

1-4-2017

State v. Kerr Clerk's Record Dckt. 44740

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IN THE DISTRICT COURT OF THE 4TH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR VALLEY COUNTY (IN THE (PUBLIC UTILITIES COMMISSION)
(INDUSTRIAL COMMISSION) OF THE STATE OF IDAHO)

STATE OF IDAHO,)	
	)	SUPREME COURT NO.
Plaintiff,)	
	)	Dist. Court No. CR-2015-4470-C
-vs-)	
)	
BRIAN C. KERR,)	
)	
Defendant.)	
)	
)	
)	

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District of the
State of Idaho, in and for the County of Valley.

Honorable Jason D. Scott, District Judge
Presiding

Kenneth Jorgensen
Deputy Attorney General
PO Box 83720
Boise, ID 83720

Daniel W. Bower
12550 W Explorer Dr. Suite 100
Boise, ID 83713

ATTORNEY FOR APPELLATE

ATTORNEY FOR RESPONDENT

State of Idaho vs. Brian Calder Kerr

Misdemeanor

Date		Judge
12/4/2015	Notice Of Appearance, Plea Of Not Guilty And Demand For Jury Trial	Lamont C. Berez
	Defendant: Kerr, Brian Calder Appearance Gabriel M Haws	Lamont C. Berez
	A Plea is entered for charge: - NG (I36-1603 F/G-Trespass on Cultivated Lands in Violation of Warning Signs, or Marked Boundaries)	Lamont C. Berez
12/9/2015	New Case Filed - Misdemeanor	Lamont C. Berez
	Prosecutor assigned Valley County Prosecutor	Lamont C. Berez
	Hearing Scheduled (Arraignment 12/15/2015 09:30 AM) Trespass to retrieve wildlife	Lamont C. Berez
	Hearing result for Arraignment scheduled on 12/15/2015 09:30 AM: Hearing Vacated Trespass to retrieve wildlife	Lamont C. Berez
	Hearing Scheduled (Pretrial Conference 02/08/2016 10:00 AM)	Lamont C. Berez
	Notice Of Hearing	Lamont C. Berez
12/10/2015	State's Notice of Response To Defendant's Request for Discovery	Lamont C. Berez
2/8/2016	Hearing result for Pretrial Conference scheduled on 02/08/2016 10:00 AM: Hearing Held	Lamont C. Berez
	A Plea is entered for charge: - GT (I36-1603 F/G-Trespass on Cultivated Lands in Violation of Warning Signs, or Marked Boundaries)	Lamont C. Berez
	Defendant's Written Plea Of Guilty	Lamont C. Berez
	Order Setting Hearing	Lamont C. Berez
	Hearing Scheduled (Sentencing 03/14/2016 02:20 PM)	Lamont C. Berez
3/14/2016	Hearing result for Sentencing scheduled on 03/14/2016 02:20 PM: Disposition With Hearing	Lamont C. Berez
	Court Accepts Guilty Plea	Lamont C. Berez
	STATUS CHANGED: closed pending clerk action	Lamont C. Berez
	Sentenced To Pay Fine 665.00 charge: I36-1603 F/G-Trespass on Cultivated Lands in Violation of Warning Signs, or Marked Boundaries	Lamont C. Berez
	Other Sentencing Option Imposed:: Other Hours assigned: 0 Terms: Update Hunter Education/Safety Class and Sent Proof To Court to be completed by 9/14/2016	Lamont C. Berez
4/11/2016	Supplemental Brief	Lamont C. Berez
4/13/2016	Hearing Scheduled (Hearing Scheduled 05/17/2016 03:30 PM)	Lamont C. Berez
	Notice Of Hearing	Lamont C. Berez
5/2/2016	Motion For An Order To Appear Telephonically	Lamont C. Berez
	Affidavit Of Counsel In Support Of Plaintiff's Motion For An Order To Appear Telephonically	Lamont C. Berez
5/9/2016	Order Granting Plaintiff's Motion To Appear Telephonically	Lamont C. Berez
5/10/2016	Hearing result for Hearing Scheduled scheduled on 05/10/2016 03:30 PM: Hearing Held Telephonic #204950	Lamont C. Berez
	Case Taken Under Advisement	Lamont C. Berez
5/31/2016	Memorandum Decision	Lamont C. Berez
7/12/2016	NOTICE OF APPEAL	Lamont C. Berez

State of Idaho vs. Brian Calder Kerr

Misdemeanor

Date		Judge
8/2/2016	Order Establishing Appellate Procedure	Jason Scott
9/2/2016	Appellant's Brief	Jason Scott
9/6/2016	Change Assigned Judge	Jason Scott
9/15/2016	Respondent's Brief	Jason Scott
10/5/2016	Appellant's Reply Brief	Jason Scott
10/18/2016	Hearing Scheduled (Oral Argument on Appeal 11/21/2016 10:00 AM)	Jason Scott
	Notice Of Hearing	Jason Scott
11/3/2016	Motion To Continue Oral Argument	Jason Scott
	Affidavit In Support Of Motion To Conitnue Oral Argument	Jason Scott
11/21/2016	Hearing result for Oral Argument on Appeal scheduled on 11/21/2016 10:00 AM: Hearing Vacated	Jason Scott
	Hearing Scheduled (Oral Argument on Appeal 12/19/2016 03:00 PM)	Jason Scott
11/22/2016	Notice Of Hearing	Jason Scott
12/19/2016	Hearing result for Oral Argument on Appeal scheduled on 12/19/2016 03:00 PM: Hearing Held	Jason Scott
	Opinion On Appeal	Jason Scott
1/4/2017	NOTICE OF APPEAL	Jason Scott
	Appealed To The Supreme Court	Jason Scott

IDAHO DEPT. OF FISH AND GAME

P. O. Box 25, Boise, ID 707

46892
CR-2015-170-C

IDAHO UNIFORM CITATION

IN THE DISTRICT COURT OF THE 4th JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF Valley
STATE OF IDAHO

VS.

Kerr

Last Name

Brian

First Name

Calder

Middle Initial

COMPLAINT AND SUMMONS

Infraction Citation

OR

Misdemeanor Citation

46892

Home Address 252 West Meadow Rd, Eagle State ID 83616

Business Address _____ Ph # 861-7110

THE UNDERSIGNED OFFICER (PARTY) HEREBY CERTIFIES AND SAYS:

I certify I have reasonable grounds, and believe the above-named Defendant,

Driver SS# _____ State ID Sex M F

Height 600 Wt. 160 Hair brn Eyes haz DOB _____

Veh. Lic. # _____ State _____ Yr. of Vehicle _____ Make _____

Model _____ Color _____

Did commit the following act(s) on Oct. 15, 2015 at 11:00 o'clock A M.

Viol. #1 Trespass to retrieve wildlife (trophy bull elk) on cultivated land (artificially irrigated pasture) without permission from

Viol. #2 Landowner 36-1603(a)

APG 2/8/16
WB

Location Bilboa Ranch

Unit 24 PCN 319 Valley County, Idaho.

Date 10-30-15 Julio Bilboa Landowner Serial #/Address _____ Dept. _____

Date 11-23-15 J. Hunter 317 IDFG Serial #/Address _____ Dept. _____

Date _____ Witnessing Officer _____ Serial #/Address _____ Dept. _____

THE STATE OF IDAHO TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned to appear before the Clerk of the Magistrate's Court of the

District Court of Valley County, Cascade, Idaho,
located at Cascade on the 15 day of Dec, 2015

(OR) on or after _____, 19____ and on or before

_____, 19____ (AT) 9:30 O'clock A M

I acknowledge receipt of this summons and I promise to appear at the time indicated.
By DOUGLAS A. MILLER, CLERK Deputy

[Signature] Defendant's Signature

I hereby certify service upon the defendant personally on DEC 09 2015, 19____

Case No. _____ Inst. No. _____

Officer _____ Filed A.M. 1:28 P.M.

NOTICE: See reverse side of your copy for PENALTY and COMPLIANCE instructions.

