

Final

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 07-339

STATE OF MONTANA,

Defendant/Appellant,

vs.

TIMOTHY SCOTT NELSON,

Plaintiff/Appellee.

DEFENDANT'S APPELLATE BRIEF

On Appeal from the Montana Ninth Judicial District Court, Pondera County

The Honorable Laurie McKinnon, Presiding.

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STATEMENT OF THE ISSUES

1. The sentence imposed by the District Court is illegal because the prohibition that Nelson not use medical marijuana has no logical correlation to the crime for which he was sentenced, and a legal sentence requires such a correlation.
2. The sentence imposed by the District Court imposes a penalty upon Mr. Nelson that is illegal under the clear and concise language of Mont. Code Ann. § 50-46-201(1).
3. The sentence imposed by the District Court exceeds the statutory mandates set forth in the sentencing and corrections policies of Montana law.
4. Both the District Court's sentence and the Montana Department of Corrections-Probation and Parole mandate that Mr. Nelson obey all laws is directly contrary to Montana law.
5. The condition imposed by the District Court that Mr. Nelson not use medical marijuana to treat his chronic pain is cruel and unusual punishment, and is therefore prohibited by both the United States and Montana Constitutions.

STATEMENT OF THE CASE

Timothy Nelson was charged on May 16, 2006, in Pondera County, with seven counts: Count I - Operation of Unlawful Clandestine Laboratory, Count II - Criminal Possession of Precursors to Dangerous Drugs, Count III - Criminal Production or Manufacture of Dangerous Drugs, Count IV - Criminal Endangerment, Count V - Criminal Possession of Dangerous Drugs, Count VI -

Criminal Possession of Dangerous Drugs, and Count VII - Criminal Possession of Drug Paraphernalia. (Sent. Judm. ¶1) On December 11, 2006, before Judge Marc Buyske, Mr. Nelson entered a no contest plea to Count II, Criminal Possession of Precursors to Dangerous Drugs, in return for the State agreeing to dismiss all other Counts. (Change of Plea Trans. Dec. 11, 2006, pg. 2)

In November, 2006, Judge Laurie McKinnon was elected as judge for Montana's Ninth Judicial District. Subsequent to her election, Judge McKinnon, in an off record discussion with counsel for the State and counsel for Mr. Nelson, let counsel know that she would not accept the sentencing recommendation proposed by the parties in the plea agreement. Thereafter, Mr. Nelson was allowed to withdraw his plea.

On February 5, 2007, a second change of plea hearing was conducted. At this time Mr. Nelson changed his plea to no contest to Count III, Criminal Production or Manufacture of Dangerous Drugs and in return for which the State agreed to dismiss Counts I, II, IV, V, VI, and VII. (Sent. Judm. ¶4) Both parties agreed to recommend to the Court a three year deferred imposition of sentence to the department of corrections. *Id.*

In a February 26, 2007, Sentencing Hearing, Judge McKinnon, after reviewing the pre-sentence investigation, accepted the plea agreement, and

deferred the sentence for a period of three years, contingent upon several conditions, notably that Mr. Nelson not ingest marijuana in any form other than through a prescription for Dronabinol, the pill form of the substance. (Sent. Trans. Feb. 26, 2007, pg. 14)

STATEMENT OF THE FACTS

Timothy Nelson is a Montana citizen who has no prior criminal history. (PSI pg. 6). Mr. Nelson relies on Social Security Disability benefits to provide for his family. *Id.* at 5. He has chronic medical problems and physical restrictions that prohibit him from doing any heavy lifting, walking, standing, or sitting for long periods of time. *Id.* Mr. Nelson is a qualifying patient under the Montana Medical Marijuana Act because he has been accepted to the State of Montana Medical Marijuana Program for treatment of chronic pain. (PSI, Attachment) Mr. Nelson is being treated for bipolar disorder, ADHD and chronic depression, in addition to pain resulting from a car accident which caused several spinal injuries. (PSI pg. 14).

