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. 148971

v.

Court of Appeals No. 312364

ROBERT TUTTLE,

Lower Court No. 2012-241272-FH

Defendant-Appellant.

_____ /

BRIEF AMICUS CURIAE OF THE MICHIGAN MEDICAL MARIJUANA ASSOCIATION

_____/

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

Dated: January 12, 2015

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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.

STATEMENT OF JURISDICTION

Amicus curiae accepts the statement of jurisdiction presented in Appellant's Brief at 3-4.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER A REGISTERED QUALIFYING PATIENT UNDER THE MICHIGAN MEDICAL MARIHUANA ACT (MMMA), MCL 333.26421 ET SEQ., WHO MAKES UNLAWFUL SALES OF MARIJUANA TO ANOTHER PATIENT TO WHOM HE IS NOT CONNECTED THROUGH THE REGISTRATION PROCESS, TAINTS ALL ASPECTS OF HIS MARIJUANA-RELATED CONDUCT, EVEN THAT WHICH IS OTHERWISE PERMITTED UNDER THE ACT?

The Trial Court answers "Yes."

The Court of Appeals answers "Yes."

The Appellee answers "Yes."

The Appellant answers "No."

Amicus Curiae answers "No."

II. 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."

III. 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.

IV. 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.

STATEMENT OF FACTS

Amicus curiae accepts the statement of facts presented in Appellant's Brief at 9-15.

SUMMARY OF THE ARGUMENT

This court has posed a question in these cases: What is the effect of the card? This question cannot meaningfully be answered without first determining when a marijuana related crime has been committed and what might constitute evidence of that crime. It is probable cause and reasonable suspicion that govern the interaction between law enforcement and citizens. It is probable cause and reasonable suspicion that is at the heart of the conflict between the Michigan Controlled Substances Act ("MCSA") and the MMMA.

A patient card shows that the holder is entitled by the state to medically use marijuana. When verified by accompanying photo ID it identifies the holder as exempt from the MCSA as an ultimate user of a controlled substance under lawful doctor's orders and entitled to use it medically as defined by the MMMA. The card "shall not constitute probable cause or reasonable suspicion, nor shall it be used to support the search of the person or property of the person possessing or applying for the registry identification card, or otherwise subject the person or property of the person to inspection by any local, county or state governmental agency." MCL 333.26426(g). The card demonstrates the patient's state-granted entitlement to broad immunity from arrest, prosecution, and penalty for the medical use of marijuana.

The card does not demonstrate an immunity from acts that are illegal under the MMMA. Under the MMMA it is illegal to 1) sell marihuana to someone who is not allowed to use marihuana for medical purposes under the MMMA per Sec. 4(k) or 2) make fraudulent representations to a law enforcement official of any fact or circumstance relating to the medical use of marihuana to avoid arrest or prosecution per Sec. 7(d). A failure to comply with the other requirements of the MMMA are not illegal. The MMMA does not otherwise define prohibited conduct and it does not authorize punishment for noncompliance. Rather, it grants immunity

from arrest, prosecution, or penalty to those who meet the delineated requirements. For instance, it is not a crime under the MMMA for a doctor to issue a written certification outside of a bona fide doctor patient relationship. *People v. Jackson,* Michigan Court of Appeals, --- N.W.2d ---, November 6, 2014. Likewise, possessing more than the allowed number of plants or growing them in a facility that is not closed and locked is not a crime under the MMMA. Nor is transferring marijuana from patient to patient or from a caregiver to someone not connected to him via the registry. The statute does not define that as "prohibited conduct, does not characterize any such conduct as constituting either a misdemeanor or felony, and does not provide for any punishment." *Id*.

The MMMA does in section 7(b) provide a list of activities that are not protected by a patient's immunity such as undertaking any task under the influence of marijuana when doing so would be negligent; possessing marijuana on a school bus, on school grounds or in a correctional facility; smoking marijuana in public or on public transportation or using marijuana without a serious or debilitating medical condition. A patient may be subject to arrest, prosecution or other penalty under statutes or ordinances that make such conduct illegal to the extent that those statues or ordinances do not conflict with the MMMA. *People v. Koon*, 494 Mich. 1 (2013). However, to be convicted under an act or part of an act that is inconsistent with the MMMA, the state must provide proof that the patient failed to comply with the requirements of the MMMA. *Id*.

As discussed above, the most harmonious way to reconcile the MCSA and the MMMA is to recognize that a registered patient is an ultimate user of a controlled substance acting under lawful doctor's orders and is therefore exempt from the MCSA's licensing requirements and the prohibitions on growing the plant for the patient's personal treatment. The patient is also exempt from the criminal provisions of the MCSA. The legality of the patient's actions is determined by

the MMMA and whatever other laws do not conflict with it.

The card determines what happens when a patient or caregiver has a police encounter. However it is reasonable suspicion of involvement of criminal activity that determines whether a police encounter will occur at all. *Terry v. Ohio*, 392 U.S. 1 (1968). Marijuana and the cannabis plant it comes from are no longer contraband per se under Michigan law, and their suspected growing, possession and use do not constitute reasonable suspicion of criminal activity without more.

Once the officer has identified a citizen as registered cardholder, that person is immune from arrest and is free from search and seizure unless the encounter or investigation has resulted in probable cause to believe that the patient has 1) sold marihuana to someone who is not allowed to use marihuana for medical purposes under the MMMA per Sec. 4(k) or 2) made fraudulent representations to a law enforcement official of any fact or circumstance relating to the medical use of marihuana to avoid arrest or prosecution per Sec. 7(d) or 3) engaged in activities prohibited by 7(b) or 4) in plain view has more marijuana than permitted by the MMMA.

This makes perfect sense in that it coincides with the way police interact with citizen in enforcing alcoholic beverage laws. Upon observing someone purchase or consume an alcoholic beverage, a policeman asks for appropriate identification, an ID demonstrating the person's adulthood and hence, privilege to consume that substance. That person cannot however, sell to someone underage or lie about his or another's age to avoid arrest. Nor can he engage in other activities otherwise made illegal regarding the use of alcohol, DUI, public intoxication, etc.

Even accepting that a registered patient or caregiver is not entirely exempt from the MCSA and loses immunity from arrest, prosecution, and penalty under its provisions if engaging

in conduct not protected by the MMMA, the patient cannot be convicted without proof that he violated the terms of his immunity. *Koon, supra*. The patient therefore cannot be searched or have person or property seized without probable cause to believe that they have violated those terms. To hold otherwise is to stand the MMMA on its head. In order for the MMMA to "have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana," the standard of probable cause must reflect the protections, immunities, rights and entitlements granted therein. Sec. 7531(1) declares that it is not necessary for the state to negate any exemption or exception to the MCSA. This is in conflict with this standard and the immunities of section 4 and does not apply. The state itself has granted patients and caregivers an exemption and exception in the form of an entitlement to immunity from arrest, prosecution, penalty and forfeiture for MMMA permitted conduct, under the MCSA and all other acts to the extent they are inconsistent with the MMMA. It is necessary for the state to negate a patient or cardholder's immunity that the state itself has granted. Sec. 7531(2) also irrevocably conflicts with the MMMA. Under this statute, a patient cannot rebut the presumption that he is committing a crime by medically using marijuana because he does not have the "appropriate license or order form issued under the article" to rebut it with. His patient card is not a prescription. It is more. It is a state granted entitlement to immunity from arrest evidencing an exemption or at least exception to the MCSA within the terms of the MMMA's immunities.

