STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Murphy P.J., *Meter* and *Shapiro,* J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEXANDER EDWARD KOLANEK,

Defendant-Appellant
_____/

Supreme Court Nos. 142695 & 142712

Court of Appeals No. 295125

Oakland Circuit Court No.
2009-009016-AR

BRIEF OF ATTORNEY GENERAL BILL SCHUETTE AS *AMICUS CURIAE*

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Richard A. Bandstra (P31928)
Chief Legal Counsel

Joel D. McGormley (P60211)
Assistant Attorney General
Department of Attorney General
Attorneys for *Amicus Curiae*
Appellate Division
P.O. Box 30217
Lansing, MI 48090
517/373-4875

Scott Shimkus
Research Assistant

Dated: October 14, 2011

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Cases (continued)

Statutes

Statutes (continued)

Other Authorities

Constitutional Provisions

QUESTIONS PRESENTED

The Michigan Medical Marihuana Act (MMMA) provides medical-marijuana users, and their caregivers certain, limited protections. Under § 4 of the Act, MCL 333.26424, a qualifying patient and a primary caregiver, who have a registry identification card, are not subject to arrest or prosecution. If they have a registry identification card and are within the Act's amount limits, these individuals have a presumption that they are engaged in medical use. Separately, the MMMA grants a narrower affirmative defense to prosecution as a stopgap measure, for those patients and caregivers engaged in medical use who do not have a card, when the requirements of § 8 of the Act, MCL 333.26428, are met and when the medical use is carried out in accordance with the Act as required by § 7, MCL 333.26427. Three questions are therefore presented here:

1. Whether the MMMA's "[e]xcept as provided in section 7" language in § 8(a), MCL 333.26428(a), requires compliance with the rest of the Act in order to assert the § 8 affirmative defense?

2. Whether a physician statement under § 8(a)(1), MCL 333.26428(a)(1), must occur after the Act's enactment and before medical use in order to qualify for the protections of § 8 where the MMMA is not retroactive under the Act's plain language?

3. Whether the MMMA's plain language requires that the § 8 affirmative defense can only be brought by a defendant in a motion to dismiss – consistent with the language of the Act – before the trial court and proven by defendant by a preponderance of the evidence?

STATEMENT OF INTEREST OF *AMICUS CURIAE* ATTORNEY GENERAL BILL SCHUETTE

The Attorney General is the chief law enforcement officer of the State of Michigan. *Fieger v Cox*, 274 Mich App 449, 451; 734 NW2d 602 (2007). As such, the Attorney General has an interest in enforcing the civil and criminal laws of this State and protecting the safety of Michigan's citizens. The Court of Appeals' decision in this case involves both these interests, because it expands the language of the Michigan Medical Marihuana Act by concluding that the affirmative defense can be presented in both a motion to dismiss and to the jury. Moreover, this case involves implementing the Act's intent of providing the limited medical use of marijuana without jettisoning requirements designed to ensure both actual medical use for those who qualify and overall public safety.

INTRODUCTION

This case raises three broad issues regarding the Michigan Medical Marihuana Act[1] (MMMA), MCL 333.26421 *et seq.*, a public initiative that has forced the lower courts to address, in piecemeal fashion, a variety of questions about the Act's scope and application.[2] *Amicus Curiae* Attorney General Bill Schuette answers three questions relating to the MMMA in this case. *Kolanek*, ___ Mich App ___; ___ NW2d ___; 2011 Mich App LEXIS 23. First, the "[e]xcept as provided in section 7" language in MCL 333.26428(a) requires compliance with the rest of the Act in order to assert the § 8 affirmative defense.[3] Second, a defendant asserting the § 8 affirmative defense must obtain the requisite physician statement after the enactment of the MMMA but before the defendant's medical use. Third, if a defendant fails to bring or prevail on a motion to dismiss under § 8, he cannot raise that issue at trial before the fact-finder.

The Court of Appeals did not squarely address the first question. But if a defendant is permitted to assert a § 8 affirmative defense without compliance with § 4 of the Act, MCL 333.26424, the § 8 defense would swallow the Act, i.e., it would be pointless to register under § 4, and the defendant would be freed from compliance with safety measures like the safe-storage and amount-limit requirements. Section 8's express reference to § 7 mandates compliance with all of

---

[1] The Act uses the spelling "marihuana," but this brief uses "marijuana" unless appearing in a direct quote.

[2] See Attachment A, Summary of Medical Marijuana Opinions.

[3] This question also appears in *People v King*, ___ Mich App ___; NW2d ___; 2011 Mich App LEXIS 224, lv granted, 489 Mich 957; 798 NW2d 510 (2011).

the Act's provisions, so that the medical use of marijuana "is carried out in accordance with the provisions of this act."

The Court of Appeals correctly resolved the second question, albeit imprecisely: the physician statement must occur after the passage of the MMMA and before arrest. The MMMA is not retroactive; therefore, the physician statement must occur after the Act's enactment. Otherwise, a physician would merely have been speculating as to the potential palliative benefit and the availability of limited medical use. Further, the Act's plain language in MCL 333.26428(a)(1) requires that "[a] physician has stated" the medical benefit, which is in the past tense and must be connected to some event in time. The § 8 affirmative defense relates to prosecutions, and the prosecution naturally begins with an arrest. The Court of Appeals was correct that the statement must occur before arrest. To be more precise, the statement must occur before the defendant's medical use. Otherwise, a defendant could create an affirmative defense *after* he has engaged in the conduct. Often there is a lag between conduct and arrest. This makes sense and cabins the statement between the Act's enactment and medical use.

For two principal reasons, the Court of Appeals erred on the third question when it concluded, at the end of the opinion, that a defendant gets multiple chances to prove the defense. The plain language of MCL 333.26428(a) indicates that a defendant is allowed to assert the affirmative defense through a motion to dismiss. Nothing in the Act permits a defendant to re-raise the defense before the jury.

There is no deprivation of a defense under the Act's plain language when a defendant is limited to presenting the defense in a motion to dismiss.

The affirmative defense language in the Act functions as a nonexculpatory affirmative defense—just as § 4 functions essentially as a bundle of immunity protections. As such, the limited defense does not go to the jury; instead, it is decided by the trial court because (1) it is a public policy-based defense whereby Michigan's citizens decided to forgo a criminal conviction in limited circumstances; (2) the defense does not implicate a defendant's culpability for an underlying drug offense, nor a defendant's right to a determination of guilt by a jury; and (3) it allows the courts to define the parameters of the defense.

In sum, this Court should affirm the Court of Appeals' reversal of the circuit court and the reinstatement of charges and hold that (1) a defendant seeking to use the § 8 affirmative defense must comply with the Act's other provisions appearing in § 4, including the safe-storage and amount limits, (2) a defendant seeking to use the § 8 affirmative defense must have obtained the physician statement after the Act's enactment and before his medical use, and (3) a defendant can only present the § 8 affirmative defense before the trial court and must prove the defense by a preponderance of the evidence.

FACTS AND PROCEEDINGS

The Attorney General relies on the People's Brief on Appeal, which recites the relevant facts and proceedings below.

ARGUMENT

I. The "[e]xcept as provided in section 7" language in MCL 333.26428(a) requires compliance with the rest of the Act in order to assert the § 8 affirmative defense.

A. Standard of Review

To the extent that the meaning of the MMMA presents a question of statutory interpretation, this Court reviews those issues *de novo*. *People v Lown*, 488 Mich 242, 254; 794 NW2d 9 (2011).

The Court of Appeals has observed that because the Act was a citizen initiative under Const 1963, art 2, § 9, it must be interpreted in light of the rules governing the construction of citizen initiatives. *People v Redden,* 290 Mich App 65, 76; 799 NW2d 184 (2010). The Court of Appeals has also explained that initiatives should be construed to "effectuate their purposes" and to "facilitate rather than hamper the exercise of reserved rights by the people." *Welch Foods v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995). In addition, the words of an initiated law should be "given their ordinary and customary meaning as would have been understood by the voters." *Welch Foods,* 213 Mich App at 461. To the extent that the initiative contains an ambiguity, it should be construed in light of the purpose of the initiative.[4] *Welch Foods,* 213 Mich App at 462.

---

[4] The MMMA was passed by a majority of Michigan citizens on November 4, 2008, and became effective in December 2008. Ballot proposal 08-1 stated that the Act would "[p]ermit physician approved use of marihuana by registered patients with debilitating medical conditions including cancer, glaucoma, HIV, AIDS, hepatitis C, MS and other conditions as may be approved by the Department of Community Health. . . . Permit registered and unregistered patients and primary caregivers to

The Attorney General has also opined that "[t]here is no essential difference in the construction of statutes enacted directly by the people and those enacted by the Legislature." OAG, 1985-1986, No 6370, pP 310, 313-314 (June 10, 1986). "[A] study of all of the provisions of the initiated statute" may reveal the intent of the electorate. The key inquiry in construing an initiative is "the collective intent of the people," and the people's intent may be measured by their "common understanding . . . of the purpose of the initiated law. . ." OAG No 6370 at 314. Here, "[t]he purpose and intent of the people must be gleaned from the language of the MMMA itself." OAG, 2011, No 7259, p 5 (June 28, 2011); See also *National Pride at Work, Inc v Governor of Mich,* 481 Mich 56, 67-68; 748 NW2d 524 (2008) ("primary objective of constitutional interpretation, not dissimilar to any other exercise in judicial interpretation. . ."). But if the statute's language is clear and unambiguous "courts will not engage in additional judicial construction of an unambiguous statute." *Lown*, 488 Mich at 254-255.

B. Analysis

There is a contextual distinction between the purpose of § 4 and § 8; the former essentially provides immunity protections and a rebuttable presumption of medical use when the qualifying patient or primary caregiver is properly registered, within the amount limits, and otherwise in compliance with the Act, while the latter provides a narrower affirmative defense as a stopgap measure for those

---

assert medical reasons for using marihuana as a defense to any prosecution involving marihuana."

patients or caregivers engaged in medical use but who do not have a registry card. "Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*: '[i]t is known from its associates,' see Black's Law Dictionary (6th ed.), p 1060. This doctrine stands for the principle that a word or phrase is given meaning by its context or setting." *Koontz v Ameritech Services, Inc*, 466 Mich 304, 318; 645 NW2d 34 (2002)(internal quotation marks omitted). Statutory language cannot therefore be read in a vacuum. *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003).

Section 8 allows an individual to "assert the medical purpose of using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence" supports three factors: (1) a physician with a true relationship with the person has previously assessed that the person will have a palliative benefit to treat or alleviate a serious or debilitating medical condition or symptoms from that condition; (2) reasonable amount limitations; and (3) the marijuana was for medical use. Under these factors, a person can file a motion to dismiss before the trial court. Section 8 serves only as a stopgap protection for those patients otherwise complying with the Act who lack a registry identification card but who have obtained the required physician statement after the Act's passage but before medical use.[5]

---

[5] But see *People v Bylsma*, ___ Mich App ___; ___ NW2d ___; 2011 Mich App LEXIS 1663, *21-22; *King*, 2011 Mich App LEXIS 224, *23; *Redden*, 290 Mich App at 81 (concluding that both unregistered and qualifying registered patients can assert the affirmative defense under § 8).

Section 4, on the other hand, establishes a bundle of protections given to a qualifying patient or primary caregiver in the same vein as immunity: no arrest, prosecution, penalty, or denial of a right or privilege, so long as that person has a registry identification card, complies with § 4's amount limits, and otherwise complies with the Act. The MMMA backs that bundle of protections with an initial rebuttable presumption of medical use, so long as the qualifying patient has a registry identification card and is within the Act's amount limits. In that way, § 4's protections are greater than § 8's. Section 8 was not intended as an additional or greater protection.[6]

All of the Act's other requirements in § 4, e.g., maintaining the marijuana in an enclosed, locked facility and the amount limitations, must equally apply to § 8.[7] Section 8 states, "Except as provided in section 7 . . . ." And § 7(a) states that "[t]he 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." In his concurrence in *People v Anderson*, Judge Kelly recognized that "§ 7(a) provides the base-line criteria for the assertion of immunity [§ 4] or a defense [§ 8] under the MMA." *People v Anderson*,

---

[6] Some states have repealed sections of their medical marijuana laws that granted an affirmative defense and left in place immunity provisions. See, e.g., Mont Code Ann 50-46-206 (affirmative defense), repealed by 2011 Prop SB 423 eff July 1, 2011 and Attachment B, Survey of States with Medical Marijuana Laws.

[7] Although § 4 has a 2.5 ounce usable-marijuana and 12 plant limit for qualifying patients, those limits are not necessarily at odds with § 8's amount limit of that which is "reasonably necessary." Read together, § 4 merely establishes a cap. A person who has otherwise complied with the Act but who does not yet have a card does not get to possess more marijuana than a qualifying registered patient. See *Anderson*, ___ Mich App ___; ___ NW2d ___; 2011 Mich App LEXIS 1017, *29-30 (Kelly, J., concurring).

___ Mich App ___; ___ NW2d ___; 2011 Mich App LEXIS 1017, *22. For example, with respect to the amount limitations listed in § 4(a), as opposed to those listed in § 8(a)(2), Judge Kelly stated, "[I]t would seem absurd to permit a person who has not registered to possess marijuana and marijuana plants in excess of the amount permitted for those persons who comply with the registration requirements." *Anderson*, 2011 Mich App LEXIS 1017, *29-30 (Kelly, J., concurring). Thus, the limitations posed in § 8(a)(2) serve as "*additional limitation[s]* to those stated under § 4." *Anderson*, 2011 Mich App LEXIS 1017, *33 (Kelly, J., concurring).

If this were untrue, § 8 would not serve as a lesser stopgap measure but would render the § 4 protections and the registry process nugatory because an individual would have greater protections under the Act if they chose not to register at all. To wit: there would be no incentive to register because a person could escape many of the MMMA's requirements that are designed to ensure public safety and to limit abuse. Furthermore, it would effectively write the registration process out of the Act. "Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory." *Koontz*, 466 Mich at 312. "Moreover, words and phrases used in an act should be read in context with the entire act and assigned such meanings as to harmonize with the act as a whole." *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008). The proper reading of § 8 is that all of the Act's other requirements apply—except that the person asserting the defense does not yet have

a registry card but has obtained the physician statement after the Act's enactment and prior to medical use.

II. A physician statement under MCL 333.26428(a)(1) must occur after the Act's enactment and before medical use because the MMMA is not retroactive under the Act's plain language.

A. Standard of Review

See I(A) at 5-6.

B. Analysis

The question of when the physician's statement required by MCL 333.26428(a)(1) must occur is cabined by two points in time: (1) the MMMA's enactment, because the Act is not retroactive, and (2) the defendant's conduct that precedes the arrest, i.e. medical use. The physician's statement must fall between those points in time.

The Court of Appeals has previously held that the MMMA is not retroactive. *People v Campbell*, 289 Mich App 533, 536; 798 NW2d 514 (2010). Specifically, the Court of Appeals recognized that statutes are presumed to apply prospectively, unless the statute indicates otherwise. *Campbell*, 289 Mich App at 535. Two exceptions are when a statute is remedial or procedural. *Campbell*, 289 Mich App at 535, citing *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992). The Court of Appeals in *Campbell* recognized that if a statute creates new rights it is not remedial. *Campbell*, 289 Mich App at 535. The MMMA creates a bundle of immunity protections as well as a limited affirmative defense that did not previously exist. See MCL 333.26424 and 333.26428. Accordingly, the Court of Appeals here correctly concluded that any discussions with a physician had to occur

after the Act's enactment because that "interpretation provides protection to those who actively sought physician approval *after* the defense actually became available, while requiring more than just a speculative discussion about whether a person might possibly be eligible should the measure actually pass." *Kolanek*, 2011 Mich App LEXIS 23, *19 (emphasis added).

On the other end of the time continuum, the Court of Appeals' reasoning here for why the physician statement must occur, *at a minimum*, before arrest is correct in result but not precisely stated:

> The primary substantive question in this case is how to interpret the requirement in MCL 333.26428(a)(1), that "[a] physician *has stated*" the medical benefit to the patient. We conclude that "has stated" requires that the physician's opinion **occur prior to arrest**. First, because the term is past tense, the initiative must have intended that the physician's opinion be stated prior in time to some event. That event would reasonably be "any prosecution involving marihuana," MCL 333.26428(a), for which the defense is being presented. Thus, because the arrest begins the prosecution, the physician's opinion must occur prior to the arrest.
>
> Furthermore, § 8(a)(1) speaks of a physician stating that "the patient *is* likely *to* receive therapeutic or palliative benefit from the medical use of marijuana." (Emphasis added.) Thus, the language contemplates a situation where a physician, at the time of providing the statement, is envisioning the future possession and use of marijuana and rendering an opinion that it will benefit the patient when it is later used.
>
> This interpretation is also consistent with the fact that the right to bring a motion to dismiss as provided for in § 8(b) requires a showing at an evidentiary hearing of "the elements listed in subsection (a)." It would not make sense to permit someone to "show the elements in subsection (a)," which requires that a physician "has stated" the benefits, by bringing a physician to the motion hearing to state, for the first time, that the defendant would receive such benefit. [*Kolanek*, 2011 Mich App LEXIS 23, *11-12 (emphasis in bold added).]