Prior to his acceptance to the Medical Marijuana Program, The Pondera County Sheriff's Office, hereinafter PCSO, began investigating Mr. Nelson's home after being contacted by a citizen informant. *Id.* at 3. The informant stated that s/he had seen marijuana plants in the basement, to which information officers

of the PCSO responded by searching Mr. Nelson's garbage on April 10, 2006. *Id.* Finding items that may be utilized in the use or production of marijuana, officers returned with a search warrant on April 24, 2006, at which time they searched Nelson's home. *Id.* The PCSO's search again revealed no actual marijuana plants, merely items that may be used in the production of marijuana. *Id.*

Based on the evidence gathered in these searches and the informant information obtained by the police, Mr. Nelson was charged with the offenses listed supra, one of which was Criminal Production of Dangerous Drug. Mr. Nelson eventually pled no contest to this charge because he believed that the State had enough evidence to convict him on this charge. This is because at the time he was cited for the offense, he had not yet been accepted to the Montana Medical Marijuana Program. During the pendency of this case, Mr. Nelson was accepted to said program.

At his sentencing hearing on February 26, 2007, Mr. Nelson's counsel objected to the PSI condition limiting him to use of medical marijuana in pill form only, due to both the expense of the medication and Mr. Nelson's limited financial capabilities. (Sent. Trans. Feb. 26, 2007, pg. 11) Requiring that Dronabinol be the only form of medical marijuana that Mr. Nelson may ingest merely adds to the list of already expensive medications he must take to treat his many medical

problems. *Id.* at pg. 19. Mr. Nelson filed a timely notice of appeal to this Court for the review of the legality of this condition of his sentence.

SUMMARY OF THE ARGUMENT

When the District Court imposed a sentencing condition on Mr. Nelson, a qualifying patient in Montana's Medical Marijuana Program, that he not ingest medical marijuana except in pill form, it violated several of Mr. Nelson's rights and Montana laws, including: Mont. Code Ann. §§ 46-18-201 and 50-46-201. The District Court also violated Mr. Nelson's rights against cruel and unusual punishment, as well as his right to dignity and his right to have the laws enforced fairly and evenly.

STANDARD OF REVIEW

The Court "will review a criminal sentence for legality only." It will review "*de novo* whether the district court violated the defendant's constitutional right to due process at sentencing." *State v. Jackson*, 2007 MT 186, ¶5 338 Mont. 344, ¶5, 165 P.3d 321, ¶5.

ARGUMENT

Issue I.

The sentence imposed by the District Court is illegal because the prohibition that Nelson not use medical marijuana has no logical correlation to the crime for which he was sentenced, and a legal

sentence requires such a correlation.

Title 50, Chapter 46, of the Montana Code is the Medical Marijuana Act which was approved overwhelmingly by the voters of Montana in 2004. Mont. Code Ann. § 50-46-201(1) clearly states in relevant part, “a qualifying patient...who possesses a registry identification card issued pursuant to [Mont. Code Ann. § 50-46-103] may not be arrested, prosecuted, or **penalized in any manner or be denied any right or privilege..., for the use of marijuana.**”

(emphasis added). Mr. Nelson would assert that the sentencing court’s condition that he not use marijuana except in pill form has no logical nexus to the crime for which he was sentenced.

The District Court’s condition 10 of the Judgment and Sentence states, in part, “although the Defendant states he has a medical use exception to possess marijuana, the Defendant may not possess marijuana except in pill form [(e.g. Dronabinol or Marinol)] and only by prescription by a licensed physician.” Mr. Nelson was sentenced for Criminal Production or Manufacture of Dangerous Drugs, a felony in violation of Mont. Code Ann. § 45-9-110 (2005). In normal circumstances, the District Court’s condition would certainly be reasonable and logically related to the crime to which Mr. Nelson pled. However, Montana’s Medical Marijuana Program and Mr. Nelson’s acceptance and participation therein

render these circumstances abnormal.

In considering what conditions of sentence can be imposed, [the Court has] previously explained 'in order to be reasonably related to the objectives of rehabilitation and protection of the victim and society,...a sentencing limitation or condition must have some correlation to the underlying offense for which the defendant is being sentenced.

State v. Holt, 2006 MT 151, ¶29, 332 Mont. 426, ¶29, 139 P.3d 819, ¶29

(holding that since there was no evidence in the record that alcohol contributed to the offense to which Holt was sentenced, a sentencing condition prohibiting Holt from using alcohol was not logically related to the crime and, therefore, improper).

