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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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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.

BRIEF OF APPELLEES

On grant of extraordinary Jurisdiction concerning a challenge to a policy prohibiting the use of medical marijuana by individuals under the supervision of the Lebanon County Court of Common Pleas.

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I. COUNTERSTATEMENT OF THE PERTINENT FACTS

Contrary to their arguments, there is no stipulation or factual finding that Petitioners are using medical marijuana consistent with the requirements of the Medical Marijuana Act ("MMA"). *E.g.*, *Brief of Petitioners (Brief)*, pp. 2-4. There has never been a judicial determination as to the actual nature of Petitioners' access to, and use of, marijuana consistent with the requirements of the MMA. There is no evidence of their physician's assessments. *E.g.*, *Brief*, pp. 3-4. Their affidavits establish ***only*** that Petitioners have medical marijuana identification cards. *E.g.*, R. 58, 65, 69. Therefore, Petitioners' references in their Brief to their ***use*** of marijuana is simply a claim that they all have valid identification cards issued by the Pennsylvania Department of Health.

This distinction is important given the record of this case. Throughout their Brief, Petitioners' arguments repeatedly conflate the concept of having a valid identification card with legal use and access to medical marijuana. *E.g.*, *Brief*, pp. 3-4. However, under the MMA, a valid identification card does not equate with lawful access to, and use of, medical marijuana.

On October 7, 2019, the Lebanon County Court of Common Pleas, 52nd Judicial District ("Judicial District"), adopted a Policy that prohibits the use of medical marijuana by persons who are under court supervision. R. 108. The Policy is designed to mesh with the Judicial District's General Conditions of

Probation, which prohibit probationers from using alcohol, narcotics, and legal and illegal mind/mood altering chemicals/substances. R. 101-02. The Judicial District had prior success with its General Conditions of probation because the structure of general conditions assists with rehabilitating offenders and reducing the risk of recidivism. R. 102, 111-12.

In addition to general safety concerns, the Judicial District also had concerns about the fact that substance abuse treatment providers will not treat anyone with a medical marijuana card due to risk of relapse. R. 101, 111. Prior to adopting the Policy, the Judicial District experienced disruption with probationers who used medical marijuana. R. 111-12. For example, some probationers could not identify the underlying medical condition that led to their prescription for medical marijuana. R. 112. Nor could laboratories discern between legal and illegal strains of marijuana, which naturally is problematic when testing probationers with a history of drug abuse or illegal possession. R. 112.

The Policy encourages probationers affected by the Policy to promptly bring their need for medical marijuana use to the court's attention:

> 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.

R. 109.

In essence, the Policy does not work any different from the violation hearing process except that it is proactive, rather than reactive. For example, even if a probationer does not elect to utilize the Policy, the Judicial District does not immediately detain a probationer who tests positive and asserts the need for medical marijuana. R. 102. Before scheduling a violation hearing, the probationer is given a chance to discuss treatment options. R. 102. If this does not resolve the issue, a violation hearing is scheduled within 30 days, where the probationer has access to legal counsel and the chance to present the need for medical marijuana to the Judicial District consistent with the guidelines set forth in the MMA. R. 103. Thus, the Policy is consistent with the current state of probation violation hearings, except that the probationer can bring the need for medical marijuana to the court's attention, rather than wait for a violation hearing. R. 108.

Petitioners all contend that they have serious medical conditions that can be effectively treated only with the assistance of medical marijuana. R. 56-71. None of the Petitioners, however, has asked for a hearing pursuant to the Policy so that the Judicial District might consider whether it should excuse a probationer from complying with the Policy. R. 108. There is no record evidence regarding the current state of their identification card issued by the Pennsylvania Department of Health or that they are using marijuana consistent with the recommendations of their physicians. There is no record evidence regarding whether Petitioners

obtained their medical marijuana from an authorized dispensary or are using the medical marijuana consistent with their prescriptions. *See* R. 56-71.

There is also limited record information regarding Petitioners' underlying criminal conduct and their personal circumstances. While Petitioners have highlighted their medical backgrounds, all of the record evidence focuses exclusively on Petitioners' health, without significant details about the criminal convictions that led to their judicial supervision.

For example, Petitioner Melissa Gass briefly references that she hit her husband in February 2016 and was convicted of simple assault. R. 57. This incident also involved some type of blackout, and while she has no memory of the incident, her husband does not provide any greater detail about the incident. R. 61-62. Petitioner Ashley Bennett began self-medicating with marijuana to manage a host of health conditions and was charged in December 2018 with possessing marijuana and drug paraphernalia. R. 65. Petitioner Andrew Koch also began self-medicating with marijuana and was convicted for possession of marijuana and driving on a suspended license. R. 68-69.

Aside from these scant facts about their criminal histories, this Court does not have further information about Petitioners' contact with the criminal justice system or extensive details about their education, family history, or other life circumstances.

II. COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

May a judicial district inquire into the nature of medical marijuana use by a probationer?

SUGGESTED ANSWER: YES

III. SUMMARY OF THE ARGUMENT

Petitioners say that they are caught between the "Scylla and Charybdis." They claim they must choose between giving up medical marijuana and facing jail. *Brief*, p. 10. Yet they ignore that much like in the Greek story, they can safely navigate both harms.

Each petitioner could have availed him or herself of the Policy's hearing procedure so that the Judicial District could meaningfully review the probationer's need for medical marijuana. A petitioner could have explained the need for medical marijuana. The petitioner could have challenged the application of the Policy to the facts of his case. A petitioner could even have asked the Judicial District to stay the Policy's application to his or her particular case after appearing before the Judicial District.

