No. _____

State of Michigan
In the Supreme Court

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

ANTHONY AGRO, *ET AL*.,

Defendant-Appellants.

ON APPEAL FROM THE 6TH JUDICIAL CIRCUIT
Court of Appeals NO. 308105,308109,308113,308111,308106, 308104,308110
Circuit Case No. 2011-2623, 25,27,28,24,22,26

DEFENDANT-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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Notice of Hearing

TO: Oakland County Prosecutor's Office
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PLEASE TAKE NOTICE that the attached Application For Leave to Appeal will be brought for hearing, with no oral arguments unless otherwise ordered by the Court, in the Michigan Supreme Court in Lansing, Michigan, on Tuesday, the 14th day of January, 2014.

Respectfully submitted,

/s/Neil Rockind

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Parties to this Appeal

The following parties are involved in this appeal:

Name	Court of Appeals Number	Attorney	IFP
R. Richmond	308110	Rockind	N
B. Agro	308109	Friedman	N
B. Johnson	308104	Friedman	Y
Ryan Fleissner	308105	Friedman	Y
Matthew Curtis	308111	Friedman	N
Nicholas Agro	308113	Friedman	N
James Agro	308105	Friedman	N

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Statement of Questions Involved

1. Did the trial court correctly dismiss the charges where the Defendants' pre-*Redden* conduct was based on a reasonable interpretation of the voter initiated Medical Marijuana Act and there were no clarifying interpretations released at the time of their conduct?

The People answer, "No."
The Court of Appeals, "No."
Defendant-Appellants answer, "Yes."

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Jurisdiction

The Court of Appeals opinion is dated September 10, 2013. The order denying the Defendant's motion for rehearing is dated October 24, 2013. This Court's jurisdiction is invoked pursuant to MCR 7.302(C)(2).

Facts

This is an application to appeal from the published Court of Appeals decision reinstating criminal charges against these defendants. *People v Johnson*, 302 Mich App 450; 838 NW2d 889 (2013). The key facts were summarized by the Michigan Court of Appeals as follows:

> These consolidated cases arose from the operation of a marijuana dispensary. Defendants Barbara Johnson and Ryan Fleissner were charged with conspiracy to possess marijuana with intent to deliver or conspiracy to deliver marijuana, MCL 333.7401(2)(d)(*iii*) and MCL 750.157a, conspiracy to possess the controlled substance delta–9–tetrahydrocannabinol (THC) with intent to deliver or conspiracy to deliver THC, MCL 333.7401(2)(b)(*ii*) and MCL 750.157a, two counts of delivery of marijuana, MCL 333.7401(2)(d)(*iii*), and delivery of THC, MCL 333.7401(2)(b)(*ii*). Defendant Anthony Agro was charged with conspiracy to possess marijuana with intent to deliver or conspiracy to deliver marijuana, conspiracy to possess THC with intent to deliver or conspiracy to deliver THC, seven counts of delivery of marijuana, and delivery of THC. Defendant Barbara Agro was charged with conspiracy to possess marijuana with intent to deliver or conspiracy to deliver marijuana and delivery of marijuana. Defendants Ryan Richmond and Nicholas Agro were charged with conspiracy to possess marijuana with intent to deliver or conspiracy to deliver marijuana and conspiracy to possess THC with intent to deliver or conspiracy to deliver THC. Defendant Matthew Curtis was charged with conspiracy to possess marijuana with intent to deliver or conspiracy to deliver marijuana, conspiracy to possess THC with intent to deliver or conspiracy to deliver THC, and two counts of delivery of marijuana. The trial court granted defendants' joint motion to dismiss all charges pursuant to the Michigan Medical Marihuana Act (MMMA),[1] MCL 333.26421 *et seq*. The prosecution appeals as of right. We reverse and remand for reinstatement of the charges.
>
> In July and August 2010, these seven defendants owned, operated, or were employed by Clinical Relief, a marijuana dispensary in Ferndale, Michigan. Clinical Relief provided marijuana to patients who possessed medical-marijuana cards. On several different days, Narcotic Enforcement Team (NET) undercover officers visited the facility and were sold marijuana and candy containing THC.

Subsequently, each defendant was arrested and bound over for trial on the charges. Defendants then filed a joint motion to dismiss in the circuit court. In the motion, they argued that "[a]t the time of their arrest their conduct was reasonable and should not be subject to criminal prosecution." Defendants argued that their "conduct was based on a reasonable understanding of the law and that they are entitled to dismissal as a matter of law...." They pointed out that the first judicial decision interpreting the MMMA was not released until after they were arrested; thus, defendants did not have the benefit of these interpretative decisions to guide their conduct with respect to the MMMA. Defendants also argued that "[t]he notion of due process and advanced notice of the conduct being prohibited is being tossed out of the window." And because the MMMA is ambiguous, defendants could have not been expected to predict that their conduct was illegal. Further, they argued, in light of the ambiguous nature of the MMMA, this Court's holding in *Michigan v. McQueen,* 293 Mich.App. 644, 811 N.W.2d 513 (2011), aff'd on other grounds 493 Mich. 135, 828 N.W.2d 644 (2013), which interpreted it, should be applied prospectively. That is, retroactive application of this decision interpreting the MMMA would violate their due process rights to understand what conduct is prohibited. The prosecutor opposed defendants' motion.

Following oral arguments, the trial court granted defendants' motion. In rendering its decision, the trial court noted that it was not giving retroactive effect to the holding in *McQueen,* 293 Mich.App. 644, 811 N.W.2d 513. The trial court also noted that it had requested defendants to specify which provisions of the MMMA were being challenged as ambiguous, and those provisions were MCL 333.26424(b), (e), and (i). Section 4(b) of the MMMA provides, in pertinent part, 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 [Department of Licensing and Regulatory Affairs'] registration process with the medical use of marihuana in accordance with this act." MCL 333.26424(b).[2] The trial court held that this provision "requires a link between the caregiver and the patient." Section 4(e) of the MMMA provides that a "registered primary caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marijuana." MCL 333.26424(e). The trial court held that the phrase "receive compensation for costs" was confusing, but rejected defendants' claim that it was ambiguous on the ground that "compensation for

> costs" does not include profit, i.e., "[c]ost is different and distinct from profit." Section 4(i) of the MMMA provides that a "person shall not be subject to arrest, prosecution, or penalty ... solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana." MCL 333.26424(i). The trial court held that "(i) juxtaposed with either or both (b) or (e) is ambiguous...." In particular, the court held that the phrase "using or administering" was ambiguous. 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. Accordingly, it granted defendants' motion to dismiss. These appeals followed.

People v Johnson, 302 Mich App 450; 838 NW2d 889, 891-92 (2013). In addition to the facts outlined by the Court of Appeals, the following facts are important to the resolution of this appeal.

The Court of Appeals reversed stating:

> Nevertheless, the trial court dismissed the charges against all seven defendants without first determining whether any defendant was entitled to the protections afforded under either MCL 333.26424 or MCL 333.26428. The trial court made no specific findings as to each of the statutory requirements. Instead, after inquiring during oral argument which specific provisions were being challenged as ambiguous by defendants—because no specific challenge was set forth in their motion to dismiss—the trial court held that one of the challenged provisions, § 4(i), was ambiguous. As set forth above, that provision provides: "A person shall not be subject to arrest, prosecution, or penalty in any manner ... solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana." The trial court summarily concluded that the phrase "using or administering marihuana" was ambiguous. Apparently, then, the trial court considered each of the seven defendants "a person" as contemplated under § 4(i), and not a "qualifying patient" or a "primary caregiver." However, even if each defendant was such "a person" contemplated under § 4(i), the trial court failed to determine that each defendant was "assisting a registered qualifying patient" with regard to each charge for which they were being prosecuted. And defendants did not challenge as ambiguous the phrase "assisting a registered qualifying patient." 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. Accordingly, we remand this matter to the trial court for reinstatement of the charges against all seven defendants

A timely request for rehearing was filed. It was denied without opinion on October 24, 2013.

An offer of proof is attached to this application outlining the proofs that counsel believes could be established at a remand hearing**.** The Offer of Proof includes the defendants had discussions with the Chief Executive Officer of Oakland County (L. Brooks Patterson) and he had believed that Clinical Relief was acting in Compliance with Michigan's Medical Marijuana Law. Defendants will further demonstrate that they attempted to fully comply with the legal guidance they received. These facts are not in the record and this offer of proof is being offered to demonstrate the need for this Court to either remand this matter or to make it clear that the Defendants are free to litigate this matter on remand.

This appeal follows.

Argument

1. The trial court correctly dismissed the charges where the Defendants' pre-*Redden* conduct was based on a reasonable interpretation of the voter initiated Medical Marijuana Act and there were no clarifying interpretations released at the time of their conduct.

Standard of Review. We review for an abuse of discretion a trial court's ruling on a motion to dismiss. People v Bylsma, 493 Mich. 17, 26, 825 N.W.2d 543 (2012). However, underlying questions of statutory interpretation are reviewed de novo as questions of law. Id; People v Johnson, 302 Mich App 450; 838 NW2d 889, 893 (2013)

In 2008, the Michigan Voter's passed 2008 Vot Int L 1 permitting the use of medical marijuana. Because of concerns of federal preemption issues, the law is written in the negative. It does not affirmatively legalize the use of medical marijuana, but extends state immunity from prosecution and a complete defense to individuals who use or assist others in using medical marijuana in accordance with the statutes.

Many individuals in law enforcement and the prosecution community have take a dim view of this law and have taken very narrow views of various provisions.[1] Proponents of medical marijuana believe that it can help with a variety of medical conditions including cancer,

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[1] *See,* e.g. J. Ooostig, *Oakland County Prosecutor Jessica Cooper Claims Medical Marijuana Law Out of Control in Michigan*, Oakland Eccentric (online edition), March 25, 2011 available online at *http://www.mlive.com/news/detroit/index.ssf/2011/03/oakland_county_prosecutor_jess_2.html* (last visited December 13, 2013).

glaucoma, HIB, Hepatitis C, Louis Gehrig's disease, Crohn's disease, agitation of Alzheimer's disease, and nail patella Opponents believe that this is the "camel's nose" for total legalization of recreational marijuana use and sales. They also believe that there are many drug dealers masquerading as medical marijuana caregivers. This has resulted in a perfect storm in terms of litigation. A Westlaw search shows that there are currently eighty-five decisions in Michigan involving medical marijuana.[2] Many of these decisions involved appellate reversals of trial courts. In one case, the Court of Appeals reversed a trial court ruling that certain medical marijuana dispensaries were legal under Michigan law and gave their reversal immediate effect.[3] *That same* day law enforcement raided various dispensaries around the state.[4]

Others involved this Court reversing the Court of Appeals. Yet other decisions involved courts which disagreed about the rationale (but not the result) of the lower court.[5] Lastly, there have been cases where this Court has said that all lower courts have gotten the issue wrong.[6]

In this climate, it is almost impossible for attorneys advise clients about the proper usage and possession of medical marijuana. Circuit judges are often refusing to grant declaratory

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[2]Counsel's search was "advanced: "medical marijuana" or "medical marihuana" & DA(aft 12-31-2007 & bef 01-01-2014."

