IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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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 REPLY BRIEF

Respectfully submitted,
KYLE JOHN SCHOBER,
Petitioner

By Counsel

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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 West Virginia 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.

INTRODUCTION

Pursuant to Rule 10(g) of the West Virginia Rules of Appellate Procedure, the Petitioner hereby files this Petitioner's Reply Brief in response to the State of West Virginia (hereinafter "Respondent")'s Respondent's Brief, filed on June 21, 2023. The Petitioner incorporates all arguments contained within the Petitioner's Brief, filed on May 5, 2023.

SUMMARY OF ARGUMENT

Petitioner asserts that the lower court erred by denying his motion for modification of probation to allow medical cannabis use, the lower court's ruling must be reversed in order to be consistent with West Virginia law, that the lower court must allow Petitioner to use medical cannabis in accordance with the West Virginia Medical Cannabis Act (hereinafter "WVMCA") while on probation, that Respondent's position is inconsistent with the law, and Petitioner addresses Respondent's arguments as below.

From review of the Respondent's Brief, it appears that Respondent's claims largely consist of the assertion that the lower court's ruling should be affirmed because: (1) the WVMCA is

federally preempted by the United States Controlled Substance Act (hereinafter "CSA"); (2) probation is an act of grace and that courts have wide discretion to set any probation conditions they deem advisable; (3) the twelve-factor test relied upon by the lower court was proper to determine whether medical cannabis use should be allowed for the Petitioner while on probation due to issues surrounding Petitioner's offense and overall history; (4) that Petitioner's analysis of out-of-state law regarding the issues presented is not pertinent to the issue raised, and that courts outside our jurisdiction can prohibit medical cannabis use for probationers; and, (5) that West Virginia statutory construction doctrine supports prohibiting probationers from using medical cannabis in accordance with the WVMCA.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner respectfully reasserts 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, 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 WVMCA 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. The Federal Controlled Substance Act does not conflict with West Virginia's Medical Cannabis Act under federal preemption analysis and Respondent's reliance on the same to support affirmation of the final order is misplaced.

Respondent argues that the WVMCA does not legalize medical cannabis; however, that is precisely what it does. *See* Resp.'s Br. 7; *see also* W. Va. Code § 16A-3-2 (2017) ("the use or possession of medical cannabis as set forth in this act is lawful within this state, subject to the following conditions. . .").

The Respondent's reliance on *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005), to justify the lower court's denial of the Petitioner's motion to modify probation to allow use of medical cannabis in accordance with the WVMCA while on probation is misplaced. *Raich* was a federal case that merely held that the federal government could enforce the CSA as it pertained to cultivating marijuana, because the cultivation of marijuana was related to activity within interstate commerce, as previously held in *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942).

The *Raich* case has no bearing upon the legitimacy of the WVMCA as it applies to Petitioner's case, because in the instant case, a state court failed to follow a state law in denying the Petitioner's probation modification request, and the federal government is not involved or asserting enforcement of a federal law.

Federal pre-emption is only triggered if:

> (1) the federal law contains "an express preemption provision," (2) Congress has determined it must exclusively govern the field, or (3) the federal and state law conflict to such an extent that compliance with both is "a physical impossibility" or the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Reed-Kaliher v. Hoggatt, 237 Ariz. 119, 123-124, 347 P.3d 136, 140-141 (2015) (citing *Arizona v. United States*, 567 U.S. 387, 398-400, 132 S. Ct. 2492, 2500-2501, 183 L. Ed. 2d 251 (2012).

None of these factors are present when comparing the CSA with the WVMCA. To adopt the Respondent's position that the CSA preempts, or trumps the WVMCA, as it relates to the issue before the Court would lead to absurd results whereby State courts across the country would be required to enforce federal law, and in doing so, usurping each and every individual state's legislative powers reserved by the United States Constitution, in violation of the Tenth Amendment to the United States Constitution.

Respondent's argument that the CSA supersedes or trumps the WVMCA conveniently omits that in enacting the CSA, Congress stated that:

> [n]o provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C.A. § 903 (West).

II. In general, courts may impose any reasonable probation condition they deem advisable; however, a condition that violates West Virginia law, is unreasonable, unlawful, and should not be enforceable.