A registered patient or caregiver's possession of a valid card rebuts the presumption of criminality in 7531. The state has the burden of negating the entitlement and must do so if at all within the bounds of due process.

The *Brown* decision erroneously enshrined the concept of marijuana as contraband for all purposes and that Michigan medical marijuana patients as criminals *per se*, justifying militarized raids of patients and caregivers based on no evidence other than the suspected presence of

marijuana and summary forfeiture of their plants and related assets.. Merely registering as a patient does not make one a criminal subject to general search, seizure and forfeiture. The *Brown* decision was flawed when decided. Since then this court in *Ter Beek* has held that Michigan law may permit what the federal government prohibits and PA 268 of 2013 has made clear that marijuana is no longer a Schedule 1 substance under the MCSA. Conduct permitted by the MMMA is not illegal under Michigan law. *Brown* can no longer be good law. Reasonable suspicion and probable cause cannot be based on the mere suspected presence of marijuana. It is no longer contraband for any purpose. Its medical use is protected.

So what does the card mean? A simple answer is that it means the same thing as a proper label on a bottle of Percocet or Demerol designating the name of the patient and treating physician. The properly identified holder is presumed to be in lawful possession of marijuana unless it is clear that he has more marijuana than allowed under the MMMA. Absent an articulable suspicion of some additional unprotected crime, the card holder is immune from further police intervention. Much like when an undercover officer engaging in marijuana use as part of an investigation when confronted by a police officer who does not know him. The undercover demonstrates his presumed immunity from arrest by showing his badge.

I. A Registered Patient Or Caregiver's Medical Use Of Marijuana Is An Entitlement Granted By The State That Cannot Be Abrogated Without Due Process.

When a citizen in Michigan obtains a valid patient or caregiver card as authorized by the MMMA and issued by the state, he or she receives an entitlement to medically use marijuana and to be immune from arrest, prosecution, penalty and forfeiture for that use in lawful compliance with the MMMA. This is not a mere affirmative defense. Section 8 provides that defense to all Michiganders. Section 4 provides an immunity, "an exemption from criminal prosecution or legal liability or punishment on certain conditions." Random House Dictionary, Random House,

Inc. 2014. Section 4 creates a *personal* right and protection for a registered qualifying patient's medical use of marijuana *State v. McQueen,* 2013 493 Mich. 135, 155 (2013).

Whether it is termed a privilege, an immunity or a right, once the entitlement is granted, its continued possession may become essential to the patient's continued heath or the caregiver's continued pursuit of a livelihood. Taking away these immunities thus involves state action that adjudicates important interests of the patient or caregiver. Such entitlements are not to be taken away without that procedural due process required by the Fourteenth Amendment. *Sniadach v. Family Finance Corp*., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (disqualification for unemployment compensation); *Slochower v. Board of Higher Education*, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956) (discharge from public employment); *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958) (denial of a tax exemption); *Goldberg v. Kelly*, supra (withdrawal of welfare benefits). See also *Londoner v. Denver*, 210 U.S. 373, 385—386, 28 S.Ct. 708, 713—714, 52 L.Ed. 1103 (1908);

Having chosen to extend the right to medically use marijuana - and to be immune from arrest for lawfully doing so - to these qualified citizens, Michigan may not "withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred." *Goss v. Lopez*, 419 U.S. 565 (1975) at 574. *See also Barry v. Barchi*, 443 U.S. 55 (1979) (horse trainer's license); *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980) (statutory entitlement of nursing home residents protecting them in the enjoyment of assistance and care.)

In Michigan, the mere allegations of a police officer are not sufficient to automatically strip a citizen of an entitlement. *Nicholas v. Secretary of State*, 74 Mich. App. 64, 253 N.W.2d 662 (1977). And yet, that is precisely what law enforcement does when it summarily arrests patients and caregivers and charges them with felonious conduct under the MCSA , complaining of non-compliance with the MMMA. "Due process demands a preliminary screening by a decision maker more detached than a complaining witness." *Id*. It demands a magistrate that is fully apprised of the fact that the suspect is a licensed patient or caregiver and specifically describe conduct that would justify stripping his immunity before he is arrested.

II. Like A Police Officer, A Registered Patient Or Caregiver Is Exempt From The Michigan Controlled Substances Act For His Lawful Possession And Use Of Marijuana.

Like a registered medical marijuana patient of caregiver, a law enforcement officer is authorized to sometimes possess marijuana. It must be in the course of his official duties. MCL 333.7304. He can even distribute marijuana to another in the course of an investigation. He is exempt from the MCSA and immune from prosecution under it for such lawful conduct. Likewise under federal law. "The federal Controlled Substances Act confers immunity on all state and federal law enforcement officers engaged in the enforcement of the Act or of any state or municipal law relating to controlled substances." *State v. Kama*, 178 Or. App 561 (2002). The state and federal statutes confer immunity on law enforcement personnel engaged in undercover drug operations. *See, e.g., U.S. v. Fuller,* 162 F.3d 256 (4th Cir.1998).

Of course an officer is not immune from arrest and prosecution under the controlled substances act for all of his marijuana related conduct. Only that which is authorized and lawful. See e.g., *U.S. v Flannigan*, 31 M.J. 240 (U.S. Ct. Military App. 1990)(Undercover officer was immune from prosecution for smoking marijuana with the wife of a suspected drug dealer but not for committing adultery with her, a crime under the UCMJ.). A badge is not a get out of jail

free card.

A policeman's badge symbolizes the officer's immunity. A patient's or caregiver's registry card symbolizes his. To search a police officer and arrest him for a violation of the controlled substances act would require probable cause to believe that his conduct was unlawful and unauthorized so as to be outside the scope of his immunity… In his case, his official duties. To search and arrest a valid registry card-carrying patient must require the same state burden. Otherwise, neither the card nor the badge mean anything.

The MMMA declares that the card "shall not constitute probable cause or reasonable suspicion" nor "used to support the search of the person" or his property. MMMA section 6(g). His conduct must be otherwise unlawful to justify searching or arresting him.

III. Defendants Before This Court Are Not Being Prosecuted Under The MMMA.

Defendants are being prosecuted under the Michigan Controlled Substances Act ("MCSA"), Article 7 of the Public Health Code. It is that statute that must be construed here. And it must be construed in light of the MMMA, this court's ruling in *Ter Beek*, and the amendments to the Public Health Code enacted through Public Act 268 of 2013.

The MMMA contains a broad preemption clause to ensure that qualifying individuals acting in accordance with the MMMA not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege for their use of marijuana for medicinal purposes. Specifically, MCL 333.26427(e) provides "[a]ll other acts and parts of acts inconsistent with this act do not apply to the medical use of marijuana as provided for by this act." Thus, to the extent that the Michigan Controlled Substances Act would subject an individual to arrest, prosecution or penalty in any manner, or denied any right or privilege, for using medical marijuana in accordance with the MMMA, it is preempted by the MMMA. See *Braska v. LARA*, ___ Mich.

App. ___ (2014)(Holding that the MMMA preempted the Michigan Employment Security Act where cardholder was denied unemployment benefits after being fired only for failing a drug test.) citing *People v. Koon*, 494 Mich at 8-9 (holding that a cardholder could not be convicted for violating a criminal statute that was in conflict with the MMMA without proof that the cardholder had engaged in activity not protected by the MMMA.)

IV. The Charging Statute In The Michigan Controlled Substances Act Conflicts With The MMMA.

MCL 333.7401(1) reads in full:

> Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.

This would appear to put the MCSA in direct conflict with the MMMA. However, we must "give the fullest possible effect to the legislative purpose underlying harmonious statutes without overreaching, unreasonableness, or absurdity. The MCSA and the MMMA are not harmonious. However, if multiple statutes can be construed in a way that avoids conflict, that construction should control." *Ryan v. Dep't of Corrections*, 259 Mich.App. 26, 30, 672 N.W.2d 535 (2003) (citations omitted). *Ter Beek* at 473. See *Ryan*, 259 Mich.App. at 30, 672 N.W.2d 535 (when construing multiple statutes together, this Court should arrive at a construction that avoids absurd results or conflicts, if possible). *Ter Beek* at 463. Such are the rules of harmony. Where the MMMA and the MCSA play discordant notes, the MCSA is silenced. Muted.

The first sentence 7401(1) is consistent with the MMMA only if the medical use of marijuana is exempted from the controlled substances act via Section 333.7303 (describing

persons exempted including agents and employees of licensees and common carriers.) In relevant part it reads:

> (4) **The following persons need not be licensed and may lawfully possess controlled substances** or prescription forms under this article... (c) **An ultimate user or agent in possession of a controlled substance ... pursuant to a lawful order of a practitioner** or in lawful possession of a schedule 5 substance.333.7109(8) defines “Ultimate user” as "an individual who lawfully possesses a controlled substance for personal use or for the use of a member of the individual's household..." “Agent” means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, dispenser, or prescriber.

This much is consistent with the MMMA, whereby a registered medical marijuana patient (ultimate user) possesses marijuana through lawful doctor’s orders (as demonstrated by the registry card) and is therefore exempt from the controlled substances act altogether. The doctor’s orders are lawful because 1) a physician has a 1st amendment right to issue a recommendation to use marijuana within a bona fide doctor patient relationship, *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2003), and 2) because the MMMA makes that recommendation a lawful order.

However, the second sentence of 7401(1) says: "A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant."

The MMMA recognizes the "legitimate and professionally recognized therapeutic (and) scientific purposes" of marijuana and a doctor is not prohibited by the Michigan controlled substances act from dispensing, prescribing or administering it within the scope of his practice on that basis. The doctor is prohibited from dispensing or prescribing marijuana if it has schedule one status. See 333.7306(3) "A practitioner shall be licensed to dispense or prescribe any

controlled substances… in schedules 2 to 5…" Under federal law, it is illegal for a doctor to recommend marijuana to a patient with the specific intent that the patient will use the recommendation like a prescription to obtain marijuana. *Conant, supra*. Such conduct technically constitutes aiding and abetting the possession of a schedule 1 controlled substance under federal law. If marijuana is a schedule 1 substance under Michigan law, then every doctor certification is a state felony.

V. Marijuana's Schedule 1 Status Under The MCSA Is In Conflict With The MMMA.

More than a conflict, this is an absurdity. Marijuana's placement on schedule 1 of the MCSA is a part of the act inconsistent with the MMMA and therefore does not apply to the medical use of cannabis per MCL 333.26427(e). However, marijuana either meets the criteria of schedule 1 as a matter of public health or it does not. It either has currently accepted medical use or it does not. It may safely be used under medical supervision or it may not. It can't both "Have and Have Not" the properties of a schedule 1 controlled substance. In light of the MMMA and PA 268 of 2013 and as further discussed below, marijuana is no longer a schedule 1 drug under the Michigan Controlled Substances Act. It would be absurd, "utterly and obviously senseless, illogical or untrue; contrary to all reason and common sense." *McGhee v Helsel*, 262 Mich App 221, 226 (2004).

While "absurd" does not mean merely that "reasonable people would think that the Legislature acted improvidently," see *McGhee* supra, it surely means that when the people through a voter referendum and the Legislature through PA 268 of 2013 declare and recognize acceptable and safe medical uses for a substance, its continued inclusion on schedule 1 is contrary to all reason and common sense.

Before we turn to the construction of the MCSA in light of PA 268 of 2013, we must

briefly address registered caregivers. A registered caregiver is not an "ultimate user" under the MCSA and thus is not exempt under 333.7303 on that basis. As a rule of statutory construction, there is a presumption against creating exemptions in a statute that has none. *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994). Courts do allow de minimis exceptions to statutory rules, so long as they do not undermine statutory policy. *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co*., 112 S. Ct. 2447, 2457-58 (1992). Holding that a caregiver is the "agent" of the "prescriber" would exempt the caregiver from the MCSA and would not undermine statutory policy. However, that would impose a relationship not necessarily intended by recommending physicians and caregivers and strain the definition of both "agent" and "prescriber."

The caregiver faces a more existential conflict with the Michigan Controlled Substances Act. The MCSA prohibits the cannabis plant from being grown. See infra.

VI. Marijuana Is No Longer A Schedule 1 Drug Under The Michigan Controlled Substances Act.

Upon the passage of the Michigan Medical Marijuana Act ("MMMA") in 2008, there arose tension between Michigan's recognition of acceptable medical uses of the cannabis plant and the plant's inclusion on Schedule 1 of the state and federal controlled substances list. The placement of cannabis on Schedule 1 required a finding that it had high potential for abuse and either had no accepted medical use in treatment in the United States or lacked accepted safety for use in treatment under medical supervision. Mich. Pub. Health Code Section 333.7211 (Eff. 9/30/78)(mirroring the Federal Controlled Substances Act "FCSA"). In enacting the MMMA, the people of Michigan roundly rejected that finding and chose to part ways with the federal government on the medical benefits of marijuana, establishing a framework for health caregiving based on the homegrown, plant-based medical use of cannabis for certain maladies and providing

for protections, privileges, immunities, and rights related thereto.

Michigan law enforcement has long taken the position that the MMMA was unconstitutional and was pre-empted by the FCSA. That position was firmly and ultimately rejected by a unanimous Michigan Supreme Court in *Ter Beek v Wyoming*. "'Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the states to require or prohibit those acts.'" citing *Printz v United States*, 521 US 898, 924 (1997), quoting *New York v United States*, 505 US 144, 166 (1992). The federal government cannot "commandeer" state law enforcement. MMMA is not pre-empted by cannabis being a schedule 1 drug under federal law. In short, Michigan has the authority to prohibit marijuana or not. However it cannot logically do both.

While the court noted that marijuana had been designated a schedule 1 drug in Michigan, the basis for marijuana's continued placement on schedule 1 status under state law was not reached. The court did not address the question of how cannabis could still rationally be considered a Schedule 1 substance under *Michigan* law when subsequent law (the MMMA) recognized certain acceptable medical uses. That question was not before the court. It did not construe the risk of penalties under *state* law or the impact of the MMMA on *state* probable cause analysis and criminal procedure. It held that Michigan can allow what federal law prohibits with regards to controlled substances and it held that the City of Wyoming could not prohibit what state law allows. The Court did not consider PA 268 of 2013 that was passed into law after the case had been argued. PA 268 of 2013 changed Michigan's scheduling of marijuana.

On 12/30/13 the governor signed into immediate effect SB 660 that had been passed by super-majorities of both houses as mandated by the Michigan Constitution, which was subsequently enrolled as Public Act 268 of 2013. PA 268 of 2013 remedied some of the conflict between the MMMA and the Michigan Controlled Substances Act by removing marijuana from

Schedule 1:

> The following controlled substances are included in schedule 2:
>
> (e) Marihuana, but only for the purpose of treating a debilitating medical condition as that term is defined in section 3(b) of the Michigan medical marihuana act, 2008 IL 1, MCL 333.26423, and as authorized under this act.
>
> **History:** 1978, Act 368, Eff. Sept. 30, 1978 ;-- Am. 1979, Act 125, Imd. Eff. Oct. 22, 1979 ;-- Am. 1981, Act 231, Imd. Eff. Jan. 13, 1982 ;-- Am. 1982, Act 352, Imd. Eff. Dec. 21, 1982 ;-- Am. 2013, Act 268, Imd. Eff. Dec. 30, 2013

Marijuana is expressly no longer a Schedule 1 substance under Michigan law. Its medical use is allowed per the MMMA. PA 268 of 2013 reinforced this change by referencing it in its concurrent amendment to Schedule 1: "Marihuana, including pharmaceutical-grade cannabis, is a schedule 2 controlled substance if it is manufactured, obtained, stored, dispensed, possessed, grown, or disposed of in compliance with this act and as authorized by federal authority." As *Ter Beek* made clear, the Federal Controlled Substances Act itself authorizes Michigan to independently schedule or otherwise regulate medical marijuana as a matter of federal law:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State. [21 USC 903.]

PA 268 of 2013 did precisely that, removing marijuana from schedule 1. This is only logical as marijuana cannot both "have" and "not have" acceptable medical uses. A court presumes that the legislature is aware of the laws on the same subject and the effect of new enactments on existing laws. *Wayne County v Wayne County Retirement Comm'n*., 267 Mich App 230, 244 (2005). While certain state rulemaking, fee-establishing and licensing functions for the implementation of the "pharmaceutical grade marijuana" program under article 8 only occur when marijuana "is rescheduled by federal authority," MCL 333.8115(2), it is a very different to

say that the state of Michigan allows for schedule 2 medical use of marijuana "as authorized by federal authority" in MCL 333.7212(2). The Michigan legislature could have said that marijuana would become schedule 2 controlled substance when "marijuana is rescheduled by federal authority." It did not. Federal "rescheduling" was not invoked. "Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

This is particularly cogent in light of *Ter Beek*. There is a vast difference between the state of Michigan saying that it will begin to implement a "pharmaceutical grade cannabis" program contingent upon "rescheduling by federal authorities" and it saying that Michigan recognizes and allows for the medical use of marijuana by Michigan citizens under Michigan law as authorized to permit such use "by federal authority." *Ter Beek* laid this to rest.

VII. PA 268 Of 2013 Exempted MMMA Permitted Conduct From The Michigan Controlled Substances Act.

PA 268 of 2013 went even further. It also provides in MCL 333.8109(3), enacted with immediate effect as of Dec. 30, 2013, that "Article 7 (MCSA) and this article (article 8) *do not apply to conduct permitted under the Michigan Medical Marihuana Act*." (emphasis added). While another part of art. 8 provides that certain acts of the "implementation and enforcement" of art. 8 depend on federal rescheduling, (e.g., promulgation of pharmaceutical grade cannabis rules by LARA and the acceptance of licensing fees. See 333.8115(2)), the non-application of article 7 (the Michigan Controlled Substances Act) to MMMA permitted conduct took immediate effect.

"Not applying" art. 7 and 8 to MMMA patients and caregivers does not require

implementation or enforcement. Quite the opposite. It requires nothing. Nor would any rules promulgated under art. 8 by LARA regulate MMMA permitted conduct. This law takes such conduct entirely out of the Michigan Controlled Substances Act as of 12/30/13. A law is presumed to take effect on the date it is enacted. *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991). Patients and caregivers are not "criminals with a get out of jail free card." MMMA permitted conduct is not subject to enforcement via the MCSA.

VIII. Independently Of The MMMA And PA 268 Of 2013, There Is No Rational Basis For Marijuana To Be Schedule 1 Under Michigan Law.

Indeed, even without the passage of PA 268 of 2013, there would be no rational basis for marijuana to still be classified as Schedule 1 in Michigan after the passage of the MMMA. As the U.S. Supreme Court said in *Raich*, "We acknowledge that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, *would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I*. See, *e.g.,* Institute of Medicine, Marijuana and Medicine: Assessing the Science Base 179 (J. Joy, S. Watson, & J. Benson eds. 1999) (recognizing that "[s]cientific data indicate the potential therapeutic value of cannabinoid drugs, primarily THC [Tetrahydrocannabinol] for pain relief, control of nausea and vomiting, and appetite stimulation"); see also *Conant* v. *Walters*, 309 F.3d 629, 640—643 (CA9 2002) (Kozinski, J., concurring) (chronicling medical studies recognizing valid medical uses for marijuana and its derivatives)." *Raich*. (emphasis added).

The Institute of Medicine study cited by the U.S. Supreme Court is one of the studies cited in the findings of the MMMA:

Modern medical research, including as found by the National Academy of Sciences' Institute of Medicine in a March 1999 report, has discovered beneficial uses for marihuana in treating or alleviating the pain, nausea, and other symptoms associated with a variety of

debilitating medical conditions. MCL 333.26422(a).

This does more than cast serious doubt on the accuracy of the findings that put cannabis on schedule 1 of the MCSA. It declares as a matter of Michigan law that those findings were inaccurate. Marihuana cannot be a schedule 1 controlled substance under Michigan law.

