IN THE SUPREME COURT OF THE
STATE OF MICHIGAN
APPEAL FROM THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

SC Docket No.: 148444
COA Docket No.: 312308
Oakland CC Case No.: 2012-240981-FH

RICHARD LEE HARTWICK
Defendant-Appellant.

AMICUS CURIAE BRIEF OF CANNABIS ATTORNEYS OF MICHIGAN IN SUPPORT OF APPELLANT RICHARD LEE HARTWICK

Attorneys for Amicus Curiae Cannabis Attorneys of Michigan

By: Denise A. Pollicella (P55629)
Ashlee N. Rudnick (P77837)
Brandon Gardner (P74569)
Cannabis Attorneys of Michigan
4330 E. Grand River Avenue
Howell, MI 48843
(517) 546-1181

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STATEMENT OF INTEREST OF AMICUS CURIAE

The **Cannabis Attorneys of Michigan**, established in 2009, is a specialized division of Denise A. Pollicella, Esq., PLLC, a Michigan law firm, created for the purpose of advocating for, counseling and representing individuals and businesses involved in Michigan's medical marihuana community. It also provides competent criminal defense for caregivers and patients under the Michigan Medical Marihuana Act. Cannabis Attorneys of Michigan also works to improve the Michigan Medical Marihuana Act in order to clarify the law for patients, caregivers, law enforcement, and communities. To that end, Cannabis Attorneys of Michigan speaks at seminars and local government meetings, provides testimony to the Michigan legislature, publishes articles, and works to create cogent legislation that protects patients, caregivers, and the State of Michigan.

STATEMENT OF JURISDICTION

The Amicus Curiae accept the statement of jurisdiction presented at Appellee's Brief at 1.

STATEMENT OF QUESTIONS PRESENTED

1. IS A DEFENDANT'S ENTITLEMENT TO IMMUNITY UNDER SECTION 4 OF THE MICHIGAN MEDICAL MARIHUANA ACT A QUESTION OF LAW FOR THE TRIAL COURT TO DECIDE?

Trial courts answered:	Yes.
Court of Appeals answered:	Yes.
Amicus Curiae answers:	Yes.
Appellee answers:	Yes.
Appellant answers:	Yes.

2. DOES THE TRIAL COURT RESOLVE FACTUAL DISPUTES REGARDING SECTION 4 IMMUNITY?

Trial courts answered:	Yes.
Court of Appeals answered:	Yes.
Amicus Curiae answers:	Yes.
Appellee answers:	Yes.
Appellant answers:	Yes.

3. IF THE TRIAL COURT DOES RESOLVE FACTUAL DISPUTES REGARDING SECTION 4 IMMUNITY, DOES IT BECOME AN ESTABLISHED FACT THAT CANNOT BE APPEALED?

Trial courts answered:	Yes.
Court of Appeals answered:	Yes.
Amicus Curiae answers:	Yes.
Appellee answers:	Yes.
Appellant answers:	Yes.

4. DOES A DEFENDANT'S POSSESSION OF A VALID REGISTRY IDENTIFICATION CARD ESTABLISH ANY PRESUMPTION FOR PURPOSES OF SECTION 4 OR SECTION 8?

Trial courts answered:	No.
Court of Appeals answered:	No.
Amicus Curiae answers:	Yes.
Appellee answers:	No.
Appellant answers:	Yes.

5. IF THE ANSWER TO # 2 IS NO, DOES A DEFENDANT HAVE TO SHOW MORE THAN HIS REGISTRY IDENTIFICATION CARD AND THAT HE IS WITHIN THE VOLUME LIMITS IN ORDER TO HAVE IMMUNITY UNDER SECTION 4?

Trial courts answered:	Yes.
Court of Appeals answered:	Yes.
Amicus Curiae answers:	No.
Appellee answers:	Yes.
Appellant answers:	No.

6. IF THE ANSWER TO # 2 IS NO, DOES A DEFENDANT HAVE TO SHOW MORE THAN HIS REGISTRY IDENTIFICATION CARD AND THAT THE AMOUNT OF MARIHUANA POSSESSED IS THAT WHICH IS REASONABLY NECESSARY FOR UNINTERRUPTED USE IN ORDER TO HAVE AN AFFIRMATIVE DEFENSE UNDER SECTION 8?

Trial courts answered:	Yes.
Court of Appeals answered:	Yes.
Amicus Curiae answers:	No.
Appellee answers:	Yes.
Appellant answers:	No.

7. DO THE VERIFICATION AND CONFIDENTIALITY PROVISIONS IN SECTION 6 OF THE ACT PLAY A ROLE IN ESTABLISHING ENTITLEMENT TO IMMUNITY UNDER SECTION 4 OR AN AFFIRMATIVE DEFENSE UNDER SECTION 8?

Trial courts answered:	Did not address.
Court of Appeals answered:	Did not address.
Amicus Curiae answers:	Yes.
Appellee answers:	No.
Appellant answers:	Yes.

8. DID THE COURT OF APPEALS ERR IN CHARACTERIZING A QUALIFYING PATIENT'S PHYSICIAN AS ISSUING A PRESCRIPTION FOR, OR PRESCRIBING, MARIHUANA?

Trial courts answered:	Did not address.
Court of Appeals answered:	Did not address.
Amicus Curiae answers:	Yes.
Appellee answers:	Yes.
Appellant answers:	Yes.

STANDARD OF REVIEW

Amicus Curiae accepts the Standard of Review presented in Appellant's Brief at 8.

STATEMENT OF FACTS

Amicus Curiae accepts the statement of background and facts presented in Appellant's Brief at 1-4.

ARGUMENT

In 2008, 68% of Michigan residents approved of a ballot initiative permitting the medical use of marihuana. "The purpose of the MMMA is to allow a limited class of individuals the medical use of marijuana, and the act declares this purpose to be an 'effort for the health and welfare of [Michigan] citizens.'" *People v Kolanek*, 491 Mich 382, 393–94; 817 NW2d 528 (2012). In the ensuing years, there has been confusion regarding the rights and responsibilities of patients and caregivers. The requirements Appellee is proposing in its brief, however, fly in the face of not only common sense and the will of the people, but also of the United States Constitution. In addition, the Appellee suggests requirements not present or contemplated by the MMMA and would require this Court to write new law.

