FILED, Clerk of the Appellate Division, November 09, 2021, **A-000198-21**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000198-21 (AM-000002-21)

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MOATAZ SHEIRA,

Defendant-Movant.

CRIMINAL ACTION

On Appeal from an Interlocutory Order of the Superior Court of New Jersey, Law Division, Morris County.

Sat Below:
Hon. Stephen J. Taylor, P.J.Cr.

BRIEF OF AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

Tess Borden (260892018)
Jeanne LoCicero
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION
P.O. Box 32159
Newark, New Jersey 07102
(973) 853-1733
tborden@aclu-nj.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS AND PROCEDURAL HISTORY 3

ARGUMENT 3

I. Barring a person from PTI because they previously received supervisory treatment for marijuana undermines the legislative intent and purpose of both the marijuana reform and PTI statutes. 3

A. With marijuana reform, the Legislature clearly intended to remove legal disabilities arising from low-level marijuana charges, specifically in the criminal legal system; its silence as to PTI eligibility must be interpreted in line with this intent. 5

i. Marijuana expungement is more expansive than previously enacted expungement provisions 5

ii. The Legislature specifically stated that marijuana records cannot be used for other legal system exclusions 9

B. The PTI statute's purpose is rehabilitation and "correction" of past criminal behavior; that purpose is not served by barring someone whose past behavior the Legislature has deemed non-criminal 14

C. O'Brien is cabined by "patent and gross abuse of discretion" review and does not decide this case 17

II. Reading the two statutes to create a per se bar to PTI for a person who previously received supervisory treatment for marijuana would yield an absurd result and constitute disparate treatment. 22

CONCLUSION 32

CASES

Goldberg v. Kelly, 397 U.S. 254 (1970)..........................25

In re Adoption of Child by W.P., 163 N.J. 158 (2000)............4

In re Expungement of the Arrest/Charge Records of T.B., 236 N.J. 262 (2019)...7, 8

In re Kollman, 210 N.J. 557 (2012)..............................8

Nw. Bergen Cnty. Utils. Auth. v. Donovan, 226 N.J. 432 (2016)...4

Saint Peter's Univ. Hosp. v. Lacy, 185 N.J. 1 (2005)....4, 22, 31

State in Int. of T.C., 454 N.J. Super. 189 (App. Div. 2018)....24

State v. Bender, 80 N.J. 84 (1979).............................19

State v. K.S., 220 N.J. 190 (2015).........................21, 22

State v. Kowitski, 145 N.J. Super. 237 (Law. Div. 1976)....25, 26

State v. Lebbing, 158 N.J. Super. 209 (Law Div. 1978)..........26

State v. Leonardis (II), 73 N.J. 360 (1977)........16, 19, 24, 26

State v. Leonardis (I), 71 N.J. 85 (1976).............23, 24, 25

State v. Maldonado, 314 N.J. Super. 539 (App. Div. 1998).......18

State v. McKeon, 385 N.J. Super. 559 (App. Div. 2006)......27, 28

State v. Nance, 228 N.J. 378 (2017).............................4

State v. Nolfi, 141 N.J. Super. 528 (Law. Div. 1976)...........24

State v. Nwobu, 139 N.J. 236 (1995)................19, 23, 24, 26

State v. O'Brien, 418 N.J. Super. 428 (App. Div. 2011).....passim

State v. Wallace, 146 N.J. 576 (1996)..........................18

State v. Watkins, 193 N.J. 507 (2008)..........................14

LEGISLATIVE MATERIALS

A. Appropriations Comm. Statement to A. 21 (Dec. 15, 2020)......7

A. Appropriations Comm. Statement to A. 5325 (May 20, 2019)....13

FILED, Clerk of the Appellate Division, November 09, 2021, **A-000198-21**

L. 2019, c. 270 13

L. 2015, c. 261, § 9 15

S. Judiciary Comm. Statement to S. 21 (Dec. 14, 2020) 7

Statement to A. Comm. Substitute for A. 1897 and 4269 (Dec. 17, 2020 7

RULES

R. 1:13-9 3

R. 3:28 26

STATUTES

N.J.S.A. 2A:162-17(b)(2)(l) 11

N.J.S.A. 2A:162-20(c)(1) 10

N.J.S.A. 2A:162-24(b) 12

N.J.S.A. 2A:162-25(c)(1)(b) 10, 11

N.J.S.A. 2C:35-5(b)(12)(b)(ii) 12

N.J.S.A. 2C:35-10(a)(3)(b)(ii) 12

N.J.S.A. 2C:35-14(m)(1) 8

N.J.S.A. 2C:35-14(m)(2) 8

N.J.S.A. 2C:35-14(m)(4) 8

N.J.S.A. 2C:35-23.1(b)(1) 6

N.J.S.A. 2C:43-12(a) 15

N.J.S.A. 2C:43-12(a)(1) 14, 27

N.J.S.A. 2C:43-12(b)(1) 15

N.J.S.A. 2C:43-12(e)(8)-(12) 21

N.J.S.A. 2C:45-1(a)(2) 12

N.J.S.A. 2C:45-3(a)(4) 12

N.J.S.A. 2C:52-5.4(a)(1) 8

N.J.S.A. 2C:52-5.4(a)(2) 8

N.J.S.A. 2C:52-6.1 .... 6, 11

N.J.S.A. 2C:52-7 8

N.J.S.A. 2C:52-8 8

N.J.S.A. 2C:52-14(b) 8

N.J.S.A. 2C:52-21 10

N.J.S.A. 2C:52-23.1 11

N.J.S.A. 2C:52-32 .... 9, 15

N.J.S.A. 24:6I-32(a) 5

N.J.S.A. 24:6I-32(e) 30

N.J.S.A. 24:6I-32(g) 17

N.J.S.A. 24:6I-32(i) 17

N.J.S.A. 24:6I-32(n) 5, 9

N.J.S.A. 24:6I-32(o) 5, 9, 29

N.J.S.A. 30:4-123.59(b)(1) 12

N.J.S.A. 30:4-123.60(b)(2) 12

N.J.S.A. 47:1A-1.1 12

OTHER AUTHORITIES

Administrative Directive #13-21, "Criminal Justice Reform" (June 30, 2021) 11

Atty. Gen. Directive 2021-1, Directive Governing Dismissals of Certain Pending Marijuana Charges (Feb. 22, 2021) 6

