TO: **District Attorney Christian A. Gossett**

FROM: **Kathryn E. DeBruin**

RE: **Judicial Order Eliminating Prosecutor's Right to Carry Concealed Weapons in Courtrooms**

DATE: **February 6, 2012**

QUESTION PRESENTED

Does a chief judge of a judicial administrative district in Wisconsin have the authority to issue an order which takes away a licensed prosecutor's constitutional and statutory right to carry a concealed weapon in a courtroom or in the alternative, does a circuit court judge in Wisconsin have the authority to prohibit a licensed prosecutor from carrying a concealed weapon in a courtroom?

SHORT ANSWER

The answer to both of these questions is no. Under its police power, it is the legislature that determines public policy relating to limitations on the constitutional right to bear arms. The chief judge's order is improper because (1) there is no authority for the issuance of the order, and (2) the order directly conflicts with **WIS. STAT. § 175.60**. For both of these reasons, the Chief Judge's order is a violation of the doctrine of Separation of Powers. Likewise, a similar attempt by a circuit court judge to prohibit a licensed prosecutor from carrying a concealed weapon in a courtroom also would violate the doctrine of separation of powers.

STATEMENT OF FACTS

1. In the fall of 2011, the Winnebago County judiciary expressed an interest in enacting a local court rule that would prohibit prosecutors from carrying concealed weapons in the Winnebago County Courthouse and courtrooms, or, at the very least, requiring prosecutors to gain permission from a judge before doing so on any given day.

2. On October 20, 2011 the Winnebago County District Attorney's office provided the Winnebago County judiciary with an early draft version of this memo which outlined the District Attorney's position that the judiciary, for reasons stated in the memo, did not have the authority to restrict a prosecutor's right to carry concealed weapons in a courthouse or courtroom.

3. On January 9, 2012 all six Winnebago County judges signed a "Chief Judge Directive," stating "It is hereby directed that, effective immediately all firearms, electric weapons, knifes, clubs and any other weapon are prohibited in the Winnebago County Courthouse and Public Safety building unless you are an on-

duty law enforcement office." The directive was approved by the signature of Chief Judge Robert Wirtz on January 20, 2012.

4. On January 13, 2012 at the Courthouse Safety Committee meeting, District Attorney Christian Gossett was first alerted to the existence of the signed directive (effective January 10, 2012). At no point between the receipt of the memo from the District Attorney's Office and the issuance of the directive did the Winnebago County judiciary advise the Winnebago County District Attorney's Office of its intent to abolish the statutory and constitutional right of licensed prosecutors to carry a weapon in a courthouse or courtroom.

5. On January 26, 2012 all six Winnebago County judges signed an Order to Rescind the Chief Judge Directive. The Order to Rescind was approved by the signature of Chief Judge Robert Wirtz on January 30, 2012.

6. On January 30, 2012, Chief Judge Robert Wirtz signed an order (hereafter "the Order") declaring that "no one other than on-duty sworn law enforcement personnel may go armed with a weapon in any courtroom, Commissioner hearing room or chambers area, in the Winnebago County Courthouse without prior written consent of the Circuit Court Judge or Circuit Court Commissioner then and there presiding." It further states that "violations of this order is [sic] punishable by contempt sanctions which may include, without limitation, fines, imprisonment and/or confiscation of weapons."

7. There is no statutory authority cited for the issuance of the Order. The Order states only that "the Winnebago County Circuit Court Judges wish to exercise their inherent authority to maintain order, safety and security in their respective courtrooms" and that "the Chief Judge has the duty, under SCR 70.19(f) [sic], to establish policies and may order, under SCR 70.20 that his directives policies and rules be carried out." Presumably, the order intended to invoke SCR 70.19(3)(f).

DISCUSSION

I. Licensed prosecutors have a both a constitutional and statutory right to carry a weapon in a courthouse or courtroom.

a. The United States Constitution and the Wisconsin State Constitution provide a fundamental right to bear arms, subject to limitation by proper exercise the State's (legislature's) police power.

The Second Amendment of the United States Constitution provides that "the right of the people to keep and bear Arms, shall not be infringed." The Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." ***District of Columbia v. Heller***, 554 U.S. 570, 592 (2008). The U.S. Supreme Court does not provide a particular test for scrutinizing laws that limit the right to bear arms, but

does state that "the very enumeration of the right takes out of the hands of government-even the Third Branch of Government-the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." ***Id.*** at 634, (emphasis original). The Due Process Clause of the Fourteenth Amendment incorporates the right recognized in ***Heller***, making it applicable to the states. ***McDonald v. Chicago***, 130 S.Ct. 3020, 3050 (2010).

