President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

March 6, 2018

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 730 AND HB 1031

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 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 and personal protection in the home and outside the home as well as a range safety officer. I appear today in OPPOSITION to HB 730 and HB 1031.

HB 1031 would amend MD Code, Public Safety § 5-124 to provide that "[i]n this section, 'transfer' includes a loan other than a temporary gratuitous exchange of a regulated firearm between two individuals who remain in the same location for the duration of the exchange." This same language is before the Senate in SB 860. Under HB 730, Section 5-124 is amended to say "in this section, 'transfer' does not include a temporary gratuitous exchange of a handgun between two individuals who remain in the same location for the duration of the exchange." The intended meaning of both of these bills is the same. Under both bills, a law-abiding non-prohibited adult who loans a handgun to another law-abiding, non-prohibited adult **must** go through all the transfer requirements imposed by Section 5-124 **unless** that loan is **both** "**gratuitous**" **and** the parties to the loan stay at the **same location**. "Same location" is not defined in either bill. As detailed below, this amendment unwisely overrules the Maryland Court of Appeals, creates enormous legal traps for innocent gun owners and is inherently unworkable. They also bring Section 5-124 into direct conflict with other provisions of Maryland firearms law, as well as in direct conflict with positions taken by the Attorney General and the State Police in litigation pending in federal district court.

These bills mean means that the transferee and the transferor to such a **non**-gratuitous loan, or parties to a gratuitous loan but the parties do not stay the "same location," must fill out a firearms application otherwise required by MD Code, Public Safety, § 5-118 (State Form 77-R) at a FFL or a State Police barracks, pay $20 and then wait 7 full days before completing the transfer. If the transferee to the loan were to return the handgun to the original transferor after the loan was

over, the process would have to be repeated with still another Form 77-R and still another 7 day wait and still another check for $20. Under MD Code, Public Safety, § 5-144, a knowing "participation" in a "transfer" that violates Section 5-124 is punishable with up to 5 years in prison or a fine up to $10,000, "or both."

These bills legislatively overrules *Chow v. State*, 903 A.2d 388 (Md. 2006), where the Court held that the term "transfer" as used in Section 5-124 meant a "permanent exchange of title or possession" and thus further held that a temporary exchange of a handgun between two non-prohibited persons would not support a conviction. By making a "loan" a transfer, this amendment to Section 5-124 would overrule that holding. Yet, the Court of Appeals adopted this holding for good reasons. As the Court explained, this definition of "transfer" to exclude non-permanent exchanges was consistent with the law's purpose which "was to reduce the proliferation of *illegal* sales and *illegal* transfers. (Id. at 405) (emphasis the Court's). Section 5-124 was thus not concerned with "the imposition of restrictions upon the temporary exchange or loan of regulated firearms between two adults that are not legally prohibited from possessing such firearms." (Id.). HB 730 and HB 1031 thus change the focus of Section 5-124 from addressing "illegal" transfers to exchanges involving otherwise perfectly legal, law-abiding persons. That is a momentous change.

First, these bills will inevitably ensnare law-abiding persons. The bills include in its definition of "transfer" all **loans** of handguns between law-abiding adults except for those loans which are "gratuitous" and even those sorts of temporary loans are exempt from coverage only so long as the persons involved stay "*at the same location for the duration of the exchange*." This definition would criminalize a loan of a handgun between a husband and wife in the home if either spouse were to thereafter leave the house for any reason, or even otherwise depart from the "same location," whatever that means (the term is undefined). That would mean that one spouse could not loan a handgun to the other spouse for self-protection in the home while away. For the same reasons, the owner of a handgun could no longer allow his or her spouse to take the owner's handgun to the range for practice. Effectively, each spouse would be required to own their own firearms because sharing would be a "transfer," subject to the Form 77-R process at the State Police barracks. Any knowing "participation" in a failure to follow that procedure is punishable with 5 years in prison under Section 5-144. Similarly, a person would no longer be able to borrow the handgun from any other person, including a member of the family, to take the range to try out unless he or she was accompanied to the range by that person. Taking a handgun to a gunsmith or sending it back to the manufacturer for repair would become an illegal "transfer." These results are utterly absurd, but yet are compelled by the language of these bills.

