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 INITIAL BRIEF ON THE MERITS

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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, in St. Lucie County Florida, before the Honorable Clifford Barnes, County Court Judge. 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's verdict, the trial judge heard argument on the various motions to dismiss. The trial judge denied all of the Defendant's motions to dismiss, and certified three questions of great public importance to this Court. (Vol. I, R. 116-117) The Defendant took this appeal.

STATEMENT OF FACTS

This case began on February 19, 2012. Dale Norman a twenty-four year old young man with no criminal record who had been issued his concealed carry permit just days before, 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 rear 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. For some reason, instead of treating Mr. Norman as a generally law abiding gun owner who had allegedly committed a non-violent second degree misdemeanor and who was posing no threat to the community, 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)

A 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).

After the jury returned a guilty verdict, the parties presented additional argument on the motions to dismiss at a separate hearing. The judge denied all of the motions. (Vol. I, R. 116-117)

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 or time for deliberations. It was passed in the wake of sweeping reforms to Florida firearms law, and in response to manufactured hysteria, that the unlicensed carry of firearms into so-called sensitive places would cause untold harms.

While the rights of Floridians to keep and bear arms has long been recognized, so have attempts to prevent certain classes from being armed. These regulations were well recognized as applying only to certain races. These 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.

The Appellant raises three main arguments on appeal in answering the questions certified by the trial court. First, that Florida's open carry ban is

unconstitutional, because as a fundamental right, it may only be infringed by satisfaction of strict scrutiny of a compelling governmental interest and a narrowly tailored method of achieving that interest. Furthermore, the suspect history of Florida's licensing of the right to carry makes any regulation of the right especially suspect. The statute at issue is also overbroad, 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. The statute at issue also violates the equal protection clause, because it treats identically situated persons in the same time and at the same place differently, depending solely on where they are spending the night, what activity they intend to do at their destination, or their respective destinations, even if the destinations are the same place or next door to one another.

Second, 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.

Third, the Legislature's attempt to allow for brief displays of firearms infects the open carry ban by rendering Sec. 790.053 so vague and incapable of clear interpretation as to make the statute unconstitutional. The very fact that the Legislature amended the statute to allow for brief exposures, shows that lawfully possessed, visible firearms are no threat to anyone but criminals.

ARGUMENT

I. IS FLORIDA'S STATUTORY SCHEME RELATED TO THE OPEN CARRY OF FIREARMS CONSTITUTIONAL?

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).

A. The ability to own and to bear firearms are enumerated rights under the United States Constitution and the Florida Constitution, and are rights bestowed on the people of Florida by their creator.

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 merely a right granted by the Constitution, but is an endowed right pre-dating its enumeration. Preamble, Fla. Const. and *Dist. Of Columbia v. Heller*, 554 U.S. 570, 592 (2008). 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] The Seventh Circuit recently considered this issue and Judge Posner eloquently explained why a ban on carry outside the home was constitutionally impermissible. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). The Michigan Court of Appeals has also ruled, regarding stun guns, that the bearing of arms openly is constitutionally protected by the Second Amendment. *People v. Yanna*, 824 N.W.2d 241 (Mich. Ct. App. 2012). While in *Moore*, there was a total ban on all carry outside the home, it is small comfort that in Florida carry outside the home is generally only available as a privilege. *Crane v. Dept. of State, Div of*

[1] The 1838 Florida Constitution and the 1861 Ordinance of Secession both provided "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 1868 Florida constitution provided that "The people shall have the right to bear arms in defense of themselves and of the lawful authority of the State." Fla. Const. 1868, Declaration of Rights, Sec. 22. The closest analog to the current right to bear arms, appeared in the 1885 Florida Constitution providing that "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.

Licensing, 547 So.2d 266 (Fla. 3d DCA 1989). A privilege which may be taken away on legislative whim, is no right. *State v. Reid*, 1 Ala. 612 (1840).

1. Florida's limitation on the exercise of the right to bear arms to the exercise of a privilege is unconstitutional.

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). The Third District Court of Appeals 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 court was correct in holding that a CWFL is a privilege and not a right, the bearing of a firearm is a **right**.

A privilege is not a right. The privilege of concealed carry is distinguishable from the constitutionally enumerated rights to 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 U.S. Supreme Court has held that the right to keep and bear arms is a fundamental right

and that the Second Amendment applies to the states through the Fourteenth Amendment. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035, 3042 (2010). Article 1, Section 8, 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).

