JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

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JUSTICE COURT
LAS VEGAS NEVADA
BY ________ DEPUTY

THE STATE OF NEVADA,

Plaintiff,

vs.

ZAON COLLINS,

Defendant.

CASE NO.: 20CR041639

DEPT. NO.: 13

ORDER

20-CR-041639
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INTRODUCTION

Following a motor vehicle collision in which Defendant was involved, the State of Nevada charged Defendant, via Criminal Complaint, with having committed the following crimes: (1) Driving Under the Influence Resulting in Death, and (2) Reckless Driving.

In the aftermath of the collision, a police officer applied for and obtained a search warrant authorizing the drawing and testing of Defendant's blood.

One of the Motions Defendant filed during the course of this case is a Motion to Suppress Blood Test Results. In this Motion, Defendant alleges that the results of his blood test should be suppressed because (1) the State of Nevada violated the Fourth Amendment to the United States Constitution, and (2) suppression is compelled by the holding of Franks v. Delaware, 438 U.S. 154 (1978). *Motion to Suppress Blood Test Results*, at 1:2-1:4.

More specifically, Defendant alleges the State of Nevada violated the Fourth Amendment to the to the United States Constitution because the taking of a blood sample from Defendant was a "search," and the telephonic search warrant application made by Officer Edward Contreras omitted the following information, which items of information are characterized by Defendant as "material:"

1. "[O]ne of the first responding police officers performed the HGN [test] on [Defendant] and informed another officer that he saw no signs of impairment." Id. at 1:25-1:26.

2. "The alleged marijuana located in the vehicle was residue (in a closed container)

and there was no odor [associated with this alleged marijuana residue]" [1] (parenthetical information in original). Id. at 2:5-2:6.

3. "[A]n independent Citizen, Mr. Garcia, called 911 and specifically informed the dispatcher that 'a white sedan was making a left into a cul-de-sac and did not see the grey Challenger coming....'"[2] Id. at 2:8-2:11.

4. "Another independent citizen, Mr. Cameron" "when asked by the 911 dispatcher if he believed either of the drivers were drinking or doing drugs, stated 'No. I don't think so.'" Id. at 2:14-2:17.[3]

5. "The reference [in the search warrant application] to 'several firearms' being found in Defendant's vehicle was a false declaration to the Judge, as the firearms were located in [the decedent's] vehicle, not the Defendant's. Id. at 2:18-2:20.

In addition to specifying the four items of information which Defendant contends were omitted from, and the one item of information Defendant contends was falsely included in, the search warrant application, Defendant's Motion also refers to the Court holding a "hearing testing the validity of the affidavit."[4] Id. at 5:24 (citing to Franks v. Delaware, 438 U.S. 154, 171 (1978). Defendant's Motion is clear that following the holding of the above-referenced hearing pursuant to the procedure dictated by Franks v. Delaware, Defendant is seeking suppression of the blood-test results which came about as a result of the search warrant which authorized the drawing and testing of his blood.

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[1] By this description, Defendant is apparently referring to the odor of burned marijuana, as opposed to no odor emanating from the residue. The Court bases its conclusion that this is the meaning intended by Defendant because Defendant's Motion uses the phrase "no odor with which to suggest there was recent [marijuana] consumption." *Motion to Suppress Blood Test Results*, at 2:6.

[2] Defendant's Motion does not explain how it was that Mr. Garcia was able to know what the driver of the white sedan did and did not see. The Court notes that Defendant nonetheless characterized Mr. Garcia's statement as "clear evidence of Mr. Garcia's personal observations." Id. at 2:11-2:12.

[3] Defendant's Motion does not explain the manner in which Mr. Cameron came to form this opinion including whether this opinion was based on his personal observation or some other means.

[4] As discussed more fully herein, the procedure mandated by Franks v. Delaware, 438 U.S. 154 (1978), includes the reviewing court holding an evidentiary hearing bearing upon the search warrant application if Defendant is able to make a substantial preliminary showing that a false statement made knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in an affidavit used to apply for a search warrant.

