



March 12, 2020

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO SB 1050

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 Maryland and 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, personal protection in the home, personal protection outside the home and in muzzle loader. I appear today as President of MSI in OPPOSITION to SB1050.

This Bill:

This bill proposes an amendment to MD Code Public Safety § 5-146 to criminalize and increase the penalties for a failure to report a lost or stolen regulated firearm. Under current law, the owner of a regulated firearm has 72 hours to report the lost or theft of the firearm to a local law enforcement agency. A knowingly and willful failure to do so is punishable, on the first offense, as a civil offense with a fine not exceeding \$500.00. On the second or subsequent offense, the failure is punishable as a criminal misdemeanor with imprisonment of 90 days and a fine not exceeding \$500.00.

This bill would abolish the civil penalty for the first offense and make a failure to report on the first offense a criminal misdemeanor punishable by up to 6 months in jail and a \$1,000 fine. Second and subsequent violations are also criminal and punishable by imprisonment not exceeding 1 year and a fine of \$2,000.

The Bill Criminalizes the Victim And Is Extreme In The Penalties Imposed

This bill is apparently motivated by a desire to prevent gun diversions and straw purchases by punishing a theft victim for a failure to report a lost or stolen regulated firearm. Those motivations are misguided. A Rand Corporation study published in 2018 found that there is no evidence or study that actually supports any reporting requirement. <https://www.rand.org/research/gun-policy/analysis/lost-or-stolen-firearms.html>. That Study is attached to this testimony. Specifically, the Study found that “[w]e found no qualifying studies showing that lost or stolen firearm reporting requirements increased any of the eight outcomes we investigated.” (Id. at 1). Indeed, the Study further states that “[w]e found no qualifying studies showing inconclusive evidence about lost or stolen firearm reporting

requirements.” (Id.). In short, the supposed benefits of such reporting requirements are speculative at best.

In contrast, criminalizing the victim is sure to have unintended consequences. First, because this bill makes the failure to report a criminal violation with jail time, instead of a civil violation, the theft victim may well be **less likely** to report a lost or stolen firearm. Section 5-146 provides that the owner must report the loss “within 72 hours after the owner first discovers the loss or theft.” Under this bill, a criminal investigation will likely be conducted into when the owner “first discovered” the loss. In all cases, the question of when the loss was “discovered” creates a question of fact for the trier of fact, thus exposing the owner to the risk of criminal prosecution.

Because a failure to report would become criminal, any rational owner will be loath to expose himself or herself to any such criminal investigation or questioning by the police for fear that his responses to such questioning might be incriminating. Indeed, for the same reasons, any competent legal counsel would advise such an owner to invoke his or her Fifth Amendment right to silence and the Sixth Amendment right to counsel and thus refuse full cooperation with the police. Thus, even if the stolen firearm is discovered at a crime scene and traced to the original owner, such owner would be legally ill-advised to submit to police questioning because of the criminal penalties imposed by this bill. That result would frustrate any investigation into the loss or theft as well as any crime that may have been committed with the stolen firearm. That consequence is, of course, exactly the opposite of the desired result.

Second, criminalizing a failure to report with steep fines and jail time is extreme. Only a small minority of states require an owner even to report lost or stolen firearms. California, for example, simply requires a report within **5 days** and does not impose any civil or criminal consequences for any failure. California Penal Code §25250. Connecticut punishes a failure to report, as a first offense, with a fine of \$90.00. CT Gen Stat § 53-202g. The District of Columbia imposes a civil fine of \$100 for any failure to report and does not impose any jail time, even for subsequent offenses. D.C. Code § 7–2502.08. Similarly, New Jersey law imposes only civil penalties for first or subsequent offenses. N.J. Stat. Ann. § 2C:58-19. Our neighbor, Delaware, punishes a first offense as a “civil penalty” with a fine of not less than \$75 and not more than \$100. Del. Code tit. 11, § 1461. Michigan requires a stolen firearm to be reported in **5 days** and punishes any failure as a “civil violation” with a fine of no more than \$500. Mich. Comp. Laws § 28.430.

