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

**PEOPLE OF THE STATE OF MICHIGAN**
Plaintiff-Appellee,

v.

SC: 148971
COA: 312364
Oakland CC: 2012-241272-FH

**ROBERT TUTTLE**
Defendant-Appellant.

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# AMICUS CURIAE BRIEF OF CANNABIS ATTORNEYS OF MICHIGAN IN SUPPORT OF APPELLANT ROBERT TUTTLE

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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. WHEN A REGISTERED, QUALIFYING PATIENT MAKES AN UNLAWFUL SALE OF MARIHUANA TO ANOTHER PATIENT TO WHOM HE IS NOT CONNECTED THROUGH THE REGISTRATION PROCESS, DOES THIS UNLAWFUL SALE TAINT ALL ASPECTS OF HIS MARIHUANA-RELATED CONDUCT, EVEN THAT WHICH IS OTHERWISE PERMITTED UNDER THE ACT?

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

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

3. 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. |

4. 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. |

5. DO THE VERIFICATION AND CONFIDENTIALITY PROVISIONS IN SECTION 6 OF THE ACT PLAY 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. |

## 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 9-15.

## 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. WHEN A REGISTERED, QUALIFYING PATIENT OR CAREGIVER MAKES AN UNLAWFUL SALE OF MARIHUANA TO ANOTHER PATIENT TO WHOM HE IS NOT CONNECTED THROUGH THE REGISTRATION PROCESS, THE UNLAWFUL ACTION DOES NOT TAINT ALL ASPECTS OF HIS MARIHUANA-RELATED CONDUCT, INCLUDING AND ESPECIALLY THAT WHICH IS OTHERWISE PERMITTED UNDER THE ACT.

The assertion that conduct not within the scope of the MMMA taints all aspects of marihuana related conduct is clearly erroneous and against the language of the Act. Section 4 indicates that the presumptions "*may* be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition." (emphasis added). As noted by the appellant in its brief at page 18, "may" is permissive and indicates discretion. *In re Forfeiture of Bail Bond*, 276 Mich App 482, 492; 740 NW2d 734 (2007). This language, however, does not implicate conduct that does conform to the requirements of the MMMA as it employs the use of "the," a definite article, when referring to a patient. Clear and unambiguous language is given its plain and ordinary meaning. *In re LE*, 278 Mich App 1, 22; 747 NW2d 883 (2008).

Every word of a statute should be read to give it meaning, and so the court must avoid interpretations that render words unnecessary or meaningless. *In re MCI Communications*, 460 Mich 396, 415; 596 NW2d 164 (1999). The use of a definite article means that the drafters intended for there to be a nexus between the conduct and the patient for whom the conduct is being undertaken as argued in appellant's brief pages 15-22. This shows that the language of the MMMA does not contemplate that non-conforming conduct will render conforming conduct as devoid of any protections.

In *Kolanek*, at 394 [*quoting* MCL 333.26427(a)], the Court noted that medical marihuana could be used by "an individual suffering from serious or debilitating medical conditions or symptoms, to the *extent* that the individuals' marijuana use is 'carried out in accordance with the provisions of [the MMMA].'" (emphasis added). It is important to note that the quoted language did not state "all the provisions of the MMMA," so that one may seek protection under the MMMA "to the extent" that the individual's conduct is in conformity with the MMMA. This language requires that one may have conduct that is simultaneously conforming with and in violation of the MMMA, but still can claim immunity under Section 4 or an affirmative defense under Section 8. Therefore, conduct not protected under the MMMA does not automatically taint conduct that is otherwise protected. Suggesting that one indefensible act taints indefensible all acts is akin to tearing down a house because a doorframe was not correctly installed.

Appellee argues that when a caregiver or patient engages in conduct contrary to the MMMA that all of their marihuana related actions are tainted and therefore are not entitled to a defense under the MMMA for their otherwise legal conduct. This flies in the face of logic and the intent of the electorate. Consider an individual who is a caregiver for three registered qualified patients, who each tells the caregiver that they need marihuana to treat their respective

debilitating medical conditions. The caregiver, on his way to deliver medicine to his first patient, blows a tire forcing him to pull over. Passers-by call the police regarding a broken down vehicle and the responding officer smells marihuana prompting a request for the caregiver's registration card. The caregiver checks his wallet and realizes that he left the card at home. The caregiver is technically not in compliance with Section 4 since it requires possession of a valid registry card.

Appellee argues that a caregiver's failure to possess an identification card taints all of his activity. The practical effect of this contention would be to charge the caregiver and all of his patients with felonies and file a civil forfeiture action for the vehicle, the caregiver's home, and each of the patients' homes. Appellee's position is Draconian in its expanse.

Statutes must be construed to prevent absurd results. *Michigan Education Association v Secretary of State*, 488 Mich 18, 37; 793 NW2d 568 (2010). It is illogical to conclude that noncompliance with the MMMA on the part of the caregiver invalidates his otherwise legal activities. The MMMA clearly delineates the separate requirements of immunity and affirmative defense, providing an affirmative defense to a broader caucus of people who are not immune under Section 4. Appellee takes the position that it can prosecute anybody connected with the MMMA, no matter how tangential from the actual crime. If the Court were to adopt the Appellee's position, thousands of law abiding citizens would be subject to incarceration and property forfeiture for something as simple as forgetting a registry card at home. The true taint would not be not with noncompliance, but with the otherwise clean criminal histories of law-abiding citizens of this state.

Appellee contends in its brief at page 16 that "once a primary caregiver transfers marihuana to a patient not connected to him or her, the protection of the MMMA is lost and all marihuana related conduct can be prosecuted." Appellee bases its theory on language of *State v*

*McQueen*, 493 Mich 135; 828 NW2d 644, which declined to extend Section 4 immunity to a caregiver who transfers marihuana to a patient to whom that caregiver is not connected through the state's registry program. The Amicus does address or rely upon Section 4 immunity here, however. The argument Amicus makes is that the MMMA does not remove all protection from such a defendant, as the protections of Section 8 provide defenses and protections significantly broader than those of Section 4 and that the defendant continues to be entitled to Section 8 defenses for conduct unrelated to the isolated, tainted conduct. Indeed, if a Section 8 defense was not intended to be used by defendants in such cases, it would not have been included in the MMMA.

