STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE REDDEN,

Defendant-Appellant.
_____/

Supreme Court No. 142044

Court of Appeals No. 295809

Circuit Court No. 2009-DA9020-AR

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOREY ALLISON CLARK

Defendant-Appellant.

Supreme Court No. 142045

Court of Appeals No. 295810

Circuit Court No. 2009-DA9020-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

Raymond O. Howd (P37681)
Joshua S. Smith (P63349)
Assistant Attorneys General
Department of Attorney General
Health, Education & Family
Services Division
PO Box 30758
Lansing, MI 48909
(517) 373-7700

Dated: March 24, 2011

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THE INTEREST OF THE AMICUS CURIAE, THE ATTORNEY GENERAL

The Attorney General is the chief law enforcement officer of the State of Michigan,[1] and as such has an interest in both enforcing the criminal law and protecting the safety of Michigan's citizens. The Court of Appeals' decision in this case involves both these interests, because it would hamper proper enforcement of the law, result in needless increased court proceedings, and would allow unregistered medical marihuana users to possess virtually unlimited amounts of marihuana. This Court should grant leave to appeal and reverse in part, the Court of Appeals' published opinion, not only to correct the error with respect to the Defendants in this case, but also to guide lower courts, law enforcement, and medical marihuana users to better understand the limitations and narrow scope of the Michigan Medical Marihuana Act.

[1] *Fieger v Cox*, 274 Mich App 449, 451; 734 NW2d 602 (2007).

STATEMENT OF QUESTIONS

I. **The Medical Marihuana Act requires a registry system for qualified patients and caregivers administered by the Department. Section 4 of the Act permits registered patients, registered caregivers and physicians to assert defenses to any prosecution involving marihuana. Section 8 of the Act duplicates these protections and was only applicable until the Department adopted rules and began processing applications. Until that time, an individual was not able to possess a registry identification card issued by the Department and the § 4 defense was not available. Did the Court of Appeals err in holding that § 8 provides an additional defense to individuals who refuse to comply with the Act's registry application process after the Department adopted rules and began processing applications?**

Trial Court's answer: "No."

Appellant's answer: "No."

Appellee's answer: "Yes."

II. **If the Act is interpreted to allow two separate and distinct defenses—one for registered individuals and one for unregistered individuals—the limitations on the amount of marihuana a qualified person is able to possess in § 4, should be equally applicable to the § 8 affirmative defenses. Did the Court of Appeals err when it concluded that the limits in § 4 do not apply to an unregistered patient asserting the affirmative defense under § 8?**

Trial Court's answer: "Yes."

Appellant's answer: "No."

Appellee's answer: "Yes."

III. **Judge O'Connell's concurring opinion raises significant problems with the language of the Michigan Medical Marihuana Act. Should this Court grant leave to appeal in order to clarify seemingly ambiguous provisions in the Medical Marihuana Act concerning the *bona fide* physician-patient relationship; what constitutes a full assessment of the patient's medical history; what debilitating conditions a patient must have and how that condition must be diagnosed; and what are the procedural requirements in a prosecution involving marihuana, where the defendant asserts a § 4 or § 8 defense?**

Trial Court's answer: "Yes."

Appellant's answer: "Yes."

Appellee's answer: "Yes."

STATEMENT OF JURISDICTION

This Court has jurisdiction over the present case pursuant to MCR 7.301(2). Furthermore, this Court has jurisdiction to consider the Attorney General's *Amicus Curiae* Brief under MCR 7.306(D)(2).

INTRODUCTION

This case provides this Court with an opportunity to address some of the seemingly contradictory terms in the Michigan Medical Marihuana Act (MMMA or Act), 2008 Initiated Law, MCL 333.26421 *et seq*, and to confirm the limited and regulated use of marihuana—a Schedule I controlled substance—that voters intended when they approved Ballot Proposal No. 1 of 2008. The ballot language and text of the MMMA bear little resemblance to the strained interpretation of the law that many who support complete legalization of marihuana are advocating. The Attorney General urges this Court to grant leave to appeal in order to quell the illegal activity occurring among individuals who do not have a debilitating disease or medical condition, and among caregivers, unregistered individuals, and physicians who either know a patient does not have a debilitating condition or are deliberately indifferent to that fact when carrying out their respective roles, purportedly in accordance with the MMMA.

The Attorney General submits that when voters approved the MMMA, they intended that the medical use of marihuana would only occur through the registry system required to be established by the Michigan Department of Community Health (DCH or Department).[2] It was the voters' intent, supported by the language of the Act as a whole, that activities permissible under the MMMA would be subject to a rigorous registry and identification system and that the Department would be charged with implementing and administering the MMMA. Under that system, registered qualified patients, registered caregivers, and physicians would be protected from arrest, prosecution, and penalty so long as they fully comply with the requirements of the Act. And until the Department adopted rules and began processing applications, the MMMA

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[2] On February 23, 2011, Governor Snyder issued Executive Order 2011-4, transferring the Department's Bureau of Health Professions and its authority, powers, duties, and functions under the MMMA to the newly created Department of Licensing and Regulatory Affairs. The Executive Order will become effective on April 25, 2011.

provided a defense for those unregistered individuals who were not yet able to become registered in accordance with the Act. That interim defense was contained in § 8. But the Court of Appeals held that "individuals may either register and obtain a registry identification card under § 4, or remain unregistered and, if facing criminal prosecution, be forced to assert the affirmative defense in § 8."[3] That construction is inconsistent with the Act as a whole and encourages the type of illegal activity among individuals and caregivers that now plagues many Michigan communities since the Act's effective date. The Court of Appeals' holding on this § 8 defense cannot be harmonized with the MMMA as a whole.