2. Article I, Section 8 of the Florida Constitution is written more broadly than the Second Amendment.

The Second Amendment states: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." Second Amendment, U.S. Const. This enumerated right has been interpreted by the Supreme Court of the United States as the fundamental individual right to keep and bear arms for the purpose of self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 602 (2008). 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, § 8(a). This enumerated right of the people to keep and bear arms is only subject to regulation of bearing arms; it does not permit the infringement of the right to bear arms by a total ban on the right. *District of Columbia v. Heller*, 554 U.S. at 647. The Supreme Court in *Heller* in analyzing the Second Amendment of the United States Constitution held that the District's total ban of a class of arms in common use for lawful purposes would not pass constitutional muster. *Id.*

The right of the people to bear firearms is broader in the State of Florida than the Supreme Court's holding in *Heller*, because Article 1, Section 8 of the constitution of the State of Florida is written more broadly than the Second Amendment. The basis for Art. I Sec. 8 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. The purposes for which arms are necessary are clearly stated within its language. The opinions in *Heller* and *McDonald* are the floor of application of gun rights to the citizens of Florida, not the ceiling.

B. Sec. 790.053 prohibiting the open carry of firearms violates both the Second Amendment to the United States

Constitution and Art. I, Sec. 8, Declaration of Rights of the Florida Constitution.

Sec. 790.053, Fla. Stat., completely bans the carrying of long guns anywhere in the state of Florida, thereby burdening an entire class of arms. It further severely restricts the carrying of handguns by limiting their possession to the exercise of a mere privilege. This ban ignores substantial Florida precedent as well as holdings of the US Supreme Court.

1. The legislative history of Florida Statute Section 790.053

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.: 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.
>
> The Legislature by which this act was passed evidently attached to it more than usual importance, regarding the enforcement of its provisions as necessary for the protection of human life, and for the preservation of the peace and good order of the State. And to secure this desired end they made it the "duty of the Judges of the Circuit Courts in this State, to give the matter contained in this act in special charge to the Grand Juries in the several counties in this State, at every session of the court." Thomp. Dig., 498.

> The statute was not intended to infringe upon the rights of any citizen to bear arms for the "common defense." 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. When no such evil intentions possess the mind, men in vexed assemblies or public meetings, conscious of their advantage in possessing a secret and deadly weapon, often become insulting and overbearing in their intercourse, provoking a retort or an assault, which may be considered as an excuse for using the weapon, and a deadly encounter results, which might be avoided where the parties stand on a perfect equality, and where no undue advantage is taken.

Sutton v. State, 12 Fla. 135, 136 (Fla. 1868). At that time there was no requirement for a license or any other restriction on the right to open carry a firearm. What these cases show, is that historically the State of Florida has recognized this fundamental right and allowed the unconcealed carry of firearms. The statute has been changed since the Supreme Court decided the *Sutton* case but the logic of that case still holds true. *State v. Sellers*, 281 So.2d 397 (Fla. 2d DCA 1973). At that time the statute even contained a proviso that this law shall not be so construed as to prevent any person from carrying arms openly outside of all their (sic) clothes. *State v. Sellers*, 281 So.2d 397 (Fla. 2d DCA 1973). The right however, has 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 both nationally and in Florida is suspect and based on racial prejudices, and "Jim Crow" laws. Even the infamous *Dred Scott* decision warned that to allow freed blacks the rights of citizenship in other states, would necessarily allow freed black men to go about bearing arms wherever they pleased, as well as assembling, speaking and holding public meetings on political affairs. *Dred Scott v. Sandford*, 60 U.S. 393, 417 (1857). Initially the state only restricted the right or required a license to restrict the rights of minorities or other unfavorable people to carry firearms. This was illustrated by the Florida Supreme Court's decision in *Watson v. Stone*, 4 So. 2d 700 (Fla. 1941). There the Court held that:

> The business men, tourists, commercial travelers, professional man on night calls, unprotected women and children in cars on the highways day and night, State and County officials, and all law-abiding citizens fully appreciate the sense of security afforded by the knowledge of the existence of a pistol in the pocket of an automobile in which they are traveling. It cannot be said that it is placed in the car or automobile for unlawful purposes, but on the other hand it was placed therein exclusively for defensive or protective purposes. These people, in the opinion of the writer, should not be branded as criminals in their effort of self preservation and protection, but should be recognized and accorded the full rights of free and independent American citizens.

