IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0190

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KENT RODERICK JENSEN,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Gregory R. Todd, Presiding

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STATEMENT OF THE ISSUE

Did the district court properly deny Appellant's motion to dismiss the charge of Vehicular Homicide While Under the Influence based upon his facial constitutional challenge to Mont. Code Ann. § 61-8-411(1)(a), alleging violations of substantive due process and equal protection under the state and federal constitutions?

STATEMENT OF THE CASE

On July 15, 2016, the State charged Appellant Kent Jensen with felony Vehicular Homicide While Under the Influence pursuant to Mont. Code Ann. § 45-5-106. The State alleged that Jensen negligently caused the death of another person while operating a motor vehicle in violation of Mont. Code Ann. § 61-8-411. (D.C. Doc. 3.)

Jensen intended to rely upon the defense of general denial. (*Id*. at 3.) Jensen filed a Motion to Determine Constitutionality of Statute and to Dismiss Charge. (D.C. Doc. 23.) The motion stated that Jensen moved the court:

> To determine the constitutionality of 45-5-106 MCA (Vehicular Homicide) as it [incorporates] and makes reference to 61-8-411 MCA (Operation of Non Commercial Vehicle or Commercial Vehicle by Person Under Influence of Delta-9 Tetrahydrocannabinol).
>
> Said reference being substantial denial of substantive due process, as it in itself is not support[ed] by the present state of scientific evidence and was not supported by substantial scientific

> evidence at the time of its passage as to be shown at a[n] evidentiary hearing to be held and as supported by the brief filed herewith.

(*Id*.)

Jensen filed a supporting brief in which he argued:

> The simple fact is that there is little substantial research [in] this area. The levels of 5 ng/ml is arbitrary and not supported by the evidence. The Defense at the evidentiary hearing on this motion will introduce expert testimony supporting the present lack of scientific evidence and that the 5 ng/ml limit has no substantial bases in fact or science, even today. Further it will show that the scientific bases used by the legislature was and remains invalid in its support for the adoption of this 5 ng/ml level.
>
> Because of this lack of scientific support[,] the use of the 5ng/ml level in the vehicular homicide statute is unconstitutional as a denial of substantive due process and is arbitrary and capricious and requiring that this charge[] be dismissed.

(D.C. Doc. 24 at 3.)

The State filed a response brief with exhibits. (D.C. Doc. 26.) Jensen filed a reply brief with exhibits. (D.C. Doc. 31.)

On June 2, 2017, the district court held a hearing on Jensen's motion to declare the statute unconstitutional and to dismiss the charge against him. (6/2/17 Transcript of Evidentiary Hearing [Tr.].) The parties submitted post-hearing briefs. (D.C. Docs 45, 48.) On July 24, 2017, the district court issued an order denying Jensen's motion to declare Mont. Code Ann. §§ 45-5-106 and 61-8-411 unconstitutional. (D.C. Doc. 49, attached to Appellant's Br. as App. A.)

In denying Jensen's motion to dismiss based upon an alleged substantive due process violation, the district court first concluded that there is no fundamental right to recreationally consume marijuana or THC. Since Mont. Code Ann. §§ 45-5-106 and 61-8-411 do not implicate a fundamental right, the district court applied a rational basis test to the substantive due process analysis. (Appellant's App. A at 4.) The district court explained:

> Jensen does not suggest that the State does not have a legitimate governmental concern in restricting impaired driving on Montana's highways. *Montana Cannabis*, ¶ 21. Nor does he disagree that THC is the "major psychoactive component" found in the cannabis plant and that it has impairing effects on persons who smoke or ingest it. Logan, [Kacinko] & Beirness, *Per Se Limits for Cannabis*, at 1, 3, 45. Jensen's argument is that the legislature could have developed a sounder threshold number of THC in the blood. That argument is insufficient to prevail on a constitutional challenge to a statute. *Ward v. Johnson*, 2012 MT 96, ¶ 23, 365 Mont. 19, 277 P.3d 1216.
>
> . . . .
>
> Currently there may be no method for precisely measuring the distracting effects of THC on a person. But, it is scientifically proven that THC has major psychoactive effects on people, and, driving while under its effects poses a major risk to the driver and the public. Logan, [Kacinko] & Beirness*, Per Se Limits for Cannabis*, at 45. The legislature has the responsibility to pass laws that provide for the general welfare notwithstanding the absence of a perfect measuring method. Given the context of what is possible to achieve, it was reasonable for the legislature to pass a 5ng/ml THC limit, even though that may not satisfy the scientific certitude that Jensen seeks. "[R]ational distinctions may be made with substantially less than mathematical exactitude." *Ward*, ¶ 23, [(]internal citations omitted). Finally, driving on the public highways while under the influence of THC is a serious danger to a driver, other travelers and the public. Therefore, curtailing the ingestion of THC before or during driving is

