STATE OF MISSISSIPPI

JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

June 13, 2013

Sheriff Brad Lance
1 Justice Drive
Senatobia, MS 38668

Re: House Bill 2

Dear Sheriff Lance:

Attorney General Jim Hood has received your request and has assigned it to me for research and reply. You ask several questions about House Bill 2 of the 2013 Regular Session.

At the outset it should be noted that since your questions specifically address the open carry provisions of this Bill, the following answers do not include a discussion of the carrying of a concealed weapon with a standard permit or enhanced permit. Different rules apply to carrying a concealed weapon with a permit or enhanced permit. Also, a convicted felon is still not allowed to possess a weapon unless he is authorized by Section 97-37-5 which includes a pardon for such felony, has received a relief from disability pursuant to Section 925 (c) of Title 18 of the U. S. Code, or has received a certificate of rehabilitation.

House Bill 2 provides:

> 97-37-1. (1) Except as otherwise provided in Section 45-9-101, any person who carries, concealed * * * on or about one's person, any bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, slingshot, pistol, revolver, or any rifle with a barrel of less than sixteen (16) inches in length, or any shotgun with a barrel of less than eighteen (18) inches in length, machine gun or any fully automatic firearm or deadly weapon, or any muffler or silencer for any firearm, whether or not it is accompanied by a firearm, or uses or attempts to use against another person any imitation firearm, shall, upon conviction, be punished as follows:

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(a) By a fine of not less than One Hundred Dollars ($100.00) nor more than Five Hundred Dollars ($500.00), or by imprisonment in the county jail for not more than six (6) months, or both, in the discretion of the court, for the first conviction under this section.

(b) By a fine of not less than One Hundred Dollars ($100.00) nor more than Five Hundred Dollars ($500.00), and imprisonment in the county jail for not less than thirty (30) days nor more than six (6) months, for the second conviction under this section.

(c) By confinement in the custody of the Department of Corrections for not less than one (1) year nor more than five (5) years, for the third or subsequent conviction under this section.

(d) By confinement in the custody of the Department of Corrections for not less than one (1) year nor more than ten (10) years for any person previously convicted of any felony who is convicted under this section.

(2) It shall not be a violation of this section for any person over the age of eighteen (18) years to carry a firearm or deadly weapon concealed * * * within the confines of his own home or his place of business, or any real property associated with his home or business or within any motor vehicle.

(3) It shall not be a violation of this section for any person to carry a firearm or deadly weapon concealed * * * if the possessor of the weapon is then engaged in a legitimate weapon-related sports activity or is going to or returning from such activity. For purposes of this subsection, "legitimate weapon-related sports activity" means hunting, fishing, target shooting or any other legal * * * activity which normally involves the use of a firearm or other weapon.

(4) For the purposes of this section, "concealed" means hidden or obscured from common observation and shall not include any weapon listed in subsection (1) of this section, including, but not limited to, a loaded or unloaded pistol carried upon the person in a sheath, belt holster or shoulder holster that is wholly or partially visible, or carried upon the person in a scabbard or case for carrying the weapon that is wholly or partially visible.

This bill becomes law on July 1, 2013, and the answers below will be applicable at that time. The statute must be read in light of MISS. CONST. art. 3, Section 12, which states, "The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons." Further, U.S. CONST. amend. II 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."

Your specific questions are set out below, followed by our answers:

1. Under House Bill 2 as signed by the Governor, can an individual carry a firearm without a permit as long as part of the firearm is visible?

ANSWER: An individual may carry a firearm without violating Section 97-37-1 (the concealed weapon statute) as long as it is not "concealed"; i.e., "hidden or obscured from common observation." Terms used in a statute should be given their common and ordinary meaning. Miss. Code Ann. Section 1-3-65. Merriam-Webster's Dictionary defines "hidden" as "being out of sight or not readily apparent : concealed," and defines the verb "obscure" as "to conceal or hide by or as if by covering." Whether a weapon is "hidden or obscured from common observation" will depend on the facts of each case. Generally however, if enough of the firearm is visible so that it is readily apparent to "common observation," then the firearm is not concealed.

After providing a definition of "concealed" the statute gives examples of what is NOT considered to be a concealed weapon, namely:

> any weapon listed in subsection (1) of this section, including, but not limited to, a loaded or unloaded pistol carried upon the person in a sheath, belt holster or shoulder holster that is wholly or partially visible, or carried upon the person in a scabbard or case for carrying the weapon that is wholly or partially visible.

