



President
Mark W. Pennak

March 6, 2018

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN SUPPORT OF HB 825

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 federal statutory and constitutional law 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 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 Range Safety Officer and a NRA certified instructor in rifle, pistol and personal protection in the home and outside the home. I appear as President of MSI in support of HB 825.

This bill should be considered wholly non-controversial. Currently, MD Code, Public Safety, § 5-101(g)(3) defines the term “disqualifying crime” to include “a violation classified as a misdemeanor in the State that carries a statutory penalty of more than 2 years.” This bill would amend Section 5-101(g)(3) to clarify that the misdemeanor “carried a statutory penalty of **incarceration** of more than 2 years **at the time of the commission of the crime.**” As thus amended, the bill clarifies that the misdemeanor must actually be punishable by an “incarceration” for more than 2 years and that such punishment must be judged by reference **to the time the crime was committed**, rather than by when the person was actually convicted, perhaps years later. The “more than 2 years” specification is left unchanged by the bill.

First, this amendment clarifies Section 5-101(g)(3) so that it mirrors the disqualification found in federal law. See 18 U.S.C. §922(g), and 18 U.S.C. § 921(a)(20)(B). Section 922(g)(1) of Title 18 of the United States Code prohibits firearm possession by persons convicted of “a crime punishable by **imprisonment** for a term exceeding one year.” 18 U.S.C. § 922(g)(1). Section 921(a)(20)(B), however, exempts “any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.” By making clear that the disqualification under Section 5-101(g)(3) is imposed only for a violation of a misdemeanor punishable by “incarceration” of more than 2 years, the amendment made by this bill echoes

the federal requirement that the misdemeanor must be punishable by “imprisonment” of more than 2 years, not simply some vague and undefined “penalty.”

Second, making the disqualification dependent on the date the misdemeanor crime was committed (rather than the date the conviction is entered) is consistent with the ban on *ex post facto* laws. Under our Constitution, that ban expressly applies both to Congress and the States. See Article 1, Section 9, Clause 3 (“No Bill of Attainder or *ex post facto* Law shall be passed”), and Article 1, Section 10, Clause 1 (“No **State** shall * * * pass any Bill of Attainder, *ex post facto* Law”). Maryland has an even a “broader protection” under Article 17 of the Maryland Declaration of Rights, banning both an “*ex post facto* Law” **and** “any retrospective oath or restriction.” *Doe v. Department of Public Safety and Correctional Services*, 430 Md. 535, 552, 62 A.3d 123, 133 (2013).

These constitutional prohibitions against *ex post facto* laws “bar[s] enactments which, by retroactive operation, increase the punishment for a crime **after its commission.**” *Garner v. Jones*, 529 U.S. 244, 249 (2000) (emphasis added). Under Maryland’s “broader protection” against on *ex post facto* “restrictions,” a defendant is protected “against laws that retroactively ‘disadvantage’ an offender” after such date. *Doe*, 430 Md. at 557. See also *Secretary v. Demby*, 390 Md. 580 (2006). Accordingly, a person may not be subjected to punitive sanctions under the Federal Constitution, or retroactive “restrictions” under the Maryland Constitution, greater than those that existed as of the time the offense was committed. Under *Doe*, a firearms disqualification is undeniably a “restriction” or “disadvantage” within the meaning of this provision of the Maryland Constitution. By defining the disqualification provision by reference to the date the crime was committed, the bill is faithful to these principles. We urge a favorable report so as to bring Section 5-101(g)(3) into compliance with the Maryland Constitution.

Sincerely,



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