

1ST OFFENSE FELONY FIREARM REVISIONS

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House Bill 4419 (Substitute H-3 as reported)
Sponsor: Rep. Kurt Heise

Analysis available at
<http://www.legislature.mi.gov>

House Bill 4420 (Substitute H-3 as reported)
Sponsor: Rep. Sherry Gay-Dagnogo

Committee: Criminal Justice
Complete to (7-29-15)

BRIEF SUMMARY: House Bill 4419 revises the penalty for a first offense of felony firearm, to change the current mandatory sentence of two years into an indeterminate sentence of no more than three years, allow the sentence to be served at the same time as the sentence for the underlying felony offense, and allow parole or probation eligibility while the person serves the sentence for felony firearm. House Bill 4420 places the revised maximum penalty in the sentencing guidelines.

FISCAL IMPACT: The bills would have an indeterminate fiscal impact on state and local corrections. See *Fiscal Information* later in the analysis for a detailed discussion.

THE APPARENT PROBLEM:

A person may be convicted of "felony firearm" when carrying or possessing a firearm or pneumatic gun, such as an airsoft gun, at the same time that the person commits or attempts to commit a crime designated as a felony. A conviction for felony firearm is in addition to the conviction for the underlying felony offense. For example, some felons are not allowed to possess a firearm; a person could therefore be charged with and convicted of felony firearm and felon in possession of a firearm (also a felony).

A first offense of felony firearm carries a *mandatory* sentence of two years in prison; this must be served before the person serves any other term of imprisonment for the underlying felony. In addition, the person is not eligible for probation or parole during this mandatory two-year sentence, and the sentence may not be suspended. A second offense of felony firearm carries a mandatory prison term of five years, and a third or subsequent conviction carries a mandatory term of imprisonment of ten years, in addition to any other term of imprisonment for an underlying felony.

The felony firearm statute was adopted in the late 1970s at a time when crimes involving the use of firearms were increasing. Part of a "tough on crime" approach, the measure was expected to have a deterrent effect—discouraging the use of firearms to commit a crime by promising extra time in prison.

Almost 40 years later, some say this policy needs to be revisited. First, though overall crime rates have decreased, there is no evidence that the felony firearm statute has directly

reduced the number of crimes involving guns. Second, where the policy was aimed at taking criminals off the streets who use guns in the commission of their crimes, the enhanced penalty has not always been applied in that way. For instance, prosecutors often tack on a felony firearm charge if a gun happens to be on the property or in the possession of the person at the time a crime is committed, even if it wasn't used in the commission of that crime. In one recent case, a man charged with possession of child pornography was also charged with felony firearm because he had a gun that hadn't been used in years buried in a closet; and another case involved an elderly man charged with felony possession of marijuana who happened to have a handgun in the trunk of his car. But because of the current mandate, judges have no discretion in such cases to weigh the facts of the crime and impose a sentence appropriate to the incident.

In addition, mandating an additional two years to be added on to a sentence for a felony conviction, whether or not the gun was actually used to commit the crime, adds to an already inflated corrections budget that currently costs taxpayers about \$2 billion a year.

If the statute were revised to make the crime of felony firearm, at least for a first offense, subject to the sentencing guidelines, and if judges were given discretion whether to order the sentence for felony firearm to be served concurrently with, rather than consecutively to, the sentence for the underlying felony, up to 2,500 prison beds could be freed up, by some estimates. This could reduce public spending without reducing public safety, according to supporters of such an initiative. Legislation addressing these and other issues has been offered.

THE CONTENT OF THE BILL:

House Bill 4419 amends the Michigan Penal Code to revise the penalties for a first offense of felony firearm; the penalties for subsequent, or repeat, convictions of felony firearm would remain the same (MCL 750.227b). Felony firearm means carrying or possessing a firearm in the commission or attempted commission of a felony. It also includes carrying or possessing a pneumatic gun (e.g., an airsoft gun) and using that pneumatic gun in furtherance of committing or attempting to commit a felony. The bill makes three significant changes.

