MEDICAL MARIHUANA CASE LAW SUMMARY

March 2011

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This material was developed through a project funded by the Michigan Office of Highway Safety Planning and the National Highway Traffic Safety Administration.

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UNITED STATES SUPREME COURT DECISIONS

Gonzalez v. Raich, 545 U.S. 1 (2005):

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 (2001):

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.

LOWER FEDERAL COURT DECISION

Casias v. Wal-Mart, Case No. 1:10-CV-781, February 11, 2011 (United States District Court, Wesetern District of Michigan):

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 held that the fundamental problem with Plaintiff's case is that the MMMA does not regulate private employment. Rather, the Act provides a potential defense to criminal prosecution or other adverse action by the state. *See* M.C.L. § 333.26422(b) ("changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana") (emphasis added); *People v. Redden*, – N.W.2d–, 2010 WL 3611716 (Mich. App. Sept. 14, 2010) (Meter, J.) ("The ballot proposal explicitly informed voters that the law would permit registered and unregistered patients to assert medical reasons for using marihuana as a defense to any prosecution involving marihuana.") (emphasis added).

The MMMA is directed at governmental conduct, and even here the protection is very narrow. Indeed, the MMMA does not even formally "de-criminalize" the use of medical marihuana; rather, it simply provides an affirmative defense and other similarly limited protections in the face of criminal proceedings.

The Court noted that possession and use of marihuana in Michigan – even for medical purposes – is still a crime. *Id*., 2010 WL 3611716 (O'Connell, P.J., concurring) (noting that the MMMA provides an affirmative defense, but does not legalize the use of marihuana). All the MMMA does is give some people limited protection from prosecution by the state, or from other adverse state action in carefully limited medical marihuana situations.5 he Defendant was charged with possession with intent to deliver cocaine and heroin. He argued that after the purpose of the initial stop was completed, he was illegally detained for questioning. At one point during the stop, the Defendant was seated in the rear of the patrol car and answered questions from the trooper.

MICHIGAN SUPREME COURT DECISION

People v. Feezel, Case No. 138031, June 8, 2010 (Michigan Supreme Court):

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. King, Case No. 294682, February, 3, 2011 (Michigan Court of Appeals):

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 of Appeals disagreed. The Court although Defendant timely raised a § 8 defense, he did not fulfill its requirements. The court further held that clearly, by its reference to § 7, § 8 required Defendant to comply with other applicable sections of the Medical Marihuana Act, which include the growing requirements set forth in § 4. Also, the court held that as a registered cardholder, Defendant must comply with the growing provisions of § 4. Section 4 applied to Defendant because he grew marihuana under a claim that he is a qualifying patient in possession of a registry identification card. The court held that, because he did not comply with § 4, he also failed to meet the requirements of § 8 and thus, he was not entitled to the affirmative defense in § 8 and he was not entitled to dismissal of the charges.

The court also 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. Kolanek, Case No. 295125, January 11, 2011 (Michigan Court of Appeals):

This case required the Michigan Court of Appeals to consider an issue of first impression involving the interpretation of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, namely when a physician must provide the statement required under MCL 333.26428(a)(1).

On April 6, 2009, Defendant was involved in an altercation that ultimately resulted in a search of Defendant's vehicle and the seizure of eight marihuana cigarettes from the trunk of Defendant's vehicle. On April 7, 2009, Defendant was charged with possession of marihuana. Defendant offered the testimony of Dr. Ray Breitenbach. Dr. Breitenbach testified that he and Defendant had previously discussed the potential for Defendant to use medical marihuana, but that Defendant did not make his actual request until April 12, 2009. It should be noted that when Defendant finally made the request of Breitenbach in April 2009, he did not inform Breitenbach that he had been arrested and charged with possession of marihuana.

On June 9, 2009, Defendant completed an affidavit in support of his assertion of the MMMA for the purpose of his affirmative defense and motion to dismiss. He stated that he uses marihuana for chronic pain and nausea caused by the Lyme disease. Also on June 9, 2009, Defendant prepared an affidavit of qualifying patient, indicating that he was a patient qualifying for the medical use of marihuana. He also provided his application form for registering for a medical marihuana card, which he prepared on April 12, 2009. The Michigan Department of Community Health issued him a certification card two weeks later.

Defendant maintained that he did not register for medical marihuana use certification before April 12, 2009, because the application form was not available online until April 8, 2009, two days after his arrest.

The issue before the Court of Appeals is when does a physician have to provide his professional opinion under MCL 333.26428(a)(1) in order for a Defendant to assert the § 8 affirmative defense.

Based on the Court's interpretation of MCL 333.26428(a)(1), that "[a] physician *has stated*" the medical benefit to the patient, the Court held that *"has stated"* requires that the physician's opinion occur prior to arrest.

The Court reasoned that "The term is past tense, the initiative must have intended that the physician's opinion be stated prior in time to some event. That event would reasonably be 'any prosecution involving marihuana,' MCL 333.26428(a), for which the defense is being presented. Thus, because the arrest begins the prosecution, the physician's opinion must occur prior to the arrest."

The Court relied on two out of state cases for its reasoning. *People v Rico*, 69 Cal App 4th 409, 414-415; 81 Cal Rptr 2d 624 (1999) (Holding that "post-arrest approval is insufficient to allow application of the compassionate use statute" because "[t]o sanction the use of marihuana under the facts presented herein would encourage the use of marihuana for any idiosyncratic problem, whether medically valid or not, with an ensuing attempt to seek medical approval after an arrest intervened."); *Oregon v Root*, 202 Ore App 491, 493-494; 123 P3d 281 (2005) (The Oregon Court of Appeals looked at the text and context of the statute and determined that the intent was that "the doctor's advice must come *before* a citizen is free to use marihuana without fear of civil or criminal penalties" based on the past tense language requiring that a Defendant "has . . . been advised." *Id.* at 495-497).

However, it should be noted that in the last paragraph of the Court's opinion, the Court stated that "As the statute does not provide that the failure to bring, or to win, a pre-trial motion to dismiss deprives the Defendant of the statutory defense before the factfinder, Defendant's failure to provide sufficient proofs pursuant to his motion to dismiss does not bar him from asserting the Section 8 defense at trial nor from submitting additional proofs in support of the defense at that time."

Editor's Note: Please note the California case is *People v. Rigo,* 69 Cal App 4th 409, 414-415; 81 Cal Rptr 2d 624 (1999), not *People v. Rico* as stated in the opinion.

People v. Redden, Case No. 295809, September 14, 2010 (Michigan Court of Appeals):

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, Case No. 291345, July 13, 2010, approved for publication, August 26, 2010 (Michigan Court of Appeals):

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 DECSIONS

UNPUBLISHED CASES

People v. Walburg, Case No. 295497, February 11, 2011 (Michigan Court of Appeals):

The Defendant claimed that he used the marihuana to treat a severe anxiety disorder and insomnia and did obtain an affidavit from a physician, after his arrest. The trial court dismissed the Defendant's case pursuant Section 8 of the Act.

Following the rationale of *People v. Kolanek,* the Court of Appeals reinstated the charges.

People v. Malik, Case No. 293397, August 10, 2010 (Michigan Court of Appeals):

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).

People v. Peters, Case No. 288219, January 21, 2010 (Michigan Court of Appeals):

In its first medical marihuana decision, the Michigan Court of Appeals ruled as follows:

"The MMMA clearly indicates that its effective date is December 4, 2008, and there is nothing included in the act to indicate that it was intended to be effective sooner than that date. Moreover, it is unlikely that the Legislature intended the act to be retroactive to a date prior to its effective date when the policies and procedures regarding identifying qualifying medical conditions and processing applications for registration cards were not even established. See MCL 333.26425(a), (b)."

MICHIGAN LOWER COURT DECISIONS

CIRCUIT COURT DECISIONS

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

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):

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.

People v. Whitburn, Case No. 10-1641-FH, February 8, 2011 (Alcona County):

The Prosecutor filed a Motion in Limine barring Defendant (and Defendant's counsel of record) from offering or introducing, in the jury's presence, any evidence, testimony, remarks, questions or arguments, either directly or indirectly, relating to the Michigan Medical Marihuana Act, her alleged medical use of Marihuana or any potential defenses relating to the Act.

The Alcona County Circuit Court agreed with the People's argument. The Court ruled that in order for the Defendant to raise Section 8 of the Act, the Defendant must have no more than 12 marihuana plants, store those plants in an enclosed, locked facility, and have a valid registration identification card. The Defendant failed to meet those requirements.