Notice to the Bar, New Jersey Supreme Court (July 1, 2021), https://www.njcourts.gov/notices/2021/n210702h.pdf 6

Press Release, N.J. Senate Democrats, Senate Advances Most Progressive Decriminalization Bill in the Country (Nov. 16, 2020) 30

FILED, Clerk of the Appellate Division, November 09, 2021, **A-000198-21**

Senator M. Teresa Ruiz & Assemblyman Benjie Wimberly, Opinion, Legislators: Marijuana decriminalization is long overdue, The Star-Ledger (Nov. 15, 2020), https://www.njsendems.org/legislators-marijuana-decriminalization-is-long-overdue-heres-what-the-bill-says-opinion/ 31

PRELIMINARY STATEMENT

This case asks the Court to harmonize the marijuana reform and pretrial intervention ("PTI") statutes, where the plain language of neither enactment explicitly addresses the present facts. To do so, the Court must examine the legislative intent and purpose of each enactment and seek to give effect to both.

The plain language of the PTI statute is unambiguous: as a general matter, a prior experience of supervisory treatment and conditional discharge is a bar to subsequent PTI admission. Likewise, the plain language of the marijuana reform statute is unambiguous: conditional discharges for low-level marijuana offenses are expunged by operation of law, and prior placements in supervisory treatment are vacated accordingly. Yet the Legislature has not expressly provided for what happens in the interplay of these two statutes: may a person still be eligible for PTI when the prior supervisory treatment was for marijuana, now that the Legislature has deemed low-level marijuana offenses non-criminal and has vacated and expunged all associated criminal records? The answer must be yes. It is the only answer that gives effect to the legislative intent and purpose of both statutes.

First, the Legislature clearly intended to remove legal disabilities and deprivations arising from marijuana charges, with effects even more far-reaching than typical expungement. Exclusion from PTI is clearly such a deprivation, so that allowing an

FILED, Clerk of the Appellate Division, November 09, 2021, **A-000198-21**

expunged and vacated marijuana record to serve as the basis of exclusion undermines the legislative intent of the marijuana reform statute. (Point I.A). Second, excluding a person from PTI because of a marijuana record also does not serve the PTI statute's purpose. That purpose is to rehabilitate and "correct" criminal behavior and to prevent a person from having a second try when they were not "amenable" to change the first time. This purpose is clearly not served in the case of behavior the Legislature now recognizes requires no correcting. (Point I.B). This Court's opinion in State v. O'Brien does not require otherwise. That case is not only distinguishable on its facts; it is severely cabined by "a patent and gross abuse of discretion" standard of review. Its holding is inapposite here. (Point I.C).

Finally, amicus joins Sheira in his argument that excluding from PTI people with an expunged conditional discharge for marijuana, but not those with an expunged marijuana conviction, yields an absurd result. Even more, this absurdity has a constitutional dimension: because there is no rational basis for classifying people with expunged conditional discharges differently from people with other kinds of marijuana records in the operation of the PTI program, such a classification runs afoul of equal protection. It also risks undermining the Legislature's racial justice goals of marijuana reform. (Point II).

For all these reasons, the trial court's order should be reversed and Sheira allowed admission into PTI, as both he and the Morris County Prosecutor argue.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus relies on the facts and procedural history set forth by Moataz Sheira in his September 1, 2021 brief to this Court, seeking leave to appeal the trial court's ruling that he was ineligible for pretrial intervention because of a prior low-level marijuana offense for which he received supervisory treatment and a subsequent conditional discharge. The Morris County Prosecutor's Office filed a brief in support of Sheira's position, also arguing he should not be barred from PTI on this basis. This Court granted leave and invited the Attorney General to appear as amicus curiae.

The ACLU-NJ filed a Motion for Leave to Appear as Amicus Curiae simultaneously with this brief. R. 1:13-9.

ARGUMENT

I. Barring a person from PTI because they previously received supervisory treatment for marijuana undermines the legislative intent and purpose of both the marijuana reform and PTI statutes.

This appeal requires the Court to assess the interplay between the marijuana reform and pretrial intervention statutes, where neither explicitly addresses the particular facts at issue. On its face, N.J.S.A. 2C:43-12(g)(1) is unambiguous: a prior experience of supervisory treatment renders a person ineligible for PTI a

second time. However, the statute does not plainly address whether the same result is required when that prior supervisory treatment, and the conditional discharge resulting from it, have been vacated and expunged by operation of law, as the marijuana reform statute demands.

"When, as here, two related statutes are relevant to the disposition of a matter, they 'should be read in pari materia and construed together as a unitary and harmonious whole.'" State v. Nance, 228 N.J. 378, 395 (2017) (quoting Nw. Bergen Cnty. Utils. Auth. v. Donovan, 226 N.J. 432, 444 (2016)). In such cases, "'the Court has an affirmative duty to reconcile them. . . . In other words, it is our obligation to make every effort to harmonize separate statutes, even if they are in apparent conflict, insofar as we are able to do so.'" Saint Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 14 (2005) (quoting In re Adoption of Child by W.P., 163 N.J. 158, 182 (2000) (Poritz, C.J., dissenting). To reconcile two statutes, Courts look to "give effect to both expressions of the lawmakers' will." Id.

An examination of "the lawmakers' will" – or legislative intent and purpose of the two statutes – requires that Sheira's prior supervisory treatment and subsequent conditional discharge for marijuana not serve as a bar to future PTI eligibility.

