

No. DA 20-0251

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSHUA PAUL CORRIHER,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, the Honorable Robert B. Allison, Presiding

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STATEMENT OF THE ISSUES

1. Did the district court err by concluding a disabled veteran, given a medical discharge from the United States Army for Post-Traumatic Stress Disorder (PTSD) and traumatic brain injury (TBI), unable to work, and receiving Army Disability Benefits should be required to pay \$3,025 in extradition expenses from his benefit entitlement?

2. Was the district court's condition ordering Corriher to surrender his medical marijuana card unconstitutional as applied to him?

STATEMENT OF THE CASE

Appellant Joshua Paul Corriher, appeals two sentences following his guilty pleas for felony criminal endangerment and for a separate felony driving under the influence (DUI). (5/22/19 Tr. at 3; 3/23/20 Tr. at 8–10.)

On June 5, 2018, Lincoln County charged Corriher by Information of DUI. (DA 20-0251, D.C. Doc. 1.) On this charge, Corriher entered into a plea agreement on a single count of criminal endangerment without reserving any issues for appeal. (*See* 5/22/19 Tr. at 3.)

On June 14, 2019, Flathead County charged Corriher by Information of felony DUI—or an alternative count of DUI Per Se, misdemeanor careless driving, and misdemeanor possession of drug paraphernalia. (DA 20-0332, D.C. Doc 4.) Corriher entered a guilty plea for a single count of felony DUI. (3/23/20 Tr. at 8–10.) The other charges on the June 14, 2019 Information were dismissed.

At sentencing, the district court ordered Corriher to surrender his medical marijuana card despite his argument that the probationary condition denying him prescription marijuana lacked any nexus to his offenses; and despite arguing and providing evidence that his doctor prescribed marijuana to manage symptoms for his severe PTSD and TBI. The district court also ordered Corriher to pay \$3,025 as restitution to the State for the cost of transporting him from Georgia to Montana. (3/5/20 Tr. at 46.) The district court reasoned that Corriher was able to pay this extradition costs because he received a monthly income of \$3,000 in Army Disability Benefits.

Corriher made timely appeals. (D.C. Doc. 43.) Corriher’s appeal for his criminal endangerment sentence—captioned DA 20-0251. He also appeals his felony DUI sentence—captioned DA 20-0332. On

March 15, 2021, this Court consolidated for the purposes of appeal his two causes DA 20-0251 and DA 20-0332 under Cause No. DA 20-0251.

STATEMENT OF THE FACTS

After serving seven years in the United States Army, Corriher received a medical discharge. (*See* D.C. Doc. 49.) His years of service in harm's way rendered him disabled and unable to work. (*See* D.C. Doc. 49.) Corriher suffered TBI when his military vehicle was hit by an Improvised Explosive Device (IED) in Afghanistan. Since his return from his last tour, Corriher was diagnosed with PTSD. After Afghanistan, Corriher has to live with the psychological and physical scars of being broken in service of our country. (*See* 3/5/20 Tr. at 13 (Corriher now wears a bandana to cover the scars on his forehead.))

In the Army, Corriher was a vehicle mechanic who rose through the ranks to become Sergeant. (*See* D.C. Doc. 49.) Corriher served two one-year-long tours to Afghanistan in 2010 and 2013. During both tours Corriher's unit experienced multiple mortar and daily indirect fire attacks. (D.C. Doc. 49 at 1.) For most of the seven years of service in the Army, Corriher was constantly afraid for his life. Often, he felt unsure whether he would survive enemy attacks. (*See* D.C. Doc. 49 at

1–2.) In 2014, after he returned from his last tour of duty he was diagnosed with PTSD. (D.C. Doc. 49 at 1.) Still, Corriher wanted to stay on with the Army, but the Army forced him into medical retirement because of his TBI and PTSD. (*See* D.C. Docs. 43 at 1–2, 49 at 1–2.)