**** First**, the bill establishes an *indeterminate* sentence of no more than three years of imprisonment, rather than a *mandatory* sentence of two years.

****Second**, the bill *allows* the sentence for felony firearm to be served concurrently (meaning at the same time) with the sentence imposed for the underlying felony offense rather than *requiring* the sentences to be served consecutively (meaning one after the other, with the felony firearm sentence being served first). A court could still order the sentences to be served consecutively.

****Third**, the bill allows a person to be eligible for parole or probation during the term imposed for a conviction of felony firearm. The bill also deletes a provision specifying that a term of imprisonment imposed under the felony firearm statute cannot be suspended.

House Bill 4420 amends the sentencing guidelines portion of the Code of Criminal Procedure (MCL 777.16m). The bill specifies that felony firearm—first offense is a Class F felony against the public safety with a maximum term of imprisonment of three years. The bill is tie-barred to House Bill 4419.

FISCAL INFORMATION:

Based on current sentencing guidelines, and current practice in the judicial system in applying sentencing guidelines, it is difficult to determine the fiscal impact of House Bill 4419 to the state or to local units of government. Under the bill, some first time offenders could be sentenced to prison for terms longer than the current mandatory term of two years. This would result in a cost increase to the Department of Corrections/end up costing the state. If less than the current two-year mandatory sentence for felony firearm was imposed, and concurrent, rather than consecutive, sentences ordered, some first time offenders could be sentenced to shorter prison terms, and others sentenced to community sanctions versus any time in prison. Shorter prison terms and community sanctions would result in a savings to the state, but could result in costs to local units of government.

The average cost of prison incarceration in a state facility is roughly \$34,800 per prisoner per year, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision average about \$3,760 per supervised offender per year. The costs of local incarceration in a county jail and local probation supervision vary by jurisdiction.

ARGUMENTS:

For:

First, it is important to understand what the bills will and won't do. The bills only affect the sentence for the first time a person is convicted of possession of a firearm when committing a felony. The mandatory penalties in place for a repeat conviction will remain the same. In short, rather than requiring a judge to impose a flat two-year prison sentence on top of any prison time imposed for the underlying felony offense, House Bill 4419 instead requires the sentence imposed for felony firearm to be determined by the sentencing guidelines. Based on the type, facts, and seriousness of a crime, plus whether the person had a prior criminal record, the sentencing guidelines provide a range of months for a judge to use in determining an appropriate sentence. An offender's score may require intermediate sanctions, meaning jail, probation, or a combination of jail and probation, or may require incarceration in a prison. For those whose score places them in what is known as a "straddle cell," a judge has discretion to send the offender either to prison or to intermediate sanctions.

Thus, depending on the offender's score under the sentencing guidelines, and if the judge allows the sentence for felony firearm to be served at the same time as the sentence for the underlying felony or felonies, the bills mean that some offenders who now must be sent to prison for at least two years could instead be put on probation, sent to jail, or serve a combination of jail and probation. If sent to prison, their felony firearm sentence could be

served at the same time as the sentence for the underlying felony offense, enabling them to be eligible for parole or release sooner than under the current law.

However, depending on the person's score, the bill may also increase some sentences by up to a year. And, when the facts of a case call for it, judges could still order the felony firearm sentence to be served first.

Response:

Language in House Bill 4419 needs tweaking to better reflect the stated intent of allowing community sanctions for a first conviction of felony firearm. For instance, the bill uses the phrase "shall be punished by imprisonment" for not more than three years. Perhaps, replacing the "shall" with "may" would correct the contradiction.

For:

Numerous issues with the current felony firearm law have led advocates, defense attorneys, lawmakers, and judges, among others, to believe the law needs to be revised. Reasons raised for supporting the bills include the following:

- ❖ The current law isn't applied fairly, in light of the facts of each case. Indeterminate sentencing, in which the sentence guidelines would apply, allows a judge to take factors into consideration and to distinguish between a gun *intended* to be used in the commission of the crime and one that was *incidental* to the crime, and between a person who made a mistake and a career criminal.
- ❖ The current law results in unintended and unjust consequences. Often the underlying felony would result in probation, but the felony firearm mandate puts offenders in prison for two years. The bills would allow, for first offenders only, probation to also be imposed for the felony firearm offense.
- ❖ By allowing concurrent sentences and probation or parole for a first offense, the bills would result in more proportionate sentences. This will limit prison overcrowding (which presents dangers to corrections officers as well as inmates); shorten sentences, which reunites broken families and makes it easier to operate effective faith-based and other recidivism-reduction programs; and reduce prison spending (currently, annual expenditures run about \$2 billion or over \$5 million a day). These resources could be better spent on law enforcement, prosecution, victims' services, and programs proven to reduce recidivism, according to the Justice Fellowship.
- ❖ Though the felony firearm statute was meant to apply uniformly across the state to increase the time an offender who used a gun in commission of a crime spends in prison, depending on the jurisdiction and how plea deals are structured, there currently are about five different applications of the law. In one practice, felony firearm may be charged but then dismissed as part of the plea negotiation. In another, a person may be convicted of felony firearm and sent to prison for two years with the underlying felony being dismissed! In fact, based on the Department of Corrections' statistics as quoted in testimony provided to the Committee, in a

small percent of cases, some first-time felony firearm offenders are already receiving probation, and some a combination of jail and probation, even though current law prohibits this.

- ❖ The felony firearm statute was enacted before adoption of the current sentencing guidelines scheme (which, when scoring the underlying crime, adds points if a gun is used) and truth-in-sentencing (which eliminated shortened prison stays for good time). Thus, the prison stays for the underlying crimes might previously have been shorter, justifying giving a flat two-years for using a gun to commit the crime.
- ❖ Changing the sentencing scheme to indeterminate and allowing consecutive sentencing for first offense felony firearm puts the sentencing in line with most other crimes.
- ❖ The bill would save taxpayers money. Michigan has the seventh largest prison system in the nation, spends more on corrections than education, and spends roughly \$60,000 to incarcerate an offender for a felony firearm conviction (over a two-year sentence). Any reduction in prison stays due to concurrent sentences, community sanctions, or parole eligibility would reduce these costs. According to testimony provided by the Department of Corrections, the legislation could free up anywhere from none to 2,500 prison beds.
- ❖ According to advocates, deterrence research shows that offenders who pose a low risk to public safety are more negatively impacted by incarceration, especially long prison terms. Recidivism actually increases when these offenders spend more time in prison. Thus, making the changes for a first-time felony firearm offense could lead to fewer offenders committing new crimes.
- ❖ Contrary to expectations, the felony firearm statute has not effectively reduced the rate of gun possession during the commission of crimes.
- ❖ For some, the only prison time imposed is for the felony firearm offense. Because of long waiting lists and limited availability for many prison programs, the person may be released before being able to access beneficial programs. Moreover, since they cannot be paroled during the felony firearm sentence, there is no incentive for positive conduct or improvement in institutional conduct, making management of this population more challenging for DOC officials and staff.
- ❖ The felony firearm statute is one contributor to why the average length of stay of an average prisoner in Michigan is far longer than the national average.
- ❖ Judges are better situated to make the punishment fit the crime because some facts don't come out until the discovery phase or pre-sentence report, whereas the prosecutor makes the decision as to which charges will be brought at the beginning of the prosecution.

- ❖ The bill is in line with national trends. Since 2000, more than half of the states have repealed mandatory minimums for various offenses. As more research is done on what how to effectively reduce recidivism and prevent crimes, national attitudes regarding how punishment should be meted out are changing.

Against:

The felony firearm statute is justified by the danger that guns bring into any situation. Just the fact that a gun is present inherently increases the risk of violence. Therefore, it is appropriate to have a separate crime that can be charged in addition to an underlying felony, for example, home invasions or drug-related crimes. Whether the felony firearm penalty acts as deterrent or not, it does remove dangerous people from the streets—at least for an extra two years for a first offense.