COURT COPY VIOLATION #1

Description	KERR, BRIAN CALDER CR-2015-4470-C	
	JUDGE LAMONT C BEREZC PROSECUTOR: VALLEY COUNTY DEFENSE COUNSEL: GABRIEL M. HAWS	
	CLERK: C. WHITE BAILIFF: J. REDMON	
Date	2/8/2016	Location
		1V-COURTROOM1
Time	Speaker	Note
<u>10:59:57 AM</u>	Judge	Calls case.
<u>11:00:13 AM</u>	Judge	Believe I gave the signed plea agreement back.
<u>11:00:22 AM</u>	Defense Counsel	Yes, approach
<u>11:00:26 AM</u>	Judge	Yes.
<u>11:00:31 AM</u>	Judge	Before the court on PTC for trespass to retrieve wildlife.
<u>11:00:56 AM</u>	Defense Counsel	Pleading to 36-1603 A
<u>11:01:13 AM</u>	Defense Counsel	Please interlineate with 16
<u>11:01:20 AM</u>	Judge	Understand pleading GT to this charge. Understand the agreement?
<u>11:01:29 AM</u>	Defendant	Yes
<u>11:01:31 AM</u>	Judge	Are you prepared to plead GT today?
<u>11:01:32 AM</u>	Defendant	Yes.
<u>11:01:33 AM</u>	Judge	Are you under the influence of any alcohol or drugs?
<u>11:01:33 AM</u>	Defendant	No
<u>11:01:34 AM</u>	Judge	Threat or force to enter GT plea?
<u>11:01:35 AM</u>	Defendant	No
<u>11:01:43 AM</u>	Judge	Enough time with your attorney?
<u>11:01:43 AM</u>	Defendant	Yes
<u>11:01:45 AM</u>	Judge	Advises defendant of rights. Understand?
<u>11:02:19 AM</u>	Defendant	Yes
<u>11:02:21 AM</u>	Judge	
<u>11:02:22 AM</u>	Defendant	I plead GT. I went onto cultivated land to retrieve an elk that I shot on public land lawfully. I did not ask the owners of the land for permission to go onto property.

11:02:54 AM	Judge	
11:03:18 AM	Judge	Sentencing 3/14/2016 @ 2:20 p.m.
11:03:30 AM		Adjourned.

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www.fortherecord.com

FEB 08 2016

THE STATE OF IDAHO)
)
Plaintiff,)
)
vs.)
)
Brian C. Kerr)
)
Defendant.)

CASE NO. CR-2015-4470-C

Case No. _____ Inst. No. _____
Filed 11:20 A.M. _____ P.M.

DEFENDANT'S WRITTEN GUILTY PLEA

- Defendant Representing Self or
- Defendant Represented by Attorney

I, Brian C. Kerr, the above-named defendant, desire to plead guilty as set forth below, to the charge(s) in this case. I am 55 years of age and have had 24 years of education. I am not under the influence of any alcohol, drugs, or other mind-affecting substances at this time. I am fully aware of the present proceedings and of their legal significance. I have decided to plead guilty (check one of the following):

- after careful consideration on my own, or
- after discussion of this matter with my attorney, Gabriel M. Haws .

No one has made any promises, threats, or other inducements to get me to plead guilty in this action. If I am on probation or parole, this guilty plea may be used against me as the basis for a probation or parole violation.

I understand that the judge is not bound by any plea agreement between the state and me, and the maximum punishment allowed under state law has been explained to me. I am aware that the Court may impose conditions of probation in my sentencing. The only agreement that has been made in this case is as follows:

Defendant pleads guilty to trespass to retrieve wildlife, a violation of Idaho Code section 36-1603(a) in exchange for state capping its sentencing recommendation to one (1) year unsupervised probation, 30 days of jail with 30 suspended, \$500 fine plus court costs, ~~\$750 civil penalty and processing penalty~~, one (1) year hunting and fishing license suspension, and fish and game will confiscate the bull elk; State will dismiss charges against co-defendants Garrett B Kerr and Jeffrey J. Peterson; Defendnat is free to argue for less; Defendant requests the court vacate the pre-trial conference date and set this case for sentencing hearing.

In entering this guilty plea, I am fully aware that I am waiving any defenses I may have to these charges. Additionally, I may be required to submit an evaluation(s) for sentencing and I am waiving certain important rights such as:

- To be represented by an attorney, and have one appointed if I cannot afford one.
- To require the state to prove every element of my charges beyond a reasonable doubt.
- To enter a plea in open court before a judge.
- To appeal this conviction, although the sentence may be appealed.
- To have a jury trial or court trial.
- To not be compelled to testify against myself.
- To personally address the court prior to sentencing.
- To confront witnesses against me and subpoena my own witnesses.

THEREFORE, I hereby authorize entry of a guilty plea on my behalf and authorize my attorney (if applicable) to enter a guilty plea in the above-captioned action, pursuant to M.C.R. 6(d) and *State v. Poynter*, 34 Idaho 504, 205 P. 561, 208 P. 871 (1921). This plea is given knowingly, intelligently, and voluntarily.

DATED this 5th day of February, 2015.

[Signature]
Defendant

[Signature]
Defendant's Counsel (if applicable)

Address: 252 W. Meadow Ridge Lane, Eagle, Idaho 83616
Phone: (208)861-7110

[Signature]
Prosecutor/Deputy Prosecutor
LUB

Magistrate Judge

Description	KERR, BRIAN CALDER CR-2015-4470-C JUDGE: LAMONT C. BERECZ PROSECUTOR: VALLEY COUNTY DEFENSE COUNSEL: GABRIEL M HAWS CLERK: J. HON BAILIFF: C. WHITE		
Date	3/14/2016	Location	1V-COURTROOM1
Time	Speaker	Note	
<u>02:37:20 PM</u>	Judge	Calls case	
<u>02:37:25 PM</u>	State	Recess for 5 minutes to speak to Fish and Game?	
<u>02:37:36 PM</u>		Recess	
<u>02:41:47 PM</u>	Judge	Recalls case	
<u>02:41:57 PM</u>	Judge	Present with counsel; having plead GT; Plea agreement for the record, free to argue for less	
<u>02:42:42 PM</u>	Judge	I will hear from the state	
<u>02:42:51 PM</u>	State	Review of case for the record. That property did not allow people to hunt, actually shot the Elk on Public Property and died on Private property. May I show exhibits?	
<u>02:44:13 PM</u>	Defendant	I object; charge with trespass not unlawful taking	
<u>02:44:34 PM</u>	Judge	I will over rule; something that I can consider	
<u>02:44:52 PM</u>	State	Photo of heart, lungs, and trees on property. Further statement for the record. I have a F & G Officer Rowley here in the courtroom for a statement. No prior record, further agreement and history of the case for the record. Also shows the antlers (trophy Elk)	
<u>02:47:10 PM</u>	Judge	So let me understand.... suggesting that he did not shoot the elk on private property?	
<u>02:47:42 PM</u>	State	Further comments for the court. F & G wants 1 year license suspension and keep the elk. Wanting to call Officer Rowley	
<u>02:48:56 PM</u>	Officer Rowley	<SWORN>	
<u>02:49:09 PM</u>	Officer Rowley	States name for the record; work experience; 2nd officer on this; showed up right before Mr Kerr was leaving; Fellow officer explained to me what had happened; animal had ran and where they were processing it. Look for evidence; blood, track; I have found none; no tracks that the animal had been running; Mr. Kerr had access from the high water mark; went west and walked a good distance; moist and mudding, no boot prints; small creek	

		coming at an angle; followed that; no prints along the creek; returned to elk; cut out vital organs; took photos at that point found no blood track; getting dark. returned the next morning, looked for any sign for where the elk had ran; blood spot was 1/4 mile from property. The entire property was fenced; flood irrigated with cows
<u>02:54:03 PM</u>	Judge	Mr Haws?
<u>02:54:09 PM</u>	Defense Counsel	
<u>02:54:19 PM</u>	Officer Rowley	Review of Photo of the Elk's heart, I don't have that particular information; yes, After Officer Hunter arrived, yes, yes, I did not fine the bullet; Officer Hunter said it was a pass thru; no; there was nothing to stop it; we did not, we did not, He was not charged with that, I am not aware; I was the secondary officer on this case, when I arrived, they were at that spot; distance for the first point, no, yes we did, no, no,
<u>02:57:29 PM</u>	Judge	Redirect?
<u>02:57:34 PM</u>	State	No
<u>02:57:44 PM</u>	Judge	Further recommendations?
<u>02:57:53 PM</u>	State	No
<u>02:58:02 PM</u>	Judge	Mr Haws?
<u>02:58:09 PM</u>	Defense Counsel	Presents exhibit to the court and explains the location of the animal. The property is not marked; there is a fence; flood irrigation, there is approximately 1 mile that is public land. Further statements for the court on the Defendant. Evidence shows that this animal was lawfully taken. Prove a negative. Appropriate sentence and puts on the record. Further Review of the case for the record. Irrigated and cultivated
<u>03:04:04 PM</u>	Judge	So he thought he could?
<u>03:04:14 PM</u>	Defense Counsel	Continued statements about the retrieving the meat and harvesting it. Could have been mistaken about the law. 30 Hours of Community Service; no license restriction and explains for the 36-202 code for the record. No unlawful taking in this case. 36-1404 B reviewed for the court and read into the record. Evidence to show it was not unlawful taking. Asking for an Order that the animal be released to Mr. Kerr. 36-1402 E reviews for the record and reads into the record. Corrected Sub-section D.
<u>03:09:05 PM</u>	Judge	You might be looking at an old... look at your pocket supplement.
<u>03:09:25 PM</u>	Defense Counsel	Continued statements for the court on the code.
<u>03:10:07 PM</u>	Judge	Clarification of license suspension
<u>03:11:00 PM</u>	Defense	Continued Statements

	Counsel	
<u>03:11:09 PM</u>	State	Final comment
<u>03:11:16 PM</u>	Judge	If it is brief
<u>03:11:26 PM</u>	State	Further comments for the court; the landowner is still not allowing the taking of the animal.
<u>03:12:22 PM</u>	Judge	Response?
<u>03:12:28 PM</u>	Defense Counsel	Continued comments.
<u>03:13:15 PM</u>	Judge	Mr. Kerr, anything you want to say before sentence?
<u>03:13:34 PM</u>	Defendant	Statement for the court. Hunting history for the court. Tracking experience and further information for the court. Did take him on public land. Officers were out to get us from the beginning. I have learned from the process. Doing our best to harvest and appreciate your consideration.
<u>03:17:28 PM</u>	Judge	Thank you.
<u>03:17:55 PM</u>	Judge	Certainly an interesting case; I don't know that.... I am not going to agree that the only evidence was taking lawfully. I have not hear the case. The state has presented the evidence that you took the elk on private property. Continued comments to the Defendant, very different offense. Bottom line I cannot say that you did or you didn't. For purpose of sentencing I have to sentence you on what you plead guilty to. In terms of forfeiting the elk; you ought to loss that; taking lawfully is not defined in the statue, shooting and retrieving it; went onto private land to take it and you trespassed; even if I accept it was taken on public land. I find that it is appropriate; forfeiter the meat and antlers to fish and game; give free to others.
<u>03:23:39 PM</u>	Defense Counsel	Short motion to reconsider?
<u>03:23:55 PM</u>	Judge	Yes
<u>03:23:59 PM</u>	Defense Counsel	Taking and explanation for the court. Retrieve is not included. Asking to reconsider; excluded from the code
<u>03:24:45 PM</u>	State	May I say something?
<u>03:24:49 PM</u>	Judge	yes
<u>03:24:52 PM</u>	State	It's the issue of possession
<u>03:25:01 PM</u>	Defense Counsel	Unlawful possession; was not charged with that?
<u>03:25:28 PM</u>	State	Clarification for the court of the code
<u>03:25:46 PM</u>	Judge	Take and the meaning from the code; unlawful taking clarification.
<u>03:26:13 PM</u>		Reconsideration; unlawfully in possession of Mr Kerr; so while....

	Judge	36-202 Taking unlawfully. I am concerned that is going to look like I am going to split the baby; and further clarification for the record.
<u>03:27:44 PM</u>	Judge	I am not going to suspend you license
<u>03:28:11 PM</u>	Judge	there is an argument on both sides. I am going to impose \$500.00 fine, cc \$165. for total of \$
<u>03:29:22 PM</u>	Judge	I am going to require you to complete an updated hunting class and send to court within 6 months in lieu of license suspension. Understand?
<u>03:30:17 PM</u>	Defendant	yes
<u>03:30:20 PM</u>	Judge	Time to pay?
<u>03:30:29 PM</u>	Defendant	No
<u>03:30:32 PM</u>	Judge	I will sign the order for Forfeiture
<u>03:30:48 PM</u>	Defense Counsel	I am wanting to back to the Forfeiture; maybe legal briefing, I would like 6 weeks to file that motion before you sign that Order.
<u>03:31:50 PM</u>	Judge	I could give you 45; let's say 30 days to do that.
<u>03:32:15 PM</u>	Judge	Officer Rowley, imperative that something was wrong.
<u>03:32:31 PM</u>	Judge	On Motion to reconsider, I will give the 30 days
<u>03:32:45 PM</u>		Adjourned

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT VALLEY COUNTY

DOUGLAS A. MILLER, CLERK
By _____ Deputy

MAR 14 2016

JUDGMENT PROBATION ORDER WITHHELD JUDGMENT

STATE OF IDAHO vs.
BRIAN CALDER KERR

Case No. _____ Inst. No. _____
Filed _____ A.M. 5:00 P.M.

SS# ###-##-_____

DEFENDANT having been charged with:
Count 1: Trespass to retrieve wildlife 136-1603 - APG
Count 2: _____
Count 3: _____

DEFENDANT having been advised of all rights & penalties per ICR 5, 11, IMCR 5(f) CASE # CR-2015-0004470-C

DEFENDANT WAS Present Not Present

Was represented by: _____
 Defendant Waived: Right Against Self-Incrimination Jury Trial
Right To: Confront & Cross Examination Counsel All Defenses

COURT ENTERS JUDGMENT AFTER: Voluntary Guilty Plea Trial: Found Guilty

WITHHELD JUDGMENT - Expires: _____

ORDERED: DEFENDANT'S DRIVING PRIVILEGES SUSPENDED _____ days beginning _____; and/or

INTERLOCK Dates: _____ With Restricted License Absolute Suspension

DEFENDANT IS ORDERED TO PAY TO THE CLERK: Time to pay Today Pay within _____ months \$ _____ /month begin on _____

Count 1: Fine/Penalty \$ ~~700~~ 500 w/\$ ~~700~~ Suspended + CT.COSTS \$ 165 = \$ Total 665

Count 2: Fine/Penalty \$ _____ w/\$ _____ Suspended + CT.COSTS \$ _____ = \$ Total _____

Count 3: Fine/Penalty \$ _____ w/\$ _____ Suspended + CT.COSTS \$ _____ = \$ Total _____

Community Service Ins. \$ _____ Public Defender \$ _____ Probation Fees \$ _____ Restitution \$ _____ Prosecution Costs \$ _____ * Total \$ _____

All cash bonds will be applied to the fines/court costs/restitution owed and any balance remaining will be returned.

****PAY TO: Valley County, PO Box 1350, Cascade, ID 83611 - PH. 208-382-7178 - Fax 208-382-7184 (include Case No.)****

DEFENDANT IS ORDERED TO BE INCARCERATED FOR:

Count 1: _____ days W/ _____ Suspended - Credit _____ = Total _____

Count 2: _____ days W/ _____ Suspended - Credit _____ = Total _____

Count 3: _____ days W/ _____ Suspended - Credit _____ = Total _____

_____ Days to be served at the discretion of the Probation Officer. _____ hours community service in lieu of jail

PROBATION ORDERED/CONDITIONS: Probation Expires: _____ (_____ Supervised) (_____ Unsupervised)

- Enroll / complete treatment program(s) marked on Judgment Supplement.
- Report to Probation Officer at 550 Deinhard Lane, McCall, ID - 634-4131, within 5 days, sign and comply with standard probation agreement. Probation Officer: _____
- No alcohol or controlled substance in bodily system on reporting to jail or during service of jail.
- Refuse no evidentiary test for drugs or alcohol with or without probable cause or reasonable suspicion.
- Commit no crime Pay all Fines, Costs, Restitution, and Reimbursements. Notify Court of any address change.
- Defendant accepted terms and conditions of probation and received copy of this form and Judgment Supplement (if applicable).
- File proof of completion of _____ hours of Community Service for Non-Profit or Government agency by _____.
- File substance abuse / alcohol evaluation with Court by _____ and file proof of completion of _____

Other Complete an updated hunter education/safety class send proof to court within 6 months

DEFENDANT: _____ Date: 3-14-2016

Date of Judgment/Order: 3/14/16 Judge [Signature]

cc: Defendant P.A. P.D./D.A. P.O. V.C. Sheriff V.C. Jail

DOUGLAS A. MILLER, CLERK
By John Deputy

MAY 02 2016

Case No. _____ Inst. No. _____
Filed _____ A.M. 2:17 P.M.

Gabriel M. Haws, ISB # 6999
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Fax No.: (208) 345-4461
ghaws@stm-law.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

STATE OF IDAHO,

Plaintiff,

vs.

BRIAN C. KERR,

Defendant.


Case No. CR-2015-0004470-C

**MOTION FOR AN ORDER TO APPEAR
TELEPHONICALLY**

COMES NOW, above-named Defendant, by and through counsel of record, Stewart Taylor & Morris PLLC, pursuant to Rule 7(b)(4) of the Idaho Rules of Civil Procedure and moves this Court for an order permitting counsel for the Defendant to appear telephonically for hearing scheduled for Tuesday, May 10, 2016, at 3:30 p.m. An Affidavit of Counsel setting forth the basis for this Motion is filed contemporaneously herewith.

DATED this 2nd day of May, 2016.

STEWART TAYLOR & MORRIS PLLC



Gabriel M. Haws
Attorneys for Defendant

DOUGLAS A. MILLER, CLERK
By Redman Deputy

MAY 09 2016

Case No. _____ Inst. No. _____
Filed _____ A.M. 3:36 P.M.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

STATE OF IDAHO,

Plaintiff,

vs.

BRIAN C. KERR,

Defendant.


Case No. CR-2015-0004470-C

**ORDER GRANTING PLAINTIFF'S
MOTION TO APPEAR
TELEPHONICALLY**

This matter having come before the Court upon Defendant's Motion for an Order to Appear Telephonically ("Defendant's Motion"), and the Court having reviewed Defendant's Motion and accompanying Affidavit of Counsel in support of the same, and good cause appearing therefor;

IT IS HEREBY ORDERED that Defendant's Motion is GRANTED and that on Tuesday, May 10, 2016, at 3:30 p.m. Defendant's counsel shall call the Court at the following phone number 208-229-8030 Code # 204950, for the hearing scheduled herein.

DATED this 9th day of May, 2016.



Lamont C. Berecz
Magistrate Judge

ORDER GRANTING PLAINTIFF'S MOTION TO APPEAR TELEPHONICALLY - 1

ORIGINAL 0015

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Valley County Prosecutor's Office
219 N. Main St.
P.O. Box 1350
Cascade, ID 83611

- U.S. Mail
- Hand Delivered
- Facsimile: (208) 382-7124
- Email:

Gabriel M. Haws
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 100
Boise, Idaho 83713

- U.S. Mail
- Hand Delivered
- Facsimile: (208) 345-4461
- Email:

J Redman
By: Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEJO

By Douglas A. Miller, CLERK
Deputy

MAY 31 2016

STATE OF IDAHO,
Plaintiff,

vs.

BRIAN CALDER KERR,
Defendant.

Case No. _____ Inst. No. _____
Filed _____ A.M. 5:12 P.M.

CASE NO. CR-2015-4470-C

MEMORANDUM DECISION

PROCEDURAL HISTORY

Brian Kerr was cited on October 15, 2015, by Fish and Game Officers for the charge of “Trespass to retrieve wildlife (trophy bull elk) on cultivated land (artificially irrigated pasture) without permission from the landowner” a violation of Idaho Code § 36-1603(a). On February 8, 2016, Kerr pled guilty to the offense as charged.

This trespassing offense is a misdemeanor under the Fish and Game statutes. As such, it carries with it a possible fine of between \$25 to \$1,000 and a jail sentence of up to 6 months. *See* I.C. § 36-1402(b). Additionally, Kerr faced a possible suspension of his hunting (or fishing or trapping) privileges for up to 3 years.

At sentencing, on March 14, 2016, per the parties’ settlement agreement, the State argued that the bull elk which Kerr shot should be confiscated to Fish and Game pursuant to I.C. § 36-1304(b). Kerr argued that he ought to be able to keep the elk despite his trespass and that I.C. § 36-1304(b) was inapplicable to his case.

The Court ultimately imposed a fine, a requirement for a hunter safety class, and ordered the elk to be forfeited to the Department of Fish of Game. Kerr asked for reconsideration of the Kerr – Memorandum Decision, Page - 1

forfeiture (technically a confiscation) and permission to brief the issue. The Court granted Kerr time to brief the issue. The State did not respond to Kerr's briefing. On May 10, 2016, the Court considered again the issue of the elk's confiscation and took the matter under advisement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

There is no question that Kerr trespassed onto another person's property, which was cultivated land, in order to retrieve a bull elk that had been shot. Those facts are not in dispute because that is what Kerr was charged with and to which he pled guilty.

At sentencing, the State presented the testimony of a Fish and Game officer, as well as photographic exhibits, which tended to prove that Kerr shot the elk on the same private property that he trespassed upon. Kerr did not testify at the sentencing hearing but his counsel argued Kerr's account – that account being that Kerr shot the elk while on public land and that the elk then ran onto the private property where it expired before Kerr retrieved it. Counsel for Kerr argued that a witness' account of hearing the gunshot would substantiate Kerr's account.

This factual dispute was not resolved by the Court as it was not necessary to Kerr's plea of guilty to the charge. Nevertheless, Kerr wants the Court to accept that he lawfully shot the elk before trespassing. Kerr argues that because the State did not charge him with illegally taking the elk under I.C. § 36-1404 and did not request a processing fee under I.C. § 36-1404 that the State tacitly agrees that he took the elk lawfully. That is, Kerr urges this Court to make a finding that Kerr "lawfully took" the elk based on the prosecutor's charging decisions. At the hearing on reconsideration, the prosecutor argued that he had the evidence to charge Kerr with illegally taking the elk but exercised his discretion to prosecute the trespass in order to resolve the case.

Divining the underlying facts of a case from a prosecutor's exercise of their discretion is an undertaking fraught with speculation. To the extent Kerr asks this Court to accept his version

that he shot the elk lawfully, this Court declines to make that factual finding. Likewise, to the extent the State asks this Court to look at the evidence presented at sentencing and make a factual finding that he shot the elk while in the act of trespassing, this Court declines to make that factual finding.

What the Court finds factually is that Kerr shot a bull elk which died on someone's private property. Kerr trespassed onto that property to retrieve the elk. The issue thus becomes: does I.C. § 36-1304(b) apply to these facts? I.C. § 36-1304(b) reads:

(b) Unlawfully Taken Wildlife--Seizure, Confiscation, Disposition.

(i) The director or any other officer empowered to enforce the fish and game laws may at any time seize and take into his custody any wildlife or any portion thereof which may have been taken unlawfully, or which may be unlawfully in the possession of any person. If it appears from the evidence before the magistrate hearing the case that said wildlife was unlawfully taken, the magistrate shall:

1. Order the same confiscated or sold by the director and the proceeds deposited in the fish and game account; or
2. In his discretion, order such confiscated wildlife given to a designated tax-supported, nonprofit or charitable institution or indigent person.

According to the statute, if the elk was unlawfully taken by Kerr then it is subject to confiscation.

Statutory construction dictates that the Court look to the terms "unlawfully" and "taken."

As stated by our Idaho Supreme Court:

The word "unlawful" has been defined as "[t]hat which is contrary to, prohibited, or unauthorized by law. That which is not lawful. The acting contrary to, or in defiance of the law; disobeying or disregarding the law. Term is equivalent to without excuse or justification." *Black's Law Dictionary 1536 (6th ed.1990).*

State v. Leferink, 133 Idaho 780, 783 (1999). Under this definition, Kerr's actions in trespassing were unlawful. That is, his act of trespassing to retrieve the elk was in defiance of the law or, in slightly gentler terms, contrary to or prohibited by the law.

The next question is whether Kerr's action of trespassing to retrieve the elk fits the definition that he had "taken" the elk. "Take" is defined in I.C. § 36-202(i): "'Take' means hunt, pursue, catch, capture, shoot, fish, seine, trap, kill, or possess or any attempt to so do."

Given the expansive definition of take,¹ there are a variety of ways in which Kerr may have taken the elk. But specific to the issue at hand, the Court finds that Kerr's action in trespassing was for the sole purpose of possessing an elk that he had shot. Or put another way, Kerr trespassed (went onto someone else's property *unlawfully*) in order to possess (*take*) an elk. Therefore, the elk was "unlawfully taken" by Kerr while he was actively trespassing.

Kerr argues that his taking or possession of the elk was lawful and that he was entitled to possess the elk.² Kerr's argument is to parse his actions into a separate taking that was accomplished prior to his trespass. The Court is not persuaded that Kerr's "taking" of the elk was a separate, earlier completed act, unrelated to the taking that occurred while trespassing. It was in the very act of trespassing that Kerr was able to accomplish the taking – that is, except for his trespass Kerr never possessed the elk. Under the broad definition of "take" it is also true that Kerr did a taking when he shot or killed the elk. The fact that he took the elk by shooting it (perhaps prior to trespassing if his account is to be believed) does nothing to diminish or wash away the taint of the taking Kerr engaged in when he trespassed to possess the elk.

¹ The term "hunt" is further and more expansively defined in 36-202(j):

"Hunting" means chasing, driving, flushing, attracting, pursuing, worrying, following after or on the trail of, shooting at, stalking, or lying in wait for, any wildlife whether or not such wildlife is then or subsequently captured, killed, taken, or wounded. Such term does not include stalking, attracting, searching for, or lying in wait for, any wildlife by an unarmed person solely for the purpose of watching wildlife or taking pictures thereof.

² Kerr makes an interesting analogy to a person possessing a ball that is kicked onto a neighbor's property. To borrow that analogy, the Court sees this case more like a parent allowing a child to have a ball so long as he follows the rules. When the child throws the ball into a neighbor's flower garden and walks through the flowers to retrieve the ball, the parent is well within their rights to confiscate the ball from the child for disobedience.

Kerr also argues that there are separate crimes related to “illegal taking” and “illegal possessing” with which he was not charged or convicted. Kerr points out that there are statutorily more stringent penalties associated with these crimes that are not in the trespassing section. Kerr then reasons that I.C. § 36-1304(b) was only intended to apply to convictions of specific crimes of “illegal taking” or “illegal possession.” Kerr also argues that because the Legislature did not detail the application of the confiscation statute to the trespassing statute that the Legislature did not intend for it to apply.

