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CHARLES MOLONY CONDON
ATTORNEY GENERAL

June 18, 1997

Captain Mark A. Keel
South Carolina Law Enforcement Division
P. O. Box 21398
Columbia, South Carolina 29221-1398

Re: Informal Opinion

Dear Captain Keel:

You have asked for an opinion concerning the Law Abiding Citizens Self-Defense Act of 1996. You state that "[t]he law enforcement community has expressed great interest and concern whether it would be appropriate for them to separate an individual from his handgun upon encountering that person while conducting law enforcement business." You note that S.C. Code Ann. Sec. 23-31-215 (k), which is part of the Act, provides that

> [a] permit holder must have his permit identification card in his possession whenever he carries a concealable weapon. A permit holder must inform a law enforcement officer of the fact that he is a permit holder and present the permit identification card when an officer (1) identifies himself as a law enforcement officer and (2) request[s] identification of a driver's license from a permit holder.

Furthermore, you state that

> [i]n my opinion, it may be permissible to temporarily separate the permit holder from his weapon based upon the U.S. Supreme Court decision in Terry v. Ohio. Recall that Terry

Request Law

> allows officers to conduct a "pat down" or frisk of the suspect, but only if the officer has reason to believe that the person is armed and dangerous. In the scenario that I've presented, the officer upon being informed and confronted by a permit holder obviously has reason to believe that the person is armed and could be dangerous. The sole purpose of Terry is not to discover evidence but to enable a police officer to pursue his or her investigation without fear of violence. Temporarily separating an individual from his handgun, though he is a permit holder, does not seem to be so intrusive of his rights often taking into consideration officer safety. After the encounter or confrontation with the officer is completed without an arrest, the officer would simply return the handgun to the permit holder.

LAW / ANALYSIS

In Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), the United States Supreme Court authorized limited intrusions such as "stop and frisk" or a "pat-down" search with less than the usually requisite Fourth Amendment standard of probable cause. The Court recognized that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." 88 S.Ct. at 1880. Beyond this, however, the Terry Court further noted the "crux" of the case before it was not the officer's steps taken to investigate suspicious behavior but "... whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons as part of that investigation." Id. at 1881. The Court believed it "would be unreasonable to require that police officers take unnecessary risks in the performance of their duties ..." and, therefore,

> ... we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the

> person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id. Therefore, the Court reasoned that

> [o]ur evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed: The issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger ... . And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Id. at 1883. Thus, because "Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons", such search was valid under the Fourth Amendment. Id. at 1885.

With the Terry background in mind, I turn to your specific question. Our Supreme Court has applied Terry in a number of cases. In State v. Fowler, ___ S.C. ___, 471 S.E.2d 706 (1996), the Court of Appeals set forth the following standard:

> [t]he police may stop, and briefly detain, a person for investigative purposes when an officer has a reasonable suspicion supported by articulate facts the person is involved in criminal activity.

If the Terry stop is proper, the Fowler Court concluded that

> ... before the police may frisk a defendant, they must have a reasonable belief the defendant is armed and dangerous.

> Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed. 238 (1979). In other words, a reasonable person in the position of the officer must believe the frisk was necessary to preserve the officer's safety. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). An officer must be able to specify the particular facts on which he or she based his or her belief the suspect was armed and dangerous. Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) ... .

These general principles have been applied in a number of cases in other jurisdictions and which are analogous to your situation. For example, in Allen v. State of Md., 584 A.2d 1279 (Md.1991), the Court held that a police officer possessed reasonable suspicion to stop and frisk a defendant based on an anonymous tip that defendant was carrying a weapon where the tip provided an accurate description of suspect's appearance and precise location and the officers corroborated the description furnished by caller prior to stopping the defendant and the area where defendant was located was notorious for its drug activities, shootings and homicides.

Likewise, in United States v. Menard, 898 F.Supp. 1317 (N.D. Iowa W.D.1995), it was determined that a police officer possessed an articulable suspicion, and thus a sufficient basis, for a pat-down search for a weapon when he was reminded by a fellow officer of a safety report which indicated that the defendant might be armed with a pistol. The Court concluded the "[t]he report that Walker might be armed justified the minimal intrusion of a pat-down search for weapons." 898 F.Supp. at 1322 (citing United States v. Hughes, 15 F.3d 798, 801 (8th Cir.1994)[where officers had been informed by confidential informants that defendant often carried weapon and had been convicted of earlier weapons violation, officers were justified in conducting a protective pat-down search] and U.S. v. Bonds, 829 F.2d 1072, 1074 (11th Cir.1987) [where officer who encountered defendant while searching another individual's apartment and had been told that defendant often carried a weapon was entitled to pat down defendant to insure his safety]).

A case even closer to the situation which you raise is State v. Leowen, 647 P.2d 489 (Wash.1982). There, an automobile accident victim was unable to identify herself to the investigating officer. The officer looked through a wallet found on the floor of the front seat of the automobile in an effort to determine the victim's identity. He found a concealed weapons permit, but no driver's license or photograph. The officer conducted a pat-down search for weapons based upon discovery of the concealed weapons permit. While the search was deemed by the Court as overly broad because it went beyond a

weapons check, the Court left no doubt that the weapons search itself was authorized. Said the Court,

> [b]oth the trial court and the Court of Appeals held the pat-down search was justified. The United States Supreme Court has permitted limited intrusions such as a "stop and frisk" or a "pat-down" search in situations when an officer reasonably apprehends danger. Terry v. Ohio, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968); see also State v. Hobart, 94 Wash.2d 437, 441, 617 P.2d 429 (1980). In determining whether such an intrusion is reasonable, we must determine "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Terry 392 U.S. at 20, 88 S.Ct. at 1879.

Based upon the foregoing authorities, I agree that the pat-down and removal of a weapon based upon the knowledge of the officer that the individual possessed a concealable weapons permit would be justified under Terry. The Court in Terry and in subsequent cases has emphasized repeatedly the overriding importance of the protection of the law enforcement officer's safety and security while conducting an investigation. Therefore, presuming the original stop by the officer is justified pursuant to the Terry standard, it is my opinion that the officer's knowledge of the probability of possession of a weapon based upon the concealable weapons permit would warrant the pat-down and temporary removal of the weapon.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy 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.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph