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SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203	
Certiorari to the El Paso County District Court Case Number 17CV30785, 4th Judicial District	
ALYSHA WALTON, Appellant v. THE PEOPLE OF THE STATE OF COLORADO, Appellee	s COURT USE ONLY s
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APPELLANT'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of Colorado Appellate Rule 28 and Colorado Appellate Rule 32, including all formatting requirements set forth in those rules. Specifically, the undersigned certifies that:

1. The brief complies with the applicable word limits set forth in C.A.R. 28(g). It contains 5,540 words, excluding the caption page, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block.
2. The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).
3. I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

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STATEMENT OF THE ISSUE PRESENTED

Whether the district court erred in finding no abuse of discretion where the trial court imposed a prohibition against the use of medical marijuana on probation without basing that prohibition on any material evidence that the prohibition was necessary and appropriate to accomplish the goals of sentencing, thereby denying petitioner's rights under the Colorado Constitution.

STATEMENT OF THE CASE

This is an appeal concerning a condition of probation imposed by the trial court following Ms. Walton's guilty plea to one count of Driving Under the Influence (hereinafter "DUI"), a traffic misdemeanor pursuant to C.R.S. 42-4-1301(1)(a). At the time of sentencing, Ms. Walton was placed on unsupervised probation as part of a deferred judgment and sentence. The trial court prohibited Ms. Walton from using medical marijuana during the term of her probation. On appeal, Ms. Walton asserts that the trial court abused its discretion in imposing such condition of probation.

On August 12, 2016, around 12:39 a.m., deputies from the El Paso County Sherriff's Office pulled over Ms. Walton for speeding. (Court File, p. 7). The deputies indicated that they could smell alcohol on Ms. Walton and requested that she exit her vehicle to perform Roadside Maneuvers. (Id.). Ms. Walton performed the maneuvers unsatisfactorily and was subsequently taken into custody on suspicion of DUI . (*Id.*).

Ms. Walton admitted to consuming two alcoholic beverages but informed deputies that she was not under the influence of any medications, and deputies did not suspect she was under the influence of drugs. (Court File, p. 15-16). Ms. Walton submitted to a chemical test at the deputies' request and the results

indicated that she had a Breath Alcohol Content of 0.117 g. (Court File, p. 16). Ms. Walton was therefore charged by Summons and Compliant with one count of DUI pursuant to C.R.S. 42-4-1301(1)(a), one count of DUI Per Se pursuant to C.R.S. 42-4-1301(2)(a), and one count of Speeding pursuant to C.R.S. 42-4-1101(1). (Court File, p. 1).

On December 20, 2016, Ms. Walton appeared with counsel from the Office of the Public Defender for a Pre-Trial Conference in the First Appearance Center of the El Paso County Combined Courts. A plea agreement was successfully negotiated and Ms. Walton then appeared in Division D of the County Court to submit a Guilty Plea and Waiver of Rights and a Stipulation and Order for Deferred Judgment and Sentence to the Honorable Judge Karla Hansen. (Court File, p. 28-34). The matter was set for Sentencing on February 2, 2017 and Ms. Walton was ordered to complete an Alcohol Evaluation with the probation department prior to the sentencing date. (Court File, p. 35). On January 11, 2017, Ms. Walton completed her Alcohol Evaluation and informed the probation officer who conducted the evaluation that she had a medical marijuana card. (Court File, p 39). The probation officer recommended that Ms. Walton complete Level II Alcohol Education classes and refrain from the use of alcohol while on probation,

but did not recommend a prohibition against the use of medical marijuana. (Court File, p. 40).

On February 2, 2017, Ms. Walton and undersigned defense counsel appeared for Sentencing in Division D with the Honorable Judge Karla Hansen presiding. Defense counsel was assigned as the public defender for Division D and was therefore aware of the Honorable Judge Hansen's policy of requiring a hearing if a defendant wished to use medical marijuana on probation. Counsel informed the court that Ms. Walton would be seeking to use medical marijuana while on probation and the court set a Plea and Sentencing date of February 23, 2017. (Tr. 2/2/17, p. 3:20-21). The court asked whether counsel had a "doctor in mind that [would] be available" and counsel stated that she needed to speak with the doctor first. (Tr. 2/2/17, p. 4:2-5).