The Act became effective on December 4, 2008. But the Department did not have any rules in place that governed the manner in which it was to consider applications for registry identification cards for qualified patients and caregivers. The Act required the Department to promulgate rules within 120 days after the effective date of the Act. Until the rules were promulgated and the Department began processing applications for registry identification cards for patients and caregivers, the § 4 defense was unavailable to qualified individuals. In fact, no patient or caregiver could be registered during this time. The § 8 affirmative defense was intended for unregistered individuals during this period—not because the individuals could choose to remain unregistered, but because the Department was unable to register an otherwise qualified patient or caregiver. Just as the provision of the MMMA requiring the Department to promulgate rules within 120 days and begin accepting applications within 140 days has been completed and is no longer operative under the Act, so too is the § 8 affirmative defense no longer operative. Only § 4 of the Act provides individuals with protections and defenses to a

[3] *People v Redden*, _____ Mich App _____; ___ NW2d _____; 2010 Mich App LEXIS 1671 (2010); *slip op* at p 10.

marihuana prosecution. And those individuals must be registered. The voters did not intend to create a rigorous registry system requiring the Department to verify whether a patient is qualified for the medical use of marihuana, while at the same time allowing unregistered individuals to use marihuana and only after being arrested, charged, and brought to court, prove that he or she was engaging in the medical use of marihuana in accordance with the MMMA.

The Attorney General requests that this Court grant leave to consider this issue.

Alternatively, if this Court agrees with the Court of Appeals' interpretation that the MMMA gives individuals a "choice" regarding whether to register, and creates two separate classes of marihuana users, each class with separate defenses based on that individual's choice, then § 8 must be construed as incorporating the limits on individual possession of marihuana set forth in § 4.

Finally, this Court should grant leave to clarify several other aspects of the Act that prosecutors and law enforcement officials interpret quite differently from marihuana proponents. These issues include what constitutes a *bona fide* physician-patient relationship and the physician-required full assessment of the patient's medical history; who is required to diagnose a patient's debilitating disease or medical condition; what verification of a debilitating condition is needed for a physician to issue a written certification; and what are the procedural requirements in a prosecution involving marihuana, where the defendant asserts either a § 4 or § 8 defense.

STATEMENT OF PROCEEDINGS AND FACTS

Although the Attorney General adopts the statement of facts set forth by the People of the State of Michigan in their Brief in Opposition to Application for Leave to Appeal, a brief synopsis of the Act and the Court of Appeals' decision in *People v Redden* is helpful.

On November 4, 2008, a majority of the voters in Michigan passed the MMMA, which became effective on December 4, 2008. The Department was to promulgate rules not later than 120 days from the effective date that govern the manner in which the Department shall consider applications for and renewals of registry identification cards for qualifying patients and primary caregivers.[4] The Act allows a qualifying patient[5] diagnosed with a debilitating medical condition or disease[6] to use marihuana after obtaining a registry identification card from DCH.[7] The Act also allows a primary caregiver to assist a qualifying patient in using marihuana after obtaining a registry identification card from DCH.[8] The Act contains certain protections from arrest or prosecution and defenses for the medical use of marihuana for a registered patient and caregiver.[9] And, the Act provides for a "medical purpose" affirmative defense that patients or caregivers may raise "as a defense to any prosecution involving marihuana."[10] That is the section at issue in this case.

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[4] MCL 333.26425(b).
[5] A "qualifying patient" is a person diagnosed by a physician as having a debilitating medical disorder. MCL 333.26423(h).
[6] As defined in MCL 333.26423(a), (1), (2), and (3).
[7] DCH created a website for the Michigan Medical Marihuana Program (MMMP), which may be found at: http://www.michigan.gov/mdch/0,1607,7-132-27417_51869---,00.html. Last accessed March 11, 2011.
[8] MCL 333.26423(g).
[9] MCL 333.26424.
[10] MCL 333.26428(1).

The Defendants in the present case were not registered with DCH at the time of their arrest,[11] although they subsequently obtained medical marihuana registry identification cards from the Department. The Court of Appeals held that a patient or caregiver did not have to go through the registration process in order to raise the § 8 affirmative defense.[12] The Court also held that an unregistered patient or caregiver who does not go through the DCH registry process and who does not possess a registry identification card may collectively possess any amount of marihuana that "was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana" to treat or alleviate the patient's serious or debilitating medical condition[13]:

> Individuals may either register and obtain a registry card under § 4 or remain unregistered and, if facing criminal charges, be forced to assert the affirmative defense in § 8.

The Court, however, remanded because "there were colorable issues for the trier of fact."[14] In particular, the Court found that there were colorable issues concerning (1) whether a *bona fide* physician-patient relationship existed, (2) whether the amount of marihuana Defendants possessed was reasonable, (3) whether the marihuana in question was being used for medical purposes, and (4) whether Defendants had been diagnosed with, and were suffering from, debilitating medical conditions.[15]

Regarding the *bona fide* physician-patient relationship, the Court found that the doctor's sole employment was assessing patients who desired to use medical marihuana.[16] He only saw

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[11] *Redden, slip op* at p 4.
[12] *Redden, slip op* at pp 6-11.
[13] *Redden, slip op* at p 14.
[14] *Redden, slip op* at p 12.
[15] *Redden, slip op* at p 12.
[16] *Redden, slip op* at p 13.

the Defendants on one occasion for approximately a half hour each—spending five minutes reviewing incomplete medical records, ten minutes on physical examination, and conducting an interview.[17] The Court found that this evidence at least raised an inference that the doctor's recommendations did not result from assessments made in the course of a *bona fide* physician-patient relationship for good-faith medical treatment, but rather, to assist the Defendants in obtaining marihuana under false pretenses.[18]

The Court found that Defendants did not present sufficient evidence under MCL 333.26428(a)(2), to establish that the amount of marihuana the Defendants possessed was "not more than was reasonably necessary to ensure the uninterrupted availability of marihuana...."[19] Although the Defendants were within the § 4 limits of 12 plants and 2.5 ounces per patient, the Court found that the lower court improperly applied the § 4 standard to the § 8 affirmative defense.[20]

