MARYLAND OFFICE OF THE PUBLIC DEFENDER

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POSITION ON PROPOSED LEGISLATION

BILL: **House Bill 320 - Criminal Procedure - Stops and Searches - Cannabis Odor and Admission of Evidence (Drug-Free Roadways Act of 2024)**
FROM: **Maryland Office of the Public Defender**
POSITION: **UNFAVORABLE**
DATE: **2/27/2024**

The Maryland Office of the Public Defender respectfully requests that this Committee issue an UNFAVORABLE report on House Bill 320. House Bill 320 would permit police officers to stop and search motor vehicles based solely on the odor of cannabis. The bill would also permit the admission and use of any evidence obtained or discovered during a stop or a search of a person, a motor vehicle, or a vessel that was initiated on a cannabis-related justification.

For decades, the odor of cannabis emanating from a vehicle, standing alone, authorized a police officer to search a vehicle during a traffic stop. That changed last year when this Legislature passed House Bill 1071, which prohibits stops and searches of motor vehicles based solely on the odor of burnt or unburnt cannabis and precludes the admission of evidence obtained from those searches.[1] 2023 Md. Laws, ch. 802 (codified at Md. Code Ann., Crim. Proc. § 1-211 (eff. July 1, 2023)). House Bill 320 repeals those key provisions in order to return the law to its previous form.

To be sure, the new law was enacted primarily to remedy the disproportionate impact that those types of stops and searches had on Black or African American people.[2] In passing House Bill 1071, this Legislature sent a clear message to all Marylanders—specifically the racially profiled minorities—that they would no longer be subjected to warrantless (and sometimes pretextual) searches and seizures based on the smell of a now-legal substance. House Bill 320 revokes that remedy and reneges on that message.

As this Committee considers House Bill 320, members of this Committee should also consider the following reasons that the former law on cannabis-odor-related searches and seizures would have been untenable under Maryland's cannabis legalization scheme and should remain the law of the past.

Condoning searches based solely on the odor of cannabis exposes people to predatory and arbitrary policing practices. These interactions do not improve public safety and often result in avoidable harm. As the stories of Demonte Ward-Blake, Derrick Thompson, and Jason Serrano demonstrate, condoning the use of cannabis-odor-based justifications re-exposes people—particularly impacted minorities—to violent encounters and unwarranted intrusions.

- Here in Maryland, Demonte Ward-Blake was stopped for driving with expired tags. The officer claimed that he smelled cannabis and Mr. Blake informed the officers that he had smoked cannabis earlier in the day. The traffic stop escalated from there: Mr. Blake was taken to the ground and his neck was severely injured. Mr. Blake was paralyzed following the traffic stop and later died.[3]
- Right across the border in Virginia, Derrick Thompson was stopped for driving with an expired registration sticker. The officer claimed that she smelled cannabis and called for backup. After Mr. Thompson refused to exit the vehicle to permit a search, the stop escalated: an officer yanked Mr. Thompson by his neck, pulled him from his vehicle, and took him to the ground. No cannabis was found in the vehicle.[4]
- In New York, Jason Serrano was the passenger of a vehicle that was stopped for a broken taillight. When the driver rolled down the window, an officer claimed he smelled cannabis then asked Mr. Serrano and the driver to step out of the vehicle. Mr. Serrano, who had recently been treated for abdominal wounds, asked to remain in the vehicle. The stop escalated from there. With Mr. Serrano cuffed and lying on the ground, an officer searched the vehicle. After finding no cannabis or other evidence, the officer planted a cannabis bud in the cup holder to justify the search.[5]

These cases (and likely many others) demonstrate that the use of cannabis odor as a justification for vehicle searches was and still is ripe for abuse.[6] Last year during the hearings on House Bill 1071, state's attorneys touted their firearm seizures as a reason this practice should continue, without any regard to the countless number of *innocent* people who were stopped, searched, and found to be drug- and gun-free.[7] This demonstrates that the odor of cannabis was an investigative tool that police officers used to justify their searches of vehicles for illicit items rather than the cannabis they claimed to smell. These were patent violations of people's constitutional rights. The new law does not make us less safe just because an officer can no longer rely on this tool. Reasonable and prudent

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officers have many other investigative techniques left in their arsenal. There is no need to reverse course and allow these predatory and arbitrary policing practices to resume.