The Appellee's brief relies heavily on *Arizona v Fields*, 232 Ariz 265; 304 P3d 1088 (2013), an out of state opinion with facts vastly different from those in the instant case. In *Fields*, the defendant exceeded his quantity limitations; the appellant here was within his. Moreover and more telling is that the Arizona medical marijuana act does not contain an equivalent to Michigan's Section 8 affirmative defense. See ARS 36-2811. Therefore, Arizona requires strict compliance with its volume limitations – 2.5 ounces – and gives defendants no immunity should they possess more than what is allowed under the statute. Michigan, however, provides its residents with an affirmative defense in Section 8, thus contemplating possession of more than 2.5 ounces to provide an uninterrupted supply of medicine in an amount reasonably necessary for the patient's use. Arizona residents are not protected if they violate the volume limits, but Michigan residents can still seek protection, therefore, the language from *Fields* is inapplicable and irrelevant, and must be rejected.

## II. 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 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.

The applicant was validly connected to two patients through the state of Michigan.[1]

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[1] The appellant was a valid caregiver for both Mr. Bathke and Mr. Colon as certified by Celeste Clarkson, Compliance Section Manager for Michigan's Health Regulation Division, Bureau of Health Professionals. See Exhibit 1.

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.

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.

In this case, it was the prosecutor's burden to show that the confidential informant was not only not connected to the defendant through the registry program, but that defendant knew that his presumptive patient had no intention of being so connected and was not seeking the marihuana for the purpose of alleviating a serious medical condition. The trial court's failure to require such evidentiary rebuttal by the prosecutor shifted the burden to the defendant where the Act does not place it and the court of appeals' affirmation of same perpetuates this error.

### 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.[2]

> (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 or secondary school; or
>
> (C) in any correctional facility.

[2] 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..."

(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.

There is no indication by any parties that appellant was not in compliance with Section 7(b). The parties agree and the facts indicate that the confidential informant, Mr. Lalonde, was a qualifying registered patient, albeit not connected to the appellant, and appellant was supplying Mr. Lalonde with medicinal marihuana to treat his medical condition, as required by section 7(b)(5). Therefore, any discussions in this case relate solely to compliance with the elements of Section 8.

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 do not possess a registry identification card or who do 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.

In the instant case, Appellant was able to show that he met the requirements of Section 8. He has obtained a patient card for himself, and showed that he was validly connected to at least two patients through the state registry. The evidence indicates that appellate had 30 plants and 7.5 ounces of marihuana – well within the limits prescribed in Section 4. As argued in Appellant's brief at 33-35, Section 4 quantity requirements should be given substantial weight when considering whether a patient or caregiver had an "amount of marijuana that was more than 'reasonably necessary,'" as required 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 not even required of the state 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.

### B. 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: "mere possession of a registry card is insufficient evidence for the purpose of Section 8 (a)(3)." *People v Tuttle*, _____ _____ Mich

App _____ ;_____ _____ NW2d _____ 2014 (Exhibit 2). 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 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 painkillers 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 is no different than an individual who is prescribed painkillers, which have high

rates of abuse and hospitalization as a result of that abuse.[3] 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.

## III. 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

[3] See http://www.michigan.gov/documents/mdch/Opioid-Related_Hospit_2000-2011_05-31-13_427136_7.pdf (last accessed on September 15, 2014 11:12 a.m). (indicating that hospitalization for opioid abuse are at rates of 20.3 per 10,000).

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 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, have 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. Furthermore, this is assuming that the physicians are able to attend such a hearing.

Under this framework, it is 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 any reasonable 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.

As can be imagined, this requirement would be unduly burdensome and would be nearly impossible to coordinate in the limited space of time between arrest and the hearing. Essentially, this burden would 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 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." *Ohio v Reiner*, 532 US 17 (2001). 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.

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 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 subsections.

However, the Court of Appeals has attempted to redefine what a bona fide doctor-patient relationship is carried out, stating that a doctor must "continuously review the patient's condition, and revise the prescription accordingly." *See Tuttle*, *supra*. As adroitly stated in appellant's brief at page 44, a physician, under current law, may not prescribe marihuana, rather it is recommended, and therefore, it is not given in a dosage as one would receive for antibiotics.

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.

## IV. 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). Despite the Appellee's contention, the MMMA does require the Department to determine whether the "information provided was falsified." 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. MDCH Rule 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.[4]

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.

---

[4] 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." http://www.deadiversion.usdoj.gov/schedules/ (last accessed September 15, 2014 1:15 p.m.).

> (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 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."[5] 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

[5] 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.

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.

## CONCLUSION

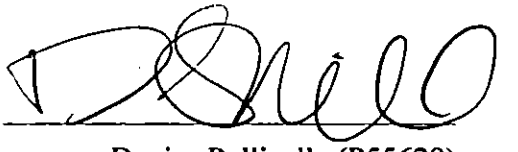
Sections 4 and 8 give rise to a number of presumptions to a patient or caregiver. A plain reading of the statute makes it clear that the intent of both the voters of the state of Michigan and the drafters of the MMMA intended that patients and caregivers were presumed as valid medicinal users of marihuana so long as the elements of the Sections were met. Requiring more than what is in the statutory defies the intent of the people of Michigan and acts to intolerably burden those who have legitimate medical need of marihuana.

## 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 dismiss Count IV-VII of the first amended information pursuant to Section 4 and Section 8 of the MMMA and dismiss counts I-III in accordance with Section 8 of the MMMA or alternatively, order that appellant may assert a medical marihuana defense at trial.

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

# EXHIBIT

# 1

Summary of Records

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

RICK SNYDER
GOVERNOR

STEVEN H. HILFINGER
DIRECTOR

June 1, 2012

Daniel J. M. Schouman
1060 East West Maple
Walled Lake, Michigan 48390

**VIA CERTIFIED MAIL**

**RE: Subpoena to Produce Information**

Dear Mr. Schouman:

The Michigan Department of Licensing and Regulatory Affairs, Bureau of Health Professions, Regulatory Division was served with a subpoena on or May 17, 2012, ordering the information below to be produced on or before Friday, June 8, 2012.

The subpoena, indicated by you to have been signed by Judge Warren, ordered the Department to produce:

> "A certified copy of all medical marihuana records held by the state for: (1) Robert Tuttle, D.O.B. 05/06/1976; (2) Michael W. Batke, D.O.B. 03/06/1976; (3) Paul A. Albarran, D.O.B. 07/23/1992; and (4) Frank R. Colon, II, D.O.B. 07/30/1985".

