**STATE OF MICHIGAN**
**IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB**

**PEOPLE OF THE STATE OF MICHIGAN,**

**Plaintiff-Appellant,** **Hon. David F. Viviano**

**-vs-** **Circuit Ct. Nos. 11-000797-AR**
**11-000798-AR**

**DEAN MICHAEL FERRETTI and**
**KENT ROBERT CURRIE,**

**Defendants-Appellees.**
_____/

# DEFENDANTS' CONSOLIDATE BRIEF IN RESPONSE TO PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

**ORAL ARGUMENT REQUESTED**

**Proof of Service**

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## STATEMENT OF JURISDICTION

Defendants-Appellees (hereafter “Appellees”) agree with Plaintiff-Appellant’s Statement of Jurisdiction.

## COUNTER-STATEMENT OF QUESTION PRESENTED

**Did the district court judge correctly rule that the question of whether probably cause to search 34111 28 Mile Road in Lenox Township when examined against the backdrop of the MMA was not one to be undertaken by the police officers, but was vested in the examining magistrate and, therefore, police should have returned to the magistrate and advised her of both Appellees' status under the Act and allowed her to re-examine the facts in light of the new information?**

Appellees answer, "yes."

The district court answered, "yes."

Appellant answers, "no."

## COUNTER-STATEMENT OF FACTS

The district court judge quashed the subject search warrant on one ground only: that police should have updated the issuing magistrate with highly relevant, newly-discovered evidence before executing the warrant. The relevant facts, therefore, relate only to those issues. Nevertheless, Appellant included detailed descriptions of evidence seized from all three of the locations underlying these cases – which comprise more than two pages of its Statement of Facts – as well as descriptions of the searches of the latter two residences, evidence allegedly seized from those locations and details regarding police interrogations of Appellees following the final search. None of these additional "Facts" have any relevant or legitimate basis for inclusion and Appellees respectfully request that they be stricken from the record before this Court.

On January 21, 2010, Roseville Detective Brian Shock acted as affiant on an "anticipatory" search warrant for 34111 28 Mile Road in Lenox Township. PET I at 7-8.[1] A copy of the affidavit is attached for this Court's convenience as Exhibit A.[2] Unlike many search warrants, it did not seek authority to arrest either of the Appellees; in fact, it sought no authority to take any action involving Appellees personally. *See* Exhibit A.

[1]The preliminary examination took two days to complete, specifically May 27 and July 27, 2010. The court reporter identified the two dates' transcripts as Volume I and II, respectively and Appellees have adopted the same method. References to the transcript, therefore, are to PET I (or II) at x.

[2]Appellees are at a loss to understand why Appellant did not attach a copy of the subject search warrant to its Brief on Appeal, rather than referring the reader to the District Court file for the document.

In completing the affidavit, what Det. Shock first set forth his experience in the "narcotics related investigations," as well as his training through various agencies. Noticeably absent is any training on the specific provisions of Michigan's Medical Marijuana Act ("MMA"). In fact, when asked at the preliminary examination what training he had actually had "regarding the medical marijuana laws," Shock replied, "What kind of training? Very little." PET I at 84.[3]

Substantively, Shock began his affidavit by alleging that at some unidentified date in early January of 2010, a confidential informant ("CI") had told him that Appellee Currie was "growing/cultivating/storing/using and selling" marijuana. Exhibit A at para 2. Detective Shock's preliminary examination testimony narrowed the time frame somewhat in that he estimated that the CI had provided the information in "early January," PET I at 55. But through cross-examination, the district judge learned that the CI had also claimed that Currie

[3]Besides Det. Shock, most of officers who testified had received little or no training regarding the MMA and/or had little or no experience with it. *See, e.g.,* PET II at 217 (New Haven Police Officer Brandon Wiley was aware that medical marijuana cardholders could possess "a certain amount of marijuana," and knew "that there's limits"; he could not, however, "tell you the specifics"); *id.* at 277 (prior to the incident, Roseville Special Investigation Crew Supervisor – and "acting" officer in charge of the case, PET II at 278 – Mark Urbaniak had had "limited" training regarding "medical marijuana and the law," and had been involved with one medical marijuana case prior to Appellees' cases).

While Roseville Officer Jeremy Scicluna claimed some knowledge of the MMA, only Roseville/COMET police officer Robert Gudenau testified to some comfort or familiarity with the MMA. He said he had received "some training," and while he denied having "great" familiarity with the terms of the Act, he asserted that he has a "good idea of . . . what it pertains to." PET I at 177-78. Significantly, when Det. Gudenau prepared an affidavit in support of a search warrant for another property – the day of but after the 28 Mile Road search, he included for the magistrate's consideration the fact that Appellee Ferretti, at least, had produced a medical marijuana card when detained in his vehicle. *See* Affidavit for Search Warrant of 17628 Kuecken, Clinton Township, attached as Exhibit B.

had moved his "grow operation" inside of the 28 Mile address. *Id.* at 94. The detective then admitted that he neither knew, nor had included in his affidavit, when this move had taken place. He agreed, therefore, that "unless . . . Mr. Currie took steps outside to try to maintain it outside until January [the time of the warrant request]," it was possible that the CI's information could have been as old as October or November of 2010. *Id.*[4]

The affidavit asserted that the CI had personal knowledge of the grow operation, specifically that s/he had "personally observed marijuana being grown on the property of [the 28 Mile Road] residence,"[5] Exhibit A at para 3, as required by MCL §780.653(b). The document, however, was devoid of "affirmative allegations from which the magistrate [could have] conclude[d] that the" unnamed CI "[was] credible or that the information [the CI provided was] reliable," as the statute also requires. Instead, the affidavit reflects only the Shock's assertion that the CI had "been deemed credible[6] an [*sic.*] reliable having provided [Shock's] unit with information in the past that [Shock] was able to independently verify." *Id.*

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[4]That some of the allegations contained in the affidavit were stale, and that the staleness was not evident for the magistrate's consideration, are just two of the issues Appellees intend to raise in opposition to bind-over should this Honorable Court reverse the district court magistrate and remand their cases. They will, of course, raise them again in any subsequent suppression motions before this Court, should same become necessary.

[5] As written, the affidavit reflects that the CI had personally seen only marijuana growing on the property. Unclear is whether the next clause, that "due to inclement weather this time of year, Currie has moved the marijuana grow operation indoors at the residence," was based on personal knowledge.

[6]There is no indication who or what had "deemed" the CI credible *or* reliable. *See* Exhibit A.

Factually, Det. Shock next alleged that surveillance of the 28 Mile address revealed that Mr. Currie had twice let himself into the home, "appearing to use a key for same." *Id.* at para 4.

Factually, Det. Shock next alleged that his investigation had revealed that thirteen years before the date at issue, Mr. Currie had been arrested for a "felony drug violation," and that Currie was "convicted of delivery manufacturing [*sic.*] marijuana and maintaining a drug house." *See id.* at para 5. It is unclear whether the referenced convictions arose from the arrest in 1998.

According to the affidavit, Shock learned from DTE that there are two "energy meters" at the 28 Mile address, one for the hot water heater and the other a "regular" meter. *Id.* at para 6. "Information supplied," presumably – although without attribution – by DTE reflected a "very large increase" in electricity registered by both meters during December (presumably of 2009) and January (presumably of 2010), compared to the same time period "the last two years." *Id.* The paragraph continued with the claim that "the amount has more than doubled, in some cases tripled." *Id.* The Detective maintained that his "training and experience" led him to conclude that the "spike" in electricity was "abnormally high," and "consistent with the amount of energy/power needed to conduct an indoor marijuana grow operation." *Id.*

Training and experience were also the basis for Det. Shock's next allegation, that "large heat lamps are used in the indoor growing of marijuana to stimulate [*sic.*] the Earth's sun." *Id.* at 7. The lamps were said to emit a heat source detectable through non-intrusive thermal imaging. *Id.* Consequently,

Shock had previously obtained a warrant for such an image of the residence at issue from another district court judge. *Id.* The warrant is silent as to when that warrant was obtained, but it must have been prior to January 14, 2010, the date Roseville Deputy Police Chief James Berlin conducted the resultant thermal imaging search. *Id.* at para 8. The phrasing Det. Shock's next assertion is curious, and vague: "Your affiant has been supplied with evidence that there [were] detectable heat anomalies consistent with indoor marijuana manufacturing" emitted from the address. *Id.* The detective did not specifically identify Deputy Chief Berlin as the individual who "supplied" such evidence.

Detective Shock next claimed to have personally "observed that the 'living portions' of the residence . . . is seldom covered with snow even though the garage is snow covered." *Id.* at para 9. When he made these observations is unspecified, but the use of the word "seldom" suggests that he had made the observations many times. When asked at the preliminary examination how many days of surveillance he had conducted, however, Shock testified that "I think there was three days that *we* did - - that *we* did surveillance. I know *Sergeant Urbaniak* did a day, again, maybe three or four days." PET I at 56 (emphasis added). The detective further asserted that the roofs of "other residences in the area also have total snow covered roofs for this time of year." Exhibit A at para 9. The conclusion he drew from the alleged absence of snow at 28 Mile was that "the residence may be producing an abundance of heat which is consistent of [*sic.*] an indoor marijuana grow operation." *Id.* (Emphasis added).

