KENNETH MAGIDSON
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

August 7, 2008

FILE #ML-45794-08
I.D. # 45794

Hon. Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0734-GA

Re: Employment restrictions upon the carrying of firearms by prosecutors with concealed handgun licenses.

Dear Mr. Abbott:

Pursuant to section 402.043 of the Texas Government Code, I request your written opinion regarding the following issue:

> Can a district attorney lawfully impose restrictions upon the carrying of a firearm in a courtroom by an assistant district attorney who possesses a concealed handgun license issued under the provisions of subchapter H of chapter 411 of the Texas Government Code, and enforce those restrictions as a condition of the prosecutor's employment?

Prior to June of 2007, the Harris County District Attorney enforced a formal written policy which prohibited prosecutors from carrying firearms in courtrooms. The 2007 Legislature amended sections 46.035 and 46.15 of the Texas Penal Code to exempt assistant district attorneys who possess concealed handgun licenses from virtually all legal restrictions on where they can carry a concealed handgun.

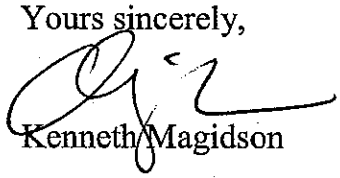
While it may now be legal for a prosecutor to carry a licensed concealed handgun in a courtroom, I retain significant concerns with regard to the level of training that should be required in order to permit prosecutors to safely carry firearms in the volatile environment of a criminal courthouse, where a disgruntled court participant might attempt to seize control of a weapon in order to effect an escape or harm other individuals. Therefore, I have required prosecutors to obtain my permission to carry a firearm in a courtroom, and only prosecutors who have dem-

onstrated a high level of proficiency to a certified firearms instructor on my staff will be given permission to carry a firearm in a courtroom, upon a finding of heightened safety concerns relating to a specific case.

A prosecutor on my staff has expressed an opinion that any restriction upon an assistant district attorney's right to carry a licensed concealed handgun in a courtroom is unlawful and unconstitutional. Therefore, I respectfully request that the attorney general provide a written opinion concerning the legality of imposing restrictions upon the carrying of a firearm in a courtroom by a prosecutor with a concealed handgun license, as a condition of the prosecutor's employment. The brief required by section 402.043 of the Government Code is enclosed.

Thank you very much for your assistance in this regard.

Yours sincerely,



Kenneth Magidson

cc: Mr. Donald W. Rogers, Jr.
Assistant District Attorney
1201 Franklin, Suite 600
Houston, Texas 77002

Mr. Craig Goodhart
Assistant District Attorney
1201 Franklin, Suite 600
Houston, Texas 77002

BRIEF IN SUPPORT OF KENNETH MAGIDSON'S REQUEST FOR AN ATTORNEY GENERAL'S OPINION REGARDING PROSECUTORS WITH CONCEALED HANDGUN LICENSES

A. Issue Presented.

Harris County District Attorney Kenneth Magidson is requesting a formal written opinion of the attorney general regarding the following issue:

> Can a district attorney lawfully impose restrictions upon the carrying of firearms in courtrooms by assistant district attorneys who possess a concealed handgun license issued under the provisions of subchapter H of chapter 411 of the Texas Government Code, and enforce those restrictions as a condition of the prosecutors' employment?

It is respectfully suggested that this question should be answered in the affirmative, because the elimination of penal sanctions for a particular course of conduct should not be viewed as a prohibition of reasonable conditions of employment pertaining to that conduct.

B. Historical Context.

Prior to 1983, an individual other than a peace officer who carried a handgun into a courtroom was subject to prosecution only for the Class A misdemeanor offense of unlawfully carrying a weapon as defined by section 46.02 of the Texas Penal Code. In 1983 the Texas Legislature amended section 46.04, captioned "Places Weapons Prohibited," to make it a third-degree-felony offense for a person other than a peace officer or "officer of the court" to carry a firearm "in any government court or offices

utilized by the court, unless pursuant to written regulations or written authorization of the court." *See* Act of June 19, 1983, 68th Leg., R.S., ch. 508, 1983 Tex. Gen. Laws 2962.

