



STATE OF ARKANSAS  
ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2015-113

February 8, 2016

The Honorable Mark Martin  
Secretary of State  
Arkansas State Capitol, Room 256  
Little Rock, AR 72201

Dear Mr. Martin:

This is in response to your request for my opinion on the following questions concerning Ark. Code Ann. § 5-73-122, as it relates to the carrying of a firearm on State Capitol grounds:

1. Does the State Capitol Police Department need to change its interpretation of Ark. Code Ann. § 5-73-122(a)(1), or can the State Capitol Police Department continue to rely upon its operative interpretation that Ark. Code Ann. § 5-73-122(a)(1) prohibits the carrying of any firearm on the State Capitol Grounds, irrespective of whether the firearm is loaded or unloaded, unless an explicit statutory exception applies?
2. Can other police departments, exercising concurrent jurisdiction over the State Capitol grounds, rely upon the State Capitol Police Department's interpretation that Ark. Code Ann. § 5-73-122(a)(1) prohibits the carrying of firearms on the State Capitol Grounds, irrespective of whether the firearm is loaded or unloaded, unless an explicit statutory exception applies; or do the other police departments need to obtain an independent opinion from their counsel?
3. Is the statutory definition of the term "deadly weapon," [as] set forth [in] Ark. Code Ann. § 5-1-102, constitutionally adequate to

make the statute, Ark. Code Ann. § 5-73-122(a)(1), sufficiently definite for purposes of criminal enforcement?

4. Does the use of the term “loaded firearm” in the statutory section, Ark. Code Ann. § 5-73-122(a)(1), render ambiguous the use of the term “deadly weapon” in that same statutory section, in any way?
5. Is there any need for legislative clarification of these issues in light of the enactment of Act 746 of 2013 and your Opinion No. 2015-064, dated on or about August 28, 2015?

## INTRODUCTION AND SUMMARY

It is illegal to “knowingly carry or possess *a firearm, whether loaded or unloaded*, in the State Capitol Building or the Justice Building in Little Rock.” Ark. Code Ann. § 5-73-122(a)(2) (Supp. 2015). State Capitol Police can certainly rely on Ark. Code Ann. § 5-73-122(a)(2) to prohibit the carrying or possession of a firearm, whether loaded or unloaded, in the State Capitol Building. Any person carrying or possessing a firearm, whether loaded or unloaded in the State Capitol Building, is subject to arrest.

Your question, however, is not about the State Capitol building. Rather, your question concerns the State Capitol grounds outside the building. The relevant criminal prohibition for State Capitol grounds is worded very differently from the criminal prohibition for the State Capitol Building. Subsection (a)(1) of section 5-73-122 makes it a Class A misdemeanor for any person to carry or possess a “loaded firearm or other deadly weapon” on the State Capitol grounds. In my opinion, the language used by the legislature makes clear that the statute does not criminalize carrying or possessing an *unloaded* firearm on the State Capitol grounds. Accordingly, I do not believe that the State Capitol Police Department can rely on Ark. Code Ann. § 5-73-122(a)(1) to arrest persons carrying or possessing an *unloaded* weapon on State Capitol grounds.

There are several caveats to this opinion. *First*, notwithstanding the foregoing, the State Capitol Police has broad statutory authority to maintain order on the Capitol grounds and exclude and eject persons from the grounds. “Except to the extent otherwise limited by the Secretary of State,” the Capitol Police—in addition to having arrest authority—is charged with protecting the State Capitol grounds and preserving and maintaining order and decorum on the grounds. Ark. Code Ann. § 12-14-102(a) (Repl. 2009). In this regard, the Capitol Police is authorized to

“[e]xclude and eject persons from and prevent trespass upon and in all of the State Capitol grounds....” Ark. Code Ann. § 12-14-102(a)(4).

