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Memorandum

To: Chief State's Attorney Kevin T. Kane, Deputy Chief State's Attorney Leonard C. Boyle, Deputy Chief State's Attorney John J. Russotto, Chief Inspector James M. Hankard, Chief Inspector Michael P. Sullivan

From: T. Sugrue

Date: February 5, 2016

Re: **"Open-Carry": Enforcement of General Statutes § 29-35 (b) as Amended in 2015**

As amended by section 2 of Public Act 15-216, General Statutes § 29-35 (b) provides as follows:

The holder of a [pistol] permit issued pursuant to section 29-28 shall carry such permit upon one's person while carrying such pistol or revolver. Such holder shall present his or her permit upon the request of a law enforcement officer who has reasonable suspicion of a crime for purposes of verification of the validity of the permit or the identification of the holder, provided such holder is carrying a pistol or revolver that is observed by such law enforcement officer.

(Emphasis added.) As might be expected, this statutory amendment has created a fair amount of confusion and uncertainty regarding the authority of the police to demand, and obligation of the holder to present, his pistol permit under circumstances where the only information available to the police officer is the otherwise non-criminal observation that the person is carrying a firearm outside of his home or place of business.

Based on the plain language of the statute, as amended, a police officer's authority to demand production of the permit is dependent upon his or her possessing a reasonable suspicion of a crime. By itself, without more, merely observing a person openly carrying a handgun does not give rise to criminal suspicion because doing so is lawful in Connecticut by persons who possess a pistol permit. In this regard, openly carrying a gun is legally akin to driving a motor vehicle; both activities are potentially dangerous, heavily regulated, and require a permit/license to engage in. Just as a police officer cannot lawfully stop a motor vehicle based merely on observing a person operating one, in order to determine whether that person is licensed, the officer cannot lawfully seize a

person merely on observing him openly carrying a gun in order to determine whether that person has a pistol permit.

It is important to note that an officer does not need reasonable suspicion of a crime to conduct a consensual encounter. So long as the officer does not "seize" the person by a show of authority or physical force, he may approach a person observed carrying a gun, engage the person in conversation, and ask him to show his permit. Without more, however, the officer cannot demand the permit, lawfully seize the person if he wishes to leave, or arrest him for interfering if he refuses to produce the permit.

This memo does not address the typical "Terry stop" in which an officer develops a reasonable suspicion to believe that criminal activity unrelated to carrying a gun may be afoot and, either during the investigation or the ensuing detention, observes a gun on the suspect or discovers that he possesses one.

This memo deals only with the scenario in which a police officer harboring no preconceived criminal suspicion observes a person openly carrying a gun either as a result of a citizen complaint or as a result of a chance observation by the officer. In these scenarios, the reasonable suspicion required to justify a demand for production of a permit may be based on any of the following:

Crimes Against Public Order. In Peruta v. Commissioner of Public Safety, 128 Conn. App. 777, 794, cert. denied, 302 Conn. 919 (2011), the Appellate Court observed generally that, "depending on the specific circumstances, a person who openly carries a pistol conceivably may be subject to arrest for violating several statutes, even if § 29-35 does not prohibit a permit holder from carrying a pistol openly" (footnote omitted).

The offense most likely falling into this category is Disorderly conduct, a class C misdemeanor, in violation of § 53a-182, which provides in pertinent part as follows:

(a) A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: ... (2) by offensive or disorderly conduct, annoys or interferes with another person....

Note that creating a public disturbance, in violation of § 53a-181a (a) (2), is virtually identical to disorderly conduct set forth above. Creating a public disturbance, however, is an infraction, and an expedient way to avoid the person later arguing that an infraction is not a "crime" for purposes of reasonable suspicion under the statute (likely a poor argument) is to act upon suspicion of disorderly conduct, which unquestionably is a crime.

