STATE OF IDAHO)
County of Kootenai)ss

FILED 1/2/19

AT 9:10 O'clock A 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.

JOSHUA PAUL KAGARICE,

Defendant.

Case No. **CR 2017 21189**

MEMORANDUM DECISION AND ORDER ON APPEAL FROM MAGISTRATE DIVISION

I. INTRODUCTION, FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This matter comes before this Court as an appeal by Plaintiff State of Idaho (State) of the May 18, 2018, decision of the Honorable James Combo, Magistrate Judge (Judge Combo), granting the motion to dismiss filed by Defendant-Respondent Joshua Paul Kagarice (Kagarice) regarding the misdemeanor charge of Unlawful Arrest, Idaho Code Section 18-703, and Order to Dismiss, entered and filed on May 21, 2018. The Plaintiff-Appellant, State of Idaho, appealed Judge Combo's decision. Before signing the Order to Dismiss, on May 18, 2018, Judge Combo orally announced his findings and his decision dismissing the misdemeanor charge of Unlawful Arrest against Kagarice. A transcript of that hearing was made for this appeal and included in the record.

A brief version of this case is in order. Kagarice is an Idaho State Police Corporal. Late one afternoon, Kagarice was at the front door of Madsen's residence investigating a

car alarm, an alleged nuisance, which had been going off early that same morning. Kagaracie demanded Madsen identify herself, and Madsen refused, resulting in her arrest by Kagarice, for resisting and/or obstructing a law enforcement officer. The Idaho State Police asked that Kagarice's behavior be investigated. A Kootenai County Sherriff Detective investigated, and submitted an affidavit in support of probable cause, alleging that Kagarice be cited for the misdemeanor crime of unlawful arrest. A magistrate judge found probable cause against Kagarice. A different magistrate judge dismissed the case. This Court on appeal reverses that dismissal. While this opinion is lengthy, there are two over-arching for reversal of the dismissal of Kagarice's misdemeanor case. First, when Kagarice arrived at Madsen's front door, any nuisance had long since abated. Second, Kagarice had a right to request identification from Madsen, but Kagarice had no right to demand that Madsen identify herself.

Judge Combo found that on June 1, 2017, Kagarice, an Idaho State Police Trooper, had finished his shift around 3:30 a.m. Transcript of Proceedings, May 18, 2018, Court's Oral Opinion, p. 3, ll. 21–23. On his way home, Kagarice received a text message from his wife informing him that a car alarm was going off near their home. Tr. p. 3, ll. 22–24. Officer Kagarice contacted dispatch to determine whether dispatch had been informed about the car alarm, and whether any other law enforcement officer from the county had responded to the alarm. Tr. p. 3, l. 25 – p. 4, l. 1. Dispatch informed Kagarice that it had not received any reports regarding a car alarm. Tr. p. 4, ll. 1–3. Kagarice made the decision to investigate the car alarm on his way home. Tr. p. 4, ll. 3–4. Shortly before 4:00 a.m., Kagarice arrived on the scene and located the car with the active alarm. Tr. p. 4, ll. 5–7. It was determined to be a Subaru Legacy that was parked in a driveway at 18138 West Spuler Road, located in Hauser, Idaho. Tr. p. 4, ll. 7–8. Kagarice believed that there

was both a city and county ordinance in place that prohibited nuisances, which included a prohibition on loud noises. Tr. p. 4, ll. 8–10. Kagarice had not experienced any issues with car alarms at that particular residence until now. Tr. p. 4, ll. 21–23. In full uniform, Kagarice exited his patrol vehicle and, as he was approaching the front door of the home, he encountered a dog displaying aggression. Tr. p. 4, ll. 10–13. Kagarice made the decision to mace it with his police-issued pepper spray to deter its aggression. Tr. p. 4, ll. 13–14.

Judge Combo found that as Kagarice approached the front door, Kagarice could hear music coming from what he believed to be the basement of the home. Tr. p. 4, ll. 17–18. He then knocked on the door and announced his presence by loudly saying, "State Police – come to the door." Tr. p. 4, ll. 15–16. After approximately four minutes had passed without anyone answering the door, Kagarice chose to leave the scene. Tr. p. 4, ll. 18–19. During those four minutes, the car alarm had stopped. Tr. p. 4, ll. 20–21. Kagarice informed dispatch that he was unable to speak with anyone at the home, and would follow up on the matter during his next shift. Tr. p. 4, ll. 15–16.

Later that day, Kagarice was informed that the Subaru Legacy belonged to a Craig King and Courtney Madsen (Madsen). Tr. p. 5, ll. 2–5. At approximately 5:17 p.m., Kagarice approached the home, knocked on the door, and made contact with a woman who would end up being Madsen. Tr. p. 5, ll. 1–2. Kagarice identified himself and informed Madsen that he had responded to a car alarm at the home earlier that morning and was following up on that matter. Tr. p. 5, ll. 1–2. He asked Madsen if she was aware that the car alarm had been going off earlier in the morning. Tr. p. 5, ll. 6–8. She denied hearing the car alarm going off, but explained both that she owned the car and that someone had previously been working on the car's electrical system because she had

been experiencing issues with the car's horn. Tr. p. 5, ll. 9–17. Madsen informed Kagarice that she had seen him on her surveillance camera's video feed and was very upset that he sprayed her dog with mace, and that she had come to the door that morning just as Kagarice was leaving the home. Tr. p. 5, ll. 9–12.

Judge Combo found that Kagarice asked for the woman's name, explaining that he needed it for his report. Tr. p. 5, ll. 18–19. She informed him that her name was Courtney, and did not provide him with her last name. Tr. p. 5, ll. 19-20. Kagarice explained that he was investigating a misdemeanor offense and that she was therefore required to identify herself. Tr. p. 5, ll, 20-22. Madsen refused to provide Kagarice with her last name, and she became argumentative, and "obviously angry that he had maced her dog." Tr. p. 5, ll. 22–24. Kagarice told Madsen multiple times that if she refused to identify herself, he would arrest her. Tr. p. 5, ll. 24–25. Madsen expressed confusion as to why she would be arrested, and as to what crime it was that Kagarice was investigating. Tr. p. 6, ll. 1–2. Kagarice told her to exit the residence because he had some safety concerns, but Madsen refused. Tr. p. 6, ll. 2–5. Kagarice then placed Madsen under arrest for resisting and obstructing the investigation of the nuisance based upon her refusal to identify herself and her refusal to exit the residence. Tr. p. 6, ll. 6–9. Madsen then stepped out of her home and was ultimately handcuffed and taken to Kagarice's patrol vehicle. Tr. p. 6, ll. 9–14.

Kagarice eventually found out that he was, in fact, dealing with the same Courtney who owned the Subaru Legacy – Courtney Madsen. Tr. p. 6, ll. 14–15. After he arrested Madsen, Kagarice then submitted a probable cause affidavit to Magistrate Judge Anna Eckhart, who subsequently found that probable cause existed to believe that the crime of resisting and obstructing had been committed by Madsen; Judge Eckhart signed the order on June 6, 2017. Tr. p. 6, ll. 18–22. The Probable Cause Order was filed the next day, on

June 7, 2017. This initiated Kootenai County Case No. CR-2017-9215, *State v. Courtney Rachel Madsen*, charging Madsen with the misdemeanor crime of resisting and/or obstructing an officer.

The Idaho State Police made an official request for Kootenai County to investigate the incident between Kagarice and Madsen for unlawful arrest and unnecessary assault by an officer. Tr. p. 6, ll. 23–25 – p. 7., ll. 1–2. Kootenai County Sheriff's Detective Ryan Duncan (Detective Duncan) was assigned to investigate Kagarice. Tr. p. 7, ll. 2–3. Detective Duncan presented documentation to be considered by Magistrate Judge Mayli Walsh (Judge Walsh) in her probable cause determination. Tr. p. 7, ll. 9–14. The documentation included transcripts of interviews with Kagarice, Madsen, and a neighbor-witness, as well as Kagarice's affidavit of probable cause on the resisting and obstruction charge against Madsen. Tr. p. 7, ll. 9–12, 15–17. At the end of Detective Duncan's probable cause affidavit was a copy of Kagarice's Affidavit in Support of Probable cause against Madsen, and at the end of that affidavit there was an unsigned copy of the proposed order provided to Judge Eckhart. Tr. p. 7, l. 18. Judge Walsh found that probable cause existed to believe that Kagarice had committed the crime of unlawful arrest, and Judge Wals signed the order finding probable cause on November 15, 2017. Tr. p. 7, ll. 23–25. Kagarice was subsequently charged with committing an unlawful arrest in violation of Idaho Code Section 18-703. Tr. p. 8, ll. 1–2.

On May 21, 2018, after reviewing Kagarice's Motion to Dismiss and Second Motion to Dismiss, and following the May 18, 2018, hearing where he announced his findings on the motions to dismiss, Judge Combo signed an Order to Dismiss, finding the following: (1) Kagarice possessed lawful authority to investigate the nuisance in violation of Hauser City Ordinance Section 3-1-1, caused by the vehicle alarm; (2) Kagarice possessed lawful

authority to request identification from Madsen, the individual who acknowledged the existence of such nuisance; (3) Madsen had a legal obligation to identify herself and failed to do so upon proper demand; (4) Kagarice possessed the lawful authority to arrest Courtney Madsen for resisting and/or obstructing, in violation of Idaho Code Section 18-705; and (5) that dismissal in this case, under Idaho Criminal Rule 48(a)(2), was the only appropriate sanction, which was partly based on the State's failure to provide exculpatory evidence, and was also based on serving the ends of justice. Order to Dismiss, 1–2.

On June 12, 2018, the State timely filed its Notice of Appeal. On September 17, 2018, the State filed Appellant's Brief. On October 17, 2018, Kagarice filed Respondent's Brief. On November 7, 2018, the State filed Appellant's Reply Brief. The State requests this court reverse the Order of Dismissal of the Magistrate Court and remand for further proceedings. Oral argument on the appeal was held December 11, 2018. At the conclusion of that hearing, this Court announced it was reversing Judge Combo's decision to dismiss this case, and this Court stated it would be issuing a decision detailing the reasons for that reversal. On December 19, 2018, this Court filed its Notice Under I.R.E. 201.

III. STANDARD OF REVIEW

Idaho Criminal Rule 54(f)(1) states that "the district court must hear appeals from the magistrate court as an appellate proceeding..." The rule further states that "[t]he district court must review the case on the record and determine the appeal in the same manner and on the same standards of review as an appeal from the district court to the Supreme Court under the statutes of law of this state, and the Idaho Appellate Rules." I.C.R. 54(f). When a district court makes an appellate review of a magistrate judge's decision, the district court "should perform that task in the same manner as [the Supreme

Court of Idaho] performs its appellate review of the trial decision of a district court." *Hawkins v. Hawkins*, 99 Idaho 785, 788–89, 589 P.2d 532, 535–36 (1978). Therefore, in reviewing a magistrate judge's findings, "the district courts should adhere to the well-recognized rule that [factual] findings based on substantial and competent, though conflicting, evidence will not be set aside on appeal." *Id.* (citing *Prescott v. Prescott*, 97 Idaho 257, 542 P.2d 1176 (1975)). "Substantial, competent evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Doe,* 143 Idaho 383, 386, 146 P.3d 649, 652 (2006) (quoting *Folks v. Moscow School District No. 281,* 129 Idaho 833, 836, 933 P.2d 642, 645 (1997)). "[T]he magistrate's factual findings will be liberally construed in favor of the judgment, and will not be set aside unless clearly erroneous." *State v. Johnson,* 131 Idaho 808, 809, 964 P.2d 675, 676 (Ct. App. 1998) (citation omitted).

"This Court exercises free review over questions of statutory construction, 'which includes whether a statute provides for judicial review, and the standard of review to be applied if judicial review is available.'" *Ravenscroft v. Boise Cty.*, 154 Idaho 613, 614, 301 P.3d 271, 272 (2013) (citing *Gibson* at 751, 133 P.3d at 1216).

When review of a trial court's decision involves entwined questions of law and fact, we exercise free review over questions of law, and uphold factual findings supported by substantial and competent evidence. *Ada Co. Hwy. Dist. V. Total Success Investments, LLC,* 145 Idaho 360, 365, 179 P.3d 323, 328 (2008), citing *Marshall v. Blair,* 130 Idaho 675, 679, 946 P.2d 975, 979 (1997).

Because mixed questions of law and fact are primarily questions of law, this Court exercises free review. *Id.* 145 Idaho 807, 812, 186 P.3d 663, 668 (2008). *Allen v.*

Reynolds, 145 Idaho 807, 812,186 P.3d 663, 668 (2008) citing *The Highlands, Inc. v. Hosac,* 130 Idaho 67, 69, 936 P.2d 1309, 1311 (1997).

As recently stated by the Court of Appeals in *Action Collection Service, Inc. v. Black,* 163 Idaho 268, 270, 411 P.3d 312, 314 (Ct. App. 2017):

> In articulating the proper standard of review for mixed questions of law and fact, this Court will differentiate among the fact-finding, law-stating, and law-applying functions of the trial courts. *Staggie v. Idaho Falls Consol. Hosps.*, 110 Idaho 349, 351, 715 P.2d 1019, 1021 (Ct. App. 1986). Appellate judges defer to findings of fact based upon substantial evidence, but they review freely the conclusions of law reached by stating legal rules or principles and applying them to the facts found. *Id.* Where there is conflicting evidence, it is the trial court's task to evaluate the credibility of the witnesses and to weigh the evidence presented. *Desfosses v. Desfosses*, 120 Idaho 354, 357, 815 P.2d 1094, 1097 (Ct. App. 1991). Over questions of law, we exercise free review. *Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610, 613, 826 P.2d 1322, 1325 (1992); *Cole v. Kunzler*, 115 Idaho 552, 555, 768 P.2d 815, 818 (Ct. App. 1989).

Kagarice seems to argue that since Judge Combo granted an I.C.R. 48 motion to dismiss, this entire appeal is to be reviewed under an abuse of discretion standard. Kagarice writes:

> Because I.C.R. 48(a)(1) uses the permissive term "may dismiss" rather than a mandatory "shall dismiss," the proper standard of review is abuse of discretion. *State v. Dixon*, 140 Idaho [301] at 304, 92 P.3d [551] at 554 (Ct.App. 2004).

Respondent's Brief 8. However, in an earlier case, the Idaho Court of Appeals held that the standard of review is whether the trial court erred as a matter of law in dismissing the criminal action. *State v. Swenson,* 119 Idaho 706, 707, 809 P.2d 1185, 1186 (Ct. App. 1991).

There were eight reasons Kagarice gave in his Motion to Dismiss, four under I.C.R. 12(b) and four under I.C.R. 48(a)(2). Motion to Dismiss 1–4. Judge Combo's Order to Dismiss does not mention I.C.R. 12(b), nor does Judge Combo mention I.C.R. 12(b) when

he gave his ruling on the record. Tr. p. 8, l. 19 – p. 14, l. 25. This Court finds a dismissal under I.C.R. 12(b) was not made and thus, is not at issue in this appeal.

Judge Combo's order specifically discussed, 1) Kagarice's "lawful authority" to investigate the car alarm, 2) Kagarice's lawful authority to request identification of Madsen, 3) Madsen had, as a matter of law, a legal obligation to identify herself and failed to do so, and thus, 4) Kagarice had the lawful authority to arrest Madsen for resisting and/or obstructing in violation of I.C. § 18-705. Order to Dismiss, 1–2. This Court finds the appropriate standard of review for those findings of law is that of free review. Judge Combo dismissed pursuant to I.C.R. 48(a)(2) as "the only appropriate sanction in this matter, which is partly based upon the State's failure to provide exculpatory evidence as a sanction, but also based upon serving the ends of justice and the effective administration of the court's business." *Id.* at 2. This Court on appeal finds Judge Combo abused his discretion in dismissing this case pursuant to I.C.R. 48(a)(2). This Court also finds Judge Combo erred as a matter of law in dismissing this case pursuant to I.C.R. 48(a)(2).

IV. ANALYSIS

A. Introduction

As mentioned above, in his May 21, 2018, Order to Dismiss, Judge Combo found the following: (1) Kagarice possessed lawful authority to investigate the nuisance in violation of Hauser City Ordinance Section 3-1-1, caused by the vehicle alarm; (2) Kagarice possessed lawful authority to request identification from Madsen, the individual who acknowledged the existence of such nuisance; (3) Madsen had a legal obligation to identify herself and failed to do so upon proper demand; (4) Kagarice possessed the lawful authority to arrest Courtney Madsen for resisting and/or obstructing, in violation of Idaho Code Section 18-705; and (5) that dismissal in this case, under Idaho Criminal Rule

48(a)(2), was the only appropriate sanction, which was partly based on the State's failure to provide exculpatory evidence, and was also based on serving the ends of justice. Order to Dismiss, 1–2.

