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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC15-650

DCA NO.: 4D12-3525

DALE NORMAN,
Petitioner,

-vs-

STATE OF FLORIDA,
Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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

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CITATIONS TO THE RECORD

Citations to the record will be in the form (Vol. __, R. __).

STATEMENT OF CASE

This case was heard as a second degree misdemeanor on a one count information alleging violation of Sec. 790.053, Fla. Stat., the Florida Open Carry Ban (hereinafter, "the Open Carry Ban"), in St. Lucie County Florida, before the Honorable Clifford Barnes, County Court Judge. Trial was held on June 8, 2012. During the preparation of the jury instructions an objection was made by the Defendant as to whether the relevant provisions of Sec. 790.25, Fla. Stat., were elements of the crime, or were affirmative defenses to the crime alleged. (Vol. III, R. 312).

Motions to dismiss raising a variety of constitutional and statutory interpretation grounds were filed. (Vol. I, R. 79-103). The trial court reserved ruling on the motions to dismiss and the case proceeded to a jury trial. (Vol. III, R. 224). The jury returned a verdict of guilty. (Vol. IV, R. 403).

After the jury returned a guilty verdict, the parties presented additional argument on the motions to dismiss at a separate hearing. The trial judge denied all of the motions to dismiss, (Vol. I, R. 116-117), and certified three questions of great public importance to the Fourth DCA. (Vol. I, R. 116-117). The Defendant appealed the trial court's decision to the Fourth DCA.

In its opinion the Fourth DCA made several holdings. First, it held that

there is a right to carry firearms outside the home for purposes of self-defense. Second, it held that because the U.S. Supreme Court recognized concealed carry restrictions were presumptively lawful, by logical extension so were limitations on open carry. Third, it found that the language of Art. I, Sec. 8, Fla. Const., allowing the Legislature to regulate the manner of bearing arms allowed for the Open Carry Ban. Fourth, it found that the ban on open carry was not unconstitutional because a Concealed Weapon Firearms License was obtainable without undue burden, and was issued as a matter of right, notwithstanding the decision of the Third DCA in *Crane v. Dep't of State, Div. Of Licensing*, 547 So. 2d 266 (Fla. 3d DCA 1989). Finally the court below found that the State could limit the right to bear arms to a license allowing concealed carry only.

STATEMENT OF FACTS

This case began on February 19, 2012. Dale Norman a young man with no criminal record, who had just received his concealed weapon firearm license that day, left his home exercising his constitutional right to bear arms (Vol. I, R. 3). A concerned citizen noticed Mr. Norman's firearm on his right hip and called police. Two Fort Pierce Police Department marked squad cars driving from opposite directions aggressively approached Mr. Norman. Both officers jumped from their vehicles, drew their weapons, and made Mr. Norman lie on the ground, treating

him as a felon rather than a citizen exercising a constitutional right to bear arms. (Vol. 3, R. 239, Video of arrest, enclosed with record and admitted as States Exhibit 1).

At all times Mr. Norman cooperated and followed police directions. He informed the officers that he had a concealed carry permit. Mr. Norman was a generally law abiding gun owner who had, at worst, committed a non-violent second degree misdemeanor and who was posing no threat to the community. Despite this fact, Mr. Norman was arrested rather than being issued a notice to appear. (Video of arrest, States Exhibit 1).

It is important to note that Mr. Norman was never charged with illegally possessing a weapon or firearm, or committing any violent crime with a weapon or firearm. The State's sole allegation in this case is that Mr. Norman carried a firearm conspicuously and openly rather than concealed. (Vol. I, R. 1).

SUMMARY OF ARGUMENT

Florida's ban on the open carrying of firearms, is unconstitutional under the Second Amendment to the United States Constitution as well as Article I, Sec. 8 of the Florida Constitution, Declaration of Rights. The current ban was passed as an ill-conceived emergency measure, without committee hearings, public comment, or time for deliberations.

Mr. Norman raises five main arguments on appeal. First, the right at issue is a fundamental right that required the lower court to use strict scrutiny.

Second, limiting the right to bear arms to a licensed privilege violates substantiative due process.

Third, the Open Carry Ban is unconstitutional because as a fundamental right, any restriction on the right requires a compelling governmental interest, a narrowly tailored method of achieving that interest, and proof that the interest asserted is achieved by the method chosen. The statute at issue is also over broad, and sweeps within its definition people who the Legislature has deemed qualified to be armed in public through its licensing scheme, just as long as they do not let anyone see they are armed.

Fourth, Open Carry has long been recognized as the right protected by the Second Amendment. While the right of Floridians to keep and bear arms has also long been recognized, so have attempts to prevent certain classes from being armed. The suspect history of Florida's licensing of the right to carry makes any regulation of the right especially suspect. These regulations were well recognized as applying only to certain races. The suspect regulations, in addition to having a questionable history, as drafted, also infringe on the fundamental individual rights of citizens to bear arms in defense of themselves, their families, and the State.

Fifth, the lower court's determination that the provisions of Sec. 790.25 are merely affirmative defenses rather than elements the State must prove in order to convict someone for violation of Sec. 790.053 is in error. The trial court's interpretation, fails to give effect to the plain language of the statutes at issue as well as the legislative intent. It also subjects law abiding citizens to arrest, detention, trial, and untold expense for engaging in lawful, constitutionally protected, and legislatively recognized activities.

ARGUMENT

Standard of Review

Interpretation of a statute is a legal issue involving the interpretation and application of statutory language and is therefore subject to a de novo review. *Brown v. City of Vero Beach*, 64 So. 3d 172, 174 (Fla. 4th DCA 2011). All issues on appeal involve the interpretation of a statute, and the constitutionality of that statute. There are no factual issues before the Court.

Argument

The Open Carry Ban severely restricts the right to bear arms. It denies the right to carry a handgun by limiting the bearing of such arms to the exercise of a mere privilege. The ban ignores substantial Florida precedent as well as holdings of the U.S. Supreme Court. It also bans the carrying of long guns anywhere in the

state of Florida, thereby burdening an entire class of arms that are in common use. This is a case of first impression regarding the constitutionality of the Open Carry Ban.

I. The right to keep and bear arms, including firearms, is an enumerated, fundamental individual right and any restriction on that right must meet strict scrutiny.

The opinion below begins a free-wheeling analysis, claiming that "general regulations of activity within the scope of the Second Amendment are constitutional if they are (1) reasonable; and (2) do not effectively destroy the right in practice by imposing a substantial limitation on its exercise." *Norman v. State*, 159 So. 3d 205, 213 (Fla. 4th DCA 2015). This is precisely the type of interest balancing that the United States Supreme Court rejected in *Heller I*:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government-even the Third Branch of Government-the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008)(*Heller I*).

A. The right to keep and bear arms is a fundamental right under the United States Constitution and the Florida Constitution.

The right to keep and bear arms is an enumerated right under both the United States Constitution and the Florida Constitution and has been held as a fundamental right by the U.S. Supreme Court. U.S. Const. Amend. II; Fla. Const. Art. 1, Sec. 8(a); *District of Columbia v. Heller*, 554 U.S. at 602; *McDonald v. City of Chicago*, 130 S. Ct. at 3042. Both the United States Constitution, in the Second Amendment, and the Florida Constitution, in Art. I, Sec. 8, of the Declaration of Rights, guarantee the right of the people to keep and bear arms.