The approval by Montana voters of the Montana Medical Marijuana Act turned what would normally be considered a normal and routine crime into an abnormal and complex issue.

In essence, the Montana Medical Marijuana Act made it legal for certain qualifying patients/participants in the program to engage in what would otherwise be illegal activity, specifically the use and production of marijuana. After the codification of the Medical Marijuana Act, for qualifying patients, marijuana became just another legal drug to be used within specific prescriptions for medical purposes, no different than Lortab, Morphine, penicillin, Viagra, etc. It is especially noteworthy that Mr. Nelson is also prescribed: Wellbutrin XL 300 mg., Gabapentin 100 mg. 3x, Clonzapam 1 mg. 3x, and Trazadone 400 mg. 1x.

However, the District Court did not prohibit Mr. Nelson from taking these drugs, nor did it order Mr. Nelson to take an acceptable alternative to these drugs because the District Court disapproved of those which Mr. Nelson had been prescribed. The District Court only focused on one drug, the medical marijuana, which after the passage of the Medical Marijuana Act should be treated as any other prescription drug recommended by a doctor.

excellent

The California Court of Appeals addressed a situation similar to this in People v. Tilehkooh, 113 Cal. App. 4th 1433 (2003). In Tilehkooh, the defendant was convicted of a crime and, as part of a condition of his probation, the sentencing court ordered the defendant to obey all laws, not possess or consume controlled substances unless prescribed by a physician, and not to use or possess any dangerous drugs or narcotics. When the defendant informed his probation officer that he was using marijuana for a medical condition upon the recommendation of his physician, the officer reported that information to the sentencing court which then revoked the defendant's probation for violation of a condition of probation. The Appellate Court overturned the defendant's revocation. "A probation condition, even if it is not a violation of the criminal law, must be 'reasonably related to the crime of which the defendant was convicted or to future criminality.' **However, it ordinarily cannot be said that**

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the treatment of an illness by lawful means is so related.” *Id.* at 1444

(emphasis added) (citations omitted).

Since Mr. Nelson is a qualifying patient and approved participant in the Montana Medical Marijuana Program, the District Court’s condition places a restriction on Mr. Nelson’s legal medical treatment. While it is true that a district court can place restrictions on otherwise legal activities (gambling, alcohol use, obtaining a credit card, etc.), those conditions must have a logical nexus to the underlying crime.

court issue here?

Issue II.

The sentence imposed by the District Court imposes a penalty upon Mr. Nelson that is illegal under the clear and concise language of Mont. Code Ann. § 50-46-201(1).

over answer

The District Court’s condition restricts Mr. Nelson from ingesting medical marijuana except in pill form. This restriction clearly constitutes a penalty or denial of Mr. Nelson’s right or privilege to participate in Montana’s Medical Marijuana Program.

It is worth reiterating that Mont. Code Ann. § 50-46-201(1) states:

...a qualifying patient...who possess a registry identification card issued pursuant to [Mont. Code Ann. § 50-46-103] may not be...penalized in any manner or be denied any right or privilege...for the medical use of marijuana...if the qualifying patient...possesses marijuana not in excess of the amounts allowed in subsection (2).

There is no evidence in the record, nor did the State set forth any evidence, that Mr. Nelson exceeded the allowable amounts of marijuana established by Mont. Code Ann. § 50-46-201(2) which allows qualifying patients to possess six marijuana plants and one ounce of usable marijuana. The State's Affidavit and Motion for Leave to File Information Direct (Affidavit) sets forth that officers of the Pondera County Sheriff's Office found the following items related to marijuana production and use: "a marijuana stem and burnt toothpick, gold tinfoil that contained marijuana stems and seeds..." (Affidavit, pg. 2). "[A] self-contained marijuana growing apparatus...inside the dark plastic unit was dirt, which seemed disturbed as though someone had removed a plant from the container." *Id.* at pg. 3. "The officers also found several marijuana pipes, marijuana seeds and containers for marijuana. They also recovered numerous magazines and books on how to cultivate and grow marijuana and a bag of Miracle Grow." *Id.* at pg. 5.

