President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

January 17, 2018

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN SUPPORT OF SB 99

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 support of SB 99.

SB 99 would amend MD Code, Public Safety, § 5-306(b)(6)(ii) to specify that "self-protection," or "self-defense" is a basis for finding a "good and substantial" reason for the issuance of a Maryland Wear and Carry Permit. The bill leaves unaltered the rest of Section 5-306, including leaving unchanged the rigorous training requirements of 16 hours of instruction that includes a live fire component that "demonstrates the applicant's proficiency and use of the firearm." Also unchanged is the requirement that the State Police conduct a background investigation using the applicant's fingerprints, and the requirement that the State Police find that the applicant "has not exhibited a propensity for violence or instability that may reasonably render the person's possession of a handgun a danger to the person or to another," found at § 5-306(b)(6)(ii).

Stated briefly, there are two powerful reasons to enact this bill into law. First, Section 5-306, as administered by the State Police, is unconstitutional without these amendments. Second, without this amendment, the Maryland requirement of a "good and substantial reason" will be effectively moot when the Concealed Carry Reciprocity Act of 2017 -- which already has passed the House of Representatives as H.R. 38 -- is enacted into law by Congress later this year.

The Constitutional Issue: 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. The rights guaranteed by the Second Amendment are fundamental and are, therefore, applicable to the States by incorporation under the Due Process Clause of the 14th Amendment. See *McDonald v. City of Chicago*, 561 U.S. 742, 768

(2010) ("[C]itizens must be permitted to use handguns for the core lawful purpose of self-defense."). In striking down a law burdening that core right, the Supreme Court recognized "the handgun to be the quintessential self-defense weapon." *Heller*, 554 U.S. at 629. The Seventh Circuit has thus held that the Second Amendment applies with full force outside the home. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2013). As Judge Posner explained, "the Supreme Court has decided that the amendment confers a right to bear arms for self-defense, inside." Id. at 942. Accordingly, "[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. at 937.

Most recently, the United States Court of Appeals for the District of Columbia Circuit applied these principles to strike down the "good reason" requirement for a carry permit imposed by D.C. 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*' (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." (at 665). The court thus concluded that the "good reason" requirement was categorically invalid without undertaking any level of scrutiny because "no tiers-of-scrutiny analysis could deliver the good-reason law a clean bill of constitutional health." (Id. at 666). The District of Columbia sought rehearing en banc from the full D.C. Circuit, but that petition was denied without a dissent on September 28, 2017. Fearing a loss at the Supreme Court, the D.C. Government decided not to file a petition for a writ of certiorari with the Court. https://www.washingtonpost.com/local/dc-politics/dc-will-not-appeal-gun-law-to-supreme-court/2017/10/05/e0e7c054-a9d0-11e7-850e-2bdd1236be5d_story.html?utm_term=.58d5067ad089. As a result, D.C. is now a "shall-issue" jurisdiction.

As Section 5-306 is currently administered by the Maryland State Police, the constitutional right "to carry arms for self-defense in public" is effectively denied in Maryland. Specifically, the "good reason" requirement struck down in *Wrenn* is indistinguishable from the "good and substantial reason" requirement imposed by Section 5-306 of Maryland law. The Maryland requirement is just as unconstitutional as the "good reason" requirement invalidated in *Wrenn*. In this regard, the Fourth Circuit's older ruling in *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), *cert. denied* 134 S.Ct. 422 (2013), does not support the manner in which the State Police have continued to implement Section 5-306. First, the *Woollard* decision decision readily assumed (712 F.3d at 876) that the Second Amendment applied outside the home and stated that that "the good-and-substantial-reason requirement ensures that those persons in palpable need of self-protection can arm

themselves in public places where Maryland's various permit exceptions do not apply." (712 F.3d at 880). Yet, the State Police have adamantly refused to recognize the Fourth Circuit's "palpable need" test in its administration of the "good and substantial" reason requirement, and instead have continued the same restrictive policies that were in place before *Heller*, *McDonald* and *Woollard* were decided. Indeed, the State Police have insisted on relying on old State case-law (dating back to before the Supreme Court's decision in *McDonald*) which had held that the Second Amendment does not even apply to the States. *McDonald* expressly overruled all that old precedent, but the State Police simply pay no heed. It is fundamentally arbitrary for the State Police to refuse to apply and give meaning to the *Woollard* court's construction of Maryland law as recognizing that a person with a "palpable need" to carry would satisfy the good and substantial reason requirement. SB 99 would correct these unlawful actions of the State Police.