The Florida Constitution makes clear that this right is not granted by the Constitution, but is an endowed right pre-dating its enumeration. Preamble, Fla. Const. and *Heller I*, at 592(finding that the Second Amendment, like the First and Fourth Amendment recognizes a pre-existing right that is not dependant on the Constitution for its existence). The right to keep and bear arms, has been included in every version of the Florida Constitution, with the exception of the 1865 military government constitution immediately following the war between the states.[1] A privilege which may be taken away on legislative whim, is no right.

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[1]"That the free white men of this State shall have the right to keep and to bear arms, for their common defense." Fla. Const. 1838, Article I Declaration of Rights, Sec. 21; and Ordinance of Secession, 1861 Declaration of Rights Sec. 21. "The people shall have the right to bear arms in defense of themselves and of the

State v. Reid, 1 Ala. 612 (Ala. 1840).

The enumerated right to keep and bear arms has been interpreted by the U.S. Supreme Courts as the fundamental individual right to keep and bear arms for the purpose of self-defense. *Heller I* at 602. Article 1, Section 8 of the Florida Constitution explicitly states: "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." Fla. Const. Art. I, Sec. 8. This enumerated right of the people to keep and bear arms is only subject to regulation regarding the manner of bearing arms; it does not permit the infringement of the right to bear arms by a total ban on the right. See, *Heller I*, 554 U.S. at 647.

Art. I, Sec. 8, Fla. Const., is not limited to a militia purpose, nor does it require historical analysis to know that it is to protect the right of self-defense, among other rights. *Norman v. State*, 159 So. 3d 205, 214 (Fla. 4th DCA 2015). The purposes for which arms are necessary are clearly stated within its language. *Norman at 214*. The opinions in *Heller* and *McDonald* are the floor of application

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lawful authority of the State." Fla. Const. 1868, Declaration of Rights, Sec. 22. "The right of the people to bear arms in defense of themselves and the lawful authority of the State, shall not be infringed, but the Legislature may prescribe the manner in which they may be borne. Fla. Const. 1885, Declaration of Rights Sec. 20.

of gun rights to the citizens of Florida, not the ceiling. *State v. J.P.*, 907 So.2d 1101, 1115 (Fla. 2004), and *State v. Kelly*, 999 So. 2d 1029, 1041 (Fla. 2008)(noting that Florida law or interpretation of rights may be broader than federal court interpretation).

B. The State has conceded that the right to carry outside the home is fundamental.

The court below ruled that there is a right to bear arms outside one's home. *Norman* at 225.[2] This is a point that the State conceded below at oral argument, agreeing that it was a fundamental right, but claiming it is subject to the licensing requirement. The State also conceded this point in an amicus brief to the U.S. Supreme Court stating:

> Consequently, [the U.S. Supreme Court] should . . . make clear that the lower courts are not free "to repudiate the Court's historical analysis,"*Moore*, 702 F.3d at 935, and to confirm the import of its

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[2]Despite its recognition that *Heller I* leads to the inescapable conclusion that the Second Amendment protects the right to bear arms outside the home, the lower court misleadingly claims in n. 17 that the "nineteenth-century cases" cited by *Heller I*, stand for the proposition that "certain modes of public carry can be prohibited when other modes are allowed." In reality, every one of these cases held that there was a right to open carry a firearm in those cases. Specifically those cases either ruled that open carry was the right, or that the state could not justify a ban on open carry by the granting of a licensed privilege. *Bliss v. Commonwealth*, 12 Ky. 90 (Ky. 1822); *State v. Reid*, 1 Ala. 612 (Ala. 1840); *Nunn v. State*, 1 Ga. 243 (Ga. 1846)(court struck down prohibition on open carry and upheld prohibition on concealed carry); *State v. Chandler*, 5 La. Ann. 489 (La. 1850).

> citations in *Heller* to *Nunn* and *Andrews* that broad-brush restrictions on law-abiding citizens carrying handguns in public, whether open or concealed, premised on the view that the public is better off if citizens do not exercise their rights, run afoul of the "right of the people to . . . bear arms." *Heller*, 554 U.S. at 629; *see Nunn v. State*, 1 Ga. 243, 251 (1846); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 187 (1871). It should make plain that the Second Amendment took New York's "policy choice[ ] off the table." *Heller,* 554 U.S. at 636.

See generally, *Kachalsky v. County of Westchester*, 2013 U.S. LEXIS 3132 (2013) *denial of petition for certiorari*, Brief of the Commonwealth of Virginia, et. al (including Florida), as amicus curie in support of certiorari. (Hereinafter, "*Kachalsky* Brief").

C. Binding precedent and stare decisis require this Court to employ strict scrutiny when analyzing the Open Carry Ban's infringement on the enumerated and fundamental right to bear arms.

While the federal courts continue to struggle with the appropriate level of scrutiny in right to bear arms cases, and the U.S. Supreme Court and the Eleventh Circuit have yet to provide a definitive answer, *State v. Kelly*, at 1041, see also *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1261 n.34 (11th Cir. 2012), this Court has been more than clear. *J.P.* at 1109-10. When laws criminalize constitutionally protected activities with broad and sweeping infringements on

fundamental rights, "strict scrutiny is the law of this state. *J.P.* at 1109.[3] "A statute which, under the pretense of regulating, amounts to a destruction of the right, . . . would be clearly unconstitutional. *State v. Reid*, 1 Ala. 612 (1840).

This Court's decisions require that when a law burdens the exercise of a fundamental constitutional right, clearly expressed in the Florida Declaration of Rights or the federal constitution, the only applicable standard is strict scrutiny. *State v. J.P.*, at 1109-10 and F.3 (Fla. 2004)(noting that regardless of federal precedent, Florida courts should always use strict scrutiny when dealing with a fundamental enumerated right, and listing numerous citations addressing a variety of rights, and consistently holding that a review of a fundamental right under Florida law requires that restrictions on fundamental rights withstand strict scrutiny to survive challenge) and *Hillsborough County Gov't. Employees Ass'n v. Hillsborough County Aviation Auth.*, 522 So.2d 358 (Fla. 1988). The court below improperly relied on federal precedent rather than the binding precedent of this Court and failed to conduct a strict scrutiny analysis. *Norman* at 220. The court below even claimed that because the right to bear arms outside the home was a right and not a mere privilege, that it was "thus subject to reasonable restrictions."

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[3]The U.S. Supreme Court has rejected relegation of the right to bear arms to a second class right which may be singled out for "specially unfavorable treatment." *McDonald* at 745-46.

Id. at 212, F.3. Reasonable restrictions are the very antithesis of a strict scrutiny analysis. This court has made no distinction between the fundamental rights in the Declaration of Rights and has never analyzed a fundamental right on a reasonableness basis. *Id.* and *Hillsborough County Gov't. Employees Ass'n v. Hillsborough County Aviation Auth.,* 522 so.2d 358 (Fla. 1988).

When placed alongside the *J.P.* and *Hillsborough County Aviation Auth.* cases, the decision below claiming to use intermediate scrutiny (but really applying a rational basis or interest balancing test) means that the right of juveniles to stay out late or the right of a public employee to join a union, are superior to and more protected than the right to bear arms. As required by the decision in *Heller I,* the rational basis test has been rejected by almost every court that has considered the right to bear arms. *Heller I* at 629 F.27("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

The two part *Chovan* analysis utilized below to determine the appropriate level of scrutiny, is a recent development of lower courts opposed to the U.S. Supreme Court's decisions in *Heller I* and *McDonald*. See, *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). *Chovan* is not binding on this Court, and

should be ignored by this Court especially in light of this Court's repeated holdings requiring strict scrutiny in the case of fundamental rights. *J.P.* at 1110, n. 3. In *J.P.* this Court discussed at length the need for stability in the law and the importance of stare decisis in regards to the use of strict scrutiny as the only applicable standard under Florida law when reviewing infringements on fundamental rights. *J.P.* at 1109. The Fourth DCA's decision to rely on the *Chovan* test violates the binding precedent of this Court.

