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IN THE SUPREME OF THE STATE OF FLORIDA

CASE NO. SC15-650

DALE LEE NORMAN,

Petitioner,

- versus -

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 0656879

HEIDI L. BETTENDORF
Assistant Attorney General
Florida Bar No. 0001805
1515 North Flagler Drive
Suite 900
West Palm Beach, FL 33401-3432
Tel: (561) 837-5000
Fax: (561) 837-5099
crimappwpb@myfloridalegal.com

Counsel for Respondent

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Preliminary Statement

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the County Court of St. Lucie County, Florida. Petitioner was Appellant and Respondent was Appellee in the District Court of Appeal of Florida, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, the following symbols will be used:

"R" to denote the record on appeal; and

"T" to denote the trial and sentencing transcript.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

Statement Of The Case And Facts

On February 19, 2012, while responding to a citizen's 911 call about Petitioner's open carrying of a firearm, police observed Petitioner walking northbound on U.S. 1 in Fort Pierce, Florida, carrying his .38 caliber revolver (R. 3; T. 237, 242, 245, 258, 259, 260, 268, 273, 275). The gun was in a black holster, on Petitioner's hip, strapped to his right belt line, completely exposed to public view for five minutes (T. 248-50, 255, 258, 259, 260, 327). According to the testimony of two police officers, which was substantiated by the video of Petitioner before his arrest, the gun was in "open view" in its holster and not covered by Petitioner's white tight-fitting T-shirt (T. 242, 258; SR.). The officers also noted that both the handle and the cylinder of the gun were visible inside the gun's holster (T. 246, 247, 258-59).

At trial, Petitioner testified that he received his concealed weapons license earlier on the day of his arrest (T. 250-51, 323, 324, 326). He also testified that when he left his apartment that afternoon, the holstered black gun was completely "concealed" under his T-shirt on his right back hip (T. 323, 326, 327). Petitioner further testified that it took him seven or eight minutes to walk from his apartment

to the location of his arrest (T. 324). Lastly, Petitioner testified that he was wearing a white, tight fitting T-shirt[1] at the time of his arrest (T. 26-27).

Petitioner was subsequently charged by Information with Open Carrying of a Weapon (a firearm), in violation of § 790.053, Fla. Stat. (2012) (R. 1).

Prior to trial, Petitioner filed five motions to dismiss challenging the constitutionality of § 790.053 on various grounds (R. 79-84, 85-96, 97-98, 99-101, 102-03). In the first motion, Petitioner argued that § 790.053 was unconstitutional because it was vague and overbroad (R. 79-84). In his second motion, Petitioner claimed that § 790.053 was unconstitutional because it violated his federal and state fundamental right to bear arms (R. 85-96). In the third motion, Petitioner argued that the charge should be dismissed because the gun was partially concealed (R. 97-98). In the fourth motion to dismiss, Petitioner argued that § 790.053 was unconstitutional because it failed to include a mens rea element (R. 99-101). Finally, in his fifth motion, Petitioner argued that the exception contained in § 790.053 regarding brief and open display was unconstitutionally vague (R. 102-03). The County Court reserved ruling on the motions.

[1]At trial, Petitioner described the T-shirt he wore that day as a "wife-beater" T-shirt, a term repeated by defense counsel in closing argument. See also Miriam Webster Online Dictionary, 2015 at http://www.merriam-webster.com/dictionary/wifebeater (defining "wifebeater" as "a man's white tank top").

After the jury found Petitioner guilty, the County Court denied Petitioner's motions to dismiss as follows:

> 1. On February 19, 2012, in the early afternoon hours, Defendant was observed by citizens carrying a firearm in plain view in a holster on his waist, while walking down a city sidewalk.
>
> 2. Defendant was duly licensed to carry a concealed firearm.
>
> 3. A member of the public called 911 and officers from the Fort Pierce Police Department responded to the scene and made the same observations.
>
> 4. One responding officer videotaped a view of Defendant just before his encounter with the officers.
>
> 5. Officers arrested Defendant for a violation of 790.053.
>
> 6. At trial, there was no credible evidence presented that the firearm had been concealed before Defendant's arrest, or that it could have been, considering his manner of dress.

(R. 116-17).

The County Court also concluded, as to the legal issues, that:

> 1. Florida's Open Carry Law, 790.053, is constitutional in that the state may set reasonable limits and conditions on the right to bear arms, and the conditions set forth in Florida's law are reasonable.
>
> 2. The Court reads this statute in conjunction with 790.25, which sets forth specific persons, places, and activities where it is legal to "own, possess, and lawfully use" (and in some cases openly display), firearms without first obtaining any permit or license. This law specifically excludes prosecution for Open Carry violations in those instances. The court believes it is an affirmative defense on the part of any defendant prosecuted under the Open Carry law to assert that he/she fit [sic] within one of the clearly defined exceptions.