A. With marijuana reform, the Legislature clearly intended to remove legal disabilities arising from low-level marijuana charges, specifically in the criminal legal system; its silence as to PTI eligibility must be interpreted in line with this intent.

i. Marijuana expungement is more expansive than previously enacted expungement provisions.

New Jersey's marijuana reform laws go further in eliminating collateral consequences and legal disabilities than any previous expungement legislation. In passing marijuana decriminalization and cannabis legalization, the Legislature explained its action constituted a "new approach," N.J.S.A. 24:6I-32(a), motivated by a desire to undo the harm of prior enforcement policies:

> It is the intent of the people of New Jersey to adopt a new approach to our marijuana policies . . . A marijuana arrest in New Jersey can have a debilitating impact on a person's future, including consequences for one's job prospects, housing access, financial health, familial integrity, immigration status, and educational opportunities . . . 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(a), (n), (o).]

To effectuate this purpose, the Legislature called for expansive, comprehensive expungement and vacatur: all convictions, adjudications of delinquency, and conditional discharges for low-level marijuana offenses – including specifically those pursuant to N.J.S.2C:36A-1, at issue in this case – "shall 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." N.J.S.A. 2C:52-6.1. The Legislature also directed that any "placement in a diversionary program" for a low-level marijuana offense, whose "final disposition" was not yet entered, "shall be vacated by operation of law." N.J.S.A. 2C:35-23.1(b)(1).[1] Indeed, recognizing the legislative intent to remove all barriers associated with low-level marijuana charges, in a July 1, 2021 Notice to the Bar, the Supreme Court took this even further. In addition to the foregoing, the Court provided that "any associated active warrants for failure to appear or failure to pay shall be rescinded; [and] any associated court-ordered driver's license suspensions or revocations for failure to appear shall be rescinded." Notice to the Bar, New Jersey Supreme Court (July 1, 2021), https://www.njcourts.gov/notices/2021/n210702h.pdf.

This is not expungement in the typical course. The directive to perform expungement "by operation of law" is novel; that phrase does not appear anywhere else in the Code of Criminal Justice. As

[1] In other words, the Legislature made abundantly clear that any supervisory treatment for marijuana would be expunged and vacated by operation of law – whether that treatment was still ongoing through a diversionary program or had been finally disposed of through conditional discharge. See also Atty. Gen. Directive 2021-1, Directive Governing Dismissals of Certain Pending Marijuana Charges (Feb. 22, 2021) (stating all placements in diversionary programs for these offenses will be "vacat[ed] by operation of law," whether ongoing or resolved).

revealed by legislative history, the Legislature designed marijuana expungement to have expansive, unique effects. Committees of both the Senate and Assembly noted the significance of the bill's "provi[sions] for criminal justice reforms." S. Judiciary Comm. Statement to S. 21 (Dec. 14, 2020); A. Appropriations Comm. Statement to A. 21 (Dec. 15, 2020). In explaining an amendment to align committee substitutes, the Assembly emphasized that expungement "by operation of law" would not require a petition to a court; effectively, an offense would be "deemed not to have occurred" by virtue of being among the enumerated offenses. Statement to A. Comm. Substitute for A. 1897 and 4269 (Dec. 17, 2020). Simply put, there would be nothing special required of an individual case or individual person.

A comparative analysis of other expungement mechanisms in New Jersey reinforces the novelty and significance of marijuana expungement "by operation of law." While the expungement statute has "evolved over time and ha[s] steadily expanded opportunities for expungement[,]" In re Expungement of the Arrest/Charge Records of T.B., 236 N.J. 262, 267 (2019), until now, each mechanism for expungement under New Jersey law has retained some level of judicial discretion, a per se exclusion based on certain records, an opportunity for objection, and/or the possibility for restoration of records upon subsequent conviction. For example, historically, every adult expungement required a petition to the

court, was not available for certain convictions, and included an opportunity for the prosecution and other parties to object and argue the need for the continued availability of records. N.J.S.A. 2C:52-7, 52-8, 52-14(b); In re Kollman, 210 N.J. 557, 569–70 (2012).

Even with more expansive expungement mechanisms, restrictions remain. With drug court expungement, although entire records may be expunged, certain convictions still render a record ineligible for expungement, the prosecution can similarly argue the need for the availability of the records, and a subsequent conviction for any crime can result in the restoration of the full record and a bar on any future expungement. N.J.S.A. 2C:35-14(m)(1), (2), (4). The Supreme Court has called this last provision "a kicker." In re T.B., 236 N.J. at 270. Finally, while clean slate expungement now allows certain records to be expunged automatically after 10 years without petition, certain convictions still render the record ineligible, and the automated process is designed to restore a person's full criminal record if they are subsequently convicted of certain offenses. N.J.S.A. 2C:52-5.4(a)(1), (2). These caveats, exceptions, and "kickers" may be explained by the general expungement chapter's construction section:

> This chapter shall be construed with the primary objective of providing relief to the reformed offender who has led a life of rectitude and disassociated himself with unlawful activity, but not to create a system

> whereby persistent violators of the law or those who associate themselves with continuing criminal activity have a regular means of expunging their police and criminal records.
>
> [N.J.S.A. 2C:52-32.]

This objective is plainly inapplicable to marijuana expungement, which does not require a petition, leaves no room for discretionary grants or denials, has no opportunity for any party to argue the need for continued availability of records, and has no clause by which records can be restored. That is because, unlike previous expungement mechanisms, marijuana expungement is not about the individual case at all: it does not seek to reward the "reformed offender who has led a life of rectitude." Id. Instead, marijuana expungement "by operation of law" is concerned only with the decriminalized offense itself – with the purpose of removing the "debilitating impact" of New Jersey's "ineffective and wasteful past marijuana enforcement policies." N.J.S.A. 24:6I-32(n), (o).

ii. The Legislature specifically stated that marijuana records cannot be used for other legal system exclusions.