On appeal, this Court finds Judge Combo was correct in finding that Kagarice possessed lawful authority to investigate the nuisance in violation of Hauser City Ordinance Section 3-1-1, caused by the vehicle alarm. This matter of law decided by Judge Combo is affirmed by this Court.

However, on appeal, this Court finds the following are all matters of law decided by Judge Combo which do not survive free review by this Court:

> (2) Kagarice possessed lawful authority to request identification from Madsen, the individual who acknowledged the existence of such nuisance;
> (3) Madsen had a legal obligation to identify herself and failed to do so upon proper demand;
> (4) Kagarice possessed the lawful authority to arrest Courtney Madsen for resisting and/or obstructing, in violation of Idaho Code Section 18-705; and
> (5) that dismissal in this case, under Idaho Criminal Rule 48(a)(2), was the only appropriate sanction, which was partly based on the State's failure to provide exculpatory evidence, and was also based on serving the ends of justice.

Order to Dismiss, 1–2. While not discussed in his May 21, 2018, Order to Dismiss, at the May 18, 2018, hearing where he orally announced his findings and his decision dismissing the misdemeanor charge of Unlawful Arrest against Kagarice, Judge Combo found that once Kagarice had identified, "the existence of a nuisance, the ordinance mandates that he serve written notice upon the person causing or maintaining the nuisance or the owner or occupier of a property to abate [...]." Tr. p. 9, ll. 17 – 21. That finding is also a matter of law decided by Judge Combo which does not survive free review by this Court. Because that misinterpretation of the ordinance served as the underpinning for most of the other legal findings, the misinterpretation of the ordinance will be discussed first by this Court,

followed by this Court's review of the other five findings set forth in Judge Combo's May 21, 2018, Order to Dismiss.

B. Kagarice was not required to personally serve a written notice to abate upon Madsen.

1. Any nuisance had long since abated.

Judge Combo explained that once Kagarice had identified "the existence of a nuisance, the ordinance mandates that he serve written notice upon the person causing or maintaining the nuisance or the owner or occupier of a property to abate [...]." Tr. p. 9, ll. 17 – 21. Because this is an interpretation of the ordinance, this Court conducts free review.

The State first argues that because the nuisance had abated during Kagarice's initial visit to Madsen's property, he no longer had an obligation to serve a written notice to abate. Appellant's Br., 9. The State next asserts the Judge Combo erred in its interpretation of Hauser City Ordinance Section 3-1-3(B) by stating that the ordinance mandates that law enforcement personally serve written notice upon the person causing or maintaining the nuisance. Appellant's Br., 7 (citing Tr. p. 9, ll. 17–20). The State explains that the language of the ordinance allows for service of the written notice in multiple ways – it does not solely require personal service. *Id.* at 7–8.

Kagarice argues that he had an affirmative obligation to personally issue a notice to abate, which required him to return to the property. Resp't Br., 10. Kagarice asserts he was not relieved of that obligation simply because the nuisance had abated while he was initially present on Madsen's property, and the nuisance remained nonexistent when he returned to the property. *Id.* Kagarice cites no case law to this Court regarding abatement of a nuisance. Kagarice discusses the applicable ordinance, but pay attention to what he emphasizes and what he ignores. Kagarice's argument to this Court is as follows:

> Hauser City Ordinance § 3-1-1 defines a nuisance as "[w]hatever is injurious to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property." The code specifically provides that "all unnecessary noises and annoying vibrations" are a nuisance and that the "creation or maintenance of a nuisance is prohibited within the city." Hauser City Ordinance §§ 3-1-1(E); 3-1-2. "Whenever the mayor, city clerk or law enforcement agency finds that a nuisance exists, he shall cause to be served upon the owner, agent or occupant of the property on which the nuisance is located, or upon the person causing or maintaining the nuisance, a written notice to abate or to request a hearing." Hauser City Ordinance § 3-1-3(B) (emphasis added). The code further identifies that "[a]ny person violating any of the provisions of this chapter, after a notice to abate is served and any appeal is exhausted, shall, upon conviction, be guilty of a misdemeanor." Hauser City Ordinance § 3-1-7 (emphasis added).

Respondent's Brief 9-10. (emphasis in original). The exact same argument, word for word, same emphasis via underlining, was presented to Judge Combo. Mem. in Supp. of Def.'s Second Mot. to Dismiss, 6–7. It is important to note what language is emphasized by Kagarice (by underlining), and what Kagarice chooses not to emphasize (in bold by this Court):

> "Whenever the mayor, city clerk or law enforcement agency finds **that a nuisance exists**, he shall cause to be served **upon the owner, agent or occupant of the property on which the nuisance is located**, or upon the person causing or maintaining the nuisance, **a written notice to abate or to request a hearing**." Hauser City Ordinance § 3-1-3(B) (emphasis added). The code further identifies that "[a]ny person violating any of the provisions of this chapter, **after** a **notice to abate** is served and any appeal is exhausted, **shall, upon conviction, be guilty of a misdemeanor**." Hauser City Ordinance § 3-1-7.

The Hauser City Ordinance makes it clear that a misdemeanor arises only when: 1) a nuisance **exists** (note the present tense of the word), **and**, 2) a written **notice to abate** has been served. In the present case, the nuisance existed when Kagarice first arrived at Madsen's property, but ceased to exist before Kagarice left the property minutes after arriving. When Kagarice returned thirteen hours later, the nuisance had by that time ceased to exist for about thirteen hours. Purportedly, the purpose for Kagarice's return visit

thirteen hours later was to serve notice upon Madsen. Under the Hauser City Ordinance, the only notice to be served could have been a "notice to abate", and the nuisance had already abated thirteen hours earlier. As soon as the car alarm stopped, the nuisance abated. At that instant, the nuisance ceased to exist.

Getting beyond that point, we need to look at the Hauser City Ordinance to see upon whom and how such notice could be served. The pertinent part of the ordinance reads: "...law enforcement agency...shall cause to be served upon the owner, agent or occupant of the property on which the nuisance is located, or upon the person causing or maintaining the nuisance, a written notice." The written notice can be served upon the person causing the nuisance, but written notice can also be served upon the owner or occupant of the property upon which the nuisance is located. The service could be accomplished by leaving the notice with the occupant, with the person causing the nuisance, or with the owner of the property. Judge Combo errantly found, "the existence of a nuisance, the ordinance mandates that he serve written notice upon the person causing or maintaining the nuisance or the owner or occupier of a property to abate [...]." Tr. p. 9, ll. 17 – 21. The ordinance does not mandate personal service. The ordinance specifically allows service of the notice by mail. The ordinance specifically allows service by leaving a notice on the property.

Next, Kagarice argues to this Court:

> At the time Corporal Kagarice made his initial contact at Madsen's residence, the car alarm was actively going off at approximately 4:00 AM. This was clearly prohibited conduct constituting a nuisance in violation of the Hauser City Ordinance. As soon as Corporal Kagarice identified a possible violation of the Nuisance Ordinance, he was affirmatively obligated under the Ordinance to issue a notice to abate or request a hearing regarding the person causing or permitting the nuisance. Corporal Kagarice was not relieved of his affirmative obligation to issue a notice under the Hauser Ordinance simply because the noise had abated by the time he returned later in the day. Due to the time of night and

> unknown duration of time that the car alarm had been sounding, it was perfectly reasonable for Corporal Kagarice to conclude it was at least possible that a notice to abate under the Ordinance had already been issued to the responsible party (thus making the offense a misdemeanor at the time of his initial arrival), or, if a notice had not been issued, that the Ordinance's affirmative obligation would still require Corporal Kagarice to issue such notice as a warning against future violations.

Respondent's Brief 9-10. (emphasis in original) No analysis of abatement of a nuisance is provided by Kagarice to this Court. No reason is given by Kagarice for the bald assertion that "Corporal Kagarice was not relieved of his affirmative obligation to issue a notice under the Hauser Ordinance simply because the noise had abated by the time he returned later in the day." Such argument defies logic. But it is the last sentence of Kagarice's argument which finds absolutely no support in fact or in law. Kagarice wants this Court on appeal to *assume* that when Kagarice arrived at Madsen's property, as a result of a text from Kagarice's wife about a car alarm going off in the neighborhood, that "due to the time of night and unknown duration of time that the car alarm had been sounding, it was *perfectly reasonable* for Corporal Kagarice to *conclude* it was *at least possible* that a notice to abate under the Ordinance had already been issued." Kagarice asks this Court on appeal to not just affirm the Judge Combo's finding that Kagarice was mandated to personally serve a "notice of a nuisance" upon Madsen, but to additionally, by engaging in layer upon layer of speculation and assumption, take it to the level of a "misdemeanor now being committed in the officer's presence," because somehow, Madsen may have magically received prior notice of a prior nuisance. In doing so, Kagarice focuses on Hauser City Ordinance Sections 3-1-7 and 3-1-3(B), and Kagarice breathes not one word on appeal before this Court about Hauser City Ordinance Section 3-1-3(D). That ordinance allows service by certified mail or by simply leaving the notice on Madsen's property. At no point did Kagarice bother to mention Hauser City Ordinance Section 3-1-3(D) to Judge Combo in

Kagarice's Memorandum in Support of Defendant's Second Motion to Dismiss. Mem. in Supp. of Def.'s Second Mot. to Dismiss 6-7. Unfortunately, counsel for the plaintiff, the State of Idaho did not brief Hauser City Ordinance Section 3-1-3(D) to Judge Combo either. Nonetheless, Judge Combo discovered Hauser City Ordinance Section 3-1-3(D) and discussed such:

> Section 3.1.3D sets forth the method of service, requiring that service shall be served personally where practicable by certified mail or posting notice to abate on the premises itself. Then if a person so notified neglects or fails to abate the nuisance after the notice to abate has been served and the time period for any appeal having run, then they can be convicted of a misdemeanor.

Tr. p. 9, ll. 1–8. However, this correct interpretation of Hauser City Ordinance Section 3-1-3(D) was soon followed by the incorrect finding that once Kagarice had identified, "the existence of a nuisance, the ordinance mandates that he serve written notice *upon the person* causing or maintaining the nuisance or the owner or occupier of a property to abate [...]." Tr. p. 9, ll. 17 – 21 (italics added). On appeal, this Court determines that Judge Combo's finding that Kagarice was mandated to serve notice to abate upon the person of Madsen is not supported as a matter of fact and as a matter of law, and is in fact contradicted by Hauser City Ordinance Section 3-1-3(D).

But the most compelling reason for this Court to find that Kagarice was not required to personally serve a written notice to abate upon Madsen, is the fact that when Kagarice arrived back at Madsen's property, the nuisance had abated for at least thirteen hours. When Kagarice returned to Madsen's property, there simply was no notice to abate to be given...the nuisance had abated while Kagarice was present on Madsen's property, thirteen hours earlier.

The attorneys for the parties are in agreement that the nuisance abated during Kagarice's first initial visit to Madsen's property, and that the nuisance remained

nonexistent when he returned to the property the second time. Oral Arg. Hr'g, Dec. 11, 2018. However, counsel for Kagarice is unwilling to admit that notice to abate need not be given for a nuisance which has already abated.

This Court has previously held in *Kobrick v.Sawmill Point Development, Inc.,* 2014 WL 4375459 (Idaho Dist.), Kootenai Co. Case No. CV20112494, August 27, 2014, Memorandum Decision and Order Granting in Part and Denying in Part Sawmill Point Development Defendants' Motion for Partial Summary Judgment:

> Nuisance is defined by statute as "[a]n obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property..." I.C. § 52-101. A public nuisance affects an entire community or neighborhood at the same time, even if the annoyance or damage amongst individuals is unequal. I.C. § 52-102. In turn, a private nuisance is "[e]very nuisance not defined by law as a public nuisance or moral nuisance..." I.C. § 52-107. "The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence." I.C. § 52-110. "A nuisance per se is that which is a nuisance at all times and under all circumstances. A nuisance in fact is that which is not inherently a nuisance, or one per se, but which may become such by reason of surrounding circumstances, or the manner in which conducted." *McVicards v. Christensen*, 156 Idaho 58, 61, 320 P.3d 948, 951 (2014) (quoting *Rowe v. City of Pocatello*, 70 Idaho 343, 348, 218 P.2d 695, 698 (1950)). For any nuisance besides a moral nuisance, "[t]he action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered." I.C. § 52-111.

Mem. Decision and Order Granting in Part and Den. in Part Sawmill Point Development Defs.' Mot. for Partial Summ. J. 25-26. Thus, the Idaho Statutes do not make conducting a nuisance a criminal act. Instead, the Idaho Statutes call for a civil remedy. The Hauser City Ordinance only makes maintaining a nuisance a misdemeanor if, after notice, the nuisance persists. Hauser City Ordinance Section 3-1-3(D) reads: "Then if a person so notified neglects or fails to abate the nuisance after the notice to abate has been served and the time period for any appeal having run, then they can be convicted of a

misdemeanor." From a **legal** standpoint, abatement of any nuisance, even after notice is given, causes the misdemeanor crime under the Hauser City Ordinance to cease to exist. From a **factual** and common sense standpoint, if a car alarm is a nuisance, it is a minor nuisance. A car alarm going off is a minor nuisance, the remedy of which is civil, not criminal. Because the minor nuisance posed by a car alarm going off is so easily abated, and once abated, not likely to recur, the civil remedy would be so infinitesimally small that it would not be worth pursuing. While the Idaho Statutory scheme does not cut off civil damages for the existence of a past nuisance which has now abated, this Court cannot imagine a jury which would give any money for nuisance damages for a car alarm which was going off on one occasion, which ceased going off while the husband of the complaining witness was present. If no *civil* remedy would ever be given for a car alarm going off, why would any *criminal* action ever be countenanced? Finally, nuisances, by statutory definition, must cause damage to the neighboring parcel, and, usually, the nuisance is created for the benefit of the landowner causing the nuisance. Whether the damage is caused by noise, by pollution of the air or water, or by some other method, the cause of the damage benefits the landowner of the nuisance to the detriment of the neighbor. While benefiting the owner of the nuisance, or the owner's shareholders, the nuisance is not for the greater good. On the other hand, a car alarm serves the legal purpose of deterring theft of the vehicle and/or its contents. A car alarm serves the greater good. A car alarm going off can be just as annoying to the owner (if he or she hears it), as compared to others who hear the alarm. Not all car alarms going off are on cars actually and actively being broken into. Car alarms can sound falsely, and often do. While any of us might think, "I wonder if that alarm means someone is breaking into a car," no

reasonable person would think to themselves, "I bet the person who owns that car detonated that alarm on purpose, just to annoy me."

In any event, as a matter of law, Hauser City Ordinance Section 3-1-3(D) mandates that no misdemeanor can occur if the nuisance abates. Because Hauser City Ordinance Section 3-1-3(D) reads, "Then if a person so notified neglects or fails to abate the nuisance after the notice to abate has been served and the time period for any appeal having run, then they can be convicted of a misdemeanor," Kagarice was not required to personally serve a written notice to abate upon Madsen. The nuisance had already abated, there was no notice to be given by Kagarice, and there was no possibility of any misdemeanor crime being committed.

2. Hauser City Ordinance Section 3-1-3(B) requires a written notice to abate to be served upon finding that a nuisance exists, and Section 3-1-3(D) provides three acceptable methods of serving a written notice to abate.

Section 3-1-3(B) of the Hauser City Ordinance states:

> Whenever the mayor, city clerk or law enforcement agency finds that a nuisance exists, he shall cause to be served upon the owner, agent or occupant of the property on which the nuisance is located, or upon the person causing or maintaining the nuisance, a written notice to abate...

Section 3-1-3(D) then states, "[t]he notice to abate shall be served personally, where practical, by certified United States mail, or by posting such notice to abate on the premises." Based on the plain language of Section 3-1-3(B), the only requirement is that a written notice to abate be served. There is no language present in that section that states the method of service is required to be personal service. Instead, Section 3-1-3(D) reiterates that the notice to abate must be served, and goes on to provide multiple methods of service.

It makes logical sense to provide the person looking to serve a written notice to abate with options based on circumstances presented, as some methods of service are more suitable for certain situations than others. If a law enforcement officer comes across a vacant field of noxious weeds, the officer would likely choose to serve the owner of the land by certified mail to the name and address in the assessor's office. If the field had a residence on it, the officer may choose to personally serve the owner of the field with a written notice to abate at his residence. Had the officer chosen to post the notice to abate to a tree adjacent to the field, the notice to abate might not be seen for days, months, or years.

