IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

PETITION OF EDWARD HOLMES WHALEN FOR JUDICIAL REVIEW OF THE DECISION OF THE MAR YLAND OFFICE OF ADMINISTRATIVE HEARINGS IN THE CASE OF EDWARD HOLMES WHALEN OAH CASE NO. MSP-LD-50B-20-23317	CASE NO. C-03-CV-21-000853

PETITIONER'S MOTION FOR SUMMARY REVERSAL

On July 21, 2020, Appellant, Edward Holmes Whalen ("petitioner") submitted an application to the Maryland State Police (hereinafter "wear and carry application" or "application") for a permit to carry a handgun in public (hereinafter "wear and carry permit" or "permit"), pursuant to MD Code, Public Safety § 5-306. On October 16, 2020, petitioner received a letter, from First Seargent Donald Pickle, an Assistant Commander with the Maryland State Police Licensing Division, informing Mr. Whalen that his application had been denied because Mr. Whalen failed to demonstrate he had a "good and substantial reason" to carry a firearm. *See* Record on Appeal at R.33, R.70.

On October 22, 2020, petitioner timely filed an appeal of that decision to the Office of Administrative Hearings (hereinafter "OAH" or "Office") pursuant to MD Code, Public Safety § 5-312(b)(1), under which OAH conducts "a de novo hearing on the matter." On December 7, 2020, Robert B. Levin, an Administrative Law Judge at the OAH, held a remote video hearing, at which petitioner appeared, representing himself, and at which Corporal Joshua Taylor, Sr. appeared, representing the Maryland State Police (hereinafter "MSP"). On February 22, 2021, Judge Levin issued an opinion, upholding the denial of Mr. Whalen's application. At the OAH

hearing, petitioner argued that he possessed a "good and substantial reason" for the issuance of a wear and carry permit, as required by MD Code, Public Safety, § 5-306(a)(6)(ii), and further argued that the "good and substantial reason" requirement was unconstitutional under the Second Amendment as construed in *District of Columbia v. Heller*, 554 U. S. 570 (2008), and *McDonald et al. v. City of Chicago*, 561 U. S. 742 (2010). *See* Record on Appeal at R.9. The same arguments were made to the Maryland State Police in support of the application. (Id. at R.49). In particular, petitioner contended that the Fourth Circuit's decision in *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), was wrongly decided. *Id.* Judge Levin expressly rejected both contentions. As to whether the "good and substantial reason" requirement was constitutional, Judge Levin held that "*Woollard v. Gallagher* and cases similarly decided show that the MSP may properly apply the good and substantial reason test to applications for handgun permits." *Id.* at R.29.

On March 18, 2021, Mr. Whalen filed a Petition for Judicial Review of the decision of the OAH with this Court. This Court has jurisdiction over the petition for review under MD Code, Public Safety, § 5-312(b)(3). Under that provision, judicial review of the decision of OAH "shall be conducted in accordance with Title 10, Subtitle 2 of the State Government Article." Under MD Code, State Government, § 10-222(h)(3), this Court may "reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision: (i) is unconstitutional; (ii) exceeds the statutory authority or jurisdiction of the final decision maker; (iii) results from an unlawful procedure; (iv) is affected by any other error of law; (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or (vi) is arbitrary or capricious." On August 18, 2021, this Court granted Mr. Whalen's unopposed motion to hold this case in abeyance, pending a ruling by the

United States Supreme Court in *New York State Rifle & Pistol Ass'n. (NYSRPA) v. Corlett*. No. 20-843, 2021, *cert. granted*, 141 S.Ct. 2566 (2021). The respondent in *NYSRPA v. Corlett*, the Superintendent of the New York State Police, changed and the case was re-captioned as *NYSRPA v. Bruen*, by operation of law. See Supreme Court Rule 35.3.

