Filing # 182178931 E-Filed 09/19/2023 05:28:05 PM

IN THE SUPREME COURT OF FLORIDA

Samuel E. Velez Ortiz

Appellant,

v.

DEPARTMENT OF CORRECTIONS

Appellee.

PETITIONERS 2nd AMENDED JURISDICTIONAL BRIEF

Case No. SC2023-1040
Lower Tribunal No(s):
1D2022-0375
DF-2021-003

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INTRODUCTION

Petitioner, Samuel Velez Ortiz, Appellant in the First District Court of Appeal shall be referred to as "Petitioner" herein. The Respondent, the Department of Corrections Appellee in the First District Court of Appeal, shall be referred to as the "Respondent".

STATEMENT OF THE ISSUES

A. Whether the Lower Court's ruling is in Error Because it Violates the 2nd Amendment to the United States Constitution by ruling that Mr. Velez as a Licensed Medical Marijuana Patient is not Permitted to Possess a Firearm at Any Time Pursuant to Federal Law Regardless of Whether He is Under the Influence or Possessing Marijuana at the Time.

B. Whether the Lower Court's Ruling is in Error Because it Violates the Rights Provided Medical Marijuana Patients in Article X. section 29 of the Florida Constitution by Sanctioning a Patient by not Permitting them to Exercise their 2nd Amendment Right to Possess a Firearm.

C. Whether the Lower Court's Ruling is in Error Because the Ruling Violates Article X. section 29 of the Florida Constitution by Permitting an Employer to Sanction and

Employee by Termination Solely for Being a Medical Marijuana Patient.

STATEMENT OF THE CASE AND FACTS

I. Nature of the Appeal.

This appeal arises from the Commission's *Final Order Adopting Presiding Officer's Report* ("*Final Order*"), denying Appellant's challenge to the Department of Correction's termination of Appellant's Employment ("*Challenge*"). The *Challenge* sought review of the Department's final agency actions terminating Appellant's employment for testing positive for his off-site use of medical marijuana. Appellant filed a challenge with the Public Relations Commissions requesting a hearing to present evidence of his legal Medical Marijuana Use. The Commission held an evidentiary hearing on October 26, 2021 and on January 11, 2022, a Final Order Denying Employee's Exceptions and upholding the Department's termination of Appellant's Employment was entered.

Petitioner was a Qualified Patient pursuant to Art. X. § 29 of the Florida Constitution and had an exemplary record and his removal from his job duties was solely due to a random test.

II. Statement of the Facts and Regulatory History.

In November of 2016, by seventy-one percent (71%) of the vote, the people of Florida passed a Constitutional Amendment Legalizing Medical Marijuana. This Amendment is now enshrined in Article X, Section 29 of the Florida Constitution. On January 3, 2017, Article X, Section 29 was adopted in the Florida State Constitution, which provides for the MEDICAL use of marijuana and provides the following sections as related to employer/ employee relationships, in relevant part that:

> (a) PUBLIC POLICY.
>
> (1) The medical use of marijuana by a qualifying patient or caregiver in compliance with this section is not subject to criminal or civil liability or sanctions under Florida law.
>
> (c) LIMITATIONS.
>
> * * *
>
> (6) Nothing in this section shall require any accommodation of any on-site medical use of marijuana in any correctional institution or detention facility or place of education or employment, or smoking medical marijuana in any public place.

To implement Article X, Section 29 the legislature passed Fla. Stat. § 381.986 (2017). Florida Statute § 381.986 provides for the legal use of medical marijuana to treat medical conditions including those from which Plaintiff suffers.

The implementing statue provides two sections related to workplace issues. First, § 381.986(15)(b), Fla. Stat. (2017) which is consistent with Article X. Section 29, states "(t)his Section does not require an employer to accommodate the Medical Use of Marijuana in any workplace or any employee working ***while under the influence***." (emphasis added). Second, § 381.986(15)(c), Fla. Stat. (2017) states that "this section does not limit an employer's ability to continue to enforce a drug-free workplace program or policy."

