STATE OF IDAHO)
County of KOOTENAI)ss

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AT 4:45 O'clock P.M
CLERK, DISTRICT COURT

Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, *Plaintiff,* vs. **JUSTIN THOMAS YOUNGMAN,** *Defendant.*	Case No. **CR28-20-2717** **MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS**

Defendant JUSTIN THOMAS YOUNGMAN's Motion to Suppress is **DENIED**.
Benjamin M. Onosko Coeur d'Alene, lawyer for defendant Youngman
Stanley Mortensen, Dep. Pros. Attorney, lawyer for plaintiff State of Idaho
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I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

On February 20, 2020, defendant Justin Thomas Youngman (Youngman) was charged with the felony offenses Trafficking in Heroin (more than 2 grams less than 7 grams), I.C. § 37-2732B(a)(6)(A) and Possession of a Controlled Substance, Methamphetamine, I.C. § 37-2732(c)(1), for events that allegedly occurred on February 19, 2020. Complaint, 1-2. By citation, Youngman was also charged with driving under the influence, I.C. § 18-8004(1)(a). Information 1-3. Youngman is also accused of being a habitual offender under I.C. § 19-2514. *Id.* at 2-3.

On April 9, 2020, an arraignment hearing occurred with defendant Youngman present appearing telephonically (due to the COVID 19 virus pandemic) from the Kootenai County Jail. At that hearing Youngman was represented by his attorney, Benjamin Onosko (Onosko). At no time did Onosko or Youngman object to the hearing taking place telephonically. Youngman remained silent when asked for his plea. The Court then asked

Youngman if he was willing to waive his right under I.C.R. 43(a)(1) and (2) to appear in person for arraignment and entry of a plea. After having the opportunity to consult with his attorney in private, Youngman refused to waive that right. An in-person hearing was scheduled for April 16, 2020. On April 16, 2020, Youngman was transported for an in-person hearing before the undersigned. At that hearing, he was represented by attorney Linda Payne. At that hearing, when asked for his plea, Youngman again remained silent and a not guilty plea was entered. His case was set for jury trial.

On April 27, 2020, Onosko, on behalf of Youngman, filed a Brief in Support of Motion to Suppress. The following are the facts claimed by Youngman:

> On February 19, 2020, officer Klitch stopped a vehicle driven by Mr. Youngman for allegedly violating traffic laws. Officer Klitch approached the passenger side of the vehicle and spoke with Mr. Youngman through the passenger side window. The officer told Mr. Youngman that he pulled his vehicle over for not signaling and having a muffler that was too loud. The officer asked Mr. Youngman several questions, and Mr. Youngman answered the officer's questions appropriately.
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> After speaking to Mr. Youngman for approximately one minute, the officer stopped pursuing the alleged traffic violations in this case and began a DUI investigation on Mr. Youngman. Officer Klitch reported that he suspected a DUI because Mr. Youngman talked fast, had jerky movements, and his eyes were glassy and slightly bloodshot.
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> A short time later, a second officer arrived. Officer Klitch asked that officer to go and speak with Mr. Youngman to see if he thought Mr. Youngman might be under the influence. That officer told officer Klitch he though Mr. Youngman might just not be all there, or he could be under the influence. Officer Klitch only replied that Mr. Youngman was talking fast.
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> Officer Klitch conducted a Modified Romberg test and an HGN test on Mr. Youngman. Mr. Youngman sometimes indicated he would conduct other SFST, and at other times indicated he didn't want to conduct SFST. Officer Klitch eventually placed Mr. Youngman in the back of his vehicle, read him the ALS advisory and prepared a breath test. Officer Klitch also searched Mr. Youngman's person and allegedly discovered a small amount of heroin.
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> While officer Klitch was advising Mr. Youngman of his ALS rights, officer Knisely (sic) arrived on scene with her K-9. Officer Knisely (sic) walked the dog around the vehicle for the purpose of conducting a free air sniff. While this was going on, officer Knisely (sic) allowed her K-9 to jump on Mr. Youngman's vehicle and stick its face inside the vehicle. After this, the dog gave a positive alert for the presence of drugs. Based

on this positive alert for the odor of narcotics, officer Knisely (sic) searched the vehicle and discovered methamphetamine and heroin inside the vehicle.

Br. In Supp. of Mot. to Suppress 1-2. Both Idaho State Police Sergeant Justin Klitch and Coeur d'Alene City Police Officer Amy Knisley testified at the June 1, 2020, hearing on Youngman's motion to suppress. Onosko's summary above is at times accurate with the police report, the body camera and dash camera recordings, and the testimony of Sergeant Klitch and Officer Knisley at the June 1, 2020, hearing. At times it is not accurate. Onosko's summary omits the fact that Sergeant Klitch arrested Youngman for driving under the influence. Preliminary Hearing Tr. 18, L. 10-11. Onosko's summary claims "officer Knisely (sic) allowed her K-9 to jump on Mr. Youngman's vehicle and stick its face inside the vehicle." Officer Knisley testified on June 1, 2020, that her dog Pecco, certified in narcotics detection and apprehension/detention, put his nose in the open window "a couple of inches." Sergeant Klitch's dash camera video and Officer Knisley's body camera video clearly show Pecco placed its front paws on the top of the driver's door for less than three seconds. The driver's window was down; it was open. The video shows Youngman left it open when he exited his vehicle. Even though Youngman initially spoke to Sergeant Klitch through his open passenger window, it was Youngman who left his driver's window down. In that less than three seconds where Pecco had his front paws on Youngman's rolled-down window frame, Pecco sniffed once without breaking the plane of where the window would have been if rolled up, and sniffed a second time breaking that plane with only the tip of its nose. On the recording, one can clearly still see that at the furthest that Pecco put his nose inside that plane, one can still see Pecco's eyes well outside of Youngman's vehicle, so the dog did not "stick its face inside the vehicle." It is not true that "Mr. Youngman sometimes indicated he would conduct other SFST, and at other times indicated he didn't want to conduct SFST." The truth is, after the second test, the HGN, Youngman simply refused and never again cooperated. Early on in the stop, Sergeant Klitch asked Youngman to perform the Romberg test, with which Youngman complied and failed. Sergeant Klitch then went to his patrol vehicle to discuss Youngman's driving status with dispatch. Youngman remained outside, free to leave (since he gave no license to Sergeant Klitch), all alone in between the back of his vehicle and in front of Sergeant Klitch's vehicle. When Sergeant Klitch came back to Youngman, Sergeant Klitch explained the remaining tests and asked Youngman if he would do the rest of the tests, to which Youngman, after rambling, said, "I will do them if you insist." Then, after two more minutes of Youngman rambling, complaining about the tests, and asking, "Can't I just do a breathalyzer", Sergeant Klitch asks, "Are you going to do the tests?" and Youngman responds, "Yeah I'll do the tests." Sergeant Klitch asks Youngman if he wanted to tie his shoes first, and Youngman tied his shoes. Then, after two more minutes of Youngman rambling and speaking very rapidly, jumping from topic to topic, Youngman performs the Horizontal Gaze Nystagmus (HGN) test. After completing the HGN, Sergeant Klitch explained the heel to toe walk and turn test and asked Youngman, "Will you do that?" Youngman responded, "It just seems silly to me. I think you are just going to be trying to find something wrong." Sergeant Klitch patiently asks Youngman if he is going to do the other three tests. Youngman rambles but doesn't respond. Sergeant Klitch then asks, "Are you going to take the tests, yes or no?" to which Youngman rambles again and does not respond. Sergeant Klitch offers to skip the heel to toe walk and turn test and go directly to the one leg stand test, and Youngman responds, "I don't think I want to do any of them, I don't feel comfortable with them." Sergeant Klitch offers to skip that test and go to the alphabet and counting tests. Youngman continues to ramble. The dash camera video ends at that point. Sergeant Klitch's report is consistent with his testimony at the June 1, 2020, hearing and defendant's Exhibit 1, the videos. Youngman cooperated with the Romberg test, and failed it; cooperated with the Horizontal Gaze Nystagmus Test, and had two negative signs; and then refused the heel to toe walk and turn test, the one leg stand test, the alphabet test and counting test. Probable Cause Aff. in Supp. of Arrest and/or Refusal to Take Test 2. The video shows that after the HGN test, Sergeant Klitch tried to get Youngman to take the remaining tests for nearly three minutes before the video ended. Youngman never cooperated and consistently refused after completing the HGN test.

The plaintiff filed its Memorandum in Opposition to Motion to Suppress on May 27, 2020. Youngman filed an Objection to State's Response and Motion to Strike on May 29, 2020, pointing out that the plaintiff's Memorandum in Opposition to Motion to Suppress was not timely filed relative to the June 1, 2020, hearing, pursuant to I.R.C.P. 7(b)(3)(B), made applicable via I.C.R. 49(a). In that Objection, Onosko makes no argument as to how Youngman is prejudiced by the late filing. In that Objection, Onosko makes no substantive reply to plaintiff's Memorandum in Opposition to Motion to Suppress, as Onosko was allowed to do pursuant to I.R.C.P. 7(b)(3)(C). Significantly, in that Objection, Onosko did not address *State v. Naranjo*, 159 Idaho 258, 359 P.3d 1055 (Ct. App. 2015), which was cited by counsel for the plaintiff in its Memorandum in Opposition to Motion to Suppress, a case this Court finds dispositive as discussed below. At oral argument on June 1, 2020, counsel for plaintiff stated his "good cause" for not filing plaintiff's Memorandum in Opposition to Motion to Suppress two days earlier, is he was hoping to have the preliminary hearing transcript. The Court notes that the preliminary hearing transcript was filed on June 1, 2020, the day of the hearing on the motion to suppress. Certainly, a preliminary hearing transcript showing past testimony of Sergeant Klitch, Officer Knisley and Trooper Sutton, would have been helpful. At the June 1, 2020, hearing, the Court denied Youngman's Objection to State's Response and Motion to Strike, finding good cause was established by plaintiff for filing its brief two days late. The Court also found no prejudice was articulated by Onosko on behalf of Youngman.

