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Criminal Law—An Analysis of the Scope of Unlicensed Concealed Carry of a Firearm in Arkansas Pursuant to Arkansas Code Annotated Section 5-73-120 as Amended by Act 746 of 2013.

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CRIMINAL LAW—AN ANALYSIS OF THE SCOPE OF UNLICENSED CONCEALED CARRY OF A FIREARM IN ARKANSAS PURSUANT TO ARKANSAS CODE ANNOTATED SECTION 5-73-120 AS AMENDED BY ACT 746 OF 2013.

I. INTRODUCTION

From the moment Governor Mike Beebe signed Act 746 of 2013 into law, amending Arkansas Code Annotated section 5-73-120 (the offense of carrying a weapon), a political and legal battle has persisted over whether Arkansas now allows for the unlicensed open and concealed carry of a firearm. Immediately upon signing the act, Governor Beebe expressed his regret and ignorance regarding the legislation.[1] Call it an oversight by the governor or call it political craftiness by the legislature, either way, the gun laws in Arkansas changed substantially—yet no one can agree on just how substantial the change was. The debate has shifted over the years. The fight initially centered around whether the amendments to the statute allowed Arkansans to open carry a handgun without a license.[2] Over time, officials have conceded that the legislation allows for unlicensed open carry;[3] however, upon closer examination of the plain language of the statute, the battle began, and

1. *See* The City Wire Staff, *New Law Could Allow Open Gun Carry in Arkansas*, ARK. TALK BUS. & POL. (Apr. 24, 2013, 5:29 PM), https://talkbusiness.net/2013/04/new-law-could-allow-open-gun-carry-in-arkansas/; Nic Horton, *Constitutional Carry: Governor's Impression or Legislative Intent?*, ARK. PROJECT (Apr. 25, 2013), https://www.thearkansasproject.com/constitutional-carry-governors-impression-or-legislative-intent/. The bill was titled, Making Technical Corrections Concerning the Possession of a Handgun and Other Weapons in Certain Places, which Governor Beebe's spokesperson claims was deceiving and resulted in the Governor's ignorance. *See Arkansas Legislature: Interpretations of New Handgun Law Vary Widely,* TIMES RECORD (May 8, 2013, 4:24 AM), https://www.swtimes.com/article/20130508/NEWS/305089859.

2. *See* Lindsey Bailey, *To Open Carry or Not to Open Carry? That May No Longer Be the Question*, ASS'N OF ARK. COUNTIES, https://www.arcounties.org/media/articles/to-open-carry-or-not-to-open-carry-that-may-no-longer-be-the-question/ (last visited Jan. 16, 2021). Notably, at the time of the amendment's passage, several sources acknowledged that the new amendment could also allow for unlicensed concealed carry but heavily emphasized the possibility of open carry. *See, e.g.*, Charles C. W. Cooke, *AR to Become 'Constitutional Carry' State*, NAT'L REV. (July 2, 2013, 4:19 PM), https://www.nationalreview.com/corner/ar-become-constitutional-carry-state-charles-c-w-cooke/; Jeff Guo, *These States Are Poised to Allow People to Carry Hidden Guns Around Without a Permit*, WASH. POST (Mar. 2, 2015, 3:43 PM), https://www.washingtonpost.com/blogs/govbeat/wp/2015/03/02/these-states-are-poised-to-allow-people-to-carry-hidden-guns-around-without-a-permit/.

3. *See* Max Brantley, *Governor Tells State Police 'Open Carry' Is the Law in Arkansas*, ARK. TIMES (Dec. 28, 2017, 10:43 AM), https://arktimes.com/arkansas-blog/2017/12/28/governor-tells-state-police-open-carry-is-the-law-in-arkansas; Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).

continues, over whether the law permits an individual to carry a concealed handgun without a license.[4]

The debate immediately following the passage of Act 746 foreshadowed the coming controversy. The issue of unlicensed concealed carry has taken interesting paths through all three branches of the Arkansas government. The executive branch has offered its fair share of commentary; the statute has warranted three opinions by two different attorneys general, though not once did the then-Attorney General come to a conclusion that accurately reflects the law.[5] The legislature has also become heavily involved, proposing a total of two failed bills and two successful nonbinding resolutions.

The courts have had some say on the issue, albeit not a lot. The issue of unlicensed concealed carry has rarely been before the courts throughout the lifetime of the amended statute. The Supreme Court of Arkansas has considered the matter once, only to remand on a procedural issue. In the interim, as the war over interpretation raged on, there was no binding authority on what the statute meant. Finally, in March 2020, the Court of Appeals addressed the issue, giving the proper interpretation, that Arkansas does in fact allow for unlicensed open and concealed carry, some teeth.[6]

When the Arkansas Court of Appeals finally addressed unlicensed concealed carry, it surprised proponents and opponents alike by holding that a person does not need a license to conceal carry a handgun in the state of Arkansas.[7] While the Court's opinion is the correct analysis of the law, it may have raised more questions than it answered. This note argues that, pursuant to Arkansas Code Annotated section 5-73-120 (hereinafter "section 5-73-120") as amended by Act 746 of 2013, an individual does not need a license to conceal or open carry a handgun. *Pettry v. State* got it right, and the Supreme Court of Arkansas should affirm the conclusion in *Pettry*, should the issue reach the court. In the alternative, if it is in fact the legislature's intent that a person does not need a license to carry a firearm in Arkansas, it had the right idea in 2017, even though its efforts failed. If that is the legislature's intent, the Arkansas General Assembly should resurrect and pass Senate Bill 585 of 2017 or House Bill 1994 of 2017, in order to invali-

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4. *See* Charles C. W. Cooke, *AR to Become 'Constitutional Carry' State*, NAT'L REVIEW (July 2, 2013, 4:19 PM), https://www.nationalreview.com/corner/ar-become-constitutional-carry-state-charles-c-w-cooke/; Laurent Sacharoff, *Open Carry in Arkansas—An Ambiguous Statute*, 2014 ARK. L. NOTES 1548 (2014), http://media.law.uark.edu/arklawnotes/2014/02/13/open-carry-in-arkansas-an-ambiguous-statute/.

5. *See* Ark. Att'y Gen., Opinion No. 2018-002 (June 15, 2018); Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015); Ark. Att'y Gen., Opinion No. 2013-047 (July 8, 2013).

6. *See* Pettry v. State, 2020 Ark. App. 162, at 11–18, 595 S.W.3d 442, at 449–53.

7. *Id*.

date any argument that section 5-73-120, standing alone, does not provide for unlicensed open or concealed carry.[8]

Section II of this note explores the historical context and development of the offense of carrying a weapon by discussing various interpretations of the language of the statute and caselaw that has developed over the years. Section III analyzes the various incorrect Arkansas Attorney General opinions and explains how certain proposed but failed legislation could have cleaned up the mess that the inaccurate opinions made. Section IV maps the path the issue has taken through the Arkansas court system, leading up to *Pettry v. State*. Finally, Section V discusses the impact of *Pettry v. State* and the questions it left unanswered.

II. HISTORY OF SECTION 5-73-120

While the most heated debate surrounding the offense of carrying a weapon has been in recent history, the offense itself dates back to Arkansas's founding.[9] Despite these historical roots, the language and interpretation of the offense has changed substantially throughout the years. The following survey of the law emphasizes that the concepts of "open carry," "concealed carry," and variations of the two while on a "journey" (a qualification that has historically allowed a person to carry a firearm in an otherwise prohibited fashion), have oscillated throughout Arkansas's history. These concepts and how they have changed over the years have shaped the modern offense. More specifically, the modern gun laws directly attempted to refute some of these historical concepts, and in doing so indirectly altered the same.

A. Deep Historical Roots

The earliest version of the offense dates back to 1842. It stated, "[E]very person who shall wear any pistol . . . concealed as a weapon, unless upon a journey, shall be adjudged guilty of a misdemeanor."[10] The offense prohibited concealed carry, unless on a journey, but open carry was permissible at all times.[11] Both concepts, open carry at all times and concealed carry on a journey, have come full circle in the modern understanding

8. *See infra* Section VI.
9. *See* Buzzard v. State, 4 Ark. 18, 18, 4 Pike 18, 18 (1842).
10. *Id*., 4 Pike at 18.
11. *Id*. at 27, 4 Pike at 27.

of the offense, with the added modern distinction that each is possible without a license.[12]

Following the Reconstruction period, the state adopted a new version of the offense that removed the concealment requirement.[13] The new offense no longer required that a person conceal a weapon to violate the law,[14] meaning that the method of carrying the weapon, open or concealed, no longer mattered—both were prohibited. In this regard, the offense was much more sweeping. However, the offense provided explicit exceptions to this blanket prohibition (a form that is more similar to the current statute),[15] and the current version of the offense still accounts for each exception.[16]

The next version of the statute that emerged was the most unconventional version. At that time, the Constitution of the United States prohibited states from regulating weapons of war needed for a militia.[17] This meant that a person could carry "war" weapons in a manner that the offense otherwise prohibited; thus, the statute only prohibited weapons that a person could use in an individual quarrel. [18] After all, it was the Wild West.

The offense provided,

> Any person who shall wear or carry in any manner whatever, as a weapon, . . . any pistol of any kind whatever, except such pistols as are used in the army or navy of the United States, shall be guilty of a misdemeanor . . . Any person . . . who shall wear or carry any such pistol as is used in the army or navy of the United States, in any manner except uncovered and in his hand, shall be deemed guilty of a misdemeanor.[19]

While the statute could not outright ban "war" weapons, it could regulate *how* a person was allowed to carry such weapons.[20] Thus, the statute literally meant that a person had to carry the "war pistol" in his hand if he wanted to carry one at all.[21]

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12. *See* ARK. CODE ANN. § 5-73-120 (2020); Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015); Brantley, *supra* note 3. The concealed-carry licensing laws were not enacted until 1995. ARK. CODE ANN. §§ 5-73-301 to -327 (2020).

