IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-573
Lower Tribunal No. 3D10-2415

ANTHONY MACKEY,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner, Anthony Mackey, was the Defendant in the trial court and the Appellant in the Third District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the Appellee in the Third District. The parties shall be referred to as they stand in this Court. The symbols "R." and "SR." refer to the record on appeal and supplemental record on appeal. The symbol "D." refers to the deposition of Officer Alexander May which was supplemented to the record of appeal. The symbol "A." refers to the opinion of the lower court in case number 3D10-2415.

STATEMENT OF THE CASE AND FACTS

On March 29, 2010, Petitioner was charged by information with possession of a firearm by a convicted felon and carrying a concealed firearm. (R. 7-10). On June 30, 2010, Petitioner filed a motion to suppress the firearm first arguing that the firearm was openly visible and, thus, was not "concealed" as defined by § 790.001(2), Florida Statutes (2010) to justify an investigatory stop. (R. 12-14). Alternatively, citing to *Regalado v. State*, 25 So. 2d 600 (Fla. 4th DCA 2009), Petitioner asserted that, because possession of a firearm is not illegal in Florida if the carrier has a concealed weapons permit, a fact that an officer cannot glean by mere observation, stopping a person solely on the fact that the individual possesses the firearm violates the Fourth Amendment. (R. 14-15). Because the officer in

this case did not observe any facts or circumstances that would show that his possession was without a permit, there was no evidence of criminal activity sufficient to justify the stop. (R. 14-15).

On August 20, 2010, the trial court held the hearing on the motion to suppress which adduced the following:[1]

Officer Alexander May was employed by the City of Miami Police Department since June 2008. (D. 3). During the day of March 6, 2010, Officer May was driving a marked patrol unit in a location that he described as "a known narcotics location" and "he has known people to have guns in that area before." (D. 5, 6). For that reason, he stated, "I tend to look at a lot of hand motions and waistbands and pockets in this line of work, especially in that area." (D. 5).

Officer May saw Petitioner standing alone on one side of a fence by an apartment complex. (D. 6). As the officer approached, he slowed down, and observed a solid object inside of Petitioner's pocket. (D. 5, 7). As he drew closer, he observed a "piece of the handle sticking out. Not much, but a piece enough for [him] to identify a firearm." (D. 5, 7). Based on his training and experience, he knew that it was a firearm. (D. 8). Officer May exited his vehicle, approached Petitioner and asked Petitioner if he had anything on him. (D. 10). Petitioner said,

[1] Because the arresting officer, Officer May, was unavailable for the hearing, the State proceeded on the deposition transcript, as stipulated by Petitioner. (SR. 6-12). The transcript was subsequently entered into evidence. (SR. 17).

"No." (D. 10). The officer then asked if he could pat him down. (D. 10).[2] The officer proceeded to conduct a pat down search of Petitioner's pocket, felt the firearm he had seen earlier, retrieved it, and subsequently asked Petitioner if he had a concealed weapons permit. (D. 8). After Petitioner said "no," he was arrested and placed into custody. (D. 8). Petitioner spontaneously stated that he kept the firearm for "protection because he's been shot at before." (D. 10).

At the conclusion of the hearing, defense counsel first argued that the firearm was not concealed. (SR. 17-22). The trial court denied the motion to suppress, finding that there was probable cause to arrest. (SR. 23, 25). Relying on *Regalado v. State*, 25 So. 3d 600 (Fla. 4th DCA 2009), the defense alternatively argued that, assuming the firearm was concealed, when the officer observed the concealed weapon, he did not know that Petitioner did not have a concealed weapons permit. (SR. 23, 26-31). The trial court denied Petitioner's second argument and instead followed the Third District's decision in *Hernandez v. State*, 289 So. 2d 16 (Fla. 3d DCA 1974), finding that whether the gun was concealed or open, the officer could have stopped the Petitioner in either instance. (SR. 28-31).

[2] It is unclear from the record whether Petitioner consented to the pat down.

On August 30, 2010, Petitioner filed a motion for rehearing which was denied. (R. 33-35, 57). Petitioner pled guilty to both counts on August 31, 2010.[3] (R. 67-73). The trial court subsequently adjudicated Petitioner guilty and sentenced him to a three year minimum mandatory term on count one and a three year term on count two to run concurrent with count one. (R. 41-43, 45-47, 73).

On direct appeal, Petitioner relied on the Fourth District's decision in *Regalado*, arguing that the firearm should be suppressed since it is legal to carry a concealed firearm in Florida, so long as you have a permit to do so, and the officer did not have reasonable suspicion unless he had reason to believe that the defendant did not have a permit. (A. 4).[4]

On March 14, 2012, the Third District Court of Appeal affirmed the denial of the motion to suppress and certified express and direct conflict with *Regalado*. (A. 11). The court first noted that the precedent as established by *State v. Navarro*, 464 So. 2d 137 (Fla. 3d DCA 1984) (holding that a police officer's observation of a bulge under the clothing of an individual, which the officer in his training and

[3] When Petitioner pled guilty, he reserved the right to appeal the suppression issue. (R. 72).

[4] In his initial brief, Petitioner alternatively argued that the officer lacked reasonable suspicion to stop him for openly carrying a firearm pursuant to § 790.053(1), Florida Statutes (2010) (prohibiting "any person to openly carry on or about his or her person any firearm"). However, during oral argument and, as noted in the Third District's opinion, Petitioner did not contest the trial court's factual determination that the firearm was "concealed." (A. 4).

experience determined to be "the outline of a firearm[,] amounted to probable cause to believe that the individual was carrying a concealed weapon, justifying not merely a pat-down, but a search.") and *Hernandez v. State*, 289 So. 2d 16 (Fla. 3d DCA 1974) (holding that both the arrest for carrying a concealed firearm and the seizure of the firearm were proper where an officer saw a portion of a firearm partially protruding from the pocket of his trousers) required affirmance. (A. 6). The court further explained that the crime of carrying a concealed firearm is complete upon proof that the defendant knowingly carried a firearm that was concealed from the ordinary sight of another person and does not require knowledge of an absence of a license since possessing a license is not an element, but an affirmative defense. (A. 9-10).

Thereafter, this Court accepted jurisdiction based on the direct conflict between *Mackey v. State*, 83 So. 3d 942 (Fla. 3d DCA 2012) and *Regalado v. State*, 25 So. 3d 600 (Fla. 4th DCA 2010).