On February 23, 2017, Ms. Walton appeared with defense counsel for Plea and Sentencing. Through counsel, Ms. Walton entered a guilty plea to DUI and was placed on a twelve month unsupervised probationary period as part of her Deferred Judgement and Sentence. (Tr. 2/23/17, p. 5:13-15). Counsel presented the court with Ms. Walton's medical marijuana documentation, including her valid State of Colorado Medical Marijuana Registry card, her Physician's Certification on a Colorado Department of Public Health and Education form, and her

physician's active license as verified through the Colorado Division of Professions and Occupations. (Seal, p. 1-3). However, counsel was unable to present Ms. Walton's physician for live testimony. (Tr. 2/23/17, p. 3:5-12). Therefore, as a condition of probation, the court prohibited Ms. Walton from consuming medical marijuana because, in sum, the defense "didn't present any evidence." (Tr. 2/23/17, p. 6:87). Defense counsel objected to this condition of probation as denying Ms. Walton her right to use medical marijuana under the Colorado Constitution. (Tr. 2/23/17, p. 6:95-96).

Ms. Walton, through counsel, filed a Notice of Appeal and Designation of Record on March 26, 2017. (Court File, p. 49-51). On May 5, 2017, the Clerk of Court filed a Notice of Completion of Record. On May 16, 2107, Ms. Walton filed an Objection to the Record on Appeal, which was granted by the district court on May 24, 2017. On June 26, 2017, the Clerk of Court filed a Notice of Record Certified to District Court. On September 30, 2017, undersigned counsel filed an Opening Brief, which was replied to in an Answer Brief dated November 9, 2017. Counsel then filed a Reply Brief on November 24, 2017.

On December 21, 2017, the El Paso County District Court, Honorable Judge David Miller, issued an order finding that the county court did not abuse its discretion in imposing a prohibition against the use of medical marijuana while on

probation. (District Court Order 12/21/17, p. 6). The District Court found that the County Court judge's policy of requiring the defense to present testimony from a doctor was a reasonable use of discretion. Id. In sum, the District Court's ruling was based on a perceived concern about the authenticity of Ms. Walton's medical marijuana documentation and the general nature of medical marijuana "authorizations" as opposed to "prescriptions" overseen by federal regulations. (District Court Order 12/21/17, p. 3-6).

On March 1, 2018, counsel for Ms. Walton filed a Petition for Writ of Certiorari and this Court granted Certiorari as to the issue above on October 15, 2018.

SUMMARY OF THE ARGUMENT

The General Assembly of the State of Colorado has bestowed upon citizens of Colorado the Constitutional right to purchase, possess, and consume marijuana for the purposes of treating medical conditions pursuant to outlined and regulated procedures. COLO. CONST. art. XVIII, § 14. In response, the legislature has amended Colorado's statute regarding conditions of probation for criminal defendants, Colo. Rev. Stat. 18-1.3-204, to allow for the use of medical marijuana while on probation. That statute prohibits courts from denying probationers the right to use medical marijuana unless certain criteria are present. Principles of statutory interpretation and the pertinent legislative history support that the legislature did not intend to give trial courts unbridled discretion to prohibit use of medical marijuana, nor was the intent to place a burden on probationers to present evidence in an effort to persuade judges to permit use of medical marijuana.

In this case, the trial court abused its discretion in prohibiting Ms. Walton from using medical marijuana for the term of her probationary period thereby denying Ms. Walton of her statutory and Constitutional rights. The court improperly placed a burden on defense counsel to present evidence in the form of a live medical professional in support of Ms. Walton's request to use medical marijuana. The court made no findings that would support a determination that a

prohibition against the use of medical marijuana was necessary and appropriate in Ms. Walton's case; rather, the court indicated that it is generally inappropriate for DUI probationers to use medical marijuana.

