IN THE SUPREME COURT OF MISSISSIPPI

FILED

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COURT OF APPEALS

ROBERT SHULER SMITH, DISTRICT ATTORNEY FOR HINDS COUNTY, MISSISSIPPI; TYRONE LEWIS, SHERIFF FOR HINDS COUNTY, MISISSIPPI; JERRY MOORE, CONSTABLE FOR HINDS COUNTY, MISSISSIPPI; JOHN BROWN, CONSTABLE FOR HINDS COUNTY, MISSISSIPPI; LAWRENCE FUNCHES, CONSTABLE FOR HINDS COUNTY, MISSISSIPPI; JON C. LEWIS, CONSTABLE FOR HINDS COUNTY, MISSISSIPPI; BENNIE C. BUCKNER, CONSTABLE FOR HINDS COUNTY MISSISSIPPI; WILLIE SIMMONS, SOLLIE NORWOOD, JOHN HORNE, AND HILLMAN FRAZIER, CITIZENS OF HINDS COUNTY, MISSISSIPPI **RESPONDENTS**

V. **No.____________________**

STATE OF MISSISSIPPI **PETITIONER**

The State of Mississippi's Combined Petition to Vacate a Restraining Order And Emergency Petition for Interlocutory Appeal

The State of Mississippi files this combined petition for interlocutory appeal and petition for an order vacating a restraining order. *See* Miss. R. App. P. 5, 21, 2(c). The State seeks an immediate order of the Supreme Court vacating a restraining order issued by the Hinds County Circuit Court at 6:15 p.m. on Friday, June 28, 2013, which enjoined the State from placing into force and effect the definition of "concealed" weapon contained in House Bill 2. The Circuit Court's order enjoining House Bill 2 violated Article 3, Section 12 of the Constitution which explicitly authorizes the legislature to regulate the carrying of concealed weapons. The Circuit Court's order violated the separation of powers mandated between co-equal branches in Article 1 of the Constitution by usurping the authority of the legislature to regulate the carrying of concealed weapons. The order also infringes on the citizens' right to bear arms recognized by Article 3, Section 12 of the Mississippi Constitution and the Second Amendment to the United States Constitution.

Based upon a suit filed at approximately 4:30 p.m. on June 28, at 6:15 p.m. the Circuit Court concluded that House Bill 2 is unconstitutionally vague on its face and enjoined the measure from becoming effective on July 1, 2013. *See* Order Transcript at 1-4, Ex. 1; H.B. 2, 2013 Reg. Session, Ex. 2. Whether a statute is unconstitutionally vague on its face is purely a legal conclusion which, having already been determined by the Circuit Court, is appropriate for review and resolution by this Court. There are no facts to be developed at the trial court pertaining to this matter of statutory and constitutional interpretation.

FACTUAL BACKGROUND

The Mississippi Constitution recognizes and protects the right of citizens to bear arms. *See* Miss. Const. art. 3, § 12. Broadly speaking, Section 12 divides the right into two categories: carrying concealed arms and carrying non-concealed arms (also known as "to carry open" or "open carry").

> 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.

Miss. Const. art. 3, § 12. The United States Supreme Court has found the phrase "to keep and bear arms" in the Second Amendment to "guarantee the individual right to possess and carry weapons in case of confrontation." *Dist. of Columbia v. Heller*, 554 U.S. 570, 592 (2008). The first portion of Section 12 declares that the right of citizens to keep and bear arms in defense of home, person, or property "shall not be called in

question."[1] The final clause of Section 12 indicates that there is a distinction between carrying concealed weapons and non-concealed weapons as it provides that "the legislature may regulate or forbid carrying concealed weapons." The legislature's authority expressed in Section 12 is limited to regulating "concealed weapons" in contrast to weapons that are carried openly.[2] Also, the legislature is given plenary authority to decide whether to forbid, heavily regulate, slightly regulate, or widely permit the carrying of concealed weapons.

Relevant to this litigation, the legislature has chosen to exercise its constitutional authority to regulate concealed weapons and the order of the Hinds County Circuit Court impermissibly infringes on the legislature's constitution authority. Decades ago the legislature enacted a statutory scheme pursuant to which citizens were generally prohibited from carrying concealed weapons unless they have a state-issued permit. *See* Miss. Code Ann. § 97-37-1(1)(making it a crime to carry concealed weapons except as authorized by law).[3] A citizen with a permit issued by the Department of Public Safety

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[1] "Shall not be called into question" is a peculiarly broad and powerful phrase not found in other sections of the Constitution.

[2] The United States Supreme Court in *Heller* recognized the important and constitutional distinction between permissible regulation of concealed carry and regulation of openly carried weapons. 554 U.S. at 626 ("For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.").

[3] "[O]pen carry remains legal in most states." *See* David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 Santa Clara L. Rev. 1113, 1178 (2010). The open carry of arms in Mississippi is not without limitation. As set forth in the Attorney General's opinion, private property owners and business owners may exercise their property rights and deny entry to persons carrying concealed or non-concealed weapons on their property (verbally, by posting a sign, or by other means). Opinion to Sheriff Lane, June 13, 2013, Ex. 3. A

may carry a concealed weapon; however, the permit is of limited scope and does not authorize carrying a concealed weapon in those places listed in Code Section 45-9-101(13). *See* Miss. Code Ann. §§ 45-9-101(1)(a), 45-9-101(13). Further, by Code Section 97-37-7 the legislature provided for what has been called an "enhanced permit" authorizing citizens to carry concealed weapons in more places than authorized by a permit under Section 45-9-101. The statutes generally criminalizing the carrying concealed weapons (Section 97-37-1), creating a permit to carry concealed weapons in certain places (Section 45-9-101), and creating an "enhanced" permit to carry concealed weapons in certain additional places (Section 97-37-7) have existed, with little or no material changes, since 1991.[4]

In the 2013 Regular Session, the legislature enacted House Bill 2. *See* H.B. 2, 2013 Reg. Session (as signed by the Governor), Ex. 2.[5] For purposes of this litigation, House Bill 2 contained only one substantive and materially relevant amendment. While the term "concealed" has appeared in Section 97-37-1 since 1991, the legislature had not defined the term. House Bill 2 defined the statutory term "concealed." *See* House Bill 2

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private property owner may even prohibit enhanced concealed permit holders from their property. *Id.* Public officials may prohibit the carrying of concealed or non-concealed weapons in sensitive places. *Id.* The United States Supreme Court recognized the historical and constitutional underpinnings of such restrictions in *Heller*. "[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." 554 U.S. at 626-27.

[4] *See* 1991 Miss. Laws Ch. 609 (S.B. 2102). Subsequent legislative amendments have been minor.

[5] Exhibits attached hereto, except exhibits 5 and 6, were presented to the trial court during the "emergency" hearing beginning at 4:57 p.m. on Friday, June 28.

at lines 48-55. To be clear, Section 12 of the Constitution authorizes the legislature to regulate the carrying concealed weapons; House Bill 2 defines the narrow scope of weapons the legislature considers to be concealed and therefore subject to its regulations. The version of Section 97-37-1 in effect in 2012 read:

> (1) Except as otherwise provided in Section 45-9-101, any person who carries, concealed in whole or in part, 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: [. . . .]

Miss. Code Ann. § 97-37-1(1) (2012). House Bill 2 deleted the phrase "in whole or in part" and added the following bolded text:

> (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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> **(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.**

See H.B. 2 at lines 8-9, 48-55, Ex. 2.

House Bill 2 was passed by the legislature and subsequently signed into law by Governor Phil Bryant on March 4, 2013. *See* History of Legislative Action, Ex. 4. The legislature decreed that House Bill 2 was to become the law of the State of Mississippi on Monday, July 1, 2013. *See* H.B. 2 at Section 5.

THE LESS THAN TWO HOUR PROCEDURAL HISTORY BEFORE THE TRIAL COURT

1. Plaintiffs File Suit, are Granted a Hearing, and are Awarded Extraordinary Injunctive Relief All Within the Last Hour of the Last Business Day Before House Bill 2 Becomes Effective.

Between the Governor's signing of House Bill 2 on March 4 and June 28, plaintiffs waited, delayed, and procrastinated. Plaintiffs bided their time as 116 days passed.

On June 28, the undersigned spoke with District Attorney Robert Smith and attorney Jody Owens about the rumor that a truly 11th hour plan was afoot to enjoin House Bill 2 from becoming effective. District Attorney Smith and attorney Owens could provide no details as to what the possible legal basis would be for such extraordinary relief sought on the last business day before July 1. At 4:23 p.m., an unsigned "Motion for Temporary Restraining Order and Injunctive Relief" was emailed to the undersigned. *See* June 28 Email, Ex. 5. Plaintiffs' counsel stated by telephone that he was proceeding at that very moment to the Hinds County Circuit Court to file the motion and that he would attempt to find a judge to grant the requested relief. When the undersigned arrived at the Hinds County Circuit Court at approximately 4:45 p.m., he was informed that the Honorable Winston Kidd had been assigned the case and was waiting to conduct a hearing. Upon entering the courtroom moments later, the

undersigned observed several television cameras already set-up in the courtroom along with several print and photo journalists. The gallery contained 20-30 individual supporters of the lawsuit. Obviously, the media, the court, and others had received notice well in advance of notice given to the Attorney General's Office. The hearing began at 4:57 p.m. *See* Email from Court Report, Ex. 6. The Hinds County Circuit Court, over the objection of counsel for the State, proceeded to hear the motion for temporary restraining order.

Although Plaintiffs inexcusably waited 116 days after House Bill 2 was signed before filing suit, and even though the State of Mississippi had received Plaintiffs' only pleading in the matter a mere half-hour before the 4:57 p.m. hearing, by 6:02 p.m. the arguments were over and by 6:15 p.m. the Circuit Court of Hinds County had overridden a law duly enacted by the legislative and executive branches. *See* Ex. 5. House Bill 2 was "enjoined." *See* Order Transcript, Ex. 1.

2. The Allegations in Plaintiffs' Motion.

No complaint has been filed and no summons has been issued. Plaintiffs' request to find the legislature to have violated the Constitution in enacting House Bill 2 rests solely on a nine-page "motion." *See* Motion, as filed, Ex. 7. The motion lists ten plaintiffs: the Hinds County District Attorney, the Hinds County Sheriff, five Hinds County Constables, and three Hinds County citizens who are also members of the legislature. *Id.* According to the motion, only Plaintiffs District Attorney Smith and

Sheriff Lewis sought the temporary restraining order. *See* Motion at ¶ I.[6] The remaining Plaintiffs sought no injunctive relief. *Id.*

As an initial matter, the Motion mistakenly claims that the right of citizens to carry non-concealed weapons is granted in House Bill 2. *See* Motion at ¶ VIII ("House Bill No. 2 amends the current law to allow individuals to legally carry weapons in plain view without a permit."). In fact, Section 12 of the Constitution grants citizens a right to carry non-concealed weapons. Plaintiffs argued to the Circuit Court -- and Court appeared to believe -- that by enjoining House Bill 2 the right of citizens to carry non-concealed arms under Section 12 of the Constitution would be overturned or restricted. *See* Transcript Order at 2 (citing alleged "harm to the public" from citizens carrying weapons as a basis for extraordinary injunctive relief).

