STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Saad, P.J., Sawyer and Jansen, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. 148444

v.

Court of Appeals No. 312308

RICHARD LEE HARTWICK,

Lower Court No. 2012-240981-FH

Defendant-Appellant.

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BRIEF AMICUS CURIAE OF THE MICHIGAN MEDICAL MARIJUANA ASSOCIATION

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By: Michael A. Komorn (P47970)
Komorn Law, PLLC
24901 Northwestern Hwy., Ste 700
Southfield, MI 48075
800-656-3557

This brief principally drafted by:
Jeff Frazier
Komorn Law, PLLC

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae is an organization dedicated to the safe and legal use of medical marihuana. Our many members will be directly affected by this court's decisions in the *Hartwick*/*Tuttle* cases and we are encouraged by this court's decision to review them. Our lawyers continue to be overwhelmed with cases brought by prosecutors relying on *Hartwick* and *Tuttle* to strip patients of immunities, defenses, and confidentialities without due process. We seek to present to the court the attached brief addressing some of the questions posed by this court in these cases.

We believe that the MMMA provides an affirmative defense in section 8. Michigan trial courts are familiar with affirmative defenses that are allowed to go to the jury if the defendant has produced some evidence on the elements of the defense. Then the state must disprove the defense beyond reasonable doubt. The Court of Appeals in *Hartwick* and *Tuttle* have legislated requirements into the section 8 defense that are not there and were never intended to be there, depriving defendants of there right to a fair trial. We pray that this court redresses that.

However, the MMMA provides for much more than an affirmative defense. The immunities, privileges, protections, and rights granted by the State to qualified patients is an entitlement that cannot be stripped from a citizen without due process. The immunity from arrest only has meaning at the police encounter. The immunities and protections from arrest in the MMMA mean nothing if they are not enshrined in the standard that governs search and seizure: probable cause to believe that illegal activity is taking place. It is the faulty standard of probable cause that leads to many of the absurdities in these cases.

The Michigan Medical Marijuana Association has an interest in this matter and has a perspective it believes will be helpful to this Court. The Michigan Medical Marijuana Association is a non-profit corporation organized under Michigan law. Its members are committed to maintaining the core principles of the Michigan Medical Marijuana Act ("MMMA") and to ensuring that the provisions of the the Act are applied fairly and as intended. The Michigan Medical Marijuana Assocation is an advocate for the confidentiality of patient records and the full legal protections of the medical marihuana registry identification card, as clearly intended by the MMMA. This organization's members include patients, caregivers, attorneys, physicians, and business professionals, and was formed out of the necessity to ensure proper implementation and understanding of the Act.

The Michigan Medical Marijuana Association believes in common sense interpretations of the MMMA, and insist that the plain language of the MMMA must be interpreted in a manner to protect the individuals for whom it was written - the patients and their caregivers. The Brief will demonstrate why this is true and will show that the Appeals Court ruling in question threatens to violate rights protected by the United States Constitution and the laws of the State of Michigan, and further will impact foundational issues relating to the implementation of the Act.

STATEMENT OF JURISDICTION

Amicus curiae accept the statement of jurisdiction presented in Appellant's Brief at vi.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER A DEFENDANT'S ENTITLEMENT TO IMMUNITY UNDER § 4 OF THE MICHIGAN MEDICAL MARIHUANA ACT (MMMA), MCL 333.26421 ET SEQ., IS A QUESTION OF LAW FOR THE TRIAL COURT TO DECIDE?

The Trial Court answers "Yes."

The Court of Appeals answers "Yes."

The Appellee answers "Yes."

The Appellant answers "Yes."

Amicus Curiae answers "No."

II. WHETHER FACTUAL DISPUTES REGARDING § 4 IMMUNITY ARE TO BE RESOLVED BY THE TRIAL COURT?

The Trial Court answers "Yes."

The Court of Appeals answers "Yes."

The Appellee answers "Yes."

The Appellant answers "Yes."

Amicus Curiae answers "No."

III. IF SO, WHETHER THE TRIAL COURT'S FINDING OF FACT BECOMES AN ESTABLISHED FACT THAT CANNOT BE APPEALED?

The Trial Court answers "No.".

The Court of Appeals answers "No."

The Appellee answers "No."

The Appellant answers "No."

Amicus Curiae answers "No."

IV. WHETHER A DEFENDANT'S POSSESSION OF A VALID REGISTRY IDENTIFICATION CARD ESTABLISHES ANY PRESUMPTION FOR PURPOSES OF § 4 OR § 8?

