STATE OF MICHIGAN
42ND DISTRICT COURT, DIVISION 2

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No. C11-0912A
Hon. William H. Hackel III

vs.

EARL CANTRELL CARRUTHERS,

Defendant.
_______________________________________/

OPINION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS.

Defendant is charged with possession of marijuana in violation of MCL 333.7403(2)(d) and operating a motor vehicle while his licensed was suspended in violation of MCL 257.904(3)(a). Defendant has filed a motion to dismiss the marijuana possession charge arguing that he is, essentially, immune from prosecution pursuant to the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. The People filed a response to the motion. A hearing was held on September 26, 2011. The parties stipulated to a series of facts, Defendant testified, and legal arguments were advanced. The Court took the matter under consideration indicating it would issue an opinion in writing.

For the purpose of Defendant's Motion, it appears that Defendant is a caregiver under the MMMA. He decided to make rice krispy treats for his patients which included approximately 12 ounces of marijuana. When the 12 ounces of marijuana were combined with the rice krispies, butter and marshmallows, the resulting total weight of the rice krispy treats was above the legal amount permitted under the MMMA. When Defendant was stopped by the

police, he did not just have one rice krispy treat in his possession but rather squares from the whole batch of treats. When all the treats were combined and weighed, the People argue the weight exceeded the amount that he was allowed to possess at a given time. Defendant argues the weight should only be determined by the amount of marijuana put into the rice krispy treats, not the aggregate weight of the treats.

The question for the Court, in reviewing the MMMA, is whether the allowable weight that a caregiver may possess is determined solely by the weight of the marijuana itself or the aggregate weight of the entire mixture. In other words, is it the weight of the entire mixture [rice krispies, brownies, etc] or just the marijuana itself? If the caregiver possesses more than permitted by the MMMA, then he is not entitled to the protections from prosecution and thus may otherwise be prosecuted under controlled substances laws and ordinances.

As to the MMMA, the provision providing protection is set forth in MCL 333.26424, which provides in part:

> (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, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, 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. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount.

(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, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, 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 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.

The issue here is what is "usable marihuana". This is defined by the MMMA:

> "Usable marihuana" means the dried leaves and flowers of the marihuana plant, **and any mixture or preparation thereof**, but does not include the seeds, stalks, and roots of the plant. [MCL 333.264239(j)].

The phrase "any mixture or preparation thereof" is not defined. In interpreting the MMMA, a voter initiative, the Court is guided by the following:

> The MMMA was enacted as a result of an initiative adopted by the voters. "The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters." *Welch Foods, Inc. v. Attorney General*, 213 Mich.App. 459, 461, 540 N.W.2d 693 (1995). We presume that the meaning as plainly expressed in the statute is what was intended. *Id.* This Court must avoid a construction that would render any part of a statute surplusage or nugatory, and "[w]e must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme." *People v. Williams*, 268 Mich.App. 416, 425, 707 N.W.2d 624 (2005). [*People v Redden*,

290 Mich App 65, 76-77; 799 NW2d 184, 191 (2010), *app withdrawn* 489 Mich 985 (2011)].[1]

In analyzing what is a "mixture" under Michigan's Controlled Substance Act, MCL 333.7401 and MCL 333.7403, *et seq*, the Court of Appeals defined "mixture" as follows:

> Where a word is undefined by statute, it is to be construed according to its common and approved usage. *People v. Troncoso*, 187 Mich.App. 567, 573, 468 N.W.2d 287 (1991). In doing so, resorting to the dictionary definition is appropriate. *Id. The Random House College Dictionary: Revised Edition*, p 856, defines "mixture" as follows:
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>> 1. a product of mixing. 2. any combination of contrasting elements, qualities, etc. 3. *Chem., Physics*. an aggregate of two or more substances that are not chemically united and that exist in no fixed proportion to each other. Cf. compound (def. 8).... 5. the act of mixing. 6. the state of being mixed....-Syn. 1. blend, combination; compound. 2. miscellany, medley, melange.
>
> *Random House*, p 856, defines "mix," in part, as follows:
>
>> 1. to put (various materials, objects, etc.) together *in a homogeneous or reasonably uniform mass*. [Emphasis added.]
>
> *Random House*, p 143, defines "blend," in part, as follows:
>
>> 1. to mix smoothly and inseparably together ... 3. to mix or intermingle smoothly and inseparably. 4. to fit or relate harmoniously ... 5. to have no perceptible separation....
>
> In light of these definitions, we conclude, contrary to the prosecutor's suggestion, that the "mixture" containing cocaine must be reasonably homogeneous or uniform. That is, the cocaine and