The State responded to Defendant's Motion by filing an Opposition to Defendant's Motion to Suppress Blood Test Results and Defendant, in turn, filed a Reply to the State's Opposition.

ANALYSIS

The Court begins its analysis with a recitation of the probable cause standard.

> In determining whether probable cause to search exists, a court must view the "totality of circumstances" set forth in the affidavit. Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), *reh'g denied,* 463 U.S. 1237, 77 L. Ed. 2d 1453, 104 S. Ct. 33 (1983). The relevant inquiry under Gates is whether in light of all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* at 238.

United States v. DeLeon, 979 F.2d 761, 764 (9th Cir.1992) [emphasis added].

In assessing probable cause, the "fair probability" determination must be based on "common sense considerations." United States v Ruiz, 758 F.3d 1144, 1148 (9th Cir. 2014).

Because the Defendant's Motion is, in part, based on Franks v. Delaware, 438 U.S. 154 (1978), the Court will also review the procedure mandated by that case.[5] In Franks, the United States Supreme Court held that

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a[n evidentiary] hearing be held at the defendant's request.

Id. at 155-156.

In Franks v. Delaware, the United States Supreme Court further held that in order to mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a desire to cross-examine. Said attack "must be accompanied by an offer of proof, including affidavits or sworn or otherwise reliable statements of witnesses, or a satisfactory explanation of their absence." Id. at 171.

[5] Franks v. Delaware contemplates the possibility of a false statement being included in an affidavit applying for a search warrant. However, the Court is satisfied that a material omission in a search warrant application also constitutes a Fourth Amendment violation. See Liston v. County of Riverside, 120 F.3d 965, 973 (1997) (holding that "whether the alleged judicial deception was brought about by material false statements or material omissions is of no consequence."

The Court finds that while Defendant's Motion itself may arguably be considered as an offer of proof, Defendant's Motion was not accompanied by "sworn or otherwise reliable statements of witnesses, or a satisfactory explanation of their absence." Thus, for this reason alone, Defendant is not entitled to an evidentiary hearing.

A separate factor bearing upon whether Defendant is entitled to an evidentiary hearing is whether the omissions of which Defendant complains, as well as the allegedly false statement regarding the presence of firearms in Defendant's vehicle, were "necessary to the finding of probable cause." Id. at 156. The United States Supreme Court further elaborated upon this determination as follows: "[i]f, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required." Id. at 171-172.

The need for the Court to make a determination as to whether the above-described omissions and falsehood alleged by Defendant negates the finding of probable cause inherent in the granting of a search warrant coincides with the holding of the Nevada Supreme Court in State v. Sample, 134 Nev. 169, 172 (2018) that

> [a] defendant is not entitled to suppression of the fruits of a search warrant, even based on intentional falsehoods or omissions, unless probable cause is lacking once the false information is purged and any omitted information is considered.

Id. at 172 (quoting Doyle v. State, 116 Nev. 148, 159 (2000)).

Accordingly, the Court will assume, without finding, that each and every one of the purported omissions identified by Defendant and listed by the Court on pages 1 and 2 above, is both accurate and was in fact omitted from the search warrant application. The Court will similarly assume, without finding, that the falsehood alleged by Defendant regarding the presence of firearms in Defendant's vehicle, listed by the Court as number 5 on page 2 above, was also in fact false, and made by the search warrant applicant in the search warrant application. Making such assumptions will assist the Court in determining whether probable cause for the issuance of the search warrant exists independent of those alleged omissions and falsehood.

