IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia,
Plaintiff Below, Respondent,

vs.) No. 23-68

Appeal from Final Order of Berkeley County Circuit Court (21-F-235)

Kyle John Schober,
Defendant Below, Petitioner

PETITIONER'S BRIEF

Respectfully submitted,
KYLE JOHN SCHOBER,
Petitioner

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases (cont.) **Page(s)**

Statutes and Rules

Secondary Sources

ASSIGNMENT OF ERROR

The lower court erred by denying petitioner's motion to modify probation to allow use of medical cannabis while on probation, after petitioner had qualified as a patient under the Medical Cannabis Act, in violation of his statutory rights, created by the Act, basing denial of petitioner's motion on a subjective made up "twelve-factors" test that does not exist in West Virginia law or jurisprudence, instead of properly applying West Virginia statutory construction law.

STATEMENT OF THE CASE

This appeal comes from the Berkeley County Circuit Court's "Order Denying Defendant's Renewed Motion to Modify Probation Conditions" (hereinafter "final Order"), entered on January 6, 2023, which denied the petitioner's motion requesting permission to use medical cannabis, while on probation, after he had been qualified as a "patient" under the Medical Cannabis Act. (A.R. 105-108).

On September 8, 2021, the petitioner was pulled over by law enforcement for a traffic violation; when law enforcement approached petitioner's vehicle, they smelled marijuana, searched his vehicle, and this search of petitioner's vehicle yielded multiple packages of marijuana, cocaine, and a wax made from THC extract, in quantities consistent with distribution. (A.R. 1-6, 20-21).

Petitioner was charged by criminal complaint, in magistrate court case number 21-M02F-754, with four felonies, possession with intent to deliver cocaine, possession with intent to deliver marijuana, transporting cocaine into the state with intent to deliver, and transporting marijuana into the state with intent to deliver. (A.R. 1-6, 20-21). Unable to post the bail set by the magistrate court at initial appearance, the petitioner was remanded to jail. (A.R. 20). Also at initial appearance,

the petitioner applied for, and was appointed counsel through the Public Defender Corporation for the 23rd Judicial Circuit, and his case was thereafter assigned to undersigned counsel. (A.R. 7, 14-15).

On September 15, 2021, the petitioner appeared in magistrate court for his preliminary hearing with counsel and waived his right to have a contested preliminary hearing in exchange for a bail reduction. (A.R. 8). After petitioner's case was bound over to circuit court, it was assigned Berkeley County Circuit Court number 21-B-348. (A.R. 20).

The State extended a plea offer by letter, in writing, dated October 4, 2021, which allowed petitioner to plead guilty to one felony count of possession with intent to deliver cocaine, with a recommendation of probation. (A.R. 11-12). On October, 5, 2021, the petitioner accepted the State's plea offer after discussing the case with counsel, and signed a waiver of indictment. (A.R. 11-13). The signed plea agreement, signed waiver of indictment, and an information charging the petitioner with one felony count of possession with intent to deliver cocaine, were filed in the lower court's record on October 15, 2021, by the State. (A.R. 9-13). This information was assigned Berkeley County Circuit Court number 21-F-235. (A.R. 9-10). On October 20, 2021, the lower court entered an Order which scheduled a plea and sentencing hearing for December 20, 2021, to consider the plea agreement, and additionally ordered that a pre-plea investigation report (hereinafter "PSI") be prepared to aid the lower court's consideration of the plea agreement. (A.R. 16-17).

The PSI was completed, and filed under seal on December 14, 2021. (A.R. 18-28). At the December 20, 2021, change of plea and sentencing hearing, the lower court accepted the plea agreement, the petitioner pleaded guilty to the information in open court, the lower court adjudicated the petitioner guilty of possession with intent to deliver cocaine as charged in the

information, and the lower court sentenced the petitioner to an indeterminate one to fifteen (1-15) years imprisonment, suspended for five years of supervised probation, with the added condition of substance abuse treatment. (A.R. 29-33, 180-208).

Subsequent to petitioner's sentencing hearing, he applied for a medical cannabis certification through Green Health Docs, was scheduled an online appointment with an OMC certified physician, on March 17, 2022, and was approved as a certified patient with a serious medical condition of Post-Traumatic Stress Disorder (hereinafter "PTSD") on March 18, 2022. (A.R. 53-55). Petitioner then inquired of his probation officer if he was allowed to consume medical cannabis while on probation and was directed to request a court Order allowing permission to do so. After consultation with counsel, petitioner filed a motion to amend his probation conditions (hereinafter "motion to modify probation") to allow for consumption of medical cannabis while on probation; this motion to modify probation was filed on April 25, 2022. (A.R. 34-36).

Thereafter, the lower court entered an Order on May 6, 2022, which scheduled a hearing to be heard on May 13, 2022, to address petitioner's motion to modify probation, and ordered petitioner to file verified documentation to address a series of twelve factors that the lower court wished to consider. (A.R. 37). The lower court's request for information regarding these twelve factors was relayed to petitioner and he tried his best to satisfy the lower court's request between May 6, 2022, and May 13, 2022. (A.R. 43-58). In this time period between May 6, 2022, and May 13, 2022, petitioner moved to have the original motion to modify probation filed under seal, moved to file a memorandum in support of said motion (hereinafter "memorandum in support") under seal which addressed the lower court's request regarding the twelve factors and raised the statutory

construction argument; said request to file these documents under seal was granted by Order. (A.R. 38-58).

Petitioner's memorandum in support was filed under seal on May 11, 2022, which contained exhibits provided by petitioner: (1) an email from petitioner attempting to address all twelve factors requested by the lower court; (2) petitioner's approved medical cannabis certification form, dated March 18, 2022; (3) a print out of the West Virginia Office of Medical Cannabis (hereinafter "OMC") website's list of approved medical cannabis physicians; and (4) a print out of petitioner's digital medical cannabis patient card. (A.R. 43-58)

On May 12, 2022, petitioner provided counsel a series of evaluations that he had undergone as a juvenile, that he wanted the lower court to consider, which were later filed under seal during the May 13, 2022, hearing; however, these evaluations do not contain a diagnosis of PTSD, the underlying serious medical condition subject of his status a patient under the Medical Cannabis Act, and thus, not relevant to the issue before the Court. (A.R. 112-114, 138-139). On May 13, 2022, prior to the hearing on petitioner's motion to modify probation, petitioner signed a verification that he had reviewed the contents of the motion to modify probation, memorandum in support, and attached exhibits, and that to the best of his knowledge, all information provided, and contained within these documents, was accurate. (A.R. 59).