SUMMARY OF THE ARGUMENT

The Third District properly determined that the officer in this case had reasonable suspicion of criminal activity to conduct a *Terry* stop when he observed the handle of the firearm protruding from Petitioner's pocket, a conclusion that is consistent with the statutory construction of § 790.01, Florida Statutes, which makes the absence of a concealed weapons permit an affirmative defense, and not,

an essential element of the crime. This result is supported by evidence of legislative intent in § 790.02, Florida Statutes, which declares the carrying of a concealed weapon as a breach of the peace and authorizes officers to make an arrest of an individual that the officer reasonably suspects is armed and dangerous. Moreover, because it is clear that the Legislature understood how to structure the license component as an essential element of the offense in § 790.05, which prohibits the manual possession of a firearm, but declined to do so in § 790.01, the Legislature intended to make the absence of a permit an affirmative defense. Finally, the Third District's interpretation is amply supported by the other Florida district courts of appeal and by other state and federal jurisdictions.

This Court should reject *Regalado v. State*, 25 So. 3d 600 (Fla. 4th DCA 2010), upon which Petitioner relies, which holds:

> Because it is legal to carry a concealed weapon in Florida, if one has a permit to do so, and no information of suspicious criminal activity was provided to the officer other than appellant's possession of a gun, the mere possession of a weapon, without more, cannot justify a Terry stop.

A careful review of the Fourth District's reasoning reveals that the court improperly relied on *United States v. Ubiles*, 224 F.3d 213 (3d Cir. 2000) where, unlike Florida, having a concealed weapons permit is an essential element of the offense that the State has the burden to prove, and is therefore, a presumptively legal activity.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL PROPERLY HELD THAT THE OFFICER HAD REASONABLE SUSPICION TO CONDUCT A *TERRY* STOP FOR THE CRIME OF CARRYING A CONCEALED FIREARM.

In his brief on the merits, Petitioner asserts that the decision of the Third District Court of Appeal below is in express and direct conflict with the Fourth District's decision in *Regalado v. State*, 25 So. 3d 600 (Fla. 4th DCA 2010) and urges this Court to adopt the holding of *Regalado* which sets forth that, because "[p]ossession of a gun is not illegal in Florida," mere possession of a concealed firearm does not justify a Fourth Amendment seizure. *Regalado*, 25 So. 3d at 604. However, based on the construction of § 790.01, Florida Statutes, possession of a *concealed* firearm is a crime in Florida. Therefore, the Third District properly determined that the officer in this case had reasonable suspicion of criminal activity to conduct a *Terry* stop when he observed the handle of the firearm protruding from Petitioner's pocket, a conclusion that is consistent with the Legislature's intent and the Second and Fourth amendments.

The Second Amendment of the United States Constitution provides that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II. It is unequivocal that the Second Amendment guarantees a personal right that is "pre-existing." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (citing *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)). However,

the right to bear arms is not an absolute right and is subject to regulation by the States under their police powers. *See Heller*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited. . . . [T]he right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . For example, the majority of the 19th century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."); *see also Cruikshank*, 92 U.S. at 533 (stating that the States were free to restrict or protect the Second Amendment right under their police powers).

Florida has codified the individual arms bearing right in its own state constitution, providing that, "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, *except that the manner of bearing arms may be regulated by law*." Art. I, § 8(a), Fla. Const. (emphasis added). That the States may limit this right is evident in Florida's constitution and inherent in this Court's holdings. *See Davis v. State*, 146 So. 2d 892 (Fla. 1962) ("The Constitution is a limitation on legislative power . . . the Declaration of Rights have been zealously guarded by this court, but in the very section of the Declaration with which we now deal the limitation which we have not italicized is modified with the provision that, although the right to bear arms shall not be impinged upon, the legislature, nevertheless, is not so restricted

that that body may not regulate the way in which the arms may be carried."); *Rinzler v. Carson*, 262 So. 2d 661, 665-66 (Fla. 1972) ("There is inherent in the holding[s] of this Court the proposition that the right to keep and bear arms is not an absolute right, but is one which is subject to the right of the people through their legislature to enact valid police regulations to promote the health, morals, safety, and general welfare of the people.") (referring to *State v. Astore*, 258 So. 2d 33 (Fla. 2d DCA 1972) (upholding the constitutionality of the statute which makes it unlawful for any person to own or have in his possession or control any "short-barreled rifle" as against the contention that the statute is an unreasonable and unconstitutional prohibition against hand guns of all sorts made from rifle parts); *Nelson v. State*, 195 So. 2d 853 (Fla. 1967) (holding constitutional section 790.23, Florida Statutes, which makes it unlawful for a convicted felon to have in his possession a pistol, sawed-off rifle, or sawed-off shotgun); *Davis*, 146 So. 2d 892 (holding valid section 790.05, Florida Statutes (1961) which made it a criminal offense for any person to carry around with him or to have in his manual possession a pistol, Winchester rifle or other repeating rifle in a county without a license from the county commissioners); *Carlton v. State*, 58 So. 486 (Fla. 1912) (upholding as valid against the contention that it unlawfully infringed upon the right of the citizen to bear arms a statute on this State which made it unlawful to carry concealed weapons)).

The regulation of "the manner of bearing arms" is set forth in Chapter 790, Florida Statutes. While the Legislature stated that the laws relating to concealed weapons "shall be liberally construed to carry out the constitutional right to bear arms for self-defense" and "is supplemental and additional to existing rights to bear arms," the Legislature recognized 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 . . . ." §§ 790.06(15), 790.25(1), Fla. Stat. (2012). Generally speaking, these regulations include the Jack Hagler Self Defense Act, as codified in § 790.06(1), which authorizes the Department of State to issue of concealed weapon or firearm licenses to qualified persons.[5] Section 790.01(2), Florida Statutes (2012) proscribes the carrying of a concealed firearm on his or her person, designating the crime as a felony of the third degree. Section 790.053(1), Florida Statutes (2012) makes it unlawful for any person to openly carry a firearm. And, § 790.25(3) delineates the authorized uses of firearms or weapons, such as use by members of the armed forces, persons carrying out or training for

[5] The Jack Hagler Act was passed during the 1987 Legislative Session and replaced by amendment § 790.06 and repealed § 790.05. *See generally* Richard Getchell, Comment, *Carrying Concealed Weapons in Self-Defense: Florida Adopts Uniform Regulations for the Issuance of Concealed Weapons Permits*, 15 Fla. St. U. L. Rev. 751 (1987); § 790.06(17). The purpose behind its enactment was to provide statewide uniformity in standard for issuing licenses to carry concealed weapons and firearms. *Id.*, § 790.06(15). Prior to the new law, this section gave county commissions the authority to issue licenses and the option to adopt ordinances to regulate the issue of licenses. *Id*.

emergency management duties, and law enforcement officers. But, that section "does not authorize carrying a concealed weapon without a permit, as prohibited by ss. 790.01 and 790.02." § 790.25(2)(a).