Defendant's Motion to Suppress Blood Test Results quotes from a portion of the transcript of the search warrant application at issue as follows:

> On 12-30-2020 Officer M. Polion, P#9808 stated to me that he was involved in a DUI investigation involving life-threatening injuries. Officer Polion went on to say that said subject was driving a gray Dodge Challenger bearing Nevada license plate [*****] northbound South Fort Apache Road at Furnace Gulch at a high rate of speed when said subject struck a vehicle which was traveling southbound turning eastbound.
>
> During Officer Polion's investigation he observed inside of said subject's vehicle, a green leafy substance consistent with marijuana near the driver's seat as well as several firearms. Said subject was transported to UMC Trauma where Officer A. Powell, P#9994 identified said subject by his descriptors as a black male adult, 6'0", black hair and brown eyes, wearing dark blue t-shirt and gray shorts. Officer Powell observed said subject's eyes to be blood shot, watery. Officer Powell also observed lack of convergence and eyelid tremors on said subject. Based on the above facts and circumstances, said subject was arrested for suspicion of DUI drugs with substantial bodily harm.

Motion to Suppress Blood Test Results, at 1:12-1:21 [omissions shown by asterisks in original].

The Court finds that based on the above recitation of what was included in the search warrant application, probable cause for the issuance of the disputed search warrant exists even when the four omissions and one falsehood alleged by Defendant are included with information quoted above from the search warrant application transcript.

Accordingly, the Court finds that Defendant is not entitled to an evidentiary hearing based on Franks v. Delaware, and is similarly not entitled to suppression of the blood-test results at issue in this case.

Because the Court has found that the search warrant at issue was validly granted

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pursuant to the "Fourth Amendment and the holding in Franks v. Delaware," the Court further finds that Defendant's Motion to Suppress Blood Test Results should be denied.

ORDER

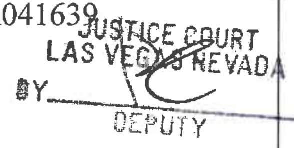
IT IS HEREBY ORDERED that the Defendant's "Motion to Suppress Blood Test Results" is denied.

DATED this 19th day of July, 2021.

JUDGE SUZAN BAUCUM
Justice of the Peace

1 JUSTICE COURT, LAS VEGAS TOWNSHIP

2 CLARK COUNTY, NEVADA



3 THE STATE OF NEVADA,)
4 Plaintiff,) CASE NO.: 20CR041639
5 vs.) DEPT. NO.: 13
6 ZAON COLLINS,)
7 Defendant.)
8)

ORDER

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9 INTRODUCTION

10 On January 7, 2021, the State of Nevada filed a Criminal Complaint charging
11 Defendant with having committed the following two crimes: (1) Driving Under the Influence
12 Resulting in Death, a Category B Felony, in violation of NRS 484C.110 and NRS 484C.430,
13 and (2) Reckless Driving, a Category B Felony, in violation of NRS 484B.653.

14 The above-referenced DUI charge sets forth varying theories under which Defendant
15 is criminally culpable.

16 > [Defendant] did then and there willfully and unlawfully drive and/or be in actual physical control of a vehicle on or off a highway at Fort
17 > Apache and Furnace Gulch, Las Vegas, Clark County, Nevada, while under the influence of one or more of the following controlled
18 > substances, to any degree, however slight, which rendered him incapable of safely driving and/or exercising actual physical control of a vehicle
19 > and/or when he was found to have one or more of the following prohibited substances in his blood, in an amount that is equal to or
20 > greater than the prohibited amount listed in NRS 484C.110(3), incorporated by reference as though fully contained herein, to wit: Delta-
21 > 9 THC, ...

22 *Criminal Complaint*, at 1:16-1:23.

23 The above-referenced Reckless Driving charge also sets forth varying theories under
24 which Defendant is criminally culpable.

25 > [Defendant] did then and there willfully, unlawfully, and feloniously drive a motor vehicle at Fort Apache and Furnace Gulch, Las Vegas,
26 > Clark County, Nevada, with willful or wanton disregard for the safety of persons or property, by driving said vehicle without paying full time and
27 > attention to his driving, and/or failing to exercise due care, and/or failing to drive in careful and prudent manner, and/or traveling 85 miles per hour
28 > in a 35 mile per hour zone, which acts, or neglect of duties, proximately causing the death of or substantial bodily harm to Eric Echevarria.

