AMERICAN CIVIL LIBERTIES UNION of RHODE ISLAND

128 DORRANCE STREET, SUITE 220
PROVIDENCE, RI 02903
401.831.7171 (t)
401.831.7175 (f)
www.riaclu.org

ANALYSIS OF 2013 GUN CONTROL LEGISLATION

Introduction

Article I, Section 22 of the Rhode Island Constitution declares: "The right of the people to keep and bear arms shall not be infringed." Although the R.I. Supreme Court has held that this right is "subject to reasonable regulation by the state in exercising its police power," the ACLU of Rhode Island believes that this constitutional guarantee clearly sets some limits on the state's power to interfere with the exercise of this right. Further, attempts to regulate the possession of firearms often implicate other constitutional rights, including rights to privacy and due process.

It is for these reasons that the ACLU of Rhode Island has participated in litigation over the years in support of the rights of gun owners. For example, in *Mosby v. Devine*, the 2004 seminal R.I. Supreme Court case interpreting Article I, Section 22, we filed a "friend of the court" brief arguing that applicants for gun permits were entitled to basic procedural protections before they could be denied a permit by the Attorney General. Two years ago, we came to the defense of a Cranston resident, arguing that his Section 22 rights were violated when police conducting an investigation seized weapons he lawfully possessed, and then refused to return them when the investigation was completed.

At the same time, we agree with the Supreme Court that the state is entitled to reasonably regulate dangerous weapons. (For example, we do not take issue with efforts to restrict the types of weapons available for purchase.) Disputes will often revolve around where the line gets drawn. It is in that context that we have reviewed the "gun control" package introduced by the

Governor and General Assembly leadership. We recognize the hard work that went into putting this package together, and from our perspective, many provisions in these bills do not raise civil liberties concerns. In the following pages, however, we attempt to briefly address those that do. In addition to commenting on particular aspects of the leadership package of bills, we address two other pieces of legislation that have been independently offered this session.

We offer the following points as a quick summary of the more detailed testimony that follows:

* The legislature should reject proposals contained in some of the bills that adopt much-discredited and fiscally imprudent mandatory minimum sentencing provisions.

* In addressing issues of gun control, the legislature should also enact provisions that provide for the implementation of basic due process protections in the gun permit application process to ensure it is fair to residents seeking to exercise their right to possess a firearm.

* Careful consideration needs to be given to the potential counter-productive consequences of participating to the fullest extent possible in the federal database system containing names of people who have had problems with mental illness or substance abuse.

* Excessive permit and registration fees should be rejected as inappropriately burdening gun owners' constitutional rights.

* Any attempts to create new criminal offenses relating to firearms should be carefully crafted to prevent their use against innocent owners.

ALTERING FIREARM IDENTIFICATION MARKS

H-5286/S-455. This bill would make it illegal for a person to "receive, transport, or possess any firearm which has had any maker, model, manufacturer's number or other mark of identification removed, altered, or obliterated."

As worded, the bill raises basic due process concerns because it lacks any requirement that the individual possessing the firearm have any actual knowledge that identifying marks have been "removed, altered, or obliterated." A crime like this should apply only to people who know or have good reason to know that the firearm they possess has been tampered with. We therefore urge that this bill be amended to include language to that effect.[1]

BEHAVIORAL HEALTH AND FIREARMS SAFETY TASK FORCE

H-5992/S 862. This bill would create a behavioral health and firearms safety task force to review and recommend statutes relating to firearms and behavioral health issues.

We appreciate the fact that legislators are attempting to take a cautious and methodical approach to the issue of turning over mental health (and substance abuse) information to the federal database designed to restrict firearms purchases to people who have been "committed to any mental institution" (or are an "unlawful user of… any controlled substance"). However, we have concerns about the wording of the resolution establishing this task force and its mission.