On June 23, 2022, the Supreme Court issued its decision in *Bruen*, striking down as unconstitutional New York's "proper cause" requirement for issuance of a permit to carry a handgun in public. *New York State Rifle & Pistol Association, Inc. v. Bruen*, --- S.Ct. ---, 2022 WL 225 (U.S. June 23, 2022). A copy of the Court's opinion is attached for the convenience of the Court. In so holding, the Supreme Court contrasted the 43 States with "shall issue" statutes, "where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability," with the six States which "have 'may issue' licensing laws, under which authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria, usually because the applicant has not demonstrated cause or suitability for the relevant license." Slip op. at 4-5. Among these "may issue" states, the Court expressly identified Maryland. *Id*. at 5. And the Court specifically cited "Md. Pub. Saf. Code Ann. §5–306(a)(6)(ii) ('good and substantial reason')," the very provision at issue in this case, as a "may issue" statute. *Id*. at 6 n.2.

The Court then went on to reject the "means-end," two step, intermediate scrutiny analysis used by the Fourth Circuit in *Woollard*, and by courts of appeal in other circuits, to

sustain such "may issue" statutes,[1] holding that "[d]espite the popularity of this two-step approach, it is one step too many." The Court ruled that the Court's decisions in "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context." Slip op. at 13 (*Heller* "did not invoke any means-end test such as strict or intermediate scrutiny"); *Id.* at 14 (*Heller* "also specifically ruled out the intermediate-scrutiny test that respondents and the United States now urge us to adopt"); *Id*. at 15 ("We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.").

The Court explained that "[t]he test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." Slip op. at 17. Under this test, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id*. at 15. Applying that standard, the Court held that the Second Amendment protected "carrying handguns publicly for self-defense," and that "[t]o confine the right to 'bear' arms to the home would nullify half of the Second Amendment's operative protections." *Id*. at 23, 24. The Court then rejected New York's remaining arguments, concluding that a responsible law-abiding citizen may exercise this right to carry a firearm outside the home without "demonstrating to government officers some special

---

[1] *See, e.g.*, *Woollard*, 712 F.3d at 874 ("…we have found that 'a two-part approach to Second Amendment claims seems appropriate under *Heller*…") (quoting *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

need." *Id*. at 62-63. *Bruen* thus concluded: "New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." *Id*. at 63.

Bruen is obviously controlling here. The Court has definitely rejected any "good cause" requirement for permit to carry, holding that citizens "with ordinary self-defense needs" have a constitutional right to bear arms outside the home. That decision is applicable to the "good cause" requirements imposed by any and all of the "may issue" state statutes identified by the Court, including the Maryland statute specifically cited by the Court. *Bruen,* slip op. at 5-6 n.2. There is not an *iota* of material difference between New York's "proper cause" statute and Maryland's "good and substantial reason" statute. The Supreme Court has directly overruled the lower courts' reliance on any "means-ends," intermediate scrutiny that had been used to sustain Maryland's "good and substantial reason" statute in the past. Both New York's "proper cause" statute and Maryland's "good and substantial reason" statute impermissibly accord "discretion" to licensing officials to deny a carry permit "even when the applicant satisfies the statutory criteria." *Id*. at 5; *See also id*. at 24-25 n.8 ("we conclude…that a State may not prevent law-abiding citizens from publicly carrying handguns because they have not demonstrated a special need for self-defense"); *id.,* at 30 n.9 (rejecting any permitting scheme, like Maryland's, that "require[d] the 'appraisal of facts, the exercise of judgment, and the formation of an opinion'") (citation omitted). Indeed, Westlaw is now marking the Maryland statute with a "red flag," stating it has been "Held Unconstitutional" by *Bruen*. It is that clear.