Corriher’s transition to civilian life has not been good. The Pre-Sentencing Investigation (PSI) amply documents Corriher’s PTSD, TBI, and severe social anxiety. (*See* D.C. Doc. 43 at 5.) Among a slew of other medical diagnoses, Corriher also suffers from migraines, insomnia, and nightmares/terrors, hypervigilance, exaggerated startle reactions, and irritability. (D.C. Doc. 43 at 5; D.C. Doc. 49 at 2.)

For the first DUI charge, Corriher pleaded guilty to a single count of criminal endangerment. (*See* 5/22/19 Tr. at 3.) Corriher also pleaded guilty to a single count of DUI for the second DUI case. (3/23/20 Tr. at 8–10.)

At sentencing, the State urged the trial court to impose a five-year commitment to the Department of Corrections, along with time-served credit for 56 days. (3/5/20 Tr. at 29.) The State requested the trial court to impose \$3,025 as restitution—alleging that the State of

Montana incurred that expense to extradite Corriher from Georgia. (3/5/20 Tr. at 30.) Corriher, through counsel, opposed the imposition of this extradition cost. (3/5/20 Tr. 32–34, 46.) The Court indicated: “I’m going to impose a condition 30, which is restitution to the State of Montana – it’s not a fine, it’s restitution, for the extradition cost in the sum of \$3,025, and that can be paid to the Department of Corrections.” After the trial court indicated it was going to impose \$3,025 as restitution, Corriher renewed his objection. (3/5/20 Tr. 32–34, 46.)

The defense also objected to fines and fees under conditions 13 and 14 of the PSI on the grounds that Corriher (who was on Army Disability Benefits) lacked the financial wherewithal to pay. (3/5/20 Tr. at 30.) The trial court noted that Corriher received \$3,000 per month from “Army Disability.” (3/5/20 Tr. at 30–31.) The defense argued that according to this Court’s precedent, Army Disability Benefits like Social Security Disability Benefits were not income and the trial court could not construe these entitlements as income. (*See* 3/5/20 Tr. at 31.) Corriher was unable to work because of the PTSD and TBI he received when he was “blown up” in the service of this country in Afghanistan. (3/5/20 Tr. at 32.) The defense maintained: “And I don’t believe he has

an income. And even if you did consider \$3,000 a month, once you take out reasonable rent, gas and food, he has a meager existence.” (3/5/20 Tr. at 32.) Corriher urged the trial court not to impose the fines and fees as conditions 13 and 14 based on his inability to pay. (3/5/20 Tr. at 39.)

Corriher also objected to the condition requiring him to surrender his medical marijuana card. (3/5/20 Tr. at 33.) He argued there was no nexus between the denying him access to his marijuana prescription and Corriher nor the offenses for which he was convicted. (*See* 3/5/20 Tr. at 33.) The State had not shown Corriher suffered any addiction to illegal drugs. (*See* 3/5/20 Tr. at 33.) Corriher argued he suffered from PTSD and TBI from his military service to our country. (*See* 3/5/20 Tr. at 33.) He established at sentencing the symptoms of PTSD and TBI were irritability, flashbacks, and overreacting to situations, among other symptoms. (3/5/20 Tr. at 33.) Corriher argued there were numerous medical articles demonstrating that marijuana was efficacious treatment for Corriher’s chronic conditions and without the adverse side effects experienced from opioids on the liver and kidneys of a patient. (3/5/20 Tr. at 33–34.) The defense continued: “And it makes

no sense to me that a much more dangerous opiate that is more addictive is allowed under his probation, but medical marijuana isn't. And so I would object that, as applied to Mr. Corriher, this condition is unconstitutional." (3/5/20 Tr. at 34.)

The trial court sentenced Corriher to a ten-year DOC sentence with five years suspended and 56 days as credit for time served. (3/5/20 Tr. at 45.) The district court struck down conditions 13–16 that Corriher objected to. However, it imposed the condition barring Corriher from accessing medical marijuana as follows:

I -- and I do feel that there's a nexus between any kind of substance abuse, whether it's legal or illegal drugs, and this offense because this offense arose out of alcohol consumption -- excessive alcohol consumption. Alcohol is a drug, and it's just different sides of the same coin, it just happens to be legal, but it has the same awful effects. I think that your drinking and driving chronically, repeatedly, persistently both before and since your traumatic brain injury indicates an addiction to alcohol, and that use other mood-altering substances like marijuana is contraindicated, and therefore I'm -- I do find that there is a nexus between the use of alcohol and the use of marijuana that renders the Medical Marijuana Act inapplicable in your case.

(3/5/20 Tr. at 45–46.)

Over Corriher's objection, the district court also ordered him to pay \$3,025, the extradition cost of transporting him from Georgia to Montana as restitution. (3/5/20 Tr. at 46.)

According to the PSI, Corriher has no income. (D.C. Doc. 43 at 5; 3/5/20 Tr. at 30–31.) But he receives \$3,000 per month as disability benefits from the United States Army. (D.C. Doc. 43 at 5; 3/5/20 Tr. at 30-31.) His only asset was his vehicle and he owed \$31,000 in debt. (D.C. Doc. 43 at 2.)

STANDARDS OF REVIEW

The Court reviews sentencing conditions first for legality, then for abuse of discretion as to the condition's reasonableness under the facts of the case. *State v. Daricek*, 2018 MT 31, ¶ 7, 390 Mont. 273, 412 P.3d 1044 (citation omitted). Whether a sentence is legal is a question of law subject to de novo review. *Daricek*, ¶ 7. This Court reviews criminal sentences for legality. *State v. Eaton*, 2004 MT 283, ¶ 11, 21, 323 Mont. 287, 99 P.3d 661 *citing State v. Montoya*, 1999 MT 180, ¶¶ 15–16, 295 Mont. 288, 938 P.2d 937. The legality of a sentencing condition is reviewed de novo. *State v. Corbin*, 2008 MT 146, ¶ 4, 343 Mont. 211,

184 P.3d 287, *citing State v. Ashby*, 2008 MT 83, ¶ 9, 342 Mont. 187, 179 P.3d 1164.

This Court's review of legality is generally confined to determining whether the sentence falls within the statutory parameters, whether the district court had statutory authority to impose the sentence, and whether the district court followed the affirmative mandates of the applicable sentencing statutes. *State v. Himes*, 2015 MT 91, ¶ 22, 378 Mont. 419, 345 P.3d 297.

SUMMARY OF THE ARGUMENT

The State imposed \$3,025 in restitution as the cost of extraditing Corriher from the state of Georgia. Corriher's only income is Army Disability Benefits. The district court cannot order restitution on the basis that Army Disability Benefits were income. That is an illegal sentence. Disability benefits are exempt from compulsory payment through garnishment, levy, or by any legal process.

Furthermore, imposition of restitution where Corriher's only source of income is the Army Disability Benefits is an abuse of discretion—Federal SSD is exempt from compulsory payment through garnishment, levy, or any legal process. A disabled retired army

veteran’s Disability Benefits may not be used to satisfy a criminal judgment. 42 U.S.C.A. § 407(a) states, “none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.”

Corriher brought an as-applied challenge to the constitutionality of Mont. Code Ann. § 50-46-307(4)—which prevents a probationer from obtaining a lawful medication. At sentencing, the district court ordered Corriher to surrender his medical marijuana card despite his showing he needed medical marijuana to manage symptoms of his chronic medical ailments including TBI and PTSD, although he argued that prohibition of medical marijuana lacked any nexus to the offense. And despite arguments and compelling evidence that Corriher needed medical marijuana to manage symptoms for his severe and chronic ailments.

ARGUMENT

- I. **The district court erred in concluding that a disabled veteran, who received a medical discharge from the Army for PTSD and TBI, unable to work, and who receives Army Disability Benefits should pay the State from his disability benefits \$3,025 for the cost of his extradition.**

The Federal Social Security Act (The Act) provides payment of SSI and disability benefits to indigent, disabled individuals such as Corriher. 42 U.S.C.A. § 1382, *et. seq.* Federal law explicitly protects Corriher’s Army Disability Benefits from, “execution, levy, attachment, garnishment, or other legal process.” 42 U.S.C.A. § 407(a). Federal law prohibits the State of Montana from collecting fees and surcharges from Corriher’s Army Disability Benefits. *State v. Eaton*, 2004 MT 283, ¶¶ 18, 21, 323 Mont. 287, 99 P.3d 661, *citing Bennett v. Arkansas*, 485 U.S. 395, 398 (1988) (a district court’s order requiring defendant to make restitution payments from his net income, including social security income, conflicts with § 407(a) and improperly burdens social security benefits).).

