IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 12-573

DCA NO. 3D10-2415

ANTHONY MACKEY,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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

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INTRODUCTION

In this brief, "R." will designate the record on appeal, "Tr." the transcript of the trial proceedings, "S.R." the supplemental record, and "D." the deposition of Officer Alexander May, which was introduced into evidence and has been supplemented to the record. The symbol "A." refers to the opinion of the lower court, as set forth in the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Mr. Anthony Mackey was standing in front of an apartment complex while Officer Anthony May was on patrol during daytime. (D. 5-6.) May saw Mackey, but did not see him engaged in any criminal or suspicious behavior. (D. 6.) Mackey was carrying a firearm inside his pocket, with a "small piece" of the handle sticking out. (D. 5.) Based on his training and experience, Officer May knew it was a concealed firearm. (D. 6-7.)

Officer May had no previous experience with Mackey. (D. 6.) There was no testimony of May knowing whether Mackey had a concealed firearms permit. Nor was there any testimony suggesting Mackey was too young to have a license.

Officer May exited his marked police car, and wearing a police uniform, approached Mr. Mackey. (D. 4, 9.) There is no evidence of Mackey ever attempting to flee or otherwise trying to avoid talking to the officer. Nor was there any evidence of May being concerned for his safety. May explained that he did not draw his weapon because he could see Mackey's hands. (D. 18.) May initiated a conversation with Mr. Mackey, but did not ask Mackey if he had a concealed weapons permit. (D. 8, 10-11.) He instead asked if Mackey "had anything on him." (D. 10.) This was a high narcotics area and Mr. Mackey replied "no." (D. 5-6, 10.)

May conducted a Terry pat-down and frisk and seized the firearm he had seen earlier. (D. 10.) Only then did he ask Mr. Mackey if he had a concealed firearms permit. (D. 11.) Mackey stated he did not and that he kept the firearm in self-defense. (D. 10-11.) Officer May arrested Mackey. (D. 11.)

The State charged Mackey with possession of a firearm by a convicted felon and carrying a concealed firearm. (R. 8-9.) Mackey moved to suppress the firearm on grounds that his arresting officer lacked reasonable suspicion to initiate the investigatory stop that led to the recovery of the firearm. (R. 12-16.) Relying on Regalado v. State, 25 So. 3d 600 (Fla. 4th DCA 2010), Mackey contended that the fact that he was carrying a concealed firearm, standing alone, did not give the officer reasonable suspicion to initiate an investigatory stop. (S.R. 25-26.)

The State countered with Hernandez v. State, 289 So. 2d 16 (Fla. 3d DCA 1974), for the proposition that there would be reasonable suspicion to stop under the facts of this case. (S.R. 27.) The court, though finding the Fourth District's analysis compelling, followed Hernandez because it was bound by the Third District's case law:

> Well, there seems to be no question if [sic] I were in the Fourth District, I'd follow Regalado to the opposite conclusion because they use the carrying analysis. . . . All right. Well, so I'm going to follow the law in the Third District. And I think the Fourth is very compelling, but we're not in the Fourth.

(S.R. 27-28.) The motion was denied, and became the subject of Mr. Mackey's appeal. (R. 33-34; S.R. 27-28.)

In its decision below, the Third District, relying on its previous decisions, concluded that possession of a concealed firearm gave an officer not only reasonable suspicion to initiate an investigatory seizure, but also probable cause to arrest. (A. 6-7.) The court acknowledged Regalado, but disagreed it. (A. 10.) The court reasoned that since having a license is an affirmative defense, an officer need not know whether the suspect has a license to initiate a Terry stop. (A. 10.) The Third District affirmed the motion's denial, but certified direct conflict with Regalado:

> We affirm the trial court's order denying the motion to suppress and, given Regalado's holding that an officer who observes an individual carrying a concealed firearm does not have reasonable suspicion to conduct a Terry stop, we certify express and direct conflict with the decision in Regalado.

(A. 11.)

ISSUE PRESENTED

Whether it is an unreasonable search and seizure under the Fourth Amendment to stop a person carrying a concealed firearm, where there is neither reasonable suspicion to believe the person is engaged in criminal activity nor reasonable suspicion to believe the possession is unlawful.

