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 THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441
fax 377-5655

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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. The symbols "R." and "T." will refer to the record on appeal and transcript of proceedings, respectively.

STATEMENT OF THE CASE AND FACTS

On September 26, 1995, around 3:00 A.M., Officer Heriberto Martinez and Officer Jack Aho of the Federal Protection Service Police were outside the 7-11 at the corner of S.W. 7th Street and Miami Avenue having a cup of coffee when they heard three gunshots. (T. 177-79, 286-87) Both officers, who were in uniform, got into their patrol cars and went to investigate. (T. 179-80, 285, 287-89) As they rode west on 7th Street, Officer Martinez observed the Defendant walking along the street with a gun in his waistband. (T. 181-82)

Officer Martinez stopped his car, opened the door, stood behind the door and asked the Defendant to talk to him. (T. 183) The Defendant told Officer Martinez that he did not want to talk to him, pulled out his gun and pointed it at Officer Martinez. (T. 183) Officer Martinez pulled his weapon, pointed it at the Defendant and told him to drop the weapon. (T. 184) Officer Martinez informed Officer Aho that the Defendant had a gun. (T. 184-85, 293)

The Defendant then ran down 1st Avenue. (T. 185, 293) Officer Martinez followed the Defendant telling him to drop the gun. (T. 186, 293) The Defendant ran behind a parked jitney. (T. 187) Officer Martinez stopped in front of the jitney. (T. 187) Officer Aho stopped next to a car near the jitney. (T. 295) The Defendant ran toward Officer Aho. (T. 296) Officer Aho pointed

his gun at the Defendant and ordered the Defendant to stop and drop his weapon. (T. 296) The Defendant pointed his gun at Officer Aho. (T. 296-97)

The Defendant then turned and ran back toward Officer Martinez. (T. 297) Officer Aho informed Officer Martinez that the Defendant was coming back around the jitney. (T. 188, 297) As the Defendant rounded the jitney, Officer Martinez placed his gun on the Defendant's chest and ordered him to drop his weapon. (T. 188-89) The Defendant then dropped his weapon. (T. 189) While the officers were subduing the Defendant, Officer Aho's mace accidentally fired saturating Officer Aho in pepper spray. (T. 189-90, 301-02)

Once the Defendant was arrested, Officer Martinez contacted his dispatcher, and Miami police officers were dispatched to take custody of the Defendant. (T. 190-91) Once the Miami police arrived, the Defendant was transferred to their custody, and the Defendant's gun was given to them. (T. 191-92) Officers Martinez and Aho then left the area in order to clean the mace off of themselves. (T. 192, 307-08)

Officers Martinez and Aho later returned to the area and searched for casings from the shots they had heard fired. (T. 192-93, 308) Officers Martinez and Aho recovered two casings just west of where they first saw the Defendant. (T. 193, 308)

As a result, the Defendant was charged with one count of possession of a weapon by a convicted felon, two counts of aggravated assault on a law enforcement officer, one count of unlawful discharge of a firearm in public and one count of resisting arrest without violence. (R. 1-5) In the information, both counts of aggravated assault alleged that the Defendant "carried, displayed, used or attempted to use a firearm," and both counts referenced 5775.087, Fla. Stat. (R. 2-3)

Prior to trial, the charge of possession of a weapon by a convicted felon was severed, and the matter proceeded to trial on the remaining charges on May 13, 1996. (R. 7-8) However, the Defendant never filed any motions attacking the information and did not request a bill of particulars. (R. 6-9, T. 3-13)

At trial, Officer Martinez testified that he did not call for backup from the local authorities because they are on a different radio frequency. (T. 186) Officer Martinez stated that he informed the Miami police that the Defendant had pointed a gun at him. (T. 228) Officer Aho also testified that he informed the Miami police that the Defendant had pointed a gun at him. (T. 341-42)

Ray Freeman, a firearms expert, then testified that he examined the gun and casings recovered from the scene. (T. 247-56) Mr. Freeman stated that the magazine for this gun was capable of holding 27 rounds. (T. 260) Mr. Freeman recovered 12 live rounds

from the magazine. (T. 262) Mr. Freeman stated that the two casings that Officers Martinez and Aho recovered had been fired from this gun. (T. 268-69)

The State then rested, and the Defendant rested without presenting any testimony. (T. 372) The Defendant moved for judgment of acquittal on the charges of aggravated assault on a law enforcement officer. (T. 373) The Defendant contended that officers of the federal protective service did not fit within the definition of a law enforcement officer. (T. 373) The trial court responded that the officers did fit under the definition contained in §790.001, Fla. Stat. and that the federal government did fit within the definition of an employing agency. (T. 374-76) The trial court denied this motion. (T. 377)

The Defendant also moved for a judgment of acquittal on the use of a semiautomatic weapon with a high capacity box magazine because more than 20 bullets were not found in the gun, and the trial court denied the motion. (T. 385) In so moving, the Defendant acknowledged that he was aware the State was seeking a minimum mandatory based on the use of such a weapon. (T. 385) Immediately prior to the commencement of voir dire, the State commented that it would be seek the 8 year sentence, and the trial court acknowledged that the statute required the imposition of such a sentence. (T. 9)

The Defendant then asserted that the allegations in the information were insufficient to inform him about the semiautomatic firearm with the high capacity box magazine. (T. 386) The trial court pointed out that the Defendant was on notice of this from the discovery, the citation to the statute and the plea negotiations. (T. 386-87) The Defendant's only response was that 5775.087, Fla. Stat. also included a 3 year minimum mandatory provision. (T. 387)

During the charge conference, the Defendant did not object to the giving of an instruction regarding high capacity semiautomatic firearms. (T. 389-402) The Defendant also did not object when the instructions were read to the jury or to the verdict forms, which permitted the jury to find that the Defendant used a high capacity semiautomatic firearm. (T. 488-89)

After deliberating, the jury returned verdicts of guilty of both counts of aggravated assault on a law enforcement officer with a high-capacity firearm and of resisting arrest without violence. (T. 492-93, R. 46-47, 49) However, the jury found the Defendant not guilty of unlawful discharge of a firearm. (T. 493, R. 48) The trial court adjudicated the Defendant in accordance with the verdicts. (T. 495-96, R. 50-51) The trial court sentenced the Defendant to 8 years imprisonment with an 8 year minimum mandatory provision for the aggravated assaults because the Defendant possessed a high-capacity firearm; (T. 502-03, R. 55-60) The Defendant was sentenced to credit for time served on the resisting

arrest. (T. 504, 56) The Defendant then pled nolo contendere to the possession of a weapon by a convicted felon. (T. 503-06) Based upon this plea, the trial court adjudicated the Defendant guilty of the possession charge and sentenced the Defendant to 366 days imprisonment. (T. 506, R. 52-54) All of the sentences were to be served concurrently. (T. 506) When the written sentence was prepared, the minimum mandatory provision was included under the law enforcement protection act. (R. 57)

On appeal, the Defendant raised two issues:

I. DEFENDANT'S CONVICTION AND SENTENCE FOR AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER MUST BE VACATED SINCE (1) THE FEDERAL OFFICERS IN THIS CASE WERE NOT LAW ENFORCEMENT OFFICERS AS DEFINED BY FLORIDA STATUTE 784.07 AND 943.10 AND (2) THE MINIMUM MANDATORY SENTENCE WAS IMPROPER SINCE THE EIGHT YEAR MINIMUM MANDATORY SENTENCE FOR USE OF A FIREARM DOES NOT APPLY TO AGGRAVATED ASSAULTS; and

II. THE TRIAL JUDGE'S RULING THAT IF DEFENDANT INTRODUCED EVIDENCE THAT THE DEFENDANT WAS NOT CHARGED WITH AGGRAVATED ASSAULT AT THE TIME OF HIS ARREST WHICH WOULD HAVE SUPPORTED HIS DEFENSE THAT NO GUN WAS EVER POINTED AT THE POLICE, THE STATE COULD INTRODUCE EVIDENCE THAT THEY DECIDED TO CHARGE THE DEFENDANT WITH TWO COUNTS OF AGGRAVATED ASSAULT SEVERAL MONTHS LATER SINCE DEFENDANT WAS A CONVICTED FELON RESULTED IN DEFENDANT BEING DENIED THE RIGHT TO INTRODUCE EVIDENCE THAT WOULD HAVE ESTABLISHED A REASONABLE DOUBT AS TO HIS GUILT.