Here, Kagarice identified the car alarm, which was coming from a Subaru Legacy located on Madsen's property, as a nuisance, pursuant to Hauser City Ordinance Section 3-1-1(E). Kagarice reported that the car alarm had stopped sounding while he was present during his first initial visit to Madsen's property. Kagarice then returned to Madsen's property approximately thirteen hours later, claiming that he had an affirmative obligation to personally serve a notice to abate on the person responsible for the nuisance. However, as discussed above, Section 3-1-3(D) provides three methods of service. It is up to the person serving the notice to choose the method that most logically fits with his or her particular situation – the method that ensures the nuisance will be abated as quickly as possible. The majority of notices are likely to be served personally, which is the preferred method, but personal service is not required by the ordinance. Therefore, because Section 3-1-3(D) provides three different methods of service, Kagarice did not have an affirmative obligation to personally serve a notice to abate.

In conclusion, the Court finds that Hauser City Ordinance Section 3-1-3(B) requires only that a written notice to abate be served upon finding an existing nuisance, while Section 3-1-3(D) provides three methods of serving the written notice to abate.

3. Hauser City Ordinance Section 3-1-3(B) does not require a written notice to abate to be served where the nuisance has ceased to exist.

The language of Hauser City Ordinance Section 3-1-3(B) specifically mandates a "finding...that a nuisance exists," before service of the notice to abate is proper. Again, Section 3-1-3(B) reads, "Whenever the mayor, city clerk or law enforcement agency finds that a nuisance exists, he shall cause to be served upon the owner, agent or occupant of the property on which the nuisance is located, or upon the person causing or maintaining the nuisance, a written notice to abate..." The language "that a nuisance exists" mandates the nuisance must be a presently-existing nuisance. There can be no other interpretation. The language "a written notice to abate" leads to the same conclusion, that the nuisance must presently exist. There is no language in the Hauser City Ordinance that even alludes to the idea that a notice to abate the nuisance should be served where the nuisance has already abated. According to Black's Law Dictionary, abatement is defined as, "the act of eliminating or nullifying." *Black's Law Dictionary*, 2 (7th ed. 1999). It would not make logical sense to serve a written notice to abate – a notice explaining that the existing nuisance must be eliminated – when the nuisance has already abated, the nuisance has been eliminated and no longer exists.

Here, during his first initial visit to Madsen's property, Kagarice reported that the car alarm had stopped. In other words, there was an existing nuisance when Kagarice arrived to the property, and at some point during the four minutes he was present at the scene, the nuisance abated. When Kagarice returned to Madsen's property approximately thirteen hours later, the nuisance remained nonexistent. Because there was no longer an existing

nuisance, as the car alarm had stopped approximately thirteen hours prior to his return, the Section 3-1-3(B) requirement of serving a written notice to abate no longer applied. Therefore, Kagarice was not under an affirmative obligation to serve a notice to abate, as the nuisance had already abated.

In conclusion, the Court finds that Hauser City Ordinance Section 3-1-3(B) does not require a written notice to abate be served where the nuisance no longer exists. Only an existing nuisance, as defined in Section 3-1-1, falls within the scope of Section 3-1-3(B).

C. Analysis of the five legal findings in the May 21, 2018, Order to Dismiss.

1. Kagarice possessed lawful authority to investigate the nuisance in violation of Hauser City Ordinance,Section 3-1-1, caused by the vehicle alarm. Order to Dismiss, 1.

Kagarice had the lawful authority to investigate the car alarm as a nuisance. At the time Kagarice arrived early the morning of June 1, 2017, following up on his wife's text message regarding a car alarm going off in their neighborhood, there was at the moment he arrived, a nuisance. While Kagarice was present, the nuisance abated. Kagarice had the lawful authority to investigate.

2. Kagarice possessed lawful authority to request identification from Madsen, the individual who acknowledged the existence of such nuisance. Order to Dismiss, 1.

Kagarice possessed lawful authority to request identification from Madsen. However, Kagarice lacked the legal authority to demand identification from Madsen. Once Kagarice demanded Madsen identify herself, he seized Madsen. This is more fully discussed in the next section.

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3. Madsen had a legal obligation to identify herself and failed to do so upon proper demand. Order to Dismiss, 1.

a. Introduction

This Court finds as a matter of law that Madsen did not have a legal duty to identify herself upon demand by Kagarice. This Court freely reviews the magistrate judge's findings of law.

Judge Combo found that Madsen had a legal obligation to identify herself, as she was the owner of the prior-existing nuisance. Tr. p. 10, ll. 12–14. Judge Combo further found that Kagarice had lawful authority to identify Madsen because he was investigating a misdemeanor offense. Tr. p. 11, 8–11. The State argues that law enforcement cannot compel a person to identify himself or herself when no criminal offense has occurred, and when there is neither reasonable suspicion nor probable cause to believe a crime has been committed or is about to be committed. Appellant's Br., 8. The State further argues that a violation of the Hauser City nuisance ordinance cannot be referred to as a misdemeanor in this case because Madsen was never served with a notice to abate. Appellant's Br., 10. The State asserts that in order for a nuisance offense to rise to a level where it could be considered a misdemeanor offense, a person must be served with a notice to abate, fail to abate, exhaust an appeal, and subsequently be convicted. *Id.* The State argues that unless each of those steps occurs, there can be no investigation of a misdemeanor. *Id.* Kagarice argues that he possessed the lawful authority to demand Madsen's identification because he was investigating a possible misdemeanor violation of the Hauser City Ordinance. Resp't Br., 12. Kagarice further argues that it was "perfectly reasonable" for Kagarice to conclude that a notice to abate had already been issued to the responsible party, "thus making the offense a misdemeanor at the time of his initial arrival." *Id.* at 10.

b. Kagarice's questioning of Madsen regarding the prior-existing nuisance was not an investigation into a misdemeanor offense.

Unless Kagarice was investigating a misdemeanor offense at the time he demanded Madsen's identification, Kagarice had no legal ability to demand Madsen's identification. This Court finds Kagarice was not investigating a misdemeanor offense when he demanded Madsen's identification.

Hauser City Ordinance Section 3-1-7 states "[a]ny person violating any of the provisions of this chapter, after a notice to abate is served and any appeal is exhausted, shall, upon conviction, be guilty of a misdemeanor and punished as provided in the general penalty section..." The plain language of the ordinance makes clear there is a multi-step process that needs to take place before a person can be convicted of a misdemeanor violation. First, the person violating the nuisance ordinance must be served with a notice to abate. Second, the person must fail to abate the nuisance and the nuisance must persist. Third, any appeal pursued by the person must be exhausted. Fourth, the person must be convicted. Once these four steps are completed, the person may then be guilty of a misdemeanor. A law enforcement official, mayor, or city clerk cannot claim to be investigating a misdemeanor offense before having even served the person with a notice to abate. To do so would be an improper deviation from Hauser City Ordinance Section 3-1-7. Further, a law enforcement official, mayor, or city clerk may not purposefully claim to be investigating a misdemeanor under the Hauser City Ordinance, before having served a notice to abate, with the intention of turning the encounter into an investigative detention or a "stop." The law enforcement official would need to abide by the ordinance and follow the proper steps before the situation could rise to a proper investigative detention.

Here, Judge Combo found Kagarice told Madsen the reason he was present at her home was because he was investigating a misdemeanor offense. Tr. p. 5, ll. 20–22.

Because Madsen was not served with a notice to abate, the remaining steps required in Section 3-1-7 had not been met. Therefore, Kagarice was not investigating a misdemeanor offense. He was actually investigating a possible prior violation of Hauser City Ordinance Section 3-1-1(E), the ordinance prohibiting all unnecessary noises and annoying vibrations. In summary, it was factually and legally false for Kagarice to tell Madsen that his questioning of Madsen regarding the brief sounding of a car alarm thirteen hours prior to his arrival was an investigation into a misdemeanor offense.

Next, this Court finds Kagarice's "perfectly reasonable" rationale that Madsen may have already been served with a notice to abate prior to his initial visit – elevating his investigation of the nuisance to the misdemeanor level – to be quite unreasonable. The State accurately provides that the proper analysis requires the Court to take an objective look at what information Kagarice had at the time of his arrival – not what he subjectively believed could have occurred beforehand. *See* Appellant's Reply Br., 8. The State's position is supported by *State v. Wisnasky*, No. CRF 2009 5869, 2009 WL 2929266, at *2 (Idaho Dist. Aug. 17, 2009) (a defendant's subjective perception is not the standard), *State v. Spies*, 157 Idaho 269, 272, 335 P.3d 609, 612 (Ct. App. 2014), quoting *Horton v. California*, 496 U.S. 128, 138, 110 S.Ct. 2301, 2308–2309, 110 L.Ed.2d 112, 124 (1990) (evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer), and *State v. Baxter*, 144 Idaho 672, 680, 168 P.3d 1019, 1027 (Ct. App. 2007) (citing *State v. Julian*, 129 Idaho 133, 136, 922 P.2d 1059, 1062 (1996) (when reviewing an officer's actions, the court must judge the facts against an objective standard). Here, Kagarice was made aware of the car alarm by way of a text message from his wife, as they live near Madsen's residence. Kagarice contacted dispatch to see if anyone had

responded to the active car alarm, or if dispatch had received any phone calls reporting the car alarm. Dispatch responded that they had not received any reports about a car alarm and thus nobody had responded to it. Kagarice arrived on the scene within thirty minutes of receiving his wife's text message.[1] From an objective viewpoint, Kagarice likely knew that he was the first person to respond to the car alarm. He responded to the location very soon after his wife texted him about the situation. Therefore, it was unreasonable for him to believe that Madsen could have been served with a notice to abate prior to his initial arrival. Further, even if Madsen had been served with a notice to abate prior to Kagarice's arrival, the nuisance in fact abated while he was still on the property. Therefore, there was no failure to abate on behalf of Madsen. Even in this far-fetched situation argued by Kagarice, the requirements of Section 3-1-7 would still not have been satisfied, and the investigation would not have risen to the misdemeanor level.

In conclusion, Kagarice's questioning of Madsen about the car alarm that was going off thirteen hours prior was not an investigation into a misdemeanor offense. Because Kagarice's questioning of Madsen was not regarding a misdemeanor offense, he had no lawful authority to demand her identification.

c. No reasonable suspicion was present that would give Kagarice the authority to require Madsen produce her identification.

The parties do not dispute that it was permissible for Kagarice to come back to Madsen's property, knock on her door, and proceed to ask her questions about the car alarm that had been going off around 3:45 a.m. that morning. While there surely are more pressing matters that an on-duty law enforcement officer could spend his time and effort on, an officer has every right to approach a home and speak with whoever answers the

[1] The time Kagarice arrived on the scene is reported differently by each party. The State asserts Kagarice arrived to Madsen's property at 3:45 a.m., while Kagarice states he

door – even when there is no current or ongoing issue.[2] A law enforcement officer is permitted to ask the individual questions and request to see identification. *See State v. Wisnasky*, No. CRF 2009 5869, 2009 WL 2929266, at *4 (Idaho Dist. Aug. 17, 2009); *State v. Fry*, 122 Idaho 100, 102-03, 831 P.2d 942, 944-45 (Ct. App. 1991) (even without reasonable suspicion, "the officer may generally ask the individual questions and *ask* to examine identification") (italics added); *State v. Nickel*, 134 Idaho 610, 613, 7 [P.3d 219, 222 (2000) ("Interrogating a person concerning his identification or *requesting* identification does not, without more, constitute a seizure.")(italics added), citing *I.N.S. v. Delgado*, 466 U.S. 210, 216, 104 S. Ct. 1758, 1762, 80 L. Ed. 2d 247 (1984); *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325, 75 L. Ed. 2d 229 (1983). Therefore, simply because there was no longer an existing nuisance, Kagarice was not prohibited from returning to the property and making contact with Madsen. The dispute between the parties arises the moment Kagarice transitioned from *requesting* that Madsen provide identification to *requiring* her to provide identification.

The Court will briefly recap the relevant facts as they were presented in Judge Combo's decision. While on duty and in full uniform, Kagarice returned to Madsen's residence around 5:17 p.m. and made contact with Madsen. Tr. p. 4, l. 25 – p. 5, ll. 1–2. Kagarice proceeded to ask her questions about the vehicle that had emitted the car alarm during the night. Tr. p. 5, ll. 5–17. He then told Madsen that he needed to identify her for his report. Tr. p. 5, ll. 18–19. She replied that her name was Courtney. Tr. p. 5, ll. 19–20.

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arrived at 3:54 a.m. Appellant's Br., 1; Resp't Br., 1.

[2] This right is not limited to law enforcement officers. A door-to-door salesman can knock on a person's door and ask to whom they are speaking with, along with other personal questions, so as to build a rapport in the hopes of selling that person a product or service. The same right is held by Girl Scouts selling cookies, a friendly new neighbor wanting to introduce themselves, and virtually almost anyone else who is not specifically prohibited from doing so by law, pursuant to a no contact order, for example.

He then explained that he was investigating a misdemeanor offense and that she was required to provide her last name. Tr. p. 5, ll. 20–22. When she refused, "[h]e told her multiple times that she needed to identify herself or that she would be arrested." Tr. p. 5, ll. 22–25. When she expressed anger and confusion about what crime he was investigating and why she would possibly be arrested, Kagarice told her to exit the residence, as he was concerned for his safety. Tr. p. 6, ll. 1–3. Madsen refused. Tr. p. 6, l. 5. "Based upon her refusal to identify herself and her refusal to exit the residence, he placed her under arrest for resisting and obstructing the investigation of the nuisance." Tr. p. 6, ll. 6–9.

As mentioned, the above are the facts as found by Judge Combo. In this case, the "facts" were as presented to Judge Combo in the Affidavit [of Kootenai County Sheriff's Detective Ryan Duncan] in Support of Probable Cause, filed on November 15, 2017. At the April 30, 2018, hearing, Judge Combo stated: "The undisputed facts considered in the light most favorable to the non-moving party as set forth in Detective Duncan's affidavit in support of probable cause are as follows:" Tr. P. 3, ll. 17-20. There was no sworn testimony provided by Kagaraice or Madsen, but in Detective Duncan's Affidavit in Support of Probable Cause there is 1) an Affidavit in Support of a Warrantless Arrest prepared by Kagarice to support his arrest of Madsen, 2) the transcript of an interview between Detective Duncan and Kagarice, not taken under oath, and 3) the transcript of an interview between Detective Duncan and Madsen, not taken under oath. The pertinent portions of the Affidavit in Support of Probable Cause are as follows, taken from Detective Duncan's report:

> On 07/27/17 I (Det. Duncan) was assigned to investigate this incident involving IL-Trooper Joshua Kagarice and V-Courtney Madsen. The request was officially made by the Idaho State Police chain of command (see attached letter). This incident specifically involved the arrest of Courtney by Trooper Kagarice on 06/01/17 for IC:18-705 Resisting/Obstructing an Officer (See Trooper Kagarice's attached report).

It should be noted that Trooper Kagarice and Courtney are neighbors and Trooper Kagarice was at Courtney's residence following up on a noise complaint he had received from his wife, via phone at the end of his scheduled shift. Her arrest occurred on a follow up contact at approx.. 1717 hrs. after he was unable to make contact with anyone at her residence at 0354 hrs.

* * *

It does appear [from the four surveillance videos from Madsen's residence] that the three low resolution videos likely show Trooper Kagarice taking Courtney to the ground while at the doorway to the residence and a dog walking around near by.

* * *

On 08/01/17 I spoke with M-Cindy Espe who normally handles code inforcement for the City of Hauser. Espe advised she has worked for the city for approx.. ten years. Espe said the normal procedure for dealing with a violation of city ordinance would be for a person to file a complaint with city hall. A notice is then mailed to the offending resident/property owner to give them an opportunity to remedy and/or address the issue to take care of it. If the letter is ignored or the problem not fixed things would then proceed toward a possible misdemeanor charge for violation of the ordinance.

* * *

The information provided during the interviews by both Trooper Kagarice and Courtney [Madsen] were very similar. In summary both stated the following:

They are neighbors living in close proximity but due to residing on different streets have had no interactions as neighbors. Trooper Kagarice arrived at Courtney's residence while on duty in the early morning hours of 06/01/17. While at the residence he was unable to contact anyone and left after a brief time, likely less than five minutes. While on scene Trooper Kagarice sprayed pepper spray toward Courtney's dog when the dog came close to him.

