DISTRICT COURT OF APPEALS, FOURTH DISTRICT

DALE NORMAN
Appellant/ Defendant,

CASE NO.: 4D12-3525
LT: **56-2012-MM-000530**

v.

STATE OF FLORIDA
Appellee.
_____/

Appeal from the County Court,
in and for St. Lucie County, Florida

Clifford Barnes, County Court Judge

APPELLANT'S REPLY BRIEF

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REPLY

Other than a conclusory claim that the statute at issue is a reasonable regulation on the right to bear arms the State offers no explanation for its claim that the statute at issue is constitutional. Despite substantial precedent to the contrary and no case in support of its claim that a ban on open carry is constitutional, the State asks this Court to uphold Sec. 790.053, Fla. Stat.

Not once does the State challenge Appellant's assertion, that the licensed concealed carry of firearms is a mere privilege, subject to the whim of the Legislature, and therefore no protection of the right to bear arms as guaranteed in the Florida and U.S. Constitutions. Instead, the State relies on claims that somehow the enumerated right to bear arms is a lesser right than any other fundamental right, subject only to "minimal" scrutiny.

The State cites precedent from the 3rd DCA, ignoring binding precedent from this Court. Contrast, *Mackey v. State,* 83 So.2d 942 (Fla. 3d DCA 2012) vs. *Regalado v. State*, 25 So. 3d 600 (Fla. 4th DCA 2009).[1]

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[1]The Florida Supreme Court has since issued an opinion in *Mackey* upholding the result reached by the 3rd DCA but rejecting the reasoning of the lower court. *Mackey v. State*, 2013 Fla. LEXIS 2289; 2013 WL 5642294 (Fla. 2013).

"[W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.". *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting) "We must stand strong in the protection of individual rights and not follow a pattern that slowly chips away at our liberty through fear in the name of purported protection from danger. As noted by philosopher David Hume, '[i]t is seldom that liberty of any kind is lost all at once.'" *Baptiste v. State*, 995 So. 2d 285, 302 (Fla. 2008).

Constitutional Challenge

The State argues that because reasonable regulation of the right to bear arms is allowed, and because the State believes the regulation at issue to be reasonable, the ban on open carry passes constitutional muster. The State follows this unsupported conclusion with the assumption that because the law does not imperil any fundamental right, the statute should only be subject to "minimal" scrutiny.

The State refuses to recognize that this is a case of a statute infringing on the very core of the fundamental right to bear arms, a right that has been recognized by the courts of this state for over 145 years.[2] It has also been

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[2]*Sutton v. State*, 12 Fla. 135, 136 (Fla. 1868)("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.: 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.")

recognized in decisions of the United States Supreme Court[3] and numerous other state and federal courts[4] as well as by the State of Florida itself in a recent brief to the United States Supreme Court, in which it joined [5] and by the State in this case in the lower Court.[6]

Generally an analysis of any law burdening a fundamental individual right is conducted under strict scrutiny, not rational basis as argued for by the State here. This has been modified by several courts in the case of the Second Amendment to require a determination as to how close the conduct at issue is to the core of the right to keep and bear arms and then determine whether to use strict scrutiny or intermediate scrutiny based on how close the regulation comes to the

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[3]*Dist. Of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

[4]*Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Nunn v. State*, 1 Ga. 243 (Ga. 1846); *State v. Reid*, 1 Ala. 612 (Ala. 1840); *State v. Chandler*, 5 La. Ann. 489, 52 Am. Dec. 599 (First Dist. Ct. New Orleans, La.1850) and *State v. Aguilar*, 2013 IL 112116 (Ill. 2013).

[5]*Kachalsky v. Cacace*, (U.S. Supreme Court No. 12-845) BRIEF OF THE COMMONWEALTH OF VIRGINIA AND THE STATES OF . . ., FLORIDA, . . . AS AMICI CURIAE IN SUPPORT OF PETITIONERS. (Hereinafter, "*Kachalsky* Brief").

[6]Rec. Vol. 4, Pg. 464.

core of the right protected.[7] *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011). The State's argument that the Court should even consider a rational basis test would relegate the right to bear arms to the status of a second-class right, an argument foreclosed by the Supreme Court in *Heller* and *McDonald*. See also, *Kachalsky* Brief.

