

No.

In The Supreme Court Of The United States

Haseeb Malik,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Appendix

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 15 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

HASEEB MALIK; ABDUL MAJID,

Defendants-Appellees.

No. 19-10166

D.C. No.

3:18-cr-00077-MMD-WGC-1

District of Nevada,

Reno

ORDER

Before: WALLACE and R. NELSON, Circuit Judges, and BLOCK,* District Judge.

Judge Nelson has voted to deny both Appellees' petitions for rehearing and rehearing en banc (Dkt. Nos. 55 and 56), and Judges Wallace and Block so recommend.

The full court has been advised of the petitions for rehearing en banc, and no judge of the court has requested a vote on them.

Appellees' petitions for rehearing and rehearing en banc are **DENIED**.

* The Honorable Frederic Block, United States District Judge for the Eastern District of New York, sitting by designation.

capricious. *See In Def. of Animals*, 751 F.3d at 1072 (noting that NEPA does not require an agency “to address in detail the substance conveyed in every single comment made on an [environmental assessment] to prove that the agency ‘considered’ the relevant factors”).

AFFIRMED.



**UNITED STATES of America,
Plaintiff-Appellant,**

v.

**Haseeb MALIK; Abdul Majid,
Defendants-Appellees.**

No. 19-10166

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 14, 2020
San Francisco, California

Filed July 6, 2020

Background: In drug prosecution, the United States District Court for the District of Nevada, Miranda Du, Chief Judge, granted defendants’ motion to suppress, and government filed interlocutory appeal.

Holdings: The Court of Appeals held that state trooper had probable cause to search tractor-trailer’s cab and containers therein. Reversed and remanded.

1. Criminal Law ⇨1139

Court of Appeals reviews grant of motion to suppress de novo.

2. Criminal Law ⇨1158.12

In reviewing grant of motion to suppress, district court’s underlying factual findings are reviewed for clear error.

* The Honorable Frederic Block, United States District Judge for the Eastern District of New

3. Searches and Seizures ⇨23

Fourth Amendment reasonableness is predominantly objective inquiry. U.S. Const. Amend. 4.

4. Automobiles ⇨349.5(7)

State trooper had probable cause to search tractor-trailer’s cab and containers therein, even though state had decriminalized possession of small amounts of marijuana, and driver claimed he had thrown out remainder of marijuana cigarette, where trooper smelled marijuana in cab, driver admitted he smoked marijuana cigarette earlier that day, it remained illegal to smoke marijuana in moving vehicle or to drive under influence of marijuana, and driver had changed his story as to when he had smoked marijuana. U.S. Const. Amend. 4; Nev. Rev. St. §§ 453D.100(1)(a), 453D.400(2), 484C.110.

Appeal from the United States District Court for the District of Nevada, Miranda M. Du, Chief District Judge, Presiding, D.C. No. 3:18-cr-00077-MMD-WGC-1

Nancy M. Olson (argued) and Phillip N. Smith Jr., Assistant United States Attorneys; Elizabeth O. White, Appellate Chief; Nicholas A. Trutanich, United States Attorney; United States Attorney’s Office, Las Vegas, Nevada; for Plaintiff-Appellant.

Kate Berry (argued), Assistant Federal Public Defender; Rene L. Valladares, Federal Public Defender; Office of the Federal Public Defender, Reno, Nevada; for Defendants-Appellees.

Before: J. CLIFFORD WALLACE and RYAN D. NELSON, Circuit Judges, and FREDERIC BLOCK,* District Judge.

York, sitting by designation.

OPINION

PER CURIAM:

Nevada Highway Patrol Trooper Chris Garcia pulled over a tractor-trailer for speeding outside of Ely, Nevada. When he approached the tractor-trailer, Garcia smelled marijuana in the cab. The driver, Haseeb Malik, admitted he smoked a marijuana cigarette six to seven hours earlier in the day. Garcia subsequently radioed for backup and conferred with Trooper Adam Zehr about whether to search the cab of the tractor-trailer. Having decided to search the cab, Garcia re-approached the tractor-trailer, ordered Malik and his co-driver, Abdul Majid, out of the cab, and *Terry* frisked both defendants. During the course of the *Terry* frisk, Malik changed his story, admitting that he smoked the marijuana cigarette three to four—rather than six to seven—hours earlier. During Garcia’s subsequent search of the cab, he discovered 135 pounds of cocaine and 114 pounds of methamphetamine.