For brevity's sake, the Petitioner largely agrees with the case law cited by the Respondent that probation is an act of grace and regarding a sentencing court's ability to generally impose any reasonable conditions of probation, as discussed in *Louk v. Haynes*, 159 W. Va. 482, 223 S.E.2d 780 (1976), *State v. Nicastro*, 181 W. Va. 556, 383 S.E.2d 521 (1989), *State ex rel. Strickland v. Melton*, 152 W. Va. 500, 165 S.E.2d 90 (1968), *State v. Rose*, 156 W. Va. 342, 192 S.E.2d 884 (1972), and *Fox v. State*, 176 W. Va. 677, 347 S.E.2d 197 (1986). *See* Resp.'s Br. 8-10; *see also* Pet'r's Br. 9, 17.

However, all of these West Virginia cases involving a court's discretion in granting and setting conditions of probation are easily distinguishable from the instant case. These aforementioned cases were decided prior to enactment of the WVMCA, and did not address a court's ability to set a probation condition in violation of a West Virginia statute, such as the WVMCA in the instant case. As asserted in Petitioner's Brief, in accordance with *Louk v. Haynes*, probation conditions must be imposed in a reasonable manner, and the Petitioner continues to assert that any probation condition that violates West Virginia law is *per se* unreasonable and cannot be imposed in a reasonable manner. *See* Pet'r's Br. 9 (*citing* Syl. Pt. 6, *Louk v. Haynes*, 159 W. Va. 482, 223 S.E.2d 780 (1976); *see also* Pet'r's Br. 10-11, 14, 32.

In *Fox v. State*, the Court held that a sentencing court could prohibit the use of intoxicants while on probation; however, this case was dealing with alcohol use by a probationer. 176 W. Va. 677, 347 S.E.2d 197. West Virginia has no immunity protections codified for the use of alcohol, nor any medical alcohol statutes. Thus, a court's general ability to prohibit the use of intoxicants for a probationer is starkly different than a court prohibiting use of a substance which has been classified as approved for medical use in the treatment of serious medical conditions by the legislature.

III. Petitioner has been certified as a "patient" within West Virginia's Medical Cannabis Act, and the legislature has not provided authority for courts to ignore provisions of the Act, nor to exercise their independent judgment regarding a patient's medical cannabis use when the "patient" is also a probationer.

The twelve-factor test relied upon by the lower court has already been substantially addressed in Petitioner's Brief. Petitioner's primary argument regarding this twelve-factor test can be summarily stated: this twelve-factors test relied upon by the lower court to deny Petitioner's

Motion for modification to allow medical cannabis use, does not exist in West Virginia law or jurisprudence, and to the extent that it was used to deny Petitioner's Motion, after Petitioner had been certified as a patient under the WVMCA; thus the lower court's final order is erroneous and must be reversed. By utilizing this test, rather that applying West Virginia law under statutory construction doctrine, the lower court infringed upon, and violated Petitioner's statutory rights to use medical cannabis for treatment of a serious medical condition, as contained within the WVMCA as enacted by the legislature.

The Respondent, rather than primarily addressing the arguments raised within Petitioner's Brief, instead focuses on portions of the record which show that Petitioner suffered from substance abuse, the testimony from his therapist, Ms. Snyder, that marijuana use could potentially trigger relapse, and Petitioner's diagnosis by Dr. Cormier. Respondent argues that Petitioner agreed that as a part of probation that he would refrain from the use of illegal substances; however, medical cannabis is not an illegal substance to use or possess within West Virginia for a patient who had been certified under the WVMCA, such as Petitioner, as argued above. See W. Va. Code § 16A-3-2 (2017).

The WVMCA, and the West Virginia Code in its entirety, as enacted by the legislature, does not provide a mechanism for courts to look behind a qualified physician's determination which led to a medical cannabis certification, nor to second guess such qualifying physician's certification decision, nor to determine whether a court believes medical cannabis to be a positive influence on a probationer. The legislature is certainly capable of codifying provisions within the state code to allow sentencing courts such authority to deny a patient probationer's use of medical cannabis, which many other states that have adopted medical cannabis statutes have done. Yet, the

West Virginia Legislature has not done so, either within the WVMCA, nor elsewhere within the West Virginia Code.

Because no such statutory mechanism exists for a court to deny medical cannabis use for probationers who have qualified as patients under the WVMCA, the lower court exceeded its authority by prohibiting medical cannabis use by the Petitioner, regardless of Petitioner's history, as related to substance abuse or past criminal activity. The Petitioner is not seeking to "evade the conditions of his probation," he is merely trying to assert his statutory right to use medical cannabis for treatment of a serious medical condition, as granted to him by the West Virginia legislature, and contained within the WVMCA.