Although marijuana expungement "by operation of law" is located within Chapter 52 of the Code, the trial court erred in concluding that the Legislature intended it to operate within the limitations of previously enacted expungement provisions. As examined above, this is evidenced by the fact that there are no caveats or exceptions for marijuana expungement. Even more, while

expunged records under Chapter 52 generally may still be used in an array of criminal legal system contexts, the Legislature specifically stated that marijuana records cannot be used for other legal system exclusions. This legislative intent to single out and treat marijuana records uniquely is evidenced by comparing their use in a number of contexts.

For example, marijuana is treated uniquely in the pretrial release context. In general, "[e]xpunged records . . . of prior arrests or convictions shall be provided to any court, county prosecutor, the Probation Division of the Superior Court, the pretrial services agency, or the Attorney General . . . for use in conjunction with a bail hearing [or] pretrial release determination[.]" N.J.S.A. 2C:52-21. However, marijuana charges may not be considered by the Court in a detention decision, and the Public Safety Assessment ("PSA") may not take marijuana charges into account. N.J.S.A. 2A:162-20(c)(1) (providing that the Court shall not consider enumerated marijuana offenses in considering "the eligible defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings"); N.J.S.A. 2A:162-25(c)(1)(b) (providing the "approved risk assessment instrument shall not consider [enumerated marijuana] charge[s] as risk

factors relevant to the risk of failure to appear in court when required and the danger to the community while on pretrial release"). Significantly, the enumerated charges include marijuana offenses both prior to marijuana reform and after, for quantities that still remain illegal. Id.; see also Administrative Directive #13-21, "Criminal Justice Reform" (June 30, 2021) (describing same).

As another example, N.J.S.A. 2C:52-23.1 provides as a general matter, "Notwithstanding any provision in this act to the contrary, expunged or sealed records may be used to facilitate the State Treasurer's collection of any court-ordered financial assessments that remain due at the time an expungement or sealing of records is granted by the court." By contrast, for marijuana records, the Legislature explicitly provided that "unpaid court-ordered financial assessment" related to expunged offenses "shall be vacated by operation of law." N.J.S.A 2C:52-6.1.

In addition to these provisions regarding the effect of marijuana charges, the Legislature explicitly removed culpability associated with marijuana use in other contexts of the criminal legal system. Thus, for example, the Legislature provided that a prohibition on marijuana-related activities cannot be a condition of pretrial release, probation, or parole, cannot result in violation or revocation thereof, and cannot be the basis of ongoing monitoring. N.J.S.A. 2A:162-17(b)(2)(l) (release conditions);

N.J.S.A. 2A:162-24(b) (revocation of pretrial release); N.J.S.A. 2C:45-1(a)(2) (probation conditions); N.J.S.A. 2C:45-3(a)(4) (revocation of probation); N.J.S.A. 30:4-123.59(b)(1) (parole conditions); N.J.S.A. 30:4-123.60(b)(2) (revocation of parole). For higher-level possession and manufacturing offenses that remain illegal, the Legislature went so far as to provide:

> a person shall not be deprived of any legal or civil right, privilege, benefit, or opportunity provided pursuant to any law solely by reason of committing [those offenses] . . . including, but not limited to, the granting, renewal, forfeiture, or denial of a license, permit, or certification, qualification for and the receipt, alteration, continuation, or denial of any form of financial assistance, housing assistance, or other social services, rights of or custody by a biological parent, or adoptive or foster parent, or other legal guardian of a child or newborn infant, or pregnant woman, in any action or proceeding by the Division of Child Protection and Permanency in the Department of Children and Families, or qualification, approval, or disapproval to serve as a foster parent or other legal guardian.
>
> [N.J.S.A. 2C:35-10(a)(3)(b)(ii); N.J.S.A. 2C:35-5(b)(12)(b)(ii).]

Relatedly, the law now makes confidential and no longer a government record subject to public inspection "the portion of any criminal record concerning a person's detection, apprehension, arrest, detention, trial or disposition" for those marijuana offense still criminalized. N.J.S.A. 47:1A-1.1.

A May 2019 committee statement describes these and other contemplated legal system reforms, which then included allowing a person to retain the right to vote while on probation or parole for marijuana offenses. A. Appropriations Comm. Statement to A. 5325 (May 20, 2019). Of course, New Jersey subsequently restored the right to vote to people on probation and parole through separate enactment, L. 2019, c. 270, but that bill was not introduced until November 2019. Months before, the Legislature's desire to restore the franchise in marijuana cases specifically shows an effort to ensure people are not to deprived of rights and opportunities because of marijuana – even marijuana offenses that remain illegal.

In sum, these provisions demonstrate the legislative intent and purpose to remove the "debilitating impact" of marijuana records – including records reflecting placement in diversionary programs and conditional discharge – and to ensure no legal disabilities or deprivations arise from them. Indeed, the Legislature was so intent on this that it explicitly included protections not only for decriminalized, expunged and vacated charges, but even for those marijuana offenses that remain criminalized. The exclusion of people from PTI under N.J.S.A. 2C:43-12(g) based on prior supervisory treatment or conditional discharge for marijuana clearly constitutes a deprivation arising from a marijuana record. Accordingly, the trial judge's order

finding Sheira ineligible for PTI solely on that basis contravenes the legislative intent of the marijuana reform law.

B. The PTI statute's purpose is rehabilitation and "correction" of past criminal behavior; that purpose is not served by barring someone whose past behavior the Legislature has deemed non-criminal.

Finding Sheira ineligible for PTI on the basis of his prior supervisory treatment does not serve the PTI statute's purpose. In enacting a statewide PTI program, the Legislature explained that the "public policy" and "purpose" of that statute is to:

> Provide applicants, on an equal basis, with opportunities to avoid ordinary prosecution by receiving early rehabilitative services or supervision, when such services or supervision can reasonably be expected to deter future criminal behavior by an applicant, and when there is apparent causal connection between the offense charged and the rehabilitative or supervisory need, without which cause both the alleged offense and the need to prosecute might not have occurred[.]
>
> [N.J.S.A. 2C:43-12(a)(1).]