However, by scoring an offense on the F grid, as House Bill 4420 would do, it is possible that few offenders will score high enough to earn prison time, unless they had numerous prior convictions or committed a particularly heinous crime. Thus, tacking on a felony firearm charge may add little additional punishment to what would be imposed for the underlying crime. This means the bill package would water down the law that currently empowers prosecutors to take dangerous individuals off the street—those who would use guns to commit their crimes.

Against:

The felony firearm statute is an important tool for prosecutors. Just because a prosecutor can charge a person with the crime, it doesn't mean that the prosecutor will. When it is clear that the firearm was never intended to be used to further the commission of the crime, such as a long-unused gun forgotten in the basement, many prosecutors will not bring a felony firearm charge or will subsequently dismiss the charge.

At other times, the prosecutor may instead elect to use this additional offense as a bargaining chip in a plea deal. Some argue that dropping the mandatory two-year sentence for a first offense felony firearm would save taxpayers money, but plea agreements also save taxpayers money. By eliminating trials, many court-related expenses can also be eliminated, such as juries, as well as reducing prosecution costs and costs associated with providing court-appointed attorneys. Plea agreements also often reduce the time an offender spends in prison because in exchange for the deal, one or more charges may be dropped.

Moreover, it is not always bad to limit the discretion of a judge if it allows the prosecutor, as an elected official, who deals with crime every day, to decide whether it is appropriate that certain offenders spend an extra two years in prison for having a firearm in their possession when committing or attempting to commit a serious crime. Better to have laws with teeth that provide justice for victims and safety for the public.

Against:

Despite glowing projections of savings and justice to convicted criminals by supporters of the bills, it is not clear what exactly the bills will accomplish. Since prosecutors don't

always tack on a felony firearm charge, even when able to do so, it is unclear if the bills will increase or decrease the use of the felony firearm statute. When negotiating plea agreements, some prosecutors may, in light of the lighter penalty for a first offense under the bills, be less likely to drop the charge. This could result in an offender being charged and subsequently convicted of more felonies than under the current system. For someone who made a mistake and who is unlikely to commit another crime, having more than one felony conviction would make the person ineligible to apply to have their criminal record expunged.

Further, it is unclear how judges would apply the bills' provisions. If judges continued to order consecutive sentences, or a higher number of offenders than expected received three years instead of two, little may be gained by the legislation.

POSITIONS:

A representative of the Michigan Judges Association testified in support of the bill. (6-9-15)

A representative of CAPPs (Citizens Alliance on Prisons and Public Spending) testified and submitted written testimony in support of the bills 6-9-15 and indicated support on 6-16-15.

A representative of the Prisons and Corrections Section of the State Bar of Michigan testified in and submitted testimony in support of the bills. (6-9-15)

A representative of the Michigan Council on Crime and Delinquency testified in support of the bills. (6-9-15)

A representative of the Criminal Defense Attorneys of Michigan testified and submitted written testimony in support of the bills 6-9-15 and indicated support 6-16-15.

The Sentencing Project submitted written testimony in support of the bills. (6-2-15)

The Justice Fellowship/Prison Fellowship Ministries submitted written testimony in support of the bills.

The Libertarian Party of Michigan submitted written testimony in support of the bills. (6-16-15)

The ACLU of Michigan indicated support for the bills 6-9-15 and 6-16-15.

The Michigan Department of Corrections indicated a neutral position on the bills. (6-19-15)

A representative of the Prosecuting Attorneys Association of Michigan (PAAM) testified in opposition to the bills on 6-9-15 and indicated opposition on 6-16-15.

The Office of Attorney General indicated opposition to the bills. (6-9-15)

The Michigan Sheriffs' Association indicated opposition to the bills 6-9-15 and 6-16-15.

The Department of State Police indicated opposition to the bills. (6-9-15)

The Michigan Association of Chiefs of Police indicated opposition to the bills. (6-9-15)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.