Florida High School Moot Court Official Issue Packet

Regan Buschell

v.

State of Florida

A collaborative court education project of
The Florida Law Related Education Association, Inc.

Special thanks to

Supreme Court of Florida
District Courts of Appeal
J. Scott Slater, Hill Ward Henderson
Florida Bar Law Related Education Committee

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FLREA FLORIDA LAW RELATED EDUCATION ASSOCIATION, INC.

NOVA SOUTHEASTERN UNIVERSITY
Shepard Broad Law Center

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FLORIDA HIGH SCHOOL
APPELLATE COMPETITION
2013 REGISTRATION FORM

_____ Yes, we would like to submit a brief for the Appellate Competition. Teams are limited to two students per brief. Briefs must be received in Tallahassee by March 22, 2013.

I. Student's Name: _____
School: _____
Address: _____
City: _____ State: _____ Zip: _____ County: _____
E-mail: _____ Phone: _____ Fax: _____
☐ Team Captain

II. Student's Name: _____
School: _____
Address: _____
City: _____ State: _____ Zip: _____ County: _____
E-mail: _____ Phone: _____ Fax: _____
☐ Team Captain

III. Teacher's Name: _____
School:_____
Address: _____
City: _____ State: _____ Zip: _____ County: _____
E-mail: _____ Phone: _____ Fax: _____

IV. Attorney Coach's Name: _____
Address: _____
City: _____ State: _____ Zip: _____ County: _____
Firm Name: _____
E-mail: _____ Phone: _____ Fax: _____

Brief submitted on behalf of: (Check One)

Petitioner or Respondent

Return 3 copies of this form and 3 copies of the brief to the address listed below.

The Florida Law Related Education Association, Inc.
2930 Kerry Forest Parkway, Suite 202
Tallahassee, Florida 32309

Email one copy in digital form to staff@flrea.org by the due date.

RULES AND GUIDELINES

Introduction

An appeal from a trial court to an appellate court normally involves two components: a written brief and an oral argument**. In this exercise, you will prepare a brief to the Supreme Court of Florida which will serve as the basis of an oral argument.** The top brief writers in each Appellate District will have the opportunity to present oral arguments in District Court of Appeal competitions. Selected teams will advance in the competition to the state level, with the statewide finalists having the opportunity to present oral arguments in the Florida Supreme Court in Tallahassee. District competitions will be held in late April 2013 and the State Finals will be held in May in Tallahassee. Multiple teams may submit briefs from each school; however, each team may submit only one brief. In determining which side you choose, you should read and analyze the cases cited in the case materials.

A. Rule 1: Teams

1. Each team must consist of two students from the same school. One student should be designated as the team captain.

2. Each team will submit only one brief for either the petitioner or respondent.

3. Teams will need to prepare oral arguments for the party they wrote a brief supporting.

4. Teams may use attorney coaches and teachers as advisors to guide them through the process of preparing the brief and oral arguments; however, the writing of the briefs must be the sole work of the students. Attorneys and teachers are strictly prohibited from writing any portion of the brief.

5. Team Roster

   Team rosters should be completed and submitted with the briefs by the due date. At registration, teams will be identified only by code.

6. Roll Call

   Students will their names and team codes at the beginning of every round to the judging panel. No information identifying the team, beyond the students' names and team code, should be provided to the judges.

B. Rule 2: The Packet

1. Students should assume the moot court packet is complete and factual. Briefs which challenge the validity of issues beyond the scope of the issues questioned in the moot court packet will not be entertained. **Students should not reference information contained in the mock trial materials unless so stated in the moot court packet. The moot court and mock trial packets are not interchangeable.**

2. Students may only utilize the case law referenced in the moot court packet. Any deviation is a rules violation.

3. Students may not construct additional facts not found in the moot court packet specifically. Any information utilized that cannot be fairly inferred from the moot court information packet will be considered beyond the scope, and therefore, a rules violation. Students cannot cite information from the mock trial materials if not explicitly found in the moot court packet.

C. Rule 3: Competition Format

1. This competition is composed of two phases: (1) the brief-writing phase; and (2) the oral argument phase.

D. Rule 4: The Brief

1. Three copies of the students' brief must be received by The Florida Law Related Education Association, Inc. no later than March 22, 2013. Additionally, a digital copy should be emailed to staff@flrea.org by the due date.

2. Each brief should follow the format of the enclosed brief outline. Failure to adhere to the format may lead to disqualification. The entire brief must be no longer than 18 pages inclusive of cover and table of contents. The pages must be letter-sized 8 ½" x 11." Format the text by allowing one-inch margins. All briefs must be typed and double-spaced. The type style should be Times New Roman 12 point font and each paragraph should be indented. Page numbers should appear centered at the bottom of each page. A cover page should identify "Brief for Petitioner" or "Brief for Respondent" and list the participants' names, school, address, telephone numbers, and email addresses.

3. Pursuant to Rule 2, briefs may not include any case law beyond what is presented in the packet and may not include any manufactured or researched facts beyond what is found in the moot court packet specifically.

4. Legal citation is not required, but is encouraged. Information on legal citations can be found in the appendices of the packet.

E. Rule 5: The Oral Argument

1. Two students must participate for a team per round. Both students must speak and address one of the two questions in each round. Only one student may handle rebuttal for petitioner.

2. Each team is given 20 minutes to present their case, as outlined below:

Speaker	Time Limit
Petitioner	*17 minutes*
Attorney - Question 1	8 minutes 30 seconds
Attorney - Question 2	8 minutes 30 seconds
Respondent	*20 minutes*
Attorney - Question 1	10 minutes
Attorney - Question 2	10 minutes
Petitioner - Rebuttal	*3 minutes*

3. Rounds will start on time. If a team, or a portion of the team, fails to appear within ten minutes of the time indicated, the team will compete with an incomplete team. If no student from a team appears within that time limit, the team will be judged to have forfeited the round, and bye round scoring will apply to the other team.

4. Two students will present during any one round of competition. Each student will address one of the two questions presented in the brief. Both students must speak during the oral argument. If the second student does not speak during the course of the oral argument, that student will receive a score of zero (0).

5. No communication should occur between students participating in the round and other team members, coaches, or anyone else in the audience outside the bar. Any communication with anyone outside of the partner student during that round will constitute a rules violation.

6. Students should display dignity and respect to the judges, staff, and other competition personnel.

   Additionally, teams should respect each other.

7. Dress should be professional, courtroom attire.

8. During oral arguments, students will be scored based on the criteria found on the score sheet in the packet.

9. Scores and winners will not be disclosed after a round, but verbal critiques will be given.

F. Rule 6: Videotaping/Photography

1. Cameras and recording devices are permitted in certain courtrooms; however, the use of such equipment may not be disruptive **and must be approved in advance of the competition by The Florida Law Related Education Association, Inc.**

2. When one team requests to videotape during a trial, the opposing team must be consulted and their permission granted prior to taping.