SUMMARY OF ARGUMENT

Citizens who exercise their constitutional right to bear arms do not surrender their Fourth Amendment right to be free from arbitrary searches and seizures. The Fourth District Court of Appeal therefore correctly concluded that mere possession of a concealed firearm does not justify a Fourth Amendment seizure. The police must first observe facts supporting a reasonable suspicion that the suspect is engaged in criminal activity or have information suggesting the possession is unlawful. Here, Officer May's pat-down was unlawful because he observed no independent criminal activity and had no information suggesting that Mackey's possession was unlawful.

The Third District's decision extinguishes Fourth Amendment protections for those lawfully bearing arms, by subjecting them to seizures at the discretion of the police. This rule of law is not in line with Terry's individualized suspicion requirement. Furthermore, contrary to the Third District's reasoning, the legislature, by making licensure an affirmative defense, did not intend to make possession of a concealed firearm inherently suspicious. Thus, the fact that licensure is an affirmative defense does not exempt the police from Terry's individualized suspicion requirement.

This Court should therefore reverse the Third District's decision and adopt the Fourth District's reasoning.

ARGUMENT

THE POLICE MAY NOT, CONSISTENT WITH THE FOURTH AMENDMENT, STOP ANY PERSON CARRYING A CONCEALED WEAPON OR FIREARM, TO CHECK FOR A LICENSE, WHERE THERE IS NEITHER REASONABLE SUSPICION TO BELIEVE THEIR POSSESSION IS UNLAWFUL, NOR REASONABLE SUSPICION OF SOME OTHER INDEPENDENT CRIMINAL OFFENSE.

The Second Amendment to the United States Constitution provides that "the right of the people to keep and bear Arms, shall not be infringed." The United States Supreme Court recently affirmed its meaning in District of Columbia v. Heller, 554 U.S. 570, 592 (2008), holding that the amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." "The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" Id. (citing United States v. Cruikshank, 92 U.S. 524, 533 (1876)).

Florida, like forty-three other states in the Union,[1] has an individual right to bear arms constitutional provision. Florida's provision reads as follows:

> 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).

[1] Nicholas J. Johnson, A Second Amendment Moment: The Constitutional Politics of Gun Control, 71 Brooklyn L. Rev. 715, 725 (2005) (explaining that forty-four states in the union have individual right to bear arm constitutional amendments).

"[T]he inherent right of self-defense has been central to the Second Amendment right," Heller, 554 U.S. at 628, and Florida's legislature has enacted laws specifically aimed at protecting and enhancing the right of Floridians to lawfully bear arms in self-defense. Florida is one of forty "states that require government officials to issue concealed weapon licenses to almost anyone who demonstrates firearms proficiency and passes a criminal background check."[2] Jack Hagler Self Defense Act, § 790.06(2), Fla. Stat. Persons lawfully carrying concealed firearms are exempt from Florida's prohibition against openly carrying firearms. All licensed persons may "briefly and openly display the firearm to the ordinary sight of another person" so long as "the firearm is [not] intentionally displayed in an angry or threatening manner, not . . . necessary [for] self-defense." § 790.053(1), Fla. Stat. As of June 30, 2012, Florida has issued nearly one million (963,512) concealed firearm permits, the most in the nation.[3] Florida also

[2] Jon S. Vernick, et. al., PART III: National Chellenges in Population Health: Technologies to Detect Concealed Weapons: Fourth Amendment Limits on a New Public Health and Law Enforcement Tool, 31 J.L. Med. & Ethics 567, 573 (2003) (explaining that Florida is one of 18 states that adopted "shall issue" concealed carry weapon laws between 1987 and 2000); Right-to-Carry Summary, NRA-ILA (Aug. 9, 2012, 12:12 PM), http://nraila.org/news-issues/fact-sheets/2011/right-to-carry-summary.aspx (explaining that forty states in the union are "shall issue" states).

[3] Concealed Weapon/Firearm License Holders by County as of July 31, 2012, Florida Department of Agriculture and Consumer Services Division of Licensing (Aug. 9, 2012, 12:23 PM), http://licgweb.doacs.state.fl.us/stats/cw_active.pdf. Miami-Dade County leads the state in the number of issued permits, having more than 85,684. Concealed Weapon/Firearm License Holders by County as of July

recognizes permits from the thirty-five states with which it has reciprocity. § 790.01, Fla. Stat.[4]

The Third District has held that any person carrying a concealed weapon in Florida may be immediately subjected to a pat down and seizure without any previous investigation as to whether the possession of the firearm is legal. This holding is contrary to Fourth Amendment jurisprudence.

