

BRIAN E. FROSH
ATTORNEY GENERAL

ELIZABETH F. HARRIS
CHIEF DEPUTY ATTORNEY GENERAL

THIRUVENDRAN VIGNARAJAH
DEPUTY ATTORNEY GENERAL



SANDRA BENSON BRANTLEY
COUNSEL TO THE GENERAL ASSEMBLY

KATHRYN M. ROWE
DEPUTY COUNSEL

JEREMY M. MCCOY
ASSISTANT ATTORNEY GENERAL

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 10, 2016

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

RE: House Bill 410 and Senate Bill 266, "Natural Resources – Poaching Restitution Act of 2016"

Dear Governor Hogan:

We have reviewed House Bill 410 and Senate Bill 266, identical bills entitled "Natural Resources – Poaching Restitution Act of 2016," for constitutionality and legal sufficiency. While the bills are not clearly unconstitutional, the bills raise serious due process concerns regarding their application and enforcement due to uncertainty as to the conduct prohibited and the potential penalties that may be imposed under the bills.¹ Although the bills may be signed, we recommend that the General Assembly clarify its intent regarding the specific prohibited acts and application of the penalties under the bills. If the bills are signed, we also recommend that the Department of Natural Resources adopt regulations identifying the specific criminal violations that are subject to the mandatory restitution and community service penalties under the bills.

The bills provide that if a person is "convicted of poaching deer," the court is required to order the person to "pay the State restitution" between a listed minimum mandatory and maximum amount, as well as mandatory hours of community service, both based on the size and presence of antlers on the deer involved. "Poaching" is defined in the legislation as "the illegal hunting, killing, or taking of game." The penalties under the bills are mandatory

¹ This Office applies a 'not clearly unconstitutional' standard in reviewing bills passed by the General Assembly prior to their approval or veto by the Governor. 71 *Opinions of the Attorney General* 266, 272 n.12 (1986). This standard of review reflects the presumption of constitutionality to which statutes are entitled and the Attorney General's constitutional responsibility to defend enactments of the Legislature, while also satisfying the duty to provide the Governor with our best legal advice.

“[n]otwithstanding” the existing, title-wide penalty provision in § 10-1101 of the Natural Resources Article (“NR”) for violations of wildlife and hunting provisions under NR Title 10.

Under basic principles of due process, a law is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A law fails to meet the requirements of the Due Process Clause of the Fifth Amendment if it is so vague and standardless that it leaves the public uncertain as to the prohibited conduct. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). *See also Ashton v. Brown*, 339 Md. 70, 88 (1995) (a statute that forbids the doing of an act in terms so vague that persons “of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law”). A statute may also be found to be unconstitutionally vague if it fails to establish standards for the police that are sufficient to guard against the arbitrary deprivation of liberty interests. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). These principles “apply not only to statutes defining elements of crimes, but also to statutes fixing sentences.” *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). *See also Bowers v. State*, 283 Md. 115, 121 (1978) (a penal statute offends due process “if it fails to provide legally fixed standards and adequate guidelines for police, judicial officers, triers of fact and others whose obligation it is to enforce, apply and administer the penal laws”).

The bills at issue provide mandatory penalties for a person “convicted of poaching deer.” Neither current State law nor the legislation provide for a specific crime of “poaching.” “Poaching” is defined in the legislation as “the illegal hunting, killing, or taking of game.” (SB 266 at page 3; HB 410 at page 2.) “Hunt” is defined in NR § 10-101(k)(1) as “to pursue, capture, catch, kill, gig, trap, shoot, or attempt to pursue, capture, catch, kill, gig, trap, or shoot, or in any manner reduce any bird or mammal to personal possession.” Title 10 of the Natural Resources Article contains a number of specific criminal acts that are related to hunting activities. *See, e.g.*, NR § 10-304 (duty to possess and show license while hunting); NR § 10-404(c) (hunting or possessing a game bird or mammal outside of season); NR § 10-410(b) (prohibition on hunting any game bird or mammal at nighttime); NR § 10-418 (clothing requirements for hunting wildlife). *See also* COMAR 08.03.03.01 (possession and bag limits on mammals; COMAR 08.03.03.07 (white-tailed deer bag limits). Although any of these offenses may constitute an act of “illegal hunting,” is it unclear which specific violations of a provision in Title 10 or a regulation authorized under NR Title 10 constitute “poaching” for purposes of the legislation.

The mandatory restitution to the State under the bills based on the type and size of deer suggests that the deer would need to be killed or taken to trigger the provisions of the legislation, as opposed to an act of illegal hunting in which no target game was taken. Without specific required elements to the offense or tying the offense of “poaching” to specific prohibited acts, however, it is unclear whether “illegal hunting” of deer that does not involve

killing or taking a deer would be subject to the penalties under the bills.² The bills are also unclear whether “illegal hunting” is exclusively limited to hunting violations under NR Title 10, or may include other criminal conduct that may involve the hunting of deer such as trespassing, the illegal possession of a firearm, or reckless endangerment.

The meaning of the new NR § 10-1101.1(a)(2) is also unclear. It states: “For an act of poaching that involves trespassing on another’s property, this section applies with respect to the trespass violation only if the person trespasses in a knowing or willful manner.” No other provision in the new section, however, applies a restitution penalty to an act of trespassing. In fact, trespass is not mentioned anywhere else in the section, or in the bills. Thus, this provision attempting to narrow the applicability of the restitution penalty has unknown significance.