A search of all issued registrations for qualifying patients and registered primary caregivers has found the information below. This information is reasonably believed to be complete and accurate through the search dates of April 6, 2009 through March 31, 2012, the date the subpoena was signed.

**ROBERT TUTTLE, DOB 05/06/1976**

A valid patient application was received from **Robert E. Tuttle** on December 1, 2009. The application was approved on December 15, 2009. Patient Registry Identification #P115540-110101 was issued to **Robert E. Tuttle.** The registry identification card expired on January 1, 2011.

A valid Change Form was received from **Robert E. Tuttle** on January 19, 2010. The Change Form requested to Add a caregiver. The Change Form request was processed and registry identification cards were issued.

A valid Change Form was received from **Robert E. Tuttle** on April 15, 2010. The Change Form requested to remove his designated caregiver. The Change Form was processed and notice was sent to the caregiver that his registry status was Inactive and that his registry identification card for Robert Tuttle was Null and Void.

Summary of Records

An incomplete renewal application was received from **Robert E. Tuttle** on December 15, 2010. A Notice of Denial was sent to **Robert E. Tuttle.** A valid renewal application was received from **Robert E. Tuttle** on January 14, 2011. The renewal application was approved and Patient Registry Identification #P115540-120101 was issued to **Robert E. Tuttle.** The registry identification card expired on January 1, 2012.

A valid renewal application was received from **Robert E. Tuttle** on January 5, 2012. The renewal application was approved and Patient Registry Identification #P115540-130101 was issued to **Robert E. Tuttle.** The registry identification card expires on January 1, 2013.

A valid application was received from a qualifying patient on July 7, 2010, designating **Robert E. Tuttle** as his primary caregiver. The application was approved on or about July 21, 2010. **Mr. Tuttle** was issued Caregiver Registry Identification #C115540-XXXXXX. The designated caregiver registry status remained active as long as the qualifying registered patient's registration was active or continued to designate this primary caregiver. The patient's registry card expired August 1, 2011.

A valid Change Form was received from a registered patient on November 24, 2010. The Change Form requested to Add/Change a caregiver and designated **Robert E. Tuttle** as the primary caregiver. Caregiver Registry Identification #C115540-XXXXXX was issued to **Robert E. Tuttle.** The designated caregiver status remained active as long as the qualifying registered patient's registration was active or continued to designate **Robert E. Tuttle** as the primary caregiver. Another valid Change Form was received from this registered patient on April 25, 2011. The Change Form requested to remove **Robert E. Tuttle** as the primary caregiver and designated a different primary caregiver. Notice was sent to **Robert E. Tuttle** that his caregiver status for this patient was Inactive and that his caregiver registry identification card was Null and Void.

A valid Change Form was received from Frank R. Colon, II, a registered patient, on June 22, 2011. The Change Form requested to Add/Change a caregiver and designated **Robert E. Tuttle** as the primary caregiver. Caregiver Registry Identification #C115540-167095 was issued to **Robert E. Tuttle.** The designated caregiver registry status remained active as long as the qualifying registered patient's registration was active or continued to designate this primary caregiver. The patient's registry card expired November 1, 2011.

A valid Change Form was received from Paul A. Albarran, a registered patient, on August 15, 2011. The Change Form requested to Add/Change a caregiver and designated **Robert E. Tuttle** as the primary caregiver. Caregiver Registry Identification #C115540-201909 was issued to **Robert E. Tuttle.** The designated caregiver registry status remained active as long as the qualifying registered patient's registration was active or continued to designate this primary caregiver. A request to withdraw from the Medical Marihuana Registry Program was received from Paul A. Albarran on December 6, 2011. The request to withdraw was processed and notice was sent to **Robert E. Tuttle** that his caregiver status for Paul A. Albarran was Inactive and that his caregiver registry identification card for Paul A. Albarran was Null and Void.

Summary of Records

A renewal application was received from Michael W. Batke on October 24, 2011, designating **Robert E. Tuttle** as his primary caregiver. The application was approved and **Robert E. Tuttle** was issued Caregiver Registry Identification #C115540-167097. The designated caregiver registry status remains active as long as the qualifying registered patient's registration is active or continues to designate **Robert E. Tuttle** as his primary caregiver. The patient's registry card expires November 1, 2012.

**MICHAEL W. BATKE, DOB 03/06/1976**

A valid patient application was received from **Michael W. Batke** on September 24, 2010. The application was approved on October 8, 2010 and Patient Registry Identification #P167097-111101 was issued to **Michael W. Batke.** The registry identification card expired on November 1, 2011.

A renewal application was received from **Michael W. Batke** on October 24, 2011, designating Robert E. Tuttle as his primary caregiver. The application was approved and Patient Registry Identification #P167097-121101 was issued. The patient's registry card expires November 1, 2012.

**PAUL A. ALBARRAN, DOB 07/23/1992**

A valid patient application was received from **Paul A. Albarran** on February 2, 2011. The application was approved on February 24, 2011 and Patient Registry Identification #P201909-120301 was issued to **Paul A. Albarran.**

A valid Change Form was received from **Paul A. Albarran** on August 15, 2011. The Change Form requested to Add/Change a caregiver and designated Robert E. Tuttle as the primary caregiver. The Change Form request was processed and registry identification cards were issued. A request to withdraw from the Medical Marihuana Registry Program was received from **Paul A. Albarran** on December 6, 2011. The request to withdraw was processed and notices were sent to **Paul A. Albarran** and his designated caregiver that their statuses were Inactive and their registry identification cards were Null and Void.

**FRANK R. COLON, II, DOB 07/30/1985**

A valid patient application was received from **Frank R. Colon, II,** on September 24, 2010. The application was approved on October 8, 2010 and Patient Registry Identification #P167095-111101 was issued. The registry identification card expired on November 1, 2011.

A valid Change Form was received from **Frank R. Colon, II,** on June 22, 2011. The Change Form requested to Add/Change a caregiver and designated Robert E. Tuttle as the primary caregiver. The Change Form request was processed and registry identification cards were issued.

Summary of Records

A valid renewal application was received from **Frank R. Colon, II,** on September 30, 2011. The renewal was approved and Patient Registry Identification #P167095-121101 was issued to **Frank R. Colon, II.** The registry identification card expires on November 1, 2012.

Copies of the approval letters sent with the registry identification card(s) and the registry identification card(s) are not retained in the master file.

