



February 22, 2018

**WRITTEN TESTIMONY OF MARK W. PENNAK,  
PRESIDENT, MARYLAND SHALL ISSUE, IN  
OPPOSITION TO SB 741 AND HB 819**

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 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. I appear today as President of MSI in **OPPOSITION** to SB 741 and HB 819.

These bills would repeal MD Code Public Safety § 5-302 and thus eliminate the Handgun Permit Review Board established by that section. Under that Section, the Board consists of five persons appointed by the Governor. The bills would also amend 5-312 of the Public Safety Article to provide appeals from decisions concerning a handgun carry permit would be only to the Office of Administrative Hearings, an administrative body who employs administrative law judges to conduct trial-type hearings in disputes over agency decisions.

As detailed below, these bills are little short of outrageous. But, let’s first put the bills in perspective with actual numbers. Between June of 2015 and end of December of 2017, there were only 207 cases actually decided by the Board and that number includes 5 continuations and 17 instances in which the State Police decided to issue a permit based on new evidence submitted to the Board. Such new evidence is expressly permitted by MD Code, Public Safety, § 5-312(c). This number of cases is minuscule. By way of contrast, 12% of the 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, 41 states are “shall-issue” and only 8 states, including Maryland, are “may-issue.” <http://www.handgunlaw.us/> “May-issue” is obviously the outlier.

It is widely acknowledged that permit holders everywhere are extremely law-abiding, with crime rates vastly smaller than that of police officers. See Concealed

Carry Permit Holders Across the United States: 2017 (July 18, 2017) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3004915](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004915). In light of that reality, the public safety is not put at risk in the slightest by carry permits. Indeed, Board that has been existence since 1972, when it was created as part of gun control legislation that sharply limited the issuance of carry permits to persons having a “good and substantial reason” for such a permit. Chapter 13, Laws of Maryland 1972, <http://aomol.msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000708/html/am708--50.html> The Board is thus an integral part of that gun control legislation. After more than 45 years of existence, it should not be lightly abolished on a politicized whim.

In this regard, abolishing the Board would do nothing to alleviate the risk borne by law-abiding citizens of Maryland. 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-AAsxw1#image=23> Yet, Maryland’s “may-issue,” “good and substantial reason” permit law leaves law-abiding citizens defenseless as ordinary citizens are disqualified from applying and receiving a permit for their own self-defense. That “good reason” requirement, as embodied in the law of the District of Columbia, was recently struck down as unconstitutional in *Wrenn v. District of Columbia*, 846 F.3d 650 (D.C. Cir. 2017), and DC elected not to seek Supreme Court review out of fear of losing. See [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=.05d5f5f9b0af](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=.05d5f5f9b0af) Maryland’s “good and substantial reason” requirement will likely meet a similar fate in due time when the issue is decided by the Supreme Court. In the meantime, it is beyond self-evident that criminals do not apply for carry permits in Maryland. If they did, they would be quickly rejected as disqualified in the extremely comprehensive background check conducted by the State Police under MD Code, Public Safety, § 5-306.

The rest of the allegations made against the Board are equally baseless. The allegation that the Board does not explain its decisions is false. In each contested case, the Board issues a letter containing findings of fact and conclusions of law fully explaining its decision. The suggestion that the Board conducts its hearings in secret is false. The Board conducts its hearings in open session, unless the applicant requests and justifies (cases typically involving highly sensitive employment cases) a closed session. In every closed session, the State Police representatives are present as well as a representative of the Attorney General’s Office. Closed hearings are thus limited to those cases that falling within the exceptions set forth in Maryland’s open meeting law. MD Code, General Provisions, § 3-305(b). The statement that Board are “radical” gun advocates is false. The Board’s membership includes an experienced lawyer, a senior detective with the Montgomery County Police, a chairman who is a military veteran, a former professional firefighter and emergency medical technician, a member who is a MSP certified handgun instructor, and a female member who has never even

owned a gun. These members are not beholden to any gun organization. These individuals give freely of their valuable time with minimal compensation. They deserve our respect and gratitude for their willingness to serve, not baseless, politically motivated attacks on their personal integrity. Politics of personal destruction should have no place in Maryland. See <https://www.youtube.com/watch?v=CpFoeTC4RyY&feature=youtu.be> for a response of Board Member Shari Judah to the remarks of Senator Madeleno.

