IN THE COURT OF APPEALS
OF THE STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, ex rel. SHEILA SULLIVAN POLK, Yavapai County Attorney, Petitioner, v. THE HONORABLE CELÉ HANCOCK, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of YAVAPAI, Respondent Judge, JENNIFER LEE FERRELL, Real Party In Interest.	)	Arizona Court of Appeals No. 1 CA-SA 13-0292 Department E Yavapai County Superior Court No. P1300CR201300261

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF REAL PARTY IN INTEREST

David J. Euchner, No. 021768
David.Euchner@pima.gov
Sarah L. Mayhew, No. 029048
Sarah.Mayhew@pima.gov
Pima County Public Defender's Office
33 N. Stone Ave., 21st Floor
Tucson, Arizona 85701
(520) 724-6800

Joel M. Chorny, No. 028022
Joel.Chorny@pima.gov
Pima County Legal Defender's Office
32 N. Stone Ave., 8th Floor
Tucson, Arizona 85701
(520) 724-5775

Attorneys for **Arizona Attorneys for Criminal Justice**

TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES iii

INTRODUCTION 1

INTERESTS OF *AMICUS CURIAE* 2

ARGUMENT 3

I. Under Arizona's Separation of Powers Doctrine, Supervision of Probationers is Wholly within the Purview of the Superior Court 3

A. The YCAO's Attempts to Interfere with the Court's Supervision of Probationers Violates Arizona's Separation of Powers Doctrine 3

1. By Placing a Provision in its Plea Agreements Barring Probationers from Participating in Lawful Conduct and Receiving the Benefits Described in the AMMA, YCAO is Controlling Probation Supervision, which is a Power that Lies Solely with the Judiciary 6

2. YCAO's Placement of Its Anti-Medical Marijuana Provision in Its Pleas is a Coercive Influence on the Judiciary's Function 9

3. The Objective of the YCAO's Placement of Its Anti-Medical Marijuana Provision in Its Pleas is to Undermine the Will of the People of Arizona, Who Collectively Voted to Prohibit Prosecuting Agencies from Exercising Such Authority 10

4. The Practical Consequence of the YCAO's Placement of Its Anti-Medical Marijuana Provision in Its Pleas is to Legislate an Amendment to the AMMA for Yavapai County that Draws a Distinction between Yavapai Probationers and the Rest of Arizona's Residents, in Defiance of the AMMA 11

B. As a Matter of Public Policy, Trial Judges are Best Situated to Make Decisions on Case-by-Case Basis about What Conditions of Probation are Most Suitable to Rehabilitation 12

II. YCAO's Attempt to Turn This Case into an Executive-Branch Referendum on Medical Marijuana is Improper, Illegal, and Unsupported 17

A. YCAO May Not Override a Voter-Approved Initiative. 17

B. This Court Has Already Decided that the State Government May Not Ignore the AMMA Based on Federal Law 19

C. The AMMA Passes the Rational Basis Test, and YCAO's Attempts to Resolve a Political Question in the Courts Must be Rebuffed 22

CONCLUSION 25

TABLE OF CASES AND AUTHORITIES

CASES PAGES

Cave Creek Unified School Dist. v. Ducey, 233 Ariz. 1, 308 P.3d 1152 (2013)........ 18-19

Broomfield v. Maricopa County, 112 Ariz. 565, 544 P.2d 1080 (1975)........9

Forty-Seventh Legislature v. Napolitano, 213 Ariz. 482, 143 P.3d 1023 (2006)........23

J.W. Hancock Enters. v. Registrar of Contractors, 142 Ariz. 400, 690 P.2d 119 (App. 1984)........4-6, 9-11

Kromko v. Ariz. Bd. of Regents, 216 Ariz. 190, 165 P.3d 168 (2007)........23

Mecham v. Gordon, 156 Ariz. 297, 751 P.2d 957 (1988)........3, 5

State v. Berger, 209 Ariz. 386, 103 P.3d 298 (App. 2004)........22

State v. Christopher, 133 Ariz. 508, 652 P.2d 1031 (1982)........12

State v. City Court of the City of Tucson, 150 Ariz. 99, 722 P.2d 267 (1986)........24

State v. Cummings, 120 Ariz. 69, 583 P.2d 1389 (App. 1978)........13

State v. Cummings, 148 Ariz. 588, 716 P.2d 45 (App. 1985)........6

State v. Dykes, 163 Ariz. 581, 789 P.2d 1082 (App. 1990)........ 7-8

State v. Frey, 141 Ariz. 321, 686 P.2d 1291 (App. 1984)........6

State v. Jones, 124 Ariz. 24, 601 P.2d 1060 (1979)........8

State v. Jones, 142 Ariz. 302, 689 P.2d 561 (App. 1984)........7

State v. Hennessey, 13 Ariz.App. 546, 479 P.2d 194 (1971)........12

State v. Hernandez, 231 Ariz. 353, 295 P.3d 451 (App. 2013)........ 13-14

State v. Lyons, 167 Ariz. 15, 804 P.2d 744 (1990) 6, 8

State v. McPherson, 228 Ariz. 557, 269 P.3d 1181 (App. 2012) 22

State v. Montgomery, 115 Ariz. 583, 566 P.2d 1329 (1977) 12-13

State v. Murphy, 113 Ariz. 416, 555 P.2d 1110 (1976) 7

State v. Oatley, 174 Ariz. 124, 847 P.2d 625 (App. 1993) 14

State v. Okun, 231 Ariz. 462, 296 P.3d 998 (App. 2013) 19-21

State v. Pakula, 113 Ariz. 122, 547 P.2d 476 (1976) 6, 8

State v. Patel, 160 Ariz. 86, 770 P.2d 390 (App. 1989) 7, 14

State v. Prentiss, 163 Ariz. 81, 786 P.2d 932 (1989) 4-7

State v. Ramsey, 171 Ariz. 409, 831 P.2d 408 (App. 1992) 7-8

State v. Smith, 112 Ariz. 416, 542 P.2d 1115 (1975) 13

State v. Stellwagen, 160 Ariz. 615, 775 P.2d 543 (App. 1989) 6

State ex rel Woods v. Block, 189 Ariz. 269 (1997) 3, 6, 9

ARIZONA REVISED STATUTES

A.R.S. § 13-901 .... 6, 16

A.R.S. § 19-102 18

A.R.S. § 36-2801 15

A.R.S. § 36-2802 16

ARIZONA RULES OF CRIMINAL PROCEDURE

Rule 10.2 24

Rule 17.4 .... 14, 16

Rule 27 6

Rule 27.1 12

Rule 27.3 .... 14, 16

Rule 27.4 14-15

ARIZONA CONSTITUTION

art. II, § 1 18

art. II, § 2 18

art. III 3, 5, 11

art. IV, § 1 18

OTHER AUTHORITIES

1 F. Cooper, *State Administrative Law* 15-16 (1965) 4

Proposition 203,
http://azsos.gov/election/2010/info/PubPamphlet/english/prop203.pdf
(last visited November 18, 2013) 19

INTRODUCTION

This case raises the questions of whether the prosecuting agency in a criminal case may dictate every last term of the conditions of probation to the Superior Court, when the Court places a criminal defendant on probation and then has sole responsibility for the supervision of that probationer. Here, the Yavapai County Attorney ("YCAO") has taken a political position that marijuana is a harmful drug, and has attempted to bootstrap that political posturing into a demand on the Superior Court that probationers must be prohibited from using medical marijuana, state law to the contrary notwithstanding. Substantial, well-settled case law prevents YCAO both from enforcing this term of its standard plea agreements and from withdrawing from plea agreements based on the Superior Court's refusal to enforce it. Some of that law is cited in YCAO's petition for special action.

Amicus curiae Arizona Attorneys for Criminal Justice ("AACJ") asks this Court to accept jurisdiction over this special action, deny the State's request for relief, and publish an opinion holding that the supervision of probationers is properly a function of the judiciary and that YCAO may not enforce a term of the plea agreement that it had every reason to know was unenforceable. Publication is particularly important in this case because the issue of the authority of trial courts to permit probationers to use medical marijuana pursuant to the Arizona Medical Marijuana Act ("AMMA") is frequently recurring statewide.

INTERESTS OF *AMICUS CURIAE*

Amicus curiae Arizona Attorneys for Criminal Justice is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Amicus offer this brief in support of the Real Party In Interest because the issue presented is critical to the right of criminal defendants to a fair sentencing hearing with a judge who exercises discretion based on the circumstances of the individual case without threats to the independence of the judiciary. In attempting to enforce an arbitrary provision in a plea agreement related to conditions of probation, which is driven exclusively by politics and not at all by any concern for rehabilitation, the YCAO has grossly overstepped its bounds and its attempts to usurp the judicial function of supervising probationers must be protected. The YCAO's arguments below, modified into insinuations before this Court, improperly seek resolution of political questions in the courts. The case presented here is case in point: the Respondent Judge, after carefully considering all of the briefing and the arguments of the parties, exercised her discretion in a manner that is wholly consistent with state law. That discretion should be left undisturbed.

ARGUMENT

I. Under Arizona's Separation of Powers Doctrine, Supervision of Probationers is Wholly within the Purview of the Superior Court.

A. The YCAO's Attempts to Interfere with the Court's Supervision of Probationers Violates Arizona's Separation of Powers Doctrine.

The United States has made a "unique contribution to the theory of ordered democracy – the concept of dividing governmental power between three separate branches of government, each independent of the other, but each requiring the cooperation of the other to attain the objects of enlightened government." *Mecham v. Gordon*, 156 Ariz. 297, 300, 751 P.2d 957, 960 (1988).