The odor of cannabis, standing alone, is insufficient indicia of crime or criminal activity. Cases establishing a police officer's authority to search a vehicle based solely on the smell of cannabis is supported by Prohibition-era reasoning that was once consistent with the absolute prohibition on the use and possession of cannabis.[8] The reasoning in those cases also derives from what is known in constitutional criminal procedure as the "plain view" doctrine.[9] Under the plain view doctrine, an officer has probable cause to associate an object with criminal activity or evidence of a crime when the incriminating character of the evidence is "immediately apparent" to the officer viewing the object.[10] When applied in the cannabis context, the "plain smell" doctrine made an officer's reliance on the odor of cannabis—when it was completely illegal in all forms—entirely reasonable because the incriminating character of the smell of cannabis made it immediately apparent to the officer that the driver was or had been engaged in illegal activity.

Today, an officer can no longer smell the incriminating character of cannabis because cannabis and other variants of the plant "Cannabis sativa L." are legal. Both cannabis and hemp come from that plant species.[11] While cannabis is legal to possess in small amounts, hemp is entirely legal. But the reality is that their smells are indistinguishable.[12] Similarly, a police officer cannot smell the difference between a legal amount of cannabis and an illegal amount of cannabis. This makes continued reliance on an officer's sense of smell for probable cause determinations untenable and unreasonable.[13]

Furthermore, the odor of cannabis lingers. It is not difficult to come up with scenarios where the smell of cannabis would attach to someone who had smoked cannabis earlier in the day or to someone who was merely in the presence of others who were smoking cannabis.[14] What this means is the *smell* of cannabis does not necessarily equate to the *presence* of cannabis. For this reason, the title of House Bill 320—"Drug-Free Roadways Act of 2024"—is completely detached from the bill's actual effect. When a person is driving while impaired or smoking in the vehicle, circumstances beyond the odor of cannabis will lead a reasonable and prudent officer to that conclusion. The odor of cannabis (or something that smells like cannabis) is no longer a reasonable basis for permitting an officer to engage in an exploratory search of a person's vehicle until something incriminating emerges.

The odor-of-cannabis justification is impossible to challenge or verify, which significantly imbalances the scales of justice. The use of evidence obtained or discovered based

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solely on the odor of cannabis creates practical problems for Marylanders who wish to challenge the admission of evidence and/or their convictions in a later proceeding. It is beyond dispute that neither a prosecutor nor a police officer can memorialize the odor that an officer smelled and present it as evidence in a court proceeding. Similarly, no one can test whether the officer detected the odor of cannabis rather than something that smelled similar (*i.e.*, an entirely legal derivative of the Cannabis sativa L. plant species).[15] This leaves many people defenseless in courts when an officer asserts that they searched a person's vehicle because they smelled cannabis. Court proceedings must be fair as a matter of constitutional law.

The provision that precludes the admission of any evidence that was obtained based on the odor of cannabis (Md. Code Ann., Crim. Proc. § 1-211(c)) must remain. This provision is a sanction for non-compliance with the law like any other sanction or sentence in the Maryland Code. While some may believe that the judicially determined "Exclusionary Rule" suffices to protect Marylanders from violations of the statute, that belief is ill-advised. The judicially determined exclusionary rule operates as a Fourth Amendment sanction for Fourth Amendment violations, without regard to Maryland's laws.[16] On the other hand, a statutory exclusionary rule operates as a remedy for a violation of the statute that contains the remedy.