Since there is no allegation that Mr. Nelson exceeded the allowable amounts of medical marijuana as established by Mont. Code Ann. § 50-46-201(2), there is no reason that he should not be afforded the protection against penalization set forth in Mont. Code Ann. § 50-46-201(1).

The District Court's condition that Mr. Nelson refrain from ingesting

medical marijuana except in pill form is clearly a penalty, especially since Mr. Nelson is a qualifying patient under the Medical Marijuana Program. The Department of Public Health and Human Services has accepted Mr. Nelson as a qualifying patient, thereby allowing him to legally use medical marijuana. The District Court has precluded, what is for Mr. Nelson, a legal activity. That is a penalty and it is an illegal penalty because Montana's Medical Marijuana Act prohibits a qualifying patient from being penalized for his or her participation in the Medical Marijuana Program.

Issue III.

The sentence imposed by the District Court exceeds the statutory mandates set forth in the sentencing and corrections policies of Montana law.

The District Court's condition of sentence that Mr. Nelson refrain from using medical marijuana is contrary to, and not supported by, correctional and sentencing policy set forth in Mont. Code Ann. § 46-18-101 (2005).

Unlike federal sentencing, Montana's correctional and sentencing policy is laudably terse and set forth in section 46-18-101. The policy reads as follows:

The correctional and sentencing policy of the state of Montana is to:
(a) punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable; (b) protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders and serious repeat offenders;

(c) provide restitution, reparation, and restoration to the victim of the offense; and, (d) encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community.

Subsection Three of Mont. Code Ann. § 46-18-101 establishes principles by which the policy shall be implemented. It reads:

- (a) Sentencing and punishment must be certain, timely, consistent, and understandable.
- (b) Sentences should be commensurate with the punishment imposed on other persons committing the same offense.
- (c) Sentencing practices must be neutral with respect to the offender's race, gender, religion, national origin, or social or economic status.
- (d) Sentencing practices must permit judicial discretion to consider aggravating and mitigating circumstances.
- (e) Sentencing practices must include punishing violent and serious repeat felony offenders with incarceration.
- (f) Sentencing practices must provide alternatives to imprisonment for the punishment of those nonviolent offenders who do not have serious criminal records.
- (g) Sentencing and corrections practices must emphasize that the offender is responsible for obeying the law and must hold the offender accountable for the offender's actions.
- (h) Sentencing practices must emphasize restitution to the victim by the offender. A sentence must require an offender who is financially able to do so to pay restitution, costs...costs of assigned counsel...and, if the offender is a sex offender, costs of any chemical treatment.
- (I) Sentencing practices should promote and support practices, policies, and programs that focus on restorative justice principles.

The statute sets forth the policy and implementation for a legal sentence.

Case law has established what considerations a sentencing court may consider in

forming a defendant's sentence. A sentencing court "may consider any relevant information to the nature and circumstances of the crime, the character of the defendant, the defendant's background and history, the defendant's mental and physical condition, and any other information that the sentencing court "deems to have probative force." *State v. Harper*, 2006 MT 259, ¶22, 334 Mont. 138, ¶22, 144 P.3d 826, ¶22. Additionally, the Montana Supreme Court has held that a sentencing court may consider "other acts, even those resulting in acquittal or which are dismissed pursuant to a plea bargain agreement." *State v. Mason*, 2003 MT 371, ¶23, 319 Mont. 117, ¶23, 82 P.3d 903, ¶23.

Here, with regard to the District Court's condition and prohibition that Mr. Nelson not smoke marijuana, the District Court seemed especially concerned with the family members in Mr. Nelson's household, specifically his two children. The record reveals a rather lengthy discussion by the District Court regarding Mr. Nelson's use of marijuana.

COURT: Right, I'm really not here to address the [medical marijuana] referendum and its liability ^(sic) in the context of a criminal proceeding an all of that; but I'm concerned with raising two children, in a family where smoking marijuana is done three or four times a day an[d] is acceptable, okay; and I think the State and this court has a concern and an obligation to make sure that those children are raised in a home where the law is not being violated.

