State v. Doe, Docket No. 33475

John Doe had been residing with his older sister in California for about a year when, on July 5, he went to his parents' residence in Idaho. On July 7, Doe, who was fifteen years old, had a disagreement with his parents about whether he would be permitted to continue living with his sister in California. Doe wanted to return to California, but his parents wanted him to remain with them. During the disagreement, Doe left the residence to "cool off." Doe's sister, who was also present at the Idaho residence, became alarmed when Doe left and called the police. An officer located Doe across the street from his parents' residence. Another officer went to the residence, where the parents told the officer that they did not want Doe to be charged with anything for his conduct. The officer with Doe warned him that, if the police were called back to the residence again that night, Doe would be arrested for being incorrigible. Later that night, the police responded to a call that there was a suicidal fifteen-year-old male at the same residence. Doe told the police that he had threatened to harm himself with a lamp cord. The officer who had spoken with Doe during the initial encounter then arrested Doe.

The state filed a petition alleging that Doe committed two counts of being incorrigible, in violation of a Twin Falls City Ordinance. The first count was for "arguing with his parents" and the second count was for "leaving the house without permission." The pertinent part of the ordinance makes it unlawful for "any person under the age of eighteen (18), living or found in the jurisdiction" to commit "any act or acts which render him incorrigible or places him beyond the control of his parents, guardian or other legal custodian." The ordinance defines "incorrigible" as "Any juvenile who is uncontrollable."

An evidentiary hearing was held and, at the close of the state's evidence, the magistrate found that the State proved that Doe was incorrigible by arguing with his parents, but not for leaving the house without permission. On appeal, Doe argues that the ordinance is unconstitutionally overbroad and vague.

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33475

IN THE MATTER OF JOHN DOE, A MINOR UNDER 18 YEARS OF AGE.	)	
STATE OF IDAHO,	)	
	)	**2007 Opinion No. 75**
Plaintiff-Respondent,	)	
	)	**Filed: November 1, 2007**
v.	)	
	)	**Stephen W. Kenyon, Clerk**
JOHN DOE,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. G. Richard Bevan, District Judge. Hon. John F. Varin, Magistrate.

Order of the district court, on appeal from the magistrate, affirming decree that juvenile fell within the purview of the Juvenile Corrections Act, reversed.

Robin M. Weeks, Twin Falls County Public Defender, Twin Falls, for appellant. Robin M. Weeks argued.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent. Daniel W. Bower argued.

PERRY, Chief Judge

John Doe, a minor, appeals from the intermediate appellate order of the district court affirming the magistrate's decree that Doe fell within the purview of the Juvenile Corrections Act (JCA) for being incorrigible. For the reasons set forth below, we reverse the district court's order and vacate the magistrate's decree.

I.

FACTS AND PROCEDURE

Doe had been residing with his older sister in California for about a year when, on July 5, 2005, he went to his parents' residence in Idaho. On July 7, Doe, who was fifteen years old, had a disagreement with his parents about whether he would be permitted to continue living with his sister in California. Doe wanted to return to California, but his parents wanted him to remain

with them. During the disagreement, Doe left the residence to "cool off." Doe's sister, who was also present at the Idaho residence, became alarmed when Doe left and called the police. An officer located Doe across the street from his parents' residence. Another officer went to the residence, where the parents told the officer that they did not want Doe to be charged with anything for his conduct. The officer with Doe warned him that, if the police were called back to the residence again that night, Doe would be arrested for being incorrigible. Later that night, the police responded to a call that there was a suicidal fifteen-year-old male at the same residence. Doe told the police that he had threatened to harm himself with a lamp cord. The officer who had spoken with Doe during the initial encounter then arrested Doe.

The state filed a petition alleging that Doe fell under the purview of the JCA. The petition alleged that Doe committed two counts of being incorrigible, in violation of Twin Falls City Ordinance 6-6-3, on or about July 7, 2005. The first count was for "arguing with his parents," and the second count was for "leaving the house without permission." The magistrate held an adjudicatory hearing. At the close of the state's evidence, Doe moved to have the case dismissed, arguing the state had not met its burden of proof. The magistrate denied the motion, and Doe presented evidence in his defense. The magistrate found that Doe fell within the purview of the JCA for being incorrigible by arguing with his parents, as charged in the first count, but not for leaving the house without permission, as charged in the second count. Prior to his disposition hearing, Doe pled guilty to petit theft in a separate case. The magistrate sentenced Doe to concurrent terms of thirty days detention for being incorrigible and ninety days detention for petit theft. However, the magistrate suspended seventy-four days of detention and placed Doe on probation for six months. Doe appealed to the district court. The district court affirmed the decree of the magistrate finding Doe to be within the purview of the JCA for violating the incorrigible ordinance. Doe again appeals.

II.
STANDARD OF REVIEW

On review of a decision of the district court, rendered in its appellate capacity, we examine the record of the trial court independently of, but with due regard for, the district court's intermediate appellate decision. *State v. Bowman*, 124 Idaho 936, 939, 866 P.2d 193, 196 (Ct. App. 1993).

III.
ANALYSIS

On appeal, Doe asserts that there was insufficient evidence to find that he fell within the purview of the JCA by arguing with his parents and that the ordinance is unconstitutionally overbroad and vague. The state asserts that Doe did not raise the constitutional arguments in the trial court. Because the sufficiency of the evidence issue is dispositive, we need not address the constitutional issues or whether Doe preserved them below.

Doe first frames the sufficiency of the evidence issue as an assertion of error in the magistrate's denial of his motion for a judgment of acquittal at the conclusion of the state's case-in-chief. However, by presenting evidence in defense at the adjudicatory hearing, Doe waived any objection to the denial of that motion. *See State v. Clifford*, 130 Idaho 259, 263, 939 P.2d 578, 582 (Ct. App. 1997).[1] *See also State v. Watson*, 99 Idaho 694, 698, 587 P.2d 835, 839 (1978); *State v. Henninger*, 130 Idaho 638, 640, 945 P.2d 864, 866 (Ct. App. 1997); *State v. Ashley*, 126 Idaho 694, 699, 889 P.2d 723, 728 (Ct. App. 1994), *on denial of petition for rehearing*. This Court, therefore, will conduct a review of all of the evidence presented at the adjudicatory hearing to determine whether it was sufficient to support the magistrate's finding. *See Henninger*, 130 Idaho at 640, 945 P.2d at 866.

Appellate review of the sufficiency of the evidence is limited in scope. A finding of guilt will not be overturned on appeal where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. *State v. Herrera-Brito*, 131 Idaho 383, 385, 957 P.2d 1099, 1101 (Ct. App. 1998); *State v. Knutson*, 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct. App. 1991). We will not substitute our view for that of the trier of fact as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. *Knutson*, 121 Idaho at 104, 822 P.2d at 1001; *State v. Decker*, 108 Idaho 683, 684, 701 P.2d 303, 304 (Ct. App. 1985). Moreover, we will consider the evidence in the light most favorable to the prosecution. *Herrera-Brito*, 131 Idaho at 385, 957 P.2d at 1101; *Knutson*, 121 Idaho at 104, 822 P.2d at 1001.

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[1] We reject Doe's assertion that we should overrule or modify *Clifford*.

The magistrate found Doe was within the purview of the JCA for being incorrigible by arguing with his parents in violation of Twin Falls City Ordinance 6-6-3 on or about July 7, 2005. We must therefore determine if Doe's conduct was prohibited by the ordinance. The pertinent part of the ordinance makes it unlawful for "any person under the age of eighteen (18), living or found in the jurisdiction" to commit "any act or acts which render him incorrigible or places him beyond the control of his parents, guardian or other legal custodian." Twin Falls City Ordinance 6-6-3. Section 6-6-1 of the ordinance defines "incorrigible" as "Any juvenile who is uncontrollable."

Rules for construction of an ordinance are the same as for construction of a statute. *State v. Roll*, 118 Idaho 936, 939 n.2, 801 P.2d 1287, 1290 n.2 (Ct. App. 1990). This Court exercises free review over the application and construction of statutes. *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003). Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000). The language of the statute is to be given its plain, obvious, and rational meaning. *Burnight*, 132 Idaho at 659, 978 P.2d at 219. If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Escobar*, 134 Idaho at 389, 3 P.3d at 67. When this Court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. *Rhode*, 133 Idaho at 462, 988 P.2d at 688. To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. *Id.* It is incumbent upon a court to give a statute an interpretation, which will not render it a nullity. *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001). Constructions of a statute that would lead to an absurd result are disfavored. *State v. Doe*, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004); *State v. Yager*, 139 Idaho 680, 690, 85 P.3d 656, 666 (2004).

Under the plain language of the ordinance, a juvenile commits a violation when he or she is uncontrollable or beyond the control of a legal custodian. We will, therefore, not overturn the magistrate's determination that Doe fell under the purview of the JCA if the record contains substantial evidence upon which a reasonable trier of fact could have determined that Doe acted

in a way that made him uncontrollable or placed him beyond the control of his parents. Additionally, we must focus on the evidence of Doe's conduct on the date that the state charged him with violating the ordinance, which was the date of his arrest.

The testimony presented at the adjudicatory hearing did not include substantial evidence that Doe was uncontrollable or beyond the control of his parents on the date of his arrest. Doe's mother testified that, although Doe was angry and "raised his voice a little," he was respectful during the argument. Doe's father also testified that Doe was respectful during the dispute but that, when Doe's sister came from California, the "house turned upside down." Doe's sister called the police when Doe left the residence, but Doe's father testified that Doe received permission from him to leave the residence to get juice at a gas station. Neither parent testified that Doe was "uncontrollable" let alone that he was beyond their ability to control him. The arresting officer indicated that, when he was called to the residence the first time, he warned Doe that his conduct was incorrigible and that, if the officer was required to return again that night, he would arrest Doe for being incorrigible. The officer also testified, however, that Doe was "very cooperative" with the him on the first call and that the other officer told him that Doe's parents did not want the police to arrest Doe for his conduct.[2] The arresting officer further testified that, when the police were called out to the residence a second time, he explained to Doe that he would be going to the detention center because the police were called out to the residence a second time. None of this testimony by people actually present and observing Doe's behavior before his arrest indicates that he was beyond his parents' control. We are not persuaded by the state's reliance on Doe's probation officer's testimony about his interview with Doe on the day after his arrest. Doe's probation officer testified that, when he informed Doe that he would have to stay with his parents, Doe began yelling and stated that he would run away from his parents' home. Doe's threat to run away the day after his arrest, however, does not support a finding that he was incorrigible by arguing with his parents on the day of his arrest.

In sum, the testimony establishes that on the night of his arrest Doe raised his voice a little while he argued with his parents in a respectful manner and was arrested primarily because the police were called to the residence twice. We conclude that this does not constitute substantial evidence from which a reasonable trier of fact could have found Doe was beyond the

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[2] Doe did not specifically object on hearsay grounds to testimony by the arresting officer as to statements made by the other officer present.

control of his parents on July 7, 2005. Other courts that have discussed the phrase "beyond the control of the parents" have likewise held that the legislative body--in this case the Twin Falls City Council--could not have intended that phrase to include an isolated act by a minor which poses no hazard to the minor or anyone else. *See In re D.J.B.*, 96 Cal. Rptr. 146, 149 (Cal. Ct. App. 1971); *In re Polovchak*, 454 N.E.2d 258, 263 (Ill. 1983); *In re Galvan*, 384 So. 2d 1000, 1003 (La. Ct. App. 1980).

IV.

CONCLUSION

There was insufficient evidence for the magistrate to find Doe fell within the purview of the JCA under Twin Falls City Ordinance 6-6-3 for being incorrigible by arguing with his parents on July 7, 2005. Accordingly, we reverse the district court's order and vacate the magistrate's decree.

Judge LANSING and Judge GUTIERREZ, **CONCUR.**

IN THE SUPREME COURT OF THE STATE OF IDAHO

****

STATE OF IDAHO,	)	
	)	Supreme Court
Plaintiff/Respondent	)	Docket No. 33475
v.	)	
	)	Twin Falls District Court
DOE, JOHN	)	Docket No. JV 05-285
	)	
Defendant/Appellant	)	

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District
of the State of ldaho, in and for the County of Twin Falls

Honorable G. Richard Bevan, District Judge, Presiding

Robin M.A. Weeks #6976
Twin Falls County Deputy Public Defender
P.O. Box 126
Twin Falls, ID 83303-0126

For Appellant

Lawrence Wasden
Attorney General
State of Idaho

Stephen A Bywater
Deputy Attorney General
Chief, Criminal Law Division

Courtney E. Beebe
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

For Respondent

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REVISED STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an appeal from a conviction of the charge oflncorrigible "by arguing with his parents, in violation of Twin Falls City Ordinance 6-6-3." Clerk's Record (hereafter R.), p. 8. Mr. Doe asks this Court to reverse the Magistrate Court's Order of Conviction and additionally find that Twin Falls City Ordinance 6-6-3 (hereafter TFCO 6-6-3) is unconstitutionally overbroad, unconstitutionally vague, and was unconstitutionally applied in violation of Mr. Doe's First and Fourteenth Amendment rights.

II. STATEMENT OF FACTS AND CITATION TO RECORD

On July 7, 2005, John Doe and his parents became engaged in a discussion about whether John would be allowed to return to California to live with his sister, as he had been doing for the past year. Clerk's Record, p. 87, Exhibit: Typed Transcript [of the August 19, 2005 Court Trial] Filed February 2, 2006 (hereinafter R., p. 87, Exhibit: Tr.Ct.) p. 9, L. 28 -p. 10, L. 17. John was determined to return and became emotionally engaged[1] in trying to convince his parents to allow it. *Id.* p. 11, L. 18-22. His parents were set against the plan and refused to yield to his entreaties. *Id.* p. 14, L. 2-8.

1 The State has characterized Mr. Doe's mood as "extremely angry" and indicated that he "suddenly left the house" but cites to nothing which supports either the extremity of his mood or the allegedly precipitate nature of his departure. It should also be noted that the State cites extensively to R. p. 87, Exhibit: Social History Report, which contains a third-party summary of the testimony after the verdict was rendered and after additional interviewing was conducted and which could not have been considered by the trial court at the time it rendered its decision. The State likewise cites extensively to the police report on page IO of the Record, which was never entered into evidence and also could not have been considered as reliable evidence by the trial court in rendering the verdict.

