President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

April 12, 2019

Mr. Christopher S. Shank
Chief Legislative Officer
Legislative Office
State House
100 State Circle
Annapolis, MD 21401-1925

Re: Veto Request for SB1000/HB1343

Dear Mr. Shank:

This letter is submitted on behalf of Maryland Shall Issue, its officers and Board and all its members, to request that Governor Hogan veto SB1000/HB1343, which abolish the Handgun Permit Review Board. As you may know, Maryland Shall Issue is an all-volunteer, non-partisan organization dedicated to the preservation and advancement of gun owners' rights in Maryland. The undersigned President of Maryland Shall Issue is an attorney and an active member of the Bar of the District of Columbia, having recently retired from the United States Department of Justice, after 33 years of practicing before the federal Courts of Appeals and the Supreme Court of the United States. Having just passed the out-of-state-attorney's bar exam, the undersigned will also soon be an active member of the Maryland Bar.

For the reasons set forth below, these bills are misguided and, worse, will reinforce harmful policies and practices of the Maryland State Police with respect to the issuances of restricted carry permits. Even if the Governor does not veto these bills, he should at least reform the permit practices of the State Police so that law-abiding citizens with State-Police-issued restricted carry permits can go about their business without being terrified of detention and arrest over the vague restrictions on permits issued by the State Police. Such arrests are happening now in this State. That cannot be allowed to continue.

A. Restrictions Cases Involve Poor State Police Practices

Rational decision-making demands that the bills be viewed by reference to the actual number of permits at issue. According to press reports, there have been 269 cases heard by the Board since December 2017, of which the board has reversed the decision of the Maryland State Police 77 times and modified restrictions 145 times. https://www.marylandmatters.org/2019/02/18/state-police-have-sought-reviews-of-handgun-permit-board-decisions-22-times-since-oct/. Thus by a margin of 2-1, the bulk of the Board's reversals are in **restriction** cases where the State Police have issued permits and thus have **already found** that the applicant has a "good and substantial reason" under Maryland law for carrying a handgun outside the home. These persons include business entrepreneurs carrying cash, security guards,

private investigators and federal government employees with top security clearances and who are vulnerable to attack by foreign and domestic terrorists. The State Police recognize that such individuals qualify for permits.

The same press reports indicates that since October 1, 2018, Maryland State Police has been appealing the decisions of the Board to the Office of Administrative Hearings ("OAH") for a full *de novo* hearing. Of the Board's first 34 decisions rendered after hearings conducted since Oct. 1, the Maryland State Police has appealed 22 times. Other cases are still under consideration. Id. So, the State Police have acquiesced in 12 of the Board's decisions in cases considered since October 1, 2018, and the merits of almost all of the State Police appeals are still being reviewed. We are reliably informed that the State Police have brought this many appeals to OAH simply to **discourage** applicants from applying and/or from appealing to the Board. OAH proceedings are formal, trial-type proceedings before an administrative law judge. Such proceedings are complex and the applicant realistically must retain a lawyer. That is expensive, a reality of which the State Police are well aware. The State Police practice of "attrition by litigation" is a nothing less than a bully tactic aimed at the least affluent applicants. That tactic is shameful and unworthy of the State Police.

These numbers also make clear the overwhelming number of cases in which the Board has reversed the State Police are in cases where the State Police have placed restrictions on carry permits issued to persons that the State Police have found to qualify for permits. Without exception, these reversals are because the restrictions placed on those permits by the State Police are hopelessly vague and thus expose these individuals to a great risk of detention, arrest and incarceration if the permit holder should ever have a chance encounter with a law enforcement officer, such as being pulled over for a broken tail light. Under Maryland law, as amended in 2013 by the Firearms Safety Act, carrying outside the restrictions on the permit is the same thing as carrying without **any permit at all** and thus expose the permit holder to 3 years in prison under MD Code Criminal Law § 4-203. Before 2013, carrying outside the restrictions was an administrative violation, with no criminal consequences. Now, carrying outside the restrictions risks serious jail time. **Any** conviction of Section 4-203, regardless of actual sentence, results in life-time disqualification under both federal and state law from possessing any modern firearms or ammunition.