[1, 2] After their arrest, Malik and Majid moved to suppress the narcotics, arguing Garcia lacked probable cause to search the cab and containers therein. The district court granted the motion. We review the grant of a motion to suppress de novo. *See United States v. Tan Duc Nguyen*, 673 F.3d 1259, 1263 (9th Cir. 2012). The district court’s underlying factual findings are reviewed for clear error. *See United States v. Barnes*, 895 F.3d 1194, 1199 (9th Cir. 2018).

We begin with the Government’s argument that the district court erred by failing to evaluate the totality of the circumstances known to Garcia prior to his search. We agree that the district court failed to evaluate the totality of circumstances known to Garcia. The district court limited its analysis to whether Garcia had

probable cause at the time he approached the cab with the intent to search it. During the *Terry* frisk of the defendants, however, Malik made statements contradicting his earlier story about when he had smoked the marijuana cigarette. The district court’s decision not to include Malik’s contradictory statements in its totality of the circumstances analysis was error. *See United States v. Ped*, 943 F.3d 427, 431 (9th Cir. 2019) (the “assessment of probable cause” takes into account “the totality of the circumstances known to the officers at the time of the search”).

[3] The district court’s failure to analyze the totality of the circumstances is part and parcel of its broader error; namely, its focus on Garcia’s subjective motivations for performing the search. “Fourth Amendment reasonableness is predominantly an *objective* inquiry.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 736, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011) (emphasis added) (internal quotation marks omitted). Although administrative searches are an exception to this rule, *see United States v. Orozco*, 858 F.3d 1204, 1210–11 (9th Cir. 2017) (observing that “actual motivations do matter” in administrative-search cases (internal quotation marks omitted)), Garcia stopped the tractor-trailer because he reasonably suspected Malik was speeding. Unlike *Orozco*, which involved an officer’s decision to use his administrative search authority as pretext for an investigatory stop, *id.* at 1213–16, Garcia stopped the tractor-trailer as part of a criminal investigation supported by reasonable suspicion. His subjective motivations, therefore, are not relevant. *See al-Kidd*, 563 U.S. at 736, 131 S.Ct. 2074.

[4] Finally, we turn to whether Garcia had probable cause to search the cab and containers therein for evidence of violations of Nevada law.¹ We conclude he did.

1. Because Garcia had probable cause to search for evidence of violations of Nevada

state law, we do not reach the question of

Although Nevada has decriminalized the possession of small amounts of marijuana, it remains a misdemeanor in Nevada to “smoke[] or otherwise consume[] marijuana in a public place, . . . or in a moving vehicle.” Nev. Rev. Stat. § 453D.400(2). Nevada also continues to prohibit drivers from operating a vehicle while under the influence of marijuana. *See* Nev. Rev. Stat. §§ 453D.100(1)(a), 484C.110, 484C.400.

Malik admitted he smoked a marijuana cigarette earlier that day, but told Garcia he had thrown out the remainder of the marijuana cigarette. Garcia was entitled to rely on Malik’s admission in making the probable cause determination, *cf. United States v. Pope*, 686 F.3d 1078, 1084 (9th Cir. 2012), and was not required to believe Malik’s statement about throwing out the remainder of the marijuana cigarette, *see District of Columbia v. Wesby*, — U.S. —, 138 S. Ct. 577, 592, 199 L.Ed.2d 453 (2018) (observing that “officers are free to disregard either all innocent explanations, or at least innocent explanations that are inherently or circumstantially implausible”), particularly in light of Malik’s changing story about when he smoked the marijuana cigarette, *see id.* at 587 (observing that when a suspect changes his or her story, the officer can “reasonably infer[] that [the person being questioned is] lying and that their lies suggest[] a guilty mind”). We conclude Garcia had probable cause to search the cab and containers therein for evidence of violations of Nevada state law based on Malik’s admission and shifting story.

