



March 12, 2020

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO SB 1050

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 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 in OPPOSITION to SB1050.

This Bill:

This bill proposes an amendment to MD Code Public Safety § 5-146 to criminalize and increase the penalties for a failure to report a lost or stolen regulated firearm. Under current law, the owner of a regulated firearm has 72 hours to report the lost or theft of the firearm to a local law enforcement agency. A knowingly and willful failure to do so is punishable, on the first offense, as a civil offense with a fine not exceeding \$500.00. On the second or subsequent offense, the failure is punishable as a criminal misdemeanor with imprisonment of 90 days and a fine not exceeding \$500.00.

This bill would abolish the civil penalty for the first offense and make a failure to report on the first offense a criminal misdemeanor punishable by up to 6 months in jail and a \$1,000 fine. Second and subsequent violations are also criminal and punishable by imprisonment not exceeding 1 year and a fine of \$2,000.

The Bill Criminalizes the Victim And Is Extreme In The Penalties Imposed

This bill is apparently motivated by a desire to prevent gun diversions and straw purchases by punishing a theft victim for a failure to report a lost or stolen regulated firearm. Those motivations are misguided. A Rand Corporation study published in 2018 found that there is no evidence or study that actually supports any reporting requirement. <https://www.rand.org/research/gun-policy/analysis/lost-or-stolen-firearms.html>. That Study is attached to this testimony. Specifically, the Study found that “[w]e found no qualifying studies showing that lost or stolen firearm reporting requirements increased any of the eight outcomes we investigated.” (Id. at 1). Indeed, the Study further states that “[w]e found no qualifying studies showing inconclusive evidence about lost or stolen firearm reporting

requirements.” (Id.). In short, the supposed benefits of such reporting requirements are speculative at best.

In contrast, criminalizing the victim is sure to have unintended consequences. First, because this bill makes the failure to report a criminal violation with jail time, instead of a civil violation, the theft victim may well be **less likely** to report a lost or stolen firearm. Section 5-146 provides that the owner must report the loss “within 72 hours after the owner first discovers the loss or theft.” Under this bill, a criminal investigation will likely be conducted into when the owner “first discovered” the loss. In all cases, the question of when the loss was “discovered” creates a question of fact for the trier of fact, thus exposing the owner to the risk of criminal prosecution.

Because a failure to report would become criminal, any rational owner will be loath to expose himself or herself to any such criminal investigation or questioning by the police for fear that his responses to such questioning might be incriminating. Indeed, for the same reasons, any competent legal counsel would advise such an owner to invoke his or her Fifth Amendment right to silence and the Sixth Amendment right to counsel and thus refuse full cooperation with the police. Thus, even if the stolen firearm is discovered at a crime scene and traced to the original owner, such owner would be legally ill-advised to submit to police questioning because of the criminal penalties imposed by this bill. That result would frustrate any investigation into the loss or theft as well as any crime that may have been committed with the stolen firearm. That consequence is, of course, exactly the opposite of the desired result.

Second, criminalizing a failure to report with steep fines and jail time is extreme. Only a small minority of states require an owner even to report lost or stolen firearms. California, for example, simply requires a report within **5 days** and does not impose any civil or criminal consequences for any failure. California Penal Code §25250. Connecticut punishes a failure to report, as a first offense, with a fine of \$90.00. CT Gen Stat § 53-202g. The District of Columbia imposes a civil fine of \$100 for any failure to report and does not impose any jail time, even for subsequent offenses. D.C. Code § 7–2502.08. Similarly, New Jersey law imposes only civil penalties for first or subsequent offenses. N.J. Stat. Ann. § 2C:58-19. Our neighbor, Delaware, punishes a first offense as a “civil penalty” with a fine of not less than \$75 and not more than \$100. Del. Code tit. 11, § 1461. Michigan requires a stolen firearm to be reported in **5 days** and punishes any failure as a “civil violation” with a fine of no more than \$500. Mich. Comp. Laws § 28.430.

Even the very few States that do impose criminal penalties for a failure to report do not, as a rule, impose the draconian penalties imposed by this bill on the first offense. Ohio, for example, punishes a failure to report within **7 days** as a fourth degree misdemeanor which is punishable with a maximum jail sentence of 30 days and a fine not to exceed \$250. Ohio Rev. Code Ann. § 2923.20(A)(5). Massachusetts does not impose jail time until the third offense and even that penalty is applicable only to sellers and or a person who has been issued a license to carry a pistol or revolver. Mass. Gen. Laws ch. 140, § 129C. In Illinois, a failure to report is a “petty offense” which is punishable by a fine between \$1 and \$1,000. 720 Ill. Comp. Stat. 5/24-4.1. Rhode Island punishes a failure to report with a “fine of not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100).” R.I. Gen. Laws § 11-47-48.1. This bill, with its heavy fine and jail time for the first offense, would plainly make Maryland an outlier jurisdiction.

Third, punishing an owner for failing to report is, itself, perverse. The owner may be unaware of any such reporting requirement, but may, under this bill, nonetheless be exposed to a criminal investigation **just for being a victim of a theft**. While the *mens rea* requirement could help the owner avoid a conviction by requiring a knowing and willful failure to report, the owner would still face the possibility of being a suspect in a potential crime when he or she has already been victimized by the theft. Such an investigation would simply add to the trauma that the victim has already experienced. It could well require the **victim** to hire legal counsel at considerable expense. That is simply no way to treat otherwise innocent crime victims. If the “victim” is truly a bad actor, then remedies are already available under existing law, not changed by this bill. See MD Code Public Safety § 5-146(e) (“The imposition of a civil or criminal penalty under this section does not preclude the pursuit of any other civil remedy or criminal prosecution authorized by law.”). There is no reason to pile on potential criminal liability that could work to ensnare the innocent person. That is especially so given that the supposed benefits associated with mandatory reporting requirements are so speculative, as the Rand study points out. In short, this bill is both bad policy and over-criminalization. We see no need or reason to alter Maryland’s existing law. We urge an unfavorable report.

Sincerely,

A handwritten signature in blue ink that reads "Mark W. Pennak". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Mark W. Pennak
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