In *Eaton*, the inclusion of Social Security Benefits in the determination of net income for the purpose of calculating restitution as a condition of a suspended sentence was held reversible error and a violation of 42 U.S.C.A § 407(a). *Eaton*, ¶22.

In *Eaton*, ¶22, the State argued 42 U.S.C.A § 407(a) only prevented a direct levy on Eaton’s benefits, and Eaton could raise that defense should a levy or garnishment be sought. This Court found a

better alternative was to, “eliminate the offending condition from the judgment in the first instance,” and reversed and remanded the sentence for a new evaluation of Eaton’s restitution. *Eaton*, ¶22.

Corriher is a retired army sergeant who suffered PTSD and TBI in service of his country. His only source of income is \$3000 per month in Army Disability payments. The entirety of Corriher’s benefits is shielded from garnishment, levy or other legal process. Corriher cannot pay the extradition expenses from his disability benefits, and the court has no mechanism to compel Corriher to pay. The sentence imposing \$3,025 in restitution is illegal and an abuse of discretion.

“The United States Supreme Court held that execution, levy, attachment, garnishment, or other legal process are terms of art referencing to formal procedures by which one person gains a degree of control over property otherwise subject to the control of another, and generally involves some form of judicial authorization.” *Eaton*, ¶21 *citing Washington State Dept. of Social and Health Services v. Guardianship*, 537 U.S. 371,385, 123 S.Ct. 1017, 1025, (2003).

Corriher’s only source of sustenance—his Army Disability Benefits—may not be levied, garnished or subject to court order. The

district court ordered Corriher to pay \$3,025 restitution as the cost of extraditing him because it construed his Army Disability Benefits as income. But the Army Disability Benefit is not subject to garnishment or levy through court process. The imposition of this \$3,025 as a condition of sentencing was an abuse of discretion. It is illegal to force a disabled Army Veteran, unable to work after suffering PTSD and TBI in the service of his country, to pay restitution from his disability benefits. Our system of justice should take better care of those veterans who risked life and limb in service of this country and are now disabled.

II. The condition of the sentence ordering Corriher to surrender his medical marijuana card and restricting access to marijuana was unconstitutional as applied.

The core constitutional right under attack in the case at bar is the fundamental right of individual privacy guaranteed by Article II, Section 10, of the Montana Constitution. Quite simply, Mont. Code Ann. § 50-46-307(4) prevents a probationer from obtaining a lawful medication even though I-190 decriminalized possession of marijuana for all adults in Montana. In so doing, it unconstitutionally infringes on a probationer's right to individual privacy and the inalienable right to

seek health under Montana’s Constitution. *See Armstrong v. State*, 1999 MT 261, ¶ 2, 296 Mont. 361, 989 P.2d 364.

Montana Code Annotated § 50-46-307(4) provides: “A person may not be a registered cardholder if the person is in the custody of or under the supervision of the department of corrections or a youth court.” This is a sweeping, blanket prohibition for all probationers. Under no circumstances may a probationer qualify for a medical marijuana card.

Montana’s Medical Marijuana Act (“MMA”), codified at Mont. Code Ann. § 50-46-301(b), provides legal protections to individuals with debilitating medical conditions, including “severe chronic pain that is persistent pain of severe intensity that significantly interferes with daily activities as documented by the patient’s treating physician....” Mont. Code Ann. § 50-46-301(2)(c). The MMA allows qualifying patients the use of marijuana to alleviate the symptoms of their debilitating medical conditions.

A central component to the fundamental constitutional rights of privacy and dignity is the right to personal autonomy. *See Gryczan v. State*, 283 Mont. 433, 450-51, 942 P.2d 112, 123 (1997); *Armstrong*, ¶ 34.

