President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

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WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MARYLAND SHALL ISSUE, IN IN SUPPORT OF HB 1538

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 **SUPPORT** of HB 1538

This bill would repeal MD Code Public Safety § 5-307(b), and thus eliminate the existing power of the State Police to "limit the geographic area, circumstances, or times of the 17 day, week, month, or year in which a [handgun carry] permit is effective." This bill is badly needed as the changes made in 2013 to MD Code Criminal Law § 4-203, that criminalize the carrying of a handgun outside of the restrictions permitted by Section 5-307(b) have made restrictions legally and practically unworkable. As a result, perfectly innocent, law-abiding permit holder have been subjected to wholly unjustified arrests and detentions on false charges of carrying outside restrictions. The continued use of restrictions, as implemented and enforced by the State Police, needlessly violates a permit holder's constitutional rights and invites civil rights actions against the police. To our knowledge, no other jurisdiction imposes such restrictions on permit holders. There is no reason to do so in Maryland.

Stated simply, the use of restrictions, especially, the State Police's implementation of restrictions, have become wholly untenable. The State Police add restrictions on most permits it issues. The wording of the restrictions are based on the "good and substantial reason" proffered by the applicant under MD Code, Public Safety, § 5-306(b)(6)(ii) and are often quite vague. For example, the standard restrictions applicable to business owners or employees read: "Valid only while conducting business as owner of _____ (MD ONLY) (Not VALID where firearms are prohibited.) OR Valid only while conducting business as employee/position of _____." See Part G. of State Police SOP 29-15-007. Prior to 2013, carrying a handgun outside permit restrictions was treated as an administrative violation that would typically lead to revocation of the permit, but no other sanction. While

prosecutions were attempted in a few of such cases, the Maryland courts refused to treat such restrictions violations as criminal, resulting in dismissals in those cases. However, as amended in 2013, MD Code, Criminal Law, § 4-203(b)(2), now makes it a serious criminal offense to carry a handgun outside the restrictions set forth on the permit. Under Section 4-203(c), on a first offense "the person is subject to imprisonment for not less than 30 days and not exceeding 3 years or a fine of not less than $250 and not exceeding $2,500 or both." (Emphasis added). Under federal law, 18 U.S.C. § 922(g), and 18 U.S.C. § 921(a)(20), any conviction under Section 4-203 would result in a lifetime federal firearms disability. Subsequent possession of a modern firearm or ammunition by a person subject to this firearms disability is a violation of 18 U.S.C. § 922(g), which is punishable by up to 10 years imprisonment under federal law. See 18 U.S.C. § 924(a)(2). A similar disability and jail time is imposed under Maryland law. See MD Code, Public Safety, § 5-101(g)(3), § 5-133(b)(1), § 5-205(b)(1).

Vague restrictions do not provide guidance to either the permit holder or, even more importantly, to a potential arresting officer. For example, a person may believe that he is conducting his business in running an errand to a store at 11:00pm, but this will be far from obvious to a law enforcement officer. Variations in these sorts of factual scenarios are virtually endless and are inherent in the State Police's use of restrictions. The State Police have apparently responded to this problem by arguing to the Handgun Permit Review Board (in challenges to restrictions) and repeatedly informing permit holders that the permit holder need "only" explain to the officer how the possession of a handgun is in compliance with any restriction appearing on the permit. That also may be the advice that the State Police Gun Center is giving to local law enforcement as part of its "screening/vetting" function of "every gun case."
http://mdsp.maryland.gov/organization/pages/criminalinvestigationbureau/criminalenforcementdivision.aspx

Yet, vague restrictions are inherently unconstitutional. In *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015), the Supreme Court stated that "[o]ur cases establish that the Government violates [the due process] guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." That principle has particular application to the State Police Policy that a permit holder must justify to an officer how his or her possession of a handgun falls within the scope of the restrictions. If the permit holder fails in his or her explanation, or declines to cooperate by refusing to articulate a justification, or simply stands mute, the implication is unavoidable that the permit holder will be arrested and prosecuted under Section 4-203. Vague permit restrictions invite "arbitrary enforcement" under *Johnson*.

Moreover, requiring a person to justify possession under the restrictions shifts the burden of going forward onto the permit holder. That shift of burden is a violation of the Due Process Clause of the 14th Amendment. As explained in *Conley v. United States*, 79 A.3d 270, 280 (2013), "[t]he defendant . . . may not be required to 'prove the critical fact in dispute,'" and "the burden of persuasion may not be shifted to the defendant with respect to a defense that serves only to negate an element of the

offense that the government is required to prove." An essential element of the crime set forth in Section 4-203(b)(2) is that the permit holder is not "in compliance with any limitations imposed under § 5-307 of the Public Safety Article." The State must prove that element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). It may not shift that burden of persuasion to the permit holder, either in court or out in the field. *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975); *Humanik v. Beyer*, 871 F.2d 432, 440 (3d Cir. 1989). Yet, shifting the burden is precisely what the State Police's policy does. That is a violation of the Due Process Clause.

