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Carrying a Firearm in a Vehicle: Combining Second Amendment Constitutional Protections with Stand Your Ground Laws

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I. Introduction

79. “I am stopping you for a broken taillight,” the officer explains to the driver, “is there anything in the car that I need to know about?”

80. “Well, there is a handgun in my vehicle,” the driver volunteers.

81. “Do you have a concealed weapons permit?” the officer continues.

82. “No sir,” comes the answer.

83. “Step out of the car please.”

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84. This simple interaction has been repeated many times throughout Florida and the United States. The implications of recent Supreme Court pronouncements on the Second Amendment and the adoption of “Stand Your Ground” laws have not been fully comprehended by the legal community. As a result, this simple scenario has not yet generated a Constitutional challenge by criminal defense lawyers. It should, and here is why.

II. Executive Summary

85. The Second Amendment protects the right of an individual to carry a readily accessible handgun in a private vehicle. In light of Florida’s adoption of Section 776.013 Florida Statutes (Florida’s “Stand Your Ground” law) and *District of Columbia v. Heller*,² Section 790.25(5) is unconstitutional when applied to the prohibition of concealed carry in a private vehicle without a concealed carry permit. Further, open carry in a vehicle, criminalized under Section 790.053 (“Florida’s Open Carry Law”), should also be constitutionally protected.

III. Foundational Constitutional Provisions and Key Sources of Law

Constitutional Provisions

86. The Second Amendment to the United States Constitution states “[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.”³

87. Article I, Section 8(a) of the Florida Constitution states “The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.”⁴

Florida’s Regulation of Concealed Carry in a Vehicle

88. The language of section 790.01 (criminalizing concealed carry) and 790.25 (regulating carrying handguns in a vehicle) have remained substantially unchanged since

2 *District of Columbia v. Heller*, 554 U.S. 570 (2008).

3 *U.S. Const. amend. II*.

4 *Art. I §8(a)*, *Fla. Const.*

1983. Section 790.01(2), Florida Statutes, states “A person who carries a concealed firearm on or about his or her person commits a felony of the third degree”⁵ Section 790.25(5), Florida Statutes states:

Notwithstanding subsection (2), it is lawful and is not a violation of s. 790.01 for a person 18 years of age or older to possess a concealed firearm or other weapon for self-defense or other lawful purpose within the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise *not readily accessible for immediate use*. Nothing herein contained prohibits the carrying of a legal firearm other than a handgun anywhere in a private conveyance when such firearm is being carried for a lawful use. Nothing herein contained shall be construed to authorize the carrying of a concealed firearm or other weapon on the person. This subsection shall be liberally construed in favor of the lawful use, ownership, and possession of firearms and other weapons, including lawful self-defense as provided in s. 776.012.⁶

Florida’s Open Carry Law

89. The relevant portion of Section 790.053(1), Florida Statutes (“Florida’s Open Carry Law”) states, “it is unlawful for any person to openly carry on or about his or her person any firearm or electric weapon or device.”⁷

“Stand Your Ground”

90. In 2005, the legislature substantially amended Section 776 as part of the “Stand Your Ground” legislation. Florida’s “Stand Your Ground” law, Section 776.013, generally codifies and clarifies the duty to retreat in self-defense situations, and provides immunity to those acting within the lawful use of self-defense.⁸ This law extends the castle doctrine to a vehicle, allowing the use of deadly force without the duty to retreat when inside a private conveyance or vehicle. The legislature reasoned “that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.”⁹ The law now provides that when in one’s home *or vehicle*, in certain circumstances, a person may use deadly force to stand his ground against an

5 Fla. Stat. §790.01(2) (2021).

6 Fla. Stat. § 790.25(5) (2021).

7 Fla. Stat. §790.053(1) (2021).

8 Fla. Stat. §776.013 (2021).

9 Committee Substitute for Senate Bill No. 436 [ch.2005-27](#)

attacker and be free from the fear of prosecution. This lack of a distinction between dwelling, residence, and vehicle is also reflected in Florida's Standard Jury Instructions in Criminal Cases 3.6(f).¹⁰ Simply put, "Stand Your Ground" provides that there is no distinction between the lawful use of deadly force for self-defense in one's home and in one's vehicle.

