

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



DAN FRIEDMAN
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

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

May 9, 2011

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

Re: Senate Bill 174 and House Bill 241

Dear Governor O'Malley:

We have reviewed Senate Bill 174 and House Bill 241, identical bills entitled "Criminal Law - Restrictions Against Use and Possession of Firearms," and have identified a significant problem with the legislative title. We have also identified an interpretative question that, while not posing a constitutional difficulty, will require further development in case law if it is not modified by the legislature.

Senate Bill 174 and House Bill 241 amend Public Safety Article, § 5-133(c)(2) and (3) as follows:

(2)(I) [A] SUBJECT TO PARAGRAPH (3) OF THIS SUBSECTION, A person who violates this subsection is guilty of a felony and on conviction is subject to imprisonment for not less than 5 years [, no part of which may be suspended.

(3) A person sentenced under paragraph (1) of this subsection may not be eligible for parole] AND NOT EXCEEDING 15 YEARS.

(II) THE COURT MAY NOT SUSPEND ANY PART OF THE MANDATORY MINIMUM SENTENCE OF 5 YEARS.

(III) EXCEPT AS OTHERWISE PROVIDED IN § 4-305 OF THE CORRECTIONAL SERVICES ARTICLE, THE PERSON IS NOT ELIGIBLE FOR PAROLE DURING THE MANDATORY MINIMUM SENTENCE.

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The Court of Special Appeals has described this provision as "requir[ing] that the sentence is mandatory and a minimum of five years, none of which may be suspended." *State v. Smoot*, Case No. 634, September Term 2009, slip op. at 9. This reflects the most natural reading of the existing language requiring a sentence of "not less than 5 years," which is that it required a mandatory minimum sentence of five years, but permitted a longer sentence of any amount so long as the sentence was not cruel and unusual in violation of the Eighth Amendment of the United States Constitution or the Maryland Declaration of Rights. As a result, the addition of the words "and not exceeding 15 years" would appear to newly limit the sentence that may be imposed under this provision. The title of the bill, however, reflects that the bill is "increasing the maximum term of imprisonment applicable to a violation of the prohibition against a person who was previously convicted of a certain crime of violence or drug-related crime possessing a certain regulated firearm." The Fiscal and Policy Note on House Bill 241 reflects that:

The two separate statutory sentencing provisions applicable to Title 5 of the Public Safety Article (as cited above) have been interpreted by the courts as mandating a five-year sentence, no more and no less, for illegal possession of a firearm by a person convicted of disqualifying crimes of violence or drug crimes.

If this is the case, then the provision in the title accurately reflects the change. We have not, however, been able to pin down the source of this information. No reported case reflects this interpretation. To the extent that the bill in fact places a limit on the available sentence rather than increasing it, the title would be both inaccurate and misleading, and the change could not be given effect until such time as the title is corrected by curative bill or otherwise.

We are also troubled by new Public Safety Article § 5-133(c)(3) which provides:

(3) At the time of the commission of the offense, if a period of more than 5 years has elapsed since the person completed serving the sentence for the most recent conviction under subsection (c)(1)(i) or (ii) of this section, including all imprisonment, mandatory supervision, probation, and parole:

(i) the imposition of the mandatory minimum sentence is within the discretion of the court; and

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(ii) the mandatory minimum sentence may not be imposed unless the State's Attorney notifies the person in writing at least 30 days before trial of the State's intention to seek the mandatory minimum sentence.

It is not completely clear what actions are open to the court if it is prevented from imposing the mandatory minimum sentence as a result of a failure of the State's Attorney to give the notice required under § 5-133(c)(3)(ii). Specifically, can the court impose a sentence of any amount under 5 years, including 4 years and 364 days? Would this lesser sentence be subject to the limitations on parole? Or is the court free to impose any sentence in the permitted range, but subject to suspension and parole? We cannot answer these questions, but will instead have to await case law development or correction by the legislature.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable Thomas V. Mike Miller, Jr.
The Honorable Curt Anderson
The Honorable John P. McDonough
Joseph Bryce
Karl Aro