> 3. Although the court believes that the recent exception to the law, allowing those with concealed carry licenses to "briefly and openly display" the weapon, would be unconstitutionally vague under other fact patterns, in the case at bar it is not since there was no credible evidence presented that this defendant at any time prior to his arrest attempted to conceal the firearm as required by the exception, which is designed to protect those with concealed carry licenses who are carrying the weapon concealed prior to its display.

(R. 116-17).

The County Court then certified three questions of great public importance:

> 1. Is Florida's statutory scheme related to the open carry of firearms constitutional?
>
> 2. 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 him/herself in the manner allowed?
>
> 3. Does the recent "brief and open display" exception unconstitutionally infect the Open Carry Law by its vagueness?

(R. 117).

Thereafter, the County Court withheld adjudication and imposed a $300 fine, along with court costs (T. 493).

Petitioner then filed his Notice of Appeal to the Fourth District wherein he stated that he was appealing his "Judgment of Conviction and Sentence," which was rendered . . . on August 14, 2012."

The Fourth District affirmed Petitioner's conviction and sentence. Norman v. State, 159 So. 3d 205 (Fla. 4th DCA 2015). The Fourth District answered the first certified question in the affirmative, holding that § 790.053, Fla. Stat., is constitutional. Id. at 223. The Fourth District answered the second certified question by holding that exceptions to the prohibition against open carry constitute affirmative defenses to a prosecution for a charge of open carry. Id. at 226. Finally, the Fourth District found no need to address the third certified question after finding that under the facts of this case, the "brief and open display" exception did not apply to Petitioner. Id. at 227.

Prior to the issuance of mandate, Petitioner filed his notice to invoke the discretionary jurisdiction of this Court. After considering the parties' briefs on the issue of jurisdiction, this Court accepted jurisdiction.

Summary Of The Argument

I. The Fourth District correctly determined that under precedent interpreting the Second Amendment and Article I, §8 of the Florida Constitution, the challenged statute is constitutionally valid. The Legislature enacted § 790.053, Fla. Stat., consistent with its constitutional authority to regulate the manner of bearing firearms.

The Fourth District correctly determined that the current statutory scheme, which allows a law-abiding citizen to carry a concealed gun in public, merely regulates the manner in which persons may exercise their Second Amendment right and thus, the statute is subject to intermediate scrutiny. Because the statute substantially advances the government's important interests in public safety and the safe and effective bearing of arms by law-abiding citizens, it passes constitutional muster. These important interests are substantially advanced by a shall-issue permitting system that requires permit holders to carry concealed. Thus, the statute does not violate Petitioner's constitutional right to bear arms.

Petitioner's substantive due process claim has not been preserved for appellate review. Even if properly preserved, substantive due process provides no broader protection to Petitioner than does the Second Amendment.

Petitioner's "prior restraint" argument has also not been preserved for appellate review. However, even if properly preserved, prior restraint is a First

Amendment doctrine that has no application to Florida's shall-issue permitting system, which requires issuance of a concealed-carry permit within ninety days to any applicant who meets objective statutory criteria.

II. Petitioner argues that the statutory exceptions, found in a separate section, are not affirmative defenses but elements of the crime, and that the State must prove beyond a reasonable doubt the inapplicability of each exception. Contrary to Petitioner's assertion it is settled law that statutory exceptions in separate statutory sections do not constitute elements that the State must disprove.

Standard Of Review

"Because a ruling on a motion to dismiss for failure to state a cause of action is an issue of law, it is reviewable on appeal by the de novo standard of review." Bell v. Indian River Mem'l Hosp., 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001) (citations omitted). Likewise, the constitutional validity of a law is a legal issue subject to de novo review. See Scott v. Williams, 107 So. 3d 379, 384 (Fla. 2013).

Argument

I. SECTION 790.053, FLA. STAT., WHICH GENERALLY PROHIBITS THE OPEN CARRYING OF FIREARMS, IS CONSTITUTIONAL .

Petitioner argues that § 790.053, Fla. Stat.,[2] which generally prohibits the open carrying of firearms, limits his constitutional right to keep and bear arms in violation of the Second Amendment to the United States Constitution and Article 1, §8, of the Florida Constitution. As discussed more fully below, the Fourth District correctly rejected Petitioner's claim.

A. The Second Amendment.

The right to keep and bear arms is a fundamental right enshrined in federal constitutional law. The Second Amendment to the United States Constitution provides that "[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."

B. Article I, §8(a), Florida Constitution.

The Fourth District correctly opined that the right to bear arms is not absolute under the Florida Constitution. Norman v. State, 159 So. 3d at 214. Article I, §8(a) of the Florida Constitution provides: "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state

[2]The Legislature has enacted exceptions which permit open carry in Florida. See § 790.25(3), Fla. Stat. (2012). Petitioner has not asserted that he meets any of these exceptions.

shall not be infringed, **except that the manner of bearing arms may be regulated by law**" (emphasis added). The last clause is a key distinction between the state and federal right. Although its meaning has subsequently been read into the federal provision by the United States Supreme Court, see District of Columbia v. Heller, 554 U.S. 570, 626 (2008), such is explicitly stated in the Florida provision. The plain wording of the Florida constitutional provision provides explicit support for the State's position that it may regulate the open carry of firearms:

> [N]o controlling authority has been presented to this court for the proposition that the legislature may not impose some restrictions and conditions on either the method or manner that lawful arms may be carried outside the home. In fact, the plain wording of the Florida Constitution provides explicit support for the State's position that it may regulate the open carry of firearms.

