State of Connecticut
DIVISION OF CRIMINAL JUSTICE

TESTIMONY OF THE DIVISION OF CRIMINAL JUSTICE

REGARDING:

S.B. No. 888 (COMM) AN ACT RESPONSIBLY AND EQUITABLY REGULATING ADULT-USE CANNABIS.

JOINT COMMITTEE ON JUDICIARY
February 26, 2021

The Division of Criminal Justice takes no position on the concept of S.B. 888, An Act Responsibly and Equitably Regulating Adult-Use Cannabis, as it believes that it is a policy decision within the purview of the legislature. The Division's goal is to ensure that any such legislation deal with the issue responsibly, as the title of the bill suggests, and that it not otherwise jeopardize public safety. For this reason, Division offers the following comments and suggested changes to the bill.

Section 1

Under the definition of "disqualifying conviction," the Division suggests the inclusion of serious drug trafficking offenses; specifically, §§ 21a-277(a), 21a-278(a), and 21a-278(b). These offenses represent individuals convicted of the sale and trafficking of large quantities of narcotics, such as heroin, cocaine, and opioids. Understanding the intent of this bill, the Division is not suggesting the inclusion of § 21a-277(b), which would represent individuals convicted of selling controlled substances, such as cannabis. The Division has serious concerns that individuals whom have been convicted in trafficking large amounts of illegal narcotics would be tempted to tie illegal narcotic drug trade to the legal business of a cannabis dispensary to increase their profits.

Section 3

Section 3 amends § 21a-279a to state that individuals 21 and older may legally possess up to 1.5 ounces of cannabis. This section also states that it is illegal for persons under 21 to possess any quantity of cannabis. However, subsection (b) goes on to state that individuals under 21 will receive a fine if they possess *up to 2.5 ounces* of cannabis. The Division is perplexed as to why the cap for possession by individuals under 21, for whom cannabis is to remain illegal, is 2.5 ounces, when an individual 21 years or older is only allowed to legally possess 1.5 ounces.

While not covered in this bill, the Division recommends the inclusion of a section which would mirror § 14-111e. This statute requires the 60-day license suspension for a person under the age of 21 convicted of possession of alcohol. Since cannabis is largely being treated similar to alcohol under this bill, and there is a strong desire to deter minors from using cannabis, a conviction of possession of cannabis while under the age of 21 should carry the same suspension of driving privileges as does possession of alcohol.

Section 4

The Division recommends that lines 314-315 be revised to state "convicted on or after October 1, 2015, *but prior to January 1, 2022 ...* ." This would allow for the erasure of any conviction under 21a-279a that occurred prior to the enactment of the revisions to that statute under this bill. As drafted, an individual convicted under 21a-297a, as amended by this bill, would be able to immediately petition for the erasure of that conviction. As such, subsections (c) and (d), as amended, which allow for penalties for "subsequent offense[s]" would be rendered superfluous, as an individual would never be treated as a second offender. The fact that this bill provides for increased penalties for subsequent offenses suggests this was not its intention.

Section 10

This section, which permits an individual to gift small quantities of cannabis to another individual appears to be inconsistent with our sales statutes. Since one of the underlying principles of this bill is to protect public health by ensuring that the cannabis being sold or distributed is safe and the THC level of the cannabis is disclosed, the Division believes this section should be limited to cannabis that was purchased in conformance with this bill.

Section 13

The Division would like to thank the Governor's office for allowing us the opportunity to provide feedback prior to the release of this bill. This is particularly true with regard to Section 13. After several discussions with the Governor's office, this section was revised to address many of our concerns. However, several still remain.

The Division understands, and agrees, that the mere smell of cannabis, or the presence of a legal amount of cannabis, should never serve as the probable cause to search a person or a vehicle. However, our courts have established that the determination of whether reasonable suspicion or probable cause exists is not based on a single factor but is based on the *totality of circumstances*. Under that test, any item can give rise to probable cause under the circumstances of a particular case. For instance, the fact that a person is wearing a particular color sweater is innocuous in and of itself. However, it becomes a factor to consider in the determination of whether probable cause exists if the perpetrator of the crime is described as wearing a red sweater. In preventing the police from *ever* considering the smell of cannabis, the possession of legal quantities of cannabis, and/or the presence of money in close proximity to cannabis, section 13 of the bill fails to recognize a combination of facts can give rise to reasonable suspicion or probable cause.

As such, the Division suggests section 13 be amended so that these elements could *only* be used to support probable cause for a search when they are in conjunction with other factors that, combined, create probable cause. This revision would allow law enforcement to better police the illegal sale of cannabis, which would only support the success of legitimate cannabis establishments.