Onosko makes three arguments. First, Onosko claims, "Officer Klitch unlawfully prolonged the traffic stop in this case when he abandoned his purpose for the stop and began a DUI investigation." *Id.* at 3-4. Second, Onosko claims, "In this case, officer Knisely (sic) allowed her K-9 to do more than just a free air sniff, she allowed the K-9 to conduct an actual search of the vehicle." *Id.* at 4-7. Third, Onosko claims, "Mr. Youngman's warrantless arrest was unlawful because officer Klitch lacked probable cause to believe that Mr. Youngman's ability to drive was impaired by drugs or alcohol." *Id.* at 7-8. As shown below, these arguments are without merit. The hearing was held June 1, 2020. The hearing began at 4 p.m. that day and took over two and one half hours. Sergeant Klitch and Officer Knisley testified. The Court finds both to be credible. The Court finds that the testimony of each was not impeached in any way during the hearing. At the conclusion of the hearing, the Court took the motion to suppress under advisement until the Court had viewed the dash camera video of Sergeant Klitch and the body camera video of Officer Knisley, defendant's Exhibit A. Onosko submitted Exhibit A. Exhibit A consists of three DVD'. All three are marked exactly the same. As a result, they cannot be differentiated in this opinion by which disc contained in Exhibit A. One is a recording of Sergeant Klitch's dash camera from the time he begins to follow Youngman's vehicle, until Youngman refuses to submit to the remaining field sobriety tests. One is a recording of Officer Knisley's body camera, showing all of Pecco's vehicle sniff. One is a recording of Sergeant Klitch's dash camera showing all of Pecco's vehicle sniff.

II. STANDARD OF REVIEW.

In an appeal from an order denying a motion to suppress, the Court of Appeals will not disturb findings of fact supported by substantial evidence, but will freely review whether the trial court's determination as to whether constitutional requirements were satisfied in light of the facts. *State v. Whiteley,* 124 Idaho 261, 264, 858 P.2d 800, 803 (Ct. App. 1993). When evaluating the trial court's determination of voluntariness of consent given, reviewing courts will not disturb such a decision on appeal if the trial court's finding is based on reasonable inferences to be drawn from the record. *State v. Post,* 98 Idaho 834, 837, 573 P.2d 153, 156 (1978). Whether consent to a search was voluntary is a question of fact and reviewing courts accept the factual findings of a trial court unless they are clearly erroneous. *State v. McCall,* 135 Idaho 885, 886, 26 P.3d 1222, 1223 (2001). Findings are not deemed clearly erroneous when supported by substantial evidence in the record. *State v. Benson,* 133 Idaho 152, 155, 983 P.2d 225, 228 (Ct.App. 1999).

III. ANALYSIS.

A. The stop was not unlawfully prolonged by a DUI investigation.

Sergeant Klitch's dashboard camera video shows he told Youngman he pulled him over for not signaling and having a muffler that was too loud. Youngman admitted he had no muffler at all. As mentioned above, Onosko claims, "Officer Klitch unlawfully prolonged the traffic stop in this case when he abandoned his purpose for the stop and began a DUI investigation." Br. In Supp. of Mot. to Suppress 1-2. That overall claim is not true and each of the two subparts of that claim are false: Officer Klitch did not unlawfully prolong the traffic stop, and Officer Klitch did not abandon the purpose for the stop when he began his DUI investigation.

Onosko claims,

> In this case, officer Klitch abandoned the purpose of the traffic stop and began a DUI investigation after talking to Mr. Youngman for approximately one minute. This shift in investigation constitutes a prolonging of the stop, and can only be justified if the officer possessed reasonable suspicion that Mr. Youngman's ability to drive was being impaired by drugs or alcohol. Because officer Klitch lacked reasonable suspicion after speaking to Mr. Youngman for only one minute, this prolonging was unlawful.

Id. at 4. Pursuant to Idaho Rule of Evidence I.R.E. 201(c), this Court takes judicial notice of Sergeant Klitch's Probable Cause Affidavit. This Court filed its Notice of Intent to Take Judicial Notice Pursuant to I.R.E. 201(c) on May 13, 2020. The report of Sergeant Klitch shows that before Sergeant Klitch had even spoken a word with Youngman, he observed the vehicle Youngman was driving: 1) fail to signal left as it merged into Interstate 90, 2) drive over the white solid fog line failing to maintain lane, and 3) follow another vehicle too closely. Upon making contact with Youngman, Sergeant Klitch wrote,

> I noticed the driver had rapid speech and was making jerky movements. The driver's eyes were glassy and slightly bloodshot. The driver's eyes appeared to be dilated.

Probable Cause Aff. in Supp. of Arrest and/or Refusal to Take Test. 2. Sergeant Klitch's two dash camera videos certainly pick up Youngman's extremely rapid, nervous and pressured speech. Sergeant Klitch had Youngman exit his vehicle. Youngman admitted he did not have a driver's license and soon thereafter admitted his license was suspended. *Id.* Sergeant Klitch had Youngman perform the Romberg test. *Id.* Sergeant Klitch noticed during the test that Youngman had eyelid flutters, and he observed marks on Youngman's left arm that were consistent with recent hypodermic needle use. *Id.* Youngman completed the Horizontal Gaze Nystagmus test, but refused to take the walk and turn test, the one-leg stand test, recite the alphabet or count. *Id.* All of this was corroborated by Sergeant Klitch's testimony on June 1, 2020, his preliminary hearing testimony, and the DVD in Exhibit A which is his dash camera recording.

Simply witnessing Youngman's driving, Sergeant Klitch had reasonable suspicion to investigate for a DUI. At the moment Sergeant Klitch had Youngman exit the vehicle, he clearly had reasonable suspicion to begin a DUI investigation.

Onosko noted:

> "[W]hile an officer may conduct certain unrelated checks during an otherwise lawful traffic stop, the officer may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *State v. Linze*, Docket No. 42321 (Ct. App., Jan. 8, 2016 [an unreported decision]) (citing *Rodriguez*, 135 S. Ct. [1609] at 16150 [191 L.Ed.2d 492 (2015)]. "Authority for the seizure thus ends when tasks tied to the traffic infraction are, or reasonably should have been, completed." *Id.*

The better practice would have been to cite a reported case, such as *State v. Linze*, 161 Idaho 605, 608, 389 P.3d 150, 153 (2016), in which the Idaho Supreme Court stated the same rule of law and upheld the Idaho Court of Appeals. In any event, what Youngman fails to recognize is the fact that while Youngman was stopped for failing to signal and a loud muffler, Sergeant Klitch had reasonable suspicion to investigate for a DUI when he first encountered Youngman, and certainly had more than reasonable suspicion once Youngman opened his mouth and began speaking. Sergeant Klitch noticed fresh needle marks on Youngman's bare arms and asked Youngman about methamphetamine use. It is important to note that at the same time Sergeant Klitch had reasonable suspicion to investigate for a DUI, he also had a confession from Youngman that Youngman was driving without a physical license and he had Youngman's confession that his license in any event was suspended. At the moment his encounter with Youngman began, and even before the DUI investigation had begun, Sergeant Klitch had probable cause to arrest Youngman based on his driving status alone. Before his initial encounter with Youngman, and no later than seconds after his encounter with Youngman began, Sergeant Klitch had reasonable suspicion to investigate Youngman for a DUI. That, coupled with the fact that even the stop for failing to signal and the loud muffler could not have ended until after Sergeant Klitch ran Youngman's information through dispatch, causes Youngman's claim that "Officer Klitch unlawfully prolonged the traffic stop in this case when he abandoned his purpose for the stop and began a DUI investigation" (Br. In Supp. of Mot. to Suppress 1-2) to be patently false.

The Unites States Supreme Court has definitively stated that a traffic stop may not be prolonged beyond the time reasonably necessary to complete the purpose of the stop, and that delaying the stop further is unconstitutional, absent reasonable suspicion of new criminal activity. *Rodriguez*, 135 S.Ct. at 1609. However, Sergeant Klitch had not yet completed the purpose of his initial stop, which was to cite or at least warn of an illegal lane change and an illegal muffler, when he had probable cause to arrest Youngman for his license status and when he had reasonable suspicion of new (really additional) criminal activity, driving while under the influence. In fact, Sergeant Klitch asked Youngman for his license, to which Youngman replied he did not have a license within the first 30 seconds of the encounter. Sergeant Klitch certainly had the right to ask Youngman for his license and, not having his license, his identifying information. In *State v. Loosli*, 2020 WL 857862 (Ct. App. February 21, 2020), the Idaho Court of Appeals recently held that a police officer asking if he could see a person's driver's license, and asking whether he could copy information from the license, did not constitute a seizure. This Court agrees with the analysis provided by plaintiff:

> "Although an investigative detention must ordinarily last no longer than is necessary to effectuate the purpose of the stop, a detention initiated for one investigative purpose may disclose suspicious circumstances that justify expanding the investigation to other possible crimes." *State v. Brumfield*, 136 Idaho 913, 916 (Ct. App. 2001). It is well established that "[t]he purpose of a stop is not permanently fixed at the moment the stop is initiated, for during the course of the detention there may evolve suspicion of criminality different from that which initially

