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AT _____ O'clock ____ M
CLERK, DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,)
)
) *Plaintiff,*)
 vs.)
)
) **JOHN ALLISON HUCKABAY,**)
) **ROBERT LYNN CUSHMAN, SR.,**)
)
) *Defendant.*)
 _____)

Case No. **CRF 2015 4413 and
CRF 2015 11345**
**MEMORANDUM DECISION AND
ORDER ON DEFENDANT HUCKABAY'S
MOTION TO DISMISS**

Defendant JOHN ALLISON HUCKABAY's Motion to Dismiss is DENIED in part and GRANTED in part.
Jed Whitaker, Deputy Prosecuting Attorney, lawyer for the Plaintiff.
Douglas R. Dick and Stephen R. Matthews, Spokane, WA for Defendant Huckabay.

I. FACTUAL BACKGROUND.

This matter is before the Court on Defendant John Huckabay's Motion to Dismiss the Amended Information, filed October 5, 2015. The Amended Information charges Huckabay with Possession of a [sic] Unlawfully Taken Cow Moose in violation of Idaho Code §§ 36-1401(c)(3) and 36-1402(a)(2), and alleges as follows:

That the Defendant, JOHN A. HUCKABAY, on or about October 2, 2014, in the County of Kootenai, State of Idaho, did unlawfully and knowingly possess an untagged and/or closed season cow moose, all of which is contrary to the form, force and effect of the statute in such case made and provided against the peace and dignity of the People of the State of Idaho.

Amended Information, pp. 1-2. The State claims the alleged facts are as follows:

On October 2, 2014, David Butts and Lee Butts drove to the regional office of the Department of Fish and Game located on Kathleen Avenue in Coeur d'Alene, Kootenai County Idaho to report the taking of a big game animal (hereinafter "Moose"). Mr. and Mrs. Butts told officials at Fish and Game that as they left their cabin in the Mica Bay area, they heard a nearby shot. They witnessed a man who identified himself as John Huckabay (hereinafter "Huckabay") loading a dead cow moose into the back of his truck. Huckabay told the Butts that he had a moose tag and that the moose season was open.

Later that day, another witness, John Griffin (hereinafter "Griffen") informed Fish and Game that he had alerted Huckabay to the cow moose and that Huckabay told him he had a moose tag and the season was open. He said Huckabay called him later and told him he had gotten the moose.

* * *

The Moose carcass was later discovered in Robert Cushman's (hereinafter "Cushman's") shop where he runs a meat cutting business. Cushman identified the carcass as an ugly beef cow and told them his client brought it in. Cushman did not have a receipt however for the ugly beef cow. The carcass in Cushman's shop was later identified as a cow moose through DNA testing at the Wildlife Forensic Laboratory in Caldwell, Idaho.

State's Reply to Defendant's Motion to Dismiss, p. 2.

On September 10, 2015, the State of Idaho filed a Motion for Joinder in Huckabay's case as well as in *State of Idaho v. Robert L. Cushman, Sr.*, Kootenai County Case CRF 2015 11345. On October 6, 2015, this Court arraigned Huckabay, who pled "not guilty". At that October 6, 2015, hearing, the Court also heard argument on the State's Motion for Joinder, and at the conclusion of that argument, granted the State's Motion for Joinder. The Court scheduled both cases for a jury trial to begin on December 14, 2015, with a priority setting.

On November 3, 2015, Huckabay filed a Motion to Dismiss this matter. In support of this motion he filed a "Memorandum in Support of Defendant John Huckabay's Motion to Dismiss" and the "Affidavit of Douglas R. Dick in Support of Motion to Dismiss". Neither the Motion to Dismiss nor the Memorandum in Support of Defendant John Huckabay's Motion to Dismiss cite to a rule upon which Huckabay's motion is based. Based on the filings

provided, the Court has determined that the motion has been raised pursuant to Idaho Criminal Rule 12(b)(2). On December 3, 2015, the State of Idaho filed “State’s Reply to Defendant’s Motion to Dismiss”. On December 7, 2015, Huckabay filed his “Reply Memorandum in Support of Defendant John Huckabay’s Motion to Dismiss.”