He returned the following afternoon again on duty. Trooper Kagarice advised Courtney he was there following up his earlier visit, which was in reference to a complaint he had received from his wife in the early morning hours of 06/01/17 that a car was alarm going off at Courtney's residence and had woken up his family.

Some discussion occurred at the doorway to the residence about the noise from the vehicle, which was a Subaru parked in front of Courtney's residence. Courtney initially identified herself only as "Courtney". Trooper Kagarice pressed her to further identify herself by providing identification and told her she needed to do so because he was there investigating a criminal violation caused by the noise from the Subaru in the early morning hours. When Courtney refused Trooper Kagarice's repeated requests to further identify herself he advised her she was under arrest for Resisting/Obstructing.

Following Trooper Kagarice advisements that she was under arrest Courtney did not immediately exit the residence and discussions

> continued at/near the residence doorway about whether he could or should be arresting her. While at/near the doorway to the residence Trooper Kagarice took Courtney to the ground. Courtney was handcuffed at some point after Trooper Kagarice went hands on and Courtney was then escorted to the front of his patrol car.

Aff. in Supp. of Probable Cause, Report for Incident 17-33310, 2-5. What is pertinent to this Court's finding that Kagarice demanded Madsen identify herself, rather than simply request, is Detective Duncan's findings, based on Kagarice's affidavit and interview, that, "Trooper Kagarice pressed her to further identify herself by providing identification and told her she needed to do so because he was there investigating a criminal violation caused by the noise from the Subaru in the early morning hours." The words "she needed to do so" is a demand, not a request. The reason given for that demand, that he "told her she needed to do so because he was there investigating a criminal violation caused by the noise from the Subaru in the early morning hours," is a false reason. There are no circumstances indicating that Madsen had committed a crime. Emboldened by his false reasoning, Kagarice the told Madsen she was under arrest for resisting and obstructing, and then Kagarice took Madsen to the ground. Madsen was under arrest, both by Kagarice's words "you are under arrest," and by Kagarice's actions, going "hands on" and taking Madsen to the ground and handcuffing Madsen. This Court finds Madsen was seized the instant Kagarice demanded Madsen identify herself. Reaching that conclusion, this Court finds the Idaho Court of Appeals decision in *State v. Fry*, cited above, to be instructive.

> Was There a "Seizure" within the Meaning of the Fourth Amendment?
>
> Preliminarily, we note that law enforcement practices are not required by the fourth amendment to be reasonable unless they are either "searches" or "seizures." Unless Fry was "seized" within the meaning of the constitution, the police encounter need not be justified by a reasonable suspicion. Thus, we begin our analysis by determining whether Fry was "seized."
>
> A seizure does not occur simply because a police officer approaches an individual on the street or other public place and asks a

few questions. *Florida v. Bostick,* 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); *Florida v. Royer,* 460 U.S. 491, 497, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983). Even when officers have no basis for suspecting a particular individual, they may generally ask the individual questions and ask to examine identification. *Florida v. Rodriguez,* 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984); *INS v. Delgado,* 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984); *State v. Zapp,* 108 Idaho 723, 701 P.2d 671 (Ct.App.1985). **So long as police do not convey a message that compliance with their requests is required, the encounter is deemed "consensual" and no reasonable suspicion is required**. *See, e.g., Bostick, supra.* A seizure occurs—and the fourth amendment is implicated—when an officer, by means of physical force or show of authority, has in some way restrained a citizen's liberty. *Bostick,* 501 U.S. at ——, 111 S.Ct. at 2386; *Terry v. Ohio,* 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968). The critical inquiry is whether, taking into account all of the circumstances surrounding the encounter, "the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Bostick,* 501 U.S. at ——, 111 S.Ct. at 2387, *quoting Michigan v. Chesternut,* 486 U.S. 567, 569, 108 S.Ct. 1975, 1977, 100 L.Ed.2d 565 (1988). *See also California v. Hodari,* 499 U.S. 621, ——, 111 S.Ct. 1547, 1547, 113 L.Ed.2d 690 (1991).

In the instant case, the state argues that Fry "voluntarily" rolled down his window at Officer Wilson's request. The state points to the fact that the officer displayed no weapons or other show of force, and maintains that the officer simply sought Fry's cooperation in answering his questions. Officer Wilson, fully dressed in his police officer's uniform, knocked on the window of Fry's pickup. Fry rolled down the window and Wilson asked Fry what he was doing and if Wilson could have his driver's license. Unlike other cases in which the police request the subject's cooperation in answering questions, the inquiry here as to what Fry was doing did not give Fry the option of answering or not. In addition, the state's characterization of this encounter ignores the significant fact that, at the time Officer Wilson approached the driver's window, Officer Dunbar had placed himself directly behind Fry's vehicle, the front end of which was nearly against the wall of a building, making it impossible for Fry to drive away without running over Officer Dunbar. *Compare United States v. Rose,* 889 F.2d 1490, 1493 (6th Cir.1989) (D.E.A. agents in civilian clothing asked driver of vehicle to turn off engine; driver's compliance deemed voluntary.) We conclude that the police conduct in this case "would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." Accordingly, we hold that Fry was "seized" within the meaning of the fourth amendment.

Was the seizure "reasonable?"

Not all seizures of the person need be justified by probable cause to arrest for a crime. A police officer may, in appropriate circumstances and in an appropriate manner, detain a person for purposes of

investigating possible criminal behavior, even though there is no probable cause to make an arrest. *Terry,* 392 U.S. at 22, 88 S.Ct. at 1880. However, in order to pass constitutional muster, an investigatory seizure, or "stop," must be justified by a reasonable, articulable suspicion on the part of the police that the person to be seized had committed or was about to commit a crime. *Florida v. Royer, supra,* 460 U.S. at 491, 103 S.Ct. at 1319; *Adams v. Williams,* 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). Whether an officer had the requisite reasonable suspicion to detain a citizen is determined on the basis of the totality of the circumstances. *United States v. Cortez,* 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *State v. Johns,* 112 Idaho 873, 887, 736 P.2d 1327, 1241 (1987). Based upon the "whole picture," the detaining officer must have a particularized and objective basis for suspecting the person stopped of criminal activity. *Mason v. State Dept. of Law Enforcement,* 103 Idaho 748, 750, 653 P.2d 803, 805 (Ct.App.1982).

In addition to the facts recited above, the district court found that the Fry's vehicle exhibited guns in its gun rack. The court further found that, prior to this incident, there had been sixty-seven property crimes in Ketchum and twenty commercial property crimes in less than a two-month period. Fry argues that neither these facts, nor any other evidence produced at the suppression hearing, were sufficient to provide Officers Wilson and Dunbar with the level of articulable suspicion to justify the seizure. We agree.

Our review of the officers' testimony in this case reveals that, prior to their encounter with Fry, they possessed no objective basis for believing that Fry had violated any criminal statute or was otherwise about to engage in criminal activity. The officers' observations yielded nothing to implicate Fry in the recent rash of property crimes. Having a gun rack in one's vehicle does not reasonably give rise to the suspicion that one is about to engage in criminal conduct. The fact that Fry attempted to leave when he saw the officers does not, without more, supply the officers with a reason to conclude that crime was afoot. Moreover, the "unusual fashion" in which Fry operated his vehicle was in no way indicative of crime. Nor can we say that these facts, combined, give rise to a particularized suspicion of criminal activity. At the very most, these facts show that Fry was having difficulty with his vehicle's reverse gear, and that he did not wish to confer with the officers. Absent articulable circumstances reasonably suggesting crime, we must reverse the district court's ruling that the seizure was a permissible investigative stop.

* * *

Conclusion

For the reasons above, we hold that Fry was unreasonably seized in violation of the fourth amendment, and that the district court erroneously denied Fry's motion to suppress. Accordingly, we vacate Fry's judgments of conviction and remand the case for further proceedings.

122 Idaho at 102-04, 831 P.2d at 944-46 (bold added). *Fry* shows that Kagarice had every right to "ask" Madsen to identify herself, but that Kagaraice had no right at all to "demand" she identify herself. In making that demand, Kagarice needed reasonable suspicion that a crime had been committed, and he had no such reasonable suspicion. At the moment he demanded Madsen to identify herself, Kagarice violated to rule discussed above in *Fry* and *Bostic*, "So long as police do not convey a message that compliance with their requests is required, the encounter is deemed 'consensual' and no reasonable suspicion is required." At the moment Kagarice demanded Madsen's identification, an objective person would believe they were no longer free to leave. Seconds later, when Madsen was told by Kagarice that she was under arrest, Madsen was certainly no longer free to leave. This is true objectively, and subjectively from Kagarice's standpoint (he is the one uttering the declaration she is now under arrest), and subjectively from Madsen's standpoint (she heard Kagarice's declaration she was now under arrest). The fact that Madsen resisted being cuffed occurred after she has been unlawfully arrested. The fact that when Madsen was handcuffed and physically no longer free to leave does not matter, because she was under arrest and no longer objectively free to leave prior to any physical resistance. Other cases support this Court's conclusions on appeal.

"The Fourth Amendment to the United States Constitution, and its counterpart, Article I, Section 17 of the Idaho Constitution, guarantee the right of every citizen to be free from unreasonable searches and seizures." *State v. Kraly*, No. 42580, 2016 WL 703042, at *2 (Idaho Ct. App. Feb. 23, 2016). They are "designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *INS v. Delgado*, 466 U.S. 210, 215, 104 S. Ct. 1758, 1762, 80 L.Ed.2d 247 (quoting *United States v. Martinez–Fuerte*, 428 U.S. 543, 554, 96 S.Ct. 3074, 3081, 49

L.Ed.2d 1116 (1976)). However, it is important to remember that "not all encounters between the police and citizens involve the seizure of a person." *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968)). "A seizure does not occur simply because a police officer approaches an individual on the street or other public place and asks a few questions." *Fry* at 102, 831 P.2d at 944 (citing *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991)). "Even when officers have no basis for suspecting a particular individual, they may generally ask the individual questions and ask to examine identification." *Id.* (citing *Florida v. Rodriguez*, 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984)). "So long as police do not convey a message that compliance with their requests is required, the encounter is deemed consensual and no reasonable suspicion is required." *Kraly* at *2 (quoting *Fry* at 102, 831 P.2d at 944) (quotations omitted).

Here, the encounter between Kagarice and Madsen started off as consensual, as Kagarice was permitted to make contact with Madsen, ask her questions, and request identification. Because Kagarice was merely inquiring about a car alarm that had gone off thirteen hours prior, as opposed to investigating a misdemeanor offense, Madsen was lawfully allowed to refuse Kagarice's request that she identify herself. However, after hearing Madsen's refusal, Kagarice then *told* her that she was *required* to provide her last name for his report regarding the prior-existing nuisance. After Madsen rightfully and lawfully refused, Kagarice escalated the situation by telling her "that she needed to identify herself or that she would be arrested." Kagarice clearly conveyed the message that Madsen was required to comply with his demands by requiring her to identify herself. Therefore, where the encounter started off as consensual, it quickly became nonconsensual. Because the encounter was nonconsensual, reasonable suspicion was required before Kagarice could lawfully compel her to identify herself.

Usually, "seizures must be based on probable cause to be reasonable." *State v. Bishop*, 146 Idaho 804, 811, 203 P.3d 1203, 1210 (2009) (citing *Florida v. Royer,* 460 U.S. 491, 499–500, 103 S.Ct. 1319, 1324–1325, 75 L.Ed.2d 229, 237–238 (1983)). "However, limited investigatory detentions, based on less than probable cause, are permissible when justified by an officer's reasonable articulable suspicion that a person has committed, or is about to commit, a crime." *Id.* (citing *Royer* at 498, 103 S.Ct. at 1324, 75 L.Ed.2d at 236). "Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts." *Id.*; *see also State v. Sheldon,* 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct.App.2003). "The quantity and quality of information necessary to establish reasonable suspicion is less than that necessary to establish probable cause." *Id.* (citing *Alabama v. White,* 496 U.S. 325, 330, 110 S.Ct. 2412, 2416, 110 L.Ed.2d 301, 308 (1990). However, "reasonable suspicion requires more than a mere hunch or 'inchoate and unparticularized suspicion.'" *Id.* (quoting *White* at 329, 110 S.Ct. at 2415, 110 L.Ed.2d at 308). "Whether an officer possessed reasonable suspicion is evaluated based on the totality of the circumstances known to the officer at...the time [...]." *Id.* (citing *Sheldon,* 139 Idaho at 983, 88 P.3d at 1223).

"Only when an officer, by means of physical force or show of authority, in some way restrains the liberty of a citizen may a court conclude that a seizure has occurred." *State v. Wisnasky*, No. CRF 2009 5869, 2009 WL 2929266, at *4 (Idaho Dist. Aug. 17, 2009) (citing *State v. Page*, 140 Idaho 841, 843, 103 P.3d 454, 456 (2004)). In *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497, 509 (1980), the United States Supreme Court stated:

> Examples of circumstances that might indicate seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the

> person of the citizen, or *the use of language* or tone of voice *indicating that compliance with the officer's request might be compelled.*

(emphasis added). *See Wisnaskey* at *1 (defendant was detained once the officer told him to step outside);*State v. Cardenas*, 143 Idaho 903, 155 P.3d 704 (Ct.App.2006) (defendant as seized the moment the deputy told him "he needed to come speak to me."; *State v. Gomez*, 136 Idaho 480, 482, 36 P.3d 832, 834 (Ct.App.2001) (defendant was seized, the state conceded, when the detective ordered him to "hang up the phone ... [because] I need to talk to you about a warrant."); *State v. Zubizareta*, 122 Idaho 823, 827, 839 P.2d 1237, 1241 (Ct.App.1992) (discussing a seizure which occurred in *State v. McAfee*, 116 Idaho 1007, 1008, 783 P.2d 874, 875 (Ct. App. 1989), where officers, after awaking McAfee, directed him to step out of his van). "[T]he proper inquiry in determining whether a seizure occurred is 'whether, under all the circumstances surrounding the encounter, a reasonable person would have felt free to leave or otherwise decline the officer's requests and terminate the encounter.'" *State v. Page*, 140 Idaho 841, 843, 103 P.3d 454, 456 (2004) (quoting *State v. Reese,* 132 Idaho 652, 653, 978 P.2d 212, 213 (1999). In other words, "'[s]o long as a reasonable person would feel free to disregard the police and go about his business,' an encounter between police and an individual is consensual." *Page* at 843–44, 103 P.3d at 456–57 (quoting *State v. Nickel*, 134 Idaho 610, 613, 7 P.3d 219, 222 (2000)).

Here, Kagarice knew that the Subaru Legacy had emitted its car alarm for a brief period of time during the early morning of June 1, 2017. Kagarice also knew that the car alarm had stopped, as he was present on the scene at the time. Kagarice knew that the car alarm no longer presented as an existing nuisance. When Kagarice returned to the property and made contact with Madsen approximately thirteen hours later, Madsen did not make any statements that would indicate she either committed a crime or was about to commit a crime. Madsen further did not engage in any movements or actions that would

indicate the same. She merely refused Kagarice's *demand* that she produce identification regarding a nonexistent nuisance. Therefore, Kagarice did not possess reasonable articulable suspicion that Madsen had committed a criminal offense, or was about to commit a criminal offense. Because reasonable suspicion was not present during Kagarice's encounter with Madsen, Kagarice did not possess the lawful authority to *require* that Madsen identify herself.

Kagarice states, "[i]n *United States v. Santana*, the Supreme Court determined that a woman who opened her door for the police was "in a 'public place' for the purposes of the Fourth Amendment [...]." Resp't Br., 11 (citing *U.S. v. Santana*, 427 U.S. 38, 40, 96 S. Ct. 2406, 2408 (1976)). Kagarice wrongly stated that the defendant in Santana opened her door for the police. That did not occur. The facts of the Santana case are as follows. After engaging in an arranged heroin "buy" with the defendant, the undercover officer who made the purchase informed his fellow law enforcement officers about the defendant. *Santana* at 40, 96 S. Ct. at 2408. The officers pulled their vehicles in front of the defendant's home and observed her standing in the doorway of her home holding a brown paper bag. *Id.* When they shouted "police" and displayed their identification, the defendant ran inside her home. *Id.* The officers quickly followed her through the open door, seized her, and as she tried to pull away, two bundles containing white powder fell out of the bag. *Id.* In its holding, the Supreme Court of the United States held that the defendant was in a public place when she had her front door completely open and was standing in her doorway, essentially exposing herself to the public, that she had no expectation of privacy, and even though she retreated into her house, law enforcement could follow her in to arrest her. *Santana* at 42, 96 S. Ct. at 2409. The Court further held that "there was a need for the police to act quickly to prevent the destruction of narcotics

evidence", and the defendant could not defeat a proper arrest that had been set in motion simply by retreating into her home. *Santana* at 42-43, 96 S. Ct. at 2409-10. This Court finds *Santana* to be entirely irrelevant to the issues before the Court in this case. Santana was suspected of committing a crime, Madsen was not. It really does not matter where Madsen was standing when Kagarice encountered her and demanded she identify herself. Madsen was in her doorway, but Madsen could have been in her bedroom or in the middle of a public park full of thousands of people. No matter where Madsen was located, Madsen had no duty to identify herself to Kagarice. This isn't a fourth amendment case, this isn't an exigent circumstances case. *Santana* is not applicable.