Therefore, it is apparent that Florida recognizes that the right to bear arms is not without limitation, especially in view of the State's interest in promoting public safety. For the reasons that follow, this Court should approve the decision of the Third District Court of Appeal, which properly determined that carrying a concealed firearm is a crime since the holding of a valid license is an affirmative defense, and therefore, an officer is not required to have knowledge of such in order to conduct a lawful investigatory stop. This Court should reject the Fourth District's decision in *Regalado* since its holding was improperly based on the laws of the Virgin Islands which makes the absence of a concealed firearms license an essential of the crime, and possession of a concealed firearm presumptively legal, a premise that has no applicability in Florida.

A. The Third District Court of Appeal was correct in determining that the officer had reasonable suspicion to warrant a *Terry* stop without requiring knowledge that the individual did not hold a valid permit since carrying a concealed firearm is a crime in Florida.

In the instant case, Officer May was driving a marked patrol unit during the day of March 6, 2010, in a location that he described as "a known narcotics location" and "he has known people to have guns in that area before." (D. 5, 6).

The officer saw Petitioner standing alone on one side of a fence by an apartment complex. (D. 6). As the officer approached, he slowed down, and observed a solid object inside of Petitioner's pocket. (D. 5, 7). As he drew closer, he observed a "piece of the handle sticking out" which, based on his training an d experience, he knew that it was a firearm. (D. 5, 7, 8). The officer exited his vehicle, approached Petitioner and asked Petitioner if he had anything on him. (D. 10). Petitioner said, "No." (D. 10). The officer then asked if he could pat him down. (D. 10). The officer proceeded to conduct a pat down search of Petitioner's pocket, felt the firearm he had seen earlier, retrieved it, and subsequently asked Petitioner if he had a concealed weapons permit. (D. 8). After Petitioner said "no," he was arrested and placed into custody. (D. 8).

The Third District Court of Appeal properly held that reasonable suspicion existed at the point that the officer observed Petitioner carry the firearm and that it was concealed from the ordinary sight of another person since possessing a license is not an element of the crime, but an affirmative defense. (A. 9-10).

The Fourth Amendment to the United States Constitution and § 12 of Florida's Declaration of Rights guarantee citizens the right to be free from unreasonable searches and seizures. U.S. Const. Amend. IV; Art. I, § 12, Fla. Const. The Florida Constitution expressly provides that the right shall be

construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. *Id*.

This Court has defined three levels of police-citizen encounters. *See Popple v. State*, 626 So. 2d 185 (Fla. 1993). First are those referred to and defined as "consensual encounters," which involve minimal police contact and do not invoke constitutional safeguards. *Id*. at 186. "During a consensual encounter a citizen may either voluntarily comply with a police officer's requests or choose to ignore them." *Id*. Second are those designated investigatory stops, at which time a police officer "may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime." *Id*. (citing § 901.151, Fla. Stat. (1991)). The third level is an arrest, which must be supported by probable cause that a crime has been or is being committed. *Popple*, 626 So. 2d at 186.

In the landmark case *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court established that a law enforcement officer who has a reasonable and articulable suspicion that criminal activity is afoot is permitted to conduct a brief investigatory stop even in the absence of probable cause. In the course of the stop, an officer may conduct a frisk or pat down of an individual in order to conduct a limited search for weapons "where he has reason to believe that he is dealing with an armed and dangerous individual." *Id*. at 27 ("[I]t would appear to

be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.").

Reasonable suspicion is defined as "a particularized and objective basis for suspecting the particular person stopped of criminal activity" based upon "the totality of the circumstances." *Terry*, 392 U.S. at 19-23. It need not involve the observation of illegal conduct, but does require "more than just a hunch." *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989). Reasonable suspicion "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

In the present case Petitioner was charged with the crime of carrying a concealed firearm in violation of § 790.01, Florida Statutes (2010), which provides:

> (2) A person who carries a concealed firearm on or about his person commits a felony in the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (3) This section does not apply to a person licensed to carry a concealed weapon or a concealed firearm pursuant to the provisions of s. 790.06.

According to the statute, the State must prove two elements beyond a reasonable doubt: (1) the defendant knowingly carried on or about his person the weapon, and

(2) the weapon was concealed from the ordinary sight of another person. Fla. Std. J. Inst. Crim. 10.1 (2010). Because the absence of a concealed weapons permit is not an essential element that the State must prove, proof of license is an affirmative defense, the burden of which lies with the defense. *See Watt v. State*, 31 So. 3d 238, 238-40 (Fla. 4th DCA 2010) (the state does not have the burden of proving the absence of a license as an element of the crime of carrying a concealed weapon, rather, proof of a license is only pertinent as an affirmative defense); *see also State v. Robarge*, 450 So. 2d 855 (Fla. 1984) (holding that under the rules of statutory construction, if an exception is contained in a clause subsequent to the enactment clause of a statute, the exception is an affirmative defense rather than an element of the offense). Thus, the crime of carrying a concealed weapon is complete upon proof that the defendant knowingly carried a firearm that was concealed from the ordinary sight of another person. Accordingly, as held by the Third District, knowledge of the absence of a concealed weapons permit is not required in order for an officer to conduct an investigatory stop.

This conclusion is buttressed by the inclusion of § 790.02, Florida Statutes, (2012) which declares the carrying of a concealed weapon as a breach of the peace and "any officer is authorized to make arrests . . . without warrant of persons violating the provisions of s. 790.01 when *said officer has reasonable grounds or probable cause to believe that the offense of carrying a concealed weapon is being*

committed." (Emphasis added). *See also West v. State*, 239 So. 2d 611, 612-13 (Fla. 2d DCA 1967); *Marden v. State*, 203 So. 2d 638, 640 (Fla. 3d DCA 1967); *Haynes v. State*, 72 So. 180, 184 (Fla. 1916); *Carlton*, 58 So. at 488-89.

A review of this Court's decision in *Robarge* further demonstrates that the Legislature intended to make the license requirement in § 790.01 an affirmative defense. In *Robarge*, the defendant was convicted of manual possession of a firearm without a license in violation of § 790.05, Florida Statutes (1981). *Robarge*, 450 So. 2d at 855. Section 790.05 provides:

> Whoever shall carry around with him, or have in his manual possession, in any county in this state, any pistol, electric weapon or device, or Winchester rifle or other repeating rifle *without having a license* from the county commissioners of the respective counties of this state shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084; provided, this section shall not apply to sheriffs, deputy sheriffs, city or town marshals, policemen, or United States marshals or their deputies as to the carrying of concealed weapons.