Article II, Section 3 of the Montana Constitution guarantees each person the inalienable right to seek safety, health and happiness in all lawful ways—i.e., in the context of this case, the right to seek and obtain medical care from a chosen health care provider and to make personal judgments affecting one’s own health and bodily integrity without government interference.

The right of individual privacy guaranteed by Mont. Const. Art. II, § 10, requires the government to leave us alone in all these most personal and private matters. *Armstrong*, ¶ 72. In applying the Montana Constitution’s guarantees of individual dignity and autonomy, this Court recognized the breadth of the protection afforded a patient’s medical judgments.

In *Armstrong*, this Court concluded: Mont Const. Art. II, § 10 broadly guarantees each individual the right to make medical judgments affecting her bodily integrity and health in partnership with a chosen health care provider free from government interference. *Armstrong*, ¶ 14.

The constitutional protection of an individual’s right to make her own medical judgments includes the right to elect the type of efficacious

treatment to treat her symptoms. A seriously ill patient's decision to ingest medication is an act of personal autonomy. It ensures an individual her core dignity and her personal autonomy. A patient's choice of medication to alleviate her medical suffering is a personal, intimate decision directly implicating her dignity, privacy and health.

However, as Judge Alex Kozinski stated in his concurrence in *Conant v. Walters*, 309 F.3d 629 (9th Cir.2002), while the allowance of medical marijuana "may seem faddish or foolish ... the public record reflect[s] a legitimate and growing division of informed opinion on this issue. A surprising number of health care professionals and organizations have concluded that the use of marijuana may be appropriate for a small class of patients who do not respond well to, or do not tolerate, available prescription drugs." *Conant*, 309 F.3d at 640–41 (Kozinski, J., concurring) (internal citations omitted); *State v. Nelson*, 2008 MT 359, ¶ 32, 346 Mont. 366, 195 P.3d 826.

A patient's medical decisions are best made with the private consultation and advice of a physician. *See Armstrong*, ¶ 75. The patient—with the intimate involvement of a physician—is best situated to determine how to best to live with pain and suffering. *Cf Armstrong*,

¶¶ 58, 74 (recognizing “partnership” between patient and physician); *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (recognizing necessity of physician in exercise of constitutional right to make and implement medical decision). *Armstrong*, ¶ 11. *Armstrong* stands for the general proposition that Montanans have the right to make medical judgments affecting their bodily integrity and health in partnership with their chosen healthcare provider, free from interference of the government. Just as the government has no business in the bedrooms of consenting adults, *Gryczan*, 283 Mont. at 450, 942 P.2d at 122, neither does it have any business in the treatment rooms of their health care providers, except under the very narrowly defined circumstances. *Armstrong*, ¶ 61.

Perhaps anticipating a systemic assault on the liberties of Montanans such as Mont. Code Ann. § 50-46-307(4), the *Armstrong* court wisely declined to draw “final boundaries... around the personal autonomy component of the right of individual privacy,” noting the “State’s ever innovative attempts to dictate in matters of conscience, to define individual values, and condemn those found to be socially repugnant or politically unpopular.” *Armstrong*, ¶38.

The Montana Supreme Court left the door open for an as-applied challenge to the constitutionality of Mont. Code Ann. § 50-46-307(4) by concluding as it did in *Montana Cannabis Indus. Ass'n*: Whether a condition or restriction of a sentence bears the requisite “nexus” to the offender or to the underlying offense is a question of compliance with sentencing statutes. *See Montana Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶¶ 71-73, 382 Mont. 256, 368 P.3d 1131.

If, in a particular case, a district court imposes a sentence prohibiting a probationer access to medical marijuana, but the required nexus is not satisfied, an offender may bring an as-applied challenge that Mont. Code Ann. § 50-46- 307(4) is unconstitutional.