The Third District affirmed, finding that federal protective service officers were law enforcement officers. The Defendant then sought review in this Court, claiming that the Third District's definition of a law enforcement officer under 5784.07, Fla. Stat. (1995), conflicted with the definition applied by this Court and other district courts of appeal. This Court granted review.

QUESTION PRESENTED

WHETHER THE LOWER COURT ERRED IN FINDING THAT THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND PROPERLY SENTENCED THE DEFENDANT FOR POSSESSION OF A SEMIAUTOMATIC FIREARM WITH A HIGH CAPACITY BOX MAGAZINE DURING THE COMMISSION OF AN AGGRAVATED ASSAULT?

SUMMARY OF THE ARGUMENT

The lower courts properly found that the federal protective service officers were law enforcement officers because the plain language of the statute creates a non-exhaustive list of who are law enforcement officers and the action of the officers fit within the intent of the statute. The statute is not overbroad because only those individuals who fit within the class created by the statute are included.

The amendment to the statute did not alter the interpretation of the statute because the amendment came well after the cases and did not affect the word "includes." The fact that a federal statute also criminalizes this conduct has no affect on the State's ability to criminalize the conduct also.

Further, the doctrine of *ejusdem generis* is properly applied to this statute because it creates a class and uses general terms to describe the class. This Court's use of this doctrine where the statute did not intentionally create a class and did use only general terms strengthens this application.

The trial court properly imposed an eight year minimum mandatory sentence because the Defendant used a semiautomatic firearm with a high capacity box magazine. Contrary to the Defendant's assertion, the statute requiring the imposition of eight year minimum mandatory sentences for the use of this type of weapon was in effect at the time he committed this crime.

Further, the information did reference 5775.087, Fla. Stat. in the aggravated assault counts. While the information did not specify which subsection of the statute, the Defendant was not mislead to his prejudice about which type of firearm. He was made aware of the type of firearm through discovery and plea negotiations. As such, his conviction and sentence should not be overturned on this basis.

ARGUMENT

I. THE LOWER COURT WAS CORRECT IN AFFIRMING THE TRIAL COURT'S FINDING THAT FEDERAL OFFICERS WERE LAW ENFORCEMENT OFFICERS AND ITS IMPOSITION OF AN EIGHT YEAR MINIMUM MANDATORY SENTENCE FOR THE USE OF A SEMIAUTOMATIC FIREARM WITH A HIGH-CAPACITY BOX MAGAZINE.

The Defendant contends that the trial court improperly found officers of the federal protection service were law enforcement officers under 5784.07, Fla. Stat. (1995) and improperly imposed an eight year minimum mandatory provision on the Defendant's sentence under this section, In fact, the trial court imposed the eight year minimum mandatory provision pursuant to 5775.087, Fla. Stat. (1995), under which the victims' status **as** law enforcement officers has no bearing. However, the State will reply to both of these issues as Issue I pursuant to Fla. R. App. P. 9.210 as much as possible.

A. THE FINDING THAT THE FEDERAL PROTECTIVE SERVICE OFFICERS WERE LAW ENFORCEMENT OFFICERS WAS CORRECT.

The Defendant contends that federal protection service officers are not law enforcement officers within the meaning of §784.07, Fla. Stat. (1995). Section 784.07(1)(a), Fla. Stat. (1995), provides:

> "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.

(emphasis added). The State agrees that this statute should be given its plain meaning. However, the plain meaning of the word "includes" is "a term of enlargement, not of limitation." Yon v. Fleming, 595 So. 2d 573, 577 (Fla. 4th DCA 1992). By using the word "includes," the legislature created a non-exhaustive list. Had the legislature meant for the list to be exhaustive, it could have used the word "means."

The Defendant contends that such a reading of the statute would make the statute overbroad. However, in *Soverino v. State,* 356 So. 2d 269 (Fla. 1978), the Court rejected a claim that the statute allowed too much prosecutorial discretion in determining who should be included in the non-exhaustive list of "law enforcement officers." The Court held that under the doctrine of ejusdem generis, the class was sufficiently narrow. In a footnote, the Court directed that guidance as to who would be included in the class should come from 5790.001, Fla. Stat. *Soverino,* 356 So. 2d at 273 n.4. This is the very statute under which the trial court

ruled that Officers Martinez and Aho qualified as law enforcement officers.