The Trial Court did not answer the question.

The Court of Appeals answers "No."

The Appellee answers "No."

The Appellant answers "Yes."

Amicus Curiae answers "Yes."

V. IF NOT, WHAT IS A DEFENDANT'S EVIDENTIARY BURDEN TO ESTABLISH IMMUNITY UNDER § 4 OR AN AFFIRMATIVE DEFENSE UNDER § 8?

The Trial Court did not directly answer the question.

The Court of Appeals did not directly answer the question.

The Appellee did not directly answer the question.

The Appellant did not directly answer the question.

Amicus Curiae did not directly answer the question.

VI. WHAT ROLE, IF ANY, DO THE VERIFICATION AND CONFIDENTIALITY PROVISIONS IN § 6 OF THE ACT PLAY IN ESTABLISHING ENTITLEMENT TO IMMUNITY UNDER § 4 OR AN AFFIRMATIVE DEFENSE UNDER § 8?

The Trial Court did not directly answer the question.

The Court of Appeals did not directly answer the question.

The Appellee did not directly answer the question.

The Appellant did not directly answer the question.

Amicus Curiae did not directly answer the question.

VII. WHETHER THE COURT OF APPEALS ERRED IN CHARACTERIZING A QUALIFYING PATIENT'S PHYSICIAN AS ISSUING A PRESCRIPTION FOR, OR PRESCRIBING, MARIJUANA.

The Trial Court answers "Yes."

The Court of Appeals answers "No."

The Appellee answers "Yes."

The Appellant answers "Yes."

Amicus Curiae answers "Yes."

STATEMENT OF FACTS

Amicus curiae accept the statement of facts presented in Appellant's Brief at1-4.

SUMMARY OF THE ARGUMENT

Amicus Curiae incorporates by reference the Summary of the Argument, and Arguments I - XV from the accompanying brief amicus curiae in *People v Tuttle*, including the standard of probable cause for medical marihuana registry identification card holders, analysis and resolution of the conflicts between the Michigan Medical Marihuana Act ("MMMA") and the marihuana charging and forfeiture statutes of the Michigan Controlled Substances Act ("MCSA"), construed in light of the legislative intent and remedial, retrospective application of the MMMA and Public Act 268 of 2013, and corresponding application of Sections 7(e), 4(d), and 6(g) of the MMMA.

I. The Search Of Hartwick Was Consensual. His Arrest Was Illegal Because It Was Without A Warrant And Without Probable Cause.

Under 764.15(1)(a) A peace officer, without a warrant, may arrest a person in any of the following situations…A felony, misdemeanor, or ordinance violation is committed in the peace officer's presence. As discussed above, Hartwick is exempt from this statute under 7(e) to the extent that it is inconsistent with the MMMA.

Unlike for instance the California Compassionate Care Act, the MMMA provides a broad immunity from arrest, not only an affirmative defense. Whether termed a right, privilege or immunity, it is an entitlement granted to Hartwick by the state and cannot be taken away without due process.

II. Is Defendant's Entitlement To Immunity Under Section 4 Of The MMMA a Question Of Law For The Trial Court To Decide?

The answer is no. Defendant's state-granted entitlement to immunity from arrest under Section 4 for using marijuana is an established matter of law, decided by the people in enacting the MMMA. It is an entitlement that may be taken away for failure to comply with the act and in compliance with due process.

III. Are Factual Disputes Regarding This Immunity From Arrest To Be Resolved By The Trial Court?

Again the answer is no. It cannot be. Any factual disputes regarding section 4 immunity from *arrest* can only be resolved by a decision to arrest or not. Immunity from arrest after the fact is no immunity at all. Likewise, the immunity from summary forfeiture. This is a decision that will only ever be made by either the officer or a magistrate. Due process dictates that it is the magistrate that must make the decision.

"[P]rocedural due process rules are shaped by the risk of error inherent in the truth–finding process as applied to the generality of cases." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). The rules "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

The most basic minimum due process requires that a citizen have notice of "what he must do to prevent the deprivation of his interest." *Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970). Further, "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The

purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment. . . . *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972). See *Joint Anti–Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170–71 (1951) (Justice Frankfurter concurring).

