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TO: The Honorable William C. Smith, Jr., Chair, Judicial Proceedings Committee

FROM: Jer Welter, Assistant Attorney General

RE: SB 51 - Criminal Procedure - Reasonable Suspicion and Probable Cause - Cannabis
(SUPPORT WITH AMENDMENTS)

As explained in this memorandum, the Office of the Attorney General urges the Judicial Proceedings Committee to issue a favorable-with-amendments report on Senate Bill 51. Senate Bill 51 modifies the role that cannabis, and particularly the odor of cannabis, could play in determinations of reasonable suspicion and probable cause, in the wake of the partial legalization of cannabis possession for adults.

Recently, at the request of the General Assembly, the Office of the Attorney General issued an opinion concluding that, even after partial legalization becomes effective July 1, 2023, it is likely that the Supreme Court of Maryland would still hold that the odor of cannabis emanating from a vehicle would be sufficient to justify a search of the vehicle.¹ The Attorney General supports the sponsor's policy goal to limit the extent to which otherwise-legal possession of cannabis could give rise to intrusive arrests, stops, or seizures.

However, because the possession or use of cannabis will remain either criminal or subject to civil citation under certain circumstances (such as amount, distribution, underage possession, or use in a motor vehicle), amendments to Senate Bill 51 would be necessary in order to ensure it is compatible with other existing criminal statutes and the legitimate needs of law enforcement. Therefore, the Office urges the Judicial Proceedings Committee to favorably report SB 51, but only if it is amended as we propose.

¹ 107 Md. Op. Att'y Gen. 153 (Dec. 1, 2022), *available at* <https://www.marylandattorneygeneral.gov/Opinions%20Documents/2022/107OAG153.pdf>

In this memorandum, we discuss the need for the amendments subsection by subsection. We will separately provide the members of the Committee with a draft of proposed amendment language.

Subsection (a)

We support the provision of subsection (a)(1) that the odor of cannabis alone would not establish reasonable suspicion or probable cause. The provisions of subsection (a)(2) and (a)(3) regarding possession of cannabis or the presence of money in proximity to cannabis, however, must be amended.

Under the law that will take effect July 1, 2023, the possession of cannabis above the personal use amount (1.5 ounces), or in any amount by a person under age 21, will remain a civil offense for which an officer must be able to detain an individual to issue a citation. *See* Md. Code, Crim. Law (“C.L.”) §§ 5-101, 5-601, 5-601.1 (eff. July 1, 2023). And possession in amounts exceeding the civil use amount (2.5 ounces) will, standing alone, remain a crime. *See* C.L. § 5-601. (Possession in the very large amounts necessary to establish the offense of “volume dealer” would also, of course, remain criminal. C.L. § 5-612). In addition, possession of cannabis even in a civil use amount (or even, potentially, a personal use amount) may, when combined with “other evidence of an intent to distribute or dispense” (which could include proximity to currency), constitute possession with intent to distribute. C.L. § 5-602(b).

Therefore, amendments are necessary to provide that possession in excess of the personal or civil use amount would establish probable cause, and to provide that the bill does not affect the authority of an officer to detain a person to issue a civil citation under C.L. § 5-601.1.

Subsection (b)

We support the intent of subsection (b) to carve out an exception to allow vehicular searches based on the odor of cannabis in order to investigate whether a person is driving under the influence of cannabis. Indeed, because the concern relates to the *use* of cannabis in a motor vehicle rather than mere possession, it may be appropriate to limit the exception in subsection (b) only to the odor of *burnt* cannabis, as similar legislation in New York has done. *See* N.Y. Penal Law § 222.05(3).

Nevertheless, under the bill's language, the exception would seem to turn on whether the officer subjectively intended to investigate a DUI offense. This is problematic for several reasons: because Fourth Amendment law is generally based on objective assessments rather than an officer's subjective intent; because an officer might subjectively be investigating multiple possible offenses; and because the investigatory aims of a police encounter can be fluid, changing based on what the officer learns. For these reasons, a subjective standard would be difficult for officers and courts to apply. We submit that the limited motor vehicle exception in subsection (b) should be based on the objective circumstance of the odor of burnt cannabis emanating from a vehicle or vessel or its operator, rather than an officer's subjective investigatory purpose.

In addition, smoking or consuming cannabis in a motor vehicle remains a misdemeanor criminal offense when committed by the driver (regardless of intoxication), *see* Transp. § 21-903, and a civil offense when committed by a passenger, *see* C.L. § 10-125. Therefore, the motor vehicle exception must accommodate an officer's authority to detain a motor vehicle and its driver and passengers either to investigate DUI or to issue charges or civil citations when an officer has probable cause for a violation of those non-DUI offenses.

Subsection (c)

Subsection (c), which would establish a provision for the exclusion of evidence, raises three concerns. First, the bill does not address how a court should apply the statutory exclusionary principle that the bill would create in conjunction with other existing Fourth Amendment law that precludes suppression in certain circumstances (e.g., standing, attenuation, good faith, etc.). The bill should specify that only the reasonable suspicion or probable cause standard is affected, and that other established judicial doctrines concerning the Fourth Amendment exclusionary rule remain applicable.

Second, and relatedly, an exclusionary provision that applies to all proceedings of any kind (including non-criminal proceedings) is overbroad and should be limited to the trial for a criminal offense or a civil cannabis offense.

Third, the proviso that the statutory exclusionary provision includes "evidence discovered or obtained with consent" should be stricken. It is unworkable as a matter of Fourth Amendment suppression law because, if evidence was obtained by consent, then it by definition was not discovered based solely on the odor of cannabis or any of the other circumstances specified in subsection (a).

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We will submit proposed amendments addressing the foregoing concerns to the members of the Committee under separate cover. If these proposed amendments are adopted, the Office of the Attorney General recommends a favorable with amendments report on Senate Bill 51.

cc: Members of the Committee