State of Michigan
In the Supreme Court

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Saad, P.J., Sawyer and Jansen, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Supreme Court
Docket No. 148971

ROBERT TUTTLE,

Defendant-Appellant.
/

Court of Appeals No. 312364
Oakland Circuit Court No. 2012-241272-FH

BRIEF ON APPEAL – APPELLEE

ORAL ARGUMENT REQUESTED

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The People contend the answer is "Yes."

Defendant contends that the answer should be "No."

The Court of Appeals answered "Yes."

The Trial Court answered "Yes."

II. WHETHER A DEFENDANT'S POSSESSION OF A VALID REGISTRY IDENTIFICATION CARD *ALONE* ESTABLISHES THE PRESUMPTION UNDER SECTION 4, OR A PRIMA FACIE CASE UNDER SECTION 8 OF THE MMMA?

The People contend the answer is "No."

Defendant contends that the answer should be "Yes."

The Court of Appeals answered "No."

The Trial Court did not answer the question.

III. WHETHER A DEFENDANT'S EVIDENTIARY BURDEN TO ESTABLISH IMMUNITY UNDER SECTION 4 IS TO MEET THE REQUIREMENTS LISTED UNDER SECTION 4(d)? WHETHER A DEFENDANT'S EVIDENTIARY BURDEN TO ESTABLISH AN AFFIRMATIVE DEFENSE UNDER SECTION 8 IS TO PRESENT A PRIMA FACIE CASE AT THE EVIDENTIARY HEARING AND, IF GRANTED, TO ESTABLISH THE AFFIRMATIVE DEFENSE BY A PREPONDERANCE OF EVIDENCE AT TRIAL?

The People contend the answer is "Yes."

Defendant contends that the answer in part is "Yes."

The Court of Appeals answered "Yes."

The Trial Court answered "Yes."

IV. WHETHER THE VERIFICATION AND CONFIDENTIALITY PROVISIONS IN SECTION 6 OF THE MMMA PLAY A PART IN ESTABLISHING ENTITLEMENT TO IMMUNITY UNDER SECTION 4, BUT DO NOT ESTABLISH ANY ENTITLEMENT TO THE AFFIRMATIVE DEFENSE UNDER SECTION 8?

The People contend the answer is "Yes."

Defendant contends that the answer should be "No."

The Court of Appeals did not answer.

The Trial Court did not answer.

JURISDICTIONAL STATEMENT

Defendant-Appellant filed a timely application in this Court for leave to appeal the January 30, 2014, published opinion of the Court of Appeals affirming the trial court's order that (1) Defendant was not entitled to immunity under section 4 of the Michigan Medical Marihuana Act (MMMA), (2) denied Defendant's request for dismissal under section 8 of the MMMA, and (3) denied Defendant's request to present the section 8 defense at trial. *People v Tuttle*, 304 Mich App 72; ___ NW2d ___ (2014) (113a-126a). In an order dated June 11, 2014, this Court granted Defendant-Appellant's application and instructed the parties to address the following issues:

> (1) whether a registered qualifying patient under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, who makes unlawful sales of marijuana to another patient to whom he is not connected through the registration process, taints all aspects of his marijuana-related conduct, even that which is otherwise permitted under the act; (2) whether a defendant's possession of a valid registry identification card establishes any presumption for purposes of § 4 or § 8; (3) if not, what is a defendant's evidentiary burden to establish immunity under § 4 or an affirmative defense under § 8; and (4) what role, if any, do the verification and confidentiality provisions in § 6 of the act play in establishing entitlement to immunity under § 4 or an affirmative defense under § 8 [*People v Tuttle*, ___ Mich ___; 821 NW2d 787 (Docket No. 145371, entered June 11, 2014) (127a).]

This Court has jurisdiction over this appeal under MCR 7.301(A)(2) and MCR 7.302(H)(3).

COUNTER-STATEMENT OF FACTS

Robert Edward Tuttle, hereinafter referred to as Defendant, is charged in this case with Counts I-III of delivery of less than five kilograms of marihuana,[1] contrary to MCL 333.7401(2)(d)(iii), Count IV of possession with intent to deliver less than five kilograms of marihuana, contrary to MCL 333.7401(2)(d)(iii), Counts V and VII of possession of a firearm during the commission of a felony (felony-firearm), contrary to MCL 750.227b, and Count VI of manufacturing 20 plants or more, but less than 200 plants, of marihuana, contrary to MCL 333.7401(2)(d)(ii).[2]

Pertinent facts at the time of Defendant's arrest on January 23, 2012, are:

1. Defendant possessed a valid registry identification card issued on January 5, 2012, and expiring on January 1, 2013. (226a) However, the *valid patient card for Defendant as a patient was never submitted into evidence*. Defendant's patient card submitted into evidence expired January 1, 2012. (165a)
2. At the time of Defendant's arrest, he possessed 33 marihuana plants and 38 grams of marihuana at his home. (18a)
3. Defendant submitted evidence at the evidentiary hearing (10a-11a) that he was purportedly connected through the registration process to two qualifying patients, Michael W. Batke and Frank R. Colon, II. However, *Defendant never submitted evidence of his primary caregiver registry identification cards*[3] connecting him to these two patients.
4. Batke's state renewal application form dated October 13, 2011, lists Defendant as his primary caregiver and that Defendant was allowed to possess the plants for Batke. (186a) However, Batke's registry identification card submitted into evidence expired on September 1, 2011. (188a, 195a) Thus, *no valid patient card for Batke was presented into evidence*. Defendant sold marihuana to Batke three times during November and December 2011. (56a-57a)
5. Colon's renewal application signed August 30, 2011, has caregiver information

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[1] Marihuana is commonly spelled "marijuana." The MMMA uses the variant "marihuana" which will be used throughout this brief, unless quoting from a case that uses the common spelling.

[2] Counts VI and VII were added to the General Information following the preliminary examination. (67b-69b)

[3] According to the department's procedural rule, Mich Admin Code R 333.115, "The department shall issue a registry identification card to the primary caregiver, if any, who is named in a qualifying patient's approved application." (257a) Thus, Defendant should have had a patient card for himself and two caregiver cards—one for Batke and one for Colon.

redacted out and lists the applicant/patient as the person allowed to possess the plants, *not Defendant*. (210a) Thus, *at the time of Defendant's arrest, he was not allowed to possess marihuana plants for Colon*. This is supported by the department's letter to trial counsel stating that Colon's registry card listing Defendant as a primary caregiver expired on November 1, 2011. (226a) Colon's renewal application received on September 30, 2011, did not list Defendant as a primary caregiver. (228a) Colon's *patient registry identification card submitted into evidence expired November 1, 2011, and thus was not valid.* (212a)

6. Defendant sold one to two ounces of marihuana *weekly* to Colon from June of 2011 to January of 2012. (82a-83a) However, *Defendant was no longer connected to Colon* from September 30, 2011 to January 23, 2012, as discussed in number 5 above.
7. In January of 2012, Defendant sold marihuana three times to Dwayne Lalonde, a confidential informant and person *not connected* to Defendant through the department's registration process. (7b-20b) Defendant concedes these sales were illegal. (Defendant's brief, p. 15) *No valid patient registry identification card for Lalonde* was submitted into evidence.

A **preliminary examination was held on March 21, 2012**, before the Honorable Jodine Debbrecht of the 51st District Court. **Dwayne Lalonde** testified that he worked with Detective Pankey as a confidential informant and made three controlled buys of marihuana from Defendant. (7b-20b)

Detective Michael Pankey, a detective with the Oakland County Sheriff's Department, testified that he utilized Lalonde as a confidential informant regarding suspected marihuana sales in Waterford Township. (25b) Pankey field tested the marihuana that Lalonde purchased from Defendant, and it tested positive for the presence of marihuana. (30b) Following the last purchase on January 23, 2012, Defendant was arrested. (34b)

The police searched Defendant's home forty minutes later and found a .45 and a 9 millimeter handgun in a safe in a closet in the bedroom. There was also a survival vest with loaded rifle magazines on it. (34b, 40b) The police also found medical marihuana paperwork with Defendant's name on it and two extra magazines for the weapons in the safe. (40b) The police found two large gun safes in the basement which contained a Colt 53, a Bushmaster 53, an AK-47, and a Benelli shotgun—all loaded. (41b) There was also a 30-30 Italian shotgun and 90

plus magazines for the weapons—over 1000 rounds. (42b)

In the locked garage, there was a grow tent, as well as digital scales, packaging, a bowl, and 8.3 grams of loose marihuana. (43b-44b) There were 19 marihuana plants in the garage and 14 marihuana plants in the locked shed on the property. (44b-45b) The shed also contained medical marihuana paperwork, grow lights, a hydration system for marihuana plants, dry racks, and an additional 30 grams of loose marihuana. (45b-46b) The loose marihuana and marihuana plants tested positive as marihuana. (54b)

After being bound over as charged to the Circuit Court, Defendant filed a motion to dismiss and request for evidentiary hearing pursuant to sections 4 and 8 of the Michigan Medical Marihuana Act (MMMA), and the People filed a response.