In the May 13, 2022, hearing, petitioner testified under oath regarding the twelve factors which the lower court wished to address and argued that statutory construction doctrine should control the issue and allow his use of medical cannabis while on probation. (A.R. 109-146). Ultimately, the lower court found that the petitioner had not satisfied the lower court's information request adequately enough to address the twelve factors the lower court wished to consider, denied petitioner's motion to modify probation, ordered that denial of petitioner's probation modification

request would not be final, and that if petitioner provided additional documentation to address what the lower court deemed to be among the twelve factors which were not adequately addressed, the lower court would revisit the petitioner's motion to modify probation to use medical cannabis while on probation at a later date. (A.R. 60-63, 138-145). The lower court made additional findings as placed upon the record and contained within its Order memorializing this hearing, including the specific portions of this twelve-factors test which the lower court deemed to need further addressed. (A.R. 60-63, 138-145).

Between the May 13, 2022, hearing and October of 2022, petitioner attempted to further comply with the lower court's request for additional information regarding the twelve-factors test, specifically petitioner sought independent treatment for his PTSD, and petitioner compiled further documentation to address the lower court's findings in the Order Denying Motion to Modify Probation Conditions, entered on June 10, 2022, which memorialized the lower court's findings and grounds for denial of petitioner's original motion to modify probation. (A.R. 69-87). On October 11, 2022, petitioner moved to file his Renewed Motion to Amend Probation Conditions (hereinafter "renewed motion"), under seal; said renewed motion was hand-delivered to the lower court on October 11, 2022, and further filed under seal on October 13, 2022, pursuant to court Order. (A.R. 64-87).

This renewed motion contained exhibit attachments, consisting of: (1) a medical release for petitioner's previous doctor referenced in the May 13, 2022, hearing, which did not produce records; (2) a letter outlining petitioner's diagnoses from his current treatment provider; (3) a letter outlining petitioner's progress in PTSD based therapy sessions; (4) a letter from petitioner's peer recovery coach outlining petitioner's progress in substance abuse treatment; and (5) petitioner's treatment plan from his PTSD and substance abuse service provider. (A.R. 76-87). On October 20,

2022, the lower court entered an Order setting a hearing to address petitioner's renewed motion, which was set for consideration on November 10, 2022. (A.R. 88-89).

Subsequently, petitioner's counsel had consulted with petitioner's therapist and peer recovery coach regarding potential testimony for the upcoming November 10, 2022, hearing, and learned that a new treatment plan had been devised for petitioner's treatment of PTSD and substance abuse; said updated treatment plan was subsequently filed under seal per court Order for consideration in the upcoming hearing, and petitioner additionally moved the court to allow these two potential witnesses be allowed to testify by telephone rather than in person, which said motion was also granted by court Order. (A.R. 90-104).

At the November 10, 2022, hearing to address petitioner's renewed motion, the lower court heard testimony by petitioner's therapist, argument by counsel regarding both statutory construction and the twelve-factors test, and concluded that the petitioner had not adequately satisfied the lower court's twelve-factors test sufficiently enough to allow petitioner's use of medical cannabis while on probation. (A.R. 147-179). In this hearing, the lower court denied the petitioner's renewed motion. (A.R. 105-108, 174-178). It from the lower court's Order denying petitioner's renewed motion that petitioner appeals. (A.R. 105-108).

SUMMARY OF ARGUMENT

The lower court should not be able to set a probation condition that the petitioner, who is on probation, is not allowed to use medical cannabis during his term of probation, because he has been qualified as a patient under the West Virginia Medical Cannabis Act, W. Va. Code, Chapter 16A, *et-seq*. To allow a lower court to set such a condition of probation contrasts with the legislative intent in enacting the Medical Cannabis Act regarding the legitimate use of medical

cannabis pursuant to W. Va. Code § 16A-3-2 (2017), as well as the immunity protections afforded patients pursuant to W. Va. Code § 16A-15-4 (2017). Even though the Medical Cannabis Act does not specifically specify immunity protections for probationers, it does for "patients" and petitioner has been certified as a patient under the Act; therefore, this probation condition violates West Virginia law.

The lower court's ruling which bars petitioner from using medical cannabis, failed to properly consider petitioner's arguments that West Virginia law regarding statutory construction when applied to the instant case would allow use of medical cannabis on probation, and instead focused on analyzing a series of twelve factors which are not present in West Virginia law, nor controlling. (A.R. 37, 60-63, 105-108, 138-145, 174-178). By relying on this twelve-factors test to deny petitioner's motion to modify probation, the lower court was presumably trying determine whether medical cannabis use was in alignment with the general rehabilitative goals of probation; however, the law cannot allow lower courts to set a probation condition which violates the statutes of West Virginia as enacted by the legislature.

The petitioner has shown throughout the pendency of this matter, that he has suffered from mental illness throughout his life and originally turned to illicit drug use in attempts to self-medicate. (A.R. 22-26, 46, 52, 80-87, 101-104, 115-120, 139-140, 186, 201-205). The petitioner was certified, by a qualified physician under the Medical Cannabis Act, as a patient for his serious medical condition of PTSD. (A.R. 53-58). Therefore, it was improper for the lower court to substitute its judgment, for that of a physician qualified under the Medical Cannabis Act, of whether a particular medical treatment, use of medical cannabis, was proper for the petitioner.

In addition to not being based in law, the twelve-factors test relied upon by the lower court to deny the petitioner's probation modification request would have been almost impossible, if not

impossible, for the petitioner to satisfy to the lower court's satisfaction. The lower court's findings to justify denial of petitioner's motion to modify probation regarding this twelve-factor test required the lower court to make speculative judgment about petitioner's prospective future use of medical cannabis, not based in fact nor law. By relying on this twelve-factor test instead of applying West Virginia's statutory construction law to the instant case, the lower court ignored the statutory rights afforded patients, such as petitioner, under the Medical Cannabis Act, as enacted by the legislature, and by doing so, the lower court usurped the role of the legislature and impermissibly created "new law" without authority to do so.

Even though statutory construction is not a new doctrine in West Virginia, application of this doctrine to the West Virginia Medical Cannabis Act as applied to probationers appears to be an issue of first impression in West Virginia. A review of case law regarding this issue from outside jurisdictions that have passed medical cannabis statutes, tends to show that absent specific statutory directives that grant authority to sentencing courts to restrict medical cannabis use, a majority of these jurisdictions have found that patient probationers are entitled to the rights created by these medical cannabis statutes, allow patient probationers to use medical cannabis while under court supervision, and have arrived at this conclusion by analyzing the issue under statutory construction doctrine.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The petitioner respectfully asserts that pursuant to Rule 18 of the West Virginia Rules of Appellate Procedure that oral argument is necessary in the instant case, because the facts and legal arguments need be further expanded due to this being an issue of first impression, petitioner does

not waive oral argument, the appeal is not frivolous, dispositive issues have not been authoritatively decided, and the decisional process would be significantly aided by oral argument.

The petitioner respectfully requests that this case be set for oral argument in accordance with Rule 20 of the West Virginia Rules of Appellate Procedure because it involves an issue of first impression, issues of fundamental public importance, and potentially, future inconsistencies or conflicts among lower tribunals.

ARGUMENT

STANDARD OF REVIEW

The standard of review for a circuit court's setting or modifying probation conditions is typically an abuse of discretion; however, probation conditions must be reasonable and imposed in a reasonable manner, otherwise they constitute an abuse of discretion. *See Louk v. Haynes*, 159 W. Va. 482, 223 S.E.2d 780 (1976). The Court has held, "W.Va. Code, 62-12-9, As amended, permits a trial judge to impose any conditions of probation which he may deem advisable, but this discretionary authority must be exercised in a reasonable manner." Syl. Pt. 6, *Louk v. Haynes*, 159 W. Va. 482, 223 S.E.2d 780.

In regards to the standard of review for interpretation of statutes, the Court has held, "[w]here the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Crystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

Because the instant case involves interpretation of the statutes referenced above, W. Va. Code §§ 16A-3-2 (2017), 16A-15-4 (2017), and 62-12-9 (2013), the standard of review to be

considered by the Court in the instant case in reviewing petitioner's statutory construction argument regarding the application of the Medical Cannabis Act to probationers is *de novo*. Alternatively, to the extent that any of petitioner's arguments do not deal with statutory construction analysis or the setting of a probation condition that violates West Virginia law, and instead address the lower court's twelve-factors test analysis outside of this context, the standard of review is abuse of discretion.

I. West Virginia statutory construction law should guide the Court to reverse the lower court's ruling that a patient, certified under the West Virginia Medical Cannabis Act, cannot use medical cannabis in accordance with the Act while on probation, and courts should not be allowed to establish probation conditions which violate West Virginia law.

The petitioner asserted below, and continues to assert, as his primary argument, that he should be allowed to use medical cannabis while on probation, based on legal argument pertaining to statutory construction, as contained within his memorandum of support, renewed motion, and legal argument presented in the two hearings held by the lower court, which the lower court failed to address. (A.R. 48-49, 60-63, 70-73, 105-108, 111, 132-134, 138-145, 149, 171-172, 174-178). Petitioner asserts the primary issue in this case, whether probationers should be allowed to use medical cannabis in accordance with the Medical Cannabis Act, after having been certified as a patient under the Act, should have been decided by the lower court in his favor under West Virginia's statutory construction doctrine.

The petitioner asserts that because the lower court's condition of probation that petitioner cannot use medical cannabis while on probation, violates West Virginia law, specifically West Virginia statutory construction law and provisions of the Medical Cannabis Act contained within W. Va. Code §§ 16A-3-2 (2017) and 16A-15-4 (2017), the lower court's ruling is *per se*

unreasonable and violates his statutory rights as a patient under the Act. Petitioner asserts that any probation condition which violates West Virginia law is *per se* unreasonable, even viewed outside of a statutory construction analysis, and that the lower court's application of its twelve-factor test in the instant case constitutes an abuse of discretion.

The petitioner recognizes, and argued to the lower court, that this case presents an issue where there is an apparent conflict of statutes present which will likely require an analysis under the rules of statutory construction under West Virginia law. (A.R. 48-49, 70-73, 111, 132-134, 149, 171-172). Even though this issue was raised by petitioner with the lower court, it was never addressed by the lower court, which instead focused on a twelve-factors test not present in West Virginia law to deny petitioner's motion to modify probation. (A.R. 60-63, 105-108, 138-145, 174-178). The Court has held, "[t]he primary rule of statutory construction is to ascertain and give effect to the intention of the legislature." Syl. Pt. 8, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1963).

Generally, in relation to conditions of probation, W. Va. Code § 62-12-9 (2013), states that, "[r]elease on probation is conditioned on the following . . . [t]hat the probationer may not, during the term of his or her probation, violate any criminal law of this or any other state or of the United States." However, the Medical Cannabis Act provides that patients may legally use and possess medical cannabis pursuant to W. Va. Code § 16A-3-2 (2017), and W. Va. Code § 16A-5-4 (2017), within the Act, carves out immunity protections for patients, stating that a patient, "shall not be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege . . . solely for lawful use of medical cannabis." Of importance to the statutory construction argument raised by petitioner, the legislature in W. Va. Code § 16A-3-2 (2017), prefaces the legitimate uses and possession of marijuana section with, "[n]otwithstanding any provision of law to the contrary, the

use or possession of medical cannabis as set forth in this act is lawful within this state," which provides clear proof that the legislature in enacting the Medical Cannabis Act intended for the provisions of the Act to supersede any other provisions of West Virginia law to the contrary, which includes the general prohibition of marijuana use in W. Va. Code § 62-12-9 (2013).[1]

The Court has held that, [t]he general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syl. Pt. 3, *Young v. State*, 241 W. Va. 489, 826 S.E.2d 346 (2019) (citing Syllabus point 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984)). Additionally, the Court has held that

> [a] statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Syl. Pt. 1, *State ex rel. Simpkins v. Harvey*, 172 W. Va. 312, 305 S.E.2d 268 (1983) (citing Syllabus point 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908)) (overruled on other grounds by *State ex rel. Hagg v. Spillers*, 181 W. Va. 387, 382 S.E.2d 581 (1989)).

In the lower court's Order which set a hearing on petitioner's motion to modify probation, the lower court ordered petitioner to file verified documentation to address twelve factors that it

[1] *See* Sandi Mather, *Note: Notwithstanding the Rehabilitation Act*, 36 Lincoln L. Rev. 91, 106 (2009) (referencing *Shomberg v. United States*, 348 U.S. 540, 547-48, 75 S.Ct. 509, 513 (1955)) ("Congress and other legislatures have drafted various types of legislation that included "notwithstanding" clauses. The courts have consistently interpreted these clauses as creating exceptions to or overriding other provisions of law. The Supreme Court itself, when faced with another "notwithstanding" clause in federal legislation, stated that "in using the 'notwithstanding' language in these sections, Congress clearly manifested its intent that certain policies should override the otherwise broad and pervasive principle of [other sections].").

deemed to be controlling to decide the issue presented. (A.R. 37). In the hearing on May 13, 2022, to address petitioner's motion to modify probation, the lower court began the hearing by advising, "I have read everything that has been submitted in the record so I don't need lengthy arguments, but I do want to give you an opportunity to bring your motion and present any other information that you would like for me to review. . ." (A.R. 111). Petitioner began argument that the primary crux of his argument was the petitioner's qualification as a patient under the Medical Cannabis Act, entitled him to the protections of the Act. (A.R. 111). In closing argument, petitioner argued again that the issue raised by his motion to modify probation should be decided on statutory construction doctrine, but also additionally addressed, at the lower court's request, the twelve factors test which the lower court deemed relevant. (A.R. 132-137).

