

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

118 MM 2019

**Melissa Gass, Ashley Bennett, and Andrew Koch,
individually and on behalf of all others similarly situated,**

PETITIONERS

V.

52ND JUDICIAL DISTRICT, LEBANON COUNTY

RESPONDENT

**ANSWER TO PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE
NATURE OF A PRELIMINARY INJUNCTION**

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INTRODUCTION

In September 2019, the 52nd Judicial District (“Judicial District”) enacted a Medical Marijuana Policy (“Policy”) prohibiting probationers, parolees and other offenders under the supervision of its Probation Services Office from using medical marijuana. This Policy relied upon the General Conditions of Probation/Parole that were already in place in Lebanon County. While the Policy bars the use of medical marijuana by probationers and parolees, it does not result in immediate detention. Rather, the Policy was amended in October to clarify that probationers and parolees may request to be excused from this condition of probation/parole by providing appropriate medical documentation. The Judicial District’s Policy is an appropriate balance of the authority of the Judicial District to supervise probationers and parolees while considering a probationer/parolee’s possible need for medical marijuana. Given that Petitioners have an appropriate remedy in the Judicial District, the Petitioner’s request for a Preliminary Injunction should be denied.

STATEMENT OF FACTS

Due to concerns about potential abuse of medical marijuana by criminal defendants under its jurisdiction, the 52nd Judicial District enacted a Medical Marijuana Policy prohibiting probationers, parolees and other offenders under the supervision of its Probation Services Office (“Office”) from using medical

marijuana. *Exhibit 1*, "Declaration of President Judge John C. Tylwalk," at ¶ 2. The Judicial District promulgated the Policy after the Office began to experience disruption in probation services and persistent difficulty supervising probationers and parolees who use medical marijuana. *See Exhibit 1* at ¶ 2 and *Exhibit 2*, "Declaration of Sally Barry," at ¶ 2. For instance, some individuals under court supervision with medical marijuana prescriptions are unable to identify the health condition that led to the medical marijuana prescription. *Exhibit 2* at ¶ 4. The Office also found a significant amount of individuals under supervision, who possess a medical marijuana card, that have a history of marijuana abuse and/or their underlying charges are related to the unlawful possession of marijuana. *Exhibit 2* at ¶ 5. Additionally, drug testing for illicit use of marijuana is also rendered meaningless if an individual has a prescription for the legal use of medical marijuana as the laboratory is unable to discern between legal and illegal strands of marijuana. *Exhibit 2* at ¶ 5.

The Board of Judges enacted the Policy after careful review of numerous factors, including:

- (a) review of research and acknowledgment that the Food and Drug Administration (FDA) does not recognize medical marijuana as a treatment for medical conditions;
- (b) evaluation of safety concerns for the community; and

- (c) determination of substance abuse treatment options for probationers as some providers have shared they will not treat anyone who has a medical marijuana card because of the risk of relapse.

Exhibit 1 at ¶ 3. Indeed, the fact that treatment providers will not admit persons with medical marijuana prescriptions limits the Office's ability to place probationers and parolees into treatment programs and the Court of Common Pleas' ability to help rehabilitate these individuals. *Exhibit 2* at ¶ 3.

Further, the use of medical marijuana conflicts with the general conditions of probation and parole established for Lebanon County. *Exhibit* ¶¶ 4 - 5. Under the Lebanon County General Conditions of Probation/Parole, all probationers and parolees agree to the following conditions:

- a. You may not possess or drink alcoholic beverages nor use any narcotic drugs and you will abstain from the possession, use or abuse, manufacturing, or sale of any legal or illegal mind/mood altering chemical/substance, including but not limited to Synthetic Drugs. (Rule 3)
- b. Comply with all Municipal, County, State and Federal criminal laws... (Rule 4)

Exhibit 1 at ¶ 4. A probationer or parolee generally will not comply with the General Conditions of Probation/Parole if they use medical marijuana because they will be violating Rules 3 and 4. *Exhibit 1* at ¶ 5. It has generally been the experience of the Judicial District that requiring adherence to general conditions

assists with rehabilitation of offenders and reduces the risk of recidivism. *Exhibit 2* at ¶¶ 6 - 7.

Though it bars the use of medical marijuana for probationers/parolees on court supervision, the Policy does not automatically result in detention for probationers or parolees who test positive or constitute a final determination that the offender has violated the terms of probation or parole. *Exhibit 1* at ¶ 7. As recently amended by the Board of Judges, the Policy provides an individual the opportunity to ask the Court of Common Pleas for relief. *Exhibit 1* at ¶ 8. The Policy, as amended, states:

Any person on supervision who believes they are aggrieved by this policy may petition the Court for a full and fair hearing to determine whether they should be excused from its application to them. At that hearing, the Petitioner will bear the burden of establishing to the Court the medical necessity of their ongoing use of medical marijuana.

Exhibit 1 at ¶ 8.

Operationally, the Policy works as follows:

- A probationer or parolee who uses medical marijuana and tests positive for marijuana during routine testing is not immediately detained.
- Before a violation hearing is scheduled, a discussion of treatment options often will occur. The probationer or parolee would be given a chance to stop using medical marijuana.

- If no agreement can be reached, the probationer or parolee would be scheduled for a violation hearing.
- The probationer or parolee has the right to legal counsel at the *Gagnon II* hearing, with Public Defender services available.
- A violation hearing is usually scheduled within 30 days after a positive drug test. At that hearing, an individual who uses medical marijuana may present evidence and argument to support his/her need for medical marijuana consistent with the guidelines set forth in the Medical Marijuana Act.