Since these requirements were not met in this case, it was ordered that the Defendant is barred from offering or introducing any evidence, testimony, remarks, questions or arguments, either directly or indirectly, relating to the Michigan Medical Marihuana Act, her alleged medical use of marihuana or any potential defenses relating to the Act.

People v. Bylsma, Case No. 10-11177-FH, February 7, 2011 (Kent County):

The Defendant was a single lessor of property located in a commercial building. Pursuant to a search warrant at this building leased by the Defendant, the police obtained approximately 86-88 plants. The Defendant was a registered primary caregiver under the Act for 2 qualifying patients.

The Court held that the Defendant failed to demonstrate that he was allowed to have access to marihuana plants designated for qualifying patients other than the 2 he was linked through the Michigan Department of Community Health.

Therefore, because Defendant failed to comply with the strict requirements of the Act that each set of 12 plants permitted under the Act to meet medical needs of a specific qualifying patient must be kept in an enclosed, locked facility that can only be accessed by one individual, he was not entitled to invoke either the immunity provided by Section 4 or to assert the affirmative defense contained in Section 8.

People v. Ferguson, Jr., Case No. 10-003200-FH, January 27, 2011 (Alpena County):

The issue is whether Defendant can raise the affirmative defense before the jury in light of *People v. Kolanek,* ___Mich. App. ___ (2011).

The Court ruled that the statement in *Kolanek* was dictum. The Court noted that the *Kolanek* panel was not squarely presented with the issue. Given the *Kolanek* statement's status as dictum, the Court disagreed absent a more specific statement from an appellate court. Allowing a Defendant to raise Section 8 affirmative defense to the factfinder after the court has already concluded that the Defendant has not met his burden only invites jury nullification of the *a priori* legal conclusion reached by the court that the Defendant has not satisfied the requirement of the Section 8 affirmative defense.

People v. Chason-Pointer, Case No. -, January 13, 2011 (Genesee County):

The Court directed a verdict in favor of the Defendant. Although there was 38 ounces of "marihuana," the seeds, stems, and roots of the plant were not separated in order to determine whether the "marihuana" exceeded 2.5 ounces of "usable marihuana."

The Prosecutor argued there was enough marihuana to infer Defendant exceeded the 2.5 ounce limitation. The judge disagreed, saying the Prosecutor was asking the jury to speculate as to the weight of the "usable marihuana" as defined under the Act.

People v. Andrew Nater, Case No. 10-234179-FH, January 12, 2011 (Oakland County):

The Court ruled that a sale between two MMMA patients who are not connected via the MDCH registration process is illegal and not protected under the MMMA.

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

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.

State of Michigan v. Brandon McQueen, et. al., Case No. 10-8488-CZ (December 16, 2010):

On May 1, 2010, Defendants started a business through which they claimed they engage in lawful medical, medical marihuana related conduct pursuant to the Michigan Medical Marihuana Act.

Defendant McQueen is a registered qualifying patient and a registered primary caregiver. Defendant Taylor is a registered primary caregiver. Defendants lease lockers on their premises to other registered qualifying patients and registered primary caregivers, who become "members" of Defendants' business upon approved application, within which to store medical marihuana.

Defendants only approve an applicant for membership if the applicant is a registered qualifying patient or registered qualifying caregiver with the MDCH. Once an applicant becomes a member, he or she pays a membership fee, receives a membership number, may lease a locker, and may store medical marihuana in such locker. The members then purchase or sell the medical marihuana among other members.

Frequently, a registered primary caregiver member receives permission from his or her registry qualifying patient to store such patient's marihuana at Defendants' business and to sell such marihuana to other members. Thus, the registered qualifying patient owns the medical marihuana at all times. The members determine the price of the marihuana. Defendants' business does not own, purchase, or sell any marihuana; however, Defendants collect locker rental fees, membership fees, and receive 20% of the sales price per transfer. The business also pays a sales tax to the State of Michigan for each transfer.

On July 22, 2010, the Isabella County Prosecuting Attorney filed a complaint where it requested the Circuit Court to enter a temporary restraining order to enjoin Defendants from operating their business in their community. On December 16, 2010, the Court denied the Prosecuting Attorney's request for a preliminary injunction.