In closing argument at this May 13, 2022, hearing, the State, through the assistant prosecutor, conceded that under the Medical Cannabis Act, petitioner would be entitled to a medical cannabis card, that understood, "that is legal here and he's been deemed eligible for it," but then further argued various aspects of the lower court's twelve factors in the State's closing argument. (A.R. 132-137). The lower court denied petitioner's motion to modify probation, at the May 13, 2022, hearing, but ordered that its ruling was not final. (A.R. 60-63, 138-145). The lower court based its denial of petitioner's motion to modify probation solely upon analysis of its twelve-factors test, and did not address petitioner's statutory construction arguments, as shown both within the transcript of this hearing and the Order memorializing the lower court's findings. (A.R. 60-63, 138-145). In this May 13, 2022, hearing, petitioner even made specific objections that the issue should be decided in petitioner's favor on statutory construction doctrine, and argued that the lower court's denial of his motion to modify probation based on the twelve-factors test wasn't in harmony

with, and didn't adequately consider West Virginia law regarding statutory construction. (A.R. 138-144).

After the May 13, 2022, hearing, petitioner acquired documentation to petition the lower court for renewal of his motion to modify probation in accordance with the lower court's Order denying the original motion to modify probation, and then subsequently filed his renewed motion, which was filed under seal, in October of 2022. (A.R. 67-87). In this renewed motion, petitioner addressed the lower court's findings for denial of his motion to modify probation from the previous hearing, and once again incorporated previous legal arguments, including statutory construction, and argued that any probation condition which violated the Medical Cannabis Act was *per se* unreasonable under West Virginia law. (A.R. 73).

The lower court set a hearing to address petitioner's renewed motion, which was heard on November 10, 2022. (A.R. 88-89, 105-108). In this hearing, in accordance with the lower court's reliance on the twelve-factor test, testimony and argument largely addressed the specific findings in the lower court's original Order denying petitioner's motion to modify probation; however, petitioner still incorporated previous arguments contained within the original motion to modify probation and hearing, including statutory construction, and in closing, once again, argued that petitioner was certified as a patient under the Medical Cannabis Act, should be entitled to protections within the Act, and that probation conditions have to comply with West Virginia law. (A.R. 149, 171-172).

The State's closing argument largely deferred to the lower court, but contextually appeared opposed to petitioner's modification request, dealt exclusively with the lower court's twelve-factors test, and did not address any of petitioner's arguments pertaining to statutory construction. (A.R. 172-174). The lower court denied petitioner's renewed motion, but once again, did not

address petitioner's statutory construction argument and based its denial ruling strictly the twelve factors test, as shown both by the transcript of the November 10, 2022, hearing, and the lower court's final Order. (A.R. 105-108, 174-178).

As presented to the lower court, petitioner once again argues, that the lower court should have ruled in his favor and allowed him to use medical cannabis in accordance with the Medical Cannabis Act while he is on probation under the West Virginia Medical Cannabis Act and West Virginia law pertaining to statutory construction. Petitioner was certified as a patient by an authorized physician pursuant to the West Virginia OMC to provide such certifications, and that as such, under West Virginia law, petitioner should be entitled to legally use medical cannabis to treat his serious medical condition of PTSD in accordance with the Medical Cannabis Act. (A.R. 48-49, 52-58). The Medical Cannabis Act does not state that patients who are probationers are excluded from the protections of the Act. The Medical Cannabis Act does not provide a mechanism for a court to look behind the grounds for a physician's certification of a specific patient.

The lower court should have analyzed the legislative intent, as required by statutory construction law, behind the legislature passing the Medical Cannabis Act, instead of relying on its twelve-factors test to deny petitioner's motion to modify probation. This twelve-factors test is not contained within West Virginia law or jurisprudence. The legislature, in enacting the Medical Cannabis Act, established, "[a] medical cannabis program for patients suffering from serious medical conditions. . ." W. Va. Code § 16A-3-1 (2017). The qualified physician who certified the petitioner as a patient under the Medical Cannabis Act, was an approved physician with the OMC. (A.R. 56). The Medical Cannabis Act does not provide a mechanism for a court to ignore the provisions of the Act, nor the statutory rights afforded patients, when a patient is a probationer; the Act instead says that someone certified as a patient, which petitioner was, is entitled to legally use

medical cannabis in accordance with the Act, and that said patient, "**shall not be subject to arrest, prosecution or penalty in any manner**." *See* W. Va. Code §§ 16A-3-2 (2017), 16A-15-4 (2017) **(Emphasis added)**.

Petitioner was trying to be proactive by filing his motion to modify probation, at the direction of his probation officer, to obtain the lower court's permission for use of medical cannabis, by seeking a court Order allowing his use of medical cannabis in accordance with the Medical Cannabis Act, rather than using medical cannabis and raising defense to a prospective probation violation based on the immunity provisions within the Act. The lower court's denial of the petitioner's motion to modify probation and renewed motion, directly violates the provisions of the Medical Cannabis Act, because it prevents petitioner from lawfully using medical cannabis in accordance with W. Va. Code § 16A-3-2 (2017), and subjects him to arrest, prosecution, and penalty, in violation of W. Va. Code § 16A-15-4 (2017), were he to exercise his statutory rights to use medical cannabis as a patient.

The legislature clearly intended the Medical Cannabis Act to supersede other provisions of the West Virginia Code, which includes W. Va. Code § 62-12-9 (2013), the statute governing general prohibition against use of marijuana while on probation, by inclusion of the language, "[n]otwithstanding any provision of law to the contrary, the use or possession of medical cannabis as set forth in this act is lawful within this state," in W. Va. Code §16A-3-2 (2017), as referenced above. Additionally, the general probation conditions statute, contained within W. Va. § 62-12-9 (2013), which bars the use of all illegal drugs for probationers, including marijuana, is generally applied to all probationers, which is in contrast with the specific protections and statutory rights afforded under the Medical Cannabis Act to patients suffering from serious medical conditions, such as petitioner; thus, the generalized prohibitions in W. Va. Code § 62-12-9 (2013), must yield

to the specific provisions of the Act which provide such protections, when a probationer is also classified as a patient under the Act.

The lower court's reliance on its twelve-factors test, appears to be an obvious attempt, to provide rationalization to deny petitioner's motion to modify probation, by utilizing the generalized standards of discretion that judicial officers have in setting conditions of probation in furtherance of the general rehabilitative goals of probation in most cases. Even though courts generally have wide discretion in setting reasonable conditions of probation for whatever they deem advisable, conditions of probation must be reasonable and exercised in a reasonable manner. *See* Syl. Pt. 6, *Louk v. Haynes*, 159 W. Va. 482, 223 S.E.2d 780 (1976). It defies logic that a probation condition which violates West Virginia law would be reasonable or exercised in a reasonable manner.

To hold that courts are allowed to set probation conditions, which not only violate West Virginia law, but also allow judges to substitute their subjective judgment regarding whether it is proper for, a legislatively protected patient, who after consulting with a medical professional who has recommended medicinal use of a substance legislatively authorized for treatment of a serious medical condition, is unreasonable, absurd, and is not consistent with the legislative intent in enacting the Medical Cannabis Act. The lower court's ruling which denied petitioner's motion to modify probation never even attempted to analyze the application of West Virginia statutory construction law as raised by petitioner on multiple occasions, and had it done so, it would have granted petitioner's motion to modify probation and allowed his use of medical cannabis on probation in accordance with the Medical Cannabis Act.

Even outside the specific context of medical cannabis, courts should not be able to create conditions of probation which violate West Virginia law. Nor should courts be able to insert their

subjective judgment as to what is proper, in medical decisions of patients who have consulted with licensed physicians for treatment of serious medical conditions, regardless of whether said patient is currently under supervision of the court. For these reasons, the lower court's final Order must be reversed and remanded for entry of an Order, consistent with the West Virginia Medical Cannabis Act and West Virginia statutory construction law, which allows probationers who have been defined as patients under the Act, to use medical cannabis in accordance with the Act.

II. Even though the "twelve-factors" test relied upon by the lower court has no basis in West Virginia law or jurisprudence, the lower court's application of this test to deny petitioner's motion to modify probation, rather than statutory construction doctrine, resulted in a subjective determination by the lower court that was almost impossible, if not impossible, for petitioner to satisfy to the lower court's satisfaction, and thus, was an abuse of discretion.

Upon petitioner filing his original motion to modify probation conditions, to use medical cannabis in accordance with the Medical Cannabis Act, the lower court ordered petitioner to provide verified documentation in regards to a twelve-factors test that it deemed relevant and controlling to deciding the petitioner's motion to modify probation. (A.R. 37). These factors, which serve the basis for the lower court's denial of petitioner's motion to modify probation, are contained within the lower court's Order Setting Hearing on Motion for Modification of Probation Terms, entered on May 6, 2022. (A.R. 37).

Petitioner attempted to the best of his ability, and in good faith, to follow the lower court's directives regarding these twelve factors, but still argued at every instance, that this issue need be determined under West Virginia law regarding statutory construction in his favor. (A.R. 48-49, 70-73, 111, 132-134, 142-143, 149, 171-172). Petitioner does not concede that the lower court should have determined this issue based on this twelve-factors test, but assuming *arguendo*, that this case is analyzed under this twelve-factors test, which has no basis in West Virginia jurisprudence, the

record shows that it would have been either impossible, or almost impossible for the petitioner to satisfy this made-up standard to the lower court's satisfaction. Therefore, petitioner addresses these twelve factors.

The nature of the offense (hereinafter "factor 1") is well documented, as memorialized within the criminal complaint, information, and PSI. (A.R. 2, 9, 21, 44-45). Petitioner was subject of a traffic stop, officers smelled marijuana, searched petitioner's vehicle, and found marijuana, THC wax, and cocaine in quantities consistent with distribution. (A.R. 2, 9, 21, 44-45).

The offender's past record (hereinafter "factor 2") is memorialized within the PSI, and reflects four prior misdemeanor convictions and one prior felony conviction, with property, drug, and driving related convictions. (A.R. 23, 45).

Past substance use disorder issues (hereinafter "factor 3") were memorialized within the PSI, documents filed in regards to petitioner's motion to modify probation and renewed motion, which can be summarized as stating that petitioner had been diagnosed with cannabis and cocaine abuse disorders, and had received no substance treatment prior to the instant case. (A.R. 24-26, 45, 52, 80-83). During the pendency of the instant case, petitioner had received substance abuse treatment briefly at a Day Report Center, and then at Potomac Highlands Guild from April of 2022, onwards. (A.R. 45, 130-131).

The ailment that petitioner was certified to receive medical cannabis for (hereinafter "factor 4") was PTSD. (A.R. 45-46, 53-55). The frequency of contact with physician (hereinafter "factor 5") was once for medical cannabis certification, and then subsequent therapy from Potomac Highlands Guild for PTSD from July of 2022, onwards. (A.R. 46, 82, 84-87, 101-104, 123-126, 151-155, 177). The petitioner's other potential factors including mental health issues (hereinafter "factor 6") was addressed within the PSI, documents filed in regards to petitioner's motion to

modify probation, and contain various mental health diagnoses, beginning at early age, to which petitioner self-medicated to treat, up until the instant case, none of which are qualified as serious medical conditions under the Medical Cannabis Act other than PTSD. (A.R. 24-26, 46, 52, 115-118). Petitioner had not had discussions regarding the availability and advisability of other medications (hereinafter "factor 7") regarding treatment of PTSD. (A.R. 46, 52).

The record is sparse in regards to information regarding impact on rehabilitation, community safety, sentencing goals (hereinafter "factor 8"), and impact on deterring future criminality (hereinafter "factor 9"). The record shows that petitioner asserted that to address factor 8 and 9, any answer in regards to these two factors would entirely involve speculation. (A.R. 46-47, 52). The lower court made brief generalized findings that modification of probation would not be in the best interests of petitioner's rehabilitation, would not be in the best interest of community safety and sentencing goals, and would not deter future criminality, without any further elaboration, in order to bolster its decision to deny petitioner's motion to modify probation. (A.R. 60-63, 105-108, 140, 177-178).

The facts and circumstances a court is normally to consider for modification of probation terms (hereinafter "factor 10") is a legal standard in alignment with each individualized case, and each defendant's specific needs for rehabilitation, and is more an independent legal judgment in most cases by the courts, and as such, because this is a legal standard, petitioner doesn't believe it linguistically accurate to classify this as a "factor".

The record reflects that petitioner held a valid medical cannabis card (hereinafter "factor 11"), issued by the OMC, with patient ID number. (A.R. 53-58). Petitioner's history of lawfully using medical marijuana (hereinafter "factor 12") was non-existent, as the medical cannabis certification subject of this appeal was petitioner's first medical cannabis certification; the Medical

Cannabis Act is a relatively recent law, and it is likely that most patient probationers who are West Virginia citizens who are required to address such a factor would not have a prior history of lawful use of medical cannabis. (A.R. 49).

When all twelve factors are viewed in their entirety, it becomes quite apparent that these twelve factors involve a mixture of: (1) static factors that would be viewed at a particular time when a probation modification request would be determined, such as factors 1, 2, 3, 4, 5, 6, 11, and 12; (2) a speculative medical assessment, such as factor 7; (3) speculative determinations regarding generalized rehabilitation goals which are impossible to predict without being able to see the future, such as factors 8 and 9; and, (4) the generalized legal standard for goals of rehabilitation under probation, factor 10.

Apart from the static factors, which are simply information present at the time of argument, all other factors when considered together do not provide any kind of coherent objective test, and instead subject a probationer who has been approved as a medical cannabis patient to whatever subjective whims a lower court determines is in line with that particular judicial officer's opinion on medical cannabis. As petitioner argued, without being able to predict the future, any judicial officer's assessment of these twelve factors in arriving at a decision of whether to allow the use of medical cannabis for a patient probationer, would almost require a judicial officer to consult a crystal ball. As such, application of such a twelve-factor test to determine this issue does not provide any consistent legal standard or guidance, and its application would likely result in infringement upon West Virginia citizens' statutory rights, created by the Medical Cannabis Act, to both: (1) use medical cannabis in accordance with the Act to treat a serious medical condition after consultation and certification by a licensed physician, and (2) to use medical cannabis in accordance with the Act without fear of being subject to "arrest, prosecution or penalty in any

manner, or denied any right or privilege . . . solely for lawful use of medical cannabis." *See* W. Va. Code §§ 16A-3-2 (2017), 16A-15-4 (2017).

Regardless of the subjective nature of this twelve-factors test, petitioner asserts that at the very least, it is apparent that allowing him to use medical cannabis for treatment of his PTSD while on probation seems likely, but not certain, due to the nature of trying to predict the future, that the impact of future criminality would be reduced, since it would legitimize what would otherwise be an unlawful act, the consumption of cannabis.

The petitioner cannot change his past, cannot change his medical or mental health history, did not utilize a medical cannabis certification or his status as a patient in the commission of the underlying crime before the lower court, did not have a nexus of criminal activity directly related to his status or certification as a patient under the Medical Cannabis Act, cannot change the actions and practice area of his certifying physician, and cannot predict the future. The record shows that petitioner to the extent he is able, has followed all directives of the lower court in seeking treatment, complying with orders to provide information regarding the twelve-factors test, sought permission rather than forgiveness from the lower court to exercise his statutory rights to use medical cannabis as a certified medical cannabis patient, and otherwise has led a law-abiding life since being placed on probation.

Just as the petitioner cannot predict the future, neither can the lower court, and the law should not allow a lower court to substitute its judgment regarding a medical decision for that of a certified patient suffering from a serious medical condition after consulting with an authorized physician, in violation of the Medical Cannabis Act. To hold otherwise would create a completely subjective and inconsistent legal standard, with the potential to deny West Virginia citizens their statutory rights under the Medical Cannabis Act, and result in certain probationers certified as

medical cannabis patients under the Medical Cannabis Act, being able to exercise their rights, with others not able to, depending solely on which judicial officer was assigned the case, and said judicial officer's personal opinions of medical cannabis.

Regardless of the properness of the lower court's twelve-factor test, petitioner adequately responded to each and every of the lower court's twelve factors as extensively as he was able. After the lower court denied petitioner's motion to modify probation, but held the issue open, it specified that the petitioner needed to address six findings for the lower court to adequately revisit the issue. The lower court requested supplemental information regarding, and found as grounds for denial of the original motion to modify probation, that: (1) petitioner only had one meeting with the certifying physician, whose specialty was OB/GYN; (2) petitioner had no plans of future treatment for PTSD; (3) that the certifying physician had summarily accepted petitioner's application for medical cannabis without requiring a diagnosis of PTSD; (4) petitioner had not previously attempted alternative treatments for PTSD nor for substance abuse disorder; (5) referring to the evaluations filed during the May 13, 2022, hearing, that the documentation was remote in time and did not contain information of a PTSD diagnosis; and (6) the documents provided by petitioner did not confirm a PTSD diagnosis, nor were related to PTSD treatment or substance abuse treatment. (A.R. 62). These factors were addressed in kind in the November 10, 2022, hearing, both through his PTSD therapist's testimony and argument by counsel, after the renewed motion was filed. (A.R. 69-87, 151-172)

Addressing the lower court's first finding, it is undisputed that petitioner only had one meeting with the certifying physician, prior to receiving his medical cannabis certification. This is a static factor that was essentially impossible for the petitioner to further address.

Addressing the lower court's second finding, petitioner was enrolled in substance abuse counseling at the time of the May 13, 2022, hearing, and additionally the petitioner enrolled in PTSD therapy sessions after this hearing. (A.R. 80-87, 100-104, 151-156).

Addressing the lower court's third finding, the record is absent of documents which the certifying physician reviewed in the certification process; however, petitioner provided documentation and testimony of an independent diagnosis of PTSD and PTSD treatment, in the form of letters and testimony of his PTSD therapist. (A.R. 80-87, 100-104, 151-166).

Addressing the lower court's fourth finding, the petitioner had been enrolled in substance abuse treatment through Day Report, and then through Potomac Highlands Guild from April of 2022, and was enrolled in substance abuse treatment at the time of the May 13, 2022, hearing, and had attended PTSD treatment through Potomac Highlands Guild from July of 2022 forward. (A.R. 80-87, 100-104, 151-166).

Addressing the lower court's fifth finding, the lower court is correct that the documentation pertaining to the evaluations provided by petitioner were remote in time and did not contain a PTSD diagnosis. (A.R. 60-63, 138-141). Petitioner agrees with this assessment by the lower court, these evaluations are not directly relevant to petitioner's PTSD diagnosis nor medical cannabis certification, and thus, not relevant to the issue before the Court; however, the lower court specifically requested information as contained in factor 6, pertaining to petitioner's "[o]ther potential factors including mental health issues." (A.R. 37). This finding is a static factor which is impossible for petitioner to adequately address further; however, petitioner did obtain an independent diagnosis of PTSD after the May 13, 2022, hearing. (A.R. 80-81, 153-156).

And finally, addressing the lower court's sixth finding, a PTSD diagnosis was independently confirmed as referenced above. (A.R. 80-81, 153-156).

If these six findings were the basis for the lower court's denial of petitioner original motion to modify probation as specified in its Order Denying Motion to Modify Probation Conditions, entered on June 10, 2022, that the lower court required be addressed for the lower court to revisit the issue, they were adequately addressed by the petitioner's submission of his renewed motion with attached documents, testimony from his PTSD therapist in the November 10, 2022, or were impossible for petitioner to adequately address to the lower court's satisfaction due to being unchanging static factors. It is unclear what else the petitioner could have done to adequately satisfy the lower court's findings.

