The Michigan Medical Marihuana Act – Immunity and Affirmative Defense

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The 2008 Voter Initiative

PROPOSAL 08-1

A LEGISLATIVE INITIATIVE TO PERMIT THE USE AND CULTIVATION OF MARIJUANA FOR SPECIFIED MEDICAL CONDITIONS
The proposed law would:

- Permit physician approved use of marijuana by registered patients with debilitating medical conditions including cancer, glaucoma, HIV, AIDS, hepatitis C, MS and other conditions as may be approved by the Department of Community Health.
- Permit registered individuals to grow limited amounts of marijuana for qualifying patients in an enclosed, locked facility.
- Require Department of Community Health to establish an identification card system for patients qualified to use marijuana and individuals qualified to grow marijuana.
- Permit registered and unregistered patients and primary caregivers to assert medical reasons for using marijuana as a defense to any prosecution involving marijuana.



Purpose of the Law - Preamble

Sec. 2. The people of the State of Michigan find and declare that:

- (a) Modern medical research, including as found by the National Academy of Sciences' Institute of Medicine in a March 1999 report, has discovered beneficial uses for marihuana in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions.
- (b) Data from the Federal Bureau of Investigation Uniform Crime Reports and the Compendium of Federal Justice Statistics show that approximately 99 out of every 100 marihuana arrests in the United States are made under state law, rather than under federal law. Consequently, 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.
- (c) Although federal law currently prohibits any use of marihuana except under very limited circumstances, states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law. The laws of Alaska, California, Colorado, Hawaii, Maine, Montana, Nevada, New Mexico, Oregon, Vermont, Rhode Island, and Washington do not penalize the medical use and cultivation of marihuana. Michigan joins in this effort for the health and welfare of its citizens.



Overview of the Law

- · Public Health Code Charging statutes
 - MCL 333.7404(2)(d) marijuana use
 - MCL 333.7403(2)(d) possession
 - MCL 333.7401(2)(d) PWID, delivery, manufacture
- MMMA section 4 Immunity
- MMMA section 8 Affirmative Defense
- MMMA section 7 Limitations
 - Section 7(e) limitations of other other statutes
- · Federal law
- · Local ordinance



Charging Statutes

- Use of marijuana MCL 333.7404(2)(d)
- Possession of marijuana MCL 333.7403(2)(d)
- PWID, Delivery MCL 333.7401(2)(d)
 - < 5 kg MCL 333.7401(2)(d)(iii)
 - 5-45 kg MCL 333.7401(2)(d)(ii)
 - 45+ kg MCL 333.7401(2)(d)(i)
- Manufacture MCL 333.7401(2)(d)
 - < 20 plants MCL 333.7401(2)(d)(iii)</p>
 - 20-200 plants MCL 333.7401(2)(d)(ii)
 - 200+ plants MCL 333.7401(2)(d)(i)
- · Section 7(e) in conflict



Section 4 - Immunity

- · Card/ Photo ID
- · 2.5 oz "usable marihuana" per patient or less
- 12 plants per patient or less
- Locked enclosed facility
- Outdoor growing
- Transfer and acquisition
- · "Bubble bursting" severability of immunity claims



People v Carruthers

Brownies made from resin are not "usable marihuana." If a defendant possesses marihuana which does not meet the definition of "usable marihuana," he or she does not qualify for immunity under § 4. If a defendant possesses marihuana which does not meet the definition of "usable marihuana," he or she can attempt to use the affirmative defense in § 8.



State v McQueen

Patient to patient transfers are not authorized under section 4. Patients are allowed to acquire from anyone due to asymmetrical protections.



People v Bylsma

Only one of two people may possess marihuana plants pursuant to §§ 4(a) and 4(b): a registered patient or caregiver. Because defendant possessed more plants than § 4 allows and he possessed plants on behalf of patients with whom he was not connected through the department's registration process, defendant is not entitled to § 4 immunity. A defendant need not establish the elements of § 4 immunity in order to establish the elements of the § 8 defense.

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People v Mazur

Section 4(i) protections for any person depend upon patient's or caregiver's compliance with section 4. Paraphernalia is not contraband per se.



Section 4 - Distinctions from Affirmative Defense

- Registration with the State
- 2.5 oz/12 plants vs reasonable quantity of marihuana
- Protection/exemption/immunity from arrest vs protection from conviction
- Presumption of medical use/ presumption of affirmative defense
- No locked enclosed facility
- Transfers and acquisition



Section 7 - Limitations

- Section 7(b) limitations on immunity/defense
 - Negligence or professional malpractice
 - Possession/use in schools and jails
 - Smoking in public/on public transportation
 - Impaired driving
- Section 7(c) limitations on private entities
 - Insurance coverage of medical marijuana costs
 - Employee use in workplace
- Section 7(e) nullifies conflicting statutes



Section 8 - Affirmative Defense

- Physician recommendation for marijuana
 - Review of medical history and bona fide relationship
 - In-person
 - Record keeping
 - Follow-up
 - Notify primary physician if desired
 - Opinion marijuana will have therapeutic or palliative benefit
- · Reasonable quantity
- · Medical use



People v King/Kolanek

The MMMA does not require that a defendant asserting the affirmative defense under § 8 also meet the requirements of § 4. The defendant must establish that the physician's statement occurred after the enactment of the MMMA and before the commission of the offense. If defendant's motion to dismiss under § 8 is denied and there are no questions of fact, then the defendant may not reassert the defense at trial but instead may apply for interlocutory leave to appeal.

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People v Anderson

The trial court's sole function at the hearing is 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.

- Standard of proof
- Evidentiary issues



People v Hartwick/Tuttle

- The holding
- Impact on section 4
- Impact on section 8
- Footnote 77



Probable Cause

- People v Brown footnote 5
- People v Sinclair no rational basis for treating marijuana like schedule 1 (or alcohol)
- People v Campbell/People v Carruthers the issue of non-plant marijuana; THC is marijuana



People v Brown

- · People v Keller smell of marijuana
- People v Kazmierczak trash pull



Conflicts of Law

- · Section 7(e) MMMA nullifies conflicting statutes
- People v Koon driving with any presence of schedule 1/2 controlled substance
- Braska v LARA unemployment insurance
- People v Callen Trent Latz improper transport of marijuana statute
- People v Amanda Latz bond/probation conditions



Strategies of Practice

- · HIPAA release
- · LARA release
- Record certification
- Evidentiary issues Hartwick footnote 77
 - MRE 902(11) ordinary business records
 - MRE 803(6) reports of occurrences
 - MRE 104, 1101 preliminary hearings
- Assessing the strengths and weaknesses of the case
- · Forfeiture claims



Parting Thoughts

- · Where are we at now?
 - Jury trial
 - Jury instructions
- Remaining MMMA Issues
 - Employment
 - Housing
 - CPS/custody
 - Bond/probation
 - Healthcare
 - Firearms



Downloads

- · HIPAA release
- · LARA release
- Record certification
- Patient/caregiver questions
- Forfeiture claim letter
- Available at komornlaw.com/CAP

