State of Michigan
In the Supreme Court

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Saad, P.J., Sawyer and Jansen, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Supreme Court
Docket No. 148444

RICHARD LEE HARTWICK,

Defendant-Appellant.
_____/

Court of Appeals No. 312308
Oakland Circuit Court No. 2012-240981-FH

BRIEF ON APPEAL – APPELLEE

ORAL ARGUMENT REQUESTED

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The People contend the answer is "Yes."

Defendant contends that the answer should be "Yes."

The Court of Appeals answered "Yes."

The Trial Court answered "Yes."

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

The People contend the answer is "Yes."

Defendant contends that the answer should be "Yes."

The Court of Appeals answered "Yes."

The Trial Court answered "Yes."

III. WHETHER FACTUAL FINDINGS BY A TRIAL COURT, UNDERLYING A SECTION 4 IMMUNITY CLAIM, ARE APPEALABLE TO THE APPELLATE COURTS?

The People contend the answer is "Yes."

Defendant contends that the answer should be "Yes."

The Court of Appeals answered "Yes."

The Trial Court answered "Yes."

IV. WHETHER A DEFENDANT'S POSSESSION OF A VALID REGISTRY IDENTIFICATION CARD *ALONE* ESTABLISHES THE PRESUMPTION UNDER SECTION 4, OR A PRIMA FACIE CASE UNDER SECTION 8 OF THE MMMA?

The People contend the answer is "No."

Defendant contends that the answer should be "Yes."

The Court of Appeals answered "No."

The Trial Court answered "No."

V. WHETHER A DEFENDANT'S EVIDENTIARY BURDEN TO ESTABLISH IMMUNITY UNDER SECTION 4 IS TO MEET THE REQUIREMENTS LISTED UNDER SECTION 4(d), AND WHETHER A DEFENDANT'S EVIDENTIARY BURDEN TO ESTABLISH AN AFFIRMATIVE DEFENSE UNDER SECTION 8 IS TO PRESENT A PRIMA FACIE CASE AT THE EVIDENTIARY HEARING AND, IF GRANTED, TO ESTABLISH THE AFFIRMATIVE DEFENSE BY A PREPONDERANCE OF EVIDENCE AT TRIAL?

The People contend the answer is "Yes."

Defendant contends that the answer in part is "Yes."

The Court of Appeals answered "Yes."

The Trial Court answered "Yes."

VI. WHETHER THE VERIFICATION AND CONFIDENTIALITY PROVISIONS IN SECTION 6 OF THE MMMA PLAY A PART IN ESTABLISHING ENTITLEMENT TO IMMUNITY UNDER SECTION 4, BUT DO NOT ESTABLISH ANY ENTITLEMENT TO THE AFFIRMATIVE DEFENSE UNDER SECTION 8?

The People contend the answer is "Yes."

Defendant contends that the answer should be "Yes" as to Section 4, and "No" as to Section 8.

The Court of Appeals did not answer.

The Trial Court did not answer.

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

The People contend the answer is "Yes."

Defendant contends that the answer should be "Yes."

The Court of Appeals did not answer.

The Trial Court did not answer.

VIII. WHETHER THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO DISMISS, AND THE DEFENDANT'S REQUEST TO PRESENT AN AFFIRMATIVE DEFENSE AT TRIAL?

The People contend the answer is "Yes."

Defendant contends that the answer should be "No."

The Court of Appeals answered "Yes."

The Trial Court answered "Yes."

JURISDICTIONAL STATEMENT

Defendant-Appellant filed a timely application in this Court for leave to appeal the November 19, 2013, published opinion of the Court of Appeals affirming the trial court's order that (1) Defendant was not entitled to immunity under section 4 of the Michigan Medical Marihuana Act (MMMA), and (2) denied Defendant's request to present the section 8 defense at trial. *People v Hartwick*, 303 Mich App 247; ___ NW2d ___ (2013). (51a-63a) In an order dated June 11, 2014, this Court granted Defendant-Appellant's application and instructed the parties to address the following issues:

> (1) 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; (2) whether factual disputes regarding § 4 immunity are to be resolved by the trial court; (3) if so, whether the trial court's finding of fact becomes an established fact that cannot be appealed; (4) whether a defendant's possession of a valid registry identification card establishes any presumption for purposes of § 4 or § 8; (5) if not, what is a defendant's evidentiary burden to establish immunity under § 4 or an affirmative defense under § 8; (6) 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 [*2] defense under § 8; and (7) whether the Court of Appeals erred in characterizing a qualifying patient's physician as issuing a prescription for, or prescribing, marijuana. [*People v Hartwick*, ___ Mich ___; 846 NW2d 922 (Docket No. 148444, entered June 11, 2014) (64a).]

This Court has jurisdiction over this appeal under MCR 7.301(A)(2) and MCR 7.302(H)(3).

COUNTER-STATEMENT OF FACTS

Defendant Richard Hartwick is charged in this case with one count of manufacturing 20-200 marijuana plants, MCL 333.7401(2)(d)(ii), and one count of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). He now brings an interlocutory appeal from the trial court's ruling on his request to pursue a defense under the Michigan Medical Marijuana Act ["MMMA"], MCL 333.26421 et seq.

The facts underlying the charges were shown at the preliminary examination. On September 27, 2011, after receiving a tip regarding marijuana distribution at the address, police officers conducted a consent search of Defendant's house (5b-8b). It was a single family residence (6b). Defendant was outside the house when the officers arrived (8b). A detective testified that someone had reported that marijuana was being grown there, and asked Defendant if he had marijuana in his house (8b). Defendant said yes (8b). Defendant claimed that he was acting in compliance with the MMMA (8b).

The officers went inside the house (8b-9b). Defendant's father was sitting in the living room (12b). He also lived at the house (12b). Defendant guided the detective through the living room to a back bedroom that had been converted into a grow room (9b). The door to the room was open, it was not locked (8b, 21b). In the room there were marijuana plants growing under grow lights (9b-10b, 14b). The plants varied in height from 1-3 feet (10b). When the Defendant was asked how many plants he had, he said he had 77 plants (13b). In fact, the police ultimately seized 78 plants from the grow room (13b).

When asked, Defendant denied that there was any other marijuana in the house, but Det. Ferguson found several dried marijuana plants hanging in the closet of another bedroom (10b-11b). Further, in Defendant's bedroom, Det. Ferguson found six mason jars full of marijuana, weighing a total of 118 grams. He also found a shoebox full of dried marijuana inside the freezer (12b). Defendant stated that he was a caregiver for patients who used medical marijuana (13b, 19b).

After the case was bound over, the trial court held an evidentiary hearing which was originally

scheduled for the purpose of addressing Defendant's request for Section 8 protection. (36a) However, on the date of the hearing, Defendant's counsel provided to the Circuit Court and the People a memorandum where he also raised the issue of potentially dismissing the charges based upon Section 4 immunity, an entirely different focus than the original purpose of this hearing. (36a) The evidence at this joint Section 4 and Section 8 hearing included not just the production of evidence through the testimony of the Defendant, but the parties also referenced the preliminary examination transcript. The record reflects that the trial court was in possession of the preliminary examination transcript, and actually reviewed it during the hearing, as evidenced by statements from Defendant's counsel to the Court such as "if you look at the preliminary exam transcript, page 11 and 12…" (36a)

At this evidentiary hearing, the Defendant had the burden of presenting credible evidence to the trial court establishing his request for Section 4 immunity, and Section 8 protection (either through a dismissal or an affirmative defense at trial). The only actual witness presented at the evidentiary hearing (not including the preliminary examination transcript and the exhibits admitted by the parties) was Defendant. As noted by the trial court, the Defendant ultimately did not sustain his burden at this hearing.

Defendant testified that he was a caregiver for five patients, and their MMMA registry cards were presented as exhibits (37a). But Defendant did not know what each of their allegedly debilitating conditions were (41a-42a, 43a) and did not know what marijuana dosages were necessary to treat their MMMA approved debilitating medical conditions (43a), with responses to questioning about the individual patient's conditions including responses like the following: "Q: What is his debilitating medical condition? A: He has… I'm not sure what he has. I'm not – I don't know" (41a); "Q: What's Rebecca Boggs' debilitating medical condition? A: She has… I know she's got arthritis and she has something stemming from a motorcycle accident. I'm not sure the—the actual--." (42a); "Q: What's his debilitating medical condition? A: He's got a lot of things going on. I don't know what the doctor signed for him for." (43a)

Defendant was also a patient himself (37a). It was undisputed that Defendant had a registry card (39a). Defendant testified that he had deteriorating discs in his lower back (37a), but he did not know the name of his allegedly debilitating condition and could not specify which disc(s) were involved (41a). Defendant also testified that his doctor did not recommend any particular dosage or reasonable amount of marijuana "medicine" for him to use, but left it to Defendant's judgment (42a-43a).

Defendant claimed that the grow room was locked, though he also acknowledged that the officer in charge of the case testified at the preliminary examination that the room where the marijuana was found was unlocked. (38a, 40a). At the hearing Defendant also claimed that only 71 plants should be counted by the Court, because prior to the search he had cut six of the seventy seven plants he was growing, allegedly leaving only stalks on these six plants when the police officers searched his residence. (38a, 39a). The defense submitted as an exhibit a forensic lab report (39a) stating that 76 plants were submitted for testing (46a), and the Defendant conceded that both the police report and the preliminary examination testimony detailed that seventy seven plants were found by the police. (40a)

After the evidentiary hearing, the trial court ruled that Defendant had not met his burden of showing credible evidence supporting his claim that he was entitled to immunity under Section 4, because there was evidence that he had too many plants, and that the marijuana was not kept in a properly locked room (46a). The trial court also ruled that Defendant had not made a prima facie showing sufficient to raise a Section 8 defense at trial because he did not show (with regard to himself or the patients for whom he was a caregiver) any therapeutic or palliative benefit from marijuana use, or that the amounts in his possession were reasonably necessary for such benefits, or that the marijuana was used to treat or alleviate a serious or debilitating medical condition or symptoms (47a). An order reflecting this ruling was filed on or about August 29, 2012.

Defendant sought interlocutory leave to appeal. On October 11, 2012, this Court denied the application "for failure to persuade the Court of the need for immediate appellate review." (49a)

Defendant then sought leave in the Michigan Supreme Court. On April 1, 2013, the Supreme Court, in lieu of granting leave, remanded the case to the Court of Appeals for consideration as on leave granted,

> On order of the Court, the application for leave to appeal the October 11, 2012 order of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration, as on leave granted, of (1) whether the defendant was entitled to dismissal of the marijuana-related charges under the immunity provision in §4 of the Michigan Medical Marijuana Act (MMMA), MCL 333.26424; (2) whether the defendant was entitled to dismissal of the charges under the affirmative defense in §8(a) of the MMMA, MCL 333.2648(a); and (3) if the defendant was not entitled to dismissal, whether he is permitted to raise the §8 affirmative defense at trial. (50a)

Upon remand, the Court of Appeals issued a published opinion affirming the trial court's order that (1) held that defendant was not entitled to immunity under Section 4 of the MMMA, (2) denied defendant's request for dismissal under Section 8 of the MMMA, and (3) denied defendant's request to present the Section 8 defense at trial. *People v Hartwick*, 303 Mich App 247; 842 NW2d 545 (2013). (51a-63a)

Defendant then sought and was granted leave to appeal in this Court. This Court's leave grant states:

> On order of the Court, the application for leave to appeal the November 19, 2013 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall include among the issues to be briefed: (1) 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; (2) whether factual disputes regarding § 4 immunity are to be resolved by the trial court; (3) if so, whether the trial court's finding of fact becomes an established fact that cannot be appealed; (4) whether a defendant's possession of a valid registry identification card establishes any presumption for purposes of § 4 or § 8; (5) if not, what is a defendant's evidentiary burden to establish immunity under § 4 or an affirmative defense under § 8; (6) 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 [*2] defense under § 8; and (7) whether the Court of Appeals erred in characterizing a qualifying patient's physician as issuing a prescription for, or prescribing, marijuana.
> [*People v Hartwick*, ___ Mich ___; 846 NW2d 922 (Docket No. 148444, entered June 11, 2014).] (64a)

Additional pertinent facts will be discussed in the body of the argument section of this brief.

