STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF MICHIGAN

Plaintiff-Appellee

v

RYAN MICHAEL BYLSMA

Defendant-Appellant
_____/

Supreme Court No. 144120

Court of Appeals No. 302762

Kent Circuit Court No. 10-011177-FH

AMICUS CURIAE BRIEF OF ATTORNEY GENERAL BILL SCHUETTE

144120

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Dated: September 26, 2012

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STATEMENT OF JURISDICTION

The Court ordered the clerk to schedule oral argument on Defendant Bylsma's application for leave to appeal, permitting the parties to file supplemental briefs within 14 days of the order. *People v Bylsma*, ___ Mich ___; 2012 Mich LEXIS 1478 (9/13/12 No. 144120.) The Court invited the Attorney General to file a brief as amicus curiae. *Id.*

COUNTER-STATEMENT OF QUESTION PRESENTED

Under the Michigan Medical Marihuana Act, primary caregivers may only possess marijuana for their patients to whom they are connected under the Act. Does the Michigan Medical Marihuana Act allow patients or primary caregivers to possess or cultivate marijuana in a collective or cooperative that results in the exchange of marijuana outside a patient-primary caregiver relationship?

Appellant's answer: Yes.

Appellee's answer: No.

Trial court's answer: No.

The Court of Appeals did not answer this question.

The Attorney General answers: No.

INITIATED LAWS INVOLVED

MCL 333.26423 provides:

As used in this act:

* * *

(e) "Medical use" means 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.

* * *

(g) "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.

(h) "Qualifying patient" means a person who has been diagnosed by a physician as having a debilitating medical condition.

MCL 333.26424 provides:

(a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount.

(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, provided that the primary caregiver possesses an amount of marihuana that does not exceed:

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

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

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

* * *

(d) There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver:

(1) is in possession of a registry identification card; and

(2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act. The 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.

(e) A registered primary caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana. Any such compensation shall not constitute the sale of controlled substances.

* * *

(g) A person 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 providing a registered qualifying patient or a registered primary caregiver with marihuana paraphernalia for purposes of a qualifying patient's medical use of marihuana.

* * *

(i) A person 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, solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana.

* * *

(k) Any registered qualifying patient or registered primary caregiver who sells marihuana to someone who is not allowed to use marihuana for medical purposes under this act shall have his or her registry identification card revoked and is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both, in addition to any other penalties for the distribution of marihuana.

MCL 333.26428, provides:

(a)Except as provided in section 7, a patient and a patient's primary caregiver, if any may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:

* * *

(2)The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and

(3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and

(b) 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).

STATEMENT OF INTEREST AND INTRODUCTION

The Attorney General is the State's chief law enforcement officer. MCL 14.28; *Fieger v Cox*, 274 Mich App 449, 451; 734 NW2d 602 (2007). Recognizing this duty, the Attorney General appreciates the opportunity to address this important issue, an extension of the issue already before the Court in *McQueen*.[1] Both cases involve protecting the health and safety of Michigan's citizens, including some of its most vulnerable. Marijuana is a Schedule 1 controlled substance for good reason. Its use involves both inherent risk[2] and risk to the community.[3]

The trial court's decision and the Court of Appeals' decision affirming it, *People v Bylsma*, 294 Mich App 219, 234; 816 NW2d 426 (2012), reasonably concluded that Defendant, Ryan Michael Bylsma, was in possession of too many marijuana plants—88, in light of his connection to only two qualifying patients. Although the Court of Appeals' opinion was rendered without the benefit of this Court's recent analysis on Section 4 and Section 8 of the MMMA, *People v Kolanek*, 491 Mich 382; 817 NW2d 528 (2012), its result is sound.

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[1] *State v McQueen*, 293 Mich App 644; 811 NW2d 513 (2011), *lv gtd*, 491 Mich 890; 810 NW2d 32 (2012).

[2] "Marijuana smoke contains some of the same cancer-causing compounds as tobacco, sometimes in higher concentrations. Studies show that someone who smokes 5 joints per week may be taking in as many cancer-causing chemicals as someone who smokes a full pack of cigarettes every day." The Partnership at Drugfree.org Drug Guide <http://www.drugfree.org/portal/drug-guide/marijuana> (accessed September 24, 2012).