Worse, the Motion itself does not contain any argument, allegation, claim, count, or assertion that House Bill 2 is unconstitutional. *See generally*, Motion, Ex. 7. Instead, the motion contains a series of subjective, vague, and conclusory policy statements, none of which represent a sufficient legal basis for the judiciary to overturn the will and judgment of the legislature. According to the unsworn and unsupported Motion, if citizens exercise the right to openly carry arms as guaranteed by Section 12 of the Constitution, it

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[6] The Motion stated that District Attorney Smith was bringing this action in his capacity as "the chief legal officer of the State of Mississippi," despite Code Section 7-5-1's clear statement that the Attorney General is the chief legal officer for the State. Motion at ¶ II. The Motion stated that Hinds County Sheriff Lewis was brining this action in his capacity as "the chief law enforcement officer of the State of Mississippi," despite the fact that a sheriff is a county official with limited jurisdiction. Motion at ¶ II; Miss. Code Ann. § 19-25-67.

- "will cause an increase in reports to law enforcement from concerned individuals." Motion at ¶ XIII.
- will increase the "difficulty in identifying imminent threats" because more citizens may be openly carrying weapons. Motion at ¶ XV.
- will cause law enforcement to "likely need to stop and question a larger number of individuals due to open carrying in order to conduct an inquiry as to the lawful possession of the firearm." Motion at ¶ XVI.
- will "place the rest of society as risk" from "individuals who are new to carrying a firearm." Motion at ¶ XVII.
- "could cause citizens to be fearful of those they observe carrying deadly weapons." Motion at ¶ XIX.
- "could lead to increased incidents of violence." Motion at ¶ XX.

Plaintiffs demand that the judiciary instruct that legislature that "the law should require training for individuals to ensure the safety of those who are carrying openly." Motion at ¶ XVII. Based on the above policy arguments (not legal arguments), Plaintiffs asked the Hinds County Court to enjoin House Bill 2.

After being permitted fifteen minutes to review the Motion (in addition to fifteen minutes of travel time from office to courtroom), the State of Mississippi orally argued that Plaintiffs' Motion was barred by laches and the court should permit the State time to draft a written opposition and prepare for a hearing.[7] The State also argued that the Plaintiffs met none of the four factors required for a preliminary injunction. Specifically, there was no likelihood of success on any legal claim as the Motion did not even allege that House Bill 2 was unconstitutional. The State also argued that the Plaintiffs lacked standing and were otherwise legally prohibited from filing the suit.

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[7] A full transcript of the hearing is not yet available. The court's order has been transcribed and attached as exhibit 1.

On rebuttal, Plaintiffs' counsel stated for the first time that he believed the definition of "concealed" in House Bill 2 was unconstitutionally vague. The State responded, among other arguments, by noting that the definition of concealed in House Bill 2 is clear and that an order which enjoined the legislature's definition of "concealed" from going into effect would leave the statute *less clear* as the term "concealed" is contained within the statute but is currently undefined.

3. The Hinds County Circuit Court Enjoins House Bill 2.

After hearing the arguments of counsel, the Circuit Judge took a thirteen minute recess. *See* Exhibit 5. Returning to the bench, the Circuit Judge appears to have accepted Plaintiffs' assertion that enjoining House Bill 2 would prohibit citizens from carrying non-concealed weapons. *See* Transcript of Order at 2-3 (entry of TRO would "prevent harm to public as a whole, to prevent chaos and confusion with respect to who can carry a weapon and how that weapon can be carried"); Motion at ¶ VIII ("House Bill No. 2 amends the current law to allow individuals to legally carry weapons in plain view without a permit."). The trial court enjoined House Bill 2 after concluding that it is "vague, it is not clear, it is ambiguous." *Id.* at 2. The Circuit Court set a preliminary injunction hearing for 1:00 p.m. on July 8. *Id.* at 4.

This petition, filed one business day later, is timely.

ARGUMENT

I. Extraordinary Injunctive Relief is Barred by Laches Given Plaintiffs' 116 Day Delay in Filing Suit.

Temporary restraining orders and preliminary injunctions are "extraordinary remedies" to be granted sparingly. *See Mississippi Val. Gas Co. v. City of Jackson*, 109

So. 2d 637, 642 (1959). The decision to grant such injunctive relief is the "exception rather than the rule." *Mississippi Power & Light v. United Gas Pipe Line Co.*, 760 F.2d 618, 620 (5th Cir. 1985); *Am. Elec. v. Singarayar*, 530 So.2d 1319, 1324 n.6 (Miss. 1988) (state courts apply both state and federal law injunction law). Because Plaintiffs delayed 116 days in filing this action, choosing to act only within the last hour of the last business day before House Bill 2 became effective, Plaintiffs' request for extraordinary injunctive relief in the form of a temporary restraining order or preliminary injunction is barred by laches. As this Court has remarked, litigants are on notice that "courts have denied injunctive relief on the grounds of untimeliness of bringing the suit." *Adams Cnty. Election Comm'n v. Sanders*, 586 So. 2d 829, 832 (Miss. 1991).[8]

Extraordinary preliminary injunctive relief is governed by the traditional notions of equity. *Sanders*, 586 So. 2d at 832 (injunction is an equitable remedy). Laches is founded on the notion that "equity aids the vigilant and not those who slumber on their rights." *NAACP v. NAACP Legal Defense & Educational Fund, Inc.*, 753 F.2d 131, 137 (D.C.Cir. 1985). Preliminary injunctions are "generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action." *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985). Under Mississippi law, "laches applies when one party neglects to assert a right or claim, and such neglect, when taken together with any lapses of time and other circumstances

[8] The State does not contend that the entire action must be dismissed on the basis of laches. Instead, laches serves to bar only the request for a restraining order and preliminary injunctive relief.

causing prejudice to the adverse party, operates as a bar in a court of equity." *Bailey v. Estate of Kemp*, 955 So.2d 777, 784 (Miss. 2007). Here, laches applies because:(1) Plaintiffs delayed 116 days before asserting their claim for injunctive relief; (2) the delay was not excusable; and (3) there was undue prejudice as Plaintiffs forced the State and the judiciary to address their constitutional arguments without adequate time to prepare, brief, and consider the matter. *See Grant v. State*, 686 So.2d 1078, 1089 (Miss.1996)(discussing the three elements of laches).

First, Plaintiffs unquestionably delayed seeking emergency judicial relief for some 116 days after the law was signed by the Governor. Second, the delay was not excusable. At the 4:57 p.m. hearing on June 28, Plaintiffs stated that waited until after the Attorney General's opinion was issued on June 13, therefore excusing their delay. *See* Opinion to Sheriff Lane, June 13, 2013, Ex. 3. However, Plaintiffs' contention is that House Bill 2 is unconstitutionally vague on its face. Neither Plaintiffs' facial vagueness argument nor the allegations in their Motion turn on the content of the Attorney General's opinion. In other words, all of Plaintiffs' arguments regarding House Bill 2 – particularly the legislature's definition of "concealed" – existed as of the Governor's signing of House Bill 2 on March 4. Plaintiffs' delay was inexcusable.[9]

Third, waiting to bring this action until literally the last hour of the last business day was unquestionably prejudicial to the State, the judiciary, and the citizens of Mississippi. Plaintiffs' delay forced the State to defend the constitutionality of House

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[9] Even if it was the issuance of the Attorney General's opinion on June 13 that causes Plaintiffs to act, Plaintiffs still inexcusably delayed two full weeks before filing suit. Had Plaintiffs filed even a week earlier, the State would have been provided at least some time to review the pleadings before a hearing.

Bill 2 after having only thirty minutes to review Plaintiffs' Motion. As other courts have found in the injunction context, "Plaintiffs' unreasonable delay prejudiced Defendants in the preparation of this case. Accordingly, this Court finds Plaintiffs are barred by laches." *Nat'l Council of Arab Americans v. City of New York*, 331 F. Supp. 2d 258, 265-66 (S.D.N.Y. 2004) (delay of 45 days in seeking preliminary injunction resulted in laches and "argues strongly against granting a preliminary injunction"). Had Plaintiffs filed days or weeks ago, a more thorough defense and argument could have been presented and the trial court would have had more than thirteen minutes to consider the arguments. A party is "guilty of laches for failing to bring the lawsuit earlier when the position of the parties could be thoroughly presented. This delay weighs strongly in the balance against granting equitable relief." *Irish Lesbian & Gay Org. v. Giuliani*, 918 F. Supp. 732, 748 (S.D.N.Y. 1996); *see also Alston v. City of Sacramento*, 2012 WL 5954090 (E.D. Cal. Nov. 28, 2012) (denying injunction where plaintiff could not explain six month delay in filing suit); *Gianni Cereda Fabrics, Inc. v. Bazaar Fabrics, Inc.*, 335 F.Supp. 278, 280 (S.D.N.Y.1971) ("A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief.")

While these Plaintiffs are not alone is seeking to develop an improper advantage by rushing to the Court with media in tow and exclaiming the need for immediate action, courts do not reward such tactics. The State was denied time to prepare. The judiciary was denied time to contemplate and evaluate the arguments. Plaintiffs' request for immediate injunctive relief should have been denied by the trial court and the order should be overturned by this Court.

II. The Requirements for Extraordinary Injunctive Relief Are Not Present.

The standards for granting preliminary injunctive relief are well known and set forth in *Am. Elec. v. Singarayar*, 530 So.2d 1319, 1324 (Miss. 1988).[10]

A. Plaintiffs' Have No Likelihood of Success in Proving House Bill 2 to be Unconstitutional.

As an initial matter, Plaintiffs face a very heavy burden in assailing the constitutionality of a statute. The judiciary's authority is limited and a statute may be declared unconstitutional

> only where the legislation under review be found 'in palpable conflict with some plain provision of the ... constitution.' Statutes ... come before us clothed with a heavy presumption of constitutional validity. The party challenging the constitutionality of a statute is burdened with carrying his case beyond all reasonable doubt before this Court has authority to hold the statute, in whole or in part, of no force or effect. When a party invokes our power of judicial review, it behooves us to recall that the challenged act has been passed by legislators and approved by a governor sworn to uphold the selfsame constitution as are we.

Trainer v. State, 930 So. 2d 373, 377 (Miss. 2006) (quoting *In re T.L.C.*, 566 So.2d 691, 696 (Miss.1990)).

1. The Use of Terms "Hidden From Common Observation," "Holster," and "Wholly or Partially visible" are Not Unconstitutionally Vague.

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[10] Plaintiffs must establish each of the four elements by a "clear" and "unequivocal" showing. *Evergreen Presbyterian Ministries, Inc. v. Hood*, 235 F.3d 908, 917 (5th Cir. 2000); *Valley v. Rapides Parish School Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997). Courts have "cautioned repeatedly" that preliminary injunctive relief is an "extraordinary remedy" to be granted only if the party seeking it has "clearly carried the burden of persuasion" on all four elements. *PCI Transportation, Inc. v. Forth Worth & Western Railroad Co.*, 418 F.3d 535, 545 (5th Cir. 2005).