In this case, the carrying of a firearm on one's person for purposes of self defense is the very core of the right to bear arms. *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010); *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012); *Bonidy v. U.S. Postal Service,* 2013 U.S. Dist. LEXIS 95435, 7 (Dist. Colo. 2013)("the Court concludes that the Second Amendment protects the right to openly carry firearms outside the home for lawful purpose, subject to such restrictions as may be reasonably related to public safety.") Florida however, has a complete ban on the constitutionally protected right to carry openly outside the home, not reasonable regulations.

Just as argued by the State in its *Kachalsky* Brief, this case:

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[7]In *Heller* the Supreme Court declined to determine the level of scrutiny applicable in Second Amendment cases. *Heller* at 634. While this method has been approved by several courts, Appellant questions the validity of any analysis that treats the right to bear arms as a second class right, subject to anything less than strict scrutiny.

> [P]resents the Court with an excellent vehicle to resolve [one] of the most contested aspects of Second Amendment jurisprudence: (1) whether its protections apply with equal force outside the home, . . . the [Florida ban on carry except as a privilege] considers the self-defense component of those rights as being of a lower order than "carry[ing] a handgun for target practice or hunting."[8] . . .
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> This [appeal] also presents the Court with a [trial court] adopting a construction of the Second Amendment that would render nugatory a "right of the people" by excessively deferring to the transitory policy determinations of the people's current representatives with respect to the right's effect on "public safety and crime prevention."; *see McDonald*, 130 S. Ct. at 3045 (plurality opinion) (rejecting "public safety" arguments against incorporation of the Second Amendment); . . .
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> [The State reaches its argument] by reading *Heller*, and the Second Amendment, for the least that they could grammatically stand for. Furthermore, it stretched and reached for distinctions that in their insubstantiality[9] reveal an animus against the very right at issue. For example, it treated as "a critical difference" [the Florida statute's] application "to carry[ing] handguns only ***in public [openly]***," while the District of Columbia's restriction struck down in *Heller* "applied ***in the home***."

Kachalsky Brief at 13.

The State improperly relies on language from *Heller* that not all regulation of firearms is impermissible. It fails to note that even though the Supreme Court included bans on concealed carry in its list of presumptively reasonable

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[8]*See*, States Answer Brief at pg. 11, and FN 3, claiming that the provisions of Sec. 790.25 providing for open carry while hunting, fishing, camping, or at a range adequately protect the right.

[9]Comparing the right to carry a handgun to the carrying of a hand grenade.

regulations, the Supreme Court never suggested that complete bans on open carry of all arms would pass any level of scrutiny.[10] The State assumes that because no Court has ruled that carrying a concealed firearm is protected by the Second Amendment, laws prohibiting the open carry of a firearm are valid as well.

The State's argument for rational basis ignores Florida Supreme Court precedent that fundamental rights necessarily require application of strict scrutiny. *Hillsborough County Gov't. Employees Ass'n v. Hillsborough County Aviation Auth.,* 522 So.2d 358, 362 (Fla. 1988). Even if the Court were to take the State's suggestion and apply rational basis, the State has failed to offer even a rational basis for denying the right to open carry, much less an interest that would meet intermediate scrutiny or a compelling state interest meeting strict scrutiny.

Contrary to the State's reliance on the reasonable restriction portion of the *Heller dicta*, the open carry ban of Sec. 790.053, Fla. Stat., is not a long-standing

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[10] "Consequently, [the Supreme Court] should grant [Florida's cert petition] both to 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 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 [the Florida Legislature's] "policy choice[ ] off the table." *Heller,* 554 U.S. at 636." (*Kachalsky* Brief).

provision unrelated to the core of the right. Historically, open carry has been recognized as the core of the right throughout Florida's history. *Sutton v. State*, 12 Fla. 135 (Fla. 1868), see also *Watson v. Stone*, 4 So. 2d 700 (Fla. 1941).

As set forth in the Initial Brief, the original basis of the ban on open carry is clear from the legislative history and the Bar Journal article related to its passage[11], to prevent the carry of arms in sensitive places, not to prevent the carrying of all arms. The open carry ban however goes much farther and bans all lawful carry in all lawful places of all types of arms except in the exercise of a privilege.[12]

While there is ample precedent that could be cited by either party that regulation of concealed carry is constitutional, there is not one case cited by the State for the proposition that a state may lawfully ban the open carry of all firearms for the purpose of self-defense while relegating the concealed carry of

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[11]Carrying Concealed Weapons in Self Defense: Florida Adopts Uniform Regulation the Issuance of Concealed Weapons Permits, FSU Law Rev., Comment, 15 (1987).