Kagarice also cites to *State v. Godwin*, 121 Idaho 491, 826 P.2d 452 (1991), for the proposition that a police officer should "be allowed to identify, with certainty, the person with whom he is dealing." Resp't Br., 11. That is a correct quote from *Godwin*, but counsel for Kagarice completely ignores the context of *Godwin*. *Godwin* involved a stop of an automobile, and the Idaho Supreme Court set forth the sundry reasons why an officer should be allowed to determine the identity of a driver (to see if they have a license, to see if that license is valid, to see if there are any warrants, etc.). The present case does not involve the stop of an automobile and the request for a driver's license. *Godwin* is not applicable.

In conclusion, because Kagarice was not investigating a misdemeanor offense, and because he did not possess any reasonable suspicion that Madsen had committed a criminal offense, or was about to commit a criminal offense, Kagarice did not have the legal authority to *compel* Madsen to produce identification. Further, based on the above facts, Madsen did not have a legal obligation to identify herself to Kagarice.

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4. Kagarice possessed the lawful authority to arrest Courtney Madsen for resisting and/or obstructing, in violation of Idaho Code Section 18-705. Order to Dismiss, 2.

This Court finds as a matter of law that Kagarice did not have the lawful authority to arrest Courtney Madsen for resisting and/or obstructing, in violation of Idaho Code Section 18-705. This Court freely reviews the magistrate judge's findings of law. This Court finds that Madsen was unlawfully seized and unlawfully arrested. This finding is based largely upon the findings immediately above, that Kagarice seized Madsen when he demanded her identification, and more clearly seized her when Kagarice told her she was under arrest. Temporally, the unlawful arrest of Madsen by Kagarice occurred before any restating or obstructing by Madsen occurred.

Judge Combo that Madsen stepped out of her home on her own, and that Kagarice had lawful authority to arrest her for resisting and obstructing by failing to identify herself. Specifically, Judge Combo stated:

> I am certainly mindful of the heightened constitutional protections that are afforded persons in their home. I do not find that there is an unreasonable infringement for an officer while investigating a nuisance to require someone to simply identify themselves. Contrary to the State's assertions in their brief, she was not pulled from her home. Her own statements in Detective Duncan's interview indicate that she stepped out on her own, and once she was out the door, she was handcuffed.
>
> So I find as a matter of law that Officer Kagarice had lawful authority to arrest her for resisting and obstructing by failing to identify herself.

Tr. p. 11, ll. 12 – 25. Then, Judge Combo stated:

> However, the mere fact that he had lawful authority doesn't mean that he exercised good judgment in its use. That certainly is a matter in this court's view that's more properly left for human resources. In addition, my decision today does not address the issue of excessive force.

Tr. p. 12, ll. 1 – 6.

The finding noted above, that "she stepped out [of her home] on her own" is belied by Judge Combo's factual finding that, "[B]ased on her refusal to identify herself and her refusal to exit the residence, he placed her under arrest for resisting and obstructing the investigation of a nuisance. As she stepped out of the door, he placed her in handcuffs, and she resisted, and he ended up taking her to the ground." Tr. p. 6, ll. 6–11. In turn, that finding by Judge Combo is belied by Detective Duncan's finding that, "[I]t does appear [from the four surveillance videos from Madsen's residence] that the three low resolution videos likely show Trooper Kagarice taking Courtney to the ground while at the doorway to the residence and a dog walking around near by." Aff. in Supp. of Probable Cause, Report for Incident 17-33310, 3. Thus, from a factual standpoint, Kagarice took Madsen to the ground while she was at her doorway. Thus, Judge Combo's factual finding that "she stepped out on her own" may or may not be supported by substantial competent evidence. But on this appellate review, this Court must find that such factual finding is supported by substantial competent evidence. However, as a matter of law, where and at what instant Madsen physically resisted (as opposed to her verbal resistance by not providing her full name), does not matter in analyzing whether the charge of unlawful arrest against Kagarice should have been dismissed. As set forth above, Madsen was unlawfully arrested by Kagarice when he demanded her identification. There can be no doubt Madsen was unlawfully arrested by Kagarice when he told her she was under arrest. At that point, she was still inside her doorway and there was absolutely no physical resistance by Madsen at that moment. While Judge Combo discussed the subsequent physical resistance, Judge Combo made his finding quite clear, stating "[S]o I find as a matter of law that Officer Kagarice had lawful authority to arrest her for resisting and obstructing by failing to identify herself." Tr. p. 11, ll. 24 – 25. Judge Combo found Kagarice had the lawful authority to

arrest Madsen for resisting and obstructing "by failing to identify herself," not for resisting being handcuffed.

Viewed in that light, the factual sequence of events as found by Judge Combo is not important. Madsen may have "stepped out [of her home] on her own", but only *after* she was "placed under arrest for resisting and obstructing the investigation of a nuisance." Thus, Judge Combo found that Madsen was placed under arrest only for refusing to identify herself and refusing to exit her own residence. Handcuffing Madsen by Kagarice occurred after he had arrested her, unlawfully, and during or following the handcuffing is when any physical resistance occurred. Thus, any physical resistance by Madsen is no defense to Kagarice for unlawful arrest.

Finally, Idaho Code Section 18-705 must be analyzed because Judge Combo held, "Kagarice possessed the lawful authority to arrest Courtney Madsen for resisting and/or obstructing, in violation of Idaho Code Section 18-705." Order to Dismiss, 2.

While the instant case is directly about Kagarice's charge of unlawful arrest, and really is not about Madsen's resisting and obstructing charge, Madsen's charge of resisting and obstructing becomes inextricably intertwined with Kagarice's unlawful arrest of Madsen only in determining whether or not that arrest of Madsen was lawful. If Madsen did more than peaceably resist or obstruct Kagarice's unlawful act of arresting and detaining Madsen, then, arguably, Kagarice might have a defense to his own charge of unlawful arrest. This is because if Madsen was anything other than peaceable in her resistance or obstruction of Kagarice's unlawful act, then Kagarice's unlawful act of unlawful arrest of Madsen, may eventually morph into a lawful act...that of arresting Madsen for physically resisting and obstructing. In other words, what started out as an unlawful arrest of Madsen (keep in mind there was no physical resistance by Madsen when Kagarice announced he

was arresting Madsen, only Madsen's refusal to give Kagarice her name) may eventually become a lawful arrest for resisting if she physically resisted Kagarice. However, as we shall see in just two paragraphs, *State v. Bishop* indicates physical resistance is lawful where the initial arrest was unlawful.

In order for Kagarice to be charged with unlawful arrest under Idaho Code Section 18-703, his arrest of Kagarice or his seizure (detains against her will) of Kagarice, must have been without "legal authority." Thus, if Kagarice had "lawful authority" to arrest and detain Madsen, then Kagarice has a defense to the charge of unlawful arrest. The statute reads, "Every public officer...who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will..., is guilty of a misdemeanor." I.C. § 18-703.

This Court has already found Kagarice's demands to have Madsen identify herself were unlawful, and this Court has already found Kagarice's demands to have Madsen exit her residence were unlawful, and this Court has already found Kagarice's arrest of Madsen was unlawful. Still, the facts of this case must be discussed in light of *State v. Bishop,* 146 Idaho 804, 203 P.3d 1203 (2009). This Court finds that before Kagarice went "hands on" with Madsen, he had no lawful authority to arrest Madsen for resisting and obstructing pursuant to Idaho Code Section 18-705. Up to the moment Kagarice went "hands on" with Madsen, Madsen had been "peaceably obstructing or refusing to obey an officer's unlawful act." Backing up to just seconds before Kagarice went "hands on," if Madsen indeed moved out of her doorway at the request of Kagarice, then at that instant, Madsen was actually cooperating with Kagarice, and was certainly no worse than "peaceably obstructing or refusing to obey an officer's unlawful act." Backing up before that, at the instant Kagarice informed Madsen he was arresting her, Madsen had been "peaceably obstructing

or refusing to obey an officer's unlawful act." When, at all times before that, Madsen had been refusing to provide her name, she was "peaceably obstructing or refusing to obey an officer's unlawful act."

At the very least, any physical resistance by Madsen does not provide Kagarice with a defense to his unlawful arrest charge. If any physical resistance that Madsen provided as Kagarice placed his handcuffs on Madsen went beyond "peaceably obstructing or refusing to obey an officer's unlawful act", there is still no defense to Kagarice on his unlawful arrest charge under Idaho Code Section 18-703 because, at the first time there is any physical resistance, Kagarice has already committed the crime of unlawful arrest. As mentioned above, this Court finds that at the moment Kagarice first demanded Madsen identify herself, he had unlawfully seized Madsen, and at no later time then when Kagarice announced to Madsen that he was arresting her for resisting and obstructing, Kagarice had committed the crime of unlawful arrest. But beyond that, implicit in the *Bishop* decision, the Idaho Supreme Court seems to countenance some physical resistance to an unlawful act. Marvin Bishop was approached by Hagerman, Idaho Police Chief, Loren Miller. Bishop had earlier approached "two carnival workers, who were in town working at the Hagerman's Fossil Day weekend celebration" and attempted to sell them methamphetamine. 146 Idaho at 809, 203 P.3d at 1208. Miller pulled up in his patrol car and told Bishop that he needed to speak with him. *Id.* Bishop said "hello" and kept walking. *Id.* Miller got out of his patrol vehicle and told Bishop to stop so they could talk. *Id.* Bishop asked Miller what he wanted to talk about and Miller responded "methamphetamine." *Id.* Bishop then stopped walking, informed Miller he was a Christian and that Jesus loved Miller. *Id.* Bishop then told Miller he was on his way to work and had just gotten off probation. *Id.* Miller observed some characteristics of Bishop consistent with drug use, noticed Bishop

holding a white grocery bag close to his chest, and so Miller decided to frisk Bishop for weapons, and told Bishop he was going to do so. *Id.* Bishop responded "no", and Miller then told Bishop unless he complied, he would be placed under arrest. *Id.* Bishop than began to comply and placed his hands on the trunk of Miller's patrol car. Once the frisk began, Bishop turned around and told Miller "no" again. *Id.* Miller then told Bishop he was under arrest for resisting and obstructing a police officer. *Id.* "This did not please Bishop, who began to struggle in order to avoid being handcuffed. It was not until after back-up arrived that Miller was able to handcuff Bishop and finish conducting the search." *Id.* A bag of methamphetamine was found in Bishop's pocket. *Id.* Bishop was subsequently charged with possession of paraphernalia, felony and misdemeanor possession of a controlled substance and resisting an officer. *Id.* The Idaho Supreme Court found Miller had reasonable suspicion to stop Bishop in order to investigate allegations of criminal activity. 146 Idaho at 815, 203 P.3d at 1214. The Idaho Supreme Court held that the methamphetamine was found in a search incident to Bishop's arrest. 146 Idaho at 815–16, 203 P.3d at 1214–15. However, the Idaho Supreme Court found both the frisk of Bishop was unlawful and the arrest of Bishop for resisting and obstructing an officer was unlawful. 146 Idaho at 815–16, 203 P.3d at 1214–15. The entire analysis of the Idaho Supreme Court in *Bishop* immediately follows. Note that at no time did the Idaho Supreme Court seem at all concerned with the undisputed fact that Bishop eventually gave some physical resistance prior to being handcuffed. In fact, in footnote 17, the Idaho Supreme Court specifically stated that any resistance by Bishop occurred after the decision had been made by Miller to arrest Bishop for resisting the frisk, so the struggle was irrelevant in determining whether Bishop's resistance to the frisk was lawful. This Court can think of no reason why any resistance by Madsen to Kagarice's efforts to handcuff her, were not

similarly irrelevant in determining whether her resistance was lawful, as any such resistance was clearly made after Kagarice had determined he was going to arrest Madsen. Indeed, in this case, as in *Bishop*, any such resistance was made by Madsen after Kagarice had *announced* the fact he was going to arrest her.

1.

> The State argues that the methamphetamine discovered during the search incident to the arrest is admissible because Bishop was lawfully arrested. It maintains that Bishop's act of resisting Miller's attempt to conduct a frisk constituted a violation of Idaho Code section 18–705. According to the State, section 18–705 makes it a crime to resist even an unlawful search or seizure. Bishop argues that his arrest was unlawful and, therefore, that the evidence must be suppressed. He maintains that his refusal to submit to an unlawful frisk did not constitute a violation of section 18–705.
>
> For an arrest to be considered lawful, it must be based on probable cause. *See Moore*, 553 U.S. at ——, 128 S.Ct. at 1607, 170 L.Ed.2d at 570–71. More specifically, an officer must "have probable cause to believe that a person has committed a crime in [his or her] presence." *Id.* at ——, 128 S.Ct. at 1608, 170 L.Ed.2d at 571–72; *see also* I.C. § 19–603 (authorizing a peace officer to arrest a person without a warrant "[f]or a public offense committed or attempted in [the officers] presence"). Probable cause exists when "the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been [or is being] committed." *Henry*, 361 U.S. at 102, 80 S.Ct. at 171, 4 L.Ed.2d at 138. Although an arresting officer is allowed some room for mistakes, the "mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusion of probability." *State v. Julian*, 129 Idaho 133, 137, 922 P.2d 1059, 1063 (1996) (quoting *Klingler v. United States*, 409 F.2d 299, 304 (8th Cir.1969)). Good faith on the part of the officer is not enough. *Henry*, 361 U.S. at 102, 80 S.Ct. at 171, 4 L.Ed.2d at 138. Because Miller arrested Bishop for obstructing a public officer in violation of Idaho Code section 18–705, Miller must have had probable cause to believe that Bishop violated the statute for the arrest to be considered lawful.
>
> Section 18–705 makes it a crime to "willfully resist[ ], delay [ ] or obstruct[ ] any public officer, in the discharge, or attempt to discharge, ... any duty of his office." I.C. § 18–705. Three elements must be satisfied in order to find a violation of the statute: "(1) the person who was resisted, delayed or obstructed was a law enforcement officer; (2) the defendant knew that the person was an officer; and (3) the defendant also knew at the time of the resistance that the officer was attempting to perform some official act or duty." *State v. Adams*, 138 Idaho 624, 629, 67 P.3d 103, 108 (Ct.App.2003). Here, there is no dispute that Miller was a law enforcement officer and that Bishop was aware of this fact. The issue is

whether Miller was attempting to perform an official act or duty of his office.

The term "duty" in section 18–705 includes only "those lawful and authorized acts of a public officer." *State v. Wilkerson*, 114 Idaho 174, 180, 755 P.2d 471, 477 (Ct.App.1988), aff'd, 115 Idaho 357, 358, 766 P.2d 1238, 1239 (1988). Because an unlawful act is not considered a "duty" under the statute, an individual may peacefully obstruct or refuse to obey an officer's unlawful act without violating the statute. *Id.* An individual may not, however, use force or violence to resist. *Id.* Accordingly, whether Bishop's arrest for obstruction was lawful depends on whether the frisk he was arrested for resisting was a "duty" under the meaning of section 18–705.

