07 and, therefore, the provisions of that statute do not apply. Furthermore, even if this court were to conclude that the federal officers were meant to be included in Florida Statute 784.07, the trial judge erred in imposing an eight-year minimum mandatory sentence since defendant was convicted of an aggravated assault and the Florida Statute 784.07(3) limits the imposition of minimum mandatory sentences to individuals convicted of a battery.

A. Officers Of the Federal Protective Service ARE Not Law Enforcement Officers As defined By Florida Statute 784.07 And, Therefore, It Was Error To Enhance Defendant's Sentence And To Impose A Minimum Mandatory Sentence.

Florida Statute 784.07 reclassifies the degree of the offense of assaults and batteries when a law enforcement officer is the victim. The statute specifically refers to Florida Statute 943.10 for a definition of a law enforcement officer:

> (l)(a) As used in this section, the term "law enforcement officer" includes a law enforcement officer, a correctional officer, a correctional probation officer, a part-time law enforcement officer, a part-time correctional officer, an auxiliary law enforcement officer, and an auxiliary correctional officer, **as those terms are respectively defined in** s. 943.10, and any county probation officer; employee or agent of the Department of Corrections who supervises or provides services to inmates; officer of the Parole Commission; and law

> enforcement personnel of the Game and Fresh Water Fish Commission, the Department of Environmental Protection, or the Department of Law Enforcement.

In order to determine who is considered a law enforcement officer under Florida statute 784.07 one must look to the definition contained in Florida Statute 943.10 which defines a law enforcement officer as follows:

> (1) "Law enforcement officer" means **any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof;** who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state. This definition includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time law enforcement officers, part-time law enforcement officers, or auxiliary law enforcement officers but does not include support personnel employed by the employing agency.

Therefore, in order for the reclassification or minimum mandatory sections of Florida Statute 784.07 to apply an officer who is the victim of an assault or battery must be **an officer employed by either the State of Florida or any municipality or political subdivision of the State of Florida.** Nowhere in the definition of law enforcement officer contained in Florida Statute 943.10 is there any mention of federal officers. Obviously the federal government is not a part of the State of Florida nor is it a municipality or political subdivision of the State of Florida. Therefore, if the victim of an assault or battery is a federal officer rather than an officer of the State of Florida or any municipality or political subdivision of the State of Florida, the provisions of Florida Statute 784.07 do not apply.

When the language of a statute is clear and unambiguous, it must be given its plain and

obvious meaning. *West Palm Beach Golf Comm 'n v. Calluway, 604* So, 2d 880 (Fla. 4th DCA 1992), rev. *denied,* 618 So.2d 212 (Fla.1993); *Holly v. Auld,* 450 So. 2d 217 (Fla.1984). *Scates v. State,* 603 So.2d 504 (Fla.1992). One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter. E.g., *Cabal v. State, 678 So.* 2d 315 (Fla. 1996); *State v. Camp,* 596 So. 2d 1055 (Fla.1992); *Perkins v. State, 576 So.* 2d 1310 (Fla. 1991); *State* v. *Jackson,* 526 So. 2d 58 (Fla.1988). This principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited. E.g., *Brown* v. *State,* 358 So. 2d 16 (Fla.1978); Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute.

Indeed, our system of jurisprudence is founded on a belief that everyone must be given sufficient notice of those matters that may result in a deprivation of life, liberty, or property. Scull *v. State,* 569 So. 2d 1251 (Fla.1990). For this reason "[a] penal statute must be written in language sufficiently definite, when measured by common understanding and practice, to apprise ordinary persons of common intelligence of what conduct will render them liable to be prosecuted for its violation." *Gluesenkamp v. State,* 391 So. 2d 192, 198 (Fla.1980), *cert. denied, 454* U.S. 818, 102 S.Ct. 98, 70 L.Ed.2d 88 (1981) (citations omitted).

The rule of strict construction also rests on the doctrine that the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch. *Borges* v. *State,* 415 So. 2d 1265, 1267 (Fla.1982); *accord United States v. L. Cohen Grocery* Co., 255 US. 81, 87-93, 41 S.Ct. 298, 299-301, 65 L.Ed. 516 (1921) (applying same principle to Congressional authority).

Explicitly recognizing the principles described above, the legislature has codified the rule

of strict construction within the Florida Criminal Code:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

Sec. 775.021(1), Fla.Stat. (1987).