Even the very few States that do impose criminal penalties for a failure to report do not, as a rule, impose the draconian penalties imposed by this bill on the first offense. Ohio, for example, punishes a failure to report within **7 days** as a fourth degree misdemeanor which is punishable with a maximum jail sentence of 30 days and a fine not to exceed \$250. Ohio Rev. Code Ann. § 2923.20(A)(5). Massachusetts does not impose jail time until the third offense and even that penalty is applicable only to sellers and or a person who has been issued a license to carry a pistol or revolver. Mass. Gen. Laws ch. 140, § 129C. In Illinois, a failure to report is a “petty offense” which is punishable by a fine between \$1 and \$1,000. 720 Ill. Comp. Stat. 5/24-4.1. Rhode Island punishes a failure to report with a “fine of not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100).” R.I. Gen. Laws § 11-47-48.1. This bill, with its heavy fine and jail time for the first offense, would plainly make Maryland an outlier jurisdiction.

Third, punishing an owner for failing to report is, itself, perverse. The owner may be unaware of any such reporting requirement, but may, under this bill, nonetheless be exposed to a criminal investigation **just for being a victim of a theft**. While the *mens rea* requirement could help the owner avoid a conviction by requiring a knowing and willful failure to report, the owner would still face the possibility of being a suspect in a potential crime when he or she has already been victimized by the theft. Such an investigation would simply add to the trauma that the victim has already experienced. It could well require the **victim** to hire legal counsel at considerable expense. That is simply no way to treat otherwise innocent crime victims. If the “victim” is truly a bad actor, then remedies are already available under existing law, not changed by this bill. See MD Code Public Safety § 5-146(e) (“The imposition of a civil or criminal penalty under this section does not preclude the pursuit of any other civil remedy or criminal prosecution authorized by law.”). There is no reason to pile on potential criminal liability that could work to ensnare the innocent person. That is especially so given that the supposed benefits associated with mandatory reporting requirements are so speculative, as the Rand study points out. In short, this bill is both bad policy and over-criminalization. We see no need or reason to alter Maryland’s existing law. We urge an unfavorable report.

Sincerely,

A handwritten signature in blue ink that reads "Mark W. Pennak". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Mark W. Pennak
President, Maryland Shall Issue, Inc.
mpennak@marylandshallissue.org



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The Effects of Lost or Stolen Firearm Reporting Requirements

March 2, 2018

Laws requiring gun owners to report lost or stolen firearms are intended to help prevent gun trafficking and straw purchases (in which a lawful buyer makes the purchase on the behalf of a prohibited buyer) and to help ensure that prohibited possessors are disarmed. Data collected from Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) trafficking investigations covering 1999 to 2002 showed that 6.6 percent (7,758 of 117,138) of diverted firearms were stolen from a residence or vehicle (Braga et al., 2012).

How Lost or Stolen Firearms Reporting Requirements Affect Gun Use Outcomes

MAY INCREASE

We found no qualifying studies showing that lost or stolen firearm reporting requirements increased any of the [eight outcomes we investigated](#).

MAY DECREASE

We found no qualifying studies showing that lost or stolen firearm reporting requirements decreased any of the [eight outcomes we investigated](#).

INCONCLUSIVE EVIDENCE

We found no qualifying studies showing inconclusive evidence about lost or stolen firearm reporting requirements.

NO STUDIES MET OUR CRITERIA

Defensive Gun Use

Gun Industry Outcomes

Hunting and Recreation

Officer-Involved Shootings

Mass Shootings

Suicide

Unintentional Injuries and Deaths

Violent Crime

Federal law requires licensed firearm dealers to report lost or stolen guns to local authorities or the U.S. Attorney General within 48 hours (18 U.S.C. 923). There is no federal law requiring individuals to report lost or stolen firearms.

In 2015, federally licensed firearm dealers reported 14,800 firearms as lost or stolen (ATF, 2016a). Quantifying the number of firearms lost or stolen from private citizens is more challenging, but based on data from ATF, 173,675 firearms were reported lost or stolen from non-federal firearm licensee entities and private citizens in 2012 (ATF, 2013). Using an alternative data source, another study estimated that about 233,000 guns were stolen annually during household property crimes between 2005 and 2010, and about four out of five firearms stolen were not recovered (Langton, 2012). Data from police departments in 14 American cities suggest that the number of guns reported lost or stolen in 2014 varies from 17 in San Francisco to 364 in Las Vegas (Everytown for Gun Safety Support Fund, 2016). A recent national survey (Hemenway, Azrael, and Miller, 2017) estimates that 2.4 percent of American gun owners had at least one gun stolen in the past five years and that the average number of guns stolen per person was 1.5. The authors use these data to estimate that 380,000 guns were stolen per year.

