IN THE COUNTY COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST LUCIE COUNTY, FLORIDA

STATE OF FLORIDA
Plaintiff,

vs. **Case No. 562012MM000530**
Judge: Clifford H. Barnes

DALE NORMAN
Defendant.

SECOND DEFENSE MOTION TO DISMISS
AND TO DECLARE FLORIDA STATUTE 790.053 UNCONSTITUTIONAL

COMES NOW the Defendant, DALE NORMAN, by and through undersigned counsel, and pursuant to Florida Rules of Criminal Procedure and the Florida Constitution, respectfully moves this Honorable Court to dismiss Count one (1) of the Information, charging the Defendant, DALE NORMAN, with Open Carry of a Weapon, a violation of Fla. Stat. 790.053, and as grounds therefore, the Defense would show as follows:

1. On February 19, 2012, the Defendant, DALE NORMAN, was arrested by the Fort Pierce Police Department for a violation of *Fla. Stat. 790.053*, Open Carry of a Weapon.

2. That Dale Norman has a carry concealed weapons permit.

3. That subsequent to the Defendant's arrest, the Office of the State Attorney filed a one count Information charging the Defendant, DALE NORMAN, with that offense in violation of *Fla. Stat. 790.053*.

4. That pursuant to the United States Constitution, the right to bear arms is a constitutionally protected right.

5. The Defendant, DALE NORMAN, respectfully moves this Honorable Court pursuant to *Fla. R. Crim. Proc. 3.190*, and the Second Amendment to the United States Constitution, to dismiss the instant information asserting that the instant Statute, *Fla. Stat. 790.053*, violates the Second Amendment.

6. That as a result, the Defendant, DALE NORMAN, moves this Honorable Court for an Order dismissing Count one (1) of the instant information declaring *Fla. Stat. 790.053* unconstitutional for any and/or all of the reasons asserted herein.

7. That all other grounds shall be argued *ore tenus.*

MEMORANDUM OF LAW

Both the Florida Constitution and the Constitution of the United States protect the right to keep and bear arms. It is now clearly established that the Second Amendment protects a fundamental individual right to keep and bear arms. *District of Columbia v. Heller*, U.S., 554 U.S. 570 (2008). The Florida Constitution contains this protection in Article I Sec. 8, and the U.S. Constitution contains the protection in the Second Amendment, which has been held to be applicable to the States through the 14th Amendment. *McDonald v. City of Chicago, Ill.*, 561 U.S. 3025 (2010). While the Supreme Court has not had an opportunity to consider the boundaries of this right it is clear that the right to keep arms in the home may not be prohibited, and there is nothing to indicate that the Supreme Court questions the right to bear arms either in or out of the home subject to reasonable restrictions, such as sensitive places, or concealed carry without a license.

In the *Heller* case the Court stated:

"At the time of the founding, as now, to "bear" meant to "carry." See *Johnson* 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 *Oxford English Dictionary* 20 (2d ed.1989) (hereinafter Oxford). When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose - confrontation. In *Muscarello v. United States*, 524 U.S. 125, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998), in the course of analyzing the meaning of "carries a firearm" in a federal criminal statute, Justice GINSBURG wrote that "[s]urely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: `wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'" Id., at 143, 118 S.Ct. 1911 (dissenting opinion) (quoting *Black's Law Dictionary* 214 (6th ed.1998)). We think that Justice GINSBURG accurately captured the natural meaning of "bear arms." Although the phrase implies that the carrying of the weapon is for the purpose of "offensive or defensive action," it in no way connotes participation in a structured military organization." *District of Columbia v. Heller*, U.S., 554 U.S. 570 (2008),

It is well established that the holdings of the Supreme Court decision reach "not only the result but also those portions of the opinion necessary to that result." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). Thus, a statement that "explains the court's rationale . . . is part of the holding." *United States v. Bloom*, 149 F.3d 649, 653 (7th Cir. 1998). The operative consideration is whether the statement "could have been deleted without seriously impairing the

analytical foundations of the holding." *Sarnoff v. Am. Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986). The Court's conclusion that the right to "bear Arms" is the right to Acarry weapons in case of confrontation" was essential to its resolution of *Heller*; and accordingly, it is part of *Heller's* holding.

At the core of the Second Amendment is the right to self-defense. *Heller* recognized that: "self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is Athe central component" of the Second Amendment right." *McDonald v. City of Chicago, Ill*., 561 U.S. 3025 (2010). A law that burdens the exercise of a fundamental 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). On June 28, 2010, the Supreme Court held that the right to bear arms in self-defense is a fundamental right. *McDonald v. City of Chicago, Ill.*, 561 U.S. 3025 (2010). However, "the right to keep and bear arms is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *McDonald v. City of Chicago, Ill.*, 561 U.S. 3025 (2010). The purpose of the fundamental right as announced by the Supreme Court relates to the right to keep and bear arms for self defense. "The right to keep and bear Arms is a fundamental right and the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller." McDonald v. City of Chicago, Ill.*, 561 U.S. 3025 (2010).