District of Columbia v. Heller, 554 U.S. 570 (2008)

91. In the *District of Columbia v. Heller*, the United States Supreme Court found that the Second Amendment guarantees the individual a right to possess and carry weapons, including firearms, in case of confrontation and that any such firearm *must be available and readily accessible for immediate use*.¹¹

IV. Discussion

92. Currently in Florida, a concealed weapon permit is not required when carrying a firearm in one's home or place of work. In these places, the possession of a firearm that is readily accessible for immediate use is allowed and legal.¹² However, in a vehicle or private conveyance, Florida criminalizes the possession of a firearm that is readily accessible for immediate use without a concealed weapons permit. If the Supreme Court's decision in *District of Columbia v. Heller* is viewed in combination with the legislative enactment of Stand Your Ground, then one must conclude that a firearm possessed in a vehicle or private conveyance readily accessible for immediate use may not be Constitutionally banned by the State. Therefore, Section 790.25(5) Florida Statutes requiring a firearm to be securely encased when carried in a vehicle is unconstitutional.

93. Driving a vehicle in Florida while possessing a firearm is a very common occurrence. For example, imagine that a law enforcement officer legally stops a vehicle. The driver possesses a concealed firearm (not securely encased and readily accessible for immediate use). The officer arrests the driver for possession of a concealed firearm, subjecting the driver to up to five years in prison. The current state of the law is at best ambiguous when it comes to the driver's rights in this situation. Confusion as to the ability of a person to carry within a vehicle, such as in this circumstance, could lead to: 1) wrongful convictions of persons who are carrying accessible firearms in their vehicles; 2) inaccessibility of legal self-defense to citizens in need of their immediate use; and 3) excessive police force, including detentions and seizures, because of wrongful

¹⁰ FSJI-Cr 3.6(f).

¹¹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹² See Fla. Sta. §790.25(3)(n) (2021).

application of the law. In this situation, and applying 790.25(5), the “securely encased” requirement can criminalize a vehicle driver for doing something that he was right to do under *Heller* and “Stand Your Ground.”

94. In *District of Columbia v. Heller*, the Supreme Court overturned a District of Columbia law that 1) effectively banned handgun possession in the home, and that 2) required that any handgun in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.¹³ This landmark case is a starting point for understanding the individual right to possess a handgun for the purpose of individual self-defense. As the Court stated in *Heller*, a requirement that handguns be kept inoperable to be legal “makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional.”¹⁴ Further, “the District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.”¹⁵ Thus, if one has a right to self-defense in a place, then allowed access to a handgun must be “immediate.”

95. Florida’s “securely encased” rule is similar to the requirements imposed on gun owners in D.C. that a handgun be kept disassembled. In both, the State is seeking to provide distance between the citizen and his handgun, rendering it unavailable for immediate use. There is no functional distinction to be made from rendering a firearm inoperable (as in the D.C. statute) and unavailable (as in Florida’s requirement that a handgun be securely encased or otherwise not readily accessible for immediate use) — both have the effect of disarming the citizen, depriving him of the right of self-defense. Yet, Florida’s laws criminalizing the immediate possession of a handgun by its citizens when in a private vehicle have not been updated. Because one has the right to immediate possession of a handgun when there is a lawful right to defend oneself, and one has a right to use deadly force to defend oneself in a private vehicle in Florida, one should be able to carry a handgun when in a private vehicle. Therefore, Section 790.25(5) Florida Statutes is likely unconstitutional when read in context of the *Heller* decision and the Florida “Stand Your Ground” statute.

V. Further Analysis and Florida Case Law

96. An instructive pre-*Heller* case is *Peoples v. State*.¹⁶ In *Peoples*, the Florida Supreme Court found the carrying of a concealed weapon could be necessary in order to exer-

13 *District of Columbia v. Heller*, 554 U.S. 570 (2008).

14 *District of Columbia v. Heller*, 554 U.S. 570 (2008).

15 *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

16 *Peoples v. State*, 287 So.2d 63 (Fla. 1973).

cise an individual's right to exercise his right to self-defense in the home or place of business.¹⁷ In reversing the lower court's finding of guilt, the Court in *Peoples* stated:

If we upheld the lower court's verdict, we would be saying that a person, in defense of his home or place of business, is not permitted to conceal his possession of a firearm. This would mean that: 1) An owner of a business, or his employee, could not carry a concealed weapon on or about his person (i.e., on his person, or in a drawer next to the cash register). He would either have to risk a loss of business by offending customers, or give up his only means of self-defense. 2) A homeowner would have to either carry his weapon in his hand or outside holster, or leave said weapon where it would be useless (as in a locked drawer and/or in plain sight). The Legislature could not have intended a result so inconsistent with its Declaration of Policy in Section 790.25(1), the Exceptions to said Section in Section 790.25(3)(n), and the Construction in Section 790.25(4).¹⁸

97. Under *Peoples*, concealment is an essential ingredient in one's right to lawful self-defense. As found in *Peoples* and *Heller*, "readily accessible for immediate use" is the essence of personal self-defense. This is a direct contradiction with Section 790.25(5) that requires that a handgun NOT be "readily accessible for immediate use."¹⁹ Criminalizing the possession of a handgun in a private vehicle when it is "readily accessible for immediate use" is an infringement on an individual's right to possess and bear arms for the purpose of self-defense in light of "Stand Your Ground" and *Heller*.

