Maryland Chiefs of Police Association
Maryland Sheriffs' Association

MEMORANDUM

TO: The Honorable Luke Clippinger. Chairman and
Members of the Judiciary Committee

FROM: Darren Popkin, Executive Director, MCPA-MSA Joint Legislative Committee
Andrea Mansfield, Representative, MCPA-MSA Joint Legislative Committee
Natasha Mehu, Representative, MCPA-MSA Joint Legislative Committee

DATE: March 9 , 2023

RE: **HB 1071 – Criminal Procedure – Reasonable Suspicion and Probable Cause - Cannabis**

POSITION: **OPPOSE**

The Maryland Chiefs of Police Association (MCPA) and the Maryland Sheriffs' Association (MSA) OPPOSE HB 1071. This bill would prohibit the odor of cannabis alone from providing either reasonable articulable suspicion (allowing a temporary seizure under the Fourth Amendment) or probable cause (allowing, among other things, a warrantless search of a vehicle under the Fourth Amendment).

Currently, possession of cannabis in any amount is illegal in Maryland, subject to rare exceptions such as being a lawful holder of a medical cannabis card. Beginning on July 1, 2023, individuals will be able to lawfully possess up to 1.5 ounces of cannabis. Possession of any amount of cannabis beyond that will continue to be illegal, with criminal penalties to more than 2.5 ounces. Possession of cannabis by individuals under the age of 21 will also continue to be illegal, regardless of the amount.

Recognizing that cannabis remained presumptively contraband, the Court of Appeals (now the Supreme Court of Maryland) has held that the odor of cannabis alone provides a law enforcement officer with probable cause to search a vehicle for the contraband, *Robinson v. State*, 451 Md. 94 (2017), and reasonable articulable suspicion to briefly detain to investigate if a criminal offense was occurring, *In re D.D.*, 479 Md. 206 (2022). The Court of Appeals also determined that the odor of cannabis alone does not provide an officer with probable cause to arrest a person. *Lewis v. State*, 470 Md. 1 (2020). The Court recognized the difference between reasonable suspicion and probable cause from burdens of proof in a court proceeding, and the importance of allowing police officers to use information available to investigate and enforce the criminal laws of the State. The Court's reasoning will continue to be completely true for individuals under 21 and for those smoking cannabis in public.

The Attorney General has provided an Opinion discussing the impact of partial legalization on search and seizure issues. 107 Op.Att'y Gen. 153 (2022). Given that "probable cause" in the context of vehicle searches "requires only a fair probability that evidence of a crime is present," Id. at 183, the Attorney General concluded that odor of cannabis in a vehicle will continue, by itself, to amount to probable cause. Similarly, the Attorney General concluded that the Supreme Court of Maryland "would hold that officers still have the authority to briefly detain someone who smells of cannabis." Id. at 195.

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The Attorney General very carefully and thoroughly discussed the issues surrounding searches and seizures and cannabis. The Attorney General reached the correct conclusions. Using odor of cannabis alone as grounds to briefly detain a person or to search a vehicle will not violate the Fourth Amendment and would be reasonable.

In general, if the government obtains evidence in violation of the Fourth Amendment's reasonable articulable suspicion or probable cause requirements, the evidence is not allowed to be used by the government in a *criminal* trial. *See, e.g., Mapp v. Ohio*, 367 U.S. 643 (1961) (applying an evidence exclusionary rule to the States). HB 1071 goes far beyond the exclusion of evidence in a criminal trial. Under HB 1071, such evidence would not be admissible in *any* proceeding, regardless of the nature of the proceeding or who wishes to introduce the evidence, for what purpose, or what the further evidence is. The prohibition even extends to evidence obtained "with consent," regardless of whether consent is knowing and voluntary. The United States Supreme Court has commented on the "heavy toll" that the Court's Fourth Amendment exclusionary rule exacts on both the judicial system and society at large and, accordingly, "Our cases hold that society must swallow this bitter pill when necessary, but only as a last resort." *Davis v. United States*, 564 U.S. 229, 237 (2011). HB 1071 makes exclusion a first resort, not a last esort.

For these reasons, MCPA and MSA OPPOSE HB 1071 and urge and UNFAVORABE Committee report.

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