The Supreme Court has summarized this provision as follows: "The primary purpose of Pretrial Intervention (PTI) is to assist in the rehabilitation of worthy defendants, and, in the process, to spare them the rigors of the criminal justice system. Eligibility is broad and includes all defendants who demonstrate the will to effect necessary behavioral change such that society can have confidence that they will not engage in future criminality." State v. Watkins, 193 N.J. 507, 513 (2008). It follows that the

discretionary admission of participants is dependent on a person's will or amenability to change: "Admission of an applicant into a program of supervisory treatment shall be measured according to the applicant's amenability to correction, responsiveness to rehabilitation and the nature of the offense." N.J.S.A. 2C:43-12(b)(1) (emphasis added). Further, it is "the policy of the State of New Jersey that supervisory treatment should ordinarily be limited to persons who have not previously been convicted" and for whom "supervisory treatment would . . . [p]rovide deterrence of future criminal or disorderly behavior[.]" N.J.S.A. 2C:43-12(a).

In significant ways, the public policy, purpose, and eligibility provisions of the PTI statute echo those of the general expungement statute: in effect, PTI shares the expungement statute's "primary objective of providing relief to the [one-time] offender . . . but not to create a system whereby persistent violators of the law . . . have a regular means of [relief]."[2] N.J.S.A. 2C:52-32.

Against this backdrop, it makes sense that the Legislature would have included a limitation on the number of times a person can receive PTI relief, as reflected in N.J.S.A. 2C:43-12(g).

---

[2] The Construction section was amended in 2016 to replace "one-time offender" with "reformed offender," reflecting expansions of eligibility requirements that de-emphasized so-called minor brushes and one-time offenses and focused on rehabilitation instead. N.J.S.A. 2C:52-32 (amended L. 2015, c. 261, § 9, eff. Apr. 18, 2016).

Presumably, the rationale is that a person whose criminal behavior was not in fact corrected and rehabilitated through a first experience of supervisory treatment would not be given the opportunity of a second. See State v. O'Brien, 418 N.J. Super. 428, 437 (App. Div. 2011) (noting that the limitation in paragraph 12(g) is "[i]n furtherance of that public policy" outlined in paragraph 12(a)). Accordingly, paragraph 12(g) must be construed in line with the statute's purpose and public policy and should not be read to exclude someone when the Legislature has explicitly deemed their prior acts did not require correction and rehabilitation.

The Supreme Court has long recognized that PTI decisions should take into account the Legislature's judgment regarding the culpability of a person's criminal offense: "the program is specifically tailored to respect the Legislature's judgment [by] require[ing] authorities in charge of diversion to pay deference to the legislative decision involved in evaluating the seriousness of a given act. . . . [T]he guidelines follow the Legislature's lead in determining, generally, whether a class of offenders should be diverted into PTI." State v. Leonardis (II), 73 N.J. 360, 372 (1977) (considering the Court Rule and Guidelines that formed the basis of the legislative enactment of PTI).

Here, the Legislature's judgment as to the non-serious nature of marijuana is clear. It has decided to "control[ ] and

legaliz[e]" marijuana "in a similar fashion to alcohol" to "free up precious resources to allow our criminal justice system to focus on serious criminal activities and public safety issues." N.J.S.A. 24:6I-32(g). Meanwhile, for other drug use, it has declared, "New Jersey must enhance State-supported programming that provides appropriate, evidence-based treatment for those who suffer from the illness of drug addiction." N.J.S.A. 24:6I-32(i).

Nothing in the PTI statute suggests that the Legislature meant paragraph 12(g)'s limitation to include people whose offenses have been expunged, vacated, decriminalized and even legalized. Certainly, the statute's correction and rehabilitation purposes are not served by excluding Sheira from PTI for behavior that the Legislature has deemed does not require correction or rehabilitation at all. That must be true especially where, as here, a person now seeks supervisory treatment for a drug offense, given the Legislature's commitment to enhancing treatment opportunities.

C. O'Brien is cabined by "patent and gross abuse of discretion" review and does not decide this case.

This Court's opinion in State v. O'Brien does not require a different result. Read as a whole, that opinion should not be understood to require that any time a conditional discharge is vacated, it must necessarily still render a person ineligible for PTI under paragraph 12(g). As a preliminary matter, the facts in O'Brien are easily distinguishable. The Court's finding that

defendant had sought to "exploit" and "take advantage" of PTI by manipulating the system was critical to the result. 418 N.J. Super. at 434. Amicus agrees with Sheira's argument, Db10-12,[3] and because his examination of these distinctions is thorough, will not repeat that examination here. Yet, critically, not only are the facts distinguishable; the procedural posture and extraordinarily deferential standard of review in O'Brien significantly cabin the scope of its holding.

The Supreme Court has reiterated that PTI is an extension of prosecutorial discretion, and as such, a trial judge must generally defer to the prosecutor's decision to exclude a person unless it amounts to "a patent and gross abuse of discretion." State v. Wallace, 146 N.J. 576, 582 (1996). As the O'Brien Court itself noted: "'A patent and gross abuse of discretion is more than just an abuse of discretion as traditionally conceived; it is a prosecutorial decision that has gone so wide of the mark sought to be accomplished by PTI that fundamental fairness and justice require judicial intervention.'" 418 N.J. Super. at 434–35 (quoting State v. Maldonado, 314 N.J. Super. 539, 543 (App. Div. 1998). "For a prosecutor's abuse of discretion, 'to rise to

---

[3] "Db" refers to Defendant Sheira's September 1, 2021 brief to this Court, seeking leave to appeal. "Sb" refers to the State's September 10, 2021 brief in support of Defendant's position. "1T" refers to the transcript dated August 6, 2021, containing the trial court's oral opinion.

the level of patent and gross, it must further be shown that the prosecutorial error complained of will clearly subvert the goals underlying Pretrial Intervention.'" Id. (quoting State v. Bender, 80 N.J. 84, 93 (1979)); see also State v. Nwobu, 139 N.J. 236, 246 (1995) (noting scope of judicial review of prosecutor's denial of PTI admission is severely limited); Leonardis II, 73 N.J. at 384 (noting judicial review is to prevent the "most egregious examples of injustice and unfairness").

Unlike the present case, in O'Brien, the prosecutor had denied the defendant entry into PTI under paragraph 12(g) despite her vacated conditional discharge, such that the only question before the Court was whether the prosecutor's action was so arbitrary as to be "a patent and gross abuse of discretion." With this standard of extraordinary deference, the Court declined to find a patent and gross abuse of discretion where the prosecutor was unmoved by a vacated conditional discharge obtained for the precise purpose of performing an end-run around paragraph 12(g). The Court explained that this standard governed its analysis:

> The trial court found that defendant's prior placement into supervisory treatment under the conditional discharge statute was "an inappropriate factor for the prosecutor to consider," and that the prosecutor was seeking to penalize defendant for attempting to circumvent the bar on re-diversion. We disagree. The trial court did not apply the proper standard of review. The court did not articulate how the prosecutor's decision rose to the level of a "patent and gross abuse of

> discretion" by "clearly subvert[ing] the goals underlying Pretrial Intervention." . . . The goals underlying pretrial intervention — to deter future criminal conduct and to provide a one-time diversion from prosecution — are not subverted by the prosecutor's decision.
>
> [O'Brien, 418 N.J. Super. at 440–41 (emphasis added).]

This conclusion is premised on the limited judicial review available to the Court. It should not be taken to mean that every vacated conditional discharge, no matter the circumstance, must also result in denial. At a minimum, it should not decide this case, where the prosecutor does not seek to exclude the defendant and where, far from obtaining the vacatur to manipulate the Legislature's intent, Sheira is in the position his is because of a legislative enactment. Put otherwise, where the O'Brien defendant obtained a vacatur to subvert the Legislature's goal in enacting paragraph 12(g) – and then pled guilty to the originally diverted offense – here, the Legislature granted Sheira the expungement and vacatur by operation of law, and simultaneously decriminalized his originally diverted offense.[4]

[4] In the spirit of candor to the Court, amicus acknowledges that, earlier in the opinion, the Court suggests a generally applicable rule:

> we hold that where an individual is placed into supervisory treatment under the conditional discharge statute, N.J.S.A. 2C:36A-1, that person is prohibited from later entering into PTI, whether the conditional discharge is later vacated or not. Simply

While O'Brien is therefore distinguishable and even inapposite, State v. K.S. may be instructive. There, the Supreme Court reviewed the denial of PTI to a defendant in light of paragraph 12(e), which includes factors regarding a "history of and propensity for violence or a pattern of anti-social behavior." 220 N.J. 190, 201 (2015); see generally N.J.S.A. 2C:43-12(e)(8)–(12). The prosecutor had relied on the defendant's juvenile record as evidence of these factors. The Supreme Court rejected this: "Because the juvenile charges had been diverted and dismissed, the defendant had no record of penal 'violations.'. . . Use of prior

---

> stated, it is the fact that the individual previously received supervisory treatment which prohibits him or her from re-enrollment into another diversionary program under PTI. See State v. McKeon, 385 N.J. Super. 559, 571 App. Div. 2006) ("[T]he [l]egislative intent in enacting N.J.S.A. 2C:43–12g, [was] to provide a single opportunity for a defendant to enroll in a PTI program in New Jersey.").
>
> [O'Brien, 418 N.J. Super. at 438 (annotations in O'Brien).]

First, amicus submits that the reasoning justifying this holding clearly restricts it to "patent and gross abuse of discretion," and that the subsequent pages of the opinion clarify the limited scope of any resulting rule. Second, inasmuch as this broader holding is premised on a reading of McKeon, that reading is misplaced and the parenthetical misleading. As examined in Point II, McKeon was concerned with the question of whether an out-of-state program was also a disqualifier, not whether a person was permitted to enroll in more than one New Jersey program. Amicus encourages this Court to clarify that O'Brien does not announce a rule that a vacated conditional discharge must be a per se bar to PTI, or to limit O'Brien's holding accordingly.

FILED, Clerk of the Appellate Division, November 09, 2021, **A-000198-21**

dismissed charges alone as evidence of a history of and propensity for violence or a pattern of anti-social behavior . . . constitutes an impermissible inference of guilt." K.S., 220 N.J. at 202. Although this PTI denial was premised on a different provision, the Supreme Court's reasoning is more analogous to the facts of this case than is O'Brien. Just as juvenile charges cannot, without more, be used as statutory considerations where those charges have been diverted and dismissed, so too should a prior record of PTI not be used as a statutory bar when the Legislature has expunged and vacated that record by operation of law. This is especially so given the Court's obligation to "harmonize" the PTI and marijuana reform statutes, Saint Peter's Univ. Hosp., 185 N.J. at 14, and given the prosecutor's explicit support of PTI eligibility in this case.

II. Reading the two statutes to create a per se bar to PTI for a person who previously received supervisory treatment for marijuana would yield an absurd result and constitute disparate treatment.

In his brief, Sheira explains how barring someone with an expunged conditional discharge for marijuana from PTI, while someone with an expunged marijuana conviction may still access it, yields an absurd result. Db11-12. This absurdity also has a constitutional dimension. Because there is no rational basis to exclude people from PTI because they have an expunged conditional discharge for marijuana, while people with other marijuana records

are not excluded, such a classification is not only absurd: it also runs afoul of equal protection.

PTI is no stranger to concerns of disparate treatment and equal protection violations. In fact, the seminal cases – and the creation of a statewide system – are founded on equal protection principles. A brief history of PTI and the Supreme Court's jurisprudence reveals that the PTI system as we know it developed as a remedy to equal protection problems.

PTI was first established by Court Rule in 1970, without enabling legislation, and was limited by county, subject to the Supreme Court's approval of a program. Nwobu, 139 N.J. at 245. By 1976, the Court had approved twelve programs out of New Jersey's 21 counties. Id. Accordingly, New Jerseyans' access to and treatment in PTI programs depended wholly on geography. This resulted in obvious disparities, which ultimately required intervention from the courts.

In the seminal case State v. Leonardis, the Supreme Court expressed alarm: "within a state-administered system, such discrepancies may no longer be tolerated, absent a rational basis for such distinctions. At the very least, the differences which distinguish the various programs implicate considerations of equal protection, particularly in counties in which no PTI programs have been established." State v. Leonardis (I), 71 N.J. 85, 120-21 (1976). This concern led the Court to "conclude that there exists

FILED, Clerk of the Appellate Division, November 09, 2021, **A-000198-21**

a need for statewide implementation of the PTI program." Id. at 121; see also State in Interest of T.C., 454 N.J. Super. 189, 200–01 (App. Div. 2018) (describing same and recalling, "Our own Supreme Court has recognized the constitutional implications of disparate treatment of offenders in the adult criminal context."). The result was the establishment of formal, uniform guidelines for a statewide system, Leonardis II, 73 N.J. at 365, which were subsequently codified in 1979 by the Legislature, Nwobu, 139 N.J. at 245.

Just months before Leonardis I, the Superior Court, Law Division had applied a similar equal protection analysis, recognizing that "the fact that PTI may be termed a privilege and not a right will not defeat an equal protection argument." State v. Nolfi, 141 N.J. Super. 528, 536 (Law. Div. 1976). The Court concluded that because there was no rational basis justifying a classification based on residence, denying the defendant admission to PTI because of his residence violated equal protection. Id. at 536–37 (also finding a violation of the Privileges and Immunities Clause of U.S. Const., art. IV, § 2, cl. 1). And in the months just after Leonardis I, another Law Division judge reasoned:

> The mere fact that there is no inherent substantive right to pretrial intervention does not withdraw it from the ambit of equal protection scrutiny. The role of equal protection in our judicial system is not to create new substantive rights, but to ensure that those individuals situated similarly are

> treated similarly by the State. PTI is an entitlement to those eligible individuals and cannot be arbitrarily withdrawn.
>
> [State v. Kowitski, 145 N.J. Super. 237, 241 (Law. Div. 1976) (citing Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Leonardis I, 71 N.J. at 116).]

In Kowitski, the defendant lived just outside Middlesex County. He was arrested in Somerset, which did not have a PTI program, and had tried but been denied access to Middlesex's program because his crime did not occur within that county. The Law Division found that depriving the defendant of a PTI opportunity would violate equal protection: "This court cannot conceive of a rational articulable justification for determining PTI eligibility for defendants accused of committing state crimes on the basis of where within New Jersey the crime was committed. An individual is no less amenable to rehabilitation, the dominant purpose behind PTI, because the situs of the crime was in Somerset County rather than Middlesex." Id. at 242. To cure the constitutional deficiency, the court ordered the Somerset County Probation Department to establish a PTI program, and to remove the defendant's case from the trial list until then. The court acknowledged it was "fully aware of the impact of today's decision on the practical problems concerning the present criminal trial calendar and the immediate implementation of a PTI program where none exists.

Nevertheless, when practical problems interfere with constitutional rights, the Constitution must prevail." Id. at 246.

When the Supreme Court decided the second Leonardis case the following year, it reiterated that classifications regarding PTI opportunity must be subject to equal protection scrutiny:

> It has been asserted that the defendant who is denied diversion will suffer no grievous loss of liberty, but would merely be subject to the same trial process which he would have undergone if PTI had not been adopted. This argument misses the point. Once the government undertakes to act, it is obligated under our Constitution not to do so in an arbitrary or capricious manner. . . . [T]hough the Legislature is not obligated to pass a particular piece of legislation, once it acts it is bound by the constitutional proscription against arbitrariness.
>
> [Leonardis II, 73 N.J. at 378 n.8 (citations omitted).][5]

Two years after Leonardis II, the Legislature codified the Pretrial Intervention Program by enacting N.J.S.A. 2C:43-12, largely adopting procedures established by Rule 3:28 and the Supreme Court's guidelines. Nwobu, 139 N.J. at 245. The Legislature was presumably aware of the Supreme Court's recent equal protection

---

[5] See also R. 3:28 ("Due process principles apply to pre-trial intervention program termination hearings, inasmuch as loss of diversionary status entails loss of conditional liberty attendant upon participation in program and loss of freedom from prosecution, as well as imposing a possibility of adjudication of guilt and stigma of conviction and possibility of an unfavorable presentence report.") (summarizing State v. Lebbing, 158 N.J. Super. 209 (Law Div. 1978)).

jurisprudence interpreting the PTI rule and guidelines it was codifying. Perhaps as proof, the Legislature explicitly stated that the public policy of the PTI program was to afford opportunity "on an equal basis." N.J.S.A. 2C:43-12(a)(1).

More recently, this Court has considered the implications of disparate treatment in PTI eligibility. In State v. McKeon, 385 N.J. Super. 559 (App. Div. 2006), the Court considered paragraph 12(g) specifically. The Court declined to find the defendant ineligible under that paragraph on the basis of a prior PTI experience in another state for a DUI offense. Preliminarily, the Court determined paragraph 12(g) was intended to be limited to New Jersey diversionary programs only. But the Court went further to opine that, even if the statute was meant to apply to out-of-state diversionary programs, "the bar would only apply if the act charged in the other state constitutes a crime under the laws of New Jersey. To construe the statute otherwise, could result in disparate treatment between defendants charged with similar acts." Id. at 572–73. Because a DUI offense was not a crime in New Jersey, the Court accepted defendant's argument that the out-of-state diversion should not count as a bar under 12(g). In so concluding, the Court gestured to the PTI statute's "equal basis" justification:

> To deny defendant admission to PTI because his prior DUI conviction occurred in Pennsylvania, where the offense is considered a crime or

FILED, Clerk of the Appellate Division, November 09, 2021, **A-000198-21**

> misdemeanor, subjects defendant to the vagaries of classification of behavior by another state and to disparate treatment, when compared to a defendant charged with DWI in New Jersey, contrary to N.J.S.A. 2C:43-12a(1). Accord Caliguiri, 158 N.J. at 36, holding that "any defendant charged with a crime [under the New Jersey Code of Criminal Justice] is eligible for PTI."). See also N.J.S.A. 2C:43-12a(1) (stating that PTI should "[p]rovid[e] applicants, on an equal basis, with opportunities to avoid ordinary prosecution by receiving early rehabilitative services or supervision.").
>
> [Id. at 573 (annotations in McKeon).]

Thus the McKeon Court recognized that, even if a person had a prior experience of diversion, if that was diversion was for an offense that did not constitute a crime in New Jersey, that person should not be excluded from PTI under paragraph 12(g) – and such an exclusion would subject a person to disparate treatment. If the defendant in McKeon should not have been excluded from PTI where his prior diversion was for a disorderly persons offense not a crime in New Jersey, certainly Sheira should not be excluded from PTI where his prior diversion was for an offense that is now not criminalized in New Jersey at all.

The foregoing line of cases demonstrates that this Court cannot turn a blind eye to the equal protection implications of the trial court's decision. If that decision is allowed to stand, it will create a classification of people with prior supervisory treatment experiences for marijuana who are treated differently

from anyone else with a marijuana record. Such a classification would mean that the only people whose marijuana records would now bar them from PTI are those who did the work of completing a supervisory treatment program. If the marijuana reform statute is read this way, New Jersey would have removed the consequences of marijuana records except for people who had undergone supervisory treatment. For those people, there would remain the lifelong consequence of not being able to access PTI.

This is not only an absurd reading of the Legislature's enactment, Db11-12, it also constitutes arbitrary state action. There is no rational basis to save such a classification. Contrary to what the trial judge suggested, any "benefit" the person received from the prior PTI experience, 1T9:21–10:9, is set off by the Legislature's recognition that criminalization in the first place was "ineffective and wasteful," N.J.S.A. 24:6I-32(o). Indeed, whereas the Legislature has expressed a purpose of enabling access to more treatment programs, this classification punishes people who completed a supervisory treatment program for marijuana and prevents them from accessing it for additional charges, including those that potentially arise from drug use.[6]

---

[6] According to the Morris County Prosecutor, Sheira is charged with possession of heroin and cocaine and was arrested as part of the county's Operation Helping Hand, "created to combat opioid addiction by linking drug-addicted individuals arrested on narcotics charges with the treatment and recovery services they need." Sb1–2 & n.2.

Finally, the classification that this Court would endorse if it affirms the trial court's decision is likely to disproportionately burden Black New Jerseyans and other communities of color targeted by New Jersey's past marijuana law enforcement policies. In enacting marijuana reform, the Legislature emphasized these racial disparities. Indeed, the legislative findings and declarations note that "Black New Jerseyans are nearly three times more likely to be arrested for marijuana possession than white New Jerseyans, despite similar usage rates." N.J.S.A. 24:6I-32(e).

The bill sponsors' statements reiterate that racial justice was an animating principle behind the Legislature's marijuana reforms. For example, on the day the Senate passed the decriminalization bill, Senator Cunningham stated, "For the last fifty years, marijuana criminalization has been used as a tool to propel mass incarceration. . . . It has done immeasurable harm to Black and Brown communities around the country, and today we begin to right the ship here in New Jersey." Press Release, N.J. Senate Democrats, Senate Advances Most Progressive Decriminalization Bill in the Country (Nov. 16, 2020). Also emphasizing the legacy of past enforcement policies and racial disparities, Senator Ruiz and Assemblyman Wimberly wrote:

> For too many young men and women of color, often from impoverished areas, an arrest on a simple marijuana charge can be a life-changing

> event and not one for the better. . . As the chief sponsors of this legislation, we see these and other reforms as steps that need to be taken start to address lingering disparities in New Jersey's criminal and civil justice system, that have for decades caused undue pain and distress in our minority communities.
>
> The facts, the data and the damage are clear – the need for policy overhaul is long overdue. While this legislation will not overnight heal those families and communities scarred by years of biased enforcement and discriminatory penalties against people of color, it is a positive first step, an earnest attempt to right our wrongs centered on racial and social justice.
>
> [Senator M. Teresa Ruiz & Assemblyman Benjie Wimberly, Opinion, Legislators: Marijuana decriminalization is long overdue, The Star-Ledger (Nov. 15, 2020).]

A classification singling out the marijuana records of those who have received conditional discharges is misguided and arbitrary. It undermines the Legislature's intent and purpose as expressed in both the PTI and marijuana reform statutes, including its explicit, important commitment to racial justice in beginning to undo decades of harm to communities of color. This Court has "an affirmative duty to reconcile" and "harmonize" the PTI and marijuana reform statutes in this case. Saint Peter's Univ. Hosp., 185 N.J. at 14. Accepting both Sheira and the prosecutor's recommendation to admit him into PTI does just that.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's order denying Sheira admission to PTI, as urged by both defendant and the State.

Respectfully submitted,

Tess Borden (260892018)
Jeanne LoCicero
AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY FOUNDATION
P.O. Box 32159
Newark, New Jersey 07102
(973) 853-1733
tborden@aclu-nj.org

Dated: November 9, 2021

Counsel for Amicus Curiae