This Michigan Supreme Court has made findings of fact that are relevant here. "It cannot be doubted that the judiciary has the power to determine the true state of facts upon which a (in this case marijuana) law is based." *People v. Sinclair*, 379 Mich. 91 (1972) citing *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). The Michigan Supreme Court in *Sinclair* addressed the issue of the rationality of the State's marijuana laws and held:

Comparison of the effects of marijuana use on both the individual and society with the effects of other drug use demonstrates not only that *there is no rational basis for classifying marijuana with the 'hard narcotics', but, also, that there is not even a rational basis for treating marijuana as a more dangerous drug than alcohol.*" *Sinclair*, 379 Mich. at 103. "No physical dependency is produced by use of the drug and, hence, there are no withdrawal symptoms or 'abstinence syndrome' when the drug is unavailable to the user. No lethal dose for marijuana has been established… the evidence available concerning marijuana's effect on psychomotor functions seems to show very little impairment, at least in experienced users. *Id*. At 107.

There is no reliable scientific evidence demonstrating that chronic psychosis can be caused by marijuana use in dramatic contrast to the American experience with alcohol. The argument that marijuana use causes or contributes to assaultive crime is now largely discredited. Again by contrast, considerable evidence points to a substantial connection between alcohol use and commission of violent crimes. Finally, the 'stepping stone argument' that marijuana use leads to use of 'hard narcotics' has no scientific basis. *Id* at 110. (internal citations omitted).

The Michigan Supreme Court went on to hold: "The murky atmosphere of ignorance and misinformation which casts its pall over the State and Federal legislatures' original classification of marijuana with the hard narcotics has been well documented… We can no longer allow the residuals of that early misinformation to continue choking off a rational evaluation of marijuana… The truth compels us to conclude *at the minimum* that marijuana has been erroneously classified with the opiates…." *Id* at 114-15 (emphasis added). Or as a concurring Justice noted, "Possession of a natural growing plant can hardly be *malum in se* (evil in and of itself). *Id* at 152. The court reversed Sinclair's conviction as violative of equal protection because of the irrational classification of marijuana and the cruel and unusual nature of the excessive punishment.

Marijuana is not and cannot be a schedule 1 controlled substance under Michigan law.

IX. Whether Or Not Marijuana Is Schedule 1 Under Michigan Law, It Is Not Contraband Per Se.

Under both state and federal law, a schedule 1 controlled substance is contraband *per se*. Its mere presence is the evidence of a crime. It is "contraband for any purpose." *Gonzalez v. Raich*, 545 U.S. 1, 27 (2005). For example, probable cause to issue a search warrant for possession of a Schedule 1 controlled substance exists if there is a substantial basis for inferring a fair probability that contraband or evidence of a crime exists in the stated place, *People v. Kazmierczak*, 461 Mich. 411, 417–418; 605 NW2d 667 (2000). As the Supreme Court in *Raich* recognized, prohibiting the possession or manufacture of dangerous or endangered things can be a rational means of regulating commerce in that product, noting such acts as trafficking in Bald Eagles, nuclear materials, biological weapons and certain plastic explosives. In Michigan, marijuana is no longer legally similar to those things.

The passage of the MMMA and PA 268 of 2013 foreclose the rationality of marijuana

being schedule 1 under the MCSA. While marijuana may still be contraband for any purpose under federal law, it is no longer so under Michigan law. Consequently, the probability that marijuana exists in a stated place by itself provides neither reasonable suspicion nor probable cause to believe a crime is being committed.

This is illustrated by the conflict between Sec. 4(h) of the MMMA and the "contraband per se" provisions of Sec. 7525 of the Michigan Controlled Substances Act which read as follows:

> (1) A controlled substance listed in schedule 1 that is possessed, transferred, sold, or offered for sale in violation of this article is contraband and shall be seized and summarily forfeited to this state….
>
> (2) Species of plants from which controlled substances in schedules 1 and 2 may be derived which have been planted or cultivated in violation of this article may be seized and summarily forfeited to this state.

Marijuana is not "contraband" per se. Both sections directly conflict with Sec. 4(h) of the MMMA which states: "Any marihuana, marihuana paraphernalia, or licit property that is possessed, owned, or used in connection with the medical use of marihuana, as allowed under this act, or acts incidental to such use, shall not be seized or forfeited." This conflicts with the MMMA as a matter of both substantive law and criminal procedure. It is the controlled substances act that must yield. Patients and caregivers cannot be subject to law enforcement's power to search for and summarily seize marijuana. They are immune from summary forfeiture. Any forfeiture procedure must comport with due process.

X. Because Marijuana Is No Longer Contraband Per Se, The Standard For Probable Cause Has Changed.

However, it is Sec 7525 of the MCSA's contraband definition that the Court of Appeals has embodied as the standard for probable cause that continues to be used to justify searching for

and summarily seizing marijuana. In the case of *People v. Brown*, 297 Mich. App. 670 (2012) decided prior to the *Ter Beek* decision and the enactment of PA 268 of 2013 and not heard by this Court, the Michigan Court of Appeals held that because marijuana was still a Schedule 1 drug under Michigan law it was still contraband per se, even in the face of MMMA protected conduct and acceptable medical uses. As a result, the court found that the mere suspected presence of marijuana was grounds for a search warrant and it was not necessary for law enforcement to apprise a magistrate of suspected non-compliance with the MMMA. Rather, "if the police do have clear and uncontroverted evidence that a person is in full compliance with the MMMA, this evidence must be included as part of the affidavit because such a situation would not justify the issuance of a warrant."

Of course, it wouldn't justify an application for a warrant either. It would justify nothing. It's simply a truism. Worse, law enforcement relies on this decision to justify not informing magistrates of any known conduct permitted by the MMMA, often failing to disclose to the magistrate the fact that the person whom they want to search is a registered patient or caregiver. This "standard" of probable cause is no standard at all and effectively gives law enforcement a general warrant to search medical marijuana patients and caregivers for contraband and summarily arrest them and seize their assets. The court blithely noted: "This scheme will reduce any potential (however unlikely) for police overreach in attempting to obtain search warrants." *Brown*, FN 5. That is not the case.

XI. The Forfeiture Powers Given To Law Enforcement In Sec. 7525 Of The MCSA Conflict With The MMMA.

Sec. 7525(1) can be partially harmonized with the MMMA by recognizing marijuana's removal from schedule 1. Because it is not schedule 1, marijuana is not subject to mandatory seizure and summary forfeiture. A search for and seizure of marijuana, including pharmaceutical

grade cannabis, must be based on more than the mere presence of "contraband." There must be proof of a crime beyond its mere existence. And it cannot be summarily seized. "Summarily" means "performed arbitrarily and quickly, without formality, as in a summary execution." *Collins English Dictionary - Complete & Unabridged* 2012 Digital Edition. To conduct a search for marijuana based on nothing but the fact of its probable existence or likely possession by someone violates constitutional mandates against unreasonable searches. Summarily seizing marijuana also violates those mandates as well as violating due process of law.

Even if marijuana (or pharmaceutical grade cannabis) is a schedule 2 controlled substance, 7525(2) of the act allows the cannabis plant to be summarily seized and forfeited from registered patients and caregivers in direct conflict with their immunities under the MMMA. "Usable marijuana" as protected under the MMMA cannot be medically used if the cannabis plant cannot be grown or if it can be seized and summarily forfeited without due process.