G. Rule 7: Viewing an Argument

1. Team members, alternates, attorney coaches, teacher coaches, and any other persons directly associated with a team, except those authorized by the State Advisory Committee, are not allowed to view other teams in competition so long as their team remains in the competition.

2. Judges should maintain order in the courtroom. If observers are disorderly, they will be asked to vacate the premises.

H. Rule 8: Decisions

1. All decisions of the judges are final.

I. Rule 9: Team Advancement

1. Teams will be scored first on their written briefs to determine if they advance to the oral argument presentations.

2. During the scoring of the written briefs, the panel of evaluators will give each brief a numerical score consistent with the score sheet located on the website. The scores from each of the judges in the panel will be added together to determine the top two to four briefs. The top two to four teams in each district may be given the opportunity to compete in the district competition.

3. During the oral argument competition, a panel of judges will score student performances in each round. The team that receives the higher score from each judge will be awarded that judge's ballot. The team with highest number of ballots wins the round.

4. At the end of the competition, the judges will consult to recommend the team or teams from the district to advance to the state competition.

5. Briefs will be scored and a Best Brief award presented at the state competition consistent with the practices outlined herein.

6. The state finals will incorporate one preliminary round and one final round of competition. The top two teams will be determined by the panel of DCA judges evaluating the preliminary rounds. These top two teams will meet in the final round of competition. The team receiving the most ballots in the final round will win the competition.

J. Rule 10: Effect of a Bye Round

1. A "bye" becomes necessary when an odd number of teams are present for the tournament. For the purpose of advancement and seeding, when a team draws a bye or wins by default, the winning team for that round will be given a win and the

number of ballots and points equal to the average of all winning team's ballots and points of that same round.

K. Rule 11: Eligibility

1. All students on a team must be enrolled in the same public or private school in the district for which they are competing.

2. Students must be enrolled in a Florida high school in order to be eligible.

All questions should be submitted in writing to ABPflreaED@aol.com

NOTE: FLREA strongly encourages the use of an appellate attorney during the coaching process. The FLREA website contains valuable resources to assist you in preparing your brief, as well as your oral argument.

SOURCES OF LEGAL RESEARCH

The legal authorities you will be using as your source of research and for purposes of citing to the Court are included or referenced in the case materials.

You may also read articles and legal authorities from other sources and jurisdictions to get ideas and arguments for your brief, but these materials may only be used to get ideas or to enhance your understanding of the legal issues. They may not be cited as authority in this contest. Your Attorney Coach may wish to suggest reading material. While you are encouraged to explore other sources, there is no requirement that you do so.

Information on research using primary and secondary sources is enclosed in the Appendices for your review.

Additionally, you can utilize on-line research through a variety of sources. You should be able to find most of the cited cases at **www.findlaw.com**, under Laws: Cases and Codes. From the Findlaw "Cases and Codes" page, scroll down and click on the U.S. Supreme Court link and pull all cases with (i.e. 123 U.S. 456). For all Circuit Court cases a ___F.2d, F.3d or F.Supp., click on the applicable Circuit Court link. For example, *Doe v. v. Dept. of Pub. Safety*, 271 F.3d 38, 60 (2d Cir. 2001) would be found under the **Second Circuit**.

Remember that in preparing your brief, you can only use the legal authorities included or referenced in these materials. You can research other authorities but you should only use authorities cited in these materials in preparing your briefs and arguments.

RELEVANT LEGAL AUTHORITY

In developing briefs and oral arguments, student competitors may utilize any authority cited in the mock appellate opinion included in the case materials, including federal and state case law (and various authorities cited therein), federal and state constitutional provisions, and federal and state statutes. Students should be careful to explore the authorities independently as opposed to relying solely on the context in which they are presented in the mock appellate opinion.

District of Columbia v. Heller, 554 U.S. 570 (2008)
McDonald v. City of Chicago, 130 S.Ct. 3020 (2010)
Robertson v. Baldwin, 165 U.S. 275 (1897)
Muscarello v. United States, 524 U.S. 125 (1998)
United States v. Marzzarella, 614 F.3d 85 (3rd Cir. 2010)
United States v. Chester, 628 F.3d 673 (4th Cir. 2010)
United States v. Reese, 627 F.3d 792 (10th Cir. 2010)
United States v. Skoien, 614 F.3d 638 (7th Cir. 2010)
Mack v. United States, 6 A.3d 1224 (D.C.2010)
United States v. Hart, 726 F.Supp.2d 56 (D.Mass.2010)
Dorr v. Weber, 741 F.Supp.2d 993 (N.D.Iowa 2010)
People v. Flores, 169 Cal.App.4th 568, 86 Cal.Rptr.3d 804 (2008)
Kachalsky v. Cacace, 817 F. Supp. 2d 235 (S.D.N.Y. 2011)
United States v. Smith, 742 F.Supp.2d 855 (S.D.W.Va. Sept. 20, 2010)
United States v. Walker, 709 F.Supp.2d 460 (E.D.Va.2010)
Peruta v. Cty. of San Diego, 758 F.Supp.2d 1106 (S.D. Cal. 2010)
United States v. Engstrum, 609 F.Supp.2d 1227 (D.Utah 2009)
State v. Reid, 1 Ala. 612 (1840)
Nunn v. State, 1 Ga. 243 (1846)

*** Note: Case law mentioned in the materials may be utilized by students in the development of briefs and oral argument. Additional cases may be added by the state committee.

Note that section 790.012, Florida Statutes, is fictional. It appears on the next few pages and is not accessible online.

Regarding the facts of the underlying case, the students do not need any facts other than what is provided in the mock appellate opinion.

Students are not allowed to use facts from the mock trial case unless specifically mentioned in the moot court package.

Florida Statute § 790.012: Licenses to Carry[1]

(a) In an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property, the chief of police of the appropriate county may grant a license to an applicant who is a citizen of the United States of the age of twenty-one years or more or to a duly accredited official representative of a foreign nation of the age of twenty-one years or more to carry a pistol or revolver and ammunition therefor concealed on the person within the county where the license is granted. Where the urgency or the need has been sufficiently indicated, the respective chief of police may grant to an applicant of good moral character who is a citizen of the United States of the age of twenty-one years or more, is engaged in the protection of life and property, and is not prohibited from the ownership or possession of a firearm, a license to carry a pistol or revolver and ammunition therefor unconcealed on the person within the county where the license is granted. The chief of police of the appropriate county, or the chief's designated representative, shall perform an inquiry on an applicant by using the National Instant Criminal Background Check System, to include a check of the Immigration and Customs Enforcement databases where the applicant is not a citizen of the United States, before any determination to grant a license is made. Unless renewed, the license shall expire one year from the date of issue.

(b) The chief of police of each county shall adopt procedures to require that any person granted a license to carry a concealed weapon on the person shall:

(1) Be qualified to use the firearm in a safe manner by providing proof of completion of an approved firearms training course;

(2) Appear to be a suitable person to be so licensed;

(3) Not be prohibited from the ownership or possession of a firearm under Florida law; and

(4) Not have been adjudged insane or not appear to be mentally deranged.