Instead, Petitioners ask this Court to invoke its King's Bench powers on a limited record and declare that simply having a medical marijuana card shuts down any judicial inquiry. *See, e.g.*, *Brief*, pp. 2, 3, 21 ("[T]he Act does not authorize any person or entity to require additional proof of medical necessity."), 22; R. 58, 65, 69. Weighing all of Petitioners' personal factors in a judicial process that considers their medical condition is more reasonable than simply declaring that they have a medical marijuana card that excuses them from judicial oversight.

What Petitioners are really arguing is not that the Policy impacts them, but rather that their medical marijuana identification cards put them beyond scrutiny. Throughout Petitioners' Brief and in the *Amicus* Brief supporting them, this Court is told that medical marijuana is an effective treatment for certain serious medical conditions. This could very well be true. But it does not automatically follow that showing a medical marijuana card is tantamount to compliance with the MMA. The MMA does not equate an identification card with full compliance with the MMA, especially for individuals on probation.

Probation serves rehabilitative purposes, and the MMA does not sacrifice individual health and safety by providing unchallenged access to medical marijuana. Therefore, this case is not really about the Policy. It is instead a referendum on what it means to possess a medical marijuana identification card.

Regarding what it means to possess an identification card, Petitioners' main argument rests on a misinterpretation of one section of the MMA that prohibits any penalty against a patient if the patient would not have been subject to restriction "but for" their use of medical marijuana consistent with the MMA. 35 P.S. § 10231.2103(a). As shown in this Brief, Petitioners are placing too much reliance on their medical marijuana cards and ignoring the fact that Section 2103(a) of the MMA does not grant unquestioned access to medical marijuana. The more logical

interpretation of the MMA is that it works in conjunction with, not opposed to, judicial supervision.

Petitioners rely on cases and other medical marijuana statutes that significantly differ from Pennsylvania's statute, which does not penalize a user only if the person is restricted solely because of medical marijuana. Instead of supporting their cause, Petitioners' cases actually support the Judicial District's approach.

Finally, Petitioners' theme that they are faced with choosing between their health and jail is simply not correct. *Brief*, p. 10. This Court is well aware that a probation violation does not mean that a person is automatically sentenced to jail. Sentencing follows a balanced analysis that accounts for the offense and the rehabilitative needs of the offender. On this record, this Court has no way of knowing how to gauge the most effective way to rehabilitate these Petitioners consistent with their health needs. If Petitioners used medical marijuana in violation of the Policy, there is no way to accurately predict how the Judicial District would have addressed the issue.

For the reasons set forth above and in greater detail below, this Court must deny the relief sought by Petitioners. This Court should lift the stay of the Judicial District's Policy and let Petitioners proceed through violation hearings or utilize the Policy. After the Judicial District hears their cases as part of the judicial

process, this Court (or an intermediate reviewing court) would have a developed record that fully accounts for Petitioners' individual situations and their need for rehabilitation.

IV. ARGUMENT

The Supreme Court has the power to exercise plenary jurisdiction "in any matter … involving an issue of immediate public importance" pending before an inferior tribunal at any stage. *In re Bruno*, 627 Pa. 505, 560, 101 A.3d 635, 668 (2014) (citations omitted). The Judicial District submits that this case does not meet this extraordinary standard.

A. The Medical Marijuana Act does not grant probationers an absolute right to use medical marijuana while on probation without any supervision or oversight by the Judicial District.

Petitioners' argument, in essence, is that once they present a medical marijuana card to the Judicial District, the MMA prohibits any further inquiry regarding their use of marijuana. *See, e.g.*, *Brief*, pp. 2, 3, 21 ("[T]he Act does not authorize any person or entity to require additional proof of medical necessity."), 22; R. 58, 65, 69. The MMA, however, is not a grant of absolute immunity to individuals who hold a medical marijuana card.

1. The fact that "probationers" are not specifically referenced in the MMA does not prohibit the judiciary from placing conditions on probationers who use medical marijuana.

Petitioners argue that because the MMA does not exclude probationers, it must therefore follow that the General Assembly intended that the judiciary could never impose conditions on the use of medical marijuana by probationers. *Brief*,

pp. 11-12. Petitioners cite first to rules of statutory construction (*Brief*, p. 12) and then claim that the word "patients" in the MMA is a broad one intended to cover probationers without limitation. *Brief*, p. 13. Petitioners reason that because the MMA protects "patients," it follows that probationers who are also "patients" are entitled to unquestioned access to medical marijuana. *Brief*, p. 13 (citing 35 P.S. § 10231.2103(a)).

This argument ignores the careful wording of Section 2103(a) of the MMA, which Petitioners cite as the main support of their argument. *Brief*, p. 13. Section 2103(a) does not grant patients an absolute immunity to use medical marijuana. Instead, the literal wording of the statute contains an important "but for" provision that undermines their arguments, *to wit*:

> **(a) Licensure.—**None of the following shall be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, including civil penalty or disciplinary action by a Commonwealth licensing board or commission, ***solely*** for lawful use of medical marijuana or manufacture or sale or dispensing of medical marijuana, or for any other action taken in accordance with this act[.]

35 P.S. § 10231.2103(a) (emphasis added).

In this case, Petitioners are not just patients, they are also probationers under court supervision. Petitioners' marijuana use is not being subject to scrutiny by the Judicial District ***solely*** because they are patients. Instead, they are subject to judicial inquiry because they have a medical marijuana card ***and*** they are under court supervision. Based upon the clear wording of Section 2103(a), the Judicial

District is not violating the MMA by placing general conditions on probationers who use medical marijuana because the Judicial District is not restricting marijuana ***solely*** because they are "patients."