Strict scrutiny is a two prong test looking first at what the compelling governmental interest is; and second, whether the law in question has been narrowly tailored to achieve the compelling governmental interest. *Fla. Retail Fed'n, Inc. v. AG of Fla.,* 576 F. Supp. 2d 1281, 1288 (N.D. Fla. 2008)(quoting *Williams v. Pryor*, 240 F.3d 944, 947-48 (11th Cir. 2001).)

There is no legitimate argument that a complete ban on open carry of firearms is necessary to achieve a compelling governmental interest. Furthermore, even a compelling "governmental purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved." *State v. Comeau*, 448 N.W.2d 595, 598 (Neb. 1989) and *J.P.* at 1117(stating that the constitutionality of the ordinance at issue hinged upon the "nexus between the asserted interests and

the means chosen, and whether this is the least restrictive alternative to achieve the goals."

II. Restricting an individual's right to bear arms until they obtain a license violates the right to substantive due process by denying a fundamental right pending and conditioned on the State's approval in the form of a license.[4]

The Fourth DCA's decision upholding the Open Carry Ban violates Norman's substantive due process rights. The lower court's theory is that if the State allows a peripheral, not historically recognized right (concealed carry), then it can restrict a core, historically recognized right (open carry). By analogy, as long as the state allows free access to pornography (a right not historically protected under the First Amendment), it can ban free speech in public parks and sidewalks (a right that is so protected). Or if the state were to provide free contraceptives, it can ban abortions. Just stating such an argument is sufficient to refute it. Until now, no court has ever adopted such a theory. See, e.g., *City of*

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[4]Mr. Norman made no challenge below to Florida's current terms of qualification for licensure to carry a concealed weapon or firearm or those places where carry is currently prohibited for licensees as the issue was not implicated by the procedural posture of the case in the lower court. Mr. Norman only challenged the requirement that a firearm may only be carried concealed. However, in light of the lower court's opinion that the privilege of a license adequately protects a fundamental enumerated right, it became necessary for Mr. Norman to address the requirement of a license and the terms of licensure before this Court.

Boerne v. Flores, 521 U.S. 507, 519 (1997) ("Congress does not enforce a constitutional right by changing what the right is.").

The right to keep and bear arms is a "substantive guarantee[s], not a prohibition that [can] be ignored so long as [Florida legislates] in an evenhanded manner." *McDonald v. City of Chicago*, 561 U.S. 742, 745-746 (U.S. 2010). While Florida generally issues CWFLs "in an evenhanded manner," the requirement of a license violates the substantive right to bear arms. *Id.*, .and *Washington v. Glucksberg*.

> The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. *Collins v. Harker Heights*, 503 U. S. 115, 125 (1992) (Due Process Clause "protects individual liberty against `certain government actions regardless of the fairness of the procedures used to implement them' ").

Washington v. Glucksberg, 521 U.S. 702 (1997). Because the State prohibits the right to bear arms until one endures a lengthy process (up to 90 days by law, and sometimes more in practice), the regulatory scheme violates substantive due process. *McDonald* at 780; see *State v. Reid*, 1 Ala. 612 (1840).

A. Bearing of *concealed* firearms under the Second Amendment is universally recognized as a privilege.

As the U.S. Supreme Court made clear in *Heller I* and *McDonald*, the carrying of ***concealed*** firearms has long been recognized as being outside the

protection of the Second Amendment. See also, *Sutton v. State*, 12 Fla. 135, 136 (Fla. 1868). Every court that has considered the issue since *Heller I* and *McDonald* has confirmed the fact that the carrying of concealed firearms is a privilege, not a right. *Moore v. Madigan,* 702 F.3d 933 (7th Cir. 2012); *Woollard v. Gallagher*, 2013 U.S. App. LEXIS 5617 (4th Cir. 2013)(assuming that the right extends outside the home but upholding restrictions on the issuance of concealed carry permit); *Kachalsky v. County of Westchester*, 701 F.3d 81, 87 (2d Cir. 2012)(finding no right to carry outside the home) *Peterson v. Martinez*, 2013 U.S. App. LEXIS 3776 (10th Cir. 2013)(upholding CO state statute preventing out of state resident from obtaining a concealed carry permit, a privilege, in an open carry state).

The Third DCA recognized that a concealed weapon firearm license ("CWFL"), and therefore the ability to lawfully carry a concealed firearm, was a privilege even before *Heller* and *McDonald*. *Crane* at 267. Some Florida courts, as well as the Attorney General of Florida have even gone so far as to say that a person with a concealed weapon is a criminal and that the possession of a CWFL is only an affirmative defense. *Mackey v. State,* 83 So.2d 942 (Fla. 3d DCA 2012)(Cert. granted by Fla. Supreme Ct., oral arguments before the Fla. Supreme

Ct. 4-10-13).[5] Under such a reading of the law, even a person lawfully carrying a concealed firearm, is subject to arrest and must affirmatively show to a court, after the fact, that they had a CWFL.[6]

The Court below reasoned that because of what it determined to be the relative ease of obtaining a CWFL in Florida, the license was actually a right and an adequate alternative for exercising the right to bear arms. Ignoring for the moment the level of restrictions placed on the exercise of the right to bear arms by Florida's licensing scheme, the Attorney General has recognized the danger of limiting a right to a privilege. (Kachalsky Brief) accord, *State v. Reid*, 1 Ala. 612 (Ala. 1840). *Kachalsky* was a challenge to New York's permit requirements and issuance process, not a challenge to the statute banning open carry. But as the court there noted, licensing officials are given a lot of discretion, meaning, 'we can

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[5]This Court's opinion in *Mackey v. State*, 124 So. 3d 176 (Fla. 2013), conclusively shows that concealed carry is not a right, and is not the Constitutionally protected bearing of arms referenced in either the United States or Florida Constitution. The idea that the exercise of a right can subject one to detention and arrest, subject merely to an affirmative defense, is the very antitheses of a right. See also *J.P.* at 1111 (Fla. 2004)(citing *Hodgkins v. Peterson*, 355 F.3d 1048, 1064 (7th Cir. 2004) for the premise that even affirmative defenses to allow protected First Amendment activity is not narrowly tailored and fails to allow for alternative channels of expression)

[6]In 2015 the Legislature amended Sec. 790.01 converting the possession of a CWFL from an affirmative defense to an element of the crime by rewording the statute.

keep guns from the undesirables that we do not trust, just as we used to prohibit the right to vote from people we did not like.' *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012).

The most telling fact regarding the permits at issue in *Kachalsky* is who did get them. As with Florida's history of gun regulation, the law at issue in *Kachalsky* only applied to the commoners. Robert DeNiro, City Council members, Harvey Keitel, Donald Trump, the chairman of the Nassau County Republican party, and Howard Stern, were all allowed to have permits for their guns. McGinty, New York Times, Feb. 18, 2011, http://www.nytimes.com/interactive/2011/02/20/nyregion/20-Owners.html?ref=nyregion (Last visited Oct. 29, 2015). Mr. Kachalsky and a Coastguardsman were not, because they could not show a good enough reason to satisfy a bureaucrat with unfettered discretion. Allowing the right in Florida to remain as a privilege means that Florida is only ever one election away from denying this most fundamental right. See, *State v. Reid*, 1 Ala. 612 (Ala. 1840).

