

***SHOWDOWN: FLORIDA GUN LEGISLATION AND THE PRESIDENTIAL EXECUTIVE ORDER OF 2015***

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**I. INTRODUCTION**

Imagine being a sitting U. S. President preparing for another impromptu address of the American people because someone with ill intent got their hands on a gun, and killed a lot of people in San Bernardino, California.<sup>1</sup> From the Fort Hood shooting on November 5, 2009, to the Roseburg community college shooting October 1, 2015, imagine doing it eleven times before.<sup>2</sup> In response to a number of mass shootings during the current administration, President Obama signed an Executive Order in January of 2015 granting new federal power governing possession and sale of firearms.<sup>3</sup> As that Executive Order was released to the American people, in Florida legislators began debating several gun bills before the Florida House or Florida Senate including; firearm sales at guns shows, concealed weapons and firearms licenses, and a repeal of the Florida *Stand Your Ground* statute.<sup>4</sup> The federal government relies on state laws and state law enforcement for the process of sales and regulation of guns.<sup>5</sup> The president pleaded with the states to help enact changes in gun laws to prevent these type of tragedies.<sup>6</sup> However, the presidential Executive Order had no impact on Florida legislation.<sup>7</sup>

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<sup>1</sup> Tanya Somanader, *President Obama on the Shooting in San Bernardino*, THE WHITE HOUSE, December 5, 2015, <https://www.whitehouse.gov/blog/2015/12/02/president-obama-shooting-san-bernardino>

<sup>2</sup> Gregory Korte, *12 mass shootings, 12 speeches: How Obama has reacted*, USA TODAY, December 03, 2015, <http://www.usatoday.com/story/news/politics/2015/12/03/12-mass-shootings-12-speeches-how-obama-has-reacted/76715090/>

<sup>3</sup> Office of the Press Secretary, *FACT SHEET: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer*, THE WHITE HOUSE, January 04, 2016, <https://www.whitehouse.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our>

<sup>4</sup> Marion P. Hammer, *Florida Alert: OBAMA Inspired Gun Control Bills in Florida*, NRA-INSTITUTE FOR LEGISLATIVE ACTION, January 10, 2016.

<sup>5</sup> Office of the Press Secretary, *supra* note 3.

<sup>6</sup> *Id.*

<sup>7</sup> The Florida Senate, *BILL LIST*, March 11, 2016, <https://www.flsenate.gov/Session/Bills/2016>

The trade and licensure bills, SB-370 Sale or Transfer of Firearms at Gun Shows by Sen. Arthenia Joyner (D), and HB-935 Concealed Weapon or Firearm License by Rep. Gwyn Clark-Reed (D), died in the senate.<sup>8</sup> The repeal of the *Stand Your Ground* statute, HB-4011 Use of Force by Rep. Alan Williams was withdrawn prior the house and senate convening for the 2016 session.<sup>9</sup>

A Republican group of eighteen legislators who drafted a bill to enact open carry gun law introduced House Bill 163.<sup>10</sup> The language aimed at allowing legislators to carry a gun to work for safety reasons; however, it did not resolve the issue of people in general taking guns to work.<sup>11</sup> This bill went into subcommittee and never emerged.<sup>12</sup>

Part II of this Article details the background of the Executive Order and the bills before Florida lawmakers.<sup>13</sup> Part III provides an analysis of the bills themselves, the political landscape, and case law leading up to the vote in the Senate.<sup>14</sup> Part III.A will analyze each of the above-mentioned bills with focus on any affect the Executive Order may have on the vote.<sup>15</sup> These subparts will also weigh the impact of the Executive Order against the majority decisions in court holdings to acquire an understanding of the distance between current law, the new bills, and President Obama's vision.<sup>16</sup> Part III.B will look at a Republican sponsored bill that suffered the same fate at the three bills mentioned above.<sup>17</sup> Part IV of the Article concludes the magnitude of impact of the presidential Executive Order and the strength of Florida gun law present and future.<sup>18</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> The Florida Senate, Bill List, March 11, 2016, <https://www.flsenate.gov/Session/Bill/2016/0163>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *Infra* Part II.

<sup>14</sup> See *Infra* Part III.

<sup>15</sup> See *Infra* Part III.A.

<sup>16</sup> *Id.*

<sup>17</sup> See *Infra* Part III.B

<sup>18</sup> See *Infra* Part IV.

The political party of the sponsor does not weigh heavily on what the outcome of a bill might be.<sup>19</sup> The Florida House of Representatives and the Florida Congress are majority republicans who are favored with gun lobbyist.<sup>20</sup> Florida's gun law is strong because it withstands unwarranted changes and modifications regardless of political influence.<sup>21</sup>

## II. BACKGROUND

The 1968 revision of the Florida Constitution puts forth the right to bear arms, be that legally regulated, and implements a mandatory holding period for gun sales known as the cooling off period.<sup>22</sup> The looming framework for this law is the second amendment to the constitution of the United States.<sup>23</sup> State laws shall expand individual rights but not limit them more than called out in the United States Constitution. Looking to the federal level, if a sitting president has enough backing in congress to pass legislation consistent with the ideals of the president, there is no need for Executive Orders.<sup>24</sup> However, gun lobbyists are strong and have a powerful influence, especially over the Republican Party.<sup>25</sup> If a presidential initiative cannot claim victory in congress, there is the Executive Order.<sup>26</sup>

December 02, 2015 saw tragedy unfold in San Bernardino, California when a mass-shooting and suspected terrorist attack took place at the Inland Regional Center.<sup>27</sup> A man and a wife took fourteen lives and caused twenty-two injuries at an event for the San Bernardino County

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<sup>19</sup> *Id.*

<sup>20</sup> John Cassidy, *Republicans and Gun Control: A Sad Mantra*, THE NEW YORKER, October 07, 2015, <http://www.newyorker.com/news/john-cassidy/republicans-and-gun-control-a-sad-mantra>.