In criminal and quasi–criminal cases, as in civil cases, "an impartial decision maker" is an essential component of due process. *Tumey v. Ohio*, 273 U.S. 510 (1927); *In re Murchison*, 349 U.S. 133 (1955). *"The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law*. . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980)(emphasis added); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

Allowing an officer to summarily determine that a registered patient or caregiver has lost his immunities from arrest, prosecution, penalty *and summary forfeiture* violates every one of these fundamental precepts. It is only through the warrant process via the magistrate that the immunity means anything at all. While Hartwick gave his consent for the home to be searched, he certainly did not consent to losing his immunity from arrest. The officer claims to have seen three plants too many, doors to grow rooms open in an otherwise locked wing of the house, and apparently some evidence that either Hartwick or his patients did not have a bona fide doctor/relationship. None of those things is a criminal violation under the MMMA. Nor was Hartwick selling to someone not entitled to use medical marijuana or making fraudulent misrepresentations to avoid arrest. The officer faced the same question in that moment that is faced by this court now. Under what circumstances may Hartwick's entitlement to immunity

from arrest be taken away? The answer is under no circumstances without due process. Due process dictates that it was not the officer's question to answer. Hartwick's entitlement to immunity was granted as a matter of law and can only be taken as a matter of law, not as a matter of fact. The officer should have filed a complaint and attempted to obtain an arrest warrant.

This is where Hartwick's section 4 immunities and due process rights conflict with the Michigan Code of Criminal Procedure's provision that "An arrest warrant is not needed for a felony committed in the officer's presence." MCL 764.15[1][a]). As discussed above, we believe Hartwick is exempt from the controlled substances act, including its criminal provisions and penalties, by the MCSA's terms, by the terms of PA 268 of 2013 and by the exemptions in 7(e) of the MMMA. However, even if he is deemed to be a felon granted an entitlement by the state to be one, that entitlement, including his immunity from arrest, may only be taken from him via due process.

That process can only be constitutionally satisfied by a warrant issued by a magistrate supported by sworn facts sufficient to determine probable cause to believe that Hartwick had either violated the terms of his immunity for medical marijuana use or had otherwise engaged in crimes not protected by the MMMA such as using marijuana in public, at a school or in jail. This due process requirement can also be satisfied if an initial search warrant is obtained under the same standards. Where, as here, the officer's warrantless search was lawful, an arrest warrant is still required to comport with the due process necessary to strip Hartwick of his immunity from arrest and make the seizure and arrest lawful. Only "this scheme will reduce any potential (however unlikely) for police overreach in attempting to obtain search warrants," cf. *Brown*, fn 4, or in summarily arresting and subjecting patients and caregivers to forfeiture without regard to due process.

For all the reasons discussed above, *Brown* must be overruled. Its most fatal flaw is that it

confuses the state granted entitlement to section 4 immunity with an affirmative defense. "Defendant has presented no authority indicating that for probable cause to exist, there must be a substantial basis for inferring that defenses do not apply." *Brown* at 677. Hartwick's immunity from arrest is not a defense. It is a state granted entitlement that cannot be taken away without due process via an impartial magistrate. This is not California where patients have only an affirmative defense. It is only by overruling *Brown* that the MCSA, the MMMA, and PA 268 of 2013 can be harmonized.

For these same reasons, a cardholder who is arrested and brought before a magistrate for a preliminary exam may not be bound over, nor be subject to a trial in the district court, without the state making a showing of probable cause to believe that the alleged marijuana use was in fact illegal. Otherwise the entitlement to immunity from prosecution means nothing, having already been stripped from a cardholder without due process.

Hartwick was unlawfully arrested without a warrant and his property was unlawfully seized. Because there was no warrant sought, the good faith exception to the exclusionary rule doesn't apply. The officer did not in good faith rely "on the (magistrate's) determination of probable cause and on the technical sufficiency" of a warrant. *People v. Goldston*, 470 Mich. 523, 541 (2004). He should have. He didn't. Hartwick's case should be remanded to the circuit court with an order to acquit.

CONCLUSION AND RELIEF REQUESTED

Amicus curiae respectfully requests this Court to overrule the judgment of the Court of Appeals on this matter, and hold 1) that Defendant Hartwick's case should be remanded to the circuit court with an order to acquit, 2) that patients and caregivers engaged in medical use of marijuana in in accordance with the MMMA are not subject to enforcement under the MCSA, and 3) because marijuana is no longer contraband per se, *Brown* is no longer good law.

Dated: January 12, 2015

Respectfully submitted,

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Michael A. Komorn (P47970)