In the instant case, Appellant was selected for a random drug screen by his employer. There is no evidence of suspicion of him being under the influence or possessing or using his Medical Marijuana during work hours. The Appellant was a medical marijuana patient pursuant to Florida law when the test was conducted.

The policy in question has two places that address Marijuana Use. One general Section in the Department of Corrections Drug-Free Workplace Statement and then a more specific Section 4(f) of Procedure Number 208.045 which allows a person to show lawful ingestion of the appropriate identified controlled substance. It was pursuant to these Sections the Appellant was terminated, Petitioner then appealed to the First District Court of Appeal.

The First District Court of Appeal held an Oral Argument on May 10th, 2023. The First District Court entered an Order affirming the appeal because the as a medical marijuana patient he is a "prohibited person" pursuant to federal law to possess a firearm. Ap. #1. The Appeal requested the Court determine whether terminating someone from employment violated Article X, section 29 of the Florida Constitution and argued that prohibiting Petitioner from possessing a firearm violated the Florida Constitution and the 2nd Amendment to the United States Constitution.

ARGUMENT

I. Whether Discretionary Jurisdiction Exists to Review the Opinion of the First District Court of Appeal Because it is Contrary to the 2nd Amendment of the United States Constitution and Federal Court Opinions**.**

The Opinion of the First District Court of Appeal was based entirely on their analysis of the interplay between state and federal law and the rights of a marijuana user under the 2nd Amendment. The Opinion held that because the Petitioner could not perform an important function of his job duties, possessing a firearm, his termination from the agency was unlawful. Petitioner submits the opinion is contrary to the 2nd Amendment to the United States Constitution and newly decided Supreme Court and Federal case law.

The analysis in the implication of the 2nd Amendment changed since the United States Supreme Court decision in *New York State Rifle Pistol*

Association, Inc. v. Bruen, 142 S. Ct. 2111 (2022), and subsequent decisions in *United States of America v. Harrison*, Case. No. CR-22-0328-PRW, (U.S. Dist. Ct. W. Dist. of Ok. February 3, 2023) and most recently *United States of America v. Daniels*, 2023 U.S. App. Lexis 20870 (U.S. 5th District Aug. 9, 2023). The *Harrison* and *Daniels* court both held that 18 U.S.C. § 922(g)(3) which prohibits possession of firearms by users or possessors of substances under the Controlled Substances Act is unconstitutional as a violation of the 2nd Amendment. *See also United States v. Rahimi*, 61 F.4th 443 (U.S. App. 5th Dist. 2023) (holding statute prohibiting possession of firearms by someone subject to a domestic violence restraining order is unconstitutional)

In each of the federal cases decided above the defendants were illegally possessing the substance at the time of their possession of the cannabis. In the case at bar Petitioner did not possess cannabis on work premises when he would need to possess a weapon, he did not attend work under the influence and therefore would never be in a situation to violate federal law as determined in the lower court's opinion. The opinion of the First District Court of appeal is contrary to the 2nd Amendment and Federal jurisprudence. The cases cited in the lower court's opinion and are all decided prior to the United States Supreme Court's ruling in *Bruen*, 142 S. Ct. 2111 (2022). *See also United States of America v. Connelly*, Case. No.

EP-22-CR-229(2)-KC (U.S. Dist. Ct. W. Dist. of Tx. April 6, 2023) (holding § 922(d)(3) unconstitutional related to unlawful users of controlled substances). The *Bruen* opinion has required an entirely different analysis than that applied by the lower court and federal case law decided after *Bruen* have all ruled that an illegal user of marijuana is not subject to a criminal conviction under 18 U.S.C. § 922 contrary to the lower court's opinion. Relevant to this analysis is the current effort to reschedule cannabis by United States Department of Health and Human Services from its current status in schedule I, to their recently filed recommendation to Schedule III. The ruling of the Appellate Court also implicates Article I section 8 of the Florida Constitution. The Court has Jurisdiction pursuant to 9.030(a)(2)(ii) to review this matter.

