

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Essex, ss.

No. SJC-08757

COMMONWEALTH

v.

MARIA LANDRY
Defendant, Appellant.

ON A REPORT FROM THE
LYNN DISTRICT COURT

APPELLANT'S AMMENDED BRIEF,
ADDENDUM AND APPENDIX

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STATEMENT OF THE ISSUES¹

1. Is it "a crime" for an enrollee in a Department of Public Health-approved needle exchange program in a particular city or town "to distribute or possess needles or syringes" in another city or town that has not granted approval to the participant's program?

2. Does the language of G.L. c. 94C, § 27(f) that "distribution or possession of [needles or syringes] as part of a pilot program approved by the Department of Public Health in accordance with" G.L. c. 111 § 215 "shall not be a crime" mean that the person who claims to the police to be enrolled in a pilot needle exchange program and produces a facially-valid enrollment card cannot be arrested, summonsed, or otherwise charged with a violation of G.L. c. 94C, § 27(a) or (e), or does the statutory language mean that such enrollment is an affirmative defense to be raised at trial?

¹ The Statement of the Issues is drawn from the Report Pursuant to Mass.R.Crim.P. 34 on Def's Mot. to Dismiss, Oct. 2, 2001, at 1-2 [hereinafter "Report"] (Appellant's Addendum, at 1 [paginated separately and cited hereinafter as "(Addend.)"]).

NATURE OF THE CASE AND PRIOR PROCEEDINGS

This case, on a report by the Lynn District Court, concerns the meaning of G.L. c. 94C, § 27(f). In 1993, the Legislature added subsection (f) to permit possession of hypodermic needles and syringes by enrollees in the Commonwealth's pilot needle exchange program. The Essex County District Attorney argues that there is a geographical limitation on the statute's applicability. The District Court reported the case to the Appeals Court to resolve the issue of statutory interpretation. This court granted direct appellate review on March 13, 2002.

On May 13, 2001, Maria Landry was detained by a store security guard in Lynn and arrested by the Lynn police. Although Ms. Landry told the police that she was a member of an authorized needle exchange program and produced her membership card, she was charged with four counts of possession of a hypodermic needle, G.L. c. 94C, § 27(a).² On August 6, 2001, Ms. Landry moved to dismiss the complaint on the grounds, inter alia, that she is a member of the Cambridge Needle Exchange Program and that a "plain reading" of G.L. c. 94C,

² Ms. Landry was also charged with one count of shoplifting. G.L. c. 266, § 30. That charge is not at issue in this appeal on the reported questions from the District Court.

§ 27(f) "clearly makes lawful possession of a hypodermic needle obtained through such a program." See Report (Addend. at 1).

The Essex County District Attorney filed its opposition on August 15, 2001, arguing that the City of Lynn has not approved a pilot program pursuant to G.L. c. 111, § 215, and that the needle exchange identification cards do not grant a member statewide license to possess a syringe. See Report (Addend. at 1).

The District Court (Lauranzano, J.) reported the questions of law presented in this brief to the Appeals Court for determination, pursuant to Mass. R. Crim. P. 34. See Report (Addend. at 1-2).

FACTUAL BACKGROUND

I. ARREST OF MARIA LANDRY FOR POSSESSION OF SYRINGES OBTAINED FROM THE CAMBRIDGE NEEDLE EXCHANGE PROGRAM.

Maria Landry, a twenty-two-year-old former resident of Lynn, Massachusetts, has been a member of the Cambridge Cares Needle Exchange Program (NEP) since December, 2000. Landry Aff. ¶ 2.³ On May 13, 2001, Ms. Landry was stopped

³ Ms. Landry moved in the Appeals Court for leave to file a Supplemental Affidavit ("Landry Aff.") and supplemental materials to provide background information to the Court on the reported questions. The Court allowed the materials to be filed, with their appropriateness to be determined by the panel.

by a security guard in a supermarket in Lynn who claimed that she had seen Ms. Landry place a magazine in her purse without paying for it. The guard asked to search Ms. Landry's purse. After Ms. Landry informed her that she had three hypodermic needles in her bag, which she had obtained from the Cambridge NEP, the guard called the Lynn Police. Although Ms. Landry showed the police her NEP identification card, which verified that she was a valid participant in the program and so was in lawful possession of the syringes, the police placed her under arrest. There is no evidence that they questioned the validity of her card. As she was being taken into custody, Ms. Landry informed the police that she had another needle in her coat pocket. The officers retrieved the needle and charged Ms. Landry with four counts of unlawful possession of a hypodermic needle.

II. ENACTMENT OF THE NEEDLE EXCHANGE LAWS.

As a consequence of her participation with the Cambridge pilot program, Ms. Landry is currently enrolled in a residential rehabilitation service provider, where she has been since early December 2001. (Landry Aff. § 2)(Appellant's Supplemental Materials, at 1 [filed separately and cited hereinafter as "(Supp.)"]). On February 12, 2002, Ms. Landry celebrated one hundred days of drug-free living and is still counting. Id. (Supp. at 1).

By the early 1990's, AIDS had become the leading cause of death among Americans aged 25-44, with Massachusetts ranked tenth in the nation for the number of people with AIDS.⁴ HIV, a blood-borne virus that causes AIDS, was detected among injection drug users early in the AIDS epidemic. By 1992, HIV transmission among injection drug users in Massachusetts had become, directly or indirectly, the leading source of new HIV infections.⁵ Fueled largely by shared injection equipment, the AIDS epidemic accelerated.⁶ Faced with the prospect of AIDS spreading among the State's approximately 50,000 injection drug users, state officials began to weigh options for stemming a mounting public health crisis.⁷ At the same time, growing

⁴ See HIV/AIDS Prevention, Centers for Disease Control & Prevention, AIDS Cases and Annual Rates per 100,000 Population, by State, 7 HIV/AIDS Surveillance Report 2, 6 (Dec. 1995)(Supp. at 8); Editorial: Relentless Virus, Boston Globe, Dec. 1, 1995(Supp. at 41).

