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 MOTION FOR REHEARING OR REHEARING EN BANC AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT OF APPELLANT'S MOTION FOR REHEARING OR REHEARING EN BANC

COMES NOW the Appellant by and through his undersigned counsel, pursuant to Rule 9.330 and Rule 9.331, Fla. R. App. P., and files this APPELLANT'S MOTION FOR REHEARING OR REHEARING EN BANC AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT OF APPELLANT'S MOTION FOR REHEARING OR REHEARING EN BANC of the Court's opinion filed on February 18, 2015.

Appellant respectfully asserts that the Court has overlooked or misapprehended points of law and therefore requests rehearing. Appellant also respectfully asserts that the issues in this case are of exceptional public importance

and requests rehearing en banc. Additionally, Appellant requests the Court certify conflict with the 3rd DCA's decision in *Crane*, and certify questions of great public importance to the Florida Supreme Court and as grounds for the foregoing states:

1. The Court's ruling reasons that as long as there is a viable alternative, even if a mere privilege rather than a right, that allows carry without undue restrictions, then the state may ban other forms of carry.

2. The Court's reasoning results in a determination that as long as a person can obtain a license to carry a handgun, the state may ban the carry of long guns (rifles or shotguns).

3. The U.S. Supreme Court has expressly rejected such reasoning. *District of Columbia v. Heller*, 554 U.S. 570 (2008)(finding that even though Washington D.C. allowed the possession of long guns, the categorical ban on the possession of a functioning handgun could not meet any level of scrutiny).

4. A ban on the open carry of long guns violates the right to bear arms because this ban would include even arms in common use at the time the Second Amendment was written.

5. While the Court's analysis applying the two-part test concluded that it should analyze the statute at issue under intermediate scrutiny, this analysis is directly contrary to the binding precedent of the Florida Supreme Court when

analyzing the right to bear arms in the Florida Constitution.

6. The Florida Supreme Court has stated unequivocally that any analysis of a fundamental enumerated right in the Florida Constitution must be analyzed with strict scrutiny. *Hillsborough County Gov't. Employees Ass'n v. Hillsborough County Aviation Auth.,* 522 So.2d 358 (Fla. 1988).

7. This decision results in Art. I, Sec. 8 being the only right in the Florida Declaration of Rights which may be impaired based on an intermediate scrutiny basis.

8. The Court ignored the binding precedent of *Crane*, on the theory that Crane is no longer good law based on the U.S. Supreme Court's reasoning in *Heller* and *McDonald*. *Crane v. Department of State, Div. of Licensing*, 547 So. 2d 266 (Fla. 3rd DCA 1989).

9. No superior court has overturned *Crane*.

10. Based on its ruling in the instant case, the Court should certify a conflict with *Crane* to the Florida Supreme Court.

11. Contrary to the Court's statement, Appellant did not bring an overbreadth challenge, but rather claimed that the prohibition on open carry was overly broad as applied to a person with a Concealed Weapon Firearms License because it was not narrowly tailored to achieving the State's alleged interest.

12. The Court's conclusion that the restriction at issue here was a traditional restriction fails for two reasons.

13. First this is not a longstanding restriction as described in *Heller* as this restriction was only created in 1987.

14. Second, open carry has traditionally been the primary means of exercising the right to bear arms. Only concealed carry has traditionally been prohibited or licensed as a privilege.

15. The state here has failed to offer any actual justification for one of the 5 most restrictive open carry laws in the country.

16. Were there some actual harm to be reasonably argued from allowing open carry, surely the state should have been able, and required, to demonstrate some evidence from one of the 45 other states that allow open carry.

17. While there was much less evidence in 1987 to contradict the Legislature's determination that open carry should be banned, changes in information should be considered. *Mance v. Holder*, 2015 U.S. Dist. LEXIS 16679 (N.D. Tex. Feb. 11, 2015).

18. The Court in *Mance* found that while it could be argued that Congress had a legitimate basis for banning interstate sale of handguns previously, experience with the ban and changes in technology could be used to show that

there was no longer a valid basis for the ban.

19. The "double deference" granted to a Legislative decision with no supporting evidence is directly contrary to the ruling in *Heller II* and the decision in *Heller III* is currently on appeal back to the U.S. Court of Appeals for the District of Columbia specifically regarding the incomplete sentence cited in this Court's holding.

20. The Court improperly relied upon the legislative intent of a statute that was not even being challenged and that predated the statute at issue by over thirty years, to uphold a statute passed decades later.

21. The Court's opinion states that : "We are now being asked to venture into this "vast terra incognita" of Second Amendment jurisprudence to answer a question of first impression, specifically, whether the Second Amendment forbids the State of Florida from prohibiting the open carry of firearms while permitting the concealed carry of weapons under a licensing scheme. *Norman v. State*, 2015 Fla. App. LEXIS 2178 (4th DCA 2015).

22. As a question of first impression dealing with a fundamental enumerated right under both the Federal and State Constitutions it is hard to imagine a case of more exceptional importance.

