The Michigan Medical Marihuana Act – Probable Cause, Immunity, and Affirmative Defense

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The 2008 Voter Initiative

PROPOSAL 08-1
A LEGISLATIVE INITIATIVE TO PERMIT THE USE AND CULTIVATION OF MARIJUANA FOR SPECIFIED MEDICAL CONDITIONS
The proposed law would:

- **Permit physician approved use of marijuana by registered patients with debilitating medical conditions including cancer, glaucoma, HIV, AIDS, hepatitis C, MS and other conditions as may be approved by the Department of Community Health.**
- **Permit registered individuals to grow limited amounts of marijuana for qualifying patients in an enclosed, locked facility.**
- **Require Department of Community Health to establish an identification card system for patients qualified to use marijuana and individuals qualified to grow marijuana.**
- **Permit registered and unregistered patients and primary caregivers to assert medical reasons for using marijuana as a defense to any prosecution involving marijuana.**

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Purpose of the Law - Preamble

Sec. 2. The people of the State of Michigan find and declare that:

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

(b) Data from the Federal Bureau of Investigation Uniform Crime Reports and the Compendium of Federal Justice Statistics show that approximately 99 out of every 100 marihuana arrests in the United States are made under state law, rather than under federal law. *Consequently, changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana.*

(c) Although federal law currently prohibits any use of marihuana except under very limited circumstances, states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law. The laws of Alaska, California, Colorado, Hawaii, Maine, Montana, Nevada, New Mexico, Oregon, Vermont, Rhode Island, and Washington do not penalize the medical use and cultivation of marihuana. Michigan joins in this effort for the health and welfare of its citizens.

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Overview of the Law

- Public Health Code – Charging statutes
  - MCL 333.7404(2)(d) – marijuana use
  - MCL 333.7403(2)(d) – possession
  - MCL 333.7401(2)(d) – PWID, delivery, manufacture
- MMMA section 4 – Immunity
- MMMA section 8 – Affirmative Defense
- MMMA section 7 – Limitations
  - Section 7(e) – limitations of other statutes
- Federal law
- Local ordinance

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Charging Statutes

- Use of marijuana – MCL 333.7404(2)(d)
- Possession of marijuana – MCL 333.7403(2)(d)
- PWID, Delivery – MCL 333.7401(2)(d)
  - < 5 kg – MCL 333.7401(2)(d)(iii)
  - 5-45 kg - MCL 333.7401(2)(d)(ii)
  - 45+ kg – MCL 333.7401(2)(d)(i)
- Manufacture – MCL 333.7401(2)(d)
  - < 20 plants – MCL 333.7401(2)(d)(iii)
  - 20-200 plants – MCL 333.7401(2)(d)(ii)
  - 200+ plants – MCL 333.7401(2)(d)(i)
- Section 7(e) – in conflict

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Section 4 - Immunity

- Card/ Photo ID
- 2.5 oz “usable marihuana” per patient or less
- 12 plants per patient or less
- Locked enclosed facility
- Outdoor growing
- Transfer and acquisition
- “Bubble bursting” severability of immunity claims

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People v Carruthers

Brownies made from resin are not “usable marihuana.” If a defendant possesses marihuana which does not meet the definition of “usable marihuana,” he or she does not qualify for immunity under § 4. If a defendant possesses marihuana which does not meet the definition of “usable marihuana,” he or she can attempt to use the affirmative defense in § 8.

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HB 4210 – Infused Products

(f) “Marihuana-infused product” means a topical formulation, tincture, beverage, edible substance, or similar product containing any usable marihuana that is intended for human consumption in a manner other than smoke inhalation. Marihuana-infused product shall not be considered a food for purposes of the food law, 2000 PA 92, MCL 289.1101 to 289.8111.

HB 4210 – Weight Equivalency

(c) For purposes of determining usable marihuana equivalency, the following shall be considered equivalent to 1 ounce of usable marihuana:

(1) 16 ounces of marihuana-infused product if in a solid form.

(2) 7 grams of marihuana-infused product if in a gaseous form.