Norman, 159 So. 3d at 214. See Rinzler v. Carlson, 262 So. 2d 661, 665 (Fla. 1972) (stating that "although the Legislature may not entirely prohibit the right of the people to keep and bear arms, it can determine that certain arms or weapons may not be kept or borne by the citizen. We have specifically held that the Legislature can regulate the use and the manner of bearing certain specific weapons."); Davis v. State, 146 So. 2d 892, 893 (Fla. 1962) ("[T]he legislature, nevertheless, is not so restricted that that body may not regulate the way in which arms may be carried.").

C. The *Heller* Decision.

In District of Columbia v. Heller, 554 U.S. 570, 592 (2008), the United States Supreme Court held that the Second Amendment protects an individual right to keep and bear arms for the purpose of self-defense. See also McDonald v. City of Chicago, 561 U.S. 742, 749-50 (2010) (extending the Second Amendment right to bear arms to the states by way of the Fourteenth Amendment).

The Supreme Court in Heller addressed the constitutionality of a District of Columbia law that banned handgun possession. Heller, 554 U.S. at 574-75. In striking down the law on Second Amendment grounds, the Court first held, as a threshold matter, that the Second Amendment protects an individual right to keep and bear arms for the purpose of self-defense. Id. at 592. The Court further held that the District of Columbia's complete ban on handgun possession, which extended to the home, was incompatible with the Second Amendment. Id. at 628-29. The Court explained:

> The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]. The prohibition extends, moreover, to the home . . . . Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," would fail constitutional muster.

Id. (citation and footnote omitted). While acknowledging the public safety concerns posed by handguns, the Court nevertheless stated that the "enshrinement"

of the Second Amendment right to bear arms "necessarily takes certain policy choices off the table." Id. at 636.

The Heller Court noted that the right is not absolute and is subject to certain long-standing limitations:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that **the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose**. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 626-27 (emphasis added).

Significantly, at the time of the Heller decision in 2008, the United States Supreme Court came to a conclusion that had already been reached by the people of the State of Florida in Art. I, §8 of the Florida Constitution: the right of self-defense is a fundamental right subject to certain regulations. The Fourth District recognized the Supreme Court's analysis was in line with the Florida Constitution:

> This court has previously made it clear that "the right of the people to keep and bear arms in defense of themselves" means that each person has the right to keep and bear arms in defense of himself, individually. See Alexander v. State, 450 So. 2d 1212, 1214 (Fla. 4th DCA 1984).

Norman, 159 So. 3d at 214. The Fourth District found that there is no controlling authority, even in the wake of Heller, that stands for the proposition that the Legislature may not impose some restrictions and conditions on either the method or manner that arms may be carried outside the home. Id. The plain wording of the Florida constitution allows the State to do exactly what the Court in Heller read into the Second Amendment: the Legislature may regulate the carrying of firearms in certain circumstances. Id.

D. Sections 790.053 and 790.062, Florida Statutes.

Consistent with the Legislature's authority to adopt reasonable regulations governing the manner of bearing firearms, the Legislature has enacted § 790.053, Fla. Stat., which prohibits the open carrying of loaded or unloaded firearms in most public areas except under specifically articulated circumstances.

More importantly, in 1987, the State of Florida became the first "shall issue" concealed carry permit state. That permitting scheme is found in § 790.06. This statute **requires** the Department to issue a license to qualified individuals:

> As a "shall issue" state, the issuance of the concealed weapons permit is not subject to any proof of need other than a statement by the applicant that they "[d]esire[] a legal means to carry a concealed weapon or firearm for lawful self-defense." Id. § 790.06(2)(g). The Department of Agriculture has no discretion, and may not withhold a permit from an individual based on any subjective beliefs, provided these statutory elements are met by the applicant.

Norman, 159 So. 3d at 218. Florida's "shall issue" permitting scheme is significant and illustrates the complete lack of infringement on Florida citizens' right to bear arms.

State concealed-carry regulations in the United States break down into four general categories: (a) states with no licensure requirements to conceal carry; (b) states with severe restrictions that prevent concealed carry and issue no permits; (c) states that issue permits within the discretion of local authorities; and (d) states that issue permits and prevent any discretion of local officials by requiring licensure for any applicant who meets objective criteria. The better-known colloquial terms for these schemes are Unrestricted, No-Issue, May-Issue and Shall-Issue, respectively. HG.org, Which states Are Likely to Issue Gun Permits and Which Are Not, http://www.hg.org/article.asp?id=31130 (last visited January 11, 2016). Often the burden of the discretionary requirements in "May-Issue" states is significant. See James England, Concealed Carry Breakdown: Where "May Issue" Is Essentially "No Permit" (June 18, 2015), http://concealednation.org/2015/06/concealed-carry-breakdown-where-may-issue-is-essentially-no-permit/.