Exhibit I at ¶¶ 10 - 14.

ARGUMENT

To obtain a preliminary injunction, Petitioners must demonstrate the following:

(1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest.

SEIU Healthcare Pennsylvania v. Com., 628 Pa. 573, 583-84, 104 A.3d 495, 501-02 (2014) (citing *Warehime v. Warehime*, 580 Pa. 201, 860 A.2d 41, 46-47 (2004)). Petitioners must meet all six requisite elements for the preliminary injunction to issue. *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 573 Pa. 637, 646, 828 A.2d 995, 1001 (2003).

In this case, Petitioners are not likely to prevail on the merits. First, the Judicial District's Policy reasonably balances the needs of the Judicial District to supervise probationers and parolees with an individual's possible need for medical marijuana. The General Assembly did not intend for the Medical Marijuana Act ("MMA") to supersede the abilities of the courts to supervise probation and parole. Consequently, an injunction would not serve the public interest.

Second, because the Policy affords probationers and parolees the opportunity for a full and fair hearing to determine if they should be excused from this condition of probation/parole, the likelihood of immediate and irreparable harm is low and greater injury thus would not result if this Court were to deny the injunction.

A. Petitioners are not likely to prevail on the merits.

Petitioners are not likely to prevail on the merits in this case because the Policy recently amended by the Judicial District's Board of Judges on October 7, 2019, carefully balances the need to rehabilitate offenders against the need for

medical marijuana and gives individual consideration for the Petitioners' specific circumstances.

Though probationers and parolees generally are prohibited under the Policy from using medical marijuana, they are informed that:

Any person on supervision who believes they are aggrieved by this policy may petition the Court for a full and fair hearing to determine whether they should be excused from its application to them. At that hearing, the Petitioner will bear the burden of establishing to the Court the medical necessity of their ongoing use of medical marijuana.

Exhibit 1 at ¶ 8.

The Policy was enacted as a careful balance between safety concerns for the community and the fact that some providers of substance abuse treatment will not treat anyone with a medical marijuana card due to the risk of relapse. *See generally Exhibit 1* at ¶ 3 and *Exhibit 2* at ¶ 3. Restricting offenders from engaging in conduct that is otherwise lawful is permitted as part of the Judicial District's obligation to ensure that the offender is effectively rehabilitated. The MMA does not override or change these powers and, therefore, Petitioners are unlikely to prevail on the merits in this case.

- 1. Courts have broad powers to regulate the activity of probationers in order to rehabilitate probationers and protect the public; this power includes the ability to regulate otherwise lawful conduct.**

Probation and parole are increasingly viewed as attractive alternatives to incarceration as state and county prisons continue to suffer from overcrowded

conditions. *Short and long term effects of imprisonment on future felony convictions and prison admissions*, Proceedings of the National Academy of Sciences of the United States of America. <<https://www.pnas.org/content/early/2017/09/26/1701544114.full>> (last accessed October 11, 2019). In Pennsylvania, sentencing courts and the Board of Probation and Parole always have enjoyed broad powers to ensure that probation is effectively rehabilitating offenders and protecting the general public. The Judicial District's Medical Marijuana Policy is entirely consistent with the legitimate aims of probation and does not unnecessarily restrict any fundamental right of Petitioners.

a. Courts have broad powers to protect the public and rehabilitate probationers.

After conviction or entry of a guilty plea, the sentencing court or individual judge is the ultimate arbiter of the sanction to be imposed, subject to the limitations set by the General Assembly in the Crimes Code and the Sentencing Code. *See* 18 Pa.C.S. §§ 1101-08 (relating to authorized disposition of offenders); *Com. v. Knighton*, 490 Pa. 16, 22-23, 415 A.2d 9, 12-13 (1980) (sentencing judge is the ultimate adjudicator of criminal sentences).¹

¹ This Brief will refer to both standards for parole and probation as conditions of probation are examined under the same standards as conditions of parole. *Commonwealth v. Hermanson*, 449 Pa. Super. 443, 449 n.4, 674 A.2d 281, 284 n.4 (1996) (citing 42 Pa.C.S. §§ 9755(d) and 9754).

One possible sentencing option is probation, which is generally understood as a sentence served under community supervision rather than in prison or jail. The United States Supreme Court considers probation to be a form of criminal sanction imposed upon an offender after a verdict, finding or plea of guilty, and is simply one point on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of community service. *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987). This Court has held that an order of probation “is not a judgment of sentence as that term is construed for purposes of procedure.” *Commonwealth v. Nicely*, 536 Pa. 144, 638 A.2d 213 (1994); *Commonwealth v. Vivian*, 426 Pa. 192, 231 A.2d 301 (1967); *Fleegle v. Pennsylvania Board of Probation and Parole*, 532 A.2d 898 (Pa. Cmwlth. 1987), *appeal denied*, 518 Pa. 614, 540 A.2d 535 (1988).

