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283 MD 2023

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Damon Monyer and the Pennsylvania Cannabis Coalition, **Petitioners,** **v.** **23rd Judicial District, Berks County,** **Respondent.**	**No. 283 MD 2023** **Original Jurisdiction**

PETITIONERS' BRIEF IN SUPPORT OF APPLICATION FOR SUMMARY RELIEF

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I. INTRODUCTION AND RELIEF SOUGHT

When Pennsylvania adopted the Medical Marijuana Act ("MMA"),[1] the General Assembly included a broad immunity provision that prohibits medical marijuana patients from being "subject to arrest, prosecution or penalty in any manner, or denied any right or privilege" as a result of their lawful use of medical marijuana. 35 P.S. § 10231.2103(a). Interpreting this language, the Pennsylvania Supreme Court in *Gass v. 52nd Judicial District* unanimously struck down a court policy prohibiting individuals on probation from using medical marijuana unless they demonstrated a "medical necessity." 232 A.3d 706, 715 (Pa. 2020). Under this controlling precedent, a policy that conditions any right or privilege on a showing of a medical marijuana patient's "medical necessity" is "contrary to the immunity accorded by Pennsylvania's Medical Marijuana Act." *Id.*

Respondent, the 23rd Judicial District, prohibits individuals in its four problem-solving treatment courts from using medical marijuana unless they prove "medical necessity" for such use, in which case their requests to use medical marijuana will be decided on a case-by-case basis. Medical marijuana patients who have not demonstrated medical necessity to the Judicial District's satisfaction have been directed to abstain from lawful medical marijuana use in order to participate

[1] Act 16 of April 17, 2016, P.L. 84, 35 P.S. §§ 10231.101-10231.2110.

in treatment court, have been denied admission to treatment court for lawful medical marijuana use, and have been sanctioned for lawful medical marijuana use while in treatment court. These patients must choose between receiving the benefits of treatment court, including possible expungement of their criminal convictions, or continuing to use medical marijuana to treat their serious medical conditions.

The Judicial District's Policy unlawfully dilutes patients' immunity under the MMA by conferring discretion on treatment courts to deny patients admission to treatment court or sanction them for using medical marijuana in compliance with the Act. Accordingly, this Court should rule that the Policy violates the MMA and enjoin its enforcement.

II. STATEMENT OF JURISDICTION

This Court has original jurisdiction in any action brought against the Commonwealth government and its officers, including challenges to policies adopted by a judicial district. *See* 42 Pa.C.S. § 761(a)(1); *Gass v. 52nd Jud. Dist., Lebanon Cnty.*, 223 A.3d 212, 212-13 (Pa. 2019) (holding that original jurisdiction rests in the Commonwealth Court for challenge to judicial district's policy on medical marijuana use); s*ee also McFalls v. 38th Jud. Dist.*, No. 4 M.D. 2021, 2021 WL 3700604, at *5-7 (Pa. Commw. Ct. Aug. 6, 2021) (unpublished) (rejecting preliminary objections to jurisdiction in lawsuit over judicial district policies).

III. QUESTION PRESENTED

Does the Judicial District's Policy, which permits its treatment courts to deny admission to treatment court or sanction an individual in treatment court for the lawful use of medical marijuana, violate the immunity provision in the Medical Marijuana Act?

Suggested answer: Yes.

IV. STATEMENT OF UNCONTESTED FACTS

The 23rd Judicial District has four treatment courts: Drug Treatment Court, DUI Treatment Court, Mental Health Treatment Court, and Veterans Treatment Court. Petitioners' Application for Summary Relief ("Application") ¶ 36. Each is considered a "problem-solving court." *Problem-Solving Courts*, UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA, https://www.pacourts.us/judicial-administration/court-programs/problem-solving-courts (last visited Apr. 8, 2024). The mission of the Judicial District's treatment courts "is to integrate substance abuse, mental health and veterans specific treatment with the justice system for the promotion of public safety, individual responsibility, and reduction of drug/alcohol/mental health related recidivism." Application ¶ 38. In addition to other benefits, individuals who successfully complete treatment court "will receive a reduced sentence," *id.* ¶ 40, and may be eligible to apply for Accelerated Rehabilitative Disposition, which

generally results in the expungement of the criminal charges. *Id.* ¶¶ 41-42; Pa.R.Crim.P. 320.