Florida is a leader in promoting a citizen's right to self-defense by implementing one of the most permissive concealed carry "Shall-Issue" licensure statutes in the United States. A study published by the Crime Prevention Research Center states Florida has the highest amount of issued concealed carry permits in

the nation; calculated to be over 1.4 million. John R. Lott, Jr., John E. Whitley, & Rebekah C. Riley, Crime Prevention Res. Ctr., Concealed Carry Permit Holders Across the United States 15-16 (July 16, 2015), available at http://crimeresearch.org/wp-content/uploads/2015/07/2015-Report-from-the-Crime-Prevention-Research-Center-Final.pdf. This ready availability of permits is contrary to Petitioner's contention that Florida is impermissibly infringing upon Florida citizens' right to armed self-defense.

Additionally, Petitioner's contention that Florida is almost alone in restricting the open carry of firearms does not tell the whole story. The variable laws of the several states offer a sliding scale of restrictions on the open carrying of firearms. For example, in North Dakota, the open carry of firearms is only legal if the firearm is unloaded. N.D. Cent. Code Ann. §62.1-03-01. Virginia bans the carrying of firearms in certain cities. Va. Code Ann. §18.2-287.4. Numerous states prevent carrying of firearms in certain public areas. See, e.g., Ala. Code §13A-11-59 (preventing possession of firearms by persons participating in, attending, etc., demonstrations at public places); Ky. Rev. Stat. Ann. §244.125 (prohibition against possession of loaded firearm in room where alcoholic beverages are being sold by the drink); Ky. Rev. Stat. Ann. §527.070 (unlawful possession of a weapon on school property; posting of sign; exemptions); LA R.S. 40:1379.3 N (prevention of carrying of handguns in meeting places of governing

authority, the state capital, etc.); Neb. Rev. Stat. Ann. §69-2441 (1)(a) (sizeable list of prohibited areas). Several states require a permit to openly carry a handgun. L. Ctr. Prevent Gun Violence, Open Carrying Policy Summary, (August 21, 2015), http://concealednation.org/2015/06/concealed-carry-breakdown-where-may-issue-is-essentially-no-permit/ (citing Conn. Gen. Stat. §§29-28(b), 29-35(a); Ga. Code Ann. §16-11-127(c); Hawaii Rev. Stat. Ann. §134-9(a); Ind. Code Ann. §35-47-2-1(a); Iowa Code §724.4(1), (4)(i); Md. Code Ann., Crim. Law §4-203(a), (b)(2); Mass. Gen. Laws Ch. 140, §131; Minn. Stat. §624.714; Mo. Rev. Stat. §21.750; N.J. Rev. Stat. §2C:39-5(b); N.J. Rev. Stat. §2C:58-4(a); Okla. Stat. tit. 21, §§1289.6, 1290.1 – 1290.26; R.I. Gen. Laws §11-47-18(a); Tenn. Code Ann. §39-17-1308(a)(2); Tex. Penal Code §46.15(b)(6); Utah Code Ann. §76-10-523(2)(a).).

Florida is at the forefront of protecting its citizens' right to armed self-defense.

E. Level Of Scrutiny To Be Applied.

Subsequent cases applying Heller and McDonald have employed a two-step approach to most Second Amendment challenges—notably, the same approach adopted by the Fourth District below. First, a court must ask "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010). If it does not, the inquiry is complete and the challenged law is

constitutional; if it does, the court must "evaluate the law under some form of means-end scrutiny." Id. In other words, the court must inquire into "the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights." Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011).

The State does not dispute that Petitioner's carry of a handgun falls within the scope of the Second Amendment. This Court therefore can immediately proceed to the second step of the inquiry and examine the strength of the State's justification for its open-carry statute. Courts have traditionally applied one of three levels of scrutiny—rational basis, intermediate, or strict—when analyzing constitutional challenges. See, e.g., Heller at 634.[3] The Heller Court has indicated that rational basis review is not appropriate in Second Amendment cases. Id. at 628 n.27. However, the Court did not specify what level of scrutiny—intermediate or strict—is appropriate. See United States v. Chester, 628 F.3d 673, 676 (4th Cir. 2010).

Relying on this Court's opinion in State v. J.P., 907 So. 2d 1101 (Fla. 2004), Petitioner argues for the application of the strict scrutiny test to determine whether § 790.053 is constitutional, urging that strict scrutiny is warranted because the Florida statute infringes on a fundamental right: the unlimited right to carry any

[3] The parties dispute the level of scrutiny that should be applied in the second step of the analysis.

type of gun (long gun or hand gun) in any manner (open or concealed). Petitioner fails to note that the statute at issue does not severely burden the Second Amendment right to bear arms. Rather, it merely regulates the manner in which persons may exercise their Second Amendment right, requiring that the gun be concealed. The current statutory scheme broadly allows law-abiding citizens to carry concealed firearms in public.