The Motion itself contains no claim that House Bill 2 is unconstitutional and the failure to plead a constitutional violation should end the matter. Notice pleadings "are still required to place the opposing party on notice of the claim beings asserted." *Estate of Stevens v. Wetzel*, 762 So.2d 293, 295 (Miss.2000). The pleadings must "provide sufficient notice to the defendant of the claims and grounds upon which relief which is sought." *Id.* The Motion fails to state a claim on its face. Moreover, it is doubtful if this matter even exists as lawsuit. Rule 3 requires a civil action to be "commenced by filing a complaint with the court." Miss. R. Civ. P. 3(a). Plaintiffs have filed only a "motion" and a motion is not a complaint. *Compare* Miss. R. Civ. P. 7(a) (addressing pleadings, such as a complaint) *with* Miss. R. Civ. P. 7(b) (addressing motions).

However, if this Court were to excuse Plaintiffs' failure to file a complaint, and further excuse Plaintiffs' failure to raise its constitutional vagueness challenge in its Motion, Plaintiffs are still not entitled to relief. "Facial invalidity is strong medicine that has been employed sparingly, as a last resort. The complainant must demonstrate that the law is '**impermissibly vague in all its applications**.'" *State ex rel. Hood v. Louisville Tire Ctr., Inc.*, 55 So. 3d 1068, 1073 (Miss. 2011)(emphasis supplied); *United States v. Salerno*, 481 U.S. 739, 745, (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").[11] A statute is unconstitutionally and impermissibly vague if it is "so vague that men of

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[11] As Plaintiffs successfully enjoined House Bill 2 before it became effective, they cannot assert an "as-applied" challenge. The are constrained to the most difficult constitutional challenge: a facial challenge to bill that has not been applied.

common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* While this test sounds broad in application, this Court has emphasized its narrow construction, heavy burden, and sparing use.

> [T]here is a strong presumption that a legislative enactment is valid, and we will strike down a statute only when it appears beyond a reasonable doubt that it violates the constitution. Criminal statutes, specifically, must clearly warn what conduct is prohibited when evaluated by common understanding and practice, as must civil statutes and regulations. **However, a rule or standard is not objectionable merely because it is stated in general terms and is not susceptible of precise application.** Common examples of such general standards include negligence, unconscionability, fraud, etc.

Louisville Tire Ctr., Inc., 55 So. 3d at 1072 (emphasis supplied). "A statute need embody only as much exactness as the subject matter permits." *Vance v. Lincoln Cnty. Dep't of Pub. Welfare by Weathers*, 582 So. 2d 414, 419 (Miss. 1991) (quoting *Yandell v. United States*, 550 F.Supp. 572, 575 (N.D.Miss.1982)).[12]

The legislature's definition of "concealed" is not unconstitutionally vague as it puts persons of common intelligence on notice of when a weapon would be considered concealed.[13] First, the definition provides a general statement that is a matter of

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[12] The United States Supreme Court has noted that "perfect clarity and precise guidance have never been required" in order to survive a vagueness challenge. *United States v. Williams*, 553 U.S. 285, 304 (2008). "There is little doubt that imagination can conjure up hypothetical cases in which the meaning of these [challenged] terms will be in nice question, because we are condemned to the use of words, we can never expect mathematical certainty from our language." *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (internal quotations and citations omitted).

[13] (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

common sense: "'concealed' means hidden or obscured from common observation." H.B. 2 at lines 48-55, Ex. 2. Next, the definition provides practical examples of its application: concealed weapons do not include a "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." *Id.* The operative terms "hidden from common observation," "holster," and "wholly or partially visible" are common terms and by no means unconstitutionally vague.[14] *See, e.g., Louisville Tire Ctr., Inc.*, 55 So. 3d at 1073 (criminal price gouging statute containing phrases "same market area" and "at or immediately before" not unconstitutionally vague); *Richmond v. City of Corinth*, 816 So. 2d 373, 378-79 (Miss. 2002) (criminal statute using terms "lewdly," "private parts," and "public place" not unconstitutionally vague); *Jones v. State*, 710 So. 2d 870, 878 (Miss. 1998) (criminal statute using phrase "deliberate design" not unconstitutionally vague); *Vance*, 582 So. 2d at 417 (statute terminating parental rights upon finding of "deep-seated antipathy" not unconstitutionally vague); *Meeks v. Tallahatchie Cnty.*, 513 So. 2d 563, 565-66 (Miss. 1987) (statute prohibiting election commissioner from running for "any office at

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> person in a scabbard or case for carrying the weapon that is wholly or partially visible.

See H.B. 2 at lines 48-55, Ex. 2.

[14] Other Mississippi statutes use those terms. *See, e.g.*,Miss. Code Ann. § 23-15-483 (counting votes "shall be conducted under the observation of the public"); Miss. Code Ann. § 49-7-95 (crime of taking a deer at night requires that the "person must have been observed committing an overt act consistent with the hunting of deer at night"); Miss. Code Ann. § 27-19-18(4)(tag lights on trailers must render tag "visible at night at distance of sixty (60) feet").

any election for which he may have been elected or with reference to which he has acted as such" not unconstitutionally vague).

Furthermore, the Attorney General's Office has responded to a request for an official opinion regarding House Bill 2. Opinion to Sheriff Lane, June 13, 2013, Ex. 3. In evaluating a facial challenge, construction of the statute by enforcement agencies are "highly relevant" and relied upon by courts. *Ward v. Rock Against Racism,* 491 U.S. 781, 795–796 (1989).[15] Thus, the Official Opinion further negates Plaintiffs' constitutional vagueness argument.

Also fatal to any vagueness argument is the fact that Plaintiffs' own motion accurately recites and summarizes the definition of "concealed" now alleged by Plaintiffs to be incomprehensible. As the Motion recites, "Under this Bill, the weapon may be loaded or unloaded, so long as the weapon may be observed with 'common observation.' An individual may carry a weapon in a holster which is only partially visible." Motion at ¶ IX, Ex. 7.

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[15] Plaintiffs' claim that the existence of an Attorney General's opinion proves House Bill 2 to be unconstitutionally vague is legal "hogwash." The Attorney General is **required** by statute to answer questions about state law posed by state and county officials. *See* Miss. Code Ann. § 7-5-25. The Attorney General of this state and other states issue thousands of opinions annually on the application of statutes. Also, even when courts arrive at conflicting interpretations of statutes, those statutes are not unconstitutionally vague. "[I]t is not a test for the constitutionality of a statute that it be so unambiguous that all judges will read the statute in only one way." *Franklin v. First Money, Inc.,* 427 F.Supp. 66, 69 (D.C.La. 1976); *The Real Truth About Abortion, Inc. v. FEC,* 681 F.3d 544, 554-555 (4th Cir. 2012) (holding that a difference of opinion between a district court and the FEC on the enforcement of a regulation does not void the regulation for vagueness). The void for vagueness doctrine "does not ordain the unconstitutionality of a statute that two lawyers may read differently." *Franklin,* 427 F.Supp. at 69.

Further, Plaintiffs cannot explain how striking the legislature's definition of "concealed" in House Bill 2 — and thereby leaving the term undefined – makes the statute *less vague*. In truth, by enjoining House Bill 2 Plaintiffs have frustrated the legislature's attempt to provide a definition to a currently undefined term. Plaintiffs have turned the vagueness doctrine into a unrecognizable argument for the judiciary to police the policy judgments of the legislature.

Finally, whether a statute is unconstitutionally vague on its face is a question of law which, having been resolved by the trial court, is properly subject to review and resolution by this Court. *See Louisville Tire Ctr., Inc.*, 55 So. 3d at 1071 ("standards for vagueness and summary judgment intersect").

2. Plaintiffs Have No Likelihood of Success as Their Requested Relief Infringes on the Constitutional Authority of the Legislature.

The Circuit Court's order enjoining House Bill 2 violated Article 3, Section 12 of the Constitution which explicitly authorizes the legislature to regulate the carrying of concealed weapons. Plaintiffs must demonstrate that House Bill 2 is in direct conflict with "the clear language of the constitution." *PHE, Inc. v. State*, 877 So.2d 1244, 1247 (Miss. 2004). Given that Section 12 authorizes the legislature to regulate concealed weapons, Plaintiffs have not and cannot identify any clear language of the Constitution which is in direct conflict with House Bill 2.

Further, the Circuit Court's order violated the separation of powers mandated between co-equal branches by Article 1 of the Constitution by usurping the authority of the legislature to regulate the carrying of concealed weapons. The judiciary's respect for

the legislature's constitutional judgment and plenary authority to establish state policy is well and properly established.

> In determining whether an act of the Legislature violates the Constitution, the courts are without the right to substitute their judgment for that of the Legislature as to the wisdom and policy of the act and must enforce it, unless it appears beyond all reasonable doubt to violate the Constitution. Nor are the courts at liberty to declare an Act void, because in their opinion it is opposed to a spirit supposed to prevail the Constitution, but not the expressed words.

Pathfinder Coach Division of Superior Coach Corp. v. Cottrell, 62 So.2d 383, 385 (Miss. 1953) (citation omitted). Plaintiffs' subjective, vague, and conclusory policy statements cannot be used by the Hinds County Circuit Court to second-guess the will and judgment of the legislature.

3. Plaintiffs Have No Likelihood of Success as Their Requested Relief Infringes on the Right of Citizens to Bear Arms Guaranteed by the Mississippi and United States Constitutions.

The order also infringes the citizens' right to bear arms recognized by Article 3, Section 12 of the Mississippi Constitution and the Second Amendment to the United States Constitution. The Circuit Court appears to have accepted Plaintiffs' assertion that enjoining House Bill 2 would prohibit citizens from carrying non-concealed weapons. *See* Order Transcript at 2-3 (entry of TRO would "prevent harm to public as a whole, to prevent chaos and confusion with respect to who can carry a weapon and how that weapon can be carried"); Motion at ¶ VIII ("House Bill No. 2 amends the current law to allow individuals to legally carry weapons in plain view without a permit."). While the actual order of the Circuit Court only enjoined the legislature's attempt in House Bill 2 to define the term "concealed" as that term already appears in Code Section 97-37-1, it

appears that the Circuit Court and Plaintiffs believe the order to actually restrict the right of citizens to carry non-concealed arms. This expansive and incorrect reading of the requested relief, of Section 12 of the Constitution, and of House Bill 2 infringes on the rights of citizens to bear arms protected under both Section 12 of the Mississippi Constitution and the Second Amendment.

B. The Balance of the Equities and Public Policy Weigh Against the Extraordinary Relief.

Plaintiffs' unadorned policy arguments are beyond the consideration of the judiciary. Remembering that the Constitution does not permit the courts to "substitute their judgment for that of the Legislature as to the wisdom and policy of the act," the Circuit Court should not have attempted to second-guess the legislature's (and Section 12 of the Constitution's) judgment regarding the bearing of arms. *See Cottrell*, 62 So.2d at 385.