(c) No person shall carry concealed or unconcealed on the person a pistol or revolver without being licensed to do so under this section.

(d) A fee of $10 shall be charged for each license and shall be deposited in the treasury of the county in which the license is granted.

(e) A person who carries a concealed firearm on or about his or her person commits a felony of the third degree punishable by up to 5 years in prison and/or a fine of up to $5,000.00

[1] **This is a fictional Florida statute.**

FORMAT OF THE BRIEF

Each brief should follow the format of the enclosed brief outline. Failure to adhere to the format may lead to disqualification. The entire brief must be no longer than 18 pages, letter-sized 8 ½" x 11." Format the text by allowing one-inch margins. All briefs must be typed and double-spaced. The type style should be Times New Roman 12 point font and each paragraph should be indented. Page numbers should appear centered at the bottom of each page. A cover page should identify "Brief for Petitioner" or "Brief for Respondent" and list the participants' names, school, addresses, telephone numbers, and email addresses.

Do not be overly concerned with legal citation; mistakes will not hurt your score. You may even choose not to use legal citation, so long as you make it clear what case you are referencing**.**

If you do try to use legal citation, here are some pointers – you may want to use the ***Blue Book, a Uniform System of Citation*****,** (18th ed., 2005), which should be available at any local law library for reference. However, you may simply follow the form of citation used in the sample brief.

When first citing a U.S. Supreme Court case, you should cite to the U.S. Reporter. For example, on page 6 of the sample brief, the petitioner cites to "*Jones v. United States*, 463 U.S. 354, 364 (1983)." The number 463 is the volume number, "U.S." stands for the U.S. Reporter, the books in which the Supreme Court cases are published, 354 is the first page of the cited case, and 364 is the exact page in the case upon which either the quoted language or the referenced portion of the case appears. *All subsequent cites* to the same case, immediately following that full cite, should be "*See id*." cites. However, if the referenced portion of the case is on a different page, your cite should appear as "*See id*. at _____" (that specific page on which the quote or reference is located).

If a case has been previously cited but not immediately previously cited, then a shortened cite form should be used. For example, in the sample brief, *Jones v. United States*, is cited on page 6, followed by a "*See id*." cite. Then on page 7, the *United States v. Ward* case is cited in its entirety. The petitioner then must again cite to *Jones v. United States*. If the petition were to use a "*See id*." cite there would be confusion because the reader would assume that the petitioner was referring to the *Ward* case, the immediately preceding case. Therefore, the petitioner abbreviated the case name and simply lists the
volume number of the U.S. Reporter, 463 and only the specific page in the case on which the reference appears after the word "at." If the petitioner went on to cite to the *Jones* case again, he or she could once again use a simple "*See id*. at _____" cite.

Again, it is not necessary that you follow the exact legal citation form used in the sample brief. Do the best you can. We are more concerned with the arguments you choose to make.

You will note that on the cover page of the sample brief, in the lower right hand corner, the petitioner's attorney has only identified himself or herself as counsel for petitioner. **You should include your full name, followed by the names and address of your high school, telephone numbers, and email addresses where you can be reached both at school and home.**
Briefs should conform to the following outline:

SECTIONS OF THE BRIEF

Cover Page

Follow the guidelines and see sample cover page.

Table of Authorities

- List cases you used in your arguments to support your position.
- List relevant constitutional and policy provisions.

Opinion Below

Include a short statement of the proceedings in the lower court/court below and the ruling or judgment of the trial court which is being appealed from.

Constitutional and Policy Provisions Involved

Spell out the relevant provisions in the U.S. Constitution and policy provisions involved in the case from either the perspective of the petitioner or respondent.

Questions Presented

Recite the two constitutional questions or issues on appeal before this Court.

Statement of the Case

This will encompass a statement of the important issues and facts before the Court from either Petitioner's or Respondent's perspective. This section should incorporate (1) a concise (one or two sentences if possible) introductory explanation of the general nature of the case as a lead-in to the brief; (2) a short statement of the proceedings in the court below and the ruling or judgment of the trial court which is being appealed from; (3) a concise statement of the issues before the Court on appeal from the Petitioner's or Respondent's perspective; and (4) a concise statement of the important facts. This section should be presented in a light favorable to your side and contentions in your case.

Summary of Argument

Include three or four paragraphs highlighting a summary of your arguments supporting either the Petitioner's or Respondent's position. Essentially this is a short synopsis of your arguments which will follow. See below.

Arguments

This portion of the brief should discuss your position on the facts, arguments, and legal authorities (statutes and case law) which support your position on the questions presented. If the case law is favorable to your side, show how the prior cases are applicable to the facts or analysis of that case from the present case. You may wish to select the cases which most strongly support your arguments.

Conclusion

This part is a short summary of your answers to the issues on appeal (the questions presented) and should consist of only a few sentences. It is a very concise statement of why you want the appellate court to agree with you. **The conclusion should also state what specific relief is being requested.**

SUBMITTING THE BRIEF

Briefs should be submitted in the required format to The Florida Law Related Education Association, Inc. and should be **received by March 22, 2013**. The winning brief writers will be notified for dates of the local oral arguments.

Submit three copies of all briefs to the following address.

The Florida Law Related Education Association, Inc.
2930 Kerry Forest Parkway, Suite 202
Tallahassee, Florida 32309

Additionally one electronic version must be submitted by the due date to staff@flrea.org.

For any questions, submit in writing to ABPflreaED@aol.com or staff@flrea.org.

BRIEF WRITING PRIMER

There are two main ways to argue your position to the appellate court: through the appellate brief and through the appellate oral argument. They serve different functions and, to an extent, courts look for different things from each function.

Of the two functions, the brief is the more important. It succinctly reviews for the court what the case is about (what the relevant facts and legal issues are), what the law is (for each issue raised by the appeal), and what relief you are seeking. It really does not matter which side of the case you are on or which issue you are addressing. Your job is to persuade the court that your position is correct – that is, that the facts and relevant law support the relief you seek and that the outcome you want makes sense.

The brief is your chance to shine. It is your chance to show the court that you understand your issue, that you have done the necessary research into it, and that you can communicate the argument in a scholarly way. The court looks to you for guidance, and it is your responsibility to convince the court that you can be trusted.

Let us go over some of the more important factors that judges look to when reading/grading an appellate brief.

Effective Organization of the Facts/Procedural History

Judges are busy and they look to you to narrow down the facts to those that are most important to deciding the issue. Have you summarized for the court all the facts that are relevant to your issue and that the court needs to know about in order to decide the case? Most cases have a lot of facts, but not all of those facts are relevant to the issue being raised on appeal.

For example, suppose your client was convicted of running a red traffic light and you are appealing that conviction. Does it make a difference how large the tires on his car were? Probably not (it might be relevant to a speeding ticket, but not running a red light). On the other hand, is it important to know what the weather and traffic conditions were at the time, or whether the police officers were in a position to see the intersection at the time that you client drove through it? Probably. Your ability to recognize a relevant or essential fact and to communicate it in an easy-to-understand way is very important to your ability to persuade the court.

