

No. DA 19-0613

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

RYAN MORRIS,

Defendant and Appellant,

TROY NELSON,

Defendant and Appellant.

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**BRIEF OF APPELLANT**

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On Appeal from the Montana Eighth Judicial District Court,  
Cascade County, the Honorable Gregory G. Pinski, Presiding

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## **STATEMENT OF THE ISSUES**

1. Did the district court lack statutory authority when it ordered Ryan Morris and Troy Nelson to wear a signboard stating “I AM A LIAR. I AM NOT A VETERAN.” for eight hours at Montana Veterans Memorial each Memorial Day and Veterans Day?

2. Did the district court violate the Montana Constitution’s right to dignity and other constitutional rights when it ordered Morris and Nelson to publicly wear a degrading and humiliating signboard each Memorial Day and Veterans Day?

3. Did the district court fail to credit Morris 93 days for time served in the written judgment?

## **STATEMENT OF THE CASE**

This is a consolidated appeal of two defendants challenging the legality of their revoked sentences.<sup>1</sup> Ryan Morris was serving a suspended sentence for burglary and Troy Nelson was serving a suspended sentence for drug possession. (Morris Doc. 76; Nelson Doc. 30.) Morris and Nelson do not know each other, and their crimes are unconnected. (Morris Tr. 12.) Both of them, however, applied for the Cascade County Veterans Treatment Court during the plea bargaining process; Morris applied in 2016, Nelson in 2019. (Morris Docs. 13, 29; Nelson Doc. 27.) Neither of them could produce paperwork showing

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<sup>1</sup> District court documents and transcripts for Ryan Morris are in DA 19-0613. District court documents and transcripts for Troy Nelson are in DA 19-0618.

they had served in the military. (Morris Doc. 21; Nelson Doc. 31.) The treatment court rejected Morris's application. (See Morris Docs. 21, 26.) The treatment court briefly admitted Nelson but removed him days later. (Nelson Doc. 30 at 4, Doc. 31.)

After they were sentenced, the State filed petitions to revoke their suspended sentences for not following probation conditions. (Morris Doc. 82; Nelson Doc. 33.) Nelson admitted to his violations, and Morris admitted to a revised allegation of absconding. (Nelson Tr. 26; Morris Tr. 8-11.) The parties stipulated Morris was entitled to 93 days of credit for time served, however, this was not reflected in the written judgment. (Morris Tr. 19, 21; Morris Doc. 103.)

At sentencing, the district court ordered Morris and Nelson to sit together and told them "you share the same conduct in the sense that you've engaged in this Stolen Valor." (Morris Tr. 11-12.) The district court told Morris and Nelson they were disloyal, disrespectful, selfish, dishonorable, lacked integrity, and did not have moral principles. (Morris Tr. 16-19.) The district court revoked their sentences and ordered them to prison with partially suspended terms. (Morris Doc. 103 at 7; Morris Tr. 23; Nelson Doc. 53 at 7-8; Nelson Tr. 39.)

The district court imposed “added condition 1(b)” to both of their suspended sentences. Morris and Nelson must wear a placard or signboard with the words “I AM A LIAR. I AM NOT A VETERAN.” on the front and “I STOLE VALOR. I DISHONORED ALL VETERANS.” on the back, with lettering of sufficient size to be easily readable across a city street. (Morris Doc. 103 at 9; Nelson Doc. 53 at 9-10.) They are to wear the signboard for eight hours every Memorial Day and Veterans Day at Montana Veterans Memorial in Great Falls for the entire duration of their suspended terms. (Morris Tr. 27; Morris Doc. 103 at 9; Nelson Doc. 53 at 9-10.)<sup>2</sup> Morris and Nelson timely appealed. (Morris Docs. 103, 106; Nelson Docs. 53, 60; Nelson Case Register Report.) They challenge the district court’s authority to impose the signboard requirement. Morris additionally asks for the written judgment to reflect the stipulated credit for time served.

### **STATEMENT OF THE FACTS**

Little is known about the lives of Ryan Morris and Troy Nelson from this record, as they have never forced the State to take their

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<sup>2</sup> Morris received 10 years with 3 years suspended, while Nelson received 5 years with 2 years suspended. If they are paroled, it is not yet known whether the parole board will also impose these terms as conditions of parole.

charges to trial and have both admitted their mistakes when accused of violating their probation conditions.

Morris stole some items from his landlord's garage. (Morris Doc. 1.) He initially received a deferred sentence but has been revoked multiple times for failing to report, not being able to keep a job, and changing his residence without telling the probation officer. (Morris Docs. 36, 40, 59, 81.) Morris feels shame for his past mistakes and works towards growing as a better person. (Morris Tr. 22.)

Nelson has struggled with mental illness and drug addiction. (Nelson Tr. 38.) He was already in jail when the State charged him with possession of methamphetamine in his keychain based on an informant's tip. (Nelson Doc. 1.) When Nelson got out, he tested positive for drug use and did not charge his GPS bracelet. (Nelson Doc. 33.) Nelson does not wish for leniency and knows he must take responsibility. (Nelson Tr. 38.)