Subsection (c) of section 13, which would prevent the use of any evidence obtained in violation of subsection (a) in any trial, hearing, or court proceeding, also is problematic. For instance, it would prevent the use of evidence obtained in violation of the statute at a hearing to determine if someone violated the conditions of his probation. This would be contrary to decisions of our courts that establish that the exclusionary rule does not apply to violation of probation hearings. Therefore, the Division suggests that subsection (c) be amended to provide for the exclusion of any such evidence in criminal prosecutions.

Section 17

The Division recommends that this section be amended to state that a "person shall be twenty-one years of age or older" to hold a cannabis establishment license to mirror the age requirement to obtain a liquor license/permit. For example, § 30-45 requires the denial of a permit for the sale of alcoholic liquor to any individual under twenty-one years of age. Since an individual must be twenty-one to legally possess cannabis, the age to receive a cannabis license also should be twenty-one.

Traffic Safety Provisions

Section 88

This section largely mirrors Connecticut's statute prohibiting drivers from consuming an alcoholic beverage while operating a motor vehicle. The Division strongly supports this section because it is well-established that the psychoactive component in cannabis, which is Delta 9 Tetrahydrocannabinol, "significantly impairs judgment, motor coordination, and reaction time, and studies have found a direct relationship between blood THC concentration and impaired driving ability."[1] (*See* "Does Marijuana Use Affect Driving?" by the National Institute on Drug Abuse "NIDA"). Moreover, as outlined in the NIDA study, cannabis "is the illicit drug most frequently found in the blood of drivers who have been involved in vehicle crashes, including fatal ones."

Section 88 allows a person to be charged with possessing, smoking and operating under the influence offenses but prohibits a conviction for all three offenses "upon the same transaction." The Division agrees that possessing cannabis is essentially a subset of smoking or ingesting it but disagrees with the language that prohibits a person from being convicted of operating under the influence as this crime contains different elements than possessing or ingesting cannabis. Under the standard *Blockburger v. U.S.* analysis, persons may be convicted of two offenses that occur at

[1] The Division is happy to provide copies of all referenced studies/reports at the request of any member of the Committee.

the same time (i.e. same transaction) provided each offense has a different element of proof from the other.

Section 89

Section 89 prohibits a passenger in a motor vehicle from smoking cannabis. The Division also strongly supports this section because there is convincing data to suggest that second hand cannabis smoke can cause a secondary, or "contact high," for others. (*See* "Non-smoker exposure to secondhand cannabis smoke II: Effect of room ventilation on the physiological, subjective, and behavioral/cognitive effects," study conducted by Johns Hopkins University School of Medicine). This measure improves traffic safety by addressing the impairing effects of second-hand cannabis smoke for a driver. A common practice for younger drivers, known as "hot boxing" has several car occupants sharing and smoking one cannabis product with the windows rolled up so that all may experience the effects of the drug. This section addresses that issue and holds the passengers accountable.

Section 90

Section 90 was designed to address the increased traffic safety concerns associated with lawful recreational cannabis. In subsections (a) through (e), it establishes reporting requirements from the Police Officer Standards and Training Council (POST) in conjunction with the Department of Transportation (DOT) for the recommended number of accredited drug recognition experts (DREs) for each law enforcement unit as well as the creation of a model DRE policy for minimum DREs in our state. The Division supports this section. However, it does impose a substantial burden on DOT and the Police Officer Standards and Training Council and will have a significant fiscal impact. To date, there are approximately 60 DREs in CT distributed throughout the state. These DREs come from both the CT State Police as well as municipal police departments.

Subsections (f) and (g) of Section 90 provide that all officers must be trained in the two day Advanced Roadside Impaired Driving Enforcement (ARIDE) before being recertified. The ARIDE program is targeted to give officer additional field sobriety tests and other tools to detect drug impaired drivers. It is a prerequisite to becoming a DRE. While the Division supports ARIDE trained officers only Drug Recognition Expert (DRE) *instructors* can provide training for ARIDE. Currently, we only have 7 DRE instructors in our state. It is expensive to train DREs as they currently have a 2 week instructional training as well as 1 week of actual drug influence evaluations. These evaluations have historically taken place at the Maricopa County jail in Arizona but the DRE instructors are contemplating a new venue in Jacksonville, FL. The drug evaluations are conducted outside of CT because there are not sufficient quantities of drug impaired subjects in local jails to conduct efficient drug influence evaluations.