When an officer conducts a legal search, he or she is performing a duty of his or her office under section 18–705. *See State v. Wiedenheft*, 136 Idaho 14, 16–17, 27 P.3d 873, 875–76 (Ct.App.2001). In *Wiedenheft,* officers responded to a domestic violence report at Wiedenheft's home. *Id.* at 15, 27 P.3d at 874. When Wiedenheft answered the door, the police noticed that she seemed shaky and upset and appeared to have been recently injured. *Id.* Upon questioning by the officers, Wiedenheft insisted that there was not a problem and repeatedly refused to let them into her home. *Id.* When she attempted to shut her door, one of the officers stopped it with his foot and was struck in the shoulder with the door. *Id.* The officers then arrested Wiedenheft for resisting and obstructing a police officer under section 18–705. *Id.* Wiedenheft was convicted by a jury and subsequently appealed her conviction. *Id.* On appeal, the Idaho Court of Appeals affirmed Wiedenheft's conviction after concluding that the officers' warrantless entry into her home was a constitutional search. *Id.* at 17, 27 P.3d at 876. The court reasoned that the officers were discharging a "duty" under section 18–705 because their warrantless entry was lawful. *Id.* at 16–17, 27 P.3d at 875–76. More specifically, the entry was justified by the exigent circumstances exception to the warrant requirement. *Id.* at 17, 27 P.3d at 876. Because the officer's entry was constitutional, Wiedenheft's refusal to let him in constituted a violation of section 18–705. *Id.*

On the other hand, when an officer conducts an illegal search, the search is not a duty under section 18–705 and an individual may peacefully resist the search without violating the statute. *Graves v. City of Coeur d'Alene*, 339 F.3d 828, 841 (9th Cir.2003), *abrogated on other grounds by Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177, 189, 124 S.Ct. 2451, 2460, 159 L.Ed.2d 292, 304 (2004). In *Graves*, a police officer observed a protester carrying a heavy backpack that contained two round cylindrical objects. *Id.* at 835–36. The officer approached the protester and asked to search the backpack out of concern that it contained a bomb. *Id.* at 836. After the protester refused the officer's request several times, the officer demanded that the protester submit to a search. *Id.* at 836–37. The protester refused again and the officer arrested him for obstructing under section 18–705. *Id.* at 837. The protester later sued the officer for false arrest and violation of his Fourth

Amendment rights, but lost at trial. *Id.* at 833, 837. After the trial court denied the protestor's motion for judgment notwithstanding the verdict, he appealed. *Id.* at 838. Relying on this Court's decision in *State v. George*, 127 Idaho 693, 905 P.2d 626 (1995), the Ninth Circuit Court of Appeals held that the protester's refusal to submit to the search could not serve as a basis for his arrest under section 18–705.10 Id. at 841 n. 17, 844. The court reasoned that, because the officer did not have the legal authority to search the backpack, he was not performing a duty of his office under the meaning of section 18–705. *Id.* at 841–45. Accordingly, the protester's peaceful refusal to submit to the search did not constitute obstruction and his arrest for violating the statute was unlawful. *Id.*

These cases make clear that whether Bishop's arrest for obstructing an officer was lawful depends on whether the frisk itself was lawful. [11]

11. The State argues that "willful resistance, delay or obstruction to even an unlawful search or seizure constitutes an independent crime for which a defendant may be lawfully arrested" and that Idaho does not recognize a right to resist an unlawful search or seizure. In making this argument, the State relies on cases from other jurisdictions, which hold that a suspect does not have the right to resist an unlawful frisk through the use of force. *See City of Columbus v. Fraley*, 41 Ohio St.2d 173, 324 N.E.2d 735, 740 (1975) (concluding that citizens are not entitled to use force to resist an unlawful arrest); *State v. Trane*, 57 P.3d 1052, 1062 (Utah 2002) (holding that individuals do not have the right to physically resist even an unlawful police order); *Commonwealth v. Hill*, 264 Va. 541, 570 S.E.2d 805, 809 (2002) (holding that individuals do not have "the right to use force to resist an unlawful detention or 'pat down' search") (emphasis added); *Brown v. City of Danville*, 44 Va.App. 586, 606 S.E.2d 523, 533 n. 7 (2004) (concluding that the defendant had "no right to forcibly resist the attempted pat down, regardless of whether the initial detention was justified") (emphasis added). The State also relies on *State v. Richardson*, 95 Idaho 446, 511 P.2d 263 (1973), which held that an individual does not have the right to use force or weapons to resist an unlawful arrest when he or she knows, or has reason to believe, the arrest is being made by a police officer. *Id.* at 451, 511 P.2d at 268. However, Richardson does not dictate the outcome in this case for two reasons. First, Richardson was interpreting Idaho Code section 18–2703, which made it a crime for individuals to use force or violence to resist a police officer in the performance of his or her duty. The statute was repealed in 1981. Second, the Court in that case only concluded that individuals must "refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest." *Id.* (emphasis added). It did not address more passive forms of resistance not involving the use of force. Wilkerson, on the other hand, specifically addressed resistance by means other than physical force and held that

peaceful resistance is permissible when an officer is not performing a lawful duty. *Wilkerson*, 114 Idaho at 180, 755 P.2d at 477, aff'd, 115 Idaho at 358, 766 P.2d at 1239 (concluding that an individual's passive resistance "does not present the same immediate risk of violence and physical harm as does forcible resistance"). Accordingly, the State's argument is flawed in that it ignores the distinction between peaceful and forceful resistance.

See Wiedenheft, 136 Idaho at 16–17, 27 P.3d at 875–76; *Graves*, 339 F.3d at 841. If the frisk was unlawful, Bishop had a right to peacefully refuse to submit to the frisk and his subsequent arrest for resisting was unlawful. *See Graves*, 339 F.3d at 841. On the other hand, if the frisk was lawful, then Bishop was properly arrested for obstructing. *Id.*

2.

As discussed above, to be reasonable a search must be authorized by a warrant that is based on probable cause, unless one of the exceptions to the warrant requirement applies. *Katz*, 389 U.S. at 357, 88 S.Ct. at 514, 19 L.Ed.2d at 585. One such exception is the pat-down search for weapons acknowledged by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889, 909 (1968). Under *Terry,* an officer may conduct a limited pat-down search, or frisk, "of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons." *Terry*, 392 U.S. at 16, 30, 88 S.Ct. at 1877, 1886, 20 L.Ed.2d at 902, 911; *see also Florida v. J.L.*, 529 U.S. 266, 270, 120 S.Ct. 1375, 1378, 146 L.Ed.2d 254, 259 (2000). Such a frisk is only justified when, at the moment of the frisk, the officer has reason to believe that the individual he or she is investigating is "armed and presently dangerous to the officer or to others" and nothing in the initial stages of the encounter dispels the officer's belief. *Terry*, 392 U.S. at 24, 30, 88 S.Ct. at 1881, 1884, 20 L.Ed.2d at 907, 911. The test is an objective one that asks whether, under the totality of the circumstances, a reasonably prudent person would be justified in concluding that the individual posed a risk of danger. *State v. Henage*, 143 Idaho 655, 660–61, 152 P.3d 16, 21–22 (2007); *see also Terry*, 392 U.S. at 27, 88 S.Ct. at 1883, 20 L.Ed.2d at 909. To satisfy this standard, the officer must indicate "specific and articulable facts which, taken together with rational inferences from those facts," in light of his or her experience, justify the officer's suspicion that the individual was armed and dangerous. *Henage*, 143 Idaho at 660, 152 P.3d at 21 (quoting *Terry*, 392 U.S. at 21, 88 S.Ct. at 1879, 20 L.Ed.2d at 905). Although an officer need not possess absolute certainty that an individual is armed and dangerous, an officer's "inchoate and unparticularized suspicion or 'hunch' " is not enough to justify a frisk. *Terry*, 392 U.S. at 27, 88 S.Ct. at 1883, 20 L.Ed.2d at 909.

Several factors influence whether a reasonable person in the officer's position would conclude that a particular person was armed and dangerous. These factors include: whether there were any bulges in the suspect's clothing that resembled a weapon; whether the encounter took place late at night or in a high crime area; and whether the individual made threatening or furtive movements, indicated that he or she

possessed a weapon, appeared nervous or agitated, appeared to be under the influence of alcohol or illegal drugs, was unwilling to cooperate, or had a reputation for being dangerous. *See Ybarra v. Illinois*, 444 U.S. 85, 93, 100 S.Ct. 338, 343, 62 L.Ed.2d 238, 246 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 112, 98 S.Ct. 330, 334, 54 L.Ed.2d 331, 337 (1977); *Henage*, 143 Idaho at 661–62, 152 P.3d at 22–23; *State v. Davenport*, 144 Idaho 99, 103, 156 P.3d 1197, 1201 (Ct.App.2007); *State v. Greene*, 140 Idaho 605, 609, 97 P.3d 472, 476 (Ct.App.2004); *State v. Holler*, 136 Idaho 287, 292, 32 P.3d 679, 684 (Ct.App.2001); *State v. Babb*, 133 Idaho 890, 893, 994 P.2d 633, 636 (Ct.App.2000); *State v. Simmons*, 120 Idaho 672, 677, 818 P.2d 787, 792 (Ct.App.1991). Whether any of these considerations, taken together or by themselves, are enough to justify a *Terry* frisk depends on an analysis of the totality of the circumstances. *Henage*, 143 Idaho at 661–62, 152 P.3d at 22–23; *see also Terry*, 392 U.S. at 27, 88 S.Ct. at 1883, 20 L.Ed.2d at 909.

For a frisk to be held constitutional, an officer must demonstrate how the facts he or she relied on in conducting the frisk support the conclusion that the suspect posed a risk of danger. *Henage*, 143 Idaho at 661–62, 152 P.3d at 22–23. In *Henage,* a police officer conducted a pat-down search on the passenger of a vehicle that had been pulled over for a broken taillight. Id. at 657–58, 152 P.3d at 18–19. The officer decided to conduct the frisk after observing the passenger's nervous behavior and learning that the passenger had a knife. *Id.* at 658, 152 P.3d at 19. During the frisk, the officer discovered the knife, a glass pipe, and a cigar tube containing methamphetamine. *Id.* The passenger, who was charged with possession of a controlled substance and drug paraphernalia, filed a motion to suppress, arguing that the frisk was illegal. *Id.* The trial court denied the motion and the passenger appealed to this Court. *Id.* On appeal, we held that the evidence should have been suppressed because it was discovered during an unlawful frisk. *Id.* at 662–63, 152 P.3d at 23–24. We reasoned that the passenger's nervous appearance did not justify the conclusion that he was armed and dangerous because the officer "did not connect [the passenger's] nervousness with anything tending to demonstrate a risk to his safety." *Id.* at 661–62, 152 P.3d at 22–23. Moreover, the passenger's admission that he had a knife did not justify the search because weapon possession, in and of itself, does not necessarily mean that a person poses a risk of danger. *Id.* at 662, 152 P.3d at 23. In fact, the circumstances indicated that the passenger was not dangerous because he did not act threatening, did not have a reputation for violence, did not make any furtive movements, and was cooperative and polite. *Id.* at 661–62, 152 P.3d at 22–23. The fact that the officer may have had a subjective feeling that his safety was compromised was irrelevant under the objective totality of the circumstances analysis. *Id.* at 662, 152 P.3d at 23.

In this case, the State failed to show how the facts known to Miller would cause a reasonable person to conclude that Bishop was armed and dangerous. Although Miller testified that he decided to conduct the frisk in order to ensure his safety, he did not identify any objective facts to

support his conclusion that his safety was in danger. Miller testified that he decided to conduct the frisk because Bishop's "statements ..., physical body language, [and] everything about [the situation] made me feel that [Bishop] *could possibly* have a weapon on him." There are several problems with Miller's attempted justification. First, the test for determining whether a frisk was lawful is objective and, therefore, Miller's subjective feelings cannot be relied on to justify the frisk. *See Henage*, 143 Idaho at 660, 662, 152 P.3d at 21, 23. Further, Miller's feeling that Bishop could possibly be carrying a weapon would not justify a search even if his subjective feelings were relevant. *Id.* at 662, 152 P.3d at 23. Second, none of Bishop's statements objectively indicate that he was dangerous. Bishop only stated " hello," "what is this about," that he was a Christian, that Jesus loved Chief Miller, and that he had just gotten off probation. Neither the substance nor the manner in which the statements were made suggest that Bishop posed a threat. Third, there is no evidence that Bishop's body language demonstrated that he was dangerous. Bishop simply stood there holding a white grocery bag close to his chest. Miller did not testify that he thought the bag contained a weapon, that Bishop was acting in a threatening manner, that Bishop made any furtive movements, or that Bishop appeared to be reaching for a weapon. Finally, Miller's statement that "everything about [the encounter]" prompted him to frisk Bishop does not support the conclusion that Bishop was armed and dangerous. Such a general statement does not include any objective facts that would indicate that Bishop was dangerous. Moreover, because Miller had very little interaction with Bishop before he decided to conduct the frisk, it is unclear how "everything about the encounter" made him fear for his safety.

Although there was evidence that Bishop was acting nervous and may have been under the influence of a narcotic, those facts alone are not enough to justify the frisk. *See, e.g.*, *State v. Setterstrom*, 163 Wash.2d 621, 183 P.3d 1075, 1077 (2008) (concluding that police were not justified in frisking suspect where officer believed suspect was under the influence of an illegal drug, suspect was nervous, and suspect lied to officer about his identity); *State v. Pearson*, 348 N.C. 272, 498 S.E.2d 599, 600–01 (1998) (holding that police officers did not have reason to believe individual was armed and dangerous just because he smelled of alcohol, appeared nervous, and provided inconsistent statements). Miller was unable to indicate how Bishop's nervous behavior or the fact that he may have been under the influence supported the conclusion that Bishop posed a risk of danger. *See Henage*, 143 Idaho at 661–62, 152 P.3d at 22–23. Additionally, Miller did not testify that Bishop behaved in an aggressive or threatening manner or that, based on his experience, suspects under the influence of narcotics tend to resort to violence.

The record does not contain evidence that would cause a reasonable person in Miller's position to conclude that Bishop posed a risk of danger. Miller's encounter with Bishop took place in public, while it was still light out, and there has been no suggestion that Bishop was stopped in a high crime area. Miller did not report observing any unusual bulges in

Bishop's clothing or other facts that would have indicated that Bishop was carrying a weapon. Moreover, there was no evidence that Bishop had a known reputation for violence or was acting in a threatening manner. In fact, Miller testified that, if anything, Bishop's behavior led him to believe that Bishop wanted to run away from him. There was no indication that Bishop appeared to be prepared to use force or violence to escape. Instead, the facts show that once Miller ordered Bishop to stop, Bishop was compliant and cooperative. Bishop told Miller "hello" and then asked what they needed to speak about. He also told Miller that he was a Christian and that Jesus loved Miller. He did not make any furtive movements or appear to reach for a weapon; instead, he held onto his grocery bag during the entire encounter, thereby making his hands visible to Miller at all times.

Based on a consideration of the totality of the circumstances, a reasonable person would not conclude that Bishop posed a risk of danger and, therefore, Miller's frisk of Bishop was unlawful. Because the frisk was unlawful, it was not a duty under section 18–705 and Bishop was entitled to peacefully refuse the frisk. [16]

16. Practical considerations also favor this result. If individuals could be arrested for peacefully resisting an unlawful frisk, an officer could order anyone on the street to submit to a frisk and, if the person merely answered "no," the officer could arrest him or her for resisting and conduct a search incident to arrest. This would give officers an incentive to violate the constitution. It would also punish individuals for asserting their constitutional rights. For instance, if Bishop had not resisted the frisk, any evidence retrieved during the frisk would have been suppressed. The evidence should not be admitted against him just because he peacefully refused to comply with an unlawful search. *See United States v. Fuentes*, 105 F.3d 487, 490 (9th Cir.1997) ("People do not have to voluntarily give up their privacy or freedom of movement, on pain of justifying forcible deprivation of those same liberties if they refuse."). Moreover, concluding that a person may peacefully resist an unlawful frisk, for example by turning around and saying "no," does not raise the same concerns for public safety as would allowing resistance by physical force or violence.

See Graves, 339 F.3d at 841 (concluding that because individuals have a constitutional right to refuse consent to unlawful searches it would be illogical to arrest them for peaceably asserting their constitutional rights). Bishop peacefully resisted the unlawful frisk by merely turning around and telling Miller "no." [17]

17. Although Bishop struggled when Miller tried to handcuff him, the struggle took place after Miller decided to arrest Bishop for resisting the frisk, so the struggle is irrelevant in determining whether Bishop's resistance to the frisk was lawful. *See Wilkerson*, 114 Idaho at 180, 755 P.2d at 477, aff'd, 115 Idaho at 358, 766 P.2d at 1239 (concluding that the fact that a defendant used force after she was placed under arrest for peacefully resisting an

> unlawful order was not relevant in deciding whether her initial resistance was lawful). It must be noted that Bishop was neither arrested nor charged for resisting arrest.
>
> He did not use force or violence to resist. Accordingly, Miller did not have probable cause to arrest Bishop for obstructing an officer, the arrest was unlawful, and the evidence obtained during a search incident to that arrest should have been excluded.

