ORIGINAL

No. 20-5714

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD JOSEPH KOSHMIDER, II — PETITIONER
(Your Name)

vs.

DANIEL LESATZ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DONALD J. KOSHMIDER II
(Your Name)

3576 Sarah Street
(Address)

Cadillac, Michigan 49601
(City, State, Zip Code)

231-884-4376
(Phone Number)

QUESTION(S) PRESENTED

I. Did the Sixth Circuit err when its opinion failed to analyze Petitioner's issues according to the Legislative directive that Public Act 283 is retroactive?

II. Did the Sixth Circuit err when it opined that "Thus" the marijuana in the room that was accessible to Petitioner could be attributable to him and he would not be entitled to § 4 immunity for the possession of it because the storage of the marijuana did not comply with the MMMA?

III. Did the Sixth Circuit err when it opined that, Petitioner was not entitled to immunity under (4) above because any assistance to a registered qualified patient must be limited to the use or administration of the marijuana, which Michigan Supreme determined is conduct involving only the actual ingestion of marijuana. McQueen, 493 Mich at 158. While the sale of medical marijuana is included within the defination of "medical use" of marijuana, McQueen, 493 Mich at 152, the transfer, delivery, and acquisition of marijuana are three activities that are

part of the "medical use" of marijuana that the drafters of the MMMA chose not to include as protected activities within §4(i)." Id. at 158 ?

IV. Did the Sixth Circuit err and abuse its discretion and deny Petitioner his Due Process right to a fair trial when it declined to determine the amount of marijuana in possession of Petitioner for purpose of Section 4 and 8 immunity/affirmative defense in Counts 4, 5, 6 and 8 ?

V. Did the Sixth Circuit err when it opined that Petitioner also claims that the trial court abused its discretion in ordering a blanket prohibition against the admission of MMMA evidence. Petitioner contends that these errors rise to the level of constitutional deprivations. We disagree ?

VI. Did the Sixth Circuit err when it opined that the trial court did not abuse its discretion when it failed to allow the jury to determine whether maintaining a drug house was the substantial purpose of the user of the property at the two locations in Counts 4 and 5 as the Michigan Supreme Court required in People v. Thompson, 477 Mich 167, 730 NW2d 708 (2007)

and trial counsel was ineffective for failure to know the law and request the additional, clarifying jury instructions. ?

VII. Was the evidence insufficient in Counts 3 and 7 that Petitioner aided and abbetted Jayson Hunt & Mike Holloway to illegally distribute marijuana ?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

1. Donald J. Koshmider, II v. Daniel LeSatz, No. 19-2437 U.S. Court of Appeals for the Sixth Judgment dated: April 15th 2020

2. Donald J. Koshmider, II v. Daniel LeSatz, No. 1:19-cv-769 U.S. District Court for the Western District of Michigan Judgment dated: November 14th 2019.

3. People of Michigan v. Donald J. Koshmider, II No. 159374 & (35) Michigan Supreme Court Order dated: July 29th 2019. Cont... attached

4. People of Michigan v. Donald J. Koshmider, II No. 340124 unpublished Michigan Court of Appeals Opinion dated: February 7th 2019.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was April 15, 2020.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Michigan Public Act 283, United States Constitutional Amendment Fourteen; Constitution 1963, Article 1 Section 17

Statement of Proceedings and Facts

Donald Joseph Koshmider, II, Defendant-Appellant was convicted of:

- Count 2: Delivery of Marijuana to Andrea Deleon on June 27, 2016. MCL 333.7401(2)(d)(iii),
- Count 3: Aid and Abet the Delivery of Marijuana to Tayler Curtis on April 21, 2016. MCL 333.7401(2)(d)(iii),
- Count 4: Maintaining a drug house at his shop. MCL 333.7101 (MCL 333.7405(1)(d),
- Count 5: Maintaining a drug house at his home. MCL 333.7101 (MCL 333.7405(1)(d),
- Count 6: Possession of Marijuana, 2nd offense. MCL 333.7403(2)(d),
- County 7: Aid and Abet the Delivery of Marijuana to Aaron Sible on June 9, 2016. MCL 333.7401(2)(d)(iii),
- Count 8: Possession with intent to deliver Marijuana on July 11, 2016. MCL 333.7401(2)(d)(iii)

Habitual 4th on Counts 2-5[2] after a four-day jury trial conducted on July 11-14, 2017, before the Honorable William M. Fagerman in the Wexford County Circuit Court Case No. 16-11749-FH. On August 28, 2017, he was sentenced to time served on Count 6, and 13 months to 180 months on the remaining counts.

[2] Mr. Koshmider was found not guilty of Count 1, Possession of ammunition by a Felon, MCL 333.74012C-A.

On May 26, 2017, an evidentiary hearing and motion to dismiss pursuant to MMA Section 4 & 8 was held and denied.

At that hearing, Donald Koshmider testified that he had a marijuana card from the State of Michigan. (EH, 5/26/17 p 7). It was current in July of 2016. On July 11, 2016, he was at 1552 Plett Road and he had a quantity of medical marijuana with him. (EH 5/26/17 p 10). He had it in a lockbox. He had about an ounce and a half of Kosher Kush and three to four grams of some concentrate. (EH 5/26/17 p 11). His card allowed him to possess two and a half ounces of usable marijuana and 12 plants for medical use. The police raided his home at 3576 Sarah Street and found plants that Mr. Koshmider stated did not belong to him. (EH 5/26/17 p 14). They belonged to Chris and Rose Swaffer who leased his basement. (EH 5/26/17 p 15). They had a grow room in the basement which was padlocked and he did not have a key to the room. (EH 5/26/17 p 16). The officers had to use bolt cutters to break the padlock and other tools to breach the room. He had never been inside the rooms after he leased the basement to the Swaffers. (EH 5/26/17 p 67).

Mr. Koshmider ran a dispensary called a club where he would sell marijuana. He verified that each member of the club was either a registered primary caregiver or a registered qualifying patient. He required to know their medical condition, their physician and their pain levels. (EH 5/26/17 p 18). He would provide them with an amount not more than reasonably necessary to ensure uninterrupted availability. (EH 5/26/17 p 20). He had a small volunteer staff that worked at his shop.

Trial

Nathan Edwards was a Deputy of the Wexford County Sheriff's office assigned to Traverse Narcotics Team (TNT). (TT 7/11/17 p 284). In 2014, the TNT was investigating some shops around Cadillac that were selling marijuana to marijuana patients and not following the statute. (TT 7/11/17 p 285.) TNT did four controlled buys of marijuana from Mr. Koshmider who they believed was providing marijuana to marijuana cardholders. (TT 7/11/17 p 288). The dates were January 30, 2014, February 13, 2014, March 27, 2014, and June 25, 2014. (TT 7/11/17 p 289). Two of the strains purchased was black widow and Bubblegum. (TT 7/11/17 p 307). A search warrant was executed on July 9, 2014. (TT 7/11/17 p 290). The search warrant address was 1632 North Mitchell St. (TT 7/11/17 p 295). Mr. Koshmider told him that he was the owner of Best Cadillac Provisions. (TT 7/11/17 p 291). The officer testified that Mr. Koshmider claimed that he would purchase marijuana from farmers and resell it to individuals who came in. He stated that Frank and Chris Swaffer also worked at assisting with the provisioning room. Chris Swaffer's name was still on the lease at Mitchell Street until the end of July. (TT 7/11/17 p 294).