> a legitimate government concern. And, establishing a threshold of 5 ng/ml of THC is a reasonable, rational and effective means of accomplishing that objective. *Montana Cannabis*, ¶ 21.

Id. at 4-5.

Jensen filed an Acknowledgement of Waiver of Rights and Plea Agreement with the court. (D.C. Doc. 75.) Pursuant to the plea agreement, Jensen agreed to plead guilty to Vehicular Homicide While Under the Influence, reserving his right to appeal the court's denial of the motion to dismiss the charge. The State agreed to recommend a 30-year prison sentence with 10 years suspended. (*Id*. at 1-2.) At a hearing on December 4, 2017, Jensen pled guilty to Vehicular Homicide While Under the Influence. (D.C. Doc. 74.)

The State filed a sentencing memorandum in support of its sentencing recommendation of 30 years in prison with 10 years suspended. (D.C. Doc. 77.) Jensen filed a sentencing memorandum recommending a sentence of 25 years with the Department of Corrections with 20 years suspended. (D.C. Doc. 78 at 7.) Adult Probation and Parole filed a presentence investigation with the court. (D.C. Doc. 80.)

The district court held a sentencing hearing on January 31, 2018, after which it sentenced Jensen to the Department of Corrections for 25 years with 20 years suspended. (D.C. Doc. 81.)

STATEMENT OF THE FACTS

I. The offense[1]

On March 7, 2016, at 6:59 p.m., Montana Highway Patrol Trooper Munson responded to a car versus motorcycle crash at the intersection of South Frontage Road and Wise Lane in Yellowstone County. When Trooper Munson arrived, Lieutenant O'Donnell of the Yellowstone County Sheriff's Office informed Trooper Munson that the driver of the motorcycle, J.F., had been pronounced dead at the scene. J.F. died from multiple blunt force injuries caused by the crash. (D.C. Doc. 1 at 2.)

At the scene, Jensen told Trooper Munson that he had stopped at the stop sign on Wise Lane at South Frontage Road. Jensen said he was turning left and never saw J.F.'s motorcycle until moments before the impact. Jensen told Trooper Munson that he had not consumed any alcohol or drugs. Trooper Munson read Jensen the Montana Implied Consent Advisory and requested a blood draw. Jensen consented. The results showed 19 ng/ml of THC quantitated in Jensen's blood. (D.C. Doc. 1 at 2.)

Jensen told Trooper Munson that he had spent the day at a friend's house located just off South Frontage Road, a few miles west of the crash site. Jensen

[1] Since Jensen pled guilty to Negligent Vehicular Homicide While Under the Influence, the State has taken the facts related to the offense from the Affidavit and Motion for Leave to File an Information (D.C. Doc. 1) in the district court record.

said he left his friend's house to go get a sandwich from Subway. Jensen was returning to his friend's house when he hit the motorcycle. Jensen reported that when he got to the stop sign on Wise Lane and South Frontage Road, he looked both ways and did not see any traffic. Jensen reported that he saw J.F.'s headlight and then "smack." (D.C. Doc. 1 at 2.)

Jensen surmised that maybe he took too quick of a look at the oncoming lane. He pulled out to make a left turn and saw J.F.'s motorcycle coming right at him. Jensen reported it was too late to do anything. (D.C. Doc. 1 at 2.) Nathan Schmitz reported to Trooper Munson that he witnessed the crash. Schmitz was a passenger in a vehicle traveling eastbound on Interstate 90 adjacent to the crash site. Schmitz looked over and saw Jensen's car pull out from Wise Lane. Schmitz saw the motorcycle wobble about 20 feet before impact. Schmitz went to the crash site and administered CPR to J.F. until emergency medical providers arrived. (D.C. Doc. 1 at 2.)