[3] See, e.g., *People v Malik*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2012 (Docket No. 305391) (hours after using marijuana, defendant drove into a motorcycle, killing the driver)(Appendix A).

The Court of Appeals recognized that the MMMA contemplates a relationship between two specified individuals under the Act: the patient and the patient's primary caregiver. Only these two individuals may possess marijuana plants for the patient's medicinal use. *Bylsma*, 294 Mich App 219, 231-232. Acts outside of this recognized relationship are not covered by the MMMA and are subject to prosecution. Failure to confine the protections of the MMMA to those individuals with an established, recognized relationship under the Act could create a safe passage for drug traffickers and those taking surreptitious advantage of the MMMA, exposing medical-marijuana patients and others to harm.

The People seek affirmance of the Court of Appeals' opinion. The Attorney General supports that effort and asks the Court to clarify that the MMMA requires strict adherence to its provisions and does not allow individuals to cultivate or maintain scheduled drugs amongst themselves, as they deem fit, even if they qualify to use marijuana for medicinal purposes under the MMMA.

COUNTER-STATEMENT OF FACTS

Attorney General Bill Schuette adopts the Statement of Facts set forth in the People's supplemental brief. He also supplements those facts as follows:

1. The concept of marijuana collectives and cooperatives does not appear anywhere in the MMMA's plain language.

2. In contrast, other states have expressly provided for collectives and cooperatives in their medical-marijuana statutes.

3. For example, California amended its medical-marijuana statute to read:

> Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California *in order collectively or cooperatively to cultivate marijuana for medical purposes*, shall not solely on the basis of that fact be subject to state criminal sanctions . . . . [Cal Health & Saf Code § 11362.775 (emphasis added).]

4. Maine had a similar provision, defining a "collective" as "an association, cooperative, affiliation, or group of primary caregivers who physically assist each other. . . ." Me. Rev. Stat. Ann tit 22 § 2422 (1-A). But Maine later abolished collectives: "Collectives are prohibited under this chapter. A person may not form or participate in a collective." Me. Rev. Stat. Ann tit 22 § 2423-A (9) (Collectives Prohibited).

5. Maine's medical-marijuana statute *does* still provide for dispensaries. Me. Rev. Stat. Ann tit 22 § 2422 (10) ("Registered nonprofit dispensary"); Me. Rev. Stat. Ann tit 22 § 2428 (1-A) (provisions pertaining to registered dispensary).

6. So does Colorado's. See Colo. Rev. Stat. § 12-43.3-104 (8) (a "medical marijuana center" is a non-caregiver who is licensed to operate a business selling medical marijuana to registered patients or primary caregivers).

7. And Arizona's as well. See Ariz. Rev. Stat. § 36-2801 (11) ("nonprofit medical marijuana dispensary").

8. Finally, Rhode Island specifically amended its medical-marijuana law to allow for "compassion centers." R.I. Gen Laws § 21-28.6-3 (2). A compassion center is a registered, non-profit corporation that "acquires, possesses, cultivates,

manufactures . . . supplies or dispenses marijuana . . . ." R.I. Gen Laws § 21-28.6-3 (2).

ARGUMENT

I. The Michigan Medical Marihuana Act does not allow patients or primary caregivers to possess or cultivate marijuana in a collective or cooperative. Primary caregivers may only possess marijuana for the patients to whom they are connected under the Act.

A. Standard of Review

The Court reviews a question of statutory interpretation de novo. *People v Kolanek*, 491 Mich 382, 393; 817 NW2d 528 (2012). However, a court reviews a motion to dismiss a charge for an abuse of discretion. *People v Bylsma*, 294 Mich App 219, 226; 816 NW2d 426 (2011). And a trial court's factual findings are reviewed for clear error. *People v Bryant*, 491 Mich 575, 595; ___ NW2d ___ (2012).

B. Analysis

The Court of Appeals correctly determined that "only one person—either the registered qualifying patient or the qualifying patient's registered primary caregiver—is allowed to possess marijuana plants for the patient's medical use of marijuana. . ." *Bylsma*, 294 Mich App at 232. The MMMA envisions that a patient and his primary caregiver will be connected to one another through the Michigan Department of Community Health's registration process before a primary caregiver may possess marijuana on behalf of his patient. In other words, disconnected individuals and third parties cannot act outside the scope of the Michigan Medical

Marihuana Act,[4] then invoke its immunity provision, MCL 333.26424 ("Section 4"), or its affirmative defense and dismissal provision, MCL 333.26428 ("Section 8").