In this case, Officer May was on patrol when he saw Mackey carrying a concealed firearm. Mackey was not engaged in any suspicious activity or other criminal activity. He was just standing on a corner. Officer May did not ask Mr. Mackey whether he had a permit for the firearm. He instead asked if Mr. Mackey had anything on him. This was a high narcotics area, and Mr. Mackey said "no." May proceeded to pat Mackey down and seized the firearm. Only then did he ask Mackey if he had a license to carry it. Mackey admitted to not having a permit, explaining that he kept the firearm in self-defense. Officer May's conduct, in

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31, 2012, Florida Department of Agriculture and Consumer Services Division of Licensing (Aug. 9, 2012, 12:23 PM), http://licgweb.doacs.state.fl.us/stats/cw_active.pdf. See U.S. Gov't Accountability Office, GAO 12-717, Gun Control, States' Laws and Requirements for Concealed Carry Permits Vary across the Nation 78 (2012) (reporting that Florida has issued the most concealed firearm permits in the nation).

[4] Concealed Carry Reciprocity, Florida Department of Agriculture and Consumer Services Division of Licensing (Aug. 9, 2012, 12:29 PM), http://licgweb.doacs.state.fl.us/news/concealed_carry.html.

seizing and searching Mackey, in the absence of any reasonable suspicion of criminal activity, violated Mr. Mackey's Fourth Amendment rights.

The Fourth Amendment to the United States Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[5] The United States Supreme Court has long recognized that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union P. R. Co. v. Botsford, 141 U.S. 250, 251 (1891).

There are three types of police-citizen encounters under the Fourth Amendment. Popple v. State, 626 So. 2d 185, 186 (Fla. 1993). The first is a consensual encounter. Id. A consensual encounter "involves only minimal police contact." Id. During the encounter, the "citizen may either voluntarily comply with a police officer's requests or choose to ignore them." Id. Because a citizen is free to leave and may terminate the encounter, constitutional safeguards are not invoked. Id. (citing United States v. Mendenhall, 446 U.S. 544 (1980)).

[5] 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. See Art. I, § 12, Fla. Const.

The second level is a seizure under Terry v. Ohio, 392 U.S. 1 (1968). Under Terry, the police may "approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." Id. at 22. The officer must "have a **reasonable suspicion** supported by articulable facts that criminal activity 'may be afoot.'" United States v. Sokolow, 490 U.S. 1, 7 (1989). During the encounter, the officer may automatically conduct a limited search of the outer clothing for weapons "[w]hen an officer is justified in believing that the individual . . . is armed and presently dangerous to the officer or to others." Terry, 392 U.S. at 24. See also § 901.151(5), Fla. Stat. (Florida's Stop and Frisk Law). The pat-down and frisk, though, is only justified if the officer had reasonable suspicion to initially conduct the seizure. In Terry, the Court recognized that investigatory stops can be "an annoying, frightening, and perhaps humiliating experience." Terry, 392 U.S. at 24-25. The police may initiate the seizure with guns drawn,[6] and if just cause exists, may temporarily place the subject in handcuffs[7] or in the police car during the investigation.[8]

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[6] See Carroll v. State, 636 So. 2d 1316, 1318 (Fla. 1994) ("The stop was not necessarily converted into an arrest because the officer drew his gun and directed Carroll to lie on the ground."); State v. Ruiz, 526 So. 2d 170 (Fla. 3d DCA 1998) (investigatory stop not converted into arrest even though officers with guns drawn directed defendant to lie on the ground).

[7] See Reynolds v. State, 592 So. 2d 1082, 1084 (Fla. 1992) (explaining that "[c]ourts have generally upheld the use of handcuffs in the context of a Terry stop where it was reasonably necessary to protect the officers' safety or to thwart a suspect's attempt to flee").

The third and final level is an arrest, which must be based on probable cause that an individual has committed a crime or is committing a crime. Popple, 626 So. 2d at 186 (citing Henry v. United States, 361 U.S. 98 (1959)). An officer with probable cause to arrest may lawfully conduct a custodial search, incident to the arrest, regardless of whether there is probable cause to believe the person is armed. Savoie v. State, 422 So. 2d 308, 313 (Fla. 1982) (quoting United States v. Chadwick, 433 U.S. 1, 14 (1977)).