Contrary to Kerr’s narrow reading, I.C. § 36-1304(b) is not tied to or limited to convictions of particular offenses. By its plain language, I.C. § 36-1304(b) is a statute of broad applicability across the spectrum of Fish and Game cases. It is a statute unrelated to penalties – rather, it provides the authority for the Department of Fish and Game to dispose of wildlife. Presumably, the rationale is that those who violate the law while hunting, fishing, trapping, etc. ought not to profit from or get to keep the fruits of their illegal activity.

Kerr’s other argument that the Legislature did not specifically detail the application of I.C. § 36-1304(b) helps make the point. The Legislature did not detail the application of I.C. § 36-1304(b) to *any* particular section of the code. That is, of course, because it is generally applicable whenever unlawfully taken wildlife is involved.

CONCLUSION

In summary, Kerr could not possess this elk without committing the illegal act of trespassing. Accordingly, under I.C. § 36-1304(b) the elk shall remain confiscated by the

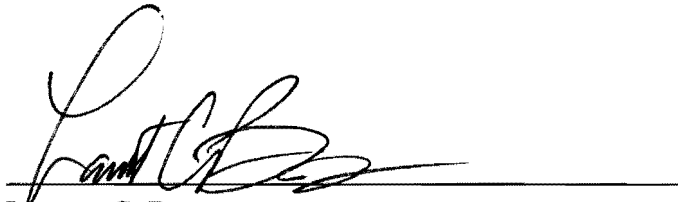
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Department of Fish and Game, and Kerr's request to reconsider is denied.

DATED this 31st day of May, 2016.

A handwritten signature in black ink, appearing to read "Lamont C. Berez", is written over a horizontal line.

Lamont C. Berez
Magistrate Judge

CERTIFICATE OF MAILING

I hereby certify that on this 31st day of May, 2016, I mailed (served) a true and correct copy of the within instrument to:

Brian Calder Kerr
252 West Meadow Ridge
Eagle, ID 83616

U.S. Mail Hand-Delivered To Defense Counsel Faxed

Valley County Prosecutor
PO Box 1350
Cascade, ID 83611

U.S. Mail Hand-Delivered Interdepartmental Box Faxed

Gabriel M Haws
Stewart Taylor & Morris PLLC
12550 W Explorer Drive, Suite 100
Boise, ID, 83713

U.S. Mail Hand-Delivered Interdepartmental Box Faxed

DOUGLAS A. MILLER
Clerk of the District Court

By: Janelle Johnson
Deputy Court Clerk

JUL 12 2016

Case No. _____ Inst. No. _____

Filed _____ A.M. _____ P.M.

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Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

STATE OF IDAHO,

Plaintiff,

vs.

BRIAN C. KERR,

Defendant.

Case No. CR-2015-0004470-C

NOTICE OF APPEAL

TO: THE STATE OF IDAHO, THE VALLEY COUNTY PROSECUTING ATTORNEY,
AND THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that pursuant to Idaho Criminal Rule 54, the defendant,
Brian C. Kerr, hereby appeals to the District Court of the Fourth Judicial District of the State of
Idaho, in and for the County of Valley from the Memorandum Decision, entered in the above-
entitled action on May 31, 2016, Honorable Lamont C. Berecz presiding.

(a) This appeal is taken upon matters of law.

NOTICE OF APPEAL - 1

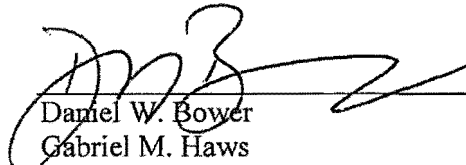
(b) Testimony and proceedings at the sentencing hearing were recorded. The person responsible and/or in possession of the recording or reporting of that sentencing hearing is the Magistrate Court Clerk.

(c) The issues on appeal are as follows:

- 1) Did the Magistrate Court misapply Idaho Code § 36-1304(b) and § 36-202(i) where there was a finding that the Defendant harvested and took game illegally prior to the trespass and no finding that the taking was unlawful prior to the trespass?
- 2) Are Idaho Code § 36-1304(b) and § 36-1304(b) unconstitutionally vague and unenforceable as to the Defendant?

DATED this 12th day of July, 2016.

STEWART TAYLOR & MORRIS PLLC



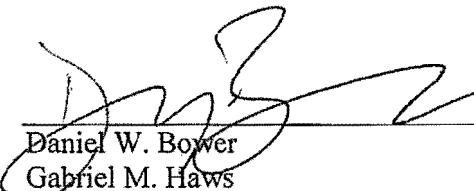
Daniel W. Bower
Gabriel M. Haws
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Valley County Prosecutor's Office
219 N. Main St.
P.O. Box 1350
Cascade, ID 83611

U.S. Mail
 Hand Delivered
 Facsimile: (208) 382-7124
 Email:



Daniel W. Bower
Gabriel M. Haws
Attorneys for Defendant

AUG 02 2016

Case No. _____ Inst. No. _____
Filed _____ A.M. 131 P.M.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

THE STATE OF IDAHO,

Plaintiff,

vs.

BRIAN CALDER KERR,

Defendant.

Case No. CR-2015-0004470-C

**ORDER ESTABLISHING
APPELLATE PROCEDURE**

Having reviewed the Notice of Appeal filed by Defendant-Appellant Brian Kerr on July 12, 2016, the Court determines under I.C.R. 54.6(c) that this appeal involves only a question of law, so no transcript is needed and the appeal will be decided on the clerk's record, the parties' briefs, and oral argument. The question to be decided is whether, under I.C. § 36-1304(b), an elk was "taken unlawfully" by the defendant or was "unlawfully in the [defendant's] possession" where the defendant lawfully shot the elk while it was on private land, but before dying the elk moved onto private land, upon which the defendant unlawfully trespassed to retrieve it.¹

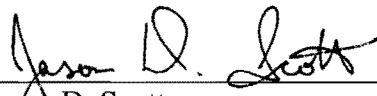
¹ Kerr's notice of appeal also asks the Court to decide whether section 36-1304(b) is unconstitutionally vague as applied to him. The Court is not aware of that issue having been presented to Magistrate Judge Berecz. As such, it has not been preserved for appellate review. Consequently, the Court does not intend to solicit briefing on it. That said, if Kerr contends he raised the issue before Judge Berecz, or that the issue for some reason may be raised for the first time on appeal, he may seek reconsideration of this order.

Kerr's opening brief on appeal is due on September 2, 2016. Plaintiff-Respondent State of Idaho's response brief then comes due within the timeframe for which I.A.R. 34(c) provides. Kerr's reply brief, if any, likewise comes due within the timeframe for which that rule provides. The Court will set the matter for oral argument promptly after the briefing is complete.

If either party contends some other appellate procedure would be more appropriate, that party may file a motion to modify this order.

IT IS SO ORDERED.

Dated this 2nd day of August 2016.



Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of August 2016, I mailed (served) a true and correct copy of the within instrument to:

Valley County Prosecuting Attorney

Daniel W. Bower
Gabriel M. Haws
STEWART TAYLOR & MORRIS PLLC
12550 W Explorer Dr, Ste 100
Boise, ID 83713

DOUGLAS MILLER
Clerk of the District Court

By: 
Deputy Court Clerk

DOUGLAS A. MILLER, CLERK
By [Signature] Deputy

NOV 03 2016

Case No. _____ Inst. No. _____
Filed _____ A.M. 5:00 P.M.

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ghaws@stm-law.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

STATE OF IDAHO,

Plaintiff,

vs.

BRIAN C. KERR,

Defendant.

Case No. CR-2015-0004470-C

MOTION TO CONTINUE ORAL
ARGUMENT

COMES NOW, above-named Defendant, by and through counsel of record, Stewart Taylor & Morris PLLC, and moves this Court for an order continuing Oral Argument currently scheduled on November 21, 2016, at 10:00 a.m. An Affidavit of Counsel setting forth the basis for this Motion is filed contemporaneously herewith.

DATED this 3rd day of November, 2016.

