

---

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Docket No. 23-68**

SCA EFiled: Jun 21 2023  
04:02PM EDT  
Transaction ID 70234629

**STATE OF WEST VIRGINIA,**  
*Respondent,*  
v.  
**KYLE JOHN SCHOBBER,**  
*Petitioner.*

---

**RESPONDENT'S BRIEF**

---

Appeal from the  
Circuit Court of Berkeley County  
Case No. 21-F-235

**PATRICK MORRISEY**  
**ATTORNEY GENERAL**

Jason David Parmer[WVSB No. 8005]  
Assistant Attorney General  
Office of the Attorney General  
Appellate Division  
1900 Kanawha Blvd. E.  
State Capitol, Bldg. 6, Ste. 406  
Charleston, WV 25305  
Telephone: (304) 558-5830  
Facsimile: (304) 558-5833  
Email: Jason.D.Parmer@wvago.gov  
Counsel for Respondent

## TABLE OF CONTENTS

	Page
Table of Contents .....	i
Table of Authorities .....	ii
Introduction.....	1
Assignments of Error .....	1
Statement of the Case.....	1
Summary of the Argument.....	5
Statement Regarding Oral Argument and Decision.....	6
Standard of Review .....	6
Argument .....	6
A. The circuit court was statutorily prohibited from granting Petitioner’s motion to use medical marijuana while on probation because marijuana is illegal under federal law. ....	6
B. The court did not abuse its discretion when it refused to modify the terms of Petitioner’s probation to allow him to use medical cannabis. ....	8
C. Neither the MCA nor the probation statute allow Petitioner to use medical marijuana while on probation .....	11
1. The MCA does not allow Petitioner to use medical marijuana while on probation because he was not a patient of the program when he was sentenced.....	11
2. Even if Petitioner had been a patient of the medical cannabis program, the MCA’s immunity provision does not create a right for probationers to use medical marijuana .....	12
Conclusion .....	15

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Click v. Click</i> , 98 W. Va. 419, 127 S.E. 194 (1925).....	14
<i>Commonwealth v. Gordon</i> , No. 543 MDA 2021, 281 A.3d 1080 (Pa. Super. Ct. June 22, 2022) .....	13
<i>Commonwealth v. Vargas</i> , 55 N.E.3d 923 (Mass. 2016) .....	11, 12
<i>Fox v. State</i> , 176 W. Va. 677, 347 S.E.2d 197 (1986).....	9
<i>Gass v. 52nd Jud. Dist., Lebanon Cnty.</i> , 232 A.3d 706 (Pa. 2020).....	12
<i>Gonzales v. Raich</i> 545 U.S. 1 (2005).....	6, 7, 8
<i>Hurley v. State</i> , No. 770, 2021 WL 5495521 (Md. Ct. Spec. App. Nov. 23, 2021).....	10
<i>Louk v. Haynes</i> , 159 W. Va. 482, 223 S.E.2d 780 (1976).....	8
<i>People v. Leal</i> , 210 Cal.App.4th 829 (Cal. Dist. Ct. App. 2012) .....	12
<i>People v. Thue</i> , 969 N.W.2d 346 (Mich. Ct. App. 2021) .....	12
<i>People v. Tilehkooh</i> , 113 Cal.App.4th 1433 (Cal. Dist. Ct. App. 2003) .....	12
<i>Reed-Kaliher v. Hoggatt</i> , 347 P.3d 136 (Ariz. 2015).....	12
<i>Smith v. State Workmen’s Comp. Comm’r</i> , 159 W. Va. 108, 219 S.E.2d 361 (1975).....	14
<i>Spencer v. Whyte</i> , 167 W. Va. 772, 280 S.E.2d 591 (1981).....	14

