

LEGAL SERVICES

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MEMORANDUM

February 16, 2010

SUBJECT: Misconduct Involving Weapons and Felons
(Work Order No. 26-LS1459\A)

TO: Representative Bill Stoltze
Attn: Ben Mulligan

FROM: Gerald P. Luckhaupt *GP*
Legislative Counsel

Enclosed is the bill draft you requested. As I have previously informed Ben, I have a few comments.

I. History of AS 11.61.200

AS 11.61.200(a)(1) does not completely include all conduct prohibited under AS 11.61.200(a)(12).

AS 11.61.200(a)(1) and (12) provide:

(a) A person commits the crime of misconduct involving weapons in the third degree if the person

(1) knowingly possesses a firearm capable of being concealed on one's person after having been convicted of a felony or adjudicated a delinquent minor for conduct that would constitute a felony if committed by an adult by a court of this state, a court of the United States, or a court of another state or territory;

...

(12) knowingly possesses a firearm that is concealed on the person after having been convicted of a felony or adjudicated a delinquent minor for conduct that would constitute a felony if committed by an adult by a court of this state, a court of the United States, or a court of another state or territory.

AS 11.61.200(a)(1) prohibits a felon from possessing a firearm capable of being concealed on the person.¹ An affirmative defense is provided to AS 11.61.200(a)(1) in (b)(1) of that section.

- (b) It is an affirmative defense to a prosecution
- (1) under (a)(1) of this section that
 - (A) the person convicted of the prior offense on which the action is based received a pardon for that conviction;
 - (B) the underlying conviction upon which the action is based has been set aside under AS 12.55.085 or as a result of post-conviction proceedings; or
 - (C) a period of 10 years or more has elapsed between the date of the person's unconditional discharge on the prior offense or adjudication of juvenile delinquency and the date of the violation of (a)(1) of this section, and the prior conviction or adjudication of juvenile delinquency did not result from a violation of AS 11.41 or of a similar law of the United States or of another state or territory

This affirmative defense allows the felon to possess a handgun if one of these requirements is met but does not necessarily allow the felon to carry the handgun concealed. The felon is prohibited from carrying the handgun concealed by AS 11.51.200(a)(12). An affirmative defense is provided to AS 11.61.200(a)(12) in (g) of that section.

- (g) It is an affirmative defense to a prosecution under (a)(12) of this section that
 - (1) either
 - (A) the defendant convicted of the prior offense on which the action is based received a pardon for that conviction;
 - (B) the underlying conviction upon which the action is based has been set aside under AS 12.55.085 or as a result of post-conviction proceedings; or
 - (C) a period of 10 years or more has elapsed between the date of the defendant's unconditional discharge on the prior offense or adjudication of juvenile delinquency and the date of the violation of (a)(12) of this section, and the prior conviction or adjudication of juvenile delinquency did not result from a violation of AS 11.41 or of a similar law of the United States or of another state or territory; and
 - (2) at the time of possession, the defendant was
 - (A) in the defendant's dwelling or on land owned or leased by the defendant appurtenant to the dwelling; or

¹ For ease of discussion in this memorandum I will refer to "a firearm capable of being concealed on the person" as a handgun even though other firearms are capable of being concealed on the person.

(B) actually engaged in lawful hunting, fishing, trapping, or other lawful outdoor activity that necessarily involves the carrying of a weapon for personal protection.

This provision allows the felon to only carry a handgun concealed if the felon meets the requirements for possessing a handgun in the affirmative defense to (a)(1) and the felon is either in or on the felon's own property or otherwise engaged in lawful hunting, fishing, trapping, or other lawful outdoor activity.

These provisions are different because one allows the handgun to be openly carried and the other sets a higher bar for the felon to carry the handgun concealed.