13. *See* Fife v. State, 31 Ark. 455, 456–57, 461, 1876 WL 1562, at *1, *4 (1876).

14. *See id*., 1876 WL 1562, at *1, *4.

15. *See id.*, 1876 WL 1562, at *1, *4; ARK. CODE ANN. § 5-73-120.

16. Notably, these exceptions are no longer exceptions in the current offense; they are permissible ways to carry a weapon. ARK. CODE ANN. § 5-73-120(c). This distinction has proven to be very important in the debate around the interpretation of the current version. *See* David Ferguson, *AG Opinion Favoring Gun Control Is Flawed,* CONDUIT FOR ACTION (July 11, 2018), https://conduitforaction.org/ag-opinion-favoring-gun-control-is-flawed/.

17. *Fife*, 31 Ark. at 460, 1876 WL 1562, at *8–9.

18. *See* Haile v. State, 38 Ark. 564, 566, 1882 WL 1513, at *1–2 (1882).

19. McDonald v. State, 83 Ark. 26, 28, 102 S.W. 703, 703 (1907).

20. *Id*., 102 S.W. at 703.

21. *See Haile*, 38 Ark. at 566, 1882 WL 1513, at *2.

The offense of carrying a weapon began to take its modern-day form with Act 696 of 1975, which provided,

> A person commits the offense of carrying a weapon if he possesses a handgun, knife, or club on or about his person, in a vehicle occupied by him, or otherwise readily available for use with a purpose to employ it as a weapon against a person.[22]

The statute made any form of carrying a handgun, open or concealed, illegal if one was carrying the handgun to use it against another person.[23] Notably, carrying a weapon for the purpose of self-defense was illegal, because in order to self-defend, one must use one's handgun "against another person."[24]

B. The Caselaw Presumption

Across all versions of the of the offense, there remained a caselaw presumption that a person carrying a loaded firearm is carrying the firearm as a weapon (hereinafter "Caselaw Presumption.).[25] This Presumption was rebuttable, but the burden was on the defendant to prove that the firearm was not intended to be used against another person.[26] However, the weapon need not be loaded for a person to violate the law; and conversely, the fact that the weapon was unloaded did not automatically prove that the person was not carrying the firearm as a weapon to use against another person.[27]

The Presumption dates back to *Carr v. State* in 1879.[28] The *Carr* court presumed that if the person carried a concealed firearm, then then the firearm was presumed loaded and thus worn as a weapon.[29] Stated another way, carrying a weapon concealed set a chain reaction of presumptions in motion;

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22. Act of 1975, No. 696, sec. 1.

23. *Id*.

24. David Ferguson, *Good Intent but a Bad Gun Bill—Support Act 746 Instead!*, CONDUIT FOR ACTION (Oct. 17, 2017), https://conduitforaction.org/good-intent-but-a-bad-gun-bill-support-act-746-instead/.

25. *See* Stoner v. Watlingten, 735 F.3d 799, 803 (8th Cir. 2013); Duckins v. State, 271 Ark. 658, 659–60, 609 S.W.2d 674, 675 (1980); McGuire v. State, 265 Ark. 621, 625–26, 580 S.W.2d 198, 200 (1957); Hathcock v. State, 99 Ark. 65, 69, 137 S.W. 551, 552 (1911); Carr v. State, 34 Ark. 448, 450, 1879 WL 1325, at *2 (1879). This presumption became a focal point of Attorney General Leslie Rutledge in two separate opinions that she published in 2015 and 2018; although the 2018 opinion mischaracterized the presumption. *See* Ark. Att'y Gen., Opinion No. 2018-002 (June 15, 2018); Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015); *infra* Section III.

26. *See Carr*, 34 Ark. at 450, 1879 WL 1325, at *2; *Hathcock*, 99 Ark. at 68–69, 137 S.W. at 552.

27. *Duckins*, 271 Ark. at 659–60, 609 S.W.2d at 675.

28. *Carr*, 34 Ark. at 450, 1879 WL 1325, at *2.

29. *Id*.

and ultimately, a person was presumed to be carrying a weapon to use against another person if the individual concealed the weapon *or* the weapon was loaded.[30] Possession of a concealed weapon or a loaded weapon were two different paths of achieving the same presumption.

Carr further provided that an affirmative showing that the firearm was unloaded or not fit for use would rebut the Presumption.[31] Yet the court in *Hathcock v. State* explained that the fact the firearm was unloaded did not rebut the Presumption as a matter of law; rather, whether the person had the purpose to use the firearm against another person was a matter of fact for the jury to decide, given all circumstances of the case.[32] *McGuire v. State* in 1979 confirmed this Presumption in the context of vehicles.[33] The court provided "[t]here is a presumption that a loaded pistol is placed in a car as a weapon," meaning that the pistol is placed there with the purpose to employ it against another person in violation of the statute.[34]

C. The Modern Shift

Apart from adding various other defenses to the offense of carrying a weapon, gun laws in Arkansas did not undergo another major statutory change until the enactment of the concealed handgun licensing laws in 1995.[35] Prior to concealed handgun licenses, there was no way for a person to carry a handgun for self-defense apart from the narrow defenses provided for in the offense of carrying a weapon. The licensing statutes provide that a concealed handgun license is for an individual who "[d]esires a legal means to carry a concealed handgun to defend himself or herself," because if not for these provisions, *there was no other legal means for an average citizen to carry a handgun for self-defense during the course of everyday activi-*

30. *See generally id*.

31. *Id.*

32. Hathcock v. State, 99 Ark. 65, 68–69, 137 S.W.2d 551, 552 (1911).

33. McGuire v. State, 165 Ark. 621, 626, 580 S.W.2d 198, 200 (1979).

34. *Id*. When the court reaffirmed the presumption in *McGuire*, the finding was part of an inquiry into whether the police officer had *probable cause* to believe that the person was carrying the weapon to be used against another person so that an officer can arrest a person for the offense, not whether the presumption amounted to proving for a *conviction* that the person had the purpose to deploy the weapon against another person. *Id.*, 580 S.W.2d at 200–01. Under the same Fourth Amendment inquiry, the Eighth Circuit, quoting *McGuire*, suggested that an *unloaded* firearm did not amount to probable cause to arrest a person for the offense of carrying a weapon. Stoner v. Watlingten, 753 F.3d 799, 803 (8th Cir. 2013).

35. *See* Act of Feb. 23, 1995, No. 411, 1995 Ark. Acts 411, 411 (codified at ARK. CODE ANN. § 5-73-309 (2020)); Acts of Feb. 23, 1995, No. 419, 1995 Ark. Acts 419, 419 (codified at ARK. CODE ANN. § 5-73-309).

ties.[36] Section 5-73-120 promptly provided carrying a weapon with a concealed handgun license as a defense to the offense of carrying a weapon.[37]

In 2011, Representative Denny Altes proposed House Bill 1051, which would have overhauled section 5-73-120.[38] Altes's stated purpose for the bill was to clarify the law surrounding carrying a weapon.[39] Altes believed that Arkansas had always been an open carry state, but that the "journey" provision needed clarification.[40] The bill passed in the House, but ultimately failed in the Senate.[41] The proposed bill would have amended the statute to say,

> (a) A person commits the offense of carrying a weapon if her or she possesses on or about his or her person, in a vehicle occupied by him or her, or otherwise readily available for use with a purpose to employ as a weapon against a person any of the following:
>
> (1) A knife;
>
> (2) A club; or
>
> (3) Unless with a license issued or recognized under § 5-73-301 et seq., a concealed handgun.[42]

The bill then continued to list *places* that a person could not carry a firearm.[43] The bill would have allowed for open carry at any time or concealed carry with a license at any time, except for in the enumerated, prohibited places.[44]

The following legislative session, Altes set out to pass the same bill; yet, quoting Altes, "[the drafters] wound-up with a totally different bill."[45] After collaborating with several law enforcement agencies, Altes suggested changing the framework of the offense so that instead of a crime with sever-

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36. ARK. CODE ANN. § 5-73-309(9). This oath, that a person desires a legal means to carry a weapon, became a cornerstone of Attorney General Rutledge's opinion that the concealed carry licensing laws preclude a person from carrying a handgun concealed without a license. *See supra* Section III.

37. Acts of Mar. 31, 1995, No. 832, sec. 1, 1995 Ark. Acts 832, 832 (codified at ARK. CODE ANN. § 5-73-120(c)(8) (2020)).

38. H.B. 1051, 88th Gen. Assemb., Reg. Sess. (Ark. 2011).

39. Denny Altes, FACEBOOK (Feb. 23, 2014), https://www.facebook.com/groups/514359201963202 (on file with the Author).

40. *Id*.

41. *Id*.

42. H.B. 1051, 88th Gen. Assemb., Reg. Sess. (Ark. 2011).

43. *Id*.

44. *See id*.

