

STATEMENT OF
ERIC E. STERLING, J.D.¹
SUBMITTED TO
THE MARYLAND SENATE
JUDICIAL PROCEEDINGS COMMITTEE
HON. WILLIAM C. SMITH, JR. CHAIR
HON. JEFF WALDSTREICHER, VICE CHAIR
March 30th, 2023

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

FAVORABLE

Chair Smith, Vice Chair Waldstreicher, and honorable Senators, thank you very much for reading my statement. I have lived in the 18th District for 25 years. I have been an attorney and advocate for cannabis reform since 1976.

Regarding the odor of cannabis in motor vehicles, this bill heads off a warning from the Maryland Attorney General Brian Frosh in the Attorney General Opinion of December 1, 2022² that if the General Assembly does not enact a bill such as HB 1071, the courts will have to rule, and that the courts will continue to justify searches based on odor.

“Absent action by the General Assembly to impose limits on police searches beyond what the United States Constitution or the Maryland Constitution would require, these are questions that the courts will ultimately have to resolve.”

The Attorney General predicted that,

Based on existing precedent, it is our opinion that, although not entirely clear, the Court of Appeals is **more likely to hold that the odor of cannabis emanating from a vehicle will still justify a police officer’s search** of that vehicle after July 1, 2023.³

Maryland law should not allow a search of a vehicle in Maryland simply on the basis of the odor of cannabis.

Cannabis possession and use are legal under Maryland law for medical purposes. I am very familiar with this because Governor O'Malley appointed me in 2013 to a four-year term as one of the original members of the Natalie M. LaPrade Maryland Medical Cannabis Commission (MMCC). In that role, I was the principal author of the regulations that created the medical cannabis program in Maryland. In that capacity I met scores of patients or their parents for whom medical cannabis was a critical medicine. As of March 15, 2023, there were 163,665 certified patients in Maryland, according to the MMCC data.⁴ **A patient may legally possess a 30-day supply of up to 120 grams of cannabis.**⁵ **Such legal possession will generate powerful odor.**

Possession of cannabis in Maryland by adults who are not patients, of amounts of less than 10 grams, is a civil offense. **Such conduct is not grounds to arrest a person. Commission of a civil offense does not create a ground justifying a search under the U.S. Constitution.**

In addition, it is probable that everyday thousands of medical cannabis patients from our neighboring states are driving on our highways, perhaps on the way to their physicians at Maryland's world-renowned medical facilities.

And further, the possession of cannabis by adults without any medical need is fully legal under state law in our neighboring jurisdictions of Virginia and the District of Columbia, and in states only a short drive away such as New Jersey, New York, and Connecticut. Thus, many persons from other states may be traveling through Maryland with personal use amounts of marijuana that are legal where they were obtained and which amount to only a civil offense in Maryland.

Searches of vehicles -- as well as of one's person -- are highly intrusive, inconvenient, and often traumatic. Tragically, the misconduct of a relatively small number of police officers has generated well-founded and widespread fear of police interactions. Escalating a traffic stop into a vehicle search is a very serious matter, and the fear created -- especially in absence of criminal conduct or criminal intent -- is profound.

Nevertheless, there is a genuine problem of drivers operating their vehicles impaired by their use of cannabis. Combined with some evidence of impairment, the smell of cannabis smoke might reasonably be the basis to conduct a field sobriety test or otherwise test a driver for more conclusive evidence of impairment. But none of those circumstances would be the ground for the search of the vehicle and its contents.

Thus, to permit searches of vehicles simply on the subjective perception of the odor of cannabis is oppressive, bad public policy, and should not be allowed by law.

Consider whether an officer's perception of the odor of alcohol, by itself, would create reasonable suspicion or probable cause that a crime has occurred that would justify a search of the vehicle. Of course not. Again, the perception of the odor is only relevant in the context of investigating impairment of operation of the vehicle and a search of the vehicle, outside the area immediately surrounding the operator, is not constitutionally permissible.

I urge a favorable report.

¹ Brief summary of my experience considering cannabis regulation: Governor Martin O'Malley appointed me as one of the original members of the Maryland Medical Cannabis Commission in 2013. As the Chair of the Commission's policy committee, I was the principal author of Maryland's medical cannabis regulations adopted in 2015. My appointment was a capstone of decades of consideration the legalization of cannabis. As early as 1982, I was one of the four co-authors of the report, "The Regulation and Taxation of Cannabis Commerce," from the National Task Force on Cannabis Regulation. From 1979 to 1989, I was the counsel to the U.S. House of

Representatives Committee on the Judiciary, Subcommittee on Crime, responsible for federal drug law enforcement, among many issues.

In 1989, U.S. Senate Judiciary Committee Chair Joe Biden and I debated the legalization of drugs at Georgetown University Law Center. Studying and promoting drug legalization options was a major role in my work at the Criminal Justice Policy Foundation for over 30 years. I was one of the co-founders of the Marijuana Policy Project and have received a lifetime achievement award from the National Organization for the Reform of Marijuana Laws (NORML).

I have never had any economic interest in, nor received any compensation from, any entity or person involved in the cannabis industry (with the exception of an honorarium for lecturing at Oaksterdam University in 2015).

² Search And Seizure – Cannabis – Whether The Partial Legalization Of Cannabis Under Maryland Law Will Affect The Authority Of Maryland Police Officers To Conduct Searches Based On The Odor Of Cannabis, December 1, 2022, 107 **Opinions of the Attorney General** 153.

³ Ibid.

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https://mmcc.maryland.gov/Documents/2023%20_PDF_Files/Patient%20Stats/commission_stats_patients_Bi-weekly02.01.pdf

⁵ COMAR 10.62.01.02B(33) defining 30-day supply.

Eric E. Sterling, J.D., served as Executive Director of the Criminal Justice Policy Foundation (1989-2020). He is currently Chair of the Montgomery County Policing Advisory Commission (PAC) but is not in any way testifying on behalf of the PAC.