<i>State v. Duke</i> , 200 W.Va. 356, 489 S.E.2d 738 (1997).....	6
<i>State v. Elder</i> , 152 W. Va. 571, 165 S.E.2d 108 (1968).....	13
<i>State v. Lucas</i> , 201 W.Va. 271, 496 S.E.2d 221 (1997).....	6
<i>State v. Nelson</i> , 195 P.3d 826 (Mont. 2008).....	12
<i>State v. Nicaastro</i> , 181 W. Va. 556, 383 S.E.2d 521 (1989).....	8
<i>State v. Ryan</i> , No. 2021-L-032, 2021 WL 5298847 (Ohio Ct. App. Nov. 15, 2021) .....	7
<i>State v. Snyder</i> , 64 W. Va. 659, 63 S.E. 385 (1908).....	13
<i>State ex rel. Strickland v. Melton</i> , 152 W. Va. 500, 165 S.E.2d 90 (1968).....	8, 9, 15
<i>Walton v. People</i> , 451 P.3d 1212 (Colo. 2019).....	12
<b>Statutes</b>	
21 U.S.C. § 812.....	6, 7, 8, 13
21 U.S.C. § 841.....	7
21 U.S.C. § 844.....	7
West Virginia Code § 16A-1-1.....	6, 7, 8, 11, 12, 13, 14
West Virginia Code § 16A-4-3.....	7
West Virginia Code § 16A-15-4.....	11
West Virginia Code § 62-12-9.....	7, 8, 13, 14
<b>Other Authorities</b>	
West Virginia Rule of Appellate Procedure 18 .....	6

## **INTRODUCTION**

Petitioner Kyle Schober pleaded guilty to possession with intent to deliver a controlled substance and the court ordered him to serve five years of probation. After a lengthy colloquy regarding Petitioner's history of drug abuse and drug-related arrests, the court ordered that Petitioner could not use illegal substances while on probation, and further ordered that he participate in intensive outpatient treatment. Petitioner indicated that he understood these conditions of probation. But after sentencing, Petitioner obtained a medical marijuana card and asked the court to allow him to use marijuana while on probation. The court refused to modify the terms of Petitioner's probation, and it is from this order that he appeals. Petitioner fails to demonstrate the existence of reversible error and, therefore, this Court should affirm the ruling of the circuit court.

## **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.

Pet'r's Br. 1.

## **STATEMENT OF THE CASE**

On September 8, 2021, Berkeley County Sheriff's Deputy C. McBee conducted a traffic stop of Petitioner's vehicle. App. 2, 196. During the stop, McBee detected the odor of marijuana and she searched Petitioner's vehicle. App. 2, 196. Inside the vehicle was Petitioner's backpack, in which McBee found six plastic bags containing marijuana (also referred to as "cannabis"), four containers of cannabis THC extract, one bag with approximately .75 ounces of cocaine, and a scale. App. 2, 196-98. Petitioner was charged with two counts of possessing a controlled substance

with intent to deliver, and two counts of transporting controlled substances into the State. At the time of arrest, Petitioner was a resident of Virginia, but he has since moved to West Virginia. App. 2, 184.

On December 20, 2021, Petitioner pleaded guilty to an information charging one count of possessing cocaine with the intent to deliver. App. 29, 191-92. On the same day, the court sentenced Petitioner to 1-15 years in prison, suspended in lieu of five years of probation. App. 30-33.

During his colloquy with the court, Petitioner admitted to using cocaine and cannabis. App. 186. Petitioner stated that, since his youth, he had been on medication for ADHD, borderline personality disorder, seasonal affective disorder, bipolar disorder, and insomnia, but he did not like the side effects and started “smoking weed instead. Then I progressed to cocaine for some reason.” App. 186. Petitioner began “self-medicating first with marijuana and then with cocaine” around age 16, and “had a fairly substantial habit due to self-medicating for any kind of mental illness he had at the time.” App. 201-02. Prior to his arrest, Petitioner was using one gram of cocaine per day and one ounce of marijuana per week. App. 201-02. Petitioner’s attorney claimed that since Petitioner’s arrest, “he’s been trying his best to abstain from all substances” and opined that outpatient treatment in the form of Narcotics Anonymous (“NA”) meetings “would be in his best interests to keep going with that.” App. 202.

