President
Mark W. Pennak

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March 6, 2018

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

This bill 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 bill 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, the bill is little short of outrageous. But, let's first put the bill 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. 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-AAsxtw1#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 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 members 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. The State Police 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 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 [1] 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

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

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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Written Testimony of Mark W. Pennak, President, Maryland Shall Issue

Before the Maryland Handgun Permit Review Board

February 21, 2017

Introduction and Summary of Conclusion

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 Civil Division, Appellate Staff of the United States Department of Justice after nearly 34 years of service. While at the Department of Justice, I practiced law almost exclusively in the Courts of Appeals of the United States and in the Supreme Court of the United States, with approximately 100 oral arguments in cases spread over every federal court of appeals in the United States. I am also a member of the Supreme Court Bar and have assisted the United States Office of the Solicitor General in the preparation of numerous briefs filed in the Supreme Court.

In many of these cases, I represented individual federal employees and federal law enforcement officers in tort and constitutional litigation arising out of the performance of their duties. I am also an expert in federal and Maryland firearms law and the law of self-defense and in constitutional issues arising under the Fourth Amendment (barring unreasonable search and seizure), the Fifth Amendment (preserving the right against self-incrimination) and the Sixth Amendment (preserving the right to legal counsel in criminal proceedings). I am 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 Range Safety Officer and a NRA certified instructor in rifle, pistol and personal protection in the home.

For the reasons set forth below, the current State Police practice of issuing carry permits with restrictions is legally and practicably untenable as enforced and implemented by the State Police. In my opinion, the Handgun Permit Review Board has a responsibility and an obligation to set aside **any** arguably vague restriction placed on a wear and carry permit. In addition, the State Police should reexamine their restrictions policies and consider exercising their statutory discretion so as to decline to issue permits with restrictions. Significantly, no state in the surrounding area, including the District of Columbia, actually imposes these types of restrictions on its carry permits. Indeed, the DC Code authorizes restrictions, DC ST § 22-4506(a), but the DC Chief of Police does not impose any restrictions. The State Police are free to do the same under Maryland law and should do so as a matter of policy.

Statutory Scheme

State Police have a permissive authority to impose restrictions on wear and carry permits under MD Code, Public Safety, § 5-307(b), which provides that "[t]he Secretary **may** limit the geographic area, circumstances, or times of the day, week, month, or year in which a permit is effective." As emphasized, this is a permissive statute. It is entirely up to the discretion of the State Police whether to issue restrictions and how to specify the scope of any restrictions thus imposed. However, as discussed below, that discretion must be exercised with sound judgment and is always subject to the limits imposed by law or the Constitution. As far as I am aware, no state actually imposes elaborate restrictions on carry permits, not even the District of Columbia, New York State or New Jersey.

In implementing Section 5-307, the State Police have adopted SOP 29-15-007 (attached) under which 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 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 is imposed under Maryland law. See MD Code, Public Safety, § 5-101(g)(3), § 5-133(b)(1), § 5-205(b)(1).

The State Police "Articulation" Policy

Stated simply, 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 this Board (in challenges to restrictions) 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.

Due Process Considerations

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 thus invite "arbitrary enforcement" under *Johnson*, including arrests.

Moreover, requiring a person to justify possession under the restrictions shifts the burden of persuasion onto the permit holder. That shift of burden is a violation of the Due Process Clause of the 14th Amendment. In *Conley v. United States*, 79 A.3d 270, 280 (2013), the D.C. Court of Appeals held that "[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 blatant violation of the Due Process Clause.

Fourth Amendment and Fifth Amendment Considerations

The street reality is that a refusal to cooperate by a permit holder with an officer's questions will almost surely result in an arrest of a permit holder under the State Police's policy. An arresting officer will feel entitled by that Policy to demand that the permit holder justify possession and will likewise feel entitled to make an arrest if the permit holder declines to cooperate. Non-cooperation may even cause the officer to pull his own weapon if the officer (who knows that the permit holder is armed) feels challenged or threatened. At that point, the risk of a tragedy is apparent. See http://www.twincities.com/2016/07/07/questions-raised-previously-about-st-anthony-police-encounters-with-permit-to-carry-holders.

Accordingly, the State Police articulation policy effectively requires the permit holder to testify against himself so as to avoid 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). That constitutional right may be claimed even in a noncustodial situation (*id*.) and 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. A carry permit is not probable cause of a crime. Indeed, a permit is actually a basis for concluding that possession of a handgun is lawful, as state law expressly allows a permit holder to possess, wear and carry a handgun. See MD Code, Criminal Law, § 4-203(b)(2). The State may also not use the permit as a basis for compelling a permit holder to answer questions. As stated recently by the Supreme Court 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"). More specifically, if the permit is presented in connection with an otherwise lawful traffic stop, an officer may have the discretion, under a recent Fourth Circuit ruling, to conduct a protective "frisk" for his safety, *United States v. Robinson*, 846 F.3d 694 (4th Cir. 2017) (en banc), but 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 have to 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 and may even be risky to the permit holder's physical safety.

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, the arresting officer would not be entitled to qualified immunity in any resulting Section 1983 suit challenging that arrest. 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 liability could 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). It is in the State Police's own best interest to rethink restrictions on permits.