Therefore, weapons carried as described above – in a wholly or partially visible sheath, holster, scabbard or case, even though no part of the firearm is visible – are not "concealed" weapons, the carrying of which is prohibited by 97-37-1.

2. If the answer to question # 1 is yes, does that include carrying openly on public educational property?

ANSWER: No. Although carrying a weapon in a visible belt holster on educational property would not violate the concealed weapon statute, (97-37-1), it would violate

Section 97-37-17.[1] The term "educational property" includes public and private schools, colleges and universities.

3. Can law enforcement approach an individual carrying a visible firearm and ask for identifying information that would allow a criminal history check to see if that person is a convicted felon?

ANSWER: We read your question to be whether a law enforcement officer may *ask for (not require)* identifying information. A law enforcement officer may certainly ask for the information. However, the individual is not *required* to provide it. As stated by the U.S. Supreme Court in *Florida v. Royer*, 460 U.S. 491 (1983):

> law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. [citations omitted]. * * * The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.

Id. at 497.

To be clear, the mere fact that a person is openly carrying a weapon, without anything more, does not give the officer grounds to detain that person, or to require him to submit to questioning. For further discussion of an officer's authority to briefly detain persons based upon reasonable suspicion of criminal activity, as well as traffic stops and community care-taking functions, please see Appendix A, attached hereto.

4. Under HB 2 will an individual be allowed to carry a long gun (i.e. shotgun or rifle) openly as well?

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[1]"It shall be a felony for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol or other firearm of any kind, or any dynamite cartridge, bomb, grenade, mine or powerful explosive on educational property. However, this subsection does not apply to a BB gun, air rifle or air pistol. Any person violating this subsection shall be guilty of a felony and, upon conviction thereof, shall be fined not more than Five Thousand Dollars ($5,000.00), or committed to the custody of the State Department of Corrections for not more than three (3) years, or both." Miss. Code Ann. Section 97-37-17 (2).

ANSWER: Yes.

5. Can an individual carry a firearm in the waistband of his/her pants or in the pocket of his/her pants or coat as long as part of the grip, or any other part, of the firearm is visible or must it be carried in a holster?

ANSWER: As stated generally in our answer to No. 1, if enough of the firearm is visible so that it is readily apparent to common observation, then the firearm is not concealed and there is no violation of 97-37-1.

We note also that Section 97-37-19, as amended by HB 2, states in part:

> If any person, having or carrying any dirk, dirk-knife, sword, sword-cane, or any deadly weapon, or other weapon the carrying of which concealed is prohibited by Section 97-37-1, shall, in the presence of another person, brandish or wield the same in a threatening manner, not in necessary self-defense, or shall in any manner unlawfully use the same in any fight or quarrel, the person so offending, upon conviction thereof, shall be fined in a sum not exceeding Five Hundred Dollars ($500.00) or be imprisoned in the county jail not exceeding three (3) months, or both.

"Brandish" is not defined by state statute, but is defined in Webster's Third New International Dictionary as "to shake or wave (as a weapon) menacingly; to exhibit in an ostentatious, shameless, or aggressive manner." "Wield" is defined by Merriam Webster as, "to handle (as a tool) especially effectively." There is authority from other jurisdictions that a weapon need not be pointed at a victim in order to be threatening. See 79 Am Jur 2d, *Weapons and Firearms*, Section 32 (2013).

6. Can an individual carry a firearm openly on private property such as a retail store, grocery store or restaurant?

At the core of this question, as well as question 7., is whether the change to the concealed weapons statute alters the power of private property owners and of custodians of public property generally to prohibit conduct on that property that is not criminal, in particular, the carrying of unconcealed weapons. Our answer is that it does not.

A private property owner or manager of a retail store, grocery store or restaurant may exercise his property rights and deny entry to persons carrying weapons on his property (verbally, by posting a sign or by other means). A private property owner may even prohibit enhanced concealed permit holders from their property. As stated by the Mississippi Supreme Court in *Biglane v. Under the Hill Corporation*, 949 So.2d 9, at 16 (Miss. 2007):

> It is a basic tenet of property law that a landowner or tenant may use the premises they control in whatever fashion they desire, so long as the law is obeyed. This leads to the logical conclusion that a landowner or valid tenant may forbid any other persons from using their property. This ideal is protected in our law to the point that there are both civil and criminal prohibitions against trespassing.