There are several plausible mechanisms through which these policies might reduce criminal use or trafficking of firearms. First, reporting requirements might encourage private gun owners to take steps that decrease the ease with which their firearms might be lost or stolen. Second, reporting requirements could deter some straw purchasers who are reluctant to report as stolen the guns they have diverted to prohibited possessors but who also fear that failure to report transferred guns as stolen could leave them accountable for explaining how their guns later turned up at crime scenes. Third, timelier reporting of gun losses or thefts may aid law enforcement gun-tracing efforts and increase criminal prosecutions of illegal users or traffickers of stolen firearms, potentially reducing the stock of firearms among prohibited possessors. However, required reporting policies could have the unintended effect of discouraging individuals from reporting lost or stolen weapons in order to avoid legal penalties from failing to report loss or theft within a certain number of days. Thus, to estimate how requirements for reporting lost or stolen firearms affect such outcomes as violent crime, we might first examine to what extent such policies affect gun owners' reporting and storage behavior.

To assess whether required reporting of lost or stolen guns reduces violent crime by disrupting illegal firearm trafficking, causal inference could be strengthened by examining crime gun trace data,^[1] as

well as changes in homicide or violent crime rates. Specifically, if these laws restrict trafficking operations from in-state sources, one should observe a larger share of crime guns originating from out-of-state sources after law passage, as well as a reduction in guns with a short time-to-crime (Webster and Wintemute, 2015; Braga et al., 2012).^[2] However, a series of provisions attached to ATF appropriations (commonly known as the Tiahrt Amendments) has denied most researchers access to firearm trace data since 2003, making it currently infeasible to conduct this type of analysis (Krouse, 2009).

Requiring gun owners to report lost or stolen firearms is unlikely to have measureable effects on such outcomes as suicide, unintentional injuries and death, defensive gun use, or hunting and recreation. If the requirements successfully discouraged straw purchases, it could have a small effect on firearm sales.

State Implementation of Lost or Stolen Firearm Reporting Requirements

AK										ME	
									VT	NH	MA
WA	ID	MT	ND	MN	WI	MI		NY	CT	RI	
OR	UT	WY	SD	IA	IL	IN	OH	PA	NJ		
CA	NV	CO	NE	MO	KY	WV	MD	DC	DE		
	AZ	NM	KS	AR	TN	VA	NC	SC			
			OK	LA	MS	AL	GA				
HI		TX					FL				

State implementation data valid as of January 1, 2017.

A minority of states require firearm owners to report to law enforcement when their weapons are lost or stolen. California,^[3] Connecticut,^[4] Delaware,^[5] Illinois,^[6] Massachusetts,^[7] New Jersey,^[8] New York,^[9] Ohio,^[10] Rhode Island,^[11] and the District of Columbia^[12] require individuals to report the loss or theft of all firearms. Maryland requires the reporting of loss or theft of handguns and assault weapons,^[13] and Michigan requires the reporting of thefts, but not loss, of all firearms.^[14]

Notes

1. The Bureau of Alcohol, Tobacco, and Firearms (2002, p. A-3) defined *crime gun* as “any firearm that is illegally possessed, used in a crime, or suspected to have been used in a crime. An abandoned firearm may also be categorized as a crime gun if it is suspected it was used in a crime or illegally possessed.” ↗
2. Per Webster and Wintemute (2015), the metric known as *time-to-crime* is the “unusually short interval—ranging from less than 1 year to less than 3 years—between a gun’s retail sale and its subsequent recovery by police from criminal suspects or crime scenes A short [time-to-crime] is considered an indicator of diversion, especially when the criminal possessor is someone different from the purchaser of record.” ↗
3. Calif. Penal Code §§ 26815, 27540, 27545 (the waiting period applies to dealers, but, in California, all sales must be processed through a dealer); D.C. Code Ann. §§ 22-4508. ↗
4. Hawaii Rev. Stat. Ann. § 134-2. A separate permit is required for each handgun purchase, and the permit expires after ten days; long-gun permits are valid for one year. ↗

References

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