Significantly, Petitioners argue in their Brief that the MMA should be compared to an Arizona law that ***does not*** contain similar "but for" language. *Brief*, p. 16 (citing *Reed-Kaliher v. Hoggatt*, 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 numerous restrictions that are specifically set forth in Pennsylvania's medical marijuana law with regard to accessing medical marijuana. Moreover, the Arizona Supreme Court did not analyze a policy like the one in this case that provides for a hearing so that probationers might establish their lawful use of, and need for, medical marijuana.

Instead, the Arizona Supreme Court analyzed an Arizona law that establishes a broad immunity that Pennsylvania's MMA does not. 237 Ariz. at 122, 347 P.3d at 139. The Arizona medical marijuana law is different from the Pennsylvania MMA because it is clear that medical marijuana use is a form of immunity in court proceedings under Arizona law, *to wit*:

> **B.** A registered qualifying patient or registered designated caregiver is not subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege, ***including any civil penalty or disciplinary action by a court*** or occupational or professional licensing board or bureau:

> 1. For the registered qualifying patient's medical use of marijuana pursuant to this chapter, if the registered qualifying patient does not possess more than the allowable amount of marijuana.

Ariz. Rev. Stat. Ann. § 36-2811 (emphasis added).

Unlike the Pennsylvania MMA, the Arizona law's language includes a broad catchall phrase specifically applicable to a court. *Id.* ("***any*** civil penalty or ***disciplinary action by a court***") (emphasis added). The Arizona law does not contain Pennsylvania's "but for" language, nor does it limit "civil penalty or disciplinary action" to only licensing boards or commissions like the MMA. *E.g.*, 35 P.S. § 10231.2103(a). Consequently, Petitioners are wrong to interpret Section 2103(a) of the MMA to mandate unquestionable access to medical marijuana while they are on probation inasmuch as Petitioners are not subject to the Policy ***solely*** because they are patients.

Additionally, the list of protected individuals and organizations set forth in Section 2103(a) of the MMA is narrowly limited to ten very specific categories. There is no catchall provision, for example, that also covers "any other individual who might have a need for medical marijuana," which would suggest broad application of the MMA. Likewise, Section 2103(a) does not specifically restrict judicial supervision, whereas the Arizona medical marijuana law apparently addresses court supervision. *E.g.*, Ariz. Rev. Stat. Ann. § 36-2811 (restricting disciplinary action by any court).

The same is true with the very narrow and specific definition of "patient" in the MMA, which also lacks a general catchall category:

> **"Patient."** An individual who:
>
> (1) has a serious medical condition;
> (2) has met the requirements for certification under this act; and
> (3) is a resident of this Commonwealth.

35 P.S. § 10231.103.

Thus, despite Petitioners' claim of broad application, the very specific references to the individual persons in Section 2103(a) of the MMA without a general catchall category shows that the General Assembly ***did not*** intend that a court is precluded from placing restrictions on a probationer's use of medical marijuana.

Further, despite Petitioners' argument that the MMA does not specifically exclude "probationers" from the protection of the MMA (*Brief*, pp. 11-12), it also does not exclude a whole host of individuals who might interact with the criminal justice system. For example, the MMA does not specifically reference "arrestees," "juvenile probationers," "detainees," "individuals under restrictions of a protection from abuse order," or, most importantly, "participants in drug court." Yet Petitioners are arguing for an interpretation of the MMA that is so expansive that the judiciary or law enforcement personnel could never make legitimate inquiry once a probationer presents a medical marijuana authorization card and a

prescription. *See, e.g., Brief*, pp. 11-12, 13-14. This would even go so far as to apply to someone in alternative treatment such as drug court, which generally requires that participants cease using medical marijuana. *E.g.*, R. 101, 111 (substance abuse treatment providers do not permit medical marijuana). Consequently, Section 2103(a)'s failure to contemplate every particular situation in the life of a "patient" that might cause friction with the MMA does not support a blanket prohibition against judicial scrutiny of medical marijuana.

There is also a logical reason why the General Assembly did not create any reference to "probationers" in the MMA. Section 2103(a) shields medical marijuana users from "arrest" and "prosecution" because these occur ***prior*** to adjudication and sentencing by the judiciary. Under the statutory principle of *esjudem generis*, the phrase, "or penalty in any manner," immediately following "arrest" and "prosecution," must be interpreted consistent with the preceding words "arrest" and "prosecution." *See* 1 Pa.C.S. § 1903(b) ("General words shall be construed to take their meanings and be restricted by preceding particular words.").

In this case, the MMA is entirely silent on the subject of judicial supervision, whereas the Arizona medical marijuana law upon which Petitioners rely specifically references court discipline. *Compare* 35 P.S. § 10231.2103(a) (restricting penalty only if marijuana was the ***sole*** basis for decision) with Ariz.

Rev. Stat. Ann. § 36-2811 (patients cannot be subject to disciplinary action by court). Therefore, the MMA's silence on the topic of probation is perfectly reasonable and expresses a clear understanding that judicial supervision of probationers falls under the exclusive province of the sentencing court. In terms of balancing a probationer's need for medical marijuana under the MMA and the need of a court to supervise probationers, the Policy is a far more reasonable solution than simply barring a court from examining the probationer's specific situation.

