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May 17, 2016

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

**RE: *Senate Bill 1005, "Justice Reinvestment Act"; and,
House Bill 565, "Criminal Law – Possession of Less Than 10 Grams of
Marijuana – Code Violation"***

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 1005, "Justice Reinvestment Act," and House Bill 565, "Criminal Law – Possession of Less Than 10 Grams of Marijuana – Code Violation." We write, however, to discuss and make recommendations about issues that do not impact the bill's constitutionality or legal sufficiency.

The first issue relates to the provision of a right to appeal. In Senate Bill 1005, on pages 128 and 129, new § 7-401(d)(4)(iv) of the Correctional Services Article ("CS") provides that a finding by a parole commissioner that adhering to limits on imprisonment for a parole violation under the bill creates a risk to public safety or to a victim or witness under new CS § 7-401(d)(4)(ii), or an action taken by a commissioner based on such a finding under new CS § 7-401(d)(4)(iii), "is subject to appeal under Title 12, Subtitle 3 or Title 12, Subtitle 4 of the Courts Article." Neither the bill nor current law, however, authorizes a right of appeal of such an administrative finding or action under Courts and Judicial Proceedings Article, Title 12, Subtitle 3 or Subtitle 4. Those provisions enumerate specific rights of appeal of final judgments and certain interlocutory orders made by a circuit court or District Court and establish the jurisdiction of the State appellate courts in reviewing such final judgments and orders by trial courts. Under existing CS § 7-401(f), an inmate may seek judicial review in a circuit court of a written decision of the Parole Commission. As the General Assembly clearly intended in Senate Bill 1005 to provide some right to appeal a parole commissioner's finding or action under new CS § 7-

401(d)(4)(ii) or (iii), the legislature may wish to clarify its specific intended procedure for judicial or appellate review of a parole commissioner's finding or action under the bill.

In addition, Section 13 of Senate Bill 1005 raises an issue under the separation of powers requirement of Article 8 of the Maryland Declaration of Rights. Section 12 of the bill directs the Governor's Office of Crime Control and Prevention (GOCCP) to study and recommend, among other things, "which State unit should assume duties currently undertaken by the Division of Parole and Probation and the Central Collection Unit regarding the collection of restitution." Section 13, in turn, states:

That unless the Governor determines that transferring the collection of restitution from the Division of Parole and Probation and the Central Collection Unit to another State unit will not improve the collection of restitution, the Governor shall order the new State unit to assume the responsibility of collecting restitution by issuing an executive order to reorganize State government under Article II, Section 24 of the Maryland Constitution for the 2017 regular session of the General Assembly. The Governor shall include a provision in the executive order providing that the transfer may not be effective until 30 days after the Governor's Office of Crime Control and Prevention notifies in writing the Governor, the President of the Senate, and the Speaker of the House that the new State unit is able to assume the collection roles and responsibilities.

In Maryland, the Governor maintains a significant measure of control over Executive Branch employees. Article II, § 24 of the Maryland constitution states, in relevant part:

The Governor may make changes in the organization of the Executive Branch of the State Government, including...the reallocation or reassignment of functions, powers, and duties among the departments, offices, agencies, and instrumentalities of the Executive Branch. Where these changes are inconsistent with existing law, or create new governmental programs they shall be set forth in executive orders in statutory form which shall be submitted to the General Assembly within the first ten days of a regular session. An executive order that has been submitted shall become effective and have the force of law on the date designated in the Order unless specifically disapproved, within fifty days after submission, by a resolution of disapproval

concurrent in by a majority vote of all members of either House of the General Assembly.

In addition, the Governor has been given express statutory authority to “order any other reorganization of the Executive Branch that is considered by the Governor to be necessary and desirable and that is not inconsistent with law.” State Govt. Article, § 8-301.