Oral argument on the Motion to Dismiss was held on December 9, 2015, at the same time both Huckabay’s and Cushman’s cases were set for a pre-trial conference. At that December 9, 2015, hearing, counsel for Robert Cushman joined in Huckabay’s Motion to Dismiss. For the reasons set forth below, the Court finds that the unlawful possession of a moose is governed by Idaho Code § 36-1401(c)(3); however, the Court also finds the State has failed to allege facts supporting the requisite felony conduct of “unlawful possession”. The Court announced its ruling on the record at the conclusion of the December 9, 2015, hearing, but promised a written opinion to provide analysis supporting that decision no later than December 11, 2015. At the December 9, 2015, hearing, the Court also granted Cushman’s motion to continue the trial set for December 14, 2015, and re-scheduled the trial to begin February 14, 2016, again, with a priority setting.

II. STANDARD OF REVIEW.

Whether a charging document corresponds with the requirements of law is subject to free review on appeal. *State v. Jones*, 140 Idaho 755, 757, 101 P.3d 699, 701 (2004) (*citing State v. Robran*, 119 Idaho 285, 287, 805 P.2d 491, 493 (Ct. App. 1991)).

III. ANALYSIS.

An indictment, information, or complaint “filed by the prosecution is the jurisdictional instrument upon which a defendant stands trial.” *State v. Jones*, 140 Idaho 755, 757, 101 P.3d 699, 701 (2004) (*citing State v. Izzard*, 136 Idaho 124, 127, 29 P.3d 960, 963 (Ct.

App. 2001)). To survive a challenge, it must be legally sufficient in two ways: (1) it must establish due process during trial, and (2) it must impart jurisdiction on the court. *Id.*, at 758, 101 P.3d at 702. In this case, Huckabay is challenging the Amended Information for both due process and jurisdictional reasons. Each will be discussed in turn below.

A. Challenges to the Amended Information Based on Due Process

Huckabay claims the Amended Information should be dismissed because it only charges him with the unlawful possession of one animal, a cow moose, not a combination of animals. He argues that because of this inaccuracy, the State failed to allege a crime under Idaho Code § 36-1401(c)(3). This is a due process challenge the Amended Information because it attacks the means by which Huckabay allegedly committed the crime, not the territorial jurisdiction of the court or a code section of the Idaho Code.

A charging document must meet certain due process requirements to be adequate. *Jones*, 140 Idaho at 758, 101 P.3d at 702. It must sufficiently advise the defendant of the nature of the charge by being factually specific, “enable[ing] a person of common understanding to know what is intended and . . . shield[ing] against double jeopardy”. *Id.* “It must also clearly indicate the facts giving rise to the offense or the means by which the defendant committed the alleged crime.” *State v. Severson*, 147 Idaho 694, 709, 215 P.3d 414, 429 (2009) (*citing State v. McMahan*, 57 Idaho 240, 250, 65 P.2d 156, 159-60 (1937)).

A challenge based on due process is waived pursuant to Idaho Criminal Rule 12(b)(2) if it is not raised before the trial commences. Specifically, Idaho Criminal Rule 12(b)(2) states:

The following must be raised prior to trial: . . . (2) Defenses and objections based on defects in the complaint, indictment or information (other than it fails to show jurisdiction of the court or to charge an offense which objection

shall be noticed by the court at any time during the pendency of the proceedings)

I.C.R. 12(b)(2).

Since the challenge to due process was raised before trial, it is timely and will be considered by the Court.

1. The Plain Language of Idaho Code § 36-1401 Does Not Require an Unlawful Killing, Possessing, or Wasting More Than One Wildlife Species or More than One Animal.

Huckabay contends, “I.C. § 36-1401(c)(3) requires ‘a combination of number of species.’” Memorandum in Support of Defendant John Huckabay’s Motion to Dismiss, p.

2. Since the word “combination” is defined by the Merriam-Webster Dictionary as “an act of combining two or more things; a result or product of combining two or more things or people”, Huckabay alleges that to be charged with a felony under Idaho Code § 36-1401(c)(3), the State must allege he unlawfully possessed more than more animal or species. *Id.*

In response, the State maintains pursuant to Idaho Code § 73-114, “combination of number and species should be construed as being in the singular.” State’s Reply to Defendant’s Motion to Dismiss, p. 3. The State argues that the following language from Idaho Code § 73-114, “the singular number includes the plural and the plural the singular”, coupled with reading the language of Idaho Code § 36-1401(c)(3) in its entirety, the unlawful possession of a single moose is a felony. *Id.* at pp. 3, 4 (quoting I.C. § 73-114).