In 1995 the Legislature enacted statutes permitting a Texas citizen to obtain a license to carry a concealed handgun, but section 46.04 ("Places Weapons Prohibited") was amended at the same time to provide that it was "not a defense to prosecution under this section that the actor possessed a handgun and was licensed to carry a concealed handgun . . ." *See* Act of May 26, 1995, 74th Leg., R.S., ch. 229, § 3, 1995 Tex. Gen. Laws 1998, 2013. The same legislation added to chapter 46 of the Penal Code a new provision, captioned, "Unlawful Carrying of Handgun by License Holder," which specified a number of locations in which a concealed handgun license (CHL) holder could not carry a handgun, in addition to the places in which firearms were already prohibited under section 46.04. *Id.*, at § 4. The Legislature also recognized the authority of an employer to prohibit the carrying of a firearms by CHL holders on the premises of a business, in an enactment that has since been codified as section 411.203 of the Government Code:

> This subchapter does not prevent or otherwise limit the right of a public or private employer to prohibit persons who are licensed under this subchapter from carrying a concealed handgun on the premises of the business.

Within months of the passage of the CHL legislation, questions arose about the authority of business owners and employers to prohibit CHL holders from carrying weapons on their premises. In an opinion issued August 30, 1995, the attorney general found that the above-quoted provision recognizing the rights of employers was "intended

to apply only to the employer-employee relationship," but noted that businesses already had the authority to prohibit non-employees from carrying licensed handguns on their premises under the trespass statute (section 30.05 of the Penal Code) by posting appropriate notices. *See* Op. Tex. Att'y Gen. No. DM-363 (1995).

Two years later the Legislature clarified the conditions under which a CHL holder could be prosecuted for trespass as the result of entering premises where handguns were unwelcome, creating a new offense captioned "Trespass by Holder of License to Carry Concealed Handgun." *See* Act of June 20, 1997, 75th Leg., R.S., ch. 1261, § 23, 1997 Tex. Gen. Laws 4766, 4775; TEX. PENAL CODE ANN. § 30.06 (Vernon 2003 & Supp. 2008).

In a 2001 opinion, the attorney general concluded that the CHL statutes authorized a CHL holder "to carry his weapon wherever a statute does not affirmatively prohibit his doing so." Op. Tex. Att'y Gen. No. JC-0325 (2001). That opinion went on to conclude that a unit of local government could not ban CHL holders other than government employees from carrying concealed weapons on government premises merely by adopting an ordinance, rule, regulation or policy, but instead was required to post the specific notices described in section 30.06. The opinion reaffirmed the conclusion in opinion DM-363 that "section 411.203 does not authorize a public or private employer to prohibit persons *other than its employees* from carrying concealed handguns on the premises of the business." *Id.* (emphasis in original).

The 2003 Legislature made two significant changes to the Penal Code provisions pertaining to the carrying of weapons. First, it exempted CHL holders from prosecution

for trespass under section 30.06 based upon the carrying of a licensed handgun in government offices other than those in which firearms are expressly prohibited under the terms of sections 46.03 or 46.035:

> (e) It is an exception to the application of this section that the property on which the license holder carries a handgun is owned or leased by a governmental entity and is not a premises or other place on which the license holder is prohibited from carrying the handgun under Sections 46.03 or 46.035.

See Act of June 30, 2003, 78th Leg., R.S., ch. 1178, § 2, 2003 Tex. Gen. Laws 3364.