I. A DEFENDANT'S ENTITLEMENT TO IMMUNITY UNDER SECTION 4 OF THE MICHIGAN MEDICAL MARIHUANA ACT IS A QUESTION OF LAW FOR THE TRIAL COURT TO DECIDE.

The Amicus agree with Appellee and Appellant to the extent that a defendant's entitlement to immunity under Section 4 of the MMMA is a question of law for the trial court to decide.

Questions of immunity, whether in civil or criminal cases, are questions of law for a trial court to decide. See *People v Patterson*, 58 Mich App 727; 228 NW2d 804 (1975); *Morden v Grand Traverse County*, 275 Mich App 325; 738 NW2d 278 (2007). The trial court is charged with determining questions of law: "[t]he determination of questions of law by the courts is not a new elitist prerogative … it is the very purpose of the judiciary." *Charles Reinhart Co v Winiemko*, 444 Mich 579, 602; 513 NW2d 772 (1994). It is the role of the trial court to determine questions of law as "the trial court must determine—as a matter of law—if the defendant established his or her right to have the charges dismissed." *Kolanek*, 492 Mich at 3.

Similarly in the context of the MMMA, the Court of Appeals in *People v Jones*, 301 Mich App 566; 837 NW2d 7 (2013) held that a question of immunity is a question for the trial court to determine.

> Further, the language of § 4 itself provides an additional basis for finding that the question of immunity ought to be decided by the trial court. MCL 333.26424 provides that both qualifying patients and primary caregivers that have been issued and possess a registry identification card "shall not be subject to arrest, prosecution, or penalty in any manner." For this protection to have meaningful effect, the immunity must be afforded at the earliest possible stages of any investigation or subsequent court proceedings. The delay occasioned by having to wait for a jury to be impaneled to resolve factual questions would hinder the implementation of § 4 immunity. Assigning the trial court the duty of determining factual questions regarding the applicability of § 4 immunity will result in a more expeditious resolution of immunity claims.
>
> In sum, relying on similar well-established principles of criminal law . . . and on the language of the MMMA itself, we hold that § 4 immunity fact-finding is a question for the trial court to decide.

Amicus Curiae do not dispute that current case law requires Section 4 immunity to be decided by the trial court. However, the Amicus submit that the holding in *Jones* should be extended.

Section 4 provides broad immunity from arrest, criminal prosecution, civil penalties, and disciplinary action. *People v Bylsma*, 493 Mich 17, 28; 825 NW2d 543 (2012). While courts of law can determine whether an individual is immune from prosecution under Section 4, law enforcement often ignores this immunity provision. The MMMA mandates that caregivers, patients, and doctors are immune from arrest. The defendants in *Bylsma* and *Kolanek* were either registered caregivers or registered qualifying patients who produced their registry identification cards to law enforcement. By presenting their registry identification cards, they were immune from arrest, at the very least. Indeed, Mr. Tuttle and Mr. Hartwick, the defendants in these cases, were also arrested despite possessing registry identification cards. If the MMMA's provision providing "broad immunity" from *arrest* is to mean anything, it should mean at least that a

caregiver or registered qualifying patient is not subject to such an intrusive, costly, and embarrassing predicament that the electorate clearly meant to prevent by this provision.

Immunity from criminal prosecution and immunity from arrest are separate and distinct protections afforded under the MMMA. Section 4 states that both caregivers and patients "who ha[ve] been issued and possess[es] 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." Appellee argues that the "in accordance with this act" language in Section 4 implicitly requires compliance with Section 8. This was not the intent of the electorate. Sections 4 and 8 contain separate and distinct language regarding the amount of marihuana (useable or not) a caregiver or patient may possess. Section 8 allows that amount which is reasonably necessary to ensure uninterrupted use while Section 4 sets a specific cap on the amount of marihuana a person is allowed to possess. It is significant that the language "otherwise in accordance with" is contained in a separate, distinct subsection in Section 7. See MCL 333.26427(a). This language is intentional. Section 7 contains several prohibitions against the use and possession of marihuana including smoking in public places, operating a vehicle while under the influence of marihuana, and using or possessing marihuana within a certain distance from a school. The language "otherwise in accordance with this act" is meant to refer to Section 7, not other sections of the MMMA.

Currently, if law enforcement is presented with a registry identification card, but believes that the MMMA is being violated in any way, the suspect is arrested and processed. This is contrary to the MMMA's immunity from arrest under Section 4. As this Court has previously held, it is not necessary to present a registry identification card in order to assert an affirmative defense under Section 8. *Kolanek*, 491 Mich at 401. Yet, the MMMA is being enforced in such a

way as to arrest first and ask questions later. To have Section 4's immunity from arrest carry any weight, all that should be required by a card carrier is to present the registry identification card, be in compliance with Section 7, and be under his or her statutorily allowed volume limit. To hold otherwise would have citizens question the real purpose of possessing a registry identification card.

II. THE TRIAL COURT RESOLVES FACTUAL DISPUTES REGARDING SECTION 4 IMMUNITY.

The Amicus agrees with Appellee and Appellant that the trial court resolves factual disputes regarding Section 4 immunity. As previously discussed, a claim of immunity is a question of law for the trial court to decide. "Questions of fact are the province of the jury, while questions of law are reserved to the courts." *Kolanek*, at 411. The *Kolanek* Court went on to state that "the trial court must determine—as a matter of law—if the defendant established his or her right to have the charges dismissed." *Id.* Therefore, where Section 4 immunity is concerned, the trial court must resolve any factual disputes. See also *People v McNeal*, 72 Mich App 507, 514; 250 NW2d 110 (1976) (trial courts can resolve factual disputes regarding an entrapment defense).

While Amicus Curiae do not dispute the case law as it currently stands, it submits that the holding in *Jones* should be extended to provide further protection to caregivers and patients under Section 4.

MCL 333.26424 provides:

> (a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable

marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. The privilege from arrest under this subsection applies only if the qualifying patient presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the qualifying patient.

(b) A primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act. The privilege from arrest under this subsection applies only if the primary caregiver presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the primary caregiver. This subsection applies only if the primary caregiver possesses an amount of marihuana that does not exceed:

(1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department's registration process; and

(2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility; and

(3) any incidental amount of seeds, stalks, and unusable roots.

The Court of Appeals has previously held that usable forms of marihuana do not include resins or extracts from the marihuana plant. *People v Carruthers*, 301 Mich App 590, 594; 837 NW2d 16 (2013). However, before a potted marihuana plant becomes usable marihuana, it must be harvested and dried. Webster's Dictionary defines a plant as "a living organism of the kind exemplified by trees, shrubs, herbs, grasses, ferns, and mosses, typically growing in a permanent site, absorbing water and inorganic substances through its roots, and synthesizing nutrients in its

leaves by photosynthesis using the green pigment chlorophyll." Once a marihuana plant is harvested, it no longer grows from a permanent site and ceases to absorb water and inorganic substances through its roots. In order to be immune under the MMMA, a registered qualifying patient or caregiver must possess less than the amounts provided under Section 4.

Drying marihuana plants should be considered in the same category as an incidental amount of seeds, stalks and unusable roots under Section 4. Drying marihuana is neither a plant nor usable, as at that stage it cannot be used to extract resins. Sections 4(a) and (b)(3) specifically contemplate the characteristics of a drying marihuana. Cannabis in this stage may contain an incidental amount of seeds, its roots are unusable as they have been permanently removed from their soil, and contain stalks. Marihuana in the drying stage are incidental to the amount of plants and usable forms of marihuana currently in a person's possession.

The possession of drying marihuana is distinguishable from *People v Carruthers*, 301 Mich App 590; 837 NW2d 16 (2013) wherein the Court of Appeals held that a person in possession non-usable forms of marihuana, such as brownies, oils and extracts, while entitled to an affirmative defense, are not immune under Section 4. *Id.* at 613. In support of this conclusion, the Court of Appeals relied heavily on the MMMA's definition of "usable marihuana:"

> "Usable marihuana" 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(k). Relying on this language, the Court of Appeals found that "The word 'thereof' . . . refers back to the immediately preceding phrase 'the dried leaves and flowers of the marihuana plant.' Therefore, to constitute usable marijuana under the MMMA, any 'mixture or preparation' must be of 'the dried leaves or flowers' of the marijuana plant." *Carruthers*, 301 Mich App at 601. Resins or a mixture or preparation of resin is not considered usable marihuana

under Section 4. *Id.* at 604. However, marihuana in a drying stage is not a resin or mixture or preparation of resin. It consists of seeds, stalks, and roots, an incidental amount of which is permissible under Section 4. "Incidental" is an adjective meaning "[s]ubordinate to something of greater importance; having a minor role." Black's Law Dictionary (8th ed). This definition fits squarely into the importance of drying marihuana in terms of its role in the production of usable marihuana. Medicinal marihuana, whether used topically as an oil, lotion, or cream, or ingested through food products or inhalation, has many palliative and therapeutic applications. In comparison, marihuana in a drying stage, in and of itself, has no palliative or therapeutic use to qualifying patients. Therefore, any possession of marihuana in a drying stage is incidental.

Quite often, however, law enforcement considers cannabis in the drying stage to be plants, which they are not by definition. When a police officer conducts a search of a home for marihuana and sees marihuana in a drying stage, they believe that this should be counted as marihuana plants, unusable marihuana, or usable marihuana. It is none of these, but rather an incidental amount of seeds, stalks, and roots the possession of which is immune from arrest and prosecution.

III. WHEN THE TRIAL COURT RESOLVES FACTUAL DISPUTES REGARDING SECTION 4 IMMUNITY, THE FACTUAL DISPUTE MAY BE APPEALED.

The Amicus agree with Appellant and Appellee that factual findings by a trial court regarding Section 4 immunity are appealable to the appellate courts. If a trial court makes a factual determination regarding Section 4 immunity, the question was one of law, not fact. Where there is a review of the factual findings of the trial court at law, the clear error standard applies. MCR 2.613(C). See also *People v Barrera*, 451 Mich 261, 286; 547 NW2d 280 (1996), cert denied sub nom *Michigan v Barrera*, 519 US 945 (1996); *People v McSwain*, 259 Mich App 654, 682; 676 NW2d 236 (2003). "A finding of fact is 'clearly erroneous' if, after a review of the

entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Roberts*, 292 Mich App 492, 502; 808 NW2d 290 (2011) [quoting *People v Swirles*, (After Remand), 218 Mich App 133, 136; 553 NW2d 357 (1996)].

IV. A PATIENT'S VALID REGISTRY IDENTIFICATION CARD IS SUFFICIENT TO ESTABLISH IMMUNITY UNDER SECTION 4 OR AN AFFIRMATIVE DEFENSE UNDER SECTION 8.

The language of the MMMA gives rise to a number of presumptions, provided that the caregiver or patient is compliant with specific requirements set forth in Section 4 or Section 8, respectively. The requirements are simple and finite, and neither imply nor suggest that a Defendant must show any more than what is written in the plain language of the statute.

A. SECTION 4 GIVES RISE TO A NUMBER OF PRESUMPTIONS IN FAVOR OF PATIENTS AND CAREGIVERS.

Under Section 4, there are three subsections that give rise to a presumption – subsections (a), (b), and (d). Each of these subsections presupposes compliance with the statute so long as the defendant can meet two requirements for each applicable subsection.

i. A PLAIN READING OF THE TEXT OF SECTION 4(a) OF THE MMMA GIVES RISE TO THE PRESUMPTION OF IMMUNITY FOR A PATIENT.

The language of Section 4 of the MMMA is exceedingly clear as to what a patient must show in order to have immunity under the statute. The language requires only the possession of a valid, registry identification card and no more than 2.5 ounces of usable marihuana and/or 12 marihuana plants:

> 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.

ii. A PLAIN READING OF THE TEXT OF SECTION 4(b) OF THE MMMA GIVES RISE TO THE PRESUMPTION OF IMMUNITY FOR A CAREGIVER.

Similar to the requirements of a patient, the statute requires only that a caregiver possess a valid registry identification card and 2.5 ounces of usable marihuana and 12 plants, for each of the caregiver's qualifying patient(s):

> (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;

iii. A PLAIN READING OF THE TEXT OF SECTION 4(d) OF THE MMMA GIVES RISE TO THE PRESUMPTION THAT A PATIENT OR CAREGIVER IS ENGAGED IN THE MEDICAL USE OF MARIHUANA.