Neither the language of the MMMA nor the recent opinions of the Court interpreting the Act support the position that defendant espouses—that "nothing in the MMMA prohibits primary caregivers and qualifying patients from utilizing the same enclosed, locked facility to grow and cultivate marijuana plants." *Bylsma*, 294 Mich App at 226. To the contrary, the Act does not contemplate collectives, cooperatives, or other marijuana-sharing arrangements. The Act says that the medical use of marijuana will occur within the confines of the primary caregiver-patient relationship. Thus, the Court of Appeals correctly concluded that Defendant Bylsma's activities were not entitled to protection under the Act.

1. The MMMA did not contemplate collective or cooperative possession or cultivation of marijuana and does not provide for it.

When presented with a question of statutory construction, the appellate court's "primary task . . . is to discern and give effect. . ." to its intended purpose. *People v Gillis*, 474 Mich 105, 114; 712 NW2d 419 (2006) (citation omitted). The language of a statute provides the "most reliable evidence of its intent. . . ." *Id.* (quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981)). Similarly, the language of an initiated law should be given its "ordinary

[4] MCL 333.26421 et seq., is referred to as the "MMMA" or the "Act" and within the text of this document, the more common spelling "marijuana" is used.

and customary meaning as would have been understood by the voters." *Welch Foods v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995).

As recognized by this Court, "because the MMMA was the result of a voter initiative, our goal is to ascertain and give effect to the intent of the electorate . . . [and] the words of the MMMA" must be given "their ordinary and plain meaning as would have been understood by the electorate." *Kolanek*, 491 Mich at 397. This Court recently remarked that the MMMA states its purpose "is to allow a limited class of individuals the medical use of marijuana[,]" which the Act declares "to be 'an effort for the health and welfare of [Michigan] citizens.'" *Id.* at 393-394 (quoting MCL 333.26422(c)) (footnote omitted).

> To meet this end, the MMMA defines the parameters of legal medical-marijuana use, promulgates a scheme for regulating registered patient use and administering the act, and provides for an affirmative defense, as well as penalties for violating the MMMA.
>
> The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law. Rather, the MMMA's protections are limited to individuals suffering from serious debilitating medical conditions or symptoms, to the extent the individuals' marijuana use is "carried out in accordance with the provisions of [the MMMA.]" [*Kolanek*, 491 Mich at 394 (footnotes omitted).]

The MMMA's framework does not contemplate collective or cooperative marijuana operations nor does it provide for them. Even the spokesperson for the Marijuana Policy Project—the lobbyist group responsible for the model legislation upon which the MMMA was patterned—stated "[t]he Michigan proposal wouldn't permit the type of cooperative growing that allows pot shops to exist in California.

. . ." *People v Redden*, 290 Mich App 65, 98, 110 n 17; 799 NW2d 184 (2010) (O'Connell, J., concurring).[5] So, "even the drafters of the MMMA were unequivocal that the statute would not permit growing cooperatives in Michigan." *Id.*

There is no provision in the MMMA allowing for individuals to collectively or cooperatively maintain or cultivate their medicinal marijuana, and it should not be read into the Act. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999). Here, the Court of Appeals in this case correctly refused to read into the Act a collective or cooperative concept that was not there[6] and also correctly determined that the MMMA "unambiguously provides that only one person may possess" plants for the qualifying patient's medicinal use. *Bylsma*, 294 Mich App at 232.

2. Patients and caregivers under the Act must share a connection under the Act before they may expect to share in its protections.

Although the MMMA is "inartfully drafted[,]" *Redden*, 290 Mich App 65, 93-94 (O'Connell, J., concurring), the patient-primary caregiver relationship is its one constant. Throughout the Act the patient-primary caregiver relationship is referred to, and it is the individuals in this relationship who are covered by the Act and who may look to it for immunity or defense. MCL 333.26424; 333.26428. Defendant

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[5] *Redden*, 290 Mich App 110 n 17 (O'Connell, J., concurring) (quoting Satyanarayana, Is Marijuana Good Medicine? Detroit Free Press, October 25, 2008, <http://www.freep.com/article/20081025/NEWS15/810250341/Ismarijuana-good-medicine> (accessed September 10, 2010)).

