**SUPREME COURT OF FLORIDA**

**CASE NO.: SC12-573**

**L.T. No.: 3D10-2415,**

**10-6837**

**ANTHONY MACKEY,** Appellant,

vs.

**STATE OF FLORIDA**, Appellee.

# AMICUS CURIAE FLORIDA CARRY, INC.'S

# BRIEF IN SUPPORT OF APPELLANT

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## Interest of Amicus Curiae

Amicus Curiae, Florida Carry, Inc., is a grassroots organization that seeks to protect the rights of law abiding Floridians and visitors to our state, to possess and use firearms and other weapons for lawful purposes including recreation and self-defense. These goals are accomplished through education, legislative initiatives, and litigation. This case, while a criminal case, will have a direct impact on law abiding Floridians who choose to exercise their right to possess and use firearms in accordance with state and federal law.

## Summary of Argument

The rights of Floridians to keep and bear arms are well recognized in the U.S. and Florida Constitutions as well as in Florida general law. To allow detentions and arrests based solely on a person's possession of a firearm without more, and then to require a person to prove through an affirmative defense that their possession of the firearm was lawful would swallow whole the right. As inconvenient as it might be, the need for enforcement of firearms laws preventing carrying by the unlawful and unskilled, must sometimes give way to the God-given right of the people to both lawfully keep and bear arms, and be free from unreasonable searches and seizures.

**Argument**

The state's position can be summed up that in order for a citizen to exercise their right under the 2nd Amendment of the United States Constitution and Article I Sec. 8 of the Florida Constitution, the citizen must give up their rights under the Fourth Amendment, to be free from unreasonable search and seizure. According to the Attorney General, persons in possession of a firearm should be presumed to be committing a crime, and should be required to prove before a court of law that their conduct is in fact lawful. Should the Court find in the State's favor in this case, this would be the first time in American jurisprudence that the exercise of a fundamental individual right has required the abdication of another fundamental right.

The State argues that the mere possession of a firearm, in and of itself, is justification under *Terry v. Ohio*, 392 U.S. 1 (1968) for a citizen to be stopped, detained and arrested, until the citizen can prove to a court that his possession is lawful. The State further argues that the fact that possession is lawful is never more than an affirmative defense to the presumptively criminal act of possessing a firearm. According to the State a person with a gun is a criminal, until they prove they are not.

**Possession of a firearm does not constitute reasonable suspicion of criminal activity.**

**Standard of Review**

Interpretation of a statute is a legal issue involving the interpretation and application of statutory language and is therefore subject to a de novo review. *Brown v. City of Vero Beach*, 64 So. 3d 172, 174 (Fla. 4th DCA 2011).

Firearm ownership and possession is not a crime in Florida. The right to own and possess firearms in Florida is well recognized and is protected under both the Florida and US Constitutions as well as by recognition of the right in Florida general law. 2nd Amendment U.S. Constitution, Art. I Sec. 8, Constitution of Florida, Secs. 790.06, 790.25, and 790.33, Fla. Stat.

There are nearly 1 million persons with a Florida Concealed Weapons Firearms License (CWFL). http://licgweb.doacs.state.fl.us/stats/Number_of_Licensees_By_Type.pdf. This does not begin to count security guards, police officers, military, and those persons carrying under other provisions of Florida's firearms laws. This Court previously recognized this fact stating "In Florida, it is generally not illegal to possess a firearm." *J.L. v. State*, 727 So.2d 204 (Fla. 1998) (affirmed by a unanimous United States Supreme Court, *Florida v. J.L.*, 529 U.S. 266 (2000)). This Court went on

to recognize that in addition to those old enough to have concealed carry permits there were even cases where minors could lawfully possess firearms. *Id.* These are not the only cases of lawful firearms possession.

At present, absent certain statutory and common law exceptions, the only legal method of carrying a firearm in Florida is concealed with possession of a CWFL. Therefore, despite the State's contention and cites to *Heller*'s acknowledgment of limitations on the right to carry, they do not apply to Florida where the legislature has specifically determined that it will allow the exercise of the right to carry only in a concealed manner. Visitors from 35 other states with some form of license reciprocity carry concealed firearms in this state. http://licgweb.doacs.state.fl.us/news/concealed_carry.html.