[12] The Florida Supreme Court's recent opinion in *Mackey v. State*, 2013 Fla. LEXIS 2289; 2013 WL 5642294 (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.

arms to a mere privilege to carry only handguns. See, *State v. Reid*, 1 Ala. 612 (Ala. 1840).

Any claim by the State that there is a rational basis or other reasonable public policy argument for a complete ban on open carry is refuted by the language in the *Kachalsky* Brief joined by the State:.

> [T]he social science research demonstrates that public carry of handguns by law-abiding citizens does not increase criminal violence or threaten public safety, but prevents crime and protects the public.
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> . . . When laws are in place that forbid the keeping and bearing of arms, whether in the home or outside of it, or only in certain places, those citizens will abide by them. However, those who commit acts of violence, whether assault, robbery, burglary, rape, or murder, are unlikely to be deterred from those crimes by an additional law forbidding possessing or carrying their desired weapon or by the knowledge that the police may apprehend them in the attempt or after the fact. . . . *See* Cramer & Kopel, *The New Wave*, *supra* at 686.
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> . . .
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> Sadly, the political and scholarly consensus is also confirmed by the high incidence of violence in jurisdictions that continue to impose onerous restrictions on law-abiding citizens owning or carrying firearms. Take Chicago for example, which both prohibits the possession of firearms anywhere without a permit, *see Gowder v. City of Chicago*, No. 11-C-1304, 2012 U.S. Dist. LEXIS 84359, at *3; 2012 WL 2325826, at *1 (N.D. Ill. June 19, 2012), and is located within the only State that completely bans citizens from carrying or possessing weapons almost anywhere outside their home. *See* 720 Ill. Comp. Stat. 5/24-1(4); *but see Moore*, 702 F.3d at 942. Despite all this regulation, the rate of violent crimes has been tragically high for decades and remains so. *See* Mark Konkol & Frank Main, *Chicago*

> *under fire: Murders rising despite decline in overall crime*, Chicago Sun-Times, July 7, 2012, available at http://www.suntimes.com/news/violence/13574486-505/chicagounder-fire-murders-rising-despite-decline-in-overall-crime. html. . . .

Kachalsky Brief at 21.

The Florida Constitution has never been interpreted to authorize a ban on open carry. While the Legislature may regulate the manner of bearing arms,[13] the 5th DCA has already addressed what was meant by the "manner of bearing arms" and what was not in the *Robarge* case. The court held that the state may prohibit the concealed carry of firearms, license the carrying of a handgun, but questioned if merely possessing a pistol openly could be a crime. *Robarge v. State*, 432 So. 2d 669, 671-672 (Fla. 5th DCA 1983), petition for review denied by, *State v. Robarge*, 450 So. 2d 855 (Fla. 1984).

The State however, argues that the Legislature has protected the right to bear arms by the passage of Sec. 790.25 Fla. Stat., going so far as to quote the Legislature's declaration of policy language. Had the State bothered to read or

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[13] A review of Florida law clearly shows that at the time of the passage of Article I, Sec. 8, while open carry of certain arms, Winchester repeaters and pistols, was licensed, concealed carry was prohibited. *Davis v. State*, 146 So. 2d at 892 (Fla. 1962).

quote the entire statute it would know that the plain language of the statute itself, contradicts their claim. Sec. 790.25(4), Fla. Stat., states:

> CONSTRUCTION.—This act shall be liberally construed to carry out the declaration of policy herein and in favor of the constitutional right to keep and bear arms for lawful purposes. This act is supplemental and additional to existing rights to bear arms now guaranteed by law and decisions of the courts of Florida, and nothing herein shall impair or diminish any of such rights. This act shall supersede any law, ordinance, or regulation in conflict herewith.

Contrary to the State's argument, that Sec. 790.25(3), Fla. Stat., is the limit of the right to bear arms in Florida, the statute itself forecloses this argument and states that the rights enumerated by this section are "**supplemental and additional to**" the rights guaranteed elsewhere and should not be construed to be the limit of the right to bear arms. The State's argument would render much of the above language superfluous and meaningless, a construction not allowed by Florida's well-known canons of statutory construction.

Prior to the passage of Sec. 790.053, Fla. Stat., the courts of Florida rejected the idea that justifying conduct, activity, or purpose was necessary and explicitly recognized the right to bear arms.