IV. Despite Respondent's assertions, the cases cited within Petitioner's Brief are pertinent, relevant, and persuasive, regarding the legal analysis other jurisdictions have applied when addressing substantially similar issues.

The Respondent fails to go into any substantial detail or analysis to distinguish the outside jurisdiction cases cited within Petitioner's Brief, outside of briefly discussing the Massachusetts case, *Commonweath v. Vargas*, 475 Mass. 86, 55 N.E.3d 923 (2016), and instead, without laying any sort of adequate legal analysis, merely concludes in summary fashion that, "they are not pertinent because they are factually distinguishable from the instant case." *See* Resp.'s Br. 11-12. Respondent's assertions that these cases are not pertinent is simply not true. The out-of-state cases cited within Petitioner's Brief show how other jurisdictions have handled similar claims by patient probationer to that of the Petitioner, and the reasons why they are pertinent, relevant, and persuasive, to the issue before the Court, is outlined clearly within Petitioner's Brief. *See* Pet'r's Br. 25-31.

The only outside jurisdiction case dealing with medical cannabis statutes cited in Petitioner's Brief, that Respondent discusses in any detail, is the Massachusetts case, *Commonweath v. Vargas*, 475 Mass. 86, 55 N.E.3d 923. However, Respondent fails to address, discuss, or distinguish, how the probationer in *Vargas* had other grounds pending for probation violation besides medical cannabis use, and fails to discuss, address, or distinguish, how the probationer's counsel in *Vargas* failed to raise any defense based on the probationer's status as a medical cannabis patient. *Id*. In the instant case, Petitioner has asserted his status as a patient throughout the pertinent proceedings dealing with the issue before the Court.

Contrary to Respondent's assertions, any nexus that may have been present between the Petitioner's qualifying patient status at the time of sentencing and at the time of request for modification does not serve any compelling policy interest, either a person qualifies as a patient under the WVMCA and is entitled to its protections or they don't, the timing is immaterial to the issue before the Court.

Respondent cites three out-of-state opinions to support their argument that courts have the authority to restrict medical cannabis use for patients while they are on probation. Upon review of these cases cited by Respondent, Petitioner argues that the cases from outside jurisdictions cited in Respondent's Brief, are either unrelated to the issue of medical cannabis use by a probationer, disparately and factually distinguishable from the issue before the Court, recognized that status as a medical cannabis patient could be an affirmative defense to a probation violation, and/or arguably held the opposite of what Respondent asserts they do.

Respondent cites to a slip opinion, in Ohio case, *State v. Ryan*, No. 2021-L-032, 2021 WL 5298847 (Ohio Ct. App. Nov. 15, 2021), where an intermediate appellate court for Ohio's Eleventh District upheld a probation violation for medical cannabis possession, after the probationer

admitted to violating his community control sanctions, and did not submit any evidence at the revocation hearing, including anything regarding his medical marijuana card or medical necessity. *Id*. at *6-7.

Absent from Respondent's analysis, the Ohio court in *Ryan,* stated within its opinion that their determination to deny appellant's relief does not preclude a defendant from raising use of medical marijuana as an affirmative defense under proper circumstances. *Id. at *7.* The ability of a probationer to raise their status as a medical marijuana patient as an affirmative defense to a community control violation was also discussed, and restated, in the subsequent Ohio case, *State v. Collins*, No. 110994, 2022 WL 2256410 at *5 (Ohio Ct. App. June 23, 2022).

Respondent cites to unreported opinion, in Maryland case, *Hurley v. State,* No. 770, 2021 WL 5495521 (Md. Ct. Spec. App. Nov. 23, 2021), in an attempt to claim that the Maryland court approved a condition of probation that prohibited use of medical marijuana. However, *Hurley v. State,* is an unreported intermediate court opinion, did not address a probationer who qualified as a medical cannabis patient, only mentions medical marijuana status in the context of a probation condition not involving the mere use of medical marijuana, but involving a prohibition, **"on the abusive use of prescription drugs and medical marijuana,"** only discussed medical marijuana use in *dicta,* and dealt primarily with the Maryland court deciding whether to allow the probationer to use alcohol while on probation. *Id*. at *9 **(emphasis added)**.