B. Because there is a fundamental right to bear arms for purposes of self-defense outside the home, and concealed carry is merely a privilege, there must be some method of exercising the right.

The state cannot ban open carry. It is the core of the right to bear arms. If one accepts that there is a right to bear arms, and every court to consider the issue

has ruled that concealed carry is a privilege, there is only one manner in which firearms can be borne in the exercise of the right, open carry.

Currently, Florida common law recognizes the ownership of firearms to be a right but the bearing of arms to be a privilege in most cases. *Crane v. Dep't of State, Div. Of Licensing*, 547 So. 2d 266, 267 (Fla. 3d DCA 1989)(holding that a license holder has no property right in the issuance of a CWFL). The Third DCA based its rationale on two Supreme Court of Florida opinions regarding liquor and business licenses. *Id.* (citing *Holloway v. Schott*, 64 So. 2d 680, 681 (holding that a liquor license was a privilege); and *Mayo v. Market Fruit Co. of Sanford, Inc.*, 40 So. 2d 555, 559 (finding that a license to do business is a privilege, not a property right, nor a contract, nor does it create a vested right). While the Third DCA was correct in holding that a CWFL is a privilege and not a right, the bearing of a firearm is a **right**.

The privilege of concealed carry is distinguishable from the constitutionally enumerated rights of ownership and possession of firearms under both the Second Amendment of the United States Constitution, and Article 1, Section 8 of the Florida Constitution. The Florida Constitution explicitly states: "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be

regulated by law." Fla. Const. Art. I, Sec. 8(a). The enumerated rights of the Second Amendment and Article I, Section 8(a) are analogous to application of the rights guaranteed under the First Amendment of the United States Constitution. *See McDonald*, 130 S. Ct. at 3047 (rejecting any argument that the Second Amendment is unique among the first eight amendments).

Regulations that limit the constitutional rights to keep and bear arms must leave some realistic alternative means to exercise the right." *State v. Hamdan*, 665 N.W. 2d 785 (Wis. 2003). *Crane* shows that the granting of a mere privilege does not sufficiently protect the right. The allowance of a privilege by the Legislature is no substitute for a fundamental right, which according to *Heller I*, was a recognized right pre-dating the U.S. Constitution. *Heller I* at 592. The current ban on open carry also prevents the bearing of an entire class of arms, all long guns and shotguns. Pursuant to this Court's decision in *Davis v. State*, such a broad ban must necessarily fail. *Davis v. State*, 146 So. 2d 892 (Fla. 1962). The current ban in no way satisfies any compelling governmental interest.

In rejecting the District of Columbia's argument that the Second Amendment provided only a collective right connected to militia service, *Heller I* relied on at least two 19th-century state supreme court cases interpreting the Second Amendment as protecting an individual right to carry weapons openly (but

not concealed) in public. More specifically, *Heller I* cited approvingly to *Nunn v. State*, 1 Ga. 243 (1846), in which "the Georgia Supreme Court construed the Second Amendment as protecting the `natural right of self-defence' and therefore struck down a ban on carrying pistols openly." *Heller I*, 128 S. Ct. at 2809 (quoting *Nunn*, 1 Ga. at 251). The *Heller I* majority described *Nunn* as "perfectly captur[ing] the way in which the operative clause of the Second Amendment furthers" the Amendment's purpose. *Id.* Similarly, *Heller I's* dicta also cited with approval *State v. Chandler*, 5 La. Ann. 489 (1850), in which "the Louisiana Supreme Court held that citizens had a right to carry arms openly" under the Second Amendment.[7] *Heller*, 128 S. Ct. at 2809 (citing Chandler, 5 La. Ann. at 490); *See also*, *State v. Reid*, 1 Ala. 612 (1840).[8]

The first and most effective method of self-defense is deterrence. Carrying a concealed firearm presents to the would-be criminal that a person is unarmed and therefore an easier target for aggression. The requirement that arms be concealed

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[7]"It interfered with no man's right to carry arms "in full open view," which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations [by the concealment of arms]."

[8]The Attorney General has previously argued that the U.S. Supreme Court should, "confirm the import of its citations in *Heller* to *Nunn* and *Andrews.*" (Kachalsky Brief).

removes all deterrent value that person is bearing arms and therefore likely to able to effectively defend themselves and those around them. In the absence of a uniformed, openly armed law enforcement officer only the passive thought that there is a small possibility that anyone may be secretly armed remains to deter aggression. The requirement that handguns may only be carried concealed destroys all but the most fleeting thought of consequence to serve as a deterrent to criminal attack. *Reid* at 619(holding that only openly carried arms are efficient for defense).

The Attorney General of Florida has even recognized that "broad-brush restrictions on law abiding citizens carrying handguns in public, whether open or concealed, run afoul of the right of the people to . . . bear arms". *Internal quotes omitted*. *Kachalsky v. County of Westchester*, 2013 U.S. LEXIS 3132 (2013) *denial of petition for certiorari*, *Kachalsky Brief*.

C. The legislature must allow for the exercise of the right to bear arms without prior restraint.

The history and text of the right to bear arms in both the United States and Florida constitutions leaves room for constitutionally permissible regulation. It does not allow the State to violate citizens' due process rights by converting the right to a privilege, and simultaneously, denying the exercise of both the right and

any alternate privilege to all citizens, until they have obtained the State's permission by obtaining a license. *McDonald* at 780 ("It cannot be doubted that the right to bear arms was regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner.") and *J.P.* at 1123("In determining the scope of a fundamental right, we should remember the general principle that "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.") citing *Glucksberg*, 521 U.S. at 720.

While self-defense is the reason for the right to bear arms, the right is not limited by that reason, just as First Amendment claims are not limited to situations where the speech actually contributed to reason behind that right: political discourse. See, e.g., *State v. O'Daniels*, 911 So. 2d 247, 249 (Fla. 3d DCA 2005) (playing guitar on a public street); *State v. Dennis*, 684 So. 2d 848, 849 (Fla. 3d DCA 1996) (yelling "99" when the police arrived). The constitution places the power to speak and use force in the people as a whole rather than the government. If citizens misuse that speech or force, they are answerable at law afterwards, but they cannot be subject to either prior restraint or anticipatory disarmament.

1. Florida's terms of licensing are too restrictive to stand as a valid alternative to the exercise of a right and constitute an undue burden on the exercise of that right.

Florida's licensing regime is not an adequate alternative to protect and preserve the fundamental, individual right to bear arms outside the home. No other right requires that an individual obtain training, submit to both photographing and fingerprinting, complete an application, and have a background check run, all at a costs of $200 or more, to exercise their right in the most basic way. If all of these restrictions are not burdensome enough, the right is denied without due process until these conditions are met. This is exactly the scenario struck down by the Alabama Supreme Court. *Reid*, 1 Ala. 612 (Ala. 1840).

The State may argue that the requirement to obtain a CWFL is no different than requiring one register to vote. There are fundamental differences between the requirements to obtain the CWFL required by the State to exercise the right to bear arms and any the restrictions to exercise any other right.

