

STATE OF MICHIGAN

BILL SCHUETTE, ATTORNEY GENERAL

FIREARMS: Possession of firearm silencers or mufflers

SILENCERS OR MUFFLERS:

MICHIGAN PENAL CODE:

The possession, manufacture, or sale of a firearm silencer is permitted in Michigan under MCL 750.224(1)(b) if the person is licensed or approved to possess, manufacture, or sell such a device by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives, as required by MCL 750.224(3)(c). Possession, manufacture, or sale of a firearm silencer by an unlicensed or unapproved person is a felony, punishable by up to five years imprisonment under MCL 750.224(2).

Opinion No. 7260

September 2, 2011

Honorable Rick Jones
State Senator
The Capitol
Lansing, MI

Honorable Tonya Schuitmaker
State Senator
The Capitol
Lansing, MI

Honorable Mark Meadows
State Representative
The Capitol
Lansing, MI

Honorable Kevin Cotter
State Representative
The Capitol
Lansing, MI

In separate requests, you have asked whether, assuming the appropriate license or approval is obtained from the federal Bureau of Alcohol, Tobacco, Firearms and explosives, a Michigan may legally possess, manufacture, or sell a firearm silencer or muffler.¹

Federal law imposes restrictions and taxes on the transfer or making of certain firearms, including devices such as silencers or mufflers. 28 USC 5845(a); 18 USC 921(a)(3).² The Department of Justice regulates firearms through

the Bureau of Alcohol, Tobacco, Firearms and Explosives.³ The federal licensing or approval process is set forth in the National Firearms Act, 26 USC 5811 *et seq* (transfers of firearms), and 26 USC 5821 *et seq* (making of firearms), and promulgated regulations. See 27 CFR Part 479. Both the transfer and the making of a silencer may be approved by the Bureau upon submitting the proper application forms.

In either case, the application process involves a detailed background check to ensure that the applicant complies with federal law, including a determination that the applicant has not been charged with or been convicted of a disqualifying crime; is a lawful resident and at least 21 years of age; does not use illegal substances; has not been adjudicated mentally defective or committed to a mental institution; and has not been convicted of a crime involving domestic violence. In addition, the applicant must undergo an identification verification process and secure a certification from a local law enforcement agency having jurisdiction in the area of the applicant's residence that the device will be used for lawful purposes, and that its possession does not violate state or local law. See 27 CFR Part 479, Subparts E and F.⁴

Turning to your question, the analysis begins with section 224 of the Michigan Penal Code, MCL 750.224, found in Chapter 37 relating to firearms. Public Act 33 of 1991 reorganized the section into its present structure, including four subsections: prohibitions are stated in subsection (1)(a) through (e); the penalty for violating the section is stated in subsection (2); the exceptions are stated in subsection 3(a) through (c); and subsection (4) provides a definition of the term "muffler" or "silencer."⁵ Section 224 thus provides, in part:

(1) *A person shall not manufacture, sell, offer for sale, or possess any of the following:*

a) A machine gun or firearm that shoots or is designed to shoot automatically more than 1 shot without manual reloading, by a single function of the trigger.

(b) *A muffler or silencer.*

(c) A bomb or bombshell.

(d) A blackjack, slugshot, billy, metallic knuckles, sand club, sand bag, or bludgeon.

(e) A device, weapon, cartridge, container, or contrivance designed to render a person temporarily or permanently disabled by the ejection, release, or emission of a gas or other substance.

(2) A person who violates subsection (1) is guilty of a felony, punishable by imprisonment for not more than 5 years, or a fine of not more than \$2,500.00, or both.

(3) *Subsection (1) does not apply to any of the following:*

(a) A self-defense spray or foam device as defined in section 224d.^[6]

(b) A person manufacturing firearms, explosives, or munitions of war by virtue of a contract with a department of the government of the United States.

(c) A person licensed by the [Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives] to manufacture, sell, or possess a machine gun, *or a device, weapon, cartridge, container, or contrivance described in subsection (1).* [Emphasis added.]

The plain language of MCL 750.224(1) prohibits the possession, manufacture, or sale of silencers. But subsection 3 of section 224 states a number of exceptions to the general prohibition set forth in subsection (1). The question, therefore, is whether any of these exceptions apply to silencers. The first two subsections, (3)(a) and (b), do not relate to silencers. Thus, an exception to the prohibition against possessing silencers stated in subsection (1) may only be found in the language of subsection (3)(c).⁷

When construing a statute, the foremost obligation is to discern and effectuate the intent of the Legislature as may reasonably be inferred from the words expressed in the statute. *Halloran v Bhan*, 470 Mich 572, 576-578; 683 NW2d 129 (2004); *Massey v Mandell*, 462 Mich 375, 380-381; 614 NW2d 70 (2000). Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. MCL 8.3a; *Western Michigan Univ Bd of Control v Michigan*, 455 Mich 531, 539; 565 NW2d 828 (1997). Both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme must be considered. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). Nothing may be read into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Roberts v Mecosta County General Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). But effect must be given to every word in a statute so as to avoid an interpretation that would render any part surplusage. *Jenkins v Patel*, 471 Mich 158, 167; 684 NW2d 346 (2004).