Moreover, the Circuit Court acted in a manner to infringe upon the constitutional authority of the legislature and to infringe upon the right of citizens to bear arms. Ordinarily, injunctions exist to protect particular constitutional rights when threatened by vague allegations of public policy and fear. In this matter, the Hinds County Circuit Court infringed on the constitutional authority of the legislature and the constitutional rights of citizens based on vague allegations of public policy and fear. The balance of the equities and public policy weight strongly against the injunction.

III. The Plaintiffs Lack Standing.

According to the Motion, only District Attorney Smith and Sheriff Lewis seek the issuance of a restraining order or preliminary injunction. *See* Motion at ¶ I. Neither the

District Attorney nor the Sheriff, both of whom have sued in their official capacity, have the legal authority or standing to file this suit or to request relief under Rule 65.

First, the Motion incorrectly declares that District Attorney Smith is brining this matter in his capacity as "the chief legal officer of the State of Mississippi." *See* Motion at ¶ II. Of course, it is the Attorney General, and not a district attorney, who is the chief legal officer of the State. Miss. Code Ann. § 7-5-1. The only *civil* suits District Attorney Smith may bring in his official capacity are civil suits in which he represents the interests of the State or Hinds County. *See* Miss. Code Ann. § 25-31-11(1). Importantly, a district attorney is prohibited from bringing any suit the subject matter or impact of which would be statewide because only the Attorney General may bring such a suit of statewide importance. *See Capitol Stages v. State*, 128 So. 759, 764 (1930) (district attorney could not sue to stop buses which traveled highways of his county because highway transportation is a statewide concern left to the Attorney General); *Kennington-Saenger Theatres v. State ex rel. Dist. Atty.*, 18 So. 2d 483 (1944) (district attorney could not sue to seek revocation of Hinds County theater's charter because such would forbid the theater from operating anywhere in the state).

Second, the Motion asserts that Hinds County Sheriff Lewis has brought this action in his official capacity as "the chief law enforcement officer of the State of Mississippi," despite the fact that a sheriff is a county official with limited jurisdiction. Motion at ¶ II; Miss. Code Ann. § 19-25-67. Assuming that Sheriff Lewis desires to argue that the statute violated Due Process because it is unconstitutionally vague, he lacks authority to raise the constitutional rights of criminal suspects. The vagueness check on statutes exists to ensure that individuals are not deprived of their property or

liberty by virtue of a vague statute and in violation of Due Process guarantees. *See Trainer*, 930 So. 2d at 376-77 (unconstitutionally vague statute deprives individuals subject to enforcement of Due Process rights). Law enforcement have no constitutional right to non-vague laws. Further, Sheriff Lewis has no standing to assert the constitutional rights of persons who may be subject to the law. *See Mississippi High Sch. Activities Ass'n, Inc. v. Farris By & Through Farris*, 501 So. 2d 393, 398 (Miss. 1987) (discussing limited circumstances of *jus tertii* standing in Mississippi law). Sheriff Lewis has no relationship with those he may or may not arrest and persons subject to the law have the authority to assert their own rights. *See id.*

IV. This Matter Satisfies the Criteria for an Interlocutory Appeal.

In addition to the request for an order vacating an improper restraining order, this matter satisfies the criteria for an interlocutory appeal under Rule 5(a). The trial court has determined that, as a matter of law, House Bill 2 is unconstitutionally vague on its face. *See* Order Transcript at 2-3, Ex. 1. No further legal development is needed at the trial court level for this Court to review this matter of law. Overturning the restraining order and taking this matter on interlocutory appeal will materially advance the termination of the litigation, avoid exceptional expense to the parties, and protect the legislature and citizens from the deprivation of their constitutional authority and rights. Finally, there can be little question that this constitutional matter is a issue of general importance to the State and to its citizens.

Conclusion

The State of Mississippi respectfully requests an order reversing the temporary restraining order issued by the Hinds County Circuit Court at 6:15 p.m. on June 28. The State respectfully requests that this matter be taken on interlocutory appeal.

The State further requests that if a reply brief is ordered by the Court from Plaintiffs, that the order require the Plaintiffs to file their brief by the close of business on Monday, July 1 – the date House Bill 2 was scheduled to become the law of the State of Mississippi. Permitting Plaintiffs an entire day to file would be a luxurious amount of time when compared with the thirty minutes provided to the State to review Plaintiffs' Motion on June 28.

THIS the 1st day of July, 2013.

Respectfully submitted,
BY: JIM HOOD, ATTORNEY GENERAL

By: /s/ Harold E. Pizzetta III

Harold E. Pizzetta III (Bar No. 99867)
Assistant Attorney General
Chief, Civil Litigation Division
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205
Telephone: (601) 359-3680
Facsimile: (601) 359-2003
Hpizz@ago.state.ms.us

Attorney for Defendant State of Mississippi

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the following persons by US Mail, properly addressed and postage prepaid, and/or by electronic mail where indicated:

Lisa Mishune Ross
Law Offices of Lisa Mishune Ross
514 E. Woodrow Wilson Avenue
Building E
Jackson, MS 39216
lross@lmrossatlaw.com

Jody E. Owens, II
Elissa Johnson
Southern Poverty Law Center
111 East Capitol Street, Suite 280
Jackson, MS 39201
jody.owens@splcenter.org
Elissa.johnson@splcenter.org

Hon. Winston L. Kidd
Hinds County Circuit Court Judge
407 East Pascagoula Street
Jackson, MS 39205

THIS the 1st day of July, 2013.

Harold E. Pizzetta III

1 * * * * *

2 THE COURT: The court has reviewed this
3 matter, and again, before the court is a motion
4 for a Temporary Restraining Order and
5 Injunctive Relief. After hearing on this
6 matter, and after view of this matter, the
7 court finds that Rule 65 is the rule that the
8 court must look at in deciding whether or not a
9 temporary restraining order is appropriate.
10 And before the court issues a temporary
11 restraining order, the court must consider
12 concern factors: Whether or not there is a
13 substantial likelihood that the plaintiffs will
14 prevail on the merits. Next, the court must
15 consider whether the injunction is necessary to
16 prevent irreparable harm. The court must also
17 consider the threatened harm, whether the
18 threatened harm outweighs the harm the
19 injunction might do to the respondent, which is
20 the State of Mississippi. And the court must
21 also decide or consider whether the entry of an
22 injunction is consistent with the public
23 interest.
24 Three of the prongs the court would find
25 that are quite obvious is the prong that the

EXHIBIT
1

1 court considered or heard most of the arguments
2 from the State on was the first prong with
3 whether or not there's a substantial likelihood
4 that the plaintiffs would prevail on the
5 merits. The court finds that the law that
6 we're speaking about today that is scheduled to
7 take effect on July 1st, which is a Monday, the
8 court finds that the law as it stands is indeed
9 vague, it is not clear, it is ambiguous, and
10 that the court finds that the injunction is
11 indeed necessary to prevent irreparable harm.
12 The court finds that the threatened harm
13 does indeed -- the court finds that the
14 threatened harm that might be caused to the
15 State of Mississippi is not outweighed by the
16 harm that might go to the general public or to
17 the applicants.
18 The entry of the judgment for a TRO in
19 this matter obviously is consistent with the
20 public interest. The plaintiffs filed this
21 motion to prevent harm to the public as a
22 whole, to prevent harm from law enforcement
23 officers, to prevent chaos and confusion with
24 respect to who can carry a weapon and how that
25 weapon can be carried. And, obviously, the

1 injury of a temporary restraining order would
2 be consistent with the public interest.
3 Herein, the court will grant the
4 plaintiff's motion for a temporary retraining
5 order, and in accordance with the law that
6 temporary restraining order will remain in
7 effect until the court can hold a hearing on
8 the merits of this matter, and at that time the
9 court will consider a preliminary injunction.
10 This matter will be set for hearing on July 8th
11 at 1:00. The temporary restraining order shall
12 remain in effect until that time.
13 Bond in this matter, which is a
14 requirement of Rule 65 shall be entered or
15 granted -- should be entered by the plaintiffs.
16 And in determining how much bond shall be
17 granted, the court must look at the facts of
18 this situation. And, again, the defendant in
19 this matter is the State of Mississippi.
20 Mr. Pizzetta has stated that attorney's fees
21 shall be considered. If the court has wrongly
22 granted a temporary retraining order, then
23 plaintiffs shall be responsible for attorney's
24 fees. The court finds that bond is appropriate
25 in this matter as a surety. And in light of

1 all of the facts and circumstances in this
2 matter, the court will require bond to be
3 posted in the amount of $1,000. Motion for
4 temporary restraining order is granted. The
5 matter is set for preliminary injunction on
6 July 8th at 1:00. The parties will have until
7 next Wednesday to file briefs in this matter.
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MISSISSIPPI LEGISLATURE REGULAR SESSION 2013

By: Representatives Gipson, Formby, Staples, Monsour, Byrd, Bain, Brown (20th), DeBar, Mims, Hood, Steverson, Arnold, Upshaw, Horne, Dixon, Lane, Shirley, Ladner, Kinkade

To: Judiciary B

COMMITTEE SUBSTITUTE
FOR
HOUSE BILL NO. 2

1 AN ACT TO AMEND SECTIONS 97-37-1, 97-37-15, 97-37-19 AND
2 45-9-101, MISSISSIPPI CODE OF 1972, TO CLARIFY THE CARRYING OF
3 CONCEALED WEAPONS; AND FOR RELATED PURPOSES.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

5 **SECTION 1.** Section 97-37-1, Mississippi Code of 1972, is
6 amended as follows:

7 97-37-1. (1) Except as otherwise provided in Section
8 45-9-101, any person who carries, concealed * * * on or about
9 one's person, any bowie knife, dirk knife, butcher knife,
10 switchblade knife, metallic knuckles, blackjack, slingshot,
11 pistol, revolver, or any rifle with a barrel of less than sixteen
12 (16) inches in length, or any shotgun with a barrel of less than
13 eighteen (18) inches in length, machine gun or any fully automatic
14 firearm or deadly weapon, or any muffler or silencer for any
15 firearm, whether or not it is accompanied by a firearm, or uses or
16 attempts to use against another person any imitation firearm,
17 shall, upon conviction, be punished as follows:

18 (a) By a fine of not less than One Hundred Dollars
19 ($100.00) nor more than Five Hundred Dollars ($500.00), or by
20 imprisonment in the county jail for not more than six (6) months,
21 or both, in the discretion of the court, for the first conviction
22 under this section.

23 (b) By a fine of not less than One Hundred Dollars
24 ($100.00) nor more than Five Hundred Dollars ($500.00), and
25 imprisonment in the county jail for not less than thirty (30) days
26 nor more than six (6) months, for the second conviction under this
27 section.

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

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

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

40 (3) It shall not be a violation of this section for any
41 person to carry a firearm or deadly weapon concealed * * * if the
42 possessor of the weapon is then engaged in a legitimate

43 weapon-related sports activity or is going to or returning from
44 such activity. For purposes of this subsection, "legitimate
45 weapon-related sports activity" means hunting, fishing, target
46 shooting or any other legal * * * activity which normally involves
47 the use of a firearm or other weapon.

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

56 **SECTION 2.** Section 97-37-15, Mississippi Code of 1972, is
57 amended as follows:

58 97-37-15. Any parent, guardian or custodian who shall
59 knowingly suffer or permit any child under the age of eighteen
60 (18) years to have or to own, or to carry * * *, any weapon the
61 carrying of which concealed is prohibited by Section 97-37-1,
62 shall be guilty of a misdemeanor, and, on conviction, shall be
63 fined not more than One Thousand Dollars ($1,000.00), and shall be
64 imprisoned not more than six (6) months in the county jail. The
65 provisions of this section shall not apply to a minor who is
66 exempt from the provisions of Section 97-37-14.

67 **SECTION 3.** Section 97-37-19, Mississippi Code of 1972, is
68 amended as follows:
69 97-37-19. If any person, having or carrying any dirk,
70 dirk-knife, sword, sword-cane, or any deadly weapon, or other
71 weapon the carrying of which concealed is prohibited by Section
72 97-37-1, shall, in the presence of * * * another person, brandish
73 or wield the same in a * * * threatening manner, not in necessary
74 self-defense, or shall in any manner unlawfully use the same in
75 any fight or quarrel, the person so offending, upon conviction
76 thereof, shall be fined in a sum not exceeding Five Hundred
77 Dollars ($500.00) or be imprisoned in the county jail not
78 exceeding three (3) months, or both. In prosecutions under this
79 section it shall not be necessary for the affidavit or indictment
80 to aver, nor for the state to prove on the trial, that any gun,
81 pistol, or other firearm was charged, loaded, or in condition to
82 be discharged.
83 **SECTION 4.** Section 45-9-101, Mississippi Code of 1972, is
84 amended as follows:
85 45-9-101. (1) (a) The Department of Public Safety is
86 authorized to issue licenses to carry stun guns, concealed pistols
87 or revolvers to persons qualified as provided in this section.
88 Such licenses shall be valid throughout the state for a period of
89 five (5) years from the date of issuance. Any person possessing a
90 valid license issued pursuant to this section may carry a stun
91 gun, concealed pistol or concealed revolver.

92 (b) The licensee must carry the license, together with
93 valid identification, at all times in which the licensee is
94 carrying a stun gun, concealed pistol or revolver and must display
95 both the license and proper identification upon demand by a law
96 enforcement officer. A violation of the provisions of this
97 paragraph (b) shall constitute a noncriminal violation with a
98 penalty of Twenty-five Dollars ($25.00) and shall be enforceable
99 by summons.
100 (2) The Department of Public Safety shall issue a license if
101 the applicant:
102 (a) Is a resident of the state and has been a resident
103 for twelve (12) months or longer immediately preceding the filing
104 of the application. However, this residency requirement may be
105 waived, provided the applicant possesses a valid permit from
106 another state, is active military personnel stationed in
107 Mississippi, or is a retired law enforcement officer establishing
108 residency in the state;
109 (b) (i) Is twenty-one (21) years of age or older; or
110 (ii) Is at least eighteen (18) years of age but
111 not yet twenty-one (21) years of age and the applicant:
112 1. Is a member or veteran of the United
113 States Armed Forces; and
114 2. Holds a valid Mississippi driver's license
115 or identification card with the "Veteran" designation issued by
116 the Department of Public Safety.

117 (c) Does not suffer from a physical infirmity which
118 prevents the safe handling of a stun gun, pistol or revolver;
119 (d) Is not ineligible to possess a firearm by virtue of
120 having been convicted of a felony in a court of this state, of any
121 other state, or of the United States without having been pardoned
122 for same;
123 (e) Does not chronically or habitually abuse controlled
124 substances to the extent that his normal faculties are impaired.
125 It shall be presumed that an applicant chronically and habitually
126 uses controlled substances to the extent that his faculties are
127 impaired if the applicant has been voluntarily or involuntarily
128 committed to a treatment facility for the abuse of a controlled
129 substance or been found guilty of a crime under the provisions of
130 the Uniform Controlled Substances Law or similar laws of any other
131 state or the United States relating to controlled substances
132 within a three-year period immediately preceding the date on which
133 the application is submitted;
134 (f) Does not chronically and habitually use alcoholic
135 beverages to the extent that his normal faculties are impaired.
136 It shall be presumed that an applicant chronically and habitually
137 uses alcoholic beverages to the extent that his normal faculties
138 are impaired if the applicant has been voluntarily or
139 involuntarily committed as an alcoholic to a treatment facility or
140 has been convicted of two (2) or more offenses related to the use
141 of alcohol under the laws of this state or similar laws of any

142 other state or the United States within the three-year period
143 immediately preceding the date on which the application is
144 submitted;
145 (g) Desires a legal means to carry a stun gun,
146 concealed pistol or revolver to defend himself;
147 (h) Has not been adjudicated mentally incompetent, or
148 has waited five (5) years from the date of his restoration to
149 capacity by court order;
150 (i) Has not been voluntarily or involuntarily committed
151 to a mental institution or mental health treatment facility unless
152 he possesses a certificate from a psychiatrist licensed in this
153 state that he has not suffered from disability for a period of
154 five (5) years;
155 (j) Has not had adjudication of guilt withheld or
156 imposition of sentence suspended on any felony unless three (3)
157 years have elapsed since probation or any other conditions set by
158 the court have been fulfilled;
159 (k) Is not a fugitive from justice; and
160 (l) Is not disqualified to possess * * * a weapon based
161 on federal law.
162 (3) The Department of Public Safety may deny a license if
163 the applicant has been found guilty of one or more crimes of
164 violence constituting a misdemeanor unless three (3) years have
165 elapsed since probation or any other conditions set by the court
166 have been fulfilled or expunction has occurred prior to the date

167 on which the application is submitted, or may revoke a license if
168 the licensee has been found guilty of one or more crimes of
169 violence within the preceding three (3) years. The department
170 shall, upon notification by a law enforcement agency or a court
171 and subsequent written verification, suspend a license or the
172 processing of an application for a license if the licensee or
173 applicant is arrested or formally charged with a crime which would
174 disqualify such person from having a license under this section,
175 until final disposition of the case. The provisions of subsection
176 (7) of this section shall apply to any suspension or revocation of
177 a license pursuant to the provisions of this section.

178 (4) The application shall be completed, under oath, on a
179 form promulgated by the Department of Public Safety and shall
180 include only:

181 (a) The name, address, place and date of birth, race,
182 sex and occupation of the applicant;

183 (b) The driver's license number or social security
184 number of applicant;

185 (c) Any previous address of the applicant for the two
186 (2) years preceding the date of the application;

187 (d) A statement that the applicant is in compliance
188 with criteria contained within subsections (2) and (3) of this
189 section;

190 (e) A statement that the applicant has been furnished a
191 copy of this section and is knowledgeable of its provisions;

192 (f) A conspicuous warning that the application is
193 executed under oath and that a knowingly false answer to any
194 question, or the knowing submission of any false document by the
195 applicant, subjects the applicant to criminal prosecution; and
196 (g) A statement that the applicant desires a legal
197 means to carry a stun gun, concealed pistol or revolver to defend
198 himself.
199 (5) The applicant shall submit only the following to the
200 Department of Public Safety:
201 (a) A completed application as described in subsection
202 (4) of this section;
203 (b) A full-face photograph of the applicant taken
204 within the preceding thirty (30) days in which the head, including
205 hair, in a size as determined by the Department of Public Safety,
206 except that an applicant who is younger than twenty-one (21) years
207 of age must submit a photograph in profile of the applicant;
208 (c) A nonrefundable license fee of One Hundred Dollars
209 ($100.00). Costs for processing the set of fingerprints as
210 required in paragraph (d) of this subsection shall be borne by the
211 applicant. Honorably retired law enforcement officers shall be
212 exempt from the payment of the license fee;
213 (d) A full set of fingerprints of the applicant
214 administered by the Department of Public Safety; and
215 (e) A waiver authorizing the Department of Public
216 Safety access to any records concerning commitments of the

217 applicant to any of the treatment facilities or institutions
218 referred to in subsection (2) and permitting access to all the
219 applicant's criminal records.
220 (6) (a) The Department of Public Safety, upon receipt of
221 the items listed in subsection (5) of this section, shall forward
222 the full set of fingerprints of the applicant to the appropriate
223 agencies for state and federal processing.
224 (b) The Department of Public Safety shall forward a
225 copy of the applicant's application to the sheriff of the
226 applicant's county of residence and, if applicable, the police
227 chief of the applicant's municipality of residence. The sheriff
228 of the applicant's county of residence and, if applicable, the
229 police chief of the applicant's municipality of residence may, at
230 his discretion, participate in the process by submitting a
231 voluntary report to the Department of Public Safety containing any
232 readily discoverable prior information that he feels may be
233 pertinent to the licensing of any applicant. The reporting shall
234 be made within thirty (30) days after the date he receives the
235 copy of the application. Upon receipt of a response from a
236 sheriff or police chief, such sheriff or police chief shall be
237 reimbursed at a rate set by the department.
238 (c) The Department of Public Safety shall, within
239 forty-five (45) days after the date of receipt of the items listed
240 in subsection (5) of this section:
241 (i) Issue the license;

242 (ii) Deny the application based solely on the
243 ground that the applicant fails to qualify under the criteria
244 listed in subsections (2) and (3) of this section. If the
245 Department of Public Safety denies the application, it shall
246 notify the applicant in writing, stating the ground for denial,
247 and the denial shall be subject to the appeal process set forth in
248 subsection (7); or
249 (iii) Notify the applicant that the department is
250 unable to make a determination regarding the issuance or denial of
251 a license within the forty-five-day period prescribed by this
252 subsection, and provide an estimate of the amount of time the
253 department will need to make the determination.
254 (d) In the event a legible set of fingerprints, as
255 determined by the Department of Public Safety and the Federal
256 Bureau of Investigation, cannot be obtained after a minimum of two
257 (2) attempts, the Department of Public Safety shall determine
258 eligibility based upon a name check by the Mississippi Highway
259 Safety Patrol and a Federal Bureau of Investigation name check
260 conducted by the Mississippi Highway Safety Patrol at the request
261 of the Department of Public Safety.
262 (7) (a) If the Department of Public Safety denies the
263 issuance of a license, or suspends or revokes a license, the party
264 aggrieved may appeal such denial, suspension or revocation to the
265 Commissioner of Public Safety, or his authorized agent, within
266 thirty (30) days after the aggrieved party receives written notice

267 of such denial, suspension or revocation. The Commissioner of
268 Public Safety, or his duly authorized agent, shall rule upon such
269 appeal within thirty (30) days after the appeal is filed and
270 failure to rule within this thirty-day period shall constitute
271 sustaining such denial, suspension or revocation. Such review
272 shall be conducted pursuant to such reasonable rules and
273 regulations as the Commissioner of Public Safety may adopt.