The court inquired whether Petitioner was planning to seek treatment for drug addiction while on probation, and Petitioner said he planned to attend NA meetings. App. 187. In open court, the court and probation officer discussed the possibility of drug treatment options for Petitioner. App. 200. When imposing sentence, the court expressed concern about Petitioner’s drug habit and informed him that a failed drug screen would violate his probation.

THE COURT: Mr. Schober is a young person. He obviously has some challenges that he needs to address in a more appropriate way than with illegal substances or else he is going to end up having to go to prison for one to 15 years because when you are on probation **you are going to have random drug screens, and if it turns up positive, you're going to end up being violated;** do you understand that?

THE DEFENDANT: I do, Your Honor.

THE COURT: And then be back before me for sentencing and the possibility is that you could have to go to prison for one to 15 years. I am giving you the underlying sentence of one to 15 years in the penitentiary to be set aside for five years of probation with one of the conditions of your probation being to get into treatment. It doesn't have to be inpatient at this time. It does need to be intensive outpatient.

App. 205-06 (emphasis added).

Despite Petitioner's stated desire to seek drug treatment, his sincerity was questionable. Petitioner's attorney foreshadowed the current dispute at the plea/sentencing hearing, stating, "I know that in the past month we have had our first medical marijuana dispensary open which may create litigation issues in the future." App. 195. Four months later, Petitioner filed a motion to amend probation conditions in an effort to get a court order allowing him to use medical marijuana while on probation. App. 34-35, 44-51. In this motion, Petitioner stated that he received a physician certification for medical marijuana from Dr. Serge Cormier on March 18, 2022 "due to a diagnosis of Post-Traumatic Stress Disorder [PTSD]." App. 45. Petitioner obtained this certification after meeting one time with Dr. Cormier. App. 61. Petitioner admitted he and Dr. Cormier did not discuss any alternative medications to treat his PTSD other than marijuana. App. 52.

In May 2022, the court held a hearing on Petitioner's motion. Petitioner testified he was prescribed several psychiatric medications from ages six to sixteen. App. 115. When Petitioner turned sixteen, he "started researching" the medications he was on "and decided it was best" if he

---

<sup>1</sup> Dr. Cormier is an OB/GYN who conducts business via a website called [greenhealthdocs.com](http://greenhealthdocs.com). App. 61.

did not take them. App. 116. He “started doing coke and smoking weed instead.” App. 116. Petitioner further testified that Dr. Don Lee diagnosed him with PTSD in 2018 after he was repeatedly robbed at gunpoint while living at a “trap house” where controlled substances were sold. App. 122-23. Despite this diagnosis, Petitioner admitted he had not received any treatment for PTSD before he obtained a certification for medical marijuana. App. 125.

The State expressed concern that Petitioner had not received treatment for PTSD after his diagnosis in 2018 “other than to go straight to marijuana which got him in trouble . . . in the first place.” App. 135. The court agreed, stating, “I think the record is clear that he has not had contact with any physician since 2018 to treat for PTSD so he needs to seek some treatment other than directly going to a prescription for medical marijuana.” App. 142.

Turning to the legal arguments presented at the May 2022 hearing, Petitioner argued that the federal prohibition against marijuana should not prevent him from using medical marijuana while on probation. App. 134. Petitioner reasoned that “federal preemption does not apply and [West Virginia’s] medical marijuana statute has specific things that require federal law to be violated, and by not having doctors do specific prescriptions it does not run afoul of the Supremacy clause.” App. 134. The court rejected Petitioner’s argument, opining “[w]e have federal law that still has not legalized it. Based upon that discrepancy medical marijuana is not a prescription. Federal law governs prescriptions. It’s a certification.” App. 139. At the conclusion of the May 2022 hearing, the court denied Petitioner’s motion to amend probation conditions. App. 60-63.