First, as an aid to guiding the task force in its work, we believe the resolution should specifically note that mental illness is not a predictor of violence; that turning over confidential medical information in this context may promote some of the stigma surrounding mental illness

[1] On April 5th, the U.S. Court of Appeals for the First Circuit, dealing with a similar federal law, specifically held that a defendant had a right to present an "innocent possession" defense. *United States v. Baird*, (No 12-1565, April 5, 2013) Rather than just allow it as an after-the-fact defense, the ACLU believes that knowledge of the tampering should be an element of the crime.

and drug abuse; and, perhaps most importantly, that breaching confidentiality for purposes of populating the federal database may be counter-productive by actually discouraging individuals with mental illness or substance abuse problems from seeking help. At the news conference announcing the introduction of this package, there appeared to be a clear recognition of these concerns. They should also be front and center when the task force goes about its business.

That leads to an even more important point. We are concerned that the task force is specifically ordered to "propose legislation and recommendations to support the state's full participation in the NICS index." Instead, we believe that the task force should be given the responsibility of first considering whether the state *should* fully participate in that database in light of its potential counter-productive impact.

In addition, while the task force is ordered to review other states' approaches to participating in the NICS index in order to "ensure that the state conforms to best practices nationally," the resolution does not explain what is meant by "best practices." Does it refer to the most common state practices? Does it mean the best practices that provide the most complete information to the index? Or does it mean, as we believe it should, the practices that best protect the rights and confidentiality of mental health patients and those with a substance abuse history? Based on the resolution's wording, we fear that it may have predetermined answers to some of the more important questions the task force should be looking into.

BACKGROUND CHECKS AND ATTORNEY GENERAL PERMITS

H-5993/S-865. This bill would require any person requesting a license to carry a pistol or revolver to undergo a national criminal records check, would increase firearm permit fees, and would authorize only the Attorney General, not municipal departments, to issue permits.

a. Permit Fee -- This bill would increase the firearm permit fee from $40 to $140. It would further require that a national criminal records check be conducted, and that the applicant pay for that background check. The ACLU opposes the increase in the licensing fee, particularly in light of the applicant's obligation to pay for an NCIC check, which itself will likely cost applicants $70 or so. In light of the constitutional underpinnings for the right to bear arms, we believe that any fees associated with exercising that right should be nominal. Paying anything more than minimal administrative fees for the "privilege" of exercising a constitutional right should be rejected. Between the current $40 fee and the proposed background check costs, applicants will already pay a significant amount of money in order to exercise their right to "keep and bear arms." Any further increases are burdensome and inappropriate.

b. Due Process in Permit Applications -- The bill eliminates the current law's provisions that give municipal police departments licensing authority, and instead rests with the Attorney General all decisions as to whether an applicant qualifies for a permit. Because the process being eliminated more tightly limited law enforcement discretion in denying permits, we believe that, in conjunction with this change, the bill should address some core due process issues that were raised, but not fully or satisfactorily addressed, in the R.I. Supreme Court's *Mosby* decision.

In what we considered to be a decidedly mixed opinion, the R.I. Supreme Court held, with then-Justice Robert Flanders dissenting, that applicants for a concealed weapons permit have only minimal due process rights to contest denials of those applications by the Attorney General. The Court rejected arguments submitted by the ACLU and others that applicants should be able to challenge denials under the state's Administrative Procedures Act, which provides detailed procedural rights to persons in "contested cases" against state agencies. Instead, the Court held that the APA did not apply and that applicants were not entitled to hearings on their

applications. The court did agree that applicants were entitled to certain minimal procedural rights, including the right to "know the evidence upon which the department based its decision and the rationale for the denial." But even then, the only recourse for aggrieved applicants was to file a discretionary petition for review with the Supreme Court, an expensive process with very little guarantee of being heard. Particularly because a constitutional right is implicated, we believe that more robust due process protections should be in place for applicants.

In short, we believe this bill should do what *Mosby* did not – establish and specify basic procedural rights that rejected gun permit applicants should have, including the right to a hearing, and subject those denials to the APA process.