274 (b) If the revocation, suspension or denial of issuance
275 is sustained by the Commissioner of Public Safety, or his duly
276 authorized agent pursuant to paragraph (a) of this subsection, the
277 aggrieved party may file within ten (10) days after the rendition
278 of such decision a petition in the circuit or county court of his
279 residence for review of such decision. A hearing for review shall
280 be held and shall proceed before the court without a jury upon the
281 record made at the hearing before the Commissioner of Public
282 Safety or his duly authorized agent. No such party shall be
283 allowed to carry a stun gun, concealed pistol or revolver pursuant
284 to the provisions of this section while any such appeal is
285 pending.

286 (8) The Department of Public Safety shall maintain an
287 automated listing of license holders and such information shall be
288 available online, upon request, at all times, to all law
289 enforcement agencies through the Mississippi Crime Information
290 Center. However, the records of the department relating to
291 applications for licenses to carry stun guns, concealed pistols or

292 revolvers and records relating to license holders shall be exempt
293 from the provisions of the Mississippi Public Records Act of 1983
294 for a period of forty-five (45) days from the date of the issuance
295 of the license or the final denial of an application.
296 (9) Within thirty (30) days after the changing of a
297 permanent address, or within thirty (30) days after having a
298 license lost or destroyed, the licensee shall notify the
299 Department of Public Safety in writing of such change or loss.
300 Failure to notify the Department of Public Safety pursuant to the
301 provisions of this subsection shall constitute a noncriminal
302 violation with a penalty of Twenty-five Dollars ($25.00) and shall
303 be enforceable by a summons.
304 (10) In the event that a stun gun, concealed pistol or
305 revolver license is lost or destroyed, the person to whom the
306 license was issued shall comply with the provisions of subsection
307 (9) of this section and may obtain a duplicate, or substitute
308 thereof, upon payment of Fifteen Dollars ($15.00) to the
309 Department of Public Safety, and furnishing a notarized statement
310 to the department that such license has been lost or destroyed.
311 (11) A license issued under this section shall be revoked if
312 the licensee becomes ineligible under the criteria set forth in
313 subsection (2) of this section.
314 (12) (a) No less than ninety (90) days prior to the
315 expiration date of the license, the Department of Public Safety
316 shall mail to each licensee a written notice of the expiration and

317 a renewal form prescribed by the department. The licensee must
318 renew his license on or before the expiration date by filing with
319 the department the renewal form, a notarized affidavit stating
320 that the licensee remains qualified pursuant to the criteria
321 specified in subsections (2) and (3) of this section, and a full
322 set of fingerprints administered by the Department of Public
323 Safety or the sheriff of the county of residence of the licensee.
324 The first renewal may be processed by mail and the subsequent
325 renewal must be made in person. Thereafter every other renewal
326 may be processed by mail to assure that the applicant must appear
327 in person every ten (10) years for the purpose of obtaining a new
328 photograph.

329 (i) Except as provided in this subsection, a
330 renewal fee of Fifty Dollars ($50.00) shall also be submitted
331 along with costs for processing the fingerprints;

332 (ii) Honorably retired law enforcement officers
333 shall be exempt from the renewal fee; and

334 (iii) The renewal fee for a Mississippi resident
335 aged sixty-five (65) years of age or older shall be Twenty-five
336 Dollars ($25.00).

337 (b) The Department of Public Safety shall forward the
338 full set of fingerprints of the applicant to the appropriate
339 agencies for state and federal processing. The license shall be
340 renewed upon receipt of the completed renewal application and
341 appropriate payment of fees.

342 (c) A licensee who fails to file a renewal application
343 on or before its expiration date must renew his license by paying
344 a late fee of Fifteen Dollars ($15.00). No license shall be
345 renewed six (6) months or more after its expiration date, and such
346 license shall be deemed to be permanently expired. A person whose
347 license has been permanently expired may reapply for licensure;
348 however, an application for licensure and fees pursuant to
349 subsection (5) of this section must be submitted, and a background
350 investigation shall be conducted pursuant to the provisions of
351 this section.
352 (13) No license issued pursuant to this section shall
353 authorize any person to carry a stun gun, concealed pistol or
354 revolver into any place of nuisance as defined in Section 95-3-1,
355 Mississippi Code of 1972; any police, sheriff or highway patrol
356 station; any detention facility, prison or jail; any courthouse;
357 any courtroom, except that nothing in this section shall preclude
358 a judge from carrying a concealed weapon or determining who will
359 carry a concealed weapon in his courtroom; any polling place; any
360 meeting place of the governing body of any governmental entity;
361 any meeting of the Legislature or a committee thereof; any school,
362 college or professional athletic event not related to firearms;
363 any portion of an establishment, licensed to dispense alcoholic
364 beverages for consumption on the premises, that is primarily
365 devoted to dispensing alcoholic beverages; any portion of an
366 establishment in which beer or light wine is consumed on the

367 premises, that is primarily devoted to such purpose; any
368 elementary or secondary school facility; any junior college,
369 community college, college or university facility unless for the
370 purpose of participating in any authorized firearms-related
371 activity; inside the passenger terminal of any airport, except
372 that no person shall be prohibited from carrying any legal firearm
373 into the terminal if the firearm is encased for shipment, for
374 purposes of checking such firearm as baggage to be lawfully
375 transported on any aircraft; any church or other place of worship;
376 or any place where the carrying of firearms is prohibited by
377 federal law. In addition to the places enumerated in this
378 subsection, the carrying of a stun gun, concealed pistol or
379 revolver may be disallowed in any place in the discretion of the
380 person or entity exercising control over the physical location of
381 such place by the placing of a written notice clearly readable at
382 a distance of not less than ten (10) feet that the "carrying of a
383 pistol or revolver is prohibited." No license issued pursuant to
384 this section shall authorize the participants in a parade or
385 demonstration for which a permit is required to carry a stun gun,
386 concealed pistol or revolver.

387 (14) A law enforcement officer as defined in Section 45-6-3,
388 chiefs of police, sheriffs and persons licensed as professional
389 bondsmen pursuant to Chapter 39, Title 83, Mississippi Code of
390 1972, shall be exempt from the licensing requirements of this
391 section. <u>The licensing requirements of this section do not apply</u>

392 to the carrying by any person of a stun gun, pistol or revolver,
393 knife, or other deadly weapon that is not concealed as defined in
394 Section 97-37-1.
395 (15) Any person who knowingly submits a false answer to any
396 question on an application for a license issued pursuant to this
397 section, or who knowingly submits a false document when applying
398 for a license issued pursuant to this section, shall, upon
399 conviction, be guilty of a misdemeanor and shall be punished as
400 provided in Section 99-19-31, Mississippi Code of 1972.
401 (16) All fees collected by the Department of Public Safety
402 pursuant to this section shall be deposited into a special fund
403 hereby created in the State Treasury and shall be used for
404 implementation and administration of this section. After the
405 close of each fiscal year, the balance in this fund shall be
406 certified to the Legislature and then may be used by the
407 Department of Public Safety as directed by the Legislature.
408 (17) All funds received by a sheriff or police chief
409 pursuant to the provisions of this section shall be deposited into
410 the general fund of the county or municipality, as appropriate,
411 and shall be budgeted to the sheriff's office or police department
412 as appropriate.
413 (18) Nothing in this section shall be construed to require
414 or allow the registration, documentation or providing of serial
415 numbers with regard to any stun gun or firearm. * * *

416 (19) Any person holding a valid unrevoked and unexpired
417 license to carry stun guns, concealed pistols or revolvers issued
418 in another state shall have such license recognized by this state
419 to carry stun guns, concealed pistols or revolvers. The
420 Department of Public Safety is authorized to enter into a
421 reciprocal agreement with another state if that state requires a
422 written agreement in order to recognize licenses to carry stun
423 guns, concealed pistols or revolvers issued by this state.
424 (20) The provisions of this section shall be under the
425 supervision of the Commissioner of Public Safety. The
426 commissioner is authorized to promulgate reasonable rules and
427 regulations to carry out the provisions of this section.
428 (21) For the purposes of this section, the term "stun gun"
429 means a portable device or weapon from which an electric current,
430 impulse, wave or beam may be directed, which current, impulse,
431 wave or beam is designed to incapacitate temporarily, injure,
432 momentarily stun, knock out, cause mental disorientation or
433 paralyze.
434 **SECTION 5.** This act shall take effect and be in force from
435 and after July 1, 2013.

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:

OFFICIAL OPINION

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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EXHIBIT
3

(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.

OFFICIAL OPINION

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

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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?

---

[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).

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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?

OFFICIAL OPINION

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.

Mississippi Legislature
2013 Regular Session

House Bill 2

House Calendar | Senate Calendar | Main Menu
Code Sections | Additional Information

Bill Text for All Versions Explanation

| | | Approved by the Governor
| | | As Passed the House
| | | Committee Substitute
| | | As Introduced

Description: Weapons; clarify definition of concealed.

Fiscal Note: No fiscal note conducted

Background Information:
Disposition: Law
Deadline: General Bill/Constitutional Amendment
Revenue: No
Vote type required: Three/Fifths
Effective date: July 1, 2013
Chapter Number: 308

History of Actions:

```
 1   01/08 (H) Referred To Judiciary B
 2   01/24 (H) Title Suff Do Pass Comm Sub
 3   01/29 (H) Committee Substitute Adopted
 4   01/29 (H) Passed      {Vote}
 5   01/30 (H) Transmitted To Senate
 6   02/13 (S) Referred To Wildlife, Fisheries and Parks
 7   02/20 (S) Title Suff Do Pass
 8   02/27 (S) Passed      {Vote}
 9   02/27 (S) Immediate Release
10   02/27 (S) Transmitted To House
11   02/28 (S) Enrolled Bill Signed
12   02/28 (H) Enrolled Bill Signed
13   03/04 Approved by Governor
```

Code Section: A 097-0037-0001, A 097-0037-0015, A 097-0037-0019, A 045-0009-0101

----- Additional Information -----

House Committee: Judiciary B
Senate Committee: Wildlife, Fisheries and Parks

EXHIBIT 4

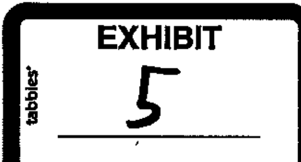
Principal Author: Gipson
Additional Authors: Formby, Staples, Monsour, Byrd, Bain, Brown (20th), DeBar, Mims, Hood, Steverson, Arnold, Upshaw, Horne, Dixon, Lane, Shirley, Ladner, Kinkade

Title: AN ACT TO AMEND SECTIONS 97-37-1, 97-37-15, 97-37-19 AND 45-9-101, MISSISSIPPI CODE OF 1972, TO CLARIFY THE CARRYING OF CONCEALED WEAPONS; AND FOR RELATED PURPOSES.