[6] "[W]e reject defendant's reliance on the fact that the MMMA is silent regarding whether registered qualifying patients and registered primary caregivers may utilize the same enclosed, locked facility to grow and cultivate marijuana plants. . ." *Bylsma*, 294 Mich App at 233.

Bylsma assisted caregivers and patients that were not his own patients. The Act does not recognize such relationships.

For example, qualifying patients must specify whether they are designating a primary caregiver when they register. MCL 333.26426(a)(5). And if the qualifying patient "designates a primary caregiver," the patient must include at the time they apply for an identification card, "whether the qualifying patient *or* primary caregiver will be allowed under state law to possess marihuana plants for the qualifying patient's medical use." MCL 333.26426(a)(6) (emphasis added). "The word 'or' is a disjunctive term. It indicates a choice between two alternatives." *Bylsma*, 294 Mich App at 232-233 (citations omitted).

The Court of Appeals' opinion in this case illustrates this designation requirement and its effect. Because the "plain language of §§ 4(a) and 4(b) unambiguously provides that only one person may possess" marijuana plants for the patient's medical use:

> That person is *either the registered qualifying patient himself* or herself, if the qualifying patient has not specified that a primary caregiver be allowed to cultivate his or her marijuana plants, *or the qualifying patient's registered primary caregiver*, if the qualifying patient has specified that a primary caregiver be allowed to cultivate his or her marihuana plants.
>
> That only one person—either the registered qualifying patient or the qualifying patient's registered primary caregiver—is allowed to possess marijuana plants is also reflected in § 6 of the MMMA. . . [*Bylsma*, 294 Mich App at 232 (emphasis added).]

Throughout the MMMA, the language references the primary caregiver-patient scenario. Accord MCL 333.26424(b) (primary caregivers may assist a

"qualifying patient to whom he or she is connected through the department's registration process. . ."). It is this relationship, and the individuals in it, who may rely on the Act's protection, not individuals acting outside the confines of the patient-primary caregiver relationship.

For example, Defendant shared no connection with Henry Wagner, a qualified patient who did not have a caregiver, i.e, Defendant Bylsma was not his caregiver. (1/14/11 Hr'g Tr, pp 5-6, 8.) Yet Defendant helped Wagner grow his plants. (1/14/11 Hr'g Tr, pp 6-7.) And Wagner did not know where his plants were within Defendant's premises, nor had he ever been there. (1/14/11 Hr'g Tr, p 7.) The MMMA does not contemplate or condone such an arrangement.

In sum, the Defendant is not entitled to immunity from prosecution for manufacturing marijuana in light of the factual record here. He was assisting other caregivers and other patients with whom he was not connected. Only those individuals using marijuana for medical use and purposes within the relationship the MMMA recognizes (the patient-primary caregiver) may seek its protections.

3. States with similar medical marijuana acts have amended them to allow for dispensaries or have referenced collectives and cooperatives explicitly in their acts. Michigan has done neither.

As noted in the Counter-Statement of Facts, *supra*, the MMMA has no language providing for cooperative or collective possession or cultivation of marijuana, even though multiple other states have enacted or added such provisions to their own medical-marijuana laws.

There is only one possible inference to draw from this glaring omission: the MMMA's drafters and the Michigan citizens who voted for it did not intend to allow cooperative or collective operations. If Defendant and his supporters want to add such a provision to the MMMA, they are free to do so through the legislative or initiative processes, just like California. What they cannot do is obtain such an amendment by judicial fiat. This Court is not the proper forum to entertain such a request.

4. Defendant is not entitled to immunity from prosecution (§ 4) or dismissal (§ 8).

"The MMMA does not create a general right for individuals to use and possess marijuana in Michigan . . . [r]ather the MMMA's protections are limited to individuals suffering from serious . . . medical conditions . . . to the extent that the individuals' marijuana use 'is carried out in accordance with the provisions of [the MMMA].'" *Kolanek*, 491 Mich at 394. Thus, the possession and manufacture of marijuana "remain punishable offenses under Michigan law." *Id.* (footnote omitted).