In applying all of the above mentioned rules of statutory construction it becomes obvious that Florida Statute 784.07 as presently written, can not apply to federal officers since the clear and unambiguous language of both Florida Statute 784.07 and 943.10 establishes that only **officers employed by either the State of Florida or any municipality or political subdivision of the State of Florida** are included in 784.07.

In ruling that federal officers were included in the definition of law enforcement officers in Florida Statute 784.07, the trial judge mistakenly relied upon the definition of law enforcement officer contained in Florida Statute 790.001 wherein the definition of law enforcement officer states:

> All officers of the United States or the State of Florida, or any agency, commission, department, board, division, municipality, or subdivision thereof, duly authorized to carry a concealed weapon.

The Third District Court of Appeal relying on this court's decision in *Soverino v. State, 356* So.2d 269 (Fla. 1979), concluded that the trial judge was correct in using the definition contained in 790.001 to determine whether a federal officer is included in 784.07 despite the fact that the statute specifically states that the definition in 943.10 should be used. A review of the holding in *Soverino, supra,* will establish that both the trial judge and the Third District Court of Appeal erred in relying on the definition of a law enforcement officer contained in 790.001 rather than the definition contained in 943.10.

In *Soverino v. State,* 356 So.2d 269 (Fla. 1978), this court was asked to decide whether Florida Statute 784.07 (1977), was over broad since the prosecutor had the authority to decide who was a law enforcement officer because the statute stated that the term law enforcement officer was not limited to the groups mentioned in the statute. The 1977 version of Florida Statute 784.07 stated the following:

> **"Assault or battery of law enforcement officers or fire fighters; reclassification of offenses.**
> "(l)(a) As used in this section, the term 'law enforcement officer' includes, **but shall not be limited to,** any sheriff, deputy sheriff, municipal police officer, highway patrol officer, beverage enforcement agent, county probation officer, officer of the Parole and Probation Commission, and law enforcement personnel of the Game and Fresh Water Fish Commission and the Departments of Natural Resources and Criminal Law Enforcement.

In concluding that this statute was not over broad, this Court relied upon the doctrine of ejusdem generis and concluded that the prosecutor could only consider someone a law enforcement officers if they were in a similar class to the individuals listed in the statute. This court in footnote 4 recognized that since the statute did not contain a definition of law enforcement officer the prosecutor could look to the definition in 790.001(8) for guidance.

Subsequent to the opinion in *Soverino, supra*, the Florida Legislature amended section 784.07 in 1989. Whereas in the old version of the statute the legislature failed to include a definition of law enforcement officer, the same was not true in the revised version of the statute. The new statute specifically states that the definition that should be used is the definition contained in 943.10. Therefore, this court's language in *Soverino* which indicated that the prosecutor could use the defmition of a law enforcement contained in 790.001 for guidance as to who was meant to be included in 784.07 was nullified when the legislature amended the statute and stated that the

definition to be used is the one contained in 943.10.

When the legislature amended 784.07 the legislature obviously was trying to eliminate any ambiguity or doubt as to who was meant to be considered a law enforcement officer. If the legislature wanted the courts to use the definition contained in 790.001 rather than the definition contained in 943.10 the legislature would have referred to 790.001 rather than 943.10 when they changed the statute..

A review of both Florida Statute 790.001 and 784.087 may clarify why the legislature chose to use the definition contained in 943.10 rather than the definition contained in 790.001 when defining a law enforcement officer for the purposes of 784.07. Chapter 790 of the Florida Statutes regulates who can possess a firearm in the State of Florida. When the legislature defined a law enforcement officer for the purposes of determining who can possess a firearm in this state the legislature obviously intended to include federal officers in the group of law enforcement officers who can possess a firearm.

On the other hand Florida Statute 784.07 is an enhancement statute which seeks to punish more severely an assault on law enforcement officers. When the legislature chose to use the definition of a law enforcement officer contained in 943.10, which did not included federal officers, rather than the definition contained in 790.001, which did include federal officers, the legislature may have decided that federal officers do not need to be included in the enhancement statute since an assault on a federal officers is a federal offense and an individual who assaults a federal officer not only can be tried in state court but they also can receive enhanced punishment if the federal government decides to prosecute the defendant under federal law. Title 18 section 111 creates a crime for an assault on a law enforcement officer and if an aggravated assault is charged the

defendant if convicted can receive ten years in federal prison.

More importantly, however, no matter what the reason was for excluding federal officers from the statute it is clear that federal officers are not included in Florida Statute 784.07 since this statute specifically states that the definition of a law enforcement officer for the purposes of this statute is contained in Florida Statute 943.10. Therefore both the trial judge and the Third District Court of appeal erred in relying on the definition of a law enforcement officer which was contained in 790.001 since the statute clearly states that the definition to be used is contained in 943.10.