WEAPONS LAW PENALTY REVISIONS

H-5994/S-864. This bill would make a number of changes to the statutes relating to the sale and possession of weapons and to the penalties for violating those laws, including adding a number of mandatory minimum sentencing provisions.

a. Domestic Violence Misdemeanors -- Presently, persons convicted of a "crime of violence" (which, it should be noted, includes certain drug offenses unrelated to any actual violence) are barred from possessing or purchasing weapons. In addition, persons convicted of felony domestic assault are barred from doing so for two years after their conviction. This bill would expand these restrictions and *permanently* disqualify any person convicted of a *misdemeanor* domestic assault charge. Those misdemeanors can include such offenses as vandalism, simple assault, and disorderly conduct. The list of disqualifying offenses is already relatively extensive. We do not believe that it should be expanded even further by automatically disqualifying people whose criminal record consists solely of misdemeanor offenses.

b. Mandatory Sentencing -- The bill increases a number of criminal penalties, and even more troubling, proposes to adopt mandatory minimum sentences for certain offenses.[2] In doing so, the legislation tries to imitate a federal sentencing scheme that has been attacked by policy-makers and judges for years as being ineffective, costly and inappropriate to individualized consideration of the offender and the circumstances surrounding the offenses. Although a few state weapons statutes currently contain mandatory sentences, for the most part Rhode Island has steered away from that path. It should continue to do so.

Less than ten years ago, a distinguished commission chaired by U.S. Supreme Court Justice Anthony Kennedy urged all jurisdictions in the country to "[r]epeal mandatory minimum sentence statutes." As the American Bar Association has noted in supporting that recommendation:

> Mandatory minimum sentences raise serious issues of public policy. Basic dictates of fairness, due process and the rule of law require that criminal sentencing should be both uniform between similarly situated offenders and proportional to the crime that is the basis of conviction. Mandatory minimum sentences are inconsistent with both commands of just sentencing.
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> Mandatory minimum sentences have resulted in excessively severe sentences. They operate as a mandatory floor for sentencing, and as a result, all sentences for a mandatory minimum offense must be at the floor or above regardless of the circumstances of the crime. This is a one-way ratchet upward …

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[2] For reference, we provide below a summary of the penalty provisions in this bill:

- Increases penalties for illegal possession of a firearm from 2-10 years to 3-15 years.
- Increases penalties for larceny of a firearm from 1-10 years to 2-15 years, and also imposes a mandatory minimum sentence.
- Creates new penalties for carrying a rifle or shotgun outside the home. The penalty for a first conviction is 2-15 years, and for a second conviction, the bill imposes a mandatory minimum sentence.
- If a firearm is sold or "caused to be sold" or given to a minor and is used in a crime of violence, an additional consecutive sentence of not less than 15 years is added to the underlying sentence.
- There is a new penalty for not reporting a stolen weapon. A second offense is a misdemeanor carrying a one-year prison sentence and/or a $1,000 fine.
- For so-called "straw man" sales, a second conviction carries a sentence of 2-15 years, and the imposition of a mandatory minimum sentence.

The ABA went on to note the misleading nature of "mandatory" sentencing, something that the public often fails to understand or appreciate:

> Aside from the fact that mandatory minimums are inconsistent with the notion that sentences should consider all of the relevant circumstances of an offense by an offender, they tend to shift sentencing discretion away from courts to prosecutors. Prosecutors do not charge all defendants who are eligible for mandatory minimum sentences with crimes triggering those sentences. If the prosecutor charges a crime carrying a mandatory minimum sentence, the judge has no discretion in most jurisdictions to impose a lower sentence. If the prosecutor chooses not to charge a crime carrying a mandatory minimum sentence, the normal sentencing rules apply. http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/crimlaw/2007jul03_minimumsenth_l.authcheckdam.pdf

Just a few months ago, U.S. Senate Judiciary Committee Chair Patrick Leahy reengaged this debate, as he joined with Republican Senator Rand Paul to introduce legislation designed to reform the federal mandatory sentencing laws. In doing so, Sen. Leahy explained: "Our reliance on mandatory minimums has been a great mistake. . . It is time for us to let judges go back to acting as judges and making decisions based on the individual facts before them. A one-size-fits-all approach to sentencing does not make us safer."