Information pertaining to this measure was last updated on 05/21/2013 at 09:11
End Of Document

HAROLD PIZZETTA

From: Jody Owens <jody.owens@splcenter.org>
Sent: Friday, June 28, 2013 4:23 PM
To: HAROLD PIZZETTA
Subject: TRO Motion
Attachments: TRO Motion Draft III.pdf



IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

ROBERT SHULER SMITH, DISTRICT ATTORNEY FOR HINDS COUNTY, MISSISSIPPI; TYRONE LEWIS, SHERIFF FOR HINDS COUNTY, MISSISSIPPI; JERRY MOORE, CONSTABLE FOR HINDS COUNTY, MISSISSIPPI; JOHN BROWN, CONSTABLE FOR HINDS COUNTY, MISSISSIPPI; LAWRENCE FUNCHESS, CONSTABLE FOR HINDS COUNTY, MISSISSIPPI; JON C. LEWIS, CONSTABLE FOR HINDS COUNTY, MISSISSIPPI; BENNIE C. BUCKNER, CONSTABLE FOR HINDS COUNTY, MISSISSIPPI ; WILLIE SIMMONS, SOLLIE NORWOOD, JOHN HORHN, AND HILLMAN FRAZIER, CITIZENS OF HINDS COUNTY, MISSISSIPPI,

PLAINTIFFS

VS. CAUSE NO. ______________

STATE OF MISSISSIPPI. DEFENDANT

MOTION FOR TEMPORARY RESTRAINING
ORDER AND INJUNCTIVE RELIEF

Plaintiffs, Robert Shuler Smith, Tyrone Lewis, Jerry Moore, John Brown, Lawrence Funchess, Jon C. Lewis, Bennie C. Buckner, Willie Simmons, Sollie Norwood, John Horhn, and Hillman Frazier ("Plaintiffs") file this Motion for Temporary Restraining Order and Injunctive Relief pursuant to Mississippi Rules of Civil Procedure 65, and would state the following:

PARTIES

I.

Plaintiffs District Attorney Smith and Sheriff Lewis seek a temporary restraining order and other injunctive relief pursuant to Mississippi Rule of Civil Procedure 65.

II.

District Attorney Smith is the chief legal officer of the State of Mississippi, charged with bringing suits which affect the public interest and Sherriff Lewis is the chief law enforcement officer of the State of Mississippi, charged with protecting the public interest and the public's safety, health, and welfare.

III.

Jerry Moore, John Brown, Lawrence Funchess, Jon C. Lewis, and Bennie Buckner, Constables for Hinds County, are law enforcement officers charged with protecting the public's safety, health, and welfare.

IV.

Willie Simmons, Sollie Norwood, John Horhn, and Hillman Frazier are citizens of the State of Mississippi.

V.

The Defendant is the State of Mississippi, charged with establishing laws which promote the public's safety, health, and welfare.

NATURE OF THE ACTION

IV.

Pursuant to Rule 65(b) of Mississippi Rules of Civil Procedure, the Court maintains authority to grant a temporary restraining order without prior notice to the adverse party if (1) the facts demonstrate that plaintiffs will suffer "irreparable injury, loss, or damage" before the defendant is afforded an opportunity to be heard in opposition to the motion and (2) the plaintiffs' attorneys have attempted to provide the defendant with notice of the hearing on the motion for temporary restraining order.

VII.

On March 4, 2013, Governor Phil Bryant signed House Bill No. 2 amending sections 97-37-1, 97-37-19, and 45-9-101 of the Mississippi Code regarding the carrying of concealed weapons.

VIII.

House Bill No. 2 amends the current law to allow individuals to legally carry weapons in plain view without a permit.

IX.

Under this Bill, the weapon may be loaded or unloaded, so long as the weapon may be observed with "common observation." An individual may carry a weapon in a holster which is only partially visible.

X.

This Bill will become effective on July 1, 2013.

FACTS

XI.

In 2011, there were 187 murders in the State of Mississippi, 138 of them committed with firearms.[1] From 2010 to 2011 the total number of firearm-related deaths increased by eighteen.[2] Firearm murders accounted for 74% of all murders in the State of Mississippi in 2011; this percentage was the third highest in the nation.[3] The State of Mississippi also ranked ninth in

[1] Federal Bureau of Investigation Uniform Crime Reports 2011.
[2] *Id.*
[3] *Id.*

firearm robberies per 100,000 at a rate of 60.07, and ranks sixteenth in firearm assaults per 100,000 with a rate of 51.69. [4]

XII.

As of 2010, Mississippi had the second highest firearm-murder rate in the nation, 92% higher than the national average in 2010.[5] The national average for firearm murders per 100,000 people in 2010 was 3.6; Mississippi's average was 6.9.[6] Further, from 2001-2010 Mississippi ranked third among all states with an average of seventeen firearm deaths for every 100,000 people in the state. [7] In 2010, 475 people lost their lives to firearm violence in Mississippi, or 1.3 persons daily.[8]

XIII.

The allowance of open carry will cause an increase in reports to law enforcement from concerned individuals. Citizens will not know whether individual are threat when they are openly carrying weapons, which can cause extensive concern. Law enforcement officials will be burdened with the need to respond to and investigate these reports even though the openly carried weapon may be legal.

XIV.

In emergency situations, such as active shootings, law enforcement will be burdened when trying to effectively diffuse the security risks and ensure the safety of innocent bystanders. If individuals are allowed to have their firearm in the open, it will become more difficult to

---

[4] *Id.*
[5] Centers for Disease Control and Prevention, "Fatal Injury Data," *available at* http://www.cdc.gov/injury/wisqars/fatal.html.
[6] *Id.*
[7] *Id.*
[8] *Id.*

identify the shooter and imminent threats to safety. This exponentially complicates the existing danger when officers are trying to assess the surrounding risks.

XV.

Law enforcement will face increased difficulty in identifying imminent threats during their routine patrol. Officers are charged with protecting the safety and welfare of the citizenry; however, they will not have the ability to require citizens to answer and produce requested information regarding the lawfulness of the weapon. This limitation will impair law enforcement's ability to enforce laws that prohibit convicted felons from carrying weapons. It is a hindrance to law enforcement officers tasked with identifying and determining whether individuals are carrying illegal weapons that could be used in crimes. Furthermore, the increased time necessary to conduct these investigations by law enforcement will place a substantial burden on local enforcement agencies to ensure that they have adequate officers patrolling to respond to emergencies.

XVI.

Under the law, in order for law enforcement to ensure their safety and the safety of the community during their routine patrol, they would likely need to stop and question a larger number of individuals due to open carrying in order to conduct an inquiry as to the lawful possession of the firearm. This subjects private citizens who are complying with the law as written to possible personal invasions by officers attempting to ensure public safety. However, even if the officers stop and question individuals, there is no requirement of the carrier to prove their lawful possession under the law as approved by the Governor

XVII.

Individuals who are new to carrying a firearm could place the rest of the society at serious risk by being able to openly carry without proper training. When firearms are openly carried by untrained individuals, it is less likely that these individuals will properly retain control of their weapons. Therefore, others are able to easily disarm carriers in order to use the weapon against innocent bystanders.

XVIII.

Furthermore, the law should require training for individuals to ensure the safety of those who are carrying openly. If law enforcement request identification, when the individual is reaching for that identification, the officer could interpret that action as reaching for the weapon at issue. Therefore, individuals need to be trained to interact with law enforcement if they are going to be openly carrying.

XIX.

Allowing any person in the State of Mississippi who is twenty-one years of age or older to openly carry a deadly weapon, including a fully automatic firearm, without any particularized knowledge of firearms, or any demonstrated training or experience with firearms, could cause citizens to be fearful of those they observe openly carrying deadly weapons and may cause citizens to feel unsafe in public spaces.

XX.

Allowing the open carrying of deadly weapons could cause the escalation of disagreements between citizens and could lead to increased incidents of violence with deadly weapons in the State of Mississippi.

XXI.

The injunctive relief of stopping the law from coming into effect is appropriate because the Plaintiffs have a substantial likelihood of success on the merits, absent injunctive relief the

Plaintiffs will suffer the threat of irreparable harm, and the threat outweighs the potential harm to Defendants. A temporary restraining order is consistent with the public interest.

XXII.

In the alternative to the complete enjoinment of the operation of these laws, the Plaintiffs respectfully request that if the law does indeed go into effect on July 1, that the force is limited in scope in order to maintain the public health and safeguard the safety of the citizenry.

On July 13, 2013, the Attorney General of the State of Mississippi issued a formal opinion to Sheriff Brad Vance of Senatobia regarding the package of new laws. Attached as Exhibit "A." In that Opinion, the Attorney General expressed two core theories: first, that the new laws do not alter the power of private property owners to prohibit carrying weapons from their property. *See* Ex. A at pages 5-6.

Second, the Attorney General opined that "[c]ustodians or owners of public property generally have the authority and duty, express or necessarily implied, to manage that property in the public interest." Ex. A at 6. *See* Ex. A at 6. The Attorney General further declared that "[s]pecifically with regard to courthouses, the sheriff is in charge of and responsible for the security of the courthouse." Ex. A at 6. Therefore, the Attorney General determined that these custodians can prohibit the carrying of weapons on property.

Therefore, in the alternative, even if the full law is not enjoined, the Plaintiffs respectfully request that the law be narrowly interpreted and tailored so as to not impugn or impinge upon the previous authority of private landowners to prohibit weapons on their property or for the custodians of the public good to prohibit weapons on public property.

WHEREFORE PREMISES CONSIDERED, the Plaintiffs pray that the Court grant this Motion for Temporary Restraining Order and Injunctive Relief stopping the law from coming into effect.

This the 28 day of June, 2013.

Respectfully Submitted,

____

Lisa Mishune Ross, MSB #9755

Law Offices of Lisa Mishune Ross
514 E. Woodrow Wilson Avenue Bldg. E
Jackson, MS 39216
Telepone (601) 981-7917
Fax (601981-7917
lross@lmrossatlaw.com

CERTIFICATE OF SERVICE

I, Lisa Mishune Ross, one of the attorneys of record for Plaintiffs do hereby certify that I have delivered by messenger, email, and U.S. Mail a copy of the foregoing motion to:

Jim Hood, Attorney General
Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205

SO CERTIFIED, this the ____ day of June, 2013.

____
Lisa Mishune Ross

HAROLD PIZZETTA

From: Danette Horne <danettehorne@yahoo.com>
Sent: Saturday, June 29, 2013 2:54 PM
To: HAROLD PIZZETTA
Subject: Re: Open Carry

It started at 4:57 and ended at 6:23 with a session break from 6:02-6:15.