Their respective revocations proceeded along normally until, without explanation, the district court issued scheduling orders (both filed on August 22, 2019 at 1:07 p.m.) in Morris's and Nelson's revocation cases, ordering them both to appear on August 23, 2019 at

1:00 p.m. for adjudication and disposition. (Morris Doc. 100.1; Nelson Doc. 50.2.) Newspaper media and a television crew were present.

There is no indication the prosecutors or defense counsel knew what was about to happen. The record does not establish why television cameras were setup in the courtroom for what appeared to be a couple of routine revocation hearings.

The district court called Nelson up first, secured his admissions, and then put the case on hold, saying it would come back to his disposition in a moment. (Nelson Tr. 25-26.) Then the court called Morris and took an admission from him. (Morris Tr. 11.) The district court said, “Now before we proceed to disposition on Mr. Morris, I have a few remarks I’d like to make regarding Mr. Morris and Mr. Nelson.” (Morris Tr. 11.) The court had Morris, Nelson, and their lawyers all sit next to each other to be able to see the judge. (Morris Tr. 11; *see also*, KRTV Great Falls, *Great Falls Judge Sentences 2 Men for Attempted “Stolen Valor”* (video), <https://www.krtv.com/news/crime-and-courts/great-falls-judge-sentences-2-men-for-attempted-stolen-valor-video> (uploaded Aug. 24, 2019), embedded video at 0:23-0:28,

hereinafter “KRTV Video.”<sup>3</sup> The district court said, “I want to make sure that my message is received loud and clear by these two defendants.” (Morris Tr. 11.)

The district court’s speech began, “Mr. Morris and Mr. Nelson, you have come before this Court having engaged in acts of Stolen Valor. And I want to make some remarks with regard to the conduct that you've engaged in because that conduct bears upon your character for which the Montana Supreme Court has held is an appropriate consideration for the Court in arriving at sentencing.” (Morris Tr. 12.)

The district court talked about the Vietnam War and there being no “Welcome Home” parades for veterans. (Morris Tr. 12.) The district court said Vietnam veterans hid their service, lived reclusive, anonymous lives, and struggled with PTSD, substance use, and depression. (Morris Tr. 12.) The district court talked about how the 1991 Gulf War rallied the country behind the veteran community, allowing Vietnam veterans “to come out of the shadows and receive the appreciation and recognition that they deserved.” (Morris Tr. 12-13.)

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<sup>3</sup> A news crew had a television camera in the courtroom and produced a story on this proceeding. The news story is not part of the record, but it is a publicly available partial video capture of the proceedings that happened that day.

The district court said, “Now that America provides the recognition that veterans deserve, sadly, inexplicably and inexcusably, there are certain people, shameful people, who have not put their lives on the line for this country that portray themselves as having done so.” (Morris Tr. 13.)

The district court said Stolen Valor is offensive and has been around since the time of George Washington. (Morris Tr. 13-14.) The district court then decided to play an amateur video it found on the internet. (Morris Tr. 14.) The district court wanted Morris and Nelson to watch this video about an allegation of Stolen Valor “to see how our country feels about those who lie about military service to get benefits that they’re not entitled to receive.” (Morris Tr. 14.)<sup>4</sup>

The district court said the outrage for acts of Stolen Valor cannot be overstated. (Morris Tr. 14.) The district court told Morris and Nelson they “disrespected the lives and families of the men and women and the sacrifice that they have made for this country. And worse yet,

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<sup>4</sup> The video played in the courtroom was not entered into the record, but it is this video: Veteran of 2/506th Calls Out Fake Ranger at Oxford Valley Mall, <https://www.youtube.com/watch?v=sOj07ClhEi8>, uploaded November 28, 2014. The video does not purport to represent how “our country” feels regarding those who lie about military service.

you have dishonored the lives and the legacy of every American that has been killed in defense of this country.” (Morris Tr. 15.)

The district court then read out the name and rank of forty service members from Montana who have been killed in the Afghanistan and Iraq wars. (Morris Tr. 15.) The district court said it did this to restore some honor and recognition. (Morris Tr. 15.)

The district court said Morris and Nelson pretended to be veterans of the United States Army. (Morris Tr. 16.) The district court said there are seven core values of the Army: loyalty, duty, respect, selfless service, honor, integrity, and personal courage. (Morris Tr. 16-18.) The district court said these values provide insight as to why Morris and Nelson were not worthy to serve in the military. (Morris Tr. 16.)

The district court then read out each Army value and told Morris and Nelson how they did not meet that value.

“You have not been loyal. In fact, you've been disloyal, disloyal to yourselves, disloyal to the Court, and disloyal to every veteran that has ever worn the US Army uniform.”

“You have been nothing but disrespectful through your conduct. You certainly have not respected the Army. You have not respected



veterans. You have not respected the Court. And you haven't respected yourselves.”

“There's been nothing that has exhibited selfless service in your conduct. In fact, it's been entirely selfish. It's driven by your own motives, your own personal gain, and to the tremendous disrespect of many others.”

“As I think my remarks highlight and underscore, you have been nothing but dishonorable.”

“I cannot think of any words that more profoundly describe the moral values that you are lacking. There is no integrity whatsoever in either of you.”

“Now as we move into each of your individual sentencing, I can assure you that you will come to know and understand those seven core values, those moral principles that are completely missing from your lives.”

(Morris Tr. 16-19.)