Id. at 2:2-2:8.

After being charged with the crimes specified above, Defendant filed several motions. Among these motions is a "Motion to Dismiss Charges with Prejudice." In said Motion, Defendant attacks each of the charges pending against him. More specifically, Defendant challenges the Reckless Driving charge by noting that after filing a Criminal Complaint in the Las Vegas Justice Court, the District Attorney's Office presented both of the above-referenced charges to the Grand Jury and that "the Grand Jury returned a True Bill as to the charge of Reckless Driving, and a No Bill as to the DUI charge." *Motion to Dismiss Charges with Prejudice*, at 4:11-4:13 [emphasis omitted]. However, on

> March 11, 2021, at the initial appearance on the returned Indictment in District Court, the State dismissed the Reckless Driving charge. [Defendant] objected to the dismissal and asserted that if the case was to be dismissed, it must be with prejudice. The Court stated that the issue of prejudice could be addressed at a later time.

Id. at 4:15-4:18.

The State has not objected to Defendant's description of the matters submitted to the Grand Jury, the Grand Jury's corresponding decisions, as well as the State's resulting request for dismissal of the Reckless Driving charge at the time of Defendant's initial appearance in District Court.

Because the state now seeks to proceed with a Preliminary Hearing as to both of the charges that the State presented to the Grand Jury, Defendant asserts that the Justice Court lacks jurisdiction over this matter and that charges pending against Defendant should be dismissed because the State has shown a conscious indifference for procedural rules and Defendant's rights.

As an additional matter, Defendant also asserts that the Court should dismiss the Driving Under the Influence Resulting in Death charge pending against him because "the Nevada DUI law, as it relates to THC, fails rational basis scrutiny and is being unconstitutionally applied to Mr. Collins." Id. at 5:6-5:7. Defendant's Motion to Dismiss Charges with Prejudice also asserts that Nevada's DUI law is "unconstitutionally vague," is "arbitrary and capricious, and fails rational basis scrutiny." Id. at 15:13-15:14.

After Defendant filed his Motion to Dismiss Charges with Prejudice, the State filed an Opposition to that Motion. In its Opposition, the State argues that with respect to the District Court's post-bindover dismissal of the Information charging Reckless Driving, Defendant failed to apprise the Court that the law in Nevada is that "dual proceedings are proper, and that the State may elect to proceed on one of two pending proceedings and dismiss the proceeding under which it has elected not to prosecute without running afoul of NRS 178.562(1)." *State's Opposition to Defendant's Motion to Dismiss Charges with Prejudice*, at 6:21-6:23 (quoting Thompson v. State 125 Nev. 807, 812-813 (2009)).

Defendant filed a Reply to the State's Opposition. In that Reply, Defendant asserted that Thompson is "distinguishable" from the case at bar because the facts of Thompson do not include the prosecution seeking a dismissal after the Grand Jury's returning of a "no bill," i.e., not indicting the Defendant, "on the DUI charge." *Reply to State's Opposition to Motion to Dismiss Charges with Prejudice*, at 4:24, 6:5.

With respect to the DUI charge at issue, Defendant's Reply also asserts that a statutory amendment was signed into law by the Governor on June 2, 2021, [and effective on July 1, 2021,] and this amendment "removes the *per se* THC levels for misdemeanor DUI offenses" but does not remove these THC *per se* levels for "felony" DUI offenses. Id. at 3:8-3:10. Defendant asserts that this removal in the misdemeanor DUI context means that the Nevada Legislature "recognizes that the *per se* THC levels of 2[nanograms] per milliliter of [b]lood for Marijuana and 5[nanograms] per milliliter of [b]lood for Marijuana metabolite ... are arbitrary and capricious and not rationally related to traffic safety." Id. at 3:13-3:16.

Defendant's explanation for why the legislature would eliminate Misdemeanor DUI *per se* THC levels, but not Felony DUI THC *per se* THC levels, is that these conflicting positions resulted from a "compromise in passing the bill." Id. at 3:25. Defendant did not attempt to explain why there would be enough votes in the legislature to reject what he asserts is an arbitrary and capricious standard in the misdemeanor DUI context, but there would not be enough votes to reject an arbitrary and capricious standard in the Felony DUI context.

ANALYSIS

At the outset of its analysis, the Court notes that "[s]tatutes are presumptively valid and the burden is on those attacking them to show their unconstitutionality." Williams v. State, 118 Nev. 536, 546 (2002).

Other Nevada cases elaborate upon the burden which must be borne by an individual challenging the constitutionality of a statute.

> [T]he burden is on the challenger to make a clear showing of [statutory] unconstitutionality." Childs v. State, 107 Nev. 584, 587, 816 P.2d 1079, 1081 (1991). To meet this burden, there must be a "clear showing of invalidity." Sheriff v. Martin, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983). When ambiguities arise, "statutes should be construed, if reasonably possible, so as to be in harmony with the Constitution." Glusman v. State, 98 Nev. 412, 419, 651 P.2d 639, 644 (1982).

Sereika v. State, 114 Nev. 142, 145 (1998).

With the fact that Defendant, as the statutory challenger, bears the burden of showing statutory unconstitutionality in mind, the Court turns to Defendant's assertions.

1. Defendant's Assertion that the Court should dismiss the charges against him because the State has shown a conscious indifference to Defendant's rights and procedural rules

The Court reiterates that parties do not dispute the basic procedural events set forth above including that the State, with leave of the District Court, dismissed the "Information," filed by the State in District Court following the Grand Jury's indictment of Defendant on said Reckless Driving charge.

The Court begins its analysis by noting the existence of NRS 178.562(1).[1] Said statute provides that the dismissal of an action, as provided for in NRS 178.554 and 178.556, is a bar to another prosecution for the same offense "[e]xcept as otherwise provided in NRS 174.085."

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[1] **NRS 178.562 Dismissal or discharge as bar to another prosecution.**
1. Except as otherwise provided in NRS 174.085, an order for the dismissal of the action, as provided in NRS 178.554 and 178.556, is a bar to another prosecution for the same offense.
2. The discharge of a person accused upon preliminary examination is a bar to another complaint against the person for the same offense, but does not bar the finding of an indictment or filing of an information.

Pursuant to Thompson v. State, 125 Nev. 807 (2009), NRS 178.562(1) addresses "only *subsequent* prosecutions for the same offense." Id. at 812 [italics in original]. Thus the State's dismissal of an Information, in Thompson, "while there was another pending vehicle for prosecution" "did not run afoul of NRS 178.562(1)." Id. Thompson also holds that "because there were two proceedings pending against Defendant for the same offenses," i.e., a Criminal Complaint/Information and a Grand Jury indictment, "when the State moved to voluntarily dismiss the information ... the State was not bringing another prosecution following dismissal of an action." Id. at 813 [emphasis added]. Thus, "the State did not need to show 'good cause' to proceed on the [non-dismissed means of prosecution] or obtain written findings and a court order permitting it to do so because NRS 174.085[2] was not triggered." Id.

In the instant case, at the time the Information which charged Defendant with Reckless Driving was both filed and dismissed in District Court, there was a second prosecution for the same charge pending against Defendant. This second proceeding includes the above-referenced DUI and Reckless Driving charges pending in the Las Vegas Justice Court, which were never dismissed even following the Grand Jury's indictment of Defendant on the above-referenced Reckless Driving charge. Thus the State's pursuit of the these charges in the Justice Court does not constitute a subsequent prosecution of Defendant, and does not violate NRS 178.562(1). Accordingly, the State is not barred from moving forward with the DUI and Reckless Driving prosecution of Defendant in the Las Vegas Justice Court. The Court finds that such a prosecution, approved of by Thompson, does not demonstrate the prosecution's conscious indifference to Defendant's rights nor a conscious

[2] The relevant section of NRS 174.085 is section 7, which is set forth below.

NRS 174.085 Proceedings not constituting acquittal; effect of acquittal on merits; proceedings constituting bar to another prosecution; retrial after discharge of jury; effect of voluntary dismissal.

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7. The prosecuting attorney, in a case that the prosecuting attorney has initiated, may voluntarily dismiss an indictment or information before the actual arrest or incarceration of the defendant without prejudice to the right to bring another indictment or information. After the arrest or incarceration of the defendant, the prosecuting attorney may voluntarily dismiss an indictment or information without prejudice to the right to bring another indictment or information only upon good cause shown to the court and upon written findings and a court order to that effect.

indifference to applicable procedural rules.

2. Defendant's Assertion that "Nevada DUI Law" is Unconstitutionally Vague, Arbitrary, and Capricious

The Court begins with the need to ascertain the identity of the specific law or laws, i.e., the specific statutes, to which Defendant is referring. The only two statutes specifically enumerated by Defendant as part of his challenge to "Nevada Law" are NRS 484C.105 and NRS 484C.110. After referencing these two statutes, Defendant's Motion makes numerous references to, and arguments concerning, the legally prohibited quantities of marijuana or marijuana metabolite in a vehicle-driver's blood, namely, two nanograms per milliliter and five nanograms per milliliter, respectively. Because these two quantities are specified in NRS 484C.110(4), it is sufficiently clear that Defendant is challenging NRS 484C.110(4).[3]

Just as it is necessary to identify precisely what is being challenged by Defendant, it is also important to understand the terms used by Defendant as part of his "Motion to Dismiss Charges with Prejudice," and, more significantly, the legal import of those terms.

The Court therefore begins with Defendant's imprecisely articulated but nonetheless existing claim that 484C.110(4) is "arbitrary." As a simple matter of English grammar, a statute itself cannot be arbitrary, just as a statute cannot be "verdant." However, it is certainly the case that the manner in which a statute is enforced can be arbitrary and the arbitrary enforcement of a statute is a significant component of constitutional "vagueness" analysis.

The vagueness doctrine is an outgrowth of the Due Process Clause[s] of the Fifth and Fourteenth Amendments to the United States Constitution. State v. Castaneda, 126

[3] **NRS 484C.110 Unlawful acts; affirmative defense; additional penalty for violation committed in work zone or pedestrian safety zone**

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4. It is unlawful for any person to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access with an amount of any of the following prohibited substances in his or her blood that is equal to or greater than:

Prohibited substance	Blood Nanograms per milliliter
(a) Marijuana (delta-9-tetrahydrocannabinol)	2
(b) Marijuana metabolite (11-OH-tetrahydrocannabinol)	5

Nev. 478, 481 (2010).

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

Nevada's statutory "vagueness" jurisprudence further elaborates upon what makes a statute void for vagueness. A statute is void for vagueness if it

> fails to give a person of ordinary intelligence fair notice that her conduct is forbidden by statute. While a facial attack may be asserted as to a statute that implicates constitutionally protected conduct, a statute that does not implicate constitutionally protected conduct, as in this instance, may be void for vagueness only if it is vague in all of its applications. The Due Process Clause "'does not require impossible standards of specificity in penal statutes.'" Instead, a statute will be deemed to have given sufficient warning as to proscribed conduct when the words utilized have a well settled and ordinarily understood meaning when viewed in the context of the entire statute.

Williams v. State, 118 Nev. 536, 545-546 (2002).

The undersigned Court also finds that the words used in NRS 484C.110, including section 4 of that statute, have a well settled and ordinarily understood meaning when viewed in the context of that entire statute. The Court also finds that a person of ordinary intelligence has adequate notice of the meaning of what is prohibited by NRS 484C.110(4) as said statute defines marijuana as "delta-9-tetrahydrocannabinol" and marijuana metabolite as "11-OH-tetrahydrocannabinol." Said statute also gives persons of ordinary intelligence adequate notice that the prohibited blood level of marijuana, i.e., the prohibited blood level of delta-9-tetrahydrocannabinol, is 2 nanograms per milliliter, and the prohibited blood level of marijuana metabolite, i.e., 11-OH-tetrahydrocannabinol, is 5 nanograms per milliliter.

