ALAN WILSON
ATTORNEY GENERAL

November 28, 2018

Mr. Clayton A. Pait
1734 Damon Drive
Florence, SC 29505

Dear Mr. Pait:

We received your request seeking an opinion on whether South Carolina State Constables are eligible to carry concealed handguns outside of South Carolina pursuant to the Law Enforcement Officer Safety Act. This opinion sets out our Office's understanding of your question and our response.

Issue:

Your extensive letter provides our Office with a great deal of background information and frames your legal question thus:

> I am seeking definitive clarification on whether, or not, South Carolina State Constables (specifically, Group III non-paid/volunteer State Constables) are granted the privilege of carrying their personal concealed firearms (handguns) while off-duty and traveling outside of the State of South Carolina, as per the Law Enforcement Officers' Safety Act (LEOSA), as currently amended. Furthermore, the question extends to such Constables after they achieve "Retired Constable" status (for which they are eligible after ten years of aggregated service), provided they continue to meet the annual firearm requalification training as set forth by S.C. State Law, and do not otherwise become prohibited from possessing or carrying firearms.

Response:

Our Office must decline to answer this question because we cannot opine on questions of federal law in the manner requested here. However, in order to be as responsive as possible to your question we will undertake to discuss powers and duties of a State Constable which appear to be consistent with the definition of a "qualified law enforcement officer" set out in the Federal LEOSA. We hope that this discussion of South Carolina law is helpful to you in shedding light on questions relating to the eligibility of a South Carolina State Constable to carry concealed

handguns outside of South Carolina under the federal Law Enforcement Officer Safety Act, but we cannot offer any formal conclusion in response to this particular question.

Discussion of the LEOSA

The Law Enforcement Officer Safety Act is a federal statute which gives qualifying law enforcement officers and qualifying law enforcement retirees the legal right to carry a concealed firearm in any state, notwithstanding that state's law to the contrary but subject to certain exceptions. The LEOSA, which is commonly but imprecisely referred to as "HR218," is codified at 18 U.S.C. § 926B and § 926C and reads, in relevant part:

> (a) Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).
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> (b) This section shall not be construed to supersede or limit the laws of any State that--
>
> > (1) permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or
> >
> > (2) prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park.
>
> (c) As used in this section, the term "qualified law enforcement officer" means an employee of a governmental agency who--
>
> > (1) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest or apprehension under section 807(b) of title 10, United States Code (article 7(b) of the Uniform Code of Military Justice);
> >
> > (2) is authorized by the agency to carry a firearm;
> >
> > (3) is not the subject of any disciplinary action by the agency which could result in suspension or loss of police powers;
> >
> > (4) meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm;

> (5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and
>
> (6) is not prohibited by Federal law from receiving a firearm.
>
> (d) The identification required by this subsection is the photographic identification issued by the governmental agency for which the individual is employed that identifies the employee as a police officer or law enforcement officer of the agency.

18 U.S.C. § 926B(a)-(c) (2013). Our Office is not aware of any reported cases originating in South Carolina relating to the LEOSA, but several other state and federal jurisdictions have addressed the definition of a "qualified law enforcement officer" under Section 926B(c). *See discussion, infra.* Of course, Section 926(B) is a federal statute which is intended by its express terms to supersede contrary state law in certain cases. 18 U.S.C. § 926B(a) (2013); *see also DuBerry v. District of Columbia*, 824 F.3d 1046, 1052 (D.C. Cir. 2016) ("Congress used categorical language . . . to preempt state and local law to grant qualified law enforcement officers the right to carry a concealed weapon."). While state courts sometimes must interpret and apply the LEOSA, our discussion here will focus on certain Federal Courts of Appeals decisions which explain how the LEOSA is intended to apply. We discuss a few of the relevant authorities in this opinion, with the caveat that this discussion is not exhaustive.