See also, *GeorgiaCarry.Org v. Georgia*, 687 F.3d 1244 (11th Cir. 2012)(2nd amendment right to bear arms is limited by equally fundamental rights of private property owners to control their property). Depending on the facts, violation of a private property owner's prohibition of weapons might constitute a violation of 97-17-97 (trespass after warning), 97-17-93 (entry without permission) or other statute.

7. Can an individual carry a firearm openly inside a courthouse, or other public buildings?

Custodians or owners of public property generally have the authority and duty, express or necessarily implied, to manage that property in the public interest. This often includes the authority to deny entry to the property, to place conditions upon entry onto the publicly-owned property, and to otherwise regulate and govern that property short of enforcing the state criminal laws. For example, a municipality may prohibit smoking in the city hall and a public library may prohibit loud speech. These activities are perfectly legal, but the municipality and the state library have the statutory authority to prohibit them and to exclude persons who do not comply. See, *Bigham v. Huffman*, 199 WL 33537149 (N.D. Miss. 1999)(Criminal trespass laws applied to public property). The authority of state or local officials to govern and manage government property may be separate and apart from any power to enact police-power ordinances or regulations having criminal or misdemeanor penalties.

Unlike private property owners, however, the authority of custodians of public property to disallow a lawful activity on land controlled by them requires a case-by-case analysis of the authority of the public body or official under state law. If the public body or official has such authority, then the question is whether the restriction or prohibition is Constitutional. This is a fact-specific and regulation or state action-specific inquiry.

Specifically with regard to courthouses, the sheriff is in charge of and responsible for the security of the courthouse. MS AG Op., Meadows (Feb. 14, 2003). Miss. Code Ann. Section 19-25-69 states:

> The sheriff shall have charge of the courthouse and jail of his county, of the premises belonging thereto, and of the prisoners in said jail. He shall preserve the said premises and prisoners from mob violence, from any injuries or attacks by mobs or otherwise, and from trespasses and intruders. He shall keep the courthouse, jail, and premises belonging

> thereto, in a clean and comfortable condition, and it shall be his duty to prosecute all persons who are guilty of injuring or defacing same. If, after a hearing by the governor, held in accordance with due process of law, it shall be ascertained that the sheriff has wilfully failed, neglected or refused to preserve the courthouse, or the jail, or any prisoners lawfully in his custody from injuries by mob violence, then the governor shall have the power and it shall be his duty to remove such sheriff from office.

This statute authorizes the sheriff to exclude from the courthouse premises county employees whom he believes are stealing county property or are intoxicated. MS AG Op., Barrett (Sept. 18, 1992). The sheriff is also the jailer and is responsible for the safekeeping of all prisoners being brought before the courts.

Thus, it is our opinion that the sheriff has the state-law authority, if he determines it reasonable and necessary to the security of the courthouse, to disallow the open carry of firearms in the courthouse. As stated above, the second part of the question is whether such action by the sheriff is constitutional. Please note that an official opinion of the Attorney General does not provide immunity from liability for violations of federal law, including possible violations of individual rights under the U.S. Constitution. See Miss. Code Section 7-5-25. Therefore, the following is provided for informational purposes only.

The United States Supreme Court has addressed this question in a limited fashion, saying that "longstanding" laws prohibiting firearms in government buildings are presumptively constitutional. In *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), a 5-4 majority of the Supreme Court held that the Second Amendment protects an individual's right to possess and carry a loaded handgun in case of confrontation and as an inherent right of self-defense. The Court extended the *Heller* holding in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), ruling that the Second Amendment right to bear arms applies to the states, thus limiting the ability of states and local government to regulate firearm possession.

These lengthy opinions provided few explicit holdings and left open many issues relating to the constitutionality of gun-control laws by not defining the scope of the right to bear arms, by not providing a standard of review for firearms regulation, and by including, without elaboration, a non-exhaustive list of examples of laws that are "presumptively lawful" and which can be exceptions to the right:

> [N]othing 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.

(italics added). *Heller* at 2816-2817. See also, *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, at 3047(2010)(Court does not question "longstanding regulatory measures" which prohibit carrying firearms in sensitive places such as schools and government buildings). This statement is consistent with other statements in *Heller*, such as the right to keep and bear arms (like other rights conferred by the Bill of Rights) is not unlimited. Moreover, *James v. State*, 731 So.2d 1135 (Miss.1999) recognized that the right to bear arms under our state constitution may be limited by reasonable regulation, such as prohibiting possession of firearms by convicted felons.