45. Altes, *supra* note 39.

al defenses, the bill should be a right with exceptions to that right[46]—and that is exactly what happened. The amended statute provides,

> A person commits the offense of carrying a weapon if he or she possesses a handgun, knife, or club on or about his or her person, in a vehicle occupied by him or her, or otherwise readily available for use with a purpose to attempt *to unlawfully employ* the handgun, knife, or club as a weapon against a person.[47]

The statute goes on to provide for *permissible* ways to carry a weapon, rather than defenses to a carrying a weapon—an important distinction.[48]

Among the permissible ways to carry a weapon are in the person's own home; if the person is acting as a law enforcement officer, a correctional officer, or a member of the armed forces during the scope of his or her official duties; if the person is on a journey; if the person is a registered security guard; if the person is hunting game pursuant to the Arkansas State Game and Fish Commission's rules and regulations; if the person is a certified police officer, on or off duty; or if the person is carrying a concealed weapon pursuant to the concealed carry handgun licensing statutes.[49]

Despite only a single nay vote and no contest from the Governor when signing the bill, Act 746, the bill that seemed to sneak through the General Assembly, was soon thrust into the limelight. Immediately upon signing the bill into law, Governor Beebe admitted that he had no idea that the statute could be interpreted to allow for unlicensed *open carry* when he signed it.[50] The governor's spokesperson, Matt DeCample, commented that the Governor signed the bill thinking that only technical corrections had been made, as the title of the bill suggested, and it was for that reason that the governor signed it.[51] DeCample added that the narrative that Arkansas was a "constitutional carry"[52] state was only an interpretation from a biased gun rights

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46. *Id*. Notably, the "exceptions" are not provided for in section 5-73-120 itself; rather, they are provided for in other statutes, such as the provisions prohibiting any type of carry in certain places. *See, e.g.*, ARK. CODE ANN. § 5-73-122 (2020). Section 5-73-120 in its entirety, including its subparts outlining "permissible" ways to carry a weapon, details the bounds of the general "right" that Altes is referring to. Thus, section 5-73-120 creates the general right, while various other statutes seek to limit the scope of this right.

47. ARK. CODE. ANN. § 5-73-120(a) (2020) (emphasis added).

48. *Id*.

49. *Id*. § 5-73-120(c).

50. The City Wire Staff, *supra* note 1. Again, immediately upon enactment, the controversy centered heavily around unlicensed open carry rather than concealed carry. *See supra* Section I.

51. *Arkansas Legislature: Interpretations of New Handgun Law Vary Widely, supra* note 1.

52. Constitutional carry is defined as unrestricted, unlicensed carry, either concealed or open. *Constitutional Carry/Unrestricted/Permitless carry*, USCCA, https://www.usconcealed

advocacy group and should not be considered law.[53] However, taking the same stance as Altes, Representative Bob Ballinger, co-sponsor of the bill, commented that the amendment was meant to decriminalize carrying a weapon, not just make "technical corrections."[54] Thus, the stage for the ensuing battle was set.

III. ATTORNEY GENERAL OPINIONS

In Arkansas, Attorney General opinions serve an important role in statutory and constitutional interpretation.[55] Pursuant to Arkansas Code Annotated section 25-16-706, only certain State officials can request an opinion from the Attorney General,[56] and the request must be a legal or constitutional question regarding, *inter alia*, official actions of the requesting official, the administration of criminal laws, or the constitutionality of proposed legislation.[57] Attorney General opinions serve as a foundation to guide official state actions. However, these opinions are just that—opinions. They are not binding interpretations of the law.

A. Attorney General Dustin McDaniel Opinion (2013)

Recall that the unlicensed concealed carry discussion began with the debate over whether one could open-carry a firearm without a license, which then evolved into a conversation about whether a person could conceal carry without a license.[58] In 2013, then-Attorney General Dustin McDaniel[59] issued the first opinion on section 5-73-120 as amended and concluded that unlicensed *open* carry was not allowed pursuant the new language of the statute.[60] Senator Eddie Joe Williams requested the opinion in an attempt to settle the score on the scope of permissible gun possession while a person was on a "journey," a term newly defined by Act 746 as one of the permis-

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carry.com/resources/terminology/types-of-concealed-carry-licensurepermitting-policies/unrestricted/ (last visited Dec. 21, 2019).

53. The City Wire Staff, *supra* note 1.

54. *Arkansas Legislature: Interpretations of New Handgun Law Vary Widely, supra* note 1.

55. *See generally* ARK. CODE ANN. § 25-16-706.

56. These officials include the governor, the heads of executive departments, either house of the General Assembly or its members, prosecuting attorneys, and election commissioners. *Id*. Notably, this provision bars private citizens from making a request for an opinion. *See id*.

57. *Id*.

58. *See* Brantley, *supra* note 3; Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).

59. McDaniel served from 2007 to 2015 as the fifty-fifth Arkansas Attorney General. *Dustin McDaniel*, MCDANIEL, WOLFF & BENCA, https://mwbfirm.com/attorney/dustin-mcdaniel/ (last visited Nov. 15, 2020).

60. Ark. Att'y Gen., Opinion No. 2013-047 (July 8, 2013).

sible ways to carry a weapon.[61] Specifically, Senator Williams asked whether the "journey" provision permits a person either to conceal or to open carry a handgun, any time that that person left his or her county,[62] so long as that person is not visiting one of the locations where firearm possession is otherwise prohibited.[63]

The question, or at least the question that the Attorney General answered, was whether Act 746 authorized "open carry" by and through the journey provision.[64] Stated another way, Attorney General McDaniel addressed the question of open carry as if the journey provision were the sole avenue for achieving unlicensed unconcealed carry.[65] McDaniel's opinion at best avoided and at worst ignored the possibility that the plain language of the general provision, section 5-73-120(a), authorized open carry, without even reaching the enumerated list of permissible ways to carry a weapon.[66]

McDaniel began the opinion by recognizing two fundamental aspects of the statute that Act 746 overhauled: the requisite mens rea and the burden of proof.[67] McDaniel noted that the mental state needed to support a conviction under § 5-73-120 had arguably changed,[68] and that the burden of proving whether a person is permissibly carrying a weapon had shifted from the defendant to the state.[69] To support his conclusion that the "journey" provision did not authorize open carry, McDaniel opined that Act 746 narrowed the definition of journey in light of the language of the definition itself, the legislative history, and the legislative intent.[70]

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61. Act 746 amended section 5-73-120(a), the provision that defines what the offense of carrying a weapon is generally, and the act added section 5-73-120(b)(3), which defined "journey." Act of Apr. 4, 2013, No. 746, sec. 2, 2013 Ark. Acts 746, 746 (codified at ARK. CODE ANN. § 5-73-120(b)(3) (2020)). Prior to Act 746, being on a "journey" was an exception to the offense of carrying a weapon; however, what exactly "journey" meant had never been statutorily defined, and accordingly, had been hotly contested. *See generally id.* (adding definition).

62. ARK. CODE ANN. § 5-73-120(b)(3) now defines a "journey" as "travel beyond the county in which a person lives."

63. Ark. Att'y Gen., Opinion No. 2013-047 (July 8, 2013).

64. *See id*.

65. *See id*.

66. *See id*.; ARK. CODE ANN. § 5-73-120(a). It was this general provision that Leslie Rutledge found to authorize open carry, as opposed to one of the enumerated permissible ways to carry a weapon. Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015). Further, McDaniel did not address the possibility of unlicensed concealed carry. *See* Ark. Att'y Gen., Opinion No. 2013-047 (July 8, 2013).

67. Ark. Att'y Gen., Opinion No. 2013-047 (July 8, 2013).

68. *Id.* The Attorney General only went so far as to call the mental state "redefined," while entertaining the possibility that the mental state had changed. *Id.*

69. *Id.* The Attorney General also noted that Act 746 had not altered in any way the rights of concealed carry license holders. *Id*.

70. *Id*. The act defined journey as "travel beyond the county in which a person lives." ARK. CODE ANN. § 5-73-120(b)(3).

McDaniel defined journey as the actual act of transporting "via some mode of transportation . . . from one place to another."[71] Assuming the mode of transportation is a vehicle, the journey begins when the person gets in the car, continues while that person travels from one county to another, and ends when the person exits his or her car.[72] Any activity that is only incidental to the act of driving, for example stopping to go inside a gas station, was not covered.[73] In sum, McDaniel believed the statute only authorized carrying a handgun without a license during the small window of time that the person is actually in the vehicle, and if at any point during this "journey" the person exits the vehicle, that person cannot continue his possession of the firearm.[74] Thus, section 5-73-120 did not provide for any open carry.

