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STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

RICHARD GOMES,

Defendant-Respondent.

SUPREME COURT OF NEW JERSEY  
APPELLATE DIVISION

Docket No. A-003477-20T1

On appeal from an  
Interlocutory Order of  
Superior Court of New Jersey,  
Law Division, Criminal Part,  
Middlesex County

Sat Below:  
Hon. Joseph Paone, J.S.C.

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**BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION**

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**PRELIMINARY STATEMENT**

The clear legislative intent in enacting the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (Marijuana Reform Act or Act) was to place individuals with prior marijuana offenses covered under the Act in the same position they would have been in had the offense not been criminalized. In furtherance of this, the legislation required the expungement of certain crimes and the vacation of certain open charges "by operation of law." In this matter, the New Jersey State Bar Association (NJSBA) urges the Court to find that allowing entry into the Pre-Trial Intervention Program (PTI) for defendants who previously received a marijuana-related diversion is consistent with the expungement/vacation requirements of the Act and the overall intent of the measure.

This is an important issue to the more than 16,000 members of the NJSBA, as it affects the constitutional rights of thousands of criminal defendants currently subject to differing outcomes in different counties in connection with their PTI applications. Moreover, the NJSBA recognizes that this issue is the focus of several cases pending before the court in State v. Gomes, A-3477-20; State v. Barry, A-697-21; State v. Chiriboga, A-581-21; and State v. Sheira, A-198-21.

The NJSBA urges the Court to resolve this issue in favor of not only the defendant in this and the companion cases being

heard at the same time, but also the many future defendants who are likely to find themselves similarly situated. In interpreting the legislative intent of the comprehensive Marijuana Reform Act, the NJSBA asks this Court to affirm the decision below and hold that N.J.S.A. 2C:43-12(g) and N.J.S.A. 2C:36-1A do not bar a defendant from entry into a diversion program where the defendant previously received supervisory services for certain low-level marijuana-related charges that have now been expunged pursuant to the Marijuana Reform Act. Doing so would achieve the aims of the legislation - to restore defendants to the place they were before being charged with the offense.

**PROCEDURAL HISTORY AND STATEMENT OF FACTS**

The NJSBA relies upon the facts as presented by the parties, with the following additional information:

On Feb. 22, 2021, Governor Phil Murphy signed into law the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (Marijuana Reform Act or Act), N.J.S.A. 24:6I-31 to -56 and certain decriminalization and expungement laws codified in N.J.S.A. 2C:35-23.1 and 2C:52-6.1. The same day, the New Jersey Attorney General issued Directive 2021-1 (the Directive). The Marijuana Reform Act and the Directive required the dismissal of pending marijuana cases. For

those cases already resolved, it directed the Administrative Office of the Courts to "vacate by operation of law" any guilty plea verdict, plea, placement in a diversionary program, or other entry of guilt. The vacated proceedings included any conviction, remaining sentence, ongoing supervision, or unpaid court-ordered financial assessment, probation, parole or other form of community supervision.

LEGAL ARGUMENT

**WHEN INTERPRETED TOGETHER, THE SWEEPING REFORMS OF THE NEW JERSEY CANNABIS REGULATORY, ENFORCEMENT ASSISTANCE, AND MARKETPLACE MODERNIZATION ACT, COMBINED WITH THE REFORMATIVE PRINCIPLES OF THE PRETRIAL INTERVENTION PROGRAM (PTI), NECESSARILY REMOVE ANY BAR TO THE APPLICATION TO PTI FOR A DEFENDANT WHO HAS PREVIOUSLY BEEN ADMITTED TO A SUPERVISORY TREATMENT PROGRAM FOR A QUALIFYING MARIJUANA OFFENSE.**

An appellate court's scope of review of a trial court's determination is limited. When the appellate court is satisfied that the findings of the trial court reasonably have been reached on sufficient, credible evidence in the record, "its task is complete and it should not disturb the result, even though it has the feeling it might have reached a different conclusion were it the trial tribunal." State v. Johnson, 42 N.J. 146, 162 (1964). However, a motion judge's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v. Manalapan Tp. Comm., 140 N.J. 366, 378 (1995).