23. The scope of the right to carry is presently being litigated around the

country, primarily on the extent of the right outside the home and the limits of the right to bear arms.

24. This is the first major case exploring the scope of the Second Amendment in Florida since 1972. *Rinzler v. Carson*, 262 So. 2d 661 (Fla. 1972).

25. It is also the first case directly addressing the right to bear arms outside the home since *Sutton v. State*, 12 Fla. 135 (Fla. 1868), and *Davis v. State*, 146 So. 2d 892 (Fla. 1962).

26. This Court's ruling was distributed nationally by all of the major television networks and wire services, and all major newspapers in Florida of which the undersigned is aware, also reported on the case.

27. This case directly affects the rights of over 1.37 million Concealed Weapons Firearms License holders in Florida, as well as an estimated 3.5 million other firearm owners in the state.

WHEREFORE, Appellant requests this Court grant rehearing ir rehearing en banc and issue an amended order, or in the alternative, certify a conflict with the *Crane* case and certify the following questions to the Florida Supreme Court as a question of great public importance:

1. Is Florida's statutory scheme related to the open carry of firearms constitutional and what level of scrutiny is appropriate

in reviewing the fundamental right to bear arms as contained in Art. I, Sec. 8, Florida Constitution?

2. **May the Legislature, consistent with the Second Amendment to the U.S. Constitution and Art. I, Sec. 8 of the Florida Constitution, prohibit entirely the carry of long guns outside the home for self-defense, and prohibit the open carry of handguns for self-defense.**

CERTIFICATION FOR EN BANC REVEIW

I express a belief based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

FLETCHER & PHILLIPS
/s/ Eric J. Friday
Eric J. Friday
Fla. Bar No.: 797901
541 E. Monroe St. STE 1
Jacksonville FL 32202
Phone: 904-353-7733
Primary:familylaw@fletcherandphillips.com
Secondary:efriday@fletcherandphillips.com

APPELLANT'S MEMORANDUM OF LAW IN SUPPORT OF APPELLANT'S MOTION FOR REHEARING

The Court's decision contains fundamental errors of law, and ignores substantial precedent, both persuasive and binding. This Court now stands alone as the only Court to ever rule that open carry is not the core of the Second Amendment, and the only Court to claim that government can ban open carry by allowing concealed carry as a licensed privilege.[1]

I. The Court's use of intermediate scrutiny violates the U.S. Supreme Court's decisions in *Heller* and *McDonald* and Appellee's own position on the Second Amendment in briefs to the U.S. Supreme Court.

The Court used the two-part test that has been overwhelmingly approved by the federal courts in reviewing challenges under the Second Amendment to find that the right to bear arms extends outside the home. The Court then went on to eviscerate the right found, by applying the "two-part test" to concluded that it should analyze the statute at issue under intermediate scrutiny. It should be noted

---

[1]The Court's opinion claims that obtaining a Concealed Weapons Firearms License (CWFL) is a right. This is directly contrary to the 3rd DCA's holding in *Crane v. Department of State, Div. of Licensing*, 547 So. 2d 266 (Fla. 3rd DCA 1989) and the 1st DCA *Middlebrooks v. Department of State, Div. of Licensing* 565 So. 2d 727 (1st DCA 1990) as well as contrary to the holding of the Florida Supreme Court that the possession of a CWFL is merely an affirmative defense to the crime of carrying a concealed firearm. *Mackey v. State*, 2012 Fla. LEXIS 1324 (Fla. 2012).

that this procedure was neither created nor authorized by the Supreme Court's analysis in *Heller* or *McDonald*. It is a creation of the lower federal courts.

The primary purpose of the two-part test has been to give lower courts an excuse to avoid applying strict scrutiny and avoid the intent of the framers in guaranteeing the right to bear arms. See, *Jackson v. City and County of San Francisco*, L.T. 746 F.3d 953 (9th Cir. 2013)(Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Pg. 19).[2]

In fact the State of Florida in the person of the Attorney General, Appellee in the instant case, has subsequently receded from the position argued in this case and, has joined in support of Jackson's petition for certiorari in *Jackson v. City and County of San Francisco.* Brief of the States of Nebraska, Et. Al.(and twenty-four other states including Florida), as Amici Curiae in Support of the Petitioners. In that brief the State of Florida argued that if any level of scrutiny should apply the Attorney General submitted "strict scrutiny, if the Court must apply any level

---

[2]"The decision below is just the latest example of lower court decisions that treat *Heller* and *McDonald* as effectively limited to their narrow facts, rather than as watershed constitutional decisions that reject the notion that the Second Amendment can be brushed aside as a second-class right. Despite the landmark nature of Heller and McDonald, little has changed in the lower courts. Before Heller, nearly every circuit embraced a collective rights view of the Second Amendment. And since Heller, those same circuits have rejected virtually every Second Amendment case to come before them." (Appellants Petition for Writ of Certiorari)

of scrutiny here, is appropriate because the ordinance extends to possession of firearms by law-abiding citizens for immediate self-defense in the home. . . If the Second Amendment does indeed protect a fundamental right, then, strict scrutiny applies when government action infringes upon that right. Based on this Court's holding there is no functional difference in the right whether in the home or out.[3]

II. Strict scrutiny should have been applied in analyzing Sec. 790.053, Fla. Stat., because the ban on open carry goes to the very core of the Second Amendment as it is only intended to regulate the conduct of law abiding persons.

Sec. 790.053, Fla. Stat., only regulates the conduct of law-abiding persons. Only a law abiding person is entitled to lawfully possess the firearm they wish to open carry in the first place. Other statutes regulate the conduct of the non-law-abiding and prohibit them from possessing firearms entirely. Sec. 790.065, Fla. Stat.(prohibiting felons, domestic violence misdemeanants, and mental defectives (including persons evaluated for illegal drug use)); Sec. 790.07, Fla. Stat. (prohibiting persons engaged in criminal offenses); and Sec. 790.151, Fla. Stat.

---

[3]Ignoring for the moment the Court's conclusion based on the concluding clause of Art. I, Sec. 8, discussed *Infra*, and focusing on the Court's conclusion that whether in or out of the home the right to bear arms in Florida is only an affirmative defense.

(prohibiting using firearms under the influence).

The use of firearms by law-abiding, responsible citizens "in defense of hearth and home" (and even in the street) is the core of the right. See, *Schrader v. Holder*, 704 F.3d 980, 989 (D.C. Cir. 2013) quoting *Heller I* at 635. This core exercise of the right cannot be subject to anything less than strict scrutiny under the well established two-part test.

III. The Court's use of intermediate scrutiny violates long established binding precedent in Florida

The application of intermediate scrutiny is directly contrary to the binding precedent of the Florida Supreme Court when analyzing the right to bear arms in the Florida Constitution. The holdings of the U.S. Supreme Court establish the floor not the ceiling of rights. *Rigterink v. State*, 66 So. 3d 866, 888 (Fla. 2011). To argue that the Florida Constitution allows the Legislature to limit the right to open carry more than the Second Amendment, when every court to ever consider the issue has held that concealed carry is the privilege, and open carry is the right is contrary to the overwhelming historical precedent found by the *Heller* Court. *Dist. Of Columbia v. Heller*, 554 U.S. 570, 585 & n. 9(2008); See also, *People v. Yanna*, 824 N.W.2d 241 (Mich. Ct. App. 2012) and *Bonidy v. U.S. Postal Service,* 2013 U.S. Dist. LEXIS 95435 (Dist. Colo. 2013)("the Court conclude that the

Second Amendment protects the right to openly carry firearms outside the home for lawful purpose, subject to such restrictions as may be reasonably related to public safety.")

The Florida Supreme Court has held unequivocally that any analysis of a fundamental enumerated right in the Florida Constitution must be analyzed with strict scrutiny. *Hillsborough County Gov't. Employees Ass'n v. Hillsborough County Aviation Auth.,* 522 So.2d 358 (Fla. 1988). This decision results in Art. I, Sec. 8 being the only right in the Florida Declaration of Rights which may be impaired subject to only an intermediate scrutiny analysis.

IV. The Court improperly relied on Sec. 790.25, Fla. Stat. (1965), in upholding the Constitutionality of Sec. 790.053 (1987), Fla. Stat.

The Court improperly relied upon the legislative intent of a statute that was not challenged, and that predated the statute at issue by over twenty years, to uphold a statute passed two decades later. Norman never asserted that Sec. 790.25 is unconstitutional, and the constitutionality of Sec. 790.25 has never been challenged. Sec. 790.053 is the unconstitutional statute. Notably, 790.053 does not include anything akin to Sec. 790.25's Declaration of Policy or Construction expressed in the statute or anywhere in its nearly non-existent legislative history.

Faced with a complete lack of evidence that 790.053, the open carry ban,

has any fit tighter than a circus tent to the claimed general public safety interest, this Court instead reviewed 790.25, a law allowing for open and concealed carry by fishermen, hunters, campers, target shooters, police, military, in the home, and at work that was enacted in 1965 by a different Florida Legislature twenty-two years before the Open Carry Ban statute was enacted. The only change to Sec. 790.25 made by the 1987 legislature was to insure that the hunters, campers, police, military, etc... included in Sec. 790.25 would be protected from prosecution under the new Open Carry Ban.[4]

V. The Court erred in ruling that the alternative outlet of licensed concealed carry adequately protects and allows for the exercise of the right to bear arms.

The Court's ruling reasons that as long as there is a viable alternative, even if a mere privilege rather than a right, that allows carry without undue restrictions, then the state may ban other forms of carry. The Court's conclusion that the restriction at issue here was a traditional restriction fails for two reasons.

