



President  
Mark W. Pennak

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## **WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HOUSE BILL 96 AND SENATE BILL 346**

I am the President of Maryland Shall Issue (“MSI”). Maryland Shall Issue is an all-volunteer, non-partisan organization dedicated to the preservation and advancement of gun owners’ rights in Maryland. It seeks to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. I am also an attorney and an active member of the Bar of the District of Columbia. I recently retired from the United States Department of Justice, where I practiced law for 33 years in the Courts of Appeals of the United States and in the Supreme Court of the United States. I am an expert in Maryland Firearms Law, federal firearms law and the law of self-defense. I am also a Maryland State Police certified handgun instructor for the Maryland Wear and Carry Permit and the Maryland Handgun Qualification License (“HQL”) and a certified NRA instructor in rifle, pistol and personal protection in the home and outside the home as well as a range safety officer. I appear today in OPPOSITION to HB 96 and SB 346.

HB 96 and SB 346 would amend MD Code, Public Safety § 5-124 to provide that “[i]n this section, ‘transfer’ includes a loan other than a temporary gratuitous exchange of a regulated firearm between two individuals who remain in the same location for the duration of the exchange.” The term “loan” is new to Title 5 and not defined either in these bills or elsewhere. Under these bills, a law-abiding non-prohibited adult who loans a handgun to another law-abiding, non-prohibited adult must go through all the transfer requirements imposed by Section 5-124. That means that the transferee and the transferor must fill out a firearms application otherwise required by MD Code, Public Safety, § 5-118 (State Form 77-R) at a FFL or a State Police barracks, pay \$10 and then wait 7 full days before completing the transfer. If the transferee to the loan were to return the handgun to the original transferor after the loan was over, the process would have to be repeated with still another Form 77-R and still another 7 day wait and still another check for \$10. Under MD Code, Public Safety, § 5-144, a knowing “participation” in a “transfer” that violates Section 5-124 is punishable with up to 5 years in prison or a fine up to \$10,000, “or both.” As detailed below, this amendment overrules controlling precedent of the Maryland Court of Appeals, creates enormous legal traps for innocent gun owners while also bringing Section 5-124 into direct conflict with numerous provisions of existing Maryland firearms law. The bill is breathtaking in its scope.

First, this amendment legislatively overrules *Chow v. State*, 903 A.2d 388 (Md. 2006), where the Court held that the term “transfer” as used in Section 5-124 meant a “permanent exchange of title or possession” and thus further held that a

temporary exchange of a handgun between two non-prohibited persons would not support a conviction. By making a temporary “loan” a “transfer” under Section 5-124, these bills would overrule that holding. Yet, the Court of Appeals adopted this holding for good reasons. As the Court explained, this definition of “transfer” to exclude non-permanent exchanges was consistent with the law’s purpose which “was to reduce the proliferation of *illegal* sales and *illegal* transfers.” (Id. at 405) (emphasis the Court’s). Section 5-124 was thus not concerned with “the imposition of restrictions upon the temporary exchange or loan of regulated firearms between two adults that are not legally prohibited from possessing such firearms.” (Id.). The bills thus radically change the focus of Section 5-124 from addressing “illegal” transfers to exchanges involving otherwise perfectly legal, law-abiding persons.

Indeed, under Maryland law, MD Code, Public Safety, § 5-134(b), it is **already** a serious crime for a dealer or any “**other person**” to sell, rent, **or transfer** a regulated firearm to a purchaser, lessee, or transferee who the dealer or other person knows or has reasonable cause to believe” is under 21 or who is a disqualified person. The mere “participation” in a violation of this prohibition is punishable by “5 years or a fine not exceeding \$10,000 or both” under MD Code, Public Safety, § 5-144(b). Maryland law, MD Code, Public Safety, § 5-101(g), already defines the term “disqualifying crime” extremely broadly to include “(1) a crime of violence; (2) a violation classified as a felony in the State; or (3) a violation classified as a misdemeanor in the State that carries a statutory penalty of more than 2 years.” In prior past testimony on similar bills, State Judiciary representatives have estimated that there are roughly **2000** crimes in Maryland that impose this lifetime disqualification on possessing any firearms whatsoever. These bills thus add nothing to existing prohibitions. What we have here is a failure **to enforce**, not a failure to ban.

