# MEDICAL MARIHUANA CASE LAW SUMMARY

# JANUARY 2015

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## UNITED STATES SUPREME COURT DECISIONS

**Gonzalez v. Raich, 545 U.S. 1; 125 S Ct 2195; 162 L Ed 2d 1 (2005):**

Issue: Can Congress criminalize the production and use of homegrown cannabis even where states approve its use for medicinal purposes?

**Holding: Yes, the court held that the Commerce Clause gives Congress the authority to prohibit the local cultivation and use of Marihuana contrary to state law.**

The United States Supreme Court ruled that under the Commerce Clause of the United States Constitution, the United States Congress may criminalize the production and use of home-grown cannabis even where states approve its use for medicinal purposes.

In a 6-3 opinion delivered by Justice John Paul Stevens, the Court held that the commerce clause gave Congress authority to prohibit the local cultivation and use of marihuana, despite state law to the contrary. Stevens believed that the Court's precedent "firmly established" Congress' commerce clause power to regulate purely local activities that are part of a "class of activities" with a substantial effect on interstate commerce.

The majority ruled that Congress could ban local marihuana use because it was part of such a "class of activities": the national marihuana market. Local use affected supply and demand in the national marihuana market, making the regulation of intrastate use "essential" to regulating the drug's national market.

The majority distinguished the case from *United States v. Alfonso Lopez, Jr.,* 514 U.S. 549 (1995) and *United States v. Morrison,* 529 U.S. 598 (2000). In those cases, statutes regulated non-economic activity and fell entirely outside Congress' commerce power. In this case, the Court was asked to strike down a particular application of a valid statutory scheme.

**United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483; 121 S Ct 1711; 149 L Ed 2d 722 (2001):**

**Issue:** Does the Controlled Substance Act contain a common law medical necessity defense?

**Holding: No, the court held that there were no common law crimes in federal law and the Controlled Substance Act did not recognize a medical necessity exception regardless of their legal status under states' laws.**

The United States Supreme Court rejected the common-law medical necessity defense to crimes enacted under the Federal Controlled Substances Act of 1970, regardless of their legal status under the laws of states such as California that recognize a medical use for marihuana.

Justice Thomas wrote for the majority. The Oakland Cannabis Buyers' Cooperative contended that the Controlled Substances Act was susceptible of a medical necessity exception to the ban on distribution and manufacture of marihuana. The Court concluded otherwise.

Since 1812, the Court had held that there were no common-law crimes in federal law. See *United States v. Hudson and Goodwin*. That is, the law required Congress, rather than the federal courts, to define federal crimes. The Court noted that the Controlled Substances Act did not recognize a medical necessity exception. Thus "a medical necessity exception for marihuana is at odds with the terms of the Controlled Substances Act." When it passed the Controlled Substances Act, Congress made a value judgment that marihuana had "no currently accepted medical use." It was not the province of the Court to usurp this value judgment made by the legislature. Thus, it was wrong for the Ninth Circuit to hold that the Controlled Substances Act did contain a medical necessity defense. It was also wrong for the Ninth Circuit to order the district court to fashion a more limited injunction that would take into account the fact that marihuana was necessary for certain people to obtain relief from symptoms of chronic illnesses.

## FEDERAL COURT DECISIONS

**Americans for Safe Access, Et. Al, v Drug Enforcement Administration, 706 F3d 438 (DC Cir, 2013)**

**Issue:** Should the DEA initiate proceedings to reschedule marijuana?

**Holding: NO. The Court upheld the DEA's decision not to reschedule marijuana.**

Americans for Safe Access challenged the decision of the Drug Enforcement Administration not to initiate proceedings to reschedule marijuana as a Schedule I controlled substance. The Department had denied the petition to reschedule marihuana in 2011 finding that "[t]here is no currently accepted medical use of marijuana in the United States" and that "[t]he limited existing clinical evidence is not adequate to warrant rescheduling of marijuana under the CSA." The DEA had requested that the Department of Health & Human Services (DHHS) conduct a scientific and medical evaluation as well as a recommendation regarding scheduling. The DHHS concluded that marijuana lacks a currently accepted medical use in the United States. In addition, the DHHS concluded that though there was on-going research, there were no studies of sufficient quality to assess "the efficacy and full safety profile of marijuana for any medical condition." Further there was "a material conflict of opinion amoung experts" as to medical safety and efficacy, thereby preluding a finding that qualified experts accepted marijuana as medicine. The DEA indicated that anecdotal reports and isolated case reports are not adequate evidence to support an accepted medical use of marijuana. The Court deferred to the DEA's decision.

**Casias v. Wal-Mart, 695 F3d 428 (CA 6, 2012)**

**Issue:** Does the Michigan Medical Marihuana Act (MMMA) regulate private employment?

**Holding: NO, the court held that the MMMA provides a potential defense to criminal prosecution or other adverse action by the state, not private employment disputes.**

Plaintiff Joseph Casias used to work as an at-will employee for a Wal-Mart store in Battle Creek, Michigan. The company fired him under its drug use policy after he tested positive for marihuana. Mr. Casias sued Wal-Mart Stores East, L.P.1 in state court for wrongful discharge, claiming that Wal-Mart's application of its drug use policy to him violated the Michigan Medical Marihuana Act ("MMMA").

The Court of Appeals agreed with the district court that accepting Plaintiff's public policy interpretation could potentially prohibit any Michigan business from issuing any disciplinary action against a qualifying patient who uses marihuana in accordance with the Act. Such a broad extension of Michigan law would be at odds with the reasonable expectation that such a far-reaching revision of Michigan law would be expressly enacted.

The Court stated that "Such a broad extension would also run counter to other Michigan statutes that clearly and expressly impose duties on private employers when the duties imposed fundamentally affect the employment relationship. *See, e.g.*, Michigan Elliott-Civil Rights Act of 1976, Mich. Comp. Laws § 37.2202(1) ("An employers shall not . . . discriminate against an individual with respect to employment . . . "); Persons With Disabilities Civil Rights Act of 1976, Mich. Comp. Laws § 37.1102(1) ("[A]n employer shall not . . . discharge or otherwise discriminate against an individual . . . because of a disability . . . "); and Michigan's Occupational Safety and Health Act, Mich. Comp. Laws § 4008.1002 ("This act shall apply to all places of employment in the state . . . . ")."

The Court concluded that the "The MMMA does not include any such language nor does it confer this responsibility upon private employers."

**United States of America v. Michigan Department of Community Health, 2011 US Dist LEXIS 59445 (WD Mich, June 3, 2011) [Case No. 1:10-MC-109]**

**Issue:** Can the DEA have documents turned over to them that involve marihuana illegal activities?

**Holding: Yes, the court stated that the DEA is charged with investigating the possession, manufacture and disposition of marihuana and the subpoena issued for the documents pertained to the DEA's investigation.**

The Court ordered the Michigan Department of Community Health to turn over the documents to the DEA.

The Court stated that "The subpoena was issued as part of an investigation for violations of the Controlled Substances Act. The DEA is a federal law enforcement agency. It is charged with, among other things, investigating the possession, manufacture and disposition of marihuana, a controlled substance, which are violations of federal law.

The documents sought here include cards identifying persons who are presumably involved in possessing and distributing marihuana contrary to federal law. The subpoena clearly seeks documents relevant to the investigation, the conduct of which is a lawful function of the DEA

## MICHIGAN SUPREME COURT DECISIONS

**Ter Beek v. City of Wyoming, Mich ; NW2d (2014):**

**Issue:** Whether the immunity provisions of the MMMA are preempted by the Federal Controlled Substances Act, and therefore, a municipality can enact an ordinance that prohibits growing, possessing or using medical marijuana in compliance with the MMMA

**Holding: The Michigan Supreme Court held as follows:**

**The immunity provisions of the MMMA are not preempted by the Federal Controlled Substances Act, and that a municipality cannot enact an ordinance that prohibits growing, possessing or using medical marijuana in compliance with the MMMA**

**People v. Green, 494 Mich 865; 831 NW2d 460 (2013):**

**Issue:** Whether the Michigan Court of Appeals' published case of *People v. Green,* decided January 19, 2013 should be overturned?

In the published Michigan Court of Appeals decision of *People v. Tony Green* decided January 19, 2013, the Court ruled that a registered qualifying patient under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421, who transferred a small uncompensated amount of marihuana to another person who was a registered qualifying patient pursuant to MCL 333.26429(b), is legally allowed to do so pursuant to the MMMA.

**Holding: The Michigan Supreme Court held as follows:**

**"In *Michigan v. McQueen,* 493 Mich 135 (2013), this Court held that, under the MMMA, "§ 4 immunity does not extend to a registered qualifying patient who transfers marihuana to another registered qualifying patient for the transferee's use because the transferor is not engaging in conduct related to marihuana for the purpose of relieving the transferor's own condition or symptoms."**

Therefore, the Court ordered the case to be remanded back to the Barry County Circuit for reinstatement of the delivery of marihuana charges.

**People v. Koon, 494 Mich 1; 832 NW2d 724 (2013):**

**Issue:** Whether the MMMA's protection supersedes the Michigan Vehicle Code's prohibition and allows a registered patient to drive when he or she has indications of marihuana in his or her system but is not otherwise under the influence of marihuana?

**Holding: The Michigan Supreme Court held that the "The immunity from prosecution provided under the MMMA to a registered patient who drives with indications of marihuana in his or her system but is not otherwise under the influence of marihuana inescapably conflicts with MCL 257.625(8), which prohibits a person from driving with any amount of marihuana in her or system. Under the MMMA, all other acts and parts of acts inconsistent with the MMMA do not apply to the medical use of marihuana. Consequently, MCL 257.625(8) does not apply to the medical use of marihuana."**

Therefore the Michigan Court held that the "Court of Appeals incorrectly concluded that defendant could be convicted under MCL 257.625(8) without proof that he had acted in violation of the MMMA by operating a motor vehicle while under the influence of marihuana."

The Michigan Supreme Court reversed the Michigan Court of Appeals and reinstated the judgment of the Grand Traverse Circuit Court, and remanded the case to the district court for further proceedings.