---

[4]The Court claims in its decision that what it finds to be affirmative defenses in Sec. 790.25 "specifically excludes prosecution for open carry violations." This is directly contrary to the Supreme Court's holding in *Mackey v. State*, 2012 Fla. LEXIS 1324 (Fla. 2012). At oral argument in *Mackey*, Justice Labarga questioned the State as to whether finding a CWFL to be an affirmative defense to concealed carry would subject a citizen to arrest, prosecution and a felony arrest record, to which the State responded that as an affirmative defense, it would.

First this is not a longstanding restriction as described in Heller as this restriction was only created in 1987. By way of contrast the laws struck down in *Heller* and *McDonald* were passed in 1975 and 1982 respectively, well before 1987, but were not longstanding enough to survive as a traditional and therefore preemptively lawful restriction. Therefore Sec. 790.053 fails the primary prong that *Heller* discuss as being a basis for a presumptively valid regulation of the right. Since the ban is not longstanding the Court's deference and presumptive validity of Sec. 790.053 were misplaced. See, *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1253 (2011)("A requirement of newer vintage is not, however, presumed to be valid").

Second, open carry has traditionally been the primary means of exercising the right to bear arms. Only concealed carry has traditionally been prohibited or licensed as a privilege. See *Dist. Of Columbia v. Heller*, 554 U.S. 570, 626-27 & n. 26(2008)(list of presumptively lawful restrictions includes only concealed carry and ignores open carry, even though open carry is accepted in almost every state, often with no restrictions, or less restrictions than placed on concealed carry).[5]

---

[5]30 states do not require any license to open carry a handgun, 14 states require a license to open carry a handgun, 1 state prohibits open carry of handguns but allows open carry of long guns. http://www.opencarry.org/?page_id=103 (Visited, 1 March 2015).

In its opinion the Court claims that no precedent was cited by Norman for the premise that open carry was the core of the right and could not be regulated similar to concealed carry, or even abandoned in favor of licensed concealed carry. This is simply untrue. Norman cited several cases all of which were also cited by the Supreme Court in *Heller I*,[6] with the obvious exception of two additional cases decided subsequent to *Heller I.* In fact, the Court specifically ignored the *Reid* decision from Alabama, which expressed the very reasons Norman raised, the exercise of a privilege can never be a substitute for a right, and the legislative ability to revoke any privilege granted. *State v. Reid*, 1 Ala. 612 (Ala. 1840).

Heller's dicta noting a non-exhaustive list of presumably constitutional restrictions on firearms was notably limited to commercial regulation, highly suspect classes, and sensitive places. *Heller* at 626-27. It does not serve as a declaration that all laws enacted against the general law-abiding and sane populace, applied in all public places, enjoy a presumption of compatibility with

---

[6]See *Bliss v. Commonwealth*, 12 Ky. 90, 2 Litt. 90, 91-92 (Ky. 1822); State v. Reid, 1 Ala. 612, 616-617 (1840); *State v. Schoultz*, 25 Mo. 128, 155 (1857); see also *Simpson v. State*, 13 Tenn. 356, 5 Yer. 356, 360 (Tenn. 1833) (interpreting similar provision with "'common defence'" purpose); *State v. Huntly*, 25 N. C. 418, 422-423 (1843) (same); cf. *Nunn v. State*, 1 Ga. 243, 250-251 (1846) (construing Second Amendment); *State v. Chandler*, 5 La. Ann. 489, 489-490 (1850) (same). *Dist. Of Columbia v. Heller*, 554 U.S. 570, 626-27 & n. 9(2008)

the right of individuals to bear arms.[7]

The Court's claim that because the Supreme Court recognized the existence of long standing regulation of concealed carry, similar regulation or prohibition of open carry is also permissible is logically faulty and directly contrary to the Supreme Court's historical analysis and reasoning. *Moore v. Madigan*, 702 F.3d 933, 937 and 941 (7th Cir. 2012)(finding that the 7th Cir. was bound by the historical analysis of *Heller*, because it was central to the Court's holding and settled by *Heller*, and inferring that any repudiation of the Supreme Court's historical analysis by a lower court would be improper).

VI. The Court's ruling impermissibly bans the bearing of an entire class of

---

[7]"For cases or attorney general opinions holding or suggesting that there is a right to carry openly, see *State v. Reid*, 1 Ala. 612, 619 (1840) (dictum), reaffirmed, *Hyde v. City of Birmingham*, 392 So. 2d 1226, 1228 (Ala. Crim. App. 1980); *Dano v. Collins*, 802 P.2d 1021 (Ariz. Ct. App. 1990), review granted but later dismissed as improvidently granted, 809 P.2d 960 (Ariz. 1991); *Nunn v. State*, 1 Ga. 243 (1846), reaffirmed, *Strickland v. State*, 72 S.E. 260, 264 (Ga. 1911); *In re Brickey*, 70 P. 609 (Idaho 1902); *Holland v. Commonwealth*, 294 S.W.2d 83, 85 (Ky. 1956) (dictum); *State v. Chaisson*, 457 So. 2d 1257 (La. Ct. App. 1984); *City of Las Vegas v. Moberg*, 485 P.2d 737 (N.M. Ct. App. 1971); *State v. Kerner*, 107 S.E. 222 (N.C. 1921); *State v. Nieto*, 130 N.E. 663, 664 (Ohio 1920) (dictum), reaffirmed, *Klein v. Leis*, 795 N.E.2d 633, 638 (Ohio 2003); *Glasscock v. City of Chattanooga*, 11 S.W.2d 678 (Tenn. 1928); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988); La. Op. Att'y Gen. No. 80- 992 (1990); Wisconsin Department of Justice Advisory Memorandum (Apr. 20, 2009), http://www.doj.state.wi.us/news/files/FinalOpenCarryMemo.pdf." ... Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. Rev. at n. 312

arms in common use for self-defense, in direct violation of *Heller* and *McDonald*.