Trooper Munson interviewed Jensen's friend, Isaac Rodriguez, who had spent the day with Jensen prior to the crash. Rodriguez reported that he and Jensen had been smoking marijuana throughout the day. Following the crash, Jensen called Rodriguez and said, "I'm scared that my levels are gonna come back high." (D.C. Doc. 1 at 3.)

II. The motion to dismiss

Robert Lantz is the director of Rocky Mountain Instrumental Laboratories in Fort Collins, Colorado. He has been in this position since 1980 and considers his specialties to be toxicology and analytical chemistry. Rocky Mountain Instrumental Laboratories focuses on high-tech testing for the prosecution, for the defense, and for drug companies. (Tr. at 4-6.)

Dr. Lantz has a Ph.D. in analytical chemistry. He has not performed any research concerning the effect of cannabis on individuals. (Tr. at 6.) Dr. Lantz primarily testifies as a defense expert in Colorado. (Tr. at 8.) Dr. Lantz has 15 peer-reviewed publications in scientific journals. (Tr. at 9.) Dr. Lantz opined that cannabis is vastly more complex than anybody originally thought, and it is not possible to correlate the concentration of cannabis with the effect. (Tr. at 11.)

Dr. Lantz testified that a 5-nanogram limit of THC for driving under the influence of a drug does not adequately correlate to impairment, explaining:

> There is a lot of variability person to person. Even at the same concentration, one person may be impaired and the other one not. It is not like alcohol where if you are a 0.2, you are intoxicated, and everybody, with rare exceptions, is intoxicated. A 5- or 10-nanogram per ml THC might be useful for saying the person might be impaired. Well, if I were a ten, it's highly likely that I would be impaired, but I lived through the '60s without smoking, and so somebody who smokes every day or nearly every day, and there are many instances where people smoke several times a day, and they are not impaired.
>
> The same thing is true for many other drugs which are politically less important, things like methadone, Oxycodone. Some people are severely impaired at x level that might kill everyone in the

> courtroom, and they would—but other people wouldn't be impaired at the same level.

(Tr. at 12-13.) Dr. Lantz stated that if there is active THC detected in a person's blood, there is no way to correlate that with a level of impairment. (Tr. at 19.) In Dr. Lantz's estimation, there is no science to support any THC per se statute. (Tr. at 26.) Dr. Lantz stated it was impossible to establish a uniform minimum level of impairment based on a nanogram level of THC. As a result, he considered Montana's 5 nanogram limit to be an arbitrary number. (Tr. at 32.)

Dr. Lantz acknowledged that there are "hundreds and hundreds" of scientific papers published on the topic of THC levels and impairment. Dr. Lantz also acknowledged that there are "differences of opinions" expressed in those hundreds of scientific papers. (Tr. at 34.) It is Dr. Lantz's opinion that a per se THC limit of any kind is not supported by science. (Tr. at 40.)

Jon Bennion, Chief Deputy of the Montana Attorney General's Office, testified regarding the passage of House Bill 168, enacted as Mont. Code Ann. § 61-8-411 during the 2013 Montana legislative session. (Tr. at 49-50.) The purpose of House Bill 168 was to establish a per se limit for THC. (Tr. at 52.) Bennion had sought input from professionals at the Montana State Crime Lab and from the Montana Highway Patrol. (Tr. at 54.) Bennion explained that the Attorney General's Office had proposed some amendments to House Bill 168:

> So the ones that I remember us really focusing in on are specifically identifying the Delta Nine aspect of the THC and excluding metabolites, that was something that we saw as a way to improve the law; and then I think originally [the] bill had things in there about urine tests and saliva tests, and I think we asked if we could just exclude those and have it focus on blood evidence.

(Tr. at 54.)

During both the House and Senate Judiciary Committee hearings, there was no strong opposition to the bill. The bill came out of the House Judiciary Committee on a 14 to 6 vote. It passed the House floor on third reading in an 80 to 18 bipartisan vote. The bill passed the Senate Judiciary Committee in a strong 11 to 1 bipartisan vote and went to the Senate Floor. On the third reading the bill passed in the Senate on a 48 to 2 vote. (Tr. at 56-57.)

