



**House
Legislative
Analysis
Section**

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GUNS POSSESSED BY EX-FELONS

House Bill 5400 (Substitute H-3)
Sponsor: Rep. Perry Bullard

House Bill 5432 (Substitute H-4)
Sponsor: Rep. Michael E. Nye

First Analysis (2-13-92)
Committee: Judiciary

THE APPARENT PROBLEM:

Prior to the enactment of Public Act 320 of 1990, Michigan law prohibited a former felon from having a pistol until eight years after his or her release from prison. Public Act 320, which took effect March 28, 1991, instead barred a person from having a pistol if he or she had been convicted of a crime punishable by imprisonment for more than one year. The new ban on pistol ownership was for an indefinite period; however, new language also stated that the prohibition was not to apply when the conviction had been expunged, when the person had been pardoned, or when the person had his or her civil rights restored, unless that expungement, pardon, or restoration expressly prohibited the person from shipping, transporting, possessing, or receiving firearms.

The changes made by Public Act 320 figured prominently in a recent decision issued in federal court (U.S. v Gilliam, Case No. 91-80587, U.S. District Court, Eastern District of Michigan, decided November 21, 1991). At issue in that case was whether federal gun charges could be sustained against an ex-felon found in possession of a .22 calibre semi-automatic rifle. While federal law bars gun possession by anyone who has been convicted of a crime punishable by imprisonment for more than a year, federal law also looks to state law for a determination of what constitutes a conviction. Any conviction that had been expunged, or for which the person had been pardoned or had his or her civil rights restored, is not to be considered a conviction, unless that pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

The court employed a test drawn from another federal case (U.S. v Cassidy, 899 F.2d 543 [6th Cir. 1990]) that suggested that a convicted felon has civil

rights restored by operation of state law when again entitled to vote, hold public office, and serve on a jury. The court noted that Michigan law allows an ex-felon to do all of these things upon release from prison, and further noted that Michigan law places no restrictions on an ex-felon's right to own a long gun. Although it was not necessary for a resolution of the case at hand, the court concluded that a defendant convicted of a felony in Michigan and released from prison cannot be prosecuted under the Federal Gun Control Act for possession of any firearm other than a pistol. (In Gilliam's case, the gun possession offense occurred before Public Act 320 took effect, and as Gilliam had been released from prison more than eight years prior to the offense, the court held that federal charges could not stand.)

The Gilliam decision is being appealed by the U.S. Attorney, whose brief in district court argued that because Michigan restricts an ex-felon's right to sit on juries (for example, court rules on jury service allow an ex-felon to be challenged for cause), and because Michigan expressly limits an ex-felon's firearm privileges, Gilliam could not avail himself of the exemption from federal laws proscribing firearm possession by convicted felons.

The Gilliam decision, the uncertain prospects for a successful appeal, and the internal inconsistencies in Michigan law (an ex-felon may not have a pistol, but an ex-felon may have a pistol if his or her civil rights are restored) have led to calls for prompt repairs to a defect in Michigan law that hampers federal gun law prosecutions, raises questions about the status of many now imprisoned for gun law violations, allows violent ex-felons unrestricted access to long guns, and places but cloudy restrictions on an ex-felon's ability to have a pistol.

House Bills 5400 and 5432 (2-13-92)

Legislation to make such repairs has been proposed.

THE CONTENT OF THE BILLS:

House Bill 5432 (MCL 750.222 et al.) would amend the Michigan Penal Code to restrict firearm ownership and sales by someone who had been convicted of a felony. For the purposes of the bill, a "felony" would be a violation of state or federal law punishable by imprisonment for four years or more. Generally, an ex-felon would be barred from having a firearm (whether a pistol or long gun) for three years after meeting all of the following conditions: payment of all fines, serving of all terms of imprisonment, and successful completion of all conditions of probation or parole. However, for certain serious felonies (which the bill would call "specified felonies"), gun possession would be barred for five years after the conditions were met, and the ex-felon would in addition have to have his or her firearm rights restored by the local concealed weapons licensing board under House Bill 5400.