STANDARD OF REVIEW

Interpreting the meaning of the MMMA involves an issue of statutory interpretation which this Court reviews de novo. *State v McQueen*, 493 Mich 135, 146; 828 NW2d 644 (2013). The MMMA was a voter-initiated statute. *Id.* As this Court explained in *McQueen*,

> "[T]he intent of the electors governs" the interpretation of voter-initiated statutes, just as the intent of the Legislature governs the interpretation of legislatively enacted statutes. The first step in interpreting a statute is to examine the statute's plain language, which provides "'the most reliable evidence of . . . intent . . . .'" "If the statutory language is unambiguous, . . . '[n]o further judicial construction is required or permitted'" because we must conclude that the electors "'intended the meaning clearly expressed.'" *Id.* at 147 [citations omitted].

This Court reviews the trial court's decision to admit evidence for an abuse of discretion. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013). However, preliminary questions of law regarding whether a statute or evidentiary rule applies are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court's factual findings are reviewed, on appeal, for clear error. MCR 2.613(C); *People v Dawson*, 431 Mich 234, 258; 427 NW2d 886 (1988).

ARGUMENT

I. THE PROPER IMPLEMENTATION OF SECTION 4 OF THE MICHIGAN MEDICAL MARIHUANA ACT REQUIRES THE TRIAL COURT TO RESOLVE QUESTIONS OF LAW

The first three issues that this Court directed the parties to address focus upon the procedure by which a defendant may properly litigate a Section 4 immunity claim. For this reason, these three questions will be addressed as subsections of a single thread addressing the proper implementation of Section 4 of the MMMA. The substance of the answers to the three questions carry a significant degree of overlap, such that the three subsections should be read together, to obtain a complete understanding of the People's position on these issues.

A. Whether a defendant is entitled 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.

For the reasons set forth in this section, the People agree with the Defendant's position that a defendant's entitlement to immunity under Section 4 is a question of law for the trial court to decide.

This Court has previously addressed both the history and purpose of the MMMA in *People v Kolanek*, 491 Mich 382, 393-4; 817 NW2d 528 (2012), describing it as follows:

> The MMMA was proposed in a citizen's initiative petition, was elector-approved in November 2008, and became effective December 4, 2008. The purpose of the MMMA is to allow a limited class of individuals the medical use of marijuana, and the act declares this purpose to be an "effort for the health and welfare of [Michigan] citizens." To meet this end, the MMMA defines the parameters of legal medical-marijuana use, promulgates a scheme for regulating registered patient use and administering the act, and provides for an affirmative defense, as well as penalties for violating the MMMA.
>
> The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law. Rather, the MMMA's protections are limited to individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individuals' marijuana use "is carried out in accordance with the provisions of [the MMMA]." [*Kolanek, 491 Mich at 393-394* (citations omitted).]

At issue in this case is Section 4 of the MMMA, which affords defendants 'immunity'[1] from prosecution, in the event that they meet the specific requirements contained in this section. Section 4 of the MMMA provides, in pertinent part:

> (a) A qualifying patient who has been issued and possesses a registry identification card **shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau**, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility…
>
> (b) A primary caregiver who has been issued and possesses a registry identification card **shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau**, for assisting a qualified patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act, provided that the primary caregiver possesses an amount of marihuana that does not exceed:
>
> (1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department's registration process; and
>
> (2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility… [MCL 333.26424 (emphasis added).]

With regard to the question presented, i.e. 'whether a defendant's entitlement to a dismissal of criminal charges based upon the immunity provision of Section 4 is a question of law for the trial court to decide,' the beginnings of the answer to this question were touched upon by this Court in the *Kolanek* case. In that decision, this Court instructed trial courts addressing a defendant's request for a Section 8 affirmative defense, that:

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[1] It should be noted that the actual term "immunity" is not contained in Section 4. Instead, the term "immunity" has been adopted by the Courts and the party litigants as a shorthand reference to the legal term that most closely reflects the rights afforded to defendants through this section.

> A trial judge considering such a motion must be guided by well-established principles of criminal procedure. Questions of fact are the province of the jury, while question of law are reserved to the courts. Judges presiding over criminal trials regularly separate legal questions from factual ones, leaving to the jury those issues requiring factual resolution and pertaining to the credibility of witnesses and weight of the evidence. *Kolanek, supra* at 411.

As correctly noted in *People v Jones*, 301 Mich App 566, 573; 837 NW2d 7 (2013) (held in abeyance pending this Court's ruling on this case), seeking guidance from well-established principles of criminal procedure is an appropriate method to resolve the interpretation of new laws and procedures arising from these new laws. It would not be logical to distinguish between Section 4 defenses and Section 8 defenses, when following the *Kolanek* instruction to seek guidance from well-established principles of criminal procedure.

1. Immunity claims are <u>legal</u> defenses, and must be resolved by the trial court

Claims of immunity, regardless of whether they are raised as a defense to potential liability in a civil case, or are raised as a bar to a criminal prosecution, share the commonality that they assert that the recipient of the immunity is shielded from liability by operation of law, regardless of the sufficiency of the proofs in the underlying case. Michigan Courts that have addressed claims of 'immunity' in defense of both civil and criminal cases have uniformly held that the question of whether a law provides immunity to a party is a matter to be decided by the trial court, and not a jury.

In *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71(2004), the Michigan Court of Appeals affirmed the trial court's ability to resolve a question of governmental immunity, holding that "the application of governmental immunity is a question of law..." *Id, citing Baker v Waste Mgt of Michigan, Inc,* 208 Mich App 602, 605; 528 NW2d 835 (1995). Whether a defendant is entitled to qualified immunity is also "a question of law." *Morden v Grand Traverse County*, 275 Mich App 325, 340; 738 NW2d 278 (2007) *citing Thomas v McGinnis,* 239 Mich App 636, 644; 609 NW2d 222 (2000). Likewise, in *Phillips v Mirac,* 470 Mich 415; 685 NW2d 174 (2004), this Court cited the governmental

immunity protections contained in MCL 691.1407 as an example of a circumstance where the trial court may rule that a party is immune from liability even in cases where the facts would have otherwise supported a jury award of damages against the party.

Michigan Court's have also affirmed the conclusion that a trial court has the authority to determine whether criminal charges are legally barred by an immunity statute. In *People v Patterson*, 58 Mich App 727; 228 NW2d 804 (1975), the Michigan Court of Appeals reversed a defendant's conviction on the basis that it was legally barred by MCL 767.19b. Likewise in *People v McIntire*, 461 Mich 147; 599 NW2d 102 (1999), this Court affirmed a trial court's dismissal of criminal charges on the basis that the charges were legally barred by a previous grant of immunity to the defendant.

In the present case, the parties agree that the question of whether a defendant is entitled to the immunity provisions of Section 4 of the MMMA is a question of law that is properly decided by the trial court. Defendants raising the immunity provision in Section 4 are asking the trial court to dismiss a criminal charge, not because of any insufficiency in the factual basis of the underlying charge, but instead because they claim that they have a legal defense to the charge. They are claiming that the law entitles them to immunity under the factual circumstances presented in the case. Resolving questions of law, whether they are purely legal interpretations or decisions rendered after facts are developed at evidentiary hearings, is the quintessential function of the Courts, as noted in *Charles Reinhart Co v Winiemko*, 444 Mich 579, 602; 513 NW2d 773 (1994), which noted that:

> Juries traditionally do not decide the law or the outcome of legal conflicts. Juries are not appellate courts. To maintain the traditional role of the jury, the jury must remain the factfinder; *a jury may determine what happened, how, and when, but it may not resolve the law itself.* The determination of questions of law by the courts is not a new elitist prerogative--to the contrary, it is a vindication of the existence of the judiciary. Indeed, it is the very purpose of the judiciary. *Id.* [Emphasis in the original]

2. The MMMA's language is consistent with allowing trial courts to resolve Section 4 immunity

In addition to the previous discussion addressing caselaw showing that a Section 4 immunity

defense addresses a question of law which is properly decided by the trial court, the actual language used in the MMMA also supports this conclusion. A comparison of Section 4 with Section 8 shows by contrast that immunity under Section 4 was not intended to be decided by a jury. The drafters of the MMMA knew how to create an affirmative defense which, in an appropriate case, would be submitted for a jury's consideration. They did so in Section 8, which sets forth the requirements to sustain such an affirmative defense. Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters were intentional in the exclusion. *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). Here, the drafters of the MMMA established an affirmative defense, appropriate for a jury, in Section 8. The language of Section 4 is different, and that difference was presumptively intentional.

It can also be presumed that the drafters of the MMMA did not inadvertently omit language that exists in *other* statutes. *People v Monaco*, 474 Mich 48, 58; 710 NW2d 46 (2006); *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). Other statutory defenses in Michigan contain language that makes clear the defense can be raised at trial. See, e.g., MCL 768.20(1) (defendant proposing to offer testimony supporting an alibi defense must file and serve a notice of intent "not less than 10 days before the trial of the case"); MCL 768.20a(1) (defendant proposing to offer testimony in support of an insanity defense must file and serve a notice of intent "not less than 30 days before the date set for the trial of the case"). Section 4 of the MMMA contains no such language. Presumably, therefore, Section 4 issues were not intended to be decided at trial.

Our Supreme Court has recently strengthened this conclusion in an opinion holding that although a defendant may assert a Section 8 defense in a motion to dismiss, if the trial court does not grant dismissal because of disputed issues of fact, the defendant may raise the defense before the jury. *People v Kolanek*, 491 Mich 382, 412; 817 NW2d 528 (2012). The *Kolanek* Court repeatedly pointed out the substantial differences between Section 4 and Section 8. Section 4 grants "immunity" to qualifying

patients with registry identification cards. *Id.*, 394-395, 397-398, 403. Section 8, in contrast, provides an "affirmative defense." *Id.*, 396, 398 n 36, 403. "The protections afforded a patient under Section 8 are much less broad than those provided under Section 4...." *Id.*, 399. "Sections 4 and 8 provide separate and distinct protections and require different showings...." *Id.*, 401.

