



PAUL DeWOLFE
PUBLIC DEFENDER

KEITH LOTRIDGE
DEPUTY PUBLIC DEFENDER

MELISSA ROTHSTEIN
DIRECTOR OF POLICY AND DEVELOPMENT

KRYSTAL WILLIAMS
DIRECTOR OF GOVERNMENT RELATIONS DIVISION

ELIZABETH HILLIARD
ASSISTANT DIRECTOR OF GOVERNMENT RELATIONS DIVISION

POSITION ON PROPOSED LEGISLATION

BILL: SB 692 -- Cannabis – Legalization and Regulation (Cannabis Legalization and Reparations for the War on Drugs Act)

FROM: Maryland Office of the Public Defender

POSITION: Favorable

DATE: March 2, 2022

The Maryland Office of the Public Defender strongly supports Senate Bill 692, Cannabis Legalization and Reparations for the War on Drugs Act. OPD supports all of the provisions in this bill, including the financial reinvestment in communities that have been ravaged by the War on Drugs, and the legalization of possession of up to four ounces of marijuana commensurate with the medical marijuana regime, along with the reduction of penalties for various marijuana related crimes. However, two particular components of this bill are essential to ensuring fairness in the criminal legal system post-legalization of marijuana.

1. Limiting the Role of Marijuana in Police Investigations

SB692 explicitly precludes the police from relying solely on the odor of marijuana, simple possession of marijuana, or possession of marijuana in proximity to money, to conduct a stop, search, or arrest of a person, or to search a vehicle. This is an essential component of any marijuana legalization to make clear to the police that they cannot rely on legal conduct alone to infringe on the citizenry's Fourth Amendment rights.

Maryland's 2014 marijuana decriminalization bill did not explain what role the odor or possession of marijuana was to play in police-citizen interactions in the post-decriminalization world. The result is that in the past eight years countless people have been stopped, searched, and arrested based on the odor of marijuana and/or the possession of a small amount of marijuana—conduct that does not in and of itself indicate someone is engaged in criminal conduct. These issues are still actively being litigated in Maryland's courts. Thus, the role of marijuana odor in stops and searches post-decriminalization remains unclear. If the legislature does not limit police action based on the odor or possession of marijuana post-legalization, people will continue to be stopped, searched, and arrested based on legal conduct. As the legal marijuana industry continues to expand, this will create an unacceptable violation of civil liberties. Permitting stops based on marijuana odor or possession may invite biased policing, because there is a possibility that police will use the odor of marijuana as a pretext for otherwise illegal, race-based stops, searches, and arrests.

Additionally, even post-legalization, possession of large amounts of marijuana will remain subject to civil penalties and will therefore be contraband. Absent a legislative limitation, this leaves open the possibility that police can continue to search vehicles based on the odor of marijuana, because under the *Carroll* doctrine officers can conduct a warrantless roadside search of a vehicle whenever they have probable cause to believe it contains contraband. *Robinson v. State*, 451 Md. 94 (2017). If the legislature does not limit the role marijuana plays in police investigations at the same time as legalization, Marylanders' cars will continue to be searched in the course of any traffic stop based on possession of, or mere proximity to, a legal substance. This will undermine the entire legalization regime.

Making clear from the outset that police cannot stop, search, and arrest people, or search vehicles, based only on the odor or simple possession of marijuana (1) ensures that people's rights are not infringed upon for legal conduct, (2) ensures that police do not continue to use the odor of marijuana to disproportionately stop, frisk, and search people and vehicles in Black and Brown communities, and (3) and prevents another decade of litigation to answer the question of what is lawful police conduct post-legalization.

A key concern remains what the odor of marijuana should mean when an officer suspects an individual is driving a motor vehicle while impaired by drugs. In that context, officers would still need to have some initial basis to suspect that a person is impaired before stopping them. The odor or possession of marijuana in this context would be an additional factor in the totality of circumstances to support the officer's observations of suspected impairment, not the sole basis for a stop. SB692's language appropriately balances concerns for maintaining safe roads and highways, with protecting individual's rights to be free from police intrusion based on legal use of marijuana.

2. Expanding Opportunities to Reverse Marijuana-Related Convictions

An essential component of community reparations is remediating harm caused by the over-policing of low-income communities and communities of color as part of the War on Drugs. The consequences from criminal convictions for marijuana crimes and crimes where police began their investigation based solely on the odor or sight of marijuana continue to harm these communities. People are incarcerated, deported, and evicted from public housing; they lose custody of their children; and they are unable to gain employment—all because of convictions that stem from marijuana. This is an injustice and a scourge on our state, particularly as we have established a lucrative medical marijuana industry and are on the verge of legalizing marijuana. We cannot move forward when our residents continue to be saddled with hefty and expansive collateral consequences from conduct that is legal.

SB692 vacates all prior convictions for possession of marijuana, marijuana paraphernalia, possession with intent to distribute marijuana, manufacturing marijuana, and distribution of marijuana. Importantly, it also allows anyone convicted of a crime where the stop, search, or arrest began based solely on the odor of marijuana, simple possession of marijuana, or the possession of marijuana in proximity to money, to have an opportunity to challenge the way the evidence was collected in their case. If the court determines in this new hearing that the evidence was gathered

in a way which is now impermissible under SB692, then that evidence is suppressed, and if that evidence is the sole basis for the conviction, the conviction is overturned.

SB692 is essential to righting the wrongs caused by the War on Drugs and over-policing in communities of color, and ensuring prospectively that marijuana is not still used as a tool to disenfranchise communities of color while the State reaps the financial benefits of legalization.

For the foregoing reasons, the Maryland Office of the Public Defender urges a favorable report on SB692.

Submitted by: Government Relations Division of the Maryland Office of the Public Defender.

Authored by: Michele Hall, Assistant Public Defender, Appellate Division, Maryland Office of the Public Defender, (410) 929-6616, michele.hall@maryland.gov;

Eva Shell, Assistant Public Defender, Appellate Division, Maryland Office of the Public Defender, (443) 470-9415, eva.shell@maryland.gov.