Watson v. Stone, 4 So. 2d at 702-703.

The concurring opinion went on to point out the real root of Florida's gun control laws and recognized that 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 original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps 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, in the early days of the civil rights movement, in *Davis v. State*, 146 So. 2d 892 (Fla. 1962). *Davis* involved a

challenge to a then existing version of the 1893 Act which required the defendants in that case to have a county issued license in order to carry, in that case openly, a pistol or a Winchester repeater. *Id.* The *Davis* court stated in its opinion:

> We do not sense the responsibility of holding the prime Act invalid because it does not specify guns of other descriptions. We do not explore the reason the legislature concentrated on pistols and repeating rifles. We are concerned with whether or not the legislature went too far, not with whether or not that body did not go far enough. The wisdom of the law is a matter of legislative not judicial concern.

Davis v. State, 146 So. 2d at 894. In so stating the *Davis* court held that it was only because a limited class of arms required a permit that the statute was valid. A ban on the carrying of any arms however, would not have been valid based on the reasoning in *Davis*. Furthermore, the *Heller* court ruled that singling out handguns for additional prohibitions is unconstitutional, because they are in common use, and in many cases the preferred method of home defense. *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). However, by 1981 the climate had changed. Despite the obvious problems with the vagueness of Sec. 790.01, specifically regarding whether a firearm was

concealed or not, 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:

> The majority opinion tries earnestly to define a vague statute and explains how several appellate courts have disagreed in construing the statute in almost identical circumstances. 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.
>
> Ambiguities in criminal laws must be construed against the state. Since Florida appellate courts would likely disagree on whether the petitioner's possession of the derringer under his car seat was a violation of law I would reverse the district court and direct it to affirm the trial court's dismissal of the criminal charge.

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, only concealed carry.

In 1987, during the regular session, the Legislature passed two laws fundamentally changing the landscape of Florida firearms law. The first, the "Jack Hagler Self Defense Act", Sec. 790.06, Fla. Stat., created a statewide system of concealed carry permits, and removed all local discretion regarding the concealed carry of firearms by persons licensed under the statute, and created a shall issue permit that required issuance of a Concealed Weapon Firearms License, as long as the individual met certain *objective* criteria. The second, the "Joe Carlucci Uniform Firearms Act", Sec. 790.33, Fla. Stat., expressly preempted all local ordinances or rules and eliminated any discretion regarding the regulation of firearms by any entity other than the Legislature.

After the 1987 regular session, a special legislative session was called on other matters. Claims by State Attorney Janet Reno, among others, that the passage of sections 790.06 and 790.33, Fla. Stat., created a loophole that would allow for the open carrying of weapons anywhere, without restrictions, convinced the Legislature to pass section 790.053 as part of the special session. Interestingly, there is almost no 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. 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 widely recognized legislative 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.

2. Judicial analysis of Section 790.53, Fla. Stat., should employ strict scrutiny when analyzing the infringement of the enumerated, fundamental, right to bear arms.

The rights to own and bear arms are enumerated rights under both the United States Constitution and the Florida Constitution and have been held as fundamental rights by the Supreme Court of the United States. U.S. Const. Amend. II; Fla. Const. Art. 1 § 8(a); *District of Columbia v. Heller*, 554 U.S. at 602; *McDonald v. City of Chicago*, 130 S. Ct. at 3042. A law that burdens the exercise of a fundamental constitutional right is subject to strict scrutiny. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *United States v. Hancock*, 231 F.3d 557, 565 (9th Cir. 2000), *Fla. Retail Fed'n v. Att'y Gen. of Fla.*, 576 F. Supp. 2d 1281, 1288 (N.D. Fla. 2008); *Hillsborough County Gov't. Employees Ass'n v. Hillsborough County Aviation Auth.,* 522 So.2d 358 (Fla.

1988).[2] Strict scrutiny is a two prong test looking at first what the compelling governmental interest is; and second, that the law in question has been narrowly tailored to achieve the compelling governmental interest. *Fla. Retail Fed'n,* (quoting *Williams v. Pryor*, 240 F.3d 944, 947-48 (11th Cir. 2001).

The Florida Supreme Court has established 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). 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).