On a chance encounter with law enforcement on the roadside, the permit holder with vague restrictions is faced with the Hobson's Choice: Either try to convince the officer that he or she is carrying within the restrictions, thereby forfeiting the right to remain silent and other constitutional rights, or insisting on his or her constitutional rights and face an unlawful arrest for "lack of cooperation." That's the street reality and that's indefensible. The Board quite properly has insisted that the restrictions not be vague, relying on expert witness testimony submitted by the undersigned on the constitutional issues created the State Police use of vague restrictions. The State Police have never even attempted to rebut that testimony. In short, in criminalizing carry permit restrictions in 2013, the General Assembly has necessarily changed the legal framework. The State Police have ignored that change, preferring to leave these law-abiding citizens at great legal peril. Shameful.

More than once, innocent permit holders have been detained for hours and even wrongly arrested because of these restrictions. See for an actual video of sworn testimony before the Board of one such case, see https://youtu.be/T3UH3Zrxt9g A. Dwight Pettit, a renowned Baltimore civil rights attorney, has quite rightly noted that these restrictions are discriminatory in impact and racist in enforcement against law-abiding citizens of Baltimore. See https://youtu.be/iYc00BH9DwA?t=718 Indeed, a law-abiding Baltimore resident was arrested for carrying outside his permit restrictions while lawfully transporting the handgun to work where he was employed **as a security guard**. He spent the night in jail before the charges were dropped. According to Dwight Pettit, these sorts of arrests have happened over and over again in Baltimore. (Id.). There's more. A doctor of veterinarian medicine who carries narcotics in his practice was arrested on the side of Interstate 270 for carrying outside his restrictions. The charges were dropped. A professional bail bondsman was arrested for carrying outside his restrictions in Hagerstown when he was forced to pull his concealed firearm when faced with a knife attack. He was never charged with any crime associated with that armed self-defense; the only charge was that he violated the restrictions on his carry permit. The charges were ultimately dropped. In all these cases, Maryland's most law-abiding citizens have been needlessly legally traumatized because of permit restrictions. And as Dwight Pettit attests, that's just the tip of the iceberg. Restrictions are ripe for arbitrary and discriminatory enforcement.

In this context, it is not at all surprising that the Board is hearing many more restriction cases than in years past. Word of such legal nightmares gets around and permit holders are terrified of getting arrested simply for carrying with a restricted permit. Restrictions thus defeat the purpose for which the permit was issued as people are afraid to actually use the permit. At a minimum, the use of vague restrictions create a new, adversarial and risky relationship between the permit holder and the police in which the constitutional rights of permit holders are being sacrificed. By making carrying outside restrictions a crime, the General Assembly created these constitutional issues and these opportunities for abuses of power by the police. Indeed, the fear of arrest led to the upsurge in restrictions cases which, in turn, led to a backlog of appeals challenging restrictions at the Board. Yet, the Board's efforts to address that backlog have been intentionally sabotaged by the State Police, which has refused to provide more than 14 case files for each hearing or to support additional hearings on additional evenings that the Board sought to conduct.[1] The restrictions problem is created by the State Police. The backlog problem is squarely due to the refusal of the State Police to cooperate in addressing these cases. The State Police are obviously in great need of civilian oversight by individuals who can appreciate the real-life problems created by inexcusable current State Police practices with respect to restrictions.

[1] The Board has also been wrongly criticized for holding some of its hearings in closed session. Virtually all of these hearings involve restriction cases where the appeal is seeking to lift the restriction on an existing permit. Maryland law expressly protects the confidentiality of these individuals who thus have every right to request closed sessions. MD Code, General Provisions, § 4-325. These closed sessions are thus fully compliant with and, indeed, required by the Maryland's Open Meeting statute. MD Code General Provisions § 3-305(b)(13).

B. Tiny Number of Permits Issued vs. Violent Crime in Maryland

Carry permits are not a problem. Even gun control advocates admit that permit holders are the most law-abiding persons in America, with crime rates a fraction of those of commissioned police officers. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3233904 The most recent study (January 2019) published by the American College of Surgeons (hardly a gun group) demonstrated "no statistically significant association between the liberalization of state level firearm carry legislation over the last 30 years and the rates of homicides or other violent crime." https://www.sciencedirect.com/science/article/pii/S107275151832074X We are unaware of any permit holder who has ever been arrested (much less convicted) for a violent crime in Maryland. Not one.