The right to bear arms in Florida is the only enumerated right that may be denied for ninety days or more. It is the only right that requires an individual to appear in person for fingerprinting. It is the only right that requires a person to be background checked. It is the only right that requires nearly $200.00 in state fees and costs to exercise. It is the only right that a person must offer proof that they have met the standards of a third party before being allowed to exercise the right. Sec. 790.06, Fla. Stat.

2. The State may license or ban concealed carry, but not open carry.

Since the U.S. Supreme Court's decision in *Heller I*, many lower courts, both federal and state, have attempted to justify restrictions on the Second Amendment by reference to what is likely the most quoted provision of *Heller I*, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions . . .". *Heller I* at 626. Many of these attempted justifications have ignored the reasoning and rationale behind *Heller* and *McDonald*. *Peruta v. County of San Diego*, 742 F.3d 1144, 1155-1167 (9th Cir 2014) vacated by, rehearing en banc granted by, *Peruta v. County of San Diego*, 2015 U.S. App. LEXIS 4941 (9th Cir., Mar. 26, 2015)(pending review)(discussing at 1167 the failure of lower courts to acknowledge the analysis and rationale in *Heller I*); see also, *Jackson v. City & County of San Francisco*, 135 S. Ct. 2799, 2801 (2015)(denial of certiorari, Thomas, joined by Scalia, author of *Heller I*, dissenting):

> *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test . . . But nothing in our decision in *Heller* suggested that a law must rise to the level of the absolute prohibition at issue in that case to constitute a "substantial burden" on the core of the Second Amendment right. . .

The court below twisted the preceding sentence in *Heller I* reasoning that because the U.S. Supreme Court said that "the majority of the 19th-century courts

to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues" there was no reason to prohibit the State here from banning open carry. See, *Heller I* at 626 .

The Fourth DCA read for the conclusion it wanted, not what the cases cited by *Heller I* actually stood for. The reality, is that while *Heller I* explicitly approved of severe regulations on certain classes of persons and places of carry, as well as long-standing historical prohibitions on concealed carry, not once does *Heller I* or *McDonald* offer any support or justification, or cite any precedential cases for the premise that open carry may be limited and regulated as strictly as concealed carry.

III. The Open Carry Ban violates both the Second Amendment to the United States Constitution and Art. I, Sec. 8, Declaration of Rights of the Florida Constitution.

In *Heller I*, the U.S. Supreme Court analyzed the Second Amendment of the United States Constitution and held that the District's total ban of a class of arms in common use for lawful purposes would not pass constitutional muster under any level of scrutiny. *Heller I* at 647.

A. The burden of proof is on the state to produce evidence and prove of the efficacy of the statute.

Whether under strict or intermediate scrutiny it is the State's burden to

produce evidence to show that the means chosen achieve the State's interest. No such showing was made in either the trial court or the Fourth DCA. This is not a question of whether sufficient evidence was produced; there was **no** evidence produced. *Norman v. State*, at 223 n. 14 (Fla. 4th DCA 2015). The State did not attempt to offer any evidence at trial, and could not offer a cogent argument to the Fourth DCA when asked how the Open Carry Ban achieved any public safety interest. Despite the complete lack of evidence to support the position, and no argument for doing so, the Fourth DCA reasoned that because the Legislature banned open carry, the court there should defer to the unsupported and unstated legislative judgment, that there was evidence that banning open carry would enhance public safety. This is directly contrary to *Heller I,* which suggest that the founders believed carrying firearms increased, not decreased, public safety. See, *Heller I* at 593-94. This is consistent with both Article I, Sec. 8, ("in defense of themselves and of the lawful authority of the state") and the Second Amendment (the right to bear arms is "necessary to the security of a free state").

The founders understood that carrying firearms for self-defense was the key to public safety. The state's asserted "public safety" interest in prohibiting the open carrying of firearm is therefore invalid. The government cannot assert an interest contrary to the Constitution. For instance, the purported governmental

interest in a free speech context must be "unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The government cannot assert an interest in "making sure people receive only true information" to justify a suppression of free speech. The Constitution has decided that truth is best achieved when the people are individually able to speak and decide for themselves. Here, the Constitution has decided that public safety is best achieved when the people are armed and able to defend themselves. The government is not free to dispute the values established in its own founding constitution.

The State Attorney at trial made the most honest argument in explaining and justifying this statute, "some people might be, uh, might be a little timid around [people with guns]." (Vol. IV, R. 373). If discomfort is a justification for abridgement of a right, then the First Amendment is in jeopardy as well.

The State's own data shows that those who lawfully carry concealed firearms are generally among the most law abiding and responsible demographic for which there are statistics. *Fla. Dep't of Agriculture and Consumer Servs., Div. Of Licensing, Concealed Weapon or Firearm License, Summary Report October 1, 1987-September 30, 2015*, available at http://www.freshfromflorida.com/content/download/7499/118851/cw_monthly.pdf (Last Visited 10/16/15). As of January 2011, of the over 2.4 million Concealed

Carry Licenses that Florida had issued since the statewide program's inception in 1987, only 168 hade been revoked for the subsequent commission of a crime involving a firearm. *Id.* A number so statistically insignificant that the Department of Agriculture no longer tracks that data point. Despite this fact, the State impairs the fundamental right to bear arms by completely eviscerating the right, and only allowing citizens to carry concealed one type of firearm (handguns) as the exercise of a privilege, not a right.

B. Legislative Deference is judicial abdication, prohibited by binding precedent.

The court below relied on the decision of the District court in *Heller III* to hold that the legislative determination to ban open carry in the interest of public safety was entitled to deference. *Heller v. District of Columbia,* 45 F. Supp. 3d 35 (D.D.C. 2014) reversed by *Heller v. Dist. of Columbia*, 2015 U.S. App. LEXIS 16632 (D.C. Cir. Sept. 18, 2015)(*Heller III*). The Fourth DCA concluded that it should defer to the Legislature's decision to ban open carry. *Norman v. State* at 223 The court did acknowledge that its brand of judicial deference was not universally accepted, noting, "[b]ut see *Peruta*, 742 F.3d at 1176-77 (stating that "when assessing 'the fit between the asserted interests and the means chosen to advance them,'" a court should apply "no such deference" (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213, 117 S. Ct. 1174, 137 L. Ed. 2d 369

(1997)))"(*Peruta* has been vacated pending en banc review.) In reaching its conclusion the court cited Sec. 790.25, Fla. Stat., which preexisted the Open Carry Ban. When enacting the Open Carry Ban in 1987, the Legislature made no finding that public safety was enhanced by banning open carry There is no legislative history or other evidence to support such a conclusion. No committee hearings were held and no opportunity for public comment was held in the enactment of the Open Carry Ban.

The policy contained in Sec. 790.25, Fla. Stat., does not save the violation of constitutional rights contained in Sec. 790.053. There is no basis on which the court below can justify a statute by reference to another statute in a different section passed over two decades before. See *Norman* at 214. (4th DCA 2015).

In reality, the court below abdicated its duty to ensure that legislative enactments infringing upon the right to bear arms were sufficiently supported by an evidentiary basis. Instead the Fourth DCA concluded that because evidence was hard to come by, the State was excused from having to present any evidence or justification supporting the Legislature's policy decision. This type of analysis and tautology has been foreclosed by the U.S. Supreme Court. See, *Turner Broad. Sys., Inc. v. FCC,* 520 U.S. 180 (1997). The decision in *Turner Broad. Sys., Inc.*, is binding precedent on this Court, unlike the decision of the D.C. District Court in

Heller III, which is not binding on this Court. See also, *State v. J.P.*, 907 So.2d 1101 (Fla. 2004)(noting this Court's fidelity to the doctrine of stare decisis).