There is no dispute here that petitioner satisfied all objective requirements for the issuance of a permit. He has done any required training, submitted his fingerprints and paid the fees, all prior to submitting his application, as mandated by MD Code, Public Safety, § 5-

306(a)(5). His application was denied by MSP solely because the State Police found that he "lacks a good and substantial reason" under Section 5-306(a)(6)(ii). *See* Record on Appeal at R.33, R.70. The OAH sustained that decision only after rejecting petitioner's argument that the "good and substantial reason" requirement was unconstitutional, citing *Woollard* as particularly persuasive. *Id*. at R.28. *Woollard* and its "means-end," two-step analysis have been abrogated by *Bruen*. *Bruen*, slip op. at 10 ("Despite the popularity of this two-step approach, it is one step too many.").

The Supreme Court has now held that the Second Amendment fully extends outside the home. *See Bruen*, slip op. at 24 ("To confine the right to "bear" arms to the home would nullify half of the Second Amendment's operative protections" and "confining the right to 'bear' arms to the home would make little sense given that self-defense is 'the *central component* of the [Second Amendment] right itself.'") (quoting *Heller*, 554 U. S., at 599) (emphasis the Court's). This is precisely the guidance that the Maryland Court of Appeals has sought. *See Williams v. State* 417 Md. 479, 496, 10 A.3d 1167 (2011) ("If the Supreme Court…meant its holding [in *Heller* and *McDonald*] to extend beyond home possession, it will need to say so more plainly"). *Bruen* has now made it very "plain" that "good cause" statutes in "may issue" states, like the "good and substantial reason" statute in Maryland, are unconstitutional. That holding is, of course, controlling on this question of federal constitutional law. *See e.g.*, *State v. Madison,* 240 Md. 265, 275, 213 A.2d 880 (1965) ("Under our governmental system, the decisions of the Supreme Court must be controlling even when, as here, the decision makes invalid a long-established provision of the Maryland Constitution, previously held valid by this Court.").

Nothing more is required to decide this case. In these circumstances, summary disposition is fully appropriate. There are no material factual disputes, and no need for a remand

to further develop the record. See *Bruen*, slip op. at 25 n.8 (rejecting the dissent's view that further record development was necessary, holding that the unconstitutionality of the "proper cause" requirement "does not depend upon any of the factual questions raised by the dissent"). *See also id.* at 16-17 n.6 (noting that the application of the proper test posed "legal questions" suitable for judicial resolution). The Court should thus summarily reverse the decision of the OAH, and remand the case to the Maryland State Police with the instructions to immediately grant a carry permit to petitioner.

CONCLUSION

Pursuant to the holding of the U.S. Supreme Court in *Bruen*, this Court should summarily reverse the denial of Mr. Whalen's application by the MSP, and the decision of the OAH upholding MSP's denial, and direct the State Police to issue a permit to petitioner without further delay.

Respectfully submitted,

/s/Mark W. Pennak

Mark W. Pennak
Maryland Shall Issue, Inc.
1332 Cape St. Claire Road #342
Annapolis, MD 21409
mpennak@marylandshallissue.org
MD Atty No. 1905150005
Counsel for Petitioner

Edward Holmes Whalen

[redacted]

[redacted]

Petitioner

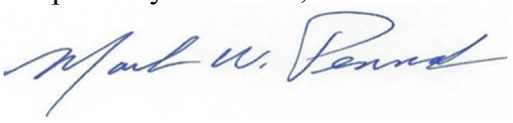
CERTIFICATE OF SERVICE

I hereby certify that, on June 29, 2022, I served a true and correct copy of the foregoing "Motion for Summary Reversal," and its attachments, upon the Office of Administrative Hearings and upon counsel for the Maryland State Police via MDEC electronic service to:

OFFICE OF ADMINISTRATIVE HEARINGS
11101 Gilroy Road
Hunt Valley, MD 21031

Mark Bowen, Esq.
DEPARTMENT OF STATE POLICE
1201 Reisterstown Road
Pikesville, MD 21208

Respectfully submitted,



Mark W. Pennak.
Maryland Shall Issue, Inc.
1332 Cape St. Claire Road #342
Annapolis, MD 21409
mpennak@marylandshallissue.org
Counsel for Petitioner