Further, this reading of the statute is consistent with the intent of the statute. In *Soverino,* the Court found the intent of §784.07, Fla. Stat. was to serve the public welfare by seeing that law enforcement officers and firefighters are protected during the performance of their duties, which were considered "indispensable public services." *356 So.* 2d at 271-72. Here, Officer Martinez and Aho were performing such an indispensable public service by investigating the source of the shots they had heard fired. While performing this public service, the Defendant pointed a gun at them and threatened their lives. As Officers Martinez and Aho were performing their duty of investigating a potential felony that they heard occur, considering them within the purview of §784.07, Fla. Stat. fulfills the intent of the statute, See *also Hughes v. State, 400* So. 2d 533 (Fla. 1st DCA 1981)(law enforcement officers covered by statute even while off duty if arresting a felon); *State v. Robinson,* 379 So, 2d 712 (Fla. 5th DCA 1980).

The Defendant contends that amendment of 5784.07, Fla. Stat. after *Soverino* and *Hunter* demonstrate a legislative intent to replace this Court's definition. However, *Soverino* was decided in 1978 and *Hunter* was decided in 1979, and the statute was not amended until 1988. As such, the amendment does not appear to have been prompted by a desire to alter this Court's rulings. Further,

the legislature left the word "includes" in the statute. As such, the lower court properly found that the amendment had no effect on this Court decision in *Soverino.*

The Defendant also alleges that the legislature must have intended to exclude federal law enforcement officers from the list because they were already covered by federal law. However, the mere fact that the federal government also punishes certain conduct as a crime does not prevent the State from punishing that same conduct criminally. See, *e.g., Heath v. Alabama, 474* U.S. *82 (1985); United States v. Wheeler, 453* U.S. *320* (1978); *United States v. Lanza, 260* U.S. *377 (1922); Brown v. United States, 551* F.2d 619 (5th Cir. 1977). As such, the inclusion of punishment for this conduct under federal law does not provide a basis for assuming that the legislature intended not to cover federal officers.

The Defendant also asserts that the doctrine of *ejusdem generis* should not apply to this statute because the statute creates a specific list of included officers. However, the statute uses the word "includes." As the lower court found, this word is term of enlargement and is meant to describe a class. The statute follows the word included with an enumeration of general type of persons whose job it is to enforce the law. 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).

In Green v. *State, 604* So. 2d 471 (Fla. 1992), the Court was construing §810.06, Fla. Stat. The statute provides, "Whoever has in his possession any tool, machine or implement . . . ." Despite the lack of any term of inclusion and the use of three general words, this Court found that the doctrine of *ejusdem* generis applied. Here, the legislature explicitly created a non-exhaustive class through use of the word "includes" and provided a general list of the type of people included in the class. As such, this statute presents a more compelling case for the use of *ejusdem* generis that did *Green.* As this Court applied that doctrine in *Green,* it should also apply it here.

B. THE IMPOSITION OF AN EIGHT YEAR MINIMUM MANDATORY SENTENCE FOR POSSESSION OF A SEMIAUTOMATIC FIREARM WITH A HIGH CAPACITY BOX MAGAZINE WAS PROPER.

The Defendant next asserts that this Court should consider a separate issue regarding the Defendant's sentence 'in this matter that was not asserted in requesting that this Court assume jurisdiction. While it is true that "once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal." *Savoie v. State, 422* So. 2d 308, 312 (Fla. 1982); *see also Feller v. State, 637 So.* 2d

911 (Fla. 1994). However, this jurisdiction is discretionary and should only be exercised when the issue is dispositive of the matter. *Savoie, 422 So.* 2d at *312.* Here, this Court should exercise its discretion not to consider the sentencing issue.