Id. at 856 n.1 (emphasis added); § 790.05, Fla. Stat. (1982). This Court interpreted the "without having license" clause to mean that "the absence of a license is an essential element of the crime of possession of a firearm without a license." *Robarge*, 450 So. 2d at 856. Because it is evident the Legislature understood how to structure the license component as an element of the offense as in § 790.05 by including the language "without having a license," but declined to do so in § 790.01, it is clear that it intended to make licensure an affirmative

defense here. To hold otherwise would be contrary to this Court's precedent in *Robarge* and the intention of the Legislature. *State v. Burris*, 875 So. 2d 408, 413-14 (Fla. 2004) (*quoting Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) ("[T]o construe [a] statute in a way that would extend or modify its express terms would be an inappropriate abrogation of legislative power.")).

This view is in accord with *Terry*, given that the original rationale in *Terry* for permitting frisks was to safeguard officers while they pursue an investigation. For, *Terry* itself specifically identified the safety of police officers and the public as legitimate interests that must be protected and, for that reason, subsequently incorporated it into its reasonable suspicion analysis. *Terry*, 392 U.S. at 27 (providing "the authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime").

The Third District's interpretation is amply supported by other Florida district courts of appeal. Notably, these courts, with the exception of *Aguilar*, have held that possession of a firearm did not amount merely reasonable suspicion, but to *probable cause*. *See, e.g., State v. Navarro*, 464 So. 2d 137 (Fla. 3d DCA 1985) (holding that a police officer's observation of a bulge under the clothing of an individual, which the officer in his training and experience determined to be "the

outline of a firearm[,] amounted to probable cause to believe that the individual was carrying a concealed weapon, justifying not merely a pat-down, but a search"); *Hernandez v. State*, 289 So. 2d 16 (Fla. 3d DCA 1974) (holding that both the arrest for carrying a concealed firearm and the seizure of the firearm were proper where an officer saw a portion of a firearm partially protruding from the pocket of his trousers); *State v. Burgos*, 994 So. 2d 1212 (Fla. 5th DCA 2008) (holding that the officers had probable cause to seize the weapon where, in investigating an anonymous tip that the defendant had been seen putting a firearm in his waistband, they approached defendant and asked him if he had anything that would harm them, and then defendant admitted that he had a firearm in his waistband); *Thomas v. State*, 250 So. 2d 15 (Fla. 1st DCA 1971) (holding that where police officer who noted bulge in defendant's hip pocket, and defendant accelerated his pace towards his automobile after viewing the officer approaching, officer had probable cause to believe that defendant was carrying a concealed weapon, and pistol discovered in the pocket, after officer felt outside pocket and noted sharpness of object inside, was admissible); *Aguilar v. State*, 700 So. 2d 58 (Fla. 4th DCA 1997) (holding that statement by teenage boy that identified defendant leaving convenience store as person who he had seen enter public restroom with gun and was tip by citizen informant, and therefore, provided officers with valid reason to believe that defendant had concealed weapon and subsequent pat down was valid).

In other jurisdictions that treat a firearms license as an affirmative defense, courts have similarly held that reasonable suspicion still exists even if there was no reason to suspect that person did not have a firearms license. *See, e.g., State v. Timberlake*, 744 N.W.2d 390, 395 (Minn. 2008) (because the "lack of a permit [is] not an element of the offense, the police in this case did not need to know whether [the defendant] had a permit in order to have reasonable suspicion that [the defendant] was engaged in criminal activity"); *United States v. Cooper*, 293 Fed. Appx. 117, 118-20 (3d Cir. 2008) (because "licensure is an affirmative defense to a statutory violation for possession of a firearm . . . an officer's observance of an individual's possession of a firearm in a public place in Philadelphia is sufficient to create reasonable suspicion to detain that individual for further investigation"); *United States v. Gaitlin*, 613 F.3d 374 (3d. Cir. 2010) (police had reasonable suspicion to believe that defendant was carrying a concealed handgun without a license, in violation of Delaware law, where a valid license is an affirmative defense); *United States v. Montague*, 437 Fed. Appx. 833 (11th Cir. 2011) (officers could conduct *Terry* stop of defendant for carrying concealed weapon despite law authorizing permits for concealed carry); *United States v. Morton*, 400 F. Supp. 2d 871 (E.D. Va. 2005) (officer could detain person suspected of carrying concealed weapon in Virginia, since having permit was an affirmative defense); *GeorgiaCarry.Org, Inc. v. Metropolitan Atlanta Rapid Transit Authority*, No. 1:09-

CV-594-TWT, 2009 WL 5033444 (N.D. Ga. Dec. 14, 2009) (officers had reasonable suspicion that suspect was engaged in unlawful activity as required for an investigative stop because a Georgia firearms license is an affirmative defense); *United States v. Lucas*, 68 Fed. Appx. 265 (2d Cir. 2003) ("That New York state permits certain licensed individuals to carry concealed weapons does not negate the officer's reasonable suspicion that unlawful activity was afoot . . . .").

Even if the absence of a license were an element of the crime, an overwhelming majority of Floridians are not licensed to carry concealed weapons. As of August 31, 2012, the number of concealed weapon or firearm permits issued in Florida is 971,263. Fla. Dep't of Agric. and Consumer Servs. Div. of Lic., Concealed Weapon/Firearm License Holders by County as of August 31, 2012, (Aug. 31, 2012), *available at* http://licgweb.doacs.state.fl.us/stats/cw_active.pdf. Where Florida had an estimated population of 19,057,542 in 2011, the percentage of the population that is licensed to carry a concealed weapon is only five percent (5%). Florida State and County QuickFacts, U.S. Census Bureau, (Sept. 25, 2012), *available at* http://quickfacts.census.gov/qfd/states/12000.html. Given the small percentage of the population that is licensed to carry a concealed firearm, the overwhelming majority of firearms, or 95%, are *not* licensed to be concealed. Thus, an officer's suspicion that a firearm is not licensed would be reasonable

because, in any given case, there would be, statistically speaking, a 95% likelihood of illegality.

1. The Third District's opinion is not inconsistent with *Terry*'s individualized suspicion requirement.

The facts of the instant case illustrate that there was a reasonable suspicion that was individualized. Here, before Officer May even approached Petitioner, he had observed a piece of a handle which he identified was a firearm. When the officer approached Petitioner and asked whether he had anything on him, the encounter was a consensual one. But when Petitioner replied, "no," and the officer knew that Petitioner was lying, the officer at that point in time had the required reasonable suspicion for the ensuing search and seizure. Therefore, Petitioner's lie contributed to the officer's reasonable suspicion, elevating the consensual encounter to a lawful investigatory stop. *See, e.g.*, *Graham v. State*, 964 So. 2d 758 (Fla. 4th DCA 2007), *rev'd on other grounds*, (police had reasonable suspicion that the defendant had trespassed in condominium when he lied about how he entered the residence and his reason for being there); *State v. Gandy*, 766 So. 2d 1234 (Fla. 1st DCA 2000) (police officers had reasonable suspicion that drug transaction had taken place when the defendant lied to officers about his reason for parking in residence's driveway); *United States v. Duenas*, 331 Fed. Appx. 576 (10th Cir. 2009) (officers had reasonable suspicion to justify detention arising from

a traffic stop when the defendant lied about his authority to drive a rental car in another state and his stated travel plans).