Courts are split on what type of police-citizen encounter is appropriate when an officer sees a person carrying a concealed weapon or firearm. Some courts, like the Fourth District Court of Appeal in Regalado v. State, 25 So. 3d 600, 606 (Fla. 4th DCA 2010), have held that this information does not justify a Terry investigatory stop. The police must observe facts indicating that the person is engaged in illegal conduct or have information suggesting the possession is illegal, before proceeding to a Terry stop and frisk.[9] Other courts, including the Third District in this case as well as in Hernandez v. State, 289 So. 2d 16, 17 (Fla. 3d DCA 1974), and State v. Navarro, 464 So. 2d 137, 139 (Fla. 3d DCA 1984), have

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[8] E.g., Goss v. State, 744 So. 2d 1167, 1169 (Fla. 2d DCA 1999) ("Under the unique facts of this case, we conclude that the State failed to carry its burden of demonstrating that the officer was justified in placing Goss in the patrol car during this investigatory stop.").

[9] See Infra Part I.A.

held that possession alone provides not only reasonable suspicion, but also probable cause for an automatic arrest.[10]

This Court should reverse the Third District's decision because it is inconsistent with Terry's individualized suspicion requirement. It essentially extinguishes Fourth Amendment protections for those lawfully bearing arms, by giving the police the power to automatically stop them, pat them down, and seize their weapon, without any basis for suspecting criminal behavior. This Court should instead adopt the Fourth District's reasoning, and hold that the police may not, consistent with the Fourth Amendment, conduct a Terry investigatory seizure, absent a particularized and individualized suspicion that that person's possession is illegal.

[10] See also Arizona v. Wyman, 3 P.3d 392, 395 (Ariz. Ct. App. 2000) ("We agree with the trial court that, once appellant admitted he was carrying a pistol in his pants pock et, the officer had probable cause to believe appellant was committing the crime of carrying a concealed weapon. . . . As a result, the officer was entitled to arrest and search appellant."); United States v. Greene, 783 F.2d 1364, 1368 (9th Cir. 1986) ("It was during the frisk of appellant that the police discovered that he was armed. This discovery independently gave the officers probable cause to arrest appellant for possession of a concealed weapon, a violation of state law."); State v. Williams, 794 N.W.2d 867 (Minn. 2011); United States v. Ruffcorn, 2002 U.S. Dist. LEXIS 18242, 29 (D. Neb. June 19, 2002).

A. The Fourth District Correctly Concluded That Mere Possession Of A Concealed Firearm, Absent Information Suggesting the Possession Is Unlawful, Does Not Give The Officer Reasonable Suspicion Of Unlawfully Carrying A Concealed Firearm.

In Regalado, an officer determined, based on his training and experience, that the defendant was carrying a concealed firearm. 25 So. 3d at 601-02. The defendant had not threatened the officer, nor had the officer observed the defendant threaten anyone else. Id. at 602. The officer did, however, have information that the defendant had earlier exposed the gun, which was in his waistband, to his friends. Id. at 601. Concerned "for the safety of the citizens of Fort Lauderdale and himself," the officer drew his service revolver and ordered the defendant to the ground. Id. at 601-02. He then conducted a pat-down and retrieved the firearm. Id. at 206.

The Fourth District suppressed the firearm, finding that "stopping a person solely on the ground that the individual possesses a gun violates the Fourth Amendment." Id. at 606-07. The court, interpreting Florida and United States Supreme Court precedent, reasoned that there must be facts or other circumstances showing that the defendant's carrying of a concealed weapon was without a permit and thus illegal:

> [T]he only information received by the officer was that the individual had a gun. Possession of a gun is not illegal in Florida. Even if it is concealed, it is not illegal if the carrier has obtained a concealed weapons permit. Although the officer observed a bulge in Regalado's waistband, which in his experience looked like a gun, no facts and

> circumstances were presented to show that Regalado's carrying of a concealed weapon was without a permit and thus illegal.
>
> The officer admitted in his testimony at the suppression hearing that he had not observed any criminal behavior. He did not see the defendant threaten anyone with a gun, nor had the anonymous tipster mentioned the defendant threatening anyone with a gun or even removing it from his pants. The officer did not observe any threatening act against him, which might provide sufficient reasonable suspicion of an assault to permit a Terry stop. The officer also did not know whether the defendant had a permit for carrying a concealed weapon. The officer had no reasonable suspicion of any criminal activity.

Id. at 604 (emphasis added) (internal citation omitted).

The Fourth District is not alone in its holding. Other courts have similarly held that since carrying a concealed firearm is only illegal without a license, mere possession is not enough to support a Fourth Amendment seizure.