[3] *State v McQueen*, 293 Mich App 644, 674; 811 NW2d 513, 531 (2011), *app gtd* 491 Mich 890 (2012) and *aff'd on other grounds* 493 Mich 135 (2013)

[4]J. Smoker, *Michigan Medical Marijuana Dispensaries Close Up Shop After Court Ruling*, Detroit Free Press, August 23, 2011 (reprinted at http://www.theweedblog.com/michigan-medical-marijuana-dispensaries-close-up-shop-after-court-ruling/) (last visited December 16, 2013).

[5]*See, e.g. State v McQueen*, 493 Mich 135; 828 NW2d 644 (2013) (reversing *State v McQueen*, 293 Mich App 644; 811 NW2d 513 (2011))

[6]*See, e.g. People v Green*, 494 Mich 865; 831 NW2d 460 (2013) (reversing Court of Appeals and lower court).

rulings and lower court rulings concerning this law are constantly being challenged. The question presented in this climate is when a person can be constitutionally prosecuted for violating Michigan's general statutory ban on the use, delivery or sale of marijuana where there are unresolved ambiguities about the extent of Michigan's law.

This case is not about "ignorance of the law."[7] This case is about failure to predict future court decisions interpreting a statute our appellate court has conceded is poorly crafted and which many lower court judges interpreted consistent with the defendants' interpretations of the law. Further, while this case has been pending many of the Court of Appeals interpretations of the Medical Marijuana statute have been reversed by the Michigan Supreme Court.

Defendants also provided the lower court with a statement by Oakland County Chief Executive L. Brooks Patterson stating that whether dispensaries can operate in a community is a matter for local control. Defendant also made an offer of proof consistent with the preliminary examination record in this case that the property had been inspected by the local police and that the mayor had signed off on the same. While the prosecution talks about what the record does show and the record does not show, defense counsel has repeatedly urged the Court of Appeals to grant a remand on that point if it had any doubts and the Court refused.

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[7] The prosecution's argued below that ignorance of the law is not a defense to a specific intent crime. "The Defendants may attempt to assert that they should not be blamed if they did not know the law. However, "ignorance of the law" is no excuse. If the Defendants knew all the facts which made their conduct illegal, even if they did not know their conduct violated the law, they did have a guilty mind; i.e., sufficient mens rea at the time they committed the offenses." Prosecution's Brief in Support of Motion in Limine, p. 19. Their proposed relief is to bar this defense from a jury. *Id.,* at 26.

The evidence showed that the police used counterfeit medical marijuana cards and falsified data on medical questionnaires to conduct these purchases. When viewed collectively, this evidence more than supports the Defendants' contentions that they attempted to comply with a law which had not been subject to any interpretation in published appellate decisions (or the best of counsel's research even unpublished appellate decisions) at the time.

Contrary to the prosecution's position below, the Michigan Court of Appeals has already ruled that the "ignorance of the law" principle does not fully apply where the Defendants rely on official interpretations of the law by government officials.[8] Defendant appropriately determined to the trial court's satisfaction that its interpretation of law was reasonable at the time. In opposing this position, it should be noted that the prosecution has simultaneously opposed the Defendant's entrapment by estoppel argument saying that this should be developed below while at the same time arguing that the Defendant failed to demonstrate individualized good faith reliance on the law at the time of the offense. If it is an objective determination, a defendant shouldn't be required to demonstrate this. If it is a mixed (objective and subjective determination), then the Court of Appeals should have remanded the matter for an evidentiary hearing. Either way, their ruling was incorrect.

The first appellate court decision to interpret this statute was not released until after these defendants were arrested. Then, many of the key provisions were only interpreted in a non-

[8] The entrapment by estoppel defense covered infra "is, in essence, a significant exception to the basic legal maxim that ignorance of the law is no excuse." *People v Woods*, 241 Mich App 545, 560; 616 NW2d 211 (2000).

binding concurrence.[9] In a concurring opinion frequently referenced by the Prosecution, Judge O'Connell noted:[10]

> The problem, however, is that the MMMA is inartfully drafted and, unfortunately, has created much confusion regarding the circumstances under which an individual may use marijuana without fear of prosecution. Some sections of the MMMA are in conflict with others, and many provisions in the MMMA are in conflict with other statutes, especially the Public Health Code.

In that opinion, Justice O'Connell also warned the public: "Until [the Michigan] Supreme Court and the Legislature clarify and define the scope of the MMMA, it is important to proceed cautiously when seeking to take advantage of the protections in it. Those citizens who proceed without due caution will become test cases and may lose both their property and their liberty."

These defendants didn't have this warning. They moved as cautiously as they could under the circumstances. They sought inspections and opinions from Ferndale. They reviewed documents and relied on documents released by the Oakland County Executive L. Brooks Patterson which said that this was a local issue and that it was up to the municipalities. Despite their precautions and outreach, they have been charged with a crime because they were not able to foresee legal interpretations that many circuit court judges around this state could not foresee. A contrary reading of the law means that every medical marijuana patient assumes the risk of a criminal prosecution until the Michigan Supreme Court has completely "blazed the trail." *This process encourages the prosecution to continue to litigate to engraft new requirements into the law which can be applied retroactively*.

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

[10] *Id.,* at 93–94 (O'Connell, J. concurring).

Prosecutors are pressing a view that any variation from Michigan's Medical Marijuana law no matter how trivial bursts the protection of the voter initiated referendum and allows the prosecution to treat people who are trying their level best to comply with the law as career drug dealers. For example, in July of 2012, the Oakland County Prosecutor convinced the Court of Appeals that two caregivers could not share a common secured and locked growing area.[11] In *People v Nicholson*,[12] the Court overturned a trial court ruling which held that a defendant forfeited the protections of the MMMA if (s)he didn't have the state issued permit on his/her person at the time of the police encounter. The Court declined to adopt an exceptionally strict construction of the word possession which would have resulted in such a forfeiture.[13]

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[11] *People v Hinzman*, No. 308909, 2012 WL 3023825 (Mich Ct App July 24, 2012).

[12] *People v Nicholson*, No. 306496, 2012 WL 2401399 (Mich Ct App June 26, 2012).

[13] *Id*. Similarly, the Court of Appeals overturned a narrow interpretation of Section 4 immunity which would have immunized a Defendant from a medical marijuana prosecution under state law, but not under a city ordinance. This Court wrote:

> "The purpose of the MMMA is to allow a limited class of individuals the medical use of marijuana, and the act declares this purpose to be an 'effort for the health and welfare of [Michigan] citizens.' " The ordinance at issue in this case conflicts with § 4(a) of the MMMA, which grants immunity to medical marijuana users and provides in pertinent part that a "qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege...." While the grant of immunity set forth in § 4(a) does not specifically limit its prohibition on arrest, prosecution, or penalty to state law, it cannot be disputed that state medical marijuana laws do not and cannot supersede federal laws criminalizing the possession of marijuana.

Ter Beek v City of Wyoming, 297 Mich App 446; 823 NW2d 864 (2012), *app gtd* 493 Mich 957 (2013) (citations omitted).

Contrary to the Court of Appeals decision, strict construction of penal laws cannot be abrogated. The genesis of the doctrine of strict construction and the corollary doctrine of lenity is the first Justice Marshall's opinion in *United States v Wilenberger*, 18 US (5 Wheat) 76, 95 (1820). There, Chief Justice Marshall stated that the purpose of the doctrine favoring the Defendant was based on the "tenderness of the law for the *rights of individuals*.." *Wilenberger* is based on the "necessary condition of a free society is the ability to avoid going to prison; one has that ability only if one can know what behavior will lead to prosecution and punishment."[14] Similarly, Justice Scalia has invoked the doctrine of lenity to defend his position that we should not consider legislative histories when construing statutes.[15] Further, Justice Scalia stated that this Court should start its analysis with these principles and not simply use it as a "tiebreaker."[16]

The rule of lenity does not reflect a lack of sympathy with the legislature's efforts to proscribe evil or antisocial conduct, but simply provides the appropriate judicial response when the legislature has not clearly spoken:[17]

> And this is not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other

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[14] William J. Stunz, *The Pathalogical Politics of Criminal Law*, 100 Mich L Rev 505, 564 n 227 (2001).

[15] *United States v RLC*, 503 US 291, 309 (1992) (Scalia, J. concurring). *United States v RLC*, 503 US 291, 309 (1992) (Scalia, J. concurring).

[16] *Id*.; *United States v Santos,* 553 US 507, 514–15, 128 S Ct 2020, 2025–26, 170 L Ed 2d 912, 920–21 (2008) (Scalia, J.).

[17] *Bell v United States*, 349 US 81, 84; 75 S Ct 620; 99 L Ed 2d 905, 910 (1955).

> enactments, not cased in technical language are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses.

Michigan is not the first jurisdiction to attempt to abrogate the rule of strict construction of penal laws. The California Supreme Court refused to enforce a California statute which commended the Courts to construe its criminal laws "according to the fair import of their terms." Cal. Penal Code § 4. In *Keeler v Superior Court*, 2 Cal 3d 619, 634; 470 P2d 617, 626; 87 Cal Rptr 481, 490 (1970), the Court noted the due process backbone underlying the twin doctrines of strict construction of penal laws and lenity and stated that the statute created separation of powers problems and violated a criminal defendant's right to notice of the charges against him. *Id* at 633-699.

In finding that the Public Health Code's purported liberal construction of penal rule trumped the Defendant's doctrine of lenity argument, the Court of Appeals relied on this Court's ruling in *People v Denio*, 454 Mich 691, 699; 564 NW2d 13, 17 (1997). *Denio*, however, dealt with a consecutive sentencing provision and the constitutional arguments presented here were not before the Court. The Court was not dealing with the issue of due process notice and this Court erred in expanding the language beyond the facts of that case. [18] "It is a maxim, not to be

[18] *Atwood v Mayor & Common Council of Sault Ste Marie*, 141 Mich 295, 296, 104 NW 649 (1905).

disregarded, that general expressions in every opinion, are to be taken in connection with the case in which those expressions are used."[19]

By narrowly reading the Medical Marihuana Act and expansively reading the penal statute, the Court of Appeals has effectively created a structure, which encourages novel prosecution theories against medical marijuana users. This will result in a chilling effect on patients partaking of the very rights that the voter's intended to give them.

Prosecutors do not like the voter initiated referendum and are using their legal skills to find a deficiency *de jour* to deprive criminal defendants of the protection of the Act. The notion of due process and advanced notice of the conduct being prohibited is being tossed out of the window. An educated medical marijuana user reviewing the state of the law may reasonably decide that the danger of attempting to use medical marijuana is so fraught with danger that he/she may forego the use of needed treatment rather than risk the danger of incarceration.