On appeal, the district court erred in finding no abuse of discretion in the trial court's imposition of a prohibition against medical marijuana use. The district court based the finding of no error on arguments and reasoning which were not articulated by the trial court or the prosecution and are not supported by the record or controlling statutes.

ARGUMENT

Trial courts are granted discretion in imposing conditions of probation other than those mandated by law and, as such, imposition of probation conditions should be reviewed for abuse of discretion. People v. Valenzuela, 98 P.3d 951, 954 (Colo. App. 2004); see also People v. Watkins, 282 P.3d 500, 502 (Colo. App. 2012). However, issues of statutory interpretation present a question of law which is reviewed de novo. Dubois v. People, 211 P.3d 41, 43 (Colo. 2009). The trial court imposed the condition of no use of medical marijuana at the time of sentencing. (Tr. 2/23/17, p. 5:67). Defense counsel contemporaneously made a verbal objection thereby preserving the issue for appeal. (Tr. 2/23/17, p. 6:95-98 – p. 7:99-110).

I. THE TRIAL COURT ABUSED ITS DISCRETION BY PROHIBITING MS. WALTON FROM USING MEDICAL MARIJUANA ON PROBATION WITHOUT BASING THAT CONDITION OF PROBATION ON ANY MATERIAL EVIDENCE THAT THE PROHIBITION WAS NECESSARY AND APPROPRIATE TO ACCOMPLISH THE GOALS OF SENTENCING, THEREBY DEPRIVING MS. WALTON OF HER RIGHT TO USE MEDICAL MARIJUANA PURSUANT TO THE COLORADO CONSTITUTION.

a. The plain language of the statute concerning conditions of probation clearly indicates that probationers are permitted to use medical marijuana while on probation unless the court is presented with evidence that suggests use should be prohibited. Accordingly, no burden is placed on the probationer to present evidence to persuade the sentencing court to permit such use of medical marijuana.

Colorado's "conditions of probation" statute, Colo. Rev. Stat. 18-1.3-204, is a clearly written statute that gives unambiguous guidance to trial courts as to certain required and other permissible conditions of probation in criminal cases. The statute provides that defendants who have not been convicted of a crime under Colorado's Medical Marijuana Code (Article 43.3 of Title 12, C.R.S.) may use medical marijuana on probation *unless* the court is presented with material evidence that supports a prohibition against use. Pursuant to Colo. Rev. Stat. 18-1.3-204(2)(a)(VIII)(B), if a sentencing court intends to prohibit a probationer from using medical marijuana on probation, it must be based on material evidence that indicates that the probationer's use of medical marijuana would be counterproductive to the goals of sentencing enumerated in Colo. Rev. Stat. 18-1-102.5. The law places no burden on the probationer or defense counsel to present evidence to the sentencing court in order to persuade the court to permit the probationer to use medical marijuana.

Colorado's statute governing probation conditions directly addresses medical marijuana use while on probation. In addition to providing that use or possession of medical marijuana is not an "offense such that its use constitutes a violation of the terms of probation," the statute indicates that use of medical

marijuana may only be prohibited in certain situations. The applicable portion reads:

> (2)(a) When granting probation, the court may, as a condition of probation, require that the defendant:
>
> (VIII) Refrain from excessive use of alcohol or any unlawful use of controlled substances, as defined in section 18-18-102(5), or of any other dangerous or abusable drug without a prescription; except that the court shall not, as a condition of probation, prohibit the possession or use of medical marijuana, as authorized pursuant to section 14 of article XVIII of the state constitution, unless:
>
> (A) The defendant is sentenced to probation for conviction of a crime under [the Medical Marijuana Code]; or
>
> (B) The court determines, based on any material evidence, that a prohibition against the possession or use of medical marijuana is necessary and appropriate to accomplish the goals of sentencing as stated in section 18-1-102.5[.]

Colo. Rev. Stat.18-1.3-204.