The two sections differ not only in what must be shown, but when the showings are to be made:

> The stricter requirements of Section 4 are intended to encourage patients to register with the state and comply with the act **in order to avoid arrest and the initiation of charges** and obtain protection for other rights and privileges. If registered patients choose not to abide by the stricter requirements of Section 4, they will not be able to claim this broad immunity, but will be forced to assert the affirmative defense under Section 8, just like unregistered patients. [*Kolanek, supra*, 491 Mich at 403 (emphasis added).]

As noted in *Jones, supra* at 577, "[t]he delay occasioned by having to wait for a jury to be impaneled to resolve factual questions would hinder the implementation of Section 4 immunity. Assigning the trial court the duty of determining factual questions regarding the applicability of Section 4 immunity will result in a more expeditious resolution of immunity claims." As such, allowing a Section 4 immunity claim to be decided by a jury would run contrary to the intent of this law.

B. Factual disputes regarding Section 4 immunity should to be resolved by the trial court.

For the reasons set forth in this section, the People agree with the Defendant's position that factual disputes regarding a defendant's entitlement to immunity under Section 4 should be resolved by the trial court. As such, it is the People's position that the trial court is the proper forum to determine whether the Defendant has met his burden of presenting credible evidence supporting his claim for entitlement to Section 4 immunity.

As discussed in the previous section, a Section 4 immunity defense is a claim that, regardless of the sufficiency of the facts in the underlying criminal charge,[2] the defendant is entitled to have the charge

[2] In fact, Section 4 immunity claims presumptively acknowledge the underlying violation of MCL 333.7401, as these actions form the basis of their claims that they are entitled to immunity.

dismissed as a matter of law. When both parties agree on the facts in a case, the matter may be resolved as a pure question of law by the trial court. However, when the parties do not agree on the facts underlying a motion to dismiss premised upon a claim of Section 4 immunity, then an evidentiary hearing is required, where the trial court must evaluate and weigh the evidence presented at this hearing in the same manner that the trial court would resolve the numerous other legal issues that may arise in a criminal proceeding.

Again following the interpretational instructions issued by this Court in *Kolanek*, at page 411, i.e. to be "guided by well-established principles of criminal procedure" with the acknowledgement that "Judges presiding over criminal trials regularly separate legal questions from factual ones," the question of whether a trial court should resolve factual disputes underlying a defendant's motion to dismiss brought pursuant to a Section 4 immunity claim can be answered by looking at how trial courts handle other questions of law in criminal cases, when the facts underlying such motions are in dispute.

When ruling that the trial court is the proper entity to resolve factual disputes underlying motions to dismiss premised upon Section 4 immunity claims, the Michigan Court of Appeals in *Jones* cited numerous other circumstances where Michigan Courts have recognized that trial courts are already required to hold evidentiary hearings and resolve factual disputes as part of the function of resolving questions of law in criminal cases. Citing *Kolanek*, at page 411, the *Jones* Court held:

> In certain instances, Michigan criminal law clearly places the fact-finding function with the trial court judge. See, e.g., *People v Sexton, 461 Mich 746, 752; 609 NW2d 822 (2000)* (affirming this Court's decision, which recognized that the trial court must make factual findings when it determines whether a defendant's statement was voluntary); *People v Juillet, 439 Mich 34, 61; 475 NW2d 786 (1991)* (holding that the trial court must make findings of fact in pretrial proceedings to determine whether a defendant was entrapped); *People v Chism, 390 Mich 104, 123; 211 NW2d 193 (1973)* (finding no clear error when the trial judge found that the consent to search was valid); *People v Hyde, 285 Mich App 428, 436; 775 NW2d 833 (2009)* (recognizing that the trial court must make factual findings when it rules on a motion to suppress physical evidence); *People v Frohriep, 247 Mich App 692, 695-696; 637 NW2d 562 (2001)* (recognizing that the trial court makes factual findings when it determines whether a consent to search was valid); *People v Parker, 230 Mich App 337, 339-341; 584 NW2d 336 (1998)* (recognizing that

> the judge makes the factual findings in conjunction with a decision on a motion to suppress evidence); *People v Dalton, 155 Mich App 591, 598; 400 NW2d 689 (1986)* (holding that the lawfulness of an arrest is a question of law to be decided by the trial court unless the lawfulness of the arrest is an element of a criminal offense in which case it becomes a question of fact for the jury). Thus, the "well-established principles of criminal procedure" suggest that under certain circumstances, it is necessary for the trial court to make factual determinations before trial. *Jones, supra*, at page 574.

Of particular note to the *Jones* Court was the example of when a criminal defendant brings a motion to dismiss a criminal charge on the basis of a claim of entrapment. Like the Section 4 immunity defense, a claim of entrapment does not challenge any of the elements of the underlying criminal charge, and if sustained, both a claim of entrapment and a claim of immunity under Section 4 result in the dismissal of the criminal charge. The *Jones* Court concluded that, being "guided by well-established principles of criminal procedure," *Kolanek*, at page 411, the manner in which trial courts resolve factual disputes in entrapment hearings is directly analogous to the manner in which trial courts should resolve factual disputes in motions to dismiss premised upon Section 4 immunity claims.

A review of other Michigan caselaw addressing the manner in which factual disputes are resolved through evidentiary hearings held by trial courts reveals further parallels between entrapment defenses and Section 4 immunity defenses. Specifically, in *People v McNeal*, 72 Mich App 507, 514; 250 NW2d 110 (1976), the Court of Appeals noted that allowing trial courts to resolve factual disputes underlying an entrapment defendant did not violate a defendant's right to a jury trial, because the entrapment defense "is totally unconcerned with the guilt or innocence of the defendant." Likewise, a Section 4 immunity defense is unconcerned with the actual elements of the criminal charge, but instead focuses upon the legal question of whether the particular factual circumstances in the defendant's case entitles the defendant to a dismissal of the criminal charge pursuant to the Section 4 immunity provisions. In *People v Julliet*, 439 Mich 34, 61; 475 NW2d 786 (1991), this Court noted that the trial court, and not the jury, was the proper forum to litigate an evidentiary hearing to determine whether the defendant met the requirements of an entrapment defense.

The trial court is the proper forum to resolve factual disputes underlying the legal question of whether, regardless of the sufficiency of evidence on the elements of the underling criminal charge, a defendant is entitled to have a criminal charge dismissed on the basis of a Section 4 immunity claim. The submission of such a legal question to the jury would constitute error, *People v Moore*, 36 Mich App 87, 93; 193 NW2d 167 (1971), and would run afoul of the very purpose of the judiciary. *See Winiemko, supra*, at 602, where this Court held that "[t]he determination of questions of law by the courts . . . is the very purpose of the judiciary." *Id.*

C. Factual findings by a trial court, underlying a Section 4 immunity claim, are appealable to the appellate courts.

For the reasons set forth in this section, the People agree with the Defendant's position that factual findings by a trial court, underlying a Section 4 immunity claim, are appealable to the appellate courts. The People further agree with the Defendant's position that when such an appeal addresses a question of law, the appellate courts review the appeal on the 'de novo' standard; but when such an appeal challenges the factual findings made by the trial court, the factual findings of the trial court are reviewed by the appellate court for 'clear error.'

As noted in the previous subsection of this brief, there are numerous examples of circumstances where a trial court may hold an evidentiary hearing and make factual findings as part of its resolution of a question of law raised by a party in a criminal case. *Walker* hearings,[3] *Wade* hearings,[4] motions seeking suppression of the evidence, and entrapment hearings often require trial courts to hold evidentiary hearings and make factual findings before resolving the legal question raised by the defendant. *See Jones, supra* at 574-5. A trial court's decision on these legal issues is appealable through the Michigan appellate court system, with factual findings reviewed for clear error, and legal questions reviewed de

[3] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).
[4] *United States v Wade*, 388 US 218; 87 SCT 1926; 18 LED2d 1149 (1967).

novo. *See People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). *See also People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000), *citing People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996), which held that the factual findings of a trial court are reviewed for 'clear error,' while questions of law are reviewed by the appellate courts 'de novo.' Following the instructions in *Kolanek*, directing the trial courts to be "guided by well-established principles of criminal procedure," supports the conclusion that a trial court's factual findings underlying a Section 4 immunity defense, should be appealable in the same manner, and subject to the same appellate standard, as are these other legal determinations made by trial courts.

In the present case, the Court of Appeals in *Hartwick* demonstrated that it was aware of the correct appellate review standards governing a litigant's appellate challenge to factual findings made by a trial court in the section entitled "Standard of Review," wherein they acknowledged that:

> A trial court's decision on a motion to dismiss is reviewed for an abuse of discretion. *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012). "**A trial court's findings of fact may not be set aside unless they are clearly erroneous**." *Id.* A finding is "clearly erroneous 'if the reviewing court is left with a definite and firm conviction that the trial court made a mistake.'" *Id., quoting People v Armstrong, 490 Mich 281, 289; 806 NW2d 676 (2011)*. Questions of statutory interpretation, including interpretation of the MMMA, are reviewed de novo. *See Kolanek*, 491 Mich at 393. [Emphasis added] *Hartwick, supra* at 255-6.

While the Court of Appeals used the term "moot" when rejecting the Defendant's unsupported recitation of the same factual argument rejected by the Circuit Court, i.e. that he did not exceed the maximum number of plants permitted in Section 4, the Court of Appeals was clearly aware that for a party to prevail on an appellate challenge to a factual finding made by a trial court, the challenge must establish that the factual finding was "clearly erroneous." *Id.* The Defendant did not sustain this high burden when he simply repeated to the Court of Appeals the same factual assertions made to the trial court, i.e. that they should believe one version of the facts over another. As such, the Court of Appeals properly rejected this generic challenge to the factual findings of the trial court.

II. A DEFENDANT'S POSSESSION OF A VALID REGISTRY IDENTIFICATION CARD *ALONE* DOES NOT ESTABLISH THE PRESUMPTION UNDER SECTION 4, MUCH LESS A PRIMA FACIE CASE UNDER SECTION 8 OF THE MMMA.

As previously noted, in November of 2008, the voters of Michigan passed an initiative by a majority which provided a limited exemption to the general rule that marihuana use, possession, cultivation, and sale is illegal.[5] The Act took effect on December 4, 2008 and is codified as MCL 333.26421 *et seq.* "The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan." *People v Kolanek*, 491 Mich 382, 394; 817 NW2d 528 (2012) (emphasis in original). The purpose of the MMMA is to allow persons suffering with a serious or debilitating medical condition the ability to use medical marihuana "to the extent that the individuals' marijuana use 'is carried out in accordance with the provisions of [the MMMA].'" *Id.* While other states vary in their statutory schemes involving the use of marihuana, the voters of Michigan chose to allow marihuana use for "medical use" only.[6]

Section 4 of the MMMA provides what has been termed 'immunity' from arrest and prosecution to qualifying patients[7] and primary caregivers[8] who have been issued and possess a registry identification card and meet the requirements regarding the marihuana possessed. MCL 333.26424(a), (b). Section 4

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[5] Federal law through the Controlled Substance Act (CSA) absolutely prohibits the use of marihuana for any legal purpose, and classifies it as a banned Schedule I drug. 21 USC § 801 *et seq.*

[6] The MMMA defines "medical use" as "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(f).