Where fundamental rights are concerned, the United States Supreme Court has "consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

While the issue of the right to open carry firearms was not before the Supreme Court in *Heller*, the Court spent considerable time considering the history of open carry in the United States in its attempt to determine the nature and extent of the right and what exactly was protected. The Court discussed that bans on handguns were analogous to bans on openly carrying unconcealed handguns in public. The Court made it clear that bans on open carry are severe restrictions that were rightfully struck down in multiple state Supreme Courts. *District of Columbia v. Heller*, U.S., 554 U.S. 570 (2008).

The Court went so far as to state:

> "Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. And some of those few have been struck down. In *Nunn v. State*, the Georgia Supreme Court struck down a prohibition on carrying pistols openly (even though it upheld a prohibition on carrying concealed weapons). See 1 Ga., at 251. In *Andrews v. State*, the Tennessee Supreme Court likewise held that a statute that forbade openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances," 50 Tenn., at 187,violated the state constitutional provision (which the court equated with the Second Amendment). That was so even though the statute did not restrict the carrying of long guns. See also *State v. Reid*, 1 Ala. 612, 616-617 (1840) ("A statute which, under the pretence 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 defence, would be clearly unconstitutional").
> It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." *District of Columbia v. Heller*, U.S., 554 U.S. 570 (2008).

Although the *Heller* Court indicated that restrictive regulations on concealed carry are presumably constitutional, bans on carrying unconcealed arms certainly do not have the same presumption considering the wide ranging cases holding that carry of unconcealed firearms is constitutionally protected.

> "Like most rights, the right secured by the Second Amendment is not unlimited. ... For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. See, e.g., *State v. Chandler*, 5 La. Ann., at 489-490; *Nunn v. State*, 1 Ga., at 251; see generally 2 Kent *340, n. 2; The American Students' Blackstone 84, n. 11 (G. Chase ed. 1884)." *District of Columbia v. Heller*, U.S., 554 U.S. 570, (2008).

As early as 1850 the Louisiana Supreme Court held that citizens did have a right to carry arms openly: "This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations." *Heller*, at 2809, citing, *State v. Chandler*, 5 La. Ann. 489, 490 (1850).

It is clear from prior rulings is that the states may regulate the bearing of concealed weapons. Courts have previously held that "the right of the people to keep and

bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons". *Robertson v. Baldwin*, 165 US 275 (1897) at 282. However, if this is true, and a prohibition on concealed carry is at the whim of the legislature, then how else may a person bear arms if the legislature chooses to prohibit the carrying of concealed arms, or make it financially unattainable for a segment of society?

While Florida has allowed concealed carry, upon the payment of significant fees, fingerprinting and training requirements, it has taken the unique step of almost completely prohibiting the open carry of firearms outside the home. It is generally unlawful to carry an unconcealed firearm in Florida regardless of time and/or place. With limited exceptions such as carry in the home or work and during some outdoor activities limited to hunting, fishing, camping, and target shooting, or going to or from these activities, the Florida Legislature has prohibited open carrying of firearms outside the home or business since 1987. To carry an unconcealed firearm, for any purpose outside of the narrow exemptions in Sec. 790.25(3), Fla. Stat. would be a violation of Sec. 790.053, Fla. Stat.. (Open Carry Ban).

The legislature has attempted to skirt this fact through a prohibitive scheme of privileges that cannot substitute for the right to bear arms. In fact courts have clearly acknowledged that the carrying of a concealed firearm in Florida is a privilege not a right. The Florida 3rd District Court of Appeals found that: "[R]etroactive application of section 790.06(2)(k), Florida Statutes, is not unconstitutional because a license to carry a concealed weapon or firearm is a privilege and not a vested right. See *Mayo v. Market Fruit Co. of Sanford*, 40 So.2d 555 (Fla. 1949)." *Crane v. Department of State*, 547 So. 2d 266 (Fla. 1989). The "*privilege of a license to carry a concealed weapon or firearm*" recognized In *Crane* cannot replace, or substitute for, the fundamental right guaranteed by the Second Amendment or Article I Section 8 of the Florida Constitution.

Florida's open carry ban is precisely the scenario that the Alabama Supreme Court warned against and the United States Supreme Court used in part as justification for overturning the DC handgun ban.

> "But the court say that it is a matter which will not admit of legislative regulation, and in order to test the correctness of its opinion, supposes one Legislature to prohibit the bearing arms secretly, and a subsequent Legislature to enact a law against bearing them openly; and then asks the question, whether the first, or last

> enactment would be unconstitutional. Under the provision of our constitution, we incline to the opinion that the Legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence." *State v. Reid*, 1 Ala. 612, 616-617 (1840).

It would be nonsensical for the United States Supreme Court to have found such persuasive support for its *Heller* and *McDonald* positions in *Nunn v. State*, *Andrews v. State*, *State v. Reid*, and *State v. Chandler* yet still reject the result of all of these cases that bans on open carry are unconstitutional.

> "To be sure, 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)."