The plain reading of the statute supports that the presumption is that defendants are entitled to the use of medical marijuana unless the court has information that suggests such use would be inappropriate. Initially, it should be noted that subsection (2)(a) begins by using the word "may," indicating that the conditions of probation that follow are discretionary. Subsection (2)(a)(VIII) then starts with the statement that courts may limit or entirely prohibit the use of alcohol and other drugs. Following a semi-colon, the word "except" signals that medical

marijuana is to be treated differently from other substances. The remaining clause instructs courts that they "shall not" prohibit the possession or use of medical marijuana "unless" certain circumstances are present. Id.

Where an offender is not being sentenced for an offense pursuant to Colorado's Medical Marijuana Code, courts may only prohibit use of medical marijuana if such prohibition is "necessary and appropriate to accomplish the goals of sentencing." Id. The statute cites directly to another statute which outlines the specific "purposes of [the criminal code] with respect to sentencing." Colo. Rev. Stat. 18-1-102.5. Those delineated purposes are:

> (a) To punish a convicted offender by assuring the imposition of a sentence he deserves in relation to the seriousness of his offense;
>
> (b) To assure the fair and consistent treatment of all convicted offenders by eliminating unjustified disparity in sentences, providing fair warning of the nature of the sentence to be imposed, and establishing fair procedures for the imposition of sentences;
>
> (c) To prevent crime and promote respect for the law by providing an effective deterrent to others likely to commit similar offenses;
>
> (d) To promote rehabilitation by encouraging correctional programs that elicit the voluntary cooperation and participation of convicted offenders;
>
> (e) To select a sentence, a sentence length, and a level of supervision that addresses the offender's individual characteristics and reduces the potential that the offender will engage in criminal conduct after completing his or her sentence; and

> (f) To promote acceptance of responsibility and accountability by offenders and to provide restoration and healing for victims and the community while attempting to reduce recidivism and the costs to society by the use of restorative justice practices.

Id.

The direct guidance to these specific purposes of sentencing clearly indicates that, if a court imposes a prohibition against the use of medical marijuana, it must be supported by a finding that the probationer's use of medical marijuana would endanger the accomplishment of one or more of these goals. Courts are not permitted to impose a blanket ban on medical marijuana use for certain offenses (e.g., all DUIs); instead, courts are required to consider the purposes of sentencing as they apply to each individual defendant.

Notably, the statute is absent as to any burden of proof and what sort of evidence can and should be considered by the court; however, such silence does not call for courts to *sua sponte* impose a burden of proof or an evidentiary requirement that is not present in the statute. The absence of an expressly indicated burden of proof, in conjunction with the strong language "shall not" and "unless," indicates that the statute places no burden on defendants to present evidence in support of their use of medical marijuana, which is presumed to be permitted. Similarly, the absence of any specifically required evidence suggests that no specific information need be provided for a defendant to be permitted to use

medical marijuana. Rather, the plain meaning of the "any material evidence" phrase is that the court should not prohibit medical marijuana use "unless" and until the court is presented with supporting evidence (*e.g.*, that the defendant was under the influence of marijuana at the time of the offense, or that the defendant's marijuana use renders him or her unable to participate in the classes required by probation).

b. Though the plain meaning of the statute is apparent, the legislative history behind Colorado's statute regarding use of medical marijuana while on probation supports that the legislature's intent was neither to grant unbridled discretion to sentencing courts nor was it to impose a burden on probationers to present evidence in support of their use of medical marijuana.

In November of 2000, Colorado's citizens voted into effect Amendment 20 to the Colorado Constitution, granting a constitutional right to citizens of Colorado to purchase and possess medical marijuana. This amendment was codified in article XVIII, section 14 of the Colorado Constitution, which sets forth the guidelines for lawful possession of medical marijuana and directives for regulations to be established by the Colorado Department of Revenue. The Colorado Department of Public Health & Environment subsequently set forth procedures for Colorado's citizens to follow in order to be properly screened for the use of medical marijuana and to seek a state-issued medical marijuana card.