In effect, repealing Md. Code Ann., Crim. Proc. § 1-211(c) would permit violations of the statute to go unchecked and essentially render the prohibition useless. Maryland courts have made it clear that when this Legislature fails to provide for the exclusion of evidence as a remedy in a statute, the court will not read one into the statute.[17] Last year, this Legislature passed House Bill 1071 with an exclusionary rule to provide a remedy for violations and greater protection for Marylanders than would have been provided under existing federal law. The U.S. Supreme Court has explained that "a State is free as a matter of its own law to impose greater restrictions on police activity than those [the] Court holds to be necessary upon federal constitutional standards." *Oregon v. Hass*, 420 U.S. 714, 719 (1975). Why then would this Legislature repeal the protection it provided to those who may be impacted by violations of the statute? Such a legislative action sends the wrong message to Marylanders who were negatively impacted by the policing practice when it existed and sends a message to the police that they can violate the statute without consequences.

Finally, permitting searches based solely on the odor of cannabis reinforces racist policies and practices and legitimizes racial profiling. It is no secret that Black people were direct targets of the war on drugs and bore the brunt of the disproportionate effects of the policies that came

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out of it.[18] The enforcement of cannabis laws in this manner is simply a vestige of that war. There was no shortage of advocates testifying in favor of House Bill 1071, who reminded this Committee of that fact last year.

The Racial Equity Impact Notes Unit projected that the prohibition on these types of stops and searches could remedy the disproportionate impact that the proliferation of Nixon-era policies had on Black or African American people. Because the new law has been in effect for less than a year, the impact of the law has yet to be realized. Thus, the timing of House Bill 320 is inappropriate and appears to reject the reality that Black people were negatively impacted by decades of policies that were aimed directly at their communities. Black people deserve better.

For these reasons, the Maryland Office of the Public Defender strongly urges this Committee to issue an UNFAVORABLE report on House Bill 320.

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[1] This Committee approved House Bill 1071 (2023) with a 15-6-1 vote for a favorable with amendment report.

[2] *See* Dept. of Leg. Srvs, Racial Equity Impact Note: House Bill 1071 - Criminal Procedure - Reasonable Suspicion and Probable Cause – Cannabis (Mar. 3, 2023), mgaleg.maryland.gov/Pubs/BudgetFiscal/2023RS-HB1071-REIN.pdf ("Maryland traffic stop data since 2018 indicates that Black or African American drivers consistently constitute at least 60% of all vehicle traffic stops in the State despite comprising only 29% of the State's population. They are also over four times as likely to be subject to a warrantless vehicle search than white drivers. Data from other jurisdictions also suggests that Blacks or African Americans are disproportionately subjected to warrantless investigative stops in those jurisdictions. **A significant portion of these investigative stops and vehicle searches involve the odor of cannabis, and to the extent the bill's provisions reduce these stops and searches based solely on the odor of cannabis, Black or African American individuals will be significantly impacted by reduced exposure to law enforcement activity.**") (emphasis added).

[3] Jess Arnold, & Kyley Schultz, *Takedown arrest leaves Prince George's County man partially paralyzed, family says*, WUSA9.com (Updated Oct. 20, 2019), www.wusa9.com/article/news/crime/takedown-arrest-pgcpd/65-b626363e-05ce-4c62-af37-d1bccff8442c.

[4] Drew Wilder & Andrea Swalec, *Virginia Trooper's Conduct in Stop of Black Driver on Beltway Is Under Investigation: Derrick Thompson was on the way to work when he was stopped for having an expired inspection decal*,

NBC4 (Updated July 16, 2020), www.nbcwashington.com/news/local/virginia-troopers-conduct-in-stop-of-black-driver-on-beltway-is-under-investigation/2362938/.

[5] Jose Martinez, *Footage Appears to Show NYPD Officer Planting Marijuana Inside Car for Allegedly the Second Time*, Complex (Mar. 18, 2020), www.complex.com/life/2020/03/nypd-officer-caught-on-camera-planting-marijuana-inside-car-for-a-second-time (detailing the encounter that occurred between Officer Erickson and Mr. Serrano and the events that led to Mr. Serrano's arrest).