The Court held that the patient-to-patient transfers and deliveries of marihuana between registered qualifying patients fall soundly within the medical use of marihuana as defined by the MMMA.

The Court also held that because the Legislature provided the presumption of medical use of marihuana in MCL 333.26424(d), it intended to permit such patient-to-patient transfers and deliveries of marihuana between registered qualifying patients in order for registered qualifying patients to acquire permissible medical marihuana to alleviate their debilitating medical conditions and their respective symptoms.

Essentially, Defendants assist with the administration and usage of medical marihuana, which the Legislature permits under the MMMA.

People v. Koon, 10-28194-AR, November 16, 2010 (Grand Traverse County):

The Court ruled that since the Defendant is a registered medical marihuana patient, the Plaintiff (i.e. Prosecutor) is prohibited from using the standard jury instruction indicating that the bodily presence of Schedule I controlled substance is a per se violation of MCL 257.625(8). The MMMA, which supersedes MCL 257.625 *et seq.*, states that qualified patients are proscribed from operating a motor vehicle while under the influence of marihuana. Therefore, evidence of impairment is a necessary requirement… The specific circumstances of this case require evidence of Defendant's impairment."

People v. Eash, Case No. 2010-001034-FH, August 20, 2010 (Berrien County):

The Defendant was arrested on March 16, 2010, and was charged with manufacturing marihuana. On June 30, 2010, after a preliminary examination was held, the Court conducted an evidentiary hearing on Defendant's Motion to Dismiss pursuant to Section 8 of the Act.

Defendant's arrest resulted from the execution of a search warrant at his residence, in which 16 marihuana plants were located. Defendant had a valid registry card at the time of the arrest. Defendant contended that he possessed only 12 marihuana plants because 4 of the 16 plants found by the police were "clones" which are simply stems cut from a larger plant in dirt to try to get the clones to grow. Defendant also argued that he satisfied his burden under MCL 333.26428(a)(1) because Dr. Kenewell testified that, in his professional opinion, Defendant was likely to benefit from the use of medical marihuana.

The Prosecutor contended that the Defendant was not entitled to the protections of the Act because the Defendant possessed more marihuana plants than are permitted by the Act. The Prosecutor also contended that Defendant had failed to establish that Dr. Kenewell conducted a full assessment of the Defendant before determining that Defendant suffered from a serious or debilitating medical condition.

The Court ruled that the Defendant was in possession of 16 plants rather than 12 plants because "The 4 clones were not merely seeds, stalks, or unusable roots but were potentially viable marihuana plants that could produce a harvest under the right conditions." Therefore, the Court concluded that the Defendant possessed more than 12 marihuana plants which were not kept in an enclosed, locked facility and thus, subject to arrest and prosecution under Section 4 of the Act.

Next, the Court ruled that "Because Defendant has not established by a preponderance of the evidence that Dr. Kenewell completed a full assessment of Defendant's medical history and current medical condition in the course of a bona fide physician-patient relationship, Defendant's assertion of the medical-purpose affirmative defense fails on the first element and the charges against him not be dismissed."

People v. Anderson, Case No. B-10-0024-FH, August 5, 2010 (Kalamazoo County):

This case tested the validity and application of the "affirmative defense" created by section 8 of the Michigan Medical Marihuana Act, enacted in 2008 as MCL 333.26421 et seq. Defendant Ted Anderson, who did not possess a medical marihuana registration card but had discussed medical marihuana with his physician, was arrested for Delivery/Manufacture of Marihuana and seeks dismissal of the charge.

He claimed he had the requisite physician's statement, had an amount that was reasonably necessary for his continued supply, and was using it for a medical purpose. The amount Defendant had in his possession at the time of the offense exceeded the amount allowed under Section 4 of the Act.

The Court held that for purposes of its decision, the court assumed, without finding, Defendant's back pain was serious or debilitating and he had a medical purpose for using marihuana for that condition, based on a physician's professional opinion.

However, the court found the amount of marihuana he possessed was more than reasonably necessary because it exceeded the presumptively reasonable "12 marihuana plants" and "2.5 ounces of usable marihuana" limits of section 4 and Defendant had not shown his condition was so unique he needed to grow and use more than that.