146 Idaho at 816–821, 203 P.3d at 1215–1220 (footnotes omitted except footnotes 11, 16 and 17). In *Wilkerson*, cited in footnote 17 in *Bishop*, defendant Jeannie Wilkerson attempted to prevent a tow truck from removing a damaged vehicle from the scene of an accident involving her son. *State v. Wilkerson*, 114 Idaho 174, 755 P.2d 471 (Ct. App. 1988). A police officer intervened on behalf of the tow truck operator and arrested Wilkerson for resisting and obstructing under Idaho Code Section 18-705. *Id.* A jury found her guilty, a magistrate judge imposed a $300 fine and fifteen days in jail, and Wilkerson appealed. *Id.* The District Court concluded that the officer may not have been discharging a "duty of his office" and set aside the conviction. *Id.* The State appealed and the State of Idaho Court of Appeals affirmed the District Court. At the scene of the accident, Wilkerson refused to remove herself from in front of the pickup, preventing it from being towed away. 114 Idaho at 175, 755 P.3d at 472. The investigating officer, John Taylor, who had dispatched the tow truck to the scene, told Wilkerson to remove herself from between the pickup and the tow truck. *Id.* Wilkerson refused, and Taylor then warned Wilkerson that continuing to block removal of the truck would result in her arrest. *Id.* Wilkerson responded, "Arrest me. I won't move. This is my rig." *Id.* When she refused to move, Taylor forcibly removed her, handcuffed her and placed her in his patrol car. *Id.* After Taylor returned to the pickup, Wilkerson began to kick a window of Taylor's patrol car. *Id.* Wilkerson was subsequently cited for violating Idaho Code Section 18-705. *Id.* The Idaho Court of Appeals first discussed *State v. Richardson*, 95 Idaho 446, 511 P.2d 263 (1973),

which held an individual may not forcefully *resist* an arrest. 114 Idaho at 176–78, 755 P.3d at 473–75. The Idaho Court of Appeals held:

> Unlike the *Richardson* felony statute, which applied to resistance or deterrence of an executive officer by threat, force, or violence, I.C. § 18–705 defines a misdemeanor and apparently encompasses mere passive resistance, delay, or obstruction of a public officer. *See State v. Wozniak,* 94 Idaho 312, 486 P.2d 1025 (1971).
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> * * *
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> Wilkerson does not deny being aware of the officer's identity, she argues only that Taylor was not performing or discharging an official duty. The duties of a police officer are many and varied. *See* I.C. § 31–2202 (setting forth duties of sheriffs). In particular, Idaho Code § 49–3608 vests authorized officers with the power to remove abandoned vehicles to a place of safety, although arguably not in the manner pursued by Taylor in the instant case. *See* I.C. § 49–3619. In addition, our Supreme Court has recognized a police officer's "community caretaking function," which is divorced from the investigative function. *Matter of Clayton,* 113 Idaho 817, 748 P.2d 401 (1988). *See Cady v. Dombrowski,* 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973).
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> On its face, § 18–705 does not require that the "duty" being performed by the officer be lawful. *Compare* Wyo.Stat. § 6–5–204(a) (1977) (subject of vagueness challenge in *Newton v. State,* 698 P.2d 1149 (Wyo.1985)). In the arrest-resistance context courts have defined official duties broadly. *See e.g., United States v. Heliczer, supra,* 373 F.2d at 245 (" 'Engaged in ... performance of official duties' is simply acting within the scope of what the agent is employed to do. The test is whether the agent is acting within that compass or is engaging in a personal frolic of his own. It cannot be said that an agent who has made an arrest loses his official capacity if the arrest is subsequently adjudged to be unlawful."). But Wilkerson was not charged with resisting arrest. Rather, she contends she obstructed the officer's attempt to perform a less significant act, having an "abandoned" vehicle removed, in a manner which was arguably contrary to state law since it was not established that the vehicle had been abandoned.
>
> As our Supreme Court recognized in *Richardson,* improvements in our laws and judicial process now provide alternative channels for the oppressed, which did not formerly exist. These advances mean that recourse to force or violence is rarely necessary or advisable for an individual in disagreement with police objectives. However, we are also mindful of the possibility that overzealous officers could abuse this rule by inciting otherwise law-abiding individuals to commit crimes by obstructing the officer's unlawful acts. We also are aware of the continuing debate regarding a citizen's duty to unquestioningly obey authority. Police are necessarily provided with discretion in exercising their duties, *see* H. GOLDSTEIN, POLICING A FREE SOCIETY, ch. 5 (1977), but passive disobedience has a legitimate role in testing the limits of that authority.

See M. KADISH AND S. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES, ch. 3 (1973). Therefore, a balance between "law and order" and individual freedom must be struck.

We can easily understand why the magistrate below felt he was bound by the holding of *Richardson.* However, despite that ruling, we are not prepared to accept the proposition that our legislature intended to criminalize *passive* disobedience to any act of a police officer. Many of the reasons to broadly construe the term "duty" that were present in *Richardson* are not presented here. Passive resistance does not present the same immediate risk of violence and physical harm as does forcible resistance. Nor, outside of the arrest context, is the officer presumptively confronting an individual believed to have previously committed a crime. For these and the other reasons set forth herein, we believe the legislature intended that the term "duty" in I.C. § 18–705 should be interpreted more narrowly than the comparable term found in I.C. § 18–2703 and construed in *Richardson.* **We hold that where an individual refuses to obey an order or obstructs an act of a public officer which is contrary to the law, be it statute or constitution, that individual does not violate I.C. § 18–705. We interpret "duty" as used in that statute to encompass only those lawful and authorized acts of a public officer. To hold otherwise would clothe an officer with protection from resistance based only on his status as an officer and would render the "in the discharge, or attempt to discharge, of a duty of his office" language of the statute mere surplusage.**

Wilkerson did not initiate the physical contact with the officer by assaulting him. She apparently resorted to force only to prevent the officer from removing and arresting her. Like our Supreme Court, we endorse resolution of disputes in the courts, not in onion fields. However, that policy alone does not criminalize every act that leads to violence. Our holding is consistent with the result reached by other courts. *See State v. Snodgrass,* 117 Ariz. 107, 570 P.2d 1280 (App.1977), *on appeal from remand,* 121 Ariz. 409, 590 P.2d 948 (App.1979) (interpreting comparable Arizona statute in light of Fourth Amendment—physical act or exertion against officer required to constitute offense of resisting or obstructing); *In re V.,* 10 Cal.3d 676, 111 Cal.Rptr. 681, 517 P.2d 1145 (1974) (not a crime to nonviolently resist the unlawful action of police officers); *In re Gregory S.,* 112 Cal.App.3d 764, 169 Cal.Rptr. 540 (1980) (also construing comparable statute); *Fields v. State,* 178 Ind.App. 350, 382 N.E.2d 972 (1978) (where officer had no legal duty to remove defendant's pickup, defendant was not interferring with the execution of a legal duty and, hence, his arrest for interferring with a police officer was illegal). *See generally,* Annotation, *What Constitutes Obstructing or Resisting an Officer, in the Absence of Actual Force,* 44 A.L.R.3d 1008 (1972).

114 Idaho at 178–180, 755 P.3d at 475–77 (bold added, footnote omitted).

On appeal, this Court finds Judge Combo's finding that "Kagarice possessed the lawful authority to arrest Courtney Madsen for resisting and/or obstructing, in violation of Idaho Code Section 18-705" was error as a matter of law. In making that finding, the Judge Combo cited no case law or statute, other than Idaho Code Section 18-705. In fairness to Judge Combo, neither counsel cited *Fry*, *Nickel*, *Bishop* or *Wilkenson* to Judge Combo. But that fact does not change this Court's conclusion that Judge Combo's finding (that Kagarice lawfully arrested Madsen for resisting and/or obstructing) is entirely inconsistent with *Fry*, *Nickel*, *Bishop* and *Wilkerson*. Kagarice was in no way performing a duty of his office when he arrested Madsen for resisting and obstructing an officer because 1) no misdemeanor crime had been committed and 2) Kagarice had no reasonable suspicion that Madsen had committed or was about to commit a criminal offense. Kagarice's arrest of Madsen was unlawful, and, as such, she did not violate Idaho Code Section 18-705 at any time.

5. Dismissal in this case, under Idaho Criminal Rule 48(a)(2), was the only appropriate sanction, which was partly based on the State's failure to provide exculpatory evidence, and was also based on serving the ends of justice.

Both the unlawful arrest case against Kagarice (CR-2017-21189) and the resisting and obstructing case against Madsen (CR-2017-9215), began with the filing of an Affidavit in Support of Probable Cause. The Affidavit in Support of Probable Cause in Madsen's case was signed by Kagarice, and the Affidavit in Support of Probale Cause in Kagarice's case was signed by Detective Duncan. After Kagarice's signature on the second page of Kagarice's two-page Affidavit in Support of Probable Cause against Madsen, there is a proposed order using standard language finding probable cause, which is submitted by the affiant for the convenience of the reviewing magistrate judge to sign (or not). The reviewing magistrate judge may sign the proposed order finding probable cause as

presented, modify the proposed order and sign it, or indicate no probable cause was found. Many affidavits filed in support of probable cause contain such a proposed order.

In the Affidavit in Support of Probable Cause prepared by Detective Duncan, and filed in this case against Kagarice, there was attached to Detective Duncan's affidavit copies of several documents, one of which was a copy of the Affidavit in Support of Probable Cause prepared by Kagarice in the case against Madsen. The copy of Kagarice's affidavit attached to Detective Duncan's Affidavit in Support of Probable Cause bears Kagarice's signature at the end of Kagarice's affidavit, but for some unexplained reason, the copy does not bear the signature of Magistrate Judge Anna Eckhart, who reviewed that affidavit and found probable cause against Madsen, initiating the case against Madsen.

Judge Combo noticed that, regarding the copy of Kagarice's Affidavit in Support of Probable Cause against Madsen, which was attached to Detective Duncan's Affidavit in Support of Probable Cause filed in this case against Kagarice, the proposed Order was not signed by Judge Eckhart. Judge Combo found such failure to be fatal to the case, requiring dismissal of that unlawful arrest case against Kagarice.

This Court on appeal finds Judge Combo erred as a matter of law, in finding, "[T]hat dismissal in this case, under Idaho Criminal Rule 48(a)(2), is the only appropriate sanction in this matter, which is partly based upon the State's failure to provide exculpatory evidence as a sanction, but also based upon serving the ends of justice and the effective administration of the Court's business." Order to Dismiss, 2. Judge Combo stated his reasoning for that legal conclusion on the record at the May 18, 2018, hearing:

> I'm also aware that Judge Walsh had reviewed the affidavit of probable cause that I had reviewed for the unlawful arrest and had, in fact, found probable cause existed to believe that a crime had occurred. However, I find as a matter of law under Idaho Criminal Rule 48(a)(2) that

dismissal is the only appropriate sanction given the detective's failure to set forth in his affidavit material exculpatory evidence that Judge Eckhart had reviewed Trooper Kagarice's affidavit of probable cause for the resist and obstruct and had found probable cause to believe that such a crime had indeed occurred.

As a general rule, the affidavits must set forth particular facts and circumstances underlying the existence of probable cause so as to allow a magistrate to make an independent evaluation of the matter. Omission of material exculpatory facts are appropriate for sanctions and, in this court's view, certainly would have altered Judge Walsh's finding of probable cause.

This problem is compounded by the fact that not only did the detective fail to disclose that probable cause had already been found by Judge Eckhart, but he had attached to Trooper Kagarice's affidavit of probable cause a probable cause order that had been left blank, suggesting to this court and any viewer of that document that no PC had been found. In fact, Judge Eckhart's finding of probable cause had been made more than five months earlier.

I recognize under I.C.R. 48(a)(2) that this court has discretion to dismiss a criminal action on its own motion or on motion of any party for any other reason if the court finds the dismissal will serve the ends of justice and the effective administration of the court's business. I recognize the matter is one of my discretion. I intend to act within the outer boundaries of that discretion and consistently with the legal standards applicable to the specific choices that I have available, and I reach my decision based upon an exercise of reason.

The State has a burden of proof beyond a reasonable doubt that Officer Kagarice arrested Miss Madsen without lawful authority. Judge Eckhart's finding that there was probable cause to arrest Miss Madsen for resist and obstruct for failing to identify herself under these circumstances, while not conclusive, is certainly material and certainly exculpatory and was required to have been provided to Judge Walsh. I find that the omission was material, deliberate, and/or reckless. I find as a matter of law that dismissal would serve the ends of justice and the effective administration of the court's business. To hold otherwise would allow the State to essentially cherry pick only those facts that support the charge and not disclose any potential exculpatory evidence, which would result in gross miscarriages of justice.

In addition, to argue that the officer has no legal authority to demand identification when the ordinance mandates that he serve on the person responsible for the nuisance notice to abate potentially leads to mystifying results of law enforcement misidentifying citizens, charging the wrong or innocent persons, and certainly that's not the effective administration of this court's business either.

Tr. p. 12, l. 7 – p. 14, l. 21.

As set forth near the beginning of this opinion on appeal, Judge Combo made the following findings. After Kagarice arrested Madsen, June 2, 2017, Kagarice submitted an Affidavit in Support of Probable Cause. At the end of that affidavit is a proposed order finding probable cause. Affidavit in Support of Probable Cause, 2. Judge Combo found this affidavit was presented to Judge Eckhart, who subsequently found that probable cause existed to believe that the crime of resisting and obstructing had been committed by Madsen; Judge Eckhart signed the order attached to the affidavit on June 6, 2017, at 9:48 a.m. Tr. p. 6, ll. 18–22. **It is important to note that Judge Combo specifically found that Judge Eckhart "signed that order on June 6th, 2017."** *Id.*at ll. 21-22. The Probable Cause Order was filed the next day, on June 7, 2017. This initiated Kootenai County Case No. CR-2017-9215, *State v. Courtney Rachel Madsen*, charging Madsen with the misdemeanor crime of resisting and/or obstructing an officer.

The Idaho State Police made an official request for Kootenai County to investigate the incident between Kagarice and Madsen for unlawful arrest and unnecessary assault by an officer. Tr. p. 6, ll. 23–25 – p. 7., ll. 1–2. Kootenai County Sheriff's Detective Ryan Duncan (Duncan) was assigned to investigate Kagarice. Tr. p. 7, ll. 2–3. On November 15, 2018, Detective Duncan signed his Affidavit in Support of Probable Cause, and presented it along with the attached documentation to Judge Walsh for her probable cause determination. Tr. p. 7, ll. 9–14. The documentation included transcripts of interviews with Kagarice, Madsen, and a neighbor-witness, as well as Kagarice's affidavit of probable cause on the resisting and obstruction charge against Madsen. Tr. p. 7, ll. 9–12, 15–17. The copy of Kagarice's Affidavit in Support of Probable Cause which was filed in CR-2017-9215, was attached to Detective Duncan's Affidavit in Support of Probable Cause in the instant case, and the copy of Kagarice's affidavit was signed by Kagarice, but the proposed

order at the end of Kagarice's affidavit is unsigned by any magistrate. Tr. p. 7, l. 18. Even though the copy of the order in Kagarice's affidavit against Madsen was unsigned, Judge Walsh still found that probable cause existed to believe that Kagarice had committed the crime of unlawful arrest against Madsen; Judge Walsh signed the proposed order on November 15, 2017. Tr. p. 7, ll. 23–25. There is no evidence of what, if any, significance Judge Walsh made of the fact that the signed copy of Kagarice's affidavit did not have a signature of Judge Eckhart on the proposed order. There is no way for this Court to know on appeal what Judge Walsh made of the unsigned order, just as there was no way for Judge Combo to have known what Judge Walsh made of the unsigned order when Judge Combo announced his decision on May 18, 2018.