Furthermore, the statute contemplates that patients and caregivers who possess a registry identification card and the requisite amount of marihuana are engaged in the medicinal use of marihuana:

> (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 language of the statute does not require that a caregiver produce medical records, information on his patients, etc. It simply entails possession of the registry identification card and that he meets the quantity requirements.

The language of the statute is not ambiguous in its requirements. What the Appellee is suggesting is requiring more than what is written in the four corners of the statute. Courts look first to the specific language of the statute. *People v Underwood,* 278 Mich App 334, 338; 750 NW2d 612 (2008). Clear and unambiguous language should be enforced as written. *In re McLeod USA Telecommunications Services Inc.* 277 Mich App 602, 609; 751 NW2d 508 (2008).

Furthermore, Section 4(d) goes on to say that "[t]he presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act." This is not an evidentiary burden on the defendant, but on the prosecutor, and where the trial and appellate courts err in their reading and application of the Act.

The prosecution must prove that the conduct was not in conformity with the MMMA, not the other way around. The Appellee would seek to shift the statutory presumption from the defendant to the prosecution and, as a result, destroy the immunity the MMMA currently provides to patients and caregivers as was intended by its drafters and the voters of this state. Nowhere in the statute does it state that a caregiver need to have intimate knowledge his patients' medical conditions. All that Section 4 requires is that possession and/or use be for the purpose of treating a medical condition or its symptoms. Absent intensive medical training, which is not required by the law, a caregiver need only have the patient's registry identification card.

B. SECTION 8 PROVIDES AN AFFIRMATIVE DEFENSE TO THOSE WHO COMPLY WITH ITS REQUIREMENTS

A party is entitled to the affirmative defense under Section 8 by establishing that:

> "[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 patient did not possess an amount of marijuana that was more than "reasonably necessary" for this purpose, and (3) the patient's use was "to treat or alleviate the patient's serious or debilitating medical condition or symptoms."

Kolanek, 491 Mich at 398–99 [quoting MCL 333.26428(a)(1)–(3)].

Section 8 states that the defense "shall be presumed valid" when the defendant presents evidence showing that he has met the elements of Section 8. "'Shall' is a mandatory term, not a permissive one." *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006). Section 8, therefore, grants a clear and durable presumption in favor of a defendant that must be overcome by the prosecution.

The Section 8 affirmative defense also requires a showing that Section 7(b) of the MMMA was not violated.[1]

> (b) This act shall not permit any person to do any of the following:
>
> (1) Undertake any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice.
>
> (2) Possess marihuana, or otherwise engage in the medical use of marihuana:
>
> (A) in a school bus;
>
> (B) on the grounds of any preschool or primary

[1] Section 8(a) reads: "Except as provided in section 7(b), 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…"

or secondary school; or

(C) in any correctional facility.

(3) Smoke marihuana:

(A) on any form of public transportation; or

(B) in any public place.

(4) Operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marihuana.

(5) Use marihuana if that person does not have a serious or debilitating medical condition

Section 7, thus, contains mostly requirements prohibiting consumption of marihuana, but Subsection 5 also prohibits marihuana use for someone who does not have a serious or debilitating medical condition.

i. SECTION 8 CONTEMPLATES THAT A PATIENT OR CAREGIVER MAY HAVE MORE MARIHUANA THAN WHAT IS PERMITTED BY SECTION 4.

The Court in *Kolanek* held that it is not necessary to demonstrate compliance with section 4 of the MMMA to assert an affirmative defense under Section 8. See 491 Mich at 401–02.

> The textual distinctions among §§ 4, 7(a), and 8 provide further support for our interpretation that the plain language of § 8 does not require compliance with the requirements of § 4. Sections 4 and 8 provide separate and distinct protections and require different showings, while § 7(a), by its plain terms, does not incorporate § 4 into § 8.
>
> * *
>
> [A]dherence to § 4 provides protection that differs from that of § 8. Because of the differing levels of protection in §§ 4 and 8, the plain language of the statute establishes that § 8 is applicable for a patient who does not satisfy § 4.

The Court clearly found that Section 4 and Section 8 provide distinctly different levels of

protections. Section 4 is available to defendant who either does not possess a registry identification card or who does not meet its volume requirements.

Section 8 provides an affirmative defense for cases that do not fall within the parameters of Section 4, such as when the amount in possession is greater than that allowed in Section 4 or if the patient or primary caregiver have not yet obtained registry identification cards. *People v Redden*, 290 Mich App 65, 81; 799 NW2d 184 (2010). Section 8 plainly contemplates a patient or caregiver possessing more than the quantity requirements set forth in Section 4. If the drafters of the MMMA intended that a patient or caregiver have less than 2.5 ounces in order to have a Section 8 affirmative defense, the drafters could have either cited a limit or referenced Section 4. Instead, the drafters made reference to an amount that would be "reasonably necessary" to ensure "uninterrupted availability" under Section 8.

A caregiver does not, and should not, carry the burden of showing why his patient requires more marihuana than the amounts stated in Section 4. As a caregiver is generally not a member of the medical community – nor is such expertise required under the act – a caregiver may meet his burden solely upon the word of his patient. Physicians do not "prescribe" marihuana, they simply state that a qualified patient would benefit from medicinal use.

Therefore, a certification does not state that, for example, a patient should use one marihuana cigarette containing one ounce of usable marihuana a day or one ounce of usable marihuana a week, as may be found in a written prescription for pharmaceuticals. If the law required such a statement by the physician, it would be included on the Michigan Marihuana Program's ("MMP") program's physician certification. In the two pages of the Physician Certification provided by the state for the use of doctors and their medical marihuana patients, no quantity is asked, or required, to be stated. It is the patient who must judge, then, what amount is

appropriate for his or her own use. This is no different than an adult using different quantities of aspirin over different spans of time to relieve headaches of varying severity. Under the Appellee's theory, the inquiry that a caregiver should be making of the patient is not only more than that of a licensed medical doctor, but is more than actions taken by the Department when issuing a caregiver license, as medical records are not requested or required by the MMP for the approval of a patient or caregiver card. If the State is allowed to rely on the patient's assertions and the physician's certification, why cannot the caregiver as well?

A caregiver must be able to rely on a patient's medical marihuana patient card as evidence of the valid and honest inquiry of the patient, the patient's physician(s) and the State of Michigan. Requiring more from a caregiver would not only place a substantially higher burden on the caregiver than is placed on the State of Michigan when issuing the caregiver card, but would work a *de facto* invalidation of the opinion and certification of a trained, licensed medical professional.

What the Appellee asks of this court is to allow the systematic dismantling of a licensing process; a process put there for the very purpose of allowing a Michigan resident to prove to the world he is authorized to use marihuana for medical purposes.

It must be the sole and exclusive purview of medical professionals to recommend amounts for patient use – not a caregiver, not law enforcement, not the court system. A caregiver is a means by which a patient obtains his medicine and needs only be a person who specializes in cultivating marihuana, not diagnosing conditions and recommending certain amounts. If this Court allows Appellee's burden on the caregiver to prevail, it will be tantamount to requiring caregivers to engage in the unauthorized practice of medicine, in direct violation of Michigan law. See MCL 333.16294. If this Court allows Appellee to prevail in its arguments, qualifying

registered patient in Michigan will be prey to over-zealous law enforcement agents seeking to threaten arrest and prosecution in order to use vulnerable patients as weapons to entrap well-meaning caregivers. Moreover, and perhaps more troubling, is that if caregivers cannot reasonably rely upon the valid registry cards of their patients upon which to base presumptively protected conduct, then none of their conduct will be protected, and the MMMA will be invalidated.

ii. THE TRIAL COURT AND THE COURT OF APPEALS ERRED IN DETERMINING THAT A REGISTRY IDENTIFICATION WAS INSUFFICIENT TO SATISFY SECTION 8.

The trial court, Court of Appeals, and the Appellee have stated that possession of a registry identification card is insufficient for the purposes of asserting an affirmative defense under Section 8. The Court of Appeals, in its opinion, stated: "Possession of a registry identification card, without more, does nothing to address these § 8 medical requirements. It offers no proof of the existence of an ongoing relationship between patient and physician, as mandated by § 8 (a)(1). *People v Hartwick*, 303 Mich App 247; 842 NW2d 545 (2013). This assertion runs afoul of the plan language of Section 8(a)(3) and common sense.

Declaring a registry identification card insufficient under Section 8 contravenes the entire point of issuing it. If the registry identification card itself is insufficient to show that a caregiver or patient has a medical need for marihuana then the entire reason for issuing these cards has been undermined. It would be akin a police officer observing a speeding driver, pulling over that driver, requesting and receiving the Michigan driver's license, then requiring that driver to perform a written and on-road driving test. As it is, and as is the purpose of all licenses, a driver's license is prima facie evidence of the ability to drive in the State of Michigan. It is

unduly burdensome and contrary to the purpose of the law not to consider a medical marihuana program registry card as proof of a person's valid medicinal use of marihuana.

The Court of Appeals also opined that a registry identification 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." *Id.* (emphasis in original). It is true that caregivers do not know if marihuana is actually being used for medical purposes, but physicians do not know if a patient is actually using a prescription painkiller for medical conditions, either. Individuals who have received a recommendation to use marihuana have seen a doctor for debilitating medical conditions and have been certified by that physician that medicinal marihuana would benefit that individual. This the courts must accept as true until proven otherwise. Proven, not presumed.

This scenario is no different than an individual who is prescribed painkillers, which have high rates of abuse and hospitalization as a result of that abuse.[2] The difference, however, is that those who have prescriptions for painkillers do not get routinely dragged into court to prove to people without medical licenses that their use is medicinal. A prescription for a painkiller is *prima facie* evidence of medicinal use. Requiring more than the registry identification card is unduly burdensome and contrary to the intent of the statute. Any finding by this Court other than a plain reading of the statute providing a presumption for the defendant based upon a duly issued state license would result in a declaration that all medicinal marihuana patients are recreational users.

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[2] See Office of Recovery Oriented Systems of Care <http://www.michigan.gov/documents/mdch/Opioid-Related_Hospit_2000-2011_05-31-13_427136_7.pdf> (accessed October 1, 2014 12:05 p.m.) (Indicating that hospitalization for opioid abuse are at rates of 20.3 per 10,000 population).

iii. A REGISTRY IDENTIFICATION CARD IS ENOUGH FOR A CAREGIVER TO PRESUME HIS PATIENTS HAVE A BONA FIDE PHYSICIAN-CAREGIVER RELATIONSHIP.

In the Appellee's brief at 25, it contends that a caregiver is required to have knowledge of his patient's relationship with her physician. This assertion, however, is found nowhere in the language of the statute. The Court of Appeals similarly asserted the requirement of a caregiver to have knowledge of his patient's conditions and relationship with her physician: "[W]e hold that mere possession of a patient's or caregiver's identification care does not satisfy the first element of § 8(a)'s affirmative defense." *Hartwick*, 303 Mich App at 260. The Court of Appeals noted that "the MMMA does not explicitly impose a duty on patients to provide such basic medical information to their primary caregivers, the plain language of § 8 obviously requires such information for a patient or caregiver to effectively assert the § 8 defense in a court of law." *Id.* at 266-67.

The Court of Appeals admits that the MMMA does not require that a patient to provide her medical information to a caregiver, but it "obviously requires" such. The Court found that Defendant was able to present a bona fide relationship between himself and his physician, but it failed to find that Defendant presented evidence of such a relationship between the patients and their respective physicians. What the Court fails to do, however, is point to statutory language that either explicitly or implicitly requires that a caregiver demonstrates that such a relationship exists. The statutory language is clear that a patient must be able to demonstrate a bona fide physician-patient relationship between himself and his physician, but nowhere does it state that a caregiver must do the same for his patients and their physicians. To place that burden on a caregiver would be to require that the caregiver have unlimited access to his patients' medical files and ultimately require that he have medical knowledge. In truth, it would require a

caregiver to request the entire medical file of a patient and to assess and verify the veracity, legitimacy, and history of that patient's medical records. This is a skill beyond that which is required by the Act and beyond what the Act requires for even the Department. Why, then, is this burden placed upon the caregiver, who, under the law, is not required to have special medical training or expertise in medical records? How would a caregiver begin to assess a patient's medical records? The Appellee and Court of Appeals summarily state that a caregiver must have all this information without pointing to specific language in the statute or case law that supports this proposition. These requirements do not appear in the law because they were never intended by the drafters or voters, and make no sense. We are aware of no other law requiring unrelated third-parties to have *and to verify* a medical need or physician-patient relationship for any other service or medicine. For that reason and the reasons stated above, there can be none.

iv. A CAREGIVER MAY RELY ON A REGISTRY IDENTIFICATION CARD IN ORDER TO SATISFY SECTION 8(A)(3).