The United States Supreme Court has not taken such an absolutist approach to the Second Amendment as that propounded by Petitioner. The Court recognized in Heller that, like all other constitutional rights, the right to keep and bear arms is not unlimited in its scope. For example, Heller expressly approved "longstanding prohibitions" on gun possession by felons and the mentally ill, and on the carry of guns into sensitive places, such as schools and government buildings ("Like most rights, the right secured by the Second Amendment is not unlimited." Heller, 554 U.S. at 626). Thus, even in light of this Court's decision in J.P., not **every** regulation of a fundamental right can be considered an infringement upon that right that must survive strict scrutiny. As post-Heller decisions have recognized by analogizing to First Amendment doctrine, the appropriate standard of scrutiny in Second Amendment cases "will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." Ezell, 651 F.3d at 703.

The open-carry statute does not severely burden Petitioner's core right to armed self-defense. Florida broadly permits law-abiding citizens to carry guns in public; they simply must carry those guns in concealment. The State has not infringed Petitioner's fundamental right, and the Fourth District did not err in refusing to apply strict scrutiny in its constitutional analysis. Because a restriction on the manner of exercising a right necessarily leaves open other means of exercising the right, the lesser standard of intermediate scrutiny is applicable.[4] Cf. United States v. Marzzarella, 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny to a regulation which "leaves a person free to possess any otherwise lawful firearm he chooses so long as it bears its original serial number").

1. Application Of Intermediate Scrutiny.

In other contexts, the United States Supreme Court has noted that "[t]o withstand intermediate scrutiny, a [statute] must be substantially related to an important governmental objective." Clark v. Jeter, 486 U.S. 456, 461 (1988). As many courts have recognized, this holds true in the Second Amendment context as well. See United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010) ("To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is

[4] After conducting an exhaustive examination of pertinent jurisprudence in the area, the Fourth District determined that Florida's ban on open carry should be subject to intermediate scrutiny. Norman, 159 So. 3d at 222.

advanced by means substantially related to that objective."); see also United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013), cert. denied, 135 S. Ct. 187 (2014); Schrader v. Holder, 704 F.3d 980, 989 (D.C. Cir.), cert. denied, 134 S. Ct. 512 (2013); Kalchasky v. Cnty. of Westchester, 701 F.3d 81, 96-97 (2d Cir. 2012), cert. denied, 133 S. Ct. 1806 (2013); Nat'l Rifle Ass'n of Am., Inc., v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 205 (5th Cir. 2012); United States v. Staten, 666 F.3d 154, 159 (4th Cir. 2011).

The interests furthered by the open-carry statute undoubtedly are important. In enacting the statute at issue here, the Florida Legislature has carefully sought to protect citizens' right to bear arms while at the same time protecting the public. In § 790.25(1), Fla. Stat., the Legislature enunciated this "Declaration of Policy" with regard to the "Lawful ownership, possession, and use of firearms and other weapons":

> The Legislature finds as a matter of public policy and fact that it is necessary **to promote firearms safety and to curb and prevent the use of firearms and other weapons in crime and by incompetent persons** without prohibiting the lawful use in defense of life, home, and property, and the use by United States or state military organizations, and as otherwise now authorized by law, including the right to use and own firearms for target practice and marksmanship on target practice ranges or other lawful places, and lawful hunting and other lawful purposes.

§ 790.25(1), Fla. Stat. (2012) (emphasis added). This law clearly indicates the Florida Legislature believes in, trusts, and favors law-abiding citizens bearing arms

in defense of themselves. Public safety is the paramount interest furthered by the ban on open carry, and this interest is important—even compelling. See Schall v. Martin, 467 U.S. 253, 264 (1984) ("The legitimate and compelling state interest in protecting the community from crime cannot be doubted") (internal quotations omitted).

Petitioner argues that the statute cannot pass muster because it has not been sufficiently tailored to achieve that interest. He simply claims the complete ban on open carry is too broad (Initial Brief at p. 22). Petitioner's argument must fail. As noted previously, the prohibition has certain exceptions, and Florida's permissive "Shall-Issue" statute allows any citizen who meets objective statutory criteria[5] to obtain a permit to carry a concealed firearm in most public places. In assessing whether there is a "reasonable fit" or "substantial relation" between the governmental interest and the means employed to advance it, courts "afford 'substantial deference to the predictive judgments'" of the legislature. Schrader, 704 F.3d at 990 (quoting Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 665 (1994)). Even in the more demanding strict scrutiny test, narrow tailoring "does not require exhaustion of every conceivable . . . alternative." Grutter v. Bollinger, 539 U.S. 306, 339 (2003). "[W]hile the government must carry its burden to

[5] The statutory exceptions are similar to those found constitutional in Heller, such as the prohibition on felons and the mentally ill possessing firearms, and laws forbidding the carrying of firearms in certain sensitive places, like schools and governmental buildings. Heller, 554 U.S. at 626-27.

establish the fit between a regulation and a governmental interest, it may resort to a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense, as circumstances and context require." United States v. Carter (Carter I), 669 F.3d 411, 418 (4th Cir. 2012); accord, United States v. Carter (Carter II), 750 F.3d 462, 465-66 (4th Cir. 2014).