> prompted the stop." *Hays*, 159 Idaho at 482-83; *Parkinson*, 135 Idaho at 362. A stop will remain a reasonable seizure as long as the officer is diligently pursuing the purpose of the stop, for which there is reasonable suspicion to support. *Linze*, 161 Idaho at 609. If the officer abandons the purpose of the stop, the original reasonable suspicion no longer supports the stop. *Id.* When the original purpose for the stop is abandoned, a new seizure with a new purpose is initiated. *Id.* Unless this new seizure is justified by its own new reasonable suspicion, the abandonment of the original purpose for the stop serves to violate the seized party's Fourth Amendment rights. *Id.*
>
> The Defendant has cited *Rodriguez v. United States*, 135 S.Ct. 1609 (2015), *Gutierrez*, and *Linze* in arguing that Sergeant Klitch unlawfully extended the traffic stop beyond the time necessary to complete the purpose of the stop in order to conduct a DUI investigation. However, all three (3) of these cases are factually distinguishable from the case at hand. In *Rodriguez*, the officer unlawfully prolonged a traffic stop five-six (5-6) minutes past its point of completion, without additional reasonable suspicion, in order to effectuate a K9 sniff of the vehicle. In *Gutierrez*, the officer unlawfully prolonged a traffic stop 60-90 seconds past its point of completion, without additional reasonable suspicion, in order to gain consent to search the vehicle. In *Linze*, the officer unlawfully abandoned the original purpose for the traffic stop, without additional reasonable suspicion, to serve as back-up for a K9 officer who had arrived on scene.
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> At no time during his traffic stop did Sergeant Klitch ever abandon the original purpose for the stop. In the case at hand, the underlying justification for the traffic stop was Sergeant Klitch's observation of several traffic violations. Having pulled the Defendat (sic) over for these traffic violations, Sergeant Klitch was lawful in contacting the Defendant to advise him of the reasons for the stop and request his driver's license and proof of vehicle registration and insurance. It was during this interaction with the Defendat (sic) that Sergeant Klitch observed the Defendant's physical characteristics. These observations, coupled with Sergeant Klitch's observations of the vehicle's driving pattern and Sergeant Klitch's training and experience, provided Sergeant Klitch With the legal justification to expand the purpose of the traffic stop to include a DUI investigation.

Mem. in Opp'n to Mot. to Suppress 5-6. Youngman's claim that "Officer Klitch unlawfully prolonged the traffic stop in this case when he abandoned his purpose for the stop and began a DUI investigation" (Br. In Supp. of Mot. to Suppress 1-2) ignores the uncontradicted facts of this case and ignores the well-established case law on this subject

B. Officer Knisley did not allow her K-9 to conduct an actual search of the vehicle.

As mentioned above, Onosko claims, "In this case, officer Knisely (sic) allowed her K-9 to do more than just a free air sniff, she allowed the K-9 to conduct an actual search of the vehicle." Br. In Supp. of Mot. to Suppress 4. Onosko then continues, "This issue has not yet been addressed by Idaho Courts, so several premises must first be established for Defendant's argument." *Id.* First, and most important, this Court finds this issue has been discussed by Idaho appellate courts. That fact will be discussed later. Onosko then creates a series of premises, beginning with a 255-year-old case, *Entick v. Carrington*, 95 Eng.Rep. 807 (C.P. 1765), then *Katz v. United States*, 389 U.S. 347 (1967) and *United States v. Jones*, 565 U.S. 945 (2012), for the premise that the government cannot trespass upon your property to conduct a search. Br. In Supp. of Mot. to Suppress 4-5. Second, Onosko adds the premise that a person has no legitimate privacy interest in an illegal substance, from *United States v. Jacobsen*, 466 U.S. 109 (1984). Br. In Supp. of Mot. to Suppress 5. Third, Onosko adds the premise,

> under the automobile exception to the warrant requirement, police may conduct a warrantless search of a vehicle if they have probable cause to believe the search will uncover illegal items. *Carroll v. United States,* 267 U.S. 132 (1925). However, "It is beyond dispute that a vehicle is an 'effect' as that term is used in the [Fourth] Amendment." *Jones,* 565 U.S. at 949 (*citing United States v. Chadwick,* 433 U.S. 1, 12 (1977)). Thus, a person's property interest in their vehicle is protected by the Fourth Amendment.

Id. The fourth premise Onosko makes is as follows:

> Finally, When the government (1) gathers information, (2) by physically intruding, (3) on persons, houses, papers or effects; a Fourth Amendment search has occurred. *Jones*, 565 U.S. 945; *Florida v. Jardines*, 569 U.S. 1 (2013). In *Jones*, the government "physically occupied private property for the purpose of obtaining information." *Id.* More specifically, the government attached a GPS device to the undercarriage of the defendant's wife's car. The Court held, "Where, as here, the Government obtains information by physically intruding on a

constitutionally protected area, such a search has undoubtedly occurred." *Id.*, at 964 n.3. It was clear in *Jones* that the defendant's reasonable expectation of privacy had not been violated, and no search had occurred under *Katz*. Defendant had no expectation of privacy in the underside of the vehicle and no expectation of privacy for the places he traveled to in public view. However, the Court found it did not matter that defendant's reasonable expectation of privacy had not been violated under *Katz* because a trespass committed by the government for purposes of obtaining information constitutes a search under *Entick*, regardless of the defendant's reasonable expectation of privacy. *Id.*, at 950.

This final premise was again echoed by the High Court only a year later when the Court analyzed a case involving a trespass by a drug dog. In *Jardines*, police officers and their drug dog stepped foot on defendant's property without his leave in order to gather information, 569 U.S. at 5 . The Court distinguished this case from the *Caballes* line of cases by pointing out:

> While law enforcement officers need not "shield their eyes" When passing by the home "On public thoroughfares," *Ciraolo*, 476 U.S., at 213, 106 S.Ct. 1809, an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas.

Jardines, 569 U.S. at 7. Unlike *Caballes*, *Parkinson* and *Martinez*, the drug dog in *Jardines* left the public thoroughfares and physically intruded on a constitutionally protected area. The *Jardines* Court ultimately concluded, "When the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred." 569 U.S. at 6 (internal quotation omitted).

The Court in *Jardines* worked through three different questions to arrive at its conclusion. First, the Court found that using a drug dog is an attempt by police to gather information. As we know from *Caballes*, just because police are attempting to gather information does not automatically mean a search has occurring [sic]. So, just because police are gathering information with a drug dog does not tell us whether or not a search has occurred. Second, the *Jardines* Court found that the information gathering took place by physically entering a constitutionally protected area. *Jardines*, 569 U.S. at 7 ("As it is undisputed that the detectives had all four of their feet and all four of their companion's firmly planted on the constitutionally protected extension of [defendant's] home, the only question is whether he had given his leave (even implicitly) for them to do so."). We know from *Jones* that a vehicle is a constitutionally protected effect; and *Jardines* makes clear that placing your feet or paws on someone's property is a physical intrusion. Third, the *Jardines* Court looked to see whether the officers were entitled to step foot on defendant's property or whether they were trespassing. The Court first noted that an officer, like any other citizen, has an implied general right of entry onto a person's property. *Jardines*, 569 U.S. at 7-8. However, the

> Court found that an officer does not have an implied invitation to intrude on a citizen's property for purposes of conducting a search with a drug dog. *Id.*
>
> Mr. Youngman's case parallels the *Jones* and *Jardines* cases and is distinguishable from *Caballes*, *Parkinson* and *Martinez*. First, it is undisputed that officer Knisely (sic) and her K-9 were attempting to gather information about the contents of Youngman's vehicle. Second, case law is clear that a vehicle is a constitutionally protected "effect." *Jones*, 565 U.S. at 949. Third, officer Knisely (sic) and her K-9 did "physically intrude" on Mr. Youngman's "effects" when the K-9 jumped on Mr. Youngman's vehicle and even stuck its head inside that vehicle. This fact distinguishes Mr. Youngman's case from *Caballes*, *Parkinson* and *Martinez* where no physical intrusion occurred, and brings the case in line with *Jones* and *Jardines* where a physical intrusion did occur. Finally, officer Knisely (sic) did not have leave, either implicitly or explicitly, to physically intrude on Mr. Youngman's vehicle. Mr. Youngman never gave the officer permission to search his car or let the K-9 jump on his car. There is also no implied invitation for an officer to allow her dog to jump on a citizen's car. Indeed, most citizens would find cause for alarm to look out their window and see a neighbor's dog or a police dog jumping on and off their car.
>
> To clarify, Defendant is not arguing that the use of the K-9 in this case was a search under *Katz*. *Caballes*, *Parkinson* and *Martinez* make clear that it was not. Had officer Knisely (sic) simply walked around the exterior of Defendant's vehicle on the public thoroughfare, no search would have occurred. But, Defendant is arguing that a search under *Entick* occurred because police trespassed on his vehicle without permission in order to uncover information.

Id. at 5-7. Onosko's premises simply do not support his conclusion. Remember, Onosko's conclusion is that Officer Knisley "allowed the K-9 to conduct an actual search of the vehicle" (*Id.* at 7) by allowing "her K-9 to jump on Mr. Youngman's vehicle and stick its face inside the vehicle" (*Id.* at 2), and thus, "a search under Entick occurred because police trespassed on his vehicle without permission in order to uncover information." *Id.* at 7. Essentially, this is a tortured legal analysis to apply *Entick* to automobile searches, when *Entick*, a Court of Common Pleas case from England, was written over a century *before* the automobile was even invented. The torture continues by conflating *Jardines*, a case which found it to be a **trespass** when a drug dog went on a person's **real property** (which is a trespass), with the hundreds of cases discussing drug dogs sniffing vehicles. None of those cases discuss trespass like *Jardines* does, but they all discuss the concept of "searches" and a person's "reasonable expectation of privacy" in places that are searched. Those many cases unanimously find that no "search" has occurred and no violation of a person's "reasonable expectation of privacy" occurs under facts similar to the instant case, where Pecco placed its front paws on Youngman's vehicle's door/window sill for less than three seconds and placed its nose one inch into the interior. Those cases also find no "search" has occurred and no violation of a person's "reasonable expectation of privacy" occurs under facts more egregious than the instant case, such as where the entire dog enters through the driver's window and sniffs in the back seat and alerts there.

Onosko is simply using *Entick* to graft the real property concept of trespass on to the thousands of cases dealing with exigent circumstances relating to a vehicle. That is an exercise which makes no sense.

Most importantly, the issue has twice been clearly decided by the Idaho Court of Appeals. Oddly enough, the Idaho Court of Appeals did not resort to *Entick* in its analysis.

In *State v. Cox*, 2020 WL 238743 (Ct. App. January 16, 2020), the Idaho Court of Appeals held a drug dog following a scent into a vehicle's interior is not a search, where the dog's acts were instinctual and police neither facilitated or encouraged the dog's actions. 2020 WL 238743 at 4. The Idaho Court of Appeals upheld the district court's denial of a motion to suppress which found that the officers were under no affirmative duty to close the door to the vehicle that the defendant had opened. *Id.* at 5. In that case, the drug dog, Geno, was walked around the vehicle and alerted near the driver's door that Cox had opened. "Geno began sniffing the driver's door pocket and sat down in the area between the open door and the interior compartment. Officer Plaisted attempted to redirect Geno's attention, giving him another command to sniff. However, Geno's head snapped towards the interior of the vehicle, he sniffed along the driver's floorboard and sat down again. At no point did Geno actually get into the vehicle." *Id.* at 2. The officer saw a pack of cigarettes in the driver's door pocket, and he opened the cigarette box and saw a small baggie that had a crystal-like substance in it that later tested positive for methamphetamine. *Id.* The Idaho Court of Appeals' analysis is as follows:

> When a reliable drug dog indicates that a lawfully stopped automobile contains the odor of controlled substances, the officer has probable cause to believe there are drugs in the automobile and may search it without a warrant. *State v. Tucker*, 132 Idaho 841, 843, 979 P.2d 1199, 1201 (1999) *State v. Naranjo,* 159 Idaho 258, 259, 359 P.3d 1055, 1056 (Ct. App. 2015); *State v. Gibson,* 141 Idaho 277, 281, 108 P.3d 424, 428 (Ct. App. 2005). A reliable drug dog's indication on the exterior of a vehicle is not a search for Fourth Amendment purposes. *Illinois v. Caballes*, 543 U.S. 405, 409, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005); *see also State v. Aguirre,* 141 Idaho 560, 563, 112 P.3d 848, 851 (Ct. App. 2005).
>
> Likewise, this Court in *Naranjo* has held that a drug dog's instinctive action of sniffing inside the interior of a vehicle does not constitute a search for Fourth Amendment purposes as long as an officer did not facilitate the sniff. *Naranjo*, 159 Idaho at 261, 359 P.3d at 1058. In *Naranjo,* an officer ran his drug dog around the exterior of Naranjo's vehicle after he had left his driver's side window open following a traffic stop. *Id.* at 259, 359 P.3d at 1056. The officer directed the dog to sniff the driver's side door seam and, while doing so, "the dog spontaneously moved his head up to the open window and thereafter alerted." *Id.* The officer searched the vehicle and found methamphetamine and paraphernalia in the driver's side door panel, and the State charged Naranjo with possession. *Id.* Naranjo moved to suppress all the evidence obtained from the dog sniff, and the district court denied the motion. *Id.*
>
> On appeal, Naranjo argued "the dog's brief, spontaneous entry into the open window exceeded the scope of an exterior vehicle sniff, amounting to an unconstitutional search without a warrant or probable cause." *Id.* at 259-60, 359 P.3d at 1056-57. The Court rejected this argument. It noted that "the district court found that no officer opened Naranjo's window and there was no indication the dog was doing anything other than acting by instinct and *leading itself to the odor source.*" *Id.* at 260, 359 P.3d at 1057 (quotations omitted). The Court, following federal Fourth Amendment case law, ruled that "absent police misconduct, the instinctive actions of trained drug dogs do not expand the scope of an otherwise legal dog sniff to an impermissible search without a warrant or probable cause." *Id.* Further, the Court ruled that "a drug dog following a scent into a vehicle's interior is not a search" and "a dog may follow the scent to its source without any indication it has detected an odor before entering a vehicle." *Id.* Based on this latter ruling, the Court noted that a

> drug dog's behavior before entering a vehicle is not constitutionally significant. *Id.* Rather, the Court emphasized the focus of the constitutional analysis of a dog sniff is "whether the dog's acts were instinctual and whether police facilitated or encouraged the acts." *Id.* " '[I]nstinctive' implies the dog enters the car without assistance, facilitation, or other intentional action by its handler." *United States v. Pierce,* 622 F.3d 209, 214 (3rd Cir. 2010).
>
> *Naranjo* is dispositive of Cox's appeal. As in *Naranjo,* the district court found that "Geno's sniff was an instinctual progression from its initiation at the passenger side of the vehicle to the eventual alert at the v-area between the open driver's side door and the interior compartment" and that "Officer Plaisted did not encourage or facilitate Geno's advance to the open door." Further, the court found that Cox opened his door after Officer Green knocked on the window and that Officer Green did not open the door. These findings are supported by substantial evidence. *See Atkinson,* 128 Idaho at 561, 916 P.2d at 1286 (noting appellate court accepts trial court's findings of fact supported by substantial evidence).
>
> Although the Court in *Naranjo* addressed a scenario in which an occupant of the vehicle opened a window rather than a door, Cox does not offer any specific reason why the analysis in *Naranjo* should not be extended to open doors. We conclude, as other courts have, that the analysis is the same for windows and doors opened by the vehicle's occupants. *See, e.g., Pierce,* 622 F.3d at 214 (applying analysis of whether drug dog's entry is instinctual and not facilitated by officers when dog jumped through open door into vehicle). Accordingly, Geno's sniff of the interior of Cox's vehicle through his open door was not an unlawful search.
>
> Contrary to *Naranjo,* Cox argues the proper "constitutional analysis in the drug sniff context turns on whether the officers are examining something which the owner has already intended to expose to public perception." Cox's proposed analysis, however, is inconsistent with the constitutional analysis articulated in *Naranjo*, which focuses on whether the dog sniff was instinctual and not facilitated by an officer. By proposing a different analysis than the one adopted by this Court in *Naranjo,* Cox implicitly urges this Court to overturn *Naranjo,* which we decline to do.

Id. at 3-4.

At oral argument following the June 1, 2020, hearing on the motion to suppress, the Court asked Onosko if he had read *Cox* and *Naranjo*. Onosko said he had. The Court then asked how he could possibly make his argument under *Entick,* given *Cox* and *Naranjo*. His response was essentially that in the present case, Officer Knisley testified at the June 1, 2020, hearing that she had "trained" her K-9, while the Court of appeals in *Cox* and *Naranjo* noted the K-9 acted "instinctively." That was the distinction with a difference in Onosko's mind. Onosko's complete answer is as follows:

> MR. ONOSKO: Well, for two reasons, Your Honor. First, Naranjo did not raise the legal issue that I've raised (based on Entick). It doesn't even discuss it, and so that's one distinguishing feature, an important distinguishing feature, and second, it's factually distinguishable because the dog in this case, unlike the dog in Naranjo apparently is not -- does not have an instinct to just seek out drugs or go and find drug odors or jump on vehicles. The dog in this case as it was testified to is actually trained to do these things, so while in Naranjo they found that the dog just instinctually went for drug odors, in this case we've learned that this dog was actually trained to go to drug odors. So that's why Naranjo is factually and legally distinguishable, Your Honor.

June 1, 2020, hearing, rough transcript, p. 85, L. 15 – 86, L. 4. There is nothing in *Naranjo* to indicate that the K-9 in that case "instinctually went for drug odors" as if from birth, and no indication that the K-9 was not trained. In fact, in *Naranjo* both the district court and the Court of Appeals discussed the "actions of trained drug dogs." 159 Idaho at 260, 359 P.3d at 1057. Next, Onosko tried to define the word "instinctual".

> THE COURT: Where in Naranjo does the Court of Appeals of the State of Idaho say that that drug dog had never received any training?
> MR. ONOSKO: The Court did not say that Your Honor.
> THE COURT: Do you have any other argument?
> MR. ONOSKO: Yes, Your Honor. Your Honor, the Court in Naranjo and Cox used the phrase -- the term and stated that the dogs in those cases were acting instinctually. If the court will look at the definition of instinctual, and Your Honor can use whatever definition you'd like, that's how I would hope Your Honor would also draw the same conclusion that the court must have been talking about a dog that was born with this ability to do this because otherwise it wouldn't be --
> THE COURT: Do you know of any such drug dog that exists on this planet?
> MR. ONOSKO: I'm not aware of such a dog which is why I was also taken aback by Naranjo when they suggested that this dog did this instinctually as opposed to being trained to do that.
> THE COURT: Maybe they just used the wrong word.