People in Florida carry securely encased in their vehicle, they carry while hunting, fishing, camping or going to or from, all with no license required. They carry in their homes and places of business. Sec. 790.25, Fla. Stat. The State however, argues that because the *Heller* court recognized that prohibitions on concealed carry were presumptively legal this means that anyone with a concealed firearm is suspicious. This ignores that 49 of the states and Puerto Rico have some form of concealed carry law and that for some states, concealed carry is the preferred method of recognition of the right to bear arms. In fact, as recently as the

2011 legislative session, the Florida Sheriff's Association argued against a bill seeking to repeal Florida's open carry prohibition. *See*, SB 234, 2011 Florida Legislature.

Despite all these situations where it is perfectly lawful to possess and carry firearms, state attorneys around the state repeatedly argue that people carrying firearms should be treated as criminals until proven otherwise. They argue that the mere possession of a concealed weapon or an openly carried firearm creates grounds for a detention of any citizen, for examination of their papers or further investigation. They argue that a citizen should have to justify or show their lawful possession of a weapon or firearm to avoid detention and arrest, and that it is the citizen's burden to establish an affirmative defense authorizing them to carry a weapon.

It has been said that figures lie and liars figure. This statement has never been more appropriate than in response to the State's contention that 95% of firearms in Florida are not licensed to be concealed. (State's brief Pg. 20). Such a statement requires ignoring basic rules of statistics, ignoring the lack of available data, ignoring the fact that there is no requirement to license individual guns in the state (doing so is a felony, See Sec. 790.335, Fla. Stat.), and ignoring the fact that some people own multiple guns.

The State's argument is that because only 5% of the population of Florida, holds a CWFL there is a 95% likelihood that a person with a firearm is committing a crime. Such a statement relies on several assumptions that are easily dismissed as common sense. In order for the State's argument to be valid, one would first have to ignore all visitors to our state from the 35 states with reciprocity. One would also have to ignore all of the circumstances where no license is required to possess a firearm. Furthermore, the State's argument also assumes that every man, woman and minor child is carrying a firearm at all times. Only by ignoring these statistical values and making a ridiculous assumption, could the State validate its absurd statistical argument that 95% of persons carrying firearms are doing so illegally.

The State also argues that the Defendant lied to the officer because he responded to the question did he "have anything on him" in the negative. A person lawfully in possession of a firearm would presumably answer the same question the same way. (D. 10) The person lawfully in possession of a firearm would have no reason to think that he must tell a police officer he is lawfully carrying because there is no such requirement in chapter 790, Fla. Stat. All Florida law requires is that in response to a request to show valid ID and a CWFL, the license holder must do so and that such a failure results in a $25 civil fine. Nothing in the section

however, indicates an intent to allow police to harass CWFL holders any more than they can stop everyone driving a vehicle for a license check at their whim.

**Lawful activity while carrying should not be an affirmative defense. The state should be required to establish every element of the crime and that the statute at issue applies.**

**Standard of Review**

Interpretation of a statute is a legal issue involving the interpretation and application of statutory language and is therefore subject to a de novo review. *Brown v. City of Vero Beach*, 64 So. 3d 172, 174 (Fla. 4th DCA 2011).

The contention that the possession of a CWFL, or other lawful purpose for possession of a firearm is merely an affirmative defense, means that it is completely proper for a person to be detained, arrested and even prosecuted, until they have satisfied a court or jury that their possession of a firearm was lawful. This means that no person lawfully carrying in Florida is safe, in their home, place of business or engaging in a multitude of lawful recreational activities.

The state's argument is that because of the structure of Sec. 790.01, Fla. Stat., the mere carrying of a firearm is a crime, subject only to a number of affirmative defenses. Sec. 790.01, however never makes such a claim. Rather, it states that it does not even apply to a person licensed under Sec. 790.06. The state

then seeks to argue that because of the myriad ways in which the legislature regulates the right to bear arms in Florida, that the legislature has indicated its intent that carrying a firearm is presumptively an indication of criminal activity which the citizen must refute.

The state is only able to make this argument by ignoring two other statutes in chapter 790.