The Court's reasoning results in a determination that as long as a license to carry a handgun may be obtained without undue restriction, the state may ban the carry of long guns (rifles or shotguns). The U.S. Supreme Court has expressly rejected such reasoning. *District of Columbia v. Heller, 554 U.S. 570, 629* ("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," and finding that even though Washington D.C. allowed the possession of long guns, the categorical ban on the possession of a functioning handgun could not meet any level of scrutiny). There is no difference between the reasoning of this Court and the argument of the District in *Heller*, which the Supreme Court rejected. The Court's failure to recognize this is understandable as long guns were not at issue in the briefs or argument of the parties here, but the Court's faulty conclusion has created a result which the Supreme Court has already foreclosed; exclusion of an entire category of arms from the right, by the comprehensive regulatory scheme this Court is allowing.[8]

---

[8]The comprehensive regulatory scheme was not challenged in the briefs as neither party questioned the holding in *Crane*, nor argued for the conclusion reached by the Court.

It can not be held that the only class of firearm that enjoys the protection of the right to bear arms is the handgun. The effect of this ruling destroys the right to bear long guns in practice by placing rifles and shotguns outside the ambit of the Second Amendment, a result foreclosed by the holding of *Heller I*. *District of Columbia v. Heller*, 554 U.S. 570, 629 (U.S. 2008)("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").

A ban on the open carry of long guns further violates the right to bear arms because this ban would include even arms in common use at the time the Second Amendment was written, and in fact the arms in most common use at that time, when handguns were more rare.[9] No ban on long guns as created by Florida's legislative scheme has ever been upheld. *Heller II* at 1255("The requirements that are not longstanding, which include ... all the requirements as applied to long guns, also affect the Second Amendment right because they are not de minimis.")

Bans on open carry and the carry of long guns (i.e. rifles and shotguns) are

---

[9]Only in 2014 did the sale of handguns nationally exceeded the sale of long guns for the first time. See, NICS Firearm Background Checks: Year by State/Type, Year 2013, 2014, Federal Bureau of Investigation (FBI); http://www.fbi.gov/about-us/cjis/nics/reports/nics_firearm_checks_-_year_by_state_type.pdf (visited 1 March 2015)

novel and were largely unprecedented at the time of the framing and ratification of the Second Amendment. Such broad prohibitions are highly uncommon to this day. *Heller v. District of Columbia*, 670 F.3d 1244, 1255 (D.C. Cir. 2011)("Although some types of licensure have been required by some states since the early 20th century, see, e.g., Act of Apr. 6, 1909, ch. 114, § 3, 1909 N.H. Laws 451, 451-52 (license "to carry a loaded pistol or revolver"); Small Arms Act, Act 206, §§ 5, 7, 1927 Haw. Laws 209, 209-11 (license to carry a pistol or revolver outside the home), the District's particular requirements are novel, not longstanding.") Only five states, including Florida have anything nearly comparable.

A central purpose of the Second Amendment is for self-defense. *Heller I* at 628. A 1994 Police Foundation survey found that 16.4 percent of all guns, and 34.0 percent of handguns, were kept loaded and unlocked, i.e., ready for immediate use (referred to hereafter as "the ready status"). Applied to the national gun stock at the end of 1994 of 84.7 million handguns, 150.0 million long guns, and 235.7 million total guns, these figures imply 28.8 million handguns, 9.9 million long guns, and 38.7 million total guns kept loaded and unlocked at any one time. *Armed : new perspectives on gun control* / Gary Kleck & Don B. Kates 300-301 citing The *1994 National Survey of the Private Ownership of Firearms*

Cook et al. (1996) - Guns in America. In other words, over one-quarter of the guns kept by Americans primarily for self-defense, are not protected by the Second Amendment according to this Court's ruling. A logical and legal absurdity.

VII. The Court correctly determined that *Crane* cannot stand in light of *Heller* and *McDonald* when combined with the reasoning in this opinion but should have certified conflict with *Crane*.

The Court ignored the binding precedent of *Crane v. Department of State, Div. of Licensing*, 547 So. 2d 266 (Fla. 3rd DCA 1989), on the theory that *Crane* is no longer good law based on the U.S. Supreme Court's reasoning in *Heller* and *McDonald*. No superior court has directly overturned *Crane*. In fact Crane arguably survives the holding in *McDonald*, and is only threatened by this Court's attempt to save a constitutionally infirm statute.

