September 16, 2019

Hon. John C. Tylwalk
Lebanon County Court of Common Pleas
400 South 8th Street
Lebanon, PA 17042

Eastern Region Office
PO Box 60173
Philadelphia, PA 19102
215-592-1513 T
215-592-1343 F

Central Region Office
PO Box 11761
Harrisburg, PA 17108
717-238-2258 T
717-236-6895 F

Western Region Office
PO Box 23058
Pittsburgh, PA 15222
412-681-7736 T
412-681-8707 F

Dear President Judge Tylwalk:

We write to urge you to reconsider the Court's new policy that prohibits any individual who is on court supervision from using medical marijuana in accordance with the Medical Marijuana Act ("MMA"). As written, the Court's Policy No. 5.1-2019 and 7.4-2019 is in direct conflict with the MMA, and we believe that the policy is therefore unlawful. As we explain in more detail below, the MMA prohibits this Court from punishing individuals who lawfully use medical marijuana, and federal law has no bearing on the restrictions that the legislature has placed on the Court's authority. Moreover, we are extremely concerned that the Court's policy will immediately and substantially harm individuals with significant disabilities who rely on medical marijuana to cope with debilitating disorders—indeed, we have already been contacted by such individuals. The result is that individuals will either go untreated, or be forced to use other, more dangerous drugs such as opioid pain killers to treat their illnesses.

Accordingly, we respectfully request that the Court rescind its policy before the end of September, when individuals who lawfully use medical marijuana must end their use or face sanctions from the Court. We would welcome the opportunity to discuss this issue with the Court in a private setting before that date.

Act 16 of 2016, the Medical Marijuana Act ("MMA"), created a medical marijuana program that allows individuals in Pennsylvania access to a "therapy that may mitigate suffering in some patients and also enhance [their] quality of life" while protecting patient safety. 35 P.S. § 10231.102. Only a small group of Pennsylvanians is eligible to use medical marijuana: those who have a "serious medical condition" as defined by either the MMA or the Department of Public Health.[1] That list is limited to:

[1] 28 Pa. Code § 1141.21.

Amyotrophic lateral sclerosis.
Anxiety Disorders.
Autism.
Cancer, including remission therapy.
Crohn's disease.
Damage to the nervous tissue of the central nervous system (brain-spinal cord) with objective neurological indication of intractable spasticity, and other associated neuropathies.
Dyskinetic and spastic movement disorders.
Epilepsy.
Glaucoma.
HIV / AIDS.
Huntington's disease.
Inflammatory bowel disease.
Intractable seizures.
Multiple sclerosis.
Neurodegenerative diseases.
Neuropathies.
Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, or for which adjunctive therapy is indicated in combination with primary therapeutic interventions.
Parkinson's disease.
Post-traumatic stress disorder.
Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain.
Sickle cell anemia.
Terminal illness.
Tourette Syndrome.

In a statement to the Lebanon Daily News, Your Honor was reported as suggesting that certain medical conditions may not be deserving of treatment through medical marijuana, and that Your Honor may view this as a matter of "convenience or preference or whatever" for certain people who use medical marijuana.[2] We urge Your Honor to review the list of actual disorders set forth above. It is simply not the case that an individual can recreationally use medical marijuana or effectively do so by claiming a minor ailment. All of the medical conditions for which access to medical marijuana is authorized are serious, debilitating conditions, which is why the Legislature—the body charged with making such policy decisions—has included them as qualifying conditions under the MMA. Forcing people to stop using medical marijuana will only exacerbate other, greater harms, such as opioid addiction and overdoses.[3]

---

[2] Nora Shelly, "Lebanon judge on medical marijuana probation rule: 'I don't think we want to be heartless,' LEBANON DAILY NEWS (Sept. 12, 2019), https://www.ldnews.com/story/news/2019/09/12/lebanon-county-pa-judge-medical-marijuana-probation-policy/2287509001/.

[3] For example, a study published in the Journal of the American Medical Association found that states with medical marijuana laws have "significantly lower state-level opioid overdose mortality rates." Marcus Bachhuber, et al., "Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999-2010" JAMA INTERNAL MEDICINE, Vol. 174, No. 10 (2014), https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/1898878. Indeed, given that the stated goal of supervision such as probation is to rehabilitate a defendant, it makes little sense to deny that individual a medically-

The Court's new policy is premised on the illicit nature of marijuana under federal law. The federal Controlled Substances Act ("CSA"), however, does not require this Court to prohibit individuals on probation from using medical marijuana. First, this Court cannot be compelled to enforce federal law, and the CSA does not purport to require such enforcement. *See generally Printz v. United States*, 521 U.S. 898, 935 (1997); s*ee also Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 538 (Mich. 2014) (CSA does not "require that the City, or the state of Michigan, enforce that [federal] prohibition."). And second, the CSA does not preempt the MMA. *See Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 141 (Az. 2015) (Arizona's substantively identical version of the MMA creates no conflict with federal law because the "trial court would not be authorizing or sanctioning a violation of federal law, but rather would be recognizing that the court's authority to impose probation conditions is limited by statute."). Indeed, Congress has explicitly restricted the use of federal funds to prevent states, including Pennsylvania, from implementing medical marijuana programs. *See* Pub. L. No. 115-141.