(Sent. Trans. Feb. 26, 2007, pg. 12)

Despite the fact that Mr. Nelson was a qualifying patient under the Montana Medical Marijuana Program, it is apparent the District Court felt his use of medical marijuana still constituted a violation of state law. Such is not the case. In fact, nothing in the Medical Marijuana Act prohibits the use of medical marijuana around the home. The limits on the use of medical marijuana are specifically set forth in Mont. Code Ann. § 50-46-205, as follows:

This chapter does not permit: any person to operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marijuana; or the smoking of marijuana: in a school bus or other forms of public transportation; on any school grounds; in any other correctional facility; or at any public park, public beach, public recreation center, or youth center.

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The drafters of the medical marijuana law were careful to include certain places and situations in which the use of medical marijuana would be inappropriate. Nowhere in the exclusions listed under the law is there a limitation on smoking medical marijuana in the privacy of one's own home. More importantly, there is no limitation on who may be present during such use. If the drafters of the law had wanted to prohibit the smoking of marijuana around children in the home, they would have specifically done so since they took great pains to include other limitations. Regardless, the District Court erred in its statement that the law was being violated in Mr. Nelson's home because he was

smoking medical marijuana.

Throughout the course of the sentencing proceedings, the District Court's primary reason for imposing upon Mr. Nelson the prohibition that he refrain from ingesting medical marijuana seems to concern the children.

COURT: ...I'm prepared to go ahead with the recommendation of the parties and the Pre-Sentence Investigation, mostly because I think it is in the best interest of the children. I'm not sure how much is in the best interest of the children, but absolutely the term of this suspended sentence will be that he be using the prescription form of the marijuana, and that it be supervised by a physician.

(Sent. Trans. Feb. 26, 2007, pg. 12).

COURT: Mr. Nelson may ingest marijuana in pill form. What I'm also acknowledging is that the pill form is least obtrusive to the remaining family members, and we're trying to raise a 10 year old, I believe, and/or a seven year old, two young children, and I don't think that we can do that while we're allowing marijuana to be used in the house.

(Sent. Trans. Feb. 26, 2007, pg. 13).

COURT: Well, Mr. Nelson, let me just tell you that if you want to withdraw your guilty plea and go forward with trial on this case I'm fine with it, okay. I think that you need to realize that everybody in this case has bent over backwards to accommodate your health use. I have a real problem with your kids being in the house while you're smoking marijuana. What if they bring [other] kids to the house to visit? And that's not the way to raise those children, in a society that at the same time is making that same use criminal.

(Sent. Trans. Feb. 26, 2007, pgs. 13-14).

The Court seemed to have extreme difficulty recognizing that Mr. Nelson's

use, by smoking, of medical marijuana is legal. In an attempt to circumvent Montana's Medical Marijuana Laws, the Court applies a "least obtrusive" test, together with a "best interests of children" test. Neither are a part of the sentencing policy of the State of Montana. However, even if these tests were applied the Court could have simply prohibited Mr. Nelson for smoking marijuana in the presence of the children. This would have been a "less obtrusive means." No one can question the State's duty to protect children and the public in general. However, the District Court exceeded the correctional and sentencing policy of Montana.

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Mr. Nelson is a qualifying patient for medical marijuana because of chronic and severe pain. One of the policies for corrections and sentencing in Montana is to "encourage and provide opportunities for the offender's self-improvement and to provide rehabilitation and reintegration of the offender back into the community." Mont. Code Ann. § 46-18-101(2)(d) (2005). The District Court's prohibition effectively does the opposite of this because it needlessly causes Mr. Nelson to suffer physical pain.

The Court attempts to mitigate the fact of Mr. Nelson's need for medical marijuana by allowing him to use marijuana in a pill form and thereby defeats a primary policy effort of the Montana Medical Marijuana Act which is to provide

Montanans a cost effective pain remedy. The simple fact is that the pill form of marijuana is far more expensive than marijuana which is legally grown pursuant to the medical marijuana statutes, harvested, and then smoked. This issue was pointed out to the court by defense counsel.

Mr. Lee: Your Honor, my position on [the condition that Mr. Nelson be required to use Dronabinol (the pill form of marijuana)] and my client's position on that, is that those medications are expensive and they're cost prohibitive for him, and here's a medication which allows him to experience the relief that he needs, that he can produce himself, and that's part of the thinking behind [the Medical Marijuana Referendum].