A "specified felony" would be burglary of an occupied dwelling, breaking and entering of an occupied dwelling, arson, or a felony in which an element of the offense was any of the following: unlawful use or threatened use of physical force against an individual; unlawful manufacture, importation, distribution, or dispensing of a controlled substance; unlawful possession or distribution of a firearm; or unlawful use of an explosive.

The bill would not apply to a conviction that had been expunged or for which the person had been pardoned, unless the expungement or pardon expressly provided that the person could not possess a firearm. (Whether the person's civil rights had been restored would not matter.)

It would be a felony punishable by up to five years in prison, a fine of up to \$5,000, or both to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in violation of the bill's restrictions on ex-felons.

An existing prohibition against selling a gun to a person under indictment for a crime punishable for imprisonment for more than one year would be revised to instead to refer to indictment for a four-year felony; the prohibition also would apply to sales to someone prohibited from owning a firearm by virtue of being an ex-felon. The penalty for

violating the sales prohibition would remain what it is now: a felony punishable by up to ten years in prison, a fine of up to \$5,000, or both.

House Bill 5400 (MCL 28.421 et al.) would amend the pistol licensing act (Public Act 372 of 1927) to delete language added by Public Act 320 of 1990 that provided that someone convicted of a crime punishable by imprisonment for more than one year could not have a pistol, and that also provided that the prohibition would not apply when a conviction had been expunged, or the person had been pardoned or had his or her civil rights restored. The bill would instead bar a pistol permit from being issued to someone who was prohibited from having a firearm under House Bill 5432.

The bill also would provide for review by local concealed weapons licensing boards of the applications submitted by ex-felons who had been convicted of serious felonies, and thus under House Bill 5432 could not possess a firearm without approval from the local board. A person could not submit more than one application per year; the board could charge a fee to cover the actual costs of processing the application.

The board would restore the rights of a person to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm if it determined by clear and convincing evidence that all of the following were true: the person had properly submitted an application; five years had passed since the person paid all fines, served all terms of imprisonment, and successfully completed all conditions of probation or parole for the felony offense in question; and, the person's record and reputation were such that he or she was not likely to act in a manner dangerous to the safety of others. An applicant could appeal a denial to the circuit court.

Neither bill could take effect unless both were enacted.

BACKGROUND INFORMATION:

The House has before it two other bills proposing a solution to the same problem: House substitutes for Senate Bills 528 and 529. For a more complete explanation of those bills, see the House Legislative Analysis Section analysis dated 12-12-91.

FISCAL IMPLICATIONS:

The House Fiscal Agency says that the fiscal implications of the bill are indeterminable at this time. (2-12-92)

ARGUMENTS:

For:

The bills would fix what one judge termed "a glitch in the gun law," and ensure that ex-felons would be appropriately restricted from possessing firearms for a minimum period of time. Without such repairs, Michigan law would continue to contain a year-old loophole that likely would continue to prevent successful prosecutions under the federal gun law. Such prosecutions are an essential tool in getting violent street criminals, especially drug offenders, behind bars. The bills would correct the deficiencies of Public Act 320 of 1990, and more: the bills would restrict ownership of not only pistols, but also long guns.