**State of Michigan v. McQueen, 493 Mich 135; 828 NW2d 644 (2013):**

**Issue:** Whether the definition of "medical use" in the Michigan Medical Marihuana Act (MMMA) includes the sale of marihuana?

**Holding: "Contrary to the conclusion of the Court of Appeals, the definition of "medical use" in the MMMA includes the sale of marihuana.**

**Issue:** Whether the MMMA permits a registered qualifying patient to transfer marihuana for another registered qualifying patient' s medical use?

**Holding: The MMMA does not permit a registered qualifying patient to transfer marihuana for another registered qualifying patient's medical use.**

The Court made the following ruling in it s decision:

"Section 4 immunity does not extend to a registered qualifying patient who transfers marihuana to another registered qualifying patient for the transferee's use because the transferor is not engaging in conduct related to marihuana for the purpose of relieving the transferor's own condition or symptoms.

Similarly, Section 4 immunity does not extend to a registered primary caregiver who transfers marihuana for any purpose other than to alleviate the condition or symptoms of a specific patient with whom the caregiver is connected through the MDCH's registration process."

Additionally, on page 20, the Court held that McQueen was not entitled to protection under 4(i) of the Michigan Medical Marihuana Act:

"In this context, the terms "using" and "administering" are limited to conduct involving the actual ingestion of marihuana. Thus, by its plain language, § 4(i) permits, for example, the spouse of a registered qualifying patient to assist the patient in ingesting marihuana, regardless of the spouse's status. However, § 4(i) does not permit defendants' conduct in this case. Defendants transferred and delivered marihuana to patients by facilitating patient-to-patient sales; in doing so, they assisted those patients in acquiring marihuana.

The transfer, delivery, and acquisition of marihuana are three activities that are part of the "medical use" of marihuana that the drafters of the MMMA chose not to include as protected activities within § 4(i). As a result, defendants' actions were not in accordance with the MMMA under that provision."

Therefore, the prosecuting attorney was entitled to injunctive relief to enjoin the operation of defendants' business because it constituted a public nuisance.

Affirmed on alternative grounds.

**People v. Bylsma, 493 Mich 17; 825 NW2d 543 (2012):**

Ryan M. Bylsma, a registered primary caregiver under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, was charged in the Kent Circuit Court with manufacturing marihuana in violation of MCL 333.7401(1) and (2)(d). Defendant moved to dismiss the charge, asserting that as the registered primary caregiver of two registered qualifying patients, he was allowed to possess 24 marihuana plants and that the remainder of the 88 plants seized by the police from his leased unit in a building belonged to other registered primary caregivers and registered qualifying patients whom defendant had offered to assist in growing and cultivating the plants.

**Issue:** Whether the Defendant was in violation of the Michigan Medical Marihuana Act (MMMA) by failing to comply with Section 4 and Section of the Act?

**Holding: The Michigan Supreme Court held that:**

**"Section 4 does not allow the collective action that defendant has undertaken because only one of two people may possess marihuana plants pursuant to §§ 4(a) and 4(b): a registered qualifying patient or the primary caregiver with whom the qualifying patient is connected through the registration process of the Michigan Department of Community Health (MDCH). Because defendant possessed more plants than § 4 allows and he possessed plants on behalf of patients with whom he was *not* connected through the MDCH's registration process, defendant is not entitled to § 4 immunity."**

**However, the Court further held that:**

**"The Court of Appeals erred when it concluded that defendant was not entitled to assert the § 8 affirmative defense solely because he did not satisfy the possession limits of § 4. Rather, in *People v Kolanek*, we held that a defendant need not establish the elements of § 4 immunity in order to establish the elements of the § 8 defense."**

It should be noted that on page 8 of its opinion, the Court stated that "In contrast to other states' medical marihuana provisions, the MMMA does not explicitly provide for collective operations such as defendant's."

In conclusion, the Court affirmed the judgment of the Court of Appeals in part, reversed it in part, and remanded the case to the Kent County Circuit Court for further proceedings.

**People v. Kolanek & King, 491 Mich 382; 817 NW2d 528 (2012):**

**Issue:** Whether the plain language of the MMMA requires that a defendant asserting the affirmative defense under § 8 also meet the requirements under § 4?

**Holding: The court held, in pertinent part:**

1. **The plain language of the MMMA does not require that a defendant asserting the affirmative defense under § 8 also meet the requirements of § 4.**
2. **Additionally, to meet the requirements of § 8(a)(1), a defendant must establish that the physician's statement occurred after the enactment of the MMMA and before the commission of the offense.**
3. **If a circuit court denies a defendant's motion to dismiss under § 8 and there are no material questions of fact, then the defendant may not reassert the defense at trial; rather, the appropriate remedy is to apply for interlocutory leave to appeal.**

The Michigan Court Supreme Court stated as follows:

"The stricter requirements of § 4 are intended to encourage patients to register with the state and comply with the act in order to avoid arrest and the initiation of charges and obtain protection for other rights and privileges. If registered patients choose not to abide by the stricter requirements of § 4, they will not be able to claim this broad immunity, but will be forced to assert the affirmative defense under § 8, just like unregistered patients. In that instance, registered patients will be entitled to the same lower level of protection provided to unregistered patients under § 8. This result is not absurd, but is the consequence of the incentives created by the wider protections of § 4."

The Court further stated as follows:

"In *Kolanek*, neither the post-arrest physician's statements nor the physician's statements made before the enactment of the MMMA satisfy, as a matter of law, the requirement under § 8(a)(1). Thus, Kolanek, although entitled to raise the § 8 defense in a motion for an evidentiary hearing, failed to establish at that hearing the requirements of the § 8 affirmative defense and he cannot now, for reasons we will explain, present the defense to the jury.

**People v. Feezel, 486 Mich 184; 783 NW2d 67 (2010):**

**Issue:** Is 11-Carboxy-THC a derivative of Marihuana and a Schedule 1 Controlled substance?
**Holding: No, the court held that 11-Carboxy-THC is not a derivative of marihuana and therefore is not a Schedule 1 Controlled substance.**

The victim was walking in the paved portion of a 5 lane road. His BAC was .268. It was dark and raining. The Defendant struck the victim and left the scene. The trial judge precluded admission of any evidence regarding the victim's intoxication. The Defendant was convicted of operating with the presence of a schedule 1 controlled substance causing death, leaving the scene of an accident resulting in death, and OWI, 2nd offense.

The Defendant appealed, claiming that evidence of the victim's intoxication should have been admitted on the issuance of causation, and that the presence of 11-carboxy-THC in his blood did not constitute a schedule 1 controlled substance.

In *People v Derror*, 475 Mich 316 (2006) the Michigan Supreme Court ruled in a 4-3 decision that 11-carboxy-THC, a metabolite of marihuana, is included in the statutory definition as a derivative of marihuana. Accordingly, the *Derror* majority upheld the Defendant's conviction for operating with a schedule 1 controlled substance in her system based upon the presence of 11-carboxy-THC in her blood. Justice Hathaway joined the three *Derror* dissenters in this case to overrule *Derror*.

The majority held that 11-carboxy-THC is not a derivative of marihuana, and therefore is not a schedule 1 controlled substance. Accordingly, they reversed this Defendant's conviction for operating with the presence of a schedule 1 controlled substance causing death. Justices Young, Markman and Corrigan dissented from this holding.

On the other issue, a unanimous Court held that evidence of the victim's extreme intoxication in this case should have been admitted to support the Defendant's claim that the victim's intoxication constituted a superseding cause of his death. They emphasized that intoxication evidence may not be relevant or admissible in all cases.

They emphasize, however, "That evidence of a victim's intoxication may not be relevant or admissible in all cases. Indeed, the primary focus in a criminal trial remains on the Defendant's conduct. Accordingly, any level of intoxication on the part of a victim is not automatically relevant, and the mere consumption of alcohol by a victim does not automatically amount to a superseding cause or de facto gross negligence."

Instead, under MRE 401, a trial Court must determine whether the evidence tends to make the existence of gross negligence more probably or less probable than it would be without the evidence and, if relevant, whether the evidence is inadmissible under the balancing test of MRE 403.

## MICHIGAN COURT OF APPEALS DECISIONS

## PUBLISHED CASES

**People v Lois Butler-Jackson, Mich App___; ___NW2d___ (2014):**

**Issue:** Whether defendant's was immune from prosecution under MCL 333.26424(f) of the Michigan Medical Marihuana Act (MMMA)?

**Holding: NO**

**Issue:** Whether the defendant's conspiracy conviction must be vacated because her conduct was not illegal?

**Holding: YES**

Defendant appeals as of right her jury convictions for conspiracy to commit a legal act in an illegal manner, MCL 750.157a, and intentionally placing false information in a patient's medical record, MCL 750.492a(1)(a).

As to the first issue, Defendant argued that she was entitled to immunity because she had bona fide relationships with her customers and stated that, in her professional opinion, each of her customers were likely to benefit from the medical use of marijuana. At the time she was charged, the phrase "bona fide relationship" was not defined in the MMMMA; however, defendant argues, she did not have to physically meet with patients to have "bona fide physician-patient relationships."

The Court of Appeals disagreed.

**The Court held that "There was no evidence that defendant had "bona fide physician-patient relationships" with the undercover police officers, or similar persons, seeking certifications, or that she completed full assessments of their medical histories before signing the written certifications that were filled out and issued by Deloose."**

**"And there was no evidence that defendant could have formulated any "professional opinion" regarding the likelihood that the undercover police officers, or similar persons—who only saw and paid Deloose for the certifications—would likely benefit from the medical use of marijuana to treat or alleviate serious or debilitating medical conditions or related symptoms."**

As to the second issue, the defendant argued that she could not be convicted of conspiracy to commit a legal act in an unlawful manner for failing to comply with MCL 333.26424(f) because such conduct is not illegal. In essence, defendant is arguing on appeal, and argued in the trial court, that the allegations set forth in the information did not constitute the crime of conspiracy to commit a legal act in an illegal manner.

The Court of Appeals agreed.