Individuals in treatment court must comply with the treatment court's policies, including the Berks County Treatment Court Policy on Narcotic Medications and Prohibited Substances (the "Policy"). Application ¶¶ 47, 55-59. The Policy prohibits the use of certain medications, including medical marijuana. *Id.* ¶ 57-58. Individuals who wish to use medical marijuana, must seek an exemption. According to the Policy:

> Medical Marijuana use will be addressed on a case-by-case basis. Consideration for use should be accompanied by a letter addressed to the Court from a treating physician that details, [sic] diagnosis and medical necessity for use.

Id. ¶¶ 58. The letter must be written by a medical provider with an established relationship with the patient and cannot be from the doctor who certified the patient to use medical marijuana. *Id.* ¶ 66. It must indicate "whatever the diagnosis the physician is treating them for and that [medical marijuana] is the ***only*** thing that will treat whatever condition they are using it for." *Id.* at ¶ 64 (emphasis added). Since the Policy was adopted in 2022, the Judicial District has granted the requests of five treatment court participants to use medical marijuana. *Id.* ¶¶ 73.

Petitioner Damon Monyer is not among them. Mr. Monyer, a United States Air Force veteran who served in the Air Force for five years on active duty,

including two back-to-back combat tours in Iraq, lawfully uses medical marijuana to treat serious medical condition he developed as a result of his service to this country. *Id.* ¶¶ 23-31. Mr. Monyer applied for admission to the 23rd Judicial District's Veterans Treatment Court on December 8, 2022. *Id.* ¶ 94. On May 3, 2023, the treatment court denied his application because Mr. Monyer failed to comply with the Policy. *Id.* ¶¶ 107-109. Specifically, Mr. Monyer continued to use medical marijuana without providing the Veterans Treatment Court with "medical documentation regarding the medical marijuana being the ONLY option to treat" his serious medical conditions. *Id.* ¶ 108.

Mr. Monyer is unable to comply with the Policy's requirement that he obtain a letter from his regular medical provider indicating that medical marijuana is the only option to treat his serious medical conditions because he receives his medical care from the Department of Veterans Affairs ("VA"). *Id.* ¶ 128. Although veteran participation in state marijuana programs does not affect eligibility for VA care and services, federal law prohibits VA medical providers from recommending the use of medical marijuana or assisting veterans to obtain medical marijuana. *Id.* ¶¶ 128-129. Mr. Monyer is eligible to re-apply for admission Veterans Treatment Court or apply for admission to another one of the Judicial District's treatment courts. *Id.* ¶ 43. His criminal case is stayed for this litigation. *Id.* ¶ 92.

Petitioner the Pennsylvania Cannabis Coalition ("PCC") is a trade association that represents approximately 75% of the medical marijuana dispensaries in Pennsylvania. *Id.* ¶ 32. Licensed dispensaries are the only entities permitted to provide medical marijuana to patients. *Id.* ¶ 134. PCC's members include three of the four medical marijuana dispensaries in Berks County: Sunnyside Medical Cannabis Dispensary and two Trulieve dispensaries. *Id.* ¶ 136. PCC's members lose money when patients in treatment court are not allowed to use medical marijuana because those patients cease purchasing medical marijuana. *Id.* ¶¶ 142-145.

V. PROCEDURAL HISTORY

Petitioners filed a Petition for Review in this Court's original jurisdiction and an Application for Summary Relief in the Nature of a Preliminary Injunction on June 21, 2023. The Judicial District did not file preliminary objections and filed answers to both the Petition and Application. The Court continued the proceedings related to the request for preliminary injunction so that the parties could engage in discovery.

