IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE:

REINSTATEMENT OF
WILLIAM A. SWAFFORD, ESQ.
STATE BAR NO. 11469

Case No:

Volume VIII

RECORD OF DISCIPLINARY PROCEEDINGS,
PLEADINGS
AND TRANSCRIPT OF HEARINGS

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INDEX
ALPHABETICAL LIST OF DOCUMENTS

EXHIBIT K

EXHIBIT K

NEVADA COMMISSION ON JUDICIAL DISCIPLINE
("NCJD")

OPPOSITION TO AB20

I. Current Commission Statutes and Procedural Rules Reflect a Careful Balancing of Competing Interests

- Competing Interests
  - Rights of judges to fair treatment
  - Judges' interest in confidentiality of complaints
  - Public's concern that complaints against judges are given serious consideration and that judges are held to high standards of behavior
  - Interests of judges and the public in having judicial disciplinary complaints resolved promptly and accurately

II. The Procedural Rules of the Commission were first adopted by the Nevada Supreme Court and were included in the Supreme Court Rules for decades

III. Article 6 Commission

- Nevada Supreme Court formed the Article 6 Commission in 2006
- Members and Participants of Article 6 Commission
  - Experts throughout the U.S.
  - Members of the public, judiciary and legal profession
  - Nevada Press Association
  - ACLU of Nevada
  - Non-profit organizations
  - Full NCJD cooperation and participation
- Goals of Article 6 Commission
  - Increase transparency of the NCJD
  - Improve timeliness of NCJD proceedings
  - Improve NCJD effectiveness
  - Ensure fair treatment of judges

- Examined for over 2 years the entire court structure and judicial discipline system in Nevada
- Investigated all topics and issues that the members of the Article 6 Commission believed should be investigated for the good of justice in Nevada
- Examined the Nevada Constitution; applicable laws and rules of courts; information from the National Center for State Courts, the National Judicial College, the National Council on Juvenile and Family Court Judges, and the American Bar Association; among others
- Outcome (2009 Legislative Session)
  - Sweeping changes to Commission's statutes and Procedural Rules enacted and adopted by the Nevada Legislature and NCJD, respectively (See AB496)
  - These changes reflect national standards for judicial conduct and are in conformity with judicial discipline commissions throughout the U.S.

IV. Analysis of AB20

- Section 1
  - Granting advice authority to limited jurisdiction judges for judicial appointments to NCJD
    - Constitutionality questionable
    - Nevada Supreme Court is appointing authority under Nevada Constitution
    - Nevada Constitution does not grant advice authority to limited jurisdiction judges
    - Sets bad precedent – other groups will petition the Legislature for advice authority to influence appointing authorities with respect to the selection of members to a multitude of boards and commissions throughout Nevada
- Section 2
  - Deletion of application of Nevada Revised Statutes and Procedural Rules of Commission
    - Constitutionality questionable
    - Nevada Constitution empowers NCJD to adopt procedural rules to govern its proceedings and carry out its duties

- AB20 seeks to negate decades of judicial precedent and judicial disciplinary jurisprudence

- Application of Nevada Rules of Civil Procedure to all stages of judicial discipline proceedings
  - AB20 would negate decades of judicial precedent and judicial disciplinary jurisprudence
  - AB20 would be a radical departure from what is normal and customary in the rules applicable to judicial discipline commissions throughout the U.S.
  - AB20 would require the wholesale revamping of NRS Chapter 1 and the Commission's Procedural Rules
  - AB20 would require the doubling of NCJD staff and resources at taxpayers' expense (See NCJD Fiscal Note)
- Requiring NCJD Procedural Rules to provide due process to judges
  - Not necessary – The Nevada Constitution, NRS Chapter 1, NCJD Procedural Rules, and Nevada Supreme Court case law already provide judges with due process rights

➢ <u>Section 3</u>

- Revises the standard of proof required in judicial discipline proceedings
  - Current standard of proof is consistent with the standards of proof found in all jurisdictions throughout the U.S.
  - AB20 would be a radical departure from what is normal and customary in rules applicable to judicial discipline commissions throughout the U.S.
- Eliminates NCJD's ability to consider all "evidence available for introduction at a formal hearing."
  - AB20 would force the Commission to only consider the investigative report and no other evidence.

➢ <u>Section 4</u>

- Refer to Section 2 above

➢ <u>Section 5</u>

- Refer to Section 3 above regarding changes to current standard of proof
- Not compelling a judge to respond to a complaint during the investigative stage of judicial discipline proceedings
  - AB20 would constitute an obstruction and impediment to the completion of NCJD investigations

- AB20 would be a radical departure from what is normal and customary in rules applicable to judicial discipline commissions throughout the U.S.
- Nevada Supreme Court will hear en banc oral arguments on April 2, 2019, with respect to the sole issue of whether the NCJD can require a judge to answer written questions during the investigative stage of a judicial discipline proceeding

➢ Section 6
- Refer to Section 3 regarding changes to current standard of proof

V. Commission's statutes and Procedural Rules being challenged by proponents of AB20 are the same as they existed in 2009 following the implementation of the Article 6 Report (See AB496, 2009 Legislative Session)

VI. Current Judicial Discipline Due Process Protections for Judges

➢ 18-24 months of due process **prior** to filing of public charges
- NCJD review of confidential complaint. Preliminary investigation commences
- NCJD holds meeting to review confidential complaint and other documents and evidence, and votes to proceed to full investigation (1st NCJD Meeting)
- Confidential investigation performed by independent investigator
  - Judge and witness interviews
  - Review of documentary and video evidence
  - Preparation of Investigation Report
  - Commission holds meeting, reviews investigation report and all evidence available for introduction at a formal hearing, and votes to require judge to respond (2nd NCJD Meeting)
  - All evidence considered by NCJD delivered to judge
  - Judge responds to complaint and follow up investigative questions by Commission to address new evidence obtained during investigative process, correct misstatements during investigative interviews, reconcile conflicting testimony and documentary evidence, provide additional evidence and legal arguments to NCJD, etc.

- NCJD holds meeting to review judge's responses and additional information and arguments, and votes to proceed to formal charges (3rd NCJD meeting)

- Judge has a right to file a Writ Petition with the Nevada Supreme Court regarding perceived due process violations prior to and after the filing of a public complaint which rise to the level of actual prejudice as defined by the Nevada Supreme Court

➢ After public charges are filed, judge has a right to a trial on the merits

➢ Judge has a right to appeal to the Nevada Supreme Court after an adverse decision by the NCJD

VII. Judges avail themselves of substantially greater due process in judicial discipline cases than any civil or criminal litigant receives in any court in the U.S.

➢ Litigants are not notified 18-24 months in advance <u>prior</u> to a public complaint being filed against them

➢ Litigants are not provided with <u>all evidence</u> gathered against them <u>prior</u> to a public complaint being filed against them

➢ Litigants are not given an opportunity to respond or provide evidence, legal arguments, etc. <u>prior</u> to a public complaint being filed against them

➢ Litigants do not have the option to file a Writ Petition with the Nevada Supreme Court regarding perceived violations of due process rights <u>prior</u> to a public complaint being filed against them

VIII. NCJD introduced legislation during the 2017 Legislative Session to <u>expand</u> due process protections for limited jurisdiction judges. See AB28

➢ Testified before the Judicial Council

➢ Drafted AB28

➢ Worked with the Administrative Office of the Courts

➢ Testified in favor of AB28 before the Assembly and Senate Judiciary Committees

IX. Discipline imposed on limited jurisdiction judges for numerous violations of the Code of Judicial Conduct and the law have been by unanimous decision

- Judges in these cases either admitted that they committed violations of the Code of Judicial Conduct and the law or were found to be in violation of the same by the NCJD after a trial on the merits
- Two of the seven Commissioners on the NCJD are limited jurisdiction judges and colleagues of these disciplined judges

X. No consensus regarding lack of due process protections among the Nevada judiciary, including limited jurisdiction judges

- See attached NCJD Pretrial Orders denying motions to dismiss on constitutionality grounds (refer to highlighted sections)

XI. Unintended and Adverse Consequences

- Confidentiality of NCJD complaints would be compromised
- Endless discovery and legal actions causing significant delays
- Investigations would be twice as lengthy and costly
- Chilling effect on the filing of complaints by the public and participation by witnesses in the judicial discipline process
- Public transparency and accountability would be significantly diminished
- AB20 would have a dramatic fiscal impact on both the Commission and Nevada taxpayers

XII. Conclusions

- Discipline systems seek to protect the public and the integrity of judicial discipline proceedings, deter future misconduct, promote public confidence in the judicial system, and reassure the public that judicial misconduct is not tolerated or condoned
- If a jurisdiction is to have a judicial system that has the confidence of its citizens, it must have a judicial discipline system that is effective

January 3, 2019

Steve Yeager
Assembly Judiciary Chair
10120 West Flamingo Road, Suite 4162
Las Vegas, NV 89147-8392

RE: Assembly Bill 20

Dear Assemblyman Yeager:

I am the Executive Director and General Counsel of the Nevada Commission on Judicial Discipline ("Commission"). The Commission is comprised of district court judges, attorneys and lay citizens appointed by the Nevada Supreme Court, the State Bar of Nevada and the Governor, respectively. I am writing this letter to you and each of your fellow colleagues on both the Assembly and Senate Judiciary Committees on behalf of the Commission regarding AB20.

If enacted into law, this bill would dramatically undermine judicial disciplinary enforcement in Nevada, thereby significantly impacting the administration of justice and causing harm to the public – your constituents – on a state-wide basis. AB20 was submitted for filing with the Legislature by the Nevada Judges of Limited Jurisdiction ("NJLJ"), which is a Domestic Nonprofit Cooperative Corporation whose members consist of justices of the peace and municipal court judges throughout the State. This bill is not supported by the Commission and many others, including those among the judiciary, for many of the same reasons set forth below.

AB20 will significantly impact the Commission's ability to carry out its constitutional and statutory mandates to protect the public from judicial misconduct.

If AB20 is enacted into law, confidential complaints filed by the public for alleged judicial misconduct warranting formal charges would never see the light of day as they will be bogged down and encumbered by endless writs, interlocutory appeals and legal actions before both the Commission and the Nevada Supreme Court prior to the filing of a formal statement of charges ("formal complaint") against a judge.

Currently, it is not until the Commission's filing of a formal complaint that the public is first made aware of pending allegations of judicial misconduct stemming from the previous filing of a confidential complaint by a member of the public. The long-standing public policy behind maintaining confidentiality of judicial disciplinary proceedings before the filing of a formal

complaint is to protect judges from unfounded and/or frivolous complaints prior to the completion of an investigation to determine whether such complaints have merit. Consequently, AB20 will substantially undermine judicial economy, as well as further delay the public dissemination of allegations of judicial misconduct warranting formal charges.

Commission investigations will also be greatly delayed and thwarted by means of excessive objections and attacks on the judicial discipline process, thereby frustrating the Commission's efforts to simply gather information to determine whether judicial misconduct occurred. This will result in endless discovery, multiple follow-up investigations, witness interviews and Commission meetings, as well as countless legal actions, all at taxpayers' expense. Consequently, cases will remain in limbo for an inordinate amount of time while these delay tactics play out and public transparency takes a back seat. This in turn will invite public criticism of not only the efficacy of the judicial discipline process, but also of any newly enacted laws, such as AB20, that would seemingly undermine it.

AB20 is contrary to existing law, Nevada Supreme Court precedent and judicial disciplinary jurisprudence throughout the United States.

The proponents of AB20 not only ignore existing Nevada law and Nevada Supreme Court precedent, but also seek to re-write critical components of judicial disciplinary jurisprudence which have developed over and existed for many decades throughout this country. No jurisdiction, including Nevada, permits the Rules of Civil Procedure to apply prior to the filing of a formal complaint against a judge. This is true even outside the area of judicial discipline as it relates to other licensed professionals appearing before their respective disciplinary authorities for alleged misconduct, such as doctors, accountants, lawyers, etc.

The effect of such a change would result in the discipline process becoming mired in the time and expense of endless discovery and legal actions which can and has been used by counsel as a means of delay. This eventuality has already been thoroughly considered and is buttressed by a detailed body of legislative history dating back to the 1970s, as well as by innumerable decisions among the highest courts throughout the country, including the Nevada Supreme Court, where such existing laws have been repeatedly upheld and any attempts to revise them in the manner proposed by AB20 rejected.

Additionally, AB20 seeks to minimize and effectively negate the existing Procedural Rules of the Commission that were first promulgated and adopted by the Nevada Supreme Court upon the creation of the Commission over 40 years ago, and which have undergone further development and revisions by both the Nevada Supreme Court and the Commission over the ensuing decades up to the present time.

AB20 will make it more difficult for the Commission to bring formal (public) complaints against judges.

The proponents of AB20 seek to change the standard of proof by which the Commission determines whether a judge has committed misconduct warranting public disclosure and the commencement of formal proceedings. The existing standard of proof to determine if a formal

complaint is filed against a judge and, thus, made public is "whether there is a reasonable probability that the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action against a judge." Importantly, this standard of proof has existed in its current form for over 40 years and is akin to the standards of proof applied in judicial discipline cases in every jurisdiction throughout the country.

A plain reading of the proposed statutory change in AB20 highlights an inherent contradiction of terms and legal outcomes which leave more questions than answers. On the one hand, there must be a reasonable probability to file a formal complaint; but on the other hand, such reasonable probability must be supported by "clear and convincing evidence," which happens to be the standard of proof required to determine if discipline is warranted after a judicial discipline trial, which has not yet occurred.

Consequently, this proposed change in law would require the Commission to prove its entire case against a judge prior to the filing of a formal complaint, prior to the case being made public and, most importantly, prior to the presentation of evidence and witness testimony during a disciplinary trial on the merits. By way of example, and to analogize to a more familiar area of law falling outside the system of judicial discipline, this would be tantamount to a district attorney's office in a criminal case being required to make a showing of "beyond a reasonable doubt" (a much higher standard), in lieu of "probable cause" (a much lesser standard), prior to taking a case to trial.

No court, tribunal, board, agency or adjudicative authority in Nevada or elsewhere requires such a high standard of proof merely to proceed to a trial or hearing, irrespective of the nature of the proceeding or whether it arises in a civil, criminal or administrative context, or otherwise. Accordingly, for many of the foregoing reasons and concerns, certain renowned experts in the field of judicial discipline have already been contacted and will be called upon to testify before both the Senate and Assembly Judiciary Committees, if necessary, to oppose this bill on behalf of the Commission and the public.

AB20 will require the doubling of the Commission's budget and staff at taxpayers' expense.

AB20 was submitted to the Legislature claiming that there would be no fiscal impact on the State. To the contrary, the Commission's budget and staff would need to be doubled, at a minimum, at taxpayers' expense if AB20 becomes law. Accordingly, the Commission will be submitting fiscal notes to the bill at the appropriate time, which will detail at length the fiscal impact on both the Commission and Nevada taxpayers.

AB20 will require the wholesale revamping of NRS Chapter 1 and the Commission's Procedural Rules, thus negating decades of legal precedent in Nevada, which will further result in the public having to endure years of future litigation, uncertainty and unwarranted delays in addressing judicial misconduct in this State. Thus, this bill will effectively tie the hands of the Commission in determining in a thorough but timely manner whether misconduct occurred warranting formal (public) proceedings, all at the expense of transparency, judicial economy and public accountability.

The NJLJ neither consulted with nor made the Commission aware of its intent to file this bill. The Commission has viewed this very inquisitively, particularly given that AB20 directly relates to and impacts the Commission, which is one of the smallest agencies in the State of Nevada in terms of its budget, staff and resources, as well as considering that the bill would require overhauling the entire judicial discipline enforcement structure in Nevada, thereby resulting in the expungement of decades of judicial jurisprudence and precedent.

The Commission has been granted broad constitutional authority to protect the public.

In carrying out this enormous responsibility, the Commission's fair and balanced, but no-nonsense approach to judicial disciplinary accountability and enforcement in this State has complied with the law and judicial precedent in all respects. The primary benefactors of such an approach have been your own constituents, the very people the Constitution of this State has empowered the Commission to protect.

The Commission is performing the job it was created to do and doing it well. AB20 will weaken the Commission and make it infinitely more difficult to protect the public in the years ahead, not to mention the numerous unintended, adverse consequences that would follow.

Thank you for your time and consideration. I would be happy to meet with you at your convenience to further discuss this bill and answer any questions that you may have.

Respectfully submitted,

Paul C. Deyhle
General Counsel and Executive Director
Nevada Commission on Judicial Discipline

Submitted on behalf of the Commission:

Gary Vause, Chairman – Appointed by the Governor
Stephanie Humphrey, Vice-Chair – Appointed by the Governor
John F. Krmpotic – Appointed by the Governor
District Court Judge Jerome Polaha - Appointed by the Nevada Supreme Court
District Court Judge Mark R. Denton – Appointed by the Nevada Supreme Court
District Court Judge Thomas L. Stockard – Appointed by the Nevada Supreme Court
Karl W. Armstrong, Esq. – Appointed by the State Bar of Nevada
Bruce C. Hahn, Esq. – Appointed by the State Bar of Nevada

cc: Assembly and Senate Judiciary Committee Members *via* U.S. Mail and Email

BEFORE THE NEVADA COMMISSION ON JUDICIAL DISCIPLINE

STATE OF NEVADA

In the Matter of THE HONORABLE RENA G. HUGHES, Eighth Judicial District Court, Family Division, Department J, County of Clark County, State of Nevada, Respondent.	CASE NO. 2016-113-P

ORDER DENYING MOTION TO DISMISS COMPLAINT

Currently before the Commission on Judicial Discipline ("Commission") is a Motion to Dismiss Complaint ("Motion"), which was filed by counsel to the Honorable Rena G. Hughes, District Court Judge, Eighth Judicial District Court, Family Division, Department J, for Clark County, Nevada ("Respondent") on May 11, 2018. Opposition to Respondent's Motion to Dismiss Complaint was filed by the Prosecuting Officer to the Commission ("Prosecuting Officer") on May 21, 2018. No reply to the Prosecuting Officer's Opposition was filed by the counsel for Respondent.

I. Statement of Facts

The underlying complaint alleges that Respondent acted in violation of the Judicial Canons. Welthy Silva ("Mother") and Rogerio Silva ("Father") were divorced in 2013 in Clark County, Nevada. The parties had one minor child. In the original Decree of Divorce, the Court granted the Mother primary physical custody of the child and the Father weekend visitation.

Beginning in May 2015, the parties began litigating a number of issues concerning the well-being of their child and whether the Mother was interfering with the Father's visitation rights. During the next twelve months, Respondent held a number of hearings on these issues.

On May 12, 2016, an in-person hearing was held. During the hearing, the parties argued whether the Mother was interfering with the Father's rights of visitation. Respondent then advised the Mother

that she was close to being held in contempt and being incarcerated. At the conclusion of the hearing, the Respondent ordered that the Father shall have visitation with the child on the upcoming weekend and that the parties shall exchange the child under the supervision of Donna's House Central.

Subsequently, the Father alleged that the Mother failed to comply with the recently ordered visitation. On May 17, 2016, the Father's counsel filed a motion to place the matter back on calendar regarding the visitation. On June 8, 2016, Respondent issued a Minute Order detailing the visitation issues. The Respondent concluded that, "[t]his Court finds that Plaintiff [Mother] is in contempt of the Court's order to facilitate visitation on weekends with the Father, AN ORDER TO SHOW CAUSE SHALL ISSUE."

The Minute Order further stated, "[m]other shall bring the minor child to Dept. J, Court room [*sic*] #4, on June 15, 2016 at 1:30 p.m. If the Mother fails to deliver the minor child to the courtroom on June 15, 2016, she shall be deemed in further contempt of Court, and sentenced to twenty-five (25) days incarceration. If the Mother fails to appear, a bench warrant shall issue." The Minute Order also addressed other Order to Show Cause issues that were not related to visitation, and stated in closing, "[t]he Order to Show Cause Hearing shall be scheduled for July 28, 2016 at 1:30 p.m."

The Mother arrived with her minor child at the scheduled hearing on June 15, 2016. Respondent ordered all parties and counsel, except the minor child, to leave the courtroom, and Respondent addressed the child for nine (9) minutes off the record. The Mother was not allowed to return to the courtroom and was escorted off the Courthouse property. In the Mother's absence, Respondent awarded the Father temporary sole legal and physical custody, terminated the Father's child support obligation, ordered the Mother to pay the statutory minimum child support to the Father, and ordered the Mother to have no contact with the minor child.

The minor child was clearly distressed and cried during the entire process while the Father remained impassive at his counsel table. Respondent addressed the crying minor child by stating that the change in custody occurred because the Mother and minor child were not cooperative with the Court ordered visitations. Respondent further stated that if the minor child refused to go with the Father she would end up in Child Haven, which Respondent referred to as a jail for kids.

At the court proceeding on June 15, 2016, no evidence or testimony was entered into the record regarding the change of custody, change in child support or the finding of contempt. No Order to Show Cause issued regarding the failure to facilitate visitation or notice regarding the change of custody and/or child support, and no hearing was held.

II. Motion

Respondent filed her Motion to Dismiss the Complaint on May 11, 2018. In her Motion, Respondent cited to Judge Weller's motion to dismiss[1] arguing that the Commission's procedures regarding investigating complaints are in contravention of the Rules of the Commission, Nevada Rules of Civil Procedure, and Respondent's due process rights. Regarding due process violations, Respondent states that the Commission improperly wears multiple hats as it executes the investigation, prosecution, hearing, and decision in judicial discipline matters. Furthermore, Respondent questions who is making the determination as to whether a rule violation has occurred and whether those same judges or individuals are on the ultimate hearing panel. Respondent argues if they are the same individuals, then in effect they have already prejudged the case without hearing Respondent's witnesses, mitigating evidence and defenses. Pertaining to civil procedure violations, Respondent notes that pursuant to the Nevada Rules of Civil Procedure, interrogatories are sent out only after a formal complaint has been filed; however, the Commission sends out interrogatories before a case is assigned to a prosecuting officer.

