President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

March 13, 2018

**WRITTEN TESTIMONY OF MARK W. PENNAK,
PRESIDENT, MARYLAND SHALL ISSUE
IN OPPOSITION TO HB 904**

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 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 and a certified instructor in rifle, pistol and personal protection in the home and outside the home. I appear today as President of MSI, as a citizen and as a parent of college-aged children, including a 19 year-old daughter currently attending an institution of higher learning in Maryland. For the reasons set forth below, House Bill 904 is ill-conceived and rife with unintended consequences. It should not become law.

HB 904 would amend Section 4-102 of the Criminal Article of the Maryland Code to extend the provisions of that section to the "property of a public institution of higher education." Specifically, the operative part of that amendment would provide that "a person may not carry or possess a firearm on the property of a public institution of higher education." This ban includes privately owned property if the "property is used for student housing." The term "property" is not defined. The penalty for possession is severe: "A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 3 years or a fine not exceeding $1,000 or both." The penalty for the possession of a handgun is even more severe, as such possession is punished under Section 4-203(c) of the Criminal Article, which provides, on the first offense, that such a person is subject to imprisonment "not less than 90 days" and up to "3 years or a fine of not less than $250 and not exceeding $2,500 or both." These are the punishments currently found in Section 4-102 for grades K-12 of public schools and thus this bill extends the scope of Section 4-102 from the property of K-12 public schools to any property owned by any public college anywhere in Maryland. The bill thus equates legal adults on college property to minor children on the property of K-12 public schools. The bill applies not only to students, but to any "person," including faculty, staff, and visitors, who possesses any firearm on any such "property," wherever found, regardless of whether the person does so knowingly or unintentionally.

The bill makes no exceptions for adults with Wear and Carry Permits issued by the State Police for "good and substantial reasons" under State law, MD Code, Public Safety, § 5-306. For example, an adult woman employee of a college with a carry permit issued because of active threats against her life by an estranged ex-boyfriend is left stripped of her defenses by this Bill. See *Caetano v. Massachusetts*, 136 S.Ct. 1027 (2016) (Alito, J., concurring) ("The Commonwealth of Massachusetts was either unable or unwilling to do what was necessary to protect Jaime Caetano, so she was forced to protect herself."). Thus, as in *Caetano*, passage of this Bill would mean that the State is "more concerned about disarming the people than about keeping them safe." (Id.).

Persons issued such permits are the most law-abiding individuals in the country, with a crime rate lower than that of sworn, active duty police officers. See http://crimeresearch.org/2014/07/new-report-from-crime-prevention-research-center-shows-11-1-million-americans-hold-concealed-carry-permits/ For example, researchers found that "concealed carry licensees [in Texas] had arrest rates far lower than the general population for every category of crime." H. Sterling Burnett, Nat'l Ctr. For Policy Analysis, Texas Concealed Handgun Carriers: Law-Abiding Public Benefactors 1 (2000). Similarly, Florida has issued nearly 3.5 million concealed carry licenses since 1987 and has revoked less than 0.5% of them for any reason, with the vast majority of those revocations having nothing to do with misuse of a firearm. See Florida Dep't Of Agric. & Consumer Servs., Div. Of Licensing, Concealed Weapon Or Firearm License Summary Report, Oct. 1, 1987 - January 31, 2017. That reality is, if anything, even more applicable to Maryland residents with wear and carry permits as Maryland subjects permit applicants to an extremely extensive background investigation, including personal interviews and vetting by the State Police. An applicant for a permit must not only demonstrate a "good and substantial reason" to have a permit, he or she must undergo16 hours of very intensive training, including instruction in the law, and pass a difficult live fire qualification requirement.

In excluding these otherwise lawfully armed persons, the Bill effectively creates giant, ill-defined gun free zones (all college "property"). Indeed, the Bill actually **requires** that the college announce to the world its status as a gun free zone, as the Bill amends Section 15-123 of the Education article require that signs to that effect be posted at entrances and exits of college property. The gun free zones thus created are immense in size. The main campus alone of the University of Maryland in College Park is 1,335 acres and that does not include all the farms and other real estate owned by the University. Such other properties include the Graduate Gardens and Graduate Hills apartments communities used by graduate students attending the University, which are owned by the University of Maryland, http://reslife.umd.edu/housing/graduate/, as well as farms all over Maryland, including rural areas, such as the Clarksville Facility, https://agresearch.umd.edu/cmrec/clarksville-facility, and the "Terp Farm" located 15 miles from the College Park campus in Upper Marlboro, http://terpfarm.umd.edu/ and the extensive acreage in agricultural extension facilities located all over the State, https://extension.umd.edu/.

