President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

March 2, 2017

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSTION TO HB 294 AND SB 224

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 almost exclusively 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 and the law of self-defense. I appear as President of MSI in opposition to SB 224 and HB 294.

MSI recognizes that domestic violence is a "scourge" on society and we join with the sponsors in condemning it in the strongest possible terms. See, e.g., *Fernandez v. California*, 134 S.Ct. 1126, 1143 (2014) (Ginsberg, J., dissenting). However, as detailed below, these bills are simply duplicative of existing law and thus do nothing to address domestic violence not already addressed by existing law. We respectfully submit that the desire to address domestic violence should not take the form of passing legislation that is duplicative. That desire is better expressed in enforcement or in other policies designed to address the problem. As Justice Ginsberg has noted, "appropriate policy responses to this scourge may include fostering effective counseling, providing public information about, and ready access to, protective orders, and enforcing such orders diligently." (Id.).

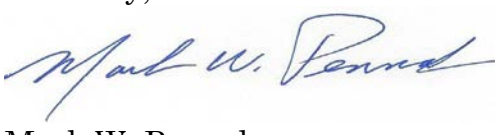
SB 224 and HB 294 would change the definition of a "disqualifying crime" for purposes of imposing a firearms disqualification for second degree assault. Currently, MD Code, Public Safety, § 5-101(b)(b-1)**(2)** provides that the term "disqualifying crime" does not include "a case in which a person received a probation before judgment: * * * (i) for assault in the second degree." The bills would change that provision to provide that the exception for probation before judgment would not apply if "THE CRIME WAS A DOMESTICALLY RELATED CRIME AS DEFINED IN § 6–233 OF THE CRIMINAL PROCEDURE ARTICLE." Yet, Section 5-101(b)(b-1)**(1)** (the prior subsection), which would not be changed by these bills, **already** provides that disqualifying crime **includes** "a case in which a person received probation before judgment **in a domestically related crime** as defined in § 6-233 of the Criminal Procedure Article." A "domestically related crime," as defined in the cross referenced Section 6-233, is merely "**a crime** committed by a defendant **against a victim who is a person eligible for relief**, as defined in § 4-501 of the Family Law Article, or who had a sexual relationship with the defendant within 12 months before the commission of the crime." As detailed below, that definition encompasses *any* crime committed by the defendant against the defined class of protected individuals, including second degree assault.

Existing law already makes second degree assault a serious "crime" within the meaning of Section 6-233. See MD Code, Criminal Law, § 3-203(a) ("a person may not commit an assault"). An "assault" is defined by MD Code, Criminal Law, § 3-201(b) to mean "the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings"). See *Nicolas v. State*, 426 Md. 385, 402–03, 44 A.3d 396 (2012). A battery is a touching that is either harmful, unlawful or merely offensive. *Marlin v. State*, 192 Md.App. 134, 166, 993 A.2d 1141, *cert. denied*, 415 Md. 339, 1 A.3d 468 (2010). See also *Nicolas*, 426 Md. at 403, 44 A.3d 396 ("an assault of the battery variety is committed by causing offensive physical contact with another person."). In Maryland, second-degree assault is a misdemeanor that carries a maximum term of imprisonment of ten years. MD Code, Criminal Law, § 3–203(b).

This broad definition of assault is in accord with federal law, 18 U.S.C. § 922(g)(9), (the Lautenberg Amendment) as construed by the Supreme Court in *United States v. Castleman*, 134 S.Ct. 1405 (2014). Section 922(g)(9) forbids the possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence." That term is defined to include any crime that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon" against persons who have (or had) a defined domestic relationship with the defendant. See 18 U.S.C. § 921(a)(33). *Castleman* held that this definition encompassed domestic abusers convicted of generic assault or battery offenses, including a "the crime of battery" which, the Court noted, "was 'satisfied by even the slightest offensive touching.'" 134 S.Ct. at 1411 (citation omitted). A person who violates Section 922(g)(9) "shall be fined as provided in this title, imprisoned not more than 10 years, or both." 18 U.S.C. § 924(a)(2).

In sum, if second degree assault is committed by a person "against a victim who is a person eligible for relief," within the meaning of Section 6-233, that person is already a disqualified person under existing MD Code, Public Safety, § 5-101(b)(b-1)(**1**), regardless of probation before judgment, The same is quite likely true under federal law as well. These bills amending § 5-101(b)(b-1)(1)(**2**) add nothing to his prohibition already set forth in § 5-101(b)(b-1)(**1**), and thus accomplish nothing not already covered by existing law. There is, accordingly, no need to amend MD Code, Public Safety, § 5-101(b)(b-1)(**2**), as proposed by these bills. Indeed, doing so risks complicating or introducing confusion in the enforcement of § 5-101(b)(b-1)(**1**). No good can come of this amendment.

Sincerely,



Mark W. Pennak
President, Maryland Shall Issue
1332 Cape St. Claire Rd #342
Annapolis, MD 21409
mpennak@marylandshallissue.org