Mr. Koshmider lived at 3576 Sarah Street in Cadillac. (TT 7/11/17 p 296). He paid for his mortgage with the rent money he received from the the Swaffer's who rented rooms in the basement of the home. The Swaffer's had two marijuana grow rooms that Mr. Koshmider did not have access to. (TT 7/11/17 p 297).

On July 10, 2014, Mr. Koshmider was given a cease and desist letter. (TT 7/11/17 p 298). He stated that no further provisions would be offered at the business until the law changed. (TT 7/11/17 p 299).

On cross examination, the officer conceded that in 2014, "edibles" and "concentrates" were not protected but at the time of trial the law had changed, and they were protected. (TT 7/11/17 p 301). Further he was not aware of how many different strains were on the market and whether Bubblegum was prevalent or not. (TT 7/11/17 p 309).

Lieutenant Daniel King was a detective assigned to the Michigan State Police who worked as a TNT commander. (TT 7/11/17 p 310). He testified regarding a settlement agreement entered into between Lieutenant King, the prosecuting attorney and Mr. Koshmider. (TT 7/11/17 p 313). Lieutenant King was also present when the cease and desist letter was delivered to Mr. Koshmider. He testified that Taylor Curtis was the confidential informant on April 21, 2016. Aaron Sible was the confidential informant at the second controlled buy on June 9, 2016. (TT 7/11/17 p 324). They attempted to make another controlled purchase the next day on June 10, 2016 with Aaron Sible. (TT 7/11/17 p 327). That controlled purchase was unsuccessful. The third control buy took place on June 27, 2016, with Andrea Deleon. (TT 7/11/17 p 332). Each of the confidential informants was required to have a medical marijuana card. Otherwise, the dispensary would not sell to them. (TT 7/11/17 p 341). In return for their cooperation in the controlled purchases, Taylor Curtis had been

originally charged with delivery of cocaine and he was allowed to plead guilty to possession of cocaine. (TT 7/11/17 p 338). Aaron Sible and Andrea Deleon were also facing criminal charges. The Officer testified that Ms. Deleon received a benefit for acting as a confidential informant. (TT 7/11/17 p 343).

Detective Olivia Garlick worked for the Michigan State Police and was assigned to TNT. She was the officer in charge of the investigation of this case. (TT 7/12/17 p 369). She testified regarding Mr. Sible's failure to make a second controlled purchase. Apparently, an issue occurred, and he was told to leave the dispensary. (TT 7/12/17 p 393) The remainder of her testimony concerned the detailed process of preparing and debriefing confidential informants. She was able to provide the information that Mr. Sible's motivation for participating was a charge of UDAA that he wanted to have dismissed. (TT 7/12/17 p 412). She testified that it was mandatory to have a patient card in order to get marijuana. (TT 7/12/17 p 425). Later, Andrea Deleon would testify that you couldn't enter the business without a valid patient card. (TT 7/12/17 p 439).

Andrea Deleon knew Mr. Koshmider because she went to his business called Cadillac Provisions. (TT 7/12/17 p 428). She purchased a couple grams of marijuana from Mr. Koshmider. She testified that he pulled it from a Mason jar that he had in a briefcase. (TT 7/12/17 p 431). She testified that previously to this day, she had been stopped by police after she left Cadillac Provisions and she had marijuana in her car that was not locked up in a case. She believed that the police had targeted her. (TT 7/12/17 p 435). Although she

was a registered patient, Mr. Koshmider was not her registered primary caregiver. (TT 7/12/17 p 443).

Taylor Curtis was another individual who had made a controlled purchase in this case. (TT 7/12/17 p 448). His motivation for participating in the controlled purchase was that he had been charged with delivery of heroin. (TT 7/12/17 p 455). He purchased four and a half grams of the bubblegum strain from Jason, who helped him at the dispensary. Jason was not his primary caregiver. (TT 7/12/17 p 451).

The last confidential informant was unavailable, so his testimony from the preliminary examination was read into the record. (TT 7/12/17 p 471). He purchased five grams of marijuana from a man named Mike. He had never met Mr. Koshmider before. (TT 7/12/17 p 474).

Jayson Hunt obtained his medical marijuana card and was his own caregiver. (TT 7/12/17 p 533). He stopped in at a dispensary on Mitchell St. He met Don Koshmider and began to help him move his shop from Mitchell St to Plett Rd. (TT 7/12/17 p 531). He then began to help in dispensing to medical patients. He was compensated with medical marijuana. He testified that Mr. Koshmider would bring the marijuana to the location. (TT 7/12/17 p 533). He would only bring the amount that was needed for the day. At the end of the day Mr. Koshmider would take the remaining medical marijuana away from the location. There were occasions when he would call Mr. Koshmider for additional product who would then arrive within 20-30 minutes. (TT 7/12/17 p 534). On April 21, 2016, he recalled an

incident when he sold to Tayler Curtis. Before dispensing the medical marijuana, he checked his card, his I.D., consulted with him on his needs and had him fill out paperwork. (TT 7/12/17 p 535). Mike Holloway was the only other person who helped Mr. Koshmider. Once or twice Mr. Koshmider's girlfriend would bring the product. (TT 7/12/17 p 536). No one else brought product to the dispensary. Mr. Hunt stated that he stopped working at the dispensary when he learned that Mr. Koshmider didn't have his permit. (TT 7/12/17 p 537). He claimed that he was not given immunity for his testimony. (TT 7/12/17 p 539).

The Surveillance

Detective Aaron Kearns was a Deputy Sheriff for Missaukee County assigned to TNT. (TT 7/12/17 p 542). His role on April 21, 2016, was surveillance. He watched the confidential informant leave Best Cadillac Provisions. His role on June 9th, 2016 was surveillance as well. (TT 7/12/17 p 546). On June 26, 2016, he role was surveillance of Mr. Koshmider at Plett Road. He was a cream-colored Ford Escort northbound on Plett Road. (TT 7/12/17 p 547). Mr. Koshmider drove a silver Chevrolet van. (TT 7/12/17 p 551).

On cross examination Detective Kearns conceded that he never saw Mr. Koshmider driving the cream-colored Ford Escort on June 27, 2016. He did not see Mr. Koshmider on April 21, 2016 nor did he see him on June 9, 2016. (TT 7/12/17 p 552).

Chad Sprik was a Deputy for the Wexford County Sheriff's office assigned to TNT and his role was surveillance. (TT 7/12/17 p 554). On April 21, 2016, he observed a white Buick parked in the lot

at 1552 Plett Rd. He saw the vehicle leave and drive northbound on Plett Road. (TT 7/12/17 p 555). On June 10th 2016, he was assigned to surveillance. He saw Mr. Koshmider driving southbound on Plett Rd. He was driving a tan or cream-color Ford Escort, and he went to the dispensary. Mr. Sible, the confidential informant, arrived after Mr. Koshmider. (TT 7/12/17 p 556). Mr. Koshmider left after Mr. Sible and he was driving a silver minivan. (TT 7/12/17 p 557). Detective Sprik followed Mr. Kosmider. At a stop light, Mr. Koshmider had his cellphone out the window and he was photographing the undercover officer and his vehicle. (TT 7/12/17 p 558).