At some point in the course of the evening, John decided to cool off by taking a walk to buy a soda at a nearby gas station. *Id.* p. 15, L. 20-21. He obtained his father's permission and left without informing his mother or the sister with whom he had been staying. *Id.*, p. 10, L. 29 - p. 11, L. 1-2. While he was gone, his sister noticed his absence, feared that he had run away, and called the police. *Id.* p. 11, L. 2-6. The responding officer, Officer Matt Triner, located John on his way back to the house and, upon finding that his parents did not wish to pursue charges, left after issuing a warning. *Id.* p. 5, L. 12-14, p. 6, L. 13-20.

Later that evening, Officer Triner again responded with another officer to the residence, this time on report of a suicidal juvenile male, whom Officer Triner concluded to be John. *Id.* p. 6, L. 23-27. No reliable evidence was presented at hearing to establish the identity of the second caller, nor was testimony presented to substantiate any actual suicidal threats on the part of John.[2] Regardless, Officer Triner placed John into custody as he had warned John he would if he were called back to the residence that night. *Id.* p. 7, L. 6-11. John was subsequently charged with two counts of Incorrigible: Count I for "arguing with his parents" and Count II for "leaving the house without permission." **R. p.** 7-9.

At evidentiary hearing, John's parents were called by the State and both testified that, though there was a disagreement, John was never disrespectful to them. *See* R. p. 87, Exhibit: Tr.Ct. p. 12, L. 6-12, p. 15, L.10. His mother, Zoe Doe, testified further that, though his voice was raised a little, they did not fight. *Id.* p. 12, L. 3, p. 10, L. 7-10. His father, Earnest

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2 The State relates and cites to hearsay testimony (Officer Triner relating what Officer Parker told him about what John allegedly said to her) which was objected to and which the trial court noted was unreliable hearsay. *See* Brief of Respondent at 2, R. p. 87, Exhibit: Tr.Ct., p. 7, L. 2-5, 14-18, p. 31, L. 16-18.

Doe, testified that he had given John permission to leave the house to go to the gas station. *Id.* p. 15, L. 21. The State's only other witness was Officer Triner, who was not a witness to the disagreement. *Id.* p. 7, L. 21-28.

Based on the lack of evidence to prove the charge beyond a reasonable doubt, John, through counsel, made a Motion of Acquittal at the close of the State's case (incorrectly phrasing it as a "Motion to Dismiss"). *Id.* p. 16, L. 25 - p.17, L. 23. This motion was denied and the Magistrate Court indicated that the defense should proceed with testimony, if desired. *Id.* p. 17, L. 25-28.

John took the stand himself and confirmed the testimony of his parents. *Id.* p. 18, L. 2 - p. 24, L. 10. Specifically, he testified that, though he was emotional about the issue, he always intended to abide by his parents' final decision. *Id.* p. 19, L. 15-22. Jose Orozco of the Juvenile Probation office took the stand as a rebuttal witness and testified that, the next day, July 8, 2005, as they filled out a contract in lieu of detention, John had indicated to him that he *did* intend to run away from his parents' home and return to California, and that, during that interview, John cried and yelled. *Id.* p. 25, L. 11-23, p. 26, L. 7-14. It is noted that this supposed occurrence was the day after the alleged incorrigible acts and also the day after the officer detained John. *Id.* p. 25, L. 11-20, p. 20, L. 28-29.

After hearing the evidence, the Honorable John Varin found John not guilty of Count II, but convicted him on Count I, finding that John had engaged in a "disruptive dispute" capable of sanction under a reasoning of "disturbing the peace." *Id.* p. 31, L. 13 - p. 32, L. 9.

III. SUMMARY OF THE ARGUMENT

The evidence presented at evidentiary hearing was insufficient to prove beyond a reasonable doubt that John Doe was out of the control of Earnest and Zoe Doe by arguing with them or even that he was outside the control of any and every reasonable parent, guardian, or other custodian and his Motion of Acquittal should have been granted or, in the alternative, he should have been found not guilty on all counts at the close of testimony. Mr. Doe also contends that the charge itself imposes an illegal restriction on his First Amendment rights and that the charging ordinance, Twin Falls City Ordinance 6-6-3, is unconstitutionally overbroad and unconstitutionally vague.

ISSUES PRESENTED ON APPEAL

I. Did the Magistrate court err when it denied the Motion of Acquittal at the close of the State's evidence?

II. Was there sufficient evidence to support the Magistrate Court's judgment of conviction beyond a reasonable doubt?

III. Did the conviction of Incorrigible "by arguing with his parents" violate Mr. Doe's First Amendment rights?

IV. Is Twin Falls City Ordinance 6-6-3 unconstitutionally overbroad?

V. Is Twin Falls City Ordinance 6-6-3 unconstitutionally vague?

ARGUMENT

Many of the issues presented by Mr. Doe have gone largely unanswered by the State, and, in the interests of brevity, this Reply Brief will not discuss at length unchallenged arguments made in his initial Brief.

I. JOHN HO POVAC SHOULD HAVE BEEN ACQUITTED BY THE MAGISTRATE COURT

Appellant asserts that whether based solely upon the evidence presented during the State's case in chief or based upon the entirety of the evidence in the case, the State did not prove that John Doe was outside the control of Earnest and Zoe Doe. Further, the State failed to prove that no reasonable parent would allow John's behavior.

A. The State Did Not Prove Beyond a Reasonable Doubt that John Doe Was Outside the Control of Earnest and Zoe Doe

In its Brief of Respondent, the State reviewed the testimony which could have been used by the magistrate court to reach its conclusion that he had engaged in a "disruptive dispute... in a way that placed him beyond the control of his parents" under a reasoning of disturbing the peace. R. p. 87, Exhibit: Tr.Ct. p. 32, L. 5-9. *See also* Respondent's Brief at 11. The testimony reviewed by the State, when viewed in the light most favorable to the prosecution, could, indeed, provide substantial evidence upon which a reasonable trier of fact could have found that Mr. Doe was emotional and that he verbally disagreed with his parents on July 7, 2005-but it did not prove that he was outside the control of Earnest and Zoe Doe.

It should be plainly evident that parents can be angry and still be in control. Parents can be stressed, bothered, and distressed and yet maintain control over their offspring. In like

manner, children can be angry, threatening, and argumentative and still be within the control of parents who have decided to allow them to blow off steam or to take the time to cool off. The State's burden was not so low as to merely have to show that Mr. Doe was emotional and upset or that his parents were stressed and bothered. The State's proof should be required to meet a higher threshold than proving that Officer Triner, the juvenile prosecutor, and the juvenile court compliance officer considered John's behavior to be uncontrolled. The State bore the burden to prove beyond a reasonable doubt that John Doe was outside the control of Earnest and Zoe Doe, his parents.

> Earnest and Zoe both testified, yet neither one said that their son was outside their control.

See R. p. 87, Exhibit: Tr.Ct. p. 9, L. 13 -p. 16, L. 16. Quite to the contrary, Earnest Doe allowed John to leave the house on his own during the argument. *Id.* p. 16, L. 10-16. Zoe, when asked if she and John had a fight, stated quite clearly that they were just talking *(Id.* p. 10, L. 7-10) and that she did not instruct her daughter to call the police or even want to have the police called. *Id.* p. 11, L. 25-29. Officer Triner, in his testimony, described a young man who was "calm" and "very cooperative" and who "did everything [Officer Triner] asked him to do." *Id.* p. 6, L. 9-12. Officer Triner further admitted that he never saw John being so much as disrespectful to his parents *(Id.* p. 7, L. 21-23) and that he made the decision to arrest John without ever once consulting Earnest and Zoe personally. *Id.* p. 8, L. 2-3.

In his Appellant's Brief, Mr. Doe proposed that this Court should impose a two- pronged test which could serve to guard against the unpredictable and capricious "I know it when I see it" method currently used to prosecute juvenile offenders under TFCO 6-6-3 and

others like it. *See* Appellant's Brief at 10-12. The State failed to present arguments in support of the standard that is apparently currently in use. Mr. Doe has listed and analyzed several cases and public policy arguments for the court's consideration in his Appellant's Brief on pages 10-12. The State has declined to address either the cases or Mr. Doe's analysis and arguments.

This Court should find that the State did not meet its burden to prove beyond a reasonable doubt that John Doe was outside the control of Earnest and Zoe Doe, his parents. Mr. Doe urges the Court to adopt a clear standard to be used when deciding cases involving allegedly incorrigible juveniles and suggests that a juvenile should not be convicted as incorrigible unless, at a minimum, 1) the State is able to prove beyond a reasonable doubt that the juvenile's specific parent, guardian, or other custodian considered the juvenile to be outside of his/her/their control; or 2) the State is able to prove beyond a reasonable doubt that any and every reasonable parent, guardian, or other custodian would consider the juvenile's behavior to be outside of his/her/their control.

The State did not present substantial evidence to prove beyond a reasonable doubt either that Zoe and Earnest Doe considered John Doe to be outside of their control or that any and every reasonable parent, guardian, or other custodian would have considered his behavior to be outside of his/her/their control. This Court should therefore reverse the decision of the district and magistrate courts and enter its Judgment of Acquittal.

B. The State Did Not Address the Distinction Between a Court Trial and a Jury Trial in Consideration of the Denial of the Motion of Acquittal

Here, it should be made clear that Mr. Doe is requesting in good faith for an extension or modification of existing law. Mr. Doe has openly acknowledged the existing case law which runs counter to his argument, but yet asks this court to consider that the standard was developed without due consideration for the differences between a court trial and a jury trial. *See* Appellant's Brief at 17-19. The State has presented no argument in support of the current standard, which insulates a trial judge's denial of a Motion of Acquittal from appellate review when further evidence is presented without distinguishing between the two types of trial settings.

II. CONSTITUTIONAL ISSUES CAN BE REVIEWED ON APPEAL

Though, as asserted by the State, it is, indeed, a "longstanding rule of [the Idaho Supreme Court]... that [it] will not consider issues that are presented for the first time on appeal," there are also well-established exceptions to this general rule. *Sanchez v. Arave*, 120 Idaho 321 (1990). The constitutional issues in this case have been presented to two magistrate judges in the juvenile court (the Honorable John Varin *see* Clerk's Record p. 87, Exhibit: Brief of Appellant on Appeal from Conviction lodged March 10, 2006 (hereinafter R. p. 87, Exhibit: Brief of Appellant), Addenda A-E; and the Honorable Thomas Borreson, *see id.*, Addenda F-G), and one district judge, the Honorable Richard Bevan, who presided over the case at bar in the District Court.[3]

[3] In its Brief of Respondent, the State "submits that these two attached cases are completely unrelated factually and procedurally to Doe' s case and were not considered by the district court in rendering its decision." Brief of Respondent at 14, fn. 2. Though it should be clear that the State cannot know what the District Court considered and that a more natural assumption would be that it considered all addenda presented to it, it should also be made equally

Though the timing of the appellate filings prompted Judge Varin and Judge Borreson to stay their own proceedings to await Judge Bevan's determination of the similar issues, it is clear that the constitutional issues raised by Mr. Doe are not fleeting, but are important and must necessarily be considered so that a clear standard may be established on these issues.

A. Because the District Court Considered and Ruled upon the Constitutional Issues, they are Preserved for Appeal

In *Sanchez,* the Idaho Supreme Court explained that it would not consider a constitutional challenge that was not raised until the appeal to that court. Quoting from *Smith v. Sterling,* 1 Idaho 128, 131 (1867), it reiterated the rationale for the rule:

> It is for the protection of the inferior courts. It is manifestly unfair for a party to go into court and slumber, as it were, on [a] defense, take no exception to the ruling, present no point for the attention of the court, and seek to present [the] defense, that was never mooted before, to the judgment of the appellate court. Such a practice would destroy the purpose of an appeal and make the supreme court one for deciding questions of law in the first instance.

Alterations in original. In its analysis, the *Sanchez* court specifically points out three significant facts: 1) "The record does not contain any indication that Sanchez challenged the constitutionality of I.C. § 12-122 in the proceedings before the magistrate judge;" 2) "Sanchez's brief on appeal to the district judge did not present the issue of the constitutionality of I.C. § 12-122;" and 3) "nor did the district judge address this issue in deciding the appeal." *Id* at 321-22. Then, on appeal to the Idaho Supreme Court, Sanchez raised his constitutional challenge as his

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clear that, far from attempting to mislead the District Court by submission of these addenda in his Brief of Appellant, Mr. Doe specifically advised the District Court that the constitutional issues were being raised for the first time on the appeal to the District Court. *See* R. p. 87, Exhibit: Brief of Appellant, p. 9.

sole issue of appeal. It is clear, therefore, that the question of whether an issue was properly raised in the trial court is not the only consideration.

State v. McCutcheon, 129 Idaho 168, 169 (Ct. App. 1996) clarifies this doctrine, dealing with a case where a defendant pled guilty to a charge of driving without privileges in the magistrate court and then appealed to the district court, alleging that the magistrate court had erred in accepting his plea because it had not inquired of him whether a plea bargain existed. The district court considered the issue and decided that, though the magistrate had erred in accepting the plea, the error was harmless and therefore the district court affirmed the judgment of conviction. *Id.* On appeal to the Idaho Court of Appeals, the defendant made essentially the same argument it had made to the district court and, for the first time, the state "contend[ed] that any error that resulted from the magistrate's alleged omission was not fundamental error, and therefore, not properly a matter raised for the first time on appeal." *Id.*

In its analysis of the State's objection, the *McCutcheon* court reiterated the oft-repeated doctrines that it would "examine the record of the trial court independently of, but with due regard for, the district court's intermediate appellate decision," and that "[i]ssues not raised before the trial court cannot later be raised on appeal unless the alleged error would constitute 'fundamental error.'" *Id.* at 169. Thereafter, it directly considered the contested issue and, holding that, since there never was any sort of plea agreement with the prosecutor for the magistrate judge to inquire about, "[t]here was no reversible error by the magistrate in accepting McCutcheon's plea," it affirmed the judgment of conviction-but on different grounds than that used by the district court. *Id.* at 169-170.

Markedly, the *McCutcheon* court did not specifically indicate that fundamental error could lie in the proper questioning of a defendant about potential plea agreements with the prosecutor. Instead, it seems to have simply regarded and sided with the judgment of the district court on the issue, which, in ruling on the issue itself, impliedly found that the issue warranted consideration.[4]

So also, in the case at bar, the 5th District Court accepted briefs, heard argument, and rendered its opinion on each of the issues raised by Mr. Doe in that court. By objecting to the consideration of the constitutional issues for the first time on appeal from the ruling of the District Court, the State implies that this Court should disregard the District Court's intermediate appellate decisions on those issues. Such was not the position taken by the *McCutcheon* court and should not be taken by this Court. Instead, "due regard" should be given to each ruling made by the District Court. *See McCutcheon,* supra.