<sup>21</sup> The Florida Senate, *supra* note 7.

<sup>22</sup> Art I, § 8(a), Fla. Const.3

<sup>23</sup> U.S. Const. amend. II

<sup>24</sup> Mark Koba, *Executive orders coming? Here's how they work*, CNBC NEWS, January 28, 2014, <http://www.cnbc.com/2014/01/28/executive-orders-what-they-are-and-how-they-work.html>.

<sup>25</sup> John Cassidy *supra* note 21.

<sup>26</sup> Mark Koba, *supra* note 17.

<sup>27</sup> Richard A. Serrano, *Authorities identify couple who they believe killed 14 at San Bernardino holiday party*, THE LA TIMES, December 02, 2015, <http://www.latimes.com/local/lanow/la-me-ln-up-to-20-shot-in-san-bernardino-active-shooter-sought-20151202-story.html>.

Department of Public Health.<sup>28</sup> The police killed the suspects in a shootout after a brief escape in an SUV.<sup>29</sup> Homeland Security stated this mass shooting was a terrorist attack and took the lead on the investigation into the suspects, who were foreign nationals.<sup>30</sup> Once again, President Obama addressed the nation; and once again, he pointed to the political machine on Capitol Hill as the stopping block to passing the kind of law the president endorses.<sup>31</sup>

#### A. *The Presidential Order*

In response to the number of mass shootings during his administration, President Obama tried numerous times to affect legislation making it harder for guns to get into the wrong hands.<sup>32</sup> When congress failed to pass gun control legislation after the Sandy Hook shooting, President Obama signed twenty-three executive actions<sup>33</sup> mostly aimed at tightening background checks.<sup>34</sup> Since the Sandy Hook shooting, the gun violence showed no signs of slowing down with incidents reported all over the map.<sup>35</sup> The 1000<sup>th</sup> mass shooting since Sandy Hook belongs to a small Florida town named Inglis where four people died<sup>36</sup> on the same day as the Oregon community college shooting that garnished much more press coverage.<sup>37</sup> In Inglis, a man named Walter Tyson was distraught with depression because his wife had left him a few days earlier.<sup>38</sup> In a confrontation

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Tanya Somanader, *supra* note 1.

<sup>32</sup> Diana d'Abruzzo, *'It's got to stop': 16 times Obama has pushed for stronger gun control*, Politico, August 26, 2015 <http://www.politico.com/gallery/2015/08/its-got-to-stop-15-times-obama-has-pushed-for-stronger-gun-control-002064#ixzz46qLZQgoZ>.

<sup>33</sup> Ewen MacAskill, *NRA promises 'fight of the century' over Obama's bold gun control plan*, THE GUARDIAN, January 17, 2013. <http://www.theguardian.com/world/2013/jan/16/obama-gun-control-plan-nra>.

<sup>34</sup> *Id.*

<sup>35</sup> Keith Carter, *Mass shootings since Sandy Hook*, USA TODAY, December 14, 2015, <http://www.usatoday.com/videos/news/2015/12/14/77031578/>.

<sup>36</sup> Matthew Teague, *Inglis, Florida: home to the 1,000th US mass shooting since Sandy Hook*, THE GUARDIAN, October 11, 2015, <http://www.theguardian.com/world/2015/oct/11/mass-shooting-florida-1000th-sandy-hook>.

<sup>37</sup> Dana Ford, *Oregon shooting: Gunman dead after college rampage*, CNN, October 02, 2015, <http://www.cnn.com/2015/10/01/us/oregon-college-shooting/>.

<sup>38</sup> *Id.*

with a man with whom the shooter would debate at town hall meetings, Tyson shot the man.<sup>39</sup> Two other men would come to aid and suffer fatal gunshots, and after conversation with his daughter, Tyson shot himself bringing the death toll to four.<sup>40</sup>

After the San Bernardino shooting, and still faced with stiff opposition in congress, President Obama took the path of the Executive Order again.<sup>41</sup> On January 04, 2016, the White House press secretary James Carney released the New Executive Actions to Reduce Gun Violence and Make Our Communities Safer fact sheet.<sup>42</sup> These executive actions include strengthening background checks to include people trying to buy guns through a trust, corporation, or other method; that could conceal the identity of the person buying the weapon.<sup>43</sup> The order will increase the number of Alcohol, Tobacco, and Firearms (“ATF”) agents by 200.<sup>44</sup> The government will increase safeguards to protect shipments from loss or theft and verify reporting from gun dealers who ship weapons.<sup>45</sup>

In addition, the president calls on states to help carry the burden, “the Administration is also calling on States and local governments to do all they can to keep guns out of the wrong hands and reduce gun violence.”<sup>46</sup> The desire to have all gun transaction recorded and repeal stand your ground laws were too much give and not enough take for the states.<sup>47</sup> This Executive Order is a broad request that touches many different aspects of gun ownership, and not all states picked up the flag on this presidential charge, states like Florida.<sup>48</sup> Former presidential candidate and former

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Office of the Press Secretary, *supra* note 3.

<sup>42</sup> Office of the Press Secretary, *supra* note 3.

<sup>43</sup> Office of the Press Secretary, *supra* note 3.