"The Arizona Constitution, written after generations of experience and experimentation under the United States Constitution, spells out the separation of powers doctrine even more specifically than does the national document." *State ex rel. Woods v. Block*, 189 Ariz. 269, 275, 942 P.2d 428, 434 (1997). Article III of the Arizona Constitution contains a clause specifically dealing with the separation of powers that precludes any branch of government from exercising the powers of either of the other two branches:

> The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

As this Court explained in *J.W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors*, 142 Ariz. 400, 690 P.2d 119 (App. 1984), "The exact origin of the separation of powers theory is disputed. [However,] 'The oracle who is always consulted "on the subject of separation of governmental powers" is the celebrated Montesquieu.'" *Id*. at 404, 690 P.2d at 123 (citing Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 Rutgers L. Rev. 449, 458 (1958), quoting *The Federalist*, No. 47 (Madison)). Montesquieu stated,

> When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, *there is no liberty, if the power of judging be not separated from the legislative and executive powers*. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. *Were it joined to the executive power, the judge might behave with all the violence of an oppressor.*

1 F. Cooper, *State Administrative Law* 15-16 (1965) (emphasis added) (quoting XI *L'Esprit des Lois* 215-17 (1750)). Heeding Montesquieu's warning, the mandate of the doctrine of separation of powers is to "protect one branch against the overreaching of any other branch." *State v. Prentiss*, 163 Ariz. 81, 84-85, 786 P.2d 932, 935-36 (1990) (citing *Hustedt v. Workers' Compensation Appeals Bd.*, 636 P.2d 1139, 1143 (Cal. 1981)).

There are at least two views that may be advanced concerning the Arizona Constitution and the separation of powers provision:

> One view is that the provision performs two functions: allocation of power among several (three) components of government which compete for power and, secondly, the protection of individual liberties. The second view is simply that article 3 is part of an overall constitutional scheme to protect individual rights and that the "power allocation" is but a part of that overall objective.

Prentiss, 163 Ariz. at 84, 786 P.2d at 935. Arizona follows the second view. *Id.* (citing *Mecham*). "Nowhere in the United States is this system of structured liberty more explicitly and firmly expressed than in Arizona." *Mecham*, 156 Ariz. at 300, 751 P.2d at 960. Therefore, any possible encroachment by one branch of government on the power or powers of another branch must be skeptically and critically scrutinized.

This Court established a four-part test in *J.W. Hancock Enterprises* to determine if one branch of government "is exercising 'the powers properly belonging to either of the others.'" 142 Ariz. at 405-06, 690 P.2d at 124-25 (quoting Ariz. Const., art. III). In analyzing a possible intrusion by one branch of government into the sphere of power of another branch, a court is to evaluate the following factors: (1) the essential nature of the power exercised; (2) whether the attempted exercise of power is a cooperative venture or a coercive influence; (3) the objective of the exercise; and (4) the practical consequences of the action, if

available. *Block*, 189 Ariz. at 276-77, 942 P.2d at 435-36 (citing *J.W. Hancock Enterprises*, 142 Ariz. at 405-06, 690 P.2d at 124-25).

1. **By Placing a Provision in its Plea Agreements Barring Probationers from Participating in Lawful Conduct and Receiving the Benefits Described in the AMMA, YCAO is Controlling Probation Supervision, which is a Power that Lies Solely with the Judiciary.**

Although control of the sentencing process is balanced among the legislative, executive, and judicial branches of government, *Prentiss*, 163 Ariz. at 84, 786 P.2d at 935 (citing *State v. Pakula*, 113 Ariz. 122, 125, 547 P.2d 476, 479 (1976)), our Supreme Court has held as a matter of course that ***probation is purely a judicial function***. *State v. Lyons*, 167 Ariz. 15, 17 n.1, 804 P.2d 744, 746 n.1 (1990). "The power to make decisions regarding probation … is solidly within the scope of the judiciary's authority." *Id*. at 16, 804 P.2d at 745; *see also* A.R.S. § 13-901, *et seq*.; Ariz. R. Crim. P. 27; *State v. Stellwagen*, 160 Ariz. 615, 616, 775 P.2d 543, 544 (App. 1989) ("the imposition of probation is clearly within the judiciary's authority").

The executive branch has the power to decide what criminal charges to file, *State v. Frey*, 141 Ariz. 321, 324, 686 P.2d 1291, 1294 (App. 1984); the power to seek enhanced punishment, *State v. Cummings*, 148 Ariz. 588, 591, 716 P.2d 45, 48 (App. 1985); and the power to decide what evidence of aggravating

circumstances to offer at sentencing. *State v. Murphy*, 113 Ariz. 416, 418, 555 P.2d 1110, 1112 (1976). It is the judicial department, however that has "the integral function of resolving criminal actions: 'when the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the disposition of that charge becomes a judicial responsibility.'" *State v. Ramsey*, 171 Ariz. 409, 413, 831 P.2d 408, 412 (App. 1992) (quoting *State v. Dykes*, 163 Ariz. 581, 583, 789 P.2d 1082, 1084 (App. 1990)). It is the function of the judiciary to carry out its duty to impartially administer justice. *Prentiss*, 163 Ariz. at 85, 786 P.2d at 936. Neither the legislature nor the executive can restrict the judiciary from deciding what a sentence should be. *Id*. Once the prosecutor has pursued and obtained a conviction, the executive role in the resolution of the criminal action is limited constitutionally. *Murphy*, 113 Ariz. at 418, 555 P.2d at 1112 (prosecutor may decide whether to present aggravating circumstances at sentencing); *State v. Patel*, 160 Ariz. 86, 770 P.2d 390 (App. 1989) (court, not prosecutor, controls the length of probation).