⁵ See HIV/AIDS Bureau, Massachusetts Dept. of Public Health, 1 HIV/AIDS in Massachusetts: An Epidemiological Profile, at 64 (2001)(Supp. at 43).

⁶ See Medical Foundation, First Year of the Pilot Needle Exchange Program in Massachusetts, at 11 (Oct. 1995)(from 1987 to 1993, "the percentage of Massachusetts AIDS cases attributed to primary injection drug use [] doubled, accounting for 39% of all reported adult cases")(Supp. at 144).

⁷ Dolores Kong, AIDS Activists Assail Ruling Against Needle Distribution, Boston Globe, Jul. 17, 1993 (Supp. at 210).

evidence showed that needle exchange programs could save lives, prevent the spread of HIV infection, and help people into treatment, without leading to increased drug use.⁸

In July, 1993, the Commonwealth passed an initiative intended to save lives and prevent the transmission of HIV. See 1993 Mass. Acts c. 110, § 142 (codified at G.L. c. 94C, § 27)(Addend. at 4). Through this initial legislation, the state authorized a pilot needle program to be implemented and regulated by the Department of Public Health with local cooperation. See 1993 Mass. Acts c. 110, § 148 (codified at G.L. c. 111, § 215)(Addend. at 5). Included in the legislation was the mandate that Public Health officials encourage participants in the pilot program to seek and to be placed in contact with substance abuse treatment and health care programs. See 1993 Mass.

⁸ Contemporaneous empirical research from other regional cities demonstrated the success of needle exchange programs. Researchers at Yale University released a ground-breaking study in 1992, documenting that syringe exchange programs save lives and improve public health. R. Heimer, Syringe Exchange Programs, 113 Public Health Reports 68, Supp. 1 (June 1998)(Supp. at 217). Most dramatically, the rate of new HIV infections among users dropped by one-third. See D. Vlahov and B. Junge, The Role of Needle Exchange Programs in HIV Prevention, 113 Public Health Reports 78, Supp. 1 (June 1998)(Supp. at 225). As a direct result, the sexual partners and newborn infants of these drug users were likewise spared the risk of HIV infection. See Heimer, Syringe Exchange Programs (Supp. at 217).

Acts c. 110, § 142 (codified at G.L. c. 94C, § 27(f))(Addend. at 4).

Boston and Cambridge quickly obtained approval from their respective city councils, and the first pilot program was operated jointly by these two cities.⁹

In their initial years of operation, the Boston and Cambridge programs referred seventeen percent of thirteen hundred long-term injection drug users to treatment without increasing crime¹⁰ or creating new addicts.¹¹ By 1998, the number referred to treatment was one in five.¹² Thus, initial fears that the pilot programs might increase the number of drug users or increase drug use among current users proved unfounded. With fewer AIDS cases, government bodies were further spared the considerable expense of

⁹ See First Year, supra note 12, at 17 (Supp. at 150).

¹⁰ Id. At 59 (Supp. at 192); Dolores Kong, Needle Exchange Benefits Are Touted, Boston Globe, Oct. 25, 1995 (Supp. at 341).

¹¹ See Scott Burris, ABA, Deregulation of Hypodermic Needles and Syringes as a Public Health Measure: A Report on the Emerging Policy and Law in the United States, at 9 (2001)(Supp. at 271).

¹² See Zachary R. Dowdy, Local Activists Tout Needle Exchange: Success in Fighting AIDS is Noted as Some Urge Us to Finance Effort, Boston Globe, Apr. 4, 1998 (Supp. at 343).

caring for sick and dying patients, many of whom rely on publicly-funded health care.¹³

Mindful of the savings in lives and fiscal resources, as well as the success in moving drug users into treatment, the Legislature amended the needle exchange law in 1995 to permit the Department of Public Health to create ten programs for the exchange of needles and syringes. 1995 Mass. Acts c. 38. § 128 (codified at G.L. c. 111, § 215)(Addend. at 5). Both Northampton and Provincetown gave their approval, and Department of Public Health-approved pilot programs were located in those cities soon after.¹⁴

SUMMARY OF ARGUMENT

Under G.L. c. 94C, § 27(f), it is "not a crime" for a person to possess hypodermic needles "as part of" a pilot needle exchange program under the auspices of the Department of Public Health. Using traditional rules of statutory construction, there is no geographic limitation on where a member of a needle exchange program may possess the needles within the Commonwealth. Thus, this Court should answer the first reported question, "no, it is not a crime for an enrollee in a pilot needle exchange program

¹³ See Phil Coffin & Julie Ruiz-Sierra, Drug Policy Alliance, Research Brief: Syringe Access, at 4 (March 1, 2001)(Supp. at 232).

based in a particular city or town to possess needles in another city or town which has not granted approval for the siting of a needle exchange program within its borders." (Pp. 12-30).

First, the plain language of § 27(f) contains no geographic limitation on where possession can occur, in contrast to G.L. c. 111, § 215 where the Legislature did impose a local approval requirement on where the Department could implement or site an exchange program itself. The specific geographic limitation in § 215 shows that the omission of a limitation in § 27(f) was not inadvertent and should not be implied by this Court. Furthermore, the Legislature clearly knew how to impose a geographic limitation when it wanted to, since it did so in other parts of § 27 governing possession of hypodermic needles and syringes. (Pp. 12-19). Despite having contemplated and amended the pilot program legislation, the Legislature never included a geographic limitation on possession in the text of the statutes themselves. (Pp. 19-20).