Sergeant Brian Hunt worked for the Osceola County Sheriff's office assigned to TNT. He was also assigned to surveillance. On June 9th, 2016, his role was surveillance. (TT 7/12/17 p 560). He saw the confidential informant arrive with Detective Garlick on that day. On June 27, 2016. He saw a cream-colored Escort sitting in the driveway of Best Cadillac Provisions. (TT 7/12/17 p 562). The confidential informant arrived after the tan Escort had left. (TT 7/12/17 p 563). Mr. Koshmider arrived in a silver minivan and the confidential informant was still there. (TT 7/12/17 p 564).

Execution of Search Warrant

On July 11, 2016 he was on the entry team to execute a search warrant at Best Cadillac Provisions. (TT 7/12/17 p 567). They found marijuana, a digital scale, baggies and brown bags. (TT 7/12/17 p 571). They also found an empty prescription bottle with the strain

name of Bubblegum written on it. (TT 7/12/17 p 572). That was found in the dining room. (TT 7/12/17 p 602).

The prosecution introduced photographic exhibits which showed the contents of Mr. Koshmider's briefcase. (TT 7/12/17 p 580). An orange plastic container that contained suspected marijuana oil, suspected marijuana, a digital scale, two cell phones. (TT 7/12/17 p 587).

On cross examination, Sergeant conceded that no firearms or ammunition was found at Best Cadillac Provisions. (TT 7/12/17 p 588). The officer testified that it was common to find large amounts of cash during drug raids, yet they didn't find any during their search, because it wasn't there. (TT 7/12/17 p 589). He testified that nothing was found in the vehicle, because it wasn't there. (TT 7/12/17 p 591). The only marijuana that was found was in Mr. Koshmider's brief case. (TT 7/12/17 p 603).

Detective Olivia Garlick directed the execution of the search warrant for Mr. Koshmider's home on Sarah Street. (TT 7/13/17 p 613). Trial counsel objected to exhibit numbers 15-17, 20-23, and 25-28.

Don Bailey was a retired Michigan State Police officer whose role in the search warrant executed at Best Cadillac Provision was security. (TT 7/12/17 p 608). He entered the trailer and found Mr. Koshmider sitting at a table. He handed him a search warrant of his home on Sarah Street. (TT 7/12/17 p 609). After the search of Best Cadillace Provision was concluded he went over to Sarah Street where the simultaneous search was wrapping up. (TT 7/12/17 p

610). Two women had recorded Mr. Bailey's statement that he was biased against medical marijuana. The prosecution objected based on relevance. The court ruled that it wasn't relevant in this case because it wasn't a medical marijuana case. Trial counsel argued that Mr. Koshmider, as a medical marijuana patient would be experiencing that bias. (TT 7/12/17 p 611). The trial court sustained the prosecution's objection.

Exhibit 15—offered to show that this was the address of Mr. Koshmider. (TT 7/13/17 p 617). Trial counsel stated he would stipulate that the search and seizure team found items at Mr. Koshmider's house. The trial court allowed Exhibit 15, 16, 17, 29, 20 21 23 admitted over objection (TT 7/13/17 p 619). Exhibits 25, 26, 27, and 28 were rejected as hearsay documents (TT 7/13/17 p 620).

Ammunition was located in the residence. (TT 7/13/17 p 624). The prosecution showed exhibit 27 to the witness and she testified that it was a close-up photograph of the contents of a backpack on the ground in the home office. (TT 7/13/17 p 632). Trial counsel objected to the exhibits as hearsay. Exhibit 27 was redacted and then admitted into evidence. (TT 7/13/17 p 634). The items removed from the backpack were seized and sent to the lab for analysis. (TT 7/13/17 p 637).

The basement of the home had a storage area and a room with two doors. Each door had a padlock. (TT 7/13/17 p 640). After gaining access to the back room, several plants were suspected to be marijuana plants. (TT 7/13/17 p 639). There were 17 plants in this room (TT 7/13/17 p 646). The key to the padlocks was not found in

the house. (TT 7/13/17 p 675). The padlocks on the room to the right was cut with bolt cutters. (TT 7/13/17 p 641). The room on the left was accessed with a screwdriver which removed the padlock from the door. (TT 7/13/17 p 645). Ten plants were in this room. (TT 7/13/17 p 646). There were names on several pots. The names were of individuals who did not reside at the residence. (TT 7/13/17 p 678). The names were Rose Swaffer and Chris Swaffer. (TT 7/13/17 p 679). Exhibit 67 showed a large black garbage bag continuing suspected marijuana clippings, stems and leaves (shake) (TT 7/13/17 p 648). Trial counsel objected to items 32, 33, 34 and 35 based on hearsay. Exhibit 32 showed a white stick with a name on it. The others were jars. The trial court admitted 32-35 into evidence. (TT 7/13/17 p 652). They found suspected marijuana leaves behind the bar area. (TT 7/13/17 p 656).

On cross examination the officer testified that no firearms, ammunition or cash was found in the basement. (TT 7/13/17 p 672). On the main level of the house she did not find any firearms, weapons or ammunition. (TT 7/13/17 p 673).

David Geyer was a trooper with the Michigan State Police, and he assisted with the TNT search at Mr. Koshmider's residence. He searched the master bedroom where he found ammunition in the closet. (TT 7/13/17 p 684). He also observed men and women's clothing in the closet. (TT 7/13/17 p 691). Mr. Koshmider's name was not on the box of ammunition. (TT 7/13/17 p 694). The Trooper could not say whether or not Mr. Koshmider had ever touched that box of ammunition. (TT 7/13/17 p 698). He was also the officer who

found the backpack in the home office. He found suspected marijuana candies in the backpack. (TT 7/13/17 p 690).

John Lucey was a Michigan State Police assigned to the Grayline forensic laboratory. (TT 7/13/17 p 715). Item 1/People's 12 was 3.6 grams of marijuana. (TT 7/13/17 p 719).

Karen Brooks was a Michigan State Police assigned to the Grayline forensic laboratory. (TT 7/13/17 p 721). People's 15 was 4.92 grams of marijuana. People's exhibit 18 was 3.08 grams of marijuana. People's exhibit 68 was 3.8 grams of marijuana. People's exhibit 28 contained THC. (TT 7/13/17 p 729). Trial counsel objected to Exhibit 28 because the lab technician could not opine if it was natural or synthetic. Mr. Koshmider had not been charged with possession of synthetics. The court denied the objection because it was not inappropriately prejudicial. (TT 7/13/17 p 733). People's exhibit 56 was the lab report for item 24 (Exhibit 66) and item 62 (exhibit 69). Exhibit 69 was 27 marijuana leaves. People's exhibit 29 was item 30. People's exhibit 67. People's exhibit 57 was the lab report for Items 22 and Item 30. Item 22 was 22 grams of marijuana. Item 30 was hard candy that contained THC. (TT 7/13/17 p 738). She could not opine if the THC in the candy was natural or synthetic. (TT 7/13/17 p 739). Trial counsel objected to this exhibit as well and was overruled. (TT 7/13/17 p 744).

The prosecution moved to admit the recordings of the confidential informants. The Court allowed the recording containing the voice of Mr. Koshmider because they were not hearsay. He denied the admission of the other recordings. (TT 7/13/17 p 752).