A court or judge imposes conditions of parole or probation in order to serve two critical purposes: (1) to assist the offender’s rehabilitation and reintegration into society; and (2) to protect society. *Commonwealth v. Walton*, 483 Pa. 588, 397 A.2d 1179 (1979); *Lee v. Pennsylvania Board of Probation and Parole*, 885 A.2d 634 (Pa. Cmwlth. 2005); *Commonwealth v. Crosby*, 390 Pa. Super. 140, 568 A.2d 233 (1990); *Commonwealth v. Quinlan*, 488 Pa. 255, 412 A.2d 494 (1980) (parole and probation are primarily concerned with the offender’s rehabilitation and restoration to a useful life); *see also* 42 Pa.C.S. § 9754(c)(7) (ensuring public

safety by requiring a probationer to remain within the jurisdiction of sentencing court). It is generally expected that a probationer or parolee must strictly adhere to the conditions, otherwise the purpose of probation or parole is rendered completely meaningless. *Commonwealth v. Rudy*, 304 Pa. Super. 64, 450 A.2d 102 (1982).

This Court has observed that the General Assembly has expressly listed among its purposes for adopting both the Sentencing Code and the Prisons and Parole Code the rehabilitation, reintegration, and diversion from prison of appropriate offenders. *Fross v. Cty. of Allegheny*, 610 Pa. 421, 439, 20 A.3d 1193, 1203-04 (2011) (citing 42 Pa.C.S. §§ 9721(b) (court to consider rehabilitative needs of defendant in determining sentence); 9754(c) (court to impose conditions of probation that assist defendant in leading law-abiding life); 61 Pa.C.S. § 6102(1)); accord *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972) (“Society has a stake in whatever may be the chance of restoring [a parolee] to normal and useful life within the law.”); *Commonwealth v. Walton*, 483 Pa. 588, 397 A.2d 1179, 1184 (1979) (“conditions of probation, though significant restrictions on the offender’s freedom, are primarily aimed at effecting, as a constructive alternative to imprisonment, his rehabilitation and reintegration into society as a law-abiding citizen”); *Commonwealth v. Basinger*, 982 A.2d 121, 128 (Pa. Super. 2009) (conditions of probation “must be constructive measures directed at rehabilitation through behavioral modification”).

So long as the courts impose conditions that are tailored to the offenders, the courts have broad authority to impose any conditions that will assist with the rehabilitation of offenders. *Fross*, 610 Pa. at 442-43, 20 A.3d at 1206 (citing *Walton*, 397 A.2d at 1184 (courts “are traditionally and properly invested with a broader measure of discretion in fashioning conditions of probation appropriate to the circumstances of the individual case”)); *Sheridan*, 502 A.2d at 696 (“sentences must be imposed individually, taking into account not only the offense but the characteristics of the offender”); *see, e.g., Woodling v. Bd. of Prob. & Parole*, 537 A.2d 89, 89 (Pa. Cmwlth. 1988) (sex offender whose victim was a minor was subject to condition of probation “that he not associate with minors (under age eighteen) who were not close relatives (first degree) without his parole agent’s prior approval”). Nevertheless, general conditions may apply to a broad category of persons within the jurisdiction of the court or the Parole Board. *See, e.g.,* 61 Pa.C.S. § 6141 (relating to general rules and special restrictions); 37 Pa. Code § 63.5(a) (Parole Board’s power to impose special conditions that are applicable only to particular parolees).

This broad power extends to curtailing otherwise lawful conduct or rights that the general public might enjoy. Parolees and probationers are in a different position than are members of the general public in that they are still subject to an existing term of imprisonment and are the focus of society’s rehabilitation efforts.

Morrissey v. Brewer, 408 U.S. 471, 483 (1972) ("Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole"). This naturally means that parolees and probationers are properly subject to conditions that restrict their liberty substantially beyond those ordinary restrictions that are imposed by the law upon ordinary citizens. *Commonwealth v. Homoki*, 423 Pa. Super. 320, 327, 621 A.2d 136, 140 (1993) (prohibition against probationer using prescription medications), *appeal denied*, 535 Pa. 675, 636 A.2d 634 (1993); *Commonwealth v. Edwards*, 400 Pa. Super. 197, 201, 583 A.2d 445, 447 (1990), *rev'd on other grounds*, 535 Pa. 241, 634 A.2d 1093 (1993); *Commonwealth v. Hermanson*, 449 Pa. Super. 443, 447, 674 A.2d 281, 283 (1996) (prohibition against probationer driving a motor vehicle). These conditions are not unusual when one remembers that offenders on probation or parole are still technically serving a sentence of imprisonment, albeit outside of the prison's walls. *Lee v. Pa. Board of Probation and Parole*, 885 A.2d 634, 638-39 (Pa. Cmwlth. 2005) (Parole Board is vested with broad powers to fashion appropriate conditions of parole where such conditions are intended to effectuate the offender's rehabilitation and reintegration into society as a law-abiding citizen); *Homoki*, 423

Pa. Super. at 327, 621 A.2d at 140; *Commonwealth v. Crosby*, 390 Pa. Super. 140, 568 A.2d 233 (1990).

With this backdrop in mind, the sentencing court or the Parole Board has the discretion to limit or prohibit an offender's use of a controlled substance or medication that is legitimately prescribed to the offender. *Commonwealth v. Homoki*, 423 Pa. Super. 320, 621 A.2d 136 (1993). In *Homoki*, the Superior Court upheld a sentencing court's imposition of a condition of probation that restricted the offender's use of a prescription medication for a back injury to only those medications that were dispensed to the offender while he was incarcerated. *Id.* at 327, 421 A.2d at 140. In upholding the restrictive condition, the Superior Court observed that the offender did not establish that the prohibited medications were essential for his welfare. *Id.* at 327-28, 621 A.2d at 140.