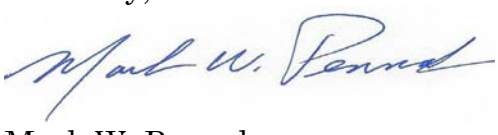
Second, these bills would also mean that established ranges may **not** "rent" a handgun to a person for use **at the range**. These bills define a "transfer" to include all **non**-gratuitous loans of a regulated firearm. The proper legal term for such a transaction is "rent." Yet, the term "rent" is defined under MD Code, Public Safety, § 5-101(s) as meaning "the temporary transfer **for consideration** of a regulated firearm that **is taken from the property of the owner** of the regulated firearm." Under that definition of rent, ranges can and do "rent" handguns to customers for

temporary use at the range without regard to provisions regulating the "rent" of handguns because such rental firearms never leave the "property of the owner." However, that rental at a range would not be possible under these bills because these bills makes such a loan permissible only if it is "gratuitous," *viz.,* not for "consideration." A commercial rental at a range is, of course, almost *never* "gratuitous." Such rentals are a common part of the business of many ranges. In essence, if the bill becomes law, Maryland's code would have two, directly conflicting definitions of "rent." Under Section 5-124, the loan **would be banned** if it was non-gratuitous (for consideration). Under Section 5-101(s), the same non-gratuitous loan **would be permitted** if the rental handgun was not taken from the owner's "property." Creating such directly conflicting definitions is senseless.

Third, these changes to Section 5-124 also effectively negate Attorney General's and the State Police's interpretation of "receive" and "transfer" under the Handgun Qualification License provisions of MD Code, Public Safety, § 5-117.1(c). Those provisions provide that a person may not "receive" a handgun without having an HQL issued by the State Police. Similarly, Section 5-117.1(b) of the HQL statute bans the "transfer" of a handgun without an HQL. Yet, the Attorney General's Office has relied on *Chow* to argue in federal district court that "receive" and "transfer" under Section 5-117.1 mean a "permanent" receipt or transfer because, according to the Attorney General, "receipt" is just a type of "transfer" which must be a "permanent" under *Chow*. See *MSI v. Hogan*, 2017 WL 3891705 (D. Md. 2017), slip op. at 10. Most recently (November 17, 2107), the State Police have issued an Advisory (attached) to the same effect, again expressly relying on *Chow*. If this bill becomes law, a transfer and receipt under the HQL statute would include every non-gratuitous loan or even a gratuitous loan in which the parties to the loan failed to remain at the "same location." That change would thus effectively destroy the Attorney General's legal position in the HQL litigation. As the Attorney General well understands, any state law that bans temporary loans of handguns among members of the same family for self-defense in the home will not survive any level of constitutional scrutiny under *District of Columbia v. Heller*, 554 U.S. 570 (2008).

In sum, the legislature has an "obligation to establish adequate guidelines for enforcement of the law" and that obligation is "'the more important aspect of the vagueness doctrine.'" *Aston v. Brown,* 339 Md. 70, 89, 660 A.2d 447, 456 (1995), quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). As outlined above, these bills miserably fail that test. For all these reasons, we urge an unfavorable report.

Sincerely,



Mark W. Pennak
President, Maryland Shall Issue, Inc.
1332 Cape St. Claire Rd #342
Annapolis, MD 21409
mpennak@marylandshallissue.org

MARYLAND STATE POLICE

Maryland Department of State Police / Licensing Division
1111 Reisterstown Road
Pikesville, Maryland
Office: (410) 653.4500 / Fax: (410) 653.4036

ADVISORY

LD-HQL-17-003

NOVEMBER 17, 2017

INTERPRETATION OF "RECEIVE" IN PS §5-117.1

PUBLIC SAFETY §5-117.1(c) states that "A person may purchase, rent, or receive a handgun only if the person:

(1) (i) possesses a valid handgun qualification license issued to the person by the Secretary in accordance with this section;…"

The Maryland State Police (MSP) has applied the ruling in *Chow v. State*, 393 Md. 431 (2006) to interpret the definition of "receive" as it pertains to PS §5-117.1(c). *Chow* held "the temporary gratuitous exchange or loan of a regulated handgun between two adult individuals, who are otherwise permitted to own and obtain a regulated handgun, does not constitute an illegal "transfer" of a firearm…." The MSP views "transfer" and "receive" as equivalent for purposes of Maryland's firearms laws and interprets "receive" as including the gratuitous **permanent** exchange of title or possession, but excluding temporary gratuitous exchanges or loans of handguns.

Therefore, an individual, not otherwise prohibited from owning or possessing regulated firearms, is not required to possess an active HQL in order to borrow a regulated firearm from another individual on a temporary basis.

If you have any questions regarding this matter, please contact the Handgun Qualification License Unit, by email, at msp.hql@maryland.gov, or call the Licensing Division at 410-653-4500. Thank you for your attention to this matter.