STEWART TAYLOR & MORRIS PLLC

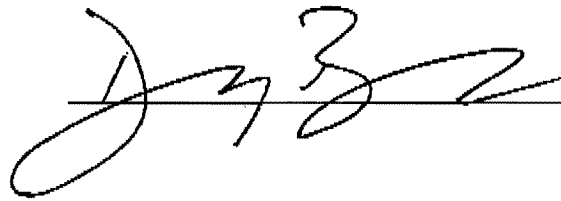
[Signature]
Daniel W. Bower
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Valley County Prosecutor's Office
219 N. Main St.
P.O. Box 1350
Cascade, ID 83611

- U.S. Mail
- Hand Delivered
- Facsimile: (208) 382-7124
- Email:

 _____

Description	KERR, BRIAN CALDER CR-2015-4470-C	
	JUDGE: JASON D SCOTT PROSECUTOR: VALLEY COUNTY DEFENSE COUNSEL: GABRIEL HAWS	
	CLERK: C. WHITE BAILIFF: G. PRICE COURT REPORTER: D. CROMWELL	
Date	12/19/2016	Location
		1V-CRT1
Time	Speaker	Note
<u>02:51:54 PM</u>	Judge	Calls Case
<u>02:52:19 PM</u>	Defense Counsel	I am Mr. Bauer, with the same law firm, on behalf of Mr. Kerr.
<u>02:52:32 PM</u>	Judge	I have read the parties briefs file in support of and opposition of this appeal. I suppose a critical issue is the appellants position lays on the idea that the elk was taken when it was shot and the shot occurred on lawful hunting grounds. The argument then goes on, since the shooting amounted to a lawful taking, that establishes the taking was lawful regardless of other aspects that were unlawful. Gist is how the statute defining take and justifies
<u>02:54:20 PM</u>	Defense Counsel	Argument for the record. Two things. Memorandum statement. Think the issue was addressed.
<u>02:55:54 PM</u>	Judge	Reading a lot into that. Magistrate did not mention void for vagueness.
<u>02:56:14 PM</u>	Defense Counsel	Concede it does not. Think we can make a good argument there is a problem. Second argument is more broad. Court noted our argument. 2nd paragraph on page 4. Argument was that pursuant to the statute there was two takings.
<u>02:58:41 PM</u>	Judge	Broad and vague are two entirely different things.
<u>02:58:52 PM</u>	Defense Counsel	Continued argument. Court recognized this is a broad definition and it is too broad. Those are the two arguments we assert.
<u>02:59:18 PM</u>	Judge	Pointing to things you are trying to infer about the magistrates decision. Haven't pointed me to anything you filed or made to try and substantiate you did raise the argument.
<u>02:59:47 PM</u>	Defense Counsel	I would respectfully disagree. His decision references our argument.
<u>03:00:04 PM</u>	Defense Counsel	Constitutes fundamental error. Issue at sentencing.
<u>03:00:39 PM</u>	Judge	Can you wait until your reply brief on appeal when inferring

		fundamental error.
<u>03:00:57 PM</u>	Judge	This is the same, could you wait until your reply brief to argue fundamental error.
<u>03:01:15 PM</u>	Defense Counsel	Will let the state argue that, but think the case law addresses that. You don't have to raise it on appeal. Magistrate did recognize the issue. Fundamental error. Would like to address the substance to the constitutional error. Will make my argument shorter.
<u>03:02:58 PM</u>	Defense Counsel	Subsequent argument is that the 4th amendment be worded with sufficient clarity.
<u>03:04:51 PM</u>	Defense Counsel	Legislature can say whatever they want to say. The problem is it gives an expansive definition. This gets to the nub of the issue. The vague or misinterpretation. If the charge is taken away and I am left with the trespassing, am I still bound to the other statute. Magistrate Judge specifically states...Kerr did a taking when he shot and killed the elk. I do not envy your or an appellate judge. Magistrate Judge recognized that issue and didn't want to deal.
<u>03:07:57 PM</u>	Judge	Isn't the upshot that if he does anything illegal he is subject to forfeiture. He can do things lawfully, but if anything else that is done is unlawful, then he forfeits it. I don't think it's that deep.
<u>03:08:57 PM</u>	Defense Counsel	Would agree. We're supposed to be great word smiths. A person of ordinary intelligence
<u>03:09:32 PM</u>	Judge	Does it matter to your argument and void for vagueness, you're challenging what a separate provision of the statutory scheme makes this
<u>03:10:09 PM</u>	Defense Counsel	I think that's the purpose of as applied challenge.
<u>03:10:19 PM</u>	Judge	So not challenging the conviction? Conviction of violating one statute.
<u>03:10:42 PM</u>	Defense Counsel	I appreciate what you are saying and think it's important for the constitutionality of it. Interesting case law, didn't site in my brief. US Burns v. United States. Talks about the failure to give notice to address higher charges. Due process. Triggers our argument.
<u>03:13:17 PM</u>	Judge	You think your client should be able to keep while in the process of breaking the law to get it?
<u>03:13:35 PM</u>	Defense Counsel	The statute says unlawful taking, if I took it lawfully, can I be held responsible?
<u>03:14:01 PM</u>	Judge	If we assume he took it lawfully, shooting is a definite taking, it moves to what he did next, which was trespassing.
<u>03:14:29 PM</u>	Judge	Don't know the answer to that. One option would have been to contact the home owner.
<u>03:14:44 PM</u>		Continued argument. I think the prosecutor and defense counsel

	Defense Counsel	should have had more discussion. It's so hard, I don't think enough care and attention was provided during that stage with what everyone expected and how it played out. Think my guy had the expectation he would be allowed to keep the elk.
<u>03:16:00 PM</u>	Defense Counsel	Based on what an ordinary person would think upon reading the statute.
<u>03:16:15 PM</u>	Judge	
<u>03:16:16 PM</u>	State	Considering how much time I have had to spend on this case, I wish I hadn't have made a deal. It bares to mention that two family members had charges that were dropped in this agreement. In the sentencing he did not testify. The only testimony was by fish and game. At the end of the day, wildlife belongs to the state of Idaho and to it's people. It could be a good tool here. If I shoot an elk and wound it and it runs away.
<u>03:18:16 PM</u>	State	Continued argument. I would have taken it under the statute. It would be an absurd thing to do, it goes without saying. These statutes are practical in a way. The Elk belongs to fish and game. They unlawfully retrieved an elk on private property and they don't get to keep it.
<u>03:20:46 PM</u>	Defense Counsel	I am confused, we are not asserting it belongs to us. I think, what the prosecutor mentions highlights some of the confusion here. Legislature could have been more clear on this. I think all of these other circumstances highlight the magistrates frustration.
<u>03:22:20 PM</u>	Judge	Decision will be under advisement and will be delivered promptly.
<u>03:22:21 PM</u>		Adjourned

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DEC 19 2016

Case No. _____ Inst. No. _____
Filed _____ A.M. 4:53 P.M.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

STATE OF IDAHO,

Plaintiff,

vs.

BRIAN CALDER KERR,

Defendant.

Case No. CR-2015-04470-C

OPINION ON APPEAL

Brian Kerr appeals the magistrate’s decision that an elk he shot, ostensibly on public land, is subject to confiscation by the Idaho Department of Fish and Game because, to retrieve it, he trespassed on cultivated private land, where the elk died. Kerr contends the magistrate misapplied the confiscation statute, I.C. § 36-1304(b)(i). Alternatively, he says the statute is unconstitutionally vague as applied to him. But, as explained below, it unambiguously provides for the result the magistrate reached. The magistrate’s decision therefore is affirmed.

I.

BACKGROUND

On October 15, 2015, Kerr shot an elk in Valley County. According to him, both he and the elk were on a public hunting ground when he shot it. The State of Idaho disagrees. In any event, Kerr and the State agree that Kerr trespassed on cultivated private land to retrieve the elk

after it died, and, by doing so, committed a misdemeanor violation of I.C. § 36-1603(a). Fish and Game cited Kerr for trespassing and, based on his trespassing, confiscated the elk.

On February 8, 2016, Kerr filed a written guilty plea to the trespassing charge. He was sentenced and a judgment of conviction was entered on March 14, 2016.

During the sentencing hearing, the magistrate determined that Fish and Game was entitled to retain the elk rather than release it to Kerr. The magistrate agreed, however, to wait thirty days before signing an order under I.C. § 36-1304(b)(i) for the elk's confiscation by Fish and Game, giving Kerr an opportunity to seek reconsideration on that point.

On April 11, 2016, Kerr filed what amounts to a motion to reconsider, arguing that the magistrate misapplied the statute. A hearing was scheduled for May 10, 2016, after which the magistrate took the motion under advisement. Three weeks later, on May 31, 2016, the magistrate issued a memorandum decision denying reconsideration.

Kerr filed a notice of appeal on July 12, 2016. In his notice of appeal, he raised two issues. The first is the issue he raised before the magistrate: whether section 36-1304(b)(i) provides for the elk's confiscation. The second is a new issue he didn't raise before the magistrate: whether section 36-1304(b)(i) is unconstitutionally vague as applied here.

About three weeks after Kerr filed his notice of appeal, the Court issued an order establishing the procedures to be followed on appeal, including setting the briefing schedule. As the order says, the Court determined that the appeal involves only a question of law, namely whether section 36-1304(b)(i) provides for confiscation of an elk Kerr lawfully shot while on a public hunting ground, but which moved before dying onto cultivated private land, upon which Kerr trespassed to retrieve it. This is the question presented by Kerr's first appeal issue. The

order also noted the Court's intention not to solicit briefing on Kerr's second appeal issue, as he didn't raise that issue before the magistrate.