Idaho Code § 36-1401(c)(3) provides:

(c) Felonies. Any person who pleads guilty to, is found guilty or is convicted of a violation of the following offenses shall be guilty of a felony:

3. Unlawfully killing, possessing or wasting of any combination of numbers or species of wildlife within a twelve (12) month period which

has a single or combined reimbursable damage assessment of more than one thousand dollars (\$1,000), as provided in section 36-1404, Idaho Code.

I.C. § 36-1401(c)(3). It is clear that the above provision, when read in its entirety and not picking apart the words individually, does not require a person to unlawfully kill, possess or waste more than one species of wildlife, but rather allows for a person to be charged with a felony by combining the reimbursable damage assessment by any number of animals or any combination of species of wildlife to get to an aggregate damage assessment of more than one thousand dollars (\$1,000). For example, a deer has a statutory reimbursement value at \$400.00. I.C. § 36-1404(a)(3). If a person unlawfully kills three deer during a twelve month period, that person could be charged with a felony, rather than three separate misdemeanors. A different example would be an elk, with a reimbursement value of \$750.00. If a person unlawfully kills one deer and one elk during a twelve month period, they could be charged with a felony. While the statute allows for the combination of a number of species or a number of animals of the same species to get to a reimbursable damage assessment of more than one thousand dollars, multiple species or multiple animals is not required if, as with a moose, the reimbursable damage assessment is more than one thousand dollars by one animal alone. A moose is valued at \$1,500.00. I.C. § 36-1404(a)(2). The alleged fact that Huckabay unlawfully possessed only one cow moose is sufficient for the State of Idaho to charge him with a felony of unlawful possession under Idaho Code § 36-1401(c)(3).

It is also clear from the limited case law on this code section that the unlawful killing, possessing or wasting of a single animal is a violation of Idaho Code § 36-1401(c)(3). See *State v. Casano*, 140 Idaho 461, 95 P.3d 79 (Ct. App. 2004); *State v. Hughes*, No. 41365, 2014 WL 5485827 (Idaho Ct. App. Oct. 31, 2014). In *State v. Casano*, the defendant shot

and killed one white-tailed deer “after dark with the aid of a spot light[;] removed the head and antlers, along with other body parts, but left an edible portion of the deer at the site of the killing” *Casano*, 140 Idaho at 462-63, 95 P.3d at 80-81. He was charged with two felony counts, flagrant killing or possession of one trophy deer and flagrant wasting of one trophy deer. *Id.* at 463, 95 P.3d at 81. Both counts were for conduct against the same deer. On appeal, the Idaho Court of Appeals upheld his convictions under Idaho Code §§ 36-202(h)(2), 36-1401(c)(3), 36-1402(e), and 36-1404(a), finding Casano failed to demonstrate that these statutes were void for vagueness. *Id.* at 465, 95 P.3d at 83. Moreover, Casano attempted to challenge whether the information could charge two felonies under the statute or whether only one charge was permissible. *Id.* The Idaho Court of Appeals found this argument untimely raised for the first time on appeal, and thus waived. *Id.* at 466, 95 P.3d at 84. However, at no time in this decision, or in any other case discussing Idaho Code § 36-1401(c) does the Idaho Court of Appeals find multiple wildlife species are a required element of the offense.

As such, the Court finds Idaho Code § 36-1401(c)(3) is clear and unambiguous, that the unlawful possession of one animal is a felony if the reimbursable damage assessment provided for in Idaho Code § 36-1404 exceeds one thousand dollars.

2. As Charged, Idaho Code § 36-1402(c) is Inapplicable.

Huckabay directs the Court to Idaho Code § 36-1402(c) which he claims sets forth the “misdemeanor penalty” to further support his argument that “possession of a single moose is a misdemeanor and possession of a combination of species or number of wildlife is a felony.” Memorandum in Support of Defendant John Huckabay’s Motion to Dismiss, p. 4. He contends “[i]f possession of a single moose was a felony, the legislature would not have set a misdemeanor penalty for that offense.” *Id.* As shown in the Court’s analysis of

Idaho Code § 36-1402(c), Huckabay's argument under Idaho Code § 36-1402(c) is misplaced.