Second, the needle exchange laws must be interpreted in a manner consistent with legislative intent and their remedial purpose to prevent the transmission of HIV and

¹⁴ See Richard Nangle, Needle Exchange Programs Growing, Telegram & Gazette, Apr. 19, 1996, at B1 (Supp. at 346).

other blood-borne diseases. As a public health initiative, the statutes must be construed broadly and liberally to achieve the Legislature's goals to curb the epidemic of AIDS and HIV transmission between injection drug users and their sexual partners and children. (Pp. 20-25).

Inferring and imposing a geographic limitation on where members of a needle exchange program may possess needles and syringes would seriously undermine the purposes the Legislature sought to achieve.

In construing G.L. c. 94C, § 27(f), this Court should also consider that the Department of Public Health, the agency with the legislatively delegated responsibility to carry out the needle exchange laws and with expertise of AIDS, HIV transmission, and drug addiction treatment and prevention, has consistently and reasonably interpreted the law to impose no geographic limitation on where members of the programs could possess needles in Massachusetts. This agency interpretation is entitled to deference by the Court. (Pp. 25-31).

This Court should answer the second reported question by holding that "a person who claims to the police to be enrolled in a pilot needle exchange program and produces a facially-valid enrollment card cannot be arrested, summonsed or otherwise charged with a violation of G.L. c.

94C, § 27(a)." The language of § 27(f), "it shall not be a crime," means that the police do not have probable cause to arrest a pilot program enrollee, especially where the individual affirms his or her enrollment status to the police and proffers an enrollment card. To construe the statute to mean that enrollment in a needle exchange program is only an affirmative defense to be proven at trial would undermine the purposes of the needle exchange statutes and would violate the Fourth Amendment and state constitutional prohibitions on arrests without probable cause. (Pp. 31-41).

ARGUMENT

I. THE NEEDLE EXCHANGE STATUTES PERMIT STATEWIDE POSSESSION OF SYRINGES.

A. The Legislature Included a Geographic Restriction Only for the Siting of Pilot Exchange Programs, but Not for the Possession of Syringes.

When the Legislature legalized needle exchange programs as a public health initiative to reduce the transmission of HIV, it did so by simultaneously passing two statutory provisions: 1993 Mass. Acts c. 110, § 142 (codified at G.L. c. 94C, § 27(f))(Addend. at 4), and 1993 Mass. Acts c. 110, § 148 (codified at G.L. c. 111, § 215)(Addend. at 5). Section 27(f) as added in 1993 provided:

(f) Notwithstanding any general or special law to the contrary, needles and syringes may be distributed or possessed as part of a pilot program approved by the department of public health in accordance with section two hundred and fifteen of chapter one hundred and eleven and any such distribution or exchange of said needles or syringes shall not be a crime.

The department of public health shall ensure that individuals participating in pilot needle exchange program will be encouraged to seek and will be placed in contact with substance abuse treatment and health care.

1993 Mass. Acts c. 110, § 142 (codified at G.L. c. 94C, § 27(f))(Addend. at 4).

In the same legislative session, the Legislature also passed 1993 Mass. Acts c. 110, § 148 (codified at G.L. c. 111, § 215)(Addend. at 5), to which reference is made in § 27(f):

The department of public health is hereby authorized to promulgate rules and regulations for the implementation of a pilot program for the exchange of needles in cities and towns within the commonwealth upon nomination by the department. Local approval shall be obtained prior to implementation of each pilot program in any city or town.

Not later than one year after the implementation of each pilot program said department shall report the results of said program and any recommendations by filing the same with the joint legislative committees on health care and public safety.

1993 Mass. Acts c. 110, § 148 (codified at G.L. c. 111, § 215)(Addend. at 5). This section was further amended in 1995 by increasing the number of pilot programs to ten.

1995 Mass. Acts c. 38, § 128 (codified at G.L. c. 111, § 215)(Addend. at 6). No changes were made in 1995 to G.L. c. 94C, § 27(f).

Statutory construction begins "with the plain language of the statute(s)," Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, 7 (1998)(citing Massachusetts Bay Transp. Auth. v. Massachusetts Bay Transp. Auth. Retirement Bd., 397 Mass. 734 (1986)), with the "statute['s] words . . . accorded their ordinary meaning and approved usage," Gateley's Case, 415 Mass. 397, 399 (1993)(citing Hashimi v. Kalil, 388 Mass. 607 (1983)). Courts are "'constrained to follow' the plain language of a statute when 'its language is plain and unambiguous,' and its application would not lead to an 'absurd result,' or contravene the Legislature's clear intent." Comm'r of Revenue v. Cargill, Inc., 429 Mass. 79, 82 (1999)(quoting White v. Boston, 428 Mass. 250, 253 (1998)).

The District Attorney invites this Court to impose a geographical limitation on the permitted possession of syringes, arguing that this case is controlled by the provision limiting where pilot programs may be implemented. See G.L. c. 111, § 215 (2000)(Addend. at 9)(authorizing "rules and regulations for the implementation of a pilot program for the exchange of needles in cities and towns

within the commonwealth" (emphasis added)). This argument fails for at least four reasons.

First, in the text of the two statutory provisions concerning needle exchange, the Legislature included only one geographical limitation, in the section of G.L. c. 111, § 215 stating: "Local approval shall be obtained prior to implementation of each pilot program in any city or town." If the Legislature had intended that a geographical limitation be placed on where an individual could possess syringes obtained "as part of" an exchange program, then one would have been included in the language of the possession statute itself. Reading an implied geographical limitation into § 27(f) is impermissible where, as here, the "explicit language of the statute unambiguously manifests a legislative intent" not to have any such restriction included. See Commonwealth v. Jones, 417 Mass. 661, 664 (1994)(refusing to read into a statute an implied limitation where no such limitation had been explicitly provided).

Second, the Legislature's failure to include a geographical limitation in the possession provision of § 27(f) cannot possibly be viewed as inadvertent, given its inclusion of such a limitation in the implementation provision of § 215. The District Attorney argues that the

possession of syringes permitted by §27(f) applies only in specified cities and towns, a measure provided for explicitly in § 215 but not included at all in §27(f). On the contrary, this Court should follow the established rule that "'where the Legislature has employed specific language in one [section], but not in another, the language should not be implied where it is not present.'" Commonwealth v. Galvin, 388 Mass. 326, 330 (1983)(quoting Beeler v. Downey, 387 Mass. 609, 616 (1982)); see also Hartford Insurance Company v. Hertz Corporation, 410 Mass. 279, 283 (1991). This rule derives from "the maxim that the statutory expression of one thing is an implied exclusion of other things omitted from the statute." Collatos v. Boston Retirement Bd., 396 Mass. 684, 687 (1986); see Bagley v. Illyrian Gardens, Inc., 401 Mass. 822, 824 (1998).

Consider, as well, the fact that a geographic limitation is explicitly expressed in the subsection of § 27 immediately prior to subsection (f). Subsection (e) provides that certain persons may "obtain, receive or purchase" syringes pursuant to a government issued license, but where the license is obtained from "the local board of health," then the license shall be valid only in a particular city or town of the Commonwealth." G.L. c. 94C,

§ 27(e)(emphasis added).¹⁵ Notably, in the very next subsection, § 27(f), the statute provides that syringes may be possessed by a person who is "part of" an approved program, with no statement limiting such possession to a particular city or town.

When the meaning of any particular section or clause of a statute is questioned, it is proper . . . to look into other parts of the statute: otherwise the different sections of the same statute might be so construed as to be repugnant, and the intention of the legislature might be defeated.

Galvin, 388 Mass. At 329. Thus, in § 27 itself, the Legislature was clear about who may possess syringes, but only under explicit circumstances does it limit where legal possession may occur.

Third, the Legislature has demonstrated that it knows how to impose explicit geographical limitations in relation to needle exchange when it chooses to do so. In providing for pilot programs, the Legislature required that local approval be obtained before the Department of Public Health could implement the programs. G.L. c. 111, § 215. This provision reflects sensitivity to the possibility that some cities, like Lynn, might be reluctant to play host to a

¹⁵ The 1993 passage of the needle exchange provision amended G.L. 94C, § 27 by adding subsection (f). When the Legislature amended § 27, it "is presumed to [have been] aware of existing" statutory provisions. Commonwealth v. Russ, 433 Mass. 515, 520 (2001).

syringe exchange site for fear that it would attract undesirable activity. Although this fear has turned out to be unfounded, the Legislature has given cities and towns the option of preventing the siting of an exchange program within their borders. This, however, is a far different matter from a city seeking to close its borders to the bona fide members of a valid exchange program -- individuals, like Maria Landry, who can carry syringes for their own personal use as a means of protecting their own health as well as the public health. The Legislature has stated, without qualification, that "as part of" an exchange program, she is entitled to possess syringes. The contrast between the statutory restriction on possession, as opposed to implementing a program, makes clear a legislative intent to permit exchange participants to possess needles and syringes outside the town where the implemented program is sited.

Fourth, the Legislature has allowed § 27(f)'s possession provision -- with its lack of geographical limitation -- to remain unchanged during amendment of the statute, further confirming a legislative intent that no such limitation be imposed. When the Legislature enacted the pilot program in 1993, it was neither the first nor the last time elected officials contemplated passage of needle

exchange legislation. Bills proposing some form of needle exchange had been unsuccessfully introduced prior to the passage of G.L. c. 94C, § 27(f) and G.L. c. 111, § 215 in 1993. Two years later, the Legislature again contemplated the statutes, and, in the end, amended § 215, expanding the pilot program by allowing the Department of Public Health to implement "not more than ten" pilot programs. Thus, on numerous occasions, the language of the needle exchange statutes was squarely before the Legislature, and at no point did the lawmakers include a geographical limitation on where syringes could be lawfully possessed. "Whether the omission came from inadvertence or of set purpose," it is contrary to the law of the Commonwealth "to read into the statute a provision which the Legislature did not see fit to put there." General Elec. Co. v. Dep't of Env't'l Protection, 429 Mass. 798, 803 (1999)(citing King v. Viscoloid Co., 219 Mass. 420, 425 (1914)). Courts shall "not add to a statute . . . word[s] that the Legislature had the option to, but chose not to, include." Dartt, 427 Mass. at 8.

B. The Needle Exchange Statutes Must Be Construed Consistent with Their Legislative and Remedial Purposes.

In the long history of construing statutes intended to curb the transmission of contagious diseases and other such

threats, courts have been steadfast in giving "statutes which are enacted for the protection and preservation of public health an extremely liberal construction in order to accomplish and maximize their beneficent objectives." Sutherland, *Statutory Construction*, § 71.02 at 235 (5th ed. 1992); see AT&T v. Automatic Sprinkler Appeals Bd., 52 Mass. App. Ct. 11, 14 (2001)("legislation on a matter of public safety should be construed so as to best effectuate its purpose"); Dalli v. Bd. of Educ., 358 Mass. 753, 756 (1971)(discussing the universal upholding of immunization laws); Manning v. Bruce, 186 Mass. 282, 285 (1904)(in holding constitutional the taking of private land for a smallpox hospital, court explained that "[e]ven the right of personal liberty must yield to the measures necessary for the protection of the general public").