A **motion hearing was held on July 12, 2012**, before the Honorable Michael Warren, Oakland County Circuit Court judge, presiding. Defendant argued that he was procedurally compliant with the MMMA because, as a claimed caregiver for two patients and himself, he was permitted to possess 36 marihuana plants and 7.5 ounces of marihuana and he only possessed 33 marihuana plants and 38 grams [1.34 ounces] of marihuana. Defendant further argued that the People did not rebut the presumption under section 4 of the MMMA that Defendant used the marihuana for medical purposes for Counts IV and VI. (78b)

The People argued that the presumption that Defendant was using the marihuana for medical purposes was rebutted when the evidence established that Defendant sold to a person to whom he was not connected through the registry system, and thus he was not entitled to the protection of section 4 immunity under the MMMA. (83b) The People further argued that Defendant could not claim that he was in compliance with section 4 of the MMMA for Counts IV and VI when he was taking marihuana from the same stockpile to sell to a person for whom

he was not a caregiver. (84b) Further, the People argued that under *State v McQueen,* 293 Mich App 644, 675; 811 NW2d 513 (2011), aff'd on other grounds 493 Mich 135; 828 NW2d 644 (2013), patient-to-patient sales were prohibited. (84b-85b) Judge Warren denied Defendant's motion without prejudice and asked both parties to provide supplemental briefing regarding the additional Counts of VI and VII that were added to the General Information. (92b)

An **evidentiary hearing** was held on August 20, 2012. The trial court denied Defendant's motion to dismiss, agreeing with the People's analysis and stating that Defendant was not entitled to section 4 immunity under the MMMA in connection with Counts IV through VII as the People successfully rebutted the presumption. (8a)

Before the first witness was called, the trial court admitted Defendant's exhibit (A), certified copies of public records.[4] The People objected that the medical opinion stated on the physician's statement within the public record had not been subjected to MRE 702. (10a-11a).

Michael Pankey, a detective with the Oakland County Sheriff's Office for eighteen years, testified that he worked as an undercover narcotics detective for the past six and a half years. (12a) Pankey was qualified by the court as an expert in cultivation of marihuana. (14a)

Pankey became aware of Defendant based on information he received from a confidential informant, Dwayne Lalonde. (15a) Pankey was aware that Lalonde was a medical marihuana patient.[5] (16a) Pankey gave money to Lalonde on January 18, 21, and 23, [2012] to purchase marihuana from defendant. There was also an additional purchase on January 5, [2012], but Defendant was not charged with that occurrence because the transmitter did not record. (17a)

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[4] The medical marihuana registration documents pertain to Defendant, Batke, and Colon. The documents are stamped by the State of Michigan-Ingham County as being on file in the office of the Department of Licensing and Regulatory Affairs Bureau of Health Professions. (128a-224a)

[5] No documentation of Lalonde's cardholder status was introduced at the hearing.

Defendant was arrested on January 23, 2012. The police searched Defendant's home in Waterford and found 33 marihuana plants and 38 grams of marihuana. (18a) Pankey stated that to his knowledge, usable marihuana consisted of the leaves and buds of the plant—not the seeds, stems, and stalks. (20a) The 38 grams of dried marihuana found in Defendant's garage and shed were for smoking purposes. (21a-22a) Defendant was growing the plants in the garage and shed, with the more mature plants mainly in the shed. Pankey only counted the plants that had a root base. (27a) The 33 plants were at various stages of growth. (29a) The garage and shed were both locked. (31a)

Pankey stated that based on the size of the plants found at Defendant's home, each plant could produce approximately an ounce or two ounces of marihuana each, but he had seen plants that could produce up to two pounds of marihuana from one plant. (34a-38a) The photos of the marihuana plants growing at Defendant's residence were admitted as Defendant's exhibits (B-1, B-2, B-3) and (C-1, C-2, C-3). (36a-37a) On cross-examination, Pankey stated that generally a half a gram of marihuana was used in a cigarette. (44a) A typical marihuana plant could be harvested three times a year. (45a)

William Allen Lalonde testified that he was a medical marihuana patient. Lalonde was already working with Pankey when he met Defendant in November of 2011 through an internet site connecting medical marihuana patients with medical marihuana caregivers. Lalonde told Defendant that he was a patient. (49a) Defendant required Lalonde to produce proof that he was a patient and to also show Defendant his driver's license. (50a) Lalonde told Defendant that he was getting marihuana for medicinal purposes. (51a)

On cross-examination, Lalonde stated that he had possessed a patient card for three years. The certification process was very simple—he spoke with a person who claimed to be a doctor

over the phone and sent a money order for one hundred fifty dollars to a place located in Southfield. Lalonde never saw the doctor before and had not seen the doctor since. Lalonde told the doctor he had chronic pain. (51a-52a) Lalonde spent less than ten minutes on the phone with the doctor. The doctor never discussed the quantity of marihuana needed to treat his pain or asked Lalonde to provide medical records. Lalonde received the documentation from the doctor in the mail and that document was what Lalonde showed to Defendant. Lalonde told Defendant that the marihuana was for pain, but Defendant did not ask Lalonde about the quantity that he needed to treat the pain. On redirect examination, Lalonde explained that he had a card by the state authorizing him to have marihuana and he showed that card to Defendant. (53a-54a)

Michael William Batke testified that he was a medical marihuana patient and had a state issued patient card. Defendant was Batke's caregiver from November 1, 2011, until January 23, 2012. Batke received marihuana from Defendant on three occasions—(1) two ounces of dried marihuana from Defendant in November for a "donation" of five hundred dollars, (2) ten cupcakes containing marihuana in December at no charge, and (3) two ounces of marihuana in December for a "donation" of five hundred dollars. (56a-60a)

Batke became a certified patient in 2010 and renewed his certification in October of 2011. Batke went to the same facility he found online for initial certification and renewal—Medical Marihuana Associates. Batke saw Doctor Wesley. He had never seen Doctor Wesley before and he had not seen her since his visit. Batke identified a copy of Doctor Wesley's certification dated October 13, 2011. The physician's certification was admitted into evidence as People's exhibit (1). (61a-63a) (Batke's Physician Certification dated 10/13/11, 186a-204a) Doctor Wesley checked the box "severe and chronic pain" as the condition that qualified Batke as a medical marihuana patient. There were no other notations on the document other than

Doctor Wesley's signature. (63a) Batke spent an hour with Doctor Wesley. (64a) When Batke needed marihuana, he would call Defendant and tell Defendant the specific amount he needed. (80a-81a)

Frank R. Colon, II, testified that he was a medical marihuana patient. Defendant was Colon's caregiver from June of 2011 until January 23, 2012. (82a-83a) Colon received approximately one to two ounces of marihuana per week from Defendant during that time period. (83a)

On cross-examination, Colon stated that he gave Defendant a "donation" of two hundred and fifty to three hundred dollars for each ounce of marihuana. Once a month or twice a month, Defendant would not charge Colon for the marihuana. (84a) Colon obtained his certification from Doctor Cywiak[6] with Medical Marihuana Affiliates in Farmington Hills. (85a) Cywiak listed Colon's conditions as shoulder and lower back pain and ADD [attention deficit disorder]. Cywiak never informed Colon about the quantity of marihuana required or how to ingest the marihuana. Colon saw Cywiak on two occasions—for certification and then recertification. (86a) The last time Colon obtained marihuana from Defendant was at the end of December or the first week in January of 2012. Colon became his own caregiver after Defendant called him and told him he had some legal issues. (87a)

After closing arguments, the trial court denied Defendant's motion to assert the section 8 defense before the jury. (105a) The trial court found that Defendant met the requirements of section 8(a)(3), but failed to meet the requirements of sections 8(a)(1) and 8(a)(2). Regarding

[6] The transcript incorrectly spells the doctor's name as Siowick. According to the certification document submitted by Defendant, the doctor's name is actually spelled [Seymour] Cywiak. (211a)

section 8(a)(1), the trial court noted that none of the patients' physician's certification statements admitted into evidence stated that there had been a *full assessment* of the patient's medical history and *current medical condition* as required by the legislature. It did not appear that the patients' current medical conditions were reviewed at all. There was no statement that there was a bona fide patient/physician relationship and any relationship that did exist was only for the purpose of medical marihuana. (100a-102a) Further, the trial court concluded that Defendant failed to prove under section 8(a)(2) that the amount of marihuana plants were not more than reasonably necessary to insure the uninterrupted availability. (103a-104a) Proceedings in the trial court were stayed so that Defendant could appeal the court's decision.

Defendant filed an interlocutory application for leave to appeal with the Michigan Court of Appeals on September 10, 2012. The Court of Appeals denied Defendant's application and his motion for reconsideration. (111a) On April 1, 2013, this Honorable Court issued an Order remanding the case back to the Court of Appeals for consideration as on leave granted of (1) whether the defendant was entitled to dismissal of the marijuana-related charges in Counts IV through VII of the second amended information under the immunity provision in § 4 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26424; (2) whether the defendant was entitled to dismissal of these charges under the affirmative defense in § 8(a) of the MMMA, MCL 333.26428(a); and (3) if the defendant was not entitled to dismissal, whether he is permitted to raise the § 8 affirmative defense at trial. [112a]

On January 30, 2014, the Court of Appeals issued a published opinion affirming the trial court's order that (1) held that defendant was not entitled to immunity under section 4 of the MMMA, (2) denied defendant's request for dismissal under section 8 of the MMMA, and (3) denied defendant's request to present the section 8 defense at trial. *People v Tuttle*, 304 Mich

App 72; ___ NW2d ___ (2014). (125a)

Defendant then sought and was granted leave to appeal in this Court. This Court's leave grant states,

> On order of the Court, the application for leave to appeal the January 30, 2014 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall include among the issues to be briefed: (1) whether a registered qualifying patient under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, who makes unlawful sales of marijuana to another patient to whom he is not connected through the registration process, taints all aspects of his marijuana-related conduct, even that which is otherwise permitted under the act; (2) whether a defendant's possession of a valid registry identification card establishes any presumption for purposes of § 4 or § 8; (3) if not, what is a defendant's evidentiary burden to establish immunity under § 4 or an affirmative defense under § 8; and (4) what role, if any, do the verification and confidentiality provisions in § 6 of the act play in establishing entitlement to immunity under § 4 or an affirmative defense under § 8. [*People v Tuttle*, ___ Mich ___; 821 NW2d 787 (Docket No. 145371, entered June 11, 2014). (127a)]

Additional pertinent facts will be discussed in the body of the argument section of this brief, *infra,* to the extent necessary to fully advise this Honorable Court as to the issues raised.