[7] The definition in effect at the time of this case was: "Qualifying patient" means a person who has been diagnosed by a physician as having a debilitating medical condition. MCL 333.26423(i). The definition was subsequently amended on April 1, 2013.

[8] The definition in effect at the time of this case was: "Primary caregiver" means a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has never been convicted of a felony involving illegal drugs." MCL 333.26423(h). The definition was subsequently amended on April 1, 2013.

provides in pertinent part:

> (a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. The privilege from arrest under this subsection applies only if the qualifying patient presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the qualifying patient.
>
> (b) A primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting *a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act.* The privilege from arrest under this subsection applies only if the primary caregiver presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the primary caregiver. This subsection applies only if the primary caregiver possesses an amount of marihuana that does not exceed:
>
> (1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department's registration process; and
>
> (2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility; and
>
> (3) any incidental amount of seeds, stalks, and unusable roots. [MCL 333.26424] [Emphasis added]

When the two conditions in Section 4(d) are met, including the requirement that the marijuana plants are "kept in an enclosed, locked facility," a qualifying patient or primary caregiver is afforded a presumption of engaging in the medical use of marihuana as stated in MCL 333.26424(d),

> (d) There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver:
>
> (1) is in possession of a registry identification card; and
>
> (2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act . . .

However, Section 4(d)(2) goes on to state, "[t]he presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act."

Relevant to this Court's analysis of section 4 is section 7 of the MMMA, which places additional limits on the medical use of marihuana: "(a) The medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act." MCL 333.26427. This Court in *McQueen,* 493 Mich at 152-153, indicated the importance of reading section 7(a) in conjunction with section 4 of the MMMA. Thus, the MMMA created immunity under section 4, but only for qualified patients and primary caregivers who carried out the medical use of marihuana *in accordance with* the provisions of the act.

A. A valid registry identification card AND possession of an amount of marihuana that does not exceed the amount allowed under the MMMA establishes a presumption under section 4(d) that still may be rebutted under section 4(d)(2).

The fourth question this Court ordered the parties to address was whether a defendant's possession of a valid registry identification card establishes the presumption stated in Section 4, or a prima facie case for purposes of Section 8 of the MMMA. The plain language of Section 4(d) of the MMMA states that "[t]here shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver: (1) is in possession of a registry identification card; and (2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act." (emphasis added) Thus, a valid registry identification card *and* possession of an amount of marihuana that does not exceed the amount allowed under the act establishes a presumption that the qualified patient is engaged in the medical use of marihuana in accordance with the act. A valid registry identification card *alone* is not enough to establish a presumption under Section 4 of the MMMA.

Pursuant to Section 4(a), the amount of marihuana allowed under the act is 12 marihuana plants kept in an enclosed, locked facility and not more than 2.5 ounces of usable marihuana. Pursuant to Section 4(b), a caregiver is allowed 12 marihuana plants kept in an enclosed, locked facility, and not more than 2.5 ounces of usable marihuana for each qualifying patient that is connected to the caregiver through the department's registration process. A caregiver may not be connected through the department's registration process to more than five patients. MCL 333.26426(d). Therefore, a defendant can establish immunity by showing that he or she was compliant with the requirements in sections 4(a) and (b) of the MMMA.

However, under Section 4(d)(2), such a presumption may be rebutted by evidence presented to the trial court showing that the Defendant's conduct was not, in fact, consistent with the 'medical use' purposes of the MMMA. While no specific lines of inquiry are established in the MMMA, to evaluate the very fact-intensive question of whether a defendant's conduct in possessing or distributing this Schedule 1 controlled substance was "for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act," the People would submit that the inquiry into 'medical use' detailed in Section 8 makes a good, but non-exclusive, start to the questioning that may show whether the particular defendant was really engaged in this purpose.

In the present case, while the trial court properly ruled that the Defendant did not sustain his burden of establishing Section 4 immunity, the evidentiary hearing also presented evidence sufficient to rebut any such presumption. This hearing showed that the Defendant's manufacture, possession and distribution of the marijuana and marijuana plants in this case "was not for the purpose of alleviating the qualifying patient's debilitating medical condition." The specific MMMA approved conditions of his 'patients' were largely unknown to the Defendant, and the amounts of this Schedule 1 controlled substance that the Defendant distributed to these patients were dictated <u>not</u> by their medical need, but

instead were based solely upon the production level of the marijuana plants in his possession (the number of which exceeded Section 4's 12 plants per patient/user limitation). Since the evidentiary hearing showed that the Defendant did not know what debilitating conditions for each patient the marijuana was approved to treat, or how much marijuana was necessary to alleviate these unknown conditions, the Defendant's conduct in manufacturing, possessing, and distributing this Schedule 1 controlled substance did not fall within the 'medical use' protections of Section 4 of the MMMA.

B. A valid registry identification card does not establish a prima facie case under Section 8 of the MMMA.

This Court previously ruled in *Kolanek* that a defendant must establish a *prima facie case* on all elements listed in Section 8(a) at the hearing to raise the affirmative defense at trial. 491 Mich at 412. The elements listed in Section 8, which all must be met to qualify for a Section 8 defense, serve as a basis to determine whether the marijuana is actually being used for, and only for, the treatment or alleviation of a MMMA approved debilitating medical condition. Based on the plain statutory language of each element in Section 8(a), a valid registry identification card is insufficient to establish a prima facie case on any element of Section 8(a).

1. Department Requirements to Issue Registry Identification Card

First, to determine if the registry identification card establishes a prima facie case for purposes of Section 8(a) of the MMMA, it is necessary to refer to the department's requirements for issuing the card. Section 6(a) of the MMMA states the requirements for the department[9] to issue registry identification cards to qualifying patients:

(a) The department shall issue registry identification cards to qualifying patients who

[9] "The Michigan Medical Marihuana Program (MMMP) is a state registry program within the Health Professions Licensing Division in the Bureau of Health Care Services at the Michigan Department of Licensing and Regulatory Affairs." LARA, Department of Licensing and Regulatory Affairs, http://www.michigan.gov/lara/0,4601,7-154-35299_63294_63303_51869---,00.html (last accessed August 13, 2014.)

submit the following, in accordance with the department's rules:
(1) A written certification;
(2) Application or renewal fee;
(3) Name, address, and date of birth of the qualifying patient, except that if the applicant is homeless, no address is required;
(4) Name, address, and telephone number of the qualifying patient's physician;
(5) Name, address, and date of birth of the qualifying patient's primary caregiver, if any;
(6) Proof of Michigan residency. For the purposes of this subdivision, a person shall be considered to have proved legal residency in this state if any of the following apply:
(*i*) The person provides a copy of a valid, lawfully obtained Michigan driver license issued under the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, or an official state personal identification card issued under 1972 PA 222, MCL 28.291 to 28.300.
(*ii*) The person provides a copy of a valid Michigan voter registration. [MCL 333.26426(a)][10]

Section 3(m) of the MMMA defines "written certification" as:

"Written certification" means a document signed by a physician, stating all of the following:
(1) The patient's debilitating medical condition.
(2) The physician has completed a full assessment of the patient's medical history and current medical condition, including a relevant, in-person, medical evaluation.
(3) In the physician's professional opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition. [MCL 333.26423(m)][11]

2. Under Section 8(a)(1) of the MMMA, a valid registry identification card does not establish a prima facie case of a bona fide physician-patient relationship.

Pursuant to Section 8(a)(1) of the MMMA, a defendant must establish,

(1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;

The statutory language of Section 8(a)(1) requires that a physician recommended the marihuana

[10] Section 6(a)(6), Proof of Michigan residency, was added to the MMMA April 1, 2013.
[11] MCL 333.26426(m)(2) was added on April 1, 2013 and not in effect at the time of this case.

as treatment "in the course of a bona fide physician-patient relationship." Based on the plain language, the People submit that a registration card does not establish a prima facie case for purposes of Section 8(a)(1).

First, the MMMA did not define "in the course of," so this Court may turn to its dictionary definition to ascertain its meaning *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 470; 521 NW2d 831 (1994). One common meaning would be "the continuous passage or progress through time or a succession of stages: *in the course of a year*." *Random House Webster's College Dictionary* (1997) (emphasis in original). This envisions an ongoing relationship between patient and doctor, not a "one-stop shopping event to obtain a permission slip to use medical marijuana." *People v Redden,* 290 Mich App 65, 123; 799 NW2d 184 (2010) (O'Connell, J., concurring)

Second, regarding the language of "bona fide physician-patient relationship" in Section 8(a)(1), the MMMA did not define "bona fide physician-patient relationship" at the time of Defendant's arrest.[12] In *Kolanek,* this Court noted that the Statement of the Boards of Medicine and Surgery indicated that the term "bona fide physician-patient" relationship "envisions 'a ***pre-existing and ongoing relationship*** with the patient as a treating physician.'" 491 Mich at 397 n 30 (emphasis added) The MMMA was amended April 1, 2013 and now defines "bona fide physician-patient relationship" in section 3(a) as follows:

> (a) "Bona fide physician-patient relationship" means a treatment or counseling relationship between a physician and patient in which all of the following are present:
> (1) The physician has reviewed the patient's relevant medical records and completed a full assessment of the patient's medical history and current medical condition, including a relevant, in-person, medical evaluation of the patient.
> (2) The physician has created and maintained records of the patient's condition in accord with medically accepted standards.
> (3) The physician has a reasonable expectation that he or she will provide follow-up care to the patient to monitor the efficacy of the use of medical marihuana as a treatment

[12] The new definition is not applicable to this case that arose before the date of the amendment. *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992) ("The general rule of statutory construction in Michigan is that a new or amended statute applies prospectively unless the Legislature has expressly or impliedly indicated its intention to give it retrospective effect.")

> of the patient's debilitating medical condition.
> (4) If the patient has given permission, the physician has notified the patient's primary care physician of the patient's debilitating medical condition and certification for the use of medical marihuana to treat that condition.

Key to the bona fide physician-patient relationship in section 3(a) is that the "physician has a reasonable expectation that he or she will provide follow-up care to the patient to monitor the efficacy of the use of medical marihuana as a treatment of the patient's debilitating medical condition." This supports the Section 8(a)(1) plain language of "in the course of" that the physician-patient relationship is progressing through time or ongoing. Additionally, the language in section 6(f) of the MMMA contemplates an ongoing relationship because it requires the physician to notify the department if the patient "has ceased to suffer from a debilitating medical condition."

Just as a patient works with their doctor to determine the best amount of medicine necessary to treat their condition, a medical marihuana patient must also have a pre-existing relationship with their doctor who then monitors the efficacy of the marihuana to treat the medical condition. This type of physician-patient relationship is needed even more so in medical marihuana cases when marihuana remains a Schedule I controlled substance. MCL 333.7211.

In Judge O'Connell's concurrence in *Redden,* 290 Mich App at 112, he suggested questions that would help the trial court to determine if a bona fide physician-patient relationship existed. These questions include:

> (a) whether the physician signing the written certification form was the patient's primary caregiver, (b) whether the patient had an established history of receiving medical care from that physician, (c) whether the physician diagnosed a particular debilitating medical condition instead of simply stating that a patient's reported symptoms must be the result of some such unidentified condition, (d) whether the physician was paid specifically to sign the written certification, and (e) whether the physician has a history of signing an unusually large number of certifications. [Id. at 112-113]

Therefore, the physician's testimony is important to present a prima facie case pursuant to Section 8(a)(1).