C. The District Court decision in *Heller III*, relied upon by the Court below, has been expressly overturned.

The decision relied upon by the court below to justify its unsupported deference to the Legislature has been overtured by the D.C. Circuit Court of Appeals. Specifically, the D.C. Circuit held that the complete lack of any evidence or insufficient evidence to support certain regulations, required those regulations to be found unconstitutional. *Heller v. Dist. of Columbia*, 2015 U.S. App. LEXIS 16632, 20 (D.C. Cir. Sept. 18, 2015)("the asserted interest in police protection 'leaves far too many false negatives to satisfy ... intermediate scrutiny'." citing, *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1295 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

D. 790.053 sweeps too broadly and should be found to be unconstitutional.

Whether under strict or intermediate scrutiny the law at issue has to be related to the interest the government seeks to advance. In the case of the Open Carry Ban, the Fourth DCA acknowledged that the interest the government seeks to advance is a general interest in public safety. *Norman* at 222-223. There is no more particularized interest asserted in the limited legislative record, the State's

briefs below, or anywhere else in the record.

With such a broad compelling interest, the question becomes whether the Open Carry Ban actually accomplishes the Legislature's goal in enhancing public safety. *J.P.* at 1117("It must demonstrate that the recited harms are real . . . and that the regulation will in fact alleviate these harms in a direct and material way"). Again, without any evidence there was no basis for the court below to determine that the regulation was either narrowly tailored or substantially related to the State's goal, or actually accomplished the State's post hoc stated goal. Instead the State's chosen means of regulation includes not only "*the unskilled, the irresponsible, and the lawless,*" but the most law abiding identifiable segment of Florida's population. See, *Davis v. State*, at 893-94 (Fla. 1962). Additionally, the statute bans the carry of an entire class of arms. The concealed carry license only allows for the carrying of handguns. There is no way to carry a long-arm, such as a rifle or shotgun, except under the very limited provisions of Sec. 790.25.

1. There is no basis for restricting licensees from open carry.

The Open Carry Ban generally prohibits the carry of firearms that are unconcealed even for those people to whom the state has issued a license to carry a concealed weapon or firearm. Because Mr. Norman and others like him have already submitted to the state's fingerprinting, background check, and proof of

safe handling requirements, there can be no claim that the Open Carry Ban is solely to satisfy the *Davis* factors. Rather, as shown by its history, it was ill advised, legislation in haste, to prevent imagined evils of allowing openly carried firearms into places where they could not be taken concealed.

The State has not and cannot argue that Mr. Norman was unqualified to possess a firearm, or that he possessed it unlawfully. The State of Florida has already agreed that Norman can carry a firearm in public lawfully, as long as it is concealed. It has offered no justification for the concealed requirement. To restrict those that the state has authorized to exercise the privilege of concealed carry, from exercising the right to open carry, is the very definition of overly broad restriction that sweeps much farther than necessary to enhance public safety. See, *J.P.* at 1117. Even a person who has met all of the conditions to carry a concealed firearm, and has obtained a license issued by the authority of the Legislature through the Dept. of Agriculture and Consumer Services is still denied the right to carry their firearm openly.

Not only did the State fail to present any evidence as to how the Open Carry Ban achieves any of the State's claimed public safety interest, it also failed to offer any evidence why a person who has been determined responsible enough to bear arms outside the home, must keep their firearm concealed. Nor did the State

explain or offer evidence as to how requiring licensed persons, who are legally allowed to bear arms as a privilege in Florida, to keep their firearms concealed is necessary to achieve the goal of public safety. While the lower court excused the State from its burden on the ground that evidence was hard to come by, the undisputed fact that 45 other states allow for open carry belies the claim that no evidence is available. The truth is that even with 45 states worth of research, there is no evidence to support the State's position.

This Court has interpreted the final clause of Art. I, Sec. 8 to mean that the Legislature's constitutional authority to regulate the manner of bearing arms is limited to preventing the "bearing of weapons by the unskilled, the irresponsible, and the lawless." *Davis v. State*, 146 So. 2d 892, 893-94 (Fla. 1962). Arguably, the Legislature has done so by the enactment of 790.06, Fla. Stat.[9]

2. Florida's statutory scheme related to the open carry of firearms is unconstitutional.

The first question certified by the trial court to the DCA was "is Florida's statutory scheme related to the open carry of firearms constitutional?" Despite the

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[9]Norman does not concede that the State can restrict the right to bear arms to the exercise of a licensed privilege. As applied to himself and other licensees with a CWFL however, the law is an unconstitutional infringement on persons the Legislature has deemed competent and responsible enough to bear arms in public.

present Open Carry Ban, the Florida Legislature and this Court have long recognized the preexisting fundamental rights to keep and bear arms. The Legislature expressly required that its licensing scheme, which the court below used to limit the right to bear arms, shall not be construed to "*impair or diminish such rights*." It requires that its terms be "liberally construed" and that it is "supplemental and additional to existing rights" to bear arms. Sec. 790.06 (15), Fla. Stat.

> This Court has explained the meaning of Art. I, § 8 as follows:
> [D]oubtless the guarantee ['The right of the people to bear arms in defense of themselves, and the lawful authority of the State, shall not be infringed'] was intended to secure to the people the right to carry weapons for their protection while the proviso ['but the Legislature may prescribe the manner in which they may be borne.'] was designed to protect the people also from the bearing of weapons by the unskilled, the irresponsible, and the lawless.

Davis v. State, 146 So. 2d at 893-94.

The Open Carry Ban goes far beyond a regulation on the manner of bearing arms and was in no way calculated to prevent the bearing of weapons by unskilled, irresponsible, and lawless people; it completely bans the bearing of arms regardless of time, place, manner or circumstance except for some narrow exceptions. *Id.*

A 2006 FBI study establishes that criminals do not open carry. See Dr. Anthony Pinizzotto, et al., Violent Encounters: A Study of Felonious Assaults on

Our Nation's Law Enforcement Officers, FBI (2006) (finding that violent criminals carefully "conceal" their guns and "eschew holsters"). Summary available at: http://www.forcesciencenews.com/home/detail.html?serial=62. This Court has held that the Legislature may only limit possession and/or concealed carry of firearms not commonly used for lawful purposes such as self-defense. A statute must "not prohibit the ownership, custody and possession of weapons not concealed upon the person, which ... are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semi-automatic pistols and rifles." *Rinzler v. Carson*, 262 So. 2d 661 (Fla. 1972).

The decision below notwithstanding, there is no method of bearing arms in Florida as a matter of right. Absent the narrow exceptions within Sec. 790.25, Florida's ban on open carry prohibits the bearing of any arm in common use, unless a citizen possess a CWFL. Because the narrow exceptions in Sec. 790.25 have a very limited applicability, the Florida ban on bearing arms is as complete as the District of Columbia's ban on keeping arms that was struck down in *Heller I.* See, *Heller I.*

3. Inclusion of long guns within the Open Carry Ban means that the right to bear all arms in common use is prohibited without a license.