The needle exchange statute aims to curb the spread of a deadly disease, just as a long line of measures has been designed to prevent the spread of typhoid, polio, measles, or other contagious diseases.¹⁶ The Essex County District Attorney's office may well have its own views about the wisdom of this remedial, public health measure to prevent

¹⁶ See Statement of Sen. James Jajuga, a prime sponsor of the needle exchange bills, quoted in Peter J. Howe, Budget Rider to Set Up Needle Program Assailed, Boston Globe, July

the spread of blood-borne diseases through contaminated syringes, but the Legislature has spoken in plain language, and this Court must adhere to that language, construing it "in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished" Commonwealth v. Connor C., 432 Mass. 635, 640 (2000); see also TBI, Inc. v. Bd. of Health of N. Andover, 425 Mass. 615, 618 (2000) (statutes may not be interpreted to produce a result "contrary to the plain language of the statute and its underlying purpose.").

The legislative intent, as expressed in the statement of the sponsor of the needle exchange statute, focuses on broad, comprehensive protection of the public health. Reaching beyond the health of drug users themselves, the Legislature intended to protect the Commonwealth's newborns from a fatal disease: "This [law] is trying to stop AIDS transmission. Eighty percent of pediatric AIDS cases are the result of IV drug use and sexual activity among IV drug users." Jajuga, State House News Service, Dec. 12, 1993 (Supp. at 212).

Inserting a geographic limitation on lawful possession of syringes obtained "as part of" an authorized syringe

13, 1993, at 18 ("My objective is to prevent the spread of HIV.") (Supp. at 399).

exchange program defeats the legislative purpose for enacting the program because it would severely restrict who has access to sterile syringes. It would mean that only residents of the city or town where the program itself is located would have access to the program's sterile needles and syringes, and only when they are in that city or town. Drug addiction, however, does not end at a town line. By the very nature of this medical condition, an addict will face an overpowering urge to consume a dose of a drug at regular intervals -- an urge made all the more powerful by the prospect of drug withdrawal if no drugs are consumed. If the addict carries a syringe at all times, then it is quite likely that injection will be safe.¹⁷ But, if the addict is required to leave the syringe behind when venturing beyond a specified city's limits, then injection

¹⁷ See, e.g., N.U. Cotten-Oldenburg, Impact of Pharmacy-Based Syringe Access on Injection Practices among Injecting Drug Users in Minnesota, 1998 to 1999, 27 *Journal of Acquired Immune Deficiency Syndromes* 183, at 183-92 (2001)(IDUs with access to sterile syringes are significantly more likely to avoid sharing)(Supp. at 348); D. Vlahov and B. Junge, The Role of Needle Exchange Programs in HIV Prevention, 113 *Public Health Reports* 75, at 75-80 (1998)(same)(Supp. at 225); H. Hagan, Changes in Injection Risk Behavior Associated with Participation in the Seattle Needle-Exchange Program, 77 *Journal of Urban Health* 368, at 369-382 (2000)(same)(Supp. at 358).

will almost certainly be done in a way that risks the spread of HIV and other diseases.¹⁸

Even where the threat is less immediate than the spread of infectious disease, courts consistently provide a broad interpretation to public health statutes. See, e.g., Boston v. Mass. Port Authority, 364 Mass. 639, 655 (1974)(rejecting narrow construction of air pollution statute); Ralston v. Hawes, 334 Mass. 589 (1956)(rejecting narrow construction of statute granting powers to boards having control over public health).

The geographical limitation proposed by the Essex County District Attorney most certainly "would lead to an absurd result, [and] be contrary to the legislature's manifest intention." Shamban v. Masidlover, 429 Mass. 50, 54 (1999).¹⁹

¹⁸ See e.g., C.A. Latkin, Patterns of Needle Acquisition and Sociobehavioral Correlates of Needle Exchange Program Attendance in Baltimore, Maryland, U.S.A., 27 Journal of Acquired Immune Deficiency Syndromes 398, at 398-404 (2001)(street-purchased needles not reliably safe)(Supp. at 373).

¹⁹ Although the pilot program statutes are remedial in purpose, they are criminal in effect: § 27 is a criminal statute with punitive penalties. Violation of § 27 may be punished with imprisonment of up to one year and/or fine of up to one thousand dollars. See G.L. c. 94C, § 38. The import of this is twofold, and further compels construing the statutes to permit statewide possession of syringes obtained "as part of" a pilot program. First, to the extent that there is an ambiguity in the pilot program

C. The Department of Public Health's Consistent Interpretation of the Needle Exchange Statutes Is, and Has Been, Based on Reasonable Interpretation of the Statutes and Their Purpose, and Should Be Accorded Deference.

From the earliest days of needle exchange programs in Massachusetts until the present - a period of more than eight years - the Department of Public Health has been the agency charged by the Legislature with administering and issuing rules and procedures under the needle exchange statute. Throughout this period, the Department has provided a consistent interpretation that adheres to the plain language of the statute and furthers its remedial purpose: "the language contains no restriction on where the needles and syringes, once lawfully acquired, may be possessed." Mem. on Criminal Liability Under Needle

statutes over whether lawful possession is statewide, it should be resolved in the interest of the statutes' purpose. "Any ambiguities in remedial legislation should, in accordance with the usual rule of construction, be resolved so as to accomplish more fully remedial purpose which prompted its passage." City of Boston v. Hospital Transp. Services, Inc., 6 Mass. App. Ct. 198, 201 (1978)(although contrary reading of statute was "plausible," court governed its decision "in the light of what the Legislature was apparently intending to accomplish"); see also Wynn v. Bd. of Assessors of Boston, 281 Mass. 245, 249 (1932)(amendment construed to apply prospectively since statute passed for remedial purpose of taxing owners only on actual value of property).