STANDARD OF REVIEW

The meaning of the MMMA represents an issue of statutory interpretation which this Court reviews de novo. *State v McQueen*, 493 Mich 135, 146; 828 NW2d 644 (2013). The MMMA was a voter-initiated statute. *Id.* As this Court explained in *McQueen*,

> "[T]he intent of the electors governs" the interpretation of voter-initiated statutes, just as the intent of the Legislature governs the interpretation of legislatively enacted statutes. The first step in interpreting a statute is to examine the statute's plain language, which provides "'the most reliable evidence of . . . intent . . . .'" "If the statutory language is unambiguous, . . . '[n]o further judicial construction is required or permitted'" because we must conclude that the electors "'intended the meaning clearly expressed.'" *Id.* at 147 [citations omitted].

This Court reviews the trial court's decision to admit evidence for an abuse of discretion. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013). However, preliminary questions of law regarding whether a statute or evidentiary rule applies are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court's factual findings are reviewed for clear error. MCR 2.613(C); *People v Dawson*, 431 Mich 234, 258; 427 NW2d 886 (1988).

ARGUMENT

I. A REGISTERED QUALIFYING PATIENT UNDER THE MICHIGAN MEDICAL MARIHUANA ACT (MMMA), MCL 333.26421 *et seq.*, WHO MAKES UNLAWFUL SALES OF MARIHUANA TO ANOTHER PATIENT TO WHOM HE IS NOT CONNECTED THROUGH THE REGISTRATION PROCESS, TAINTS ALL ASPECTS OF HIS MARIHUANA-RELATED CONDUCT.

A. The MMMA is a limited exemption to the illegal use, possession, cultivation, and sale of marihuana.

In November of 2008, the voters of Michigan passed an initiative by a majority which provided a limited exemption to the general rule that marihuana use, possession, cultivation, and sale is illegal.[7] The Act took effect on December 4, 2008 and is codified as MCL 333.26421 *et seq.* "The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan." *People v Kolanek*, 491 Mich 382, 394; 817 NW2d 528 (2012) (emphasis in original). The purpose of the MMMA is to allow persons suffering with a serious or debilitating medical condition to be able to use medical marihuana "to the extent that the individuals' marijuana use 'is carried out in accordance with the provisions of [the MMMA].'" *Id.* While other states vary in their statutory schemes involving the use of marihuana, the voters of Michigan chose to allow marihuana use for "medical use" only.[8]

Section 4 of the MMMA provides immunity from arrest and prosecution to qualifying

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[7] Federal law through the Controlled Substance Act (CSA) absolutely prohibits the use of marihuana for any legal purpose, and classifies it as a banned Schedule I drug. 21 USC § 801 *et seq.*

[8] The MMMA defines "medical use" as "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(f).

patients[9] and primary caregivers[10] who have been issued and possess a registry identification card and meet the requirements regarding the marihuana possessed. MCL 333.26424(a), (b). Section 4 provides in pertinent part:

> (a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. The privilege from arrest under this subsection applies only if the qualifying patient presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the qualifying patient.
>
> (b) A primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting *a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act*. The privilege from arrest under this subsection applies only if the primary caregiver presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the primary caregiver. This subsection applies only if the primary caregiver possesses an amount of marihuana that does not exceed:
>
> (1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department's registration

[9] The definition in effect at the time of this case was: "Qualifying patient" means a person who has been diagnosed by a physician as having a debilitating medical condition. MCL 333.26423(i). The definition was subsequently amended on April 1, 2013.

[10] The definition in effect at the time of this case was: "Primary caregiver" means 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 never been convicted of a felony involving illegal drugs." MCL 333.26423(h). The definition was subsequently amended on April 1, 2013.

process; and

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

(3) any incidental amount of seeds, stalks, and unusable roots. [MCL 333.26424] [Emphasis added]

A qualifying patient or primary caregiver is afforded a presumption of engaging in the medical use of marihuana as stated in MCL 333.26424(d),

> (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 . . .

However, section 4(d)(2) goes on to state, "The presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act."

Relevant to this Court's analysis of section 4 is section 7 of the MMMA, which places additional limits on the medical use of marihuana: "(a) The medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act." MCL 333.26427. This Court in *McQueen,* 493 Mich at 152-153, indicated the importance of reading section 7(a) in conjunction with section 4 of the MMMA. Thus, the MMMA created broad immunity under section 4, but only for qualified patients and primary caregivers who carried out the medical use of marihuana *in accordance with* the provisions of the act.

B. A person must be acting "in accordance with" the MMMA to benefit from the limited exemption, otherwise all conduct related to marihuana is subject to arrest, prosecution, and penalty.

The question presented here is whether a registered qualifying patient under the MMMA,

who makes unlawful sales of marihuana to another patient to whom he is not connected through the registration process, *taints all aspects of his marihuana-related conduct*. Based on the plain language of the statute, the answer must be "yes." A qualifying patient or primary caregiver cannot select which marihuana-related conduct is subject to section 4 immunity and which is not. The qualifying patient or primary caregiver is either protected from arrest, prosecution, or penalty because he or she was acting in compliance with the MMMA, or the qualifying patient or primary caregiver is not protected for acting outside the provisions of the MMMA. In the latter case, *all* of his or her marihuana-related conduct is subject to arrest, prosecution, and penalty.

The first step when interpreting a statute is to examine its plain language, which provides the most reliable evidence of intent. If the statutory language is unambiguous, no further judicial construction is required or permitted because this Court must conclude that the electors intended the meaning clearly expressed. *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012). "Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory . . . ." *People v Warren*, 462 Mich 415, 429; 615 NW2d 691 (2000) (citation omitted).

Here, the statutory language is unambiguous. The plain language in section 4(d)(2) of the MMMA states, "The presumption may be rebutted by evidence that *conduct related to marihuana* was not for the purpose of alleviating *the* qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, *in accordance with this act*." MCL 333.26424(d)(2) (emphasis added). The pertinent words are "conduct related to marihuana," "the qualifying patient," and "in accordance with this act."

First, the electors chose to use the language of "conduct related to marihuana" which indicates *any* conduct, including possessing, cultivating, selling, driving under the influence of

marihuana, etc. Therefore, a defendant's conduct of manufacturing/cultivating/possessing marihuana is conduct "related to marihuana."

Second, this Court analyzed the definite article "the" within "the qualifying patient" in section 4(d)(2), and held that it does not refer to *any* qualifying patient, but to the qualifying patient asserting section 4 immunity. *McQueen*, 493 Mich at 155. Based on the statutory language, this Court held that a registered qualifying patient could not transfer marihuana to another registered qualifying patient. *Id.* at 156. This Court went on to explain that similarly, in the case of a primary caregiver, "§ 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 MDCH's registration process*." *McQueen,* 493 Mich at 156 (emphasis in original). Therefore, 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.

Third, the plain statutory language of "in accordance with this act" establishes that the electorate intended for qualified patients and primary caregivers to act in compliance with the provisions of the MMMA. This is demonstrated by the use of "in accordance with this act" in five separate areas of the statute—sections 4(a), 4(b), 4(d), 4(i), and 7(e). This Court in *McQueen* stated, "[t]he inclusion of the phrase 'in accordance with the act' reiterates the overarching principle of the MMMA, stated in § 7(a), that the 'medical use' of marihuana is *only permitted to the extent* that it is carried out *in accordance with* the provisions of the MMMA." *McQueen,* 293 Mich App at 665 (emphasis added). Moreover, as this Court explained in *Kolanek*, 491 Mich at 403, a registered patient either complies with section 4 of the MMMA to claim broad immunity, or does not, and then is entitled to a lower level of protection under section 8:

> If registered patients choose not to abide by the stricter requirements of § 4, they will not be able to claim this broad immunity, but will be forced to assert the affirmative defense under § 8, just like unregistered patients. In that instance, registered patients will be entitled to the same lower level of protection provided to unregistered patients under § 8.

The People's position that *all* marihuana-related conduct is tainted by acting outside the parameters of the MMMA provisions is supported by a published Arizona Court of Appeals opinion, *Arizona v Fields*, 232 Ariz 265; 304 P 3d 1088 (2013). The Arizona Medical Marijuana Act [AMMA] contains similar language to Michigan's medical marihuana statute regarding a presumption of medical use for a qualifying patient or caregiver.[11] The AMMA states in pertinent part,

> A. There is a presumption that a qualifying patient or designated caregiver is engaged in the medical use of marijuana pursuant to this chapter.
>
> 1. The presumption exists if the qualifying patient or designated caregiver:
> (a) Is in possession of a registry identification card.
> (b) Is in possession of an amount of marijuana that does not exceed the allowable amount of marijuana.
>
> 2. The presumption may be rebutted by evidence that conduct related to marijuana was not for the purpose of treating or alleviating the qualifying patient's debilitating medical condition or symptoms associated with the qualifying patient's debilitating medical condition pursuant to this chapter. [Ariz Rev Stat 36-2811]

In *Fields*, the defendant posted an ad on Craigslist.com, advertising marihuana for legal card holders. *Id.* at 266. A police officer bought six grams of marihuana from defendant and the defendant was arrested. *Id.* Officers searched the defendant's home and found marihuana plants,

[11] The AMMA differs from the MMMA in that it allows a limited number of non-profit dispensaries around the state. § 36-2804(C). However, there is currently legislation pending in Michigan to allow for medical marihuana dispensaries. See HB 4271 (Mich 2013).

two mason jars containing marihuana, and three scales. *Id.* There was a discrepancy whether there were 18 marihuana plants found or 11 marihuana plants. *Id.* at 267.