As Defendant has not been charged with driving with a prohibited level of marijuana metabolite, i.e., 11-OH-tetrahydrocannabinol, in his blood, the marijuana metabolite portion of NRS 484C.110(4) is not implicated in this case.

In sum, the Court finds that NRS 484C.110, including NRS 484C.110(4) is not void for vagueness.

3. Defendant's Assertion that "Nevada DUI Law" fails rational basis scrutiny

A matter related to Defendant's "rational basis" claim is that the prosecution has "no obligation to produce evidence to sustain the rationality of a statutory classification." Williams v. State, 118 Nev. 536, 542 (2002).

Defendant's assertion that NRS 484C.110 fails rational basis scrutiny is a claim that said statute violates Defendant's right to equal protection of the laws. A person's right to "equal protection" is guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution[4] and Article 4, Section 21 of the Nevada Constitution.[5]

A statute's different treatment of similarly situated people is what offends both the Nevada and Federal Constitutions.

> When the law, however, does not implicate a suspect class or fundamental right, it will be upheld as long as it is rationally related to a legitimate government interest. Id. (citing Romer v. Evans, 517 U.S. 620, (1996)).

Zamora v. Price, 125 Nev. 388, 395 (2009) [emphasis added].

The case of Williams v. State, referenced above, similarly holds as follows:

> [I]n analyzing equal protection challenges, the appropriate level of judicial scrutiny must first be determined by considering the nature of the right being asserted. Statutes which involve fundamental rights (such as privacy) or which are based on suspect classifications (such as race) are subject to strict scrutiny. Statutes which do not infringe upon fundamental rights nor involve a suspect classification are reviewed using the lowest level of scrutiny-rational basis. Under the rational basis standard, legislation will be upheld so long as it is rationally related to a legitimate governmental interest

Williams v. State, 118 Nev. 536, 541-542 (2002) [emphasis added].

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[4] **Sec. 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[5] **21. General law to have uniform application.**
In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State.

As Williams makes clear, driving a vehicle after ingestion of marijuana is not constitutionally protected conduct. Defendant has not asserted that NRS 484C.100(4) implicates a fundamental right or a suspect class. Instead, Defendant challenges the constitutionality of the two and five nanogram levels specified in NRS 484C.100(4). As noted above, the five nanogram level is not relevant in this case because Defendant has been charged with driving while having a prohibited quantity of Marijuana, but not marijuana metabolite, in his blood, as specified in the Criminal Complaint. Defendant has argued that "there was no rational basis in determining that the respective 2 and 5 nanogram levels [per milliliter of blood] were appropriate for considering whether a person was impaired for criminal DUI purposes …." *Motion to Dismiss Charges with Prejudice*, at 2:9-2:11.

Defendant also argues that

> the Nevada Legislature apparently maintained these levels to specifically ensure criminal punishment irrespective of science. As such, it is clear that application of the law fails to meet rational basis scrutiny as the basis to maintain the respective 2 and 5 nanogram levels is completely arbitrary and not rationally related to highway safety and in deterring illicit drug use.

Id. at 23:17-23:21 [emphasis in original omitted].

Defendant's arguments appear to be based on his view of what Defendant says "science" dictates the law should be. Such arguments fail to grasp both the nature of a "*per se*" violation of the law as well as Nevada case law.

In Williams, the Nevada Supreme Court held as follows

> "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." . . . Finally, courts are compelled . . . to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it "'is not made with mathematical nicety or because [in practice it results in some inequality.'" "The problems of government are practical ones and may justify . . . rough accommodations- [however] illogical . . . and unscientific [the accommodations may be]."
>
> The State contends that the prohibited substance statute is rationally related to the State's interest in highway safety and in deterring illicit drug use. We agree.