Persuasive Use of Pertinent Facts/Diffusing Damaging Facts

Do not ignore bad facts. If they are important to the case (and, of course, relevant to the issues on appeal), someone will find them. Probably your opposing counsel. It will make you look less than honest with the court if you do not disclose bad facts. Your job is to find a way to be candid, but to emphasize the facts that support your position. Finally, do not merely list the essential facts. Weave them into a story. Make the brief interesting to read.

Issue Recognition

The way that you frame your issue will direct the court to the specific question it must decide in the case. Once you have identified the issues to be raised on appeal, state them clearly in the

brief. Be direct and forceful, without being wordy. Use active verbs. Remember that judges are very busy. They do not often have the time to wade through wordy, vague, or repetitive briefs.

The way you phrase the issue for the judges sets the stage for everything to follow in the brief. The issue also determines what your analysis will be. You have to make sure that your legal analysis and the conclusion that you reach parallel the issue that you raise.

Legal Analysis

Now that you have framed the issue that you want the appellate court to address, you have to lay out an analysis that is direct, logical, and persuasive. Your reader should be able to follow the analysis and, at the end of it, reach the same conclusion that you did.

Remember that your analysis revolves around the law. What is the law on the subject of your argument/on your issue? You either want the appellate court to apply the existing law (and perhaps extend it to a new set of facts and application) or to explain why, based on the distinct facts in your case, the existing law does not apply.

You must be clear in your thinking and direct in your writing.

Persuasive Use of Authority

Courts are guided by the law, and it is your job to tell them what the law is, how the facts of the cases that you cite are either substantially similar to your facts or are so different (in important ways) that the legal conclusion in those cases should not apply to your case. Your Issue Booklet identifies the leading cases for the issue you have raised. Your job is to explain to the court why the conclusions in those cases do or do not control the outcome in your case.

To do this, you may need to discuss the facts of the more relevant cases. Discussing the facts of those cases may help the court in your case to determine whether the holding in the prior cases apply to your circumstances.

Remember that you, acting in the role of a moot court lawyer, are, essentially, stepping into the same role as an officer of the court that all attorneys step into. While you represent a client, you also play an important role in helping to shape the law. So be candid, thorough, and forceful.

Clarity, Conciseness and "Readability"

In writing, let the first sentence of each section be your thesis sentence. State what your proposition is and let subsequent sentences support your thesis statement. End your paragraph with a conclusion that repeats your thesis statement.

Once you have completed your brief, be prepared to review and edit it. Revision means "to see again." You can revise your writing most effectively if you can figure out a way to see it again. When we review something we have written, however, it is often difficult. Not only do we have what we have written on paper, but we also have what is still in our mind.

To distance ourselves from what we have put on the printed page from what is in our mind, we need to see what we have written in a different way. For example, instead of looking at our

complete message, we need to review what we have written differently, i.e. sentence by sentence. As we review each sentence individually, we can ask ourselves the following questions: 1) did the sentence say what I wanted it to say?; 2) did I say it in a clear manner?; 3) could I have said what I wanted to say in fewer words?; and 4) could I have said it better? When we look at what we have written sentence by sentence, we will often find that we wrote many things that were unnecessary. For example, in the preceding sentence, could I have just say "…we'll find we wrote many unnecessary things."

Organization, Headings and Subheadings

No one likes to read a brief that is nothing more than a blob of words (imagine this Help Guide without any headings). Your readers are human and like to be able to focus on certain ideas at a time. As you take notes regarding the issues you are treating, therefore, you should note what the different issues are and organize your writing around each issue. To alert your reader that one issue is ending and another beginning, you should use headings and subheadings. Headings and subheadings not only help you telegraph to your reader that a change in issues or the treatment of a sub-issue is coming up, but help you frame your brie around the issues that will aid the logical organization of your full brief.

Compliance with Rules

Let's be honest. Following your appellate brief-writing rules can be less intellectually challenging than writing other school papers and you might even find it boring. Following the rules, however, is vital to practicing attorneys. Attorneys are required to follow different sets of rules to ensure a certain standard is followed that will be fair to everyone. For example, a Florida attorney writing a brief in state court has to follow the Florida Rules of Appellate Procedure (in federal court, the Federal Rules of Appellate Procedure apply). Because attorneys have to learn and follow court (and their Bar Association) rules, you too are being judged on your willingness to learn and follow you "quasi-court" rules for your moot court competition.

Spelling and Grammar

Spelling and grammar are important to clarity and presentation. Errors in spelling or grammar have a negative effect on your reader. A reader who sports spelling and grammar errors may believe that the writer lacks credibility. The reader may question, therefore, the soundness of that writer's legal arguments. In this day of spell-check and automated grammar-check tools, there is no excuse (other than competition rules) not to use them, and using those tools will enhance your credibility with the reader. Remember, though, to still proofread: spell-check cannot substitute to careful review of your final brief. The appearance of your document will also affect your credibility and opportunity to persuade. People do see the small stuff.

Citation Style

Are the citations sloppy? Are your citations proper (do they follow the rules provided)? Did you pay attention to detail? Again people see the small stuff and are affected by anything that might affect your credibility. Remember when doing your citations (as well as other portions of your brief) that you should base your decisions on the rules, not your own preferences.

Good luck!

Sixth District Court of Appeal

State of Florida, July Term, A.D. 2012

Opinion Filed December 9th, 2012

Consolidated Appeal No. 6D12-1252

Lower Tribunal No.
12-92834-CT-1

REGAN BUSCHELL,
Appellant,

vs.

STATE OF FLORIDA,
Appellees.

Appeal from the Circuit Court of the Twenty First Judicial Circuit In and For Emerald County, Florida.

Before JUDGES RUIZ, HARRISON, and SLATER.

RUIZ, Judge

This appeal comes to this Court as a result of Appellant Regan Buschell's ("Buschell") conviction for carrying a concealed weapon without a permit pursuant to Fla. Stat. § 790.012. Buschell was sentenced to 2 years in state prison and 3 years of probation.

On appeal, Buschell contends that the trial court erred when it denied his motion to dismiss the charges on the grounds that Fla. Stat. § 790.012 is unconstitutional under the Second Amendment to the United States Constitution. Buschell raises two issues for our consideration. First, Buschell claims that the trial court erred when it ruled that carrying a concealed weapon outside the home is not a protected right under the Second Amendment. Second, Buschell claims that because the right is protected under the Second Amendment, strict scrutiny must be applied and the concealed weapon statute cannot survive that level of scrutiny.

For the reasons set forth below, we affirm the trial court's denial of Buschell's motion and find that Fla. Stat. § 790.012 is constitutional. We address each issue in turn.