B. Constitutional Issues are Preserved for Appeal because of Fundamental Error Doctrine

State v. Knowlton, 123 Idaho 916, 918 (1993) explains the doctrine of fundamental error thusly:

> Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive. Each case will of necessity, under such a rule, stand on its own merits. Out of the facts in each case will arise the law.

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[4] In contrast, the case of *State v. Adams,* 138 Idaho 624 (Ct. App. 2003) shows the Idaho Court of Appeals taking a similar stance in support of a ruling made by the district court, but, in that case, supports the district court's decision *not* to consider an issue which was raised for the first time on appeal.

Knowlton dealt with a case where a defendant who had been convicted of statutory rape learned, after his probation was revoked, that the sentencing judge served on a task force for Children at Risk. *Id.* After ruling that Knowlton's unaddressed question about the judge's impartiality didn't amount to fundamental error, the Idaho Supreme Court explained that, as it had ruled in the similar case of *State* v. *Kenner,* 121 Idaho 594 (1992):

> This Court refused to consider the issue as fundamental error since, even assuming the defendant had requested the magistrate judge disqualify himself and the magistrate had denied that request, any error in so doing would not go to the very foundation of the case or defendant's rights, or take from the defendant a right essential to his defense.

Knowlton, 123 Idaho at 919. Thus, the Idaho Supreme Court seems to create a test wherein the outcome of an adverse ruling should be considered in light of the facts of the case to determine whether the adverse ruling, if it had been made by the trial court, would have amounted to a fundamental error, undermining the foundation of the defendant's case or the defendant's rights, or whether such a ruling would have taken from the defendant a right which was essential to his defense.

In the case at bar, the State asks this Court to uphold the conviction of a young man who was found to be incorrigible for using speech to disagree with his parents. In such a case, First Amendment considerations go directly to the foundation or basis of his rights as well as to the foundation of the case. Similarly, it is increasingly obvious that a statute which allows speech and other expressive behaviors to be sanctioned by the state is unconstitutionally vague and unconstitutionally overbroad. These issues, likewise, go to the foundation of the questions raised

in this case, for a statute more narrowly and specifically drawn could have made it clear that the State ought not to attempt to sanction Mr. Doe for simply arguing with his parents.

III. THE STATE DID NOT ADDRESS MR. DOE'S FIRST AMENDMENT CHALLENGE

Other than reviewing the arguments made by the parties in the District Court and the ruling of the District Court, the State declined to address the substantive argument that Mr. Doe's conviction of Incorrigible "by arguing with his parents" violated his First Amendment rights. Instead, the State contends that

> Doe's claim that his speech and conduct in his home is protected by the First Amendment, regardless of whether it falls into a protected subject, fails because Doe produces no legal authority in support of his argument that an argument between a child and a parent that results in a police response is protected by the First Amendment.

Brief of Respondent at 19. The State refers the Court to *State v. Zichko,* 129 Idaho 259,263 (1996), which does, indeed, indicate that "[a] party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking." By this argument, the State appears to assume that the Court is incapable of extrapolating the reasoning used in cases which addressed similar yet distinguishable issues, and can only decide an issue when clear precedent guides its decision.

It is freely acknowledged that no case has been presented for the Court's consideration which falls directly on point with the case at bar. This is because Mr. Doe is aware of no case which deals with the issue of how much of the power wielded by parents can be exercised by the State-especially without the concurrence of the parents. The real First Amendment

question here is whether, because Mr. Doe's *parents* could have chosen to sanction his speech, the *State* can also sanction it under the banner of lending support to his parents whether or not they requested such support. This a question of first impression in Idaho.

When a question of first impression arises, cases which are tangentially related are considered both from Idaho as well as from sister jurisdictions nationwide. *See, e.g. State v. Moore,* 131 Idaho 814, 820-21 (1998) (finding, as a question of first impression, that testimony that Moore refused to meet with police did not violate his right to remain silent) and *State v. Barros,* 131 Idaho 379, 381-83 (1998) (finding, as a question of first impression, that state officers could arrest Barros in Indian country for a crime committed off Indian country). After an analysis of somewhat related case law (or case law on point from another jurisdiction), the court is then able to form a reasoned judgment on the question of first impression.

Mr. Doe has provided a detailed analysis of related First Amendment case law on pages 23-31 of his Appellant's Brief. Because the State has declined to address the cases or analysis contained therein, Mr. Doe simply invites the Court to review those related cases and his analysis thereof. This Court should then find that the State's decision to sanction his speech was undertaken in violation of the rights afforded Mr. Doe by the First Amendment.

IV. TWIN FALLS CITY ORDINANCE 6-6-3 IS UNCONSTITUTIONALLY OVERBROAD

The State's overbreadth analysis deals primarily with a recitation of the applicable case law followed by an unembellished reiteration of the ruling of the District Court. Its analysis of the first prong of the overbreadth test found in *State v. Korsen,* 138 Idaho 706 (2003) rests, as did

the ruling of the District Court, upon the finding that "private disputes are not constitutionally protected" and points out that "Doe has failed to describe how his conduct with his parents expresses any kind of constitutionally protected idea." Brief of Respondent at 25. It does not seek to address the concern raised by Mr. Doe that "[b]ecause many parents, teachers, and guardians desire to control not only the actions but the speech, reading material, associations, and thoughts of their children, there is vast potential for abuse" because "a plain reading of TFCO 6-6-3 allows a child to be prosecuted anytime he or she is disobedient or considered to be outside his or her parent,' school's or guardian's control." Appellant's Brief at 33-34. This Court should find that the first prong of the *Korsen* test has been met.

In addressing the second prong of the *Korsen* overbreadth test, the State again overlooks the meat of Mr. Doe's analysis, contenting itself with unsupported argument and bald statements of questionable fact. It asserts that TFCO 6-6-3 "is a valid criminal law that reflects legitimate state interests in maintaining comprehensive controls over harmful, uncontrollable behavior that places a juvenile beyond the control of his parents such that police intervention is required." Respondent's Brief at 25. Overlooking the facts of the case at bar, the State asserts that TFCO 6-6-3 only prohibits conduct and that because it does not specifically prohibit "interfamily disputes or developing teenage thought processes... [or] expressive conduct that concerns a specific idea," it does not prohibit a significant amount of constitutionally protected conduct. *Id.* The State makes no effort to distinguish TFCO 6-6-3 from the ordinance invalidated for overbreadth in *State v. Hill,* 482 U.S. 451, 464 (1987) and therefore ignores completely the reasoning used by the U.S. Supreme Court when it said that because "the ordinance [at question

in *Hill]* is *susceptible* of regular application to protected expression... the ordinance is substantially overbroad." Emphasis added. *See* Appellant's Brief at 35 and Respondent's Brief at 25-26.

This Court should find that both prongs of the *Korsen* overbreadth test have been met and that TFCO 6-6-3 is substantially overbroad.

V. TWIN FALLS CITY ORDINANCE 6-6-3 IS UNCONSTITUTIONALLY VAGUE

TFCO 6-6-3 is unconstitutionally vague as applied both to the facts of the case at bar as well as to countless other potential juvenile defendants because it does not provide sufficient notice to juveniles regarding which behaviors may be sanctioned and because it does not provide sufficient guidance to law enforcement. Though Mr. Doe has consistently argued both of these points, both the State and the District Court have declared that Mr. Doe has only alleged a facial vaguEarnests argument. *See* Brief of Respondent at 27, R., p. 75. In fact, the reverse is true.

In his initial Briefto the District Court, Mr. Doe first outlined the two-pronged test for vaguEarnests found in *State v. Bitt,* 118 Idaho 584 (1990), and then argued that 1) Twin Falls City Ordinance 6-6-3 gives no notice to those who are subject to it as to what behavior can and will be sanctioned; and 2) Twin Falls City Ordinance 6-6-3 provides no guidelines to guide the discretion of those who must enforce it. *See* R. p. 87, Exhibit: Brief of Appellant, p. 35-38. Nowhere in his vaguEarnests analysis did Mr. Doe indicate whether he was discussing facial or as-applied vaguEarnests, but it should be noted that, as is mentioned in *State v. Poe,* 139 Idaho 885,

893 (2004), *Bitt* "did not even involve a facial challenge to a statute," and instead deals exclusively with as-applied vaguEarnests.

In its Respondent's Brief in the District Court, the State alleged that, because Mr. Doe did not cite to the specific facts of the case at bar, that his analysis was necessarily a facial one. *See* Clerk's Record., p. 87, Exhibit: Respondent's Brief Lodged April 7, 2006 (hereafter R., p. 87, Exhibit: Respondent's Brief), p. 34. This despite the fact that Mr. Doe had not proposed, discussed, nor tried to prove that the standard for facial vaguEarnests found in *Korsen* at all applied to the case at bar. The State thereafter considered both as-applied and facial vaguEarnests analysis. *Id.* p. 33-37.

Regretfully exacerbating the problem, Mr. Doe subsequently erroneously asserted that "the State has correctly pointed out that Mr. Doe has not previously asserted a specific as-applied vaguEarnests challenge." Clerk's Record p. 87, Exhibit: Reply Brief of Appellant on Appeal from Conviction, Lodged April 28, 2006 (hereafter R., p. 87, Exhibit: Reply Brief of Appellant) p. 21. Then, ineffectively attempting to remedy his perceived error, Mr. Doe proceeded to apply the *Bitt* test to both facial and as-applied vaguEarnests. *Id.* p. 21-24. Again, Mr. Doe did not attempt to discuss or prove the applicability of the *Korsen* facial vaguEarnests test.

In oral argument before the District Court, Mr. Doe argued both prongs of the *Bitt* test, but never that the *Korsen* facial vaguEarnests test applied. *See* Transcript on Appeal, filed October 26, 2006 (hereafter Tr.A), p. 16, L. 14- p. 18, L. 8.

In its Memorandum Decision, the District Court, as did the State, asserted that "John asserts only a facial challenge of the statute. Therefore, John must show that no set of

circumstances exists under which the statute would be valid." R., p. 75. The analysis of the District Court utterly overlooks Mr. Doe's arguments relating to the *Bitt* two-pronged as- applied vaguEarnests test. *Id.*

Not realizing the error until very recently, Mr. Doe, in his Appellant's Brief to this Court, again attempted to argue both facial and as-applied vaguEarnests, again utilizing only the *Bitt* two-pronged test for as-applied vaguEarnests. *See* Appellant's Brief at 38-40.

As can be clearly seen, Mr. Doe has staunchly applied the *Bitt* two-pronged as- applied vaguEarnests test in each brief and argument presented to the District Court and to this Court. Likewise, Mr. Doe has not at any time correctly addressed the issue of facial vaguEarnests and, as the State pointed out, "fail[ed] to even argue on appeal that there are no instances where the statute does not apply." Respondent's Brief at 28. The State, similarly, did not attempt to address the arguments for as-applied vaguEarnests. *Id.* at 26-29. In the interest of remaining consistent with his foregoing arguments (if not with the labels which may have been applied to them), Mr. Doe disclaims any assertion of facial vaguEarnests as defined by *Korsen* and acknowledges that there may be many instances where the plain language of TFCO 6-6-3 may be clearly applied to actual out of control conduct of juveniles.

As he has consistently asserted, however, TFCO 6-6-3 is nonetheless impermissibly vague as applied to himself as well as to many other juveniles who are subjected to it, providing no notice as to the range of behaviors which it will sanction and no guidance to law enforcement to help them decide which juveniles are incorrigible and which are simply unruly or annoying.

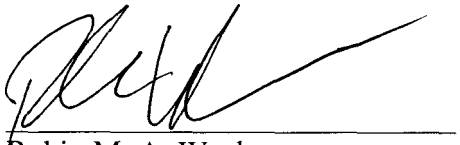
This Court should find that TFCO 6-6-3 is unconstitutionally vague in its application.

VI. CONCLUSION

This court should find that the State did not meet its burden to prove beyond a reasonable doubt that John Doe was outside the control of Earnest and Zoe Doe and/or any and every reasonable parent, guardian, or other custodian's control. This Court should further find that TFCO 6-6-3 is unconstitutionally overbroad, unconstitutionally vague as applied, and unconstitutionally applied to John Doe in violation of his First Amendment rights.

Mr. Doe respectfully requests that this Court reverse the decision of the Magistrate Court and enter its judgment of acquittal, or in the alternative, dismiss the case. Finally, Mr. Doe requests that this Court correct the language and scope of Twin Falls City Ordinance 6- 6-3, or else invalidate the "Incorrigible" portion entirely.

RESPECTFULLY SUBMITTED this 3J day of May, 2007.



Robin M. A. Weeks
Deputy Public Defender
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, the undersigned, hereby certify that I caused a true and correct copy of the foregoing BRIEF OF APPELLANT JOHN DOE to be properly delivered to the Attorney General by U.S. Mail, on this 3,, day of May, 2007.

Courtney E. Beebe
Deputy Attorney General
Criminal Law Division
Statehouse Mail Room 210
P.O. Box 83720
Boise, ID 83720-0010

IN THE SUPREME COURT OF THE STATE OF IDAHO

****

STATE OF IDAHO,	)	
	)	Supreme Court
Plaintiff/Respondent	)	Docket No. 33475
v.	)	
	)	Twin Falls District Court
DOE, JOHN	)	Docket No. JV 05-285
	)	
Defendant/Appellant	)	

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District
of the State of ldaho, in and for the County of Twin Falls

Honorable G. Richard Bevan, District Judge, Presiding

Robin M.A. Weeks #6976
Twin Falls County Deputy Public Defender
P.O. Box 126
Twin Falls, ID 83303-0126

For Appellant

Lawrence Wasden
Attorney General
State of Idaho

Stephen A Bywater
Deputy Attorney General
Chief, Criminal Law Division

Courtney E. Beebe
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

For Respondent

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REVISED STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an appeal from a conviction of the charge oflncorrigible "by arguing with his parents, in violation of Twin Falls City Ordinance 6-6-3." Clerk's Record (hereafter R.), p. 8. Mr. Doe asks this Court to reverse the Magistrate Court's Order of Conviction and additionally find that Twin Falls City Ordinance 6-6-3 (hereafter TFCO 6-6-3) is unconstitutionally overbroad, unconstitutionally vague, and was unconstitutionally applied in violation of Mr. Doe's First and Fourteenth Amendment rights.