As we approach 2014 and have the benefit of numerous rulings concerning various distribution approaches, it is easy to say that the *McQueen* model was contrary to the MMMA. It was quite a different story when this case took place. It should also be noted that *McQueen* is a civil suit brought by the Isabella County Prosecutor's Office to enjoin a nuisance. Therefore, the due process issues raised in this case simply were not present in the *McQueen* case. This approach (which counsel commends) was an excellent way to deal with an issue where

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[19] *Zenith Radio Corp v United States*, 437 US 443, 462, 98 S Ct 2441, 57 L Ed 2d 337 (1978) (quoting Co*hens v Virginia*, 6 Wheat 264, 399, 5 L Ed 257 (1821)) As Judge Kolenda from the Kent Circuit Court (now retired) once explained: "Unnecessary pronouncements are often incorrect because they are made without the crucial focus provided by making an actual difference." (quoting *Cohen v Virginia,* 6 Wheat 264, 299; 5 L Ed 257, 290 (1821)). *Morgan v Grand* Rapids, 2004 WL 5229295 (attached).

reasonable minds could differ. It allows courts to decide the issue in a civil manner and avoids tarnishing people's names with a criminal record for not being psychic.

Similarly, while this case was pending in the Court of Appeals, this Court overturned two of this Court's rulings interpreting the MMA.[20] The Court's ruling in *Kolanek* expressly rejected the fact that a Defendant had to prove all the facts of a Section 4 immunity defense in order to present a Section 8 defense to the jury. By implication, this directly overruled *Blysma*, a case which the prosecution used to suggest a defendant can never claim an affirmative defense if they have more than the number of plants authorized in Section 4. This is no longer the law under *Kolanek*. A Section 8 defense to a jury can still be presented even where a Defendant's amounts exceed Section 4's limits. This Court's ruling in *People v Danto* is heavily based on the overruled decision in *Kolanek* and the premise that a Defendant has to meet the elements of Section 4 immunity in order to present a Section 8 defense.[21]

Each week, new interpretations of the law are being released; many of which conflict with prior understandings of the law. Like tax law, this Court should hold that a good faith attempt to comply with the statute or a substantial compliance is a defense. The Defendants' are accused of violating specific intent offenses. Intent is critical.

Contrary to the frequently uttered saw, in regulatory areas "ignorance of the law" is often a defense. The Michigan Supreme Court has held that when the reach of a statute is unclear and

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[20] *People v Kolanek*, 491 Mich 382; 817 NW2d 528 (2012); *People v King*, 291 Mich App 503; 804 NW2d 911 (2011), *app gtd* 489 Mich 957 (2011) and *rev'd sub nom*. *People v Kolanek*, 491 Mich 382 (2012).

[21] *People v Danto*, 294 Mich App 596, 822 NW2d 600 (2012).

the Defendant's conduct is not malum in se, Courts should rule prospectively. In fact, the Michigan Supreme Court has in fact on some occasions even extended the ruling to conduct that is clearly malum in se.

Without turning this brief into a pro-marijuana advocacy piece, it is important to stress that many people did not originally see our Medical Marijuana Act as a narrow exception to the general rule that marijuana is a dangerous and illegal drug. The voters overwhelmingly passed a law designed to allow people to be treated with medical marijuana. The preamble to this 2008 Act stated:

> "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."

The voters initiated referendum contained extensive fact findings about the beneficial nature of the drugs when they adopted by reference the National Academy of Sciences research paper on the subject. Without the benefit of this defense, no reasonable person would dare avail themselves of the protections of a law which experienced appellate lawyers cannot accurately interpret. Even the principle drafter of the original voter referendum based initiative has confessed that she has not been able to accurately predict how the Michigan Courts would interpret it. The voter initiated referendum adopted extensively from the National Academy of Science's paper which found that marijuana had beneficial medical purposes. Well established doctrines of law hold that documents which are adopted by reference in a statute are treated as if

they are incorporated directly in the statute.[22] It was perfectly reasonable to believe that the statute would be construed in a fashion designed to insure that patients would be able to easily get their medication.

A reasonable pre-*Redden* reviewer of the law could easily see that a Court would not attempt to harmonize a law which said that marijuana had no medicinal use with a law that said "yes it did." Typically the voters are attempting to override a legislative judgment.[23] Their decision may be attempting to make a "sea change" rather than a minor tweak in an established system. As the California Court of Appeals recognized:[24]

> " [O]ur review of this appeal is also strictly circumscribed by the long-established rule of according extraordinarily broad deference to the electorate's power to enact laws by initiative. The state constitutional right of initiative or referendum is 'one of the most precious rights of our democratic process.' [Citation.] These powers are reserved to the people, not granted to them. Thus, it is our duty to ' ' 'jealously guard' ' ' these powers and construe the relevant constitutional provisions liberally in favor of the people's right to exercise the powers of initiative and referendum."

Again, the question is not whether Michigan law permitted dispensaries, but whether a reasonable person operating before *People v Redden* could have concluded that Michigan law did. This Court should remember that a number of judges around this state found that Michigan's Medical Marijuana Law effectively abrogated many of the previous prohibitions contained in our

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[22]Marijuana and Medicine: Assessing the Science Base, http://www.nap.edu/openbook.php?record_id=6376&page=2 (last visited Aug. 22, 2012).

[23]*Carson v Oxenhandler*, 334 SW2d 394, 398 (Mo Ct App 1960) ("It is said that the adoption of the initiative and referendum as a part of the organic law in some jurisdictions came about as a result of the growth of dissatisfaction of the people with their legislative bodies").

[24] *Citizens for Planning Responsibly v Cnty of San Luis Obispo*, 97 Cal Rptr 3d 636, 641–42; 176 Cal App 4th 357 (2009).

law.[25] It is fundamentally unfair to punish lay people for failing to predict interpretations future legal interpretations that many learned jurists missed.

The State alleges that the Defendants did not reasonably rely on this law because they operated with a profit motive. This is a non-textual exception that has been created in case law that did not exist at the time of the offense and is currently before the Supreme Court in *McQueen*. The MMA provides that a caregiver can recover their cost[26] and there is nothing in the statute which prohibits them from making a profit. The Prosecutor's position is lifted from *McQueen* which did not exist at the time of the trial. Similarly, there is nothing in the statute which links the caregiver and the patient. This again was the product of later Court of Appeals opinions. Further, it should be noted that while this Court has discussed the role of patients and primary caregivers, these are not the only ones protected under this Act. Section 4 immunity is

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[25]*Cf People v Brown*, 2012 WL 3705325 (August 28, 2012) (overturning trial court ruling which held that medical marijuana was effectively legal); *People v Koon*, 296 Mich App 223; 818 NW2d 473 (2012) (same).

[26]The relevant provision provides: "A registered primary caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana. Any such compensation shall not constitute the sale of controlled substances." MCL 333.26424. Compensation has been held to include compensation for labor. *See* 26 USC 261 ("compensation for services"). See also o *In re Im*, 495 BR 46 (2013). More importantly, nothing states that this provision negated any other mechanism of reimbursement. *Cf Bell Atl-Pennsylvania, Inc v Com, Tpk Com'n*, 703 A2d 589, 591 (Pa Commw Ct 1997), *aff'd* 552 Pa 41 (1998) (provision providing for "compensation of costs" associated with damaged or destroyed property did not preclude court from also awarding costs for having to move property). The Court of Appeals's opinion utilized the controversial tool of statute construction known as expression unius maxum est exclusion alterius – the express mention of certain things precludes the inclusion of other things by implication. See ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 63 (2012) (criticizing doctrine). Reasonable minds could differ about the extent that the statute permitted compensation for labor, overhead, and other expenditures and reasonable minds could differ the statute barred other forms of remuneration.

also provided to people who provide assistance to patients who are not primary caregivers.[27] Lastly, another provision in the statute provides that a registered caregiver or patient can be prosecuted for sales if the person sells the drugs to an individual "not allowed to use marihuana for medical purposes."[28] A reasonable reviewer of the statute could interpret the statute to provide that a sale to an individual who *was allowed* to use marihuana for medical purposes would be permitted under the statute. The express mention of prohibited conduct could allow a reasonable person to conclude that the opposite conduct was not included. Here, the police officers presented a sheriff-manufactured counterfeit medical marijuana card and completed a medical questionnaire with fake information.

Statutory construction is not mathematics. As Professor Llewellyn recognized over fifty years ago, the Canons of Statutory Construction are often at war with each other.[29] For every rule of statutory construction there is an equal and opposite rule of statutory construction. In that article, Professor Llewellyn systematically went through twenty-eight of the Canons of Statutory Construction and demonstrated that a conflicting Canon could be invoked in most cases to reach a conflicting result.

For example, this Court stated that the voter initiated referendum concerning medical marijuana should be given its ordinary meaning.[30] In an earlier decision, however, the Michigan Court of Appeals said that initiatives should be construed to "effectuate their purposes" and to

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[27]MCL 333.26424

[28]MCL 333.26424

[29] K. Llewellyn, *Remarks on the Theory of Appellate Decision and the rules or Canons about How Statutes are to be Construed*, 3 Vand L Rev 395 (1950).

[30] *People v Reed*, — NW2d —, 2011 WL 3820071 (Mich Ct App Aug 30, 2011).

"facilitate rather than hamper the exercise of reserved rights by the people."[31] The California Supreme Court, however, says that in order to give effect to the citizen's referendum power, these laws should be liberally construed.[32] The language of the Act assumes that people will benefit from medical marijuana and that fear of criminal prosecution and professional license revocation would deter people from being caregivers. It can easily be argued that individuals who voted for this law would not have endorsed a strict construction of the exemption with a series of felony prosecutions for individuals who could not foresee future judicial interpretations of the law.

Similarly, reading the Medical Marijuana Act in *pari materia* with the Controlled Substance Act, a court could easily conclude that medical marijuana usage was an implied repeal of a portion of the Controlled Substance Act. While implied repeals of laws may disfavored, we are also talking about a penal law which must be constitutionally construed and doubts must be resolved in the accused's favor. [33]

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[31] *Welch Foods v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995).

[32] As Justice Trobriner of the California Supreme Court noted that voter initiated referendums are the ultimate expression of democracy by the people and it is the "duty of the courts to jealously guard this right." Based on this: "[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." *Associated Home Builders etc, Inc v City of Livermore*, 18 Cal 3d 582, 591; 135 Cal Rptr 41 (1976) (Trobriner, J. concurring) (citations omitted).

[33] This is part of the time-honored rule that penal statutes are construed in favor of the defendant. As Chief Justice Marshall of United States Supreme Court stated in 1820:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain

In *Reed*, the Court relied on the "absurd results" doctrine of the Canon of Statutory Construction.[34] That doctrine says that this Court should avoid construing a statute in a manner that creates absurd results. The Court, however, failed to even take note of Justice Young's opinion for the majority of the Court decrying this Canon of the statutory construction as a tool designed to encourage results oriented jurisprudence and refusing to follow the same.[35] In that case, Justice Young writing for the Court found that an immunity agreement given to a prosecution witness in exchange for his testimony did not carry with it an implied agreement to testify truthfully. In *Reed*, the Court found that failing to apply common sense in interpreting the

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> principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is todefine a crime, and ordain its punishment.

