In The Supreme Court
Appeal From The Oakland County Circuit Court
Judge Michael Warren

People Of The State Of Michigan,

Plaintiff/Appellee,

v.

Supreme Court No.148971
COA Case No. 312364
Oakland County Case No. 2012-241272-FH

Robert Tuttle

Defendant/Appellant

/

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Brief On Appeal—Appellant
ORAL ARGUMENT REQUESTED

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Judgment Being Appealed and Basis of Jurisdiction

Defendant-appellant sought leave to appeal an order denying his Motion to Dismiss pursuant to § 4 and § 8 of the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*. (the MMMA) and further denying defendant's request to present a § 8 affirmative defense at trial. The order was entered on August 20, 2012 and is appended as 1a. The trial court's Register of Actions is appended as 2a-3a and the transcript of the § 8 hearing as 4a-109a. Appellant timely filed an application for leave to appeal on an interlocutory basis with the Court of Appeals. Appellant relied upon MCR 7.205 when it sought leave to appeal.

The Court of Appeals denied appellant's application for leave and his subsequent motion for reconsideration. Those orders are appended as 110a and 111a respectively. However, on April 1, 2013, this Court remanded the "case for consideration, as on leave, of (1) whether the defendant was entitled to dismissal of the marijuana-related charges in Counts IV through VII of the second amended information 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 these charges under the affirmative defense in § 8(a) of the MMMA, MCL 333.26428(a); and if the defendant was not entitled to dismissal, whether he is permitted to raise the § 8 affirmative defense at trial." The order is appended as 112a.

In a published opinion dated January 30, 2014, the Court of Appeals determined that: (1) The defendant-appellant is not entitled to the immunity provisions of Section 4 of the MMMA. (2)The defendant-appellant is not entitled to dismissal of the charges

under the affirmative defense in § 8(a) of the MMMA. (3) The defendant-appellant is not permitted to raise the § 8 affirmative defense at trial.

The opinion of the Court of Appeals is appended as 113a-a.

On March 25, 2014, defendant-appellant asked this Court to grant its application for leave to appeal and to reverse the decision of the Court of Appeals that affirmed the trial court's denial of his motion to dismiss and further denied his request to present a medical marijuana defense at trial. Defendant-appellant relied upon MCR 7.302 in filing its application for leave to appeal.

On June 11, 2014, this Court granted defendant-appellant's application for leave to appeal the January 30, 2014 judgment of the Court of Appeals. This Court specifically directed defendant-appellant to brief the following issues: (1) Whether a registered qualifying patient under the MMMA who makes unlawful sales of marijuana to another patient to whom he is not connected through the registration process, taints all aspects of his marijuana-related conduct, even that which is otherwise permitted under the act. (2) Whether a defendant's possession of a valid registry identification card establishes any presumption for purposes of § 4 or §8. (3) If, not, what is a defendant's evidentiary burden to establish immunity under § 4 or an affirmative defense under § 8. (4) What role, if any, do the verification and confidentiality provisions in § 6 of the act play in establishing entitlement to immunity under § 4 or an affirmative defense under § 8. The Order of the Supreme Court is appended as 127a.

In accordance with this Court's Order, defendant-appellant has timely filed this brief in accordance with MCR 7.309(B).

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Statement of Questions Involved

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

The trial court answers:.....Yes

The court of appeals answers:.....Yes

The appellee answers:.....Yes

The appellant answers: .....No

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

The trial court answers:.....No

The court of appeals answers:.....No

The appellee answers:.....No

The appellant answers:..... Yes

III. **If Possession Of A Valid Registry Identification Card Does Not Establish Any Presumptions For Purposes of § 4 Or §8 Of The MMMA, What Is A Defendant's Evidentiary Burden To Establish Immunity Under § 4 Or An Affirmative Defense Under § 8.**

The trial court answers:.....Not Directly Answered

The court of appeals answers:.....Not Directly Answered

The appellee answers:.....Not Directly Answered

The appellant answers: .....Not Directly Answered

IV. **What Role, If Any, Do The Verification And Confidentiality Provisions In § 6 Of The Act Play In Establishing Entitlement To Immunity Under § 4 Or An Affirmative Defense Under § 8.**

The trial court answers:.....Not Directly Answered

The court of appeals answers:.....Not Directly Answered

The appellee answers:.....Not Directly Answered

The appellant answers: .....Not Directly Answered

STATEMENT OF THE STANDARDS OF REVIEW

All factual issues determined by a trial court are reviewed under the clearly erroneous standard. *See People v. Swirles* (after remand) 218 Mich app 133, 136; 553 NW2d 357 (1996). Additionally, a trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich. 543, 549; 581 N.W.2d 654 (1998). And, preliminary questions of law are reviewed *de novo*. *People v. Kolanek*, 491 Mich. 382, 393; 817 N.W.2d 528 (2012). Finally, the MMMA is the results of a voter initiative. Therefore, the intent of the electorate must be determined. *People v. Kolanek*, 491 Mich. 382, 397; 817 N.W.2d 528 (2012

Accordingly, in the case at hand, the trial court's factual determinations such as the credibility of the witnesses should be reviewed under the clearly erroneous standard. The decision to preclude the § 8 affirmative defense should be reviewed for an abuse of discretion as it pertains to the admission of evidence. However, preliminary questions of law such as the application of § 4 and § 8 of the Act to the facts of this case should be reviewed *de novo*. With respect to interpreting the MMMA, the intent of the electorate must be determined.

Statement of Material Proceedings and Facts

This case involves the interpretation and application of the MMMA. In particular, this case involves the interpretation and application of two specific sections of the MMMA - MCL 333.26424 (§ 4) and MCL 333.26428 (§ 8).

At all relevant times hereto, defendant-appellant, Robert Tuttle, was certified by the State of Michigan as a medical marijuana patient.[1] He was also certified by the State of Michigan as a medical marijuana caregiver for two patients, Michael W. Batke[2] and Frank R. Colon, II.[3] A summary of the State's official records was prepared by Celeste Clarkson, Compliance Section Manager for Michigan's Health Regulation Division, Bureau of Health Professionals, confirming the appellant's status as a patient and caregiver.[4]

In November of 2011, the appellant met Dwayne Lalonde online through a medical marijuana patient/caregiver website. Mr. Lalonde asked appellant to provide him with medical marijuana for his pain. Prior to providing medical marijuana to Mr. Lalonde, the appellant reviewed documentation establishing that Mr. Lalonde was in fact a medical marijuana patient.[5]

Thereafter, on January 18, 21, and 23, 2012, the appellant met Mr. Lalonde in the parking lot of the Waterford, Michigan Meijer store and distributed a combined total of 7 ounces of marijuana to Lalonde. It is not disputed that the appellant wasn't the caregiver for Mr. Lalonde when he delivered the marijuana. However, it is also not disputed that

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[1] Mr. Tuttle's certified records are appended as 128a-185a.
[2] Mr. Batke's certified records are appended as 186a -204a.
[3] Mr. Colon's certified records are appended as 205a-224a.
[4] The summary is appended as 225a-228a.
[5] The transcript from the August 20, 2012 evidentiary hearing is appended as 4a-109a. See particularly, 49a-51a.

Mr. Lalonde was certified by the State of Michigan as a medical marijuana patient at all relevant times hereto.[6]

As it turns out, Mr. Lalonde was not seeking the marijuana for his chronic pain. Mr. Lalonde was actually working as a confidential informant for Detective Pankey; an undercover narcotics officer employed by the Oakland County Sheriff's Department. Apparently, Mr. Lalonde had committed a crime and had agreed to work with Detective Pankey in an attempt to mitigate the consequences of his prior criminal activity. It wasn't until after he decided to work with Detective Pankey that Mr. Lalonde met the appellant under the guise of a medical marijuana patient in need of medicine.[7]

Based upon Mr. Lalonde obtaining medical marijuana from the appellant, Detective Pankey obtained a search warrant to raid the appellant's home. Nowhere in the affidavit for search warrant was it ever disclosed that appellant was a medical marijuana caregiver and Mr. Lalonde a patient. As such, a search warrant was obtained and on January 23, 2012 the appellant was arrested near the Waterford, Michigan Meijer after meeting with Lalonde. The appellant's house was subsequently searched.

During the search, a total of 33 marijuana plants were seized from appellant's shed and garage. According to Detective Pankey, the plants were in various stages of growth. In fact, some of the plants were only a few inches in height while others were flowering/budding.[8] None of the plants were being harvested and only 38 grams of useable marijuana was present.[9]

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[6] See the portion of the transcript from the August 20, 2012 evidentiary hearing, appended as 51a, ln 16-18.
[7] See the portion of the transcript from the August 20, 2012 evidentiary hearing, appended as 49a-51a.
[8] See the portion of the transcript from the August 20, 2012 evidentiary hearing appended as 29a ln. 1, 40a ln. 12.
[9] See the portion of the transcript from the August 20, 2012 evidentiary hearing, appended as 21a ln. 22-25.