Three months later, Petitioner renewed his motion to amend probation conditions and the court held a hearing on this motion in October 2022. App. 70-87, 147-79. Petitioner called Emma Snyder, a substance abuse therapist for Potomac Highlands Guild, to testify. App. 151. Snyder testified that she was treating Petitioner for the following disorders: cannabis abuse, cocaine abuse,



PTSD, and anxiety. App. 154, 164. Despite being Petitioner's witness, Snyder did not testify that medical marijuana would help Petitioner's PTSD. Instead, she stated "the use of any substance can potentially trigger someone to want to use something stronger than just marijuana." App. 155-57. That Petitioner was robbed while involved in the distribution of controlled substances increased Snyder's concern about his use of marijuana. App. 158. Snyder recommended that Petitioner continue his treatment for PTSD in ways that do not involve medical marijuana. App. 160.

After considering Petitioner's evidence and arguments presented at the October 2022 motion hearing, the court again denied Petitioner's request to modify his probation. App. 105-08, 178. The court found that "[w]ith regard to impact on rehabilitation, community safety, and sentencing goals," allowing Petitioner to use medical marijuana "would not be in the best interests of [Petitioner's] rehabilitation. It would not be in the best interest of the community safety and sentencing goals." App. 177-78. The court further found that a "modification of probation to allow medical marijuana under these facts would not deter future criminality." App. 178. Petitioner appeals from the court's order denying his motion to modify probation.

### **SUMMARY OF ARGUMENT**

The circuit court properly refused to allow Petitioner to use medical marijuana while on probation. He had a significant amount of marijuana when he was arrested, and he pled guilty to possession of a controlled substance (cocaine) with intent to deliver. Importantly, when the court sentenced him to probation, he was not a patient of West Virginia's medical cannabis program, and the court told him he could not use illegal substances while on probation. Further, he has a lengthy history of selling and using illegal controlled substances. And West Virginia's probation statute requires him to comply with federal laws that prohibit the possession of marijuana. The Court should thus affirm the order denying Petitioner's motion to modify probation.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(3)-(4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record. Accordingly, this case is appropriate for resolution by memorandum decision.

## STANDARD OF REVIEW

“The Supreme Court of Appeals reviews sentencing orders ... under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997). As a general rule of statutory interpretation, “[q]uestions of law and interpretations of statutes and rules are subject to a de novo review.” Syl. Pt. 1, in part, *State v. Duke*, 200 W.Va. 356, 489 S.E.2d 738 (1997).

## ARGUMENT

### **A. The circuit court was statutorily prohibited from granting Petitioner’s motion to use medical marijuana while on probation because marijuana is illegal under federal law.**

Petitioner argues that the court cannot prevent him from using medical marijuana while on probation because this violates West Virginia’s Medical Cannabis Act (MCA). Pet’r’s Br. 10-18. But the circuit court was correct to deny Petitioner’s motion to modify his probation because possession of marijuana for any reason is illegal under the federal Controlled Substances Act (CSA). 21 U.S.C. §§ 812(b)(1), 812(c)(10); *see Gonzales v. Raich* 545 U.S. 1 (2005) (holding that CSA is a valid exercise of Congress’ power under the Commerce Clause to prohibit medical marijuana). Congress has classified marijuana as a Schedule I narcotic and made its possession illegal. 21 U.S.C. §§ 812(b)(1), 812(c)(10). And the federal prohibition of cannabis forecloses Petitioner’s reliance upon the MCA to justify a modification of the terms of his probation. W. Va. Code § 16A-1-1 *et seq.* The CSA does not contain a provision allowing for the medical use of cannabis.

One of the statutory conditions of probation is that a probationer, such as Petitioner, cannot violate any criminal law of the United States. W.Va. Code § 62-12-9(a)(1). West Virginia's medical cannabis program operates in a legal grey area because marijuana is illegal under the CSA. 21 U.S.C. §§ 812(b)(1), 812(c)(10); *see Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that application of CSA provisions criminalizing manufacture, distribution, or possession of marijuana to intrastate grower and users of marijuana for medical purposes did not violate Commerce Clause). The objectives of the CSA are "to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. ... To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except as authorized by the CSA." *Raich*, 545 U.S. at 13 (citing 21 U.S.C. §§ 841(a)(1), 844(a)).