[6] *See* Shawn Stout & Andy Elders, *"I Smell Marijuana": How Virginia Gave Cops License to Harass*, Just. Forward Va. (July 13, 2020), justiceforwardva.com/blog/2020/7/13/i-smell-marijuana-how-virginia-gave-cops-license-to-harass (explaining that the words **"I smell marijuana" have become magic words** and "police have learned that they don't need to actually find marijuana to make the search legal. They just have to say those three magic words, and the Fourth Amendment disappears") (emphasis added); Ned Oliver, *When Police Say They Smell Pot, They Can Search You. Lawmakers Worry Decriminalization Won't Change That.*, NBC 12, www.nbcl2.com/2020/01/25/when-police-say-they-smell-pot-they-can-search-you-lawmakers-worry-decriminalization-wont-change-that/ (Jan. 24, 2020, 8:48 PM) (noting officers frequently claim the odor of burnt marijuana as a basis for probable cause to conduct a warrantless search of a vehicle and that a judge was cognizant of the fact that **there is a high frequency in which officers falsely cite the odor of marijuana**) (emphasis added); Joseph Goldstein, *Officers Said They Smelled Pot. The Judge Called Them Liars*, N.Y. Times (Sept. 12, 2019), www.nytimes.com/2019/09/12/nyregion/police-searches-smelling-marijuana.html (stating that New York City police officer Pedro Serrano, admitted that often times his colleagues conduct a vehicle stop and report the odor of marijuana, but once he arrives at the scene he does not smell any odor in the vehicle) (referring to a decision written by Judge April Newbauer wherein she stated **"[t]he time has come to reject the canard of marijuana emanating from nearly every vehicle subject to a traffic stop"**) (emphasis added).

[7] The fact is that we may never know how many people suffered this type of predatory policing. *See* Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 Case W. Res. L. Rev. 931, 942 (2016) ("Discussing *Whren* in particular, whatever putative utility investigatory stops provide is concentrated heavily fighting the War on Drugs. Contraband seizures look good on arrest reports and big scores look good for cameras. But those **busts say nothing about the humiliating experiences of countless innocent people stopped before finding that one car full of drugs and guns out of many fruitless and invasive searches**.") (emphasis added); *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) ("I am convinced that there are ... many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.").

In Philadelphia, where reporting was required, data showed that odor-based searches increased after decriminalization, but officers found no drugs during many of those searches. *See* Samantha Melamed, *Philadelphia Police are Searching More Cars for Marijuana - but Finding Less of It, Critics Say*, Phila. Inquirer (Oct. 31, 2019, 5:00 AM), www.inquirer.com/news/philadelphia/philadelphia-police-racial-profiling-marijuana-vehicle-stops-20191031.html (emphasizing the contradiction between the fact that while the number of times police officers listed the odor of marijuana as a justification for traffic stops and searches increased, the number of "hit rates" at which drugs were found inside of the vehicles decreased); *see also* Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 Mich. L. Rev. 651, 660 (2002) (finding that "large hauls of drugs" was rare and that "[n]early two-thirds of all drivers searched were not carrying any illegal drugs").

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[8] *Carroll v. United States*, 267 U.S. 132 (1925), is a Prohibition-era case in which the U.S. Supreme Court established a police officer's authority to conduct a warrantless search of a vehicle based on probable cause that the vehicle contains contraband. This is known as the "*Carroll* doctrine." In *Carroll*, an officer stopped a vehicle, searched it, and found "contraband liquor" that was being "illegally transported." *Id.* at 156. Maryland cases have applied the *Carroll* doctrine in holding that an officer has authority to search a vehicle based solely on the odor of cannabis because cannabis was contraband, *i.e.*, illegal to use or possess. *See, e.g.*, *Robinson v. State*, 451 Md. 94 (2017) (applying the *Carroll* doctrine); *Wilson v. State*, 174 Md. App. 434 (2007) (same); *Ford v. State*, 37 Md. App. 373 (1977) (same). *See also* CONTRABAND, Black's Law Dictionary (11th ed. 2019) (defining "contraband" as "[g]oods that are unlawful to import, export, produce, or possess").

[9] *See Ford*, 37 Md. App. at 378 ("Generally evidence acquired by unaided human senses from without a protected area is not considered an illegal invasion of privacy, but is usable under doctrines of plain view or open view or the equivalent. Odors so detected may furnish evidence of probable cause of 'most persuasive character, physical fact(s) indicative of possible crime.") (cleaned up).