The Supreme Court reiterated last year that “the Government violates this guarantee [of due process] 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.” *Johnson*, 135 S. Ct. at 2556. In that case, the question involved what previous convictions qualified for the imposition of an enhanced sentence under the Armed Career Criminal Act. The language at issue defined violent felony to include a crime that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” The Court concluded that the language left “uncertainty about how much risk it takes for a crime to qualify as a violent felony.” *Id.* at 2558. The Court also rejected the notion that a statute “is constitutional merely because there is some conduct that clearly falls within the provision’s grasp.” *Id.* at 2560-61. Applying the reasoning used in the *Johnson* case, the lack of clarity about the full range of conduct that would trigger the new poaching restitution penalty under the bills poses a significant risk that a court would find the legislation unconstitutionally vague even if it clearly applies to the taking of deer illegally.

Similarly, the application of the penalties under the bills are not clear. The bills do not clearly address whether the mandatory restitution and community service penalties under the bills are intended as substitute penalties or to enhance existing penalties for the underlying illegal hunting offenses that may constitute “poaching.” For example, the various prohibited hunting acts under NR Title 10 are subject to the general penalty provision contained in NR § 10-1101. That section provides that, “[u]nless another penalty is specifically provided elsewhere in this title,” a violation of a provision of NR Title 10 or a

² The Merriam-Webster online dictionary defines a poacher as “one that trespasses or steals” or alternatively as “one who kills or takes wild animals (as game or fish) illegally.” Black’s Law Dictionary defines “poaching” as “[t]he unlawful entry upon land for the purpose of taking or destroying game; the taking or destruction of game upon another’s land, usually committed at night.”

violation of a regulation adopted under the title is a misdemeanor subject to a fine not exceeding \$1,500 plus court costs. A subsequent offense is subject to a fine not exceeding \$4,000 or imprisonment not exceeding one year, or both. NR § 10-1101. The bills provide, in new NR § 10-1101.1, that “[n]otwithstanding” NR § 10-1101, “if a person is convicted of poaching deer on any land in the State, the court shall order the person to pay the State restitution[.]” Mandatory restitution imposed under the bills is not less than \$2,000 but not more than \$5,000, plus 80 hours of community service, for each sika deer or antlered white-tailed deer under a particular antler size. A violation involving an antlered white-tailed deer with antlers above a certain size requires restitution between \$5,000 and \$10,000 plus 80 hours of community service. A violation under the bills involving an antlerless deer requires restitution between \$300 and \$500 plus 40 hours of community service.

The language of the legislation suggests that the new provisions are to be more specific penalties that would serve as an exception to the general penalty provisions in NR § 10-1101. The legislative history, however, suggests that the penalties were intended to enhance existing criminal penalties. The Senate Education, Health, and Environmental Affairs Committee Floor Report for HB 410 provides that the bill “requires that if a person is convicted of poaching deer in the State, the court must order the person, *in addition to any criminal penalties*, to pay restitution and perform community service as determined by the court.” (Emphasis added). This ambiguity in the application of the penalties under the bill may present a due process concern with respect to the notice to the public or to courts with respect to the penalties that may be imposed upon illegal hunting activities involving deer.

Regarding due process rights in the granting of restitution, the Court of Appeals has explained, restitution’s “predominant and traditional purpose is to reimburse the victim for certain kinds of expenses that he or she incurred as a direct result of the defendant’s criminal activity.” *Chaney v. State*, 397 Md. 460, 470 (2007). This purpose is consistent with the existing restitution provisions contained in NR § 10-1107, which provides that if a person violates NR Title 10 that results in the injury, death, or destruction of any wildlife, in addition to any other criminal penalty, the person is subject “to pay restitution to the State for the resource value of the wildlife,” in the amount determined by the court. The Department of Natural Resources has given a resource value for white tail and sika deer of \$300. COMAR 08.0310.11B(4)-(5).

In *Chaney*, the Court of Appeals explained that “[b]ecause restitution is part of a criminal sentence, as a matter of Constitutional due process and Maryland criminal procedure, such an order may not be entered unless[:]” (1) the defendant is given “reasonable notice that restitution is being sought and the amount that is being request[;]” (2) “the defendant is given a fair opportunity to defend” against the order and amount; and (3) “there is sufficient admissible evidence to support the request – evidence of the amount of a loss or expense incurred for which restitution is allowed and evidence that such loss or expense was a direct

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result of the defendant's criminal behavior." *Chaney*, 397 Md. at 470. Under House Bill 410 and Senate Bill 266, the General Assembly has determined a value range for an individual deer as a measure of loss to the State based on the presence and size of the deer's antlers. It's possible that a defendant ordered to pay restitution could challenge the statutory range as unreasonable. It is our view, however, that a reviewing court would give deference to the General Assembly's determination of value of the deer to the State. As a result, we do not believe the amount of restitution that may be granted facially violates due process.

In summary, while the provisions of House Bill 410 and Senate Bill 266 are not clearly unconstitutional, the bills present a number of significant due process concerns with respect to their application and enforcement. If these bills are signed, in order to avoid any possible constitutional challenges, we recommend that the General Assembly in a future session clarify its intent regarding the specific prohibited acts and application of the penalties under the bills. Moreover, in order to provide guidance for hunters and law enforcement officials, if the bills are signed, we also recommend that the Department of Natural Resources adopt regulations that identify the specific criminal violations involving illegal hunting that results in the killing and taking of deer that may constitute acts of poaching under the bills and for which the mandatory restitution penalties under the bills may be appropriate.

Sincerely,

A handwritten signature in cursive script, appearing to read "Brian E. Frosh".

Brian E. Frosh
Attorney General

BEF/JMM/kk

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Warren Deschenaux