Florida's open-carry statute substantially relates to the State's important interests in ensuring public safety, reducing firearm-related crime, and ensuring that law-abiding citizens who exercise their right to bear arms do so safely and effectively. While open carry may provide a visible deterrent to crime in some instances, the Legislature has reasonably concluded that concealed carry serves the State's interests, while open carry does not. An armed attacker engaged in the commission of a crime, for example, might be more likely to target an open carrier than a concealed carrier for the simple reason that a visibly armed citizen poses a more obvious danger to the attacker than a citizen with a hidden firearm. By choosing concealed over open carry, the Legislature has reasonably concluded that requiring citizens to conceal their firearms advances the state's interest in public safety. The Legislature was further entitled to determine that because it does not draw the attention of potential attackers, concealed carry provides a safer and more effective form of self-protection than open carry. Finally, it is reasonable to conclude that open carry poses a greater risk that someone who is otherwise not

lawfully entitled to possess the weapon will gain access to it. Thus, the Legislature was entitled to opt for concealed over open carry in its efforts to enhance public safety, reduce firearm-related crime, and maximize the defensive utility of firearms for those who choose to carry them.

As support for his argument that the open-carry statute is overbroad, Petitioner points to the number of jurisdictions that allow open carry in some form. Petitioner's reliance on these other jurisdictions is mistaken. Intermediate scrutiny's requirement of a substantial relation to an important government interest does not foreclose states from reaching different policy judgments. Cf. Knight v. Thompson, 797 F.3d 934, 947 (11th Cir. 2015) (holding that, under a statute requiring strict-scrutiny review, a state's prisons need not adopt more permissive policies simply because other jurisdictions have adopted them). Other states have chosen to allow open carry, but this does not prevent the Florida Legislature from choosing a different course where—as here—doing so substantially advances important interests. The Constitution entrusts to the Legislature's policy judgment whether it should choose to join other jurisdictions in allowing both open and concealed carry.

Finally, Petitioner suggests that the State previously has taken the position that the Constitution requires states to allow open carry. (Initial Brief at p. 31 (citing multi-state amicus brief)). This suggestion is false. As Petitioner notes,

Florida was among 20 states joining an amicus brief in Kachalsky v. Cacace, urging the United States Supreme Court to grant certiorari and reverse the judgment of the Second Circuit, which had upheld New York's highly restrictive may-issue concealed-carry regime. U.S. Supreme Court, No. 12-845, Brief of the Commonwealth of Virginia, et al. (Feb. 11, 2013) ("Kachalsky Br."). As the brief noted, New York law effectively denied the right to bear arms to most of its law-abiding citizens, prohibiting both forms of carry—open and concealed. The amicus brief argued that the Constitution forbids such "broad-brush restrictions on law-abiding citizens carrying handguns in public, whether open or concealed." Kachalsky Br. at 12. It did not, however, suggest that states must allow both forms of carry. Id. Because Florida, unlike New York, has adopted a "Shall-Issue" concealed-carry permitting system, it has complied with the Constitution's requirements.

In sum, the open carry statute substantially advances the important interests of protecting the public from firearm-related crime and fostering the safe and effective bearing of arms. Therefore, it passes intermediate scrutiny.

If, however, this Court determines that strict scrutiny provides the appropriate rubric for Petitioner's constitutional challenge, the open-carry statute should still pass muster. "Strict scrutiny must not be 'strict in theory but fatal in fact,'" Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2421 (2013) (quoting

Adarand Constr., Inc. v. Pena, 515 U.S. 200, 237 (1995)), and where the State has sufficient interests (as it does here), courts uphold statutes even when strict scrutiny applies. In fact, this Court has repeatedly upheld laws under the rubric of strict scrutiny. See, e.g., J.A.S. v. State, 705 So. 2d 1381, 1386 (Fla. 1998); Jones v. State, 640 So. 2d 1084, 1086 (Fla. 1994); Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985); Fla. Bd. of Bar Examiners Re: Applicant, 443 So. 2d 71, 75-76 (Fla. 1983). However, if this Court should determine that strict scrutiny applies, this Court should remand the case for a determination, in the first instance, of whether the statute passes strict scrutiny. See, e.g., T.M. v. State, 784 So. 2d 442, 444 (Fla. 2001) (reversing Second District's application of intermediate scrutiny to juvenile curfew ordinance and remanding for application of strict scrutiny); see also Fisher, 133 S. Ct. at 2421-22 (vacating and remanding for the lower court to apply the correct level of scrutiny "in the first instance").

