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From: Philip A. Cherner, Attorney at Law
Date: July 24, 2014
Re: Probationers who have been forbidden to use marijuana

Individuals placed on probation by a Colorado state court are forbidden to use marijuana, even with appropriate medical documentation. This is disappointing news for probationers who would otherwise be users of medical marijuana; they are denied access to a substance which often is the most or only effective treatment for their conditions. The rationale is that state law prohibits probationers from breaking almost any law (minor traffic violations being one of the few exceptions), state or federal. Our Court of Appeals, in *People v. Watkins*, 281 P.2d 500 (Colo. App. 2012) determined that the use of marijuana is an "offense" under federal law and therefore its use violates the state statute. Until the statute is modified, therefore, probationers are automatically instructed not to use marijuana, regardless of the bona fides of their situation.

Still, a probationer who sincerely needs medical marijuana may have some options. One would be to use Marinol instead of marijuana. Marinol is legal with a doctor's prescription. While many patients have observed that Marinol has strong and often undesirable intoxicating effects, as well as a variety of other side effects, it is nevertheless effective in treating certain types of pain and should be considered as an option after appropriate medical consultation.

There are other potential solutions. One is to not be on probation in the first place. The fact that a case ends up in probation often indicates it's not terribly serious, and therefore there might be alternative sentences such as a fine, or even a short jail sentence. A second line of defense, for an individual currently on probation, may be to politely and honestly refuse to comply with that condition. If a revocation petition is filed, the court has to find that the probation has been violated, but in most cases it does not have to impose a jail/prison sentence. Crim.P. 32(f)(5). For example, a judge may choose to continue or re-grant probation. This may only postpone the inevitable, but it is a valid course of action for some individuals. Anyone in this situation would be wise to be sure they can provide compelling medical testimony at a hearing to defuse the argument that their medical need is not genuine.

Another line of attack focuses on the *Watkins* case. One can argue that *Watkins*, which precedes Amendment 64's passage, is no longer authoritative. In *Watkins*, the Court of Appeals interpreted the term "offense" as including any crime, even at the federal level, for which jail time was a potential sentence. Their justification was that the Colorado Legislature intended to compel a probationer to lead a generally "law-abiding life." Our claim would be that the Amendment's command that marijuana be "regulated like alcohol" means that the voters of Colorado have determined that the use of marijuana may be part of a generally "law-abiding life." And, the statute defining an "offense" needs to be reinterpreted in light of A64. Therefore, since probationers can drink, be told not to drink to excess (a common probation condition, see C.R.S. §18-1.3-204(2)(a)(VIII)), and be ordered not to drink at all, the court should have the discretion to do the same for marijuana use. Sounds good, but we are not aware of any relevant court decisions.

Another approach is a petition for collateral relief, C.R.S. §§18.1.3-107 and 213. These laws give the judge broad authority at sentencing to remove a "collateral consequence," or side effect, of a convicted person's punishment if the judge thinks that removing the side effect will help the probationer re-integrate into society. While these statutes are new and not yet interpreted by the courts, they may very well give a favorably inclined court some maneuvering room.

Whatever course of action is contemplated, be advised it has serious consequences, including jail/prison time. Consultation with a licensed attorney is a must. After all, this memo is only a starting point and should not be seen as legal advice. There may be other arguments and we stand ready to assist litigants and/or their attorneys in fighting this important battle. Any probationer presented with this issue should share this document with his attorney, and any such probationer or attorney should feel free to call Vicente Sederberg regarding this critical issue.