II. STATEMENT OF FACTS AND CITATION TO RECORD

On July 7, 2005, John Doe and his parents became engaged in a discussion about whether John would be allowed to return to California to live with his sister, as he had been doing for the past year. Clerk's Record, p. 87, Exhibit: Typed Transcript [of the August 19, 2005 Court Trial] Filed February 2, 2006 (hereinafter R., p. 87, Exhibit: Tr.Ct.) p. 9, L. 28 -p. 10, L. 17. John was determined to return and became emotionally engaged[1] in trying to convince his parents to allow it. *Id.* p. 11, L. 18-22. His parents were set against the plan and refused to yield to his entreaties. *Id.* p. 14, L. 2-8.

1 The State has characterized Mr. Doe's mood as "extremely angry" and indicated that he "suddenly left the house" but cites to nothing which supports either the extremity of his mood or the allegedly precipitate nature of his departure. It should also be noted that the State cites extensively to R. p. 87, Exhibit: Social History Report, which contains a third-party summary of the testimony after the verdict was rendered and after additional interviewing was conducted and which could not have been considered by the trial court at the time it rendered its decision. The State likewise cites extensively to the police report on page IO of the Record, which was never entered into evidence and also could not have been considered as reliable evidence by the trial court in rendering the verdict.

At some point in the course of the evening, John decided to cool off by taking a walk to buy a soda at a nearby gas station. *Id.* p. 15, L. 20-21. He obtained his father's permission and left without informing his mother or the sister with whom he had been staying. *Id.*, p. 10, L. 29 - p. 11, L. 1-2. While he was gone, his sister noticed his absence, feared that he had run away, and called the police. *Id.* p. 11, L. 2-6. The responding officer, Officer Matt Triner, located John on his way back to the house and, upon finding that his parents did not wish to pursue charges, left after issuing a warning. *Id.* p. 5, L. 12-14, p. 6, L. 13-20.

Later that evening, Officer Triner again responded with another officer to the residence, this time on report of a suicidal juvenile male, whom Officer Triner concluded to be John. *Id.* p. 6, L. 23-27. No reliable evidence was presented at hearing to establish the identity of the second caller, nor was testimony presented to substantiate any actual suicidal threats on the part of John.[2] Regardless, Officer Triner placed John into custody as he had warned John he would if he were called back to the residence that night. *Id.* p. 7, L. 6-11. John was subsequently charged with two counts of Incorrigible: Count I for "arguing with his parents" and Count II for "leaving the house without permission." **R. p.** 7-9.

At evidentiary hearing, John's parents were called by the State and both testified that, though there was a disagreement, John was never disrespectful to them. *See* R. p. 87, Exhibit: Tr.Ct. p. 12, L. 6-12, p. 15, L.10. His mother, Zoe Doe, testified further that, though his voice was raised a little, they did not fight. *Id.* p. 12, L. 3, p. 10, L. 7-10. His father, Earnest

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2 The State relates and cites to hearsay testimony (Officer Triner relating what Officer Parker told him about what John allegedly said to her) which was objected to and which the trial court noted was unreliable hearsay. *See* Brief of Respondent at 2, R. p. 87, Exhibit: Tr.Ct., p. 7, L. 2-5, 14-18, p. 31, L. 16-18.

Doe, testified that he had given John permission to leave the house to go to the gas station. *Id.* p. 15, L. 21. The State's only other witness was Officer Triner, who was not a witness to the disagreement. *Id.* p. 7, L. 21-28.

Based on the lack of evidence to prove the charge beyond a reasonable doubt, John, through counsel, made a Motion of Acquittal at the close of the State's case (incorrectly phrasing it as a "Motion to Dismiss"). *Id.* p. 16, L. 25 - p.17, L. 23. This motion was denied and the Magistrate Court indicated that the defense should proceed with testimony, if desired. *Id.* p. 17, L. 25-28.

John took the stand himself and confirmed the testimony of his parents. *Id.* p. 18, L. 2 - p. 24, L. 10. Specifically, he testified that, though he was emotional about the issue, he always intended to abide by his parents' final decision. *Id.* p. 19, L. 15-22. Jose Orozco of the Juvenile Probation office took the stand as a rebuttal witness and testified that, the next day, July 8, 2005, as they filled out a contract in lieu of detention, John had indicated to him that he *did* intend to run away from his parents' home and return to California, and that, during that interview, John cried and yelled. *Id.* p. 25, L. 11-23, p. 26, L. 7-14. It is noted that this supposed occurrence was the day after the alleged incorrigible acts and also the day after the officer detained John. *Id.* p. 25, L. 11-20, p. 20, L. 28-29.

After hearing the evidence, the Honorable John Varin found John not guilty of Count II, but convicted him on Count I, finding that John had engaged in a "disruptive dispute" capable of sanction under a reasoning of "disturbing the peace." *Id.* p. 31, L. 13 - p. 32, L. 9.

III. SUMMARY OF THE ARGUMENT

The evidence presented at evidentiary hearing was insufficient to prove beyond a reasonable doubt that John Doe was out of the control of Earnest and Zoe Doe by arguing with them or even that he was outside the control of any and every reasonable parent, guardian, or other custodian and his Motion of Acquittal should have been granted or, in the alternative, he should have been found not guilty on all counts at the close of testimony. Mr. Doe also contends that the charge itself imposes an illegal restriction on his First Amendment rights and that the charging ordinance, Twin Falls City Ordinance 6-6-3, is unconstitutionally overbroad and unconstitutionally vague.

ISSUES PRESENTED ON APPEAL

I. Did the Magistrate court err when it denied the Motion of Acquittal at the close of the State's evidence?

II. Was there sufficient evidence to support the Magistrate Court's judgment of conviction beyond a reasonable doubt?

III. Did the conviction of Incorrigible "by arguing with his parents" violate Mr. Doe's First Amendment rights?

IV. Is Twin Falls City Ordinance 6-6-3 unconstitutionally overbroad?

V. Is Twin Falls City Ordinance 6-6-3 unconstitutionally vague?

ARGUMENT

Many of the issues presented by Mr. Doe have gone largely unanswered by the State, and, in the interests of brevity, this Reply Brief will not discuss at length unchallenged arguments made in his initial Brief.

I. JOHN HO POVAC SHOULD HAVE BEEN ACQUITTED BY THE MAGISTRATE COURT

Appellant asserts that whether based solely upon the evidence presented during the State's case in chief or based upon the entirety of the evidence in the case, the State did not prove that John Doe was outside the control of Earnest and Zoe Doe. Further, the State failed to prove that no reasonable parent would allow John's behavior.

A. The State Did Not Prove Beyond a Reasonable Doubt that John Doe Was Outside the Control of Earnest and Zoe Doe

In its Brief of Respondent, the State reviewed the testimony which could have been used by the magistrate court to reach its conclusion that he had engaged in a "disruptive dispute... in a way that placed him beyond the control of his parents" under a reasoning of disturbing the peace. R. p. 87, Exhibit: Tr.Ct. p. 32, L. 5-9. *See also* Respondent's Brief at 11. The testimony reviewed by the State, when viewed in the light most favorable to the prosecution, could, indeed, provide substantial evidence upon which a reasonable trier of fact could have found that Mr. Doe was emotional and that he verbally disagreed with his parents on July 7, 2005-but it did not prove that he was outside the control of Earnest and Zoe Doe.

It should be plainly evident that parents can be angry and still be in control. Parents can be stressed, bothered, and distressed and yet maintain control over their offspring. In like

manner, children can be angry, threatening, and argumentative and still be within the control of parents who have decided to allow them to blow off steam or to take the time to cool off. The State's burden was not so low as to merely have to show that Mr. Doe was emotional and upset or that his parents were stressed and bothered. The State's proof should be required to meet a higher threshold than proving that Officer Triner, the juvenile prosecutor, and the juvenile court compliance officer considered John's behavior to be uncontrolled. The State bore the burden to prove beyond a reasonable doubt that John Doe was outside the control of Earnest and Zoe Doe, his parents.

> Earnest and Zoe both testified, yet neither one said that their son was outside their control.

See R. p. 87, Exhibit: Tr.Ct. p. 9, L. 13 -p. 16, L. 16. Quite to the contrary, Earnest Doe allowed John to leave the house on his own during the argument. *Id.* p. 16, L. 10-16. Zoe, when asked if she and John had a fight, stated quite clearly that they were just talking *(Id.* p. 10, L. 7-10) and that she did not instruct her daughter to call the police or even want to have the police called. *Id.* p. 11, L. 25-29. Officer Triner, in his testimony, described a young man who was "calm" and "very cooperative" and who "did everything [Officer Triner] asked him to do." *Id.* p. 6, L. 9-12. Officer Triner further admitted that he never saw John being so much as disrespectful to his parents *(Id.* p. 7, L. 21-23) and that he made the decision to arrest John without ever once consulting Earnest and Zoe personally. *Id.* p. 8, L. 2-3.

In his Appellant's Brief, Mr. Doe proposed that this Court should impose a two- pronged test which could serve to guard against the unpredictable and capricious "I know it when I see it" method currently used to prosecute juvenile offenders under TFCO 6-6-3 and

others like it. *See* Appellant's Brief at 10-12. The State failed to present arguments in support of the standard that is apparently currently in use. Mr. Doe has listed and analyzed several cases and public policy arguments for the court's consideration in his Appellant's Brief on pages 10-12. The State has declined to address either the cases or Mr. Doe's analysis and arguments.

This Court should find that the State did not meet its burden to prove beyond a reasonable doubt that John Doe was outside the control of Earnest and Zoe Doe, his parents. Mr. Doe urges the Court to adopt a clear standard to be used when deciding cases involving allegedly incorrigible juveniles and suggests that a juvenile should not be convicted as incorrigible unless, at a minimum, 1) the State is able to prove beyond a reasonable doubt that the juvenile's specific parent, guardian, or other custodian considered the juvenile to be outside of his/her/their control; or 2) the State is able to prove beyond a reasonable doubt that any and every reasonable parent, guardian, or other custodian would consider the juvenile's behavior to be outside of his/her/their control.

The State did not present substantial evidence to prove beyond a reasonable doubt either that Zoe and Earnest Doe considered John Doe to be outside of their control or that any and every reasonable parent, guardian, or other custodian would have considered his behavior to be outside of his/her/their control. This Court should therefore reverse the decision of the district and magistrate courts and enter its Judgment of Acquittal.

B. The State Did Not Address the Distinction Between a Court Trial and a Jury Trial in Consideration of the Denial of the Motion of Acquittal

Here, it should be made clear that Mr. Doe is requesting in good faith for an extension or modification of existing law. Mr. Doe has openly acknowledged the existing case law which runs counter to his argument, but yet asks this court to consider that the standard was developed without due consideration for the differences between a court trial and a jury trial. *See* Appellant's Brief at 17-19. The State has presented no argument in support of the current standard, which insulates a trial judge's denial of a Motion of Acquittal from appellate review when further evidence is presented without distinguishing between the two types of trial settings.

II. CONSTITUTIONAL ISSUES CAN BE REVIEWED ON APPEAL

Though, as asserted by the State, it is, indeed, a "longstanding rule of [the Idaho Supreme Court]... that [it] will not consider issues that are presented for the first time on appeal," there are also well-established exceptions to this general rule. *Sanchez v. Arave*, 120 Idaho 321 (1990). The constitutional issues in this case have been presented to two magistrate judges in the juvenile court (the Honorable John Varin *see* Clerk's Record p. 87, Exhibit: Brief of Appellant on Appeal from Conviction lodged March 10, 2006 (hereinafter R. p. 87, Exhibit: Brief of Appellant), Addenda A-E; and the Honorable Thomas Borreson, *see id.*, Addenda F-G), and one district judge, the Honorable Richard Bevan, who presided over the case at bar in the District Court.[3]

[3] In its Brief of Respondent, the State "submits that these two attached cases are completely unrelated factually and procedurally to Doe' s case and were not considered by the district court in rendering its decision." Brief of Respondent at 14, fn. 2. Though it should be clear that the State cannot know what the District Court considered and that a more natural assumption would be that it considered all addenda presented to it, it should also be made equally

Though the timing of the appellate filings prompted Judge Varin and Judge Borreson to stay their own proceedings to await Judge Bevan's determination of the similar issues, it is clear that the constitutional issues raised by Mr. Doe are not fleeting, but are important and must necessarily be considered so that a clear standard may be established on these issues.

A. Because the District Court Considered and Ruled upon the Constitutional Issues, they are Preserved for Appeal

In *Sanchez,* the Idaho Supreme Court explained that it would not consider a constitutional challenge that was not raised until the appeal to that court. Quoting from *Smith v. Sterling,* 1 Idaho 128, 131 (1867), it reiterated the rationale for the rule:

> It is for the protection of the inferior courts. It is manifestly unfair for a party to go into court and slumber, as it were, on [a] defense, take no exception to the ruling, present no point for the attention of the court, and seek to present [the] defense, that was never mooted before, to the judgment of the appellate court. Such a practice would destroy the purpose of an appeal and make the supreme court one for deciding questions of law in the first instance.

Alterations in original. In its analysis, the *Sanchez* court specifically points out three significant facts: 1) "The record does not contain any indication that Sanchez challenged the constitutionality of I.C. § 12-122 in the proceedings before the magistrate judge;" 2) "Sanchez's brief on appeal to the district judge did not present the issue of the constitutionality of I.C. § 12-122;" and 3) "nor did the district judge address this issue in deciding the appeal." *Id* at 321-22. Then, on appeal to the Idaho Supreme Court, Sanchez raised his constitutional challenge as his

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clear that, far from attempting to mislead the District Court by submission of these addenda in his Brief of Appellant, Mr. Doe specifically advised the District Court that the constitutional issues were being raised for the first time on the appeal to the District Court. *See* R. p. 87, Exhibit: Brief of Appellant, p. 9.

sole issue of appeal. It is clear, therefore, that the question of whether an issue was properly raised in the trial court is not the only consideration.