I certify that the attached documents are true copies taken from the master file maintained by the Michigan Department of Licensing and Regulatory Affairs, Bureau of Health Professions, Medical Marihuana Program.

If you have any further questions, please contact me at 517-373-4992.

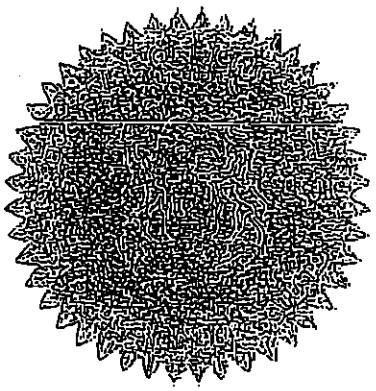
Regards,

Celeste Clarkson

Celeste Clarkson, Compliance Section Manager
Health Regulatory Division, Bureau of Health Professions
P.O. Box 30083
Lansing, Michigan 48909
Telephone: 517.373.4992

Attachments

cc: files



# EXHIBIT

# 2

# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee,<br><br>v<br><br>ROBERT TUTTLE,<br><br>Defendant-Appellant. | FOR PUBLICATION<br>January 30, 2014<br>9:15 a.m.<br><br>No. 312364<br>Oakland Circuit Court<br>LC No. 2012-241272-FH<br><br>Advance Sheets Version |

Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

SAAD, P.J.

Defendant appeals the trial court's order that (1) held that he was not entitled to immunity under § 4 of the Michigan Medical Marihuana Act (MMMA),[1] (2) denied defendant's request for dismissal under § 8 of the MMMA, and (3) denied his request to present the § 8 defense at trial. For the reasons set forth in this opinion, we affirm in part and reverse in part.

## I. NATURE OF THE CASE

Defendant was arrested for selling marijuana to a confidential informant of the Oakland County Sheriff's Office. He was subsequently charged with the sale and production of marijuana and possession of a firearm during the commission of a felony (felony-firearm). Defendant holds a valid registry identification card under the MMMA, MCL 333.26421 *et seq.* He claims that possession of the card, without more, entitles him to (1) immunity from prosecution under § 4 of the MMMA, MCL 333.26424, for the charges not relating to the sale of marijuana, and (2) an affirmative defense under § 8 of the MMMA, MCL 333.26428, for all the charges. In addition, defendant argues that the testimony of his medical marijuana patients allows him to assert the § 8 affirmative defense. The trial court rejected both arguments and held that defendant was not entitled to immunity under § 4 and that he had not presented the requisite evidence to make an affirmative defense under § 8.

[1] The MMMA uses the variant "marihuana." Throughout this opinion, we use the more common spelling "marijuana" unless quoting from the MMMA or cases that use the variant spelling.

We uphold the trial court, and expand our analysis to include defendant's arguments regarding (1) his possession of a registry identification card, and (2) the testimony of his medical marijuana patients. To adopt defendant's MMMA interpretation would subvert the purposes of the statute. It provides a limited "exception to the Public Health Code's prohibition on the use of controlled substances . . . ." *People v Bylsma*, 493 Mich 17, 27; 825 NW2d 543 (2012). This exception is intended to allow Michiganders "suffering from serious or debilitating medical conditions or symptoms" the use of marijuana to help treat and alleviate their symptoms. *People v Kolanek*, 491 Mich 382, 394; 817 NW2d 528 (2012). We therefore reject defendant's arguments and hold that the trial court did not abuse its discretion when it (1) ruled that defendant was not entitled to immunity from criminal prosecution under § 4, (2) denied defendant's request for dismissal under § 8, and (3) held that defendant could not present the § 8 defense at trial.

## II. FACTS AND PROCEDURAL HISTORY

On three occasions in January 2012, defendant sold marijuana to a confidential informant of the Oakland County Sheriff's Office. Defendant originally met the informant on a website that connects medical marijuana patients with marijuana growers.[2] Before the sales, defendant met with the confidential informant in Waterford and asked him for various documents to demonstrate that he was a "qualifying patient"[3] under the MMMA. Defendant did not ask the confidential informant (nor did the confidential informant provide) information on how much marijuana he required to treat his debilitating medical condition, or how long this treatment should continue.

The Oakland County Sheriff's Office arrested defendant shortly after the third sale. The office also obtained a warrant to search defendant's home. At the house, a detective recovered 33 marijuana plants and 38 grams of dried marijuana from a locked garage and shed. The police also discovered a cache of firearms (including an AK-47) in a gun safe in defendant's basement.

The state subsequently charged defendant with numerous counts related to marijuana manufacture and delivery and possession of a firearm during the commission of a felony.[4] After

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[2] Defendant himself is a medical marijuana patient with a state-issued registry identification card. He also is a registered "caregiver" for two other qualifying patients. MCL 333.26423(h) defines "primary caregiver" and "caregiver" as "a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has not been convicted of any felony within the past 10 years and has never been convicted of a felony involving illegal drugs or a felony that is an assaultive crime . . . ."

[3] MCL 333.26423(i) defines "qualifying patient" and "patient" as "a person who has been diagnosed by a physician as having a debilitating medical condition."

[4] Counts I-III relate to the sale of marijuana to the confidential informant—one charge for each of the sale dates. Counts IV and V concern possession of the 38 grams of loose marijuana and a related felony-firearm charge. Counts VI and VII relate to the growing of 33 marijuana plants and a related felony-firearm charge.

defendant was bound over to the circuit court, he moved to dismiss the charges based on possession of marijuana in his home and the related felony-firearm charges under § 4 of the MMMA, which grants immunity from prosecution. The defendant asserted that § 4 allowed him to possess up to 7.5 ounces of dried marijuana and 36 marijuana plants. Defendant also argued that the remaining charges should be dismissed under the affirmative defense provision in § 8 of the MMMA because he possessed only an amount of marijuana "reasonably necessary" to treat him and his patients. Defendant also requested an evidentiary hearing under § 8.