In any event, these 269 cases entertained by the Board is an infinitesimally small number. There were over 22,000 carry permits issued by the State Police in 2018 in Maryland, including the 147 in which the Board merely reversed restrictions. The 77 cases in which a denial was overturned by the Board is thus .0035 of this 22,000 universe. And that universe is unbelievably tiny for a state. By way of comparison, 12% of the entire adult population of neighboring Pennsylvania and over 8% of adults in Virginia have carry permits. Over a million adults have carry permits in Florida, Texas and Pennsylvania, and yet the crime rate in these states is markedly less than in Maryland. In fact, 42 states are "shall-issue" and only 8 states, including Maryland, are "may-issue." http://www.handgunlaw.us/ "In 2018, the number of concealed handgun permits soared to now over 17.25 million – a 273% increase since 2007. 7.14% of American adults have permits." https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3233904 The notion that carry permits in Maryland are too easily obtained under the current Board is laughable.

In this regard, persons hostile to the Board err in their premise that Maryland is safer because it restricts the right to carry to a truly tiny number of individuals. The FBI violent crime statistics for 2017 confirm that Maryland citizens are far safer in Virginia (shall issue) and Pennsylvania (shall issue) than they are at home. https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-4 According to FBI statistics, in 2017, Maryland far exceeded the national average for violent crime. Specifically, the national rate was **394** violent crimes per 100,000. Maryland's violent crime rate was **500.2** per 100,000, over 25% higher. And Maryland's rate is **up** from 2016, while the national rate in 2017 **fell** from 2016. https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-4.

The violent crime rate in Baltimore, in particular, is mind-boggling. Specifically, the press has reported that "there were 1,780 violent crimes reported per 100,000 Baltimore residents in 2016, far more than the national rate of 386 incidents per 100,000 Americans." https://www.msn.com/en-us/news/crime/25-most-dangerous-cities-in-america/ss-AAsxtw1#image=23 That was far more than even the District of Columbia, which had a violent crime rate of 1,203.5 per 100,000 in 2016, according to the FBI. It is Baltimore that leads the nation with the second-highest

per capita murder rate (exceeded only by St Louis). https://www.statista.com/statistics/718903/murder-rate-in-us-cities-in-2015/. Every legislator in the General Assembly should be ashamed of these numbers. Abolishing the Board will do nothing about this crime wave. It will simply further discourage law-abiding persons who are otherwise fully qualified from applying for permits or seeking review of arbitrary State Police actions. The General Assembly should be held to account for its "do-nothing" actions. Vetoing these bills should be used to remind the General Assembly to do something substantive about violent crime.

C. Armed Self-Defense Is Common Nationwide and Desirable

Suppressing permits is bad public policy. Maryland's "good and substantial reason" permit law is used to exclude ordinary citizens from applying and receiving a carry permit for their own self-defense. Indeed, it is almost impossible for ordinary, law-abiding residents of the City of Baltimore to obtain carry permits. As a result, these citizens are forced to carry illegally simply to protect themselves from the violent predators that have taken over in so many communities in Baltimore. That means that these persons do not receive the 16 hours of formal training, including live fire qualification that permit holders obtain under current Maryland law. Certainly, the Baltimore police have proved unable to stop Baltimore's violent crime wave. Some members of the Baltimore Police Department have even become criminals. https://www.baltimoresun.com/news/maryland/crime/bs-md-ci-police-scandal-timeline-20180516-story.html. In light of these realities, Maryland should not expect law-abiding citizens, particularly in Baltimore, to sacrifice their own lives and safety on the altar of Maryland's unthinking antipathy toward guns. Maryland's effective ban on permits is forcing otherwise law-abiding people in Baltimore to carry illegally for their own protection.

These people understand well that armed self-protection is effective. The FBI has found that out of the 50 mass shooting incidents studied, "[a]rmed and unarmed citizens engaged the shooter in 10 incidents. They safely and successfully ended the shootings in eight of those incidents. **Their selfless actions likely saved many lives**." FBI, Active Shooter Incidents in the United States in 2016 and 2017 at 8. Available at https://www.fbi.gov/file-repository/active-shooter-incidents-us-2016-2017.pdf/view. And armed self-defense is common. One report states that "a range of credible data suggest that civilian use guns to stop violence more than 100,000 times per year." https://fee.org/articles/defensive-gun-use-is-more-than-shooting-bad-guys/ In 1994, a CDC study found that Americans use guns to frighten away intruders breaking into their homes about 498,000 times per year. (Id.). In 2013, the CDC ordered a study conducted by The National Academies' Institute of Medicine on the incidence of armed self-defense. That study reported that "[d]efensive use of guns by crime victims is a common occurrence," stating further that "almost all national survey estimates indicate that defensive gun uses by victims are at least as common as offensive uses by criminals, with estimates of annual uses ranging from about 500,000 to more than 3 million, in the context of about 300,000 violent crimes involving firearms in 2008." https://www.forbes.com/sites/paulhsieh/2018/04/30/that-time-the-cdc-asked-about-defensive-gun-uses/#3aaa3929299a. Eliminating the Board will simply make it

harder to review arbitrary State Police actions and thus needlessly limit permits and discourage applications. Inevitably, lives that could have been saved by armed citizens will be lost.