**The Court held that "MCL 333.26424(f) does not prohibit physicians from issuing written certifications in the absence of a bona fide physician-patient, without conducting a full assessment of medical history, and when a "professional opinion" cannot be formulated. That is, this statute does not define any prohibited conduct, does not characterize any such conduct as constituting either a misdemeanor or felony, and does not provide for any punishment."**

The conspiracy conviction of the defendant is vacated. In all other respects, the Court affirmed.

**Braska v Department of Licensing and Regulatory Affairs, Mich App ; NW2d (2014):**

**Issue:** Whether an employee who possesses a registration identification card under the Michigan Medical Marihuana Act (MMMA) is disqualified from receiving unemployment benefits under the Michigan Employment Security Act (MESA) after the employee has been terminated for failing to pass a drug test?

**Holding: NO**

**The Court held that "because there was no evidence to suggest that the positive drug tests were caused by anything other than claimants' use of medical marijuana in accordance with the terms of the MMMA, the denial of the benefits constituted an improper penalty for the medical use of marijuana under the MMMA, MCL 333.26424(a).**

**Because the MMMA preempts the MESA, the circuit courts did not err in reversing the MCAC's rulings that claimants were not entitled to unemployment compensation benefits."**

Affirmed.

**People v Tuttle, Mich App ; NW2d (2014):**

**Issue:** Whether the defendant is entitled to the immunity provisions of Section 4 of the Michigan Medical Marihuana Act (MMMA) or entitled to dismissal of the case pursuant to Section 8 of the MMMA?

**Holding: NO**

The defendant was a registered patient and a registered caregiver for two other registered patients. He sold marijuana on three occasions to a confidential informant who was a registered patient, but not tied to him as a caretaker. The police searched his house and found 33 plants and 1.34 ounces of marijuana, plus weapons. He was charged with three counts of delivery, one count of possession for the marijuana in his home, and felony firearm.

Judges Saad and Sawyer noted that he was entitled to a rebuttable presumption of immunity under section 4 of the MMMA because he possessed less than the 36 plants and 7.5 ounces allowed for the defendant and his two registered patients. They held, however, that his illegal sale to the CI indicated that his possession of the marijuana was not done in accordance with the MMMA, and therefore rebutted his presumption of immunity.

In regard to his claimed section 8 defense, they held that he failed to present sufficient evidence on any of the three requirements. They first noted that the defendant had to establish each requirement for himself, his two registered patients, and the CI. A failure of proof on any claimed patient, on any prong, would defeat the defense.

In regard to the first prong, they held that possession of a registration card by the defendant, his registered patients and the CI, did not establish that a physician, as part of a bona fide relationship, had conducted a full in-person examination and determined that they had a debilitating condition that would benefit from marijuana. They further noted that defendant did not present any other proof that the CI, who testified that he obtained his physician certificate over the phone, had a bona fide physician relationship. He also failed to present any evidence that he had a bona fide relationship, and the testimony from his two registered patients was also insufficient.

**He presented no proof that he knew how much marijuana the CI needed for treatment. He provided no testimony regarding how much he needed, and his two registered patients provided no testimony that the defendant knew how much marijuana was necessary for their treatment; so he failed on the second prong.**

**Finally, they held that possession of a registry card alone does not prove that the marijuana is being used to treat or alleviate a debilitating medical condition. Because he presented no proof that he or the CI were currently using the marijuana to treat or alleviate a debilitating medical condition, he failed on the third prong. Judge Jansen concurred in the result only.**

Affirmed.

**People v Hartwick, 303 Mich App 247; 842 NW2d 545 (2013):**

**Issue:** Whether mere possession of the registry identification card entitled the defendant to immunity from prosecution under Section 4 of the Michigan Medical Marihuana Act (MMMA)?

**Holding: NO.**

**Issue:** Whether mere possession of the registry identification card entitled the defendant to an affirmative defense under Section 8 of the MMMA?

**Holding: NO.**

The defendant was the only testifying witness at the evidentiary hearing. He claimed that he was a medical marihuana patient and his own caregiver; and he also served as a caregiver for five additional medical marihuana patients. Defendant possessed registry identification cards for himself and his five patients, and submitted the cards as evidence. The prosecution stipulated to the validity of defendant's own registry identification card. However, the record showed that the defendant was unfamiliar with the health background of his patients, and could not identify the "debilitating conditions" suffered by two of his patients. Nor was he aware of how much marihuana any of his patients were supposed to use to treat their respective conditions, or for how long his patients were supposed to use "medical marihuana." And he could not name each patient's certifying physician.

The defendant's first argument is that mere possession of the registry identification card entitled him to immunity from prosecution under Section 4 of the Michigan Medical Marihuana Act (MMMA). The Court rejected the defendant's argument. The Court noted that the defendant possessed 77 plants-five more than permitted to him by Section 4(b)(2).

However, the Court went one step further on this issue and stated as follows:

"Yet, were we to accept defendant's numerical assessment, defendant would nonetheless not qualify for § 4 immunity. His interpretation of the MMMA ignores the underlying medical purposes of the statute, explicitly referenced in § 4(d). Mere possession of a state-issued card—even one backed by a state investigation—does not guarantee that the cardholder's *subsequent* use and production of marihuana was "for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26424(d)(2). Indeed, defendant's testimony provided ample evidence that he was not holding true to the medical purposes of the statute. He failed to introduce evidence of: (1) some of his patients' medical conditions; (2) the amount of marihuana they reasonably required for treatment and how long the treatment should continue; and (3) the identity of their physicians."

The defendant's second argument is that mere possession of the card entitled him to an affirmative defense under Section 8 of the MMMA. The Court rejected the defendant's argument.

The Court stated as follows as to why the defendant failed to meet the first element under Section 8:

"A registry card—even one verified by the state, pursuant to the requirements of § 6—cannot demonstrate a "pre-existing" relationship between physician and patient, much less show "ongoing" contact between the two. Accordingly, mere possession of a patient and/or caregiver's card does not satisfy the requirements of the first element of § 8(a)'s defense. That the statute requires this outcome is in keeping with its medical purpose and protects the patients it is designed to serve. By requiring a bona fide physician-patient
relationship for § 8's defense, the MMMA prevents doctors who merely write prescriptions—such as the one featured in *Redden*—from seeing a patient once, issuing a medical marihuana prescription, and never checking on whether that prescription actually treated the patient or served as a palliative."

In this case, as to the first element the Court noted that "Here, defendant presented evidence of a bona fide physician-patient relationship between him and his doctor. But he presented no evidence that his patients have bona fide physician patient
relationships with their certifying physicians. None of his patients testified. Nor was defendant able to provide the names of his patients' certifying physicians. While it is true that the MMMA does not explicitly impose a duty on patients to provide such basic medical
information to their primary caregivers, the plain language of § 8 obviously requires such information for a patient or caregiver to effectively assert the § 8 defense in a court of law."

The Court stated as follows as to why the defendant failed to meet the second element under Section 8:

"Here, defendant lacks the requisite knowledge of how much marihuana is required to treat his patients' conditions—and even his own condition. He presented no evidence regarding how often and how much marihuana he required to treat his pain. And he testified that he did not know how much marihuana his patients required to treat their conditions. Defendant thus failed to satisfy the second element of the §8 affirmative defense."

The Court stated as follows as to why the defendant failed to meet the third element under Section 8:

"Once again, defendant unconvincingly suggests that mere possession of state-issued registry cards is sufficient evidence to establish this element. Possession of a registry card indicates that the holder has gone through the requisite steps in § 6 required to obtain a

registry card. It does not indicate that any marihuana possessed or manufactured by an individual is *actually* being used to treat or alleviate a debilitating medical condition or its symptoms. In other words, prior state issuance of a registry card does not guarantee that the holder's subsequent behavior will comply with the MMMA. Defendant's theory is akin to stating that possession of a Michigan driver's license ensures the holder of the license always obeys state traffic laws."

Lastly, Footnote 18 is very important:

"We note that another panel of this Court held in an unpublished, per curiam opinion that an individual's state registration as a medical marihuana user is "prima facie evidence of the first and third elements of the affirmative defense." *People v Kiel*, entered July 17, 2012 (Docket No. 301427). The panel did not explain its reasoning beyond this statement. We do not agree with this interpretation of the MMMA. In addition, defendant did not cite *Kiel* in his brief, nor is *Kiel* binding precedent, because it is unpublished. MCR 7.215(C)(1).

**People v Johnson et al, Mich App ; NW2d (2013):**

**Issue:** Is the rule of lenity applicable when construing the MMMA?

**Holding: NO.**

**Issue:** Should the Court of Appeals' and Supreme Court's decisions in *State v McQueen,* be retroactively applied?

**Holding: YES.**

These consolidated cases arose from the operation of a marijuana dispensary. After indicating that due process ramifications exist in criminal cases, the trial court held that the rule of lenity should be applied under the circumstances of this case. The trial court granted defendants' joint motion to dismiss all charges pursuant to the Michigan Medical Marihuana Act (MMMA).

The prosecutor first argued that the trial court erroneously dismissed the charges against all seven defendants without requiring defendants to first demonstrate that they were entitled to the protections afforded under the MMMA. The Michigan Court of Appeals agreed.

The Court noted that "None of the defendants argued or attempted to establish that any one of them was entitled to the protection afforded under MCL 333.26428(a) as either "a patient" or "a patient's primary caregiver. In other words, in their joint motion for dismissal, defendants did not argue or attempt to establish that they had the legal right to seek the protections from arrest, prosecution, or penalty afforded under the MMMA for their marijuana-related activities. And they did not challenge as ambiguous any specific term as relates to their alleged right to seek the protections afforded under the MMMA.

Defendants' brief on appeal likewise fails to assert any such arguments. Again, on appeal, defendants merely appear to argue that the entirety of the MMMA is ambiguous. In light of all of these considerations, we conclude that the trial court abused its discretion when it dismissed the charges against all seven defendants without determining whether any of the defendants were specifically entitled to the protections afforded under either MCL 333.26424 or MCL 333.26428."

Next, the prosecutor argued trial court erroneously held that the rule of lenity applied under the circumstances of this case. The defendants argued in the trial court, and argued in the Court of Appeals, that the rule of lenity should be applied under the circumstances of this case because they were denied "due process and advanced notice of the conduct being prohibited," i.e., they lacked "fair warning." The Michigan Court of Appeals agreed with the prosecutor.