In *Heller I*, D.C. attempted to argue that a ban on handguns was permissible because long guns were not banned. The U.S. Supreme Court explicitly declined to accept that reasoning. *Heller I* at 629. The counter argument attempted by the court below is no better. Allowing citizens to bear arms by carrying handguns, whether as a privilege or a right, does not save the statute's impermissible prohibition against the bearing of any long gun. Sec. 790.06 limits concealed carry to only handguns, except in the limited circumstances set forth in Sec. 790.25.

IV. Open Carry is the traditional and long recognized method of exercising the right to bear arms.

From the time of settlement of the United States through its creation and acknowledgment of the preexisting right to bear arms, the peaceable carry of arms was not only allowed but was often required by law. All of the early cases cited in *Heller I*, *McDonald*, and in this case supported open carry not concealed carry. For example:

> In 1623, Virginia forbade its colonists to travel unless they were "well armed"; in 1631 it required colonists to engage in target practice on Sunday and to "bring their peeces to church." In 1658 it required every householder to have a functioning firearm within his house and in 1673 its law provided that a citizen who claimed he was too poor

> to purchase a firearm would have one purchased for him by the government, which would then require him to pay a reasonable price when able to do so.

The Right To Keep And Bear Arms, Report of the Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, 97th Cong., 2d Sess. 3 (1982) (citations omitted). See also, N. Johnson et al., Firearms Law and the Second Amendment 101-09 (2011) (all colonies except Pennsylvania had some form of arms mandate). Of the only six states prior to the 1860s which had statutes restricting the public carrying of arms, none prohibited the lawful and peaceful open carry of arms, only doing so in a manner to terrorize the people, citizens or country.

In one of the few early cases regarding the right to bear arms where a law restricting the right was upheld the Court was clear that it was not the mere fact of carrying a firearm stating:

> the carrying of a gun, per se, constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun. It is the wicked purpose, and the mischievous result, which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm a peaceful people.

State v. Huntley, 25 N.C. 418, 422-23 (N.C. 1843). In the first 25 years of the Republic, no state had a concealed or Open Carry Ban. Prior to the

Mexican-American war, only eight states restricted concealed carry in any way, and all of them permitted open carry of pistols, rifles, and shotguns.

The very first mention of the right to bear arms by the U.S. Supreme Court is also instructive. There the Court noted that "the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons." *Robertson v. Baldwin*, 165 U.S. 275 (1897). Once again, the U.S. Supreme Court recognized that while there was a right to bear arms, it did not include the right to bear them concealed. Since the U.S. Supreme Court recognized there was a right to bear arms but that the bearing of concealed arms was outside the protection of the right, the only logical conclusion is that the Court recognized the right to bear arms as the right to carry them unconcealed, or openly.

In the *Kachalsky* case the court listed a few states from the late nineteenth century that enacted bans on concealed carry. None of those states however, banned the carry of all firearms and in some cases case law explicitly recognized the right to open carry. The American tradition of open carry is further shown by the leading legal scholar at the time of our founding. St. George Tucker noted in his commentary:

> In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his

hand, than an European fine gentleman without his sword by his side. V St. George Tucker, Blackstone's Commentaries App. 19 (1803). Importantly in this case he was discussing the carrying of long guns, not handguns, which are completely prohibited by the statute at issue here. In fact the first four Presidents openly carried firearms.

Heller I made clear that the proper standard for review of the right to bear arms was the period following the ratification of the Second Amendment. Even approximately one hundred years after its enactment only two of the top one hundred most populous cities in 1880 had restrictions on the carry of arms, Syracuse, NY, and Nashville, TN. Both open and concealed carry were lawful in almost all large cities.

The oft quoted language of *Heller I* regarding presumptively valid regulations is more harmful than helpful to the State's position. Florida's Open Carry Ban is a novel and new regulation without a valid legal or historical precedent, not a longstanding regulation of the type referenced in *Heller I*.

First, Florida's Open Carry Ban is of more recent vintage than the regulations at issue in *Heller I* (1975) or McDonald (1982). Second, nothing in any case cited by the State or the court below stands for the proposition that a state may lawfully ban open carry by allowing for concealed carry, whether as a right or

a privilege. Third the historical record supports the right to bear arms openly.

Just as in the rest of the country, Open Carry was historically permitted in Florida. The Florida Supreme Court in 1868, while considering a case involving a charge of carrying a *concealed* weapon under the then current statute stated:

> The statute under which this indictment was found provides, "that hereafter it shall not be lawful for any person in this State to carry arms of any kind secretly on or about their person, &c.:(sic) Provided, that this law shall not be so construed as to prevent any person from carrying arms openly outside of all their clothes." Th. Dig., 498, § 5. . . .
>
> It merely directs how they shall be carried, and prevents individuals from carrying concealed weapons of a dangerous and deadly character, on or about the person, for the purpose of committing some malicious crime, or of taking some undue advantage over an unsuspecting adversary. . .

Sutton v. State, 12 Fla. 135, 136 (Fla. 1868). At that time there was no requirement for a license to open carry a firearm. Historically the State of Florida has recognized this fundamental right and allowed the unconcealed, or open, carry of firearms. The state only had an interest in regulating the concealed carry of arms due to the risk of provocation by a person being secretly armed. This Court's logic in *Sutton* still holds true. *State v. Sellers*, 281 So.2d 397 (Fla. 2d DCA 1973). This long recognized right with over one-hundred years of common law decisional history, has now been abolished by the legislature in exchange for a privilege to carry concealed firearms. *Crane* at 267.

The entire scheme of licensing the possession of firearms is suspect and based on racial prejudices, and "Jim Crow" laws. The infamous *Dred Scott* decision warned that to allow freed blacks the rights of citizenship, would necessarily allow freed black men to go about bearing arms wherever they pleased. *Dred Scott v. Sandford*, 60 U.S. 393, 417 (1857). After the 14th Amendment, the state only enforced the licensing requirement against the freedmen, as acknowledged by this Court in *Watson v. Stone*, 4 So. 2d 700 , 702-703 (Fla. 1941).

The concurring opinion went on to point out the real root of Florida's gun control laws and recognized the reason their enforcement had only been limited to minorities was because it was generally recognized as unconstitutional and therefore could only reasonably be applied against minorities.

> . . . the Act was passed for the purpose of disarming the negro laborers . . . and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied. We have no statistics available, but it is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute. It is also a safe guess to say that not more than 5% of the men in Florida who own pistols and repeating rifles have ever applied to the Board of County Commissioners for a permit to have the same in their possession and there had never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested.

Watson v. Stone, 4 So. 2d at 703 (Buford, J. concurring specially); *see also*, *Sutton v. State*, 327 So. 2d 234 (Fla. 1st DCA 1976)(reversing conviction for possessing a concealed weapon in a vehicle on statutory interpretation grounds and citing with approval, *Watson v. Stone)* overturned by *Ensor v. State*, 403 So. 2d 349 (Fla. 1981); *Ensor v. State* superseded by statute as found in *Alexander v. State*, 450 So. 2d 1212, 1214 (Fla. 4th DCA 1984).

The 1893 Act was again considered in 1962. *Davis v. State*, 146 So. 2d 892 (Fla. 1962). The *Davis* court held that it was only because a limited class of arms required a permit that the statute was valid. *Id.* But *Heller I*, ruled that singling out handguns for additional prohibitions is unconstitutional, because they are in common use. *Heller* at 2818.