I. Facts and Procedural History

On the evening of May 1, 2011, Detective Kennedy Shephard arrived at Buschell's home with an arrest warrant issued due to evidence linking Buschell to an aggravated battery and assault. Shephard noticed Buschell walking to his SUV, which was parked on the street in front of the house. When Buschell reached the sidewalk, the detective arrested him and conducted a search incident to arrest. The search yielded a loaded .38 caliber revolver inside Buschell's right overcoat pocket. The detective asked Buschell if he had a permit to carry the concealed weapon. Buschell indicated he did not and stated to the officer that he carried the weapon only for purposes of self-defense. Buschell had previously applied for and been denied a permit to carry a concealed weapon for purposes of lawful self-defense. Buschell owned the revolver lawfully.

When Buschell turned 21 at the beginning of senior year of college, he applied to the Emerald County Sheriff's Department for a concealed carry permit. In compliance with the requirements to apply for a permit, Buschell had a family friend write a letter under penalty of perjury stating that Buschell was of good moral character. Buschell also produced documentation that he had never been arrested or been the recipient of disciplinary action in school. To prove that good cause existed to issue the permit to carry a concealed weapon, Buschell produced documentation of six threats over the last couple of years. In one threat, the person described classes Buschell was enrolled in and places he frequented. This threat was made against Buschell's life. Buschell submitted an affidavit to the Sheriff's office indicating that he was afraid of being seriously harmed or killed if not allowed to carry a concealed weapon for self-defense. Buschell provided documentation that he was a resident of the State of Florida and had completed the mandatory firearms training course from an approved provider, which included instruction on firearm safety and the law regarding the permissible use of a firearm.

In the last three years the Sheriff's Department used the following procedure to review permit applications: First, it determined whether the applicant was a resident of the State of Florida and had completed the required training course. If the applicant met both criteria, it determined whether the applicant had good moral character and good cause. A panel of four sheriff's deputies with at least 15 years of experience met and discussed each application. The panel always ordered background checks.

Like the Sheriff's Department had done in all but 10 out of 117 (8.5%) cases in the last five years, it denied Buschell's application. The permits granted were to prosecutors, a federal judge, and several merchants who transport expensive goods.

Buschell was charged with violating the Florida Concealed Carry Statute, Fla. Stat. § 790.012. The statute reads as follows:

> **Licenses to carry.** (a) In an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property, the chief of police of the appropriate county may grant a license to an applicant who is a citizen of the United States of the age of twenty-one years or more or to a duly accredited official representative of a foreign nation of the age of twenty-one years or more to carry a pistol or revolver and ammunition therefor concealed on the person within the county where the license is granted. Where the urgency or the need has been sufficiently indicated, the respective chief of police may grant to an applicant of good moral character who is a citizen of the United States of the

> age of twenty-one years or more, is engaged in the protection of life and property, and is not prohibited from the ownership or possession of a firearm, a license to carry a pistol or revolver and ammunition therefor unconcealed on the person within the county where the license is granted. The chief of police of the appropriate county, or the chief's designated representative, shall perform an inquiry on an applicant by using the National Instant Criminal Background Check System, to include a check of the Immigration and Customs Enforcement databases where the applicant is not a citizen of the United States, before any determination to grant a license is made. Unless renewed, the license shall expire one year from the date of issue.
>
> (b) The chief of police of each county shall adopt procedures to require that any person granted a license to carry a concealed weapon on the person shall:
>
> (1) Be qualified to use the firearm in a safe manner by providing proof of completion of an approved firearms training course;
>
> (2) Appear to be a suitable person to be so licensed;
>
> (3) Not be prohibited from the ownership or possession of a firearm under Florida law; and
>
> (4) Not have been adjudged insane or not appear to be mentally deranged.
>
> (c) No person shall carry concealed or unconcealed on the person a pistol or revolver without being licensed to do so under this section.
>
> (d) A fee of $10 shall be charged for each license and shall be deposited in the treasury of the county in which the license is granted.
>
> (e) A person who carries a concealed firearm on or about his or her person commits a felony of the third degree punishable by up to 5 years in prison and/or a fine of up to $5,000.00

Fla. Stat. § 790.012 (2012).

Buschell filed a motion to dismiss the information on the ground that the concealed carry statute was unconstitutional under the Second Amendment. The trial court denied the motion and proceeded to trial. At trial, Buschell renewed his motions, which the trial court denied. Buschell was convicted of carrying a concealed weapon in violation of the statute. Buschell was sentenced to 2 years in Florida State Prison and 3 years of probation. This appeal follows.

II. Standard of Review

"A trial court decision on the constitutionality of a statute is reviewed by the de novo standard, because it presents a pure issue of law. The appellate court is not required to defer to the judgment of the trial court." *State v. Wells*, 965 So. 2d 834, 837 (Fla. 1st DCA 2007). Therefore, this Court reviews the constitutionality of Fla. Stat. § 790.012 without deference to the trial court or the presumption that the trial court's decision was correct. That being said, "[i]f it is reasonably possible to do so, a court is obligated to interpret statutes in such a manner as to uphold their constitutionality." *Id.*

III. The Second Amendment Does Not Recognize a Right to Carry a Concealed Weapon Outside the Home and is Thus Not Protected by the Second Amendment.

Our inquiry into Buschell's claims on appeal must naturally begin with the question of whether the purported right to carry a concealed weapon implicates protections under the Second Amendment to the United States Constitution.

The Second Amendment provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. While the Second Amendment is clearly applicable to the states[2], we must first determine whether Buschell's actions implicate a Second Amendment right *ab initio*. Several federal courts that have addressed Second Amendment issues in the context of *District of Columbia v. Heller*, 554 U.S. 570 (2008) have recognized that Second Amendment protections apply only to conduct that was originally sought to be protected under the Second Amendment. For example, the Third Circuit Court of Appeals stated in *United States v. Marzzarella* that,

> "As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid."

614 F.3d 85, 89 (3rd Cir. 2010) (citation and footnote omitted); *accord, e.g.*, *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *United States v. Skoien*, 614 F.3d 638, 639–43 (7th Cir. 2010). *Marzzarella* establishes the analytical process we will follow.

We turn now to the decisions in *Heller* and *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010) to glean a historical context in assisting us in answering the question of whether carrying weapons outside the home invites Second Amendment protections.

Before the United States Supreme Court decided *Heller*, constitutional jurisprudence firmly established that the right to keep and bear arms under the Second Amendment was a collective right and not an individual right. *See U.S. v. Miller*, 307 U.S. 174 (1939)*; Silveira,* 312 F.3d 1052, 1092 (9th Cir. 2003); *Gillespie v. City of Indianapolis,* 185 F.3d 693, 710 (7th

[2] Our discussion of the applicability of the Second Amendment to the states is discussed later.

Cir. 1999); *United States v. Wright,* 117 F.3d 1265, 1273-74 (11th Cir. 1997); *United States v. Rybar,* 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Pepersack,* 47 F.3d 120, 122 (4th Cir. 1995); *United States v. Hale,* 978 F.2d 1016, 1019-20 (8th Cir. 1992); *United States v. Oakes,* 564 F.2d 384, 387 (10th Cir. 1977); *United States v. Warin,* 530 F.2d 103, 106 (6th Cir. 1976); *Cases v. United States,* 131 F.2d 916, 921-23 (1st Cir. 1942).