The 'rule of lenity' provides that courts should mitigate punishment when the punishment in a criminal statute is unclear." *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997).

**The Court held that "Accordingly, the retroactive application of this Court's decision in *McQueen*, although rendered after defendants' arrests, does not present a due process concern because this decision does not operate as an ex post facto law. Here, none of the defendants are deprived of "due process of law in the sense of fair warning that his contemplated conduct constitutes a *crime*." *Bouie*, 378 US at 353 (emphasis supplied). Neither our holding in *McQueen*, nor our Supreme Court's subsequent holding in *McQueen*, 493 Mich at 135, had the effect of criminalizing previously innocent conduct. This is not a case in which marijuana dispensaries were authorized by statute and then, by judicial interpretation, deemed illegal."**

Therefore, the Michigan Court of Appeals reversed and remanded for reinstatement of the charges against the defendants.

**People v Carruthers, ___Mich App___; ___NW2d____ (2013):**

**Issue:** Whether edibles made from resin (which contain THC) qualify as usable marihuana?

**Holding: NO. Because the definition of "usable marihuana" only refers to leaves and flowers, edibles made purely of resin do not constitute "usable marihuana."**

**Issue:** Whether, if a defendant possesses marihuana which does not meet the definition of "usable marihuana," does he qualify for immunity under §4 (MCL 333.26424)?

**Holding: NO.**

**Issue:** Whether, if a defendant possesses marihuana which does not meet the definition of "usable marihuana" can he attempt to avail of the affirmative defense listed in §8 (MCL 333.26428)?

**Holding: YES.**

Defendant was stopped at a traffic stop possessing edibles weighing 54.9 ounces as well as 9.1 ounces of raw marihuana. The edibles in his possession were made from straining the resin from marihuana plant and mixing it with baking ingredients. He claimed that he was entitled to avail of the immunity from prosecution listed in §4 since he was a patient and a caregiver and he had four patients. Defendant claimed that the court should only count the pure resin in the amount requirements. Defendant asserted that though the baked goods weighed 54.9 ounces, the pure resin weighed under 12.5 ounces and therefore he was entitled to avail of the immunity from prosecution listed in §4.

The Court found that because the baked goods were not made with leaves and flowers of the plant but instead were made of resin, the marihuana that he possessed in the baked goods did not qualify as "usable marihuana." The MMMA defines "usable marihuana" as "the dried leaves and flowers of the marijuana plant, and any mixture or preparation thereof, but does not include the seeds, stalks, and roots of the plant." MCL 333.26423(k). The Court then indicated that because §4 only provided individuals with an immunity from prosecution if they possessed "an amount of marihuana that does not exceed 2.5 ounces of usable marihuana," (MCL 333.26424(a),(b)) because defendant possessed marihuana which did not fall under the definition of "usable marihuana" he could not avail of the protection in §4.

However, the Court was careful to note that if the edibles were made from leaves and flowers, then the edibles would meet the definition of "usable marihuana." Furthermore, the Court held that the defendant could seek to avail of the affirmative defense listed in §8 and remanded for a hearing. (The case had been decided in the lower court before the Supreme Court reversed *People v King,* 291 Mich App 503; 804 NW2d 911 (2011))

**People v Anderson (After Remand), 298 Mich App 10; 825 NW2d 641 (2012)**

**Issue:** Whether the court erred in determining that the amount restrictions in §4 were pertinent on whether the defendant could avail of the affirmative defense?

**Holding: YES.**

**Issue:** Whether the court erred by precluding the defense based on credibility findings?

**Holding: YES. The trial court's sole function at the hearing was to assess the evidence and to determine whether as a matter of law, the defendant presented sufficient evidence to establish a prima facie defense under §8, and if he did whether there were any material factual disputes on the elements of the defense that must be resolved by the jury.**

The case was heard before the Supreme Court's decision in *Kolanek, supra,* and the trial court at the §8 hearing had determined in part that because the defendant failed to comply with the requirements in §4, he could not avail of the affirmative defense. The trial court also made credibility findings regarding the expert witness who was called by the defense. The Court of Appeals reversed and remanded based on *Kolanek,* but indicated that the parties were entitled to a new §8 hearing because the parties were functioning under pre-*Kolanek* case law when conducting the previous hearing.

**People v. Brown, 297 Mich App 670; 825 NW2d 91 (2012):**

**Issue:** Whether there was sufficient probable cause in the search warrant to have it issued by the magistrate?

**The Court held in pertinent part, that "We conclude that to establish probable cause, a search-warrant affidavit need not provide facts from which a magistrate could conclude that a suspect's marihuana-related activities are specifically not legal under the MMMA."**

"Probable cause exists if there is a substantial basis for inferring a fair probability that contraband or evidence of a crime exists in the stated place. Kazmierczak, 461 Mich 417-418. Defendant has presented no authority indicating that for probable cause to exist, there must be a substantial basis for inferring that defenses do not apply."

The Court did note, however, "While we decline, in light of the pertinent case law, to impose an affirmative duty on the police to obtain information pertaining to a person's noncompliance with the MMMA before seeking a search warrant for marijuana, if the police do have clear and uncontroverted evidence that a person is in full compliance with the MMMA, this evidence must be included as part of the affidavit because such a situation would not justify the issuance of a warrant. This scheme will reduce any potential (however unlikely) for police overreach in attempting to obtain search warrants."

**People v. Nicholson, 297 Mich App 191; ___NW2d___ (2012):**

**Issue:** Whether the defendant was immune from arrest because his application paperwork for a registry identification card under the MMMA was "not reasonably accessible at the location of his arrest.

**Holding: The court held that the defendant was not immune from arrest because his application paperwork for a registry identification card under the MMMA was "not reasonably accessible at the location of his arrest."**

**However, the court further held that because he possessed a registry identification card that had been issued before his arrest when being prosecuted, he was immune from prosecution unless there is evidence showing that his possession of marihuana**

**at the time was not in accordance with "medical use" as defined in the MMMA or otherwise not in accordance with the MMMA.**

**People v. Danto, 294 Mich App 596; 822 NW2d 600 (2011) [abrogated in part by 491 Mich 382; 817 NW2d 528 (2012)]:**

Much of *Danto*'s holding regarding the MMMA has been abrogated by the Supreme Court's decision in *King & Kolanek,* that a defendant's failure to follow the requirements in §4 do not preclude him from attempting to avail of the affirmative defense listed in §8.

However, the Court found that because the defendants had marihuana growing in various places around the house where they all lived, they did not demonstrate that the house itself qualified an enclosed, locked facility.

The Court also made the following finding:

> Nater has identified no provision in the MMA that would have authorized him to sell marijuana to the undercover officers. MCL 333.26424(b) provides that "[a] primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty . . . for assisting a qualifying patient to whom he or she is connected through the [Michigan Department of Community Health's] registration process with the medical use of marihuana in accordance with this act . . . ." Nater does not claim or offer evidence that he was connected through the department's registration process with the undercover officers to whom he sold marijuana.

**People v. Brian Bebout Reed, 294 Mich App 78; 819 NW2d 3 (2011)**

**Issue:** For a Section 8 affirmative defense to apply, does the physician statement have to occur before the purportedly illegal conduct?

**Holding:** The Court held as follows: "We stated in *People v Kolanek,* ___ Mich App ___; ___ NW2d ___; 2011 WL 92996 (2011), lv granted 489 Mich 956; 798 NW2d 509 (2011), slip op at 7, that the relevant deadline for obtaining the physician's statement required to establish the affirmative defense in MCL 333.26428 was the time of a defendant's arrest.

**We now extend that ruling and hold that, for the affirmative defense to apply, the physician's statement must occur before the commission of the purported offense. We further hold that defendant has no immunity under MCL 333.26424 because defendant did not possess a registry identification card at the time of the purported offense."**

**In essence, "In light of the above-considerations, we hold that, for a Section 8 affirmative defense to apply, the physician's statement must occur before the purportedly illegal conduct."**

In this case, the Defendant's marihuana plants were discovered before any physician authorization, but defendant was not arrested until after he had obtained physician authorization, as well as a registry identification card from the Michigan Department of Community Health (MDCH). See MCL 333.26424.

Because the Defendant's Motion to Dismiss was denied, the Court stated that "No reasonable jury could find that defendant is entitled to the Section 8 defense, and thus defendant is barred from asserting it at trial."

**People v. King, 291 Mich App 503; 804 NW2d 911 (2011) [abrogated in part by 491 Mich 382; 817 NW2d 528 (2012)]:**

Much of *King*'s holding regarding the MMMA has been abrogated by the Supreme Court's decision in *King & Kolanek,* that a defendant's failure to follow the requirements in §4 do not preclude him from attempting to avail of the affirmative defense listed in §8.

However, (though the definition of enclosed locked facility has now been charged by statute, MCL 333.26423(d)) for pre-April 1, 2013 cases, *King's* definition of enclosed-locked facility is pertinent.

**Issue:** What is an "enclosed locked facility"?

**Holding: The enclosed area itself must have a lock or other security device to prevent access by anyone other than the person licensed to grow marihuana.**

The facts of the case are that on May 13, 2009, the Michigan State Police received an anonymous tip that someone was growing marihuana in the backyard of a house. The officers saw a chain-link dog kennel behind the house. Although the sides of the kennel were covered with black plastic, some areas of the kennel were uncovered and, using binoculars. The officer could see marihuana plants growing inside.

The Defendant, who was at home at the time, showed the officers medical marihuana card that was issued on April 20, 2009. The officers asked him to show them the marihuana plants and he unlocked a chain lock on the kennel. The kennel was six feet tall, but had an open top and was not anchored to the ground. Defendant disclosed that he had more marihuana plants inside the house. After they obtained a search warrant, the officers found marihuana plants growing inside Defendant's unlocked living room closet. Defendant was charged with two counts of manufacturing marihuana.

The Defendant argued that he was entitled to the limited protections of the MMA because he complied with its statutory provisions including meeting the definition of "Enclosed, locked facility." The trial court agreed.

The court held that the trial court incorrectly interpreted and applied the phrase "Enclosed, locked facility." The court further held that, although the plants inside Defendant's home were kept in a closet, which is the type of enclosure specifically mentioned in the statute, there was no lock on the closet door. The statute explicitly states that the enclosed area itself must have a lock or other security device to prevent access by anyone other than the person licensed to grow marihuana under the MMA.

Lastly, the court noted that the "Trial court's conclusion that Defendant acted as a "security device" for the marihuana growing inside his home is pure sophistry and belied by defense counsel's unsurprising admission at oral argument that, at times, Defendant left the property, thus leaving the marihuana without a "security device" and accessible to someone other than Defendant as the registered patient."

**People v. Redden, 290 Mich App 65; 799 NW2d 184 (2010):**

**Issue:** Can Defendants use the affirmative defense contained in §8 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26428, if their registry identification card was acquired after the offense?

**Holding: Yes, the court held that registered patients under §4 and unregistered patients under §8 would be able to assert medical use of marihuana as a defense even though the defendant does not satisfy the registry identification card requirement of §4.**

**Issue:** What constitutes a physician-patient relationship?

**Holding: The doctor's recommendations have to result from assessments made in the course of bona fide physician-patient relationships and the Defendants have to see the physician for good-faith medical treatment not in order to obtain marihuana under false pretenses.** [The Legislature has now passed a definitional statute: MCL 333.26423(a)]

Defendant Robert Lee Redden and Defendant Torey Alison Clark appealed by leave granted from a December 10, 2009, circuit court order reversing for each Defendant the district court's dismissal of a single count of manufacturing 20 or more but less than 200 marihuana plants.

This case arose from the execution of a search warrant on March 30, 2009, at Defendants' residence, which resulted in the discovery of approximately one and one-half ounces of marihuana and 21 marihuana plants. Defendants were in the residence at the time of the search. The officers found 3 bags of marihuana in a bedroom and 21 marihuana plants on the floor of the closet in the same bedroom.

It should be noted that although the MMMA went into effect on December 4, 2008, the State of Michigan did not begin issuing registry identification cards until April

4, 2009. The Michigan Department of Community Health issued medical marihuana registry identification cards to each Defendant on April 20, 2009.

As part of the preliminary examination, Defendants asserted the affirmative defense contained in § 8 of the MMMA, MCL 333.26428. In support of the defense, Defendants presented testimony from Dr. Eric Eisenbud, M.D., licensed to practice in the State of Michigan. Dr. Eisenbud testified that Defendants were his patients and he examined each of them on March 3, 2009, when both were seeking to be permitted to use medical marihuana under the MMMA.

Dr. Eisenbud testified that he signed the authorization for each Defendant in his professional capacity because each qualified under the MMMA and each would benefit from using medical marihuana. He opined that his relationship with each Defendant was a bona fide physician-patient relationship because he interviewed Defendants, examined them, and looked at their medical records in order to gain a full understanding of their medical problems.

The prosecution has argued throughout each stage of the judicial process that Defendants were not entitled to assert the affirmative defense from § 8 of the MMMA because they did not each have a registry identification card at the time of the offense as required by § 4(a) of the MMMA, MCL 333.26424(a).

On the other hand, the Defendants argued that they each met the requirements of § 8 because they each had a signed authorization from a licensed physician with whom they had a bona fide physician-patient relationship and who concluded that they each had conditions covered under the MMMA. Defendants also argued that the amount of marihuana was reasonably necessary.

The Court noted 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. The Court stated "That adherence to § 4 provides protection that differs from that of § 8. Because of the differing levels of protection in sections 4 and 8, the plain language of the statute establishes that § 8 is applicable for a patient who does not satisfy § 4."

The Court also mentioned the ballot proposal language, specifically, the following language:

• Permit registered and unregistered patients and primary caregivers to assert medical reasons for using marihuana as a defense to any prosecution involving marihuana.

Based on this language, the Court ruled that "The language supports the view that registered patients under § 4 and unregistered patients under § 8 would be able to assert medical use of marihuana as a defense."

Therefore, the Court held that the district court did not err by permitting Defendants to raise the affirmative defense even though neither satisfied the registry-identification-card requirement of § 4.

The next issue is whether there was a bona fide physician-patient relationship. The Court stated that "We find that there was evidence in this particular case that the doctor's recommendations did not result from assessments made in the course of bona fide physician-patient relationships. The Court ruled that "The facts at least raise an inference that Defendants saw Dr. Eisenbud not for good-faith medical treatment but in order to obtain marihuana under false pretenses."

The circuit court's decision to reverse the district court's bindover was affirmed.

**People v. Campbell, 289 Mich App 533; 798 NW2d 514 (2010):**

**Issue:** Should the Michigan Medical Marihuana Act (MMMA) be retroactively applied?

**Holding: The court held that the MMMA should not be retroactively applied.**

Defendant was charged with manufacture of marihuana, MCL 333.7401(2)(d)(iii), possession with intent to deliver marihuana, MCL 333.7401(2)(d)(iii), possession of a firearm during the commission of a felony (two counts), MCL 750.227b, and misdemeanor possession of marihuana, MCL 333.7403(2)(d). The trial court granted Defendant's motion to dismiss after concluding that the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 et seq., should be retroactively applied. Plaintiff appealed as of right.

The charges against Defendant resulted from a search, pursuant to a warrant, of his home and vehicle on December 3, 2007. Nine marihuana plants, two bags of dried marihuana, and assorted drug paraphernalia were discovered in the search. A shotgun was also recovered from Defendant's home. Defendant stated to the police who executed the warrant that the marihuana was for medicinal use. While Defendant's criminal charges were pending, the MMMA was enacted and became effective on December 4, 2008.

Defendant moved to dismiss the charges against him based on the MMMA, which provides an affirmative defense for a criminal Defendant facing marihuana-related charges. MCL 333.26428(a). The trial court granted Defendant's motion, despite the prosecutor's assertion that Defendant was not entitled to the defense because his arrest occurred before the MMMA became effective.

The sole issue on appeal was whether the MMMA should be retroactively applied. A trial court's decision on a motion to dismiss is reviewed for an abuse of discretion.

Generally, statutes are presumed to operate prospectively unless the Legislature either expressly or impliedly indicates an intention to give the statute retroactive effect. People v Conyer, 281 Mich App 526, 529; 762 NW2d 198 (2008).

The Court rejected Defendant's argument that MCL 333.26428(a) was subject to retroactive application because there is an indication that the Legislature intended such. The sections of the MMMA that Defendant relies on to support this position, specifically MCL 333.26425 and MCL 333.26429, do not relate to whether the provision should be retroactively or prospectively applied.

Instead, those sections provide a timeline for actions to be taken by the Department of Community Health to implement the registered user provisions of the MMMA, as well as a self-executing alternative if the department fails to take the necessary actions within the specified timeline.

The case was reversed and remanded for reinstatement of the charges against Defendant.

## MICHIGAN COURT OF APPEALS DECISIONS
## UNPUBLISHED CASES

**People v Amsdill, No. 317875, December 2, 2014 (Michigan Court of Appeals):**

**Issue:** Whether the trial court erred when it ruled that the State of Michigan Supreme Court decision of State of Michigan v. McQueen should not be applied retroactively?

**Holding: Yes**

**The Court of Appeals citing *People v Johnson,* 302 Mich app 450 (2013) held "that "In Johnson, we held that "defendants were never led to believe by a judicial decision of this Court or our Supreme Court that operating a marijuana dispensary was permitted under the MMMA" and that because the McQueen decisions did not overrule clear and uncontradicted case law, they warrant "retroactive application." 302 Mich App at 465-466. We also declined to apply the rule of lenity because: "The MMMA did not, and still does not, include any provision that states that marijuana dispensaries are or were legal business entities." 302 Mich App at 463; see also People v Vansickle, 303 Mich App 111, 119-120; 842 NW2d 289 (2013) ("the retroactive application of our decision in McQueen did not present due process concerns because it did not operate as an ex post facto law.")."**

Reversed and remanded.

**People v Grant, No. 316487, September 23, 2014 (Michigan Court of Appeals):**

**Issue:** Whether the defendant should be excused from liability for the charged offenses because he reasonably – albeit mistakenly – believed that the co-defendant was growing marihuana in **compliance with the Michigan Medical Marihuana Act (MMMA)?**

**Holding: NO**

**The Court held that "The fact that defendant may have acted under a mistaken belief as to the legality of the marijuana grow operation is no defense under Michigan law because "ignorance of the law or a mistake of law is no defense to a criminal prosecution." People v Motor City Hosp & Surgical Supply, Inc, 227 Mich App 209, 215; 575 NW2d 95 (1997). As such, the trial court properly precluded defendant from admitting evidence concerning the MMMA or medical marijuana in an effort to show that his actions should be excused. Moreover, we note that**

**reference to the MMMA and medical marijuana was irrelevant given defendant's theory of defense."**

**People v Mazur, No. 317447, April 1, 2014 (Michigan Court of Appeals):**

**Issue:** Whether the defendant was entitled to have her drug charges dismissed based on the immunity provision of the MMMA because office "sticky notes" should be considered "drug paraphernalia" under the PHC.

The defendant argued that she was entitled to immunity under the MCL 333.26424(g) for her marihuana manufacturing and possession with intent to deliver charges. Under the MMMA, a person may not be prosecuted 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.'"

The defendant claimed that the two "sticky notes" containing marijuana "harvest dates" that she gave to her husband constituted "marihuana paraphernalia." She claimed that "these acts were 'all that is required for immunity.'" However, that a "defendant was completely isolated from the possibility of prosecution, arrest, or other penalty for all of her alleged marihuana-related activity by virtue of having written harvest dates on two sticky notes is contrary to the principle of statutory interpretation that statutes must be construed to prevent absurd results." If a person "provides a patient or caregiver with paraphernalia, it is only that isolated act of providing paraphernalia that cannot be penalized under MCL 333.26424(g), and not, as defendant by implication" urged the court to hold, "all of the person's marihuana-related activity."