State v. McCutcheon, 129 Idaho 168, 169 (Ct. App. 1996) clarifies this doctrine, dealing with a case where a defendant pled guilty to a charge of driving without privileges in the magistrate court and then appealed to the district court, alleging that the magistrate court had erred in accepting his plea because it had not inquired of him whether a plea bargain existed. The district court considered the issue and decided that, though the magistrate had erred in accepting the plea, the error was harmless and therefore the district court affirmed the judgment of conviction. *Id.* On appeal to the Idaho Court of Appeals, the defendant made essentially the same argument it had made to the district court and, for the first time, the state "contend[ed] that any error that resulted from the magistrate's alleged omission was not fundamental error, and therefore, not properly a matter raised for the first time on appeal." *Id.*

In its analysis of the State's objection, the *McCutcheon* court reiterated the oft-repeated doctrines that it would "examine the record of the trial court independently of, but with due regard for, the district court's intermediate appellate decision," and that "[i]ssues not raised before the trial court cannot later be raised on appeal unless the alleged error would constitute 'fundamental error.'" *Id.* at 169. Thereafter, it directly considered the contested issue and, holding that, since there never was any sort of plea agreement with the prosecutor for the magistrate judge to inquire about, "[t]here was no reversible error by the magistrate in accepting McCutcheon's plea," it affirmed the judgment of conviction-but on different grounds than that used by the district court. *Id.* at 169-170.

Markedly, the *McCutcheon* court did not specifically indicate that fundamental error could lie in the proper questioning of a defendant about potential plea agreements with the prosecutor. Instead, it seems to have simply regarded and sided with the judgment of the district court on the issue, which, in ruling on the issue itself, impliedly found that the issue warranted consideration.[4]

So also, in the case at bar, the 5th District Court accepted briefs, heard argument, and rendered its opinion on each of the issues raised by Mr. Doe in that court. By objecting to the consideration of the constitutional issues for the first time on appeal from the ruling of the District Court, the State implies that this Court should disregard the District Court's intermediate appellate decisions on those issues. Such was not the position taken by the *McCutcheon* court and should not be taken by this Court. Instead, "due regard" should be given to each ruling made by the District Court. *See McCutcheon,* supra.

B. Constitutional Issues are Preserved for Appeal because of Fundamental Error Doctrine

State v. Knowlton, 123 Idaho 916, 918 (1993) explains the doctrine of fundamental error thusly:

> Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive. Each case will of necessity, under such a rule, stand on its own merits. Out of the facts in each case will arise the law.

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[4] In contrast, the case of *State v. Adams,* 138 Idaho 624 (Ct. App. 2003) shows the Idaho Court of Appeals taking a similar stance in support of a ruling made by the district court, but, in that case, supports the district court's decision *not* to consider an issue which was raised for the first time on appeal.

Knowlton dealt with a case where a defendant who had been convicted of statutory rape learned, after his probation was revoked, that the sentencing judge served on a task force for Children at Risk. *Id.* After ruling that Knowlton's unaddressed question about the judge's impartiality didn't amount to fundamental error, the Idaho Supreme Court explained that, as it had ruled in the similar case of *State* v. *Kenner,* 121 Idaho 594 (1992):

> This Court refused to consider the issue as fundamental error since, even assuming the defendant had requested the magistrate judge disqualify himself and the magistrate had denied that request, any error in so doing would not go to the very foundation of the case or defendant's rights, or take from the defendant a right essential to his defense.

Knowlton, 123 Idaho at 919. Thus, the Idaho Supreme Court seems to create a test wherein the outcome of an adverse ruling should be considered in light of the facts of the case to determine whether the adverse ruling, if it had been made by the trial court, would have amounted to a fundamental error, undermining the foundation of the defendant's case or the defendant's rights, or whether such a ruling would have taken from the defendant a right which was essential to his defense.

In the case at bar, the State asks this Court to uphold the conviction of a young man who was found to be incorrigible for using speech to disagree with his parents. In such a case, First Amendment considerations go directly to the foundation or basis of his rights as well as to the foundation of the case. Similarly, it is increasingly obvious that a statute which allows speech and other expressive behaviors to be sanctioned by the state is unconstitutionally vague and unconstitutionally overbroad. These issues, likewise, go to the foundation of the questions raised

in this case, for a statute more narrowly and specifically drawn could have made it clear that the State ought not to attempt to sanction Mr. Doe for simply arguing with his parents.

III. THE STATE DID NOT ADDRESS MR. DOE'S FIRST AMENDMENT CHALLENGE

Other than reviewing the arguments made by the parties in the District Court and the ruling of the District Court, the State declined to address the substantive argument that Mr. Doe's conviction of Incorrigible "by arguing with his parents" violated his First Amendment rights. Instead, the State contends that

> Doe's claim that his speech and conduct in his home is protected by the First Amendment, regardless of whether it falls into a protected subject, fails because Doe produces no legal authority in support of his argument that an argument between a child and a parent that results in a police response is protected by the First Amendment.

Brief of Respondent at 19. The State refers the Court to *State v. Zichko,* 129 Idaho 259,263 (1996), which does, indeed, indicate that "[a] party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking." By this argument, the State appears to assume that the Court is incapable of extrapolating the reasoning used in cases which addressed similar yet distinguishable issues, and can only decide an issue when clear precedent guides its decision.

It is freely acknowledged that no case has been presented for the Court's consideration which falls directly on point with the case at bar. This is because Mr. Doe is aware of no case which deals with the issue of how much of the power wielded by parents can be exercised by the State-especially without the concurrence of the parents. The real First Amendment

question here is whether, because Mr. Doe's *parents* could have chosen to sanction his speech, the *State* can also sanction it under the banner of lending support to his parents whether or not they requested such support. This a question of first impression in Idaho.

When a question of first impression arises, cases which are tangentially related are considered both from Idaho as well as from sister jurisdictions nationwide. *See, e.g. State v. Moore,* 131 Idaho 814, 820-21 (1998) (finding, as a question of first impression, that testimony that Moore refused to meet with police did not violate his right to remain silent) and *State v. Barros,* 131 Idaho 379, 381-83 (1998) (finding, as a question of first impression, that state officers could arrest Barros in Indian country for a crime committed off Indian country). After an analysis of somewhat related case law (or case law on point from another jurisdiction), the court is then able to form a reasoned judgment on the question of first impression.

Mr. Doe has provided a detailed analysis of related First Amendment case law on pages 23-31 of his Appellant's Brief. Because the State has declined to address the cases or analysis contained therein, Mr. Doe simply invites the Court to review those related cases and his analysis thereof. This Court should then find that the State's decision to sanction his speech was undertaken in violation of the rights afforded Mr. Doe by the First Amendment.

IV. TWIN FALLS CITY ORDINANCE 6-6-3 IS UNCONSTITUTIONALLY OVERBROAD

The State's overbreadth analysis deals primarily with a recitation of the applicable case law followed by an unembellished reiteration of the ruling of the District Court. Its analysis of the first prong of the overbreadth test found in *State v. Korsen,* 138 Idaho 706 (2003) rests, as did

the ruling of the District Court, upon the finding that "private disputes are not constitutionally protected" and points out that "Doe has failed to describe how his conduct with his parents expresses any kind of constitutionally protected idea." Brief of Respondent at 25. It does not seek to address the concern raised by Mr. Doe that "[b]ecause many parents, teachers, and guardians desire to control not only the actions but the speech, reading material, associations, and thoughts of their children, there is vast potential for abuse" because "a plain reading of TFCO 6-6-3 allows a child to be prosecuted anytime he or she is disobedient or considered to be outside his or her parent,' school's or guardian's control." Appellant's Brief at 33-34. This Court should find that the first prong of the *Korsen* test has been met.

In addressing the second prong of the *Korsen* overbreadth test, the State again overlooks the meat of Mr. Doe's analysis, contenting itself with unsupported argument and bald statements of questionable fact. It asserts that TFCO 6-6-3 "is a valid criminal law that reflects legitimate state interests in maintaining comprehensive controls over harmful, uncontrollable behavior that places a juvenile beyond the control of his parents such that police intervention is required." Respondent's Brief at 25. Overlooking the facts of the case at bar, the State asserts that TFCO 6-6-3 only prohibits conduct and that because it does not specifically prohibit "interfamily disputes or developing teenage thought processes... [or] expressive conduct that concerns a specific idea," it does not prohibit a significant amount of constitutionally protected conduct. *Id.* The State makes no effort to distinguish TFCO 6-6-3 from the ordinance invalidated for overbreadth in *State v. Hill,* 482 U.S. 451, 464 (1987) and therefore ignores completely the reasoning used by the U.S. Supreme Court when it said that because "the ordinance [at question

in *Hill]* is *susceptible* of regular application to protected expression... the ordinance is substantially overbroad." Emphasis added. *See* Appellant's Brief at 35 and Respondent's Brief at 25-26.

This Court should find that both prongs of the *Korsen* overbreadth test have been met and that TFCO 6-6-3 is substantially overbroad.

V. TWIN FALLS CITY ORDINANCE 6-6-3 IS UNCONSTITUTIONALLY VAGUE

TFCO 6-6-3 is unconstitutionally vague as applied both to the facts of the case at bar as well as to countless other potential juvenile defendants because it does not provide sufficient notice to juveniles regarding which behaviors may be sanctioned and because it does not provide sufficient guidance to law enforcement. Though Mr. Doe has consistently argued both of these points, both the State and the District Court have declared that Mr. Doe has only alleged a facial vaguEarnests argument. *See* Brief of Respondent at 27, R., p. 75. In fact, the reverse is true.

In his initial Briefto the District Court, Mr. Doe first outlined the two-pronged test for vaguEarnests found in *State v. Bitt,* 118 Idaho 584 (1990), and then argued that 1) Twin Falls City Ordinance 6-6-3 gives no notice to those who are subject to it as to what behavior can and will be sanctioned; and 2) Twin Falls City Ordinance 6-6-3 provides no guidelines to guide the discretion of those who must enforce it. *See* R. p. 87, Exhibit: Brief of Appellant, p. 35-38. Nowhere in his vaguEarnests analysis did Mr. Doe indicate whether he was discussing facial or as-applied vaguEarnests, but it should be noted that, as is mentioned in *State v. Poe,* 139 Idaho 885,

893 (2004), *Bitt* "did not even involve a facial challenge to a statute," and instead deals exclusively with as-applied vaguEarnests.

In its Respondent's Brief in the District Court, the State alleged that, because Mr. Doe did not cite to the specific facts of the case at bar, that his analysis was necessarily a facial one. *See* Clerk's Record., p. 87, Exhibit: Respondent's Brief Lodged April 7, 2006 (hereafter R., p. 87, Exhibit: Respondent's Brief), p. 34. This despite the fact that Mr. Doe had not proposed, discussed, nor tried to prove that the standard for facial vaguEarnests found in *Korsen* at all applied to the case at bar. The State thereafter considered both as-applied and facial vaguEarnests analysis. *Id.* p. 33-37.

Regretfully exacerbating the problem, Mr. Doe subsequently erroneously asserted that "the State has correctly pointed out that Mr. Doe has not previously asserted a specific as-applied vaguEarnests challenge." Clerk's Record p. 87, Exhibit: Reply Brief of Appellant on Appeal from Conviction, Lodged April 28, 2006 (hereafter R., p. 87, Exhibit: Reply Brief of Appellant) p. 21. Then, ineffectively attempting to remedy his perceived error, Mr. Doe proceeded to apply the *Bitt* test to both facial and as-applied vaguEarnests. *Id.* p. 21-24. Again, Mr. Doe did not attempt to discuss or prove the applicability of the *Korsen* facial vaguEarnests test.

In oral argument before the District Court, Mr. Doe argued both prongs of the *Bitt* test, but never that the *Korsen* facial vaguEarnests test applied. *See* Transcript on Appeal, filed October 26, 2006 (hereafter Tr.A), p. 16, L. 14- p. 18, L. 8.

In its Memorandum Decision, the District Court, as did the State, asserted that "John asserts only a facial challenge of the statute. Therefore, John must show that no set of

circumstances exists under which the statute would be valid." R., p. 75. The analysis of the District Court utterly overlooks Mr. Doe's arguments relating to the *Bitt* two-pronged as- applied vaguEarnests test. *Id.*

Not realizing the error until very recently, Mr. Doe, in his Appellant's Brief to this Court, again attempted to argue both facial and as-applied vaguEarnests, again utilizing only the *Bitt* two-pronged test for as-applied vaguEarnests. *See* Appellant's Brief at 38-40.

As can be clearly seen, Mr. Doe has staunchly applied the *Bitt* two-pronged as- applied vaguEarnests test in each brief and argument presented to the District Court and to this Court. Likewise, Mr. Doe has not at any time correctly addressed the issue of facial vaguEarnests and, as the State pointed out, "fail[ed] to even argue on appeal that there are no instances where the statute does not apply." Respondent's Brief at 28. The State, similarly, did not attempt to address the arguments for as-applied vaguEarnests. *Id.* at 26-29. In the interest of remaining consistent with his foregoing arguments (if not with the labels which may have been applied to them), Mr. Doe disclaims any assertion of facial vaguEarnests as defined by *Korsen* and acknowledges that there may be many instances where the plain language of TFCO 6-6-3 may be clearly applied to actual out of control conduct of juveniles.

As he has consistently asserted, however, TFCO 6-6-3 is nonetheless impermissibly vague as applied to himself as well as to many other juveniles who are subjected to it, providing no notice as to the range of behaviors which it will sanction and no guidance to law enforcement to help them decide which juveniles are incorrigible and which are simply unruly or annoying.

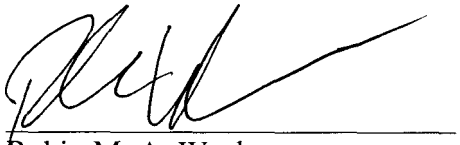
This Court should find that TFCO 6-6-3 is unconstitutionally vague in its application.

VI. CONCLUSION

This court should find that the State did not meet its burden to prove beyond a reasonable doubt that John Doe was outside the control of Earnest and Zoe Doe and/or any and every reasonable parent, guardian, or other custodian's control. This Court should further find that TFCO 6-6-3 is unconstitutionally overbroad, unconstitutionally vague as applied, and unconstitutionally applied to John Doe in violation of his First Amendment rights.

Mr. Doe respectfully requests that this Court reverse the decision of the Magistrate Court and enter its judgment of acquittal, or in the alternative, dismiss the case. Finally, Mr. Doe requests that this Court correct the language and scope of Twin Falls City Ordinance 6- 6-3, or else invalidate the "Incorrigible" portion entirely.