Secondly, ambiguity in a criminal statute must be resolved in favor of the defendant. See Staples v. U.S., 511 U.S. 600, 619 (1994)(discussing the "rule of lenity,

Exchange, Howard Saxner, April 15, 1994 (Appellant's Appendix at 22 [paginated separately and cited hereinafter as "(App.)"]); accord Dep't of Public Health Advisory, Needle Exchange Program Participation: Public Health and Public Safety, May 2001 (App. at 19).

"While "[t]he duty of statutory interpretation is for the courts[,] . . . an administrative agency's interpretation of a statute within its charge is accorded weight and deference Where the [agency's] statutory interpretation is reasonable . . . the court should not supplant [its] judgment." Dowling v. Registrar of Motor Vehicles, 425 Mass. 523, 525 (1997)(quoting Massachusetts Medical Soc'y v. Comm'r of Ins., 402 Mass. 44, 62 (1988)). Courts should disturb an agency's interpretation only if the "interpretation is patently wrong, unreasonable, arbitrary, whimsical, or capricious." Brookline v. Comm'r of the Dep't of Env'tl. Quality Eng'g, 398 Mass. 404, 414 (1986); see also Gateley's Case, 415 Mass. at 399 ("The interpretation of a statute by the agency charged with primary responsibility for administering it is entitled to substantial deference." (emphasis added)). Especially

under which an ambiguous criminal statute is to be construed in favor of the accused.").

where "contemporary administrative construction [has been] long continued," Ace Heating Servs. Inc. v. State Tax Comm'n, 371 Mass. 254, 256 (1976), courts routinely grant "deference to an administrative interpretation of statute.'" Greater Media, Inc. v. Dep't of Public Utils., 415 Mass. 409, 414 (1993)(quoting Massachusetts Org. of State Eng'rs & Scientists v. Labor Relation Comm'n, 389 Mass. 920, 924 (1983)).

To receive deference, administrative interpretations of statutes need not be the product of a formal regulatory procedure. Informal interpretations are entitled to deference. See, e.g., Rivera v. H.B. Smith Co., 27 Mass. App. Ct. 1130 (1989)(circular letter of Department of Industrial Accidents entitled to deference)(citing Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944)); NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995)(Comptroller of the Currency's deliberative conclusions entitled to deference). See generally United States v. Mead Corp., 533 U.S. 218 (2001)("an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency")(quoting Skidmore, 323 U.S. at 139). This Court should defer to the Department of Public Health's

interpretation, even if not formally promulgated as a regulation, because of "the thoroughness evident in [the Department's] consideration, the validity of its reasoning, its consistency. . . , and [other] factors which gave it power to persuade. . . ." Rivera, 27 Mass. App. Ct. at 1131-32 (quoting Skidmore, 323 U.S. at 140).

Here, the Department's interpretation of the needle exchange statutes has been consistent and based on thorough consideration. Beginning with the April 15, 1994 Memorandum on Criminal Liability Under Needle Exchange, the Department issued its interpretations from senior officials with specific expertise. (App. at 22). Howard Saxner, legal counsel for the Department's HIV/AIDS Bureau at the time, affirmatively states that his legal opinion was reached "after reviewing the pertinent provision of the [statutes]." Id. The reasoning in this 1994 memo is also evident in the May 2001 Advisory on Needle Exchange Program Participation issued by the Department (App. at 19) and in the 1999 letter from the Commissioner of Public Health, Howard Koh, to the Criminal Justice Training Council (Addend. at 10-12).²⁰

²⁰ The Criminal Justice Training Council subsequently amended its Controlled Substances Field Manual which is used to train police officers from across the Commonwealth. See Mass. Criminal Justice Training Council, Controlled

Thus, in all of its external and internal communications over the eight years of administering the pilot programs, the Department of Public Health has consistently interpreted G.L. c. 94C, § 27(f) as authorizing statewide possession of syringes obtained as part of a pilot program. Indeed, the Department issued enrollment cards to all needle exchange participants, which state explicitly on the back of the card: "c.94C, s.27: s.142 of chapter 110 of the Acts of 1993 'needles and syringes may be distributed or possessed as part of a pilot program approved by the Dept. of Public Health . . . and any such distribution or exchange of said needles and syringes shall not be a crime.'" Landry's Enrollment Card (App. at 15-16); see also Report, at 2 (Addend. at 2). These cards were first distributed to all enrollees of the initial pilot program, and are currently still issued with the same language.

Informal modes of administrative interpretation are generally accorded more weight when the interpreting agency has expertise in the area. See Wolf v. Dep't of Pub. Utils., 407 Mass. 363, 367 (1990) ("We give great deference to the department's expertise and experience in areas where

Substance Field Manual (2000 Ed.)(Supp. at 394-398); see also G.L. c. 6,

the Legislature has delegated to it decision making authority. . . .')(quoting Costello v. Dep't of Pub. Utils., 391 Mass. 527, 533 (1984)); see also Batterton v. Francissee, 432 U.S. 416, 425 (1977))("Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise.")(citations omitted)).

