4956 1536

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

June 22, 1995

Captain Joseph A. Holley
South Carolina Law Enforcement Division
Post Office Box 21398
Columbia, South Carolina 29221

Re: Informal Opinion; Section 23-31-120(c)

Dear Captain Holley:

Deputy Attorney General Zeb Williams has referred to me your letter of June 1, 1995, regarding the above statute, for reply.

You inquired as to the effect of the General Assembly's 1994 repeal of Subsection (c) of the above statute. The repeal deleted judicial review of the denial of a concealed weapon permit (CWP), and you inquired as to whether or not there still existed some type of judicial review, by common law. You also inquired whether or not we would recommend that SLED undertake efforts to have the language regarding judicial review restored, or should the Chief of SLED or his designee have sole authority to deny issuance of a CWP.

To summarize, S.C. Code Ann. Section 23-31-120, enacted in its present form by the General Assembly in 1974, contained three subsections. Subsection (a) granted SLED the authority to issue a CWP; Subsection (b) provided for investigation of the applicant, the fee, requirement of proficiency in the use of a handgun, issuance and duration, as well as the authority of the Chief of SLED to promulgate regulations; and Subsection (c) required the recipient of a CWP to post a bond, and, pertinent to your inquiry, contain the following provision:

> Any person whose application has been denied may appeal such denial to the Circuit Court for the county of his residence and shall be heard as on certiorari.

In 1994 the General Assembly repealed Subsection (c). I have examined the bill, and it is clear from the markings thereon that it was the General Assembly's intent to strike the entire Subsection, and not simply amend. It is an accepted rule of statutory construction that legislation which revises an entire statute

creates the strong implication of a legislative intent not only to repeal, but to supersede the common law regarding the same subject. See, Sutherland, Statutory Construction, Section 23.13.

It is also generally held that the repeal of a statutory provision revised the common law as it existed prior to the enactment of the statute. Sutherland, Section 50.01; see, also State v. Charleston Bridge Company, 113 S.C. 116, 101 S.E. 657 (1990).

The common law applies in South Carolina, but may be replaced by statute. Given the above rules of statutory construction, the question presented is whether or not a common law writ of certiorari existed for review of denial of a CWP prior to the enactment of Subsection (c). My research has shown that, as noted above, Subsection (c) was enacted in 1974. The earliest prohibition about carrying a concealed pistol is in Act 362 of 1880, found at page 447 of the Acts and Joint Resolutions of the General Assembly for that year. Later versions modified the prohibition to include the carrying of a pistol, concealed or otherwise, but it wasn't until 1974 that the authority to issue CWPs was granted to SLED.

Based upon this review, it is clear the General Assembly has intended that the privilege to carry a concealed pistol is exactly that: a privilege, created by statute, even subject to total repeal if the General Assembly were to strike Section 23-31-120 in its entirety.

The question remains whether or not the writ of certiorari existed under the common law for review of a decision by SLED. Generally speaking, a writ of certiorari is defined as a writ from a superior court issued to an inferior court, tribunal, officer or board, to send up the record of a particular case for review. See, 14 C.J.S. "Certiorari", Section 2. Certiorari is described as an extraordinary writ, resorted to for supplying a defect in justice, in cases "obviously entitled" to redress, yet unprovided for by ordinary forms of proceedings. It exists to enforce rights, but not to compel performance. Id., Section 3.

However, a writ of certiorari cannot be used to control the discretion lodged by law in the Chief Executive of South Carolina, and, is reasonable to suggest, SLED, since the Division is a branch of the Executive Department of this state. In Wyse v. Wolfe, 129 S.C. 499, 123 S.E.2d 818 (1924) the Court, citing the above rule, stated that:

> The writ will not lie to review errors or mistakes in matters of discretion, where the Court has acted within its jurisdiction, and

> where there has been no disregarding by the Court of the procedures described by law.

129 S.C. at 503.

In addition, for a writ of certiorari to lie under the common law, there must have been a judicial or quasi-judicial act undertaken by the inferior court, tribunal, officer or board, which affected a legal or property right in a manner similar to the procedure of a court. To be reviewed under a common law writ, for example, the act of an administrative body, such as SLED, must have been made with notice and an opportunity to have been heard, and a hearing provided to the applicant. In other words, the act must have contained some of the characteristics of a judicial proceeding. In the instant case, SLED's issuance of CWPs does not contain those characteristics, and therefore would reasonably be understood not to be a quasi-judicial act.

To summarize, the General Assembly in 1974 created by statute authorization for SLED to issue a CWP. At the same time the General Assembly created a provision for appeal, where a CWP was denied, to the Circuit Court for the county of the applicant's residence, to be heard as on certiorari. In 1994 the General Assembly repealed that provision, thereby effectively eliminating judicial review. Since SLED's actions do not appear to be judicial or quasi-judicial, and were undertaken by a part of the Executive branch of government, it would appear that there is no common law writ of certiorari to be restored by the repeal of the statute.

Whether or not SLED would be advised to solicit legislative assistance in restoring judicial review would be a decision of policy, and not a legal recommendation. SLED could, as an alternative, consider promulgating regulations to provide for some sort of administrative appeal within the agency, but again, whether or not to pursue that would be a question of policy.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

Yours very truly,

James G. Bogle, Jr.
Senior Assistant Attorney General

JGB,JR:jca