Second, the Legislature amended the portion of section 46.03 which barred the carrying of weapons in "government courts" to extend that prohibition to the entire "premises" in which the courts were located:

> (a) A person commits an offense if the person intentionally, knowingly or recklessly possesses or goes with a firearm, illegal knife, club, or prohibited weapon listed in Section 46.05(a):
>
> * * *
>
> (3) *on the premises of* any government court of offices utilized by the court, unless pursuant to written regulations or written authorization of the court . . .

Id. at § 3 (emphasis supplied). Because the term "premises" was defined inexactly to include a "building or a portion of a building," prosecutors initially were advised not to carry licensed handguns within the Harris County Criminal Justice Center, which contained both the district attorney's offices and numerous criminal courts. In September of 2003, however, the Harris County commissioners court passed a resolution permitting elected county officials the discretion to allow their employees who were CHL holders to carry concealed handguns in the buildings shared by courts and other county

departments. The Harris County district attorney promptly permitted employees who were CHL holders to carry concealed handguns within the common areas of the Criminal Justice Center and the office areas utilized by the district attorney, but continued a policy of prohibiting the carrying of firearms in courtrooms by persons who were not licensed peace officers.

The 2007 Legislature effected two more significant changes to chapter 46 of the Penal Code. It exempted prosecutors with concealed handgun licenses from prosecution under sections 46.02 ("Unlawful Carrying Weapons") and 46.03 ("Places Weapons Prohibited"), thereby permitting them to carry firearms in places like bars, schools, polling places, and secured areas within airports; and it amended section 46.035 ("Unlawful Carrying of Handgun by License Holder") to exempt prosecutors from virtually all of the standard restrictions on the carrying of weapons by other CHL holders:

> SECTION 5. Section 46.035, Penal Code, is amended by adding Subsection (h-1) to read as follows:
>
> (h-1) It is a defense to prosecution under Subsections (b)(1), (2), and (4)-(6), and (c) that at the time of the commission of the offense, the actor was:
>
> (1) a judge or justice of a federal court;
>
> (2) an active judicial officer, as defined by Section 411.201, Government Code; or
>
> (3) a district attorney, assistant district attorney, criminal district attorney, assistant criminal district attorney, county attorney, or assistant county attorney.
>
> SECTION 6. Section 46.15(a), Penal Code, is amended to read as follows:

(a) Sections 46.02 and 46.03 do not apply to:

* * *

(7) an assistant district attorney, assistant criminal district attorney, or county attorney who is licensed to carry a concealed handgun under Subchapter H, Chapter 411, Government Code.

See Act of June 15, 2007, 80th Leg., R.S., ch. 1222, §§ 5 & 6, 2008 Tex. Gen. Laws 4124, 4125.

As a result of these statutory amendments, an assistant district attorney who possesses a CHL can now only be prosecuted under chapter 46 for carrying a concealed handgun under two circumstances: the prosecutor cannot carry a concealed firearm on the premises of a correctional facility, and he cannot carry one while intoxicated. The question remains, however, whether an elected district attorney can require as a condition of employment that a prosecutor with a CHL forego the carrying of a firearm in a courtroom.

After the passage of the 2007 amendments, several Harris County assistant district attorneys requested a change in the district attorney's policy regarding the carrying of a concealed handgun in a courtroom by a prosecutor. The policy was tweaked, but as a general rule, the Harris County district attorney still prohibits employees from carrying concealed handguns in courtrooms without the district attorney's express written permission. The relevant section of the district attorney's Operations Manual currently reads as follows:

(b) Chapter 411, Subchapter H, Concealed Handgun Licensees

Staff members who are licensed to carry a concealed handgun under Chapter 411, subchapter H, of the Texas Government Code may carry concealed firearms in the offices of the district attorney and in the common areas of county buildings other than correctional facilities. Licensees shall comply with all provisions of Chapter 411 of the Government Code and Chapter 46 of the Texas Penal Code.

Weapons that are not actually being carried on the person of such licensee shall be out of sight and securely locked so that visitors and other members of the staff do not have access to such weapons.