[10] *Wengert v. State*, 364 Md. 76, 88-91 (2001) (citing and discussing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)).

[11] In the Maryland Code, both "cannabis" and "hemp" mean "the plant Cannabis sativa L." Md. Code Ann., Crim. Law § 5-101(e-1); Md. Code Ann., Agric. § 14-101(c)(1).

[12] *See* Debra Cassens Weiss, *After Decriminalization, Pot Smell and Joint Didn't Justify Search, Court Says; Hemp Laws Also Raise Issues*, A.B.A. J. (Aug. 14, 2019, 1:46 PM), www.abajournal.com/news/article/after-decriminalization-pot-smell-and-joint-didnt-justify-search-court-says-hemp-laws-also-raise-issues ("New laws legalizing hemp also are raising concerns among prosecutors and police. Some fear that probable cause to search a vehicle is destroyed in such states because **marijuana's smell can't be distinguished from that of hemp**.") (emphasis added); *see also Simms v. State*, No. 1850, Sept. Term, 2021, 2022 WL 17412916, at *4 (Md. Ct. Spec. App. Dec. 5, 2022) ("At the suppression hearing, Corporal Samuel testified that **he could not distinguish between the odor of cannabis and the odor of hemp**.").

[13] *See* Cece White, *The Sativas and Indicas of Proof: Why the Smell of Marijuana Should Not Establish Probable Cause for A Warrantless Vehicle Search in Illinois*, 53 UIC J. Marshall L. Rev. 187, 222-23 (2020) (highlighting that an issue related with the plain smell doctrine is that police officers cannot accurately detect the odor of cannabis and smell is usually less reliable than sight).

[14] *See Lewis v. State*, 470 Md. 1, 23-24 (2020) (quoting *Lewis v. State*, 237 Md. App. 661, 691 (2018) (Arthur, J., concurring)) (discussing the ways that the odor of cannabis attaches and lingers on a person); *see also id.* at 24 n.7 (quoting *People v. Brukner*, 25 N.Y.S.3d 559, 571 (N.Y. City Ct. 2015) ("An odor of stale or burnt marihuana on clothing, without more, is equally susceptible to the innocent non-criminal explanation that the Defendant smoked marihuana previously in private, and not in public.")).

[15] *See Lewis*, 470 Md. at 24 (quoting *Lewis*, 237 Md. App. at 703 (Nazarian, J., dissenting)) ("There is no way to challenge or verify what the officer smelled, no way to test whether a person actually smelled of marijuana, ... and no way to control for the fully legal and otherwise non-criminal or second-hand ways someone could come to smell like marijuana.").

[16] The United States Supreme Court has explained the judicially determined exclusionary rule is a judicially created remedy for violations of the Fourth Amendment. *Davis v. United States*, 564 U.S. 229, 238, 248 (2011).

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[17] *King v. State*, 434 Md. 472, 492-93 (2013) ("'One may not wish an exclusionary rule into being by waiving a magic wand. It is something that must be deliberately and explicitly created to cover a given type of violation.' Accordingly, where the Legislature does not provide explicitly for a suppression remedy, courts generally should not read one into the statute.") (quoting *Sun Kin Chan v. State*, 78 Md. App. 287, 311 (1989)); *see also Dejarnette v. State*, 478 Md. 148, 169-70 (2022) (explaining that absence of a statutory exclusionary rule provided no suppression remedy).

[18] *See generally* American Civil Liberties Union, *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests*, 1, 155 (June 2013), www.aclu.org/criminal-law-reform/war-marijuana-black-and-white-report; *see also* The Balt. Story, "1971: Nixon's War on Drugs," https://www.thebaltimorestory.org/history-1/1971-nixons-war-on-drugs (last visited Jan. 31, 2024) (quoting John Ehrlichman) ("The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and [B]lack people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or [B]lack, but **by getting the public to associate the hippies with marijuana and [B]lacks with heroin, and then criminalizing both heavily, we could disrupt those communities**. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.") (emphasis added).

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