> In regulating the "manner of bearing arms", the state may require that one obtain and possess a license in order to carry a handgun and criminally punish those who do not. see *Watson v. Stone*, 148 Fla. 516, 4 So.2d 700 (1941). Likewise, the state may make it illegal to carry certain types of weapons such as concealed weapons, section

> 790.01, Florida Statutes (1981), or those ordinarily used for criminal purposes such as machine guns and short barreled shotguns. § 790.221, Fla.Stat. (1981). See *Rinzler v. Carson*, 262 So.2d 661 (Fla.1972). However, we have grave doubts as to whether the state, consistent with Article I, section 8 of our constitution, can obtain a criminal conviction by merely proving that a defendant possessed a pistol.

Robarge v. State, 432 So. 2d 669, 671-672 (Fla. 5th DCA 1983).

The State argues that providing a right to carry for recreational activities is all that is necessary to effect the right to bear arms. This is the same limited scope that was struck down in *Moore* and *Aguilar* as insufficient protection of the right to bear arms. *Moore*, 702 F.3d 933 (7th Cir. 2012) and *Aguilar*, 2013 IL 112116 (Ill. 2013)(striking down Illinois ban on carry outside the home, which only provided for exceptions for certain recreational activities including hunting, fishing and target practice). Both the Seventh Circuit and the Illinois Supreme Court recognized the holdings from *Heller* and *McDonald* that the State would have this Court ignore, that the Second Amendment protects the right to bear arms in case of confrontation. *Heller* at 584, and *McDonald* at 3026. That is the holding of all four cases, not the *dicta* regarding reasonable regulations cited by the State.

If even the courts in Illinois, the last state to recognize the right to carry outside the home, held that exceptions for fishing, hunting and target shooting do

not adequately protect the right to bear arms, this Court should do no less and find that Florida's similar statute is also unconstitutional.

Equal Protection

McDonald makes clear that, just as demonstrated in Norman's Initial Brief, the entire history of restrictions on the right to bear arms is rife with racial discrimination. *McDonald* at 3038-3042. The *McDonald* Court was also careful to point out that the equal protection of the 14th Amendment is much more than an anti-discrimination provision. See *McDonald* at 3043(rejecting the idea that non-discriminatory bans on the bearing of arms would pass constitutional muster under the 14th Amendment).

While equal protection does not prohibit the state from making distinctions or require that all people be treated identically, it does require the State to advance some argument for disparate treatment. The State has failed to do so. The State instead makes a bare conclusion that the provisions of Chapter 790 which provide for hunting are target shooting are sufficient to protect the right to bear arms. The State's contention was considered by the Seventh Circuit and rejected. *Moore*, 702 F.3d 933 (7th Cir. 2012). The State attempts to justify the statute by claiming that the Legislature could reasonably conclude people need openly carried

firearms for some activities but not others, and ignores that the fundamental right protected is the right to be armed in case of confrontation, not for hunting or target shooting. See *Heller* at 592; *McDonald* at 3026 (2010); and *Moore* at 935.

Overly Broad

The State's claim that this Court can consider the question of whether a statute is overly broad only in the context of the First Amendment and not the Second is thoroughly discredited by the Supreme Court's decisions in *Heller* and *McDonald*. The very point of both cases was that the "broad-brush" bans at issue, were overly broad, going far beyond reasonable regulations permitted by the Second Amendment. *Dist. Of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

The Second Amendment is not a second-class right. *McDonald* at 3043-3044 (2010). Every case cited by the State to support its claim that the overbreadth doctrine is not applicable in Second Amendment cases suffers from the same infirmities. They are opinions that either pre-date or explicitly ignore *McDonald* and *Heller*, and rely instead on Supreme Court cases pre-dating *Heller*, that did not recognize the Second Amendment as an incorporated right, or a co-equal right of the Bill of Rights. The *Ezell* Court did not hesitate to recognize the similarities between the First and Second Amendments. *Ezell v. City of Chicago*,

651 F.3d 684, 697 and 699 (7th Cir. 2011). Unlike the other amendments, which are solely aimed at restriction of governmental authority, only the First and Second Amendments affirm the right of the people act of their own accord, whether to speak freely or to bear arms freely, the two most fundamental rights of Americans as a free people. These rights are of course subject to reasonable restrictions, but not outright bans like Sec. 790.53, Fla. Stat.