It appears that the federal court system for the District of Columbia has the most developed body of law in the country on the LEOSA, and this includes the ongoing litigation in the case of *DuBerry v. District of Columbia*, 824 F.3d 1046 (D.C. Cir. 2016). In *DuBerry*, certain retired District of Columbia correctional officers alleged that they were denied the appropriate credentials by the D.C. Department of Corrections which would have permitted them to carry weapons under the LEOSA. *Id.* at 1050. The District of Columbia in that case took the position that the corrections officers were not "qualified retired law enforcement officers" for purposes of the LEOSA because D.C. law did not recognize corrections officers as law enforcement officers, and D.C. law did not give them a general police arrest authority. *Id.* Those officers then brought an action under 42 U.S.C. § 1983 which "provides a remedy for the deprivation of federal constitutional and statutory rights by any person under color of state law." *Id.* Essentially, the officers argued that they had a right under the LEOSA to be issued appropriate credentials and that this federal statutory right had been violated. *Id.* The federal district court initially dismissed the claim on the basis that "any LEOSA right did not 'attach' until [the officers] obtained the firearms certification, and alternatively, that the LEOSA did not create a procedural right to have the Department correctly apply the LEOSA definition in processing appellants' prior employment certification form." *Id. at* 1050-51.

On appeal, the panel of the Court of Appeals for the D.C. Circuit reversed and held that the LEOSA did in fact create an individual legal right which is enforceable through a Section 1983 action. *DuBerry*, 824 F.3d at 1054-55. We must note that because of the procedural posture of the case the D.C. Circuit in *Duberry* stopped short of holding that held that the retired corrections officers were in fact "qualified retired law enforcement officers" for purposes of the LEOSA. *Id.* at 1053. ("The court must, on a motion to dismiss pursuant to Rule 12(b)(6), accept the allegations of the amended complaint as true."). However the majority opinion, authored by Judge Rogers and joined by then-Judge Kavanaugh, included some discussion the merits of the legal question, and we quote here at length from that opinion:

> To the extent these allegations present a legal question, it is not obvious that the District of Columbia's interpretation of the LEOSA "powers of arrest" is correct. In the LEOSA, Congress defined "qualified law enforcement officers" broadly, to include individuals who engage in or supervise incarceration. Given the breadth of Congress's definition, the reference to "statutory powers of arrest" necessarily means some statutory power of arrest such as a power to arrest parole violators, and not, as the District of Columbia suggests, only the police power to arrest upon probable cause, see Appellee's Br. 25. Further, contrary to the District of Columbia's suggestion at oral argument, the LEOSA does not require that, prior to retiring, a law enforcement officer's job required carrying a firearm in order to be a "qualified retired law enforcement officer[ ]."
>
> Second, the LEOSA right to carry is not the type of "vague and amorphous" right that is "beyond the competence of the judiciary to enforce." *Golden State*, 493 U.S. at 106, 110 S.Ct. 444 (quoting *Wright v. Roanoke Redevelop. & Housing Auth.*, 479 U.S. 418, 431–32, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987)). The LEOSA sets specific requirements for "qualified law enforcement officers" in historical and objective terms. The definition of such an officer is based on the service requirements of the officer's former law enforcement agency and the circumstances at the time of the officer's retirement. Had the officer been a law enforcement officer for at least ten years? Had the officer retired in good standing? Had the officer had a statutory power of arrest prior to retirement? The answers to these questions are to be found in the officer's personnel records and the statutes in effect before the officer retired. Similarly, the requirement for annual firearms training is defined as the standards for active duty officers and can be met through either the former employing agency or the officer's state of residence or a firearms trainer certified by that state. The LEOSA, then, falls on the side of statutes that are not so vague as to be judicially unenforceable, even where the states may retain some compliance discretion. *See*

> *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 519–20, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990).

Id. at 1053. After setting out this discussion, the Court of Appeals remanded the case to the district court for further proceedings. *Id.* at 1057. On remand, the district court held that the corrections officers did meet the definition of a "qualified retired law enforcement officer" for purposes of the LEOSA. *Duberry v. District of Columbia*, 316 F.Supp.3d 43, 57 (D.D.C. 2018). That case has been appealed once again to the D.C. Circuit, and a decision in that appeal has not yet been reported.