(Sent. Trans. Feb. 26, 2007, pg. 11).

Mr. Nelson's use of medical marijuana was legal under state law and he had legitimate and necessary medical reasons for his use. While it is true that a sentencing court may restrict a convicted defendant's participation in otherwise legal activities, it should not do so when there is a medical necessity for that legal activity. The District Court's focus on the best interests of the children exceeds the considerations and requirements for a legal sentence in Montana per Montana's Correctional and Sentencing Policy. For this reason, Mr. Nelson requests that this Court render the District Court's condition that Mr. Nelson use marijuana in pill form, rather than smoke form, void.

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ISSUE IV.

Both the District Court's sentence and the Montana Department of Corrections' mandate that Mr. Nelson obey all laws is directly contrary to Montana law.

Even if the District Court had not made it a special condition that Mr. Nelson not smoke medical marijuana, Mr. Nelson would still have been prohibited from smoking medical marijuana by the rules and regulations for the Montana Department of Corrections and the District Court's incorporation of those rules and regulations in the pronouncement of sentence. While it is true that the use of medical marijuana is legal in the State of Montana, federal law still criminalizes the possession of marijuana by an individual whether for medical reasons or not.

In its oral pronouncement of sentence, the District Court stated that Mr. Nelson was to "comply with all city, county, state, and federal laws and ordinances...." (Sent. Trans. Feb. 26, 2007, pg. 16). Additionally, the District Court ruled that Mr. Nelson was to be subject to all rules and regulations of Adult Parole and Probation. One of the rules and regulations is that "the defendant shall comply with all city, county, state, federal laws and ordinances...." In other words, even if the District Court had not specifically prohibited Mr. Nelson from smoking medical marijuana, the rule that he obey federal law would have had the same effect.

Since Probation and Parole officers have to enforce Montana law but do not

have to enforce federal law, they should not be prohibiting qualifying patients from possessing and using medical marijuana, in contradiction of state law, simply because there is a federal law which prohibits it.

Applied to the present situation, this means that as much as the federal government may prefer that Montana keep medical marijuana illegal, it cannot force the state to do so.

If the federal government wants to arrest and prosecute medical marijuana patients, it is free to do so. If the federal government wants to challenge the Montana Medical Marijuana Act, it is also free to do so. Furthermore, if the State wants to overturn the Montana Medical Marijuana Act, as approved by the voters of Montana, it may do so through the legislative or initiative process. The State should not be able to circumvent the law of Montana simply by citing to a federal law which its officers are not obligated to enforce. also in PSI

The California Court of Appeals faced a similar situation in *People v. Tilehkooh*. There the defendant was also given a probation condition that he obey all laws, including federal law. The State cited the defendant's use of medical marijuana as evidence that he had not complied with all laws because federal law prohibits possession of marijuana, per 21 U.S.C. § 844. Again, the Appellate Court for California overturned the defendant's revocation of probation.

"The people have misunderstood the role that federal law plays in the state system. The California courts long ago recognized that state courts do not enforce the federal criminal statutes. 'The State tribunals have no power to punish crimes against the laws of the United States, *as such*. The same act may, in some instances, be an offense against the laws of both, and it is only as an offense against the State laws that it can be punished by the state, in any event.'

Since the state does not punish a violation of the federal law as such, it can only reach conduct subject to the federal criminal law by incorporating the conduct into the state law. The People do not claim they are enforcing a federal criminal sanction attached to the federal marijuana law. Rather, they seek to enforce the state sanction of probation revocation which is solely a creature of state law. The state cannot do indirectly what it cannot do directly. That is what it seeks to do in revoking probation when it cannot punish the defendant under the criminal law....A trial court may find a defendant has violated a condition even if he has been acquitted of a charged crime or never been charged. However, this rule does not extend to the medical treatment of a disease by use of a prescription drug or by means which have been sanctioned by the state law.

People v. Tilehookh, 113 Cal. App. 4th at 1445-46 (citations omitted).