Excluding lawfully owned persons from college property is nonsensical. Lawfully armed individuals have actually stopped such mayhem on a college campus, such as at the 2002 shooting at the Appalachian Law School in Virginia. See https://en.wikipedia.org/wiki/Appalachian_School_of_Law_shooting. Studies confirm that "[c]oncealed carry permit holders have stopped attacks at schools and other places before police arrived" including shootings in Pearl, Miss., and Edinboro, Pa.," and "in busy downtowns such as Memphis; in churches such as the New Life Church in Colorado Springs; in malls in Portland, Ore., and Salt Lake City; and outside an apartment building in Oklahoma." http://crimeresearch.org/2014/07/new-report-from-crime-prevention-research-center-shows-11-1-million-americans-hold-concealed-carry-permits/ See also Auditing Shooting Rampage Statistics, Davi Barker, July 2012 (finding that armed citizens responding to rampage killers result in 1/8th the number of casualties on average as opposed to situations where the shooter was stopped only by police intervention) (available at http://dailyanarchist.com/2012/07/31/auditing-shooting-rampage-statistics/.

In essence, by banning all otherwise lawful possession of firearms, this Bill would actually make the property of these institutions more likely to be attacked by a mass shooter, a criminal or deranged individual, rather than less likely. Everyone on college properties is less safe. A potential shooter, willing to commit murder, will simply not care that this Bill would make his possession of a firearm illegal. The numbers are chilling: between 1950 and 2016, 98.4% of all mass shootings (as properly defined by the FBI) have taken place in gun free zones. https://crimeresearch.org/2014/09/more-misleading-information-from-bloombergs-everytown-for-gun-safety-on-guns-analysis-of-recent-mass-shootings/ Between 1998 and December 2015, the percentage is 96.2%. https://www.nationalreview.com/2014/01/cruelty-gun-free-zones-john-r-lott-jr/. Mass shooters are drawn to gun free zones as they know that they will be unopposed to extended periods while they commit their horrific rampages. The Report from the Crime Prevention Research Center (Oct. 2014) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629704),indicates that "mass public shooters pay attention to whether people with guns will be present to defend themselves." (Id. at 10). No sane person would post a gun free sign outside their own home. If such signs are not suitable outside the home, they not suitable for college campuses.

Fundamentally, if the State is going to create a gun free zone, it has the concomitant obligation to secure fully such a zone so as to prevent attacks by criminals, deranged persons or terrorists. The Bill makes no provision for such security. Such disarmament might be defensible where effective protection measures, such as controlled access, are in use. But it is quite impossible to control access to thousands of acres encompassed by all the "property" of public institutes of higher learning.

This Bill not only fosters these new dangers, it creates and severely punishes a whole new class of newly-created criminals without any showing of need. For example, the University of Maryland Code of Student Conduct §10(b) already makes subject to disciplinary action any "[u]nauthorized on campus or illegal off campus use, possession, or storage of any weapon." The Frostburg State University

Police Statement takes a slightly different approach. Instead of a flat ban, the Statement provides that "[p]ossession of firearms or potentially dangerous weapons or explosives is not permitted on university property unless they have been properly registered and secured with University Police." (§11). We are aware of no evidence suggesting that these sorts of regulations have not been effective. By severely criminalizing the mere innocent possession of a firearm on any college-owned property, the Bill eliminates the ability of college administrators to create and apply their own rules in light of the particular circumstances presented in each case. Every arguably unauthorized but otherwise innocent firearm possession will escalate from a possible disciplinary issue into a criminal case with the obvious potential to devastate the future of the persons involved.

Because of the severity of the consequences inflicted by this Bill, this new ban is an open invitation to arbitrary and discriminatory enforcement. Leaving the term "property" undefined, in particular, creates an enormous vagueness problem, as no reasonable person would know that stepping anywhere on the rural acreage of a college farm would be a violation. A hunter tracking a wounded animal on to such "property" could be arrested without ever knowing he had inadvertently stepped on college "property." That is inherently a violation of the Due Process Clause. As the Supreme Court recently stated in *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015), "[o]ur cases establish that the Government violates [the due process] guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."

And a conviction under this Bill has additional real consequences beyond the sentence. For example, because this crime is "punishable" by imprisonment by more than two years, any conviction (regardless of actual sentence) would attach a permanent, lifelong ban on possession of modern firearms and ammunition under federal law under 18 U.S.C. § 921(a)(20) and 18 U.S.C. § 922(g). The mere arrest for an innocent possession could ruin the lives and futures of students, faculty and employees, as it would compromise their educational prospects and future job opportunities, including precluding military service or government employment. Whatever the merits of this sort of ban in grades K-12, it is senseless to treat law-abiding adults, including students, faculty and employees of colleges, to these sorts of draconian punishments for the otherwise perfectly lawful possession of a firearm anywhere on the vast properties of all the public colleges in this State.