REVERSED and REMANDED.



whether Garcia had probable cause to search

**UNITED STATES of America,
Plaintiff - Appellee,**

v.

Tommy PEÑA, Defendant - Appellant.

No. 19-2050

United States Court of Appeals,
Tenth Circuit.

FILED June 24, 2020

Background: Following vacatur under *Johnson v. United States* of original aggregate sentence of 480 months for possession of firearm by convicted felon, using or carrying firearm during and in relation to crime of violence, carjacking, and related conspiracy, defendant was resentenced in the United States District Court for the District of New Mexico, William P. Johnson, Chief Judge, 2018 WL 6003538, and he appealed.

Holdings: The Court of Appeals, Seymour, Senior Circuit Judge, held that:

- (1) aggregate sentence of 360 months was procedurally reasonable;
- (2) sentence was not rendered substantively unreasonable based on defendant’s assertions that his conduct was not as egregious as codefendant’s and that he had fired his weapon over roof of car, and not into it;
- (3) sentence was not rendered substantively unreasonable based on defendant’s assertion that district court failed to adequately consider all relevant information regarding postconviction conduct;
- (4) sentence was not rendered substantively unreasonable based on sentencing disparity with codefendant who received sentence of 36 months;

for violations of federal law.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,

Case No. 3:18-cr-00077-MMD-WGC

Plaintiff,

ORDER

v.

HASEEB MALIK and ABDUL MAJID,

Defendants.

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 Findings⁴

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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¹Because 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).

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

³The 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.)

⁴Fed. 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."

1 Malik pulled over to the side of the road and Garcia approached the CMV's
2 passenger side. (*Id.*) Malik opened the passenger door and the curtain to the
3 living/sleeping quarters upon Garcia's request. (*Id.*) After asking Malik for his driver's
4 license and paperwork, Garcia detected the smell of burnt marijuana emitting from the
5 CMV. (ECF No. 40-2 at 3.) Garcia asked Defendants if they were in possession of
6 marijuana on them or inside the vehicle and they said no. (ECF No. 41-1 at 2; ECF No.
7 40-2 at 3.) Malik subsequently admitted that he had bought a pre-rolled marijuana
8 cigarette, but, explained that he had smoked part of it the day before, placed the remainder
9 in his cigarette package, and smoked it about six or seven hours earlier then threw away
10 the filter with any residuals. (ECF No. 40-2 at 3; ECF No. 41-1 at 2; Garcia Body Cam (Exh.
11 A-1) at 04:08:31–04:08:58.)

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

25 About 30 minutes after the stop, at around 9:36 p.m., Zehr arrived on scene.⁵ (ECF
26 No. 41-1 at 2.) Zehr's Body Cam shows that Garcia again explained to him, upon his
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28 ⁵Garcia testified that he was preparing the paperwork relating to the traffic stop while he waited for Zehr.

1 arrival, that Malik admitted to smoking earlier in the day and that both Malik and Majid
2 denied possessing any additional marijuana. (Zehr Body Cam at 04:37:21–04:38:16.) Zehr
3 then told Garcia that they would get Defendants out of the CMV, pat them down, and then
4 search the vehicle. (*Id.* at 04:38:16–04:38:28.) Garcia asked whether he should issue a
5 citation for the speeding first and Zehr told him it did not matter because there was
6 probable cause to search and the driver was out of service. (Garcia Body Cam (Exh. A-1)
7 at 04:38:05–04:38:15.) However, Zehr then mentioned that he was not sure the driver
8 could be ordered out of service if they could not find any marijuana. (*Id.* at 04:38:15–
9 04:38:28; Zehr Body Cam at 04:38:28–04:38:56.) The Troopers expressed wanting to
10 search the vehicle to look for a remaining user amount of marijuana. (Garcia Body Cam
11 (Exh. A-1) at 04:38:51–04:39:07; Zehr Body Cam at 04:39:16–04:39:25.) Zehr explained
12 it was “probably a user amount so they probably – there’s all sorts of places in there they
13 can stash it.” (*Id.*)

14 The Troopers went to the CMV and ordered Malik and Majid to exit. (ECF No. 40-
15 2 at 4.) Zehr asked Defendants who smoked the marijuana. (*Id.*) Malik again admitted that
16 he smoked the marijuana, but provided the timeframe of approximately three to four hours
17 earlier. (*Id.*) Zehr asked where the marijuana was, and Malik again informed that he threw
18 it out. (*Id.*) Garcia advised dispatch that he was doing a probable cause search. (ECF No.
19 41-1 at 3.) At no point did the Troopers conduct a sobriety test on Malik or Majid.

