

special primary arose solely as a result of an error on the part of the probate judge.

### UNOFFICIAL OPINION U78-45

To: Probate Judge,  
McIntosh County

October 30, 1978

Re: A probate judge may not issue a pistol permit prior to the return of the law enforcement agency check should such check exceed 60 days as provided by law.

This is in response to your recent letter concerning whether a probate judge must issue a pistol permit on the 60th day of an application for such a license even though the required law enforcement agency criminal history check has not been returned to the court. The requirement for a criminal history background check under Ga. Laws 1976, pp. 1430, 1433, Ga. Code Ann. § 26-2904 (b), was a major change in the procedure for issuing a pistol permit.

As you are aware, Ga. Laws 1976, pp. 1430, 1433, Ga. Code Ann. § 26-2904 (b), stated that the probate judge was to issue a license not later than 30 days after he had received an application for such a license if no facts establishing ineligibility have been reported to the judge. Due to the fact that a license background check was a significant change to that which previously existed, the General Assembly at the time apparently felt that 30 days would be a sufficient period of time in which to accomplish this objective. However, almost immediately after July 1, 1976, it became obvious that the 30-day period in which to obtain this background check would not be workable. Consequently, the General Assembly in 1978 amended Ga. Code Ann. § 26-2904 (b) so as to provide for 60 days in which to conduct the background investigation rather than the original 30 days. See Ga. Laws 1978, pp. 1607, 1608.

In your letter of October 4, 1978, you are concerned as to whether you must issue a license on the 60th day, notwithstanding the fact that the results of the background check have not been completed. In reviewing both the original 30-day provision passed in 1976, and the enlarged 60-day provision enacted in 1978, it is my unofficial opinion that the background check by a law enforcement agency is an essential condition precedent to your issuing a license to an applicant. It is my unofficial opinion that the General Assembly never intended for a probate judge to issue a license until he had received

a report from the respective law enforcement agency conducting the background check. Initially, the General Assembly believed that such a report could be returned to the judge within 30 days, but due to the large number of applicants, and several other factors, the General Assembly increased the 30-day period to that of 60 days, again a period in which it felt that this procedure could be accomplished. You will note in both the 1976 and 1978 Acts that this report may initially be given to the judge by way of telephone, but must ultimately come to the judge in written form. This is evidence to me that the General Assembly saw that providing a written report might take longer than 30 days, and now hopefully not more than 60 days, but in order to speed up the process gave its approval to doing so by having this information to the bare minimum returned to the probate judge by telephone.

Even though the statute now states that "Not later than 60 days after the date of application the judge of the probate court shall issue the applicant a license to carry any pistol or revolver if no facts establishing ineligibility have been reported . . .", it is my unofficial opinion that the use of the word "shall" is directory and not mandatory in view of the fact that the General Assembly intended that the licensing check be a condition precedent to the issuance of any license. Perhaps the 60-day period will need to be extended an additional 15 to 30 days. I am of the opinion, however, that you should not issue a permit to an applicant until you have received either verbal or written confirmation of the background check, even though that information may result in the license being issued later than 60 days from the date of initial application. The background examination not only protects the public, but it is also a means of protecting you in the issuance of a license. For example, what if the applicant in fact had criminal history for assaultive behavior, but that fact had not been reported to you by the 60th day and you proceeded to issue a license, with the licensee subsequently using that pistol to inflict grievous bodily harm upon some citizen. In that instance the issuance of that license before the return of the background check, but after the 60-day period could put you in a rather uncomfortable position, and could result in possible civil action on behalf of the victim. Consequently, to avoid a situation such as this, I believe you would be fully protected in not issuing a permit until you receive the results of the background check, even though that check may exceed 60 days in length.

The responsibility for conducting the background examination in an application for a pistol license under Ga. Laws 1976, as amended, Ga. Code Ann. § 26-2904 (b), is placed upon the appropriate law

enforcement agency. The 1978 amendment, Ga. Laws 1978, pp. 1607, 1608, states that the law enforcement agency is to report its findings from its investigation to the probate judge by the 50th day of the 60-day period previously discussed. Your second question asks whether it is mandatory that the law enforcement agency have their investigation report to you by the 50th day of the 60-day period in which you are to issue a pistol license.

Again, I believe that the General Assembly felt that 50 days would be a reasonable period of time for a law enforcement agency to conduct a background check, and that it would much rather have the check completed in 50-plus days, rather than not to have a check at all. Consequently, I believe that the 50-day period for the agency check is a directory period, but not a mandatory period. I believe, however, that the law enforcement agency should strive to comply with the wishes of the General Assembly and return the results of its investigation to the judge by the 50th day of the overall 60-day period, if at all possible.