Fundamentally, the State Police articulation policy also effectively requires the permit holder to testify against himself or face arrest. Yet, such implicitly coerced testimony violates the permit holder's right to affirmatively claim his or her Fifth Amendment right to remain silent. See *Salinas v. Texas*, 133 S.Ct. 2174 (2013). Any assertion of that right may not be used against a person or provide a basis for an arrest. *United States v. Okatan*, 728 F.3d 111,118 (2d Cir. 2013) (holding, post *Salinas*, that the prosecution "may not" use "a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview"); *United States v. Moore*, 104 F.3d 377, 389 (D.C. 1997) ("the law is plain that the prosecution cannot, consistent with the Constitution, use a defendant's silence against him as evidence of his guilt"). The law is also crystal clear that a "'refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure'" under the Fourth Amendment. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000), quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991). A person has a "right to go about his business or to stay put and remain silent in the face of police questioning." *Wardlow,* 528 U.S. at 125.

Simple possession of a carry permit cannot be viewed as a constitutionally sufficient basis for a reasonable suspicion of a crime so as to justify continued detention or questioning. The State may not use the permit as a basis for compelling a permit holder to answer questions. As stated recently in *White v. Woodall*, 134 S.Ct. 1697, 1703 (2014), "'[t]he Government retains' . . . 'the burden of proving facts relevant to the crime . . . and cannot enlist the defendant in this process at the expense of the self-incrimination privilege.'" (Quoting *Mitchell v. United States*, 526 U.S. 314, 330 (1999)). See also *United States v. Flowers*, 912 F.2d 707, 712 (4th Cir. 1990) (noting that a defendant has "the right to refuse to speak with . . . officers, who in turn possess no right to detain citizens who decline to talk or otherwise identify themselves"). It is clearly established law that an officer may not detain the permit holder any longer than necessary to carry out the original, otherwise lawful, purpose for which the permit holder was stopped. See *Rodriguez v. United States*, 135 S.Ct. 1609 (2015).

Even if the permit holder elects to cooperate with an officer's questions concerning the restrictions, there is no assurance that the officer will (a) find the articulation sufficient or (b) actually believe the explanation. Yet, any statements made by the permit holder during such cooperation may be used against him. Since the police only give *Miranda* warnings after an arrest or taking a person into custody, the police will feel free to pursue this line of questions until then. A traffic stop or a *Terry* stop is not considered "custodial." *Rodriguez*, 135 S.Ct. at 1614; *Maryland v. Shatzer*, 559 U.S. 98 (2010). Any statement made during any such encounter is

admissible. *United States v. Fish*, 432 F.d 107 (4th Cir. 1970). In sum, the State Police's articulation policy places the permit holder in an impossibly perilous legal position.

This risk is not theoretical. More than once, innocent permit holders have been detained for hours on the side of the road and even falsely arrested because of these restrictions. For an actual video of sworn testimony before the Handgun Permit Review Board of one such case, see https://youtu.be/T3UH3Zrxt9g It is a horror story for a law-abiding permit holder. The risk of racial discrimination in such arbitrary enforcement is also apparent. As A. Dwight Pettit, a renowned Baltimore civil rights attorney, has quite rightly noted, these restrictions have proved discriminatory in impact and racist in enforcement. See https://youtu.be/iYc00BH9DwA?t=718

The State Police articulation policy also places the officer at substantial legal risk of suit against him or her personally under 42 U.S.C. § 1983, if the officer makes an arrest merely for lack of cooperation rather than for probable cause. In making arrests, officers may feel entitled to rely on the State Police policy as providing a basis for an arrest for a failure to cooperate. Yet, because possession of a permit is not probable cause of a crime and because the law is "clearly established" by controlling Supreme Court precedent that non-cooperation does not provide probable cause for an arrest or detention, the arresting officer would not be entitled to qualified immunity in any resulting Section 1983 suit. See, e.g., *McDaniel v. Arnold*, 898 F.Supp.2d 809 (D. Md. 2012); *Lane v. District of Columbia*, --- F.Supp.3d ----2016 WL 5929949 (D.D.C. 2016). Such personal liability would also extend to State Police officials who adopted or espoused such a policy, even though such a policy may be entirely informal. See, e.g., *Hafer v. Melo,* 502 U.S. 21(1991). The General Assembly should solve the problem by enacting this bill into law. We urge a favorable report.

Sincerely,

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