It is noteworthy that it was only in this limited scenario that McDaniel entertained the possibility that the statute authorized unlicensed carry,[75] a stark contrast to the reasoning currently understood to authorize unlicensed open carry.[76] The Attorney General made clear that in his opinion, the journey exception does not provide a blanket open carry authorization. Clarifying his conclusion, the Attorney General added, "[Section 5-73-120 does not] permit a person to possess a handgun outside of their [sic] vehicle or other mode of transportation while on a journey outside their [sic] county of residence."[77]

B. Attorney General Leslie Rutledge Opinion (2015)

In 2015, Leslie Rutledge replaced Dustin McDaniel as Arkansas's Attorney General;[78] promptly, Senator Jon Woods, Representative Nate Bell, and Representative Tim Lemons requested a second opinion on section 5-73-120. The legislators asked three questions: (1) whether a person can legally conceal or open carry a weapon when that person is *not* on a journey, so long as he or she does not have the intent to employ the weapon unlawfully against another person, (2) whether a person who carries a handgun,

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71. Ark. Att'y. Gen., Opinion No. 2013-047 (July 8, 2013).
72. *See id.*
73. *See id*.
74. *See id*.
75. While the question presented by Senator Williams inquired into unlicensed open and concealed carry, the Attorney General only specifically referenced open carry in the opinion. *See id*.
76. ARK. CODE ANN. § 5-73-120(a) is currently understood to authorize unlicensed open carry. *See infra* notes 83–97 and accompanying text.
77. Ark. Att'y. Gen., Opinion No. 2013-047 (July 8, 2013).
78. Leslie Rutledge is the fifty-sixth Attorney General of Arkansas. *Meet Leslie*, ARKANSAS ATT'Y GEN. LESLIE RUTLEDGE, https://arkansasag.gov/meet-leslie/ (last visited Dec. 21, 2019). She was sworn into office in 2015, and she is the first woman Attorney General in Arkansas. *Id*.

open or concealed, during everyday activities without the intent to employ the weapon unlawfully against another person is in violation of the law, and (3) whether the law allows a person to conceal or open carry a weapon when he or she leaves his or her own county.[79]

These questions appear to be in direct response to Attorney General McDaniel's opinion and an attempt to broaden the scope of the question answered by the previous Attorney General.[80] Importantly, these legislators inquired about handgun possession given the general offense of carrying a weapon, section 5-73-120(a), rather than solely through the journey provision, section 5-73-120(c)(4). This meant that an affirmative answer to the questions would allow a person to carry a weapon, open or concealed, at all times,[81] not just during the course of events tied to a journey.[82]

1. The Opinion

At the outset of the opinion, Rutledge encouraged the legislature to clarify Act 746's intent.[83] Absent such clarification, Rutledge concluded that an individual may open carry without a license when that individual is on a journey, not on a journey, and during the course of everyday activities—a blanket open carry; however, unlicensed *concealed* carry is only allowed on a journey.[84]

Explaining the scope of unlicensed carry on a journey, Rutledge concluded that when a person is on a journey, that person can open or conceal carry a weapon without a license during the course of that person's travel. However, when that person exits his mode of transportation, he has effectively ended his journey and therefore his right to carry the firearm *concealed* without a license.[85] Once the scope of the journey provision has ended, the person may only open carry the firearm without a license because that is precisely what is otherwise permissible pursuant to the general provi-

79. Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).

80. *See supra* notes 58–87 and accompanying text.

81. "At all times" is obviously limited if the possession of a handgun violates some other statute, such as laws against possessing a handgun at an airport or elsewhere. *See, e.g.*, ARK. CODE ANN. § 5-73-127.

82. Attorney General McDaniel's opinion left open the first two questions asked by the legislators. *See supra* notes 58–87 and accompanying text. The third question presented by the legislators is on point with the question answered by Attorney General McDaniel, and on this point, Attorney General Rutledge provides her interpretation of the "journey" provision and its scope. *See* Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015); Ark. Att'y. Gen., Opinion No. 2013-047 (July 8, 2013).

83. The AG has consistently advocated for clarification on what the language of the new law is intended to mean. *See* Ark. Att'y Gen., Opinion No. 2018-002 (June 15, 2018); Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).

84. Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).

85. *Id*.

sion of the statute,[86] or at least pursuant to Rutledge's interpretation of the general provision.[87] In practical effect, this means a person could conceal carry his or her handgun while traveling from one county to another while the person is in his or her vehicle. However, if during that journey the person stops at gas station to use the restroom, that person must remove the handgun from concealment and wear the gun open on his or her hip for the duration of the time spent outside the vehicle.[88]

Rutledge structured her opinion by first explaining the major changes in the statute that led her to conclude generally that a person can open carry without a license at all times. Rutledge then explained four important caveats that she believed both served as limits to this general right to open carry without a license and explained why the same treatment could not be extended to concealed carry.

Explaining her general conclusion that a person could open carry at all times without a license, Rutledge reasoned that Act 746's amendments only criminalized gun possession when a person possesses the weapon with the simultaneous intention to use the weapon unlawfully and against another person.[89] Rutledge believed the Caselaw Presumption, which developed under previous versions of section 5-73-120,[90] was no longer compatible with its new language, and that the courts would not apply the Caselaw Pre-

86. *Id*.

87. *Id.*

88. *See id*. To keep score, a person can "open carry" a weapon without a license at all times; however, a person can conceal carry a weapon without a license only when that person is in his or her vehicle *and* that person is on a journey within the meaning of section 5-73-120. *See generally id*.

89. Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015). This provision is in contrast to the previous version that outlawed the intention simply to use the weapon against another person. ARK. CODE ANN. § 5-73-120(a) (2012). Adding "unlawfully" narrows the punishable mental state.

90. This is the same Presumption discussed in Section II of this note. It is important to note that in this opinion, Rutledge discusses two independent and separate presumptions. Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015). First, the Attorney General addresses the Caselaw Presumption, as discussed in the proceeding section of this note. *Id.*; *see supra* Section II. The Caselaw Presumption presumes that a person is carrying a weapon within the meaning of the offense when that person was either carrying a concealed weapon or carrying a loaded weapon. Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015). The second presumption Rutledge references is one that she concluded of her own reasoning rather than based on any type of precedent. This distinction between the two presumptions becomes important because, while the Attorney General kept them separate and clear in this opinion, she failed to do so in her second opinion regarding Act 746. Ark. Att'y Gen., Opinion No. 2018-002 (June 15, 2018); Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015). In her second opinion, Rutledge discusses both presumptions as if they were one and in a manner that not only contradicts her findings in this opinion, but also mischaracterizes the presumptions all together. Ark. Att'y Gen., Opinion No. 2018-002 (June 15, 2018).

sumption to cases decided after Act 746.[91] The "leap" from merely possessing a loaded firearm to the intention to use that weapon *unlawfully* against another person was too far of a stretch, as opposed to the "leap" required to go from mere possession of a firearm to the broader intent to use the firearm against another person.[92] Moreover, Rutledge pointed to the reclassification from affirmative defenses to permissible ways to carry a weapon as an explanation of why the Caselaw Presumption was no longer applicable. The reclassification keeps the burden of proof with the State at all times, rather than shifting the burden to the defendant to prove that the defendant fell within the scope of one of the enumerated defenses.[93] Rutledge therefore reasoned that a presumption that shifts the burden of proof to the defendant, does not keep within the spirit of the intention of the legislature.[94] This meant that the Caselaw Presumption was no longer plausible.[95] To summarize, Rutledge stated, "While I do not encourage open carry, so long as a person has no intent 'to attempt to unlawfully employ the handgun, knife, or club as a weapon against a person,' he or she may possess a handgun without violating § 5-73-120(a)."[96] Rutledge limited this conclusion by noting four important "caveats."[97]

First, if a person is carrying a handgun, that person should be aware that the circumstances surrounding his or her firearm possession might warrant a stop from police if the officer has the requisite suspicion that the individual is violating section 5-73-120.[98] To this point, Rutledge believed that merely possessing a loaded firearm, without more, doesn't rise to the requisite level of reasonable suspicion needed to warrant a stop.[99] Yet Rutledge believed this was true only when a person was open carrying the firearm.[100] It was Rutledge's final caveat, discussed below, that explained why she believed a person with a concealed weapon would be treated differently.[101] The

91. Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).
92. *Id.* Rutledge believed this second leap was too "strained." *Id.*
93. *Id.*; *see also* ARK. CODE ANN. § 5-73-120(c) (2020).
94. Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* (citing ARK. R. CRIM. P. 3.1 (2014)). Circumstantial factors the officer can consider include the person's demeanor, the person's gait and manner, information from third parties, and the person's proximity to criminal conduct. *Id.* (quoting ARK. CODE ANN. § 16-81-203 (Repl. 2005)).
99. Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015). If merely possessing a loaded firearm doesn't amount to the level of suspicion needed to warrant an investigatory stop, the logical conclusion would be that merely possessing a loaded firearm, without more, couldn't amount to the requisite suspicion needed to sustain a conviction for violating Ark. Code Ann. § 5-73-120.
100. *Id.*
101. *Id.*

second caveat was that firearms are still prohibited in certain *places* regardless of the person's intent.[102] These prohibited places are laid out in various other criminal statutes.[103] Third and similarly, private property owners are still free to prohibit weapon possession on their property.[104]

As described in her fourth caveat, Rutledge believed that section 5-73-120 does not authorize unlicensed concealed carry at any time.[105] In fact, Rutledge went as far as to hypothesize that it was likely the Supreme Court of Arkansas would apply a presumption that a person concealing a handgun, without the properly issued license, was carrying the weapon with an unlawful intent (hereinafter referred to as the "Hypothesized Presumption").[106] The premise behind the Hypothesized Presumption is the concealed carrier has found a way to circumvent the statutory means of carrying a concealed weapon and therefore the person's intent is unlawful.[107]

This hypothesis has two faults. First, if section 5-73-120(a) does in fact create a statutory right to carry a weapon, then the statute is simply an alternative means to carry a firearm rather than a circumvention of the licensing laws. The statute provides another lawful route of achieving the same end. Second, if the legislature intended to keep the burden with the state at all times when it reclassified the exceptions to permissible ways—as the Attorney General says is the case—why would the court impose a different standard for unlicensed concealed carriers?