98. One Florida District Court has addressed whether the private conveyance exception of Section 790.25, Florida Statutes permits the unlicensed carrying of a concealed firearm or other weapon in a zippered pack around the waist while riding a motorcycle.²⁰ In *Doughty v. State*, the Fourth DCA concluded that it does not.²¹ However, *Doughty* was decided March 18, 2008, three months before the U.S. Supreme Court's holding in *Heller*. As discussed herein, *Doughty* was wrongly decided in light of "Stand Your Ground" and *Heller*.

VI. Rules of Statutory Construction

99. As a rule of statutory construction, more recent legislative pronouncement takes precedence over older legislative pronouncements. This is expressed by the Latin phrase

¹⁷ *Peoples v. State*, 287 So.2d 63 (Fla. 1973).

¹⁸ *Peoples v. State*, 287 So.2d 63 (Fla. 1973).

¹⁹ Fla. Stat. §790.25(5) (2021).

²⁰ *Doughty v. State*, 979 So.2d 1048 (Fla. 4th DCA 2008).

²¹ *Doughty v. State*, 979 So.2d 1048 (Fla. 4th DCA 2008).

“Leges posteriores priores contrarias abrogant”, or subsequent laws repeal those before enacted to the contrary, aka "Last in Time". This basically means that when two statutes conflict, the one enacted last prevails.²² The Florida statute criminalizing the possession of a concealed weapon was last modified by the legislature in 1983. Florida amended Chapter 776 regarding the justifiable use of force in 2005. Thus, the later legislative pronouncement provides that in Florida there is no distinction in the right of self-defense between dwelling and vehicle. The distinction provided for in the earlier legislative pronouncement must give way to the later. Therefore, the right to self-defense in a vehicle, and the right to concealed carry in a vehicle, should take precedence. The more recent Florida law gives a Florida citizen the right to defend his private vehicle using deadly force just as he can his home or business. It would not be logical to then foreclose that ability by effectively disarming him with other, older statutory provisions.

100. The legislature itself anticipated changing law, and provided for changing circumstances. Section 775.021(1) requires that any ambiguity or situation in which statutory language is susceptible to differing constructions must be resolved in favor of the person charged with an offense.²³ More specifically, the Florida legislature has directed that the courts, when dealing with firearms laws, should liberally construe the statutes “in favor of the lawful use, ownership, and possession of firearms and other weapons, including lawful self-defense.”²⁴ Further, Section 790.25(4), regarding statutory construction states

This act shall be liberally construed to carry out the declaration of policy herein and in favor of the constitutional right to keep and bear arms for lawful purposes. This act is supplemental and additional to existing rights to bear arms now guaranteed by law and decisions of the courts of Florida, and nothing herein shall impair or diminish any of such rights. This act shall supersede any law, ordinance, or regulation in conflict herewith.”²⁵

101. This Rule of Lenity should be construed in favor of lawful possession and should mandate the reading of statute to allow for concealed carry in a vehicle. As applied to the earlier fact scenario, the driver was lawfully possessing a handgun for the purpose of immediate self-defense of his vehicle, which he has a right to do in Florida. This Court should construe the conflicting statutes in favor of the Constitutional Right to bear arms, as the legislature directed.

²² See generally *Watt v. Alaska*, 451 U.S. 259 (1981) (Stewart dissenting); Cf. Fla. Stat. § 775.01 (2021).

²³ Fla. Stat. §775.021(1) (2021).

²⁴ Fla. Stat. §790.25(5) (2021).

²⁵ Fla. Stat. §790.25(4) (2021).

VII. Further Questions Concerning Carrying a Firearm in a Vehicle

102. Expanding on the fact scenario that began this article, several practical problems arise when dealing with concealed carry in a vehicle. For example, in *Montoya-Martinez v. State*, a non-permit holder was lawfully stopped for an inoperative tail light violation.²⁶ The officer did not see a firearm, but Mr. Montoya told the officer that there was a firearm in the car.²⁷ The investigating officer asked him to step out of the vehicle, and when he did the firearm was visible between the driver seat and the console.²⁸ Martinez did not have a concealed weapons permit. Mr. Montoya was charged and ultimately pled to carrying a concealed firearm without a permit under Section 790.01(2).²⁹ Under the analysis in this paper, the firearm carried by Mr. Montoya in his vehicle should have been constitutionally protected.