Petitioners' reliance on *United States v. Jackson*, 388 F. Supp. 3d 505, 514-15 (E.D. Pa. 2019), is misplaced. What the District Court did in *Jackson* after reaching its legal conclusions is more germane to this case. The District Court scheduled a hearing to determine whether the probationer's use of medical marijuana was compliant with state law:

> Such an evidentiary hearing should precede any hearing on the violation of supervised release. ***At the evidentiary hearing, defendant bears the burden of showing, by a preponderance of the evidence, that he "strictly complied with all relevant conditions imposed by" the Medical Marijuana Act***. *See id.* These requirements include, *inter alia*, that defendant has one of the seventeen enumerated serious medical conditions that qualify an individual for medical marijuana use, that he is "in possession of a valid identification card issued by" the Pennsylvania Department of Health, and that the medical marijuana was dispensed in an appropriate form. *See* 35 Pa. Stat. Ann. §§ 10231.103, 10231.303.

Id. at 514-15 (emphasis added). The District Court did not simply accept that the defendant had a medical marijuana card. Rather, after concluding that the defendant was a "patient" as defined by Section 103 of the MMA, the court proceeded to inquire further. In so doing, the District Court sought to determine the nature of the defendant's medical need, the validity of the identification card, and that the patient received medical marijuana from an authorized dispensary. *Id.* Further, and just like the Policy in this case, the District Court put the ***burden on the defendant*** to appear at a hearing to determine whether he was fully compliant with state law. *Id.* at 515-16 (emphasis added).

This scenario is virtually identical to what the Judicial District's Policy would accomplish if allowed to be implemented. The Policy, similar to the process constructed by the court in *Jackson,* 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.**

R. 109 (emphasis added).

The Judicial District's Policy mirrors the District Court's approach in *Jackson*. A probationer can come to court, where the court can verify that the probationer has a legitimate need and is lawfully using medical marijuana consistent with the MMA. R. 109; *see Jackson,* 388 F. Supp. 3d at 514-15. This is

a common sense approach. The Judicial District is balancing a probationer's need for medical marijuana and judicial supervision. It is certainly more practical than simply concluding that the MMA shields any probationer possessing a medical marijuana card from any judicial inquiry.

For all of the foregoing reasons, Petitioners' arguments about Section 103 of the MMA and its reference to "patients" do not support the conclusion that in simply being "patients" probationers can never be subject to judicial inquiry with regard to their use of medical marijuana. 35 P.S. § 10231.2103(a) (shielding patients from penalties only where medical marijuana is the sole basis for action). Because Petitioners are patients who also are under judicial supervision, the Judicial District's Policy creates a reasonable avenue for the Judicial District to examine Petitioners' needs for medical marijuana. R. 109; *see Jackson*, 388 F. Supp. 3d at 514-15.

2. Undercutting Petitioners' arguments for broad access to medical marijuana is that in every respect, the MMA is a law of restriction as regards medical marijuana.

Petitioners focus almost exclusively on Sections 103 and 2103(a) of the MMA in asserting that because probationers are not excluded from the definition of "patients," the judiciary has no power to impose conditions on probationers using medical marijuana. *Brief*, pp. 11-14. They ignore that, as a whole, the MMA is not written as a law of broad permission, but rather as a law of restricted

access to medical marijuana. There are numerous parts of the MMA that directly undermine Petitioners' arguments for unlimited access to medical marijuana.

First, in the opening sections of the MMA, the General Assembly has not declared that the MMA supersedes all other governmental policies, but only that the use and possession of medical marijuana in accordance with the MMA is lawful "[n]otwithstanding any provision of ***law*** to the contrary," *to wit*:

> **(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 not to a law, but only to the reasonable restrictions imposed by the Judicial District's Policy promulgated under its power to prescribe conditions of probation and parole under the Sentencing Code. *See* 42 Pa.C.S. § 9754. Further, the plain language of the statute – "any provision of law to the contrary" – excepts only a ***law*** that would otherwise generally prohibit the possession and use of medical marijuana in accordance with the MMA. *See* 1 Pa.C.S. § 1903(a) (words are interpreted according to their plain meaning). Moreover, the General Assembly intended that the MMA will supersede only the Controlled Substances, Drug, Device and Cosmetic Act in the event of a conflict of laws situation. 35 P.S. § 10231.2101.

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[1]; 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.

[1] The "department" in the MMA refers to the Department of Health. *See* 35 P.S. § 10231.103.

> (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.
>
> (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 cannabinol 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. Patients must follow a specific process. They must first obtain certification from a practitioner and have a valid identification card. They cannot use illegally obtained marijuana even if they have a qualifying medical condition. Moreover, similar restrictions extend beyond patients to other aspects of the

medical marijuana business in the form of restrictions on growers (35 P.S. § 10231.702), storage and transportation (35 P.S. § 10231.703), medical practitioners (35 P.S. §§ 10231.401-.405), employment and financial interests (35 P.S. § 10231.2101.1), and dispensaries (35 P.S. § 10231.801-.803). Nor does medical marijuana use impose unfettered accommodation requirements on insurers (35 P.S. § 10231.2102), schools (35 P.S. § 10231.2104), and day care centers (35 P.S. § 10231.2105).

Again, these prohibitions undermine Petitioners' arguments about the MMA giving a broad right of access to medical marijuana. None of these foregoing restrictions are consistent with the notion that probationers have an all-encompassing right to medical marijuana that cannot be questioned. Indeed, the entire notion of using medical marijuana is restricted as a starting proposition under the MMA. *E.g.*, 35 P.S. § 10231.103(b).

Similarly, under Section 510 of the MMA, there are safety-sensitive restrictions 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).