Petitioner asserts that the Third District's opinion creates an automatic stop and frisk of anyone carrying a firearm because, first, it is inconsistent with *Terry*'s individualized suspicion requirement and, second, the Legislature, by making licensure an affirmative defense, did not intend to make possession of a concealed firearm inherently suspicious. Petitioner's Brief on the Merits, p. 20. However, both points are without merit.

First, by not requiring an officer to have knowledge that an individual lacks a permit to carry does not convert it into an automatic stop and frisk. Florida law, as interpreted by the majority of the district courts of appeal, and the majority of States, would require that an officer have facts that a person is (a) in possession of a firearm, and (b) *that it be concealed*. Thus, it would not lead to the "carte blanche" approach that Petitioner avers. An officer's suspicion that the crime of carrying a concealed firearm must still be based on a suspicion that is reasonable and the continued detention reasonably related in scope to the circumstances which justified the initial stop, for example, "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." *United States v. Sharpe*, 470 U.S. 675, 686 (1985). In accordance with § 790.06(1), a licensee of a concealed firearm is required to carry and display their

permit to any officer upon demand. Thus, any seizure and resulting detention would be brief for the lawful permit holder.

Petitioner next posits that the Third District's approach essentially amounts to the unfettered automobile stops that were prohibited in *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (holding that stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile is unreasonable under the Fourth Amendment where there is no suspicion that a motorist is unlicensed or that the vehicle is not registered or that the car is being driven contrary to the laws governing the operation of motor vehicles or any other applicable law) and *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (holding that roving patrol stops if persons for questioning about their citizenship near the international border violated the Fourth Amendment where there was no reasonable suspicion that the persons may be aliens). Petitioner's Brief on the Merits, 21-23. *Prouse* has no application to the facts of this case since *Prouse* involved purely random stops. Here, on the other hand, the police are not conducting stops of any and all persons in order to determine whether they have a concealed weapon. Not only did the officer in this case initiate the stop, after observing enough to know that Petitioner possessed a firearm and that it was concealed, thereby not selecting Petitioner at random, but the officer did so in an area that was known as a high crime area, and after asking Petitioner a voluntary

question, to which Petitioner responded with a lie. This scenario is a far cry from the random stops of motor vehicles that occurred in *Prouse*.

Petitioner also argues that, like *Prouse*, the State's interest in ensuring compliance with its firearms regulations does not outweigh the resulting intrusion on the privacy and security of the persons detained. Petitioner's reading of these cases necessarily overlooks the fact that, in both *Prouse* and *Brignoni-Ponce*, the Supreme Court expressly distinguished automatic automobile stop cases from those involving firearms. In *Brignoni-Ponce*, the Court pointed to *Terry v. Ohio*, 392 U.S. 1 and *Adams v. Williams*, 407 U.S. 143 (1972) (holding that a policeman was justified in approaching the respondent to investigate a tip that he was carrying narcotics and a gun) in recognizing a state's interest in protecting the public and preventing crime in the regulation of firearms:

> These cases together establish that in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime. In both *Terry* and *Adams v. Williams*, the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous. *The limited searches and seizures in those cases were a valid method of protecting the public and preventing crime.*

Id. at 881 (emphasis added). And in *Prouse*, the Court recognized, "There are certain 'relatively unique circumstances,' in which consent to regulatory restrictions is presumptively concurrent with participation in the regulated

enterprise" and then referred to the federal regulation of firearms in *United States v. Biswell*, 406 U.S. 311 (1972).

In *Biswell*, the Court upheld a search pursuant to the Gun Control Act of 1968 that resulted in the discovery of two sawed-off rifles in a locked storeroom which respondent was not licensed to possess. *Biswell*, 406 U.S. at 312; *see also* 18 U.S.C. § 923(g) (authorizing official entry during business hours into "the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at such premises"). Central to this holding was the Court's recognition of a federal interest in preventing violent crime and to assisting the States in regulating firearms traffic within their borders. *Id*. at 315. *Biswell* also warranted the intrusion on fact that the inspections were a limited threat to a dealer's justifiable expectation of privacy:

> When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. Each license is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority. The dealer is not left to wonder about the purposes of the inspector or the limits of his task.

Id. at 316 (citations omitted).

Similarly here, Florida has an interest in promoting firearms safety and to curb and prevent the use of firearms and other weapons in crime and by incompetent persons. § 790.25(1), Fla. Stat.; *Davis*, 146 So. 2d at 893-94 (constitutional guarantee of right of people to bear arms in their own defense was intended to secure to people right to carry weapons for their protection, but was also designed to protect people from bearing of weapons by the unskilled, irresponsible, and lawless). And, as in *Biswell*, when a person applies for a concealed weapons permit, he does so with knowledge that he necessarily subjects himself to investigation for compliance with the law. The Florida concealed weapon or firearm license application requires an applicant to read and become knowledgeable of the provisions of Chapter 790, Florida Statutes and includes a copy of the statutes in that chapter in the application. Fla. Dep't of Agric. & Consumer Servs., Div. of Lic., Florida Concealed Weapon or Firearm License Application, 1, 6 (April 2012) *available at http://licgweb.doacs.state.fl.us/FORMS/ConcealedWeaponLicenseApplicationInstructions.pdf*; *see also State v. Williams*, 794 N.W.2d 867, 876 (Minn. 2011) (Page, J., concurring) ("[I]t is likely to come as a shock to all those people who have obtained a permit to carry, hold, or possess a pistol in a public place that by carrying, holding, or possessing the permitted pistol in a public place they subject themselves to arrest . . . .").

Petitioner further declares that the "automatic stop" of carriers of concealed firearms are unnecessary because the police already have an alternative mechanism in place for verifying licenses under the Jack Hagler Self Defense Act. Petitioner's Brief on the Merits, 23. This approach fails to consider the unique danger that comes with confronting an individual in possession of a firearm, which could result in fatal consequences. *See Terry*, 392 U.S. at 33 (Harlan, J., concurring) ("There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.").