We also must note that the legal question at the center of the D.C. Circuit Court of Appeals decision in *Duberry* – whether a retired law enforcement officer has a federal right to obtain identification from their agency – is the subject of ongoing litigation throughout the country. For instance the opinion of the federal district court in *Burban v. City of Neptune Beach* observed that "the only circuit court to address the issue is the District of Columbia Circuit, which decided in *DuBerry* . . . that LEOSA did create such a right." *Burban v. City of Neptune Beach*, 2018 WL 1493177 (M.D. Fla 2018). But that district court also noted that "both before and after *DuBerry*, district courts . . . have reached a contrary conclusion." *Id.* at 6 (internal citations omitted). We quote that language here simply to highlight that there are legal questions surrounding the LEOSA which have yet to be fully resolved in the judicial system, including questions related to the rights of individuals with respect to the political jurisdictions which formerly employed them. *See id.*

By contrast, the court system District of Columbia also has several reported opinions related to Virginia Special Conservators of the Peace, or "SCOPs," and their eligibility to carry a firearm pursuant to the LEOSA. *See Thorne v. U.S.*, 55 A.3d 873 (D.C. 2012). In the way of background, it appears that the practice in Virginia is for private security companies on behalf of their employees to seek a state court order which gives that employee a commission as a SCOP. A SCOP commission gives that individual law enforcement authority within a certain geographic area and while carrying out the duties of their employment. *Id.* at 875. At least in some instances, that state court order also purports to expressly bestow upon a SCOP the status of a qualified law enforcement officer for purposes of the laws of the State of Virginia and the LEOSA. *See Ord v. District of Columbia* 587 F.3d 1136, 1138 (D.C. Cir. 2009). However, in the case of *Thorne v. U.S.* the D.C. Court of Appeals upheld the conviction of a SCOP found with a firearm in the District despite Virginia's grant of authority which included the power to carry a gun during the course of performing SCOP duties. *Thorne v. U.S.*, 55 A.3d 873 (D.C. 2012). The opinion in *Thorne* turned both on the defendant's status as an employee of a private corporation, and on a construction of the LEOSA:

> As discussed in our case law, the ordinary understanding of policemen and law enforcement officers is that these terms describe professionals with "general duties and broad authority." *Franklin v. United States*, 271 A.2d 784, 785 (D.C.1970); *see also Klopfer v. District of Columbia*, 25 App.D.C. 41, 44 (D.C.Cir.1905) (distinguishing "a special policeman for a special purpose" as someone "not subject to the performance of the general duties of a policeman, in the ordinary sense of that term"). Those general duties include the authority to carry a firearm at all times, see *Bsharah*, 646 A.2d at 999 (distinguishing between policemen, who are authorized to carry guns at all times, and special police officers, "who are authorized to carry firearms only when they are on duty"), and the authority to make arrests even when they are off duty, see *Bauldock v. Davco* Food, Inc., 622 A.2d 28, 34 (D.C. 1993) (recognizing that an off-duty police officer retains his authority to make arrests from his status as a Metropolitan Police Department officer). . . .
>
> Mr. Thorne is not a policeman or other duly appointed law enforcement officer under the ordinary sense of those terms because, outside of specific times when he is working, he does not have general police authority or authorization to carry a gun. His Order of Appointment from the City of Alexandria limits his authority as a conservator of the peace to times when he "is engaged in the performance of duties . . . at or on the premises described in the application." Similarly, his Order of Appointment from Fairfax County limits his authority to times when he "is engaged in the performance of duties . . . for the use in services contracted by Alexandria Security Patrol only." In addition, both orders specifically limit his ability to carry a firearm to times when he is on duty.

Id. at 878-79.

We have set out this law around Virginia SCOPs for two reasons. First, the reasoning of the D.C. Court of Appeals in *Thorne* implies that a state cannot expressly confer LEOSA protections simply by issuing an official statement or even a judicial determination that individuals qualify. *Id.* Of course the *DuBerry* case from the U.S. Court of Appeals for the D.C. Circuit stands for the rule that a jurisdiction likewise cannot deny LEOSA protections to qualifying individuals either. *See DuBerry v. District of Columbia*, 824 F.3d 1046, 1054-55 (D.C. Cir. 2016). Instead, the courts must determine whether a particular individual meets the statutory test set out in 18 U.S.C. § 926 by examining the powers and duties of an individual position under state or local law. *See id.* at 1053.