Michael Holloway was a friend of Mr. Koshmider and he worked with him at Best Cadillac Provisioning. (TT 7/13/17 p 775). On June 9, 2016 he was working at the dispensary. He recalled that Aaron Sible came in and bought a few grams of marijuana flower. He checked that Mr. Sible had a valid medical marijuana card. (TT 7/13/17 p 776). He recalled seeing him only the one time. (TT 7/13/17 p 778). He was asked by trial counsel if he had any ill feelings toward Mr. Koshmider. (TT 7/13/17 p 781).

Kris Swaffer had known Mr. Koshmider for 3-4 years. He met him at the Cadillac Provision Center. At that time, it was an established center that Mr. Swaffer had with a partner. (TT 7/14/17 p 819). Mr. Swaffer was asked to close it and Mr. Koshmider took it over from there. Later he rented rooms in Mr. Koshmider's basement to grow medical marijuana. He paid Mr. Koshmider $500 a month and the electric bill. (TT 7/14/17 p 821). He had a "veg" room and a "flowering room." The veg room was where plants were started before they begin to flower. The flowering room was where the plants went to finish growing their buds. (TT 7/14/17 p 823). He would put sticks in plants to label them for the specific needs of specific patients. (TT 7/14/17 p 824). The left back corner of the flowering room was a little drying room. (TT 7/14/17 p 825). There was no door at the top nor the bottom of the basement stairs. (TT 7/14/17 p 826). He had no reason to believe that Mr. Koshmider came down to the basement. (TT 7/14/17 p 832). He described trimming as cutting the leaves and buds off the plant. He and his wife did that outside of the locked rooms. (TT 7/14/17 p 836). The debris laying around would have been from their plants in the basement.

(TT 7/14/17 p 837). The trimmings would have had no value. The black bag of trash was waiting to be disposed of. Mr. Koshmider never kept an eye on the plants in the basement. (TT 7/14/17 p 841). He denied ever supplying Mr. Koshmider with the Bubblegum strain. (TT 7/14/17 p 842). He said that he and Mr. Koshmider didn't do business other than to rent his basement.

Detective Garlick retook the stand. She testified that a "dab" referes to wax, Shatter, honey-BHO which is just butane honey oil. It's a concentrate of THC. It is extracted from clippings and leaves of marijuana plants. Trial counsel voir dired her and she conceded that she had only been trained in one method of extraction which was Butane. She was not aware of other solvents that were used, and she was not trained in CO2 extraction. (TT 7/14/17 p 863). If she were to look at an extract, she would not be able to tell if it was BHO or CO2. The trial court opined that the witness was not an expert in "dab," and she was excused.

Matt Verschaeve was a detective with the Michigan State Police Computer Crimes Unit. He worked with the data extraction tool called Cellebrite to download information off of cell phones. Mr. Koshmider's phone only had one chat program which was Facebook messenger. (TT 7/14/17 p 877). Trial counsel challenged Detective Verschaeve's verification of the report. The trial court stated:

> THE COURT: All right. The Court is satisfied that the witness's testimony satisfies the requirements of 702. The testimony is based on sufficient facts and data and that the product has adequate reliability and principles, and methods have been applied and applied to the particular facts and data in this case.

(TT 7/14/17 p 884).

Mr. Verschaeve continued. Exhibit 73 was an extraction report identifying a Facebook messaging conversation between a Don Koshmider's device as well as a device identified as Lynn Huizenga. The start date was February 2, 2016 and ended on June 12, 2016. The conversations from February were redacted. (TT 7/14/17 p 896). The exhibit was entered into evidence and the witness was excused.

The prosecution rested.

Lois Kinstner was Mr. Koshmider's girlfriend. (TT 7/14/17 p 905). She recognized her clothing in the photograph of the master bedroom closet. She was directed to look at the box on the shelf and she testified that she knew what was in the box. (TT 7/14/17 p 907). The box contained items that belonged to her deceased husband. All of his hunting stuff was in the box. (TT 7/14/17 p 908). She never told Mr. Koshmider about the contents of the box, and Mr. Kosmider never went through her boxes. (TT 7/14/17 p 909). She was shown photographs of the basement which she recognized. She testified that Mr. Swaffer had rented the basement room to grow medical marijuana for his patients. She never went in the rooms nor did she go in the basement. (TT 7/14/17 p 910). She never saw Mr. Koshmider go into the basement. She never saw Mr. Koshmider obtain marijuana from Mr. Swaffer. (TT 7/14/17 p 911). In the seven years she had known Mr. Koshmider, she had never seen him with a firearm or ammunition. (TT 7/14/17 p 912).

Donald Koshmider testified in his own defense. He testified that he kept belongings in his bedroom and he allowed Lois, his girlfriend to keep her belongings there too. (TT 7/14/17 p 925). He recognized Lois' boxes in the closet. He had no idea what she kept in her boxes, and he didn't go poking through her stuff. (TT 7/14/17 p 926). He stated that he had never owned a firearm, but he had shot one 10-20 years ago. He leased the basement of his home to Chris Swaffer. (TT 7/14/17 p 927). He was paid $500 and the electric bill. After he rented the basement, he never entered either of the two back rooms. (TT 7/14/17 p 928). He described the process of trimming and that the trimmings went into a garbage bag. They only wanted the flowers. They never gave, distributed, or transferred marijuana to Mr. Koshmider. Nor did they ever sell, transfer, or distribute to his shop. (TT 7/14/17 p 929). In 2014, the Wexford County Prosecutor raided all of the dispensaries in Wexford County and gave them cease and desist notices. (TT 7/14/17 p 930). He encouraged people to keep their medicine in a lockbox. (TT 7/14/17 p 931). No one was allowed any medicine from his shop without a medical marijuana card. (TT 7/14/17 p 932). On cross examination, he conceded that he was not a registered caregiver underneath the State of Michigan. (TT 7/14/17 p 942). He conceded that the marijuana that he had in a lockbox was not necessarily intended for him, it was also intended for other sales on that day. (TT 7/14/17 p 948). He distributed 3.2 grams to a confidential informant on June 27, 2016. (TT 7/14/17 p 949). He was aware that Michael Holloway distributed marijuana to a confidential informant on June 9, 2016. He was aware that on April 21, 2016, he allowed Jayson Hunt to

have access to Best Cadillac Provisions to distribute marijuana. (TT 7/14/17 p 950). Mr. Koshmider would bring the marijuana that was sold or distributed to Best Cadillac Provisions. (TT 7/14/17 p 951). He explained that the plants that a Ms. Huizenga wanted to purchase would be clones that come from any dispensary in Traverse City. (TT 7/14/17 p 952). He admitted to having access to the trimmings on the floor of the open area of the basement. (TT 7/14/17 p 954). He did not know if the products contained in his backpack contained synthetic or natural THC. (TT 7/14/17 p 962).