Missoula County Sheriff Carl Ibsen wrote a letter in support of House Bill 168. Sheriff Ibsen stated:

> In Montana, and nationally, we find that a large number of impaired drivers are under the influence of alcohol, marijuana (THC) or a combination of both. Additionally involved can be prescription drugs.
>
> Statistics indicate that approximately half of the alcohol impaired drivers who kill someone in a wreck are also under the influence of marijuana (THC), creating an even deadlier combination.
>
> Such was the case with the young man who killed my wife, Judy Wang, in a horrific crash on I-90 near Warm Springs on 25 September 2009.
>
> . . . .

> HB 168 will provide one more tool for Montana and the law enforcement officers of Montana to use in our battle against impaired drivers and the carnage they wreak on society.

(State's Ex. 2 attached to D.C. Doc. 26.)

Sarah Braseth, a forensic toxicologist with the Montana Forensic Science Division, prepared a fact sheet for HB 168. The fact sheet included three categories of information: (1) that HB 168 established a per se threshold for blood delta-9-tetrahydrocannabinol (THC) and distinguished THC from its metabolites; (2) that science supports a 5 ng/ml blood THC limit as a reasonable guideline for separating impaired from unimpaired drivers; and (3) that heavy marijuana users should have their blood THC level fall below 5 ng/ml if they wait a few hours before driving. (*Id*.) Braseth attached a bibliography for marijuana impairment and driving research. (*Id*.)

At the time of the hearing on Jensen's motion to dismiss, there had been no other constitutional challenge to Mont. Code Ann. § 61-8-411. (Tr. at 69.)

SUMMARY OF ARGUMENT

This Court has previously recognized that in Montana driving is a privilege, not a right, the State has a compelling interest in keeping unsafe drivers off Montana's roadways, and ingesting recreational marijuana, which is illegal in Montana, is not a protected constitutional right. Montana Code Annotated § 61-8-

411(1)(a) is rationally related to the State's compelling interest in highway safety. Montana's per se statute is presumed constitutional, and Jensen has failed to prove beyond a reasonable doubt that Mont. Code Ann. § 61-8-411(1)(a) facially violates the constitutional guarantees of substantive due process and equal protection.

Jensen's facial constitutional challenge to the per se statute fails because he does not show that the law is unconstitutional in all its applications. Jensen and his expert acknowledged that some recreational marijuana users driving while their delta-9-tetrahydrocannabinol level is 5 ng/ml or greater will be impaired. Thus, Jensen's facial constitutional challenge fails.

Jensen fails to prove that Mont. Code Ann. § 61-8-411(1)(a) is not reasonably related to the permissible legislative objective of preventing drug impaired driving. Jensen argues that the statute is unconstitutional because there is no science that can establish with certainty that every driver with a delta-9-tetrahydrocannabinol level of 5 ng/ml or greater in his blood will be impaired. But when a court analyzes a statute under the rational basis standard, the statute must survive a constitutional challenge even where there is an imperfect fit between means and ends.

ARGUMENT

I. The standard of review

A district court's denial of a motion to dismiss in a criminal case is a question of law this Court reviews de novo for correctness. *State v. Davis*, 2016 MT 102, ¶ 8, 383 Mont. 281, 371 P.3d 979. This Court exercises plenary review of constitutional issues. *Id*.

The constitutionality of a statute is presumed "unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt." *Powell v. State Comp. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877. If any doubt exits, it must be resolved in favor of the statute. *Id*. The party challenging a statute bears the burden of proof. *Big Sky Colony, Inc. v. Mont. Dep't of Labor & Indus.*, 2012 MT 320, ¶ 16, 368 Mont. 66, 291 P.3d 1231.

II. The district court properly denied Jensen's motion to dismiss based on his argument that Mont. Code Ann. § 61-8-411(1)(a) is unconstitutional.