It gets worse. Of those 207 cases mentioned above, the Board and the Maryland State Police **acted in total agreement in 85 cases**, so the number of reversals at issue is only 122, **over a 2 year time period**. Tellingly, of those 122 cases, the State Police, after consulting with a representative of the Attorney General's Office, elected to appeal in **NONE**. That's right, the Attorney General **has not appealed a single case**. The State Police have the absolute right to appeal a Board decision to circuit court and are accorded a full 30 days in which to do so. During this time most decisions of the Board **have been reviewed by a salaried attorney of the Attorney General's Office** before the decision is actually issued. The suggestion that the Board has been acting contrary to law is thus patently false. If the Attorney General or the State Police truly thought that the Board was acting contrary to law, the State Police would have appealed the Board's decisions. The undersigned has personally urged the State Police to take appeals from Board decisions in order to obtain judicial resolution of contested legal issues. They have refused to do so.

And it gets still worse. In 68 of the 122 cases (more than half), the MSP **had already issued** a permit and the only issue before the Board was the reasonableness **of the restrictions** placed on those permits by the MSP. Such restrictions are wholly discretionary under the law – the State Police are legally free to issue all permits without any restrictions under MD Code Public Safety § 5-307, and thus could do so tomorrow. Nothing in these bills would change that. Of those 68 restrictions cases, the Board reversed the restrictions in 54 cases, principally because the restrictions failed to account for the applicant's status as a MSP certified firearms instructor (these are persons who have a compelling need to carry handguns) or where the applicant was at higher risk of attack due to the sensitive nature of his or her employment. These restrictions cases raise important constitutional issues under the Due Process Clause, the Fourth Amendment and the Fifth Amendment. Stated simply, restrictions place the permit holder (and, potentially, the law enforcement officer) in great legal peril. See Attached Testimony of Mark W. Pennak, Feb. 21, 2017. The State Police and the Attorney General's Office have been made aware of these issues since February of 2017, and yet neither the State Police nor the Attorney's General Office has responded or rebutted the legal reality outlined in expert legal testimony to the Board.

More than once, innocent permit holders have been detained for hours and even falsely 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> <sup>1</sup>

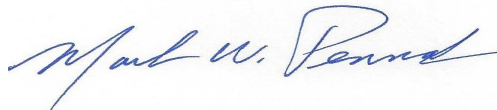
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<sup>1</sup> For a video of the entire 25 minute Board meeting in this case, see [https://www.youtube.com/watch?v=ilDn5-xZy\\_A](https://www.youtube.com/watch?v=ilDn5-xZy_A)

A. Dwight Pettit, a justifiably renowned Baltimore civil rights attorney, has quite rightly noted that these restrictions are discriminatory in impact and racist in enforcement. See <https://youtu.be/iYc00BH9DwA?t=718> These legal issues arise because in 2013 the General Assembly decided to criminalize carrying outside restrictions, a matter that previously was addressed administratively through revocation. Since carrying outside restrictions is now a serious crime, punishable with three years in prison under MD Criminal Law § 4-203, it is not surprising that the Board is hearing many more such cases than in years past. By making carrying outside restrictions a crime, the General Assembly created these constitutional issues. It should not blame the Board for being forced to confront the legal fallout created by that legislation.

Finally, the Board is accessible to citizens who cannot afford a lawyer. Such access is simply not reasonably possible if hearings are relegated to administrative law judges who conduct trial-type hearings under rules and procedures that are well beyond the ability of lay persons to understand or follow. These bills thus would unjustly impact the ability of ordinary citizens to seek justice from arbitrary State Police action by limiting the right of appeal to the well-off and well-connected. That's shameful. The Board has admirably corrected arbitrary agency actions and that should be applauded, not condemned.

Sincerely,



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