The Defendant alleges that the trial court erred in sentencing him to an 8 year minimum mandatory sentence because §784.07(3), Fla. Stat. (1995), only allows the imposition of 8 year minimum mandatory terms for batteries on law enforcement officers, However, the trial court imposed the 8 year minimum mandatory sentence pursuant to §775.087(3), Fla. Stat. (1995) . The section provides:

> a) Any person who is convicted of a felony or an attempt to commit a felony and the conviction was for:
>
> . . .
>
> 6. Aggravated assault;
>
> . . .
>
> And during the commission of the offense, such person possessed a semiautomatic firearm and its high-capacity detachable box magazine . . . shall be sentenced to a minimum term of imprisonment of 8 years.
>
> . . .
>
> b) As used in this subsection, the term:
>
> 1. "High-capacity detachable box magazine" means any detachable box magazine, for use in a semiautomatic firearm, which is capable of being loaded with more than 20 centerfire cartridges.

Here, the Defendant was convicted of aggravated assault, and the jury specifically found that the Defendant possessed a semiautomatic firearm with a high-capacity detachable box magazine. (R. 46-47) This finding was supported by Mr. Freeman's testimony

that the gun recovered at the scene could hold 27 rounds. (T. 260) As such, the trial court properly imposed the 8 year minimum mandatory sentence.

In *D'Alessandro* v, *Shearer, 360 So.* 2d 774 (Fla. 1978), this Court held that trial courts are required to impose the minimum mandatory sentences pursuant to §775.087, Fla. Stat. In *State v. Sesler*, 386 So. 2d 293, 294 (Fla. 2d DCA 1980), the court followed *D'Alessandro* and stated that the imposition of the firearm minimum mandatory sentences "is a matter of legislative prerogative and is nondiscretionary." *See also State v. Leatherwood,* 561 So. 2d 459 (Fla. 2d DCA 1990); *Nova* v. *State,* 439 So. 2d 255 (Fla. 3d DCA 1983). As such, the trial court here was compelled by §775.087(3), Fla. Stat. (1995), to impose the 8 year minimum mandatory sentence for the aggravated assault with a firearm having a high-capacity box magazine regardless of whether the victims were characterized as law enforcement officers.

The Defendant asserts that the trial court could not have sentenced him pursuant to §775.087(3), Fla. Stat. (1995), because that section did not become effective until October 1, 1995. In fact, the provision adding the eight year minimum mandatory for use of a semiautomatic firearm with a high capacity box magazine during certain offenses, including aggravated assault, was originally added by Ch. 89-306, §3, Laws of Fla. This section became effective on October 1, 1989. As such, the section was in effect

at the time the Defendant committed his crime and compelled the trial court to sentence him to an 8 year minimum mandatory sentence.

The Defendant also asserts that the imposition of the 8 year minimum mandatory sentence was error because he was not charged with it in the information. Not only did the Defendant not assert this alleged error as a jurisdiction basis in this Court, the Defendant never raised this issue in the Third District. As such, this issue has been waived. See *Trushin v. State, 425 So.* 2d 1126 (Fla. 1982).

Even if the Defendant had not waived the issue on appeal, the Defendant had already waived the issue in the trial court. In *State v. Gray,* 435 So. 2d 816, 818 (Fla. 1983), this Court explained the requirements for preservation of defects in charging documents in the trial court:

> Thus the district court ruled on two issues in deciding the appeal: (1) whether the information had failed to allege certain matters that were essential elements of the offense sought to be charged; and (2) whether such failure rendered the information so fundamentally defective that the defect was cognizable when raised for the first time by motion in arrest of judgment.
>
> Regarding the second issue, the state argues that the failure of respondent to have challenged the sufficiency of the information by motion to dismiss constituted a waiver and should have precluded the raising of the issue at a later time. The state cites cases holding that defects in charging documents are not always fundamental where the omitted

matter is not essential, where the actual notice provided is sufficient, and where all the elements of the crime in question are proved at trial. *See, e.g., Tracey v. State,* 130 So.2d 605 (Fla.1961); *State v. Fields,* 390 So.2d 128 (Fla. 4th DCA 1980); *Haselden v. State,* 386 So.2d 624 (Fla. 4th DCA 1980); *Caves v. State,* 302 So.2d 171 (Fla. 2d DCA 1974), *cert. denied,* 314 So.2d 585 (Fla.1975).