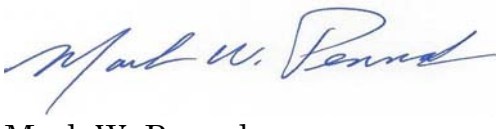
In any event, the *Woollard* holding sustaining the "good and substantial reason" requirement is in conflict with *Wrenn*'s holding that a "good reason" requirement is unconstitutional. There is thus a clear conflict in the circuits between *Wrenn* and *Woollard* with respect to the constitutionality of a "good reason" requirement. It is hornbook law that such a conflict on an important issue of constitutional law will almost certainly lead to Supreme Court review. The District of Columbia's dodge of Supreme Court review notwithstanding, it is only a matter of time before that conflict is presented to the Supreme Court for resolution. For the reasons well stated by the *Wrenn* court, we believe that the "good and substantial reason" requirement will not survive an appeal to the Supreme Court. Apparently, that view was shared not only by D.C., but also by the Maryland Attorney General, who lobbied hard to persuade D.C. to forego Supreme Court review. https://www.washingtonpost.com/local/dc-politics/dc-weighs-gun-law-appeal-while-fate-of-the-whole-country-hangs-in-balance/2017/10/03/8b1bb338-a859-11e7-850e-2bdd1236be5d_story.html?utm_term=.804d119e3790 Should Maryland lose in such litigation, the attorneys' fees award against Maryland under 42 U.S.C. 1988, could prove quite expensive.

National Reciprocity: As noted, H.R. 38, the Concealed Carry Reciprocity Act of 2017, has passed the House of Representatives and is now in the Senate. https://www.congress.gov/bill/115th-congress/house-bill/38?q=%7B%22search%22%3A%5B%22concealed+carry+reciprocity+act%22%5D%7D. First, the bill creates a new section in the United States Code (18 U.S.C. 926D) to provide that a not otherwise disqualified person "who has been issued pursuant to the law of a State" and who is carrying a valid State-issued form of photo identification, "may possess and carry a concealed handgun" in any State that otherwise issues concealed carry permits to its residents. Furthermore, this federal protection is also extended to persons who are "entitled to carry a concealed firearm in the State in which the person resides," thereby including residents of "Constitutional Carry" states to the extent that state law permits such persons to carry concealed without a permit. All State laws in conflict with the concealed carry permitted by the bill are preempted by this bill. These preemption provisions thus bar State-imposed restrictions, including time, place and manner restrictions not otherwise permitted by the bill.

Second, the bill creates real procedural protections against arbitrary arrest or detention of persons who carry in the manner permitted by the bill, expressly providing that such persons "may not be arrested or otherwise detained" for any violation of State or local law that would otherwise make illegal the concealed carry permitted by the bill. Indeed, the bill provides that presentation of the carry permit and the State-issued identification specified in the bill is "prima facie evidence" that the carry is protected by the bill and specifies further that, in such cases, the prosecution bears the burden of proof to show, "beyond a reasonable doubt," that the carry at issue was not protected by the bill. The bill further provides that if the person is prosecuted for carrying in a manner protected by the bill and prevails, then that person is entitled to attorneys' fees incurred because of that prosecution. Finally, the bill creates a new legal cause of action, providing that a person who deprived of any right afforded by the bill may bring suit against the state or locality or person causing that deprivation, including a right to recover money damages and attorneys' fees. These procedural and cause of action provisions put real teeth into the substantive and preemption protections built into the bill.

Once it passes the Senate and is signed into law this year, H.R. 38 will make Maryland's restrictions on its wear and carry permit effectively a dead letter. Every state in the Union issues carry permits to its residents for lawful purposes. Forty-one states and the District of Columbia are "shall issue" jurisdictions. Currently thirteen other states have Constitutional Carry -- Alaska, Arizona, Arkansas, Idaho, Kansas, Maine, Mississippi, Missouri, New Hampshire, North Dakota, Vermont, West Virginia, and Wyoming. Under H.R. 38, every permit holder from another state and every law-abiding resident from the Constitutional Carry states will have a powerfully protected federal right to carry a concealed weapon in Maryland **without** obtaining a Maryland permit. Indeed, because H.R. 38 provides that a person need only carry a permit issued by "a State," Maryland residents with **non-resident** permits issued by other states will likewise be entitled to carry in Maryland **without** obtaining a Maryland permit. Such non-resident permits are relatively easy to obtain from numerous states, including nearby Virginia. Under these circumstances, it would be obviously senseless for Maryland to maintain its restrictive permit policies. The State should become "shall issue." That way, Maryland could be in a position to encourage Maryland residents seeking to carry to apply for the Maryland permit and thus undergo the training and background checks required by other parts of Section 5-306. SB 99 is an essential first step in that process. For all these reasons, we urge a favorable report.

Sincerely,



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