Petitioner next cites to *Florida v. J.L.*, 529 U.S. 266 (2000) (holding that police officers lacked reasonable suspicion to conduct a *Terry* stop when an anonymous caller reported that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun") for the proposition that the Supreme Court declined to extend exceptions to the Fourth Amendment to firearms. Petitioner's Brief on the Merits, 24. The Supreme Court explained that that the precise issue before the Court was "whether the *tip* pointing to J.L. had [sufficient] indicia of reliability." *Id*. at 354 (emphasis added). Thus, *J.L.* did not contemplate a firearms exception to *Terry*'s reasonable suspicion requirement in the context of this case. Rather, it declined to extend the exception in view of the reliability analysis required by the anonymous tip. *J.L.*, 529 U.S. at 273.

2. Because licensure is an affirmative defense, the crime of carrying of a concealed firearm is "presumably suspicious."

Petitioner argues that the Third District's conclusion is inconsistent with Florida's licensing scheme. Petitioner's Brief on the Merits, 26. Specifically, Petitioner suggests that because § 790.06 states that the section "shall be liberally construed to carry out the constitutional right to bear arms for self-defense" and that the section "is supplemental and additional to existing rights to bear arms," it necessarily evidences that the Legislature did not intend to make possession of a concealed weapon an inherently suspicious activity. Petitioner's Brief on the Merits, 26. However, based on the construction of the statute, the Legislature has, in fact, made the possession of a concealed firearm "presumably suspicious" since the holding of a valid permit is an affirmative defense, which the defense must prove, and the State need only prove that the weapon is a firearm and that it concealed on or about the individual's person.

Petitioner cites to no other authority, but to the Massachusetts decision in *Commonwealth v. Couture*, 552 N.E.2d 538 (Mass. 1990) to support the proposition that the elements of the crime and its burden of proof is only applicable at trial and does not extend to Fourth Amendment reasonable suspicion analysis. Petitioner's Brief on the Merits, 26.

Other jurisdictions have disagreed with Massachusetts's view that the affirmative defense applies only to trial proceedings and has no bearing on an

officer's initiation of an investigatory stop. In *Gaitlin*, the Third Circuit held that reasonable suspicion existed in that case based solely on the reliable tip from a known informant because carrying a concealed handgun is presumptively a crime in Delaware. *Gaitlin*, 613 F.3d at 378. It explained that while it is possible to have a concealed handgun license, the burden is upon the defendant to establish that he had a license to carry the concealed weapon. *Id*. (citing *Lively v. State*, 427 A.2d 882, 884 (Del. 1981). Thus, under Delaware law, carrying a concealed handgun is a crime to which possessing a valid license is an affirmative defense, and *an officer* can presume a subject's possession is not lawful until proven otherwise. *Id*. *See Lively*, 427 A.2d at 884 (emphasis added).

Likewise, in *United States v. Morton*, 400 F. Supp. 2d 871, 877 (E.D. Va. 2005), the district court concluded that carrying a concealed handgun is a crime in Virginia because the state must prove "(1) [t]hat the defendant was carrying [a firearm] about his person; and (2) [t]hat this weapon was hidden from common observation" and that the permit provision was not an element. The court went on to conclude:

> This interpretation is logical and achieves the statutory purpose of the prohibitive provision of the statute. By defining the crime as the carrying of a concealed weapon, the General Assembly made it possible for *law enforcement officers to identify and react to simple objective criteria.* Then, by providing a long list of exemptions from the prohibited conduct, the General Assembly made it possible for citizens to demonstrate facts that would render lawful conduct that is otherwise unlawful. But, those facts are knowable only by the citizen

> who qualifies for a statutory exemption or who has a permit. *Given the rapidity with which law enforcement must react to the events transpiring on the streets,* they cannot be expected reasonably to know whether an otherwise unknown person is protected by an exemption or possesses a permit.

Id. at 878-79 (emphasis added).

B. The Fourth District's decision in *Regalado v. State*, 25 So. 3d 600 (Fla. 4th DCA 2010) is incorrect since the holding rested on *United States v. Ubiles*, 224 F.3d 213 (3d Cir. 2000) which is inapposite to the law in Florida.

In *Regalado v. State*, 25 So. 3d 600 (Fla. 4th DCA 2010), the defendant was convicted of carrying a concealed weapon. *Regalado*, 25 So. 3d at 601. There, an informant approached a police officer and explained that a man in the restaurant had raised his shirt, exposing a gun in his waistband to friends at the table. *Id*. at 601. The man did not take the gun out of his waistband. *Id*. The informant gave a description of the man, and as the man walked by, the informant identified the defendant as the man with the gun. *Id*. At that point, the informant refused to give his name and then took off. *Id*. The defendant started to walk into a crowded area. *Id*. The officer followed him. *Id*. The officer then observed a bulge in the defendant's waistband, which, from his training and experience, he believed was the butt of a handgun. *Id*. For the safety of citizens, the office pulled out his weapon and ordered the suspect to the ground. *Id*. at 601-602. The officer patted down the defendant, felt the firearm, and took it out. *Id*. at 602. The Fourth District held:

> *Because it is legal to carry a concealed weapon in Florida*, if one has a permit to do so, and no information of suspicious criminal activity was provided to the officer other than appellant's possession of a gun, the mere possession of a weapon, without more, cannot justify a Terry stop.

Id. at 601. In so holding, the Fourth District heavily relied on *United States v. Ubiles*, 224 F.3d 213 (3d Cir. 2000) where, during a carnival celebration in the U.S. Virgin Islands, an elderly gentleman reported to a police officer that a young man in a crowd had a gun. *Regalado*, 25 So. 3d at 604 (citing *Ubiles*, 224 F.3d at 215). The tipster then disappeared. *Id*. The officer approached the young man but observed no suspicious behavior. *Id*. The officer then frisked the defendant, finding an unregistered firearm. *Id*. *Regalado* then interpreted the analysis of *Ubiles* as follows:

> Analyzing the evidence, the court determined that the officer did not have reasonable suspicion of criminal activity, *because possession of a firearm was not illegal* in the U.S. Virgin Islands. Although possession of an unregistered or defaced firearm would be a crime, the officer possessed no information which would suggest that the fun was unregistered. Therefore, the authorities had no reason to believe that the defendant was planning or had participated in criminal activity merely based upon his possession of a gun.

Regalado, 25 So. 3d at 605.

In this appeal, Petitioner relies primarily on *Regalado*'s premise that "it is legal to carry a concealed weapon in Florida," thereby requiring an officer to know that a person does not have a concealed weapons permit. However, as discussed above, carrying a concealed firearm is a crime that does not require an officer to

know that the individual is without a valid permit. In this regard, *Regalado*'s reliance on *Ubiles* is severely misplaced because *Ubiles* occurred in the Virgin Islands, where, unlike Florida, having a concealed weapons permit *is an element of the offense*, and is therefore a presumptively legal activity.