Furthermore, Wisconsin's state constitutional right to bear arms, set forth in Article I, Section 25, is fundamental. ***State v. Cole***, 2003 WI 112, ¶ 20, 264 Wis.2d 520, ¶ 20,, 665 N.W.2d 328, ¶ 20. Prior to the Supreme Court's decisions in ***Heller*** and ***McDonald***, the Wisconsin Supreme Court established the test for challenges to the validity of gun control statues as "whether the statute is a reasonable exercise of police power." ***Id.*** at ¶ 23. Police power is "the inherent power of the government to promote the general welfare, and covers all matters having a reasonable relation to the protection of the public health, safety and general welfare." ***State v. Smet***, 2005 WI App 263, ¶ 7, 288 Wis.2d 525, ¶ 7, 709 N.W.2d 474, ¶ 7. "Where legislative action is within the scope of the police power, fairly debatable questions as to reasonableness, wisdom, and propriety of action, are not for the determination of the court but for the legislative body." ***State v. Dried Milk Products Co-op***, 16 Wis.2d 357, 363, 114 N.W.2d 412, 415 (1962).

b. WIS. STAT. § 175.60 provides licensed prosecutors with an express right to carry a weapon in a courthouse.

The Wisconsin legislature utilized its police power to enact **WIS. STAT. § 175.60**, which lays out the scope of the right to carry a concealed weapon within state bounds. **WIS. STAT. § 175.60(2g)(a)** provides that a concealed carry licensee "may carry a concealed weapon anywhere in this state except as provided under subs. (15m) and (16) and ss. 943.13(1m)(c) and 948.605(2)(b)1r." This is a permissive statute that lays out a right to carry a concealed weapon *unless* the listed statutes provide otherwise.

WIS. STAT. § 175.60(16)(a)6. does prohibit the carrying of a weapon, whether concealed or not, in "[a]ny portion of a building that is a county, state, or federal courthouse." However, **WIS. STAT. § 175.60(16)(b)3.** provides that the prohibitions under **(a)** *do not* apply to the carrying of a weapon in a courthouse or courtroom "if a district attorney, or an assistant district attorney, who is a licensee is carrying the weapon." The statute provides a clear and express exception to weapon carrying prohibitions in courthouses and courtrooms for licensed prosecutors. Since licensed prosecutors are not subject to the prohibition within courthouses or courtrooms, their *right* to carry in courthouses and courtrooms is expressly granted by the statute.

It is clear that the legislature specifically contemplated the issue of whether licensed prosecutors should be permitted to carry weapons in courthouses or courtrooms and made the determination that prosecutors *should* have that right. A judicial order that directly conflicts with this legislative determination is an unauthorized and unprecedented usurpation of legislative power. "Choices about what laws represent wise public policy for the State of Wisconsin are not within the constitutional purview of the courts." ***State ex rel. Ozanne v. Fitzgerald***, 2011 WI 43, ¶ 15, 334 Wis.2d 70, ¶ 15, 798 N.W.2d 436, ¶ 15.

c. A prosecutor's express right to carry a weapon in a courthouse is not limited by a requirement of judicial permission.

Nothing about the language of the statute suggests that the prosecutor's right to carry a weapon in a courtroom is subject to judicial permission. In fact, surrounding portions of the statute suggest the contrary. **WIS. STAT. § 175.60(16)(b)2.** provides an exception to the prohibition of carrying weapons in a courthouse or courtroom if "a judge who is a licensee is carrying the weapon or if another licensee or if another licensee or out-of-state licensee, whom a judge has permitted in writing to carry a weapon, is carrying the weapon." This is the only portion of the statute in which judicial authority is

contemplated, and it provides judges with the ability to *grant permission* to individuals who would otherwise be prohibited from carrying weapons in the courtroom and in no way suggests judicial authority to *prevent* carrying by individuals given express statutory permission to do so.

It is also clear that the legislature contemplated providing authority to limit the carrying of weapons to particular individuals because the legislature wrote such authority into the statute. For example, **WIS. STAT. § 175.60(15m)(a)** provides that "an employer may prohibit a licensee or an out-of-state licensee that it employs from carrying a concealed weapon...in the course of the licensee's or out-of-state licensee's employment." The legislature chose not to provide such authority for judges.