It is important to note that, while the Hypothesized Presumption may ultimately prove true, the Attorney General did not cite to any caselaw or other precedent to support this novel presumption.[108] Furthermore, this Hypothesized Presumption should not be confused or conflated with the first Caselaw Presumption that Rutledge addressed, which *was* founded on precedent. Each presumption is separate and independent of the other, and the Attorney General indicates as much.[109] Alternatively, Rutledge believed that, even if the Court does not apply the Hypothesized Presumption, at the very least carrying a concealed weapon without a license could amount to reasonable suspicion and even probable cause that the person's intentions are in violation of section 5-73-120.[110]

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102. *Id.*; *see, e.g.*, ARK. CODE ANN. § 5-73-127 (2020).
103. *See, e.g.*, ARK. CODE ANN. § 5-73-127.
104. Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).
105. *Id.*
106. *Id.*
107. *See id.*
108. *See* Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).
109. *See generally id*.
110. *Id.* If an officer has reasonable suspicion that an individual has engaged in, is about to engage in, or is engaging in criminal activity, an officer may conduct a brief investigatory stop. ARK. R. CRIM. P. 3.1. If an officer has probable cause, he may arrest an individual. Frette v. City of Springdale, 331 Ark. 103, 108, 959 S.W.2d 734, 736 (1998) (quoting

Another anomaly Rutledge created in this opinion was her acknowledgment of section 5-73-120(c)(8), which recognizes that carrying a concealed weapon pursuant to the concealed carry licensing laws is a permissible way to carry a firearm. In her acknowledgement of section 5-72-120(c)(8), Rutledge considered the provision an "exception" to the offense of carrying a weapon.[111] Whether this was an oversight or intentional, taking the Attorney General at her word and treating the provision as an exception to the offense of carrying a weapon creates an interesting dilemma. If carrying a weapon pursuant to the concealed carry laws is truly an exception to the offense of carrying a weapon with the intent to *use unlawfully against another person*, then an exception would allow a person to carry a firearm with the intent to use it unlawfully against another person, as long as that person had a license. However, if carrying a weapon pursuant to the concealed carry laws were treated as a permissible way rather than an exception, then a person is prohibited from carrying a weapon with an unlawful intent *at all* times, regardless of whether that person had a license or not.

Finally, Rutledge reasoned that unlicensed concealed carry pursuant to section 5-73-120 as amended outright conflicts with the concealed licensing laws.[112] She explained that because the concealed licensing laws require a person to take an oath that the applicant "desires a legal means to carry a concealed handgun to defend himself or herself," if Act 746 affected the licensing requirement, this oath would be nullified.[113] However, proponents of unlicensed open and concealed carry pursuant read this oath to be in harmony, not conflict, with Act 746.[114] These proponents do not read the oath as suggesting that a concealed carry license is the *sole* means for lawfully possessing a concealed handgun; rather, they acknowledge the non-exhaustive nature of the language of the statute, which says that the concealed licensing laws are "*a* legal means" instead of "*the* legal means" to carry a concealed handgun.[115]

Thompson v. State, 303 Ark. 407, 409, 797 S.W.2d 450, 452 (1990)). The Court in *Taff v. State* found the Attorney General's notion to be incorrect. 2018 Ark. App. 488, at 9, 562 S.W.3d 877, 882. The Court found that merely possessing a concealed weapon didn't even amount to reasonable suspicion, much less probable cause. *Id*., 562 S.W.3d at 882.

111. Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015). Noteworthy is that the Attorney General noted, as one of the core reasons for her decision that blanket open carry was permissible, that the previous "exceptions" are not instead permissible ways to carry a weapon. *Id.*

112. *Id.*

113. *Id.*

114. Ferguson, *supra* note 24.

115. *Id*. The debate over whether or not open carry was allowed in Arkansas essentially ended after the release of this 2015 opinion. Shortly after the opinion's release, Governor Asa Hutchinson wrote a letter to the Arkansas State Police ("ASP") notifying the agency that open carry was, in his opinion, permissible in Arkansas in light of Rutledge's opinion. John

2. The Legislative Response

Following Attorney General Rutledge's call for clarification in her 2015 opinion, the Arkansas General Assembly unsuccessfully attempted to do just that.[116] In 2017, during the Regular Session of the Ninety-First General Assembly, Representative Aaron Pilkington and Senators Linda Collins and Terry Rice proposed two identical bills in their respective chambers to clarify that Arkansans do not need a license in order to conceal or open carry a handgun.[117] The bills did not seek to further amend section 5-73-120. Rather, the bills sought to add a provision to the concealed-carry licensing laws that made it clear that the mere existence of the licensing laws does not bar a person from legally carrying a handgun under another statute, which would include legally carrying a weapon pursuant to section 5-73-120—a direct response to Rutledge's flawed analysis in her 2015 opinion.[118] The proposed legislation provided,

> This subchapter does not prohibit a person from carrying a handgun without a license to carry a concealed handgun under this subchapter, whether openly or concealed, if he or she is not otherwise prohibited by the laws of this state from possessing a firearm in the state as permitted by the United States Constitution.[119]

Had this legislation passed, it would have directly addressed two issues to which Attorney General Rutledge opened the door in her 2015 opinion.[120] First, the legislation would have put to rest any concerns that unlicensed concealed carry pursuant to section 5-73-120 was in conflict with the oath one must take when obtaining a concealed carry license.[121] Rather, this provision would have clarified that section 5-73-120(c)(8) can be read in harmony with the concealed-carry licensing laws because it would have explicitly debunked the notion that a concealed carry license is the *only* way to

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Mortiz, *Open Carry Is in Law, Arkansas Governor Tells Officials*, ARK. DEM. GAZETTE, (Dec. 29, 2017, 4:30 AM), https://www.arkansasonline.com/news/2017/dec/29/open-carry-is-in-law-governor-tells-off/. Accordingly, the ASP promptly notified its officers of the interpretation. *Id*.

116. David Ferguson, *Does Act 746 of 2013 Allow Carrying a Concealed Handgun Without a License?*, CONDUIT NEWS (Mar. 27, 2017).

117. S.B. 585, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); H.B. 1994, 91st Gen. Assemb., Reg. Sess. (Ark. 2017). *See also*, https://conduitnews.com/2017/03/does-act-746-of-2013-allow-carrying-a-concealed-handgun-without-a-license/.

118. Ark. S.B. 585; Ark. H.B. 1994.

119. Ark. S.B. 585; Ark. H.B. 1994.

120. *See* Ark. S.B. 585; Ark. H.B. 1994; Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).

121. *See* Ark. S.B. 585; Ark. H.B. 1994; Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).

conceal carry a weapon.[122] The legislation would have made clear that section 5-73-120 could in fact offer a concurrent method of carrying a concealed weapon. Accordingly, it would have been abundantly clear that section 5-73-120, standing alone, provides for unlicensed concealed carry.

Second, had the legislation passed, it would have eliminated any chance that the courts might apply Rutledge's Hypothesized Presumption that a person is presumed to have an unlawful intent by circumventing the concealed licensing laws.[123] The proposed bill would have recognized multiple ways to carry a concealed handgun, and, given that possibility, a person could hardly be said to have "circumvented" the licensing laws by choosing to carry a weapon under the authority of another statute. Thus, the leap to unlawful intent could not be founded in the law when a person's behavior fits squarely within the behavior allowed by the law. Accordingly, the clarification that the bill proposed would have supported the argument that section 5-73-120(a) does in fact authorize unlicensed concealed carry. Ultimately, both bills died in committee.[124]

C. Attorney General Leslie Rutledge Opinion (2018)

Unsatisfied with Attorney General Rutledge's opinion regarding whether a person can conceal a handgun at all times without a license, Senator Linda Collins requested another opinion.[125] Specifically, Senator Collins asked Rutledge to opine on whether the law provides for any express *penalties* for carrying a concealed weapon without a license.[126] Rutledge answered in the negative but qualified her answer by emphasizing that, while there are no express penalties, she believed that there are ways that a court could imply criminality.[127] To this point, the Attorney General referenced the fourth caveat of her 2015 opinion.[128] Rutledge again explained that because of the oath in the concealed carry licensing laws, it was her belief that the mere

122. *See* Ark. S.B. 585; Ark. H.B. 1994; Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).

123. *See* Ark. S.B. 585; Ark. H.B. 1994; Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).

124. *SB585—Concerning the Intended Purpose of the Concealed Handgun Licensing Program*, ARK. ST. LEGIS., https://www.arkleg.state.ar.us/Bills/Detail?ddBienniumSession=2017%2F2017R&measureno=SB585 (last visited Dec. 30, 2020); *HB1994—Concerning the Intended Purpose of the Concealed Handgun Licensing Program*, ARK. ST. LEGIS., https://www.arkleg.state.ar.us/Bills/Detail?ddBienniumSession=2017%2F2017R&measureno=HB1994 (last visited Dec. 30, 2020).

125. *See* Ark. Att'y Gen., Opinion No. 2018-002 (June 15, 2018).

126. *Id.*

127. *See id.*

128. *Id.*; Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).

existence of the concealed carry handgun laws suggests that a person must have a license.[129]

Rutledge's opinion begins to run afoul of her hypothesis that a court could apply a presumption that a person carrying a concealed weapon without a license had the intent to unlawfully employ that weapon against another person, a point that Rutledge made in her first opinion. Rutledge identified and discussed two *separate and independent* presumptions in her 2015 opinion;[130] not only does Rutledge improperly comingle the two previously discussed presumptions in her 2018 opinion, but she also mischaracterizes them.[131] Accordingly, Rutledge contradicts herself, but in doing so, improperly articulates the law.[132]

Rutledge's 2018 opinion references only one presumption, which is the improper combination of the two presumptions in her 2015 opinion. Rutledge stated:

> [C]urrent caselaw from the Arkansas Supreme Court indicates that courts might apply a presumption that a person carrying a concealed handgun without a concealed-carry license has the intent "to attempt to unlawfully employ the . . . handgun as a weapon against a person." To be clear, I am not stating that I agree with the application of this presumption, but it is my responsibility to alert Arkansans that current court precedent suggests the presumption might be used. This presumption, if applied, could expose the person to arrest and conviction under section 5-73-120.[133]

First, there is in fact the Caselaw Presumption courts applied prior to Act 746 that allowed a jury to presume that a person carrying a loaded firearm had the intent to use that firearm against another person; however, that is not the presumption that the Attorney General is attempting to reference.[134] It is important to note that in that line of cases, there is a small subset of cases that allowed a presumption that a concealed weapon was loaded; and if the weapon was loaded, there was presumably the intent to use it against another person.[135] However, this again is not the presumption recognized by the Attorney General in her 2018 opinion.[136] The presumption she recognizes in this opinion hinges on the fact that a person is carrying the

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129. Ark. Att'y Gen., Opinion No. 2018-002 (June 15, 2018). Rutledge discussed this same point in her 2015 opinion. Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).; *supra* notes 112–15 and accompanying text.