The prosecution responded to defendant's motion, and conceded that defendant complied with the "quantity and storage parameters" of § 4. But the prosecution asserted that defendant's conduct rebutted the presumption that he was engaged in the "medical use of marihuana" under § 4(d) of the MMMA. Defendant sold marijuana to a patient, the confidential informant, and was connected to that patient in a method outside the state's registration process, contravening § 4(b)(1), which mandates that caregivers be connected with patients through "the department's registration process." MCL 333.26424(b)(1). The prosecution also noted that the marijuana sold to the confidential informant came from the same stockpile used to supply defendant's legitimate medical marijuana patients. Finally, the prosecution noted that defendant's sale to the confidential informant violated the regulations in § 4(a) for medical marijuana patients because this Court has ruled that patient-to-patient sales of marijuana do not fall under the MMMA.[5] The prosecution acceded to defendant's request for an evidentiary hearing.

The trial court agreed with the prosecution and denied defendant's motion to dismiss under § 4 before the evidentiary hearing. It held that the prosecution had rebutted the presumption of compliance with the MMMA referred to in § 4(d).

At the evidentiary hearing, a detective and the confidential informant offered testimony. Defendant's two registered patients testified as well. After it heard this evidence, the trial court denied defendant's request for dismissal under § 8. It also held that defendant was precluded from presenting the § 8 affirmative defense at trial because he had failed to provide evidence of every element required under that section. Specifically, the court noted that the physician statements provided by defendant did not actually state that the respective physicians completed a full assessment of each patient's medical history and current medical condition. It was also troubled by the number of plants found in defendant's home, stating that "33 plants certainly could be viewed to be significantly beyond the required quantity" to treat his patient's conditions. However, the trial court did find evidence that defendant was actually engaged in the possession and cultivation of marijuana for medical purposes, citing the testimony of defendant's two certified patients.

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[5] *Michigan v McQueen*, 293 Mich App 644, 675; 811 NW2d 513 (2011). This case was subsequently affirmed on other grounds by our Supreme Court. *Michigan v McQueen*, 493 Mich 135; 828 NW2d 644 (2013). However, the Supreme Court agreed that MMMA § 4 did not provide immunity for patient-to-patient sales. *McQueen*, 493 Mich at 156. We will return to the Supreme Court's interpretation of § 4 later in this opinion.

In September 2012, defendant sought leave to appeal in this Court, which denied leave.[6] Defendant then sought leave to appeal in the Michigan Supreme Court, which entered an order remanding the case to this Court for consideration as on leave granted.[7] Defendant appeals the ruling of the trial court, arguing that Counts IV through VII of the charges against him (the possession and felony-firearm charges) should be dismissed under the § 4 immunity provisions. He also argues that he is entitled to dismissal of all charges under the § 8 affirmative defense. In the alternative, he argues that he should be permitted to raise the § 8 affirmative defense at trial.

## III. STANDARD OF REVIEW

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

## IV. ANALYSIS

### A. SECTION 4 IMMUNITY

Only some of the multiple subsections of § 4 are relevant to this case: §§ 4(a), 4(b), and 4(d). Under § 4(a), qualifying patients who hold registry identification cards[8] receive immunity from criminal prosecution. MCL 333.26424(a); *Kolanek*, 491 Mich at 394-395. To be entitled to immunity, a qualifying patient cannot possess more than 2.5 ounces of usable marijuana and 12 marijuana plants. MCL 333.26424(a). Section 4(b) contains a parallel immunity provision that applies to registered primary caregivers. *Bylsma*, 493 Mich at 28. Our Supreme Court recently clarified that the immunity provisions in § 4 do not extend to

> a registered qualifying patient who transfers marijuana to another registered qualifying patient for the transferee's use because the transferor is not engaging in conduct related to marijuana for the purpose of relieving *the transferor's own* condition or symptoms. Similarly, § 4 immunity does not extend to a registered primary caregiver who transfers marijuana for any purpose other than to alleviate the condition or symptoms of a specific patient *with whom the caregiver is connected through the* [*Michigan Department of Community Health's*] *registration process*. [*McQueen*, 493 Mich at 156.]

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[6] *People v Tuttle*, unpublished order of the Court of Appeals, entered October 11, 2012 (Docket No. 312364).

[7] *People v Tuttle*, 493 Mich 950 (2013).

[8] MCL 333.26423(j) defines "registry identification card" as "a document issued by the department that identifies a person as a registered qualifying patient or registered primary caregiver."

Under § 4(d), qualifying patients and primary caregivers are presumed to be "engaged in the medical use of marihuana in accordance with [the MMMA]" if they are in possession of (1) "a registry identification card" and (2) "an amount of marihuana that does not exceed the amount allowed under this act." MCL 333.26424(d). This presumption is rebuttable—if the prosecution provides "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" it will not apply. MCL 333.26424(d)(2).

Here, defendant's transfer of marijuana to the confidential informant is clearly not protected under § 4. See *McQueen*, 493 Mich at 156. He transferred marijuana to the confidential informant, who, though a registered qualifying patient, was not connected to defendant through the state's registration process.

Defendant concedes that he is not entitled to § 4 immunity for the sales of marijuana to the confidential informant. Yet he asserts that the other charges—namely, the ones related to marijuana possession and the accompanying felony-firearm counts—should be dismissed under § 4. He bases this claim on the following evidence: (1) his and his patients' possession of valid registry identification cards, and (2) his possession of 33 marijuana plants and 1.34 ounces of dried marijuana—an amount less than permitted to him under § 4(b).[9] As such, defendant claims he is entitled to the presumption under § 4(d) that he is "engaged in the medical use of marihuana in accordance with" the MMMA. MCL 333.26424(d).

Defendant is correct that he is entitled to the presumption in § 4(d): he was in possession of the requisite identification cards and possessed an "amount of marihuana that [did] not exceed the amount allowed under [the MMMA]." MCL 333.26424(d)(2). But what § 4(d) gives may also be lost under § 4(d)(2), because the prosecution may rebut the presumption. It has done so here. Defendant has engaged in "conduct related to marihuana [that] was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, *in accordance with this act*." MCL 333.26424(d)(2) (emphasis added). By his own admission, defendant sold marijuana to an individual outside the parameters of the MMMA. And as a consequence, he does not have the privilege to claim immunity under § 4. This action rebuts the presumption with regard to *all* his conduct involving marijuana—even conduct involving his two other qualifying patients.

Defendant attempts to obscure this clear statutory outcome by asserting that there is no evidence that the specific marijuana found by the police in his home—i.e., the 33 plants and 1.34 ounces of useable marijuana—was used for the illegal sale to the confidential informant. He also suggests that one illicit marijuana sale shouldn't "taint" the ostensibly "clean" marijuana used to supply his legitimate, MMMA-compliant patients.