The CSA classifies all controlled substances into five schedules; cannabis appears on Schedule I, which means that it has no currently accepted medical uses. 21 U.S.C. §§ 812(b)(1), 812(c)(10). Because cannabis is classified as a Schedule I controlled substance, it is illegal for physicians to "prescribe" medical cannabis under federal law. *See* 21 U.S.C. §§ 841(a)(1). West Virginia's MCA creates a regulatory scheme to work around the federal prohibition of marijuana, but it does not legalize medical cannabis because it is still illegal under federal law. W. Va. Code § 16A-1-1 *et seq.* Under the MCA, physicians issue a "certification to use medical cannabis" if certain conditions are satisfied. W. Va. Code § 16A-4-3.

It is of no moment whether Petitioner is in full compliance with the MCA, because compliance with West Virginia law does not place Petitioner's "activities beyond congressional reach." *Raich*, 545 U.S. at 29. Rather, the CSA prohibits Petitioner from possessing marijuana "for any purpose." 21 U.S.C. § 844; *Raich*, 545 U.S. at 27; *see State v. Ryan*, No. 2021-L-032, 2021

WL 5298847 at \*4 (Ohio Ct. App. Nov. 15, 2021) (holding that Ryan violated probation because marijuana remains illegal under federal law).

The CSA's prohibition of marijuana trumps West Virginia's authorization of medical cannabis because

[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is superior to that of the State to provide for the welfare or necessities of their inhabitants, however legitimate or dire those necessities may be.

*Raich*, 545 U.S. at 29 (citations omitted). In other words, the MCA cannot permit what the CSA prohibits. And West Virginia's probation statute prevents the court from allowing Petitioner to violate federal law. W. Va. Code § 62-12-9(a)(1) (conditions of probation). Thus, this Court should affirm the lower court's order.

**B. The court did not abuse its discretion when it refused to modify the terms of Petitioner's probation to allow him to use medical cannabis.**

The circuit court has the authority to order that Petitioner refrain from using medical marijuana while on probation—especially because Petitioner's criminal conduct involves the use and delivery of controlled substances. Under West Virginia Code § 62-12-9, a trial judge may impose “any” reasonable probation conditions “he may deem advisable.” Syl. Pt. 6, *Louk v. Haynes*, 159 W. Va. 482, 223 S.E.2d 780 (1976) (emphasis added). “The matter of probation is within the sound discretion of the trial court.” *State v. Nicastro*, 181 W. Va. 556, 562, 383 S.E.2d 521, 527 (1989) (additional citations omitted). And “[p]robation is not a sentence for a crime but instead is an act of grace upon the part of the State to a person who has been convicted of a crime.” Syl. Pt. 2, *State ex rel. Strickland v. Melton*, 152 W. Va. 500, 165 S.E.2d 90 (1968); Syl. Pt. 1, *State v. Rose*, 156 W. V. 342, 192 S.E.2d 884 (1972) (“Probation is a matter of grace and not a matter of right.”). Rather, probation is a device “of an enlightened system of penology which has

for its purpose the reclamation and rehabilitation of the criminal.” *Melton*, 152 W. Va. at 506, 165 S.E.2d at 94.

