President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

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WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 1302

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, federal 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 as well as a range safety officer. I appear today in adamant OPPOSITION to HB 1302.

HB 1302 would amend MD Code, Public Safety to create a new subtitle 6. It would create a new system that would allow "any interested person" to petition a judge for what the bill calls an "extreme risk protection order" by alleging that a person ("the respondent") poses and "immediate and present danger of causing personal injury" to another person "by possessing a firearm." While it requires the petitioner to execute the petition under oath, it then grants complete legal immunity to that person from both civil and criminal liability if the petition acts in subjective "good faith." After a hearing, which may be "ex parte or otherwise," a judge may enter a "temporary extreme risk prevention order" if the judge finds "by preponderance of the evidence" that there are "reasonable grounds to believe" that the respondent poses such a risk. That order is good for 7 days but may be extended for 6 months by the judge for any undefined "good cause." After service of the temporary order, the judge may then enter "final" order if the judge finds by "clear and convincing evidence" that here are "reasonable grounds to believe" that the respondent poses such a risk. Upon the issuance of such orders, the respondent is required to surrender his firearms to law enforcement and can be fined and imprisoned for any failure to do so. A final order is effective for 1 year, but it may be extended for up to six additional months by a judge. The bill does not require or even purport to authorize the judge to order an emergency mental health evaluation under title 10, subtitle 6 of the Health - General article. The orders maybe entered and the respondent's firearms may be seized under the orders without any showing whatsoever that the respondent has committed a crime.

This bill is unconstitutional under the Fourth Amendment to the Constitution of the United States. The Fourth Amendment provides in pertinent part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." Yet, the bill authorizes the seizure of property without any showing that the respondent has committed a crime or is about to commit a crime. In the absence of such a showing, there is no constitutional basis for a seizure of **any** property under the 4th Amendment, **much less** property (firearms) that is protected by the Second Amendment, as the Supreme Court made clear in *Dist. Of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

Specifically, under the Fourth Amendment, property cannot be seized until there is "probable cause" that the property was used in a crime or is the fruit of an actual crime or is contraband. See e.g., *Soldal v. Cook County*, 506 U.S. 56, 68 (1992) ("our cases ... hold that seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place."). Thus, "an officer who happens to come across an individual's property in a public area could seize it only if Fourth Amendment standards are satisfied-for example, if the items *are evidence of a crime or contraband*." (Id.). In this respect, it simply does not matter that the seizures are through a civil proceeding, rather than in a criminal proceeding. As the Court stated in *Soldal*, the Court's precedents make clear that "the Amendment's protection applies in the civil context as well." (506 U.S. at 67). See also *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993) ("The Fourth Amendment does place restrictions on seizures conducted for purposes of civil forfeiture"); *One 1995 Corvette*, 353 Md. 114 (1999) (holding that evidence seized in violation of the Fourth Amendment may not be relied upon by the government to sustain a forfeiture).

Indeed, even in civil "*in rem"* forfeiture cases (cases brought to seize only property), the government must show that property is substantially connected to criminal activity. See, e.g, *Austin v. United States*, 509 U.S. 602, 616 (1993) (noting that civil forfeiture is premised on the notion that "the owner who allows his property to become involved in an offense has been negligent"). The Court in *Austin* thus had little difficulty in concluding that "that forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment." Id. at 618. Thus, the federal forfeiture statute, 18 U.S.C. § 881, uniformly addresses circumstances in which the property has been associated with a crime. The same is true under the Maryland forfeiture statute, MD Code, Criminal Procedure, § 12-102. Nor does it matter that the seizure is arguably temporary (up to 1.5 years for a final order under this bill). Under Supreme Court precedent, a "seizure" of property under the Fourth Amendment occurs when "there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Deprivation of constitutionally protected property for up to 1.5 years easily constitutes "meaningful interference" in a person's "possessory interests."

HB 1302 allows the seizure of property (guns) that have NOT been used in a crime. There is no requirement in the bill that the property has been associated with any crime. Moreover, the bill does not require a mental health evaluation or any

determination by a mental health professional that the "respondent" is mentally ill or otherwise mentally incompetent. Guns are not contraband and they are not evidence of any actual crime. In essence, the property is being seized on grounds that the defendant might use firearms to commit a crime *in the future*. This is akin to punishing someone for a crime that may never happen, as in the 2002 film "Minority Report" in which the police were allowed to arrest people on the basis of "precrimes." What's next? Will the State seek to take away firearms from gun owners who have the temerity to "disparage" a person? Some "interested person" might well feel threated by such speech, yet that speech is fully protected by the First Amendment, just as firearms are protected by the Second Amendment. See *Matal v. Tam*, 137 S.Ct. 1744, 1763 (2017) (reaffirming that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.") (citations omitted). Once the State abandons the need to show an **actual** crime, there is no logical or principled stopping place for punishment by forfeiture. George Orwell (*1984*) and Franz Kafka (*The Trial*) would easily understand this bill. It is, however, alien to civil liberties under the United States Constitution.