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[9] Under § 4(b)(2), defendant could possess up to 36 plants and, subject to certain volume limitations, remain in compliance with the MMMA. The statute allows him to possess 12 plants for himself, plus 12 plants for each patient for whom he is a caregiver (3 x 12 = 36). In addition, § 4(b)(1) allows defendant to possess up to 7.5 ounces of usable marijuana: 2.5 ounces for himself, and 5 ounces combined for his two patients.

This argument lacks any grounding in the statute itself. Defendant ignores that it is his *conduct* that is at issue—conduct that is tainted by his violation of the MMMA. Defendant's reasoning also contravenes the MMMA's stated aims: to provide a particular exception to the general illegality of marijuana use,[10] so that the drug can be used by "individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individuals' marijuana use 'is carried out in accordance with the provisions of [the MMMA].'" *Kolanek*, 491 Mich at 394 (alteration in original), quoting MCL 333.26427(a). And, as noted, defendant's claim ignores common sense. The fact that he sold marijuana to the confidential informant is obvious evidence that defendant did not conduct his marijuana-related activities in compliance with the MMMA. The plain meaning of § 4 does not allow defendant to decouple his illicit actions involving marijuana from his other marijuana-related activities—even if those other activities are within the parameters of the statute. The evidence of defendant's illicit actions rebuts the presumption of MMMA-compliant conduct.

Accordingly, defendant is not entitled to the immunity provisions of § 4. The trial court was correct to so hold, and we affirm.

## B. SECTION 8(A) DEFENSE

Under § 8(a) of the MMMA, a defendant may assert the medical purpose for using marijuana as a defense in any prosecution involving marijuana.[11] The defense has three elements, all of which must be satisfied for the defense to be successful. MCL 333.26428(a).[12] This burden originates in the medical reasons that inform the statute.

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[10] See *Bylsma*, 493 Mich at 27 (which held that the MMMA provides an "exception to the Public Health Code's prohibition on the use of controlled substances").

[11] Defendant's claims regarding § 8 of the MMMA are almost identical to the claims of the defendant in *People v Hartwick*, 303 Mich App 247; 842 NW2d 545 (2013), which was submitted to this same panel on the same date as this case. Accordingly, our analysis of § 8 in the two cases is largely the same.

[12] The Michigan Supreme Court recently outlined very specific steps and procedural outcomes for defendants who assert the § 8(a) affirmative defense. If the defendant establishes the three § 8(a) elements during a pretrial evidentiary hearing, and there are no material questions of fact, the defendant is entitled to dismissal of the charges. *Kolanek*, 491 Mich at 412. If the defendant establishes evidence of each element, but there are still material questions of fact, then the § 8(a) affirmative defense must be submitted to a jury. *Id.* Finally, if no reasonable juror could conclude that the defendant has satisfied the elements of the § 8(a) affirmative defense, then the defense fails as a matter of law and the defendant is precluded from asserting it at trial. *Id.* at 412.

In this case, the trial court held that no reasonable juror could conclude that defendant had satisfied all the elements of the § 8(a) affirmative defense. Accordingly, it ruled that the defense failed as a matter of law and that defendant was precluded from asserting it at trial.

Before we address each subsection of § 8, it is important to consider the mandate of the section as a whole. Because the MMMA is a limited statutory exception to the general state prohibition of marijuana, the MMMA promulgates a comprehensive statutory scheme that must be followed if caregivers and patients wish to comply with the law. Section 8 outlines a possible defense that a defendant can raise when charged with any state crime involving marijuana. In so doing, the section weaves together the obligations of each individual involved in the prescription, use, and production of marijuana for medical purposes. Under the act, doctors must have an ongoing relationship with their patients, in which the doctor regularly reviews the patient's condition and revises any marijuana prescription accordingly.[13] Further, patients must provide certain basic information regarding their marijuana use to their caregivers. And caregivers, to be protected under the MMMA, must ask for this basic information—specifically, information that details, as any pharmaceutical prescription would, how much marijuana the patient is supposed to use, and how long that use is supposed to continue. Though patients and caregivers are ordinary citizens, not trained medical professionals, the MMMA's essential mandate is that marijuana be used for medical purposes. Accordingly, for their own protection from criminal prosecution, patients and caregivers must comply with this medical purpose—patients by supplying the necessary documentation to their caregivers, and caregivers by only supplying patients who provide the statutorily mandated information.

Possession of a registry 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). Nor does it prove the caregiver is aware of how much marijuana the patient is prescribed or for how long the patient is supposed to use the drug, as mandated by § 8(a)(2). And it does not ensure the marijuana sold by the caregiver is actually being used by the patient for medical reasons, as mandated by § 8(a)(3).

In sum, possession of a registry card is not sufficient to demonstrate compliance with the MMMA, and clearly does not satisfy the requirements for asserting the § 8 defense in a prosecution for a crime involving marijuana.

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[13] The importance of a legitimate, ongoing relationship between the marijuana-prescribing doctor and the marijuana-using patient is stressed throughout the MMMA. Section 4(f), which provides a qualified immunity for physicians, mandates that the immunity only applies to physicians that prescribe marijuana "in the course of a bona fide physician-patient relationship . . . ." MCL 333.26424(f). Section 4(f) further implies that this relationship must be ongoing by stressing that "nothing shall prevent a professional licensing board from sanctioning a physician for . . . otherwise violating the standard of care for evaluating medical conditions." This standard of care presumably includes follow-up visits with the patient. And § 6—as noted, the section that governs the issuance of registry cards—also implies the expectation of an ongoing physician-patient relationship. It states that if a "patient's certifying physician notifies the department in writing that the patient has ceased to suffer from a debilitating medical condition, the card shall become null and void upon notification by the department to the patient." MCL 333.26426(f).

1. SECTION 8(a)(1): THE BONA FIDE PHYSICIAN-PATIENT RELATIONSHIP

To satisfy § 8(a)(1), a defendant must present evidence 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 to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition[.] [MCL 333.26428(a)(1).]