In the U.S. Virgin Islands, the crime of possession of a firearm is governed by § 2253 of the Virgin Islands Code:

> (a) Whoever, unless otherwise authorized by law, has, possesses, bears, transports or carries either openly or concealed on or about his person or under his control in any vehicle of any description any firearm . . . may be arrested without a warrant, and shall be sentenced to imprisonment . . . .

V.I. Code Ann. tit. 14, § 2253(a) (2012). Thus, the elements for the crime of carrying an open or concealed firearm are that: (i) the defendant possessed the firearm, (ii) he was not licensed to possess it, and (iii) it meets the definition of a firearm. *See Government of Virgin Islands v. Bedford*, 671 F.2d 758, 763 n.7 (3d Cir. 1982). Therefore, it is the government's burden to prove that a defendant is unauthorized to carry or possess the firearm. *See United States v. McKie*, 112 F.3d 626, 629, 630 (3d Cir. 1997) ("In the past, we have interpreted the clause 'unless otherwise authorized by law' to mean possession without a license."); *see also Government of Virgin Islands v. Soto*, 718 F.2d 72, 80 (3d Cir. 1983); *United States v. Xavier*, 2 F.3d 1281, 1289 (3d Cir. 1993). As such, it is, in fact, legal per se in the Virgin Island to carry a firearm; the crime would not be complete, and

reasonable suspicion would not exist, unless an officer had knowledge that the individual did not possess a license. *See Ubiles*, 224 F.3d at 217-18; V.I. Code Ann. tit. 23, § 470 (2012).

Based on this distinction, *Ubiles* has no applicability in Florida, where knowledge that an individual did not possess a license is an affirmative defense, and the merely carrying of a concealed firearm amounts to criminal activity. *See United States v. Montague*, No. 10-20638-CR, 2010 WL 3294289, at *7 n.5 (S.D. Fla. July 27, 2010) (rejecting the defendant's reliance on *Ubiles* since, there, the absence of a concealed weapons permit is an element of the offense); *Georiacarry.org, Inc.*, 2009 WL 5033444, at *6 ("*Ubiles* is a case from the Virgin Islands and, under Virgin Islands law, the absence of a firearm license is an element of the crime of unauthorized possession of a firearm."); *United States v. Collins*, No. 01-CR-00780, 2007 WL 4463594, at *4 (E.D. Pa. Dec. 19, 2007) ("*Ubiles* is distinguishable [because] the gun laws in the Virgin Islands are different from the gun laws in Pennsylvania."); *Gaitlin*, 613 F.3d at 378-79 (3d Cir. 2010) ("While *Ubiles* presented similar facts (in that the only evidence was a tip of firearm possession), the case arose in the U.S. Virgin Islands, which, unlike

Delaware, does not apply a presumption of illegality. Instead, there it is the *Government's* burden to prove the absence of a license.") (emphasis supplied).[6]

Petitioner relies chiefly on *Commonwealth v. Couture*. In *Couture*, a clerk at a convenience store telephoned the police and informed them that a man inside the store had a small handgun protruding from his right rear pocket. *Couture*, 552 N.E.2d at 539. The clerk said that the man entered a gray truck and reported the registration number to the police. *Id*. Pursuant to a national park ranger's radio transmission stating that the ranger was following a truck which matched the clerk's description, the police officer located and stopped the vehicle. *Id*. The officer approached with his service revolver drawn and ordered the defendant out of the vehicle. *Id*. As his partner detained the defendant, the officer searched the vehicle and found a small caliber pistol underneath the seat, near the transmission. *Id*. The officer testified that he was not in fear of his safety at the time of the search. *Id*. The officer asked the defendant if he had a license for the gun. *Id*. The defendant replied that he did not. *Id*. The Massachusetts Supreme Judicial Court affirmed the suppression of the firearm, holding that the police had no probable cause to believe that the defendant was or had been engaged in any

[6] The majority of states have held that, in prosecutions for carrying a weapon without a license, the burden of proof as to lack of license is on the defendant. *See generally* Dag E. Ytreberg, *Burden of Proof as to Lack of License in Criminal Prosecution for Carrying or Possession of Weapon Without License*, 69 A.L.R.3d 1054, § 2 (1976).

criminal activity since carrying a concealed weapon was only illegal if the person has no license. *Id*.

Couture is distinguishable because the officers there did not have reasonable suspicion to stop the defendant based solely on a bare-boned anonymous tip. Unlike the case at hand, the officers did not directly observe the defendant in possession of a firearm, nor perceive any other facts that would give rise to a reasonable suspicion of criminal activity. And, the United State Supreme Court decision in *Florida v. J.L.*, 529 U.S. 266 (2000) has held that an anonymous tip, without more, is insufficient to justify a stop and frisk.

It is also worth noting that this case is the only case cited in support of his position. By contrast, when the Minnesota Supreme Court in *State v. Williams*, 794 N.W.2d 867 (Minn. 2011) was confronted with the very same issue, the court rejected the defendant's arguments based on *Couture* and *Jones*:

> Cases from other jurisdictions are not particularly helpful because they depend on interpretation of a particular state's or territory's own licensing statute. Here, we rely only on our own interpretation of Minnesota's statute.

Id. at 874 n.5 (Minn. 2011) (citing *Timberlake*, 744 N.W.2d at 394 n.5).

Petitioner also cites to *United States v. Jones*, 606 F.3d 964 (8th Cir. 2010) (Loken, C.J., concurring); *United States v. DeBerry*, 76 F.3d 884 (7th Cir. 1996); *State v. Stepney*, 84 Wash. App. 1083 (Wash. Ct. App. 1997) (unpublished opinion); and *United States v. Garvin*, No. 11-480-01, 2012 WL 1970385 (E.D. Pa

May 31, 2012). However, all these cases, with the exception of *Jones*, are factually distinct in that the officers' suspicion is based on an anonymous tip without direct observation of the firearm and are only marginally persuasive.

For example, in *Jones*, the Eighth Circuit held that there was no reasonable suspicion of criminal activity where the defendant was walking in a high crime area while clutching the front area of the hooded sweatshirt he was wearing, although it was a warm sunny day, and that he watched the police cruiser drive by. *Jones*, 606 F.3d at 967. *Jones* does not apply because the court focused its analysis entirely on the fact that the officer was unable to determine what, if anything, the defendant possessed in his sweatshirt. *Id*. ("On cross examination, [the officer] admitted that he was unable to see the size or shape of whatever was in Jones's hoodie pocket, and that Jones exhibited none of the other clues [the officer] had been trained to look for, such as walking with an unusual gain, turning that part of his body away from the officers' view, adjusting his grip or the location of the item in his pocket, or running away."). It was only in the concurring opinion, to which Petitioner points, that the court addressed that mere possession of a concealed weapon was not unlawful. And, as the concurrence readily admits, "No Eighth Circuit opinion has addressed that issue." *Id*. at 968.

