STATE OF SOUTH DAKOTA

OFFICE OF ATTORNEY GENERAL
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX (605) 773-4106
www.state.sd.us/atg

LARRY LONG
ATTORNEY GENERAL

MARK BARNETT
CHIEF DEPUTY ATTORNEY GENERAL

September 17, 2004

The Honorable Larry Rhoden
District 29
P.O. Box 512
Union Center, SD 57787-0512

Re: Handguns in vehicles

Dear Representative Rhoden:

You have asked for an opinion from this Office regarding the legality of having a handgun in a motor vehicle. The answer to your question requires an interpretation of state criminal statutes. This Office generally does not issue opinions interpreting criminal statutes. Such opinions are not binding on either local prosecutors or judges. However, as you point out, because various members of law enforcement in South Dakota disagree about the interpretation of the concealed weapons statutes, I have departed from my usual practice. This opinion will serve as a guide to law enforcement until a definite opinion is issued or the Legislature modifies the statute.

You have asked the following question.

Question: Whether SDCL 22-14-9 and 22-14-10 indicates that handguns in motor vehicles[1] should automatically be considered "concealed?"

In re question: Based upon the following review of legislative history and applying rules of statutory construction, it is my opinion that under SDCL 22-14-9 and -10 a hand gun in a motor vehicle should not automatically be considered "concealed."

1. History of concealed weapon statutes

The original versions of SDCL 22-14-9 and -10 are found at SDC 1939, §§ 21.0105 through 21.0107. These statutes provided:

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[1] Motorcycles are specifically addressed in SDCL 32-20-6.6 and not intended to be a part of this discussion.

21:0105 Carrying pistol. No person shall carry a pistol in any vehicle or concealed on or about his person, except in his place of abode or fixed place of business, without a license therefore as hereinafter provided.

Source: § 5, ch. 208, 1935.

21.0106 Exception. The provisions of the preceding section shall not apply to marshals, sheriffs, prison or jail wardens, or their deputies, policemen, or other law enforcement officers or employees of railway or express companies while on duty, or to members of the Army, Navy, or Marine Corps of the United States or of the National Guard or organized reserves when on duty, or to the regularly enrolled members of any organization duly authorized to purchase or receive such weapons from the United States or from this state, provided such members are at or are going to or from their places of assembly or target practice, or to officers or employees of the United States duly authorized to carry a concealed pistol, or to any person engaged in the business of manufacturing, repairing, or dealing in firearms or the agent or representative of any such person having in his possession, using, or carrying a pistol in the usual or ordinary course of such business, or to any person while carrying a pistol unloaded and in a secure wrapper from the place of purchase to his home or place of business or to a place of repair or back to his home or place of business or in moving from one place of abode or business to another.

Source: § 6, ch. 208, 1935.

21.0107 Issue of licenses to carry. The judge of a court of record, the chief of police of a municipality, the sheriff of a county, may upon the application of any person issue a license to such person to carry a pistol in a vehicle or concealed on or about his person within this state for not more than one year from date of issue, if it appears that the applicant has good reason to fear an injury to his person or property, or has any other proper reason for carrying a pistol and that he is a suitable person to be so licensed. The license shall be in triplicate in form to be prescribed by the

> Secretary of State and shall bear the name, address, description, and signature of the licensee and the reason given for desiring a license. The original thereof shall be delivered to the licensee, the duplicate shall within seven days be sent by registered mail to the Secretary of State, and the triplicate shall be preserved for six years by the authority issuing said license. The fee for issuing such license shall be fifty cents, which fee shall be collected by the official issuing such license and shall be remitted by him to the State Treasurer.
>
> Source: §7, ch. 208, 1935.

It is clear that the original statutory scheme prohibited carrying a handgun in a vehicle unless a license to do so had been issued.

In 1966, the Legislature enacted SDCL 23-7-5. That statute provided, "No person shall carry a pistol in any vehicle or concealed on or about his person, except in his place of abode or fixed place of business, without a license therefore as provided in SDCL 23-7-7 and 23-7-8." This was repealed by SL 1976 ch. 158, § 14-14, and replaced by SDCL 22-14-9 and -10.

SDCL 22-14-9 originally set forth:

> Any person who:
>
> (1) Carries a pistol or revolver, loaded or unloaded, concealed on or about his person without a license as provided in chapter 23-7 or:
>
> (2) Carries a pistol or revolver, loaded or unloaded, <u>concealed</u> <u>or</u> <u>otherwise</u>, in any vehicle operated by him, without a license as provided in chapter 23-7.

is guilty of a class 1 misdemeanor (emphasis added). SL 1976 ch. 158, § 14-6. That statute was amended the following year to read:

> 22-14-9. Any person, other than a law enforcement officer when acting as such, who:
>
> (1) Carries a pistol or revolver, loaded or unloaded, concealed on or about his person without a license as provided in chapter 23-7; or
>
> (2) Carries a pistol or revolver, loaded or unloaded, <u>concealed</u> <u>in</u> <u>any</u> <u>vehicle</u> <u>operated</u> <u>by</u>

> him, without a license as provided in chapter 23-7,

is guilty of a class 1 misdemeanor (emphasis added). SL 1977, ch. 189, § 29. Thus, the Legislature removed the "or otherwise" modifier of "concealed."

In 1985 the Legislature defined "concealed" as, "any firearm that is totally hidden from view. If any part of the firearm is capable of being seen, it is not concealed." SL 1985, ch. 190, § 4; SDCL 22-1-2(6).

Finally, SDCL 22-14-10 contains exceptions to the provisions of SDCL 22-14-9 and provides:

> Section 22-14-9 does not apply to persons who carry one or more unloaded pistols or revolvers for the purpose of, or in connection with, any lawful use, if the unloaded weapon or weapons are carried:
>
> (1) In the trunk or other closed compartment of a vehicle; or
>
> (2) In a closed container which is too large to be effectively concealed on the person or within his clothing. The container may be carried in a vehicle or in any other manner.
>
> Any person who complies with this section may not be required to obtain a permit for the lawful uses herein described.

In summary, the law originally stated that a person needed a license to carry a handgun in a vehicle. The law was refined a bit to provide that such a license was needed whether the handgun was concealed or otherwise carried. Our lawmakers then removed the "or otherwise" language and seemingly limited the license to a concealed carry situation. Lastly, the Legislature provided if any part of the firearm is capable of being seen, it is not "concealed."

2. Statutory Construction:

For the purposes of determining legislative intent, courts must assume that the Legislature in enacting a provision has in mind previously enacted statutes relating to the same subject matter. State v. Hirsch, 309 N.W.2d 832, 835 (S.D. 1981). Where the Legislature amends the terms of a statute, it is generally presumed that the lawmakers intended to alter the meaning of the statute. State v. Heisinger, 252 N.W.2d 899, 903 (S.D. 1977; Rosander v. Board of County Commissioners of Butte County, 336 N.W.2d 160, 161 (S.D. 1983).

> [A]n amendment substituting a new term or phrase for one previously construed indicates that the

> judicial or executive construction of the former term or phrase did not correspond with the legislative intent and a different interpretation should be given the new term or phrase.

State v. One 1972 Lincoln Continental, 295 N.W.2d 343, 345 (S.D. 1980) (Wollman, Chief Justice, dissenting).

> It is a cardinal principle of statutory construction to give effect to the legislative intent where possible. It is further an established principle of statutory construction that, where the wording of an act is changed by amendment, it is evidential of an intent that the words shall have a different meaning.

In re Dryer, 41 S.D. 350, 207 N.W. 210, 212 (1926).

Applying the above rules of construction to the legislative history answers your question. Reviewing the various amendments, it is my opinion that Legislature did not intend to require a license or a permit to carry a handgun in a vehicle if any part of the firearm is capable of being seen. Therefore the criminal sanctions in SDCL 22-14-9 do not apply unless the handgun is truly "concealed." If the firearm is "concealed" within a motor vehicle and thus completely incapable of being seen, the carrier must either have a license or permit or comply with the provisions of SDCL 22-14-10.

Very truly yours,

Larry Long
Attorney General

LL/RM/kak

cc: State's Attorneys

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