103. The Constitutional issue presented in this paper does not appear to have been raised by the defense counsel. Instead, in the *Montoya* case, the question was whether factually the firearm in Mr. Montoya's car was being open carried under Section 790.053, (a misdemeanor under "Florida's Open Carry Law") or concealed carried without a permit (a felony).³⁰ The appellate court determined that this was a factual, not a legal, determination and therefore was not appropriate for appellate review.³¹ But applying the analysis argued herein, whether the firearm was concealed or open carry should not have mattered. The Constitutional protection should logically extend to the second degree misdemeanor of open carry in a vehicle. Therefore, applying the same logic, it would also appear that Section 790.053 ("Florida's Open Carry Law") does not extend to criminalizing firearm possession when the open carry is inside a vehicle.³²

104. The case also raises the practical question of whether during a traffic stop a driver should ever volunteer that there is a concealed weapon in their vehicle. Most criminal defense lawyers would advise a person in that situation to remain silent and not create an issue when one is not present. However, would a driver's failure to respond to a direct question from an officer create reasonable suspicion to remove the driver from the vehicle to search for weapons? It would seem not. A positive statement by the driver, in and of itself, does not create criminal liability because the concealed weapons permit status of the driver would be underdetermined at the time of the question. However,

26 *Montoya-Martinez v. State*, 46 Fla. L. Weekly D2404 (Fla. 3d DCA 2021).

27 *Montoya-Martinez v. State*, 46 Fla. L. Weekly D2404 (Fla. 3d DCA Nov. 10, 2021).

28 *Montoya-Martinez v. State*, 46 Fla. L. Weekly D2404 (Fla. 3d DCA 2021).

29 Fla. Stat. §790.01(2) (2021).

30 *Montoya-Martinez v. State*, 46 Fla. L. Weekly D2404 (Fla. 3d DCA 2021).

31 *Montoya-Martinez v. State*, 46 Fla. L. Weekly D2404 (Fla. 3d DCA 2021).

32 Fla. Stat. §790.053 (2021).

the existence of a firearm during a traffic stop may allow an officer to remove the driver from the vehicle and secure the weapon under *Terry v. Ohio*.³³

105. In another possible factual wrinkle, if a driver possesses a concealed firearm in their pocket and the officer asks the driver to exit the car, should the driver then disclose the existence and location of the firearm? If the driver exits the car with a firearm in their pocket, are they now outside of the zone of Constitutional protection, or by following the command of the officer are they excused from concealed carrying outside the vehicle? Note that exiting a vehicle with an undisclosed concealed weapon in your pocket also creates a dangerous situation for both the officer and the driver.

106. If a driver possesses a concealed firearm under their driver's seat and the officer asks the driver to exit the car, should the driver disclose the existence and location of the firearm? The existence of a passenger can complicate this problem. For example, a passenger may be a prohibited possessor, such as a convicted felon. If the driver exits the vehicle with the firearm still in the vehicle alone with the passenger, is the passenger now in felonious illegal possession of that firearm? Is the driver now setting up a dangerous situation wherein the firearm that he is responsible for is left unattended? Not only does it expose the passenger and possibly the driver to criminal liability, it creates a dangerous situation for both driver and officer. Since these factual scenarios are unresolvable until the courts or legislature actually weighs in, a lawyer advising a person who wishes to carry a handgun should advise them to obtain their concealed weapons permit. But if a criminal defense lawyer is defending a person charged with carrying a handgun in their vehicle, these Constitutional objections should be raised.

VIII. Conclusion

107. Through inattention or inadvertence, Florida has effectively criminalized handgun possession if you are in a private vehicle unless it is securely encased and not available for immediate use or you have a concealed weapons permit. One cannot have the right to use deadly force with a handgun in a vehicle and then have no means to exercise that right. The statutory requirement that a handgun carried in a private conveyance be kept "securely encased" or "otherwise not readily accessible for immediate use" must give way to the constitutional right to self-defense and to carry a handgun. The right to possess a handgun must be logically extended to concealed possession within a private vehicle. Section 790.25(5) Florida Statutes is inconsistent with other more recent statutes, Constitutional rights, and case law. Therefore, is unconstitutional. Alternatively, or in parallel, Florida's statutory scheme should be clarified so that, if otherwise entitled, one can lawfully possess a concealed handgun in a private vehicle that is readily accessible for immediate use.

³³ *Terry v. Ohio*, 392 U.S. 1 (1968).