The Court further found that even though there was testimony that the Defendants could benefit from using medical marihuana, there was no express evidence establishing that the defendants used the specific marihuana in question for medical purposes.[21] Accordingly, the Court of Appeals concluded the district court erred in dismissing the charges and affirmed the circuit court's reversal.[22]

Finally, the Court found that the doctor failed to identify the nature of the Defendants' diagnosed debilitating medical conditions.[23] Indeed, he *refused* to state the Defendants'

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[17] *Redden, slip op* at p 3.
[18] *Redden, slip op* at p 13.
[19] *Redden, slip op* at p 14.
[20] *Redden, slip op* at p 14.
[21] *Redden, slip op* at p 14.
[22] *Redden, slip op* at p 14.
[23] *Redden, slip op* at p 14.

diagnosed underlying medical conditions.[24] Instead, he only stated that Redden suffered from "pain" and Clark suffered from "nausea."[25] The Court found that this testimony was insufficient to establish a "serious medical condition" under MCL 333.26423.[26]

Judge O'Connell issued a lengthy concurring opinion summarizing his concerns with the Act:

> The problem, however, is that the MMMA is inartfully drafted and, unfortunately, has created much confusion regarding the circumstances under which an individual may use marihuana without fear of prosecution. Some sections of the MMMA are in conflict with others, and many provisions in the MMMA are in conflict with other statutes, especially the Public Health Code. Further, individuals who do not have a serious medical condition are attempting to use the MMMA to flout the clear prohibitions of the Public Health Code and engage in recreational use of marihuana. Law enforcement officers, prosecutors, and trial court judges attempting to enforce both the MMMA and the Public Health Code are hampered by confusing and seemingly contradictory language, while healthy recreational marihuana users incorrectly view the MMMA as a de facto legalization of the drug, seemingly unconcerned that marihuana use remains illegal under both state and federal law.[27]

Judge O'Connell noted that the Act was based on model legislation from the Marihuana Policy Project, a Washington, D.C. lobbying group that advocates for the decriminalization of marihuana.[28] He expressed concern that patients are abusing the poorly written MMMA in order to obtain marihuana for reasons the voters did not approve, and that "pot docs" are facilitating this by assisting in certification, for a profit, without genuine consideration of a patient's true medical condition and needs.[29]

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[24] *Redden*, *slip op* at p 13.
[25] *Redden*, *slip op* at p 14.
[26] *Redden*, *slip op* at p 15.
[27] *Redden*, O'Connell, J., concurring, *slip op* at p 3.
[28] *Redden*, O'Connell, J., concurring, *slip op* at p 5.
[29] *Redden*, O'Connell, J., concurring, *slip op* at pp 5-6.

Judge O'Connell proposed some guidelines for determining whether a *bona fide* physician-patient relationship exists. He suggested that a court hearing an affirmative defense ask the following questions:

- Whether the physician signing the written certification form is the patient's primary caregiver.
- Whether the patient has an established history of receiving medical care from that physician.
- Whether the physician has diagnosed the patient with a particular debilitating medical condition instead of simply stating that a patient's reported symptoms must be the result of some unidentified such condition.
- Whether the physician has been paid specifically to sign the written certification.
- Whether the physician has a history of signing an unusually large number of certifications.[30]

Further, Judge O'Connell suggested certain protocols must be met before a *bona fide* physician-patient relationship is established. Among these are the following:

- The physician must create and maintain medical records.
- The physician must have a complete understanding of the patient's medical history.
- Specific medical issues must be identified, and plans must be developed to address each.
- Treatment must be conducted in a professional setting.
- The physician must, where appropriate, set the boundaries for a patient.
- The physician must monitor the patient's progress.[31]

Judge O'Connell found that patients suffering from chronic pain needed continual monitoring and continuity of treatment,[32] not a permission slip from a physician to enable the patient to use marihuana for a year until the patient needs a renewal certification.

The Attorney General urges this Court to grant leave on the issues raised in the proceedings below, the continued validity of the § 8 affirmative defense or alternatively, the relationship between the § 4 and § 8 defenses, and the related issues raised by Judge O'Connell's concurring opinion.

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[30] *People v Redden*, O'Connell, J., concurring, *slip op* at pp 14-15.
[31] *Redden*, O'Connell, J., concurring, *slip op* at p 20.
[32] *Redden*, O'Connell, J., concurring, *slip op* at p 20.

ARGUMENT

I. The Michigan Medical Marihuana Act requires a registry system for qualified patients and primary caregivers administered by the Department. Section 4 of the Act permits registered patients, registered caregivers, and physicians to assert defenses to any prosecution involving marihuana. Section 8 of the Act duplicates these protections and was only applicable until the Department adopted rules and began processing applications. Until that time, an individual could not possess a registry identification card issued by the Department and the § 4 defense was not available. The Court of Appeals erred in holding that § 8 provides an additional defense to individuals who refuse to comply with the Act's registry application process after the Department adopted rules and began processing applications.

A. Standard of Review

The meaning of the MMMA presents an issue of statutory interpretation, which this Court reviews *de novo*.[33]

B. Under the plain language of the Michigan Medical Marihuana Act, "medical use" of marihuana is limited to the administration of marihuana to treat or alleviate a registered qualifying patient's diagnosed debilitating medical condition or symptoms associated with the diagnosed debilitating medical condition.

Section 7(a) of the MMMA protects the "medical use of marihuana" only to the extent that it is carried out in accordance with the provisions of this Act[34]:

> 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.

Therefore, if the medical use of marihuana is not carried out in strict compliance with the Act, it is not allowed under state law.

The term "medical use" as used throughout the Act means[35]:

> [T]he 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.

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[33] *People v Lown*, 488 Mich 254; __ NW2d __ (2011) (Docket No. 139969).
[34] MCL 333.26427(a).
[35] MCL 333.26423(e) (Emphasis added).