For purposes of disorderly conduct,
the predominant intent is to cause what a reasonable person operating under contemporary standards would consider a disturbance to or

impediment of a lawful activity, a deep feeling of vexation or provocation, or a feeling of anxiety prompted by threatened danger or harm. State v. Indrisano, 228 Conn. 795, 810 (1994); State v. Wolff, 237 Conn. 633, 670 (1996). A person acts recklessly “with respect to a result or a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.” See § 53a-3 (13).

No Connecticut court has yet to determine whether, and under what circumstances, openly carrying a gun in a public place gives rise to a reasonable suspicion that disorderly conduct has been or is being committed. Based on the widespread proliferation of gun violence in contemporary American society, especially random mass shootings, and the provocation that is inherent in any person who is not readily identifiable as a law enforcement agent or armed security agent openly carrying a handgun in a public place, it is reasonable to suspect, in situations in which the police are present in response to a citizen complaint reporting concern over a person carrying a gun, that the crime of disorderly conduct, in violation of § 53a-182 (a) (2), is being or has been committed. Prior to making a demand for production, the officer should speak with the complainant and gather any other pertinent information, including that relating to events that occurred before the officer(s) arrived on-scene, and to watch the person carrying the gun for any signs of nervousness, inappropriate sweating, lack of eye contact, and evasiveness, among other indicia of suspicion. Pertinent information to note in a report also includes, where applicable, the high incidence of criminal activity, especially crimes of gun violence, in the area or at the specific site in question.

Another offense that might fall into this category depending upon the circumstances is Breach of peace in the second degree, a class B misdemeanor, in violation of General Statutes § 53a-181, which provides in pertinent part as follows:

(a) A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or ... (5) in a public place, uses abusive or obscene language or makes an obscene gesture.... For purposes of this section, “public place” means any area that is used or held out for use by the public whether owned or operated by public or private interests.

The same intent, described above for disorderly conduct, also is required for breach of peace.

Knowledge or Suspicion Relating to Person's Status: A lawful demand for production may be based on actual knowledge or a reasonable suspicion to believe that the person's is in criminal possession thereof in violation of General Statutes § 53a-217c, which provides that:

(a) A person is guilty of criminal possession of a pistol or revolver when such person possesses a pistol or revolver, as defined in section 29-27, and **(1)** has been convicted of a felony committed prior to, on or after October 1, 2013, or of a violation of section 21a-279 or section 53a-58, 53a-61, 53a-61a, 53a-62, 53a-63, 53a-96, 53a-175, 53a-176, 53a-178 or 53a-181d committed on or after October 1, 1994, **(2)** has been convicted as delinquent for the commission of a serious juvenile offense, as defined in section 46b-120, **(3)** has been discharged from custody within the preceding twenty years after having been found not guilty of a crime by reason of mental disease or defect pursuant to section 53a-13, **(4) (A)** has been confined prior to October 1, 2013, in a hospital for persons with psychiatric disabilities, as defined in section 17a-495, within the preceding twelve months by order of a probate court, or has been confined on or after October 1, 2013, in a hospital for persons with psychiatric disabilities, as defined in section 17a-495, within the preceding sixty months by order of a probate court, or, with respect to any person who holds a valid permit or certificate that was issued or renewed under the provisions of section 29-28 or 29-36f in effect prior to October 1, 2013, such person has been confined in such hospital within the preceding twelve months, or **(B)** has been voluntarily admitted on or after October 1, 2013, to a hospital for persons with psychiatric disabilities, as defined in section 17a-495, within the preceding six months for care and treatment of a psychiatric disability and not solely for being an alcohol-dependent person or a drug-dependent person as those terms are defined in section 17a-680, **(5)** knows that such person is subject to **(A)** a restraining or protective order of a court of this state that has been issued against such person, after notice and an opportunity to be heard has been provided to such person, in a case involving the use, attempted use or threatened use of physical force against another person, or **(B)** a foreign order of protection, as defined in section 46b-15a, that has been issued against such person in a case involving the use, attempted use or threatened use of physical force against another person, **(6)** knows that such person is subject to a firearms seizure order issued pursuant to subsection (d) of section 29-38c after notice and an opportunity to be heard has been provided to such person, **(7)** is prohibited from shipping, transporting, possessing or receiving a firearm pursuant to 18 USC 922(g)(4), or **(8)** is an alien illegally or unlawfully in the United States. For the purposes of this section, “convicted” means having a judgment of conviction entered by a court of competent jurisdiction. [Emphasis added.]

A lawful demand for production also may be based on actual knowledge or suspicion that the person is not carrying his permit on his person in violation of § 29-35 (b). Although this is only an infraction pursuant to § 29-37 (c), it is a violation of the law that the police officer cannot process without possessing the authority to demand the permit

for purposes of confirmation. It is akin to stopping a motor vehicle for a traffic infraction and demanding the operator's license.

Suspicion Based on the Manner of Carrying: A lawful demand for production may be based on observations that the person is carrying or displaying the gun in an unsafe or unorthodox manner, atypical of persons with permits and the basic training that getting a permit entails. A good example is United States v. Wiggan, 530 Fed. Appx. 51, 55-56 (2d Cir. 2013), a case in which the following specific, articulable facts were held to give rise to the reasonable suspicion needed to detain the suspect and demand his permit: The suspect was in a barbershop, he appeared nervous in the presence of the police, and the police saw the grips of a firearm sticking out of his front pants pocket. The manner in which the gun was being carried was an important factor based upon the testimony given by one of the officers at the suppression hearing that, in his experience, people who are legally in possession of a firearm usually carry it secured in a holster, while people who are in illegal possession of a firearm typically keep it in their “[f]ront pocket or tucked [loosely] into their waistband or inside a coat or jacket.”

Suspicion Based on Place: A lawful demand for production may be based on actual knowledge or a reasonable suspicion that the person is carrying the gun on school grounds, in violation of General Statutes sec. 53-217b, which provides that:

(a) A person is guilty of possession of a weapon on school grounds when, knowing that such person is not licensed or privileged to do so, such person possesses a firearm or deadly weapon, as defined in section 53a-3, (1) in or on the real property comprising a public or private elementary or secondary school, or (2) at a school-sponsored activity as defined in subsection (h) of section 10-233a.

(b) The provisions of subsection (a) of this section shall not apply to the otherwise lawful possession of a firearm (1) by a person for use in a program approved by school officials in or on such school property or at such school-sponsored activity, (2) by a person in accordance with an agreement entered into between school officials and such person or such person's employer, (3) by a peace officer, as defined in subdivision (9) of section 53a-3, while engaged in the performance of such peace officer's official duties, or (4) by a person while traversing such school property for the purpose of gaining access to public or private lands open to hunting or for other lawful purposes, provided such firearm is not loaded and the entry on such school property is permitted by the local or regional board of education.

With respect to places in which the person is observed carrying the gun, note that, pursuant to § 29-28 (e),

The issuance of any permit to carry a pistol or revolver does not thereby authorize the possession or carrying of a pistol or revolver in any premises

where the possession or carrying of a pistol or revolver is otherwise prohibited by law or is prohibited by the person who owns or exercises control over such premises.

In accordance with § 29-37 (a), a violation of § 29-28 is a class E felony. Owners of quasi-public private premises, like eateries and retail establishments, may avail themselves of the above by posting "No Guns Allowed" signs in prominent places.

Suspicion Based on Age: A lawful demand for production may be based on actual knowledge or a reasonable suspicion that the person is under age. See General Statutes sec. 29-28 (b) (only persons age 21 and older may hold a permit).

Suspicion Based on Sobriety: A lawful demand for production may be based on actual knowledge or a reasonable suspicion that the person is not sober. See General Statutes sec. 53a-206d (criminal to possess or carry a firearm while under the influence of alcohol or drugs).

In every case in which an officer demands production of a permit, he or she should be scrupulous in documenting all of the pertinent information that was relied upon in doing so.

Specific questions regarding this memo and questions in particular cases must be addressed to the appropriate Office of the State's Attorney.