This case was certified to this Court as involving questions of great public importance. This Court's recognition that this is a case of first impression only buttresses the lower court's certification.

Based on its ruling in the instant case, the Court should certify a conflict with *Crane* to the Florida Supreme Court and certify the requested question of

great public importance. [10]

VIII. The Court erred in applying "double deference"[11] to the Legislature's decision to ban open carry without any evidence or supporting findings of fact.

The State here has failed to offer any actual justification for one of the five most restrictive open carry laws in the country. Were there some actual harm to be reasonably argued from allowing open carry, surely the State should have been able, and required, to demonstrate some evidence from one of the forty-five other states that allow open carry. Of course as shown by the oral argument, the state was not even aware that Florida was in the extremely small minority of states which have attempted to prohibit open carry.

Legislative deference, much less the "double deference" used by the U.S. District court in *Heller III* (currently on appeal in *Heller IV*) and this Court, does not comport to the D.C Circuit's command in *Heller II* at 1259 that "[The Legislature] needs to present some meaningful evidence, not mere assertions, to

---

[10]The Court's decision was covered by all four of the national TV networks, the major wire services and every major Florida newspaper that counsel is aware of.

[11] *Heller IV*, Brief For Appellants, (D.C. Cir. Case No.: 14-7071), Stephen Halbrook, Counsel for Appellants.

justify its predictive judgments." This despite a plethora of alleged evidence offered by D.C. when compared with the complete lack of supporting evidence to justify Sec. 790.053, the open carry ban.[12] Here, the Court merely accepted the

---

[12]"For example, the Committee Report asserts "studies show" that "laws restricting multiple purchases or sales of firearms are designed to reduce the number of guns entering the illegal market and to stem the flow of firearms between states," and that "handguns sold in multiple sales to the same individual purchaser are frequently used in crime." Id. at 10. The Report neither identifies the studies relied upon nor claims those studies showed the laws achieved their purpose, nor in any other way attempts to justify requiring a person who registered a pistol to wait 30 days to register another one. The record does include testimony that offers cursory rationales for some other requirements, such as safety training and demonstrating knowledge of gun laws, see, e.g., Testimony of Cathy L. Lanier, Chief of Police, at 2 (Oct. 1, 2008), but the District fails to present any data or other evidence to substantiate its claim that these requirements can reasonably be expected to promote either of the important governmental interests it has invoked (perhaps because it was relying upon the asserted interests we have discounted as circular).

Although we do "accord substantial deference to the predictive judgments" of the legislature, *Turner Broad. Sys., Inc. v. FCC* (*Turner II*), 520 U.S. 180, 195, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997) (quoting *Turner I*, 512 U.S. at 665) (internal quotation marks omitted), the District is not thereby "insulated from meaningful judicial review," *Turner I*, 512 U.S. at 666 (controlling opinion of Kennedy, J.); see also *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002) (plurality opinion) (citing *Turner I* and "acknowledg[ing] that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems"). Rather, we must "assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Turner II*, 520 U.S. at 195 (quoting *Turner I*, 512 U.S. at 666) (internal quotation marks omitted). Therefore, the District needs to present some meaningful evidence, not mere assertions, to justify its predictive judgments. On the present record, we conclude the District has not supplied evidence adequate to show a substantial relationship between any

decision of the Legislature to ban open carry, with no justification or any requirement that any evidence be produced.

Contrary to the Court's statement that "courts have traditionally been more deferential to the legislature in this area", *Heller II* specifically repudiates this Court's claim. *Heller v. District of Columbia*, 670 F.3d 1244, 1259 (D.C. Cir. 2011). Heller has appealed the absurdity that is *Heller III*. See also, *Jackson v. City and County of San Francisco*, L.T. 746 F.3d 953 (9th Cir. 2013)(Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Pg. 19)(Appellant's brief for certiori arguing that the Supreme Court must take another Second Amendment case to repudiate repeated attempts by the lower courts to water down Heller and McDonald).[13]

The deference accorded to legislative predictive judgments does not mean that they are "insulated from meaningful judicial review," nor do legislative findings "foreclose our independent judgment of the facts bearing on an issue of constitutional law." *Turner I* at 666 (citation omitted). "This obligation to exercise independent judgment . . . is to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." Id.

---

of the novel registration requirements and an important governmental interest." *Heller v. District of Columbia,* 670 F.3d 1244, 1258-1259 (D.C. Cir. 2011).

[13]The State of Florida, Appellee here, is supporting Jackson's Petition for Certiorari.

Based on the "paucity of evidence" that a problem existed when the open carry ban was enacted, and lacking "any findings concerning the actual effects of" the restrictions, it was impossible for this Court to determine whether the law was narrowly tailored and whether there were "'constitutionally acceptable less restrictive means' of achieving the [State's] asserted interests."
Id. at 667-68.