Based on this broad grant of authority, the State Capitol Police may choose to exclude from the Capitol grounds firearms and/or persons carrying firearms, whether the firearm is loaded or unloaded. If the Capitol Police lawfully orders a person to stay off the Capitol grounds or to leave the grounds, defiance of that order could result in arrest for criminal trespass. The State Capitol Police’s decision to exclude firearms or persons carrying or possessing firearms from the Capitol grounds is subject to only two types of limitations: (1) limitations imposed on the State Capitol Police by the Secretary of State, and (2) limitations imposed by other provisions allowing firearms on the State Capitol grounds for certain limited events or activities.

*Second*, any person who carries a firearm should be aware that a law enforcement officer might lawfully inquire into that person’s purpose. Determining culpability or potential culpability under section 5-73-122(a)(1) (making it illegal to carry or possess a “loaded firearm or other deadly weapon” on the State Capitol grounds) is initially a matter for law enforcement following guidelines that routinely apply when investigating a criminal offense involving the danger of forcible injury to persons. A law enforcement officer may stop and detain any person reasonably suspected of violating section 5-73-122(a)(1) if necessary to identify the person or determine the lawfulness of his or her conduct.<sup>1</sup>

Whether an officer has reasonable suspicion will depend upon a number of circumstance-specific factors. Some of these factors are recounted in Ark. Code Ann. § 16-81-203 (Repl. 2005), including: the demeanor of the suspect; the gait and manner of the suspect; whether the suspect is carrying anything, and what he or she is carrying; the particular streets and areas involved; any information received from third parties; and the apparent effort of the suspect to avoid identification or confrontation by a law enforcement officer.

*Third*, this opinion only addresses the question whether it is illegal under Ark. Code Ann. § 5-73-122 to carry an unloaded firearm on the State Capitol grounds. I therefore do not address whether the conduct in question might be unlawful under some other statute not brought to my attention.

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<sup>1</sup> See Ark. R. Crim. P. 3.1 (2014).

## QUESTIONS AND DETAILED RESPONSES

***Question 1 - Does the State Capitol Police Department need to change its interpretation of Ark. Code Ann. § 5-73-122(a)(1), or can the State Capitol Police Department continue to rely upon its operative interpretation that Ark. Code Ann. § 5-73-122(a)(1) prohibits the carrying of any firearm on the State Capitol Grounds, irrespective of whether the firearm is loaded or unloaded, unless an explicit statutory exception applies?***

With certain exceptions, Ark. Code Ann. § 5-73-122(a)(1) makes it unlawful for any person to carry a “loaded firearm or other deadly weapon” on the State Capitol grounds (among other locations):

Except as provided in § 5-73-322 and § 5-73-306(5), it is unlawful for any person other than a law enforcement officer or a security guard in the employ of the state or an agency of the state, or any city or county, or any state or federal military personnel, to knowingly carry or possess a *loaded firearm or other deadly weapon* in any publicly owned building or facility or on the State Capitol grounds.<sup>2</sup>

The terms “firearm” and “deadly weapon” are not defined in section 5-73-122, but they are defined by the Criminal Code as follows:

“Deadly weapon” means:

- (A) A firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious physical injury; or
- (B) Anything that in the manner of its use or intended use is capable of causing death or serious physical injury.<sup>3</sup>

(A) “Firearm” means any device designed, made, or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use.

(B) “Firearm” includes:

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<sup>2</sup> Ark. Code Ann. § 5-73-122(a)(1) (Supp. 2015) (emphasis added). The referenced exceptions under Ark. Code Ann. §§ 5-73-322 and -306(5) involve the carrying of a concealed handgun by, respectively, staff members of higher-education institutions and county employees and officials whose principal place of employment is within the courthouse.

<sup>3</sup> Ark. Code Ann. § 5-1-102(4) (Repl. 2013).

(i) A device described in subdivision (6)(A) of this section that is not loaded or lacks a clip or another component to render it immediately operable; and

(ii) Components that can readily be assembled into a device described in subdivision (6)(A) of this section.<sup>4</sup>

These definitions apply to the prosecution of an offense defined by section 5-73-122.<sup>5</sup>

As defined above, therefore, the term “deadly weapon” includes “a firearm,” and “firearm” includes “[a] “device ... that is not loaded.” You indicate that this has led the Capitol Police to interpret subsection 5-73-122(a)(1)’s prohibition against a “loaded firearm or other deadly weapon” to include unloaded firearms as part of the “deadly weapon” definition.

