8-1-2017

State v. Kerr Respondent's Brief Dckt. 44740

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, **Plaintiff-Respondent,** **v.** **BRIAN CALDER KERR,** **Defendant-Appellant.**	)	**No. 44740** **Valley County Case No. CR-2015-4470**

BRIEF OF RESPONDENT

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

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

KALE D. GANS
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR PLAINTIFF-RESPONDENT

DANIEL W. BOWER
Stewart Taylor & Morris PLLC
12550 W. Explorer Dr., Ste. 100
Boise, Idaho 83713
(208) 345-3333

ATTORNEY FOR DEFENDANT-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

STATEMENT OF THE CASE

Nature Of The Case

Brian Calder Kerr appeals from the district court's ruling affirming the magistrate's judgment.

Statement Of The Facts And Course Of The Proceedings

Kerr shot an elk while hunting and trespassed onto private property in order to retrieve it. (R., pp. 35-36.) He was cited for the misdemeanor charge of trespassing on private property to retrieve wildlife. (R., p. 4.)

Kerr entered a guilty plea as part of a settlement agreement with the state. (R., pp. 5-7.) The parties appeared to agree on Kerr's sentence as spelled out in the plea agreement; however, they disputed a term of the sentence that "fish and game will confiscate the bull elk." (Compare R., p. 7 with R., pp. 8-11.) At sentencing, the state presented evidence and argued the elk should be confiscated by the state. (See R., pp. 8-9, 18.) Kerr, on the other hand, "argued that he ought to be able to keep the elk despite his trespass" and that the confiscation statute "was inapplicable to his case." (R., pp. 9-11, 17.) The magistrate imposed the sentence and ordered the confiscation, but allowed a subsequent "motion to reconsider" the confiscation issue. (R., pp. 11-12.) Kerr filed supplemental briefing and noticed a hearing on the matter. (See R., p. 2.)

The magistrate issued a memorandum decision resolving the confiscation issue. (R., pp. 17-23.) The magistrate's findings, adopted and relied on by the state on appeal, included the following:

> 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.
>
> …
>
> …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.[1]
>
> 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 [the confiscation statute] apply to these facts?

(R., pp. 18-19.)

[1] Kerr takes for granted on appeal that it is an "incontrovertible fact that Kerr had already lawfully 'taken' the animal" prior to trespassing. (Appellant's brief, p. 15; see also Appellant's brief, pp. 13 ("Here, that after Kerr had lawfully taken and possessed an elk…"), 14 ("Here, Kerr pled guilty to trespassing for the purpose of retrieving wildlife (an elk) that, pursuant to the plain language of the statute, he had already lawfully taken."), 17 ("Significantly, the magistrate court indirectly recognized the problem of creating the impossible circumstance of two 'takings' and the question of whether Kerr could 'unlawfully take' an animal that he had already 'lawfully taken'….").) However, the magistrate expressly declined to make that factual finding. (R., pp. 18-19.) The state contends, as the magistrate and district court apparently found, that the issues on appeal can be resolved without finding whether Kerr lawfully possessed the elk prior to the trespass. (See R., pp. 20, 38-39.) However, if this Court determines this fact is relevant, the proper remedy would be a remand for the magistrate to make a finding as to whether Kerr initially lawfully took the elk, as opposed to reversing the confiscation order based on a factual finding that the magistrate specifically declined to make.

The magistrate determined that the confiscation statute would apply to these facts, because if the elk "was unlawfully taken by Kerr then it is subject to confiscation," and here "Kerr's action in trespassing was for the sole purpose of possessing an elk that he had shot." (R., pp 19-20.) In other words, "Kerr trespassed (went onto someone else's property *unlawfully*) in order to possess (*take*) an elk," and "[t]herefore, the elk was 'unlawfully taken' by Kerr while he was actively trespassing," subjecting the elk to confiscation. (R., p. 20.)

Kerr appealed to the district court, arguing the magistrate misapplied the statute, and for the first time argued that Idaho Code § 36-1304(b) is "unconstitutionally vague and unenforceable as to the Defendant." (R., pp. 24-25.)