Just because the State's asserted interests are substantial in the abstract . . . does not end the inquiry. To satisfy narrow tailoring, the State should have been required to prove Sec. 790.053 directly advance its asserted interests in achieving public safety. *Edwards v. District of Columbia*, 755 F.3d 996, 1003 (D.C. Cir. 2014), citing *United States v. Alvarez*, 132 S.Ct. 2537, 2549 (2012) ("There must be a direct causal link between the restriction imposed and the injury to be prevented."). Overly broad restrictions that target an entire class (here, persons seeking to exercise their Second Amendment rights) rather than criminal acts are, by definition, not narrowly tailored. See *Id*. at 1005, 1009.

"This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001)

(citation omitted). Here, no particular harms were even cited.

These principles were repeated in *Turner II. Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195 (1997). The expanded record allowed the Court to address whether the "provisions were designed to address a real harm, and whether those provisions will alleviate it in a material way." *Id*. Deference to the legislative judgments applied to this first step of the analysis. *Id*. at 195-96.

Deference is not proper in the second portion of the inquiry, which "concerns the fit between the asserted interests and the means chosen to advance them." *Id*. at 213. A restriction must promote "a substantial governmental interest that would be achieved less effectively absent the regulation," and must not "burden substantially more [activity] than is necessary to further" that interest. *Id*. at 213-14. In determining whether the means were narrowly tailored, Id. at 215-16, the Court assessed whether "the means chosen are not substantially broader than necessary" and if there was any "adequate alternative" to the restriction. *Id*. at 218 (citation omitted).

The Supreme Court rejected a plea "to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees . . . ." *McDonald*, 130 S.Ct. at 3044. This Court has done just that with its "double deference" rule, relying on a U.S. District Court case that

is attempting to ignore the prior direction from its own court of appeals.

Regarding the State's burden to "show that its predictions about the effect of its gun-registration laws reflect 'reasonable inferences based on substantial evidence,'" this Court relied on *Heller III's* claim that the standard for substantiality is doubly deferential, where the Court is reviewing a legislative judgment on firearms policy." *Heller v. District of Columbia* (*Heller III*), 2014 U.S. Dist. LEXIS 66569, 35. In support of that novel rule, the court in *Heller III* stated that the "substantiality requirement [is] more deferential when reviewing legislative judgments . . . ." *Id*., citing *Turner II*, 520 U.S. at 195. "More deferential" than what? *Turner II* finished the sentence: "more deferential than we accord to judgments of an administrative agency." *Id*. That standard applies to all legislative judgments and suggests nothing unique about "firearms policy."

The district in *Heller III* further stated that "courts should be especially deferential to legislative predictions when it comes to gun policy," *Heller III* at 27, based on the following: "In the context of firearm regulation, the legislature is far better equipped than the judiciary to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." *Schrader v. Holder*, 704 F.3d 980, 990 (D.C. Cir. 2013). But that is a truism about legislation on all subjects, and is derived from

Turner I's statement of that general rule. *Id.*, citing *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (quoting *Turner I*, 512 U.S. at 665).

Moreover, *Schrader* concerned gun possession by convicted criminals, who are "individuals who cannot be said to be exercising the core of the Second Amendment right identified in *Heller*, i.e., 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" *Schrader*, 704 F.3d at 989, quoting *Heller*, 554 U.S. at 635. For law-abiding citizens, restrictions on that fundamental right are subject to a rigorous narrow-tailoring analysis, not "double deference."

Additionally, "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality" of certain legislation. *Mance v. Holder*, 2015 U.S. Dist. LEXIS 16679 (N.D. Tex. Feb. 11, 2015)(a Second Amendment case) citing, *United States v. Morrison*, 529 U.S. 598, 614, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) (holding that simply because Congress concluded that a particular activity substantially affected interstate commerce did not necessarily make it so).

By contrast, this Court has allowed the State to avoid any obligations to prove "definitively that the challenged gun regulations will actually further its important interests." *Heller III* at 30. While "definitive" proof may not be required, the *Heller II* case was remanded because "the District needs to present

some meaningful evidence, not mere assertions, to justify its predictive judgments." *Heller II*, 670 F.3d at 1259. The standard should be no less here, and the Court's reliance on *Heller III*'s impudent refusal to comply with binding precedent is completely misplaced.

While there was much less evidence in 1987 to contradict the Legislature's determination that open carry should be banned, changes in information and law should be considered. *Mance v. Holder*, 2015 U.S. Dist. LEXIS 16679, 31-32(N.D. Tx. 2015).

The Court in *Mance* found that while it could be argued that Congress had a legitimate basis for banning interstate sale of handguns previously, experience with the ban and changes in technology could be used to show that there was no longer a valid basis for the ban. *Id.* at 30-32.

Similarly, even if the Court continues to grant double deference to the legislative judgment; history and a lack of any evidence over many years of open carry in almost every other state, shows that there is no evidence to support what may have been reasoned judgment in 1987. It is now justified by nothing more than 'the Legislature may do as it wishes.'