AS 11.61.220(a)(12) was enacted in 1998 as part of amendments to the concealed handgun permit laws. HCS CSSB 141(FIN) am H, by Senator Lyda Green, made substantial changes to the eligibility requirements to receive a concealed handgun permit and repealed almost all the restrictions on where a permittee could carry a concealed handgun. The rationale provided by Senator Lyda Green's staff was that anyone eligible to possess a handgun under state or federal law should be eligible to receive a concealed handgun permit and a person who has received a permit should be able to carry a concealed handgun anywhere not otherwise prohibited under state or federal law. To this end certain misdemeanor offenses that previously barred a person from receiving a permit were eliminated. In addition provisions relating to carrying a concealed firearm without a permit were strengthened and clarified while restrictions on where firearms could be possessed were mostly eliminated except for a few limited circumstances where those restrictions were applied generally to everyone (where previously the restrictions only had applied to persons holding permits to carry concealed weapons). As a part of this clarification AS 11.61.200(a)(12)² was enacted so that felons who possessed a handgun that was concealed were punished at a greater level than regular members of the public who carried a concealed handgun without a permit. And so a felon who might be permitted to possess a handgun due to the affirmative defense provided in AS 11.61.200(b)(1), would still be subject to a felony penalty if they carried that handgun concealed unless they (1) met the requirements to possess a handgun and (2) were in or on their own property or engaged in certain lawful outdoor activities.

In 2003 the Alaska Legislature enacted CSHB 102(STA) which removed restrictions on members of the public from carrying concealed deadly weapons, including firearms. CSHB 102(STA) made the concealed handgun permit system permissive; no longer would a permit be necessary to carry a handgun concealed.³ Presumably at this time the legislature could have repealed AS 11.61.200(a)(12) and (g) as Alaska no longer

² As well as the affirmative defense of AS 11.61.200(g).

³ Although a permit could still be obtained if a person wanted to avail themselves of reciprocity provisions of other states and carry concealed in those states.

distinguished between open or concealed possession of firearms. But the legislature did not. I cannot say that the legislature merely overlooked those provisions as I remember some concern by at least some members about extending the right to carry concealed to those that had committed felonies. *

2. Do you want to allow all felons convicted of crimes outside of AS 11.41 to be able to carry concealed handguns? *

To build on my comment #1 above, the changes in this bill draft would allow felons convicted of crimes outside of AS 11.41 to carry concealed handguns, if they have received a pardon, a set aside, or 10 years have elapsed from the felon's unconditional discharge for the offense. Felonies outside of AS 11.41 include unclassified felonies and class A through C felonies, such as arson, misconduct involving controlled substances (including engaging in a continuing criminal enterprise, delivering drugs to children and methamphetamine manufacture and delivery), burglary of a dwelling or while armed with a firearm, promoting prostitution, and distribution and possession of child pornography. Clearly, felons who have received a pardon should be treated differently and a change in current law is clearly warranted in this regard. To a lesser extent persons who have received a set aside under AS 12.55.085(e) are probably deserving of a change in current law. The question becomes whether felons who have not had someone pass upon their character, whether that be the governor in issuing a pardon or a judge when issuing a set aside, should be able to possess concealed handguns merely because of the passage of time.. If so, should this apply to all felonies, even felonies that are considered more egregious or comparable to crimes against a person under AS 11.41?

3. Changing affirmative defense to nonapplicability provision.

The bill draft changes the affirmative defense provided in AS 11.61.200(b) to a nonapplicability provision. This change may have an extreme impact upon the ability of the state to prosecute felons possessing concealable firearms. Currently an affirmative defense is provided for felons to show that they have received a pardon, a set aside, or 10 years have elapsed from their conviction for a felony other than a crime against a person. The reason this is an affirmative defense is because the information necessary to establish the defense is within the knowledge and control of the felon and may not be available to the prosecution. A felon knows if they have received a pardon, a set aside, or 10 years have elapsed while the prosecution does not always have access to this information.⁴ By making this a nonapplicability section, the prosecution may be required to disprove the existence of a pardon or set aside, or prove that 10 years have not elapsed, prior to the case proceeding. In many cases this may not be possible.

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⁴ Indeed, there is no organized way of searching for this information in most states.