

MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Mary Ellen Barbera
Chief Judge

187 Harry S. Truman Parkway
Annapolis, MD 21401

MEMORANDUM

TO: House Judiciary Committee
House Ways and Means Committee

FROM: Legislative Committee
Suzanne D. Pelz, Esq.
410-260-1523

RE: House Bill 1400
Cannabis – Legalization, Taxation and Regulation

DATE: February 8, 2020
(3/6)

POSITION: Oppose

The Maryland Judiciary opposes House Bill 1400. This comprehensive legislation substitutes the term “cannabis” for “marijuana” throughout various sections of the Annotated Code of MD and governs a wide array of subject areas wherein cannabis would be regulated.

This bill also establishes that all court records and police records relating to any disposition of a charge of possession of cannabis under § 5–601 of the Criminal Law Article involving a quantity of cannabis that did not exceed the personal use amount entered before October 1, 2022, where possession of cannabis is the only charge in the case shall be automatically expunged on or before October 1, 2024. All court records and police records relating to any disposition of a charge of possession of marijuana under § 5–601 of the Criminal Law Article involving a quantity of cannabis that did not exceed the personal use amount entered before October 1, 2022, where the defendant was also charged with one or more other crimes in the same case, regardless of the disposition of the other charge or charges, shall be automatically expunged on or before October 1, 2030. With regard to any disposition of a charge of possession of cannabis under CR § 5–601 involving a quantity of cannabis that did not exceed the personal use amount entered on or after October 1, 2020: 1) the court with jurisdiction over the case shall initiate efforts to automatically expunge all court records and police records relating to the charge 4 years after disposition of the charge; 2) expungement of court records and police records relating to the charge shall be completed on or before 4 years and 90 days after disposition.

The Judiciary reiterates its concerns expressed relative to other bills requiring automatic expungement. The Judiciary does not have the data, nor is there currently a mechanism in place in any court to search for and investigate automatic expungement of any charge. The bill also imposes an insurmountable burden on the court and clerks of the court to

determine which cases are eligible for expungement. There is often no way to determine from a review of the court file the amount of marijuana (cannabis) involved for purposes of determining eligibility for automatic expungement. This is especially problematic for cases that were filed or adjudicated prior to the date when the legislature decriminalized possession of less than 10 grams of marijuana.

The expungement process is a long, labor-intensive, and expensive process involving the determination of eligibility; the use of multiple NCR forms; postage costs for mailing petitions and orders to State's Attorneys, law enforcement agencies, defendants, defendant's attorneys; copying expenses; holding periods for pending expungements, physical redaction, and storage costs for the expunged records for three years. Court records that need to be redacted include all official records maintained by the clerk or other personnel pertaining to any criminal action or proceeding for expungement, including indices, docket entries, charging documents, pleadings, orders, memoranda, assignment schedules, disposition sheets, transcriptions of proceedings, electronic recordings, orders, judgments, exhibits, and decrees. Some circuit courts do not have indexes of old cases. Searching for marijuana charges would involve manually going through docket books and microfilm to review each case to determine if a charge exists. In cases where there are multiple charges in a case but only one charge needs to be expunged, clerks would need to read through all aspects of the court record to properly redact references to the expungable charge. The appellate court process would be similar to the circuit court process, with a significant number of paper records needing to be researched. In addition, the bill does not cover the removal of "published" opinions of a court. Part of the expungement process for paper and electronic files is identifying all the custodians of the records that must expunge their files and then respond to the court with a Certificate of Compliance. Not all custodians are readily apparent by looking in a computer. Court commissioners can be a custodian of a record when a defendant applies for Public Defender eligibility determination. The entire file needs to be checked.

The bill is also retroactive and involves any charges involving the use and possession marijuana in an amount that is considered less than personal use filed in the District Court since it was established in 1971, as well as charges filed in the circuit court going back even further. All District Court records prior to 1981 are archived and having to retrieve them would be burdensome for the Judiciary and the State Archives. Locating old cases can take up a significant amount of clerk time. If a case is not in the electronic case management system, it is sometimes difficult to locate or obtain a case number. Some old cases are referenced in index books, if there is an index, that clerks can look through to locate a case. If a case number is located, clerks can look through warehouse listings to see if the box that houses that case file may be located. The case file may be on microfilm or may be located at the Maryland State Archives. Sometimes it takes several tries to find the correct case file location. The process varies for the circuit courts. Some courts have no index of cases with paper records, or the index does not indicate the charges. Unless the legislation specifically directs the Archives to redact the expunged information, courts would have to retrieve files from storage and manually review *every* criminal case to determine if there were any marijuana possession (less than a personal amount) charges. Even in cases with the lead charges listed, subsequent charges or

violations of probation would not be listed in the index, necessitating a thorough review of all criminal cases. While some circuit courts have older records (approximately 1986 and older) with State Archives, others have maintained all their court records on-site or in warehouses. In addition to the paper files, many older circuit court files are on microfilm or microfiche with no obvious way to expunge a case or charge within a case. In courts where the paper record was lost due to flood or fire, the microfilm may be the only record remaining of cases for a given timeframe.

