



March 4, 2020

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 1104

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 Maryland and 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, personal protection in the home, personal protection outside the home and in muzzle loader. I appear today as President of MSI in OPPOSITION to HB 1104.

This Bill:

This bill would amend MD Code, Public Safety, § 5-124 to define a transfer of a regulated firearm covered by that Section to include A SALE, A RENTAL, A FURNISHING, A GIFT, A LOAN, OR ANY OTHER DELIVERY, WITH OR WITHOUT CONSIDERATION. However, the bill then defines “transfer” to **exclude** (I) A CHANGE IN POSSESSION THAT IS TEMPORARY AND OCCURS UNDER CIRCUMSTANCES IN WHICH THE TRANSFEROR HAS NO REASON TO BELIEVE THAT THE TRANSFEREE INTENDS TO USE THE REGULATED FIREARM IN THE COMMISSION OF A CRIME; OR (II) A CHANGE IN POSSESSION TO ALLOW ANOTHER PERSON TO USE THE REGULATED FIREARM EXCLUSIVELY AND IN THE ACTUAL PRESENCE OF THE TRANSFEROR. The bill then deletes all references in existing Section 5-124 to a “sale” or a “rental” by deleting those terms and inserting simply the word “transfer” in lieu thereof.

The Bill Does Not Do Anything (except to create confusion):

In *Chow v. State*, 393 Md. 431, 903 A.2d 388 (2006), the Court of Appeals held that “the word ‘transfer,’ as used in [MD Code Public Safety § 5-124], is used in an ownership context and does not apply to the situation extant in the case *sub judice* — that of a gratuitous temporary exchange or loan between two adults who are otherwise permitted to own and obtain regulated firearms.” While this bill would purport to change definition of “transfer” to include a loan, the bill then exempts from that definition the very type of temporary changes in possession that is embodied in the term “loan” permitted under *Chow’s* definition of “transfer,” *viz.*, A CHANGE IN POSSESSION THAT IS TEMPORARY AND OCCURS UNDER CIRCUMSTANCES IN WHICH THE TRANSFEROR HAS NO REASON TO BELIEVE THAT THE TRANSFEREE INTENDS TO USE THE REGULATED FIREARM


IN THE COMMISSION OF A CRIME. In short, the bill simply does not change the result in *Chow*.

However, the bill will potentially create massive confusion among the public and the courts. First, the bill does not purport to define “temporary.” The common dictionary definitions define “temporary” to mean “lasting for only a limited period of time; **not permanent.**” <https://www.google.com/search?client=firefox-b-1-d&q=temporary+defined>. But that definition is simply the mirror image of the word “transfer,” which the *Chow* court defined simply as “**a permanent** exchange of title or possession.” *Chow*, 393 Md. at 447. If the bill means something else in its use of “temporary,” then the bill is hopelessly vague and thus violative of the Due Process Clause. See *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (“Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people’s ability to oversee the creation of the laws they are expected to abide.”).

The bill’s reference to “circumstances” in which the transferor has no reason to believe that the transferee intends to use the regulated firearm in a crime is likewise little different in substance from the *Chow* court’s emphasis that the exchange involved in *Chow* was between two persons “who are otherwise permitted to own, obtain, possess, and use a regulated firearm.” (Id. at 462). Indeed, current Maryland law, amended just this last Session, provides that a person may not “loan” a regulated firearm to any person “who the dealer or other person knows or has reasonable cause to believe” is an otherwise prohibited person. See MD Code Public Safety § 5-134. There is not much difference between that prohibition and the prohibition in this bill against loaning a gun to a person whom the transferor knows will use the gun in a crime.

Finally, a person who temporarily transfers a firearm (any firearm) to a person who the transferor knows will use it to commit a crime is likely guilty of aiding and abetting that crime or being an accessory to the crime or being an accomplice to the crime. See MD Code, Criminal Procedure, § 4-204 (addressing accessory). “An accomplice is one who knowingly, voluntarily, and with common criminal intent with the principal offender, unites with him in the commission of the crime either as a principal or as an accessory before the fact.” *Burley v. State*, 5 Md. App. 469, 471-72 (1968). That knowledge element also is present in the crime of aiding and abetting. See *Williams v. State*, 101 Md.App. 408, 427-28 (1994), *cert. denied*, 337 Md. 90 (1995); *Thomas v. State*, 2 Md.App. 502 (1967), *cert. denied* 249 Md. 733 (1968). As the Maryland courts have explained, “[t]he activity of a principal in the second degree is generally referred to as aiding and abetting, and the aider or abettor is usually called an accomplice.” *Pope v. State*, 284 Md. 309, 326 (1979). Alternatively, such a transferor might well be deemed to be an actual co-conspirator to the crime. *Carroll v. State*, 428 Md. 679, 696-97 (2012). A person who provides a firearm to a person in such circumstances will not escape criminal liability, regardless of this bill.

Sincerely,



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