In its Order Establishing Appellate Procedure the district court found "this appeal involves only a question of law," namely, "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." (R., p. 27.) The district court also noted the previously unpresented void-for-vagueness issue, and indicated it would not consider it on appeal unless Kerr sought reconsideration of the Order Establishing Appellate Procedure and contended "he raised the issue before [the magistrate], or that the issue for some reason may be raised for the first time on appeal." (R., p. 27, n. 1.)

Following a hearing on the intermediate appeal (R., pp. 32-34), the district court affirmed the magistrate's order (R., pp. 35-48). The district court noted that pursuant to Idaho Code Section 36-1304(b)(i) "Fish and Game may confiscate any wildlife 'taken unlawfully.'" (R., p. 37.) The district court also pointed out that "[i]n this context, 'take' means, among other things, 'hunt, pursue, … shoot, …kill, or possess or any attempt to do so.'" (R., p. 37 (emphasis and ellipses in original, quoting I.C. § 36-202(i).) The district court accordingly concluded that:

> 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.

(R., p. 38 (emphasis in original).)

While finding "the case is straightforward enough that the Court could end its analysis there," the district court nevertheless addressed the rest of Kerr's arguments in detail. (R., p. 38.) Regarding Kerr's contention that he initially shot the elk lawfully on public land, the court noted that the magistrate made no factual finding as to whether Kerr did so. (R., p. 38.) The district court instead concluded the magistrate took the fact of an initial lawful shooting "as a given" for the purposes of a legal analysis, because "[i]t didn't matter whether Kerr shot the elk lawfully" when "after shooting it he proceeded to possess it unlawfully." (R., p. 38.) "Thus," the court found, "even assuming he shot the elk lawfully, he

unlawfully possessed it, triggering Fish and Game's confiscation right under section 36-1304(b)(i)." (R., p. 38 (emphasis in original).)

The district court also found there were two procedural bars to raising a void-for-vagueness claim on intermediate appeal: first, Kerr did not raise the issue to the magistrate, and second, Kerr failed to argue that the alleged error was "fundamental error" until his reply brief, preventing the state from briefing the issue in its response. (R., pp. 40-41.) The district court further concluded that even if the void-for-vagueness claim was not procedurally barred it failed on the merits. (R., p. 42.) The district court accordingly affirmed the magistrate's decision upholding the confiscation order. (R., p. 42.)

Kerr timely appealed. (R., pp. 44-46.)

ISSUES

Kerr states the issues on appeal as:

I. Is Idaho Code § 36-1304(b), read together with the definition provided in Idaho Code § 36-202(i), unconstitutionally vague and unenforceable?

II. Did the Magistrate Court misapply Idaho Code § 36-1304(b), where there was no finding that the Appellant took game illegally (or illegally possessed game) prior to the trespass?

(Appellant's brief, p. 8.)

The state rephrases the issues as:

I. Has Kerr failed to show the district court erred in affirming the magistrate's denial of Kerr's motion to reconsider the judgment?

II. Has Kerr failed to show it was fundamental error for the magistrate to not *sua sponte* rule Idaho Code § 36-1304 unconstitutional?

ARGUMENT

I.
Kerr Has Failed To Show The District Court Erred In Affirming The Magistrate's Denial Of Kerr's Motion To Reconsider The Judgment

A. Introduction

Kerr argues the magistrate and district court misapplied Idaho Code Sections 36-1304(b) and 36-202. (Appellant's brief, pp. 17-20.) This argument fails because the undisputed evidence before the magistrate was that Kerr unlawfully trespassed while retrieving the elk at issue. Per the plain language of the statutes, that constituted an unlawful taking and subjected the elk to confiscation by the department of Fish and Game. The district court therefore correctly affirmed the magistrate's denial of Kerr's motion to reconsider the confiscation order.

B. Standard Of Review

This Court "directly reviews the district court's decision" when the district court acts in its intermediate appellate capacity. In re Doe, 147 Idaho 243, 248, 207 P.3d 974, 979 (2009) (citing State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008); Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2008)). This Court reviews the magistrate record "to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings." In re Doe, 147 Idaho at 248, 207 P.3d at 979. "If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the

magistrate's decision, [the appellate court] affirm[s] the district court's decision as a matter of procedure." Id.

C. Because Kerr Indisputably Unlawfully Trespassed When He Took The Elk, The Plain Language Of The Statutes Subjected The Elk To Confiscation

An Idaho Fish and Game official "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." I.C. § 36-1304(b)(i). If the evidence before a magistrate shows "said wildlife was unlawfully taken," the magistrate shall order "the same confiscated or sold by the director." I.C. § 36-1304(b)(i)(1).

The meaning of "take," as used above, can be found in Idaho Code 36-202, which provides definitions for "[w]henever the following words appear in title 36." "Take," so defined, means to "hunt, pursue, catch, capture, shoot, fish, seine, trap, kill, or possess or any attempt to do so." I.C. § 36-202(i). Because disjunctives such as "or" introduce alternatives (State v. Herren, 157 Idaho 722, 726, 339 P.3d 1126, 1130 (2014)), one can take wildlife by shooting it, or killing it, or possessing it, or attempting to possess it.

Here, Kerr pleaded guilty (R., pp. 5, 7) to "enter[ing] the real property of another … for the purposes of … retrieving wildlife … without the permission of the owner." I.C. § 36-1603(a). (See also, R., p. 4.) "Retrieving" or "attempting to retrieve" something is synonymous with possession or attempted possession, and here Kerr possessed or attempted to possess the elk while actively unlawfully trespassing on cultivated private property. (See R., pp. 4-5, 19.) The

magistrate therefore had more than enough evidence to determine that Kerr unlawfully took the elk, thus subjecting the elk to confiscation.

Kerr's arguments against this inevitable conclusion are unavailing. The core of Kerr's claim is that because he already lawfully took the elk prior to trespassing, a second, post-trespass taking of "something already taken" constitutes "impossible physics." (Appellant's brief, pp. 4-5, 13-16.) Kerr characterizes the magistrate's application of Sections 36-1404 and 36-202 to these facts as "creating the impossible circumstance of two 'takings' and the question of whether Kerr could 'unlawfully take' and animal that had already been 'lawfully taken.'" (Appellant's brief, p. 4.) Kerr therefore argues the magistrate misapplied the law when it "reasoned that the physical impossibility of two takings did not matter," and concluded Kerr could have taken the elk both by shooting it and by possessing it.[2] (See Appellant's brief, pp. 4-5, 19-20.)

This argument fails because "[l]egislative definitions of terms included within a statute control and dictate the meaning of those terms as used in the statute." State v. Hartzell, 155 Idaho 107, 110, 305 P.3d 551, 554 (Ct. App. 2013). Title 36 specifically defines a taking as something that can be done via

[2] Kerr also claims, alternatively, that the magistrate erred by not concluding that the initial shooting and killing of the elk was a taking. (Appellant's brief, p. 18.) But this claim is belied by the magistrate's statement that "[u]nder the broad definition of "take" it is also true that Kerr did a taking when he shot or killed the elk." (R., p. 20.) Far from concluding that the shooting was not a taking, the magistrate simply concluded that "[t]he 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." (R., p. 20.) Thus, Kerr fails to show that the magistrate found that the shooting was not a taking, much less that such a finding would be reversible error.

multiple non-exclusive acts. I.C. § 36-202(i). One could shoot an animal, pursue it, hurt it, kill it, catch it, possess it, or attempt to do any of the above, and by performing each separate act a person would "take" the animal as defined by the statute. Id. The statute places no explicit or implicit limits on the amount of times one may take an animal. See id. It is clearly physically possible to both shoot something, and later possess it, as Kerr did here—and given the statutory definition of "take" both of these acts would be takings.

Kerr appears to be applying a non-statutory definition of "take" when he claims something cannot be taken more than once. But statutory definitions control: the law routinely defines non-human corporations as "persons" (see, e.g., 1 U.S.C. § 1), non-possession as "constructive possession" (see, e.g., Henderson v. United States, 135 S. Ct. 1780, 1784 (2015)), and the impact of land-use regulations as "takings" (see, e.g., Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992)), to name just a few. Challenging these legal definitions in a court of law for "physical impossibility" would be as nonsensical as enjoining chemical processes in a laboratory for legal reasons. In any event, Kerr fails to show that "physical impossibility" has any bearing on statutory interpretation, much less that taking wildlife multiple times through different acts is impossible, or that the statutory definition of "take" was incorrectly applied here.

Because the taking by possession occurred while Kerr was indisputably unlawfully trespassing, he unlawfully took the elk and subjected it to confiscation. The magistrate correctly applied the law to the facts when it arrived at this same

conclusion, and this Court should therefore affirm the district court as a matter of course.

II.
Kerr Has Failed To Show It Was Fundamental Error For The Magistrate To Not *Sua Sponte* Rule Idaho Code Sections 36-1304 and 36-202 Unconstitutional

A. Introduction

Kerr argues that Idaho Code Sections 36-1304 and 36-202 are void for vagueness. (Appellant's brief, pp. 13-16.) Covering familiar ground, Kerr contends that "it is simply not reasonable for him to believe that he could be penalized for what would have to be a second 'taking,'" and therefore "the statute is ambiguous and fails to provide notice." (Appellant's brief, p. 15.)

But because Kerr never argued the statute was unconstitutional before the magistrate, he must show that it was fundamental error for the magistrate to not *sua sponte* rule the statute unconstitutional. Moreover, Kerr waived his fundamental error argument by not raising it to the district court in his opening briefing, and fails to challenge that finding on appeal. Lastly, should his claim be preserved, Kerr still fails to show the district court erred by ruling in the alternative and dismissing his constitutional claim on the merits.

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, 711, 69 P.3d 126, 131 (2003). The party challenging the constitutionality of the statute must overcome a strong presumption of constitutionality. Id. The appellate court is obligated to seek a construction of a statute that upholds its constitutionality. Id.

C. It Was Not Fundamental Error For The Magistrate To Not *Sua Sponte* Rule Idaho Code Sections 36-1304 and 36-202 Unconstitutional

"Issues not raised below will not be considered by this court on appeal, and the parties will be held to the theory upon which the case was presented to the lower court." State v. Garcia-Rodriguez, No. 44443, 2017 WL 2569786, at *3 (Idaho, June 14, 2017) (citing Heckman Ranches, Inc. v. State, By & Through Dep't of Pub. Lands, 99 Idaho 793, 799–800, 589 P.2d 540, 546–47 (1979); Marchbanks v. Roll, 142 Idaho 117, 119, 124 P.3d 993, 995 (2005); Frasier v. Carter, 92 Idaho 79, 82, 437 P.2d 32, 35 (1968)) ("We have held generally that this court will not review issues not presented in the trial court, and that parties will be held to the theory on which the cause was tried."). A well-settled exception to this doctrine is that appellate courts may "consider a claim of error to which no objection was made below if the issue presented rises to the level of fundamental error." State v. Pentico, 151 Idaho 906, 912, 265 P.3d 519, 525 (Ct. App. 2011).

Here, a review of the record shows that Kerr did not present an argument to the magistrate that the statute was void for vagueness or otherwise unconstitutional on its face or as applied to him.[3] (See R., pp. 8-11.) The magistrate accordingly never ruled on the question. (See R., pp. 17-22; State v. Pickens, 148 Idaho 554, 557, 224 P.3d 1143, 1146 (Ct. App. 2010) ("In order for

[3] The state's review of Kerr's claims below is limited to the record Kerr has supplied on appeal, which contains no transcripts, none of Kerr's briefing to the magistrate in support of his motion, and none of the parties' briefing to the district court. (See generally, R.) "In the absence of an adequate record on appeal to support the appellant's claims, we will not presume error." State v. Tregeagle, 161 Idaho 763, ___, 391 P.3d 21, 26 (Ct. App. 2017).

an issue to be raised on appeal, the record must reveal an adverse ruling that forms the basis for the assignment of error.") (citations omitted).)

Kerr disagrees on appeal, arguing that he presented a void-for-vagueness claim to the magistrate:

> Directly stated, Kerr asserts that the district court is mistaken and directs this Court to the language of the May 31, 2016 Memorandum Decision. Indeed the magistrate court acknowledged that "Kerr's other argument" was whether "the Legislature did not specifically detail the application of I.C. § 36-1304(b)…." (*See* R., p.21 (Memorandum Decision, p. 5).) Whether the Idaho Legislature erred by not providing specific detail for the application of Idaho Code § 36-1304(b) is a void for vagueness argument. Accordingly, the issue was raised below, and the district court's determination that the issue was not raised below is without basis.