IX. The Court's ruling has stripped all Floridians of their RIGHT to bear arms without due process.

Both the *Heller* and *McDonald* decisions were based on a violation of substantive due process. The absolute denial of the right to bear arms until one obtained governmental permission. Despite the Supreme Court finding that due process was denied in each case, the Court here has recycled the losing side's argument in favor of upholding Florida's ban on open carry. As stated by the *McDonald* Court: "The right to keep and bear arms must be regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner." *McDonald v. City of Chicago*, 561 U.S. 742, 746 (2010). Yet here the Court has done just that, claiming that as long as it is easy enough to get a permission slip from the state, the right to bear arms may otherwise be denied with no prior due process. This would not be tolerated in the context of any other right and should not be tolerated here.

X. The Court's reliance on the phrase "except that the manner of bearing arms may be regulated by law" is misplaced given the origin and intent of the phrase as set forth in Appellant's brief, and uncontested by the State.

Contrary to the Court's statement that "the Legislature has the right to enact laws regarding the manner in which arms can be borne", the Legislature does not have rights. Claiming that the Declaration of Rights grants a right to the

Legislature is directly contrary to Sec. 1 of the Declaration of Rights that "[a]ll political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people." Furthermore, the Courts immediate resort to *Carlton v. State*, 58 So. 486 (Fla. 1912), further affirms that it is concealed carry not open carry which may be so regulated.

Given the express history of Florida gun law, especially the concluding clause of Art.I, Sec. 8, the Court's reliance on this provision is misplaced. This provision was included for the first time in the post-Reconstruction Florida Constitution to disenfranchise recently freed slaves. It took less than a decade from this point to pass a now authorized law in response to a prevented lynching as set forth in Appellant's Initial Brief. *Negroes and the Gun: The Black Tradition of Arms* (2014), Nicholas Johnson, (ISBN 978-1-61614-839-3). For this Court to rely on this phrase to disenfranchise a Black man in 2015 is nothing short of a continuation of Jim Crow and the Court should be reversed.

Conclusion

While it is certainly understandable that the Court sought every avenue to uphold the statute at issue here, reliance on legislative intent from other statutes, ignoring of cited precedent, and reliance on questionable precedent shows the

weakness of the opinion here. Mr. Norman respectfully requests the Court grant rehearing of this case or rehearing en banc and reverse its opinion consistent with the Supreme Court's decisions in *Heller* and *McDonald*, and consistent with the rights of Floridians. Norman respectfully requests the Court review the precedent cited in *Heller I* and by appellant here, and reverse its ruling.[14]

This case is certainly one of great public importance on a novel issue and involves a direct conflict with an opinion from another DCA. At a minimum the court should certify a conflict with Crane and certify the requested question of great public importance to the Florida Supreme Court.

---

[14] *Norman v. State*, 2015 Fla. App. LEXIS 2178, 41(Fla. 4th DCA 2015)("no decision interpreting the Second Amendment can be cited for the proposition that a state must allow for one form of carry over another") but see, *Bliss v. Commonwealth*, 12 Ky. 90, 2 Litt. 90, 91-92 (Ky. 1822); *State v. Reid*, 1 Ala. 612, 616-617 (1840); *State v. Schoultz*, 25 Mo. 128, 155 (1857); see also *Simpson v. State*, 13 Tenn. 356, 5 Yer. 356, 360 (Tenn. 1833) (interpreting similar provision with "'common defence'" purpose); *State v. Huntly*, 25 N. C. 418, 422-423 (1843) (same); cf. *Nunn v. State*, 1 Ga. 243, 250-251 (1846) (construing Second Amendment); *State v. Chandler*, 5 La. Ann. 489, 489-490 (1850); and *Bonidy v. U.S. Postal Service,* 2013 U.S. Dist. LEXIS 95435 (Dist. Colo. 2013)("the Court conclude that the Second Amendment protects the right to openly carry firearms outside the home for lawful purpose, subject to such restrictions as may be reasonably related to public safety.")(all allowing for the open carry of arms as permitted by the Second Amendment or state analogues).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served via e-service this _3rd_ day of March 2015 on the following:

Office of the State Attorney, Bruce Colton
19th Judicial Circuit
411 South 2nd Street
Fort Pierce, FL 34950
balsonso@sao19.org

Cynthia Comras, Esq.
Criminal Appeals Division
Office of the Attorney General
1515 N. Flagler Dr., Suite 900
West Palm Beach, FL 33401
Cynthia.Comras@myfloridalegal.com
CrimAppWPB@myfloridalegal.com

FLETCHER & PHILLIPS
/s/ Eric J. Friday
Eric J. Friday
Fla. Bar No.: 797901
541 E. Monroe St. STE 1
Jacksonville FL 32202
Phone: 904-353-7733
Primary:familylaw@fletcherandphillips.com
Secondary:efriday@fletcherandphillips.com

Fender & Minton, P.A.
Ashley N. Minton
Florida Bar Number 23734
207 S. Second Street
Fort Pierce, Florida 34950
(772) 465-0029
ashleyatfendermintonlaw@gmail.com