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

1 The Troopers ultimately got a knife and cut into a package. (*Id.*) A white powdery
 2 substance was revealed (*id.*). After detaining Malik and Majid (Zehr Body Cam at
 3 04:54:38–04:57:46), Zehr expressed shock, stating: “[t]here was not even any indicators.
 4 Was there any nervousness?” to which Garcia responded, “No.” (Zehr Body Cam at
 5 05:05:00–05:05:12; Garcia Body Cam (Exh. A-1) at 05:04:45–05:04:53.)

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

17 **III. LEGAL FRAMEWORK**

18 **A. Fourth Amendment Law Regarding Traffic Stops and Reasonable** 19 **Suspicion**

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

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

1 legitimate expectation of privacy in the invaded place. *Katz v. U.S.*, 389 U.S. 347, 353
2 (1967).

3 When a vehicle is stopped by a police officer and its occupants are detained, a
4 seizure within the Fourth Amendment has occurred, even if the purpose of the stop is
5 limited and the resulting detention is quite brief. *Delaware v. Prouse*, 440 U.S. 648, 653
6 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–58 (1976). But a court need
7 not determine the reasonableness of a temporary detention if it determines that the officer
8 had reasonable suspicion to conclude that a traffic violation occurred. See *U.S. v.*
9 *Magallon-Lopez*, 817 F.3d 671, 675 (9th Cir. 2016) (citing *Whren v. United States*, 517
10 U.S. 806, 812–13 (1996)). However, “a seizure that is lawful at its inception can violate
11 the Fourth Amendment if its manner of execution unreasonably infringes interests
12 protected by the Constitution.” *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). “The
13 reasonableness of a seizure . . . depends on what the police in fact do.” *Rodriguez v. U.S.*,
14 135 S. Ct. 1609, 1616 (2015). This inquiry particularly focuses on whether the officer’s
15 conduct “adds time” to the stop. *Id.* at 1616.

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

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

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

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

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

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

4 **B. Fourth Amendment Law Regarding Warrantless Searches**

5 Additionally, “[w]arrantless searches by law enforcement officers ‘are per se
 6 unreasonable under the Fourth Amendment—subject only to a few specifically established
 7 and well-delineated exceptions.’” *United States v. Cervantes*, 703 F.3d 1135, 1138-39 (9th
 8 Cir. 2012) (quoting *Katz*, 389 U.S. at 357). The government bears the burden of showing
 9 that a warrantless search or seizure falls into one of these exceptions. *Id.* at 1141. Here,
 10 the pertinent exception is the automobile exception. Under this exception to the warrant
 11 requirement, officers are required to possess “probable cause” to believe that the vehicle
 12 or its containers within contain contraband or evidence of a crime. *California v. Acevedo*,
 13 500 U.S. 565, 580 (1991). “An officer will have probable cause to search if there is a fair
 14 probability that contraband or evidence of a crime will be found in *a particular place*, based
 15 on the totality of circumstances.” *Cervantes*, 703 F.3d at 1139 (internal quotations and
 16 citations omitted) (emphasis added).

17 **C. Nevada Law**

18 In Nevada, it is now legal for individuals 21 years of age or older to possess an
 19 ounce or less of marijuana anywhere in Nevada, including vehicles. NRS §§ 453D.100,
 20 453D.110. NRS § 453D.110 provides, in relevant part:

21 Notwithstanding any other provision of Nevada law and the law of any
 22 political subdivision of Nevada, except as otherwise provided in this chapter,
 23 it is lawful, in this State, and must not be used as the basis for prosecution
 24 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:

25 1. Possess, use, consume, purchase, obtain, process, or transport
 26 marijuana paraphernalia, one ounce or less of marijuana other than
 concentrated marijuana, or one-eighth of an ounce or less of concentrated
 27 marijuana.