The amount he possessed was nearly double the presumptive limit. While the Defendant's burden of proof is by a preponderance of the evidence, it is a heavy burden when the amount the MMA presumes to be reasonable is exceeded. Also, the plants outside were not in an "enclosed, locked facility" as required for the section 4 presumption.

Lastly, the Court stated that the court's findings of fact and conclusions of law resolve the issue of a section 8 defense in this case, so the defense may not be raised again at trial. Defendant elected his remedy by filing the motion to dismiss, much like a party in a civil lawsuit who elects to pursue an affirmative defense by a motion for summary disposition pursuant to MCR 2.116(C)(7). Both parties are bound by the result when the Section 8 defense is presented by a motion to dismiss. Neither is "entitled to a second hearing on the same matter." *People v Lenic*, 255 Mich 29, 31 (1931).

People v. Anthony Orlando, II, Case No. 10-010352-FH, July 26, 2010 (Lapeer County):

The Court held that a Defendant who is not being treated or under the care of a physician at the time he possessed marihuana cannot assert the affirmative defense under Section 8 of the Act. Therefore, since the Defendant cannot assert a section 8 defense, evidence to show the Defendant subsequently obtained a medical marihuana card is properly excluded from trial.

It should be noted that the Michigan Court of Appeals denied application for leave to appeal. *People v. Orlando, II,* Case No. 299899 (November 24, 2010).

Pursuant to the decision of *People v. Kolanek*, the MMMA defense was not intended to afford Defendants an after the fact exemption for otherwise illegal activities.

People v. Vanderbutts, Case No. 09-10276, April 12, 2010 (Cass County):

On April 21, 2010, a Cass County Circuit Court jury unanimously convicted the Defendant, Sylvester Vanderbutts of Possession with Intent to Deliver Marihuana, Manufacturing Marihuana, Maintaining a Drug House, and Possession of Marihuana.

The testimony at trial showed Defendant had 47 marihuana plants at his residence and approximately 17 ounces of loose usable marihuana throughout his house. The officers testified that the Defendant had over a year's worth of marihuana in plants alone. The testimony indicated that the Defendant would be able to conduct approximately another 2 grows within the year, giving him well over a 3 year supply in just 1 year of growing.

The Defendant raised the affirmative defense under Section 8 of Michigan's Medical Marihuana Act prior and during the trial. The Circuit Court judge ruled prior to trial (April 12, 2010) in pertinent part, that the "Defendant is not entitled to dismissal of the information because he has failed to prove that a physician has stated, within the course of a bona-fide physician-patient relationship, that he would benefit from the use of marihuana."

Further, the Circuit Court ruled that the "Defendant is not entitled to a dismissal of the information because the evidence established that he was in possession of a quantity of marihuana in excess of that reasonably necessary to ensure the uninterrupted availability of the drug for the purpose of treating or alleviating his medical condition." Lastly, the Court ruled that the "Defendant is not entitled to a dismissal of the information because he was not engaged in the acquisition, possession, cultivation, or manufacture of marihuana to treat his own medical condition, but rather engaged in that conduct for the actual, or potential, benefit of persons not permitted to possess marihuana."

People v. Brockless, Case No. 09-033323-FH-5, March 5, 2010 (Saginaw County):

The Defendant filed a Motion to Dismiss in relation to the marihuana charge pursuant to the affirmative defense provision stated in Section 8 of the Michigan Medical Marihuana Act. The Prosecution opposed Defendant’s request for dismissal, arguing that this affirmative defense was not available to the Defendant because he did not obtain a state-issued registry identification card to possess and use marihuana under the Act until after the date of the offense.

The Court ruled that the Defendant was not required to show that he possessed a valid registry identification card on the date of the offense in order to establish an affirmative defense to the marihuana charge.

People v. Partlow, Case No. 09-3933-FH, December 31, 2009 (Manistee County):

The Defendant argued that the statute should be applied retroactively prior to December 4, 2008.

The Circuit Court agreed. The Court was satisfied that the correct application of the statute was to apply it retroactively to cases that were pending when it became effective.

The result otherwise was a result that the Court suggested would be offensive to a sense of fairness.

