Case Nos: 12-2338 and 12-2339

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

GERALD LEE DUVAL, JR. (12-2338), and
JEREMY DUVAL (12-2339),

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION,
Case No. 2:11-cr-20594

APPELLANTS' INITIAL BRIEF

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REQUEST FOR ORAL ARGUMENT

The Appellants, GERALD LEE DUVAL, JR., and JEREMY DUVAL, through undersigned counsel and pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Sixth Circuit Rule 34(a), hereby respectfully request oral argument. In light of the complexity of the record and the novelty of the issues on appeal, the Duvals believe that oral argument would assist this Court in determining the outcome of this appeal.

STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Michigan had subject matter jurisdiction over this federal criminal prosecution pursuant to 18 U.S.C. § 3231. Under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), this Honorable Court has appellate jurisdiction to review the judgments and sentences in this case, which were timely appealed on October 15, 2012. R.E. 96, Page ID# 1254; R.E. 97, Page ID# 1256. The judgments and sentences are final orders that dispose of all matters pending before the district court.

STATEMENT OF THE ISSUES

Jeremy Duval and his sister Ashley Duval cultivated medical marijuana as registered "patients" and "caregivers" under Michigan's Medical Marihuana Act ("MMMA") on the property of their father, Gerald Duval. Law enforcement officers from the Office of Monroe County Narcotics Investigation ("OMNI")

visited the property and gave the Duvals advice on how to comply with Michigan's statutory framework. The Duvals followed that advice.

Nine months later, Deputy Glick, who worked for both OMNI and the federal Drug Enforcement Agency, initiated a federal investigation of the Duvals. Glick applied for a search warrant under Michigan law from a Michigan magistrate because it was "easier" than procuring a federal warrant from a federal judge.

In his affidavit to the Michigan magistrate, Deputy Glick omitted two facts that would have negated a probable cause finding under Michigan law: (1) OMNI officers had previously visited the premises to ensure that the Duvals were complying with the MMMA and issued no citations; and (2) Ashley Duval, Jeremy Duval, and Gerald Duval all had legal authority under Michigan law to grow the marijuana plants in the greenhouses. Unaware of these facts, the magistrate issued the state warrant, pursuant to which federal agents seized marijuana that led to this federal prosecution for the manufacture of marijuana.

The district court ruled that Glick's omissions were irrelevant because the search warrant affidavit established probable cause that the Duvals violated the Controlled Substances Act.

ISSUE I: Did the district court err in holding that compliance with state law is irrelevant in determining whether a state search warrant application establishes probable cause?

ISSUE II: Does the cultivation of marijuana by a registered caregiver in conformity with Michigan's Medical Marihuana Act fall within the "practitioner exception" to the definition of "manufacture" under the Controlled Substances Act?

STATEMENT OF THE CASE

Gerald Lee Duval, Jr., and his son, Jeremy Duval (collectively, the "Duvals"), hereby appeal their judgments and sentences. On September 22, 2011, the Government filed an indictment charging the Duvals with one count of conspiracy to manufacture 100 or more marijuana plants in violation of 21 U.S.C. §§ 846, 841(a)(1); two counts of manufacturing 100 or more marijuana plants with the intent to distribute the drug in violation of 21 U.S.C. § 841(a)(1); maintaining a drug premises in violation of 21 U.S.C. § 856(a)(1); and possession of a firearm in the furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c). R.E. 1, Page ID# 1-4. The Government also charged Gerald Lee Duval, Jr., with possession of a firearm by a convicted felon under 18 U.S.C. § 922(g)(1). R.E. 1, Page ID# 3.

On November 10, 2011, the Duvals jointly moved for a hearing under *Franks v. Delaware*, 438 US 154 (1978) and to suppress evidence gathered during two searches of Gerald Duval's home and farm. R.E. 22, Page ID# 67. On January 23 and 24, 2012, the district court held a hearing on the motion. R.E. 40,

Page ID# 303; R.E. 41, Page ID# 417. After the conclusion of the hearing, the district court issued an order directing the parties to file supplemental briefing and provide additional photographic evidence related to the searches. R.E. 38, Page ID# 298. The parties complied. R.E. 42; R.E. 43; R.E. 44.

The court held the second evidentiary hearing on March 5 and 6, 2012. R.E. 100, Page ID# 1260; R.E. 101, Page ID# 1461. The district court denied the motion to suppress at the conclusion of the hearing. R.E. 101, Page ID# 1532.

On April 3, 2012, the Government filed a Superseding Indictment in which it added more weapons to the firearms charges. R.E. 64, Page ID# 857-59. One week later, the court commenced a jury trial. R.E. 103, Page ID# 1570. On April 20, 2012, the jury found the Duvals guilty of the drug-related charges, but innocent of the charges related to firearms. R.E. 71, Page ID# 886-87; R.E. 73, Page ID# 890-91. The court entered a judgment on September 9, 2012, sentencing Gerald Duval to a ten-year term of incarceration, an eight-year term of supervised release and a fine of $12,500. R.E. 94, Page ID#1187; R.E. 92, Page ID#1093-96. That same day, the court entered a judgment sentencing Jeremy Duval to a five-year term of incarceration and a four-year term of supervised release. R.E. 93, Page ID#1100-03.

The Duvals filed their respective notices of appeal on October 15, 2012. R.E. 96; R.E. 97. This appeal followed.

STATEMENT OF THE FACTS

In September of 2010, law enforcement officers working in the Office of Monroe County Narcotics Investigation ("OMNI") visited Gerald Duval's property located at 20277 Ida Center Road in Petersburg, Michigan (the "Ida Center Property"). R.E. 110, Page ID# 3428. OMNI, Monroe County's drug enforcement team, is comprised of state and local law enforcement officers, as well as members of the Monroe County Sheriff's Office. *Id.* OMNI officers learned that the Duvals were cultivating marijuana when they conducted a helicopter fly-over in the area. R.E. 108, Page ID# 2861.

At least two OMNI officers[1] entered the property to investigate whether the Duvals had obtained authorization to grow marijuana under the Michigan Medical Marihuana Act ("MMMA"). Gerald Duval and Jeremy Duval produced their registration as patients under the MMMA, along with the registration of Ashley Duval, Gerald Duval's daughter. R.E. 108, Page ID#2835, 2863; R.E. 109, Page ID# 3167; R.E. 110, Page ID# 3264; Page ID# 3447-48. Under Michigan law, each of the three Duvals was allowed to grow twelve plants. R.E. 106, Page ID# 2390; R.E. 110, Page ID# 3266. Jeremy Duval informed the OMNI officers that

[1] There is some dispute as to how many OMNI officers visited the Ida Center Property that day. Jeremy Duval, Gerald Duval, and their housekeeper, Carrie Shimp, all testified that three members of the OMNI team, including Deputy Ian Glick, were present. R.E. 109, Page ID#2945; Page ID# 3169; R.E. 110, Page ID# 3264. However, Glick and officers Hart and Zimmerman all denied that Glick entered the property that day.

he intended to apply for caregiver status the following year, at which point he would be permitted to grow up to seventy-two marijuana plants. R.E. 110, Page ID# 3266. The OMNI officers confirmed that this was correct. *Id*.