As it analyzes a statute, this Court looks to the words of the statute and interprets them "in light of their ordinary meaning and their context within the statute and reads them harmoniously to give effect to the statute as a whole." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). In doing so, this Court "should avoid a construction that would render any part of the statute surplusage or nugatory." *Id.* at 181. Giving an overly broad definition to the medical use or

purpose language in the Act, or otherwise ignoring the exclusive patient-primary caregiver relationship the Act recognizes will nullify its caregiver provisions.

a. Section 4 immunity

This Court recently analyzed Section 4, the immunity provision of the MMMA, MCL 333.26424, which states in pertinent part:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty . . . 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. . . [*Kolanek*, 491 Mich at 395-396) (footnotes omitted).]

Section 4 applies only to those who have properly registered with the Michigan Department of Community Health. *Kolanek*, 491 Mich at 397. Comparing Sections 4 and 8, this Court observed that additional protections are available under Section 4. *Id.*

Qualifying patients must specify whether they are designating a primary caregiver when they register. MCL 333.26426(a)(5). When an individual submits his or her materials for registration, he or she must designate with specificity, at that time, who his or her caregiver will be, "if any[one]." MCL 333.26426(a)(5). The Court of Appeals' opinion in this case illustrates the effect of this requirement. The Court of Appeals determined that the "plain language of §§ 4(a) and 4(b) unambiguously provides that only one person may possess" marijuana plants for the patient's medical use and:

> That person is *either the registered qualifying patient himself* or herself, if the qualifying patient has not specified that a primary caregiver be allowed to cultivate his or her marijuana plants, *or the qualifying patient's registered primary caregiver*, if the qualifying patient has specified that a primary caregiver be allowed to cultivate his or her marihuana plants.
>
> That only one person—either the registered qualifying patient or the qualifying patient's registered primary caregiver—is allowed to possess marijuana plants is also reflected in § 6 of the MMMA. . . . [*Bylsma*, 294 Mich App at 232 (emphasis added).]

Defendant is not entitled to immunity from prosecution for manufacturing marijuana in light of the facts presented in this case. The police seized 88 plants from Defendant's unit. He was in possession of all of them. Possession is not equated with ownership. And possession may be "either joint or exclusive." *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002) (citation omitted). "A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive." *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992). It is of little consequence that others may have claimed ownership of some of the 88 plants in Defendant's possession. The law equates possession with the exercise of dominion and control. This, Defendant clearly had for all 88 plants. The trial court did not clearly err in its finding. See *Bryant*, 491 Mich at 595.

Defendant was in possession of all 88 plants but only had two patients to call his own. *Bylsma*, 294 Mich App at 223 (recitation of facts). Thus, the Court of Appeals correctly determined that he was not entitled to immunity under Section 4. *Id.* at 233-234. The Act does not allow one caregiver to cultivate or store plants for

another. Therefore, Defendant's possession of plants for others, unconnected to him through the Act, is subject to prosecution.

b. Section 8 affirmative defense and dismissal

In addition to its analysis of Section 4, this Court in *Kolanek* examined Section 8, which provides an affirmative defense to criminal charges for marijuana, MCL 333.26428. The Court observed that, unlike Section 4, Section 8 may apply to people, "generally" who are facing prosecutions for marijuana offenses.[7] *Kolanek*, 491 Mich at 398. In other words, though Section 8's application is broader, its protection is narrower. Defendant Bylsma was acting outside the scope of the Act's protection and therefore is not entitled to dismissal of the manufacturing charge under Section 8, MCL 333.26428.

A patient and a patient's "primary caregiver, if any, may assert the medical purpose for using marihuana as a defense. . ." MCL 333.26428(a). The Court outlined the required elements for establishing the affirmative defense:

> that (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," (2) the patient did not possess an amount of marijuana that was more than "reasonably necessary" for this purpose, and (3) the patient's use was "to treat or alleviate the patient's serious or debilitating medical condition or symptoms. . . . [*Kolanek*, 491 Mich at 398-399.]

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[7] See *Kolanek*, 491 Mich 394 n 24 (citing: MCL 333.7403(2)(d)(making possession of marijuana a misdemeanor); MCL 333.7401(2)(d)(making the manufacture or delivery of marijuana or the possession of marijuana with intent to deliver it a felony). The Court also noted the MMMA's "acknowledgment that federal law continues to prohibit marijuana use. . ." *Kolanek*, 491 Mich 394 n 24.

