President
Mark W. Pennak

January 31, 2023

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 159

I am the President of Maryland Shall Issue ("MSI"). Maryland Shall Issue is a Section 501(c)(4), all-volunteer, non-partisan, non-profit 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 and the Bar of Maryland. 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 and a certified NRA instructor in rifle, pistol, personal protection in the home, personal protection outside the home, muzzle loading, as well as a range safety officer. I appear today in opposition to HB 159.

The Bill: This bill is very simple. It adds "KNOWINGLY BEING A PARTICIPANT IN A STRAW PURCHASE OF A REGULATED FIREARM UNDER § 5–141 OF THE PUBLIC SAFETY ARTICLE" to the existing list of offenses, found in MD Code, Criminal Procedure, § 2-203, for which a police officer may arrest a person without a warrant if the officer has probable cause to believe that a person is engaged in such conduct. The underlying conduct is already prohibited in MD Code, Public Safety, § 5-141. That section simply provides that "[a] dealer or other person may not be a knowing participant in a straw purchase of a regulated firearm for a minor or for a person prohibited by law from possessing a regulated firearm."

Existing Law: The undersigned and MSI yield to no one in their opposition to straw purchases. Existing law, Section 5-141, severely punishes a knowing participation in a straw purchase, providing that this offense is punishable with up to 10 years imprisonment and a $25,000 fine. Federal law likewise punishes straw purchases. Historically, straw purchases were punished as a federal felony under 18 U.S.C. § 922(a)(6), which makes it unlawful "for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter."

Section 922(a)(6) bans straw purchases as a lie on the federal form for a purchase (Form 4473). That form specifically asks if the purchase is "the actual transferee/buyer of the firearm" and expressly warns that "[y]ou are not the actual transferee/buyer if you are acquiring the firearm(s) on behalf of another person." The Supreme Court has held that this section is violated **regardless** of whether the "other person" is a prohibited person or not. *Abramski v. United States*, 573 U.S. 169 (2014). This last summer, with the enactment of the Bipartisan Safer Communities Act, PL 117-159 (June 25, 2022), Congress enacted a more express ban on straw purchases in 18 U.S.C. § 932. That section provides that "[i]t shall be unlawful for any person to knowingly purchase, or conspire to purchase, any firearm in or otherwise affecting interstate or foreign commerce for, on behalf of, or at the request or demand of any other person, knowing or having reasonable cause to believe that such other person" is a prohibited person as otherwise defined in federal law. So federal prosecutors may now proceed under either Section 922(a)(6) or Section 932, **or both**. Section 5-141 is quite similar to Section 932. That's all well and good.

The Problems With This Bill: The difficulty with this Bill lies not in its prohibitions, which it leaves unchanged. Rather, this Bill is directed solely at **enforcement** of these provisions by allowing a law enforcement officer to arrest for a violation of Section § 5-141 *without a warrant* under the provisions of MD Code, Criminal Procedure, 2-203. Section 2-203 allows a police officer to arrest without a warrant where the officer has "probable cause" to believe that any one of the listed crimes has been committed. The general rule in Maryland (and elsewhere) allows a misdemeanor arrest on probable cause *only* where the misdemeanor is committed **in the officer's presence** and such an arrest must be made with "reasonable promptness." See *Torres v. State,* 147 Md.App. 83, 807 A.2d 780 (2002). In *Torres*, the court recognized that misdemeanor arrests following under Section 2-203 is an exception to this general rule as are misdemeanor arrests for domestic abuse (Section 2-204), for a violation of a protective order (Section 2-204.1), for stalking (Section 2-205), and, of course, for felonies. *Torres*, 147 Md.App. at 87-88.

This Bill would allow warrantless arrests for violations of Section 5-141, in addition to these other crimes. Allowing an arrest without a warrant would likewise likely lead to a search of the immediate area, also without a warrant, as such a search is constitutional if it is incident to an otherwise lawful arrest. See *Riley v. California*, 573 U.S. 373, 384-85 (2014). Warrantless arrests and searches raise profound Fourth Amendment issues. "As the text makes clear, 'the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Riley*, 573 U.S. at 381-82, quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). But "subject only to a few specifically established and well-delineated exceptions, a warrantless search or seizure that infringes upon the protected interests of an individual is presumptively unreasonable." *Grant v. State*, 449 Md. 1, 16–17, 141 A.3d 138 (2016). The constitutionality of such warrantless arrests and searches under Section 2-203 (and under these other sections) is an open question.

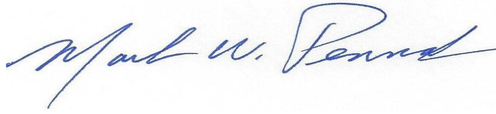
The Supreme Court of the United States and Maryland Court of Appeals (now the Maryland Supreme Court) have both recognized that the warrant requirement is an important protection for the innocent because a neutral **judicial officer** is charged

with assessing probable cause, rather than just the law enforcement officers on the beat. See *Torres*, 147 Md.App. at 97-98 (collecting cases). As the Supreme Court stated in *Birchfield v. North Dakota*, 579 U.S. 438 (2016), "warrants protect privacy in two main ways. First, they ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found." The same point was stressed by the Supreme Court noted in *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963), where the Court stated that "[t]he arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause." See also *Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984) ("Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are 'few in number and carefully delineated,'… and that the *police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests*.") (citation omitted) (emphasis added). Under these principles, the additional exception to the warrant requirement created by this Bill is of dubious constitutionality. See *Dunnuck v. State*, 367 Md. 198, 204, 786 A.2d 695 (2001) ("'no exigency is created simply because there is probable cause to believe that a serious crime has been committed'"), quoting *Welsh*, 466 U.S. at 753.

The policy reasons for Bill's addition to the Section 2-203 list are scant and insufficient. This Bill is no doubt motivated by the reality that it is rare for a straw purchase to take place in the presence of an officer. And there is no doubt as well that illegally obtained firearms may be sold and resold on the street. Those realities will not change under this Bill. But those realities are not sufficient to carry the State's "heavy burden" to justify doing away with the warrant requirement. If an officer has probable cause to believe that a straw purchase has taken place outside his presence, that officer may present such evidence to a judicial officer and obtain an arrest warrant. See *State v. Dodd*, 17 Md.App. 693, 304 A.2d 846 (1973) ("Both the federal and Maryland constitutions require that arrest warrants and search and seizure warrants be supported by oath or affirmation."). Warrants in this State may be obtained quite rapidly by a competent police officer when needed.

Stated differently, straw purchases simply do not fall within any recognized exigency (such as a hot pursuit of a fleeing felon) that would excuse a failure to use the warrant process. See *Dunnuck*, 367 Md. at 204 (listing recognized exigent circumstances). As the sorry history of unconstitutional actions that led to Baltimore's consent decree with the Department of Justice and grossly illegal and unconstitutional actions of the infamous Gun Trace Task Force make plain, the need for a neutral judicial officer in such probable cause determinations is real and important. Expanding police powers to make misdemeanor arrests outside the purview of such a neutral judicial officer will sow even more community mistrust of the police. Such distrust is already rampant. It will create a potential for abuse and misuse that is too apparent to be ignored. We urge an unfavorable report.

Sincerely,



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