RESPECTFULLY SUBMITTED this 3J day of May, 2007.



Robin M. A. Weeks
Deputy Public Defender
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, the undersigned, hereby certify that I caused a true and correct copy of the foregoing BRIEF OF APPELLANT JOHN DOE to be properly delivered to the Attorney General by U.S. Mail, on this 3,, day of May, 2007.

Courtney E. Beebe
Deputy Attorney General
Criminal Law Division
Statehouse Mail Room 210
P.O. Box 83720
Boise, ID 83720-0010

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 33475**
	)	
vs.	)	
	)	
JOHN DOE,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

HONORABLE G. RICHARD BEVAN
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

STEPHEN A. BYWATER
Deputy Attorney General
Chief, Criminal Law Division

COURTNEY E. BEEBE
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

Robin M. A. Weeks
Twin Falls County Public
Defender's Office
PO Box 126
Twin Falls, ID 83303
(208) 734-1155

ATTORNEY FOR
DEFENDANT-APPELLANT

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STATEMENT OF THE CASE

Nature of the Case

Doe, a juvenile, challenges his conviction for being incorrigible, under Twin Falls City Ordinance 6-6-3.

Statement of the Facts and Course of the Proceedings

In 2005, Doe was 15 years old and lived with his sister in California.[1] (Social History Report, p.2.) During this period, and prior to, Doe refused to attend school or work. (Id.) On July 7, 2005, while he was visiting his parents at their home in Twin Falls, Idaho, his parents and sister decided that Doe could not return to California, but would stay in Twin Falls. (Id.) Doe became extremely angry and suddenly left the house, and Doe's sister called the police to search for Doe. (R., p.10; Social History Report, p.2.)

Officer Triner responded to the phone call and arrived at the street where Doe lived. (R., p.10) Officer Triner found Doe walking down the street and asked him to sit on the curb. (R., p.10.) Doe told Officer Triner that he was angry and left his parents' house to "cool off." (R., p.10; Social History Report, p.2.) Doe's parents did not want to pursue any further action (8/19/2005 Tr., p.6, Ls.15-20)

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[1] Doe has failed to support any of his factual assertions with citation to the record. (Appellant's Brief, pp.6-8.) Idaho Appellate Rule 35(b)(6) requires citation to the clerk's record, and any factual assertion that is not supported by citation to authority, in this case the record and transcripts, should be disregarded on appeal. *See* Sprinkler Irrigation Co., Inc. v. John Deere Ins. Co., Inc., 139 Idaho 691, 85 P.3d 667 (2004) (sanctioning attorney who disregarded an order to follow Idaho Appellate Rule 35(b)(6) by failing to cite to the record and transcript for the statement of facts and factual assertions made in his argument). Because Doe has failed to cite to any authority in support of his factual assertions in his statement of facts, the state submits Doe's factual assertions should be disregarded.

and Officer Triner told Doe that he needed to do what his parents told him to or he would end up in the detention center (8/19/2005 Tr., p.6, Ls.15-20; R., p.10). Officer Triner then left.

Thirty minutes later, Officer Triner and Officer Parker received a second call to respond to a possible suicidal male at the Doe residence. (R., p.10; 8/19/2005 Tr., p.6, Ls.23-25.) Officer Triner responded, and upon arrival discovered that Doe had argued with his parents regarding a cigarette lighter (8/19/2005 Tr., p.7, Ls.1-9) and had "grabbed a cord and threatened to kill himself if he had to stay" at his parent's house (R., p.10; 8/19/2005 Tr., p.7, Ls.1-9). According to Doe's sister, Doe had threatened to hang himself with a lamp cord, stating "man, if I could just kill myself." (Social History Report, p.2.) Doe admitted he had grabbed the lamp cord and that he wanted to kill himself; Officer Triner then handcuffed Doe and took him to the juvenile detention center. (R., p.10.)

The state filed a petition in the juvenile division of magistrate court (JV 05-285) on July 8, 2005, charging Doe with two counts of being "incorrigible" under Twin Falls City Ordinance 6-6-3 (hereafter "Ordinance 6-6-3"), for arguing with his parents and leaving the house without permission. (R., pp.7-9.) The ordinance is a public safety ordinance applicable to runaways and incorrigibles, and reads as follows:

> (A) Goals: The City Council of the City recognizes the importance of the family as crucial to a child's development.
>
> (B) Specifics: It shall be unlawful for any person under the age of eighteen (18), living or found in the jurisdiction, to attempt to run away or to run away from his parents, guardian or other legal

> custodian, or to remain a person who has run away from his parents, guardian, or other legal custodian, or who commits or has committed any acts which render him incorrigible or places him beyond the control of his parent's guardian, or other legal custodian.

(Appendix A (emphasis added).) An "incorrigible" is "any juvenile who is uncontrollable." (Appendix B, Twin Falls City Ordinance 6-6-1.)

On July 12, 2005, Doe appeared and denied the counts, and the court placed him on house arrest and appointed an attorney. (R., pp.12-13.) When Doe was released into his parent's custody, Doe engaged in an angry outburst, yelling that he wanted to go back to California with his sister. (8/19/2005 Tr., p.11, Ls.8-22.) On July 26, 2005, Doe appeared for a pretrial conference on both counts and the trial court set an evidentiary hearing. (R., pp.16-17.) Prior to that hearing, Doe committed petit theft. (8/19/2005 Tr., p.33, Ls.1-3.)

On August 19, 2005, the trial court held an evidentiary hearing. (R., pp.18-19.) In addition to Officer Triner's testimony, the state offered the testimony of Doe's parents. Doe's mother testified that Doe had stopped going to school and went to live with his sister. (8/19/2005 Tr., p.10, Ls.1-6.) According to Doe's mother, Doe had returned to his parents' home on July 5, 2005, and on that day agreed that he would remain with them. (Id., p.10, Ls.7-19.) On July 7, 2005, Doe's sister arrived and told Doe that she did not want Doe to live with her in California anymore, but then waffled about whether Doe would return and this made Doe angry. (Id., p.10, Ls.20-28.) Doe's mother did not want the police involved, but admitted that Doe had become angry and raised his voice. (Id., p.12, Ls.3-16.)

Doe's father testified that Doe's sister did not want Doe to live with her anymore and had sent Doe to his parents' home. (Id., p.13, Ls.15-19.) According to Doe's father, everything was fine until Doe's sister arrived and "a big mess after that started" (Id., p.13, Ls.23-25) and it was Doe's sister that was causing the problems (Id., p.14, L.11 – p.15, L.2.) Doe's father also admitted that he was not present during the argument, but was outside when Doe left to "buy some juice" and that he said Doe could go. (Id., p.15, Ls.18-2.)

Doe moved to dismiss at the close of the state's case, arguing that the state had not met its burden of proof. (Id., p.16, Ls.25-26.) The trial court denied the motion, noting the standard in juvenile cases. (Id., p.17. Ls.24-28.) Doe then testified on his own behalf, stating that he left the house to cool off and get a soda and that his dad knew where he was and he had permission. (Id., p.18, Ls.20-24; p.19, Ls.23-27.) Doe denied raising his voice at his parents (Id., p.18, Ls.25-28) and testified that in fact his parents and his sister both wanted him to stay with each of them, so he became confused and wanted to kill himself. (Id., p.19, Ls.3-10.) When asked on cross-examination if he had told a juvenile detention worker, Mr. Orozco, that he wanted to go back to California because his father beat him, Doe stated that his father had beat him when the family lived in Bosnia and he wanted to live with his sister because he believed it was safer for him. (Id., p.21, Ls.6-22.)

Finally, Mr. Orozco testified that Doe had told him that he wanted to go back to California and that he cried, raised is voice, and then yelled about having to go back to his parents' home upon release. (Id., p.26, Ls.3-29.) According to

Mr. Orozco, Doe threatened to run away and claimed that he would not follow the rules of his release. (Id., p.26, L.22 – p.27, L.27.)

After considering all the testimony, the court found Doe not guilty of the second count because he had permission to leave the house and his father was aware of his location. (Id., p.31, Ls.19-23.) However, the trial court found Doe guilty of count one because Doe had engaged in a "disruptive dispute" and that there was evidence of "a lot of emotion" and Doe placed himself "beyond the control of his parents." (Id., p.32, Ls.3-11.)

The trial court waited to sentence Doe until the disposition of his petit theft charge; Doe later entered an Alford plea to that charge in case JV - 05-426. (R., pp.23-24, 26.) As a result of both the conviction for being incorrigible and the petit theft, Doe was sentenced to 120 days in detention, but 74 days were suspended and Doe was placed on probation. (R., pp.29-34.)

Doe appealed to the district court, alleging the state did not meet its burden for proving the incorrigible charge, and for the first time claimed that Twin Falls City Code 6-6-3 is unconstitutionally vague, overbroad, and violates the First and Fourteenth Amendments. (R., pp.1-4.) Specifically, Doe alleged: 1) the magistrate erred by failing to grant Doe's motion for acquittal; 2) there was insufficient evidence to support the conviction; 3) the conviction of incorrigible "by arguing with his parents" violated Doe's first amendment right to free speech; 4) Ordinance 6-6-3 is unconstitutionally overbroad; and 5) Ordinance 6-6-3 is unconstitutionally vague. (7/5/2006 Tr., p.5, L.22 – p.6, L.7.) The state responded. (Exhibit, Respondent's Brief.)

During the pendancy of the appeal, Doe violated the terms of his probation by failing to attend school, failing to attend meetings with his probation officer, cavorting with other juvenile probationers, and running from probation officers when they attempted to contact him. (R., pp.48-49.) It is not part of the record whether Doe's probation was revoked, but he did complete his probation on May 22, 2006. (R., p.60.)

After hearing oral argument, the district court issued its memorandum decision and order on appeal. (R., pp.62-80.) The district court affirmed Doe's conviction, and concluded as follows: 1) the trial court did not err in denying Doe's motion for acquittal, and could consider all the evidence provided at trial, because the state had proved Doe had an altercation with his parents; 2) there was sufficient evidence to support the verdict; 3) the ordinance does not violate Doe's right to free speech; 4) the ordinance is not unconstitutionally overbroad; 5) the ordinance is not unconstitutionally vague, and 6) the district court does not have the authority to limit the ordinance and to do so would be superfluous. (R., pp.65-78.) Doe again appeals.

ISSUES

Doe states the issues on appeal as:

I. Did the Magistrate court err when it denied the Motion of Acquittal at the close of the State's evidence?

II. Was there sufficient evidence to support the Magistrate Court's judgment of conviction beyond a reasonable doubt?

III. Did the conviction of Incorrigible "by arguing with his parents" violate Doe's First Amendment rights?

IV. Is Twin Falls City Ordinance 6-6-3 unconstitutionally overbroad?

V. Is Twin Falls City Ordinance 6-6-3 unconstitutionally vague?

(Appellant's brief, p.9.)

The state rephrases the issues as:

1. Has Doe waived his claim that the trial court erred by denying his motion for acquittal at the close of the state's evidence because Doe put evidence on in his defense?

2. Has Doe failed to show that the state's evidence was insufficient to support the trial court's judgment of conviction?

3. Has Doe failed to preserve for appeal his challenges to the constitutionality of Ordinance 6-6-3 because he failed to raise the issues in the trial court and the magistrate did not enter any findings or conclusions as to the constitutionality of the ordinance?

4. Has Doe failed to show Ordinance 6-6-3 is violative of the constitution?

   a. Has Doe failed to show that Ordinance 6-6-3 unconstitutionally infringes on Doe's right to free speech?

   b. Has Doe failed to show that Ordinance 6-6-3 is unconstitutionally overbroad?

   c. Has Doe failed to show that Ordinance 6-6-3 is unconstitutionally vague?

ARGUMENT

I.

Doe's Challenge to the Denial of His Motion for Acquittal is Waived on Appeal Because Doe Put Evidence On In His Defense

A. Introduction

At the close of the state's evidence, Doe moved to dismiss the charges for failure to prove its cases beyond a reasonable doubt. (8/19/2005 Tr., p.16, Ls.25-26.) The trial court denied Doe's motion to dismiss concluding that the state had presented sufficient evidence, and Doe put on evidence in his defense. (8/19/2005 Tr., p.17, Ls.25-28.) On appeal to the district court, the district court concluded that Doe's claim was waived. (R., p.68.) On appeal, Doe echos his claim that the trial court erred by denying his motion to dismiss. The state submits that Doe's motion was in fact a motion for judgment of acquittal under I.C.R. 29(a), and that Doe waived any further challenge to its denial by putting evidence on in his defense. Regardless, the trial court properly concluded that the state met its burden and denied Doe's motion for acquittal. The trial court's denial of Doe's Rule 29 Motion for Judgment of Acquittal should be affirmed.

B. Standard of Review

In reviewing the denial of a motion for judgment of acquittal, the appellate court must independently consider the evidence in the record and determine whether a reasonable mind could conclude that the defendant's guilt as to such material evidence of the offense was proven beyond a reasonable doubt. State v. Mercer, 143 Idaho 108, 109, 138 P.3d 308, 309 (2006), *citing* State v. Grube,

126 Idaho 377, 386, 883 P.2d 1069, 1078 (1994). "The determination of the meaning of a statute and its application is a matter of law over which this [C]ourt exercises free review." Mercer, 143 Idaho at 109, 138 P.3d at 309, *citing* Woodburn v. Manco Prods., Inc., 137 Idaho 502, 504, 50 P.3d 997, 999 (2002).

On appeal from the decision of a district court sitting in its intermediate appellate capacity, the appellate court reviews the magistrate's ruling independently, giving due consideration to the district court's appellate consideration. State v. Hammersley, 134 Idaho 816, 818, 10 P.3d 1285, 1287 (2000), *citing* State v. Salisbury, 129 Idaho 307, 308, 924 P.2d 208, 209 (1996) and Ireland v. Ireland, 123 Idaho 955, 957-958, 855 P.2d 40, 42-43 (1993), *overruled on other grounds by* State v. Poe, 139 Idaho 885, 88 P.3d 704 (2004).