All the facts and circumstances, and his training and experience, had led Det. Shock to conclude that Mr. Currie "is growing/cultivating/selling the illegal drug but not limited to marijuana."[7]

Judge Catherine Steenland issued a warrant to search 34111 28 Mile Road the same day the warrant was sought, January 21, 2010.

Prior to the warrant's execution, New Haven Officer Brandon Wiley was dispatched "to assist in . . . stopping a vehicle that was traveling into the Village[.]" PET II at 207. The vehicle was a Saturn Vue and Mr. Ferretti was driving it 208. *Id.* at 208. Mr. Currie was the only passenger.[8] Officer Wiley had observed no traffic violation prior to stopping the Vue, *id.* at 219. The officer did not know why he was stopping the vehicle, the name of the person driving it, the charges for which he might have been under investigation, whether there were warrants out for the driver, whether anyone in the car had committed any crime. *Id.* at 218-19; he only stopped them because he was told to. *Id.* at 219.

Mr. Ferretti produced all paperwork requested by Officer Wiley. *Id.* at 208.

Officer Wiley's testimony was that as he approached the vehicle, he smelled "a strong odor of marijuana." *Id.* at 208-09. He neither specified, nor did anyone ask, whether the smell was of burned or unburned marijuana.[9] Officer

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[7]The affidavit contains no assertions other than the above. Specifically, Det. Shock made no allegations regarding the possible presence of any drug other than marijuana at any of the locations at issue in these cases.

[8]Although it is clear that Officer Wiley had not known the name of the passenger in the Vue, *see, e.g.,* PET at 215-16, other testimony clearly established that Mr. Currie was the passenger. *See, e.g.,* PET I at 19 (testimony of Det. Shock).

[9]What seems clear is that police found no partially-burned marijuana, such as a marijuana cigarette, and no paraphernalia indicating the substance had been

Wiley said he asked Mr. Ferretti if there was marijuana in the vehicle; he said Ferretti said there was not. *Id.* at 209. Mr. Ferretti told Wiley that he had his medical marijuana card and provided it to the officer. *Id.* at 216. Detective Shock testified that both Ferretti and Currie had produced medical marijuana cards. PET I at 81, 104. Mr. Ferretti identified himself as a medical marijuana caregiver and patient, *id.* at 73; PET II at 273, and Mr. Currie was a patient, whose caregiver was Mr. Ferretti. *Id.* at 273.

While Wiley was talking to Mr. Ferretti, an undercover officer present at that location got Mr. Currie out of the Vue, prompting Wiley to get Mr. Ferretti out, search him and "secure" him in the back of his (Wiley's) patrol car. *Id.* The New Haven officer then searched the Vue, finding two clear bags of marijuana in the rear of the vehicle. *Id.* According to Det. Shock, who was the lead detective on the case, *see* PET II at 286 (testimony of Sgt. Urbaniak), and the affiant on the search warrant, each bag appeared to contain five ounces of marijuana. PET I at 36.

Officer Wiley advised undercover officers of his discovery and turned the vehicle and the marijuana over to them. *Id.* at 210, 215.

Various officers testified that Appellees made various inculpatory statements after being advised of their rights under *Miranda*; those statements are not relevant to the only issue before this Court, however.

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recently smoked. Furthermore, Officer Wiley did not testify to seeing smoke when he approached or as he searched the vehicle, and did not indicate that Mr. Ferretti appeared to have ingested marijuana or any other legal or illegal substance.

Although he had learned that Appellees possessed medical marijuana cards conferring them with some legal status under the MMA, Detective Shock, the affiant on the 28 Mile Road search warrant never even considered returning to the magistrate and advising her of those facts. PET I at 85. His reason for failing to do so was *his* conclusion that the rest of the evidence still supported the search. *Id.* He and others on team searched the 28 Mile address. *See, e.g.,* PET I at 19-24.

Based on statements Mr. Ferretti made while being detained at the 28 Mile address, PET II at 163-64, Det. Gudenau decided to seek a warrant to search 17628 Kuecken in Clinton Township. *Id.* at 164. As affiant for that warrant request, Gudenau included several sentences about Mr. Ferretti's status as a caregiver and patient, and related that Ferretti had produced his card for inspection. Exhibit B at para 3.[10] The detective also included details of evidence allegedly seized from 28 Mile Road, as well as admissions Mr. Ferretti allegedly made while he was detained. *Id.* Judge Steenland issued the warrant sought.