On February 2, 2024, Petitioners filed an Amended Application for Summary Relief in the Nature of a Preliminary Injunction. During a March 13, 2024 telephone status conference, the parties agreed "that there are no material

issues of fact" and that the case is "ripe for summary relief." Application Exhibit 51, March 13, 2024 Telephone Conference Transcript at 6:10-13.

The Court set the case for expedited summary relief.

VI. STANDARD OF REVIEW

A court should grant summary relief if, when viewing the evidence in the light most favorable to the non-moving party, "there are no genuine issues of material fact" and "the right to relief is clear as a matter of law." *Flagg v. Int'l Union, Sec., Police, Fire Prof'l of Am., Local 506*, 146 A.3d 300, 305 (Pa. Commw. Ct. 2016). "A fact is considered material if its resolution could affect the outcome of the case under the governing law." *Hosp. & Healthsystem Ass'n of Pa. v. Commonwealth*, 77 A.3d 587, 602 (Pa. 2013). A party may seek summary relief any time after an original jurisdiction petition for review is filed. Pa.R.A.P.1532(b).

The party responding to summary judgment cannot simply deny the facts set forth by the movant and claim that there is a genuine dispute of material fact. Instead, the responding party must identify "one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion." Pa.R.C.P. 1035.3(a) and (a)(1). Pursuant to this Rule, "where a motion for summary judgment has been made and properly supported, parties

seeking to avoid the imposition of summary judgment must show by specific facts in their depositions, answers to interrogatories, admissions or affidavits that there is a genuine issue for trial." *Marks v. Tasman*, 589 A.2d 205, 206 (Pa. 1991).

The Pennsylvania Supreme Court has explained that "the substantive law defines which facts are material," which requires that a court review the operative statutory text and determine which facts bear on it. *Strine v. Commonwealth*, 894 A.2d 733, 738-42 (Pa. 2006) (portion of Malpractice Act at issue required the court to determine whether "medical services" were provided, the core facts of which were uncontested despite disputes over whether those facts constituted liability). Moreover, "[d]isputed facts which are not critical to the issue in the petition will not preclude summary judgment." *Bartlett v. Bradford Publ'g, Inc*., 885 A.2d 562, 568 (Pa. Super. Ct. 2005).

VII. SUMMARY OF ARGUMENT

In adopting the Policy, the 23rd Judicial District has created an administrative policy at the district level that results in medical marijuana patients being denied the privilege of participating in a diversionary program that allows them to receive treatment, avoid potential incarceration, and possibly have their criminal conviction expunged. The MMA specifically prohibits medical marijuana patients from being denied any "right or privilege" as a result of their lawful use of medical marijuana. 35 P.S. § 10231.2103(a). This is a substantive limitation on the

power of the courts that has been set by the Pennsylvania General Assembly. The Policy, however, disregards this restriction and purports to vest each treatment court and the supervising judge with the discretion to decide which patients are permitted to use medical marijuana, in direct violation of the MMA as construed by the Pennsylvania Supreme Court.

In *Gass v. 52nd Judicial District*, the Court unanimously invalidated a judicial district policy that prohibited individuals on probation from using medical marijuana unless they proved a "medical necessity" for such use. 232 A.3d at 715. That policy, which is materially indistinguishable from the policy at issue here, was "contrary to the immunity accorded by Pennsylvania's Medical Marijuana Act" and could not be enforced against patients. *Id.* That decision is controlling. Accordingly, this Court should declare that the Judicial District's Policy is unlawful and permanently enjoin its enforcement.

VIII. ARGUMENT

The Pennsylvania Supreme Court's unanimous decision in *Gass* dictates the result here. First, the Judicial District's Policy requiring individuals to establish "medical necessity" to use medical marijuana while in treatment court is tantamount to the policy the Supreme Court held unlawful in *Gass*. Second, participation in treatment court is a privilege protected by the MMA. And finally, the MMA's immunity provision protects medical marijuana patients from being

denied the privilege of participating in treatment court or penalized by the treatment court for the lawful use of medical marijuana.