130. *See* Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015); *supra* notes 89–110 and accompanying text.

131. *See* Ark. Att'y Gen., Opinion No. 2018-002 (June 15, 2018).

132. *See* Ferguson, *supra* note 16.

133. *Id.* (alteration in original).

134. *See supra* Section II.

135. *See supra* Section II.

136. *See* Ark. Att'y Gen., Opinion No. 2018-002 (June 15, 2018).

weapon concealed *without a license*.[137] As characterized by Rutledge in the above quote, the "presumption" developed by the caselaw is that if a person carries concealed without a concealed handgun license, that person has the intent to employ that weapon unlawfully against another person.[138] Not only is this a blatant misstatement of the law, but it is not what the Attorney General said in her 2015 opinion.[139] The Caselaw Presumption developed during a time period when concealed carry licensing laws did not exist, meaning that first, there is no possible way that the Caselaw Presumption is tied to unlicensed carry.[140] Second, the Presumption progresses from concealed to loaded, then from loaded to intent *to use against another*, not the intent to use *unlawfully*. It was this very point that the Attorney General relied on when opining that such a presumption would not be applicable to the new statute.[141] In both these regards, the Attorney General's statement of the law is wrong.

To be clear, in her 2015 opinion Attorney General Rutledge did reference a second presumption, separate and apart from the Caselaw Presumption, that the Court could presume that a person who "flouted" the concealed carry laws had the requisite unlawful intent.[142] *This* presumption addressed the absence of a license. However, the Attorney General hypothesized this presumption and had no precedent to support it; moreover, Rutledge properly discussed the two presumptions distinct from one another.[143] While both presumptions could in fact be applied by the courts post-Act 746—although recent courts have declined to do so—the Attorney General improperly referenced and mischaracterized not only the law but also her own analysis by discussing the two presumptions as if they were one. In doing so, the Attorney General gave the impression that precedent supports the Hypothesized Presumption when that is only a partial truth.[144]

IV. PATH THROUGH THE COURTS

With all the media attention[145] and conflicting executive commentary since Act 746's passage[146], it is surprising that the courts have not been overwhelmed with cases challenging the scope of the amended statute.

137. *Id*.
138. *Id*.
139. *See* Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).
140. *See supra* Section II. Concealed carry licenses did not exist until 1995. *See* ARK. CODE ANN. §§ 5-73-301 to -327 (2020).
141. *See supra* note 94 and accompanying text.
142. *See* Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).
143. *See id*.
144. *See* Ark. Att'y Gen., Opinion No. 2018-002 (June 15, 2018).
145. *See e.g.*, *supra* notes 1-4 and accompanying text.
146. *See generally*, *supra* Section II.

Nonetheless, caselaw is scant. Only once has the issue of concealed, unlicensed carry reached the Supreme Court of Arkansas, only to be remanded on procedural grounds.[147] However, as of late, section 5-73-120 is getting more attention, with decisions coming more frequently and growing more impactful. Thus, the stage is being set for the issue to reach the court of highest jurisdiction.

A. The Twilight Zone

State v. Taylor was the first and only time that the Supreme Court of Arkansas has had the opportunity to interpret section 5-73-120, post-Act 746, and settle the score on whether Arkansas is a true constitutional carry state.[148] On May 30, 2014, Jerroll Taylor was arrested and charged with, among other things, violating section 5-73-120.[149] The charges arose from an altercation with police officers during a child custody exchange scheduled in the Prescott Police Department parking lot.[150]

During the exchange Taylor kept his handgun holstered on his hip, concealed.[151] Yet, after a verbal altercation between Taylor and an officer, Taylor was ultimately arrested for claims unrelated to the handgun possession because at the time of the arrest, the officer was unaware that Taylor was armed.[152] It was *during* the arrest that Taylor alerted the officer to the weapon, and accordingly, the officer charged Taylor with violating section 5-73-120.[153] At no point during the child custody exchange or the verbal altercation with the officer did Taylor brandish the firearm or threaten to use the weapon; Taylor otherwise maintained that he at no point intended to use the weapon unlawfully against a person.[154] Taylor's stated reason for carrying the weapon in the first place was strictly for self-defense and to protect himself and his children from wild hogs during the fishing trip that he had planned for after the exchange.[155] Taylor did not have a concealed handgun license.[156]

147. *See* Taylor v. State, 2016 Ark. 392, 1–2, 503 S.W.3d 72, 73–74.
148. *See id.* at 1 n.1, 503 S.W.3d at 74 n.1.
149. Jerroll Taylor's Abstract, Appellant Brief, & Addendum at 1–4.
150. *Id.*
151. *Id.* at 1, 3–4.
152. *Id.* at 3.
153. *Id.* at 3–4. Taylor was also charged with harassing communications and disorderly conduct. *Id.* at 4.
154. Jerroll Taylor's Abstract, Appellant Brief, & Addendum, *supra* note 149, at 3–4.
155. *Id.* at 1–2.
156. *Id.* at 14.

Taylor was found guilty of the offense of carrying a weapon, a finding that was affirmed on appeal.[157] In the district court's order, the judge relied on the archaic, pre-Act 746 Caselaw Presumption that if an individual is carrying a loaded pistol in a car or on an individual's person, he is presumed to be impermissibly carrying the firearm as a weapon within the meaning of section 5-73-120.[158]

On appeal to the Supreme Court of Arkansas, Taylor argued (1) that the trial court used the wrong version of the statute, meaning that the court convicted him pursuant to the unamended, pre-Act 746 version of section 5-73-120, and accordingly, the court relied on outdated precedent, and (2) that the trial court misinterpreted the intent required by the correct version of section 5-73-120.[159] Taylor pointed to the use of the Caselaw Presumption as evidence that the court used the incorrect version of section 5-73-120, and he argued that the use of the Presumption at all was incompatible with the correct version of section 5-73-120. Taylor argued the Presumption only amounts to the intent to use the weapon against another person, rather than the heightened intent to use the weapon unlawfully against another person.[160] Taylor noted that because this was an issue of first impression to the court, *any* reliance on outdated precedent was improper.[161]

To his second point that the lower court misinterpreted the post-Act 746 version of section 5-73-120, Taylor claimed that the statute was plain and unambiguous; and accordingly, the statute required that the state prove beyond a reasonable doubt that Taylor possessed the weapon and simultaneously intended to use it unlawfully against another person.[162] While maintaining that the amended statute was unambiguous, Taylor nonetheless noted that adding the word "unlawfully" has created great discussion all over the

157. Taylor made a motion for a new trial, which was denied by inaction, based on the allegation that the court applied the incorrect version of the Ark. Code Ann. § 5-73-120. *Id.* at 4–5. Taylor asserted that the court applied the pre-Act 746 statute rather than the law as amended by Act 746. *Id.*

158. Jerroll Taylor's Abstract, Appellant Brief, & Addendum, *supra* note 149, at 5–6. The judge made no reference to Act 746 or how it changed the interpretation of the statute. *Id.* Further, the District Court noted that the "journey" provision, which the judge called an exception, did not apply because Taylor's journey ended when he returned to his home county. *Id.* at 9. Note, this is the same presumption that Rutledge said could, but shouldn't, apply in her 2015 opinion. Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015). The judge applied it without recognizing the change in the law, indicating that the presumption still applies regardless of the change or acting as if the change never happened. Order, State of Arkansas v. Jerroll Taylor, No. 2015-15-1 (Jan. 22, 2016).

159. Taylor argued additional procedural issues unrelated to Act 746 on which the court ultimately decided the case. *See* Taylor v. State, 2016 Ark. 392, 1–2, 503 S.W.3d 72, 73–74.

160. Jerroll Taylor's Abstract, Appellant Brief, & Addendum, *supra* note 149, at 5–7.

161. *Id.* at 9.