Morris apologized. Morris said he did it to try to escape the justice system two and a half years ago and has not said anything about being a veteran since. (Morris Tr. 21.) “My deepest apology goes out to

everybody that has served, and the families that had fallen soldiers. I know my words pretty much fall on deaf ears at this point, but – my heart does go out for them, and I’m very shameful for what I said and what I’ve done, and I’ve been doing stuff to try to grow as a better person.” (Morris Tr. 21-22.)

Nelson apologized. “I apologize for lying to the Court, for all the men and women who have served, the men and women who have lost their lives. I take responsibility for whatever may come. I truly am sorry. I do have mental diseases going on, and I do have a lot of addiction problems. I apologize for the cowardice actions of my behavior. I wish to do nothing but spend every waking moment trying to get that back in any way, shape or form that you see fit. I do not wish for leniency or anything else. But receive what you deem to do, what I shall take. I make no other excuses for my behavior.” (Nelson Tr. 38-39.)

The district court revoked their suspended sentences. (Morris Tr. 23; Nelson Tr. 39.) The district court ordered them to handwrite the names of all 6,756 Americans that have been killed in the Iraq and Afghanistan wars. The district court ordered them to handwrite the

obituaries of forty dead Montana service members. The district court ordered them to write letters of apology and send them to six different veterans' organizations. The district court deemed Morris and Nelson ineligible for parole if they did not comply. (Morris Doc. 103 at 7-8; Morris Tr. 23; Nelson Doc. 53 at 8; Nelson Tr. 39.)

The district court was not done. As to the suspended sentence, the district court re-imposed all prior probation conditions and emphasized two more. The district court required Morris and Nelson to perform 441 hours of community service, one hour for every Montana veteran killed in combat since the Korean War. (Morris Doc. 103 at 8-9; Nelson Doc. 53 at 9.)

The district court then ordered, "The Court further requires as a condition of your probation that on each Memorial Day and Veterans Day, while you are on probation, you appear at the Montana Veterans Memorial, and for eight hours each day, you will stand at the memorial. You will be wearing a placard that reads as follows." (Morris Tr. 24.) "I AM A LIAR. I AM NOT A VETERAN." (Morris Tr. 24; *see also*, KRTV Video at 0:59-1:12.)

Morris's attorney began to make an objection. (Morris Tr. 24.)

The district court aggressively told the attorney to stop. (Morris Tr. 24; *see also*, KRTV Video at 1:12-1:14.)

The district court then said, “On the other side it will say, I STOLE VALOR. I DISHONORED ALL VETERANS.” (See Morris Tr. 24.)

Morris’s and Nelson’s sentencing hearing made national news. Stories of the hearing appeared in The Washington Post, USA Today, Associated Press, The New York Post, and Time Magazine. Features were shown on CNN, Fox News, and NPR.<sup>5</sup>

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<sup>5</sup> Appellants ask this Court to take judicial notice under M. R. Evid. 201 that Morris’s and Nelson’s sentencing hearing created a nationwide sensation and resulted in substantial press coverage across the country, as demonstrated by the following articles from major press organizations:

The Washington Post, *Two Men Lied About Being Veterans. The Judge’s Sentence: Wear Signs saying ‘I am a Liar.’*, <https://www.washingtonpost.com/national-security/2019/08/26/two-men-lied-about-being-veterans-judges-sentence-wear-signs-saying-i-am-liar/> (uploaded August 27, 2019).

USA Today, *2 Men Who Lied About Military Service Must Wear Sign that Says ‘I am a Liar.’ Judge Rules*, <https://www.usatoday.com/story/news/nation/2019/08/27/two-montana-men-who-lied-being-veterans-sentenced/2128167001/> (uploaded August 27, 2019).

Associated Press, *Montana Men Get Writing Assignment for False Military Claims*, <https://apnews.com/67fa8ff260c54c2e92e09c3023a00cf7> (uploaded August 25, 2019).

The New York Post, *Judge Orders Men Who Lied About Being Vets to Write Names of Everyone Killed Overseas*, <https://nypost.com/2019/08/27/judge-orders-men-who-lied-about-being-vets-to-write-names-of-everyone-killed-overseas/> (uploaded August 27, 2019).

The district court said the Montana Supreme Court allows it to order Morris and Nelson to wear a placard or signboard because this Court gives district courts discretion to consider a wide range of factors, including a defendant's character. (Morris Tr. 24.) The district court said federal cases allowed him to do this, and that the signboard requirement "is connected to the behavior. The requirement is connected to the rehabilitation of the Defendant. And the requirement is specifically related to the character of the Defendant. And it is so limited." (Morris Tr. 24-25.)

Morris's attorney said that while acts of Stolen Valor are very, very important, they were not the basis of this revocation. (Morris Tr. 20.) Counsel pointed out the penalties imposed by the district court

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Time Magazine, *Montana Judge Orders Men Who Lied About Military Service to Wear Sign Reading 'I Stole Valor'*, <https://time.com/5664714/montana-judge-orders-stole-valor/> (uploaded August 29, 2019).

CNN, *They Falsely Claimed to be Military Veterans, so a Judge Ordered Them to Write the Names of More Than 6,700 Americans Killed in Iraq, Afghanistan*, <https://www.cnn.com/2019/08/27/us/montana-military-veterans-trnd/index.html> (uploaded August 27, 2019).