Of course, the designation of the three categories as "presumptively lawful" means there exists the possibility that a regulation can be unconstitutional under particular circumstances. The *Heller* Court acknowledged that its opinion left much doubt to be clarified, but that it would further expound upon the historical justifications for the exceptions that it had mentioned if and when those exceptions came before the Court. In the meantime, states and local governmental entities are left with the task of deciding whether existing or contemplated restrictions violate state and federal constitutional rights.

Neither *Heller* nor *McDonald* provide a clear framework for deciding whether a restriction is an impermissible infringement on the right to bear arms. However, the *Heller* opinion eight times drew parallels between the First and Second Amendments. Consequently, several courts have analyzed restrictions in light of First Amendment principles – most notably, the doctrines of strict scrutiny and intermediate scrutiny. *See e.g., Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011)(whether government regulation infringes the Second Amendment requires the court to evaluate the regulatory means the government has chosen and the public-benefits end it seeks to achieve, and the rigor of this judicial review will depend on how close the regulation comes to the core of the Second Amendment right and the severity of the regulation's burden on the right). In *Ezell*, the court found that city ordinances effectively banned private possession of firearms by simultaneously requiring range training in order to lawfully possess, while also forbidding firing ranges within the city limits. In addition, the city offered no evidence of a governmental purpose being served by the ordinances. Therefore, the court ruled the ordinances to be invalid under the Second Amendment.

Several other court cases addressing the "sensitive places" language of *Heller* have upheld partial restrictions,. See *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011)(federal regulation banning loaded - but not unloaded - firearms in vehicles in National Parks upheld); *GeorgiaCarry.Org v. Georgia*, 687 F.3d 1244 (11th Cir. 2012)(law banning guns from churches upheld, but church leadership had private property right to grant permission); *DiGiacinto v. Rector & Visitors of George Mason*, 704 S.E.2d 365 (Va. 2011)(upheld state university regulation banning guns from specified college buildings and events but not from open grounds).

Others who have written on the subject of sensitive places observe that some "facilities would qualify as sensitive places because security personnel electronically screen persons entering these facilities to determine whether persons are carrying firearms, or weapons of any kind. Equally important, security personnel restrict access to these facilities to only those persons who have been screened and determined to be unarmed." James M. Manley, *Defining the Second Amendment Right to Carry: Objective Limits on a Fundamental Right*, 14 T.M. Cooley J. Prac. & Clinical L. 81, 100 (2012).

In answer to question 7., it is our opinion that a county courthouse would easily be characterized as a "sensitive place." It is a "government building" per *Heller* and *McDonald*, and is the scene of emotionally charged disputes such as child custody battles, criminal prosecutions, property forfeitures, tax sales, etc. Opposing parties are often in close contact with one another. Judges, prosecutors and other elected officials who routinely make unpopular decisions affecting persons have their offices there and are vulnerable. Further, the ban, being limited to the courthouse, is reasonably tailored to serve the governmental interest in preserving security for courthouse proceedings and personnel. The provision by the county of security measures such as the presence of deputies and metal detector checkpoints would further support the Constitutionality of the sheriff's action.

In any case, the sheriff should be able to articulate the government interest being served by such a ban, and why the ban is a reasonable means to achieve that interest. The same applies to any ban imposed by other state or local custodians of government property pursuant to lawful authority. Any ordinance adopted by a county or municipality pursuant to Miss. Code Ann. Section 45-9-53 should be supported by similar findings, preferably reflected in the minutes. Any regulation adopted by a state agency which restricts firearm possession on state property should be supported by similar findings, preferably placed in the administrative record.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:

Mike Lanford
Deputy Attorney General

APPENDIX A

TERRY STOPS AND TRAFFIC STOPS

Under *Terry v. Ohio*, 392 U.S. 1 (1968), a law enforcement officer may briefly detain an individual if he has a reasonable, articulable suspicion that the person to be detained is involved or is about to be involved in criminal activity. Where such a detention occurs, the officer may frisk the outer clothing of the person detained to be sure the person is not armed, if the officer has a reasonable belief that the person may be armed and presently dangerous. *See also Ybarra v. Illinois,* 444 U.S. 85 (1979); *Adams v. Williams*, 407 U.S. 143 (1972); *Sibron v. New York*, 392 U.S. 40 (1968). If the officer feels a weapon, he may take it from the person to ensure the safety of the officer. The reason an officer is permitted to frisk for weapons, where he has a reasonable belief that the person detained may be armed and presently dangerous, is to ensure officer safety. *Terry, supra.*

Terry frisks normally involve instances in which a police officer believes that a person detained has a weapon concealed on his person. Where a person is carrying a weapon in a non-concealed fashion, the question, assuming a valid *Terry* stop, is simply whether the officer may temporarily seize that weapon during the period of the detention.