A registered qualifying patient must have a registry identification card in order to participate in the "medical use" of marihuana under the Act. Section 3 of the Act defines a registry identification card as "a document issued by the Department that identifies a person as a registered qualifying patient or registered primary caregiver."[36] The Act does not define an "unregistered" qualifying patient nor "unregistered" primary caregiver, nor does it permit or protect the medical use of marihuana by unregistered individuals. Reading these provisions together, it is clear that the permissible "medical use" of marihuana under the Act is limited to registered qualifying patients and registered primary caregivers.

This interpretation is consistent with the Act and the MMMA's ballot language, which advised voters that the Act would:

- Permit physician approved use of marihuana by **registered patients** with debilitating medical conditions. . . .
- Permit **registered individuals** to grow limited amounts of marihuana for qualifying patients in an enclosed, locked facility.
- Require MDCH to establish an identification card system for patients qualified to use marihuana and individuals qualified to grow marihuana.
- Permit registered and unregistered patients and primary caregivers to assert medical reasons for using marihuana as a defense to any prosecution involving marihuana.

No one can seriously contest that the first three provisions of this proposal informed voters that under § 4 of the MMMA, only registered qualified patients and individuals registered with the Department's registry system could lawfully engage in the medical use of marihuana, including the growing of limited amounts of marihuana. In addition, §§ 3, 4, 5, 6, and 9 relate to the Act's requirement that the Department establish an identification card system for qualified patients and

[36] MCL 333.26423(i).

caregivers, and provide remedies for patients if the Department fails to adopt rules and process applications within 120 days after the effective date of the Act.

Section 4 of the Act provides certain protections and affirmative defenses for the medical use of marihuana in accordance with the MMMA. These protections are limited to qualifying patients and primary caregivers who have been issued and possess a registry identification card[37]:

> (a) A qualifying patient who has been issued and possess a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner . . . for the medical use of marihuana in accordance with this act. . . .
>
> (b) A primary caregiver who has been issued and possess a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner . . . for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act.
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> * * *
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> (f) A physician shall not be subject to arrest, prosecution, or penalty in any manner . . . solely for providing written certifications, in the course of a bona fide physician-patient relationship and after the physician has completed a full assessment of the qualifying patient's medical history. . . .

These provisions taken together reflect the voters' reasonable understanding of the MMMA's requirements governing the medical use of marihuana through a mandatory identification card system, together with the protections and affirmative defenses afforded registered qualifying patients, registered primary caregivers and physicians, so long as they are in full compliance with the Act.

C. The Court of Appeals' construction of § 8 cannot be harmonized with the MMMA as a whole.

The Court of Appeals held that the language in § 8 allows nonregistered individuals to assert a "medical purpose" defense separate from the § 4 defense that a registered patient or

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[37] MCL 333.26424(a), (b) and (f).

caregiver could assert. But § 8 does not purport to specify how the medical use of marihuana may be carried out in accordance with the provisions of the Act. Construed in light of the Act's other requirements, this section is best interpreted as a procedural provision, designed to present a defense only until the registration process authorizing "medical use" was developed.

The Court's reading of § 8 contradicts and nullifies all other provisions of the Act that reference the "medical use" of marihuana, which by definition relates only to registered qualifying patients and registered primary caregivers.[38]

By reading Section 8 of the Act in isolation and out of context from the other provisions in the MMMA, the Court of Appeals misconstrued the Act as creating a defense for a separate class of individuals who need not register with the Department, but who may nonetheless engage in the use of marihuana for a "medical purpose," without complying with any other provision of the MMMA.

Under principles of statutory construction, § 8 cannot be interpreted in isolation of the registry-driven provisions of the MMMA. It must be read in context with the entire Act and the words and phases must be assigned a meaning to harmonize it with the Act as a whole. As this Court observed in *GC Timmis & Co v Guardian Alarm Co*[39]:

> [Statutory] language does not stand alone, and thus it cannot be read in a vacuum. Instead, "it exists and must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute . . . ." "Words in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole." Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. "In seeking meaning, words and clauses will not be divorced from those which precede and those which follow."

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[38] MCL 333.26423(e).

[39] *GC Timmis & Co v Guardian Alarm Co.*, 468 Mich 416, 422; 662 NW2d 710 (2003) (citations omitted).

Applying these principles of statutory construction to § 8 of the MMMA, it is clear that only registered qualifying patients and caregivers may engage in the "medical use" of marihuana.

Again, § 7(a) of the Act summarizes the scope and limitations of the MMMA:

> 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.

There are 10 sections in the MMMA. Sections 3, 4, 5, 6 and 9 all expressly relate to a registered qualifying patient, a registered primary caregiver and the Department's obligation to adopt rules and administer a registry identification system. Sections 1, 2, and 10 do not involve or discuss the scope or limitations on an individual's medical use of marihuana. And § 7 expressly requires that the medical use of marihuana be carried out only "in accordance" with the provisions of the MMMA, and lists prohibited acts that even a qualified registered patient and caregiver may not engage in.

The Court of Appeals' interpretation of § 8 would undermine every other requirement for "medical use" contained in the MMMA and nullify the Department's role in implementing and administering the Act. It would be inconsistent with the purpose of the Act to construe it as allowing an individual to choose whether he or she wishes to apply for a registry identification card and unilaterally determine whether he or she is violating a criminal law in this State.

Otherwise, the definition of "medical use" in § 3(e) would have no meaning. The Court of Appeals' construction of § 8 would render nugatory the Act's requirement that the Department implement and administer the MMMA.[40] It would also render nugatory the Department's authority to revoke a registry identification card from an unregistered patient or caregiver who sells marihuana to someone who is not allowed to use marihuana under the Act.[41]

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[40] MCL 333.26425(b).
[41] MCL 333.26424(k).

