

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Walter Earl Allen, II,	:	
Petitioner	:	
	:	
v.	:	No. 234 C.D. 2025
	:	Submitted: May 12, 2026
Pennsylvania Parole Board,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE STACY WALLACE, Judge

OPINION BY

PRESIDENT JUDGE COHN JUBELIRER

FILED: September 1, 2026

Walter Earl Allen, II (Petitioner) seeks review of an Order of the Pennsylvania Parole Board (Board) denying him credit for his time spent at liberty on parole (street time) because of unresolved drug and/or alcohol problems, following his third driving under the influence (DUI) conviction. Petitioner argues the Board violated his due process rights and abused its discretion in denying him credit because the Board's reason is not supported by the record due to his status as a medical marijuana patient, which he maintains protects him from any penalty for that usage under the Medical Marijuana Act (MMA).¹ Because Petitioner's new conviction involved the use of a controlled substance while driving, his offense is not protected by MMA immunity and the Board's reason is supported by the record. Therefore, we conclude the Board did not violate Petitioner's due process rights or abuse its discretion in denying him credit.

¹ Act of April 17, 2016, P.L. 84, 35 P.S. §§ 10231.101-10231.2110.

In 2004, Petitioner pled guilty to charges of robbery and criminal conspiracy. (Certified Record (C.R.) at 1.) He was sentenced to a total of 6 years and 8 months to 20 years in prison, with an original maximum sentence date of April 14, 2023. (*Id.*) Petitioner applied for and was denied parole in 2009 for several reasons and he was advised that the Board would consider in any future parole request whether he had successfully completed a treatment program for substance abuse and violence prevention. (*Id.* at 4.) In September 2010, Petitioner once again applied for, and was granted, parole. (*Id.* at 6.) In August 2018, Petitioner was recommitted as a convicted parole violator (CPV) following his conviction of two counts of DUI. (*Id.* at 22.) Petitioner was granted credit for his street time. (*Id.* at 23.) On May 23, 2020, Petitioner was released on parole with a new maximum date of May 2, 2023. (*Id.* at 32.)

On October 26, 2022, Petitioner, whose license was suspended, was stopped at a DUI checkpoint. (*Id.* at 48.) Petitioner admitted to using marijuana and was arrested and charged with multiple DUI related offenses, including violating Section 3802(d)(1)(i) of the Vehicle Code, 75 Pa.C.S. § 3802(d)(1)(i) (driving with any amount of a schedule I controlled substance in individual's blood), and Section 3802(d)(2) of the Vehicle Code, 75 Pa.C.S. § 3802(d)(2) (where an individual is under the influence of a drug to a degree which impairs the individual's ability to safely drive). (*Id.* at 57.) These charges are third-degree felonies under Section 3803(b)(4.1) of the Vehicle Code, 75 Pa.C.S. § 3803(b)(4.1), due to Petitioner having two prior DUI offenses.² The October 26, 2022 charge was Petitioner's third

² On October 26, 2022, the Department of Corrections issued a Warrant to Commit and Detain Petitioner for violating his parole. However, on May 2, 2023, an Order to Cancel Warrant to Commit and Detain was issued because Petitioner's maximum sentence date had passed before his conviction for his third DUI. (C.R. at 39, 41.)

DUI offense. (*Id.*) On October 30, 2023, Petitioner pled guilty to violating Section 3802(d)(1)(i) of the Vehicle Code, relating to having any amount of controlled substance in the blood, and was sentenced to 21-84 months of incarceration in county jail, with credit for time served.³ (*Id.* at 54.)

Petitioner received a Notice of Charges and Hearing, informing him of the charges against him and his right to a revocation hearing before the Board, which was scheduled for November 6, 2023. (*Id.* at 43-44.) Petitioner waived his right to both a revocation hearing and counsel. (*Id.* at 45.) In his signed Waiver of Revocation Hearing and Admission Form, Petitioner acknowledged that his conviction violated his parole, stating:

On the 6th day of November 2023, I, Walter Allen do knowingly, intelligently, and voluntarily admit that: I . . . ple[]d guilty . . . to the new criminal offense[] listed on the attached [form] dated 11/6/2023[,] that the conduct underlying the charge[] occurred while I was on parole[], the offense[] was punishable by imprisonment, and I have been convicted of the offense[] in a court of record . . . pursuant to [Section 6138(a)(1.1) of the Prisons and Parole Code (Code),] 61 Pa.C.S. § 6138(a)(1.1). Specifically, I knowingly, intelligently, and voluntarily admit that I have been convicted of DUI: controlled substance-schedule I – 3rd offense (F3)[.]

(*Id.* at 45.)

Upon Petitioner's parole from his county sentence for the new conviction, he was returned to the Department of Corrections on August 7, 2024. (*Id.* at 95-96.) The Board issued a final Order to Recommit on August 27, 2024, recommitting Petitioner and denying him credit, with a new maximum sentence date of July 17,

³ Petitioner's remaining related charges were withdrawn. (C.R. at 58.)

2027.⁴ (*Id.* at 95.) Petitioner, acting pro se, appealed the Board’s August 27, 2024 decision, arguing he held a valid medical marijuana card and could not be punished for using medical marijuana. He asserted that the Board was unaware of his status as a medical marijuana cardholder, and, as a result, it lacked substantial evidence to deny him credit based on unresolved drug and/or alcohol problems because his marijuana was prescribed and he never tested positive for any other substance. (*Id.* at 99-101.) The Board responded on January 30, 2025, affirming the decision, reasoning:

[T]he Board articulated that you were denied such credit because you continue to demonstrate unresolved drug and/or alcohol issues. The record reveals that while on supervision you incurred a conviction for DUI: Controlled Substance – 3rd offense, which supports the reason for demonstrating unresolved drug issues. Thus, the panel finds the reason for denying you credit for [your street time] is sufficient.

(*Id.* at 103.)

Petitioner, now represented by appointed counsel, appeals⁵ and argues the Board provided a legally insufficient explanation for denying him credit for his street time. He contends there is no evidence in the record that supports that he has “unresolved drug and/or alcohol problems” as his offense involved only medical marijuana, which he is lawfully permitted to use so it is not an unresolved problem. (Petitioner’s Brief at 6, 8.) By denying him credit for a reason unsupported by the

⁴ The Board first issued an order on November 28, 2023, recommitting Petitioner as a CPV. However, Petitioner had to serve his county sentence for the new DUI conviction before he could recommence serving his original sentence. *See* 61 Pa.C.S. § 6138(a)(5) (outlining the order of serving sentences following a conviction while on parole).

⁵ In reviewing the Board’s Order, we are to determine “whether the decision was supported by substantial evidence, whether an error of law occurred[,] or whether constitutional rights were violated.” *Brown v. Pa. Bd. of Prob. & Parole*, 184 A.3d 1021, 1023 n.5 (Pa. Cmwlth. 2017) (quoting *Ramos v. Pa. Bd. of Prob. & Parole*, 954 A.2d 107, 109 n.1 (Pa. Cmwlth. 2008)).

record, Petitioner contends that the Board abused its discretion and violated his constitutional due process rights. Lastly, Petitioner argues his use of medical marijuana is protected by the MMA and therefore, it cannot be used as evidence of a substance abuse problem.

The Board responds that its order should be affirmed because the fact Petitioner's DUI conviction involved controlled substances is sufficient evidence to deny Petitioner credit. Further, the Board argues that Petitioner was not denied credit because he is a medical marijuana patient, and his status as such does not shield him from criminal prosecution and sentencing or the credit forfeiture provisions applicable to a CPV. Lastly, the Board argues that when Petitioner waived his revocation hearing, he waived the argument that he is protected by the MMA.

We begin with the Board's waiver argument. The Board relies on our Supreme Court's decision in *Fisher v. Pa. Bd. of Prob. & Parole*, 62 A.3d 1073 (Pa. Cmwlth. 2013), to argue petitioner's waiver of the revocation hearing is a waiver of all arguments he could have raised at a hearing. The Court in *Fisher*, though, held that petitioners waive any issues as to the timeliness of the hearing when waiving a revocation hearing as such claim could be raised at the hearing. 62 A.3d at 1075-76. Here, Petitioner is not raising a timeliness issue, rather he is making an argument related to the Board's reasoning for his credit denial. This Court has previously held that petitioners do not waive arguments they could not have made before their recommitment. See *Rosado v. Pa. Bd. of Prob. & Parole* (Pa. Cmwlth., No. 1852 C.D. 2017, filed Nov. 1, 2018) ("Even if [the petitioner] had not waived his revocation hearing, he could not have raised the [] issue because he would not

become aware of such [issue] until he received his recommitment.”).⁶ Furthermore, Petitioner raised the argument that he is protected by the MMA at the first opportunity he had, in his Administrative Appeal. *Cf. Welch v. Pa. Bd. of Prob. & Parole*, 314 A.3d 942 (Pa. Cmwlth. 2024) (holding petitioner waived issue by not raising it in his Administrative Appeal to the Board). Because Petitioner could not have known the reason the Board would deny him credit until after it did so, and he raised the issue at his earliest opportunity thereafter, we conclude Petitioner did not waive his argument concerning MMA protection when he waived his revocation hearing. Having concluded that Petitioner did not waive his present argument, we now turn to the merits of Petitioner’s argument.

Under Section 6138(a)(2.1) of the Code, 61 Pa.C.S. § 6138(a)(2.1), the Board is authorized, in its discretion, to award partial credit or deny credit for street time, except in circumstances not applicable here.⁷ Our Supreme Court held in *Pittman v. Pennsylvania Board of Probation and Parole*, 159 A.3d 466, 468 (Pa. 2017), that

⁶ Unreported panel decisions of this Court may be cited for their persuasive value pursuant to Rule 126(b) of the Pennsylvania Rules of Appellate Procedure, Pa.R.A.P. 126(b), and Section 414(a) of this Court’s Internal Operating Procedures, 210 Pa. Code § 69.414(a).