Prior to 2011, before the passage of the new MMA, the Supreme Court in *Nelson*, ¶ 29, held, in the context of conditions for probation, that medical marijuana must be treated as a prescription medicine, not a controlled substance. The Court reasoned that when a qualifying patient uses medical marijuana in accordance with the MMA, he is receiving lawful medical treatment. *Nelson*, ¶ 29. In this context, medical marijuana is a prescription drug. *Nelson*, ¶ 29. The Court allowed access to medical marijuana even though Nelson had a history

of illegal drug use, including marijuana, and though he pled guilty to possessing the precursors of a methamphetamine lab. *Nelson*, ¶ 29. In striking the errant probation condition that denied a qualifying patient access to medical marijuana, the Court reasoned that the previous version of the MMA stated unequivocally that a qualified patient in the medical marijuana registry “may not be arrested, prosecuted, or penalized in any manner or be denied any right or privilege, including but not limited to civil penalty or disciplinary action by a professional licensing board or the department of labor and industry, for the medical use of marijuana.” Mont. Code Ann. § 50-46-201(1).

The repealed version of the MMA simply did not give sentencing judges the authority to limit the privilege of medical use of marijuana while under state supervision. *Nelson*, ¶ 31. A sentencing court was only free to impose limitations on the place of use, and could certainly order that marijuana not be used in the presence of children. *Nelson*, ¶ 33. The sentencing judge could also impose conditions that prohibited a defendant from abusing medical marijuana. *Nelson*, ¶ 33. Such discretion to make a case-by-case determination has been unconstitutionally stripped away by the new blanket prohibition in

Mont. Code Ann. § 50-46-307(4). *See Montana Cannabis Indus. Ass’n*, ¶¶ 71-73.

Medical marijuana is prescription medication. The Supreme Court said in *Nelson*: “When a qualifying patient uses medical marijuana in accordance with the MMA, he is receiving lawful medical treatment. In this context, medical marijuana is most properly viewed as a prescription drug.” *Nelson*, ¶ 29.

In California, for example, the issue of probationers’ access to medical marijuana is handled on a case-by-case basis in the court’s discretion. *See People v. Moret*, 180 Cal.App.4th 839, 104 Cal.Rptr.3d 1 (2009); *see also, People v. Brooks*, 182 Cal.App.4th 1348, 107 Cal.Rptr.3d 501 (2010). The California statute at issue in *Moret* specifically provided: “Any criminal defendant who is eligible to use marijuana pursuant to Section 11362.5 may request that the court confirm that he or she is allowed to use medical marijuana while he or she is on probation or released on bail.” *Moret*, 180 Cal.App.4th at 853.

A probation condition, even if it is not a violation of the criminal law, must be reasonably related to the crime for which the defendant was convicted or to future criminality. However, it ordinarily cannot be

said that the treatment of an illness by lawful means is so related.

State v. Tilehkooh, 113 Cal. App. 4th 1433, 1443-44, 7 Cal. Rptr. 3d 226, 234 (2003).

In Montana, a probation condition is reasonable if it has a nexus to either the offense for which the offender is being sentenced or to the offender himself. *State v. Ashby*, 2008 MT 83, ¶ 15, 342 Mont. 187, 179 P.2d 1164. In *Ashby*, ¶ 15, this Court reaffirmed the proposition that a sentencing court may impose reasonable restrictions or conditions on sentences, but also made it clear that the condition must have “a nexus to either the offense for which the offender is being sentenced, or to the offender himself or herself.”

The Court in *Ashby* cautioned against imposition of stock conditions, requiring a case-by-case analysis:

We caution, however, that courts may impose offender-related conditions only in those cases in which the history or pattern of conduct to be restricted is recent, and significant or chronic. A passing, isolated, or stale instance of behavior or conduct will be insufficient to support a restrictive probation condition imposed in the name of offender rehabilitation.

Ashby, 15.