The Court of Appeals' interpretation of § 8 would also nullify other requirements the Act imposes on a person in order to lawfully engage in the medical use of marihuana. The MMMA provides for the administration and enforcement of rules by the Department, which must issue registry identification cards to a qualifying patient or primary caregiver if they submit the statutorily required information. Section 6 mandates the Department to verify the information in the application to assure it is not falsified and to assure that a primary caregiver may assist no more than five qualifying patients with their medical use of marihuana.[42] And while the Department is subject to strict confidentiality requirements, it may notify law enforcement about falsified or fraudulent information submitted to the Department.[43] If the Department is notified by a registered qualifying patient's certifying physician that the patient has ceased to suffer from a debilitating medical condition, the registry identification card shall become null and void upon the Department's notification to the patient.[44] Finally, the Department is required to submit an annual report to the Legislature that contains information that does not disclose any identifying information about the number of applications the Department received, the number of qualifying patients and caregivers approved in each county, the nature of the debilitating medical condition of the patients, the number of registry cards revoked and the number of physicians providing written certifications.[45]

It was clearly the intent of the voters as supported by the plain language of the MMMA that a qualified patient and caregiver must be registered to engage in the lawful medical use of marihuana in accordance with the Act. It is even clearer that the Department's role under the

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[42] MCL 333.26424(c) and (d).
[43] MCL 333.26426(h)(4).
[44] MCL 333.26426(f).
[45] MCL 333.26426(i).

MMMA is to review and verify an applicant's information to ensure that only qualified patients and caregivers who meet the requirements of the Act are issued registry identification cards, so that they may lawfully engage in the medical use of marihuana in accordance with the MMMA. The Department is the gatekeeper under the MMMA. If the Department denies an application or renewal, the individual may appeal the Department's action to the Ingham County Circuit Court.[46] The Department has been given the responsibility and authority to implement and administer the Act through its registry system. The Department has the responsibility to verify information and to approve and deny applications, to revoke registry cards, and to coordinate with law enforcement to determine the validity of a registration card. This function is integral to the entire MMMA. The MMMA cannot be read in isolation to negate the Department's authority, duties and functions set forth in the Act.

The Court of Appeals decision interpreting § 8 creates a defense for unregistered patients and caregivers wholly divorced from all other provisions of the MMMA. The Court held that § 8 provides a defense in a marihuana prosecution for individuals who choose to "remain unregistered and if facing criminal prosecution" allowing them "to assert the affirmative defense in § 8." This construction cannot be harmonized with the MMMA as a whole.

If the Court's interpretation were correct, an unregistered patient or caregiver could, in effect, establish that he or she was lawfully engaged in the medical use of marihuana in accordance with the Act through judicial proceedings. Trial courts and juries would assume the responsibilities and duties the Department is authorized to carry out when a patient or caregiver submits an application for a registry identification card.

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[46] MCL 333.26426(c).

Before a court or jury could make that determination, however, law enforcement resources would be be needlessly wasted through the investigation, arrest, booking, and jail process. The prosecutor would be required to bring charges and the defendant would be entitled to an evidentiary hearing to establish essentially the same requirements that the Department would otherwise verify through the registration process.. That was not the intent of the voters nor can this interpretation be supported by the language in the MMMA as a whole.

Further, the Court's interpretation would give unregistered patients and caregivers greater defenses in criminal prosecutions than registered patients could assert. Under § 4(a), a qualifying registered patient may assert a defense in a criminal prosecution that he or she was engaged in the medical use of marihuana in accordance with the Act.[47] But that qualifying patient must not possess an amount that exceeds 2.5 ounces of usable marihuana, and if the qualifying patient has not specified a primary caregiver, up to 12 marihuana plants in an enclosed locked facility.[48]

Similarly, under § 4 a registered primary caregiver may assert a defense for assisting a qualifying patient to whom he or she is connected through the Department's registry system. But that defense fails if the registered caregiver possesses an amount of marihuana that exceeds 2.5 ounces for each qualifying patient he or she is connected with through the registry information system. And for each qualified patient who has specified the caregiver as connected to the patient, the primary caregiver may cultivate up to 12 marihuana plants kept in an enclosed locked facility.[49] Each registered patient may have no more than one primary caregiver, and a primary caregiver may assist no more than five qualifying patients with their medical use of marihuana.[50]

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[47] MCL 333.26424(a).
[48] MCL 333.26424 (b).
[49] MCL 333.26424(4)(b).
[50] MCL 333.26426(d).

Under § 4, there is a presumption that a qualified patient or primary caregiver is engaged in the medical use of marihuana in accordance with the Act if the patient or caregiver is in possession of an amount of marihuana that does not exceed the amount allowed under the Act. This 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 the Act.[51]

In contrast to all these strict limitations, § 8 permits a "patient and a patient's primary caregiver, if any" to assert the medical purpose for using marihuana in any prosecution involving marihuana. But this defense allows the patient and the caregiver to collectively possess any quantity of marihuana "that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana...." As interpreted by the Court of Appeals, the amount an unregistered patient and caregiver may possess is thus left to a court or trier of fact to determine what is reasonably necessary on a case-by-case basis, unlike the limited amounts a registered patient and caregiver may individually possess under § 4.

The § 8 defense provides no limits on the number of patients a caregiver could assist, nor is a patient or caregiver required to keep his or her marihuana plants in an enclosed locked facility. Section 8 does not specify how often a physician must certify a patient's debilitating condition, whereas under § 4, a registered patient must present the Department with a written physician certificate annually to renew his or her registry identification card. Nor is an unregistered patient subject to revocation of a registry identification card if he or she sells marihuana to a person not qualified to use marihuana under the Act. An unregistered patient is not subject to losing the defense under § 8, that a registered user would lose under § 4 if a

[51] MCL 333.26424(d).

certifying physician notifies the Department that the patient has ceased to suffer from a debilitating condition.

In sum, under the Court's interpretation of § 8, an unregistered patient could engage in the use of marihuana without complying with the Act. That patient could avoid all of the Department's requirements and duties to implement and administer the MMMA in accordance with its Act. That was not the intent of the voters, nor is it a reasonable interpretation of the MMMA as a whole. The Court of Appeals' reasoning that § 8 applies to individuals who choose not to obtain a registry identification card cannot be harmonized with the rest of the MMMA.