Indeed, by its terms, this bill would impose strict criminal liability on the defendant regardless of whether the defendant even knew he was on the "property" of a public college and without regard to the *mens rea* of the defendant. Such strict liability statutes are heavily disfavored in the law. See *Staples v. United States*, 511 U.S. 600, 605 (1994) (noting that "the requirement of some *mens rea* for a crime is firmly embedded" in common law). As noted above, college "properties" occupy vast tracts of land that may well be undefined by any apparent boundaries or identifying markers. Inflicting strict liability criminal punishment on someone who inadvertently steps on or drives through college "property" with a firearm in the trunk on the way to hunt or shoot at a range would be egregiously unjust. Yet, that is precisely the result allowed by this Bill. See, e.g., *Garnett v. State*, 332 Md. 571,

577-78, 632 A.2d 797, 800 (1993) ("The requirement that an accused have acted with a culpable mental state is an axiom of criminal jurisprudence."); *Lowery v. Sta*te, 430 Md. 477, 498, 61 A.3d 794, 807 (2013) (same). Thus, at a minimum, the Bill must be amended so that it includes a "specific intent" element, *viz.*, that a person "knowingly" carried or possessed a firearm on college property with the knowledge that he or she was on college property and with the knowledge that such possession or carriage was illegal under Section 4-102. See *Chow v. State*, 393 Md. 431, 471, 903 A.2d 388, 412 (2006) (holding that the "knowingly" element as used in MD Code, Public Safety, § 5-144, "requires that a defendant 'knows' that the sale, rental, transfer, purchase, possession, or receipt of a regulated firearm of which they are a participant in is in a manner that is illegal and not a legal sale").

The bill is also facially unconstitutional in imposing categorical bans without any attempt to tailor the ban to the governmental interest. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the people have a right to possess handguns and other types of operative firearms in the home. This right is so fundamental that it has been incorporated into the Due Process Clause of the 14th Amendment and thus made applicable to the States. See *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010) ("citizens must be permitted to use handguns for the core lawful purpose of self-defense"). This Bill flouts these principles as it would ban any possession of "arms" in any home located anywhere on any college "property," including (presumably) the home of the college President as well as off-campus apartments owned by private entities but leased by the college for use as adult student housing.

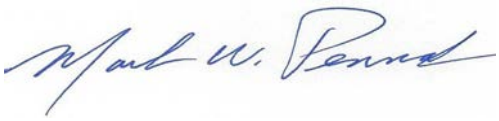
Whatever its application to dormitories, that constitutional right does not cease to exist for otherwise law-abiding adults in off-campus housing simply because the college is the entity subletting an apartment to the lessee. Criminalizing possession of a firearm by a legal adult in off-campus housing is especially egregious. See *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654 (Del. 2014) (holding that under the Delaware counterpart to the Second Amendment, the state could not ban the possession of firearms in common areas of public housing units owned by the state), followed in *Doe v. Wilmington Housing Authority*, 568 Fed.Appx. 128, 129 (3rd Cir. 2014). The Second Amendment applies to all law-abiding adults, including adult students. *DiGiacinto v. Rector and Visitors of George Mason University*, 281 Va. 127, 704 S.E.2d 365 (2011) (sustaining a narrowly tailored regulation of firearms on college campuses that was not a complete ban). Categorical bans applicable to K-12 schools, where small children and minors are present, cannot be applied wholesale to college campuses, where children are not typically found. See, e.g., *Regents of University of Colorado v. Students of Concealed Carry on Campus*, LLC, 271 P.3d 496 (Colo., 2012) (applying legislation that distinguished between schools K-12 and colleges with respect to a ban on firearms).

The Maryland Court of Appeals has recognized these principles. Recently, the Connecticut Supreme Court reversed, on Second Amendment grounds, the conviction of person who was carrying a "dirk knife" and police baton in his car while moving between his residences. *State v. DeCiccio*, 315 Conn. 79, 105 A.3d 165 (2014). In so holding, the court not only held that a "dirk" knife was entitled to Second Amendment protection, but it also affirmed the right of persons to be armed

in their homes and to transport between their residences. The court found support for its holding in *Williams v. State*, 417 Md. 479, 10 A.3d 1167 (2011), where the Maryland Court of Appeals held "that state statute prohibiting carrying or transporting of handgun without permit did not violate the Second Amendment when statute also provided exceptions for, *inter alia*, home possession, moving, repair, and travel to and from place of purchase and sale...." *DeCiccio*, 105 A.3d at 208 n.47. This bill would criminalize precisely the sorts of possession and carriage that *Williams* and *DeCiccio* recognized as protected by the Second Amendment.

We urge an unfavorable report.

Sincerely,



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