Judges recognize that community safety and protection are furthered when an alcoholic in recovery is on a monitored sobriety program. With alcohol prohibited, this probationer is more likely to work through the recovery program successfully; from this a judge may infer that a successful recovery program will reduce the likelihood of the offender returning to drinking or drugging and driving. However, a prohibition of prescribed medication is rarely recognized as furthering community safety and protection. See Frederic Rodgers, *When May A Probation Condition Allowing Use of Medical Marijuana Violate the Code of Judicial Conduct? Judicial Respect for the Law and Promoting Public Confidence in the Judiciary*, 89 Denv. U. L. Rev. 1017, 1023–24 (2012). Medication is different. See *Chavez v. Superior Court*, 123 Cal. App. 4th 104, 107–08, 23 Cal. Rptr. 3d 21, 23 (2004) (“Concluding Chavez was entitled to possess marijuana because of his chronic pain from a degenerative spine disease.”). It is important not to sentence by rote formula and mandatory guidelines. 89 Denv. U. L. Rev. at 1026. Each case before a judge must be carefully examined on its own merits and the applicable law. 89 Denv. U. L. Rev. at 1025; see also, *Chavez*, 123 Cal. App. 4th at 107- 08, 20 Cal. Rptr. 3d at 23. A judge can

balance the need for medical marijuana treatment against the goals of community safety and protection based on evidence at sentencing about the defendant's medical condition and the effects of prescribed marijuana upon it. *See* 89 Denv. U. L. Rev. at 1025; *see also*, *Chavez*, 123 Cal. App. 4th at 107–08, 20 Cal. Rptr. 3d at 23. If any applicant for probation appears to be using any prescribed medication in bad faith, such use may serve as a factor in the judge's weighting of the community-safety and protection-sentencing goals in deciding the probation issue. 89 Denv. U. L. Rev. at 1025. Judges may determine that a defendant's marijuana use for medical purposes is in bad faith if there exists no debilitating medical condition to support the patient's placement on the state registry of qualified medical marijuana users. 89 Denv. U. L. Rev. at 1025; *see also*, *Chavez*, 123 Cal. App. 4th at 107-08, 20 Cal. Rptr. 3d at 23.

Here, the district court intruded into the doctor/patient relationship in violation of the right to privacy and in violation of an individual's inalienable right to make his own health care decisions. The learned judge unschooled in medicine denied Corriher access to his prescription marijuana by reasoning:

I think that your drinking and driving chronically, repeatedly, persistently both before and since your traumatic brain injury indicates an addiction to alcohol, and that use of other mood-altering substances like marijuana is contraindicated, and therefore I'm -- I do find that there is a nexus between the use of alcohol and the use of marijuana that renders the Medical Marijuana Act inapplicable in your case.

(3/5/20 Tr. at 45–46.)

Access to medication enables patients to achieve a peaceful and dignified life. Patients with debilitating medical conditions need not live with unbearable suffering just because they are on probation. They must be allowed some control over their own circumstances.

Montana's strong constitutional protections of individual dignity, privacy, and the right to life's basic necessities, including health, also encompass the right to choose a treatment plan prescribed by a physician.

Because this right is a fundamental individual right to dignity, privacy and health, the State cannot place insurmountable barriers to choice and it can only limit its exercise if it shows both a compelling interest and that such interest is vindicated by narrowly tailored means. *See, e.g., Gryczan*, 283 Mont. at 449, 942 P.2d at 122.

Corriher was denied medical marijuana in a violation of his due process rights. The State cannot use its power to take an unreasonable, arbitrary or capricious action against an individual. *Montana Cannabis Indus. Ass'n*, ¶ 21

A prohibition of prescribed medication use is rarely a provision of probation. While possession of marijuana remains a criminal offense in Colorado, Colo. Rev. Stat. § 18-18-406(1), a patient's medical use of marijuana within the limits set forth in Colorado's medical marijuana laws is deemed lawful under the Colorado Constitution. *See* Colo. Const. Art. XVIII, § 14(4)(a).

Moreover, in Montana, the Legislature, just like the Washington Legislature, reached the conclusion that medical marijuana was efficacious treatment for patients with terminal and debilitating medical conditions. *See* Wash. Rev. Code Ann. § 69.51A.005(1)(a) (“The legislature finds that ... [t]here is medical evidence that some patients with terminal or debilitating medical conditions may, under their health professional's care, benefit from the medical use of cannabis.”).