INTRODUCTION

Mr. Kosmider was convicted as follows:

- Count 2: Delivery of Marijuana to Andrea Deleon on June 27, 2016. MCL 333.7401(2)(d)(iii),
- County 3: Aid and Abet the Delivery of Marijuana to Tayler Curtis on April 21, 2016. MCL 333.7401(2)(d)(iii),
- Count 4: Maintaining a drug house at his shop. MCL 333.7101 (MCL 333.7405(1)(d),
- Count 5: Maintaining a drug house at his home. MCL 333.7101 (MCL 333.7405(1)(d),
- Count 6: Possession of Marijuana, 2nd offense. MCL 333.7403(2)(d),
- Count 7: Aid and Abet the Delivery of Marijuana to Aaron Sible on June 9, 2016. MCL 333.7401(2)(d)(iii),
- Count 8: Possession with intent to deliver Marijuana on July 11, 2016. MCL 333.7401(2)(d)(iii)

The trial court made two critical errors during the pre-trial stage that denied Defendant-Appellant his Due Process right to a fair trial. The first error was when the trial court declined to make a findings of fact as required by *People v Hartwick,* 498 Mich 192 (2015) which would have provided a Section 4 and 8 immunity to counts:

Count 4: maintain a drug house at Plett Road

Count 5: maintaining a drug house at his home

Count 6: possession of marijuana

Count 8: possession with intent to deliver.

The second error was a blanket prohibition on any *res gestae* evidence concerning the MMA. That would have resulted in insufficiency of the evidence on counts:

Count 3: Aiding and abetting Taylor Curtin

Count 7: Aiding and abetting Aaron Sible.

A defendant cannot be guilty of aiding and abetting conduct that is legal. However, no evidence was or could be presented on this element of aiding and abetting since it would involve testimony as what the MMA allowed or didn't allow. The ensuing consequences of these errors will be analyzed more fully below.

Finally, the Court of Appeal erred when it failed to recognize the retroactivity of PA 283.

Reasons Why Leave Should be Granted

Public Act 283 states:

> This amendatory act is curative and applies retroactively as to the following: clarifying the quantitiesand forms of marijuana for which a person is protectedfrom arrest, precluding an interpretation of "weight" asaggregate weight, and excluding an added inactivesubstrate component of a preparation in determining theamount of marijuana, medical marijuana, or usable marijuana that constitutes an offense.[1]

Plainly put, this Act made medical marijuana protections retroactive as of December 20, 2016, and thus included the wide variety of marijuana products. The Court of Appeals included the following statements in its opinion that demonstrated that Mr. Koshmider's appeal was analyzed based on the law in effect at the time of the alleged offense, and the 2016 amendments were not applied retroactively as directed by the Legislature. Each conclusion within the opinion cannot be relied upon as a correct statement of law.

The Court of Appeals issued the following erroneous statements:

- Under the version of the MMMA in effect on July 11, 2016, the possession of edible products containing anything but the dried leaves and flowers of the marijuana plant by a qualifying patient did not meet the requirements for § 4 immunity."

1 http://www.legislature.mi.gov/documents/2015-2016/publicact/pdf/2016-PA-0283.pdf

- "While the amended version of the MMMA does not prohibit the possession or use of concentrates or edibles, the MMMA does not apply retroactively and only has prospective effect. See, *People v Kolanek,* 491 Mich 382, 406; 817 NW2d 528 **(2012)."**

- "Because the actions defendant was charged with occurred prior to the December 20, 2016, amendment of the MMMA, the version of the statute in effect at the time of defendant's actions is used."

- "he [Defendant] was not entitled to immunity under (4) above because any assistance to a registered qualified patient must be limited to the use or administration of the marijuana, which our Supreme Court has determined is conduct involving only the actual ingestion of marijuana. *McQueen,* 493 Mich, at 158. While the sale of medical marijuana is included within the definition of "medical use" of marijuana, *McQueen,* 493 Mich, at 152, "the transfer, delivery, and acquisition of marijuana are three activities that are part of the "medical use" of marijuana that the drafters of the MMMA chose *not* to include as protected activities within § 4(i)." Id. at 158

- "Finally, regarding defendant's claim that a specific amount of marijuana had to be found by the trial court with respect to his maintaining a drug house charge at his home address, defendant's possession of marijuana edibles and concentrate were not allowed under the MMMA when defendant possessed them, and defendant essentially admitted that the same were for sale. He is, therefore, not entitled to immunity with respect to that charge."

ISSUE I

The Court of Appeals erred when its opinion failed to analyze Mr. Koshmider's issues according to the Legislative directive that Public Act 283 is retroactive.

Standard of Review

This Court reviews the proper interpretation and application of statutes de novo. *People* v *Bemer,* 286 Mich App 26, 777 NW2d 464 (2009).

Analysis

Public Act 283 states:

> This amendatory act is curative and applies retroactively as to the following: clarifying the quantities and forms of marihuana for which a person is protected from arrest, precluding an interpretation of "weight" as aggregate weight, and excluding an added inactive substrate component of a preparation in determining the amount of marihuana, medical marihuana, or usable marihuana that constitutes an offense.[3]

Plainly put, this act made medical marijuana protections retroactive as of December 20, 2016, and thus included the wide variety of marijuana products.

Marijuana infused products are now included within the definition of "usable marijuana," then, when they had previously not. The Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws or amending statutes. *GMACLLC* v *Treasury Dept.,* 286 Mich App 365, 372; 781 NW2d 310 (2009)."

The Court of Appeals included the following erroneous statements in its opinion:

- Under the version of the MMMA in effect on July 11, 2016, the possession of edible products containing anything but the dried leaves and flowers of the marijuana plant by a qualifying patient did not meet the requirements for § 4 immunity."

3 http://www.legislature.mi.gov/documents/2015-2016/publicact/pdf/2016-PA-0283.pdf

- "While the amended version of the MMMA does not prohibit the possession or use of concentrates or edibles, the MMMA does not apply retroactively and only has prospective effect. See, *People* v *Kolanek,* 491 Mich 382, 406; 817 NW2d 528 **(2012)."**

- "Because the actions defendant was charged with occurred prior to the December 20, 2016, amendment of the MMMA, the version of the statute in effect at the time of defendant's actions is used."

- "Finally, regarding defendant's claim that a specific amount of marijuana had to be found by the trial court with respect to his maintaining a drug house charge at his home address, defendant's possession of marijuana edibles and concentrate were not allowed under the MMMA when defendant possessed them, and defendant essentially admitted that the same were for sale. He is, therefore, not entitled to immunity with respect to that charge."

Mr. Koshmider was allowed to possess the edibles and concentrate under the retroactive amendment. Additionally, he said that he wasn't bringing them to the center because people wanted "marijuana flowers."

In regards to the marijuana found at the Sarah street address, Mr. Koshmider did not possess any marihuana found in the basement as it was the property of the Swaffer's and the Swaffer's were in compliance of the MMMA.

In the alternative, the evidence was unclear whether the marijuana in the basement area was "usable." See, e.g. *People v Manuel,* 319 Mich App 291 (2017).

ISSUE II

The Court of Appeals erred when it opined that "Thus, the marijuana in the room that was accessible to defendant could be attributable to him and he would not be entitled to § 4 immunity for the possession of it because the storage of the marijuana did not comply with the MMMA."

Standard of Review

This Court reviews the proper interpretation and application of statutes de novo. *People v Bemer,* 286 Mich App 777 NW2d 464 26, (2009).