After reviewing the registration information, the OMNI officers gave Jeremy and Gerald Duval advice on how to comply with the MMMA. Specifically, the officers told the Duvals that each caregiver needed to keep his plants in a separate, secure, and locked enclosure, with the licenses posted on the fence. R.E. 108, Page ID# 2835-36, 2838, 2842. The OMNI officers then left the property without seizing any plants, arresting any of the Duvals or issuing any citations. R.E. 108, Page ID# 2854.

Heeding the advice of law enforcement, the Duvals constructed two greenhouses and a fence to keep intruders out of the greenhouses. R.E. 109, Page ID# 3172-73. Jeremy Duval kept his plants in the one of the greenhouses, while Ashley Duval kept her plants in the other. *Id*. Both applied to become caregivers, and both kept their caregiver and patient registration on the gate outside their respective greenhouses. R.E. 106, Page. ID, 2313, 2390; R.E. 109, Page ID# 3173.

Gerald Duval moved out of the Ida Center residence in May of 2011 after a fight with his wife, Tracy Duval, who remained in the residence with Ashley Duval. R.E. 109, Page ID# 2922, 3234, 3052-53. Gerald Duval moved in with Jeremy Duval at his residence on 6108 Robinson Road. R.E. 109, Page ID# 3052.

On June 15, 2011, Deputy Ian Glick, acting on behalf of the Monroe County Sheriff's Department, submitted an application for a search warrant to a state magistrate in Monroe County, Michigan. R.E. 22-1, Page ID#93-95. The application does not cite to any federal statutes. *Id*. Instead, Glick refers to marijuana as a controlled substance under the Michigan Public Health Code of 1978, and asserted that Gerald Duval could not legally grow marijuana as a caregiver under the MMMA because of a prior felony conviction. *Id*.

To establish probable cause, Glick recited the following facts:

The DEA office in Toledo received a tip on May 6, 2011, that Gerald Duval had constructed one greenhouse for the purpose of growing and selling medical marijuana and had begun construction on another greenhouse. *Id*. at Page ID# 94. The tip alerted DEA that there is chain link fence approximately eight feet in height surrounding the greenhouses. *Id*.

The confidential source also stated that Gerald Duval had been bragging about growing and selling medical marijuana, but had a prior felony conviction, which prevented him from lawfully growing marijuana as a "Primary Caregiver" under Section 333.101 of the Michigan Compiled Laws. *Id*. In addition, the source stated that he/she had seen a large potter with a marijuana plant growing in it and had heard guns being fired on the Ida Center Property. *Id*. Glick also attested that he and Reserve Deputy Shumaker had personally observed a large

quantity of marijuana growing in the greenhouses on June 13, 2011. *Id.* at Page ID# 95.

Deputy Glick omitted any reference to the previous OMNI investigation of the Ida Center Property. *Id.* at Page ID#93-95. He did not inform the magistrate that OMNI officers knew Gerald Duval had a license to grow twelve plants as a patient. *Id.* Nor did he mention that OMNI officers knew that Ashley and Jeremy Duval had registered with the state to grow marijuana in the greenhouses. *Id.* The state magistrate signed a warrant to search the greenhouses and adjacent residence of Gerald Duval. R.E. 22-1, Page ID# 96.

On June 16, 2011, federal law enforcement agents executed the search warrant and seized 144 live marijuana plants from the two greenhouses, along with 30 dead plants, two dry marijuana plants, eight bags of marijuana, paraphernalia related to marijuana cultivation, seven firearms, personal documents belonging to Gerald Duval, and the MMMA registration documents. R.E. 28, Page ID#142. After the seizure, Jeremy Duval, believing that the warrant was only executed under state law, replanted an additional sixty-seven marijuana plants in his greenhouse, as he was permitted to do under Michigan law. R.E. 110, Page ID# 3289.

On August 9, 2011, Glick applied for another search warrant, this time with a federal magistrate. R.E. 22-2, Page ID# 104. As evidence of probable cause,

Glick recited much of the same information contained in the first state application. *Id*. at Page ID# 103. Glick also included a number of details related to the June 16, 2011 search and seizure. *Id*. at Page ID# 104. The affidavit also states that a confidential source informed the DEA that Gerald Duval had replanted marijuana in the greenhouses, and that Glick and two other DEA agents personally observed the marijuana plants. *Id*. at Page ID# 104-05. The federal magistrate signed the search warrant that day. On August 11, 2011, law enforcement executed the warrant and seized Jeremy Duval's sixty-seven newly-planted marijuana plants. R.E. 28, Page ID#145. The fruits of the June 16 and August 11 searches and seizures provided the basis for the prosecution of Jeremy and Gerald Duval.

On November 10, 2011, the Duvals jointly moved to suppress the evidence seized pursuant to the search warrants. R.E. 22. In their motion to suppress, the Duvals maintained that the affidavits contained false statements and material omissions and were prepared with an intentional or reckless disregard for the truth. R.E. 22, Page ID# 68. They maintained that neither Glick nor any other DEA agent could have seen the marijuana plants from the neighbor's property because the greenhouses shielded the plants from outside observation. *Id*. at Page ID# 74, 83-84.

The Duvals also disputed the assertion in the August 11 affidavit that Glick had obtained permission from the owner of the adjoining property, whose parcel

number is provided in the affidavit. *Id.*, Page ID# 81. The Duvals provided a sworn affidavit from that property owner, Kerry Iott, who averred that he had not spoken to any federal agent and had not consented to law enforcement's entry onto his property. *Id.*, Page ID# 81-83. Based on this evidence, the Duvals requested a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). *Id.*

The district court granted the request. R.E. 25. At the outset of the evidentiary hearing, the district court significantly narrowed the scope of the inquiry by identifying two "pivot points." R.E. 40, Page ID# 306. The court first posited that "if the officers' testimony is credible that they saw the marijuana in the hoop huts, I think it's pretty fair to say that the probable cause is established." R.E. 40, Page ID# 306. The district court then suggested that if the affidavit contained sufficient information from which the magistrate could have concluded that the informant's information was credible, then "that is sort of game over." *Id.*

The court first heard the testimony of Deputy Glick who stated that he worked with the Monroe County Sheriff's Department, but was assigned work as a Task Force Agent with the DEA Toledo Resident Office. *Id.*, Page ID# 320. Glick claimed that he was able to see the marijuana in the greenhouses using binoculars. *Id.*, Page ID# 336. When asked what he did to find out who lived at the Ida Center Property, Glick stated that he talked to his informant, asked people

at the post office, ran Mr. Duval's information through a computer database, and talked to other people in the community. *Id.*, Page ID# 373.