There have been a number of decisions nationwide that hold that an officer may temporarily seize a weapon that is in plain view in order to ensure the safety of the officer as well as the safety of others who may be nearby, where there is a legitimate or reasonable concern for safety. *E.g..United States v. Antwine* 882 F.2nd 1144, 1147 (8th Cir. 1989)(Officer may seize weapons when justified by the officer's legitimate concern for the safety of others)*; United States v. Malacheson*, 597 F.2d 1232 (8th Cir. 1979); *United States v. Rodriquez*, 601 F.3rd 402 (5th Cir. 2010)(Officers justified in temporarily seizing weapons in plain view where officers were reasonably concerned about safety); *United States v. Bishop*, 338 F.3rd 623 (6th Cir.)(*and cases cited therein*). What factual circumstances would be sufficient to give rise to a legitimate concern for safety of an officer or others is a question that can only be addressed on a case - by - case basis.

As stated above, If an officer observes a person carrying a weapon included in Miss. Code Ann. Section 97-37-1(1) in a way that is not "hidden or obscured from common observation", this, without more, will not give rise to a reasonable suspicion of criminal activity. Nor will it of itself present a reasonable or legitimate concern about safety. The fact of carrying such a weapon in such a manner will not in and of itself provide a lawful basis for a *Terry* stop, or provide a lawful basis to remove the weapon from the person carrying it. However, there could be circumstances in which the carrying of such a weapon could be a factor which, when taken together with other factors, could give rise to a reasonable suspicion of criminal activity.

In the instance of a valid traffic stop, an officer may conduct a limited *Terry* search for weapons in the areas of the passenger compartment of an automobile where a weapon may be placed or hidden, if the officer possesses a reasonable belief, based upon specific, articulable facts, that the occupant or occupants are dangerous, and may take immediate control of a weapon in the car. *Michigan v. Long*, 463 U.S. 1032 (1983). It is our view that where a weapon is in plain view in an automobile, and, where an officer has a reasonable concern about his safety or the safety of others, he may seize the weapon for that reason. He may also order the driver out of the vehicle, *Pennsylvania v. Mims*, 434 U.S. 106 (1977), and he may order the passengers out of the vehicle, *Maryland v. Wilson*, 519 U.S. 408 (1997).

In all instances in which the detention ends without arrest, the weapon seized is to be returned by the officer.

COMMUNITY CARETAKING

Law enforcement officers have "complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses"; by design or default, the police are also expected to "reduce the opportunities for the commission of some crimes through preventive patrol and other measures," "aid individuals who are in danger of physical harm," "assist those who cannot care for themselves," "resolve conflict," "create and maintain a feeling of security in the community," and "provide other services on an emergency basis." 3 Wayne R. LaFave, A Treatise on the Fourth Amendment, § 6.6, p. (5th ed.)

In *Cady v. Dombrowski*, 93 S.Ct. 2623, 2528 (1973), the Supreme Court used the term "community caretaking function" to refer to police responsibilities that were "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."

When law enforcement officers are not "identifying and apprehending persons committing" criminal offenses, but instead are performing non-investigative duties characterized as part of the "community caretaking function," their actions must be reasonable. For instance, an officer may stop an individual with a firearm who is believed to be mentally deranged and a danger to himself or others if "a reasonable person, given the totality of the circumstances, would believe [the individual] is in need of help or that the safety of the public is endangered." [internal quotations omitted] *Trejo v. State*, 76 So.3d 684 (Miss. 2011). Should a stop under the community caretaking function disclose evidence that is later used for criminal prosecution, courts will carefully analyze the circumstances to ensure that this doctrine is not "abused or used as a pretext for conducting an investigatory [stop and] search for criminal evidence." *Trejo* at 689.