Jensen pled guilty to Vehicular Homicide While Under the Influence, pursuant to Mont. Code Ann. § 45-5-106(1), which provides that a person commits the offense if the person negligently causes the death of another human being while the person is operating a vehicle in violation of 61-8-411. Jensen asserts that Mont. Code Ann. § 61-8-411(1)(a) is facially unconstitutional. This statute

provides that it is unlawful for any person to drive or be in actual physical control of:

> (a) a noncommercial vehicle upon the ways of this state open to the public while the person's delta-9-tetrahydrocannabinol level, excluding metabolites, as shown by analysis of the person's blood, is 5 ng/ml or more[.]

A. Jensen has failed to meet his burden of proving his facial challenge that Mont. Code Ann. § 61-8-411(a) violates substantive due process under the state and federal constitutions.

1. Introduction

In the trial court, Jensen argued that Mont. Code Ann. § 61-8-411(1)(a) violated his right to substantive due process. Due process "emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated." *Mont. Cannabis Indus. Ass'n* ¶ 19, 2016 MT 44, 382 Mont. 256, 368 P.3d 1131, *quoting Evitts v. Lucey*, 469 U.S. 387, 405 (1985). This Court has recognized that substantive due process reflects a principle distinct from that which procedural due process protects:

> If an individual asserts that the government must provide him with some type of procedural safeguards before the government takes an interest from him, he must demonstrate that the interest constitutes life, liberty, or [p]roperty. . . . There is no need to define life, property or liberty for a substantive due process analysis. . . . All laws might be said to restrict [an] individual's use of property rights or personal liberty, in the sense of restricting which actions the individual can take in society. Laws regulating property or liberty that do not restrict the exercise of a fundamental right should be upheld unless the person attacking the law can overcome the presumption of constitutionality

> and demonstrate that the law is not rationally related to a legitimate interest.

Mont. Cannabis Indus. Ass'n, ¶ 20, *quoting* Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, § 15.5 at 847-48 (5th ed. 2012.)

Where, as here, a fundamental right is not implicated[2], "[s]ubstantive due process analysis requires a test of the reasonableness of a statute in relation to the State's power to enact legislation." *Mont. Cannabis Indus. Ass'n*, ¶ 21, *quoting Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 33, 353 Mont. 265, 222 P.3d 566. The State cannot use its power to take an unreasonable, arbitrary, or capricious action against an individual, so a statute enacted by the legislature must be reasonably related to a permissible legislative objective to satisfy substantive due process guarantees. *Mont. Cannabis Indus. Ass'n*, ¶ 21.

Because Jensen makes a facial challenge to Mont. Code Ann. § 61-8-411(1)(a), to prevail, Jensen must show that "no set of circumstances exists under which the [statute] would be valid, *i.e.*, that the law is unconstitutional in all of its applications." *Mont. Cannabis Indus. Ass'n*, ¶ 14, *quoting Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008).

[2] This Court has previously ruled there is no fundamental right to medical marijuana. *Mont. Cannabis Indus. Ass'n*, ¶ 5, *citing Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 35, 366 Mont. 224, 286 P.3d 1161.

2. Jensen's facial challenge to Mont. Code Ann. § 61-8-411(1)(a) on substantive due process grounds fails.

a. Jensen fails to prove Mont. Code Ann. § 61-8-411(1)(a) is facially unconstitutional.

Jensen's facial constitutional challenge to Mont. Code Ann. § 61-8-411 fails at the outset because Jensen has not proved that no set of circumstances exists where the statute would not be constitutional. Jensen's entire constitutional challenge is premised on his theory that not every marijuana user driving while the person's delta-9-tetrahydrocannabinol level, as shown through a blood test, is 5 ng/ml or greater would be driving impaired. But the converse of Jensen's theory is equally valid—not every marijuana user driving while the person's delta-9-tetrahydrocannabinol level, as shown through a blood test, is 5 ng/ml or greater, would be driving unimpaired. Under Jensen's own argument and theory, there is a set of circumstances where the per se statute is constitutional. Jensen's own expert recognized as much when he testified that 5 or 10 ng/ml "might be useful for saying the person might be impaired." (Tr. at 12-13.) Consequently, Jensen's facial challenge to the statute fails.

b. Mont. Code Ann. § 61-8-411(1)(a) is reasonably related to a permissible legislative objective.

