

THE 'AARON' RULE: PAROLE OPPORTUNITY

House Bill 4539 (Substitute H-3) First Analysis (12-3-98)

Sponsor: Rep. Kirk Profit
Committee: Judiciary

THE APPARENT PROBLEM:

The 1975 edition of the Michigan Standard of Criminal Jury Instructions reportedly included two different felony murder instructions for judges to choose from: (1) that a death in the perpetration of a felony was, by fact, a first degree murder, or (2) that each individual defendant must have done a wrongful act equivalent to murder before being convicted of felony murder.

This instruction led to a long-standing dispute regarding the elements of felony murder: specifically, whether felony murder involved a death and a killing, or a death and the elements of murder. In other words, whether the defendant must be shown to have acted with malice (intended to kill or do great bodily harm or acted with wanton and willful disregard) or whether the defendant must only be shown to have intended to commit the underlying felony. In 1980, the state supreme court resolved the dispute in its decision in *People v Aaron* [409 Mich 672; 299 NW2d 304 (1980)] by throwing out the first instruction. Thus, the court concluded that felony murder required a death and the elements of murder. As a result, a conviction for felony murder now requires a showing of malice on the part of the defendant. However, the supreme court's decision in *Aaron* was applied only prospectively. Thus, most felony murder convictions that had occurred up until that time under the first instruction were left standing. Many have asserted that this result is unfair and that prisoners who were convicted under the pre-*Aaron* standards should be given the opportunity for release.

THE CONTENT OF THE BILL:

The bill would amend the Department of Corrections act to allow certain prisoners convicted of first degree murder prior to November 25, 1980 to be eligible for parole in the same manner as a parolable life sentence. A prisoner would have to apply to the sentencing judge or that judge's successor in office for a determination of his or her eligibility. Upon

receiving an application for such a determination from a prisoner, the court would be required to notify the prosecuting attorney or his or her successor of the application and allow the prosecuting attorney to respond.

In order for the prisoner to be eligible for parole under the bill, the judge would have to review the record of the prisoner's case and from that review make three determinations: 1) that the prisoner had been convicted of first degree murder before November 25, 1980, 2) that the *Aaron* decision would have applied to the prisoner had the decision been made retroactive (i.e., he or she had been convicted of felony murder), and 3) that the conviction would not have been supported if the *Aaron* standards had been applied to the case (i.e., there was no evidence or insufficient evidence of an intent to kill or do great bodily harm or wanton and willful disregard). If the judge concluded that all of these were true, he or she would be required to enter an order certifying that the prisoner was subject to the parole board's jurisdiction. A copy of the judge's order would then be promptly forwarded to the parole board.

MCL 791.234

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

People in favor of the bill argue that the current situation is grossly unfair and undermines the principle of equal protection under the law. When a new judicial rule, such as the one set forth in the Supreme Court's *Aaron* decision, is not applied retroactively, the result is that two groups of people who have committed the same or similar acts are given different

treatment. It is argued that there is no good reason that those people who were convicted before November 25, 1980 should be subject to significantly harsher sentences for the same or similar crimes than those people convicted after the *Aaron* decision.

Although the bill would not completely undo the injustice of the current situation, it would at least ensure that some of those convicted prior to November 25, 1980 will have an opportunity to be paroled instead of spending the rest of their lives in prison.

Against:

According to opponents of the bill, the *Aaron* decision provided a new rule of law that was not made retroactive. The supreme court did not determine that the convictions in question were unconstitutional, nor did it conclude that the courts had misinterpreted the existing law. Each individual currently imprisoned under a pre-*Aaron* standard was properly convicted and sentenced under the prevailing law at that time. Therefore, changing the sentences of these individuals would be unwarranted as no injustice has been done to defendants since they were properly tried and convicted of felony-murder.

Since the convictions are valid, any change in the law that would allow these prisoners to either be released or paroled would be improper. The law already provides for appeals, pardons, and commutation of sentences where errors or injustice has occurred. By retroactively changing valid criminal sentences through legislation, the legislature sets a bad precedent. Since the legal system is admittedly not perfect, injustice sometimes results even when the law is followed. However, the system already provides a means of dealing with situations where, in spite of the best efforts of the participants, the punishment does not, in truth, fit the crime, even though it might fit the law. The system provides an avenue for dealing with such unfairness by means of pardon or commutation of the person's sentence. Instead of this, the bill could open the door for legislation to be introduced to deal with any number of arguably unfair conviction results when a means to repair the injustice already exists without changing the law.

Response:

The bill's proponents argue that pardon and commutation of sentence are insufficient under the current circumstances, because of the number of prisoners involved (some estimates are as many as 200 prisoners), and due to the negative political impact of providing a pardon or commutation for a convicted murderer.

Against:

Opponents also argue that the bill will provide for the potential release of all prisoners convicted under the pre-*Aaron* standard. At the time these trials occurred there was no need to prove the elements now required by the *Aaron* case in order to convict and, thus, even if it existed, evidence that might have been used in a post-*Aaron* case likely would not have been presented at a pre-*Aaron* trial. Therefore, it is unlikely that the record of any of these trials will contain any evidence sufficient support a post-*Aaron* conviction. As a result, even those individuals who might have been convicted of the same crime under the post-*Aaron* standards likely would be eligible to be paroled under the bill, unless by some fluke, the record of the case contains the sort of evidence needed to obtain a post-*Aaron* conviction.

Response:

The provisions requiring the notification of the prosecuting attorney involved in the case, or his or her successor, will likely provide for the production of information that could have been used at trial.

Rebuttal:

Even if the same prosecutor is still there some 18 or more years later, or if the prosecutor's records are such that the successor has knowledge of evidence that wasn't presented at trial, the bill requires the judge to make his or her determination based on the record, which could be limited to a review of only the court transcripts of the trial. At the very least the basis for the judge's decision should be clearly expanded to include consideration of other information provided by the prosecutor or his or her successor.

POSITIONS:

The State Appellate Defender's Office supports the bill. (12-1-98)

The American Civil Liberties Union supports the bill. (12-2-98)

The American Friends Service Committee supports the bill. (12-2-98)

The Michigan Prosecuting Attorneys Association opposes the bill. (12-2-98)

Analyst: W. Flory

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