Although the legislature may prescribe a range of punishment, it may not empower the prosecutor to veto a court's resolution of a criminal matter within that range. *Ramsey*, 171 Ariz. at 414, 831 P.2d at 413 (citing *State v. Jones*, 142 Ariz. 302, 689 P.2d 561 (App. 1984)) (prosecutor's discretion to make or withhold a recommendation of alternative sentencing unconstitutionally encroached on the judicial function); *Prentiss*, 163 Ariz. at 85, 786 P.2d at 936 (conditioning

mitigation upon the prosecutor "alleging" certain statutory factors unconstitutionally encroached upon the sentencing discretion of the judiciary); *Dykes*, 163 Ariz. at 584, 789 P.2d at 1085 (requiring motion by prosecutor before judge could apply lesser sentence unconstitutionally violates separation of powers doctrine). The judiciary alone has the power to resolve criminal matters. *Ramsey*, 171 Ariz. at 414, 831 P.2d at 413. The separation of the powers of the judiciary concerning sentencing from the powers of the executive is so clearly demarcated that our Supreme Court has held that "it is impermissible for a person to be on probation and under control of the court and at the same time be in prison or on parole and under the control of the executive." *State v. Jones*, 124 Ariz. 24, 26, 601 P.2d 1060, 1062 (1979). This is in part because "the efforts of the executive department in a rehabilitation effort may not be in harmony with the objectives of the court's probation department." *Pakula*, 113 Ariz. at 125, 547 P.2d at 479.

Only the judiciary may dictate the terms of probation. *Lyons*, 167 Ariz. at 17, 804 P.2d at 746 ("The judicial branch alone determines whether a violation of a condition of probation occurred. When the court determines that such a violation has occurred, it may revoke, modify, or continue the probation."). Allowing the executive to proscribe legal behavior for a probationer where the judiciary would choose not to is anathema to our system of justice.

The importance of protecting the powers of the judiciary from the other two

branches of government can hardly be overstated. It is a "necessary corollary of our tripartite form of government, 'that the courts must be independent, unfettered, and free from directives, influence or interference from any extraneous source.'" *Broomfield v. Maricopa County*, 112 Ariz. 565, 567, 544 P.2d 1080, 1082 (1975) (quoting *Smith v. Miller*, 384 P.2d 738, 741 (Colo. 1963)). YCAO is unlawfully attempting to control probation, which is clearly a judicial function that must be protected and preserved exclusively for the judiciary.

2. YCAO's Placement of Its Anti-Medical Marijuana Provision in Its Pleas is a Coercive Influence on the Judiciary's Function.

Despite the clear language of the AMMA, the YCAO includes the directive to the Superior Court at issue here in "every plea offer made by the County Attorney's Office." *Petition* at 6 n.3. The YCAO does this without regard for the objectives of the Yavapai Adult Probation Department and without regard for the need to individually tailor medical treatment and leave medical decisions to trained medical professionals.

The Court in *Block* described the second prong of the *Hancock* test as a consideration of "whether the [other branch's] involvement is a cooperative venture or a coercive influence." 189 Ariz. at 277, 942 P.2d at 436 (citing *J.W. Hancock Enterprises,* 142 Ariz. at 405, 690 P.2d at 124). Nothing about the way the YCAO has chosen to proceed in regards to medical marijuana and the AMMA

can be construed as a "cooperative venture" with the judiciary's efforts to supervise and rehabilitate probationers. The YCAO is intent on removing from the judiciary and its representatives any semblance of control over the decision of whether or not a probationer can avail him or herself of the protections and benefits of the AMMA. This violates article III of the Arizona Constitution.

3. The Objective of the YCAO's Placement of Its Anti-Medical Marijuana Provision in Its Pleas is to Undermine the Will of the People of Arizona, Who Collectively Voted to Prohibit Prosecuting Agencies from Exercising Such Authority.

The third factor to consider in the *Hancock* test is the objective of the exercise of power in question. When evaluating the objective of the Legislature in *Hancock*, this Court asked, "Is the intent of the Legislature to cooperate with the executive by furnishing some special expertise of one or more of its members or is the objective of the legislature obviously one of establishing its superiority over the executive department in an area essentially executive in nature?" *J.W. Hancock Enterprises*, 142 Ariz. at 405, 690 P.2d at 124. Here the question becomes whether the intent of the executive is to cooperate with the judiciary by furnishing some special expertise of one or more of its members or rather is it to establish its superiority over the judiciary department in an area essentially judicial in nature.