Therefore the law is clear that courts, sentencing judges and the Board of Probation and Parole all have the power to restrict otherwise lawful activity in the interests of rehabilitating the offenders and protecting the general public.

b. The 52nd Judicial District's policies are consistent with these powers.

In this case, the Judicial District has both general conditions of probation and a specific policy that applies to the use of medical marijuana. Pursuant to the Lebanon County General Conditions of Probation/Parole, all probationers agree to the following general conditions:

- a. You may not possess or drink alcoholic beverages nor use any narcotic drugs and you will abstain from the possession, use or abuse, manufacturing, or sale of any legal or illegal mind/mood altering chemical /substance, including but not limited to Synthetic Drugs. (Rule 3).
- b. Comply with all Municipal, County, State and Federal criminal laws... (Rule 4).

Exhibit 1 at ¶ 4.

Pursuant to the Policy, probationers are prohibited from using medical marijuana and are informed that:

Any person on supervision who believes they are aggrieved by this policy may petition the Court for a full and fair hearing to determine whether they should be excused from its application to them. At that hearing, the Petitioner will bear the burden of establishing to the Court the medical necessity of their ongoing use of medical marijuana.

Exhibit 1 at ¶ 8. The Policy was enacted as a careful balance between safety concerns for the community and the fact that providers of substance abuse treatment will not treat anyone with a medical marijuana card due to the risk of relapse. *See generally Exhibit 1* at ¶ 3 and *Exhibit 2* at ¶ 3. Some individuals under court supervision with medical marijuana prescriptions are unable to identify the health condition that led to the medical marijuana prescription. *Exhibit 2* at ¶ 4. The Probation Office also found a significant amount of individuals under supervision, who possess a medical marijuana card, that have a history of marijuana abuse and/or their underlying charges are related to the unlawful possession of marijuana. *Exhibit 2* at ¶ 5. Drug testing for illicit use of marijuana

is also meaningless if an individual has a prescription for the legal use of medical marijuana as the laboratory is unable to discern between legal and illegal strands of marijuana. *Exhibit 2* at ¶ 5.

Further, assuming no other aggravating factors are present, probationers/parolees are not automatically detained if they test positive for marijuana. *Exhibit 1* at ¶ 7. Instead, the Judicial District schedules the probationers/parolees for a violation hearing. At such hearing the probationer/parolee will be able to utilize legal counsel and introduce evidence of the need for medical marijuana. *Exhibit 1* at ¶¶ 10 - 14.

These conditions are entirely consistent with the Judicial District's powers to balance the needs of rehabilitating offenders against the general need for public safety. Further, as detailed below, given that the MMA provides only a very limited and proscribed right to use medical marijuana, the Policy is not overly broad or unduly restrictive of a fundamental right of probationers. *E.g., Homoki*, 423 Pa. Super. at 327, 621 A.2d at 140.

Consequently, because sentencing courts and judges have wide discretion to supervise probationers and set general and specific conditions of probation, the 52nd Judicial District's Medical Marijuana Policy is a reasonable exercise of supervisory powers.

2. **The MMA does not alter, change, or conflict with the broad powers of the courts to take all necessary actions to rehabilitate and reintegrate probationers into society while at the same time protecting public safety.**

Contrary to Petitioners' assertions, the MMA is entirely silent on the use of medical marijuana by individuals under court supervision. The MMA clearly shows the General Assembly intended the law *not* to supersede the ability of the courts to prescribe reasonable probation restrictions consistent with the Sentencing Code and the Crimes Code.

First, in the opening sections of the MMA, the General Assembly clearly demonstrated the MMA would not otherwise supersede other laws because the use of medical marijuana must not be in violation of "any provision of law" to the contrary:

(a) General rule.—Notwithstanding *any provision of law to the contrary*, use or possession of medical marijuana as set forth in this act is lawful within this Commonwealth.

35 P.S. § 10231.303 (emphasis added). In this case, the use of medical marijuana would be contrary to the reasonable restrictions of the Judicial District's medical marijuana policy and the aforementioned powers of the courts to prescribe conditions of probation and parole.

Second, the General Assembly permitted only the very limited use of medical marijuana within the confines of a strict system:

(b) Requirements.—The lawful use of medical marijuana is subject to the following:

(1) Medical marijuana may only be dispensed to:

(i) a patient who receives a certification from a practitioner and is in possession of a valid identification card issued by the department;² and

(ii) a caregiver who is in possession of a valid identification card issued by the department.

(2) Subject to regulations promulgated under this act, medical marijuana may only be dispensed to a patient or caregiver in the following forms:

(i) pill;

(ii) oil;

(iii) topical forms, including gels, creams or ointments;

(iv) a form medically appropriate for administration by vaporization or nebulization, excluding dry leaf or plant form until dry leaf or plant forms become acceptable under regulations adopted under section 1202;

(v) tincture; or

(vi) liquid.

(3) Unless otherwise provided in regulations adopted by the department under section 1202, medical marijuana may not be dispensed to a patient or a caregiver in dry leaf or plant form.

² The “department” in the MMA refers to the Department of Health. See 35 P.S. § 10231.103.

(4) An individual may not act as a caregiver for more than five patients.

(5) A patient may designate up to two caregivers at any one time.

(6) Medical marijuana that has not been used by the patient shall be kept in the original package in which it was dispensed.