Second, even assuming away the non-existence of an actual crime, the standard of proof used in HB 1302 is independently unconstitutional under the Fourth Amendment. The bill states that firearms may be seized if the judge finds by a "preponderance of evidence" (temporary order), or by "clear and convincing evidence" (final order) that there are "reasonable grounds to believe" that the person is a danger. But, such "**evidence"** of "reasonable grounds" is simply not the same as an **actual finding** that there are, **in fact**, reasonable grounds for the seizure. At a minimum, an actual, fully supported finding of "probable cause" is required to obtain a Fourth Amendment warrant to seize property. Probable cause is defined as a "reasonable ground for a belief of guilt," *Collins v. State*, 322 Md. 675, 680, 589 A.2d 479 (1991), or as "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

As the Maryland Court of Appeals has explained, "[a] finding of probable cause requires less evidence than is necessary to sustain a conviction, but more evidence than would merely arouse suspicion." (Id.). No one is convicted and deprived of liberty or property on the basis of probable cause alone, for conviction of a crime requires proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970) ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation."). Yet, this bill requires only that there be clear and convincing evidence of reasonable grounds for a final order that deprives the respondent of his constitutionally protected interest in his firearms. That standard is not even an **actual** finding of reasonable grounds necessary for a probable cause warrant, much less a basis for a criminal conviction. Similarly, and *a fortiori,* the bill's reliance on the "preponderance of the evidence" of reasonable grounds (the standard for a temporary order) is even further afield from meeting the required standard of probable cause. That "preponderance of the evidence" standard simply means that it is more likely than not there are "reasonable grounds" – not that reasonable grounds even actually exist. That is not "probable cause" of anything. In short, the standards of proof set out in this bill are a nightmarish mishmash unknown to the law.

There are a host of other problems with the bill which are chilling in their implications. First, in allowing "any interested person" to file a petition, the bill empowers the world, including persons possessing animus against the respondent, to inflict a legal nightmare upon the respondent. The bill, egregiously, then gives such a petitioner effectively complete legal immunity from both civil and criminal liability from any claim associated with bringing the petition as long as the petitioner asserts that the petition was filed in subjective "good faith." Gun owners will thus become targets under this bill based on nothing more than the petitioner's aversion to guns as the petitioner need only allege, in good faith, that they are afraid of guns and gun owners. That has already happened. See, e.g., https://www.thenewamerican.com/usnews/constitution/item/28472-red-flag-warning-states-confiscating-guns-by-ignoring-4th-amendment. A person wrongly subjected to this process and who is guilty of no wrongdoing whatsoever has no remedy, but will face public humiliation and scorn simply by having the process forced upon them. Such persons become the new Hester Prynne in a modern day version of the 17th-century Puritan Massachusetts Bay Colony. Gun owners become the new pariahs under this bill.

Gun owners are also hamstrung in defending themselves. The bill requires only "notice" to the respondent, yet nothing in the "notice" requirement mandates that the respondent receive an actual copy of the petition and any and all supporting documentation. Nothing in this bill ensures that the respondents have the right to cross-examine the petitioner or enjoy compulsory process. That is a basic violation of Due Process. There is also no standard by which a lay judge must assess the issue of whether the respondent poses an immediate danger. Judges are not mental health professionals. Such judges are competent at assessing "probable cause" for crimes, but they have no expertise in the field of mental health or at predicting *future crimes*. The bill does not require the lay judge to refer the respondent to a mental health professional for an evaluation before stripping a person of his or her constitutional right to own and possess firearms. The risk of wrongful deprivation is apparent.

And all of this is wholly unnecessary. Maryland already has, under Section 10 of the Health General Article, MD Code, Health - General, § 10-622, et seq., an established procedure for an emergency mental health evaluation of an individual who presents a danger to the life or safety of any individual. Any person may petition for such an emergency evaluation. Petitions filed by lay persons must first be evaluated for **actual** "probable cause" by a judge (not the preponderance of the evidence of reasonable grounds for belief). (Section 10-623). If the judge finds probable cause, **or** if the petition is filed by an enumerated mental health professional, the person is taken to an emergency facility for evaluation where the person can request a voluntary admission or a determination can be made as to whether that person meets the requirements for involuntary admission. (Section 10-624). If the person is involuntarily admitted, the person is entitled to a hearing within 10 days of initial confinement, at which time the evidence must show, by clear and convincing evidence that person has a mental disorder, needs in-patient care and presents a danger to himself or others. (Section 10-632). At that hearing, if the person is involuntarily committed the hearing officer may also determine

whether the person "cannot safely possess a firearm based on credible evidence of dangerousness to others" and, if so, may order the person to surrender to law enforcement authorities any firearms in the individual's possession and refrain from possessing a firearm "unless the individual is granted relief from firearms disqualification in accordance with § 5-133.3 of the Public Safety Article." Nothing less than these sorts of procedures is constitutional. See *Zinermon v. Burch*, 494 U.S. 113 (1990); *Kansas v. Hendricks*, 521 U.S. 346 (1997).

The foregoing mental health procedures focus on the individual, and seek to treat the individual while at the same time depriving that individual of ready access to firearms. By contrast, the procedures set forth in HB 1302 do not even attempt to treat the individual, but simply deprive that person of firearms without any treatment for what might be a seriously mental illness. The approach followed by this bill thus could simply enrage further a possibly already mentally unstable person. Taking firearms from such an individual will do nothing to prevent such an individual from causing harm by other means. As Nice and Boston have instructed, mass mayhem does not depend on the use of or access to firearms. In short, the bill is **both** unconstitutional **and** poor public policy. We urge an unfavorable report.

Sincerely,

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