Heller drastically changed the landscape of Second Amendment jurisprudence. In *Heller*, the District of Columbia, a federal territory, banned the possession of unregistered firearms. *Heller*, 554 U.S. at 574-75. Handguns could generally not be registered, leading to the result that handguns were generally banned in the District of Columbia. *Id.* at 575. Lawfully registered and owned firearms were required to be "unloaded and disassembled or bound by a trigger lock or similar device." *Id.* (internal citations omitted).

Dick Heller applied for a registration certificate for a handgun he was going to keep at his home, but his request was denied. *Id.* Heller filed suit in the United States District Court for the District of Columbia, which dismissed his complaint. *Id.* at 577. The Court of Appeals for the District of Columbia reversed and held that, "the Second Amendment protects an individual right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right." *Id.* The Supreme Court invalidated the District of Columbia's law and held that, "the inherent right of self-defense has been central to the Second Amendment right." *Id.* at 628.

However, the *Heller* Court stated, albeit in dicta, that, "[f]rom Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose… [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." *Heller*, 554 U.S. at 626.

The Court also stated that:

> "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose."

Id. at 595.

Heller did not address whether the Second Amendment was applicable to the states. The Supreme Court returned to the Second Amendment in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010) to address that very question. *McDonald* involved plaintiffs that wished to keep handguns in their homes for self-defense purposes. *Id.* at 3026. The City of Chicago had passed an ordinance very similar to the one at issue in *Heller*. The Chicago ordinance stated, "[n]o person shall ... possess ... any firearm unless such person is the holder of a valid registration

certificate for such firearm." *Id.* The ordinance then goes on to say that the registration of most handguns is not permitted, effectively banning handguns from the city. *Id.*

The Court ultimately held that the due process clause of the Fourteenth Amendment makes the Second Amendment applicable to the states as the amendment is fundamental to the American scheme of ordered liberty and "deeply rooted in this Nation's history and traditions." *Id.* at 3036, 3050. Thus, the Second Amendment applies to the States through incorporation under the Fourteenth Amendment. *Id.*

Heller and *McDonald* support the conclusion that the right to carry weapons outside the home is not protected by the Second Amendment. *Heller* recognizes a much narrower right than "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. Rather, the Second Amendment protects only the "right of law-abiding, responsible citizens to use arms *in defense of hearth and home*." *Id.* at 635 (emphasis added). We do not read *Heller* as expanding the scope of the Second Amendment. The Supreme Court made it clear that the decision was not intentioned to do so:

> "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

Id. at 626-27. The Court, by way of footnote, adds, "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627 n. 26. We also do not believe that the Court overruled *Robertson v. Baldwin*, 165 U.S. 275 (1897). In *Robertson*, the Supreme Court stated, "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." *Id.* at 282.

The historical context of the Second Amendment as discussed in *Heller* and *McDonald* and the decisions themselves lead us to one inevitable conclusion: There exists no constitutionally protected right to carry concealed weapons outside the home.

We are not the first court to reach this result. Several courts throughout the country, both at the federal and state levels, have correctly reasoned that carrying a concealed weapon is not a protected right under the Second Amendment. *See e.g. Mack v. United States*, 6 A.3d 1224, 1236 (D.C.2010) (citing *Robertson* and *Heller* and noting "it simply is not obvious that the Second Amendment secures a right to carry a concealed weapon"); *United States v. Hart*, 726 F.Supp.2d 56, 60 (D.Mass.2010) ("*Heller* does not hold, nor even suggest, that concealed weapons laws are unconstitutional."); *Dorr v. Weber*, 741 F.Supp.2d 993, 1004-05 (N.D.Iowa 2010) ("[t]he Court's recognition, in *Heller*, that prohibitions on carrying concealed weapons were lawful was in full accord with long-standing Supreme Court precedent."); *People v. Flores*, 169 Cal.App.4th 568, 86 Cal.Rptr.3d 804, 808 (2008) (citing *Robertson* and *Heller* in holding that "[g]iven this implicit approval [in *Heller*] of concealed firearm prohibitions, we cannot read *Heller* to have altered the courts' longstanding understanding that such prohibitions are

constitutional"). The decision in *Kachalsky v. Cacace*, 817 F. Supp. 2d 235 (S.D.N.Y. 2011) contains an exhaustive discussion of courts that have held as we now hold.

In sum, the Second Amendment does not recognize a right to carry a concealed firearm. Thus, Buschell's attack of Florida's statute under the Second Amendment fails, and his conviction must be affirmed. Buschell, however, raises a second issue concerning the proper standard to apply if we assume, *arguendo*, that carrying a concealed weapon outside the home is a protected right under the Second Amendment. We now address Buschell's second issue on appeal.[3]

IV. Carrying a Concealed Weapon Outside the Home is Not a Fundamental Right, Strict Scrutiny Does Not Apply, and the Statute Survives Intermediate Scrutiny

Heller dealt with the right of individuals to possess arms in their homes for purposes of self-defense, an issue significantly different from the issue before us since Buschell was convicted of carrying a concealed weapon outside the home. Thus, that decision does not provide an express directive regarding the appropriate standard of scrutiny to utilize when evaluating statutes concerning the possession of handguns to be used for self-defense outside the home, namely concealed carry statutes. *Heller* does, however, provide us with strong clues and guidance that lead us to identifying the appropriate standard.

Although the Supreme Court in *Heller* failed to define which level of scrutiny should apply to Second Amendment challenges, it did indicate which level of scrutiny it would *not* apply. By way of a footnote, the Court rejected flatly the rational basis test for Second Amendment challenges. *Id.* at 628-29 n.27. The Court also rejected Justice Breyer's proposed "interest-balancing inquiry." *Id.* at 634. The inquiry would ask, "whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Id.* In unequivocally rejecting the interest-balancing inquiry, the Court stated:

> "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."

Id.

The Supreme Court also indicated that, with respect to laws banning handguns in a home for purposes of self-defense, such laws would be unconstitutional regardless of what standard of scrutiny were applied. *Heller*, 554 U.S. at 628-29 ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning *from the home* 'the most preferred

[3] Although judicial principles disfavor addressing Buschell's second issue in light of our ruling on the first issue, we address it to fully develop the record.

firearm in the nation to 'keep' and *use for protection of one's home and family*' would fail constitutional muster.") (emphasis added) (internal citations omitted).

It is clear to us from *Heller*, *McDonald*, and America's history as set forth in those two cases that an outright ban on the possession of handguns in a home for purposes of self-defense requires no level of scrutiny to be applied; it is automatically unconstitutional. It is equally clear to us that the right to possess a weapon, including a handgun, outside the home is not fundamentally rooted in our nation's history and does not implicate a fundamental right requiring strict scrutiny. Buschell argues that the right to carry a concealed weapon outside the home is a fundamental right and that our analysis should reflect the same. However, even if we assume that the right is deeply rooted and would be considered a fundamental right, it does not naturally follow that it must be subjected to strict scrutiny.

