Testimony of Douglas Johnson
Before the Judicial Proceedings Committee of the Maryland Senate
On House Bill 1302, "Extreme Risk Prevention Orders"

[In opposition to the bill, as passed by the House of Delegates]

March 23, 2018

"No, no!" said the Queen. "Sentence first--verdict afterwards." "Stuff and nonsense!" said Alice loudly. "The idea of having the sentence first!" "Hold your tongue!" said the Queen, turning purple.

-- Lewis Carroll, *Alice's Adventures in Wonderland* (1865)

Chairman Zirkin, distinguished members of the committee, I am Douglas Johnson, a resident of Prince George's County, in the 47st Senate District. I have been a Maryland resident for 34 years. Among my current firearms-related activities, I am certified as a Qualified Handgun Instructor by the Maryland State Police, which means that I may certify that persons who apply for Maryland Wear & Carry permits, or Handgun Qualification licenses, have met the applicable training requirements. I have also done a little bit of scholarly and technical writing on firearms issues, including contributions to the *Standard Catalog of Smith & Wesson*[1], a reference book widely relied on by gun collectors. I do not speak for or at the behest of any organization on firearms-related matters – I testify today purely on my own behalf.

I am testifying as an opponent of HB 1302, as passed by the House of Delegates, but I would support "extreme risk prevention order" legislation that was properly crafted to minimize potential for abuse, respect civil liberties as recognized by the U.S. Supreme Court, and maximize public safety benefits. Unfortunately, HB 1302, especially after the last-minute committee-sponsored amendments adopted by the House of Delegates, is so loosely drafted that it would invite abuse, and would run roughshod over constitutional concerns. Indeed, the language of HB 1302 is so implicitly contemptuous of gun owners that its enactment may well increase opposition to even more carefully crafted "red flag" bills in some other states – and once in operation, the House-passed bill is highly likely to produce horror stories that will magnify that effect down the road.

The U.S. Supreme Court has ruled, repeatedly, that the federal Constitution's Bill of

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[1] *Standard Catalog of Smith & Wesson, 4th Edition*, by Jim Supica and Richard Nahas (Gun Digest Books, 2016). Contributions to chapters on "Single-Shot Pistols – 1893-1936" and "Named Model Hand Ejectors, 1896 to 1957."

Rights protects the right to possess a handgun for self-defense, at least in the home.[2] While there are many who disagree with those rulings, including perhaps some members of this panel, they are the law of the land. I respectfully submit that a law that simply provides for confiscation of all firearms from a law-abiding citizen, based on an *ex parte* proceeding, with criminal penalties attached for failure to immediately comply, is incompatible with the federal constitutional right to possess a handgun in the home for defensive purposes.

I believe that if HB 1302 becomes law in its current form, many prudent gun owners and gun collectors in Maryland will be chilled from engaging in activities that are constitutionally protected, including vigorous engagement in public debate over contentious public issues. They may also draw back from some purely voluntary ways of assisting law enforcement agencies. For example: A couple of years ago, I personally earned the enmity of a homeowner in my neighborhood by calling the attention of law enforcement to activity suggestive of trafficking in stolen cars. One result was that at least one car, apparently stolen, was seized by local police, after I noticed that it wore two different license plates on two successive days. The ringleader confronted me and made his displeasure known, which did not particularly concern me since a police officer was at my side at the time. But, I would think long and hard about calling attention to myself in any such a manner in the future, if "any other interested person" could directly, or through some witting or unwitting agent, use a weapon such as this bill to direct a police raid in my direction – with little if any legal jeopardy to himself, and with possibly severe detrimental consequences for my family's physical security and some irreplaceable artifacts.

If HB 1302 becomes law, "extreme risk" might be imputed to anyone who is known to be a gunowner and who makes any enemy of "any other interested person" by voicing strong opinions on social media or elsewhere on any contentious issue – for example, gun control, or police use of force, or abortion, or you name it. The bill completely immunizes any petitioner who is in "good faith," whatever that means -- but a petitioner may be in "good faith" and yet hyper-sensitive, or deluded, or subjective in memory or interpretation of events. As for petitioners who consciously lie, I believe that most prosecutors and defense lawyers will agree that prosecutions for perjury are rare. If the operation of the provisions of HB 1302 ever do produce a prosecution for perjury, it will be long after the fact and likely of little comfort to the victim.

It seems to me likely that under HB 1302, more than few district (or circuit) court judges

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[2] *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742 (2010).

in Maryland will adopt essentially a rubber-stamp policy, and will routinely grant "interim" confiscation orders on a basis similar to those currently employed for *interim peace orders*. This means that more than a few "interim extreme risk prevention orders" are going to be issued based on petitions filed by people who have malicious or retaliatory motives, or who are highly subjective or themselves deluded, and/or who are prejudiced against the "target" due to race, sexual orientation, manner of dress, political opinions, or what have you.