The petitioner could not go back in time and change the nature of the static factors contained within the lower court's findings that were the basis for initial denial of his motion to modify probation, and he addressed all of the findings which were not static by enrolling in additional PTSD treatment and regular therapy sessions, continuing with his substance abuse treatment, submitting his treatment plans to the lower court, arranging for his therapist to testify, and otherwise following all probation directives.

Thus, it appears clear that between the May 13, 2022, hearing and November 10, 2022, hearing, the lower court had made its mind up that denial was inevitable, that petitioner could do nothing to the lower court's satisfaction to obtain an Order from the lower court granting petitioner's motion to modify probation, and the lower court utilized this subjective twelve-factors test to approximate some kind of basis for denial. As such, even when viewed from an abuse of discretion standard, the lower court's application of its twelve-factors test was entirely subjective and an abuse of discretion.

III. Outside jurisdictions with medical cannabis statutes who have analyzed this issue have generally applied statutory construction doctrine to allow a patient

probationer's use of medical cannabis while under court supervision unless their legislature had specifically codified authority for sentencing courts to decide otherwise.

Because this is an issue of first impression for the Court, even though petitioner asserts that this issue should be resolved in his favor under West Virginia statutory construction law, a review of how other jurisdictions have handled similar claims is prudent for the Court's consideration. As reviewed below, but not in overly extensive analysis, the majority trend across the United States seems to favor allowing probationers to use medical cannabis if they have been certified as a medical cannabis patient.

Michigan dealt with this issue in *People v. Thue*, 336 Mich.App. 35, 969 N.W.2d 346 (2021). In *Thue*, the Michigan Court held that a circuit court could not set a condition of probation which prohibited a patient probationer from using medical cannabis. *Thue*, 336 Mich.App. 35, 46-49, 969 N.W.2d 346, 353-354. The Court in *Thue*, analyzed the issue under statutory construction doctrine and ascertained that the legislative intent in enacting the Michigan Medical Cannabis statute intended for the specific protections for patient, and that a condition of probation which prevented a patient probationer from using medical cannabis while under court supervision violated the Michigan Medical Cannabis statute and was impermissible. *Id*. at 47-48, 353-354. The Michigan statute appears to have similar language to the "notwithstanding" language contained within W. Va. Code §16A-3-2 (2017), contains an immunity protection similar to W. Va. Code §16A-15-4 (2017), Michigan jurisprudence appears to have a "reasonable conditions of probation" standard similar to that in *Louk v. Haynes*, 159 W. Va. 482, 223 S.E.2d 780 (1976), and Michigan jurisprudence appears to have a similar statutory construction analysis to West Virginia. *Id*. at 40-43, 349-351.

The Supreme Court of Pennsylvania addressed a similar issue in *Gass v. 52nd Judicial District, Lebanon County*, 659 Pa. 590, 232 A.3d 706 (2020). The *Gass* case was a class action brought by patient probationers seeking an injunction against a judicial district that had established a broad policy prohibiting patient probationers from using medical cannabis. *Gass*, 659 Pa. 590, 232 A.3d 706. The district's policy was struck down for violating the Pennsylvania Medical Cannabis statute's immunity provisions. *Id*. at 605-606, 715. The Pennsylvania statute immunity provision, contained in 35 Pa. Stat. Ann. § 10231.2103 (West) (2016), contains almost completely identical language as W. Va. Code § 16A-15-4 (2017), and its authorization statute, contained in 35 Pa. Stat. Ann. § 10231.303 (West) (2016), contains the same "notwithstanding" provision as W. Va. Code § 16A-3-2 (2017). The *Gass* decision was decided on Pennsylvania statutory construction doctrine, and in arriving at its decision, the Court noted, "the Supreme Court of Montana has aptly observed that, "whether or not medical marijuana is ultimately a good idea is not the issue. . .." *Id*. at 605, 715. (citing *State v. Nelson*, 2008 MT 359, 346 Mont. 366, 195 P.3d 826 (2008)).

The Supreme Court of Montana, in *State v. Nelson*, 2008 MT 359, 346 Mont. 366, 195 P.3d 826 (2008), addressed this issue in a case where the probationer was convicted of drug offenses involving charges related to marijuana manufacturing and precursors to a meth lab with children present in the residence. The Montana Court analyzed a lower court's sentencing condition that a defendant could only use medical cannabis in pill form under statutory construction doctrine, and found that such a condition violated the Montana Medical Cannabis statute and reversed the lower court's sentencing condition that restricted medical cannabis use. *See Nelson*, 2008 MT 359, 346 Mont. 374-375, 195 P.3d 831-832. The Montana Court found that the lower court did not have the statutory authority to impose a sentencing condition that violated the Montana Medical Cannabis

statute, and that the Medical Cannabis statute did not give sentencing judges the authority to limit the privilege of medical cannabis use. *Id*. at 359, 376, 832-833.

The Supreme Judicial Court of Massachusetts, Essex, in *Com. v. Vargas*, 475 Mass. 86, 55 N.E.3d 923 (2016), ruled against a patient probationer in upholding a probation violation, based partly on medical cannabis use. However, the *Vargas* case is easily distinguishable from the instant case before the Court. In *Vargas*, the Massachusetts Court found that the probationer had explicitly and verbally waived his right to use medical cannabis in open court, the probationer in *Vargas* stipulated to the violations involving use of medical cannabis with counsel present, the probationer in *Vargas* had additional grounds for revocation present such as cocaine use, missed probation appointments, and medical cannabis use prior to obtaining his medical cannabis certification, and the opinion in *Vargas* is absent of the probationer raising any statutory construction arguments, or for that matter, any challenge to the violations related to medical cannabis use. *Vargas*, 475 Mass. 88-94, 55 N.E.3d 926-930.

The Massachusetts Court in *Vargas* discussed how probationer's counsel failing to raise any defense based on the probationer's status as a medical cannabis patient, as well as failure to seek modification of probation to allow for medical cannabis use, could also constitute ineffective assistance of counsel, but ultimately held that the additional violations outside of medical cannabis use constituted enough to affirm the lower court's ruling which violated probation. *Id*. at 94-98, 930-933. In contrast with the current case, as argued above, here petitioner has raised statutory construction argument throughout the proceedings, attempted to seek modification of probation preemptively instead of willfully using medical cannabis and later seeking forgiveness in a violation hearing, and even though he does not agree with the lower court's ruling on this issue, has abided by the rulings of the lower court pending appellate review by the Court.