(7) A patient or caregiver shall possess an identification card whenever the patient or caregiver is in possession of medical marijuana.

(8) Products packaged by a grower/processor or sold by a dispensary shall only be identified by the name of the grower/processor, the name of the dispensary, the form and species of medical marijuana, the percentage of tetrahydrocannabinol and cannabinal contained in the product and any other labeling required by the department.

35 P.S. § 10231.303. Under this strict system, patients are not free to obtain immediate access to medical marijuana. They are also not able to dictate the form of the medical marijuana. Again, these prohibitions undermine Petitioners' arguments about the MMA giving a broad right of access to medical marijuana.

Similarly, under Section 510, there are also safety-sensitive restrictions in the MMA that recognize potential harmful side effects associated with users under the influence of medical marijuana. That section applies the following restrictions:

(1) A patient may not operate or be in physical control of any of the following while under the influence with a blood content of more than 10 nanograms of active tetrahydrocannabis per milliliter of blood in serum:

(i) Chemicals which require a permit issued by the Federal Government or a state government or an agency of the Federal Government or a state government.

(ii) High-voltage electricity or any other public utility.

(2) A patient may not perform any employment duties at heights or in confined spaces, including, but not limited to, mining while under the influence of medical marijuana.

(3) A patient may be prohibited by an employer from performing any task which the employer deems life-threatening, to either the employee or any of the employees of the employer, while under the influence of medical marijuana. The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.

(4) A patient may be prohibited by an employer from performing any duty which could result in a public health or safety risk while under the influence of medical marijuana. The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.

35 P.S. § 10231.510(4). In addition, medical marijuana patients may be restricted from using medical marijuana in the workplace if their employer elects to deny such use at work. 35 P.S. § 10231.2103(b)(2).

All of these restrictions show that the MMA was not intended to give broad fundamental or absolute rights to use medical marijuana. The limited uses of medical marijuana and the numerous proscriptions show that the General Assembly did not intend for medical marijuana to create a broad absolute right for users. Indeed, even Petitioners would have to agree that they are arguing for an

absolute right to use medical marijuana while on probation even though the offenders' employers could deny them employment in a safety sensitive position for using medical marijuana. 35 P.S. § 10231.510(4). If safety sensitive employment is worthy of protection, why is the rehabilitation of probationers not as worthy?

Third, the MMA is not intended to create a permanent right for the citizens of Pennsylvania because it is intended that the MMA only “serve as a temporary measure, pending Federal approval of and access to medical marijuana through traditional medical and pharmaceutical avenues.” 35 P.S. § 10231.102. Far from creating some kind of permanent right to use medical marijuana, the MMA is at most a temporary placeholder that is subject to change.

Fourth, while the MMA does state that users cannot be “subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, including civil penalty or disciplinary action by the Commonwealth licensing board or commission,” 35 P.S. § 10231.2103(a), the Judicial District has broad powers to restrict lawful conduct in the interest of rehabilitating offenders on probation. This statement in the MMA is virtually meaningless in the probation context. Persons on probation are already subject to restrictions they would not otherwise be subject to *but for* the fact that they were sentenced to probation for committing a crime. Consequently, a plain reading of the MMA shows that the General Assembly did

not intend for the MMA to create all-encompassing powers that automatically restrict the courts in a way that creates on-demand access to medical marijuana by offenders.

Petitioners cite to cases such as *Reed-Kaliher v. Hoggatt* for the proposition that the MMA grants a broad right to Petitioners and that a probation condition that restricts the use of medical marijuana actually violates Pennsylvania law. 237 Ariz. 119, 123, 347 P.3d 136, 140 (2015). *Reed-Kaliher* involved an Arizona law and the Arizona Supreme Court did not address the foregoing restrictions that are specifically set forth in Pennsylvania's medical marijuana law with regard to accessing medical marijuana. Further, the Arizona Supreme Court incorrectly considered the general probation condition at issue in that case as a specific mandate for the probationer to violate Arizona law. *Id.* However, this analysis overlooks the fact that probation is a form of criminal sanction and the probationer has agreed to accept probation in lieu of some other possible sanction such as prison. *See generally Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (probation is simply one form of possible sanctions for criminal conduct). Thus, the probationer or parolee is not compelled to violate any law. Rather, he or she has elected to choose community supervision over a prison sentence; the probationer or parolee is not compelled do anything.

Based on all of the foregoing, it is unlikely that Petitioners will ultimately succeed on the merits in this case because the 52nd Judicial District's Medical Marijuana Policy is reasonably tailored toward ensuring compliance with federal law, ensuring public safety, and finding effective treatment options for offenders. Any offender who needs medical marijuana is given the chance to explain that need to a judge with the assistance of legal counsel. *Exhibit 1* at ¶8.

B. Petitioners are not likely to suffer irreparable harm.

Petitioners argue that the Policy will cause them irreparable harm because they will essentially have to choose between ceasing the use of medication that might mitigate suffering or have to face detention. *Brief*, pp. 7-8. To the contrary, as highlighted above, Petitioners have the absolute right under the Policy to argue their specific needs for medical marijuana to the Court of Common Pleas of Lebanon County. *Exhibit 1* at ¶8.