The State Attorney in this case made the most honest argument in explaining and justifying this statute, "some people might be, uh, might be a little

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[2]While the federal courts continue to struggle with the appropriate level of scrutiny and the Supreme Court has yet to provide a definitive answer, Florida courts have made no distinction between the fundamental rights in the Declaration of Rights. See generally, *Hillsborough County Gov't. Employees Ass'n v. Hillsborough County Aviation Auth.,* 522 so.2d 358 (Fla. 1988).

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 clearly shows that those who lawfully carry concealed are generally among the most law abiding and responsible demographics for which there are statistics. *Fla. Dep’t of Agriculture and Consumer Servs., Div. Of Licensing, Concealed Weapon or Firearm License, Summary Report*, available at http://licgweb.doacs.state.fl.us/stats/cw_monthly.pdf. Of the over 2.4 million Concealed Carry Licenses that Florida has issued since the statewide program’s inception in 1987, only 168 have been revoked for the subsequent commission of a crime involving a firearm. *Id.* 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.

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

As the Supreme Court made clear in *Heller* and *McDonald*, the carrying of concealed firearms has long been recognized as being outside the protection of the Second Amendment. Every court that has considered the issue since these cases

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).

Florida courts 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) 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.

i. *Moore v. Madigan*

The Seventh Circuit most recently reviewed two combined cases challenging the constitutionality of an Illinois law that banned the carrying of loaded and immediately accessible guns. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). Judge Posner, delivered the majority opinion, and explained that the United State's Supreme Court's opinions in *Heller* and *McDonald*, establishes the prevailing historical analysis that "the *Second Amendment* protects the right to keep and bear arms for the purpose of self-defense." *Moore v. Madigan,* 702 F.3d 933, 935 (7th Cir. 2012)(quoting *McDonald v. City of Chicago*, 130 S. Ct. at 3026 citing to *District of Columbia v. Heller*, 554 U.S. at 593-94). The court stated "[c]onfrontations are not limited to the home" and is a logical step after *Heller* because *"Heller* repeatedly invokes a broader *Second Amendment* right than the right to have a gun in one's home, as when it says that the amendment 'guarantee[s] the individual right to possess and carry weapons in case of confrontation.'" *Moore v. Madigan*, 702 F.3d at 935-36(citing *Heller*, 554 U.S. at 592).

The statute in *Moore* prevented individual self-defense anywhere except for inside one's own home and was explained to be "so substantial a curtailment of the right of armed self-defense [and] requires a greater showing of justification

than merely that the public might benefit. . . ." *Id.* at 940. "To confine the right to be armed to the home is to divorce the *Second Amendment* from the right of self-defense described in *Heller* and *McDonald*." *Moore v. Madigan*, 702 F.3d at 937. Judge Posner illustratively explained:

> A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress. But Illinois wants to deny the former claim, while compelled by McDonald to honor the latter. That creates an arbitrary difference.

Moore v. Madigan, 702 F.3d at 937.

Moore discussed and analyzed the recent Second Circuit decision in *Kachalsky*, which upholds a state statute of New York that requires a concealed carry permit applicant to demonstrate "proper cause" to obtain such a license. *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012) (discussing *Kachalsky v. County of Westchester*, 701 F.3d 81,87 (2d Cir. 2012). Judge Posner rejected the reasoning in *Kachalsky* because of the Second Circuit's implication "that the *Second Amendment* should have much greater scope inside the home than outside simply because other provisions of the Constitution have been held to make that distinction." *Id.* An example given in *Kachalsky* was to emphasize the United

States Supreme Court's decision "in *Lawrence v. Texas*, [ ] that the state's efforts to regulate private sexual conduct between consenting adults is especially suspect when it intrudes into the home." *Id.* at 941 (quoting *Kachalsky*, 701 F.3d at 94). Judge Posner distinguished this argument and stated, "[w]ell of course–the interest in having sex inside one's home is much greater than the interest in having sex on the sidewalk in front of one's home. But the interest in self-protection is as great outside as inside the home." *Id.* at 941.

ii. *Kachalsky v. County of Westchester*.