D. Section 8 can only be harmonized with the MMMA if it was applicable only until the Department promulgated rules and began processing applications, thereby making § 4 operative as the sole defense to the medical use of marihuana in prosecutions.

The Attorney General acknowledges that § 8 must have some meaning within the MMMA. That meaning can be ascertained, however, from the circumstances existing when the MMMA was adopted, the effective date of the Act, and the Department's future obligation to promulgate rules governing the registry system. On the effective date of the Act, § 8 was the only defense available to patients and caregivers until the Department was able to process applications and issue identification cards. Until then, the § 4 defense, by its own terms, was not available since it was impossible for a patient or caregiver to possess a registry identification card. Once the Department began issuing registration cards, however, § 4 became operational and there was no longer a need for the § 8 defense.

The MMMA became effective on December 4, 2008. Section 5 of the Act required the Department—within 120 days—to promulgate rules that governed the applications for and

renewals of registry identification cards for qualifying patients and primary caregivers. Section 5(b) also charged the Department with implementing and administering the MMMA[52]:

> Not later than 120 days after the effective date of this act, the department shall promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, that govern the manner in which it shall consider applications for and renewals of registry identification cards for qualifying patients and primary caregivers. The department's rules shall establish application and renewal fees that generate revenues sufficient to offset all expenses of implementing and administering this act.

Section 6 of the MMMA describes the information a qualifying patient and caregiver must submit, and the verification responsibilities of the Department. Moreover, this provision of the Act placed tight deadlines on the Department to approve or deny an application or renewal within 15 days of receiving it.[53] The Department is required to issue registry identification cards within five days of approving an application or renewal, which expires one year after the date of issuance.[54] If the Department fails to issue a valid registry identification card in response to a valid application or renewal request within 20 days of its submission, then under § 9(b),[55] the registry identification card shall be deemed granted, and a copy of the registration application or renewal shall be deemed a valid registry identification card.

Under § 4 of the MMMA, a qualifying patient or primary caregiver who has been issued and who possesses a registry identification card, shall not be subject to arrest or prosecution for the medical use of marihuana in accordance with the MMMA.[56] But, the § 4 defenses in marihuana prosecutions were not available when the MMMA became effective on December 4, 2008. The Department had not promulgated rules governing the application process, a

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[52] MCL 333.26425(b).
[53] MCL 333.26426(c).
[54] MCL 333.26426(e).
[55] MCL 333.26429(b).
[56] MCL 333.26424(a) and (b).

prerequisite to processing the applications for qualified patients and primary caregivers. The Department did not adopt rules until April 2009 and did not accept applications for registry identification cards until April 4, 2009. Between December 4, 2008 and April 4, 2009 all qualified patients and primary caregivers were unregistered.

During this period, § 8 provided the only defense for an otherwise qualified patient and primary caregiver, to assert in a prosecution involving the use of marihuana. But once the Department adopted rules and began processing applications, § 4 of the MMMA became the sole defense a patient and primary caregiver could assert, and these individuals were required to be registered with the Department.

Just as § 5 of the MMMA, which required the Department to promulgate rules within 120 days is no longer operative because those rules have been promulgated, and just as § 4 could not become operative until the Department issued registration cards, the § 8 medical purpose defense is no longer applicable now that the § 4 defenses are available.[57]

This construction of § 8 harmonizes all of the provisions of the Act and is consistent with the intent of the MMMA that the Department implement and administer the Act through its registry identification card system. That intent would be thwarted if an individual could choose not to register, yet still be permitted to assert the § 8 affirmative defense. It would create two parallel classes of marihuana users—those who register and those who choose to stay under the radar by not registering. Each class of patients would be subject to different requirements of the Act. This approach would require a needless and substantial drain on the resources of law enforcement personnel, local units of government, prosecutors and courts, by allowing

[57] MCL 333.26429(c) also applies where the Department is not accepting applications any time following 14 days after the effective date of the Act. The provision allows for an alternative valid registration identification card.

unregistered users the opportunity to establish a medical purpose defense. And by allowing this separate class of unregistered patients to engage in the use of marihuana until such time as a court determines whether that use was lawful, it is inevitable that the Act will be abused by non-qualifying individuals and spawn criminal activity. This construction of the Act is simply not reflective of the voters' intent.

The Attorney General requests that this Court grant the application for leave to appeal to consider the issue.

II. Alternatively, if § 8 of the Act is interpreted to provide a defense for unregistered individuals, the limitations on the amount of marihuana a registered qualified patient or caregiver is able to possess in § 4 should be equally applicable to § 8. The Court of Appeals erred when it concluded that the limits in § 4 may not be applied to an unregistered individual asserting an affirmative defense under § 8.

A. Standard of Review.

This presents an issue of statutory interpretation which this Court reviews *de novo*.[58]

B. The rules of statutory interpretation apply to the Michigan Medical Marihuana Act.

The primary issue in this case is the interpretation of the MMMA. If this Court concludes that § 8 remains a viable defense even now that registration is available it must harmonize § 4 and § 8 with respect to the limitations on the amount of marihuana a patient or caregiver may possess.

Because the Act was enacted as a citizen initiative under Const 1963, art 2, § 9, it must be interpreted in light of the rules governing the construction of citizen initiatives. Initiatives should be "construed to effectuate their purposes" and to "facilitate rather than hamper the

[58] *People v Lown*, at p 14. Lexis pagination used.

exercise of reserved rights by the people."[59] In addition, the words of an initiative law should be given their "ordinary and customary meaning as would have been understood by the voters."[60]

Importantly, "[t]here is no essential difference in the construction of statutes enacted directly by the people and those enacted by the Legislature."[61] Thus, the traditional rules of statutory interpretation apply to citizen initiatives.

