



February 21, 2023

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, AS INFORMATION FOR SB 656

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 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 to provide INFORMATIONAL testimony on SB 656

The Bill:

The Bill would amend MD Code Criminal Law § 4-104. Specifically, Section 4-104 currently provides that “[a] person may not store or leave a loaded firearm in a location where the person knew or should have known that an unsupervised child would gain access to the firearm.” A child is defined for these purposes as a person “under the age of 16 years.” The Bill would amend Section 4-104 to expand this ban on storage to include a ban on providing access to a WARD, who is defined to as an adult who is both **a prohibited person** and who is **THE SUBJECT OF A LEGAL GUARDIANSHIP**. The Bill then provides that a person may not also violate this ban on storage where such violation “**RESULTING IN THE CHILD OR WARD USING THE FIREARM AND CAUSING THE DEATH OF ANOTHER.**” A person who violates this additional prohibition is deemed to be “**GUILTY OF A FELONY AND ON CONVICTION IS SUBJECT TO IMPRISONMENT NOT EXCEEDING 10 YEARS OR A FINE NOT EXCEEDING \$10,000 OR BOTH.**”

The Bill Is Unnecessary: The Bill cannot be justified as necessary to bar access to a firearm by a prohibited person. Existing federal and State law already ban possession by a prohibited person and these bans extend not only to actual possession but to constructive possession. “Constructive possession’ of a firearm is established when a person, though lacking physical custody of the firearm, still has the power and intent to exercise control over the firearm.” *Henderson v. United States*, 575 U.S. 622, 626 (2015). Such constructive possession is a violation of federal law, 18 U.S.C. § 922(g)(1), which is punishable by up to 10 years imprisonment under federal law. 18 U.S.C. § 924(a)(2). Under the Sentencing Reform Act of 1984, Congress eliminated parole for defendants convicted of federal crimes

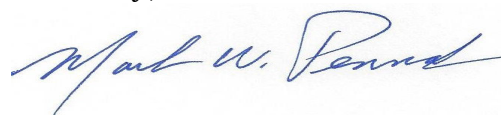
committed after November 1, 1987. Such constructive possession by a prohibited person also violates MD Code, Public Safety, § 5-133(b)(1) (regulated firearms), and MD Code, Public Safety, § 5-205(b)(1) (long guns). See, e.g., *Moore v. State*, 2106 WL 103352 (Ct.of.Sp.App. 2016). A violation of MD Code Public Safety, § 5-133(b), is punishable by imprisonment for up to 5 years and/or a fine not exceeding \$10,000. MD Code, Public Safety, § 5-144(b). Such possession by a convicted felon is a felony and is punishable by under Md Code, Public Safety, 5-133(c), for up to 15 years. These punishments are comparable to the punishment imposed by this Bill.

Persons who allow such access may be charged as accessories or as aiders and abettors or as co-conspirators. See 18 U.S.C. §§ 2, 3; MD Code, Criminal Procedure, § 4-204. See *United States v. Olson*, 856 F.3d 1216 (9th Cir. 2017); *Bellamy v. State*, 403 Md. 308, 334, 941 A.2d 1107, 1122 (2008). Allowing such access to a disqualified person is also chargeable under 18 U.S.C. § 922(d), a violation of which is a federal felony punishable by imprisonment for up to 15 years. 18 U.S.C. § 924(a)(8). See *United States v. Stegmeier*, 701 F.3d 574, 580 (8th Cir. 2012) (affirming a conviction under Section 922(d)).

The Reckless Endangerment Statute Or The Manslaughter Statute Are Better Vehicles: A failure to store a firearm properly can be (and has been) charged under Maryland's reckless endangerment statute. MD Code, Criminal Law, § 3-204. See <https://www.foxnews.com/us/baltimore-grandmother-indicted-9-year-old-boy-fatally-shot-teen-girl>. In our view, the "reckless endangerment" statute sets the appropriate legal standard for the imposition of the severe penalties contemplated by the Bill and effectively make this Bill unnecessary. That statute provides that "(a) A person may not recklessly: (1) engage in conduct that creates a substantial risk of death or serious physical injury to another." A violation is "subject to imprisonment not exceeding 5 years or a fine not exceeding \$5,000 or both." This statute is already being used to address recklessly allowed access to a firearm by a child. The same statute is equally applicable to recklessly allowing access to a firearm by a prohibited person who is also a ward of the defendant.

Section 3-204 could easily be amended to provide for an increase of penalties to 10 years of imprisonment and a fine of \$10,000 where a person recklessly allows access to a firearm death results from the use of that firearm by the ward or a child. Such recklessness or "gross negligence" is, for example, the standard used by MD Code, Criminal Law, § 2-209 to punish "manslaughter by vehicle or vessel." As with this Bill, a violation of Section 2-209 is a felony and punishable by up to 10 years in prison. In both cases, death was the unintended result of reckless behavior. The conduct addressed by the Bill is also arguably addressed by Maryland's "manslaughter" statute, which is likewise punishable as a felony and imprisonment for up to 10 years. MD Code, Criminal Law, § 2-207. See *Tolen v. State*, 242 Md.App. 288, 215 A.3d 363, 369 (2019) (discussing the elements of involuntary "unlawful act-manslaughter"). Any competent prosecutor can make use of these tools to address the circumstances described in this Bill. These tools need only be used.

Sincerely,



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