Kerr nevertheless argued both issues in his opening brief, failing even to acknowledge the Court's expressed concern that he didn't raise the void-for-vagueness issue before the magistrate and therefore is foreclosed from raising it on appeal. In its brief, the State asserted that Kerr waived his void-for-vagueness argument by not raising it before the magistrate. On reply, Kerr contended that he indeed had made that argument to the magistrate, citing as proof the magistrate's reference to his "other argument" (Memorandum Decision 5), without pointing to anything in the brief he submitted to the magistrate or to any statement he made in open court in front of the magistrate. In context, the magistrate's reference to Kerr's "other argument" gives no indication the magistrate perceived Kerr to have made a void-for-vagueness argument. (Memorandum Decision 5.) Kerr simply did not make any such argument.

Oral argument was held on December 19, 2016, at which point the Court took the matter under advisement, telling the parties its decision would be issued right away.

II.

ANALYSIS

Fish and Game may confiscate any wildlife "taken unlawfully." I.C. § 36-1304(b)(i). In this context, "take" means, among other things, "hunt, pursue, . . . shoot, . . . kill, or possess or any attempt to do so." I.C. § 36-202(i) (emphasis added).¹ "The word 'or' is disjunctive, meaning that it is a conjunction used to introduce an alternative." *State v. Herren*, 157 Idaho

¹ Section 36-202's prefatory language says its definitions apply whenever the defined terms are used in Title 36 of the Idaho Code, and it says "[t]he present tense includes the past and future tenses, and the future, the present." I.C. § 36-202. Thus, the meaning of the word "taken," as used in section 36-1304(b)(i), is set by section 36-202(i)'s definition of the word "take."

722, 726, 339 P.3d 1126, 1130 (2014). It follows that Fish and Game may confiscate an elk from a hunter who unlawfully hunted it, unlawfully pursued it, unlawfully shot it, unlawfully killed it, or unlawfully possessed it, or who unlawfully attempted to do any of those things. The hunter might have done one or more of those things lawfully, but doing any one of them unlawfully subjects him to confiscation of his kill. By his own admission, Kerr acted unlawfully in gaining possession of the elk he shot. That is the bottom-line reason the magistrate's decision was correct and Kerr's appeal fails.

Although the case is straightforward enough that the Court could end its analysis there, the Court will proceed to address Kerr's arguments in detail. Kerr contends he shot the elk lawfully because he had the necessary hunting tag and he and the elk were located on a public hunting ground when he shot it. The magistrate made no finding as to whether Kerr in fact shot the elk on public land. Instead, the magistrate effectively took that as a given, despite the parties' dispute on the point. It didn't matter whether Kerr shot the elk lawfully, the magistrate concluded, because after shooting it he proceeded to possess it unlawfully, admittedly trespassing on cultivated private land in violation of I.C. § 36-1603(a) to gain possession.²

The magistrate's view is indisputably correct as a matter of statutory interpretation because it gives effect to the plain, usual, and ordinary meaning of the statute's words. *See, e.g., Wright v. Ada Cty.*, 160 Idaho 491, 497, 376 P.3d 58, 64 (2016). Kerr may have shot the elk lawfully, but he violated the law against trespassing on cultivated private land in order to gain possession of it after shooting it. Thus, even assuming he shot the elk lawfully, he unlawfully possessed it, triggering Fish and Game's confiscation right under section 36-1304(b)(i).

² The word "possession" is defined for this purpose in I.C. § 36-202(m). Kerr doesn't argue that he neither gained nor attempted to gain possession of the elk according to that definition.

Moreover, according to his own version of events—in which he lawfully shot the elk on public land and trespassed on cultivated private land to retrieve it—he unlawfully pursued the dying elk because he pursued it after shooting it by trespassing on cultivated private land, triggering that same confiscation right in a second way.

Kerr’s arguments to the contrary are not well taken. His principal argument is that, by shooting the elk lawfully, he “took” it lawfully, and because the same elk logically can’t be “taken” twice, the elk he shot wasn’t “taken” again when he unlawfully gained possession of it by trespassing on cultivated private land to retrieve it. The fundamental problem with this argument is that nothing in the statute suggests an elk can only be “taken” once.

As already noted, “take” is a statutorily defined term. Its meaning is very broad and isn’t synonymous with “kill” (though that is one way to “take” an elk). I.C. § 36-202(i). Of course an elk can’t be killed more than once. But, given the statutory definition of “take,” the same elk can be “taken” multiple times. Indeed, Kerr first “took” the elk by “hunting” it, even before he shot it. *See* I.C. § 36-202(i) (providing that to “hunt” is to “take”); I.C. § 36-202(j) (defining “hunting” essentially as trying to capture or kill wildlife, whether successfully or not). He may well have “taken” the elk a second time by “pursuing” it (if it happened to have been necessary for him to pursue the elk after seeing it but before shooting it). Then he “took” it another time by “shooting” it, perhaps another time by “killing” it (if shooting it alone weren’t enough to cause its death), and still another time by “pursuing” the dying elk onto cultivated private land. Finally, he “took” the elk by “possessing” it.

Kerr’s principal argument—that one act qualifying as “taking” the elk bars any subsequent act from also qualifying as “taking” the elk—is without statutory grounding. And applying his logic to the confiscation statute would yield the absurd result that one who lawfully

“hunts” an elk—and thus under section 36-202(i) “takes” the elk before having shot, killed, or possessed it—is free of the risk of confiscation, no matter how many fish-and-game laws he violates in ultimately shooting, killing, or possessing it. The magistrate’s correct interpretation, by contrast, sensibly places a hunter at risk of confiscation unless every act that qualifies as “taking” the animal at issue is a lawful one.

Kerr also argues that the confiscation statute has no application when the hunter’s only unlawful behavior is violating the statute he violated, section 36-1603(a). This argument fails because nothing in the confiscation statute, or elsewhere in the fish-and-game statutory scheme, suggests any such limitation on the scope of the confiscation statute. The confiscation statute applies by its own terms whenever wildlife is unlawfully taken. I.C. § 36-1304(b)(i). It doesn’t list any particular fish-and-game statute or statutes that must be violated for it to apply, indicating that it was intended—just as it says—to apply whenever the animal to be confiscated was “taken” through unlawful conduct. The magistrate did not err by declining to read a limitation into the confiscation statute that simply isn’t there. Moreover, the statute Kerr violated, which he mischaracterizes as a mere trespass-to-retrieve statute, proscribes not only trespassing on private land to retrieve wildlife, but also trespassing on private land to hunt wildlife. I.C. § 36-1603(a). By his logic, a hunter who trespasses on private land to kill an elk hasn’t subjected himself to confiscation of his kill because he merely violated the trespassing statute. That result is as unsound logically as it is lacking in statutory support.

For these reasons, the magistrate didn’t misapply the confiscation statute.

But that isn’t the end of the inquiry, as Kerr has argued that the confiscation statute is unconstitutionally vague as applied to him. Although he now says otherwise, he simply didn’t raise that argument in front of the magistrate. “[I]ssues not raised below generally may not be

considered for the first time on appeal.” *State v. Pentico*, 151 Idaho 906, 912, 265 P.3d 519, 525 (Ct. App. 2011). Thus, unless it was “fundamental error” for the magistrate not to find the confiscation statute unconstitutionally vague as applied to Kerr, despite Kerr’s failure to so argue, this alleged error is unreviewable. *See id.* at 913, 265 P.3d at 526. Moreover, even on appeal, Kerr waited until filing his reply brief to begin arguing that this alleged error is “fundamental error.” That is too late, as issues first raised in the appellant’s reply brief will not be considered. *E.g., Gordon v. Hedrick*, 159 Idaho 604, 612, 364 P.3d 951, 959 (2015). Thus, Kerr faces two procedural bars, one for waiting until appeal to raise his void-for-vagueness argument and the other for waiting until his reply brief on appeal to characterize as “fundamental error” the magistrate’s failure to *sua sponte* find the confiscation statute unconstitutionally vague as applied to him.

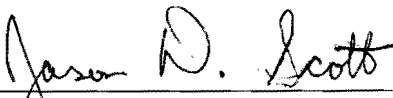
There is no good reason Kerr should be permitted to avoid the effect of the latter of those two procedural bars. In its order establishing the procedures for this appeal, the Court expressly noted Kerr’s failure to raise his void-for-vagueness argument before the magistrate and his consequent inability to assert that issue on appeal. Thus, Kerr was on notice before the briefing schedule began that the Court regarded the void-for-vagueness issue as untimely. If he wished to pursue that issue anyway, he should’ve argued in his opening brief that the “fundamental error” doctrine permits him to do so. His failure to make that argument at the appropriate time prevented the State from briefing whether the alleged error is reviewable as “fundamental error.” The latter procedural bar therefore thus eliminates the need to address whether Kerr can avoid the effect of the former procedural bar by characterizing the alleged error as “fundamental error.”