The language of subsection (3)(c) of section 224 must be analyzed with these guiding principles in mind. That language states that subsection (1) does not apply to: "A person licensed by" the Bureau of Alcohol, Tobacco, Firearms and Explosives "to manufacture, sell, or possess a machine gun, or a device, weapon, cartridge, container, or contrivance described in subsection (1)." The plain text applies to a person federally licensed "to manufacture, sell, or possess a machine gun." OAG, 2005-2006, No 7183, p 63 (December 27, 2005), examined this provision and the applicable federal licensing law and concluded that it authorized a person in Michigan to possess a machine gun if it was lawfully possessed before May 19, 1986, and was properly registered under federal law. This language does not apply to silencers, however, leaving the balance of subsection (3)(c) for review.

The remaining part of subsection (3)(c) states that subsection (1) does not apply to a person federally licensed to manufacture, sell, or possess "a *device*, weapon, cartridge, container, or contrivance *described in subsection (1)*." MCL 750.224(3)(c) (emphasis added). Answering your question requires determining the meaning of this emphasized language, which is important in several respects.

First, the language refers to specific items mentioned in subsection (1) of section 224: a machine gun, as mentioned in subsection (1)(a), and the five items mentioned in subsection (1)(e) ("device, weapon, cartridge, container, or contrivance"). But it does not incorporate the same clause used in subsection (1)(e) to limit the items listed there ("designed to render a person temporarily or permanently disabled by the ejection, release, or emission of a gas or other substance").

Second, when qualifying the terms "device, weapon, cartridge, container, or contrivance," the exception refers to "subsection (1)" and not the more limiting subdivision (e) of subsection (1). The question therefore arises whether the Legislature intended to authorize possession of only federally-registered machine guns and certain gas-emitting devices or whether it intended to authorize possession of all the items listed in subsection (1) if federally registered.

Again, the foremost rule is to ascertain and effectuate the intent of the Legislature. *Halloran*, 470 Mich at 576-578. "[I]t is the court's duty to give effect to the intent of the Legislature as expressed in the actual language used in the statute. It is the role of the judiciary to interpret, not write the law. If the statutory language is clear and unambiguous, the statute is enforced as written. Judicial construction is neither necessary nor permitted because it is presumed that the Legislature intended the clear meaning it expressed." *People v Schaefer*, 473 Mich 418, 430-431; 703 NW2d 774 (2005) (footnotes omitted).

Here, the Legislature exempted from the prohibition set forth in subsection 224(1) any federally-licensed "device . . . described in subsection (1)." MCL 750.224(3)(c). A silencer is a "*device* for muffling, silencing, or deadening the report of a firearm." MCL 750.224(4)(a) (emphasis added). Had the Legislature intended to limit the exception in subsection (3)(c) of section 224 to machine guns and devices that eject, release, or emit gas or other substances, it would have limited the application of the exception to machine guns and those weapons and devices set out in subsection (1)(a) and (e). Instead, the Legislature chose neither option, electing to use statutory language indicating that any of the devices listed in "subsection (1)" qualify for the federal licensee exception to the state prohibition. Whether all of the devices listed in subsection (1) should fall within the exception for federally-registered devices is a policy determination for the Legislature alone to make; unambiguous statutes must be enforced as written. The wisdom of a statute is for the Legislature to determine and not the courts; the law must be enforced as written. *Smith v Cliffs on the Bay Condo Ass'n*, 463 Mich 420, 430; 617 NW2d 536 (2000).⁸

Moreover, since section 224 is part of the Penal Code and criminal penalties are provided for the illegal possession of a firearm silencer, specific rules of statutory construction involving criminal laws must also be considered. A fundamental rule of statutory construction is that criminal statutes must be strictly construed. *People v Carlson*, 466 Mich 130, 138; 644 NW2d 704 (2002). But see MCL 750.2 (requiring that the provisions of the Penal Code be construed according to the "fair import of their terms, to promote justice and to effect the objects of the law"). Any doubt whether conduct is criminal must be resolved in favor of the defendant. *People v Jahner*, 433 Mich 490; 446 NW2d 151 (1989). The fair and plain application of the exception set forth in MCL 750.224(3)(c) supports the conclusion that each of the devices or weapons "described in subsection (1)" of section 224 is exempted from the otherwise applicable prohibition of that subsection if possession is federally approved.