The State contends Idaho Code § 36-1401(b), "sets forth the minimum 'fine' for the unlawful possession of a moose." State's Reply to Defendant's Motion to Dismiss, p. 5. The State is in error, as Idaho Code § 36-1402(b) sets forth minimum fine amounts, not Idaho Code § 36-1401(b). That error aside, the Court agrees with the State's argument that the relevant monetary amount (relevant in that it is what helps separates a felony from a misdemeanor) is found in Idaho Code § 36-1404(a), the reimbursable damage assessment, not the fine imposed by Idaho Code § 36-1401(b). *Id.*

Pursuant to Idaho Code § 36-1401(b), "Any person who pleads guilty to, is found guilty or is convicted of a violation of the provisions of this title or rules or proclamations promulgated pursuant thereto, or orders of the commission, **except where an offense is expressly declared to be an infraction or felony**, shall be guilty of a misdemeanor." I.C. § 36-1401(b) (emphasis added). The legislature expressly declared that it is a felony for a person to **unlawfully possess** a species of wildlife with a single or combined reimbursable damage assessment of more than \$1,000.00 as provided by Idaho Code § 36-1404. I.C. § 36-1401(c)(3). Huckabay is charged with unlawfully possessing a moose. Pursuant to Idaho Code § 36-1404(a)(2), the reimbursable damage assessment for a moose is \$1,500.00 per animal killed, possessed or wasted. I.C. § 36-1404(a)(2). Thus, under the plain language of the statute, it is clear that the legislature intended for a person who unlawfully kills, possesses or wastes a moose to be charged with a felony.

As mentioned above, Huckabay relies on Idaho Code § 36-1402(c) to support his claim that taking a moose is a misdemeanor. Idaho Code § 36-1402(c) imposes a \$500.00 misdemeanor penalty for *illegally* taking, *illegally* possessing, or *illegally* wasting a moose.

While it is true that Idaho Code § 36-1402(c) sets forth a misdemeanor penalty pertaining to moose, that section is not applicable when a violation of Idaho Code § 36-1401(c)(3) is alleged. In Huckabay's case he is specifically charged with violating Idaho Code § 36-1401(c)(3) and is charged with unlawfully possessing a moose, not illegally possessing a moose. Both Huckabay's and the State's arguments interchange the term "unlawful possession" found in Idaho Code § 36-1401(c)(3) with "illegal possession" found in Idaho Code § 36-1402(b), further confusing the issue.

"Unlawful possession" is defined in Idaho Code § 36-502(b) and provides: "No person shall have in possession any wildlife or parts thereof protected by the provisions of this title and the taking or killing of which is unlawful." I.C. § 36-502(b). While that sentence is a grammatical train wreck, it is what the Idaho Legislature has given us, and it is still an understandable sentence. Under Idaho Code § 36-502(b), if you possess wildlife (or part thereof) which is protected under title 36 (and moose are protected), and that wildlife (or part thereof) was taken or killed unlawfully, then you are in "unlawful possession" of that wildlife or wildlife part. If the animal was taken or killed unlawfully and you are in possession of that animal, you have committed a felony under Idaho Code § 36-502(b). "Possession" is separately defined as "both actual and constructive possession, and any control of the object or objects referred to; provided that wildlife taken accidentally and in a manner not contrary to the provisions of this title shall not be deemed to be in possession while being immediately released live back to the wild." I.C. § 36-202(m).

Huckabay's argument in his motion to dismiss focuses solely on the number of animals, without considering the conduct of the accused. Unlawfully killing, possessing or wasting wildlife plus a reimbursable damage assessment of more than \$1,000.00 is a felony. If the conduct of the accused is something other than **unlawfully killing**,

possessing or wasting wildlife, Idaho Code § 36-1401(c)(3) would be inapplicable.

Likewise, if a person is accused of unlawfully killing, possessing or wasting wildlife but the reimbursable damage assessment of the animal or animals was less than \$1,000.00, Idaho Code § 36-1401(c)(3) would be inapplicable. If, for example, Huckabay was charged with unlawfully possessing an elk, he could not be charged under Idaho Code § 36-1401(c)(3). While his conduct would fall under Idaho Code § 36-1401(c)(3), since elk have a reimbursable damage assessment of \$750.00, which is less than \$1,000.00 felony threshold, the second requirement of Idaho Code § 36-1401(c)(3) would not be met. In that instance, he could be charged with a misdemeanor under Idaho Code § 36-1402(b). However, that is not the case. In the instant action, Huckabay is charged with the requisite conduct, unlawful possession, and the wildlife, a moose, has a reimbursable damage assessment of \$1,500.00, which is over the felony threshold. Thus, Idaho Code § 36-1401(c)(3) is the appropriate code section for the alleged facts of this case. Accordingly, Idaho Code § 36-1402(c) is inapplicable to the alleged facts of this case.

3. Rule of Lenity.

Huckabay contends that if the Court finds Idaho Code § 36-1401 ambiguous, the rule of lenity would apply and the statute should be construed in favor of the defendant. Memorandum in Support of Defendant John Huckabay's Motion to Dismiss, p. 5.

As stated above, under the plain language of Idaho Code § 36-1401(c)(3), the unlawful possession of a moose (wildlife with a reimbursable damage assessment value of more than \$1000) is a felony, not a misdemeanor, as specifically declared by the Idaho legislature. Since Idaho Code § 36-1401(c)(3) is clear and unambiguous, the rule of lenity does not apply. See *State v. Leslie*, 146 Idaho 390, 392, 195 P.3d 749, 751 (Ct. App. 2008).

4. As the Court Finds Idaho Code § 36-1401(c)(3) is Unambiguous, it is Inappropriate for the Court to Trace its Legislative History.

Huckabay further argues that if the Court finds Idaho Code § 36-1401(c)(3) to be ambiguous, it should look to the legislative history to ascertain the legislative intent.

Memorandum in Support of Defendant John Huckabay's Motion to Dismiss, p. 5. If the Court does so, Huckabay claims the legislative history would show that multiple animals are required for a person to be charged with a felony under Idaho Code § 36-1401(c)(3). *Id.*, pp. 5-9.

In response, the State contends that the legislative history supports its position, that the unlawful killing or possession of a moose, which has a reimbursable value of more than \$1,000.00, is a felony. State's Reply to Defendant's Motion to Dismiss, pp. 7-10.

Interpretation of a statute is a question of law for the court to decide. *See Twin Falls v. Cities of Twin Falls & Filer*, 143 Idaho 398, 399, 146 P.3d 664, 665 (2006). It must begin with an examination of the literal words, "giving effect to plain, usual, and ordinary meaning" without engaging in any statutory construction and following it as written. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) (citing *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003)). If a statute is unambiguous, the court follows it as written. *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 139 Idaho 65, 69, 72 P.3d 905, 909 (2003) (citing *Hansen v. State Farm Mut. Auto. Ins. Co.*, 112 Idaho 663, 735 P.2d 974 (1987)). "A statute is ambiguous where the language is capable of more than one reasonable construction. If the statute is ambiguous, then it must be construed to mean what the legislature intended for it to mean." *Id.* (internal citations omitted). However, "[i]f the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory

interpretation.” *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003) (citing *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000)).

As the Court has found Idaho Code § 36-1401(c)(3) to be clear and unambiguous, it must follow it as written and avoid tracing the history of the statute.

5. The Amended Information is Jurisdictionally Defective Because it Fails to Charge a Required Element of the Felony Offense.

Huckabay maintains the Amended Information fails to charge an offense because “to plead unlawful possession an information must state that the wildlife was both possessed and unlawfully taken or killed. Memorandum in Support of Defendant John Huckabay’s Motion to Dismiss, p. 5. Since the Amended Information does not allege an unlawful taking or killing, Huckabay claims it lacks the “elements necessary to charge unlawful possession as either a misdemeanor or a felony...” *Id.*, p. 12. As discussed below, the Court agrees with Huckabay’s argument that the State has not at the present time alleged a felony, but the Court finds at present the State has alleged a misdemeanor.

The State alleges the charging language is sufficient because it “advises Defendant that the moose he had was unlawfully possessed because it was obtained without a tag and/or during closed season.” State’s Reply to Defendant’s Motion to Dismiss, p. 10.

A charging document “must do more than simply state the offense charged. It must also clearly indicate the facts giving rise to the offense or the means by which the defendant committed the alleged crime.” *State v. Severson*, 147 Idaho 694, 709, 215 P.3d 414, 429 (2009) (internal citations omitted). Pursuant to Idaho Criminal Rule 7(e), “[t]he court may permit a complaint, an information or indictment to be amended at any time before the prosecution rests if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.” I.C.R. 7(e). “Factors relevant to determining whether the defendant was prejudiced include whether the amendment

alleging the additional facts took the defendant by surprise, impaired the defendant's ability to adequately prepare his defense, necessitated extensive further preparation by the defendant, or subjected him to double jeopardy. *Severson*, 147 Idaho at 709, 215 P.3d at 429 (citing *State v. Banks*, 113 Idaho 54, 58-60, 740 P.2d 1039, 1043-45 (Ct. App.1987)).

In *State v. Byington*, a grand jury indictment charged the defendant with felony injury to child under Idaho Code § 18-1501, however, it failed to allege that Byington had care or custody of the victim child at the time of the offense. *Byington*, 135 Idaho at 623, 21 P.3d at 945. Prior to entering her guilty plea, Byington moved to dismiss the charging document filed against her, arguing among other things, that it was defective for failing to state an offense. *Id.* at 622, 21 P.3d at 944. Upon learning this, the State did not move to amend the indictment to cure the defect. *Id.* at 624, 21 P.3d at 946. On appeal, the state asserted Byington was not prejudiced by the indictment because she was aware that she had care or custody of the child despite it not being specifically alleged in the charging document. *Id.* at 623, 21 P.3d at 945. The Court of Appeals ultimately held that the indictment was jurisdictionally defective because it did not include the allegation that the defendant had the care or custody of the child victim. *Id.* at 623–24, 21 P.3d at 945–46. It stated: “an indictment is jurisdictionally defective ‘when alleged facts are not made criminal by statute, or where there is a failure to state facts essential to establish the offense charged.’” *Id.* at 643, 21 P.3d at 945 (citing *Hays v. State*, 113 Idaho 736, 739, 747 P.2d 758, 761 (Ct. App. 1987)).

Here, the Amended Information charges Huckabay with Possession of a [sic] Unlawfully Taken Cow Moose in violation of Idaho Code §§ 36-1401(c)(3) and 36-1402(a)(2), and alleges as follows:

That the Defendant, JOHN A. HUCKABAY, on or about October 2, 2014, in the County of Kootenai, State of Idaho, did unlawfully and knowingly

possess an untagged and/or closed season cow moose, all of which is contrary to the form, force and effect of the statute in such case made and provided against the peace and dignity of the People of the State of Idaho.

Amended Information, pp. 1-2. The court finds the language of the Amended Information fails to allege conduct by Huckabay that amounts to “unlawful possession”.

The elements of Idaho Code § 36-1401(c)(3) are: 1) unlawfully killing, possessing or wasting; 2) a wildlife species or combination of wildlife species; 3) with a single or combined reimbursable damage assessment of more than \$1,000.00. I.C. § 36-1401(c)(3).

“Unlawful possession” is defined in Idaho Code § 36-502(b) and provides: “No person shall have in possession any wildlife or parts thereof protected by the provisions of this title **and the taking or killing of which is unlawful.**” I.C. § 36-502(b) (emphasis added).

While the Court has commented above on the grammatical deficiencies of that statute, it is still capable of being understood. That statute requires that if the animal was taken or killed unlawfully and you are in possession of that animal, you have committed a felony under Idaho Code § 36-502(b).

The State argues that “the charging document provides that the **possession of the moose was illegal** because it was not tagged and/or it was possessed out of season.”

State’s Reply to Defendant’s Motion to Dismiss, p. 12 (emphasis added). While the language “illegal possession” is not in the Amended Information, the Court finds that the conduct alleged does not rise to “unlawful possession”, but merely rises to “illegal possession”.

The State alleges that Huckabay possessed an untagged cow moose and/or possessed a closed season cow moose. Amended Information, p. 1. The Court will discuss each of these allegations in turn below.

Idaho Code § 36-502(a) governs the possession of wildlife. It provides, in pertinent part:

The possession . . . of any legally taken wildlife shall be lawful when the same is in the possession of or is being transported by the taker of said wild life and is accompanied by the appropriate licenses, tags, and/or permits attached and/or validated in the manner prescribed by the provisions of sections 36-409(d) and 36-410(a), Idaho Code.

I.C. § 36-502(a)(1). Nowhere in Title 36 is this conduct designated to be a felony if not complied with. Idaho Code 36-1401(b) specifically provides that “except where an offense is expressly declared to be an infraction or felony, [a defendant] shall be guilty of a misdemeanor.” Idaho Code § 36-1401(b). For possessing wildlife without a tag to be a felony, the legislature needed to specifically designate it as so. The Court has not been directed to any such provision. As stated above, it is a felony for a person to unlawfully possess a moose. For possession of a moose to be unlawful, the State must allege the defendant had in possession wildlife protected by Title 36, **“and the taking or killing of which is unlawful.”** I.C. § 36-502(b) (emphasis added). Alleging a person is in possession of a moose without a tag is not the same as alleging that they are in possession of a moose after an unlawful killing or unlawful taking. A taking is the means by which a person came into possession of the animal. Specifically, Idaho Code § 36-202(i) defines the term “take” to mean “hunt, pursue, catch capture, shoot, fish, seine, trap, kill, or possess or any attempt to do so.” At no point in that definition is a tag mentioned. While the term “possess” is included in the definition of “take”, it is illogical to read the definition of unlawful possession to be an unlawful taking by mere possession.

In the alternative, the State argues Huckabay unlawfully possessed the moose because the possession occurred during the closed season. Amended Information, p. 1.

Idaho Code § 36-1402 sets forth the penalties for violations of Title 36. Of importance is the following language found in subsection (e):

. . . Provided further, that the **magistrate** hearing the case shall forthwith revoke the hunting, fishing, or trapping privileges for a period of not less than one (1) year for any of the following offenses:

1. Taking or **possessing** upland game birds, migratory waterfowl, salmon, steelhead, sturgeon, or **any big game animal during closed season**.

I.C. § 36-1402(e)(1). A moose is a big game animal. See I.C. § 36-202(h)(5). Magistrates are assigned misdemeanor and quasi-criminal actions. I.C. § 1-2208(3)(a). If possessing big game during the closed season were a felony, the magistrate would not have jurisdiction over the offense. While it is true that there are big game that do not have a reimbursable damage assessment of more than \$1,000.00, such as deer and elk, the Court has been directed to no code section that says possessing big game with a reimbursable damage assessment of more than \$1,000.00 fits the definition of unlawful possession.

Alleging a person is in possession of a moose during closed season and/or without a tag is not the same as alleging that they are in possession of a moose after an unlawful killing or unlawful taking during closed season. It is the **unlawful** conduct that makes the possession a felony, rather than a misdemeanor. The State has failed to plead those heightened facts. As mentioned above, to allege a felony, for possession of a moose to be unlawful, the State must allege the defendant had in possession wildlife protected by Title 36, “**and the taking or killing of which is unlawful.**” I.C. § 36-502(b) (emphasis added).

In the Amended Information, the State does not allege any act by Huckabay, other than the unlawful possession. The problem is the State hasn't alleged any act by Huckabay as to how this particular moose assumed ambient air temperature. In its

briefing, but not in its Amended Information, the State alleges it has circumstantial evidence that it was Huckabay that caused the death of this moose, and the State has direct evidence that it was Huckabay that loaded this moose into the back of a truck. Those would be facts which would support an allegation of unlawful taking and unlawful killing.

Because the State does not allege Huckabay's conduct prior to his possession, we are left with the possibility that what is charged is illegal possession of a moose which met its demise by accident, disease or old age. The alleged facts that Huckabay's possession was without a tag and was outside of an open season are important, but lacking at present is the alleged Huckabay's alleged actions of unlawful killing and unlawful taking. Lacking such alleged actions of Huckabay, that State at present has alleged at best a misdemeanor by illegally taking or possessing under Idaho Code § 36-1402(c).

As such, the Court finds that the Amended Information is jurisdictionally defective for a felony, as the present language supports a misdemeanor, not a felony charge.

B. Challenges to the Amended Information Based on Subject Matter Jurisdiction.

Huckabay also alleges the Court lacks subject matter jurisdiction because the Amended Information is legally deficient. Memorandum in Support of Defendant John Huckabay's Motion to Dismiss, p. 10. He contends "[t]his court [sic] lacks jurisdiction because the amended information fails to allege facts constituting a violation of I.C. § 36-1401(c)(3) for failing to allege more than one animal possessed as argued above, and for failing to allege an unlawful taking or killing." *Id.* at pp. 10-11.

That is not a challenge to subject matter jurisdiction. A challenge based on jurisdiction may be raised at any time. *State v. Jones*, 140 Idaho 755, 758, 101 P.3d 699, 702 (2004). When the information, indictment, or complaint alleges an offense was

committed in the state of Idaho, the court is imparted with subject matter jurisdiction. I.C.R. 12(b)(2); *Jones*, 140 Idaho at 757–58, 101 P.3d at 701–02. A charging document will survive a jurisdictional challenge if it, “contains a statement of the territorial jurisdiction of the court and a citation to the applicable code section of the Idaho Code.” *State v. Quintero*, 141 Idaho 619, 622, 115 P.3d 710, 713 (2005) (*citing Jones*, 140 Idaho at 759, 101 P.3d at 703).