If HB 1302 is enacted, some judges may conduct searching inquiries before they issue an interim extreme-risk order, but I see nothing in HB 1302 to require or invite this, and it seems to me unlikely that any such inquiry will occur in most cases. Some malicious or hyper-sensitive petitioners may be recognized as such and turned away by discerning judges -- but it seems likely that in most cases, the judges will rely solely on the information presented by the petitioner, without knowing or being able to know important ways in which the claims may be distorted, biased, or just mistaken.

In our little neighborhood, a few years back, we had an extended episode in which a resident with a petty criminal record, including at least one weapons conviction, used temporary peace orders as part of a campaign of harassment against the president of our neighborhood association. This was retaliation for the good citizen summoning police to investigate the aggressive individual's sometimes-alarming behavior. Being targeted with a maliciously motivated peace order might be considered merely annoying -- but for many citizens (including but not limited to persons who are themselves at risk from violent individuals, and gun collectors), being hit with an interim "extreme risk prevention order" would be a far more consequential matter.

Indeed, the interim *ex parte* confiscation orders are bound to be issued in cases in which *neither the petitioner nor the judge* knows anything about the security risks to which they are subjecting the respondent and perhaps his family. Thus, for example, a judge, on the basis of a complaint from someone embroiled in a neighborhood dispute, may unknowingly disarm a person who has been granted a Wear & Carry permit by the Maryland State Police because of threats against her *life* – perhaps threats regarding which the petitioner has no knowledge. Or, a judge may unknowingly disarm an honorably retired career law enforcement officer even though she may legally carry a handgun under federal law (18 U.S.C. § 926C). Judges will lack context, and they won't know what they don't know.

In order to reduce the potential for abuse and the constitutional concerns, I believe that the classes of persons who are empowered to seek an emergency confiscation order should be narrowed. The empowerment of "any other interested person" should be removed. A far

more sensible approach is found in the Connecticut statute[3] that was highlighted in a page 1 story in the *Washington Post* on March 18, 2018.[4] The Connecticut law allows an emergency confiscation order to be sought only by a state's attorney or police officer. A state's attorney or law enforcement officer may seek such a petition after receiving a complaint or report from a member of the public, but importantly, the law provides that "such state's attorney or police officers shall not make such complaint unless such state's attorney or police officers have conducted *an independent investigation* and have determined that such probable cause exists *and that there is no reasonable alternative available* to prevent such person from causing imminent personal injury to himself or herself or to others with such firearm" [italics added for emphasis]. It seems to me that those limiting provisions substantially reduce the potential for abuse.

A bill currently under consideration in the Rhode Island legislature, H 7688 / S 2492, limits extreme-risk petitions to law enforcement officers and to "a family or household member of the respondent." Yet, the Rhode Island ACLU issued a 14-page critique of the bill on March 2, 2018, which noted:

> A second major concern with the legislation involves the wide range of criteria a judge is given to consider in deciding whether to issue an ERPO. . . . it seems axiomatic that the granting of an ERPO should be premised on allegations of recent acts of violence or threats of violence by the respondent. But that is not required under this bill. . . . In light of the stakes involved, it is not unreasonable to assume that the courts' default, once presented with a petition, will be to find grounds for sustaining the petition even when the evidence presented is less than compelling.[5]

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[3] Connecticut Code: Title 29, Public Safety and State Police, Chapter 529, Sec. 29-38c.

[4] "After his family died, he threatened to kill himself. So the police took his guns," by Eli Saslow. *Washington Post*, March 17, 2018. https://www.washingtonpost.com/national/after-his-family-died-he-threatened-to-kill-himself-so-the-police-took-his-guns/2018/03/17/38e3138e-26e6-11e8-874b-d517e912f125_story.html?utm_term=.5ef3c7c75408

[5] "An Analysis of 18-H 7688 and 18-S 2492, Relating to Extreme Risk Protective Orders," American Civil Liberties Union of Rhode Island, March 2, 2018, http://www.riaclu.org/news/post/aclu-of-rhode-island-raises-red-flags-over-red-flag-gun-legislation

I believe that observation, and some of the others in the Rhode Island ACLU's paper, are equally applicable to HB 1302.

California already has a "red flag" law[6], and it allows such orders to be sought by somewhat broader classes of persons than the Connecticut law. However, in 2006, the legislature passed a bill (AB 2607) to expand the classes empowered to seek confiscation orders to include "an employer, a coworker, a mental health worker who has seen the person as a patient in the last 6 months, or an employee of a secondary or postsecondary school that the person has attended in the last 6 months." The California ACLU objected, stating in part:

> For example, it is not hard to imagine a scenario in which someone might harbor an irrational fear of a coworker based on that coworker belonging to some minority group that the person dislikes and distrusts, and their being able to persuade a judge that their coworker is armed and poses a threat. AB 2607 would authorize that, on the basis of this person's uncorroborated allegation, the police could show up at the coworker's door, in the manner you could expect when they anticipate confronting someone who they believe to be armed and dangerous, and order them to surrender their firearms.[7]

These concerns are obviously applicable to HB 1302, and to a greater degree, in view of the wide-open universe of potential petitioners.