The rationale used by the California Court of Appeals is equally applicable in Montana. By ordering Mr. Nelson to comply with federal laws, the District Court exceeded its authority with respect to medical marijuana. The District Court has no authority to enforce or punish a violation of federal law, nor should it be allowed to indirectly enforce federal law in the guise of a probation violation, especially when Mr. Nelson's supposed violation might consist of nothing more than exercising his right to treat a medical illness in a manner recommended by a

? no objection
lack of jurisdiction

qualified physician and in accordance with a state law.

For these reasons, neither Montana Department of Corrections-Adult Probation and Parole, nor the District Court have the authority to impose such a restriction upon Mr. Nelson under the guise that the activity is against federal law. The District Court and the Adult Probation and Parole officers are not authorized to enforce federal law and should not be allowed to restrict Mr. Nelson from a legal and authorized medical treatment.

ISSUE V.

The condition imposed by the District Court that Mr. Nelson not use medical marijuana to treat his chronic pain is cruel and unusual punishment, and is therefore prohibited by both the United States and Montana Constitutions.

The Montana Constitution prohibits excessive sanctions, including the infliction of cruel and unusual punishment. Mont. Con. Art. II, § 22. Additionally, the Montana Constitution has two other rights which uphold Mr. Nelson's right to be free from pain: Article II, §§ 4 (the dignity clause) and 34 (unenumerated rights).

Mr. Nelson received his medical marijuana card for chronic pain.

According to Mr. Nelson's Pre-Sentence Investigation, Mr. Nelson:

has Degenerative Disc Disorder and has had 4 surgeries on his spine. This was the result of being thrown from a vehicle in an accident

caused by a drunk driver....[Mr. Nelson] has physical restriction wherein he cannot do any heavy lifting, no walking, standing or sitting for long periods of time....[Mr. Nelson] is unemployed and has been on Social Security Disability since 1996 due to injuries from a car accident.

(Pre-Sent. Investigation, pg. 5).

It is evident that Mr. Nelson is in a great deal of pain. It was so evident to a treating physician that he/she recommended Mr. Nelson qualify as a patient under the Montana Medical Marijuana Program. Since Mr. Nelson was approved by the Department of Health and Human Services as a qualifying patient, Mr. Nelson's treating physician

"stated or had medical records to indicate that, in the physician's professional opinion, after having completed a full assessment of [Mr. Nelson's] medical history and current medical condition made in the course of a bona fide physician-patient relationship, the potential benefits of medical marijuana would likely outweigh the health risks for [Mr. Nelson]."

See Mont. Code Ann. § 50-46-206 (2005).

Additionally, when the District Court prohibited Mr. Nelson from smoking medical marijuana, but rather told him that he could use marijuana in the pill form, Mr. Nelson's counsel responded

that those medications are expensive and they're cost prohibitive for him, and here's a medication [grown marijuana in plant form] which allows him to experience the relief that he needs, that he can produce himself...It's not the legislation but the referendum in this case that

allows that and he will be able to experience pain relief, and be able to experience it in a cost effective way.

(Sent. Trans. Feb. 26, 2007, pg. 12).

In essence, the District Court forced upon Mr. Nelson pain reliever which he could not afford and therefore, could not take. The District Court deprived Mr. Nelson of an inexpensive and legal method of pain relief and such a deprivation, especially given the medication at issue was legal by state law, constitutes cruel and unusual punishment.

The United States Supreme Court has long held that cruel and unusual must be interpreted in a flexible and dynamic manner measured against evolving standards of decency that mark the progress of a maturing society. *See Rhodes v. Chapman* (1981), 452 U.S. 337, 346-347, 101 S.Ct. 2392, 2398-2399, 69 L.Ed.2d 59. It is obvious, despite the federal government's reluctance, that voters and lawmakers have successfully sought to lessen the criminal nature of marijuana either by enacting medical marijuana laws or lessening the penalty for possession of marijuana in certain quantities. In Montana, the approval for medical marijuana passed by almost 62 percent of the vote.¹

See <http://sos.mt.gov/ELB/archives/2004/2004-GenState.pdf>. (Exhibit "A")

¹The Medical Marijuana Initiative passed in Pondera county, the county from which Mr. Nelson's case stems. Also, the Initiative passed in every one of the four counties which comprise the Ninth Judicial District for Montana.