No individual in Petitioners' circumstance will be immediately detained. *Exhibit 1* at ¶ 7. Instead, the Judicial District schedules the probationer for a violation hearing. At that hearing, the probationer will be able to utilize legal counsel and introduce evidence of the need for medical marijuana. These probation violation hearings are typically scheduled promptly within 30 days after a positive drug test. *Exhibit 1* at ¶¶ 10 - 14. Thus, their individual circumstances

will be considered and the Judicial District can elect to release Petitioners from the requirements of the Medical Marijuana Policy.

Further, the medical consequences that might arise from a probationer not having access to the medication of their choice does not create irreparable harm absent a definitive showing of life or death circumstances. *E.g., Homoki*, 423 Pa. Super. 320, 621 A.2d 136 (1993). In this case, while Petitioners certainly have invoked concern over their health, the Judicial District will be able to consider their individual needs for medical marijuana and whether Petitioners should be relieved from the requirements of the Policy. *See Exhibit 1* at ¶¶ 10 - 14. As in *Homoki*, the Judicial District will allow the offender to establish that medical marijuana is essential for his or her welfare.

C. Greater injury would not result if this Court were to deny the injunction given that Petitioners have the chance to argue their need for medical marijuana before the Court of Common Pleas.

Petitioners incorporate much of their same argument on the issue of irreparable harm; namely, that they are faced with the dilemma of choosing between medical treatment and violating the conditions of their probation. *Brief*, pp. 29-30. That argument was addressed, *supra*, in Section A.

D. The General Assembly did not intend for the MMA to supersede the abilities of the courts to supervise probation and parole and, consequently, an injunction would not serve the public interest.

As stated above, the MMA permits the limited use of medical marijuana only in narrow circumstances. The MMA also contains safety restrictions and employment limitations, and curtails the use of certain types of marijuana beyond the permissible forms set forth in the MMA. Far from being a broad, unrestricted right, medical marijuana is limited in Pennsylvania. An injunction would only serve to thwart the various common pleas courts that are attempting to address medical marijuana use by probationers throughout the state.

E. Petitioners' remaining arguments do not support an injunction.

Many of Petitioners' remaining arguments for an injunction restate their arguments regarding Petitioners' particular need to use medical marijuana without regard to the conditions of their probation or parole. For the reasons stated above, the 52nd Judicial District has already responded to all of these arguments.

CONCLUSION

Based on the foregoing arguments, Respondent, the 52nd Judicial District, respectfully requests this Honorable Court deny Petitioners' Application for Special Relief in the Nature of a Preliminary Injunction.

Respectfully submitted,

s/Geri Romanello St. Joseph
GERI ROMANELLO ST. JOSEPH, ESQUIRE
s/Robert Krandel
ROBERT KRANDEL, ESQUIRE

EXHIBIT 1

IN THE SUPREME COURT OF PENNSYLVANIA

MELISSA GASS, et al.

v.

52nd JUDICIAL DISTRICT

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No. 118 MM 2019

DECLARATION OF PRESIDENT JUDGE JOHN C. TYLWALK

1. I am the President Judge for the Lebanon County Court of Common Pleas, 52nd Judicial District. I am familiar with the facts set forth herein.

2. Due to recent concerns about potential abuse of medical marijuana by probationers and parolees, the Court enacted a Policy prohibiting probationers and parolees from using medical marijuana.

3. This Policy was enacted after careful review of numerous factors including: review of research and acknowledgment that the Food and Drug Administration (FDA) does not recognize medical marijuana as a treatment for medical conditions; safety concerns for the community; substance abuse treatment options for probationers as some providers have shared they will not treat anyone who has a medical marijuana card because of the risk of relapse; and the general conditions of probation and parole established for Lebanon County.

4. Under the Lebanon County General Conditions of Probation / Parole (attached as Exhibit A), all probationers and parolees agree to the following conditions:

- a. "You may not possess or drink alcoholic beverages nor use any narcotic drugs and you will abstain from the possession, use or abuse, manufacturing, or sale of any

legal or illegal mind/mood altering chemical /substance, including but not limited to Synthetic Drugs." (Rule 3)

b. "Comply with all Municipal, County, State and Federal criminal laws..." (Rule 4)

5. A probationer or parolee generally will not comply with the General Conditions of Probation / Parole if they use medical marijuana because they will be violating Rules 3 and 4.

6. It has generally been the experience of the Court that requiring adherence to general conditions assists with rehabilitation of offenders and reduces the risk of recidivism.

7. However, the Medical Marijuana Policy, which bars the use of medical marijuana for probationers/parolees on court supervision, does not automatically result in a detention for probationers or parolees who test positive.

8. The Policy was recently amended (attached as Exhibit B) to explain the process which is provided to individuals who believe they are aggrieved by this probation condition. The Policy states:

"Any person on supervision who believes they are aggrieved by this policy may petition the Court for a full and fair hearing to determine whether they should be excused from its application to them. At that hearing, the Petitioner will bear the burden of establishing to the Court the medical necessity of their ongoing use of medical marijuana."

9. Probationers or parolees who use medical marijuana, and test positive for medical marijuana, during routine testing, are not immediately detained by their probation officers.

10. Often, before a violation hearing is scheduled, a discussion of treatment options will occur - a probationer or parolee will be given a chance to stop using medical marijuana.

11. If no agreement is reached, then the probationer or parolee will be scheduled for a violation hearing.

12. These probationers or parolees always have the right to legal counsel at the Gagnon II hearing and Public Defender services are available too.