Respondent cites to Judge Weller's points and authorities which argued that the Commission failed to follow applicable procedural rules, and thus acted in excess of its jurisdiction and denied Judge Weller his Fourteenth Amendment due process rights. Moreover, Respondent cites to the *Whitehead* decisions and the ABA Model Rules that Judge Weller used in his motion to highlight the need for separate investigative and adjudicative functions of the commission members. Respondent acknowledges that the Nevada Supreme Court has the ultimate authority to review the Commission's findings de novo. *Assad v. Nevada Commission on Judicial Discipline*, 124 Nev. 391 (2008).

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[1] Respondent attached and incorporated by reference Exhibit A, a copy of Judge Weller's unfiled points and authorities for Case No. 2017-025-P. Respondent noted that the cases are the same on a procedural level even though the cases are factually distinct.

Finally, Respondent agrees with Judge Weller's points and authorities that there is no basis set forth within the interrogatories to justify the use of interrogatories prior to the filing of a formal statement of charges.

III. Opposition

The Prosecuting Officer argues that Respondent inappropriately integrated an unfiled, twenty-nine page pleading from an entirely different case in her Motion. The Prosecuting Officer notes that Respondent incorporated the entire motion as her own by stating that her case and Judge Weller's are almost identical. However, the Prosecuting Officer attests that even if Judge Weller's arguments were applicable to Respondent, her Motion exceeds the Commission's Pre-Hearing Order page limits of fifteen (15) pages for the motion. While the limitation does not apply to exhibits, Respondents use of the "exhibit" as a pleading causes Respondent's Motion to be thirty-five pages. Furthermore, he notes that Respondent did not seek permission to file a motion in excess of the page limits.

Moreover, the Prosecuting Officer notes that Judge Weller's arguments are not applicable to Respondent. Judge Weller argues that the allegations against him lack merit and thus the Commission's decision was arbitrary and capricious in violation of Judge Weller's Fourteenth Amendment rights. However, the Prosecuting Officer further notes that no such argument has been made by Respondent, as Respondent's case centers upon a hearing that was recorded on the Court's JAVS system, with the exception of nine (9) minutes, and related court filings.

The Prosecuting Officer noted that in *Mosely v. Nevada Commission on Judicial Discipline*, the Nevada Supreme Court analyzed the combination of the Commission's investigative, prosecutorial and adjudicative functions in regards to a judge's due process rights. 177 Nev. 371, 22 P. 3d 655 (2001). The Prosecuting Officer states that the Court rejected that argument, and noted that the Commission is authorized to play multiple roles through the legislative intent manifested in the amendment process to the Constitution. *See Mosley at 379 (citing to Withrow v. Larkin*, 421 U.S. 35 (1975) (holding that a medical disciplinary board's process of investigating and then holding a hearing on the same issues did not deny the doctor his procedural due process rights). The Prosecuting Officer declares that judicial discipline proceedings wherein there is a combination of adjudicative and prosecutorial functions is not biased per se, and without more, does not violate a judge's due process rights. *Mosley*, 117 Nev. At

380.

The Prosecuting Officer further argues that pursuant to *Mosely*, Respondent has the burden of showing actual bias to prove a violation of her due process rights. The Prosecuting Officer notes that Respondent claims that the Commission is inherently biased because the Commission had made a probable cause determination; however, he opines that this argument was rejected by the Nevada Supreme Court in *Matter of Davis,* 113 Nev. 1204, 1218 (1997) (holding that probable cause determinations are not determinations of guilt, and that proof by clear and convincing evidence is required at the formal adjudicatory level, thus Commissioners who found probable cause were not disqualified from participating in the formal hearing).

The Prosecuting Officer emphasizes that the Commission is presumed to be comprised of people who are capable of judging a controversy fairly on the basis of its own circumstances. *Mosley*, 117 Nev. At 381 (citing to Withrow, 421 U.S. at 54). Therefore, the Prosecuting Officer argues that the burden rests upon Respondent to overcome the presumption that the Commission is unbiased. *Id.*

The Prosecuting Officer further argues that Respondent's contention that Nevada should adhere to the 1994 ABA Model Rules for Judicial Discipline Enforcement ("Model Rules") of a two-panel system, separating investigative and adjudicative functions, is without merit as those rules were rejected in Nevada when the Nevada Constitution was amended in 1997 to create the modern Commission. Moreover, he notes, that decisions of the Commission are reviewed de novo; therefore, any risk of harm to Respondent is minimal.

ISSUES

Whether the combination of the Commission's investigative, prosecutorial and adjudicative functions violate the due process rights of Respondent.

STANDARD OF LAW

The Nevada Rules of Civil Procedure provide that the defense of lack of jurisdiction over the subject matter may, at the option of the defendant, be made by motion. NRCP 12(b)(1).

NRCP 12(b)(5) permits a party to file a motion to dismiss for failure to state a claim upon which relief can be granted. In considering a motion to dismiss, the court construes all factual allegations in the complaint as true and draws all inferences in favor of the non-moving party. *Buzz Stew, LLC v. City*

of North Las Vegas, 181 P.3d 670, 672 (Nev. 2008). A complaint will be dismissed if it appears beyond doubt that the plaintiff can prove no set of fact which, if true, would entitle it to relief. *Id.*

DISCUSSION

Respondent's Motion to Dismiss attacks the composition and procedures of the Commission as it relates to due process. However, the cited points and authorities are in the form of an exhibit to Respondent's Motion. Respondent attached an unfiled brief of the Honorable Charles Weller for Case No. 2017-025-P. Procedurally, the Commission issued a Prehearing Order in this matter, wherein motions were limited to fifteen pages in length. While the Prehearing Order does not set a page limit for exhibits, Respondent's incorporation of an exhibit as her own argument is a blatant attempt to circumvent the reasonable page limits set by the Commission. Therefore, Respondent's Motion is procedurally in violation of the Commission's Prehearing Order, and as such, only the actual Motion filed by Respondent and the Prosecuting Officer's Opposition will be addressed in this Order.

Respondent makes an overall due process argument that the Commission wears too many hats, stating that the Commission does the investigation, prosecution, and adjudicatory functions. Moreover, Respondent notes that it is unclear if the same Commissioners participate in the initial determination of probable cause and in the formal hearing. Respondent's concern is that if the same Commissioners participate in both proceedings, the clear and convincing evidence standard falls to the wayside. However, this due process argument has already been ruled upon in *Mosley v. Nevada Comm'n on Judicial Discipline,* 117 Nev. 371, 22 P.3d 655 (2001); *see also Matter of Davis* 113 Ne. 1204, 1218, 946 P. 2d 1033, 1043 (1997) (holding that because some of the Commissioners previously had found there was probable cause to believe appellant had committed perjury does not require that they be disqualified from participating in the formal hearing). In *Mosely,* the Court held that the Commission's combination of prosecutorial, investigative, and adjudicative functions is not implicitly prejudicial to judges brought within the disciplinary process, and therefore, the Commission's procedures do not violate a judge's protected due process rights.

The combination of investigative and prosecutorial functions vested in disciplinary commissions has been consistently upheld by the Nevada Supreme Court and other courts. *See*, e.g., *Matter of Davis,* 113 Nev. 1204, 1218, 946 P.2d 1033, 1043 (1997); *Mosley v. Nevada Comm'n on Judicial Discipline*,

22 P.3d 655, 660 (Nev. 2001) ("Although the Court's ruling concerned an administrative agency and not, as here, a court of judicial performance [or discipline], ... *Withrow* is otherwise indistinguishable and therefore dispositive."); *Mississippi Comm'n on Judicial Performance v. Russell*, 691 So.2d 929, 946 (Miss. 1997) (bifurcated judicial disciplinary process presented "no more evidence of bias or the risk of bias ... than inheres in the very fact that the Board had investigated and would now adjudicate") (quoting *Withrow*, 421 U.S. at 54); *In re Eriksson*, 36 So.3d 580, 591 (Fla. 2010) (finding that "the analysis of *Withrow* from other jurisdictions [in the context of judicial discipline] is persuasive").[2]

The *Mosely* and *Davis* decisions ruled that the combination of functions did not per se violate the judges' due process rights; however, the Court noted that in order to make such a finding, a judge must show actual bias. Respondent, as in the *Mosely* and *Davis* cases, has not demonstrated actual bias. Moreover, Commission Procedural Rule 3(6) permits challenges for cause for a judge to disqualify a commissioner for actual or implied bias or prejudice or other cause based upon an affidavit specifying why the disqualification is sought. Respondent did not file such a challenge for cause, but rather she filed a peremptory challenge to remove a Commissioner, the Honorable Jerome Polaha, under Commission Procedural Rule 3(8).

Respondent alleges that her due process rights were violated during the investigatory phase of the proceedings regarding the Commission's use of interrogatories. Respondent's objections to answering interrogatories after the investigation has occurred, but before a prosecuting officer is appointed, lacks merit. Although not mandated by procedural due process, Commission Procedural Rule 12 permits the judge an opportunity to present information during the investigatory process. The interrogatories provide Respondent with more due process as the interrogatories narrow the issues from the initial complaint filed with the Commission, to allegations based upon the factual findings

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[2] *See, e.g., Withrow v. Larkin*, 421 U.S. 35, 52-58 (1975), wherein the Supreme Court rejected a physician's challenge to the constitutionality of the Wisconsin Medical Examining Board on the basis that the Board's combined investigative and adjudicative functions implicitly biased the adjudicators and, therefore, violated due process. *Withrow*, 421 U.S. at 57-58. Noting that constitutional due process does not bar a judge from making a preliminary determination of probable cause and then presiding over a criminal trial, the Court held that such a combination of investigative and adjudicative functions in an administrative agency likewise did not violate due process. *Id.*, at 56-57. Further the Court held that "The mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing. Without a showing to the contrary, [Commission members including judges, attorneys and laypersons] 'are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Withrow*, 421 U.S. at 55 (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941).

supported by the independent investigator's investigation, and subsequent determination by the Commission based on the same. Commission Procedural Rule 12 effectuates important public policy concerns regarding the confidentiality required in judicial disciplinary proceedings prior to the filing of a formal statement of charges. NRS 1.4683. In this instance, Respondent provided the Commission with a detailed written response and exhibits.

Furthermore, confidentiality during the investigatory stage protects a judge's due process rights. Such confidentiality protects judges from "injury which might result from publication of unexamined and unwarranted complaints," and further enhances the public confidence in the judicial system by preventing the "premature announcement of groundless claims of judicial misconduct or disability since it can be assumed that some frivolous complaints will be made against judicial officers." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 835 (1978); *see also Jones v. Nev. Comm'n on Jud. Discipline, 318 P.3d 1078 (2014) citing to In re Flanagan*, 690 A.2d 865, 875 (Conn 1997) (holding that "Two interests must be accommodated in judicial disciplinary proceedings: (1) the review council must have broad authority to investigate the conduct of our judges in order to maintain public confidence in the judiciary; and (2) our judges must be afforded adequate process before discipline is imposed to ensure that discipline is not imposed on the basis of unfounded charges of misconduct."). Therefore, the fact that Respondent was provided an opportunity to respond to allegations in the complaint and investigatory findings while the matter was confidential, protected Respondent's due process rights.

Moreover, procedural due process rights attach at the adjudicatory stage, and not during the investigatory phase of the judicial discipline process. *Jones v. Nevada Comm'n on Judicial Discipline*, 318 P.3d 1078, 1083 (Nev. 2014). Judicial discipline proceedings consist of two distinct phases, one investigatory and the other adjudicatory, wherein the investigatory phase is confidential and the adjudicatory phase is public. "It is during this [adjudicatory] phase that the judge's legal rights are adjudicated, not before. Accordingly, due process rights will generally not attach before a formal statement of charges is filed." *Jones* at 1083; *see also Ryan v. Comm'n on Judicial Performance*, 754 P.2d 724, 729 (Cal. 1988) (stating that while "a judge certainly has the right to conduct a proper defense in disciplinary actions[,] … the right attaches [only] once formal proceedings are instituted," not during

the preliminary investigation); *In re Petition to Inspect Grand Jury Materials*, 576 F. Supp. 1275, 1284 (S.D. Fla. 1983), *aff'd*, 735 F.2d 1261 (11th Cir. 1984) (observing that during the judicial-misconduct investigatory stage "procedural protections are minimal at most").

The Commission has protected Respondent's due process rights. The procedures employed by the Commission in this case followed the step by step path set out in the Procedural Rules of the Commission from the initial complaint through the investigation and adjudication phase. Moreover, due process rights do not attach until the formal statement of charges issues; therefore, Respondent lacks a procedural due process constitutional challenge to the Commission's investigatory procedures. Furthermore, the Nevada Supreme Court has de novo authority over the Commission's adjudicatory decisions, thus there is another layer of due process protection for Respondent. Moreover, Respondent has not shown the bias required by the Nevada Supreme Court in *Davis*, *Mosley*, and *Jones* to support her assertion of a denial of due process.

Respondent's Motion to Dismiss the Complaint is therefore denied.

The Honorable Thomas L. Stockard is authorized to sign this Order on behalf of the full Commission.

IT IS SO ORDERED.

DATED this 25th day of May, 2018.

STATE OF NEVADA
COMMISSION ON JUDICIAL DISCIPLINE

Thomas L. Stockard

Thomas L. Stockard, Presiding Officer

CERTIFICATE OF SERVICE

I hereby certify on this 25th day of May, 2018, I transmitted a copy of the foregoing ORDER DENYING MOTION TO DISMISS COMPLAINT, via email and by placing said document in the U.S. Mail, postage prepaid, addressed to:

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BEFORE THE NEVADA COMMISSION ON JUDICIAL DISCIPLINE

STATE OF NEVADA

In the Matter of HEIDI ALMASE, former Municipal Court Judge, City of Las Vegas, County of Clark, State of Nevada, Respondent.	CASE NO. 2017-099-P

ORDER DENYING MOTION TO DISMISS COMPLAINT

Currently before the Commission on Judicial Discipline ("Commission") is a Motion to Dismiss Complaint ("Motion"), which was filed by former Municipal Court Judge Heidi Almase, City of Las Vegas, Clark County ("Respondent") on September 6, 2018. Opposition to Respondent's Motion to Dismiss Complaint was filed by the Prosecuting Officer to the Commission ("Prosecuting Officer") on September 10, 2018. The Reply to the Prosecuting Officer's Opposition ("Reply") was filed by Respondent on September 12, 2018.

STATEMENT OF FACTS

The underlying Formal Statement of Charges ("FSOC") alleges that in 2017, Respondent ran for a second term as a Municipal Court Judge. Respondent was initially represented in her bid for re-election by David Thomas, Esq. After Mr. Thomas withdrew from representing Respondent, she entered into an Independent Contractor Agreement with Jennifer C. Barrier, on April 10, 2017, for campaign management. On June 6, 2017, Ms. Barrier posted a photo-shopped image of the actor Dwayne "the Rock" Johnson with Respondent on the Respondent's official Facebook page. The image was captioned: "It just makes sense: Re-Elect Judge Heidi Almase" and identified Dwayne Johnson, including his signature. Respondent commented on the photo/page: "I'm 'almost' taller than him. Almost." On or about June 7, 2017, the *Las Vegas Review Journal* ("*Review Journal*") ran an article about the Facebook posting in which the reporter asked Ms. Barrier if she had authority to post the image of Mr. Johnson. Ms. Barrier replied she was "...waiting on written authorization to use his

photo..." and added, "It was never an endorsement." In her interview with the Commission's Investigator, Respondent said she had no prior knowledge that Ms. Barrier was going to post this image. Respondent also stated that Ms. Barrier assured her, after the image was posted, that she had obtained Mr. Johnson's permission to use his likeness on Respondent's Facebook page. Respondent stated Ms. Barrier explained that she had "family connections" with Mr. Johnson. The picture was removed from Respondent's official Facebook page shortly after Ms. Barrier spoke to the *Review Journal*. Respondent later apologized for the Dwayne Johnson Facebook posting in a press release dated June 9, 2017. She also verbally self-reported these actions to the Commission on June 8, 2017, and followed up with a letter to the Commission dated June 9, 2017. Ms. Almase lost the election to her opponent.

I. Motion

Respondent in her motion notes that she answered interrogatories prior to the FSOC being filed in this matter. Respondent opines that the Commission's use of interrogatories prior to the filing of the FSOC violates Respondent's due process rights. She cites to Nevada Revised Statutes ("NRS") and Commission Procedural Rules which state that the Nevada Rules of Civil Procedure ("NRCP") and Evidence apply after a FSOC has been filed in a matter. Respondent further cites to NRCP 26(a) and NRCP 33(a) pertaining to discovery. Moreover, Respondent acknowledges Canon 2, Rule 2.16(A) that a judge shall cooperate with judicial disciplinary agencies, and that due process rights are generally not implicated in the investigatory phase, citing to *Jones v. Nev. Comm'n on Jud. Discipline*, 130 Nev. Adv. Op. 11, 318 P. 3d 1078, 1082 (2014).

Respondent asserts that she cooperated with the Commission's investigation and answered the interrogatories under oath. She highlights that the December 7, 2017 letter that accompanied the interrogatories stated that failure to respond to the documents would be considered an admission pursuant to Commission Procedural Rule 12(3). She further notes that the letter stated that the investigation was complete. Respondent emphasized that Interrogatory No. 19 directed Respondent to admit or deny the alleged violations of the Canons prior to a FSOC being filed by the Prosecuting Officer. Respondent argues that even in the context of an administrative disciplinary proceeding, such a requirement violates her due process protections. Moreover, Respondent cites to NRS Chapter

622A regarding administrative procedures before administrative bodies wherein interrogatories and discovery begin only after the filing of a complaint, citing NRS 622A.330(1) and (3).

Respondent further states that the Commission has relied upon the position that interrogatories are propounded during the investigatory phase and are confidential pursuant to Commission Procedural Rule 12.[1] Respondent argues that NCJD's reliance in this regard is misplaced as actual prejudice occurs because admissions are required, or the judge shall face automatic discipline. Therefore, Respondent requests that the FSOC against her be dismissed, and that a letter of caution be issued.

II. Opposition

The Prosecuting Officer in her Opposition states that NRS 1.462(2) provides that the Nevada Rules of Civil Procedure apply to proceedings before the Commission after the filing of a FSOC. The Prosecuting Officer argues that Respondent cites no authority for her request that the Commission dismiss with prejudice the FSOC filed with the Commission on April 19, 2018, and that Respondent cannot meet the prerequisites for dismissal under NRCP 12(b)(5) and its interpretative case law, citing to *Blackjack Bonding v. City of Las Vegas*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000).

The Prosecuting Officer argues that the Commission acted pursuant to its governing statutes and Commission Procedural Rules and that Respondent was not denied any due process rights. Respondent underscores that the Nevada Supreme Court has clarified when due process is afforded in cases before the Commission in *The Honorable Steven E. Jones v. Nevada Commission on Judicial Discipline*, 130 Nev. Adv. Op. 11 (2014). She sets forth the argument that pursuant to *Jones*, due process rights will generally not attach before a FSOC is filed citing *Jones* at 1083-84. She further contends that *Jones* supports "unobstructed investigation" prior to the filing of the FSOC, and that there is no basis for dismissal under the NRCP 12(b)(5) analysis.

The Prosecuting Officer claims that Respondent ignores the statutory and procedural authority, which is on point regarding the use of interrogatories. She contends that NRS 1.4667(3) applies after the investigation, but before the FSOC, and states: "If the Commission determines that such a

[1] Respondent cites to *In the Matter of the Honorable Rena G. Hughes*, Case No. 2016-113-P and *In the Matter of the Honorable Charles Weller*, Case No. 2017-025-P.

reasonable probability exists, the Commission shall require the judge to respond to the complaint in accordance with procedural rules adopted by the Commission." Therefore, she explains that the Commission adopted its Procedural Rule 12, Determination to Require an Answer, section 2:

> If the Commission determines it could in all likelihood make a determination that there is a Reasonable Probability the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds of disciplinary action, it shall require the respondent named in the complaint to respond.

The Prosecuting Officer asserts that NRCP 26(a) regarding discovery does not apply at this point of the process, because the Commission has its own Procedural Rule on point.

The Prosecuting Officer notes that Respondent admits that due process relief can be granted on a showing of actual prejudice. Motion, p. 8, ll. 11-15. The Prosecuting Officer cites to *Jones* at 1084, wherein it defines actual prejudice in the context of a NCJD case as the Commission having taken action which is absolutely prohibited or having asserted charges which were "unfounded or rendered with improper motive" or "stated in a manner insufficient to allow Judge Jones to respond." The Prosecuting Officer proclaims that Respondent offers no allegations or evidence that the charges in her FSOC were unfounded, put forward with improper motive or were impossible for her to answer.

The Prosecuting Officer rebuts Respondent's assertion that NRS Chapter 622A, "Administrative Procedure Before Certain Regulatory Bodies" applies to the Commission. The Prosecuting Officer explains that the Commission was created by the Nevada Constitution and statutes to serve as the independent body tasked with disciplining judicial behavior pursuant to the Revised Nevada Code of Judicial Conduct.[2] Therefore, she stresses that the Nevada Administrative Procedures are not part of the enforcement scheme of the Commission.

The Prosecuting Officer indicates that Respondent argues "as have Judges Hughes and Weller" that "the NCJD has historically relied on the position that interrogatories are propounded during the investigatory phase and are confidential under Commission Rule 12." Motion, p. 10, ll. 1 14.[3] The Prosecuting Officer states this is correct and that the Commission is justified in taking this position. The

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[2] The Revised Nevada Code of Judicial Conduct ("Revised Code") took effect January 19, 2010, pursuant to ADKT 427.

