

THIRTEENTH JUDICIAL DISTRICT
STATE OF COLORADO
ADMINISTRATIVE ORDER 09- 02

CHIEF JUDGE POLICY CONCERNING “MEDICAL USE” OF MARIJUANA BY
PROBATIONERS SUPERVISED IN THE THIRTEENTH JUDICIAL DISTRICT

THE THIRTEENTH JUDICIAL DISTRICT RECOGNIZES:

1. Both the Colorado Constitution and the statutes of our State permit the use and possession of marijuana when prescribed for certain medical uses. Colo. Const., Art. XVIII, §14; §18-18-406.3; §25-15-106, C.R.S., as amended.
2. Nevertheless, the use and possession of marijuana is a violation of federal law. 21 U.S.C. §§841(a)(1), 844(a) (Controlled Substances Act).
3. The United States Supreme Court does not recognize a “medical necessity” exception to the statutory prohibition against marijuana use under federal law. *U.S. v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 149 L.Ed.2d 722, 121 S.Ct. 1711 (2001). Federal law permits the prosecution of patients for marijuana use or possession, even in states which have enacted “medical marijuana” laws. *Gonzales v. Raich*, 545 U.S. 1, 162 L.Ed.2d 1, 125 S.Ct. 2195 (2005).
4. Federal law does not allow physicians to prescribe marijuana for “medical use,” while many other controlled substances may be so prescribed. The Supreme Court has concluded that, as a Schedule I controlled substance, marijuana has “no currently accepted medical use,” for the purposes of federal law. *Oakland Cannabis Buyers’ Coop.*, *supra*. In addition, there is no known medical standard defining therapeutic levels of marijuana.

5. Further, the issuance of a registry identification card for small amounts of “medical marijuana” need not be supported by medical necessity in Colorado. Colo. Const. Article XVIII, §14(2)(a) (affirmative defense established by showing that patient “*might* benefit from the medical use of marijuana” (emphasis added)).
6. The application of principles of federalism to the question does result in tension between the right of the federal government to regulate controlled substances under the Commerce Clause, *Gonzales v. Oregon*, 546 U.S. 243, 270, 163 L.Ed.2d 748, 126 S.Ct. 904 (2006), and the right of states to enact criminal laws consistent with their police power. *Id.* Further, all judicial officers and probation officers are under oath to support and uphold both the constitutions and laws of the United States of America, and the State of Colorado.
7. Nevertheless, individuals convicted of criminal activity lose certain rights and privileges normally available to others. These include limitations or restrictions placed on voting, employment, driving, holding public office, immigration and citizenship, bonding capacity, security clearances, credibility determinations as witnesses, state professional licensing, and possession and use of firearms and body armor. A handful of these restrictions may impair otherwise fundamental constitutional rights. *People v. Bolt*, 984 P.2d 1181 (Colo.App. 1999).

8. More specifically, probationary terms may restrict otherwise lawful activities, such as travel, use of alcohol or controlled substances, privacy, and rights of association. §18-1.3-204(2).
9. The medical use of marijuana is not a fundamental constitutional right under the Colorado Constitution. *See Ferguson v People*, 824 P.2d 803 (Colo. 1992) (discussing nature of fundamental rights in context of criminal regulation); *Regency Services Corp. v. Board of Comm'rs*, 819 P.2d 1049 (Colo. 1991) (commercial regulation). At best, it is a privilege for otherwise law-abiding individuals to possess and use marijuana under certain conditions, and/or an affirmative defense to charges under §§18-18-405 and -406.
10. Probation is a privilege, and not a right. *People v. Colabello*, 948 P.2d 77 (Colo.App. 1997). Further, a defendant must be willing to accept probationary terms in order to enjoy such a sentence. *People v. Rollins*, 771 P.2d 32 (Colo.App. 1989).
11. The possession or use of marijuana by a probationer gives rise to potential problems of supervision in a variety of contexts, including mandated drug testing, driving restrictions, employment requirements, safe parenting, delinquency prevention, and claims of privacy related to "medical marijuana" registry records, among other things. It also may result in discriminatory treatment of different probationers, as some would be permitted to engage in the use of the controlled substance, marijuana, but others would not be so permitted as to other controlled substances.

12. Probationary conditions are made orders of the Court. While state law creates an exemption from criminal sanctions for possession and use of marijuana for medical purposes, there is no constitutional or statutory exemption from compliance with Court orders.
13. A court-ordered, probation-related prohibition of the use of "medical marijuana" would not specifically violate Colo. Const. Art. XVIII, §14, or any statutes enacted under the authority of that provision; it would merely serve to restrict probationers from engaging in the privileged use of marijuana during the term of their probation. In that regard, it is not distinct from any other permissible order of a court restricting a probationer from otherwise lawful acts, such as the use of alcohol. *People v. Richards*, 795 P.2d 1343 (Colo.App. 1989) (wide discretion given to courts in to fashion probationary conditions consistent with the statutes).
14. Finally, §18-1.3-204(1) requires a sentencing court to mandate "as an explicit condition of every sentence that the defendant not commit another offense" during the term of probation. In addition, §18-1.3-204(2)(a)(VII) allows a court to impose probationary conditions prohibiting the unlawful use of controlled substances, or of any other "dangerous or abusable drug without a prescription." In terms of juveniles granted probation, courts are required to ensure obedience to federal and state statutes, and orders of court. §19-2-925(2)(a). Additional required terms of probation mandate that juveniles refrain from the use of "any controlled substance without a prescription." §19-2-925(2)(b).

15. As observed, the use of marijuana is a violation of federal law; such is true, regardless of whether that law is enforced. Moreover, the Colorado constitutional provision permitting medical marijuana use does not call for it to be *prescribed*; it merely allows such use once a "Registry identification card" is lawfully obtained. Colo. Const., Art. XVIII, §14(1)(g). Thus, a probationary condition prohibiting the use of marijuana is both consistent with the duty, as well as the power, of trial courts.

ACCORDINGLY, IT IS THE POLICY of the Thirteenth Judicial District that no persons on either adult, or juvenile probation, (including those supervised by private agencies), will be permitted to use or possess marijuana, even when the same may be otherwise permitted under the Colorado Constitution or associated statutes.

SO ORDERED, THIS 30th day of December, 2009, at Sterling, Colorado.


MICHAEL K. SINGER, CHIEF JUDGE
THIRTEENTH JUDICIAL DISTRICT