No prosecutor or other staff member licensed to carry a concealed handgun shall carry on or about his or her person a firearm in any courtroom without the express written permission of the district attorney.

C. Preclusion and/or Preemption.

Prosecutors who have requested reconsideration of the district attorney's handgun policy argue that the 2007 statutory amendments reflect a legislative intent to preclude any limitation upon their ability to carry licensed concealed firearms to any location in Texas other than a jail or prison. They argue that in light of the Legislature's determination that they cannot be prosecuted for trespassing if they ignore a governmental ban upon the carrying of a concealed firearm in a government building, including a courthouse, then there can be no other lawfully imposed consequences for carrying a handgun in a courtroom or other publicly owned premises. While they have not used the word "preemption," their argument appears to be, in part, that the Legislature has preempted all forms of governmental restriction upon their ability to carry a concealed firearm, including restrictions imposed as a condition of employment. Among other things, they point to the attorney general's statement in opinion number JC-0325 that, "In

our opinion, a unit of government has no authority, merely by promulgating rules, regulations, or policies, to prohibit entry by concealed handgun licensees carrying their weapons."

The district attorney disagrees with this analysis, because: (1) the Legislature's exemption of prosecutors from the scope of criminal statutes governing the carrying of weapons does not affect the employment-at-will doctrine and employers' general authority to enforce reasonable rules for the conduct of their employees; (2) other statutes assume the authority of public employers and courts to regulate the carrying of firearms upon premises under their control; and (3) numerous other jurisdictions have found that statutes which expressly preempt local regulation of firearms do not impact the ability of public employers to restrict or prohibit the carrying of weapons by employees.

Assistant district attorneys are "at-will" employees who serve at the pleasure of the elected prosecutor. TEX. GOV. CODE ANN. § 41.105 (Vernon 2004). An inherent feature of at-will employment is that an employee can be discharged for failing to follow the employer's rules and regulations governing the manner in which a job is performed. Since a Texas "employer generally can terminate an at-will employee for any reason or no reason at all," *Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705, 715 (Tex. 2003), it necessarily follows that an employee can be required, upon pain of termination, to follow reasonable rules imposed for the safety of coworkers and members of the public.

The authority of an employer to restrict the carrying of licensed handguns on the premises under the employer's control is expressly recognized in TEX. GOV. CODE ANN. § 411.203 (Vernon 2005):

> This [subchapter H of chapter 411 of the Government Code, entitled "License to Carry a Concealed Handgun,"] does not prevent or otherwise limit the right of a public or private employer to prohibit persons who are licensed under this subchapter from carrying a concealed handgun on the premises of the business.

It has been suggested that § 411.203 has been effectively repealed—at least to the extent that it would apply to assistant district attorneys—upon the passage of the 2007 legislation which removed most restrictions upon prosecutors' ability to carry concealed handguns, but the two legislative enactments are not in irreconcilable conflict. "If two statutes are *in pari materia* or address the same subject, then an effort should be made to harmonize and give effect to both statutes." *First American Title Insurance Co. v. Strayhorn*, 169 S.W.3d 298, 304 (Tex. App. – Austin 2005), *aff'd,* 2008 WL 2069840 (Tex. No. 05-541, May 16, 2008). Section 411.203 can easily be harmonized with the 80th Legislature's House Bill 2300: prosecutors are exempted from the application of penal statutes pertaining to the unlawful carrying of firearms, while public employers retain their authority to impose rules pertaining to firearms as a condition of employment. No conflict exists.