Section 91

Section 91 makes numerous changes to our existing operating under the influence statute under C.G.S. § 14-227a. The Division supports these revisions as they largely address the traffic safety concerns associated with drug impaired driving, which is on the rise in our state as well as

nationwide. Subsection (b) (2) admits Drug Recognition Expert (DRE) testimony without the necessity of a lengthy, costly *Daubert/Porter* hearing. Maine and North Carolina have similar statutes and they work quite well. The Drug Evaluation and Classification (DEC) program propagated by IACP and NHTSA has been admitted in over twenty-six states as well as internationally. It is a well-accepted, scientifically validated program to detect drug impaired drivers using a twelve step evaluation technique. There are numerous scientific studies supporting this standardized drug influence evaluation.

Subsection (d) of Section 91 was originally proposed by the Division in the last legislative session. It provides protection for hospital staff engaged in blood draws for suspected impaired drivers. Law enforcement officers are required to get a blood or breath sample under 14-227c if there is a motor vehicle crash involving serious injury or death. Some hospital staff are reluctant to draw blood at the law enforcement officer's behest for fear of civil liability. This provision eliminates that fear absent "gross negligence."

Subsection (e) of Section 94 allows evidence to be admitted for a refusal to submit to a chemical test as well as a refusal to submit to "the nontestimonial portion of a drug influence evaluation." Subsection (e)(2) provides that DRE testimony is admissible as evidence. This section also has a provision that a judge "shall take judicial notice" that THC can be impairing for drivers under subsection (e) (3).

The provisions in Section 91 are important traffic safety measures to reduce drug impaired fatalities on our roadways. As such, the Division fully supports them.

Section 92

Section 92 proposes numerous changes to CT's administrative license suspension statute under C.G.S. § 14-227b. The Division supports these changes to more effectively address the growing number of drug impaired drivers who jeopardize the safety of all motorists. It contains many of the proposed changes to C.G.S. §14-227a and now includes license suspension proceedings for a refusal to submit to a chemical test as well as a refusal to submit to the nontestimonial portion of the drug influence evaluation. Section 92 (a) provides that all motorists have impliedly consented to submit to a chemical test as well as the nontestimonial part of a DRE evaluation.

Like Section 91 involving 14-227a, Section 92 allows into evidence both the DRE testimony and drug influence evaluations at the license suspension hearings. This section is vital in that it now captures ALL impaired drivers as being subjected to a license suspension even if they don't have the per se .08 blood alcohol content (BAC) limit. Currently, all drug *only* impaired cases are excluded from license suspension proceedings because there is no per se nanogram level for drugs unlike the .08 BAC. While the Division does not support a specific nanogram level of drugs for per se impairment because there is no scientific basis to support it, this new section applies the same license suspension penalties to drug impaired drivers as it does to alcohol impaired drivers.

This proposed legislation will have a fiscal impact as more per se license suspension hearings will likely occur. Currently, the Department of Motor Vehicles only has 2 attorneys who handle these hearings.

Section 93

This section implements changes to C.G.S. § 14-227c, which outlines the protocol for chemical testing in motor vehicle crashes involving serious bodily injury or death. The Division supports these changes to more effectively investigate and prosecute drug impaired driving. It adopts the same provisions under Sections 91 and 92 regarding DRE evidence admissibility. Subsection (b) mandates a drug influence evaluation for the surviving operator if uninjured. This section also adds urine as a method of testing for motor vehicle crashes involving serious injury or death. Further, under subsection (e) this section provides civil immunity for medical staff on blood draws. Section 93, like Section 92, would provide for license suspension hearings in these serious cases under subsection (c). Subsection (d) requires an ARIDE officer to be at the scene (if available).

Section 94

Section 94 makes a substantive change to subsection (c) of C.G.S. § 14-44k, which addresses license disqualification for commercial driver license holders. The Division supports this change as it is consistent with the changes proposed in sections 91 and 92 for commercial drivers. It also allows DRE testimony into evidence and provides that a person who refuses to submit to a chemical test or DRE evaluation is disqualified from operating a commercial vehicle for one year

Section 95

Section 95 imposes a duty for the state Traffic Safety Resource Prosecutor (TSRP) and DOT to provide DRE training materials to judges. The Division supports this proposal as the TSRP and DOT are both heavily involved in the implementation and training for the DRE program. The state coordinator for the DEC program that certifies DREs in our state works for DOT in their Highway Safety Office.

Sections 96 and 97

Sections 96 and 97 make substantive changes to the boating under the influence statute, which is C.G.S. § 15-140q. DCJ supports this revisions as they are consistent with the proposals contained in Sections 91 and 92.

In conclusion, the Division respectfully recommends that should the Committee choose to proceed with S.B. No. 888, that the Committee amend the legislation to address the concerns identified herein. We thank the Committee for affording this opportunity to provide input on this matter and would be happy to provide any additional information the Committee might require or to answer any questions that you might have.