Petitioners rely on *State v. Nelson*, a Montana case that viewed access to medical marijuana as a "right." *Brief*, p. 17 (citing 346 Mont. 366, 370-77, 195 P.3d 826, 828-33 (2008)). Critically, much like the Arizona law, the Montana medical marijuana law does not contain Pennsylvania's provision that a medical marijuana card cannot be the ***sole*** basis of state action:

> (1) A qualifying patient or caregiver who possesses a registry identification card issued pursuant to 50–46–103 may not be arrested, prosecuted, or penalized in any manner or be denied any right or privilege, including but not limited to civil penalty or disciplinary action by a professional licensing board or the department of labor and industry, for the medical use of marijuana or for assisting in the medical use of marijuana if the qualifying patient or caregiver possesses marijuana not in excess of the amounts allowed in subsection (2).

State v. Nelson, 346 Mont. at 369-70, 195 P.3d at 828[2]; *compare* 35 P.S. § 10231.2103(a) (restricting penalty only if marijuana was the ***sole*** basis for decision) with Mont. Code Ann. § 50-46-319 (2019).

The Montana Supreme Court never cited the source of this supposed right beyond the statutory framework that allows citizens of Montana to access medical marijuana in certain circumstances. 346 Mont. at 375, 195 P.3d at 832. The Montana Supreme Court did not consider access to medical marijuana similar to a constitutional right and even noted that, "this is not to say that there can be no restrictions on lawful medical marijuana use . . . [a] sentencing court is free to impose limitations on the place of use, and may certainly order that marijuana not be used in the presence of children . . .a court [could] prohibit a defendant from abusing medical marijuana." *Id.* at 377, 195 P.3d at 833. The Montana Supreme Court was mostly concerned with the concept of an outright ban against the use of

[2] The Montana Medical Marijuana Act has undergone substantial revision since *Nelson*. The most current citation to the law can be found at Mont. Code Ann. § 50-46-301 *et seq.* (2019).

medical marijuana. *Id.* This kind of outright ban is not at issue in this case because the Judicial District allows for probationers to explain their need for medical marijuana. R. 109. Consequently, *Nelson* supports the Judicial District's Policy that Petitioners can be subject to restrictions in the use of medical marijuana and that a judicial hearing is a prudent process for a court to investigate the need for medical marijuana.

All of the restrictions within the MMA show that the statute was not intended to give broad fundamental or absolute rights to use medical marijuana. 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 or prevent them from using medical marijuana at work. *E.g.*, 35 P.S. §§ 10231.510(4) and 10231.2103(b)(2).

Third, the MMA is not intended to create a permanent right for the citizens of Pennsylvania because the MMA is only to "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 further amendment.

In conclusion, the MMA as a whole is clearly a law of restriction. It does not give unfettered access to medical marijuana and consequently, does not support

Petitioners' broad claim that a medical marijuana card is above judicial scrutiny. A patient must possess a card when they are in possession of medical marijuana. 35 P.S. § 10231.303(b)(7). Nowhere does the MMA contemplate that this card creates total immunity from judicial inquiry. 35 P.S. § 10231.2103(a) (restricting penalty only if marijuana was the ***sole*** basis for decision).

B. Courts have the power to enact reasonable general conditions of probation such as the Policy at issue in this case.

Petitioners next claim that probation conditions must fall under one of thirteen specific conditions set forth by statute or the conditions will be considered unreasonable. *Brief*, p. 19. In Petitioners' view, "none of the specific conditions listed in [42 Pa.C.S. § 9754] authorize courts to prohibit individuals from using medical marijuana or any other drug." *Brief*, p. 19. However, the law is clear that the Policy at issue in this case does not conflict with the powers of the judiciary or Section 9754 of the Sentencing Code.

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).[3]

One possible sentencing option is probation, which is generally understood as a sentence served under community supervision rather than in prison or jail.

[3] 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).

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." *E.g.*, *Commonwealth v. Nicely*, 536 Pa. 144, 638 A.2d 213 (1994); *Commonwealth v. Vivian*, 426 Pa. 192, 231 A.2d 301 (1967); *Fleegle v. Pa. Board of Probation and Parole*, 532 A.2d 898 (Pa. Cmwlth. 1987), *appeal denied*, 518 Pa. 614, 540 A.2d 535 (1988). This Court explained:

> A court, in its discretion, may place an offender on probation as an alternative to imposing a sentence. 61 P.S. § 331.25. The probation order may be conditioned upon a number of factors, including restitution to an injured party and payment of costs of prosecution. *See* 42 Pa.C.S. § 9754. It is also important to note that the court does not exhaust its sentencing power when it places an offender on probation with terms and conditions. *Commonwealth v. Ferguson*, 201 Pa. Super. 649, 653, 193 A.2d 657, 659-60 (1963).

Com. v. Nicely, 536 Pa. 144, 150-51, 638 A.2d 213, 216 (1994).

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. Pa. 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) ("[C]onditions 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. Ct. 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 ("[S]entences 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 public might enjoy. Parolees and probationers are in a different position than are members of the 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 (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 Judicial District's Policy is consistent with these powers.

Pursuant to the Policy, probationers are prohibited from using medical marijuana and are informed that if they are aggrieved by the Policy, they can petition for a hearing to establish their medical need for medical marijuana. R. 109.

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 above, 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 when balanced against the narrow rights afforded by the MMA. *E.g.*, *Homoki*, 423 Pa. Super. at 327, 621 A.2d at 140. As stated above, in *United States v. Jackson*, a federal District Court approved of a hearing process for a probationer that was almost identical to the Policy in this case. 388 F. Supp. 3d 505, 514-15 (E.D. Pa. 2019) (citing 35 P.S. §§ 10231.103, 10231.303). This is a far more common sense approach than simply concluding that the MMA completely forecloses reasonable probation conditions and restrictions.