Based upon the marijuana, the Oakland County Prosecutor charged the appellant with 7 separate counts of criminal activity. The alleged facts creating the basis for each count are broken down as follows:

a. Count I - delivery of marijuana to Mr. Lalonde on January 18, 2012.

b. Count II - delivery of marijuana to Mr. Lalonde on January 21, 2012.

c. Count III – delivery of marijuana to Mr. Lalonde on January 23, 2012.

d. Count IV – possessing 38 grams of loose marijuana that was found during the raid and having the intent to deliver the same.

e. Count V – felony firearm for having 38 grams of useable marijuana in the garage and shed and having guns locked in safes inside his house.

f. Count VI – growing 33 marijuana plants in his shed and garage.

g. Count VII - felony firearm for growing 33 plants in his shed and garage while having guns locked in safes inside his house.[10]

On June 28, 2012 the appellant, through counsel, filed a motion to dismiss certain counts of the Information pursuant to § 4 of the MMMA and for an evidentiary hearing on the remaining counts pursuant to § 8 of the MMMA.[11] Oral arguments were held on July 11, 2012 and the lower court requested supplemental briefing on the issue of dismissal of certain counts under § 4 of the MMMA. The Court also granted the request for an evidentiary hearing under § 8 of the MMMA. On July 13, 2012, the appellant's supplemental brief in support of his motion to dismiss in accordance with § 4 of the MMMA was filed.[12] The appellant argued that counts IV through VII must be dismissed as a matter of law because he was authorized under Michigan law to grow 36 plants and

[10] See the First Amended General Information that is appended as 229a-231a.
[11] The Brief in Support of the Motion to Dismiss is appended as 232a-238a.
[12] The Supplemental Brief is appended as 239a-242a.

possess 7.5 useable ounces of marijuana. In opposition, the prosecutor argued that counts IV through VII should not be dismissed because the presumption under Section 4 of the MMMA (the marijuana was for medicinal purposes) was rebutted in accordance with § 4(d)(2) of the MMMA because Mr. Tuttle delivered marijuana to a patient who wasn't registered to him.

On August 20, 2012, the trial court heard supplemental oral arguments on the request to dismiss counts IV through VII pursuant to § 4.[13] The trial court then ruled that as a matter of law the appellant's conduct giving rise to Counts I-III (delivering marijuana to a patient not registered to him) rebutted the § 4 presumption with respect to the conduct that was charged in counts IV through VII. Accordingly, the trial court denied appellant's motion to dismiss pursuant to § 4 of the MMMA.[14]

Thereafter appellant's § 8 evidentiary hearing commenced. Detective Pankey was the first witness and he testified in relevant part that:

a. There were only 33 plants confiscated.
b. There were only 38 grams of useable marijuana confiscated.
c. That none of the plants were in the process of being harvested.
d. That the plants were in various stages of growth ranging from only a few inches in size to a few feet.
e. That the 14 plants in the shed were flowering/budding.
f. That the flowering/budding plants seemed to have less than an ounce of harvestable marijuana growing on them on the low end to around 2 ounces on the high end. As such, he established a ballpark estimate of the amount of marijuana available from these plants for future use.
g. That it takes well in excess of 2.5 ounces of marijuana to make a stick of marijuana butter used to bake marijuana edibles such as brownies.
h. That it takes a substantial amount of marijuana to make a small amount of hash.
i. That all the plants and usable marijuana were located in an enclosed, locked facility(s); to wit, the garage and the shed. [15]

[13] See the portion of transcript from the August 20, 2012 evidentiary hearing, appended as 6a-8a.
[14] See the portion of the transcript from the August 20, 2012 evidentiary hearing, appended as 8a ln 8-15.
[15] See the portion of the transcript from the August 20, 2012 evidentiary hearing appended as 12a-47a.

Dwayne Lalonde, the confidential informant, was next to testify. His testimony in relevant part established the following:

a. That he became a confidential informant for Detective Pankey because he had done something illegal.
b. That he met Detective Pankey in October of 2011 and was working for the detective when he met the appellant.
c. That he met the appellant in November of 2011 on a patient/caregiver website.
d. That he asked the appellant to provide him with marijuana for his pain.
e. That before the appellant gave him any marijuana, the appellant verified his medical marijuana paperwork and demanded to see identification from Mr. Lalonde to confirm said paperwork.
f. That at all relevant times hereto, Mr. Lalonde was certified as a medical marijuana patient by the State of Michigan.
g. That he never told the appellant that he was purchasing marijuana for any reason except for his pain.[16]

Next to testify was Michael Batke who was one of appellant's medical marijuana patients. His testimony in relevant part established the following:

a. That at all relevant times hereto he was a medical marijuana patient approved by the State of Michigan.
b. That at all relevant times hereto his medical marijuana caregiver was the appellant.
c. That in November and December of 2012 he received about 4 ounces of useable marijuana from the appellant and he also received edible marijuana in the form of cupcakes.[17]

The final witness was Frank Colon, II. Mr. Colon's testimony in relevant part established the following:

a. That at all relevant times hereto he was a medical marijuana patient approved by the State of Michigan.
b. That at all relevant times hereto his medical marijuana caregiver was the appellant.
c. That he would obtain 1 to 2 ounces of marijuana a week from the appellant.[18]

[16] See the portion of the transcript from the August 20, 2012 evidentiary hearing appended as 48a-51a.
[17] See the portion of the transcript from the August 20, 2012 evidentiary hearing appended as 55a-58a.
[18] See the portion of the transcript from the August 20, 2012 evidentiary hearing appended as 82a-83a.

After Mr. Colon finished testifying, the trial court determined that the appellant failed to satisfy his burden under § 8 of the MMMA. In fact, the court determined that the appellant didn't even establish a *prima facie* case for the § 8 affirmative defense. As such, the court not only refused to dismiss the charges, but also determined that the appellant could not even present the § 8 affirmative defense to a jury.[19] Appellant requested a stay to appeal the decision, which was granted by the trial court and an application for leave to appeal was timely filed with the court of appeals on September 10, 2012. On October 11, 2012 the court of appeals denied defendant's application for leave to appeal, "for failure to persuade the Court of the need for immediate appellate review."[20] Appellant timely filed a motion for reconsideration with the court of appeals that was subsequently denied on November 21, 2012.[21] However, on April 1, 2013, this Court remanded, "this case for consideration, as on leave, of (1) whether the defendant was entitled to dismissal of the marijuana-related charges in Counts IV through VII of the second amended information under the immunity provision in § 4 of the Michigan Medical Marijuana MMMA (MMMA), MCL 333.26424; (2) whether the defendant was entitled to dismissal of these charges under the affirmative defense in § 8(a) of the MMMA, MCL 333.26428(a); and if the defendant was not entitled to dismissal, whether he is permitted to raise the § 8 affirmative defense at trial."[22]

In a published opinion dated January 30, 2014, the Court of Appeals determined that:

1. The defendant-appellant is not entitled to the immunity provisions of § 4 of the MMMA.

[19] See the portion of the transcript from the August 20, 2012 evidentiary hearing appended as 99a-105a.
[20] The Order is appended as 110a.
[21] The Order is appended as 111a.
[22] See the April 1, 2013 Supreme Court Order appended as 112a.

2. The defendant-appellant is not entitled to dismissal of the charges under the affirmative defense in § 8(a) of the MMMA.
3. The defendant-appellant is not permitted to raise the § 8 affirmative defense at trial.[23]

Thereafter, appellant timely filed an application for leave with the Supreme Court. On June 11, 2014 this Court granted the application for leave and this brief was timely filed.[24]

ARGUMENT

I. A Registered Qualifying Patient Under The MMMA Who Makes Unlawful Sales Of Marijuana To Another Patient To Whom He Is Not Connected Through The Registration Process, Does Not Taint All Aspects Of His Marijuana-Related Conduct.

Appellant sold marijuana to another patient to whom he was not connected through the registration process. This conduct gives rise to Counts I-III against him and is not protected conduct under § 4 of the MMMA. *State v. McQueen*, 828 N.W.2d 644, 493 Mich. 135 (Mich. 2013). Nevertheless, the remaining Counts against the appellant arise out of activity that appears to be in full compliance with §4 of the MMMA. The relevant portions of § 4 of the MMMA are as follows:

> *(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..... 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, provided that the primary caregiver possesses an amount of marihuana that does not exceed:*

[23] The Opinion of the Court of Appeals is appended as 113a-126a.
[24] The Order granting leave is appended as 127a.

(1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected... ...; 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; .....

(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. 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.

In this case, the evidence shows and the Court of Appeals acknowledges that appellant:

was in possession of the requisite identification cards and possessed an "amount of marijuana that [did] not exceed the amount allowed under [the MMMA]."[25]

However, the trial court and the Court of Appeals both determined that appellant's patient to patient transfers giving rise to Counts I – III rebutted the § 4(d)(2) "presumption as to all of the appellant's conduct involving marijuana—even conduct involving his two other qualifying patients."[26] Therefore, the Court of Appeals held that appellant is not entitled to § 4 immunity as to any Counts against him.