[3] Respondent cites to her Exhibit 8, the May 25, 2018 NCJD Order Denying Motion to Dismiss Complaint in the Judge Hughes case and the appeal, Docket No. 76117 (filed June 18, 2018). She also cites to the NCJD Case No. 2017-025-P against Judge Charles Weller and the Supreme Court Order Denying Writ in that case, filed August 22, 2018, Docket No. 76260.

Prosecuting Officer quoted portions from the Hughes Order referenced in the Motion at p. 10, ll.4. Therefore, the Prosecuting Officer expounds that Respondent's references to the ruling in the Judge Hughes case support the actions taken by the Commission in the instant case.

Finally, the Prosecuting Officer asserts that Respondent's prayer for relief runs contrary to the Commission's authority, and must be denied on substantive and procedural grounds. First, she argues that Respondent's arguments fail to prove "beyond a doubt" that the charges could prove "no set of facts" to justify discipline citing to NRCP 12(b)(5).

Second, she contends that NRS 1.4657(2) provides for the possibility of the Commission issuing a letter of caution, but only if it first determines that the verified complaint does not contain "objectively verifiable evidence from which a reasonable inference can be drawn that a judge committed misconduct or is incapacitated." (*See*, 1.4657(1)). The Prosecuting Officer affirms that this case is well beyond that stage.

III. Reply

In her Reply, Respondent notes that the Prosecuting Officer did not deny or otherwise respond to Respondent's factual assertion set forth in the Commission's December 7, 2017 correspondence stating the investigation was complete and directing Respondent to answer. *See* Motion to Dismiss, p. 5, ll. 15-20. Similarly, she argues that the Prosecuting Officer did not deny or otherwise respond to Respondent's argument that mandating Respondent to admit or deny allegations in interrogatories under oath violates applicable procedural rules and, therefore, violates Respondent's due process rights and results in actual prejudice. *See* Motion to Dismiss, p. 5, ll. 20-25; pp. 7-9.

Respondent cited to *Jones v. Nev. Comm'n on Jud. Discipline,* 130 Nev. Adv. Op. 11, 318 P.3d 1078, 1098 (2014), for the proposition that when a judicial office is at stake, a fair trial is mandated by due process. She further cites to *Jones* [at 1082 (internal citations omitted)], noting that due process rights are not normally implicated during the investigatory phase of judicial discipline proceedings, thus relief will only be granted based upon actual prejudice. Respondent opines that she is challenging the Commission's rule and procedure allowing interrogatories to be propounded prior to the filing of a FSOC. Respondent alleges that even assuming the interrogatories were propounded during the investigative phase, the interrogatories state that they must be submitted under oath and that failure to

respond would be considered an admission. Respondent contends that she was never informed that the interrogatories were voluntary.

Respondent points to analogous statutory authority codified at NRS Chapter 622A (as well as NRCP 26(a) and 33(a)) which specifically preclude propounding interrogatories prior to the filing of a complaint. Respondent contends the self-promulgated rules are also self-serving as any judicial officer or judicial candidate subject to discipline is impermissibly caught between the rule requiring cooperation and the right to challenge any disciplinary action brought against them. Respondent insists that the Commission cannot denominate the process as 'investigatory' to avoid the error and due process violations. Respondent points out definitions of error found in criminal proceedings. Reply p. 6, ll. 1-7.

Respondent contends that because there are no protections when interrogatories are propounded in this way, the error here amounts to the type of structural error found in criminal proceedings as it affects the very framework of the proceedings rendering the hearing fundamentally unfair. For that reason, Respondent stresses the Motion to Dismiss can survive an NRCP 12(b)(5) analysis and, for a similar reason, contends actual prejudice occurred. Answering the Prosecuting Officer's argument that Respondent's Prayer for Relief runs contrary to the Commission's governing authority, Respondent argues there is nothing in the rules or caselaw suggesting that matters have never been, nor will ever be, negotiated based on fairness, judicial economy, or the procedural posture of a case.

Respondent reiterates her statement that her actions were non-willful and isolated in nature. Therefore, she requests that the Commission dismiss the FSOC and issue a letter of caution.

ISSUES

Whether the Commission violated Respondent's due process rights by issuing interrogatory type questions to Respondent prior to the issuance of a FSOC, and therefore whether the FSOC should be dismissed.

STANDARD OF LAW

The Nevada Rules of Civil Procedure provide that the defense of lack of jurisdiction over the subject matter may, at the option of the defendant, be made by motion. NRCP 12(b)(1). NRCP 12(b)(5) permits a party to file a motion to dismiss for failure to state a claim upon which relief can be granted. In considering a motion to dismiss, the court construes all factual allegations in the complaint as true

and draws all inferences in favor of the non-moving party. *Buzz Stew, LLC v. City of North Las Vegas,* 181 P.3d 670, 672 (Nev. 2008). A complaint will be dismissed if it appears beyond doubt that the plaintiff can prove no set of fact which, if true, would entitle it to relief. *Id.*

Nevada Constitution Sec. 21. Commission on Judicial Discipline; Code of Judicial Conduct.

. . .

5. The Legislature shall establish:

. . .

(d) The confidentiality or nonconfidentiality, as appropriate, of proceedings before the Commission, except that, in any event, a decision to censure, retire or remove a justice or judge must be made public.

. . .

7. The Commission shall adopt rules of procedure for the conduct of its hearings and any other procedural rules it deems necessary to carry out its duties.

11. The Commission may:

. . .

(d) Exercise such further powers as the Legislature may from time to time confer upon it.

NRS 1.4667 Review of report of investigation; letter of caution; judge to respond to complaint under certain circumstances

1. The Commission shall review the report prepared pursuant to NRS 1.4663 to determine whether there is a reasonable probability that the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action against a judge.
2. If the Commission determines that such a reasonable probability does not exist, the Commission shall dismiss the complaint with or without a letter of caution. The Commission may consider a letter of caution when deciding the appropriate action to be taken on a subsequent complaint against a judge unless the caution is not relevant to the misconduct alleged in the subsequent complaint.
3. If the Commission determines that such a reasonable probability exists, the Commission shall require the judge to respond to the complaint in accordance with procedural rules adopted by the Commission.

NRS § 1.4667

Commission Procedural Rule 12 - Determination to Require an Answer

. . .

2. If the Commission determines it could in all likelihood make a determination that there is a Reasonable Probability the evidence available for introduction at a formal hearing could clearly and convincingly establish grounds for disciplinary action, it shall require the Respondent named in the complaint to respond.

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DISCUSSION

Respondent alleges that her due process rights were violated during the investigatory phase of the proceedings regarding the Commission's use of interrogatories.[4] Respondent's objections to answering interrogatories after the investigation has occurred, but before a prosecuting officer is appointed, lacks merit. Commission Procedural Rule 12 permits the judge an opportunity to present information after the investigation but before the matter is potentially made public. The interrogatories provide Respondent with more due process as the interrogatories narrow the issues from the initial complaint filed with the Commission, to those supported by the factual findings of the independent investigator's investigation and subsequent Determination by the Commission based on the same. Commission Procedural Rule 12 effectuates important public policy concerns regarding the confidentiality required in judicial disciplinary proceedings prior to the filing of a FSOC.[5] NRS 1.4683. In this instance, Respondent provided the Commission with a detailed written response.

Furthermore, confidentiality during the investigatory stage protects a judge's due process rights. Such confidentiality protects judges from "injury which might result from publication of unexamined and unwarranted complaints," and further enhances the public confidence in the judicial system by preventing the "premature announcement of groundless claims of judicial misconduct or disability since it can be assumed that some frivolous complaints will be made against judicial officers." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 835 (1978); *see also Jones v. Nev. Comm'n on Jud. Discipline,* 318 P.3d 1078 (2014) *citing to In re Flanagan*, 690 A.2d 865, 875 (Conn 1997) (holding that "Two interests must be accommodated in judicial disciplinary proceedings: (1) the review council must have broad authority to investigate the conduct of our judges in order to maintain public confidence in the judiciary; and (2) our judges must be afforded adequate process before discipline is imposed to ensure that discipline is not imposed on the basis of unfounded charges of misconduct."). Therefore, the fact that Respondent was provided another opportunity to respond to allegations in the complaint and the investigatory findings while the matter was still confidential, further protected Respondent's due process rights.

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[4] The Commission uses the term "interrogatories"; however, the questions are not interrogatories pursuant to NRCP as the NRCP apply to Commission proceedings after the FSOC is filed by the Prosecuting Officer. NRS 1.462(2).

[5] These confidentiality concerns originate from the Nevada Constitution, Article 6, Section 21.

Moreover, procedural due process rights attach at the adjudicatory stage, and not during the investigatory phase of the judicial discipline process. *Jones v. Nev. Comm'n on Judicial Discipline*, 318 P.3d 1078, 1083 (Nev. 2014). Judicial discipline proceedings consist of two distinct phases, one investigatory and the other adjudicatory, wherein the investigatory phase is confidential, and the adjudicatory phase is public. "It is during this [adjudicatory] phase that the judge's legal rights are adjudicated, not before. Accordingly, due process rights will generally not attach before a formal statement of charges is filed." *Jones* at 1083; *see also Ryan v. Comm'n on Judicial Performance*, 754 P.2d 724, 729 (Cal. 1988) (stating that while "a judge certainly has the right to conduct a proper defense in disciplinary actions[,] ... the right attaches [only] once formal proceedings are instituted," not during the preliminary investigation); *In re Petition to Inspect Grand Jury Materials*, 576 F. Supp. 1275, 1284 (S.D. Fla. 1983), *aff'd*, 735 F.2d 1261 (11th Cir. 1984) (observing that during the judicial-misconduct investigatory stage "procedural protections are minimal at most").

Respondent's contention to dismiss the FSOC is based upon the Commission requesting that Respondent answer interrogatories. The Constitution, Nevada Revised Statutes and Commission Procedural Rules all permit a judge to respond to a complaint before it becomes public. This is procedural due process. For the Commission to impose discipline, a prosecuting officer must be appointed, FSOC filed and a hearing held. The interrogatories are simply a procedural opportunity for Respondent to answer and perhaps clarify the allegations in the filed complaint. There are times that cases are dismissed based upon Respondent's answers to the interrogatories.

The procedures employed by the Commission in this case complied with the Constitutional and statutory authority of the Commission and followed the step by step path set out in the Commission's Procedural Rules from the filing of the initial complaint to the present. Moreover, due process rights do not attach until the FSOC issues; therefore, Respondent has no constitutional due process challenge to the Commission's investigatory procedures. Furthermore, the Nevada Supreme Court has de novo authority over the Commission's adjudicatory decisions, thus there is another layer of due process protection for Respondent.

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Respondent's Motion to Dismiss the Complaint is therefore Denied. The Honorable Thomas Armstrong is authorized to sign this Order on behalf of the full Commission.

IT IS SO ORDERED.

DATED this 25 day of September, 2018.

STATE OF NEVADA
COMMISSION ON JUDICIAL DISCIPLINE

Thomas Armstrong, Presiding Judge

CERTIFICATE OF SERVICE

I hereby certify on this 20th day of September, 2018, I transmitted a copy of the foregoing ORDER DENYING MOTION TO DISMISS COMPLAINT, via email and by placing said document in the U.S. Mail, postage prepaid, addressed to:

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EXHIBIT L

EXHIBIT L

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. ABDUL MAJID Defendant.	CASE NO.: 3:18-cr-00077-MMD-WGC-2 **MOTION TO SUPPRESS EVIDENCE (EVIDENTIARY HEARING REQUESTED)**

CERTIFICATION

This motion is timely filed on or before **March 14, 2019**. Responses are due on or before **March 28, 2019**; replies are due on or before **April 4, 2019**.

MOTION

COMES NOW, Defendant ABDUL MAJID (hereinafter "Majid"), by and through his counsel, THE LAW OFFICES OF DAVID R. HOUSTON, David R. Houston, Esq., and hereby moves this Honorable Court for an Order suppressing the evidence seized between July 19, 2018 and July 20, 2018, from a white Commercial 2018 Freightliner Cascadia Tractor, bearing Alberta commercial registration E11142, and Vin # 3AKJGLDR8JSSHP7276, and from its passengers, Haseeb U. Malik and Majid, to wit: (i) all evidence obtained during warrantless searches of the vehicle; (ii) all evidence obtained during the execution of search warrants on the vehicle; (iii) all evidence obtained during searches of Majid's personal cell phones; (iv.) all evidence obtained

from Mr. Malik's cell phones; (v) all statements made by Majid and Mr. Malik subsequent to arrest. Defendant respectfully requests an evidentiary hearing, as some material facts may be in dispute.

POINTS & AUTHORITIES

I. STATEMENT OF FACTS

Based upon the police reports, affidavits, recordings and other items tendered in discovery, the facts appear to be as follows:

1. On July 19, 2018, at approximately 2104 hours, Nevada Highway Patrol ("NHP") Trooper Chris Garcia ("Tpr. Garcia") observed a commercial motor vehicle ("CMV") traveling northbound on Interstate 93 in White Pine County, Nevada near mile marker 58, traveling 71 mph, which was in excess of the posted 60 mph speed limit. (See Police Report of Tpr. Garcia ("Garcia Report") attached hereto as Exhibit 1.) Upon initial contact with the driver, Haseeb U. Malik ("Malik"), Tpr. Garcia informed him that he stopped the vehicle because it was driving in excess of the posted speed limit. (See Report of Investigation by DEA Special Agent Karen Rossi ("Rossi Report"), attached hereto as Exhibit 2, at ¶ 1.) Tpr. Garcia observed that the curtains to the sleeper area of the cab were closed and asked if anyone else was present in the vehicle. Rossi Report ¶2. Malik indicated that his co-driver, Majid, was in the sleeper area and Trooper Garcia had him open the curtains and reveal Majid. Rossi Report ¶2. Tpr. Garcia asked Malik to provide him with his driver's license and paperwork. While communicating with the occupants of the vehicle Tpr. Garcia detected the odor of burnt marijuana emitting from within the passenger compartment and/or the driver. Rossi Report ¶2. Tpr. Garcia asked the occupants whether they were in possession of marijuana and they both denied having any marijuana on them or inside of the vehicle. Rossi Report ¶2. Tpr. Garcia asked the occupants if they smoked marijuana, and they both replied that they do sometimes on their days off. Rossi Report ¶2. Tpr.

Garcia told the men that he could smell marijuana and asked whether there was still marijuana inside of the truck. Rossi Report ¶2. The driver, Malik, stated that he purchased a pre-rolled marijuana cigarette the previous day, smoked half of it and placed the remainder in his cigarette package; he then finished smoking it inside of the truck approximately six (6) to seven (7) hours earlier. Rossi Report ¶2. Tpr. Garcia asked Malik what he did with the joint when he was finished, and Malik responded that he threw the filter and any remaining portion of the joint outside of the vehicle. Rossi Report ¶2.

2. Tpr. Garcia was not trained or certified in CMV regulations and enforcement, and thus, he returned to his patrol vehicle and called NHP Tpr. A. Zehr to inquire about the situation involving the marijuana. Rossi Report ¶3. Tpr. Garcia informed Tpr. Zehr that the driver stated he has smoked marijuana earlier in the day and then threw the filter and "roach" out of the vehicle. Garcia Report. Tpr. Zehr advised that it was an automatic 24-hours out of service, and that Tpr. Garcia would be able to do a probable cause search of the vehicle. Rossi Report ¶3. Tpr. Zehr stated that he was currently finishing a traffic stop, and he would come to the scene when he was finished. Tpr. Zehr arrived on scene at approximately 2136 hours. Garcia Report. Tpr. Zehr's body camera recording demonstrates that when he arrived on scene he spoke to Tpr. Garcia, who told him that the driver admits to smoking marijuana earlier in the day, and stated that he smoked a joint and then threw it out of the vehicle, and both occupants denied possessing any additional marijuana. (See Tpr. Zehr Body Camera Video (USAO 000404 Malik.Majid 4 – Zehr.mp4) ("Zehr Body Cam.") beginning at 3:33 minutes.) The body camera recording shows that Tpr. Zehr told Tpr. Garcia that they would get the occupants out of the vehicle, pat them down, and then search the vehicle for the marijuana cigarette which could be stored anywhere. Id. Tpr. Garcia asked whether he should cite the driver for speeding now or later, and Tpr. Zehr

responded that it did not matter because there was probable cause to search and the driver was out of service. Id. Tpr. Zehr then stated, however, that *he was unsure if he could order the driver out of service if they could not find any marijuana*. Id.

3. The troopers went to the CMV and ordered the occupants to exit. Rossi Report ¶3. Tpr. Zehr asked the men who smoked the marijuana and the driver, Malik, admit that he smoked the marijuana approximately three to four hours previously. Rossi Report ¶3. Tpr. Zehr asked where the marijuana was, and Malik claimed that he was positive that he threw it out. Rossi Report ¶3. Tpr. Garcia advised dispatch that he was doing a probable cause search and began searching the inside of the CMV. Garcia Report. Tpr. Garcia located a garbage bag and searched it, and inside located an electronic vaping device. Garcia Report. Majid told Tpr. Garcia that it was his and it must have fallen into the garbage, and that is was nicotine only. Garcia Report. Tpr. Garcia continued his search into the sleeper area and opened a built in cabinet where he observed white plastic garbage bags containing numerous items that appeared to be similar in shape and size. Garcia Report. Tpr. Garcia believed that the bags contained paperback books, but as he manipulated the objects further it became apparent to him that the objects in the bags were not books. Garcia Report. Tpr. Garcia removed one of the objects from the bags and noticed that the packaging on the exterior of the object consisted of masking tape, and based on his experience and training, he concluded that the packaging was consistent with that of illegal narcotics packaging. Garcia Report. Tpr. Garcia placed the object back into the bag, exited the CMV and directed Tpr. Zehr to the cabinet to view the items. Garcia Report. The body camera of Tpr. Zehr reveals that Tpr. Garcia exited the CMV to speak with Tpr. Zehr at approximately 2151 hours. Tpr. Zehr located the items and asked for a knife. Garcia Report. Tpr. Garcia retrieved a knife from Tpr. Zehr's patrol vehicle and brought it to him. Garcia

Report. Tpr. Zehr made a small cut into one of the packages to reveal a white power substance. Garcia Report. Tpr. Zehr retrieved a NIK Type G test kit from his patrol vehicle and utilized the kit on a sample of the white substance from the package he cut into. Garcia Report. The substance tested positive for the presence of cocaine. Garcia Report.

4. Tpr. Garcia advised Malik and Majid that they were under arrest, and he read them their Miranda rights. Garcia Report. Both men invoked their rights and stated that they did not want to answer any questions. Garcia Report. NHP Tpr. Deeds arrived on scene and transported Malik to the White Pine County Jail. Garcia Report. Tpr. Deeds returned and transported Malik to the White Pine County Jail. Garcia Report. The troopers decided that based on the suspected amount of illegal narcotics present that they would stop the search, have the CMV transported to town, seal the CMV and apply for a search warrant. Rossi Report ¶6.

5. Tpr. Zehr placed the Nevada Highway Patrol trailer seal no. 0001433 on the CMV's trailer. Rossi Report ¶7. Battleborn Towing arrived on scene to transport the CMV to their tow yard located in Ely, Nevada. Rossi Report ¶7. Tpr. Garcia followed the CMV as it was transported to the tow yard, maintaining visual contact with the CMV until it arrived at its destination. Rossi Report ¶7. Tpr. Garcia sealed the CMV pending a search warrant. Rossi Report ¶7. Tpr. Garcia applied for a search warrant from the Ely Justice Court Justice of the Peace Steven Bishop. Rossi Report ¶7. Justice of the Peace Steven Bishop granted the search warrant of the 2018 Frieghtliner Cascadia Alberta commercial registration E11142 and the attached 53' white box trailer with Alberta commercial registration 5MR394. Rossi Report ¶7.

6. At approximately 12:49 a.m. on July 20, 2018, Tpr. Garcia and Tpr. Zehr executed the search warrant. Rossi Report ¶8. During the search, in the same cabinet the suspected cocaine was located in, there were packaging items including a box of white plastic trash bags, two pairs

of latex gloves, packing tape, and items possibly used to conceal odor including packs of cayenne pepper and three packages of Glade Air Freshener. Rossi Report ¶8. The located box of white plastic trash bags was consistent with that of which the suspected cocaine was located. Rossi Report ¶8.

7. Tpr. Garcia raised the lowered bed which revealed a storage area under the bed. Rossi Report ¶9. Located in the center of the storage area were two large suitcases black and blue in color. Rossi Report ¶9. Upon opening the suitcases, both contained numerous packages wrapped in a saran wrap type plastic. Rossi Report ¶9. Both suitcases and their contents were taken as evidence. Rossi Report ¶9. On the top bunk in the sleeper, Tpr. Garcia observed blankets stacked on top of unknown items that were toward the passenger side of the sleeper area. Rossi Report ¶9. Upon moving the blankets Tpr. Garcia noticed three lack duffel bags. Rossi Report ¶9. The bags contained numerous packages sealed with Food Saver type packaging which was consistent with packaging of illicit controlled substances for transport. Rossi Report ¶9. The three duffel bags and their contents were taken for evidence. Rossi Report ¶9.

8. On July 20, 2018, Tpr. Garcia, along with Tpr. Deeds, Tpr. Barney, Tpr. Boynton, Sgt. Brewer and Det. Sifre processed the suspected controlled substances which included testing, weighing, labeling and sealing for evidence. The two substances identified by presumptive testing were cocaine and methamphetamine. Rossi Report ¶`10. At the conclusion of the packaging, testing and weighing process it was determined that a total of 135.36 lbs. of cocaine, and 114.27 lbs. of methamphetamine were collected from the CMV. Rossi Report ¶10.

9. Defendants Majid and Malik are charged with Possession with Intent to Distribute a Controlled Substance, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A)(ii)(II) and (viii).

II. ARGUMENT

A. THE DURATION OF THE TRAFFIC STOP INVOLVING MAJID WAS UNLAWFUL UNDER THE FOURTH AMENDMENT BECAUSE LAW ENFORCEMENT OFFICERS LACKED THE INDEPENDENT REASONABLE SUSPICION NECESSARY TO PROLONG ITS DURATION

1. Majid Has Standing Under The Fourth Amendment To Challenge The Traffic Stop And Seizure Of His Person.

The Fourth Amendment to the U.S. Constitution guarantees "[t]he right of the people to be secure in their, persons, houses, papers, and effects, against unreasonable searches and seizures. As opined by the U.S. Supreme Court, "The security of one's privacy against arbitrary intrusion by the police -- which is at the core of the Fourth Amendment -- is basic to a free society. It is therefore implicit in the 'concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." Wolf v. Colorado, 338 U.S. 23, 27-28 (1949). A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed, while a 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interest in that property." United States v. Jacobsen, 466 U.S. 109, 113 (1984). A person may challenge the propriety of a search or seizure which violates the defendant's own reasonable expectation of privacy in the area searched or the items seized. Rakas v. Illinois, 439 U.S. 128 (1978). The capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. Katz v. U.S., 389 U.S. 347, 353 (1967).

Fourth Amendment jurisprudence recognizes three levels of contact between law enforcement officers and citizens: (i) consensual encounters, (ii) investigatory detentions, and (iii) arrests. United States v. Roberts, 2007 WL 1381776, *3 (D. Nev.). Although a consensual

encounter is not a seizure within the meaning of the Fourth Amendment, investigatory detentions and arrests are such seizures. Id. When a vehicle is stopped by a police officer and its occupants are detained, a seizure within the fourth amendment of the United States Constitution has occurred, even if the purpose of the stop is limited and the resulting detention is quite brief. Delaware v. Prouse, 440 U.S. 648, 653 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 556-558 (1976). It is well settled that a traffic stop constitutes a seizure within the purview of the Fourth Amendment. Delaware v. Prouse, 440 U.S. 648, 661-663 (1979); United States v. Daniel, 804 F.Supp. 1330, 1334 (1992). (See Arizona v. Johnson, 129 S.Ct. 781, 788 (U.S. 2009): "a traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will.")

A vehicle passenger may challenge a traffic stop on Fourth Amendment grounds even if he lacks a property interest in the vehicle itself. USA v. Twilley, 222 F.3d 1092 (9th Cir., 2000). Even where a passenger cannot challenge a search directly, he or she may establish that a traffic stop was unlawful under the Fourth Amendment, and the evidence seized as a result of that stop is subject to suppression as 'fruit of the poisonous tree.' Id.; see United States v. Kimball, 25 F.3d 1, 5 (1st Cir., 1994) (Because passenger's interests are affected when a vehicle is stopped, he/she has standing to challenge the stop, and if illegal, evidence may be excluded as fruit of poisonous tree).

In this case, Mr. Majid was the co-driver of the commercial motor vehicle, was living in the vehicle during the trip back to Alberta, Canada, had personal possession in the cab, he was sleeping in its sleeper-compartment in the rear of the cab when the vehicle was stopped by NHP Trooper Garcia, and he has standing under the Fourth Amendment to challenge the legality of the prolonged warrantless detention following the initial traffic stop.

2. The Extended Duration of the Traffic Stop Involving Majid Was Unreasonable Under the Fourth Amendment to the U.S. Constitution.

"A seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." Illinois v. Caballes, 543 U.S. 405, 407 (2005). In particular, a seizure that is justified solely by the interest in issuing a traffic ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. Id. A traffic stop that extends beyond the time necessary to effectuate its initial purpose is not unreasonable per se. State v. Beckman, 305 P.3d 912, 917 (Nev., 2013). A prolonged stop may be reasonable in three limited circumstances: when the extension of the stop was *consensual*, the *delay was de minimis*, or the officer lawfully receives information during the traffic stop that creates a *reasonable suspicion of criminal conduct*. Id. A prolonged stop is obviously not unreasonable under the Fourth Amendment where it is consensual. Id. at 918. A modest delay may be reasonable, depending on the circumstances of the stop. Id. A prolonged stop is permissible if the results of the initial detention provide an officer with reasonable suspicion of criminal conduct, thereby creating a new Fourth Amendment event. Id., citing Estrada v. Rhode Island, 594 F.3d 56, 64 (1st Cir.2010) (recognizing that information gathered during a traffic stop may provide reasonable suspicion of criminal conduct that will justify extending the stop). Absent independent reasonable suspicion justifying each prolongation, a seizure is unreasonable and violates the Fourth Amendment. United States v. Evans, 786 F3d 779, 788 (9th Cir., 2015)).

In Rodriguez v. United States, 135 S. Ct. 1609, 1614 (2015), the U.S. Supreme Court opined that "[a] relatively brief encounter," a routine traffic stop is "more analogous to a so-called 'Terrystop' ... than to a formal arrest." "Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the

traffic violation that warranted the stop and attend to related safety concerns." Id. (Internal citations omitted.) The court in Rodriguez held, authority for the seizure ends "when tasks tied to the traffic infraction are — or reasonably should have been — completed." Id. at 1616. "Tasks not related to the traffic mission, such as dog sniffs, are therefore unlawful if they "add time" to the stop and are not otherwise supported by independent reasonable suspicion of wrongdoing. Id. An officer may prolong a traffic stop if the prolongation itself is supported by independent reasonable suspicion. Id. at 1615; United States v. Mendez, 476 F.3d 1077, 1080 (9th Cir. 2007).

i. The Extended Detention Failed to Conform to the Traffic Stop's Initial Purpose

Tpr. Garcia initiated the traffic stop of the CMV due to a speeding violation at approximately 2104 hours. Garcia Report. While communicating with the occupants of the CMV, Tpr. Garcia detected the odor of burnt marijuana inside of the vehicle and asked whether either of them had smoked marijuana or were otherwise in possession thereof. The driver, Malik, admit to smoking a pre-rolled marijuana cigarette ("joint") a few hours previously, and he further stated that he threw the remainder of the smoked joint out of the vehicle. Garcia Report. Tpr. Garcia returned to his patrol vehicle to issue a citation for speeding, and he because he had no training or certification in CMV regulation/enforcement he called Tpr. Zehr to inquire about the driver's admission to recently smoking marijuana. Garcia Report. Tpr. Zehr informed him that it was automatic out-of-service and that there was probable cause to search the CMV for marijuana. Garcia Report. Tpr. Zehr advised that he assist with the search as soon as he finished with his current traffic stop which was approximately five miles away. Garcia Report. Tpr. Zehr arrived at approximately 2136 hours, which was approximately 31 minutes after the traffic stop

was initiated. Rossi Report ¶3. The body camera video of Tpr. Zehr recorded the following dialogue between Tpr. Zehr and Tpr. Garcia:

> Tpr. Zehr: We'll get them out and pat them down, and then you can search, or you want me to search? I'll let you search.
>
> Tpr. Garcia: Should I give them the cite or give it to him last?
>
> Tpr. Zehr: It doesn't matter because it's P.C., he's out of service… Well, I think it's any detectible amount, but I don't know about putting him out of service if we don't find anything. Smell is one thing.
>
> Tpr. Garcia: He admit to using it this morning though. I don't know if that changes anything.
>
> Tpr. Zehr: Yeah I have to double check the out of service criteria.
>
> Tpr. Zehr: Yeah, we will just give that to them in the end.
>
> Tpr. Garcia: I'll just throw it in here, so I don't lose it.
>
> Tpr. Zehr: And then it's probably a user amount, so there is all sorts of places in there they can stash it.

See Zehr Body Cam.: 4:29 – 5:43.

Tpr. Zehr's body camera video shows that Tpr. Garcia had a ticket already prepared and was going to issue it to Malik until Tpr. Zehr told him that he could give it to him after the search because there was probable cause. The video shows Tpr. Garcia holding the ticket on his clipboard and then putting it back into his vehicle so that he would not misplace it during the search. Hence, in this case, the purpose of the traffic stop, the enforcement of a speeding violation, had already been completed, and the detention was prolonged in order to search the vehicle for marijuana. Tpr. Garcia waited approximately 30 minutes for Tpr. Zehr to arrive at the scene, and then the occupants were ordered out of the vehicle six (6) minutes later. See Zehr Body Cam. at 6:15. The troopers questioned the occupants about their marijuana use for three

(3) more minutes until Tpr. Garcia started searching the CMV at approximately 2145 hours; more than 40 minutes after the CMV was initially stopped. See Zehr Body Cam. at 9:22.

The officers in this case extended the traffic stop for more than 40 minutes so that they could search the CMV for marijuana. This prolonged detention was unreasonable unless Trooper Garcia had developed independent reasonable suspicion regarding unrelated criminal conduct during the course of the traffic stop. As stated below, he had not.

ii. Tpr. Garcia Had No Independent Reasonable Suspicion of Criminal Activity Necessary to Measurably Prolong the Detention

"Reasonable suspicion is formed by specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity." United States v. Lopez-Soto, 205 F.3d 1101, 1105 (9th Cir. 2000); United States v. Gibson, *4 (D. Nev., 2017). Reasonable suspicion to extend the stop beyond its initial mission "exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized suspicion" of *criminal activity*. United States v. Montero-Camargo, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc). While the reasonable suspicion standard requires more than a mere hunch, "the likelihood of *criminal activity* need not rise to the level required for probable cause." United States v. Arvizu, 534 U.S. 266, 274 (2002). Nevada statute, NRS 171.123, codifies *Terry* and provides in relevant part that "[a]ny peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person *has committed, is committing or is about to commit a crime*." NRS 171.123(1) (emphasis added).

In Nevada, the possession of a miniscule amount of marijuana is not a crime. Specifically, NRS 453D.110 states in relevant part:

> Notwithstanding any other provision of Nevada law and the law of any political subdivision of Nevada, except as otherwise provided in this chapter, it is lawful, in this State, and must not be used as the basis for prosecution or penalty by this State or a political subdivision of this State, and must not, in this State, be a basis for seizure or forfeiture of assets for persons 21 years of age or older to:
>
> 1. Possess, use, consume, purchase, obtain, process, or transport marijuana paraphernalia, one ounce or less of marijuana other than concentrated marijuana, or one-eighth of an ounce or less of concentrated marijuana.

The NHP troopers were told that the driver smoked a single marijuana cigarette a few hours before and had thrown the filter/"roach" out of the vehicle. The troopers had no reasonable suspicion that any crime had been, or was about to be committed, and they were not searching for any evidence of criminal conduct.

Rather, as stated by Tpr. Zehr in his police report:

> I advised Trooper Garcia that we had probable cause to search the CMV as it is a zero tolerance to possess or be under the influence of marijuana in a CMV and that according to Commercial Federal Regulations adopted by the state of Nevada under NAC 706.247, we should place the driver out of service for 24 hours. (See the Federal motor carrier safety administrations official website for the following information).
>
> According to the FMCSA, "Marijuana continues to be classified as a Schedule I controlled substance by the Drug Enforcement Administration (DEA) in 21 CFR § 1308.11. Under the Federal Motor Carrier Safety Regulations (FMCSRs), a person is not physically qualified to drive a CMV if he or she uses any Schedule I controlled substance such as marijuana. (49 CFR §§ 391.11(b)(4) and 391.41(b)(12)). In addition to the physical qualification requirements, the FMCSRs prohibit a driver from being in possession of or under the influence of any Schedule I controlled substance, including marijuana, while on duty, and prohibit motor carriers from permitting a driver to be on duty if he or she possesses, is under the influence of, or uses a Schedule I controlled substance. (*See* 49 CFR §§ 392.2 & 392.4.)"
>
> Furthermore, the legalization of marijuana by states and other jurisdictions does not supersede the federal regulations that govern the trucking industry. Based on this information, Trooper Garcia began a probable cause search of the CMV.
>
> (See Police Report of Tpr. Zehr ("Zehr Report"), attached hereto as Exhibit 3.)

Tpr. Zehr believed that there was probable cause that the driver of the CMV was in possession of marijuana, and that if marijuana was found in the vehicle he could order the driver out-of-service for violating FMCSRs prohibiting the possession of marijuana while on duty. It should be noted that cocaine and methamphetamine were found in the CMV, yet no criminal charges were filed for violating any FMCSRs. The violation of federal regulations mentioned in Tpr. Zehr's police report do not implicate criminal conduct, but merely potential administrative sanctions in the form of a temporary out-of-service order. Accordingly, even if Tpr. Zehr's analysis of the law was correct, there would be no reasonable suspicion of criminal activity by which to extend the duration of the traffic stop in this case.

Additionally, as explained below, the regulations cited by Tpr. Zehr do not authorize a search for marijuana to potentially justify an out-of-service order.

iii. The Troopers Could Not Have Removed Malik From Service Pursuant to the FMCSRs Adopted Under NAC 706.247 and Mentioned by Tpr. Zehr In His Report - As They Related to Possession of Marijuana

The Motor Carrier Safety Improvement Act of 1999 ("the Act"), established the Federal Motor Carrier Safety Administration ("FMCSA") as a division of the United States Department of Transportation ("DOT"). Under the Act, the Motor Carrier Safety Assistance Program (MCSAP), a federal grant program, was developed to provide financial assistance to States to reduce the number and severity of accidents and hazardous materials incidents involving CMVs. 49 C.F.R. § 350.101. The MCSAP also sets forth the conditions for participation by states and local jurisdictions and promotes adoption and uniform enforcement of safety rules, regulations and standards compatible with the FMCSRs. To be eligible for funding through the MCSAP, a state must adopt regulations consistent with the federal regulations. Id. § 350.201(a). The MCSAP, in conjunction with the Commercial Vehicle Safety Alliance ("CVSA"), an

organization of federal, state and provincial government agencies and private industry representatives, developed the North American Standard ("NAS") Training and Inspections program. 49 C.F.R. § 350.105. *This program is the "methodology used by State CMV inspectors to conduct safety inspections of CMVs*." Id.

Pursuant to the MCSAP, individual states are the primary enforcers of the highway safety regulations at roadside inspections. In return for their acceptance of the MCSAP grants, a state assumes responsibility for enforcing the FMCSRs or other compatible state rules. 49 C.F.R. § 350.201; see also Nat'l Tank Carriers v. Fed. Highway Admin. of the U.S. Dept. of Transp., 170 F.3d 203, 204-06 (D.C. Cir. 1999) (discussing the history of the MCSAP). Nevada ensures compliance with federal regulations through enactment of a Commercial Vehicle Safety Plan ("CVSP"), which complies with the MCSAPs requirements for receiving federal highway funding "by, inter alia , requiring Nevada Highway Patrol troopers to conduct inspections in a manner consistent with "the North American Standard ["NAS"] Inspection procedure."" United States v. Orozco, 858 F.3d 1204 (9th Cir., 2017); 49 C.F.R. § 350.211(d). Nevada's CVSP provides that the Nevada Highway Patrol's "enforcement activities" will include "scheduled and unannounced roadside inspections." Orozco, 858 F.3d at 1207.

Nevada's Legislature has charged the Nevada Transportation Authority ("the Authority") with regulation of motor carriers. Orozco 858 F.3d at 1207. The Department of Public Safety, and its subsidiary arm, the Nevada Highway Patrol, are charged with enforcing the regulations adopted by the Authority. NRS 706.151(1).

In relevant part, Nevada's Legislature set forth the duties of NHP officers as follows:

NRS 480.360:

> The duties of the personnel of the Nevada Highway Patrol include, without limitation:

> 1. To police the public highways of this State, to enforce and to aid in enforcing thereon all the traffic laws of the State of Nevada and to enforce all other laws of this State when:
>
> (a) In the apprehension or pursuit of an offender or suspected offender;
>
> (b) Making arrests for crimes committed in their presence or upon or adjacent to the highways of this State; or
>
> (c) Making arrests pursuant to a warrant in the officer's possession or communicated to the officer. …
>
> 4. To enforce the provisions of laws and regulations relating to motor carriers, the safety of their vehicles and equipment, and their transportation of hazardous materials and other cargo.

The Authority additionally enacted NAC 706.2472, which states in relevant part as follows:

> 1. The Department of Public Safety hereby adopts by reference the regulations contained in 49 C.F.R. Parts 40, 382, 383, 385, 387, 390 to 393, inclusive, 395, 396 and 397, and Appendices B and G of 49 C.F.R. Chapter III, Subchapter B, as those regulations existed on May 30, 2012, with the following exceptions: …
>
> 2. To enforce these regulations, enforcement officers of the Department of Public Safety may, during regular business hours, enter the property of a carrier to inspect its records, facilities and vehicles, including, without limitation, space for cargo and warehouses.

The Authority may employ compliance enforcement officers "whose duties shall include, without limitation, enforcement activities to ensure motor carriers are operating in compliance with state statutes and regulations, conducting operational inspections of motor carriers and investigating complaints against motor carriers." NRS 706.176 (4). Such officers may "examine, at any time during the business hours of the day, the books, papers and records of any fully regulated carrier, and of any other common, contract or private motor carrier doing business in this State to the extent necessary for their respective duties." NRS 706.171(1)(d).

Tpr. Zehr advised Tpr. Garcia that there was probable cause to search the CMV because it was illegal to possess marijuana in a CMV, and according to FMCSRs adopted by the state of Nevada pursuant to NAC 706.247, the driver could be placed out of service for 24 hours (Zehr Report), so long as marijuana was actually found during the search (Zehr Body Cam). In his report, Tpr. Zehr stated that under the FMCSRs, a person is not physically qualified to drive a CMV if he or she uses marijuana (49 CFR §§ 391.11(b)(4) and 391.41(b)(12)) and is prohibited from being on duty if he possesses marijuana (49 CFR §§ 392.2 & 392.4.).

Tpr. Zehr's advisement to Tpr. Garcia was wrong for the numerous reasons that follow.

First, pursuant to NAC 706.2472, the Department of Public Safety adopted 49 CFR §§ 390. 49 CFR §§ 390.5 defines an "out-of-service order" as "a declaration by an authorized enforcement officer of a Federal, State, Canadian, Mexican, or local jurisdiction that a driver, a commercial motor vehicle, or a motor carrier operation, is out-of-service pursuant to §§ 386.72, 392.5, 392.9a, 395.13, 396.9, or compatible laws, or the North American Standard Out–of–Service Criteria."

NRS 482.083 provides that an "out-of-service order" means a "temporary prohibition on operation by a motor carrier that is issued: (1) By a federal or state entity with authority to issue such a temporary prohibition; and (2) Pursuant to a provision of 49 C.F.R. Part 385 or 386 that is specified in regulations adopted pursuant to NRS 482.2914. Additionally, NRS 483.904 states that an "out-of-service order" means a "temporary prohibition against: (a) A person operating a commercial motor vehicle as such a prohibition is described in 49 C.F.R. § 395.13; or (b) The operation of a commercial motor vehicle as such a prohibition is described in 49 C.F.R. § 396.9(c)."

Under NAC 706.2472, the Department of Public Safety adopted 49 C.F.R. Part 385 but did not adopt Part 386. Part 385 establishes the FMCSA's procedures to determine the safety fitness of motor carriers, to assign safety ratings, to direct motor carriers to take remedial action when required, and to prohibit motor carriers receiving "unsatisfactory" ratings from operating a CMV. This Part involves inspections of operators' records and not driver's and their vehicles at roadside inspections. This Part is inapplicable to the instant facts. 49 C.F.R. § 395.13 allows enforcement officers to place drivers out of service where they exceed maximum periods of time on duty and prohibits motor carriers from permitting drivers who have been declared out of service from driving. 49 C.F.R. § 396.9(c) provides, "[a]uthorized personnel shall declare and mark out-of-service any motor vehicle which by reason of its mechanical condition or loading would cause and accident or a breakdown." None of these parts under Title 49 allow an enforcement officer to place a driver out-of-service for possessing marijuana.

Additionally, while 49 CFR §§ 392.5 states that no driver shall be on duty while possessing alcohol and must be placed out of service immediately for 24 hours if found to be in violation, there is no requirement for placing a driver out of service who possesses a Schedule I controlled substance in violation of 49 CFR §§ 392.4. Concerning 49 CFR §§ 391.11(b)(4) and 391.41(b)(12), a driver is not physically qualified to drive a CMV unless he is first medically certified as physically qualified to do so, and if initial drug screening reveals use of Schedule I controlled substances, a driver will not be able to obtain a medical certification. In this case, Mr. Malik's admission to using marijuana earlier in the day did not provide grounds for an out-of-service order.

In this case, the NHP troopers believed that because the driver admitted to smoking a joint in the CMV a few hours earlier, and they detected the odor of burnt marijuana emitting

from the driver or the inside of the cab, there was reason to suspect that marijuana would be found inside of the vehicle. This would not have constituted evidence of any criminal conduct, as there was no evidence that more than one ounce of fresh marijuana would be located inside of the vehicle, and the troopers did not suspect that the driver was under the influence of marijuana. Secondly, this evidence would not have allowed the troopers to issue an out-of-service order, and there were no grounds at all to search the vehicle for marijuana. Thirdly, the odor of burnt marijuana and admission that the driver smoked a joint and threw it out of the vehicle did not support reasonable suspicion or probable cause to believe that the unused portion of the joint would be found somewhere inside of the vehicle.

iv. CMV Enforcement Officers Must Search For Evidence of Regulatory Violations Under Administrative Inspection Criteria

"Except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967). Among the "carefully defined classes of cases" for which no warrant is needed are administrative searches, that is, searches "conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime." United States v. Davis, 482 F.2d 893, 910 (9th Cir.1973). Administrative inspections are "searches subject to the reasonableness standards of the Fourth Amendment." Donovan v. Dewey, 452 U.S. 594, 598 (1981). In general, therefore, a warrant is required to authorize an administrative inspection. Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978). In closely regulated industries, however, warrantless inspections are permitted in recognition of the reduced expectation of privacy that accompanies pervasive regulation. New York v. Burger, 482 U.S. 691, 702 (1987). To satisfy the Fourth Amendment

standard of reasonableness, such warrantless inspections must be necessary to further substantial governmental interest, and must be "carefully limited in time, place and scope." Id. at 703.

Commercial trucking is a closely regulated industry. United States v. Abreu, 736 F.Supp. 1018, 1028 (D.C. Colo. 1990). Close regulation of the trucking industry promotes an obvious and substantial government interest in maintaining highway safety. Further, warrantless inspection appears reasonably necessary to effectuate the regulatory purposes. See Dominguez-Prieto, 923 F.2d 464, 468 (6th Cir. 1991), cert. denied, 500 U.S. 936 (1991). "If inspection is to be effective and serve as a credible deterrent, unannounced, even frequent inspections are essential." United States v. Biswell, 406 U.S. 311, 316 (1972). Though permissible, warrantless inspections of closely regulated businesses are highly circumscribed.

> In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. To perform this first function, the statute must be "sufficiently comprehensive and defined that the owner of the commercial property cannot help but be aware that his property is subject to periodic inspections undertaken for specific purposes." In addition, the discretion of the inspectors… must be "carefully limited in time, place, and scope."
>
> New York v. Burger, 482 U.S. at 703 (citations omitted).

As discussed above, Nevada's CVSP requires NHP troopers to conduct inspections of CMVs in a manner consistent with NAS inspection procedure. 49 C.F.R. § 350.211(d). "Level I and Level II Inspections tend to primarily address commercial vehicles while Level III Inspections focus more on the driver." Owner–operator Indep. Driver Ass'n Inc. v. Dunaski, 763 F.Supp.2d 1068, 1074 (D. Minn., 2011). The regulatory guidelines for a Level III inspection authorize an officer to "[c]ollect the following documents: driver's license; medical examiner's certificate (and waiver, if applicable); records of duty status; driver's daily vehicle inspection report; documentation of periodic inspections; shipping papers and/or bills of lading, and receipts

or other documents that may be used to verify the log." U.S. v. Knight, 306 F.3d 534, 535 (8th Cir., 2002) citing 49 C.F.R. § 350.105. The guidelines also authorize an officer to "[c]heck the cab for possible illegal presence of alcohol, drugs, weapons or other contraband." Id. However, this check for illegal drugs, alcohol and contraband consists of a visual inspection for evidence that may be in plain view. State v McClure, 74 S.W.3d 362, 365 (Tenn. Crim. App., 2001). Further, although the regulations prohibit drivers from possessing narcotics or other substances "which render the driver incapable of safely operating a motor vehicle," 49 C.F.R. § 392.4(a), they contain no provision authorizing the inspection of passengers or their personal belongings for drugs. V–1 Oil Co. v. Means, 94 F.3d 1420, 1427 (10th Cir.1996) ("The [motor carrier safety] regulations make it clear the inspections are limited in scope to safety concerns. They do not authorize a general search by any law enforcement officer." (citation omitted)).

In this case, the search was not circumscribed by administrative regulations, and did not address safety concerns. Instead, the search in this case, for the "roach" of a marijuana cigarette was a general search of the entire contents of the CMV's cab, including cabinets, drawers and personal luggage. (As discussed by Tpr. Zehr with Trp Garcia in Zehr's body camera video, the small personal use amount could have been stashed anywhere in the vehicle.) While the purpose of the search was to uncover evidence of FMCSR violations, the officers did not inspect the vehicle pursuant to corresponding search criteria, claiming instead that they had probable cause.

The term "probable cause," within the context of a search, exists if "there is a fair probability that *contraband or evidence of a crime* will be found in a particular place," based on the totality of circumstances. Illinois v. Gates, 462 U.S. 213, 238 (1983). Describing the "probable cause" standard, the 9th Circuit Court of Appeals previously stated that this standard "merely requires that the facts available to the officer would "warrant a man of reasonable

caution in the belief" that certain items may be contraband or stolen property or useful as evidence of a crime." Dawson v. City of Seattle, 435 F.3d 1054 (9th Cir., 2006). A search based on probable cause can sometimes be an exception to the Fourth Amendment's warrant requirement. In Nevada, pursuant to NRS 179.035, "a warrant may be issued under NRS 179.015 to 179.115, inclusive, to search for and seize any property:

> 1. Stolen or embezzled in violation of the laws of the State of Nevada, or of any other state or of the United States;
>
> 2. Designed or intended for use or which is or has been used as the means of committing a criminal offense; or
>
> 3. When the property or things to be seized consist of any item or constitute any evidence which tends to show that a criminal offense has been committed or tends to show that a particular person has committed a criminal offense.

There was no probable cause in this case to search under the automobile exception because the evidence sought could not have established that a criminal offense was committed. The troopers' intended to uncover evidence that FMCSRs had been violated so that they could order the driver out-of-service. However, the specific regulations pertaining to possession of marijuana discussed in Tpr. Zehr's police report would not have permitted the officers to order the drivers out of service. While an inspection of a CMV for evidence of regulatory violations is required to be made under the exacting NAS criteria, Tpr. Garcia was not even certified to perform said inspections and did not stop the vehicle or perform the necessary steps of an administrative inspection, and searched the vehicle based on purported probable cause of regulatory violations. Accordingly, there was no lawful basis to prolong the traffic stop for more than 40 minutes so that the troopers could search the CMV for a smoked joint that the driver repeatedly said he threw out of the vehicle after smoking it.

v. The Extended Duration of the Traffic Stop Was Unreasonable Under the Fourth Amendment

Tpr. Garcia stopped the CMV for speeding and returned to his vehicle to issue a citation. He waited for the arrival of Tpr. Zehr who arrived more than 30 minutes after the CMV was stopped. The troopers then questioned the occupants about the marijuana, and Tpr. Garcia started searching the vehicle for a "roach" that there was no reason to believe was inside of the vehicle. This extended detention (more than 40 minutes) was not supported by independent reasonable suspicion of criminal activity, and the assertion by the police that they had probable cause to search is bellied by the law.

B. THE NHP TROOPERS LACKED PROBABLE CAUSE TO SEARCH THE CMV

1. Majid Has Standing Under The Fourth Amendment To Challenge The Search of the Vehicle

Majid was a co-driver of the CMV who was sleeping in the sleeper area of the cab at the time of the traffic stop. The two drivers were from Alberta, Canada, and were transporting property between California and Alberta. Majid was temporarily residing in the vehicle, had personal belongings in the sleeper area, was sleeping in the bed when the vehicle was stopped and had an objectively reasonable expectation of privacy in the vehicle where he resided and drove while in route back to Alberta.

2. The Search for the Marijuana Cigarette Was Unlawful Under the Fourth Amendment

It was argued above that the NHP troopers lacked the independent reasonable suspicion necessary to extend the duration of the traffic stop in order to search the CMV for a personal use (arguably much less) quantity of marijuana. The police officers alleged that they had probable cause to search the vehicle, however, as previously argued, the officers lacked probable cause of criminal activity, and had no ability to issue an out-of-service order

even if the remainder of the marijuana joint would have been found. For the same reasons, the NHP troopers violated both the warrant and the reasonableness requirement of the Fourth Amendment. The Government shoulders the burden of establishing that the warrantless search of the CMV was reasonable. Yet, it cannot rely on the automobile exception because there was no probable cause to believe that the vehicle contained evidence of a crime or illegal contraband that it could seize. The Government cannot rely on the administrative search exception because Tpr. Garcia was not trained and certified, and the officers did not strictly follow the requirements and limitations of regulations circumscribing administrative safety inspections of CMVs.

C. THIS COURT SHOULD SUPPRESS ALL EVIDENCE CONSTITUTING FRUITS OF UNLAWFUL SEIZURES.

"The Fourth Amendment protects against the "overhearing of verbal statements" and "matters observed" during an unlawful search and seizure, as well as against the more traditional seizure of "papers and effects". Wong Sun v. United States, 371 US 471, 485 (1963).

"Once it is established that a search or seizure was illegal, all evidence, which was obtained by exploitation of that illegality, is "fruit of the poisonous tree", and such evidence is inadmissible unless the prosecution proves it was obtained "by means sufficiently distinguishable to be purged of the primary taint." Id. at 488. "Evidence obtained as the result of an unreasonable search and seizure is inadmissible." Mapp v. Ohio, 367 US 643 (1961).

If this Court finds that the prolonged detention and/or search of the CMV was unreasonable under the Fourth Amendment, it must order suppression of all evidence constituting fruits of the illegality. The initial search of the vehicle, statements/admissions of its passengers, evidence obtained from subsequently executed search warrants of the CMV and its

containers, cell phones and any other similar evidence proximately derived from unlawful seizures must be suppressed.

D. CONCLUSION

Mr. Majid was illegally detained during an unreasonable detention that was unduly extended without independent reasonable suspicion of criminal activity. The subsequent search of the CMV for evidence of regulatory violations was additionally unlawful under the Fourth Amendment. The subsequent searches and seizures of the items which are the subject of this motion are clearly fruits of the poisonous tree and must be suppressed.

Therefore, this Court should grant the within motion.

DATED: March 13, 2019.

Respectfully submitted,

/s/ David Houston_____
Law Office of David R. Houston, PLC
David R. Houston, Esq.
Attorney for Defendant Abdul Majid

CERTIFICATE OF SERVICE

The undersigned hereby affirms, under penalty of perjury, that I am an Employee of the Law Office of David R. Houston and that on this date, I caused to be delivered via e-filing system (CM/ECF) and/or electronic mail a true and correct copy of the within document, **MOTION TO SUPPRESS EVIDENCE (EVIDENTIARY HEARING REQUESTED)** that was filed March 13, 2019 to the below-named:

Megan Rachow, AUSA
United States Attorney's Office
100 West Liberty Street, Suite 600
Reno, Nevada 89501

DATED this 13th day of March 2019

/s/ Crystal Guardino
Crystal Guardino

INDEX OF EXHIBITS

Exhibit 1: Police Report of NHP Tpr. Garcia ("Garcia Report")

Exhibit 2: Report of Investigation by DEA Special Agent Karen Rossi ("Rossi Report")

Exhibit 3: Police Report of NHP Tpr. A. Zehr ("Zehr Report")

EXHIBIT M

EXHIBIT M

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA, Plaintiff, v. HASEEB MALIK and ABDUL MAJID, Defendants.	Case No. 3:18-cr-00077-MMD-WGC ORDER

I. SUMMARY

Odor is not the bedrock of probable cause in this case. Defendants Haseeb Malik and Abdul Majid's (collectively, "Defendants") have separately and jointly filed motions to suppress that are pending before the Court ("Defendants' Motions"). (ECF Nos. 40, 41, 42 (Majid's joinder).) In resolving Defendants' Motions, the Court grapples with the interplay of legal marijuana and the strictures of Fourth Amendment law in the context of a traffic stop by Nevada Highway Patrol ("NHP") troopers. Ultimately, that Nevada law legalizing possession of user amounts of marijuana conflicts with federal law is of no import here because of the NHP troopers' particular decision to search. Because the Court finds that even if there was independent reasonable suspicion to extend the duration of the traffic stop, the NHP troopers lacked probable cause to search the Commercial Motor Vehicle ("CMV") driven by Malik, the Court will grant Defendants' Motions. The NHP troopers' failure to enforce the law within the confines of the Fourth Amendment leads to one conclusion: that the ultimate fruits of their stop and search—the drugs found in the CMV—must be suppressed.

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II. RELEVANT BACKGROUND

A. Charge and Motion

Defendants have each been charged with one count of Possession with the Intent to Distribute a Controlled Substance—Cocaine and Methamphetamine—in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(ii)(II) and (viii) stemming from drugs found on July 19, 2018. (ECF No. 24.) Defendants filed their respective motions to suppress this drug evidence.[1] (ECF Nos. 40, 41, 42.) The Court also heard testimony from the Troopers[2,3] and argument on Defendants' Motions on April 25, 2019 ("Hearing").

B. Factual Findings[4]

The facts relating to Defendants' Motions are rather straight-forward and materially undisputed. They are based on the Troopers' reports, affidavits, and the Troopers' body camera ("Body Cam") recordings, all of which are exhibits admitted pursuant to the parties' stipulation. (ECF Nos. 58, 67.) The Court also considers the Troopers' testimony during the Hearing.

At approximately 9:04 p.m. on July 19, 2018, NHP Trooper Chris Garcia stopped the CMV being driven by Malik for speeding. (ECF No. 41-1 at 2.) Malik's co-driver, Defendant Majid, was in the living/sleeping quarters. (*Id.*)

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[1]Because Defendants' paramount objections are ultimately the same—that the prolongation of the traffic stop and search violated their Fourth Amendment rights under the U.S. Constitution, the Court considers the Defendants' motions to suppress collectively unless otherwise noted. The Court has also considered the government's response (ECF No. 45) and Defendants' replies (ECF Nos. 50, 52).

[2]Troopers collectively refer to Trooper Chris Garcia and Trooper Adam Zehr.

[3]The Court denied Defendants' motion to vacate the evidentiary hearing (ECF No. 55) to permit the government to offer the following testimony: (1) the facts Garcia was developing that led to his determination that there was reasonable suspicion to extend the traffic stop and probable cause to search the CMV; and (2) the Troopers' training and experience that led to both determinations. (ECF No. 62.)

[4]Fed. R. Crim. P. 12(d) provides: "Where factual issues are involved in determining a motion, the court must state its essential findings on the record."

Malik pulled over to the side of the road and Garcia approached the CMV's passenger side. (*Id.*) Malik opened the passenger door and the curtain to the living/sleeping quarters upon Garcia's request. (*Id.*) After asking Malik for his driver's license and paperwork, Garcia detected the smell of burnt marijuana emitting from the CMV. (ECF No. 40-2 at 3.) Garcia asked Defendants if they were in possession of marijuana on them or inside the vehicle and they said no. (ECF No. 41-1 at 2; ECF No. 40-2 at 3.) Malik subsequently admitted that he had bought a pre-rolled marijuana cigarette, but, explained that he had smoked part of it the day before, placed the remainder in his cigarette package, and smoked it about six or seven hours earlier then threw away the filter with any residuals. (ECF No. 40-2 at 3; ECF No. 41-I at 2; Garcia Body Cam (Exh. A-1) at 04:08:31–04:08:58.)

Garcia was not trained or certified in CMV regulations and enforcement, so he returned to his patrol vehicle and called another NHP trooper, Adam Zehr. (ECF No. 40-2 at 4; Garcia Body Cam (Exh. A-1) at 04:16:36–04:17:14.) Garcia inquired with Zehr about the situation involving the marijuana and informed him that that the driver stated he smoked marijuana earlier in the day and threw the rest out. (Garcia Body Cam (Exh. A-1) at 04:17:18–04:17:42.) Garcia particularly relayed disregarding Malik's statement that he had thrown away the remnants of the marijuana cigarette. (*Id.* (Garcia speaking to Zehr: "He's saying he threw his last joint out. And I'm like, nobody throws their marijuana out, man. Come on. He is like, no, it was smoked. I didn't want to keep just a filter. And I'm like eh, I think there's some weed in here"). Zehr advised Garcia that it was an automatic 24 hours out of service for the CMV and that Garcia would be able to do a probable cause search of the vehicle. (Garcia Body Cam (Exh. A-1) at 04:16:36–04:17:27; ECF No. 40-2 at 4.)

About 30 minutes after the stop, at around 9:36 p.m., Zehr arrived on scene.[5] (ECF No. 41-1 at 2.) Zehr's Body Cam shows that Garcia again explained to him, upon his

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[5]Garcia testified that he was preparing the paperwork relating to the traffic stop while he waited for Zehr.

arrival, that Malik admitted to smoking earlier in the day and that both Malik and Majid denied possessing any additional marijuana. (Zehr Body Cam at 04:37:21–04:38:16.) Zehr then told Garcia that they would get Defendants out of the CMV, pat them down, and then search the vehicle. (*Id.* at 04:38:16–04:38:28.) Garcia asked whether he should issue a citation for the speeding first and Zehr told him it did not matter because there was probable cause to search and the driver was out of service. (Garcia Body Cam (Exh. A-1) at 04:38:05–04:38:15.) However, Zehr then mentioned that he was not sure the driver could be ordered out of service if they could not find any marijuana. (*Id.* at 04:38:15–04:38:28; Zehr Body Cam at 04:38:28–04:38:56.) The Troopers expressed wanting to search the vehicle to look for a remaining user amount of marijuana. (Garcia Body Cam (Exh. A-1) at 04:38:51–04:39:07; Zehr Body Cam at 04:39:16–04:39:25.) Zehr explained it was "probably a user amount so they probably – there's all sorts of places in there they can stash it." (*Id.*)

The Troopers went to the CMV and ordered Malik and Majid to exit. (ECF No. 40-2 at 4.) Zehr asked Defendants who smoked the marijuana. (*Id.*) Malik again admitted that he smoked the marijuana, but provided the timeframe of approximately three to four hours earlier. (*Id.*) Zehr asked where the marijuana was, and Malik again informed that he threw it out. (*Id.*) Garcia advised dispatch that he was doing a probable cause search. (ECF No. 41-1 at 3.) At no point did the Troopers conduct a sobriety test on Malik or Majid.

Garcia commenced search of the CMV's cab. (*Id.*) During his search of the driver and passenger seating area, Garcia found a vape that he asked about. (*Id.*) Majid explained that it was his and that it only had nicotine in it and the exchange ended. (*Id.*) Nothing else is noted as being found in the cab. (*See id.*) Garcia resumed the search and ultimately made his way into the living/sleeping quarter. (*Id.*) In there, Garcia looked inside, among other things, the built-in cabinet and bags within. (*Id.*) He manipulated the items inside the bags to confirm whether they were books and determined they were not. (*Id.*) He took a package out of one of the bags and based on his training and experience concluded it was consistent with illegal narcotic packaging. (*Id.*)

The Troopers ultimately got a knife and cut into a package. (*Id.*) A white powdery substance was revealed (*id.*). After detaining Malik and Majid (Zehr Body Cam at 04:54:38–04:57:46), Zehr expressed shock, stating: "[t]here was not even any indicators. Was there any nervousness?" to which Garcia responded, "No." (Zehr Body Cam at 05:05:00–05:05:12; Garcia Body Cam (Exh. A-1) at 05:04:45–05:04:53.)

Zehr conducted a preliminary test of the white substance and found it to be "presumptively" cocaine. (ECF No. 41-1 at 3; Zehr Body Cam at 05:06:52–05:07:19.) Zehr then informed that they needed to get a warrant. (Zehr Body Cam at 05:07:34–05:07:53; Garcia Body Cam (Exh. A-1) at 05:07:42–05:07:46.) The Troopers arrested Malik and Majid and read them their *Miranda*[6] rights. (ECF No. 41-1 at 3.) Zehr and Garcia decided to stop the search at the located items, had the CMV towed, and applied for a search warrant from the Ely Justice Court's Justice of Peace Stephen Bishop. (*Id.*) Justice Bishop granted the search warrant. (*Id.*) Zehr and Garcia executed a search on the CMV at approximately 12:49 a.m. the following day. (*Id.*) Upon search, the Troopers found what was later determined to be significant quantities of suspected cocaine and suspected methamphetamine that Defendants now seek to suppress. (*Id.* at 41-1 at 4.)

III. LEGAL FRAMEWORK

A. Fourth Amendment Law Regarding Traffic Stops and Reasonable Suspicion

"The Fourth Amendment prohibits unreasonable searches and seizures by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal quotation marks omitted); *see also* U.S. Const. amend. IV. The capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the Amendment has a

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[6] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

legitimate expectation of privacy in the invaded place. *Katz v. U.S.*, 389 U.S. 347, 353 (1967).

When a vehicle is stopped by a police officer and its occupants are detained, a seizure within the Fourth Amendment has occurred, even if the purpose of the stop is limited and the resulting detention is quite brief. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–58 (1976). But a court need not determine the reasonableness of a temporary detention if it determines that the officer had reasonable suspicion to conclude that a traffic violation occurred. *See U.S. v. Magallon-Lopez*, 817 F.3d 671, 675 (9th Cir. 2016) (citing *Whren v. United States*, 517 U.S. 806, 812–13 (1996)). However, "a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). "The reasonableness of a seizure . . . depends on what the police in fact do." *Rodriquez v. U.S.*, 135 S. Ct. 1609, 1616 (2015). This inquiry particularly focuses on whether the officer's conduct "adds time" to the stop. *Id.* at 1616.

An officer may conduct certain unrelated checks during an otherwise lawful traffic stop, but "he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.* at 1615; *see also U.S. v. Landeros*, 913 F.3d 862, 866 (9th Cir. 2019) (quoting *Rodriguez*). On one hand, an officer may, in issuing a traffic ticket also conduct "inquiries incident to [the traffic] stop." *Rodriguez*, 135 S. Ct. at 1614 (quoting *Caballes*, 543 U.S. at 404). On the other, "[o]n-scene investigation into other crimes . . . detours from [an officer's traffic stop] mission." *Id.* at 1616 (citation omitted). Therefore, *any* prolongation of the duration of the applicable traffic stop outside the scope of that traffic stop's mission violates the Fourth Amendment—warranting suppression—unless the applicable officer had independent reasonable suspicion for that prolongation. *Landeros*, 913 F.3d at 868. Reasonable suspicion exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized

suspicion." *Id.* (citing *U.S. v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc) and *U.S. v. Evans*, 786 F.3d 779, 788 (9th Cir. 2015)) (internal quotation marks omitted).

"The requirement of *particularized* suspicion encompasses two elements. First, the assessment must be based upon the totality of the circumstances. Second, that assessment must arouse a reasonable suspicion that *the particular person being stopped* has committed or is about to commit a crime." *Montero-Camargo*, 208 F.3d at 1129 (emphasis in original, internal citations and footnotes omitted). In determining the totality of the circumstances, the Court must avoid nitpicking factors or disregarding factors altogether unless context renders those factors non-probative. *See U.S. v. Cotterman*, 709 F.3d 952, 970 (9th Cir. 2013) (en banc); *U.S. v. Valdes-Vega*, 738 F.3d 1074, 1079 (9th Cir. 2013).

Further, the applicable standard of review requires the Court to defer to the inferences drawn by the officers on the scene. *See Valdes-Vega*, 738 F.3d at 1077. Thus, courts in the Ninth Circuit have taken the analytical approach of weighing each factor individually and then collectively to satisfy the totality of the circumstances test. *See, e.g., Thomas v. Dillard*, 818 F.3d 864, 884 (9th Cir. 2016), *as amended* (May 5, 2016). "The nature of the totality-of-the-circumstances analysis also precludes us from holding that certain factors are presumptively given no weight without considering those factors in the full context of each particular case." *Valdes-Vega*, 738 F.3d at 1079 (citing *Arvizu*, 534 U.S. at 274). "We may conclude that 'some factors in a particular case are more probative than others,' but this evaluation cannot be done in the abstract by divorcing factors from their context in the stop at issue." *Id.* (quoting *Arvizu*, 534 U.S. at 277).

Finally, "[t]he reasonable-suspicion standard is not a particularly high threshold to reach." *Id.* at 1078. "Although . . . a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *Id.* (quoting *Arvizu*, 534 U.S. at 274). "Reasonable suspicion is a 'commonsense, nontechnical

conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Id*. (quoting *Ornelas v. U.S.*, 517 U.S. 690, 695 (1996)).

B. Fourth Amendment Law Regarding Warrantless Searches

Additionally, "[w]arrantless searches by law enforcement officers 'are per se unreasonable under the Fourth Amendment–subject only to a few specifically established and well-delineated exceptions.'" *United States v. Cervantes*, 703 F.3d 1135, 1138-39 (9th Cir. 2012) (quoting *Katz*, 389 U.S. at 357). The government bears the burden of showing that a warrantless search or seizure falls into one of these exceptions. *Id.* at 1141. Here, the pertinent exception is the automobile exception. Under this exception to the warrant requirement, officers are required to possess "probable cause" to believe that the vehicle or its containers within contain contraband or evidence of a crime. *California v. Acevedo*, 500 U.S. 565, 580 (1991). "An officer will have probable cause to search if there is a fair probability that contraband or evidence of a crime will be found in *a particular place*, based on the totality of circumstances." *Cervantes*, 703 F.3d at 1139 (internal quotations and citations omitted) (emphasis added).

C. Nevada Law

In Nevada, it is now legal for individuals 21 years of age or older to possess an ounce or less of marijuana anywhere in Nevada, including vehicles. NRS §§ 453D.100, 453D.110. NRS § 453D.110 provides, in relevant part:

> Notwithstanding any other provision of Nevada law and the law of any political subdivision of Nevada, except as otherwise provided in this chapter, it is lawful, in this State, and must not be used as the basis for prosecution or penalty by this State or a political subdivision of this State, and must not, in this State, be a basis for seizure or forfeiture of assets for persons 21 years of age or older to:
>
> 1. Possess, use, consume, purchase, obtain, process, or transport marijuana paraphernalia, one ounce or less of marijuana other than concentrated marijuana, or one-eighth of an ounce or less of concentrated marijuana.

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Nonetheless, an individual cannot drive while under the influence of marijuana or while impaired by marijuana. NRS § 453D.100(1)(a).

IV. DISCUSSION

Considering the relevant legal framework, the Court begins by clarifying what this case is not about. Based on the pertinent facts—as they occurred on the day of the traffic stop and not after-the-fact explanations—the following is evident. Neither the prolongation of the traffic stop nor search of the CMV were premised on the smell of marijuana alone, contrary to the government's insistence at the Hearing.[7] The Troopers clearly acted under the supposition that smell alone was not enough in this case, otherwise they would have arrested Defendants upon detecting the marijuana odor and Malik's admission that he had used albeit hours earlier, or they would have searched the vehicle for contraband based on the marijuana odor instead of going on a hunt for the marijuana remnants to take the CMV out of service. The Troopers, without reasonable basis, went in search of the "enough" that they needed. As such, the Troopers' actions impermissibly abridged Fourth Amendment protections.

The Court's inquiry here is two-fold. First, did Garcia have independent reasonable suspicion to extend the stop for speeding violation after he smelled marijuana and Malik admitted using marijuana? Second, even if Garcia had reasonable suspicion to prolong the initial traffic stop, did he and Zehr also have probable cause to undertake a search of the CMV's driver and passenger seating areas as well as the living/sleeping quarters? The Court discusses each issue in turn.

A. Prolonged Stop

The Court's reasonable suspicion analysis is narrowed by the government's concession at the start of the Hearing that reasonable suspicion was developed by Garcia before Zehr arrived about 30 minutes after the stop. Pertinently, Majid argues that Garcia

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[7]For this reason, the government's argument that the Court must apply current Ninth Circuit caselaw providing that marijuana odor constitutes probable cause to search has no application to the facts here.

lacked independent reasonable suspicion to prolong the duration of the stop of the CMV. (ECF No. 40 at 7–14, 22–23.) In its opposition, the government argues that the smell of marijuana and Malik's admission to having smoked marijuana provided reasonable suspicion to prolong the traffic stop (ECF No. 45 at 5, 16–17).[8] However, at the Hearing, the government refined its argument based on Garcia's testimony. Garcia testified that his independent reasonable suspicion to think there was more marijuana in the CMV is not only based on the smell and Malik's admission to having smoked marijuana, but additionally because he did not believe Malik based on the six to seven-hour timeframe Malik provided. Garcia testified to believing that such timeframe was inconsistent with the smell of marijuana emitting from the CMV. While the record does not support Garcia's claimed timeframe basis for disbelief as provided in his testimony,[9] given the low threshold

[8]The government's reliance on *United States v. Sanders*, 248 F. Supp. 3d 339 (D. R.I. 2017) to support this argument (ECF No. 45 at 5) is misguided. As Majid points out, a review of *Sanders* shows that the finding of reasonable suspicion there required more than the odor of marijuana and admission to having smoked marijuana (ECF No. 50 at 13–14). *See Sanders*, 248 F. Supp. 3d at 346–47. Further, an application of *Sanders* here is problematic to the extent its consideration in entirety appear more akin to a probable cause analysis. *See* probable cause discussion *infra*. In any event, *Sanders* leads to the conclusion that, at minimum, in a state where a user amount of marijuana is legal, the smell of burnt marijuana *and* admission to using marijuana do not support a finding of independent reasonable suspicion. *See id.*

[9]As an initial matter, it appears Garcia did not decide reasonable suspicion exists to extend the stop as evidence by his communication with Zehr. In particular, he relayed what he found to Zehr to seek guidance on what to do—he explained the marijuana odor, the driver's admission of having smoked earlier in the day and his incredulity that the driver would throw out the rest of the "joint." (Garcia Body Cam (Exh. A-1) at 04:17:18–04:17:42.) It was Zehr who stated that was an automatic 24 hours out of service and they would be able to do a probable cause search.

Further, during the relevant exchange with Zehr, Garcia made no mention of not believing Malik because of the timeframe Malik provided. (Garcia Body Cam (Exh. A-1) at 04:16:11–04:17:49.) Nor does his narrative report support that he had questions regarding the mentioned timeframe. (ECF No. 41-1 at 2.) Moreover, when pressed by defense counsel about his reason for his lack of belief, Garcia testified that he could not specifically tell why he believed the timeframe was inconsistent with the smell of marijuana and admitted that he received no training to help ascertain how marijuana smell dissipates over time and conceded knowledge that a user amount of marijuana is not illegal in Nevada. Thus, Garcia's subjective timeframe belief is unsupported by any articulated reasonable objective basis.

for finding reasonable suspicion, the Court finds that the record suggests that Garcia did not believe Malik had thrown out the remainder of the marijuana. (Garcia Body Cam (Exh. A-1) at 04:17:18–04:17:42.) Albeit the latter belief being borderline flummoxing,[10] the Court finds it is arguably enough in conjunction with the smell and admission to warrant a finding of reasonable suspicion.

However, has explained below, the same cannot be said for a finding of probable cause to search. The Court now turns to that issue.

B. Search of the CMV

Even if there was independent reasonable suspicion for prolonging the traffic stop, there was a glaring absence of probable cause for the search, much less the extent of the search of the CMV—going beyond the cab.

To reiterate, the facts in the record do not support the government's argument, as illuminated at the Hearing, that the probable cause to search here was grounded on the smell of marijuana alone, or in conjunction with Malik's admission to having smoked marijuana or any basis of disbelief. The Troopers undertook the search based on the assumption that they could put the CMV out of service for 24 hours only if they found evidence of marijuana and more particularly a user amount of marijuana. Thus, the search here was merely undertaken as a means to justify the desired end of putting the CMV out of service, presumably out of safety reasons. But, as the defense points out in briefing and at the Hearing, the Troopers were not concerned with Malik's sobriety as a driver—as evidenced by the fact that they never administered a sobriety test (ECF No. 41 at 2, 11–12). Instead, the Troopers dubiously at once conducted a search of the CMV in order to rely on federal regulations, discussed *infra*, while at the same time positing that the not-yet-found violation of those regulations provided probable cause to search the CMV. As

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Accordingly, the record supports only that at the point where Garcia decided to prolong the stop, all he had was the marijuana odor and his disbelief of the claim that the "joint" had been discarded.

[10]Common sense suggests that individuals ordinarily throw away leftovers or remnants of items they do not want.

the Court next explains, the government's circular reliance on federal law or federal regulations to justify the search of the CMV turns the Fourth Amendment on its metaphorical head.

1. Reliance on Federal Law and Federal Regulations as Basis for Searching the CMV

a. Federal Marijuana Law as Basis to Search the CMV

The government largely argues that probable cause to search the CMV existed under federal law—because marijuana remains illegal under federal law. (ECF No. 45 at 3–11.) Defendants argue, *inter alia*, that there is no basis in the record to support a finding that Garcia and Zehr were even attempting to enforce federal marijuana law or were tasked to enforce such law. (*See, e.g.*, ECF No. 52 at 9–15.) The Court agrees with Defendants that the government's argument suggesting the Troopers relied on federal marijuana law is not supported by the record.

Absent evidence in the record that Garcia conducted the search of the CMV pursuant to federal marijuana law, it is irrelevant whether there was probable cause to search based on that law. *See, e.g.*, *United States v. $186,416.00 in U.S. Currency ("US Currency")*, 590 F.3d 942, 948 (9th Cir. 2010) ("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."); *Kidder v. County of Los Angeles*, No. 14-06218, 2015 WL 13439812, at *3 (C.D. Cal. Mar. 9, 2015), *aff'd sub nom. Kidder v. Los Angeles County*, 684 F. App'x 642 (9th Cir. 2017) (relying on *US Currency* and holding that the "[l]ogical extension of this case to warrantless searches suggests that probable cause is governed by the parameters of state law when the officer is a state agent participating in a purely state operation" and that "[s]ince the incident in this case lacks any hint of federal authority, it appears that Deputy Draper could not have relied on [federal law] to form his probable cause"); *Kruesi v. Linn Cty.*, No. 6:14- 1465, 2015 WL 5829839, at *2 (D. Or. Oct. 6, 2015) ("Although the defendants contend that the grow 'violated Oregon and federal law' the application was

for a state search warrant, was made to a state circuit judge, was premised on the grow site containing more plants than permitted under the Oregon Medical Marijuana Act, and the warrant was executed solely by state law enforcement officers. Thus federal law, which does not provide a safe harbor for medical marijuana growers, is not implicated in this case.").[11]

b. Federal Regulations as Basis to Search the CMV

The government's probable cause contention is also unavailing to the extent the government's federal law claim is based on its argument that federal regulations prohibit the possession or use of marijuana by commercial drivers. The government rests this argument on Nevada's adoption of federal motor carrier safety regulations via Nevada Administrative Code 706.2472(1). (ECF No. 45 at 14–16.) NAC 706.2472(1) provides:

> 1. The Department of Public Safety hereby adopts by reference the regulations contained in 49 C.F.R. Parts 40, 382, 383, 385, 387, 390 to 393, inclusive, 395, 396 and 397, and Appendices B and G of 49 C.F.R. Chapter III, Subchapter B, as those regulations existed on May 30, 2012, with the following exceptions: …
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> 2. To enforce these regulations, enforcement officers of the Department of Public Safety may, during regular business hours, enter the property of a carrier to inspect its records, facilities and vehicles, including, without limitation, space for cargo and warehouses.

The government argues that under the Federal Motor Carrier Safety Administration ("FMCSA"), specifically 49 C.F.R. § 392.4, drivers of a commercial motor vehicle are prohibited from being in possession of or under the influence of any controlled substances listed under Scheduled I of 21 C.F.R. § 1308.11—which includes marijuana (ECF No. 45 at 14). *See* 49 C.F.R. § 392.4 ("No driver shall be on duty and possess, be under the

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[11]Additionally, the government fails to pinpoint any federal law—including 21 U.S.C. §§ 844(a) and 812(c) which the government relies on (ECF No. 45 at 3)—authorizing state law enforcement officers to investigate violations of federal marijuana law. *See generally* 21 U.S.C. §§ 844(a) and 812(c). Further, as a matter of policy it would be antithetical for Nevada to both legalize recreational use of a certain amount of marijuana, but nonetheless direct its officers to enforce federal marijuana law—which has not legalized the use of marijuana in any amount.

influence of, or use, any of the following drugs or other substances . . ."). The government contends that this regulation provided probable cause to search the CMV based on the smell of and admission to having smoked marijuana (*id.* at 16) because marijuana constitutes contraband under the regulations.[12] Defendants essentially respond that the government's position improperly conflates administrative searches with probable cause searches under the criminal code. (*See, e.g.*, ECF No. 41 at 2–3, 3–15.)

The Court finds that the government's leap to probable cause based on 49 C.F.R. § 392.4 (ECF No. 45 at 14) obscures the bounds of regulatory searches and ultimately loosens Fourth Amendment protections.

First, the government concedes that the administrative search exception is inapplicable here; yet, claims that the Troopers' basis to search was grounded in Nevada's adoption of 49 C.F.R. § 392.4.[13] The government's argument is particularly grounded in Zehr's advise to Garcia after Garcia contacted Zehr regarding the combination of marijuana and the CMV (ECF No. 41-1 at 2). As noted, Zehr advised Garcia that there was probable cause to search the CMV apparently because it was illegal to possess marijuana in a CMV, and according to FMCSRs adopted by Nevada pursuant to "NAC 706.247[,]"[14] the driver could be placed out of service for 24 hours (ECF No. 41-5 at 2), so long as marijuana was actually found during the search (Zehr Body Cam at 04:38:37–04:38:49).[15]

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[12]The latter part of this argument was provided at the Hearing.

[13]The government also cites to 49 C.F.R. § 391.5 as supporting the "disqualification" of an on-duty commercial motor vehicle driver (ECF No. 45 at 14). However, § 391.5's disqualification comes into play only where a driver has already lost his driving privileges, or after a driver "is convicted of" the following: a disqualifying offense; violating an out-of-service order; violation of the prohibition of texting while driving; or using a hand-held mobile telephone while driving. 49 C.F.R. § 391.5(a)–(f).

[14]Renumbered 706.2471.

[15]Although Zehr's report provides statements regarding use being prohibited under the regulations, the Body Cam footage after Zehr arrived on scene supports that Zehr's out-of-service advise depended on finding marijuana in the CMV. To the extent the narrative report suggests otherwise, the Court defers to the Body Cam footage.

As Majid argues, Zehr's out-of-service advisement was wrong (ECF No. 40 at 14–19). Because the government pinpoints 49 C.F.R. § 392.4, the Court notes that the section is devoid of any requirement for placing a driver out of service for possessing a controlled substance. *See* 49 C.F.R. § 392.4. The absence of such requirement means Zehr could not have legally put the CMV out of service and search it under this regulatory section. *Cf.* 49 C.F.R. § 392.5 (applicable to alcohol, providing that no driver shall be on duty while possessing alcohol *and* must be placed out of service immediately for 24 hours if found to be in violation).

Second, the Court agrees with Defendants that in relying on the regulations as providing probable cause to search, the government appears to aggregate two areas of law—that pertaining to an administrative search and that pertaining to probable cause outside the purview of an administrative search. The government's position is mind-boggling given its apparent lack of reliance on the administrative search exception (*see* ECF No. 45 at 15 ("[T]his case does not involve a random, suspicionless stop or a random, suspicionless inspection of the defendants' tractor trailer.")). Moreover, the government's position is undermined by the very function of a search based on the regulations. This is because the government's position requires the problematic conclusion that a search may in its nature be both an administrative regulatory search and a probable cause search at once. *But see U.S. v. Knight*, 306 F.3d 534, 536 (8th Cir. 2002) (quoting *New York v. Burger*, 482 U.S. 691, 703 (1987) ("The regulatory statute serves the function of a warrant because it explicitly limits the 'time, place, and scope' of the authorized search as the fourth amendment requires, but it does not provide probable cause.")).

Third, Majid rightly points out that the very regulations the government relies on must be enforced within the framework of particular criteria and the framework of warrantless automobile searches under the Fourth Amendment (ECF No. 40 at 19–22). *See id.* While the Supreme Court has held that a warrantless search of closely regulated industries may be constitutional, such is the case where *inter alia*, the rules governing the search offer adequate substitute for the Fourth Amendment's warrant requirement.

Burger, 482 U.S. at 702–03. Adequate substitute means that the regulatory rules must provide notice to owners that their property may be searched for a specific purpose, and they "must limit the discretion of the inspecting officers." *Id.* at 703. The inspecting officer's discretion must be 'carefully limited in time, place, and scope.' *Id.* (quoting *United States v. Biswell*, 406 U.S. 311, 315 (1972)).

Here, Nevada ensures compliance with federal regulations through enactment of a Commercial Vehicle Safety Plan ("CVSP"), which conforms to the federal Motor Carrier Safety Assistance Program's ("MCSAP") requirements for receiving federal highway funding "by, inter alia, requiring [NHP] troopers to conduct inspections in a manner consistent with 'the North American Standard [("NAS")] Inspection procedure.'" *United States v. Orozco*, 858 F.3d 1204 (9th Cir., 2017); 49 C.F.R. § 350.211(d). The state's CVSP provides that NHP's "enforcement activities" include "scheduled and unannounced roadside inspections." *Orozco*, 858 F.3d at 1207. Under NAS inspection procedure, "Level I and Level II Inspections tend to primarily address commercial vehicles while Level III Inspections focus more on the driver." *Owner–operator Indep. Driver Ass'n Inc. v. Dunaski*, 763 F. Supp. 2d 1068, 1074 (D. Minn., 2011). The guidelines under Level III—applicable here—authorize an officer to "[c]heck the cab for possible illegal presence of alcohol, drugs, weapons or other contraband." *Knight*, 306 F.3d at 535.[16] Compliance enforcement is done by NHP troopers "who *are trained to conduct NAS inspections* but are also charged with *enforcement of Nevada's criminal laws*." *Orozco*, 858 F.3d at 1207 (emphasis added). Moreover, "[t]he [motor carrier safety] regulations make it clear the inspections are limited in scope to safety concerns. They do not authorize a general search by any law enforcement officer." *V–1 Oil Co. v. Means*, 94 F.3d 1420, 1427 (10th Cir. 1996) (internal citation omitted). Nor do they permit the search of personal belongings. *Knight*, 306 F.3d at 535–36.

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[16]The check of the cab may be limited to a visual view of drugs, alcohol, or other contraband in plain view. *See, e.g.*, *State v McClure*, 74 S.W.3d 362, 365 (Tenn. Crim. App. 2001).

It is undisputable that the search here went beyond the search of the CMV's cab, and particularly items in plain view within the cab. Further, Garcia lacked the foundational NAS training to conduct search of the CMV and thus was not authorized to conduct the search of the CMV under NAS regulations. Additionally, as the defense argues, if the Troopers were concerned about highway safety and Malik's level of sobriety, in light of Malik's admission to having smoked marijuana, they could have: inquired into whether he smoked while driving; examined how long he had been driving compared to when he admitted to smoking; and/or conduct a sobriety test. (ECF No. 40 at 11–12.) But, the Troopers did none of these. This absence of enforcement in accordance with the regulatory criteria and guidelines by the Troopers strongly suggests that 49 C.F.R. § 392.4 was merely being used as pretext to search the CMV for contraband or evidence of a crime. Likewise, even if the evidence supported that the Troopers were exercising authority under NAS inspection guidelines, it is clear that the Troopers exceeded that authority and thus exceeded the scope of a constitutionally permissible regulatory search. *See, e.g.*, *United States v. Bulacan*, 156 F.3d 963, 967 (9th Cir. 1998), as amended (Nov. 16, 1998) (explaining the administrative search exception and noting the role of the courts in "ensur[ing] that an administrative search is not subverted into a general search for evidence of crime").

2. Whether the Troopers Had Probable Cause to Search Based on Nevada Law

In any event, the government presents an alternative argument—that the Troopers had probable cause to search the CMV "for a violation of state law" because Nevada continues to criminalize the use of marijuana in a wide range of circumstances. (ECF No. 48 at 11–13.)

As indicated, in undertaking its probable cause inquiry the Court also considers the totality of the circumstances. Specifically, the Court examines whether under the totality of the circumstances, a fair probability existed that a search of the CMV would reveal

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contraband or evidence *of a crime*. *See, e.g.*, *Cervantes*, 703 F.3d at 1139 (quoting *Dawson v. City of Seattle*, 435 F.3d 1054, 1062 (9th Cir. 2006).

To begin, the Court is unpersuaded by the government's first argument regarding probable cause to search the CMV based on possible—but not articulated at the relevant time—violations of state law. (*Id.* at 12–13.) The government essentially reargues that the Troopers had probable cause to search based on the odor and Malik's admission to smoking marijuana earlier in the day because (1) smoking marijuana before driving is a state crime, (2) smoking marijuana in a truck while moving or parked is a state crime, and (3) if Malik or Majid possessed any more than one ounce of marijuana, they committed a state crime. (*Id.*) Importantly, in its briefing the government provided nothing more than the odor and admission as supporting a finding of probable cause, and as indicated *supra* and *infra*, these alone are not enough. Next, the first two basis the government argues—smoking before driving and smoking while parked—without inquiry into the particular provisions the government cites[17]—would suggest the Troopers did not need to search the CMV at all to charge Malik for violating Nevada law. Yet, the fact here is that the Troopers searched the CMV to look for something more than the odor and admission and made no inquiry into Malik's existing sobriety. Further, the Court considers the odor and smoking admission here within the permissible possession of an ounce or less of marijuana under Nevada law.

The Court's probable cause analysis is aided by three decisions from other states where recreational marijuana is now legal in some amount: *People v. Zuniga*, 372 P.3d 1052 (Colo. 2016); *Colorado v. Cox*, 401 P.3d 509 (Colo. 2017) and *State v. K.C.-S*, No. 73036-3-I, 2016 WL 264960 (Wash. Ct. App. Jan. 19, 2016). The parties respectively contend that this authority supports their position. (ECF No. 41 at 22–24; ECF No. 45 at 13; ECF No. 52 at 7–9.) Based on this caselaw and the record here, several factors counsel against a finding of probable cause.

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[17] *See* ECF No. 45 at 12–13 (citing NRS §§ 453D.100(1), 453D.400, and 486C.110.)

In *Zuniga*, the Colorado Supreme Court, identified several indicia of criminality that, in combination with the odor of marijuana, established probable cause to search the vehicle there. The court noted that the occupants of the car exhibited extreme nervousness and remained overly nervous; the trooper noted that the driver "had beads of sweat on his face, stuttered in response to requests, and had shaky hands[;]" the driver would not look in the trooper's eyes; the passenger—Zuniga—was, in addition to nervous, 'overly nice.' *Id.* at 1054–55. The court noted that "the two men's extreme nervousness . . . leads to a reasonable inference that illegal activity was ongoing during the traffic stop." *Id.* at 1060. Further, the men "gave remarkably disparate accounts of their visit to Colorado." *Id.* at 1055. The court reasoned "[t]he vast inconsistencies between the two men's stories lead to a reasonable inference that the two men were attempting to conceal illegal conduct from the Trooper." *Id.* at 1059. The court in *Zuniga* additionally considered that the trooper smelled the "heavy odor" of "raw (i.e., unburnt) marijuana[,]" to suggest that "marijuana was in the vehicle, potentially in an illegal amount." *Id.* at 1054, 1060. These combined indicia of criminality led the trooper in *Zuniga* to call for a K-9. *Id.* at 1055.

Similarly, in its later *Cox* decision, the Colorado Supreme Court found probable cause to search when the trooper observed, in addition to the smell of marijuana: the defendant had two cell phones on the car seat; exhibited unusual nervousness; and gave inconsistent explanations regarding his travels in conjunction with a later dog alert. 401 P.3d at 510.

Likewise, in *K.C.-S.* the Washington Court of Appeals found there was probable cause to search the car in that case based on numerous indicators of criminality in combination with the smell of marijuana. 2016 WL 264960, at *4. The court focused on that there was a suspected drug deal along with "K.C.-S.'s furtive movements, the *strong odor of fresh marijuana* despite the car's open windows and the removal of its occupants, K.C.-S.'s outstanding [violation of the uniform controlled substances act] warrant, and [a] K9 sniff" (emphasis added). *Id.*

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There is great dissimilarity between the facts of *Zuniga*, *Cox*, and *K.C.-S* and this case. First, the government's opposition fails to address any indicators to suggest that either Defendant was in possession of marijuana. (ECF No. 45 at 14–16.) To the contrary, the Troopers' Body Cam footage captured the Troopers' conclusion that Defendants exhibited no indicia of criminality—particularly nervousness. (Zehr Body Cam at 05:05:00–05:05:12; Garcia Body Cam (Exh. A-1) at 05:04:45–05:04:53.) Testimony was also provided at the Hearing that Defendants were cooperative, which also tends to suggest a lack of criminality or at a minimum is not indicia of criminality. Nonetheless, when Zehr arrived at the scene of the CMV stop and Garcia advised him a second time of the smell and admission to use of marijuana, Zehr stated: "well, get them out and we can pat them down and then we can search, or you want me to search or what." (Garcia Body Cam (Exh. A-1) at 04:37:54–04:38:01; Zehr Body Cam at 04:38:16–04:38:28.) The Court considers this marker to be the ending delineation of its inquiry as to whether probable cause existed for the search because the Troopers had clearly decided they had probable cause to search at this moment.

This limitation of the Court's probable cause inquiry is of utmost importance here. At this point, it appears the Troopers have no more than the same basis on which Garcia's reasonable suspicion is grounded plus the established improper belief that probable cause to search was authorized by noted federal regulations and a lack of identified indicators of criminality.[18] Markedly, the inconsistency in the timeframe—between having smoked six or seven hours ago to three or four hours—was yet to occur. Next, unlike in *Zuniga* where the trooper smelled a heavy odor of marijuana and thus "potentially in an illegal amount,"

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[18]As indicated, the government's fallback argument that odor alone satisfies probable cause is factually unsupported based on the Troopers' reasons for undertaking the search. The Court therefore declines to address the government's contention that in this circuit odor alone is enough despite the legalization of possessing an ounce or less of marijuana for recreational use in Nevada. *But see United States v. White*, 732 F. App'x 597, 598 (Mem.) (9th Cir. 2018) (concluding odor was enough to establish probable cause in medical marijuana case where the defendant had not explained he had a medical marijuana card and "possession of nonmedical marijuana was *then still a state crime*") (emphasis added).

here Body Cam footage documents that Garcia described the smell as a "little marijuana"—thus consistent with Malik's admission to smoking a single marijuana cigarette. (Garcia Body Cam (Exh. A-1) at 04:16:12–04:16:30; *see also id.* at 04:39:00–04:39:28 (Zehr stating it is "probably a user amount" and suggesting it could be anywhere in the CMV). This Court considers Garcia's representation as to the amount of marijuana—as evidence of odor—at the time of the stop to be controlling, albeit his suggestion of a stronger odor during his testimony at the Hearing. Notably, Zehr confirmed at the Hearing that at the time of the stop of the CMV Garcia told him he smelled a little marijuana in the cab of the CMV.

Moreover, there was nothing to suggest that the CMV contained marijuana at all—much less in excess of a one-ounce user amount—in light of Malik's repeated explanation that he had thrown the unwanted remains of the marijuana cigarette out. As such, under the totality of the circumstances the Troopers articulate no objectively reasonable basis for concluding there was a fair probability that Malik and Majid were engaging in unlawful activity. The Court therefore finds that the Troopers lacked probable cause to search the CMV for contraband or evidence of a crime in violation of Nevada law. Additionally, even if the Troopers initially had probable cause to search, there is no basis for Garcia to have extended the search beyond the CMV's cab—however, the government does not address the issue and the Court need not discuss it in depth here.[19]

In sum, the Court finds that Defendants are entitled to suppression on the basis that the Troopers lacked probable cause under Nevada law to search the various areas of the CMV. Accordingly, the Court grants the Defendants' Motions (ECF Nos. 40, 41, 42).

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[19]Defendants argue in briefing and at the Hearing that *even assuming* that the Troopers had probable cause to search the CMV, the search exceeded the permissible scope of a warrantless search because Garcia went beyond the object of the search and the particular place wherein he may have objectively had probable cause to believe the user amount (or remnants) of marijuana they were looking for may be found. (*See, e.g.*, ECF No. 41 at 24.)

V. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the issues before the Court.

It is therefore ordered that Defendants' motions to suppress (ECF Nos. 40, 41, 42) are granted.

DATED THIS 10th day of May 2019.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

EXHIBIT N

EXHIBIT N

This draft addresses the arguments that I believe are the strongest. In my opinion the argument that the State exceeded its legislatively prescribed statutory authority in seeking the emergency regulation is the strongest argument and has the best chance of winning.

I focused heavily on the response to this argument. This is very wordy and should be edited, but I wanted to provide all of my thoughts concerning this issue and argument. I also address the federal preemption argument at great length and reply to some of the arguments that the court lacks jurisdiction to entertain specific arguments.

This does not address the introduction in the Opposition or the Injunction Standards. This case is complex and I didn't have time to address these issues. I figured someone else probably did this or is doing it. I think that someone can incorporate these arguments into what they have done already. Joey, as you know I typically do all this work before I prepare the complaint so it is very precise and is tailored to my motions and arguments I will make in subsequent motions. But I tried to tailor what was alleged in the initial complaint and motion/petition for injunction into these arguments and the manner in which I organize them. I realize that there are reasons why the court could agree with all of the State's arguments and deny every argument asserted. However, I strongly believe that the initial argument concerning the lack of statutory authority is a very good argument that

should win. I would focus heavily on this argument. I have incorporated a separation of powers argument into this argument as it is proper and it makes the arguments much stronger. I have not have any time to proof read what I have written, and could continue on this all week, but I know time is of the essence and I am giving you what I have done in the last few days right now.

LEGAL ARGUMENT

1. The March 23, 2020 BOP Emergency Regulation at Issue is Void Because it Exceeds the Agency's Statutorily Prescribed Authority and Violates the Nevada Separation of Powers Doctrine

Defendants argue that the BOP lawfully interpreted its scope of authority under NRS 639.070, and because its interpretation was reasonably consistent with the statutory language this Court must provide deference to the agency's interpretation. *See* Joint Opposition, p. 22, ln. 3-4. The Defendants cite to Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Human Servs., 414 P.3d 305 (Nev., 2018) for the premise that "an agency interpretation of the statute it is tasked with enforcing is entitled to "great deference."" Joint Opposition, p. 21, ln. 20-21. Defendants contend that "what that means is "as long as [the agency's] interpretation is reasonably consistent with the language of the statute" this Court should not disturb it." Id. at ln. 21-23.

The Defendants' recitation of Nevada law is flawed and should be rejected. Nevada's Supreme Court has consistently held:

> Review in this court from a district court's interpretation of a statute is de novo." Additionally, "matters involving the construction of an administrative regulation are a question of law subject to independent appellate review." Regardless, this court will generally defer to the "agency's interpretation of a statute that the agency is charged with enforcing,' when determining the meaning of an administrative regulation. However, no deference will be given "to the agency's interpretation if, for instance, regulation 'conflicts with existing statutory provisions or exceeds the statutory authority of the agency." (*Internal citations omitted*).

Spittler v. Routsis, * 5 (Nev., 2013).

The Supreme Court has also stated:

> The legislature may authorize administrative agencies to make rules and regulations supplementing legislation if the power given is prescribed in terms sufficiently definite to serve as a guide in exercising that power.

Banegas v. State Indus. Ins. Sys., 19 P.3d 245, 248 (Nev., 2001).

If a regulation enacted by an administrative agency exceeds the agency's scope of statutorily prescribed authority the regulation is void and is invalid, and courts do not give any deference to an agency's interpretation of a statute.

Nevada's Separation of Powers doctrine is contained in Article 3, Section 1 of the Nevada Constitution, which provides that "no persons charged with the exercise of powers properly belonging to [another branch] shall exercise any functions, appertaining to either of the others." This doctrine exists to "prevent on branch of government from encroaching on the powers of another branch." Comm'n on Ethics v. Hardy, 212 P.3d 1098 (Nev., 2009). Nevada's Supreme Court has held that "this separation is fundamentally necessary because '[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator: were it joined to the executive power the judge might behave with all the violence of an oppressor.'" Berkson v. LePome, 245 P.3d 560, 565 (Nev., 2010).

The Defendants are correct in that NRS 630.070 prescribes the authority of the BOP. The BOP did not interpret this statute in the enforcement of a regulation enforced by the agency, but rather interpreted its scope of authority in its proposed emergency regulation and letter to the Governor seeking emergency enactment in lieu of normal procedures outlined in the Nevada Administrative Procedure Act ("NAPA"). The Agency's interpretation amounted to the exercise

of a legislative function which it unlawfully usurped from another branch of government in violation of the Separation of Powers doctrine of the Nevada Constitution. Defendants argue that this Court cannot review Nevada statutes to determine whether the emergency regulation at issue exceeds the scope of the BOP's authority, but must instead defer to the agency's interpretation. Thus, the Defendants suggest that this Court has no jurisdiction to review and interpret Nevada statutes, which is unquestionably a judicial function reserved exclusively to the judicial branch, but must instead rely on the agency's assertion that its interpretation of the statute is a reasonable interpretation of the applicable law. The Defendants suggestion would lead to a situation where an executive agency could arbitrarily exercise legislative, executive and judicial powers and create an oppressive situation that the Separation of Powers doctrine was specifically drafted to prevent.

NRS 233B.040 states in relevant part:

> 1. To the extent authorized by the statutes applicable to it, each agency may adopt reasonable regulations to aid it in carrying out the functions assigned to it by law and shall adopt such regulations as are necessary to the proper execution of those functions. If adopted and filed in accordance with the provisions of this chapter, the following regulations have the force of law and must be enforced by all peace officers:
>
> (a) The Nevada Administrative Code; and
>
> (b) Temporary and emergency regulations.
>
> Ê *In every instance, the power to adopt regulations to carry out a particular function is limited by the terms of the grant of authority pursuant to which the function was assigned.*
>
> 2. Every regulation adopted by an agency must include:
>
> (a) A citation of the authority pursuant to which it, or any part of it, was adopted; …

The emergency regulation at issue states, "existing law authorizes the Board of Pharmacy to adopt regulations appertaining to the practice of pharmacy. (NRS 630.070)."

NRS 630.070, the statute cited by the BOP as the authority pursuant to which the regulation was adopted

1. The Board may:

(a) *Adopt such regulations*, not inconsistent with the laws of this State, as are necessary for the protection of the public, appertaining to the practice of pharmacy and the lawful performance of its duties.

(b) *Adopt regulations* requiring that prices charged by retail pharmacies for drugs and medicines which are obtained by prescription be posted in the pharmacies and be given on the telephone to persons requesting such information.

(c) *Adopt regulations*, not inconsistent with the laws of this State, authorizing the Executive Secretary of the Board to issue certificates, licenses and permits required by this chapter and chapters 453 and 454 of NRS.

(d) *Adopt regulations* governing the dispensing of poisons, drugs, chemicals and medicines.

(e) Regulate the practice of pharmacy.

(f) Regulate the sale and dispensing of poisons, drugs, chemicals and medicines.

(g) Regulate the means of recordkeeping and storage, handling, sanitation and security of drugs, poisons, medicines, chemicals and devices, including, but not limited to, requirements relating to:

(1) Pharmacies, institutional pharmacies and pharmacies in correctional institutions;

(2) Drugs stored in hospitals; and

(3) Drugs stored for the purpose of wholesale distribution.

(h) Examine and register, upon application, pharmacists and other persons who dispense or distribute medications whom it deems qualified.

(i) Charge and collect necessary and reasonable fees for the expedited processing of a request or for any other incidental service the Board provides, other than those specifically set forth in this chapter.

(j) Maintain offices in as many localities in the State as it finds necessary to carry out the provisions of this chapter.

(k) Employ attorneys, inspectors, investigators and other professional consultants and clerical personnel necessary to the discharge of its duties.

(l) Enforce the provisions of NRS 453.011 to 453.552, inclusive, and enforce the provisions of this chapter and chapter 454 of NRS.

(m) Adopt regulations concerning the information required to be submitted in connection with an application for any license, certificate or permit required by this chapter or chapter 453 or 454 of NRS.

(n) Adopt regulations concerning the education, experience and background of a person who is employed by the holder of a license or permit issued pursuant to this chapter and who has access to drugs and devices.

(o) Adopt regulations concerning the use of computerized mechanical equipment for the filling of prescriptions.

(p) Participate in and expend money for programs that enhance the practice of pharmacy.

2. The Board shall, to the extent feasible, communicate or cooperate with or provide any documents or other information to any other licensing board or any other agency that is investigating a person, including, without limitation, a law enforcement agency.

3. This section does not authorize the Board to prohibit open-market competition in the advertising and sale of prescription drugs and pharmaceutical services.

The citation in the regulation uses identical language to that used in NRS 630.070(1)(a), and this is the stated authority for the emergency regulation. The Defendants argue that NRS 639.070 empowers the Board to "[a]dopt regulations governing the dispensing of poisons, drugs, chemicals and medicines, and to regulate the sale and dispensing of poisons, drugs, chemicals and medicines." Joint Opposition, p. 22, ln. 3-6. *Citing* NRS 639.070(1)(d), (f).

Subsections (1) (a)-(d) provide that the Board "may adopt regulations" while the following subsections state that the Board "may regulate." Only those provisions relating to regulations that the Board may adopt are relevant to determining the agency's power to adopt a regulation. The BOP clearly cited specifically to the language of NRS 630.070(1)(a) as statutory authorization in its emergency regulation. This provision provides that the BOP may "[a]dopt such regulations, not inconsistent with the laws of this State, as are necessary for the protection of the public, appertaining to the practice of pharmacy and the lawful performance of its duties."

In its letter to Governor Sisolak, the BOP stated:

> The BOP has determined that an emergency exists due to the hoarding and stockpiling of chloroquine and hydroxychloroquine during the COVID-19 pandemic *and the resulting shortage of supplies of these drugs for legitimate medical purposes*. …
>
> As, this emergency regulation will ensure access for Nevada patients to chloroquine and hydroxychloroquine for legitimate medical purposes, your endorsement is requested.

This letter demonstrates that the emergency sought to be addressed by the regulation was the shortage of supplies of the drugs for legitimate medical purposes. The letter states that these restrictions "include prohibiting the prescribing and dispensing of chloroquine and hydroxychloroquine for a COVID-19 diagnosis or any new diagnosis made after the effective date of the regulation, and requiring an ICD-10 code and a limit to a 30-day supply for any new prescription of these drugs." In applying for emergency enactment by the Governor of this regulation, the BOP determined that prescribing these medications for COVID-19 patients outside inpatient hospitalization settings did not amount to a legitimate medical purpose, and that by restricting physicians from prescribing these medications for COVID-19 purposes, the medications would be available for prescribing to patients for legitimate medical purposes.

Determining that the prescribing by a physician of these medications to treat COVID-19 patients is not a legitimate medical purpose, and ensuring that the supplies of these medications would be available for dispensing to patients who need them for legitimate medical purposes does not appertain to the practice of pharmacy and the lawful performance and the lawful performance of the BOP's duties.

The "practice of pharmacy" is defined in NRS 639.0124, and does not include determining what constitutes a legitimate medical purpose, or restricting physicians in the manner they choose to treat a particular patient.

NRS 453.381 provides in relevant part:

> 1. In addition to the limitations imposed by NRS 453.256 and 453.3611 to 453.3648, inclusive, *a physician, physician assistant, dentist, advanced practice registered nurse or podiatric physician may prescribe or administer controlled substances only for a legitimate medical purpose and in the usual course of his or her professional practice*, and he or she shall not prescribe, administer or dispense a controlled substance listed in schedule II for himself or herself, his or her spouse or his or her children except in cases of emergency.
> …
>
> 4. A pharmacist shall not fill an order which purports to be a prescription *if the pharmacist has reason to believe that it was not issued in the usual course of the professional practice of a physician*, physician assistant, dentist, advanced practice registered nurse, podiatric physician or veterinarian.

This statute is contained under Nevada's Controlled Substances Act which is modeled after the federal CSA. The federal CSA prohibits physicians from dispensing and prescribing controlled substances except for legitimate medical purposes. *See* 21 C.F.R. § 1306.04(a) ("A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose …"); United States v. Kaplan, 895 F.2d 618, 619 (9th Cir. 1990) (stating that the CSA prohibits "prescribing controlled substances for reasons other than legitimate medical purposes.").

NRS 453.381(1) states that a physician may prescribe or administer controlled substances only for a legitimate medical purpose *and* in the usual course of his or her professional practice. NRS 453.381(4) stats that a pharmacist shall not fill an order which purports to be a prescription if the pharmacist has reason to believe that it was not issued in the usual course of the professional practice of a physician (such as where there is no in person consultation with a physician as in the case of illegal internet pharmacy) but it does not state that a pharmacist may determine that the prescription was not issued for a legitimate medical purpose. Further, chloroquine and hydroxychloroquine are not controlled substances as they are not listed in either the federal or state controlled substance schedules. Instead, these medications constitute "dangerous drugs" which is defined at NRS 454.201, stating ""dangerous drug" means any drug, other than a controlled substance, unsafe for self-medication or unsupervised use, and incudes (1) any drug which has been approved by the Food and Drug Administration for general distribution and bears the legend "RX Only" …; (3) any drug which, pursuant to the board's regulations, may be sold only by prescription because the board has found those drugs to be dangerous to public health or safety." NRS 454.201.

Clearly, under NRS 630.070(1)(a), the specific statutory section cited as authorization in the regulation, the BOP has no authority to restrict the treatments by which a physician may choose to prescribe to his patients via a determination that such prescribing does not amount to a legitimate medical purpose.

It should be noted that pursuant to 21 C.F.R. Part 1306 (Docket No. DEA-3395 – Statement of Policy) to be effective (i.e., valid), a prescription for a controlled substance must be issued for a legitimate medical purpose by a practitioner acting in the usual course of professional practice. United States v. Moore, 423 U.S. 122 (1975); 21 CFR 1306.04(a). Thus,

the practitioner must determine that a prescription for a controlled substance is for a legitimate medical purpose. Nevada's Legislature has enacted similar statutes under its CSA (NRS Chapter 453) and the determination of what constitutes a legitimate medical purpose is left to the physician in light of his training and experience. The BOP and pharmacists charged with properly executing duties amounting to the practice of pharmacy cannot determine what constitutes the practice of pharmacy.

It is also important to understand why the FDA may regulate and prohibit off label marketing of drugs by manufacturers but not off label prescribing by physicians. An "off-label drug" a drug used for a condition or in a manner not appearing on the FDA approved label. The American Medical Association reported in 1995 that approximately half of all prescriptions were written for off-label uses. Moreover, the General Accounting Office (GAO) has testified that 90% of cancer drug use, 80% of pediatric use, and 80-90% of drugs used to treat rare diseases are prescribed off-label.[1]

In 1938 Congress passed the Food, Drug and Cosmetics Act (FDCA) and in doing so, the members of the 75th Congress firmly established the federal government's role in regulating the pharmaceutical industry and ensuring the safety of the nation's prescription drug supply. During the debates leading to the FDCA's passage, Congress made clear that while it intended to regulate production and distribution of prescription drugs, it did not wish to regulate the practice of medicine. As the Third Circuit has observed:

> "New Uses for drugs are often discovered after FDA approves the package inserts that explain a drug's approved uses. Congress would have created havoc in the practice of medicine had it required physicians to follow the expensive and time-consuming procedure of obtaining FDA approval before putting drugs to new uses.

[1] *Final Report on the Activities of the House Comm. on Government and Oversight,* 104th Cong. 2d Sess. 104 H. REP. 874 (Section 2), (January 2, 1997) at 114.

> Thus, Congress exempted the practice of medicine from the [FDCA] so as not to limit a physician's ability to treat his patients.
>
> United States v. Algon Chemical Inc., 879 F.2d 1154, 1163 (3d Cir. 1989).

Many drugs have important off-label uses and government restrictions merely prevent needed medicine from reaching the sick. As the American Medical Association testified before Congress[2]:

> Prescribing FDA-approved drugs for off-label uses often is necessary for optimal patient care. For a product to have the most effective potential benefits, law and regulation ... must follow, not precede, science. There are too many variations in clinical circumstances and too much time delay in regulations to allow the government to impede the physician's ability to practice in these regards when it is medically appropriate.

While the FDA and Congress have determined and stated that they exclude the prescribing of off-label prescriptions by physicians from federal regulation because to do so would encroach on the practice of medicine and prohibit physicians from prescribing medications, drugs and chemicals for effective, beneficial purposes not initially recognized by the FDA and communicated in corresponding labels would be unavailable to patients who could greatly benefit from treatment using those prescriptions at the direction and advice of his or her physician. In cases like this one, where the disease at issue is novel and potentially deadly, off-label prescribing is prevalent and necessary for the public benefit. What if a certain drug already in existence is found to treat, prevent or cure COVID-19? Should state boards of pharmacy be permitted to adopt regulations prohibiting such prescribing by substituting the judgement of the Board over the physician who personally observes, diagnoses and treats the patient? If this same

[2] *Promotion of Drugs and Medical Devices for Unapproved Uses: Hearings Before the Human Resources and Intergovernmental Relations Subcomm. of the House Comm. on Gov't Operations* , 102d Cong., 1st Sess. 103 (1991) (statement of George Lundberg, M.D.)

action was taken with respect to cancer treatments more than 70% of all currently prescribed medications would be prohibited by regulation.

The Defendants argue that the emergency regulation at issue is authorized pursuant to NRS 630.070(1)(d) which allows the BOP to adopt regulations governing the dispensing of poisons, drugs, chemicals and medicines. However, the medications at issue are statutorily defined as "dangerous drugs" and are regulated under Chapter 454 of NRS rather than 630. NRS 454.181 to NRS 454.371, inclusive, govern the regulation of "dangerous drugs" and NRS 454.211 defines "dispense" in relation to *dangerous drugs*. NRS 454.211 states that "Dispense" means "the furnishing of a dangerous drug in any amount greater than that which is necessary for the present and immediate needs of the ultimate user. The regulation at issue does not purport to restrict the furnishing of chloroquine and hydroxychloroquine in any amounts greater than that which is necessary for the present and immediate needs of the ultimate user, but rather prohibits prescribing them at all to patients diagnosed with COVID-19. Thus, the Defendants' reliance on NRS 630.070(1)(d) as authority for the adoption of the emergency regulation is flawed and should be rejected. It is also clear that this specific provisions was not cited in the regulation as required by law, as NRS 233B.040(2)(a) states that every regulation adopted by an agency must include a citation of the authority pursuant to which it, or any part of it, was adopted.

Defendants contend that NRS 454.215(1) further provides that "a dangerous drug may be dispensed by … a registered pharmacist upon the legal prescription from a practitioner … except that no person may dispense a dangerous drug in violation of a regulation adopted by the Board. Joint Opposition, p. 22, ln. 7-10. Defendant argue that the Board exercised those powers here, in that it promulgated regulations to protect pharmaceutical supplies by governing conditions under which the drugs could be dispensed: only with a valid prescription in a hospital setting. Id. ln.

10-12. This contention is flawed for numerous reasons. First, the language that no person may dispense a dangerous drug in violation of a regulation adopted by the Board in NRS 454.215(1) does not authorize the Board to adopt a regulation, and clearly does not authorize the Board to determine what constitutes a legitimate medical purpose attendant to the prescribing of a drug approved by the Food and Drug Administration. Second, in the statute defining "dangerous drug," NRS 454.201, subsection (3) stats that a dangerous drug includes any drug which, pursuant to the Board's regulations, may be sold only by a prescription because the Board has found those drugs to be dangerous to the public health or safety. This suggests that the Board may adopt regulations that require dangerous drugs to be dispensed only with a prescription, but it does not suggest that the BOP has the authority to enact the regulation at issue for the reasons discussed above. Third, "prescription" is defined at NRS 639.013 and subsection (2) states that "the term does not include a chart order written for an impatient for use while he or she is an impatient." Defendants' contention that the emergency regulation at issue was adopted pursuant to lawful statutory authority in that the BOP promulgated the regulation to protect pharmaceutical supplies by governing the conditions under which the drugs could be dispensed (only with a valid prescription in a hospital setting) is flawed because a prescription is defined by statute so that it does not constitute a chart order for an impatient. Hence, because the statute already excepts chart orders for inpatients in hospital settings from dispensing and prescription requirements, this emergency regulation only prohibits physicians from prescribing the medications at issue due to a determination by the BOP that such treatment is not a legitimate medical purpose.

The Defendants then assert that Plaintiffs are incorrect in their claim that the regulation interferes with a physician's right to practice medicine, and they argue that the emergency

regulation determine any course of treatment, but simply limits the conditions under which pharmacists may dispense drugs. This assertion is at odds with the plain language of the regulation which states that "this emergency regulation prohibits the prescribing and dispensing of chloroquine and hydroxychloroquine for a COVID-19 diagnosis …" The definition of dispense under NRS 639.0065 states that "Dispense" means to deliver a controlled substance or dangerous drug to an ultimate user, patient, or subject of research by or pursuant to the lawful order of a practitioner, *including the prescribing by a practitioner* …" Accordingly, this regulation clearly interferes with a physician's right to practice medicine. The Defendants' argument that the regulation only limits the conditions under which pharmacist may dispense drugs is inconsistent with the language of the regulation which prohibits physicians from prescribing these medications to patients when in their best judgement the patient would benefit from the use of the medications.

Finally, the Defendants argue that Plaintiffs argument concerning NRS 441A.200 is flawed. This statute states in part that no person may interfere in any manner with the right of a person to receive approved treatment for a communicable disease from a physician of his or her choice … NRS 630.070(1)(a) is the specific provision cited in the regulation as authority for its issuance and adoption. This statute states that the BOP may adopt such regulations not inconsistent with the laws of this State, as are necessary for the protection of the public. This regulation is clearly inconsistent with the laws of this State and specifically NRS 441A.200. The Defendants argue that this statute imposes substantive limits only on NRS chapter 441A, but the emergency regulation was adopted pursuant to the Board's authority under NRS chapters 454 and 639 to regulate the dispensing of dangerous drugs for the protection of the public. The Defendants are wrong for several reasons. First, the authority cited to in the regulation provides

that the BOP "may adopt regulations not inconsistent with the laws of this State" not "the laws of this Section of NRS." The language of NRS 441A.220 demonstrates one of several reasons why the emergency regulation was not authorized by law. Second, the Defendants argue that NRS 441A.200 refers only to "approved treatment" and the drugs at issue are not an approved treatment within the COVID-19 outpatient setting because the emergency regulation bars use in that case. The Defendants argument suffers from an inherent and glaring 'cart-before-the-horse' problem. NRS 441A.220 demonstrates a reason why the emergency regulation could not be lawfully adopted, as it would conflict with the laws of this State in violation of the subsection cited as authority by the BOP in the regulation itself. The State argues that the language of NRS 441A.220 is irrelevant because once it adopted the regulation the statute would no longer present an obstacle because the use of the medicines at issue in an outpatient setting would no longer constitute an approved treatment. It seems obvious that the relevant time at issue in the argument is before the regulation was adopted, at which time the proposed regulation would conflict with the cited authorization provision NRS 639.070(1)(a) which permits the BOP to adopt regulations that are not inconsistent with the laws of this State.

2. <u>The Emergency Determination is Subject to Judicial Review</u>

In its Joint Opposition, Defendants argue at subsection (1) (p. 9) that the declaration concerning the emergency is not subject to judicial review for various reasons which are addressed below. At the outset of this subsection the Defendants claim that Plaintiffs correctly state that the emergency identified by the BOP in proposing the regulation was the hoarding a shortages of drugs. <u>Joint Opposition</u>, p. 9, ln. 21-22.

Plaintiffs have clarified this in the section above, which demonstrates that the BOP's declaration of emergency involved the shortage of medications needed for legitimate medical

purposes, with the shortage allegedly caused by the hoarding and stockpiling of the drugs. The letter to the Governor requesting adoption of the emergency regulation did not state who was hoarding the medications or allege that physicians were prescribing the medications in a manner which caused them to be oversupplied and stockpiled. Yet, the BOP letter requesting the emergency regulation stated that the emergency regulation would ensure access for Nevada patients to the drugs for legitimate medical purposes. This both declares that the prescribing of these drugs by physicians to their patients is not a medical purposes (as explained above the definition of "dispense" under Chapter 639 of NRS does not include inpatient chart orders) and that prescribing would contribute to further hoarding and stockpiling. As explained above, these medications are defined as "dangerous drugs" and are not controlled substances, and under Chapter 449 of NRS "dispense" within the context of "dangerous drugs" refers to situations where excessive drugs are prescribed beyond the immediate or short term need not exceeding a 30 day supply. As addressed above, the Defendants suggest that the emergency regulation was authorized by statutory authority that allowed the BOP to adopt regulations pertaining to the dispensing of drugs, and the Defendants acknowledge that the medications at issue are "dangerous drugs" which suggests that the Defendants intended on, and believed they could enact this regulation for the purpose of regulating the excessive dispensing of dangerous drugs, but instead restricted any prescribing even in short immediate need supplies.

The Defendants argue that the NAPA does not permit review of the factual basis for an emergency determination. Defendants contend that Nevada's Supreme Court held in Smith v. Bd. of Wildlife Comm'rs, No 77485, 461 P.3d 164 (Nev. Apr. 23, 2020) that the NAPA does not give the courts power to declare regulations arbitrary or capricious. However, the Defendants recognize that the emergency determination in the letter to the Governor requesting the adoption

of the emergency regulation was not a regulation, but rather a final decision in an agency action. Plaintiffs do not challenge the emergency declaration in connection with a substantive challenge to the emergency regulation, but rather the final agency decision as memorialized in the BOP's letter. NRS 233B.135 states that a court may set aside a final decision of an agency where the petitioner has been prejudiced because the final agency decision is (a) in violation of constitutional or statutory provisions (separation of powers doctrine and state statutes violated), (b) in excess of the statutory authority of the agency (this is argued), (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or (f) arbitrary or capricious or characterized as an abuse of discretion.

The Defendants are misguided in their assertion that this Court lacks jurisdiction under the NAPA.

Defendants argue that the Plaintiffs' challenge to the emergency declaration is a nonjusticiable political question because: (1) there is a "lack of judicially discoverable and manageable standards for resolving it" and (2) deciding the question would require and "initial policy determination of a kind clearly for non-judicial discretion. Initially, it should be recognized that the Defendants argued that this Court should provide deference to the BOP's interpretation of statutory authorization, and because its interpretation was reasonably consistent with the statute this Court should not review its interpretation. This argument was off-mark because as previously addressed, this Court may review the agency's statutory basis of authorization and determine if the language of the proposed regulation sent to the Governor, or the regulation itself was consistent with the claimed basis of statutory authority. It would be impossible for a Court to perform this analysis without reviewing both the statute and the emergency regulation, yet, the Defendants suggest that such analysis should be precluded

because the emergency regulation in this case involved policy choices and value determinations committed to resolution to the legislative and executive branches.

Plaintiffs do in fact argue that the regulation is unlawful and void because it exceeded statutory authority, and that the final agency action in sending the letter to the Governor requesting adoption of the emergency regulation was unlawful because the determination was both arbitrary and capricious and unsupported by reliable, probative and substantial evidence on the whole record. An agency decision must be supported by a "substantial basis." A "substantial basis" must mean that there is at least substantial evidence supporting the agency decision. In Prof'l Fire Fighters of Massachusetts v. Com., 888 N.E.2d 981, 992 (Mass. App. 2008) the court stated "We recognize that 'emergency' findings under [the emergency regulation statute] must be carefully scrutinized because if unwarrantably made, they may lead to improper denial of public hearings or comment on regulations, to evasion of the salutary purposes of [the emergency regulation statute] and possibly to other serious abuse. The Defendants assert that an agency should be permitted to sidestep the usual requirements under the APA for enacting regulations by simply declaring that there is an emergency, and that courts should not be permitted to review whether the determination is either arbitrary or capricious or otherwise unsupported by substantial evidence where an agency states that its determination of emergency is based on political questions.

The Defendants assert that this injudicious procedure does not lack accountability because an agency's emergency determination does nothing more than put the ball in the governor's court, and the governor is accountable to the voters. Thus, the Defendants argue that any prejudice caused by the emergency regulation can be remedied by voting the governor who approved and caused the emergency regulation to be adopted out of office at the end of their four

year appointment. Plaintiff simply counters that the better and proper procedure is for the courts to review the emergency determination and ensure that it is supported by substantial evidence and rationally supported by that evidence.

Defendants' next argument is that this Court cannot entertain an argument that an agency acted unreasonably, and thus, arbitrarily and capriciously when it promulgated a regulation because the NAPA does not give courts the power to declare regulations arbitrary or capricious. NRS 233B.110 (NAPA) states that the court shall declare a regulation invalid if it finds that it violates constitutional or statutory provisions, or exceeds the statutory authority of the agency. In contrast, NRS 233B.135(3)(f) states that courts may set aside a "final agency decision" in a contested case if the decision of an agency was arbitrary or capricious.

This does not present any problem in this case. The regulation itself may be reviewed under either NRS 233B.110 or 233B.135 to determine whether the agency lacked statutory authority or if the regulation violated constitutional or statutory rights. The BOP has no authority to adopt a final emergency regulation, as it can only request the Governor to adopt a proposed emergency regulation. As stated by the Defendants, all the BOP can do is put the ball in the Governor's court. This letter requesting the adoption of the emergency regulation is a final action by an agency in a contested case and it may be reviewed by this Court under NRS 233B.135 to ascertain whether the determination by the agency concerning the emergency regulation was supported by substantial evidence in the record, or was otherwise arbitrary and capricious in violation of due process. This Court should reject the Defendants attempt to create justiciability issues where none exist.

Defendants argue that even if this Court can review the BOP's emergency determination, the determination would pass the arbitrary and capricious test. The Defendants cite to authority

stating that in Nevada the arbitrary and capricious standard is a "deferential standard of review" and the courts may not substitute their judgement for the agency's. The Defendants then argue that the Board possessed and presented sufficient evidence of an emergency situation to overcome that deferential standard. Pharmacists reported to the board that there was a high and increasing volume of hydroxychloroquine prescriptions that could lead to shortages. At the public meeting to discuss proposing the emergency regulation the Board's executive secretary explained that the emergency regulation was necessary because suppliers and hospitals were struggling to get the medication, with hospitals running especially low.

However, in the letter to the governor requesting adoption of the emergency regulation, it was stated that an emergency exists due to the hoarding and stockpiling of the drugs and the resulting shortage of supplies of these drugs for legitimate medical purposes. The letter did not indicate how the prescribing of the medications by physicians to their patients with COVID-19 infections contributed to hoarding or stockpiling. The emergency stated in the letter by the BOP was that due to hoarding a stockpiling there were insufficient supplies of the drugs for legitimate medical purposes, and that the emergency regulation was necessary to prohibit the medications from being prescribed by physicians for illegitimate medical purposes. What is missing from the record is any substantial evidence of any kind whatsoever that the prescribing of these medications by physicians to their patients for treatment of COVID-19 amounted to an illegitimate medical purpose. This evidence could not have been included because as argued previously, it would be beyond the BOP's prescribed authority to make this determination as it would have nothing to do with the practice of pharmacy and would entail restrictions on the practice of medicine. Additionally, it is argued that the stated reasons supporting the emergency regulation which were discussed and determined by the BOP during the meeting to discuss the

proposed regulation were either incorrect, arbitrary and irrational or simply unsupported by any substantial evidence. These arguments can be addressed by this Court in connection with the challenge to a final agency action in a contested case under the NAPA. Like its numerous arguments before, the Defendants bend the facts and rules to cobble together arguments why this Court lacks jurisdiction to entertain the merits of the arguments. None of these arguments concerning jurisdiction are applicable to the facts of this case and the actions, determinations and procedures challenged.

I do not know about the adequate documentation argument which I would put here.

Same with the Open Meeting Law which should go here.

3. The Emergency Regulation at Issue is Preempted by Federal Law

Defendants argue that there is no conflict with federal law and the emergency regulation because the regulation is consistent with the FDA's guidance on safety with respect to the drugs. The Defendants assert that the FDA's emergency use authorization permitted the use of the drugs only for patients who are hospitalized. According to the Defendants, the FDA later reaffirmed the importance of using the drugs to treat COVID-19 only in the hospital setting, issuing guidance that the drugs "when used for COVID-19 should be limited to clinical settings or for treating certain hospitalized patients. The Defendants assert that by restricting the dispensing of the drugs to hospital settings, the emergency regulation is right in line with that guidance. The most obvious issue with this argument is that the FDA's emergency use authorization permits the prescribing and dispensing of these drugs to persons who are either inpatient or participating in a clinical study, and these persons need not be inpatient. The regulation does not permit these medications to be prescribed by a physician to a patient unless they are inpatient, and this necessarily excludes persons from participating in clinical studies, or for physicians to prescribe

these medications to patients who are enrolled in a clinical study who are outpatient. If only hospitalized, inpatient individuals were permitted to participate in a clinical study, then it would not have been necessary for the FDA to state in its guidance that the medications could be prescribed for COVID-19 purposes to either persons who are hospitalized or those participating in clinical studies.

The regulation is actually not consistent with this FDA emergency use authorization. In its entirety, the emergency regulation states:

1. A prescription for chloroquine or hydroxychloroquine may not be issued, filled or dispensed to an outpatient:

(a) For a COVID-19 diagnosis made after the effective date of this regulation.
(b) For any new diagnosis made after the effective date of this regulation.

2. A prescription for chloroquine or hydroxychloroquine issued after the effective date of this regulation:

(a) Must contain a confirmed, written ICD-10 diagnosis code from the prescriber; and

(b) Must be limited to no more than a 30-day supply at any time.

3. The provisions of this regulation do not apply:

(a) To a chart order for an inpatient in an institutional setting; or

(b) To any existing course of treatment for a diagnosis made after the effective date of this regulation.

"Course of treatment" is defined within NRS chapter 639 and means "[a]ll treatment of a patient for a particular disease or symptom of a disease, including, without limitation, a new treatment initiated by any practitioner, other than a veterinarian, for a disease or symptom for which the patient was previously receiving treatment." NRS 639.0061. The emergency regulation states that a prescription for chloroquine or hydroxychloroquine may not be issued, filled or dispensed *to an outpatient* for a COVID-19 diagnosis or for any new diagnosis made

after its effective date. The meaning of "*new diagnosis*" refers to a new diagnosis of a particular outpatient rather than a new virus or symptom.

Subsection (3) provides two exceptions to the applicability of the regulation. The first exception is that the regulation does not apply to a chart order for an inpatient in an institutional setting. As stated above, NRS 639.013 defines prescription within the statutes governing the BOP and practice of pharmacy in Nevada, and subsection (3) states, "the term does not include a chart order written for an inpatient for use while he or she is a patient. This means that this exception was unnecessary, and the regulation prohibits physicians from prescribing these drugs to treat COVID-19 or any other disease where the diagnosis is made after the effective date of the regulation. The second exception states that the regulation does not apply to any existing course of treatment for a diagnosis made after the effective date of this regulation. This exception is at odds with subsection (1) (b) which prohibits physicians from prescribing the drugs to an outpatient for a new diagnosis made after the effective date. It could be argued that the regulation means that if a person is diagnosed with malaria, rheumatoid arthritis or lupus the drugs could be used as an existing course of treatment for a diagnosis of these diseases because these medications have been approved by the FDA for such use. Hence, it appears that the exception refers to any existing course of treatment for a diagnosis as approved by the FDA for such use. However, the definition of course of treatment provides that it applies to new treatments initiated by any practitioner for a disease or symptom. This suggests that Nevada law recognizes that physicians may prescribe medications to treat diseases in new ways that have not been expressly approved by the FDA. As explained in Plaintiff's previous motion/petition, this is known as off-label prescribing.