Though Colo. Rev. Stat. 18-1.3-204 now clearly directs courts on medical marijuana use for probationers, the initial legalization of medical marijuana created a grey area in the criminal justice system because the statute was previously silent as to the use of medical marijuana by probationers. Courts were therefore required to look to the rest of the statute, imposing prohibitions against medical marijuana use pursuant to courts' discretion to impose any conditions necessary to ensure that the defendant leads a "law-abiding life," pursuant to the mandatory condition that defendants "not commit another offense" on probation, or pursuant to courts' discretion to prohibit use of "any other dangerous or abusable drug without a prescription." Colo. Rev. Stat. 18-1.3-204(1)(a) and (2)(a)(VIII); see People v. Watkins, 282 P.3d 500 (Colo. App. 2012) (finding that under the former version of C.R.S. 18-1.3-204 it was within the trial court's discretion to prohibit use of medical marijuana on probation under the mandatory requirement of committing no new offenses as the use of medical marijuana is still a federal offense).

In 2015, the legislature recognized and remedied the lack of direction with respect to medical marijuana use on probation by introducing and passing House Bill 15-1267. The bill created subsection (1)(b) of C.R.S. 18-1.3-204 which stated that the possession or use of medical marijuana could no longer be considered a new offense in violation of a defendant's probation. Of particular importance, the

legislature also amended subsection (2)(a)(VIII) of the statute, which had previously read:

> (2)(a) When granting probation, the court may, as a condition of probation, require that the defendant:
> (VIII) Refrain from excessive use of alcohol or any unlawful use of controlled substances, as defined in section 18-18-102(5), or of any other dangerous or abusable drug without a prescription[.]"

Colo. Rev. Stat. § 18-1.3-204 (Effective April 7, 2014 to May 7, 2015).

After the passage of HB 15-1267, the subsection stated:

> (2)(a)When granting probation, the court may, as a condition of probation, require that the defendant:
> (VIII) Refrain from excessive use of alcohol or any unlawful use of controlled substances, as defined in section 18-18-102(5), or of any other dangerous or abusable drug without a prescription; *except that the court shall not, as a condition of probation, prohibit the possession or use of medical marijuana, as authorized pursuant to section 14 of article XVIII of the state constitution, unless…(A)the Defendant is sentenced to probation for conviction of a [medical marijuana related crime]; or (B) the court determines, [based on a risk assessment by the probation department], a prohibition against the possession or use of medical marijuana is necessary and appropriate to accomplish the goals of sentencing as stated in 18-1-102.5."*

Colo. Rev. Stat. 18-1.3-204 (as amended, effective May 8, 2015) (emphasis added).

The amendment of subsection (2)(a)(VIII) is clear evidence of the legislature's intent to curtail sentencing courts' discretion to prohibit the use of medical marijuana in a manner entirely apart from courts' discretion to prohibit the

use of other types of drugs and alcohol. When construing a statute, an appellate court's "primary task... is to give effect to the intent of the General Assembly." People v. Perez-Hernandez, 348 P.3d 451, 457 (Colo.App. 2013), citing Campbell v. Indus. Claim Appeals Office, 97 P.3d 204, 207 (Colo.App.2003). To determine legislative intent, "a statute must be read and considered as a whole and should be interpreted so as to give consistent, harmonious, and sensible effect to all its parts." People v. Andrews, 871 P.2d 1199, 1201 (Colo. 1994). Additionally, a cornerstone of statutory interpretation is that Colorado courts must "avoid an interpretation or construction that would render any language meaningless." Well Augmentation Subdistrict v. City of Aurora, 221 P.3d 399, 420 (Colo. 2009). Here, the legislature's intent was clearly to distinguish use of medical marijuana from use of other drugs and alcohol; if courts were still permitted to prohibit the use of medical marijuana in the same manner as other drugs, the added language regarding medical marijuana would be meaningless.