US v. Masciandaro, 648 F. Supp. 2d 779, FN[13] (E.D. Va.2009) (upholding conviction for unlawful possession of a firearm).

Jurisprudence on the right to carry openly is certainly not limited to *Heller*, *McDonald*, and 19th century precedent. In 2003 the Wisconsin Supreme Court upheld that state's concealed carry restrictions, which are similar to Florida's privilege of a concealed carry license, because unlicensed open carry is a viable alternative that is available to legal gun owners in Wisconsin, stating, Ain addition to weighing the public interest in enforcing the CCW statute against an individual's interest in exercising the right to keep and bear arms by carrying a concealed weapon, a court must assess whether an individual could have exercised the right in a reasonable, alternative manner that did not violate the statute." And "in circumstances where the State's

interest in restricting the right to keep and bear arms is minimal and the private interest in exercising the right is substantial, an individual needs a way to exercise the right without violating the law. We hold, in these circumstances, that regulations limiting 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).

Despite the present open carry ban, The Florida Legislature has long recognized the preexisting right to carry arms, outside the home, for self-defense and other lawful purposes under both the Florida and United States constitutions. The legislature expressly requires that its ordinances shall not be construed to A*impair or diminish such rights*." See:

> Florida Statute 790.25 (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.*

> Florida Statute 790.06 (14) *The Legislature finds - 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.*

The Florida Supreme Court, similarly, has a long history of protecting the right to bear arms outside the home. In *Davis v. State* the Florida Supreme Court also clearly stated that 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.*" "Doubtless the guarantee ("The right of the people to bear arms in defence 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 892 (Fla. 1962)

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.*" "A statute which, under the pretence 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 defence, would be clearly unconstitutional." *State v. Reid*, 1 Ala. 612 (1840).

"[A] legitimate 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. The legislature has instituted requirements for training to insure skill and responsible weapon handling and mandates background checks that include fingerprinting to insure that the lawless are not given licenses to carry concealed. The state's own data clearly shows that those who carry are generally amongst the most law abiding and responsible demographics for which there are statistics. Of the nearly 2.1 million Concealed Carry Licenses the state 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. http://licgweb.doacs.state.fl.us/stats/cw_monthly.pdf.

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.

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: http://www.forcesciencenews.com/home/detail.html?serial'62.

We make 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. We do challenge the requirement that a firearm may only be born so as to conceal it.

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 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).

In fact open carry was historically permitted in Florida. The statute has been changed since the Supreme Court decided the case of *Sutton v State*, 12 Fla 135 (Fla. 1868), but the logic of that case still holds true: "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." 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).

When the recent decision of *McDonald v. City of Chicago*, 561 US 3025 (2010) held that the right to bear Arms is a fundamental right and that "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment", the United States Supreme Court was quite aware that incorporation would lead to the finding that some state restrictions on the right to bear arms are constitutionally invalid. [I]ncorporation of the Second Amendment right will to some extent limit the legislative freedom of the States, but this is always true when a Bill of Rights provision is incorporated. "Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights." "*Unless considerations of stare decisis counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in Heller.*" *McDonald v. City of Chicago*, 561 US 3025 (2010) (internal cites omitted).

> "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U. S., at __ (slip op., at 64). This conclusion is no more remarkable with respect to the Second Amendment than it is with respect to all the other limitations on state power found in the Constitution." *McDonald v. City of Chicago*, 561 US 3025 (2010).

While the State will likely argue that it is the province of the legislature or that the Court should consider some policy of cost and benefit of ruling Florida's open carry ban unconstitutional, the majority in *McDonald* specifically rejected the notion that a judge should attempt to balance the costs and benefits of restrictions on the right to bear arms. A restriction that amounts to destruction of the right to carry openly for self-defense by the law abiding, as is present with Florida's Open Carry ban, is unconstitutional regardless of legislative intent or public policy considerations.

The Supreme Court specifically rejected any type of interest balancing test in *Heller*, noting that. "The very enumeration of the right takes out of the hands of government - even the Third Branch of Government - the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *McDonald v. City of Chicago*, 561 U.S. 3025 (2010) (internal cites omitted).

The most telling case however is 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."

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 700 (Fla. 1941).

The only way this Court can continue to uphold Sec. 790.053, Fla. Stat., is to reverse 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.

WHEREFORE, the Defendant, DALE NORMAN, by and through undersigned counsel, and pursuant to Fla. R. Crim. Pro. 3.190 and the United States Constitution moves this Honorable Court for an Order Dismissing the instant information and declaring Fla. Stat. 790.053 unconstitutional.

BEFORE ME the undersigned authority, personally appeared, DALE NORMAN, who is personally known to me and who being duly sworn, deposes and says that the facts set forth in the above motion are true.

By:_____
DALE NORMAN

SWORN AND SUBSCRIBED before me this _____ day of June, 2012.

By:_____
NOTARY PUBLIC-STATE OF FLORIDA

I HEREBY CERTIFY that a copy hereof has been furnished to Frank Alessi, Assistant State Attorney, by in open court on September 4, 2012.

Respectfully submitted,

BY:_____
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