The Legislature has acknowledged the Department of Public Health's expertise in the area of needle exchange programs, see G.L. c. 111, § 215; AIDS prevention, see G.L. c. 111, § 2F (authorizing the commissioner of public health "to appoint all members of the AIDS advisory board"); and drug rehabilitation, see G.L. c. 111E § 2 (placing the Division of Drug Rehabilitation under the auspices of the Department of Public Health). This Court should defer to the Department of Public Health's reasonable interpretation.

II. ARREST AND PROSECUTION OF MS. LANDRY IS IMPROPER WHERE THE LEGISLATURE HAS DECLARED THAT POSSESSION OF SYRINGES OBTAINED "AS PART OF A PILOT PROGRAM . . . SHALL NOT BE A CRIME."

Because the Legislature mandated that possession of syringes obtained "as part of a pilot program . . . shall

§ 116(establishing Criminal Justice Training Council).

not be a crime," there is no probable cause to arrest a pilot program participant, especially where the police have reasonably reliable indicia that the individual is validly enrolled. When Maria Landry was detained by the security guard and then arrested by the Lynn police, she voluntarily alerted the arresting officer to her possession of four syringes. She proffered a card showing that she was an enrolled member of the Cambridge pilot program. The card was facially valid. No allegation has been made that it had any indicia of falsity.

The question raised before this Court is whether these facts gave rise to probable cause to arrest Ms. Landry. The Essex County District Attorney, in arguing that participation in the program is an affirmative defense at trial to the crime of syringe possession, fails to focus on the critical, antecedent question of whether an exchange participant can be arrested in the first place. According to the District Attorney, anyone in possession of a syringe, no matter how obviously lawful, must be subjected to the burden of arrest, possible pretrial detention, trial, and the risk of wrongful conviction. By this logic, a physician, pharmacist, diabetic, or mortician (all of whom have same statutory authorization as exchange participants to possess syringes) could be arrested and

forced to go to trial to present an affirmative defense. This position is not only absurd; it is also contrary to the language of the statute, contrary to the case law examining similar circumstances, and would render the pilot programs futile and ineffective.

A. Mere Possession of a Syringe, Especially When Possessed "As Part of" a Pilot Program, Provides No Basis for Finding That Probable Cause Exists to Believe a Crime Has Been Committed.

It is axiomatic that police officers may not lawfully arrest someone without first establishing probable cause to believe that a crime has been committed. See Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("the standard of probable cause applies to all arrests" (quotation omitted)); U.S. Const. amend. IV; Mass. Const. Art. 14, Massachusetts Declaration of Rights. In conducting an inquiry into the existence of probable cause, the Court focuses on the "moment of arrest" to determine whether "the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense." Commonwealth v. Santiliz, 413 Mass. 238, 240 (1992). Mere suspicion is insufficient; the police officer must have "something definite and substantial." See Commonwealth v. Bond, 375 Mass. 201, 210 (1978).

Here, at the moment of arrest, the police officer knew three facts: (1) Ms. Landry possessed syringes; (2) she verbally claimed to have legal authority to do so; and (3) she substantiated her claim by presenting an enrollment card for an authorized syringe exchange program. The question presented asks whether these circumstances suffice to avoid arrest. The answer to that question is surely that the arrest was improper. As demonstrated above, the plain language of the statute provides that possession of a syringe "as part of" an authorized program is not a crime. Moreover, Massachusetts law provides that in the context of evaluating probable cause, the possession of a syringe is not a sufficient ground for an arrest. The police would need to have an affirmative reason to believe the possession was unauthorized -- the precise opposite of the situation here where all available information supports the belief that the syringe possession was permitted.

The issue before the court is controlled directly by a line of cases interpreting an analogous statutory scheme making firearm possession generally illegal, while authorizing such possession for persons who have obtained a proper license or other such authorization. See G.L. c. 269, § 10(a). In that context, this Court held that "mere possession of a handgun [is] not sufficient to give rise to

a reasonable suspicion that the defendant was illegally carrying the gun." Commonwealth v. Couture, 407 Mass. 178, 183 (1990), cert. denied, 498 U.S. 951 (1990); see also Commonwealth v. Toole, 389 Mass. 159 (1983). In both Couture and Toole, the police conducted a search of and then arrested the defendant after having some reason to believe that the defendant was in possession of a firearm. The Court refused to admit evidence of the firearm, finding that there was no probable cause, nor any reasonable suspicion, to believe that the defendant had committed a crime prior to the search. Therefore the search and subsequent arrest were unlawful.

If the suspect in Couture and Toole had told the police officer that he was not licensed to possess a firearm, then probable cause might exist. But, where the police "never asked the defendant whether he had a license to carry a firearm," Toole, 389 Mass. at 163-164, there was no probable cause to believe a crime had been committed. See id.; see also Couture, 407 Mass. at 181 ("The police . . . had no reason to believe, before conducting the search . . . that the defendant had no license to carry a firearm.") Because "carrying a firearm is not necessarily a crime," Toole, 389 Mass. at 163, there can be no finding of probable cause based on the fact of a person has "merely

been seen in public with a handgun . . . without any opportunity to respond as to whether he has a license," Couture, 407 Mass. at 183; see also Commonwealth v. Barros, 435 Mass. 171, 177 (2001) ("'Carrying a gun is not a crime. Carrying a firearm without a license (or other authorization) is.'" (quoting Commonwealth v. Alvarado, 423 Mass. 266, 269 (1996))).