When a patient presents a caregiver with a registry identification card, it should be the end of the inquiry for the caregiver regarding the patient's medical conditions for purposes of a Section 8 affirmative defense. As stated above, a caregiver is not required to be a medical professional under the MMMA. Section 8(a)(3) states:

> 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.

The language clearly states that the action must relate treating or alleviating a medical condition. It does not require knowledge of the medical condition, it only requires that the conduct relates to a medical condition. The caregiver needs only be satisfied that the use

is for the purpose of treating a medical condition.

A registry identification card provides the proof a caregiver needs to indicate that the medical professional has recommended the use of marihuana for a patient's debilitating medical condition. A caregiver is much like a pharmacist, who relies solely on the prescription from a physician. A pharmacist need not inquire as to the reasons for the prescription. A caregiver is no different and should not be tasked with determining legitimacy and appropriateness of medication for a medical condition. It is an onerous and ridiculous proposition to expect a lay person to make value-based judgments on a person's medical condition, as such expectation is well beyond the language of the statute.

v. THE VOLUME LIMITATIONS DESCRIBED UNDER SECTION 4 OUGHT TO BE CONSIDERED IN DETERMINING WHAT IS "REASONABLY NECESSARY" UNDER SECTION 8.

The Appellee and the trial court assert that in order to show "an amount reasonably necessary" under Section 8(2), the defendant must have reviewed the patient's medical records and be well-versed in her medical conditions and use this information to determine an amount reasonably necessary to address these medical needs. What is being proposed is placing a burden on a defendant that should reasonably be on the physician. A physician is the party that certifies a patient for marihuana for medicinal purposes. This, then, leaves a caregiver to stand in the shoes of a medical professional to determine what is "reasonably necessary" under the law.

The State of Michigan, however, has provided the "dosage" in the language of the statute – 2.5 ounces under Section 4 or as reasonably necessary for uninterrupted use under Section 8. The drafters of the statute clearly contemplated that 2.5 ounces is a floor rather than a ceiling for proper volume amounts. Had the drafters contemplated that, under Section 8, a patient could

only possess 2.5 ounces, they would have inserted the 2.5 ounces requirement. The language of Section 8 did not include the 2.5 ounces amount because, if, for instance, a patient only needed one ounce for her uninterrupted use, she would have immunity under Section 4 so long as she has her patient card. The drafters anticipated that some patients would require more than 2.5 ounces as they plainly anticipated patients who either require more marihuana because of chronic, painful conditions or who use other, non-smokable forms of marihuana, which require vastly different quantities.

V. IF POSSESSION OF A VALID REGISTRY IDENTIFICATION CARD DOES NOT ESTABLISH ANY PRESUMPTION UNDER SECTION 4 OR SECTION 8, THE EVIDENTIARY BURDEN FOR A DEFENDANT WOULD BE UNDULY BURDENSOME.

A. EVIDENTIARY BURDEN UNDER SECTION 4.

As stated above, there are most certainly multiple presumptions that arise under Section 4 of the MMMA, but without these presumptions, the burden upon the defendant would be unduly onerous. The language of Section 4(d) reads that "(t)here shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana..." As the presumption is that the defendant is engaged in the medical use of marihuana, without that presumption the burden upon the defendant would be to show that he is engaged in the medical use of marihuana in accordance with the MMMA.

Section 4 immunity is raised at a preliminary examination, as it is the best time to have charges dismissed before full discovery and trial. The preliminary examination is where the court determines if there is probable cause that a crime has been committed and if the defendant committed it. *People v Duncan*, 388 Mich 489, 499; 201 NW2d 629 (1972). A date for the preliminary examination must not exceed 14 days after the arraignment on the warrant. MCL 766.4; MCR 6.104(E)(4). Probable cause signifies evidence sufficient to cause a person of

ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. *People v Greene*, 255 Mich App 426; 661 NW2d 616 (2003). Probable cause must be demonstrated for each element of the offense charged, or there must be evidence from which the elements can be inferred. *People v Mason*, 247 Mich App 64, 72; 634 NW2d 382 (2001).

Therefore, in order to assert Section 4 immunity, assuming *arguendo* that a registry identification card is insufficient to show medical use of marihuana, a defendant would have to prove that each of her patients, up to five, has debilitating medical conditions. This would involve coordinating all five individuals, together with all of their doctors, plus medical records and, Appellee would argue, an expert witness who is competent to testify as to the prescription of medicinal marihuana, to show that the defendant and each of his patients were engaged in the medical use of marihuana. This is also assuming that the five patients consent to the release of their medical records and further inquiry into their medical conditions in a court of law, and that the physicians are able to attend such a hearing. This presents a practical impossibility for the patient defendant, and operates to invalidate the purpose of the Act.

Under Appellee's theory, it would be the defendant who is rebutting, *not* the prosecution. Section 4 states that a defendant's medicinal use "*may be rebutted*" by the prosecution to show noncompliance with the MMMA. Appellee and the Court of Appeals have reversed the rule, in effect claiming that if the prosecution suspects noncompliance, it is the defendant's burden to show compliance in *all* aspects of his actions under the MMMA. If it is truly the prosecution's burden to rebut, then it must be their burden alone to establish that the caregiver's patients do not suffer from a debilitating medication condition, or are not engaged in a bona fide physician-patient relationship, or that the defendant is not in possession of more than is reasonably necessary under the MMMA.

The inclusion of the word "rebut" in Section 4 is deliberate. "Rebut" means "[t]o refute, oppose, or counteract (something) by evidence, argument, or contrary proof." Black's Law Dictionary (8th end). By definition, once cannot "rebut" something that does not exist. As this Court has previously held, Sections 4 and 8 are textually distinct. *Kolanek*, 492 Mich at 401. Section 8 and Section 4 intentionally differ on how much marihuana an individual may possess.