This clashes with, MMMA Sec. 4(h) that provides: "Any marihuana, marihuana paraphernalia, or licit property that is possessed, owned, or used in connection with the medical use of marihuana, as allowed under this act, or acts incidental to such use, shall not be seized or forfeited." The summary forfeiture provisions of MCL 333.7525 cannot apply to registered patients and caregivers. The patient or their caregiver must have notice and a right to be heard before any such forfeiture can take place.

Interestingly, sec. 7525(2) does not conflict with the cultivation of pharmaceutical grade cannabis by a pharmaceutical grade cannabis licensee pursuant to the new article 8 of the Public Health Code as enacted by PA 268 of 2013. MCL 333.8109 expressly provides that such cultivation is pursuant to an article 7 controlled substances license and thus not a per se violation of the controlled substances act. The pharmaceutical grade cannabis licensee can stop the seizure and forfeiture of the plants by producing "the appropriate license or proof thereof" to "the

administrator or its authorized agent" per MCL 333.7525. A registered patient or caregiver cannot. They lack a controlled substance license.

XII. Law Enforcement Has A Mandatory Duty To Investigate And Determine If Suspected Marijuana Use Is Protected. They May Do That By Asking.

Patients and caregivers have a registry card that represents a state-granted entitlement to cultivate the cannabis plant and use the marijuana to treat the patient's debilitating medical condition. This card represents immunity from arrest, prosecution, or penalty in any manner, or denial of any right or privilege for their use of marijuana for medicinal purposes including the unreasonable search of the homes and persons and the seizure and forfeiture of their medical marijuana, plants, and property. However, the card means nothing if *any* marijuana related conduct constitutes reasonable suspicion or probable cause to believe a crime is being committed or evidence of a crime might be found, thereby justifying a police raid and summary forfeiture. Cardholders "shall not" be subject to arrest, prosecution or penalty or denial or rights and privileges nor have their property searched and seized because of the exercise of their entitlements under the MMMA. As a matter of statutory construction the word "shall" refers to a mandatory duty or requirement. *Wayne County v State Treasurer*, 105 Mich App 249, 252 (1981). Law enforcement has the mandatory duty to investigate whether suspected marijuana cultivation and use is in fact legal and protected by the MMMA before stripping patients and caregivers of these entitlements with a standard of probable cause based on the MCSA's designation of the cannabis plant as "contraband for any purposes."

There is a simple way to do that. Ask to see an acceptable ID. This is harmonious with MMMA sec. 7(d)'s criminal penalties for making a fraudulent representation to a law enforcement officer regarding medical use of marijuana to avoid arrest or prosecution. Investigate. And inform the magistrate of any evidence of MMMA protected conduct, most

crucially the fact that a suspect is a cardholder.

XIII. The MMMA Did Not End The Drug War.

While the above is logically true, it is not necessarily emotionally true. Law enforcement has been at war with the marijuana plant since at least 1972. By the very terms of the MCSA, law enforcement has been given the affirmative duty to seize and summarily forfeit the plant because of its schedule 1 status. It has for 40 years been declared *malum en se*, evil in and of itself. The summary forfeiture of the plant and any assets associated with its use have become an enormous part of what law enforcement does and a correspondingly large part of how law enforcement funds itself. According to the FBI, 48.3% of all drug arrests are for marijuana. It is reasonable to expect for law enforcement react to marijuana's removal from the per se contraband list and a cardholder's inclusion on the non-combatant list as it would to an existential threat. The MMMA after all did not end the drug war.

In the Michigan drug war, a patient or caregiver card is like a Red Cross protective sign, a symbol used during times of war or armed conflict to mark persons or objects under the protection of various treaties of international humanitarian law. Its essential meaning can be summed up as "Don't shoot!" or "Don't attack!" Geneva Conventions prohibit attacking doctors, patients, ambulances and hospital ships displaying the Red Cross. Of course, a Red Cross "cardholder" cannot engage in warlike acts or acts of "perfidy," that is, feigning sickness, feigning non-combatant status, or feigning protected status by the use of the Red Cross symbol itself. Article 37, Protocol 1 Additional to the Geneva Conventions of 12 August 1949. Like the flyer of a Red Cross flag, a cardholder is presumed to not be an enemy combatant and marijuana is presumed to not be an article of war.

With due deference to John Lennon, it has become clear that it is not enough to say "War

is over if you want." It is only with an appropriate standard of probable cause and reasonable suspicion as a matter of criminal procedure that the law can keep the immunities, rights, and entitlements granted by the state to patients and caregivers in the MMMA from blowing in the wind.

XIV. Probable Cause Analysis From Other States Is Helpful To This Court's Decisions.

Courts in other states have addressed the issue of probable cause in light of medical marijuana. The California Court of Appeals recently held, as the Michigan Court of Appeals did in *Brown*, that law enforcement officers seeking a search warrant did not have an affirmative duty to investigate a suspect's status as a qualified patient or caregiver or apprise the magistrate of efforts to determine if the marijuana being grown was for medical use. *People v. Clark*, 230 Cal. App. 4th 490 (Cal. App., Division 5, 2014). However, this was because California's Compassionate Use Act, unlike the MMMA, provides only an affirmative defense and not an immunity and thus does not shield a person cultivating marijuana from investigation or arrest. Clark stands for the proposition that where a patient card grants an immunity from arrest, the standards of investigation, reasonable suspicion and probable cause must reflect that immunity.

Likewise Alaskan courts have addressed the issue. In *State v. Crocker*, the Alaskan Court of Appeals held that because not all possession of marijuana is a crime, "a court should not issue a search warrant based on an allegation of marijuana possession unless the State establishes probable cause to believe that the type of marijuana possession at issue in the case is something other than the type of possession" protected by law. More than an affirmative defense, the state constitution at the time provided immunities and protections for personal use of marijuana in the home. Consequently, law enforcement was required to demonstrate probable cause that marijuana was being possessed or used illegally. *State v. Crocker*, 97 P.3d 93, 95 (Alaska App.

2004).

The patient card in Michigan is a sign that the holder is entitled to a broad grant of immunity from reasonable suspicion and probable cause to arrest without some other indication of a crime. Crucially, this immunity extends far beyond the cardholders and physicians. All Michiganders are immune from arrest, prosecution, and penalty for providing a cardholder with Marijuana paraphernalia, 4(g); or for solely being in the presence of MMMA permitted conduct or assisting a registered patient with using or administering marijuana, 4(i). A patient card is a demonstration that the patient, and those merely in his presence or assisting him, are non-combatants, immune from being stopped or arrested unless additional facts indicate that some criminal activity is afoot. *United States v. Sokolow* (1989) 490 U.S. 1, 7 [104 L.Ed.2nd 1, 10]; quoting *Terry v. Ohio*, *supra*, at p. 30 [20 L.Ed.2nd at p. 911].

That is the standard for police intervention that Michiganders deserve.