D. Maryland's Restrictive Permit Law Will Soon Fall

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that citizens have the right to possess operative handguns for self-defense. That holding was extended to the States in *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010), which held that "[c]itizens must be permitted to use handguns for the core lawful purpose of self-defense." Following *McDonald*, the Seventh Circuit held that the Second Amendment applies with full force outside the home. *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2013). The court held that "[t]o confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*." (Id.). As a result of the decision in *Moore*, Illinois enacted "shall issue" legislation, thus converting that State from a "no-issue" state into a "shall issue" jurisdiction.

Most recently, the D.C. Circuit applied these principles to strike down the "good reason" requirement for a carry permit imposed by D.C. law, a statute that was largely copied from Maryland law. *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017). In so holding, the court stressed that the "core" of the Second Amendment protected "the individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs." (Id. at 661). That meant, the court explained, that "the Second Amendment must enable armed self-defense by commonly situated citizens: those who possess common levels of need and pose only common levels of risk." (864 F.3d at 664). Under this test, the Court reasoned that the "District's [good reason] regulation completely prohibits most residents from exercising the constitutional right to bear arms as viewed in the light cast by history and *Heller I*" (id. at 665) and that "the good-reason law is necessarily a total ban on most D.C. residents' right to carry a gun in the face of ordinary self-defense needs, where these residents are no more dangerous with a gun than the next law-abiding citizen." (Id.). The court concluded that "no tiers-of-scrutiny analysis could deliver the good-reason law a clean bill of constitutional health." (Id. at 666).

Under *Wrenn*, D.C. is now a "shall issue" jurisdiction, just like 42 states in the United States. Importantly, *Wrenn* created a direct conflict with the Fourth Circuit's decision that had previously sustained Maryland "good and substantial reason" requirement. *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir.), *cert. denied,* 134 S.Ct. 422 (2013), as well as a direct conflict with prior decisions in other circuits that had sustained the "good cause" laws in the few states that still impose this requirement. These circuit conflicts are presently before the Supreme Court on a petition for certiorari filed in *Rogers v. Grewal*, No. 18-824 (filed Dec. 20, 2018), a case involving a challenge to New Jersey's "good cause" requirement. In an order issued February 19, 2019, the Supreme Court ordered New Jersey to respond to this petition filed in *Rogers*. Such orders are not issued unless at least one Justice on the Court wants a response before deciding on whether to grant review. New Jersey's law is thus "on the table." Maryland's "good cause" law is being challenged

in *Malpasso v. Pallozzi*, No. 18-2377 (4th Cir.), which is presently pending in the Fourth Circuit. Also pending are suits against the "good cause" laws of New York, Massachusetts and California. The conflict between these laws and the D.C. Circuit's decision in *Wrenn* will have to be resolved soon by the Supreme Court. The Second Amendment cannot mean one thing in D.C. and 42 states, and something else in Maryland. We fully expect that the Supreme Court will follow the analysis applied in *Wrenn* and strike down "good cause" laws.

Indeed, the scope of the Second Amendment outside the home may also be addressed in *NYSRPA v. NYC*, No. 18-280, *cert. granted*, 2019 WL 271961 (S.Ct. Jan 22, 2019), a New York City case involving transport outside the home. The Supreme Court has already agreed to hear that case. A decision in *NYSRPA* will likely address the appropriate "standard of review" to be utilized in assessing the constitutionality of state gun control laws. It is widely understood that the Supreme Court took the case in order to reverse the Second Circuit's decision sustaining NYC's law. A decision will likely be in late 2019 or 2020, during the Court's next Term. In short, Maryland can follow Illinois' lead and become "shall issue" by legislation, or follow D.C.'s lead and have "shall issue" forced on it by the courts. Either way, the Board and/or OAH will have far fewer cases once Maryland becomes a "shall issue" jurisdiction. The much-touted backlog at the Board will completely disappear once that happens. In the meantime, the Board is much needed to provide oversight to the State Police. Please veto SB 1000 and HB 1343.

Sincerely,

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