Mr. Nelson is clearly a man in pain and with limited financial means. His pain, coupled with his limited finances, places him in a unique situation in which the District Court's prohibition requires that he refrain from using a legal and affordable medication and instead use a much more expensive drug that he cannot afford. The Court's order forces Mr. Nelson to live in pain because he cannot afford the medication he needs to control his pain. This result is clearly cruel and certainly unusual.

This Court has "read the dignity provision of the Montana Constitution together with Article II, Section 22 to provide Montana citizens greater protections from cruel and unusual punishment than does the federal constitution." *Walker v. State*, 2003 MT 134, ¶73, 316 Mont. 103, ¶73, 68 P.3d 872, ¶73. Thus, Montanans have stronger protection against cruel and unusual punishment than those seeking protection only under the United States Constitution. As noted above, the District Court denied Mr. Nelson access to a legal, affordable, and effective medication to manage his intense pain. As a result of this denial, Mr. Nelson is forced to live in great pain because he cannot afford the drug the District Court "prescribed" him to use. Mr. Nelson has indicated that the District Court sentenced him to pain when he has a perfectly acceptable, legal, and affordable alternative. By denying him this alternative, the condition imposed by the District

Court is cruel and unusual and a violation of Mr. Nelson's dignity. No one lives in dignity if they live needlessly in pain.

Finally, Article II, § 34, states that "the enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people." "Most laws are made to protect the rights of the individuals, and not the government. Hence the right to have laws enforced, and officers perform their legal duties, should pertain as much if not more to the private person than to the civil being called government." *Chumaseo v. Potts* (1875), 2 Mont. 242, 280.

The Montana Medical Marijuana Act is part of the law of Montana and Mr. Nelson was in full compliance with its provisions at the time this sentence was imposed. He has the right to have the law enforced as it is clearly set forth under Montana law. The fact that the District Court disregarded a Montana law which grants to Mr. Nelson the "right or privilege..., for the medical use of marijuana," *See* Mont. Code Ann. § 50-46-201(1), violates Mr. Nelson's right to be protected by the law and to have the law equally and justly enforced.

CONCLUSION

The District Court's sentence condition does not have a logical nexus to the crime for which he was sentenced. In most situations it would; however, Mr. Nelson is a qualifying patient of the Montana Medical Marijuana Program and,

for-all-intents-and-purposes, the District Court forbade him from taking a prescription drug. A qualified medical professional recommended Mr. Nelson smoke medical marijuana for pain relief. The District Court should not substitute its medical opinion for that of a qualified medical professional.

Second, the District Court's condition that Mr. Nelson refrain from ingesting medical marijuana except in pill form constitutes a penalty which cannot be applied to qualifying patients of the Medical Marijuana Act. Coupled with the fact that the condition lacks any nexus to the crime for which Mr. Nelson was sentenced, this penalty is illegal because Mr. Nelson is protected against penalties and prosecution for his participation in the Medical Marijuana program.

Third, the District Court's condition that Mr. Nelson obey federal law in this context imposes an illegal condition because officers of the Montana Department of Corrections-Adult Probation and Parole are not obligated or authorized to enforce federal law.

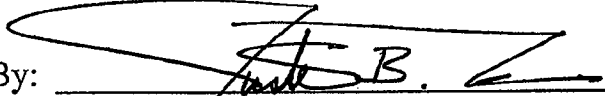
Fourth, the District Court's rationale behind the sentencing condition does not fall within Montana's sentencing and correctional policy and, even if it did, the District Court could have achieved its purpose through a method less restrictive to Mr. Nelson.

Finally, Mr. Nelson will be subject to a cruel and unusual punishment

should this Court uphold the District Court's order. Mr. Nelson experiences daily, excruciating pain, a pain which can be alleviated by the legal use of medical marijuana via inhalation. Unfortunately, the District Court has denied Mr. Nelson this remedy, electing instead to "prescribe" Mr. Nelson to take medical marijuana in the pill form. This pill has always been available to Mr. Nelson, but he found it to be cost prohibitive. By denying Mr. Nelson a cost effective method to alleviate his pain, the District Court is imposing a cruel and unusual punishment which also deprives him of his dignity and his right to be free of pain. It also denies Mr. Nelson his right to have the laws of Montana enforced evenly and fairly.

Respectfully submitted this 1st day of October, 2007.

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