[10]It will come as no surprise that Mr. Ferretti will seek to quash this search warrant as well as the warrant at issue. Among other issues is the fact that Det. Gudenau alleged that the search of the Saturn Vue was done "with consent." This statement directly contradicts the testimony of the on-scene officer who conducted the search and found the evidence: Brandon Wiley. When asked, "Did you have consent to search the vehicle," he replied, "Nope." PET II at 223.

## COUNTER-ARGUMENT

**The district court judge correctly ruled that the question of whether probably cause to search 34111 28 Mile Road in Lenox Township when examined against the backdrop of the MMA was not one to be undertaken by the police officers, but was vested in the examining magistrate and, therefore, police should have returned to the magistrate and advised her of both Appellees' status under the Act and allowed her to re-examine the facts in light of the new information.**

### I. Introduction

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that **those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.**"

*Johnson v United States,* 333 US 10, 13-14; 68 SCt 367, 369; 92 LEd 436 (1948) (emphasis added).

> "Judges bear the responsibility of applying, interpreting, and shaping the [Medical Marijuana] law[.]"

*People v. Redden,* 290 Mich App 65, 95; 799 NW2d 184, 201 (2010) (O'Connell, J. concurring).

> "[B]ased on everything that I had investigated, . . . **my** probable cause led me to believe that [Mr. Ferretti was] manipulating the law and selling marijuana and growing a lot of it."

*From the Preliminary Examination Testimony of the Affiant on the Search Warrant at Issue, Detective Brian Shock,* PET I at 106 (emphasis added).

The noise surrounding the MMA tends to distract from or distort the nature of the questions presented for review to judges and justices of this State. The question before this Honorable Court is no more and no less than a search

question: did Detective Shock violate Appellees' state and federal constitutional protections against unreasonable searches and seizures by not informing the examining magistrate of material evidence he discovered prior to executing the warrant at issue? The fact that the Act may have been inartfully written or is inconsistently applied merely underscores the obvious conclusion that the balancing of the additional factors it adds to a typical probable cause equation must be undertaken by a constitutionally designated authority, not the police.

**II. <u>General Search Warrant Considerations</u>**

Both the Michigan and United States Constitutions protect citizens against unreasonable searches and seizures.

Article 1, §11 of the Michigan Constitution of 1963 provides that,

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or thing shall issue without describing them, nor without probable cause, supported by oath or affirmation[.]

Similarly, the Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularity describing the place to be searched and the persons or things to be seized.

The Michigan Supreme Court has repeatedly emphasized that, "[T]he warrant requirement is not a burdensome formality designed to protect those who would engage in illegal activity, but, rather, a procedure which guarantees a measure of privacy and personal security to all citizens." *See, e.g., People v Beavers,* 393 Mich 554, 577; 227 NW2d 511 (1975), overruled on other grounds

*People v Collins,* 438 Mich 8; 475 NW2d 684 (1993). Generally, evidence obtained in violation of Fourth Amendment protections must be excluded from a criminal prosecution. *People v Cartwright,* 454 Mich 550, 557-558; 563 NW2d 208 (1997).

The protection against unreasonable searches and seizures are applied particularly forcefully when a search is focused on a private residence. “Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” *Payton v New York,* 445 US 573, 585; 100 SCt 1371, 63 LEd2d 639 (1980). This principal is so entrenched in Fourth Amendment jurisprudence that in reiterating it in *Wilson v Layne,* the United States Supreme Court noted the importance of preserving the “overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.” 526 US 603, 610; 119 SCt 1692; 143 LEd2d 818 (1999).

In general, an affidavit in support of a search warrant must contain facts establishing probable cause to believe evidence of the commission of a crime will be found in the location to be searched. US Const, Amend IV; Mich Const, 1963, Art 1 §11; *Illinois v Gates,* 462 US 213, 238; 103 SCt 2317, 76 LEd2d 527 (1983); *United States v Greene,* 250 F3d 471, 478 (6CA 2001). In reviewing a magistrate’s determination of probable cause, a court must evaluate the affidavit and the decision to issue the warrant in a common sense and realistic manner, and then determine whether a reasonably cautious person could have, under the totality of the circumstances, reached the conclusion that there was a substantial basis for finding probable cause to search. *People v Russo,* 439 Mich 584, 604;