In my opinion, this reading of the statute is incorrect because it ignores the term “loaded firearm” in the phrase “*loaded* firearm or other deadly weapon.” If the legislature intended for “other deadly weapon” here to include any firearm (because of the “deadly weapon” definition), there would have been no reason to refer to “loaded firearm.” Indeed, doing so would have been redundant. A common rule of statutory construction is to give effect to each word of a statute, so that no language is reduced to surplusage.<sup>6</sup>

The better reading is that “other deadly weapon” refers to non-firearms, and thus the overall prohibition against carrying or possessing a “loaded firearm or other deadly weapon” does not reach unloaded firearms.

This latter understanding of the statute is buttressed by another subsection of section 5-73-122. Subsection 5-73-122(a)(2) prohibits carrying a firearm, “whether loaded or unloaded,” in the Capitol Building or Justice Building:

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<sup>4</sup> *Id.* at § 5-1-102(6).

<sup>5</sup> Although section 5-73-122 is not part of the Criminal Code (*see* notes to Ark. Code Ann. § 5-1-101), the Criminal Code’s definitional section governs pursuant to Ark. Code Ann. § 5-1-103(b) (Repl. 2013), which states: “Unless otherwise expressly provided, the provisions of the Arkansas Criminal Code govern the prosecution for any offense defined by a statute not part of this Arkansas Criminal Code and committed after January 1, 1976.”

<sup>6</sup> *See Locke v. Cook*, 245 Ark. 787, 793, 434 S.W.2d 598, 601 (1968) (“A statute should be construed so that no word is void, superfluous or insignificant and meaning and effect must be given to every word contained therein, if possible.”) (citations omitted).

It is unlawful for any person other than a law enforcement officer or a security guard in the employ of the state or an agency of the state, or any city or county, or any state or federal military personnel, to knowingly carry or possess *a firearm, whether loaded or unloaded*, in the State Capitol Building or the Justice Building in Little Rock.<sup>7</sup>

This shows that when the legislature intended to include “unloaded” firearms in a similar criminal prohibition, it knew how to do so and made its intent very clear in the language of the relevant subsection. The absence of the word “unloaded” in section 5-73-122(a)(1) is striking when compared to its inclusion in section 5-73-122(a)(2). Its absence must have been intentional and cannot be ignored.

Section 5-73-122 is a criminal statute. The Arkansas Supreme Court adheres to the rule that criminal laws are “subject to strict guidelines of interpretation.”<sup>8</sup> As stated in *Trice*:

The rule for enforcement by criminal action is markedly different [from the rule in civil actions] because there can be neither constructively created criminal offenses nor criminal offenses established by implication. [Laws] creating criminal offenses must be clear and unambiguous. In civil law we inquire into what the legislature meant but in criminal law we inquire into only what the statute means.<sup>9</sup>

Criminal statutes are therefore “strictly construed with all doubts resolved in favor of the defendant, and nothing is taken as intended which is not clearly expressed.”<sup>10</sup> Especially in light of the strict construction and lenity requirements, it is my opinion that the Arkansas Supreme Court would conclude that subsection 5-73-122(a)(1) does not criminalize carrying or possessing an *unloaded* firearm on the State Capitol grounds.

If the statute were to be interpreted to include a prohibition against unloaded firearms, there is a significant question as to whether it would run afoul of the

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<sup>7</sup> Ark. Code Ann. § 5-73-122(a)(2) (emphasis added).

<sup>8</sup> *Trice v. City of Pine Bluff*, 279 Ark. 125, 129, 649 S.W.2d 179, 181 (1983).

<sup>9</sup> *Id.*

<sup>10</sup> *Hales v. State*, 299 Ark. 93, 94, 771 S.W.2d 285, 286 (1989) (citations omitted).