In Massachusetts v. Couture, 552 N.E.2d 538, 539 (Mass. 1990), a clerk telephoned the police and informed them that a man had a "small gun protruding from his right rear pocket." The clerk described the man's gray pickup truck and tag number. Id. Upon seeing the pickup truck, the officer stopped the vehicle and ordered the defendant out the car with guns drawn. Id. The defendant moved to suppress the firearm. The Massachusetts Supreme Judicial Court held that since carrying a concealed weapon was only illegal if the person has no license, the "mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun." Id. at 540-41.

Similarly, in United States v. Ubiles, 224 F.3d 213, 215 (3d Cir. 2000), the officers received information that the defendant was carrying a firearm during the J'ouvert Carnival in the Virgin Islands, a festival that attracted "[h]undreds if not thousands" of people. The informant pointed the defendant out and described his clothing, but did not allege that there was anything unusual or suspicious about the gun or the defendant. Id. The officers conducted a Terry stop and pat-down of the defendant, and found a machete and loaded Jennings Long Rifle, .22 caliber semi-automatic pistol, concealed on his person. Id. The defendant moved to suppress the firearm and machete.

At the motion to suppress hearing, the officer admitted that he had no information suggesting that the defendant had no license to carry the firearm. Id. Nor had the defendant brandished the gun or machete or done anything suggesting he posed a danger to the officers or to the crowd. Id. The trial court nonetheless denied the motion, finding that the information that he had a gun was enough.

The Third Circuit Court of Appeals reversed. The court, first citing the United States Supreme Court's rejection of a firearms exception to Terry in Florida v. J.L. 529 U.S. 266, 272 (2000), concluded that a "mere allegation that a suspect possesses a firearm, as dangerous as firearms may be," did not "justify an officer in stopping a suspect absent the reasonable suspicion required by Terry." Id. at 217. The court then decided whether there was reasonable suspicion of criminal

activity. In the Virgin Islands it is not necessarily a crime to possess a firearm. Id. It is only a crime if the gun is defaced or unlicensed. Id. at 218. Thus, since the officers had no information suggesting the defendant's possession was illegal, they lacked reasonable suspicion to stop him. Id. The court explained:

> This situation is no different than if Lockhart had told the officers that Ubiles possessed a wallet, a perfectly legal act in the Virgin Islands, and the authorities had stopped him for this reason. Though a search of that wallet may have revealed counterfeit bills--the possession of which is a crime under United States law--the officers would have had no justification to stop Ubiles based merely on information that he possessed a wallet, and the seized bills would have to be suppressed.
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> **** **** ****
>
> As with the case of the hypothetical wallet holder, the authorities here had no reason to know that Ubiles's gun was unregistered or that the serial number had been altered. Moreover, they did not testify that it is common for people who carry guns in crowds--or crowds of drunken people--to either alter or fail to register their guns, or to use them to commit further crimes--all of which would be additional evidence giving rise to the inference that Ubiles may have illegally possessed his gun or that criminal activity was afoot. Therefore, as with the wallet holder, the authorities in this case had no reason to believe that Ubiles was engaged in or planning or preparing to engage in illegal activity due to his possession of a gun. Accordingly, in stopping him and subsequently searching him, the authorities infringed on Ubiles's Fourth Amendment rights.

Id.

Case from the Seventh and Eighth Circuit Courts of Appeal, the state of Washington, and the United States District Court for the Eastern District of Pennsylvania supports the Fourth District's holding. See United States v. Jones, 606 F.3d 964, 968 (8th Cir. 2010) (Loken, J., concurring) (agreeing that the firearm

was properly suppressed because the police had no particularized reason to believe that the possession of the concealed weapon was unlawful); United States v. DeBerry, 76 F.3d 884, 886-87 (7th Cir. 1996) (Chief Judge Richard Posner, explaining in dicta, that an officer who sees a person carrying a concealed weapon in a state where it is legal to do so, would need information suggesting the possession was unlawful in order to justify a Terry stop); State v. Stepney, 1997 Wash. App. LEXIS 127, *11-12 (Wash. Ct. App. Jan. 27, 1997) (holding 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); United States v. Garvin, 2012 U.S. Dist. LEXIS 76540, *10 (E.D. Pa. May 31, 2012) ("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.").

This Court should adopt the reasoning of these decisions and find that since possession of a firearm in Florida is only illegal if the person is unlicensed, mere possession does not give the officer reasonable suspicion to conduct a Terry stop, frisk, and seizure of that weapon. Here, because Officer May did not observe any

suspicious facts or behavior by Mackey that would support a reasonable suspicion of criminal activity, the Terry pat-down was illegal.

