



**House
Legislative
Analysis
Section**

Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6486

GUNS POSSESSED BY EX-FELONS

House Bill 5400 as enrolled
Sponsor: Rep. Perry Bullard

House Bill 5432 as enrolled
Sponsor: Rep. Michael E. Nye

Second Analysis (1-11-93)
House Committee: Judiciary
Senate Committee: Family Law, Criminal
Law, and Corrections

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 was appealed by the U.S. Attorney, whose brief 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.

Issues raised by *Gilliam* were later addressed by the U.S. Court of Appeals for the sixth circuit in its decision on *U.S. v Driscoll* (No. 91-1583, decided July 16, 1992). The court of appeals rejected the reasoning in *Gilliam*, holding instead that Michigan

House Bills 5400 and 5432 (1-11-93)

does not restore the right of convicted felons to sit on a jury, and therefore the defendant, an ex-felon, could be prosecuted for a federal firearms violation. The court further determined that the federal prohibition should be read to apply to all firearms, notwithstanding that the applicable Michigan statute concerns only possession of handguns, not long guns.

Questions regarding the meaning and implications of Michigan law remain, however. Statutory language confusingly says that an ex-felon may not have a pistol, but also states that he or she may have a pistol if his or her civil rights are restored. The Gilliam decision and its aftermath have led to calls for repairs to a defect in Michigan law that has hampered 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. Legislation to make such repairs has been proposed.

THE CONTENT OF THE BILLS:

House Bill 5432 would amend the Michigan Penal Code (MCL 750.222 et al.) 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, or an attempt to violate such a law. 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: use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature, involved a substantial risk that physical force against the person or property of

another could be used in the course of committing the offense; unlawful possession, 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 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 would amend the pistol licensing act (Public Act 372 of 1927, MCL 28.421 et al.) 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 of not more than \$10 to cover the actual and necessary 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.

House Bills 5400 and 5432 would take effect September 1, 1992. They are tie-barred to each other, and each is tie-barred to House Bill 4822, and Senate Bills 528 and 529, which would make various amendments to laws regulating firearms.

FISCAL IMPLICATIONS:

According to the Senate Fiscal Agency, the bills would have an indeterminate fiscal impact on state and local government. Local governments could incur costs if the cost of processing gun applications exceeded \$10 each. The bill's penalty provisions could result in additional costs for the Department of Corrections for incarcerating offenders. There also could be additional revenue generated by the imposition of new fines established by the bills. (6-5-92)

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 be unacceptably ambiguous. 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 burglaries of businesses such as drugstores and banks, or for possession of explosives, even though such offenses may be indicative of a dangerous criminal.

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 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.