Because the MMA is not preempted by federal law, it, and not federal law, defines this Court's authority to impose probation conditions regarding the use of medical marijuana. The MMA contains no language restricting the use of marijuana by individuals under court supervision. But it explicitly protects patients from any form of punishment, or the denial of rights or privileges, stemming from their use of medical marijuana under the MMA. According to the MMA, "none" of those individuals:

> 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). This provision prohibits *any* arrest, prosecution, or other penalty. *Id*. In addition, a medical marijuana patient cannot be denied *any* right or privilege for using medical marijuana pursuant to the MMA.

Because the legislature did not exempt individuals under court supervision from the protection of the MMA, the MMA *prohibits* this Court from imposing any penalty on patients for the lawful use of medical marijuana under state law, regardless of the drug's status under federal law. This is so even though probation is a privilege under Pennsylvania law,[4] as the MMA explicitly prohibits the denial of any privilege to patients who use medical marijuana in compliance with the law.

---

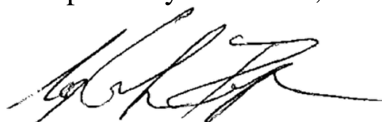
needed treatment for one of those serious and debilitating disabilities. Imposing additional barriers for a person who is trying to cope with a debilitating, serious medical condition will only make it more difficult for that person to successfully complete probation. That, of course, violates the purpose of 42 Pa.C.S. § 9754 and serves no benefit to society at large.

[4] *See Commonwealth v. Newman*, 310 A.3d 380, 381 (Pa. Super. Ct. 1973) (en banc) (describing the "privilege of probation").

We are aware that courts across the state have taken different positions on whether to prohibit patients under court supervision from using medical marijuana. Many courts, consistent with state law, permit medical marijuana patients to use the drug while on probation or other forms of court supervision. Other courts, however, have imposed blanket bans like the one recently issued by this Court. Those restrictions ignore the immunity clause in the MMA, 35 P.S. § 10231.2103(a). Indeed, earlier this month the Lycoming County Court of Common Pleas issued a decision denying a medical marijuana patient's motion to modify the terms of his probation so that he could continue to use the drug pursuant to the MMA. Critically, the court failed to address the MMA's immunity clause in its opinion even though it was raised by the patient and the ACLU-PA and is plainly the most important provision at issue in determining whether state law allows courts to condition probation on abstaining from medical marijuana.[5] *See Hoggatt*, 347 P.3d at 139 (holding that because Arizona's medical marijuana law did not explicitly exclude probationers, such an exclusion would "constitute denial of a privilege" in violation of the law).

Since Policy No. 5.1-2019 and 7.4-2019 was announced, the ACLU-PA has been contacted by several medical marijuana patients under court supervision in Lebanon County who will be irreparably harmed if they are forced to choose between using medical marijuana or facing probation revocation or other penalties. Your Honor told the Lebanon Daily News that the Court does not want to be "heartless or lacking in sympathy or lacking in empathy." But a blanket policy that prohibits all patients from using medical marijuana while under court supervision ignores the finding of the Pennsylvania legislature that "medical marijuana is one potential therapy that may mitigate suffering in some patients and also enhance quality of life." 35 P.S. § 10231.102. It also conflicts with state law. Accordingly, we respectfully request that the Court rescind Policy No. 5.1-2019 and 7.4-2019 and allow patients under the supervision of the Lebanon County Court of Common Pleas to use medical marijuana in accordance with state law. We would welcome the opportunity to meet with the Court at its convenience to discuss this issue further.

Respectfully submitted,



Mary Catherine Roper
Deputy Legal Director

Sara Rose
Senior Staff Attorney

Andrew Christy
Criminal Justice and Poverty Attorney

---

[5] The Lycoming Court acknowledged that the MMA is not preempted by federal law because it "does not render compliance with federal law impossible or stand as an obstacle to the congressional objectives underlying" the CSA. *Commonwealth v. Wood*, CR-2065-2012, 15 (Lycoming Cnty. Ct. Common Pleas Sept. 12, 2019).

cc: Gregory Dunlop, Chief Counsel, AOPC
Stephanie Axarlis, District Court Administrator
Sally Barry, Director of Lebanon County Probation Services
David Warner, Jr., Lebanon County Solicitor