B. The Third District Incorrectly Held That Mere Possession Of A Concealed Firearm Constitutes Reasonable Suspicion Of Criminal Activity.

In its decision below, the Third District held that mere possession of a concealed weapon or firearm gives the police reasonable suspicion to conduct a Terry investigatory stop. This rule permitting automatic stop, frisk, and seizure of anyone carrying a concealed firearm is impermissible under the Fourth Amendment, and this Court should reject it for two reasons. First, a rule that allows the police to stop everyone with a concealed weapon or firearm, without reasonable suspicion of illegality, is inconsistent with Terry's individualized suspicion requirement. Second, the legislature, by making licensure an affirmative defense, did not intend to make possession of a concealed firearm inherently suspicious, thereby removing the need for an individualized suspicion that the person's possession is illegal.

1. The Third District's Automatic Stop, Frisk, And Seize Anyone Carrying A Concealed Firearms Approach Is Inconsistent With Terry's Individualized Suspicion Requirement.

Individualized suspicion is a core tenet of Terry, and mere possession of a concealed weapon does not satisfy this requirement. In Florida, approximately one million (952,415) Floridians have concealed weapon permits.[11] Under the Third

[11] Concealed Weapon/Firearm License Holders by County as of July 31, 2012, supra n. 3.

District's decision, all one million carriers are subject to seizure anytime they exercise their constitutional right to bear arms, subject only to the officer's discretion.

The police may not, consistent with the Fourth Amendment, seize any person carrying a concealed firearm, without having reasonable suspicion to believe the person's possession is unlawful. The United States Supreme Court has rejected similar approaches. In Delaware v. Prouse, 440 U.S. 648, 650 (1979), the police stopped a vehicle in which the defendant was driving for the sole purpose of checking his driver's license and vehicle registration. 440 U.S. at 650. The officer did not observe a traffic or equipment violation. Id. Nor did he observe any suspicious activity. Id. The issue before the Court was

> [W]hether it is an unreasonable seizure under the Fourth and Fourteenth Amendments to stop an automobile, being driven on a public highway, for the purpose of checking the driving license of the operator and the registration of the car, where there is neither probable cause to believe nor reasonable suspicion that the car is being driven contrary to the laws governing the operation of motor vehicles or that either the car or any of its occupants is subject to seizure or detention in connection with the violation of any other applicable law.

Id.

The state contended that stopping all vehicles to verify drivers' licenses and vehicle registrations was reasonable under the Fourth Amendment, because the state's interest in promoting highway safety outweighed the intrusion. Id. at 658. Though recognizing the state's interest, the Court found that the interest did not

"justify subjecting every occupant of every vehicle on the roads to a seizure . . . at the unbridled discretion of law enforcement officials." Id. at 659, 661. Licenses could be checked during routing traffic stops. Furthermore, without an individualized suspicion requirement, seizures could be based on nothing more than inarticulate hunches:

> To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches.

Id. at 661 (emphasis added).

The Court ultimately held that stops for the sole purpose of verifying licenses and registrations were unreasonable under the Fourth Amendment:

> Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

Id. at 663. See also United States v. Brignoni-Ponce, 422 U.S. 873, 874-75 (1975) (holding that Border Patrol officers could not stop vehicles near the Mexican border and verify the occupants' immigrant status, "when the only ground for suspicion is that the occupants appear to be of Mexican ancestry." While the probability that a Mexican-looking person might be an illegal alien was high

enough to be a relevant factor, it did not justify stopping all Mexican-appearing persons to verify their status).

The Third District's automatic stop anyone carrying a concealed firearm approach is similarly unreasonable under the Fourth Amendment. The State's interest in ensuring compliance with Florida's firearms regulations does not justify subjecting the entire universe of persons carrying concealed firearms to seizures at the unbridled discretion of the police. Like Prouse, these discretionary stops are unnecessary because the police already have an alternative mechanism in place for verifying licenses. Under the Jack Hagler Self Defense Act, every Florida citizen lawfully carrying a concealed weapon has agreed, in advance, to show the permit to any officer who asks:[12]

> The licensee must carry the license, together with valid identification, at all times in which the licensee is in actual possession of a concealed