In *Heller*, the Supreme Court drew a parallel to the First Amendment, noting that, "Of course [Second Amendment rights were] not unlimited, just as the First Amendment's right of free speech was not." *Id.* at 595. We believe the First Amendment provides insight into the appropriate level of scrutiny to utilize.

First Amendment jurisprudence permits restrictions on content-neutral time, place, and manner restrictions. These restrictions are subject to an intermediate scrutiny analysis rather than a strict scrutiny analysis. In *United States v. O'Brien*, 391 U.S. 367, 377 (1968), the Supreme Court applied what is now called intermediate scrutiny to a law banning the mutilation of military draft cards. It stated, "we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*

First Amendment rights are sometimes provided even less protection than intermediate scrutiny permits. For example, restrictions on speech in nonpublic forums need only be reasonable so long as they do not discriminate based on the viewpoint of the speaker. *See Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678–79 (1992). Thus, even assuming the right to carry a concealed weapon outside the home were a fundamental right, strict scrutiny does not necessarily apply, and, here, we are of the view that it does not.

Likewise, we believe a rational basis standard does not apply here. The Supreme Court was unequivocal in *Heller* that rational basis should not be utilized for any Second Amendment challenge, and although the context of that issue dealt with self-defense at home, we believe that rational basis should not be utilized in evaluating Second Amendment issues centered on self-defense outside the home. The overall analytical scheme we can discern from *Heller* and *McDonald* suggests utilizing a rational basis test would be unwise.

Our analysis, therefore, leads us to the clear and inevitable conclusion that intermediate scrutiny is the only appropriate standard for evaluating a concealed carry permit statute or any law challenged under the Second Amendment that involves the carrying of weapons outside of the home. The First Amendment provides a parallel that the Supreme Court itself utilized. Indeed, the Supreme Court's examples of laws that are permissible under the Second Amendment fit well within this context. For example, carrying of a weapon in a sensitive place

would be akin to speech in a nonpublic forum and the restrictions would only need to be reasonable. The licensing of concealed weapons permits parallels time, place, and manner restrictions.

As with the first issue we addressed, we are not the first court to reach this result. Several courts have applied intermediate scrutiny in a Second Amendment analytical context. *See, e.g.*, *United States v. Smith*, 742 F.Supp.2d 855, 863–64 (S.D.W.Va. Sept. 20, 2010); *United States v. Walker*, 709 F.Supp.2d 460, 466 (E.D.Va.2010); *United States v. Marzzarella*, 595 F.Supp.2d 596 (W.D.Pa.2009).

Florida's concealed weapons statute survives intermediate scrutiny. There is little doubt that the regulation of weapons outside the home falls within the police powers of the state. The State argues that the licensing of concealed weapons furthers an important governmental interest, namely the reduction of crime by ensuring that only those persons with a necessity for carrying concealed weapons are lawfully permitted to do so. We agree. The statute is unrelated to the suppression of Second Amendment rights. Rather, it concerns itself only with the regulation of firearms outside the home. Lastly, the incidental restriction on alleged Second Amendment freedoms is no greater than necessary to achieve the government's goals. The law provides for the carrying of concealed weapons via a licensing scheme and does not, on its face, ban the possession of firearms outside the home altogether.

Thus, even assuming the Second Amendment applied in this context, Florida's concealed carry statute survives constitutional muster.

V. Conclusion

For the foregoing reasons, we find that the trial court did not err when it concluded that Fla. Stat. § 790.012 is constitutional. The judgment of the trial court is AFFIRMED.

HARRISON, J., CONCURS

SLATER, C.J., DISSENTING

The majority today holds that the Second Amendment provides no rights to individuals that desire to carry concealed weapons outside of their home for the purpose of lawful self-defense. To add insult to injury, the majority claims that even if the amendment did protect such conduct, laws relating to the carrying of concealed weapons would be subject only to intermediate scrutiny.

I disagree with the analysis of my brethren and would reverse Buschell's conviction because the relevant law and history indicates that the Second Amendment does protect the right to carry a concealed weapon, and laws affecting that right are subject to strict scrutiny, which Florida's concealed carry statute cannot satisfy.

I address each of my issues with the majority's opinion in turn.

I. The Right to Carry a Concealed Weapon Outside the Home is Protected by the Second Amendment

Heller dealt with Mr. Dick Heller's desire to *keep* a handgun in his *home*. 554 U.S. at 575. The Second Amendment, however, provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to *keep and bear* Arms, shall not be infringed." U.S. CONST. amend. II (emphasis added). *Heller*, notwithstanding the majority's claim that it speaks to concealed weapons, defined neither the right to "keep" arms nor the right to "bear" arms in terms limiting the scope of that right to the home. Thus, I do not read *Heller* as tacitly approving concealed carry statutes.

Heller defined the keeping of arms simply as, "[to] have weapons." 554 U.S. at 583 (internal quotations omitted). It indicated that it this definition flows from a "natural reading" of "keep Arms" in the Second Amendment. *Id.* The Court looked at various definitions of "keep" around the period that the Second Amendment was adopted. These definitions included, "[t]o retain; not to lose," "[t]o have in custody," and "[t]o hold; to retain in one's power or possession." *Id.* (internal citations omitted). I do not believe that there is any serious debate about the meaning of the word "keep" in the context of the Second Amendment.

Heller also defined the word "bear" in the context of the Second Amendment. The Court stated succinctly that, "[a]t the time of the founding, as now, to 'bear' meant to 'carry'." *Id.* at 584. It went further and stated, "When used with 'arms,' however, the term has a meaning that refers to carrying for a particular purpose—confrontation." *Id.* Moreover, it approved of Justice Ginsburg's language in her dissent in *Muscarello v. United States*, quoting, "[s]urely a most familiar meaning is, as the Constitution's Second Amendment ... indicate[s]: 'wear, bear, or carry ... upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person.'" *Id.* (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting) (internal citations omitted)).

Curiously, by adopting Justice Ginsburg's language in *Muscarello*, the Court recognized that the particular purpose of *confrontation* includes both *offensive* and *defensive* action. This is a clear recognition that the Second Amendment affords a right to 'wear, bear, or carry' a weapon in order for an individual to be prepared for a hostile encounter outside the home. It would be a stretch to assume that Justice Ginsburg was referring to confrontations solely within a home.

Furthermore, the Court stated "nothing in our opinion should be taken to cast doubt on ... laws forbidding the carrying of firearms in sensitive places such as schools of government building…" *Heller*, 554 U.S. at 626. Such language indirectly indicates that the Court recognized there is a lawful place for individuals to bear arms outside the home.

The majority cites to dicta in *Heller* for support of the proposition that the Court did not modify any Second Amendment principles pertaining to concealed weapon laws. In dicta, the Court stated, "[f]rom Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose… [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." *Heller*, 554 U.S. at 626.