While the California legislature passed AB 2607 notwithstanding the ACLU objections, the bill was vetoed by Governor Jerry Brown (D).[8]

Beyond greatly narrowing the class of persons empowered to seek gun-confiscation orders, I propose an additional revision that would advance the stated purpose of

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[6] California Penal Code sections 18100-18205 (Gun Violence Restraining Order).

[7] California ACLU letter in opposition to AB 2607 (2016) at http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_2601-2650/ab_2607_cfa_20160613_102613_sen_comm.html

[8] "States Consider Laws Allowing Courts to Take Guns from Dangerous People," *Wall Street Journal*, March 2, 2018. ("The American Civil Liberties Union objected to a proposal in California that would have expanded that state's law to allow employers, co-workers and mental-health workers to also petition judges directly; it was vetoed by Gov. Jerry Brown in 2016.")

separating a purportedly dangerous person from firearms, while at the same time minimizing the costs and dangers incurred by persons who are subjected to interim extreme-risk confiscation orders on grounds that are in reality based on political, personal, malicious, subjective, or mistaken grounds. I suggest that the gunowner-respondent, on being served with an "interim extreme risk protection order," should have the *option* of placing himself immediately in the custody of the law enforcement officers who serve the interim order, and the respondent should then be subject to "emergency evaluation" as already provided for in Title 10 of the Health–General Article. The respondent who chooses this option would remain confined until a court hearing on a "temporary extreme risk protection order," but his status would nevertheless be defined as a "voluntary admission," so that choosing this option would not in and of itself trigger any future firearms disability under various provisions of current law. The respondent would be guaranteed the right to attend the court hearing, and to be represented by counsel if he so chooses.

For the respondent who chooses this proposed option, no firearms confiscation would occur until the judge has heard all sides of the story. The judge will also have the benefit of the evaluation by mental-health professionals. Of course, there may be cases in which the medical evaluation reveals that the respondent does not suffer from a mental disorder and is not a candidate for involuntary commitment, and yet the respondent is found by the judge to present a real and immediate danger to himself or others – based, for example, on clear and convincing evidence that the respondent has made actual threats. In such a case, a gun-confiscation order would be executed, and the confinement would end.[9]

There are many firearms owners, and certainly many gun collectors, who would be likely to choose such a voluntary-evaluation option, rather than surrender firearms willy-nilly to a law enforcement agency (probably ill equipped to properly transport, store, or protect them), leaving his spouse or other family members without an effective means of home defense, deprived of a right protected by the Bill of Rights.

Moreover, the confinement provision would more effectively accomplish the purpose described by proponents of the bill, which is *to separate a dangerous individual from*

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[9] In the 2002 science fiction movie *Minority Report* (based on a story by Philip K. Dick), the creator of a precognitive crime-fighting program, Dr. Iris Hineman, says, "The Precogs are never wrong. But, occasionally, they do disagree." Judges may also disagree. I would also favor a right of the respondent to immediately appeal to the circuit court, prior to confiscation, any "temporary extreme risk" confiscation order issued by a district court – which would involve no risk because the respondent would remain under confinement if he exercises this right.

firearms. Under the House-passed HB 1302, a respondent who really is dangerous may illegally procure another firearm after the deputies depart with his guns – or perhaps he will fail to surrender at least one gun. But if the respondent opts to place himself in custody, he will be separated not only from *his* guns, but from *all* guns, at least until the adversarial hearing.

I do not see why any person who in good faith believes that there are solid reasons to believe that a certain gunowner poses an immediate danger, would not find such temporary "voluntary" confinement, followed by a court hearing at which all sides are heard from, to be a satisfactory remedy.

Some may object that an individual who is truly planning violence is unlikely to exercise an option to voluntarily place himself under medical evaluation. Perhaps so, but I see no downside to offering the respondent this option. It is an option that may particularly appeal to some blameless persons who are hit with interim extreme risk orders that are generated by deluded, misguided, or malicious petitioners. Those respondents who find the voluntary-evaluation option unpalatable or unworkable would remain subject to the immediate confiscation order.

Even with such a change, potential for abuses and infringements on constitutionally protected rights would remain – but giving the respondent the option I have described would, in some cases, diminish the harm done to a person unjustly targeted by a malicious or deluded petitioner.

Thank you for your kind consideration of these points.

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