And here the Red Cross analogy ends. A soldier in wartime might have a "hunch" that the ambulance from Doctors Without Borders is flying a protective flag while transporting terrorists or transporting weapons. He might stop and search it to make sure that it is not. However, a police officer deals with citizens granted statutory and constitutionally protected rights. "A *hunch* may provide the basis for solid police work; it may trigger an investigation that uncovers facts that establish reasonable suspicion, probable cause, or even grounds for a conviction. A hunch, however, is not a substitute for the necessary specific, articulable facts required to justify a Fourth Amendment intrusion." *People v. Pitts,* (2004) 117 Cal.App.4th 881, 889; quoting *United States v. Thomas* 211 F.3d 1186, 1192 (9th Cir. 2000). *Brown* is bad law. Probable cause has changed. Michigan cannot accept a standard of probable cause that amounts to nothing more than, "Raid 'em all and let the courts sort it out." The card means that the holder is presumed to be suffering from a serious or debilitating disease or related symptoms and is

entitled by the state of Michigan to use Marijuana for relief.

XV. Because PA 268 of 2013 Remedied The Status Of Marijuana's Status As Contraband Per Se, The Above Probable Cause Analysis Is Applicable Retrospectively.

PA 268 of 2013 redefined marijuana's status as a schedule 1 controlled substance thereby remedying a conflict between the MMMA and the MCSA regarding marijuana's acceptable medical use and its categorization as contraband per se. It also remedies that conflict by effectuating a change in constitutional probable cause analysis that is the heart of criminal procedure, guaranteed by the state and federal constitutions. It redefines what it means for there to be probable cause to believe a marijuana crime has been committed or evidence of a crime will be found. It furthers a remedy from the summary seizure and forfeiture of the cannabis plant from MMMA registered cardholders. It does not create new or take away existing rights of medical marijuana patients and caregivers. Rather PA 268 of 2013 confirms the acceptable medical use of marijuana under lawful doctor's orders. Indeed it confirms the rights established by the MMMA by expressly removing MMMA-permitted conduct out of the controlled substances act altogether. MCL 333.8109. PA 268 of 2013 is remedial and relates to probable cause, the most fundamental of modes of procedure.

"Remedial statutes, or statutes related to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of a remedy or confirmation of rights already existing, do not come within the legal conception of restrospective law, or the general rule against retrospective operation of statutes. To the contrary, the statutes or amendments pertaining to procedure are generally held to operate retrospectively, where the statute or amendment does not contain language clearly showing a contrary intention. Indeed, in the absence of any savings clause, a new law changing a rule of practice is generally regarded as applicable to all cases then pending." *Hansen-Snyder Co. v. General Motors Corp.*, 371 Mich.

480, 124 N.W.2d 286 (1963). Such cases must be re-analyzed under the remedial probable cause standard.

> Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. *Johnson v. United States*, 330 U.S. 10 (1948).

XVI. Applying The Foregoing Probable Cause Standard To The Defendant, Robert Tuttle, Requires A Ruling That He Is Immune From Further Prosecution.

Mr. Tuttle was a registered patient and caregiver. He met a Mr. Lalond on a website for medical marijuana patients and caregivers who asked Tuttle to provide him with marijuana for his pain. Tuttle reviewed documentation and established that Lalond was indeed a registered medical marijuana patient. What Tuttle could not know was that Lalond was a CI working for the police and was not seeking to buy marijuana to alleviate his pain.

At this point, there is no suspicion of illegal activity. Before someone can care for a patient, they must first meet. It is also clear that the police may institute an undercover investigation without a showing of reasonable suspicion. The government's use of undercover activity, strategy, or deception is necessarily unlawful. *Lewis v United States,* 385 US 206, 208-209; 87 S Ct 424, 426; 17 L Ed 2d 312, 315 (1966). Such infiltration may be a recognized and permissible means of investigation....” *People v. Henley*, 54 Mich.App. 463, 221 N.W.2d 218 (1974). Furthermore, the use of such undercover sales operations as a means by which to detect criminal activity is not entrapment per se. See, e.g., *People v. Roy*, 80 Mich.App. 714, 265 N.W.2d 20 (1978), lv. den. 402 Mich. 903 (1978), and *People v. Duke*, 87 Mich.App. 618, 274 N.W.2d 856 (1978).

However, an official may employ deceptive methods to obtain evidence of a crime only as long as the activity does not result in the manufacturing of criminal behavior. *People v. Jamieson,* 436 Mich. 61, 82, 461 N.W.2d 884 (1990). (G)overnmental participation may be so outrageous or fundamentally unfair as to deprive the defendant of due process of law or to move the courts in the exercise of their supervisory jurisdiction over the administration of criminal justice to hold that the defendant was "entrapped" as a matter of law . . . *United States v. Quinn,* 543 F.2d 640, 648 (8th Cir. 1976). See also *United States v. Szycher,* 585 F.2d 443, 445 (10th Cir. 1978);*United States v. Prairie*, 572 F.2d 1316 (9th Cir. 1978).

A Law enforcement's use of a facially valid patient card in an undercover operation is entrapment as a matter of law.

People v. Reynolds, 139 Mich. App. 471 (1984), is instructive. In that case, an undercover and underage CI acting under the supervision of sheriff's department officers, attempted to make purchases at 22 stores and succeeded at six stores. In each instance of a successful purchase, the CI turned the alcoholic liquor over to his supervisors immediately upon leaving the store. The CI was apparently an exceptionally mature-looking 19-year-old; however, no attempt was made to disguise Bush's appearance and *no false identification was presented*. Consequently, no entrapment occurred.

Likewise, a Minnesota court held there to be no entrapment where an underage purchaser wore a khaki cap with blue cursive writing that identified him as a member of the "Blue Earth County Sheriff's Office Alcohol Compliance Team." The detective and a colleague *instructed the underage purchaser to produce identification showing his true age* at the bartender's request. The underage purchaser entered the bar and asked to buy a 12–pack of beer from appellant Karen Kay Fitzpatrick. *Without asking for identification*, Fitzpatrick made the sale, and the underage purchaser left the bar with the beer. *State v. Fitzpatrick*, 690 N.W.2d 387 (Minn. App 2004).

No court allows for law enforcement to give an underage CI a state issued, facially valid fake ID showing him to be of legal age and have him use it to buy beer. Convicting someone for selling to a minor under such circumstances would be outrageous. It would be "manufacturing criminal behavior."

The Michigan Court of Appeals only peripherally addressed this in the context of a patient card in *People v. Vansickle*, 303 Mich. App 111 (2013). There the defendant sold his "excess" marijuana to an undercover officer in the parking lot of a dispensary during a raid. The court in finding no entrapment was careful to note that the undercover officer never presented the fake patient card he was carrying to the defendant.

What happened to Tuttle is different by an order of magnitude. Tuttle, a registered caregiver entitled by the state to care and grow for patients, was presented a facially valid card that identified Lalond as a person recognized by the state as suffering from a serious or debilitating disease. Lalond presented prima facie, state-issued evidence of his medical necessity and his entitlement by the state to acquire and use marijuana and his immunity from arrest for doing so. "A registered qualifying patient who acquires marijuana—whether from another registered qualifying patient *or even from someone who is not entitled to possess marijuana*—to alleviate his own condition can still receive immunity from arrest, prosecution, or penalty because the § 4(d) presumption cannot be rebutted on that basis." *McQueen*. It would be outrageous to convict him for "selling marihuana to someone who is not allowed to use marihuana for medical purposes" under MMMA Sec. 4(k). That would be like sending in a 19 year old with a facially-valid, state-issued fake ID to buy beer. It is entrapment as a matter of law. In any event, Lalond *was* allowed to use marijuana for medical purposes under the MMMA.