After Petitioner filed his motion to modify probation, the court set a hearing and entered an order asking him to address the following factors: 1) nature of the offense; 2) offender’s past record; 3) past substance use disorder issues including treatment; 4) the ailment that the offender receives medical marijuana to treat; 5) frequency of contact with physician for condition; 6) other potential factors including mental health issues; 7) the availability and advisability of other medications; 8) impact on rehabilitation, community safety, and sentencing goals; 9) impact on deterring future criminality; 10) facts and circumstances a court normally considers for modification of probation terms; 11) valid medical marijuana card—verified for authenticity; 12) history of lawfully using medical marijuana—verified with authentic medical records. App. 37. Petitioner argues these factors have no basis in West Virginia law and the court abused its discretion to the extent that it relied on them. Pet’r’s Br. 18-25. Despite Petitioner’s protestation, these factors are relevant to the trial court’s fact-finding process at the hearing on Petitioner’s motion to modify probation. The court properly exercised its discretion when it asked Petitioner to address these factors because “a court must not decide matters relating to probation until it is in possession of all the relevant facts.” *Rose*, 156 W. Va. at 51, 192 S.E.2d at 889 (Caplan, J., dissenting).

When considering the general purposes of sentencing, especially rehabilitation, and Petitioner’s history of substance abuse, it was reasonable for the court to prohibit Petitioner from using medical marijuana. *See Fox v. State*, 176 W. Va. 677, 685, 347 S.E.2d 197, 205 (1986) (holding that a trial court has the authority to order, as a condition of probation, that the offender refrain from using intoxicants, at least where the offender’s criminal conduct was related to the

use or abuse of such substances); *Hurley v. State*, No. 770, 2021 WL 5495521 at \*9 (Md. Ct. Spec. App. Nov. 23, 2021) (approving condition of probation that prohibited use of medical marijuana). At his plea/sentencing hearing, Petitioner admitted that prior to his arrest he was using one gram of cocaine per day and one ounce of marijuana per week. App. 201-02. But the Petitioner assured the court that he planned on ceasing the use of all substances and attending NA meetings. App. 187, 202. The court accepted his representation and informed Petitioner that the use of any illegal substances would violate his probation. App. 205-07. The court openly discussed drug treatment options for Petitioner, and ordered him to participate in intensive outpatient treatment as a condition of probation. App. 200, 205-06. The court's prohibition on the use of illegal substances necessarily included marijuana, because Petitioner was not a patient of the medical cannabis program when the court sentenced him to probation.

Despite the frank discussions about Petitioner's drug problem and the court's order that Petitioner remain drug free, Petitioner applied to become a patient of West Virginia's medical cannabis program after the court placed him on probation. App. 34-35, 44-51. Petitioner was approved as a patient of the program and then he filed a motion asking the court to allow him to use marijuana while on probation. App. 34-35. The court denied Petitioner's motion, noting that Petitioner had a prior conviction in the Commonwealth of Virginia for possessing marijuana with the intent to deliver. App. 176, 23. Given Petitioner's history of drug use and drug-related arrests, the court found that "modifying [Petitioner's] probation to allow for medical marijuana would not be in the best interests of Mr. Schober's rehabilitation" and would not further community safety or sentencing goals or deter future criminality. App. 177. Further, Petitioner's own substance abuse therapist Emma Snyder testified about her concern that medical marijuana could trigger him to use

something stronger than marijuana. App. 156-57. And Snyder recommended that Petitioner receive treatment for PTSD in ways that do not involve medical marijuana. App. 160.

**C. Neither the MCA nor the probation statute allow Petitioner to use medical marijuana while on probation.**

**1. The MCA does not allow Petitioner to use medical marijuana while on probation because he was not a patient of the program when he was sentenced.**

Petitioner was not a patient of West Virginia’s medical cannabis program when the court placed him on probation, and this Court should not reward his attempt to evade the conditions of his probation. Although the plain language of the MCA does not allow a qualifying patient to be denied any right or privilege “solely for lawful use of medical cannabis,” this provision necessarily applies only in circumstances where a person already has attained the status as a qualifying patient. W. Va. Code § 16A-15-4 (providing protections for qualifying *patients* for the “lawful use” of medical cannabis); *Commonwealth v. Vargas*, 55 N.E.3d 923, 930 (Mass. 2016) (holding that defendant’s status as qualifying patient under Massachusetts’ medical marijuana statute did not immunize his use of marijuana in violation of a probation condition, which was imposed before defendant became qualifying patient). Because Petitioner was not a patient of the medical cannabis program when he agreed to the court’s requirement that he refrain from using illegal substances, this agreement necessarily included marijuana.

