**President**
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

March 14, 2017

# WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN SUPPORT OF HB 1108

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 the District of Columbia. I recently retired from the United States Department of Justice, where I practiced federal statutory and constitutional law 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 and the law of self-defense. I am 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 Range Safety Officer and a NRA certified instructor in rifle, pistol and personal protection in the home. I appear as President of MSI in support of HB 1108.

This bill is a clarification amendment and should be considered wholly non-controversial. Currently, MD Code, Public Safety, § 5-101(g)(3) defines the term "disqualifying crime" to include "a violation classified as a misdemeanor in the State that carries a statutory penalty of more than 2 years." This bill would amend Section 5-101(g)(3) to state that the misdemeanor "CARRIED a statutory penalty OF INCARCERATION of more than 2 years AT THE TIME OF THE COMMISSION OF THE CRIME." As thus amended, the bill clarifies that the misdemeanor must actually be punishable by an "incarnation" for more than 2 years and that such punishment must be judged by reference **to the time the crime was committed**, rather than by when the person was actually convicted, perhaps years later. The "more than 2 years" specification is left unchanged by the bill.

As detailed below, this clarification properly focuses on the "incarceration" that was statutorily available "at the time of the commission of the crime." That focus brings the disqualification imposed by Section 5-101(g)(3) into alignment with the actual punishment that could be constitutionally imposed under the Ex Post Facto Clause for that misdemeanor crime. That result is consistent with the obvious original purposes of Section 5-101(g)(3), federal law and the Ex Post Facto Clause of the Constitution, and makes perfect sense.

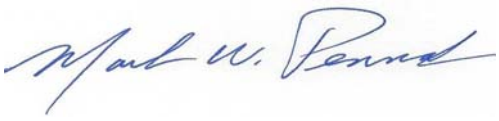
First, this amendment clarifies Section 5-101(g)(3) so that it mirrors the disqualification found in federal law. See 18 U.S.C. §922(g), and 18 U.S.C. § 921(a)(20)(B). Section 922(g)(1) of Title 18 of the United States Code prohibits firearm possession by persons convicted of "a crime punishable by **imprisonment** for a term exceeding one year." 18 U.S.C. § 922(g)(1). Section 921(a)(20)(B), however, exempts "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." By making clear that the disqualification under Section 5-101(g)(3) is imposed only for a violation of a misdemeanor punishable by "incarceration" of more than 2 years, the amendment made by this bill echoes the federal requirement that the misdemeanor must be punishable by "imprisonment" of more than 2 years. What may have been implicit in current Section 5-101(g)(3) is now properly explicit with this amendment.

The different treatment accorded misdemeanors reflect the general understanding that, at common law, "'[o]nly the most serious crimes' were considered to be felonies." *United States v. Booker*, 644 F.3d 12, 24 n.14 (1st Cir. 2011), *cert denied,* 132 S.Ct. 1538 (2012). See also *Baldwin v. New York*, 399 U.S. 66, 70 (1970) (noting that it "may readily be admitted – that a felony conviction is more serious than a misdemeanor conviction"). Accordingly, this State and Congress have deemed it inappropriate to impose a lifetime firearms disability, and thus strip someone of their Second Amendment constitutional right to own and possess a firearm, for minor, misdemeanor crimes punishable by 2 years or less. See, e.g., *United States v. Chovan,* 735 F.3d 1127, 1144 (9th Cir. 2013) (Bea, J., concurring) ("Throughout history, felons have been subject to forfeiture and disqualification, but misdemeanants, in direct contrast to felons, have not.").

Relying on these principles, the federal courts have allowed "as applied" constitutional challenges to misdemeanor disqualification statutes. See, e.g., *Tyler v. Hillsdale County*, 837 F.3d 678 (6th Cir. 2016) (en banc) (allowing an "as applied" challenge to 18 U.S.C. § 922(g)(4), which attaches a lifetime disqualification who has been "adjudicated as a mental defective or who has been committed to a mental institution"); *Binderup v. Attorney General*, 836 F.3d 336, 347-48, 351 (3d Cir. 2016), petition for cert. docketed, sub nom. *Sessions v. Binderup*, No. 16-847 (filed Jan. 5, 2017) (**sustaining** an "as applied" challenge to 18 U.S.C. § 922(g)(1), by persons who had been convicted of non-violent misdemeanors punishable by more than 2 years imprisonment); *Hamilton v. Pallozzi,* 848 F.3d 614, 626 n.11 (4th Cir. 2017) (distinguishing felonies from misdemeanors for purposes of an "as applied" challenge to Section 922(g)(1)). These decisions embody a recognition that the government does not have free license to attach a permanent firearms disability for any reason whatsoever. The right to keep and bear arms is a constitutional right and "[t]he boundaries of this right are defined by the Constitution," not by Congress or by state legislatures. *Chovan*, 735 F.3d at 1148 (Bea, J. concurring).

Second, making the disqualification dependent on the date the misdemeanor crime was committed is consistent with basic precepts embodied in the ban on *ex post facto* laws. Under our Constitution, that ban expressly applies both to Congress and the States. See Article 1, Section 9, Clause 3 ("No Bill of Attainder or ex post facto Law shall be passed"), and Article 1, Section 10, Clause 1 ("No **State** shall * * * pass any Bill of Attainder, ex post facto Law"). This constitutional prohibition against ex post facto laws "bar[s] enactments which, by retroactive operation, increase the punishment for a crime **after its commission**." *Garner v. Jones*, 529 U.S. 244, 249 (2000) (emphasis added). A statute that retroactively imposes a legal disability on a person will fall under the Ex Post Facto Clause if "the intention of the legislature was to impose punishment" or if the scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Smith v. Doe*, 538 U.S. 84, 92 (2003)(citation omitted). Under these principles, a person may not be subjected to punitive sanctions greater than those that existed as of the time the offense was committed. If the crime was punishable by imprisonment for 2 years or less as of the time it was committed, the State may not, consistent with the Ex Post Facto Clause, make that offense punishable by a sentence of more than 2 years after the date of crime. By focusing on the date the crime was committed, the bill is faithful to these principles. It should receive a favorable report by this Committee.

Sincerely,



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