The legislative history behind HB 15-1267 further reveals that the legislature did not intend to allow courts to police the legitimacy of probationers' physician-issued medical marijuana authorizations or inquire into the medical reasons for the authorization being issued. During discussions on HB 15-1267 in the House Committee on the Judiciary, Representative Yeulin Willett informed the bill's

sponsor, Representative Joseph Salazar, that he had concerns about people who may hold medical marijuana cards but whose usage may be more "recreational than medical" and inquired about potentially having a "court approved doctor who would verify the prescription." Hearing on H.B. 15-1267 before the H. Judiciary Comm., 70th Gen. Assemb., 1st Reg. Sess., 7:44:25 – 7:45:27 (Apr. 9, 2015) (http://coloradoga.granicus.com/MediaPlayer.php?view_id=21&clip_id=7665&meta_id=142776). Representative Salazar responded that "courts don't do that and they're not going to do that with medical marijuana usage." Id. at 7:45:28 – 7:45:39. He proceeded to say, "Courts aren't going to question when a physician issues [an authorization] under the Constitution to an individual. They're just not [going to] do it." Id. at 7:45:39 – 7:45:47. Representative Salazar concluded the discussion by noting that such an approach would be "dangerous" and commenting that it would be absurd if that approach was taken with respect to probationers' prescriptions for pharmaceutical drugs. Id. at 7:45:58 – 7:46:04.

On June 10, 2016, the statute was further amended with the passing of House Bill 16-1359, which entirely removed the requirement that probationers undergo an assessment by the probation department before being permitted to use medical marijuana on probation. Colo. Rev. Stat. 18-1.3-204(2)(a)(VIII)(B) (effective August 10, 2016). During testimony in front of the House Committee on

the Judiciary, the Director of Probation Services explained to the Committee that the assessment previously required was problematic because the assessment was not designed to address possible future abuse of medical marijuana, just like it was not designed to predict the potential abuse of prescription medications. Hearing on H.B. 16-1359 before the H. Judiciary Comm., 70th Gen. Assemb., 2nd Reg. Sess., at 36:30 (Apr. 14, 2016) (statement of Eric Phillip) (http://coloradoga.granicus.com/MediaPlayer.php?view_id=21&clip_id=9434&meta_id=190947). Therefore, probation departments were issuing risk assessments to judges that were not helpful in determining whether a specific defendant should be prohibited from using medical marijuana in order to accomplish the goals of sentencing.

The statute was therefore amended to state that courts "*shall not*, as a condition of probation, prohibit the possession or use of medical marijuana...*unless*...the court determines, based on any material evidence, that a prohibition...is necessary and appropriate to accomplish the goals of sentencing[.]" Colo. Rev. Stat. 18-1.3-204(2)(a)(VIII)(B) (effective August 10, 2016). Though the legislature did not clearly outline what "material evidence" should be considered, the issue was discussed before the House Committee on the Judiciary. After being questioned about what evidence judges would consider without the assessment, the

Director of Probation Services noted that most of the evidence would be "associated with the case or criminal history of the defendant." Hearing on H.B. 16-1359 before the H. Judiciary Comm., 70th Gen. Assemb., 2nd Reg. Sess., at 41:25 (Apr. 14, 2016) (statement of Eric Phillip) (http://coloradoga.granicus.com/MediaPlayer.php?view_id=21&clip_id=9434&meta_id=190947). He went on to give an example: "If someone is charged and convicted of a DUI-D and the substance for which that charge is brought is use of marijuana – that would be material evidence that would be considered by the court." Id. Notably, the legislature still chose not to delineate specific offenses which would directly disqualify probationers from using medical marijuana, such as drug possession or driving under the influence of marijuana, with the exception of offenses relating to unlawful handling of medical marijuana. See Colo. Rev. Stat. 18-1.3-204(2)(a)(VIII)(A).

Although the legislature did not clarify the procedure that should be used by courts in determining whether the use of medical marijuana should be prohibited, it is clear that the legislature did not intend to place a burden on criminal defendants to present evidence in support of their medical marijuana usage. Finding that trial courts may require criminal defendants to present evidence to persuade the court that their medical marijuana use is legitimate opens the door to the concerns stated

by Representative Salazar in the 2015 sessions. Should the legislature have intended to require sentencing hearings during which subpoenaed physicians are questioned in open court about their patients' private medical conditions, the legislature would have included such language in C.R.S. 18-1.3-204.

c. In light of the applicable law, the record in this case does not support the trial court's denying Ms. Walton the right to use medical marijuana while on probation.

