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State v. Kerr Appellant's Reply Brief Dckt. 44740

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, vs. BRIAN C. KERR, Defendant/Appellant.	Supreme Court No. 44740 Appeal from Valley County Case No. CR-2015-4470-C

APPELLANT'S REPLY BRIEF

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

STEWART TAYLOR & MORRIS PLLC
Daniel W. Bower
12550 W. Explorer Drive, Suite 100
Boise, ID 83713
Telephone: (208) 345-3333
Facsimile: (208) 345-4461

Attorneys for Defendant/Appellant

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, ID 83720
Telephone: (208) 334-4534

Attorneys for Plaintiff/Respondent

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INTRODUCTION

As set forth in opening brief submitted by Brian C. Kerr, (the "Appellant" or "Kerr"), there are two issues on appeal. The first issue is whether Idaho Code § 36-1304(b), read in concert with Idaho Code § 36-202(i), is unconstitutionally vague and unenforceable as to Kerr. The second issue on appeal is whether the magistrate court misapplied Idaho Code § 36-1304(b). In response to Kerr's assertions, the State makes two primary arguments. First, the State argues that because Kerr admitted to the trespass, the magistrate court properly applied the applicable statute. *See* Brief of Respondent, p. 8-11. Second, the State attempts to avoid the vagueness argument by claiming that the issue was not raised or ruled on below and that any error was not "fundamental." As explained more fully below, these responsive arguments lack merit. The question of vagueness was raised below as evidence by the magistrate court's ruling. And, even if it was not raised before the magistrate court, the error was fundamental and was properly raised before the district court and can be raised by this Court. Moreover, the State's attempt to simply point to the trespass ignoring other facts including facts that constituted the physical taking of the Elk highlights the primary issue on the appeal. That issue is that the plain and ordinary language of the statute makes interpreting and applying the statute impossible given the particular circumstance of this case. The State's theoretical and ivory tower approach to the magistrate court's clear struggle with the application of the statute at issue exemplifies its incomplete approach to the issue on appeal. The plain language of the statute cannot and should not be ignored. The language of the Idaho Code § 36-202(i) and § 36-1304(b) must be applied to the facts of this case--all of the facts. Here, that application did not occur and, consequently, Kerr asserts reversible error.

RESPONSIVE ARGUMENT

I. The Question Of Vagueness Was Raised Below As Evidenced By The Magistrate Court's Memorandum Decision

The State incorrectly claims that Kerr did not raise the question of vagueness before the magistrate court. Indeed, the State's position is that "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 fact or as applied to him." Respondent's Brief, p.12. The State makes this argument notwithstanding the language of the May 31, 2016 Memorandum Decision that implicitly acknowledges that Kerr raised the issue that the "Legislature did not specifically detail the application of I.C. § 36-1304." (R., p.21). 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. The argument is not complicated--the Idaho Legislature did not put sufficient "detail" in the statute and, accordingly, the statute is impermissible vague. Thus, the issue was raised below, and the State's argument is without basis.

The State attempts to explain away this argument by claiming that the word "detail" has no meaning: "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…" Respondent Brief, p. 14. Significantly, the State makes no attempt to explain what the magistrate court meant when it acknowledged that Kerr's "other" argument was that the Legislature impermissibly did not specifically "detail" the application of the Idaho Code § 36-1304(b). Indeed, Black's Law Dictionary defines "vague" as "imprecise; not sharply outlined; indistinct." *See* Blacks Law Dictionary (7th ed. 1999). Stated differently, and in the language of

the magistrate court, quoting Kerr's argument before it---the statute lacks "detail" and is, therefore, vague.

As explained in Kerr's opening brief, the Fourteenth Amendment prohibits the lack of detail found in the present statute. Idaho criminal statutes must be worded with sufficient clarity and definiteness that ordinary people understand what conduct is prohibited, and the statute must be worded in a manner that does not allow arbitrary and discriminatory enforcement. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497–99 (1982); *State v. Korsen*, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003); *State v. Martin*, 148 Idaho 31, 34, 218 P.3d 10, 13 (Ct. App. 2009). "Thus, a statute may be void for vagueness <u>if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes or if it fails to establish minimal guidelines to govern law enforcement or others who must enforce the statute.</u>" *Burton v. State, Dep't of Transp.*, 149 Idaho 746, 748, 240 P.3d 933, 935 (Ct. App. 2010) (emphasis added). Again, simply put, if the statute lacks sufficient detail.

Here, as set forth in Kerr's opening brief, the problem with the statute is that it requires a person of ordinary intelligence to believe that a person can violate the law for doing something that is completely illogical and nonsensical, indeed physically impossible--to conclude that he or she can "take" something already "taken." The State's only response to this argument is that "physical impossibility" has no "bearing on statutory interpretation." Respondent Brief, p.10. This argument sells Idaho's Legislative short of their important responsibility and utterly fails to appreciate the purpose of a criminal statute--to inform the Idaho citizenry of criminality. A criminal statute that is physically impossible, illogical and nonsensical does not serve its important purpose but rather hinders that purpose.

It is undisputed fact that per the language of the statute Kerr had already lawfully "taken" the animal. Thus, it is not reasonable for him to believe that he could be penalized for what would have to be a second "taking"--a "retaking" of something already taken. As explained by the Idaho Court of Appeals in *Burton*, here, persons in Kerr's situation are "[p]ersons of ordinary intelligence [who] can only guess at the statute's directive in this circumstance." *See Burton*, 149 Idaho 746 at 749, 240 P.3d at 936. Accordingly, the statute is vague and ambiguous and fails to provide requisite notice and is, therefore, unconstitutional.

II. Even The Vagueness Issue Was Not Raised Below, This Court Should Address The Issue As Fundamental Error

Kerr asserts that, even if he did not preserve his challenge to the constitutionality of the statute as applied to him as reflected in the Memorandum Decision, this Court should review it based on fundamental error. Per Idaho law, appellate courts consider a claim of error to which no objection was made below if the issue presented rises to the level of fundamental error. *See e.g.*, *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007); *State v. Haggard*, 94 Idaho 249, 251, 486 P.2d 260, 262 (1971). Recently, the Idaho Supreme Court abandoned the definitions it had previously utilized to describe what may constitute fundamental error. *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010). This Court held that an appellate court should reverse an unobjected-to error when the defendant persuades the court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) affected the outcome of the trial proceedings. *Id*. at 221, 245 P.3d at 978. Here, even if Kerr failed to raise "vagueness" below, the failure constitutes fundamental error because

it violated an unwaived constitutional right, the error is clear and obvious from the record with no need of additional information, and unquestionably affected the outcome of the proceeding.

In response to this the fundamental error argument the State reiterates its prior arguments and asserts in conclusive and unsupported fashion that "Kerr has also failed to show that any error is clear from the record." Respondent's Brief, p.20. The State fails to appreciate the simple basis for Kerr's claim—that the statute is flawed. There is no extensive record that needs to be reviewed to come to this conclusion. The record as it exists and the language of the Idaho Code § 36-1304 and 36-202 are sufficient to determine whether the statutory scheme is confusing to ordinary people such that they cannot appreciate what conduct is prohibited. Thus, the State's conclusory statement that fundamental error is not clear form the record is unsupported.

III. The Magistrate Court Erred In Its Application Of Idaho Code § 36-1304(b)

Kerr's argument here is not complicated. Kerr asserts that the magistrate court misapplied the language of the statute (in large part because language of the statute is not clear) to the circumstances at issue. Significantly, the State avoids citing the language of the magistrate court which illustrates not just the error, but the difficulty the magistrate court had in applying a flawed statute. A review of the magistrate court's ruling illustrates the real difficulty that the lower court had in applying the language of Idaho Code §§ 36-1404(b) and 36-202(i) to Kerr's circumstances and why a ruling in Kerr's favor is in the interest of justice and benefits all Idahoans.

As explained in the opening brief, the magistrate judge erred by concluding that the initial act of shooting the elk was not, by itself, a separate act of taking, that but rather "was in

the very act of trespassing that Kerr was able to accomplish the [first] taking – that is, except for his trespass, Kerr never possessed the elk." Again, this application is problematic and erroneous because it is clearly inconsistent with the plain language of Sections 36-1404(b) and 36-202(i) and ignores Title 36 taken as a whole. Idaho Code § 36-202(i) defines "take" as "hunt, pursue, catch, capture, shoot, fish, seine, trap, kill or possess or any attempt to do so." These broad definitions mean that Kerr's act of shooting and killing the elk was, unquestionably an act of taking. This cannot be ignored--although that is precisely what the State asks this Court to do.

The State's position is that it does not matter. The State argues that "the statute places no explicit or implicit limits of the times one may take an animal" and that "physical impossibility" does not matter. Kerr respectfully disagrees. The plain language of the statute makes what constitutes a "taking" a dispositive fact and a seminal issue. However, it is not a fact that can be selectively and arbitrarily applied.

As explained multiple times in the briefing, Idaho Code § 36-202(i) defines "take" as "hunt, pursue, catch, capture, shoot, fish, seine, trap, kill or possess or any attempt to do so" has to be applied to all of Kerr's acts. And, thus, Kerr's act of shooting and killing the elk before any trespass was, unquestionably, an act of "taking." Again, the State simply ignores the meaning of the word "take" as it applies to Kerr's prior acts and attempts to selectively apply what it means to take only when it is helpful to its argument--only to the trespass. Here, the statute provides as follows:

> 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….

See Idaho Code § 36-1304(b) (emphasis added). Here, it is incontrovertible that the elk was a lawfully taken before any unlawful activity.

Simply stated, the "Fish and Game" statutes taken as a whole, do not support the isolated reading and application decided upon by the magistrate court and asserted in the State's Respondent's Brief. Application of the statute has to apply to all of Kerr's acts--otherwise, the application is truly arbitrary and capricious.

Moreover, a review of the statutory language of Title 36 indicates that the legislature did not intend for the unlawful taking penalties to be read into the "trespass to retrieve" statute. Throughout Title 36, the legislature treated "unlawful taking" and "unlawful possession" much differently than "trespass to retrieve" and, accordingly, outlined specific penalties associated with those crimes. For example, the unlawful taking violation has detailed penalties associated with it, like possible felony conviction (Idaho Code § 36-1401(c)(3)), confiscation (Idaho Code § 36-1304(b)), and civil monetary penalties (Idaho Code § 36-1404(a)). The trespass to retrieve statute does not have these additional penalties and is outlined as a simple misdemeanor.

Thus, this additional evidence that if Idaho's legislature intended for trespass violations to have the same penalties as unlawful taking (*i.e.*, confiscation and mandatory civil penalty), it would have said so. However, the Legislature did outline specific penalties for other types of

trespassing violations. *See* Idaho Code § 36-1402(e) (imposing mandatory hunting and fishing license revocation for "[t]respassing in violation of warning signs or failing to depart real property of another after notification"). Accordingly, as explained in Kerr's opening brief, by expressly excluding trespass to retrieve violations from enhanced penalties associated with unlawful taking or possession and failing to detail the application of the confiscation statute to "trespass to retrieve" violations, the Idaho Legislature apparently intended or at least created the possibility to exclude "trespass to retrieve" as an "unlawful taking" or "unlawful possession" for the purpose of confiscation. *See State v. Schoger*, 148 Idaho 622, 629, 226 P.3d 1269, 1276 (2010) (stating the inclusion of one thing is the exclusion of another under the statutory construction principle of *inclusio unio est alterius*). And, in this case, this is significant because the State, as part of the plea deal, removed the taint of "illegal possession" when it struck the charge and removed all fines and penalties associated with "illegal possession." The State ignores this significant part of the procedural history.

In sum, the statutes at issue taken as a whole and as applied to the facts of Kerr's case do not support the isolated reading and application decided upon by the magistrate court and advocated by the State. Accordingly, Kerr asserts the magistrate court committed reversible error.

CONCLUSION

For the reasons set forth above and as more fully set forth in his Appellant's Brief, Kerr respectfully requests this Court reverse the magistrate court's order denying the State's request for an order of confiscation.

DATED this 23rd day of August, 2017.

STEWART TAYLOR & MORRIS PLLC

/s/ *Daniel W. Bower*
Daniel W. Bower
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 2017, I served two (2) true and correct copy of the foregoing APPEALLANT'S REPLY BRIEF by the method indicated below, and addressed to the following:

Kale D. Gans
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720

☒ U.S. Mail
☐ Hand Delivered
☐ Facsimile: (208) 382-7124
☒ Email: kale.gans@ag.idaho.gov

/s/ *Daniel W. Bower*
Daniel W. Bower
Attorneys for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

Kale D. Gans DEPUTY ATTORNEY GENERAL P.O. Box 83720 Boise, Idaho 83720-0010	☒ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: (208) 854-8074 Email: kale.gans@ag.idaho.gov
CLERK OF THE COURT Supreme Court Building P.O. Box 83720 Boise, ID 83720-2210	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: (208) 854-8074 Email: sctbriefs@idcourts.net

Dated and certified this 23rd day of August, 2017

/s/ Daniel W. Bower
Daniel W. Bower
Attorneys for Defendant-Appellant