Not only is it readily apparent here that the YCAO's objective is to assert superiority over the judiciary and dictate how the judiciary is to perform its

function of probation supervision, but it is also evident that YCAO wishes to express the executive's disapproval of Arizona law and circumvent it. These are not legitimate concerns that justify the encroachment by one governmental branch into the powers of another.

4. The Practical Consequence of the YCAO's Placement of Its Anti-Medical Marijuana Provision in Its Pleas is to Legislate an Amendment to the AMMA for Yavapai County that Draws a Distinction between Yavapai Probationers and the Rest of Arizona's Residents, in Defiance of the AMMA.

In *Hancock*, this Court held that a fourth consideration for determining whether an action violated separation of powers could be "the practical result of the blending of powers as shown by actual experience over a period of time where such evidence is available." *J.W. Hancock Enterprises,* 142 Ariz. at 405, 690 P.2d at 124. If allowed to continue, the YCAO will successfully and effectively supersede a lawfully and constitutionally enacted initiative and remove the protections against "penalties" and "disciplinary action by a court" that are afforded to qualifying patients under the AMMA. It is not for the executive to legislate and it is not for the executive to dictate the terms of probation. This exercise by the YCAO of a power not vested in it is a violation of the separation of powers clearly outlined in article III of the Arizona Constitution.

B. As a Matter of Public Policy, Trial Judges are Best Situated to Make Decisions on Case-by-Case Basis about What Conditions of Probation are Most Suitable to Rehabilitation.

"[R]ehabilitation is an important goal of probation in Arizona." *State v. Christopher*, 133 Ariz. 508, 510, 652 P.2d 1031, 1033 (1982); *see also State v. Montgomery*, 115 Ariz. 583, 584, 566 P.2d 1329, 1330 (1977) ("... the court may require that a defendant comply with numerous conditions of probation when, in the opinion of the court, such conditions aid in the rehabilitation process or prove a reasonable alternative to incarceration as punishment for the crime committed."); *State v. Hennessey,* 13 Ariz.App. 546, 547, 479 P.2d 194, 195 (1971) ("Probation is calculated to aid the individual in rehabilitation."). In fact, the first sentence of Ariz. R. Crim. P. 27.1 contemplates rehabilitation: "The sentencing court may impose on a probationer such conditions as will promote rehabilitation."

As the Arizona Supreme Court acknowledges, "any society considered civilized by Western standards stresses rehabilitation in its penological system. This is so as a matter of altruism (society should help those people who commit crimes to help themselves to improve their condition and become law-abiding citizens) and pragmatism (rehabilitated criminals will not continue to prey on society by committing more crimes and will cease being economic burdens on the community)." *Christopher*, 133 Ariz. at 510.

Probation "is a sentencing alternative, which a court may use in its sound

judicial discretion when the rehabilitation of the defendant can be accomplished with restrictive freedom rather than imprisonment." *State v. Smith*, 112 Ariz. 416, 419, 542 P.2d 1115, 1118 (1975). Because probation is intended to be rehabilitative, trial judges – not prosecutors – are given wide discretion in fashioning, and modifying, probation terms to promote rehabilitation of the defendant. It is "the law of Arizona that an appellate court is reluctant to interfere with the trial court's discretion in imposing conditions of probation and will uphold any conditions reasonably related to reparations or prevention of future crime." *State v. Cummings*, 120 Ariz. 69, 70, 583 P.2d 1389, 1390 (App. 1978). "Unless the terms of probation are such as to violate basic fundamental rights or bear no relationship whatever to the purpose of probation over incarceration, we will not disturb the trial court in the exercise of its discretion in imposing conditions of probation." *Montgomery*, 115 Ariz. at 584, 566 P.2d at 1330.

Notably, great deference is given to the trial judge over any other entity – be it prosecuting attorney or even the appellate courts. Impartial trial judges are imbued with the ultimate authority and discretion to fashion probation terms that will serve the rehabilitative purpose of probation because "…in determining what sentence a defendant should receive 'the trial judge is, in most instances, better able than we to evaluate him and to determine what is necessary to rehabilitate him to constructive activity.'" *State v. Hernandez*, 231 Ariz. 353, 356 ¶ 5, 295 P.3d

451, 454 (App. 2013) (quoting *State v. Moreno,* 109 Ariz. 266, 266, 508 P.2d 730, 730 (1973), *overruled on other grounds by State v. Lewis,* 109 Ariz. 466, 512 P.2d 9 (1973) (alteration added)). Because the trial court is "better able" to evaluate a criminal defendant and to determine what is necessary to rehabilitate the particular defendant, Arizona's statutes and rules of criminal procedure have consistently rejected attempts by prosecutors to bind the courts to blanket, overbroad, and over-restrictive probation terms that will prevent the court from tailoring the terms of probation to the needs of justice and rehabilitation of a particular defendant. *Patel*, 160 Ariz. at 89, 770 P.2d at 393; *State v. Oatley*, 174 Ariz. 124, 126, 847 P.2d 625, 627 (App. 1993).