Colo. Rev. Stat. 18-1.3-204 clearly states that probationers may not be denied the right to use medical marijuana while on probation unless they are placed on probation for an offense pursuant to the Medical Marijuana Code, or such an imposition is "necessary and appropriate" to accomplish the goals of sentencing outlined in Colo. Rev. Stat. 18-1-102.5. As Ms. Walton was not convicted of a medical marijuana related offense, the trial court's imposition of a prohibition on the use of medical marijuana must have been supported by a finding that Ms. Walton's use of medical marijuana would interfere with one of the goals of sentencing. Such a finding is not supported by the record.

As noted above, the legislature considered that a court may consider it "material evidence" to support a prohibition against the use of medical marijuana if the defendant was convicted of a DUI involving marijuana. As evidenced by the record in the matter, Ms. Walton's DUI offense was entirely alcohol related. None

of the three deputies involved noted any signs that Ms. Walton might be under the influence of marijuana or any other drugs. (See Court File, p. 1-16). Notably, the deputy who completed the standard DUI paperwork for Ms. Walton's case wrote that drugs were non-applicable and categorized the DUI as only alcohol related. (Court File, p.15). The fact that deputies did not suspect Ms. Walton was unde the influence of marijuana or any other drug is further supported by Ms. Walton being given the choice between submitting to a blood or breath test, as Colorado's Expressed Consent law requires blood testing where drug use is suspected. Colo. Rev. Stat 42-4-1301.1(2)(b)(I); Court File, p. 17.

The record, including the police reports and Ms. Walton's alcohol evaluation, does not support a finding that a prohibition against the use of medical marijuana was necessary to "promote rehabilitation" through treatment programs. Colo. Rev. Stat. 18-1-102.5(1)(d). To the contrary, the probation officer who performed Ms. Walton's alcohol evaluation specifically recommended that Ms. Walton "refrain from the use of alcohol" during treatment but did not recommend that she refrain from the use of medical marijuana. (Court File, p. 40.) The probation officer further found that Ms. Walton required the lowest level of treatment available for DUI probationers, recommending only a Level II education course with no therapy hours to follow and no inpatient or outpatient treatment.

(Court File, p. 40.) Lastly, the probation officer found that Ms. Walton needed no supervision and recommended unsupervised probation due to Ms. Walton's scoring in the minimum range for the need of supervision. Id.

The trial court was also not justified in prohibiting medical marijuana use based on concerns of recidivism or the need to promote acceptance and responsibility. Colo. Rev. Stat. 18-1-102.5(1)(e); *see also* District Court Order 12/21/17, p. 5. The record lacks any evidence to suggest that Ms. Walton had ever consumed marijuana while driving or that she presented a risk of ever doing so in the future. (See Tr. 2-23-17, p. 7, ln. 20-25.) The probation officer not only noted that this was Ms. Walton's first and only DUI offense, but also specifically found that Ms. Walton presented a "low risk to reoffend." (Court File, p. 39-40.) The probation officer also noted that Ms. Walton "expressed an understanding that through her choices and behavior she has placed herself, others, and the community as a whole in grave danger" and that Ms. Walton indicated that "this is one of the biggest mistakes of her life" (Court File, p. 39.) Ms. Walton echoed those sentiments when speaking to the trial court during sentencing, stating that this offense was "out of character" for her. (Tr. 2-23-17, p. 5, ln. 12.)