Furthermore, **WIS. STAT. § 175.60(16)(b)3.** would be rendered superfluous if prosecutors were required to obtain judicial permission prior to carrying a weapon in a courtroom because prosecutors would be covered under **(b)2.** as a licensee whom a judge has given permission to carry a weapon. "A statute should be construed so as to not render any part of it superfluous, if such construction can be avoided." ***State v. Eichman***,155 Wis.2d 552, 560, 456 N.W.2d 143, 146 (1990). Therefore, it is clear that subsection **(b)3.** providing an exception to the prohibition on carrying weapons in courthouses for licensed prosecutors was not intended to be subject to judicial permission.

II. No authority exists for the Order, which directly conflicts with a licensed prosecutor's constitutional and statutory right to carry a weapon in a courthouse or courtroom.

a. SCR 70.19(3)(f) and 70.20, the only authority cited for the issuance of the Order, do not provide authority for the chief judge to issue an order that requires a licensed prosecutor to obtain judicial permission prior to exercising his or her constitutional and statutory right to carry a weapon in a courthouse or courtroom.

SCR 70.19(1) describes a chief judge's general responsibility; it states:

> The chief judge is the administrative chief of the judicial administrative district. The chief judge is responsible for the administration of judicial business in circuit courts within the district, including its personnel and fiscal management. The general responsibility of the chief judge is to supervise and direct the administration of the district, including the judicial business of elected, appointed and assigned circuit judges.

It is clear that the chief judge's general responsibilities are *administrative*. **SCR 70.19(3)(f)** provides that in the exercise of his "general responsibility" the chief judge has the duty of "[e]stablishment of policies and plans." The chief judge's duty to establish policies and plans is confined to the exercise of his general responsibilities, which are administrative in nature. A rule that requires a licensed prosecutor to obtain judicial permission prior to carrying a weapon in a courthouse or courtroom has nothing to do with the administration of the judicial district. Therefore, **SCR 70.19(3)(f)** does not provide authority for the issuance of the Order.

SCR 70.20 provides that "[t]he chief judge may order that his or her directives, policies and rules be carried out." However, inherent in the ability to order that a directive, policy, or rule be carried out is the requirement that there first be authority to issue the directive, policy, or rule. As already explained, **SCR 70.19(3)(f)** provides no such authority.

b. The authority granted to circuit court judges under WIS. STAT. § 753.35(1) does not give judges authority to enact a rule preventing a licensed prosecutor from carrying a weapon in a courthouse or courtroom or requiring judicial permission to do so.

Circuit courts are provided with the authority, under **WIS. STAT. § 753.35(1)**, to "adopt and amend rules *governing practice in that court* that are consistent with rules adopted under s. 751.12 and statutes relating to pleading, practice, and procedure." (emphasis added). There is a clear limitation that "*local rules may not be inconsistent with state rules or statutes.*" ***Hefty v. Strickhouser***, 2008 WI 96, ¶ 59, 312 Wis.2d 530, 559, 752 N.W.2d 820, 834 (emphasis original). Local rules "may supplement state statutes and rules, but they may not supersede state statutes and rules." ***Id.***

There are two questions to address in determining whether a circuit court may impose a local rule preventing properly licensed prosecutors from carrying a weapon in a courthouse or courtroom. First, is it the type of rule a circuit court has authority to create? (i.e., Is it a rule "governing practice in that court"?) If the answer is no, the rule fails. If the answer is yes, the second question is, does the rule supersede rather than supplement the state statute? If the answer is yes, the rule fails.

1. **A court rule requiring a prosecutor to obtain judicial permission prior to carrying a weapon in a courthouse or courtroom is not a rule "governing practice in that court" under WIS. STAT. § 753.35(1).**

Black's Law Dictionary (9th ed. 2009) defines "practice" as "[t]he procedural methods and rules used in a court of law." In a criminal case, procedural rules are those "which provide[] or regulate[] the steps by which one who violates a criminal statute is punished." ***Matter of E.B.***, 111 Wis.2d 175, 189, 330 N.W.2d 584, 591 (1983), citations omitted. A rule requiring a prosecutor to obtain judicial permission prior to carrying a weapon in a courthouse or courtroom has nothing to do with the steps by which one who violates a criminal statute is punished. Therefore, **WIS. STAT. § 753.35(1)** does not provide any authority for a circuit court judge to impose such a rule.