Further, interpreting the MCA to require a nexus between qualifying patient status and the timing of Petitioner’s request for modification of probation serves important policy interests. As the Supreme Judicial Court of Massachusetts reasoned,

[t]he prospective focus of the act avoids a wholesale disruption of dispositions in criminal cases as would occur if a probationer could acquire a certificate and demand the retraction of a prohibition on the use of marijuana. Likewise, the prospective application of the immunity provision preserves the court’s authority to fashion appropriate dispositions for public safety in criminal cases without the threat of a future limitation on the prohibition of marijuana use.

*Vargas*, 55 N.E.3d at 930.

Petitioner cites several out-of-state cases for the proposition that courts cannot prevent probationers from using medical marijuana, but other than *Vargas, supra*, they are not pertinent because they are factually distinguishable from the instant case. The other cases cited by Petitioner do not address whether a person, like Petitioner, is entitled to a modification of probation to use medical cannabis where the person: 1) has a history of drug abuse and drug arrests; 2) pleaded guilty to a felony drug offense; 3) was not a qualifying patient of a medical cannabis program when the court granted probation; 4) as a condition of probation, was ordered to refrain from the use of illegal substances and to participate in intensive outpatient treatment. *See People v. Thue*, 969 N.W.2d 346 (Mich. Ct. App. 2021); *Gass v. 52<sup>nd</sup> Jud. Dist., Lebanon Cnty.*, 232 A.3d 706 (Pa. 2020); *State v. Nelson*, 195 P.3d 826 (Mont. 2008); *Walton v. People*, 451 P.3d 1212 (Colo. 2019); *People v. Tilehkooh*, 113 Cal.App.4<sup>th</sup> 1433 (Cal. Dist. Ct. App. 2003); *People v. Leal*, 210 Cal.App.4<sup>th</sup> 829 (Cal. Dist. Ct. App. 2012); *Reed-Kaliher v. Hoggatt*, 347 P.3d 136 (Ariz. 2015). The particular facts of the instant case illustrate that the court properly ordered Petitioner to remain drug free and seek treatment while on probation, and Petitioner later attempted to circumvent the court's order by obtaining a medical marijuana certification. The court correctly exercised its discretion when it denied Petitioner's motion to use medical marijuana while on probation, and this court should affirm.

**2. Even if Petitioner had been a patient of the medical cannabis program, the MCA's immunity provision does not create a right for probationers to use medical marijuana.**

Petitioner argues that the legislature intended the MCA to supersede the probation statute, which would allow Petitioner to use marijuana while on probation. But this is wrong. Not only does our probation statute not provide an exception for medical marijuana, but it unambiguously



requires probationers to comply with federal law, which includes the CSA's prohibition of marijuana. W. Va. Code § 62-12-9(a)(1); 21 U.S.C. §§ 812(b)(1), 812(c)(10).

“Courts always endeavor to give effect to the legislative intent, but a statute that is clear and unambiguous will be applied and not construed.” Syl. Pt. 1, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968).

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. 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908).

The statutory text here is clear, so the Court need just apply it. When the legislature passed the MCA, this court must presume that the legislators who drafted it were aware that West Virginia Code § 62-12-9(a)(1) requires compliance with federal criminal laws. The probation statute conflicts with no MCA provision because the MCA never mentions probation. In other words, West Virginia Code § 62-12-9(a)(1) does not offend the MCA, because the MCA does not provide that a person can use medical marijuana while on probation. *See Commonwealth v. Gordon*, No. 543 MDA 2021, 281 A.3d 1080 at \*5 (Pa. Super. Ct. June 22, 2022) (holding that Pennsylvania's Medical Marijuana Act does not grant immunity from DUI prosecution). And the Legislature's silence on probation in the MCA is best understood to mean that the legislature did not intend to upset either the probation statute's incorporation of the CSA or circuit court judges' discretion.