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. All of the authority cited by Petitioners shows trial courts balancing reasonable probation conditions against the needs of probationers – a process that Petitioners have cut short by seeking relief in this Court.

Petitioners cite to cases that directly undermine their position that the Policy is an unreasonable probation condition. Each case that Petitioners cite proceeded in the normal course of post-sentence relief. *Brief*, pp. 19-21. In these cases, the courts held full hearings on the probation conditions and heard evidence and argument as to why the probation conditions were specifically unreasonable as to each defendant. The cases support the reasonableness of the Judicial District's Policy because, if Petitioners would have followed the Policy, they would have had a chance for the Judicial District to evaluate their specific situation. Through the judicial process, the Judicial District would have had the chance to take evidence and review the specific situations of these Petitioners who are on probation. *E.g.*, *United States v. Jackson*, 388 F. Supp. 3d 505 (E.D. Pa. 2019). None of these cases support the idea that probationers can take a restriction that they believe is unreasonable and leapfrog the judicial process.

For example, in *Com. v. Rivera*, the trial court examined a post-sentence motion and issued an opinion that considered the specific probation conditions at

issue in that case. 95 A.3d 913, 914-15 (Pa. Super. Ct. 2014). Likewise, in *Com. v. Hall*, the trial court issued Rule 1925(a) opinions where appropriate and this Court had a full record of analysis to examine by the time the specific probation conditions reached the Court. 622 Pa. 396, 402-03, 80 A.3d 1204, 1207-08 (2013). The same is true in *Com. v. Wilson*, where this Court reviewed whether a sentencing court could impose a condition that a probationer would be subject to warrantless searches. 620 Pa. 251, 266, 67 A.3d 736, 745 (2013). In order to reach the conclusion that a probation condition for warrantless searches was illegal, this Court examined a complete analysis of the underlying conviction and the post-sentencing process. *Id.* at 620 Pa. 254-55, 67 A.3d 738 (2013). None of these cases cited by Petitioners bypassed the normal judicial process.

In this case, Petitioners claim that the Policy is not reasonably related to their rehabilitation and therefore illegal, yet they did not use the Policy's process to actually develop a record on this point. *Brief*, p. 20. They are arguing from the presupposed assumption that the MMA grants them unchallenged access to medical marijuana anytime and anywhere rather than letting judges weigh and balance their specific needs for medical marijuana through judicial process. R. 109; *see also Jackson*, 388 F. Supp. 3d at 514-15. As a result, their citation to legal authority regarding probation conditions as applied to specific probationers is not relevant to this case.

3. Petitioners' arguments presented on pages 21 to 28 of their Brief attempt to justify their decision to step over the Policy, yet all of their arguments cite to valid reasons for the Policy's hearing process.

Petitioners next challenge the Policy on the basis that the MMA "does not authorize any person or entity to require additional proof of medical necessity," and that the Policy in this case amounts to re-writing the MMA. *Brief*, pp. 21- 22. However, as already shown, *supra*, the MMA does not grant absolute immunity with regard to the use of medical marijuana because of the many arguments set forth in Argument Section IV.A. Those arguments are equally responsive to the arguments set forth on pages 21 to 22 of Petitioners' Brief. Rather than rewriting the MMA, the Policy is a reasonable balance between probationers' rights to access medical marijuana and judicial supervision. R. 109; *see Jackson*, 388 F. Supp. 3d at 514-15. Petitioners' medical marijuana use is not being subject to judicial inquiry ***solely*** due to the fact they are patients under the MMA; their use is subject to scrutiny because they are probationers, which is entirely consistent with the MMA. 35 P.S. § 10231.2103(a).

Petitioners also claim that the Policy is too vague regarding what evidence they must provide under the Policy in order to use medical marijuana. *Brief*, p. 23. This argument fails in three respects.

First, virtually all of Petitioners arguments starting on page 23 of their Brief and ending with page 25 engage in pure speculation because they chose ***not*** to avail themselves of the Policy in the first place. This Court has no way of knowing if the Judicial District is enforcing the Policy in a vague or inconsistent manner because of Petitioners' decision to sidestep the Policy. For example, there is no way of knowing if the Judicial District would have considered the information in Petitioners' affidavits, balanced their criminal history, and concluded that they should all have been excused from the Policy's restriction against medical marijuana.

Second, Petitioners clearly know what is proper and improper with regard to post-sentencing and probation violation hearings because they cite extensively to those standards in their Brief. *Brief*, pp. 19-21. The Judicial District's hearing procedure under the Policy and imposition of a probation condition would still have to meet *Gagnon* legal standards. If it does not, Petitioners could file for a relief from the conditions and seek redress just as any other probationers.

Finally, Petitioners are well aware of what they would need to establish because their brief extensively cites the legal standards for lawful medical marijuana use under the MMA. *See generally Brief and Amicus Brief.* The standards are apparent from simply reading the MMA. The District Court in *Jackson* read the MMA and cited the necessary criteria a probationer would have

to establish at a hearing to prove lawful use of medical marijuana. *See Jackson*, 388 F. Supp. 3d at 514-15. Consequently, Petitioners' arguments about the Policy setting a vague standard are without merit.

Petitioners next attempt to challenge the underlying need for the Policy and speculate that denying medical marijuana to any probationer, for any reason, is not rehabilitative. *Brief*, pp. 24-25. This is speculative reasoning on a record that Petitioners chose not to develop in detail. This Court has no way of knowing how the Judicial District, after a "full and fair hearing," would have considered the benefits of their medical marijuana use in relation to their underlying criminal acts and personal histories. R. 109.