This Court has previously acknowledged two important related principles. First driving in Montana constitutes a privilege, not a right. *State v. Michaud*, 2008 MT 88, ¶ 58, 342 Mont. 244, 180 P.3d 636. And second, the State has a

compelling interest in keeping unsafe drivers off the road. *State v. Pyette*, 2007 MT 119, ¶ 17, 337 Mont. 265, 159 P.3d 232. Also, Jensen "agrees with the State when it asserted the purpose of House Bill 168 was to prevent drug-impaired driving." (Appellant's Br. at 20.)

Thus, Jensen argues that the per se level is not reasonably related to what he acknowledges is a permissible legislative objective to prevent drug impaired driving. Under Jensen's analysis, no per se level would ever be reasonably related to the permissible legislative purpose of preventing drug impaired driving because, whatever the level, it would be inherently arbitrary because it is not scientifically supported to a level of certainty for every recreational marijuana user who drives after that recreational use. (Appellant's Br. at 20.)

Although this Court has not yet considered such a challenge to Mont. Code Ann. § 61-8-411(1)(a), other state courts have rejected substantive due process challenges to similar statutes. For example, in *Loder v. Iowa DOT*, 622 N.W.2d 513 (Iowa Ct. App. 2000), Loder challenged the constitutionality of Iowa's zero tolerance marijuana statute through a driver's license revocation proceeding. *Id*. at 514. Loder argued that the presence of marijuana metabolites in a person's system bears no rational relationship to that person's ability to safely drive. *Id.* at 515. Consequently, Loder argued that Iowa's zero tolerance statute did not protect public safety. *Id*. Loder relied upon expert testimony to establish that "there is not

a direct mathematical relationship or correlation between a urine/drug test and drug effect with this drug [marijuana] as there is with the drug alcohol." *Id* at 516.

In rejecting Loder's constitutional challenge to Iowa's per se statute, the court explained:

> The lack of any numerical correlation or direct relationship between the amount of marijuana metabolites in a person's system and the impairment of that person's ability to drive does not foreclose the finding that the statute is rationally related to protecting the public. The statute is aimed at keeping drivers who are impaired because of the use of illegal drugs off the highways. Unlike the blood alcohol concentration test used to measure alcohol impairment there is no similar test to measure marijuana impairment. There is, though, as was used here, a test to measure the use of marijuana, a drug illegal in the State of Iowa, in a person's body. There being no reliable indicator of impairment, the legislature could rationally decide that the public is best protected by prohibiting one from driving who has a measurable amount of marijuana metabolites.

Id.; *see also State v. Comried*, 693 N.W.2d 773, 776 (Iowa 2005) ("[t]he legislature could reasonably have imposed such a ban because the effects of drugs, as contrasted to the effects of alcohol, can vary greatly among those who use them"); *State v. Childs*, 898 N.W.2d 177, 185 (Iowa 2017) ("It is not absurd for the legislature to enact a per se, or zero-tolerance, ban on driving with [a controlled substance] in one's body, given the absence of an available scientific test to determine what level of [controlled substance] impairs driving.").

In *Shepler v. State*, 758 N.E.2d 966 (Ind. Ct. App. 2001), the court rejected Shepler's constitutional challenge to Ind. Code § 9-3-5-1 on substantive due

process grounds. The Indiana statute provides that it is a class C misdemeanor to operate a vehicle with a schedule I or II controlled substance in one's blood. *Id*. at 968. Shepler argued that there was no basis for the deprivation of his liberty because the statute did not quantify the amount of controlled substances necessary to cause impairment. *Id*. at 970. The court disagreed, noting that the record before it established that there was no accepted toxicological agreement as to the amount of marijuana necessary to cause impairment. The court used the lack of toxicological agreement to conclude:

> The legislative decision to prohibit those with any level of controlled substances in their body from driving cannot be said to be without a rational basis. The legislature did not act arbitrarily in deciding that any person who operates a vehicle with any level of a controlled substance in their body is endangering others and should be subject to criminal charges.

Id.

The Ohio Court of Appeals rejected a constitutional vagueness and overbreadth challenge to Ohio's marijuana per se statute, explaining:

> Although Mr. Whalen couches his arguments in terms of vagueness and overbreadth, his real quibble seems to be with the legislative decision to criminalize driving based upon the presence of a marihuana metabolite that may not itself cause impairment. Certainly, however, the presence of a marihuana metabolite in one's system indicates that one has used marihuana, an illegal drug in Ohio. Furthermore, THC, the active ingredient in marihuana, leaves the body relatively quickly. Unlike the case with alcohol breathalyzer tests, which are commonly administered by police during roadside stops, it may take some time before police are able to transport and administer a blood or urine test to a suspected drugged driver.

> Accordingly, the legislative decision to include marihuana metabolites within the per se prohibition is not unreasonable.

State v. Whalen, 991 N.E.2d 738, 743-44 (Ohio Ct. App. 2013.)

In *Williams v. State*, 118 Nev. 536, 50 P.3d 1116 (2002), after a jury convicted Williams of six counts of driving with a prohibited substance in the blood or urine, Williams challenged the constitutionality of Nev. Rev. Stat. § 484.379(3), which provides that it is unlawful for a person to drive or be in actual physical control of a vehicle on a highway with 2 ng/ml of marijuana or 5 ng/ml of marijuana metabolite. *Williams*, at 1119. In support of her due process challenge to the statute, Williams argued that the State could not deprive her of her right to drive while having "low" levels of marijuana because "there is no rational, non-arbitrary connection to a legitimate purpose." *Id*. at 1122. Williams also argued that the means the legislature utilized to achieve its legitimate purpose was too onerous because there is no legitimate interest in prosecuting unimpaired drivers. *Id*.

The Nevada Supreme Court disagreed, explaining:

> As previously discussed, there are several ways in which the statute could be rationally related to legitimate governmental objectives. One plausible rationale suffices even if not considered or articulated by the Legislature. Further, when the constitutionality of a statute is examined using the rational basis standard, the state is not compelled to use the least restrictive means to reach the desired objective. A statute analyzed under this standard must survive a constitutional challenge "even when there is an imperfect fit between means and ends."

Id., *quoting Heller v. Doe*, 509 U.S. 312, 321 (1993).

Here, Jensen is arguing that Montana's per se statute is unconstitutional because there is an imperfect fit between means and ends. Jensen has not met his burden of proving Mont. Code Ann. § 61-8-411(1)(a) violates substantive due process under either the state or federal constitution.

B. Jensen's facial challenge to Mont. Code Ann. § 61-8-411(1) on equal protection grounds fails.

For the first time on appeal, Jensen makes a facial constitutional challenge to Mont. Code Ann. § 61-8-411(1) on equal protection grounds.

1. Introduction

This Court has explained that the principal purpose of the Montana Constitution's Equal Protection Clause, article II, section 4, is "to ensure that Montana's citizens are not subject to arbitrary and discriminatory state action." *Mont. Cannabis Indus. Ass'n*, ¶ 15, *citing Powell*, ¶ 16. When considering an equal protection challenge, this Court first identifies the classes involved and determines whether the classes are similarly situated." *Mont. Cannabis Indus. Ass'n*, ¶ 15. If the Court determines that the challenged statute creates classes of similarly situated persons, it then decides whether the law treats the classes in an unequal manner. Here, it is Jensen's burden to demonstrate that "the state has adopted a classification that affects two or more similarly situated groups in an unequal

manner." *Mont. Cannabis Indus. Ass'n*, ¶ 15, *quoting Bustell v. AIG Claims Serv. Inc.*, 2004 MT 362, ¶ 20, 324 Mont. 478, 105 P.3d 286.

Assuming Jensen could successfully demonstrate a legislative classification, this Court would then determine the level of scrutiny to apply. The Court applies three recognized levels of scrutiny—strict, intermediate, or rational basis. *State v. Davison*, 2003 MT 64, ¶¶ 10-11, 314 Mont. 427, 67 P.3d 203.

Strict scrutiny applies if the law affects a suspect class or threatens a fundamental constitutional right. In such a case, the State must show that the law is narrowly tailored to serve a compelling state interest. *Id*. ¶ 11. Marijuana users are not a suspect class, and illegally ingesting marijuana is not a fundamental constitutional right.