C. Doe's Claim on Appeal is Waived

Doe's claim on appeal that the trial court erred by denying his motion for acquittal at the close of the state's case is waived because he put on evidence in his own defense. In State v. Brown, the Idaho Court of Appeals concluded that Brown could not challenge as error "the district court's denial of his motion for a judgment of acquittal at the conclusion of the State's case" because "by presenting evidence in defense at trial, Brown waived any right to appellate review of the sufficiency of the evidence at the conclusion of the State's case." Brown, 131 Idaho 61, 71, 951 P.2d 1288, 1289 (Ct. App. 1998) (citations omitted). As a result, the court reviewed the sufficiency of all the evidence presented at trial to determine whether there was sufficient evidence to support the jury's verdict. *See,* State v. Watson, 99 Idaho 694, 698, 587 P.2d 835, 839

(1978); State v. Hughes, 130 Idaho 698, 946 P.2d 1338 (Ct. App. 1997); and State v. Henninger, 130 Idaho 638, 640, 945 P.2d 864, 866 (Ct. App. 1997).

Doe moved for acquittal at the close of the state's case (8/19/2005 Tr., p.16, Ls.25-26) and this motion was denied (8/19/2005 Tr., p.17, Ls.25-28). Doe then testified himself (Id., p.18, L.9 – p.24, L.5) and called Mr. Orozco (Id., p.25, L.5 – p.28, L.4). Because Doe offered evidence in his defense, he cannot now challenge the denial of his motion for acquittal, but must challenge the sufficiency of the evidence to support his conviction in its entirety. Doe has provided no authority to the contrary. Doe's claim is waived.

II.

Doe's Conviction for Being "Incorrigible" Is Supported by Sufficient Evidence

A. Introduction

Doe challenges the sufficiency of the evidence supporting his conviction. The state submits that Doe's claim fails because the state provided sufficient evidence that Doe argued with his parents and thus committed an act which rendered him incorrigible. The state proved this through the testimony of Officer Triner, Mr. Orozco, Doe, and Doe's parents. Doe's conviction should be affirmed.

B. Standard of Review

A finding of guilt will not be overturned on appeal where there is substantial evidence upon which a reasonable trier of fact could have found the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. State v. Herrera-Brito, 131 Idaho 383, 385, 957

P.2d 1099, 1101 (Ct. App. 1998); State v. Knutson, 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct. App. 1991). An appellate court will not substitute its view for that of the trier of fact as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. Knutson, 121 Idaho at 104, 822 P.2d at 1001. It will consider the evidence in the light most favorable to the prosecution. Herrera-Brito, 131 Idaho at 385, 957 P.2d at 1101. On appeal from the decision of a district court sitting in its intermediate appellate capacity, the appellate court reviews the magistrate's ruling independently, giving due consideration to the district court's appellate consideration. State v. Hammersley, 134 Idaho 816, 818, 10 P.3d 1285, 1287 (2000), *citing* State v. Salisbury, 129 Idaho 307, 308, 924 P.2d 208, 209 (1996) and Ireland v. Ireland, 123 Idaho 955, 957-958, 855 P.2d 40, 42-43 (1993), *overruled on other grounds by* State v. Poe, 139 Idaho 885, 88 P.3d 704 (2004).

C. Doe's Conviction Is Supported by Sufficient Evidence

To establish guilt, the state had to prove Doe "committed any act or acts which render[ed] him incorrigible or places him beyond the control of his parents, guardian or other legal custodian." (R., p.4.) The trial court specifically found and concluded that Doe engaged in a "disruptive dispute." (Tr., p.32, Ls.3-11.) The court based its conclusion on the testimony of both parents that there was "a lot of emotion going on . . . [and] Ahment engages in this discussion, in this disruption in a way that placed him beyond the control of his parents." (8/19/2005 Tr., p.32, Ls.5-9.)

The state offered the three witnesses who provided ample testimony that Doe argued with his parents and became uncontrollable as a result. Officer Triner testified that on his first contact with Doe, Doe had admitted he had "gotten into a verbal altercation with his parents and that he had decided to leave the residence to cool off." (8/19/2005 Tr., p.6, Ls.1-4.) Officer Triner also testified that during the second contact with Doe, Doe had stated he "had been angry with his parents and had grabbed a lamp cord and was threatening to harm himself. This was over an argument about a cigarette lighter." (Id., p.7, Ls.1-9.) Finally, Officer Triner testified that Doe's sister said that Doe had been in an altercation with his parents. (Id., p.8, 1-6.)

Doe's mother testified that "he was angry" and that the situation was "giving him stress" and "bothering him" and "affecting him" and he "left the house." (Id., p.10, Ls.27-29.) She also testified that Doe left without stating where he was going, and that it was "hard for me that he left." (Id., p.11, Ls.8-11.) Doe on cross-examination also admitted that his voice was "raised a little." (Id., Tr., p.12, Ls.3-5.) Doe's father testified that a "big mess started" after his daughter arrived, and that he was concerned about whether things would "calm down." (Id, p.13, Ls.24-28.) He also stated that the situation was embarrassing and that if Doe returned to live with his sister, that "we'll have the same problems again" (Id., p.14, Ls.4-8) and that his grandchildren may not want to visit him anymore (Id., p.15, Ls.10-15). Doe's father stated "all that mess has his brain turned around." (Id., p.15, Ls.18-22.)

Doe argues on appeal that his "speech was [not] outside the control of [his parents]. Nor did the state prove that no reasonable parent would have allowed his speech." (Appellant's brief, p.13.) This assertion misidentifies the state's burden of proof in this case and reads a subjective "reasonable parent" standard into the Ordinance. There is no authority for such a standard and Doe has not identified any on appeal. (*See*, Appellant's Brief, pp.13-17.) The state did not have to prove that Doe's parents would have allowed the "speech," but instead the state had to prove that Doe committed one act. The state met its burden of proving that Doe committed acts that rendered him incorrigible, i.e. he argued with his parents and became uncontrollable. The denial of his motion for judgment of acquittal should be affirmed.

The court also considered the testimony of Doe and Mr. Orozco. Doe's testimony provided sufficient evidence because he testified that he "got mad" (Id., p.20, Ls.1-2) and that he was upset that he could not go back to California. (Id., p.20, Ls.18-24). Doe also testified that he would feel safer with his sister and that he told Mr. Orozoco that he intended to go to California with his sister upon release. (Id., p.21, Ls.12-14; p.22, Ls.5-6.) Finally, Doe admitted he was upset when he left his parent's home to get a soda, and that he did not tell his mother or sister where he was going. (Id., p.22, Ls.22-29.)

Mr. Orozoco's testimony shows that Doe continued to remain out of control even after his arrest. Mr. Orozoco testified that when he told Doe that he had to stay with his parents, Doe cried, yelled, and threatened to go to California anyway. (Id., p.26, Ls.7-15.) The entirety of the testimony shows that Doe

argued with his parents and became uncontrollable as a result. In the light most favorable to the proseuction's case, there is ample evidence to support Doe's conviction and this conviction should be affirmed.

III.

Doe Failed to Preserve for Appeal his Challenges to the Constitutionality of Ordinance 6-6-3

Doe raised his constitutional challenges for the first time on appeal to the district court and attempted to argue two other juvenile cases the appeal.[2] The state submits that because Doe failed to raise his constitutional challenges to Ordinance 6-6-3 in Doe's specific case in the trial court by way of a motion to dismiss or a challenge to the petition, the issues are not preserved for appeal. Additionally, because the trial court did not enter any findings of fact or conclusions of law regarding the constitutionality of 6-6-3, there is no ruling for this court to review. As a result, this court should decline to consider Doe's constitutional challenges to Ordinance 6-6-3.

There is no indication in the record that Doe raised any constitutional challenge to Ordinance 6-6-3 in the trial court by filing a motion to dismiss or a challenge to the petition. Issues not raised before in the trial court generally

[2] Attached to Doe's Appellant's Brief filed in the district court are court filings in two other Twin Falls juvenile cases, In Re the Interest of Juan Romero (JV 05-311) and In the Interest of Dakota Colby (JV 05-519), where the Twin Falls Public Defender actually moved to dismiss based on constitutional claims in the trial court. (Exhibit, Appellant's Brief, pp.22-23 and Appendixes A-G.) Because of these attachments, the brief reads as if Doe had asserted the constitutional claims in the trial court; however, the underlying record reveals that he has never raised a constitutional challenge in his case. The state submits that these two attached cases are completely unrelated factually and procedurally to Doe's case and were not considered by the district court in rendering its decision.

cannot be considered for the first time on appeal. State v. Fodge, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Even constitutional issues are generally not considered on appeal unless they are properly raised below. State v. Bowman, 124 Idaho 936, 940, 866 P.2d 193, 197 (Ct. App. 1993). Constitutional challenges based on free speech have been raised by motion in other cases. *See,* State v. Hammersley, 134 Idaho 816, 10 P.3d 1285 (2000) (where the defendant moved to dismiss a charge of disturbing the peace in the trial court); State v. Suiter, 138 Idaho 13, 56 P.3d 775 (2002) (where the defendant moved to dismiss a charge of disturbing the peace in the trial court). Because constitutional challenges to the ordinances were not raised in the trial court, these issues are not preserved for appeal.

Also, the magistrate did not enter any findings of fact or conclusions of law regarding the constitutionality of Ordinance 6-6-3, so there is no adverse ruling from the trial court to review. An appellate court will not review a trial court's alleged error unless the record discloses an adverse ruling which forms the basis for the assignment of error. State v. Green, 130 Idaho 503, 506, 943 P.2d 929, 932 (1997), *citing* State v. Fisher, 123 Idaho 481, 485, 849 P.2d 946, 950 (1993); *see also* State v. Cochran, 129 Idaho 944, 949, 935 P.2d 207, 212 (Ct. App. 1997). Error is never presumed on appeal and the burden of showing it is on the party asserting it. Idaho Power Co. v. Cogeneration, Inc., 134 Idaho 738, 745, 9 P.3d 1204, 1211 (2000). Here, the trial court has never entered any findings of fact or conclusions of law regarding the constitutionality of Ordinance 6-6-3, so there is no ruling for this court to review.

Moreover, as this court has repeatedly stated it does not review the intermediate appellate decision, but reviews the trial court's ruling independently. On appeal from the decision of a district court sitting in its intermediate appellate capacity, the appellate court reviews the magistrate's ruling independently, giving due consideration to the district court's appellate consideration. State v. Hammersley, 134 Idaho 816, 818, 10 P.3d 1285, 1287 (2000), *citing* State v. Salisbury, 129 Idaho 307, 308, 924 P.2d 208, 209 (1996) and Ireland v. Ireland, 123 Idaho 955, 957-958, 855 P.2d 40, 42-43 (1993) *overruled on other grounds by* State v. Poe, 139 Idaho 885, 88 P.3d 704 (2004). Because this court does not independently review the district court's intermediate appellate opinion and Doe's claims are only raised in that intermediate appeal, Doe's claims are not preserved. Doe failed to preserve his constitutional challenges to Ordinance 6-6-3 for appeal and there is no adverse ruling by the trial court for this court to review. The state submits that Doe's claims should be disregarded.

IV.

Doe Failed to Show Ordinance 6-6-3 is Unconstitutional

A. Introduction

Should this court conclude that Doe's constitutional challenges to Ordinance 6-6-3 are preserved, the state submits that Ordinance 6-6-3 is constitutionally sound as found and concluded by the district court. Doe's claim that the Ordinance infringes on his right to free speech fails because neither matters of private concern, nor angry disagreements, both of which are at issue in this case, implicate the first amendment.

Ordinance 6-6-3 is also not overbroad because the restriction is on conduct that is not protected, i.e. juveniles running away from home, disobeying their parents and guardians, and committing acts that render the juvenile uncontrollable. Finally, Ordinance 6-6-3 provides sufficient notice to juveniles of reasonable intelligence that behavior that places them beyond the control of their parents is prohibited, the ordinance's language guided the discretion of the officers in enforcing the ordinance in Doe's case, and the ordinance was properly applied in Doe's case. Doe's constitutional claims fail and the district court's memorandum decision and order should be affirmed.

B. Standard of Review

Where the constitutionality of a statute is challenged, the appellate court reviews it de novo. State v. Korsen, 138 Idaho 706, 712, 69 P.3d 126, 132 (2003). The party challenging the constitutionality of the statute must overcome a strong presumption of constitutionality and clearly show the invalidity of the statute. Korsen, 138 Idaho at 712, 69 P.3d at 132. The appellate court is obligated to seek a construction of a statute that upholds its constitutionality. Id., State v. Schumacher, 131 Idaho 484, 485, 959 P.2d 465, 466 (Ct. App. 1998). Upon review, the language of the statute is to be given its plain, obvious, and rational meaning. State v. Burnight, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999).

On appeal from the decision of a district court sitting in its intermediate appellate capacity, the appellate court reviews the magistrate's ruling independently, giving due consideration to the district court's appellate

consideration. State v. Hammersley, 134 Idaho 816, 818, 10 P.3d 1285, 1287 (2000), *citing* State v. Salisbury, 129 Idaho 307, 308, 924 P.2d 208, 209 (1996) and Ireland v. Ireland, 123 Idaho 955, 957-958, 855 P.2d 40, 42-43 (1993) *overruled on other grounds by* State v. Poe, 139 Idaho 885, 88 P.3d 704 (2004).

C. This Court Should Decline to Consider Doe's Constitutional Issues Because They are Not Supported by Citation to Authority

On appeal to the district court, Doe did not specifically assert how Ordinance 6-6-3 violated his first amendment right to free speech, but instead alleged that in two unrelated juvenile cases the state's argument failed and baldly asserts that "all speech, regardless of topic, is protected unless if falls within certain specific clearly delineated exceptions, such as fighting words and true threats." (Appellant's Brief, pp.23-28.) The state responded that Doe's angry, private disagreement with his parents that created a disruption and required police intervention, is not protected speech under the First Amendment. (Exhibit, Brief of Respondent, pp.10-19.) The district court concluded that "private family matters discussed in the home qualify as an exception to protected speech" because the First Amendment is designed to protect public discourse and religious freedom, not angry and disruptive disagreements between parents and children. (R., pp.72-73.)

On appeal to this court, Doe reframes the issue as the district court erred by finding that "State laws and sanctions designed to prohibit and punish speech are constitutional so long as the topic of prohibited speech did not fall within a limited list of protected subjects." (Appellant's brief, p.24.) Doe's claim that his speech and conduct in his home is protected by the First Amendment, regardless

of whether it falls into a protected subject, fails because Doe produces no legal authority in support of his argument that an argument between a child and a parent that results in a police response is protected by the First Amendment. A party waives an issue on appeal if either authority or argument is lacking. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Because Doe provides no legal authority for his claim, he has waived the issue on appeal.