A registration card does not establish prima facie evidence that the bona fide physician-patient relationship is *preexisting and ongoing*. All that is required by the department to obtain the registration card is a completed application, a written certification signed by a licensed physician, a copy of state issued identification, and the requisite fee. Mich Admin Code R 333.103. The department verifies that the form is completed and that the doctor is certified in the state of Michigan. Mich Admin Code R 333.107. An application can be denied for failing to provide the physician certification, failing to provide an address in the state of Michigan, falsifying any information in the application, or failing to meet the requirement of R 333.107. Mich Admin Code R 333.113(4).

Nowhere in the written certification definition in section 3(m) of the MMMA, which is a requirement for the department to issue the registry identification card under section 6(a), does it discuss any type of ongoing physician-patient relationship where there is a "reasonable expectation of follow-up care." Thus, a registry identification card does not establish element 8(a)(1) of the MMMA that a "in the course of a bona fide physician-patient relationship" exists between a patient and the physician.

Although Defendant suggests that a registration card is sufficient evidence of a bona fide physician-patient relationship, the Department does not verify that the certification is legitimate. It is the defendant that provides the information to the department to obtain the card, not the physician. MCL 333.26426 indicates that the Department "*shall* issue registry identification cards to qualifying patients" who submit 1) a written certification, 2) an application, and 3) the name and address of the patient and name address and telephone number of the patient's physician. MCL 333.26426(a) (emphasis added). The Department only verifies that information. MCL 333.26426(c). Therefore, under the plain language of the MMMA, possession of a written certification or patient registry card does not establish a bona fide physician-patient relationship.

While Defendant also suggests that a caregiver should not have to delve into the specifics of the physician-patient relationship of his patients, the statutory scheme under the MMMA of having no more

than five patients assigned to one caregiver demonstrates the voters' intent that a caregiver work closely with their patients, when distributing this Schedule 1 controlled substance. MCL 333.26426(f). If the caregiver is compliant with the requirements of Section 4 of the MMMA, then a caregiver or patient would never need to establish an affirmative defense under Section 8. Once the caregiver's marihuana-related conduct is called into question, and the presumption of Section 4 is rebutted, a caregiver will have to present prima facie evidence to establish the element of Section 8(a)(1). Simply presenting a registry identification card is not enough.

In this case, Defendant demonstrated no knowledge of any ongoing bona fide physician-patient relationship between doctors and his patients. In fact, the Defendant did not know the names of any of the doctors allegedly treating the individuals to whom he was supplying marijuana. (41a-43a) Nor was any testimony presented from Defendant's 'patients,' or their physicians. As summarized by the Court of Appeals, while the Defendant did produce some testimony regarding his (albeit limited) interactions with his own physician,

> [H]e presented no evidence that his patients have bona fide physician-patient relationships with their certifying physicians. None of his patients testified. Nor was defendant able to provide the names of his patients' certifying physicians. While it is true that the MMMA does not explicitly impose a duty on patients to provide such basic medical information to their primary caregivers, the plain language of *§ 8* obviously requires such information for a patient or caregiver to effectively assert the *§ 8* defense in a court of law.
> Accordingly, we hold that mere possession of a patient's or caregiver's identification card does not satisfy the first element of *§ 8(a)*'s affirmative defense. Therefore, the trial court was correct to rule that defendant did not present valid evidence with respect to the first element of the § 8 affirmative defense. *Id* at 266-7

This decision was both an accurate summary of the facts presented (or in this case not presented) at the evidentiary hearing, and the law as applied to those facts. As such, the Court of Appeals properly affirmed the trial court's finding that the Defendant failed to make the necessary showing required in Section 8(a)(1).

3. Under Section 8(a)(2) of the MMMA, a valid registry identification card does not establish a prima facie case of how much marihuana is *reasonably necessary* to treat the patient's condition.

Section 8(a)(2) of the MMMA provides that a defendant must establish,

> (2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was *not more than was reasonably necessary* to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition . . .

Thus, at the Section 8 evidentiary hearing the Defendant must establish that the marihuana in their possession was *not more than reasonably necessary* to treat the patient or patients. A valid registry identification card does not provide ***any*** such information and neither does the written certification submitted to the department. Thus, a valid registry identification card does not establish a prima facie case for Section 8(a)(2).

In Michigan in particular, the trial judge must play a "gatekeeper role" under MRE 702 in the admission of expert testimony. *Gilbert v Daimler Chrysler Corporation*, 470 Mich 749, 780; 685 NW2d 391, 408 (2004). The proponent of the expert witness bears the burden of establishing relevance and admissibility. *Id.* at 781. "The reliability of the expert's testimony is to be determined by the judge in advance of its admission--not by the jury at the conclusion of the trial by evaluating the testimony of competing expert witnesses." *Tobin v Providence Hospital,* 244 Mich App 626, 651; 624 NW2d 548 (2001). Indeed, "the trial court's obligation under MRE 702 is even stronger than that contemplated by [the federal rule] because Michigan's rule specifically provides that the court's determination is a precondition to admissibility." *Gilbert,* 470 Mich at 780, n 46.

Defendant argues that the Court of Appeals was wrong in finding that the caregiver must obtain details on how much marihuana is necessary to treat a each patient's MMMA compliant serious medical condition, instead alleging that compliance with the quantity requirements in Section 4 automatically satisfied the requirements imposed through Section 8. But the Defendant's position both misinterprets

the law, and conveniently ignores the overriding "medical use" purpose of the MMMA.

The Court of Appeals in *Redden* previously held that the quantitative amounts listed in Section 4 do not apply to inquiries into Section 8 defenses. *Redden, supra* at 87, citing MCL 333.26428(a)(2). This Court in *Kolanek* similarly ruled that Section 4 and Section 8 differ in purpose, and are intended to address different circumstances based upon different factual inquiries. *Kolanek, supra* at 397-399. Further, as noted by the Court of Appeals, "importing *§ 4(b)*'s volume limitations to *§ 8(a)(2)* ignores the treatment-oriented nature of the act and *§ 8(a)*'s specific medical requirements," as such requirements "are intended for a patient or caregiver that is intimately aware of exactly how much marijuana is required to treat a patient's condition, which he learns from a doctor with whom the patient has an ongoing relationship." *Hartwick, supra* at 268.

Defendant suggests that a caregiver cannot be held to such a high accountability, but if this Court were to adopt Defendant's argument, a caregiver would have no accountability other than to check that a person has a registry identification card in their possession. That is contrary to both the language used in the MMMA, and the limited exception "medical use" purpose of this law. A caregiver is responsible for providing marihuana—a Schedule I controlled substance—to a patient for *medical* purposes, and *only* for medical purposes. MCL 333.26423(h). A caregiver must have accountability, when undertaking this serious obligation. The MMMA does not allow a caregiver to provide unlimited marihuana whenever the patient requests it, irrespective of the actual medical needs of the patient. Instead, the MMMA imposes upon caregivers, who have accepted the responsibility of distributing this Schedule 1 controlled substance, a duty to find out what amount of marihuana his/her patient needs to treat their MMMA approved debilitating medical condition.

Likewise, a patient growing his or her own marihuana must be aware of the amount reasonably necessary to treat his/her own serious or debilitating condition, especially if the person chooses not to register with the state and/or comply with the strict requirements of Section 4(a). *Kolanek,* 491 Mich at

403 ("The stricter requirements of § 4 are intended to encourage patients to register with the state and comply with the act in order to avoid arrest and the initiation of charges and obtain protection for other rights and privileges.")

Based on the evidence presented in this case, including the absence of any knowledge by the Defendant of what specific debilitating conditions his patients were suffering from, much less how much marijuana was necessary to treat these 'conditions,' the trial court properly found that Defendant did not establish that he was "in possession of a quantity of marihuana that was *not more than was reasonably necessary* to ensure the uninterrupted availability of marihuana for the purpose of treating" his patients' conditions. MCL 333.26428(a)(2). (103a-104a) The Court of Appeals therefore properly affirmed the trial court's ruling, agreeing that Defendant did not establish a prima facie case under Section 8(a)(2). This decision was supported by the evidence, and should remain undisturbed on appeal.

4. Under Section 8(a)(3) of the MMMA, a valid registry identification card does not establish that the patient or caregiver was "engaged in" the listed marihuana related activities to treat the patient.

Section 8(a)(3) of the MMMA provides that a defendant must establish,

> (3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

Here, the key word is "engaged." The word "engaged" is not defined in the statute so this Court may turn to its dictionary definition to ascertain its meaning. *Popma,* 446 Mich at 470. The common meaning of "engaged" is "busy or occupied." *Random House Webster's College Dictionary* (1997).

The department issues a valid registry identification card which marks one point in time. The

registry identification card expires after two years.[13] MCL 333.26426(e). The card would not establish that the patient or caregiver was *engaged in, or busy or occupied with*, the listed activities under Section 8(a)(3) to treat the patient's condition at the time that the marihuana-related offense occurred. Thus, a valid registry identification card would not establish a prima facie case under Section 8(a)(3).

In the present case, the Court of Appeals noted that the trial court never reached the inquiry into whether the Defendant satisfied the requirements of Section 8(a)(3). For this reason, they concluded that they "need not address whether defendant satisfied this element through his testimony," further noting that the Defendant's failure to make the requisite showings under Section 8(a)(1)&(2) rendered the Defendant ineligible for Section 8 protection. *Hartwick, supra* at 269. While the Court of Appeals did not address this section, the underlying record at the evidentiary hearing shows that, just like the Defendant failed to make the requisite showings in Sections 8(a)(1) & (2), the Defendant also failed to make any showing that his marijuana was actually being used by his patients to alleviate their 'serious medical condition.'

III. A DEFENDANT'S EVIDENTIARY BURDEN TO ESTABLISH IMMUNITY UNDER SECTION 4 IS TO MEET THE REQUIREMENTS LISTED UNDER SECTION 4(d). A DEFENDANT'S EVIDENTIARY BURDEN TO ESTABLISH AN AFFIRMATIVE DEFENSE UNDER SECTION 8 IS TO PRESENT A PRIMA FACIE CASE AT THE EVIDENTIARY HEARING AND, IF GRANTED, TO ESTABLISH THE AFFIRMATIVE DEFENSE BY A PREPONDERANCE OF EVIDENCE AT TRIAL.

The fifth question that this Court directed the parties to address is, if the valid registry identification card does not create a presumption under Section 4, or a prima facie case under 8 of the MMMA, what is Defendant's evidentiary burden?

A. Defendant's evidentiary burden under Section 4 of the MMMA is to present a valid registry identification card, possess an amount of marihuana that does not exceed the allowed amount under Section 4, and then, if necessary, overcome any rebuttal of this medical use presumption.

[13] The statute at the time of this case stated that the card was valid for one year, but was subsequently amended to two years on April 1, 2013.

If a qualifying patient or primary caregiver is compliant with Section 4 of the MMMA, establishing immunity should not be complicated. As noted previously, Section 4(d) of the MMMA states,

> There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver: (1) is in possession of a registry identification card; and (2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act.