Kachalsky is distinguishable from the instant case, as well as being poorly reasoned and relying on facts that are not only not present in Florida, but have been directly contradicted by the findings of the Florida Legislature.[3] Sec. 790.25(1) and (4), Fla. Stat. and *Moore v. Thompson*, 126 So.2d 543 (Fla. 1961)(stating that the general rule is that findings of fact made by the Legislature are presumptively correct). The *Kachalsky* court also chose to ignore the Supreme Court's decisions in *Heller* and *McDonald* regarding the historical analysis of the

[3]The Attorney General of Florida disagreed with the *Kachalsky* court, and signed a brief to the U.S. Supreme Court, in support of Kachalsky's Petition for Certiorari, Brief of the Commonwealth of Virginia, et. al (including Florida), as amicus curie in support of certiorari.

Second Amendment and well as the Court's clear language that the rights to keep and *bear* arms are both fundamental individual rights.

First, the *Kachalsky* court relied on the historical regulation of gun powder and the regulation of concealed firearms predating the Constitution. *Kachalsky* at 84; *But See*, *Moore* at 941(criticizing the *Kachalsky* opinion for equating self defense outside the home with sex on a sidewalk, and ignoring the settled historical analysis by the US Supreme Court). The court chose to ignore that the Supreme Court had considered these same factors in its analysis in *Heller* and came to the opposite conclusion. *Heller* at 631. Second, the *Kachalsky* court quoted a 1913 New York state case stated that hand guns were the favored weapon of the "turbulent criminal class", and ignored the Supreme Court's finding that handguns were widely used by citizens for lawful self defense and could not be banned based on their use by criminals. *Heller* at 628.

Third, the court relied on findings and reports which are directly contradicted by the Florida Legislature's finding of fact, intent, and purpose that the lawful use of firearms is laudable. Sec. 790.25(1) and (4), Fla. Stat. This Court should not substitute the judgement of the 1913 New York legislature for the repeatedly recognized rights of Floridians, nor make the exercise of a right dependent on how it is abused. *Heller* at 636. Fourth, the court ignored the

precedent in *Heller* and *McDonald* that the Second Amendment could not be singled out for unfavorable treatment. *McDonald* at 3024. The court chose to rely on a 1997 law review article rather than the language of two landmark Supreme Court decisions. Fifth, the court attempted to justify overbroad regulation of the Second Amendment with an appeal to tradition, ignoring the fact that its own decision recognized that New York's historic regulation of firearms had been based on the faulty premise that the Second Amendment did not apply to the states. *Kachalsky* at 85 and 100.

It is also notable that 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 noted, licensing officials are given a lot of discretion, read, "we can keep guns from the undesirables that we do not trust, just as we used to limit the right to vote."

The most telling fact regarding the permits at issue in *Kachalsky* is who does get them. As with Florida's history of gun regulation, the law at issue in *Kachalsky* only applies to the commoners. Robert DeNiro, City Council members, Harvey Keitel, Donald Trump, the chairman of the Nassau County Republican party, and Howard Stern, are 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. Mr. Kachalsky and a Coast Guardsman were not, because they could not show a good enough reason to satisfy a bureaucrat with unfettered discretion.

4. 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.

Regulations that limit a constitutional right 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. *Crane v. Dep't of State, Div. Of Licensing*, 547 So. 2d 266 (Fla. 3d DCA 1989)(holding that a license holder has no property right in the issuance of a CWFL).. The allowance of a privilege by the legislature is no substitute for a fundamental right, which according to *Heller*, was a recognized right pre-dating the U.S. Constitution. *Heller* at 592. The current ban on open carry prevents the bearing of an entire class of arms, all long guns and shotguns. Pursuant to *Davis*, such a broad ban must necessarily fail. 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* 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* 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*, 128 S. Ct. at 2809 (quoting *Nunn*, 1 Ga. at 251). The *Heller* 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's* dicta also cited with approval to *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. *Heller*, 128 S. Ct. at 2809 (citing Chandler, 5 La. Ann. at 490); *See also*, *State v. Reid*, 1 Ala. 612 (1840).

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 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 though 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*, Brief of the Commonwealth of Virginia, et. al (including Florida), as amicus curie in support of certiorari.

The state cannot ban open carry. It is the core of the right to bear arms. When every court to consider the issue has ruled that concealed carry is a privilege, and if you accept that there is a right to bear arms as the plain language states, there is only one manner in which firearms can be borne in the exercise of the right–openly.