But this Court should be more precise in one key regard. Not only must the physician statement "occur prior to arrest," it must occur before the alleged medical use. Otherwise, a defendant can create an affirmative defense after he has engaged in the conduct. There is often a lag between conduct and arrest. The Court of Appeals recognized this distinction in *People v Reed* when it held that "for a § 8 affirmative defense to apply, the physician's statement must occur before the purportedly illegal conduct." *People v Reed,* ___ Mich App ___; ___ NW2d ___; 2011 Mich App LEXIS 1541, *8. The Court of Appeals' conclusion in *Reed* resulted simply from applying the Act's plain language—the language says what it means. *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Managers, LLC*, 282 Mich App 410, 414; 766 NW2d 874 (2009) ("The drafters of statutes are presumed to know the rules of grammar, and statutory language must be read within its grammatical context unless a contrary intent is clearly expressed.").

III. The MMMA's plain language requires that the § 8 nonexculpatory affirmative defense can only be brought by a defendant in a motion to dismiss before the trial court and proven by the defendant by a preponderance of the evidence.

A. Standard of Review

See I(A) at 5-6.

B. Analysis

The MMMA's plain language indicates that § 8's circumscribed affirmative defense is brought pursuant to a motion to dismiss. The language of the Act does not provide an opportunity to present this claim at other stages of the proceeding, but only in a motion to dismiss. The Act's language is unambiguous. And as a other states have found, this Court should conclude that the burden of production and persuasion remains with the defendant.

1. The MMMA's plain language requires that a defendant bring the affirmative defense through a motion to dismiss.

Under the MMMA, "[t]he 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(a). The Act protects qualifying patients with debilitating medical conditions and their primary caregivers from arrest, prosecution, and penalty for the medical use of a limited amount of marijuana, but only if done in accordance with the MMMA. MCL 333.26424(d)(1) and (2).

Among other things, the MMMA also created a new affirmative defense as a stopgap measure for individuals who have obtained the required physician's statement after the Act's enactment and prior to its use. Generally, "[a]n affirmative defense is one that admits the doing of the act charged, but seeks to justify, excuse, or mitigate it . . . ." *People v Lemons*, 454 Mich 234, 245, n 15; 562 NW2d 447 (1997), quoting 21 Am Jur 2d, Criminal Law, § 183, p 338. MCL 333.26428(b) states, "A person may assert the medical purpose for using marihuana *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)." (Emphasis added.) Section 8(a) goes on to establish who is permitted to raise the limited defense.

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). But a grant of discretion whether to do one thing does not constitute a grant of discretion to do any other particular things. When the context so indicates, "may" can have the effect of "must" or "shall." *Burns v Auto Owners Ins Co*, 88 Mich App 663; 279 NW2d 43 (1979). E.g., *Fink v Detroit*, 124 Mich App 44, 49; 333 NW2d 376 (1983) (the phrase "may appeal" means that a party must appeal or take no further action at all).

Here, under the Act's plain language, a defendant is permitted, i.e., granted the opportunity, to file a motion to dismiss based upon § 8. Nowhere in the Act is a

defendant given permission or the opportunity to present the defense at any other stage of the criminal proceedings, i.e., nowhere does the Act permit a defendant to also present the defense to the jury.[8] This position is consistent with other states' statutory language. See, e.g., RI Gen Laws 21-28.6-8; Attachment B, Survey of States with Medical Marijuana Laws. It is also in contrast to other states with medical marijuana statutes that indicate the defense can be asserted at trial. See, e.g., Or Rev Stat 475.319; Attachment B, Survey of States with Medical Marijuana Laws.

2. The MMMA's limited affirmative defense is a public-policy-based nonexculpatory defense; therefore, if the trial court denies a defendant's motion to dismiss, nothing requires nor allows a defendant to have a second chance to present the defense to the jury.

The § 8 affirmative defense in the MMMA is a statutorily-created defense based on a public policy determination that those who comply with the Act will have a defense to prosecution. The MMMA's affirmative defense is best understood as a nonexculpatory affirmative defense that is decided by the trial court, consistent with the Act's plain language, rather than one that is submitted to the jury.[9] In that way, the § 8 affirmative defense is similar to the bundle of immunity

---

[8] Moreover, the Act's use of a motion to dismiss is consistent with the potential public policy decision to resolve the medical-use issue early on as in § 4, which shields someone from arrest. Allowing a defendant to prove medical-use at trial undermines the early resolution of the question and is asymmetrical to the protection in § 4.

[9] This argument applies equally to the immunity provisions available to qualifying patients with a registry card. See MCL 333.26424.

protections under § 4. As such, a defendant's Sixth Amendment right to trial by jury is not implicated.

a. Not all defenses are the same, nor require that a defendant be allowed to present them to the jury.

The Court of Appeals here, and in *People v Reed*, was incorrect in the blanket application of the principle that affirmative defenses have to go to the jury. *Kolanek*, 2011 Mich App LEXIS 23, *20-21; *Reed*, 2011 Mich App LEXIS 1541, *8-9. Not all defenses are the same, and they can be generally broken down into conceptual categories. The nature of a defense can affect whether the defense should go to the jury as the fact-finder or whether it is decided by the trial court. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 Colum L Rev 199, 263 (1982). It also can affect who bears the burden of production and persuasion for the defense. Robinson, 2 Crim L Def §§ 33-34. Legal theorists have generally divided defenses into five—sometimes overlapping—categories: (1) failure of proof defenses, (2) offense modifications, (3) justifications, (4) excuses, and (5) nonexculpatory public-policy defenses. LaFave, Criminal Law, (5th ed), § 9.1(a), p 469. Most, but not all, defenses go to the jury—the primary category of defenses that does not go to the jury are nonexculpatory public-policy defenses. Robinson, 82 Colum L Rev at 263.