Thus, a valid registry identification card, *and* possession of an amount of marihuana that does not exceed the amount allowed under the act (with plants also kept in a secured locked facility), creates a presumption that the qualified patient is engaged in the medical use of marihuana in accordance with the act.

The first problem arises when a qualifying patient or primary caregiver *acts outside the parameters* set forth in sections 4(a) and (b). In that case the defendant is <u>not</u> entitled to Section 4 Immunity. Further, the presumption may be rebutted by "evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act." MCL 333.26424(d)(2).

In this case, even if the Defendant sustained his burden of establishing a Section 4 presumption (which he did not), this presumption was rebutted when the People established at the evidentiary hearing that the Defendant's provision of marijuana to his clients was done (1) without any knowledge of their actual MMMA approved debilitating medical conditions, and (2) in an amount that bore no relationship to the medical needs of these patients, since he did not know what their needs were, and since he admitted that the marijuana he gave to his patients was not based upon their needs, but instead was based solely upon how much marijuana was harvested from particular plants at a particular time. Once the presumption is rebutted, the presumption disappears and a defendant is no longer entitled to protection

under Section 4 of the MMMA.

B. Defendant's evidentiary burden at the Section 8 hearing is to present a prima facie case as to each of the elements detailed in Section 8.

As stated, by this Court in *Kolanek,* 491 Mich at 410-411,

> [T]he medical use of marijuana is a statutorily created affirmative defense. Section 8(a) provides that a patient or person may assert this defense in "any prosecution involving marihuana" and that the defense "shall be presumed valid" if its elements can be established. Section 8(b) provides that a person "*may* assert [this defense] in a motion to dismiss, and the charges *shall be dismissed following an evidentiary hearing* where the person shows the elements listed in subsection (a)." This scheme makes clear that the burden of proof rests with the defendant, that the defendant "may" move to dismiss the charges by asserting the defense in a motion to dismiss, and that dismissal "shall" follow an evidentiary hearing. This last requirement is significant because it indicates that the § 8 defense cannot be asserted for the first time at trial, but must be raised in a pretrial motion for an evidentiary hearing. [emphasis in original]

Thus, the evidentiary burden rests with the defendant to prove the affirmative defense.[14] *Id.* This Court in *Kolanek* further explained,

> [I]f a defendant raises a § 8 defense, there are no material questions of fact, and the defendant "shows the elements listed in subsection (a)," then the defendant is entitled to dismissal of the charges following the evidentiary hearing. Alternatively, *if a defendant establishes a prima facie case* for this affirmative defense by presenting evidence *on all the elements listed in subsection (a)* but material questions of fact exist, then dismissal of the charges is not appropriate and the defense must be submitted to the jury. Conflicting evidence, for example, may be produced regarding the existence of a bona fide doctor-patient relationship or whether the amount of marijuana possessed was reasonable. Finally, if there are no material questions of fact and the defendant has not shown the elements listed in subsection (a), the defendant is not entitled to dismissal of the charges and the defendant cannot assert § 8(a) as a defense at trial. A trial judge must preclude from the jury's consideration evidence that is legally insufficient to support the § 8 defense because, in this instance, no reasonable juror could conclude that the defendant satisfied the elements of the defense. If the defendant believes that the circuit court erroneously denied the motion, the defendant's remedy is to apply for interlocutory leave to appeal. [Id. at 412-413][citiation omitted][emphasis added]

Based on *Kolanek's* holding, a defendant must establish a ***prima facie case for every element of Section***

[14] An affirmative defense admits the crime but seeks to excuse or justify its commission. It does not negate specific elements of the crime. *People v Lemons*, 454 Mich 234, 246 n 15; 562 NW2d 447 (1997).

8(a) of the MMMA to be able to assert the affirmative defense at trial. A defendant does this by presenting ***legally sufficient evidence***. *Id.* at 412. Prima facie evidence is defined as,

> Evidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient . . . to sustain a judgment in favor of the issue which it supports . . . . [*People v Lemons*, 454 Mich 234, 248 n 20; 562 NW2d 447 (1997) (citing Black's Law Dictionary (6th ed), p 1190).]

"A 'prima facie' case means, and means no more than, evidence sufficient to justify, but not to compel, an inference of liability, if the jury so find." *People v Stewart*, 397 Mich 1, 6 n 1; 242 NW2d 760, on rehearing 400 Mich 540; 256 NW2d 31 (1977), superseded in part on other grounds by *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984).

If, as in this case, the evidence presented by the defendant fails to satisfy the burden of production of a prima facie claim, the judge *must preclude* the affirmative defense from the jury's consideration. *Kolanek*, 491 Mich at 412. As this Court stated, "To allow submission of the defense to the jury when the defense fails as a matter of law would unnecessarily burden the jury and the circuit court with irrelevant testimony." *Id* at 413.

C. Defendant's evidentiary burden at trial for the affirmative defense is by a preponderance of evidence.

If a defendant does present legally sufficient evidence to establish a prima facie case on every element under Section 8(a), and the defendant is permitted to present the affirmative defense at trial, the question becomes, "What is a defendant's evidentiary burden at trial?"

Defendant's evidentiary burden at trial is not statutorily defined by the MMMA. However, this Court has both the power and the obligation to allocate the burden of proof in such circumstances:

> "[I]t is 'normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" [*Patterson v New York*, 432

US 197, 201-202; 97 S Ct 2319; 53 L Ed 2d 281 (1977).]

MCL 333.26428(a) places the burden on the defendant to prove each prong of the affirmative defense. *Kolanek,* 491 Mich 412-413. Based on federal and state case law, the People submit that a defendant must prove the Section 8 affirmative defense at trial by a preponderance of evidence. "Proof by a preponderance of the evidence requires less certainty than proof beyond a reasonable doubt. The defendant merely needs to establish that 'the evidence supporting [defendant's insanity] outweighs the evidence supporting its nonexistence.'" *People v Weddell*, 485 Mich 942; 774 NW2d 509 (2009) (citation omitted).[15]

"The United States Supreme Court has upheld the constitutionality of requiring a defendant to prove an affirmative defense as long as the defendant does not have the burden of disproving any of the elements included by the state in its definition of the crime." *People v Likine*, 492 Mich 367; 823 NW2d 50 (2012) (citing *Patterson*, 432 US at 210; *Martin v Ohio*, 480 US 228, 232; 107 S Ct 1098; 94 L Ed 2d 267 (1987). In *Patterson*, 432 US at 206, the United States Supreme Court rejected a due process challenge to a New York law which placed on a criminal defendant the burden of proving the affirmative defense of extreme emotional disturbance by a preponderance of evidence. In *Martin*, 480 US at 232, the United States Supreme Court upheld an Ohio statute placing the burden of producing evidence on defendant by a preponderance of evidence.

In addition to these constitutional challenges in the United States Supreme Court, some state law cases are also specifically applicable to the burden of proof in medical marihuana defenses. Both Washington and Maine have established that when a defendant is asserting a medical marihuana defense at trial, the burden of proof is by a preponderance of evidence. See *State v Fry*, 168 Wn 2d 1, 7; 228 P 3d

[15] For the affirmative defense of insanity in Michigan, the defendant has the burden of proving insanity by a preponderance of the evidence. MCL 768.21a(3); *People v Mette,* 243 Mich App 318, 324-325; 621 NW2d 713 (2000).

1 (2010); *State v Christen,* 976 A2d 980, 984 (Me, 2009).

A few states actually include the 'preponderance of evidence' burden of proof in their statutes. Washington amended its medical marihuana act in 2011 and added a preponderance requirement. See Wash Rev Code Ann 69.51A.043(2). The New Jersey statute states "[t]he affirmative defense established herein shall be proved by the defendant by a preponderance of the evidence." NJ Stat § 2C:35-18. Nevada has established a statutory burden of proof for its affirmative defense for defendants claiming that they used marijuana for legitimate medical purposes. Nevada indicates that if defendants use more than the amount authorized by the statute, they must establish the elements of the affirmative defense by a preponderance. Nev Rev Stat Ann 453A.310(1)(a)(3).

In conclusion, placing the burden of proof by a preponderance of evidence on the defendant is not unconstitutional. Other states have applied the burden of proof as by a preponderance of evidence in their medical marihuana cases and statutes. Accordingly, in Michigan, when a defendant is permitted to present at trial the affirmative defense of medical marihuana pursuant to Section 8 of the MMMA, the burden of proof is on the defendant to present the affirmative defense by a preponderance of evidence.

IV. THE VERIFICATION AND CONFIDENTIALITY PROVISIONS IN SECTION 6 OF THE MMMA PLAY A PART IN ESTABLISHING ENTITLEMENT TO IMMUNITY UNDER SECTION 4, BUT DO NOT ESTABLISH ANY ENTITLEMENT TO THE AFFIRMATIVE DEFENSE UNDER SECTION 8.

The sixth question that this Court directed the parties to address is what role does the verification and confidentiality provisions in section 6 of the MMMA play in establishing entitlement to immunity under Section 4, or an affirmative defense under Section 8?

A. The verification provision in section 6(c) plays a part in establishing immunity under Section 4.

The verification provision of section 6(c) of the MMMA is part of the procedure that the department is required to follow prior to issuing the registry identification card. Therefore, once a person

receives their registry identification card, the department should have already verified the information contained in the qualifying patient's application. MCL 333.26426(c) provides,

> The department shall verify the information contained in an application or renewal submitted pursuant to this section, and shall approve or deny an application or renewal within 15 business days of receiving it. The department may deny an application or renewal only if the applicant did not provide the information required pursuant to this section, or if the department determines that the information provided was falsified. Rejection of an application or renewal is considered a final department action, subject to judicial review. Jurisdiction and venue for judicial review are vested in the circuit court for the county of Ingham.

Thus, the application *may* be denied if the application was not completely filled out or if the information contained in the application was false.

As discussed previously, a valid registry identification card *and* possession of an amount of marihuana that does not exceed the amount allowed under the act creates a presumption under Section 4 of the MMMA, that the qualified patient or primary caregiver is engaged in the 'medical use' of marihuana in accordance with the Act. Thus, the procedure the department follows pursuant to section 6(c) plays a part in whether a patient or caregiver receives the registry identification card. The qualifying patient must still establish the listed requirements under Section 4 of the MMMA and his or her marihuana-related conduct must be in accordance with the Act.

Moreover, the verification requirements in this section do not supplant or override a caregiver's responsibility to only provide marijuana to their patient(s) for medical use, and only for medical use. Whether or not the state verifies the initial registration information has no effect on the amount of marijuana actually required to alleviate the patient's MMMA approved debilitating medical condition. As noted by the Court of Appeals,

> His [the Defendant's] interpretation of the MMMA ignores the underlying medical purposes of the statute, explicitly referred to in *§ 4(d)*. Mere possession of a state-issued card--even one backed by a state investigation--does not guarantee that the cardholder's *subsequent* use and production of marijuana was "for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition . . . ." *MCL 333.26424(d)(2). Hartwick, supra* at 260.

When a caregiver assumes the considerable responsibility of manufacturing a Schedule 1 controlled substance, and then distributing this Schedule 1 controlled substance to patients for the medical purpose of, and only for medical purpose of, alleviating the patient's MMMA approved debilitating medical condition, that caregiver also assumes the considerable responsibility of ensuring that the marijuana that they have manufactured and distributed is being used for medical, and not recreational, purposes. Neither the verification provisions by the state in section 6, nor the quantity limitations in Section 4, obviate a caregiver's responsibility to have a personal relationship with each of his patients that is sufficient to verify the nature of their MMMA approved debilitating medical condition; the quantity of marijuana necessary to alleviate this condition, as the condition changes over time; and that the marijuana provided to the patient is actually being used for the approved medical purpose. In this case the evidentiary hearing rebutted any presumptions and clearly demonstrated that the Defendant was not providing marijuana in the amount necessary to alleviate MMMA approved debilitating medical conditions.

B. The verification provision in section 6 does not establish entitlement to the affirmative defense under Section 8.

Pursuant to sections 8(a)(1), 8(a)(2), and 8(a)(3) of the MMMA, verification of the patient's application does not establish that (1) an *ongoing bona fide* physician-patient relationship exists and the doctor is monitoring the efficacy of the marihuana treatment, (2) that the amount of marihuana a defendant possessed was *not more than reasonably necessary* to treat the serious or debilitating condition, or (3) that a defendant was *engaged in* the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

The verification provision of section 6 do not address any of the elements that must be shown to entitle a defendant to a Section 8 defense. Accordingly, the verification provision in section 6(c) of the

MMMA does not establish entitlement to the affirmative defense in Section 8(a) of the MMMA.

C. The confidentiality provision in section 6(h)(3) plays a part in establishing immunity under Section 4.

MCL 333.26426(h) lists the confidentiality rules that apply *to the department* to protect the information gathered:

> (1) Subject to subdivisions (3) and (4), applications and supporting information submitted by qualifying patients, including information regarding their primary caregivers and physicians, are confidential.
>
> (2) The department shall maintain a confidential list of the persons to whom the department has issued registry identification cards. Except as provided in subdivisions (3) and (4), individual names and other identifying information on the list are confidential and are exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.
>
> (3) The department shall verify to law enforcement personnel whether a registry identification card is valid, without disclosing more information than is reasonably necessary to verify the authenticity of the registry identification card.
>
> (4) A person, including an employee, contractor, or official of the department or another state agency or local unit of government, who discloses confidential information in violation of this act is guilty of a misdemeanor, punishable by imprisonment for not more than 6 months, or a fine of not more than $ 1,000.00, or both. Notwithstanding this provision, department employees may notify law enforcement about falsified or fraudulent information submitted to the department.

The confidentiality provisions in section 6(h) of the MMMA plays a part in implementing the immunity established through Section 4. Pursuant to section 6(h)(3), the department shall verify to law enforcement personnel whether the registry identification card is valid. Thus, the confidentiality provision allows law enforcement to check the validity of the card, which is part of establishing the presumption under Section 4(d)—to present evidence of a *valid* registry identification card and possession of an amount of marihuana that does not exceed the amount allowed under the act. However, Defendant has to first present evidence of the valid card to avail himself of immunity and have the case dismissed.

D. The confidentiality provisions in section 6 do not establish entitlement to the affirmative defense under Section 8 when a defendant waives any confidentiality or physician-patient privilege by asserting the defense.

Defendant bears the burden of establishing the affirmative defense. *Kolanek,* 491 Mich at 410. The confidentiality provisions in section 6(h) apply to the department. Thus, to avail themselves of a

Section 8 affirmative defense, a defendant must waive any confidentiality provision or physician-patient privilege. Likewise, a caregiver's patients also must waive any doctor-patient privilege when they avail themselves of the services of the caregiver and benefit from the MMMA.

Statutory privileges and confidentiality provisions are narrowly defined, while their exceptions are broadly construed. *People v Warren*, 462 Mich 415, 428; 615 NW2d 691 (2000). Furthermore, any privilege can be waived. *Saur v Probes,* 190 Mich App 636, 639; 476 NW2d 496 (1991).

> [A] privilege can be waived through conduct that would make it unfair for the holder to insist on the privilege thereafter . . . A waiver is to be predicated not only when the conduct indicates a plain intention to abandon the privilege, but also when the conduct (though not evincing that intention) places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege. It is not to be both a sword and a shield . . . [*Howe v Detroit Free Press,* 440 Mich 203, 214-215; 487 NW2d 384 (1992) (citing 8 Wigmore, Evidence (McNaughton rev), § 2388(3), p 855).]

Michigan courts have held in criminal cases that parties waive any privilege by asserting a medical defense or introducing evidence that opens the door to such testimony. See, e.g., *People v Hunter,* 374 Mich 129, 135-136; 129 NW2d 95 (1965) (indicating that once the People sought to introduce medical testimony at trial, the complainant's physician-patient privilege was deemed waived); accord *People v Kayne*, 268 Mich 186, 190; 255 NW 758 (1934); *People v Mitchell,* 454 Mich 145, 169; 560 NW2d 600 (1997) (indicating that "[b]y putting in issue the effectiveness of the representation he received at the trial, [the defendant] waived the attorney-client privilege." (citation omitted)) The concurrence in *Redden,* 290 Mich App at 117-118, specifically found that when a defendant is seeking to avail of the affirmative defense under the MMMA, the defendant must waive the privilege even concerning medical records. A defendant also waives the privilege by referring to an otherwise privileged conversation on the record, *In re Guilty Plea Cases*, 395 Mich 96, 127; 235 NW2d 132 (1975), or disclosing the conversation to third parties, *Oakland Co Prosecutor v Dep't of Corrections*, 222 Mich App 654, 658; 564 NW2d 922 (1997).

This situation is also comparable to the case of *People v Johnson,* 111 Mich App 383; 314 NW2d 631 (1981), where the prosecution wished to call defendant's doctor in an obtaining a false prescription prosecution. The Court of Appeals said,

> Defendant seeks to use the privilege herein as both a sword and shield. On the one hand, defendant sought out the benefits of the relationship, and, in doing so, obtained the prescription that is not in dispute . . . Now he seeks protection of the privilege to insulate himself from criminal prosecution, knowing full well that only he and [his doctor] know the original contents of the prescription. To prevent [the doctor] from testifying . . . is inherently unfair, and we see no reason to allow the use of this privilege under such conditions." [*Id.* at 389]

In this case as well, the Defendant sought out the benefits of this relationship to manufacture, distribute and use marihuana for 'medical use.' Now he cannot use any confidentiality provision to absolve himself of criminal liability without allowing the prosecution to probe whether he had a qualifying medical condition, whether the relationship with his physician was bona fide, and whether his physician advised how much marihuana he needed to treat his qualifying medical condition and was monitoring the efficacy of the marihuana treatment.

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

The fifth question that this Court directed the parties to address is whether the Court of Appeals erred in characterizing a qualifying patient's physician as issuing a prescription for, or prescribing, marijuana. In its decision in *Hartwick*, the Court of Appeals used the term "prescription" several times in reference to the 'medical use' of marijuana. The fact that marijuana is classified as a Schedule 1 controlled substance by the Michigan Board of Pharmacy, rendering this drug incapable of being legally 'prescribed' by licensed medical professionals in Michigan, was discussed in detail in the Court of Appeals decision in *People v McQueen*, 293 Mich App 644, 655-658; 811 NW2d 513 (2011), *affirmed* by this Court on alternate grounds in *People v McQueen*, 493 Mich 135; 828 NW2d 644 (2013). As such, the use of this specialized Public Health Code term with reference to the medical use of marijuana

was technically in error.

In this case, in its opinion the Court of Appeals used the word "prescription" in place of the detailed MMMA 'certification' that is required to be given by a licensed Michigan physician who has a bona fide physician-patient relationship with the medical marijuana user. However, when read in context, it is clear that the Court of Appeals was using the term "prescription" as a shorthand method of identifying the 'written certification' in the MMMA that is required to be issued by a licensed Michigan physician, after engaging in a bona fide physician-patient relationship and finding that **(1)** [t]he patient has a debilitating medical condition involving "[c]ancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Crohn's disease, agitation of Alzheimer's disease, nail patella, or the treatment of these conditions; a "chronic or debilitating disease or medical condition or its treatment that produces 1 or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including but not limited to those characteristic of epilepsy; or severe and persistent muscle spasms, including but not limited to those characteristic of multiple sclerosis," or "[a]ny other medical condition or its treatment approved by the department, as provided for in section 6(k);" **(2)** the "physician has completed a full assessment of the patient's medical history and current medical condition, including a relevant, in-person, medical evaluation," **(3)** "[i]n the physician's professional opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition."

In common parlance, when the term 'prescription' is used in conjunction with a doctor, it evokes the concept that the doctor evaluated the person, identified a legitimate medical need, and issued a document allowing the person to receive a medication intended by the doctor to treat the legitimate medical condition identified during the examination. In the *Hartwick* opinion, the Court of Appeals used

the term "prescription" in this manner, as shorthand to identify the medical certification process set forth in the MMMA, instead of including the actual (and extremely lengthy) MMMA verbage cited above.

Specifically, in *Hartwick, supra* at page 261, the Court of Appeals used the phrasing "prescription, use and production of marijuana for medical purposes" to differentiate between the MMMA's detailed medical certification process, the use of medical marijuana, and the production of marijuana for medical purposes. Likewise, in footnote 17 on the same page, the Court of Appeals again used the shorthand reference to 'prescribing' marijuana to differentiate "between the medical-prescribing doctor and the marijuana-using patient." *Id.*

The Court of Appeals' use of variants of the term 'prescription' elsewhere in the opinion, with reference to the doctor's medical marijuana certification detailed in the MMMA, also highlights the fact that, to meet the 'medical use' purpose of the MMMA, the amount *and* frequency of a person's use of marijuana should have a direct relationship to the medical condition underlying the MMMA authorized use of marijuana, in a similar manner that other controlled substances are given to patients, in similarly controlled amounts, as part of their physician supervised medical treatment. As such, while the Court of Appeals use of variants of the shorthand term "prescription" in its opinion was in error, the People submit that this should at worst be deemed a technical error, which could be remedied by simply replacing this word with the longer and much more awkwardly worded language in the MMMA detailing the physician certification process.

VI. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO DISMISS, AND THE DEFENDANT'S REQUEST TO PRESENT AN AFFIRMATIVE DEFENSE AT TRIAL.

To follow the order of Defendant's appellate brief, the final section of the People's brief will address the propriety of the Court of Appeals' affirmance of the Circuit Court's denial of the Defendant's request for a dismissal of the charges under Section 4 of the MMMA, and the Court of Appeals affirmance of the Circuit Court's denial of the Defendant's request for a dismissal or to present an

affirmative defense under Section 8 of the MMMA.

a. The lower courts properly found that the Defendant was not entitled to Section 4 Immunity

The Defendant challenges two rulings made by the Circuit Court, and affirmed by the Court of Appeals. First, the Defendant challenges the ruling finding that he did not sustain his burden of establishing that he was entitled to a dismissal based upon Section 4 immunity.