In C.L. v. State, 22 Fla. L. Weekly D1322 (Fla. 4th DCA 1997), the Fourth District Court of Appeal in a case issued after *Soverino, supra,* was asked to decide whether a Palm Beach County school board police officer was a law enforcement officer within the meaning of section 784.07, Florida Statute (1995). In concluding that a school board police officer was included in the definition of a law enforcement officer as defined by Florida Statute 784.07, the court held that in determining who is a law enforcement officer under section 784.07 it is necessary to rely on the definition of law enforcement officer as defined in Florida Statute 943.10(1). The court concluded that a school board police officer was included in the definition of a law enforcement contained in Florida Statute 943.10(1 1), and therefore he was a law enforcement officer within the meaning of section 784.07. It is important to note that the court did not rely on the definition contained in section 790.001 as this court did in Soverino since the amended statute requires that the definition to be used in determining who is a law enforcement officer is contained in section 943.10.

In concluding that federal officers are law enforcement officers within the meaning of Florida Statute 784.07 the Third District Court of Appeal not only misapplied the holding in Soverino but also wrongfully applied the doctrine of ejusdem generis. A review of this court's

decision in Green *v. State,* 604 So. 2d 471 (Fla. 1992), which defined and explained the doctrine of ejusdem generis will establish that this rule of statutory construction does not apply in this case.

In *Green, supra,* this Court was asked to decide whether items of personal apparel, such as common gloves were included under the terms "tool, machine, or implement" as used in section 810.06, Florida Statutes. In rejecting the state's argument that gloves were meant to be included in 8 10.06 the court relied upon the doctrine of ejusdem generis. The court defined this rule of statutory construction as follows:

> Another maxim of statutory construction, ejusdem generis, is applicable to our interpretation of the phrase "tool, machine or implement." **Under the doctrine of ejusdem generis, where an enumeration of specific things is followed by some more general word, the general word will usually be construed to refer to things of the same kind or species as those specifically enumerated.** *State ex rel. Wedgworth Farms, Inc. v. Thompson,* 101 So.2d 381,385 (Fla.1958). With respect to the language in section 8 10.06, the word "implement" should be interpreted to refer to objects similar in nature to "tools" or "machines." Because gloves are not included in the definitions of "tool" or "machine," the doctrine of ejusdem generis limits the word "implement" to a definition that does not include gloves.

Therefore, this court recognized that the doctrine of ejusdem generis only applies where an **enumeration of specific things is followed by some more general word.** When a statute contains this pattern, then the general words must be construed to refer to things of the same kind or species as those specifically enumerated.

Florida Statute 784.07 lists a group of officers who are meant to be included in the definition of a law enforcement officer. Following this enumerated list, the statute then specifically states that in order to determine if an individual fits within this list one must look to the definitions contained in Florida Statute 943.10. Florida Statute 784.07 is not a statute that contains a list of individuals

followed by a more general term but instead it is a statute that contains a list of officers followed by a reference to another statute which defines specifically who shall be included in the statute. Therefore the doctrine of ejusdem generis did not apply to this case. Instead the court should have relied upon the rule of "expressio unius est exclusio alterius" which is the firmly established principle of statutory construction that the mention of one thing in a statute implies the exclusion of another. *Capers v. State,* 678 So. 2d 330 (Fla. 1996). *Thayer v. State, 335 So.* 2d 815, 817 (Fla.1976); *Brown v. State, 672 So.* 2d 861 (Fla.App. 3 Dist. 1996); *Tillman v. Smith, 533 So.* 2d 928, 929 (Fla. 5th DCA 1988).

In *Hunter v. State,* 376 So. 2d 438 (Fla. 1st DCA 1979) a case decided after *Soverino* but before the amendment to 784.07, the defendant was charged with aggravated assault on a law enforcement officer. The alleged law enforcement officer was a county correctional officer. The issue the court had to decide was whether county correctional officers were included in the Section 784.07, Florida Statutes (1977). In concluding that a county correctional officer was not included in section 784.07 the, court pursuant to this court's decision in *Soverino v. State,* 356 So.2d 269 (Fla. 1978), looked to the definition of a law enforcement officer which was contained in section 790.001(8). The First District concluded that since county correctional officers were not included in the definition in 790.001(8) they were not a law enforcement officer within the meaning of section 784.07, Florida Statute even though they would appear to be in the same class as state correctional officers.