Appellant contends that this decision is in error because neither the trial court nor the Court of Appeals considered any other evidence associated with appellant's conduct related to marijuana. The Court of Appeals simply determined that the appellant made a patient to patient transfer; and therefore, was barred as a matter of law from asserting §4

[25] See the portion of the Court of Appeals Opinion appended as 117a, par.4.
[26] See the portion of the Court of Appeals Opinion appended as 117a, par.4.

immunity for anything. This approach is akin to throwing the baby out with the bathwater and is contrary to the plain meaning of the statute and the facts of this case.

Plain Meaning of the Statute

On its face, the presumption in section § 4 assists the patient/caregiver in establishing § 4 immunity. The prosecution is the party that is burdened with rebutting a § 4 presumption. This burden conforms with the purpose of the MMMA which in large part is to provide protections for the medical use of marijuana.[27] The Court of Appeals decision is contrary to this intent. It's decision holds a patient/caregiver strictly liable for all of his conduct—even if his "illicit" conduct is totally unrelated to his conduct in alleviating his qualifying patient's debilitating medical condition. Strict liability in criminal cases is generally discouraged by the judiciary. *United States v. United States Gypsum Co.*, 438 U.S. 422, 438, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978); *People v. Lardie*, 452 Mich. 231, 240, 551 N.W.2d 656 (1996).

Appellant asserts that the MMMA requires a nexus between the unprotected conduct pertaining to marijuana and the protected marijuana conduct in order to fully rebut a § 4 presumption of immunity. In this case, the conduct in Counts I-III (patient to patient transfers) is not protected conduct under § 4. However, the conduct giving rise to Counts IV-VII is protected conduct that would give rise to immunity—but for the patient to patient transfers that occurred. After all, the trial court heard from appellant's patients and concluded that their, "testimony demonstrated that the marijuana at issue in the case

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[27] Initiated law 1 of 2008 states:
AN INITIATION of Legislation to allow under state law the medical use of marihuana; to provide protections for the medical use of marihuana; to provide for a system of registry identification cards for qualifying patients and primary caregivers; to impose a fee for registry application and renewal; to provide for the promulgation of rules; to provide for the administration of this act; to provide for enforcement of this act; to provide for affirmative defenses; and to provide for penalties for violations of this act.

was actually used to alleviate 'the [patients'] serious or debilitating medical condition'".[28] Thus, the Court of Appeals decision throws the baby out with the bathwater.

Appellant's position that a nexus must exist between unprotected and protected conduct in order to fully rebut a § 4 presumption is supported by the plain language in §4(d)(2) which states:

> 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. (emphasis added).

The MMMA does not necessitate that the 4(d) presumption be rebutted if there is evidence that conduct related to marijuana was not for the purpose of alleviating the patient's condition. If it were mandated, the language in 4(d)(2) would read, "the presumption ***shall*** be rebutted;" and not, "the presumption ***may*** be rebutted." (emphasis added). Using *may* in lieu of *shall* infers that other factors should be considered. The words "may" and "shall" are to be given their ordinary and primarily accepted meaning. *Smith v. Amber Twp. School Dist. No. 6,* 241 Mich. 366, 369, 217 N.W. 15 (1928); *Breen v. Kehoe,* 142 Mich. 58, 62, 105 N.W. 28 (1905). "May" is used to express possibility[29]. So, it is nothing more than a possibility that the presumption would be rebutted by appellant's patient to patient transfers. It is not self-evident as the Court of Appeals has concluded and other factors must be taken into consideration.

Here, the trial court heard testimony and determined that the appellant's patients were legitimately receiving marijuana from him. Based on evidence of legitimacy, a nexus should have to be drawn between the conduct giving rise to counts I-III and the

[28] See the portion of the Court of Appeals Opinion appended as 124a, par. 4.
[29] Random House Webster's College Dictionary (2001).

conduct giving rise to Counts IV-VII. Otherwise, the 4(d) presumption is not rebutted and Counts IV-VII should be dismissed.

No Nexus In This Case

In order for the § 4(d) presumption to be rebutted as to Counts IV-VII, there must at least be a connection between the marijuana involved in the patient to patient transfers (Counts I-III) and the marijuana growing at appellant's house (Counts IV-VII). As Detective Pankey pointed out, there was no marijuana being harvested at the home when it was searched and the drying rack was empty.[30] Thus, the marijuana given to Mr. Lalonde could not have recently been harvested from the plants that were seized. One can speculate that appellant provided the last of his useable marijuana from a previous harvest to Mr. Lalonde. However, there is no evidence of this. Just as there is no evidence that appellant had to purchase the marijuana from a dispensary or another caregiver in order to provide the medicine to Mr. Lalonde. In fact, the record is void as to where the marijuana received by Mr. Lalonde's was grown. Accordingly, it is nothing more than an assumption to find that appellant used the marijuana growing at his home (legally for himself and his registered patients) for the patient to patient transfers to Mr. Lalonde. An unsubstantiated assumption should not be the sole basis to rebut the § 4(d) presumption. Without some nexus between the marijuana seized at the home and that which was tendered to Mr. Lalonde, the § 4(d) presumption must survive with respect to Counts IV-VII. After all, Mr. Lalonde never went to appellant's home. The patient to patient transfers all happened at the Waterford Meijer. Thus, there is no evidence that the marijuana used as the basis for Counts IV-VII had anything to do with the marijuana that was part of the patient to patient transfers in Counts I-III. As each and every criminal

[30] See the portion of the August 20, 2012 evidentiary hearing appended as 43a, ln 1-13.

count is a separate and distinct cause of action, the conduct in Counts I-III cannot solely be relied upon to criminalize other legal conduct that was occurring and which forms the basis for Counts IV-VII. To do so is akin to convicting a man for a new crime based solely upon his prior acts.

In *People v. Bylsma*, 825 N.W.2d 543, 493 Mich. 17, 33 (Mich. 2012), the Supreme Court determined that under the MMMA there needs to be a sufficient nexus between a defendant and the marijuana that was being grown. A sufficient nexus is no less required in this case. A sufficient nexus must be found between the marijuana transferred to Mr. Lalonde and the marijuana being grown for appellant and his patients. Otherwise, the presumption in §4 cannot be rebutted.

Additionally, with respect to Counts IV-VII, the prosecutor's position would be more reasonable if appellant had sold marijuana to a person who did not need the drug. However, that is not the case here. Mr. Lalonde, the confidential informant, was a medical marijuana patient at all relevant times.[31] This was established at the preliminary exam through Mr. Lalonde's testimony that he told appellant that he needed the marijuana for medicinal purposes.[32] Prior to supplying any marijuana, appellant required him to produce evidence that he was an approved patient. It was only after Mr. Lalonde told appellant that he needed marijuana for his pain and he established *via* documents and photo identification that he was a legitimate medical marijuana patient that appellant delivered marijuana to him.[33] Such conduct does not establish that appellant was acting

[31] See the portion of the transcript from the August 20, 2012 evidentiary hearing that is appended as 49a, ln 1-2. Also, Detective Pankey testified to this fact.
[32] See the portion of the transcript from the August 20, 2012 evidentiary hearing that is appended as 49a, ln. 1-2. Also, Detective Pankey testified to this fact.
[33] See the portion of the transcript from the August 20, 2012 evidentiary hearing that is appended as 50a ln. 1-16.

for a purpose contrary to alleviating the qualifying patient's medical condition. By making a patient to patient transfer, the appellant is not entitled to immunity for that action. Yet, that doesn't establish that everything he was doing as a patient and caregiver was contrary to the law. Appellant had no reason to believe that he was delivering marijuana to Mr. Lalonde for any purpose except to alleviate Mr. Lalonde's pain. Such conduct is the entire point of the MMMA itself; and therefore, cannot be the basis to rebut the § 4(d) presumption.

This Court's decision in *State v. McQueen*, 828 N.W.2d 644, 493 Mich. 135 (Mich. 2013) supports appellant's position that a nexus is required. In accordance with *McQueen*, § 4 immunity does not extend to Counts I-III as these were patient to patient transfers of marijuana. Nevertheless, *McQueen* did not hold that a patient to patient transfer rebuts a § 4(d) presumption as to *all* conduct involving marijuana. To the contrary, *McQueen* only determined that § 4 immunity ***does not extend*** to patient to patient transfers:

> *§ 4 immunity does not extend to a registered qualifying patient who transfers marijuana to another registered qualifying patient for the transferees use because the transferor is not engaging in conduct related to marijuana for the purpose of relieving the transferor's own condition or symptoms. Similarly, § 4 immunity does not extend to a registered primary caregiver who transfers marijuana for any purpose other than to alleviate the condition or symptoms of a specific patient with whom the caregiver is connected through the Michigan's Department of Community Health's registration process. McQueen, at 156*

By utilizing the words, "does not extend" *McQueen* supports appellant's position that a patient to patient transfer does not rebut a § 4 presumption as to *all* conduct involving marijuana. If such conduct produced a blanket § 4 rebuttal, then *McQueen* would have held that § 4 immunity is *lost* if a patient to patient transfer occurs.