D. Ordinance 6-6-3 Is Not Unconstitutionally Overbroad

Doe fails to describe the actual speech or conduct that he believes was infringed upon, and because Doe does not make a challenge to Ordinance 6-6-3 as it was applied to his specific speech, but instead challenges whether the statute is on its face overbroad, review should be limited to whether Ordinance 6-6-3 is facially valid.

The First Amendment to the Constitution of the United States Protects both actual speech and symbolic or expressive conduct. Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536 (2003). In State v. Hammersley, Hammersley was charged with disturbing the peace for yelling "shut your fucking mouth, you bitch Nikki." Hammersley, 134 Idaho 816, 817, 10 P.3d 1285, 1286 (2000). Hammersley moved to dismiss, asserting a violation of the First Amendment to the United States Constitution and Article I. § 9 of the Idaho State Constitution. Id. On appeal to the Idaho Supreme Court, Hammersley asserted that the magistrate erred in ruling that 1) Hammersley's statement constituted "fighting words" and is therefore not constitutionally protected, and 2) whether the magistrate erred in ruling that I.C. § 18-6409 is not vague or overbroad as

applied. Id. The Idaho Supreme Court first concluded that the magistrate correctly determined that Hammersley's specific statement was fighting words and therefore not constitutionally protected. Id. at 818-820, 10 P.3d at 1287-1289 (emphasis added). The court reasoned that Hammersley's statement did not contain any "essential element of the expression of ideas, entitled to constitutional protection." Id. Instead, the statement was for the "sole purpose of being derogatory and abusive." Id.

The Hammersley court went on to analyze whether the disturbing the peace statute is constitutionally overbroad as applied to Hammersley and vague. The Idaho Supreme Court stated that vagueness and overbreadth are "logically related and similar, so combined the analysis in a two part test. " Id. at 820, 10 P.3d at 1289. The court then went on to decide that the statute was not overbroad as applied to Hammersley, nor void for vagueness. Id.

In State v. Suiter, the Idaho supreme court again considered the disturbing the peace statute. 138 Idaho 13, 15, 56 P.3d 775, 777 (2002). In this case, Suiter loudly said "Hey, **** off" to an officer and turned to leave. Id. Suiter was cited and tried for disturbing the peace. Id. On appeal to the Idaho Supreme Court, Suiter argued that he was convicted solely on the "grounds of the content of his statement to the detective and that his statement constituted protected speech pursuant to the First Amendment." Id. at 16, 56 P.3d at 778. The Idaho Supreme Court agreed, concluding Suiter's statement was "not subject to the 'fighting words' exception to the First Amendment" because such a common statement would be unlikely to "provoke a violent reaction." Id. The court went

on to hold that it was error for the court to allow the state to argue that the content of Suiter's protected speech could, even in part, support a conviction for disturbing the peace. Id. at 17, 56 P.3d at 779. Like the Hammersley decision, the Idaho Supreme Court considered only whether the statute was unconstitutionally overbroad as applied to Suiter. Id.

Later, in State v. Poe, 139 Idaho 885, 88 P.3d 704 (2004), the Idaho Supreme Court overruled Hammersely and distinguished Suiter. In Poe, Poe was charged with disturbing the peace based upon statements he made to a thirteen-year-old boy. Poe, 139 Idaho, 139 Idaho at 891, 88 P.3d at 710. Poe challenged I.C. § 18-6409 as unconstitutionally overbroad on its face, but did not challenge the applicability of I.C. § 18-6409 to his particular case based upon what he said to the boy. Instead, Poe made a facial challenge to the statute as unconstitutionally overbroad.

This is the challenge Doe makes in this case. Doe does not identify the particular speech or conduct he believes was infringed upon in his particular case by the application of Ordinance 6-6-3. Instead, Doe simply challenges the constitutionality of Ordinance 6-6-3 on its face. As a result, this court's analysis should be restricted to whether Ordinance 6-6-3 is unconstitutionally overbroad on its face.

Ordinance 6-6-3 does not regulate protected conduct or preclude a significant amount of that conduct, so it is not unconstitutionally overbroad on its face. The overbreadth doctrine is aimed at statutes which, though designed to prohibit legitimately regulated conduct, include within their prohibitions

constitutionally protected freedoms. State v. Leferink, 133 Idaho 780, 785, 992 P.2d 775, 780 (1999), *citing* State v. Richards, 127 Idaho 31, 896 P.2d 357 (Ct. App. 1995). When a statute may deter protected speech only to some unknown extent, a court cannot justify invalidating the statute and thereby prohibit the government from regulating conduct within its power to proscribe. Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S.Ct. 2908, 2917, 37 L.Ed.2d 830, 841 (1973). "If the overbreadth is 'substantial,' the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation." Leferink, 133 Idaho at 785, 992 P.2d at 780, *citing* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503-04, 105 S.Ct. 2794, 2801-02, 86 L.Ed.2d 394, 405-06 (1985). Overbreadth, however, is not substantial if, "despite some possibly impermissible application, the 'remainder of the statute ... covers a whole range of easily identifiable and constitutionally proscribable ... conduct....'" Leferink, 133 Idaho at 785, 992 P.2d at 780.

"The United States Supreme Court has recognized that the overbreadth doctrine should be applied sparingly." Korsen, 138 Idaho 706, 712, 69 P.3d 126, 132 (2003). In as noted in Korsen, the United States Supreme Court stated in Broadrick v. Oklahoma:

> [F]acial overbreadth adjudication is an exception to our traditional rules of practice and ... its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct-even if expressive-falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally

> unprotected conduct. *Id.* at 615, 93 S.Ct. at 2917, 37 L.Ed.2d at 842.

Korsen, 138 Idaho at 713-714, 69 P.3d at 133 – 134.

"A statute will not be invalidated for overbreadth merely because it is possible to imagine some unconstitutional applications. Korsen, 138 Idaho at 713-714, 69 P.3d at 133-134, *citing* Members of City Council v. Taxpayers of Vincent, 466 U.S. 789, 800, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772, 783 (1984). Rather, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court ..." Id. at 801-02, 104 S.Ct. at 2126, 80 L.Ed.2d at 784. According to the United State's Supreme Court then, "overbreadth must be 'substantial' before the statute will be held unconstitutional on its face. Only if the statute "intrude[s] upon a substantial amount of constitutionally protected conduct" may it be struck down for overbreadth." Korsen, 138 Idaho 706, 713-714, 69 P.3d 126, 133-134, (*citing* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362, 368 (1982)).

Recently in Poe, the Idaho Supreme Court further discussed the standard for determining whether a statute is overbroad:

> The First Amendment to the Constitution of the United States protects both actual speech and symbolic or expressive conduct. Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003). A statute that punishes only spoken words is facially overbroad if it is susceptible of application to speech that is protected by the First Amendment. Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). The overbreadth doctrine has less application, however, to conduct. Virginia v. Hicks, 539 U.S. 113, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003). In

> the latter circumstance, the statute will not be held overlybroad unless its application to protected speech is substantial, not only in an absolute sense but also relative to the scope of the law's plainly legitimate applications. Id. Nonverbal expressive activity can be banned because of the action it entails as long as such ban is unrelated to the ideas it expresses. R.A.V. v. St. Paul, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Likewise, reasonable time, place, or manner restrictions on speech may be upheld if they are justified without reference to the content of the speech, and speech may be proscribed based upon a non-content element, such as noise. Id. The Supreme Court has permitted restrictions upon the content of speech in a few limited areas, such as obscenity, defamation, fighting words, true threats, and intimidation.

Poe, 139 Idaho at 893-894, 88 P.3d at 712 – 713 (emphasis added). The party claiming overbreadth bears the burden of demonstrating from the text of the statute that substantial overbreadth exists. Virginia v. Hicks, 539 U.S. 113 (2003).

As identified by the district court, to determine if a law is overbroad, the court must first consider whether the conduct regulated by the statute is constitutionally protected, and second, whether the law precludes a significant amount of constitutionally protected conduct. (R., p.74, citing Korsen, 138 Idaho at 713, 69 P.3d at 135.) Doe has not met his burden of proving either prong because the conduct regulated is not constitutionally protected, nor is a significant amount of the protected conduct prohibited.

First, Ordinance 6-6-3 specifically limits “any act or acts” which render juveniles incorrigible, and therefore applies to expressive conduct and does not punish only spoken words. Doe has failed to show that the acts of fighting with one’s parents at home, threatening suicide, and leaving the home is constitutionally protected speech. Moreover, as described above in Part C.1,

private disputes are not constitutionally protected. Further, Doe has failed to describe how his conduct with his parents expresses any kind of constitutionally protected idea. Doe has failed to meet the first prong of the inquiry. As concluded by the district court, the second prong cannot then be met and Doe's claim fails.

Even if Doe's conduct was constitutionally protected conduct, Doe has failed to show that the ordinance precludes a significant amount of that conduct. The Ordinance is a valid criminal law that reflects legitimate state interests in maintaining comprehensive controls over harmful, uncontrollable behavior that places a juvenile beyond the control of his parents such that police intervention is required. The Ordinance does not on its face significantly prohibit interfamily disputes or developing teenage thought processes, nor does it prohibit expressive conduct that concerns a specific idea. The Ordinance only prohibits children from engaging in conduct that create such a disruption that they are uncontrollable by their parents and police are required to intervene.

Doe makes no argument and provides no authority that the Ordinance does not reflect a legitimate state interest. In fact, Doe merely lists a series of rebellious behaviors, none of which Doe engaged in, and asserts that the Ordinance on its face regulates these behaviors. What Doe fails to acknowledge however, is that the ordinance does not punish the content of speech, but instead the act that makes the juvenile uncontrollable by his parents. Doe has not shown that the ordinance applies to protected speech in either an absolute sense or relative to the ordinances plainly legitimate applications.

Ordinance 6-6-3 simply does not apply to any constitutionally protected acts and even if it did, the Ordinance does not significantly prohibit that conduct. The district court's findings and conclusions are therefore correct and should be affirmed.

E. Ordinance 6-6-3 is Not Void for Vagueness

Doe also alleges that Ordinance 6-6-3 is unconstitutionally vague, but this claim also fails because Doe has failed to meet his burden and show the ordinance is impermissibly vague in all of its applications. "The void-for-vagueness doctrine is premised upon the Due Process Clause of the Fourteenth Amendment. This doctrine requires that a statute defining criminal conduct be worded with sufficient clarity and definiteness to permit ordinary people to understand what conduct is prohibited and to prevent arbitrary and discriminatory enforcement." State v. Casano, 140 Idaho 461, 464, 95 P.3d 79, 82 (2004), *citing* Korsen, 138 Idaho at 711, 69 P.2d at 131. A law may be vague and therefore void if the acts it prohibits are not clearly defined. Korsen, 138 Idaho at 711, 69 P.2d at 131. "Due process requires that all be informed as to what the state commands or forbids and that persons of common intelligence not be forced to guess at the meaning of the criminal law. Casano, 140 Idaho at 464, 95 P.3d at 82, *citing* State v. Cobb, 132 Idaho 1957, 1959, 969 P.2d 244, 246 (1998).

A void for vagueness challenge, like an overbreadth challenge, can be a facial challenge, or an as applied challenge. Korsen, 138 Idaho 712, 69 P.3d at 132. As discussed above, and as found by the district court, Doe only made a

facial void-for-vagueness challenge to the Ordinance, and did not make an "as applied" challenge. (R., p.75.) In fact, Doe readily admits he never made any void for vagueness challenge in either the trial court, or in his initial brief on appeal to the district court. (Appellant's Brief, pp.37-38.) However, Doe attempts a void for vagueness "as applied" challenge on appeal to this court. As discussed in Part III, claims not raised below cannot be considered for the first time on appeal. Thus, this court should only address Doe's void for vagueness challenge as a facial challenge to the ordinance.

"A statute may be challenged as unconstitutionally vague on its face. For a facial vagueness challenge to be successful, the complainant must demonstrate that the law is impermissibly vague in all of its applications." Casano, 140 Idaho at 464, 95 P.3d at 82, *citing* Korsen, 138 Idaho 712, 69 P.3d at 132. *See also*, United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697, 707 (1987) (holding that the challenger must establish that no set of circumstances exists under which the Act would be valid"); State v. Newman, 108 Idaho 5, 12, 696 P.2d 856, 863 (1985), *citing* Steffel v. Thompson, 415 U.S. 452, 474, 94 S.Ct. 1209, 1223, 39 L.Ed.2d 505, 523 (1974).

In Korsen, the Idaho Supreme Court concluded that the statute for trespassing was not facially void for vagueness because all it required was that a person refuse to leave property owned by another person and there were clearly numerous instances where the statute applied. 138 Idaho at 712, 69 P.3d at 132. In Casano, the Idaho Court of Appeals determined that a hunting statute was not void for vagueness on its face because not every term of the statute

need be statutorily defined and the instances of applicability were numerous. Finally, in Poe, the Idaho Supreme Court concluded that a statute was not unconstitutionally vague because it failed to precisely quantify the level of such conduct necessary to disturb someone else's peace. 139 Idaho 885, 904, 88 P.3d 704, 723.

Like these cases, Ordinance 6-6-3 is not unconstitutionally vague because there are instances where it applies. The ordinance applies to incorrigible conduct, i.e. conduct that renders a juvenile uncontrollable. Examples of conduct that renders a juvenile uncontrollable are running away from home, breaking household items, threatening suicide, refusing to attend school at parents direction, and refusing to live with the parents are all examples of conduct that renders a juvenile uncontrollable such that police need to intervene.

Doe fails to even argue on appeal that there are no instances where the statute does not apply, and likewise provides no authority for his facial challenge to the ordinance. Doe argues that the statute does not provide notice, but this is not the correct standard for a facial challenge to the ordinance. A party waives an issue on appeal if either authority or argument is lacking. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Because Ordinance 6-6-3 can be applied, it is not void for vagueness. Further, because Doe provides no argument or authority for his claims, his claims of vagueness should be disregarded. The district court's order should be affirmed.

CONCLUSION

The state respectfully requests this Court to affirm Doe's conviction and disregard Doe's challenges to the constitutionality of Ordinance 6-6-3.

DATED this 22nd day of March 2007.

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COURTNEY E. BEEBE
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of March 2006, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

Robin M.A. Weeks
Twin Falls County Deputy Public Defender
PO Box 126
Twin Falls, ID 83303-0126

_____
COURTNEY E. BEEBE
Deputy Attorney General

CEB/pm