As Onosko suggested, this Court looked up "instinctive" in Webster's, where "instinctive" is defined as "prompted by natural instinct or propensity: arising spontaneously and being independent of judgment or will." Webster's Ninth New College Dictionary, 627 (1983). That definition does nothing to support Onosko's made-up definition. More important than Webster's, the Idaho Court of Appeals in *Cox*, referring to *Naranjo*, and citing *Pierce*, held, "'[I]nstinctive' implies the dog enters the car without assistance, facilitation, or other intentional action by its handler.' *United States v. Pierce*, 622 F.3d 209, 214 (3rd Cir. 2010)." 2020 WL 238743 at 4. A similar definition of "instinctively" was reached by the Supreme Court of North Carolina, "If a police dog is acting without assistance, facilitation, or other intentional action by its handler (in the words of *Sharp,* [689 F.3d at 618–20,] acting "instinctively"), it cannot be said that a State or governmental actor intends to do anything. In such a case, the dog is simply being a dog." *State v. Miller*, 766 S.E.2d 289, 296 (N.C.2014). But what really demolishes Onosko's argument about a difference between "instinctive" and trained" is the following from the Idaho Court of Appeals in *Naranjo*: "Those cases hold that absent police misconduct, the instinctive actions of trained drug dogs do not expand the scope of an otherwise legal dog sniff to an impermissible search without a warrant or probable cause." 159 Idaho at 260, 359 P.3d at 1057. Onosko's distinction between a trained dog and a dog acting on instinct is wholly without merit.

In *State v. Naranjo*, 159 Idaho 258, 359 P.3d 1055 (Ct. App. 2015), the Idaho Court of Appeals held a drug dog's brief but spontaneous entry into an open window of a stopped vehicle did not constitute a search under the Fourth Amendment. The analysis of *Naranjo* is thoroughly set forth in *Cox*, above. The final finding by the Court of Appeals affirming the district court's denial of Naranjo's motion to suppress is as follows:

> In this case, the district court found the dog putting his nose in the window was an instinctual act that the police did not facilitate. Further, the district court found the dog was "leading itself to the odor source" and, after putting his nose in the window, the dog "immediately thereafter sat

> down and indicated the presence of narcotics." Although the dog did not indicate he had detected an odor before entering the vehicle, the district court's findings established that the dog was instinctually following an odor into Naranjo's vehicle and police did not facilitate the dog's conduct. Because these findings lead to the conclusion that the dog sniff here did not amount to a search, we hold that there was no search and the district court properly denied Naranjo's motion to suppress and motion for reconsideration.

159 Idaho at 261, 359 P.3d at 1058. These are virtually the identical facts of the instant case. Officer Knisley testified that Pecco is trained that once he smells a substance upon which he is trained (methamphetamine, marijuana, heroin and cocaine), he will get his nose as close as he can to the source. The video shows Pecco was up on Youngman's rolled-down window frame for less than three seconds, sat down and alerted.

The Idaho Court of Appeals in *Cox* and *Naranjo* is certainly in line with other appellate courts who have been presented such arguments. In *Commonwealth v. Rogers*, 741 A.2d 813 (Pa. 1999), the Superior Court of Pennsylvania held that even a drug dog jumping inside of a vehicle through an open window did not violate federal and state search and seizure provisions. That Court's reasoning upholding the trial court's denial of a motion to suppress was as follows:

> Appellee further argues that probable cause was required because the dog searched the interior of his vehicle where his belongings were located. We disagree. The Appellee ignores that he stipulated to the fact that the window was open, the dog was not prompted to enter the vehicle and once he did the search was immediately terminated. We do not believe such a limited intrusion into the vehicle under these particular facts was violative of either Article 1 § 8 or the Fourth Amendment. *See United States v. Stone*, 866 F.2d 359 (10th Cir.1989) (finding that where a trained dog jumped into the defendant's vehicle prior to alerting to the presence of drugs, "the dog's instinctive action [leaping into the vehicle through an open hatchback] did not violate the Fourth Amendment" because there was no evidence the police asked the defendant to open the hatchback). *Id.* at 364. Accordingly, the marijuana obtained subsequent to the execution of the search warrant was lawfully obtained.

741 A.2d 813, 820. Counsel for plaintiff aptly cited *State v. George*, 889 N.W.2d 244

(2016). Mem. in Opp'n to Mot. to Suppress 6. In *George*, an unpublished opinion from the Court of Appeals of Iowa, the K-9 named Sali jumped through an open window and alerted on drugs located in the back seat, "stuck her snout in a suitcase and bags" lying in that area, alerted, and methamphetamine was found. 889 N.W.2d 244, at 2. The Court of Appeals of Iowa gave an in-depth discussion of the state of the law throughout the country, and concluded with the Idaho Court of Appeals' opinion in *Naranjo*.

> The detection of an odor of a controlled substance emanating from an automobile provides probable cause to conduct a comprehensive search of the vehicle, regardless of whether the detection is made by an officer or a canine trained to detect narcotics. *Compare State v. Eubanks,* 355 N.W.2d 57, 59 (Iowa 1984) ("The odor of that controlled substance in the automobile gave the patrolman reasonable cause to conduct a comprehensive search of the car."), *with Bergmann,* 633 N.W.2d at 338 ("Because the drug dog alert established probable cause, the police legally searched the car without a warrant under the probable cause plus exigent circumstances exception to the warrant requirement."). Precedent clearly establishes that a "dog sniff" does not constitute a search when it occurs outside a vehicle. *See United States v. Place,* 462 U.S. 696, 707 (1983); *Bergmann,* 633 N.W.2d at 334. George claims the dog's sniff cannot constitute probable cause because the dog did not alert to or indicate the presence of the narcotic odor before jumping into the SUV.
>
> Sali is not the first drug detection dog to have instinctively jumped into a vehicle without direction by its handler. In 1989, the Tenth Circuit Court of Appeals in *United States v. Stone* was faced with substantially the same circumstances we face here. 866 F .2d 359, 361 (10th Cir.1989). In that case, a drug-detection dog was performing a sniff outside a vehicle when he jumped through the open rear hatch "where he 'keyed' on a duffel bag." *Id.* The bag was searched and drugs were discovered. *See id.* Asserting the search of his car violated his Fourth Amendment rights, Stone moved to suppress the drugs. *See id.* The motion was denied. *See id.* On appeal, the Tenth Circuit affirmed, ruling the dog's instinctive actions did not violate the Fourth Amendment because there was "no evidence ... that police asked Stone to open the hatchback so the dog could jump in. Nor [was] there any evidence the police handler encouraged the dog to jump in the car." *Id.* at 364.
>
> Since *Stone,* other federal circuit courts of appeal have also held that absent police misconduct, the instinctive actions of a trained canine do not violate the Fourth Amendment. *See United States v. Guidry,* 817 F.3d 997, 1006 (7th Cir.2016) (finding no Fourth Amendment violation where there was no indication that the officers intended to facilitate the dog putting its head through the open door); *United States v. Sharp,* 689 F.3d 616, 620 (6th Cir.2012) (holding a dog's instinctive jump through

open window without encouragement or facilitation by the dog's handler did not violate the Fourth Amendment), *cert. denied,* 133 S.Ct. 777 (2012); *United States v. Mostowicz,* 471 F. App'x 887, 891 (11th Cir.2012) (finding dog's act of jumping instinctively into the car without encouragement or facilitation from officers did not violate the Fourth Amendment); *United States v. Pierce,* 622 F.3d 209, 214–15 (3d Cir.2010) (finding the defendant's Fourth Amendment rights were not violated when the dog instinctively jumped through the vehicle's open door without facilitation by his handler); *United States v. Lyons,* 486 F.3d 367, 373 (8th Cir.2007) (holding search permissible where, without direction from his handler, drug dog stuck its head through van's open passenger window and indicated source of drugs). Numerous federal district courts have reached similar results. *See United States v. Johnson,* ELH–15–0542, 2016 WL 4592377, at *22 (D.Md. Sept. 2, 2016) (listing cases); *accord United States v. Pulido–Ayala,* No. 15–00359–01–CR–W–DGK, 2016 WL 3828500, at *2 (W.D.Mo. July 13, 2016); *United States v. Azpeitia,* No. 2:12CR00289 DS, 2013 WL 840053, at *3 (D.Utah Mar. 6, 2013); *United States v. Irvin,* No. 07–20557, 2012 WL 5817903, at *6 (E.D.Mich. Sept. 20, 2012); *United States v. Nance,* No. 3:09–CR–163, 2010 WL 4004782, at *21 (E.D.Tenn. Sept. 17, 2010); *United States v. Williams,* 690 F.Supp.2d 829, 835 (D.Minn.2010); *United States v. Pierce,* No. 08–126–JJF, 2009 WL 255627, at *6 (D.Del. Feb. 2, 2009). Likewise, many state appellate courts have also followed suit. *See Omar v. State,* 262 S.W.3d 195, 202 (Ark.Ct.App.2007); *People v. Stillwell,* 129 Cal.Rptr.3d 233, 240–41 (Cal.Ct.App.2011); *State v. Naranjo,* 359 P.3d 1055, 1057–58 (Idaho Ct.App.2015); *Cruz v. State,* 895 A.2d 1076, 1087 (Md.Ct.Spec.App.2006); *State v. Cadavid,* No. 08–08–1452, 2015 WL 2212200, at *5 (N.J.Super.Ct.App.Div. May 13, 2015); *State v. Miller,* 766 S.E.2d 289, 296 (N.C.2014). Naturally there are some factual differences between each case and the one at hand; nevertheless, we find these cases to be persuasive.

After a comprehensive analysis of the issue, the Supreme Court of North Carolina aptly summed up:

> If a police dog is acting without assistance, facilitation, or other intentional action by its handler (in the words of *Sharp,* [689 F.3d at 618–20,] acting "instinctively"), it cannot be said that a State or governmental actor intends to do anything. In such a case, the dog is simply being a dog. If, however, police misconduct is present, or if the dog is acting at the direction or guidance of its handler, then it can be readily inferred from the dog's action that there is an intent to find something or to obtain information. *See* [*United States v.*] *Winningham,* 140 F.3d [1328,] 1330–31 [(10th Cir.1998)] (invalidating a search on such grounds). In short, we hold that a police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is not a search within the meaning of the Fourth Amendment....