(Appellant's brief, pp. 10-11.) Putting aside the issue of whether the magistrate's paraphrase of a party's claim is proof the party *itself* raised an issue below, this partial quote of the magistrate fails to show Kerr raised a void-for-vagueness claim. Indeed, scrutinizing the entire passage shows that the magistrate was only responding to Kerr's argument regarding the *application* of one statute to another:

> 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. § 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 specially 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.

(R., p. 21 (italic emphasis in original, boldface emphasis added).) In other words, simply because the magistrate used the word "detail" in dispatching Kerr's statutory application argument, does not mean that Kerr argued the statute was void for vagueness or otherwise unconstitutional below. Because Kerr did not present a void-for-vagueness argument to the magistrate he must show the magistrate committed fundamental error by not *sua sponte* ruling the statute unconstitutional.

As a separate procedural matter, Kerr waived his fundamental error claim below by waiting until his reply brief to raise it.[4] (R., p. 41 (noting that on intermediate appeal "Kerr waited until filling his reply brief to begin arguing that this alleged error is 'fundamental error'").) The district court ruled that this was too late to consider the issue:

> 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.

[4] Here too, the state's review of the claims Kerr brought below is limited to the record Kerr has supplied on appeal, which does not include his opening briefing to the district court, but does include the district court's ruling on his intermediate appeal. (See R., pp. 40-41.)

> 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 regard 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 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."

(R., p. 41 (citing Gordon v. Hedrick, 159 Idaho 604, 612, 364 P.3d 951, 959 (2015)).

On appeal, Kerr has failed to address the fact that he waited until his reply brief to raise fundamental error claim, much less does he claim that the district court's preservation ruling was incorrect. (See Appellant's brief pp. 10-12 (addressing whether Kerr raised the argument before the magistrate, but not whether Kerr raised the issue to the district court prior to his reply briefing).) To preserve arguments on appeal parties must raise issues in their opening briefs. Patterson v. State, Dep't of Health & Welfare, 151 Idaho 310, 321, 256 P.3d 718, 729 (2011) ("In order to be considered by this Court, the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief.") Because Kerr neglected to raise the fundamental error claim in his opening brief on intermediate appeal—and likewise fails to challenge the district court's preservation ruling in his opening brief on direct appeal—he has

waived a challenge to the district court's ruling that he failed to preserve his fundamental error claim by not raising it in his opening brief.

Turning to the merits, assuming *arguendo* Kerr has preserved his claim, fundamental error is an error that "so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his fundamental right to due process." State v. Lavy, 121 Idaho 842, 844, 828 P.2d 871, 873 (1992). In order to constitute fundamental error the defendant must show that the error: "(1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." State v. Perry, 150 Idaho 209, 228, 245 P.3d 961, 980 (2010). Kerr cannot show fundamental error because he cannot show that his constitutional rights were violated, much less clearly so.

1. Idaho Code Sections 36-1304 and 36-202 Do Not Violate Kerr's Unwaived Constitutional Rights, As They Are Not Void For Vagueness

Idaho Code Sections 36-1304 and 36-202 are not void for vagueness. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." State v. Knutsen, 158 Idaho 199, 202, 345 P.3d 989, 992 (2015) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). "[T]he more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a

legislature establish minimal guidelines to govern law enforcement.'" Id. (quoting Kolender, 461 U.S. at 358).

As a constitutional matter "[a] conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012) (quoting United States v. Williams, 553 U.S. 285, 304 (2008)). Accordingly, "the void-for-vagueness doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions." Skilling v. United States, 561 U.S. 358, 412 (2010) (citing Kolender, 461 U.S. at 357). But the doctrine also grants statutes a "strong presumption" of validity and the court must, if possible, "construe, not condemn" them. See id. at 402-403 (internal quotes and citations omitted). Even if a statute's "outermost boundaries" are "imprecise" that fact has little relevance where "appellant's conduct falls squarely within the 'hard core' of the statute's proscriptions." Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973); see also Skilling, 561 U.S. at 412 (citing Broadrick).