A. The MMA's immunity provision bars the Judicial District from requiring medical marijuana patients to prove a "medical necessity" to use medical marijuana.

The MMA provides broad protections for "patients"[2] from any form of punishment, or the denial of rights or privileges, stemming from their use of medical marijuana. No individual involved in lawful practice under the MMA:

> 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).

The Supreme Court ruled in *Gass* that a policy regulating the use of medical marijuana by the 52nd Judicial District violated the MMA because it required patients to "prov[e] medical necessity" to be allowed to use medical marijuana while on probation. 232 A.3d at 715. The MMA does not use the term "medical necessity." Instead, for an individual to be eligible to obtain a medical marijuana

[2] The MMA broadly defines a "patient" under the MMA as a person 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." *See* 35 P.S. § 10231.103. It is undisputed that each of the Petitioners is a "patient" within the meaning of the MMA.

card a physician must certify that the individual suffers from a qualifying serious medical condition and that it "is likely the patient will receive therapeutic benefit from the use medical marijuana." 35 P.S. §§ 10231.103, 10231.403. The MMA does not require physicians to certify that medical marijuana is the only effective treatment for the patient's condition or that the patient has tried other treatments first.

According to the *Gass* Court, requiring patients to prove "medical necessity" to use medical marijuana "fails to afford sufficient recognition to the status of a probationer holding a valid medical marijuana card as a patient, entitled to immunity from punishment, or the denial of any privilege, solely for lawful use." 232 A.3d at 715 (citing 35 P.S. § 10231.2103(a)). The policy in *Gass*, which originally prohibited all medical marijuana use by individuals on probation, was amended prior to the commencement of litigation to provide an exemption allowing individuals to use medical marijuana "in the event they prove, at a hearing, the 'medical necessity' for their ongoing use of medical marijuana." *Id.* at 710.[3] But the Court considered the exemption to be "an insufficient countermeasure to the Policy's foundationally inappropriate presumption." *Id.* at 715.

[3] The Court referenced the 52nd Judicial District's explanation that "this hearing would '[o]perationally be part of a parole or probation revocation proceeding.'" *Gass*, 232 A.3d at 710.

The Judicial District's Policy employs the same "medical necessity" standard that *Gass* expressly rejected. Until 2022, the Judicial District banned all medical marijuana use in its four treatment courts. Application ¶ 50. At some point after 2022, each of the treatment courts added an exemption for medical marijuana use under certain conditions. *Id.* at ¶ 51. To be considered for the exemption, a patient must provide "a letter addressed to the Court from a treating physician that details, [sic] diagnosis and medical necessity for use." *Id.* at ¶ 58. Once a patient provides such a letter, the Policy confers discretion on the treatment court judges to decide whether to allow the patient to use medical marijuana "on a case-by-case basis." *Id.* at ¶ 58, 86.

It is undisputed that the Judicial District's treatment courts, without any suspicion of unlawful usage, have rejected patients' requests to use medical marijuana. *Id.* ¶ 72. Indeed, the treatment courts have even rejected requests by patients who attempted to comply with the Policy by submitting letters from their medical providers. *Id.* at 73-74. Although the Policy does not define "medical necessity," Judicial District officials have explained that patients must prove not only that they have a qualifying serious medical condition, but also that medical marijuana "is the ***only*** thing that will treat whatever condition they are using it for." *Id.* at 63 (emphasis added). Accordingly, like *Gass*, "this case does not merely concern an effort on the part of the District (or its judges or probation

officials) to reasonably inquire into the lawfulness of a probationer's use of medical marijuana." Instead, the policy is "constructed upon a presumption that any and all use is impermissible," imposes more stringent criteria than the MMA, and gives unbridled discretion to treatment courts to decide whether to allow a patient to use medical marijuana. *Gass*, 232 A.3d at 715.