Fox News, *Montana Men Who Lied About Being Veterans Sentenced, Ordered to Write Names of Americans Who Died in Wars*, <https://www.foxnews.com/us/montana-men-military-veterans-writing-sentenced> (uploaded August 26, 2019).

NPR, *Montana Men Who Lied About Military Service Ordered to Wear 'I am a Liar' Signs*, <https://www.npr.org/2019/08/28/755237153/montana-men-who-lied-about-military-service-ordered-to-wear-i-am-a-liar-signs> (uploaded August 28, 2019).

here seemed to be aligned with stealing valor, not the actual grounds for the underlying revocation. (Morris Tr. 26.) Morris's attorney also objected to the placard requirement because it violated the Montana Constitution's right to dignity. (Morris Tr. 26.) Nelson's counsel joined in these objections. (Nelson Tr. 41.)

The district court said it was not revoking and sentencing Morris for stolen valor, but for absconding and not completing the terms of probation. (Morris Tr. 25.) The district court said it was revoking and sentencing Nelson for not engaging in community-based drug treatment. (Nelson Tr. 40-41.) The district court said the signboard condition did not violate the First Amendment or the Cruel and Unusual Punishment Clause of the Eighth Amendment. (Morris Tr. 24-25; Morris Doc. 103 at 9-13; Nelson Doc. 53 at 10-14.)

### **STANDARD OF REVIEW**

Criminal sentences are reviewed for legality. *State v. Yang*, 2019 MT 266, ¶ 8, 397 Mont. 486, 452 P.3d 897. A claim that a sentence violates a constitutional provision is reviewed de novo. *Yang*, ¶ 8.

## **SUMMARY OF THE ARGUMENT**

Requiring Morris and Nelson to wear large placards or signboards in public describing them as liars who dishonor veterans is a shaming and humiliation punishment not reasonably related to goals of rehabilitation or protection of victims or society, contrary to Mont. Code Ann. § 46-18-201(4)(p). Conditions designed to cause humiliation or shame do not serve rehabilitative goals and are not statutorily authorized. This appeal is controlled by *State v. Muhammad*, 2002 MT 47, ¶¶ 34-38, 309 Mont. 1, 43 P.3d 318, which struck a similar sign-display requirement.

*Muhammad* followed precedent from Illinois, Tennessee, and New York with similar “catch-all” sentencing statutes. The Court explained the sign-display requirement was a scarlet letter condition that overshadows any possible rehabilitative potential the punishment might generate. Kansas and Pennsylvania have since adopted *Muhammad* and struck similar probation conditions that do not further rehabilitative goals. The signboard condition must be struck.

Montanans possess an inviolate constitutional right to dignity. Punishments cannot be implemented in a manner that degrades a

person's humanity. The district court's unusual probation condition requires Morris and Nelson to wear a placard in the public square, to be observed by all, and to carry a message about their character that speaks on their behalf instead of being allowed to speak for themselves. No provision was made for their personal safety. They are to be identified, called out, and ridiculed for the message they must wear. This message was imposed by a member of the judiciary, ruling from the bench that Morris and Nelson lacked loyalty, were dishonorable, possessed no integrity, and had moral principles missing from their lives. And so, they must wear a signboard stating as much. The district court deprived Morris and Nelson of their dignity and other constitutional protections in pronouncing—and unconstitutionally imposing—the signboard requirement.

Finally, Morris's judgment must be amended to reflect credit for 93 days served, the amount of credit stipulated to by the parties below and acknowledged by the district court.



## ARGUMENT

- I. The district court lacked statutory authority to order Morris and Nelson to wear a signboard because this probation condition is a shaming and humiliation punishment not reasonably related to the goals of rehabilitation.**
  - A. Wearing a placard or signboard at Montana Veterans Memorial on days of high attendance is not reasonably related to rehabilitation.**

When district courts impose probation conditions for defendants to follow during a suspended or deferred sentence, the condition “must be reasonably related to the objectives of rehabilitation or the protection of the victim or society.” *City of Bozeman v. Cantu*, 2013 MT 40, ¶ 20, 369 Mont. 81, 296 P.3d 461. District courts must have statutory authority to impose a sentence, and they have a broad menu of reasonable restrictions and conditions to choose from in Mont. Code Ann. § 46-18-201(4). This includes a “catch-all” statute, which states “any other reasonable restrictions or conditions considered necessary for rehabilitation or for the protection of the victim or society.” Mont. Code Ann. § 46-18-201(4)(p). Montana’s “catch-all” statute is similar to other

statutes across the country, including Illinois, Tennessee, New York, and Pennsylvania.<sup>6</sup>

District courts have broad discretion to impose sentencing conditions, but this discretion is not without limit. *State v. Zimmerman*, 2010 MT 44, ¶ 17, 355 Mont. 286, 228 P.3d 1109. This Court will reverse sentencing conditions that are overly broad or unduly punitive to the point of being unrelated to rehabilitation. *Zimmerman*, ¶ 17; *Muhammad*, ¶¶ 37-38.

Humiliation and shaming practices are not rehabilitative. Michael L. Perlin, “*Friend to the Martyr, a Friend to the Woman of Shame*”: *Thinking About the Law, Shame, and Humiliation*, 24 S. Cal. Rev. L. & Soc. Just. 1, 5 (Fall 2014). Humiliation is broadly defined as “treating people as if they were not human beings but merely things, tools, animals, subhumans, or inferior humans,” reflecting a loss of control over one’s identity. *Id.* at 8. Shaming penalties include public stigmatizing, self-debasement, and demands for public expression of contrition. *Id.* at 21. In almost every instance, humiliating measures

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<sup>6</sup> Illinois Compiled Statutes Annotated, 730 I.L.C.S. 5/5-6-3(b); Tennessee Code Annotated, T.C.A. § 40-35-303(d)(9); McKinney’s Consolidated Laws of New York Annotated, Penal Law § 65.10[2](l); Purdon’s Pennsylvania Statutes and Consolidated Statutes, 42 Pa. C. S. A. § 9763(b)(15).

are punitive in design and scope. *Id.* at 21. There are no comprehensive studies showing such punishments to be effective. *Id.* at 24.

To the contrary, shame can result in maladaptive responses such as depression, hiding/avoidance, and anger. Heather Ellis Cucolo, *Promoting Dignity and Preventing Shame and Humiliation by Improving the Quality and Education of Attorneys in Sexually Violent Predator (SVP) Civil Commitment Cases*, 28 U. Fla. J.L. & Pub. Pol’y 291, 298-299 (August 2017). These punishments require more, not less, mental health programming to address the trauma people have suffered from being humiliated. *Id.* at 298.

Probation conditions designed to cause humiliation or shame do not serve rehabilitative goals and are unduly severe and punitive to the point of not being reasonably related to rehabilitation. *Muhammad*, ¶¶ 35, 37. Such conditions are not authorized by the “catch-all” statute Mont. Code Ann. § 46-18-201(4)(p). Other states with similar statutes have also reached this conclusion.

In Illinois, the Court held that posting a large sign at the family farm that read “Warning! A Violent Felon lives here. Enter at your own

risk!” was not a reasonable probation condition and did not serve the purpose of restoring defendants to useful citizenship. *Illinois v. Meyer*, 680 N.E.2d 315, 316, 318-319 (Ill. 1997). In Tennessee, the Court held that ordering a probationer to post a 4-foot by 8-foot yellow sign with black lettering advising neighbors that he was a convicted child molester went “beyond the bounds of traditional notions of rehabilitation,” and struck the sign requirement. *Tennessee v. Burdin*, 924 S.W.2d 82, 84, 87 (Tenn. 1996). In New York, the Court struck an order to attach a fluorescent sign to a probationer’s license plate stating “convicted dwi,” explaining that while its catch-all sentencing provision granted wide latitude, the punitive and deterrent nature of “scarlet letter” probationary conditions overshadowed any possible rehabilitative potential. *New York v. Letterlough*, 655 N.E.2d 146, 147-148, 150 (N.Y. 1995).

Montana adopted these prior cases into its own precedent when faced with a similar sign-display issue. *Muhammad*, ¶¶ 35-37. In *Muhammad*, this Court considered whether the catch-all statute authorized a requirement to post a prominent sign outside of Muhammad’s residence stating, “CHILDREN UNDER THE AGE OF 18

ARE NOT ALLOWED BY COURT ORDER.” *Muhammad*, ¶ 30.

Echoing *Meyer*, *Burdin*, and *Letterlough*, this Court explained that while rehabilitation and punishment are not mutually exclusive, the imposition of sign-display conditions exceeded both explicit and implicit statutory authority to trial courts because sign placement is not reasonably related to goals of rehabilitation and protection of victims or society. *Muhammad*, ¶¶ 35, 37. “[T]he effect of such a scarlet letter condition tends to over-shadow any possible rehabilitative potential that it may generate.” *Muhammad*, ¶ 37. The Court also noted that less restrictive means to rehabilitate the probationer had been imposed, such as restricting contact with the victim and requiring sexual offender treatment. *Muhammad*, ¶ 37. The Court vacated the sign requirement, determining it was not reasonably related to rehabilitation. *Muhammad*, ¶¶ 37-38.

Other states have since adopted *Muhammad*’s reasoning and rationale. Kansas, citing *Muhammad*, held that posting multiple “sexual predator lives here” signs was a “badge of shame for all to see” that would deter the probationer’s rehabilitation by making it nearly impossible to assimilate within the community. *Kansas v. Schad*, 206

P.3d 22, 27, 33-34 (Kan. 2009). “The signage conditions were simply a punitive measure not reasonably related to rehabilitation.” *Id.* at 35. Pennsylvania, also citing *Muhammad*, noted that Montana and many other states have concluded “shaming is not reasonably related to rehabilitation and may in many circumstances overshadow any possible rehabilitative effects that the punishment might otherwise provide.” *Pennsylvania v. Melvin*, 103 A.3d 1, 55-56 (Penn. 2014). No condition may be imposed for the sole purpose of shaming or humiliating a probationer. *Id.* at 55.