The reasons behind the Policy are clear and persuasive. The Policy was designed to mesh with the Judicial District's General Conditions of Probation that prohibit probationers from using alcohol, narcotics, and legal and illegal mind/mood altering chemicals/substances. R. 101-02. The Judicial District had prior success with its General Conditions of probation because the structure of general conditions assist with rehabilitating offenders and reducing the risk of recidivism. R. 102, 111-12. The Judicial District also had concerns about the fact that substance abuse treatment providers will not treat anyone with a medical marijuana card due to risk of relapse, as well as general safety concerns for the community. R. 101, 111.

Prior to adopting the Policy, the Judicial District experienced disruption supervising probationers who used medical marijuana. R. 111. For example, some probationers could identify the underlying medical condition that led to their prescription for medical marijuana. R. 112. Nor could laboratories discern between legal and illegal strains of marijuana, which naturally is problematic when testing probationers with a history of drug abuse or illegal possession. R. 112. Notably, Petitioners avoid citation to these issues in their Brief. Their argument is based entirely on the notion that medical marijuana is above question because of the MMA and the expertise of the medical profession. *Brief*, pp. 24-26. Yet the MMA itself notes that the efficacy of medical marijuana is still in its early stages and that safety of patients remains a high priority:

> The General Assembly finds and declares as follows:
>
> > (1) Scientific evidence ***suggests*** that medical marijuana is ***one*** potential therapy that ***may*** mitigate suffering in some patients and also enhance quality of life.
> >
> > (2) The Commonwealth is committed to patient safety. Carefully regulating the program which allows access to medical marijuana will enhance patient safety ***while research into its effectiveness continues***.
> >
> > (3) It is the intent of the General Assembly to:
> >
> > > (i) Provide a program of access to medical marijuana which ***balances the need of patients to have access to the latest treatments with the need to promote patient safety***.

….

35 P.S. § 10231.102 (emphasis added). The Policy in this case parallels these same concerns.

Petitioners next claim that additional cases from other jurisdictions support the notion that any restriction on medical marijuana is an improper probation condition. *Brief*, pp. 24-25. In reality however, those cases only support a finding that the Policy in this case is reasonable. For example, in *California v. Tilehkooh*, the California appellate court examined an affirmative defense to probation revocation in accordance with California's Compassionate Use Act of 1996 and held that it was improper to deny a probationer a hearing under that law because the statute specifically created an affirmative defense to marijuana use to "seriously ill Californians." 113 Cal. App. 4th 1433, 1441, 7 Cal. Rptr. 3d 226, 232 (2003). Under that law, and much like the Policy in this case,

> To meet the requirements of section 11362.5[,] it is the defendant's burden to show "that he or she was a 'patient' or 'primary caregiver,' that he or she 'possesse[d]' or 'cultivate[d]' the 'marijuana' in question 'for the personal medical purposes of [a] patient,' and he or she did so on the 'recommendation or approval of a physician' (§ 11362.5(d))." (*Mower, supra*, 28 Cal.4th at 477, 122 Cal. Rptr. 2d 326, 49 P.3d 1067.)

Id. The *Tilehkooh* court did not ultimately conclude that medical marijuana was above inquiry, but instead noted that, "depriving defendant of the right to predicate a defense to a probation revocation upon section 11362.5 denied him due process." *Tilehkooh*, 113 Cal. App. 4th 1433, 1445, 7 Cal. Rptr. 3d 226, 235 (2003).

Tilehkooh is therefore in perfect harmony with the Policy's provision for a "full and fair hearing." R. 109; *see also Jackson*, 388 F. Supp. 3d at 514-15.

Petitioner's reliance on *U.S. v. Martin* also is not helpful because the District Court in that case apparently did not conduct any hearing but chose instead to accept that the probationer had a valid medical marijuana card. The federal probation officers in that case also apparently did not elect to make any further inquiry or seek a hearing similar to *Jackson*. The *Martin* opinion does not provide any substantive reason for the court's decision and does not stand for the proposition that a court can never make inquiry into a probationer's medical marijuana use.

Finally, Petitioners attempt to distinguish *Com. v. Homoki* on page 27 of their Brief. In that case, the Superior Court upheld a probation condition that specifically prevented a probationer from accessing lawful prescription medication. *Com. v. Homoki*, 423 Pa. Super. 320, 327-28, 621 A.2d 136, 140 (1993). Notably, the case proceeded through a hearing on the probationer's specific need for the prescription, just like the Policy in this case anticipates. *Id.*, 423 Pa. Super. at 323-24, 621 A.2d at 138. The Superior Court agreed with the trial court's conclusion after a full hearing on the issue and an analysis of the trial court's rationale. *Id.* at 327-28, 621 A.2d at 140.

Petitioners' argument that the *Homoki* case might be decided differently if the probationer could demonstrate some harm only further supports the Judicial District's position that Petitioners should have followed the Policy and proceeded to a hearing in the first place. Nothing prevented Petitioners from following the Policy and showing the Judicial District all of the valid criteria for medical marijuana use under the MMA and how restricting their access would cause them specific harm. *E.g.*, R. 109; *see also Jackson*, 388 F. Supp. 3d at 514-15. The Judicial District could have weighed all of the issues and balanced all of the appropriate concerns. *E.g.*, *Homoki* at 323-24, 621 A.2d at 138.