People v. Cook, Case No. 09-47066-AR, December 14, 2009 (Marquette County):

The Defendant was arrested for possession of marihuana. After he was arrested, he obtained a certificate from a medical doctor indicating he suffered from a "debilitating condition" requiring the use of marihuana for treatment. The issue before the court was whether or not the defense of medical use of marihuana could be raised when the Defendant had not seen a doctor or obtained a medical marihuana card prior to arrest.

The judge first noted statutes are to be interpreted in their entirety. The Judge discussed the elaborate provisions in the statute for obtaining a medical marihuana card. The Judge then reviewed the statutory definitions. The statute defines "medical use" as being use by a "registered qualifying" patient. "Registered" refers to the requirement the qualifying patients obtain a medical marihuana identification card from the Department of Community Mental Health. "Qualifying Patient" refers to the requirement that a doctor certify the patient suffers from a "debilitating condition" that could be ameliorated by the use of marihuana.

Section 7 of the Act states: "The medical use of marihuana is allowed under state law to the extent it is carried out in accordance the provisions of this act." The judge held this means all other use of marihuana continues to be legal and marihuana continues to be a controlled substance. The court stated only "medical use" is permitted by this language. The definition of "medical use" in the statute requires a medical marihuana card and a physician's certificate.

The court said the opening words of the affirmative defense contained in section 8 provide: "Except as provided in section 7…." and this language incorporates the requirements of section 7 in the affirmative defense (section 8). Therefore, the Court found the Medical Marihuana Act requires both a registration card and a medical certificate must be obtained in order for possession of marihuana to be lawful.

People v. Andrzejewski, Case No. B-09-0398-FH, October 19, 2009 (Kalamazoo County):

The Defendant sought dismissal of the criminal charges for manufacture and possession of marihuana, based on the affirmative defense provided in the Michigan Medical Marihuana Act. Defendant's arrest pre-dates the effective date of the Act, but took place after the Act was approved in a referendum. The date of the offense was on November 19, 2008.

The Court relying on *People v. Rigo*, 69 Cal App 4th 409 (1999), held that the Michigan Medical Marihuana Act is not retroactive.

People v. Shawl, Case No. 09-004937, October 12, 2009 (Iosco County):

The Court held that the "Defendant was not a registered qualifying patient at the time of the arrest and is not entitled to dismissal of the case."

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

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).

People v. McGrath, Nos. 099103, 09-9104, September 9, 2009 (Wexford County):

The Wexford County Circuit Court ruled that the act is only prospective. The court ruled it will only apply as it relates to charges brought under the public health code as it relates to marihuana from the date on and after the enactment of the statute.

People v. Miron, Case No. 09-1867-FH, September 2, 2009 (Alger County):

The Defendant was arrested and charged some 5 months after passage of the Medical Marihuana Act. Defendant had not presented to the Court any information suggesting that he had a serious illness or was being treated for any particular disease or condition or had been counseled prior to his arrest that marihuana usage may have some palliative benefit for him.

It was the opinion of the Court that the intent of the MMA was not to provide individuals with a get out of jail free card by seeking out a physician after being arrested on a controlled substance abuse charge.

Under the facts, this Court found that any post-arrest approval under the MMA failed to satisfy the intent of the Act. The Act was not promulgated, in the Court's opinion, to

encourage the use of marihuana for a panoply of problems legitimate or not developed post-arrest and approximately six months after the Acts passage.

The Court noted that had the legislature intended post-arrest approvals under the MMA, the same could easily have been codified within the Act by allowing or providing for a post-arrest assertion of the affirmative defense found within the Act. As poorly written as this Act is; that aspect was not incorporated for good reason.

People v. Bliss, Case No. 09-05412-AR, September 1, 2009 (Kent County):

The Kent County Circuit Court ruled that Section 8 reveals no express indications that it should be applied retroactively.

People v. Rude, Case No. 09-002664-FH, August 21, 2009 (Alpena County):

The Alpena County Circuit Court stated that for the Act to apply and offer protection from prosecution, a physician's approval and certification must predate the cultivation or use of marihuana. The Court held that it is reasonable to embrace the exception of an exigent circumstance which may offer the Defendant relief, but the Court can find no such circumstances in these facts. The Court cited *People v. Rigo*, 69 Cal. App. 4th 409 (1999).

People v. Dietz, Case No. -, July 27, 2009 (Branch County):

The Branch County Circuit Court ruled that the statute was not intended to apply to cases pending at the time of its enactment, and therefore, the Defendant was precluded from raising the affirmative defense argument.