Turning to other jurisdictions, several state legislatures have promulgated preemptive statutes which prohibit any local restriction of the rights of persons who are licensed to carry handguns. Public employees have frequently argued that such statutes preclude their employers from restricting their right to carry firearms in the workplace,

but it appears that every appellate court to consider the issue has found that public employers retain their ability to enforce, as a condition of employment, restrictions on their employees' possession of firearms. For instance, in, *Cherry v. Municipality of Metropolitan Seattle,* 808 P.2d 746 (Washington 1991), a municipal bus driver unsuccessfully challenged the ability of his employer to terminate his employment because of a violation of a no-weapons policy. The Supreme Court of Washington held that a preemptive statute did not limit the municipality's ability to enforce a ban on handguns in the workplace:

> The Legislature did not intend to interfere with public employers in establishing workplace rules. The "laws and ordinances" preempted are laws of application to the general public, not internal rules for employee conduct . . . We interpret RCW 9.41.290, consistent with legislative history and the general purpose of the Uniform Firearms Act, as not being preemptive of the authority of a municipal employer to regulate or prohibit a municipal employee's possession of firearms while on the job or in the workplace.

808 P.2d at 801-803.

In *Pelt v. State of Florida, Department of Transportation*, 664 So.2d 320, 321 (Fla. App. 1st DCA 1995), *rev. denied*, 671 So.2d 788 (Fla. 1996), a Department of Transportation employee appealed a suspension from employment on grounds that a preemptive statute (section 790.33) precluded his employer from punishing him for carrying a weapon on the job. The appellate court agreed with a hearing officer that the statute was inapplicable to internal rules governing the conduct of employees:

> Section 790.33 is directed towards local governments' regulation of the conduct of its citizenry, not to an employer's regulation of the conduct of its employees. Sound policy reasons exist for allowing an employer, be it public or private, to regulate the conduct of its employees as it relates to

> the possession and use of firearms. These relate to the safety of its employees and others who may be injured by the weapons, and the exposure of an employer to liability for the actions of its employees. State agencies commonly regulate employee conduct in this area . . .

The Supreme Court of Utah recently held in *Hansen v. America Online, Inc.*, 96 P.3d 950, 955 (Utah 2004), that the Utah legislature's passage of a preemptive statute did not establish a public policy that would invalidate a corporate ban on firearms on company premises or limit the application of the employment-at-will doctrine:

> Our task is to determine whether the right to keep and bear arms in Utah is a public policy which is so clear and substantial as to supersede an employer's attempt to restrict weapons in the workplace by contract. We hold that it does not. We read the language of section 63-98-102(7) to indicate that the legislature has purposefully declined to give the right to keep and bear arms absolute preeminence over the right to regulate one's own private property.
>
> * * *
>
> The legislative debates over section 63-98-102 suggest that to the extent Utah has a "clear and substantial" public policy relating to the possession of firearms, public policy does not implicate an employer's right to restrict firearms in a parking lot leased by the employer and to terminate an at-will employee for violating that prohibition . . .

These cases demonstrate a consensus that legislative efforts to eliminate restrictions on the carrying of licensed firearms should not affect the ability of public and private employers to restrict employees' possession of firearms while on duty or present upon the employer's premises. In Texas, the Legislature has acted to minimize restrictions on the ability of a prosecutor to carry a concealed handgun under the authority of a CHL, but it has not acted to prohibit public employers from regulating the carrying for firearms by employees. The Legislature's exemption of prosecutors from the

application of penal laws concerning firearms does not logically lead to a conclusion that governmental employers' cannot prohibit or restrict the carrying of licensed firearms by employees; and to the contrary, the continued existence of § 411.203 of the Texas Government Code reflects a legislative desire to preserve employers' authority to restrict the carrying of firearms as a condition of employment.

D. The Constitutional Right to Bear Arms.

Prosecutors also have suggested that an office policy restricting their ability to carry firearms in a courtroom constitutes a violation of their Constitutional right to keep and bear arms, as established by the Second Amendment to the United States Constitution and Article I, section 23, of the Texas Constitution.

The constitutional right to bear arms has always been subject to restrictions and limitations, and it has never been construed to be unlimited or absolute. Article I, section 23, of the Texas Constitution specifically states that the "Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime." Laws limiting the right to carry a firearm have always been found to be constitutionally authorized by this provision.