The Policy also effectively bars medical marijuana use by any patients in Veterans Treatment Court. The Policy's requirement that patients submit a letter from their "treating physician"—who cannot be the doctor who certified the patient to use medical marijuana, Application at ¶ 65—makes it impossible for any veteran who receives their medical care from the VA to comply. Federal law prohibits VA medical providers from recommending medical marijuana for their patients. But Veterans Treatment Court participants must obtain all of their medical care from the VA. Application ¶ 118. They are thus unable to comply with the Policy's threshold requirement that they submit a letter from their treating physician detailing their "medical necessity" to even be considered for an exemption to the Policy.

That admission to treatment court is discretionary does not save the Judicial District's Policy from violating the MMA's immunity provision. Medical marijuana users must—in all cases—submit a letter from a treating physician demonstrating "medical necessity" in order to gain admission to treatment court.

Application, ¶ 89. This element of the Policy is a gating issue for medical marijuana patients who wish to gain the privilege of treatment court admission, and it stands as an unlawful barrier for those who do not demonstrate medical necessity to the court's satisfaction.

In *Gass*, the Court rejected the Judicial District's argument that "it may rely on its general conditions of probation to make discretionary determinations about probationers' use of medical marijuana, beyond making inquires [sic] to determine whether the usage is lawful under the MMA." 232 A.3d at 714. As the Court noted, the authority of judicial districts to regulate medical marijuana use is different from their authority to restrict the use of alcohol and other drugs because "the Legislature has not implemented a remedial scheme authorizing the use of alcohol for treatment of serious medical conditions." *Id.* In any event, if the sole reason for denying admission to treatment court is the applicant's lawful medical marijuana use, as was the case with Mr. Monyer, then the applicant has been denied a privilege in violation of the MMA.

Far from being a pro forma requirement to ensure compliance with the MMA, the Policy subverts the will of the General Assembly by imposing additional requirements on patients not contemplated by the Act and that many patients in the Judicial District's treatment courts cannot meet. It imposes the same burdens on patients as the policy held to violate the MMA in *Gass* and has the

same effect of restricting patients' lawful use of medical marijuana to treat their serious medical conditions.

B. The MMA's immunity provision protects access to treatment courts.

In *Gass*, probation was considered a "privilege" that could not be denied solely for lawful use of medical marijuana. *Gass*, 232 A.3d a 715. Likewise, participation in treatment court programs is a "privilege" because of the advantages it affords participants versus those who do not participate. *See generally Commonwealth v. McCabe*, 265 A.3d 1279, 1288 (Pa. 2021) (explaining that "targeted treatments and programing afforded by the [treatment court] are themselves a benefit, as is the mitigating consideration of a defendant's successful participation at sentencing").

Treatment courts offer individuals the opportunity to participate in a diversionary program that provides "counseling, treatment for their addictions or illnesses, educational assistance and healthcare support." *Problem-Solving Courts*, UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA, https://www.pacourts.us/judicial-administration/court-programs/problem-solving-courts (last visited Apr. 8, 2024). The Judicial District's treatment courts are part of "the Commonwealth's multi-faceted system of problem-solving courts, a program which [the Pennsylvania Supreme Court] has taken great pride in establishing and fostering." *Off. of Disciplinary Couns. v. Pozonsky*, 177 A.3d 830, 833 (Pa. 2018).