**Holding: The court held that the MMMA and the controlled-substances article of the PHC are *in pari materia* and that it was "appropriate to adopt the definition of 'drug paraphernalia' found in" the PHC when addressing the defendant's assertion of immunity under the MMMA. Under the PHC, "the notes were not paraphernalia."**

The court determined that "the Legislature intended to grant immunity to a person who provides a registered qualifying patient or caregiver with 'marihuana paraphernalia for purposes of a qualifying patient's medical use of marihuana,' MCL 333.26424(g), that is, items *specifically* designed to facilitate the use of marihuana. Objects that serve as ordinary household and office supplies, such as sticky notes, are outside the ambit of what the Legislature contemplated when it created the paraphernalia-immunity provision."

Further, the evidence failed to show that the growing operation was in accordance with the MMMA. Marihuana was found growing in several unlocked places. Thus, the defendant was not entitled to immunity under MCL 333.2624(i). The trial court also did not err by denying her a second, discrete evidentiary hearing so she could assert the affirmative defense under MCL 333.26428 because she did not show that she was either a "patient" or a "primary caregiver" as defined by the MMMA.

Affirmed.

**People v. O'Connor, No. 312843, January 16, 2014 (Michigan Court of Appeals):**

**Issue:** Whether the defendant met the requirements under Section 8 of the MMMA?

**Holding: NO.**

The Defendant asserted that the trial court improperly denied his motion to present a § 8 defense because the defense is available to unregistered patients, including unregistered caregivers.

The Court of Appeals disagreed. The Court ruled as follows:

"We conclude that the trial court properly dismissed O'Connor's untimely motion. MCL 333.26427(b) requires a person to bring a pretrial evidentiary hearing to prove the elements of MCL 333.26427(a)—the defense cannot be asserted for the first time at trial. Here, O'Connor moved to present a § 8 defense at the conclusion of the first day of trial. Thus, O'Connor did not comply with the provisions of the act because he asserted the defense for the first time during trial. We conclude that the trial court did not err by denying O'Connor's motion to present a § 8 defense."

Affirmed.

**People v. Dehko, No. 305041, March 21, 2013 (Michigan Court of Appeals):**

Defendant was granted an evidentiary hearing and provided with numerous opportunities to present evidence on the elements of the MMMA's affirmative defense, up to the eve of trial. Defendant declined to do so. Instead, the defendant maintained that he would continue to rely on his physician's certification and evaluation and a proposed marihuana cultivation expert.

**Issue:** Whether the defendant met the requirements under Section 8 of the MMMA?

**Holding: The Court ruled held that "Given defendant's chosen evidence, there is no question of fact regarding whether defendant satisfied the second element under § 8(a)(2)."**

**"Here, even if the physician certification raised an inference of a bona fide patient physician relationship, because defendant failed to present any evidence regarding whether the amount of marihuana he possessed was reasonable, it is not necessary to determine whether he also established a question of fact with respect to the other elements of a § 8 defense, including whether he had a bona fide physician-patient relationship with his respective certifying physician."**

The Court reasoned as follows:

"Although afforded the opportunity to do so, defendant did not present any evidence that he possessed only the amount of marihuana reasonably necessary to ensure him an uninterrupted supply for the treatment or alleviation of his alleged serious or debilitating medical condition or symptoms of that condition. Defendant did not testify and did not present any medical records, or medically-based evidence or testimony from Dr. May or another knowledgeable doctor regarding how much marihuana he was instructed to use or needed to use at a time to address his condition, and how often and how long he needed to use it.

The mere certification does not provide any information regarding how much marihuana defendant should use for treatment. Further, defendant did not explain below how a marihuana cultivation expert possessed the medical knowledge or information to address defendant's medical condition and the amount of marihuana defendant needed for his allegedly serious or debilitating health condition. Because defendant failed to establish a question of fact with respect to this element of the § 8 defense, he was not entitled to assert the § 8 defense at trial."

**People v. Hinzman, No. 309351, February 5, 2013 (Michigan Court of Appeals):**

The defendant was charged with perjury, MCL 750.422. Defendant appealed by leave granted the circuit court's order denying defendant's motion to exclude evidence. On appeal, defendant argued that the circuit court erred in denying her motion.

The defendant and her husband were originally charged as codefendants with illegally delivering/manufacturing marihuana. During an evidentiary hearing in that matter, defendant testified that on May 25, 2010, she was a registered medical marihuana caregiver to three patients. Subsequently, in order to verify this testimony, the prosecutor obtained a subpoena from the trial court, directed to the Department of Licensing and Regulatory Affairs (DLRA), for the production of documents pertaining to defendant's asserted status as a registered medical marihuana caregiver.

In response to the subpoena, Celeste Clarkston, the Compliance Section Manager of the Health Regulatory Division in the DLRA, gathered and provided the following information: three Caregiver Attestations (dated May 10, May 14, and July 20, 2010); three Change Forms (dated May 10, May 14, and July 20, 2010); a photocopy of a check for $10 made out to "State of Michigan –MMMP"; a photocopy of a money order for $10 made out to "Michigan Department of Community Health"; three photocopies of a Physician's Statement (dated March 27, 2010); photocopies of three driver's licenses; and a letter from Clarkston summarizing the information contained in the records and certifying that the documents are true copies of those contained in the master file.

During trial in the illegal delivery/manufacture case, the prosecutor marked as Exhibit 19 all of the documents obtained by subpoena from the DLRA, and sought their admission

into evidence. Defendant challenged the admission of this evidence, arguing that the information produced under subpoena was illegally produced and, alternatively, that the information produced was beyond the scope of information permitted to be disclosed by MCL 333.26423(i).

**Issue:** Whether the trial court properly denied the motion to exclude this evidence?

Defendant first argued that the information contained in Exhibit 19 was obtained in violation of MCL 333.26426 and Mich Admin Code, R 333.121 (Rule 333.121) and that as a result, the exhibit should be suppressed. The Court of Appeals disagreed.

Defendant claimed, without citation to any authority, that a LEIN inquiry is the sole method by which law enforcement can verify the validity of MMMA registry cards. The Court of Appeals rejected this argument as without merit. The Court noted that "LEIN is not mentioned in the statute at all, let alone established as the only permissible way of verifying the validity of registry cards.

Defendant next argued that the information provided exceeded what was permissible under statute and rule. The Court noted that "Both MCL 333.26426(h)(3) and Rule 333.121(3) provide that information *shall* be provided to law enforcement upon request and that the disclosure should not contain "more information than is reasonably necessary to verify the authenticity of the registry identification card."

**Holding: The Court held that "Exhibit 19 does not disclose more information than necessary to determine the authenticity of defendant's registry card and caregiver status as of May 25, 2010. The only identifying information disclosed in the records are defendant's name, date of birth, home address and telephone number, social security number, and driver's license number. All the information pertaining to her patients is redacted. Each document is necessary to determine whether defendant was, in fact, a registered caregiver for three patients on May 25, 2010.**

Therefore, the trial court properly concluded that information contained in Exhibit 19 complied with the requirement in both the statute and the administrative rule to avoid disclosure of more information than reasonably necessary."

**People v. Hinzman, No. 308909, July 24, 2012 (Michigan Court of Appeals):**

**Issue:** Whether the Defendant was able to successfully assert the affirmative defense under Section 8 of the MMMA?

**Holding: Applying the Section 8 defense as interpreted by the Supreme Court in *King* and *Kolanek*, the Court held, in pertinent part, that defendants could not establish that the amount of marihuana they possessed was not more than "reasonably necessary" to provide uninterrupted availability.**

**People v. Kiel, No. 301427, July 17, 2012 (Michigan Court of Appeals):**

**Issue:** Whether the Defendant was entitled to present an affirmative defense as to all of the marihuana plants on his property?

**Holding: The Court held that In light of the most recent Michigan Supreme Court decision of *People v. Kolanek,* No. 142695, decided May 31, 2012, which was decided after Kiel's conviction, the *Kiel* Court of Appeals held that "While this instruction matches the requirements under § 4, the trial court erred in giving this instruction to the jury because, as discussed, *supra*, defendant was entitled to assert a § 8 affirmative defense at trial. As clarified by our Supreme Court, § 4 applies only to *registered* qualifying patients, while § 8 provides an affirmative defense to "patients" generally. *Kolanek*, ___ Mich at ___ (slip op at 19). Because the jury was not properly instructed concerning the applicable affirmative defense, defendant is entitled to a new trial."**

**People v. Keller, Case No. 304022, May 10, 2012 (Michigan Court of Appeals):**

**Issue:** Whether the plants on defendant's property were in an "enclosed, locked facility?"

**Holding: The Court held that "Those plants joined all the others as being readily accessible to a member of defendant's family, or any passerby his dogs did not decide to treat as a foe. The statute's requirement that the facility be enclosed and locked indicates that access to them is to be secured by something more than the grower's withholding of permission to unauthorized persons to access them. Because defendant grew more than 12 plants and failed to keep them in a secure, enclosed facility, the MMMA afforded him no defense to that general prohibition."**

Note the new definition of "enclosed locked facility" in MCL 333.26423(d) which went into effect on April 1, 2013.

**People v. Malik, Case No. 293397, August 10, 2010 (Michigan Court of Appeals):**
**Issue:** Can a Defendant be criminalized for the operation of a motor vehicle while having any amount of a schedule 1 controlled substance in his or her body, regardless of whether that individual has exhibited signs of impairment? Is the Medical Marihuana Act retroactive?

**Holding: Yes, the court held that while evidence of a positive test for 11-Carboxy-THC is inadmissible, evidence of the presence of tetrahydrocannibinol (THC) in a Defendant's system is till relevant in determining whether the Defendant was operating the vehicle while intoxicated. The Court rejected the application of the Medical Marihuana Act retroactively.**

The prosecution presented only one issue on appeal, arguing that the trial court erroneously invalidated MCL 257.625(8) on due process grounds in contravention of the Supreme Court's decision in *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006).

On October 17, 2008, Defendant's automobile collided with the victim's motorcycle. Defendant's blood test revealed four nanograms of parent tetrahydrocannibinol (THC), and 15 nanograms of 11- carboxy-THC. Defendant was charged, as an habitual offender, second offense, MCL 769.10, with operating a vehicle while intoxicated and causing death, MCL 257.625(4)(a), operating a vehicle with a suspended or revoked license and causing death, MCL 257.904(4), and negligent homicide, MCL 750.324.