Subsequent to the Hunter decision the legislature amended Florida Statute 784.07 and specifically stated that the definition that should be used in determining who is a law enforcement officer under this statute was contained in Florida Statute 943.10. Therefore, the only difference

between this case and the *Hunter* case is that in *Hunter* the court was required to use the definition contained in 790.001(8) to determine who was a law enforcement officer and in this case the court was required to look at 943.10 for the definition of a law enforcement officer. Just like Section 790.001(8) does not include county correctional officers, 943.10 does not include federal officers. In *Hunter, supra*, the court aptly stated "Had the legislature intended that county correctional officers be classified as law enforcement officers, it could have so stated in either of the statutes." 376 So.2d at 439.

Similarly in this case if the legislature had intended federal officers to be classified as law enforcement officers under 784.07 they could have stated so in either 784.07 or 943.10. Since federal officers are not included in the definition of law enforcement officers as contained in 784.07 this statute was inapplicable to defendant's conviction. Therefore it was error for the court to rely upon 784.07 to reclassify defendant's aggravated assault conviction from a third degree felony to a second degree felony and to impose an eight year minimum mandatory sentence pursuant to 784.07.

B. EIGHT-YEAR MINIMUM MANDATORY SENTENCE MUST BE VACATED SINCE 784.07 CREATES MINIMUM MANDATORY SENTENCING FOR BATTERIES AND NOT ASSAULTS.

Even if this court were to conclude that federal officers were law enforcement officers included in Section 784.07 the minimum mandatory sentence still must be vacated since Section 784.07(3) creates minimum mandatory sentences for individuals who commit batteries on a law enforcement officer and while in the commission of the battery the defendant possesses a firearm. The statute specifically states:

(3)Any person who is convicted of a **battery** under paragraph (2)(b)

and during the commission of the offense, such person possessed:

The statute goes on to state that if the individual who commits the battery possesses a semiautomatic firearm or a high-capacity detachable box magazine the court shall impose a minimum term of imprisonment of 8 years. Since the defendant in this case was convicted of an aggravated assault and not a battery, the minimum mandatory provisions of section 784.07(3) did not apply in this case and, therefore, it was error to impose an eight year minimum mandatory sentence pursuant to 784.07 even if this court were to conclude that federal officers were law enforcement officers under this statute.

C. Eight-Year Minimum Mandatory Sentence Must Be Vacated Since The Information Failed To Allege That Defendant Used A Semiautomatic Firearm.

On direct appeal the state argued that the eight year minimum mandatory sentence was properly imposed pursuant to Florida Statute 775.087 (1995) which creates an eight year minimum mandatory sentence when a semiautomatic firearm is used during an aggravated assault even if the victim is not a law enforcement officer.

Initially it is defendant's position that the state improperly relied upon Florida Statute 775.087 (1995)since the section creating eight year minimum mandatory sentences for possessing a semiautomatic weapon during the commission of an aggravated assault went into effect on October 1, 1995 and the crime in this case was committed on September 26, 1995. Therefore this statute was not in effect when defendant committed his crime and the court could not impose an eight-year minimum mandatory sentence pursuant to this statute.

More importantly, however, it is defendant's position that defendant could not receive an eight year minimum mandatory sentence under any statute in this case regardless of whether the

victims were law enforcement officers under 784.07 or whether 775.087 (1995) applied to defendant since the information failed to allege that a semiautomatic weapon was used during the commission of the crime.

The law is well settled that a defendant can not receive a three year minimum mandatory sentence pursuant to Florida Statute 775.087 unless the information alleges that a firearm or destructive devise is used. *See Gibbs* v. *State*, 623 So.2d 551 (Fla. 4th DCA), rev. denied, 630 So.2d 1099 (Fla. 1993)(enhancement of convictions for use of firearm when information does not charge use of firearm is fundamental error); *Cerrato* v. *State*, 576 So.2d 351 (Fla. 3d DCA 1991)(because information did not charge the defendant with shooting the victim with a firearm, the trial judge erred in reclassifying the offense from a second-degree felony to a first-degree felony and in imposing a three-year mandatory minimum sentence); *Sullivan* v. *State*, 562 So.2d 813 (Fla. 1st DCA 1990) (defendant's sentence could not be enhanced where information did not contain statutory elements necessary for enhancement); *Cox v. State*, 530 So.2d 464 (Fla. 5th DCA 1988) (enhancing offenses of battery on law enforcement officer to second-degree felonies and imposing three-year mandatory minimum sentence because of use of firearm was fundamental error, where defendant was not charged with possession of firearm under battery counts in information); *Peck v. State*, *425* So.2d 664 (Fla.2d DCA 1983) (in order to apply statutory three-year mandatory minimum, state must allege in the information and prove at trial that defendant possessed a firearm during commission of crime);