At the motion hearing, the defendant argued that only the amount in excess of the 12 permitted plants should be considered for sale. *Id.* The state argued that once the defendant was "'found not to be using marijuana in accordance with the [AMMA],' he was not entitled to its protections." *Id.* The *Fields* Court stated that the AMMA provided two different statutory protections for cardholders. One protection in subsection (A) that there is a presumption that the cardholder is engaged in the medical use of marihuana if he or she has a valid card and does not possess more than the allowable amount of marihuana. *Id* at 269. The presumption could be rebutted by showing that the cardholder was using or possessing the marijuana for reasons other than medical use. *Id.* The *Fields* Court stated that "[o]nce rebutted, the presumption disappears and the cardholder may be charged with marijuana-related offenses." *Id.* (citation omitted)

The second protection under section (B)(1) of the AMMA is immunity from prosecution "if the registered qualifying patient does not possess more than the allowable amount of marijuana." *Id.* The *Fields* Court found that, based upon the plain language of the statute, immunity from prosecution was conditioned on a cardholder not possessing more than the allowable amount of marihuana *and* not improperly transferring the marihuana. *Id.* The *Fields* Court held, "We therefore agree with the state that, if the cardholder does not comply with those conditions, he or she may be prosecuted for marijuana-related offenses. ***None** of a cardholder's marijuana use or possession is protected by the AMMA if he or she fails to abide by the enumerated conditions.*" *Id.* (emphasis added)

Similar to the holding in *Fields,* the Court of Appeals stated that "what § 4(d) gives may also be lost under § 4(d)(2), because the prosecution may rebut the presumption." *Tuttle,* 304

Mich App at 82. Just as the *Fields* Court held that none of the defendant's marijuana use or possession was protected when he failed to comply with the provisions of the AMMA, the Court of Appeals in this case properly concluded that Defendant's actions of selling marihuana to an individual outside the parameters of the MMMA rebutted the presumption "with regard to *all* his conduct involving marijuana - - even conduct involving his two other qualifying patients." *Id.* at 83 (emphasis in original).

Here, Defendant sold marihuana to a patient *not connected to him* on three different occasions within approximately one week. (7b-17b) Less than an hour after the last sale, police searched Defendant's home and found 33 marihuana plants and 38 grams of loose marihuana, as well as a cache of firearms. (40b-45b) Defendant was a patient cardholder but *never presented caregiver cards* to establish that he could grow plants for Batke and Colon. From the proofs submitted at the evidentiary hearing,[12] it does not appear that Defendant was authorized by the department as a primary caregiver for Batke at the time of Defendant's arrest. Thus, Defendant did not establish the presumption under section 4(d)(1) of the MMMA.

Moreover, even if Defendant had established the presumption in section 4(d)(1), the presumption was rebutted under section 4(d)(2) by Defendant's marihuana-related conduct of patient-to-patient sales, which did not constitute "medical use." *McQueen,* 493 Mich at 142. Just as the *Fields* Court held, once the presumption is rebutted, the presumption disappears and none of Defendant's marihuana use or possession is protected. *Fields,* 232 Ariz at 269.

Defendant concedes that his sales of marihuana to Lalonde were illegal under *McQueen,* but argues that his conduct of possessing 38 grams of loose marihuana and 33 marihuana plants

[12] See page 3 of this brief, item number 5.

was in compliance with the MMMA and because of that, he should be immune from prosecution on Counts IV through VII. However, as previously discussed, once the presumption is rebutted under section 4(d)(2), the presumption disappears, and Defendant may be charged with all marihuana-related offenses. *Fields*, 232 Ariz at 269. Defendant himself admits that the conduct in Counts IV through VII is protected conduct "*but for* the patient to patient transfers that occurred." (Defendant's brief, 17) (emphasis added) Defendant cannot now attempt to compartmentalize his conduct so as to claim partial protection when he exceeded the protection of the law. He must be held criminally liable for all of his marihuana-related conduct.

Defendant additionally argues that use of the word "may" in section 4(d)(2) instead of "shall" indicates that rebutting the presumption is not mandatory. It is true that rebuttal is not mandatory. This Court has determined that the word "may" is permissive and is "used to express opportunity or permission . . . " *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008), quoting *Random House Webster's College Dictionary* (1997). Therefore, if a defendant is in compliance with the MMMA, there will be no evidence to rebut the presumption. However, section 4(d)(2) *allows* the state to introduce evidence to rebut the presumption if a defendant's "conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition."

Although Defendant argues that there must be a nexus between the marihuana he sold illegally to a patient not connected to him through the registry and the marihuana found at his house,[13] there is *no such requirement* in the plain wording of the MMMA. As discussed *supra*,

[13] Defendant relies on the holding in *Bylsma*, 493 Mich at 32, that there must be a sufficient nexus between the defendant and the marihuana. However, in that case, the issue was whether the defendant possessed all the marihuana in the warehouse. *Id.* Here, there is no question that Defendant possessed the marijuana found at his house.

the language of "conduct related to marihuana" indicates *any* conduct, including Defendant's conduct of manufacturing/cultivating/possessing marihuana.

In sum, the MMMA only provides protections from arrest, prosecution, and penalty when a person is in compliance with the provisions of the MMMA. Defendant's conduct of selling marihuana to a patient *not connected to him* through the registration process is *conduct related to marihuana* and he was not acting *in accordance with* the provisions of the MMMA, thus *all aspects* of his marihuana-related conduct is tainted and he is not entitled to immunity under section 4. Accordingly, the trial court properly held that Defendant was not entitled to section 4 immunity for any of his marihuana-related conduct. (8a)

In accordance with the MMMA's plain language, the People ask this Court to hold that once a qualifying patient or primary caregiver fails to comply with the requirements of section 4, *none* of a cardholder's marihuana use or possession is protected by the MMMA. A defendant is either compliant with section 4 of the MMMA, or he or she is not. If a defendant is not in compliance with the MMMA, broad immunity protection is lost under the plain language of the statute.

II. A DEFENDANT'S POSSESSION OF A VALID REGISTRY IDENTIFICATION CARD *ALONE* DOES NOT ESTABLISH THE PRESUMPTION UNDER SECTION 4, OR A PRIMA FACIE CASE UNDER SECTION 8 OF THE MMMA.

The next issue presented is whether a defendant's possession of a valid registry identification card establishes the presumption stated in section 4, or a prima facie case for purposes of section 8 of the MMMA.

A. A valid registry identification card AND possession of an amount of marihuana that does not exceed the amount allowed under the MMMA establishes a presumption under section 4(d) that may be rebutted under section 4(d)(2).

The plain language of section 4(d) of the MMMA states that "[t]here 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." (emphasis added) Thus, a valid registry identification card *and* possession of an amount of marihuana that does not exceed the amount allowed under the act establishes a presumption that the qualified patient is engaged in the medical use of marihuana in accordance with the act. A valid registry identification card *alone* is not enough to establish a presumption under section 4 of the MMMA.

Pursuant to section 4(a), the amount of marihuana allowed under the act is 12 marihuana plants kept in an enclosed, locked facility and not more than 2.5 ounces of usable marihuana. Pursuant to section 4(b), a caregiver is allowed 12 marihuana plants kept in an enclosed, locked facility, and not more than 2.5 ounces of usable marihuana for each qualifying patient that is connected to the caregiver through the department's registration process. A caregiver may not be connected through the department's registration process to more than five patients. MCL 333.26426(d). Therefore, a defendant can establish immunity by showing that he or she was

compliant with the requirements in sections 4(a) and (b) of the MMMA.

Furthermore, as discussed in Argument I, *supra*, the presumption may be rebutted by "evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act." MCL 333.26424(d)(2).

In this case, Defendant did not establish the presumption under section 4 of the MMMA when, although he presented evidence of possessing a valid *patient* registry identification card, he did not provide evidence of valid registry *caregiver* cards[14] connecting him to two patients, Batke and Colon. Further, without the caregiver cards, Defendant failed to establish that the amount of marihuana in his possession—33 plants—did not exceed the amount allowed under section 4(b)(2) of the MMMA which only allows a primary caregiver to possess 12 marihuana plants 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." (emphasis added)

B. A valid registry identification card does not establish a prima facie case under section 8 of the MMMA.

This Court previously established in *Kolanek* that a defendant must establish a *prima facie case* on all elements listed in section 8(a) at the hearing to raise the affirmative defense at trial. 491 Mich at 412. Based on the plain statutory language of each element in section 8(a), a valid registry identification card is insufficient to establish a prima facie case on any element of section 8(a).

[14] "The department shall issue a registry identification card to the primary caregiver, if any, who is named in a qualifying patient's approved application." Mich Admin Code R 333.115. Thus, a primary caregiver receives a card for each qualifying patient that is connected to him or her through the department's registration process.

1. Department Requirements to Issue Registry Identification Card

First, to determine if the registry identification card establishes a prima facie case for purposes of section 8(a) of the MMMA, it is necessary to refer to the department's requirements for issuing the card. Section 6(a) of the MMMA states the requirements for the department[15] to issue registry identification cards to qualifying patients:

> (a) 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. For the purposes of this subdivision, a person shall be considered to have proved legal residency in this state if any of the following apply:
> (*i*) The person provides a copy of a valid, lawfully obtained Michigan driver license issued under the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, or an official state personal identification card issued under 1972 PA 222, MCL 28.291 to 28.300.
> (*ii*) The person provides a copy of a valid Michigan voter registration. [MCL 333.26426(a)][16]

Section 3(m) of the MMMA defines "written certification" as:

> "Written certification" means a document signed by a physician, stating all of 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.