C. 790.053 is over broad and should be found to be unconstitutional.

The statute in question provides for criminal punishment of a second degree misdemeanor, if an individual openly carries a firearm, by failing to conceal it from the ordinary sight of another person. Sec. 790.001(2) and Sec. 790.053, Fla. Stat. A person licensed under Sec. 790.06 is not in violation of this section if they "briefly and openly display[s] the firearm to the ordinary sight of another person . .. ." Fla. Stat. Fla. Stat. § 790.053.

Despite the present open carry ban, historically, the Florida Legislature and Florida Supreme Court have long recognized the preexisting right to own and bear arms. The legislature expressly requires that its enactments shall not be construed to "*impair or diminish such rights*."See:

> (4) 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.
> Sec. 790.25, Fla. Stat.
>
> (15) The Legislature finds as a matter of policy and fact . . . This section shall be liberally construed to carry out the constitutional right to bear arms for self-defense. This section is supplemental and additional to existing rights to bear arms, and nothing in this section shall impair or diminish such rights.
> Sec. 790.06, Fla. Stat.

The Florida Supreme Court 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. In other words it is not a question of the Legislature deciding whether or not open carry is allowed, but deciding that firearms must be holstered, not stuck in a waistband, or placing limited restrictions on the bearing of arms in "sensitive" places.

Florida's open carry ban, however, goes far beyond a regulation on the manner of bearing arms by to prevent bearing of weapons by unskilled, irresponsible, and lawless people; it completely bans the entire method of carry regardless of time, place, or circumstance except for some narrow exceptions. It was in no way calculated to prevent the *bearing of weapons by the unskilled, the irresponsible, and the lawless. Davis v. State*, 146 So. 2d at 893-94.

When legislation criminalizes constitutionally protected activities along with unprotected activities with broad and sweeping infringements on fundamental rights, it is overbroad and unconstitutional. *Firestone v. News-Press Publishing Co.*, 538 So.2d 457, 459 (Fla. 1989). A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so

borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional." *State v. Reid*, 1 Ala. 612 (1840).

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. It is therefore overbroad and unconstitutional in all of its possible applications. 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 cannot argue that Mr. Norman was unqualified to possess a firearm, or that he possessed it unlawfully. The state of Florida has already stated that he can carry it lawfully as long as it is concealed. 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 overbreadth.

A 2006 FBI study essentially concludes 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. Appellant makes no challenge through this action 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. Appellant does challenge the requirement that a firearm may only be carried concealed.

In analyzing what limits on ownership of machine guns are permissible, the Florida Supreme Court again held that the legislature may only limit possession and/or concealed carry of firearms not commonly used for lawful purposes such as self-defense. "We hold that the Legislature may prohibit the possession of weapons which are ordinarily used for criminal and improper purposes and which are not among those which are legitimate weapons of defense and protection and protected by Art. I., Section 8 of the Florida Declaration of Rights". *Rinzler v. Carson*, 262 So. 2d 661 (Fla. 1972). The Florida Supreme Court found that to withstand constitutional challenge, 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).

D. Sec. 790.053 Violates the Equal Protection Clause of the United States Constitution in that it treats similarly situated persons differently without any compelling governmental interest.

Under the current statutory scheme, two identically situated persons, who appear for all intents and purposes to be the same, are treated differently for no apparent or justifiable reason. Because this case involves the exercise of a fundamental right, judicial scrutiny must be "exacting." *Fla. Retail Fed. , Inc. v. Attorney General of Florida*, 576 F. Supp.2d. 1281(N.D. Fla. 2008).

Two people, each with a backpack, riding the same city bus or walking down the same city street, may or may not be able to open carry. If one of them is going to be camping, then it is perfectly lawful for him to open carry. If on the other hand the second person is merely going for a day hike on the same trail, he may not open carry. The same is true of someone traveling to a friend's house. If they are going there to shoot at the friend's private range, open carry is lawful without any license, but if they are just going to visit their friend, they must have a CWFL and conceal the firearm at all times. *See* Sec. 790.25, Fla. Stat. The absurd dichotomies are endless.

The Legislature offered no reasonable explanation for the distinction that could satisfy intermediate scrutiny, much less the strict scrutiny that must be

applied here. The only explanation offered was the one by the state attorney in this case, this is really just about making sure people are not uncomfortable. (Vol. IV, R. 373).

The real reason is that as set forth above, the Legislature never intended a permanent open carry ban, merely an emergency measure. After 25 years since the emergency passed however, the statute has not been corrected, and still not even a rational basis has been offered to distinguish why a person walking to the range can open carry, but a person walking down the same city street cannot if he is going to the attached gun store, but not to shoot.