We therefore urge rejection of all mandatory minimum sentence provisions in this bill, and reconsideration, for the reasons expressed in our analysis of H-5991/S-860 (page 9), of other sentencing provisions that appear to arbitrarily increase the sentences for other crimes.

c. Innocent Sales -- In creating a new crime against a person who has "sold, transferred, given, conveyed, or caused to be sold, transferred, given, or conveyed" to a minor a firearm that is used in a crime of violence, the bill fails to include a proviso that the person have knowledge that the individual is a minor. In fact, the current crime of given or selling a firearm to a minor (unrelated to its later use in a crime of violence) requires the person to know or have reason to know that the recipient of the weapon is a minor. See R.I.G.L. 11-47-30(a). The same should be

true for this new offense. Thus, for reasons we have previously expressed about the need to address "innocent possession" of an illegal firearm, this provision should be similarly amended.

RELIEF FROM DISQUALIFIERS BOARD

H-5996/S-861. This bill would create the "relief from disqualifiers board," which would hear petitions from individuals who are seeking relief from their disqualification for possessing or purchasing a weapon due to their mental health or substance abuse history.

Our first concern about this bill is that it presumes full compliance and cooperation with the federal law governing the disclosure to a federal database of information of people with mental health or substance abuse problems. We believe this is premature, for the reasons we expressed in suggesting amendments to the proposed resolution establishing a task force to examine this issue.

We also have concerns about some of the procedures that are specified for the relief board's consideration of a petition. Section 40.1-30-5(b)(2) requires certified copies of "medical records from all of the petitioner's current treatment providers." The phrase "treatment providers" is not defined, and thus could include the petitioner's podiatrist or gynecologist, not just doctors who are in a position to provide relevant treatment for purposes of the petition.

Section 40.1-30-5(b)(5) requires the petitioner to submit "any further information or documents requested by the board." Again, there is no limitation of relevancy imposed on such board requests. Just as importantly, it does not specifically allow for the submission of further information that the *applicant* deems relevant. Similarly, Section 40.1-30-5(b)(6) allows for submission of additional testimony by any other person "determined by the *board*," but not the petitioner, "to have an interest in the matter."

Finally, subsection 40.1-30-5 (d) requires that any information requested by the board be provided within 15 calendar days after the request, except for good cause shown. We believe this time period is unduly compressed and will impose significant burdens on petitioners. The process for obtaining many of the records the board may wish to see will be well beyond the petitioner's control, and unlikely to be received so quickly.

STOLEN FIREARMS

H-5991/S-860. This bill would increase the criminal penalties for carrying a stolen firearm while committing a violent crime, would add a new crime relating to the possession of a stolen firearm, and would change provisions regarding providing false statements in the firearm application and registration process.

a. Increased Penalties -- Section 1 of the bill increases from 10 to 15 years the maximum penalty for carrying a stolen firearm while committing a "crime of violence." The ACLU opposes the seemingly arbitrary increase in the criminal sentence for violations of this law (and, for the same reason, has concerns about the penalty increases for other crimes contained in H-5994/S-864). Indiscriminately increasing prison sentences in order to "get tough" is unlikely to have any real deterrent effect, but it does have significant fiscal consequences for the state. Too often, legislation increasing prison sentences is given a fiscal "free ride" that virtually any other type of legislation with fiscal implications – whether it is designed to feed or house the poor, provide better education, or offer other important social services – does not receive. From a fiscal perspective, a bill increasing prison sentences is no different. If it costs approximately $40,000 a year to incarcerate an individual at the ACI, an additional five-year sentence for just one person can mean an extra $200,000 spent on corrections – money that cannot be spent on

more useful preventive methods or other pressing social needs. Any proposals for increased sentences for weapons-related crimes should include fiscal notes that specify the estimated financial costs associated with those increases, and should have a rationale beyond just wanting to "get tougher."[3]

In terms of this particular bill, it is worth noting that any sentence imposed under this statute is already required to run consecutive to the sentence for the underlying crime. This makes any need to increase the maximum sentence even more questionable.