HB1400 also requires the court to expunge charges of possession of marijuana in an amount that is considered less than personal use, where the defendant was also charged with one or more other crimes in the same case, regardless of the disposition of the other charge or charges on or before October 1, 2030. This type of expungement is called a partial expungement. Currently charges in a “unit” cannot be expunged. (CP § 10-107)

The Judiciary maintains we are not able to effectively expunge one charge in a unit. There is no functionality currently within CaseSearch to remove records at the charge level without displaying a space for a missing charge(s). When a person is charged with multiple offenses, the charges are numbered and reported to the Criminal Justice Information System (CJIS) in the order presented on the charging document. For instance, if there are three charges, and charge 2 is expunged, the system will still reflect charges 1 and 3. They are not and cannot be renumbered because the case information reported to CJIS must align with the same charge numbers initially reported. A missing numbered charge may raise questions and red flags, thereby, nullifying the purpose of the expungement.

The clerk would need to review the file, page by page to remove any information pertaining to the expunged charge. Charge information is repeated throughout the case many times and the charging document outlines what the alleged events are that occurred. There may not be a clear way to obliterate all information in a charging document related to a specific charge.

In addition, there is currently no functionality to build programmatic relationships between CaseSearch and the six case management systems that process criminal information to remove any reference to the existence of specific charges that may exist in any of the various components within those systems as required by the proposed legislation. As explained in the current and prior legislative sessions, the Judiciary anticipates that the implementation of CaseSearch Version 2 will provide the needed functionality to enable the removal of case information at a more granular level such as individual charges and will parallel the final rollout of MDEC. The CaseSearch rebuild is estimated to cost at a minimum \$1.14 million.

Costs will increase in direct relation to the higher number of expungements. Clerical positions will be necessary due to the expansive amount of charges that would become eligible and the retroactive nature of this bill.

As indicated below, the initial cost to implement HB 1400 is estimated to be approximately \$8,472,775 million. That total includes 109 judicial clerks. It is anticipated that as many as 15 additional judicial clerks will need to be hired to fully implement the bill and to process ongoing expungements of eligible marijuana charges. The cost for the 15 additional clerks and the associated operating cost will be an additional cost to the Judiciary. The aforementioned costs do not include expungement of charges that were never entered in any of the Judiciary’s case management systems, which is indeterminable at this time.

Clerk Need in Fiscal Years 2021 to 2030 to Expunge Existing Charges for Possession of Marijuana with Electronic Records

	Single Charge	Single Charge		Multiple Charges	Multiple Charges
	DC	CC		DC	CC
No. of Electronic Cases	187,900	23,879		284,316	76,411
Hours to Complete Expungement Process	1.5	1.5		3	5
No. of Cases x Time to Complete the Process	281,850	35,819		852,948	382,055
No. of Clerks Needed*	58	7		12	32
*Number of clerks needed accounts for the time allotted in the bill to complete expungement at two years for single charge cases and seven years for multiple charge cases.					

The total number of new clerks needed to accomplish the existing expungements for cases in an electronic format is:

District Court: 70
Circuit Court: 39

Please note that the above numbers do not account for cases that are still in paper.

Additional Clerk Need for Possession of Marijuana Starting in Fiscal Year 2023

	Single Charge	Single Charge		Multiple Charges	Multiple Charges
	DC	CC		DC	CC
No. of Cases*	11,247	173		3,366	1,945
Hours to Complete Expungement Process	1.5	1.5		3	5
No. of Cases x Time to Complete the Process	16,870.5	259.5		10,098	9,725

No. of Clerks Needed	7	-		4	4
* Number of cases is based on the three-year average filings for Fiscal Years 2017-2019					

The total number of new clerks needed to accomplish the new expungements starting in year four is:

District Court: 11

Circuit Court: 4

The Administrative Office of the Courts is in the process of analyzing clerk workload and the amount of time required to effectively and efficiently process the same, which will result in the development of a sound methodology by which to determine clerk need, similar to how judgeship need is determined. The estimated number of clerks needed to perform expungements indicated above was derived from that preliminary analysis, using the number of hours clerks have available to perform their duties and responsibilities. The time a clerk has available to perform their duties accounts for weekends, holidays, leave, judicial support, training, and general office work.

The District Court can share some resources since it is a unified court system; however, circuit courts do not share resources and it may require one person in each circuit despite the data showing a need for 4 circuit court clerks. The cost is **\$7,119,641** in additional personnel costs and additional operating expenses in the first full fiscal year. (See spreadsheet).

The Judiciary is currently researching redaction software. There may be additional costs if a decision is made to purchase the software to assist the clerks with the time-consuming searching and redaction of records or case information within the records. Cost estimates are not available at this time.

For all the reasons stated above, the Judiciary opposes House Bill 1400.

cc. Hon. David Moon
 Judicial Council
 Legislative Committee
 Kelley O'Connor