Analysis

The plants were in "enclosed locked facilities"

The MMMA defines enclosed locked facility as a "closet, room, or other comparable, stationary, and fully enclosed area equipped with secured locks or other functioning security devices that permit access only by a registered primary caregiver or registered qualifying patient". In this case the two grow rooms were both equipped with secured locks. The MMMA does not provide for a definition of secured. The definition of secured at dictionary.com is "dependable; firm; not liable to fail, yield, become displaced, etc., as a support or a fastening". This particular grow room was equipped with secured locks. The lock was secured by a screw and access was only gained with the use of tools. It is also important to note that the grow room was located in a basement leased to others inside Mr. Koshmider's residence which helps add to the security of the facility in regards to permitting access to only the caregiver.

In the alternative, the evidence was unclear whether the marijuana in the basement's common area was "usable." See, e.g. *People* v *Manuel,* 319 Mich App 291 (2017).

The above considerations were questions of fact that the trial court was required by the statute to resolve. A section 4 dismissal for Count 6 would have been available had the trial court made the legal and factual conclusions regarding the marijuana in the basement. Finally, he was entitled to a hearing on the amount possessed for purposes of Section 4 and 8 immunity/affirmative defense in Counts 4, 5, 6, and 8. The Court of Appeals erred when it did the *Hartwick* legal analysis using the old statute and concluded that the "right result was reached, even if for a different reason."

ISSUE III

The Court of Appeals erred when it opined that "he [Defendant] was not entitled to immunity under (4)[1] above because any assistance to a registered qualified patient must be limited to the use or administration of the marijuana, which our Supreme Court has determined is conduct involving only the actual ingestion of marijuana. *McQueen*, 493 Mich, at 158. While the sale of medical marijuana is included within the definition of "medical use" of marijuana, *McQueen*, 493 Mich, at 152, "the transfer, delivery, and acquisition of marijuana are three activities that are part of the "medical use" of marijuana that the drafters of the MMMA chose *not* to include as protected activities within § 4(i)." *Id.* at 158

[1] (4) one who is "solely" assisting a registered qualifying patient with using or administering medical marijuana, so long as the assistance is specifically for the use or administration of medical marijuana, not the transfer, delivery, and acquisition of marijuana Mazur, 497 Mich, at 312).

Standard of Review

This Court reviews the proper interpretation and application of statutes de novo. *People v Bemer,* 286 Mich App 26, 777 NW2d 464 (2009).

Analysis

While it is true that *McQueen* stated that section 4(i) excluded "transfer, delivery and acquisition from the definition of "using or administering medical marijuana." *Mazur,* as cited for this proposition by the Court of Appeals, did not. The Court of Appeals refers to page 312 of *Mazur.* Following is the entire page of 312 from Mazur:

This Court has previously addressed the second claim of immunity in § 4(i):

> Notably, § 4(i) does not contain the statutory term "medical use," but instead contains two of the nine activities that encompass medical use: "using" and "administering" marijuana.... In this context, the terms "using" and *312 "administering" are *limited to conduct involving the actual ingestion of marijuana.* Thus, by its plain language, § 4(i) permits, for example, the spouse of a registered qualifying patient to assist the patient in ingesting marijuana, regardless of the spouse's status. [*McQueen,* 493 Mich, at 158, 828 N.W.2d 644 (emphasis added).]

"Medical use", as defined in former § 3(e),[1] is a term that encompasses nine different actions. Because the second type of immunity available under § 4(i) refers genetically to "using and administering" marijuana and not to the statutorily defined "medical use" of marijuana, this Court read § 4(i) narrowly in *McQueen.* Because the defendants in *McQueen* were engaged in the transfer, delivery, and acquisition of marijuana—activities that are found under the umbrella of "medical use"—but were not engaged in the mere use and administration of marijuana, this Court found that they were not entitled to immunity under § 4(i). *Id.* Similarly, defendant here was not merely assisting her husband with conduct involving the actual *ingestion* of marijuana; instead, she assisted him with the *cultivation* of marijuana. Because assisting in the cultivation of marijuana does not constitute assistance with "using" or "administering" marijuana, defendant cannot lay claim to immunity under this provision of the MMMA.

MCL 333.26424(g):

Under § 4(g) of the MMMA, an individual may claim immunity "for providing a registered qualifying patient or a registered primary caregiver with marijuana paraphernalia for purposes of a qualifying patient's medical use of marijuana." MCL 333.26424(g). At issue here is ***313** the definition of the term "marijuana paraphernalia," which is not explicitly defined in the MMMA.

People v *Mazur,* 497 Mich 302, 872 NW2d 201 (2015) stands for the proposition that "Marijuana paraphernalia" under the Michigan Medical Marijuana Act (MMMA) applies both to those items that are specifically designed for the medical use of marijuana as well as those items that are actually employed for the medical use of marijuana. M.C.L.A. § 333.26421 et seq.

ISSUE IV

The Court of Appeals erred when it opined that "Defendant also claims that the trial court abused its discretion in

[1] "Medical use" is now defined in MCL 333.26423(h). "Medical use of marijuana" means the acquisition, possession, cultivation, manufacture, extraction, use, internal possession, delivery, transfer, or transportation of marijuana, marijuana- infused products, or paraphernalia relating to the administration of marijuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." ***This change in the statute is retroactive pursuant to Public Act 283***

ordering a blanket prohibition against the admission of MMMA evidence. Defendant contends that these errors rise to the level of constitutional deprivations. We disagree."

Standard of Review

This Court reviews the proper interpretation and application of statutes de novo. *People* v *Bemer,* 286 Mich App 26, 111 NW2d 464 (2009).

Analysis

In this case the trial court granted the "Prosecution's Motion in Limine to Prohibit the Defense from Asserting an affirmative defense under or Presenting any evidence of the Michigan Medical Marijuana Act" (TT 7/11/17 p 237). The trial court stated:

> So, as a result, I believe that the fact that Mr. Holloway or Mr. Hunt or Mr. Koshmider has a card to a medical marijuana card for medical treatment is not relevant under 401, and 402 tells us that irrelevant evidence is not generally admissible. (TT 7/11/17 p 236)

In general, "'[a]11 relevant evidence is admissible," while "'[e]vidence which is not relevant is not admissible.'" *People* v *Henry,* 315 Mich App. 130, 889 NW2d 1 (2016), quoting MRE 402 (alterations in original). "Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence." People v Aldrich, 246 Mich App 101, 631 NW2d 67 (2001). "Relevant evidence may be excluded under MRE 403 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *People v Meissner,* 294 Mich App 438, 812 NW2d 37 (2011), quoting MRE 403. Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People* v *Mardlin,* 487 Mich. 609, 790 NW2d 607 (2010).

"Res gestae" are circumstances, facts and declarations which so illustrate and characterize the principal fact as to place it in its proper effect." *People v Bostic,* 110 Mich App 747, 313 NW2d 98 (1981). As explained by our Supreme Court in *People* v *Delgado,* 404 Mich 76, 83, 273 NW2d 395 (1978),

"It is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *People* v *Sholl,* 453 Mich 730, 556 NW2d 851 (1996). Our Supreme Court recently reiterated "that *Delgado* and *Sholl* provide firm support for the notion that evidence meeting their 'res gestae' definition is potentially relevant and admissible." *People v Jackson,* 498 Mich 246, 869 NW2d 253 (2015).