In order to secure a conviction for violation of MCL 257.625(4)(a), the prosecution sought to prove that Defendant violated MCL 257.625(8).MCL 257.625(8), which criminalizes the operation of a motor vehicle by an individual who has any amount of a schedule I controlled substance in his or her body, regardless of whether that individual has exhibited signs of impairment.

It should be noted that MCL 333.7211 provides a general definition of schedule 1 controlled substances, while MCL 333.7212 designates specific substances as schedule 1 controlled substances. THC is one such schedule 1 controlled substance.

Defendant filed a number of pretrial motions, including a challenge to the constitutionality of MCL 257.625(4). The Barry County Circuit Court ruled that "MCL 257.625(8) is fundamentally unfair, does nothing to promote public safety, and bears no rational relationship to any legitimate governmental interest," and it invalidated MCL 257.625(8) on due process grounds.

In an unpublished opinion, the Court of Appeals reversed and remanded. The Court ruled as follows:

"Defendant has not alleged that it is unconstitutional to criminalize operating a motor vehicle while under the influence of THC. Consequently, we hold that the trial court's ruling regarding the constitutionality of MCL 333.7212 must be reversed and this matter is remanded for trial. At trial, the evidence of the positive test for 11-carboxy-THC is inadmissible as it is now irrelevant. However, the evidence of the presence of THC in Defendant's system is still relevant in determining whether he was operating his motor vehicle while intoxicated."

Lastly, the Court rejected the argument about the Michigan Medical Marihuana Act being applicable and retroactive under *People v Conyer*, 281 Mich App 526 (2008).

## MICHIGAN LOWER COURT DECISIONS

## CIRCUIT COURT DECISIONS

**People v. Carlton, Case No. 13-11210-AR, March 11, 2014 (Isabella County):**

**Issue:** Whether by smoking marihuana in a vehicle in a casino parking lot is a public place?

**Holding: The Court held that "A private vehicle is not a public place for the purposes of the MMMA. The public does not have a right to resort in an individual's vehicle. Therefore, this court affirms the district court's holding that the holder of a medical marihuana card is not in a public place when he or she is in or the car in a parking lot, as well as the district court's decision to dismiss the complaint against appellee."**

**Kent County Prosecuting Attorney v. City of Grand Rapids, Case Nos. 12-11068-CZ, May 6, 2013 (Kent County):**

**Issue:** Whether an amendment to the City of Grand Rapids' Charter concerning the possession, control, and giving away of marihuana is valid?

**Holding: The Court held that "The voters of Grand Rapids had the power to amend the City Charter and plaintiff has failed to show that any section of the charter amendment necessarily conflicts with state law."**

The Court reasoned that "The charter amendment merely creates a civil infraction in the City and directs the City's police resources away from some of these laws."

**People v. Ferretti, 2011-798-AR, September 27, 2011 (Macomb County):**

In this case, in pertinent part, the People argued that the lower court erred in quashing the search warrant, suppressing the fruits of the searches, and dismissing the charges, According to the People, the search warrant affidavit set forth probable cause and the new information did not materially change or cast doubt on the existence of probable cause.

Specifically, the People asserted the fact that defendants produced medical marihuana cards is not material to the decision of probable cause and does not alter the alleged crime, or scope or nature of the resulting search. Further, the People maintained possession of a medical marihuana card is only an affirmative defense with no legal bearing on the decision to issue a search warrant or probable cause that a violation of the Public Health Code occurred.

In response, defendants claimed the lower court properly quashed the search warrant because the police officers failed to update the issuing district court with highly relevant, newly discovered evidence before executing the warrant. Defendants asserted the new information regarding defendants' possession of medial marihuana cards was a material fact that cast doubt on the decision of probable cause. Defendants maintained it is presumed that medical marihuana card holders are conforming to the act and this alters the information provided in the search warrant affidavit.

**Issue:** Whether the lower court erred in quashing the search warrant, suppressing the fruits of the searches, and dismissing the charges,

**Holding: The Court held that "In this matter, the new information would not affect the finding of probable cause. The only new information to be added to the affidavit is that defendants possess medical marihuana cards."**

The new information did not affect the veracity of the statements made in the affidavit including the confidential informant's statements regarding a large grow operation and the selling of marihuana; information from DTE Energy that the residence had two energy meters and a very large increase in energy/electricity had been used on both meters as compared to the last two years for the same period of time; evidence from a non-intrusive thermal imaging search that there were detectable heat anomalies consistent with indoor marihuana manufacturing; and, based on surveillance of the residence, the roof of the living portion of the residence was not snow-covered even though the garage and other residences in the area had snow-covered roofs.

Further, the new information does not alter the alleged crime, or the scope or nature of the resulting search. Even with the supplemental information, the affidavit clearly establishes, by a fair probability, that evidence of a large marihuana grow operation would be discovered at the 28 Mile Road address.

**People v. Salerno, 10-234766-FH, August 18, 2011 (Oakland County):**

**Issue:** Whether the defendant is entitled to assert the affirmative defense under Section 8 of the MMMA?

**Holding: The Court found that Defendant cannot assert the affirmative defense under Section 8 for several reasons.**

The defendant stated he had sold 30 to 50 times in the two prior years. He was selling it between $350.00 and $450.00 per ounces. Clearly, defendant was not in possession of marihuana for his medical needs.

Additionally, it cannot be reasonably argued that Defendant needed 140.1 grams to treat himself for his diabetic condition. Lastly, the Doctor was lacking any knowledge as to the amount of marihuana the defendant should be taking to alleviate his symptoms.

**People v. Finney & Wert, Case No. 2009-408-FH, June 8, 2011 (Midland County):**

**Issue:** Are Defendants allowed to use medical marihuana while on probation?

**Holding: The Court ruled that the two probationers/defendants are not allowed the use of medical marihuana while on probation.**

What is particularly interesting in the opinion is that the Judge declares the MMMA to be "without effect." The reasoning for this declaration can be found in the opinion from pages 20–26.

**People v. Buthia, Case No. 2010-4199-FH, April 12, 2011 (Macomb County):**

**Issue:** Whether a Defendant can use medical marihuana while on probation.

**Holding: Court ordered that the defendant's motion for the use of medical marihuana while on probation is DENIED.**

The Defendant filed a motion for the use of medical marihuana while on probation. The Prosecutor filed a response seeking denial of the motion.

Court order that the defendant's motion for the use of medical marihuana while on probation is DENIED.

**People v. Hicks, Case No. 2010-232705-FH, March 15, 2011 (Oakland County):**

**Issue:** Whether the defendant demonstrated a legitimate need for medical marihuana use.

**Holding: The court found that the defendant failed to demonstrate that a full assessment of his medical history and current condition were conducted or that he had a bona fide relationship with the doctor. Also, the court found that the defendant was not diagnosed with a serious or debilitating condition and defendant failed to prove that the amount of marihuana that he possessed was legitimate.**

**People v. Prell, Case No. 2010-233008-FH, March 4, 2011 (Oakland County):**

**Issue:** Can a Defendant assert an MMMA defense when the Defendant's expert witness is not qualified under *Daubert* MRE 702?

**Holding: The Court found that Defendant was precluded from asserting MMMA defense. Essentially, Defendant had failed to demonstrate the necessary predicate for the testimony of her expert; namely, that her expert was qualified to render an opinion.**

A circuit court opinion denied Defendant's motion to dismiss because her doctor was not qualified under *Daubert*/MRE 702.

More specifically, the Court found that Defendant was precluded from asserting MMMA defense. Essentially, Defendant had failed to demonstrate the necessary predicate for the testimony of her expert; namely, that her expert was qualified to render an opinion concerning Defendant use of marihuana for her medical condition.

The Defendant relied on the testimony of Dr. Moscovic for his professional opinion concerning the medical use of marihuana by the Defendant. On the other hand, the People argued that the Defendant had failed to establish the expertise of the physician pursuant to MRE 702. The Defendant contended that Dr. Moscovic is a "pain specialist" and had "extensive expertise in pain management." The Court noted that there is no evidence to support these assertions.

The Court stated that there was no evidence of any formal training or certification regarding Dr. Moscovic's expertise as a pain specialist or that he had extensive expertise in pain management.

Therefore, the Court found that the Defendant had not met her burden in demonstrating that her expert was qualified to render an opinion in this matter. The Court also noted the opinion rendered by the doctor was not derived from reliable data.

**People v. Agro, Case No. 10-233920-FH, February 24, 2011 (Oakland County):**

**Issue:** Whether the Defendant's home qualifies as an enclosed, locked facility.

**Holding: The court held that the Defendant could not demonstrate that the house was inaccessible to anyone other than licensed growers or qualifying patients.**

The Defendant argued that her home qualified as an enclosed, locked facility. The Court disagreed. The Defendant failed to explain how an entire house was of the same kind of character as a closet or room. Even if Defendant's house fell within the definition of an enclosed, locked facility, Defendant could not demonstrate that the house was inaccessible to anyone other than licensed growers or qualifying patients.

The police officer who executed the warrant testified that the front door was not locked. In addition, Defendant testified that her children and grand-children were allowed in the home. Therefore, because there was no question of fact that Defendant's home was accessible by persons other than qualifying patients or caregivers, she failed to demonstrate that her home was an enclosed, locked facility within the meaning of MCL 333.26424(a).

Defendant also could not demonstrate that the basement where she grew and stored her marihuana was an enclosed, locked facility. It was undisputed that the police found marihuana plants in Defendant's basement where her home was searched. Both Defendant and the officer testified that there was no door on the stairs to the basement.

According to the Defendant, she placed a locked "baby gate" barrier on the stairs, but she failed to explain how the gates permitted access only by registered caregivers or qualifying patients. Therefore, the Defendant failed to demonstrate that the marihuana in her basement was in an enclosed, locked facility as required by MMMA.

Note, on March 31, 2011, the Court of Appeals order "That the application for leave to appeal is denied for failure to persuade the Court of the need for immediate appellate review."