[12] Florida is not alone, as numerous states require that the license be kept, while carrying a concealed weapon, and be presented to any police officer who asks. Ark. Code Ann. § §5-73-315 (2012); Colo. Rev. Stat. § 18-12-204 2(a) (2012); Iowa Code §724.5 (2012); Kan. Stat. Ann. §75-7c03(b) (2012); Ky. Rev. Stat. Ann. § 237.110(15) (2012); Me. Rev. Stat. tit. 25, § 2003(11) (2012); Mass. Gen. Laws ch. 140, § 129C (2012); Mich. Comp. Laws §28.422(9) (2012) (nonresidents must present the license upon the demand of a police officer); Miss. Code Ann. §45-9-101(1)(b) (2012); Mo. Rev. Stat. §571.121(1) (2012); Nev. Rev. Stat. §202.3667 (2012); N.M. Stat. Ann. § 29-19-9 (2012); N.D. Cent. Code §62.1-04-04 (2012); 18 Pa. Cons. Stat. §6122(a) (2012); Tenn. Code Ann. §39-17-351 (n)(1) (2012); Tex. Gov't Code Ann. §411.205 (2012); Va. Code Ann. § 18.2–308(H) (2012); Wash. Rev. Code §9.41.070(1)(b) (2012); Wisc. Stat. §175.60(2g)(c) (2012); Wyo. Stat. Ann. § 6-8-104(b) (2012).

> weapon or firearm and must display both the license and proper identification upon demand by a law enforcement officer.

§ 790.06(1), Fla. Stat. An officer may request a person possessing a concealed firearm to produce a permit during a consensual encounter, without conducting a Fourth Amendment seizure. Failure to produce the license and/or other suspicious behavior may ultimately give the officer reasonable suspicion to believe the possession is unlawful and then perform a legal stop.[13]

Yet the Third District's approach would give the police the authority to immediately seize, and even arrest any of the one million Floridians carrying a concealed firearm based solely on observed possession, without any indication that the possession is illegal. This carte blanche approach is unreasonable, and is not in keeping with Terry's individualized suspicion requirement.

As the United States Supreme Court noted in J.L., there is no firearms exception to Terry's reasonable suspicion requirement.[14] 529 U.S. at 272. The

[13] If the person claims they do have a license, the officer could verify the claim using the Florida Department of Law Enforcement's database, which contains a listing of all persons licensed to carry a firearm. Of course, short of asking for the permit, the officer may have other information suggesting the person does not qualify for a permit. For example, the officer may know the person is under the age of 21, the person's criminal record, or some other impediment that would disqualify them from obtaining a permit.

[14] Indeed, any officer safety concerns could be alleviated by the legislature adopting the approach taken by other states. The following seven states (Louisiana, Michigan, Nebraska, North Carolina, Ohio, Oklahoma, and South Carolina) require that the permit holder not only submit to a consensual encounter, but that the holder also immediately inform the police about their concealed

Fourth Amendment requires individualized suspicion that the person may be engaged in illegal activity. Absent such particularized information, the officer does not have reasonable suspicion to initiate a Terry stop and seizure.

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firearm and present their license. La. Rev. Stat. Ann. § 40:1379.3(2) (2012); Mich. Comp. Laws §28.425f(3) (2012) (requirement for residents); Neb. Rev. St. Ann. § 69-2440(2) (2012); N.C. Gen. Stat. §14-415.11(a) (2012); Ohio Rev. Code Ann. §2923.12(B)(1) (2012); Okla. Stat. tit. 21 §1290.8 (2012) (must be disclosed "during the course of any arrest, detainment, or routine traffic stop"); S.C. Code Ann. § 23-31-215(K) (2012).

2. Licensure Being An Affirmative Defense Does Not Make Possession Of A Concealed Firearm Presumably Suspicious, Thereby Relieving The Police Of The Need To Have An Individualized Suspicion That The Possession Is Unlawful.

The Third District reasoned that because licensure is an affirmative defense, the officer need not first ask for a license or otherwise have information suggesting the possession is unlawful before conducting a Terry stop and frisk. At least three other courts have similarly held this.[15] This reasoning, however, materially conflicts with the purpose behind Florida's licensing scheme. The licensing requirement, as explained by the legislature, was intended to **supplement and enhance** the constitutional right to bear arms, not to diminish it:

> 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.

§ 790.06(15), Fla. Stat.[16]

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[15] See United States v. Gatlin, 613 F.3d 374, 378 (3d Cir. Del. 2010); United States v. Montague, CASE NO. 10-20638-CR-UNGARO/SIMONTON, 2010 U.S. Dist. LEXIS 86179, *18-21 (S.D. Fla. July 27, 2010); GeorgiaCarry.Org, Inc. v. MARTA, 2009 U.S. Dist. LEXIS 117989, *12-13, 2009 WL 5033444 (N.D. Ga. Dec. 14, 2009).