E. The failure to provide for a *mens rea* requirement renders Sec. 790.053, Fla. Stat. Unconstitutional.

The legislature's ability to impose crimes without a *mens rea* requirement is not unfettered. The Legislature can be limited in three ways; (1) if the crime is *mala in se* rather than *malum prohibitum*, (2) if the statute imposes an affirmative duty to act, and (3) if the statute impinges or curtails a constitutional right, such as the first amendment right to free speech. *State v. Gruen*, 586 So.2d 1280 (Fla. 3rd DCA 1991).

The statute in the instant case touches on two of the limitations placed on the Legislature when attempting to enact laws that have no *mens rea* requirement,

Fla. Stat. 790.053 imposes an affirmative duty to act, ie. conceal the weapon at all times (other than briefly), despite the fact that historically the act of concealing the firearm was a crime. *See, Heller* at 626. It also curtails the Second Amendment right to bear arms. Because the statute imposes an affirmative duty to act and curtails the Second Amendment right to bear arms, the Legislature is not allowed by law, to proscribe conduct without requiring a *mens rea* element, thereby making open carry a strict liability crime. The failure to require a mental element to the crime of openly carrying a firearm, renders Sec. 790.053, Fla. Stat., defective and this Court should declare the statute invalid.

The only way this Court can continue to uphold Sec. 790.053, Fla. Stat., is to ignore what was conceded by the justices of the Florida Supreme Court in 1941, and is still the law today. The citizens of Florida have the right to bear arms for their defense. The Courts have recognized that concealed carry is only a privilege. There is no legitimate basis to uphold the 1987 statute prohibiting the only constitutionally protected form of carry, open carry, that had always been lawful in Florida until then and is today lawful in 44 states.

The prohibition on open carry violates the Florida and United States Constitution and should be stuck down.

II. DO THE EXCEPTIONS TO THE PROHIBITION AGAINST OPEN CARRY CONSTITUTE AFFIRMATIVE DEFENSES TO A PROSECUTION FOR A CHARGE OF OPEN CARRY OR DOES THE STATE NEED TO PROVE BEYOND A REASONABLE DOUBT THAT A PARTICULAR DEFENDANT IS NOT CONDUCTING HEM/ HERSELF IN THE MANNER ALLOWED?

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).

A. The non-applicability provisions of Sec. 790.25, Fla. Stat., constitutes an element of the crime of open carrying a firearm, not merely an affirmative defense.

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. Appellant has been unable to locate any other statute in Florida with 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 Appellant, 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.

The section then 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.

B. Interpreting the provisions of Sec. 790.25 as affirmative defenses to Sec. 790.053, rather than elements of the charge, would be unworkable, produce absurd results, and result in the arrest of perfectly law abiding citizens.

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.

The State argued below, and trial court agreed, that the provisions of Sec. 790.25 are merely affirmative defenses to a charge of violation of Sec. 790.053. 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.

The state offered no evidence that Mr. Norman was not engaged in any of the activities covered under Sec. 790.25. Given the exact situation in this case, if Mr. Norman was engaged in one of the protected activities, he was rushed by two officers from opposite directions who held him at gun point and forced him to the ground, all for engaging in a lawful activity. A person in Mr. Norman's position would then be subject to arrest, trial, attorneys fees, and would have to convince a jury that he was engaged in lawful activity. The arrest however, does not go away, nor does the stigma. There is also no hope of recovery for a wrongful arrest because the person's actions were merely affirmative defenses that they were obligated to prove, not an element restricting the power of the state.

No other constitutionally protected activity requires a Defendant to prove that they were lawfully engaged in the protected activity in order to avoid arrest. The State's argument is analogous to arresting a reporter, and requiring him to prove as an affirmative defense that he is a reporter and is entitled to first amendment protections, or requiring the citizen to prove that his pamphlet was about a politician and therefore protected.

III. DOES THE RECENT "BRIEF" AND OPEN DISPLAY EXCEPTION UNCONSTITUTIONALLY INFECT THE OPEN CARRY BAN BY ITS VAGUENESS

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).