<sup>44</sup> Office of the Press Secretary, *supra* note 3.

<sup>45</sup> Office of the Press Secretary, *supra* note 3.

<sup>46</sup> Office of the Press Secretary, *supra* note 3.

<sup>47</sup> Alex Leary, *Florida reaction to President Obama’s executive actions on gun control*, THE TAMPA BAY TIMES, January 05, 2016.

<sup>48</sup> *Id.*

Florida Governor stated, “When I am president of the United States, I will repeal Obama’s anti-gun executive orders on Day One of my administration.”<sup>49</sup> Marco Rubio, current presidential candidate stated, “It undermines the Second Amendment and it will do nothing to keep people safe. Barack Obama is obsessed with undermining the Second Amendment”<sup>50</sup>

### ***B. Florida Gun Legislation***

In late 2015, Florida had three bills in process of enactment that were drawing a lot of attention from the NRA and from voters.<sup>51</sup> Each bill had implications ripe for support of the President Obama Executive Order. The subjective intent of the bills fell in line with the “common sense” initiatives defined by the president in his press release.<sup>52</sup>

Sen. Arthenia Joyner filed SB-370, Sale or Transfer of Firearms at Gun Shows, on September 28, 2015.<sup>53</sup> This bill requires a vendor be part of any deal at a gun show, and that vendor be a federally licensed firearms dealer.<sup>54</sup> One private party cannot transact a firearm purchase to another private party at a gun show.<sup>55</sup> A show consists of any event where three or more federally licensed firearms dealers are offering to buy or sell guns.<sup>56</sup> The criminal justice committee took referral of this matter in October, and introduced it in senate not one week after the presidential announcement.<sup>57</sup> The bill died March 11, 2016, in the criminal justice committee during HJ-122<sup>58</sup>

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<sup>49</sup> Alex Leary *supra* note 47.

<sup>50</sup> Alex Leary *supra* note 47.

<sup>51</sup> Marion P. Hammer, *supra* note 4.

<sup>52</sup> Office of the Press Secretary, *supra* note 3.

<sup>53</sup> The Florida Senate, *Bill List*, March 11, 2016, <https://www.flsenate.gov/Session/Bill/2016/0370>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

Representative Gwyn Clark-Reed introduced HB-935 Concealed Weapon or Firearm License Bill as a partial rewrite of the existing concealed weapons license requirements.<sup>59</sup> The bill increases the fine for failure to display the concealed carry permit and proper identification to a first responder from \$25.00 to \$1000.00 per incident.<sup>60</sup> The bill also requires suspension or revocation of a license of a firearm course instructor for subsequent violations of legal requirements.<sup>61</sup> Representative Clark-Reed filed this bill December 11, 2015, and introduced it to the house on January 12, 2016, a week after the announcement of the Presidential Executive Order.<sup>62</sup> The Business and Professions Subcommittee took referral of the bill, where it died March 11, 2016, the same day SB-370 died during HJ-122.<sup>63</sup>

Finally, Representative Alan Williams introduced HB-4011, Use of Force bill that is a partial rewrite of existing statute repealing the Stand Your Ground law.<sup>64</sup> Most notable on this bill, a new *duty to retreat* appears before the use of deadly force.<sup>65</sup> This bill was “withdrawn from consideration” on September 3, 2015 prior to the introduction of HJ-122.<sup>66</sup>

All three bills drafted with the ideals of keeping guns out of the wrong hands, all three bills marching in step with President Obama’s Executive Order, and all three bills rejected by Florida lawmakers.<sup>67</sup> Florida is in a perfect storm of election years for state and federal representatives, senators, and the president of the United States.<sup>68</sup> The constitution of the state of Florida is revised

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<sup>59</sup> The Florida Senate, *Bill List*, March 11, 2016, <https://www.flsenate.gov/Session/Bill/2016/0935>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> The Florida Senate, *Bill List*, March 11, 2016, <https://www.flsenate.gov/Session/Bill/2016/4011>.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See Marion P. Hammer, *supra* note 4. See also Office of the Press Secretary, *supra* note 3.

<sup>68</sup> Election Dates, 2015 to 2017 *Election Dates Calendar*, FLORIDA DEPARTMENT OF STATE, 2015. <http://dos.myflorida.com/media/695026/elections-calendar-2015-2017.pdf>.

every twenty years and that committee that meets in 2017-2018.<sup>69</sup> Florida's politicians have sent a strong message about the tampering of Florida Constitution's article I, section 8. Right to Bear Arms.<sup>70</sup>

Future legislation will look at open carry laws and a case is rising through the system now in *Norman*, where the constitutionality of a ban on carrying firearms.<sup>71</sup> Mr. Norman was videotaped openly carrying a firearm in a way visible to the public and charged with Open Carrying of a Weapon (a firearm).<sup>72</sup>

### III. ANALYSIS

Pointing to a single ingredient in this mixture of legislative failure, the single commonality in all three bills is the political party; all three legislators involved in writing and sponsoring the bills are democrats.<sup>73</sup> The president is a democrat. The Republican Party has a 67% hold on both the Florida House of Representatives, and the Florida Senate.<sup>74</sup> The fact that the three bills appeared before the signing of the presidential Executive Order, before the shooting in California, should have gained significant punch by the unfolding of these events. This was not the case as one bill did not survive to see the start of the first 2016 legislative session, and the other two did not survive to see the end of it.<sup>75</sup>

#### A. *Gun Shows, Concealed Carry and Stand Your Ground*

The Florida courts shed light on the predictability of this political status quo with several recent cases that identify the vision of the current state political administration.<sup>76</sup> In all three legal

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<sup>69</sup> *Every 20 Years – Florida's Constitution Revision Commission*, THE FLORIDA BAR, 2015.

<sup>70</sup> Alex Leary, *supra* note 36.

<sup>71</sup> *Norman v. State*, 159 So. 3d 205 (Fla. 4th Dist. App. 2015).

<sup>72</sup> *Id.* at 209.

<sup>73</sup> Marion P. Hammer, *supra* note 4.

<sup>74</sup> The Florida Senate, *2014-2016 Senators*, March 11, 2016.

<sup>75</sup> The Florida Senate, *BILL LIST*, March 11, 2016, <https://www.flsenate.gov/Session/Bills/2016>.

<sup>76</sup> See *Infra* Part III.A-III.C.

arenas defined by the legislative bills, the court does not attempt change the language of the statutes themselves.<sup>77</sup>

#### 1. The Sale or Transfer of Firearms at Gun Shows Bill

The Sale or Transfer of Firearms at Gun Shows bill was an attempt to bring Florida in line with a dozen other states that require background checks on private firearm sales.<sup>78</sup> Also known as the *Gun Show Loophole*, or *Brady Bill Loophole*, the law is targeting the secondary market for firearm sales.<sup>79</sup> This bill modifies the statutes defining *firearms* and *gun show*.<sup>80</sup> It imposes criminal penalties for gun sales that do not involve a holder of a federal firearms license, “A person may not sell, offer for sale, transfer, exchange, or deliver a firearm at a gun show unless a gun show vendor is a party to the transaction.”<sup>81</sup> The modification adds, “A person who violates this section commits a felony of the third degree, punishable as provided in s. 775.082, s.775.083, or s. 775.084.”<sup>82</sup> This bill failed to pass the Criminal Justice subcommittee in the Florida House of Representatives because there were not enough Republicans willing to vote for restrictions to the Florida or United States Constitutions.<sup>83</sup>

The law applies different standards to licensed businesses and private citizens.<sup>84</sup> Current federal law states, “[a]ny person may sell a firearm to an unlicensed resident of the State where he resides as long as he does not know or have reasonable cause to believe the person is prohibited from receiving or possessing firearms,” invoking no requirement for a background check.<sup>85</sup> By

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<sup>77</sup> See *Infra* Part III.A-III.C.

<sup>78</sup> Staff, *Universal Background Checks & the “Private” Sale Loophole Policy Summary*, LAW CENTER TO PREVENT GUN VIOLENCE, September 10, 2015.

<sup>79</sup> The Florida Senate, *Bill List*, March 11, 2016, <https://www.flsenate.gov/Session/Bill/2016/0370>.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Richard Cole *Brady bill loophole Removes Waiting: Private Gun Owners Can Sell Their Guns to Anyone*, The News (Boca Raton, Florida), Associated Press, Retrieved February 16, 2015.

<sup>85</sup> 18 U.S. Code § 922.

contrast, a business that holds a Federal Firearms License (“FFL”), must run complete background checks in trade shows or their place of business.<sup>86</sup>

The Florida courts address the very point in reference with *Jensen v. Pinellas County*.<sup>87</sup> The appellate court reversed a lower court’s declaratory judgment against Mr. Jensen and remanded back to the lower court to address the appellant’s issues of gun show and public access spaces.<sup>88</sup>

This issue is *Jensen* defines the type of access one has to locations where firearms sales occur. The county codified the following language, “any part of the sale transaction is conducted on property to which the public has a right of access.”<sup>89</sup> Mr. Jensen defends that a private show requiring purchase of tickets is not open access to the public and attempts to nullify the county code as unconstitutional against the Second Amendment of the Constitution.<sup>90</sup> The Florida Constitution does not resolve the matter because of the ambiguity of the word retail in the codified law requiring “a three-day waiting period from purchase to delivery “retail of any handgun.”<sup>91</sup> The court refused to nullify county code, but vacated the declaratory judgment against him and sent the matter back for further debate.<sup>92</sup>

By contrast, the very reason for the bill itself is to identify people that the courts legally denied ownership of a firearm from obtaining a gun at a gun show.<sup>93</sup> Located in the factual background of *United States v. Charlestain*, the government identified the *straw-purchase* at a gun show of two firearms that landed in the possession of a man with three prior felony convictions.<sup>94</sup>

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<sup>86</sup> Richard Cole *supra* note 67.

<sup>87</sup> *Jensen v. Pinellas County*, 2D14-5948, 2016 WL 746442 (Fla. 2d Dist. App., 2016).

<sup>88</sup> *Id.* at 4.

<sup>89</sup> *Id.* at 1.

<sup>90</sup> *Id.* at 2.

<sup>91</sup> *Id.* at 2, *emphasis removed*.

<sup>92</sup> *Id.* at 4.

<sup>93</sup> Richard Cole *supra* note 67.

<sup>94</sup> *U.S. v. Charlestain*, 12-80054-CR, 2015 WL 9266915, at \*1 (S.D. Fla. Sept. 17, 2015)

Absent any background check for private citizens conducting business in a gun show, there is no need for a strawman purchase.

In *Charlestain*, the dealer at a gun show had an obligation of running a background check on the firearm purchases, and did so for an accomplice of Mr. Charlestain. The accomplice was not the real intended buyer and this did not escape attention of authorities.<sup>95</sup> ATF agents observed this transaction and identified My Charlestain as a convicted felon.<sup>96</sup> Later when they arrest him at his home, they found the two weapons purchased in the gun show transaction, loaded, in Mr. Charlestain's bedroom.<sup>97</sup>

Many U.S. presidents have proffered new law to close the loophole in gun show sales.<sup>98</sup> Presidents that have addressed this double standard include Bill Clinton who called the situation a loophole, and recommended legislation.<sup>99</sup> George W. Bush recommended the federal government fix the problem their laws created. In 2013, President Obama identified legislation to close the *gun show loophole*.<sup>100</sup> To date only a fourth of the states require the recording of private gun sales or a background check run.<sup>101</sup> The State Law in Florida does not require a private firearm seller to run a background check on the buyer at a gun show, unless one of the parties holds a FFL.<sup>102</sup>

By some national metrics, Florida is a pro-gun state.<sup>103</sup> The Florida Constitution permits counties to enact ordinance to require a waiting period and a criminal check.<sup>104</sup> Only five counties

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Amy Sherman, *PolitiFact Sheet: 3 things to know about the 'gun show loophole'*, POLITIFACT, January 07, 2016, <http://www.politifact.com/truth-o-meter/article/2016/jan/07/politifact-sheet-3-things-know-about-gun-show-loop/>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Art I, § 8(b), Fla. Const.3.

<sup>103</sup> Keith Wood, *Best States for Gun Owners 2015*, GUNS&AMMO, July 21, 2015,

<sup>104</sup> Art VIII, § 5(b), Fla. Const.3.

have enacted such an ordinance out of a state with sixty-seven counties.<sup>105</sup> SB-370 Sale or Transfer of Firearms at Gun Shows did not have the case law, nor the numerical support in the Florida House, even with the timing of the bill coinciding with the presidential plea to the States to follow his Executive Order.<sup>106</sup>

## 2. Concealed Weapon or Firearm License Bill

The Concealed Weapon or Firearm license Bill is a modification to a Florida statute concerning the license to carry a concealed weapon.<sup>107</sup> The proposed language is more restrictive than the current legislation, and the penalties are much more severe.<sup>108</sup> Representative Gwyn Clark-Reed brought forth Hose Bill 935 last fall and introduced it to the Florida House a week after the release of the presidential Executive Order in January of 2016.<sup>109</sup> There are two distinct pieces to the bill, one involving the interaction with first responders, and the other requiring a firearms instructor to keep records on students firing habits.<sup>110</sup>

### *a. Concealed Weapon*

The changes to the language of the existing statute require an individual to state they are in possession of a firearm, and present both valid identification and the concealed carry license upon approach by or demand of a first responder.<sup>111</sup> Before this modification a legally licensed individual carrying a legal firearm has no duty to announce, but must provide the license itself and valid identification upon demand of a law enforcement officer.<sup>112</sup> In addition, the penalty for

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<sup>105</sup> Peter Jamison, *Gun-show loophole laws on the books in Florida, but ignored*, TAMPA BAY TIMES, April 06, 2013, <http://www.tampabay.com/news/publicsafety/gun-show-loophole-laws-on-the-books-in-florida-but-ignored/2113376>.

<sup>106</sup> The Florida Senate, *supra* note 7.

<sup>107</sup> The Florida Senate, *Bill List*, March 11, 2016, <https://www.flsenate.gov/Session/Bill/2016/0935>.

<sup>108</sup> *Id.* at 2.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 4.

<sup>111</sup> *Id.* at 2.

<sup>112</sup> *Id.*

failure to abide by this law rises from twenty-five dollars (\$25.00) to one thousand dollars (\$1,000.00).<sup>113</sup>

The case law in Florida is not recent on this matter; the last on-point case, *Regalaldo v. State*, concluded in 2009.<sup>114</sup> Mr. Regalaldo appealed from a conviction of carrying a concealed weapon in violation of Florida Statute §790.01, “Unlicensed carrying of concealed weapons or concealed firearms,”<sup>115</sup> when in fact he was in possession of a valid concealed carry license.<sup>116</sup> The court reversed his conviction on this matter because with a valid license, it is legal to carry a gun and a law-abiding citizen that has not demonstrated suspicious activity, does not raise the suspicion necessary for a *Terry* stop.<sup>117</sup> Mr. Regalaldo did not announce his weapon to the officer before the officer began the pat down associated with a terry stop.<sup>118</sup> The court held he did not have to announce, the possession of a concealed carry license was itself enough to justify the presence of the weapon.<sup>119</sup>

The proposed change to existing law shifts the need to announce from the demand of a law enforcement officer to a public duty to announce to any first responder.<sup>120</sup> The 4000% increase in the fine is not a reasonable increase; the existing limit was set with purpose.<sup>121</sup> Both of these points weight heavily against a change so drastic without much more support than a minority position in the Florida House can muster.

b. Firearm License

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<sup>113</sup> *Id.*

<sup>114</sup> *Regalado v. State*, 25 So. 3d 600 (Fla. 4th Dist. App. 2009).

<sup>115</sup> *Id.* at 601.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 603.

<sup>118</sup> *Id.* at 601.

<sup>119</sup> *Id.* at 606.

<sup>120</sup> The Florida Senate, *Bill List*, March 11, 2016, <https://www.flsenate.gov/Session/Bill/2016/0935>.

<sup>121</sup> *Id.*

The second part of the proposal by Representative Clark-Reed involves recordkeeping by firearms instructors requiring the tracking of a student’s weapon and ammunition usage during training.<sup>122</sup> The proposed language changes including the addition, “in his or her physical presence and that the discharge of the firearm included live fire using a firearm and ammunition as defined in s. 790.001.”<sup>123</sup> In addition, the penalty for a second or subsequent violation of the first requirement results in suspension or revocation of the license.<sup>124</sup>

Most notably, in 2015, the court recited the provisions of concealed carry including firearm-training requirements in *Norman v. State* and found them all to be constitutionally in line with the second amendment of the United States Constitution.<sup>125</sup> The court posted no objection with the language, “as an instructor, attests to the completion of such courses, must maintain records certifying that he or she observed the student safely handle and discharge the firearm.”<sup>126</sup>

The new language of this part of House Bill 935 is only slightly more restrictive than the current statute adding above proposed language to the end of the existing statute.<sup>127</sup> By itself, this bill is not as large a change to existing law as the portion coupled with it involving concealed carry duty.

The two parts of the Concealed Weapon or Firearm License Bill fell in line with presidential common sense ideology on gun control as defined in his Executive Order.<sup>128</sup> The introduction was just a week after the release of the Executive Order.<sup>129</sup> The timing with the presidential plea to the states was not enough to move the Republican lawmakers and, in a fate

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<sup>122</sup> *Id.* at 4.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Norman v. State*, 159 So. 3d 205, 214 (Fla. 4th Dist. App. 2015).

<sup>126</sup> *Id.* at 237.

<sup>127</sup> See The Florida Senate, *Bill List*, March 11, 2016, <https://www.flsenate.gov/Session/Bill/2016/0935>.

<sup>128</sup> Office of the Press Secretary, *supra* note 3.

<sup>129</sup> The Florida Senate, *BILL LIST*, March 11, 2016, <https://www.flsenate.gov/Session/Bills/2016>.

shared with SB-370 Sale or Transfer of Firearms at Gun Shows, House Bill 93 failed in subcommittee hearings.<sup>130</sup> Florida politicians that supported either element of the changes to concealed carry laws were too few in number, and the statute remains unchanged.<sup>131</sup> Legislation to change this law will require majority backing to survive the hearing process unless there is a strong public rally, which did not happen in support of this bill.

### 3. Use of Force Bill

The Use of Force Bill drew the most publicity of the gun bills introduced in late 2015 when Representative Alan Williams sponsored House Bill 4011.<sup>132</sup> The bill repeals section 776.013, of the Florida Statute and modified the language of section 776.012.<sup>133</sup> The bill removes the language defining the “stand your ground” law, in that a duty to retreat is now required even in a car or one’s home.<sup>134</sup> This bill also had a second action that defined *dwelling* as used in section 790.15 of the Florida statutes: “Discharging firearm in public or on residential property.”<sup>135</sup> This small change was less weighty compared to the great effort required to repeal the *stand your ground* law.<sup>136</sup> This bill did not make it as far as the previous attempt in 2013; Representative Williams withdrew this bill before the end of the calendar year.<sup>137</sup> In 2013, the initiative to repeal the *stand your ground* statute entirely lost eleven to two in a house criminal justice subcommittee.<sup>138</sup> This bill had about the same chance because no major shift in the legislators has occurred and the Republicans enjoy a two-to-one advantage in the Florida house and senate.<sup>139</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> The Florida Senate, Bill List, March 11, 2016, <https://www.flsenate.gov/Session/Bill/2016/4011>.

<sup>133</sup> *Id.* at 1.

<sup>134</sup> *Id.* at 2.

<sup>135</sup> *Id.* at 4.

<sup>136</sup> Morgan Whitaker, *Stand your ground repeal rejected in Florida*, MSNBC, November 07, 2013, <http://www.msnbc.com/msnbc/stand-your-ground-repeal-rejected-florida>.

<sup>137</sup> The Florida Senate, *Bill List*, March 11, 2016, <https://www.flsenate.gov/Session/Bill/2016/4011>.

<sup>138</sup> Morgan Whitaker *supra* note 119.

<sup>139</sup> The Florida Senate, *2014-2016 Senators*, March 11, 2016.

Florida case law on *stand your ground* has had worldwide media coverage.<sup>140</sup> A large number of shooting cases in Florida invoke the stand your ground law at some point.<sup>141</sup> A Tampa Bay newspaper reported that 200 incidents occurred that involved prosecutorial decisions in Florida between 2005 and 2012, the year of the Trayvon Martin shooting.<sup>142</sup> Daytona, Florida has an on-point case brewing through the system.<sup>143</sup> On April 14, 2016, a murder defendant invoked the stand *your ground* law in a case where one man shot another after an incident in Port Orange, Florida.<sup>144</sup> Florida was the first state to enact a stand your ground law.<sup>145</sup> Florida had arguably the biggest case to date involving stand your ground, even though the defense did not raise this statute at trial.<sup>146</sup> The jury admitted in the trial of George Zimmerman for the killing of Trayvon Martin that they had discussed self-defense.<sup>147</sup>

In Zimmerman, a jury acquitted a volunteer neighborhood watch coordinator of second-degree murder and manslaughter in the 2012 case.<sup>148</sup> The defense claimed Mr. Martin had attacked Mr. Zimmerman and the latter felt his life was in peril and used lethal force to repel the attack.<sup>149</sup> The police were on scene within two minutes of the shooting and arrested Mr. Zimmerman, treated his head injuries and released him after interrogation because there was no evidence suggesting

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<sup>140</sup> Gloria Goodale, Zimmerman trial: Did wall-to-wall media coverage inform, or entertain?, THE CHRISTIAN SCIENCE MONITOR, July 11, 2013, <http://www.csmonitor.com/USA/Justice/2013/0711/Zimmerman-trial-Did-wall-to-wall-media-coverage-inform-or-entertain>

<sup>141</sup> Darla Cameron, *Those who stood, those who fell: fatal cases*, TAMPA BAY TIMES, June 03, 2012, <http://www.tampabay.com/stand-your-ground-law/>

<sup>142</sup> *Id.*

<sup>143</sup> Frank Fernandez, *Shooter in Port Orange road rage killing claims stand-your-ground*, THE DAYTONA BEACH NEWS-JOURNAL, April 13, 2016. <http://www.news-journalonline.com/article/20160412/NEWS/160419816/101025?Title=Shooter-in-Port-Orange-road-rage-killing-claims-stand-your-ground&tc=ar>

<sup>144</sup> *Id.*

<sup>145</sup> Elizabeth Chuck, Florida had first Stand Your Ground law, other states followed in 'rapid succession', NBC NEWS, July 18, 2013, <http://www.nbcnews.com/news/other/florida-had-first-stand-your-ground-law-other-states-followed-f6C10672364>

<sup>146</sup> *State of Florida v. George Zimmerman*, Case No. 592012CF001083A (18<sup>th</sup> Jud. Cir. 2013).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

this was not an act of self-defense.<sup>150</sup> The trial lasted only three days; the jury acquitted Mr. Zimmerman.<sup>151</sup>

On July 19, 2013, President Obama spoke to the people again, this time postponing an opportunity to set up economic planning but to address the ruling of the Zimmerman trial in Florida.<sup>152</sup> His speech was to offer prayers to the Martin family, he confirmed the professionalism of the judicial process, and spoke about the racial perceptions that African Americans live with in America.<sup>153</sup> He spoke specifically to people and families to find peace, and leave the legal inquiries to the commentators and analyst.<sup>154</sup> He specifically questions Florida's stand your ground law. In the July address, he states:

And for those who resist that idea that we should think about something like these "stand your ground" laws, I'd just ask people to consider, if Trayvon Martin was of age and armed, could he have stood his ground on that sidewalk? And do we actually think that he would have been justified in shooting Mr. Zimmerman who had followed him in a car because he felt threatened?<sup>155</sup>

The Executive Order and this 2013 speech are not about the same type of gun tragedy; however, 2013 was a bad year for gun violence with 23 mass shootings and 147 victims in a single year.<sup>156</sup> The President has pushed for stronger gun control laws over

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Office of the Press Secretary, *Remarks by the President on Trayvon Martin*, THE WHITE HOUSE, July 19, 2013, <https://www.whitehouse.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin>

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> William M. Welch et al., *30 mass killings, 137 victims: A typical year*, USA TODAY, December 16, 2013, <http://www.usatoday.com/story/news/nation/2013/12/15/mass-killings-main/3821897/>

sixteen times in his administration.<sup>157</sup> His Executive Order was too late to have any influence over the Use of Force Bill in the Florida Legislature. No other bills exist for the repeal of *stand your ground* to date.

## **B. Open Carry**

House Bill 163 Weapons and Firearms defined and allowed open carry; the bill shared similar timeline with the previous bills discussing gun show sales and concealed carry or firearms license. The Criminal Justice subcommittee killed the bill in March of 2016. The co-authors of this bill were all Republicans, according to the math already calculated with the Republican advantage in the Florida House and Senate, this bill requires separate analysis.<sup>158</sup> Eighteen Florida legislators design the bill addressing open carry as a law, but allowing them as politicians to carry weapons to work for protection.<sup>159</sup> The Bill tries to lay framework for people carrying a weapon to their workplace.<sup>160</sup> This language sparked debate in chambers of the Criminal Justice subcommittee and a large reason the bill died there.<sup>161</sup>

Florida is hearing a case that related to the law House Bill 163 intended to affect, the gun legislation concerning open carry.<sup>162</sup> In the *Norman* case, the trial court denied Mr. Norman's challenge that the statute is unconstitutional, but they did pose three questions of public importance:

Is Florida's statutory scheme related to the open carry of firearms constitutional?

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<sup>157</sup> Diana d'Abruzzo, *'It's got to stop': 16 times Obama has pushed for stronger gun control*, Politico, August 26, 2015 <http://www.politico.com/gallery/2015/08/its-got-to-stop-15-times-obama-has-pushed-for-stronger-gun-control-002064#ixzz46qLZQgoZ>.

<sup>158</sup> The Florida Senate *supra* note 7.

<sup>159</sup> See The Florida Senate, Bill List, March 11, 2016, <https://www.flsenate.gov/Session/Bill/2016/0163>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Norman V. State* 159 So. 3d 205 (Fla. 4th Dist. App. 2015).

Do the exceptions to the prohibition against open carry constitute affirmative defenses to a prosecution for a charge of open carry, or does the State need to prove beyond a reasonable doubt that a particular defendant is not conducting himself or herself in the manner allowed?

Does the recent “brief and open display” exception unconstitutionally infect the open carry law by its vagueness?<sup>163</sup>

The court answered all of these questions by performing an analysis of whether or not the statute is a burden to conduct protected by the Second Amendment, the court decided it is not.<sup>164</sup> They then applied a level of scrutiny test to determine if the law is close to the core of what law exists in the second amendment.<sup>165</sup> The court stated that a law that severely restricts a right in fact destroys it, which is unconstitutional under any scrutiny.<sup>166</sup> The court state, “If a restriction or limitation on carrying concealed weapons can pass constitutional review under the Second Amendment, we must also consider whether those restrictions imposed by the Florida Statutes violate Florida's own state constitutional guarantee.”<sup>167</sup> The court finds the Federal and State constitutions in harmony quoting the Florida Constitution, “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.”<sup>168</sup> With both constitutions in sync, the court did not find fault in the law, Mr. Norman lost his constitutionality challenge to open carry restruictions.<sup>169</sup>

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<sup>163</sup> *Id.* at 209.