(3) 36 fluid ounces of marihuana-infused product if in a liquid form

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HB 4210 - Retroactivity

Enacting section 2. This amendatory act clarifies ambiguities in the law in accordance with the original intent of the people […]

This amendatory act is curative and applies retroactively as to the following: clarifying the quantities and forms of marihuana for which a person is protected from arrest, precluding an interpretation of "weight" as aggregate weight, and excluding an added inactive substrate component of a preparation in determining the amount of marihuana, medical marihuana, or usable marihuana that constitutes an offense.

Retroactive application of this amendatory act does not create a cause of action against a law enforcement officer or any other state or local governmental officer, employee, department, or agency that enforced this act under a good-faith interpretation of its provisions at the time of enforcement.

HB 4210 affects Carruthers

- Unique – curative and retroactive
- Caused by failure of the government re: Findings
- Section 2(b) - "Data from the Federal Bureau of Investigation Uniform Crime Reports and the Compendium of Federal Justice Statistics show that approximately 99 out of every 100 marihuana arrests in the United States are made under state law, rather than under federal law. *Consequently, changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana*."
- New remedies under the law

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HB 4210 – Other Changes

- New definitions for "marihuana plant" and "marihuana" include visible roots or growth medium, MCL 333.26423(g,j)
- Amended definitions of "usable marihuana" and "medical use of marihuana" now include resin and extractions, MCL 333.26423(h,n)
- New restrictions of transfer of infused products, MCL 333.26424(m)
- New restrictions on transport of infused products, MCL 333.26424b
- Access to card registry (for verification only) for Marihuana Tracking Act, MCL 333.26426(h)(3), HB 4827
- $8.5 million appropriation for implementation of HB 4209
- Snowmobiles and off-road vehicles cannot be operated under the influence of marihuana, MCL 333.26427(b)(4)
- Butane extraction is effectively prohibited on residential property, MCL 333.26427(b)(6,7)

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State v McQueen

Patient to patient transfers of marihuana are not authorized under section 4. Patients are allowed to acquire marihuana from anyone due to asymmetrical protections.

What about plants?

People v Manuel

- Usable marijuana
- Cardholder to cardholder transfers of plants
- Enclosed locked facility

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Transfer of Plants Allowed

- There is no immaculate conception of plants
- The MMMA didn't account for acquisition of plants explicitly
- Transferring plants makes sense, for weight issues it vitiates liability, and any debate over excess usable marihuana.

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People v Ventura

Despite the existing definition of plant in MCL 333.7401(5), the COA couldn't find it and created a new one.

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HB 4210 - Amended Definitions

- MCL 333.26423(g) – “Marihuana plant” means any plant of the species Cannabis sativa L.
- MCL 333.26423(j) – “Plant” means any living organism that produces its own food through photosynthesis and has observable root formation or is in growth material.

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PHC - Plant Definitions

- MCL 333.7401(5) – "plant" means a marihuana plant that has produced cotyledons or a cutting of a marihuana plant that has produced cotyledons.

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Final Thoughts on HB 4210

- One way to look at it: HB 4210 identifies various marihuana "substances" and divides them into two categories
  - Ingest by smoke
  - Ingest by other
- Increased weights apply only to non-smoke ingestion

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Final Thoughts on HB 4210

- Extractions remain categorized as "presumed smokable"
- However, some patients ingest extracts by eating or vaporizing
- This is an issue for section 4 hearing
- Credibility/weight evaluated by court
- Only confession/statement could contradict testimony

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People v Bylsma

Only one of two people may possess marihuana plants pursuant to §§ 4(a) and 4(b): a registered patient or caregiver. Because defendant possessed more plants than § 4 allows and he possessed plants on behalf of patients with whom he was not connected through the department's registration process, defendant is not entitled to § 4 immunity. A defendant need not establish the elements of § 4 immunity in order to establish the elements of the § 8 defense.

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People v Mazur

Section 4(i) protections for any person depend upon patient's or caregiver's compliance with section 4. Paraphernalia is not contraband per se.

Section 4 – Distinctions from Affirmative Defense

- Registration with the State
- 2.5 oz/12 plants vs reasonable quantity of marihuana
- Protection/exemption/immunity from arrest vs protection from conviction
- Presumption of medical use/ presumption of affirmative defense
- No locked enclosed facility
- Transfers and acquisition

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Section 7 - Limitations

- Section 7(b) – limitations on immunity/defense
  - Negligence or professional malpractice
  - Possession/use in schools and jails
  - Smoking in public/on public transportation
  - Impaired driving
- Section 7(c) – limitations on private entities
  - Insurance coverage of medical marijuana costs
  - Employee use in workplace
- Section 7(e) – nullifies conflicting statutes

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Section 8 – Affirmative Defense

- Physician recommendation for marijuana
  - Review of medical history and bona fide relationship
    - In-person
    - Record keeping
    - Follow-up
    - Notify primary physician if desired
  - Opinion – marijuana will have therapeutic or palliative benefit
- Reasonable quantity
- Medical use

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People v King/Kolanek

The MMMA does not require that a defendant asserting the affirmative defense under § 8 also meet the requirements of § 4. The defendant must establish that the physician’s statement occurred after the enactment of the MMMA and before the commission of the offense. If defendant's motion to dismiss under § 8 is denied and there are no questions of fact, then the defendant may not reassert the defense at trial but instead may apply for interlocutory leave to appeal.

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People v Anderson

The trial court's sole function at the hearing is to assess the evidence and to determine whether as a matter of law, the defendant presented sufficient evidence to establish a prima facie defense under §8, and if he did whether there were any material factual disputes on the elements of the defense that must be resolved by the jury.

- Standard of proof
- Evidentiary issues

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People v Hartwick/Tuttle

- The holding
- Impact on section 4
- Impact on section 8
- Footnote 77
- Standard of Proof

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When to Call the Physician

- The file is incomplete or does not document bona fide physician-patient relationship
- No medical marihuana registry card at time of incident

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Probable Cause

- People v Brown – footnote 5
- People v Sinclair – no rational basis for treating marijuana like schedule 1 (or alcohol)
- People v Campbell/People v Carruthers – the issue of non-plant marijuana; THC is marijuana
- Pre-immunity scenarios – the smell of marihuana + medical marihuana card

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People v Brown

- People v Keller – smell of marijuana
- People v Kazmierczak – trash pull

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Conflicts of Law

- Section 7(e) – MMMA nullifies conflicting statutes
- People v Koon – driving with any presence of schedule 1 controlled substance
- Braska v LARA – unemployment insurance
- People v Latz – improper transport of marijuana statute
- People v Magyari – bond/probation conditions

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Strategies of Practice

- HIPAA release
- LARA release
- Record certification
- Evidentiary issues – Hartwick footnote 77
  - MRE 902(11) – ordinary business records
  - MRE 803(6) – reports of occurrences
  - MRE 104, 1101 – preliminary hearings
  - Prima facie evidence – not for the truth

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Civil Forfeiture

- MCL 333.7522 et seq. – bond no longer required to claim interest
- Affirmative defense dismissal/acquittal – MCL 333.26428(c)(2)
- Stay of proceeding pending outcome of criminal matter

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What about the lab scandal?

- The Legislature has passed amendments to the public health code to synchronize penalties for marihuana and synthetic THC
- The MSP Forensic Laboratory has made substantial changes to its procedures manual which will prevent the reporting of synthetic THC for any substance other than Marinol
- Eastern District Court dismissed the suit

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Parting Thoughts

- Where are we at now?
  - Jury trial
  - Jury instructions
- Remaining MMMA Issues
  - Employment
  - Housing
  - CPS/custody
  - Bond/probation
  - Healthcare
  - Firearms

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Downloads

- Section 4 & 8 Flowcharts
- LARA patient application and record releases
- Hartwick/Tuttle affirmative defense evidence matrix
- Affirmative defense opinions
- Law, rules, and definitions
- Available at komornlaw.com/SBM