Absent from the Respondent's analysis of *Hurley v. State*, is the holding of the case, that the Maryland court in *Hurley* actually held that a probation condition that appellant abstain from alcohol would be stricken as unreasonable. *Id*. at *9-10.

The last out-of-jurisdiction case cited by Respondent is the non-precedential decision, Pennsylvania Superior Court case, *Commonwealth v. Gordon*, No. 543 MDA 2021, 281 A.3d 1080

(Pa. Super. Ct. 2022). In the *Gordon* case, the Pennsylvania court upheld a driving under the influence conviction and sentence for a medical cannabis patient who drove a vehicle while intoxicated on marijuana.

This case is not relevant toward the assignment of error raised by Petitioner in the slightest. Petitioner is not asserting that he should be allowed to drive a vehicle while intoxicated, nor trying to use his status as a medical cannabis patient to argue to same; he is merely asserting that as a patient under the WVMCA, he should be entitled to the statutory rights provided by the WVMCA, to be allowed to use medical cannabis in accordance with the WVMCA while on probation.

Thus, Respondent not only fails to adequately distinguish any of the out-of-state case law cited by Petitioner in support of Petitioner's Brief, but also bases its argument merely on citations to slip opinions, unreported opinions, or non-precedential opinions, which arguably ruled against Respondent's asserted position or are irrelevant to the issue before the Court. Additionally, none of Respondent's cited cases appear to be from a state court of last resort, unlike many of the out-of-state cases cited within Petitioner's Brief.

Respondent's out-of-state case citations contained within Respondent's Brief are easily distinguishable from the facts of the instant case, and, Petitioner asserts do not persuasively support Respondent's position upon substantive review of the holdings and applicable facts.

V. The legislature clearly intended for the West Virginia Medical Cannabis Act to supersede other provisions of law, including the general probation statute, by inclusion of the operative language contained within the Act.

The Petitioner largely agrees with the accuracy of the case law cited by Respondent regarding statutory construction, as contained in *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968), *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908), *Smith v. State Workmen's Comp.*

Comm'r, 159 W. Va. 108, 219 S.E.2d 361 (1975), and *Click v. Click*, 98 W. Va. 419, 127 S.E. 194 (1925), but staunchly disagrees with Respondent's asserted application of such law to the facts of the instant case.

This is addressed in depth within Petitioner's Brief, but in summary, the WVMCA provisions at issue as contained within W. Va. Code §§ 16A-3-2 (2017) and 16A-15-4 (2017), are not ambiguous; thus, are to be applied as written. *See* Pet'r's Br. 10-18. Even if the Court somehow finds ambiguity within the provisions of the WVMCA at issue in this appeal, or conflict of laws present when the WVMCA is viewed alongside the general probation conditions statute contained within W. Va. Code § 62-12-9 (2013), the provisions of the WVMCA supersede the general probation conditions statute because the provisions of the WVMCA are more specific, and the operative language within the WVMCA shows legislative intent for it to supersede, "any provision of law to the contrary. . ." *See* W.Va. Code § 16A-3-2 (2017); *see also* Syl. Pt. 8, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953) ("The primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature."); *see also* Syl. Pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984) ("The 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."); *see also* Pet'r's Br. 10-18.

Further, it appears that Respondent's Brief does not address Petitioner's argument that by inclusion of the "notwithstanding" language contained within the WVMCA, the legislature makes their intent clear, that the provisions of the WVMCA are intended to supersede any other provisions of the West Virginia Code. *See* Pet'r's Br. 11-12.

Finally, Respondent's legal analysis that the recent legislative changes to W. Va. Code § 62-12-9, contained within 2023 W. Va. Acts, S.B. 136, does not discuss how this legislative change

to the probation conditions statute only address enhanced changes to probation conditions for sex offenders, and makes no substantial changes to the general probation conditions outside the context of sex offenders. See. Resp.'s Br. 14. Therefore, it is unreasonable for Respondent to assert that by not changing the language of the general probation conditions, in a bill designed to address additional probation conditions for sex offenders, the legislature intends to restrict probationers from using medical cannabis in accordance with the WVMCA.

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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CERTIFICATE OF SERVICE

I, Jonathan T. O'Dell, do hereby certify that on July 6, , 2023, a true copy of the foregoing Petitioner's Reply Brief, was served via efiling to all File & Serve participants to the following:

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