In this case the information alleged that a firearm was used and it also cited to Florida Statute 784.07 and 775.087 which both create three year minimum mandatory sentences when a firearm is used and an eight year minimum mandatory sentence when a semiautomatic firearm is used. Since

the information alleged that a firearm was used and cited to statute that creates a three year minimum mandatory sentence defendant was on notice that he could have received a three year minimum mandatory sentence. See Mesa v. *State,* 632 So.2d 1094 (Fla. 3d DCA 1994)(defendant can receive a three year minimum mandatory sentence even if the information does not allege a firearm as long as the information alleges the statute that creates the three year minimum mandatory sentence since citing the statute gives the defendant on sufficient notice.)

However, in this case the information failed to allege that the firearm was a semiautomatic weapon and the information failed to specify the specific portions of Florida Statute 775.087 and 784.07 which created the eight year minimum mandatory sentence for possessing a semiautomatic firearm. Therefore the information did not put defendant on notice that he could receive an eight year minimum mandatory sentence.

In *Palmer v. State* 692 So.2d 974 (Fla. 5th DCA 1997) the Fifth District Court of Appeal correctly recognized that in order for a defendant to receive an eight year minimum mandatory sentence the information must allege that a semiautomatic weapon was used when the court stated:

> "Analogous cases have made it clear that Palmer's possession of a semi-automatic weapon during the commission of the aggravated battery had to be charged in the indictment before his sentence could be enhanced on this basis." See, e.g., *Mesa v. State, 632* So.2d 1094, 1097 (Fla. 3d DCA 1994) (possession of a firearm is "an essential element of the crime charged" which "must be alleged in the indictment or information" before enhancement is permitted pursuant to section 775.087, Florida Statutes); *Cox v. State, 530* So.2d 464 (Fla. 5th DCA 1988) (fundamental error to enhance offenses and impose minimum mandatory sentence because of use of firearm in commission of offenses where defendant was not charged with possession of firearm under

battery counts in amended information).

Since the information did not allege that a semiautomatic weapon was used, it was error to impose an eight year minimum mandatory sentence. Therefore, this case should be remanded back to the trial court with instructions to resentence defendant after reducing the two aggravated assault charges from second degree felonies to third degree felonies and vacating the eight year mandatory minimum sentence.

CONCLUSION

Based on the foregoing arguments and authorities this court should reverse defendant's convictions and sentence as to the two aggravated assault convictions and order that a new sentencing hearing take place.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Suite #950 - Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33 13 1 this 28th day of January, 1998.

_____
ROBERT KALTER
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO: 91,488

DANIEL MARCUS MCLAUGHLIN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

_____/

APPENDIX TO BRIEF OF PETITIONER ON THE MERITS

Opinion of the Third District Court of Appeal
Dated July 23, 1997 . . . . . APPENDIX A

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1997

DANIEL MARCUS MCLAUGHLIN, **

Appellant, **

vs. ** CASE NO. 96-1942
LOWER TRIBUNAL NO. 95-38366

THE STATE OF FLORIDA, **

Appellee. **

Opinion filed July 23, 1997

An appeal from the Circuit Court for Dade County, Leslie B. Rothenberg, Judge.

Bennett H. Brummer, Public Defender, and Robert Kalter, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Sandra S. Jaggard, Assistant Attorney General, for appellee.

Before NESBITT, LEVY, and GODERICH, JJ.

NESBITT, J.

United States Federal Protection Service officers Heriberto 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;[1] (2) unlawfully discharging a firearm in public;[2] and (3) resisting an officer without violence.[3] At sentencing, McLaughlin pleaded nolo contendere to unlawful possession of a firearm by a convicted

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[1] §§ 784.021, 784.07, Fla. Stat. (1995).

[2] § 790.15, Fla. Stat. (1995). It is clear that the listing of this count on the judgment of conviction was a clerical error. The jury found McLaughlin not guilty of this charge. In accord with that finding, the trial court orally acquitted McLaughlin of that charge. Additionally, no sentence was imposed for that count and it was not included in the sentencing guidelines scoresheet. Thus, we strike this count from the judgment of conviction but affirm it in all other respects. See Samudio v. State, 460 So. 2d 418 (Fla. 2d DCA 1984).