162. *Id.* at 9.

state, including opinions by two separate Attorneys General.[163] Taylor took issue with both.[164]

Taylor argued that by its plain, unambiguous language, Act 746 authorized open and concealed carry without a license.[165] Taylor criticized Rutledge's Hypothesized Presumption for lack of precedent and for the lack of an express requirement in either the concealed carry statutes or the weapons possession statutes that a person have a license to conceal a handgun.[166] Instead, Taylor reasoned that because self-defense is a lawfully recognized purpose, carrying a weapon for that sole reason fits squarely within the amended version of section 5-73-120.[167] The Supreme Court remanded the case on procedural grounds while expressly declining to address the merits of Taylor's arguments about the application and interpretation of section 5-73-120.[168]

The scope of section 5-73-120 made its way to the court again in May of 2018 when Kirby Ward of Greenbrier, Arkansas, was charged with the offense of carrying a weapon.[169] Ward travelled across county lines each day for work, and on the day in question, police stopped Ward for expired tags.[170] Submitting to a traffic stop, Ward put his car in park, took his firearm out of his waistband, unloaded it, and put it on the dash of his truck.[171] The seizing officer claimed that Ward needed a license to carry the weapon and that absent such license, Ward was violating the law.[172] At trial, both Ward and the seizing officer admitted that Ward's intent was to unload the weapon and safely place the weapon on the dash of the vehicle, which was not an unlawful intent.[173] In fact, Ward explained his intentions were solely

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163. *Id.*; *see also* Ark. Op. Att'y. Gen No. 2013-047 (July 8, 2013); Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015). Because *Taylor* was decided in 2016, Attorney General Rutledge had not yet issued her second opinion on the subject, meaning that at the time *Taylor* was decided, only Attorney General McDaniel's and Attorney General Rutledge's first opinion existed. *See* Jerroll Taylor's Abstract, Appellant Brief, & Addendum, *supra* note 148; Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015); Ark. Att'y. Gen., Opinion No. 2013-047 (July 8, 2013).

164. Jerroll Taylor's Abstract, Appellant Brief, & Addendum, *supra* note 149, at 9.

165. *Id.*

166. *Id.*

167. *Id.*

168. Taylor v. State, 2016 Ark. 392, at 3 n.1, 503 S.W.3d 72, 74 n.1.

169. *Defendant Not Guilty on Carrying a Weapon Charge; Judge Says Act 746 Confusing*, CONDUIT NEWS (Aug. 23, 2018, 10:59 PM), https://conduitnews.com/2018/08/23/defendant-not-guilty-on-carrying-a-weapon-charge-judge-says-act-746-confusing/.

170. *Id*.

171. *Id*.

172. *Id*. During the stop, Ward attempted to explain to the officer that it was Ward's belief that he did not need a license to carry the weapon concealed. *Id*.

173. *Id*.

based on his own safety and the officer's.[174] The judge avoided interpreting Act 746 by finding Ward not guilty because he was on a journey within the meaning of the offense.[175] However, regarding Act 746, the judge claimed, "[S]aying Act 746 has created confusion is the understatement of the year."[176]

B. The Shift Toward Judicial and Legislative Clarity

1. Taff v. State—*The First Step Towards Judicial Clarity*

Breaking the cycle on the courts' unwillingness to even address Act 746, in 2018 the Arkansas Court of Appeals stated in *Taff v. State* that merely possessing a concealed weapon was not prohibited pursuant to amended section 5-73-120.[177] The issue in *Taff* was whether the officer had the requisite reasonable suspicion to warrant a seizure of Jamie Taff.[178] Responding to a call about a man "acting suspiciously" with a handgun concealed in his waistband, officers stopped Taff walking along the highway.[179] During the course of this stop, the officers searched Taff and found contraband that led to criminal charges relating to possession of controlled substances.[180]

To be clear, Taff was not charged with the offense of carrying a weapon; instead, he was charged for his possession of contraband that was only discovered pursuant to a search that was conducted based on reasonable suspicion arising from, *inter alia*, Taff's possession of the concealed weapon.[181] Thus, Taff challenged the initial stop along the highway that led to his arrest, arguing that the officers lacked the requisite reasonable suspicion to make the stop.[182] To this point, the State conceded that the officers were not investigating a crime; rather, the State argued that the officers needed to determine Taff's lawfulness with regards to going in and out of a store, carrying the weapon, and otherwise "acting suspiciously."[183] The court did not buy this argument and found that Taff's concealment of the firearm in his waistband did not amount to reasonable suspicion to believe a crime was

174. *Defendant Not Guilty on Carrying a Weapon Charge*, *supra* note 169

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175. *Id*.

176. *Id*.

177. Taff v. State, 2018 Ark. App. 488, at 9, 562 S.W.3d 877, 882. Importantly, this is the exact opposite of Attorney General Rutledge's opinion. *See* Ark. Att'y Gen., Opinion No. 2018-002 (June 15, 2018); Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).

178. *Taff*, 2018 Ark. App. at 6, 562 S.W.3d at 881.

179. *Id*. at 1–2, 562 S.W.3d at 879.

180. *Id.* at 2, 562 S.W.3d at 879.

181. *Id.*

182. *Id.* at 6, 562 S.W.3d at 881.

183. *Id.* at 3, 6, 8, 562 S.W.3d at 880–82.

afoot.[184] Citing section 5-73-120, the court stated, "Merely possessing a weapon is not a crime in the State of Arkansas."[185]

Ironically, the court quoted Attorney General Rutledge's reasoning from her 2015 opinion to come ultimately to the opposite conclusion of Rutledge.[186] More specifically, the court quoted Rutledge's reasoning regarding why a person could *open carry* a handgun pursuant to section 5-73-120 and found that this reasoning applies whether an individual is carrying open or concealed—the precise point that proponents of unlicensed concealed or open carry pursuant to section 5-73-120 have been making all along.[187] The court's reasoning also refuted Rutledge's Hypothesized Presumption that carrying concealed without a license creates a presumption that person is carrying the weapon with unlawful intent, and in similar fashion, the court did not apply the Caselaw Presumption.[188] While *Taff* was a victory for proponents of unlicensed concealed carry, the court's reasoning is dicta, and thus is merely persuasive authority.

2. *Legislative Clarity in Response to* Taff v. State

The most effective legislative efforts regarding unlicensed concealed carry happened in the 2019 Regular Session. In response to the decision in *Taff* and in an effort to bolster the merely persuasive nature of the court's dicta, the House and the Senate proposed and passed two separate and identical, non-binding resolutions that made it clear that the reasoning in *Taff* was in fact the law in Arkansas; thus, a person can conceal or open carry a handgun without a license.[189] Introduced in the House by Representative Brandt Smith and introduced in the Senate by Senator Scott Flippo, the resolutions stated,

> [T]he citizens of the state deserve clarity in regard to gun rights and gun laws . . . [I]n the recent *Jamie Taff v. State of Arkansas* (2018 Ark. App. 488) case, the Court of Appeals gave judicial clarity and affirmed that Arkansas is a constitutional carry state, with no permit required to carry a handgun, either openly or concealed.[190]

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184. *Id.*, 562 S.W.3d at 883.

185. *Id.* at 9, 562 S.W.3d at 882.

186. *See id.*, 562 S.W.3d at 882 (citing Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015)).

187. *See id.*

188. *See id.*; Ark. Att'y Gen., Opinion No. 2018-002 (June 15, 2018); Ark. Att'y Gen., Opinion No. 2015-064 (Aug. 28, 2015).

189. H.R. 1013, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019); S.R. 18, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019).

190. Ark. H.R. 1013; Ark. S.R. 18.

The resolutions clearly and expressly recognized that Arkansas is a constitutional carry state.[191] Though the resolutions were another victory for proponents of unlicensed carry and doubly persuasive, they were not binding, bringing the grand total, at that time, up to three non-binding decisions in favor of unlicensed concealed carry.

The weaknesses of the merely persuasive nature of these efforts were apparent only a few short months later when the Arkansas State Police ("ASP") publicly refused to accept an interpretation of the law that allows for unlicensed concealed carry. [192] When pressed on why the ASP still took this position in light of *Taff* and the resolutions, the ASP explained that it was relying on its own interpretation of the statute and that the mere existence of the concealed licensing regime was a clear indicator that a person must have a license in order to carry a firearm concealed—the same point raised by Attorney General Rutledge.[193] The actions by the ASP highlighted some important points. Regardless of the motives behind the ASP's position, its actions demonstrated the divisive nature of the issues and showcased just how important either legislative or judicial clarity had become.[194]

3. Pettry v. State

After what could only be described as a roller coaster of ideas, the Arkansas Court of Appeals again addressed section 5-73-120 in March 2020, but this time the court's decision was binding. Following a drunken altercation at a bar in Fayetteville, Arkansas, Jesse Pettry was charged with the offense of carrying a weapon.[195] The court ultimately found that Pettry did not have the requisite intent to sustain a conviction under section 5-73-120, meaning that Pettry did not have the intent to use the weapon unlawfully against another person.[196] Most importantly, the court addressed one of the

191. Ark. H.R. 1013; Ark. S.R. 18.

192. *Past Committee Meetings: Arkansas Legislative Council Game & Fish/State Police Subcommittee*, ARK. ST. LEGIS. (June 20, 2019), http://sg001-harmony.sliq.net/00284/Harmony/en/PowerBrowser/PowerBrowserV2/20190618/-1/17337?viewMode=1#agenda_ (at video bookmark for 10:37:07 AM).

193. *Id*.; *supra* Section III. The ASP explained it was its belief that, read as a whole, section 5-73-120 required a concealed handgun license to conceal a firearm because a license is an "exception" to the general rule. *Past Committee Meetings*, *supra* note 192.

194. A common theme in the Arkansas Legislative Council meeting was that *legislative* clarity was imperative, and the ASP expressed its willingness to cooperate with upcoming attempts to pass clarifying legislation. *Past Committee Meetings*, *supra* note 192.