Montana I-190 also decriminalizes possession of marijuana within our state borders. This was after Montana Voters passed Montana I-

190, the Marijuana Legalization Initiative in 2020. Therefore, possession of marijuana in Montana by a probationer is not illegal. This is yet another reason blanket prohibition of marijuana for those under supervision is even more improper. *See* Mont. Code Ann. § 50-46-301. Such a ban on access to marijuana is arbitrary and capricious punishment. Does a debilitating medical condition cease to be debilitating when a person is suddenly labelled a probationer? It most certainly does not. Do the medicinal properties of marijuana become less efficacious for treatment when a probationer finds himself suddenly under supervision? Surely not.

Montana Courts must be wary of using the probation system for any non-rehabilitative purpose no matter how superficially rational. *See Tilehkooh*, 113 Cal. App. 4th at 1444, 7 Cal. Rptr. 3d at 234 (internal citation omitted). A rehabilitative purpose is not served when the probation condition proscribes the lawful use of marijuana for medical purposes—any more than it could be said that prohibiting the lawful use of a prescription drug for probationers has a rehabilitative purpose. *See Tilehkooh*, 113 Cal. App. 4th at 1444, 7 Cal. Rptr. 3d at 234. It is unconstitutional to deny Corriher possession and acquisition

of any prescription drug with a physician's prescription. *See Tilehkooh*, 113 Cal. App. 4th at 1444, 7 Cal. Rptr. 3d at 234. The MMA considers medical marijuana as prescription medication.

Here, the district court violated Corriher's right to individual privacy when it ordered him to surrender his medical marijuana card thereby denying him access to medical marijuana. Corriher, through counsel, objected to the condition requiring him to surrender his medical marijuana card. (3/5/20 Tr. at 33.) Corriher asserted there was no nexus between the prohibition on access to medical marijuana and Corriher nor the offense for which he was convicted. (*See* 3/5/20 Tr. at 33.) The State had not shown Corriher suffered any addiction to illegal drugs. (*See* 3/5/20 Tr. at 33.) Corriher argued he suffered from PTSD and TBI from his military service to our country. (*See* 3/5/20 Tr. at 33.) Corriher argued there were numerous medical articles demonstrating that THC was efficacious treatment for Corriher's chronic conditions and without the adverse side effects experienced from opioids on the liver and kidneys of a patient. (3/5/20 Tr. at 33–34.) The district court ordered Corriher to surrender his medical marijuana card without

considering that his doctors prescribed him marijuana to treat symptoms of his PTSD and TBI.

The district court reasoned that marijuana like alcohol is a drug: “Alcohol is a drug, and it’s just different sides of the same coin, it just happens to be legal, but it has the same awful effects.” This reasoning does not hold water. By the same logic, an opioid, like alcohol is a drug. It is “[j]ust a different side of the same coin, it just happens to be legal, but it has the same awful effect.” Yet doctors prescribe opioids for managing debilitating pain. By this same stretch of logic, the district court could impose probationary conditions denying Corriher access to opioids. Opioids are a drug like alcohol and more over they are even more addictive than marijuana and also have worse side effects. It would be a clear abuse of discretion for the trial court to deny Corriher access to opioids because he was convicted of a DUI. Yet this is the same premise, leap in logic, the district court used to deny him access to medical marijuana.

As warned by *Armstrong*, the district court denied Corriher access to medical marijuana based on a belief that smoking marijuana was “socially repugnant.” *Armstrong*, ¶38.

There was no nexus between the prohibition in this case and the offender nor the offense. The district court erred by precluding Corriher access to efficacious treatment for his debilitating pain: medical marijuana.

CONCLUSION

Corriher requests the Court to reverse with instructions to strike condition 30 which imposes restitution of \$3,025 and to order the Department of Health and Human Services to allow Corriher his medical marijuana prescription.

Respectfully submitted this 15th day of April, 2021.

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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 5,615, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Moses Okeyo

MOSES OKEYO

APPENDIX

Judgment App. A

Sentencing Tr. App. B

CERTIFICATE OF SERVICE

I, Moses Ouma Okeyo, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-15-2021:

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