487 NW2d 698 (1992); *Illinois v Gates,* 462 US 213; 103 SCt 2317; 76 LEd2d 527 (1983).[11]

### III. The Medical Marijuana Act

In 2008, Michigan voters passed the Michigan Medical Marijuana Act ("MMA"), a citizen initiative. Regarding the intent of the Act, his dissent in *People v King,* Michigan Court of Appeals Judge Fitzgerald asserted as follows:

> [T]he MMA declares that, in "chang[ing] state law," the act was designed to "have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana." . . . The MMA further declares that the laws of certain other states "do not penalize the medical use and cultivation of marihuana. Michigan joins in this effort for the health and welfare of its citizens.". . . **Such declarations reveal the intent that the MMA be used not as a sword against those who have a medical need to use marihuana, but rather as a shield.**

*People v King,* ___ Mich App ___ (2011 WL 337365; issued Feb 3 2011), *lv to appeal granted* 489 Mich 957; 798 NW2d 510 (2011) (Fitzgerald, J., dissenting).

Regardless of the purpose to which it has been put, the Act

> [g]enerally . . . protects qualified patients, primary caregivers, physicians, and other persons from arrest, prosecution, or penalty in any manner for the use of marijuana for medical purposes.

*People v Peters,* unreported case *per curiam* of the Court of Appeals, issued January 21, 2010, Docket No. 288219 (citation omitted). A copy of *Peters* is attached as Exhibit C.

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[11]A central, and long-established, tenet of Fourth Amendment jurisprudence is that the fruits of a search cannot be used to establish the validity of that search. *Byars v United States,* 273 US 28, 29-30; 47 SCt 248; 71 L Ed 520 (1927). Neither this court, nor any reviewing court, can allow itself to be influenced by the type of detailed recitations of evidence allegedly seized pursuant to the warrant fact Appellant included in its Statement of Facts.

Section 4 of the MMA sets forth "Protections for the Medical Use of Marijuana," The section provides, in pertinent part, as follows:

> (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, . . . 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.
>
> (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:
>
> > (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.
>
> . . . .
>
> (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. . . .
>
> (g) A person shall not be subject to arrest, prosecution, or penalty in any manner, . . . for providing a registered qualifying patient or a registered primary caregiver with marihuana paraphernalia for purposes of a qualifying patient's medical use of marihuana.
>
> . . . .
>
> (i) A person shall not be subject to arrest, prosecution, or penalty in any manner, . . . solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana.

MCL §333.26424. The interplay between section 4 and other sections of the Act is proving troubling. In fact, of the 46 pages Judge O'Connell's concurring opinion in *People v Redden* (pages 90-136), she devoted 23 pages to analyzing the "interplay among §§ 4, 7, and 8," of the Act (pages 90 to 136).

Appellees assert that it stretches credulity to claim, as the police and prosecutor do in this case, that probable cause in situations involving the MMA can be constitutionally assessed by anyone *other than* a magistrate or judge charged with just such functions.

Judge O'Connell also offered the following insight into the unusual nature of section 4's provisions:

> The unusual structure of this section reflects the intent of the MMA as set forth in MCL 333.26422(b). Instead of describing an affirmative right to grow, possess, or use marijuana, § 4 simply indicates that registered qualifying patients, primary caregivers, and physicians are protected from arrest, prosecution, or penalty if they meet the specific requirements set forth.

*Redden,* 290 Mich App 65, 104; 799 NW2d 184, 206 (2010) (O'Connell, J. concurring). The following footnote accompanied the above quote:

> Most legislation either grants rights and privileges to citizens by stating that a person may do a certain activity or it makes certain activity illegal. In either circumstance, the statute affirmatively indicates what an individual may or may not do. The MMA does the opposite; instead of granting a right or implementing a prohibition, the statute leaves the underlying prohibition of the manufacture, possession, or use of marijuana intact and states that individuals meeting certain criteria "shall not be subject to arrest, prosecution, or penalty" for using, possessing, or growing marijuana under specified circumstances. As a result, **this state finds itself in the unusual position of having a statute that precludes enforcement, in certain circumstances, of another statute that makes certain activity illegal.** Needless to say, this decision to use one statute to undercut the enforceability of another statute, instead of simply redefining the circumstances under which marijuana use and possession are legal in this state, greatly adds to the confusion that surrounds this act.

*Id.* (Emphasis added).

Every court that has considered the matter seems to have commented, often at length, on the confusion generated by the MMA. Judge Redden noted the confusion the Act has caused "Law enforcement officers, prosecutors, and trial court judges attempting to enforce both the MMA and the Public Health Code." Unless and until the Act is modified or amended by the Legislature, or construed into utter clarity by the courts, the layer of complexity it adds to determinations of probable cause cannot be denied. Nor can those determinations devolve onto law enforcement personnel.