A. Does a holstered weapon constitute a concealed firearm within the meaning of Sec. 790.053 and 790.001, Fla. Stats.

The law is well settled that a firearm which is partially visible may still be "concealed" for purposes of the crime of carrying a concealed firearm. *See* §790.001 Fla. Stat. (2010) (defining "concealed firearm" as "any firearm ... which is carried on or about a person in such a manner as to conceal the firearm from the ordinary sight of another person."); *Ensor v. State,* 403 So.2d 349, 354 (Fla.1981) (holding that "absolute invisibility is not a necessary element to a finding of concealment under section 790.001"); *see also Mackey v. State*, 83 So.3d 942, Fla.3DCA (2012).

While this may seem an absurd argument as to whether a visible holstered weapon is concealed or openly carried, the case history of this issue shows the

confusion. Courts have had to divine how much of the firearms needed to be visible to make it an openly carried weapon rather than a concealed weapon. *See, 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); and *Mackey v. State*, 83 So.3d 942, Fla.3DCA (2012).

The state has even argued that the *concealed* firearm should not be suppressed because at least a portion of the firearms was in *plain view*. *Id.* The problem is further illustrated by the existence of holsters and fanny packs which are clearly made for a firearm, but completely conceal the entire firearm. Any statute which allows the state to claim illegal concealment at the same time it argues for plain view doctrine must be vague.

In *Mackey*, the trial court ruled, and the appellate court affirmed, that a "piece of the handle sticking out" of a waistband still constituted a concealed weapon. Id. at 943. All that could stick out of a holster is, at most, the handle.

In this case the Defendant's gun was in a holster and only the handle was sticking out, so at least according to *Mackey* the firearm was concealed. If the weapon was

concealed, as ruled in *Mackey*, then the Defendant, cannot be convicted on Open Carry, as he was carrying a concealed firearm and has a lawful license for concealed carry.

B. Sec. 790.053 is unconstitutionally vague as to what constitutes an openly carried firearm or a "brief" open display.

Fla. Stat. 790.053 states that a person can open carry, so long as they have a carry concealed permit, they do so in a non-threatening manner, and they do so briefly. The prevailing case law defines briefly as anywhere from 15-40 minutes. (*See Hamilton v. State*, 597 So.2d 417 (Fla. 2d DCA 1992), *Powell v. State*, 593 So.2d 1110 (Fla. 1st DCA 1992), *Hayes v. Florida,* 470 U.S. (1985), and *State v. Bankston*, 435 So.2d 269 (Fla. 3d DCA 1983).

In this case, assuming that a holstered firearm the handle of which is visible constitutes an openly carried firearm in violation of Sec. 790.053, it is a factual question as to whether it was carried in such a manner for a "brief" period of time, and if so, was it carried in an otherwise concealed manner. The wording of the statute is so vague as to require a finding that it does not give sufficient notice as to the crime.

At trial the jury found that Defendant never had the firearm concealed, but there was no evidence from which the jury could make such a finding, nor does the

statutes state how long ago the firearm was required to be concealed to constitute that it was carried in an otherwise concealed manner. As an example, would a person who had their firearm previously concealed by a jacket, but who stepped from their vehicle and walked into a store before realizing they had forgotten their jacket, be carrying in an otherwise concealed manner or be guilty. Clearly when they exited the vehicle they were not carrying in an otherwise concealed manner, but at their last stop with the jacket on, they were carrying in an otherwise concealed manner.

Upholding Mr. Norman's conviction will continue to lead to such absurd results due to the mere failure to remember a covering garment when exiting a vehicle. While this Court may find that the Legislature has an interest in requiring firearms to be concealed, imposing jail time because one forgot a jacket is an absurd result.

When a statute is as vague as this one, the only remedy is to strike the statute. While the state may ask the Court to reform the statute, such a result has previously been rejected in regard to other firearms laws. *Fla. Retail Fed., Inc. V. Attorney General of Florida*, 576 F. Supp.2d 1281 (N.D. Fla. 2008).

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 by law enforcement 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. The current ban on open carry is unconstitutional. It cannot satisfy any level of scrutiny and should be struck down.

Alternatively, if the open carry ban is not unconstitutional, this Court should hold that the provisions of Sec. 790.25 operate not as affirmative defenses but rather as elements that the state must prove in order to arrest and obtain a conviction of a person with a visible firearm.

Appellant, Dale Norman respectfully requests this Court declare Sec. 790.053 unconstitutional and overturn the conviction below. Alternatively, he requests this court rule 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 _22ndth_ day of April 2013 on the following:

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