13. A violation hearing is usually scheduled within 30 days after a positive drug test.

14. Any individual who uses medical marijuana may present evidence and argument at the violation hearing to support a need for the use of medical marijuana consistent with the guidelines set forth in the Medical Marijuana Act.

I hereby state that the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Date: OCTOBER 15, 2019


John C. Tyrlwalk, J.

EXHIBIT A

LEBANON COUNTY GENERAL CONDITIONS OF PROBATION/PAROLE

NAME: _____ DOCKET #: _____

ADDRESS: _____

SSN: _____ DOB: _____

In accordance with authority conferred by law, you have been placed on probation/parole on _____ for a period until _____ by the Honorable _____ of the Court of Common Pleas of Lebanon County, Lebanon, Pennsylvania.

- 1) You shall report to the probation/parole office weekly unless directed otherwise by your probation/parole officer.
- 2) Work regularly. Unless previously excused, you shall obtain and maintain full-time employment and support your legal dependents; if employment is lost or changed, notify your probation officer within 72 hours and cooperate with your Probation Officer in finding other employment. Do not cause, resign, or become unemployed due to behavior attributed to actions by yourself.
- 3) You may not possess or drink alcoholic beverages nor use any narcotic drugs and you will abstain from the possession, use or abuse, manufacturing, or sale of any legal or illegal mind/mood altering chemical/substance, including but not limited to Synthetic Drugs.
- 4) Comply with all Municipal, County, State and Federal criminal laws, as well as the provisions of the PA Vehicle Code and Pa Liquor Code and you will notify your probation officer within 72 hours of any arrest, citation, or investigation by any law enforcement agencies.
- 5) Every time a written or oral request is made for the information, you must give to any probation/parole officer a truthful account of the way you are living, your employment status, your associations, and of any other matter or thing he/she desires to know.
- 6) You may not change your residence without permission from your Probation Officer. Once you have permission to change your residence, you shall notify the Probation Department within 72 hours of changing your residence.
- 7) You may not be outside of your approved residence between the hours of 11:00 PM and 7:00 AM each day except for employment purposes. Deviation from this condition and/or overnight travel requires permission from your probation/parole officer; travel which exceeds (3) three days requires a written travel pass from your probation/parole officer.
- 8) You are required to make bi-weekly or monthly payments on fines, costs and restitution so that they are paid in full at least two (2) weeks prior to the expiration of your maximum sentence, unless otherwise directed by the Court or the probation/parole department.
- 9) You will submit to urine testing at your own expense at the direction of your officer at anytime, day or night **A REFUSAL TO SUBMIT TO A URINE SAMPLE WILL BE DEEMED A FAILURE TO COMPLY.** You will have to pay for any tests you request to double-check positive results of the original test.
- 10) Refrain from overt behavior which threatens or presents clear and present danger to yourself or others.

- 11) You may not possess, have available to your control, or have in your place of residency contraband such as: stolen property, drugs and drug paraphernalia, firearms (hand-guns, rifles, shotguns), other weapons, and instruments of crime.
- 12) In addition to all of the foregoing rules, you must abide by all SPECIAL CONDITIONS that are imposed by the Court and your probation/parole officer, including but not limited to the following:
 - (A) **DRUG CONVICTIONS.** You may not own or have on your possession any pagers, cellular telephones, police scanners or \$50.00 or more without a receipt of origin. Int. _____
 - (B) **DUI CONVICTIONS.** You shall attend and successfully complete Alcohol Safe Driving Classes; the Pennsylvania Court Reporting Evaluation; a Drug and Alcohol Evaluation and any recommended treatment. You shall refrain from operating a motor vehicle until receiving permission from both the Pennsylvania Department of Transportation and your supervising Probation/Parole Officer. Int. _____
 - (C) **SEX OFFENDER RULES.** I acknowledge I have received a copy of the SPECIAL CONDITIONS that apply for sex offenders. Int. _____
- 13) If you request transfer of supervision from Lebanon County to another county in the Commonwealth via Inter-County Transfer, you will be assessed an administrative fee to cover processing and administrative costs. This fee shall be collected prior to the submission of the requests to the receiving county and shall not be refunded upon rejection of the request for transfer by the receiving county.
- 14) Pennsylvania law (Act 185 of 2004) requires that all offenders having a felony conviction submit to DNA testing prior to placement on a work release program, release from incarceration or discharge from supervision. Results of that testing will be forwarded to the Commonwealth of Pennsylvania State Police.

I hereby certify and state that I have carefully read the above rules and conditions which I now know I must follow while on probation/parole. I understand them and do solemnly promise that I will faithfully comply with them in every detail.

Signature: _____ Date: _____

Witness: _____ Date: _____

NOTIFICATION OF POINTS OF LAW:

Within the period of probation/parole/intermediate punishment, you are hereby subject to a search of your person, property, and place of residence and seizure of all contraband found therein. You are hereby advised, that under the law, the Court may at any time revoke or modify any conditions of the probation/parole or intermediate punishment. You shall be subject to arrest, for cause, upon order of the Court, or without order, for violation of any of the above conditions by the Probation/Parole Officer. If your probation or intermediate punishment is revoked, you may be sentenced to the maximum penalty for the offense for which you were convicted. If your parole is revoked, you may be required to serve the balance of your sentence in the Lebanon County Prison without credit for the time you were on parole.