**People v. Toth, Case No. 10-05-9404-FH, January 5, 2011 (Branch County):**

**Issue:** Whether the Defendant can assert the affirmative defense contained in Section 8?

**Holding: The Court ruled that although an inference could be made that some of marihuana was being manufactured for medical purpose, there was no explicit testimony to this fact. The Defendant admitted to the Michigan State Police that his intent was to make money from his grow operation of 163 plants. He was not entitled to assert the affirmative defense contained in Section 8.**

The Michigan State Police received an anonymous tip reference to an outside grow of marihuana. One hundred and sixty three (163) marihuana plants were located on the Defendant's property. The Defendant moved to have the case dismissed pursuant to Section 8 of the Act.

The Court ruled that although an inference could be made that some of marihuana was being manufactured for medical purpose, there was no explicit testimony to this fact. The Defendant admitted to the Michigan State Police that his intent was to make money from his grow operation of 163 plants.

**People v. Finney, Case No. 09-4081, September 9, 2009 (Midland County):**

**Issue:** Whether the Defendant can assert an MMMA §8 defense.

**Holding: The Midland County Circuit Court ruled that the Defendant offered no evidence to the court with regard to element (2) of Section 8(a). The Court therefore had no basis at this time to conclude that the amount of marihuana in Defendant's possession on January 29, 2009 was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the Defendant's serious or debilitating medical condition within the meaning of element (2).**

## DISTRICT COURT DECISIONS

**People v. Barber, Case No. 14-00098-SM, March 4, 2014 (Ingham County):**

**Issue:** Whether Michigan Compiled Law 750.574, (Improper Transportation of Marihuana), is unconstitutional?

**Holding: The Court held that "So Public Act 460 of 2012 is inconsistent as it limits transportation, a right granted by the Medical Marihuana Act, to certain criteria. Therefore, it's inconsistent with the act pursuant to Section 7 of the act. The act wins, because it handles all of medical marihuana, the act being the Medical Marihuana Act."**

**People v. Hosfeld, Case No. 2011-0079-SM, June 24, 2011 (Branch County):**
**Issue:** Whether the Michigan Medical Marihuana Act is a defense against Marihuana being a schedule 1 controlled substance.

**Holding: The Court held *Kazmierczak, supra, was* still governing and that the act didn't remove marihuana from the realm of contraband. In addition, the Court held that the act created affirmative protections as opposed to legalizing anything and that the Deputy had no obligation to inquire about card status, rather a card holder had an obligation to advise the Deputy of their cardholder status.**

The case involved a traffic stop for speeding. As the Deputy approached the vehicle he detected the odor of burnt/burning marihuana coming from inside the vehicle. He asked the driver (defendant) and the female passenger about the smell and they both denied any MJ, instead claiming the odor to be tobacco. The Deputy, who was previously attached to SWET and has narcotics enforcement training, did a PC/automobile exception search on the vehicle and found a small quantity of MJ in the ashtray.

The defense attorney filed a motion to dismiss claiming that the odor of marihuana was no longer, in light of MMMA, PC for a search. His argument was that since it was now 'legal' for some people to possess marihuana that MJ is no longer clearly contraband and therefore cannot be used to form PC for the search. It is interesting to note that the Defendant is not a card holder nor has he claimed section 8. The attorney argued that the Deputy had an obligation to specifically ask if any of the occupants have a MMMA card before conducting a warrantless search.

Prosecutor argued that the act didn't legalize marihuana, that it was still a schedule 1 drug, and that the act didn't provide any support for the defendant's argument. Prosecutor also noted that *People v. Kazmierczak,* 461 Mich. 411 (2000) was still good law and the defense attorney acknowledged as much. The Court denied the motion to dismiss. The Court held *Kazmierczak, supra, was* still governing and that the act didn't remove marihuana from the realm of contraband. In addition, the Court held that the act created affirmative protections as opposed to legalizing anything and that the Deputy had no obligation to inquire about card status, rather a card holder had an obligation to advise the Deputy of their cardholder status.

## MICHIGAN ATTORNEY GENERAL'S OPINIONS

**Attorney General Opinion 7270, released May 10, 2013:**

The Attorney General was asked several questions concerning the application of the Michigan Medical Marihuana Act (MMMA), Initiated Law 1 of 2008, MCL 333.26421 *et seq.*, in child-protective proceedings brought under the Michigan Juvenile Code (Juvenile Code), MCL 712A.1 *et seq*.

Based on the questions asked of him, the Attorney general opined on 4 key issues:

1. A properly registered patient or primary caregiver, who engages in the "medical use" of marihuana "in accordance with" the Michigan Medical Marihuana Act (MMMA), Initiated Law 1 of 2008, MCL 333.26421 *et seq.*, may invoke the protections provided in sections 4(a) and (b) of the Act in a child-protective proceeding under the Michigan Juvenile Code, MCL 712A.1 *et seq*. MCL 333.26424(a) and (b). But the protections are subject to the exception in section 4(c) of the MMMA for behavior that creates an unreasonable danger to a minor that can be clearly articulated and substantiated. MCL 333.26424(c).

2. Whether a person's actions associated with the medical use of marihuana present an "unreasonable danger" to a child under section 4(c) of the Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26424(c), is a fact-specific inquiry dependent upon the circumstances of each case. Any assertion that a person's behavior associated with the medical use of marihuana presents an unreasonable danger to a child must be clearly expressed and supported by evidence.

3. To invoke the protections provided for in sections 4(a) and (b) of the Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26424(a) and (b), in a child-protective proceeding under the Michigan Juvenile Code, MCL 712A.1 *et seq.*, a patient or primary caregiver must have been issued and possess a valid registry identification card. The affirmative defense provided for in section 8(a) of the MMMA only applies in a criminal prosecution, and thus is not available in a child-protective proceeding under the Juvenile Code. MCL 333.264248(a).

4. The Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26421 *et seq.*, does not permit a court in a child-protective proceeding under the Michigan Juvenile Code, MCL 712A.1 *et seq.*, to independently determine whether a person is a qualifying patient. But the court may review evidence to determine whether a person's conduct related to marihuana is for the purpose of treating or alleviating the person's debilitating medical condition or symptoms associated with the condition. MCL 333.26424(d)(2). If the person's use or possession of marihuana is not for that purpose, and thus not "in accordance with"

the MMMA, the person is not entitled to invoke the protections offered in section 4(a) in a child-protective proceeding. MCL 333.26424(a), MCL 333.26427(a).

**Attorney General Opinion 7262, released November 10, 2011:**

The Attorney General was asked whether a law enforcement officer who arrests a patient or primary caregiver registered under the Michigan Medical Marihuana Act (MMMA or Act), Initiated Law 1 of 2008, MCL 333.26241 *et seq.*, must return marihuana found in the possession of the patient or primary caregiver upon his or her release from custody.

The Attorney General noted "That under section 4(h) of the MMMA, a law enforcement officer must return marihuana to a registered patient or caregiver if the individual's possession complies with the MMMA. But the federal Controlled Substance Act (CSA) prohibits the possession or distribution of marihuana under any circumstance."

He further noted that "If a law enforcement officer returns marihuana to a patient or caregiver as required by section 4(h), the officer is distributing or aiding and abetting the distribution or possession of marihuana by the patient or caregiver in violation of the CSA. Thus, a Michigan law enforcement officer cannot simultaneously comply with the federal prohibition against distribution or aiding and abetting the distribution or possession of marihuana and the state prohibition against forfeiture of marihuana. By returning marihuana to a registered patient or caregiver, a law enforcement officer is exposing himself or herself to potential criminal and civil penalties under the CSA for the distribution of marihuana or for aiding or abetting the possession or distribution of marihuana."

Therefore, the Attorney General opined that "Section 4(h) of the Michigan Medical Marihuana Act, MCL 333.26424(h), which prohibits the forfeiture of marihuana possessed for medical use, directly conflicts with and is thus preempted by, the federal Controlled Substances Act, 21 USC 801 *et seq*., to the extent section 4(h) requires a law enforcement officer to return marihuana to a registered patient or primary caregiver upon release from custody."

**Attorney General Opinion 7261, released September 15, 2011:**

Attorney General opined that "2009 PA 188, which prohibits smoking in public places and food service establishments, applies exclusively to the smoking of tobacco products. Because marihuana is not a tobacco product, the smoking ban does not apply to the smoking of medical marihuana."

He further opined that "The Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26421 *et seq*, prohibits qualifying registered patients from smoking marihuana in the public areas of food service establishments, hotels, motels, apartment buildings, and any other place open to the public."

Lastly, he opined that "An owner of a hotel, motel, apartment building, or other similar facility can prohibit the smoking of marihuana and the growing of marihuana plants anywhere within the facility, and imposing such a prohibition does not violate the Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26421 *et seq*."

**Attorney General Opinion 7259, released June 28, 2011:**

The Attorney General opined that "The Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26421 *et. seq.* prohibits the joint cooperative cultivation or sharing of marihuana plants because each patient's plants must be grown and maintained in a separate enclosed, locked facility that is only accessible to the registered patient or the patient's registered primary caregiver."

Further, he states on page 8 of his opinion that "It also protects against unauthorized access to marihuana plants because, at any given time, there is only one person responsible and accountable for a patient's plants. The plain language of the MMMA thus prohibits the joint cooperative cultivating or sharing of marihuana plants because only the individual authorized to cultivate the marihuana plants, either the registered patient or the patient's registered primary caregiver, may have access to the enclosed, locker facility housing the marihuana plants intended for the individual patient's use."

**Attorney General Opinion Number 7250, August 31, 2010:**

The Michigan Attorney General opined that the Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26421 et seq, does not prohibit the Department of Community Health from entering into an agreement or contract with an outside vendor to assist the department in processing applications, eligibility determinations, and the issuance of identification cards to patients and caregivers, if the Department of Community Health retains its authority to approve or deny issuance of registry identification cards.

However, 2009 AACS, R 333.121(2) promulgated by the Department of Community Health under the Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26421 et seq, which provides that the confidential information "may only be accessed or released to authorized employees of the department," prevents the Department of Community Health from entering into a contract with an outside vendor to process registry applications or renewals.

## INDEX OF CASES