The Supreme Court of Colorado, in *Walton v. People*, 2019 CO 95, 451 P.3d 1212 (2019), held that a condition of probation barring a defendant probationer who had been convicted of DUI, and certified as a medical cannabis patient under Colorado's Medical Cannabis statute was disapproved of, and issued this opinion even after expiration of the probationer's probation term under exceptions to mootness doctrine. The Colorado Court analyzed the *Walton* case under statutory construction doctrine, and held that Colorado's Medical Cannabis statutes and probation statutes create a presumption that a defendant may use authorized medical cannabis while on probation. *Walton*, 2019 CO 95, 451 P.3d 1215. However, the Colorado Court noted that in Colorado's probation statute, Colo. Rev. Stat. Ann. § 18-1.3-204 (West) (2019), the Colorado legislature had carved out specific provisions that allowed a sentencing judge to prohibit a probationer's use of medical cannabis should certain written findings be made that such prohibition is necessary and appropriate to accomplish sentencing goals. *Id*. at 95, 1215-1217. In the instant case, West Virginia's Medical Cannabis Act and general probation statutes have no such carve out provision to allow sentencing judges the authority to restrict a patient probationer's statutory rights related to medical cannabis use.

The Court of Appeal, Third District, California, in *People v. Tilehkooh*, 113 Cal.App.4th 1433, 7 Cal.Rptr.3d 226 (2003), reversed a lower court's ruling which prohibited a defendant who had been convicted of marijuana possession from asserting an immunity defense to a probation violation based on consumption of medical cannabis, when the patient probationer had been "prescribed" medical cannabis. The California Court engaged in a statutory construction analysis by looking at the California Medical Cannabis statute in comparison with the general probation statute which prohibited violation of federal law, namely the use of marijuana, and determined that because state courts do not punish violations of federal law, that the patient probationer was entitled

to assert a medical cannabis defense to the probation violation, and that the lower court's ruling to the contrary violated the patient probationer's due process rights to assert an immunity defense based on California's Medical Cannabis statute. *Tilehkooh*, 113 Cal.App.4th 1440-1447, 7 Cal.Rptr.3d 231-236.

The Court of Appeal, First District, Division 2, California, in *People v. Leal*, 210 Cal.App.4th 829, 149 Cal.Rptr.3d 9 (2012), arrived at a different conclusion than the California Court in *Tilehkooh*. The California Court in *Leal* prohibited a patient probationer, who had a medical cannabis card on his person when arrested, who had been convicted of firearms offenses and possessing marijuana for sale from using medical cannabis. *Leal*, 210 Cal.App.4th 833-834, 149 Cal.Rptr.3d 11-12. The California Court in *Leal* determined that there was a nexus between the medical cannabis restriction and the crime at issue, that *Leal* was misusing medical authorization in hopes of escaping arrest and prosecution, and that it was not logical to think that *Leal* would buy marijuana from a dispensary while in the business of selling marijuana illegally unless he was using his patient status as a façade to mask criminal behavior. *Id*. at 840-842, 17-19.

In the instant case before the Court, there is no such nexus between the petitioner using his status as a medical cannabis patient to mask criminal behavior subject of the underlying case. Additionally, prior to the *Leal* opinion, but subsequent to the *Tilehkooh* opinion in 2003, the California Legislature had enacted Cal. Health & Safety Code § 11362.795 (West) (2004), effective January 1, 2004, which set forth a procedure for courts to follow in deciding whether to allow probationers and defendants on bail supervision to use medical cannabis. Thus, the *Leal* opinion, when viewed in conformity with Cal. Health & Safety Code § 11362.795 (West) (2004), shows that the California legislature specifically addressed this issue, negating the need to ascertain legislative intent through statutory construction analysis under California law.

The Supreme Court of Arizona also addressed this issue in *Reed-Kaliher v. Hoggatt*, 237 Ariz. 119, 347 P.3d 136 (2015), when a patient probationer filed a motion to be allowed use of medical cannabis while on probation, the lower court denied his request, and through appeals, this decision was ultimately determined to be a violation of the patient probationer's rights under Arizona's Medical Cannabis statute. The patient probationer in *Reed-Kaliher* was convicted of possession of marijuana for sale and attempted possession of a narcotic drug for sale, he was placed on probation with the condition that he "obey all laws." *Reed-Kaliher*, 237 Ariz. 121, 347 P.3d 138. The Arizona Court analyzed their Medical Cannabis statute in conjunction with the probation conditions statute, and utilized statutory construction doctrine to determine that lower courts did not have the authority to set probation conditions which violated Arizona law as contained in the Arizona Medical Cannabis statute. *Id*. at 121-123, 138-140. The Arizona Court stated that, "[w]hile the court can condition probation on a probationer's agreement to abstain from lawful conduct, it cannot impose a term that violates Arizona law." *Id*. at 123, 140.

CONCLUSION

The lower court erred in the instant case by failing to follow West Virginia law, as contained within the Medical Cannabis Act, failed to properly address petitioner's motion to modify probation under West Virginia statutory construction doctrine when it involved obvious statutory interpretation as raised by petitioner, and instead utilized a subjective made up "twelve-factor" test that does not exist in West Virginia law or jurisprudence, in order to try and provide justification for prohibiting petitioner from using medical cannabis while on probation, in conformity with the lower court's subjective opinion regarding the properness of medical cannabis, which is in

violation of petitioner's statutory rights created under the Act. Therefore, the lower court's final order is in violation of West Virginia law, cannot stand, and must be reversed.

In the instant case, petitioner respectfully requests that this Court should also adopt a new syllabus point that specifies that West Virginia courts cannot adopt any condition of bail, sentencing, or supervision in any other manner, that violates West Virginia law, including, but not limited to, the West Virginia Medical Cannabis Act. To adopt such a syllabus point, would be consistent with, and the logical extension of the *Louk* doctrine, that probation conditions must be reasonable and imposed in a reasonable manner. Petitioner asserts that any probation condition which violates West Virginia law is *per se* unreasonable.

WHEREFORE, the petitioner respectfully requests this Honorable Court reverse the lower court's "Order Denying Defendant's Renewed Motion to Modify Probation Conditions," entered on January 6, 2023, and remand this case to the Berkeley County Circuit Court for entry of an Order which provides that petitioner may use medical cannabis while on probation, as long his use of medical cannabis remains in compliance with the West Virginia Medical Cannabis Act, and for such further relief as the Court deems proper.

Respectfully submitted,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia,
Plaintiff Below, Respondent,

vs.) No. 23-68 **Appeal from Final Order of Berkeley County Circuit Court (21-F-235)**

Kyle John Schober,
Defendant Below, Petitioner

CERTIFICATE OF SERVICE

I, Jonathan T. O'Dell, do hereby certify that on May 5, 2023, a true copy of the foregoing Petitioner's Brief and Appendix Record, was served via efiling to all File & Serve participants to the following:

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