Regardless, if the Court nevertheless addresses on the merits Kerr’s assertion that he is the victim of “fundamental error” by the magistrate, the Court finds that assertion incorrect. An

error is “fundamental error” if it: “(1) [it] violates one or more of the defendant’s unwaived constitutional rights; (2) the error is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) the error affected the outcome of the trial proceedings. *Pentico*, 151 Idaho at 913, 265 P.3d at 526. Beginning with the first element, the constitutional right at issue is the due-process right not to be held to account under an unconstitutionally vague statute. That right was waived when Kerr failed to argue before the magistrate that the statute is unconstitutionally vague as applied to him. *Cf. State v. Hollon*, 136 Idaho 499, 503, 36 P.3d 1287, 1291 (Ct. App. 2001) (“We are not persuaded that it amounts to fundamental error to allow a defendant to waive a challenge that a statute is overbroad as applied.”). Thus, the constitutional right at issue isn’t “unwaived.” Regardless, moving to the second element, Kerr hasn’t shown any error at all, much less a clear or obvious one. The confiscation statute’s proper application to this case is perfectly clear: unlawfully taken wildlife may be confiscated by Fish and Game, and wildlife is unlawfully taken if the hunter pursues it or gains possession of it unlawfully, such as by trespassing on cultivated private land to retrieve it.

The magistrate correctly decided the elk was taken unlawfully and therefore subject to confiscation under section 36-1304(b)(i). Accordingly, that decision is affirmed.

Dated this 19th day of December, 2016.



Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of December, 2016, I mailed (served) a true and correct copy of the within instrument to:

VALLEY COUNTY PROSECUTORS OFFICE

Daniel W. Bower
Gabriel M. Haws
STEWART TAYLOR & MORRIS PLLC
12550 W Explorer Dr, Ste 100
Boise, ID 83713

DOUGLAS MILLER
Clerk of the District Court

By: Candice White
Deputy Court Clerk

DOUGLAS A. MILLER, CLERK
By [Signature] Deputy

JAN 03 2017

Case No. _____ Inst. No. _____
Filed 9:10 A.M. _____ P.M.

Daniel W. Bower, ISB #7204
Gabriel M. Haws, ISB #6999
STEWART TAYLOR & MORRIS PLLC
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ghaws@stm-law.com

Attorneys for Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

STATE OF IDAHO,

Respondent,

vs.

BRIAN C. KERR,

Appellant.

Supreme Court Case No. _____
Valley County Case No. CR-2015-0004470-C

NOTICE OF APPEAL

TO: THE STATE OF IDAHO, THE VALLEY COUNTY PROSECUTING ATTORNEY,
THE IDAHO ATTORNEY GENERAL, AND THE CLERK OF THE ABOVE-
ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, Brian C. Kerr ("Mr. Kerr"), appeals to the Idaho Supreme Court from the Opinion on Appeal, entered in the above-entitled action on December 19, 2016, by the District Court, in the District Court of the Fourth Judicial District of

the State of Idaho, Valley County, affirming the May 31, 2016 Memorandum Decision entered by Magistrate Judge Lamont C. Berecz.

2. Mr. Kerr has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(c), I.A.R.

3. The issues on appeal are:

- 1) Did the Magistrate Court misapply Idaho Code § 36-1304(b) and § 36-202(i) where there was a finding that Mr. Kerr harvested and took game illegally prior to the trespass and no finding that the taking was unlawful prior to the trespass?
- 2) Are Idaho Code § 36-1304(b) and § 36-202(i) unconstitutionally vague and unenforceable as to Mr. Kerr?

4. Has an order been entered sealing all or any portion of the record? No. If so, what portion? Not applicable.

5. Is a reporter's transcript requested? No.

6. Appellant does not request any additional documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R., other than the May 31, 2016 Memorandum Decision and the December 19, 2016 Opinion on Appeal.

7. I certify:

(a) That a copy of this Notice of Appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Name and address: Not applicable

(b) That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript – Not applicable.

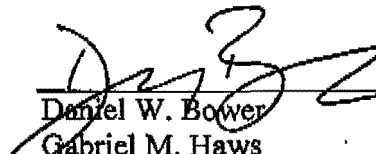
(c) That the estimated fee for preparation of the clerk's record has been paid.

(d) That Appellate filing fee has been paid – Not applicable.

(e) That service has been made upon all parties required to be served pursuant to Rule 20, I.A.R. (and the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code).

DATED: January 3, 2017.

STEWART TAYLOR & MORRIS PLLC


Daniel W. Bower
Gabriel M. Haws
Attorneys for Appellant

CERTIFICATE OF SERVICE

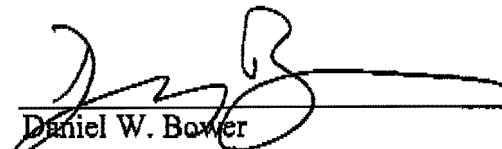
I hereby certify that on January 3, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Valley County Prosecutor's Office
219 N. Main St.
P.O. Box 1350
Cascade, ID 83611

- U.S. Mail
- Hand Delivered
- Facsimile: (208) 382-7124
- Email:

Office of the Attorney General
Criminal Law Division
700 W. Jefferson Street
P.O. Box 83720
Boise, ID 83720-0010

- U.S. Mail
- Hand Delivered
- Facsimile: (208) 854-8074
- Email:


Daniel W. Bower
Gabriel M. Haws
Attorneys for Appellant

IN THE DISTRICT COURT OF THE 4TH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF VALLEY

STATE OF IDAHO,)	
	)	SUPREME COURT NO.
Plaintiff,)	
	)	Dist. Court No. CR-2015-4470-C
-vs-)	
	)	CLERK'S CERTIFICATE
BRIAN C. KERR,	)	OF EXBIHITS
)	
Defendant.)	
)	
)	
)	

I, DOUGLAS A. MILLER, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Valley, do hereby certify that the following is a list of the exhibits, offered or admitted and which have been lodged with the Supreme Court or retained as indicated:

<u>NO.</u>	<u>DESCRIPTION</u>	<u>OFFER/ADMIT</u>	<u>SENT/RETAINED</u>
#1			

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 28th day of March, 2017.

DOUGLAS A. MILLER,
Clerk of the District Court

By: 

IN THE DISTRICT COURT OF THE 4TH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR VALLEY COUNTY (IN THE (PUBLIC UTILITIES COMMISSION)
(INDUSTRIAL COMMISSION) OF THE STATE OF IDAHO)

STATE OF IDAHO,)	
	)	SUPREME COURT NO.
Plaintiff,)	
	)	Dist. Court No. CR-2015-4470-C
-vs-)	
	)	CLERK'S CERTIFICATE
BRIAN C. KERR,	)	OF SERVICE
)	
Defendant.)	
)	
)	

TO: Kenneth Jorgensen
Deputy Attorney General
PO Box 83720
Boise, ID 83720
ATTORNEY FOR RESPONDENT

TO: Daniel W. Bower
12550 W Explorer Dr. Suite 100
Boise, ID 83713
ATTORNEY FOR APPELLANT

YOU ARE HEREBY NOTIFIED:

That the Clerk's Record, Exhibits and Transcripts in the above entitled cause has been lodged with the District Court and copies sent to counsel; that objections to the Clerk's Record and Reporter's Transcript, including any requests for corrections, deletions, or additions, must be filed with the District Court together with a Notice of Hearing within twenty-eight (28) days from the date of this Notice.

DATED this 28th day of March, 2017.

DOUGLAS A. MILLER,
Clerk of the District Court

By: 
Deputy

IN THE DISTRICT COURT OF THE 4TH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
 IN AND FOR VALLEY COUNTY (IN THE (PUBLIC UTILITIES COMMISSION)
 (INDUSTRIAL COMMISSION) OF THE STATE OF IDAHO)

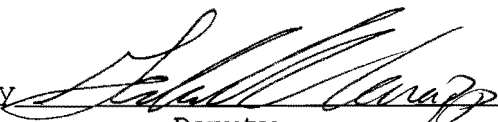
STATE OF IDAHO,)	
	)	SUPREME COURT NO.
Plaintiff,)	
	)	Dist. Court No. CR-2015-4470-C
-vs-)	
	)	CLERK'S CERTIFICATE
BRIAN C. KERR,	)	OF RECORD
)	
Defendant.)	
)	
)	

I, DOUGLAS A. MILLER, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Valley, do hereby certify that the foregoing Record in this cause was compiled and bound under my direction and contains true and correct copies of all pleadings, documents and papers designated to be included under Rule 28, IAR, the Notice of Appeal, any Notice of Cross-Appeal, and any additional documents requested to be included.

I do further certify that all documents, x-rays, charts and pictures offered or admitted as exhibits in the above entitled cause, if any, will be duly lodged with the Clerk of the Supreme Court along with the Court Reporter's Transcript and Clerk's Record as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 28th day of March, 2017.

DOUGLAS A. MILLER
 Clerk of the District Court

By 
 Deputy