Williams v. State, 118 Nev. 536, 542-543 (2002).

The Nevada Supreme further held that "[t]o the extent that Williams argument is

1 premised on the distinction between legal and illegal users of marijuana, we likewise
2 conclude that it lacks merit." Id. at 544.

3 In Williams, the Nevada Supreme Court ultimately concluded that "the governmental
4 interest in maintaining safe highways is sufficient for our prohibited substance statute to
5 survive a constitutional attack on the basis that it impermissibly treats drivers with the
6 proscribed levels of illicit drugs in their system differently from others." Id.

7 As part of reaching this conclusion, the Nevada Supreme court reiterated:

8 [I]t is the province of the Legislature to pass legislation, while our duty is to determine whether such legislation passes constitutional
9 scrutiny and is therefore valid law. Opponents of a valid statute must look to the Legislature rather than the judiciary to amend the
10 law.

11 Id. at 545.

12 The statute at issue in Williams was NRS 484.379(3). By virtue of that statute, the
13 legally prohibited quantity of marijuana in a vehicle-driver's blood was two nanograms per
14 milliliter. NRS 484C.110 contains the same two nanogram limitation.

15 Thus, in addition to concluding that NRS 484C.110 is not void for vagueness, the
16 Court is also not persuaded by Defendant's "rational basis" arguments and finds that NRS
17 484C.110(4) is rationally related to a legitimate governmental interest, does not violate
18 Defendant's right to equal protection of the laws, and is constitutional.

19 The Court wishes to note that it is aware of the existence of Williams v. Gentry, 2020
20 U.S. Dist. LEXIS 107564 (2020) and finds that said case does not alter the Court's
21 conclusion that Defendant's Motion lacks merit. Defendant's *Motion to Dismiss Charges*
22 *with Prejudice* refers to Williams v. Gentry in that Motion's footnote 4, but does not actually
23 argue that said case means that Defendant's Motion should be granted. Defendant does
24 assert the conclusion that his case is "distinguishable from Ms. Williams," but does not
25 provide any additional detail in support of this conclusion. *Motion to Dismiss Charges with*
26 *Prejudice,* at p24 n4.

27 As noted above, Defendant has argued that the Court should dismiss the Felony DUI
28 charge brought by the State against Defendant because the 2021 Nevada Legislature

removed, in the misdemeanor context, *per se* blood-THC levels from a Nevada's DUI statutory framework via an amendment that became effective on July 1, 2021.

There are at least three reasons that this argument lacks merit. First, Defendant's argument lacks merit because his conduct occurred when the prior version of the DUI law was applicable. Second, Defendant's citation to and reliance upon Fiore v White, 531 U.S. 225 (2001) and Bunkley v. Florida, 538 U.S. 835 (2003) which cites to Fiore v. White, is misplaced.[6] Third, the DUI charge pending against Defendant is a Felony and not a Misdemeanor charge, so even if the DUI related statutory change made in the 81st Legislative session in 2021 were to be retroactively applied, a finding that this Court is not making, that change is factually inapplicable to the DUI charge pending against Defendant.

ORDER

IT IS HEREBY ORDERED that Defendant's "Motion to Dismiss Charges with Prejudice" is denied.

DATED this 19th day of July, 2021.

JUDGE SUZAN BAUCUM
Justice of the Peace

In Fiore v White, 531 U.S. 225 (2001). the U.S. Supreme Court reversed the contrary judgment of the Court of Appeals because Fiore's conviction was obtained in the absence of federal "due process," i.e., without Pennsylvania proving every element of the crime with which it had charged Fiore. In sum. Fiore's conviction was "not consistent with the demands of the Federal Due Process Clause." Id. at 226. In the instant case. there has been no federal or state due process violation as to the charges pending against Defendant Collins and the statutes underlying those charges, and so Fiore is not factually inapplicable to those charges