



President
Mark W. Pennak

February 25, 2019

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 95

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. I appear today as President of MSI in opposition to SB 448 and HB 402.

These bills basically prohibit an otherwise disqualified person from possessing an “antique” firearm. Under current law, Public Safety, § 5-205 prohibits a disqualified person from possessing a rifle or a shotgun, but makes an exception from that prohibition for “a rifle or shotgun that is an antique firearm as defined in § 4-201 of the Criminal Law Article.” SB 448 and HB 402 remove that exception from Section 5-205. Section 5-205 is then further amended by the bills to state that an otherwise disqualified person “may not possess a rifle, a shotgun, or an antique firearm.” The bills leave unchanged the current definition of an “antique firearm” found at MD Code, Criminal Law, § 4-201(b).

First, the ban on possession of an antique firearm imposed by these bills is unenforceable. Federal law, 18 U.S.C. § 922 comprehensively addresses sales of all modern firearms, including requiring that all persons who are “engaged in the business” of selling firearms in interstate commerce must become Federal Firearms Licensees. See *Abramski v. United States*, 134 S.Ct. 2259, 2271 n.9 (2014) (“the federal scheme ... controls access to weapons’ through the federally licensed firearms dealer, who is ‘the principal agent of federal enforcement’”), quoting *Huddleston v. United States*, 415 U.S. 814, 824, 825 (1974). However, federal law expressly defines firearms to “not include an antique firearm.” 18 U.S.C. § 921(a)(3). Maryland law similarly requires that “[a] person must lawfully possess a dealer’s license issued by the Secretary before the person engages in the business of selling, renting, or transferring regulated firearms” (handguns). MD Code, Public Safety, § 5-106. And, like federal law, Maryland regulates to whom a dealer may sell regulated firearms, including also categorically banning the sale of any such

firearm to a minor. MD Code, Public Safety, § 5-134. But, Maryland law does not otherwise address the sale to adults of unregulated firearms, such as modern long guns (leaving those sales to federal regulation under Section 922). Like federal law, Maryland also excludes “antiques” from its definition of firearms. MD Code, Criminal Law, § 4-201(b). Accordingly, since antique firearms are not regulated by either State law or federal law, a person may purchase such antiques in the United States without undergoing any background check. That reality makes these bills impossible to enforce because a disqualified person may freely buy any antique firearm virtually anywhere in the United States. Criminalizing the possession of antiques by disqualified persons thus cannot not stop such sales. Passing an unenforceable law simply invites disrespect for the law.

Second, existing Maryland law, Md Code Criminal Law 4-204 **already severely** punishes any use of any “antique” firearm (or any other firearm), loaded or unloaded, operable or inoperable, in a crime of violence. A violation of 4-204 is punishable “for not less than 5 years and not exceeding 20 years” in prison. Indeed, Section 4-204 further provides that “the sentence shall be consecutive to and not concurrent with any other sentence imposed for the crime of violence or felony.”

We understand, of course, that an antique gun was used in a horrendous Germantown, June 2015 murder by a disqualified person. This bill would have only made possession of the antique by that killer a crime under Section 5-205. A person who violates Section 5-205 is “subject to imprisonment not exceeding 3 years or a fine not exceeding \$1,000 or both.” Thus, if this bill had been law at that time, the Germantown killer would have faced only an “illegal possession” charge in addition to the far more serious crimes of first degree murder and the use of the antique firearm in a violent crime under Section 4-204. The prospect of that additional “possession” charge would not possibly have deterred the Germantown murderer who committed these far serious crimes. Piling on a possession offense would not have mattered to this person.

Third, while federal statistics do not separately identify the use of antique firearms in crime, the use of an antique or replica firearm in a murder appears to be extraordinarily rare. That is for easily understandable reasons. Antiques are, by definition, more than a 100 years old. State law defines an antique to be a firearm “with a matchlock, flintlock, percussion cap, or similar ignition system, **manufactured before 1899.**” MD Code, Criminal Law, § 4-201(b). Federal law, 18 U.S.C. § 921(a)(16), similarly defines an antique to mean “any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) **manufactured in or before 1898.**” Such antiques are not often fully functional if only because these antiques used “black power” as the propellant and black power is extremely corrosive to metal surfaces.

Both federal and State law also define “replicas” of such pre-1899 firearms as antiques, but **only** to the extent that the replica “is not designed or redesigned to use rimfire or conventional centerfire fixed ammunition; or (ii) uses rimfire or conventional centerfire fixed ammunition that is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.” Thus, these replicas only use black power as the propellant in much the way

black power was used by actual antiques in the 19th century. The functionality of such replicas is thus quite primitive by comparison to modern firearms that use modern ammunition, including those firearms which are readily, but illegally, available on the streets of Baltimore and other cities. For these reasons, antiques and replicas are obviously not the gun of choice by criminals. That such an antique replica was used in the Germantown murder is quite anomalous. In short, there is no need for this legislation and, if enacted, the bill would be wholly ineffective in preventing the extraordinarily rare misuse of antique firearms in crimes. Such criminal use of antiques is already severely punished by existing state law.

Finally, the downside to this bill is that it would ban possession of black power hunting rifles by persons who may be disqualified. There are roughly 2,000 misdemeanor crimes in Maryland which are punishable by more than 2 years in prison and thus impose a possession disqualification under Section 5-101(g)(3) of the Public Safety Article. By far, most of those crimes are non-violent. That disqualification is already incorporated by reference into Section 5-205(b)(1) for long guns. There is no good reason that these individuals should not be allowed to hunt using black power antique rifles in order to put food on the table for their families, especially given that any misuse of such antique rifle is already severely punished by Section 2-204. This bill would criminalize such hunting.

Sincerely,

A handwritten signature in blue ink that reads "Mark W. Pennak". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

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