IN THE

SUPREME COURT OF THE STATE OF FLORIDA

March Term, 2012

Case No.: SC13-0001

Lower Tribunal No.: 12-92834-CT-1

REGAN BUSCHELL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE

TWENTY FIRST JUDICIAL COURT OF APPEAL

BRIEF FOR THE RESPONDENT

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This action now comes before this Honorable Court on a Notice to Invoke Discretionary Appellate Jurisdiction commenced by the Petitioner, Regan Buschell. Petitioner was convicted under Fla. Stat. § 790.012 in the Twenty First Judicial Circuit in and for Emerald County, Florida for carrying a concealed weapon without a permit and was sentenced to 2 years in prison and 3 years of probation.

Petitioner appealed his conviction, contending that the trial court erred when it denied his motion to dismiss the charged on the grounds that Fla. Stat. § 790.012 is unconstitutional under the Second Amendment to the United States Constitution. On December 9th, 2012, appellant's action came before the Sixth District Court of Appeal of the State of Florida as an appeal from the Twenty-First Judicial Circuit in and for Emerald County, Florida. The district court of appeal affirmed that Buschell's conviction under Fla. Stat. § 790.012 was constitutional because carrying a concealed weapon outside of the home is not a protected right under the Second Amendment. The district court of appeal also found that intermediate scrutiny is the appropriate standard to use in evaluating the constitutionality of Fla. Stat. § 790.012 and that the statute survives the intermediate scrutiny standard. Appellant filed a Notice to Invoke Discretionary Appellate Jurisdiction on January 3, 2012.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment of the United States Constitution provides in relevant part:

> 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.

The Fourteenth Amendment of the United States Constitution provides in relevant part:

> …No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States…

Florida Statute § 790.012 provides in relevant part:

> (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 to carry a pistol or revolver and ammunition therefor concealed on the person within the county where the license is granted…
>
> (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 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.

QUESTIONS PRESENTED

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

II. What standard is appropriate to apply in evaluating whether Fla. Stat. § 790.012 is constitutional under the Second Amendment to the United States Constitution, and whether the statute survives such level of scrutiny.

STATEMENT OF THE CASE

This case is being brought before the Supreme Court of Florida to determine whether the Second Amendment to the United States Constitution recognizes a right to carry concealed weapons outside the home in public spaces, to establish the level of scrutiny to be applied in such Second Amendment challenges, and to evaluate whether the concealed carry statute survives such scrutiny.

Petitioner, Regan Buschell, was charged and convicted of carrying a concealed weapon without a permit under Fla. Stat. § 790.012. Before and during the trial Buschell moved to dismiss the count for violation of § 790.012, arguing that the right to carry a concealed weapon is protected under the Second Amendment, strict scrutiny must be applied, and the concealed weapon statute cannot survive such scrutiny. In both instances, the trial court denied Buschell's motion.

Regan Buschell was twenty-one years old when he applied to the Emerald County Sheriff's Department for a concealed carry permit. In applying for a permit, Buschell completed all of the requirements necessary to apply. A panel of four sheriff's deputies with at least 15 years of experience each met and discussed Buschell's application to determine whether Buschell met the criteria of being a resident of the State of Florida, had completed the required training course, was of good moral character, and had good cause to obtain such a license. In the last five years, only 10 out of 117 cases, approximately 8.5%, were granted a license to carry a concealed weapon. Such grants were made to prosecutors, federal judges, and merchants who transport expensive goods. After reviewing Buschell's case, the Emerald County Sheriff's Department denied Buschell's application to obtain a permit to carry a concealed weapon for purposes of lawful self-defense.

On May 1, 2011, Detective Kennedy Shephard arrived at Buschell's home with an arrest warrant for Regan Buschell issued due to evidence linking Buschell to an aggravated battery and aggravated assault. The detective noticed Buschell walking toward his SUV, which was parked on the street in front of his house. When Buschell reached the sidewalk, a public space, the detective arrested Buschell and conducted a search incident to arrest. The search yielded a loaded .38 caliber revolver inside of the right pocked of Buschell's overcoat. When asked by the detective if Buschell had a permit to carry the concealed weapon, Buschell indicated that he did not have a permit. Buschell was then charged with violating Fla. Stat. § 790.012.

SUMMARY OF ARGUMENT

The Supreme Court of Florida should affirm the decision of the Sixth District Court of Appeal and uphold Regan Buschell's conviction in the trial court under Fla. Stat. § 790.012. The Second Amendment to the United States Constitution does not recognize a right to keep and bear concealed firearms outside of the home in public spaces, therefore, the appropriate standard to use in evaluating the constitutionality of Fla. Stat. § 790.012 is the intermediate scrutiny standard. Respondent holds that Fla. Stat. § 790.012 survives the intermediate scrutiny standard.