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[15] "The Michigan Medical Marihuana Program (MMMP) is a state registry program within the Health Professions Licensing Division in the Bureau of Health Care Services at the Michigan Department of Licensing and Regulatory Affairs." LARA, Department of Licensing and Regulatory Affairs, http://www.michigan.gov/lara/0,4601,7-154-35299_63294_63303_51869---,00.html (last accessed August 13, 2014.)

[16] Section 6(a)(6), Proof of Michigan residency, was added to the MMMA April 1, 2013.

> (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)][17]

2. Under section 8(a)(1) of the MMMA, a valid registry identification card does not establish a prima facie case of a bona fide physician-patient relationship.

Pursuant to section 8(a)(1) of the MMMA, a defendant must establish,

> (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;

The statutory language of section 8(a)(1) requires that a physician recommended the marihuana as treatment "in the course of a bona fide physician-patient relationship." Based on the plain language, the People submit that a registration card does not establish a prima facie case for purposes of section 8(a)(1).

First, the MMMA did not define "in the course of," so this Court may turn to its dictionary definition to ascertain its meaning *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 470; 521 NW2d 831 (1994). One common meaning would be "the continuous passage or progress through time or a succession of stages: *in the course of a year*." *Random House Webster's College Dictionary* (1997) (emphasis in original). This envisions an ongoing relationship between patient and doctor, not a "one-stop shopping event to obtain a permission slip to use medical marijuana." *People v Redden*, 290 Mich App 65, 123; 799 NW2d 184 (2010) (O'Connell, J., concurring)

Second, regarding the language of "bona fide physician-patient relationship" in section

[17] MCL 333.26426(m)(2) was added on April 1, 2013 and not in effect at the time of this case.

8(a)(1), the MMMA did not define "bona fide physician-patient relationship" at the time of Defendant's arrest.[18] In *Kolanek*, this Court noted that the Statement of the Boards of Medicine and Surgery indicated that the term "bona fide physician-patient" relationship "envisions 'a ***pre-existing and ongoing relationship*** with the patient as a treating physician.'" 491 Mich at 397 n 30 (emphasis added) The MMMA was amended April 1, 2013 and now defines "bona fide physician-patient relationship" in section 3(a) as follows:

> (a) "Bona fide physician-patient relationship" means a treatment or counseling relationship between a physician and patient in which all of the following are present:
>
> (1) The physician has reviewed the patient's relevant medical records and completed a full assessment of the patient's medical history and current medical condition, including a relevant, in-person, medical evaluation of the patient.
>
> (2) The physician has created and maintained records of the patient's condition in accord with medically accepted standards.
>
> (3) The physician has a reasonable expectation that he or she will provide follow-up care to the patient to monitor the efficacy of the use of medical marihuana as a treatment of the patient's debilitating medical condition.
>
> (4) If the patient has given permission, the physician has notified the patient's primary care physician of the patient's debilitating medical condition and certification for the use of medical marihuana to treat that condition.

Key to the bona fide physician-patient relationship in section 3(a) is that the "physician has a reasonable expectation that he or she will provide follow-up care to the patient to monitor the efficacy of the use of medical marihuana as a treatment of the patient's debilitating medical condition." This supports the section 8(a)(1) plain language of "in the course of" that the physician-patient relationship is progressing through time or ongoing. Additionally, the language in section 6(f) of the MMMA contemplates an ongoing relationship because it requires the

[18] The new definition is not applicable to this case that arose before the date of the amendment. *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.")

physician to notify the department if the patient "has ceased to suffer from a debilitating medical condition."

Just as a patient works with their doctor to determine the best amount of medicine necessary to treat their condition, a medical marihuana patient must also have a pre-existing relationship with their doctor who then monitors the efficacy of the marihuana to treat the medical condition. This type of physician-patient relationship is needed even more so in medical marihuana cases when marihuana remains a Schedule I controlled substance. MCL 333.7211.

In Judge O'Connell's concurrence in *Redden*, 290 Mich App at 112, he suggested questions that would help the trial court to determine if a bona fide physician-patient relationship existed. These questions include:

> (a) whether the physician signing the written certification form was the patient's primary caregiver, (b) whether the patient had an established history of receiving medical care from that physician, (c) whether the physician diagnosed a particular debilitating medical condition instead of simply stating that a patient's reported symptoms must be the result of some such unidentified condition, (d) whether the physician was paid specifically to sign the written certification, and (e) whether the physician has a history of signing an unusually large number of certifications. [Id. at 112-113]

Therefore, the physician's testimony is important to present a prima facie case pursuant to section 8(a)(1).

A registration card does not establish prima facie evidence that the bona fide physician-patient relationship is *preexisting and ongoing*. All that is required by the department to obtain the registration card is a completed application, a written certification signed by a licensed physician, a copy of state issued identification, and the requisite fee. Mich Admin Code R 333.103. The department verifies that the form is completed and that the doctor is certified in the state of Michigan. Mich Admin Code R 333.107. An application can be denied for failing to provide the physician certification, failing to provide an address in the state of Michigan,

falsifying any information in the application, or failing to meet the requirement of R 333.107. Mich Admin Code R 333.113(4).

Nowhere in the written certification definition in section 3(m) of the MMMA, which is a requirement for the department to issue the registry identification card under section 6(a), does it discuss any type of ongoing physician-patient relationship where there is a "reasonable expectation of follow-up care." Thus, a registry identification card does not establish element 8(a)(1) of the MMMA that a "in the course of a bona fide physician-patient relationship" exists between a patient and his physician.

Although Defendant argues that a registration card is sufficient evidence of a bona fide physician-patient relationship,[19] the Department does not verify that the certification is legitimate. It is the defendant that provides the information to the department to obtain the card, not the physician. MCL 333.26426 indicates that the Department "*shall* issue registry identification cards to qualifying patients" who submit 1) a written certification, 2) an application, and 3) the name and address of the patient and name address and telephone number of the patient's physician. MCL 333.26426(a) (emphasis added). The Department only verifies that information. MCL 333.26426(c). Therefore, under the plain language of the MMMA, possession of a written certification or patient registry card does not establish a bona fide physician-patient relationship.

[19] The testimony of confidential informant Lalonde demonstrates the weakness in Defendant's argument. Lalonde received a certificate without ever meeting with a physician. (51a-54a) Judge O'Connell described this type of physician certification abuse of the system in his concurrence in *Redden*, 290 Mich App at 125-129. "Doctors with the personal integrity demanded of that profession would not examine a patient for just several minutes, opine from that short examination that the patient has a terminal illness or a serious or debilitating condition, and then certify that the patient would benefit from the use of a schedule 1 drug." *Id.* At 129.

While Defendant argues that a caregiver should not have to delve into the specifics of the physician-patient relationship, the statutory scheme under the MMMA of having no more than five patients assigned to one caregiver demonstrates the voters' intent that a caregiver work closely with their patients. MCL 333.26426(f). If the caregiver is compliant with the requirements of section 4 of the MMMA, then a caregiver or patient would never need to establish an affirmative defense under section 8. Once the caregiver's marihuana-related conduct is called into question, and the presumption of section 4 is rebutted, a caregiver will have to present prima facie evidence to establish the element of section 8(a)(1). Simply presenting a registry identification card is not enough.

In this case, Defendant relied on his *expired* patient card[20] and physician certification to show that he had an ongoing bona fide physician-patient relationship with his physician. (164a-165a) Defendant did not testify or present any physician testimony. In addition, Defendant presented patient cards and certifications for his allegedly connected patients, Batke and Colon. (9a-11a, 194a-195a, 211a-212a)

The trial court found that the physician statements *on their face* did not establish a "full assessment," a "current medical condition," or "bona fide patient/physician relationship" pursuant to section 8(a)(1). (102a) The Court of Appeals noted that Batke's testimony that he saw his certifying physician one time for one hour (61a), and Colon's testimony that he saw his certifying physician twice—once for certification and once for re-certification (86a), did not establish evidence of a bona fide physician-patient relationship. *Tuttle,* 304 Mich App at 92.

The Court of Appeals held that a valid registry identification card alone would not

[20] Defendant did present evidence from the department that he had renewed his application and had a valid card that expired on January 1, 2013. (226a)

establish that the physician had an ongoing relationship with the patient to establish a prima facie case under section 8(a)(1). *Tuttle,* 304 Mich App at 90. Further, the Court of Appeals noted that Defendant cannot "substitute the procedural requirements in § 6 for the legal requirements in § 8." *Id.* at 91. Both courts were correct in finding that the registry identification card or physician certification statement did not provide evidence of an ongoing, bona fide physician-patient relationship as required by section 8(a)(1) of the MMMA.

3. **Under section 8(a)(2) of the MMMA, a valid registry identification card does not establish a prima facie case of how much marihuana is *reasonably necessary* to treat the patient's condition.**

   Section 8(a)(2) of the MMMA provides that a defendant must establish,

   > (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 . . .

Thus, Defendant has to establish at the evidentiary hearing how much marihuana was *not more than reasonably necessary* to treat the patient. A valid registry identification card does not provide ***any*** such information and neither does the written certification submitted to the department. Thus, a valid registry identification card does not establish a prima facie case for Section 8(a)(2).

The plain wording of this section would imply that a doctor has opined regarding the amount of marihuana reasonably necessary to treat the patient's serious or debilitating medical condition. Otherwise, how would a patient or a caregiver determine how much marihuana is reasonably necessary? Accordingly, a physician must testify at the evidentiary hearing to establish the bona-fide physician-patient relationship and the amount of marihuana recommended for the patient to treat the condition. But before a doctor could even tender an

opinion, he would have to show that he did have the expertise not only to diagnose the defendant with the requisite condition, but also that he had sufficient experience with treatment with marihuana to be able to opine that marihuana was a suitable treatment option for whatever condition defendant suffered from. MRE 702.