In this case, it is undisputable that appellant is his own patient and that he is also

the caregiver for Mr. Batke and Mr. Colon.[34] Thus, he was entitled to possess 7.5 ounces (212.6 grams) of useable marijuana and 36 plants and appellant had less than that amount.

The prosecution would like to shape the MMMA so that appellant's patient to patient transfers (counts I –III) taints any and all of appellant's marijuana activity. This broad stroke of taint being painted by the prosecution is contrary to the intent of the MMMA and not supported by the plain language of *McQueen.* In order to agree with the prosecution, the court must overlook the following facts:

A. Appellant was entitled to have 12 plants and 2.5 ounces of marijuana for himself.
B. Appellant was entitled to have another 12 plants and 2.5 ounces of marijuana for Mr. Batke.
C. Appellant was entitled to have another 12 plants and 2.5 ounces of marijuana for Mr. Colon.
D. Appellant's marijuana plants were in various stages of development suggesting that he wasn't trying to grow one big cash crop, but was trying to keep a steady supply of a much small quantity to meet the needs of himself and his patients.
E. Appellant in counts I-III wasn't delivering marijuana to an individual for illegal purposes. He was under the impression that he was helping out a fellow registered patient who was in need of the medicine.

None of appellant's conduct suggests that he was ever engaged in marijuana-related conduct that was not to alleviate a qualifying patient's debilitating medical condition. Thus, the prosecution has not established evidence that would rebut the presumption set forth in Section 4(d) with respect to Counts IV - VII. Clearly under *McQueen*, appellant is not entitled to immunity for Counts I-III; however, he is entitled to immunity for the remaining counts.

[34] See certified records of Mr. Tuttle, Batke, and Colon and the summary of the same appended as 128a-228a.

II. A Defendant's Possession Of A Valid Registry Identification Card Establishes Presumptions For Purposes Of § 4 And § 8 Of The MMMA?

A. § 4 Of The MMMA

A valid registry identification card is an essential part of the broad immunity afforded patients and caregivers under § 4 of the MMMA. Possession of a valid card gives rise to the presumption that a patient or caregiver is engaged in the medicinal use of marijuana in accordance with the MMMA so long as the volume requirements set forth in § 4(b) of the MMMA are adhered to:

4(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. 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.

Appellant asserts that a valid registry identification card also gives rise to multiple presumptions under § 8 of the MMMA.

B. § 8 Of The MMMA

At the August 20, 2012 §8 evidentiary hearing, the trial court determined that the appellant did not meet his burden with respect to § 8(a)(1) and 8(a)(2) of the MMMA, but that he did meet his burden with respect to § 8(a)(3).[35] On appeal, the Court of Appeals affirmed the trial court's decision with respect to § 8(a)(1) and § 8(a)(2) but reversed the trial court's determination that appellant satisfied § 8(a)(3). Appellant contends that the

[35] See the portion of the transcript from the August 20, 2012 evidentiary hearing appended as 99a-105a.

trial court erred in applying the facts to the law with respect to § 8(a)(1) and § 8(a)(2) and that the Court of Appeals erred in affirming the same and further erred with respect to its interpretation of § 8(a)(3). In support of his position, appellant relies upon the presumptions that arise through the possession of a valid registry identification card.

Numerous presumptions arise when a defendant possesses a valid registry identification card. At a minimum, by possessing a valid card a defendant establishes *prima facie* evidence of compliance with § 8(a)(1) and 8(a)(3) of the MMMA. Specifically, the presumptions that arise from possessing a valid registry card are as follows:

1. A doctor has completed a full assessment of the patient's medical history.
2. A doctor has conducted an in-person medical evaluation of the patient.
3. A doctor has observed a debilitating medical condition.
4. A doctor has concluded that the patient is likely to benefit from the medical use of marijuana.
5. A bona-fide physician-patient relationship did exist at the time of certification.
6. A patient and his/her caregiver were engaged in marijuana activity for medicinal purposes.

Additionally, as to the requirements set forth in § 8(a)(2) of the MMMA, the appellant asserts that compliance with the volume limits set forth in § 4(b) of the MMMA is *prima facie* evidence of compliance with § 8(a)(2). Accordingly, a defendant should be able to submit a § 8 defense to a jury if the patient or caregiver possessed a valid registry card and the amount of marijuana in question was not greater than the volume limits set forth in § 4(b) of the MMMA. In support of this position, appellant states the following.

§ 8 of the MMMA provides an affirmative defense for the possession and/or distribution of marijuana for medical purposes. § 8 of the Act states:

> *(a) Except as provided in section 7, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:*
>
> *(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;*
>
> *(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; and*
>
> *(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.*
>
> *(b) A person may assert the medical purpose for using marihuana 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).*

People v. Kolanek, 491 Mich. 382, 817 N.W.2d 528 (2012) set forth specific guidelines with respect to § 8 of the Act:

> *7. A defendant is entitled to the dismissal of criminal charges under § 8 if, at the evidentiary hearing, the defendant establishes all the elements of the § 8 affirmative defense, which are (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, " (2) the*

defendant did not possess an amount of marijuana that was more than "reasonably necessary for this purpose, " and (3) the defendant's use was "to treat or alleviate the patient's serious or debilitating medical condition or symptoms . . . ." As long as a defendant can establish these elements, no question of fact exists regarding these elements, and none of the circumstances in § 7(b), MCL 333.26427(b), exists, then the defendant is entitled to dismissal of the criminal charges.

8. With regard to the physician's statement required by § 8(a)(1), the defendant must have obtained the physician's statement after enactment of the MMMA, but before the commission of the offense.

9. If a defendant moves for dismissal of criminal charges under § 8 and at the evidentiary hearing establishes prima facie evidence of all the elements of the § 8 affirmative defense, but material questions of fact exist, then dismissal of the charges is not appropriate and the defense must be submitted to the jury.

10. If a defendant moves for dismissal of criminal charges under § 8 and at the evidentiary hearing fails to present evidence from which a reasonable jury could conclude that the defendant satisfied the elements of the § 8 affirmative defense, and there are no questions of fact, then the circuit court must deny the motion to dismiss the charges. In this instance, the defendant is not permitted to present the § 8 defense to the jury. Rather, the defendant's remedy is to apply for interlocutory leave to appeal.

i. § 8(a)(1).

A Valid Registration Card Satisfies A Caregiver's Requirement With Respect to § 8(a)(1) Of The MMMA.

In this case, the Court of Appeals determined that possession of a registry identification card satisfies some of the requirements of § 8(a)(1) but not all. Specifically, the Court of Appeals determined that a registry identification card does not establish a bona fide physician-patient relationship:

The MMMA mandates that the department cannot issue a registry identification card to a patient and/or caregiver applicant unless it verifies the information submitted in the patient and/or caregiver's written certification. As such, possession of a registry identification card, if valid, satisfies some of the requirements of § 8(a)(1)'s affirmative defense. Further, if the department actually followed its statutory obligations and conducted an investigation, the card would serve as evidence that a physician did the following: (1) stated he completed a full assessment of the patient's medical history; (2) conducted an in-person medical evaluation; (3) observed a debilitating medical

condition; and (4) concluded that the patient is likely to benefit from the medical use of marijuana. However, the physician's written certification is not evidence of the existence of the bona-fide physician patient relationship, which is required for the § 8(a)(1) affirmative defense.[36]

Appellant contends that a validly issued MMMA registration card is sufficient evidence of a bona fide physician-patient relationship because a registration card should not be issued without the existence of the same. A physician by signing a certification is attesting to the bona fide relationship. Specifically, a registration card will not be issued without a doctor's certification in accordance with § 6(a)(1). The MMMA places the burden on the physicians to only issue certifications during the course of a bona fide physician-patient relationship. Otherwise, the doctor is not protected by the MMMA and could be subject to arrest and prosecution:

4(f) A physician 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 the Michigan board of medicine, the Michigan board of osteopathic medicine and surgery, or any other business or occupational or professional licensing board or bureau, solely for providing written certifications, in the course of a bona fide physician-patient relationship and after the physician has completed a full assessment of the qualifying patient's medical history, or for otherwise stating that, in the physician's professional opinion, a 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 associated with the serious or debilitating medical condition, provided that nothing shall prevent a professional licensing board from sanctioning a physician for failing to properly evaluate a patient's medical condition or otherwise violating the standard of care for evaluating medical conditions.

Thus, a reasonable caregiver would assume that a doctor is only certifying his bona fide patients and should not have to delve into the specifics of the physician-patient relationship. It is reasonable for a caregiver to assume that a physician is following the MMMA when he or she certifies a patient under the MMMA. After all, we don't hold a pharmacist responsible if a doctor is unnecessarily prescribing a patient vicodin. We

[36] See the portion of the Court of Appeals Opinion appended as 121a, par.2.

don't hold a pharmacist responsible if a doctor calls in a prescription for his friend who has never actually been the doctor's patient. Yet, the Court of Appeals believes that the MMMA holds a caregiver responsible.

As this transfer of liability is uncommon at best, Michigan voters would never have intended such a burden to fall upon a caregiver. In fact, appellant contends that a reasonable voter would never even consider transferred liability as an option. Since a caregiver is not required to be a doctor, a reasonable voter would never have expected the MMMA to hold a caregiver responsible for a physician's misconduct.