Miller, 766 S.E.2d at 296. We agree and hold that absent police misconduct, the instinctive actions of a trained canine do not violate the Fourth Amendment or article I, section 8 of the Iowa Constitution.

Although there is some dispute as to whether or not Sali alerted to the presence of the odor of a drug before she jumped through the driver's window, it does not play an integral role in our analysis. On this point, our sister court in Idaho concluded:

> We do not believe a drug dog's behavior before entering a vehicle is constitutionally significant. While the dogs in many (but not all) of the cases above exhibited some indication they had detected an odor before entering the vehicle, none of the cases based their holding on this fact. Rather, the cases focused on whether the dogs' acts were instinctual and whether police facilitated or encouraged the acts. *Sharp,* 689 F.3d at 620; *Pierce,* 622 F.3d at 214–15; *Lyons,* 486 F.3d at 373–74; *Stone,* 866 F.2d at 364; [*United States v.*] *Hutchinson,* 471 F.Supp.2d [497,] 510–11 [(M.D.Pa.2007)]; *cf. Winningham,* 140 F.3d at 1331. Further, a dog may follow a scent to its source without any indication it has detected an odor before entering a vehicle. *Hutchinson,* 471 F.Supp.2d at 506 n. 8 (presuming dog entered car "due to the smell of the narcotics" because the dog indicated immediately after entry and the canine officer testified the dog " 'followed the odor of narcotics' into the car," but "offered no testimony as to how he knew what drew [the dog] into the car").

Naranjo, 359 P.3d at 1057–58 (footnote omitted). We agree, and for all the above reasons, we hold that Sali's instinctive jump into George's SUV did not violate his federal or state constitutional rights to be free from unreasonable searches.

889 N.W.2d 244 at 4-6.

Onosko's claim that, "While this was going on, officer Knisely (sic) allowed her K-9 to jump on Mr. Youngman's vehicle and stick its face inside the vehicle" (Br. In Supp. of Mot. to Suppress 1-2), is not supported by the evidence. Even if Pecco stuck his entire face in the window, the only evidence is that Youngman opened the window and left the window opened when he exited his vehicle. Likewise, there is no evidence that Officer Knisley "allowed" her K-9 to jump on Youngman's vehicle." *Id.* There is no evidence that Officer Knisley directed, prompted or even somehow allowed her dog to jump on Youngman's vehicle. What *Naranjo*, *Cox*, and *Rogers* make clear is that even though drug dogs are professionally trained, they are still dogs, and they will at times act like dogs. That is what acting "instinctively" means according to these decisions. "Instinctively" does not mean that just because Officer Knisley trained Pecco, that fact makes Pecco an agent of the state, acting with bad intent when he tries to get as close as he can to a scent and places his front paws on a car door for less than three seconds. Pecco's training does not make him a government actor. While not trained to jump up to a window, let alone jump through a window, the appellate courts are quite unified that dogs are going to at times proceed on their instinct.

In *Cruz v. State*, 168 Md. App. 149, 895 A.2d 1076 (Md. App. 2006), the Maryland Court of Special Appeals did an excellent job discussing this issue in light of United States Supreme Court decisions and decisions from Maryland and other jurisdictions, and explaining why the actions of Pecco in Youngman's case are not an illegal search, given that there is absolutely no evidence that Officer Knisley allowed the drug dog to stick its face inside of Youngman's vehicle. That Court's analysis, in its entirety, is as follows:

> Here, according to Officer Catalano, Bruno's behavior changed at the corner of the vehicle. Then, of Bruno's own accord, and without any command from Catalano, the dog jumped up on the car "to get a better sniff," and "stuck his head in the window." The motion court found that Bruno's behavior changed at the rear corner of the vehicle, before he jumped up, but the court did not find that the dog's conduct at the corner of the vehicle amounted to an alert. Instead, the court found that Bruno alerted only after he "smelled something coming out the window." Although the motion court did not expressly resolve whether Bruno's nose or head actually entered the interior of the vehicle before he alerted, the court was satisfied that Bruno " didn't invade any private protected area."
>
> Therefore, in analyzing this case, we shall assume that Bruno jumped upon the vehicle before he alerted, put his head through the open window, and then alerted. In turn, we must decide whether the dog's conduct exceeded the scope of a lawful canine scan. We hold that the canine scan was lawful, and explain.
>
> The Supreme Court has addressed the issue of canine scans in *United States v. Place,* 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); *United States v. Jacobsen,* 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984); *City of Indianapolis v. Edmond,* 531 U.S. 32, 121 S.Ct.

447, 148 L.Ed.2d 333 (2000); and *Illinois v. Caballes,* 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005). We pause to review these cases.

In *Place,* 462 U.S. at 707, 103 S.Ct. 2637, the Court concluded that the canine sniff of luggage at an airport was not a search because it "discloses only the presence or absence of narcotics, a contraband item," without requiring the opening of the suitcase. The Court characterized the canine sniff as "limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Id.* Further, it pointed out that, "despite the fact that the sniff tells the authorities something about the contents of the luggage, the ... limited disclosure ... ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." *Id.*

In *Jacobsen,* the Court concluded, 466 U.S. at 122–24, 104 S.Ct. 1652, that a field test of white powder seized by government agents was not a search. Relying on *Place,* the Court analogized the field test to a dog sniff, which reveals only the presence or absence of contraband. In its view, the field test likewise did not infringe upon a legitimate expectation of privacy. *Id.* at 122, 104 S.Ct. 1652.

In *City of Indianapolis,* 531 U.S. at 40, 121 S.Ct. 447, the Court found unconstitutional a highway checkpoint program designed to discover and interdict illegal narcotics, but noted that the program's use of dogs to sniff the outside of automobiles was constitutional. Relying on *Place,* the Court stated:

> Just as in *Place,* an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. Like the dog sniff in *Place,* a sniff by a dog that simply walks around a car is "much less intrusive than a typical search."

Id. at 40, 121 S.Ct. 447 (citations omitted).

More recently, in *Caballes,* 543 U.S. at 409, 125 S.Ct. 834, the Supreme Court determined that a drug dog's sniff of the exterior of an automobile that had been lawfully stopped for speeding did not "implicate legitimate privacy interests." Because the sniff revealed only the "location of a substance that no individual has a right to possess," the Court concluded that the scan did not violate the Fourth Amendment. *Id.* at 410, 125 S.Ct. 834.

Numerous Maryland cases have recognized that a positive alert by a drug dog during an exterior scan of a vehicle gives rise to probable cause to search that vehicle. In *Wilkes v. State,* 364 Md. 554, 774 A.2d 420 (2001), for example, the Court said: "We have noted that once a drug dog has alerted a trooper 'to the presence of illegal drugs in a vehicle, sufficient probable cause exist[s] to support a warrantless search of [a vehicle].' " *Id.* at 586, 774 A.2d 420 (quoting *Gadson v. State,* 341 Md. 1, 8, 668 A.2d 22 (1995), *cert. denied,* 517 U.S. 1203, 116 S.Ct. 1704, 134 L.Ed.2d 803 (1996)). *See also State v. Wallace,* 372 Md. 137, 145, 159, 812 A.2d 291 (2002) (noting that "canine sniff" of the vehicle "provided the police officers with probable cause to search the car," but concluding that a canine alert on the exterior of a vehicle does not provide probable cause to search a particular occupant of that vehicle), *cert. denied,* 540 U.S. 1140, 124 S.Ct. 1036, 157 L.Ed.2d 951 (2004); *State v. Cabral,* 159 Md.App. 354, 859 A.2d 285 (2004) (a positive alert by a drug dog gives probable cause to search, even if the alert pertains to a residual odor); *Carter v. State,* 143 Md.App. 670, 674, 795 A.2d 790 ("The dog 'alert' supplied the probable cause for a warrantless search of the van."), *cert. denied,* 369 Md. 571, 801 A.2d 1032 (2002); *State v. Funkhouser,* 140 Md.App. 696, 711, 782 A.2d 387 (2001)("When a qualified dog signals to its handler that narcotics are in a vehicle ... that is *ipso facto* probable cause to justify a warrantless *Carroll* Doctrine search of the vehicle."); *In re Montrail M.,* 87 Md.App. 420, 437, 589 A.2d 1318 (1991) (stating that "[t]he dog's reaction properly served as probable cause to search the vehicle"), *aff'd.,* 325 Md. 527, 601 A.2d 1102 (1992); *Snow v. State,* 84 Md.App. 243, 248, 578 A.2d 816 (1990) (stating that canine alert at perimeter of car "could be held to provide probable cause to search the interior of the car.").

The recent case of *Fitzgerald v. State,* 384 Md. 484, 864 A.2d 1006 (2004), is instructive. There, the Court of Appeals determined that a dog sniff conducted in the common area of an apartment hallway, and at the exterior of an apartment door, did not amount to a "search" under the Fourth Amendment. *Id.* at 494–95, 864 A.2d 1006. Based on its review of Supreme Court decisions, the Court observed: "The only relevant locational determination is whether the dog was permitted outside the object sniffed." *Id.* at 494, 864 A.2d 1006. The *Fitzgerald* Court added that "the location or circumstance of the sniff was relevant only to determine whether the dog and officer's presence there was constitutional." *Id.* The Court explained, *id.* at 493–94, 864 A.2d 1006:

> *Place* and *Jacobsen* together establish that government tests, such as *a canine sniff,* that can reveal only the presence or absence of narcotics and are *conducted from a location where the government officials are authorized to be, i.e. a public place, are not searches.*
>
> A review of *Place* and *Jacobsen* indicates that a crucial component of the Supreme Court's holdings is the focus on the scope and nature of the sniff or test, rather than on the object sniffed, in determining whether a legitimate privacy interest exists.