F. Substantive Due Process.

Quoting McDonald v. City of Chicago, 561 U.S. 742 (2010), Petitioner argues that the right to keep and bear arms is a "substantive right" incorporated in the concept of due process found in the Fourteenth Amendment (Initial Brief at p. 24). Petitioner concedes that this is the first time he has ever raised this issue in any court.

Petitioner's claim should be rejected because it has not been properly preserved. Florida case law and statutes require a defendant to preserve issues for appellate review by raising them first in the trial court. Harrell v. State, 894 So. 2d 935 (Fla. 2005). Proper preservation requires three components: (1) a litigant must make a timely, contemporaneous objection; (2) the party must state the legal ground for the objection; and (3) the argument on appeal must be the specific contention asserted as the legal ground of the objection or motion below. Id. at 940. Petitioner's failure to present any argument on this issue in the trial court thus precludes appellate review. See also Booker v. State, 969 So. 2d 186, 194-95 (Fla. 2007) (when a defendant fails to pursue an issue during proceedings before the trial court, and then attempts to present that issue on appeal, this Court deems the claim to have been abandoned or waived).[6]

Turning to the substance of Petitioner's claim, it is well-settled that because the Second Amendment explicitly provides for a constitutional right to bear arms, one cannot look to the due process clause as an additional source of protection for that right. See, e.g., Graham v. Connor, 490 U.S. 386, 395 (1989) ("Because the

[6] In support of his argument, Petitioner claims that "[b]ecause the State prohibits the right to bear arms until one endures a lengthy process (up to 90 days by law, and sometimes more in practice), the regulatory scheme violates substantive due process" (Initial Brief at p. 24). Because this argument was not presented to the trial court, it was not preserved for appellate review. Additionally, because Petitioner failed to raise this claim in the trial court, his bald allegation that a license "sometimes [takes] more [than 90 days] in practice" is bereft of any factual support.

Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."). Therefore, the substantive due process clause provides no broader protection to Petitioner than does the Second Amendment.

G. Long Guns Vs. Handguns.

Another argument advanced by Petitioner in favor of the unconstitutionality of Florida's current scheme is that it prohibits the open carry of long guns. However, this argument strays well beyond the facts of this case. Petitioner was not convicted for openly carrying a long gun; he was convicted for openly carrying a handgun, and as explained supra, the statute under which Petitioner was convicted passes constitutional muster. Moreover, in any event, the same important interests that justify the State's prohibition on open carry of handguns justify its prohibition on open carry of long guns.

H. Prior Restraint.

Petitioner contends that Florida's application process is a prior restraint on his Second Amendment rights (Initial Brief at p. 31). Clearly the record shows that this argument was not raised or addressed by the lower courts.[7] As with

[7] To support his claim of prior restraint, Petitioner makes a broad allegation that the licensing requirements, which include an application, the payment of a fee, training, photographing, fingerprinting and background check, are so onerous that

Petitioner's substantive due process claim, this ground should be rejected for Petitioner's failure to properly present it to the lower courts for their consideration.

However, even assuming, arguendo, that the claim is properly before this Court, it is without merit. Prior restraint is a First Amendment doctrine aimed at preventing the chilling effect of censorship. Freedman v. Maryland, 380 U.S. 51 (1965). Even assuming that prior restraint doctrine might have some application in the Second Amendment context—a notion that some courts have questioned, see Kachalsky v. County of Westchester, 701 F.3d 81, 91-92 (2d Cir. 2012)—it has no application here, where the Legislature has robustly protected the right to bear arms from bureaucratic caprice with a shall-issue permitting system. This system requires issuance of a concealed-carry permit to any individual who meets objective statutory criteria within ninety days of receiving the application, leaving no room for discretion by the issuing authority. § 790.06, Fla. Stat. In no material way does Florida's shall-issue concealed-carry regime resemble a prior restraint on the right to bear arms.

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they prohibited individuals from "exercis[ing] their right in the most basic way" (Initial Brief at p. 33). Again, Petitioner's claim is not properly preserved for this Court's review. Petitioner never raised this claim in any way in the lower courts. Finally, Petitioner has not claimed that he has standing to raise such an argument. Because Petitioner had a license at the time of his arrest, there was no inability to secure a license which led to his arrest.

I. Conclusion.

The Fourth District correctly determined that prior to Heller, Art. I, §8 of the Florida Constitution protected its citizens in a way that it took the United States Supreme Court until 2008 to recognize. Norman, 159 So. 3d at 214. The Florida Constitution had already identified the right to bear arms as an individual right that could be regulated by the Legislature. Id. at 214. The Heller decision has not changed the right of Florida's citizens to arm themselves for self-defense. Section 790.053, Fla. Stat., which was a constitutional regulation of the manner in which firearms are carried prior to Heller, remains constitutional.