Consequently, Petitioners have not presented any legitimate reason as to why they could not have proceeded to a hearing under the Policy. They start from the presumption that medical marijuana can never be questioned and carry that theme throughout the Brief. They cite to probation cases that came up through the appellate courts after hearings, which is entirely inconsistent with their arguments in this case. They misinterpret the breadth of Section 2103(a) of the MMA, which shields patients from penalties only where medical marijuana is the sole basis for action. In short, they have not presented any legitimate argument as to why it is unreasonable for probationers to appear at a hearing that requires them to establish they are using medical marijuana consistent with the MMA. R. 109; *see also Jackson*, 388 F. Supp. 3d at 514-15.

C. Petitioners' arguments about principles of federalism and the federal Controlled Substances Act miss the point behind the Policy.

The Judicial District's Policy does not rely on any compulsion to enforce the federal Controlled Substances Act, as Petitioners argue in their Brief. *Brief,* p. 29. Nor does the Policy rest on the notion that the MMA is preempted by the Controlled Substances Act. *Brief,* pp. 30-36.

The Judicial District has had success with its General Conditions of probation because the structure of general conditions assist with rehabilitating offenders and reducing the risk of recidivism. R. 102, 111-12. One of those general conditions includes complying with Federal laws. R. 102, 112. The Judicial District has experienced overall positive impact on rehabilitation by using this general condition and this condition also prevents inconsistent enforcement of probation general conditions. R. 112. The focus is on creating a general condition that has a positive impact on the probationer's rehabilitation.

Consequently, Petitioners' arguments about federalism and preemption are not on point, and this Court should refuse to offer any kind of advisory opinion in this area.

D. Petitioners' argument that no probationer with a medical marijuana card can be subject to judicial scrutiny undermines the entire sentencing process.

By arguing for a blanket protection in their use of medical marijuana, Petitioners are seeking essentially to rewrite Pennsylvania criminal law and

prevent all courts from making logical and reasoned decisions that balance medical marijuana use with the needs of reforming the probationer. *See, e.g.*, *Brief*, 21-22 (arguing that no person or entity can ask for additional evidence beyond a medical marijuana card).

Prior to revoking probation, courts must follow the procedure and legal requirements set forth in the Rules of Criminal Procedure. Pa. R. Crim. P. 708. In order to sentence any probationer to jail for violation conditions of probation, the courts must consider multiple factors that are often set forth in presentence reports utilized by both probation offices and prosecutors. *Com. v. Goggins*, 748 A.2d 721, 728 (Pa. Super. Ct. 2000) (A sentencing judge must use either a presentence report or conduct sufficient inquiry that the court is apprised of the offense but also the defendant's personal history and background.); *Commonwealth v. Kelly*, 33 A.3d 638, 642 (Pa. Super. Ct. 2011) (vacating sentence of probationer where court failed at the *Gagnon II* level to consider a report or conduct a pre-sentence inquiry as required under *Goggins*).

It has long been the law that judges have wide discretion to receive any relevant information that will assist in this analysis. *Com. v. Vernille*, 275 Pa. Super. 263, 274-75, 418 A.2d 713, 719 (1980). This Court has outlined the following information that would be essential to a full pre-sentence analysis:

(A) a complete description of the offense and the circumstances surrounding it, not limited to aspects developed for the record as part of the determination of guilt;

(B) a full description of any prior criminal record of the offender;

(C) a description of the educational background of the offender;

(D) a description of the employment background of the offender, including any military record and including his present employment status and capabilities;

(E) the social history of the offender, including family relationships, marital status, interests and activities, residence history, and religious affiliations;

(F) the offender's medical history and, if desirable, a psychological or psychiatric report;

(G) information about environments to which the offender might return or to which he could be sent should probation be granted;

(H) supplementary reports from clinics, institutions and other social agencies with which the offender has been involved;

(I) information about special resources which might be available to assist the offender, such as treatment centers, residential facilities, vocational training services, special educational facilities, rehabilitative programs of various institutions to which the offender might be committed, special programs in the probation department, and other similar programs which are particularly relevant to the offender's situation; and

(J) a summary of the most significant aspects of the report, including specific recommendations as to the sentence if the sentencing court has so requested.

Commonwealth v. Martin, 466 Pa. 118, 134, 351 A.2d 650, 658 n.26 (1976).

In this case, Petitioners argue that these factors are beyond the Judicial District's review once they present their medical marijuana cards. *See, e.g.*, *Brief*, pp. 21-22. Indeed, the most essential part of Petitioners' argument has nothing to do with their own health conditions because they argue that the General Assembly intended that once a medical marijuana card is presented, medical marijuana users are beyond any further examination. *Brief*, p. 21. Under this view, not only is the Policy in this case unenforceable, but no judicial district could ever properly examine the *Martin* factors in ***any*** revocation proceeding once a probationer produces a medical marijuana card.

Consequently, not only is the Policy consistent with customary criminal justice sentencing guidelines with respect to probationers, Petitioners are also advancing an argument for absolute immunity for individuals who present medical marijuana cards. As stated *supra*, this was simply not the intent of the MMA.

V. CONCLUSION

For the reasons set forth herein, this Honorable Court must deny the relief sought by the Petitioners in this case and permit the Judicial District to proceed with the Policy.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Pa.R.A.P. 2135(a)(1) undersigned counsel certifies that this Brief contains 10,309 words and is therefore in compliance with the word count restrictions of the Rules of Appellate Procedure.

_/s/ Robert J. Krandel_____
ROBERT KRANDEL

AFFIDAVIT OF SERVICE

DOCKET NO 118 MM 2019

----------X

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

v.

52nd Judicial District, Lebanon County

----------X

I, Elissa Diaz, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

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Sworn to before me on February 28, 2020

/s/ Robyn Cocho
_____

Robyn Cocho
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