During the course of supervision, if you believe that your rights as a probationer/parolee have been violated by an employee of Lebanon County Adult Probation and Parole Department, you may file a written complaint to his/her immediate supervisor who will investigate the complaint and respond in writing. If you feel the need for further ~~and may proceed~~ in a similar fashion according to the chain of command in the department

EXHIBIT B

	Lebanon County Probation Services	Policy No.	5.1-2019 & 7.4-2019
		Pages:	2
Related Standards:		Section:	Adult and Juvenile Supervision
Issuing Authority:		Subject:	Medical Marijuana
		Revised Date:	OCTOBER 7, 2019

I. PURPOSE:

The purpose of this Medical Marijuana Policy is to establish guidelines to be referenced by Lebanon County Probation Officers when supervising offenders who declare the certified use of Medical Marijuana.

The Medical Marijuana Act (Act 16 of 2016) was signed into law on April 17, 2016 and became effective May 17, 2016. This Act is intended to “serve as temporary measure until there is Federal Approval of and access to Medical Marijuana through traditional medical and pharmaceutical avenues.”

The medical marijuana card is **not a prescription** for medication, but rather a recommendation by a physician as to a form of treatment. Medical marijuana has not been approved as a MAT (medically assisted treatment) by the FDA (Food and Drug Administration). The use of medical marijuana may have benefits for some medical conditions and under certain circumstances may be helpful. Individuals, however, who are involved in substance abuse and issues surrounding addiction which may have played a part in the defendant’s criminal violations of law, must be dealt with in a humane but effective manner so the defendant can be rehabilitated and become a contributing member of society.

Under the Federal Controlled Substances Act (CSA) of 1970, marijuana is classified as a Schedule I substance. By definition under the law, Schedule I drugs have a high potential for abuse and dependency, with no recognized medical use or value. Any marijuana possession, cultivation, or use is a federal crime, subjecting a defendant to fines, prison time, or both. Since marijuana use (medical or recreational) is deemed illegal under Federal law, the Court and the Probation Department should not knowingly allow violations of law to occur, the prohibition against such use is required.

II. APPLICABILITY:

To all Probation Department employees and all offenders under the direct supervision of Lebanon County Probation Services.

III. POLICY:

Lebanon County Probation Services shall not permit the active use of medical marijuana, regardless of whether the defendant has a medical marijuana card, while the individual is under supervision by the Lebanon County Probation Services Department. Offenders under supervision who are currently using medical marijuana will have 30 days to discontinue use. Offenders may use CBD hemp oil as this product is legal, pursuant to the Agricultural Act of 2014, the Farm Bill.

Offenders are prohibited from using oil derived from the marijuana plant, or what most people call CBD cannabis oil. The use of CBD cannabis oil follows the same regulations as medical marijuana and shall likewise be prohibited while the defendant is under supervision.

Any person on supervision who believes they are aggrieved by this policy may petition the Court for a full and fair hearing to determine whether they should be excused from its application to them. At that hearing, the Petitioner will bear the burden of establishing to the Court the medical necessity of their ongoing use of medical marijuana.

EXHIBIT 2

IN THE SUPREME COURT OF PENNSYLVANIA

MELISSA GASS, et al.

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:
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:
:

v.

No. 118 MM 2019

52nd JUDICIAL DISTRICT

DECLARATION OF SALLY BARRY

1. I am the Director of Probationer Services for the Lebanon County Court of Common Pleas, 52nd Judicial District. I am familiar with the facts set forth herein.

2. My office has seen disruption in probation services and experienced difficulty for some time now with respect to supervising probationers and parolees who use medical marijuana.

3. By way of one example, several substance abuse treatment providers within the county will not treat anyone who has a medical marijuana card because of the risk of relapse. This limits our ability to place probationers and parolees into treatment programs and our ability to help rehabilitate these individuals.

4. Further, our office frequently finds that the individuals with medical marijuana prescriptions cannot identify the underlying health condition that led to

the medical marijuana prescription in the first place. My current analysis of individuals on probation/parole shows that of 76 persons with medical marijuana prescriptions, 14 cannot identify the health condition that led to the prescription.

5. Additionally, we have found a significant number of individuals under supervision, who possess a medical marijuana card, have a history of marijuana abuse and/or their underlying charges are related to the unlawful possession of marijuana. There is little usefulness in conducting urinalysis screening as a condition of their supervision, because the laboratory is unable to discern between the legal and "illegal" strand of marijuana.

6. A general condition of probation and parole that limits the use of illegal narcotics under Federal law has an overall positive impact on the rehabilitation of offenders and prevents inconsistent enforcement of probation general conditions.

7. It has generally been the experience of the Probation Services office that requiring adherence to general conditions assists with rehabilitation of offenders and reduces the risk of recidivism.

I hereby state that the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the

statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Date: October 16, 2019


Sally Barry
Sally Barry

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

118 MM 2019

MELISSA GASS, ET AL.

PETITIONERS

V.

52ND JUDICIAL DISTRICT, LEBANON COUNTY

RESPONDENT

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on *October 17, 2019*, they personally caused to be served upon the following a true and correct copy of the foregoing Answer to Petitioners' Application for Special Relief in the Nature of a Preliminary Injunction by filing and serving via PACFile to all counsel of record (which service satisfies the requirements of Pa.R.A.P. 121).

s/Geri Romanello St. Joseph

GERI ROMANELLO ST. JOSEPH, ESQUIRE

s/Robert Krandel

ROBERT KRANDEL, ESQUIRE