United States v Wiltberger, 18 US (5 Wheat) 76, 95, 5 L Ed 37 (1820). As to the corresponding "rule of lenity," *see Huddleston v United States*, 415 US 814, 830-831; 94 S Ct 1262; 39 L Ed 2d 782 (1974), quoting *Rewis v United States,* 401 US 808, 812; 91 S Ct 1056, 28 L Ed 2d 493 (1971).

[34] The Court wrote:

> We note that statutes should be construed so as to avoid absurd results. It would qualify as absurd if it were possible to assert the § 8 affirmative defense by obtaining a physician's statement after the crime has been committed but before an arrest has been made. The law would provide less incentive to obtain a qualifying physician's statement if it were construed the way defendant argues. This interpretation would also place too much emphasis on the police decision to arrest a suspect rather than the illegal conduct undertaken by that suspect."

People v Reed, 294 Mich App 78; 819 NW2d 3 (2011) (citations omitted).

[35] *People v McIntire*, 461 Mich 147, 155; 599 NW2d 102 (1999).

medical marijuana referendum would mean that a savvy drug user or dealer might be able to defeat a prosecution by obtaining an after the fact physician's statement. The Court could just as easily have adopted Justice Young's viewpoint and found that such argument was contrary to the principles of textualism outlined in *McIntire*.

The point of this discussion is not to urge disobedience with published appellate decisions, but to suggest that these rulings were not self-evident. In statutory construction cases in particular, dissents are often every bit as reasonable as the majority as the majority opinion. As a U.S. Supreme Court remarked in a related context, "We are not final because we are infallible, we are infallible because we are final."[36]

1.1 Failing to Predict How a Future Court Will Interpret an Ambiguous Statute is Not "Ignorance of the Law".

Justice Cardozo was noted: "Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable."[37] As our body of law has grown far more complex and is often been enforced through regulatory processes, the notion that every man should "know the law" has become a practical impossibility.

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[36] *Brown v Allen*, 344 US 443, 540 (1953) (Jackson, J. concurring).

[37] Benjamin N. Cardozo, The Growth of the Law 3 (1924) (as quoted in *Complex Times Don't Call For Complex Crimes*, 89 NCLR 1849, 1878 (2011)). "Fair warning mandates that it is made clear to people what the law intends to do if they cross a certain line. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. No one should be left to speculate about what constitutes a crime or about the meaning of a penal statute. *People v Yamat*, 475 Mich 49, 67; 714 NW2d 335 (2006) (Weaver, J.).

Over the last fifteen years, courts have increasingly taken notice of this and recognized that ignorance of the law sometimes is an excuse.[38] The United States Supreme Court in particular has recognized that ignorance of the law and mistake of fact is sometimes a defense to a criminal charge, even a strict liability offense.[39]

In *Cheek*, the defendant refused to pay his taxes, believing that the income tax was unconstitutional.[40] The Court recognized that the tax code is extremely complex, and found that in such cases, defendants must be aware of the law and choose to violate it if they are to be found "willful" under the criminal tax statutes. [41]

In *Ratzlaf*, the Defendant was convicted of money laundering for willfully violating the antistructuring provisions of the law. The Court per Justice Ginsburg held that in order to convict the Defendant, the Government was required to prove that the accused knew that his structuring of a transaction violated the money laundering laws.

Federal law required organizations receiving $10,000 or more in cash to report the transaction to the federal government. Ratzlaf racked up $160,000 in casino debts and was given

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[38] Richard E. Meyers, *The Jurisprudence Of Willfulness: An Evolving Theory Of Excusable Ignorance*, 48 Duke LJ 341 (1998).

[39] *See Staples v United States*, 511 US 600, 622-23 (1994) (interpreting a facially strict liability statute to require a *mens rea* element and holding that ignorance of factual characteristics of the gun negated proof of *mens rea*); *Ratzlaf v United States*, 510 US 135, 136-37 (1994) (holding that a money laundering statute requires the government to prove the defendant acted with knowledge that the conduct was unlawful); *Cheek v United States*, 498 US 192, 205 (1991) (creating an ignorance of tax law defense); *Liparota v United States*, 471 US 419, 434 (1985) (holding that defendant must know that food stamps were acquired in an unauthorized manner).

[40] *Id.,* at 194-95.

[41] *Id.,* at 199-200.

one week to pay the debt off. He showed up at the Nevada casino with $100,000 in cash. The casino informed him that they needed to report the transaction but would not need to do so if he had a cashier's check.

The casino provided Mr. Ratzlaf with a limousine, a driver, and a casino employee to convert the cash into cashier's checks. They proceeded to go to a number of banks purchasing cashier's checks for less than a $10,000 reporting threshold. This was a clear violation of the anti-structuring provisions of the law.

The Defendant claimed that the Government had to prove that he knew about and violated the anti-structuring provisions of the law. The Ninth Circuit disagreed, citing the adage about ignorance of the law not being an excuse.[42] The high court disagreed. The Court stated that currency structuring was not inherently nefarious and that innocent individuals could be easily swept up by this law if the Government was not required to demonstrate their actual knowledge of the law. [43]

In *Staples*, the Defendant was charged with possessing an unregistered machine gun. Justice Thomas writing for the majority found that the Government was required to prove that the Defendant had to know that the gun he possessed had the characteristics that brought it within the statutory definition of a machine gun. The National Firearms Act penalizes the ownership of an unregistered machine gun. Mr. Staples was arrested because his factory manufactured semi-automatic rifle had been illegally modified to fire in fully automatic mode.

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[42] *United States v Ratzlaf*, 976 F2d 1280, 1284 (9th Cir 1992).

[43] *Ratzlaf v United States*, 510 US 135 (1994).

The lower court had ruled that the Government was not required to prove that the Defendant knew of the weapon's physical properties.

Staples is significant because the statute was silent about the required intent. The Court found that even though the statute was silent about the required *mens rea*, this does not mean "that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal." [44]

In *Staples*, Justice Thomas continued by noting: "As we have observed, '[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."[45] Justice Thomas further took notice that abrogating a scienter requirement would allow an otherwise law abiding person to get convicted of a felony. He then noted that the potential ten year penalty that the individuals were looking at further compelled his construction. "The potentially harsh penalty attached to violation of § 5861(d)-up to 10 years' imprisonment-confirms our reading of the Act. Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*."[46] Based on this, Justice Thomas distinguished the offenses from minor regulatory offenses, which often do not have a scienter requirement. "In rehearsing the characteristics of the public welfare offense, we, too, have included in our consideration the

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[44] *Staples v United States*, 511 US 600, 605; 114 S Ct 1793 (1994).

[45] *Id.,* at 605. See also *Morissette v United States,* 342 US 246, 250; 72 S Ct 240, 243; 96 L Ed 288 (1952). ('The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.")

[46] *Staples,* 511 US 600, 616; 114 S Ct 1793 (1994).

punishments imposed and have noted that 'penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation."[47] Criminal sanctions are not simply another enforcement tool in the regulator's arsenal to promote public policy objectives. A criminal sanction is fundamentally different in character."[48]

Because the Defendants operated with a good faith belief that their conduct was protected under the Michigan Medical Marijuana Act, the trial court correctly dismissed the charges. The Court of Appeals erred in reversing this ruling.

1.2 The Clarifying Judicial Interpretations of the Statute Should be Applied Prospectively.

The Prosecution proceeds from the assumption that the Defendants should have knowledge of all the appellate decisions which were released *after* they were arrested and should have conformed their conduct to the subsequently released decisions. This is not the case.

This Court dealt with a related issue a number of years ago in *People v Dempster*.[49] Phyllis Dempster was convicted of selling unregistered securities in violation of the Uniform Securities Act. Ms. Dempster unsuccessfully argued that the instruments she was selling fell within the commercial paper exemption to the act.

The Court, per Justice Kavanagh, stated that the exemption only applied to "prime quality commercial paper" and that Ms. Dempster's instruments did not meet the definition of this

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[47] *Id.*, at 618.

[48] Complex Times Don't Call For Complex Crimes, 89 NCLR 1849, 1855 (2011) (quoting Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 Loy LA L Rev 867, 883 (1994).

[49] *People v Dempster*, 396 Mich 700; 242 NW2d 381 (1976).

exemption. The Court, however, reversed her conviction holding that because the clarifying gloss was applied to her conviction after the act was done, they could not let her conviction stand.

The Court stated:[50]

> "It is contended that even if we hold that these instruments were not exempted from the registration requirements of the Uniform Securities Act as commercial paper, it would be a denial of due process to impose this interpretation retroactively and sustain defendants' conviction. Defendants argue that the record in this case provides evidence that even those charged with the enforcement of the State's securities law were of the view that if these instruments fit within the Uniform Commercial Code concept of 'commercial paper', they would be exempt from registration. There is support for that contention in the record of Mr. Hueni's testimony.
>
> Because these instruments fit within an acceptable definition of commercial paper, it is contended that the defendants were free to rely on such a definition unless the statutory language clearly indicated otherwise."

The Court stated that Ms. Dempster had a due process protected right to understand what was prohibited and what was permitted. The Court stated: "Exemptions and provisos within a criminal statute must be defined with the same specificity as the prohibitive language of the statute. This Court is not able, within the bounds of due process, to 'interpret' a criminal statute which contains an ambiguous exemption such that it results in conviction of the defendant charged in the specific case. That is not the 'fair warning' demanded by the Constitution."[51] The

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[50] *Id.*, at 714.

[51] *Id.*, at 715.

Court stated that its decision is designed to provide a clarifying gloss to future defendants, but that this gloss cannot be applied retroactively. The Court stated that the retroactive application of such a clarifying interpretation would act like an *ex post facto* law and deprive the defendant of the due process required under the law. The Court cited back to the first Justice Marshall's opinion in *Wiltberger*, and stated that a contrary approach would undercut the very purpose of notice required in our criminal law. "[W]hile the construction we have placed on the commercial paper exemption is valid for the future, 'it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal."[52]

Similarly in *Marks v United States*,[53] the Court held that the Due Process Clause prohibited the retroactive application of a harsher obscenity test standard, even though the earlier (more pro-defendant) instruction was announced by the court in a non-binding plurality opinion. This Court should note that *State v McQueen* was a civil suit, not a criminal prosecution. Therefore, the Court did not need to address the issue. Further, there is nothing which suggests that the issue was briefed or addressed by the defendant in the other cases. Therefore, any argument that those Courts did not speak to this issue was not before the Court and was not

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[52] *People v Dempster*, 396 Mich 700, 717; 242 NW2d 381 (1976). In fact, existing Michigan law has applied the defense to *malum in se* conduct. *See also People v Stevenson*, 416 Mich 383; 331 NW2d 143 (1982) (year and a day rule); *State v Picotte*, 261 Wis 2d 249; 661 NW2d 381 (2003) (same).