As noted previously in this brief, the purpose of the MMMA is to authorize the medical use of marijuana as a limited exception to the criminal penalties normally imposed for its use, possession, or manufacture. The Court of Appeals summarized this purpose, and the importance of factoring in the "medical use" purpose of the MMMA when interpreting its provisions, by stating:

> The MMMA is best viewed as an "exception to the Public Health Code's prohibition on the use of controlled substances [that permits] the medical use of marijuana when carried out in accordance with the MMMA's provisions." *Bylsma, 493 Mich at 27.* The statute's protections are "limited to individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individuals' marijuana use 'is carried out in accordance with the provisions [the MMMA].'"*Kolanek,* 491 Mich at 394, quoting MCL 333.26427(a).
>
> Accordingly, proper analysis of the MMMA must focus on its overriding medical purpose. *Hartwick, supra* at 256-7

Under Section 4, in the event that a defendant is a qualifying patient who is in possession of a registry identification card and otherwise meets the requirements of Section 4, then a rebuttable presumption is created that the defendant's use of the marijuana in their possession is for a medical purpose. In this case, the Defendant did not meet his burden of establishing the necessary Section 4 requirements, and regardless, the totality of the evidence presented at the evidentiary hearing rebutted any presumption and showed that the Defendant's conduct related to the marijuana was not for the purpose of alleviating a qualifying patient's debilitating medical condition, or symptoms related to such a condition.

In the present case, the trial court held an evidentiary hearing that was originally scheduled to only

address the Defendant's request for a Section 8 dismissal or for a Section 8 affirmative defense at trial. (36a) However on the date of the hearing, Defendant's counsel provided to the Circuit Court and the People a memorandum wherein he raised the issue of potentially dismissing the charges based upon Section 4 immunity, a separate issue from the original purpose of this hearing. (36a)

A hearing was ultimately held to allow the Defendant to attempt to present the trial court with credible evidence sustaining his burden of establishing that he was entitled to a dismissal of his case under Section 4, and/or that he was entitled to the protections of Section 8. The evidence at this hearing included not just the testimony of the Defendant, but exhibits were admitted and the parties also referenced the preliminary examination transcript, which the record acknowledges that the Court was in possession of, and actually reviewed, during the hearing, as evidenced by statements from Defendant's counsel to the Court such as "if you look at the preliminary exam transcript, page 11 and 12…" (36a)

At this hearing, the Defendant did not sustain his burden of convicting the trial court that he had a permissible number of marijuana plants, as his claim that he had just cut six of the seventy seven marijuana plants was not just contradicted by the testimony of a police officer at the preliminary examination, his statements to the officers on the date of the search and the laboratory report admitted at the hearing, but this defense still acknowledges that he was in possession of seventy seven marijuana plants before the police arrived at his residence. (39a, 40a)

Additionally, there was evidence that Defendant did not keep the marijuana in an enclosed, locked facility. An enclosed, locked facility "means a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient", MCL 333.26423(c). The detective previously testified in this case that the grow room was unlocked. (8b, 21b) Further, Defendant did not live alone. (12b) As such, Defendant failed to conclusively show that access to the marijuana was limited as required by Section 4. In light of these facts, the trial court properly ruled that the Defendant did not meet his burden of establishing that he is

entitled to a dismissal of the charges based upon Section 4 immunity. In his appellate pleadings, the Defendant has failed to demonstrate, either to the Court of Appeals or to this Court, that the factual finding of the trial court was clearly in error. As such, this decision should remain undisturbed.[16]

Even if a presumption of medical use was created in this case, which the lower court record clearly shows did not happen, the evidence presented at this hearing was sufficient to rebut any such presumption, and in fact established that the Defendant's conduct related to the marijuana was not for the purpose of alleviating a qualifying patient's debilitating medical condition, or symptoms related to such a condition.

The evidence before the Circuit Judge showed that Defendant's conduct was not assisting actual qualified patients with the treatment of a qualifying debilitating condition. A qualifying patient is "a person who has been diagnosed by a physician as having a debilitating medical condition", MCL 333.26423(a). Defendant testified at the hearing that he did not know what each of his 'patient's' allegedly debilitating conditions were, with responses to questioning about the individual patient's conditions including responses like the following: "Q: What is his debilitating medical condition? A: He has... I'm not sure what he has. I'm not – I don't know" (41a); "Q: What's Rebecca Boggs' debilitating medical condition? A: She has... I know she's got arthritis and she has something stemming from a motorcycle accident. I'm not sure the—the actual--." (42a); "Q: What's his debilitating medical condition? A: He's got a lot of things going on. I don't know what the doctor signed for him for." (43a)

[16] To the extent that the Defendant is raising a challenge to this Court regarding the quantity of harvested marijuana in his possession, the People adopt by reference the argument forwarded by the People in the *People v Tuttle* case, docket 148971, addressing the People's position that when a criminal defendant fails to comply with the Section 4 requirements as to one aspect of a his 'medical use' of marijuana, this bars the defendant from asserting Section 4 immunity on other charges directly linked with his use of marijuana. Such a finding would be especially applicable in this case, since the harvested marijuana and the marijuana plants are so directly tied to the same activity by the Defendant. The People would further note that, even in the alternative, the evidence produced at the evidentiary hearing was sufficient to rebut any presumptions created by Section 4.

Defendant further testified that he did not know the identity of, or have any contact with, any of the doctors who were allegedly treating the patients who were receiving marijuana from the Defendant, nor did he have any idea how much marijuana (or at what frequency) was necessary to properly alleviate the conditions or symptoms associated with their MMMA approved debilitating medical conditions (known and unknown) that he thought his patients may have been suffering from. (41a-43a) Instead, the Defendant offered contradictory testimony about how the marijuana was provided to these patients,[17] with an acknowledgement that he gave the patients whatever marijuana was harvested from "their plants." (38a-39a)[18]

Even the Defendant's testimony about his own qualification for medical marijuana use did not support a finding of 'medical use.' While the Defendant was also a patient himself (37a), he testified that he did not even know the name of his allegedly debilitating condition and could not specify which disc(s) were involved in the medical condition that he claimed required the use of marijuana to treat. (41a). Defendant also testified that his doctor (who was the only doctor he could even name, among the six alleged doctors involved in treating him and his five patients) did not recommend any particular dosage or reasonable amount of marijuana "medicine" for him to use, but left it to Defendant's judgment (42a-43a).

Defendant's position at the evidentiary hearing did not attempt to show that the marijuana in the Defendant's possession was properly for a medical use. Instead, the Defendant asserted that by issuing

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[17] When asked how the individual patients received their marijuana, the Defendant testified that "either they come and get it or I take it to them" followed shortly by a contradictory statement that "[n]obody's really came and got it." (43a) This is an example of testimony that often does not come through in a written transcript, yet when observing the testimony in person, as the trial court did in this case, enables a fact finder to determine that the testimony was not credible.

[18] Of course, there was no testimony explaining how the Defendant delineated which of the 77 marijuana plants growing in his house were tracked to which particular patient, nor could such a delineation occur, since such a delineation would result in designating more plants than allowable under Section 4 to most of his patients.

the registration card, "the state's already made the determination" as to whether the marijuana was for medical purposes. (41a) But the evidence was clear that the marijuana in the Defendant's possession was not being provided to qualified patients only in the amounts and frequencies necessary to alleviate MMMA qualified debilitating medical conditions. Instead, plants were grown in excess of the Section 4 limits, and Defendant acknowledged that it was distributed in amounts and frequencies that bore no relation to any medical condition. (38a-39a) As summarized by the Court of Appeals:

> Yet defendant was unfamiliar with the health background of his patients and could not identify the maladies or "debilitating conditions" suffered by two of his patients. He was not aware of how much marijuana any of his patients were supposed to use to treat their respective conditions or for how long his patients were supposed to use 'medical marijuana.' And he could not name each patient's certifying physician. *Hartwick, supra* at 253.

The Court of Appeals therefore properly concluded that, even if the Defendant had qualified for the Section 4 rebuttable presumption that his marijuana was for a medical purpose, this presumption was rebutted by the People at the evidentiary hearing when it was shown that the marijuana in the Defendant's possession was possessed and distributed in a manner unrelated to his qualifying patient's needs to alleviate alleged (and unknown) MMMA qualifying debilitating medical conditions. As stated by the Court of Appeals:

> Indeed, defendant's testimony provided ample evidence that he was not holding true to the medical purposes of the statute. He failed to introduce evidence of (1) some of his patients' medical conditions, (2) the amount of marijuana they reasonably required for treatment and how long the treatment should continue, and (3) the identity of their physicians. *Hartwick, supra* at 260.

In light of the facts produced at the evidentiary hearing, the trial court properly ruled that the Defendant was not entitled to Section 4 immunity.

b. The trial court did not err in finding that the Defendant did not meet his burden to show that he was entitled to dismissal or an affirmative defense under Section 8

The second trial court ruling that the Defendant is challenging through this appeal is the trial court's ruling that he did not meet his burden of establishing that he was entitled to either a dismissal, or to present an affirmative defense, under Section 8, at trial.

To fulfill the requirements of Section 8, a Defendant must establish three things. The Defendant must establish that there was an ongoing and bona fide doctor-patient relationship between patient and physician, wherein the doctor found that the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's MMMA qualified serious or debilitating medical condition or symptoms of such a condition. MCL 333.26428(a)(1) The Defendant then must establish that amount of marijuana in his possession was not more than was reasonably necessary to ensure the uninterrupted availability of marijuana required for the treatment of the MMMA qualified serious or debilitating medal condition, or symptoms thereof. MCL 333.26428(a)(2) Finally, to qualify for a Section 8 affirmative defense, the Defendant must demonstrate that the marijuana is actually being used by the patient for medical reasons, as mandated by MCL 333.26428(a)(3).

As noted in the previous section, the Defendant in this case had no knowledge of the medical conditions that were allegedly being treated by the marijuana in his possession, or the nature of the doctor patient relationship underlying his patient's alleged certifications. (41a-43a) The Defendant also admitted that his distribution of marijuana to these individuals was not based upon their medical need, but instead was based upon however much marijuana was harvested from "their" marijuana plants each month. (38a-39a) As such, the proofs presented by the Defendant at this hearing facially failed to demonstrate the proofs detailed in Section 8, to render the Defendant entitled to an affirmative defense instruction at the Defendant's trial.

Defendant's argument, as to his entitlement to a Section 8 affirmative defense, is in essence just a repetition of the factual argument he made to the trial court, i.e. he claims that if he possessed less than the maximum amounts listed in Section 4, this should establish the elements of Section 8. As discussed,

this interpretation runs contrary to the actual language of the MMMA, and was rejected by the Court of Appeals in *Redden, supra* at 87, citing MCL 333.26428(a)(2). See also *Kolanek, supra* at 397-399, wherein this Court noted that Section 4 and Section 8 address different situations, and should be interpreted based upon the differing requirements in these two sections. In light of the facts produced at the evidentiary hearing, the trial court properly ruled that the Defendant was not entitled to a Section 8 defense.

RELIEF

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Jeffrey M. Kaelin, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court affirm the Court of Appeals and trial court's order that (1) Defendant was not entitled to immunity under Section 4 of the MMMA, and (2) Defendant was not entitled to a dismissal under Section 8, or to present this affirmative defense at trial.

Respectfully submitted,

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OAKLAND COUNTY

THOMAS R. GRDEN
CHIEF, APPELLATE DIVISION

BY: 

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DATED: September 11, 2014