It is unknown how or why Judge Combo found the copy of the affidavit in CR-2017-9215, which contained the unsigned order, and was submitted as one of the attachments to Detective Duncan's affidavit in the instant case CR-2017-21189, to be exculpatory. In order for the copy of the unsigned order at the end of Kagarice's affidavit in CR-2017-9215 to be exculpatory evidence to the decision Judge Walsh had to make on November 15, 2017, finding probable cause in this instant case of unlawful arrest against Kagarice, Judge Combo would have had to have assumed that Judge Walsh looked at Detective Duncan's affidavit, Judge Walsh saw an unsigned order, Judge Walsh then assumed that since the order was unsigned that no charges were ever found against Madsen, thus clearing the way for the charge of unlawful arrest against Kagarice (in essence, depriving Kagarice of the defense of a "lawful" arrest, arresting Madsen for resisting and/or obstructing). That is a lot of assumptions. There are other, more plausible explanations or outcomes that could have been assumed by Judge Combo. When Judge Combo made his decision he was obviously aware of the fact that on June 17, 2018, Magistrate Judge Anna Eckhart signed

the order in CR-2017-9215. Rather than assume the blank order was exculpatory, why isn't more likely to assume that Judge Walsh was aware of that fact (that Judge Eckart signed the order on June 17, 2018) when Judge Walsh, on November 15, 2017, signed her probable cause order, and that at that time Judge Walsh realized the blank order was simply a mistake, an oversight by Detective Duncan? The unsigned order had no markings that it was "denied", so why would Judge Walsh assume it was denied? Why isn't it just more likely to assume that Judge Walsh placed no legal significance on the copy of the unsigned order? If Judge Walsh was aware of *Fry*, she would know Madsen was not required to abide by Kagarice's demand for her identification. If Judge Walsh was aware of *Bishop* and *Wilkerson*, she would know that Madsen could peaceably resist Kagarice's unlawful act of arresting her, and could quite arguably resist non-peaceably. Why not assume Judge Wash appreciated the unsigned order cannot be exculpatory evidence if at the time Kagarice went "hands on" Madsen, Kagarice had already committed the crime of unlawful arrest? Why isn't it more likely to assume Judge Walsh understood the facts and the applicable law when she found probable cause? Depriving the State of Idaho a jury trial against Kagarice, and depriving Kagarice's alleged victim Madsen, the right to a jury trial against Kagarace, is a high price to pay based on the assumption that this unsigned order was somehow exculpatory evidence.

Judge Combo obviously had the entirety of Detective Duncan's affidavit before him when he announced his decision on May 18, 2018, ending this case; as did Judge Walsh when she found probable cause on November 15, 2017, beginning this case. In Detective Duncan's affidavit, there is evidence which shows probable cause **was** found against Kagarice–that Kagarice had committed the crime of unlawful arrest. Thus, Judge Combo's assumption that the unsigned copy of the order finding probable cause against Madsen

was exculpatory, is unfounded. In addition to that unsigned copy of the order, attached to Detective Duncan's Affidavit in Support of Probable Cause against Kagarice is a copy of a transcript of an interview Detective Duncan had with Courtney Madsen on August 9, 2017. At the very beginning of that transcript, the following discussion occurred:

> Det. R. Duncan: First thing we're gonna do, um, because there is still an active case down at the prosecutor's office in reference to this, I, uh, it looks like right now, it's scheduled to go to trial in September, is that —
>
> Courtney Madsen: Yeah.
>
> Det. R. Duncan: — correct? Okay. Because we might potentially touch on some areas that would be relevant to that case, I am gonna advise you 0f your Miranda rights, uh, because what we're talking about here could potentially become relevant to that case. Does that make sense?
>
> Courtney Madsen: Right, right, what, what case are we talking about?
>
> Det. R. Duncan: Uh, well, we're, we're here to investigate what happened down at your house -
>
> Courtney Madsen: Right.
>
> Det. R. Duncan: — back on June 1st.
>
> Courtney Madsen: That's why I was like is that is that what I'm going to trial. I was like--
>
> Det. R. Duncan: Yes.
>
> Courtney Madsen: -I'm confused a little bit-
>
> Det. R. Duncan: There's -
>
> Courtney Madsen: -okay.
>
> Det. R. Duncan: - not something else that I'm unaware of is there?
>
> Courtney Madsen: No -
>
> Det. R. Duncan: That there's --
>
> Courtney Madsen: --that's ****--
>
> Det. R. Duncan: — just that?
>
> Courtney Madsen: — **** I thought —
>
> Det. R. Duncan: Okay.
>
> Courtney Madsen: — I was ****.
>
> Det. R. Duncan: Okay.
>
> Courtney Madsen: ****.
>
> Det. R. Duncan: Um, so I'm gonna just I'll advise you in writing, then I'll give you a, uh, I'll read it and you can take a look at it. If you have any questions, you can let me know and if not, I'll just have you sign and I'll sign, um, as just that I observed you sign it.
>
> Courtney Madsen: Okay.
>
> Det. R. Duncan: Okay? All right. You do have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him or her present with you

while, while you are being questioned. If you cannot afford to hire a lawyer, one can be appointed to you to represent you before any questioning, if you wish one. You can decide at any time to exercise these rights and not answer questions or make any statements. Um, I'll go a little further than that. If you decide you want to leave at some point today, even if it's in the middle, you just let me know and you can walk out —

Courtney Madsen: Okay.

Det. R. Duncan: — the door. I'm not here to, uh, try and get any, and get you to answer any questions that you don't want to and this all is totally voluntary, okay?

Courtney Madsen: Okay.

Det. R. Duncan: All right. So I'll just have you sign here and here, and then I'll sign witnessing at the bottom.

Courtney Madsen: Okay.

Det. R. Duncan: All right. So I'll just have you sign here and here, and then I'll sign witnessing at the bottom.

Courtney Madsen; Today is the —

Det. R. Duncan: 9th.

Courtney Madsen: -- 9th.

Det. R. Duncan: All right. And just, uh, based off of that, do you have any questions about this —

Courtney Madsen: No.

Det. R. Duncan: — before we go any further? Okay.

Gretta Gregson: Did John not want to be here?

Courtney Madsen: Who?

Gretta Gregson: Did John to want to be here?

Courtney Madsen: Oh, I was just, um, they just told me or Marsha called me and said that they wanted me to do an investigation so I was like ok.

Affidavit in Support of Probable Cause, Transcript of August 9, 2017, interview between Detective Duncan and Courtney Madsen, 1-3. Thus, Judge Walsh had before her information in Detective Duncan's affidavit which showed that as of August 9, 2017, Madsen was headed to a jury trial in her case in September, and that is why Madsen needed to have her Miranda rights explained to her and waived by her. An accused would only have a jury trial scheduled if there had been a finding of probable cause previously made. Also, Detective Duncan clearly discussed Madsen's rights under Miranda, because Madsen's case was "scheduled to go to trial in September." Thus, Judge Combo's "exculpatory" finding regarding the unsigned probable cause order, is not plausible. There

is no reason to "assume" that Judge Walsh was not presented with exculpatory evidence. There is every reason to "assume" on November 17, 2017, when Judge Walsh signed the probable cause Order in Kagarice's case, that Judge Walsh either knew that, at some point, probable cause had been found on Madsen, or, that Judge Walsh attached no legal or factual significance to whether or not probable cause had been found upon Madsen for resisting and obstructing. Judge Walsh knew for an uncontroverted fact that Madsen was arrested by Kagarice for resisting and/or obstructing. Given that known fact, it is entirely possible that Judge Walsh placed no legal or factual significance upon a probable cause finding against Madsen. And if Judge Walsh did place significance upon a probable cause finding, it is also entirely possible that Judge Walsh was aware that such a finding had been made, given the transcript of the interview of Madsen by Detective Duncan.

Finally, this Court finds unsupportable Judge Combo's finding on the record at the May 18, 2018, hearing, that "he [Detective Duncan] had attached to Trooper Kagarice's affidavit of probable cause a probable cause order that had been left blank, suggesting to this court and any viewer of that document that no PC had been found." Tr. p. 13, ll. 2-10. A proposed order left unsigned in any criminal file could suggest that no probable cause had been found. However, a proposed order left unsigned in any criminal file would more typically mean something is wrong, that perhaps this probable cause affidavit has not been submitted to a magistrate for review for probable cause. Ordinarily, if probable cause is not found, that fact is noted on the proposed order, interlineated with the word "denied," and signed by the magistrate who reviewed the affidavit and found no probable cause. To do otherwise would lead to confusion as to whether the affidavit had ever been presented to and reviewed by a magistrate judge in the first place. The fact that Judge Walsh reviewed a copy of a blank, unsigned probable cause order at the end of Detective

Duncan's Affidavit in Support of Probable Cause, when in fact a signed probable cause order existed in Madsen's file, does not provide exculpatory evidence. Because an unsigned order would have been unusual, it is more likely that it prompted Judge Walsh to examine that file and see the signed order, or that it prompted her to look at the repository and see that an order had been signed, or that it prompted her to look at the transcript of the interview between Madsen and Detective Duncan and realize that such an order had to have been signed in order for Madsen to be proceeding to trial.

While this Court finds the assumption of "exculpatory" evidence made by Judge Combo to be unsupportable, this Court finds the *remedy* of *dismissal* of this action based on that unsupported assumption, to be legal error. Dismissal under I.C.R. 48 is an unusual and rarely used remedy. There are few appellate cases in Idaho interpreting that rule. The first two sentences of Am.Jur. § 699 - Court's power to dismiss on its own motion – grounds for dismissal, read (with the footnote cases in parentheses):

> A court's dismissal of a criminal case is a remedy of last resort (*Anderson v. Commr. Of Correction*, 158 Conn. App. 585, 119 A.3d 1237 (2015), certification denied, 319 Conn. 927, 125 A.3d 202 (2015); *State v. Bonnett*, 985 So.2d 1194 (Fla. Ed CDA 2008)), and a trial judge abuses his or her discretion by ignoring intermediate remedial steps (*People v. Jenner*, 39 A.D.3d 1083, 835 N.Y.S.2d 501 (3d Dep't 2007); *State v. Koerber*, 85 Wash. App. 1, 931 P.2d 904 (Div. 1 1996, as amended, (Feb. 21 1997)). Such dismissal is reserved for severe circumstances (*State ex rel. Jackson County Prosecuting Attorney v. Prokes*, 363 S.W.3d 71 Mo. Ct. App. W.D. 2011)) because dismissal of a charging instrument frustrates the public interest in the prosecution of crimes (*U.S. v. Lyons*, 352 F.Supp.2d 1231 (M.D. Fla. 2004); *State v. Hadsell*, 129 Or. App. 171, 878 P.2d 444 (1994)).

In the transcript of the May 18, 2018, hearing, Judge Combo viewed his decision under I.C.R. 48 to be an act committed to his sound discretion. If it is an act submitted to his sound discretion, such discretion was abused, and this Court so finds. It is simply untenable to arrive at the remedy of dismissal, deprive one party of their right to a trial, and

deprive the people and the alleged victim of a right to a trial, based solely on unfounded speculation. If this decision is a matter of law, this Court finds, for the same reason, that Judge Combo erred as a matter of law in dismissing this case based on those unsupported assumptions.

IV. CONCLUSION.

As to the May 21, 2018, Order to Dismiss, Judge Combo's finding (1) that Kagarice possessed lawful authority to investigate the nuisance in violation of Hauser City Ordinance Section 3-1-1, caused by the vehicle alarm, that finding is affirmed. As to Judge Comb's finding (2) that Kagarice possessed lawful authority to request identification from Madsen, the individual who acknowledged the existence of such nuisance, that finding is affirmed, but this Court on appeal finds that Kagarice did not simply request identification, but instead demanded identification, which he was not allowed to do. As to Judge Combo's finding (3) that Madsen had a legal obligation to identify herself and failed to do so upon proper demand; (4) that Kagarice possessed the lawful authority to arrest Courtney Madsen for resisting and/or obstructing, in violation of Idaho Code Section 18-705; and (5) that dismissal in this case, under Idaho Criminal Rule 48(a)(2), was the only appropriate sanction, which was partly based on the State's failure to provide exculpatory evidence, and was also based on serving the ends of justice, those findings are reversed.

We need to keep in mind that this case involves a car alarm which was going off for a finite period. This case does not involve a drunk driver on the road, it does not involve a drug dealer at our schools, it does not involve a person committing a violent act. There is absolutely no danger to the public in a car alarm which has been inadvertently activated. In fact, the alarm itself is meant to prevent or reduce crime. Madsen owned a car in which the alarm was inadvertently going off. There was no malice on Madsen's part. Kagarice

had the right to investigate such an alarm while it was sounding. But in doing so, is macing the landowner's dog really worth investigating a car alarm? And, because anyone, law enforcement or otherwise would have had the right to knock on Madsen's door thirteen hours later, Kagarice had the right to be at Madsen's door the next day. Kagarice had the right to ask questions and ask for identification, but that is where his rights ended. For Kagarice to demand identification from Madsen, for a car alarm which had sounded thirteen hours earlier and shortly therafter ceased sounding, not receive that identification and as Kagarice's remedy tell Madsen she was under arrest, handcuff Madsen, remove Madsen from her home, and take Madsen to jail, is unthinkable. A car alarm going off demands really no attention, it demands no action; it happens from time to time. When it happens, people are rarely cited or given "notice." People should never go to jail as a result of a car alarm inadvertently sounding. If a car alarm going off demands any attention, it lies in the civil arena, not the criminal arena. Kagarice's actions late in the afternoon of June 1, 2017, are shocking. Kagarice's actions put the concept of "community policing" into the dark ages. Kagarice's actions are a disgrace to the Idaho State Police and to all law enforcement. To not give the people of the State of Idaho, and the alleged victim, Madsen, the opportunity to hold Kagarice accountable, is untenable. There is no legal reason why Kagarice should not have his day in court. The dismissal of his case is reversed.

As mentioned above, Judge Combo made a finding that when Madsen expressed anger and confusion on what crime Kagarice was investigating and why she would possibly be arrested, Kagarice told her to exit the residence, as Kagarice **was concerned for his safety**. Tr. p. 6, ll. 1–3. Madsen refused. Tr. p. 6, l. 5. "Based upon her refusal to identify herself and her refusal to exit the residence, he placed her under arrest for resisting and

obstructing the investigation of the nuisance." Tr. p. 6, ll. 6–9. Let the above bold portion sink in for just a little bit. Put yourself in Kagarice's position. You are present on a neighbors doorstep, in full Idaho State Police uniform, thirteen hours after you maced that same neighbor's dog which was barking at you just before four that morning as you investigated a car alarm. Your neighbor answers the door and you start asking her questions, she answers some of them, then you **demand** that she identify herself, even though you know she is your neighbor and you know who owns the car and you know the address of the house of which you are at the doorstep. When your neighbor refused to tell you anything other than her first name, you that **demand** that she now exit her residence, and the reason you give for that demand is because **you are concerned for your safety**. If you allow your neighbor to go back into her home, are you not more safe than you are by demanding she exit her own residence? Concerns about officer safety must be supported by objective facts (*Fry*, 146 Idaho at 819, 203 P.3d at 1218), and Kagarace can point to no objective facts for his claim that he told Madsen to exit her own home as he was concerned for her safety. It is quite clear to this Court that Kagarice did not demand Madsen exit her own home because he was concerned for his own safety. It is quite clear that Kagarice demanded Madsen exit her own home so that he could do what he'd already told her he would do...arrest her, handcuff her, and take her to jail. All for a car alarm.

V. ORDER.

IT IS HERBY ORDERED that the Order to Dismiss entered and filed in this case on May 21, 2018, is REVERSED.

IT IS FURTHER ORDERED that this case is REMANDED back to Magistrate Division, this case is reinstated, and this case is to be set for a jury trial.

IT IS FURTHER ORDERED that as to the May 21, 2018, Order to Dismiss, Judge

Combo's Finding (1) that Kagarice possessed lawful authority to investigate the nuisance in violation of Hauser City Ordinance Section 3-1-1, caused by the vehicle alarm, that finding is AFFIRMED.

IT IS FURTHER ORDERED that as to Judge Combo's finding (2) that Kagarice possessed lawful authority to request identification from Madsen, the individual who acknowledged the existence of such nuisance, that finding is AFFIRMED, but this Court on appeal finds that Kagarice did not just request, but demanded identification, which he was not allowed to do.

IT IS FURTHER ORDERED that as to Judge Combo's finding (3) that Madsen had a legal obligation to identify herself and failed to do so upon proper demand, that finding is REVERSED.

IT IS FURTHER ORDERED that as to Judge Combo's finding (4) that Kagarice possessed the lawful authority to arrest Courtney Madsen for resisting and/or obstructing, in violation of Idaho Code Section 18-705, that finding is REVERSED.

IT IS FURTHER ORDERED that as to Judge Combo's finding (5) that dismissal in this case, under Idaho Criminal Rule 48(a)(2), was the only appropriate sanction, which was partly based on the State's failure to provide exculpatory evidence, and was also based on serving the ends of justice, those findings are REVERSED.

DATED this 31st day of December, 2018

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 2 day of ~~December~~ January, 2018 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – Destry W. Randles KCpdcourts@kcgov.us
Prosecuting Attorney – Joseph Sullivan Joe@Sullivanlaw.us
Honorable James Combo I.D.

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY
BY: Deputy