<sup>164</sup> *Id.* at 210.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 214.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 227.

The Norman case will not have any resurrection powers on House Bill 163; the bill is dead and requires one to start over to reintroduce such law.<sup>170</sup> This law is not in the general schema that the changes the Executive Order addressed.<sup>171</sup> President Obama has not included the *open carry* law in any of his speeches but open carry protestors in Texas made themselves known during a presidential visit in 2009—even carrying a gun to the presidential visit.<sup>172</sup>

The Presidential Executive Order did not affect gun legislation in Florida for all the reasons given and some voters believe that having a weapon can prevent a mass shooting or prevent further damage.<sup>173</sup> The question often arises, “Do armed citizens prevent mass, active shootings?”<sup>174</sup> Gun proponents say they do, but research show this does not happen as often as claimed.<sup>175</sup> In September 2014, the FBI reported that three percent of the 160 mass-shooting incidents investigated between 200 and 2013 ended with gunfire exchanged with an armed civilian.<sup>176</sup> Often these stories involve an off-duty police officer, a military veteran, or an armed security guard.<sup>177</sup> The FBI states there may be other instances, but they do not have hard numbers to report.<sup>178</sup>

The fact the open carry bill died the same time and way the other three bills reduce the impact of political party on the outcome.<sup>179</sup>

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<sup>170</sup> The Florida Senate, Bill List, March 11, 2016, <https://www.flsenate.gov/Session/Bill/2016/0163>.

<sup>171</sup> Office of the Press Secretary *supra* note 3.

<sup>172</sup> Carol Cratty, Man carries assault rifle to Obama protest -- and it's legal, CNN, August 18, 2009, <http://www.cnn.com/2009/POLITICS/08/17/obama.protest.rifle/>

<sup>173</sup> Hunter Roosevelt, *12 Times Mass Shootings Were Stopped by Good Guys With Guns*, Controversial Times, June 23, 2015, <http://controversialtimes.com/issues/constitutional-rights/12-times-mass-shootings-were-stopped-by-good-guys-with-guns/>.

<sup>174</sup> Merrie Monteagudo et al., Do armed citizens prevent mass, active shootings? THE SAN DIEGO UNION-TRIBUNE, December 3, 2015, <http://www.sandiegouniontribune.com/news/2015/dec/03/guns-mass-shootings-gunmen-concealed-carry/>.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> The Florida Senate *supra* note 7.

Florida is not willing to amend gun laws at this time.<sup>180</sup> Florida has a long line of legislation on guns and is actually a sportsman dream; the Florida Fish and Wildlife Conservation Commission stays busy with licenses and enforcement.<sup>181</sup> Labeled a gun friendly state, Florida still has a large amount of law on purchase, handling use, and safety.<sup>182</sup> With so much law on the books and case law following statute closely it will take a strong movement to make changes to existing code.<sup>183</sup>

#### IV. CONCLUSION

The presidential Executive Order had no influence on Florida gun control legislation. All on-point bills in process at the time of the order or introduced within days of the Executive Order died in the Florida Senate. These legislators did not reject the Executive Order as an act of defiance. Florida lawmakers have confidence in the framework of the legal structure because the written law and court processes in place are strong and proven. Florida judges are not quick on the draw to push the boundaries of gun legislation.

The political party backing the reform of legislation is somewhat relevant. The fact that three legislative bills came from a political party at a two-to-one disadvantage in both the Florida House and Florida Senate speaks to the result if party-line-voting. The bill from the republicans that shared the same fate defies that bias. With eighteen fellow republicans backing the open carry bill, it still failed. Political alliance that doomed these bills; they attempted to modify a strong existing statute.

Without a singularity of purpose, the numbers are too strong to overcome, and a minority party has an uphill battle on any legislation. This fact does not guarantee results for the majority

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<sup>180</sup> Alex Leary *supra* note 36.

<sup>181</sup> Staff, *Season Dates and Bag Limits by Zone*, FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION, 2016.

<sup>182</sup> Fla. Stat. Ann. § 790.000 (West).

<sup>183</sup> Alex Leary *supra* note 36.

party if the legislation is not a public benefit. This can also answer the lack of movement based on the Presidential appeal set forth in the Executive Order. Not only is the President also a democrat, his is a lame duck appointment as to the next election. If a new president affirms, and perhaps Supreme Court directs influence to change, the state politicians might modify the law, it would happen then, not now.

The gun laws in Florida are the envy of enthusiast in other states. Over half the states of the Union recognize the Florida concealed carry license. The NRA ranks Florida in the top twelve most gun-friendly states. Fishing and hunting are popular in Florida, the voters will favor laws that benefit these sports. The voters will elect politicians that think as they do. When these bills failed in subcommittee, the politicians acted, but so did the people.

The presidential influence had no impact because the state of Florida has strong gun laws on the books. The fact that case law so closely follows the statute with little to no negative treatment in the courts shows the quality of the codified law. The Florida Constitution and Florida gun laws withstand change from any political party without proper due diligence. This does not happen without a solid Constitution and case law that follows it closely.