Defendant claims that the documents he presented at the evidentiary hearing—his medical marijuana patient and caregiver cards, his patients' registry identifications, and the various documentation supporting both—are sufficient evidence to satisfy the requirement of a physician statement and a bona fide physician-patient relationship. In addition, defendant asserts that the testimony of his two patients is further evidence of the existence of the bona fide physician-patient relationship required by the statute. We address each claim in turn.

a. REGISTRY IDENTIFICATION CARDS

Defendant's argument regarding the registry identification cards has some basis in § 6 of the MMMA. Section 6 governs the procedures patients and the Department of Licensing and Regulatory Affairs (the department) must follow for the department to issue patient and caregiver cards. Specifically, § 6(a) mandates that the department

> shall issue registry identification cards to qualifying patients who submit the following, in accordance with the department's rules:
>
> (1) A written certification;
>
> (2) Application or renewal fee;
>
> (3) Name, address, and date of birth of the qualifying patient, except that if the applicant is homeless, no address is required;
>
> (4) Name, address, and telephone number of the qualifying patient's physician;
>
> (5) Name, address, and date of birth of the qualifying patient's primary caregiver, if any;

(6) Proof of Michigan residency. [MCL 333.26426(a).[14]]

In its definitional section, the MMMA defines a "written certification" as a document signed by a physician that states the following:

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

The MMMA mandates that the department cannot issue a registry identification card to a patient or caregiver applicant unless it verifies the information submitted in the patient or caregiver's written certification. As such, possession of a registry identification card, if valid, satisfies some of the requirements of § 8(a)(1). Further, if the department actually followed its statutory obligations and conducted an investigation, the card would serve as evidence that a physician did the following: (1) completed a full assessment of the patient's medical history, (2) conducted an in-person medical evaluation, (3) observed a debilitating medical condition, and (4) concluded that the patient is likely to benefit from the medical use of marijuana. However, the physician's written certification is not evidence of the existence of the bona fide physician-patient relationship, which is required for the § 8(a) affirmative defense.

The initial, voter-initiative version of the MMMA did not define "bona fide physician-patient relationship." See *People v Redden*, 290 Mich App 65, 86; 799 NW2d 184 (2010). The Legislature has since amended the MMMA to define that phrase. See 2012 PA 512. But this amendment took effect April 1, 2013. The new definition is therefore not applicable to cases, like this one, that arose before that date. See *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992) ("The general rule of statutory construction in Michigan is that a new or amended statute applies prospectively unless the Legislature has expressly or impliedly indicated its intention to give it retrospective effect. This rule applies equally to criminal statutes.") (citation omitted). If the MMMA had originated in the Legislature, the amendment could be considered evidence of what the Legislature intended "bona fide physician-patient relationship" to mean at

[14] Under the earlier version of the MMMA that applies to this case, the final element, MCL 333.26426(a)(6), read as follows: "If the qualifying patient designates a primary caregiver, as designation as to whether the qualifying patient or primary caregiver will be allowed under state law to possess marihuana plants for the qualifying patient's medical use." 2008 IL 1. Neither this earlier language nor the amended language concerning residency bears on the outcome of this case.

the date of the MMMA's enactment.[15] But the MMMA is the result of a voter initiative, passed by the people of Michigan. As such, we must "ascertain and give effect to the intent of the electorate, rather than the Legislature, as reflected in the language of the law itself." *Kolanek*, 491 Mich at 397. The Court is thus required to construe the MMMA's language with the words' "ordinary and plain meaning as would have been understood by the electorate." *Id.*

Earlier cases have defined "bona fide" in the preamendment context. This Court used a dictionary to discern the plain-meaning definition of the term in *Redden*. *Redden* stated that "*Random House Webster's College Dictionary* (1997) defines 'bona fide' as '1. made, done, etc., in good faith; without deception or fraud. 2. authentic; genuine; real.' " *Redden*, 290 Mich App at 86. Our Supreme Court also quoted with approval a joint statement issued by the Michigan Board of Medicine and the Michigan Board of Osteopathic Medicine and Surgery, which advised that the phrase "bona fide physician-patient relationship" envisioned " 'a pre-existing and ongoing relationship with the patient as a treating physician.' " *Kolanek*, 491 Mich at 396 n 30 (citation omitted).

These definitions do not support defendant's effort to substitute the procedural requirements in § 6 for the legal requirements in § 8. The steps outlined in § 6 for obtaining a patient or caregiver's card cannot demonstrate the existence of a physician-patient relationship that is "pre-existing" and involves "ongoing" contact. Accordingly, mere possession of a patient identification card, a caregiver's card, or both does not satisfy the requirements of § 8(a)(1). That the statute requires this outcome is in keeping with its medical purpose and protects the patients it is designed to serve. By requiring a bona fide physician-patient relationship in order to establish the affirmative defense under § 8, the MMMA prevents doctors who merely write prescriptions—such as the one featured in *Redden*[16]—from seeing a patient once, issuing a medical marijuana prescription, and never checking on whether that prescription actually treated the patient or served a palliative purpose.

b. THE PATIENT TESTIMONY

Our analysis of the phrase "bona fide physician-patient relationship" cannot end here, as defendant also asserts that the testimony of his two patients satisfies this requirement of § 8(a)(1). This assertion is incorrect. Again, defendant attempts to elide the fact that he illegally sold marijuana to the confidential informant. He does so by pointing to his supposedly legal

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[15] The Legislature clearly has the power to subsequently amend statutes that enact voter initiatives. Const 1963, art 2, § 9; *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49, 64; 340 NW2d 817 (1983). It is unclear, however, if such a subsequent legislative amendment can serve as evidence of the peoples' intent at the time they passed the initiative. In this case, we follow the preamendment holdings of our Supreme Court, which instruct us to look to the plain meaning of the MMMA's terms to discern the peoples' intent.

[16] The *Redden* physician practiced medicine in six states, spent 30 minutes with each of the *Redden* defendants, and seemingly examined the patients with the express purpose of helping them qualify to receive marijuana for medical purposes. See *Redden*, 290 Mich App at 70-71.

activities involving marijuana with his two qualifying patients. Defendant did not provide evidence of the confidential informant's bona fide patient-physician relationship with his physician.[17] Nor did defendant provide evidence of a bona fide relationship between defendant and his own physician. Defendant did present a number of documents at the evidentiary hearing, which primarily related to the defendant's caregiver status for his two patients. He also presented a physician's certification for his own use of marijuana for medical purposes. Neither that certification, nor any other evidence submitted by defendant, indicates (1) how often defendant saw his doctor, (2) what kinds of evaluations the doctor performed, or (3) when he began seeing his doctor.