Here, the Amended Information meets all the requirements to impart jurisdiction on the Court. The violations of Idaho Code §§ 36-1401(c)(3) and 36-1404(a)(2) were alleged to have occurred in Kootenai County, State of Idaho. As such, the Court has subject matter jurisdiction over this case.

C. Void for Vagueness

Huckabay argues Idaho Code § 36-1401(c)(3) is vague because “[t]he uncertainty in the statute [] allows the prosecutor in one county to charge a felony while in another county the same conduct would be viewed as only constituting a misdemeanor.” Memorandum in Support of Defendant John Huckabay’s Motion to Dismiss, pp. 9-10.

A party challenging a statute on constitutional grounds bears the burden of establishing that the statute is unconstitutional. *State v. Korsen*, 138 Idaho 706, 711, 69 P.3d 126, 132 (2003). When a statute or ordinance is subjected to a constitutional challenge, there is a strong presumption of validity and courts are obligated to seek an interpretation that upholds the statute’s constitutionality. *State v. Hellickson*, 135 Idaho 742, 744, 24 P.3d 59, 61 (2001). “A statute should not be held void for uncertainty if any practical interpretation can be given it.” *Id.*

“The void for vagueness doctrine is an aspect of due process which requires that the meaning of criminal statutes be determinable.” *Id.* at 745, 24 P.3d at 62 (*citing State v.*

Cobb, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998)). It “requires that a statute defining criminal conduct be worded with sufficient clarity and definiteness to permit ordinary people to understand what conduct is prohibited and to prevent arbitrary and discriminatory enforcement.” *State v. Casano*, 140 Idaho 461, 464, 95 P.3d 79, 82 (Ct. App. 2004) (citing *Korsen*, 138 Idaho at 711, 69 P.3d at 131). “A statute may be challenged as unconstitutionally vague on its face or as applied to a defendant’s conduct. For a ‘facial vagueness’ challenge to be successful, ‘the complainant must demonstrate that the law is impermissibly vague in all of its applications.’” *Korsen*, 138 Idaho at 712, 69 P.3d at 132 (internal citations omitted).

While Huckabay does not specifically indicate whether his challenge is for facial vagueness or as applied to the defendant, based on his argument, it appears his argument goes to the former.

There is no discretion under Idaho Code § 36-1401(c)(3) to elect to prosecute a person for a misdemeanor rather than a felony. While provided above, for ease of reference, Idaho Code § 36-1401(c)(3) states:

(c) Felonies. Any person who pleads guilty to, is found guilty or is convicted of a violation of the following offenses **shall be guilty of a felony**:

3. Unlawfully killing, possessing or wasting of any combination of numbers or species of wildlife within a twelve (12) month period which has a single or combined reimbursable damage assessment of more than one thousand dollars (\$1,000), as provided in section 36-1404, Idaho Code.

I.C. § 36-1401(c)(3) (emphasis added). The “shall be” language requires a person who meets the requirements of section (c)(3) to be charged with a felony. There is no discretion to charge a person with a misdemeanor for a violation of Idaho Code § 36-1401(c)(3). If a person unlawfully killed, possessed, or wasted wildlife with a reimbursable

damage assessment provided for in Idaho Code § 36-1404 that exceeds one thousand dollars, he shall be guilty of a felony. There is no vagueness there. It is clear what conduct is prohibited and consequences for a violation.

Therefore, the Court finds that Idaho Code § 36-1401(c)(3) is not vague and is constitutional as written.

IV. CONCLUSION.

For the reasons set forth above, the Court grants the Motion to Dismiss in part and denies the Motion to Dismiss in part. The Court specifically finds that the Amended Information is jurisdictionally defective, as it fails to charge the defendant with felony conduct. The Amended Information does not cite to I.C. § 36-502(b) and does not have that statute's language, "and the taking or killing of which is unlawful." Pursuant to *Byington*, the State should be given an opportunity to cure the defect by amending its Amended Information prior to trial.

V. ORDER.

IT IS HEREBY ORDERED THAT JOHN ALLISON HUCKABAY's Motion to Dismiss is **GRANTED** in part (that the Amended Information is jurisdictionally defective, as it fails to charge the defendant with felony conduct) and **DENIED** as to all other aspects.

DATED this 11th day of December, 2015

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of December, 2015 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney (Huckabay) - Douglas R. Dick/Stephan R. Mathews
Defense Attorney (Cushman) – Chris Bugbee
Prosecuting Attorney – Jed Whitaker

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____
Deputy