Against:

The bills would not do enough to prevent dangerous criminals from having firearms. Even violent offenders could receive the right to possess a gun as little as five years after being released from prison; this is a step backward from prior Michigan law, which banned pistol ownership for eight years after release. Further, the bills fall short of adequately describing what constitutes a serious offense worthy of the tighter restrictions on gun ownership; there is no specific provision for attempted offenses, for burglaries of businesses such as drugstores and banks, or for possession of explosives, even though such offenses may be indicative of a dangerous criminal. Of particular concern is the bills' failure to specifically include attempted crimes, especially given the way that plea bargaining can lead to a plea of guilty to a lesser offense such as an attempted offense. To be subject to the bills' restrictions, the attempt would have to be a four-year felony; however, to meet that standard, the completed offense would have to be one that was punishable by imprisonment for five years or more. Under the penal code, it is only a misdemeanor to attempt an offense that is punishable by less than five years in prison. The bills thus would fail to cover the attempt of a four-year felony such as felonious assault, which involves the use of a weapon and is clearly a violent crime. The safety of the public demands that stiffer restrictions be imposed.

Response:

The attempts of more serious crimes would fall under the tougher restrictions proposed by the bills. Any difficulties that might be presented by the lack of certain provisions for attempted offenses could be resolved through prosecutorial discretion in deciding what charges to bring, and, obviously, in avoiding plea bargaining that would circumvent the aims of the bills. If problems should develop, legislation to correct any deficiencies could be quickly enacted. The important thing now is to get a clear law enacted.

Against:

The bills would unduly intrude on the rights of nonviolent people to own guns. Someone who has successfully completed the terms of any sentence has already paid his or her debt to society; to require shoplifters, bad-check passers, and embezzlers to wait an additional three years before being able to have a firearm is simply unnecessary. Worse, it raises the threat of prosecution for something that should not be within the purview of prosecutorial authority: under the bills, it would, for instance, be possible for a former embezzler whose teenager had a bird gun in the house to be convicted of a firearm violation. A prosecution or the threat of it could be used in inappropriate ways. In addition, the bill proposes stiff penalties for illegal possession of a firearm by a former felon. Such penalties far exceed the misdemeanor penalties that would apply to a non-felon, and would be unnecessary: penalties for violating the federal gun law equal or exceed those proposed by the bill, and could be applied in federal prosecutions against serious criminals. The bills propose to write gun laws on the basis of a person's prior status; they make virtually no accommodation for individual circumstances.

Response:

While it may make some people uncomfortable to have to rely on prosecutorial discretion, the reality of the situation is that already-strained prosecutorial resources are not going to be used to attempt to put inconsequential offenders behind bars, and judges are not going to sentence nonviolent minor offenders to already-overcrowded prisons. Moreover, the nature of a gun possession offense is such that a person is not likely to be charged with that offense unless he or she was committing some other crime. It is not likely that the firearm would otherwise come to the attention of the authorities.

Against:

House Bill 5432 departs from state and federal usage in what it considers to be a "felony." That term is commonly defined and understood to be an offense that is punishable by imprisonment for more than one year. The bill, however, would define a felony as an offense punishable by imprisonment for four years or more. By employing a different definition for the narrow purposes of the felon-in-possession law, the bill risks generating confusion and unforeseen complications.

Response:

Four years is the maximum prison term for a felony when a term is not otherwise specified by statute. Use of the four-year standard rather than the one-year standard helps to protect minor offenders from the reach of the bill's restrictions and penalties, and, according to the legal reasoning employed by some, from the reach of federal gun prosecutions.

POSITIONS:

The Prosecuting Attorneys Association of Michigan supports the concept of the bills, is still reviewing the substitutes, and has no formal position at this time. (2-11-92)

The U.S. Attorney's Office for the Eastern District of Michigan supports the concept of the bills, but believes the scope of coverage to be inadequate. (2-11-92)

The Wayne County Prosecutor's Office supports the concept of the bills, but finds that the definition of a "felony" as a four-year offense is a radical variation from the accepted definition of a felony, and would breed uncertainties and inconsistencies of application. (2-12-92)

The Michigan Council on Crime and Delinquency opposes penalties for a former felon illegally in possession of a firearm that are substantially higher than those that would apply to a nonfelon illegally in possession of a firearm. (2-12-92)

The Michigan United Conservation Clubs (MUCC) is neutral on the bills. (2-11-92)