In construing a statute, the function of a court is to determine the intent of the Legislature and, "generally, the best indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005). "A clear and unambiguous statute is not open to construction or interpretation." Watt v. Mayor Council of Franklin, 21 N.J. 274,

277 (1956). It is not the function of a court to “presume that the Legislature intended something other than that expressed by way of the plain language.” O’Connell v. State, 171 N.J. 484, 488 (2002).

However, “[e]qually recognizable is the principle that ‘statutes are to be read sensibly rather than literally, and the controlling legislative intent is to be presumed as consonant to reason and good discretion.’” State v. McKeon, 385 N.J. Super. 559, 568 (App. Div. 2006) (quoting Schierstead v. City of Brigantine, 29 N.J. 220, 230 (1959)). “Additionally, where a literal reading of the statute leads to absurd consequences, the court must restrain the words and seek the true legislative intent.” Id. (internal quotations omitted). Stated another way, “where a literal rendering will lead to a result not in accord with the essential purpose and design of the act, the spirits of the law will control the letter.” Id. (quoting In re Eligibility of Certain Assistant Union County Prosecutors to Transfer to PFRS, 301 N.J. Super. 551, 558 (App. Div. 1997)). When construing a statute, the courts “should assume the Legislature intended a reasonable approach, and . . . should construe the statute to provide one. . .” Roman v. Sharper, 53 N.J. 338, 341 (1969).

The PTI Program was established as an alternative to prosecution of defendants who are good candidates for

rehabilitation and allow prosecutors to focus their resources more efficiently. State v. Leonardis, 71 N.J. 85 (1976). The New Jersey Supreme Court has repeatedly emphasized the role of PTI in augmenting the criminal justice system and enhancing a prosecutor's options. State v. Caliguiri, 158 N.J. 28, 36 (1999); State v. Brooks, 175 N.J. 215, 223 (2002) (holding the aim of PTI is to "provide prosecutors an alternate method to dispose of charges levied against qualified applicants consistent with the interest of the applicant and the overall interests of society and the criminal justice system.").

"Generally, the PTI eligibility criteria are intended to be flexible in their application, as 'individualized evaluation is at the heart of the program.'" McKeon, 385 N.J. Super. at 568 (quoting State v. Mickens, 236 N.J. Super. 272, 277 (App. Div. 1989)). The criteria must be applied with the aim of furthering the purposes of PTI, to "divert eligible defendants out of the criminal process" to the advantage of the defendant, society, and the criminal justice system; to deter future criminal behavior through the receipt of early rehabilitative services; and to relieve overburdened criminal calendars. McKeon, 385 N.J. Super. at 569 (quoting State v. DeMarco, 107 N.J. 562, 566-68 (1987)). A PTI determination requires that the prosecutor make an individualized assessment of the defendant considering his or

her amenability to correction and potential responsiveness to rehabilitation. State v. Roseman, 221 N.J. 611, 621-622 (2015).

At issue here are the disqualifiers found under the PTI statute and Court Rule and whether they continue to bar entry given the passage of the Marijuana Reform Act and the Directive. N.J.S.A. 2C:43-12(g) provides, in pertinent part:

Supervisory treatment may occur only once with respect to any defendant and any person who previously received supervisory treatment under section 27 of P.L.1970, c.226 (C.24:21-27), a conditional charge pursuant to N.J.S. 2C:36A-1, a conditional dismissal pursuant to P.L.2013, c.158 (C.2C:43-13.1 et al.), or was granted a dismissal due to successful participation in the Veterans Diversion Program pursuant to P.L.2017, c.42 (C.2C:43-23 et al.) shall not be eligible for supervisory treatment under this section.