The district court's finding of no abuse of discretion in the trial court was based largely on the district court's concern about the authenticity of Ms. Walton's

medical marijuana documentation. The district court repeatedly raised the question of the authenticity of Ms. Walton's medical documents and the trial court's apparent need to confirm that there was "authority to use marijuana." (Court Order 12-21-17, p. 4-6). That concern has no basis in the record. Initially, as noted above, Colo. Rev. Stat. 18-1.3-204 placed no evidentiary burden on Ms. Walton to present her medical marijuana documentation to the court; however, counsel for Ms. Walton chose to submit those items to the trial court. (Seal, p. 1-3). At that time, the trial court did not express any concerns with the authenticity of the documents under the Colorado Rules of Evidence or of their reliability for purposes of an informal sentencing hearing, nor did the prosecutor object to the admission of those documents into evidence. (See Tr. 2-23-17). Further, the court did not express any concern with "contrivance" or "forgery of documents" as discussed by the District Court. (Court Order 12-21-17, p. 5).

The district court further erred in basing its ruling partially on that court's perceived distinction between medical marijuana "authorizations" as opposed to "a true 'prescription' for say painkillers." (Court Order 12-21-17, p. 3-6). As an initial matter, the relationship between prescription drugs and medical marijuana is irrelevant for purposes of this specific appeal and the imposition of probation conditions in general, as the legislature specifically distinguished between

prescription drugs and medical marijuana in drafting the pertinent statute. *See* Colo. Rev. Stat. 18-1.3-204(2)(a)(VIII). Still, the district court essentially expressed an opinion that courts should be more skeptical of the legitimacy of medical marijuana authorizations than a prescription for "federally-controlled" drugs such as painkillers, partially because medical marijuana authorizations cover a one-year period. (Court Order 12-21-17, p. 6). As noted above, the State of Colorado has imposed specific guidelines and procedures for the authorization and use of medical marijuana, and the legislature chose to make authorization periods last for one year. The district court expressed an opinion unsupported by law that this procedure should make medical marijuana authorizations subject to increased scrutiny by trial courts, as opposed to a prescription for abusable pain killers. Though Colorado physicians may have to engage in a "nimble dance" to "avoid running afoul of federal law" (Court Order 12-21-17, p. 5), that issue has no bearing on the matter at hand, which is controlled exclusively by the Colorado Constitution and the Colorado Revised Statutes.

Finally, both the trial court and the district court placed great emphasis on defense counsel's failure to procure live testimony from Ms. Walton's physician at the time of sentencing. The record reflects that the sentencing court appeared to have no dispute regarding the fact that Ms. Walton was an authorized holder of a

medical marijuana card. (See Tr. 2/23/17). Rather, the court wanted Ms. Walton, an indigent defendant represented by the Office of the Public Defender, to provide expert witness testimony on Ms. Walton's "medical situation." (Tr. 2-23-17, p. 7:12). Initially, it should be noted that while medical professionals can be subpoenaed, they are also entitled to be compensated for their time and testimony. The trial court's request to hear from Ms. Walton's physician appeared to have been related to the court's desire to hear testimony about Ms. Walton's medical condition for which she had been issued a medical marijuana card so that the court could determine whether her specific condition was sufficient to earn her the privilege to continue to use medical marijuana. Such a policy is concerning for a number of reasons and were adequately addressed by Representative Salazar in the House Committee hearings as noted above. Additionally, as noted above, the legislature did not indicate that only defendants with certain illnesses are permitted to use medical marijuana on probation, and certainly did not give discretion to judges to determine whose medical condition is legitimate enough to warrant use on probation.

CONCLUSION

In sum, the district court erred in finding no abuse of discretion in the trial court's improper imposition of a condition of probation prohibiting Ms. Walton from using medical marijuana for the term of her probationary sentence. The trial court's imposition of a prohibition against the use of medical marijuana violated Ms. Walton's rights under the Colorado Constitution and Colorado Revised Statutes. Due to those violations and the reasons set forth above, Alysha Walton requests that this Court find error in the district court's ruling and order that the condition of probation be vacated from Ms. Walton's probation sentence.

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CERTIFICATE OF SERVICE

I certify that, on January 17, 2019, a copy of this Petition for Writ of Certiorari was electronically served through ICCES on Doyle Baker of the 4th Judicial District Attorney's Office.

Dated: January 16, 2019