> (15) The Legislature finds as a matter of public policy and fact that it is necessary to provide statewide uniform standards for issuing licenses to carry concealed weapons and firearms for self-defense and finds it necessary to occupy the field of regulation of the bearing of concealed weapons or firearms for self-defense ***to ensure that no honest, law-abiding person who qualifies under the provisions of this section is subjectively or arbitrarily denied his or her rights***. The Department of Agriculture and Consumer Services shall implement and administer the provisions of this section. The Legislature does not delegate to the Department of Agriculture and Consumer Services the authority to regulate or restrict the issuing of licenses provided for in this section, beyond those provisions contained in this section. Subjective or arbitrary actions or rules which encumber the issuing process by placing burdens on the applicant beyond those sworn statements and specified documents detailed in this section or which create restrictions beyond those specified in this section are in conflict with the intent of this section and are prohibited. ***This section shall be liberally construed to carry out the constitutional right to bear arms for self-defense. This section is supplemental and additional to existing rights to bear arms, and nothing in this section shall impair or diminish such rights.***

Sec. 790.06, Fla. Stat. (Emphasis added).

Also,

> (1) Declaration of policy.--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.

Sec. 790.25, Fla. Stat. Ann.

These two provisions make clear that the legislature intended to recognize the right to keep and bear arms, presumably free from the harassment that would necessarily be allowed should the state prevail in its argument to make the possession of a CWFL or other lawful purpose an affirmative defense only. **Legislative pronouncements and statutory history indicate an intent to protect Floridians' rights to keep and bear arms, not an intent to allow for stop or detention without at least a reasonable suspicion of a crime other than mere possession of a firearm.**

**Standard of Review**

Interpretation of a statute is a legal issue involving the interpretation and application of statutory language and is therefore subject to a de novo review. *Brown v. City of Vero Beach*, 64 So. 3d 172, 174 (Fla. 4th DCA 2011).

As set forth above, the Legislature, throughout Chapter 790, Fla. Stat.,

repeatedly affirms the rights of Floridians to lawfully possess firearms. The State argues that the change in structure of the carry laws in 1987, of Sec. 790.05, and Sec. 790.01 should guide this Court's decision, and lead it to reverse its decision in *Robarge*. *State v. Robarge*, 450 So.2d 855 (Fla. 1984).

What the State ignores is that the legislature did not simply rewrite Florida's carry statutes in 1987 with the intent of changing the elements of the offense. Rather, the 1987 revisions to Chapter 790 were a substantial alteration of Florida's firearms laws to make carrying a firearm easier. *See* Richard Getchell, Comment, *Carrying Concealed Weapons in Self-Defense: Florida Adopts Uniform Regulation for the issuance of Concealed Weapons Permits*, 15 Fla. St. U. L. Rev. 751 (1987).

The State's argument is that the legislature eliminated Sec. 790.05 in favor of the rewritten version of Sec. 790.01 to provide less right to carry a firearm converting a license from an element of the crime to an affirmative defense, a conclusion directly at odds with everything else surrounding the 1987 amendments to Chapter 790. *See* Getchell, Comment, *Supra*. Rather, the 1987 revisions were the end result of seven years of lobbying and effort to liberalize carry of firearms in Florida.

Among other things the 1987 amendments, created state preemption of firearms laws, created shall issue rather than may issue CWFL, and took license

issuance away from counties. The reason Sec. 790.05, Fla. Stat., was eliminated was to reflect that the counties no longer issued concealed weapons licenses. Nothing in the legislative history of Sec. 790.01 or Sec. 790.06 indicates in any way an intent to overturn the prior findings of this Court that the lack of possession of a CWFL is an element of the crime of unlawfully carrying a concealed firearm.

The State relies, as did the Court below, on a partial, incomplete reading of the *Robarge* decision by this Court. While this Court went to great lengths to explain the difference between subsequent clauses, enacting clauses and exemptions in statutory construction, this Court also recognized that the placement of a statutory exception is not necessarily determinative of the Legislature's intent or purpose. *State v. Robarge*, 450 So.2d 855, 857 (Fla. 1984).

The State argues, without any legislative history or evidentiary support that the Legislature, in re-drafting Chapter 790 in 1987, intended to change this Court's determination in *Robarge*, that lack of a CWFL was an essential element of the crime. The Legislature is presumed to know the state of the law, but made no mention of *Robarge* or any intent to change the possession of a CWFL into an element of the crime. It could have easily done so, by stating that a CWFL was an affirmative defense to the crime of carrying a concealed firearm. It did not. Instead it left Sec. 790.01 in substantially the same form it was in when *Robarge*

was decided, stating that it did not apply to a person with a CWFL under the re-written 1987 law.

The various sections of chapter 790 cannot be read independently as the State suggests. Unlike other chapters of Florida's criminal code, Chapter 790 is not a purely penal chapter. It contains restrictions on state authority and discretion in the issuance of permits (790.06), details the rights of citizens to be free of local regulation (790.33), protects persons with CWFL from public disclosure (790.0601), protection of commerce in firearms (790.331) protection of shooting ranges (790.333), employment protection for CWFL holders (790.251), and limits the power of the state to maintain certain records (790.335) Chapter 790, Fla. Stat.

A full and complete reading of Chapter 790, Fla. Stat. cannot lead to any other conclusion than that the right of Floridians to lawfully possess and carry arms is protected. The State argues however that the mere possession of a firearm should put one on notice that they are subject to stop and detention at any time. (State's Brief Pg. 25). citing, *United States v. Biswell*, 406 U.S. 311 (1972) and *State v. Williams*, 794 N.W. 2nd 967 (Minn. 2011).

Neither *Biswell* nor *Williams* should guide the Court here. *Biswell* had to do with the regulation of Federal Firearms Licensees and the interstate commerce of firearms, conduct that has long been held subject to much more restriction than the

basic fundamental right to keep and bear arms as recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008). In *Williams*, the portion cited in the State's brief was from a concurring opinion, warning that while he joined in the result, the justice there was very concerned that the court's ruling slid too far into invading the rights of those choosing to protect themselves by carrying a legal firearm.

The clearest method of determining how the Legislature drafts bills and what the language of statutes mean is the Florida Senate Manual for Drafting Legislation, 2009, (MDL). The MDL explains the legislature's intent in using certain instructions and phrases in its drafting of legislation. The purpose of the manual is to assist the legislature in drafting statutory language.

The MDL explains at page 118, what is meant by the term liberally construed in legislative drafting. It explains:

> [A] statute enacted for the public benefit should be construed liberally in favor of the public even though it contains a penal provision. In this posture a reasonable construction should be applied giving full measure to every effort to effectuate the legislative intent.

*citing*, *City of Miami Beach v. Berns*, 245 So.2d 38, at 40 (Fla. 1971). Throughout Chapter 790, the Legislature repeatedly instructs that the provisions of Chapter 790 are to be liberally construed in favor of the lawful bearing of arms. The idea that a

person carrying arms is presumably a criminal is anything but a liberal construction in favor of the right to bear arms. The idea that the Legislature simultaneously liberalized the carrying of firearms, made firearms laws uniform across the state, directed the liberal construction of said statutes and yet intended to convert the right to carry a firearm into a mere affirmative defense is nothing short of absurd.

**Conclusion**

President Lyndon B. Johnson was quoted as saying, "you do not examine legislation in the light of the benefits it will convey if properly administered, but in the light of the wrongs it would do and the harms it would cause if improperly administered." His statement is just as applicable to case law. The harm that can come from the decision sought by the State far outweighs any benefit that will come from such a ruling.

The very fact that the State makes the arguments it has in this case shows that a ruling for the State would subject every person lawfully carrying a firearm in the state of Florida to the whim of any agent of the state they encounter. This could not have been the intent of a legislature seeking to encourage the lawful use of arms that specifically stated that it sought to protect any citizen from being "subjectively or arbitrarily denied his or her rights" to lawfully carry a firearm.

Florida Carry, asks this Court to recognize the basic fundamental right to keep and bear arms in the State of Florida, and find that the mere possession of a firearm, without more, is not sufficient justification for a *Terry* stop or any other non-consensual encounter. Furthermore this Court should find that the lack of a CWFL or other lawful reason for possessing a firearm is an element of the crime of illegal possession of a firearm, and not merely an affirmative defense.

## CERTIFICATE OF SERVICE

I HERE BY CERTIFY that a copy of the foregoing was served via U.S. Mail this _5th_ day of October 2012 to the following:

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Rule 9.210 Fla. R. App. P.

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