Current law assigns the Division of Parole and Probation and the Central Collection Unit the responsibility for the collection of restitution. Section 12 of Senate Bill 1005 directs GOCCP “to determine which State unit should assume the duties currently undertaken by the Division of Parole and Probation and the Central Collection Unit regarding collection of restitution.” Although it is not entirely clear, the legislative intent of Section 13 appears to direct you to follow the recommendation of GOCCP about which new unit should undertake restitution collection duties. On the other hand, the provision also grants you the discretion to keep those responsibilities within the Division of Parole and Probation and the Central Collection Unit upon a finding “that transferring...will not improve the collection of restitution...”

Should a transfer of restitution responsibilities occur, Section 13 directs you to issue an executive order pursuant to Article II, § 24. This method is the appropriate method for a Governor to reorganize the Executive Branch where the change is contrary to current law. Executive orders issued under the authority granted by Article II, § 24 have the force of law. 64 Op. Att’y Gen. 180 (1979). At the same time, we believe that Section 13 cannot be read to impose an obligation on you to issue an Article II, § 24 executive order even if GOCCP makes a recommendation that another State unit should take over restitution duties. Moreover, Section 13 cannot be interpreted as prohibiting the General Assembly to disapprove of an executive order submitted to adopt GOCCP’s recommendation because the General Assembly lacks the authority to bind a future legislature. *Liberto v. City of Baltimore*, 180 Md. 105, 112 (1941).¹

¹ Another possible separation of powers is raised by the amendments on page 166 of Senate Bill 1005 to Criminal Law Article, § 9-804, specifically new § 9-804(f)(3)(iii), which allows a court to suspend or revoke “any license, permit, or prior approval granted to the enterprise or person by a unit of the State or a political subdivision in the State.” Maryland courts have in the past determined that a sentence revoking a license granted by another government branch is an illegal sentence. *See, e.g., Leopold v. State*, 216 Md. App. 586 (2014); *Towers v. State*, 92 Md. App. 183 (1992). In those cases, however, the courts discussed the statutory grant of licensing authority to executive branch agencies. In Senate Bill 1005, the General Assembly has also authorized the court, as part of a sentence, to revoke a license, permit or prior approval. Thus, we cannot say the provision is clearly unconstitutional.

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We also note that Criminal Law Article, § 9-804, specifically new § 9-804(f)(3)(i), allows a court to “order a person or criminal gang to be divested of any interest in an enterprise or real property” on conviction. (Page 166, lines 11-12). The provision does not limit the property subject to forfeiture to that constituting or derived from proceeds the defendant obtained by engaging in the criminal enterprise. Nevertheless, we believe that the provision can be read as such and thus would not be a violation of Article 27 of the Maryland Declaration of Rights (“That no conviction shall work corruption of blood or forfeiture of estate.”); or Article 16 of the Maryland Declaration of Rights or the Eighth Amendment of the U.S. Constitution, which prohibits excessive penalties. *See, e.g., U.S. v. Chandler*, 36 F.3d 358, 365 (4th Cir. 1994).

We also write to notify you that Senate Bill 1005 amends the same criminal law provision that House Bill 565 does, albeit differently. House Bill 565 and Senate Bill 1005 both amend Criminal Law Article, § 5-601(c)(2)(i). House Bill 565 states that “[e]xcept as provided in subparagraph (ii) of this paragraph, a person whose violation of this section involves the use or possession of marijuana IN THE AMOUNT OF 10 GRAMS OR MORE IS GUILTY OF THE MISDEMEANOR OF POSSESSION OF MARIJUANA AND is subject to imprisonment not exceeding 1 year or a fine not exceeding \$1,000 or both.” (Page 2, lines 30-31, and page 3, lines 1-2.) Whereas Senate Bill 1005, amends that section to provide that “[e]xcept as provided in subparagraph (ii) of this paragraph, a person whose violation of this section involves the use or possession of marijuana IS GUILTY OF A MISDEMEANOR AND is subject to imprisonment not exceeding [1 year] 6 MONTHS or a fine not exceeding \$1,000 or both.” (Page 137, lines 28-31.) If you sign both bills, the provision in the bill you sign last will control.

Sincerely,



Brian E. Frosh
Attorney General

BEF/SBB/kk

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Warren Deschenaux