

**STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT**

**STATE OF NEW MEXICO,**

**Plaintiff,**

**v.**

**D-202-CR-2017-04212**

**JOE MONTANO,**

**Defendant.**

**ORDER GRANTING DEFENDANT’S MOTION FOR DECLARATORY JUDGMENT  
AND PETITION FOR WRIT OF MANDAMUS**

**THIS MATTER** came before the Court on Defendant’s Motion for Declaratory Judgment and Petition for Writ of Mandamus filed on July 2, 2020, Defendant’s Reply in Support of Defendant’s Motion for Declaratory Judgment and Petition of Writ of Mandamus filed on July 21, 2020, and State’s Response to Petition for Writ of Mandamus filed on July 22, 2020.

The Court having reviewed the pleadings and the Court file, and being otherwise fully advised, finds the Defendant’s Motion for Declaratory Judgment and Petition for Writ of Mandamus is well taken and a Writ of Mandamus is hereby granted. The Court further **FINDS** and **ORDERS** as follows:

1. On July 12, 2018, Defendant entered into a Repeat Offender Plea and Disposition Agreement.

2. Defendant then entered into the Mental Health Court Program and successfully graduated September 24, 2019.
3. On October 10, 2019, Defendant was sentenced and authorized to participate in the Metropolitan Detention Center (MDC) Community Custody Program (CCP) for a term of 90 days, with a turn in date of October 18, 2019. The Judgment and Sentence was filed November 15, 2019, which reflects the aforementioned 90 days on CCP with the turn in date. Defendant received a total sentence of 12 months and 90 days, with 12 months suspended on the condition of supervised probation, with Defendant receiving credit toward probation for his time spent in Mental Health Court.
4. Defendant's probationary conditions included, but were not limited to, Defendant not having or using illegal drugs. An Amended Judgment and Sentence was filed on March 26, 2020, but these conditions did not change.
5. Defendant has a valid Medical Cannabis Patient Identification Card, effective May 12, 2015 to September 24, 2022.
6. The parties do not dispute that Defendant was removed from MDC's CCP program for having marijuana in his possession, and was ordered to serve the remainder of his 90 days in custody at MDC.
7. Defendant asks for declaratory judgment that the MDC "policy and practice of preventing and penalizing the possession and use of medical cannabis by post-conviction CCP participants violates the New Mexico Lynn and Erin Compassionate Use Act ["Compassionate Use Act"] and for the Court to issue a Writ of Mandamus that MDC comply with its duty to not impose a penalty on defendants on CCP who purchase, possess, store, or use medical cannabis pursuant to the Compassionate Use Act.

8. The County asserts the use of medical marijuana is still illegal under federal law, and therefore, Defendant's use of marijuana was a violation of law contrary to his agreement to comply with all city, county, state and federal laws and ordinances. The County also notes that MDC will follow any order issued by the Court and if the order includes the use of medical cannabis, MDC would allow such use on CCP.
9. The County also argues (1) the issue is moot because Defendant is no longer on CCP; (2) a Writ of Mandamus should not issue because a motion to reconsider would be a speedier and more adequate remedy; and (3) even if the issue is not moot, the Compassionate Use Act does not apply to defendants on the CCP program.

### **Analysis**

10. "Mandamus lies only to force a clear legal right against one having a clear legal duty to perform an act and where there is no other plain, speedy and adequate remedy in the ordinary course of law." *Brantley Farms v. Carlsbad Irr. Dist.*, 1998-NMCA-023, ¶ 16, 124 N.M. 698. Additionally, "mandamus is an appropriate means to prohibit unlawful or unconstitutional official action." *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 19, 120 N.M. 562.
11. "[A]n exception to the mootness doctrine allows for review of moot cases that present issues 'which are capable of repetition yet evade review.'" *Garcia v. Dorsey*, 2006-NMSC-052, ¶ 15, 140 N.M. 746.
12. The Compassionate Use Act allows for the beneficial use of medical cannabis for qualified patients. *See*, NMSA 1978, § 26-2B-3(V).
13. Effective June 14, 2019, Section 26-2B-10 states "[a] person who is serving a period of probation or parole or who is in the custody or under the supervision of the state or a

local government pending trial as part of a community supervision program shall not be penalized for conduct allowed under the Lynn and Erin Compassionate Use Act.”