The starting point for any review of a statute is the plain language of the statute itself.[62] Where the language is unambiguous, the statute is applied as written and no further construction is necessary or even permitted.[63] At the same time, statutory provisions should be read as a whole and understood in context rather than isolation.[64] Similarly, the words in a statute must be read together to harmonize their meaning.[65] A court may not render any portion of a statute surplusage or nugatory; every word used in a statute must be given meaning.[66]

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[59] *Welch Foods v Attorney General*, 213 Mich App 459, 461-462; 540 NW2d 693 (1995).
[60] *Welch Foods*, 213 Mich App at 461.
[61] OAG, 1985-1986, No. 6370, p 310, 313-314 (June 10, 1986). See also OAG, 2009-2010, No. 7250 (August 31, 2010).
[62] *Michigan Dep't of Transportation v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008) ("It is axiomatic that statutory language expresses legislative intent"); *People v Anstey*, 476 Mich 436, 443; 719 NW2d 579 (2006).
[63] *Tomkins*, 481 Mich at 191; *In re Certified Question (Kenneth Henes Special Projects Procurement v Continental Biomass)*, 468 Mich 109, 113; 659 NW2d 597 (2003).
[64] *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010).
[65] *Robinson*, 486 Mich at 15. See also *Hall v Calhoun County Board of Suprs*, 373 Mich 642, 646 n 4; 130 NW2d 414 (1964)("[I]t has long been our policy so to interpret statutory provisions as to harmonize them and to give effect to all of the legislative language").
[66] *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 574; 592 NW2d 360 (1999).

C. The Court of Appeals erred by failing to read in context and harmonize the provisions of § 4 and § 8 to construe the terms "quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana" under § 8 as allowing possession of no more than 2.5 ounces of marihuana as set forth in § 4.

Section 8 provides an affirmative defense "to any prosecution involving marihuana" for a patient or primary caregiver who complies with the Act.[67] This, however, is not an open-ended defense. Rather, the affirmative defense states: "Except as provided in section 7...." Thus, § 7 places limitations on the affirmative defense. And § 7(a) expressly includes the restrictions contained elsewhere in the Act: "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."[68] Thus, under the plain language of the Act, a patient or caregiver seeking to assert the affirmative defense under § 8 must comply with *all* of the provisions of the Act.

Section 4 of the Act specifies how much marihuana qualified patients or caregivers may possess.[69] A qualifying patient may possess up to 2.5 usable ounces of marihuana.[70] A qualifying patient may designate a primary caregiver to assist him or her in the use of medical marihuana.[71] If the qualifying patient has not specified that a primary caregiver will be allowed to cultivate marihuana for the qualifying patient, the qualifying patient may keep up to 12 marihuana plants in an enclosed, locked facility.[72] Similarly, a primary caregiver may possess up to 2.5 usable ounces of marihuana for each qualifying patient to whom he or she is connected

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[67] MCL 333.26428(a).
[68] MCL 333.26427(a).
[69] MCL 333.26424.
[70] MCL 333.26424(a). Incidental amounts of seeds, stalks, and unusable roots are not included in the possession limit. MCL 333.26424(a).
[71] MCL 333.26424(a).
[72] MCL 333.26424(a).

through DCH's registration process.[73] A primary caregiver may also keep up to 12 marihuana plants for each of his or her qualifying patients in an enclosed, locked facility.[74]

Section 8 does not expressly incorporate the § 4 possession limitations, but rather allows the collective possession of not more than an amount "reasonably necessary" to "ensure uninterrupted availability of marihuana" to a patient.[75] The Court of Appeals found that the affirmative defense must be read separately from the limitations of MCL 333.26424,[76] and that § 8 "does not place any restriction on defendants' raising the affirmative defense."[77] According to the logic employed here, this lack of any restriction allows the affirmative defense to be raised by either registered or unregistered patients.

Under the Court of Appeals' interpretation, § 8 would conflict with § 7(a) and § 4 by rendering nugatory their specific limitations on the amount of marihuana that may be possessed in favor of a "reasonably necessary" standard. That is an incorrect interpretation as § 8 specifically incorporates § 7 and thereby incorporates the amount limitations established for "(t)he medical use of marihuana . . . in accordance wit the provisions of this act." § 7(a).

Moreover, this interpretation ignores, if not renders nugatory, the Act's many express provisions creating the registration process and requiring patients and caregivers to become registered if they seek to engage in the protected "medical use" of marihuana. And again registered patients and caregivers are only protected if they possess marihuana in the amounts prescribed under § 4. But under the Court of Appeals' interpretation unregistered patients and

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[73] MCL 333.26423(g); MCL 333.26424(b). Incidental amounts of seeds, stalks, and unusable roots are not included in the possession limit. MCL 333.26424(b)(3).
[74] MCL 333.26424(b).
[75] MCL 333.26428(a)(2).
[76] *Redden, slip op* at pp 6-11.
[77] *Redden, slip op* at p 8.

caregivers are afforded greater legal protections than those who go through the registration process with DCH. Unregistered patients and caregivers, according to the Court of Appeals, can possess any amount of marihuana, so long as they can show it is not more than is "reasonably necessary to ensure the uninterrupted availability of marihuana."[78] Patients and caregivers that register with DCH, however, are limited to 2.5 ounces of usable marihuana and up to 12 plants.[79]

The people did not intend such a result in enacting the MMMA. Rather, the better construction of § 4 and § 8 is that § 4 acts as a cap or maximum amount of marihuana that can be considered "reasonably necessary" for purposes of asserting a § 8 defense. In other words, for purposes of § 8, possession in an amount in excess of the 2.5 ounces permitted by § 4 will never be "reasonably necessary." For unregistered patients and caregivers possessing marihuana in amounts less than the § 4 limits, those persons would still bear the burden of demonstrating that the amount they possessed 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 course an unregistered patient or caregiver must also "show" that they meet the requirements of § 8(a)(1) and (3) in order to assert the affirmative defense.