On Jun 29, 2013, at 1:43 PM, HAROLD PIZZETTA <HPIZZ@ago.state.ms.us> wrote:

\> Danette,
\>
\> Do you know the time the hearing started and when it ended?
\>
\> -----Original Message-----
\> From: Danette Horne [mailto:danettehorne@yahoo.com]
\> Sent: Saturday, June 29, 2013 9:34 AM
\> To: HAROLD PIZZETTA
\> Subject: Re: Open Carry
\>
\> Okay. Will do.
\>
\> On Jun 29, 2013, at 9:30 AM, HAROLD PIZZETTA <HPIZZ@ago.state.ms.us> wrote:
\>
\>> That would be great. If you have the order portion finished first, I would appreciate it if you could send that part as soon as it is ready.
\>>
\>> At least it is too hot to be outside!
\>>
\>> -----Original Message-----
\>> From: Danette Horne [mailto:danettehorne@yahoo.com]
\>> Sent: Saturday, June 29, 2013 9:03 AM
\>> To: HAROLD PIZZETTA
\>> Subject: Re: Open Carry
\>>
\>> If you would like the whole thing, I will be finished with it sometime tonight, if that's okay.
\>>
\>> On Jun 29, 2013, at 8:37 AM, HAROLD PIZZETTA <HPIZZ@ago.state.ms.us> wrote:
\>>
\>>> Thank you Danette. Do you think you will have the entire transcript or just the order transcribed today?
\>>>
\>>> On Jun 29, 2013, at 1:23 AM, "Danette" <danettehorne@yahoo.com> wrote:
\>>>
\>>>> It was nice to meet you, too. I'll have this done by the afternoon.
\>>>>
\>>>> On Jun 28, 2013, at 8:00 PM, HAROLD PIZZETTA <HPIZZ@ago.state.ms.us> wrote:
\>>>>
\>>>>> Danette, it was nice to meet you. Please do email me a copy of the opinion when you have a moment.
\>>>>>

EXHIBIT
6
tabbies

>>>>> Thank you, Harold Pizzetta Assistant Attorney General.
>>>>

IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

ROBERT SHULER SMITH, DISTRICT ATTORNEY FOR HINDS COUNTY, MISSISSIPPI; TYRONE LEWIS, SHERIFF FOR HINDS COUNTY, MISSISSIPPI; JERRY MOORE, CONSTABLE FOR HINDS COUNTY, MISSISSIPPI; JOHN BROWN, CONSTABLE FOR HINDS COUNTY, MISSISSIPPI; LAWRENCE FUNCHESS, CONSTABLE FOR HINDS COUNTY, MISSISSIPPI; JON C. LEWIS, CONSTABLE FOR HINDS COUNTY, MISSISSIPPI; BENNIE C. BUCKNER, CONSTABLE FOR HINDS COUNTY, MISSISSIPPI ; WILLIE SIMMONS, SOLLIE NORWOOD, JOHN HORHN, AND HILLMAN FRAZIER, CITIZENS OF HINDS COUNTY, MISSISSIPPI,

FILED
JUN 28 2013
BARBARA DUNN, CIRCUIT CLERK
BY

PLAINTIFFS

VS. CAUSE NO. 251-13-595CIV

STATE OF MISSISSIPPI. DEFENDANT

MOTION FOR TEMPORARY RESTRAINING
ORDER AND INJUNCTIVE RELIEF

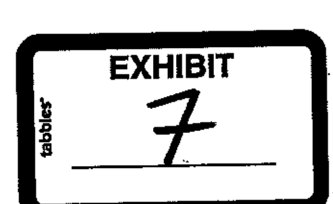
Plaintiffs, Robert Shuler Smith, Tyrone Lewis, Jerry Moore, John Brown, Lawrence Funchess, Jon C. Lewis, Bennie C. Buckner, Willie Simmons, Sollie Norwood, John Horhn, and Hillman Frazier ("Plaintiffs") file this Motion for Temporary Restraining Order and Injunctive Relief pursuant to Mississippi Rules of Civil Procedure 65, and would state the following:

PARTIES

I.

Plaintiffs District Attorney Smith and Sheriff Lewis seek a temporary restraining order and other injunctive relief pursuant to Mississippi Rule of Civil Procedure 65.

II.



District Attorney Smith is the chief legal officer of the State of Mississippi, charged with bringing suits which affect the public interest and Sherriff Lewis is the chief law enforcement officer of the State of Mississippi, charged with protecting the public interest and the public's safety, health, and welfare.

III.

Jerry Moore, John Brown, Lawrence Funchess, Jon C. Lewis, and Bennie Buckner, Constables for Hinds County, are law enforcement officers charged with protecting the public's safety, health, and welfare.

IV.

Willie Simmons, Sollie Norwood, John Horhn, and Hillman Frazier are citizens of the State of Mississippi.

V.

The Defendant is the State of Mississippi, charged with establishing laws which promote the public's safety, health, and welfare.

NATURE OF THE ACTION

IV.

Pursuant to Rule 65(b) of Mississippi Rules of Civil Procedure, the Court maintains authority to grant a temporary restraining order without prior notice to the adverse party if (1) the facts demonstrate that plaintiffs will suffer "irreparable injury, loss, or damage" before the defendant is afforded an opportunity to be heard in opposition to the motion and (2) the plaintiffs' attorneys have attempted to provide the defendant with notice of the hearing on the motion for temporary restraining order.

VII.

On March 4, 2013, Governor Phil Bryant signed House Bill No. 2 amending sections 97-37-1, 97-37-19, and 45-9-101 of the Mississippi Code regarding the carrying of concealed weapons.

VIII.

House Bill No. 2 amends the current law to allow individuals to legally carry weapons in plain view without a permit.

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Under this Bill, the weapon may be loaded or unloaded, so long as the weapon may be observed with "common observation." An individual may carry a weapon in a holster which is only partially visible.

X.

This Bill will become effective on July 1, 2013.

FACTS

XI.

In 2011, there were 187 murders in the State of Mississippi, 138 of them committed with firearms.[1] From 2010 to 2011 the total number of firearm-related deaths increased by eighteen.[2] Firearm murders accounted for 74% of all murders in the State of Mississippi in 2011; this percentage was the third highest in the nation.[3] The State of Mississippi also ranked ninth in

[1] Federal Bureau of Investigation Uniform Crime Reports 2011.
[2] *Id.*
[3] *Id.*

firearm robberies per 100,000 at a rate of 60.07, and ranks sixteenth in firearm assaults per 100,000 with a rate of 51.69.[4]

XII.

As of 2010, Mississippi had the second highest firearm-murder rate in the nation, 92% higher than the national average in 2010.[5] The national average for firearm murders per 100,000 people in 2010 was 3.6; Mississippi's average was 6.9.[6] Further, from 2001-2010 Mississippi ranked third among all states with an average of seventeen firearm deaths for every 100,000 people in the state.[7] In 2010, 475 people lost their lives to firearm violence in Mississippi, or 1.3 persons daily.[8]

XIII.

The allowance of open carry will cause an increase in reports to law enforcement from concerned individuals. Citizens will not know whether individual are threat when they are openly carrying weapons, which can cause extensive concern. Law enforcement officials will be burdened with the need to respond to and investigate these reports even though the openly carried weapon may be legal.

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In emergency situations, such as active shootings, law enforcement will be burdened when trying to effectively diffuse the security risks and ensure the safety of innocent bystanders. If individuals are allowed to have their firearm in the open, it will become more difficult to

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[4] *Id.*
[5] Centers for Disease Control and Prevention, "Fatal Injury Data," *available at* http://www.cdc.gov/injury/wisqars/fatal.html.
[6] *Id.*
[7] *Id.*
[8] *Id.*

identify the shooter and imminent threats to safety. This exponentially complicates the existing danger when officers are trying to assess the surrounding risks.

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Law enforcement will face increased difficulty in identifying imminent threats during their routine patrol. Officers are charged with protecting the safety and welfare of the citizenry; however, they will not have the ability to require citizens to answer and produce requested information regarding the lawfulness of the weapon. This limitation will impair law enforcement's ability to enforce laws that prohibit convicted felons from carrying weapons. It is a hindrance to law enforcement officers tasked with identifying and determining whether individuals are carrying illegal weapons that could be used in crimes. Furthermore, the increased time necessary to conduct these investigations by law enforcement will place a substantial burden on local enforcement agencies to ensure that they have adequate officers patrolling to respond to emergencies.

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XVII.

Individuals who are new to carrying a firearm could place the rest of the society at serious risk by being able to openly carry without proper training. When firearms are openly carried by untrained individuals, it is less likely that these individuals will properly retain control of their weapons. Therefore, others are able to easily disarm carriers in order to use the weapon against innocent bystanders.

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Furthermore, the law should require training for individuals to ensure the safety of those who are carrying openly. If law enforcement request identification, when the individual is reaching for that identification, the officer could interpret that action as reaching for the weapon at issue. Therefore, individuals need to be trained to interact with law enforcement if they are going to be openly carrying.

XIX.

Allowing any person in the State of Mississippi who is twenty-one years of age or older to openly carry a deadly weapon, including a fully automatic firearm, without any particularized knowledge of firearms, or any demonstrated training or experience with firearms, could cause citizens to be fearful of those they observe openly carrying deadly weapons and may cause citizens to feel unsafe in public spaces.

XX.

Allowing the open carrying of deadly weapons could cause the escalation of disagreements between citizens and could lead to increased incidents of violence with deadly weapons in the State of Mississippi.

XXI.

The injunctive relief of stopping the law from coming into effect is appropriate because the Plaintiffs have a substantial likelihood of success on the merits, absent injunctive relief the

Plaintiffs will suffer the threat of irreparable harm, and the threat outweighs the potential harm to Defendants. A temporary restraining order is consistent with the public interest.

XXII.

In the alternative to the complete enjoinment of the operation of these laws, the Plaintiffs respectfully request that if the law does indeed go into effect on July 1, that the force is limited in scope in order to maintain the public health and safeguard the safety of the citizenry.

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Second, the Attorney General opined that "[c]ustodians or owners of public property generally have the authority and duty, express or necessarily implied, to manage that property in the public interest." Ex. A at 6. *See* Ex. A at 6. The Attorney General further declared that "[s]pecifically with regard to courthouses, the sheriff is in charge of and responsible for the security of the courthouse." Ex. A at 6. Therefore, the Attorney General determined that these custodians can prohibit the carrying of weapons on property.

Therefore, in the alternative, even if the full law is not enjoined, the Plaintiffs respectfully request that the law be narrowly interpreted and tailored so as to not impugn or impinge upon the previous authority of private landowners to prohibit weapons on their property or for the custodians of the public good to prohibit weapons on public property.

WHEREFORE PREMISES CONSIDERED, the Plaintiffs pray that the Court grant this Motion for Temporary Restraining Order and Injunctive Relief stopping the law from coming into effect.

This the 28th day of June, 2013.

Respectfully Submitted,

Lisa Mishune Ross

Lisa Mishune Ross, MSB #9755

Law Offices of Lisa Mishune Ross
514 E. Woodrow Wilson Avenue Bldg. E
Jackson, MS 39216
Telephone (601) 981-7900
Fax (601981-7917
lross@lmrossatlaw.com

CERTIFICATE OF SERVICE

I, Lisa Mishune Ross, one of the attorneys of record for Plaintiffs do hereby certify that I have delivered by messenger, email, and U.S. Mail a copy of the foregoing motion to:

Jim Hood, Attorney General
Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205

SO CERTIFIED, this the 28th day of June, 2013.

Lisa M. Ross
Lisa Mishune Ross