2. **Even if a rule requiring a prosecutor to obtain judicial permission prior to carrying a weapon in a courthouse or courtroom qualifies as one "governing practice in that court," such a rule impermissibly supersedes WIS. STAT. § 175.60.**

A local rule preventing a prosecutor from carrying a weapon in a courthouse or courtroom is in direct conflict with **WIS. STAT. § 175.60**. As noted above, the statute is a permissive statute that provides individuals with the right to carry a concealed weapon unless otherwise stated within specifically named statutes. Circuit courts do not have the authority to create additional prohibitions, as any additional prohibitions would directly conflict with an express statutory right.

Enactments by the legislature are limited by the requirement that they not violate the constitutional principle of separation of powers by "unduly burdening or substantially interfering with the judicial branch." ***Matter of E.B.***, 111 Wis.2d 175, 184, 330 N.W.2d 584, 589 (1983), citations omitted. The question to consider is whether the operation of the statute, here **WIS. STAT. § 175.60(16)(b)3.** exempting prosecutors from the prohibition on carrying a weapon in a courtroom, "materially impairs or practically defeats the proper functioning of the judicial system so as to constitute a violation of the doctrine of separation of powers." ***Id.*** at 185, citations omitted.

The legislature's decision to exempt prosecutors from the prohibition on carrying weapons in courtrooms in no way materially impairs or practically defeats the proper functioning of the judicial system. Whether or not a prosecutor carries a weapon in a courtroom has no bearing on the judge's ability to run court proceedings. The legislature has made clear its determination that prosecutors who are properly licensed should be able to, at their own discretion, choose to carry a weapon in a courthouse or courtroom. A circuit court judge has no authority to override this legislative decision. Such a rule would be inconsistent to the express right granted to prosecutors to carry a concealed weapon in the courthouse or courtroom and therefore contrary to ***Hefty v. Strickhouser***.

c. Supreme Court Rule 70.39 provides no basis for a chief judge to impose a rule requiring a prosecutor to obtain permission prior to carrying a weapon in a courthouse or courtroom.

SCR 70.39 addresses security, facilities, and staffing standards for courts. **SCR 70.39(3)** provides that the "presiding judge for each county *shall* appoint a security and facilities committee," (emphasis added) which is to be composed of eight individuals, including the district attorney. **SCR 70.39(3)(d)** states that the committee "*shall* coordinate the adoption of general court security and facilities polices" (emphasis added), while presiding judges retain discretion with regard to "[d]ay-to-day security decision[s] and case-specific security measures." The grant of authority for the creation

of general court security polices lies with the committee, not with individual judges. Requiring a prosecutor to obtain judicial permission prior to carrying a weapon into a courthouse or courtroom is a general rule. A general security policy decision such as this—provided it could be made in compliance with other applicable laws—would fall under the authority of the security and facilities committee, not under the authority of an individual circuit court judge.

Additionally, **SCR 70.39** does not give the security and facilities committee authority to regulate the carrying of weapons by prosecutors in courthouses or courtrooms. The only mention of regulation of weapons in courtrooms is **SCR 70.39(5)**, which states that the security and facilities committee "should consider and adopt a policy concerning whether court security officers are permitted to be armed and whether other law enforcement officers are permitted to have firearms in courtrooms." There is no mention of regulating the carrying of weapons by prosecutors. Prosecutors are distinguishable from law enforcement officers in that they are statutorily exempted from the prohibition on carrying weapons in courthouses and courtrooms under **WIS. STAT. § 175.60(16)(b)3.**, while law enforcement officers are not.

Even if something within **SCR 70.39** gave the security and facilities committee authority to regulate weapons in a courthouse or courtroom, such authority is still subject to compliance with state statutes enacted by the legislature. A policy created by the committee preventing a licensed prosecutor from carrying a weapon in a courthouse or courtroom would be in direct conflict with **WIS. STAT. § 175.60**. As noted previously, the statute is a permissive statute that provides individuals with the right to carry a concealed weapon unless otherwise stated within specifically named statutes. The committee does not have the authority to create additional prohibitions, as any additional prohibitions would directly conflict with an express statutory right provided by the legislature.

CONCLUSION

Chief Judge Robert Wirtz had no authority to issue the Order, which directly conflicts with a licensed prosecutor's constitutional and statutory right to carry a weapon in a courthouse or courtroom. The legislature clearly contemplated the issue of whether licensed prosecutors should be permitted to carry weapons in courthouses or courtrooms and determined that prosecutors *should* have that right. The judiciary has no authority to override the legislature's determination through a judicial order; such an action is a direct usurpation of legislative authority.