As an initial matter, the Court never actually stated that the holdings of those 19th century courts are still valid. Also, it is difficult, if not impossible, to reconcile the 19th century cases

with the Court's statement that the right to bear arms means, "carrying for a particular purpose—confrontation." *Id.* at 584.

Furthermore, the cases cited by the Court in its dicta, while upholding the right of the state to ban the carrying of concealed weapons, rested upon the logic that the state provided alternative means of carrying weapons. *See, e.g.*, *State v. Reid*, 1 Ala. 612, 616-17 (1840) ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional."); *Nunn v. State*, 1 Ga. 243 (1846) ("A law which merely inhibits the wearing of certain weapons in a concealed manner is valid. But so far as it cuts off the exercise of the right of the citizen altogether to bear arms, or, under the color of prescribing the mode, renders the right itself useless-it is in conflict with the Constitution, and void."); *see also Peruta v. Cty. of San Diego*, 758 F.Supp.2d 1106, 1114 (S.D. Cal. 2010) ("The *Heller* Court relied on 19th-century cases upholding concealed weapons bans, but in each case, the court upheld the ban because alternative forms of carrying arms were available."). Thus, these decisions indicate that some form of carrying of a weapon outside the home is constitutionally protected, but subject to some modicum of regulation.

Contrary to the majority's assertion, I find little support in *Heller* that *Robertson v. Baldwin*, 165 U.S. 275 (1897) is still valid law or that it now stands for the broad proposition that all statutes effectively banning the carrying of concealed weapons are constitutional. A more appropriate reading of *Heller* and the cases it worked with to arrive at its holdings indicate to me that the state has the ability to ban either the carrying of concealed weapons or the open carrying of weapons, *but not both*. This prohibition stems from the Second Amendment, which is to say that the carrying and bearing of a firearm outside the home is a right recognized by the Second Amendment. Unlike the keeping of a firearm inside the home – as was the case in *Heller* – carrying a weapon in public is subject to some regulation, just as the *Heller* decision recognizes.

In sum, the Second Amendment applies to the carrying of weapons outside of the home for purposes of self-defense. Thus, the Second Amendment applies to the facts in the case at hand. I now turn to the validity of the law under the Second Amendment.

II. Strict Scrutiny is the Appropriate Standard to Use When Evaluating Florida's Concealed Weapon Statute, and the Statute Fails to Satisfy Strict Scrutiny

The trend in analyzing Second Amendment issues indicates that strict scrutiny should be applied. In *United States v. Engstrum*, 609 F.Supp.2d 1227, 1231–32 (D.Utah 2009), the district court analyzed *Heller* and determined that strict scrutiny was the only appropriate level of scrutiny to utilize when Second Amendment rights are burdened. It stated,

> "Although not expressly stated by the *Heller* Court, strict scrutiny appears the appropriate level of scrutiny for two reasons. First, the *Heller* Court described the right to keep and bear arms as a fundamental right that the Second Amendment was intended to protect. The Tenth Circuit has declared that, where fundamental rights are at stake, strict scrutiny is to be applied. Second, the *Heller* Court categorized Second Amendment rights with other fundamental rights which are analyzed under strict scrutiny."

Id.

I find *Engstrum*'s logic far more convincing than those of the cases cited by the majority's opinion. The *Engstrum* court relied on the language in *Heller* to determine that the Second Amendment contains the type of fundamental right that is subject to strict scrutiny analysis. *Id.* n.28 (citing *Heller*, 554 U.S. at 591 ("[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.")).

Moreover, *Heller*'s discussion of which standards were *inappropriate* provides guidance that indicates strict scrutiny is the only appropriate level of scrutiny for Second Amendment challenges. The majority is correct when it states that *Heller* ruled out the rational basis and interest-balancing approaches. In reaching its decision, the *Heller* Court cited many of our most fundamental and cherished rights: the freedom of speech (First Amendment), the right to be free from unreasonable searches and seizures (Fifth Amendment), and the right to counsel (Sixth Amendment). *Heller*'s rationale implies strongly that strict scrutiny, the highest level of protection for most fundamental rights, is the only merited level of scrutiny to be applied in this Second Amendment challenge.

With strict scrutiny being the proper standard to apply, I now turn to evaluating whether the statute at issue survives that scrutiny.

Florida's concealed weapons scheme amounts to a total ban on weapons outside the home. The sheriffs of each county have too much discretion in deciding whether to issue permits and the number of permits issued over time indicates a clear policy effectuated by the government that permits should be issued almost exclusively to individuals in government. Given that Florida law prohibits the open carrying of weapons in public, the concealed carry statute has the practical – and I believe intended – effect of banning all weapons in public. Given this level of restriction, Florida has essentially imposed a complete ban on weapons in public.

These effective restrictions mean that the law does not survive strict scrutiny. The law severely restricts an individual's means of protecting him or herself lawfully while in public against the threat of deadly force. Although I agree that the government has a compelling interest in preserving human life, the licensing scheme is not narrowly tailored to serve the government's interest nor is it the least restrictive means of accomplishing the state's goal. For example, the government could have opted to require sheriffs to issue concealed weapons licenses when the criteria is met, rather than make it optional for them to do so, or it could have made lawful the open carrying of weapons, including firearms. However, the law, while purporting to provide a channel for individuals to protect themselves outside the home by applying for a permit to carry a weapon based on speculation that self-defense will need to be employed in the future, and then issuing very few licenses to the public fails to provide less restrictive alternatives and fails strict scrutiny.

Strict scrutiny provides the appropriate level of protection for the Second Amendment's fundamental right of an individual to keep and bear arms. Buschell's claim that Florida's concealed carry statute fails to survive strict scrutiny is valid, and I would reverse the trial court's decision to the contrary.

III. Conclusion

For the aforementioned reasons, I believe that the trial court erred in denying Buschell's motion to dismiss the information and subsequent denial when he renewed his motion to dismiss the charges. The Second Amendment protects the right to carry arms outside the home for purposes of lawful self-defense, and laws affecting those rights must be subjected to strict scrutiny. Since Florida's concealed weapon's law fails to satisfy strict scrutiny, I would hold it unconstitutional and reverse Buschell's conviction.

I respectfully dissent.

Supreme Court of Florida

No. SC13-0001

REGAN BUSCHELL,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

ORDER INVOKING DISCRETIONARY JURISDICTION

On consideration of Petitioner's Notice to Invoke Discretionary Appellate Jurisdiction, the above-styled case is hereby acknowledged. Upon direction of the Justices of the Court, it is hereby ordered that the following issues be briefed and argued to the Court by the parties:

1. Whether the Second Amendment to the United States Constitution recognizes a right to keep and bear concealed arms outside the home in public spaces.

2. What standard is appropriate to apply in evaluating whether Florida's concealed weapons statute, Fla. Stat. § 790.012, is constitutional under the Second Amendment to the United States Constitution, and whether the statute survives the appropriate standard.

Dated: January 3rd, 2013.

Sarah Rojas

Sarah Rojas
Clerk, Supreme Court

HOW A CASE PROGRESSES THROUGH THE COURTS