Under Section 4, a defendant is *immune* so long as they are in possession of a registry identification card and are in possession of the marihuana counts provided in that section and, if a caregiver, that the caregiver and patient are connected through the Department. *That is it under Section 4.* The inquiry stops and it is then the burden of the prosecution to rebut defendant's evidence under Section 4. There is no requirement for a patient or caregiver under Section 4 to establish whether there is a bona-fide patient-physician relationship, they are in possession of an amount that is reasonably necessary, or that the registration card itself is valid. Indeed, Sections 4(a) and 4(b) conspicuously omit the word "valid" in qualifying the words "a registry identification card." The reason is clear: the electorate intended that possession of a registration card is *prima facie* evidence that is to be rebutted by the prosecution under Section 4 alone.

It is not in dispute that Section 8 carries a much higher evidentiary burden than Section 8. But to hold that Section 4 is unavailable to the defendant if he cannot comply with Section 8 effectively overrules *Kolanek* and *Redden*.

Moreover, if the only way a defendant can establish immunity under Section 4 is to comply with Section 8, the defendant's procedural rights will be substantially prejudiced. As previously discussed, Appellee argues that the defendant must produce doctors, lay and expert witnesses, caregivers, patients, and medical records in order to assert any defense under the MMMA. If this is truly the burden in a felony case, the defendant would be required to conduct

discovery at a blistering pace or, more likely, be forced to waive his preliminary examination, a hearing that he has a right to have and not be forced or coerced into waiving simply because the burden is too high for him to meet so quickly after his arraignment. Additionally, even if a defendant were able to gather the necessary information and testimony, it would be a detriment to judicial efficiency. A court would have to accommodate medical records of the five patients and caregivers, plus their physicians. It would take up a court's valuable time to hear all this information at a preliminary examination. Requiring more than a registry identification card, in short, would be overly burdensome, bordering on unconstitutional, to a defendant and a waste of the court's time.

This burden would essentially force a defendant to waive his preliminary examination, as it would be nearly impossible to gather the necessary information in time. According to MCR 2.305(B)(1), "(t)he subpoena must be served at least 14 days before the time for production," which would coincide with the time span between arrest and preliminary examination, effectively giving a defendant no time to review the documents and prepare. In addition, this completely ignores the time it takes to locate a record holder, which often takes a substantial amount of time.

The defendant's criminal liability is not the only thing at stake here. It is well within a patient's right to refuse to release her medical records and allow her physician to testify in order to assist her caregiver as she would risk prosecution for her own medical marihuana use. While the defendant may place his own medical condition at issue, he does not have standing to place his patients' medical conditions at issue. Requiring the release of a patient's records in her caregiver's defense works against the patient's right against self-incrimination. A witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. "The [Fifth

Amendment right against self-incrimination] serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Grunewald v United States*, 353 US 391, 421 (1957) (internal citations omitted). Requiring the patients, caregivers and doctors to testify as to their own personal use discourages the appearance and cooperation with the judicial process.

If no records or physicians are available, defendant would have no choice but to take the stand in order to prove the medical use of marihuana. This would clearly violate the Fifth Amendment's guarantee against self-incrimination as the only way to prove medical use would be testimony by the defendant. Requiring such a high burden contravenes the whole purpose of the registry identification cards, the US Constitution, and dismantles the defendant's due process rights. This is illustrated at the case at hand; the defendant had to testify because neither his patients nor their physicians testified on behalf of the defendant. As there was no other way to prove compliance with the Act, the defendant had no choice but to take the stand. A defendant should not have to choose between his Constitutional rights and having sufficient evidence at trial. The effect of requiring a caregiver to have such information is far-reaching and would violate the rights of defendants.

B. EVIDENTIARY BURDEN UNDER SECTION 8.

Under Section 8, a defendant, in order to show that he was engaged in the medical use of marihuana, must also show the following:

(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.

As the statute is written, the defendant already has a fairly high burden and must prove the elements of each subsection.

VI. THE VERIFICATION AND CONFIDENTIALITY PROVISIONS IN SECTION 6 OF THE ACT ESTABLISHES ENTITLEMENT TO IMMUNITY UNDER SECTION 4 OR AN AFFIRMATIVE DEFENSE UNDER SECTION 8?

A. VERIFICATION PROVISIONS UNDER SECTION 6.

Section 6 of the MMMA contains certain verification and confidentiality provisions. The relevant verification subsection states:

(c) The department shall verify the information contained in an application or renewal submitted pursuant to this section, and shall approve or deny an application or renewal within 15 business days of receiving it. The department may deny an application or renewal only if the applicant did not provide the information required pursuant to this section, *or if the department determines that the information provided was falsified.*

MCL 333.26426(c) (emphasis added). It is therefore the responsibility of the Department to determine whether the information is false, not a caregiver or patient. In other words, Section 6(c) requires that the Department verify that the information contained on the application is true. The information a patient submits, pursuant to Section 6(a) is:

(1) A written certification;

(2) Application or renewal fee;

(3) Name, address, and date of birth of the qualifying patient, except that if

the applicant is homeless, no address is required;

(4) Name, address, and telephone number of the qualifying patient's physician;

(5) Name, address, and date of birth of the qualifying patient's primary caregiver, if any;

(6) Proof of Michigan residency.

The written certification must be written by a Medical Doctor or a Doctor of Osteopathic Medicine and must state: (1) the patient's debilitating medical condition; (2) that the patient's condition or symptoms are covered under the MMMA; and (3) that a patient will receive some sort of palliative benefit from the medical use of medicine marihuana. 2009 ACCS, R 333.101(22). Having received all the information that is required to become a certified patient, and determining whether any of this information has been falsified, the Department issues a registry identification card.

The Department will not issue a registry identification card if it finds that the information on the certification is not valid. In addition, pursuant to Section 6(f) if a physician determines that a patient no longer has a debilitating condition, she must notify the state and the patient's card becomes null and void. MCL 333.26426(f).

The MMMA has thus given two layers of protection to ensure that those with a registry identification card are using marihuana for medicinal purposes: written certification and confirmation of that certification. Requiring a caregiver to research particular conditions and amounts necessary for treatment is more than what a physician must do as a physician does not prescribe marihuana as other medications, due to it being a Schedule I Controlled Substance.[3]

[3] According to the Drug Enforcement Agency: "Substances in this schedule (I) have no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse United States Department of Justice Drug

B. CONFIDENTIALITY PROVISIONS UNDER SECTION 6.

Section 6 also contains confidentiality provisions that enable law enforcement officials to verify the validity of a registry identification card while protecting the patient's information.

(h) The following confidentiality rules shall apply:

(1) Subject to subdivisions (3) and (4), applications and supporting information submitted by qualifying patients, including information regarding their primary caregivers and physicians, are confidential.

(2) The department shall maintain a confidential list of the persons to whom the department has issued registry identification cards. Except as provided in subdivisions (3) and (4), individual names and other identifying information on the list are confidential and are exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

Under this subsection, a patient's records are considered confidential. The *Department* is the entity that is responsible for reviewing patient records, not a caregiver. The Department is to determine whether or not a particular patient is eligible for a registry identification card and whether any of the information provided by the patient is fraudulent, it alone has the power to review records and issue the cards.

A caregiver is not required to hold a medical degree nor be involved with the issuance of registry identification cards, therefore, expecting a caregiver to determine if there is, in fact, a debilitating medical condition, bona fide physician patient relationship, or confirm the validity of a registry identification card entirely shifts the burden from the physician and Department, respectively, to an individual whose specialty is cultivation of marihuana. Nothing in the MMMA provides that a caregiver needs to investigate, interrogate or interview a patient to

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Enforcement Administration, *Controlled Substances Schedules* <http://www.deadiversion.usdoj.gov/schedules/#define> (accessed October 1, 2014 12:23 p.m.).

provide him/her medicinal marihuana. This is deliberate as the electorate did not intend a caregiver to be a quasi-physician. The electorate knew that caregivers could be any layperson without any excluded felonies.

Consider a cashier at a grocery store that sells alcohol. When a customer approaches the register and attempts to purchase alcohol, the cashier naturally asks for identification. A driver's license is produced, the cashier glances at the expiration date and the picture, then proceeds by unlocking the transaction on the point of sale terminal. The cashier is selling an item that is illegal some individuals to buy and/or consume. In fact, the cashier could face criminal charges for selling the alcohol to a minor. But, the cashier is protected because he verified the customer's identification by looking at it.

The process to obtain a driver's license in Michigan is very similar to obtaining a registry identification card. Both require an application, certification from a third party for eligibility under the program (a DO or MD for the MMMA or a Driving Skills Testing Organization), both require an application fee, and both require the department to issue a card if it determines that all the information has been received and is not falsified (Department of Licensing and Regulatory Affairs or Secretary of State). A caregiver should be able to rely on a government issued registry identification card just as a cashier selling alcohol is able to rely on a government issued driver's license. The suggestion by the Appellee and Court of Appeals that this burden lies with a caregiver is preposterous and onerous to caregivers.

As previously mentioned, the Department is solely responsible for identifying "falsified or fraudulent information," placing the burden of verification solely upon the Department.

> (4) A person, including an employee, contractor, or official of the department or another state agency or local unit of government, who discloses confidential information in violation of this act is guilty of a misdemeanor, punishable by imprisonment for not more than 6 months, or a fine of not

> more than $1,000.00, or both. Notwithstanding this provision, department employees may notify law enforcement about falsified or fraudulent information submitted to the department.

MCL 333.26426(4).

Simply stated, it is not a caregiver's duty to verify information that the MMMA expressly describes as "confidential."[4] It is the caregiver's duty to connect himself to a patient through the Department's registry and possess amounts of marihuana as provided under the MMMA, not to check medical records, investigate how many time the patient has seen his certifying physician, obtain a prescription of a doctor stating how much marihuana is necessary for uninterrupted use, or even conduct a search of the patient's home to make sure that he/she is growing marihuana in his basement. The caregiver need only know that he is providing marihuana for the patient's medicinal use – nowhere in the MMA is a caregiver required to know for what condition or verify any information with medical professionals. A caregiver cannot be expected to police the action of his patients to ensure that the patient is using marihuana for her debilitating medical condition.

VII. DID THE COURT OF APPEALS ERR IN CHARACTERIZING A QUALIFYING PATIENT'S PHYSICIAN AS ISSUING A PRESCRIPTION FOR, OR PRESCRIBING, MARIHUANA?

The Amicus concur with the Appellant and Appellee that the Court of Appeals erred when it characterized a physician as issuing a prescription or prescribing marihuana. As marihuana is currently classified under federal law as a Schedule I controlled substance, physicians may not issue a prescription for marihuana. 21 USC 812(c).

The Amicus take issue, however, with the Appellee's contention that in order to meet the

[4] See also Section 6(3): "The department shall verify to law enforcement personnel whether a registry identification card is valid, without disclosing more information than is reasonably necessary to verify the authenticity of the registry identification card." Suggesting that a name alone is sufficient in order verify patient status.

"medical use" purpose of the MMMA, the amount and frequency of marihuana use must have a direct relationship to a medical condition. Although the Amicus believe that a patient is charged with consuming marihuana in amounts and frequencies that are appropriate for their medical condition, to charge a caregiver with monitoring such use is outside what the MMMA contemplates. As pointed out above, a physician does not prescribe marihuana and therefore only recommends usage – no recommended amounts are given. Therefore, when a caregiver supplies marihuana to his patients, he only has the word of the patient regarding amount and frequency. The burden on relaying specifics of amount falls squarely on the patient. The caregiver should only need to provide marihuana in amounts, in his best judgment, seem reasonable. Caregivers are not required to be medical professionals under the MMMA and to require them to assess patient's marihuana amounts goes beyond the language of the MMMA.

RELIEF REQUESTED

The Amicus respectfully request that this Court determine that this Court reverse the decision of the trial court and the Court of Appeals and allow the Appellant to assert Section 4 immunity or a Section 8 affirmative defense under the MMMA . The Amicus also request that this Court find that a registry identification card is sufficient for purposes of Section 4 immunity and Section 8 affirmative defense.

Respectfully submitted,

Denise A. Pollicella, Esq., PLLC
Cannabis Attorneys of Michigan

Denise Pollicella (P55629)
Ashlee Rudnick (P77837)
Brandon Gardner (P74569)
4330 E. Grand River Ave.
Howell, MI 48843
(517) 546-1181
dp@smallbusinesslegal.net