A person asserting the Section 8 affirmative defense is not required to establish that he meets all of the requirements of Section 4. *Kolanek*, 491 Mich at 401, 403. But, Section 8 must be read as a whole and in context. *Peltola*, 489 Mich at 181. Although this Court determined that Section 4's requirements cannot be imported into Section 8 vis-à-vis Section 8's reference to Section 7; *Kolanek*, 491 Mich at 401-402, the Act, and Section 8, must be read in context.

Again, the MMMA does not provide for collectives or cooperatives and such an inference should not be created from the void. Unlike other states, the definition of primary caregiver in Michigan[8] does not include collective or cooperative entities and they are not recognized by the Act. In Section 8, the evidence in support of the affirmative defense must include that:

> the patient and the patient's primary caregiver, if any, were collectively in possession 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 of symptoms. . . [MCL 333.26428(a)(2) (emphasis added).]

Section 8's use of the term "collectively" should not be misconstrued and must be read within its proper context. *Peltola*, 489 Mich at 181. This section refers to the amount of marijuana that the patient and his primary caregiver may, among the two of them, possess. And that amount cannot be above what is "reasonably necessary. . ." MCL 333.26428(a)(2). Thus, read in context, this section pertains to

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[8] A primary caregiver under the MMMA "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(g).

the amount that may be possessed under Section 8. The sections that follow also refer to the patient—primary caregiver relationship. MCL 333.26428(a)(3) ("The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation. . ."); MCL 333.26428(c) ("If a patient or a patient's primary caregiver demonstrates. . .").

Though Section 8 should not be read in isolation, Section 8, like the rest of the Act refers to the patient-primary caregiver relationship. The Act does not include a provision for collective or cooperative possession or cultivation such as Defendant was engaged in. The patient or the patient's primary caregiver must demonstrate that the patient is using medical marijuana pursuant to the parameters set forth in that section. MCL 333.26428(c). Defendant Bylsma failed to make this showing.

Defendant Bylsma possessed 88 plants, much more than can objectively qualify as "reasonably necessary to ensure the uninterrupted availability" of marijuana for his two patients. MCL 333.26428(a)(2). The Act does not recognize "caregiver-caregiver" relationships, nor disconnected patient-caregiver relationships, as in this case. Thus, the trial court and the Court of Appeals correctly determined that Defendant Bylsma was subject to prosecution for manufacturing marijuana in violation of MCL 333.7401(2)(d)(iii).

CONCLUSION AND RELIEF REQUESTED

Amicus Curiae Attorney General Bill Schuette respectfully requests that this Court affirm the Court of Appeals' opinion and confirm that the Michigan Medical Marihuana Act does not authorize the collective or cooperative possession or cultivation of marijuana.

Respectfully submitted,

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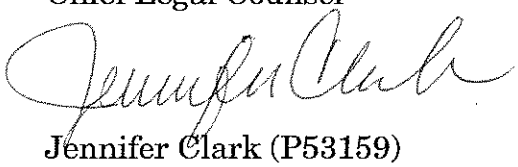

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Dated: September 26, 2012

20120022625A/Bylsma, Ryan/Amicus Brief

APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN J. MALIK,

Defendant-Appellant.

UNPUBLISHED
September 20, 2012

No. 305391
Barry Circuit Court
LC No. 09-100048-FH

Before: M. J. KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant Justin J. Malik appeals by right his jury convictions of operating a vehicle under the influence causing death, MCL 257.625(4) and (8), and operating a vehicle with a suspended or revoked license causing death, MCL 257.904(4). Because we conclude that there were no errors warranting relief, we affirm.

On October 17, 2008, at about 9:50 p.m., Malik was driving east on M-43 in Carlton Township. As Malik turned left, the driver of a westbound motorcycle struck him. The motorcyclist died. Amy Joy Wilinski was at a nearby house and came outside when she heard the accident. She talked with Malik to try and calm him down. She could smell alcohol on his breath and he told her he had had three or four beers. Trooper Michael Behrendt noticed defendant had glassy eyes and smelled of intoxicants. Malik told Behrendt that he had had three beers and that he had the last beer about 30 minutes before the accident.