Requiring Morris and Nelson to wear placard or signboard with a message about being liars in lettering large enough to be visible across the street (Morris Doc. 103 at 9; Nelson Doc. 53 at 9-10) is a humiliation and shaming punishment not authorized by the sentencing statutes. The district court described Morris and Nelson as “shameful people” who have “no integrity whatsoever,” and assured them they will come to know and understand the core values of the Army, “those moral principles that are completely missing from your lives.” (Morris Tr. 13, 18-19.)

Similar to *Muhammad*, the district court is requiring Morris and Nelson to prominently display a message describing a characteristic about themselves, specifically that they are liars who dishonor veterans. While *Muhammad* and other cases at least describe a crime the probationer had been duly convicted of, the district court is telling these probationers not to describe any convicted crime at all. Rather, the district court is ordering Morris and Nelson to publicly display signs about actions they took during the plea bargaining process, not for convicted crimes or even probation violations.

Wearing a placard or signboard in a public location on days of heavy attendance is exactly the kind of “scarlet letter” punishment this Court and other state courts have prohibited. The theater here of wearing a signboard that says “I AM A LIAR . . . I STOLE VALOR” each Memorial Day and Veterans Day at a veterans memorial to be seen by all overshadows “any possible rehabilitative potential that it may generate.” *Muhammad*, ¶ 37. The signboard is a shaming penalty that will generate a stigmatizing effect and is not reasonably related to rehabilitation or protecting victims or society. *See Muhammad*, ¶¶ 34-38.

Morris and Nelson are not even being revoked for lying about their veteran status. Morris talked about being a veteran in 2016, years before the revocation action in this case. (Morris Docs. 13, 29.) Morris was not revoked for saying he was a veteran. (Morris Tr. 25.) He was revoked for a failure to adhere to probation conditions, like reporting or moving without permission. (Morris Doc. 82; Morris Tr. 25.) One of the grounds for Nelson’s revocation was failing to complete Veterans Treatment Court, which is a failure to meet a condition, not a separate crime of stolen valor. (See Doc. 30 at 2; Doc. 31 at 1.) Additionally, the district court said it was revoking Nelson for not participating in drug treatment and absconding. (Nelson Tr. 40-41.)

The district court’s probation condition of requiring Morris and Nelson to wear a placard or signboard exceeded the statutory sentencing authority granted to trial courts by the Legislature. See *Muhammad*, ¶ 37. As such, their unlawful probation conditions, or “added condition 1(b)”, must be struck.

**B. The requirement to wear the placard will make it almost impossible for Morris and Nelson to interstate compact, hindering rehabilitation.**

Morris and Nelson are concerned about their personal safety and



the risk of physical harm that may come to them if required to display a signboard with such a message on days of high attendance and likely media coverage at Montana Veterans Memorial. Additionally, Morris and Nelson wish to leave Montana and are worried this probation condition, which must be performed in Great Falls (Morris Tr. 27), will harm their ability to interstate compact.

Requiring this condition to be performed at Montana Veterans Memorial in Great Falls (Morris Tr. 27; Morris Doc. 103 at 9; Nelson Doc. 53 at 9-10) twice a year will impair Morris's and Nelson's ability to interstate compact, that is, transfer their supervision to another state. The Interstate Commission for Adult Offender Supervision (ICAOS) has adopted rules providing for the transfer of probationers to different states. See <http://www.interstatecompact.org>. These rules provide for mandatory transfers, which receiving states must accept, and discretionary transfers, which receiving states may decline. ICAOS R. 3.101, 3.101-2.

Morris and Nelson may not be eligible for mandatory transfers because they cannot be "in substantial compliance with the terms of supervision in the sending state" if they must be in Montana twice a

year to wear signboards. *See* ICAOS R. 3.101(c). Their eligibility for discretionary transfers is also hobbled because moving to another state would not “support successful completion of supervision” due to a Montana-based signboard requirement. *See* ICAOS R. 3.101-2(a).

Even if they could interstate compact, the State can revoke them at any time for not wearing the placard or signboard in Great Falls. *See* Mont. Code Ann. § 46-23-1115(2), art. I(4). As Morris and Nelson both wish to leave Montana to be closer to their social support networks and opportunities for work, the signboard condition further hinders their rehabilitation efforts to assimilate back into the community.

## **II. The district court’s imposition of the signboard requirement violated Morris’s and Nelson’s constitutional rights.**

### **A. The district court violated Morris’s and Nelson’s constitutional right to dignity when it ordered them to wear a signboard in public saying they were liars who dishonor veterans.**

“The dignity of the human being is inviolable.” Mont. Const. art. II, § 4. In Montana, no person can be deprived of their dignity. Dignity means people possess intrinsic worth that should be recognized and respected. Perlin, 24 S. Cal. Rev. L. & Soc. Just. at 11. People should

not be treated by the government in a manner inconsistent with their intrinsic worth. *Id.* Persons may be deprived of their life, liberty, and property with due process of law, but no amount of due process can ever deprive a person of dignity because the right to individual dignity is inviolable. Mont. Const. art. II, § 4. Dignity is a fundamental right whose infringement is subject to the highest level of scrutiny and protection by the courts. *Walker v. State*, 2003 MT 134, ¶¶ 72-74, 316 Mont. 103, 68 P.3d 872.