Thus, although the "state and a defendant may bargain regarding a guilty plea" pursuant to Ariz. R. Crim. P. 17.4, "it does not follow that a trial court that accepts the bargain is thereby deprived of its statutory authority" to determine or modify the sentence imposed. *Patel*, 160 Ariz. at 88, 770 P.2d at 392. Instead, Rule 17.4(d) expressly provides, "The court *shall not be bound by any provision in the plea agreement* regarding the sentence or the term and *conditions of probation to be imposed*, if, after accepting the agreement and reviewing a presentence report, it rejects the provision as inappropriate." (Emphasis added.) Indeed, the Rules of Criminal Procedure grant the court the authority to modify or clarify "***any*** condition or regulation" of probation. Ariz. R. Crim. P. 27.3; *see also* Ariz. R.

Crim. P. 27.4(a) (court has authority to terminate probation "any time" by motion of the "probation officer or on its own initiative").

Here, the YCAO has announced a blanket policy to include in every plea agreement a prohibition against medical marijuana use, even when it is prescribed by a medical professional, used by a patient with a qualifying debilitating medical condition possessing a valid medical marijuana card, and used in compliance with the AMMA. And the prosecuting attorney has threatened to change the sentencing judge if a judge refuses to require this blanket prohibition to any particular defendant.

In Arizona, probation often requires a defendant to not possess or use any controlled substances, inhalants, narcotics or ***prescription drugs***, except those prescribed by a medical professional authorized to prescribe medication. This is how a rehabilitative probationary system is supposed to function. Prescription pain medications are permitted to probationers if they are used as prescribed and not abused. Likewise, the AMMA authorizes the prescription use of marijuana for qualifying "debilitating medical conditions" as long as the patient registers with the state and obtains a license from the Arizona Department of Health Services for the medical use of marijuana. A.R.S. § 36-2801(3). And the AMMA protects licensed patients from prosecution or penalty based on the possession or use of medical marijuana if the patient complies with the AMMA. Based on the AMMA,

probation departments in Arizona have established policies that follow their existing guidelines regarding prescribed medications; probationer-patients are allowed to use medical marijuana in accordance with the AMMA, subject to the limitations in A.R.S. § 36-2802. This policy is in line with public policy because probation is intended to promote rehabilitation of the defendant and to protect from threats to personal or public safety resulting from ***abuse*** of medical marijuana in the same manner as any other form of prescription drug abuse.

A prohibition of medical marijuana inserted into every plea offer would impermissibly interfere with the court's jurisdiction to impose and modify ongoing conditions of probation, as appropriate. A.R.S. § 13-901; Ariz. R. Crim. P. 27.3. It also interferes with a trial court's authority to disregard conditions of probation recommended in a plea bargain, where the trial court determines that the recommended conditions are inappropriate. Rule 17.4(d). Moreover, such a blanket prohibition interferes with the doctor-patient relationship and a medical professional's authority to prescribe treatments. Such a result will be detrimental to a trial court's authority to fashion conditions of probation that serve the core purpose – rehabilitation of the defendant. Public policy supports the legislative and constitutional grant of authority to the trial courts to determine – within their sound discretion – the terms of probation.

II. YCAO'S Attempt to Turn This Case into an Executive-Branch Referendum on Medical Marijuana is Improper, Illegal, and Unsupported.

The YCAO's pleadings before the Respondent Judge state clearly what it insinuates throughout its special action petition: that marijuana is not really medicine and the government must do all in its power to thwart the enactment rather than acquiesce to the will of the electorate. YCAO's efforts are misguided at best, and at worst they willfully violate the Arizona Constitution by soliciting the courts to ignore or even reject a properly-enacted initiative measure.

AACJ is aware that there is inconsistency in the application of the AMMA to probationers, and at least some trial judges in other counties have held that they are precluded from permitting probationers to use medical marijuana on account of a belief that federal law prohibits them from doing so. Because this issue is of great statewide importance, AACJ asks this Court to publish an opinion in this case and hold that probationers may use medical marijuana consistently with the provisions of the AMMA.

A. YCAO May Not Override a Voter-Approved Initiative.

The Arizona Constitution defines the legislative authority of the State as residing not only in a Senate and House of Representatives but also in the people, and it immediately specifies the powers retained by the people through the

initiative and referendum processes. Ariz. Const. art. IV, § 1; *see also* A.R.S. § 19-102. "The legislature and electorate 'share lawmaking power under Arizona's system of government.'" *Cave Creek Unified School Dist. v. Ducey*, 233 Ariz. 1, 4 ¶ 8, 308 P.3d 1152, 1155 (2013) (quoting *Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 469 ¶ 7, 212 P.3d 805, 807 (2009)). The legislature is specifically prohibited from repealing, and the governor is specifically prohibited from vetoing, any initiative measure approved by a majority of the votes cast. Ariz. Const. art. IV, § 1(6)(A)-(B). The legislature has the power to amend an initiative only upon a vote of three-fourths of the members of each house of the legislature, and only then if the legislative action "furthers the purposes" of the initiative measure. *Id*. § 1(6)(C), (14) (the "Voter Protection Act").