Next, in *DeBerry*, where an officer searched the defendant matching the description of an anonymous tip and the defendant made suspicious gestures as if

he might be about to draw a gun, the court found that this was sufficient to establish reasonable suspicion. *Deberry*, 76 F.3d at 886. Petitioner relies on dicta in that case which suggests that if the crime had occurred in another state, such as Texas, where carrying a concealed weapon was lawful, "it would be essential that the officers have a reasonable belief and not a mere hunch that if he was carrying a gun he was violating the law." *Id*. at 886-87. *Deberry* has since been called into doubt by the United States Supreme Court in *Florida v. J.L.*, 529 U.S. at 270. In addition, in Texas, in order to uphold a conviction for unlawfully carrying a handgun there must be evidence in the record that the individual was carrying a handgun, on or about his person, unlawfully. *Turner v. State*, 744 S.W.2d 318, 319 (Tex. App. 1988). Under Texas law, any carrying of a handgun is unlawful unless the individual shows that he comes within an exception to the statute. *Id*. (citing *United States v. Elorduy*, 612 F.2d 986 (5th Cir.1980)); *see also Hall v. State*, 205 S.W.2d 369 (Tex. Crim. App. 1947) (proof that defendant carried on or about his person a pistol and with the pistol committed an assault made a prima facie case of assault with a prohibited weapon and burden of proving authorization by law to carry pistol rested upon defendant).

In *Stepney*, an anonymous 911 caller reported that a group of neighbors gathered outside of her apartment and that she has known that the male in the previously carried a gun in the front of his pants. *Stepney*, 84 Wash. App. at *1.

When the two officers arrived, they located the group of individuals and identified the only adult male as the defendant. *Id*. The officers patted down the exterior of the defendant's waistline and recovered a handgun. *Id*. The court held that the 911 call was the only basis for suspecting the defendant had a gun and this fact alone does not sufficiently state a reasonable suspicion. *Id*. at *3. It is important to note that *Stepney* is an *unpublished* opinion from another state that is distinguishable on multiple levels. First, Petitioner misstates the holding of this case. In his brief, Petitioner represents that *Stepney* "[held] that since, 'being armed is not a crime, nor is it necessarily illegal to have a concealed weapon,' the officers lacked reasonable suspicion to conduct a Terry frisk and pat-down, where the officers had no information suggesting the defendant's possession was illegal." Petitioner's Brief on the Merits, 18. However, it is clear that the court determined that reasonable suspicion did not exist based on the *unreliability of the 911 call*. And, it is only in a footnote that the court mentioned the legality of carrying a concealed weapon. *See Stepney,* 84 Wash. App. at *3, n.22 ("We note that being armed is not a crime, nor is it necessarily illegal to have a concealed weapon. Thus, the officer's suspicion that Stepney was armed is not equivalent to a suspicion of criminal activity."). Finally, in the State of Washington, the absence of a firearms license *is* an element of the crime. *See* Wash. Rev. Code § 9.41.050(1)(a) (2012) ("Except in the person's place of abode or fixed place of business, a person shall

not carry a pistol concealed on his or her person without a license to carry a concealed pistol."); Wash. Patt. J. Inst. Crim. 133.04 (2012) ("To convict the defendant of the crime of carrying a pistol, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That . . . defendant carried a pistol concealed on *[his][her]* person; (2) That the defendant did not have a license to carry the pistol; (3) That the defendant was not in *[his][her]* place of abode or *[his][her]* fixed place of business; and (4) That this act occurred in the *[State of Washington][City of][County of]*."). As such, based on the construction of the applicable statute, it would *not* be a crime unless the State proved that the individual did not possess a license to carry.

In *Garvin*, the Eastern District of Pennsylvania upheld a frisk search for weapons pursuant to an anonymous tip alleging that a man matching the defendant's description was carrying a gun. *Garvin*, 2012 WL 1970385 at *1. Petitioner cites to *Garvin* which provided, "However, as some individuals are legally permitted to carry guns pursuant to the Second Amendment of the Constitution, a reasonable suspicion that an individual is carrying a gun, without more, is not evidence of criminal activity afoot." Petitioner's Initial Brief on the Merits, 18; *Garvin*, 2012 WL 1970385 at * 3. Yet, *Garvin* does not stand in support of *Regalado*'s holding since the court, in the very next sentence the court provides, "Therefore, the tip alone was not sufficient to support an investigatory

stop and the Court must examine whether the stop was supported by other factors" and thus only applies when an anonymous tip serves as the basis for reasonable suspicion. *Id*. at *3. Even if Petitioner's interpretation of *Garvin* is taken as true, in Pennsylvania, the absence of a license is an essential element of the crime for carrying a concealed firearm that the State must prove, and thus, it is, in fact presumptively legal to carry a concealed weapon. *Commonwealth v. McNeil*, 461 Pa. 709, 715 (Pa. 1975); *see* 18 Pa. Cons. Stat. § 6106 (2012) ("[A]ny person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license).

Therefore, because *Regalado* was based on a case where the laws differ substantially from Florida and Petitioner offers little in support of *Regalado*, this Court should approve of the Third District's decision below. In addition, contrary to Petitioner's assertion, *Regalado* is not in conflict with this case because *Regalado* focuses on the reliability of an anonymous tip to satisfy the reasonable suspicion requirement, a distinct analysis under the Fourth Amendment, which does not apply here where the officer independently observed a concealed firearm. Moreover, this case is further distinguishable from *Regalado* on the basis that the officer here had reasonable suspicion. Before Officer May even approached Petitioner, he had observed a piece of a handle which he identified was a firearm. And, when the officer approached Petitioner and asked whether he had anything on

him, the encounter was a consensual encounter, where reasonable suspicion was not needed. But when Petitioner replied, "no," and the officer asked to pat him down knowing that Petitioner was lying about having the firearm, Petitioner had the opportunity to inform Officer May that he had a license to carry the firearm. Because he did not do so, Officer May had the requisite reasonable suspicion at this point in time to conduct a pat down. These facts go beyond those in *Regalado* where the officer had no information of suspicious criminal activity other than appellant's possession of a gun, since Officer May engaged in a consensual encounter, provided Petitioner with an opportunity to inform him that he had a permit, Petitioner did not, and which resulted in the officer's suspicion that Petitioner's possession of the firearm was unlawful.

CONCLUSION

WHEREFORE, Respondent, THE STATE OF FLORIDA respectfully requests that this Court approve the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed and electronically mailed to Michael T. Davis, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125, and appellatedefender@pdmiami.com and mdavis@pdmiami.com, on this 4th day of October, 2012.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

s/Shayne R. Burnham
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