There are differences among the five categories of defenses. For example, first, in a failure of proof defense situation, the defense bars proof of all of the elements of the crime. Robinson, 82 Colum L Rev at 203. Second, offense

modifications "modify or refine the criminalization decision embodied in the definition of the particular defense." Robinson, 82 Colum L Rev at 203. The remaining three defenses apply regardless of whether the elements have been met. Robinson, 82 Colum L Rev at 203. Third, under a justification defense, "[a] justified actor engages in conduct that is not culpable because its benefits outweigh the harm or evil of the offense . . . ." Robinson, 82 Colum L Rev at 203. Under this defense, "triggering conditions permit a necessary and proportional response." Robinson, 82 Colum L Rev at 216. An example is the use of defensive force. Robinson, 82 Colum L Rev at 214-215. Fourth, under excuse, "an excused actor admits the harm or evil but nonetheless claims an absence of personal culpability" because of a condition that renders a defendant blameless. Robinson, 82 Colum L Rev at 203. Examples of excuses are involuntary acts, insanity, or immaturity. Robinson, 82 Colum L Rev at 221-222.

Fifth, nonexculpatory defenses are different. "Nonexculpatory defenses arise where an important public policy other than that of convicting culpable offenders, is protected or furthered by foregoing trial or conviction and punishment." Robinson, 2 Crim L Def § 201. "[A]n actor exempt under a nonexculpatory public policy defense admits the harm or evil and his culpability but relies upon an important public policy interest, apart from blamelessness, that is furthered by foregoing the defendant's conviction." Robinson, 82 Colum L Rev at 203. A nonexculpatory defense is rooted in a public policy where the harm of defendant's conduct is outweighed by not prosecuting the defendant. LaFave, Criminal Law, (5th ed), §

9.1(a)(5), p 473. Public policy is the controlling factor and not the "innocence of the defendant." Robinson, 82 Colum L Rev at 231.

> In nonexculpatory defenses, the defendant's conduct is harmful, and creates no societal benefit; the defendant is blameworthy. The societal benefit underlying the defense arises not from his conduct, but from foregoing his conviction. The defendant escapes conviction in spite of his culpability. Robinson, 82 Colum L Rev at 232.

Moreover, because the underlying conduct in a nonexculpatory defense case is generally disfavored and "sought to be deterred," the defense can be denied when the defendant has a mistaken belief that it is applicable to him. Robinson, 82 Colum L Rev at 272. Common examples are diplomatic immunity; judicial, legislative, and executive immunity; immunity granted after compelling testimony; dismissals following application of the exclusionary rule or prosecutorial misconduct; and some constitutional provisions, e.g., double jeopardy. Robinson, 82 Colum L Rev at 230-231. Unlike justifications or excuses, for example, a nonexculpatory defense does not raise the same concerns about the constitutional right to have a jury decide guilt because culpability is not at issue. See Robinson, 82 Colum L Rev at 263-264.

b. The MMMA's § 8 affirmative defense is best understood as a nonexculpatory defense—like Michigan's objective view of entrapment—that does not go to the jury.

The MMMA's statutory affirmative defense is a nonexculpatory public policy defense. In Michigan, marijuana remains an illegal schedule 1 substance. MCL 333.7212 (except as a schedule 2 under the limited circumstances of a marijuana therapeutic research program under MCL 333.7214; 333.7335; 333.7336). A

defendant solely asserting the affirmative defense under § 8 of the MMMA is not challenging the underlying elements or proof of the elements of a crime, e.g., a marijuana possession charge only requires possession of the controlled substance of marijuana. MCL 333.7403; MCL 333.7212; *People v Meshell*, 265 Mich App 616, 621-622; 696 NW2d 754 (2005) (defining proof of possession). Rather, under § 8, the MMMA includes a public policy choice. Michigan's citizens—through the Act—expressed a willingness to forego prosecution of medical marijuana users (and medical marijuana caregivers) who comply with the Act and who are suffering from a debilitating medical condition—following a motion to dismiss addressed by the trial court. In that way, the MMMA's affirmative defense is a nonexculpatory public-policy-based defense—akin to another nonexculpatory affirmative defense: entrapment. See Robinson, 82 Colum L Rev at 236-240 (entrapment can be properly viewed as an excuse or a nonexculpatory defense).

With respect to entrapment, this Court has concluded that "[t]he policy considerations which moved us to adopt the objective test of entrapment compel with equal force the conclusion that the judge and not the jury must determine its existence." *People v D'Angelo*, 401 Mich 167, 173-174; 257 NW2d 655 (1977); see also Model Penal Code § 2.13. "[T]he issue of entrapment is best decided by the trial court outside the presence of the jury. This procedure is necessary to effectuate the policy considerations which underlie the objective test and is more consonant with an efficacious and fair system of justice." *D'Angelo*, 401 Mich at 177 (footnote omitted). The underlying public policy for prohibiting entrapment is "that

law enforcement conduct which essentially manufactures crime is a corruptive use of governmental authority which, when used to obtain a conviction, taints the judiciary which tolerates its use." *D'Angelo*, 401 Mich at 174.

The focus of the entrapment inquiry is therefore on police conduct, and the "guilt or innocence of the defendant is irrelevant to that determination." *D'Angelo*, 401 Mich at 176. "Should the court determine that government did not engage in impermissible conduct, the guilt or innocence of the defendant will be decided by the jury." *D'Angelo*, 401 Mich at 176. Therefore, "[a] court determination of entrapment does not deprive the defendant of the Sixth Amendment right to trial by jury." *D'Angelo*, 401 Mich at 176.