Trooper Behrendt evaluated Malik with field sobriety tests. Malik did not indicate impairment in the horizontal gaze nystagmus test and he completed the "walk and turn" test and a "one leg stand" test without incident. Malik consented to a blood draw and told the trooper who took him to the hospital for the blood draw that he had smoked or consumed marijuana between 4:00 p.m. and 5:00 p.m. that day. The blood draw showed that Malik had .01 grams of alcohol per 100 milliliters of blood and 4 nanograms of THC and 15 nanograms of the THC metabolite.

Before trial, Malik challenged the constitutionality of MCL 257.625(4) and (8). The trial court found MCL 257.625(8) unconstitutional because it was fundamentally unfair, did not promote public safety and was not rationally related to a governmental interest. The prosecution appealed. After this Court heard oral arguments, our Supreme Court determined 11-carboxy-THC was not a schedule 1 substance. *People v Feezel*, 486 Mich 184, 210-212; 783 NW2d 67

(2010). Because Malik's arguments regarding constitutionality were primarily premised on 11-carboxy-THC, this Court reversed the trial court in light of *Feezel*.[1]

Malik now argues that his conviction of operating a motor vehicle and causing death with any amount of a schedule 1 controlled substance in his blood violated his due process rights. This Court reviews de novo challenges to the constitutionality of a statute. *People v Hrlic*, 277 Mich App 260, 262; 744 NW2d 221 (2007).

MCL 257.625(8) provides that a person shall not operate a motor vehicle "if the person has in his or her body any amount of a controlled substance listed in schedule 1 . . ." and MCL 257.625(4) provides that a person who operates a motor vehicle in violation of MCL 257.625(8) and causes death is guilty of a felony. MCL 333.7212 lists schedule 1 substances and includes marijuana.

On appeal, Malik argues that MCL 257.625 violates due process because it does not require a driver to know he has consumed a controlled substance and may be intoxicated. Our Supreme Court has already determined that the driver does not need to know he may be intoxicated: "[t]he plain language of MCL 257.625(8) does not require the prosecution to prove beyond a reasonable doubt that a defendant knew he or she might be intoxicated; it simply requires that the person have 'any amount' of a schedule 1 controlled substance in his or her body when operating a motor vehicle." *People v Derror*, 475 Mich 316, 334; 715 NW2d 822 (2006), overruled on other grounds *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010).[2] Regarding defendant's claim that the statute is unconstitutional, the *Derror* decision also determined that MCL 257.625(8) was constitutional. *Id.* at 334-341. In *Feezel*, the majority declined to address whether the statute was constitutional in light of the interpretation provided in *Derror*. See *Feezel*, 486 Mich at 211-212 (opining that the majority's interpretation of MCL 257.625(8) "was probably unconstitutional", but declining to address the constitutional issues). As such, the portion of the *Derror* decision determining that the statute was constitutional remains binding on this Court. *O'Dess v Grand Trunk Western R Co*, 218 Mich App 694, 700; 555 NW2d 261 (1996).

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens

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[1] *People v Malik*, unpublished per curiam opinion of the Court of Appeals, issued August 10, 2010 (Docket No. 293397).

[2] *Feezel* overruled *Derror* only to the extent *Derror* was inconsistent with the *Feezel* opinion. *Feezel*, 486 Mich at 205. Thus, *Derror* was only overruled as to the conclusion that 11-carboxy-THC was a schedule 1 controlled substance under MCL 333.7212.

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF MICHIGAN

Plaintiff-Appellee

v

RYAN MICHAEL BYLSMA

Defendant-Appellant
_____/

Supreme Court No. 144120

Court of Appeals No. 302762

Kent Circuit Court No. 10-011177-FH

PROOF OF SERVICE

The undersigned certifies that on September 26, 2012, a copy of the *Amicus Curiae* Brief of Attorney General Bill Schuette was served on the attorneys of record in the above cause by mailing the same to them at their respective addresses, with first class postage fully prepaid.

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September 26, 2012

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Lansing, Michigan 48913

Re: *People v Bylsma*
Michigan Supreme Court No. 144120
Court of Appeals No. 302762

Dear Clerk of the Court:

Please find enclosed for filing, an original and seven copies of the *Amicus Curiae* Brief of Attorney General Bill Schuette, along with a Proof of Service.

Thank you.

Best Regards,

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(517) 373-6889

JKC:mrt
Enclosures
cc: Gary A. Moore
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