II. Whether Discretionary Jurisdiction Exists to Review the Opinion of the First District Court of Appeal Because it is Contrary to Article X section 29 of the Florida Constitution.

This Court should accept jurisdiction pursuant to Fla. R. App. P. 9.030(1)(A)(iii), (2)(A)(ii) because the lower court's opinion conflicts with Article X § 29 Florida Constitution public policy protections for medical marijuana patients have. The Public Policy section of Art. X. § 29(a)(1) states that "the medical use of marijuana by a qualifying patient . . . in compliance with this section is not subject to criminal or civil liability or

sanctions under Florida law." The lower Court's opinion directly implicates Art. X. §§ 29(a)(1), 29(c)(6) of the state constitution. These would be issues of first impression before this Court.

This lower court's opinion permits a sanction on medical marijuana patients, which results in loss of employment for being a qualified patient and strips a person's right to bear arms for being a qualified patient. The opinion states because he uses medical marijuana "he cannot lawfully possess a firearm. Each time he does, he is committing a felony." The lower court's opinion directly implicates the policy considerations under Art. X. § 29, Art. I. § 8 of the Florida Constitution and the 2nd Amendment to the United States Constitution.

III. Whether Discretionary Jurisdiction Exists to Review the Opinion of the First District Court of Appeal Because it is to be of Great Public Importance and Could Have a Great Effect on the Proper Administration of Justice.

The issues presented in this case should be reviewed because it passes upon a question of great public importance related to the newly enacted Art. x. § 29 of the Florida Constitution and the Second Amendment to the United States Constitution and Art. I. § 8 of the Florida Constitution. The opinion could affect any of the 840 thousand current medical marijuana patients. The former Commissioner of Agriculture, Nikki Fried, openly

acknowledged that she possessed, and the Department would permit people to possess both a concealed weapons permit and a medical marijuana card. https://www.cannamd.com/florida-firearms-medical-marijuana-nikki-fried-exclusive/#:~:text=Having%20your%20medical%20marijuana%20card,purchasing%20firearms%20is%20another%20issue. The opinion by the lower court overnight criminalizes the possession of firearms for over 840 thousand Qualified Patients and strips them of their right to defend themselves.

The affects all medical marijuana patients' rights to use their constitutionally protected medication and not be subject to termination solely for their off-site use of medical marijuana. Although the opinion of the lower court based their decision on the possession of a weapon by a medical marijuana patient being illegal, the case originated as a challenge to the right of the Respondent to terminate the Petitioner for his off-site use of medical marijuana contrary to Art. X. §§ 29(a)(1), (c)(6) of the Florida Constitution.

This lower court's opinion permits a sanction on medical marijuana patients, which results in loss of employment for being a qualified patient and strips a person's right to bear arms for being a qualified patient. The opinion states because he uses medical marijuana "he cannot lawfully possess a firearm. Each time he does, he is committing a felony." The lower court's opinion directly implicates the policy considerations under Art. X. § 29, Art. I.

§ 8 of the Florida Constitution and the 2nd Amendment to the United States Constitution. This Court should accept jurisdiction pursuant to Fla. R. App. P. 9.030(1)(A)(iii), (2)(A)(ii).

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the court should exercise that jurisdiction to consider the merits of the Petitioner's argument. This case potentially effects over 800 thousand, and growing, people in Florida and implicates a person's 2nd Amendment right to bear arms and constitutional right to use medical marijuana. The lower court's opinion is contrary to recent United States Supreme Court Jurisprudence and this Court should accept jurisdiction.

Respectfully submitted this **17th** day of **September 2023.**

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to counsel below by electronic mail on this **17th** day of **September 2023.**

Ashley Moody Attorney General, via the Florida e-filing portal to bridget.ohickey@myfloridalegal.com and jenna.hodges@myfloridalegal.com

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure Rule 9.045 and Rule 9.210(a)(2)(A), counsel for Petitioner hereby certifies this brief complies with all applicable font and word count limit requirements as the brief is written in 14-point Arial font and does not exceed 2,500 words, on this 11th day of September, 2023.

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