(Emphasis added.)

While recognizing that "the dog and police must lawfully be present at the site of the sniff," the Court concluded that "binding and persuasive authority compel our holding that a dog sniff of the exterior of the residence is not a search under the Fourth Amendment." *Id.* at 503, 864 A.2d 1006. Notably, in reaching its decision, the Court pointed out that the canine and his police handler "lawfully were present, as the apartment building's common area and hallways were *accessible to the public through an entrance of unlocked glass doors.*" *Id.* at 504, 864 A.2d 1006 (emphasis added; citations omitted).

Nevertheless, appellant seizes on *dicta* in *Fitzgerald* to support his contention that Bruno's scan was illegal. He notes that in *Fitzgerald* the Court underscored that the dog "occupied the same position as the government agent; he observed from the public space outside the residence." *Id.* at 498, 864 A.2d 1006. But, as Cruz points out, the Court went on to say that, "*[w]ere [the dog] to have entered the residence himself without a warrant, he would have conducted an unconstitutional search.*" (Emphasis added).

We are not persuaded by appellant's reliance on *dicta* in *Fitzgerald.* The cases cited above lead us to conclude that, under the circumstances attendant here, Bruno's brief and instinctive intrusion into the open window of the vehicle did not transform the scan into an illegal interior search. As in *Fitzgerald,* Bruno and Trooper Catalano "lawfully were present at the site of the sniff," 384 Md. at 503, 864 A.2d 1006; the officer and the dog had a right to stand outside the vehicle, which had been lawfully stopped for a traffic offense. And, of significance here, it is undisputed that the window of the vehicle was already open when Bruno jumped onto the sill, and Catalano never instructed Bruno to jump. Rather, as Catalano testified, Bruno "on his own ... put his paws up on ... the window sill." Moreover, the videotape demonstrates that Bruno briefly "stood" on his back legs, with his paws upon the door, and then immediately went into a full-alert "sit."

In essence, while in a public place, Bruno responded to the smell he detected, which was emanating from the open car window. Accordingly, the motion court was not clearly erroneous in finding that Bruno simply "smelled something coming out of the window" after his scan of the car's exterior, "got up on [his] hind feet, put front feet on the end of the window momentarily," and then alerted.

Courts in other jurisdictions have considered whether the Fourth Amendment is violated by a dog's entry into the interior of a vehicle during a canine scan. In general, these cases support our conclusion.

In *United States v. Stone,* 866 F.2d 359 (10th Cir.1989), the dog was commanded to sniff the car and "became interested underneath the car at the passenger side where the door was open." *Id.* at 362. The defendant challenged the legality of the canine search because the dog jumped into the open hatchback and "keyed" on illegal "substances he was trained to detect...." The dog "apparently did not positively 'key' on the methaqualone until he was inside the car." *Id.* at 363. So, "when the dog jumped into the hatchback of Stone's car the police had only reasonable suspicion to believe it contained narcotics. Only after the dog was in the trunk, where it 'keyed' on the methaqualone, did the police have probable cause." *Id.* at 364.

The Tenth Circuit acknowledged that, "[e]ven though the police could use a trained dog to sniff the exterior of Stone's automobile, the dog created a troubling issue under the Fourth Amendment when it entered the hatchback." *Id.* at 363. Nevertheless, the Court upheld the denial of the suppression motion, agreeing with the trial judge "that the dog's instinctive actions did not violate the Fourth Amendment." *Id.* In this regard, the appellate court pointed out that "[t]here is no evidence, nor does [defendant] contend, that the police asked [defendant] to open the hatchback so the dog could jump in. Nor is there any evidence the police handler encouraged the dog to jump in the car." *Id.* Accordingly, the court concluded that "the police remained within the range of activities they may permissibly engage in when they have reasonable suspicion to believe the automobile contains narcotics." *Id.*

United States v. Watson, 783 F.Supp. 258 (E.D.Va.1992), is also illuminating. In that case, the federal court addressed the question of "whether by jumping in the open passenger door, the dog caused what is supposed to be a very limited encounter to escalate into a violation of the Fourth Amendment." *Id.* at 265. Relying on *Stone,* the court stated, *id.*:

> [T]he court finds that the dog's actions were within the bounds of a proper canine sniff. In *Stone,* the dog jumped through a car's open hatchback and proceeded to do a canine sniff of the car. The court held that the dog's "instinctive actions" did not violate the Fourth Amendment because the police did not ask the Defendant to open the hatchback so the dog could jump in, nor did the police handler encourage the dog to jump in. *Id.* at 364. As in *Stone,* this court was presented with no evidence that the dog was encouraged to jump in the car by its handler. Consequently, the court follows *Stone* and declares that the canine sniff of the passenger compartment was proper.

State v. Logan, 914 S.W.2d 806 (Mo.App.1995), is also relevant. There, a trained drug dog, while scanning a vehicle, "suddenly jumped into the car through an open rear window" and then " 'alerted' on the trunk of the car as trained to indicate the presence of drugs." *Id.* at 807. The appellant complained that, "unlike the search under scrutiny in *Place,* the search ... did not take place in a public area." *Id.* at 810. The court acknowledged that the dog "entered the interior" of appellant's car, the window of which "had apparently been left open by the defendant and his wife." *Id.* But, it noted that there was "no evidence" that the dog had been " prompted by his handlers to enter the car." Relying on *Stone,* the court found that the entrance of the dog into the car was not "equivalent for fourth amendment purposes to an entrance into the car by a police officer." *Id.* at 810. Therefore, it concluded that "the trial court did not err in admitting the evidence obtained as a result of [the dog's] investigative sniffing." *Id.*

In *United States v. Morales–Zamora,* 914 F.2d 200 (10th Cir.1990), the Tenth Circuit reversed a district court's grant of a motion to suppress. In that case, the appellate court considered "whether the police must have a reasonable suspicion of drug-related activity before employing a narcotics-detection dog to sniff a vehicle already detained by the police." *Id.* at 203. The court held "that the dog sniff, under these circumstances, is not a 'search' within the meaning of the fourth amendment and therefore an individualized suspicion of drug-related criminal activity is not required when the dog sniff is employed during a lawful seizure of the vehicle." *Id.*

Of import here, the Tenth Circuit rejected the argument that the defendants had "a legitimate expectation of privacy in the odor of narcotics detected by the dog because this odor emanated from inside their vehicles, a private area protected by the fourth amendment." *Id.* at 205. The court stated that, "when the odor of narcotics escapes from the interior of a vehicle, society does not recognize a reasonable privacy interest in the public airspace containing the incriminating odor." *Id.*

United States v. Perez, 37 F.3d 510 (9th Cir.1994), is also pertinent. There, the Ninth Circuit considered "[w]hether a search went beyond the scope of a suspect's consent" when the dog, while outside of the vehicle, "alerted to the spot on its undercarriage where the drugs were found." *Id.* at 515–16. The defendant claimed that " '[n]o reasonable person ... could have foreseen that his consent [to search] opened the door to a trained K–9 unit's examination of their entire automobile.' " *Id.* at 515. Rejecting that claim, the court determined "that the search was not more intrusive than Perez had envisioned when giving his consent, but rather simply more effective." *Id.* at 515–16. According to the appeals court, "The undercarriage of a van, where the drugs were found, is not a uniquely private space." *Id.* at 516 (citations omitted). Further, it stated: "Using a narcotics dog to carry out a consensual search of an automobile is perhaps the least intrusive means of searching because it involves no unnecessary opening or forcing of closed containers or sealed areas of the car unless the dog alerts." *Id.* (citations omitted).

The State also refers us to *Commonwealth v. Rogers,* 741 A.2d 813, 820 (Pa.Super.Ct.1999) *aff'd,* 578 Pa. 127, 849 A.2d 1185 (2004), in which the Superior Court of Pennsylvania, relying on *Stone,* noted that "the window was open, the dog was not prompted to enter the vehicle and once he did the search was immediately terminated." The court stated that it did "not believe such a limited intrusion into the vehicle under these particular facts was violative" of either Pennsylvania law or the Fourth Amendment to the U.S. Constitution.

We recognize that other courts have held that a dog's entry into the interior of a vehicle during a canine scan constituted an unreasonable search. But, those courts have based their decisions on evidence that the handler facilitated or encouraged the dog's entries into the vehicles. *See State v. Warsaw,* 125 N.M. 8, 956 P.2d 139, 143 (Ct.App.1997) (distinguishing *Stone* and *Watson,* noting that "Officer Williams reached into the trunk to remove the glass-laden carpet because he expected the dog to jump in there. [The dog], under the preparation, guidance, and stimulation of Officer Williams, jumped into the open trunk"); *United States v. Winningham,* 140 F.3d 1328, 1331 (10th Cir.1998) ("A desire to *facilitate* a dog sniff of the van's interior, absent in *Stone,* seems readily apparent here"); *State v. Freel,* 29 Kan.App.2d 852, 32 P.3d 1219, 1225 (2001) (finding that the officer "encouraged the dog to enter into the car when it had not alerted on the exterior").

In this case, there was absolutely no evidence to suggest that the

> police encouraged Bruno to jump up on the car and stick his nose through the window of Cruz's vehicle. To the contrary, the record reflects that the dog acted instinctively, because he detected from the open window the odor he was trained to identify. Indeed, Catalano testified that the dog "on his own jump [ed] into the window...." Moreover, Mr. Cruz had no "reasonable privacy interest" in the odor of cocaine emanating from the car, which Bruno detected from "the public airspace." *Morales–Zamora,* 914 F.2d at 205. For these reasons, we shall affirm.