The appellant agrees with the Court of Appeals that the MMMA's essential mandate is for marijuana to only be used for medical purposes.[37] Accordingly, the burden of ensuring a bona fide relationship rightfully falls upon the medical community and not upon a caregiver. A doctor and not a caregiver is rightfully the gatekeeper as to whether or not a patient will benefit from marijuana. To become a doctor, a person is required to go through an extensive, costly, and difficult medical education process. Conversely, the only requirement to be a caregiver is that a person is at least 21 years old and doesn't have certain felonies on his record.[38] Clearly, the Michigan voters did not contemplate caregivers having any medical background. If they did, there certainly would be more requirements to become a caregiver than not having certain felony convictions.

Undoubtedly, someone is going to abuse the essential mandate of the MMMA and utilize marijuana for recreational purposes. This is as certain as people abusing the

[37] See the portion of the Court of Appeals Opinion appended as 119a par. 1.
[38] MMMA §3 (h).

Controlled Substances Act (CSA)[39] by asking their doctors for unnecessary or excessive narcotic prescriptions because of an addiction. In either case, the doctors are the gatekeepers. If the MMMA is being abused by recreational marijuana users and distributors, it is the doctors who are at fault by not thoroughly doing their job. It is also the doctors who can resolve the problem by not certifying questionable patients.

Nowhere in the MMMA is it contemplated that a caregiver must interfere with the physician-patient relationship and make a determination that a doctor isn't doing his job. Such interference reeks of HIPPA violations[40]. Accordingly, a caregiver should be able to rely upon a registry card as the card requires a doctor's certification. To be protected by the MMMA, a doctor can only give a certification to his bona fide patients. As appellant, his patients, and even Mr. Lalonde all had valid medical marijuana cards, appellant should be found in compliance with § 8(a)(1) of the MMMA.

ii. § 8(a)(1) And The Facts Of This Case

Alternatively, If The Court Determines That A Registry Card Alone Is Not Enough, Said Card Together With A Proper Certification Should Satisfy The Requirements Of § 8(a)(1) Of The MMMA.

If under the MMMA, a caregiver cannot rely on a doctor to only certify his bona fide patients; if under the MMMA, the voters of this State intended such responsibility to fall upon a caregiver, than appellant asserts that he nevertheless meets this stringent requirement.

As this case arose prior to the MMMA specifically defining a bona fide relationship, the Court of Appeals cited the dictionary definition of bona fide as well as a

[39] See 21 USC 801 *et seq.*
[40] See The Health Insurance Portability and Accountability Act of 1996 (HIPAA; Pub.L. 104–191, 110 Stat. 1936, enacted August 21, 1996).

joint statement issued by the Michigan Board of Medicine and Board of Osteopathic Medicine and Surgery. After reviewing the same, the Court of Appeals held that a bona fide relationship is pre-existing and ongoing.[41] Then the Court of Appeals determined that appellant's patients did not have a bona fide relationship with their doctors. However, the certification in this matter indicates to the contrary.

Appellant contends that evidence of a bona-fide physician-patient relationship is present in his patients' certifications; and therefore, he has satisfied the requirements of § 8(a)(1). His patient's certifications would lead a reasonable juror to believe that the relationships were pre-existing and ongoing. In particular, the certifications set forth the following:

1. A doctor evaluated the patient.
2. Reviewed his medical records and history.
3. Reviewed objective test results from medical facilities and specialists.
4. Determined that he had a qualifying diagnosis for medical marijuana.
5. Gave a professional medical opinion that he may benefit from marijuana.
6. Agreed to continue to monitor his medical conditions and to provide advice on his progress.
7. Advised him on safe and prudent use of medicinal marijuana.[42]

This certification establishes a pre-existing relationship as the review, evaluation, and determination were all made prior to the issuance of the marijuana registration card. Moreover, the doctors agreed to continue to monitor appellant's patients and advise on safe and prudent use of marijuana. This shows their intent to continue an ongoing physician-patient relationship. No further evidence should be required for appellant to satisfy § 8(a)(1).

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[41] See the portion of the Court of Appeals Opinion appended as 122a par. 2.
[42] The appellant concedes that all the certifications are similar to the one that was reviewed by the trial court.

With respect to appellant himself, his doctor's certification goes even further. Not only does it state everything mentioned above, it also certifies that his doctor, "has responsibility for the care and treatment" of the appellant.[43] This additional "care and treatment" language further shows the legitimacy of the physician-patient relationship in this case. As to Mr. Lalonde, the appellant contends that if his possession of a registration card is not enough, that the prosecution's failure to established a sufficient nexus between Counts I-III and Count IV-VII should preclude him from consideration under the § 8(a)(1) affirmative defense at least as to Counts IV-VII.

As additional evidence that appellant and his patients' relationship with their doctors satisfies the requirements of § 8(a)(1), the appellant relies upon the Michigan Board of Medicine and Board of Osteopathic Medicine and Surgery's adoption of a statement to clarify the standard of care applicable to the evaluation of an individual for medical marijuana. The boards have concluded that:

> *Generally accepted components of a full medical evaluation to determine suitability and appropriateness for recommending treatment of any kind, including certification for medical marihuana, include:*
>
> - *a hands-on physician patient encounter*
> - *full assessment and recording of patient's medical history*
> - *relevant physical examination*
> - *review of prior records of relevant examinations, treatments and treatment response including substance abuse history*
> - *receipt and review of relevant diagnostic test results*
> - *discussion of advantages, disadvantages, alternatives, potential adverse effects and expected response to treatment*
> - *development of plan of care with state goals of therapy monitoring of the response to treatment and possible adverse effects*
> - *creation and maintenance of patient records documenting the information above*
> - *communication with patient's primary care physician when applicable.*[44]

[43] See physician certification for Robert Tuttle appended as 129a.
[44] Appended as 243a-246a.

The certifications in this case are substantially similar to the statement made by the State's medical boards. As such, at a minimum, there is *prima facie* evidence for a jury to review in accordance with § 8(a)(1).

This issue of a bona fide physician-patient relationship with respect to § 8 was also addressed by the Court of Appeals in *People v. Redden,* 290 Mich.App. 65; 799 N.W.2d 184 (2010). In *Redden*, a question of fact existed with respect to a bona fide physician-patient relationship. However, this case is distinguishable from *Redden.* First, the physician in *Redden* apparently didn't have an actual medical practice in this State and was limiting the practice that he did have to exclusively certifying medical marijuana patients. Second, the *Redden* court determined that the facts of that case at least raised an inference that the patient saw the doctor to obtain marijuana under false pretenses, *id.* at 196. Conversely, in this case the trial court determined that appellant's patients were seeking medical marijuana for legitimate purposes. In fact, the lower court found the testimony of the patients to be credible and determined that appellant met his burden with respect to § 8(a)(3).[45] This determination by the trial court distinguishes this case from *Redden.*

Finally, logic dictates that a bona-fide physician-patient relationship exists when you meet a doctor at her office and she reviews your medical records. She then assesses your current condition and makes a diagnosis, and agrees to continue to monitor your condition. Such is exactly what Dr. Joanne Wesley attested to doing in her certification for Mr. Batke. Such is exactly what the other certification stated on behalf of Mr. Colon. Further, the appellant's doctor even states that he is responsible for appellant's "care and

[45] See the portion of the transcript from the August 20, 2012 evidentiary hearing that is appended as 104a-105a.

treatment."[46] Accordingly, a bona fide physician-patient relationship exists in this case and the requirements of § 8(a)(1) are satisfied.

iii. § 8(a)(2).

§ 4 Volume Limitations Should Be Considered As Evidence Of Compliance With The Requirements Set Forth In § 8(a)(2) Of The MMMA.