Once a trial court rejects an entrapment claim, it properly bars defense counsel from raising the claim again before the jury. *People v Jones*, 203 Mich App 384, 388; 513 NW2d 175 (1994). "There will be, in other words, no 'second bite at the apple' enabling the jury to second guess the determination of the trial court." *D'Angelo*, 401 Mich at 178. Moreover, the "[r]esolution of the entrapment issue by the court . . . will provide, through an accumulation of cases, a body of precedent which will stand as a point of reference for both law enforcement officials and the courts." *D'Angelo*, 401 Mich 175. In this way, the affirmative defense established in § 8 and the immunity provisions under § 4 of the MMMA are different from other traditional affirmative defenses that go to the jury. See 6 Gillespie, Michigan Criminal Law & Procedure Practice Deskbook (2d ed), §§ 33, 91, 102 (duress, insanity, and self-defense, respectively).

The same reasoning for having the entrapment defense decided by the trial court applies to the affirmative defense established in § 8 and the immunity provisions under § 4 of the MMMA. The applicability of the defense is not a matter of the defendant's factual guilt or innocence. Instead, the defense is available as a matter of public policy and its applicability and parameters are best decided by the court, not the trier of fact. In that manner, a body of case law will develop around the Act's affirmative defense, for the benefit of the bench and bar as well as law enforcement and the general public. Allowing the applicability of the defense to be decided by the jury may well result in nothing more than jury nullifications based on sympathetic factual situations.[10] See LaFave, Criminal Law, (5th ed), § 9.8(f)(2), pp 544-545.

3. Burden of production and persuasion

The burden of production and persuasion for the § 8 affirmative defense lies on the defendant to prove the elements of the defense by a preponderance of the evidence. The MMMA's express language places the burden of production on the defendant. Specifically, MCL 333.26428(a) establishes that the patient or patient's primary caregiver "may assert" medical use as a defense to a marijuana prosecution. Further, MCL 333.26428(b) plainly states that a person "may assert"

[10] The Rhode Island statute that establishes an affirmative defense for the medical use of marijuana is identical to MCL 333.26428(b). The Rhode Island statute states, "A person may assert the medical purpose for using marijuana *in a motion to dismiss*, and the charges shall be dismissed following an evidentiary hearing where the defendant shows the elements listed in subsection (a) of this section." RI Gen Laws 21-28.6-8(b) (emphasis added). Rhode Island has no opinion construing the language. See Attachment B, Survey of States with Medical Marijuana Laws.

medical use in a motion to dismiss, and at an evidentiary hearing, that person must "show[ ]" the elements in MCL 333.26428(a).

This Court should conclude that the burden of persuasion is a preponderance of the evidence. In *D'Angelo*, this Court held that a defendant claiming entrapment carries the burden of proving that claim by a preponderance of the evidence. 401 Mich at 183. This conforms to the burdens that the defendant carries in asserting some other defenses under Michigan law. See 6 Gillespie, Michigan Criminal Law & Procedure Practice Deskbook (2d ed), §§ 3, 58, 95(2), pp 441-442, 458, 467-468 (abandonment, insanity, and intoxication as a defense to a specific intent crime).[11]

Moreover, other states with medical marijuana laws have determined that the defendant must prove the affirmative defense by a preponderance of the evidence. In fact, six states have expressly set forth that their respective medical marijuana defenses must be proven by the defendant by a preponderance of the evidence (Alaska, Delaware, Hawaii, New Jersey, Oregon, and Washington). See Attachment B, Survey of States with Medical Marijuana Laws.

---

[11] The allocation of the complete burden of production to the defendant is different from other common-law defenses, e.g., self-defense ("[O]nce the issue of self-defense is injected and evidentially supported, '(t)he burden of proof to exclude the possibility that the killing was done in self-defense rests on the prosecution.'" *People v Jackson*, 390 Mich 621, 626; 212 NW2d 918 (1973), quoting *People v Stallworth*, 364 Mich 528, 535; 111 NW2d 742 (1961)).

CONCLUSION AND RELIEF REQUESTED

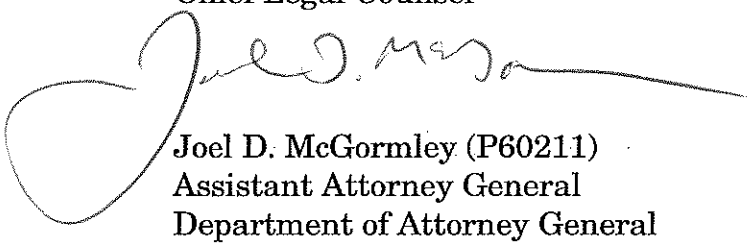
The Attorney General respectfully requests that this Court hold that: (1) a defendant seeking to use the § 8 affirmative defense must comply with the Act's other provisions appearing in § 4, including the safe-storage and amount limits, (2) a defendant seeking to use the § 8 affirmative defense must have obtained the physician statement after the Act's enactment and prior to medical use, and (3) a defendant can only present the § 8 affirmative defense before the trial court and must prove the defense by a preponderance of the evidence.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Richard A. Bandstra (P31928)
Chief Legal Counsel



Joel D. McGormley (P60211)
Assistant Attorney General
Department of Attorney General
Appellate Division
P.O. Box 30217
Lansing, MI 48090
517/373-4875