As early as 1874, the Supreme Court of Texas held that the carrying-a-weapon statute was "nothing more than a legitimate and highly proper regulation" of the possession of firearms, and that it did not operate to deprive citizens of their constitutional right to "keep and bear arms." *See State v. Duke*, 42 Tex. 455 (1874). The Court of Criminal Appeals has since repeatedly held that the Legislature can constitutionally regulate the carrying of firearms. *See, e.g., Collins v. State*, 501 S.W.2d

876 (Tex. Crim. App. 1973) ("We hold that Art. 483, *supra*, which makes it unlawful [for a person] to 'carry On or about his person . . . any pistol . . .' is not violative of the constitutional right of every citizen to keep and bear arms in the lawful defense of himself or the state, the Legislature having the power by law to enact such law with a view to prevent crime."); *see also Masters v. State*, 685 S.W.2d 654 (Tex. Crim. App. 1985).

The United States Supreme Court's recent decision in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), changed nothing. In *Heller*, the Supreme Court found that the Second Amendment did afford individual citizens the right to possess firearms in their homes, but it noted that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, *or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings*, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 2816-17 (emphasis supplied).

At least one court has already found that the decision in *Heller* does not impact the validity of regulations pertaining to the carrying of firearms in governmental buildings. In *United States v. Dorosan*, 2008 WL 2622996 (E.D La. No. 08-042, June 30, 2008), a letter carrier challenged the validity of a federal regulation prohibiting the possession of firearms on postal property, on grounds that he had a Second Amendment right under *Heller* to leave a firearm in his car while it was parked at the postal facility where he worked. The federal district court noted that *Heller* expressly recognized the validity of laws regulating the carrying of firearms in "sensitive places such as . . . government

buildings," and concluded that the regulation in question was a constitutionally viable limitation upon the individual right recognized in *Heller:*

> The ban at issue does not affect the right of all individuals to bear arms at home or traveling in a vehicle to and from work through high crime areas. Its reach does not extend beyond the noticed, gated confines of United States Postal Services' property. It is narrowly tailored to effect public and workplace safety *solely on postal property* consistent with the Property and Postal Clauses. Similarly, 18 U.S.C. § 930(a) criminalizes knowing possession of dangerous weapons, but only within the confines of a federal facility/building. Regulations forbidding the possession or carrying of firearms "in sensitive places" such as federal and/or postal property abound; these longstanding prohibitions have been upheld [footnotes omitted].

Id. at *6 (emphasis in original).

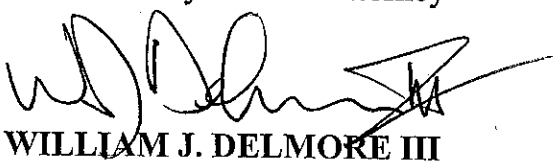
Similarly, the district attorney's policy generally prohibiting prosecutors from carrying concealed firearms in courtrooms does not deprive the prosecutors of their constitutional right to keep firearms in their homes or vehicles for purpose of self-defense. The policy is "narrowly tailored" to promote safety in the extremely dangerous arena of the criminal courthouse, by limiting prisoners' ability to obtain firearms from participants in legal proceedings, and it is similar to other restrictions upon the ability to carry firearms in government buildings which previously been upheld. It does not violate either the Second Amendment as construed in *Heller,* or the Texas constitutional provision which recognizes a right to bear arms.

E. Conclusion.

For all the foregoing reasons, the attorney general should conclude that a district attorney may lawfully and constitutionally prohibit prosecutors with concealed handgun licenses from carrying firearms in courtrooms.

Respectfully submitted,

KENNETH MAGIDSON
Harris County District Attorney



WILLIAM J. DELMORE III
Assistant District Attorney
Harris County, Texas
(713) 755-5826

Date: August 7, 2008