14. The County argues the issue is moot because Defendant is no longer on CCP. Defendant, however, argues the Court has jurisdiction to prevent MDC from violating the statutorily protected rights of cannabis patients in the future. The County contends that the Court has the discretion and authority to order people on to CCP and to determine whether an inmate is permitted to use medical marijuana while on CCP. The County argues that if the Court allows for use of medical marijuana, MDC will comply with the order and would not penalize a defendant for using medical marijuana. However, if the Court does not allow such use, MDC will consider any marijuana use to be a violation of the CCP agreement.
15. The County argues also Section 26-2B-10 does not apply to defendants on CCP because the defendant is considered housed at MDC only with the ability to be at home. However, this is the same treatment that parolees are given when they are released on parole, *see* NMSA 1978, § 31-21-10(E) (“Every person while on parole shall remain in the legal custody of the institution from which the person was released[.]”), and the Compassionate Use Act clearly applies to these individuals. Although CCP is not specifically mentioned in the Compassionate Use Act, the County fails to demonstrate that CCP should be treated differently than probation or parole. Therefore, it appears as though the Compassionate Use Act does apply to defendants on CCP as it does to defendants on probation or parole.
16. As the Compassionate Use Act applies to these defendants, the County’s argument, that the Court has discretion or authority to allow or prohibit the use of medical marijuana

while on CCP is misleading. Prior to June 14, 2019, courts may have had the discretion to allow or prohibit the use of medical marijuana for defendants under supervision.

However, the Compassionate Use Act now prohibits penalization of conduct allowed under the Act.

17. While the Compassionate Use Act does not provide any guidance or limitation on the ability of courts to address a defendant's use of medical marijuana<sup>1</sup>, the Act does limit the ability of the supervising authority or the court to penalize a defendant who is a qualified patient. *Cf. Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 139 (revocation of probation is a penalty). Even if the court were to prohibit the use of medical marijuana while on probation, parole, or CCP, MDC or the court cannot penalize a defendant's use of medical marijuana. Therefore, since it appears that MDC will continue to penalize people on CCP for the use of medical marijuana, Defendant's argument that this issue may be repeated has merit.

18. Given MDC's interpretation of the Compassionate Use Act and its argument that it will not allow the use of medical marijuana unless the court explicitly allows such use, this issue is capable of repetition and yet evading review, and is an exception to the mootness doctrine.

19. MDC's interpretation of the Compassionate Use Act is incorrect and its policy that it will continue to penalize defendants for medical marijuana use is contrary to Section 26-2B-

10.

---

<sup>1</sup> Compare *Reed-Kaliher v. Hoggatt*, 347 P.3d 136 (noting that when the medical marijuana law precludes the court from imposing any penalty for compliant marijuana use, and holding that "while the court can impose a condition that probationers not violate federal law generally, it must not include terms requiring compliance with federal laws that prohibit [medical] marijuana use") and *People v. Tilehkooh*, 7 Cal.Rptr.3d 226 (Cal. Ct. App. 2003), with *People v. Watkins*, 282 P.3d 500, 2012 COA 15 (Colo. App. 2012) (holding that the "right to use medical marijuana may be curtailed during the term of his probationary sentence").

**IT IS THEREFORE ORDERED** that Defendant's Motion for Declaratory Judgment and Petition for Writ of Mandamus is **GRANTED**, and the Writ of Mandamus is attached hereto as **EXHIBIT A**, directing Respondents to comply with the Lynn and Erin Compassionate Use Act and specifically Section 26-2B-10.



---

HON. LUCY SOLIMON  
District Court Judge

**STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT**

**JOE MONTANO,**

**Petitioner,**

**v.**

**D-202-CR-2017-04212**

**STATE OF NEW MEXICO,  
BOARD OF COUNTY COMMISSIONERS,**

**Respondents.**

**WRIT OF MANDAMUS**

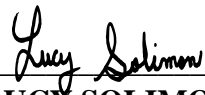
**TO:** Bernalillo County Metropolitan Detention Center,  
Greg Richardson, Bernalillo County Chief of Corrections,  
J. Torres, Community Custody Officer,  
A. Montoya, Community Custody Officer.

**GREETINGS:**

**WHEREAS**, a petition for writ of mandamus having been granted by this Court on December 29, 2020, and the Court being sufficiently informed and good cause appearing for issuance of a writ of mandamus;

**NOW, THEREFORE**, you, the above named entities and persons, shall comply with the Lynn and Erin Compassionate Use Act, NMSA 1978, Sections 26-2B-1 through 26-2B-10 (2019), and specifically, Section 26-2B-10, and shall not penalize persons in custody or under the supervision of the Metropolitan Detention Center, including those in the Community Custody Program, for conduct allowed under the Lynn and Erin Compassionate Use Act.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
**LUCY SOLIMON**  
**District Judge, Division XXIX**

**Exhibit A**