§ 8(a)(2) requires that:

> *(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...*

Appellant contends that the volume limits set forth in §4(b) of the MMMA should be given substantial weight in satisfying the requirements of § 8(a)(2). This argument was adamantly rebuffed by the Court of Appeals. The Court of Appeals relying on *Redden, id* at 87 held that:

> *Indeed, if the intent of the statute were to have the amount in § 4 apply to § 8, the § 4 amount would have been reinserted in § 8(a)(2), instead of the language concerning an amount 'reasonably necessary to ensure ... uninterrupted availability...'*

However, appellant's argument is distinguishable from the holding in *Redden*. Appellant isn't arguing that the volume limits in § 4 should be reinserted into § 8(a)(2). Appellant is arguing that since volume limits are included in the MMMA, compliance with such limits should be *prima facie* evidence of compliance with § 8(a)(2). Appellant believes that a thorough reading of the entire statute supports his position; and therefore, that the intent of the electorate was that the volume limits in § 4 are relevant to § 8(a)(2). This

[46] See physician certification for Robert Tuttle appended as 129a.

position is consistent with *Kolanek, id.* In *Kolanek,* this Court held that the requirements of § 4 need not be established prior to raising a § 8 affirmative defense; and it did determine that these two sections address different legal standards. Yet, *Kolanek* in refuting the prosecutor's argument did point out that the requirements of § 4 are actually stricter than § 8:

> *We also reject the argument that § 8 must incorporate § 4 because otherwise unregistered patients could possess more than 2.5 ounces of usable marijuana and keep more than 12 marijuana plants outside an enclosed locked facility while registered users cannot do so in an enclosed locked facility. The prosecution asserts that this result affords unregistered patients more protection under the MMMA than registered patients. This assertion is false and premised on a basic misunderstanding of how the differing protections of § 4 and § 8 operate. 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. If registered patients choose not to abide by the* ***stricter requirements of § 4****, they will not be able to claim this broad immunity, but will be forced to assert the affirmative defense under § 8, just like unregistered patients.*[44] *In that instance, registered patients will be entitled to the same lower level of protection provided to unregistered patients under § 8. This result is not absurd, but is the consequence of the incentives created by the wider protections of § 4. Id. at 402-403. (Emphasis added).*

As the requirements of § 4 are actually stricter than §8, the volume limits in § 4 should bear on the reasonableness of the amount of marijuana possessed in a § 8(a)(2) inquiry. It is undisputable that a patient may be entitled to protection under § 8 even if he possesses more marijuana than allowed in § 4. Yet, what if he possesses less? Appellant contends that if he possesses less than the strict requirements set forth in § 4, that such fact is *prima facie* evidence of compliance with § 8(a)(2). The Court of Appeals' determination that this fact can be given no weight whatsoever is contrary to the plain language in the statute and is too narrow an interpretation of *Kolanek.*

In fact, referring to the amount of marijuana set forth in § 4(b) as "§ 4 volume limits" is a bit of a misnomer. Such reference infers that the volume limits written into § 4(b) is limited exclusively to § 4 of the MMMA. However, a literal reading of § 4(d) shows that those volume limits actually apply to the entire MMMA. Specifically, § 4(d)(2) states that a patient/caregiver is presumed to be engaged in the medical use of marijuana if said person, "(2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act." (Emphasis added). Accordingly, the § 4 volume limits refer to the amount of marijuana that you are allowed to possess under the entire act—not just under § 4 of the act. If the volume limits in §4 were to be wholly removed from § 8 then the statute would not refer to the amount listed in §4(b) as the, "amount allowed under the act". It would refer to it as the amount allowed under § 4 of the act—or the amount allowed under this section. As such, the plain meaning of the statute supports appellant's position. § 8 is not a separate act, it is part of the MMMA. Thus, the amount of marijuana allowed under the act is relevant to more than just § 4. It is relevant to § 8 as well. These two sections, although different, are not intended to be viewed in separate bubbles. As this Court recognized in *Kolanek*, § 4 is stricter than § 8. However, § 4 affords broad immunity. The standards are different, yet they share a commonality of purpose—to provide protection for the medical use of marijuana. Courts would be ignoring the clear and unambiguous language of the statute if the volume limits under the act were not even considered at a § 8 hearing.

iv. § 8(a)(2) and Appellant's Case

The Totality Of The Evidence Submitted At Appellant's § 8 hearing Satisfies The Requirements Of § 8(a)(2) Of The MMMA?

In the case at hand, appellant has set forth other factors that when taken in conjunction with § 4 volume limits should satisfy his § 8(a)(2) burden—or at least be enough evidence that a reasonable jury could infer compliance. Specifically, there were only 38 grams of useable marijuana and 33 plants confiscated in the raid of appellant's home. Said amount is well below the volume limits in § 4. Moreover, the 33 plants were ranging in size from a few inches to a few feet, and were in various stages of development and could not all be harvested at one time. This is not disputed.[47] As such, there is no evidence that the appellant was intending to harvest a substantial amount of marijuana at one time. Thus, the lower court's determination that, *"the 33 plants certainly could be viewed to be significantly beyond the required quantity for the patient's – for the purpose of treating or alleviating the patient's serious or debilitating medical condition"* overlooks the fact that the plants were in various stages of growth.[48] Many plants were only a few inches tall and none were even being harvested. Based on the number of plants, their various stages of development, the minimal amount of useable marijuana, and the fact that no marijuana was even being dried at the time of the search, the overwhelming evidence in this case establishes that the appellant did not possess any more marijuana than was reasonably necessary to ensure the uninterrupted availability for himself and his patients. In fact, appellant likely had less usable marijuana than he should for himself and 2 patients, as 38 grams is substantially less than the limit for one patient under § 4.

[47] See the portion of the transcript from the August 20, 2012 evidentiary hearing that is appended as p. 40a, ln. 8-15.
[48] See the portion of the transcript from the August 20, 2012 evidentiary hearing that is appended as p. 104a, ln. 11-14.

The Court of Appeals determined that the appellant had too much marijuana as he made a patient to patient transfer with Mr. Lalonde. Yet, this opinion is based on an assumption that appellant was using his and his patient's marijuana to supply Mr. Lalonde. As state above, there is no evidence in this case that appellant utilized his and his patient's marijuana for Mr. Lalonde—just as there is no evidence that appellant obtained the marijuana for Mr. Lalonde from a dispensary. As an insufficient nexus exists between appellant's conduct with Mr. Lalonde and the marijuana at his house, the patient to patient transfers in this case should not bar appellant's § 8 affirmative defense.

Finally, the Court of Appeals determined that in order to satisfy the requirements of §8(a)(2) a caregiver must know, "how much marijuana is necessary to treat their [patients'] debilitating medical conditions."[49] This ruling will place a burden on caregivers that is in excess of that placed on a trained and licensed pharmacist. Caregivers will either have to obtain medical degrees and board certifications to be qualified to determine exact dosages, or they will have to continuously consult their patient's doctor before transferring any of the marijuana to a patient in need. To place this burden on an individual that is not required to have any medical training whatsoever is contrary to what Michigan voters would have expected.

Additionally, if a caregiver decides to educate himself so that he can determine a patient's dosage, he would likely be committing a felony for unauthorized practice of medicine.[50] If a caregiver decides to consult his patient's doctor prior to any distribution, he would be interfering with the physician-patient relationship; and from a practical standpoint, he would unlikely be able to timely reach a physician. Thus, a patient in need

[49] See the portion of the Opinion of the Court of Appeals appended as p. 124a, par. 1-2.
[50] See MCL 333.16294

of medicine would have to be turned away. Either way, such a result is contrary to the plain meaning of the MMMA and would never have been contemplated by the electorate.

Accordingly, appellant asserts that a § 8(a)(2) inquiry should consider the volume limits set forth in § 4(b). If over said limit, the inquiry should consider the amount of marijuana that the patients are using and compare that testimony with the amount of useable marijuana that the caregiver is possessing.

Appellant's approach is supported by the language of the MMMA which does not require caregivers to hold doctorate degrees—or a GED for that matter. Holding caregivers to a higher standard was not the intent of the electorate. Accordingly, appellant is in compliance with § 8(a)(2) as he had:

1. A very small amount of usable marijuana that was less than his patients' actually used on a regular basis.
2. Plants that were growing at various stages demonstrating his intent to keep a limited, continuous amount of marijuana available.
3. Less than the volume limits set forth is 4(b).
4. Not used the marijuana at his home for a patient to patient transfer, according to the evidence presented in this case.

iv. Section 8(a)(3).

The Trial Court And The Court Of Appeals Erred In Determining That Possession Of A State Issued MMMA Registry Card Does Not On Its Own Satisfy The Requirements Of Section 8(a)(3)

§ 8(a)(3) requires that:

> *(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. (Emphasis added).*

The language of § 8(a)(3) suggests that this prong is satisfied if the caregiver and/or patient is involved in the use of marijuana for medicinal purposes. As the language is clear, such is how the electorate would have understood it to mean.

After appellant's § 8 hearing, the trial court determined that he satisfied § 8(a)(3) as his patients were legitimately using the marijuana in question medicinally. However, the Court of Appeals overturned the trial court and held that, "Any analysis of § 8(a)(3) needs to incorporate every patient possibly using the marijuana at issue".[51] The Court of Appeals then determined that since the appellant did not testify he did not satisfy the requirements of § 8(a)(3). Finally, the Court determined, "that mere possession of a registry card is insufficient evidence for the purposes of § 8(a)(3)"[52] because the registry card, "does not indicate that any marijuana possessed or manufactured by an individual is *actually* being used to treat or alleviate a debilitating medical condition or its symptoms."[53] (Emphasis added by Court of Appeals).