In *People* v *Trzos,* unpublished opinion per curiam of the Court of Appeals, issued December 12, 2017 (Docket No. 334666) (Attachment B) states the following:

> The trial court recognized that at least some evidence regarding the MMMA, reference to the marijuana as medicinal, and evidence that defendant was a caregiver and/or patient was relevant to explaining to the factfinder the events and circumstances that led to the alleged offenses. Essentially, the trial court ruled that some of this evidence regarding these broad categories was necessary to give the jury the "complete story"

People v Watkins, Unpublished Opinion of the Court of Appeals per curiam published August 11, 2011 (Docket 302558 and 302559) (Attachment C) states:

> The trial court did not err when it granted the prosecution's motion in limine to the extent that it precluded both defendants from asserting or presenting evidence in support of the immunity stated under § 4 or the defense provided under § 8 of the MMA. <u>The order does not, however, preclude Eric Watkins from presenting evidence that his father was a registered, but non-compliant, patient under the MMA for purposes other than establishing a defense under the MMA.</u> (emphasis added)

Purposes Other than MMA Defense

<u>Maintaining a drug house defense</u>: Mr. Koshmider could not present any

evidence in his defense that he believed that the locked rooms in his basement leased by the Swaffers complied with the completely dried marijuana[2] on the floor and in the garbage bin were excluded from amounts possessed under the MMA.

Bias. Trial counsel attempted to discover bias felt by a detective.

> Q: And isn't it true during that conversation, that you stated that you were biased against medical marijuana?
>
> MR. ELMORE: Objection, your Honor. Relevance.
>
> MR. COVERT: Bias, bias is always a relevance.
>
> THE COURT: No, it's not relevant here. This isn't a medical marijuana case. I've already ruled on that. Sustained.
>
> MR. COVERT: But my client, as a medical marijuana patient, would be experiencing that bias. (TT 7/12/17 p 610-611)

Aiding and abetting legal conduct. Trial counsel was prevented from arguing that the prosecutor had not met his burden of proving that Mr. Koshmider had aided and abetted a crime because that would involve the exploration of the MMMA and whether or not Jayson Hunt or Mike Holloway were committing a crime.

ISSUE V

The Court of Appeals erred when it opined that Defendant's contention that, "whether the employees (who would be testifying) and defendant had their medical marijuana cards was relevant to whether defendant aided and abetted them, given that one could not aid or abet something that is legal. The trial court agreed with the prosecution and "we find no abuse in discretion on this issue."

Standard of Review

This Court reviews the proper interpretation and application of statutes de novo. *People* v *Berner,* 286 Mich App 26, *111* NW2d 464 (2009).

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[2] ***People*** **v** ***Manuel,*** 319 Mich App 291, 901 NW2d 118 (2017)

Analysis

According to section 4, he was not aiding and abetting because he had a legal defense to prosecution. He testified that he intended the facility to be for medical marijuana.

> "Medical use of marijuana" means: the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marijuana or paraphernalia relating to the administration of marijuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition. [MCL 333.26423(f)]

He was able to assist in the use of marijuana. Additionally, he was entitled to a hearing on the matter. Further, as will be argued below, the trial court prohibited Mr. Kosmider from presenting any evidence that he believed that the locked rooms complied with the MMA and that the "seeds, stalks and unusable roots" on the floor and in the garbage bin were excluded from amounts possessed under the MMA.

Counts 4 and 5—Maintaining a Drug House

For the reasons stated above, the trial court erred and abused its discretion when it did not allow a Section 4a defense to Counts 4 and 5, Maintaining a drug house.

The relevant statute is MCL 333.7405(1)(d) as follows:

> "Shall not knowingly keep or maintain a store, shop warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances, or that is used for keeping or selling controlled substances in violation of this article."

Had the trial court made the factual determinations as required, the marijuana in the basement would not have been included in the equation and Mr. Koshmider would not have been tried for Maintaining a drug house.

ISSUE VI

The Court of Appeals erred when it opined that the trial court did not abuse its discretion when it failed to allow the jury to

determine whether maintaining a drug house was the substantial purpose of the user of the property at the two locations in Counts 4 and 5 as this Court required in *People v Thompson,* 477 Mich 164, 730 NW2d 708 (2007) and trial counsel was ineffective for failure to know the law and request the additional, clarifying jury instructions.

Standard of Review/Unpreserved Issue

This Court reviews de novo claims of instructional error. *People v Martin,* 271 Mich App 280, 721 NW2d 815 (2006).

Appellant may raise an ineffective assistance of counsel claim for the first time on appeal because it involves a constitutional error that likely affected the outcome of the trial. *People v Henry,* 239 Mich App 140; 607 NW2d 767 (1999).

The performance and prejudice prongs of an ineffective assistance of counsel claim are mixed questions of law and fact reviewed de novo. *Strickland v Washington,* 466 US 668, 104 S Ct 2052 (1984).

Analysis

In Counts No. 4 and 5, Defendant-Appellant was charged with the maintaining or keeping of a drug house. These allegations had to do with his shop at 1552 Plett Road and his residence at 3576 Sarah St.

The trial court read the following jury instruction to the jury:

> First, that the defendant knowingly kept or maintained, as to Count 4, a building, and as to Count 5, a dwelling; second, at this building and or dwelling was frequented by persons for the purpose of illegally using controlled substances or used for illegally keeping controlled substances, or used for illegally selling of controlled substances; third, that the defendant knew that the building and or dwelling was frequented or used for such illegal purposes. (T 985-986)

"A criminal defendant has a constitutional right to have a jury determine his or her guilt from its consideration of every essential element of the charged offense." *People* v *Kowalski,* 489 Mich 488, 803 NW2d 200 (2011). Thus, a defendant is entitled to have all the elements of the crime submitted to the jury. *Id.*

"Instructional errors are presumed to be harmless, MCL 769.26, but the presumption may be rebutted by a showing that the error resulted in a miscarriage of justice." *People* v *Dupree,* 284 Mich App 89,117; 771 NW2d 470 (2009). See also *People v Riddle,* 467 Mich. 116, 124-125; 649 NW2d 30 (2002) ("The defendant's conviction will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative.").

The Criminal Jury Instructions are not promulgated by the Supreme Court; they are drafted by the Michigan State Bar Standing Committee on Standard Criminal Jury Instructions and are adopted after taking public comments on proposed revisions and additions. *People* v *Stephan,* 241 Mich App 482, n 10; 616 NW2d 188 (2000). Our Supreme Court stated the following in *People v Petrella,* 424 Mich 221, 380 NW2d 11 (1985):

> Moreover, we remind the bench and bar once again that the Michigan Criminal Jury Instructions *do not have the official sanction of this Court.* Their use is not required, and *trial judges are encouraged to examine them carefully before using them, in order to ensure their accuracy* and appropriateness to the case at hand. [*Id.* (emphasis added).]

It is "error for the trial court to give an erroneous or misleading jury instruction on an essential element of the offense" including when the misleading instruction is taken from the Criminal Jury Instructions. *Id.* While the Supreme Court "urges" trial courts to utilize these criminal jury instructions, this is not a mandate. *Stephan, supra. supra.* "Where a Criminal Jury Instruction does not accurately state the law," trial courts must refuse to give it. *Stephan, supra* at 495.

Maintaining a Drug House

The relevant statute is MCL 333.7405(1) (d) as follows:

"Shall not knowingly keep or maintain a store, shop, warehouse,

dwelling, building, vehicle, boat, aircraft, or other structure or place, that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances, or that is used for keeping or selling controlled substances in violation of this article."