This construction is consistent with the purpose of the Act and makes sense and gives meaning to both sections especially as to the term "reasonably necessary." To read § 8 as the Court of Appeals did creates an incentive for persons to remain unregistered and potentially avoid the Act's strict possession limits, along with the other specific requirements for registration. But, considered as a whole, the Act clearly requires that people become registered

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[78] *Redden, slip op* at pp 13-14.
[79] MCL 333.26424(a) and (b).

patients and caregivers in order to engage in the protected "medical use" of marihuana under § 4. Indeed, their actions are only protected if they comply fully with the Act as stated in § 7(a).[80] The Court of Appeals should have read the statute as a whole in such a way to harmonize the meaning of each provision.[81] Read in context, the intent of the voters in § 8 was to cap the amount of marihuana that unregistered patients or caregivers may possess at the § 4 limits while also requiring that persons in possession of lesser amounts bear the burden of proving their possession is "reasonably necessary" under § 8.

III. Judge O'Connell's concurring opinion raises significant questions regarding the language of the Michigan Medical Marihuana Act. This Court should grant leave to appeal in order to clarify provisions in the Medical Marihuana Act concerning the *bona fide* physician-patient relationship; what constitutes a full assessment of the patient's medical history; what debilitating conditions a patient must have and how that condition must be diagnosed; and what are the procedural requirements in a prosecution involving marihuana where the defendant asserts a § 4 or § 8 defense.

As discussed below, there are several areas of the Court of Appeals' decision that this Court should consider and affirm. Instead of allowing the case law to be developed on an *ad hoc* basis, however, this Court should also consider the issues identified in Judge O'Connell's concurring opinion concerning the confusing provisions in the Act. The Attorney General urges this Court to grant leave and allow the parties and interested *amici* to brief these issues. This will aid in clarifying the meaning of the Act in order to provide guidance to registered qualifying patients, registered primary caregivers, law enforcement offices, local government, attorneys, and the courts.

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[80] MCL 333.26427(a).

[81] *Robinson*, 486 Mich at 15; *Hall*, 373 Mich at 646 n 4.

A. This Court should affirm the Court of Appeals holding that the defendant failed to establish a *bona fide* physician-patient relationship and adopt the factors articulated by Judge O'Connell.

The Attorney General agrees with the Court's decision affirming the circuit court's reversal of the district court's dismissal of charges against defendants because they failed to establish a *bona fide* physician-patient relationship. The Attorney General, however, asks this Court to consider and decide what constitutes a *bona fide* physician-patient relationship in the medical marihuana setting and what type of examination, medical history assessment, diagnosis and verification of a patient's debilitating condition is required of a physician who issues a written certification. The Attorney General agrees with the well-reasoned concurring opinion of Judge O'Connell which set forth important factors to be considered in this regard:

- Whether the physician signing the written certification form is the patient's primary caregiver.
- Whether the patient has an established history of receiving medical care from that physician.
- Whether the physician has diagnosed the patient with a particular debilitating medical condition instead of simply stating that a patient's reported symptoms must be the result of some unidentified such condition.
- Whether the physician has been paid specifically to sign the written certification.
- Whether the physician has a history of signing an unusually large number of certifications.[82]

In addition, the Attorney General agrees with the necessary elements of the physician-patient relationship articulated by Judge O'Connell:

- The physician must create and maintain medical records.
- The physician must have a complete understanding of the patient's medical history.
- Specific medical issues must be identified, and plans must be developed to address each.
- Treatment must be conducted in a professional setting.

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[82] *Redden*, O'Connell, J., concurring, *slip op* at pp 14-15.

- The physician must, where appropriate, set the boundaries for a patient.
- The physician must monitor the patient's progress.[83]

This Court should grant leave to consider and adopt these criteria for the benefit of the bench, bar, medical profession, and qualifying patients.

B. This Court should affirm the Court of Appeals' holding that the Defendants failed to establish that the marihuana they possessed was being used for medical purposes.

This Court should also affirm the Court of Appeals' holding that the Defendants failed to establish that the marihuana they possessed was being used for medical purposes. Furthermore, this Court should clearly hold that a defendant must not only present evidence that he or she could benefit from the medical use of marihuana, but that a defendant must also present express evidence establishing the fact that the marihuana in question was used solely for medical purposes. The burden should be on the defendant to present all relevant evidence to establish this defense.

C. This Court should affirm the Court of Appeals holding that Defendants failed to show that they suffered from serious or debilitating medical conditions.

The Court of Appeals correctly found that the doctor failed to identify the nature of Defendants' debilitating medical conditions. Indeed, the doctor completely *refused* to state Defendants' diagnosed underlying medical conditions.[84] As held by the Court of Appeals, this testimony was completely insufficient to establish that Defendants suffered from a diagnosed "serious medical condition" under MCL 333.26423. While affirming these rulings, this Court should clarify that any defendant asserting the affirmative defense in § 8, MCL 333.26428 must present testimony from a doctor who clearly and expressly states the nature of the defendants'

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[83] *Redden*, O'Connell, J., concurring, *slip op* at p 20.
[84] *Redden*, *slip op* at p 13.

diagnosed underlying medical condition. Furthermore, as argued by the prosecutor, defendants who assert the affirmative defense must necessarily waive any physician-patient privilege and allow their medical records to be used at the evidentiary hearing.

RELIEF SOUGHT

Amicus Curiae Attorney General Bill Schuette respectfully requests that this Honorable Court grant Appellant's Application for Leave to Appeal and affirm in part and reverse in part the Court of Appeals' September 14, 2010 Opinion. Further, this Court should grant leave to allow all interested parties to brief the issues identified in this *amicus* brief and in Judge O'Connell's concurring opinion to clarify the MMMA for the benefit of registered qualifying patients and their physicians and primary caregivers, local government, law enforcement, the courts, and the citizens of this State.

Respectfully submitted,

Bill Schuette
Attorney General

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

Richard A. Bandstra (P31928)
Chief Legal Counsel

Raymond O. Howd (P37681)
Joshua S. Smith (P63349)
Assistant Attorneys General
Department of Attorney General
Health, Education & Family
Services Division
PO Box 30758
Lansing, MI 48909
(517) 373-7700

Dated: March 24, 2011