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

3 **IV. DISCUSSION**

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

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

22 **A. Prolonged Stop**

23 The Court’s reasonable suspicion analysis is narrowed by the government’s
 24 concession at the start of the Hearing that reasonable suspicion was developed by Garcia
 25 before Zehr arrived about 30 minutes after the stop. Pertinently, Majid argues that Garcia
 26 ///

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

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

12
 13 ⁸The government’s reliance on *United States v. Sanders*, 248 F. Supp. 3d 339 (D.
 14 R.I. 2017) to support this argument (ECF No. 45 at 5) is misguided. As Majid points out, a
 15 review of *Sanders* shows that the finding of reasonable suspicion there required more than
 16 the odor of marijuana and admission to having smoked marijuana (ECF No. 50 at 13–14).
 17 See *Sanders*, 248 F. Supp. 3d at 346–47. Further, an application of *Sanders* here is
 18 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*.

19 ⁹As an initial matter, it appears Garcia did not decide reasonable suspicion exists
 20 to extend the stop as evidence by his communication with Zehr. In particular, he relayed
 21 what he found to Zehr to seek guidance on what to do—he explained the marijuana odor,
 22 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.

23 Further, during the relevant exchange with Zehr, Garcia made no mention of not
 24 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
 25 the mentioned timeframe. (ECF No. 41-1 at 2.) Moreover, when pressed by defense
 26 counsel about his reason for his lack of belief, Garcia testified that he could not specifically
 27 tell why he believed the timeframe was inconsistent with the smell of marijuana and
 28 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.

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

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

8 **B. Search of the CMV**

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

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

25 ///

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

28 ¹⁰Common 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

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

6 **b. Federal Regulations as Basis to Search the CMV**

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

12 1. The Department of Public Safety hereby adopts by reference the
 13 regulations contained in 49 C.F.R. Parts 40, 382, 383, 385, 387, 390 to 393,
 14 inclusive, 395, 396 and 397, and Appendices B and G of 49 C.F.R. Chapter
 15 III, Subchapter B, as those regulations existed on May 30, 2012, with the
 16 following exceptions: ...

17 2. To enforce these regulations, enforcement officers of the Department of
 18 Public Safety may, during regular business hours, enter the property of a
 19 carrier to inspect its records, facilities and vehicles, including, without
 20 limitation, space for cargo and warehouses.

21 The government argues that under the Federal Motor Carrier Safety Administration
 22 (“FMCSA”), specifically 49 C.F.R. § 392.4, drivers of a commercial motor vehicle are
 23 prohibited from being in possession of or under the influence of any controlled substances
 24 listed under Scheduled I of 21 C.F.R. § 1308.11—which includes marijuana (ECF No. 45
 25 at 14). See 49 C.F.R. § 392.4 (“No driver shall be on duty and possess, be under the
 26 ///

27 ¹¹Additionally, the government fails to pinpoint any federal law—including 21 U.S.C.
 28 §§ 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.

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

7 The Court finds that the government’s leap to probable cause based on 49 C.F.R.
 8 § 392.4 (ECF No. 45 at 14) obscures the bounds of regulatory searches and ultimately
 9 loosens Fourth Amendment protections.

10 First, the government concedes that the administrative search exception is
 11 inapplicable here; yet, claims that the Troopers’ basis to search was grounded in Nevada’s
 12 adoption of 49 C.F.R. § 392.4.¹³ The government’s argument is particularly grounded in
 13 Zehr’s advise to Garcia after Garcia contacted Zehr regarding the combination of
 14 marijuana and the CMV (ECF No. 41-1 at 2). As noted, Zehr advised Garcia that there
 15 was probable cause to search the CMV apparently because it was illegal to possess
 16 marijuana in a CMV, and according to FMCSRs adopted by Nevada pursuant to “NAC
 17 706.247[,],”¹⁴ the driver could be placed out of service for 24 hours (ECF No. 41-5 at 2), so
 18 long as marijuana was actually found during the search (Zehr Body Cam at 04:38:37–
 19 04:38:49).¹⁵

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21 _____
 22 ¹²The latter part of this argument was provided at the Hearing.

