March 1, 2023

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN SUPPORT OF HB 756

I am the President of Maryland Shall Issue ("MSI"). Maryland Shall Issue is a Section 501(c)(4), 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 SUPPORT of HB 756.

The Bill: The Bill amends MD Code, Public Safety § 5-306, to make clear that a person who has been granted a petition for expungement of conviction under Title 10, Subtitle 1 of the Criminal Law article of the Maryland is eligible for a wear and carry permit.

The Bill is Appropriate: Federal and State law has long recognized the restoration of rights by expungement. For example, federal law, 18 U.S.C. § 921(a)(33(B)(ii), makes clear that conviction of an otherwise disqualifying misdemeanor under State law is not disqualifying if the conviction "has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." Similarly, 18 U.S.C. § 921(a)(20) provides that "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

Maryland law likewise allows for expungement of convictions or arrests for a variety of offenses. See MD Code, Criminal Procedure, § 10-105. Maryland law also states that the term "convicted of a disqualifying crime" "does not include a case" * * * (ii) that was expunged under Title 10, Subtitle 1 of the Criminal Procedure Article." MD Code, Public Safety, § 5-101(b-1)(2). Maryland law, MD Code, Criminal Procedure, § 10-108, further provides that these expunged records are sealed, stating that "[a] person may not open or review an expunged record or disclose to another person any information from that record without a court order from: (1) the court that ordered the record expunged; or (2) the District Court that has venue in the case of a police record expunged under § 10-103 of this subtitle.

Indeed, Section 10-108(d) makes it a crime to improperly access expunged records, providing that "[a] person who violates this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $1,000 or imprisonment not exceeding 1 year or both." In addition, "an official or employee of the State or a political subdivision of the State who is convicted under this section may be removed or dismissed from public service." However, Section 10-108(c) does permit a State's Attorney to reopen and examine expunged records where "(i) the expunged record is needed by a law enforcement unit for a pending criminal investigation; and (ii) the investigation will be jeopardized, or life or property will be endangered without immediate access to the expunged record."

The FBI has apparently informed the Maryland State Police that Maryland expungements are not considered to be "expungements" under federal law, as defined in 18 U.S.C. § 921(a)(20) and 18 U.S.C. § 921(a)(33), because law enforcement agencies may, under very limited circumstances, still access expunged records under MD Code, Criminal Procedure, § 10-108(c). In support, the FBI has relied on a 2008 Tenth Circuit case, W*yoming ex rel. Crank v. United States*, 539 F.3d 1236, 1246 (10th Cir. 2008), which ruled that where, under State law, "the conviction records are not destroyed and remain available to law enforcement agencies for criminal enforcement purposes, [State law] does not result in 'expungement' that removes the fact of conviction for criminal justice purposes." The State Police have yielded to the FBI's application of the Wyoming case, and thus refused to issue wear and carry permits (or Handgun Qualification Licenses) to any person whose conviction has been expunged under Maryland law, even in those cases where the order of expungement did not impose any limitation on firearm possession. That position of the State Police (and the FBI) is impossible to square with the provisions of Section 921(a)(20), which as noted, gives full effect to expungement orders, unless the order of expungement expressly limits firearms access in some way. The State Police stance has led to litigation, including at least one case in which the decision of the State Police was overturned on review by the Office of Administrative Appeals.

Wyoming ex rel. Crank is inapplicable to Maryland because the Maryland statutory scheme is unlike the Wyoming statute there at issue. The Wyoming statute allowed the person to possess firearms, but it **also** expressly stated that expungement did not insulate the person from enhanced penalties for any future crime based on the expunged conviction. See 539 F.3d at 1240. In contrast, Maryland law not only provides that an expunged conviction is not a disqualifier, MD Code, Public Safety, § 5-101(b-1)(2), it also seals the records under MD Code, Criminal Procedure, § 10-108. Unlike Wyoming law, there is nothing in Maryland's expungement law, MD Code, Criminal Procedure, § 10-108, that allows any expunged conviction to be used for sentencing enhancements. Again, Section 10-108 merely permits a State's Attorney to access expunged records where the State's Attorney swears out an affidavit stating that "(i) the expunged record is needed by a law enforcement unit for a pending criminal investigation; **and** (ii) the investigation will be jeopardized, or life or property will be endangered without immediate access to the expunged record." Such access need not even necessarily relate to the person whose conviction was expunged.

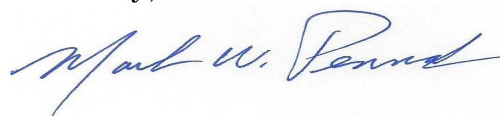
The State's treatment of expungements is controlling. Such deference is demanded by 18 U.S.C. § 921(a)(20), which provides that "[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." Thus, in *United States v. Essick*, 935 F.2d 28, 31 (4th Cir. 1991), the Fourth Circuit held that "[i]n enacting the Firearm Owners' Protection Act in 1986, Congress

clearly empowered each state to determine if ex-felons would be legally permitted under federal law to possess firearms. In effect, each state is able to carve out exemptions to the general federal proscription against possession of *any* firearm by *any* ex-felon." (Emphasis the court's). Under this test, "the government must show the continuing vitality of the conviction." Id.

Other case law is in full accord. See *United States v. Laskie*, 258 F.3d 1047, 1050-52 (9th Cir. 2001) (overturning a conviction for being a felon in possession of a firearm because an "honorable discharge" of a previous drug conviction was "unequivocal," changed the finding of "Guilty" to "Not Guilty," and released Laskie from "all penalties and disabilities resulting from the crime of which he has been convicted"); *United States v. Aka*, 339 F.Supp.3d 11, 19 (D.D.C. 2018) (holding that DC's disqualifying statute was controlling on the question of disqualification under federal law); *Siperek v. United States*, 270 F. Supp.3d 1242, 1249 (W.D. Wash. 2017) (concluding that the expungement of plaintiff's juvenile adjudication was established under federal law because "Washington law clearly dictates that ... the sealing of a juvenile record constitutes expungement of the juvenile offense" because the statute explicitly states that "the proceedings in the case shall be treated as if they never happened"). Compare *Bergman v. Caulk*, 938 N.W.2d 248 (Minn. 2020) (holding that merely sealing the records did not constitute an expungement where such records remained fully accessible).

In short, the law of Maryland makes clear that expunged convictions are not disqualifiers and may not be used for any other purpose as against the person whose conviction has been expunged. Such expunged convictions simply have no "continuing vitality." *Essick*, 935 F.2d at 31. See *United States v. Bagheri*, 990 F.2d 80, 84 (4th Cir. 1993) (discussing Maryland expungement law). The State Police are violating these expungement provisions by using expunged convictions to deny permits. The General Assembly is fully empowered to instruct the State Police to disregard expunged convictions. We urge a favorable report.

Sincerely,



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