In *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897), the United States Supreme Court stated that, "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." And although the decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), changed the landscape of Second Amendment jurisprudence, Respondent holds that the Court did not overrule *Robertson* in the *Heller* decision. In *Heller*, the Court recognized that 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). The Court never overturned *Robertson* in the *Heller* decision because the Court clearly restricted Second Amendment rights to only protect individuals carrying weapons "in defense of hearth and home," (*Id*. at 635), not in public confrontations. Respondent further contends that the United States Supreme Court has not overturned *Robertson* in any subsequent case.

When determining the appropriate level of scrutiny to apply to this case, strict scrutiny does not apply and the statute survives intermediate scrutiny. Several courts have reached this same decision. The right to possess a weapon outside the home is not a fundamental right that requires the strict scrutiny standard. Similar to restrictions to the First Amendment, carrying a weapon in a sensitive place would permit time, place, and manner restrictions; this makes

intermediate scrutiny the appropriate standard to be used. Furthermore, Fla. Stat. § 790.012 survives intermediate scrutiny because the licensing of concealed weapons furthers important governmental interests, such as the reduction of crime. The statute deals only with the regulation of firearms outside the home and is unrelated to the suppression of Second Amendment rights. The statute does not ban the possession of firearms outside the home altogether; it instead allows the carrying of concealed weapons through a licensing scheme. Intermediate scrutiny is the appropriate standard to apply to Fla. Stat. § 790.012 and it survives such scrutiny.

ARGUMENT

I. THE SECOND AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT RECOGNIZE A RIGHT TO CARRY A CONCEALED WEAPON OUTSIDE OF THE HOME

This Court should uphold the finding of the District Court of Appeal of the Sixth District in the matter herein described because Fla. Stat. § 790.012 does not violate Petitioner's rights guaranteed by the Second Amendment as the Second Amendment does not recognize a right to carry a concealed firearm. Respondent argues that the United States Supreme Court has never overruled *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897), in which the Court stated that, "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons."

Before the turn of the century, the Court had firmly and repeatedly established that the right to keep and bear arms under the Second Amendment was not even an individual right, but rather a collective right. *See U.S. v. Miller*, 307 U.S. 174 (1939); *Silveria*, 312 R.3d 1052, 1092 (9th Cir. 2003); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1273-74 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3rd 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). However, in the landmark decision of *District of Columbia v. Heller*, 554 U.S. 570 (2008), the landscape of Second Amendment jurisprudence changed. In *Heller*, the Court found 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…Thus we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation…"

Id. at 595.

However, in the *Heller* decision, the Court in no way invalidated *all* of the holdings of the 19th century courts. In *Heller*, the Court recognized a right for an individual to carry weapons that is much narrower than "a right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose." *Id*. at 626. Rather, the Court recognized that 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). And although the Court did not address in *Heller* whether the Second Amendment was applicable to the states, in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010) the Court returned to the Second Amendment to hold 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. Therefore, although it is clear that the rights protected under the Second Amendment do apply to the states, according to *Robertson v. Baldwin* those rights are not violated by "laws prohibiting the carrying of concealed weapons." *Id*. at 282. The Court never overturned *Robertson* in the *Heller* decision because the Court clearly restricted Second Amendment rights to only protect individuals carrying weapons "in defense of hearth and home," (*Id*. at 635), not in public confrontations. Respondent further contends that the United States Supreme Court has not overturned *Robertson* in any subsequent case to this date.

In the wake of the *Heller* decision, multiple courts throughout the nation have also reasoned as Respondent does, 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 weapon 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").

Thus, Respondent contends that the Second Amendment does not recognize a right to carry a concealed firearm. In this case, Regan Buschell was arrested with a loaded .38 caliber revolver inside Buschell's right overcoat pocket on the public sidewalk outside of Buschell's home in Emerald City, Florida. Furthermore, Fla. Stat. § 790.012 requires licensing of weapons in the public sphere, or "within the county where the license is granted." Carrying concealed firearms outside of the home in the public sphere is not protected under the Second Amendment as interpreted by *Heller* because such carrying is not "in defense of hearth and home." *Id*. at 635. Respondent urges this Court to uphold the precedent of *Robertson v. Baldwin* and find that Fla. Stat. § 790.012 does not violate Petitioner's rights guaranteed by the Second Amendment as the Second Amendment does not recognize a right to carry a concealed firearm.

II. FLA. STAT. § 790.012 SURVIVES THE INTERMEDIATE SCRUTINY STANDARD, WHICH IS THE APPROPRIATE STANDARD TO APPLY IN EVALUATING ITS CONSTITUTIONALITY

Petitioner also argues his conviction under Fla. Stat. § 790.012 should be overturned on the grounds that because the right to carry a concealed weapon is protected under the Second Amendment, strict scrutiny must be applied and the concealed weapon statute cannot survive that level of scrutiny. Respondent argues that because carrying a concealed weapon outside the home

is not a fundamental right, strict scrutiny does not apply, and the statue survives intermediate scrutiny.

When determining which standard of scrutiny to utilize when evaluating Fla. Stat. § 790.012 there are four choices: strict scrutiny, intermediate scrutiny, interest-balancing approach, and rational basis standard. Even though *District of Columbia v. Heller*, 554 U.S. 570 (2008), involved self-defense inside the home and does not explicitly state the appropriate level of scrutiny that should be applied to Second Amendment challenges, it does indicate the levels of scrutiny that would not apply. The Supreme Court in *Heller* rejected the rational basis test as well as the proposed interest-balancing inquiry. *Id* at 634, 628-29 .27. With rational basis test and the interest-balancing inquiry being ruled as inappropriate standards of scrutiny to utilize in any Second Amendment challenge, strict scrutiny and intermediate scrutiny are the remaining two standards of scrutiny that remain.

When referencing *Heller* and *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), it is clear that the right to possess a weapon outside the home is not fundamentally ingrained in our nation's history and is not a fundamental right that would require strict scrutiny. Even if the right to carry a concealed weapon outside the home is a fundamental right it does not necessarily mean that it should be subjected to strict scrutiny. *Heller* referenced the First Amendment in their analysis of which level of scrutiny should be applied. It was noted, in regards to the First Amendment that "[Second Amendment rights were] not unlimited, just as the First Amendment's right of free speech was not." *Id.* at 595. The First Amendment permits restrictions on content-neutral time, place, and manner restrictions. This idea can be applied to the Second Amendment challenges and carrying a concealed weapon would permit time, place, and manner restrictions, like those of the First Amendment. Even if the right to carry a concealed

weapon outside the home was a fundamental right, strict scrutiny does not necessarily apply. Respondent believes that intermediate scrutiny is the appropriate standard that should be applied. In a First Amendment case, *United States v. O'Brien*, 391 U.S. 367. 377 (1968), which involved a law banning the mutilation of military draft cards, it is stated that intermediate scrutiny is used when it is:

> "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 government interest, if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest." *Id.*

Several court, such as those in *United States v. Smith*, 742 F.Supp.2d 855, 864-64 (S.D.W.Va. Sept. 20, 2010), *United States v. Marzzarella*, 595 F.Supp.2d 596 (W.D.Pa.2009), and *United States v. Walker*, 709 F.Supp.2d 460, 466 (E.D.Va.2010), have also decided that intermediate scrutiny is the appropriate standard to apply with Second Amendment challenges.

Florida's concealed carry statute § 790.012 survives intermediate scrutiny. It is an important government interest for the licensing of concealed weapons and the regulations of weapons outside of the home falls within the police powers of the state. There is an important governmental interest in allowing persons with a necessity to carry concealed weapons to lawfully do so with the interest in reducing crime. In addition, Fla. Stat. § 790.012 does not suppress Second Amendment rights and is only concerned with regulating firearms outside of the home. In addition, the restrictions on alleged Second Amendment freedoms are no greater than what is necessary to achieve the government's goal. The concealed carry statute allows for persons to carry a concealed weapon through a licensing scheme and does not ban the possession of firearms outside the home altogether. Assuming the Second Amendment does apply in this context, Florida's concealed carry statute does survive intermediate scrutiny.

CONCLUSION

The Second Amendment to the United States Constitution does not recognize a right to keep and bear concealed firearms outside of 10 me in public spaces, therefore, the appropriate standard to use in evaluating the constitutionality of Fla. Stat. § 790.012 is the intermediate scrutiny standard. Respondent holds that Fla. Stat. § 790.012 survives the intermediate scrutiny standard.

For the reasons set out above, the Respondent, the State of Florida, respectfully requests that the Honorable Supreme Court of Florida affirm the decisions of the Sixth District Court of Appeal and find Fla. Stat. § 790.012 constitutional.

Respectfully submitted,

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