[16] See also Eaton County Deputy Sheriffs Asso. v Smith, 195 NW2d 12 (Mich. 1971) ("[P]rohibiting carrying of concealed weapons without license, is [a] limitation by [the] legislature on constitutional right of citizens to keep and bear arms and it is within state's police power and, therefore, in keeping with power of legislature."); Heller, 554 U.S. at 627 n.26 (categorizing statutes that prohibit felons and the mentally ill from possession weapon as "lawful regulatory measures").

Thus, licensure being an affirmative defense does not transform possession of a concealed weapon into the inherently suspicious activity that justifies a Terry investigatory stop. And it does not absolve the police of needing an individualized suspicion that the person's possession is illegal.

The licensure affirmative defense is really aimed at allocating the burden of proof **at trial**. The Massachusetts Supreme Judicial Court's decision in Couture, 552 N.E.2d at 540-41, is instructive. Like Florida, possession of a license is an affirmative defense in Massachusetts. See Commonwealth v. Jones, 361 N.E.2d 1308, 1311 (Mass. 1977). In Couture, the state contended that the supreme court's holding—that mere possession of a firearm does not give an officer reasonable suspicion of criminal activity absent information suggesting the person has no license—would create an irrational result, because "a police officer in the street must show more in determining that a gun is unlawfully carried than a prosecutor needs to prove to obtain a conviction." Couture, 552 N.E.2d at 540.

The high court rejected the argument, finding that there is a clear difference between the trial burden of producing a license and an officer initiating a Terry stop without first giving the person an opportunity to produce a license:

> Where the defendant at trial has had every opportunity to respond to the Commonwealth's charge that the defendant was unlawfully carrying a handgun, where the defendant need only produce that slip of paper indicating that he was licensed to carry that gun, and where instead the defendant produces no evidence to that effect, the jury are entitled to presume that the defendant indeed did not have a license to

> carry the gun, and the Commonwealth need present no additional evidence to prove that point. This scenario is a far cry from a defendant who, having merely been seen in public with a handgun, and without any opportunity to respond as to whether he has a license, is forced out of his vehicle at gunpoint and subjected to an invasive search.

Id. at 540-41 (internal citations omitted).

In Florida, under subsection 790.06(1), all citizens carrying a concealed weapon must produce their license upon demand by the police. By making possession of a license an affirmative defense, the legislature has simply extended this initial burden to trial, which means the possessor must either produce the license during the police-citizen street encounter or produce it at trial. If it is never produced, then the trier of fact may rightfully assume it does not exist.

The trial burden of proof therefore does not make possession of a concealed weapon inherently suspicious, and it consequently does not exempt the police from having to articulate an individualized suspicion that the person's possession is unlawful before conducting a Fourth Amendment seizure. It likewise does not justify the stop, frisk, and seizure of every person carrying a concealed firearm, without first giving them the opportunity to produce their license during a consensual encounter.

The Third District's ruling forces citizens to choose between two constitutional rights. Citizens can either choose their right to bear arms in lawful self-defense and surrender their Fourth Amendment right to be free from

unreasonable searches and seizures, or they may choose their Fourth Amendment rights and surrender their right to bear arms. This was not the intent of Florida's licensing scheme, and the Third District's decision, which forces this choice by transforming constitutionally protected activity into presumably illegal activity, must be reversed.

CONCLUSION

A balance must be stricken between the right of citizens to carry concealed firearms and the need to verify compliance with Florida's licensing regulations. Giving officers unfettered discretion to stop every person carrying a concealed weapon or firearm, is not the answer. An officer, during a consensual encounter, may inquire as to whether the person has a license, as contemplated by subsection 790.06(1). But to initiate a Fourth Amendment **seizure**, the officer must observe suspicious facts suggesting the person is engaged in illegal activity. Here, the officer did not observe Mackey engaging in any illegal activity, he had no information suggesting that Mr. Mackey's possession of a concealed firearm was illegal, and he did not request to see a permit before conducting a Terry investigatory seizure. The seizure was therefore illegal and the firearm and statements must be suppressed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida, this __ day of August, 2012.

BY:_____
MICHAEL T. DAVIS
Assistant Public Defender

CERTIFICATE OF FONT COMPLIANCE

I hereby certify that the type used in this brief is 14 point proportionately spaced Times New Roman.

BY:_____
MICHAEL T. DAVIS
Assistant Public Defender

APPENDIX