Finally we note that our research has identified at least one instance of the recognition of the right of certain state constables to carry pursuant to the LEOSA in a series of trial court

opinions in New York. *See Rodriguez v. City of New York*, 649 F.Supp.2d 301 (S.D.N.Y. 2009). We must emphasize that trial court opinions typically have no precedential value. And as you alluded to in your request letter, the powers and duties of a constable can vary significantly between two states. However, these opinions are perhaps the most directly responsive to your particular question, and accordingly we discuss them here with those caveats. Those cases are *Rodriguez v. City of New York*, 649 F.Supp.2d 301 (S.D.N.Y. 2009), and *Ramirez v. Port Authority of New York & New Jersey*, 2015 WL 9463185 (S.D.N.Y. Dec.28, 2015). In each of these cases, which otherwise are unrelated, the basic factual background was that a Pennsylvania state constable possessed a handgun in New York when encountering local law enforcement. 649 F.Supp.2d at 304-05; 2015 WL 9463185 at *1-2. In each case the individual identified himself as a constable to law enforcement, but nevertheless was arrested and indicted for illegal possession of a handgun. *Id.* In the case of Mr. Rodriguez the indictment ultimately was dismissed in an unreported state court decision which the D.C. Court of Appeals in *Thorne v. U.S.* described as a "[ruling] that an elected Pennsylvania constable who functioned as an 'independent contractor' but nonetheless was paid directly by the government[] was entitled to LEOSA's protection." *Thorne v. U.S.*, 55 A.3d 873, 882 (D.C. 2012) (internal citation omitted). Mr. Ramirez' indictment was dismissed on technical grounds which did not relate to the LEOSA. 2015 WL 9463185 at 2. In each case the constables thereafter brought civil suits involving the complex intersection of Section 1983 civil rights litigation and the LEOSA. *Id.* at 2-3; 649 F.Supp.2d at 303. We will not undertake to discuss those complexities more fully here, nor will we undertake to discuss the difference and similarities between Pennsylvania state constables and South Carolina state constables. For the purposes of this opinion, we simply highlight that in each of those reported decisions the federal district court for the Southern District of New York expressed or presumed that the Pennsylvania state constables were entitled to carry a handgun pursuant to the LEOSA, notwithstanding contrary state law in New York. *Rodriguez*, 649 F.Supp.2d at 305; *Ramirez*, 2015 WL 9463185 at *1-2, 6.

Discussion of a South Carolina Constable

Our Office has opined on several occasions regarding the power and duties of constables in South Carolina, and our summary of the law here should be read in the context of those prior opinions. *See, e.g., Ops. S.C. Att'y Gen.*, 2013WL 1695512 (April 4, 2013); 1995 WL 803315 (February 1, 1995); 2018 WL 1557222 (March 16, 2018).

South Carolina state constables are appointed by the Governor pursuant to Section 23-1-60, which reads in full:

> (A) The Governor may, at his discretion, appoint additional deputies, constables, security guards, and detectives as he deems necessary to assist in the detection of crime and the enforcement of the criminal laws of this State. The

> qualifications, salaries, and expenses of these deputies, constables, security guards, and detectives appointed are to be determined by and paid as provided for by law. Appointments by the Governor may be made pursuant to this section without compensation from the State. Appointments of deputies, constables, security guards, and detectives made without compensation from the State may be revoked by the Governor at his pleasure.
>
> (B) All appointments of deputies, constables, security guards, and detectives appointed pursuant to this section without compensation expire sixty days after the expiration of the term of the Governor making the appointment. Each Governor shall reappoint all deputies, constables, security guards, and detectives who are regularly salaried as provided for by law within sixty days after taking office unless the deputy, constable, security guard, or detective is discharged with cause as provided for by law.
>
> (C) All persons appointed pursuant to the provisions of this section are required to furnish evidence that they are knowledgeable as to the duties and responsibilities of a law enforcement officer or are required to undergo training in this field as may be prescribed by the Chief of the South Carolina Law Enforcement Division.
>
> (D) A voluntary deputy, constable, security guard, or detective appointed pursuant to this section, must be included under the provisions of the workers' compensation laws only while performing duties in connection with his appointment and as authorized by the State Law Enforcement Division. The workers' compensation premiums for these constables must be paid from the funds appropriated for this purpose upon warrant of the Chief of the State Law Enforcement Division.

S.C. Code Ann. § 23-1-60 (Supp. 2017).