According to the Judicial District, treatment courts confer numerous benefits on participants "through a coordinated interdisciplinary approach that treats the whole person while protecting public safety." Application ¶ 38. Participants have "the opportunity to learn not just about their addiction/mental health issues but about themselves, what and what not to do in high risk situations, and ways to improve their life skills. This results in better, more productive lives for the participant and those around them." *Id.* ¶ 39. They receive help "forming treatment strategies and identifying issues currently affecting the participants [sic] recovery." *Id.* ¶ 45. Perhaps most importantly, successful completion means the person "will receive a reduced sentence," *id.* ¶ 40, and permits participants to apply for Accelerated Rehabilitative Disposition, which generally results in the expungement of the criminal charges. *Id.* ¶¶ 41-42; Pa.R.Crim.P. 320. Patients who are denied admission to treatment court or face sanctions due to lawful medical marijuana use are denied these benefits.

The Supreme Court has held that individuals under court supervision, whether on probation or in treatment court, are entitled to the MMA's full protections. Regulating the use of medical marijuana by patients in treatment court,

either by denying them admission or penalizing them for lawful use, thus violates the MMA's immunity provision.

C. The MMA's immunity provision protects treatment court participants.

The MMA's protections apply to unincarcerated individuals who are under court supervision, whether they are on parole, probation, or participating in a problem-solving court or diversionary program. *See Gass*, 232 A.3d at 713. In *Gass*, the Court rejected the argument that "the integral involvement of court supervision means that any punishment or denial of the privilege of probation" is not "solely for" medical marijuana use, noting that criminal offenders who are prohibited by the Act from working for a dispensary or acting as caregivers "can nonetheless qualify as 'patients' who are otherwise eligible to use medical marijuana outside the restricted parameters." *Gass*, 232 A.3d at 713.

As the Court explained, the "Legislature considered persons under court supervision and chose to impose constraints only upon a specific subcategory (those physically present in a correctional institution)…. [H]ad the General Assembly intended broader limitations, it would have been a straightforward matter for it to have said this." *Id.*

Likewise, if the General Assembly intended to give problem-solving courts discretion to prohibit participants from using medical marijuana, it could have excluded such participants from the Act's broad protections. It did not do so in the

MMA, and it did not do so in the statute that authorizes the creation of treatment courts and other problem-solving courts. *See* 42 Pa.C.S. § 916. The decision not to exclude those individuals demonstrates the General Assembly's intent to protect patients' access to medical marijuana when they participate in problem-solving courts.

Any concern that medical marijuana use may affect an individual's successful completion of treatment court must be addressed by the legislature, not the courts. *See Gass*, 232 A.3d at 714-15. The Supreme Court specifically considered in *Gass* "concerns that medical marijuana use by probationers may, in fact, cause difficulties with court supervision and treatment," but it held that the responsibility for addressing any unintended consequences of the law fell to the legislature. *Id.* The same is true here. While "judges and probation officials may make reasonable inquiries into the lawfulness of a probationer's use of medical marijuana … [they] should have some substantial reason to believe that a particular use is unlawful under the Act" before denying admission to treatment court or sanctioning a treatment court participant for using medical marijuana. *Id*. at 715. The Court recognized that "ensuring strict adherence to the MMA by those possessing a valid medical marijuana card may be difficult," but held that the

alternative of "diluting the immunity afforded to probationer-patients by the Act is simply not a viable option." *Id.*

The Judicial District has authority to "make reasonable inquiries into the lawfulness" of a treatment court participant's use of medical marijuana. *Id.* at 715. But the legislature has limited judicial districts' authority to impose more restrictive conditions on patients' use than those enumerated in the MMA. Denying patients access to the benefits of treatment court simply because they lawfully use medical marijuana to treat their serious medical conditions violates the MMA and should be permanently enjoined.

IX. CONCLUSION

For the foregoing reasons, petitioners respectfully requests that this Court enter summary relief in their favor, permanently enjoin the Judicial District from enforcing its Policy on the use of medical marijuana in treatment courts, and declare that the Policy is unlawful.

Dated: April 8, 2024

Respectfully submitted,

/s/ Sara Rose

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CERTIFICATES OF COMPLIANCE

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

I hereby certify, pursuant to Pa.R.A.P. 2135, that this brief does not exceed 14,000 words.

/s/ *Sara Rose*
Sara Rose