Court's constitutional "rule against vagueness."<sup>11</sup> The rule is based on constitutional due-process standards and provides that a criminal statute must give "fair warning" of the prohibited conduct:

The norm by which we determine when a statute is void-for-vagueness is whether it lacks ascertainable standards of guilt such that persons of average intelligence must necessarily guess at its meaning and differ as to its application. The law must give fair warning in definite language of the prohibited act. In addition to the fair warning, a statute is also void-for-vagueness if it is so broad that it becomes susceptible to arbitrary and discriminatory enforcement. Nevertheless, flexibility, rather than meticulous specificity or great exactitude, in a statute is permissible as long as its reach is clearly delineated in words of common understanding.<sup>12</sup>

In *Higgins*, the defendant argued that the statute under which he was prosecuted was void for vagueness because of its use of the term "deadly weapon."<sup>13</sup> The Court rejected the argument, holding that the statute "conveys fair and sufficient warning" of what is meant by "deadly weapon" because the term is defined in the Criminal Code.<sup>14</sup> In short, the Court observed, "a definition exists to explain what 'deadly weapon' means."<sup>15</sup> The Court held that it is proper to refer to this definition, notwithstanding that it is in another chapter of the Code.<sup>16</sup>

It thus seems that the meaning of "deadly weapon" in isolation is sufficiently clear based on the Criminal Code definition. And if the term "deadly weapon" has been

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<sup>11</sup> *See id.*

<sup>12</sup> *Higgins v. State*, No. CACR 01-179, 2001 WL 11192139, at \*3 (Ark. App. Oct. 10, 2001) (quoting *State v. Torres*, 309 Ark. 422, 424-425, 831 S.W.2d 903, 904-905 (1992) (internal citations omitted)).

<sup>13</sup> He was prosecuted under Ark. Code Ann. § 16-90-121 (Repl. 2006), which at the time of his crime mandated an enhanced sentence for the commission of a felony "involving the use of a deadly weapon." It was amended in 2001 to enhance sentences for felonies "involving the use of a firearm." *See* Acts 2001, No. 1783, § 1.

<sup>14</sup> *Higgins*, 2001 WL 11192139, at \*4.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

used in isolation, its definition would plainly include both loaded and unloaded firearms. But in this statute, the term “deadly weapon” is used together with the term “loaded firearm” (the operative phrase in subsection 5-73-122(a)(1) prohibiting possession or the carrying of a “loaded firearm or other deadly weapon”). In such circumstances, there is a very strong argument that a person of average intelligence would not have fair warning that the statute criminalized possession of unloaded firearms in addition to the expressly identified loaded firearms. At the very least, a person of average intelligence would have to guess at the statute’s meaning.

The Court will construe the statute as constitutional, if it is possible to do so.<sup>17</sup> Construing the statute to prohibit the carrying of *any* firearm on the Capitol grounds—whether loaded or unloaded—could give rise to the claim that the defendant did not have “fair warning” that carrying an unloaded firearm was prohibited. The constitutional issue is avoided, however, if “other deadly weapon” is interpreted to refer only to non-firearms. As noted above, under that reading, the phrase “loaded firearm or other deadly weapon” does not cover unloaded firearms.

Because this would be a case of first impression, I cannot definitively opine on the question whether the Capitol Police must change its interpretation. But in my opinion, the Capitol Police should not rely on this statute to arrest persons carrying unloaded firearms on the Capitol Grounds.

Notwithstanding the foregoing, the State Capitol Police has broad statutory authority to maintain order on the Capitol grounds and exclude and eject persons from the grounds. “Except to the extent otherwise limited by the Secretary of State,” the Capitol Police—in addition to having arrest authority—is charged with protecting the State Capitol grounds and preserving and maintaining order and decorum on the grounds. Ark. Code Ann. § 12-14-102(a). In this regard, the Capitol Police is authorized to “[e]xclude and eject persons from and prevent trespass upon and in all of the State Capitol grounds....” Ark. Code Ann. § 12-14-102(a)(4).

Based on this broad grant of authority, the State Capitol Police may choose to exclude from the Capitol grounds firearms and/or persons carrying firearms, whether the firearm is loaded or unloaded. If the Capitol Police orders a person to stay off the Capitol grounds or to leave the grounds, defiance of that order could

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<sup>17</sup> See *Torres*, 309 Ark. at 424, 831 S.W.2d at 904.

result in arrest for criminal trespass.<sup>18</sup> The State Capitol Police's decision to exclude firearms or persons carrying or possessing firearms from the Capitol grounds is subject to only two types of limitations: (1) limitations imposed on the State Capitol Police by the Secretary of State, and (2) limitations imposed by other provisions allowing firearms on the State Capitol grounds for certain limited events or activities.<sup>19</sup>

Additionally, any person who carries a firearm should also be aware that a law enforcement officer might lawfully inquire into that person's purpose. Determining culpability or potential culpability under section 5-73-122(a)(1) (making it illegal to carry or possess a "loaded firearm or other deadly weapon" on the State Capitol grounds) is initially a matter for law enforcement following guidelines that routinely apply when investigating a criminal offense involving the danger of forcible injury to persons. A law enforcement officer may stop and detain any person reasonably suspected of violating section 5-73-122(a)(1) if necessary to identify the person or determine the lawfulness of his or her conduct.<sup>20</sup> Whether an officer has reasonable suspicion will depend upon a number of circumstance-specific factors. Some of these factors are recounted in Ark. Code Ann. § 16-81-203, including: the demeanor of the suspect; the gait and manner of the suspect; whether the suspect is carrying anything, and what he or she is carrying; the particular streets and areas involved; any information received from third parties; and the apparent effort of the suspect to avoid identification or confrontation by a law enforcement officer.

***Question 2 - Can other police departments, exercising concurrent jurisdiction over the State Capitol grounds, rely upon the State Capitol Police Department's interpretation that Ark. Code Ann. § 5-73-122(a)(1) prohibits the carrying of firearms on the State Capitol Grounds, irrespective of whether the firearm is loaded or unloaded, unless an explicit statutory exception applies; or do the other police departments need to obtain an independent opinion from their counsel?***

I cannot provide an opinion or advice in response to this question. The decision whether to rely upon the State Capitol Police's interpretation is a matter to be

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<sup>18</sup> See Ark. Code Ann. §§ 5-39-101(2) and 5-39-203 (Repl. 2013).

<sup>19</sup> E.g. Ark. Code Ann. § 5-73-122(a)(3)(A) and (B) (shooting match or target practice under the auspices of the Secretary of State, as the agency responsible for the Capitol grounds; and trade show, exhibit, or education course conducted on the Capitol grounds).

<sup>20</sup> See Ark. R. Crim. P. 3.1 (2014).

addressed by each law enforcement agency with the counsel of its own legal advisor.

***Question 3 - Is the statutory definition of the term "deadly weapon," [as] set forth [in] Ark. Code Ann. § 5-1-102, constitutionally adequate to make the statute, Ark. Code Ann. § 5-73-122(a)(1), sufficiently definite for purposes of criminal enforcement?***

I take this question to be asking whether Ark. Code Ann. § 5-73-122(a)(1) would survive a due-process challenge on the ground of vagueness if it is interpreted to prohibit the carrying of any firearm on the State Capitol grounds, whether loaded or unloaded. This matter is discussed above in response to Question 1.

***Question 4 - Does the use of the term "loaded firearm" in the statutory section, Ark. Code Ann. § 5-73-122(a)(1), render ambiguous the use of the term "deadly weapon" in that same statutory section, in any way?***

See response to Question 1 above.

***Question 5 - Is there any need for legislative clarification of these issues in light of the enactment of Act 746 of 2013 and your Opinion No. 2015-064, dated on or about August 28, 2015?***

As stated above, I believe the language used by the legislature makes clear that Ark. Code Ann. § 5-73-122(a)(1) does not criminalize carrying or possessing an *unloaded* firearm on the State Capitol grounds. The question whether this is a matter requiring clarification is ultimately one for the legislature.

Sincerely,



LESLIE RUTLEDGE  
Attorney General