Scott Shimkus
Research Assistant

Dated: October 14, 2011

20110006410A/Kolanek, Alexander/Amicus Brief

ATTACHMENT A

ATTACHMENT A:
SUMMARY OF MEDICAL MARIJUANA OPINIONS

Case	Issue(s)	Holding(s)
People v Anderson, ___ Mich App ___; ___ NW2d ___; 2011 Mich App LEXIS 1017.	(1) Whether the defendant is required to present an expert witness to support his affirmative defense at a pre-trial evidentiary hearing. (2) Whether the defendant was precluded from raising the affirmative defense under § 8 during trial.	(1) Expert testimony is relevant to establish the affirmative defense under § 8, but not required. (2) The defendant could still mention the MMMA during trial, just not in terms of a defense. (3) A defendant must meet the safe-storage requirement to be entitled to the § 8 affirmative defense.
People v Bylsma, ___ Mich App ___; ___ NW2d ___; 2011 Mich App LEXIS 1663.	(1) Whether registered primary caregivers may jointly grow medical marijuana for their patients. (2) Whether a registered qualifying patient asserting the affirmative defense under § 8 must adhere to the amount and safe-storage requirements under § 4. (Question left open: Whether registered primary caregivers must keep each patient's plants in separate enclosed, locked facilities).	(1) Registered primary caregivers may not jointly grow medical marijuana. (2) A registered qualifying patient under § 4 may assert the § 8 affirmative defense, but must comply with the amount and safe-storage requirements under § 4.
People v Campbell, 289 Mich App 533; 798 NW2d 514 (2010).	Whether the MMMA applies retroactively.	The MMMA does not apply retroactively.
People v Carroll, unpublished, 2011 Mich App LEXIS 1009.	Whether the MMMA applies retroactively.	The MMMA does not apply retroactively.
People v King, ___ Mich App ___; ___ NW2d ___; 2011 Mich App LEXIS 224.	Whether a registered qualifying patient asserting the affirmative defense under § 8 must adhere to the amount and safe-storage requirements under § 4.	A registered qualifying patient under § 4 may assert the § 8 affirmative defense, but must comply with the amount and safe-storage requirements under § 4.
Michigan v McQueen, ___ Mich App ___; ___ NW2d ___; 2011 Mich App LEXIS 1512.	Whether the MMMA permits the selling of marijuana. (Questions left open: (1) Whether the MMMA permits uncompensated patient-to-patient conveyances of medical marijuana; (2) Whether registered primary caregivers can be compensated, per § 4(e), for assisting those patients with whom they are not "connected" through the MMMA).	(1) The defendants engaged in patient-to-patient sales in violation of the MMMA. (2) The "medical use" presumption was rebutted. (3) The MMMA does not authorize the sale of marijuana.

ATTACHMENT A:
SUMMARY OF MEDICAL MARIJUANA OPINIONS

People v Peters, unpublished, 2010 Mich App LEXIS 142.	Whether the MMMA applies retroactively.	The MMMA does not apply retroactively.
People v Redden, ___ Mich App ___; ___ NW2d ___; 2010 Mich App LEXIS 1017.	Whether a defendant must have a registry card under § 4 to assert the affirmative defense under § 8. (Question left open: Whether failure to comply with the requirements of § 4 forecloses a defendant from asserting the affirmative defense under § 8).	There are two defenses under the MMMA: registration under § 4 or the affirmative defense under § 8; a defendant need not register under § 4 to qualify for the § 8 affirmative defense.
People v Reed, ___ Mich App ___; ___ NW2d ___; 2011 Mich App LEXIS 1541.	When a defendant need obtain a physician's authorization to use marijuana for medical purposes when asserting the § 8 affirmative defense.	(1) A defendant must obtain physician authorization prior to the purported offense (extension of *Kolanek*). (2) The § 8 affirmative defense can go to the jury, even after the court denies a motion to dismiss, unless there is no issue of fact.
People v Walburg, unpublished, 2011 Mich App LEXIS 274.	Whether a defendant must have a registry card under § 4 to assert the affirmative defense under § 8.	(1) Defendant can either register under § 4 or assert the affirmative defense under § 8. (2) "Reasonably necessary" amount requirement in § 8 is not equivalent to the amount requirement in § 4. (3) A physician's affidavit must be obtained before arrest.
People v Watkins, unpublished, 2011 Mich App LEXIS 1117.	Whether § 8 mandates an evidentiary hearing on a motion to dismiss in which the defendant asserts the affirmative defense.	An evidentiary hearing is not required to deny a motion to dismiss under § 8.
People v Watkins, unpublished, 2011 Mich App LEXIS 1471.	Whether a trial court can preclude a defendant from raising the § 8 affirmative defense during trial.	A defendant is precluded from discussing the § 8 affirmative defense when no reasonable jury could find the elements of the defense have been established.

ATTACHMENT B

ATTACHMENT B:
SURVEY OF STATES WITH MEDICAL MARIJUANA LAWS

STATE	IMMUNITY VS. AFFIRMATIVE DEFENSE DISTINCTION	PRETRIAL MOTION TO DISMISS VS. AFFIRMATIVE DEFENSE AT TRIAL	BURDEN OF PERSUASION FOR AFFIRMATIVE DEFENSE
Alaska	Alaska Stat 17.37.030(b) (immunity) Alaska Stat 11.71.090; 17.37.030(a) (affirmative defense)	Unaddressed	Alaska Stat 11.81.900(b)(2) provides that the burden is on defendant to prove an affirmative defense by a preponderance of the evidence. This applies to all affirmative defenses in Title 11 of Alaska Statutes, including the medical marijuana defense in 11.71.090.
Arizona	Ariz Rev Stat 36-2811(B)-(F) (immunity) Ariz Rev Stat 36-2812 (affirmative defense), Repealed by 2010 Prop 203 (an Initiative Measure) 5 eff April 14, 2011	Ariz Rev Stat 36-2812 ("A person may assert the medical purpose for using marijuana in a motion to dismiss . . ."), Repealed by 2010 Prop 203	Inapplicable
California	Cal Health & Safety Code 11362.71(e) (immunity) Cal Health & Safety Code 11362.5(d) (immunity) *People v Moret,* 180 Cal App 4th 839; 104 Cal Rptr 3d 1, 16 (2009) (affirmative defense)	*People v Mower*, 49 P3d 1067, 1070; 122 Cal Rptr 2d 326 (Cal 2002) (defendant may argue medical use of marijuana in either a motion to dismiss or at trial)	*People v Mower*, 49 P3d 1067, 1071; 122 Cal Rptr 2d 326 (Cal 2002) (burden on defendant to raise a reasonable doubt with respect to medical marijuana affirmative defense)
Colorado	Colo Const 1876, art XVIII, §14(2)(a) (affirmative defense only)	Unaddressed	Cf. Colo Rev Stat 18-1-407 (burden is generally on the prosecution to disprove an affirmative defense beyond a reasonable doubt), with *People v Reed*, 932 P2d 842, 844 (Colo App 1996) (holding that, in raising a defense under the Dangerous Drugs Therapeutic Research Act (now repealed), defendant bore the burden of proving his defense).

