President
Mark W. Pennak

January 30, 2018

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MARYLAND SHALL ISSUE, IN REGARD TO SENATE BILL 126 FOR INFORMATIONAL PURPOSES

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 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 personal protection outside the home and a range safety officer. I appear today as President of MSI for informational purposes regarding SB 126.

The bill amends MD Code Courts and Judicial Proceedings § 12-301 to create a new subsection (c)(5) under which the State would be accorded a new right of appeal in cases "involving a violation of § 5–133, § 5–205, or § 5–206 of the Public Safety article" and "where the trial court "excludes evidence offered by the State" or requires the "return of evidence" that the trial court has ruled was seized in violation of the Constitution of the United States or of Maryland Constitution or the Maryland Declaration of Rights. Section 5-133(c) punishes, as a felony, possession of a handgun by disqualified persons, but Section 5-133(d) punishes, as a misdemeanor, possession of a handgun by any minor, with numerous exceptions. Section 5-205 punishes, as a misdemeanor, possession of a long gun by certain disqualified persons, while Section 5-206 punishes, as a felony, possession of a long gun by persons previously convicted of a crime of violence.

It is well established that appeals taken by the State must be specifically authorized by statute. Here, subsection (c)(4) of Section 12-301 already recognizes a right of appeal from orders suppressing evidence offered by the State or ordering the return of property, but limits that right of appeal to cases "involving a crime of violence as defined in § 14–101 of the Criminal Law Article," and certain types of major drug cases addressed in "§§ 5–602 through 5–609 and §§ 5–612 through 5–614 of the Criminal Law Article." The crimes of violence are all major felonies, such as murder, forcible rape, kidnapping, first degree assault and similar crimes. The drug cases are similarly serious offenses. In contrast, as noted, some of the gun possession violations addressed by the new subsection (c)(5) under this bill are

misdemeanors. Appeals in misdemeanor cases are hard to justify if only because misdemeanor offenses are, by definition, less serious than felonies. More fundamentally, it seems misguided to equate a non-violent possessory offense with *mala in se* crimes of violence for purposes of allowing appeals.

Yet, not only does this bill authorize appeals in misdemeanor cases, it inexplicably abandons **all the limitations** on appeals imposed by subsection (c)(4) for cases involving "crimes of violence." For example, subsection (c)(4)(ii) provides that such appeals must be made "before jeopardy attaches to the defendant" and provides further that "the appeal shall be taken no more than 15 days after the decision has been rendered and shall be diligently prosecuted." The requirement is designed, in part, to ensure that the State's appeal does not run afoul of the Double Jeopardy Clause of the Fifth Amendment to the Constitution. Under the Double Jeopardy Clause, jeopardy attaches when the jury is empaneled and sworn, and in a nonjury trial, jeopardy attaches when the first witness is sworn. After that point, an appeal by the prosecution is prohibited where a successful appeal would grant the prosecution a new trial or subject the defendant to multiple prosecution. See generally *United States v. Wilson*, 420 U.S. 332 (1975); *Mansfield v. State*, 422 Md. 269 (2011). These principles are fully applicable to the possessory crimes specified by this bill, cf. *Morris v. Reynolds*, 264 F.3d 38 (2d Cir. 2001), yet the bill completely omits any such limitation.

Similarly, new subsection (c)(5) created by this bill does not contain the other protections accorded the accused in (c)(4), such as the requirement that the charges be dismissed if the trial court is affirmed; the requirement that State "certify" that appeal is not taken for reason of delay and that the excluded evidence be "substantial proof of a material fact;" the requirement that the appeal must be resolved within120 days of the time that the record on appeal is filed in the appellate court; the requirement that, in certain cases, that "the defendant shall be released on personal recognizance bail;" and the requirement that the State pay the defendants' attorneys' fees and costs if the State loses on appeal. These protections help ensure that appeals are limited to the most serious or important issues. The time limits likewise protect the defendant's Sixth Amendment and statutory right to a speedy trial. See, e.g, *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *State v. Hicks*, 285 Md. 310 (1979). There is no apparent reason that these protections should not be equally applicable to cases "involving a violation of § 5–133, § 5–205, or § 5–206 of the Public Safety article" addressed by this bill.

Sincerely,

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