Intermediate scrutiny applies if the law affects a right conferred by the constitution, but not found in the constitution's declaration of rights. In this instance, the State must show that the law is reasonable—that the need for the resulting classification outweighs the value of the right to the individual. *Id*. Illegally ingesting marijuana is not a right conferred by the constitution.

Rational basis scrutiny is appropriate if neither strict scrutiny nor intermediate scrutiny apply. The State must prove that the law is rationally related to a legitimate government interest. *Id*.

2. Jensen fails to demonstrate that Mont. Code Ann. § 61-8-411(1) violates equal protection principles.

Jensen seemingly argues that the two classes of similarly situated individuals are "unimpaired" drivers with a blood analysis level of delta-9-tetrahydrocannabinol at 5 ng/ml or greater and "impaired" drivers with a blood analysis level of delta-9-tetrahydrocannabinol at 5 ng/ml or greater. Stated another way, Jensen's classifications are novice users of illegal marijuana driving a motor vehicle with delta-9-tetrahydrocannabinol at 5 ng/ml or greater and experienced users of illegal marijuana driving a motor vehicle with delta-9-tetrahydrocannabinol at 5 ng/ml or greater. According to Jensen, the novice users driving with 5 ng/ml or greater of delta-9-tetrahydrocannabinol in their system would likely be impaired, while the more experienced users driving with 5 ng/ml or greater of delta-9-tetrahydrocannabinol in their system would likely not be impaired.

But the statute only creates one classification—people who illegally use recreational marijuana and drive with 5 ng/ml or greater of delta-9-tetrahydrocannabinol in their system. Jensen's argument fails at the outset because he does not identify a classification that would warrant equal protection analysis under any level of scrutiny. *See State v. Schulz*, 34 N.E.3d 176, ¶¶ 13-15 (Ohio Ct. App. 2015). Even if this Court were to disagree, Jensen's equal protection challenge fails because Jensen does not have a constitutionally protected right to

illegally use any amount of recreational marijuana, and Mont. Code Ann. § 61-8-411(1)(a) is rationally related to the legitimate government interest of reducing impaired driving and promoting public safety.

This Court has previously recognized that the State has a *compelling* interest in keeping unsafe drivers off the road. *Pyette*, ¶ 17. As set forth above in addressing Jensen's substantive due process challenge, Mont. Code Ann. § 61-8-411 is rationally related to that interest. Consistent with many other state courts, the district court correctly concluded:

> Currently there may be no method for precisely measuring the distracting effects of THC on a person. But, it is scientifically proven that THC has major psychoactive effects on people, and, driving while under its effects poses a major risk to the driver and the public. Logan, [Kacinko] & Beirness, *Per Se Limits for Cannabis*, at 45. The legislature has the responsibility to pass laws that provide for the general welfare notwithstanding the absence of a perfect measuring method. Given the context of what is possible to achieve, it was reasonable for the legislature to pass a 5ng/ml THC limit, even though that may not satisfy the scientific certitude that Jensen seeks. "[R]ational distinctions may be made with substantially less than mathematical exactitude." *Ward*, ¶ 23, [(]internal citations omitted). Finally, driving on the public highways while under the influence of THC is a serious danger to a driver, other travelers and the public. Therefore, curtailing the ingestion of THC before or during driving is a legitimate government concern. And, establishing a threshold of 5 ng/ml of THC is a reasonable, rational and effective means of accomplishing that objective. *Montana Cannabis*, ¶ 21.

(Appellant's App. A at 5); *see also Schulz*, ¶¶ 16-17.

CONCLUSION

Montana Code Annotated § 61-8-411(1)(a) is presumed constitutional. Jensen has failed to meet his burden of proving that the statute is facially unconstitutional either as a violation of substantive due process or of equal protection. This Court should affirm the order of the district court concluding that Mont. Code Ann. § 61-8-411(1)(a) is a constitutional exercise of legislative authority rationally related to the State's compelling interest in keeping unsafe drivers off Montana's roadways.

Respectfully submitted this 21st day of July, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,763 words, excluding cover page, table of contents, table of authorities, signatures, certificate of service, certificate of compliance, and appendices.

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CERTIFICATE OF SERVICE

I, Tammy Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-21-2020:

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