In addition, the testimony of his two qualifying patients does not demonstrate the existence of a bona fide relationship between the patients and their physicians. One of the patients testified that he saw his certifying physician one time, for an hour. The other saw his certifying physician twice. This evidence does not demonstrate a " 'pre-existing and ongoing relationship' " between patient and physician. See *Kolanek*, 491 Mich at 396 n 30 (citation omitted).

Accordingly, we hold that mere possession of a patient identification card, a caregiver's card, or both does not satisfy § 8(a)(1). Further, we hold that the testimony of defendant's patients did not demonstrate a bona fide physician-patient relationship. Therefore, the trial court was correct to rule that defendant did not present valid evidence with respect to the first element of the § 8 affirmative defense.

2. SECTION 8(a)(2): NO MORE MARIJUANA THAN "REASONABLY NECESSARY"

To satisfy § 8(a)(2), a defendant must present evidence that

> [t]he patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than 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. [MCL 333.26428(a)(2).]

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[17] In fact, the confidential informant testified at the evidentiary hearing that he received the certification for his registry identification card by speaking with a doctor—or someone who claimed to be a doctor—over the phone. He spoke with the individual for less than 10 minutes. The confidential informant could not remember the name of the certifying doctor, and testified that he had never seen the doctor before, nor had he seen the doctor since. Whatever sort of relationship existed between the confidential informant and the certifying physician, it was certainly not a bona fide physician-patient relationship as required by the MMMA. In short, the confidential informant possessed a state-issued registry identification card—and yet did not have the bona fide relationship with his physician required for the § 8 affirmative defense. There is no plainer illustration of why mere possession of a registry identification card does not satisfy defendant's evidentiary burden under § 8(a)(1).

Accordingly, this element contains two components: (1) possession and (2) knowledge of what amount of marijuana is "reasonably necessary" for the patient's treatment.

Defendant notes that the amount of marijuana seized from his home is less than that permitted to him by § 4(b). Though he admits that this fact alone is not enough to satisfy the "reasonably necessary" standard of § 8(a)(2), he suggests that it be given "substantial weight" in our determination.

Defendant's approach misconstrues the law and ignores common sense. Our Supreme Court has strongly suggested that §§ 4 and 8, and the mandates found in each, are to be kept separate. See *Kolanek*, 491 Mich at 397-399. They are different sections and address different standards.[18] *Id.* This Court has also noted that mixing of the standards set forth in §§ 4 and 8 does violence to rules of statutory interpretation: "Indeed, if the intent of the statute were to have the amount in § 4 apply to § 8, the § 4 amount would have been reinserted into § 8(a)(2), instead of the language concerning an amount 'reasonably necessary to ensure . . . uninterrupted availability . . . .' " *Redden*, 290 Mich App at 87, quoting MCL 333.26428(a)(2). Further, importing the quantity limitations from § 4(b) into § 8(a)(2) ignores the treatment-oriented nature of the MMMA and the specific medical requirements of § 8(a). Those requirements are intended for a patient or caregiver who is intimately aware of how much marijuana is required to treat his or her condition, which he or she learns from a doctor with whom the patient or caregiver has an ongoing relationship.

At the evidentiary hearing, defendant's patients testified regarding the amount of marijuana defendant provided. However, they did not give testimony that defendant knew how much marijuana was necessary to treat their debilitating medical conditions. Defendant himself also failed to provide any evidence of how much marijuana he used, or how often he used it to treat his severe or debilitating medical condition. Finally, defendant obviously had more marijuana than reasonably necessary to treat him and his patients. He possessed enough to sell to the confidential informant—on three different occasions.

Defendant thus failed to satisfy the second element of the § 8 affirmative defense. Accordingly, the trial court properly held that there was no question of fact with regard to this issue.

3. SECTION 8(a)(3): ACTUAL MEDICAL USE OF MARIJUANA

To satisfy § 8(a)(3), a defendant must present evidence that

> [t]he 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

[18] See also *Bylsma*, 493 Mich at 28.

symptoms of the patient's serious or debilitating medical condition. [MCL 333.26428(a)(3).]

The trial court held that defendant established this element, and pointed to the testimony of defendant's patients as its reason for so holding. The two patients testified that they suffer from chronic pain, which is alleviated through the medical use of marijuana. The trial court found this testimony demonstrated that the marijuana at issue in the case was actually used to alleviate "the [patients'] serious or debilitating medical condition" as required by § 8(a)(3).

The trial court's holding with respect to this element is flawed. Any analysis of § 8(a)(3) needs to incorporate every patient possibly using the marijuana at issue. Here, that group includes four individuals: defendant, his two patients, and the confidential informant. The trial court received testimony on this matter—testimony that it found convincing—from two of these individuals. It also heard from the confidential witness, who stated that he suffered from chronic pain, which he used marijuana to treat. But the trial court did not cite his testimony as a factor in its § 8(a)(3) determination.

In addition, the trial court received no testimony from defendant himself, who is a qualifying patient and caregiver. Defendant did not provide evidence that he personally used the marijuana found in his home to alleviate a "serious or debilitating medical condition," as required by § 8(a)(3). We again note that mere possession of a registry card is insufficient evidence for the purposes of § 8(a)(3). Possession of a registry card indicates that the holder has gone through the required steps set forth in § 6 to obtain a registry card. It 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. In other words, prior state issuance of a registry card does not guarantee that the holder's subsequent behavior will comply with the MMMA. We reverse the trial court's ruling that defendant satisfied the elements of § 8(a)(3).

## V. CONCLUSION

Because the prosecution presented evidence to rebut the medical-use presumption under § 4(d), defendant is not entitled to immunity under § 4. Further, because defendant did not present evidence satisfying all three elements of the § 8 affirmative defense, he is not entitled to have the case dismissed under that section, nor is he permitted to assert that defense at trial. In so holding, we note that the trial court improperly held that defendant satisfied one element of the affirmative defense, § 8(a)(3). Nonetheless, the trial court properly rejected defendant's § 4 and § 8 claims.[19] We therefore reverse the trial court's ruling as to § 8(a)(3), but affirm its order denying defendant's motion to dismiss the case and precluding defendant from asserting a § 8 defense at trial.

/s/ Henry William Saad
/s/ David H. Sawyer

[19] "A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT TUTTLE,

Defendant-Appellant.

FOR PUBLICATION
January 30, 2014

No. 312364
Oakland Circuit Court
LC No. 2012-241272-FH

Advance Sheets Version

Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

JANSEN, J. (*concurring in the result*).

I concur in the result only.

/s/ Kathleen Jansen