Here, too, the police cannot establish probable cause based on the mere fact of syringe possession. As with the guns in Couture and Toole, possession of a syringe itself does not create probable cause. Even more clearly, where the syringe possessor claims a valid authorization -- for instance, by claiming to be a diabetic, a physician, or a member of a syringe exchange program -- then no probable cause could possibly exist. And the clearest case by far arises where, as here, the syringe possessor corroborates her claim of authorization -- for instance by presenting an insulin prescription, a medical license, or a syringe exchange participant card.

If the police in the Toole line of cases were in error for failing to ask if the defendants were authorized to carry the firearm, then it is all the more evident that Ms. Landry's arrest was in error. After she disclosed to the police that she had syringes in her purse and jacket, but

before she was arrested, she proffered her enrollment card to show that she was in legal possession of the syringes, and so was not committing a crime. Despite these efforts, she was arrested and charged.

B. The Burden of Proof at Trial Has No Bearing on the Question of Probable Cause.

The District Attorney seems distracted by the fact that at trial a defendant facing charges for unauthorized possession of a firearm bears the burden of initially coming forward with evidence of authorization -- a copy of a license or other such document -- whereupon the burden of proof shifts to the prosecution to prove the invalidity of the license. See Commonwealth v. Jones, 372 Mass. 403 (1977). The same appears to be true of syringes. See Commonwealth v. Jefferson, 377 Mass. 716 (1979). But none of this pertains to the grounds for a valid arrest, which is controlled by Couture and Toole.

In Jones and Jefferson, an individual was on trial for possession of, respectively, a firearm and a syringe, and the defendant stood silent, offering no basis for authorized possession. See Jones, 372 Mass. at 404 (firearm); Jefferson, 377 Mass. at 717 (syringe). The defendant in each case made no objection to being arrested. See Jones, 372 Mass. at 404; Jefferson, 377 Mass. at 717.

Rather, each defendant proposed that the Commonwealth, at trial, should bear the burden of proving that the defendant was neither licensed nor otherwise authorized to carry the firearm or the syringe. See id. This Court held in each case that the defendant would bear the burden of initially presenting evidence of being authorized to possess a firearm or a syringe. See id.

Nothing in these cases supports the District Attorney's claim that the sole opportunity enrollees have to establish their statutory authorization is "in the courtroom." Commonwealth's App. for Dir. App. Rev., at 11 (App. at 35). At most, these cases suggest that, if a person had been validly arrested and then wishes to claim at trial the protection of §27(f), the "burden is on the defendant to come forward with evidence of the defense," Jones, 372 Mass. at 406. Upon presenting such evidence (e.g., an enrollment card or a letter from the Department of Public Health attesting to the defendant's enrollment²¹), then "the burden is on the prosecution to persuade the trier of fact beyond a reasonable doubt that the defense does not exist." Id.

²¹ Ms. Landry produced such a letter following her arrest. See Letter from Natalie Cramer, Aug. 6, 2001 (App. at 18). Her card, of course, was presented at the time of arrest.

Again, when the police arrested Ms. Landry, they were faced with syringe possession which, by itself, would have created no probable cause to arrest. Coupled with prima facie proof of authorization to possess a syringe, there were certainly no grounds for arrest. The Court in Couture explicitly considered the effect of the Jones case, and rejected precisely the argument made here by the District Attorney. See Couture, 407 Mass. at 181-82.

C. Subjecting Exchange Program Participants to Arrest Would Defeat the Public Health Purposes of the Legislature.

The Commonwealth legislated the pilot programs as a public health initiative. In doing so, it delegated implementation and operation of the programs to the agency with expertise in AIDS prevention and drug treatment: the Department of Public Health. Under its authority "to promulgate rules and regulations" for the pilot program, see G.L. c. 111, § 215, the Department issues the cards to program participants along with sterile syringes so that participants have the security of their statutory authorization in hand. Knowing that they are engaging in lawful activity is an incentive for enrollees to carry the sterile syringes on them. This means, in turn, that (1)

they are less afraid of arrest;²² (2) they are less likely to share used syringes; and (3) they are more likely to return the used syringes for exchange at the pilot program and not discard them in an unsafe, bio-hazardous manner. These are all goals of the pilot program legislation.

The District Attorney asserts, with no legal basis, that "police officers should not be barred from making an arrest" for syringe possession "just because a defendant displays a needle exchange membership card at the time of arrest." Commonwealth's App. for Dir. App. Rev., at 10 (App. at 34). It is not the enrollment card that prevents police from arresting pilot program participants. It is the Fourth Amendment, Article Fourteen, and G.L. c. 94C, § 27(f): there is no probable cause that a crime is being committed when syringes are possessed "as part of" a pilot program. To find otherwise would directly contravene the Legislature's purpose of protecting the public health.

In closing, the only question presented by the facts of this case at this stage is whether the police had the

²² Users are extremely sensitive to the possibility of arrest. See Ricky Blumenthal, et. al, Collateral Damage in the War on Drugs: HIV Risk Behaviors Among Injection Drug Users, 10 Int'l J. on Drug Policy 25, 31-33 (1999)(Supp. at 382). As numerous studies demonstrate, fear of arrest or police harassment will cause users not to carry syringes, which means they will not participate in exchange programs. Id.

authority to arrest Ms. Landry after she showed a facially valid card. For the reasons stated above, they did not. Nor would the police have had a lawful basis to arrest any similarly situated program participant.

CONCLUSION

For the reasons stated above, this Court should answer the first reported question as "no," and the second reported question as "a person who claims to the police to be enrolled in a pilot needle exchange program and produces a facially-valid enrollment card cannot be arrested, summonsed, or otherwise charged with a violation of G.L. c. 94C, § 27(a)." The District Court should be ordered to dismiss the criminal complaint against Ms. Landry for possession of needles.

Respectfully submitted,
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