People v. Burke, Case No. 08-17863-FH, April 16, 2009 (Livingston County):

The Livingston County Circuit Court ruled that the statute was not intended to apply to cases pending at the time of its enactment, and therefore, the Defendant was precluded from raising the affirmative defense argument.

People v. Peterson, Case No. 09-1854-FH, April 6, 2009 (Alger County):

The Alger County Circuit Court ruled that the medical marihuana law was retroactive, and granted the Defendant's motion to dismiss predicated on the affirmative defense.

DISTRICT COURT DECISIONS

City of Dearborn v. Brandon, Case Nos. 10C214, 10C0215, March 7, 2011 (Wayne County):

The District Court found that in consequences of the lawful designation of marihuana as a Schedule I narcotic under the Controlled Substances Act the MMMA is rendered unconstitutional and void in its entirety by operation of the Supremacy Clause of the United States Constitution.

People v. Ferretti, Case No. C10-0185A, February 7, 2011 (Macomb County):

Defendant contended certain facts arose after the issuance of the search warrant and before the execution of the warrant that not only put the subject matter of the warrant in issue, but should have caused the officer to contact the issuing magistrate to determine if the warrant was needed.

The Court ruled that the officers should not have executed the search warrant without first advising a magistrate or district judge of the existence of the State issue medical marihuana cards. It was at that time the officers should have informed the magistrate of this new, additional information rather than execute the search.

Therefore, the Defendant motion to dismiss was granted.

People v. Chase, Case No. 10-FY-033, September 23, 2010, reaffirm on October 27, 2010 (Delta County):

The legislature in passing laws to insure the safety of the motoring public has indicated that regardless of the impairment, or obvious impairment, by a driver certain substances in a driver's body are still and remain illegal." Finally, the Court stated that the "Medical Marihuana Act did not abrogate their ability to prescribe what they believe to be the law that protects the motoring public."

People v. Gilbert, Case No. 10-05-068 SD, September 8, 2010 (Manistique County):

On May 7, 2010, the Defendant was arrested by the Michigan State Police for OWI and for possession of marihuana. The Defendant raised the affirmative defense under Section 8 of the Act.

On May 15, 2010, the Defendant received a certification from a physician prescribing medical use of marihuana and the Michigan Medical Marihuana Registry form was submitted to the state on May 17, 2010.

The Court rule that the Defendant's appointment with her physician was made prior to arrest, but that was all he did. There was no prior identification of the illness or

debilitating medical condition identified by a qualified physician, no reasonably necessary identified medically therapeutic or palliative benefit from the use of marihuana, and no application to the State of Michigan as required by the statute.

Therefore, the Court found that the medical use of marihuana affirmative defense was not available to the Defendant as a matter of law.

City of Troy v. Dodge, Case No. 09-000927OM-01, October 29, 2009 (Oakland County):

The Defendant filed a Motion to Dismiss pursuant to Section 8 of the Act.

The Court stated that the Defendant did not seek the protection of the Act until after he was charged with the offense of possession of marihuana. At no time prior or during the arrest did the Defendant assert that he had a medical history that required the use of marihuana, or that he had a debilitating medical condition as defined in the Act.

People v. Collins, Case No. 09-1594-SM, September 10, 2009 (Livingston County):

The Livingston County District Court ruled that provisions of MCL 333.26428(3)(b) requiring an evidentiary hearing to be held to afford the Defendant an opportunity to establish the elements in subsection (a) was only applicable after the Defendant had established the existence of a registry card at the time of offense.

People v. Martin, Case No. 09-6217-SM, September 30, 2009 (Dickinson County):

The Dickinson County District Court ruled that the affirmative defense in section 8 was subject to the limitations of section 7 which was subject to section 4. The Court held that to be protected by the statute, an individual must have the card prior to the date of the offense.

People v. Dutton, Case No. 08-2298-SM, August 20, 2009 (Eaton County):

The Eaton County District Court ruled that the Medical Marihuana Act cannot be applied retroactively. The Court stated that Section 4(a) of the act was clear and that it does not apply to a case in which Defendant was stopped with marihuana then seeks physician approval, and then gets an ID card after the event.

MICHIGAN ATTORNEY GENERAL'S OPINION

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.