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[1] Indeed, this interpretative analysis is not unique to voter initiatives. When ascertaining the voter intent on a constitutional amendment, courts examine each word for its plain meaning at the time of ratification and ascertains the plain meaning by referencing a dictionary. *Citizens Protecting Michigan's Constitution v Secy of State*, 280 Mich App 273, 295; 761 NW2d 210, 223; 280 Mich App 801, *aff'd in part, app den in part* 482 Mich 960 (2008).

> the filler (in this case, baking soda) must be "mixed" together to form a "mixture" that is reasonably uniform. A sample from anywhere in the mixture should reasonably approximate in purity a sample taken elsewhere in the mixture. It should be reasonably difficult to separate the cocaine from the filler material because of the mixing or blending of the two substances.

People v Barajas, 198 Mich App 551, 555-56; 499 NW2d 396, 398-99 (1993), *aff'd* 444 Mich 556 (1994).[2]

As stated in *People v Stahl*, 110 Mich App 757, 760-61; 313 NW2d 103, 105 (1981):

> In interpreting statutes, all words and phrases should be construed according to the common and approved usage of the language. Correct and proper interpretation means giving effect to every word of the statute. Every effort must be made to avoid declaring any portion of the Legislature's language to be surplusage." (Footnotes omitted.)
>
> If the Legislature intended that the weight classifications in the statute should apply to the controlled substance alone rather than to the aggregate weight of a mixture containing a controlled substance, there would be no purpose for the inclusion of the phrase "of any mixture containing that substance", and the phrase would be surplusage.

Thus:

> We believe that a plain reading of the above language establishes that the weight classifications refer to the aggregate weight of a mixture containing a controlled substance and not solely to the weight of the pure controlled substance. [*Id.* at 760].

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2. *Webster's American English Disctionary*, p 215, defines "mixture" as "act or product of mixing". It should be recognized that some may rely on the internet, rather than hardcover books, for the interpretation of words. At www.thefreedictionary.com, "mixture" is defined as:

1.
   a. The act or process of mixing: *an alloy made from the mixture of two metals.*
   b. The condition of being mixed: *the inevitable mixtures of urban neighborhoods.*
2. Something produced by mixing.
3. One that consists of diverse elements: *The day was a mixture of sun and clouds.*
4. A fabric made of different kinds of thread or yarn.
5. *Chemistry* A composition of two or more substances that are not chemically combined with each other and are capable of being separated.

Obviously, this can lead to what some may consider fairly bizarre results, as recognized in *Barajas*:

> Thus, the amount of cocaine within the mixture is irrelevant; rather, it is the weight of the entire mixture that establishes the penalty, without regard to purity. *People v. Kidd,* 121 Mich.App. 92, 328 N.W.2d 394 (1982). Thus, a person delivering a mixture containing 649 grams of baking soda and one gram of cocaine is punished more seriously than an individual who delivers 649 grams of pure cocaine. [198 Mich App at 554-555].

The reasoning is explained as follows:

> It is reasonable for the Legislature to impose more severe punishment for those possessing greater amounts of a mixture containing a controlled substance due to the potential for wider dissemination with an increased potential harm to society. The wording of M.C.L. s 333.7403; M.S.A. s 14.15(7403), indicates to this Court that the Legislature intended to punish defendants more severely for possession of greater amounts of "any mixture" containing a controlled substance with the recognition that purchasers of such mixtures often have little or no idea of what percentage of the mixture is filler and what percent is the "pure" drug. The greater the quantity of the mixture, regardless of the degree of purity, the greater the potential harm to society. Therefore, the different treatment for persons in different situations under the code is proper because it is based on the object of the legislation, deterrence of the distribution of the drug. [*People v Lemble*, 103 Mich App 220, 222-23; 303 NW2d 191, 193 (1981)].[3]

The only exceptions to this "aggregate mixture" rule appear to be when the controlled substance and the filler are (1) not actually mixed, or (2) the filler is water. See *Baraja, supra* (cocaine taped inside of jar containing baking soda is not a "mixture"); *People v Hunter*, 201 Mich App 671; 506 NW2d 611 (1993) (cocaine and water in a jar is not a "mixture").

[3] Applying the Court of Appeals's language, then "the greater the quantity of the [marijuana/ rice krispy treat] mixture , regardless of the degree of purity, the greater potential harm to society."

Even when donning the great hat of retrospective insight with the matching scarf of pontification, it is difficult to assess whether the voters truly thought, for example, that mixing 1 ounce of marijuana with 12 ounces of brownie mix, 6 ounces of peanuts, and 6 ounces of chocolate chips means you now possess 25 ounces of "usable marijuana". But, the court decisions holding the weight of a controlled substance, for criminal prosecution purposes, includes the aggregate weight of the entire mixture was well established almost 30 years before the MMMA was enacted by the voters. Maybe the drafters of this fine piece of legislation thought about this and concluded "mixture" should be interpreted the same as with the other controlled substance statutes, or maybe they just did not even think about it all. Nonetheless, the common understanding of the term "mixture" is the product of all the mixed ingredients.

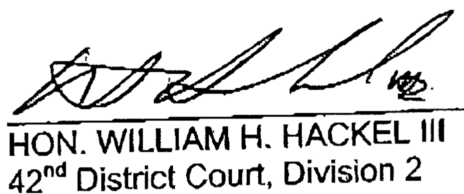
Moreover, even when not relying on the plain language of the MMMA by utilizing the tried and true legislative interpretative analysis of looking at various dictionary definitions, the maxim *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), would support the conclusion that anything other than "seeds, stalks, and roots of the plant" would be considered part of the "usable mixture". In other words, since the definition of "usable marijuana" only excludes "seeds, stalks, and roots of the plant", this necessarily means the definition includes all other things within the mixture—rice krispies, marshmallows, brownie mix, cookies, bundt cake, etc.

Finally, this Court believes there must be continuity in the interpretation and application when assessing intention of statutes that address the same

subject matter, even when the statutes are not even enacted at the same time. In this manner, then, the public can be fully aware of the rules and responsibilities when dealing with a particular subject matter. In short, absent a specific and distinguishing definition, words should be interpreted the same when dealing with the same subject matter. Here, the Court of Appeals has articulated a definition of the term "mixture" when interpreting Sections 7401 and 7403 of the Controlled Substances Act. There being no special or differentiating definition offered by the drafters of the MMMA, the term "mixture" should be accorded the same definition. By analyzing the statutes this way, and together, then the public is fully aware that the weight of any controlled substance, including medicinal marijuana, includes not only the controlled substance itself, but also what it is blended with.

For the above reasons, this Court holds that the term "usable mixture" as defined in the MMMA includes the aggregate weight of the marijuana and any filler wherein the only exception is when the filler is a seed, stalk, root or water. MCL 333.26439(j); *Hunter, supra*. Here, the parties stipulated that the aggregate weight of the mixture exceeded the amount that could be legally possessed by a caregiver. Accordingly, Defendant's Motion to Dismiss is DENIED.

IT IS SO ORDERED



Dated: October 5, 2011

HON. WILLIAM H. HACKEL III
42nd District Court, Division 2

cc: Andrew Kassab, Macomb County Assistant Prosecuting Attorney, Attorney for the People
Charles Longstreet II, Attorney for the Defendant