COA Opinion: Under the Michigan Medical Marihuana Act, a physician's statement of medical benefit to the patient must have occurred after the enactment of the MMMA, but prior to arrest, to establish an affirmative defense

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A search of defendant's vehicle on April 6, 2009 resulted in the seizure of eight marijuana cigarettes. On April 7, 2009, defendant was charged with possession of marijuana, and on June 3, 2009, defendant asserted an affirmative defense under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421, *et seq.* The district court found that defendant had not satisfied the requirements for the affirmative defense because it construed section 8(a)(1) of the MMMA as requiring a statement from a physician before a patient is arrested. The circuit court disagreed with the district court, and on appeal reversed the district court's denial of defendant's motion to dismiss. Granting the prosecution's application for leave to appeal this issue of first impression, the Court of Appeals in a *per curiam* opinion in *People v Kolanek*, No. 295125, concluded that the physician's statement must occur after the enactment of the MMMA (December 4, 2008), but prior to arrest. The Court of Appeals reversed the circuit court's reversal, and remanded for a reinstatement of the charges against defendant.

Defendant testified that he suffers from Lyme disease and uses marijuana for relief from pain and nausea. Defendant submitted a document signed by his physician on June 9, 2009, stating that in his opinion, defendant is "likely to receive therapeutic benefit from the medical use of marijuana" and that defendant would have been eligible to use marijuana when he was arrested. Defendant testified that on July 14, 2008, he and his physician had discussed the upcoming vote on the use of medical marijuana, during which his physician indicated that he would support defendant using it.

The Court of Appeals interpreted section 8(a)(1) of the MMMA, which requires that "[a] physician has stated that … the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana …". The Court of Appeals construed the past tense "has stated" language to require that the physician's statement occur prior to arrest. The Court of Appeals further interpreted the language that "the patient is likely to receive …" as contemplating the future possession and use of marijuana. The Court of Appeals also determined that the physician's statement must have occurred after the enactment of the MMMA, because any discussion prior to December 4, 2008, was speculative.