The State of Florida in the *Kachalsky* Brief contradicts its claim here that overbreadth is not applicable in this case because Mr. Norman did not personally suffer harm. It cannot be said better than the State of Florida itself:

> Everyone has, in the only relevant sense, a "particularized interest" in the exercise of their rights. First, this Court's case law, consistent with the Constitution's text, suggests no different level of constitutional protection for keeping handguns in the home than that accorded to bearing them without. Rather, it suggests the same standard should apply.

Kachalsky Brief at 11.

The State claims that Mr. Norman misunderstands the overbreadth doctrine. It is the State however, that misunderstands the doctrine, its application here, and the very nature of Mr. Norman's challenge. Mr. Norman has not challenged the law under the First Amendment overbreadth doctrine, that the law may be overly broad as applied in some other circumstance, but has challenged the law as being

overly broad specifically as it applies to him. See *United States v. Decastro*, 682 F.3d 160 (2nd. Cir. 2011)(finding that an unlicensed individual could not facially challenge the overbreadth of a statute requiring a license where he had not even applied for the license and the law was not overly broad as to the challenger).

Unlike Mr. Decastro, Mr. Norman does possess the license required and issued by the State of Florida for the carrying of a firearm in public. His claim, among others, is that the law is overly broad as applied to himself and other Concealed Weapon Firearm License (CWFL) holders, because the State, instead of merely prohibiting the carry of arms by the *unskilled, the irresponsible, and the lawless, . . . (or unlicensed)* as permitted by the court in *Davis*, also prohibits the bearing of arms by Mr. Norman and all other persons with a CWFL. *Davis* at 894. Mr. Norman brings both an as applied and a facial challenge. None of the cases cited by the State stand for the proposition urged by the State, that an individual whose Second Amendment rights are restricted, cannot claim that the law is overly broad as applied to him, while simultaneously raising a facial challenge. Even the "persuasively discredited"[14] *Kachalsky* Court cited by the State, recognized that if the overbreadth doctrine were applicable in the context of the Second Amendment,

[14]*Bonidy v. U.S. Postal Service,* 2013 U.S. Dist. LEXIS 95435 (Dist. Colo. 2013).

it would have to be invoked by an individual such as Mr. Norman, with a valid as applied challenge.[15]

Contrary to the Second Circuit's opinion in *Decastro*, a blanket ban on the bearing of arms unless granted a privilege to do so by the state, is unconstitutional and this Court should decline the State's invitation to rely on precedent from the Second Circuit rather than the better reasoned decisions of the Seventh Circuit, District of Colorado and the Illinois and Michigan Supreme Courts, that there is a fundamental right to bear arms outside the home and the even longer standing decisions of Kentucky, Georgia, Alabama, Louisiana cited in *Heller* which recognized the right to open carry. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Bonidy v. U.S. Postal Service,* 2013 U.S. Dist. LEXIS 95435 (Dist. Colo. 2013); *State v. Aguilar*, 2013 IL 112116 (Ill. 2013); *People v. Yanna*, 824 N.W.2d 241 (Mich. Ct. App. 2012); *Bliss v. Commonwealth, 2 Littell 90 (Ky. 1822); Nunn v. State*, 1 Ga. 243 (Ga. 1846); *State v. Reid*, 1 Ala. 612 (Ala. 1840)*; and State v.*

[15]Presumably the state has accepted the finding of the trial court that the law is valid as applied to Mr. Norman, and therefore assumes that Mr. Norman is not making an as applied challenge. That finding however is one of the specific rulings that Mr. Norman is appealing and is a question for *de novo* review as a question of law, whether the statute was invalid as applied to Mr. Norman. Despite the trial court's ruling, Mr. Norman claims that the law is invalid both as applied and facially.

Chandler, 5 La. Ann. 489, 52 Am. Dec. 599 (First Dist. Ct. New Orleans, La.1850).

Vagueness

The State attempts to argue in keeping with the findings of the trial Court that Mr. Norman could not have had his gun concealed because it would have shown through the white t-shirt he was wearing. The law however, only requires that the gun be concealed from the ordinary sight of another. Sec. 790.001, Fla. Stat.