[3] § 843.02, Fla. Stat. (1995).

felon.[4] 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.

McLaughlin argues on appeal that United States Federal protection Service officers do not fall under the definition of a "law enforcement officer" for purposes of section 784.07, Florida Statutes (1995). That provision provides, among other things, that when a person is charged with knowingly committing an aggravated assault on a law enforcement officer, the offense is to be reclassified from a third degree felony to a second degree felony. § 784.07(2)(c), Fla. Stat. (1995). It further provides:

> As used in this section, the term "law enforcement officer" includes a law enforcement officer, a correctional officer, a correctional probation officer, a part-time law enforcement officer, a part-time correctional officer, an auxiliary law enforcement officer, and an auxiliary correctional officer, as those terms are respectively defined in Sec. 943.10, and any county probation officer; employee or agent of the Department of Corrections who supervises or provides services to inmates; officer of the Parole Commission; and law enforcement personnel of the Game and Fresh Water Fish Commis'sion, the Department of Environmental Protection, or the Department of Law Enforcement.

§ 784.07(1)(b), Fla. Stat. (1995).

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[4] § 790.23, Fla. Stat. (1995).

Section 943.10(1), in turn, reads:

> "Law enforcement officer" means any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state. This definition includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time law enforcement officers, part-time law enforcement officers, or auxiliary law enforcement officers but does not include support personnel employed by the employing agency.

McLaughlin maintains that because Federal Protection Service officers do not fall under the definition of "law enforcement officer" found in section 943.10, it was error to subject him to the enhancement provisions of section 784.07.

For two reasons, we are convinced that the legislature did not intend to exclude federal law enforcement personnel from the statute's ambit. First, section 784.07(1)(a) states that "the term 'law enforcement officer' includes a law enforcement officer . . . ." (emphasis added). "Includes" is a term of enlargement, not limitation. See Yon v. Fleming, 595 So. 2d 573, 577 (Fla. 4th DCA), rev. denied, 599 So. 2d (Fla. 1992). To "include" means 'to place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate . . . .' Webster's Third New International Dictionary 1143 (1986). Thus, by using the term "includes" the legislature expressed its intent that what followed that term was meant to be a list of individuals protected by the

statute who were but a part of a larger class of people called "law enforcement officers." Obviously, applying the principle of ejusdem generis, that larger class or group would have to be construed to refer to persons of the same kind or nature as those specifically mentioned in the statute. We believe Federal Protection Service police officers fall into that class.

Second, in Soverino v. State, 356 So. 2d 269 (Fla. 1978), our supreme court interpreted the substantially similar predecessor to the current statute.[5] Applying the same principle of statutory construction we referred to earlier, the court held that section 784.07 covers those officers specifically enumerated in the statute and those persons falling within the general class of "law enforcement officers." Id. at 273. The court specifically noted that prosecutors may look to section 790.001(8) for guidance as to what individuals fall within the class of "law enforcement officers." Id. at 273 n.4. That subsection specifically provides that officers of the United States with authority to make arrests are "law enforcement officers." § 790.001(8), Fla. Stat. (1995). Thus, in this case, the trial judge correctly ruled that United States Protection officers were "law enforcement officers" for

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[5] That statute provided that the term "'law enforcement officer' includes, but shall not be limited to . . ." Soverino, 356 So. 2d at 271 n.1 (emphasis added;.' We do not believe the elimination of the phrase "but-shall not be limited to" from the statute changes our analysis given the definition of the term "includes" standing alone. In our view, the dropping of that phrase simply eliminated a redundancy.

purposes of section 784.07, Florida Statutes.

We find the remaining points raised by McLaughlin to be without merit and do not discuss them. Thus, in accord with our discussion in footnote two, supra, we strike Count 4, unlawfully discharging a firearm in public, from the judgment of conviction. We affirm the judgment, as modified, and the sentences entered thereon.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1997

WEDNESDAY, SEPTEMBER 10, 1997

DANIEL MARCUS MCLAUGHLIN, **

Appellant, . **

** CASE NO. 96-1942

THE STATE OF FLORIDA, ** LOWER TRIBUNAL NO. 95-38366

Appellee. **

**

Upon consideration, appellant's motion for rehearing or in the alternative motion to certify conflict is hereby denied.

NESBITT, LEVY and GODERICH, JJ., concur.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk, District Court of Appeal, Third District

By _____ Deputy Clerk

cc: Robert Kalter Sandre S. Jaggard

/NB