23 ¹³The government also cites to 49 C.F.R. § 391.5 as supporting the
 24 “disqualification” of an on-duty commercial motor vehicle driver (ECF No. 45 at 14).
 25 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).

26 ¹⁴Renumbered 706.2471.

27 ¹⁵Although Zehr’s report provides statements regarding use being prohibited under
 28 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.

1 As Majid argues, Zehr's out-of-service advisement was wrong (ECF No. 40 at 14–
2 19). Because the government pinpoints 49 C.F.R. § 392.4, the Court notes that the section
3 is devoid of any requirement for placing a driver out of service for possessing a controlled
4 substance. See 49 C.F.R. § 392.4. The absence of such requirement means Zehr could
5 not have legally put the CMV out of service and search it under this regulatory section. *Cf.*
6 49 C.F.R. § 392.5 (applicable to alcohol, providing that no driver shall be on duty while
7 possessing alcohol *and* must be placed out of service immediately for 24 hours if found to
8 be in violation).

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

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

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

6 Here, Nevada ensures compliance with federal regulations through enactment of a
 7 Commercial Vehicle Safety Plan (“CVSP”), which conforms to the federal Motor Carrier
 8 Safety Assistance Program’s (“MCSAP”) requirements for receiving federal highway
 9 funding “by, inter alia, requiring [NHP] troopers to conduct inspections in a manner
 10 consistent with ‘the North American Standard [(“NAS”)] Inspection procedure.’” *United*
 11 *States v. Orozco*, 858 F.3d 1204 (9th Cir., 2017); 49 C.F.R. § 350.211(d). The state’s
 12 CVSP provides that NHP’s “enforcement activities” include “scheduled and unannounced
 13 roadside inspections.” *Orozco*, 858 F.3d at 1207. Under NAS inspection procedure, “Level
 14 I and Level II Inspections tend to primarily address commercial vehicles while Level III
 15 Inspections focus more on the driver.” *Owner–operator Indep. Driver Ass’n Inc. v. Dunaski*,
 16 763 F. Supp. 2d 1068, 1074 (D. Minn., 2011). The guidelines under Level III—applicable
 17 here—authorize an officer to “[c]heck the cab for possible illegal presence of alcohol,
 18 drugs, weapons or other contraband.” *Knight*, 306 F.3d at 535.¹⁶ Compliance enforcement
 19 is done by NHP troopers “who *are trained to conduct NAS inspections* but are also charged
 20 with *enforcement of Nevada’s criminal laws*.” *Orozco*, 858 F.3d at 1207 (emphasis added).
 21 Moreover, “[t]he [motor carrier safety] regulations make it clear the inspections are limited
 22 in scope to safety concerns. They do not authorize a general search by any law
 23 enforcement officer.” *V–1 Oil Co. v. Means*, 94 F.3d 1420, 1427 (10th Cir. 1996) (internal
 24 citation omitted). Nor do they permit the search of personal belongings. *Knight*, 306 F.3d
 25 at 535–36.

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27 _____
 28 ¹⁶The 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).

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

19 **2. Whether the Troopers Had Probable Cause to Search Based on** 20 **Nevada Law**

21 In any event, the government presents an alternative argument—that the Troopers
 22 had probable cause to search the CMV “for a violation of state law” because Nevada
 23 continues to criminalize the use of marijuana in a wide range of circumstances. (ECF No.
 24 48 at 11–13.)

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

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

3 To begin, the Court is unpersuaded by the government's first argument regarding
4 probable cause to search the CMV based on possible—but not articulated at the relevant
5 time—violations of state law. (*Id.* at 12–13.) The government essentially reargues that the
6 Troopers had probable cause to search based on the odor and Malik's admission to
7 smoking marijuana earlier in the day because (1) smoking marijuana before driving is a
8 state crime, (2) smoking marijuana in a truck while moving or parked is a state crime, and
9 (3) if Malik or Majid possessed any more than one ounce of marijuana, they committed a
10 state crime. (*Id.*) Importantly, in its briefing the government provided nothing more than
11 the odor and admission as supporting a finding of probable cause, and as indicated *supra*
12 and *infra*, these alone are not enough. Next, the first two basis the government argues—
13 smoking before driving and smoking while parked—without inquiry into the particular
14 provisions the government cites¹⁷—would suggest the Troopers did not need to search
15 the CMV at all to charge Malik for violating Nevada law. Yet, the fact here is that the
16 Troopers searched the CMV to look for something more than the odor and admission and
17 made no inquiry into Malik's existing sobriety. Further, the Court considers the odor and
18 smoking admission here within the permissible possession of an ounce or less of
19 marijuana under Nevada law.