The State's contention that concealed is necessarily the opposite of open carry is belied by the State's position in numerous other cases and the findings of courts of this state, that a firearm may be concealed and in plain view at the same time. *Ensor v. State*, 403 So. 2d 349 (Fla. 1981)(overturned by legislative enactment); *Dorelus v. State*, 747 So.2d 368 (Fla. 1999); *Cope v. State*, 523 So.2d 1270 (Fla. 5th DCA 1988); and *Alexander v. State*, 450 So.2d 1212 (Fla. 4th DCA 1984). Moreover, the courts of this state have continually suggested that the Legislature amend or reconsider provisions of Chapter 790 to address the difference between concealed, open, and securely encased firearms. *Dorelus*, 747 So.2d 368 (Fla. 1999) and *State v. Hanigan*, 312 So.2d 785 (Fla. 2nd DCA 1975). The very fact that the State has repeatedly argued this position and the continued

requests for clarification by the courts, show conclusively that there is substantial ambiguity in the provisions of Chapter 790 regarding when a firearm is concealed, nor is there any clear indication of what constitutes a brief exposure. The lower court ruled that the statute was facially vague, just not as applied in this case. R. Vol. 4, Pg. 454.

Jury Instructions

It is usually true and supported by ample precedent that subsequent clauses are affirmative defenses rather than elements of the offense. The statutes at issue here are clearly distinguishable. While it might not be obvious on reading the State's brief, the State failed to consider, or to show the Court that there is much more to Sec. 790.25 Fla. Stat., than that portion cited by the State. Specifically, the Legislature's direction as to how Sec. 790.25 should be construed and applied, states that it should be liberally construed and supersede any conflicting law. Sec. 790.25(4), Fla. Stat.[16]

The Supreme Court of Florida in considering Sec. 790.25, has explicitly rejected a strict reading of the statute in a way that would fail to carry out the

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[16]The state's citing of precedent from the 3rd DCA in the *Mackey* case while ignoring this Court's ruling in *Regalado*, and failure to cite that *Mackey* itself was currently pending review by the Supreme Court of Florida fails to uphold the high standards of the Florida Bar that should be expected of attorneys for the State.

express intent and construction called for by the statute stating, "[t]he Legislature could not have intended a result so inconsistent with its Declaration of Policy in Section 790.25(1), the Exceptions to said Section in Section 790.25(3)(n), and the Construction in Section 790.25(4)." *Peoples v. State*, 287 So. 2d 63, 67 (Fla. 1973). The Court held that "subsection (3)(n) of Section 790.25 specifically exempt[ted]", Mr. Peoples. The court refused to interpret the language of Sec. 790.25 in a way that would ignore the express intent of the Legislature. *Id.*

While the usual construction urged by the State might hold true in interpreting almost any other statute, no other statute in Florida law expresses such a broad and explicit statement of its supremacy and method of construction.

In effect the State's argument is that because Sec. 790.25, which pre-exists the crime charged by over 20 years, appears later in the chapter, it is an affirmative defense to the crime charged. The State makes this claim, and ignores that the statute itself expresses that it controls over any conflicting statute.

The Court should apply the rationale of the Florida Supreme Court in *Peoples*, and find that Sec. 790.25 supercedes over any conflicting statute and is an element of the crime charged here not merely an affirmative defense. This is especially true in light of the State's contention that Sec. 790.25 is in fact the protection of the right to bear arms in Florida.

The Stop

The recent Florida Supreme Court decision in *Mackey,* shows that regardless of this Court's ruling on the certified questions, the stop of Mr. Norman as shown on the video was not a valid stop. *Mackey v. State*, 2013 Fla. LEXIS 2289 (Fla. 2013); *Terry v. Ohio*, 392 U.S. 1 (1968); *Regalado v. State*, 25 So. 3d 600 (Fla. 4th DCA 2009). Mr. Norman was stopped for no reason other than possession of a firearm, a result not allowed under the court's analysis in *Mackey*. As in *Regalado*, Mr. Norman was stopped at gun-point, with no attempt to determine whether his possession and carrying of the firearm was lawful or not prior to his arrest, and without any reasonable suspicion that he was engaged in criminal activity. *Mackey*, 2013 Fla. LEXIS 2289 (Fla. 2013).

Conclusion

This Court should declare that the open carry ban of Sec. 790.053, Fla Stat., violates the fundamental right of Floridians to bear arms for protection against the criminal class. Mr. Norman asks this Court to declare Sec. 790.053, Fla. Stat. unconstitutional. This Court should furthermore deny any request for a stay of its decision, and immediately require the State of Florida to respect this most fundamental of human rights without further delay.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served via e-service this _28th_ day of October 2013 on the following:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the requirements set forth in Rule 9.210, Fla. R. App. P., by using Times New Roman 14-point font.

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