[53] *Marks v United States*, 430 US 188; 97 S Ct 990; 51 L Ed 2d 260 (1977).

decided.[54] This Court must remember that the voter initiated referendum was designed to get needed medication to often terminal patients. Requiring patients to wait until the law completely settles would effectively negate the benefit of the Act and would leave these individuals at risk to every new and creative statutory construction argument that a clever prosecution with an anti-medical marijuana bias could create.

The People say that the due process exception outlined in this brief only applies to "previously innocent conduct."[55] This is not the law. Again, unlike *Rogers v Tennessee* , the Defendants here did not conduct which was *malum in se* (murder). Marijuana is not *malum in se*. Marijuana was legal until the 1920s.[56] Similarly, *People v Doyle*,[57] dealt with an habitual offender augmentation. The Defendant did not rely on the law as it existed or the ambiguities in acting. Like Ms. Dempster, these defendants absolutely did. The prosecution seems to argue that even though marijuana usage by a registered patient is somehow amorphously illegal, (even though immunized), a defendant's conduct is not "innocent" and they cannot rely on official assurances that their conduct was lawful. They cite no precedent for this construction. Again, these Defendants did not have the benefit of any of the clarifying gloss provided by this Court's later rulings.

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[54] Points decided in this manner are not binding as precedents *See Atwood v City of Sault Ste Marie*, 141 Mich 295, 297; 104 NW 649 (1905).

[55] People's Brief, p 37.

[56] Legal History of Cannabis, http://en.wikipedia.org/wiki/Legal_history_of_cannabis_in_the_United_States (last visited September 1, 2012).

[57] *People v Doyle*, 451 Mich 9, 545 NW2d 627 (1996).

An interesting comparison in this case is with the Illinois Supreme Court's ruling upholding its ticket scalping laws.[58] Many years earlier, that Court had invalidated the predecessor version of the law based on substantive due process theories that started to erode from our jurisprudence in the New Deal.[59] By 1963, the main case invalidating these laws was overruled by the United States Supreme Court.[60] Based on this, the Illinois Attorney General argued that a criminal defendant could not reasonably rely on the 1907 Illinois Supreme Court decision invalidating ticket scalping laws. The Illinois Supreme Court disagreed holding:[61]

> The State contends that the latest judicial pronouncement on the subject under consideration in Gold sustains the validity of our statute. Therefore, the defendant's reliance on Steele was not justified. However, Gold considered the statute of New York which, though it involved the same general subject, was substantially different from the Illinois statute. By contrast the Illinois statute which we now sustain is so nearly identical to the statute which this court previously held invalid that the decision in Steele carried considerable if not conclusive weight in judging the present statute particularly as it is tested by the provisions of the Illinois Constitution. We therefore hold that our decision in this case overruling Steele shall be applied prospectively only to offenses committed against the statute **a**fter the date of this decision. The complaint against the defendant must therefore be dismissed.

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[58] *People v Patton*, 57 Ill 2d 43; 309 NE2d 572 (1974).

[59] *People v Steele*, 231 Ill 340; 83 NE 236 (1907), *overruled by People v Patton*, 57 Ill 2d 43 (1974).

[60] *Gold v DiCarlo*, 235 F Supp 817 (SDNY 1964), *aff'd Gold v Dicarlo*, 380 US 520 (1965) aff'd *Gold v Dicarlo*, 380 US 520; 85 S Ct 1332; 14 L Ed 2d 266 (1965).

[61] *People v Patton*, 57 Ill 2d 43, 49; 309 NE2d 572, 575 (1974).

Patton controls when he court in *Patton* where there are "decisions making the law less favorable to defendants must be applied prospectively."[62]

In *Dempster*, the Court held that it was contrary to basic notions of fairness to convict individuals based on ambiguous penal laws. Notice of the conduct required is essential:

> Thus we have struck down a state criminal statute under the Due Process Clause where it was not 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.' We have recognized in such cases that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law,' ibid., and that 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.'

This is precisely what is at risk here. No matter how much research a medical marijuana patient conducted, there were dozens of questions where there was no definitive answer and reasonable minds could differ. If the lower court judges (including appellate judges) can legitimately differ about the meaning of the statute, how can we legitimately claim that an average citizen could not? Contrary to the Court of Appeals ruling below, the case law does not need to be "uncontradicted" and completely "clear." That was not the situation in *Patton*, *Dempster*, or *Stevenson*.

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[62] *People v Harvey*, 366 Ill App 3d 119, 133; 851 NE2d 182, 195 (2006) (internal citations omitted).

The Court of Appeals attempt to distinguish the *Dempster* ruling is flawed. There was no prior determination that Phyllis Dempster's conduct was legal. This Court had the ability to overrule Dempster in the intervening years and did not. Contrary to the Court of Appeals opinion (p. 8), the Defendants did show that their interpretation was reasonable. They showed that L. Brooks Patterson, the Oakland County Chief Executive, had opined that the issue of dispensaries was a matter of local control. The opinion is attached and was before the trial court and this point can certainly be developed in a remand proceeding. The problem is that the Court of Appeals ruling effectively cuts off those proceedings.

Further, the Isabella County Circuit Court in *State v McQueen*, Isabella County Circuit Court No.10-8488-CZ, had held that patient-to-patient sales of marijuana were protected under the statute. While the ruling was ultimately overruled, this Court cannot say that the Circuit Judge was unreasonable.[63] The Court of Appeals faults the Defendant for not demonstrating what provisions of the medical marijuana allowed them to run a *for profit* dispensary. While this Court's ruling in *McQueen* may have upheld the results of the Court of Appeals, this Court did not endorse the Court of Appeals interpretation below that making a profit was prohibited. This Court stated that the donor patient had to have a medical purpose in a patient-to-patient transfer, not simply the receiving one. In a case where both patients derived a benefit, conceivably one patient could receive a profit. That question has never been settled.

The Defendants also had a right to rely on the fact that they were acting under the color of a voter initiated referendum. This Court of Appeals statement that initiatives should be

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[63] The overruled lower court opinion is only cited to show that a reasonable mind could find that a business model similar to the one employed by compassionate care was reasonable.

"liberally construed to effectuate their purposes and to facilitate rather than hamper the exercise of reserved rights by the people."[64]

The argument that patient-to-patient transfers were broadly protected is easily discerned from the language of the Act itself. A qualifying patient is not "subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege" if that patient is engaged in the medical use of marijuana in accordance with the MMA. Section 3(f) defines "medical use" as the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition.

It was also reasonable to believe that a caregiver could derivatively assert these protections when acting as an agent for a patient. Pursuant to Section 4(b), caregivers are not "subject to arrest, prosecution, or penalty in any manner... for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana...."MCL 333.26424(b). Although patients are protected when engaging in the "medical use" of marijuana, caregivers are protected for "assisting" a connected patient "with the medical use" of marijuana. In other words, in a pre-*McQueen* world, it is easy to believe that caregivers could assist their connected patients in the transfer, acquisition, delivery, or cultivation of marijuana, and this is protected conduct under the MMA. [65]

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[64] *Welch Foods v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995).

[65] MCL 333.26423(e).

If a patient permits his caregiver to cultivate and possess marijuana plants for him, the caregiver is assisting the patient in the cultivation of that patient's plants. The caregiver is protected from arrest, prosecution, or penalty when cultivating the plants, preparing the marijuana, and driving it to his connected patient because the caregiver is assisting the patient in the manufacture, transportation, delivery, and transfer of marijuana. However, the MMA does not limit the caregiver's assistance to cultivating or delivering marijuana directly to the patient. Instead, a caregiver may "assist" his connected patients in any of their permitted "medical use" actions. Based on this, in a pre-*McQueen* world patients are engaged in the "medical use" when transferring marijuana to another patient; caregivers are authorized under the MMA to assist in the transfer of the connected patient's marijuana to another unconnected patient.

The Court of Appeals cannot overrule this Court. In attempting to distinguish *Dempster*, the Court first stated that *Dempster* was inapplicable to cases brought under the Public Health Code because the doctrine of lenity did not apply. The Court went on to say:

> It appears from defendants' motion to dismiss, as well as their brief on appeal, that they are arguing they did not know and could not know that marijuana dispensaries were not legal under the MMMA. However, even if we considered defendants' arguments, defendants have failed to identify any allegedly ambiguous provision of the MMMA that led them to their mistaken belief that marijuana dispensaries were, in fact, legal. The MMMA did not, and still does not, include any provision which states that marijuana dispensaries are or were legal business entities. Similarly, defendants have failed to identify any allegedly ambiguous provision of the MMMA from which it could reasonably be inferred that marijuana dispensaries were legal business entities. Accordingly, the trial court's decision to apply the rule of lenity in this case is reversed.

The distinctions invoked by this Court are "distinctions without a difference" and are not a basis for rejecting the *Dempster* ruling.[66] The *gravamen* of these holdings is that where a Defendant's interpretation was reasonable, subsequent cases cannot be retroactively applied. The effect of this Court's ruling is to creating a chilling effect on all medical marijuana users because five years into Michigan's Medical Marijuana law, the meaning of the statute is very much in dispute.

In finding that no reasonable person could have interpreted the statute in the fashion that these defendants did, this Court must also be guided by the fact that Justice Cavanagh specifically disagreed with the majority opinion and found that patient-to-patient transfers were permitted under the law, that there was no requirement that both patients have a medicinal gain from the transfer, and that the majority had improperly narrowed the protections of the statute.[67]

> [U]nder the majority's holding, a qualified patient's right to receive marijuana is effectively extinguished because a patient-to-patient transfer of marijuana can never occur lawfully for both qualifying patients. I cannot conclude from the plain meaning of the language of the MMMA that the electorate intended to afford a person a right only to foreclose any real possibility that the person may benefit from that right. Furthermore, the majority's view is inconsistent with the purpose of the MMMA—to promote the "health and welfare of [Michigan] citizens"—because qualified patients who are in need of marijuana for medical use, yet do not have the ability to either cultivate marijuana or find a trustworthy primary caregiver, are, for all practical purposes, deprived of an additional route to obtain marijuana for that use—another qualified patient's transfer. MCL 333.26422(c).

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[66] *Cf Gold v Sinai Hosp of Detroit, Inc*, 5 Mich App 368, 370; 146 NW2d 723, 724 (1966) (rejecting Appellant's attempt to distinguish case law as a "distinction without a difference").

[67] *People v McQueen*, 493 Mich 135, 164; 828 NW2d 644, 659 (2013) (Cavanagh, dissenting).

Justice Cavanagh believed that the *McQueen* majority improperly grafted a dual medicinal need showing thereby making it very difficult for patients to ever assist one another**.** While his opinion is obviously a dissent, this Court cannot say that Justice Cavanagh's viewpoint was objectively unreasonable.[68]

This case is controlled by *Dempster,* and the dismissal should be upheld on this basis. Alternatively, this case should be remanded for further proceedings where these defendants can demonstrate the reasonableness of their reliance.