Dignity is violated by treatment which degrades or demeans persons, that is, treatment which deliberately reduces a person's value and fails to acknowledge their worth as human beings. *State v. Kingman*, 2011 MT 269, ¶ 58, 362 Mont. 330, 264 P.3d 1104. "Dignity may be directly assailed by treatment which degrades, demeans, debases, disgraces, or dishonors persons, or it may be more indirectly undermined by treatment [that] interferes with self-directed and responsible lives." Matthew O. Clifford and Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications*, 61 Mont. L. Rev. 301, 308 (Summer 2000). Punishment is a signal of the community's reproach

for a defendant's actions, but dignity demands that neither punishment nor reform can be implemented in a way that degrades a person's humanity. *Id.* at 331-332.

The degradation of Morris's and Nelson's humanity began at their sentencing hearing. The district court talked about the core values of the Army and repeatedly told Morris and Nelson they did not have those values. The district court told Morris and Nelson they were disloyal, disrespectful, dishonorable, and had no integrity whatsoever. (Morris Tr. 16-19.)

After lambasting their supposedly complete lack of moral principles, the district court ordered Morris and Nelson to stand as props in the public square, loudly brandishing a court-ordered message telling them what they were. I AM A LIAR. I AM NOT A VETERAN. I STOLE VALOR. I DISHONORED ALL VETERANS. Morris and Nelson cannot speak, the signboard speaks for them. The district court made no provision for their personal safety from the spectating crowd. They are to be called out and ridiculed by the public, if not worse, for the message they must bear.

This Court is not compelled to “march lock-step” with federal courts. *State v. Hardaway*, 2001 MT 252, ¶ 31, 307 Mont. 139, 36 P.3d 900. The district court relied on *U.S. v. Gementera*, 379 F.3d 596 (9th Cir. 2004) in imposing the placard. This case upheld a probation requirement to wear a sandwich board outside a post office that read “I stole mail. This is my punishment.” *Id.* at 598-599. The 9th Circuit conceded the punishment was humiliating and “somewhat crude.” *Id.* at 601-602, 606. Unlike the U.S. Constitution, the Montana Constitution has a dignity clause subject to the highest levels of protection and scrutiny. *Walker*, ¶¶ 72-74. *Gementera* also clashes against this Court’s own precedent in *Muhammad*, which has already found public sign-display conditions as not reasonably related to goals of rehabilitation or protecting others. *See Muhammad*, ¶ 37.

The requirement to wear a signboard is a punishment whose primary objective is to inflict humiliation and shame, not rehabilitation. Interwoven with the reasoning to impose such a requirement is a flawed assumption that Morris and Nelson deserve what they are getting, so this thing can be done to them, even though such things would not be done to other human beings.

People who have made mistakes still have dignity, honor, loyalty, integrity, and moral principles. But the district court, using the force of law, deprived Morris and Nelson of their dignity by declaring them to have none of these values and to furthermore share their loss of dignity to the public by brandishing signs announcing they are liars who dishonor veterans. These unconstitutional actions deprived Morris and Nelson of their dignity. The signboard condition must be rescinded to correct this constitutional violation.

**B. The district court violated Morris' and Nelson's right to be free from cruel and unusual punishment when it ordered them to wear a signboard for public display.**

The Eighth Amendment of the United States Constitution and Article, II, § 22 of the Montana Constitution prohibit the infliction of cruel and unusual punishments. A punishment violates this clause if the punishment does not (1) comport with evolving standards of decency; (2) does not relate to a legitimate penological goal; or (3) subjects the punished person to a substantial physical or psychological risk of serious harm. *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958); *Ewing v. California*, 538 U.S. 11, 23 (2003); *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The order for Morris and Nelson to wear a

signboard at a veterans' memorial on public holidays violates all three of these tests.

A condition that mandates wearing a signboard saying “I AM A LIAR. I AM NOT A VETERAN.” does not comport with evolving standards of decency in a maturing society. Any technique outside the bounds of fines and imprisonment is constitutionally suspect. *Trop*, 356 U.S. at 100. Colonial-style punishments that stage a direct confrontation between the offender and the public are no longer permitted. *See Smith v. Doe*, 538 U.S. 84, 97-98 (2003). These punishments include being required “to stand in public with signs cataloguing their offenses.” *Id* at 97.

Wearing a signboard in public is a shaming punishment that does not advance any legitimate penological goal of rehabilitation or protection of victims or society. *See Mont. Code Ann. § 46-18-201(4)(p); Muhammad*, ¶ 37. “Releasing an offender to live in a community, but at the same time making him or her a public spectacle, is an affront to our constitutional principles.” *Muhammad*, ¶ 60 (Rice, J., concurring).

Research has repeatedly shown that certainty of punishment, not severity, has a greater deterrent effect. Daniel S. Nagin, *Deterrence in*

*the Twenty-First Century*, 42 Crime and Justice 199, 201 (2013). Shame is a complicated emotion with uncertain and unpredictable consequences. Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 Psychology, Public Policy, and Law 645, 697-699 (1997). Shame holds the potential to provoke feelings of anger and violence. June P. Tanguey, *Moral Emotions and Moral Behavior*, 58 Annu. Rev. Psychol. 345 (2007). A shaming punishment can even be linked to increased recidivism. *Id.*

Finally, requiring Morris and Nelson to wear such a signboard or placard at Montana Veterans Memorial each Memorial Day and Veterans Day places them at substantial risk of serious harm. When the government takes a person into custody and holds them against their will, the Eighth Amendment and Due Process clause impose a corresponding duty to assume responsibility for that person's safety and well-being. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 199-200 (1989). This duty applies to probation to the extent the State controls the probationer's conduct and presence at a particular place. *Williams v. Georgia*, 505 S.E.2d 816, 818 (Ga. 1998).