It could be argued that the Legislature's use of the phrases "machine gun" and "device, weapon, cartridge, container, or contrivance," which initially appear in subsection (1)(a) and (e), and then are repeated in subsection (3)(c), evidence its intent to restrict the exception to the enumerated items in (1)(a) and (e). Under this argument, the prohibition of subsection (1) would not apply based on the exception of subsection (3)(c) for a person licensed by the Department of Alcohol, Tobacco, Firearms and Explosives to possess, manufacture, or sell a "machine gun," see (1)(a), or for a "device, weapon, cartridge, container, or contrivance *designed to render a person temporarily or permanently disabled by the ejection, release, or emission of a gas or other substance*," see (1)(e) (emphasis added). A silencer does not fit either category, and thus, under this reading, would not be exempt from prohibition.

But this interpretation assumes that the Legislature mistakenly omitted from subsection 3(c) language it placed in subsection 1(e). Alternatively, it requires assuming that the Legislature intended "described in subsection (1)" to mean "described in subsection 1(e)." But under basic principles of statutory interpretation, language cannot be added to a statutory provision that the Legislature did not itself include. *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 423; 565 NW2d 844 (1997); *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). Moreover, an interpretation that the Legislature intended to limit the "subsection (1)" exception to subsection 1(e) would require persons wishing to acquire any devices that disable a person through the ejection or release of a "gas or other substance" to secure a federal permit in order to qualify for the exception, which is not possible since the National Firearms Act does not generally regulate such devices, unless they are in the form of a poison gas bomb, missile, grenade, etc. 28 USC 921 and 922. A fundamental rule of statutory construction is that the Legislature did not intend to do a useless thing. *Girard v Wagenmaker*, 437 Mich 231, 244; 470 NW2d 372 (1991). Accordingly, the better reasoned interpretation, and the interpretation consistent with the rules of statutory construction that guide this office and the courts, is that a silencer is a "device" exempt from the prohibition of subsection 1 under the plain language of subsection 3(c).

It is my opinion, therefore, that the possession, manufacture, or sale of a firearm silencer is permitted in Michigan under MCL 750.224(1)(b) if the person is licensed or approved to possess, manufacture, or sell such a device by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives, as required by MCL 750.224(3)(c). Possession, manufacture, or sale of a firearm silencer by an unlicensed or unapproved person is a felony, punishable by up to five years imprisonment under MCL 750.224(2).

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Attorney General

¹ Section 224(4) of the Michigan Penal Code, MCL 750.224(4), defines "muffler" or "silencer" to mean one or more of the following:

- (a) A device for muffling, silencing, or deadening the report of a firearm.
- (b) A combination of parts, designed or redesigned, and intended for use in assembling or fabricating a muffler or silencer.
- (c) A part, designed or redesigned, and intended only for use in assembling or fabricating a muffler or silencer.

These devices are also often referred to as "sound suppressors." For convenience, reference to the term "silencer" or "silencers" throughout this opinion should be understood as referring to all the items listed in this definition.

² Federal law also requires that all firearms be registered and listed on the National Firearms Registration and Transfer Record. See 26 USC 5841 *et seq.*

³ Historical responsibility of the Secretary of the Treasury of the United States to regulate firearms through the Bureau of Alcohol, Tobacco, Firearms and Explosives was transferred by Congress to the Department of Justice by Public Law No 107-296, Title XI, Subtitle B, § 1112(f)(4), (6), 116 Stat 2276 (codified at 18 USC 922 (2002)).

⁴ More detailed information regarding this process may be found on the Bureau of Alcohol, Tobacco, Firearms and Explosives website at <http://www.atf.gov> (accessed August 31, 2011).

⁵ See the full text of the current definition quoted in n 1.

⁶ MCL 750.224d defines a self-defense spray device to include those devices capable of carrying, and ejects, releases, or emits not more than 35 grams of any combination of orthochlorobenzalmalononitrile and inert ingredients or a solution containing not more than 10% oleoresin capsicum.

⁷ But see MCL 750.231 for additional exceptions, not relevant to your questions, afforded to law enforcement, armed forces, and similar personnel.

⁸ In OAG, 1977-1978, No 5210, p 189 (August 10, 1977), the Attorney General opined that MCL 750.224 prohibited a person from possessing either an automatic weapon or a weapon equipped with a silencer. However, section 224 has undergone various amendments since that time, and these changes to the law supersede that opinion. See 1978 PA 564; 1980 PA 346; 1991 PA 33.