195. Pettry v. State, 2020 Ark. App. 162, 1–2, 595 S.W.3d 442, 444.

196. *Id*. at 17, 595 S.W.3d at 452–53. To this point, the court stated that the offense requires that the State prove that the purpose of the possession of the gun was to achieve an unlawful end. *Id.*, 595 S.W.3d at 452–53. In Arkansas, a person acts purposefully when the person's conduct or the result of the person's conduct is that person's conscious objective. *Id*. at 18, 595 S.W.3d at 453 (citing ARK. CODE ANN. § 5-2-202(1) (Repl. 2013)). Thus, the court

hottest topics that has fueled the fight between proponents and opponents of the unlicensed concealed carry. The court made abundantly clear that section 5-73-120 is not "a statute imposing criminal liability on a person for merely possessing a concealed firearm without a license to carry one in a concealed manner."[197] Thus, in one sentence the court settled years' worth of controversy—maybe.

V. *PETTRY* AND WHAT IT MEANS FOR THE FUTURE

A. The Fallout

Pettry may have opened the door to more questions than it answered. First, the court explicitly declined to address the archaic Caselaw Presumption that a person carrying a firearm concealed is presumed to be carrying the firearm loaded and as a weapon.[198] While the circuit court applied the Caselaw Presumption in order to convict Pettry, the state did not press the issue on appeal.[199] While this note argues that the presumption is no longer viable, the question is still ultimately unresolved.[200] Moreover, the validity of Rutledge's Hypothesized Presumption remains an open question. While Pettry seems to indicate that courts will not apply such a presumption, it remains unclear whether courts would recognize something short of a presumption when a person carries a concealed weapon without a concealed carry license. Stated another way, will the courts use the lack of a license at least as a factor pointing to unlawful intent, even if they do not go as far as to create a presumption?

Curiously, the holding in *Pettry* suggests that a person has more freedoms when carrying a weapon *without* a license than that person has *with* a license. At the very least, there are different standards of conduct to which a person must conform his or her behavior. Note that had Pettry been a concealed carry license holder, he would have been in violation of his obligations under the licensing regime.[201] Per the concealed carry laws, a concealed carry license holder is forbidden from carrying a weapon into a bar, whether or not the person is drinking.[202] Not only did Pettry carry his weap-

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did not find that Pettry possessed the weapon in order to employ the weapon unlawfully against another person. *Id*. at 17, 595 S.W.3d at 452–53.

197. *Id.* at 18, 595 S.W.3d at 453. The court noted that finding Pettry guilty in this case would have been the same thing as finding him guilty just because he didn't have a license. *Pettry*, 2020 Ark. App. at 17–18, 595 S.W.3d at 453.

198. *Id.* at 14 n.2, 595 S.W.3d at 451 n.2.

199. *Id.*, 595 S.W.3d at 451 n.2.

200. *See supra* Section III.

201. *See* ARK. CODE ANN. § 5-73-306(12).

202. *Id.* This assertion can be qualified if a person has an "enhanced" concealed licensed issued pursuant to Arkansas Code Annotated section 5-73-322. An enhanced license holder

on into a bar, he was intoxicated, and in his rage tore the door of the bar off its hinges.[203] The dilemma is that had Pettry been a concealed carry license holder, he would have had his license suspended or revoked.[204] While that does not necessarily amount to a conviction under section 5-73-120, it does come with serious consequences, such as loss of reciprocity, and, if the person is an enhanced license holder, loss of ability to carry his weapon into otherwise restricted places.[205] Thus, this situation begs the question of whether a violation of the concealed carry regime by a license holder could be used by the court as evidence that the license holder had unlawful intent.

Continuing in this same vein, one may ask if a revocation of a license is really that grave of a consequence because it merely puts the former licensee in the same position as a person carrying a concealed weapon without a concealed license pursuant to section 5-73-120(a). Note, however, that there are certain benefits afforded only to concealed carry license holders, as briefly highlighted above.[206] Some of the most attractive benefits include reciprocity and if a person is an enhanced license holder, the ability to carry a weapon in otherwise prohibited places if the person has an enhanced license.[207] Though Arkansas seemingly does not require a license to carry a firearm, that is not the case in every state. Yet, many of these states do allow a person to carry a weapon with a license.[208] Thus, several states have enacted "reciprocity" laws that recognize another state's concealed license.[209] As a result, any person that holds an Arkansas concealed carry license can also legally conceal carry his or her weapon in those enumerated states that recognize Arkansas's license.[210] Moreover, Arkansas has enacted what has been

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can carry a concealed weapon into a bar. *See* ARK. CODE ANN. § 5-73-306(12)(B). An enhanced license allows a person to conceal a firearm in certain enumerated places that a person with a basic concealed license or a person with no license could not carry his or her firearm. *See* ARK CODE ANN. § 5-73-322.

203. Pettry v. State, 2020 Ark. App. at 1, 595 S.W.3d at 444.

204. DEP'T OF ARK. STATE POLICE, ARKANSAS CONCEALED HANDGUN CARRY LICENSE RULES, 7.0.

205. Reciprocity is when a person's Arkansas concealed carry license is also sufficient as a concealed carry license in another state. For example, Arkansas's reciprocity statute that makes other states' concealed carry licenses valid in Arkansas is found at ARK. CODE ANN. § 5-73-321. Arkansas's enhanced license statutes are found at ARK. CODE ANN. § 5-73-322. *See also* Ferguson, *supra* note 24.

206. *See* Ferguson, *supra* note 24.

207. *Id.*

208. *See e.g.* TENN. CODE ANN. § 39-17-1351; Mo. Ann. Stat. § 571.101; TEX. GOV. CODE ANN. § 441.172.

209. *See e.g.* TENN. CODE ANN. § 39-17-1351(r)(1); Mo. Ann. Stat. § 571.107(1); TEX. GOV. CODE ANN. § 441.173.

210. *See e.g.* TENN. CODE ANN. § 39-17-1351(r)(1); Mo. Ann. Stat. § 571.107(1); TEX. GOV. CODE ANN. § 441.173.

coined the "enhanced" concealed carry license.[211] An enhanced license allows a person to carry his or her weapon in places that would otherwise be prohibited, such as the state capitol or state universities, if the person goes through various forms of additional and more rigorous training.[212] In order to qualify for an "enhanced" license, a person must first have a concealed license.[213] Thus, the concealed carry licensing laws are not obsolete and do offer important benefits to license holders.

In short, even if a person does not necessarily have more "freedoms" without a license than with a license, there is at least a cost-benefit analysis. On the one hand, there are various benefits of having a license, namely reciprocity or, in the case of an enhanced license, the ability to carry your weapon in otherwise forbidden places.[214] On the other hand, a license is expensive. A license costs $91.90 at the outset, plus the cost of the licensing class, plus the cost of license renewals.[215] An insolvent person has no less need to protect himself or herself than a wealthy person. Thus, while the various benefits of a license might be desirable for some, for others, the cost simply is not worth it or might not be possible. Being able to carry a weapon without a license levels the playing field and allows an insolvent person an equal right to protect himself or herself, notwithstanding his or her ability to pay.

B. Could Legislation Be the Answer?

In the absence of further legislative clarity, if the issue of unlicensed concealed carry reaches the Supreme Court of Arkansas, the court should affirm the conclusion in *Pettry* by holding that section 5-73-120, standing alone, allows for unconcealed open or concealed carry. However, the calls for clarification, though unnecessary, cannot be overlooked. If it is in fact the legislature's intent to allow a person to conceal a weapon without a license, the legislature could launch a "preemptive strike." To ensure that there is no way the Court could interpret section 5-73-120 as requiring a person to have a license to conceal carry a weapon, the General Assembly could resurrect and pass Senate Bill 585 of 2017 or House Bill 1994 of 2017.

This legislation would serve two vital functions. First, the legislation would remove any scintilla of an argument that unlicensed concealed carry

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211. ARK. CODE ANN. § 5-73-322.
212. *Id.*
213. *Id.*
214. *See Id.*. *See generally,* Ferguson, *supra* note 24.
215. *Arkansas State Police Concealed Handgun Carry Online Licensing System*, ARK. DEP'T OF PUB. SAFETY, https://chcl.ark.org/asplicense/chcl_application/chcl.aspx (last visited Oct. 23, 2019). There are discounts for senior citizens. *Id.*

pursuant to section 5-73-120 and concealed carry pursuant to the concealed licensing laws cannot simultaneously coexist as two separate means of achieving the same end.[216] Second, the legislation would prevent a prosecutor from relying on Rutledge's Hypothesized Presumption that a person carrying a concealed weapon, by circumventing the concealed licensing statutes, had the requisite mal intent to sustain a conviction for carrying a weapon.[217] Because the concealed licensing statutes would not be the sole avenue to lawfully carry a concealed weapon, a person would not have circumvented anything.[218]

Although the bills were unable to garner enough support in 2017, the landscape has changed. With *Pettry*, the court has given the legislature fresh material to add to the momentum of *Taff* and the resulting resolutions. As a result, a new attempt to pass the legislation just might be successful.

VI. CONCLUSION

While the offense of carrying a weapon is an old offense, its recent overhaul has brought new debate. The language of the statute itself is unambiguous; however, all the distracting commentary has made it seem as otherwise. Nonetheless, a person does not need a license to carry a concealed weapon in the state of Arkansas. In the event that the issue reaches the Supreme Court of Arkansas, the court should affirm the holding in *Pettry*. However, if it is truly the intent of the Arkansas General Assembly to allow unlicensed concealed carry, the legislature had the right idea in 2017. If the legislature wishes to clarify that Arkansans can in fact open or conceal carry a handgun with or without a permission slip from the government, it should resurrect and pass Senate Bill 585 of 2017 or House Bill 1994 of 2017.

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216. *See supra* notes 120–24 and accompanying text.
217. *See supra* notes 120–24 and accompanying text.
218. *See supra* Section III.

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