President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

February 13, 2018

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MARYLAND SHALL ISSUE, AS INFORMATION WITH RESPECT SB 602

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 outside the home. I appear today as President of MSI to provide information with respect to SB 602.

SB 602 simply provides that "a person may not be denied the right to purchase, possess, or carry a firearm under this title solely on the basis that the person is authorized to use medical cannabis under title 13, subtitle 33 of the health – general article." MSI takes no position with respect to the merits of this bill. However, we do wish to point out some legal realities for purposes of informing the debate.

With the recent changes in Maryland law concerning medical marijuana, see MD Code, Health - General, § 13-3304 et seq., and the push to legalize the use of marijuana in Maryland, a recurring issue is how such marijuana use would affect Second Amendment rights. The short answer is that it may well act to abrogate those rights by (1) barring a FFL from selling a firearm to such a user and (2), by making such a user a prohibited person under federal law.

1. As to FFLs, the pertinent statutory provision under federal law is 18 U.S.C. 922(d)(3), which provides:

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person--

* * *

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

The AFT has issued a bulletin to all Federal Firearms Licensees that advises FFLs that "if you are aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then you have 'reasonable cause to believe' that the person is an unlawful user of a controlled substance." See Open Letter to All Federal Firearms Licensees, Sept. 21, 2011, available at www.atf.gov/file/60211/download. That means that the FFL (or any other person with such knowledge) is prohibited from selling a firearm to such a person with a medical marijuana card. This AFT prohibition has been sustained in federal court. *Wilson v. Lynch*, 835 F.3d 1083, 1093 (9th Cir. 2016).

Moreover, Federal Form 4473 (attached hereto in relevant part) expressly asks if the purchaser is "an unlawful user of . . . any controlled substance" and states in bold type: **"Warning: The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside."** A false statement or answer on Form 4473 is federal felony under 18 U.S.C. 922(a)(6) (barring material misrepresentations "in connection with the acquisition" of a firearm). See *Abramski v. United States*, 134 S.Ct. 2259 (2014). A violation of Section 922(a)(6) is punishable by up to 10 years in prison. See 18 U.S.C. 922(a)(2).

2. As to becoming a disqualified person, a user of marijuana may well be a disqualified person under 18 U.S.C. 922(g)(3) which states:

(g) It shall be unlawful for any person--

* * *

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)); to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

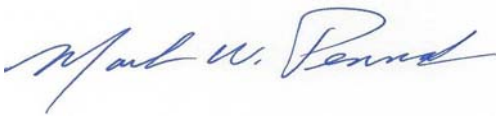
A violation of Section 922(d)(3) or Section 922(g)(3) is a felony, punishable with up to 10 years in prison. See 18 U.S.C. 924(a)(2). Both of these provisions define the term "unlawful user" by reference to the Controlled Substances Act, a federal law. A "controlled substance" under federal law specifically includes marijuana as marijuana is expressly classified as a Schedule I controlled substance under the Controlled Substances Act, 21 U.S.C. § 812(c). See also ATF regulations 27 C.F.R. § 478.11. A user of marijuana is an unlawful user under that federal law. Period. Indeed, while the medical marijuana law of Maryland permits the use of marijuana under the tightly controlled circumstances specified in that law, the mere possession of marijuana in Maryland remains otherwise illegal in any other circumstance. See *Robinson v. State*, 451 Md. 94 (2017). That is so even though possession of small amounts of marijuana has also been decriminalized in Maryland. See *Robinson*, 451 Md. at 98 ("Simply put, decriminalization is not

synonymous with legalization, and possession of marijuana remains unlawful."). Under the Supremacy Clause of the Constitution, Article VI, Clause 2, these federal law provisions cannot be abrogated by State law. And they cannot be simply ignored, if only because every purchaser of a firearm from a FFL must fill out ATF Form 4473. As noted above, a false statement in filling out that form is a felony.

It is important to note that, for several years now, Congress has adopted an appropriations rider that prohibits the Department of Justice from spending funds to "prevent" the "implementation" of State medical marijuana laws. See, e.g., Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015) (also known as the Rohrabacher–Blumenauer amendment). See *McIntosh v. United States*, 833 F.3d 1163 (9th Cir. 2016). However, the bar imposed by this rider only extends to the expenditure of funds for prosecutions that "prevent" the "implementation" of medical marijuana laws. It does not address enforcement of federal **gun** laws, such as 18 U.S.C 922, or ATF regulation of FFLs. Enforcement of such gun laws arguably does not "prevent" the "implementation" of medical marijuana laws; it simply means that medical marijuana users could not possess or purchase firearms. See *McIntosh*, 833 F.3d at 1178 (the rider "prohibits the federal government only from preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana"). And, of course, an appropriations rider does not change the underlying law – it merely prevents the expenditure of funds to enforce it. Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding. See *McIntosh*, 833 F.3d at 1179 n.5. The federal government can prosecute such offenses for up to five years after they occur. See 18 U.S.C. § 3282.

The question the Committee should ask itself is whether passage of this bill might mislead medical marijuana users into thinking that they may use and possess medical marijuana without any fear of losing their gun rights. Under federal law, that is not an assurance that the State is in a position to accord.

Sincerely,



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