Of course, Tuttle is not charged with nor was he investigated for violating the MMMA but rather for violating the controlled substances act. Selling to someone to whom you are not

connected via the registry is not a crime under the MMMA. However, nor did this undercover operation target a violation of the MCSA. Its goal was to summarily strip Tuttle of the entitlements and immunities provided by the MMMA, entitlements that cannot be revoked without due process of law. If this behavior were allowed, it would also summarily strip Tuttle of his ability to assert a medical necessity defense based on the needs of his patient. Lalond lied about those serious and debilitating needs using facially-valid, state-issued credentials. This is outrageous behavior. It is the equivalent of a policeman lying on the road, pretending to be beaten and bloody in order to arrest a passing Good Samaritan for practicing medicine without a license while stripping him of his Good Samaritan defense. It is the very fabrication of criminal activity. Tuttle was entrapped.

B The search of Tuttle's house was illegal.

In the affidavit for the warrant to raid the home, the affiant did not disclose that Tuttle was a registered caregiver or that the CI was a registered patient. Consequently, it was impossible for the magistrate to determine if there was probable cause to believe a crime was being committed under either the MMMA or the MCSA. As discussed above, patients and caregivers are exempt from the MCSA or at least from those provisions of it that conflict with the MMMA. The provisions of the MCSA either requiring or allowing for the seizure and summary forfeiture of marijuana irrevocably conflict with the MMMA's provision 4(h) "Any marihuana, marihuana paraphernalia, or licit property that is possessed, owned, or used in connection with the medical use of marihuana, as allowed under this act, or acts incidental to such use, shall not be seized or forfeited."

In failing to inform the magistrate of the two men's cardholder status, law enforcement unilaterally stripped Tuttle of any protections that he had under the MMMA against unreasonable search, seizure, forfeiture or arrest. The officer took it upon himself to decide that he could

search for and summarily seize Tuttle's property because in his opinion it was not used as allowed under the MMMA. It is for the magistrate, not the police officer to determine probable cause. Particularly when execution of the warrant will result in a police raid of a home and the summary forfeiture of a citizen's property. The officer had an affirmative duty to disclose the cardholding status of Tuttle and Lalond to the magistrate. It is only then that the magistrate could have determined what was a reasonable search and seizure of Tuttle's home and what circumstances supported probable cause to execute it. It was for the magistrate to determine whether the three alleged controlled buys stripped Tuttle of his immunities for growing marijuana in his home or amounted to probable cause to search it.

This was not a harmless error. Even if the officer had disclosed the actors' cardholder status and alleged that Tuttle had sold to someone he was not connected to via the registry, the warrant would have failed to present probable cause to search the house. It would not allege an activity illegal under the MMMA. There would be nothing in the affidavit to indicate to the magistrate that defendant had an illegal marijuana grow at his house. No alleged transaction occurred at defendant's house. The CI did "not assert that the informant had been inside defendant's house, that he had ever seen drugs or other evidence inside defendant's house, or that he had seen any evidence of a crime other than the one that occurred when Tuttle allegedly sold him drugs. Without such an assertion, the affidavit fails to establish the necessary "nexus between the place to be searched and the evidence sought." *United States v. Van Shutters*, 163 F.3d 331, 336–37 (6th Cir.1998) (internal quotation marks omitted), *cert. denied,* 526 U.S. 1077, 119 S.Ct. 1480, 143 L.Ed.2d 563 (1999).

Michigan marijuana law and jurisprudence since the pre-MMMA case of *People v. Darwich*, 226 Mich. App. 635 (1997), has changed the essence of probable cause analysis. Mr. Tuttle is not presumed to be a "drug dealer" packaging and selling "narcotics" at one location

and selling in another. *Of course* Mr. Tuttle's home was a logical place to look for marijuana. He has a state privilege to grow it there. The simple, uncorroborated assertion of a CI that he illegally bought marijuana somewhere from Mr. Tuttle does not immediately strip defendant of all constitutional or statutory protections for medical marijuana cultivation and use in his home. A cardholder's entitlements cannot be revoked without due process.

Nowhere in the affidavit is there probable cause to believe that illegal marijuana activity was happening in the home. Were the affiant truly "experienced" in Michigan's medical marijuana law, he would have provided the magistrate with full and accurate information regarding defendant's caregiver status and provided information regarding the patient status of the purported CI. He might have investigated further to determine whether there was cause to believe that some criminal activity or MMMA violation was happening at Mr. Tuttle's home. He might have knocked on Tuttle's door to inquire within. Instead, he willfully withheld relevant information from the magistrate and raided Mr. Tuttle's home at gunpoint, seizing and summarily forfeiting Tuttle's property in violation of Tuttle's MMMA protections.

C Whether A Registered Qualifying Patient Under The MMMA Who Makes Unlawful Sales Of Marijuana To Another Patient To Whom He Is Not Connected Through The Registration Process, Taints All Aspects Of His Marijuana-Related Conduct, Even That Which Is Otherwise Permitted Under The Act.

No. A "taint" means "a trace of something bad or offensive." It is a way for instance by which to infer corrupt intent as an element of the crime of misconduct in office. *People v. Coutu (On Remand), 235 Mich.App 695, 705;* 599 NW2d 556 (1999). To hold that a patient to patient sale, not a crime under the MMMA, iradicably taints all of the patient's conduct thereby immediately resulting in the taking of a patient's entitlement to immunity would violate due process and subject a patient to unreasonable search and seizure. The patient's entitlements under the MMMA, particularly his immunity from arrest, can only be guaranteed through the warrant

process via the magistrate. This sale, a "trace of something bad" should be presented to the magistrate with all other known MMMA conduct to determine within the totality of the circumstances whether the patient's immunity from arrest should be abridged.

D Does A Defendant's Possession of A Valid Registry Identification Card Establish Any Presumption For Purposes Of § 4 Or §8 Of The MMMA?

Yes. A citizen's possession of a valid registry ID card identifies that citizen as having been granted an entitlement by the state to medically use marijuana that includes immunity from arrest. It establishes the presumption of an entitlement that may not be taken away without the due process that can only be satisfied through a warrant issued by a magistrate that is supported by probable cause to believe that the citizen has breached the terms of his immunity or has otherwise engaged in criminal conduct not protected by the MMMA.

A valid patient or caregiver card satisfies prongs one and three of section 8 as set forth by the Court of Appeals in *People v. Kiel*, ___ Mich. App. ___, *6 (2012) WL 2913467, unpublished, and we urge this Court to adopt that panel's ruling.

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 Tuttle's case should be remanded to the circuit court with an order to acquit, 2) that marijuana produced in accordance with the MMMA is no longer a controlled substance and is 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)