1.3. At Most, the People Should be Given an Evidentiary Hearing on the Defendant's Due Process/Entrapment by Estoppel Defense.

Before there was any clear binding precedent interpreting an ambiguous law, the Defendant had the right to rely on a reasonable interpretation of the law that was consistent with local law enforcement's understanding of the law.

The Defendants have the right to present evidence to both the Court and the jury on this point. In *Dempster,* the defendants produced evidence that persons in charge of enforcing securities law believed that if the instruments at issue fit within the UCC concept of commercial paper, they would be exempt from registration. Because the instruments involved arguably fit

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[68] On January 15, 2014, the Court of Appeals will hear oral arguments in *Lott v Bloomfied Hills*, Court of Appeals No. 307692 and *Doe v Township of Bloomfield*, Court of Appeals No. 308906. In each of those cases, the trial court ruled that a medical marijuana user who had doubts about the applicability of a municipal ordinance restricting the use of medical marijuana could not bring a declaratory judgment action to determine the applicability of the ordinance to their conduct or the validity of the ordinance. If these rulings are upheld, Michigan has effectively told the medical marijuana patient that they must "bet their freedom" in situations where there are unsettled questions about the validity of medical marijuana laws.

within that definition, the defendants contended that they could freely rely on such a definition unless the statutory language clearly indicated otherwise.

The Michigan Supreme Court agreed, concluding that because the statutory commercial paper exemption was ambiguous, the defendants lacked the ' 'fair warning' ' demanded by the Constitution that their conduct would render them liable to criminal penalties. [69]

The Court relied on the U.S. Supreme Court's ruling in *Bouie v City of Columbia*.[70] In *Bouie*, several civil rights demonstrators were cited for criminal trespass for participating in a "sit in" demonstration. The demonstrators sat at a segregated lunch counter and waited to be served. . The police came and asked the demonstrators to leave. *See Id*. When the demonstrators refused, they were arrested and ultimately convicted of criminal trespass.

On appeal, the Supreme Court overturned the convictions, concluding that the South Carolina courts had unconstitutionally expanded the scope of the trespass statute to include remaining at a location after being asked to leave, despite the fact that the statute had never before been so interpreted. The Court concluded that the sudden change in the interpretation of the law violated the demonstrators' due process rights.[71]

Here, the Defendants are prepared to demonstrate that Clinical Relief was inspected by the Ferndale Police Department, the Ferndale mayor, and that their conduct tracked an approach

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[69] *People v Dempster*, 396 Mich 700, 715-716; 242 NW2d 381 (1976).

[70] *Bouie v City of Columbia*, 378 US 347 (1964).

[71] In *People v Brown*, No. 131942, 2010 WL 5129882 (Mich Ct App Dec 16, 2010), the Court of Appeals applied *Bouie* to bar the retroactive application of new case law which made it easier to charge the Defendant as an habitual offender – fourth. Under prior case law, convictions arising out of the same transaction or occurrence were scored as one conviction; under *People v Gardner*, 482 Mich 41; 753 NW2d 78 (2008), they could be scored as multiple convictions. The *Brown* Court refused to apply *Gardner* retroactively based on reliance on the prior rule.

that was originally signed off by Oakland County Chief Executive L. Brooks Patterson. While Mr. Patterson may have backed away from this approach after the *Redden* ruling, their interpretation of the law was reasonable and an acceptable interpretation of the law in a pre-*Redden*, pre-Mc*Queen* world.

In *Cox v Louisiana*,[72] the United States Supreme Court recognized that the defense asserted here is also anchored in due process. There, the Defendant was convicted of picketing near a courthouse. The Defendant offered proof that the local police chief, in the presence of the sheriff and the mayor, told them that they could picket the courthouse as long as they remained 101 feet away from the courthouse. Despite complying with this limitation, they were still arrested. The U.S. Supreme Court reversed finding a due process violation:[73] The Court found that the citizens had a right to rely on the advice of the public officials and that due process bars a conviction where the public official's incorrect advice induced the commission of the technical offense.

Similarly, in *United States v Pennsylvania Industrial Chemical Corp*,[74]a corporation was convicted for violating a statute that prohibited the discharge into navigable waters of "refuse matter of any kind ... other than that flowing from streets and sewers." There, the Army Corps of Engineers had earlier construed the statute to address only the discharge of refuse that "affected navigation" and the corporation had relied upon this interpretation when conducting business. The district court refused to admit evidence regarding the corporation's reliance upon the Army

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[72] *Cox v Louisiana*, 379 US 559 (1965).

[73] *Id*., at 571.

[74]*United States v Pennsylvania Industrial Chemical Corp*., 411 U.S. 655 (1973).

Corps' construction of the statute. On appeal, the Supreme Court reversed the conviction and remanded the case with directions that the trial court consider the evidence

The Court stated: "The Corps is the responsible administrative agency under the 1899 Act, and 'the rulings, interpretations and opinions of the [responsible agency] ..., while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which ... litigants may properly resort for guidance.' "

In addition to the due process argument pressed above, there is also a related defense called "entrapment by estoppel."[75] As our Court of Appeals stated:[76] 'When a citizen reasonably and in good faith relies on a government agent's representation that the conduct in question is legal, under circumstances where there is nothing to alert a reasonable citizen that the agent's statement is erroneous, basic principles of due process should preclude prosecution. '

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[75] Some courts have held that the defense is not entrapment, but solely a due process defense. While recognizing a functionally identical defense, those courts have disavowed the term "entrapment by estoppel. *See United States v Brady,* 710 F Supp. 290, 295 (D.Colo.1989); *Miller v Commonwealth,* 25 Va App 727; 492 SE2d 482, 487 n 4 (1997). For the sake of clarity and ease of reference, the doctrine is hereinafter referred to as the reliance doctrine pressed here.

[76] *People v Woods*, 241 Mich App 545, 548–49; 616 NW2d 211 (2000). *See also United States v Giffen*, 473 F3d 30, 41–42 (2d Cir 2006). ("If a drug enforcement agent solicits a defendant to engage in otherwise criminal conduct as a confidential informant, or effectively communicates an assurance that the defendant is acting under [government] authorization, and the defendant, relying thereon, commits forbidden acts in the mistaken but reasonable, good faith belief that he has in fact been authorized to do so as an aid to law enforcement, then estoppel bars conviction"); *United States v Brady*, 710 F Supp 290, 294-95 (D.Colo.1989) (holding it would violate due process to convict for weapons possession a two-time felon who had been incorrectly told by a judge that he could use a gun for the vocation of hunting and trapping); *Salt Lake City v Terkelson*, 61 P3d 282 (Utah Ct App 2002) (city could not unilaterally change its prior interpretation without notice and then prosecute the defendants under the new interpretation); *United States v Tallmadge*, 829 F2d 767 (CA 9, 1987) (relying on *Cox* to find the Defendant could rely on erroneous advice from a federally licensed gun dealer and criminal defense attorney that his conviction did not disqualify him from owning a firearm).

The elements of the defense are: "[T]he entrapment by estoppel defense applies where the defendant establishes by a preponderance of the evidence that (1) a government official (2) told the defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement.[77] Under Michigan law, a party is entitled to a right to an evidentiary hearing on an entrapment by estoppel defense. "When a defendant claims entrapment, including entrapment by estoppel, the proper procedure is for the trial court to hold an evidentiary hearing, at which the defendant bears the burden of proving entrapment by a preponderance of the evidence."[78]

This position is common sense, because a contrary position would mean that a citizen could never rely on an assurance that his/her conduct is legal. Under Michigan law, a party has a right to seek a declaratory ruling from the State about the lawfulness of their conduct.[79] If the State refuses to assure them that the conduct is lawful, they can sue for declaratory relief that the conduct is in fact lawful. The Defendants should not be required to gamble their freedom in such a situation.

Where the law is unclear, People should be encouraged to "ask for first." Refusing to recognize the defense in this case will penalize people for relying on the official advice they received. If the prosecutor doesn't approve of police or other government officials answering

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[77] *People v Woods*, 241 Mich App at 558; 616 NW2d 211 (2000) (quoting . *United States v West Indies Transport, Inc.,* 127 F3d 299, 313 (C.A.3, 1997).

[78] *People v Pierce*, 272 Mich App 394, 400; 725 NW2d 691 (2006).

[79] *Strager v Olsen*, 10 Mich App 166; 159 NW2d 175 (1968).

these questions, the prosecutor can easily create a procedure where all these questions are directed to the County Prosecutor or the Attorney General. Because these Defendants justifiably relied on these assurances, the charges should be dropped or at minimum their defense should be submitted to the jury.

Relief

WHEREFORE, Defendant asks this Court to grant leave to appeal or set this case for oral arguments on the Application. Alternatively, the Defendants request this Court indicate in a leave denial order that leave to appeal is without prejudice to the Defendant's further developing their reliance on remand and representing the issue to the Michigan Court of Appeals.

Respectfully submitted,

/s/Neil Rockind

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Offer of Proof

Defendants through their attorneys make the following offer of proof concerning what they can establish on remands:

1. Defendants provided the lower court with a statement by Oakland County Chief Executive L. Brooks Patterson which stated whether dispensaries can operate in a community is a matter for local control.

2. One of the principals of Clinical Relief met with Brooks Patterson, discussed the business plan, the medical marijuana act and the county wide policy." Clearly, you'll add that at an evidentiary hearing they will offer testimony that the information they received caused them to move forward with their business and that they relied on the information.

3. Defendant will offer testimony that a representative and/or some of them met with and discussed the matter with L. Brooks Patterson, that the facility was inspected by the local police, and that the Ferndale Mayor had also approved the facility.

4. Defendants will establish below that they demanded medical marijuana cards from patients and made them complete medical questionnaires. Defendant will further establish below that the police used counterfeit medical marijuana cards and falsified data on medical questionnaires to conduct these purchases.

5. Counsel bases this offer of proof on information and belief based on interviews with various interviews.

6. For purposes of demonstrating the need for a remand, a party may properly attach materials that are not part of the record below. *People v Christle*, No. 267374, 2007 WL 2189071 (Mich Ct App July 31, 2007).

Respectfully submitted,

/s/Neil Rockind

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Proof of Service

STATE OF MICHIGAN)
) SS.
COUNTY OF OAKLAND)

The undersigned declarant being first duly sworn, deposes and says that on December 18, 2013, (s)he did mail a copy of the attached DEFENDANT-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL to the Oakland County Prosecutor's Office at their address of record. Further a copy of the Application was electronically filed with the Court of Appeals and the prosecutor (who consented to eService below) was also served in this fashion.

Declaration in Lieu of Notarization. I declare that the foregoing is true and correct to the best of my information, knowledge, and belief.

Respectfully submitted,

/s/Stuart G. Friedman

_____

Declarant

DATED: December 18, 2013

APPENDIX

302 Mich.App. 450
Court of Appeals of Michigan.
PEOPLE
v.
JOHNSON.
People
v.
Anthony **Agro**.
People
v.
Fleissner.
People
v.
Barbara **Agro**.
People
v.
Richmond.
People
v.
Curtis.
People
v.
Nicholas **Agro**.