Contrary to this holding, the appellant contends that possession of a registry card is sufficient evidence that marijuana is intended for medicinal use. This position is supported by an unpublished opinion of the Court of Appeals. In *People v. Kiel* (unpublished opinion No. 301427 Court of Appeals of Michigan, July 17, 2012).[54] In *Kiel*, the Court of Appeals determined that the possession of a registration card establishes *prima facie* evidence with respect to Sections 8(a)(1) and 8(a)(3) of the MMMA.[55] The ruling that registry card possession at least establishes *prima facie* evidence rings true with the intent of the MMMA, the language of § 8(a)(3), and thus,

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[51] See the portion of the Court of Appeals Opinion appended as p. 124a, par.4.
[52] See the portion of the Court of Appeals Opinion appended as p. 125a, par. 4.
[53] See the portion of the Court of Appeals Opinion appended as p. 125a, par.1.
[54] The unpublished opinion is appended as 247a-251a.
[55] See p. 250a, last paragraph.

the intent of the electorate. The language in § 8(a)(3) doesn't require that the marijuana was "actually" used medicinally as the Court of Appeals has determined. It requires that the caregiver and the patient were "engaged" in possession, use, cultivation, etc. of marijuana for medicinal purposes. The word "engaged" does not mean "actually". According to Merriam-Webster.com.[56] Engaged is defined as:

> *1*
> *: involved in activity : occupied, busy*
> *2*
> *: pledged to be married : betrothed*
> *3*
> *: greatly interested : committed*
> *4*
> *: involved especially in a hostile encounter*
> *5*
> *: partly embedded in a wall <an* engaged *column>*
> *6*
> *: being in gear : meshed*

Conversely, Actually means:

> *—used to refer to what is true or real*
>
> *—used to stress that a statement is true especially when it differs in some way from what might have been thought or expected* .[57]

The language of § 8(a)(3) states that patients and caregivers must be ***engaged*** in the use of marijuana for medicinal purposes. The Court of Appeals ruling changes this language to make § 8(a)(3) a strict liability affirmative defense.[58] By simply engaging in an activity, a person is not absolutely certain to accomplish their goal. For example, a

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[56] "Engaged." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 20 Mar. 2014. <http://www.merriam-webster.com/dictionary/engaged>

[57] "Actually." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 20 Mar. 2014. <http://www.merriam-webster.com/dictionary/actually>

[58] It is noteworthy that the Court of Appeals has labeled the portion of its opinion that interprets § 8(a)(3) as: ACTUAL MEDICAL USE OF MARIJUANA.

scrivener may be engaged in an effort to write an interesting brief, yet he might actually bore his readers to death. The Court of Appeals' ruling that requires any and all marijuana to actually be used medicinally in order to satisfy § 8(a)(3) is in error. § 8(a)(3) only requires the parties to be engaged in medicinal marijuana. Thus, the possession of a registry card is at a minimum *prima facie* evidence that the person registered with the state is engaged in medicinal marijuana.

Moreover, the requirement that, "every patient possibly using the marijuana"[59] testify under oath is contrary to the plain language of the statute. § 8(a)(3) does no more than require the person asserting this defense to be engage in the medical use of marijuana. Again, it does not require a caregiver to be strictly liable if one marijuana leaf is not actually used medicinally. Therefore, appellant has complied with § 8(a)(3) as he was clearly engaged in the medical use of marijuana as testified to by his patients.

Finally, if Court of Appeals is correct that a § 8(a)(3) analysis must include appellant, his patients and Mr. Lalonde, the appellant nonetheless satisfies this requirement. Appellant's patients both testified and the trial court found them to be credible. The Court of Appeals noted that Mr. Lalonde testified that he suffered from a chronic pain for which he used marijuana to treat.[60] Thus, Mr. Lalonde testified that he was engaged in medicinal marijuana. In addition to this testimony, the appellant submitted certified copies of all of his medical marijuana documentation that were on file with the state of Michigan.[61] Such certified documentation is prima facie evidence that

[59] See the portion of the Court of Appeals Opinion appended as 124a, par.4.
[60] See the portion of the Court of Appeals Opinion appended as 125a at top.
[61] See the certified records for Mr. Tuttle, Batke, and Colon and the summary of the same appended as 128a-228a.

the appellant was engaged in the possession and cultivation of marijuana for medicinal purposes. Thus, appellant has satisfied the requirements set forth in § 8(a)(3).

III. If Possession Of A Valid Registry Identification Card Does Not Establish Any Presumptions For Purposes of § 4 Or §8 Of The MMMA, What Is A Defendant's Evidentiary Burden To Establish Immunity Under § 4 Or An Affirmative Defense Under § 8?

A. Evidentiary Burden If No § 4 Presumptions.

Under § 4, there is a presumption that a patient or caregiver who possesses a valid registry identification card is engaged in the medicinal use of marijuana in accordance with the MMMA so long as the volume requirements set forth in § 4(b) of the MMMA are adhered to:

4(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. 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.

If no presumption existed, a defendant would have to additionally establish that he or she is engaged in the medical use of marihuana in accordance with the MMMA. Thus, possessing a valid card under § 4 (and complying with volume limits) entitles a patient or caregiver to broad immunity.

B. Evidentiary Burden If No § 8 Presumptions.

If the possession of a valid registry identification card does not establish any presumptions under § 8, a defendant must establish that the following occurred prior to the conduct giving rise to the criminal charge but subsequent to the enactment of the MMMA:

§ 8(a)(1) requirements:

> (1) A doctor has completed a full assessment of the patient's medical history. (2).A doctor has conducted an in-person medical evaluation of the patient. (3) A doctor has observed a debilitating medical condition. (4) A doctor has concluded that the patient is likely to benefit from the medical use of marijuana. (5) A bona-fide physician-patient relationship did exist at the time of certification.

Additionally, it must be established in accordance with § 8(a)(2) that the patient and caregiver, if applicable:

> (1) 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 medicinal purposes. And, (2) were engaged in marijuana activity for medicinal purposes as required in § 8(a)(3).

In accordance with *Kolanek*, *Id.* at 415, a defendant must file a motion and conduct an evidentiary hearing in order to assert a § 8 affirmative defense. If a defendant establishes the above, and no questions of fact exist, the charge must be dismissed. If *prima facie* evidence is established at the evidentiary hearing but questions of fact exist, the defense is submitted to a jury. If no *prima facie* case is established, the motion fails.

The Court of Appeals determined that in order to satisfy the above-mentioned requirements:

1) A doctor must, "continuously review the patient's condition, and revise the

marijuana prescription accordingly."[62] 2) A caregiver must obtain, "information that details, as any pharmaceutical prescription would, how much marijuana the patient is suppose to use, and how long that use is suppose to continue.[63] Every patient who possibly would have used the marijuana must testify (or provide adequate evidence in some other manner) at the evidentiary hearing.[64]

Appellant respectfully disagrees with the Court of Appeals' analysis. First, § 3(m) § 4(f) and §6(a)(1) of the MMMA support appellant's position that a doctor does not prescribe marijuana to a patient. In fact, it is illegal for a doctor to prescribe marijuana as it is federally classified as a Schedule I narcotic.[65] Thus, a physician who prescribes a patient marijuana or other Schedule I drugs may be stripped of his or her federal license to prescribe drugs and be prosecuted.[66] Conversely, in accordance with *Conant v. Walters*, 309 F.3d 629 (9th Cir October 29, 2002) a physician may discuss and recommend marijuana to their patients without fear of federal prosecution. Such is the basis of the doctor's role in the MMMA under § 4(f).

Practically speaking, physicians do not prescribe marijuana because there are no legal supply sources from which a patient may obtain the drug. Thus, a patient must personally grow it or utilize the services of a caregiver. The Court of Appeals' opinion requiring doctors to continuously review a patient's condition and revise the marijuana prescription is not supported by the MMMA. Under the act, a doctor certifies a patient every two years, and the doctor may notify the State if they determine that their patient

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[62] See the portion of the Court of Appeals Opinion appended as 119a.
[63] See the portion of the Court of Appeals Opinion appended as 115a and 119a.
[64] See the portion of the Court of Appeals Opinion appended as 124a.
[65] See http://www.justice.gov/dea/druginfo/ds.shtml showing marijuana as a Schedule 1 narcotic.
[66] The following link to a June 6, 2014 article in the Boston Globe demonstrates how doctor's risk losing their DEA license to prescribe narcotics if they do more than simply certify a patient:
http://www.bostonglobe.com/metro/2014/06/05/drug-enforcement-administration-targets-doctors-associated-with-medical-marijuana-dispensaries-physicians-say/PHsP0zRlaxXwnDazsohIOL/story.html

no longer needs marijuana.[67]

With respect to caregivers, the MMMA does not require a caregiver to act like a licensed pharmacist and fill a prescription for a marijuana patient. The determination by the Court of Appeals that a caregiver must grow and maintain marijuana similarly to how a pharmacist distributes a drug is not only unreasonable but also impossible. Marijuana does not grow overnight. It takes time to cultivate and harvest a marijuana plant. Moreover a caregiver cannot place an order for marijuana with a pharmaceutical company if a doctor determines that a patient requires a greater dosage. The practical hurdles that exist for the distribution of medical marijuana make the Court of Appeals requirements unworkable. In fact, the Court of Appeals' requirements will render § 8 nugatory. Physicians won't become so intimately involved with marijuana as they will risk loss of DEA licensing, and caregivers simply aren't qualified to become so involved. Accordingly, the MMMA has put specific volume limits right into the statute. As stated above, those limits are not exclusively for § 4 cases. The plain language of the MMMA shows that the volume limits are relevant to the entire act. With respect to § 8, the volume limits may be increased—above the amount otherwise allowed under the act, if a medicinal purpose is established in accordance with § 8(a) and *Kolanek, Id.* The volume limits set forth a baseline for a reasonable amount of marijuana under § 4 and § 8.