## IV. Information Discovered Before Executing the Instant Warrant and the Issues that Information Raised

The information discovered by Det. Shock after the warrant was authorized but before it was executed, is not limited to Appellees' qualified statuses under the Act.

As set forth in Appellees Counter-Statement of Facts, before the warrant was executed, Officer Brandon Wiley "assist[ed] in . . . stopping a vehicle that was traveling into the Village[.]" PET II at 207. The vehicle was a Saturn Vue and Mr. Ferretti was driving it 208. *Id.* at 208. Mr. Currie was the only passenger.[12] Officer Wiley had observed no traffic violation prior to stopping the Vue, *id.* at 219. The officer did not know why he was stopping the vehicle, the name of the driver, the charges for which an occupant might have been under investigation, whether there were warrants out for the driver, or whether anyone in the car had committed any crime. *Id.* at 218-19. Officer Wiley's entire basis for stopping the vehicle was that he was told to. *Id.* at 219.

It is undisputed that Mr. Ferretti had and produced all paperwork Wiley requested of him. *Id.* at 208.

Officer Wiley's testimony was that as he approached the vehicle, he smelled "a strong odor of marijuana." *Id.* at 208-09. He neither specified, nor did anyone ask, whether the smell was of burned or unburned marijuana. Officer Wiley said that Mr. Ferretti denied that there was marijuana in the vehicle. However, there was no evidence that Wiley – or any other of the myriad officers

[12]Although it is clear that Officer Wiley had not known the name of the passenger in the Vue, *see, e.g.,* PET at 215-16, other testimony clearly established that Mr. Currie was the passenger. *See, e.g.,* PET I at 19 (testimony of Det. Shock).

involved on January 21, 2010 – found partially-burned marijuana, such as a marijuana cigarette, or drug paraphernalia indicating the substance had been recently smoked. Furthermore, Officer Wiley did not testify to seeing smoke when he approached or as he searched the vehicle, and did not indicate that Mr. Ferretti appeared to have ingested marijuana or any other legal or illegal substance.

Nor is there any evidence that Mr. Currie was under the influence of any legal or illegal substance.

Mr. Ferretti told Wiley that he had his medical marijuana card and provided it to the officer. *Id.* at 216. Detective Shock testified that both Ferretti and Currie had produced medical marijuana cards. PET I at 81, 104. Mr. Ferretti identified himself as a medical marijuana caregiver and patient, *id.* at 73; PET II at 273, and Mr. Currie was a patient, whose caregiver was Mr. Ferretti. *Id.* at 273.

The apparent total amount of marijuana police found in the vehicle was also a new and material fact because they did not weigh it at the time. At best, police estimated that each of the two – and only – ziplock bags found contained five ounces each of marijuana. *Id.* at 36. Det. Shock admitted ignorance of the specifics of the MMA, which allows a caregiver to possess 2.5 ounces of medical marijuana for himself and for every patient of his, up to a total of five patients, MCL §333.26424. Not knowing what he did not know, he *should have known* to leave the issue to the one person unassailably in a position to interpret the law and apply it to the facts – the examining magistrate.

Even in play was the question of whether the amount of marijuana in the Saturn Vue was within "the presumptive limit," as the Court of Appeals called it in *People v Anderson,* ___ Mich App ___ , 2011 WL 2202553 (issued June 7, 2011). Since the issue is not how much "marijuana" a person possesses, but the amount of "useable marijuana," the statutory definition of the latter term is crucial:

> "Usable marihuana" [marijuana] means the dried leaves and flowers of the marihuana plant, and any mixture or preparation thereof, **but does not include the seeds, stalks, and roots of the plant**.

MCL §333. 26423(j). *See also People v Walburg,* unpublished opinion of the Court of Appeals, issued February 10, 2011, Docket No. 295497 (footnotes omitted) (emphasis added), attached as Exhibit D.

Given his unfamiliarity with the MMA, Detective Shock was likely equally unaware that section 8 of the Act would further complicate the probable cause determination. Considering the provisions of section 8, the magistrate would have had to consider whether the two men (if both can be said to have possessed the amount in the car, a point neither Appellee concedes)

> 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 [both patients'] serious or debilitating medical condition[s] or symptoms of [both patients'] serious or debilitating medical condition[s].

MCL §333.26428.