Docket Nos. 308104, 308105, 308106, 308109, 308110, 308111, 308113. | Submitted Aug. 6, 2013, at Detroit. | Decided Sept. 10, 2013, at 9:10 a.m.

Synopsis
Background: Defendants who owned, operated, or were employed by marijuana dispensary moved to dismiss possession, delivery, and conspiracy charges. The Oakland Circuit Court, Daniel Patrick O'Brien, J., granted motion pursuant to the Michigan Medical Marihuana Act (MMMA). State appealed.

Holdings: The Court of Appeals held that:

[1] trial court abused its discretion in dismissing charges without requiring defendants to first demonstrate that they were entitled to the protections afforded under particular provisions of MMMA;

[2] rule of lenity does not apply to construction of the Public Health Code, under which defendants were charged; and

[3] holdings of the Court of Appeals and the Supreme Court, that MMMA did not authorize a marijuana dispensary facilitating patient-to-patient sales of marijuana, applied retroactively to charges at issue.

Reversed and remanded.

West Headnotes (7)

[1] **Controlled Substances**
Medical necessity

Trial court abused its discretion when, pursuant to Michigan Medical Marihuana Act (MMMA), it dismissed possession, delivery, and conspiracy charges against seven defendants who owned, operated, or were employed by marijuana dispensary without requiring those defendants to first demonstrate that they were entitled to the protections afforded under particular provisions of MMMA; defendants did not explain which provisions of MMMA allegedly gave rise to their "good faith belief" that their conduct was protected, they did not challenge as ambiguous any specific term in MMMA, and trial court made no specific findings about each of the statutory requirements for protection under MMMA. M.C.L.A. §§ 333.7401(2)(b)(ii), (2)(d)(iii), 333.26421 et seq., 333.26424, 333.26428, 750.157a.

[2] **Criminal Law**
Liberal or strict construction; rule of lenity

Under "rule of lenity," when the punishment in a criminal statute is unclear, a court should mitigate punishment.

[3] **Statutes**
Liberal or strict construction; rule of lenity

Rule of lenity applies only if the statute is ambiguous or if a firm indication of legislative intent is absent.

[4] **Health**
Constitutional, Statutory, and Regulatory Provisions

The rule of lenity does not apply to construction of the Public Health Code in view of legislature's mandate that the code's provisions be liberally construed for the protection of the health, safety, and welfare of the people of this state. M.C.L.A. § 333.1111(2).

[5] **Courts**
In general; retroactive or prospective operation

Holdings of the Court of Appeals and the Supreme Court, that Michigan Medical Marihuana Act (MMMA) did not authorize a marijuana dispensary facilitating patient-to-patient sales of marijuana, applied retroactively to prosecution on possession, delivery, and conspiracy charges of seven defendants who owned, operated, or were employed by marijuana dispensary; defendants were not deprived of due process in the form of fair warning as to what constituted a crime, retroactive application did not have effect of overruling clear and uncontradicted caselaw, and defendants identified no MMMA provision that could have reasonably led to a belief that MMMA authorized operation of marijuana dispensary. U.S.C.A. Const.Amend. 14; M.C.L.A. §§ 333.7401(2)(b)(ii), (2)(d)(iii), 333.26421 et seq., 750.157a.

[6] **Courts**
In general; retroactive or prospective operation

As general rule, full retroactive effect is given to judicial decisions, and complete prospective application is limited to decisions overruling clear and uncontradicted caselaw.

[7] **Constitutional Law**
Retroactive laws and decisions; change in law

Retroactive application of an unforeseeable interpretation of a criminal statute may violate the Due Process Clause if it is detrimental to a defendant. U.S.C.A. Const.Amend. 14.

Attorneys and Law Firms

***891** Bill Schuette, Attorney General, John J. Bursch, Solicitor General, Jessica R. Cooper, Prosecuting Attorney, Thomas R. Grden, Chief, Appellate Division, and Danielle Walton, Assistant Prosecuting Attorney, for the people.

Stuart G. Friedman, Southfield, for Barbara M. Johnson, Ryan M. Fleissner, Barbara J. Agro, Ryan D. Richmond, Matthew Curtis, and Nicholas Agro.

Before: SERVITTO, P.J., and MARK J. CAVANAGH and WILDER, JJ.

Opinion

PER CURIAM.

These consolidated cases arose from the operation of a marijuana dispensary. Defendants Barbara Johnson and Ryan Fleissner were charged with conspiracy to possess marijuana with intent to deliver or conspiracy to deliver marijuana, MCL 333.7401(2)(d)(*iii*) and MCL 750.157a, conspiracy to possess the controlled substance delta–9–tetrahydrocannabinol (THC) with intent to deliver or conspiracy to deliver THC, MCL 333.7401(2)(b)(*ii*) and

MCL 750.157a, two counts of delivery of marijuana, MCL 333.7401(2)(d)(*iii*), and delivery of THC, MCL 333.7401(2)(b)(*ii*). Defendant Anthony Agro was charged with conspiracy to possess marijuana with intent to deliver or conspiracy to deliver marijuana, conspiracy to possess THC with intent to deliver or conspiracy to deliver THC, seven counts of delivery of marijuana, and delivery of THC. Defendant Barbara Agro was charged with conspiracy to possess marijuana with intent to deliver or conspiracy to deliver marijuana and delivery of marijuana. Defendants Ryan Richmond and Nicholas Agro were charged with conspiracy to possess marijuana with intent to deliver or conspiracy to deliver marijuana and conspiracy to possess THC with intent to deliver or conspiracy to deliver THC. Defendant Matthew Curtis was charged with conspiracy to possess marijuana with intent to deliver or conspiracy to deliver marijuana, conspiracy to possess THC with intent to deliver or conspiracy to deliver THC, and two counts of delivery of marijuana. The trial court granted defendants' joint motion to dismiss all charges pursuant to the Michigan Medical Marihuana Act (MMMA),[1] MCL 333.26421 *et seq.* The prosecution appeals as of right. We reverse and remand for reinstatement of the charges.

In July and August 2010, these seven defendants owned, operated, or were employed by Clinical Relief, a marijuana dispensary in Ferndale, Michigan. Clinical Relief provided marijuana to patients who possessed medical-marijuana cards. On several different days, Narcotic Enforcement Team (NET) undercover officers visited the facility and were sold marijuana and candy containing THC. Subsequently, each defendant was arrested and bound over for trial on the charges. Defendants ***892** then filed a joint motion to dismiss in the circuit court. In the motion, they argued that "[a]t the time of their arrest their conduct was reasonable and should not be subject to criminal prosecution." Defendants argued that their "conduct was based on a reasonable understanding of the law and that they are entitled to dismissal as a matter of law...." They pointed out that the first judicial decision interpreting the MMMA was not released until after they were arrested; thus, defendants did not have the benefit of these interpretative decisions to guide their conduct with respect to the MMMA. Defendants also argued that "[t]he notion of due process and advanced notice of the conduct being prohibited is being tossed out of the window." And because the MMMA is ambiguous, defendants could have not been expected to predict that their conduct was illegal. Further, they argued, in light of the ambiguous nature of the MMMA, this Court's holding in *Michigan v. McQueen,* 293 Mich.App. 644, 811 N.W.2d 513 (2011), aff'd on other grounds 493 Mich. 135, 828 N.W.2d 644 (2013), which interpreted it, should be applied prospectively. That is, retroactive application of this decision interpreting the MMMA would violate their due process rights to understand what conduct is prohibited. The prosecutor opposed defendants' motion.

Following oral arguments, the trial court granted defendants' motion. In rendering its decision, the trial court noted that it was not giving retroactive effect to the holding in *McQueen,* 293 Mich.App. 644, 811 N.W.2d 513. The trial court also noted that it had requested defendants to specify which provisions of the MMMA were being challenged as ambiguous, and those provisions were MCL 333.26424(b), (e), and (i). Section 4(b) of the MMMA provides, in pertinent part, 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 [Department of Licensing and Regulatory Affairs'] registration process with the medical use of marihuana in accordance with this act." MCL 333.26424(b).[2] The trial court held that this provision "requires a link between the caregiver and the patient." Section 4(e) of the MMMA provides that a "registered primary caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marijuana." MCL 333.26424(e). The trial court held that the phrase "receive compensation for costs" was confusing, but rejected defendants' claim that it was ambiguous on the ground that "compensation for costs" does not include profit, i.e., "[c]ost is different and distinct from profit." Section 4(i) of the MMMA provides that a "person shall not be subject to arrest, prosecution, or penalty ... solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana." MCL 333.26424(i). The trial court held that "(i) juxtaposed with either or both (b) or (e) is ambiguous...." In particular, the court held that the phrase "using or administering" was ambiguous. 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. Accordingly, it granted defendants' motion to dismiss. These appeals followed.

***893** [1] The prosecution first argues 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. We agree.

We review for an abuse of discretion a trial court's ruling

on a motion to dismiss. *People v. Bylsma,* 493 Mich. 17, 26, 825 N.W.2d 543 (2012). However, underlying questions of statutory interpretation are reviewed de novo as questions of law. *Id.*

It is illegal under the Public Health Code, MCL 333.1101 *et seq.,* for a person to possess, use, manufacture, or deliver marijuana. The MMMA was proposed by initiative petition, was subsequently approved by the electors, and became effective December 4, 2008. This change in our state law was to have "the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana." MCL 333.26422(b). Accordingly, pursuant to MCL 333.26427(a), the "medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act." The "medical use" of marijuana is defined by MCL 333.26423(f) as "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition."[3]

In light of the fact that possession, use, manufacture, and delivery of marijuana remain punishable offenses under the Public Health Code, the MMMA set forth specific and limited protections from arrest, prosecution, or penalty for marijuana-related activities. In particular, at the time of defendants' arrests, MCL 333.26424 as originally enacted provided:

> (a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner ... for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility....[4]
>
> (b) A primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner ... for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act, provided that the primary caregiver possesses an amount of marihuana that does not exceed:
>
> (1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department's registration process; and
>
> (2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law ***894** to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility; and
>
> (3) any incidental amount of seeds, stalks, and unusable roots.
>
> * * *
>
> (d) There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver:
>
> (1) is in possession of a registry identification card; and
>
> (2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act. The presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act.
>
> (e) A registered primary caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana. Any such compensation shall not constitute the sale of controlled substances.
>
> * * *
>
> (i) A person shall not be subject to arrest, prosecution, or penalty in any manner ... solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana.

The second protection afforded under the MMMA is set forth in MCL 333.26428, which as originally enacted provided, in relevant part:

> (a) Except as provided in [MCL 333.26427], a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:

> (1) A physician has stated that ... the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana ...;
>
> (2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and
>
> (3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana ... to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.
>
> (b) A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a).