The Michigan Supreme construed the phrase "keep or maintain" in the case of *People v Thompson,* 477 Mich 164, 730 NW2d 708 (2007) where it ascertained the legislative intent as well as surveying other states in interpreting the phrase. The Supreme Court of Michigan concluded the following:

> "The state need not prove that the property was used for the exclusive purpose of keeping or distributing controlled substances, but such use must be a *substantial purpose* of the users of the property, and the use must be *continuous* to some degree; incidental use of the property for keeping or distributing drugs or a single, isolated occurrence of drug-related activity will not suffice. The purpose [for] which a person uses property and whether such use is continuous are issue of fact to be decided on the totality of the evidence of each case; the state is not required to prove more than a single specific incident involving the keeping or distribution of drugs if other evidence of continuity exits." *Id* at 156.

In the case of *People v LaForest,* unpublished opinion per curiam of the Court of Appeals, decided May 25, 20110 (Docket No. 291553) (Attachment D) the jury heard the following jury instructions:

> "First, that the Defendant knowingly kept or maintained a dwelling. Second, that this dwelling was used for illegally keeping controlled substances. Third, that the Defendant knew that the dwelling was frequented or used for such illegal purposes.
>
> "Now, the phrase keep or maintain implies usage with some degree of continuity that can be deduced by actual observation of repeated acts or circumstantial evidence, such as perhaps a secret compartment or the like, that leads to the same conclusion. In other words, the State need not prove that the home was used for the exclusive use of keeping marijuana, but such use must be a substantial purpose of the user of the property. (emphasis added)

> "The use of keeping of marijuana must be continuous to some degree. Incidental use of the property for keeping marijuana or a single isolated occurrence of drug related activity will not suffice. Whether the Defendant used the residence to keep marijuana and whether such use is continuous, are questions of fact for you to decide based on the totality of the evidence. The State is not required to prove more than a single specific incident involving the keeping of drugs if other evidence of continuity exists."

For unknown reasons, the Michigan Model Criminal Jury Instructions does not include the language of Paragraphs 2, 3, and 4, above. It merely notes the case of "*People v Thompson*, ATT Mich 146, 156-57, 730 NW2d 708 (2007)" in the footnotes.

In *People v Norfleet*, 317 Mich App 649; 897 NW2d 195 (2016). Defendant was convicted of various drug crimes, including keeping or maintaining a drug house and a drug vehicle under MCI 333.7405(d). This Court agreed that two counts were defective as to the elements in that they failed to provide a definition of "keep or maintain," and neglected to instruct on the requirement of continuous use.

In the alternative, pursuant to Strickland v Washington, 466 US 668,104 S Ct 2052 (1984), it was ineffective assistance of counsel for not knowing the law where the additional information for the jury would have bolstered Defendant Appellant's defense to maintaining a drug house/vehicle. Failure to research *Thompson* and request additional jury instructions betrays a startling ignorance of the law. *Kimmelman v Morrison*, ATT US 365, 106 S Ct 2574 (1986).

Prejudice

Continuous Use AND Substantial Purpose

Prejudice can be shown by something less than a preponderance of the

evidence. *Strickland v Washington,* 466 US 668, 104 S Ct 2052 (1984) ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.").

It affirmatively appears that it is more probable than not that the error was outcome determinative. Especially at his home there was not continuous use and substantial purpose. Defendant-Appellant respectfully requests this Court reverse his convictions for Maintaining a Drug House and Vehicle (MCL 333.7450(1)(d) based on the insufficiency of the jury instruction, or in the alternative, based on ineffective assistance of counsel.

ISSUE VII

The evidence was insufficient in Counts 3 and 7 that Mr. Koshmider aided and abetted Jayson Hunt & Mike Holloway to illegally distribute marijuana.

Standard of Review

A claim of insufficiency of the evidence invokes a defendant's constitutional right to due process of law. US Const, Am, XIV; Const 1963, Art I, Section 17; *In re Winship,* 397 US 358, 364; 90 SCt 1068 (1970) which this court reviews de novo on appeal. *People v Hawkins,* 245 Mich App 439, 457; 628 NW2d 105 (2001). "[T]his Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Fennell,* 260 Mich App 261, 270; 677 NW2d 66 (2004).

Analysis

Our Michigan Supreme Court, when comparing the concept of the sufficiency of evidence to the relevancy of evidence stated in *People v Hampton*, 407 Mich 354, 285 NW2d 284 (1979):

> The concept of sufficiency, on the other hand, is designed to determine whether all the evidence, considered as a whole, justifies submitting the case to the trier of fact or requires a judgment as a matter of law. This is in contrast to the standards for relevancy which usually focus on one particular piece of evidence. The fact that some evidence is introduced does not necessarily mean that the evidence is sufficient to raise a jury issue, (emphasis added) Because there is no requirement that the evidence be sufficient to support a conviction to be admissible, it does not necessarily follow that merely because some evidence is admitted, the evidence is sufficient to raise a jury issue.

Due process requires that the prosecutor introduce sufficient evidence which could justify a trier of fact in reasonably concluding that defendant is guilty beyond a reasonable doubt before a defendant can be convicted of a criminal offense, see, ***Jackson, supra.*** If sufficient evidence is not introduced, a directed verdict or judgment of acquittal should be entered. The statements in Johnson, supra; Abernathy, supra; ***Eaton, supra,*** [3] to the effect that a trial judge should direct a verdict only where there is no evidence on a material element of the offense are specifically disapproved. *Id.* at 367

Additionally, the prosecution must prove its theory beyond a reasonable doubt in the face of any contradictory evidence provided by defendant. People v Nowack, 462 Mich 392, 400; 614 NW2d 78 (2000).

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[3] People v Johnson, 397 Mich. 686, 246 N.W.2d 836, (1976); People v Abernathy, 253 Mich. 583, 235 N.W. 261, (1931); People vEaton, 59 Mich. 559, 26 N.W. 702, (1886)

Elements of Aiding and Abetting

> Delivery means that the defendant transferred or attempted transfer the substance to another person knowing that it was marijuana and intending to transfer it to that person. In this case, the defendant is charged with committing the delivery of marijuana or intentionally assisting someone else in committing it. Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abettor.
>
> To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the alleged crime was actually committed, either by the defendant or someone else. It does not matter whether anyone else has been convicted of the crime. Second, that before or during the crime, the defendant did something to assist in the commission of the crime; third, that -- that at that time, the defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission or that the crime alleged was a natural and probable consequence of the commission of the crime intended. It does not matter how much help, advice, or encouragement the defendant gave; however, you must decide whether the defendant intended to help another commit the crime; and whether this help, advice, or encouragement actually did help, advise, or encourage the crime. (T 983-984)

Was an alleged crime actually committed? The answer to that question could not be explored because the MMA could not be considered. Therefore, the evidence of the first element was not proven beyond a reasonable doubt and the two aiding and abetting charges must be reversed.

Relief Requested and Conclusion

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Court reverse his conviction and remand for a new trial and grant Petitioners Writ of Certiorari.

Respectfully submitted,

/s/ Donald J. Koshmider II
DONALD J. KOSHMIDER II
Petitioner
3576 Sarah Street
Cadillac, Michigan 49601
(231) 884-4376

Dated: September 4, 2020