However, these bills **will** inevitably ensnare law-abiding persons for otherwise entirely innocent conduct. The bill includes in its definition of “transfer” all **loans** of handguns between law-abiding adults except for those loans which are “temporary” and “gratuitous” and even those sorts of temporary loans are exempt from coverage only so long as the persons involved stay “*at the same location for the duration of the exchange.*” This definition would criminalize a loan of a handgun between a husband and wife in the home if either spouse were to thereafter leave the house for any reason. Since mere possession (including constructive possession) would be sufficient to prove such a gratuitous transfer, *United States v. Turnmire*, 574 F.2d 1156, 1157 (4th Cir. 1978), each spouse would need to buy their own guns, keep them in their own separate safes and not share access (or the combination) with the other spouse. For example, one spouse could not loan a handgun to the other spouse for self-protection in the home while the owner was away on a business trip. For the same reasons, the owner of a handgun could no longer allow his or her spouse (or other family member) to take the owner’s handgun to the range for practice unless he or she was accompanied to the range by the owner. Each spouse would be required to maintain a separate gun safe that would be inaccessible to the other spouse. Each spouse would be required **to use** only his or her **own** gun for self-defense in the home, as there is no provision that allows even such a temporary possession in a life-or-death emergency. That is senseless.

Effectively, each spouse or family member would be required to own their own firearms because sharing (other than at the “same location” – whatever that means) would be a “transfer,” subject to the Form 77-R process (including the 7-day waiting period) at the State Police barracks. Again, any knowing “participation” in a failure to follow that procedure is punishable with 5 years in prison under Section 5-144. A conviction under Section 5-144 would impose, regardless of actual sentence, a lifetime federal firearms disability. 18 U.S.C. § 922(g), and 18 U.S.C. § 921(a)(20). Subsequent possession of a modern firearm or ammunition by a person subject to this firearms disability is a violation of 18 U.S.C. § 922(g), which is punishable by up to 10 years imprisonment under federal law. See 18 U.S.C. § 924(a)(2). A similar disability is imposed under Maryland law. See MD Code, Public Safety, § 5-101(g)(3), § 5-133(b)(1), § 5-205(b)(1).

This bill would also mean that established firing ranges may **not** “rent” a handgun to a person for use **at the range**. This bill defines a “transfer” to **include** all non-gratuitous loans of a regulated firearm between two individuals. The proper legal term for such a transaction is “rent.” Yet, the term “rent” is defined under MD Code, Public Safety, § 5-101(s) as meaning “the temporary transfer **for consideration** of a regulated firearm that **is taken from the property of the owner** of the regulated firearm.” Under that definition, ranges can and do “loan” firearms to customers for temporary use at the range without regard to provisions regulating the “rent” of handguns because such rental firearms never leave the “property of the owner.” However, that loan would not be possible under these bills because these bills would make such a loan permissible only if it is “gratuitous,” *viz.*, not for “consideration.”

A commercial rental at a range is, of course, almost *never* “gratuitous” as use of the range is not free. Such rentals are a common part of the business of many ranges. In essence, if the bill becomes law, Maryland’s code would have two, directly conflicting definitions of “rent.” Under Section 5-124, as amended by these bills, the non-gratuitous loan **would be banned** while, under Section 5-101(s), the same non-gratuitous loan **would be permitted** if the rental handgun was not taken from the owner’s “property.” Such directly conflicting definitions is a violation of the Due Process Clause. See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (noting a due process violation is established where “the legislature has acted in an arbitrary and irrational way”); *Anderson v. Douglas County*, 4 F.3d 574, 577 (8th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994) (noting that a substantive due process claim is established by “truly irrational” governmental action); *MHC Financing Ltd. Partnership v. City of San Rafael*, 714 F.3d 1118 (9th Cir. 2013), *cert. denied*, 571 U.S. 1125 (2014) (“We will strike down a statute on substantive due process grounds if it is arbitrary and irrational.”) (citation omitted).

Similarly, a paid instructor could be prosecuted under this bill for the “loan” of his handguns to students during HQL or wear and carry permit firearms instruction. Such instruction is expressly mandated by State law. MD Code, Public Safety, § 5-117.1(d)(3) (HQL); MD Code, Public Safety, § 5-306(a)(5) (wear and carry permit). By definition, such a loan would not be “gratuitous” because the instructor is being paid and that amount includes the cost of allowing students to use the instructor’s handguns. This bill would thus effectively outlaw all paid instruction by handgun instructors certified by the State Police and thus impede the very firearms training

that State law now contemplates and promotes. The bill would also effectively ban leaving a handgun with a dealer or gunsmith for repair, as such a transfer of possession would be neither gratuitous nor would it take place at the “same location” once the owner left.