In Michigan in particular, the trial judge must play a "gatekeeper role" under MRE 702 in the admission of expert testimony. *Gilbert v Daimler Chrysler Corporation*, 470 Mich 749, 780; 685 NW2d 391, 408 (2004). The proponent of the expert witness bears the burden of establishing relevance and admissibility. *Id.* at 781. "The reliability of the expert's testimony is to be determined by the judge in advance of its admission--not by the jury at the conclusion of the trial by evaluating the testimony of competing expert witnesses." *Tobin v Providence Hospital*, 244 Mich App 626, 651; 624 NW2d 548 (2001). Indeed, "the trial court's obligation under MRE 702 is even stronger than that contemplated by [the federal rule] because Michigan's rule specifically provides that the court's determination is a precondition to admissibility." *Gilbert*, 470 Mich at 780, n 46.

Defendant argues that the Court of Appeals was wrong in finding that the caregiver must obtain details on how much marihuana the patient is supposed to use because a doctor does not *prescribe* marihuana to a patient.[21] *Tuttle*, 304 Mich App at 94. However, in the course of a bona fide physician-patient relationship, a doctor is required "to monitor the efficacy of the use of medical marihuana as a treatment of the patient's debilitating medical condition." MCL

[21] As Defendant points out, federal law criminalizes the acts of prescribing, dispensing, and possessing marijuana for any purpose because of its Schedule I status. 21 USC § 801 *et seq*. A Schedule I banned drug has a high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision. MCL 333.7211.

333.26423(a)(3). This would entail working with the patient to determine how much marihuana is necessary to treat the debilitating medical condition. "Prescribe" is defined as: "1. originally, to write beforehand. 2. to set down as a rule or direction; to order; ordain; direct. 3. to order or advise as a medicine or treatment: said of physicians, etc. 4. in law, to invalidate or outlaw by negative prescription." *Webster's New Universal Unabridged Dictionary* (1983). Therefore, although the Court of Appeals repeatedly refers to "prescribe" or "prescription" in its opinion, the words not only mean an official written message from a doctor, but also "to advise as a medicine or treatment." A doctor does not need to write a "prescription," but does need to recommend or "advise" how much marihuana a patient should use to treat their condition and must continue to monitor the efficacy of marihuana as a medical treatment for the patient. MCL 333.26423(a)(3); MCL 333.26426(f).

Defendant argues that a caregiver cannot be held to such a high accountability, but if this Court were to adopt Defendant's argument, a caregiver would have no accountability other than to check that a person has a registry identification card in their possession. That cannot be what the electorate intended when they passed the initiative. A caregiver is responsible for providing marihuana—a Schedule I controlled substance—to a patient for *medical* purposes. MCL 333.26423(h). A caregiver must have accountability. It cannot be that the electorate intended the caregiver to provide unlimited marihuana whenever the patient requests it. Thus, the caregiver has some duty to find out what amount of marihuana his/her patient needs to treat their medical condition.

Likewise, a patient growing his or her own marihuana must be aware of the amount reasonably necessary to treat his/her own serious or debilitating condition if the person chooses not to register with the state and/or comply with the strict requirements of section 4(a). *Kolanek,*

491 Mich at 403 ("The stricter requirements of § 4 are intended to encourage patients to register with the state and comply with the act in order to avoid arrest and the initiation of charges and obtain protection for other rights and privileges.")

Defendant additionally argues that the volume limitations in section 4 should serve as prima facie evidence that a person meets that element under section 8(a)(2). However, the protections offered under sections 4 and 8 are very different and should be analyzed separately. *Kolanek,* 491 Mich at 397-399. "[T]he plain language of the statute does not support that the amount stated in § 4 is equivalent to the "reasonably necessary" amount under § 8(a)(2)." *Redden*, 290 Mich App at 87. In this case, the Court of Appeals aptly noted that if the intent of the electorate was to use the amounts 12 plants and 2.5 ounces of marijuana listed in section 4, it would have reinserted the language into section 8(a)(2). *Tuttle,* 304 Mich App at 93. It chose not to do so. This Court must give effect to the plain language of the statute. *McQueen,* 493 Mich at 147.

Under section 8(a)(2), a person must show what amount of marihuana is reasonably necessary to treat the patient. Perhaps a patient only needs three to four marihuana plants, or perhaps a patient needs as many as twenty marihuana plants to treat the debilitating condition.[22] The language of section8(a)(2), that the "quantity of marihuana that was not more than was reasonably necessary," would suggest that the amount can vary depending on the physician's recommendation.

In this case, Defendant did not testify and no physician testimony was presented. Thus,

[22] However, one marihuana plant could yield as much as two pounds of marihuana, and the plant can be harvested three times a year. (35a, 45a) To put this in perspective, only half a gram of marihuana is used in a cigarette. (44a)

the amount of marihuana Defendant was required to take to treat his medical condition was not established. Further, Lalonde testified that he purchased marihuana three times from Defendant from January 18 through January 23, 2012 (7b-20b), but Defendant never asked Lalonde how much marihuana he needed to treat the pain. (53a-54a) Batke was Defendant's patient for almost three months and, during that time, Defendant sold him two ounces in November, ten cupcakes in December, and another few ounces in December. (56a-57a) Colon testified that he had been Defendant's patient for almost eight months and he received one to two ounces of marihuana per week from Defendant. (82a-83a) Batke's doctor never told him how much marihuana was required to treat his medical condition. (86a)

Based on the evidence presented, the trial court properly found that Defendant did not establish that he was "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" his patients' conditions. MCL 333.26428(a)(2). (103a-104a) The Court of Appeals agreed that Defendant did not establish a prima facie case under section 8(a)(2). The Court noted that Defendant did not know how much marihuana was necessary to treat his patient's medical conditions, as well as his own. *Tuttle*, 304 Mich App at 94. Moreover, Defendant provided no evidence of how much marihuana he used and how often. *Id.* "[D]efendant obviously had more marihuana than reasonable necessary to treat him and his patients" when he sold to a confidential informant three different times. *Id.* Defendant failed to satisfy the second element of the section 8 affirmative defense.

4. **Under section 8(a)(3) of the MMMA, a valid registry identification card does not establish that the patient or caregiver was "engaged in" the listed marihuana related activities to treat the patient.**

Section 8(a)(3) of the MMMA provides that a defendant must establish,

> (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.

Here, the key word is "engaged." The word "engaged" is not defined in the statute so this Court may turn to its dictionary definition to ascertain its meaning *Popma,* 446 Mich at 470. The common meaning of "engaged" is "busy or occupied." *Random House Webster's College Dictionary* (1997).

The department issues a valid registry identification card which marks one point in time. The registry identification card expires after two years.[23] MCL 333.26426(e). The card would not establish that the patient or caregiver was *engaged in, or busy or occupied with*, the listed activities under section 8(a)(3) to treat the patient's condition at the time that the marihuana-related offense occurred. Thus, a valid registry identification card would not establish a prima facie case under section 8(a)(3).[24]

The Court of Appeals found that the defendant must establish that "any marijuana

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[23] The statute at the time of this case stated that the card was valid for one year, but was subsequently amended to two years on April 1, 2013.

[24] Defendant also argues that possession of registration cards established prima facie evidence with respect to section 8(a)(1) and section 8(a)(3) of the MMMA based on *People v Kiel,* unpublished opinion per curiam of the Court of Appeals, decided July 17, 2012, Docket No. 301427 (247a-251a). However, *Kiel* is not binding precedent. MCR 7.215(C)(1). Moreover, the Court of Appeals in *People v Hartwick*, 303 Mich App 247, 264; 842 NW2d 545 (2013), lv gtd ___ Mich ___; 846 NW2d 922 (2014), disagreed with the *Kiel* Court's interpretation of the MMMA.

possessed or manufactured by an individual is *actually* being used to treat or alleviate" a medical condition. *Tuttle,* 304 Mich App at 95 (emphasis in original). Defendant argues that "actually" means "used to refer to what is true or real" and thus the Court's interpretation of section 8(a)(3) is incorrect in that it "requires any and all marijuana to actually be used medicinally." (Defendant's brief, 40-41) That is exactly what is intended by section 8(a)(3) in accordance with the MMMA's purpose which is to allow Michigan citizens "suffering from serious or debilitating medical conditions or symptoms" the use of marihuana to help treat and alleviate their symptoms. *Kolanek,* 491 Mich at 394. If a defendant is not *actually* engaged in the medical use of marihuana, then his or her activities are not in compliance with the MMMA, and there is no affirmative defense available under section 8.

Defendant also argues that the Court of Appeals holding that every patient must testify is contrary to the plain language of the statute. However, considering the language of "engaged in" means "busy with," how would a defendant show that he was "engaged in" the listed marihuana activities of section 8(a)(3) for a medical purpose if the caregiver and each patient does not testify? A registry identification card does nothing to satisfy this element. The department's issuance of a card at the one point in time does not establish that the caregiver or patient was *busy with* 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." MCL 333.26428(a)(3). Thus, the patient, or a caregiver along with all of his or her patients, would need to testify that the marihuana possessed by the defendant was used to treat each patient's debilitating or serious medical condition. Only testimony from each caregiver and/or patient would satisfy the requirement under section

8(a)(3).

In this case, the trial court found that Defendant established section 8(a)(3) of the MMMA when Batke and Colon, Defendant's two patients, testified that they had chronic pain and that the pain could be treated by the use of marihuana. (104a-105a) The Court of Appeals did not agree with the trial court's reasoning because the trial court did not consider the testimony of the confidential informant, Lalonde,[25] in its analysis, and Defendant himself did not testify to show that the marihuana he possessed was actually being used to treat his own debilitating medical condition. *Tuttle,* 304 Mich App at 95. The Court of Appeals held that all of the patients' testimony had to be incorporated to establish the requirement of section 8(a)(3). *Id.*

Because a card alone does not establish any presumption that Defendant was *engaged in* the medical use of marihuana, and the testimony presented at the evidentiary hearing did not establish that Defendant was 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 each patient's medical condition, the Court of Appeals' holding that Defendant failed to satisfy section 8(a)(3) of the MMMA was correct.

[25] In fact, Lalonde was *not* using the marihuana for medical purposes, but rather was assisting Detective Pankey in gathering evidence. (7b-8b)

III. A DEFENDANT'S EVIDENTIARY BURDEN TO ESTABLISH IMMUNITY UNDER SECTION 4 IS TO MEET THE REQUIREMENTS LISTED UNDER SECTION 4(d). A DEFENDANT'S EVIDENTIARY BURDEN TO ESTABLISH AN AFFIRMATIVE DEFENSE UNDER SECTION 8 IS TO PRESENT A PRIMA FACIE CASE AT THE EVIDENTIARY HEARING AND, IF GRANTED, TO ESTABLISH THE AFFIRMATIVE DEFENSE BY A PREPONDERANCE OF EVIDENCE AT TRIAL.

The next question presented is, if the valid registry identification card does not create a presumption under section 4, or a prima facie case under 8 of the MMMA, what is Defendant's evidentiary burden?

A. Defendant's evidentiary burden under section 4 of the MMMA is to present a valid registry identification card and possess an amount of marihuana that does not exceed the allowed amount under section 4.

If a qualifying patient or primary caregiver is compliant with section 4 of the MMMA, establishing immunity should not be complicated. As noted in Argument II(A) *supra*, section 4(d) of the MMMA states,

> 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.

Thus, a valid registry identification card, *and* possession of an amount of marihuana that does not exceed the amount allowed under the act, creates a presumption that the qualified patient is engaged in the medical use of marihuana in accordance with the act.[26]

The problem arises when a qualifying patient or primary caregiver *acts outside the*

[26] Although not raised in this case, the question of whether a defendant is entitled to section 4 immunity is a question of law for the trial court to decide. MCL 333.26424(a) and (b) provide that both qualifying patients and primary caregivers who have been issued and possess a registry identification card "shall not be subject to arrest, prosecution, or penalty in any manner." Thus, a defendant would want this determination to be made at the earliest possible stages of the proceedings. This issue was raised in this Court's grant of leave in the companion case of *People v Hartwick*, ___ Mich ___; 846 NW2d 922 (2014).

parameters set forth in sections 4(a) and (b). As discussed in Argument I, *supra*, the presumption may be rebutted by "evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act." MCL 333.26424(d)(2). Patient-to-patient sales is one such type of "conduct related to marihuana" that was not for the purpose of alleviating the qualifying patients conditions or symptoms in accordance with the MMMA. *McQueen,* 493 Mich at 142. Once the presumption is rebutted, the presumption disappears and a defendant is no longer entitled to protection under section 4 of the MMMA. *Fields*, 232 Ariz at 269.

B. Defendant's evidentiary burden at the section 8 hearing is to present a prima facie case.

As stated, by this Court in *Kolanek,* 491 Mich at 410-411,

> [T]he medical use of marijuana is a statutorily created affirmative defense. Section 8(a) provides that a patient or person may assert this defense in "any prosecution involving marihuana" and that the defense "shall be presumed valid" if its elements can be established. Section 8(b) provides that a person "*may* assert [this defense] in a motion to dismiss, and the charges *shall be dismissed following an evidentiary hearing* where the person shows the elements listed in subsection (a)." This scheme makes clear that the burden of proof rests with the defendant, that the defendant "may" move to dismiss the charges by asserting the defense in a motion to dismiss, and that dismissal "shall" follow an evidentiary hearing. This last requirement is significant because it indicates that the § 8 defense cannot be asserted for the first time at trial, but must be raised in a pretrial motion for an evidentiary hearing. [emphasis in original]

Thus, the evidentiary burden rests with the defendant to prove the affirmative defense.[27] *Id.* This Court in *Kolanek* further explained,

> [I]f a defendant raises a § 8 defense, there are no material questions of fact, and

[27] An affirmative defense admits the crime but seeks to excuse or justify its commission. It does not negate specific elements of the crime. *People v Lemons*, 454 Mich 234, 246 n 15; 562 NW2d 447 (1997).

> the defendant "shows the elements listed in subsection (a)," then the defendant is entitled to dismissal of the charges following the evidentiary hearing. Alternatively, *if a defendant establishes a prima facie case* for this affirmative defense by presenting evidence *on all the elements listed in subsection (a)* but material questions of fact exist, then dismissal of the charges is not appropriate and the defense must be submitted to the jury. Conflicting evidence, for example, may be produced regarding the existence of a bona fide doctor-patient relationship or whether the amount of marijuana possessed was reasonable. Finally, if there are no material questions of fact and the defendant has not shown the elements listed in subsection (a), the defendant is not entitled to dismissal of the charges and the defendant cannot assert § 8(a) as a defense at trial. A trial judge must preclude from the jury's consideration evidence that is legally insufficient to support the § 8 defense because, in this instance, no reasonable juror could conclude that the defendant satisfied the elements of the defense. If the defendant believes that the circuit court erroneously denied the motion, the defendant's remedy is to apply for interlocutory leave to appeal. [Id. at 412-413][citiation omitted][emphasis added]

Based on *Kolanek's* holding, a defendant must establish a ***prima facie case for every element of section 8(a)*** of the MMMA to be able to assert the affirmative defense at trial. A defendant does this by presenting ***legally sufficient evidence***. *Id.* at 412. Prima facie evidence is defined as,

> Evidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient . . . to sustain a judgment in favor of the issue which it supports . . . . [*People v Lemons*, 454 Mich 234, 248 n 20; 562 NW2d 447 (1997) (citing Black's Law Dictionary (6th ed), p 1190).]

A prima facie case "means and means no more than evidence sufficient to justify, but not to compel, an inference of liability, if the jury so find." *People v Stewart*, 397 Mich 1, 6 n 1; 242 NW2d 760, on rehearing 400 Mich 540; 256 NW2d 31 (1977), superseded in part on other grounds by *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984).

If the evidence presented by the defendant fails to satisfy the burden of production of a prima facie claim, the judge *must preclude* the affirmative defense from the jury's consideration. *Kolanek*, 491 Mich at 412. As this Court stated, "To allow submission of the defense to the jury when the defense fails as a matter of law would unnecessarily burden the jury and the circuit

court with irrelevant testimony." *Id* at 413.

C. Defendant's evidentiary burden at trial for the affirmative defense is by a preponderance of evidence.

If a defendant does present legally sufficient evidence to establish a prima facie case on every element under section 8(a), and the defendant is permitted to present the affirmative defense at trial, the question becomes, "What is a defendant's evidentiary burden at trial?"

Defendant's evidentiary burden at trial is not statutorily defined by the MMMA. However, this Court has the power to allocate the burden of proof:

> "[I]t is 'normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" [*Patterson v New York,* 432 US 197, 201-202; 97 S Ct 2319; 53 L Ed 2d 281 (1977).]

MCL 333.26428(a) places the burden on the defendant to prove each prong of the affirmative defense. *Kolanek,* 491 Mich 412-413. Based on federal and state case law, the People submit that a defendant must prove the section 8 affirmative defense at trial by a preponderance of evidence. "Proof by a preponderance of the evidence requires less certainty than proof beyond a reasonable doubt. The defendant merely needs to establish that 'the evidence supporting [defendant's insanity] outweighs the evidence supporting its nonexistence.'" *People v Weddell,* 485 Mich 942; 774 NW2d 509 (2009) (citation omitted).[28]

"The United States Supreme Court has upheld the constitutionality of requiring a

[28] For the affirmative defense of insanity in Michigan, the defendant has the burden of proving insanity by a preponderance of the evidence. MCL 768.21a(3); *People v Mette*, 243 Mich App 318, 324-325; 621 NW2d 713 (2000).

defendant to prove an affirmative defense as long as the defendant does not have the burden of disproving any of the elements included by the state in its definition of the crime." *People v Likine*, 492 Mich 367; 823 NW2d 50 (2012) (citing *Patterson*, 432 US at 210; *Martin v Ohio*, 480 US 228, 232; 107 S Ct 1098; 94 L Ed 2d 267 (1987). In *Patterson*, 432 US at 206, the United States Supreme Court rejected a due process challenge to a New York law which placed on a criminal defendant the burden of proving the affirmative defense of extreme emotional disturbance by a preponderance of evidence. In *Martin*, 480 US at 232, the United States Supreme Court upheld an Ohio statute placing the burden of producing evidence on defendant by a preponderance of evidence.

In addition to these constitutional challenges in the United States Supreme Court, some state law cases exist that are specifically applicable to the burden of proof in medical marihuana defenses. Washington and Maine have established that when a defendant is asserting a medical marihuana defense at trial, the burden of proof is by a preponderance of evidence. See *State v Fry*, 168 Wn 2d 1, 7; 228 P 3d 1 (2010); *State v Christen,* 976 A2d 980, 984 (Me, 2009).