The purpose of the Voter Protection Act is simple: control of the sovereignty of the State rests with the people, not with the government. Ariz. Const. art. II, § 2. The people get to challenge the laws enacted by their elected representatives, not the other way around. The founders of this State recognized that governments tend to promote their own interests rather than those of the people. For that reason, the very first provision of Arizona's declaration of rights, article II, § 1, states that: "a frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."

The only manner by which an initiative may be repealed is by another

initiative, or by a legislative referral to the electorate. It matters not that the initiative at issue in this case, the AMMA, is statutory rather than constitutional in source. *Cave Creek*, 233 Ariz. at 6 ¶ 18, 308 P.3d at 1157. YCAO had its chance to oppose enactment of the AMMA in 2010, and it did by co-signing an argument opposing Proposition 203 with several other County Attorneys and Sheriffs. *See* http://azsos.gov/election/2010/info/PubPamphlet/english/prop203.pdf (last visited November 18, 2013). Now that the AMMA is law, however, YCAO is tasked with upholding the law. YCAO states that marijuana is a harmful drug; the voters exercised their legislative authority to express their emphatic disagreement.

B. This Court Has Already Decided that the State Government May Not Ignore the AMMA Based on Federal Law.

Earlier this year in *State v. Okun*, the Yuma County Attorney and Sheriff challenged an order from the Superior Court that the Sheriff return marijuana seized from a lawful patient. 231 Ariz. 462, 296 P.3d 998 (App. 2013). Some of the challenges made by YCAO before the Respondent Judge were made by the Yuma County officials in *Okun*, and this Court addressed those challenges and rejected them all in turn. For example, not only did the State allege that Okun could be subjected to federal prosecution for possessing marijuana, but the Yuma County Sheriff also alleged that he would be subjected to federal prosecution for transfer of marijuana. This Court found that not only did "the State lack[ ] standing

to argue that federal law prohibits Okun from possessing the marijuana," *id*. at 466-67 ¶ 17, 296 P.3d at 1002-03, but also that as a matter of law the Sheriff is immune from prosecution for complying with a court order. *Id*. at 465-66 ¶¶ 13-14, 296 P.3d at 1001-02.

The YCAO and Superior Court are even further removed from any fantasized violation of federal law for possessing marijuana, because in this case, none of the government officials would have any role whatsoever in possessing marijuana on behalf of, or transferring marijuana to, the probationer. Instead, all that is happening in this case is the Respondent Judge is tacitly acknowledging Section 2F of Proposition 203: "States are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law. Therefore, compliance with this act does not put the state of Arizona in violation of federal law." The Yavapai County Adult Probation Department provided its guidelines to counsel in this case with regard to supervising probationers with valid medical marijuana cards; that e-mail was provided as part of the appendix to defendant's "Motion that Illegal Stipulation in Plea Agreement Not be Imposed." *State's Appendix, Exhibit D*. This e-mail from Billie Globe of the Adult Probation Department was available to the Respondent Judge, who, as a Superior Court judge, has authority to retract that policy.

YCAO's continued attempts to argue that the AMMA is pre-empted by

federal law ignored not only *Okun* but also the report of the Attorney General answering questions posed by several County Attorneys (including YCAO) on this very issue. *State's Appendix, Exhibit F*. In that Attorney General Opinion, Attorney General Horne stated that "the AMMA provisions and related rules that pertain to the issuance of registry identification cards for patients and caregivers are not preempted because they merely serve to identify those individuals for whom the possession or use of marijuana has been decriminalized under state law and, therefore, are not authorizations to violate federal law." *Id*. This statement also serves to invalidate YCAO's claim that it is being asked to support the use of marijuana as medicine. To the contrary, the literal truth is no one is asking the YCAO for its opinion on this issue; it is the YCAO which is insisting on providing that opinion and using this litigation as part of a political campaign against the legal medicinal use of marijuana.

The Respondent Judge in this case did nothing more than find that the probationer may use prescribed medication. There is no functional difference, as a matter of law, between a trial judge refusing to interfere with a patient's medical care when the doctor prescribed hydrocodone, a highly-addictive but also highly-effective narcotic drug, and when the prescription is for marijuana, which is not addictive and yet is also highly-effective. The YCAO may disagree that marijuana is useful medicine, but the legislative body of Arizona – the voters – has decided

otherwise. *See* Proposition 203, Section 2(A)-(E), *supra*. Therefore, the YCAO must cease this shirking of its responsibilities to uphold state law and focus its efforts instead on ensuring compliance with state law.