These changes to Section 5-124 also effectively negate Attorney General’s and the State Police’s interpretation of “receive” under the HQL provisions of MD Code, Public Safety, § 5-117.1(c). Those provisions provide that a person may not “receive” a handgun without having an HQL issued by the State Police. Similarly, Section 5-117.1(b) of the HQL statute bans the “transfer” of a handgun without an HQL. Yet, the Attorney General’s Office has relied on *Chow* to argue in federal district court that “receive” means a “permanent” receipt because, according to the Attorney General, “receipt” is just a type of “transfer” which must be a “permanent” under *Chow*. See *MSI v. Hogan*, 2017 WL 3891705 (D. Md. 2017), slip op. at 10. Most recently (November 17, 2107), the State Police have issued an advisory to the same effect, again expressly relying on *Chow*. The Attorney General’s legal position in the HQL litigation is effectively destroyed if *Chow* is legislatively overruled, as the AG’s argument ties the meaning of “receipt” under Section 5-117.1 to the meaning of “transfer” under Section 5-124 (as construed in *Chow*) in a vain attempt to defend the constitutionality of the HQL statute.

Alternatively, under the Attorney General’s and the State Police’s interpretation of “receipt,” a temporary loan of a handgun would still be a permissible “receipt” under the HQL statute, but, under these bills, such a loan would still be banned as an illegal “transfer,” as that term is defined by Section 5-124, if it was non-gratuitous **or** if one person were to leave the “same location.” That result is perverse and arbitrary. Again, such self-contradictory legislation is a violation of the Due Process Clause.

The bill’s broad ban on temporary possessions in the home would also make it unconstitutional. As the Attorney General well understands, any state law that bans temporary loans of handguns among members of the same family for self-defense in the home will not survive any level of constitutional scrutiny under *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Heller* holds that law-abiding adults have a fundamental constitutional right to possess a handgun in the home. These bills would criminalize innocent temporary transfers and hence possession by law-abiding adult members of the same family within the home. In a vain attempt to control illegal guns, the bills would criminalize tens of thousands ordinary gun owners and families. Yet, the bills will do nothing actually to control illegal gun transfers among criminals. Existing state law already makes these possessions and transfers illegal many times over. See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2313-14 (2016) (“Determined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations.”).

The Maryland Court of Appeals has stated that the General Assembly has an “obligation to establish adequate guidelines for enforcement of the law” and that obligation is “the more important aspect of the vagueness doctrine.” *Aston v. Brown*, 339 Md. 70, 89, 660 A.2d 447, 456 (1995), quoting *Kolender v. Lawson*, 461

U.S. 352, 358 (1983). As outlined above, these bills miserably fails that test. Indeed, the same version of these bills was before the Senate Judicial Proceedings Committee in 2018 (as SB 860). During that hearing, a State's Attorney representative testified in favor of SB 860 and a legislative overruling of *Chow* so as to include even the most temporary of transfers as a violation of Section 5-124, even though he acknowledged it would have criminalized innocent possession of handguns among family members in the home. When the late Senator Norman pointed out that would be the effect, the States Attorney representative agreed but stated that prosecutors might choose not prosecute such possessions in the exercise of "prosecutorial discretion."<sup>1</sup>

Not a soul on the Committee seemed to find that "reassurance" much comfort and for good reason. Law-abiding citizens will inevitably fail to comply with this law. Even those who become aware of the law, few will understand that they will need to bar all unaccompanied access to or possession of a handgun in order to come within full compliance. With violations thus virtually guaranteed, these bills lack any semblance of legitimacy. It simply a form of legal terrorism against gun owners.

Fundamentally, the sort of "prosecutorial discretion" contemplated by these bills is a receipt for abuse, arbitrary enforcement and discrimination. The prosecutor's job is necessarily adverse to that of a potential defendant. The prosecutor exists to enforce the law as written, not apply some sort of ad hoc extra-legal sense of justice in deciding whether to prosecute a violation. Legislators may not "abdicate their responsibilities for setting the standards of the criminal law." *Smith v. Goguen*, 415 U. S. 566, 575 (1974). Thus, it is the duty of the General Assembly to define what is illegal, not delegate that determination to the case-by-case decisions of the prosecutor in the exercise of "prosecutorial discretion." As the Supreme Court has stated, "if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department." *Kolendar*, 461 U.S. at 358 n.7. For all these reasons, these bills, if they become law, will not survive judicial review.

We urge an unfavorable report.

Sincerely,



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<sup>1</sup> See <http://mgahouse.maryland.gov/mga/play/19874286-6d77-46fc-9a43-77c1f52bbc6e/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c&playfrom=1664000> (sponsor testimony beginning at 29:00, State Attorney testimony beginning at 42:00, referenced response concerning "prosecutorial discretion" is at 48:00).