In this case, defendants moved for the dismissal of the charges, asserting that "[a]t the time of their arrest their conduct was reasonable and should not be subject to criminal prosecution." They argued that their interpretation of the MMMA was reasonable and, in light of the ambiguous nature of the MMMA, they could not have predicted that their conduct of operating a marijuana dispensary was illegal. ***895** However, defendants did not specifically argue that they were entitled to the protections afforded under either MCL 333.26424 or MCL 333.26428 or in what capacity they acquired such rights. That is, for example, defendants did not argue or establish that they were qualifying patients who had been issued and possessed registry identification cards, MCL 333.26424(a), or primary caregivers who had been issued and possessed registry identification cards, MCL 333.26424(b). They did not argue or attempt to establish that they were entitled to the protection afforded under MCL 333.26424(i). And 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 it related 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. For example, defendants argue: "Because the Defendants operated with a good faith belief that their conduct was protected under the [MMMA], the trial court correctly dismissed the charges." However, defendants have never explained which particular provisions of the MMMA allegedly gave rise to this "good faith belief." That is, what particular provisions of the MMMA purportedly led them to believe that they could operate a for-profit marijuana dispensary?

Nevertheless, the trial court dismissed the charges against all seven defendants without first determining whether any defendant was entitled to the protections afforded under either MCL 333.26424 or MCL 333.26428. The trial court made no specific findings about each of the statutory requirements. Instead, after inquiring during oral argument which specific provisions were being challenged as ambiguous by defendants—because no specific challenge was set forth in their motion to dismiss—the trial court held that one of the challenged provisions, § 4(i), was ambiguous. As set forth above, that provision provides: "A person shall not be subject to arrest, prosecution, or penalty in any manner ... solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana." MCL 333.26424(i). The trial court summarily concluded that the phrase "using or administering marihuana" was ambiguous. Apparently, then, the trial court considered each of the seven defendants "a person" as contemplated under § 4(i) and not a "qualifying patient" or a "primary caregiver." However, even if each defendant was such "a person" contemplated under § 4(i), the trial court failed to determine that each defendant was "assisting a registered qualifying patient" with regard to each charge for which he or she was being prosecuted. And defendants did not challenge as ambiguous the phrase "assisting a registered qualifying patient." In light of all 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. Accordingly, we remand this matter to the ***896** trial court for reinstatement of the charges against all seven defendants.

Next, the prosecution argues that the trial court erroneously held that the rule of lenity applied under the circumstances of this case. We agree.

[2] [3] [4] "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 N.W.2d 13 (1997). The rule of lenity applies only if the statute is ambiguous or " 'in absence of any firm indication of legislative intent.' " *Id.* at 700 n. 12, 564 N.W.2d 13, quoting *People v. Wakeford,* 418 Mich. 95, 113–114, 341 N.W.2d 68 (1983). However, the rule of lenity does not apply when construing the Public Health Code because the Legislature mandated in MCL 333.1111(2) that the code's provisions are to be "liberally construed for the protection of the health, safety, and welfare of the people of this state." *Denio,* 454 Mich. at 699, 564 N.W.2d 13. "It is illegal under the Public Health Code, MCL 333.1101 *et seq.,* for a person to possess, use, manufacture, create, or deliver marijuana." *People v. Nicholson,* 297 Mich.App. 191, 197, 822 N.W.2d 284 (2012).

Defendants here argued that the holding in *People v. Dempster,* 396 Mich. 700, 242 N.W.2d 381 (1976), supported their argument that the rule of lenity should apply under the circumstances of this case. The statute violated in *Dempster,* however, was not part of the Public Health Code. *Id.* at 703, 242 N.W.2d 381. Nevertheless, defendants argued in the trial court, and argue here on appeal, 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." It appears from defendants' motion to dismiss, as well as their brief on appeal, that they are arguing they did not know and could not know that marijuana dispensaries were not legal under the MMMA. However, even if we were to consider defendants' arguments, defendants have failed to identify any allegedly ambiguous provision of the MMMA that led them to their mistaken belief that marijuana dispensaries were, in fact, legal. The MMMA did not, and still does not, include any provision that states that marijuana dispensaries are or were legal business entities. Similarly, defendants have failed to identify any allegedly ambiguous provision of the MMMA from which it could reasonably be inferred that marijuana dispensaries were legal business entities. Accordingly, the trial court's decision to apply the rule of lenity in this case is reversed.

[5] In a related argument, the prosecution argues that the trial court erred by failing to give retroactive effect to this Court's decision in *McQueen,* 293 Mich.App. 644, 811 N.W.2d 513, which addressed the legality of operating a marijuana dispensary that facilitates patient-to-patient sales of marijuana. We agree.

In *McQueen,* the defendants owned and operated a marijuana dispensary that facilitated sales of marijuana between its members who were either registered qualifying patients or their primary caregivers. *McQueen,* 293 Mich.App. at 647–648, 811 N.W.2d 513. A complaint was filed against the defendants, seeking injunctive relief on the ground that the MMMA did not provide for the operation of marijuana dispensaries and, thus, the dispensary was a public nuisance. *Id.* at 648, 651–652, 811 N.W.2d 513. The trial court denied the plaintiff's request, and this Court reversed the decision, holding that the dispensary was a public nuisance. *Id.* at 648, 811 N.W.2d 513. After holding that "the MMMA does not authorize marijuana dispensaries" and "the MMMA does not expressly ***897** state that patients may sell their marijuana to other patients," we considered whether that authority could be inferred from provisions of the MMMA. *Id.* at 663, 811 N.W.2d 513. In particular, we held that although the "medical use" of marijuana is allowed to the extent that it is carried out in accordance with the MMMA, MCL 333.26427(a), the definition of "medical use" did not include the sale of marijuana.[5] *Id.* at 665, 668–669, 811 N.W.2d 513. Accordingly, the defendants had "no authority under the MMMA to operate a marijuana dispensary that actively engages in and carries out patient-to-patient sales of marijuana."[6] *Id.* at 670, 811 N.W.2d 513. We likewise rejected the defendants' argument that they were entitled to immunity under § 4(i), MCL 333.26424(i), because they were assisting registered qualifying patients with "using or administering" marijuana. *Id.* at 671, 811 N.W.2d 513. We held that a person assists a qualifying patient with "using or administering" marijuana when they aid in preparing it for consumption or by physically aiding the patient in consuming the marijuana.[7] *Id.* at 673, 811 N.W.2d 513.

[6] [7] The general rule is that judicial decisions are given full retroactive effect and complete prospective application is limited to decisions that overrule clear and uncontradicted caselaw. *People v. Neal,* 459 Mich. 72, 80, 586 N.W.2d 716 (1998). But "[t]he retroactive application of an unforeseeable interpretation of a criminal statute, if detrimental to a defendant, may violate the Due Process Clause." *People v. Brown,* 239 Mich.App. 735, 750, 610 N.W.2d 234 (2000). In *People v. Doyle,* 451 Mich. 93, 100, 545 N.W.2d 627 (1996), our Supreme explained that due process is violated when the retroactive application of a judicial decision acts or operates as an ex post facto law, i.e., criminalizes conduct that was innocent at the time performed.

First, we note that defendants were not charged with violating any penalty provision of the MMMA. Defendants' charges arose from their alleged violation of

certain controlled substance provisions of the Public Health Code. In defense of these charges, defendants have alleged that they are entitled to immunity as provided under § 4 of the MMMA. 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. 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 v. City of Columbia,* 378 U.S. 347, 355, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) (emphasis added). Neither our holding in *McQueen,* 293 Mich.App. 644, 811 N.W.2d 513, nor our Supreme Court's subsequent holding in *McQueen,* 493 Mich. 135, 828 N.W.2d 644, had the effect of criminalizing previously innocent conduct. This is not a case in which marijuana dispensaries were authorized by statute ***898** and then, by judicial interpretation, deemed illegal.

Second, the retroactive application of this Court's decision in *McQueen* does not have the effect of overruling clear and uncontradicted caselaw. See *Neal,* 459 Mich. at 80, 586 N.W.2d 716; *Doyle,* 451 Mich. at 104, 545 N.W.2d 627. That is, 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 third, defendants have not identified any allegedly ambiguous provision of the MMMA that could have reasonably led them to believe that operating a marijuana dispensary was permitted under the MMMA; thus, defendants have failed to establish that this Court's interpretation of the MMMA in *McQueen* is unforeseeable. Accordingly, this Court's decision in *McQueen* is entitled to retroactive application and the trial court erred by failing to apply the holding to this case. Further, our Supreme Court's subsequent decision in *McQueen,* 493 Mich. 135, 828 N.W.2d 644, is also entitled to retroactive application for the same reasons.

Reversed and remanded for reinstatement of the charges against defendants and for further proceedings consistent with this opinion. We do not retain jurisdiction.

SERVITTO, P.J., and MARK J. CAVANAGH and WILDER, JJ., concurred.

Parallel Citations

838 N.W.2d 889

Footnotes

1 Although the MMMA refers to "marihuana," by convention this Court uses the more common spelling "marijuana" in its opinions. See *People v. Nicholson,* 297 Mich.App. 191, 193 n. 1, 822 N.W.2d 284 (2012).

2 We quote the version of the statute as amended by 2012 PA 512, effective April 1, 2013. The differences from the original version do not affect our holding.

3 Before the amendments set forth in 2012 PA 512, this definition was found in MCL 333.26423(e).

4 An "enclosed, locked facility" includes a locked room that permits "access only by a registered primary caregiver or registered qualifying patient." MCL 333.26423(d), as amended by 2012 PA 512.

5 Our Supreme Court, however, has since held that the definition of "medical use" includes the sale of marijuana. *Michigan v. McQueen,* 493 Mich. 135, 152, 828 N.W.2d 644 (2013).

6 Our Supreme Court affirmed this holding, albeit on different grounds, holding that the defendants' business, which facilitated patient-to-patient sales, encompassed "marijuana-related conduct that is not for the purpose of alleviating the *transferor's* debilitating medical condition or its symptoms." *Id.* at 157, 828 N.W.2d 644.

7 Our Supreme Court agreed, holding that "the terms 'using' and 'administering' are limited to conduct involving the actual ingestion of marijuana." *Id.* at 158, 828 N.W.2d 644.

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Court of Appeals, State of Michigan

ORDER

Deborah A. Servitto
Presiding Judge

Mark J. Cavanagh

Kurtis T. Wilder
Judges

People of MI v Barbara Mira Johnson; People of MI v Anthony James Agro; People of MI v Ryan Michael Fleissner; People of MI v Barbara Jean Agro; People of MI v Ryan Daniel Richmond; People of MI v Matthew Curtis; People of MI v Nicholas Agro

Docket No. 308104-06; 308109-11; 308113

LC No. 2011-236622 FH; 2011-236623 FH; 2011-236624 FH; 2011-236625 FH; 2011-236626 FH; 2011-236627 FH; & 2011-236628 FH

The Court orders that the motion for reconsideration is DENIED.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

OCT 24 2013
Date

Chief Clerk