In *Williams*, the Georgia Court of Appeals struck a condition that the probationer wear a placard stating “BEWARE HIGH CRIME AREA” between the hours of 7:00 p.m. and 11:00 p.m. in the area where the probationer committed the offense, holding the condition placed the probationer in danger and had no provisions to provide for his safety besides the occasional patrol. *Williams*, 505 S.E.2d at 817-818.

The signboard requirement imposed by the district court here contains absolutely no provisions for even the presence of an officer to protect Morris and Nelson from potential threats they may face from wearing such a provocative message on days of high attendance at Montana Veterans Memorial. (Morris Doc. 103 at 9; Nelson Doc. 53 at 9-10.) Imposing this signboard condition violates Morris’s and Nelson’s right to be free from cruel and unusual punishment.

**C. The district court compelled the speech of Morris and Nelson in violation of the First Amendment by imposing a signboard condition with a court-mandated message that must be displayed to the public.**

“It is [a] basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say.”

*Agency for Intl. Development v. Alliance for Open Society Intl., Inc.*, 570

U.S. 205, 213 (2013). And the right to free speech includes both the right to speak freely and the right to refrain from speaking at all. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Ordering Morris and Nelson to wear a signboard that says “I AM A LIAR. I AM NOT A VETERAN. I STOLE VALOR. I DISHONORED ALL VETERANS” is a judicial order of compelled speech that violates the First Amendment. Morris and Nelson may challenge the illegality of their sentence, even in the absence of a specific First Amendment objection. *State v. Ellis*, 2007 MT 210, ¶ 7, 339 Mont. 14, 167 P.3d 896.

This Court has not yet applied a compelled speech challenge to the legality of a probation condition, however, the California Supreme Court has held that in order for a government to impose a condition that deprives or waives a person’s constitutional rights, the government agency must establish that (1) the imposed condition reasonably relates to the purpose sought by the legislation that confers the benefit; (2) the value accruing to the public from imposing the condition manifestly outweighs any resulting impairment of constitutional rights; and (3) there are no available alternative means less subversive of the

constitutional right at issue. *Parrish v. Civil Service Commission of Alameda County*, 425 P.2d 223, 230 (Cal. 1967).

A suspended sentence allows a probationer to remain at liberty but subject to probation conditions reasonably related to rehabilitation or the protection of victims or society. *See Muhammad*, ¶ 34. Compelling someone to say they are a liar who stole valor does not protect any victim nor promote rehabilitation, as previously discussed. The district court's explanation for imposing the condition described no value that would accrue to the public from compelling Morris's and Nelson's speech, particularly a public value that manifestly outweighs a right to refrain from presenting government-mandated speech.

Most importantly, multiple alternatives less subversive to the First Amendment were available. The district court, in fact, imposed such an alternative when it conditioned parole eligibility in requiring letters of apology to be sent to veterans' organizations. (*See Morris Doc. 103 at 7-8; Nelson Doc. 53 at 8.*) Probation is a restriction of liberty, but a government-mandated speech condition of wearing a signboard goes too far, particularly when there are other alternatives available that do not require such an infringement on constitutional rights.

### **III. Morris’s written judgment must be amended to reflect 93 days of credit for time served.**

“A person incarcerated on a bailable offense against whom a judgment of imprisonment is rendered must be allowed credit for each day of incarceration prior to or after conviction.” Mont. Code Ann. § 46-18-403(1). Calculating credit for time served is not a discretionary act, but a legal mandate. *State v. Parks*, 2019 MT 252, ¶ 9, 397 Mont. 408, 450 P.3d 889.

At sentencing, the State and Defense stipulated to 93 days of credit for Morris. (Morris Tr. 19, 21.) The district court acknowledged the parties had agreed on the amount of credit for time served. (Morris Tr. 21.) However, the district court did not order that credit. (*See* Morris Doc. 103; Morris Tr. 23-26.) When the proper amount of credit has not been given, the remedy is to remand for an amended judgment granting the credit, or 93 days in this case. *See Parks*, ¶ 14.

### **CONCLUSION**

Morris respectfully requests this Court instruct the district court to strike the entirety of “added condition 1(b)” on page 9 of the written

August 29, 2019 judgment and to further amend that written judgment to reflect 93 days of credit for time served.

Nelson respectfully requests this Court instruct the district court to strike the entirety of “added condition 1(b)” on pages 9-10 of the written August 30, 2019 judgment.

Respectfully submitted this 2nd day of October, 2020.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,122, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ James Reavis  
JAMES REAVIS  
Assistant Appellate Defender

## **APPENDIX**

Written Judgment (Morris).....	App. A
Sentencing Hearing (Morris) .....	App. B
Written Judgment (Nelson) .....	App. C
Sentencing Hearing (Nelson) .....	App. D

## **CERTIFICATE OF SERVICE**

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