If this Court finds the MCA immunity provision to be ambiguous in light of the probation statute that requires probationers to comply with federal law, the rules of statutory construction apply. “The primary object in construing a statute is to ascertain and give effect to the intent of the

Legislature.” Syl. Pt. 1, *Smith v. State Workmen’s Comp. Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). Further,

[i]t is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.

Syl. Pt. 2, *Click v. Click*, 98 W. Va. 419, 127 S.E. 194 (1925).

The legislature has the primary right to define crimes and punishments, and because of the legislative primacy in this area, this Court considers “the right to determine the conditions under which a sentence can be suspended and a person placed on probation to be a legislative prerogative.” *Spencer v. Whyte*, 167 W. Va. 772, 775, 280 S.E.2d 591, 593 (1981) (superseded by statute, W. Va. Code § 62-12-9, as recognized in *State v. White*, 188 W. Va. 534, 425 S.E.2d 210 (1992)). One of those conditions is that probationers must comply with both state and federal criminal laws. W. Va. Code § 62-12-9(a)(1).

This Court may glean the legislature’s intent on this issue from the amendment to West Virginia Code § 62-12-9 during the 2023 Regular Session, after passage of the MCA. 2023 W. Va. Acts, S.B. 136. These amendments do not specify that patients of the medical cannabis program might use medical marijuana while on probation.

Further, an interpretation of the MCA that allows Petitioner to use marijuana while on probation would lead to injustice and an absurd result. *See* Syl. Pt. 1, *Click*, 98 W. Va. 419, 127 S.E. 194. Petitioner was not a patient in the medical cannabis program when the court placed him on probation. Petitioner admitted in open court that he had a significant drug problem and agreed to refrain from using any illegal substances and to seek intensive outpatient treatment as conditions of his probation. Under the circumstances, these are reasonable conditions consistent with the

rehabilitative purpose of probation. *See Strickland*, 152 W. Va. at 506, 165 S.E.2d at 94. Thus, any legal ambiguity should be resolved in favor of the court's ability to require Petitioner to refrain from the use of medical marijuana while on probation.

### **CONCLUSION**

For the reasons stated, this Court should affirm the judgment of the circuit court.

Respectfully Submitted,

**STATE OF WEST VIRGINIA,  
RESPONDENT,  
BY COUNSEL**

PATRICK MORRISEY,  
ATTORNEY GENERAL

JASON DAVID PARMER  
ASSISTANT ATTORNEY GENERAL  
West Virginia State Bar ID 8005  
1900 Kanawha Boulevard East  
State Capitol  
Building 6, Suite 406  
Charleston, West Virginia 25305  
Phone: (304) 558-5830  
Email: Jason.D.Parmer@wvago.gov

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Docket No. 23-68**

**STATE OF WEST VIRGINIA,**  
*Respondent,*

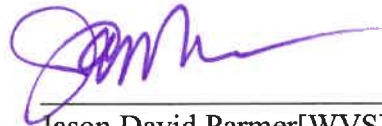
v.

**KYLE JOHN SCHOBBER,**  
*Petitioner.*

**CERTIFICATE OF SERVICE**

I, Jason David Parmer, do hereby certify that on the 21st day of June, 2023, I served a true and accurate copy of the foregoing **Notice of Appearance** upon the below-listed individuals via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure, and further, a courtesy copy was mailed to said individuals at the addresses below:

Jonathan T. O'Dell  
Assistant Public Defender  
Public Defender Corp.  
301 W. Burke Street, Suite A  
Martinsburg, WV 25401



Jason David Parmer[WVSB No. 8005]  
Assistant Attorney General  
Office of the Attorney General  
Appellate Division  
1900 Kanawha Blvd. E.  
State Capitol, Bldg. 6, Ste. 406  
Charleston, WV 25305  
Telephone: (304) 558-5830  
Facsimile: (304) 558-5833  
Email: Jason.D.Parmer@wvago.gov  
Counsel for Respondent