As to the Court of Appeals' requirement that each and every patient must testify at a § 8 evidentiary hearing, said requirement is excessive and most likely impossible to achieve. Patients may be unable or unwilling to come to court even if subpoenaed. For example, extremely sick or dying individuals may not physically have the strength or will to go to Court. Others may not show for fear of arrest or reprisal as marijuana is

[67] See § 6(e) and §6(f) respectively.

federally illegal. Appellant asserts that possession of a valid registry card naming a caregiver creates a presumption of medicinal use. However, even if no presumption exists, all that must be established is that the caregiver and patient were engaged in marijuana activity for medicinal purposes. The doctor's certification filed with the patient's registry card application is evidence of medicinal intent. After all, people generally go to doctors for medicinal purposes. In this situation, a doctor may certify a patient for medicinal marijuana. Then the person names a caregiver to grow the marijuana. Taking these steps is certainly evidence of a medicinal intent.

Moreover, a caregiver's actions that substantially comply with the requirements set forth in the MMMA are further evidence of a medicinal intent. If a caregiver has the plants locked in an enclosed facility and has no more marijuana for a patient than the MMMA authorizes, such conduct is evidence of medicinal intent. The fact that a caregiver actually distributes marijuana to a patient is further evidence of medicinal intent. Therefore, the requirement that each and every patient testify at an evidentiary hearing is excessive, likely impossible, and not supported by the plain language of the MMMA. This standard should not be adopted.

IV. What Role, If Any, Do The Verification And Confidentiality Provisions In § 6 Of The Act Play In Establishing Entitlement To Immunity Under § 4 Or An Affirmative Defense Under § 8?

§ 6 sets forth the prerequisites for the issuance of a valid registry card by the Department of Licensing and Regulatory Affairs (Department). A patient will not receive a registry card unless the requirements of § 6 are verified by the Department. The § 6(a)(1) requirement mandates that a doctor certify a patient before a registry card is

issued. Moreover, a doctor may only certify a patient with whom he or she has a bona fide relationship.[68] Therefore, by issuing a registry card, the Department has verified that a bona fide physician-patient relationship exists at the time of certification. The Court of Appeals' determination that verification under § 6 does not establish a bona fide relationship is contrary to the requirements of § 6 and the administrative rules promulgated to implement the MMMA.

In accordance with § 5(b) of the MMMA, the Department has promulgated procedural rules for the approval of registry cards.[69] Rule 3 mandates that applications must be submitted with a written certification as defined in R 333.101(22), signed by a licensed physician.[70] In accordance with Rule 7, the application, "shall be denied" if all of the requirements of Rule 3 are not submitted.[71] Therefore, the Department is not to issue a registry card unless it has verified the written certification. In fact, Rule 9 requires the Department to verify the application and authorizes the Department to verify that the physician is licensed in the State of Michigan and to directly contact the physician to confirm the validity of the written certification.

Additionally, the Department is obligated to notify a patient that his or her registry card is null and void upon doctor notification that the condition no longer exists in accordance with Rule 19. The Department is obligated to notify a patient or caregiver of revocation of his or her status and a right to a contested hearing under Rule 25(4)(b).

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[68] See §4(f). A doctor risks committing a crime if he or she certifies someone without a bona fide relationship.

[69] The rules are appended as 252a - 262a.

[70] Rule 333.101(22) requires that the certification specifically state the patient's debilitating condition. Additionally, a doctor must complete a full assessment of a patients medical history and current medical condition including an in-person medical evaluation. Finally, the doctor must state that in his or her opinion the patient's condition will medically benefit from the use of marijuana.

[71] Rule 13(4)(a) specifically states that the application must be denied if there is no physician's written certification.

Moreover, the Department has a panel made up mostly of doctors to add medical conditions or treatments to the list of debilitating medical conditions as set forth in Rule 31. And, in accordance with Rule 33, anyone can petition the Department to add a new named condition. If approved, the Department shall add the new condition to Rule 333.101.

Accordingly, the Department does much more than rubber stamp applications. It denies applications, adds medical conditions, verifies certifications, revokes cards, notifies people of revocations, and holds administrative hearings on denials and revocations. As such, the requirements in § 6 make the Department, not the caregiver, responsible for verifying a patient's legitimate medical need for marijuana.

The opinion of the Court of Appeals in this case has shifted the burden of establishing a bona fide physician-patient relationship from the Department to a caregiver. This shift is contrary to the MMMA. The Department is authorized, if not required, to verify that a certifying physician is licensed. A caregiver is not so authorized. By determining that a physician is licensed, the department is attempting to verify that the doctor is legitimate, *i.e.,* a law abiding member of the medical community. As a law abiding member of the medical community, a doctor would not certify a patient with whom he or she does not have a bona-fide physician-patient relationship. Such certification would clearly be unethical and is contrary to law.

Therefore, the verification requirements set forth in § 6 establish the following:

1. A doctor has completed a full assessment of the patient's medical history.
2. A doctor has conducted an in-person medical evaluation of the patient.
3. A doctor has observed a debilitating medical condition.

4. A doctor has concluded that the patient is likely to benefit from the medical use of marijuana.
5. A bona-fide physician-patient relationship did exist at the time of certification.
6. A patient and his/her caregiver were engaged in marijuana activity for medicinal purposes.

By having to verify the application prior to issuing a registry card, the Department is the gatekeeper for medical marijuana. This verification establishes the *prima facie* evidence required under § 8(a)(1) and § 8(a)(3) of the MMMA.

CONCLUSION

Appellant contends that the Court of Appeals erred in making the following determinations.

1. That a patient to patient transfer of marijuana automatically taints all of a caregiver's marijuana activity—even if there is no evidence linking the unprotected conduct to the protected conduct.
2. That a valid registry identification card is not *prima facie* evidence of § 8(a)(1) and § 8(a)(3) of the MMMA.
3. That the marijuana volume limits set forth in §4(b) are not relevant to the requirements set forth in § 8(a)(2).

Appellant relies upon its arguments set forth above in support of its position. Those arguments are briefly summarized as follows:

First, requiring no nexus between protected and unprotected activity creates strict liability for patients and caregivers that was neither contemplated by the MMMA nor encouraged by the judiciary. Additionally, the ruling is not supported by this Court's decision in *State v. McQueen* and is not a proper interpretation of the application of §4(d)(2) of the MMMA.

Second, the MMMA places the burden on physicians, not caregivers, to ensure

that no certification is made by a doctor in the absence of a bona fide physician-patient relationship. Additionally, §6 places the burden of verification upon the Department and not upon a caregiver. § 6 also requires that the Department only verify people who require marijuana for medicinal purposes. Thus, possession of a card is *prima facie* evidence of compliance with § 8(a)(1) and § 8(a)(3).

Third, the MMMA sets forth volume limits in § 4(b). Said limits apply to the entire act, not just § 4 of the act. Accordingly, they are relevant to the requirements set forth in § 8(a)(2) of the MMMA. Additionally, as the requirements of § 4 are stricter than § 8 it is illogical to ignore the strict volume limits in § 4(b) when analyzing § 8(2)(a). If a patient or caregiver is in possession of an amount less than permitted in § 4(b) that is *prima facie* evidence of compliance with § 8(a)(2). The MMMA did not reinsert the volume limits set forth in § 4(b) into §8 (a)(2) as § 8(a)(2) is not necessarily capped by the amounts in § 4(b), yet that does not make §4 (b) irrelevant to an § 8(a)(2) analysis.

With respect to the appellant's case, Counts I – III of the first amended information arise from a patient to patient transfer. § 4 of the MMMA does not extend to such activity in accordance with *State v. McQueen, Id.* However, there was no evidence linking this unprotected conduct with the 33 plants and 38 grams of marijuana that appellant was rightfully growing for himself and his two patients. As no nexus exists, appellant submits that the remaining counts should be dismissed under §4 of the MMMA.

Appellant also submits that all of the counts should be dismissed pursuant to § 8—or at least a medical marijuana defense should be submitted to a jury. Appellant satisfies all three prongs of § 8 and otherwise conforms with the requirements set forth in

People v. Kolanek, Id. Specifically, appellant, his two patients and the confidential informant all had valid medical marijuana registry cards. Thus, § 8(a)(1) and § 8(a)(3) are satisfied. Moreover, appellant had less marijuana than was permitted under the act, so § 8 (a)(2) is satisfied as well.

RELIEF REQUESTED

FOR THE FOREGOING REASONS, defendant-appellant, Robert Tuttle, asks that this Court reverse the decision of the trial court and the Court of Appeals and dismiss Counts IV-VII of the first amended information pursuant to § 4 and § 8 of the MMMA and dismiss counts I-III in accordance with § 8 of the MMMA or alternatively, order that appellant may assert a medical marijuana defense at trial.

Respectfully submitted,

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Dated: July 24, 2014