In sum, then, Det. Shock knew that the two men stopped and detained had appropriate and proper paperwork on them. No evidence suggested that either Ferretti or Currie was under the influence of legal or illegal substances,

possessed partially burned marijuana or marijuana cigarettes, or paraphernalia. The bags of marijuana in the Saturn Vue appeared to total approximately ten ounces, and no determination appears to have been made as to the presence of stems and/or seeds in the substance or, if same were presence, the effect that deducting them would have on the total weight.

Detective Shock had discovered a wealth of additional facts since leaving Judge Steenland.

## V. The Effect of Facts Discovered After Issuance but Before Execution of a Warrant

In his Order Granting Defendant's Motion to Suppress Evidence and Dismissal of the Complaint, a copy of which is attached as Exhibit E,[13] District Judge William Hackel III asked whether "a police officer [is] required to get [a] second warrant when facts arise after the issuance of the initial warrant, but before its execution." Exhibit E at 1. Judge Hackel stated that he had been unsuccessful in finding caselaw on the issue. *Id.* at 2.

In its Brief on Appeal, Appellant cited to and quoted at length from the 2d Circuit Court of Appeals decision in *United States v Marin-Buitrago,* 734 F2d 889 (2CA 1984).

Regarding what circumstances require police to re-examine the facts for a probable cause determination, the *Marin-Buitrago* Court said the following:

> when a **definite and material change** has occurred in the facts underlying the magistrate's determination of probable cause, **it is**

[13]Appellant failed to attach a copy of Judge Hackel's February 7, 2011 Order to its Claim of Appeal as required by MCR 7.101(C)(2)(a). No copy of the Order was attached to the copy of the Claim served on Appellant, as required by MCR 7.101(C)(3)(a).

> **the magistrate, not the executing officers, who must determine whether probable cause still exists**. Therefore, the magistrate must be made aware of any material new or correcting information.
>
> The duty to report new or correcting information to the magistrate does not arise unless the information is material to the magistrate's determination of probable cause.

*Id.* at 894 (emphasis added).

What, then, are "material facts"?

> Facts omitted from a warrant affidavit are not material unless they cast doubt on the existence of probable cause. . . . The omitted information and the information in the affidavit must be considered as a whole in determining if probable cause continues to exist. *United States v. Kunkler,* 679 F.2d 187, 190–91 (9th Cir.1982); *United States v. Martin,* 615 F.2d 318, 328 (5th Cir.1980).[14] *Id.* at 895 (additional internal citation omitted).

The Court then "assume[d] the role of issuing magistrate" to "determine whether the affidavit still supports a finding of probable cause after the inclusion of [the additional] information [at issue]."

Appellant also cites this Court to *Query v State,* a 2001 case in which the Indiana Supreme Court upheld a search conducted pursuant to original information presented in support of a warrant because "new information altered neither the crime alleged nor the scope or nature of the resulting search." 745 NE2d 769, 772 (2001). The *Query* court noted that the new information

[14]Omitted footnote 7 appended to the above quote made a critical point:

> Even though the cases discuss the materiality of misstatements in, not omissions from, affidavits in support of a search warrant, the materiality of misstatements and omissions is determined through a similar analysis. United States v. Martin, 615 F.2d 318, 328 (5th Cir.1980); United States v. Waxman, 572 F.Supp. 1136, 1142–43 (E.D.Pa.1983).

734 F2d 889, n 7.

established probable cause for a different crime from that originally established, *id.,* but concluded that the change in the warrant allegations were not "material" because "the old information justified a warrant for the same location and virtually the same items." *Id.*

> In *Ware v State,* 859 NE2d 708 (2007), the Indiana Court of Appeals held that
>
> > the analysis of a search warrant application omitting allegedly material information is the same under Indiana law as under federal law. Therefore, a probable cause affidavit must include all material facts, which are those facts that "cast doubt on the existence of probable cause." . . . When the State has failed to include a material term in its application, we will determine the validity of the warrant by considering the omitted information and the information contained in the affidavit together.

*Id.* at 718 (internal citations omitted).

Appellees assert that the *Query* holding is antithetical to the conclusion it seeks from this Court and for which it cites the authority. Unlike the search warrant in that case, not only does the discovery of Appellees' medical marijuana statuses not establish probable cause for "different crime," it changes the very nature probable cause equation. The fact that Appellees were cardholders under the MMA created a presumption that they could not be arrested or prosecuted if they were in conformity with the Act. The allegations in support of the warrant, therefore, had to be analyzed against that presumption.

> Furthermore, in allowing for the "medical use" of marijuana, the MMA allows for 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(3)(e).