b. Innocent Possession -- Section 2 of the bill creates the new felony of possessing a stolen firearm. As with H-5286/S-455 and H-5994/S-864, discussed above, this section contains no intent or knowledge requirement; i.e., even innocent possession of a stolen firearm is made a criminal offense. We believe it is essential that the bill be amended to require that the possession of a stolen firearm is criminal only if the owner is aware of its stolen pedigree.

c. Making False Statements -- Section 3 amends a statute that currently makes it a crime, with felony penalties, for a person purchasing a firearm, or applying for a firearm license, to "give false information or offer false evidence of his or her identity." Under the bill's revised and expanded language, this section would now bar any person from giving "false statements or representations… with respect to the requirements of this chapter." This new phrase makes the statute exceedingly and problematically broad. As written, for example, a person who purportedly falsely represents what any of the state's weapons laws say or mean would be guilty of a felony. This language is troubling from both a First Amendment and due process perspective and should be removed.

[3] Rhode Island law presently requires the preparation of "prison impact statements" for bills, like H-5994/S-864, proposing mandatory minimum sentences. R.I.G.L. 42-56-39.

Rounding out this analysis, we note that the ACLU of Rhode Island has no position on three bills in the leadership package: H-5576/S-425, making unlawful, with certain exceptions, the possession of a firearm by a minor; H-5990/S-859, imposing restrictions on the manufacture, transfer and possession of certain semiautomatic assault weapons; and H-5995/S-863, creating a task force to review firearms laws.

Finally, we wish to briefly address two additional House bills that have been introduced separately from the leadership package:

STATEWIDE GUN REGISTRY

H-5573. This bill requires possessors of firearms to register them with their local licensing authority, imposes a $100 registration fee, establishes felony penalties for failure to register, requires maintenance of all information provided in support of firearms applications, and requires that all registered firearms be equipped with a safety device.

a. Registration Fee -- For reasons previously expressed regarding H-5993/S-865, we oppose the imposition of a $100 registration fee for every firearm a person owns. It is an onerous and excessive burden on a person's exercise of a constitutional right.

b. Firearm Registry Database -- The ACLU of RI opposes the bill's creation of a firearm registration database. Under existing law, information regarding a firearm application is destroyed within 30 days, and the creation of a firearm registry database is prohibited. By contrast, the proposed legislation would prescribe the creation of such a database and would broadly allow the disclosure of information in it to law enforcement personnel for undefined and unlimited "legitimate law enforcement purposes." The creation of such a database with such loose limits on its use, and with no specified protections to reduce the potential of technological breaches, raises numerous privacy concerns and should be rejected.

c. Failure to Register Penalties -- The bill makes it a felony, with punishment of up to three years in prison, for failing to register a firearm. We believe this is excessive and inappropriate, even if one accepts the underlying notion of maintaining a firearms registry database. The mere failure to register a firearm, which a person has a constitutional right to possess, should not lead to such a harsh penalty. And in those instances where the person has also committed a separate underlying offense, it is the underlying crime that should be the focus of any major criminal penalties. The state should not be allowed to use a person's failure to register a firearm as leverage for when there is insufficient evidence to pursue, or when the prosecution simply does not want to go to the trouble of proving, a more serious crime that may have led to the discovery of a non-registered firearm. In other words, the registration requirement should not be a proxy for imposing harsh punishment for other unproven conduct.

GUN PERMIT APPLICATIONS

H-5688. This bill would bar municipalities from providing the name, address or date of birth of any person who has applied for a license or permit to carry a concealed pistol or revolver except to other law enforcement agencies when necessary to perform background checks.

Rhode Island law already provides confidentiality for *approved* licenses, so we believe it makes sense to provide similar privacy protections for the applications. However, in order to ensure clarity, we would urge that the bill be amended to specify that redacted information will be available. The public availability of generalized information would add a layer of protection against arbitrary decision-making, for we believe there is a public interest in being able to see how and why licenses are being granted or denied.

The ACLU of RI appreciates the opportunity to testify on these various pieces of legislation. We know that this is a very contentious, controversial and difficult issue, and we recognize the good, and very sincere intentions, behind these bills and the goal of addressing the very serious problem of gun violence. We hope that our comments and analysis will prove helpful as legislators grapple with this critical issue.