⁷ Subsection 6138(a)(2.1) provides:

The [B]oard may, in its discretion, award credit to an offender recommitted under paragraph (2) for the time spent at liberty on parole, unless any of the following apply:

(i) The crime committed during the period of parole or while delinquent on parole is a crime of violence or a crime listed under 42 Pa.C.S. Ch. 97 Subch. H (relating to registration of sexual offenders) or I (relating to continued registration of sexual offenders).

(ii) The parolee was recommitted under [S]ection 6143 (relating to early parole of inmates subject to Federal removal order).

61 Pa.C.S. § 6138(a)(2.1).

when the Board denies credit, it must provide a contemporaneous statement explaining its rationale for denying a CPV credit for their street time. The Board's reasons must "accurately reflect the facts informing its decision." *Marshall v. Pa. Bd. of Prob. & Parole*, 200 A.3d 643, 652 (Pa. Cmwlth. 2018).

Petitioner relies on *Gass v. 52nd Judicial District, Lebanon County*, 232 A.3d 706 (Pa. 2020), to support his argument that he is protected by MMA immunity, and the Board cannot use his status as a medical marijuana patient to justify its denial of credit. In *Gass*, the Supreme Court held that probationers are permitted to use medical marijuana for specified purposes and are awarded immunity in accordance with the MMA. The immunity provision in the MMA states, "[a patient] shall [not] be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege . . . **solely** for **lawful** use of medical marijuana" Section 2103(a) of the MMA, 35 P.S. § 10231.2103(a) (emphasis added). Thus, in *Gass*, the Supreme Court held that a policy that effectively punished probationers for the use of medical marijuana by prohibiting them from using it while on probation was invalid.

Here, however, Petitioner's conviction and subsequent denial of credit were a result of Petitioner's unlawful driving while using medical marijuana. Though it is lawful under the MMA for Petitioner to possess and use medical marijuana as directed, it was the **unlawful** act of driving after using a controlled substance that led to Petitioner's conviction, and he was, therefore, not immune from prosecution. *See* Section 3810 of the Vehicle Code, 75 Pa.C.S. § 3810 ("The fact that a person charged with [DUI] is or has been legally entitled to use alcohol or controlled substances is not a defense to a charge of [DUI]."). Unlike the probationers in *Gass*, Petitioner was not recommitted or denied credit for his use of medical marijuana but for his driving while using medical marijuana. Therefore, MMA immunity is

inapplicable here because Petitioner's penalty was not solely based on his lawful use of medical marijuana.

The Board cited Petitioner's unresolved drug and/or alcohol issues as its reason for denying credit, which Petitioner asserts is not supported by substantial evidence. We conclude this is a sufficient reason to deny Petitioner credit under *Pittman*. Upon review, this reason is supported by the record because the evidence that Petitioner's unresolved drug and/or alcohol issues is related to his using drugs and then driving. Despite Petitioner's contention that his DUI is not substantial evidence of an unresolved drug and/or alcohol problem, the record shows this is Petitioner's **third** DUI, a substance-related offense, and his **second while on parole**. (C.R. at 77, 84.) Although Petitioner's conviction arose from his being stopped at a DUI check point, rather than being pulled over on suspicion of DUI, this does not alter the fact that Petitioner drove with a schedule I controlled substance in his system, which is unlawful. The fact that Petitioner did not plead guilty to or was convicted of driving while impaired is irrelevant, as it is sufficient for there to be "**any amount** of a Schedule I controlled substance" to support a conviction of this type of DUI. *See* Section 3802(d)(1) of the Vehicle Code, 75 Pa.C.S. § 3802(d)(1) (emphasis added). Further, Petitioner's parole agent expressed concerns that Petitioner was "tak[ing] advantage of the medical marijuana system and intak[ing] more than necessary." (C.R. at 77.) When viewed together, this reflects the unresolved nature of Petitioner's problems with using drugs and driving. That is, notwithstanding his prior two DUIs, and the resulting penalties including the prior revocation of his parole and suspension of his operating privilege, Petitioner **continued** to unlawfully drive **while under the influence of a controlled substance**. Because of his history of driving illegally due to his use of a controlled

substance and the lack of MMA immunity, the Board did not violate Petitioner's due process rights or abuse its discretion in denying Petitioner credit for his time at liberty on parole.

Accordingly, we affirm the Order of the Board.

RENÉE COHN JUBELIRER, President Judge

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Pennsylvania Parole Board,	:	
Respondent	:	

ORDER

NOW, September 1, 2026, the Order of the Pennsylvania Parole Board, entered in the above-captioned matter, is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, President Judge