In other words, and not to put too fine a point on it, the existence of a "marijuana grow operation" – the essential allegation upon which the entire search warrant house of cards in these cases rests – is not per se unlawful. Appellees respectfully assert that Appellant's contention that Appellees status as cardholders was not a "material" fact is disingenuous at best.

Appellant's reliance on *United States v Bowling* is also misplaced. In *Bowling,* police failed to disclose to the magistrate that a prior search of the premises sought to be searched pursuant to the warrant at issue had been fruitless. 900 F2d 926, 929 (6CA 1990).

The *Bowling* court held as follows:

> Collectively, the [authorities cited by the court] suggest that where an initial fruitless consent search dissipates the probable cause that justified a warrant, new indicia of probable cause must exist to repeat a search of the same premises pursuant to the warrant. We agree with this proposition and therefore reject the district court's reasoning that gives primacy to the time of the warrant's issuance over the time of its execution. **The law is clear that probable cause must exist at both points in time.** Where officers become aware after a warrant's issuance that a fruitless consent search has been conducted, the officers' knowledge of such an event is relevant to a determination of whether they relied on the warrant in good faith. Cf. Maryland v. Garrison, 480 U.S. 79, 107 S.Ct. 1013, 1017, 94 L.Ed.2d 72 (1987) (validity of a warrant and the reasonableness with which it is executed raise two separate grounds on which to find a violation of the Fourth Amendment).

*Id.* at 932 (emphasis added). The *Bowling* court's validation of the second search before it was based on the facts squarely before it and the issue remains: was the district court in this case wrong in concluding that police were obligated to advise the examining magistrate of the additional information they had

discovered before executing the warrant? Contrary to Appellant's assertion, *Bowling* suggests that not only was the district judge now wrong, but was entirely correct because he decided, essentially, "that probable cause [had] to exist at both points in time."

## VI. Conclusion

The Medical Marijuana Act has to mean something, has to have some effect. As it relates to this case, it has to provide a backdrop against which probable cause must be evaluated.

At the beginning of their Introduction, Appellees quoted from *Gerstein v Pugh.* The Supreme Court in *Pugh* stated that "probable cause" is "defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense.'" 420 US 103, 111-12; 95 SCt 854, 862; 43 LEd2d 54 (quoting *Beck v Ohio,* 379 US 89 (1964)). To reiterate Appellees Introduction, *Pugh* did more than merely restate the definition. Shortly after the immediately preceding quote, the opinion stressed that whether "probable cause" has been met in a specific situation is preferably to be decided by a neutral and detached magistrate:

> To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle appears in *Johnson v. United States,* 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948):
>
> > "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its

> protection consists in requiring that **those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.**"

*Id.* (Emphasis added).

But, probable cause determinations are more difficult in cases involving the MMA. As Justice Redden said in her concurrence in *People v Redden,*

> The problem . . . is that the MMA is inartfully drafted and, unfortunately, has created much confusion regarding the circumstances under which an individual may use marijuana without fear of prosecution. Some sections of the MMA are in conflict with others, and many provisions in the MMA are in conflict with other statutes, especially the Public Health Code. Further, individuals who do not have a serious medical condition are attempting to use the MMA to flout the clear prohibitions of the Public Health Code and engage in recreational use of marijuana. **Law enforcement officers, prosecutors, and trial court judges attempting to enforce both the MMA and the Public Health Code are hampered by confusing and seemingly contradictory language***,* while healthy recreational marijuana users incorrectly view the MMA as a de facto legalization of the drug, seemingly unconcerned that marijuana use remains illegal under both state and federal law.

*People v Redden,* 290 Mich App 65, 93-94; 799 NW2d 184, 200 (2010) (O'Connell, J., concurring) (emphasis added).

Because of the inartful drafting resulting confusion, determinations of probable cause that implicate the MMA present far greater challenges than more common factual situations. However, as Judge O'Connell also asserted,

> **In any event, the MMA is currently the law in Michigan. To the extent possible, it must be administered in a manner that protects the rights of all our citizens***.* When prosecutors and defense attorneys agree that the law is hazy and unclear and poses hazards to all concerned because it does not with sufficient clarity identify what conduct is subject

> to prosecution, it is time for action from our legislative and executive officials. While the MMA may be controversial and polarizing, **politics should be set aside in the interest of the rule of law in our state**.

*Id.* at 135; 799 NW2d at 184 (emphasis added).

## X. REQUESTED RELIEF

Appellants Ferretti and Currie respectfully request that this Honorable Court affirm the District Judge's decision to quash the search warrant at issue and dismiss the charges against them.

Respectfully submitted,

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