C. The AMMA Passes the Rational Basis Test, and YCAO's Attempts to Resolve a Political Question in the Courts Must be Rebuffed.

To the extent that the YCAO is attempting to argue that the AMMA fails to articulate a rational basis, this Court must uphold the AMMA unless it fails to meet the rational basis test. *State v. McPherson*, 228 Ariz. 557, 563 ¶ 18, 269 P.3d 1181, 1187 (App. 2012) (citing *State v. Berger*, 209 Ariz. 386, 388 ¶¶ 6-8, 103 P.3d 298, 300 (App. 2004), *affirmed in part and vacated in part*, 212 Ariz. 473, 134 P.3d 378 (2006)). As this Court explained in *Berger* and re-affirmed in *McPherson*:

> "Rational basis review imposes on … the parties challenging the constitutionality of the Act … the burden of establishing that the law is unconstitutional by demonstrating that there is no conceivable basis for the Act. A legislative enactment challenged under the rational basis test will pass constitutional muster unless it is proved beyond a reasonable doubt to be wholly unrelated to any legitimate legislative goal. Moreover, the law 'need not be in every report logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and th[at] it might be thought that the particular legislative measure was a rational way to correct it.'"

McPherson, 228 Ariz. at 563-64 ¶ 18 (quoting *Berger*, 209 Ariz. at 388 ¶ 8, 103 P.3d at 300) (quoting in turn *Martin v. Reinstein*, 195 Ariz. 293, 309-10 ¶ 52, 987 P.2d 779, 795-96 (App. 1999)) (alteration in *Berger*, citations omitted in *Berger*).

As stated above, in passing Proposition 203 the voters explicitly found that prosecuting patients as criminals for using medicine was an evil that needed to be corrected. The YCAO clearly does not share the opinion of the will of the electorate, but challenges to the constitutionality of the AMMA under the rational basis test are obviously doomed to fail. Its insinuations that Arizona voters made an unwise choice when voting for Proposition 203, therefore, fall on deaf ears in the courts.

Though YCAO's claims about the harmfulness of marijuana are clearly antiquated, that question is irrelevant to the question before this Court. In these proceedings, this Court may not answer political questions related to the wisdom of the AMMA. "'Political questions,' broadly defined, involve decisions that the constitution commits to one of the political branches of the government and raise issues not susceptible to judicial resolution according to discoverable and manageable standards." *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485 ¶ 7, 143 P.3d 1023, 1026 (2006) (citing *Baker v. Carr*, 369 U.S. 186 (1962)). Where the courts involve themselves in political questions, "at best, we would be substituting our subjective judgment of what is reasonable under all the circumstances for that of … the very branches of government to which our Constitution entrusts this decision." *Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190, 194 ¶ 21, 165 P.3d 168, 172 (2007).

The proof that YCAO is litigating a political question appears in the e-mail sent by the Yavapai County Attorney to the Respondent Judge and the Presiding Judge of Yavapai County Superior Court. *Ferrell's Appendix, Exhibit A*. In that message, the elected official not only attempts to issue a blanket notice of change of judge against the Respondent Judge (what our Supreme Court referred to in *State v. City Court of the City of Tucson*, 150 Ariz. 99, 103, 722 P.2d 267, 271 (1986), as "threatening the independence of the judiciary, [and] an abuse of Rule 10.2"), but invites the judges to be educated by her presentation at the Republican Women's monthly luncheon called "Marijuana Harmless? Think Again." Presumably, the elected prosecutor, who possesses no apparent medical qualifications, wishes to influence the judiciary on this issue in a political venue. Ironically, neither the executive branch nor the judicial branch has any say in this matter – because the legislative authority, *i.e*. the voters, has already spoken through its enactment of Proposition 203.

The matter is already decided. The YCAO's last-ditch efforts to entice the courts into a political question are misguided at best and threaten the independence of the judiciary at worst. For these reasons, this Court should reject the YCAO's arguments below and insinuations before this Court that the AMMA may be challenged through these proceedings.

CONCLUSION

The Respondent Judge correctly concluded in this case that the YCAO had no authority to compel enforcement of the illegal stipulation and that YCAO had no basis for withdrawing from the plea. This Court should grant jurisdiction and publish an opinion so that the authority of judges to permit probationers to use marijuana as medicine (provided, of course, that they have a state-issued card) is fully recognized throughout Arizona.

RESPECTFULLY SUBMITTED this 19th day of November, 2013.

PIMA COUNTY PUBLIC DEFENDER'S OFFICE

By s/ David J. Euchner

David J. Euchner
Sarah Mayhew
Pima County Public Defender's Office
33 N. Stone Ave. 21st Floor
Tucson, AZ 85701

Joel M. Chorny
Pima County Legal Defender's Office
32 N. Stone Ave. 8th Floor
Tucson, AZ 85701

Attorneys for **Arizona Attorneys for Criminal Justice**