A few states actually state the burden of proof by a preponderance of evidence in their statutes. Washington amended its medical marihuana act in 2011 and added a preponderance requirement. See Wash Rev Code Ann 69.51A.043(2). The New Jersey statute states "The affirmative defense established herein shall be proved by the defendant by a preponderance of the evidence." NJ Stat § 2C:35-18. Nevada has established a statutory burden of proof for its affirmative defense for defendants claiming that they used marijuana for legitimate medical purposes. Nevada indicates that if defendants use more than the amount authorized by the statute, they must establish the elements of the affirmative defense by a preponderance. Nev Rev Stat Ann 453A.310(1)(a)(3).

In conclusion, placing the burden of proof by a preponderance of evidence on the defendant is not unconstitutional. Other states have applied the burden of proof as by a preponderance of evidence in their medical marihuana cases and statutes. Accordingly, in Michigan, when a defendant is permitted to present at trial the affirmative defense of medical marihuana pursuant to section 8 of the MMMA, the burden of proof is on the defendant to present the affirmative defense by a preponderance of evidence.

IV. THE VERIFICATION AND CONFIDENTIALITY PROVISIONS IN SECTION 6 OF THE MMMA PLAY A PART IN ESTABLISHING ENTITLEMENT TO IMMUNITY UNDER SECTION 4, BUT DO NOT ESTABLISH ANY ENTITLEMENT TO THE AFFIRMATIVE DEFENSE UNDER SECTION 8.

The last question presented is what role does the verification and confidentiality provisions in section 6 of the MMMA play in establishing entitlement to immunity under section 4, or an affirmative defense under section 8?

A. The verification provision in section 6(c) plays a part in establishing immunity under section 4.

The verification provision of section 6(c) of the MMMA is part of the procedure the department is required to follow prior to issuing the registry identification card. Therefore, once a person receives their registry identification card, the department should have already verified the information contained in the qualifying patient's application. MCL 333.26426(c) provides,

> 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. Rejection of an application or renewal is considered a final department action, subject to judicial review. Jurisdiction and venue for judicial review are vested in the circuit court for the county of Ingham.

Thus, the application *may* be denied if the application was not completely filled out or if the information contained in the application was false.

As discussed in Argument II(A) *supra*, a valid registry identification card *and* possession of an amount of marihuana that does not exceed the amount allowed under the act creates a presumption under section 4 of the MMMA that the qualified patient or primary caregiver is engaged in the medical use of marihuana in accordance with the act. Thus, the procedure the department follows pursuant to section 6(c) plays a part in whether a patient or caregiver receives the registry identification card. The qualifying patient must still establish the listed

requirements under section 4 of the MMMA and his or her marihuana-related conduct must be in accordance with the act.

B. The verification provision in section 6 does not establish entitlement to the affirmative defense under section 8.

Pursuant to sections 8(a)(1), 8(a)(2), and 8(a)(3) of the MMMA, verification of the patient's application does not establish that (1) an *ongoing bona fide* physician-patient relationship exists and the doctor is monitoring the efficacy of the marihuana treatment, (2) that the amount of marihuana a defendant possessed was *not more than reasonably necessary* to treat the serious or debilitating condition, or (3) that a defendant was *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.

Defendant cites various department rules and argues that the verification procedures ensure that there is legitimate bona fide physician-patient relationship and thus the caregiver has no burden in that respect to establish section 8(a)(1). However, if the caregiver is the defendant in a case, the statutory language places the burden on "the defendant." *Kolanek,* 491 Mich at 410. As discussed in Argument II(B)(2) *supra*, the People submit that the department procedural rules do not ensure a legitimate bona fide physician-patient relationship exists. Otherwise, as demonstrated by the facts in this case, Lalonde would not have received a registry identification card for speaking to a doctor for ten minutes on the phone. (53a)

Further, the plain language of section 6(c) that 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" suggests that

approval of the application is *mandatory unless* there is missing information in the application or the application contained false information. Accordingly, the verification provision in section 6(c) of the MMMA does not establish entitlement to the affirmative defense in section 8(a) of the MMMA.

C. The confidentiality provision in section 6(h)(3) plays a part in establishing immunity under section 4.

MCL 333.26426(h) lists the confidentiality rules that apply *to the department* to protect the information gathered:

> (1) Subject to subdivisions (3) and (4), applications and supporting information submitted by qualifying patients, including information regarding their primary caregivers and physicians, are confidential.
>
> (2) The department shall maintain a confidential list of the persons to whom the department has issued registry identification cards. Except as provided in subdivisions (3) and (4), individual names and other identifying information on the list are confidential and are exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.
>
> (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.
>
> (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.

The confidentiality provisions in section 6(h) of the MMMA plays a part in establishing immunity under section 4. Pursuant to section 6(h)(3), the department shall verify to law enforcement personnel whether the registry identification card is valid. Thus, the confidentiality provision allows law enforcement to check the validity of the card, which is part of establishing the presumption under section 4(d)—to present evidence of a *valid* registry identification card and possession of an amount of marihuana that does not exceed the amount allowed under the act. However, Defendant has to first present evidence of the valid card to avail himself of

immunity and have the case dismissed.

D. The confidentiality provisions in section 6 do not establish entitlement to the affirmative defense under section 8 when a defendant waives any confidentiality or physician-patient privilege by asserting the defense.

Defendant bears the burden of establishing the affirmative defense. *Kolanek,* 491 Mich at 410. The confidentiality provisions in section 6(h) apply to the department. Thus, by raising the affirmative defense of medical use, a defendant must waive any confidentiality provision or physician-patient privilege. Likewise, a caregiver's patients also must waive any doctor-patient privilege when they avail themselves of the services of the caregiver and benefit from the MMMA.

Statutory privileges and confidentiality provisions are narrowly defined, while their exceptions are broadly construed. *People v Warren*, 462 Mich 415, 428; 615 NW2d 691 (2000). Furthermore, any privilege can be waived. *Saur v Probes,* 190 Mich App 636, 639; 476 NW2d 496 (1991).

> [A] privilege can be waived through conduct that would make it unfair for the holder to insist on the privilege thereafter . . . A waiver is to be predicated not only when the conduct indicates a plain intention to abandon the privilege, but also when the conduct (though not evincing that intention) places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege. It is not to be both a sword and a shield . . . [*Howe v Detroit Free Press,* 440 Mich 203, 214-215; 487 NW2d 384 (1992) (citing 8 Wigmore, Evidence (McNaughton rev), § 2388(3), p 855).]

Michigan courts have held in criminal cases that parties waive any privilege by asserting a medical defense or introducing evidence that opens the door to such testimony. See, e.g., *People v Hunter,* 374 Mich 129, 135-136; 129 NW2d 95 (1965) (indicating that once the People sought to introduce medical testimony at trial, the complainant's physician-patient privilege was deemed waived); accord *People v Kayne*, 268 Mich 186, 190; 255 NW 758 (1934); *People v Mitchell,* 454 Mich 145, 169; 560 NW2d 600 (1997) (indicating that "[b]y putting in issue the

effectiveness of the representation he received at the trial, [the defendant] waived the attorney-client privilege." (citation omitted)) The concurrence in *Redden*, 290 Mich App at 117-118, specifically found that when a defendant is seeking to avail of the affirmative defense under the MMMA, the defendant must waive the privilege even concerning medical records. A defendant also waives the privilege by referring to an otherwise privileged conversation on the record, *In re Guilty Plea Cases*, 395 Mich 96, 127; 235 NW2d 132 (1975), or disclosing the conversation to third parties, *Oakland Co Prosecutor v Dep't of Corrections*, 222 Mich App 654, 658; 564 NW2d 922 (1997).

This situation is also comparable to the case of *People v Johnson*, 111 Mich App 383; 314 NW2d 631 (1981), where the prosecution wished to call defendant's doctor in an obtaining a false prescription prosecution. The Court of Appeals said,

> Defendant seeks to use the privilege herein as both a sword and shield. On the one hand, defendant sought out the benefits of the relationship, and, in doing so, obtained the prescription that is not in dispute . . . Now he seeks protection of the privilege to insulate himself from criminal prosecution, knowing full well that only he and [his doctor] know the original contents of the prescription. To prevent [the doctor] from testifying . . . is inherently unfair, and we see no reason to allow the use of this privilege under such conditions." [*Id.* at 389]

In this case as well, the Defendant sought out the benefits of the relationship to obtain marihuana for medical use. Now he cannot use any confidentiality provision to absolve himself of criminal liability without allowing the prosecution to probe whether he had a qualifying medical condition, whether the relationship with his physician was bona fide, and whether his physician advised how much marihuana he needed to treat his qualifying medical condition and was monitoring the efficacy of the marihuana treatment.

Defendant argues that the MMMA does not contemplate a caregiver interfering with the physician-patient relationship and argues that HIPAA (Health Insurance Portability and

Accountability Act) violations would result. (Defendant's brief, p. 29). However, HIPAA applies only to covered entities. 45 CFR 164.502(a).[29] The Department of Licensing and Regulatory Affairs is not a covered entity under HIPAA. 45 CFR 160.103. Nonetheless, even if HIPAA did apply, defendants can waive any protection by signing waivers. 45 CFR 164.508(a). Thus, any assertions by Defendant that establishing a bona fide physician-patient relationship under section 8(a)(1) of the MMMA violates HIPPA is unfounded.

[29] A covered entity means "a health plan," "a health care clearinghouse," and "a health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter." 45 CFR 160.103.

RELIEF

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Tanya L. Nava, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court affirm the Court of Appeals and trial court's order that (1) Defendant was not entitled to immunity under section 4 of the MMMA, (2) Defendant cannot raise the section 8 affirmative defense at trial, and (3) Defendant is not entitled to dismissal of the charges under section 8 of the MMMA.

Respectfully submitted,

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BY: Tanya L Nava .
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