II. THE EXCEPTIONS LISTED WITHIN § 790.25(3), FLA. STAT., ARE AFFIRMATIVE DEFENSES RATHER THAN ELEMENTS OF THE OFFENSE .

Petitioner next contends that the exceptions in § 790.25(3), Fla. Stat., are elements that the State must prove to support a violation of § 790.053, Fla. Stat. Petitioner's claim must fail as the exceptions are affirmative defenses that must initially be raised by and supported with evidence from the defendant, rather than negated in the first instance by the State.

Determining whether an exception is an element of the crime to be negated by the State or is in the nature of a defense, requiring the defendant to come forward with evidence, is an issue of law subject to de novo review. See Hodge v.

State, 866 So. 2d 1270, 1271-72 (Fla. 4th DCA 2004). The law on this issue is settled:

> If the exception appears in the enacting clause, the burden lies with the State to prove that the defendant is not within the exception; but, **if the exception is contained in a subsequent clause or statute, that is a matter of defense requiring the defendant to put forth some evidence in support thereof**. Only then does the burden shift to the State, requiring it to disprove the defense beyond a reasonable doubt.

Id. at 1272 (emphasis added); see also Wright v. State, 442 So. 2d 1058, (Fla. 1st DCA 1983) (citing Baeumel v. State, 7 So. 371, 372 (Fla. 1890)) ("if there is an exception in the enacting clause, the party pleading must show that his adversary is not within the exception; but, **if there be an exception in a subsequent clause, or subsequent statute, that is a matter of defense**, and is to be shown by the other party.") (emphasis added).

Mackey v. State, 83 So. 3d 942 (Fla. 3d DCA 2012), aff'd on other grounds, 154 So. 3d 176 (Fla. 2013), involved the defendant's unlicensed carrying of a concealed firearm, in violation of § 790.01(2). That statute prohibits the carrying of a concealed firearm, but gives an exception in subsection (3) for an individual with a concealed carry license. The Third District found that a concealed carry license is an exception because it is contained in a separate and distinct subsection and must be raised as an affirmative defense. Id. at 946-47. See also Mackey v. State, 124 So. 3d at 181 (holding, without discussion, that "licensure is an affirmative defense to a charged crime of carrying a concealed weapon, as codified

at section 790.02, Florida Statutes (2013), and the lack of a license is not an element of the crime. This conclusion is based upon a clear reading of section 790.01 and consideration of its structure, the chapter of the Florida Statutes that governs firearms and other weapons, and the legal precedent on this issue." (footnote omitted)); Watt v. State, 31 So. 3d 238, 242 (Fla. 4th DCA 2010) (absence of a concealed carry license is not an element of the crime that must be proven by the State; proof of a license is an affirmative defense); cf. State v. Robarge, 450 So. 2d 855, 856 (Fla. 1984) (under prior version of statute, where "without a license" was contained in the enacting clause of the statute, the absence of a license was an essential element of the crime of possession of a firearm without a license).

Here, the exceptions listed within § 790.25(3), Fla. Stat., are not in the enacting clause of § 790.053, Fla. Stat., but are contained in a **separate statute altogether**. This resolves the issue, and any exception is a defense that must be initially supported by evidence proffered by the defendant. See Hodge, 866 So. 2d at 1272; Mackey v. State, 83 So. 3d at 946-47; Baeumel, 7 So. at 372. To the extent Petitioner intended to rely upon an exception, he must have raised the exception and supported it with evidence. Petitioner neither asserted nor proffered evidence to show that his conduct fell within any of the statutory exceptions.

Conclusion

WHEREFORE, based on the foregoing argument and authorities, Respondent respectfully submits that this Court should affirm the judgment of the Fourth District Court of Appeal in Norman v. State, 159 So. 3d 205 (Fla. 4th DCA 2015).

Respectfully submitted,

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

/s/ Celia A. Terenzio
CELIA A. TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 0656879

/s/ Heidi L. Bettendorf
HEIDI L. BETTENDORF
Assistant Attorney General
Florida Bar No. 0001805
1515 North Flagler Drive
Ninth Floor
West Palm Beach, FL 33401-3432
Tel: (561) 837-5000
Fax: (561) 837-5099

Counsel for Petitioner

Certificate Of Service

I HEREBY CERTIFY that on this 20th day of January, 2016, in accordance with Fla. R. Jud. Admin. 2.516, a .pdf copy of the foregoing with an electronic signature has been e-mailed to Eric J. Friday, Esquire, Fletcher & Phillips, 541 E. Monroe Street, Jacksonville, Florida, 32202, at efriday@fletcherandphillips.com, epittman@fletcherandphillips.com, and familylaw@fletcherandphillips.com. Additionally, a .pdf copy of the foregoing with an electronic signature has been electronically filed at https://myflcourtaccess.com.

/s/ Heidi L. Bettendorf
HEIDI L. BETTENDORF
Assistant Attorney General

Certificate Of Type Size And Style

In accordance with Fla. R. App. P. 9.210(a)(2), Appellee hereby certifies that the instant brief has been prepared with Times New Roman 14 point font.

/s/ Heidi L. Bettendorf
HEIDI L. BETTENDORF
Assistant Attorney General