20 The Court's probable cause analysis is aided by three decisions from other states
21 where recreational marijuana is now legal in some amount: *People v. Zuniga*, 372 P.3d
22 1052 (Colo. 2016); *Colorado v. Cox*, 401 P.3d 509 (Colo. 2017) and *State v. K.C.-S*, No.
23 73036-3-I, 2016 WL 264960 (Wash. Ct. App. Jan. 19, 2016). The parties respectively
24 contend that this authority supports their position. (ECF No. 41 at 22–24; ECF No. 45 at
25 13; ECF No. 52 at 7–9.) Based on this caselaw and the record here, several factors
26 counsel against a finding of probable cause.

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

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

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

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

28 ///

1 There is great dissimilarity between the facts of *Zuniga*, *Cox*, and *K.C.-S* and this
 2 case. First, the government's opposition fails to address any indicators to suggest that
 3 either Defendant was in possession of marijuana. (ECF No. 45 at 14–16.) To the contrary,
 4 the Troopers' Body Cam footage captured the Troopers' conclusion that Defendants
 5 exhibited no indicia of criminality—particularly nervousness. (Zehr Body Cam at 05:05:00–
 6 05:05:12; Garcia Body Cam (Exh. A-1) at 05:04:45–05:04:53.) Testimony was also
 7 provided at the Hearing that Defendants were cooperative, which also tends to suggest a
 8 lack of criminality or at a minimum is not indicia of criminality. Nonetheless, when Zehr
 9 arrived at the scene of the CMV stop and Garcia advised him a second time of the smell
 10 and admission to use of marijuana, Zehr stated: “well, get them out and we can pat them
 11 down and then we can search, or you want me to search or what.” (Garcia Body Cam
 12 (Exh. A-1) at 04:37:54–04:38:01; Zehr Body Cam at 04:38:16–04:38:28.) The Court
 13 considers this marker to be the ending delineation of its inquiry as to whether probable
 14 cause existed for the search because the Troopers had clearly decided they had probable
 15 cause to search at this moment.

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

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24 ¹⁸As indicated, the government's fallback argument that odor alone satisfies
 25 probable cause is factually unsupported based on the Troopers' reasons for undertaking
 26 the search. The Court therefore declines to address the government's contention that in
 27 this circuit odor alone is enough despite the legalization of possessing an ounce or less of
 28 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).

1 here Body Cam footage documents that Garcia described the smell as a “little
2 marijuana”—thus consistent with Malik’s admission to smoking a single marijuana
3 cigarette. (Garcia Body Cam (Exh. A-1) at 04:16:12–04:16:30; *see also id.* at 04:39:00–
4 04:39:28 (Zehr stating it is “probably a user amount” and suggesting it could be anywhere
5 in the CMV). This Court considers Garcia’s representation as to the amount of marijuana—
6 as evidence of odor—at the time of the stop to be controlling, albeit his suggestion of a
7 stronger odor during his testimony at the Hearing. Notably, Zehr confirmed at the Hearing
8 that at the time of the stop of the CMV Garcia told him he smelled a little marijuana in the
9 cab of the CMV.

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

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

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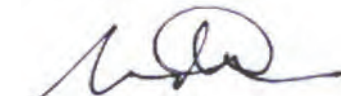
26 ¹⁹Defendants argue in briefing and at the Hearing that *even assuming* that the
27 Troopers had probable cause to search the CMV, the search exceeded the permissible
28 scope of a warrantless search because Garcia went beyond the object of the search and
the particular place wherein he may have objectively 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