By 1973 the Florida statutes had been amended and re-numbered but the courts still recognized Sec. 790.01, Fla. Stat., as the current version of the statute at issue in *Watson* and *Davis*. *Supra*. *Sutton*, 327 So. 2d 234, 235 (Fla. 1st DCA 1976). Despite the obvious problems with the vagueness of Sec. 790.01, the *Ensor* court upheld a conviction for possession of a concealed firearm. *Ensor v. State*, 403 So. 2d 349 (Fla. 1981). As stated by Justice Boyd in his dissent:

> I think instead of trying to save the statute by stating our own views of what the law should provide we should firmly urge the legislature to define what acts and circumstances constitute carrying a concealed

> weapon.
>
> What the public generally knows, courts can notice judicially. The rising increase of violent crimes in which pistols are used should demonstrate the urgent need for laws clearly stating who may carry weapons that are ***concealed,*** and under what circumstances, and what constitutes concealment.

Ensor, 403 So. 2d at 355 (Justice Boyd, *dissenting*); *see also Dorelus v. State*, 747 So. 2d 368, 374 (Fla. 1999)(suggesting that further legislative explanation was necessary regarding the definition of concealed versus unconcealed firearms in vehicles). It is important to note that at this time, Florida Statute, Section 790.053, did not exist, and there was no state law prohibiting the open carrying of firearms.

In 1987 the Legislature created a statewide system of concealed carry permits, and expressly preempted the field of firearms law. During a special session later that year 790.053 was enacted. There is little legislative history on the statute, as the bill did not go through any committee, and was passed as an emergency measure within days after the bill was filed, with no opportunity for public comment. *Carrying Concealed Weapons in Self Defense: Florida Adopts Uniform Regulation the Issuance of Concealed Weapons Permits*, FSU Law Rev., Comment, 15 (1987):751.

Based on the history alone this Court should cautiously consider any request to uphold a statute, that has either been held unconstitutional, or has been

selectively applied to minorities in every prior similar iteration.

IV. The exceptions to the prohibition against open carry contained in Sec. 790.25, Fla. Stat., should be treated as an element of the crime of open carry rather than an affirmative defense based on the supremacy provision of Sec. 790.25.

Sec. 790.25 is an unusual statute. First, unlike a statute providing for an affirmative defense to a crime, it clearly states that other statutes do not apply within the boundaries of Sec. 790.25. Sec. 790.25(2)(a), Fla. Stat. Second, it declares that its provisions control over any statute in conflict. Sec. 790.25(4), Fla. Stat. No other statute in Florida has such a broad and sweeping supremacy clause. Third, its Declaration of Policy and its Construction statements, require an expansive and liberal reading of the statute in favor of the right to bear arms. Sec. 790.25(1) and (4). The first point mandates the result sought by Mr. Norman, while the second and third points, should guide this Court in its interpretation of the first point and determining whether these exceptions are mere affirmative defenses or elements of the crime of open carry of a firearm.

Sec. 790.25(3) LAWFUL USES, states:

> [t]he provisions of ss. 790.053 and 790.06 do not apply in the following instances, and, despite such sections, it is lawful for the following persons to own, possess, and lawfully use firearms and other weapons, ammunition, and supplies for lawful purposes.

This is not an exception contained in a clause subsequent to the enactment clause

of the statute. *See, Mackey v. State*, 83, So.3d 942, 947 (Fla. 3d DCA 2012). This is an entirely separate statute that by its terms is supreme.

A statute, which by its very terms: supersedes any law in conflict; is to be liberally construed in favor of the right to bear arms, and which states that another potentially conflicting statute does not apply in certain situations, cannot be held to merely provide an affirmative defense. Such a ruling would result in arrests for lawful conduct. Only by ruling that the provisions of 790.25 are elements of the crime of violating 790.053 can this Court fulfill the intent of the Legislature and protect law abiding citizens from arrest.

If the supplemental rights in Sec. 790.25 are affirmative defenses, then a person completing the mandatory training to "demonstrate[s] competence with a firearm, Sec. 790.06(2)(h), Fla. Stat., required to obtain the license necessary to carry a firearm under the current scheme, is subject to arrest for attempting to comply with that scheme. After being arrested, the person will be denied their right to obtain the license necessary to exercise their right until the charges are resolved. As an affirmative defense, the person will have to endure prosecution until they can present and prove to a judge or jury enough evidence that their actions were within Sec. 790.25. All of this will cost several thousand dollars just to vindicate the fundamental right to bear arms and to obtain the license necessary

to bear arms in this state.

The same analysis applies to any hunter, any fisherman, any person improving their skill at a range, and even an off-duty law enforcement officer out of their jurisdiction is subject to arrest at the unbridled discretion of a police officer.

The section provides a list of cases where 790.053, the statute at issue here, has no application. Sec. 790.25(3)(a)-(o), Fla. Stat. Included in this list is everything from military, police, and security guards, to citizens who are fishing, camping, hunting, or shooting at a range, or going to or from these activities. Sec. 790.25 Fla. Stat. By the plain language of the statute, Sec. 790.25 is a list of rights of Floridians, not a list of affirmative defenses, and cannot be subordinate to Sec. 790.053.

This Court has long recognized the Legislative intent behind Sec. 790.25. This Court has previously held that despite the plain text of Sec. 790.25, the express intent of the Legislature in the statute, required a holding contrary to the plain language. *Peoples v. State*, 287 So. 2d 63 (Fla. 1973). Despite the plain language of the statute which only allowed for open carry, this Court held that the statute also allowed for concealed carry.

The State argued below, and the trial court agreed, that the provisions of

Sec. 790.25 are merely affirmative defenses to a charge of violation of Open Carry Ban. In other words, a person traveling to or from the range for target practice must satisfy a law enforcement officer that he is engaged in one of the protected exceptions which provide for open carry. If he fails to do so, the officer has the unbridled discretion to choose whether to arrest the individual or not. This is a recipe for arbitrary enforcement and harassment.

An affirmative defense is an inadequate protection of a constitutional right. A statute cannot criminalize speaking against the government as sedition with a First Amendment affirmative defense. Nor could one criminalize all abortion as murder with a Right to Privacy affirmative defense. Such statutory schemes would be struck down because affirmative defense place the burden of proof on the individual, not the state. *In re Winship*, 397 U.S. 358, 364 (1970)("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

No other constitutionally protected activity requires a defendant to prove that they were lawfully engaged in the protected activity in order to avoid arrest.

CONCLUSION

Mr. Norman's arrest and prosecution were unconstitutional from beginning to end. The gunpoint detention of Mr. Norman, a lawfully armed person, clearly shows that the current interpretation of firearms law is suspect and dangerous. With no knowledge or indication of where Mr. Norman was going or had been, two police officers conducted an extremely dangerous detention of Mr. Norman solely because his firearm was visible.

The open carrying of a firearm was lawful in Florida from its admission as a state until 1987. Additionally, for the safety of Floridians and visitors, this Court should hold that the provisions of Sec. 790.25 operate not as affirmative defenses, but as elements that the state must prove in order to arrest and obtain a conviction of a person with a visible firearm.

Dale Norman respectfully requests this Court declare Open Carry Ban unconstitutional to the extent it prohibits open carry and overturn the conviction below. He requests this court rule that 790.053, is unconstitutional as applied to those with a CWFL. Alternatively he requests that the Court find that the provisions of Sec. 790.25 Fla. Stat. are elements the State must prove in order to convict a person of open carry, and remand this case for new trial with appropriate jury instructions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served via e-service this _25th___ day of November 2015 to the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the typ used in this brief is 14 point proportionally spaced, Times New Roman.

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