Rule 3:28-1(c) (1), discussing prior diversions, similarly provides:

A person who has previously been enrolled in a program of pretrial intervention; previously been placed into supervisory treatment in New Jersey under the conditional discharge statute pursuant to N.J.S.A. 24:21-27 or N.J.S.A. 2C:36A-1, or the conditional dismissal statute, N.J.S.A. 2C:43-13.1 et seq.; previously was granted a dismissal due to successful participation in the Veterans Diversion Program pursuant to N.J.S.A. 2C:43-23 et seq.; or previously was enrolled in a diversionary program under the laws of any other state or the United States for a felony or indictable offense, shall be ineligible to apply for admission into pretrial intervention.

In previous interpretations of these provisions, even when a defendant has taken affirmative action to vacate the prior diversion, PTI participation has been denied. See State v.

O'Brien, 418 N.J. Super. 428 (App. Div. 2011) (finding that the timing of the Order vacating an earlier conditional discharge was a clear effort by defendant to subvert the PTI eligibility requirements and concluded that was not permitted.)

The Marijuana Reform Act, however, presents a distinguishing factor from the facts considered by the Court in O'Brien and envisioned by N.J.S.A. 2C:43-12(g) and Rule 3:28-1(c)(1). Here, the Legislature clearly intended to provide a "clean slate" for defendants previously charged with certain marijuana offenses. The legislative history is replete with indicia of the new law's purpose to "usher in a new era for social justice by doing away with the failed policy that criminalized the use of marijuana." Statement by Sen. Nicholas Scutari, Dec. 17, 2020 (<https://www.njsendems.org/scutari-statement-on-enactment-of-marijuana-legalization-law/>). As former Senate President Steve Sweeney announced at the passage of the Act: "The decriminalization law is the most sweeping measure of its kind in the country and is a groundbreaking step in our continued effort to make criminal justice reforms that are fairer and more effective [in order to] help reduce the racial disparities and social inequities that have long plagued our criminal justice system." Governor Press Release, Feb. 22, 2021 (<https://nj.gov/governor/news/news/562021/approved/20210222a.shtml>).

The legislative findings and declarations codified in the Act at N.J.S.A. 24:6I-31 to -56 explain:

- a. It is the intent of the people of New Jersey to adopt a new approach to our marijuana policies by controlling and legalizing a form of marijuana, to be referred to as cannabis, in a similar fashion to the regulation of alcohol for adults.
- e. Black New Jerseyans are nearly three times more likely to be arrested for marijuana possession than white New Jerseyans, despite similar usage rates:
  - o. New Jersey cannot afford to sacrifice public safety and individuals' civil rights by continuing its ineffective and wasteful past marijuana enforcement policies.

[N.J.S.A. 24:6I-32(2)].

More pointedly, the law provided criminal justice reforms with respect to possession, distribution and manufacturing smaller amounts of marijuana and hashish, specifically by "decriminalizing such offenses, requiring dismissal of pending charges, vacating current entries of guilty or placement in diversionary programs, and vacating current convictions for such offenses, as well as expunging past charges, arrests, and convictions for such offenses and providing for administrative action to expunge records associated with any such matters." Senate Judiciary Committee Statement to Senate Bill 21 (Dec. 14, 2020).

The Assembly Press Release from Dec. 17, 2020 declared:

With legalization comes an unprecedented opportunity for residents to clean the slate with expungement provisions and for communities to grow their economic base with businesses," said Assemblyman Jamel Holley (D-Union). "A key component of cannabis legalization is addressing social justice concerns. The fact that Black New Jerseyans are 3 or 4 times more likely to be arrested on cannabis charges has contributed to the disenfranchisement of black communities. We have the opportunity here to also right the wrongs in our society in regards to past criminal possession of cannabis. No matter where you stand in the legalized marijuana debate, there has been a clear understanding that minorities within our urban communities have been hit hardest in the so-called War on Drugs. During this entire campaign for legalization, there has been one united vocal stance: There was harm done in the past and it must be corrected.

Assembly Press Release, Dec. 17, 2020  
(<https://www.assemblydems.com/quijano-holley-timberlake-mcknight-danielsen-wimberly-bill-guiding-regulation-of-adult-use-cannabis-in-new-jersey-heads-to-governors-desk/>).

To accomplish this, one of the provisions of the Marijuana Reform Act was to expunge certain crimes and vacate certain open charges "by operation of law." N.J.S.A. 2C:52-6.1. The Marijuana Reform Act requires the expungement of a conviction or adjudication of delinquency solely for one of the offenses covered under the Act, or any disorderly persons offense or petty disorderly persons offense subject to conditional discharge pursuant to N.J.S.A. 2C:36A-1. The measure permitted the Administrative Director of the Courts, in consultation with the Attorney General to "take any administrative action as may be necessary to expeditiously effectuate the expungement of

records associated with any expunged matter.” Id. Accordingly, following enactment of the measure, defendants did not have to take any affirmative action to vacate their previous offenses; expungement was provided for automatically and expeditiously by operation of law. Id.

Against that background, the trial judge in this matter permitted defendant to apply to the PTI program, despite a prior qualifying marijuana conviction. In doing so, he interpreted N.J.S.A. 2C:52-6.1 as consistent with the Legislative “intent to restore those who had previously suffered any adverse consequence to the position they enjoyed before commission of an offense now deemed lawful.” (Pa30)<sup>1</sup>. The court below recognized “the Legislature did not merely legalize the possession of marijuana prospectively, but also sought to undo the harmful consequences suffered as a result of the former statute that criminalized the possession and use of marijuana.” The trial judge found N.J.S.A. 2C:52-6.1 and the language calling for all qualifying convictions to be “expunged by operation of law, and any remaining sentence, ongoing supervision, or unpaid court-ordered financial assessment . . . shall be vacated by operation of law.”

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<sup>1</sup> Pa = Plaintiff/Appellant’s Appendix

Put succinctly, the trial judge properly recognized that individuals who were previously convicted of marijuana offenses covered by the Marijuana Reform Act should not be automatically prohibited from admission into PTI on the sole account of the prior supervisory treatment program for a marijuana offense that is no longer a crime.

In this instance, the Legislature clearly intended to wipe away any record and any consequence of a prior marijuana offense. Its intent was to put individuals who previously faced such an offense in the same position they would have been in had the offense not been criminalized. Since entry into a diversionary program based on a marijuana offense was a consequence of a prior marijuana offense that the defendant in this case and other similarly situated defendants would not have faced were it not for the now-decriminalized marijuana offense, it is clear that the Legislature intended that the previous diversionary program service be wiped clean, just like the offense itself.

Unlike the defendant in O'Brien, defendants here seeking diversion following the automatic expungement of a prior marijuana offense under the Marijuana Reform Act do not come before this Court through the exploitation of ambiguities in the Court Rule and efforts at gamesmanship. See O'Brien, 418 N.J. Super. at 434. The NJSBA asks this Court to recognize the

important fundamental difference between a prior diversion which has been vacated as matter of law and a prior diversion for a crime that the people of New Jersey now no longer deem criminal. The Marijuana Reform Act did more than simply legalize marijuana going forward, it eviscerated the crime itself by erasing prior convictions and taking broad ameliorative efforts to restore individuals to the place they were prior to their charge.

Allowing consideration for entry into a diversion program for defendants who were previously diverted for conduct no longer deemed criminal from laws that had a discriminatory impact is in accord with the will of the Legislature and not in violation of the existing PTI statute. Even more, when read together, allowing such consideration furthers the legislative intent of both statutes by providing a clean slate and allowing those impacted by the now-reversed marijuana offenses an opportunity to participate in the full rehabilitative purposes of PTI.