The state points out that here the information was drafted substantially in the language of the statute, and concludes that any omitted matters were non-essential. Since any defects were thus non-fundamental and could easily have been remedied if objected to before trial, the state argues that they were waived by the failure to raise them by motion to dismiss. *See generally* Fla.R.Crim.P. 3.140(o), 3.190(c), and 3.610.

The state is correct in arguing that ordinarily the test for granting relief based on a defect in the charging document is actual prejudice to the fairness of the trial. *Lackos v. State,* 339 So.2d 217 (Fla.1976). However, a conviction on a charge not made by the indictment or information is a denial of due process of law. *Thornhill v. Alabama,* 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); *De Jonge v. Oregon, 299* U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937). If the charging instrument completely fails to charge a crime, therefore, a conviction thereon violates due process. Where an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state. Since a conviction cannot rest upon such an indictment or information, the complete failure of an accusatory instrument to charge a crime is a defect that can be raised at any time--before trial, after trial, on appeal, or by habeas corpus. See, e.g., State v. Black, 385 So.2d 1372 (Fla.1980); *State v. Dye, 346* So.2d 538 (Fla.1977); *La Russa v. State, 142* Fla. 504, 196 So. 302 (1940); *State v. Fields,* 390 So.2d 128 (Fla. 4th DCA 1980);

Catanese v. State, 251 So.2d 572 (Fla. 4th DCA 1971).

See also Mesa v. State, 632 So. 2d 1094 (Fla. 3d DCA 1994)(citation to 5775.087, Fla. Stat. sufficient to allege essential element of possession of firearm); *Williams* v. State, 617 So. 2d 398 (Fla. 3d DCA 1993)(mention of §787.01, Fla. Stat. in kidnapping charge and additional charge of felony alleged essential elements of kipnapping to commit or facilitate felony); Carver v. *State, 560 so.* 2d 258 (Fla. 1st DCA 1990)(vagueness in an information regarding what separate acts are being used to support each count does not cause it to fail to state an essential element of the offense).

Here, the Defendant admits that a firearm was alleged in the information and that the information made reference to §775.087, Fla. Stat. without reference to a particular subsection. As such, the information does not wholly fail to allege an essential element of the charge; it is merely vague.

Further, the Defendant was on notice of the type of firearm. The record reflects that the Defendant was aware prior to trial that the State was seeking an eight year minimum mandatory sentence for the use of a semiautomatic firearm with a high capacity box magazine. The matter was discussed immediately prior to trial during the discussion of the plea offer. (T. 9) When the Defendant moved for a judgment of acquittal at the end of the evidence, the trial court again pointed out that the Defendant was

on notice of type of weapon from the discovery, the plea negotiation and the reference to the statute. (T. **386-87)** The Defendant did not deny that he was on notice of the type of weapon or assert any prejudice from the charging document. (T. **387)** All the Defendant asserted was that the statute contained two different type of firearm minimum mandatorys. As such, the defect in the information was not fundamental.

Where no fundamental error resulted for a defect in a charging document, the defendant must moved to dismiss the information before entering a plea to it in order to preserve any issue regarding the defect. *Sinclair v. State,* 46 So. 2d 453 (Fla. 1950). Here, the Defendant did not moved to dismiss the charging document. As such, the issue was waived.

Even if the issue had not **been** waived, it is meritless. Florida Rule of Criminal Procedure 3.140(d)(1) provides:

> (1) Allegation of Facts; Citation of Law Violated. Each count of an indictment or information on which the defendant is to be tried shall allege the essential facts constituting the offense charged. In addition, each count shall recite the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. **Error in or omission of the citation shall not be ground for dismissing the count or for a reversal of a conviction based thereon if the error or omission did not mislead the defendant to the defendant's prejudice.**

(Emphasis added). Here, the information made reference to §775.087, Fla. Stat. without an reference to a particular

subsection. However, this error or omission did not mislead the Defendant to his prejudice because the Defendant had notice of the charges against him.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that the Court affirm the decision under review.

Respectfully Submitted,

ROBERT A. BUTTERWORTH
Attorney General

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar Number 0012068
Office of the Attorney General
Department of Legal Affairs
444 Brickell Ave., Suite 950
Miami, Florida 33131
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee was mailed this 23rd day of February, 1998, to Robert Kalter, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125.

SANDRA S. JAGGARD
Assistant Attorney General