Deputy Glick admitted that he knew at the time that he executed the affidavit that even Tracy Duval, the wife of Gerald Duval, lived at the residence and that nothing prevented her from legally growing marijuana as a caregiver under Michigan law. *Id.*, Page ID# 375. He also admitted that he applied for a state rather than a federal search warrant because it "would be easier at some points for some reasons." R.E. 40, Page ID# 371. The Government also adduced testimony from (1) DEA Special Agent Brendan Gillen, who testified to having observed the replanted marijuana on July 21, 2011; and (2) Agent Jeremy Langenderfer, who corroborated Agent Gillen's account. R.E. 41, Page ID# 473, 490.

The Duvals called Kevin Taylor, a neighbor, who testified that Glick and Shumaker flashed federal DEA identification to gain entry to his land. *Id.*, Page ID# 512. This led Mr. Taylor to believe "they were definitely agents of that department." *Id.* The defense also called Kerry Iott, who contradicted the statement in Glick's August 11 affidavit that law enforcement secured permission from the owner of Iott's parcel to conduct surveillance on June 13, 2011. *Id.*, Page ID#525. Mr. Iott also testified that he had tried to see inside the greenhouses from his property but could not do so because the plastic was opaque. *Id.*, Page ID# 527.

Jeremy Duval then testified that he kept seventy-two plants in the greenhouse: twelve for each of his five patients and twelve for his own use as patient. *Id.*, Page ID# 547. He also testified that Ashley Duval grew medical marijuana in the second greenhouse. *Id.*, Page ID# 554. According to Jeremy Duval, it would have been impossible to see inside the greenhouses because he had hung burlap on the side through which law enforcement claimed to have viewed the marijuana and because the greenhouse was constructed using double-layered opaque plastic. *Id.*, Page ID# 558-60. Jeremy Duval admitted that there were times when he opened vents on the side of the greenhouse. *Id.*, Page ID# 566-67. He claimed, however, that he only opened the vents to ventilate the area while he tilled the soil, but otherwise kept them closed. *Id.* Page ID# 567. He also claimed that, even when he opened the vents, he always kept the burlap up because Michigan law required the plants to be concealed. *Id.*, Page ID# 567-68.

The Duvals also introduced photographs taken by Gerald Duval's brother, Tharon Duval, who testified that he began photographing the scene approximately forty minutes after the Government began executing the June 11 warrant. *Id.*, Page ID# 585-86. Tharon Duval testified that he observed law enforcement cranking a handle that opened the vents, and that he photographed this activity. *Id.*, Page ID# 588-89.

Glick was recalled to the stand, whereupon he admitted that he did not provide the correct parcel number from which he surveilled the Ada Center Property. *Id.*, Page ID# 623. He explained away the inconsistency as a "typo," even though the parcel number differed by four or five digits and corresponded to the parcel from the Iott property. *Id.*, Page ID# 630. Glick also testified that the panels were open when the DEA agents arrived. *Id.*, Page ID# 629.

The district court found the lack of photographic evidence during the execution of the search warrant troubling, given the inconsistency between the testimony of Glick and Tharon Duval regarding the position of the vents. *Id.*, Page ID# 631. To resolve the dispute, the court ordered supplemental briefing and scheduled another evidentiary hearing. *Id.*, Page ID# 632. Before concluding the first hearing, the court reiterated its belief that the "only issue . . . in play" is the credibility of the witnesses who testified that they observed marijuana on June 13, 2011. *Id.*, Page ID# 633. The court also expressly found there was insufficient independent corroboration of the information provided by confidential source to sustain the warrant without the observation of the marijuana on June 13, 2011. *Id.*, Page ID# 634.

At the second evidentiary hearing, DEA Special Agent Michael Noel testified that he took videos and photographs to document to the scene upon the execution of the June 16 search warrant. R.E. 100, Page ID# 1272-76. Agent Noel

testified that the ventilation panels on Jeremy Duval's greenhouse were open when the DEA agents arrived, and the Government introduced video and photographic evidence to support this assertion. *Id*., Page ID# 1276-93. Agent Noel conceded on cross-examination that no one had taken any photographs or videos of the scene when Glick purported to observe the marijuana on June 13, 2011. *Id*., Page ID# 1301. He also testified that he never saw anyone alter the position of the vents during the course of the search. *Id*., Page ID# 1312.

However, another DEA Agent, Kevin Graber, directly contradicted the testimony of Glick and Noel with respect to the position of one of the vent panels. Graber testified that he had, in fact, cranked one of the panels up and that this was standard practice because law enforcement frequently needed to ventilate property. *Id*., Page ID# 1384. According to Graber, increasing the air flow is "almost always the first priority" when executing a raid on a marijuana grow house. *Id*., Page ID# 1377.

On the final day of the hearing, defense counsel moved the court to reopen proofs and offered to prove that OMNI officers visited the property in September 2010 to give advice on how to comply with Michigan law. R.E. 101, Page ID# 1463-64. The court denied the request, reasoning that even if it accepted the offer of proof as true, the information would not be useful in determining whether the Duvals could meet their ultimate burden. *Id*., Page ID# 1468-69.

The court further explained its rationale as follows:

> Regardless of the legality of that or the conflict between State and Federal law, the question before the Court now is whether there was probable cause to believe that there -- whether a Magistrate Judge could determine there was probable cause to believe that there was marijuana in -- growing in that greenhouse at the time, which, in fact, is a violation of Federal law, regardless of Michigan's medical marijuana legislation.

Id., Page ID# 1531-32. In other words, the district court ruled that whether the state search warrant established probable cause under state law was irrelevant as long as the state search warrant established probable cause under federal law.

At the conclusion of the hearing, the court denied the motion to suppress. *Id.*, Page ID# 1532. The ruling was not made without reservation. The court found that Glick had "some credibility issues." *Id.*, Page ID# 1527. The court noted, in fact, that "if the sole observations were made by Mr. Glick and he was the sole source of the information in the search warrant," then it would "have some serious reservations about accepting that as genuine." *Id.*, Page ID# 1527-28. Despite the Glick's credibility issues, the court found sufficient evidence existed to support the assertion in the warrant affidavit that he observed marijuana on June 13, 2011. *Id.*, Page ID# 1532.

The matter proceeded to trial on April 11, 2012. The defense argued that the prosecution should be barred under the doctrine of entrapment by estoppel because Government officials gave the Duvals advice in September 2010 on how to comply

with the MMMA. R.E. 111, Page ID# 3571-75. In connection with this defense, counsel for the Duvals questioned Deputy Glick about Ashley and Jeremy Duval's compliance with Michigan law. R.E. 106, Page ID# 2287-91.

Glick openly admitted during his testimony that Ashley Duval and Jeremy Duval were permitted to cultivate seventy-two plants each under the MMMA when the DEA executed the raid. R.E. 106, Page ID# 2290. Glick also admitted that he did not inquire as to the status of Ashley Duval or Jeremy Duval and that he "didn't care" about their status under Michigan law. *Id.*, Page ID# 2291. Defense counsel also attempted to establish that Glick applied for a state search warrant to avoid scrutiny by a federal court. *Id.*, Page ID# 2276.

In addition, defense counsel offered to prove that the information in the state warrant was incomplete because Glick failed to inform the state magistrate that OMNI law enforcement officials knew that Jeremy and Ashley Duval had legal authority to grow marijuana. *Id.* The court found, however, that this information had no relevance. *Id.* Nonetheless, defense counsel persisted. Glick agreed that he submitted the first search warrant application based on Gerald Duval's purported violation of state, not federal, law. *Id.*, Page ID# 2280. On redirect, Glick confirmed that, notwithstanding the issuance of the warrant by a state magistrate, DEA agents - acting under the authority of the United States Department of Justice - executed the June 16 search warrant. *Id.*, Page ID# 2398-

2404. Other federal agents who took part in its execution corroborated that this investigation was federal in nature. R.E. 107, Page ID# 2462, 2540, 2559.

The Duvals elicited testimony in their case in chief from Adam Zimmerman, one of the OMNI team members who visited the Ida Center Property in September 2010. R.E. 108, Page ID# 2833-35. Mr. Zimmerman confirmed that OMNI had reviewed the MMMA registration of Jeremy, Gerald and Ashley Duval, and informed the defendants that they would not be prosecuted if they had the proper paperwork. *Id*. Zimmerman also testified that, after he learned of the raid, he informed Deputy Glick that he visited the Duval residence in September 2010. *Id*., Page ID# 2832. The Duvals also took the testimony of Susan Hill, one of Jeremy Duval's patients. R.E. 108, Page ID# 2727. Ms. Hill testified that Glick visited her and offered advice on how to comply with the MMMA. *Id*.

In an attempt to establish that Glick had not come to the Ida Center Property in September 2010, the Government called Detective Jeff Hart, who accompanied Adam Zimmerman that day. R.E. 110, Page ID# 3420, 3436. Detective Hart testified that he considered Glick a friend. *Id*., Page ID# 3440. He also stated that they saw each other almost every day, but that Glick had not come that day to the Ida Center Property. *Id*.

On April 20, 2012, the jury found Jeremy and Gerald Duval guilty on the counts related to the manufacture of marijuana. R.E. 71; R.E. 73. The jury

acquitted the Duvals on the counts related to the possession of firearms. *Id*. After holding sentencing hearings, the court imposed a ten-year term of incarceration for Gerald Duval and a five-year term of incarceration for Jeremy Duval. R.E. 92; R.E. 93. The Duvals now appeal their judgment and sentences to this Honorable Court.

SUMMARY OF THE ARGUMENT

The district court erred in two respects. First, the trial court erroneously concluded that the June 15, 2011 search warrant application provided the state magistrate judge with sufficient information to establish probable cause to search the Ida Center Property. Deputy Glick applied for a warrant under state law. Thus, the relevant inquiry is *not*, as the trial court assumed, whether the state magistrate could have concluded that Gerald Duval had violated federal law. The proper inquiry is whether the application established probable cause that the Duvals violated the MMMA.

Although the face of the warrant may establish probable cause under Michigan law, Glick prepared the warrant affidavit with intentional disregard for the truth. It is undisputed that OMNI team members visited the Ida Center Property and learned that the Duvals had authorization under Michigan law to grow medical marijuana. Indeed, OMNI officers testified that they gave the Duvals advice on how to comply with the MMMA and avoid prosecution.

The Duvals followed that advice: they built two separate greenhouses with a fence around the perimeter and hung the registration papers on the gate. But Glick, an OMNI member, omitted this information from his search warrant affidavit. As a matter of Michigan law, a state magistrate judge would have declined to issue the search warrant if this information were provided. Therefore, the evidence from the June 16, 2011 search and seizure of the Ida Center Property should have been excluded. Likewise, the evidence obtained from the August 11, 2011 search and seizure should be excluded as fruit from the poisonous tree.

Second, the Duvals did not "manufacture" marijuana as that term is defined under the CSA. The definition of "manufacture" under 21 U.S.C. § 802 of the Controlled Substances Act ("CSA") specifically excludes actions performed "by a practitioner" who acts "*in conformity with applicable State or local law*." 21 U.S.C. § 802(15) (emphasis added). A "practitioner," as defined under the 21 U.S.C. § 802, includes persons "licensed, registered, or otherwise permitted by the United States *or the jurisdiction in which he practices*" to distribute controlled substances "in the course of professional practice or research." (emphasis added).

The actions of the Duvals served a medical purpose and entailed the participation of physicians, who approved the use of medical marijuana on behalf the patients of Jeremy and Ashley Duval. Therefore, the underlying conduct at issue in this case falls within the practitioner exception to the statutory definition of

"manufacture." Accordingly, the Government has failed to allege a federal crime, and this Court should vacate the judgments and sentences entered against Jeremy and Gerald Duval.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT COMPLIANCE WITH STATE LAW IS IRRELEVANT IN DETERMINING WHETHER A STATE SEARCH WARRANT ESTABLISHES PROBABLE CAUSE.

A. Standard of Review.

When reviewing a district court's denial of a motion to suppress, this Court reviews the district court's findings of fact for clear error and its conclusions of law *de novo*. *United States v. Graham*, 275 F.3d 490, 501 (6th Cir. 2001).

B. Argument on the Merits.

The district court should have suppressed the evidence seized in this case because Deputy Glick deliberately omitted facts from his search warrant affidavit that would have negated probable cause under Michigan law. Where a warrant affidavit contains a statement, necessary to the finding of probable cause, that is demonstrated to be both false and included by an affiant knowingly and intentionally, or with reckless disregard for the truth, the warrant is not valid. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

The holding in *Franks* also extends to instances where an officer preparing a search warrant affidavit flagrantly omits evidence that is critical to determining the

existence of probable cause. *See U.S. v. Carpenter*, 360 F.3d 591, 596 (6th Cir. 2004) ("this court has recognized that 'material omissions [from an affidavit] are not immune from inquiry under *Franks*.'") (quoting *United States v. Atkin*, 107 F.3d 1213, 1216-17 (6th Cir.1997)). In order to establish a Fourth Amendment violation on these grounds, the defendant must show that (1) the material was deliberately or recklessly omitted; and (2) the material would have undermined the showing of probable cause. *Id*.

The Duvals asked the district court to consider Glick's omission of the fact that law enforcement officers from OMNI had come onto their property nine months before the search. R.E. 101, Page ID# 1463-64. The OMNI officers learned that Jeremy and Ashley Duval had permission under Michigan law to cultivate marijuana and *gave the Duvals advice on how to comply with the MMMA*. *Id*. The Duvals followed their advice, constructed separate greenhouses with a chain link fence surrounding the enclosures, and hung the registration information of Jeremy and Ashley Duval on the gate.

Rather than informing the magistrate of these critical facts, Deputy Glick attempted to use the Duvals' compliance with the MMMA as *support* for probable cause. The affidavit states: "Through training and experience it is known to the Affiant that it is extremely unusual for a person(s) to put a fence with barbed wire and to use dogs to protect a green house." R.E. 22-1, Page ID# 94. But the Duvals

constructed the fenced greenhouses on the advice provided by OMNI law enforcement officers. No reasonable magistrate would have issued a warrant knowing that (1) Ashley and Jeremy Duval had state licenses to grow marijuana; (2) OMNI law enforcement officers instructed the Duvals on how to comply with Michigan law; and (3) the Duvals constructed the greenhouses to comply with the MMMA.

Indeed, as a matter of Michigan law, police *must* include clear evidence of a person's compliance with the MMMA in an affidavit because the inclusion of this information would destroy probable cause. *People v. Brown*, 297 Mich. App. 670, 678 n.5, 825 N.W.2d 91, 95 n.5 (2012) ("if the police do have clear and uncontroverted evidence that a person is in full compliance with the MMMA, this evidence must be included as part of the affidavit because such a situation would not justify the issuance of a warrant.") Thus, the omitted information would have negated probable cause.

This omission was deliberate. At trial, Jeremy Duval, Gerald Duval, and Carrie Shimp all testified that Glick, himself, had provided the advice in question. Although Glick denied visiting the Ida Center Property in September 2010, the district court expressly found that he had "credibility issues." R.E. 101, Page ID# 1527. Certainly, if Glick had provided the advice in question, the omissions

should be deemed deliberate because he had to have known these facts would have negated probable cause.

Yet, even if Glick did not personally visit the Ida Center Property, the omissions are still deliberate or reckless because other OMNI team members had visited the property during the course of a drug investigation. Detective Hart, who visited the Ida Center Property, said that he considered Glick a friend and saw him almost every day. R.E. 110, Page ID# 3440. Adam Zimmerman also testified that, after learned of the raid, he told Glick that he had visited that property. R.E. 108, Page ID# 2832.

Of course, Glick admitted at trial that he "didn't care" about the legal status of Ashley Duval and Jeremy Duval. R.E. 106, Page ID# 2291. If he had cared, he could have asked the OMNI officers about the case and taken steps to determine whether they complied with the MMMA, just as he did with Gerald Duval. In any event, given the foregoing, Deputy Glick is charged with the knowledge of other OMNI team members. *See Franks*, U.S. at 164 n.6 (the police cannot insulate one officer's deliberate misstatements or omissions "merely by relaying it through an officer/affiant personally ignorant of its falsity"); *see also United States v. Woods*, 544 F.2d 242, 259-60 (6th Cir. 1976) ("the collective knowledge of agents working as a team is to be considered together in determining probable cause"); *United States v. DeLeon*, 979 F.2d 761 (9th Cir. 1992); *United States v. Wapnick*, 60 F.3d

948, 956 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 2556 (1996); *United States v. Calisto*, 838 F.2d 711, 714 (3rd Cir.1988); *United States v. Pritchard*, 745 F.2d 1112, 1118 (7th Cir.1984).

DeLeon is particularly instructive in this regard. In *DeLeon*, the defendant, who owned forty acres of uncultivated land, was suspected of growing marijuana. *DeLeon*, 972, F.2d at 762. Three men went on the property of the defendant's neighbor to discuss the sale of farm equipment. *Id*. The men saw another piece of equipment on DeLeon's property and asked about it, but the neighbor warned them that they should be very careful approaching that property because the defendant purportedly grew marijuana in an outbuilding. *Id*.

The men ignored the warning, went on DeLeon's property, and on their return allegedly informed the neighbor that marijuana was growing in the outbuilding. *Id*. The neighbor then told a local law enforcement official what the men told him. *Id*. The chief deputy then assigned another law enforcement officer, Investigator Jurovich, to locate the three men and investigate the tip. *Id*. One of the men denied entering the building and seeing or smelling anything incriminating. *Id*. The second of the three men claimed, however, that all three of them smelled marijuana emanating from the outbuilding. *Id*. at 763. The affidavit for the search warrant, which was drafted by another officer present during the conversations, was presented to a magistrate, who issued the search warrant. *Id*.

Law enforcement seized 351 marijuana plants during the execution of the search warrant. *Id.* The district court denied the defendant's motion to suppress. *Id.*

On appeal, the Government argued that an omission by a non-affiant cannot support a finding that a *Franks* hearing was necessary. The Ninth Circuit disagreed. It reasoned that the "Fourth Amendment places restrictions and qualifications on the actions of the government generally, not merely on affiants." *Id.* at 764. It also noted that a different rule "would permit government officials deliberately to keep from affiants or the court information material to the determination of probable cause and by such conduct avoid the necessity of a *Franks* hearing." *Id.* The court further found that if the omitted information had been included in the warrant affidavit, then there would have been no probable cause to issue the warrant. *Id.* Accordingly, it held that the motion to suppress should have been granted. *Id.* at 756.

The district court in this case should have reached the same conclusion. But, when counsel offered to establish these facts, the district rejected the offer, holding that even if the allegations were true, they were immaterial to a probable cause finding under federal law. *Id.*, Page ID# 1468-69. Counsel tried to raise the issue again at trial, but once again was rebuffed by the court. R.E. 106, Page ID# 2276. Even though a violation of federal law had nothing to do with the state warrant, the

district court found the inquiry irrelevant because federal law governed the state magistrate's determination. *Id*.

This is error. *United States v. $186,416.00 in U.S. Currency*, 590 F.3d 942 (9th Cir. 2010) is directly on point. In *$186,416.00 in U.S. Currency*, the Los Angeles Police Department ("LAPD") seized $186,416.00 in connection with a search of a non-profit medical marijuana dispensary. *Id*. at 945. While LAPD secured a state court warrant for the search, it failed to provide the state court with extensive evidence that the dispensary may have been operating in accordance with California's medical marijuana laws. *Id*. The state court later approved the release of the seized currency to the United States, which initiated a federal civil forfeiture action against the money. *Id*. No criminal charges were ever pursued in state or federal court. *Id*.

The dispensary challenged the validity of the forfeiture, and filed a motion to suppress the evidence. *Id*. at 947. The district court granted the motion to suppress, finding that the state court lacked probable cause to issue the warrant for a violation of state law because the warrant affidavit submitted by the LAPD had been "misleading" and contained "reckless" omissions of numerous relevant facts pertaining to the dispensary's legal status under California law. *Id*.

The dispensary then filed a motion for summary judgment. *Id*. The district court denied that motion, however, finding that the government had sufficient

evidence to initiate its action, even in the absence of all evidence excluded under the court's prior suppression ruling and the fruits of the suppressed evidence. *Id.*

The Ninth Circuit reversed. *Id.* at 948. First, the appellate court ruled that district court erred in basing the suppression ruling on a purported violation of Rule 41 of the Federal Rules of Civil Procedure. *Id.* It reasoned as follows:

> While there may have been probable cause to search [the dispensary] for a violation of federal law, that was not what the LAPD was doing. Nothing in the documents prepared at the time the warrant was obtained from the state court or in the procedure followed to obtain that warrant supports the proposition that the LAPD thought it was pursuing a violation of federal law. Instead, it sought a warrant from a state court judge, though, as the District Court found, it lacked probable cause for a state law violation and failed to inform the state court judge of relevant facts that supported the conclusion that [the dispensary] was not in violation of state law. The LAPD, a city agency, never initiated the process of seeking a federal search warrant from a federal magistrate or indicated that it was pursuing a violation of federal law.

Id. Accordingly, it ruled that the evidence should have been suppressed based on the violation of the Fourth Amendment, and not because of a violation of Rule 41. *Id.*

This Court should follow the logic of *$186,416.00 in U.S. Currency*. As in *$186,416.00 in U.S. Currency*, the state magistrate judge here was *not* called to determine whether probable cause existed under federal law. Deputy Glick admitted at trial that he applied for the warrant under state law. R.E. 106, Page ID# 2280. More importantly, Glick did not cite a single federal statute in his

search warrant application. Nor did he provide any indication that federal authorities would execute the search warrant.

Instead, Glick noted that marijuana is a controlled substance under Michigan law and informed the magistrate that Gerald Duval was ineligible to grow marijuana as a caregiver, even though Mr. Duval was entitled to grow twelve marijuana plants under the MMMA as a patient. The bigger problem is that Glick omitted any mention of the fact that OMNI agents *knew* that the Duvals were in compliance with the MMMA *because OMNI officials gave them instructions on how to comply with Michigan law*. And the Duvals dutifully followed their instructions. If these facts had been included in the search warrant application, no reasonable magistrate could have concluded that sufficient probable cause existed under Michigan law to issue the search warrant. *Brown*, 297 Mich. App. at 678 n.5.

Even if Glick *had* informed the magistrate that the violation arose under federal law, the June 15 warrant would still be invalid under Rule 41. Under Rule 41(b)(1), a federal law enforcement officer can only resort to a state magistrate upon a showing that a federal magistrate is not "reasonably available." FED. R. CRIM. P. 41(b)(1). The Government failed to make any showing that a federal magistrate was unavailable.

Glick candidly admitted that he chose to apply for a state warrant because he perceived it was "easier" than getting a warrant from a federal magistrate, even though the investigation originated out of the *federal* DEA office in Toledo, Glick flashed his *federal* identification to gain entry to Kevin Taylor's land to conduct surveillance, and *federal* officials executed the warrant. Given the federalism concerns that inhere in the federal prosecution of a crime that is legal under state law, Glick's fear that a federal magistrate would carefully scrutinize the warrant application is well-founded.

But fear of scrutiny is not an adequate basis to permit federal law enforcement to circumvent the requirements of Rule 41(b)(1). Rule 41(b)(1) requires a showing that a federal magistrate is not reasonably available, and the Government made no showing whatsoever in this regard. Thus, the warrant is invalid under Rule 41.

In sum, the warrant is invalid under state *or* federal law. If the warrant issued under Michigan law, it is invalid because of the intentional omissions contained in the affidavit. If the warrant issued under federal law, it is invalid because Glick flouted the letter and the spirit of Rule 41 by resorting to a state magistrate solely because he perceived it would be "easier." There is no principled way to affirm the search and seizure that occurred on June 16, 2011. Accordingly,

this Court should reverse the district court and suppress the evidence seized that day.

Likewise, the evidence obtained from the August 11, 2011 search and seizure should be excluded as fruit from the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). This is because the August 11 affidavit cites to evidence seized on June 16, 2011, as evidence of probable cause. R.E. 22-2, Page ID# 104. However, even if this Court finds that the August 11, 2011 search warrant was supported by probable cause, law enforcement only seized sixty-seven plants. Thus, this Court would have to reverse the judgment and sentence because the Duvals could not be deemed to manufacture 100 marijuana plants, as required to satisfy the conspiracy and manufacturing charges in the indictment. Accordingly, this Court should reverse the denial of the motion to suppress and remand this matter for further proceedings.

II. THE INDICTMENT DOES NOT ALLEGE A FEDERAL CRIME BECAUSE JEREMY AND ASHLEY DUVAL ARE PRACTITIONERS WHOSE CULTIVATION OF MARIJUANA IN CONFORMITY WITH MICHIGAN'S STATUTORY AND REGULATORY SCHEME EXCLUDES THEM FROM FEDERAL PROSECUTION FOR THE MANUFACTURE OF MARIJUANA.

A. Standard of Review.

"Whether the elements of the offense are adequately alleged in the indictment is a legal question subject to *de novo* review." *United States v. Landham*, 251 F.3d 1072, 1080 (6th Cir. 2001).

B. **Argument on the Merits.**

The indictment in this case is defective as a matter of law because Jeremy and Ashley Duval cultivated the marijuana plants while serving as registered "caregivers" under Michigan law. Therefore, the Duvals cannot be charged with the "manufacture" of marijuana as that term is defined under the Controlled Substances Act.

"[E]ven if presented for the first time on appeal, claims of jurisdictional defects in the indictment are not waived." *United States v. Schaffer*, 586 F.3d 414, 421 (6th Cir. 2009). Under Rule 12(b)(3) of the Federal Rules of Criminal Procedure, a court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense at any time until the issuance of the mandate. FED. R. CRIM. P. 12(b)(3)(B); *United States v. Izurieta*, 11-13585, 2013 WL 718325 (11th Cir. Feb. 22, 2013).

The indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." FED. R. CRIM. P. 7(c)(1). One purpose served by an indictment is to "inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had." *Russell v. United States*, 369 U.S. 749, 768 (1962) (quoting *United States v. Cruikshank*, 92 U.S. 542, (1875)).

Thus, an indictment that alleges conduct that is not criminal under the relevant statute is subject to dismissal for failure to state a federal offense. *See*, *e.g.*, *United States v. Superior Growers Supply Co.*, 982 F.2d 173 (6th Cir. 1992); *United States v. McGhee*, 854 F.2d 905, 908-09 (6th Cir. 1988). "Where an indictment sets forth a bare recitation of the statutory language, such indictment may be sustained only if the statute sets forth all the necessary elements fully and clearly, without ambiguity or uncertainty, accompanied by a statement of facts sufficient to inform the accused of the specific conduct which is prohibited." *United States v. Salisbury*, 983 F.2d 1369, 1374 (6th Cir. 1993).

Here, the manufacturing and conspiracy charges contain only a bare recitation of the statutory language. Count I alleges the Duvals "did knowingly and intentionally combine, conspire, confederate, and agree with each other and with others known and unknown to the Grand Jury to *manufacture* 100 or more marijuana plants, a Schedule I controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1)." R.E. 64, Page ID# 856 (emphasis supplied). Count Two similarly states that the Duvals "did knowingly and intentionally *manufacture* 100 or more marijuana plants, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 846, 841(a)(1), and 841(b)(1)(B)(vii)." R.E. 64, Page ID# 857 (emphasis supplied). The indictment makes no mention of the Jeremy Duval's and Ashley Duval's status as

registered caregivers under the MMMA. Nor does it allege that they engaged in conduct that exceeded the scope of their practice as registered caregivers under the MMMA or extended beyond the manufacture of marijuana.

Under the Controlled Substances Act, the term "manufacture" means:

> the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or relabeling of its container; *except that such term does not include the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with applicable State or local law by a practitioner as an incident to his administration or dispensing of such drug or substance in the course of his professional practice.* The term "manufacturer" means a person who manufactures a drug or other substance.

21 U.S.C. § 802(15) (emphasis added). According to this definition, the term "manufacture" does not encompass (1) the "preparation, compounding, packaging, or labeling" of a drug; (2) by a "practitioner"; (3) who acts in conformity with applicable state law; and (4) administers or dispenses the drug "in the course of his professional practice." *Id*.

The term "practitioner," as defined in the Controlled Substances Act, means:

> a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, *or other person licensed, registered, or otherwise permitted*, by the United States *or the jurisdiction in which he practices or does research*, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

21 U.S.C. § 802(21) (emphasis supplied). Thus, like the definition of manufacture, the broad definition of practitioner expressly recognizes the role of states in the licensing and registration of practitioners. This statutory language is in keeping with the pre-emption provision of the CSA, which provides:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision . . . and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903.

As recognized by the United States Supreme Court in *Gonzales v. Oregon*, 546 U.S. 243 (2006), the CSA "manifests no intent to regulate the practice of medicine generally," which is understandable given the "great latitude" afforded the States under their police powers to "legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon*, 546 U.S. at 270 (internal citation and quotation omitted). Instead, the "structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers." *Id*. Thus, the Government's authority to prohibit dispensing controlled substances "in the face of a state medical regime permitting such conduct" is highly circumscribed. *Id*. at 275. In sum, the Government is generally required to defer to the regulation of medicine by the individual states.

Against this backdrop, this Court must determine whether Michigan's enactment of the MMMA establishes the sort of medical regime described in *Gonzales v. Oregon*. It does. Section 333.26422 of the Michigan Compiled Laws states: "Modern medical research . . . has discovered beneficial uses for marihuana in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions." MICH. COMP. LAWS § 333.26422(a). The MMMA defines "Medical use" of marijuana 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." MICH. COMP. LAWS § 333.26423(e).

The statute defines "debilitating medical condition" as:

> (1) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Crohn's disease, agitation of Alzheimer's disease, nail patella, or the treatment of these conditions.
>
> (2) A chronic or debilitating disease or medical condition or its treatment that produces 1 or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including but not limited to those characteristic of epilepsy; or severe and persistent muscle spasms, including but not limited to those characteristic of multiple sclerosis.
>
> (3) Any other medical condition or its treatment approved by the department, as provided for in section 5(a).

MICH. COMP. LAWS § 333.26423(a) (2008). It also defines the "Physician" as "an individual licensed as a physician under Part 170 of the public health code, 1978 PA 368, MCL 333.17001 to 333.17084, or an osteopathic physician under Part 175 of the public health code, 1978 PA 368, MCL 333.17501 to 333.17556." MICH. COMP. LAWS § 333.26423(f) (2008).

A patient may obtain medical marijuana only "after the physician has completed a full assessment of the qualifying patient's medical history" and after the physician has provided a "written certification" that "a patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms associated with the serious or debilitating medical condition." MICH. COMP. LAWS § 333.26423(f)-(l) (2008). Then, the patient may be issued a "registry identification card" that identifies the patient as a person qualified to use medical marijuana. MICH. COMP. LAWS § 333.26423(i) (2008).

To obtain the marijuana, the patient must coordinate with a "primary caregiver," which is defined as "a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has never been convicted of a felony involving illegal drugs." MICH. COMP. LAWS § 333.26423(g) (2008). A primary care giver, like a patient, must register with the Michigan Department of Community Health to receive a registry identification card. MICH.

COMP. LAWS § 333.26426. Although a primary care giver may receive compensation for the provision of marijuana, "such compensation shall not constitute the sale of controlled substances." MICH. COMP. LAWS § 333.26424(e) (2008).

In its findings, the Michigan Legislature recognized that "changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana" from prosecution. MICH. COMP. LAWS § 333.26422(b) (2008). To ensure that patients can receive that medication, the statute expressly exempts primary caregivers, physicians and patients from prosecution, provided those parties comply with the requirements of the MMMA. MICH. COMP. LAWS § 333.26424.

With respect to primary caregivers, the statute provides:

> 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*,[2] 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:

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[2] It is notable that the statutory exemption makes no distinction between federal or state prosecutions. Thus, a citizen contemplating becoming a registered primary caregiver might read that statutory provision as an exemption from any prosecution, state or federal.

> (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.

MICH. COMP. LAWS § 333.26424(b) (2008) (emphasis added).

In short, the MMMA provides a comprehensive statutory scheme designed to regulate the use of marijuana for *medical* purposes as a means to address debilitating *medical* conditions. The statutory scheme draws on the expertise of physicians, who determine in their expert opinion whether the patient may benefit from the use of medical marijuana. It also requires the participation of caregivers, who provide the medical marijuana in the same manner as pharmacists who fill prescriptions for pharmaceutical products on behalf of patients.

As such, a primary caregiver who provides medical marijuana to a qualified patient meets the "practitioner" exemption from the definition of "manufacture" set form in 21 U.S.C. § 802(15). The cultivation of medical marijuana entails the "preparation, compounding, packaging, or labeling" of a drug. *Id*. In addition, in order to comply with the MMMA, a caregiver must act "in conformity with applicable state law." *Id*.

A caregiver also meets the definition of a "practitioner" in that a caregiver, whose practice is functionally identical to that of a pharmacist, qualifies as "*any other person licensed, registered, or otherwise permitted . . . [in] the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research*." 21 U.S.C. § 802(21) (emphasis supplied). It follows from the foregoing that a registered caregiver who administers or dispenses the medical marijuana "in the course of his professional practice," either in his capacity as a registered caregiver or, alternatively, as an agent of the physician who authorizes the provision of medical marijuana, is exempt from prosecution for the manufacture of marijuana. 21 U.S.C. § 802(15).

The Duvals recognize that in *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001), the Supreme Court held that there is no "medical necessity" defense under the CSA because marijuana is a Schedule I controlled substance for which there is "no currently accepted medical use." *Id*. at 492. However, *Oakland Cannabis* dealt only with the issue of whether the common law defense of necessity could be reconciled with the language of the CSA. *Id*. at 490. The Supreme Court held that it could not. However, the argument raised herein was neither aired nor disposed of in *Oakland Cannabis*.

This case more closely resembles *Gonzales v. Oregon*, where the Supreme Court had to determine the extent to which the CSA provided the Government with the authority to regulate "medical practice beyond prohibiting a doctor from acting as a drug 'pusher' instead of a physician." *Gonzales v. Oregon*, 546 U.S. at 269. Here, the State of Michigan, exercising its police power, saw fit to create a broad statutory and regulatory framework to govern the *medical* use of marijuana. The definition of "manufacture" under the CSA expressly permits states to define the scope of medical practice and allows for states to register practitioners, in their varied capacities, for the purpose of distributing medical marijuana *in conformity with state law*.

This case is not about drug pushers. It is about the interplay between Michigan law and the CSA. The Duvals believe that there is no "positive conflict" between the two and that the statutes can, in fact, co-exist. 21 U.S.C. § 903. Under the reading of the statute urged here, where a caregiver, acting as a practitioner within Michigan's medical regime, cultivates marijuana in conformity with the law, no criminal liability lies for the manufacture of that drug. This is not to say that there can be no criminal liability for the manufacture of marijuana that exceeds the scope of the state law.

But, based on the plain language of the definition of "manufacture," the actions of Jeremy and Ashley Duval cannot serve as a basis for criminal liability

for the manufacture of marijuana. As such, this Court should reverse the district court and order that the conspiracy and manufacturing counts be dismissed.

The Duvals submit, by way of conclusion, that there is, at the very least, ambiguity in the language of the statute. It is well settled that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 130 S. Ct. 2896, 2932 (2010) (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)). This is because "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.).

Here, the Duvals relied on a statute duly enacted by the citizens of the State of Michigan that expressly stated that they could not be prosecuted for the conduct at issue in this case.[3] In addition, they could have reasonably concluded, after

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[3] It is also worth noting that on October 19, 2009, Deputy Attorney General David Ogden issued a memorandum with the subject line "Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana." The memo was designed to provide guidance for United States Attorneys regarding the prosecution of marijuana-related offenses in jurisdictions where state laws permit the cultivation, sale, and consumption of marijuana for medical purposes. The Ogden Memo states that:

> prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such

reading the definition of manufacture in the CSA, that their conduct would not subject them to criminal liability for the manufacture of marijuana. Because the CSA can be read to provide immunity for their actions, this Court should reverse the convictions for conspiracy and manufacturing the marijuana at issue here.

CONCLUSION

Based upon the foregoing arguments and legal authority, Defendants-Appellants, GERALD LEE DUVAL, JR., and JEREMY DUVAL, respectfully request that this Honorable Court vacate their judgments and sentences, suppress the fruits of the illegal searches and seizures, dismiss the conspiracy and manufacturing counts in the indictment against them, and afford any other relief deemed necessary.

DATED this 4th day of June, 2013.

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individuals with marijuana, is unlikely to be an efficient use of limited federal resources.

David W. Ogden, Dep't of Justice, *Memorandum for Selected United States Attorneys*, Oct. 19, 2009, *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf, (last visited May 15, 2013). Though the memo also reaffirmed the illegality of marijuana under federal law, its issuance supports the view that Mr. Marcinkewciz and Ms. Waldron lacked fair warning that they would be prosecuted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii). This Brief also complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

/s/ Andrew B. Greenlee
Andrew B. Greenlee, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Initial Brief was served via CM/ECF on this date to opposing counsel.

/s/ Andrew B. Greenlee
Andrew B. Greenlee, Esq.

DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS

Pursuant to 6th Cir. R. 30(g), the Appellants hereby identify the record entries that are most relevant to his position on appeal:

Description of Entry	Date Filed	Record Entry No.	Page ID Range
Indictment	9/22/2011	1	1-6
Joint Motion to Suppress	11/10/2011	22	67-91
Response to Joint Motion to Suppress	11/30/2011	28	136-159
Joint Reply to Government's Response to Motion to Suppress	12/4/2011	36	271-278
Transcript of Motion to Suppress Hearing	2/23/2012	40	303-416
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