168 Md. App. 149, 160-68, 895 A.2d 1076, 1082-87 (footnotes omitted).

Onosko has come forward with absolutely no evidence that Pecco put its face in Youngman's vehicle's open window. Onosko has come forward with no evidence that Officer Knisley trained or encouraged Pecco to put any part of his face in Youngman's open window.

Broken down, Onosko's argument rests on two tongs of twisted reasoning. First, Onosko grafts the concept of "trespass" into an area where all courts which have analyzed the issue discuss whether a "search" has occurred under the Fourth Amendment and focus on whether the place searched violated a person's "reasonable expectation of privacy". Second, Onosko injects a contorted definition of "instinctive", to distinguish Officer Knisley's "training" of Peeco in the present case from *Cox* and *Naranjo*, when that contorted definition is expressly rejected in both *Cox* and *Naranjo.*

Youngman's motion to suppress must be denied because he has presented no evidence which would support his motion and because his motion is not supported by Idaho appellate case law directly on point.

C. Sergeant Klitch had probable cause to arrest Youngman for DUI.

Youngman's third argument is, "Mr. Youngman's warrantless arrest was unlawful because officer Klitch lacked probable cause to believe that Mr. Youngman's ability to drive was impaired by drugs or alcohol." Br. In Supp. of Mot. to Suppress 7. Onosko then adds,

> In this case, officer Klitch lacked probable cause to believe that Mr.

> Youngman's ability to drive was impaired by drugs. Officer Klitch has only alleged that he believed Mr. Youngman was under the influence of a CNS stimulant, not alcohol. However, officer Klitch is not a DRE, and did not conduct the 13 step DRE process required before a trained officer can make a determination about Whether or not someone is under the influence of a CNS stimulant. Given the totality of the circumstances, officer Klitch lacked probable cause to arrest Mr. Youngman for DUI.

Id. at 7-8. None of that argument by Onosko is supported by any evidence. None of that argument is supported by the law. Onosko has cited no law to support a claim that a peace officer has to be a DRE (drug recognition expert) in order to find reasonable suspicion of being under the influence of drugs. Certainly at trial the plaintiff may need a DRE to testify, but there is no case law requiring a DRE in the field to formulate reasonable suspicion to investigate for driving under the influence of drugs or to formulate probable cause to arrest a person for driving under the influence of drugs. Sergeant Klitch testified he was a certified drug recognition expert from 2008 until 2015, when he was assigned as a detective, and let his certification lapse. Because he is no longer certified does not mean he forgets all he learned in his training and experience as a DRE for eight years. Sergeant Klitch testified to a host of specific, articulable facts he observed in Youngman to develop reasonable suspicion to investigate and probable cause to arrest Youngman for driving under the influence of drugs. These included: speeding, then driving well below the speed limit, following too closely behind the vehicle in front of him, crossing over the fog line, failure to maintain lane, taking 36 seconds to pull over, extremely rapid speech, failure to follow instructions on Romberg test (didn't say "stop"), failed Romberg test, two negative clues out of six on HGN, dilated pupils, glassy and bloodshot eyes, and needle marks on his arm. As stated above, this Court finds Sergeant Klitch had reasonable suspicion to investigate Youngman for a possible driving under the influence charge. As that was being investigated, the drug dog alerted to the heroin and methamphetamine. So even if *probable cause* for DUI did not exist at that instant, *reasonable suspicion* did, and the drugs found would not be suppressed. The Idaho Supreme Court has held, "A reliable drug dog's alert on the exterior of a vehicle is sufficient, in and of itself, to establish probable cause for a warrantless search of the interior." *State v. Anderson*, 154 Idaho 703, 706, 302 P.3d 328, 331 (2012) citing *State v. Tucker,* 132 Idaho 841, 843, 979 P.2d 1199, 1201 (1999). In any event, this Court now finds that as a result of that investigation, Sergeant Klitch had probable cause to arrest Youngman for the charge of DUI. This finding is based on the Probable Cause Affidavit in Support of Arrest and/or Refusal to Take Test. A neutral detached magistrate judge has already found this to be the case. In addition to all the specific articulable facts listed by Sergeant Klitch in his report, those additional observations he testified about at preliminary hearing and at the motion to suppress hearing, (set forth above) there is the fact the Youngman refused to take all the field sobriety tests.

> There [*State v. Ferreira,* 133 Idaho 474, 484, 988 P.2d 700, 710 (Ct.App.1999)], we held that whether or not the officer had enough facts to establish probable cause to arrest, he lawfully administered field sobriety tests on the basis of reasonable suspicion that the driver was under the influence of alcohol. *Id.* at 480–82, 988 P.2d at 706–08; *see also State v. Pick,* 124 Idaho 601, 605, 861 P.2d 1266, 1270 (Ct.App.1993) (officer had reasonable suspicion for detention and to administer field sobriety tests where he detected the odor of alcohol and the defendant slurred her speech and admitted to consuming alcohol). We later concluded that a driver's refusal to participate in field sobriety tests may be a factor in determining whether probable cause exists that a driver is under the influence of alcohol, as the refusal or evasion of field sobriety tests can infer a guilty conscience. *Thompson v. State,* 138 Idaho 512, 515–16, 65 P.3d 534, 537–38 (Ct.App.2003). Because field sobriety tests are used to either confirm or dispel an officer's reasonable suspicion that a driver is under the influence of alcohol, just as performing poorly on such tests can raise the level of suspicion to probable cause, the driver's refusal to participate may do the same.

State v. Martinez-Gonzalez, 152 Idaho 775, 780, 275P.3d 1, 6 (Ct. App. 2012)

Thus, even as to the DUI alone, which is what this argument of Youngman's seems to be limited to, the motion to suppress must be denied as this Court finds probable cause existed to arrest Youngman with the crime of DUI. This is a search incident to an arrest for that crime, and the search was lawful. The evidence will not be suppressed.

Finally, at oral argument, at the conclusion of the lengthy motion to suppress hearing on June 1, 2020, counsel for the plaintiff argued the doctrine of inevitable discovery. With a suspended license, to which Youngman readily admitted, he could have been arrested, and likely would have been arrested. With the DUI, Youngman could have been arrested, and certainly would have been arrested given the public safety concerns. There was no one else riding with Youngman; thus, his vehicle would be impounded. Pursuant to impound, Youngman's vehicle would have been searched and the drugs would have been found. Thus, even if some appellate court in the future were to buy into Onosko's tortured argument based on *Entick* and find Pecco had trespassed on Youngman's property with his front paws and last two inches of his nose, the drugs would have been inevitably discovered.

> Thus, the inevitable discovery doctrine applies when a preponderance of the evidence demonstrates that the evidence discovered pursuant to an unlawful search or seizure would have inevitably been discovered by lawful methods. *Nix,* 467 U.S. at 444, 104 S.Ct. at 2509, 81 L.Ed.2d at 387–88; *Bunting,* 142 Idaho at 915, 136 P.3d at 386. This doctrine balances society's interests in deterring illegal police conduct and in having juries receive all probative evidence of a crime by only applying the exclusionary rule to put the government in the same, not a worse, position that it would have occupied absent the police misconduct. *Nix,* 467 U.S. at 443, 104 S.Ct. at 2508–09, 81 L.Ed.2d at 387; *State v. Russo,* 157 Idaho 299, 306, 336 P.3d 232, 239 (2014); *see also State v. Bower,* 135 Idaho 554, 558, 21 P.3d 491, 495 (Ct.App.2001) (noting that, because of the high cost the exclusionary rule imposes upon society by allowing the guilty to escape prosecution, it should be employed only when there has been a substantive violation of a defendant's constitutional rights). When the discovery of the evidence would have been inevitable as the result of other lawful means, the exclusionary rule fails to serve this purpose, and, therefore, does not apply. *Nix,* 467 U.S. at 443–44, 104 S.Ct. at 2508–09, 81 L.Ed.2d at 387–88.

> Although those lawful means need not be the result of a wholly independent investigation, *State v. Buterbaugh,* 138 Idaho 96, 102, 57 P.3d 807, 813 (Ct.App.2002), they must be the result of some action that actually took place (or was in the process of taking place) that would inevitably have led to the discovery of the unlawfully obtained evidence, *Bunting,* 142 Idaho at 915–16, 136 P.3d at 386–87. Indeed, the inevitable discovery doctrine was never intended to swallow the exclusionary rule by substituting what the police *should* have done for what they really did or were doing. *State v. Holman,* 109 Idaho 382, 392, 707 P.2d 493, 503 (Ct.App.1985); *Cook,* 106 Idaho at 226, 677 P.2d at 539.

State v. Rowland, 158 Idaho 784, 787-88, 352 P.3d 506, 509-10 (Ct. App. 2015). There was no "should have done" here. Yougman admitted he had a suspended license. There was probable cause to arrest him for driving under the influence of drugs. These actions "actually took place (or was in the process of taking place)". This Court finds the inevitable discovery doctrine applies to the facts of this case, and provides but one more reason Youngman's motion to suppress must be denied.

IV. ORDER.

IT IS HEREBY ORDERED THAT JUSTIN THOMAS YOUNGMAN's Motion to Suppress is **DENIED**.

DATED this 3rd day of June, 2020

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 3 day of June, 2020 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – Benjamin M. Onosko pdfax@kcgov.us
Prosecuting Attorney – Stanley T. Mortensen kcpaicourts@kcgov.us

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: Deputy