

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1626/P1dn
JEO:jlg:km

February 26, 1999

Representative Travis:

Please note the following when reviewing this draft:

1. In addition to covering a conviction in this state for one of the specified "serious misdemeanors", the draft also covers: a) convictions in another state or under federal law for a crime that would be a serious misdemeanor if committed in this state; and b) acquittals of serious misdemeanors by reason of mental disease or defect. Compare s. 941.29 (1) (a), (b), (c) and (d), stats. Is that your intent? Conversely, the draft does *not* include juvenile delinquency adjudications for serious misdemeanors. Compare s. 941.29 (1) (bm), stats. Do you want to cover such adjudications?

2. Federal law prohibits a person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. 18 USC 922 (g) (9). A "misdemeanor crime of domestic violence" is a misdemeanor that has, "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." 18 USC 921 (1) (33) (A) (ii). Do you want to cover similar crimes in this draft? (I would have to make substantial changes in the federal language to make it consistent with current Wisconsin statutes concerning domestic violence.)

3. Under s. 941.29 (2m), stats., a person who is convicted of a second or subsequent violation of s. 941.29, stats., is guilty of a Class D felony. This draft provides that a person prohibited from possessing a firearm due to a serious misdemeanor offense is guilty of a Class A misdemeanor for a second or subsequent offense. Is that okay?

4. The drafting instructions requested creating new crimes for a person who is prohibited from possessing a firearm but who then possesses a firearm during the commission of a crime. While such new crimes can be created, this draft does not do so because I was unsure whether those crimes were meant to replace s. 939.63, stats., which provides penalty enhancers for possessing a firearm or other dangerous weapon during the commission of a crime. If you do not intend to replace s. 939.63, stats., how do you want that statute and the new crimes interact?

5. The draft provides that a person may petition a court for permission to possess certain firearms after at least five years have elapsed since the person's conviction for

a serious misdemeanor. See proposed s. 941.29 (11). If the person was found not guilty of a serious misdemeanor by reason of mental disease or defect, however, they could be authorized to possess *any* firearm again under s. 941.29 (7), stats. Is that okay or do you want all serious misdemeanor cases dealt with under proposed s. 941.29 (11)?

6. Note that proposed s. 941.29 (11) refers to “a firearm other than a handgun”. Your drafting instructions referred to “long guns”, but that term is not used in the statutes and I would think need to be more specifically defined (for instance, a barrel length of at least 16 or 18 inches; compare s. 941.28 (1) (b) and (c), stats.). One problem with referring to “a firearm other than a handgun” is that the phrase would appear to include, for instance, assault weapons (to the extent they are otherwise legal). Do you intend to limit proposed s. 941.29 (11) to weapons used for certain purposes, such as rifles or shotguns used for hunting or target practice? If so, we may have to create a definition that more clearly specifies what weapons you intend to cover.

7. If a person files a petition under proposed s. 941.29 (11) and the judge denies the petition, should the person be able to file another petition sometime in the future? Or does a person get only one kick at the cat?

8. This draft amends s. 941.29 (5) (a), stats., to take into account the repeal of 18 USC app. 1203, which had the effect of invalidating s. 941.29 (5) (a), stats. See 78 *Opinions of the Attorney General* 22 (1989). Before the change in federal law, a person could possess a firearm under s. 941.29 (5) (a), stats., if he or she was granted a pardon that expressly authorized him or her to possess a firearm. In 1986 Congress repealed 18 USC app. 1203 and instead provided that a pardon authorized a person to possess a firearm *unless* the pardon expressly provided that the person could *not* possess a firearm. 18 USC 921 (a) (20).

While it is not necessary to achieve your intent, this draft changes s. 941.29 (5) (a), stats., to parallel federal law. You could instead decide to repeal s. 941.29 (5) (a), stats., altogether or to leave it alone (though something should be done with it a some point, given that it is essentially a nullity now).

Note that, if the treatment remains in the draft, the change in s. 941.29 (5) (a), stats., will apply to pardons granted on or after the effective date of the draft. Pardons granted between the change in federal law in 1986 and the effective date of the draft will give the pardoned person the right to possess a firearm *unless* the pardon expressly provides otherwise. 78 *Opinions of the Attorney General* at 26.

9. Please review the initial applicability provision carefully to make sure that it does what you want it to do. It provides that a person is prohibited from possessing a firearm under the draft even if he or she was convicted *before* the effective date of the draft. Is that your intent? Note that this approach does not create retroactive punishment in violation of the *ex post facto* clause. See *State v. Thiel*, 188 Wis. 2d 695 (1994). You could, however, as a matter of policy decide that the prohibition should apply only to persons who commit serious misdemeanors on or after the effective date of the draft.

Please let me know if you have any questions or changes.

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