ATTACHMENT B:
SURVEY OF STATES WITH MEDICAL MARIJUANA LAWS

Delaware	Del Code Ann tit 16, 4903A (immunity) Del Code Ann tit 16, 4913A(a) (resembling an affirmative defense, but only called a "defense")	Del Code Ann tit 16, 4913A(b) ("The defense and motion to dismiss shall not prevail if the prosecution proves [certain elements.]")	Del Code Ann tit 11, 304 provides that a defendant bears the burden of proving an "affirmative defense" by a preponderance of the evidence.
District of Columbia	DC Code 7-1671.02(a), (b), 7-1671.04(c), 7-1671.06(a), (b). (immunity) DC Code 7-1671.08(c) (affirmative defense)	Unaddressed	Unaddressed
Hawaii	Haw Rev Stat 329-125(a) (affirmative defense) Haw Rev Stat 329-126(a) (immunity for physicians)	*State v Manzano-Hill*, 222 P3d 465 (Hawaii Ct App 2010), unpublished (defendant brought affirmative defense in a motion to dismiss)	Haw Rev Stat 701-115 provides that the defendant bears the burden of proving an affirmative defense by a preponderance of the evidence. This applies to any defense designated as an "affirmative defense," including the medical marijuana defense in Haw Rev Stat 329-125(a).
Maine	Me Rev Stat Ann tit 22, 2423-E (immunity) Me Rev Stat Ann tit 22, 2423-E (affirmative defense), eff September 27, 2011. PL 2011, ch 407, sec. B-20.	Unaddressed	See *State v Christen*, 976 A2d 980, 984 (Me 2009) (addressing a since-repealed version of the affirmative defense, and holding that the burden is on defendant to prove that defense by a preponderance of evidence)
Maryland	Md Code Ann, Crim Law 5-601(c)(3)(iii) (affirmative defense only)	Unaddressed	*Jackson v State*, 322 A2d 574, 577 (Md App 1974) (as a general rule, the defendant bears the burden of proving an affirmative defense by a preponderance of the evidence)
Montana	Mont Code Ann 50-46-319(2) (immunity only) Mont Code Ann 50-46-206 (affirmative defense), Repealed by 2011 Prop SB 423, eff July 1, 2011	Inapplicable	Inapplicable

ATTACHMENT B:
SURVEY OF STATES WITH MEDICAL MARIJUANA LAWS

Nevada	Nev Rev Stat 453A.200 (immunity) Nev Rev Stat 453A.310(1) (affirmative defense)	Nev Rev Stat Ann 453A.310(4) (medical use defense to be argued at trial, defendant must give notice to prosecutor or defense is forfeited)	*Ybarra v State*, 100 Nev 167; 679 P2d 797, 800 (1984) (as a general rule, the defendant bears the burden of proving an affirmative defense by a preponderance of the evidence)
New Jersey	NJ Stat Ann 24:6I-6(b) (immunity) NJ Stat Ann 2C:35-18(a), 24:6I-6 (affirmative defense)	Unaddressed	NJ Stat Ann 2C:35-18(a) states that the defendant has burden to prove the medical marijuana affirmative defense by a preponderance of the evidence
New Mexico	NM Stat 26-2B-4 (immunity only)	Inapplicable	Inapplicable
Oregon	Or Rev Stat 475.309(1) (immunity) Or Rev Stat 475.319(1) (affirmative defense)	Or Rev Stat Ann 475.319(4) (defendant must give notice to prosecutor or defense is forfeited)	*State v Haley*, 64 Or App 209; 667 P2d 560, 562 (1983) (holding that "for *all* affirmative defenses," the defendant bears the burden of proving the defense by a preponderance of the evidence, "absent some express direction or contextual requirement to the contrary.")
Rhode Island	RI Gen Laws 21-28.6-4 (immunity) RI Gen Laws 21-28.6-8 (affirmative defense)	RI Gen Laws 21-28.6-8(b) ("A person may assert the medical purpose for using marijuana in a motion to dismiss...")	*McMaugh v State*, 612 A2d 725, 733-734 (RI 1992) (as a general rule, the defendant bears the burden of proving an affirmative defense by a fair preponderance of the evidence)
Vermont	Vt Stat Ann tit 18, 4474b (immunity only)	Inapplicable	Inapplicable
Washington	Wash Rev Code 69.51A.040 (immunity—specifically, medical use "does not constitute a crime") Wash Rev Code 69.51A.0001(2) (affirmative defense)	Wash Rev Code 69.51A.0001(2) (defendant may present defense "through proof at trial"); see also *State v Fry*, 174 P3d 1258, 1259 (Wash Ct App 2008); aff'd 228 P3d 1 (Wash 2010) ("[T]he defense is to be determined by a judge or jury at trial....")	Wash Rev Code 69.51A.0001(2) (burden on defendant to prove affirmative defense by a preponderance)