Our Office has observed in numerous previous opinions that the territorial jurisdiction of a state constable extends to the entire state unless otherwise restricted by the terms of their commission or by statute. *See, e.g., Ops. S.C. Att'y Gen.* 1995 WL 803315 (February 1, 1995). Regarding the powers of a state constable, our Office has carefully reviewed the jurisprudence of our state's Supreme Court to reach a similar conclusion:

> This Office, citing the decision of the South Carolina Supreme Court in *State v. Luster*, 178 S.C. 199, 182 S.E. 427 (1935), has often concluded that State constables [[commissioned pursuant to § 23-1-60] possess the authority of regularly commissioned peace officers, including the power of arrest. *See, e.g.,*

Op. S.C. Attv. Gen., January 25, 1996 (1996 WL 82898). In *Luster*, the Court stated:

> [t]he trial judge held, and so instructed the jury, that Miliam, under the Commission given him by the Governor, was a peace officer of the State, and as such officer had the right and authority to arrest anywhere without a warrant any person committing a misdemeanor in his presence. This charge or holding, was unquestionably correct and was applicable under the facts of the case.

Id., 182 S.E. at 429. Thus, a State constable clearly possesses statewide law enforcement authority as a peace officer. The Court has stated that constables perform all the duties of law enforcement officers and, in particular, "a constable stands on the same footing as a sheriff." *State v. Franklin*, 80 S.C. 332, 338, 60 S.E. 953, 955 (1908). Therefore, a State constable whose commission has not been limited by the issuing authority, would generally be authorized to enforce all the laws of South Carolina anywhere in the State.

Op. S.C. Att'y Gen., 2013 WL 1695512 (April 4, 2013) (emphasis added).

Consistent with these powers, state constables are authorized to carry handguns anywhere in the state whether on duty or not. This authorization is derived from Subsection 16-23-20(1) of the South Carolina Code, the same statutory authority as other law enforcement officers:

> It is unlawful for anyone to carry about the person any handgun, whether concealed or not, except as follows, unless otherwise specifically prohibited by law:
>
> (1) regular, salaried law enforcement officers, and reserve police officers of a state agency, municipality, or county of the State, uncompensated Governor's constables, ...

S.C. Code Ann. § 16-23-20(1) (2015). We highlight that this statutory authority exists independently of any authorization pursuant to a Concealed Weapons Permit. *Cf.* § 16-23-20(1) (authorizing law enforcement officers, including constables, to carry a handgun) *&* § 16-23-20(12) (authorizing "a person who is granted a permit under provision of law by the State Law Enforcement Division to carry a handgun about his person, under conditions set forth in the permit.").

We also observe that while some state constables serve in a volunteer capacity, those constables "must be included under the provisions of the workers' compensation laws . . . while

performing duties in connection with his appointment and as authorized by the State Law Enforcement Division." S.C. Code Ann. § 23-1-60(D) (Supp. 2017). This also is consistent with the role of a constable as a peace officer who is "generally . . . authorized to enforce all the laws of South Carolina anywhere in the State" except as expressly restricted according to the terms of their commission.

Conclusion:

In conclusion, we hope that this discussion of South Carolina law is helpful to you in shedding light on questions relating to the eligibility of a South Carolina State Constable to carry concealed handguns outside of South Carolina under the federal Law Enforcement Officer Safety Act. We must reiterate that this Office cannot opine on questions of federal law in the manner requested here and therefore we cannot offer any formal conclusion in response to this particular question. In this opinion we merely have discussed ways in which the powers and duties of a State Constable appear to be consistent with the definition of a "qualified law enforcement officer" set out in the Federal LEOSA.

This Office has reiterated in numerous opinions that it strongly supports the Second Amendment and the right of citizens to keep and bear arms. *See, e.g., Op S.C. Att'y Gen.*, 2015 WL 4596713 (July 20, 2015). But we must note that some other jurisdictions prosecute handgun possession very aggressively, including cases where courts ultimately have found that the LEOSA permits an individual to carry a firearm contrary to state law. *See Rodriguez v. City of New York*, 649 F.Supp.2d 301 (S.D.N.Y. 2009). Accordingly, South Carolina constables who choose to rely upon the LEOSA to travel with their firearms outside of South Carolina do so at their own risk until there is a judicial resolution of this question.

Sincerely,

David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General