Here, Idaho Code Sections 36-1304 and 36-202 are not void for vagueness, either on their face or as applied to Kerr. As explained above, Section 36-1304 provides that unlawfully taken wildlife may be seized by the department of Fish and Game. I.C. § 36-1304(b). Further, Section 36-202 explicitly defines "take" and expressly applies that definition to the entirety of Title 36. I.C. § 36-202(i). Unlawfully taking wildlife, as defined in Section 36-202,

accordingly subjects that wildlife to confiscation per Section 36-1304(b). Far from being vague in any meaningful sense, the statute places persons of ordinary intelligence on notice that if they unlawfully take wildlife, as defined by the Code, that wildlife is subject to confiscation.

Kerr argues otherwise, contending again that "where the statute makes clear that Kerr lawfully 'took' the elk when he shot and killed the elk, it is simply not reasonable to believe that Kerr had the requisite notice to believe he, or anyone else that lawfully harvests an animal that unfortunately happened to die on private property, would be subject to confiscation if they trespassed to get to the animal and pled guilty to a trespass." (R., p. 14.) This reconstruction of the facts, however, glosses over the fundamental point: regardless of Kerr's actions prior to the trespass, when Kerr "trespassed to get to the animal" he necessarily did so unlawfully. I.C. § 36-1603(a). Moreover, "trespassing to get to" an animal, followed by possessing that animal while trespassing, falls under at least two of the unmistakable statutory definitions of takings. I.C. § 36-202(i). Because Kerr possessed or attempted to possess the elk while trespassing he necessarily unlawfully took it, and subjected it to confiscation. I.C. § 36-1304(b). Kerr was therefore reasonably on notice of the statute's plain meaning, and its plain application to him.

Kerr also fails to show Idaho Code Section 36-1304(b) is void for vagueness because it "allows for arbitrary and discriminatory enforcement." (See Appellant's brief, p. 16.) Where statutory language "is sufficiently clear," "the speculative danger of arbitrary enforcement does not render the ordinance

void for vagueness." Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 503 (1982). Here, the language is perfectly clear: if a person unlawfully takes wildlife then the wildlife is subject to confiscation. Because this language is clear, any speculative danger of arbitrary enforcement does not render the statute void for vagueness.

Kerr disagrees, protesting that the "very language" of the statutes would lead to arbitrary and discriminatory enforcement: "any wrongful act, regardless of how minor, committed by any individual involved in the activity of hunting or trapping, would subject the malfeasor in possession of a legally harvested animal subject to confiscation." (Appellant's brief, p. 16.) But this hypothetical worst-case scenario flows from a flawed reading of the statute; it incorrectly assumes that "any wrongful act," as opposed to *unlawful* acts, would trigger the confiscation statute. It also ignores that the hunter must have unlawfully taken the wildlife as a predicate act. When read correctly the statutes do not subject lawfully taken wildlife to confiscation for unrelated minor wrongdoings; they only subject unlawfully taken wildlife to confiscation. Or in other words, as stated by the magistrate, the common-sense effect of the statute 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." (R., p. 21.) Kerr may disagree with the wisdom of this as a policy matter, but he has not shown that the statutes themselves allow for arbitrary enforcement or are otherwise void for vagueness.

Idaho Code Sections 36-1304 and 36-202 are not void for vagueness, and Kerr has accordingly failed to establish the first prong of the fundamental error analysis.

2. The Error Is Not Clear From The Record

Kerr has also failed to show that any error is clear from the record. An error plainly exists if the error is clear from the record and there is not any need for additional information, including information as to whether the failure to object was a tactical decision. See Perry, 150 Idaho at 228, 245 P.3d at 980. On appeal, Kerr summarily contends that "the claim of error is clear without the need for reference to any additional information not contained in the appellate record." (Appellant's brief, p. 12.) But because Kerr has failed to show a constitutional violation in the first place, Kerr fails this prong of the fundamental error analysis for the same reason he failed the first prong. Even if there was error for the district court to not *sua sponte* rule Idaho Code Sections 36-1304 and 36-202 unconstitutional, that error is not clear from the record. The argument provided by Kerr regarding "clear error" has failed to establish any error was clear from the record.

Kerr has failed to show fundamental error.

CONCLUSION

The state respectfully requests this Court affirm the district court's decision to affirm the magistrate's denial of Kerr's motion to reconsider the judgment.

DATED this 1st day of August, 2017.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 1st day of August, 2017, served two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

DANIEL W. BOWER
STEWART TAYLOR & MORRIS PLLC
12550 W. EXPLORER DR., STE. 100
BOISE, ID 83713

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd