HB

364

STATE OF ALASKA
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May, 1988

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Mary Van Nimwegen

House Judiciary:

4-26-88

Aleck CONSTANTINE, Appellant,

v.

STATE of Alaska, Appellee.

David BYAYUK, Appellant,

v.

STATE of Alaska, Appellee.

George KOKTELASH, Appellant,

v.

STATE of Alaska, Appellee.

Nos. A-1247, A-1409 and A-1414.

Court of Appeals of Alaska.

July 2, 1987.

Rehearing Denied July 31, 1987.

Fishermen who were found to be in violation of fisheries regulations appealed from separate judgments entered in the District Court, Third Judicial District, Naknek, John D. Mason and S.J. Buckalew, Jr., JJ., imposing fines in excess of $300 and requiring forfeiture of fish and fishing equipment. Upon consolidation of appeals, the Court of Appeals, Coats, J., held that fishermen could be fined maximum of $300 for noncriminal violation of fisheries regulations and could be required to forfeit fish obtained in violation of regulations.

Reversed and remanded for resentencing.

Bryner, C.J., concurred and filed opinion.

Singleton, J., dissented and filed opinion.

Fish ⇐14

Fishermen charged with noncriminal violations of fisheries regulations, under theory of strict liability, could be fined maximum of $300 for each violation and could be required to forfeit fish obtained in violation of regulations. AS 12.55.035(b)(5), 16.05.190, 16.05.195.

Lisa M. Fitzpatrick, Asst. Public Defender, and Dana Fabe, Public Defender, Anchorage, for appellant Constantine.

Barbara K. Brink, Asst. Public Defender, and Dana Fabe, Public Defender, Anchorage, for appellants Koktelash and Byayuk.

W.H. Hawley, Asst. Atty. Gen., Office of Sp. Prosecutions and Appeals, Anchorage, and Harold M. Brown, Juneau, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

COATS, Judge.

This case raises the question of what noncriminal penalties the court is authorized to impose for the violation of a regulation.[1] In *Beran v. State*, 705 P.2d 1280 (Alaska App.1985), we dealt with Fish and Game Regulation 5 AAC 39.002 which provides:

> *Liability for Violations.* Unless otherwise provided in 5 AAC 01-5 AAC 41 or in AS 16, a person who violates a provision of 5 AAC 01-5 AAC 41 is strictly liable for the offense, regardless of his intent.

We concluded that the Board of Fisheries, in passing this regulation, intended to au-

1. Aleck Constantine was found to be in violation of a regulation, based upon a no contest plea, for fishing in closed waters. 5 AAC 06.350(f). District Court Judge John D. Mason imposed a fine of $2,500, all suspended, and placed Constantine on probation for two years. Judge Mason ordered $6,797.60 worth of fish and 150 fathoms of gill net forfeited to the state.

David Byayuk was found to be in violation of a regulation, based upon a no contest plea, for fishing in closed waters. 5 AAC 06.350(f). Superior Court Judge S.J. Buckalew, Jr., imposed a fine of $5,000 with $3,000 suspended. The suspension was conditioned on no similar violations for one year. The fish on board the vessel, valued at $6,094.62, and three shackles of net were forfeited to the state.

George Koktelash was found to be in violation of a regulation, based upon his no contest plea, for fishing outside the Naknek subdistrict. 5 AAC 06.320(e). Judge Buckalew imposed a fine of $2,000, all suspended. The suspension was on the condition of no similar violations within one year. Judge Buckalew ordered the forfeiture of the gear and fish on board the vessel.

thorize the imposition of criminal penalties for fishing regulations even if the defendant had acted without negligence. *Beran*, 705 P.2d at 1284. However, we held that we could not find that the Board of Fisheries was authorized to criminalize violations which occurred without negligence where the legislature had not specifically given it that authority. *Id.* at 1284–85. We concluded that under these circumstances, in order for a court to impose criminal penalties for the violation of a fishing regulation, proof of at least a *mens rea* of negligence was necessary. *Id.* at 1291.

In *Beran*, we also concluded that the legislature did authorize the Board of Fisheries to make the breach of a regulation punishable by a noncriminal fine without proof of a culpable *mens rea*. *Id.* at 1283–84. However, we did not decide what noncriminal penalties could be imposed. *Id.* at 1284 n. 4. In this appeal, we are asked to determine what penalties the legislature intended to be available to sanction those found in violation of fish and game regulations where the state elects to proceed on a theory of strict liability.

The appellants point to the definition of a "violation" as it is defined in AS 11.81.-900(b)(56):

> "violation" is a noncriminal offense punishable only by a fine, but not by imprisonment or other penalty; conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime; a person charged with a violation is not entitled
>
> (A) to a trial by jury; or
>
> (B) to have a public defender or other counsel appointed at public expense to represent the person....

The appellants cite AS 12.55.035(b)(5) which sets a maximum fine of $300 for a violation and AS 12.85.010 which states that the provisions of Title 12 "apply to all criminal actions and proceedings in all courts except where specific provision is otherwise made...." They contend, therefore, that a $300 fine is the maximum sentence which may be imposed for a strict liability violation of fish and game regulations.

The state contends that it is a misconception to assume that AS 12.85.010 precludes reference to any penalty provision other than AS 12.55.035(b)(5) for fish and game violations under Title 16. The state urges us to apply the penalty sections, except those which provide for imprisonment, set forth in AS 16.05.720(a) and (c) and AS 16.05.195.[2] These penalties involve fines of

2. Alaska Statute 16.05.720 states in pertinent part:

> *Penalties.* (a) Except as modified by (c) of this section, a person who violates AS 16.05.-480–16.05.690 or the regulations of the department pertaining to commercial fisheries is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $5,000, or by imprisonment for not more than one year, or by both.
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> ....
>
> (c) A person who is convicted of commercial fishing in closed waters, commercial fishing during a closed period or season, or commercial fishing with unlawful gear including but not limited to nets, pots, tackle, or other devices designed or employed to take fish commercially, is guilty of a misdemeanor and in addition to the penalty imposed under (a) of this section is punishable by a fine of not less than the gross value to the fisherman of the fish found on the vessel or at the fishing site at the time of the violation. Upon a third conviction of a person for a violation under this subsection, and in addition to the forfeiture provision in AS 16.05.710, the fine shall be not less than three times the gross value to the fisherman of the fish found on the vessel or at the fishing site, or, if no fish are found on the vessel or at the fishing site, a fine of not more than $10,000.

Alaska Statute 16.05.195 states:

> *Forfeiture of equipment.* (a) Guns, traps, nets, fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear used in or in aid of a violation of this title, or regulation adopted under this title, and all fish and game or parts of fish and game or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title, or regulation adopted under it, may be forfeited to the state
>
> (1) upon conviction of the offender in a criminal proceeding of a violation of this title in a court of competent jurisdiction; or
>
> (2) upon judgment of a court of competent jurisdiction in a proceeding *in rem* that an item specified above was used in or in aid of a violation of this title or a regulation adopted under it.
>
> (b) Items specified in (a) of this section may be forfeited under this section regardless of whether they were seized before instituting the forfeiture action.
>
> (c) An action for forfeiture under this section may be joined with an alternative action for

up to $5,000 and the forfeiture of fish and gear.

After closely examining the question of what noncriminal sanctions might be appropriate for violations of fisheries regulations, we conclude that the legislature simply has not addressed this problem. We are reluctant to assume that the legislature intended to allow imposition of the maximum permissible noncriminal sanctions in the face of legislative silence. The cases before us involve the imposition of large fines and forfeiture of fish and gear in cases where there has been no proof that the defendants acted with negligence. In *Beran*, Chief Judge Bryner, in a concurring opinion, concluded that the due process clause of the Alaska Constitution, art. 1 § 7, precluded imposition of criminal sanctions for an offense where there had been no proof of a minimum *mens rea*. 705 P.2d at 1292. In my concurring opinion in *Beran*, I recognized that this due process issue raised a serious question, but found it unnecessary to resolve this issue under the facts of *Beran*.[3] *Id.* at 1293.

We consider the imposition of substantial penalties for the violation of an offense without proof of mental culpability to be a serious matter. We recognize that other states and the federal government have allowed the imposition of substantial sanctions, including imprisonment, without proof that an offense was committed with a culpable mental state. However, before the courts are authorized to impose these sanctions, in light of the due process implications under the Alaska Constitution, we believe that the legislature should specifically indicate that it is necessary to impose substantial penalties. The legislature should also establish the nature of these penalties, even if they can be properly denominated as noncriminal penalties.

We believe that it is sufficiently clear that the legislature has approved at least the imposition of a maximum fine of $300 for a noncriminal violation. AS 12.55.035(b)(5). We also believe that it is clear that the legislature intended to authorize the court to order the forfeiture of any fish or game obtained in violation of a regulation. We see no reason to allow a defendant, even if he or she acted without fault, to have a valid claim to fish or game obtained in violation of a regulation. We believe that AS 16.05.190 and AS 16.05.195 provide sufficient legislative authorization for this action. However, we are unwilling to go beyond this point without a clearer indication of legislative intent.

The sentences are REVERSED and the cases are REMANDED for resentencing consistent with this opinion.[4]

BRYNER, Chief Judge, concurring.

In order to avoid the possibility that the dissent might engender some degree of confusion, I think it appropriate to summarize my understanding of the limited scope and effect of our decision in *Beran v. State*, 705 P.2d 1280 (Alaska App.1985), and in the present case.

damages brought by the state to recover damages for the value of fish and game or parts of them or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title or a regulation adopted under it.

(d) It is no defense that the person who had the item specified in (a) of this section in possession at the time of its use and seizure has not been convicted or acquitted in a criminal proceeding resulting from or arising out of its use.

(e) Forfeiture may not be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased the item innocently and in good faith shall be on the purchaser.

(f) An item forfeited under this section shall be disposed of at the discretion of the department. Before the department disposes of an aircraft it shall consider transfer of ownership of the aircraft to the Alaska Wing, Civil Air Patrol.

3. In *Beran v. State*, 705 P.2d 1280 (Alaska 1985), the narrow holding of the case was that, unless specifically authorized by the legislature, criminal sanctions could not be imposed for the violation of a fishing regulation without proof of a *mens rea* of at least negligence.

4. Constantine claims that the trial court erred in ordering the forfeiture of all of the fish on board his vessel. He argues that the state failed to show that all the fish were fruits of the violation. Our decision to remand for resentencing makes it unnecessary for us to decide this issue.

In *Beran*, we held that, absent express legislative authorization, the Board of Fisheries was not empowered to create a strict liability offense punishable by criminal sanctions. We nonetheless concluded that the regulation challenged in that case could be enforced as a strict liability offense but only if punished exclusively by noncriminal penalties. We expressly left open the question of what penalties might be considered permissible. *Beran*, 705 P.2d at 1283–84 and n. 4.

Our decision today provides a partial answer to the question we left open in *Beran:* we hold only that, in the absence of more specific legislation, the challenged regulation, when enforced as a strict liability offense, is punishable under the provisions applicable to noncriminal violations under AS 12.55.035(b)(5).

We do not purport to restrict the legislature from adopting other, more stringent noncriminal penalty provisions. Nor do we restrict the state from invoking the full force of the sanctions already provided for under Title 16, by prosecuting violators for negligent, rather than innocent, acts. *See Reynolds v. State*, 655 P.2d 1313 (Alaska App.1982).

SINGLETON, Judge, dissenting.

These consolidated cases present a single issue: What penalties has the legislature prescribed for violations of commercial-fishing regulations?[1] It appears to me that the legislature has clearly and unambiguously manifested its intention that the only penalties provided for commercial-fishing violations are to be found in AS 16.05.-720(a) and (c). A contrary holding constitutes statutory repudiation, not statutory interpretation.[2]

Alaska Statutes 16.05.010–.950 constitute the Fish and Game Code. *See* AS 16.05.-950. Alaska Statute 16.05.720 is part of this code and was clearly intended by the legislature to provide the penalties for all commercial-fishing violations. *See Theodore v. State*, 407 P.2d 182 (Alaska 1965), *cert. denied*, 384 U.S. 951, 86 S.Ct. 1570, 16 L.Ed.2d 547 (1966). This is clear from the plain wording of AS 16.05.720, which provides:

> (a) Except as modified by (c) of this section, a person who violates AS 16.05.-480–16.05.690 [statutes regulating commercial fishing] or the regulations of the department pertaining to commercial fisheries is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $5,000, or by imprisonment for not more than one year, or by both.

By its terms, the statute applies to anyone who violates a commercial-fishing regulation. It makes no mention of *mens rea.* Reading the statute as the exclusive penalty provision for these violations is reinforced by AS 16.05.925, enacted in 1984, which provides in relevant part:

> A person who violates AS 16.05.920, or a regulation adopted under this chapter or AS 16.20, is guilty of a class A misdemeanor. *However, a person who violates a regulation adopted under this*

1. The majority has mischaracterized the question as "what *noncriminal* penalties the court is authorized to impose for the violation of a [commercial-fishing] regulation." *See supra* p. 2 (emphasis added). The mischaracterization comes from the majority's initial failure to recognize legislative supremacy in providing penalties for violations of law, and also from the majority's failure to recognize that AS 16.05.-720(a)–(c) were all enacted in 1959. *See* ch. 94, art. I § 23, art. III § 12 (1959). As I shall show, a fine in any amount was a "criminal penalty" at that time. *See* § 65–2–1 ACLA (1949) which provided:

> "Crime" defined. That a crime or public offense is an act or omission forbidden by law, and punishable, upon conviction, by either of the following punishments: First. Death; Second. Imprisonment; Third. Fine; Fourth. Removal from office; Fifth. Disqualification to hold and enjoy any office of honor, trust, or profit.
>
> This section was amended by ch. 132, § 2, SLA 1957 to abolish capital punishment, and was renumbered after codification without significant change as former AS 11.75.020. This section was repealed in 1978.

2. The extent to which seizure and forfeiture of gear is also available as a penalty for a violation of a commercial-fishing regulation is governed by AS 16.05.190 and AS 16.05.195. *See also* § 39–2–10 ACLA (1949), which governed "forfeitures" for violations of fishing regulations prior to statehood.

chapter for the regulation of commercial fisheries is subject to the penalties set out in AS 16.05.720. [Emphasis added.]

Compare AS 16.05.900 (a person who violates AS 16.05.870–.895 is guilty of a class A misdemeanor [and implicitly subject to the penalties prescribed in AS 12.55.035]).

The majority does not explain why it finds these statutes inapplicable to these consolidated cases. It does not contend that they are ambiguous. It appears to mistakenly conclude that because the legislature refers to a violation of a commercial-fishing regulation as a "misdemeanor," this somehow excludes strict-liability offenses and renders the described penalties inapplicable in the absence of a finding of *mens rea*.[3] This would seem to be the only explanation for the court ignoring the plain language of AS 16.05.720 and looking instead to AS 12.55.035. If this is the basis for the majority's action, its error comes from failing to recognize that the Fish and Game Code was enacted in 1959, long before the adoption of the Revised Criminal Code or AS 12.55.035.[4] Further, in 1959, any violation of law punishable by a fine was a crime. *See* § 65–2–1 ACLA (1949) (former AS 11.75.020). And, any crime that was not a felony was a misdemeanor. *See* former AS 11.75.030, which provided:

> Crimes are divided into felonies and misdemeanors. A felony is a crime which is or may be punishable by imprisonment for a period exceeding one year. Every other crime is a misdemeanor. [*See also*] § 65–2–2 ACLA (1949).

Consequently, there is no reason to believe that a prudent legislator, contemplating enactment of what would become AS 16.05.720, would have considered it inconsistent to treat a violation of a commercial-fishing regulation as a strict liability offense, and to term such a violation a misdemeanor carrying a penalty of up to one year imprisonment and a fine of up to $5,000. This conclusion is reinforced by the way fishing violations were being treated at the time these statutes were enacted. Prior to statehood, unlawful fishing in Alaska was regulated by federal law. *See* 48 U.S.C. § 222 (1952). *See also* § 39–2–10 ACLA (1949) (codifying federal law). The predecessor to AS 16.05.720 was 48 U.S.C. § 226 (1952) (§ 39–2–10 ACLA (1949)), which provided in relevant part:

> Any person, company, corporation or association violating any provisions of sections 221–228 or 230–241 [statutes regulating commercial fishing in the territory of Alaska] of this title, or of any regulation made under authority of said sections shall, upon conviction thereof be punished by a fine not exceeding $5,000 or imprisonment for a term not more than ninety days in the county jail or by both such fine and imprisonment....

The federal courts had consistently interpreted violations of the commercial-fishing regulations as "misdemeanors." *United States v. Doo-Noch-Keen*, 2 Alaska 624, 628 (D.Alaska 1905). *But see United States v. Alaska Packers' Ass'n and Babler*, 1 Alaska 217, 224 (D.Alaska 1901).[5]

3. It is difficult to respond to the majority opinion in the absence of any reasons for its conclusions beyond a hinted antipathy to strict liability. I have, therefore, assumed that references to "misdemeanors" in AS 16.05.720 explain the majority's decision.

4. And long before this court's decisions in *Beran v. State*, 705 P.2d 1280 (Alaska App.1985), and *Reynolds v. State*, 655 P.2d 1313 (Alaska App. 1982). Consequently, the concerns voiced in those decisions could not have influenced the legislature's choice of language.

5. In *United States v. Alaska Packers' Ass'n and Babler*, 1 Alaska 217 (D.Alaska 1901), the court considered a prosecution which was apparently brought under former §§ 180, 183 of the Alaska Penal Code, and concluded that a fish and game violation was a felony. It then concluded that criminal intent was a necessary element. *Id.* at 224. The court did not explain why it thought the offense was a felony. In later cases, it was argued that a provision in § 183 providing for "imprisonment at hard labor for a term not exceeding ninety days" made a fishing violation a "felony." Apparently, under federal law, imprisonment at hard labor was limited to penitentiaries, and imprisonment in penitentiaries was limited to felonies. *United States v. Doo-Noch-Keen*, 2 Alaska 624, 626 (D.Alaska 1905). In *Doo-Noch-Keen*, the court concluded that this principle of federal law did not apply to fishing violations, which it held were misdemeanors. In any event, the court concluded that, whether a felony or a misdemeanor, a fishing violation

The courts had just as consistently held violations to be strict-liability offenses. *Doo-Noch-Keen*, 2 Alaska at 628; *see also Rustad v. United States*, 258 F.2d 563, 565–67 (9th Cir.), *cert. denied*, 358 U.S. 898, 79 S.Ct. 222, 3 L.Ed.2d 149 (1958) (in prosecution for fishing in a closed area appellate court pointed out that sole issue submitted to jury was whether appellant's boat was fishing in a closed area; the court approved instructions informing jury that there was no need to prove intent and that the government need only prove an act in violation of the regulation).

In summary, a legislature in 1959, contemplating the enactment of legislation providing for penalties for fishing violations, would not have seen any inconsistency in calling a violation a misdemeanor and in imposing strict liability, since that was the accepted practice at the time. Nor would it have considered referring to the trial of such a case as a "criminal" proceeding, or referring to the penalty imposed as a "criminal" penalty inconsistent with strict liability. Consequently, the use of the term "misdemeanor" in AS 16.05.720, standing alone, cannot support a finding that the legislature intended that the penalties provided in that section would not apply in the absence of a finding of *mens rea*.

There is nothing in AS 12.55.015 or AS 12.55.035(a) which is inconsistent with looking to AS 16.05.720 as the exclusive source of penalties for violations of commercial-fishing regulations. Alaska Statute 12.55.015 indicates that a court may impose a fine on a person convicted of an offense, when authorized by law, and as provided in AS 12.55.035; AS 12.55.035(a) states that "[u]pon conviction of an offense, a defendant may be sentenced to pay a fine as authorized in this section or as otherwise authorized by law...." Alaska Statute 16.05.925 clearly establishes that penalties for commercial-fishing violations are to be found in AS 16.05.720, *i.e.*, are "otherwise authorized by law," and, by implication, are not to be found in AS 12.55.035. Consequently, AS 16.05.720 serves to take commercial-fishing violations out of AS 12.55.035.

Nor do the definitions in the Revised Criminal Code, which went into effect for the first time in 1980,[6] point to a different result. The introductory paragraphs to these definitions make it clear that they are intended only "for purposes of this title," or "as used in this title," *i.e.*, Title 11. *See, e.g.*, 11.81.900(a) & (b). Thus, they have no bearing on the proper interpretation to be given to the fish and game statutes in Title 16, enacted over twenty years earlier. More significantly, AS 11.81.600, which requires a culpable mental state unless an offense is specifically labeled a "violation," or "is designated as one of strict liability," is one of a series of statutes expressly made inapplicable outside of the Revised Criminal Code and therefore has no bearing on Title 16 offenses. *See, e.g.*, AS 11.81.640 ("AS 11.81.600–11.81.630 [general principles of criminal liability] apply only to this title").

The majority offers no reasons why AS 16.05.190–.195, governing forfeitures, are

was a "statutory crime" and not a common law crime and, therefore, no showing of criminal intent was required. *Id.* at 628. It appears clear that fishing violations were thereafter considered misdemeanors, not felonies. *United States v. Kono*, 4 Alaska 613, 621 (D.Alaska 1912).

6. *See, e.g.*, AS 11.81.900(b)(9) "crime" means an offense for which a sentence of imprisonment is authorized; a crime is either a felony or a misdemeanor; (b)(19) "felony" means a crime for which a sentence of imprisonment for a term of more than one year is authorized; (b)(31) "misdemeanor" means a crime for which a sentence of imprisonment for a term of more than one year may not be imposed; (b)(33) "offense" means conduct for which a sentence of imprisonment or a fine is authorized; an offense is either a crime or a violation; and, finally, (b)(56) "violation" is a noncriminal offense punishable only by a fine, but not by imprisonment or other penalty; conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime; a person charged with a violation is not entitled (A) to a trial by jury; or (B) to have a public defender or other counsel appointed at public expense to represent the person.

These definitions replaced those in former AS 11.75.020 and AS 11.75.030 (recodifying § 65–2–1 (ACLA 1949)). It was these now repealed statutes which were in force when AS 16.05.720 was first enacted.

inapplicable to these appellants. Alaska Statute 16.05.190 does not refer to a "misdemeanor" but simply requires a conviction of the offender. Again, looking at this language as it would have been interpreted in 1959, when the statute was enacted, anyone violating a commercial-fishing regulation was subject to conviction in a criminal proceeding if he or she was subject to a fine of any amount, including $300. The majority does not dispute the fact that forfeiture is an appropriate penalty for a violation of a commercial-fishing regulation. *See Graybill v. State*, 545 P.2d 629 (Alaska 1976) (forfeiture after conviction of commercial-fishing regulation can take place without recourse to separate civil *in rem* forfeiture proceeding). *See also F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980). There is nothing in Title 12 inconsistent with permitting forfeitures in this case. Alaska Statute 12.55.015(c) clearly permits forfeitures where authorized by law. Similarly, AS 16.05.190–.195 authorize forfeitures for violations of commercial-fishing regulations.

In conclusion, a fair reading of the applicable statutes clearly establishes that the penalties authorized in AS 16.05.720, and not the fines authorized in AS 12.55.035, were intended by the legislature as the exclusive source of penalties for violations of commercial-fishing regulations. There is nothing in Title 11, Title 12, or Title 16 limiting the availability of forfeiture or fines under $5,000 as a remedy for fishing violations.[7] I would therefore affirm the decisions of the district court.[8]

7. A pervasive theme underlying the majority opinion is a supposed Alaska Constitution limitation on legislative authority to impose strict liability for commercial-fishing violations. No such limitation exists! A proposed Alaska Constitution was debated by popularly elected delegates during the winter of 1955–56. The constitution was approved by the voters and the United States Congress, and took effect on January 2, 1959, when President Eisenhower signed the official statehood proclamation. *See* V. Fischer, *Alaska's Constitutional Convention* 3 (1975).

As Mr. Fischer, a delegate to the convention, points out:

> In drafting the declaration of rights, the committee and the convention were generally unwilling to let go of tradition. As a result, Article I of the Alaska Constitution includes standard provisions contained in other state constitutions and in the first ten amendments to the United States Constitution.... A few changes were made pertaining to then current problems in the area of government-individual relationships, but largely deliberations on this article [Article I Declaration of Rights] were more significant with respect to subject matter that was kept out of the constitution than the provisions that were included.

Id. at 70.

My independent review of the minutes of the convention bears out Mr. Fischer's conclusions. *See* 6 Proceedings of the Alaska Constitutional Convention (PACC) App. V at 71 (December 15, 1955). *See also* 2 PACC at 1446–50; 1446–49 (January 7, 1956). There certainly were specific areas in which the constitutional convention wished to provide greater protection to criminal defendants than was found in the Bill of Rights. But this was the exception, not the rule. Thus, the oft-repeated statement that the drafters of the Alaska Constitution intended to provide criminal defendants substantially greater protection than was then current under federal law would appear to be largely judicial myth without a basis in historical fact. *But see Breese v. Smith*, 501 P.2d 159, 167 n. 30 (Alaska 1972); *State v. Browder*, 486 P.2d 925, 936–37 (Alaska 1971); *Glasgow v. State*, 469 P.2d 682, 686 (Alaska 1970); *Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969).

It is not necessary to explore this general point further, however, because the legislature's right to establish strict liability for commercial-fishing violations seems especially constitutionally secure. Prior to statehood, Alaska law was federal law and the rights of its citizens were those rights established under the United States Constitution and those statutes implementing it and enacted by the United States Congress. *See* V. Fischer, *Alaska's Constitutional Convention* 69. Strict liability for violation of statutory, *i.e.*, noncommon law, offenses was firmly established in federal law at that time. *United States v. Dotterweich*, 320 U.S. 277, 284, 64 S.Ct. 134, 138, 88 L.Ed. 48 (1943); *United States v. Balint*, 258 U.S. 250, 252, 42 S.Ct. 301, 302, 66 L.Ed. 604 (1922). In fact, the first hint that strict liability in any circumstance might be unconstitutional came in *Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957). As we have seen, strict liability for commercial-fishing violations was firmly established in Alaska law at the time of the constitutional convention, *see Rustad v. United States*, 258 F.2d 563, 567 (9th Cir.), *cert. denied*, 358 U.S. 898, 79 S.Ct. 222, 3 L.Ed.2d 149 (1958); *Doo-Noch-Keen*, 2 Alaska at 628, and remains firmly established for commercial-fishing violations in federal law today. *See United States v. Ayo-Gonzalez*, 536 F.2d 652, 662 (5th Cir.1976), *cert. denied, Gonzalez v. United States*, 429 U.S. 1072, 97 S.Ct. 808, 50 L.Ed.2d 789 (1977). The constitutional convention was deeply concerned with the management of the state's fish and game and devoted a number of hours to the question. *See* V. Fischer, *Alaska's*

8. See note 8 on page 195.

Note 7—Continued

Constitutional Convention 134–37. There is nothing in that discussion, nor in the resulting constitution, critical of strict liability. Under the circumstances, there is simply no basis for concluding that a legislature establishing strict liability for commercial-fishing violations would contravene the state constitution.

In fact, the Alaska State Constitution may have expressly manifested an intent that commercial-fishing violations be strict liability offenses. Alaska Constitution Article VIII § 3 provides that "[w]henever occurring in their natural state, fish, wildlife and waters are reserved to the people for common use."

The committee proposing this provision explained its purpose in part, as follows:

> Game fish, wildlife, fisheries, and water are recognized as belonging to the state so long as in a natural state. These resources are subject to a private right *only when they have been acquired or utilized as provided by law.* For example, a private person has no right to buy and sell wild animals in their natural state, but once an animal is taken in compliance with law, it becomes the property of the taker, subject to use or disposition within the law.... [Emphasis supplied.]

6 PACC Appendix 5 proposal 8 at 75; proposal 8A at 98.

The legislature implemented Article VIII § 3 by enacting AS 16.05.920(a) which states:

> Unless permitted by this chapter or by a regulation adopted under this chapter, a person may not take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game or marine aquatic plants, or any part of fish, game or aquatic plants, or a nest or egg of fish or game.

The Alaska Supreme Court relied on this statute and particularly the fact that it was phrased in the negative to strike down a subsistence defense to violation of a hunting regulation. *See State v. Eluska*, 724 P.2d 514, 515 (Alaska 1986) (" 'unless permitted,' no one has a right to take or possess Alaska game"). The statute and the state constitutional provision strongly support the conclusion that commercial-fishing regulations were intended to be "strict liability" offenses, since no one could lawfully possess fish unless expressly authorized to do so by statute or regulation.

8. The majority holds that the legislature has established a maximum fine of $300 for commercial-fishing "violations." Ironically, the legislature enacted a number of penalty provisions in 1959 governing noncommercial fish and game violations in which no provision for imprisonment was made; thus, these provisions would qualify as "violations" under the Model Penal Code. In each case, the maximum fine exceeds $300. *See, e.g.*, AS 16.05.860 ($1,000 per day maximum fine); AS 16.10.030 (maximum $500 fine). If the legislature did not consider a maximum $300 fine sufficient to deter noncommercial-fishing violations in 1959, it is inconceivable that it would consider a maximum $300 fine sufficient to deter commercial-fishing violations in 1987. The state has argued, and the district court has found, that strict liability is necessary to enforce the fish and game laws. If this is so, the majority's decision will substantially undermine enforcement; a result which the legislature would unlikely have intended. Curiously, the majority does not even address this argument.

Neither *Beran* nor *Reynolds* supports the majority's decision. *Beran* and *Reynolds* depend primarily on a factual conclusion that strict liability supported by a penalty of imprisonment is not necessary to enforce the state's fishing regulations. *Beran*, 705 P.2d at 1290–91; *Reynolds*, 655 P.2d at 1316. Where strict liability is necessary for effective enforcement, it must be sustained. *See Nelson v. State*, 387 P.2d 933, 935 (Alaska 1964). In addition, *Beran* rested on the assumption that strict liability punishable by imprisonment was not in accordance with other provisions of law. 705 P.2d at 1288–90. No similar showing could be made regarding fines and forfeitures. In fact, the Alaska Supreme Court has specifically held that fines and forfeitures, which do not depend on the defendant's degree of culpability, are not even "criminal penalties," as the majority apparently understands that term. *Resek v. State*, 706 P.2d 288, 291–93 (Alaska 1985). The court analogized forfeitures to fines and reasoned: "the forfeiture law does not attempt to tailor the amount of loss suffered through a forfeiture to the degree of culpability to fit the 'punishment' to the crime. The forfeiture penalty may be high for some, and negligible or non-existent for others who are as deserving or even more deserving of criminal punishment." *Id.* at 292.

Alaska Statute 16.05.720(a) establishes maximum fines but establishes no minimum. Nor does it set out standards for determining what fines would be appropriate in individual cases. Thus, by default, we must look to AS 12.55.035(a) for this limited purpose. This section makes it clear that "[i]n determining the amount and method of payment of a fine, the court shall take into account the financial resource of the defendant and the nature of the burden its payment will impose. No defendant may be imprisoned solely because of inability to pay a fine." Thus any fine imposed under this section will depend upon a defendant's ability to pay and not on his or her culpability. *See Karr v. State*, 686 P.2d 1192 (Alaska 1984) (interpreting similar language in AS 12.55.045 regarding restitution). It follows that such fines are not criminal penalties. *Resek*, 706 P.2d at 292. Thus, none of the reasons advanced in *Beran* support the majority's decision in this case.

ants have challenged the propriety of the grand jury's substantive decision to issue indictments solely on the ground that some members of the grand jury had not received the required oaths. The defendants have not alleged or shown that the grand jury's failure to keep a contemporaneous voting record might have resulted in any prejudice, except to the extent that it precluded an accurate determination of the number of sworn grand jurors who voted for an indictment in each case.

Since our holding that unsworn alternate jurors were *de facto* grand jury members obviates the need to determine the number of sworn jurors voting in individual cases, and since no other showing of potential prejudice has been made, we find that any error in the recording of grand jury votes does not warrant dismissal in these cases. In reaching this conclusion, we find the following language from Criminal Rule 7(c) to be particularly relevant:

> No indictment is insufficient, nor can the trial, judgment or other proceedings thereon be affected by reason of a defect or imperfection in matter of form in the indictment, which does not tend to prejudice the substantial rights of the defendant.

The record in this case does not support a conclusion that the grand jury's failure to keep an accurate record of its votes resulted in prejudice to any substantial right of the defendants.

The orders of dismissal entered by the superior court are REVERSED.

Antonin BERAN, Appellant,

v.

STATE of Alaska, Appellee.

Gary CARLOS, Appellant,

v.

STATE of Alaska, Appellee.

Peter MOST, Appellant,

v.

STATE of Alaska, Appellee.

Williard PARK, Appellant,

v.

STATE of Alaska, Appellee.

Ralph BORS, Petitioner,

v.

STATE of Alaska, Respondent.

Elizabeth IANI and David Iani, Petitioners,

v.

STATE of Alaska, Respondent.

John JENSEN, Kurt Kvernick, Dennis O'Neill, and Larry Hendricks, Petitioners,

v.

STATE of Alaska, Respondent.

Paul MORENO and Paul Zackar, Petitioners,

v.

STATE of Alaska, Respondent.

Sam WHITTEN, Robert H. Blake, and Mark I. Hutton, Petitioners,

v.

STATE of Alaska, Respondent.

Nos. A-535, A-679, A-629, A-630, A-668, A-652, A-638, A-658 and A-727.

Court of Appeals of Alaska.

Sept. 6, 1985.

Appeals from judgments of the District Court, Third Judicial District, at Cor-

dova and Dillingham, before John Boshard, III and Geoffrey T. Comfort, JJ., adjudicating defendants guilty of violating a fishing regulation were consolidated for hearing with petitions for review of pretrial determinations of the District Court, Third Judicial District, at Naknek, before Victor D. Carlson and J. Justin Ripley, JJ., invalidating fishing regulation in question. The Court of Appeals, Singleton, J., held that: (1) the Board of Fisheries is authorized to make the breach of a regulation a violation and a strict liability offense which would be punishable by a noncriminal fine, but unless mens rea is required, is not authorized to make the breach of a regulation a crime which would be punishable by imprisonment; (2) a finding of negligence is a predicate to a sentence of imprisonment when a higher degree of mens rea is not specified in the regulation; (3) regulation may not be adopted by the Board if a violation would subject the violator to the statutory penalty of imprisonment in the absence of a finding of mens rea; and (4) regulation making it a violation to have some length of net in the water after the closing of the fishery, notwithstanding the mechanical problems encountered while hauling in the net, is valid to the extent that it governs violations, but is invalid to the extent that it governs crimes.

Remanded.

Bryner, C.J., and Coats, J., concurred and filed concurring opinions.

1. Fish ⇐13(1), 14
Game ⇐7, 8

The Board of Fisheries is authorized to make the breach of a fish and game regulation a violation and a strict liability offense which would be punishable by a noncriminal fine, but unless a higher degree of mens rea is specified, is not authorized to make the breach of the regulation a crime which would be punishable by imprisonment. AS 11.81.250(a)(6), 11.81.900(b)(9), 22.10.030(d).

2. Fish ⇐14
Game ⇐8

Finding of negligence is a predicate to a sentence of imprisonment for violation of a fish and game regulation the breach of which is a crime when a higher degree of mens rea is not specified in the regulation. AS 11.81.250(a)(6), 11.81.900(b)(9), 22.10.030(d).

3. Fish ⇐14
Game ⇐8

Fish and game regulation may not be adopted by the Board of Fisheries if a violation of the regulation would subject the violator to the statutory penalty of imprisonment in the absence of a finding of mens rea. AS 11.81.250(a)(6), 11.81.900(b)(9), 22.10.030(d).

4. Fish ⇐14
Game ⇐8

Imprisonment is not a permissible penalty for a violation of a fish and game regulation based upon strict liability in the absence of express legislative authorization, but is a permissible penalty for violation of a regulation based upon a finding of negligence or some higher level of mens rea without further legislative authorization. AS 11.81.250(a)(6), 11.81.900(b)(9), 22.10.030(d).

5. Fish ⇐13(2)

Regulation of the Board of Fisheries making it a violation to have some length of net in the water after the closing of a fishery, notwithstanding mechanical problems encountered while hauling in the net, is valid to the extent that it governs violations, but is invalid to the extent that it governs crimes. AS 11.81.250(a)(6), 11.81.900(b)(9), 22.10.030(d).

6. Administrative Law and Procedure ⇐390

The effect of validating a statute on constitutional grounds is sufficiently similar to the effect of invalidating a regulation for lack of statutory authorization that similar rules should apply.

7. Fish ⇐13(1), 14
Game ⇐7, 8

Regulation of the Board of Fisheries making a person strictly liable for violation of a fishing and game regulation regardless of intent must be viewed as separating each affected regulation into two offenses, a crime requiring a negligence mens rea punishable by possible imprisonment, and a violation satisfied by strict liability but only punishable by a noncriminal fine or possible forfeiture. AS 11.81.250(a)(6), 11.81.900(b)(9), 22.10.030(d).

8. Constitutional Law ⇐278(6)

A prosecutor must ensure that all those accused of fishing regulation violations receive due process and, to that extent, must give notice in advance of trial whether he will be seeking imprisonment as a penalty, in absence of which court should treat the matter as a prosecution of a violation and on conviction impose appropriate noncriminal sanctions. AS 11.81.250(a)(6), 11.81.900(b)(9), 22.10.030(d); U.S. C.A. Const.Amend. 14.

9. Fish ⇐15

If the prosecutor seeks imprisonment as a penalty for the breach of a fishing regulation, the jury must be instructed on the applicable mens rea. AS 11.81.250(a)(6), 11.81.900(b)(9), 22.10.030(d).

10. Fish ⇐15

The judgment of conviction for the breach of a fishing regulation should indicate whether the conviction is for a crime or only for a violation. AS 11.81.250(a)(6), 11.81.900(b)(9), 22.10.030(d).

11. Administrative Law and Procedure ⇐385

A determination whether a regulation is authorized by statute requires a consideration of the scope of authority conferred by the authorizing statute, the extent to which the regulation is in accordance with standards prescribed by other provisions of law, the extent to which the regulation is consistent with the authorizing statute, and the extent to which the regulation is reasonably necessary to carry out purpose of the authorizing statute. AS 44.62.020, 44.62.030.

12. Administrative Law and Procedure ⇐386

In the absence of express statutory authorization, violation of administrative regulation is not a strict liability offense if the violation is punishable by imprisonment because in the absence of express legislative authorization strict liability offenses are not in accordance with standards prescribed by other provisions of law. AS 44.62.020, 44.62.030.

13. Administrative Law and Procedure ⇐329

To the extent a regulation calls for a possible penalty of criminal imprisonment, strict liability is not reasonably necessary to carry out the purpose of the statutes authorizing the agency to adopt it. AS 44.62.020, 44.62.030.

14. Administrative Law and Procedure ⇐329

Imposing a prison sentence on someone convicted of violating an administrative regulation on the basis of strict liability fails two of the four tests for invalidating the validity of an administrative regulation. AS 44.62.020, 44.62.030.

15. Administrative Law and Procedure ⇐336

In the absence of express statutory authorization an administrative regulation based on strict liability and punishable by imprisonment is not "in accordance with other provisions of law" to which an administrative regulation must conform. AS 44.62.020.

See publication Words and Phrases for other judicial constructions and definitions.

16. Fish ⇐14

The state is free to seek conviction and a fine under a theory of strict liability for a violation of a fishing regulation, but if the state desires imposition of a criminal penalty, it must show a negligence mens rea. AS 11.81.250(a)(6), 11.81.900(b)(9), 22.10.030(d).

Marcia Vandercook, Anchorage, and William Bixby, Valdez, for Antonin Beran.

Frederick Torrisi and David B. Snyder, Dillingham, for Peter Most, Williard Park and Gary Carlos.

Frederick Torrisi and David B. Snyder, Dillingham for Ralph Bors.

Melvin M. Stephens, II, Hartig, Rhodes, Norman, Mahoney & Edwards, Kodiak, for David and Elizabeth Iani.

Jeffrey M. Feldman, Gilmore & Feldman, Anchorage, for John Jensen, Dennis O'Neill, Kurt Kvernik and Larry Hendricks.

Bridgette E. Siff, Asst. Public Defender, and Dana Fabe, Public Defender, Anchorage, for Paul Moreno and Paul Zackar.

Lewis F. Gordon, Anchorage, for Sam Whitten, Robert H. Blake, Mark I. Hutton.

W.H. Hawley, Asst. Atty. Gen., Anchorage, G. Scott Sobel, Asst. Dist. Atty., Russell S. Babcock, Asst. Dist. Atty., Victor C. Krumm, Anchorage, and Norman C. Gorsuch, Atty. Gen., Juneau, for the State of Alaska.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

SINGLETON, Judge.

After separate trials, Antonin Beran, Gary Carlos, Peter Most, and Williard Park were convicted of violating regulations adopted by the State Board of Fisheries. The offenses occurred after the effective date of Fish and Game Regulation 5 AAC 39.002 which provides:

> *Liability for Violations.* Unless otherwise provided in 5 AAC 01–5AAC 41 or in AS 16, a person who violates a provision of 5 AAC 01–5 AAC 41 is strictly liable for the offense, regardless of his intent.

In reliance on this regulation, the trial court in each case applied a strict liability standard.[1] Each of the four appellants was convicted on the basis that he was strictly liable for having some length of net in the water after the closing of the fishery, notwithstanding the fact of mechanical problems encountered while hauling in the net. They now appeal, contending that the legislature has not authorized the Board of Fisheries to make violations of its regulations strict liability offenses. They also argue that if the legislature had authorized the Board of Fisheries to adopt strict liability regulations the regulations are unconstitutional.[2]

Ralph Bors and the petitioners, charged with fishing violations, sought pretrial determinations from Judges Victor D. Carlson and J. Justin Ripley that 5 AAC 39.002 was invalid. Upon denial of their request, they petitioned for review raising essentially the same arguments as Beran.[3] Finding that the issues presented were of sufficient significance to warrant immediate resolution, we granted the petitions for review. We consolidated all of these cases with *Beran*. Appellate Rule 402(b)(2).

[1–3] Having carefully reviewed the Alaska statutes dealing with administrative crimes and having considered the parties' oral arguments and their briefs on the law, we conclude, first, that the legislature has

1. In *Beran*, the court refused to instruct the jury that *mens rea* (literally, a guilty mind) was an element of the offense. In each of the three other cases on appeal, the court denied a pretrial motion for an instruction that would require a jury to find (at a minimum) negligence in order to convict. That motion being denied, the three men consented to bench trials.

2. Beran also urges that this court declare 5 AAC 39.002 invalid because the regulation was adopted allegedly without satisfying the notice requirements of the Alaska Administrative Procedures Act. AS 44.62.200. As Beran did not make this argument at trial nor did he list the issue in his statement of points on appeal, we will not consider this issue on appeal.

3. Elizabeth and David Iani also argue that Judge Carlson abused his discretion in denying their motion for a change of venue from Naknek to Kodiak. AS 22.10.030(d). We decline to decide the venue issue at this juncture. If the Ianis are ultimately convicted, they may pursue this issue on appeal.

authorized the Board of Fisheries to make the breach of a regulation a "violation" and a strict-liability offense which would be punishable by a noncriminal fine.[4] Second, we are satisfied that the legislature has authorized the Board of Fisheries to constitute the breach of a regulation a crime[5] which would be punishable by imprisonment, but only if *mens rea* is required. Where a higher degree of *mens rea* is not specified in a regulation we will continue to infer a negligence requirement as a predicate to a sentence of imprisonment. *See Reynolds v. State*, 655 P.2d 1313 (Alaska App.1982). Third, we conclude that the legislature has not authorized the Board to adopt a regulation if a violation of the regulation would subject the violator to the statutory penalty of imprisonment in the absence of a finding of *mens rea*. We therefore need not consider the parties' constitutional arguments except to the extent that an understanding of the constitution helps us to determine the legislature's intent in authorizing agencies to adopt regulations whose violation subjects violators to civil and criminal penalties.

[4, 5] Applying these principles to 5 AAC 39.002, we accept the state's representation that the Board of Fisheries intended to make violations of the described fishing regulations strict liability offenses to the extent permitted by the legislature including, if authorized, imprisonment as a possible penalty. Under our reading of the relevant statutes, imprisonment is not a permissible penalty for a violation of a regulation based upon strict liability in the absence of express legislative authorization. However, imprisonment is a permissible penalty for violation of a regulation

4. We use the term "violation" as it is defined in AS 11.81.900(b)(56):

> "Violation" is a noncriminal offense punishable only by a fine, but not by imprisonment or other penalty; conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime; a person charged with a violation is not entitled
>
> (A) to a trial by jury; or
>
> (B) to have a public defender or other counsel appointed at public expense to represent him;

See also AS 11.81.250(a)(6) (violations are offenses "'which characteristically involve conduct inappropriate to an orderly society but do not denote criminality in their commission'"). Violations are thus quasi-criminal. *See State v. Clayton*, 584 P.2d 1111, 1113 n. 4 (Alaska 1978).

We use the term "noncriminal" fine to exclude fines "so heavy" that they indicate criminality. The distinction between "criminal" and "noncriminal" fines is made in a number of Alaska Supreme Court decisions which consider offenses for which a right to jury trial and the appointment of counsel attach. *See Alexander v. Anchorage*, 490 P.2d 910, 915 (Alaska 1971) (right to counsel) and *Baker v. Fairbanks*, 471 P.2d 386, 402 (Alaska 1970) (jury trial). Criminal prosecutions are defined to include those prosecutions whose penalty may include a period of imprisonment, the loss of a valuable license, or a fine so heavy that it indicates criminality. *Alexander*, 490 P.2d at 913. In these consolidated cases, the parties have concentrated on the significance of imprisonment as a penalty and have not considered the extent to which a substantial fine or the loss of a valuable license would require a finding of *mens rea*. We therefore do not resolve that issue. We note that the supreme court does not seem to consider either the size of a fine or the risk of loss of a license as significant in themselves but rather views them as indicative of the community's attitude toward the conduct in question. *Wood v. Superior Court*, 690 P.2d 1225, 1233 (Alaska 1984). In the supreme court's view, if an adverse judgment followed by the penalties under consideration serves to brand the defendant with the same stigma as a misdemeanor conviction, the penalties are criminal penalties and the defendant is entitled to the assistance of counsel and the right to a jury trial. *See Alaska Public Defender Agency v. Superior Court*, 584 P.2d 1106, 1110 (Alaska 1978) (discussing fines) and *Alaska Board of Fish and Game v. Loesche*, 537 P.2d 1122, 1125 (Alaska 1975) (discussing loss of a valuable license). The issue is discussed further in *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 537–38 (Alaska 1980) (Dimond, J., concurring, joined by Rabinowitz, C.J.) (approving $5,000 fine as a civil penalty but noting the importance of the collateral consequences of an adverse judgment in determining criminality). *See also Brown v. Multnomah County District Court*, 280 Or. 95, 570 P.2d 52 (1977) (first offense of driving while intoxicated is a crime rather than an infraction despite the absence of imprisonment as a sanction because of collateral consequences).

5. We use the term "crime" as defined in AS 11.81.900(b)(9): "'crime' means an offense for which a sentence of imprisonment is authorized; a crime is either a felony or a misdemeanor."

based upon a finding of negligence or some higher level of *mens rea* without further legislative authorization. The language of 5 AAC 39.002 providing for strict liability does not specifically address the question of penalties. In our view, the regulation is valid to the extent that it governs violations but invalid to the extent that it governs crimes.

The question then becomes whether we invalidate the regulatory scheme for adopting strict liability but failing to specify the penalties to which it attaches or whether we should enforce the regulatory scheme to the extent that it is within the legislative authorization. We conclude that the latter result is preferable. We reach this conclusion by analogy to the legislature's treatment of severability in AS 01.10.030 which provides:

> Any law heretofore or hereafter enacted by the Alaska legislature which lacks a severability clause shall be construed as though it contained the clause in the following language, "If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be effected [sic] thereby."

[6] Strictly speaking, this statute does not apply to the interpretation of regulations. Nevertheless, the effect of invalidating a statute on constitutional grounds is sufficiently similar to the effect of invalidating a regulation for lack of statutory authorization that similar rules should apply. In *Lynden Transport, Inc. v. State*, 532 P.2d 700, 711–15 (Alaska 1975), the supreme court interpreted this statute and determined that ultimately severance was a question of legislative intent. In attempting to fathom legislative intent the court adopted the following test:

> The test for determining the severability of a statute is twofold. A provision will not be deemed severable "unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall." [*Quoting Dorchy v. Kansas*, 264 U.S. 286, 290, 44 S.Ct. at 323, 324, 68 L.Ed.2d 686, 690 (1924).]

532 P.2d at 713.

[7–10] We conclude that the Board of Fisheries' intent was to make fishing regulations strict-liability offenses to the extent possible under law. Therefore we are confident that the Board would wish to preserve strict liability as a predicate for a noncriminal fine without surrendering the power to have those who negligently violate the regulations subject to imprisonment. Finally, we conclude that this intent can be given legal effect by viewing the Board's action in adopting 5 AAC 39.002 as in effect serving to separate each affected regulation into two offenses: a crime requiring a negligence *mens rea* punishable by possible imprisonment and a violation satisfied by strict liability but only punishable by a noncriminal fine or possible forfeiture.[6] In order to insure that all those accused of fishing regulation violations receive due process the prosecutor should give notice in advance of trial of whether he or she will be seeking possible imprisonment as a penalty. *Cf. Johansen v. State*, 491 P.2d 759, 766 n. 27 (Alaska 1971) (in order to insure that proper procedures will be followed in contempt proceedings, prosecutor must announce at the beginning of a proceeding whether he or she is seeking a criminal contempt conviction with possible imprisonment as a sanction or only a finding of civil contempt). If the prosecutor seeks imprisonment as a penalty for the

6. The parties have not directly addressed the question whether Alaska law permits forfeitures other than a forfeiture of contraband for a violation of strict liability offenses. *See State v. Rice*, 626 P.2d 104, 110–115 (Alaska 1981). *Cf. Resek v. State*, — P.2d —, Op. No. 2972 (Alaska, August 30, 1985) (discussing forfeitures as civil or criminal penalties). Beran is the only person before this court in this proceeding who was convicted of an offense and he was not sentenced to such a forfeiture. It is therefore not necessary for us to decide this question at this time. *See also* n. 4 (regarding fines).

breach of a fishing regulation, the jury must be instructed on the applicable *mens rea*. In the absence of such notification by the prosecutor on the record the court should treat the matter as a prosecution of a violation and on conviction only impose appropriate sanctions. The judgment of conviction should also indicate whether the conviction was for a crime or only for a violation.

Before setting out the reasons which lead us to this result a preliminary comment is in order. Since we find a legislative intent not to permit criminal offenses without *mens rea* in the absence of an express authorization to be determinative in this case, we need not address the legislature's authority to delegate to an agency the power to establish the elements of an offense including the *mens rea*. *See United States v. Grimaud*, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911); W. LaFave & A. Scott, *Criminal Law* § 14 at 101–105 (1972); 1 Davis, *Administrative Law* § 3.11 (2d ed. 1978); Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 Cornell L.Rev. 478 (1974); Abrahams and Snowden, *Separation of Powers and Administrative Crimes: A Study of Irreconcilables*, 1976 So.Ill.L.J. 1; Schwenk, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 42 Mich.L.Rev. 51 (1943). LaFave and Scott state the rules applicable to this question as follows:

> A legislature may delegate to an administrative agency the power to make rules, the violation of which is punishable as a crime by virtue of a penalty set by statute. But the legislature may not delegate the power to determine which administrative regulation shall carry criminal penalties, nor may it delegate the power of adjudication when criminal penalties are to be imposed. The legislature may make it a crime to violate an administrative order.

W. LaFave and A. Scott, *Criminal Law* § 14 at 101 (1972).

A fortiori we do not decide, in this case, whether the legislature may constitutionally give express authorization to an administrative agency to establish strict liability offenses which under applicable statutes are punishable by sentences of imprisonment. No statute provides such express authorization. Our inquiry is limited to deciding whether the legislature in fact intended to provide implicit authorization to agencies to adopt strict liability regulations which would be punishable by imprisonment.

We begin our analysis of the Board of Fisheries' statutory authorization to enact regulations by considering four statutes: AS 11.81.220, AS 16.05.251, AS 44.62.020 and AS 44.62.030.[7]

Alaska Statute 11.81.220 provides:

7. Also significant are AS 16.05.710 which provides:

> *License forfeiture.* Upon a first or second conviction of a person for a violation of AS 11.16.05.440–16.05.720 or a federal or state law or regulation for the protection of the commercial fish of the state, the court may, in addition to the penalty imposed by law, forfeit the commercial fishing license of the person for a period of one year. Upon a third conviction, the court may, in addition to the penalty imposed by law, forfeit the commercial fishing license for a period not the exceed three years.

and AS 16.05.720 which provides:

> *Penalties.* (a) Except as modified by (c) of this section, a person who violates AS 16.05.480–16.05.690 or the regulations of the department pertaining to commercial fisheries is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $5,000, or by imprisonment for not more than one year, or by both.
>
> (b) The court shall transmit the proceeds from all fines to the proper state officer for deposit to the general fund of the state.
>
> (c) A person who is convicted of commercial fishing in closed waters, commercial fishing during a closed period or season, or commercial fishing with unlawful gear including but not limited to nets, pots, tackle or other devices designed or employed to take fish commercially, is guilty of a misdemeanor and in addition to the penalty imposed under (a) of this section is punishable by a fine of not less than the gross value to the fisherman of the fish found on the vessel or at the fishing site at the time of the violation. Upon a third conviction of a person for a violation of this subsection, in addition to the forfeiture provision in AS 16.05.710, the fine shall be not less

No conduct constitutes an offense unless it is made an offense

(1) by this title;

(2) by a statute outside this title; or

(3) by a regulation authorized by and lawfully adopted under a statute.

AS 16.05.251(a)(4):

Regulations of the Board of Fisheries. (a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

(4) establishing the means and methods employed in the pursuit, capture and transport of fish;

Alaska Statute 44.62.020 provides:

Authority to adopt, administer, or enforce regulations. Except for the authority conferred upon the lieutenant governor ..., AS 44.62.010–44.62.320 do not confer authority upon or augment the authority of a state agency to adopt, administer, or enforce a regulation. To be effective, each regulation adopted must be within the scope of authority transfered and in accordance with standards prescribed by other provisions of law.

Alaska Statute 44.62.030 provides:

Consistency between regulation and statute. If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent with the statute and reasonably necessary to carry out the purposes of the statute.[8]

[11–14] In summary, in determining whether a regulation is authorized by statute we look to four things. First, the scope of authority conferred by the authorizing statute. Second, the extent to which the regulation is in accordance with "standards prescribed by other provisions of law." AS 44.62.020. Third, the extent to which the regulation is consistent with the authorizing statute, and fourth, the extent to which the regulation is reasonably necessary to carry out the purpose of the authorizing statute. Applying these standards, we conclude that in the absence of express statutory authorization, an administrative regulation is not a strict liability offense if the violation is punishable by imprisonment because in the absence of express legislative authorization strict liability offenses are not in accordance with "standards prescribed by other provisions of law." We further conclude that to the extent a regulation calls for a possible penalty of criminal imprisonment, strict liability is not reasonably necessary to carry out the purpose of the statutes authorizing the Board of Fisheries to adopt it. Thus imposing a prison sentence on someone convicted of violating an administrative regulation on the basis of strict liability fails two of the four tests for evaluating the validity of an

than three times the gross value to the fisherman of the fish found on the vessel or at the fishing site, or, if no fish are found on the vessel or at the fishing site, a fine of not more than $10,000.

While these statutes purport to provide penalties for any violation of an administrative regulation they do not expressly address the question of *mens rea* or indicate whether differing penalties require a differing level of *mens rea*. In order to decide that question we must consider the interplay of these statutes with other statutes discussed in the text of this decision. We therefore do not consider the general reference to anyone violating a regulation as being guilty of a misdemeanor to preclude us from holding that someone who negligently, recklessly or intentionally violates a regulation is guilty of a misdemeanor but one who violates the regulation without fault is at most guilty of a violation. Reading all statutes *in pari materia*, we conclude that the legislature intended to permit th Board of Fisheries to adopt regulations the breach of which would be subject to civil or criminal penalties depending on the presence or absence of *mens rea*. In addition, the legislature has established appropriate penalties for the conduct proscribed.

8. AS 44.62.020–30 are part of the Alaska Administrative Procedure Act. This act was derived from former California law. *Pan American Petroleum Co. v. Shell Oil Co.*, 455 P.2d 12, 21 n. 36 (Alaska 1969). We have not been cited to any cases or commentary from California helpful to an interpretation of these statutes.

administrative regulation. We will deal with these issues in turn.

ABSENT EXPRESS STATUTORY AUTHORIZATION, IS AN ADMINISTRATIVE REGULATION BASED ON STRICT LIABILITY AND PUNISHABLE BY IMPRISONMENT "IN ACCORDANCE WITH OTHER PROVISIONS OF LAW"?

AS 01.10.010 provides in relevant part:

> *Applicability of common law.* So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the legislature of the State of Alaska is the rule of decision in this state.

The common law consists of judicial pronouncements in situations not dealing with a constitutional question or statutory interpretation unless and until modified by the Alaska legislature. *See, e.g., Surina v. Buckalew*, 629 P.2d 969, 973 (Alaska 1981). Consequently, in determining what standards are prescribed "by other provisions of law" (AS 44.62.020) to which administrative regulations must conform we must look (1) to the state and federal constitutions, (2) to statutes enacted by the legislature and (3) to appellate court decisions declaring the common law to the extent that they are not inconsistent with the constitution or a legislative enactment. Examination of these sources leads us to conclude that, in the absence of express statutory authorization, administrative agencies do not have the power to establish strict liability crimes but do have the power to establish strict liability violations. Looking first to the constitution, the courts of this state have consistently recognized that strict liability offenses punishable by possible imprisonment are of questionable constitutionality. *See, e.g., State v. Rice*, 626 P.2d 104 (Alaska 1981); *Hentzner v. State*, 613 P.2d 821 (Alaska 1980); *Kimoktoak v. State*, 584 P.2d 25 (Alaska 1978); *Speidel v. State*, 460 P.2d 77 (Alaska 1969). *See also Reynolds v. State*, 655 P.2d 1313 (Alaska App.1982).[9] In *Kimoktoak* the court recognized the importance of the constitution in statutory interpretation when it said,

> Finally, we note that in *Campbell*, [*State v. Campbell*, 536 P.2d 105 (Alaska 1975)] we recognized the well-established rule of statutory construction that a court should if possible construe statutes so as to avoid the danger of unconstitutionality. We have alluded to this rule on many other occasions. It recognizes that the legislature, like the courts, is pledged to support the state and federal constitutions and that the courts, therefore, should presume that the legislature sought to act within constitutional limits. [Citation omitted.]

584 P.2d at 31.

Recognizing that strict liability crimes were constitutionally suspect, the *Kimoktoak* court construed an ambiguous statute to require *mens rea*. Closely related to the constitutional concerns expressed above is

9. We recognize that the Alaska Supreme Court has been more critical of strict liability than the courts of other jurisdictions. *see, e.g., State v. Buttrey*, 293 Or. 575, 651 P.2d 1075 (1982) (upholding constitutionality of statute which made driving without a license under some circumstances a class C felony absent any showing of *mens rea*. Buttrey received a five-year suspended imposition of sentence on condition, *inter alia*, that she serve one year's imprisonment.)

We would point out in this regard that the line between strict liability and negligence is a narrow one. We apply an objective standard in determining negligence. Many of the United States Supreme Court cases which appear to authorize strict-liability offenses may be establishing a negligence standard with the duty defined to require a very high degree of care. *See, e.g., United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971) (where defendant engages in a heavily regulated industry he must be presumed to be aware of the terms and regulations); *United States v. Freed*, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971) (no specific intent required for receiving and possessing a firearm not registered to him). The scope of the duty which the law imposes on those engaged in commercial fishing is not an issue presented in this appeal. We assume that upon timely request the trial court will instruct the jury regarding the specific duties which the law imposes upon the defendant in a given case.

the position of the common law explicated in case law. To a limited extent the common law objections and constitutional objections to strict liability crimes overlap. A number of common law authorities which recognize the constitutionality of strict liability crimes, nevertheless criticize adoption of strict liability crimes on common law grounds. *See, e.g.*, W. LaFave & A. Scott, *Criminal Law* § 31 at 218–223 (1972); Hall, *General Principles of Criminal Law*, 325–359 (2d ed. 1960); Mueller, *Mens Rea and the Law Without It*, 58 W.Va.L. Rev. 34 (1955). *But see* Wasserstrom, *Strict Liability in the Criminal Law*, 12 Stan.L.Rev. 731 (1960). LaFave & Scott summarize the arguments against strict liability as follows:

> Aside from the question of constitutionality, there is the question of wisdom in providing for strict-liability crimes. The reasons for having statutes imposing criminal liability without fault are those of expediency: in some areas of conduct it is difficult to obtain convictions if the prosecution must prove fault; so enforcement requires strict liability. If the conduct to be stamped out is harmful enough, or if the number of prosecutions to be expected is great enough, the legislature may thus wish to make the absence of fault no defense, in order to relieve the prosecution of the task of going into the matter.
>
> For the most part, the commentators have been critical of strict-liability crimes. "The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea*." [Footnote omitted.]

W. LaFave & A. Scott, *Criminal Law* § 31 at 222.

Finally, and most importantly, the legislature's treatment of strict liability in the revised criminal code strongly militates in favor of construing statutes authorizing agencies to enact regulations defining crimes to require express statutory authorization before permitting an administrative agency to attach the potential punishment of imprisonment to conviction of a strict liability offense. AS 11.81.600(b) provides:

> A person is not guilty of an offense unless he acts with a culpable mental state, except that no culpable mental state must be proved
>
> (1) if the description of the offense does not specify a culpable mental state and the offense is
>
> (A) a violation; or
>
> (B) designated as one of "strict liability"; or
>
> (2) if a legislative intent to dispense with the culpable mental state requirement is present.

The legislature has exercised great care to insure that strict liability will not be inferred in interpreting statutes. It seems reasonable to rely upon that decision to preclude an inference of legislative authorization for administrative agencies to establish a strict liability offense except to the extent that that offense would be a "violation" and imprisonment unavailable as a sanction.[10]

10. The Revised Criminal Code is based upon the Model Penal Code (Approved Draft 1962), *Neitzel v. State*, 655 P.2d 325, 327 (Alaska App.1982). Consequently, recognition of what the legislature altered, modified or eliminated from the Model Penal Code is useful in determining legislative intent. *Id.* The Model Penal Code makes its culpability requirements applicable to offenses defined by statutes outside the Code. MPC § 2.05. The revised code does not. AS

[15] In summary, whether we look to the constitution, the common law or state statutes discussing the circumstances under which strict liability may be inferred, we are left with the conclusion that in the absence of express statutory authorization a regulation imposing strict liability but providing for punishment by possible imprisonment is not "in accordance with standards prescribed by other provisions of law." AS 44.62.020.

IS STRICT LIABILITY NECESSARY TO CARRY OUT THE PURPOSE OF THE STATUTES AUTHORIZING THE FISHERIES BOARD TO ADOPT REGULATIONS AND MAKE THEIR VIOLATIONS CRIMINAL?

In *Kelly v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971) the Alaska Supreme Court concluded:

> Thus, where an administrative regulation has been adopted in accordance with the procedures set forth in the Administrative Procedure Act, and it appears that the legislature has intended to commit to the agency discretion as to the particular matter that forms the subject of the regulation, we will review the regulation in the following manner: First, we will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, we will determine whether the regulation is reasonable and not arbitrary. This latter inquiry is proper in the review of any legislative enactment.

In *State v. Rice*, 626 P.2d 104, 110 (Alaska 1981) the court indicated that a hunting regulation establishing strict liability without regard to knowledge of legality would bear no reasonable relation to a legitimate regulatory purpose. If this is so, then strict liability would not be necessary to carry out the statutory authorization found in AS 16.05.251(a)(4). The state argues vigorously that this court should not question the wisdom of the policy determination of the Joint Boards of Fisheries and Game, that the strict liability standard is necessary for effective enforcement of fish & game regulations; *citing Kelly v. Zamarello*, and *Earth Resources Co. v. State Department of Revenue*, 665 P.2d 960 (Alaska 1983). Essentially the state argues that the Joint Board was concerned that a due care defense, *i.e.*, a requirement of a negligence *mens rea* or a reasonable mistake of fact defense (the two are virtually interchangeable) could so easily be feigned that fishermen would violate the regulations with impunity if the state were required to prove negligence. We are satisfied that the state has misunderstood the issue. Under our interpretation of the statute and implementing regulations, a fisherman who violates a regulation without fault is not free from any sanction. He is subject to a reasonable fine and at the very least the forfeiture of any fish illegally taken. Commercial fishing is a business; forfeiture of the fish illegally taken and in addition a fine should take the profit out of violations and deter most violators. It is only where the state seeks possible imprisonment as a penalty that a negligence

11.81.640. The reasons for this change do not appear in the Commentary to the Revised Criminal Code set out in the Senate Journal. *See*, Supp. No. 47 in 2 Senate Journal (1978) (regarding "Construction of Statutes with respect to Culpability" and "Effect of Ignorance or Mistake on Liability"), following p. 1413. The issue is not discussed in the tentative draft of the revised code. *See* Alaska Criminal Code Revision Part 2, at 7–24 (Tent.Draft 1977); Part 5 at 6–10 (Tent.Draft 1978). A number of reasons might explain the legislature's action without establishing legislative intent to implicitly authorize agencies to establish strict liability offenses punishable by imprisonment. We therefore recognize the problem posed by AS 11.81.640 but adhere to the views expressed in the text of this opinion. *Cf. Adams v. Waddell*, 543 P.2d 215, 217–18 (Alaska 1975) (while exercise of option to purchase real estate is expressly excluded from coverage under Article II of the UCC, court construing former may consider principles found in latter as relevant recent legislative judgment) *Rego v. Decker*, 482 P.2d 834, 838 (Alaska 1971) (*accord*).

mens rea must be proved. There is nothing in the record presented to the Board of Fisheries or the trial courts in these cases to support a finding that a penalty of imprisonment is necessary in the great majority of cases to effectively enforce the regulations. In fact, the evidence is to the contrary. *See Statistical Analysis of Major Fish & Game Sentencing Outcomes in Alaska*, Nicholas Maroules and Francis N. Troxell, Alaska Judicial Council (April 1983). Very few commercial fish offenders are actually ordered to serve time in jail. According to the state's brief on appeal

> Fish & Wildlife Protection records indicate that 16,182 persons were charged with fish and game offenses between January 1, 1983, and October 12, 1984. These records together with the Judicial Council study further show that only 95 commercial fish offenders were ordered to serve time in jail between 1973 and October 12, 1984—.06 of 1% of all Fish & Game offenders.

The state elaborates on this argument:

> Fish & Wildlife records do not show any person served time in jail in 1980 and that eleven persons served time in jail in 1981. Council records show that twenty-two persons served time in jail in 1980 and 1981. In order to arrive at the total of 95, it was assumed that eleven persons were ordered to serve jail sentences in 1980.

While jail sentences are rare, there is at least the potential that a person convicted of multiple fishing violations could be sentenced to a substantial period of imprisonment. *See, e.g., State v. Graybill*, 695 P.2d 725 (Alaska 1985) (affirming consecutive sentences totaling seven years with five and one-half years suspended imposed on recidivist violator of hunting regulations).

[16] Under our interpretation of the Board's authority, the state is free to seek conviction and a fine under a theory of strict liability for violations exactly as they have in the past. It is only in the rarer case where the state desires imposition of a criminal penalty that it must show a negligence *mens rea*. Since it appears that the state in fact only asks for a penalty of imprisonment for substantial recidivists it is unlikely that it will have difficulty proving the requisite *mens rea*. *See, e.g.*, Alaska Evidence Rule 404(b) which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person or to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident [11]

Beran, Carlos, Most, and Park were convicted of fishing in closed waters. 5 AAC 24.310(c); 5 AAC 27.810(d). The state did not prove negligence. Beran received a sentence of a $4,000 fine with $1,500 suspended and 30 days' imprisonment with 30 days suspended. Carlos received a sentence of $3,000 with $2,250 suspended and 15 days' imprisonment with 15 days suspended. Most received the same sentence. Park received a sentence of a $1,500 fine with $1,000 suspended, and 15 days' imprisonment with 15 days suspended.

Under our view of the applicable statute and regulations, fines in these amounts may be a permissible penalty for commercial violations.[12] The suspended sentence is not. On remand, the state should determine whether it wishes to seek a criminal penalty from each of the appellants in which case reprosecution with appropriate jury instructions would be required.[13] Al-

11. We do not suggest that prior convictions of strict liability fishing offenses are automatically admissible to disprove a reasonable mistake of fact defense. The proper interpretation and application of A.R.E. 404(b) and 403 are matters committed to the sound discretion of the trial court.

12. *See* n. 4 *supra*.

13. We hold that every fish and game regulation comprises both a crime requiring *mens rea* and a violation which differs from the crime only in that a conviction does not require a finding of *mens rea*. The parties have not briefed and we do not decide whether a violation is therefore a lesser-included offense of every fish and game violation prosecuted as a crime.

ternatively, the state may request that the suspended jail term be stricken from the judgment and the conviction be treated as one for a violation. *See Nix v. State*, 624 P.2d 823 (Alaska App.1981) (where defendant was necessarily found guilty of a lesser-included offense and the only errors requiring reversal relate to greater offense trial court may on remand enter conviction on lesser offense as an alternative to holding new trial). Should the state request an amended judgment and the appellant objects, the trial court should hear argument from the parties on the appropriateness of the fine suspended as a civil penalty. *See State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 537–38 (Alaska 1980) (Dimond J., concurring).

The petitioners have not yet been tried. On remand the state shall elect in each case whether to seek a penalty of imprisonment, in which case a *mens rea* of negligence must be proved, or proceed on a theory of strict liability in which case the penalties to be imposed on conviction shall not exceed an appropriate fine.[14]

These cases are REMANDED for further proceedings consistent with this opinion.

BRYNER, C.J., and COATS, J. concur.

BRYNER, Chief Judge, concurring.

I concur.

While I do not disagree with the majority's decision, I would prefer to address squarely the constitutional issue raised in these cases: whether the Alaska Constitution permits criminal sanctions to be imposed without proof of any culpable mental state. I would resolve the issue by holding that the due process clause of the Alaska Constitution, art. I, § 7, precludes imposition of criminal sanctions for an offense in the absence of proof establishing a minimally adequate level of *mens rea*. My position, in effect, reflects the views expressed in *Hentzner v. State*, 613 P.2d 821, 824–29 (Alaska 1980), and is fully in keeping with other decisions of the Alaska Supreme Court and the Court of Appeals. *See, e.g., State v. Rice*, 626 P.2d 104, 107–09 (Alaska 1981); *Kimoktoak v. State*, 584 P.2d 25, 28–31 (Alaska 1978); *Speidel v. State*, 460 P.2d 77, 78–82 (Alaska 1969); *Reynolds v. State*, 655 P.2d 1313 (Alaska App.1982); *Wheeler v. State*, 659 P.2d 1241, 1249–1254 (Alaska App.1983).

The level of *mens rea* that satisfies due process will vary, depending on the nature of the specific offense charged. In *Reynolds v. State*, 655 P.2d at 1315, a commercial fishing case, we adopted a *mens rea* requirement equivalent to a civil negligence standard, indicating that the defendant was entitled to rely on reasonable mistake of fact as a defense to the prosecution. In other contexts, it is manifest that a civil negligence standard would not suffice to meet the requirements of due process. *See, e.g., Speidel v. State*, 460 P.2d at 80 (reversing felony conviction for theft where a statute would have permitted criminal liability to be based on a finding of negligence). *Cf.* AS 11.81.610(b) (where no mental state is expressly provided for under the revised criminal code, the applicable mental states are "knowingly" with respect to conduct and "recklessly" with respect to a circumstance or a result).

Commercial fishing, however, is a heavily regulated industry which involves one of Alaska's most vital natural resources; I believe the state has a legitimate right to hold participants in the industry to a higher standard of care than might otherwise be appropriate as a predicate for criminal responsibility. Accordingly, I would follow our decision in *Reynolds* and hold that in commercial fishing cases the state may meet its burden of proving *mens rea* by establishing that the conduct of the accused was negligent.

Since, in the present cases, the superior court upheld the challenged regulations as constitutional, despite their express provi-

14. Nothing in this opinion would preclude a trial court from imposing a forfeiture as a penalty for conviction of a violation if after argument it is convinced such a penalty is authorized by the statutes and the constitution.

sion for strict liability, I concur in the majority's decision to reverse the superior court's decisions.

COATS, Judge, concurring.

There is serious question whether a defendant who violates the law without any negligence on his part can be punished by criminal sanctions under art. I, § 7 of the Alaska Constitucion. However, since the legislature has not clearly authorized the imposition of criminal sanctions where the defendant has violated the law without a culpable mental state, I join Judge Singleton in holding that criminal sanctions have not been authorized. I therefore find it unnecessary to reach the constitutional issue reached by Chief Judge Bryner. However, I think it is only fair to point out that if the legislature clearly authorizes the imposition of criminal sanctions for defendants who commit violations without having a culpable mental state, there is a substantial chance that the legislation would be in violation of art. I, § 7 of the Alaska Constitution.

Michael POOLEY, Appellant,

v.

STATE of Alaska, Appellee.

No. A-310.

Court of Appeals of Alaska.

Sept. 6, 1985.

Defendant pled nolo contendere to misconduct involving controlled substance in fourth degree, preserving his right to appeal decision on motion to suppress, in the Superior Court, Third Judicial District, Anchorage, Victor D. Carlson and J. Justin Ripley, JJ., after his motion to suppress marijuana and other evidence seized pursuant to warrant had been denied. Defendant appealed. The Court of Appeals, Bryner, C.J., held that: (1) Alaska Constitution was not implicated by actions of California agent, for purposes of suppressing evidence obtained pursuant to search warrant; (2) police had basis for suspecting defendant might constitute imminent danger to public safety, for purposes of justifying investigatory stop, where defendant was reasonably suspected of being drug courier; and (3) reasonable suspicion that defendant was carrying contraband justified limited seizure of defendant's suitcases for purposes of exposing them to drug detection dog.

Affirmed.

1. Drugs and Narcotics ⇐188

Evidence presented to magistrate was more than sufficient to establish probable cause for issuance of warrant to search defendant's suitcases; "alert" to all three suitcases by dog which had received training and had excellent record in detecting cannabis, cocaine, and heroin, and information which had been passed on by police officer in another city with respect to defendant, who was airplane passenger. U.S. C.A. Const.Amend. 4.

2. Criminal Law ⇐394.1(3)

Court would only have been justified in suppressing evidence obtained pursuant to search warrant if it was product of, or "tainted" by, some earlier illegality. U.S. C.A. Const.Amend. 4.

3. Searches and Seizures ⇐3.6

Use of unlawfully obtained evidence to secure search warrant will not invalidate warrant if it could have been issued on basis of untainted evidence before magistrate. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⇐3.9

If the Court of Appeals finds that some of the evidence presented to magistrate to obtain search warrant was product of illegality, it has to determine whether the remaining evidence would have been

greatest emphasis. *Asitonia v. State*, 508 P.2d 1023, 1026 (Alaska 1973). *See also State v. Lancaster*, 550 P.2d 1257, 1259–60 (Alaska 1976). The courts of Alaska have repeatedly recognized the particular gravity of forcible sexual assaults such as the one committed in the present case. *Mallot v. State*, 608 P.2d 737, 752 (Alaska 1980); *Newsom v. State*, 533 P.2d 904, 911 (Alaska 1975); *Davis v. State*, 635 P.2d 481, 488 (Alaska App.1981). The Alaska Supreme Court has declared that, in such cases, significant weight must be given to the sentencing goal of community condemnation. *State v. Lancaster*, 550 P.2d at 1260.

We recognize, especially in light of Peetook's young age and his lack of any prior felony conviction as an adult, that a fifteen year sentence is a long time. *Newsom v. State*, 533 P.2d at 912. However, in this case, Judge Hodges discussed and gave appropriate consideration to all of the *Chaney* sentencing goals before imposing Peetook's sentence. We cannot say that Judge Hodges was clearly mistaken in failing to give higher priority to the sentencing goal of rehabilitation.[5] *McClain v. State*, 519 P.2d 811, 813–14 (Alaska 1974).

The sentence is AFFIRMED.

David REYNOLDS, Appellant,

v.

STATE of Alaska, Appellee.

No. 6432.

Court of Appeals of Alaska.

Dec. 10, 1982.

Defendant was convicted in the District Court, Third Judicial District, Naknek, Victor D. Carlson, J., of fishing in closed waters, he appealed. The Court of Appeals held that defendant could not be convicted of fishing in closed waters in violation of the Board of Fisheries regulation without a showing of negligence.

Reversed.

1. Criminal Law ⇐20

Strict liability is the exception to rule that criminal intent is required and decision whether to require that a mental state be read into a statute or regulation, even in context of fish and game violations, must be made on a case-by-case basis.

2. Fish ⇐13(1)

Defendant could not be convicted of fishing in closed waters in violation of the Board of Fisheries regulation without a showing of negligence. AS 16.05.251(2), 16.05.720(a).

Jeffrey M. Feldman, Gilmore & Feldman, Anchorage, for appellant.

Larry R. Weeks, Dist. Atty., Anchorage, and Wilson L. Condon, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

PER CURIAM.

David Reynolds was convicted of fishing in closed waters in violation of 5 AAC 06.350(b). He appeals, contending that the trial judge's failure to require a showing of *mens rea* was error. We agree, and therefore reverse Reynolds' conviction.

Reynolds is a commercial fisherman in the Bristol Bay area. On July 21, 1981, his boat drifted up the Kvichak River with the tide past two shore markers beyond which gill net fishing is prohibited. Reynolds had

5. We note that Judge Hodges expressly recommended alcohol therapy and psychiatric treatment for Peetook during his incarceration.

one drift gill net in the water. Two Fish and Wildlife Protection officers observed Reynolds' boat as it drifted past the markers. The officers then approached the craft, asked Reynolds to pull in his net, and eventually issued a uniform summons and complaint. One of the officers testified at trial:

> When we approached the boat ... we called out 'hello' and there was no response, so we pounded on the side of the boat, and Mr. Reynolds came out groggy and said he'd been sleeping.

Reynolds appeared *pro se* at trial, and he testified on his own behalf that he had no intention of drifting into the closed area. He was very tired on the evening of July 21 and decided to get some sleep. Before setting his alarm clock and lying down, Reynolds calculated his position and estimated that the boat would not drift into closed waters. His particular fear was that he might drift into the set net sites located in those waters and tangle his gear; it was this fear which caused him to make the calculations with some care.

It was not developed at trial whether Reynolds' calculations, his fatigue, his alarm clock or some combination of these factors accounted for this somnolent transgression. The judge's response to Reynolds' testimony and argument was succinct:

> Thank you. Fish and Game laws are just like traffic laws. It doesn't require an intention to violate them, and so if one violates them, they're guilty. And therefore you're found guilty.

Reynolds was assessed a fine of $5,000 with $3,000 suspended on condition that he violate no similar laws for one year. His nets and the six fish found in them at the time of the offense were forfeited, pursuant to AS 16.05.190 and AS 16.05.195. The trial judge remarked at this time:

> Now you've gotten a better deal than anyone else has from this court because I believe that you did it completely unknowingly. I believed you.

AS 16.05.251(2) authorizes the Board of Fisheries to promulgate regulations establishing "open and closed seasons and areas for the taking of fish." Pursuant to this authority, the Board designated the particular waters of Kvichak Bay in which Reynolds was found as "closed waters." 5 AAC 06.350(b). Violation of a regulation pertaining to commercial fisheries is a misdemeanor punishable by a fine of not more than $5,000 or one year's imprisonment or both. AS 16.05.720(a). Despite the substantial nature of the penalty to which an offender is thus exposed, the regulation does not, on its face, require any accompanying mental state or criminal intent.[1] Thus, according to the view apparently held by the trial judge, proof that a defendant was in a prohibited area and that he had a net in the water[2] would make out a *prima facie* case that the regulation had been violated.

However, the Alaska Supreme Court has repeatedly expressed its aversion to the imposition of criminal sanctions against one who has no "awareness or consciousness of some wrongdoing." *Speidel v. State*, 460 P.2d 77, 78 (Alaska 1969); *see also Morissette v. United States*, 342 U.S. 246, 250, 72 S.Ct. 240, 243, 96 L.Ed. 288, 293 (1952). The statute in *Speidel* made it a felony to wilfully neglect to return a rented motor vehicle to the owner and included within the definition of wilful neglect an "indifference whether a wrong is done the owner or not." *Id.* The court held that:

> Although an act may have been objectively wrongful, the mind and will of the doer of the act may have been innocent. In such a case the person cannot be pun-

1. This regulation can be distinguished from those which require proof that the offender "knew or should have known" of a particular circumstance. *See, e.g.*, 5 AAC 31.090(c); 5 AAC 32.090(c); 5 AAC 34.090(c).

2. This element of the offense would more properly be designated as "fishing," and would presumably require the present capability, such that no further act is required, to hook or trap a fish. Reynolds does not contend that his drift gill net was not, at the time of his contact with the Fish and Game officers, capable of catching a fish, so the precise definition of this element is not at issue here.

ished for a crime, unless it is one such as the "public welfare" type of offense, which we have discussed, where the penalties are relatively small and conviction does no great damage to an offender's reputation. Under the terms of AS 28.-35.026 there is no escape from a felony conviction and a possible five-year prison term for simple neglectful or negligent failure to return a rented automobile at the time specified in the rental agreement. To make such an act, without consciousness of wrongdoing or intention to inflict injury, a serious crime, and criminals of those who fall within its interdiction, is inconsistent with the general law. To convict a person of a felony for such an act, without proving criminal intent, is to deprive such person of due process of law.

Id., 460 P.2d at 80. Thus, "public welfare offenses," described earlier as those in which health, safety or welfare of the general public is involved, and for which no great penalty is generally imposed, were expressly reserved by *Speidel* as special cases in which strict criminal liability might be imposed.

Hentzner v. State, 613 P.2d 821 (Alaska 1980), relied on *Speidel* to impute knowledge of wrongdoing as an element of a securities offense. A distinction was made for *mens rea* purposes between offenses which are *mala in se* (those "which reasoning members of society regard as condemnable") and those which are *mala prohibita* (where "there is no broad societal concurrence that [the proscribed conduct] is inherently bad"). *Id.* at 826. The fact that the crime in *Hentzner* was essentially *malum prohibitum* militated in favor of requiring *mens rea*. Moreover, the court felt impelled to remove the offense from the "public welfare" category because of the possible penalty involved (a maximum term of five years' imprisonment), a collateral rationale in *Speidel*. 613 P.2d at 826–27.

The contours of strict criminal liability were further defined in *State v. Rice*, 626 P.2d 104 (Alaska 1981). *Rice* dealt with a regulation providing that, "No person may possess or transport any game or parts of game illegally taken." 626 P.2d at 106, n. 2. Rice was convicted in district court, but the superior court overturned the conviction on the basis that it was error for the trial judge to refuse to instruct the jury that it must find beyond a reasonable doubt that the defendant "knew or should have known" the meat was illegally taken. *Id.* at 106. The supreme court affirmed, relying on *Speidel* for the proposition that criminal statutes should be strictly construed to require some degree of *mens rea* absent a clear legislative intent to the contrary. *Id.* at 107–08. The court recognized that "the mere fact that the case at bar involves a fish and game regulation might perhaps be considered by some to be sufficient to justify characterization of the subject offense as a strict liability offense," but declined to do so where application of such a statute would violate a defendant's due process rights. *Id.* at 108. Without imputing a requirement that defendant "knew or should have known" the meat was illegally taken when he transported it, the statute as applied would be "void for vagueness," according to the court. *Id.* at 109.

[1, 2] The teaching of these cases is that strict liability is an exception to the rule that criminal intent is required. The decision whether to require that a mental state be read into a statute or regulation, even in the context of fish and game violations, must be made on a case-by-case basis. *State v. Rice*, 626 P.2d at 108; *Kimoktoak v. State*, 584 P.2d 25, 31 (Alaska 1978). By not requiring the prosecution to produce evidence that Reynolds was at least negligent with respect to the location of his boat, the court here imposed a classic form of strict liability. Given the nature of the regulation in question and the circumstances of this case, we find that the trial judge erred in not requiring some minimal element of *mens rea*, *i.e.*, negligence, to accompany Reynolds' conduct.

Contrary to the state's assertion, strict liability does not necessarily follow from either the fact that fishing is a heavily regulated activity in Alaska or that Reyn-

olds entered into this activity for commercial purposes. This is not an offense like that in *Nelson v. State*, 387 P.2d 935, 935 (Alaska 1964), where "[t]o require proof of guilty knowledge as a prerequisite to conviction . . . would mean that the regulation could not be enforced." In *Nelson* the court was faced with a statute prohibiting the taking of a bear under two years of age. Because it is difficult for a hunter to know the precise age of a bear, requiring the state to prove knowledge or negligence would impose an insurmountable burden and render the provision virtually unenforceable. The court in *Nelson* simply held that, under these circumstances, imposition of strict liability was clearly justified. We do not think that requiring proof that the operator of a fishing vessel was negligent, in other words, that he knew or reasonably should have known the vessel's location, would pose a similar hardship on the state.[3] Only in occasional cases, such as Reynolds', will the issue admit of much doubt.

Moreover, although the regulation in question, 5 AAC 06.350(b), pertains to a traditionally regulated commercial activity, this activity is not, by its nature, restricted to large-scale, sophisticated business enterprises. Instead, the regulation applies to all commercial fishing and would include within its sweep the smallest and most casual commercial fishing enterprises. In this regard, it is significant that the regulation here has not expressly been designated as creating a strict liability offense.[4] Especially in the context of regulatory provisions, which can be modified or re-enacted more expeditiously and with less complexity than can formal statutory provisions, we do not think it unrealistic to expect that, if a provision is intended to create a strict liability offense, an express statement to that effect will be included. Finally, the state has not called to our attention, nor are we aware of, any legislative history indicating that 5 AAC 06.350(b) was promulgated with the intent that it be applied as a strict liability offense, precluding any defense based on reasonable mistake of fact. *Cf. United States v. Ayo-Gonzalez*, 536 F.2d 652, 658–60 (5th Cir.1976), *cert. denied*, 429 U.S. 1072, 97 S.Ct. 808, 50 L.Ed.2d 789 (1977) (legislative history of a federal statute prohibiting unauthorized fishing by foreign vessels in territorial waters of the United States disclosed a belief by Congress that effective and strict enforcement was essential, a finding that innocent offenses were unlikely to occur, and persuasive evidence that strict liability was intended to be applied).

These considerations, when taken with the substantial criminal penalties available to a court in sentencing for this offense, are sufficient to convince us that strict liability is inappropriate here. We therefore hold that a showing of negligence on the part of the defendant—that he knew or reasonably

3. The state argues that, if 5 AAC 06.350(b) were construed to require an element of criminal intent, enforcement of the provision would be rendered difficult because juries sympathetic to a defendant's plight would invariably rely upon the intent requirement as a means of nullifying a generally unpopular regulation. Assuming *arguendo* that the state's argument is accurate as a factual matter, it hardly seems appropriate to resolve problems in enforcement of unpopular laws by the elimination of criminal intent and the imposition of strict liability.

4. We note that AS 11.81.600(b), applicable only to Title 11 but persuasive in its logic, specifically provides:

> (b) A person is not guilty of an offense unless he acts with a culpable mental state, except that no culpable mental state must be proved
>
> (1) if the description of the offense does not specify a culpable mental state and the offense is
>
> (A) a violation; or
>
> (B) designated as one of 'strict liability'; or
>
> (2) if a legislative intent to dispense with the culpable mental state requirement is present.

The revised criminal code further provides that except as described above, "if a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to

> (1) conduct is 'knowingly'; and
>
> (2) a circumstance or a result is 'recklessly.' "

AS 11.81.610. While this scheme has removed much of the speculation about mental states under Title 11, no such relief has yet been provided under the Alaska Administrative Code or its statutory corollaries.

should have known the location of his boat in closed waters—was necessary before a finding of guilt would be justified. Because the trial court applied strict liability in the determination of Reynolds' guilt, we REVERSE the conviction.

Louis METIGORUK, Appellant,

v.

MUNICIPALITY OF ANCHORAGE, Appellee.

No. 186.

Court of Appeals of Alaska.

Dec. 17, 1982.

Defendant was convicted before the District Court, Third Judicial District, John D. Mason, J., of shoplifting, and he appealed. The Court of Appeals, Singleton, J., held that defendant's statement to private security guard who had placed defendant under citizen's arrest was not inadmissible for want of *Miranda* warnings absent showing that the security guard was acting as agent of the police.

Affirmed.

1. Criminal Law ⇐412.1(2)

Private security guard who is not acting as a police agent need not give *Miranda* warnings prior to interrogating a suspect he has placed under citizen's arrest. U.S.C.A. Const.Amend. 5.

2. Criminal Law ⇐414

The state must prove that a self-incriminating statement was voluntary before it can be admitted against the defendant. U.S.C.A. Const.Amend. 5.

3. Criminal Law ⇐412.1(1)

A self-incriminating statement is "voluntary" if it is free from duress, coercion or inducement. U.S.C.A. Const.Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law ⇐412.2(3, 4)

Before questioning someone in police custody, the officer must tell him that he has a right to remain silent, that anything he says may be used against him in court, that he has the right to have an attorney present at questioning and that if he wishes an attorney but cannot afford one an attorney will be provided at public expense, and questioning may not continue unless defendant waives his right to remain silent. U.S.C.A. Const.Amend. 5.

5. Criminal Law ⇐412.1(2)

Where security officer at department store observed defendant enter the store and remove an electric blanket and a woman's purse and walk out of the store without paying for them and the officer stopped defendant and advised that he was under arrest for shoplifting and trespassing and escorted him to the security office and called the police to request assistance, the security officer's questioning defendant while awaiting arrival of police was not required to be preceded by *Miranda* warnings, absent showing that arrest was instigated by the police or that security officer was acting as police agent. U.S.C.A. Const. Amend. 5.

Susan Orlansky, Asst. Public Defender, and Dana Fabe, Public Defender, Anchorage, for appellant.

Scott T. Fleming, Asst. Municipal Prosecutor, Allen M. Bailey, Municipal Prosecutor, and Theodore D. Berns, Municipal Atty., Anchorage, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

Proctor J. BAKER, Petitioner,
v.
CITY OF FAIRBANKS, Alaska, Respondent.
No. 1141.

Supreme Court of Alaska.
June 5, 1970.

The Superior Court, Fourth Judicial District, Everett W. Hepp, J., denied defendant's request for jury trial on charge under municipal ordinance relating to assault and defendant's petition for review was granted. The Supreme Court, Connor, J., held that defendant had right to jury trial. The Court further held that for purposes of determining right to jury trial, "criminal prosecutions" includes any offense a direct penalty for which may be incarceration in jail or penal institution, offenses which may result in loss of valuable license such as a driver's license or license to pursue common calling, occupation, or business and offenses which, even if incarceration is not possible punishment, still connote criminal conduct in traditional sense of term.

Reversed and remanded with instructions.

1. Constitutional Law ⇐267

Courts retain residual constitutional power to determine that offense, whatever its possible punishment may be, is serious and requires jury trial. U.S.C.A.Const. Amends. 6, 14.

2. Jury ⇐21(1)

In determining whether an offense is one for which jury trial must be granted, courts not only consider maximum possible punishment but also look at social and moral opprobrium which attaches to offense, degree to which it may be regarded as antisocial behavior, possible consequences to defendant in terms of loss of livelihood, and whether offense is one traditionally regarded as crime or is predominately in nature of regulatory offense. U.S.C.A.Const. art. 3, § 2; Amend. 6.

3. Constitutional Law ⇐82

American constitutional theory is that Constitutions are restraining force against abuse of governmental power, not that individual rights are matter of governmental sufferance.

4. Jury ⇐21(1), 23(1)

In any criminal prosecution, whether under state law or for violation of city ordinance, accused, on demand, is entitled to jury trial; overruling Knudsen v. City of Anchorage, 358 P.2d 375. AS 11.15.230; U.S.C.A.Const. art. 3, § 2; Amends. 6, 14.

5. Jury ⇐23(2)

Defendant charged under municipal ordinance relating to assault had right to jury trial. AS 11.15.230; U.S.C.A.Const. art. 3, § 2; Amends. 6, 14.

6. Courts ⇐97(6)

While state Supreme Court must enforce minimum constitutional standards imposed by United States Supreme Court's interpretation of Fourteenth Amendment, state Supreme Court is free, and under duty, to develop additional constitutional rights and privileges under State Constitution if it finds such fundamental rights and privileges to be within intention and spirit of local constitutional language and to be necessary. U.S.C.A.Const. Amend. 14.

7. Jury ⇐23(1)

For purposes of determining right to jury trial, "criminal prosecutions" includes any offense a direct penalty for which may be incarceration in jail or penal institution, offenses which may result in loss of valuable license such as a driver's license or license to pursue common calling, occupation, or business and offenses which, even if incarceration is not possible punishment, still connote criminal conduct in traditional sense of term.

See publication Words and Phrases for other judicial constructions and definitions.

8. Jury ⇐22(2)

Excluded from requirement of jury trial are such offenses as wrongful parking

of motor vehicles, minor traffic violations, and violations which relate to regulation of property, sanitation, building codes, fire codes, and other legal measures which can be considered regulatory rather than criminal in their thrust, so long as incarceration is not one of possible modes of punishment. AS 11.15.230; U.S.C.A.Const. art. 3, § 2; Amends. 6, 14.

Lloyd I. Hoppner, of Rice & Hoppner, Fairbanks, for petitioner.

Howard Staley and Stephen S. DeLisio of Merdes, Schaible, Staley & DeLisio, Fairbanks, for respondent.

Before BONEY, C. J., and DIMOND, RABINOWITZ and CONNOR, JJ.

CONNOR, Justice.

This case raises important questions about the right to jury trial for certain city ordinance violations. This necessarily means that we must reconsider the rationale of the opinion in Knudsen v. City of Anchorage, 358 P.2d 375 (Alaska 1960), which held that a person charged with a violation of a city ordinance prohibiting reckless driving was not entitled to a jury trial. Since *Knudsen* was decided, the United States Supreme Court in Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), has made applicable to the states, through the Fourteenth Amendment due process clause, the Sixth Amendment right to jury trial in criminal cases other than those traditionally labeled "petty offenses." It is with the implications of the *Duncan* decision and the Sixth Amendment right to jury trial that we must deal in the present decision.

In the case before us petitioner was charged in the District Court at Fairbanks, Alaska, with violating a City of Fairbanks ordinance, in that he did "assault Bradley W. Hollister by throwing him into the wall and refrigerator" contrary to Fairbanks City Code, Section 6.101(b).[1]

Petitioner asserted in the courts below that he was entitled to a jury trial. His claim was denied. He then filed a petition for review with this court. We have granted review of this case because of the importance of the question which is raised by petitioner.[2]

Petitioner argues that under Duncan v. Louisiana, supra, he is entitled to a jury trial as a matter of right, and that the specific holding of *Duncan* is dispositive of his case.

In *Duncan* the Court held that one charged with assault and battery under Louisiana law, which offense carried a maximum possible penalty of two years' imprisonment, or a $300 fine, or both, must be afforded a jury trial. Louisiana had contended that assault and battery traditionally was recognized to be a "petty offense," and that there was, therefore, no constitutional requirement that it must be tried by a jury. The offense, despite the somewhat long possible period of imprison-

1. City of Fairbanks Code of Ordinances, § 6.101(b) provides:
"(b) *Assault* No person shall bent, strike, wound, imprison, or inflict violence on another where the circumstances show malice or assault another with intent to commit murder, rape, mayhem, robbery or larceny. Nor shall any person assault another with a lethal weapon, instrument, or thing with intent to commit upon the person of another any bodily injury where no considerable provocation appears or where the circumstances of the assault show malice."
City of Fairbanks Code of Ordinances, § 1.108 provides that the maximum punishment shall be "by fine of not more more than Six Hundred and 00/100 ($600.-00) Dollars or by imprisonment for not more than sixty (60) days, or by both such fine and imprisonment."

2. Alaska Sup.Ct.R. 23, 24: "This court grants review because the order of the Superior Court judge affects a substantial right of petitioner and is of such substance and importance as to justify deviation from the normal appellate procedure by way of appeal in order that the questions of law be given the immediate attention of this court." Knudsen v. City of Anchorage, 358 P.2d 375–376 (Alaska 1960).

ment, was classified as a misdemeanor under Louisiana law. It was also contended that the granting of a jury trial was a matter for state determination and not a part of federal due process of law.

In rejecting Louisiana's claims, the Court in *Duncan* determined that the right to jury trial, as expressed in the Sixth Amendment, must be made applicable to the states of the Union as part of the due process of law guaranteed by the Fourteenth Amendment. Mr. Justice White, speaking for the Court, stated:

> "Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." 391 U.S. at 149, 88 S.Ct. at 1447 (footnote omitted).

In declaring the right to jury trial to be a fundamental right comprehended under the federal notion of due process of law, the Court abandoned an older group of cases which had implied that jury trial might not be necessary to satisfy the guarantee of the Fourteenth Amendment.

The Court in *Duncan* recognized that there is within the Sixth Amendment an area where the trial by jury of certain offenses is not constitutionally required. This implied exception has been read into the Sixth Amendment by the courts over a period of many years, despite the express language of the amendment.

A literal reading of the Sixth Amendment would tell the reader that, as a matter of plain English, all offenses which can be regarded as criminal must be tried by jury if the defendant demands such a trial.[3] Despite this apparently plain language, some courts have adhered to the position that, because certain offenses were not triable by jury at the time our Republic was founded, the framers of our federal constitution did not mean to include such offenses as being triable by jury under the guarantees of the Sixth Amendment and similar state guarantees of jury trial. This position was reaffirmed in the *Duncan* case, with certain important qualifications.

In elaborating upon what this Sixth Amendment guarantee includes, Mr. Justice White explained:

> "Of each of these determinations that a constitutional provision orginally written to bind the Federal Government should bind the States as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of criminal processes maintained by the American States.
>
> "When the inquiry is approached in this way the question whether the States can impose criminal punishment without granting a jury trial appears quite different from the way it appeared in the older cases opining that States might abolish jury trial. See, e. g., Maxwell v. Dow, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597 (1900). A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the pur-

3. U.S.Const. Amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *."

In Schick v. United States, 195 U.S. 65, 70, 24 S.Ct. 826, 831, 49 L.Ed. 99 (1904), Mr. Justice Harlan (dissenting) stated the following: "The contention in the present prosecutions is that, although the positive constitutional injunction that the trial of all crimes shall be by jury furnishes an inflexible rule that may not be ignored in cases of felony, that rule, even where the accused pleads not guilty, may be disregarded altogether in a trial for a misdemeanor, provided he consents to be tried by the court without a jury. Plainly, such an exception is unauthorized by the Constitution if its words be interpreted according to their ordinary meaning. Nor, in my opinion, it is consistent with the fundamental rules of criminal procedure, as established and enforced at common law."

poses that the jury serves in the English and American systems. Yet no American State has undertaken to construct such a system. Instead, every American State, including Louisiana, uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict. In every State, including Louisiana, the structure and style of the criminal process—the supporting framework and the subsidiary procedures—are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial." 391 U.S. at 149–150, 88 S.Ct. at 1448, n. 14.

In other words, the Court stressed the importance of providing procedures which are fundamentally fair within the context of our present-day American system of criminal justice.

In *Duncan* the Court held that a jury trial was required for the offense of assault and battery, even though that offense, considered by its label alone, did not historically come within the concept of a "serious misdemeanor." From the language used by the Court, it appears that the maximum possible sentence was the influential factor in determining that assault and battery, at least in Louisiana, was not a petty offense, despite the nomenclature attached by the State. As the Court explained:

"It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses. But the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. The penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgment' of the crime in question." 391 U.S. at 159–160, 88 S.Ct. at 1453 (footnotes and citations omitted).

The Court noted that in the federal system Congress has defined petty offenses as those punishable by no more than six months in prison and a $500 fine. Additionally, it noted that in 49 of the 50 states, crimes which are subject to trial without a jury, which sometime include simple assault and battery, are punishable by no more than one year in jail. Further, the vast catalogue of crimes which were triable without a jury in 18th Century America, that is, before the framing of the United States Constitution, the Bill of Rights, and the various state constitutions, were, with rare exceptions, punishable by no more than a six-month period of incarceration. Most importantly, the Court in *Duncan* did not adopt a mechanical test for distinguishing between petty offenses and serious misdemeanors.

"We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense." 391 U.S. at 161–162, 88 S.Ct. at 1454.

Traditionally two main approaches have been used by the courts in determining whether a crime was petty or serious. The first approach looks to the maximum possible punishment—not the punishment actually imposed by the court—as a gauge of the sentiments of the locality or of the lawmakers in determining whether, because of the severity of the punishment, the offense should be regarded as serious in itself. Duncan v. Louisiana, supra.

[1] The second approach is to look to the nature of the offense, consider its common law background, if any, consider whether it carries sufficient opprobrium to require its being labeled a "serious" mis-

demeanor, and consider also the consequences of conviction of such an offense.

> "The truth is, the nature of the offense, and the amount of punishment prescribed, rather than its place in the statutes, determine whether it is to be classed among serious or petty offenses,—whether among crimes or misdemeanors." Schick v. United States, 195 U.S. 65, 68, 24 S.Ct. 826, 827 (1904).

Upon an evaluation of all these factors together hinges the determination of whether the offense is serious enough to require jury trial. It is important to note that under this second approach the maximum possible sentence is not the test of seriousness. Even though the lawmaker has provided a relatively slight sentence, this will not render the offense "petty" if it otherwise has serious connotations. As this court noted in Knudsen v. City of Anchorage, supra, the "quality of the offense and the consequences to the accused are the factors which determine whether there is a constitutional right to trial by jury."[4] In short, the courts retain residual constitutional power to determine that an offense, whatever its possible punishment may be, is serious and requires a jury trial, despite the views of the lawmaker as expressed merely in the maximum permissible sentence which may be imposed. As the Court stated in *Duncan*:

> "Of course the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance. In either case it is necessary to draw a line in the spectrum of crime, separating petty from serious infractions. This process, although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little." 391 U.S. at 160–161, 88 S.Ct. at 1453.

Petitioner argues that because under the Fairbanks ordinance he could have been sentenced to either two months in jail, a $600 fine, or both, that the offense with which he is charged is necessarily a serious one. This contention is based upon the fact that the United States Supreme Court in *Duncan* alluded to the congressionally enacted standard of what constitutes a petty offense. He argues that because Congress employs a six-month or $500-fine test to distinguish petty from serious, we are bound by that same test. Because petitioner could possibly be sentenced to pay a $600 fine, he asks that we declare on this basis alone that he has a right to a jury trial. We feel that this argument misapprehends what the Court decided in *Duncan*. Although the Court there mentioned the congressional standard, it did not make that standard applicable to the states. In establishing guidelines for the lower courts to follow, the Court had this to say:

> "In determining whether the length of the authorized prison term or the seriousness of other punishment *is enough in itself to require a jury trial*, we are counseled by District of Columbia v. Clawans, supra, [300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843] to refer to objective criteria, chiefly the existing laws and practices in the Nation." 391 U.S. at 161, 88 S.Ct. at 1453 (emphasis supplied.)

We think it would be unreflective for us to hold that the mere accident that petitioner might pay a fine of $600 rather than $500 should determine his right to a jury trial. We are unable to read the *Duncan* decision as requiring the application of any such mathematical standard. As that decision points out, Congress is not the body which exercises exclusive power

4. 358 P.2d at 383.

in determining what offenses are petty or serious. The courts have additional power which must be exercised independently. Nor did the Court in *Duncan* hold that the congressional standard should provide the test to be applied to the states under the Fourteenth Amendment. More analysis is required to achieve a reasoned solution.

The historical development influencing the concept of what constitutes a "petty" offense has been treated in depth in a well-known law review article by Frankfurter and Corcoran.[5] In that article the authors survey the legal history of offenses handled in a summary fashion in England and in the American colonies. They deal with a variety of offenses which did not carry with them the right to trial by jury. In treating these non-jury offenses, the authors stress that the historical genealogy of the right to jury trial should be a major guide in the interpretation of the Sixth Amendment of the Constitution, as well as article III, section 2 of the Constitution.[6] Article III refers to "all crimes" as being triable by jury, and the Sixth Amendment refers to the right to jury trial in "all criminal prosecutions." The authors concluded that these two terms should be considered interchangeable. But they also determined that there were certain offenses, familiar to the framers of our federal and state constitutions, which were considered to fall within an implied exception to the constitutional guarantee. This accords with the interpretations of the United States Supreme Court. Cheff v. Schnackenberg, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966); District of Columbia v. Clawans, 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843 (1937); Schick v. United States, 195 U.S. 65, 24 S.Ct. 826 (1904); Natal v. Louisiana, 139 U.S. 621, 11 S.Ct. 636, 35 L.Ed. 288 (1891).

While the argument advanced is well documented, it is perhaps so well ministered that it says too much. As one legal scholar noted,

> "If that practice [the English practice of dealing with petty offenses summarily] proves anything at all in this connection, it proves too much. For as Frankfurter and Corcoran point out, summary trials in England were not restricted to such crimes [petty offenses]." Kaye, Petty Offenders Have No Peers, 26 U.Chi.L.Rev. 245, 247 (1959) (citations omitted).

Prosecutions of serious crimes were also authorized without jury intervention.[7] Blackstone was even moved to comment upon the constantly increasing scope of summary jurisdiction, lamenting that it "has of late been so far extended, as, if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury, unless only in *capital* cases!" 4 Blackstone Comm. 277–78 (Blackstone's emphasis).

In the subject matter before us, one looking only to the past will find a jumble of offenses with no coherent, rationalizing principle by which to determine the line between what is a petty and a serious crime.[8] For example, "[v]iolations of the laws relating to liquor, trade and manufacture, labor, smuggling, traffic on the highway, the Sabbath, 'cheats', gambling, swearing, small thefts, assaults, offenses to property, servants and seamen, vagabondage, and disorderly conduct were largely in the

5. Frankfurter and Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv.L.Rev. 917 (1926).

6. U.S.Const. art. III, § 2: "The trial of all crimes, except in cases of impeachment, shall be by jury * * *."

7. E. g., 22 & 23 Car. II, c. 7 (1670) punished, apparently without jury trial, the burning of houses at night with transportation for seven years; and made the offense a felony. See Frankfurter and Corcoran, supra note 5, at 926, n. 34 and at 960, n. 216; Md.Sess.Laws, c. 3 (1782).

8. Frankfurter and Corcoran, supra note 5, at 927.

justices' hands."[9] Penalties ranged from a fine of three shillings fourpence for "the individual who tippled long at the alehouse" to a fine of 500 pounds with confinement at hard labor until paid, for the bribery of an excise officer.[10]

What is often not perceived about this influential article is that the authors were not arguing that historical usage should necessarily govern modern constitutional adjudication. As the authors point out, historical continuity does not require rigid adherence to an historical stereotype.

> "We have reached the end of the narrow inquiry which this paper proposed. The evidence has been summarized to indicate the common-law history of penal legislation which dispensed with the jury. Both in England and in the colonies a clear and unbroken practice—despite all uncertainties and reservations—emerges for two centuries preceding the Constitution. Many offenses were customarily tried solely by magistrates. These offenses were compendiously characterized as 'petty.' But pettiness was not a rigidly fixed conception; demarcation between resort to jury trial and its dispensation was not mechanical. In subjecting certain conduct to the summary procedure of magistrates, unguarded by the popular element, there was an exercise of moral judgment dividing behavior into serious affairs and minor misdeeds. The gravity of danger to the community from the misconduct largely guided the moral judgment; the wide repetition of the act, raising practical problems of enforcement, in part influenced the moral value which the community attached to the act."[11]

Unfortunately, not too many cases dealing with the petty offense problem required a decision by the United States Supreme Court. A large number of federal offenses clearly fall within the category of serious misdemeanors because they carry a maximum punishment of more than six months. Most of those cases which disallow jury trial are easily distinguishable as treating offenses which are regulatory in nature. A careful analysis of the decisions of the United States Supreme Court will reveal that only rarely and for rather trifling offenses has jury trial actually been denied.

In District of Columbia v. Clawans, 300 U.S. 617, 57 S.Ct. 660 (1937), the accused was charged with selling the unused portions of railway excursion tickets in violation of a congressional statute. The Court, in denying jury trial to the accused, had the following to say about the nature of the offense:

> "Engaging in the business of selling second-hand property without a license was not indictable at common law. Today *it is at most but an infringement of local police regulations, and its moral quality is relatively inoffensive.*" 300 U.S. at 625, 57 S.Ct. at 662 (emphasis supplied).

In Schick v. United States, supra, the Court upheld the conviction without a jury of a defendant who had violated a statute which prohibited the receipt for sale of any unstamped oleomargarine. The case has two noteworthy features. First, the defendant had waived jury trial. Second, the offense charged was the violation of a regulatory act, the Oleomargarine Act, subjecting the offender to only a $50 fine and no confinement. As Mr. Justice Brewer, speaking for the majority, aptly noted:

> "So small a penalty for violating a revenue statute indicates only a petty offense. It is not one necessarily involving any moral delinquency." 195 U.S. at 67, 24 S.Ct. at 826.

In Callan v. Wilson, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223 (1888), the accused was charged with the crime of conspiracy and sentenced to pay a fine of $25 or serve 30 days' confinement. Defendant, with

9. Id. at 928 (footnotes omitted).

10. Id. at 930–31.

11. Id. at 980.

others, had conspired to refrain from working with certain other musicians or working for any person who employed these musicians. Mr. Justice Harlan, in explaining why the Sixth Amendment right to jury trial was afforded this defendant, stated that,

> "It is not to be construed as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the constitution to hold that no prosecution for a misdemeanor is a prosecution for a 'crime' within the meaning of the third article, or a 'criminal prosecution' within the meaning of the sixth amendment." 127 U.S. at 549, 8 S.Ct. at 1303.

The above principle was applied in California in Taylor v. Reynolds, 92 Cal. 573, 28 P. 688 (Cal.1891), which held that a violation of a municipal ordinance, blocking the sidewalk, carried with it a right to jury trial, even though the maximum sentence possible was only a $100 fine and 30 days' confinement. In deciding upon the importance of the fact that only a municipal ordinance had been violated, the court in *Taylor* quoted at length from Dillon on Municipal Corporations, Vol. 1, § 433, as follows:

> "'So, here, where the act or omission sought to be punished by imprisonment under a municipal ordinance *is in its nature not peculiarly an offense against the municipality, but rather against the public at large, and where it falls within the legal or common-law notion of a crime or misdemeanor, and especially where, being of such nature, it is embraced in the criminal code of the state* then the constitutional guaranties intended to secure the liberty of the citizen, and the right to a trial by jury, cannot be evaded by the nature of the powers vested in the municipal corporation, or the nature of the jurisdiction conferred upon the municipal courts.'" 28 P. at 689 (emphasis supplied).

It is significant in the case at bar that a violation of the municipal ordinance is also a violation of AS 11.15.230.[12]

In District of Columbia v. Colts, 282 U. S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930), defendant was put upon trial before a judge and found guilty of reckless driving, his demand for a jury trial being denied. In holding that he was entitled to a jury trial, the Court stated that:

> "Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense. The offense here charged is not merely malum prohibitum, but in its very nature is malum in se. It was an indictable offense at common law, * * *" 282 U.S. at 73, 51 S.Ct. at 53.

[2] From a review of the cases which have dealt with this subject, certain broad criteria do emerge. In determining whether an offense falls within one category or the other the courts, in the last analysis, have resorted to a weighing or grouping together of various factors. Not only must the maximum possible punishment be considered, but one must look also at the social and moral opprobrium which attaches to the offense, the degree to which it may be regarded as anti-social behavior, the possible consequences to the defendant in terms of loss of livelihood, and whether the offense is one traditionally regarded as a crime or is predominately in the nature of a regulatory offense. It is then necessary to balance the consequences to the defendant against considerations of social and governmental expediency. In short,

12. "Assault and assault and battery. A person not armed with a dangerous weapon, who unlawfully strikes or threatens another in a menacing manner, or unlawfully strikes or wounds another, is punishable by a fine of not more than $500, or by imprisonment in a jail for not more than six months, or by both."

legal precedents do not provide any specific means of drawing lines. They furnish only a general method for arriving at decisions.

In the past, courts have had difficulty in determining the qualitative difference by which an offense is to be placed in the category of serious or petty. We believe the most critical question is not where the line should be drawn, but why it should be drawn at all.

Substantial reasons of policy must play an important part in any disposition of this problem. These naturally divide themselves into two major groups. On the one hand, we have considerations of convenience or expediency for the state and its legal subdivisions. It imposes a certain burden upon the machinery of government to make every offense triable by jury. There are also some infractions of laws or ordinances which are so slight that probably all reasonable persons would agree that they should not be triable by a jury. District of Columbia v. Clawans, supra. Balanced against the need to allow government to operate as unencumbered as possible is the right of an accused to be convicted, if at all, only by means which are fair.

[3] The argument from expediency contains inherent defects. If an individual right is vested by the Constitution, the overriding demands of governmental efficiency must be of a compelling nature and must be identifiable as flowing from some enumerated constitutional power. To allow expediency to be the basic principle would place the individual constitutional right in a secondary position, to be effectuated only if it accorded with expediency.[13]

This would negate our entire theory of constitutional government. The American constitutional theory is that constitutions are a restraining force against the abuse of governmental power, not that individual rights are a matter of governmental sufferance.

Such an argument may have had validity at a time when the abilities of government were limited to the needs and financial capabilities of an agrarian or early industrial society. Today the government not only provides services to society on a broad basis, it even poses a problem of thrusting the citizenry into a morass of impersonal regulation. The danger today is thought by some to be not too little or too weak a government, but an all too pervasive one, in which individual freedom, responsibility, and dignity are obliterated by a faceless bureaucracy. Any governmental system capable of directly intervening in the life of the citizen from cradle to grave ought to be able to make effective such minimal guarantees of individual rights as are found in the express language of our constitutions. There is no sound reason why

13. City of Canon City v. Merris, 137 Colo. 160, 323 P.2d 614 (Colo.1958).

In Schick v. United States, 195 U.S. 65, 24 S.Ct. 826, 49 L.Ed. 99 (1904), Mr. Justice Harlan in his dissenting opinion placed the argument from expediency within proper perspective.

> "It is contended that this mode of trial, at least in misdemeanors involving only a fine, ought to be sanctioned,—indeed, encouraged,—as convenient both for the government and the accused. What was said by Blackstone when referring to summary proceedings authorized by acts of Parliament in particular cases may well be repeated, at this day, whenever it is proposed, upon grounds of convenience, to dispense with juries in criminal prosecutions, and thereby introduce a new mode for the trial of crimes. He said: 'And, however *convenient* these may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet let it be again remembered, that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.' Book 4, chap. 27, p. 350." 195 U.S. at 99, 24 S.Ct. at 839 (emphasis in original).

a social and economic system which can send men to the moon, develop nuclear weaponry, and, as in the case of Alaska, extract many billions of barrels of oil from the depths of the earth, cannot also honor the guarantee that if one must be subjected to criminal prosecution, it shall, upon demand, be by a jury of his peers.

Another factor which should be considered is that the constitutional language, in its plain meaning, expressly requires a jury trial in "all criminal prosecutions." If an implied exception is to be read into this language, then perhaps we should adopt an approach by which the classification of any offense falling within the gray area between petty and serious should be resolved in favor of a jury trial for the defendant who claims it. Even such an approach as this carries with it certain difficulties. It still does not resolve the ultimate question —where to draw the final line of demarcation. It is immanently more sensible to look to the possible consequences of a denial of jury trial and the reasons for providing this constitutional safeguard.

We can also derive guidance from cases treating the geminous provision of the Sixth Amendment which secures the right to counsel. Several courts have declared, for example, that the right to counsel, as guaranteed by the Constitution, must be afforded to every defendant charged with an offense which may result in incarceration upon conviction.[14]

It is significant that the United States Supreme Court has very recently declared that the "petty offense rule" does not apply to all constitutional guarantees. In Williams v. Oklahoma City, 395 U.S. 458, 89 S.Ct. 1818, 23 L.Ed.2d 440 (1969), the Court applied the equal protection doctrine of Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), to the appeal of a drunken driving conviction under an Oklahoma City municipal ordinance where the defendant was sentenced to 90 days in jail and a $50 fine. The opinion did not mention the "petty offense rule," reaffirmed three weeks earlier in Frank v. United States, 395 U.S. 147, 89 S.Ct. 1503, 23 L.Ed.2d 162 (1969). Citing Williams v. Oklahoma, supra, the Oregon Supreme Court decided that the Sixth Amendment right to counsel extends to prosecutions for misdemeanors, including violations of municipal ordinances carrying a maximum possible penalty of less than six months and a $500 fine. Stevenson v. Holzman, 89 Or.Adv.Sh. 27, 458 P.2d 414 (Sept. 10, 1969).

Duncan counsels us to look to the national standard in determining whether to grant a right to jury trial of certain offenses. Such an approach is sensible since the collateral consequences to the accused are reflected by our mores and standards. In the instant case, one convicted under this ordinance might suffer severe disabilities in obtaining future employment or in having heaped upon him a certain amount of social opprobrium. It is hard to determine how either layman or lawyer might regard a person indicted under this ordi-

14. In re Johnson, 62 Cal.2d 325, 42 Cal. Rptr. 228, 398 P.2d 420 (1965); Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250 (1951); People v. Mallory, 378 Mich. 538, 147 N.W.2d 66 (1967) (concurring opinion); People v. Witenski, 15 N.Y.2d 392, 259 N.Y.S.2d 413, 207 N.E. 2d 358 (1965); City of Toledo v. Frazier, 10 Ohio App.2d 51, 226 N.E.2d 777 (Ohio 1967); Hunter v. State, 288 P.2d 425 (Okl.Crim.1955); State v. Blank, 241 Or. 627, 405 P.2d 373 (1965); City of Tacoma v. Heater, 67 Wash.2d 733, 409 P.2d 867 (1966); State ex rel. Barth v. Burke, 24 Wis.2d 82, 128 N.W. 2d 422 (1964).

In some judicial decisions the right to counsel has been distinguished from the right to jury trial. James v. Headley, 410 F.2d 325 (5th Cir. 1969). This bifurcation of the Sixth Amendment requires a process of subtle reasoning, indeed.

It is said that the right to counsel is necessary to secure the entire panoply of other constitutional rights and is, therefore, more fundamental than the right to a jury trial. There may be degrees of fundamentalness, but the Sixth Amendment itself makes no distinction between these specific rights.

nance, or what he might think about the seriousness and degree of culpability which attaches to one convicted thereunder. There is a continual shifting of moral values in society. What once may have been looked upon as an offense of slight moment may now command the attention of a large number of people. Witness the current emphasis upon research into crimes of violence.[15] Precisely because there is today such a focus of attention upon crimes against the person, we must reassess the nature of the crime of assault and the possible consequences to the defendant. Because societal values do shift, this sort of crime of violence is peculiarly susceptible to appraisal by a jury of one's peers.

In deciding as we do, we are in effect disregarding the suggestions made by those who revere history. We feel that the argument from history is not determinative because what was practical historically is not necessarily adequate to the needs of our times. To look only to history would deny a progressive development of our legal institutions. As the United States Supreme Court stated in Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 292, 28 L. Ed. 232 (1884),

> "[A]s it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms." 110 U.S. at 531, 4 S.Ct. at 118.

Because *Duncan* directs that we look to the standards of the nation, we are given a wide range of choice in selecting those policies which we feel are dispositive in deciding whether to extend the right to jury trial. Although it is tempting to abdicate our responsibility by merely looking to procedures as they have existed in the past, we must not succumb to this temptation; rather, we must carefully weigh all of those factors bearing upon this important right.

There is no doubt that the right to jury trial holds a central position in the framework of American justice. Trial by jury is one of the oldest discernible and distinguishing institutions of our Anglo-American system of jurisprudence. Its heritage can be traced in an unbroken line at least from the 14th century forward. The Magna Carta declared that "no freeman shall be taken, or imprisoned, or exiled, or in any other manner destroyed, except by the judgment of his peers, or by the law of the land."[16] The importance of jury trial in the English constitutional tradition was commented upon by Blackstone as follows:

> "Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution if exerted without check or control, by justices of oyer and terminer occasionally named by the crown: who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that * * * the truth of ev-

15. See the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime in America, p. 23 (U.S. Gov't Printing Office ed. 1967).

16. As quoted in 4 Blackstone Comm. 343 (Cooley ed. 1899). Although there is dispute as to whether judicium parium of the famous chapter 39 was the practical equivalent of our verdict on the facts of "twelve good men and true," the practice can be observed in ordinary criminal trials by at least the beginning of the 1300's. Frankfurter and Corcoran, supra note 5, at 923.

ery accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighboors, indifferently chosen and superior to all suspicion." 4 Blackstone Comm. 349–350 (Cooley ed. 1899).

In the development of our American constitutional system, Alexander Hamilton made the following observation that,

"The friends and adversaries of the plan of the [Federal] Convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government." The Federalist No. 83.

The proposition that a man is entitled to a trial before a panel of his peers does no more than declare a belief in the dignity and integrity of man. Indeed the deprivation of this right was one of the moving forces in fomenting a violent revolution which had as its aim the overthrow of a tyrannous ruler. Such was the proclamation in our Declaration of Independence (1776):

"The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object, the establishment of an absolute Tyranny over these States * * *. He has combined, with others, to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation * * * for depriving us, in many cases of the benefit of Trial by Jury * * *."

In spite of a current note of dissent upon the efficacy of jury trial, the right remains a highly coveted one which is presently in great demand throughout the country. This demand should not go unheeded.

We must now consider the effect of the earlier decision of this court in Knudsen v. City of Anchorage, supra. In that case it was held that the Alaska Constitutional Convention, in adopting the wording of the Sixth Amendment to the United States Constitution as the language of the Alaska Constitution, article I, section 11,[17] did not intend to give to that language any broader application than it had been given by the United States Supreme Court at the time our constitution was drafted. A careful analysis of *Knudsen* will facilitate resolution of certain difficulties inherent in that decision.

At the outset, we are confronted with the rule that the intent underlying statutory or constitutional language should first be gathered from the plain meaning of the language itself, viewed on an objective basis. This approach was not employed in *Knudsen*. There is nothing ambiguous about our Alaska constitutional guarantee of the right to jury trial. We could simply hold that the language of the Alaska Constitution means what it plainly says, that jury trial is available in "all criminal prosecutions." As Mr. Justice Holmes observed in Northern Securities Co. v. United States, 193 U.S. 197, 401, 24 S.Ct. 436, 48 L.Ed. 679 (1903), the function of a judge in such instances requires mainly the ability "to read English intelligently." It is only when the meaning of the words used is open to reasonable dispute that one must look to other sources to discover the intention of those who wrote the provision.

In *Knudsen* it is said that the proceedings of the Alaska Constitutional Convention support the conclusion that the framers intended to grant to criminal defendants no broader rights than those which had been developed through the decisional processes of the United States Supreme

17. "In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record. * * *"

Court.[18] We do not think that the convention proceedings will support that proposition. In *Knudsen* considerable reliance was placed upon certain remarks of the Chairman of the Committee on Preamble and Bill of Rights which noted that the committee had drawn upon identical language in the federal constitution as a source of the statement of rights in the Alaska Constitution. These remarks noted that certain provisions of the federal constitution had served their purposes well and were well suited to the needs of Alaska. From the fact that these safeguards worked well within the federal system, we cannot simply conclude that the framers of our constitution intended to include the entire corpus of law which had developed in interpreting these provisions. More than mere acceptance of the federal provisions is needed to support such a finding of specific purpose. Nor is there anything in these remarks which even suggests that the Alaska constitutional language should be tied to interpretations by the United States Supreme Court in perpetuity. At later times this court has rejected the notion that it is bound to employ constitutional standards as developed by the United States Supreme Court, first, in the area of separation of church and state,[19] and later in holding that the taking of handwriting exemplars while defense counsel was not present was a denial of the assistance of counsel.[20]

Even assuming, arguendo, that the Alaska Constitution framers intended to accept extant federal standards, *Knudsen* chose to go only halfway with that doctrine by rejecting the ruling of the United States Supreme Court in District of Columbia v. Colts, supra. In that case the court decided that a defendant charged with reckless driving, as was the defendant in *Knudsen*, must be provided a jury trial because of the nature of the offense.

A careful reading of the minutes of the Constitutional Convention will support an argument in contradiction of the *Knudsen* decision. It is quite apparent from the remarks made by some members of the convention that they believed that the jury trial provision would apply in all cases prosecuted as criminal offenses. The language of one of the committee members is significant on this point:

> McNEALY: I don't feel strongly one way or the other in regard to this amendment here. The only reason I objected to the amendment was for the same reason I voted for this in Committee. To allow for juries of six in magistrate courts or in commissioner's courts or justice of peace courts, as they possibly will be, both a prosecuting and defending of cases in these inferior courts there is very often that I have called for a jury of twelve in a commissioner's court on a *traffic violation or a drunken driving charge or some petty misdemeanor*, and the reason I did was because it was the Federal government that was paying twelve dollars a day, I believe, jury's fees, and in looking this over in the Committee I felt that if the state was going to have to pay that, that comes a little closer to home and was purely a financial matter as far as I was concerned. Actually, I believe if the party that was accused of assault and battery or drunken driving or some parking violation or any misdemeanor, that

18. It is true that it was probably not the purpose and effect of section 12 of article I [Alas.Const. art. I, § 11] to enlarge the then existing right to a jury trial. But it also was not the purpose and effect to restrict the right. This is clear from the commentary on this section to the effect that "This section protects the rights of the accused in criminal cases" (Alaska Constitutional Convention, report of Committee on Preamble and Bill of Rights, December 15, 1955); and from the remarks of the committee chairman that "we tried to provide a procedure which would protect the right to a jury * * *."

19. Matthews v. Quinton, 362 P.2d 932 (Alaska 1961).

20. Roberts v. State, 458 P.2d 340 (Alaska 1969).

he can get ample justice before a jury of six, and it would save the state about $72 on these one-hour trials and further, if he is still not satisfied with the decision of the jury of six he has the right of course then to appeal and have his case heard before a jury of twelve in the higher court, so it was strictly from a financial point of view that gives the legislature power, and I believe that if the legislature, if they feel that people's rights aren't covered by a jury of six, then they can cause the jury to be set at twelve or they can legislate this particular amendment.[21]

The inclusion of the language, not found in the United States Constitution, which provides for a six-man jury in courts not of record can support an inference that the framers of the Alaska Constitution were making a limited exception to an otherwise comprehensive guarantee. That is, while jury trial might generally require a jury of twelve, a jury composed of a smaller number could be used in courts not of record which would be handling relatively slight offenses.

Silence in the convention discussions about the petty offense exception does not support a conclusion that the framers intended to incorporate the petty offense exception as it had been expounded by the federal courts. The framers of our constitution had a background of actual experience in which the jury trial had been available in criminal cases on a broad basis.[22] First, a broad right to jury trial obtained in prosecutions for any offense under territorial law.[23] Second, some municipalities had provided for jury trial, on

21. 2 Alaska Constitutional Proceedings 1317–18 (Jan. 5, 1956).

22. Consequently, the wording of the constitutional guaranty as to the right to a jury trial in all criminal prosecutions must be read in the light of the established practice that existed in Alaska at that time, where in a justice's court one charged with a violation of territorial law constituting a misdemeanor had the right to a jury trial, without regard to the distinction made at common law between petty and more serious offenses, and without regard to the degree of punishment that might be inflicted. Such a right to a jury trial was thus broader than the right preserved by the federal constitution. Therefore, the technique utilized by the Supreme Court of the United States for determining what behavior gave rise to the right to trial by jury and what did not, which consisted of dividing offenses between minor misdeeds and serious affairs, cannot be availed of to determine in Alaska the right to trial by jury in criminal prosecutions which is preserved by the language of article I, section 11 of the state constitution. Neither would the differentiation between severity of sentence and relative lightness be, standing alone, a governing factor.

23. Act of March 3, 1899, ch. 41, § 410, 30 Stat. 1253 [now § 69–2–1, A.C.L.A.1949] provides in part: "That a justice's court has jurisdiction of the following crimes: First. Larceny * * *. Second. Assault * * *. Third. Of any misdemeanor punishable by imprisonment in the county jail or by fine, or by both."

Section 418 (as amended by ch. 47, S.L.A.1925 [now § 69–3–11, A.C.L.A. 1949]) provides: "That upon a plea other than a plea of guilty, if the defendant expressly waive a trial by jury, the justice must proceed to try the issue."

Section 419 (as amended by ch. 23, S.L.A. 1933 [now § 69–3–12, A.C.L.A. 1949]) provides: "If a trial by jury be demanded the justice must make an order in writing * * *."

That there was such a right (if not constitutional then of statutory origin) seems clear from a consideration of the law. The justice's court was given jurisdiction of "any misdemeanor" punishable by imprisonment in jail or by fine (§ 69–2–1, A.C.L.A.1949). The trial of a misdemeanor in a justice's court was considered a "criminal action" (§ 69–3–1 et seq., A.C.L.A.1949). If a defendant, charged with having committed a misdemeanor, demanded a trial by jury, then the statute provided that the justice "must make an order in writing accordingly and proceed to select a trial jury" (§ 69–3–12, A.C.L.A.1949).

It is clear that the statutes in effect since 1899 contained no limitations as to the right to trial by jury. There is no other way, that the express language of the statute can be construed. Thus, it is fair to assume that in a justice's court while Alaska was a territory every misdemeanor was triable of right by a jury if

demand;[24] and while other municipalities had not so provided, the question of the entitlement to jury trial had never been tested through an appellate proceeding during territorial times. United States v. Farwell, 76 F.Supp. 35, 11 Alaska 507 (1948), referred to in *Knudsen*, contains only pure dictum to the effect that jury trial was not necessary in municipal ordinance violation cases. If the framers of the Alaska Constitution were aware of the petty offense exception to the Sixth Amendment, their silence about this exception in the convention proceedings and in the remarks on the floor of the convention cannot be taken as evidence of an intention to adopt that exception.

If, historically, jury trial had always been available on a broad basis in Alaska, it is only reasonable to conclude that the

a defendant demanded a jury, and that this was true without any distinction being made between petty and more serious offenses, and without distinction between the possibility of light or severe punishments.

In Rassmussen v. United States, 197 U.S. 516, 25 S.Ct. 514, 49 L.Ed. 862 (1905), a prosecution for keeping a bawdy house, it was held that Congress could not substitute a jury of six misdemeanor cases because the Sixth Amendment, applicable to Alaska, required a common law jury of twelve.

24. In the Act of June 6, 1900, ch. 786, § 1 et seq., 31 Stat. 321, authority was given for the incorporation of towns of Alaska. Although this statute gave each town council the authority by ordinance to provide for "police protection," it was held that this was not sufficient statutory authority for the establishment by ordinance of a municipal court. In re Bruno Munro, 1 Alaska 279 (D.Alaska 1901).

This statute was amended by Congress in 1904. Act of April 28, 1904, ch. 1778, 33 Stat. 529. The town council was given express authority to "appoint * * * a municipal magistrate * * *", upon whom was conferred jurisdiction "of all actions for violation of municipal ordinances." Appeals would lie to the district court from judgments of the magistrate "in the same manner as appeals from the judgments of ex-officio justices of the peace." There was no mention made of a jury trial.

In 1923 the legislature provided that "The rules of proceeding before a municipal magistrate shall be as near as practicable the same as before a justice of the peace, unless otherwise prescribed by ordinance enacted by the council." Law of May 4, 1923, ch. 97, § 24 [§ 16-1-70, A.C.L.A.1949].

No further change was made in the statute, and there was no elaboration as to what was intended by the words "rules of proceeding"—particularly, whether it was intended to incorporate in the proceedings before a municipal magistrate those provisions of territorial law relating to trial by jury in a justice's court. (§§ 69-3-11, 69-3-12, A.C.L.A.1949).

However, as a practical matter it was apparently left to the discretion of the city whether there should be trial by jury. Some cities provided for a jury trial for any misdemeanor upon demand of the defendant. Others made no such provision, and in those cases the municipal magistrate consistently refused to allow jury trials for violations of municipal ordinances. Thus, from this practical application, it might be logical to assume that the language of § 16-1-70, making the rules of proceeding before a municipal magistrate as near as practicable the same as before a justice of the peace, unless otherwise provided by municipal ordinance, could be interpreted as permitting each individual city to choose for itself whether one charged with a violation of a municipal ordinance should be entitled to a trial by jury.

The phrase "rules of proceeding," as used in the statute relating to jurisdiction of magistrates over violation of municipal ordinances (§ 16-1-70, A.C.L.A.1949) means the same thing as "practice and procedure" as used in that portion of the statute relating to the civil jurisdiction of a municipal magistrate.' Hence, it is logical to conclude that when the legislature stated that the rules of proceeding for violations of municipal ordinances before a municipal magistrate should be "as near as practicable the same as before a justice of the peace," that it was intended that "rules of proceeding" would include the right to demand a trial by jury, and that this would be the practice in a municipal magistrate's court "unless otherwise prescribed by ordinance enacted by the council." Thus, there is reason for the established practice in Alaska up to the time of statehood, whereby jury trials were authorized in some city courts, and not in others.

See Knudsen v. City of Anchorage, 358 P.2d 375 (Alaska 1960).

framers thought they were continuing an existing practice. This may account for the lack of discussion on the convention floor about the petty offense exception.

For these reasons we do not think that *Knudsen* represents a necessary or adequate reading of the Alaska constitutional language. More recently we have recognized that we are at liberty to make constitutional progress in Alaska by our own interpretations, as long as we measure up to the national standards which are required by the United States Supreme Court.[25] It is our duty to move forward in those areas of constitutional progress which we view as necessary to the development of a civilized way of life in Alaska. As Mr. Justice Cardozo observed,

> "We take a false and one-sided view of history when we ignore its dynamic aspects. The year books can teach us how a principle or a rule had its beginnings. They cannot teach us that what was the beginning shall also be the end." Cardozo, The Growth of the Law, 104–105 (1924).

To the extent that the *Knudsen* case is inconsistent with our opinion today, it is overruled.

In interpreting the Alaska Constitution we must consider the consequences of denying jury trial to the person being prosecuted. It is of small moment to the citizen whether the period of incarceration is long or short: one day may be too long. Its results may be serious for one man and less so for another, depending upon a variety of circumstances. Furthermore, the great bulk of the citizenry encounters the judicial process most frequently in the prosecution of what have been called the petty offenses. Punishments inflicted at that level can be as harsh and as devastating to the life of the citizen as those meted out for more serious misdemeanors and for felonious conduct. Why should the remedial process be less just at one level than at another? We should be alert against attempts by government to whittle away fundamental rights on grounds of expediency. It is our constitutional duty to prevent such untoward consequences for the citizen at large. It is well stated in Duncan v. Louisiana, supra, that,

> "Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge he was to have it." 391 U.S. at 156, 88 S.Ct. at 1451.

[4–6] Accordingly, we declare that in any criminal prosecution, whether under state law or for violation of a city ordinance, the accused upon demand is entitled to a jury trial. What is ultimately persuasive to us is the strong indication by other courts that fundamental fairness under the Fourteenth Amendment requires an extension of procedural safeguards in the administration of criminal justice to an area of crimes once deemed outside the pale of protection. In deciding today that appellant has a constitutional right to a jury trial, we have decided to so extend this protection. In doing so, we recognize that this result has not been reached in certain other jurisdictions or by the United States Supreme Court.. The mere fact, however, that the United States Supreme Court has not extended the right to jury trial to all types of offenses does not preclude us from acting in this field. While we must enforce the minimum constitutional standards imposed upon us by the United States

25. Roberts v. State, 458 P.2d 340 (Alaska 1969).

Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.[26] We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law.[27]

[7] In extending the right to jury trial, we define the category of "criminal" prosecutions as including any offense a direct penalty for which may be incarceration in a jail or penal institution. It also includes offenses which may result in the loss of a valuable license, such as a driver's license or a license to pursue a common calling, occupation, or business.[28] It must also include offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term.[29]

[8] Excluded from the requirement of jury trial are such relatively innocuous offenses as wrongful parking of motor vehicles, minor traffic violations, and violations which relate to the regulation of property, sanitation, building codes, fire codes, and other legal measures which can be considered regulatory rather than criminal in their thrust, so long as incarceration is not one of the possible modes of punishment.

It is said that by allowing a broad right to jury trial too great a burden is imposed on the operation of government. But fears about the ramifications of constitutional decisions usually are not borne out in reality. Mr. Justice Cardozo wisely commented on such predictions of doom by observing that in making constitutional progress, "[w]e are to be aware of the insularity of mind that perceives in every inroad upon habit a catastrophic revolution." Cardozo, The Paradoxes of Legal Science, 121

26. Roberts v. State, 458 P.2d 340, 342 (Alaska 1969). We again iterate our position, taken in Roberts, that "[w]e are not bound in expounding the Alaska Constitution's Declaration of Rights by the decisions of the United States Supreme Court, past or future, which expound identical or closely similar provisions of the United States Constitution."

We also again voice our disapproval of the language in Knudsen v. City of Anchorage, 358 P.2d 375 (Alaska 1960) which would indicate that we are bound by the United States Supreme Court's intepretation of the Sixth Amendment of the United States Constitution.

27. Other high state courts in interpreting their constitutions have anticipated or applied standards different from those minimally required by the United States Supreme Court. People v. Donovan, 13 N.Y.2d 148, 243 N.Y.S.2d 841, 193 N.E. 2d 628 (1963), extended the New York State constitutional right to counsel during police interrogation prior to the United States Supreme Court holding in Escobedo and Miranda; California, in People v. Cahan, 44 Cal.2d 434, 282 P. 2d 905, 915 (1955), adopted the exclusionary rule prior to Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, stating "In developing a rule of evidence applicable to the state courts, this court is not bound by the decisions that have applied the federal rule * * *"; in Perez v. Lippold, 32 Cal.2d 711, 198 P. 2d 17 (1948), the California court struck down a miscegenation law, thus anticipating by 19 years the United States Supreme Court's ruling in Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L. Ed.2d 1010 (1967).

28. This does not cover revocation of licenses pursuant to administrative proceedings where lawful criteria other than criminality are a proper concern in protecting public welfare and safety, as the basis of revocation or suspension in such instances is not that one has committed a criminal offense, but that the individual is not fit to be licensed, apart from considerations of only guilt or innocence of crime.

29. A heavy enough fine might also indicate criminality because it can be taken as a gauge of the ethical and social judgments of the community.

(1928). Furthermore, we need not rely only on speculation about the consequences of extending the right to jury trial. We have available empirical evidence which is of comfort. In jurisdictions such as California which provide jury trial for all offenses, regardless of type, no breakdown of the machinery of justice has occurred.[30]

We recognize that this decision represents an advance from what historically was thought by some to be the necessary extent of jury trial in criminal cases. But the evolving spirit of due process must be discerned and made effective as civilization advances. We reach a point when the crudities of an earlier time must be abandoned. In this dawning of the Age of Aquarius it is not too much to require that the right to jury trial shall be made available to everyone on equal terms as the plain constitutional language commands.

The decision below is reversed. This case is remanded with instructions to grant petitioner a jury trial.

CITY OF FAIRBANKS, Appellant,
v.
William E. GREENE, Appellee.
No. 1170.

Supreme Court of Alaska.
June 29, 1970.

Appeal from order of the Superior Court, Fourth Judicial District, Fairbanks, Everett W. Hepp, J., reversing District Court's suspension of driving privilege. The Supreme Court held that District Court had authority to suspend motorist's driver's license for violation of municipal ordinance.

Reversed and remanded with directions.

Automobiles ⇐144.1(1)

District court had authority to suspend motorist's driver's license for violation of municipal ordinance. AS 28.15.220.

Richard C. Folta, Merdes, Schaible, Staley & DeLisio, Fairbanks, for appellant.

No appearance by or on behalf of appellee.

OPINION

Before BONEY, C. J., and DIMOND, RABINOWITZ, and CONNOR, JJ.

PER CURIAM.

On January 18, 1968, upon court trial, William Earl Greene was found guilty of violating Section 7.348 of the Fairbanks Code of Ordinances.[1] Based on that conviction Greene was fined $300 and his driver's license was suspended for a period of one year. On March 19, 1968, Greene petitioned the superior court for a review of that portion of the sentence concerning suspension of his driving privilege.

Greene's argument in the superior court was to the effect that the district court did not possess the authority to suspend his driver's license for violation of a municipal ordinance. On June 12, 1969, the superior court reversed that portion of the sentence dealing with license suspension. On July 9, 1969, the City of Fairbanks filed its notice of appeal from this order. On July 21, 1969, this court, in a case factually identical to the instant case, held that the district court has the necessary authority under AS 28.15.220 to suspend a license for violation of an ordinance regulating

30. Kalven and Zeisel, The American Jury 18-19 (1966).

1. In pertinent part Fairbanks Code of Ordinances § 7.348 recites:

> No person, whether licensed or not * * * who is under the influence of intoxicating liquor * * * shall drive any vehicle on any property, whether public or private, within this city.

insufficient to support an award of compensatory damages.[7]

[5] A more troublesome issue is presented by the grant of a new trial on the City's claim on the ground that the jury failed to render a verdict. While under normal circumstances we would be strongly inclined toward the view that the verdict was properly returned, we find ourselves in doubt as to exactly what transpired below. The award of $2,416 in damages on the counterclaim where the only evidence was for a sum in excess of $3,000 suggests a compromise verdict on the part of the jury. One explanation of this award is that the jury deducted from the counterclaim some amount owed to the City in arriving at the final figure. Under these peculiar circumstances, we find no abuse of discretion in the grant of a new trial on the City's claim.[8]

[6] We also find no error in the refusal of the district court to limit the new trial of the counterclaim to the issue of damages. Because of the possibility of a compromise verdict, we are unable to say that the jury clearly separated the issues of liability and damages so that a limited retrial would have been permissible.[9] The power to grant restricted retrial is discretionary;[10] no abuse of that power occurred below.

The judgment of the superior court affirming the action of the district court is affirmed.

7. On the basis of the evidence presented, the trial court would have been justified in granting a judgment notwithstanding the verdict on the counterclaim.

8. Undoubtedly, this ambiguity would have been avoided by clear instructions from the trial court on the proper method of filling out the verdict form. Counsel should have been instrumental in this regard.

9. Lofgren v. Western Wash. Corp. of Seventh Day Adventists, 65 Wash.2d 144, 396 P.2d 139, 144 (1964); Phipps v. Hulit, 128 N.J.L. 74, 24 A.2d 506, 507–508 (1942); Annot., 85 A.L.R.2d 9, 26 (1962).

10. *Cf.* 6A Moore, Federal Practice ¶ 59.06 at 3760–61 (2nd ed. 1966). Pennington v. Snow, 471 P.2d 370 (Alaska 1970), and City of Fairbanks v. Nesbett, 432 P.2d 607 (Alaska 1967), cited by Dowling Supply, are cases in which this court remanded only as to the issue of damages. They stand for no more than the proposition that this court has the power to order restricted new trial where liability is clear but the extent of damages is in controversy.

Kathleen ALEXANDER, Petitioner,

v.

CITY OF ANCHORAGE, Respondent.

No. 1373.

Supreme Court of Alaska.

Nov. 19, 1971.

Petitioner charged with offense of loitering under city ordinance requested appointment of counsel to represent her. The District Court, Dorothy D. Tyner, J., denied request and petitioner appealed. The Superior Court, Third Judicial District, Anchorage, James M. Fitzgerald, J., affirmed and petition for review was filed. The Supreme Court, Dimond, J., held that where conviction for misdemeanor may result in incarceration, loss of valuable license, or fine so heavy as to indicate criminality, defendant has right to be represented by counsel.

Order of Superior Court reversed.

1. Criminal Law ⇨1023(2)

Generally, appeals may be taken to Supreme Court from final judgments of Superior Court. Rules of the Supreme Court, rules 6, 23, 23(e), 24.

2. Criminal Law ⇨1023(3)

Ruling by Supreme Court on question of whether petitioner charged with loitering in violation of city ordinance had right to assistance of counsel was so crucial to

proper administration of criminal justice that it was appropriate for Supreme Court to exercise its discretionary review jurisdiction before petitioner was tried. Rules of the Supreme Court, rule 24.

3. Criminal Law ⇐641.2

Person prosecuted for misdemeanor, conviction of which may result in incarceration in jail or penal institution, loss of valuable license, or fine so heavy as to indicate criminality, has right to be represented by counsel. Const. art. 1, § 11.

4. Criminal Law ⇐641.11

Where direct penalty for conviction for offense may be incarceration, loss of valuable license, or fine heavy enough to indicate criminality, such offense is a "serious crime" within public defender statute and therefore defendant who is charged with any such misdemeanor and who cannot afford to hire his own lawyer is eligible for representation by public defender. Const. art. 1, § 7; Dist.Ct.Rules of Criminal Procedure, rule 1(j); Rules of Criminal Procedure, rules 15(c), 39(b); AS 18.85.100, 18.85.170(5).

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⇐641.2

City must pay cost of providing counsel for indigent accused of loitering in violation of city ordinance. AS 22.15.270.

Philip B. Byrne, Alaska Legal Services, Anchorage, for petitioner.

Victor D. Carlson and Herbert Soll, Public Defender Agency, Anchorage, amicus curiae for petitioner.

Harold W. Tobey, City Atty., John R. Spencer, Asst. City Atty., Anchorage, for respondent.

John E. Havelock, Atty. Gen., Juneau, Seaborn J. Buckalew, Dist. Atty., Robert L. Eastaugh, Asst. Dist. Atty., Anchorage, amicus curiae for respondent.

Before BONEY, C. J., and DIMOND, RABINOWITZ, CONNOR and ERWIN, JJ.

OPINION

DIMOND, Justice.

Petitioner was arrested and charged with the offense of loitering under an ordinance of the City of Anchorage.[1] She requested the district court to appoint counsel to represent her, but the court held it had no such authority and denied her request. The superior court affirmed the district court ruling on the basis that District Court Criminal Rule 1(j) provided in misdemeanor cases that Criminal Rules 39(b) and 15(c), relating to the appointment of counsel for indigent defendants, had no application.[2] A petition for review has

1. Code of Ordinances, City of Anchorage, § 15-1(h) provided in part as follows:

It shall be unlawful for any person to:

* * * * *

(h) Loiter or prowl in a place, at a time, or in a manner, and under circumstances that manifest an unlawful purpose or warrant alarm for the safety of persons or property in the vicinity * * *.

2. District Ct.Crim.R. 1(j) provides in part:

(j) *Rules Inapplicable in Misdemeanor Cases.* In a misdemeanor case the provisions of the following Rules of Criminal Procedure shall not apply:

Rule 5, relating to preliminary examamination,

Rule 32(c), relating to pre-sentence investigation,

Rule 39(b) and 15(c), with respect to appointment of counsel for indigent defendants.

Crim.Rules 15(c) and 39(b) provide, respectively, as follows:

15(c) *Defendant's Counsel and Payment of Expenses.* If a defendant is without counsel the court shall advise him of his right and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel. If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof the court may direct that all expenses of travel and subsistance of the defendant's attorney for attendance at the examination shall be paid by the state. In that event payment shall be made accordingly

been filed in this court, and all proceedings in the district court have been stayed by order of this court pending the disposition of the petition.

[1] We grant the petition for review in our discretionary authority to do so under Supreme Court Rules 23 and 24. The general rule is that appeals may be taken to this court from final judgments of the superior court.[3] If that rule were strictly adhered to we would not now pass upon petitioner's claim that she is entitled to the appointment of counsel, but would do so only after she had been tried and convicted of the offense with which she is charged. But there are substantial reasons for deviating from that general policy in this case. Supreme Court Rule 23(e) permits one to seek review of an interlocutory order

> [w]here postponement of review until appeal may be taken from a final judgment will result in injustice because of impairment of a legal right * * *.

If petitioner has a legal right to have the assistance of counsel for her defense in this case, such right will have been impaired and injustice might well result if she were forced to go to trial without counsel and were convicted.

> 39(b) *Appointment of Counsel for Persons Financially Unable to Employ Counsel.* If the defendant states that he desires the aid of counsel and that he is financially unable to employ counsel, the court shall conduct the examination and make the determination provided for in (c) of this rule. If the court determines that the defendant is in fact financially unable to employ counsel and that he is entitled to have counsel provided at public expense, the court shall appoint counsel to represent him. Counsel so appointed shall be allowed such fees for their services as are provided for pursuant to Rule 15, Rules Governing Administration of All Courts. In the absence of a request by the defendant, the court in its discretion may appoint counsel when it deems it in the best interests of justice to do so.

[2] Supreme Court Rule 24 also comes into play. It provides in part that review will be granted

> (1) where the order or decision sought to be reviewed is of such substance and importance as to justify deviation from the normal appellate procedure by way of appeal and to require the immediate attention of this court * * *.

What we are dealing with here is a constitutional safeguard—the claimed right of an accused to have the assistance of counsel for her defense. If petitioner is correct in her contention that such right extends to prosecution for a criminal misdemeanor, the order denying the right to counsel is of substance and importance because it would be unjust to put petitioner to the tribulations of a criminal trial and possible conviction without the valuable assistance that could be given her by trained counsel. A ruling by this court on this point is so crucial to the proper administration of criminal justice that this is an appropriate instance for the exercise of our discretionary review jurisdiction.[4]

In Baker v. City of Fairbanks[5] we held that in any criminal prosecution the accused, upon demand, is entitled to a jury trial.[6] We defined "criminal prosecution" as including "any offense a direct penalty for which may be incarceration in a jail or penal institution."[7] We also included

3. Supreme Ct.R. 6 provides:
> *What May be Appealed.* An appeal may be taken to this court from a final judgment entered by the superior court or a judge thereof in any action or proceeding, civil or criminal, except that the state shall have a right to appeal in criminal cases only to test the sufficiency of the indictment or on the ground that the sentence is too lenient.

See City of Fairbanks v. Schaible, 352 P.2d 129 (Alaska 1960).

4. State v. Browder, 486 P.2d 925, 931–932 (Alaska 1971).

5. 471 P.2d 386 (Alaska 1970).

6. *Id.* at 401.

7. *Id.* at 402.

in the definition of that term offenses which may result in the loss of a valuable license [8] and offenses where a heavy enough fine is imposed so as to indicate criminality because such a fine could be taken as a gauge of the ethical and social judgments of the community.[9]

[3] The term "criminal prosecution", as used in *Baker*, is taken from article I, section 11 of the Alaska constitution which guarantees to one in a criminal prosecution the right to a trial by jury. But that same section of the constitution also guarantees to the accused in a criminal prosecution the right to have the assistance of counsel for his defense.[10] We can see no justifiable reason for defining "criminal prosecution" any differently in relation to the right to the assistance of counsel than we have defined it in relation to the right to trial by jury. Consequently, we hold that in any criminal prosecution, as we have defined that term in *Baker*, the accused shall have the right to be represented by counsel. This means that he has the right to the assistance of counsel for his defense if he is prosecuted for a misdemeanor, as well as for a felony, when the penalty upon conviction of the misdemeanor may result in incarceration in a jail or penal institution, the loss of a valuable license, or a fine so heavy so as to indicate criminality.

To be assisted by counsel in a criminal action is not merely desirable. It is a valuable right. Nearly 40 years ago the United States Supreme Court, in speaking of this right as guaranteed by the sixth amendment to the federal constitution,[11] had this to say:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[12]

The right to the assistance of counsel means, of course, that an accused who can afford it may employ an attorney to represent him in a criminal prosecution. But it means more than that. The constitutional guarantee would have little meaning if it did not also encompass the right of the poor person to have counsel appointed at public expense to represent him in a criminal action when he could not afford to hire a lawyer. The United States Supreme Court

8. *Id.*

9. *Id.* at 402, n. 29.

10. Alaska Const. art. I, § 11 provides:
> *Rights of Accused.* In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

11. The sixth amendment to the United States Constitution provides in part:
> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense.

12. Powell v. Alabama, 287 U.S. 45, 68–69, 53 S.Ct. 55, 64, 77 L.Ed. 158, 170 (1932).

recognized this fact in 1963 in Gideon v. Wainwright.[13] The court stated there:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[14]

Gideon dealt with a felony, and therefore did not necessarily lay down a rule to cover a misdemeanor prosecution. In fact, subquent decisions of the United States Supreme Court seem to have limited the rule in *Gideon* to felony prosecutions. For example, in Mempa v. Rhay, 389 U.S. 128, 134, 88 S.Ct. 254, 256, 19 L.Ed.2d 336, 340 (1967), the court stated that *Gideon* established "[the] right to appointment of counsel in felony cases." In Burgett v. Texas, 389 U.S. 109, 114, 88 S.Ct. 258, 261, 19 L.Ed.2d 319, 324 (1967), it was noted that *Gideon* made it "unconstitutional to try a person for a felony in a state court" without providing counsel. And in the case of In re Gault, 387 U.S. 1, 29, 87 S.Ct. 1428, 1444, 18 L.Ed.2d 527, 547 (1967), the court remarked that the juvenile involved in the case, had he been an adult, would have been entitled to the appointment of counsel "at least if a felony were involved."

On the other hand, the United States Supreme Court has taken other action indicating the right of indigents to be represented by counsel in other than felony cases. In promulgating the rules of procedure for the trial of minor offenses before United States Magistrates the United States Supreme Court has provided that on the trial of a minor offense, other than a petty offense, it is the duty of the magistrate, when the defendant makes his appearance, to inform the defendant "of his right to retain counsel" and "of his right to request the assignment of counsel if he is unable to obtain counsel."[15]

In contrast, where petty offenses, as distinguished from minor offenses, are concerned, the magistrate need only advise the defendant "of his right to counsel" and not of his right to request the assignment of counsel if he is unable to obtain counsel.[16]

Whatever distinction the Supreme Court of the United States intended to make between minor and petty offenses, it seems clear enough that that court has not yet extended the right to assigned counsel for indigent defendants in all types of criminal prosecutions. But this does not preclude us from acting in this field in interpreting our own constitutional provisions guaranteeing the assistance of counsel for an accused's

13. 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

14. *Id.* at 344, 83 S.Ct. at 796, 9 L.Ed.2d at 805 (1963).

15. 51 F.R.D. 107, 201 (1971).

16. *Id.* at 202.

defense in all criminal prosecutions. As we stated in Baker v. City of Fairbanks:[17]

> The mere fact, however, that the United States Supreme Court has not extended the right to jury trial to all types of offenses does not preclude us from acting in this field. While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. We need not stand by idly and impassively, waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law. [Footnotes omitted.][18]

[4] As we did in *Baker*, in extending the right to trial by jury under article I, section 11 of the Alaska constitution, we here define the term "criminal prosecution", as it relates to the right to have the assistance of counsel, as including any offense a direct penalty for which may be incarceration in a jail or penal institution, which may result in the loss of a valuable license, or which may result in a heavy enough fine to indicate criminality. We further hold, in conformity with well reasoned opinions of other jurisdictions,[19] that such right to the assistance of counsel means that counsel must be appointed at public expense to a misdemeanor defendant who is indigent and too poor to have his own lawyer. In Nichols v. State,[20] which dealt with post-conviction right to counsel, Justice Rabinowitz noted in his concurring opinion that denial would be "fundamentally unfair and violative of the due process clause of article I, section 7 of the Alaska constitution."[21] The nature of the injustice is no different where counsel is denied to an indigent defendant in a misdemeanor case within the category of a "criminal prosecution," as we have defined it. Of necessity, our decision in this case means that District Court Criminal Rule 1(j) has no application so far as it excludes from the Criminal Rules of the District

17. 471 P.2d 386 (Alaska 1970).

18. *Id.* at 401–402. *See also* Whitton v. State, 479 P.2d 302, 309 (Alaska 1970); Roberts v. State, 458 P.2d 340, 342 (Alaska 1969).

19. James v. Headley, 410 F.2d 325 (5th Cir. 1969); Marston v. Oliver, 324 F. Supp. 691 (E.D.Va.1971); Arbo v. Hegstrom, 261 F.Supp. 397 (D.Conn.1966); Rodriguez v. Rosenblatt, 58 N.J. 281, 277 A.2d 216 (1971); Wright v. Denato, Iowa, 178 N.W.2d 339 (1971); State ex rel. Monts v. Janco, W.Va., 180 S.E.2d 74 (1971); Application of Stevenson, 254 Or. 94, 458 P.2d 414 (1968); In re Smiley, 66 Cal.2d 606, 58 Cal.Rptr. 570, 427 P.2d 179 (1967); State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1967); People v. Mallory, 378 Mich. 538, 147 N.W.2d 66 (1967); People v. Fletcher, 74 Ill.App.2d 387, 220 N.E.2d 70 (1966); City of Tacoma v. Heater, 67 Wash.2d 733, 409 P.2d 867 (1966); Taylor v. City of Griffin, 113 Ga.App. 589, 149 S.E. 2d 177 (1966); Hunter v. State, 288 P. 2d 425 (Okl.Cr.1955); Bolkavoc v. State, 229 Ind. 294, 98 N.E.2d 250 (1951); Evans v. Rives, 75 U.S.App.D.C. 242, 126 F.2d 633 (1942).
On February 23, 1971 the United States Supreme Court granted certiorari to review State ex rel. Argersinger v. Hamlin, 236 So.2d 442 (1970) where the Florida Supreme Court held that an indigent defendant charged with an offense punishable by not more than six months imprisonment was not entitled to assigned counsel. 401 U.S. 908, 91 S.Ct. 887, 27 L.Ed. 2d 805 (1971).
For representative statutes, *see, e. g.*, New Hampshire Rev.Stat.Annot., chapter 604–A:2 (Supp.1969); Vernon's Ann. Texas Code of Crim. Procedure, art. 26.04 (1966).

20. 425 P.2d 247 (Alaska 1967).

21. *Id.* at 256. Alaska Const. art. I, § 7 provides in part:
> No person shall be deprived of life, liberty, or property, without due process of law.

Court the Superior Court Criminal Rules 15(c) and 39(b).

It remains for us to determine what we mean by "public expense" when we speak of counsel for indigent defendants in misdemeanor cases that come within the constitutional category of criminal prosecutions. AS 18.85.100 provides that indigents being detained for or charged with "serious crimes" are eligible for representation by the Public Defender. AS 18.85.170(5) defines a "serious crime" to include a "criminal matter in which a person is entitled to representation by an attorney under the Constitution of the State of Alaska or the United States Constitution." Since we have held that an indigent defendant is entitled to representation by counsel when prosecuted for an offense the direct penalty for which may be incarceration, loss of a valuable license, or a fine heavy enough to indicate criminality, it follows that any such offense is a serious matter and a "serious crime" within the meaning of the Public Defender statute. Therefore, a defendant charged with any such misdemeanor who cannot afford to hire his own lawyer is eligible for representation by the Public Defender.

[5] Who pays the costs of representation by counsel is still another matter. AS 22.15.270 requires that any fines resulting from violations of ordinances of political subdivisions be paid to the political subdivision, in return for which the subdivision shall pay the state for the judicial services rendered. Based upon this statute, most of the major political subdivisions of the state have entered into contractual arrangements with the Alsaka Court System whereby the political subdivision has agreed to pay the salaries of the district judges, and all other costs of running the courts which are attributable to prosecutions initiated by the political subdivision. Since the cost of providing counsel seems indistinguishable from the cost of providing these judicial services, it should be treated in the same way and fall, in cases such as the present, upon the City of Anchorage.

The order of the superior court, which affirmed the district court order denying the motion for appointment of counsel for petitioner, is reversed.

Herbert A. DeSACIA, Appellant,
v.
STATE of Alaska, Appellee.
File No. 1071.

Supreme Court of Alaska.
May 15, 1970.

Manslaughter prosecution in which defendant was charged with killing two victims, driver and passenger in another automobile, in automobile accident. The Superior Court, Fourth Judicial District, Fairbanks District, Warren William Taylor, J., rendered judgment on verdict finding defendant guilty as to one victim and not guilty as to another, and defendant appealed. The Supreme Court, Boney, C. J., held that the verdicts were inconsistent, requiring reversal, but that defendant could be again tried on charge on which he had been convicted.

Reversed and new trial ordered.

Dimond, J., dissented in part and filed opinion.

1. Homicide ⇐74

Criminal negligence theory is within purview of manslaughter statute. AS 11.15.040, 11.15.080.

2. Automobiles ⇐353

Prosecution in manslaughter case based on criminal negligence theory and arising out of automobile accident needed only to show that victim's automobile left road as direct result of defendant's culpably negligent handling of his own vehicle and was not required to show that defendant intentionally forced victim's vehicle off road. AS 11.15.040, 11.15.080.

3. Criminal Law ⇐1144(13), 1159(2)

In reviewing sufficiency of evidence, court must view evidence and inferences to be drawn therefrom in light most favorable to state and question is whether finding is supported by relevant evidence adequate to support conclusion by reasonable mind that there was no reasonable doubt as to guilt.

4. Homicide ⇐74

In order to establish culpable negligence for purposes of manslaughter statute, degree of conduct more reckless and wanton than would be involved in ordinary negligence is required. AS 11.15.040, 11.15.080.

5. Automobiles ⇐356

Evidence in manslaughter prosecution arising out of automobile accident which occurred when victim's vehicle left road at curve while defendant's automobile was attempting to pass, presented question for jury. AS 11.15.040, 11.15.080.

6. Criminal Law ⇐894

Defendant did not waive right to question consistency of verdicts by failing to move for acquittal at close of evidence. Rules of Civil Procedure, rule 50(b); Rules of Criminal Procedure, rule 47(b).

7. Criminal Law ⇐1040

Supreme Court could consider objection to inconsistency of verdict, under plain error rule, even if defendant should have objected to instructions which permitted inconsistency. Rules of Criminal Procedure, rule 47(b).

8. Criminal Law ⇐878(4)

Manslaughter prosecution verdict, in case arising out of automobile accident occurring when defendant was attempting to pass victims' automobile, acquitting defendant as to driver but convicting him as to passenger in driver's automobile, were irreconcilably in conflict, although there was evidence that cause of death differed in case of each victim.

9. Criminal Law ⇐878(4)

One accused in different counts of indictment of same crime, there being no difference in means alleged to have been employed, may not be adjudged guilty on verdict of conviction on one count and of acquittal on the other.

10. Criminal Law ⇐878(4)

Verdicts must not be strictly inconsistent.

11. Criminal Law ⇐878(4)

Inconsistency in verdicts in manslaughter prosecution arising out of automobile accident, finding defendant not guilty as to driver but guilty as to passenger in driver's automobile, was fatal.

12. Criminal Law ⇐204

Defendant who had been charged with manslaughter of two victims and convicted as to one and acquitted as to the other did not waive his right to double jeopardy protection as to acquittal by appealing from conviction, and could not be retried as to charge on which he was acquitted after reversal of conviction on ground that verdicts were fatally inconsistent. U.S.C.A.Const. Amends. 5, 14; Const. art. 1, § 9.

13. Criminal Law ⇐204

Defendant appealing his conviction waives his right to protection under double jeopardy clause. U.S.C.A.Const. Amend. 5.

14. Judgment ⇐751

Doctrine of collateral estoppel applies to criminal as well as civil law.

15. Judgment ⇐751

As ingredient of guarantee against double jeopardy, rule of collateral estoppel requires degree of confidence in prior acquittal as adjudication of ultimate issues of fact.

16. Judgment ⇐751

Collateral estoppel did not operate to bar second prosecution of defendant on manslaughter charge on which he had been convicted where he had been charged with killing two victims and acquitted as to one charge and convicted as to other and conviction was reversed on appeal on ground of inconsistency of verdicts.

Sherman A. Noyes, Fairbanks, for appellant.

Gerald J. Van Hoomissen, Dist. Atty., William T. Christian, Jr., Asst. Dist. Atty., Fairbanks, for appellee.

Before BONEY, C. J., and DIMOND, RABINOWITZ and CONNOR, JJ.

OPINION

BONEY, Chief Justice.

Appellant, Herbert A. DeSacia, was convicted by a jury on October 4, 1968, of the manslaughter of Reynaldo E. Evangelista, as charged in count II of a two count indictment. He was, at the same time, found not guilty on the first count of the indictment, which charged the manslaughter of Eugene E. Hogan. After the jury rendered its verdict, DeSacia moved for judgment notwithstanding the verdict, arguing that the verdict of conviction in count II was inconsistent with the acquittal in count I. The trial court denied the motion for judgment notwithstanding the verdict and on the basis of this denial, DeSacia appealed.

The facts relevant to this appeal center about an automobile accident which occurred in Fairbanks on September 1, 1967. On that date, shortly before midnight, appellant was driving his car, a 1959 Ford, westward along a stretch of First Avenue which is bordered to the North by the Chena River. With appellant in his car were two passengers. Ahead of the DeSacia car was a red Ford Ranchero, a vehicle similar in design to a pickup truck, driven by Eugene E. Hogan. Accompanying Hogan in the front of the Ranchero were three passengers, one of whom was Reynaldo Evangelista; there were two additional passengers in the back of Hogan's Ranchero. A short distance behind the DeSacia car was a Chevrolet driven by Steve Weltz, who was accompanied by one passenger. The three cars continued to drive west along First Avenue in this order until they came to a left-hand curve. At this time, apparently, DeSacia pulled his car out to the left in an attempt to pass the Ranchero driven by Hogan; Steve Weltz remained some distance behind in his car. As the two lead cars went around the curve, side by side, traveling at between 40-60 miles per hour, Hogan lost control of the Ranchero and drove off the road into the river. Both Hogan and Evangelista were trapped in the car of the Rancero and

killed. The four other passengers in the Hogan car managed to escape.

DeSacia was later arrested and charged with two counts of violation of AS 11.15.040,[1] the Alaska manslaughter statute; in the first count appellant was charged with the manslaughter of Eugene E. Hogan, the driver of the Ranchero, while in the second he was charged with the death of Reynaldo E. Evangelista. On September 30, 1968, a jury trial on the alleged violations of AS 11.15.040 was commenced in Fairbanks. On October 4, the jury returned verdicts finding DeSacia not guilty of the manslaughter of Eugene E. Hogan as charged in count I, and guilty of the manslaughter of Reynaldo E. Evangelista as charged in count II.

[1,2] The appellant first contends that the evidence at the trial below was insufficient to allow his conviction, since it did not show that he forced Hogan's Ranchero to lose control and go off of the road. At the outset we must note that it is evident upon examination of the indictment and upon a reading of the trial court's instructions to the jury that the violations charged were based on a criminal negligence theory.[2] Such a theory is clearly within the purview of AS 11.15.040. Thus, in order to sustain its burden of proof, the prosecution needed only to show that Hogan's car left the road as a direct result of DeSacia's culpably negligent handling of his own vehicle. There was no need for the prosecution to show that DeSacia intentionally forced the Hogan vehicle off of the road.

[3] In reviewing the record of the trial below pursuant to an allegation of insufficiency of the evidence, we must view the evidence and the inferences to be drawn therefrom in a light most favorable to the state.[3] The proper question on appeal is whether the finding of guilt is supported by "such relevant evidence which is adequate to support a conclusion by a reasonable mind that there was no reasonable doubt as to appellant's guilt." [4]

At the trial, testimony of witnesses established that DeSacia's automobile attempted to pass the Hogan vehicle while on a curve; both cars were traveling at a high rate of speed on a graveled road, at night. The testimony would further support the

1. AS 11.15.040 provides:

> Except as provided in §§ 10–30 of this chapter, a person who unlawfully kills another is guilty of manslaughter, and is punishable by imprisonment in the penitentiary for not less than one year nor more than 20 years.

AS 11.15.040 is supplemented in our statutes by AS 11.15.080, which provides:

> Every killing of a human being by the culpable negligence of another, when the killing is not murder in the first or second degree, or is not justifiable or excusable, is manslaughter, and is punishable accordingly.

2. Counts one and two of the indictment charged DeSacia with the killing of Eugene E. Hogan and Reynaldo E. Evangelista "by operating a motor vehicle * * * carelessly, heedlessly and without due caution, and circumspection so as to force a 1966 red Ford Ranchero * * * to loose [sic] control and go into the Chena River * * *." Ins. No. 11 and 12 repeated the substance of the indictment.

In Ins. No. 13, the court cautioned the jury that "culpable negligence" must be distinguished from ordinary negligence, and that in order to convict, the jury "must find beyond a reasonable doubt that the defendant's acts constituted culpable negligence, not ordinary negligence * * *". Finally, in Ins. No. 16 the court went to considerable length in defining "culpable negligence":

> Culpable negligence is something more than that slight degree of negligence necessary to support a civil action for damages, and is negligence of such a degree, so gross and wanton, as to be deserving of punishment. Culpable negligence implies a reckless disregard of the consequences which might ensue from the doing of an act and constitutes conduct of such a reckless, gross and wanton character so as to indicate an utter, heedless indifference to the rights, property, safety and even the lives of others.

3. Beck v. State, 408 P.2d 996, 997 (Alaska 1965).

4. *Id.*

conclusion that, in attempting to pass, DeSacia did not allow the Hogan vehicle enough room to negotiate the curve; that the DeSacia vehicle commenced to slide in the direction of the Hogan vehicle; and that, as a result, Hogan was forced to swerve off of the road. While the appellant attempted to refute the prosecution's theory at trial by introducing testimony to show that Hogan's Ranchero went out of control and left the road when Hogan shifted gears and thereby lost traction, testimony of witnesses for the prosecution tended to show that Hogan did not, in fact, change gears or accelerate while the two cars were negotiating the corner where the accident occurred.

[4, 5] We are well aware that, in order to establish culpable negligence for the purposes of our manslaughter provision, a degree of conduct more reckless and wanton than would be involved in ordinary negligence is required. As we have already noted, the trial court was also aware of this distinction between ordinary and criminal negligence, and properly instructed the jury to this effect. However, we are nevertheless of the opinion that, when viewed in a light most favorable to the state, the evidence in the record is sufficient to allow the appellant's conviction to stand.

In his next assignment of error, DeSacia argues that the jury's verdict convicting him of the manslaughter of Reynaldo E. Evangelista is irreconcilably inconsistent with its verdict acquitting him of the manslaughter of Eugene E. Hogan. Appellant's argument rests on the assertion that the elements of the crimes charged in counts I and II of the indictment are in all respects identical. Thus it is contended on appeal that the verdict of guilty on count II of the indictment, in light of the verdict of not guilty on count I, is not only inconsistent, but is so contradictory as to be ridiculous. Appellant would have this court reverse his conviction on the grounds of this inconsistency.

We are at the outset confronted by two arguments advanced by the state. The state contends first that the appellant has waived his right to question the consistency of the verdicts by failing to make a timely motion for acquittal before moving for a judgment notwithstanding the verdict.[5] Rule 29(a) of the Alaska Rules of Criminal Procedure provides that a motion for acquittal can be made at two junctures in the course of trial: (1) at the close of the state's evidence or (2) at the close of the evidence of defense. From this we may conclude that such a motion, if made after the close of the defense's case, would not be timely. Thus, according to the state's point of view, to question the consistency of the verdicts in this case, DeSacia should first have been required to move for acquittal no later than at the close of his presentation of evidence.

[6] The flaw in the state's reasoning on this point is all too obvious. If the state were to have its way, we would, in effect, be requiring a defendant to move for acquittal on the basis of inconsistent jury ver-

5. The state's argument stems from Supreme Court Rule 22. The pertinent part of that rule as it was repromulgated on 1/1/70, provides:

> (b) Applicability of Rules. The rules governing the practice and procedure in civil cases including, but not limited to, the rules governing the preparation, form and filing of the record and the preparation, form and filing of briefs, shall apply to appeals in criminal cases, except as otherwise provided in these rules, and except where any such rule is obviously inconsistent with or not reasonably adaptable to appeals in criminal cases.

The state argues that Rule 22 would make applicable to the instant case Civil Rule 50(b), which has been interpreted to provide that in civil cases a motion for judgment notwithstanding the verdict must be predicated upon a motion for a directed verdict. The state continues its argument with the assertion that, in criminal matters, a motion for judgment of acquittal is directly analogous to a motion for a directed verdict in a civil suit, and that therefore a criminal defendant must be required to move for a judgment of acquittal before a motion for judgment notwithstanding the verdict can be heard.

dicts before those verdicts were returned and before the inconsistency existed. Such a result would indeed be anomalous, and cannot be approved by this court. We feel, moreover, that a requirement in this instance of a motion for acquittal would not be consistent with the views we expressed in Shafer v. State, 456 P.2d 466, 467–468 (Alaska 1969).

[7] The state next contends that even if the verdicts below were inconsistent, DeSacia is foreclosed from raising the issue because he failed to object to the instructions of the trial court which permitted the inconsistencies to arise. Even in states where inconsistency is held to be a ground for reversal of convictions, the state argues, an objection to trial court instructions permitting inconsistency is required before an appeal will be allowed. The cases cited by the state in support of this contention are not persuasive.[6] Insofar as these cases are pertinent, they stand only for the proposition that, where a defendant has been shown to be guilty by the overwhelming weight of the evidence, or where a trial court instruction specifically permits inconsistent verdicts, an appeal on the basis of inconsistency will not be heard, absent a timely objection to the trial court's instructions. In the instant case we are confronted with neither situation. First, we cannot say that the overwhelming weight of the evidence adduced at the trial below pointed to DeSacia's guilt. Second, the trial court instruction here in question, although allowing sufficient latitude for an inconsistent jury verdict to be returned, certainly did not specifically direct that such a finding would be acceptable.[7] Even if we accept the proposition that the appellant should have objected to Instruction No. 10, it does not necessarily follow that we cannot consider the question of inconsistency on appeal. Criminal Rule 47(b) provides:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

We interpreted the above provision in the case of Hammonds v. State, 442 P.2d 39 (Alaska 1968): "The meaning of Crim.R. 47(b) is that we may consider questions raised for the first time on appeal if necessary to effect substantial justice or prevent the denial of fundamental rights." 442 P.2d at 43. Accordingly, we hold that, in the circumstances of the case before us now, Criminal Rule 47(b) permits us to consider the question of inconsistency on appeal.[8]

[8] We turn next to the question of whether the conviction on count II of the indictment is necessarily inconsistent with the acquittal on count I. Upon a close scrutiny of the circumstances underlying the indictment, the conclusion seems inescapable that the two verdicts are, in fact, irreconcilably in conflict. We note first that the crime charged in the two indictments is based in each instance on the same alleged conduct of DeSacia, namely his criminally negligent operation of a motor vehicle. Since both Eugene Hogan and

6. The state cites four cases on this point: Kugzruk v. State, 436 P.2d 962 (Alaska 1968); Evans v. State, 46 Ga.App. 39, 166 S.E. 449 (1932); State v. Axley, 121 Kan. 881, 250 P. 284 (1926); People v. Steffens, 12 A.D.2d 962, 211 N.Y.S.2d 249 (1961).

7. The state contends that appellant should have objected to Instruction No. 10:

> You will note that a separate and distinct crime is charged in each Count of the Indictment. Each crime and the evidence applicable thereto should be considered separately. Your verdict with respect to either one of the crimes charged should in no way influence or control your verdict with respect to the other crime charged.

8. For other decisions of this court on "plain error", see: Kugzruk v. State, 436 P.2d 962 (Alaska 1968); Tracey v. State, 391 P.2d 732 (Alaska 1964); Thomas v. State, 391 P.2d 18 (Alaska 1964); Gilley v. City of Anchorage, 376 P.2d 484 (Alaska 1962); Rank v. State, 373 P.2d 734 (Alaska 1962); Bowker v. State, 373 P.2d 500 (Alaska 1962); McBride v. State, 368 P.2d 925 (Alaska 1962), cert. denied, 374 U.S. 811, 83 S.Ct. 1702, 10 L.Ed.2d 1035 (1963).

Reynaldo Evangelista were riding in the same car when that car was allegedly forced off of the road by the DeSacia vehicle, there is no conceivable way in which appellant's conduct toward Eugene Hogan could be found to differ from his conduct toward Reynaldo Evangelista. Moreover, while it might have been possible to distinguish between the intent of the accused toward one or the other of the victims had the crime charged been based on intentional conduct, because the crime of which DeSacia was accused stemmed from his alleged negligence toward the vehicle in which both of the victims were riding, it is virtually impossible to maintain that DeSacia was more negligent toward one or the other of the victims.

Appellee insists, however, that the two verdicts are not in fact inconsistent, since different evidence was presented at trial to prove each of the two counts. Appellee points to the testimony of Dr. Raymond Evans to support its claim. Dr. Evans testified at the trial that he had performed autopsies on both victims of the accident. He stated that Reynaldo Evangelista, while trapped inside the cab of the Ranchero, vomited (apparently as a result of injuries suffered to his thorax and abdomen), aspired the vomit and asphyxiated. Dr. Evans further testified that a skull fracture rendered Eugene Hogan unconscious while submerged, causing him to drown.

Although the state is correct in asserting that evidence was presented to the effect that the cause of death differed in the case of each of the victims, it must be noted that the medical cause of death, under these circumstances, has no bearing whatsoever on the elements of the crime charged. There can be no doubt here that both victims died as a proximate result of the automobile accident in which they were involved. It follows, then, that the difference in medical cause of death is of no legal significance.

It is obvious that the two counts of the indictment in this case charged DeSacia with identical conduct and with the same element of negligence. They differed only in that a different person was named as the victim in each instance. Under these circumstances, the verdict convicting DeSacia must of necessity be construed to be inconsistent with the verdict acquitting him.

The question of whether inconsistent jury verdicts of the kind with which we are today confronted should be considered sufficiently prejudicial to the rights of the accused to constitute grounds for reversal is entirely another matter. This is an issue upon which courts of other jurisdictions are split.[9] Although there are numerous cases, both state and federal, dealing with the issues presented by inconsistent jury verdicts,[10] very few cases actually deal with circumstances similar to those of the instant case, where the appellant was charged in both counts of the indictment with crimes involving identical elements of conduct and volition. In short, very few cases deal with verdicts as inconsistent as those before us now.

9. As of the year 1960, the states were apparently split in the following manner on the issue of whether inconsistent jury verdicts in multi-count indictments required reversal: Fifteen states, including Colorado, Florida, Indiana, Kansas, Massachusetts, Maryland, Montana, Nebraska, New Jersey, New Mexico, Ohio, Pennsylvania, South Dakota, Wisconsin, and Wyoming, held that such inconsistency was not grounds for reversal; ten states, including Arizona, California, Georgia, Illinois, Maine, Michigan, Missouri, New York, Texas and Washington held that inconsistency required reversal. In addition to the above, two states, Hawaii and Mississippi, leaned toward holding that such inconsistency would require reversal.

   For an extensive treatment of the division among the states on the question of inconsistency, *see* Comments, Inconsistent Verdicts in a Federal Criminal Trial, 60 Colum.L.Rev. 999, 1002–1004, n. 18 (1960).

10. An exhaustive annotation reviewing state and federal cases involving inconsistencies between verdicts on different counts of one indictment has recently been published. *See*, Inconsistency of Criminal Verdict as Between Different Counts of Indictment or Information, 18 A.L.R.3d 259 (1968).

Certainly, if we followed the federal rule set out in Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932), as it is applied in the federal courts today,[11] we would be compelled to hold that such inconsistencies do not provide a basis for reversal. But the question is one of first impression in the State of Alaska; hence we must decide whether to follow the federal rule, or whether to hold, with a minority of our sister states, that a truly inconsistent jury verdict will necessitate reversal.

A proper understanding of the arguments supporting the federal rule on inconsistent jury verdicts is a necessary prerequisite to our decision of this issue; such an understanding can be gained only through recourse to the origins of the federal rule in *Dunn*. Initially it should be noted that prior to *Dunn*, federal courts split on the matter of inconsistency. The 3rd Circuit[12] followed the 8th Circuit[13] in holding that inconsistent jury verdicts on multiple count indictments could furnish an adequate basis for overturning a conviction. On the other hand, the 2nd Circuit,[14] the 6th Circuit,[15] and the 7th Circuit[16] all held that such inconsistent verdicts would not invalidate an otherwise valid conviction. In 1932 the split among the federal courts was ended by the *Dunn* case, in which the United States Supreme Court, in an opinion written by Mr. Justice Holmes, held: "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." 284 U.S. at 393, 52 S.Ct. at 190, 76 L.Ed. at 358–359.

The rule stated in *Dunn* was supported by two propositions. Primary importance was given the argument that, had each of the counts involved been charged on separate indictments, an acquittal as to one would not have given rise to a valid plea of *res judicata* as to the other. From this it was concluded that it would be unjust to allow a defendant greater rights simply because the charges against him were joined in a single indictment. Despite the possibility that this rationale may have been persuasive at the time *Dunn* was decided, subsequent development in the law of *res judicata* has made it amply clear that *Dunn* can no longer be supported on the basis of such an argument.[17]

11. *See, e. g.*, United States v. Carbone, 378 F.2d 420 (2d Cir. 1967); United States v. King, 373 F.2d 813 (2d Cir. 1967); Tri-Angle Club, Inc. v. United States, 265 F.2d 820 (8th Cir. 1959); Grant v. United States, 255 F.2d 341 (6th Cir.), cert. denied, 358 U.S. 828, 78 S.Ct. 48, 3 L.Ed.2d 68 (1958); Williams v. United States, 244 F.2d 303 (4th Cir. 1957).

12. Speiller v. United States, 31 F.2d 682 (3d Cir. 1929).

13. Boyle v. United States, 22 F.2d 547 (8th Cir. 1927); Murphy v. United States, 18 F.2d 509 (8th Cir. 1927); Peru v. United States, 4 F.2d 881 (8th Cir. 1925).

14. Seiden v. United States, 16 F.2d 197 (2d Cir. 1926); Steckler v. United States, 7 F.2d 59 (2d Cir. 1925).

15. Gozner v. United States, 9 F.2d 603 (6th Cir. 1925).

16. Carrigan v. United States, 290 F. 189 (7th Cir. 1923).

17. In Sealfon v. United States, 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1948), the United States Supreme Court issued an opinion that cast substantial doubt upon the validity of the *res judicata* argument made in the Dunn case. Sealfon involved a situation in which the appellant had been tried and acquitted by a jury on a charge of conspiring to defraud the United States Government. After the acquittal, the appellant was re-indicted, this time charged with the substantive offense. On appeal, Sealfon objected to the introduction at the second trial of evidence that had been adduced against him at the first trial. The United States Supreme Court, Justice Douglas writing the opinion, held that in determining whether a matter was *res judicata*, the proper question on appeal was whether the first trial jury's verdict was determinative of the issues necessary to convict on the substantive offense. Since in Sealfon the only evidence of conspiracy at the first trial had been evidence of the commission of the substantive offense, it was held that the earlier verdict must be interpreted to have adjudicated issues necessary to convict on the substantive offense.

The second argument advanced to support the holding in the *Dunn* case is discernible in Mr. Justice Holmes' reference to Steckler v. United States, 7 F.2d 59, 60 (2d Cir. 1925):

> As was said in Steckler v. United States, (citation omitted):
>
> 'The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. *We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.*' (Emphasis supplied.)

284 U.S. at 393, 52 S.Ct. at 190, 76 L.Ed. at 359. This argument has subsequently been explained and clarified by the Second Circuit Court of Appeals in United States v. Maybury, 274 F.2d 899 (2d Cir. 1960); indeed, the *Maybury* case makes it clear that the federal rule on inconsistent jury verdicts can be supported only by this second rationale advanced in *Dunn*.[13] Briefly stated, the argument may be paraphrased in the following manner. Since their very origins, juries have had the power, if not the right, to act irrationally. In the context of inconsistent jury verdicts, the traditional power of irrationality is essential, since it permits a jury to express its desire to act leniently toward certain defendants by convicting on only one of several counts. Without such power, a jury would have no assurance that a desire on its part to have an accused treated leniently would be heeded by the court.

The point must be stressed that this argument, the basis for the federal rule on inconsistent jury verdicts, relies upon its stated assumption that an inconsistent verdict will almost certainly reflect the jury's disposition to favor the accused by acting leniently in his behalf. The assumption has most recently been restated in United States v. Carbone, 378 F.2d 420 (2d Cir. 1967):

> The very fact that the jury may have acquitted of one or more counts in a multicount indictment because of a belief that the counts on which it was [has, sic] convicted will provide sufficient punishment forbids allowing the acquittal to upset or even to affect the simultaneous conviction. * * * It is true, as both Judge Hand and Mr. Justice Holmes recog-

The Sealfon case clearly shows the basic premise underlying the first argument in Dunn—that a person confronted by successive indictments charging crimes arising from the same conduct would under no circumstances be able to successfully claim *res judicata*—to be incorrect. Even proponents of the federal rule on inconsistency have admitted, as early as 1950, that the federal rule can no longer be supported by the type of *res judicata* argument made in Dunn. *See*, Bickel, Judge and Jury—Inconsistent Verdicts in the Federal Courts, 63 Harv.L.Rev. 640, 650 (1950).

Moreover, opinions in recent cases decided by the federal courts bear out the proposition that, in light of Sealfon, the first rationale advanced in Dunn can no longer be considered persuasive. *See*, for example, United States v. Carbone, 378 F.2d 420, 422 (2d Cir. 1968); United States v. Maybury, 274 F.2d 899, 902-903 (2d Cir. 1960).

18. The Maybury case involved an inconsistency between a verdict of acquittal on one count of a two count indictment, and a conviction on the other count. The inconsistent verdicts were rendered by a judge, jury trial having been waived. On appeal it was held, Judge Friendly writing the opinion, that the rule on inconsistency in the Dunn case had its roots in the historic power of juries to act irrationally; this irrationality could be attributed to the tendency on the part of juries to feel that conviction on one of several counts would be sufficient punishment. In other words, Judge Friendly stated that Dunn stood for the proposition that an inconsistent jury verdict, although irrational, merely indicated a disposition on the part of the jury to act leniently toward the accused. Judge Friendly went on to hold that this rationale is applicable only to a jury trial situation. Accordingly since the inconsistency in Maybury was the product of a judge rather than a jury, the conviction was reversed.

nized, that allowing inconsistent verdicts in criminal trials runs the risk that an occasional conviction may have been the result of compromise. But the advantage of leaving the jury free to exercise its historic power of lenity has been correctly thought to outweigh that danger. (Citations omitted.)

378 F.2d at 422–423.[19]

With this assumption we are unable to agree. Although the assertion that juries have traditionally not been required to render consistent verdicts is itself subject to some doubt,[20] our disagreement with the logic underlying the federal rule on inconsistent jury verdicts is not of a historical nature. Rather, we can see no basis to assume, as was assumed in *Dunn*, that inconsistent verdicts are the product of a jury's disposition toward treating the accused leniently; nor can we see a basis for assuming that, in allowing inconsistent jury verdicts in criminal trials to stand, we run only "the risk that an occasional conviction may have been the result of compromise." The truth is simply that we do not know, nor do we have any way of telling, how many inconsistent verdicts are attributable to feelings of leniency, to compromise, or, for that matter, to outright confusion on the part of the jury.

An excellent illustration of this point can be found in the instant case. A study of the record of DeSacia's trial below reveals that, at some time after the jury had been charged and sent out to deliberate, the court called the jurors back to determine what their position was at that time. It is not clear from the record how long the jury had been out before it was first called back. At any rate, it is certain that at that particular time the jury was disposed six to five, with one undecided, as to the first count; no recent consideration had even been given to the second count. The jury was again sent out. At about 11:30 p. m., the court once again called back the jury to determine whether any progress was being made in reaching a verdict. With the exception of a single person all of the jurors felt that no progress had been made toward a solution.[21]

The hour was late and the trial judge was obviously perplexed. He stated that because there were several conventions in town at the time, no accommodations could be made for the jury on that particular night. He also said that it was, of course, out of the question to allow the jurors to return to their homes for the night. It was finally decided, after a conference with counsel in the anteroom, to let the jury vote as to whether it wanted to continue deliberations for a while longer. A vote was taken and ten members of the jury voted to continue through the night; the other two were apparently willing to accede to the wishes of the majority. The court agreed, and the jury was again sent out to deliberate. The jury continued to deliberate into the night for an undetermined length of time. Sealed verdicts of not guilty as to count I and guilty as to count II were rendered by 10:00 a. m., the following morning.

It is manifest that this particular set of circumstances suggests the possibility that the jury below, after a prolonged period of stress, reached its conclusions through compromise. Yet it is still possible that the jury acquitted the appellant on count I of the indictment only because it felt that a

19. For a full argument based on the notion that inconsistent verdicts are a product of a jury's disposition to be lenient, *see* Bickel, Judge and Jury—Inconsistent Verdicts in the Federal Courts, 63 Harv.L.Rev. 649 (1950). *See also*, United States v. Maybury, 274 F.2d 899, 902–903 (2d Cir. 1960).

20. Mr. Justice Butler, in a lengthy dissenting opinion in Dunn, 284 U.S. 390, 394–407, 52 S.Ct. 189, 76 L.Ed. 356, 359–366 (1932), attempted to show that, contrary to the view taken in the majority opinion, consistency in jury verdicts had long been required. For a similar historical argument, *see*, Comments, Inconsistent Verdicts in a Federal Criminal Trial, 60 Colum.L.Rev. 999 (1960).

21. One juror, at this time, expressed the view that the jury was hung and did not know whether the situation would change.

conviction on count II would be sufficient punishment. As a matter of fact it might be possible to speculate indefinitely as to what paths the jury followed in reaching its conclusions in this case. The point is that we have no reliable way to discover what really lies behind the inconsistent verdicts; and any conclusions—any assumptions on our part—would not be warranted.

What we do know, however, is that the verdict of the jury convicting DeSacia on count II of the indictment is inconsistent, and necessarily so, with the acquittal in count I. This result is irrational. In our system of criminal procedure, both at trial and on appeal, the entire focus of the fact-finding effort is upon a reasonable solution of factual issues. Accordingly, the language of our cases centers upon the element of reason. For example a jury will not be allowed to convict a person accused in a criminal matter unless it finds guilt to be established beyond a *reasonable* doubt. A trial court judge must enter a judgment of acquittal if he determines that fair-minded men cannot *reasonably* differ on the question of whether there is a *reasonable* doubt as to the defendant's guilt.[22] We can conceive of no reason why, under these circumstances, we cannot require at the very least, a minimal degree of reasonableness in the rendering of jury verdicts.

[9-11] We could, of course, seek to distinguish the *Dunn* case from the case now before us. A recent case of a New York court, People v. Bullis, 30 A.D.2d 470, 294 N.Y.S.2d 331 (N.Y.1968), involving a situation very close to that of the instant case, reversed a conviction on the grounds that it was repugnant to, rather than merely inconsistent with, a simultaneous acquittal in another count. Such an approach, however, tends to confuse substance with semantics. In reaching our conclusion, we find it necessary only to agree with the words of Justice Butler, dissenting in *Dunn:*

> One accused in different counts of an indictment of the same crime, there being no difference in the means alleged to have been employed, may not be adjudged guilty on a verdict of conviction on one count and of acquittal on the other. (Citations omitted.)

284 U.S. at 402, 52 S.Ct. at 194, 76 L.Ed. at 363. The state argues, in this regard, that we would be asking too much of juries in criminal matters by requiring that they render, in all cases, strictly consistent verdicts. To this we reply that, in holding as we do today, we require only that verdicts not be strictly inconsistent. Appellant's conviction is reversed.

[12] Having reversed appellant's conviction, we are next faced with the question of proper disposition of the case against the appellant. First, as to the jury's verdict of acquital on count I of the indictment below, we conclude that a retrial is precluded by the double jeopardy clause of the fifth amendment of the United States Constitution,[23] and by the similar clause of the Alaska Constitution.[24] In the recent case of Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), the United States Supreme Court overruled its previous holding in Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937), and made applicable to the states, through the fourteenth amendment, the double jeopardy clause of the fifth amendment. Accordingly, the case of Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957), speaks directly to the issue with which we are confronted in the case at hand, and necessarily precludes a retrial of count I.

[13] Certainly the argument might be made that DeSacia, by seeking a reversal of his conviction on the basis of incon-

22. *See,* Jennings v. State, 414 P.2d 652, 654 (Alaska 1965).

23. The double jeopardy clause of the fifth amendment to the Constitution of the United States provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *".

24. Article I § 9 of the Alaska Constitution provides: "No person shall be put in jeopardy twice for the same offense."

sistency, casts doubt not only upon the validity of his conviction, but also upon the validity of his acquittal. Thus it could be contended that DeSacia waived his right to protection by the double jeopardy clause not only as to his conviction but also as to his acquittal.[25] It was this very argument, however, which was confronted and resolved in the *Green* case. In an opinion written by Mr. Justice Black, the Court noted that any finding that a person appealing a conviction must waive his right to a plea of former jeopardy on a count of acquittal necessarily forces the person to choose between accepting his conviction or appealing at the risk of incurring an additional punishment. The Court further stated:

> The law should not, and in our judgment does not, place the defendant in such an incredible dilemma. *Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy.* (Emphasis added.)

355 U.S. at 193–194, 78 S.Ct. at 227, 2 L.Ed. 2d at 208. Certainly DeSacia, prior to appealing his conviction, had a valid plea of former jeopardy as to his acquittal on count I.[26] Following the *Green* case, as we must, we cannot hold that by appealing his conviction DeSacia was forced to surrender his right to be protected from retrial on the acquittal.

We must next decide whether DeSacia may be retried on the reversed conviction. The issue which we must face here is one of collateral estoppel.[27] The doctrine of collateral estoppel must be considered because of the unique situation which would inevitably arise on a retrial of DeSacia's reversed conviction.

As we have previously stated, the elements of conduct and intent charged in both counts of the indictment below were identical. Thus, in order to secure a conviction on retrial, the state would have to adduce essentially the same evidence which was ruled upon when DeSacia was acquitted on count I. Because of this situation, it could be argued that collateral estoppel precludes retrial of the conviction we have reversed. The question that arises is whether such a plea of collateral estoppel would be valid.

[14] There can be little doubt that the doctrine of collateral estoppel applies to the criminal as well as the civil law in Alaska. In Dapcevich v. State, 360 P.2d 789, 792–793 (Alaska 1961), we held that collateral estoppel acts, by precluding the state from litigating matters previously ruled upon by a jury, to prevent harassment by successive prosecution in criminal cases.[28]

In the federal law, collateral estoppel has long been held applicable to criminal cases by the United States Supreme Court. In

25. It is well settled that a defendant appealing his conviction waives his right to protection under the double jeopardy clause of the fifth amendment, Ball v. United States, 163 U.S. 662, 672, 16 S.Ct. 1192, 41 L.Ed. 300, 303 (1896).

26. Had DeSacia chosen not to appeal his conviction, the matter of his acquittal could certainly not have been raised by the state. Alaska Supreme Court Rule 6 provides in this regard: "[T]he state shall have a right to appeal in criminal cases only to test the sufficiency of the indictment or on the ground that the sentence is too lenient."

27. The distinction between "collateral estoppel" and "res judicata" is not of tremendous importance here. The two terms are frequently used interchangeably in the criminal law; to avoid confusion, we will speak consistently in terms of collateral estoppel. *See* Comment, 27 Tex.L.Rev. 231, 232–33 (1948).

28. In our holding in Dapcevich, we relied in part on the case of Vaughn v. State, 83 Ga.App. 124, 62 S.E.2d 573 (1950). While the Vaughn case shows some factual similarity to the present case, it must be noted that it differs in the vital respect that the basis for reversal of the initial conviction in Vaughn was insufficiency of the evidence, and not inconsistency of the verdicts.

Sealfon v. United States, 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1948), it was held:

> [Collateral estoppel] applies to criminal as well as civil proceedings and operates to conclude those matters in issue which the [earlier] verdict determined though the offenses be different. (Citations omitted)

332 U.S. at 578, 68 S.Ct. at 239, 92 L.Ed. at 184.[29] Most recently, the United States Supreme Court has held that, in light of Benton v. Maryland, *supra*, the rule of collateral estoppel is embodied in the fifth amendment as an adjunct to the constitutional guarantee of double jeopardy. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (April 6, 1970). In considering the significance of collateral estoppel in criminal cases, Mr. Justice Stewart, writing for the majority of the Court in *Ashe* noted:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

397 U.S. at 443, 90 S.Ct. at 1194.

The difficulty in the instant case is unlike the usual collateral estoppel problem in criminal cases, where it must be decided what particular issues a prior general verdict of acquittal resolved.[30] In this case we must determine whether, because of its inconsistency, DeSacia's acquittal on count I resolved any issues whatsoever.

In making this determination we are guided by the admonition of the Court in *Ashe:*

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality.

397 U.S. at 444, 90 S.Ct. at 1194. Accordingly, we are well aware that our decision as to whether DeSacia's acquittal constitutes a meaningful adjudication of any ultimate issues of fact must be based upon an examination of the entire record, and upon a consideration of all other circumstances relevant to the appeal.[31] Here we feel that the logical inconsistency of the acquittal with the conviction is obviously a factor relevant to the decision of what issues were decided by the acquittal.

[15] We have held that DeSacia's acquittal must be allowed to stand insofar as double jeopardy precludes a retrial on that count. But our holding in this regard should not be taken as an expression of faith on our part in the merit of the acquittal as a resolution of the issues involved in the charge. As an ingredient of the guarantee against double jeopardy, the rule of collateral estoppel requires a degree of confidence in a prior acquittal as an adjudication of ultimate issues of fact. It should be quite obvious that the inconsistency of the verdicts here reflects as much doubt upon the acquittal as it did upon the conviction. We must decide whether this element of doubt will be sufficient to preclude a claim of collateral estoppel on a retrial of the second count.

29. For the first United States Supreme Court decision applying collateral estoppel in a criminal matter, *see* United States v. Oppenheimer, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161 (1916).

30. *See, e. g.*, State v. Hong, 21 N.J. 406, 122 A.2d 628 (1956); aff'd, 350 U.S. 404, 78 S.Ct. 329, 2 L.Ed.2d 313 (1958); State v. Orth, 106 Ohio App. 35, 153 N.E.2d 304 (1957).

See also Mayers and Yarbrough, New Trials and Successive Prosecutions, 74 Harv.L.Rev. 1 (Nov.1960); Comments, An Analysis of the General Verdict: Res Judicata Applied in Criminal Proceedings, 10 Hastings L.J. 404 (May 1959); Comments, Collateral Estoppel in a Criminal Prosecution—Effect of a Previous Acquittal of a Related Crime, 34 N.Y.U.L.Rev. 631 (March 1959).

31. Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469 (April 6, 1970); Sealfon v. United States, 332 U.S. 575, 579, 68 S.Ct. 237, 92 L.Ed. 180, 184 (1948).

[16] We have found little case law, either federal or state, to assist us in making this determination.[32] In the absence of persuasive authority, our approach is to seek a resolution grounded in considerations of fairness to both parties involved. As for the appellant, we are at a loss to discern how he would be unfairly disadvantaged by the granting of a retrial. Clearly this is not a case like Dapcevich v. State, *supra,* or Ashe v. Swenson, *supra,* where further prosecution would subject the accused to harassment by repeated and unnecessary prosecution. We fail to see how a retrial here could possibly subject the appellant to a greater chance of harassment than he would be subjected to in any other case ordered for retrial following a successful appeal.

On the other hand, if we allow the acquittal in this case, despite its doubtful nature, to be the source of a valid claim of collateral estoppel, then the state would be deprived, through no fault of its own, of the opportunity to have a full and fair resolution of the charges it has brought. Both *Dapcevich* and *Ashe,* in dealing with the problem of harassment of accused individuals, in effect encourage the prosecution to consolidate into one indictment the various charges upon which it seeks to convict. To allow a plea of collateral estoppel in this case would, we think, serve only to frustrate attempts by the prosecution to comply with the spirit of *Dapcevich* and *Ashe.*

In bringing this appeal, the appellant has successfully argued that the inconsistency between verdicts rendered his conviction meaningless. In our opinion, it would impose an unjustifiably harsh restriction on the state to allow the appellant to argue, in the same breath, that his acquittal is of sufficient certainty to suit the purposes of collateral estoppel. There is simply no reason here to force the prosecution to run a perilous gauntlet of criminal procedure. Under these circumstances, to allow the appellant to invoke the rule of collateral estoppel would, as Judge Friendly stated in *Maybury,* "convert the guarantee of double jeopardy from a shield into a sword." 274 F.2d at 905.

Accordingly, we order a new trial on the appellant's reversed conviction, and further hold that such a retrial will not be precluded by a claim of collateral estoppel.

DIMOND Justice (dissenting in part).

Appellant was tried for manslaughter in connection with the deaths of two persons, Reynaldo Evangelista and Eugene Hogan. The evidence showed that both persons died after appellant had caused the car in which they were riding to drive off a road into a river. A jury found appellant guilty of manslaughter as to Evangelista, but not guilty as to Hogan.

Both deaths resulted from one act of criminal negligence on appellant's part. He was either responsible for both deaths or not responsible for either. He could not rationally be held accountable for only one death and not for the other. The two conflicting verdicts were obviously and totally inconsistent. It is because of the inconsistency that this court sets aside the conviction of appellant for the manslaughter of Evangelista.

Up to this point I agree with the court. But I am unable to see why the not guilty verdict as to the death of Hogan should not

32. Although the majority of the court in Maybury v. United States, 274 F.2d 899 (2d Cir. 1960), decided against application of *res judicata* to prevent retrial of the conviction reversed in that case, Maybury does not bear directly upon the problem of the present case. Since the inconsistent verdicts in Maybury did not stem from counts alleging identical elements, the state could have, on retrial of the reversed conviction, sought to establish the elements of the crime without resort to evidence used in the count upon which the appellant was acquitted. Thus, in Maybury, a holding on the basis of *res judicata* would have been, at that stage, premature.

See Mayers and Yarbrough, New Trials and Successive Prosecutions, 74 Harv.L. Rev. 1, 41–43 (Nov.1960); Comments. Inconsistent Verdicts in a Federal Criminal Trial, 60 Colum.L.Rev. 999, 1011–1014 (1960).

also be set aside. The reason for disregarding the guilty verdict—and the only reason—is because it is inconsistent with the not guilty verdict. The overall result is irrational. Both verdicts, and not just the guilty one, are affected by the inconsistency and irrationality, so there is no way of knowing what the jury actually decided.

The court feels that it is obliged to give effect to the not guilty verdict, when it gives none to the guilty verdict, because of the double jeopardy provision of the constitution. At this point I disagree with my colleagues.

The principle of double jeopardy prevents the government from prosecuting a person more than once for the same offense. It reflects a sound policy—to prevent the government, with all its resources and power, from harassing an accused by successive prosecutions so as to afford the government a more favorable opportunity to convict.[1] The double jeopardy clause "stands as a constitutional barrier against possible tyranny by the overzealous prosecutor."[2]

In order to effectuate the policy of the double jeopardy clause, it is held that a verdict of acquittal is conclusive even though it may appear to be erroneous.[3] We are not concerned here with error on the part of the jury. Our concern is with the inability to ascertain, because of inconsistent verdicts, what the jury decided as to the guilt or innocence of appellant. We simply do not know what their decision was, since appellant cannot be guilty of one manslaughter and not guilty of the other.

It is also held that one appealing from a conviction of one offense may not be required, as a condition of appealing, to surrender his defense of double jeopardy as to another offense for which he had been acquitted.[4] No such condition would be imposed here by setting aside the not guilty verdict, as well as the guilty verdict, and requiring a new trial as to both counts of the indictment. The court says that it cannot express [illegible]th "in the merit of the acquittal as a resolution of the issues involved in the charge." It states that "[i]t should be quite obvious that the inconsistency of the verdicts here reflects as much doubt upon the acquittal as it did upon the conviction." I believe what the court is saying is that the not guilty verdict is as meaningless as the court holds the guilty verdict to be. This being so, there is nothing for double jeopardy to operate upon. Appellant would not be required to waive a defense of double jeopardy because it has no application. In fact, he is not even required to appeal the conviction in order to obtain a new trial. The trial court, when faced with the totally inconsistent verdicts, ought to have disregarded both verdicts, discharged the jury and ordered another trial as to both counts of the indictment.

Because of the inconsistency, I can reach no other logical conclusion than that the jury failed to perform its function as a jury. The result is no different than if the jury had been unable to reach any verdict at all. This situation is equivalent to a hung jury—a jury unable to agree on a verdict. In such a situation double jeopardy is not a bar to another trial. As the United States Supreme Court has said:

> There may be unforeseeable circumstances that arise during a trial making its completion impossible, *such as the failure of a jury to agree on a verdict.* In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying

1. Downum v. United States, 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L.Ed.2d 100, 102–103 (1963). *See also* Green v. United States, 355 U.S. 184, 187–188, 78 S.Ct. 221, 2 L.Ed.2d 199, 204 (1957).

2. Ashe v. Swenson, 397 U.S. 436, 456, 90 S.Ct. 1189, 1200, 25 L.Ed.2d 469, 482 (No. 57, April 6, 1970) [Concurring opinion of Justices Brennan, Douglas and Marshall].

3. Green v. United States, 355 U.S. 184, 188, 78 S.Ct. 221, 2 L.Ed.2d 199, 204 (1957).

4. Green v. United States, 355 U.S. 184, 193–194, 78 S.Ct. 221, 2 L.Ed.2d 199, 207–208 (1957).

courts power to put the defendant to trial again. [Emphasis added.] [5]

A jury unable to agree is a "classic example" where double jeopardy has no application.[6]

I believe there should be a new trial on both counts of the indictment. As a practical matter, it probably will make no difference whether appellant is tried on both counts or only one, for under the evidence a finding of guilt or innocence as to one would require the same finding as to the other. The point I wish to make is that if the court is going to require reason and consistency of a jury, as it does in this case, it should not set a different standard for itself and ignore reason and consistency in its own decisions. That is what it does here by holding that the guilty verdict is without effect because of inconsistency with the not guilty verdict, and then holding that the not guilty verdict is effective despite the same inconsistency.

Tracie THORSHEIM, Administratrix of the Estate of Stanley Thorsheim, deceased, Appellant,

v.

STATE of Alaska, Employer's Liability Assurance Corporation, and Alaska Workmen's Compensation Board, Appellees.

No. 1090.

Supreme Court of Alaska.

May 22, 1970.

Workmen's compensation proceeding. The Superior Court, Anchorage District, Edward V. Davis, J., affirmed Workmen's Compensation Board's denial of compensation, and claimant appealed. The Supreme Court, Boney, C. J., held that even if the Department of Administration, in securing contracts for various departments of state, could be considered contractor within "contractor-under" provision of Workmen's Compensation Act, Department, in conducting bidding and in issuing contract, which required flying service to furnish state certain specified types of aircraft complete with fuel, pilot and maintenance, did not create contractor-subcontractor relationship between Department and flying service, and thus fact that flying service failed to carry workmen's compensation insurance did not render state liable as contractor under Workmen's Compensation Act for claim arising from death of flying service's pilot that occurred when agent of Department of Fish and Game was being flown on stream survey flight.

Affirmed.

Rabinowitz, J., dissented and filed opinion.

1. Workmen's Compensation ⇐351

"Contractor", within statute providing that if employer is subcontractor, contractor is liable for and shall secure payment of workmen's compensation to employees of subcontractor unless subcontractor secures payment, is person who undertakes, by contract, performance of certain work for another, including furnishing of goods and services. AS 23.30.045(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Workmen's Compensation ⇐348

"Subcontractor", under statute providing that if employer is subcontractor, contractor is liable for and shall secure payment of workmen's compensation to employees of subcontractor unless subcontractor secures payment, is person to whom contractors have let all or part of their initial contractual undertaking. AS 23.30.045(a).

See publication Words and Phrases for other judicial constructions and definitions.

5. Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974, 978 (1949).

6. Downum v. United States, 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L.Ed.2d 100, 102 (1963).

appropriate sentences in light of the *Chaney*[16] criteria, the facts of the offenses, and Tugatuk's background.

The minimum sentence for a conviction of first degree murder is twenty years and the maximum is life imprisonment.[17] We have on numerous occasions affirmed life sentences for first degree murder convictions.[18] Tugatuk's crimes, though alcohol related, resulted in the death of two small children and the wounding of another child and the mother. Given the gravity of the offenses and their devastating impact on the family affected, we hold that the superior court was not clearly mistaken and therefore that the sentences are not excessive.

Affirmed.

STATE of Alaska, Petitioner,

v.

Wilder S. RICE and Cessna Finance Corporation, Respondents.

CESSNA FINANCE CORPORATION, Cross-Petitioner,

v.

STATE of Alaska, Wilder S. Rice, and United Bank of Alaska, Cross-Respondents.

Nos. 4777, 4778.

Supreme Court of Alaska.

April 10, 1981.

Defendant was convicted before the District Court, Christopher Cook, J., of game violations while using airplane, and he appealed. Secured party sought and was granted leave to intervene. The Superior Court, Fourth Judicial District, Jay Hodges, J., overturned conviction and vacated sentence and held that constitutional due process required that notice and opportunity to be heard be given in order to forfeit secured party's interest in aircraft. State filed petition for review. Petition was consolidated with secured party's petition for review of order entered by the Superior Court, Third Judicial District, S. J. Buckalew, Jr., J., in civil forfeiture proceeding, denying secured party's motion for summary judgment alleging unconstitutionality of forfeiture statute. The Supreme Court, Rabinowitz, C. J., held that: (1) regulation, providing that no person may possess or transport any game or parts of game illegally taken, was overbroad and proper limiting construction, implying "know or reasonably should know" standard, was necessary to render regulation constitutional; (2) regulation, if enforced according to its literal terms, would bear no reasonable relationship to legitimate regulatory purpose underlying it and was therefore also unconstitutional under substantive due process principles; and (3) secured party, which had asserted it was an innocent holder of an interest in seized airplane which did all it could reasonably be expected to do, had been deprived of constitutional right to substantive due process through failure of statutory forfeiture scheme to provide for remission of interests of innocent nonnegligent third parties in forfeited item, and was entitled to remand for remission hearing.

Affirmed in part; reversed in part.

Matthews, J., filed concurring opinion.

16. *State v. Chaney*, 477 P.2d 441 (Alaska 1970).

17. At the time of the offense AS 11.15.010 provided:

> *First degree murder.* A person who, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, rape, arson, robbery, or burglary kills another, is guilty of murder in the first degree, and shall be sentenced to imprisonment for not less than 20 years to life.

18. *See Vail v. State*, 599 P.2d 1371 (Alaska 1979); *Bendle v. State*, 583 P.2d 840 (Alaska 1978); *Wilson v. State*, 582 P.2d 154 (Alaska 1978); *Morgan v. State*, 582 P.2d 1017 (Alaska 1978); *Hampton v. State*, 569 P.2d 138 (Alaska 1977); *Gray v. State*, 487 P.2d 680 (Alaska 1971).

1. Criminal Law ⇐20

Strict liability is an exception to rule which requires criminal intent.

2 Statutes ⇐241(1)

Criminal statutes will be strictly construed to require some degree of mens rea absent clear legislative intent to contrary, and even when statute or regulation does not explicitly require any element of mens rea, Supreme Court will scrutinize statute or regulation to determine whether mens rea must be made part of definition of particular offense.

3. Constitutional Law ⇐48(1)

A danger of unconstitutionality is relevant concern in determining whether to construe intent into regulation.

4. Game ⇐7

Regulation providing that no person may possess or transport any game or parts of game illegally taken was overbroad and proper limiting construction, implying "know or reasonably should know" standard, was necessary to assure adequate notice of prohibited conduct so as to render regulation constitutional. U.S.C.A.Const. Amends. 1, 14; Const. Art. 1, § 7.

5. Constitutional Law ⇐258(3)

Criminal regulation, if enforced according to its literal terms as imposing liability on any person who possesses or transports illegally taken game without regard to whether such person knew or should have known of illegality, would bear no reasonable relationship to legitimate regulatory purpose underlying it and thus was violative of substantive due process. U.S.C.A. Const. Amends. 5; 14; Const. Art. 1, § 7.

6. Courts ⇐91(1)

Although Supreme Court is bound to enforce constitutional protections under Federal Constitution, it also has concomitant duty to develop constitutional rights under State Constitution. U.S.C.A.Const. Amends. 5, 14; Const. Art. 1, § 7.

7. Constitutional Law ⇐303

Not to allow innocent owners and security holders of property forfeited under civil forfeiture statute for use in criminal offense to show that they have not been involved in criminal activity that triggered forfeiture proceeding violates state's constitutional due process provision and, if party can show manner in which property came into possession of person committing criminal offense and that prior to parting with property he did not know, nor have reasonable cause to believe, either that property would be used to violate law or that violator had criminal record or reputation for commercial crime, substantive due process requires that procedure be available for remission of forfeited item.

8. Constitutional Law ⇐303

Holder of security interest in airplane seized by State for use in game offense, which had asserted innocence as holder of interest in seized airplane and that it did all it could reasonably be expected to do, had been deprived of its constitutional right to substantive due process through failure of statutory scheme relating to forfeitures to provide for remission of interests of innocent nonnegligent third parties in forfeited item, and was entitled to remand for remission hearing. U.S.C.A.Const. Amends. 5, 14; Const. Art. 1, § 7; AS 16.05.195.

Sarah Elizabeth Fussner, Asst. Atty. Gen., Anchorage, and Avrum M. Gross, Atty. Gen., Juneau, for petitioner/cross-respondent, State of Alaska.

Wilder S. Rice, pro se.

James R. Peterson, Burr, Pease & Kurtz, Inc., Anchorage, for respondent/cross-petitioner, Cessna Finance Corp.

OPINION

Before RABINOWITZ, C. J., CONNOR, BURKE and MATTHEWS, JJ., and DIMOND, Senior Justice.

RABINOWITZ, Chief Justice.

This petition for review considers important questions concerning mens rea in game regulations and issues of substantive and procedural due process as to security hold-

ers in the forfeiture of equipment for game violations.

Wilder Rice, a big game guide, and two clients of his were arrested and charged with killing a moose in violations of game regulations. More particularly, Rice and his co-defendants were charged with allegedly killing a moose the "same day airborne" in violation of 5 AAC 81.070(b)(6).[1] Rice was also charged with transporting meat taken illegally in violation of 5 AAC 81.140(b).[2] Acquitted on the first charges, Rice was convicted of illegal transportation and sentenced in December 1977 to thirty days in jail, a $500 fine, and forfeiture of a Cessna airplane used in committing the alleged offense.

Rice appealed his conviction to the superior court on several grounds, including contentions that the regulation was void for vagueness and that some form of intent must be implied in the regulation he was convicted of violating. Meanwhile, Cessna Finance, possessing a substantial security interest in the airplane, sought and was granted leave to intervene in the superior court proceedings, to plead violations of substantive and procedural due process in the forfeiture of the airplane without formal notice to it of the sentencing proceeding. The superior court overturned Rice's conviction and vacated the sentence, finding reversible error in the failure of the district court to instruct that the jury must find beyond a reasonable doubt that the defendant knew or should have known the moose meat was illegally taken.[3] The superior court also held that constitutional due process requires "that in order to forfeit a third party's interest in this aircraft or in any other particular item, that notice and an opportunity to be heard must be given." The state then filed the instant petition for review.

Pursuant to AS 16.05.195,[4] the state, on October 16, 1977, also filed a civil action in

1. 5 AAC 81.070(b) provides, in part:

   (b) The illegal methods and means of taking big game ... are

   ....

   (6) a person who has been airborne may not thereafter take or assist in taking big game until after 3:00 a. m. following the day in which the flying occurred ....

2. 5 AAC 81.140(b) provides, "No person may possess or transport any game or parts of game illegally taken."

3. Specifically, the superior court stated:

   The court, however, feels that with respect to the question of the instruction as to knowledge under this particular regulation there should have been an instru—by the plain reading of the regulation it would apply to anyone, however innocent or non-innocent they may be with respect to any knowledge they might have had or whatever steps they had gone through to ascertain whether or not the game in question was illegally [taken]. It could apply equally to Wien or any other person and therefore, because of that, the court is reversing the conviction. That this particular regulation, the way it is written, is not void for vagueness when the jury would be instructed that the particular individual involved who is charged with the crime either knew or should have known that the game in question was improperly taken.

4. AS 16.05.195 provides:

   Forfeiture of equipment. (a) Guns, traps, nets, fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear used in or in aid of a violation of this title, or regulation promulgated under this title, and all fish and game or parts of fish and game or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title, or regulation promulgated under it, may be forfeited to the state

   (1) upon conviction of the offender in a criminal proceeding of a violation of this title in a court of competent jurisdiction; or

   (2) upon judgment of a court of competent jurisdiction in a proceeding in rem that an item specified above was used in or in aid of a violation of this title or a regulation promulgated under it.

   (b) Items specified in (a) of this section may be forfeited under this section regardless of whether they were seized before instituting the forfeiture action.

   (c) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value of fish and game or parts of them or nests or eggs of bird taken, transported or possessed contrary to the provisions of this title or a regulation promulgated under it.

   (d) It is no defense that the person who had the item specified in (a) of this section in possession at the time of its use and seizure has not been convicted or acquitted in a criminal proceeding resulting from or arising out of its use.

the superior court for damages against Rice and Reidt (one of the co-defendants) and for forfeiture of the airplane. On November 18, 1977, the state issued a notice of complaint for forfeiture which was sent to Cessna Finance. Cessna later moved for summary judgment on this action, asking, inter alia, that AS 16.05.195 be held unconstitutional as violating due process. The superior court denied the motion, concluding that there was no denial of substantive due process in the forfeiture proceedings. Cessna petitioned for review of this ruling.

The petitions were granted[5] and the cases consolidated. The first issue that must be considered is whether the superior court erred in requiring an element of mens rea in the offense for which Rice was convicted.

Rice was convicted of violating 5 AAC 81.140(b), which provides: "No person may possess or transport any game or parts of game illegally taken." Rice contended on appeal and the superior court agreed that there is an implied element of intent in this offense, and that the accused must have known, or reasonably should have known, that the game was illegally taken. The state on appeal to this court argues that such an element should not be implied.

During argument on jury instructions before the district court, Rice's counsel brought up the issue of scienter and, after discussion, specifically requested an instruction that in order to convict, the jury "must be satisfied that the person either knew, or reasonably should have known, that the game or parts of game were illegally taken."[6] The district court denied the requested instruction, and Rice was convicted.

[1, 2] This court has several times considered the question of whether a statute, which does not explicitly require criminal intent, implicitly requires it. The general position of the court was recently summarized in *State v. Guest*, 583 P.2d 836, 838 (Alaska 1978) (footnotes omitted):

> We recognized in *Speidel v. State*, 460 P.2d 77 (Alaska 1969), that consciousness of wrongdoing is an essential element of penal liability. 'It is said to be a universal rule that an injury can amount to a crime only when inflicted by intention—that conduct cannot be criminal unless it is shown that one charged with criminal conduct had an awareness or consciousness of some wrongdoing.' *Id.* at 78....
>
> Our opinion in *Speidel* stated that there are exceptions to the general requirement of criminal intent which are categorized as 'public welfare' offenses. These exceptions are a rather narrow class of regulation, 'caused primarily by the industrial revolution, out of which grew the necessity of imposing more stringent duties on those connected with particular industries, trades, properties, or activities that affect public health, safety or welfare.' *Speidel v. State, supra* at 78. The penalties for the infraction of these strict liability offenses are usually relatively small and conviction of them carries no great opprobrium. *Id.* at 79.

The question is whether 5 AAC 81.140(b) is a public welfare regulation for which the

(e) No forfeiture may be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased the item innocently and in good faith shall be on the purchaser.

(f) An item forfeited under this section shall be disposed of at the discretion of the department.

5. Petitions were granted in the criminal case under former Alaska R.App.P. 23(c)(3) and in the civil case under former Alaska R.App.P. 23(d). We concluded that review should be granted pursuant to former Alaska R.App.P. 24(a)(1) since the issues were of such substance and importance as to warrant deviation from normal appellate procedures.

6. The state argues that the court must consider the question under the plain error standard since "the only instruction discussed in the points on appeal [to the superior court] and in the defendant's brief was a requested instruction that the jury must find beyond a reasonable doubt that the defendant *knew* that the meat he transported was illegally taken." However, the actual transcript reveals that Rice requested an instruction in the form "know or reasonably should know." Therefore, the point was properly raised below, and the state's argument to the contrary is rejected.

omission of any requirement of criminal intent is valid. In *Kimoktoak v. State*, 584 P.2d 25, 31 (Alaska 1978), we stated that such determinations are to be made on a case-by-case basis. It must be remembered that strict liability is an exception to the rule which requires criminal intent. Criminal statutes will be strictly construed to require some degree of mens rea absent a clear legislative intent to the contrary. Even when a statute, or a regulation, does not explicitly require any element of mens rea, we will scrutinize the statute or regulation to determine whether mens rea must be made part of the definition of the particular offense.[7]

Strict liability offenses were originally considered in F. Sayre's classic article, *Public Welfare Offenses*,[8] in which he concluded that these offenses fell into certain limited categories.[9] Among these are "violations of general police regulations."[10] These encompass, as originally proposed by Sayre, fish and game regulations,[11] and a number of fish and game regulations have been upheld on the theory of strict liability.[12] Thus, the mere fact that the case at bar involves a fish and game regulation might perhaps be considered by some to be sufficient to justify characterization of the subject offense as a strict liability offense.

[3] Nevertheless, we think that other concerns must also be considered. Fish and game regulations are not necessarily by their very nature immune from the requirement of mens rea. As we noted in *Kimoktoak v. State*, 584 P.2d 25, 31 (Alaska 1978), a danger of unconstitutionality is a relevant concern in determining whether to construe intent into the regulation:

> Finally, we note that in *Campbell*, we recognized the well-established rule of statutory construction that courts should if possible construe statutes so as to avoid the danger of unconstitutionality. We have alluded to this rule on many other occasions. It recognizes that the legislature, like the courts, is pledged to support the state and federal constitutions and that the courts, therefore, should presume that the legislature sought to act within constitutional limits. 2 Sutherland Statutory Construction, § 4509, at 326 (Horack

7. In *State v. Campbell*, 536 P.2d 105 (Alaska 1975), we had implied that the mens rea requirement would only be applied in crimes with common law origins. In *Kimoktoak v. State*, 584 P.2d 25, 31 (Alaska 1978), this court overruled *Campbell* and held that intent under certain circumstances would be read into non-common law offenses:

> Accordingly, we hold that to the extent that our decision in *Campbell* established the broad rule that criminal intent can be found by implication only in statutes which codify common law crimes, *Campbell* is overruled. Although we can conceive of cases where we may decline to imply such intent into statutes silent in this respect, hereafter we will resolve such questions on a case by case basis.

8. F. Sayre, *Public Welfare Offenses*, 33 Colum. L.Rev. 55 (1933).

9. Sayre grouped the categories as follows:
(1) Illegal sales of intoxicating liquor;
(a) sales of prohibited beverage;
(b) sales to minors;
(c) sales to habitual drunkards;
(d) sales to Indians or other prohibited persons;
(e) sales by methods prohibited by law;
(2) Sales of impure or adulterated food or drugs;
(a) sales of adulterated or impure milk;
(b) sales of adulterated butter or oleomargarine;
(3) Sales of misbranded articles;
(4) Violations of anti-narcotic acts;
(5) Criminal nuisances;
(a) annoyances or injuries to the public health, safety, repose or comfort;
(b) obstructions of highway;
(6) Violations of traffic regulations;
(7) Violations of motor-vehicle laws;
(8) Violations of general police regulations, passed for the safety, health or well-being of the community.
Id. at 73 (footnote omitted).

10. *Id.*

11. *Id.* at 87-88.

12. *United States v. Ayo-Gonzalez*, 536 F.2d 652, 662 (5th Cir. 1976) (no intent required for statute prohibiting foreign vessels from fishing within contiguous fishing zone of United States); *United States v. Ardoin*, 431 F.Supp. 493, 495 (W.D.La.1977) (offense of migratory bird hunting with aid of bait as a crime without intent); *State v. Barber*, 91 N.M. 764, 581 P.2d 27, 28-30 (App.1978) (hunting by spotlight requires no criminal intent).

3d Ed. 1943). [footnote and citations omitted]

The wording of the regulation under consideration, 5 AAC 81.140(b), is broad. It provides: "No person may possess or transport any game or parts of game illegally taken." Upon appeal to the superior court, Rice attacked the regulation as being void for vagueness. It is quite apparent from a reading of the transcript of the hearing before the superior court that the court was concerned with the broad applicability of the statute. It noted that, under the statute, if illegally taken game were found on board a commercial aircraft then the commercial airplane would also be subject to forfeiture. The seeming absurdity of the possible seizure of a commercial aircraft for shipping a piece of moose meat that would in no fashion reflect the fact that the moose was illegally killed no doubt had a persuasive impact on the superior court in reading an intent requirement into the regulation. By interpreting the regulation to embody a reasonable person standard in the phrase "knew or should have known," the superior court concluded that the regulation was not void for vagueness.

A recent treatment of a claim of void for vagueness is found in this court's opinion in *Holton v. State*, 602 P.2d 1228 (Alaska 1979). In *Holton*, we set forth three factors that are applicable in considering such a claim:

> First, a statute may not be so imprecisely drawn and overbroad that it 'chills' the exercise of first amendment rights. The second consideration is that in order to be consistent with notions of fundamental fairness a statute must give adequate notice of the conduct that is prohibited. The final element in an analysis of statutory vagueness is whether the statute's imprecise language encourages arbitrary enforcement by allowing prosecuting authority undue discretion to determine the scope of its prohibitions.[13]

The first is not applicable here, since the regulation does not concern First Amendment rights of speech, religion, association and expression.[14] The third consideration is also not applicable since recent cases have stated that this court "will not invalidate a statute on these grounds unless there is some history of arbitrary or selective enforcement" [15] and there was no showing of such a history in this case.

[4] Thus, it is on the second of these factors, that of adequate notice, that a claim of void for vagueness must rest. In *Stock v. State*, 526 P.2d 3, 8 (Alaska 1974), we noted:

> The second consideration is that a statute must give adequate notice to the ordinary citizen of what is prohibited. This principle involves basic fairness and was long ago enunciated by the United States Supreme Court in *Connally v. General Construction Co.* [269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322], stating:
>
> > That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.
>
> A statute in its broad contours may be subject to criticism for failure to give adequate notice as to all types of conduct which are punishable, but, when not involved with the 'overbreadth' problem,

13. *Holton v. State*, 602 P.2d 1228, 1235–36 (Alaska 1979), *quoting Summers v. Anchorage*, 589 P.2d 863, 866–67 (Alaska 1979) (footnotes omitted).

14. *See, e. g., Larson v. State*, 564 P.2d 365, 372 (Alaska 1977) ("The criminal acts with which Larson was charged do not involve the exercise of these [First Amendment] rights, so this consideration is not pertinent").

15. *Holton v. State*, 602 P.2d 1228, 1237 (Alaska 1979); *see Summers v. Anchorage*, 589 P.2d 863, 868 (Alaska 1979).

> may still pass muster if: (a) there can be no question as to its applicability to the particular offense involved, and (b) a construction may be placed upon the statute so that in the future the type of offenses coming within its purview may reasonably be understood. [footnotes omitted]

We find with the superior court that the statute is overbroad and that a proper limiting construction, implying a "know or reasonably should know" standard, is necessary to render the regulation constitutional.

In this case, we note that other state regulations concerning possession of illegally taken wildlife, specifically shrimp and crab, require criminal intent and take the form, "It is unlawful for any person to possess [shrimp or crab] ... if that person knows or has reason to know that such shrimp were taken or possessed in contravention of the regulations of this chapter."[16] We conclude that identical language implying at least the element of negligence must be read into 5 AAC 81.140(b). Therefore, we affirm the superior court's setting aside of Rice's conviction because of the district court's failure to instruct the jury on this element of the alleged offense.

[5] We note, additionally, that an alternative analysis compels the same result. Under the Alaska Constitution, "[s]ubstantive due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose." *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 452 (Alaska 1974). *See also Mobil Oil Corporation v. Local Boundary Commission*, 518 P.2d 92, 101 (Alaska 1974). For the reasons discussed above, we believe that if enforced according to its literal terms, as imposing liability on any person who possesses or transports illegally taken game without regard to whether such person knew or should have known of the illegality, 5 AAC 81.140(b) would bear no reasonable relationship to the legitimate regulatory purpose underlying it. We are therefore persuaded that the superior court's interpretation of 5 AAC 81.140(b) is required by substantive due process principles as well as by the void for vagueness rationale relied upon by this court.

Cessna has urged that both substantive and procedural due process have been or will be violated by forfeiture of Rice's airplane, in which Cessna has a security interest.[17] We first consider whether substantive due process is violated by the act of forfeiture itself, since such a finding would require return of the plane and would render the question of procedural due process moot.

The question before the court specifically is whether the superior court erred in failing to grant summary judgment for defendant Cessna Finance in the civil forfeiture action initiated by the state. Given its security interest in the airplane and its inno-

16. 5 AAC 31.090(c) provides:

> (c) It is unlawful for any person to possess, purchase, barter, sell, or transport shrimp within the state or within waters subject to the jurisdiction of the state if that person knows or has reason to know that such shrimp were taken or possessed in contravention of the regulations of this chapter.

5 AAC 32.090(c) provides:

> (c) It is unlawful for any person to possess, purchase, barter, sell or transport dungeness crab within the state or within waters subject to the jurisdiction of the state if that person knows or has reason to know that such dungeness crab were taken or possessed in contravention of the regulations of this chapter.

5 AAC 34.090(c) provides:

> (c) It is unlawful for any person to possess, purchase, sell, barter, or transport king crab within the state or within waters subject to the jurisdiction of the state if that person knows or has reason to know that such king crab were taken or possessed in contravention of the regulations of this chapter.

These regulations were promulgated pursuant to AS 16.10.210 which provides:

> *Unlawful sale or offer prohibited.* It is unlawful for a person to possess, purchase, offer to purchase, sell, or offer to sell in the state migratory fish or migratory shellfish taken on the high seas knowing that they were taken in violation of a regulation promulgated by the Board of Fisheries governing the taking of migratory fish or migratory shellfish in certain areas designated by the Board of Fisheries or the commissioner.

17. Cessna's security interest was $36,953.16 plus a substantial amount of interest.

cence in respect to the criminal offense upon which the forfeiture is based, Cessna contends that the civil forfeiture statute, AS 16.05.195,[18] deprives it of a property right without just compensation. Cessna does not contend that forfeiture is unconstitutional in respect to Rice, the titleholder of the airplane, but only as to itself as innocent holder of a security interest in the plane.

The subject of forfeitures and their application to innocent parties' property was recently considered at length by the Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). In *Pearson Yacht*, a yacht owned by Pearson had been leased to two persons, one of whom used it for transportation of marijuana, and thus it was subject to seizure under a Puerto Rican forfeiture statute. The Supreme Court, in determining that there was no constitutional violation in such seizure, offered a succinct discussion of the applicable law in this area at 679–683, 94 S.Ct. at 2089–2092, 40 L.Ed.2d at 466–67.

As that Court observed, the history of forfeiture is deeply rooted in the common law with even Biblical origins.[19] It has received widespread use and approval throughout the history of American jurisprudence.[20] "Despite this proliferation of forfeiture enactments, the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."[21]

The first suggestion for qualification came in the Supreme Court's opinion in *United States v. United States Coin & Currency*, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971), which seemed to indicate that lack of significant involvement in the criminal enterprise was a defense. Subsequently, in *Pearson Yacht*, the Supreme Court stated that such a conclusion was wrong. "*Coin and Currency* did not overrule prior decisions that sustained application to innocence of forfeiture statutes, like the Puerto Rican statutes, not limited in application to persons 'significantly involved in a criminal enterprise.'"[22] The Court noted two instances in which constitutional questions might still arise. The first, if the property had been seized when it was used without the owner's consent,[23] is not applicable in this case. The second instance alluded to by the Supreme Court involves "an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property."[24] Cessna argues that this latter cir-

18. *See* note 4 *supra*.

19. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681, 94 S.Ct. 2080, 2090, 40 L.Ed.2d 452, 466–67 (1974). For a comprehensive discussion of the history of forfeiture, *see* J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 Temple L.Q. 169 (1973).

20. [A]lmost immediately after the adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to forfeiture under federal law, as were vessels used to deliver slaves to foreign countries, and somewhat later those used to deliver slaves to this country. The enactment of forfeiture statutes has not abated; contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise.
416 U.S. at 683, 94 S.Ct. at 2092, 40 L.Ed.2d at 468 (footnote omitted).

21. *Id. See also United States v. One 1967 Cadillac Coupe Eldorado*, 415 F.2d 647, 648–49 (9th Cir. 1969), and cases cited therein; *United States v. One 1950 Burger Yacht*, 395 F.Supp. 802, 803 (S.D.Fla.1975).

22. 416 U.S. at 688, 94 S.Ct. at 2094, 40 L.Ed.2d at 471.

23. [I]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent.
416 U.S. at 689, 94 S.Ct. at 2094, 40 L.Ed.2d at 471.

24. *Id.* (footnote omitted).
In *F/V American Eagle v. State*, 620 P.2d 657, 666–68 (Alaska 1980), we considered a claim by owners of a seized fishing vessel that they were entitled to remission as innocent third parties. On the facts, we determined that all the owners were active business partners in the fishing vessel's activity and failed to dem-

cumstance is parallel to its position in the case at bar. In such circumstances, the Supreme Court noted that "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." [25]

The primary purpose for forfeiture as noted by the Supreme Court in *Pearson Yacht* is as follows:

> Forfeiture of conveyances that have been used—and may be used again—in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable. To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property.[26]

This passage clearly suggests that under federal constitutional due process, forfeiture of the interest of an innocent security holder, rather than that of an owner, is not violative of substantive due process, and does not come under the exception noted above. Several federal courts [27] and state courts [28] have so held.

[6] Cessna asks, however, that we review its claim under the substantive due process clause of the Alaska Constitution. As we have previously noted, although this court is bound to enforce constitutional protections under the Federal Constitution, we also have a concomitant duty to develop constitutional rights under the Alaska Constitution:

> if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. We need not stand by ... waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law.

Baker v. City of Fairbanks, 471 P.2d 386, 402 (Alaska 1970) (footnotes omitted).

Cessna's claim under both the Federal and State Constitutions is largely based on the lack, under the Alaska statutory scheme, of a remissions procedure. Alaska's forfeiture statute only allows for remission when an innocent buyer subsequently purchases, in good faith, property subject to forfeiture.[29] It makes no provision for remission to an innocent owner or security holder.[30] On the other hand, the

onstrate that they had done all that reasonably could be expected to prevent the proscribed use of the property.

25. 416 U.S. at 689-90, 94 S.Ct. at 2095, 40 L.Ed.2d at 472.

26. *See* note 38 *infra* and accompanying text.

27. *See United States v. One 1969 Plymouth Fury Auto*, 476 F.2d 960, 961 (5th Cir. 1973), *reh. denied*, 509 F.2d 1324, *cert. denied sub nom. Ford Motor Credit Co. v. United States*, 423 U.S. 838, 96 S.Ct. 65, 46 L.Ed.2d 57 (1975); *United States v. One 1967 Ford Mustang*, 457 F.2d 931 (9th Cir.), *cert. denied sub nom. Bank of America Nat'l Trust & Savings Ass'n v. United States*, 409 U.S. 850, 93 S.Ct. 59, 34 L.Ed.2d 92, *reh. denied*, 409 U.S. 1050, 93 S.Ct. 512, 34 L.Ed.2d 503 (1972).

28. *See, e. g., Commonwealth v. One 1977 Pontiac Grand Prix Auto*, 378 N.E.2d 69, 72 (Mass. 1978); *Dillon v. Barefoot*, 88 Misc.2d 887, 389 N.Y.S.2d 513 (N.Y.Sup.1976).

29. AS 16.05.195(e) provides:

> No forfeiture may be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased the item innocently and in good faith shall be on the purchaser.

30. A bill was before the Alaska legislature in the 1979 session to provide for remission and adopt procedures for remission in this situation. Committee Substitute for S.B. 7, 11th Leg., 1st Sess. (1979). The bill provided for a new statute which would have read, in part:

> (d) If an item specified in AS 16.05.190(a) is forfeited, a claimant who holds an interest in the item and has filed a timely claim, may petition the court in which the action is pending for remittance of his interest upon showing at a hearing before the court as trier of fact that
>
> (1) he holds a valid interest in the item and
>
> (2) he was not a consenting party to nor privy to the illegal act.

state notes that remission for forfeitures and fines is available by application to the governor under his power of executive clemency:

> Subject to procedure prescribed by law, the governor may grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures.

Alaska Const. Art. III, § 21. Cessna argues that this is not a substitute for an administrative remission procedure and that no procedures have been established for remission under executive clemency.

[7] Cessna also points to the text of a footnote in *Pearson Yacht* in which the Supreme Court notes the long history of federal provisions for remission of forfeited property to innocent owners:

> Since 1790 the Federal Government has applied the ameliorative policy—first adopted in England—of providing administrative remissions and mitigations of statutory forfeitures in most cases where the violations are incurred 'without willful negligence' or an intent to commit the offense. Indeed, forfeitures incurred under 21 U.S.C. § 881(a), which served as the model for enactment of the disputed Puerto Rican statute, are subject to the remission and mitigation procedures of 19 U.S.C. § 1618. Regulations implementing § 1618 provide that, if the seized property was in the possession of another who was responsible for the act which resulted in the seizure, the petitioner must produce evidence explaining the manner in which the other person acquired possession and showing that, prior to parting with the property, he did not know or have reasonable cause to believe that the property would be used in violation of the law or that the violator had a criminal record or a reputation for commercial crime. 19 CFR § 171.13(a). These provisions are also extended to those individuals holding chattel mortgages or conditional sales contracts. 19 CFR § 171.13(b). See also 18 U.S.C. § 3617(b) establishing standards for judicial remission and mitigation of forfeitures resulting from violations of the internal revenue laws relating to liquor.[31]

The importance of a remission procedure has also been noted in several other cases.[32] The state argues that none of these cases hold that remission is constitutionally required. However, after careful consideration, we are persuaded that a remission procedure is mandated under the Alaska Constitution. Not to allow innocent owners and security holders to show that they have not been involved in the criminal activity that triggered the forfeiture proceeding violates Alaska's constitutional due process provision.

The law of forfeiture, as already noted, is of ancient origin dating back to Biblical times. The theory of civil forfeiture is that the action is in rem, against the object. As the Supreme Court noted in *United States Coin & Currency*:

> [F]orfeiture actions have proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing. ... The forfeiture action in the present case was instituted as an in rem proceeding in which the money itself is the formal respondent. More remarkable, the Government's complaint charges the *money* with the commission of an actionable wrong. [footnotes omitted] [emphasis in original]

401 U.S. at 719–20, 91 S.Ct. at 1044, 28 L.Ed.2d at 438. Although the implicit fiction in forfeiture actions is often acknowledged by courts, lingering concepts derived from that fiction have kept forfeitures from receiving clear analysis. As one commentator noted:

> An automobile that had been used to violate the revenue laws, or the narcotics laws is not a 'dangerous' res.... It is

31. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 n.27, 94 S.Ct. 2080, 2095 n.27, 40 L.Ed.2d 452, 471 n.27 (1974) (citations omitted).

32. *United States v. United States Coin & Currency*, 401 U.S. 715, 721, 91 S.Ct. 1041, 1044, 28 L.Ed.2d 434, 439 (1971); *United States v. One 1976 Lincoln Mark IV*, 462 F.Supp. 1383 (W.D. Pa.1979); *United States v. One 1974 Mercury Cougar*, 397 F.Supp. 1325 (C.D.Cal.1975).

> neither more nor less dangerous to the public welfare or safety than any other automobile. The simple proof of the distinction, of course, is that such confiscated automobiles are not in fact destroyed, but are ultimately sold, their proceeds going to the public treasury, while the cars themselves, having publicly 'expiated' for being 'offending reae,' may resume their normal 'life' on the public highways. The ox that gored a person to death was treated as a real felon—as were all those domestic animals that were tried before regular courts in the Middle Ages for causing the death of a person—and was duly executed. The procedure was the natural consequence of a bona fide concern about a human life and not a subterfuge by means of which the authorities were aiming to penalize the owner of the beast. The modern doctrine of the offending res, on the other hand, is a deliberate subterfuge—a judicial fiction, by resort to which the sovereign, with the sanction of the courts, can impose a punishment on a blameless individual who is thereby deliberately left without recourse to his constitutional rights of due process.[33]

What purpose is left then to forfeiture if it is not to destroy and expiate the offending res? One purpose is to prevent possible use of the property in further illicit acts.[34] This purpose is well served when the seized property is not returned to the offender. It is not served when the interests of innocent non-negligent third parties are left unprotected or uncompensated. All that remain as purposes for forfeiture are the goals generally advanced for penal measures.[35] If this is accurate, then what purpose is served by punishing the owner who has done all that reasonably could be expected to prevent illegal use? Or in punishing a security holder who has an interest in the forfeited item and has done everything possible to prevent its illegal use, especially considering the minimal control that a security holder has over an item whose ownership is in the hands and direct control of another? The Supreme Court, in *Pearson Yacht*, stated that as to secured creditors, "confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."[36] We think that limits must be recognized as to the care a creditor can be required to take to safeguard a security interest. We think that if a party can show "the manner in which the property came into possession of such other person" and that "prior to parting with the property he did not know, nor have reasonable cause to believe, [either] that the property would be used to violate [the law, or] ... that the violator had a criminal record or a reputation for commercial crime,"[37] substantive due process under the Alaska Constitution requires that a procedure be available for remission of the forfeited item.

[8] Here, Cessna Finance has asserted it is an innocent holder of an interest in the seized airplane which did all it could reasonably be expected to do. We conclude that Cessna has been deprived of its constitutional rights to substantive due process through the failure of the statutory scheme relating to forfeitures to provide for remission of the interests of innocent non-negligent third parties in the forfeited item.

33. *See* J. Finkelstein, *supra* note 19, at 252.

34. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687, 94 S.Ct. 2080, 2094, 40 L.Ed.2d 454, 470 (1974); *F/V American Eagle v. State*, 620 P.2d 657, 668 (Alaska 1980).

35. *See State v. Chaney*, 477 P.2d 441, 444 (Alaska 1970).

36. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686–88, 94 S.Ct. 2080, 2093–2094, 40 L.Ed.2d 452, 470–71 (1974). The Court also noted:

> Seizure and forfeiture statutes also help compensate the Government for obtaining security for subsequently imposed penalties and fines. [citations omitted]

416 U.S. at 687 n.26, 94 S.Ct. at 2094 n.26, 40 L.Ed.2d at 470 n.26. We do not find these interests compelling when the seizure involves property of innocent owners and security holders.

37. 19 CFR § 171.13(a).

Thus, the case is remanded to the superior court to hold a remission hearing. If Cessna Finance can make the requisite showing,[38] it is entitled to reimbursement from the state for its share in the forfeited airplane at the time of seizure.

Having determined that the forfeiture itself violated substantive due process, we need not consider whether the superior court was correct in finding that procedural due process was also violated.

AFFIRMED in part; REVERSED in part.

BOOCHEVER, J., not participating.

MATTHEWS, Justice, concurring.

I agree with the result of the majority opinion. However, the majority's reasons for imposing a mens rea requirement as a part of 5 AAC 81.140(b) seem to me to be somewhat unfocused.

The majority's first reason is that without a mens rea requirement the regulation is overbroad and is therefore void for vagueness. The concept of overbreadth as it is used in vagueness cases refers to a lack of fair notice as to what conduct is punishable. *Stock v. State*, 526 P.2d 3, 8 (Alaska 1974). Here there is fair notice in the sense that the regulation is linguistically precise in delineating the type of conduct proscribed. The problem with it is that it includes within its ambit the conduct of people who have no reason to believe that what they are doing is criminal. I suggest, therefore, that the vagueness rationale does not support the conclusion reached.

The alternative reason set out by the majority strikes down the regulation because it has no reasonable relation to a legitimate governmental purpose. Once again, this is at best a tangential expression of what is wrong with the regulation. There certainly is a legitimate government interest in preventing the unlawful killing of game, and imposing strict forfeiture or criminal fines on persons who transport unlawfully killed game bears a relationship to the accomplishment of that purpose.

I would require mens rea as an element of this regulation because the penalty for its violation includes a possible six-month term of imprisonment. *See* AS 16.05.900(a). In my view due process requires that there be a culpable mental state in every case where a sentence of imprisonment may be imposed. Although we have never unconditionally adopted such a rule, our cases suggest that it is appropriate.

In *Speidel v. State*, 460 P.2d 77 (Alaska 1969) we held that a culpable mental state must exist for there to be a conviction of a crime. We recognized a "public welfare offense" exception to this rule, and noted that such offenses are characterized by relatively small penalties, and conviction of them does not significantly damage one's reputation. *Id.* at 79.

In *Alex v. State*, 484 P.2d 677, 681 (Alaska 1971), we reaffirmed the principles of *Speidel* and noted "the necessity of basing serious crimes upon a general criminal intent as opposed to strict criminal liability which applies regardless of intention," the goal being to "avoid criminal liability for innocent or inadvertent conduct." *Accord Kimoktoak v. State*, 578 P.2d 594 (Alaska 1978); *State v. Guest*, 583 P.2d 836 (Alaska 1978).

Likewise, in the recent case of *Hentzner v. State*, 613 P.2d 821, 825 (Alaska 1980), we noted that the " 'general conditions of penal liability' require 'not only the doing of some act by the person to be held liable, but also the existence of a guilty mind during the commission of the act.' "

These cases establish that mens rea is an essential element for criminal liability, except as to crimes for which the penalties are relatively small, and do minimal damage to

38. The state argues that Cessna had not done anything more than a routine credit check. However, it seems that Rice had neither a prior criminal record nor a record or reputation as a game law violator. If the inquiry would have revealed nothing, the loan was made in good faith. If Cessna had no knowledge that Rice was a violator of the game laws and was not negligent in its inquiry, it is entitled to remission. *Cf. United States v. One 1972 Ford Pickup Truck*, 374 F.Supp. 413, 415 (E.D.Tenn. 1973).

the offender's reputation. In my view, any prison sentence is an important, even traumatic, event in the life of a human being, especially one who conducts his affairs with an intent to conform to the norms required by law. Further, any prison sentence is likely to have a considerable detrimental effect on one's reputation. The laws of our society should not be structured so that an individual may be jailed for conduct which he reasonably believes to be lawful. Therefore, I believe that a mens rea requirement should be imposed in all cases in which the penalty may be incarcerat[1]

Many commentators agree with this position. For example, in F. Sayre's article, *Public Welfare Offenses*,[2] he notes that the severity of the penalty represents a cardinal principle upon which to determine whether mens rea should be required. He concludes that if the possible penalty is serious, particularly if it involves imprisonment, the defendant's individual interest weighs too heavily to allow conviction without proof of mens rea:

> To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure. Crimes punishable by prison sentences, therefore, ordinarily require proof of a guilty intent.[3]

Accord W. LaFave & A. Scott, Handbook on Criminal Law § 31 at 218 (1972); Model Penal Code § 2.05, Comments (Tent. Draft No. 4, 1955).

For these reasons I agree that a mens rea element should be read into 5 AAC 81.-140(b).

1. The possibility of incarceration is a dividing line between serious and non-serious crimes for other purposes in the criminal law such as the right to trial by jury and to court appointed counsel. *Alexander v. City of Anchorage*, 490 P.2d 910, 915 (Alaska 1971); *Baker v. City of Fairbanks*, 471 P.2d 386, 401-02 (Alaska 1970).

2. F. Sayre, *Public Welfare Offenses*, 33 Colum. L.Rev. 55 (1933).

3. *Id.* at 72.

MUNICIPALITY OF ANCHORAGE, Petitioner,

v.

James A. BROWN, Respondent.

No. 5645.

Court of Appeals of Alaska.

April 9, 1981.

On municipality's petition for review of order of the District Court, Third Judicial District, Beverly W. Cutler, J., dismissing prosecution against driver for driving while license suspended, the Court of Appeals held that failure of the Alaska Department of Public Safety to give timely notice to driver, as required by statute, that his license would be suspended if he failed to show financial responsibility or contest liability for an accident in which he had been involved did not preclude subsequent suspension of his license pursuant to the statute.

Reversed and remanded.

Automobiles ⇐144.2(7)

Failure of the Alaska Department of Public Safety to give timely notice to driver, as required by statute, that his license would be suspended if he failed to show financial responsibility or contest liability for an accident in which he had been involved did not preclude subsequent suspension of his license pursuant to the statute. AS 28.20.050.

Allen M. Bailey, Municipal Prosecutor, Theodore D. Berns, Municipal Atty., Anchorage, for petitioner.

was "clearly mistaken". The trial court properly considered all of the appropriate objectives and elements of sentencing, and furthermore imposed a sentence basically consistent with other robbery convictions. We must therefore uphold the trial court's imposition of the sentence.

The decision of the trial court is accordingly

AFFIRMED.

Edward STORK, Appellant,

v.

STATE of Alaska, Appellee.

No. 2708.

Supreme Court of Alaska.

Jan. 26, 1977.

Defendant was convicted in Third Judicial District Court, Anchorage District, C. J. Occhipinti, J., of the manslaughter killing of his common-law wife, and he appealed. The Supreme Court, Burke, J., held, inter alia, that the trial court committed reversible error in omitting the word "culpable" from its instruction defining negligent manslaughter and in failing to instruct the jury that admissions by defendant were to be viewed with caution.

Reversed and remanded.

Erwin, J., dissented and filed statement.

1. Criminal Law ⇐1038.1(4)

Plain error doctrine required Supreme Court to examine defendant's contention that trial court committed reversible error in manslaughter instruction even though no objection to such instruction was entered at trial. AS 11.15.040, 11.15.080; Rules of Criminal Procedure, rules 30(a), 47(b).

2. Homicide ⇐74

Under manslaughter statute, proof of ordinary negligence, not amounting to reckless and wanton disregard of consequences to others, is not sufficient to support conviction for manslaughter; degree of conduct "more reckless and wanton than would be involved in ordinary negligence" is required to constitute culpable negligence under such statute. AS 11.15.040.

3. Homicide ⇐309(1), 340(1)

Trial court in homicide prosecution committed reversible error when it omitted term "culpable" from its instruction defining negligent manslaughter. AS 11.15.040, 11.15.080; Rules of Criminal Procedure, rules 30(a), 47(b).

4. Criminal Law ⇐1038.2

Failure to give mandatory instruction is error which Supreme Court must notice on appeal. Rules of Criminal Procedure, rules 30(a), 47(b).

5. Criminal Law ⇐781(1)

For purpose of determining necessity for trial court to instruct jury that defendant's admissions should be viewed with caution, conflicting versions of cause of victim's death advanced by defendant constituted "admissions" since, when considered together and compared with defendant's testimony at trial, they could have been interpreted by jury as attempt to cover up truth and as proof of defendant's consciousness of guilt. Rules of Criminal Procedure, rule 30(b), (b)(2).

See publication Words and Phrases for other judicial constructions and definitions.

6. Criminal Law ⇐781(1), 1173.2(7)

Trial court committed reversible error when it failed to charge jury in manslaughter prosecution that defendant's admissions should be viewed with caution; testimony of three witnesses regarding defendant's three conflicting versions of wife's shooting was substantial factor leading to his conviction, especially since prosecutor repeatedly emphasized such testimony in both opening

and closing arguments. AS 11.15.040; Rules of Criminal Procedure, rule 30(b), (b)(2).

7. Criminal Law ⇐338(7)

In manslaughter prosecution, prosecutor's questions regarding whether defendant had paid hospital bills of victim, his wife, or had supported their children after wife's death were improper in that their probative value was outweighed by their prejudicial effect. AS 11.15.040.

8. Constitutional Law ⇐268(8)

Due process is violated when prosecution calls attention to silence of accused at time of arrest. U.S.C.A.Const. Amend. 5.

Terry C. Aglietti, Edgar Paul Boyo & Associates, P. C., Anchorage, for appellant.

Glen C. Anderson, Asst. Dist. Atty., and Joseph D. Balfe, Dist. Atty., Anchorage, Avrum M. Gross, Atty. Gen., Juneau, for appellee.

OPINION

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR, ERWIN and BURKE, JJ.

BURKE, Justice.

In this case, Edward Stork appeals his manslaughter conviction. The indictment which issued on April 18, 1975 charged Stork with killing his common law wife, Ethel, "by shooting her with a handgun." On August 18, 1975, a jury found Stork guilty of manslaughter, as defined by AS 11.15.040.[1]

The state presented to the jury the theory that Stork had killed his wife in the midst of a heated argument. In addition to evidence of an argument occurring immediately before the shooting, the state offered proof that Stork and his wife had for some time been experiencing marital difficulties, that Stork had a proclivity towards violence and had broken his wife's nose a week prior to her death, and that he was intoxicated at the time that he shot Ethel Stork. A ballistics expert testified that the weapon used in the shooting was functioning normally and that it had been fired at a distance of approximately six inches from the victim. The state also adduced testimony that Stork had told three different exculpatory versions of the shooting to various neighbors and relatives. Stork, on the other hand, testified that the gun had accidentally discharged while he was removing its clip, causing his wife's death.

Stork has raised five issues on appeal. We turn first to his contention that the trial court erroneously instructed the jury on the elements required to convict him of manslaughter. The court gave two manslaughter instructions, one of which set out the substance of AS 11.15.080, which provides that manslaughter embraces a killing by culpable negligence.[2] In its instruction, however, the trial court omitted the term "culpable" and instructed the jury only that negligent performance of a lawful act can constitute manslaughter. The instruction of which appellant complains provided:

> Manslaughter embraces a killing without malice and intent, in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily injury, *or in doing negligently some lawful act,* or in omitting to perform a legal duty. It is the unlawful killing of a human being without intent to kill or inflict the injury causing death, committed accidentally in the commission of some unlawful act not felonious, *or in the improper or negligent performance of an act lawful in itself.* (Jury instruction no. 7) (emphasis added)

1. AS 11.15.040 provides:

Manslaughter. Except as provided in §§ 10–30 of this chapter, a person who unlawfully kills another is guilty of manslaughter, and is punishable by imprisonment in the penitentiary for not less than one year nor more than 20 years.

2. AS 11.15.080 provides:

Negligent homicide. Every killing of a human being by the culpable negligence of another, when the killing is not murder in the first or second degree, or is not justifiable or excusable, is manslaughter, and is punishable accordingly.

[1] Stork's attorney failed to object to this instruction at trial, and normally this failure would preclude our consideration of the point on appeal. Alaska Criminal Rule 30(a);[3] *Evans v. State,* 550 P.2d 830, 843 (Alaska 1976). Pursuant to Alaska Criminal Rule 47(b),[4] however, this court may notice "plain errors" or "defects affecting substantial rights" which were not previously brought to the attention of the trial court, and the plain error rule in effect provides an exception to the provisions of Criminal Rule 30(a). *Dimmick v. State,* 449 P.2d 774, 776 (Alaska 1969). We noted in *Dimmick* that the plain error exception should be exercised only "where necessary to prevent a miscarriage of justice." In the case before us, such a necessity exists.

The state has advanced the argument that since it presented to the jury no evidence tending to support a theory of negligent manslaughter, the omission in the instruction was not prejudicial to appellant. It concedes that if it had submitted the case to the jury on a negligence theory, an instruction distinguishing culpable negligence from ordinary negligence would have been necessary.

The state overlooks the fact that in final argument the prosecutor did argue an alternative theory of negligence, saying:

> So, if you found that he didn't intend to kill his wife or it wasn't in the heat of passion but that he carelessly and heedlessly handled a weapon or that he was in . . . possession of a weapon, a 22, and did things when he was intoxicated, you will still find manslaughter. In other words this is an accident that shouldn't have happened and it happened maybe because he was intoxicated. But you will have to review the evidence to decide what were the facts and what were the causes. But in Alaska the . . . you will be instructed that the . . . manslaughter is either voluntary or involuntary and there's no requirement either way.

[2] In addition, the state fails to discuss the fact that Stork's own testimony placed the question of negligence before the jury. Stork testified that the gun went off accidentally, while he was unloading it. Thus, even if the jury chose to believe Stork's testimony, it could have convicted him of manslaughter under the court's instruction that negligent performance of a lawful act constitutes manslaughter. However, under our manslaughter provision, proof of ordinary negligence, not amounting to a reckless and wanton disregard of the consequences to others, is not sufficient to support a conviction for manslaughter. A degree of conduct "more reckless and wanton than would be involved in ordinary negligence is required" to constitute culpable negligence. *DeSacia v. State,* 469 P.2d 369, 372 (Alaska 1970).

[3] Under these circumstances, the trial court's omission of the term "culpable" in its instruction on negligent manslaughter and its failure to give an instruction which delineated for the jury the difference between ordinary and culpable negligence substantially prejudiced the appellant and constitutes plain error. Since it is quite possible that these omissions contributed to the jury's verdict, reversal is required. *Love v. State,* 457 P.2d 622 (Alaska 1969). *See also Thomas v. State,* 522 P.2d 528 (Alaska 1974).

3. Alaska Criminal Rule 30(a) provides:

> (a) *Requested Instructions—Objections.* At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections. Opportunity shall be given to make the objection out of the hearing of the jury by excusing the jury or hearing objections in chambers.

4. Rule 47(b), Alaska Rules of Criminal Procedure provides:

> (b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

The second issue raised by this appeal involves the trial court's failure to instruct the jury that the defendant's admissions should be viewed with caution, as mandated by Criminal Rule 30(b)(2). This case was tried before Criminal Rule 30(b) was amended in December, 1975, and at the time of trial it provided in pertinent part:

> The court shall instruct the jury on all matters of law which it considers necessary for the jury's information in giving their verdict, and whether or not requested to do so, shall give the following basic instructions on all proper occasions:
>
> * * * * * *
>
> (2) That the testimony of an accomplice ought to be viewed with distrust and the oral admissions of a party with caution.

[4] Although Stork's attorney neither requested that an instruction concerning his client's admissions be given nor objected to the court's failure to give such an instruction, we have on previous occasions held that the failure to give a mandatory instruction is an error which we must notice on appeal. *Kristich v. State*, 550 P.2d 796, 800–01 (Alaska 1975); *Anthony v. State*, 521 P.2d 486, 489–90 (Alaska 1974).

[5] We consider first the threshold question of whether Stork's differing exculpatory versions of the shooting constituted oral admissions. On various occasions, Stork related three different exculpatory versions of the cause of his wife's death. He told one neighbor that the gun fell and went off; he told another neighbor that the weapon discharged as he was cleaning it; and he told his wife's brother-in-law that he was unloading the gun when it fired accidentally. The state argues that these inconsistent statements did not constitute admissions since they were exculpatory in nature. If the state is correct, and there were no oral admissions in evidence, the trial court was not required to instruct under Criminal Rule 30(b)(2). *See Avery v. State*, 514 P.2d 637, 644 (1973).

In his treatise on Evidence, McCormick distinguishes between confessions and admissions and points out that an admission need not be an acknowledgment of facts which directly establish the defendant's guilt. Statements which are intended to prove innocence but which, when proven untrue, imply guilt are admissions.

> [An admission exists where] the mere making of the assertion (without regard to its truth) tends to prove guilt. For example, in a conspiracy trial evidence was introduced that one defendant had denied knowing the other defendants on a given date. This was an admission because the assertion, when considered with other proof which tended to show it was erroneous, indicated consciousness of guilt and therefore permitted an inference of actual guilt. McCormick, *Evidence*, 2d Ed., § 146, p. 310, citing *Williamson v. United States*, 310 F.2d 192, 199 (9th Cir. 1962).[5]

Stork's conflicting versions of the cause of his wife's death follow the same pattern as the example given by McCormick. They constituted admissions because when considered together and compared with Stork's testimony at trial, they could have been interpreted by the jury as an attempt to cover up the truth and as proof of Stork's consciousness of guilt.

[6] The issue for determination thus becomes whether the trial court's failure to give the mandatory instruction constituted reversible error. In three of our previous decisions we have discussed this issue in some detail, and our analysis in all three cases centered on the importance of the admission or the accomplice's testimony to the government's case and its impact on the jury's verdict. In *Bakken v. State*, 489 P.2d 120 (Alaska 1971), the defendant, charged with statutory rape, had allegedly made comments to his friend regarding the size of the prosecuting witness' vagina. We found that the friend's testimony "assumed

5. McCormick does point out that while some authorities view exculpatory statements which tend to imply guilt as admissions against interest others place exculpatory statements in a separate category. See *State v. Cobb*, 2 Ariz. App. 71, 406 P.2d 421, 423 (1965).

a crucial role in the conviction of Bakken,"[6] and held that the trial court's failure to give the mandatory instruction was obviously prejudicial, "given the closeness of the case and the importance of Johansen's testimony concerning Bakken's purported admission. . . ."[7] In *Anthony v. State*, 521 P.2d 486 (Alaska 1974) we used a similar analysis. In that case, an accomplice's testimony was the only evidence placing Anthony at the scene of the crime and reliably demonstrating his motive or guilty knowledge. We held that "because the testimony alone was a substantial factor leading to Anthony's conviction, the conclusion that the failure properly to instruct under Criminal Rule 30(b)(2) constituted prejudicial error is inescapable."[8] In *Kristich v. State*, 550 P.2d 796 (Alaska 1976), however, we found that the failure to instruct regarding an admission by the defendant was not prejudicial error. The defendant in that case told police that "the roll," house money in a gambling operation, was across the street. We held that in view of all the other evidence of maintenance of a gambling operation at the defendant's house, including early morning arrivals at the house, the sound of chips, gambling paraphernalia found on the premises, and money on a bar with people gathered around it, the admission did not appreciably affect the jury's verdict.

The facts of the case now before us fall somewhere between those in *Bakken* and *Anthony*, where the admission or accomplice's testimony essentially comprised the state's entire case, and those in *Kristich*, where other evidence of a gambling operation was plentiful. We conclude that the testimony of three witnesses regarding Stork's three conflicting versions of the shooting was a substantial factor leading to his conviction, especially since the prosecutor repeatedly emphasized this testimony in both his opening and closing arguments. Under the test for harmless error articulated in *Love v. State*, 457 P.2d 622, 632 (Alaska 1967), we cannot fairly say that the trial court's omission of the mandatory instruction "did not appreciably affect the jury's verdict." The trial court's failure to give the Rule 30(b)(2) instruction constituted prejudicial error.

Because additional issues raised in this appeal may come up again during retrial of the case, we consider two points which would not otherwise be dispositive.

[7] First, Stork contends that the prosecutor's questions regarding whether Stork had paid Ethel Stork's hospital bills or had supported their children after Ethel's death were improper. The trial court disallowed the question concerning payment of the hospital bills, but permitted the question regarding payment of child support. Although the state argues that these questions constituted proper cross-examination and were designed only to impeach Stork's testimony that he had a close and caring relationship with his family, we find their probative value to be outweighed by their prejudicial effect. *See generally Poulin v. Zartman*, 542 P.2d 251, 260 (Alaska 1975).

[8] Second, the appellant argues that repeated questioning regarding his failure to give a statement to the police was prejudicial error. Although Stork's attorney may have waived his client's fifth amendment rights by failing to object to this line of questioning, we need not reach the issue of plain error, due to our resolution of the other issues in this case. We do note, however, that due process is violated when the prosecution calls attention to the silence of the accused at the time of arrest. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Justice White confronted this issue in his concurring opinion in *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975).

> . . . When a person under arrest is informed, as Miranda requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it

6. 489 P.2d at 123

7. 489 P.2d at 125.

8. 521 P.2d at 492.

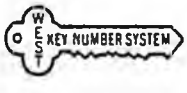
seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. 422 U.S. at 182–83, 95 S.Ct. at 2139.

We need not treat the sentencing issue which appellant has raised in this case.

REVERSED and REMANDED.

ERWIN, Justice, dissenting.

I dissent. I do not think this case is an appropriate one[1] in which to exercise the doctrine of plain error and to waive the requirement of Criminal Rule 30(a) requiring the appellant to object to the instruction in the trial court before his claim of error is considered on appeal.



INTERIOR CREDIT BUREAU, INC., Appellant,

v.

Vernon BUSSING a/k/a Vern C. Bussing, Appellee.

No. 2822.

Supreme Court of Alaska.

Jan. 31, 1977.

Assignee of creditor brought suit against debtor. The Superior Court, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, J., granted the debtor's motion to confirm a settlement agreement and assignee of creditor appealed. The Supreme Court, Boochever, C. J., held that where there was no dispute as to the material terms of an oral settlement stipulation, the stipulation was enforceable where both parties admitted either in a writing filed with the clerk or orally in open court that the settlement had been reached.

Affirmed.

1. Appeal and Error ⇐761

Argument not in points on appeal and not raised in trial court would not be considered by Supreme Court.

2. Stipulations ⇐6, 7, 9

Purpose of rule providing that stipulations between parties or their attorneys will be recognized only when made in open court, or when made in writing and filed with clerk, is to avoid expending court resources to resolve arguments as to existence and terms of oral settlement agreements. Rules of Civil Procedure, rule 81(e).

3. Compromise and Settlement ⇐2
Stipulations ⇐1

Stipulations and settlements are favored in law because they simplify, shorten and settle litigation without taking of valuable court resources. Rules of Civil Procedure, rule 81(e).

4. Stipulations ⇐7

Where there was no dispute as to material terms of oral settlement stipulation, stipulation was enforceable where both parties admitted either in writing filed with clerk or orally in open court that settlement had been reached. Rules of Civil Procedure, rule 81(e).

Peter J. Aschenbrenner, Fairbanks, for appellant.

Thomas P. Blanton, Fairbanks, for appellee.

OPINION

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR and BURKE, JJ.

BOOCHEVER, Chief Justice.

In this appeal, Interior Credit Bureau (ICB) challenges the enforceability of an

1. See Erwin, J., dissenting, *Bakken v. State*, 489 P.2d 120, 127 (Alaska 1971).

Pat Malone

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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March 10, 1988

Representative Sam Cotten
Representative Adelheid Herrmann
Co-Chairmen, House Resources Committee
P. O. Box V
Juneau, AK 99811

Re: HB 364, for An Act Relating to Commercial Fishing Violations

Dear Representatives Cotten and Herrmann:

Our office recently received a copy of the letter, dated February 22, 1988, that Soldotna attorney Chuck Robinson sent to at least one member of the House Resources Committee regarding HB 364, a bill for an act relating to commercial fishing violations. That bill would, among other things, increase the maximum fines for violations and misdemeanors involving commercial fishing. We believe Mr. Robinson's views are mistaken and offer our own in response.

Mr. Robinson first states that it is "fundamentally unfair" to allow suspension or revocation of a commercial fishing license as a penalty for violation of a fisheries regulation governing "allocation" of fisheries resources. Mr. Robinson argues that allocation regulations are made "generally for purely socioeconomic reasons" (letter at page 2) and that therefore violation of these regulations should not subject the violator to the same penalties that may be imposed upon a fisherman who violates a "conservation" law.

As the House Resource Committee members know, when the board of fisheries makes commercial fisheries regulations it must insure that fisheries stocks are managed in a manner that conserves the resources on a sustained yield basis. AS 16.05.221; Alaska Const. art. VIII, sec. 4. The board must often also allocate between different fisheries or user groups. In so doing, the board must consider certain allocation criteria set out at AS 16.05.251(e) and 5 AAC 39.205.

An allocation of fisheries resources among fishermen is premised upon a level of harvest that will not harm those resources. Violation of an allocation based regulation may just

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as likely be detrimental to public fisheries resources as a violation of a conservation based regulation because the total harvest exceeds (or may exceed) the intended level and may be unaccounted for. For example, the fisheries board may decide to open an area or period for one gear type instead of another. A harvest by a person using illegal gear still harms the resource and that kind of violation can have a ripple effect upon the entire resource management program by upsetting often carefully balanced guideline harvests for specific areas or times. Thus, it is not improper to treat persons who violate regulations based on allocation the same as persons who violate regulations based on a conservation rationale.

The second argument advanced in Mr. Robinson's letter is that increasing the possible maximum fine for a noncriminal strict liability violation from the $300 maximum authorized by the court in Constantine v. State, 739 P.2d 188 (Alaska App. 1987) to $6,000 is unfair. While Mr. Robinson concedes that some higher fine is needed, he asserts that it is unfair to increase the fine to a level higher than the maximum fine for a misdemeanor. (Under AS 12.55.035(b)(3) and (4), the maximum fine in the general criminal code for a class A misdemeanor is $5,000 and the maximum fine for a class B misdemeanor is $1,000; under AS 16.05.720, the maximum fine for a commercial fisheries misdemeanor is presently $5,000). Mr. Robinson also argues that there is no need to impose fines in strict liability cases "greater than those imposed for criminal violations," (letter at page 3) because unintentional conduct cannot be deterred.

The first flaw in Mr. Robinson's reasoning is that to allow the state to pursue a noncriminal strict liability violation in which the state does not have to prove intent does not necessarily mean that the violation was unintentional. It only means that the state does not have to meet the often impossible burden of proving intent. The state often prosecutes commercial fisheries offenders on a strict liability theory even though there is evidence of a more culpable mental state. Moreover, imposition of a fine not only serves the purpose of deterring conduct, but is also intended to compensate the public for damage to public trust resources and management regimes and to reaffirm societal norms.

A second flaw in Mr. Robinson's rationale relates to his assertion that to raise the strict liability maximum fine to $6,000 would create a fine higher than allowed for a misdemeanor. While it is true that most misdemeanor fines are presently less

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than $6,000, it is also true that the legislature has wide discretion to determine what maximum fine is appropriate for various misdemeanor offenses. HB 364, for example, would raise the maximum misdemeanor fine for commercial fishing violations to $15,000. The maximum fines set in title 11, Alaska statutes (criminal code), do not restrict the legislature from establishing different maximum fines for misdemeanors in title 16 (fish and game) or other areas. See, e.g., AS 46.03.790(d) ($25,000 misdemeanor fine for failure to report or to falsely report an oil discharge).

It should be noted that HB 364 is intended, to some extent, to return the treatment of commercial fisheries cases to the status quo that existed before the court decisions in Reynolds v. State, 655 P.2d 1313 (Alaska 1982), Beran v. State, 705 P.2d 1280 (Alaska App. 1985), and Constantine v. State, 739 P.2d 188 (Alaska App. 1987). Before these court rulings, commercial fisheries cases were traditionally treated as strict liability offenses -- with a maximum fine of $5,000 (in addition, forfeiture of gear and equipment and jail time had been authorized.) The above-cited cases interpreted the relevant state statutes as expressing legislative intent to limit the maximum fine for a strict liability commercial fisheries offense to $300. HB 364 would make it clear that the legislature does not intend to limit the maximum strict liability fine to a mere $300.

It should also be stressed that the maximum fine proposed for strict liability violations in HB 364 is not a mandatory fine; the courts retain the power to tailor the amount of a fine to the individual circumstances of the case and the economic status of the fishery in question. See, e.g., Karr v. State, 686 P.2d 1197 (Alaska 1984) (court must consider defendant's ability to pay a fine).

A third component of HB 364 that Mr. Robinson criticizes is the burden of proof proposed for noncriminal strict liability offenses. Mr. Robinson argues that noncriminal offenses must be proven by the criminal standard of "beyond a reasonable doubt" and he implies that the Governor's transmittal letter inaccurately interprets the definition of "violation" in AS 11.81.900(56) as specifing the burden of proof of "by a preponderance of evidence."

HB 364 specifies that the burden of proof in a noncriminal strict liability offense is the civil burden of "by a

preponderance of the evidence," rather than the burden of proof required in criminal cases of "beyond a reasonable doubt." This is consistent with the noncriminal nature of these strict liability offenses and, we believe, with applicable case law.

Moreover, the Governor's transmittal letter does not state that the definition of "violation" in AS 11.81.900(56) includes a defintion of the burden of proof of "by a preponderance of evidence," as Mr. Robinson suggests. The Governor's transmittal letter actually states in pertinent part:

> In summary, sec. 3 of the bill will bring treatment of most commercial fisheries cases as strict liability offenses back to the situation that existed before the Beran and Constantine decisions. The section also sets out the rule already established by the court in Beran and in AS 11.81.900(56) that a "violation" is a noncriminal offense and that a person charged with a violation is not entitled to a trial by jury or to representation at public expense. It also specifies that in a noncriminal violation the state bears the burden of proving the violation "by a preponderance of the evidence."

The word "it" in the last sentence above obviously refers to section 3 of the bill, not to AS 11.81.900(56), contrary to Mr. Robinson's interpretation.

The fourth argument Mr. Robinson makes with respect to HB 364 is that it would violate principles of equal protection embodied in the state and federal constitutions to increase the maximum fine for commercial fisheries misdemeanor offenses to an amount greater than that imposed for violation of other laws relating to other occupations. We believe there is no merit to this assertion, as explained below.

Commercial fisheries violations can readily be distinguished from violations involving laws governing other activities or occupations. Commercial fisherman harvest, for commercial use, fish that belong to all the people of the state -- a public trust resource. A violator can net, in certain fisheries, $10,000 to $15,000 in one illegal set. In other fisheries, fishermen invest millions of dollars in equipment and may reap profits in the six digit range. There is no question that the legislature can amend -- and increase -- the misdemeanor

FROM LAW BRNCH CIVIL 03/11/88 16:10 P. 6

fines applicable to commercial fisheries without addressing violations relating to other occupations. As noted before, the maximum fine of $5,000 for a commercial fisheries violation has not changed since the 1920's. Other statutes presently in force authorize noncriminal fines that could exceed $100,000. See, e.g., AS 46.03.758 (environmental pollution violations). Other statutes provide criminal fines far larger than the $15,000 proposed in HB 364. See AS 46.03.790(d) (criminal penalties up to $25,000 for false reporting of or failure to report an oil discharge).

A fifth argument in Mr. Robinson's letter is that it may be unconstitutional to provide simple negligence as the culpable mental state required for commercial fisheries offenses. Mr. Robinson states "under this definition [of negligence] a person could be found guilty of a crime for conduct that was purely accidental." It is difficult to perceive what Mr. Robinson means by "purely accidental." Many accidents of course do involve negligence. We believe it is clear from case law in Alaska that in order to be liable for a misdemeanor a person must be shown at the least to have been "negligent," and that the definition of negligence in the context of commercial fisheries violations can, without any constitutional problems, simply be defined as a deviation from the standard of care a reasonable person involved in commercial fishing would observe in the situation. See, e.g., Reynolds v. State, 655 P.2d 1313, 1316-17 (Alaska App. 1982).

For the same reasons stated above with respect to the amount of fines, the legislature is not bound by the definitions of criminal intent found in title 11 (the general criminal code). We believe that to require proof of a "gross" deviation from the standard of care for commercial fisheries violations would present a very serious and unjustified roadblock to prosecution of commercial fisheries cases, as District Attorney Charles Merriner explained to a subcommittee of the House Resources Committee on March 1, 1988.

As stated above, it should be emphasized that fines for both strict liability violations and misdemeanors proposed in HB 364 are maximum fines. A sentencing judge has discretion to fashion an appropriate fine that is lower, taking into account the unique circumstances of each case and each fishery, including, in misdemeanor cases, the seriousness of the negligence involved.

We hope these comments will be of assistance to your committee in reviewing HB 364 and we appreciate the opportunity to comment.

Yours sincerely,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: Sarah E. McCracken
Sarah E. McCracken
Assistant Attorney General

SEM/jmo

cc: Rep. Cliff Davidson
Rep. Lyman Hoffman
Rep. Mike Navarre
Rep. Drue Pearce
Rep. Richard Shultz
Rep. Heinrich Springer
Rep. John Sund
Sen. Paul Fischer, S. Resources Committee
Rep. C. E. Swackhammer
Arthur Robinson, Esq.

FROM THE OFFICE OF
REP. MIKE NAVARRE
FOR YOUR INFORMATION

COMPARISON - existing law v. CSHB 364 (Judiciary)

	Violation	Misdemeanor
standard	now: strict liabilty HB364: same	negligence same
jury	now: no HB364: same	yes same
public defender	now: no HB364: same	yes same
jail	now: no HB364: same	up to one year same
fines (maximum)	now: $ 300 HB364: $ 3,000 1st offense $ 6,000 2nd or subsequent offense	$ 5,000 $ 15,000 * larger potential fine in "big 4" cases and/or for 3-time offenders
forfeiture and suspension	now: AS.16.05.190 calls for discretionary forfeiture of gear, mandatory forfeiture of fish in violation or misdemeanor cases. AS 16.05.195 calls for discretionary forfeiture in misdemeanor cases. AS 16.05.710(a) allows for forfeiture & suspension of "licenses", it's unclear as to whether this means crewmember licenses OR limited entry permits, also unclears as to whether a CRIMINAL conviction is required for forfeiture of these licenses. (this subsection was written in 1960, long before limited entry permits existed)	
	HB 364: FISH: Upon conviction, fish are forfeited in either strict liability or misdemeanor cases. However, bill establishes rebuttable presumption that fish were taken illegally. If defendant can prove some or all of the fish were not taken illegally, they can get them (or their fair market value) back. The defendant must prove this by a preponderance of the evidence.	
	EQUIPMENT: vessel or gear CANNOT be forfeited	Vessel or gear MAY be forfeited by court
	LICENSE OR PERMIT: CANNOT be suspended.	License and/or permit MAY be suspended for up to 1 year for a first or second misdemeanor conviction, SHALL be suspended for up to 3 years for a third or subsequent conviction. Cannot be transferred or sold while suspended.

The reason for HB 364 is this: recent court of appeals decisions have seriously reduced the deterrant effect of penalties for commercial fishing offenses. The pertinent court cases are:

Reynolds v. State (1982)
Beran v. State (1985)
Constantine v. State (1987)

In Reynolds v. State, the court refused to hold a commercial fisherman "strictly liable" for his conduct, requiring the state to prove at least a culpable mental state of negligence to establish a criminal offense. The court did suggest, indirectly, that the legislature could enact a "strict liability" violation category if it wished.

Subsequently, the Board of Fish adopted regulations establishing strict liability as an applicable mental state for commercial fishing violations.

In Beran v. State, the court affirmed that the legislature had authorized the Board to make the breach of commercial fishing regulations a "violation", but that this strict liability offense could not lead to "criminal penalties". In this particular case, "criminal penalties" was defined as a jail sentence. The court indicated it would uphold the fine of $2500.

In Constantine v. State, because they lacked other legislative definition, the court concluded that a "violation" in a commercial fishing case would also fall under the definition of "violation" for criminal procedure, and applied AS 12.55.035(b)(5), which limits fines to $300. If the state wished to impose a larger fine, it would have to prove negligence mens rea, and prosecute the case as a criminal offense, rather than relying on the strict liability.

Through all these cases, the court did not address, or else they upheld, forfeiture of the fish taken as a result of the offense.

****

CS HB 364 (Judiciary) accomplishes the following:

Bill Sec 1.

Revised AS 16.05.170 (a): Clarifies that the court may suspend a commercial fishing license and/or limited entry permit for a criminal conviction (not a strict liability conviction).

Bill Sec. 2.

Revised AS 16.05.710: Clarifies that while a permit is suspended, a

card may not be issued and the permit may not be transferred or sold, also clarifies the definition of licenses and permits.

Bill Sec. 3.

New AS 16.05.722: Establishes strict liability offenses as violations, and sets penalties. Clarifies existing law that upon conviction, forfeiture of illegally taken fish (or their fair market value) is mandatory.

Note: it is a "rebuttable presumption" that the fish on board or at the site were taken illegally. If the defendant can prove the contrary by a preponderance of the evidence, they can reclaim all or part of the fish (or their fair market value).

Also, it makes it clear that for a strict liabilty offense, the defendant is not allowed a jury trial or public defender (the same as a "violation" under criminal code).

New AS 16.05.722: Raises the maximum fine for a criminal commercial fishing conviction from $5,000 (established in 1924) to $15,000, more accurately reflecting the current value of commercial fishing offenses. Also states that forfeiture of fish is mandatory upon conviction, and allows for the same "rebuttable presumption" as in strict liability offenses. As in existing law, forfeiture of gear or vessels is up to the discretion of the court.

If the conviction is for one of the following (referred to as the "big four"), the court MAY impose an additional fine equal to the gross value of the fish:

1. Commercial fishing in closed waters,
2. Commercial fishing during a closed period or season,
3. Commercial fishing with illegal gear,
4. Commercial fishing without a limited entry permit or the permit holder present, if required by law or regulation.

Additionally, if it is the defandant's THIRD criminal conviction of one of the "big four" listed above, the court SHALL impose a fine equal to three times the gross value of the fish, or $10,000, whichever is greater.

Bill Sec.'s 4 and 5 make the proper technical amendments to existing statutes.

Bill Sec. 6 is the effective date clause.

PRESENT LAW	HB 364	CSHB 364
AS 16.05.720:	AS 16.05.720 is repealed.	AS 16.05.720 is repealed.
All violations of AS 16.05.480-16.05.690 are **misdemeanors** punishable by:	New sec. 16.05.723, provides that one who **negligently** violates 16.05.44-16.05.690 is guilty of a **misdemeanor** and is punishable by:	Same as HB 364
a) fine up to $5000	a) a fine up to $15,000	Same as HB 364
b) up to 1 year in prison	b) up to 1 year in prison	Same as HB 364
Additional penalties:	Additional penalties:	Additional penalties:
AS 16.05.710: forfeiture of commercial fishing license for up to one year (1st & 2nd conviction); up to three years (3rd conviction)	AS 16.05.710: amended to include possible forfeiture of limited entry permits and interim use permits. Only **misdemeanor** convictions subject offender to possible forfeiture of licenses & permits.	Same as HB 364, except 3-year license suspension/ forfeiture kicks in at second conviction.
AS 16.05.190: **equipment** used in violation of F & G statutes and regulations **may** be seized and **may** be forfeited after conviction in a criminal case under AS 16.05.195 (a)(1) or in a civil proceeding under AS 16.05.195(a)(2).	AS 16.05.190: no change. (Note: this section makes reference to forfeiture upon conviction for a violation of F & G statutes and regulations. This presumably means that the forfeiture applies regardless	Same as HB 364

Under AS 16.05.190, fish may be seized under a valid search. **Upon conviction, the fish are forfeited,** according to the statute.

Under AS 16.05.195, **fish** taken, transported or possessed in violation of Title 16 or F & G regulations **may** be forfeited after conviction in a criminal case or in a civil proceeding.

If convicted of one of the **"BIG 4"** violations, in addition to all other penalties, the violator is punishable by a fine of not less than the gross value to the fisherman of the fish found on the vessel or at the fishing site at the time of the violation. If it's a 3rd conviction, in addition to the possible license forfeiture under AS 16.05.710, the fine is not less than three times the gross value of the fish or $10,000., whichever is greater.

of the offender's mental state.)

AS 16.05.195: no change. (Note: 16.05.723 itself requires the court to forfeit any fish taken in connection with the violation (or its fair market value). There is a rebuttable presumption that fish found on board or at the site were taken in violation of the law. The Court may **not** use **both** .195 and .723 to make a double forfeiture

If convicted of one of the **"Big 4"** offenses prosecuted as a **misdemeanor,** the additional fine for gross value of the fish remains as in existing law.

AS 16.05.195 not amended, but 16.05.723 gives Court discretion to forfeit fish.

Same as HB 364, except that "gross value" fines are discretionary with the Court.

The Court of Appeals has ruled that, absent authorization from the Legislature, the penalties for any offenses prosecuted under a strict liability theory may not include imprisonment, and that fines may not exceed $300.

New section 16.05.722 provides that that a person who offends with **no culpable mental state** is guilty of a **violation** and is punishable by:

a) a fine of up to $6,000

b) mandatory forfeiture of fish taken in connection with the violation.

There is no jury trial and no public representation.

Same as HB 364, except Court may impose the following:

a) $3,000 fine for 1st conviction

$6,000 fine for 2nd and subsequent convictions.

b) additional fine of 50% of value of fish on board or at site at time of violation. (1st conviction)

additional fine of full value of fish (2nd and subsequent convictions)

MEMORANDUM State of Alaska

DEPARTMENT OF LAW/CRIMINAL DIVISION

TO: RONALD W. LORENSEN
Deputy Attorney General
Juneau

DATE: August 18, 1987

FILE NO:

TELEPHONE NO:

COMMISSIONER'S OFFICE
RECEIVED
AUG 24 1987
DEPARTMENT OF FISH AND GAME

THRU:

SUBJECT: Application of Strict Liability to Fish and Game Offenses

FROM: W. H. Hawley
Assistant Attorney General
OSPA -- Anchorage

Legislation is needed to authorize the imposition of increased penalties for fish and game offenses. The need for this legislation stems from inflation and from three decisions issued by the court of appeals, Reynolds v. State, 655 P.2d 1313 (Alaska App. 1982); Beran v. State, 705 P.2d 1280 (Alaska App. 1985) and Constantine v. State, ___ P.2d ___ (Alaska App., July 2, 1987).

Historically, fish and game offenses were treated by the courts as strict liability offenses. However, in Reynolds, the court of appeals refused to hold a commercial fisherman strictly liable for his conduct. The court held that the state would have to prove at least negligence to establish a criminal offense. The court indirectly suggested, however, that the legislature could enact strict liability offenses if it wished.

In response to this judicial invitation, the Board of Fisheries adopted regulations establishing strict liability as the applicable mental state for commercial fishing violations. In Beran v. State, the court ruled that the legislature had authorized the Board of Fisheries to make the breach of a commercial fishing regulation a "violation," that is, "a strict liability offense which would be punishable by a non-criminal fine." 705 P.2d at 1284. However, the court held that the regulations were only valid to the extent that they did not lead to the imposition of "criminal penalties." The Beran court, without directly deciding the issue, indicated they would uphold a fine of $2,500.00. 705 P.2d at 1085 n.6.

In Constantine v. State a majority of the court concluded that the maximum fine for a violation could not exceed $300.00. See AS 12.55.035(b)(5). Illegally taken fish and the net used to catch the fish can still be forfeited, but the court held that the higher provision for fines in Title 16 ($5,000) can be utilized only if a person is convicted of a

"crime"; that is, if the state proves negligence rather than relying on strict liability. The court merely ruled that the legislature had not yet authorized any fine greater than $300 and did not decide whether larger fines could be imposed that did not amount to criminal penalties. A copy of the Constantine opinion is attached.

Legislation is needed to authorize higher fines for violations -- perhaps up to $5000. $300.00 fines are meaningless to commercial fishermen. They would pay $300.00 fines in advance. The court indicated in Constantine that the legislature should make findings indicating that substantial penalties are necessary. Legislation authorizing civil fines similar to those provided by the Magnusen Act might also be appropriate. More substantial forfeitures should also be permitted to supplement the existing enforcement scheme or as an alternative.

A separate reason new penalty provisions are needed is inflation. The present Title 16 penalty provisions which generally provide for maximum fines of $5000 were enacted many years ago and should be revised upward to permit more substantial fines when the state establishes a "crime" -- that a defendant acted negligently, recklessly, or intentionally. A single set near the mouth of a stream may prevent spawning and effectively ruin an entire run of salmon. Secondly, the incentive to fish illegally is high because, for example, a single illegal set for salmon at the right time and place can result in the catch of $15,000.00 worth of fish. Thus, larger fines, as well as imprisonment, and forfeitures of fishing vessels should be available as penalties for these more serious violations.

Finally, if the foregoing legislation is offered, the other penalty provisions in Title 16 should be reviewed and possibly harmonized.

cc: Liza McCracken
Charles Merriner
Larri I. Spengler
Don W. Collinsworth ✓
Capt. Jack Jordan

WHH/jgm

MEMORANDUM State of Alaska

Department of Law

TO: Honorable Don Collinsworth
Commissioner
Dept. of Fish & Game

DATE: July 14, 1987

FILE NO.:

THRU:

TELEPHONE NO.: 465-3600

SUBJECT: Constantine v. State (maximum fine strict liability violations $300)

FROM: Larri Irene Spengler
Assistant Attorney General
Natural Resources Section-Juneau

Attached is a recent court of appeals decision in Constantine v. State ___ P.2d ___ Op. No. 717 (Alaska App., July 2, 1987). This case examined the question of what "noncriminal" fines are permissible when someone is convicted of a violation of a fish and game regulation, under a strict liability standard. This situation contrasts to criminal fines and imprisonment which may be imposed on individuals convicted of violating fish and game regulations upon a showing of at least negligence, which conviction constitutes a misdemeanor, rather than a violation.

The court held that AS 12.55.035(b)(5) controls the maximum fine for a violation, $300, and thus $300 is the maximum fine that can be imposed for convictions of violations of fish and game regulations. Additionally, the court noted that it saw "no reason to allow a defendant, even if he or she acted without fault, to have a valid claim to fish or game obtained in violation of a regulation." Decision, p. 7. However, the $300 fine and forfeiture of illegally taken fish or game for a violation (under strict liability) contrasts with the significantly higher fines for a misdemeanor (if negligence or intent can be proved) authorized by AS 16.05.720, and with the forfeiture of equipment used in conjunction with the misdemeanor authorized by AS 16.05.195.

The Department of Law's Office of Special Prosecutions and Appeals, which handled the appeal, is currently considering petitioning the state supreme court for a review of the court of appeals' decision. We will keep you apprised of any developments.

In the meanwhile, it is worth noting that the court mentioned that it was not authorized to impose more substantial sanctions for strict liability violations unless "the legislature should specifically indicate that it is necessary to impose substantial penalties," and the legislature "should also establish the nature of these penalties, even if they can be properly denominated as noncriminal penalties." Decision, p. 7. Thus, even if the supreme court accepts a petition for review of the lower court's decision, your department may wish to consider

whether it would be appropriate to recommend to the governor's office that some legislative action be sought in the future.

LIS/cck

Attachment

cc w/attach.:
Steve Pennoyer
Norm Cohen
Ken Parker
Beth Stewart
Norval Netsch
Lew Pamplin
Steve Behnke
ADF&G

Liza McCracken
DOL

W.H. Hawley
OSPA/Anchorage

Alaska Court System
State of Alaska
OFFICE OF ADMINISTRATIVE DIRECTOR

303 K Street
Anchorage, Alaska 99501

APR 5 1988

March 29, 1988

Representative John Sund
Chair
House Judicial Committee
Box V
Juneau, Alaska 99811

Re: Fish and Game Bail Forfeiture Schedule

Dear Representative Sund:

The Supreme Court has adopted the changes in the Fish and Game Bail Forfeiture Schedule which were recently recommended to it. Attached is a copy of Supreme Court Order No. 892 which amends Administrative Rule 43.2 effective April 1. I have marked on it the new offenses being added by this amendment.

Thank you for your assistance with the revision of the schedule.

Sincerely,

Susan Miller

Susan Miller
Office of Special Projects
Tel: 264-8229

Attachment

SM:gah

IN THE SUPREME COURT FOR THE STATE OF ALASKA
ORDER NO. 892

Revision of Administrative Rule 43.2, Fish and Game Bail Forfeiture Schedule to add five offenses.

IT IS ORDERED:

Administrative Rule 43.2 is revised as follows:

Administrative Rule 43.2. Fish and Game Bail Forfeiture Schedule.

Pursuant to AS 16.05.165(b), the following fish and game offenses are appropriate for disposition without court appearance upon payment and forfeiture of the bail amounts listed. If a person charged with one of these offenses appears in court and is found guilty, the penalty imposed for the offense may not exceed the bail amount for that offense listed below. An offense for which a bail forfeiture amount has been established shall be charged on a citation which meets the requirements of District Court Criminal Rule 8(c) and shall not be filed, numbered or processed as a criminal case.

Statute or Regulation	Description of Offense	Bail
AS 16.05.330(a)	Sport fishing without license in possession	$ 75
AS 16.05.330(a)	Hunting without license in possession	100
AS 16.05.340(a)(17)(A)	Taking waterfowl without state duck stamp	75
AS 16.05.480(a)	Crewmember Fishing License Required	150
AS 16.05.490(a)	Vessel License Required	200
AS 16.05.520(a)	Vessel Number Plate	75
AS 16.05.680(l)	Employ Unlicensed Crew	150
5 AAC 39.119	Vessel Identification	100

These are the five offenses being added.

5 AAC 56.015(b)	Failure to record king salmon or rainbow/steelhead trout landing (freshwaters of the Kenai penninsula)	100
5 AAC 58.015(b)	Failure to record king salmon or rainbow/steelhead trout landing (Cook Inlet-Resurrection Bay saltwater area)	100
5 AAC 61.015(b)	Failure to record king salmon landing (freshwaters of the Susitna-West Cook Inlet area)	100
5 AAC 75.020	Sport fishing with more than one line	100
5 AAC 75.022(a)(1)	Using fixed or weighted hook - freshwater	100
5 AAC 75.022(a)(2)	Multiple hook with gap larger than ½" - freshwater	50
5 AAC 75.022(a)(4)	Unauthorized use of spear - sport fishing	100
5 AAC 75.022(a)(5)	Unauthorized use of arrow - sport fishing	100
5 AAC 75.022(c)	Attempt to snag - freshwater	100
5 AAC 75.022(c)	Fail to release - freshwater	100
5 AAC 92.010	Harvest ticket not in possession; fail to validate	100
5 AAC 92.012(a)	Taking waterfowl without federal duck stamp	75
5 AAC 92.012(a)	Unsigned federal duck stamp	25
5 AAC 92.018	Unsigned state duck stamp	25
5 AAC 92.020	Fail to submit required report	75

5 AAC 92.052(14)	Failure to submit registration permit hunt report	50
5 AAC 92.075(e)(1)	Taking migratory birds with shotgun capable of holding more than 3 shells	50
5 AAC 92.100(a)(1), (2) & (3)	Taking migratory birds by illegal methods	100
5 AAC 92.100(b)	Transportation of migratory bird without fully feathered wing or head attached	50
5 AAC 92.100(c)	Taking migratory birds before or after legal shooting hours	$50 plus $2/minute
5 AAC 92.150(a)	Possess mountain sheep without both horns	100
5 AAC 92.150(b)	No evidence of sex attached	100
5 AAC 92.165	Fail to seal bear or possess unsealed bear skin or skull	100
5 AAC 92.170	Fail to seal wolf, wolverine, lynx	100
5 AAC 92.200(d)	Fail to submit required report	75
5 AAC 92.230	Feeding game	50
5 AAC 92.410(b)	Fail to submit required report	75

DATED: March 17, 1988

EFFECTIVE DATE: April 1, 1988

Chief Justice Matthews

Justice Rabinowitz

Justice Burke

Justice Compton

Justice Moore

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

☒ *1031 W 4th AVENUE*
SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550

☐ *1st NATIONAL CENTER*
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701-4679

☐ *P.O. BOX K—STATE CAPITOL*
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

DEPARTMENT OF PUBLIC SAFETY
COMMISSIONER'S OFFICE
Juneau, Alaska

APR 2 5 1988

April 22, 1988

Hon. John Sund, Chairman
House Judiciary Committee

Hon. Fran Ulmer, Vice-Chairman,
House Judiciary Committee

Members, House Judiciary Committee

Re: HCS HB 364 (Commercial Fisheries)

Dear Representatives:

This letter addresses concerns our department has with certain aspects of the House Resources Committee substitute for HB 364, relating to commercial fishing violations. We would like your committee to be aware of potential effects of some of these amendments.

Our first and foremost concern is with the HCS amendments to Section 3 of the bill regarding forfeiture of fish on board or at the site of the violation (page 2, line 15 of the 4/20/88 work draft). The HRC substitute provides that upon a first conviction for a strict liability violation the court "may" (not "shall") impose a fine equal to 50 percent of the value of the fish found on board the vessel or at the site. This language departs from that in HB 364, which provides that upon conviction

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the court "shall" forfeit the fish on board or at the site and creates a presumption, rebuttable by the violator, that all fish on board were taken illegally. The problem with the CS language is two-fold, and relates to the fact that the fine is not tied to illegally taken fish: (1) it could allow a violator to keep illegally taken fish, and (2) it might result in a fine so high as to be "criminal in nature" and hence invalid as a penalty for a non-criminal violation, as explained below.

Under existing law, AS 16.05.190, upon conviction of a fish or game violation, all illegally taken fish "are forfeited to the state." This is universally understood to mean that all illegally taken fish must be forfeited by the court. This result stems from the fact that fish (and game) are public trust resources that belong to all the citizens of the state; they may only be reduced to private possession if lawfully taken. (See, Alaska Const. art. VIII, sec. 3 and AS 16.06.920(a)). Fish unlawfully taken do not rightfully belong to the offender.

What the HB 364 language did was address the problem inherent in requiring the state to prove which fish on board were the illegally taken ones. The creation of the rebuttable presumption that all fish on board or at the site were illegally taken placed the burden of showing which fish were not illegally taken on the person most likely to have the information -- the fisherman. The HB 364 provision was modeled after the federal Magnuson Fishery Conservation and Management Act.

The CS language does not address forfeiting fish at all, but allows a discretionary fine of up to 50 percent of the "value" (rather than "fair market value") of all fish on board or at the site -- regardless of whether they were illegally taken. Under this provision, if the entire catch were taken, for example, in closed waters, the court could only impose, in addition to the $3,000.00 maximum fine for a first offender, a fine of up to one-half of the value of the catch -- leaving the fisherman with half a boat load of illegally taken fish.

In Constantine v. State, 739 P.2d 188 (Alaska App. 1987), the court acknowledged the validity of forfeiting illegally taken fish in the context of a strict liability violation. What that case and its predecessors held, however, was that it would violate constitutional principles of due

process to impose, in a non-criminal violation case, a fine so high as to be "criminal in nature" as viewed by community standards. The HCS language would allow a court to impose, in addition to the maximum strict liability fine of $3,000.00 (first offense) or $6,000.00 (subsequent offense)(which maximum amount was selected in HB 364 as being non-criminal in nature), an additional fine, not tied to a showing of illegally taken fish, that could well exceed the maximum fine for the violation. For example, a crab vessel could have a catch of $100,000.00 worth of crab on board. If the skipper were convicted of a violation of having sub-legal sized crab on board, a court could, under the CS language, fine the skipper $50,000.00 without this necessarily representing the illegally taken crab. We strongly urge this committee to replace the original HB 364 language regarding forfeiting fish or their fair market value, or at the very least, substituting language reflecting current law -- mandatory forfeiture of illegally taken fish.

A second concern we have with the CS is the deletion of the provision that in a non-criminal violation the violator is entitled to a court trial only -- not a jury trial -- and is not entitled to defense at public expense. The implication from the HRC's deletion of this language may be that a fisherman would be entitled to a jury trial at public expense for a non-criminal violation. This would depart from provisions for all violations in Title 11 (criminal code -- see AS 11.81.900(56)) and would be both unworkable and expensive.

A third problem with the CS language is deletion of the definition of negligence. The implication from deletion may be that the committee intends to require the state to prove criminal negligence as defined in Title 11 -- a "gross deviation" from the standard of care. Such a result would deviate from the standard of negligence trial courts presently require and from the standard the Alaska Supreme Court articulated in State v. Rice, 626 P.2d 104, 110 (Alaska 1981). Representatives of our office have previously testified on HB 364 explaining that the definition of negligence reflects the standard of negligence currently required by trial judges, and explaining the great difficulty of proving a "gross deviation" as defined in AS 11.81.900(4). We urge this committee to reinsert the definition of negligence in HB 364, or at least clarify that the deletion of

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the definition is not intended to mean the Title 11 definition applies.

Although the three above-noted problems with the CS are our greatest concerns, there are some additional changes with which we have difficulty.

First, the CS changes the 364 provisions regarding forfeiture or suspension of commercial fisheries licenses and limited entry permits in a manner that is more restrictive than current law. Work draft, page 1, lines 16 -- 27. The HB 364 language was intended merely to clarify some confusing language in existing AS 16.05.710(a) and address the functional or procedural differences between commercial fishing licenses and limited entry permits.

The current AS 16.05.710, as interpreted by our department, allows for suspension of a fisherman's commercial fishing license and limited entry permit (because a limited entry permit is a commercial fishing license -- see AS 16.05.480). The CS language is rather confusing, but appears to give the court, in a misdemeanor case, the authority to either forfeit a commercial fishing license and the right to apply for a limited entry permit or to suspend a permit but not to prohibit the person from applying for or buying another one. We recommend that your committee reinsert the more clear language in original HB 364.

Finally, we note that the CS is less strict than existing law regarding imposing a fine equal to the value of fish on board for certain violations (page 3, line 15 and page 4, line 3).

Thank you for the opportunity to comment on this bill. We consider the need to address commercial fishing penalty provisions a very high priority in order to help protect our important public trust resources. We believe it is essential for certain modifications to be made in the CS language in order to

XEROX TELECOPIER 295 : 22-22-22;22:22 22; CCITT G3 → 5 # :

have a workable final bill. If we can be of any further assistance to your committee, please let us know.

Sincerely yours,
GRACE BERG SCHAIBLE
ATTORNEY GENERAL

Sarah E. McCracken

By: Sarah E. McCracken
Assistant Attorney General

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a:sund.sem

XEROX TELECOPIER 295 ; 22-22-22;22:22 22; CCITT G3 → ; # 6

9

8½ x 11

(9)

REPORT

Date referred: 1

REFERRALS: Judiciary

DATE: 4-20-88

The Resources Committee has considered HB 364

"An Act relating to commercial fishing violations; and providing for an effective date."

RECOMMENDS:

[X] replace with CS HB 364 (Res) [X] the same title

[ ] attached amendment(s) [ ] a new title

- [X] do pass
- [ ] do not pass
- [ ] no recommendation
- [ ] individual recommendations
- [ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

- [ ] fiscal impact
- [ ] zero fiscal note
- [ ] zero with analysis
- [ ] same as previous fiscal note published _____
- [X] same as previous zero fiscal note[s] published _____

SIGNING DO PASS:

Adelheid Herrmann

Mike Navarre

Dick Shultz

- Jan R GT

SIGNING OTHER RECOMMENDATIONS:

Lyn Hoff

Adelheid Herrmann

Chairman's signature

John L. GRAYBILL, Appellant,
v.
STATE of Alaska, Appellee.
No. 2386.

Supreme Court of Alaska.
Jan. 23, 1976.

Defendant was convicted in the Superior Court, Third Judicial District, Anchorage, C. J. Occhipinti, J., of possession and attempted transportation of bear hide by airplane, and he appealed. The Supreme Court, Connor, J., held that superior court had authority to order forfeiture of aircraft used in violation of game laws.

Affirmed.

1. Forfeitures ⇐1

Forfeiture is civil remedy unless otherwise provided by statute. AS 16.05.190, 16.05.195(a).

2. Forfeitures ⇐3

Superior Court had authority in prosecution of defendant for attempted transportation of bear hide by airplane to order forfeiture of aircraft. AS 16.05.190, 16.05.900, 16.05.920.

LeRoy J. Barker, Robertson, Monagle, Eastaugh & Bradley, Anchorage, for appellant.

Avrum M. Gross, Atty. Gen., Juneau, Joseph D. Balfe, Dist. Atty., Stephen G. Dunning, Asst. Dist. Atty., Anchorage, for appellee.

Before BOOCHEVER, Chief Justice, and RABINOWITZ, CONNOR, ERWIN and BURKE, Justices.

OPINION

CONNOR, Justice.

This appeal questions the procedure by which an aircraft was ordered forfeited because it was used in violation of the game laws.

Appellant Graybill was charged on two counts: (I) possession and (II) attempted transportation of a bear hide by airplane[1] when not permitted to do so by applicable regulations, in violation of AS 16.05.920.[2] After a jury trial, Graybill was convicted on both counts. On Count I (possession) he was given a six-month suspended sentence. On Count II (attempted transportation) he was sentenced to a one-year revocation of his hunting license and forfeiture of his aircraft.[3]

Following his conviction, Graybill appealed to this court, urging that the superior court lacked the authority in a criminal proceeding to order a forfeiture of the aircraft.[4] We dismissed the appeal as

1. The airplane was referred to in the complaint as a "Piper Aircraft No. N3373B."

2. AS 16.05.920 provides in part:
"(a) Unless permitted by this chapter or by regulation made under this chapter, it is unlawful for a person to take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game or marine aquatic plants, or any part of fish, game or aquatic plants, or a nest or egg of fish or game."

3. This was the sentence imposed by the trial judge in open court. We note, however, that both the judgment and order of probation of 24 August 1972 and the amended judgment and order of probation of 14 February 1973 reflect conviction on only the possession count, and impose revocation of the hunting license and forfeiture of the aircraft as special conditions of probation. The record shows that the jury returned a guilty verdict as to both counts, and Graybill does not dispute conviction for both possession and attempted transportation. The trial judge carefully considered the form by which he imposed sentence in court. We must remand the case to allow entry of judgment, pursuant to Alaska R. Crim.P. 36 concerning clerical mistakes, in accordance with the sentence actually imposed in open court. Therefore, we do not reach the issue of whether forfeiture of an aircraft could validly be imposed as a special condition of probation.

4. In superior court Graybill challenged the modification of his probation order to include specifications as to which aircraft was to be forfeited. His argument there was that AS 16.05.900 provides for penalties of up to $1,000 fine and six months imprisonment, but

untimely,[5] and suggested that Graybill proceed under Alaska R.Crim.P. 35(b) for post-conviction relief. He did so, but the state prevailed in superior court by way of summary disposition pursuant to Alaska R.Crim.P. 35(g)(3). From that summary disposition Graybill brings this second appeal.

Graybill's appeal rests upon his reading of the forfeiture section of AS 16.05.190, which in relevant part states:

> "[A]ircraft . . . seized under the provisions of this chapter . . ., unless forfeited by order of the court, shall be returned . . .."

While he does not deny that aircraft can be forfeited under the statute, Graybill contends that the proviso "unless forfeited by court order" refers to an order rendered pursuant to a civil proceeding in rem against the aircraft, and does not include sentences imposed upon offenders as part of criminal proceedings.

Graybill relies on *United States v. Pollastrine*, 8 Alaska.Rpts. 104 (D.Ak.1929), which interpreted the territorial predecessor to AS 16.05.190.[6] The court there said:

> ". . . [N]o criminal court has the jurisdiction upon conviction of an offender for violation of the act to enter a decree of forfeiture, where a forfeiture is not prescribed as part of the penalty, but such procedure can be had legally only after a full hearing upon motion and opportunity to defend." 8 Alaska at 109.

Since the penalty provision, AS 16.05.900,[7] applicable to the statute under which he was convicted, AS 16.05.920(a),[8] does not mention forfeiture as part of the prescribed penalty, Graybill argues that the state must file a separate action in rem. *See United States v. $3,236*, 167 F.Supp. 495, 498 (D.Alaska 1958) (*dictum*).[9]

[1,2] Under the territorial statute, the United States Attorney was required to institute an in rem action for forfeiture of siezed property.[10] In 1959 the Alaska legislature enacted a statute substantially sim-

that section does not provide for forfeiture of the aircraft. Forfeiture is provided for in AS 16.05.190, which provides:

> "Guns, traps, nets, fishing tackle, boats, aircraft, automobiles or other vehicles, sleds, and other paraphernalia used in or in aid of a violation of this chapter, or rule or regulation of the department may be seized under a valid search, and all fish and game, or parts of fish and game, or nests or eggs of birds, taken, transported, or possessed contrary to the provisions of this chapter, or rule or regulation of the department shall be seized by any person designated in § 150 of this chapter. Upon conviction of the offender or upon judgment of the court having jurisdiction that the item was taken, transported, or possessed in violation of t. s chapter or rule or regulation of the department, all fish and game, or parts of them are forfeited to the state and shall be disposed of as directed by the court. . . . Guns, traps, nets, fishing tackle, boats, aircraft, or other vehicles, sleds, and other paraphernalia seized under the provisions of this chapter, or rule or regulation of the department, unless forfeited by order of the court, shall be returned, after completion of the case and payment of the fine, if any."

5. *Graybill v. State*, 522 P.2d 539 (Alaska 1974).

6. 48 U.S.C. § 192 *et seq.*

7. AS 16.05.900(a) provided in part:
"A person who violates §§ 830, 870–895, or 920 of this chapter or any rule or regulation promulgated under this chapter is guilty of a misdemeanor and, upon conviction, is punishable by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both . . . ."

8. *See* note 2, *supra*.

9. Graybill also relies on *Rubino v. State*, 391 P.2d 946 (Alaska 1964). That case is not helpful here, for there forfeiture was disallowed because the state had failed to seize Rubino's nets at the time of his arrest. Here Graybill's airplane was seized when he was arrested.

10. 48 U.S.C. § 201 provides in part:
"It shall be the duty of the United States attorney for the division . . . in which any . . . aircraft . . . has been seized because used in the transportation of any wild animal, game fish, wild bird, or part thereof, or any nest or egg of such bird, illegally bought, sold, or possessed contrary to the provisions of [this title], to institute an action in rem against it for the forfeiture thereof to the United States in any case in which the disposition of such article is not involved in a criminal prosecution."

ilar to the law applied to Graybill.[11] The territorial law providing for forfeiture exclusively by mandatory in rem action was specifically repealed.[12] Thus Graybill's reliance on Alaska territorial cases is misplaced. While we agree that forfeiture is a civil remedy unless otherwise provided by statute, we believe that AS 16.05.190 as it applied to Graybill did so provide.

AS 16.05.190[13] distinguishes between mandatory forfeiture of contraband (fish, game, birds) upon conviction, and discretionary forfeiture of paraphernalia (guns, traps, aircraft, etc.). Such paraphernalia "unless forfeited by order of the court, shall be returned, after completion of the case and payment of the fine, if any." Since the "case" and "fine" referred to in this section concern criminal proceedings, we find it reasonable to interpret an "order of the court" as likewise referring to orders rendered subsequent to a criminal conviction, as well as those following a separate civil action. The distinction which the legislature sought to draw between contraband and paraphernalia is between mandatory and discretionary forfeiture, not between requiring criminal or civil forfeiture proceedings as Graybill contends.[14]

It is commonly understood that forfeitures, even when civil in form, are basically criminal in nature.[15] At least one other state has held that a statute providing for forfeitures authorized either criminal or civil proceedings.[16] No case from any other jurisdiction has been cited to us which requires a separate in rem proceeding to effect a valid forfeiture, absent a specific statutory provision similar to that provided under Alaska territorial law.[17] Furthermore, we do not understand how such a separate civil proceeding, if judicially implied, could benefit Graybill.[18] Any arguments available to him to prevent forfeiture could have been presented in the context of his criminal trial and sentencing.[19] Thus we find that it was not necessary for the state to institute a separate civil in rem proceeding against Graybill's aircraft. The order of the trial judge is affirmed and the case remanded for entry of judgment in accordance with the sentence imposed.[20]

Affirmed.

11. Ch. 94 SLA 1959 § 23.
12. Ch. 94 SLA 1959 Art. IV, § 1; *see* Annot., ACLA 1949 639-10-1 (Cum.Supp.1958, Supp. 1959); ACLA 639-6-16.
13. Quoted note 4, *supra*.
14. Since Graybill's conviction, the legislature has clarified the statute with the enactment of the present AS 16.05.195(a), which explicitly provides for forfeiture alternatively through civil or criminal proceedings.
15. *Boyd v. United States*, 116 U.S. 616, 634, 6 S.Ct. 524, 29 L.Ed. 746 (1886); *Compton v. United States*, 377 F.2d 408, 411 (8th Cir. 1967). Their purpose is to penalize commission of offenses. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965); *United States v. One 1960 Ford Four-Door Galaxie Sedan*, 202 F.Supp. 841, 843 (E.D.Tenn.1962), and to deter future infractions. *People v. Reulman*, 62 Cal.2d 92, 41 Cal.Rptr. 290, 293 (1964).
16. *Department of Wildlife & Fisheries v. The Trawler Baltimore*, 213 La. 956, 36 So.2d 1 (1948), holding forfeiture of a fishing trawler in a civil proceeding proper, despite the fact that it was not preceded by a criminal trial. The court relied on the separate sections of La.Act No. 143 of 1942 § 17 (as amended by Act No. 78 of 1946), a construction not present in the Alaska statute. The court stated in dictum that the language "may be forfeited by order of the court" referred to an order following a criminal proceeding under the Louisiana statute. 36 So.2d at 2-3. That statute has since been codified into two sections, 56 La.Rev.Stat. §§ 507, 508.
17. Appellant cites *People ex rel. Hanrahan v. One 1965 Oldsmobile*, 52 Ill.2d 37, 284 N.E.2d 646 (1972); *State v. Kaufman*, 201 N.W.2d 722 (Iowa 1972) (*see* Iowa Code Ann. § 751.16.3); *Commonwealth v. One 1970 2 Dr. H. T. Lincoln Automobile*, 212 Va. 597, 186 S.E.2d 279 (1972); *Vasile v. District of Columbia*, 290 A.2d 443 (D.C.App. 1972); *Gatewood v. State*, 264 Md. 301, 285 A.2d 623 (1972). In each of these cases a statute explicitly required separate forfeiture proceedings.
18. This is especially true in light of the doctrine of collateral estoppel, which would prevent retrial of the crucial issues.
19. Indeed, Graybill's counsel requested, and the court granted, the return of certain items (two pair of snowshoes, a shotgun, two pairs of coveralls, and snowpack boots) which were not properly forfeitable under the statute.
20. *See* note 3, *supra*.

AS 16.05.--- Seizure, forfeiture, and disposition of catch and equipment. (a) All equipment used in or in aid of a violation this title, or a regulation adopted under it, may be seized and forfeited to the state, and all catch taken, transported or possessed contrary to the provisions of this title shall be seized and forfeited to the state

(1) upon conviction of the offender in a criminal proceeding in a court of competent jurisdiction.

(2) upon judgement of a court of competent jurisdiction in a proceeding in rem that an item specified above was used in or in aid of a violation of this title or a regulation adopted under it.

(c) Items specified under (a) of this section may be forfeited under this section regardless of whether they were seized before instituting the forfeiture action.

(d) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value of catch transported, or possessed contrary to the provisions of this title or a regulation adopted under it.

(e) It is no defense that the person who had the item specified in (a) of this section in possession at the time of its use and seizure has not been convicted or aquitted in a criminal proceeding resulting from or arising out of its use.

(f) Forfeiture may not be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased the item innocently and in good faith shall be on the purchaser.

(g) For the purposes of forfeiture of catch in this section, it is a rebuttable assumption that all catch found in possession of the defendant at the time of the offense were taken or retained in violation of this title, or a regulation adopted under it. It is the defendant's burden to prove the contrary by a preponderance of the evidence.

(h) An item forfeited under this section shall be disposed of at the discretion of the department. If sold, the proceeds of the sale shall be transferred to the proper state officer for deposit in the general fund. Before the department disposes of an aircraft it shall consider transfer of ownership of the aircraft to the Alaska Wing, Civil Air Patrol.

AS 16.05.--- Definitions. For the purposes of AS 16.05.---(above) "equipment" includes guns, traps, nets fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear, and "catch" includes all fish and game or parts of fish and game or nests or eggs of birds taken.

Repealers 16.05.190 -.195

(7)

HOUSE COMMITTEE REPORT

Date referred: 4/21/88

FURTHER REFERRALS:

DATE: April 26, 1988

The Judiciary Committee has considered HB 364

"An Act relating to commercial fishing violations; and providing for an effective date."

RECOMMENDS:

[✓] replace with CS HB 364 (JUD) [✓] the same title

[ ] attached amendment(s) [ ] a new title

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published _____

[✓] same as previous zero fiscal note published 1/15/88

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Chairman's signature

Original sponsor: Rules/Governor

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 364 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to commercial fishing violations; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 16.05.710(a) is repealed and reenacted to read:

(a) A person convicted of a misdemeanor for violating AS 16.05.-440 - 16.05.690 or a federal or state commercial fishing statute or regulation is, in addition to other penalties provided by law, subject to the following penalties:

(1) upon a first or second conviction the court may suspend, for a period of not more than one year,

(A) the person's commercial fishing license and the right to obtain a limited entry permit; or

(B) one or more of the person's limited entry permits and the person's right to obtain a commercial fishing license; and

(2) upon a third or subsequent conviction the court shall suspend, for a period of not more than three years,

(A) the person's commercial fishing license and the right to obtain a limited entry permit; or

(B) one or more of the person's limited entry permits and the person's right to obtain a commercial fishing license.

* Sec. 2. AS 16.05.710 is amended by adding new subsections to read:

(c) During the period for which a limited entry permit is suspended under (a) of this section a permit card may not be issued and

the permit may not be transferred or sold.

(d) In this section

(1) "commercial fishing license" includes a crew member license;

(2) "limited entry permit" includes an interim use permit.

* Sec. 3. AS 16.05 is amended by adding new sections to read:

Sec. 16.05.722. STRICT LIABILITY COMMERCIAL FISHING PENALTIES. (a) A person who without any culpable mental state violates AS 16.05.440 - 16.05.690, or a regulation of the Board of Fisheries or the department governing commercial fishing, is guilty of a violation and upon conviction is punishable by a fine of not more than

(1) $3,000 for a first conviction; and

(2) $6,000 for a second or subsequent conviction.

(b) In addition, the court shall order forfeiture of any fish, or its fair market value, taken or retained as a result of the commission of the violation. For purposes of this subsection, it is a rebuttable presumption that all fish found on board a fishing vessel used in or in aid of a violation, or found at the fishing site, were taken or retained in violation of AS 16.05.440 - 16.05.690 or a commercial fisheries regulation of the Board of Fisheries or the department. It is the defendant's burden to show by a preponderance of the evidence that fish on board or at the site were lawfully taken and retained.

(c) A person charged with a violation under this section is entitled to a trial by court but not by jury, and is not entitled to representation at public expense.

Sec. 16.05.723. MISDEMEANOR COMMERCIAL FISHING PENALTIES. (a) A person who negligently violates AS 16.05.440 - 16.05.690, or a regulation of the board of fisheries or the department governing

commercial fishing, is guilty of a misdemeanor and in addition to punishment under other provisions in this title, including AS 16.05.-195 and 16.05.710, is punishable upon conviction by a fine of not more than $15,000 or by imprisonment for not more than one year, or by both. In addition, the court shall order forfeiture of any fish, or its fair market value, taken or retained as a result of the commission of the violation, and the court may forfeit any vessel and any fishing gear, including any net, pot, tackle, or other device designed or employed to take fish commercially, that was used in or in aid of the violation. Any fish, or its fair market value, forfeited under this subsection may not also be forfeited under AS 16.05.195. For purposes of this subsection, it is a rebuttable presumption that all fish found on board a fishing vessel used in or in aid of a violation, or found at the fishing site, were taken or retained in violation of AS 16.05.440 - 16.05.690 or a commercial fisheries regulation of the board of fisheries or the department, and it is the defendant's burden to show by a preponderance of the evidence that fish on board or at the site were lawfully taken and retained.

(b) If a person is convicted under this section of one of the following offenses, then, in addition to the penalties imposed under (a) of this section, the court may impose a fine equal to the gross value of the fish found on board or at the fishing site at the time of the violation:

(1) commercial fishing in closed waters;

(2) commercial fishing during a closed period or season;

(3) commercial fishing with unlawful gear, including a net, pot, tackle, or other device designed or employed to take fish commercially; or

(4) commercial fishing without a limited entry permit

holder on board if the holder is required by law or regulation to be present.

(c) If, within the 10 years preceding an offense, a person has been convicted two or more times of a misdemeanor offense listed in (b) of this section or under former AS 16.05.720, then, upon a conviction of that person under this section for an offense listed in (b) of this section, and in addition to the penalties imposed under (a) of this section, the court shall impose a fine equal to three times the gross value of the fish found on board or at the fishing site at the time of the offense, or a fine equal to $10,000, whichever is greater.

* Sec. 4. AS 16.05.925 is amended to read:

Sec. 16.05.925. PENALTY FOR VIOLATIONS. Except as provided in AS 16.05.430, 16.05.722, 16.05.723, [16.05.720,] 16.05.831, and 16.05.860, a person who violates AS 16.05.920, or a regulation adopted under this chapter or AS 16.20, is guilty of a class A misdemeanor.

* Sec. 5. AS 16.05.720 is repealed.

* Sec. 6. This Act takes effect immediately under AS 01.10.070(c).

go0288hL
Hein
4/26/88

Original sponsor: Rules/Governor

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 364 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to commercial fishing violations; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 16.05.710(a) is repealed and reenacted to read:

(a) A person convicted of a misdemeanor for violating AS 16.05.-440 - 16.05.690 or a federal or state commercial fishing statute or regulation is, in addition to other penalties provided by law, subject to the following penalties:

(1) upon a first or second conviction the court may suspend, for a period of not more than one year,

(A) the person's commercial fishing license and the right to obtain a limited entry permit; or

(B) one or more of the person's limited entry permits and the person's right to obtain a commercial fishing license; and

(2) upon a third or subsequent conviction the court shall suspend, for a period of not more than three years,

(A) the person's commercial fish license and the right to obtain a limited entry permit; or

(B) one or more of the person's limited entry permits and the person's right to obtain a commercial fishing license.

* Sec. 2. AS 16.05.710 is amended by adding new subsections to read:

(c) During the period for which a limited entry permit is suspended under (a) of this section a permit card may not be issued and

the permit may not be transferred or sold.

(d) In this section

(1) "commercial fishing license" includes a crew member license;

(2) "limited entry permit" includes an interim use permit.

* Sec. 3. AS 16.05 is amended by adding new sections to read:

Sec. 16.05.722. STRICT LIABILITY COMMERCIAL FISHING PENALTIES. (a) A person who without any culpable mental state violates AS 16.05.440 - 16.05.690, or a regulation of the Board of Fisheries or the department governing commercial fishing, is guilty of a violation and upon conviction is punishable by a fine of not more than

(1) $3,000 for a first conviction; and

(2) $6,000 for a second or subsequent conviction.

(b) In addition, the court shall order forfeiture of any fish, or its fair market value, taken or retained in any manner in connection with or as a result of the commission of the violation. For purposes of this section, it is a rebuttable presumption that all fish found on board a fishing vessel used in or in aid of a violation, or found at the fishing site, were taken or retained in violation of AS 16.05.440 - 16.05.690 or a commercial fisheries regulation of the Board of Fisheries or the department. It is the defendant's burden to show by a preponderance of the evidence that fish on board or at the site were lawfully taken and retained.

(c) A person charged with a violation under this section is entitled to a trial by court but not by jury, and is not entitled to representation at public expense.

Sec. 16.05.723. MISDEMEANOR COMMERCIAL FISHING PENALTIES. (a) A person who negligently violates AS 16.05.440 - 16.05.690, or a regulation of the board of fisheries or the department governing

15,000 $/year

commercial fishing, is guilty of a misdemeanor and in addition to punishment under other provisions in this title, including AS 16.05.-195 and 16.05.710, is punishable upon conviction by a fine of not more than $15,000 or by imprisonment for not more than one year, or by both. In addition, the court shall order forfeiture of any fish, or its fair market value, taken or retained in any manner in connection with or as a result of the commission of the violation, and the court may forfeit any vessel and any fishing gear, including any net, pot, tackle, or other device designed or employed to take fish commercially, that was used in or in aid of the violation. Any fish, or its fair market value, forfeited under this section may not also be forfeited under AS 16.05.195. For purposes of this section, it is a rebuttable presumption that all fish found on board a fishing vessel used in or in aid of a violation, or found at the fishing site, were taken or retained in violation of AS 16.05.440 - 16.05.690 or a commercial fisheries regulation of the board of fisheries or the department, and it is the defendant's burden to show by a preponderance of the evidence that fish on board or at the site were lawfully taken and retained.

(b) If a person is convicted under this section of one of the following offenses, then, in addition to the penalties imposed under (a) of this section, the court may impose a fine equal to the gross value of the fish found on board or at the fishing site at the time of the violation:

(1) commercial fishing in closed waters;

(2) commercial fishing during a closed period or season;

(3) commercial fishing with unlawful gear, including a net, pot, tackle, or other device designed or employed to take fish commercially; or

(4) commercial fishing without a limited entry permit holder on board if the holder is required by law or regulation to be present.

(c) If, within the 10 years preceding an offense, a person has been convicted two or more times of an offense listed in (b) of this section, ~~regardless of whether the convictions are under this section, under AS 16.05.722, or under former AS 16.05.720,~~ then, upon a conviction of that person under this section for ~~a violation~~ listed in (b) of this section, and in addition to the penalties imposed under (a) of this section, the court may impose a fine equal to three times the gross value of the fish found on board or at the fishing site at the time of the ~~violation~~, or a fine equal to $10,000, whichever is greater.

* Sec. 4. AS 16.05.925 is amended to read:

Sec. 16.05.925. PENALTY FOR VIOLATIONS. Except as provided in AS 16.05.430, 16.05.722, 16.05.723, [16.05.720,] 16.05.831, and 16.05.860, a person who violates AS 16.05.920, or a regulation adopted under this chapter or AS 16.20, is guilty of a class A misdemeanor.

* Sec. 5. AS 16.05.720 is repealed.

* Sec. 6. This Act takes effect immediately under AS 01.10.070(c).

go0288hB
Hein
4/20/88

Original sponsor: Rules/Governor

IN THE HOUSE

CS FOR HOUSE BILL NO. 364 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to commercial fishing violations and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 16.05.710(a) is repealed and reenacted to read:

(a) A person convicted of a misdemeanor for violating AS 16.05.440 - 16.05.690 or a federal or state commercial fishing statute or regulation is, in addition to other penalties provided by law, subject to the following penalties:

(1) upon a first conviction the court may, for a period of not more than one year,

(A) forfeit the person's commercial fishing license and the right to obtain a limited entry permit; or

(B) suspend one or more of the person's limited entry permits and forfeit the person's right to obtain a commercial fishing license; and

(2) upon a second or subsequent conviction the court may, for a period of not more than three years,

(A) forfeit the person's commercial fishing license and the right to obtain a limited entry permit; or

(B) suspend one or more of the person's limited entry permits and forfeit the person's right to obtain a commercial fishing license.

* Sec. 2. AS 16.05.710 is amended by adding a new subsection to read:

(c) In this section

(1) "commercial fishing license" includes a crew member license;

(2) "limited entry permit" includes an interim use permit.

* Sec. 3. AS 16.05 is amended by adding new sections to read:

Sec. 16.05.722. STRICT LIABILITY COMMERCIAL FISHING PENALTIES. (a) A person who without any culpable mental state violates AS 16.05.440 - 16.05.690, or a regulation of the Board of Fisheries or the department governing commercial fishing, is guilty of a violation and upon conviction is punishable by a fine of not more than

(1) $3,000 for a first conviction; and

(2) $6,000 for a second or subsequent conviction.

(b) In addition to the penalties imposed under (a) of this section, the court may

(1) for a first conviction, impose a fine equal to 50 percent of the value of the fish found on board or at the fishing site at the time of the violation; and

(2) for a second or subsequent conviction, impose a fine equal to the value of the fish found on board or at the fishing site at the time of the violation.

Sec. 16.05.723. MISDEMEANOR COMMERCIAL FISHING PENALTIES. (a) A person who negligently violates AS 16.05.440 - 16.05.690, or a regulation of the board of fisheries or the department governing commercial fishing, is guilty of a misdemeanor and in addition to punishment under other provisions in this title, including AS 16.05.195 and 16.05.710, is punishable upon conviction by a fine of not more than $15,000 or by imprisonment for not more than one year, or by both. In addition, the court may order forfeiture of any fish, or its fair market value, taken or retained in any manner in connection with or as a result of the commission of the violation, and the court may

forfeit any vessel and any fishing gear, including any net, pot, tackle, or other device designed or employed to take fish commercially, that was used in or in aid of the violation. Any fish, or its fair market value, forfeited under this section may not also be forfeited under AS 16.05.195. For purposes of this section, it is a rebuttable presumption that all fish found on board a fishing vessel used in or in aid of a violation, or found at the fishing site, were taken or retained in violation of AS 16.05.440 - 16.05.690 or a commercial fisheries regulation of the board of fisheries or the department, and it is the defendant's burden to show by a preponderance of the evidence that fish on board or at the site were lawfully taken and retained.

(b) If a person is convicted under this section of one of the following offenses, then, in addition to the penalties imposed under (a) of this section, the court may impose a fine equal to the gross value of the fish found on board or at the fishing site at the time of the violation:

(1) commercial fishing in closed waters;

(2) commercial fishing during a closed period or season;

(3) commercial fishing with unlawful gear, including a net, pot, tackle, or other device designed or employed to take fish commercially; or

(4) commercial fishing without a limited entry permit holder on board if the holder is required by law or regulation to be present.

(c) If, within the 10 years preceding an offense, a person has been convicted two or more times of an offense listed in (b) of this section, regardless of whether the convictions are under this section, under AS 16.05.722, or under former AS 16.05.720, then, upon a

conviction of that person under this section for a violation listed i
(b) of this section, and in addition to the penalties imposed unde
(a) of this section, the court may impose a fine equal to three time
the gross value of the fish found on board or at the fishing site a
the time of the violation, or a fine equal to $10,000, whichever i
greater.

* Sec. 4. AS 16.05.925 is amended to read:

Sec. 16.05.925. PENALTY FOR VIOLATIONS. Except as provided in AS 16.05.430, 16.05.722, 16.05.723, [16.05.720,] 16.05.831, and 16.05.860, a person who violates AS 16.05.920, or a regulation adopted under this chapter or AS 16.20, is guilty of a class A misdemeanor.

* Sec. 5. AS 16.05.720 is repealed.

* Sec. 6. This Act takes effect immediately under AS 01.10.070(c).

Introduced: 1/15/88
Referred: Resources and Judiciary

go00288h

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

IN THE HOUSE

HOUSE BILL NO. 364

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to commercial fishing violations; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS ~~16.05.710(a) is amended to read:~~

(a) Upon a first or second misdemeanor conviction of a person for a violation of AS 16.05.440 -- ~~16.05.690~~ [16.05.720] or a federal or state law or regulation for the conservation or development ~~[PROTECTION]~~ of the commercial fish of the state, the court may, in addition to the penalty otherwise imposed by law, forfeit the person's right to hold or obtain a commercial fishing license or to obtain an interim use or limited entry permit [OF THE PERSON] for a period of one year, or, if the person holds an interim use or limited entry permit, suspend one or more of the person's permits for a period of one year. Upon a third or subsequent conviction, the court may, in addition to the penalty otherwise imposed by law, forfeit the person's right to hold or obtain a commercial fishing license for a period not to exceed three years, or if the person holds an interim use or limited entry permit, suspend one or more of the person's permits for a period not to exceed ~~three~~ years. During the period that an interim use or limited entry permit is suspended, a permit card may not be issued and the permit may not be transferred or sold.

* Sec. 2. AS ~~16.05.710 is~~ amended by adding a new subsection to read:

(c) In this section "commercial fishing license" includes a crewmember license.

* Sec. 3. AS 16.05 is amended by adding new sections to read:

Sec. 16.05.722. STRICT LIABILITY COMMERCIAL FISHING PENALTIES. (a) A person who without any culpable mental state violates AS 16.05.440 -- 16.05.690, or a regulation of the board of fisheries or the department governing commercial fishing, is guilty of a violation and upon conviction is punishable by a fine of not more than $6,000. In addition, the court shall order forfeiture of any fish, or its fair market value, taken or retained in any manner in connection with or as a result of the commission of the violation. For purposes of this section, it is a rebuttable presumption that all fish found on board a fishing vessel used in or in aid of a violation, or found at the fishing site, were taken or retained in violation of AS 16.05.440 -- 16.05.690 or a commercial fisheries regulation of the board of fisheries or the department. It is the defendant's burden to show by a preponderance of the evidence that fish on board or at the site were lawfully taken and retained.

(b) A person charged with a violation under (a) of this section is entitled to a trial by court but not by jury, and is not entitled to representation at public expense.

(c) The state must prove the commission of a violation of this section by a preponderance of the evidence.

Sec. 16.05.723. MISDEMEANOR COMMERCIAL FISHING PENALTIES. (a) A person who negligently violates AS 16.05.440 -- 16.05.690, or a regulation of the board of fisheries or the department governing commercial fishing, is guilty of a misdemeanor and in addition to punishment under other provisions in this title, including AS 16.05.195 and 16.05.710, is punishable upon conviction by a fine of not more than $15,000 or by imprisonment for not more than one year, or by both. In addition, the court shall order forfeiture of any

fish, or its fair market value, taken or retained in any manner in connection with or as a result of the commission of the violation, and the court may forfeit any vessel and any fishing gear, including any net, pot, tackle, or other device designed or employed to take fish commercially, that was used in or in aid of the violation. Any fish, or its fair market value, forfeited under this section may not also be forfeited under AS 16.05.195. For purposes of this section, it is a rebuttable presumption that all fish found on board a fishing vessel used in or in aid of a violation, or found at the fishing site, were taken or retained in violation of AS 16.05.440 -- 16.05.690 or a commercial fisheries regulation of the board of fisheries or the department, and it is the defendant's burden to show by a preponderance of the evidence that fish on board or at the site were lawfully taken and retained.

(b) If a person is convicted under this section of one of the following offenses, then, in addition to the penalties imposed under (a) of this section, the court shall impose a fine equal to the gross value of the fish found on board or at the fishing site at the time of the violation:

(1) commercial fishing in closed waters;

(2) commercial fishing during a closed period or season;

(3) commercial fishing with unlawful gear, including a net, pot, tackle, or other device designed or employed to take fish commercially; or

(4) commercial fishing without a limited entry permit holder on board if the holder is required by law or regulation to be present.

(c) If, within the 10 years preceding an offense, a person has been convicted two or more times of an offense listed in (b) of this

section, regardless of whether the convictions are under this section, under AS 16.05.722, or under former AS 16.05.720, then, upon a conviction of that person under this section for a violation listed in (b) of this section, ~~and in addition to the~~ penalties imposed under (a) of this section, the court shall impose a fine equal to three times the gross value of the fish found on board or at the fishing site at the time of the violation, or a fine equal to $10,000, whichever is greater.

(d) ~~In~~ this section, to be "negligent" means ~~to~~ a gross deviate from the standard of care that a reasonable person involved in commercial fishing would observe in the situation.

Accidental Conduct

See case law Reynolds

* Sec. ~~4. AS 16.05.925 is amended to read:~~

Sec. 16.05.925. PENALTY FOR VIOLATIONS. Except as provided in AS 16.05.430, 16.05.722, 16.05.723, [16.05.720,] 16.05.831, and 16.05.860, a person who violates AS 16.05.920, ~~or a regulation~~ adopted under this chapter or AS 16.20, is guilty of a class A misdemeanor.

* Sec. 5. ~~AS 16.05.720 is repealed.~~

* Sec. 6. This Act takes effect immediately under AS 01.10.070(c).

(1) Allocation (1) Regs vs Conservation (2) Regs
- Loss of License for violation of (1)

(2) Raises strict liability $300 → $6,000 + Misdemeanor ~~$5,000~~ 10,000

Section 1.

AS 16.05.710 is repealed and reenacted to read:

(a) Upon a first misdemeanor conviction of a person for a violation of AS 16.05.440 -- 16.05.690 or a federal or state law or regulation governing commercial fishing, the court may, in addition to the penalty imposed by law,

(1) forfeit the person's right to hold or obtain a commercial fishing license, or limited entry permit for a period of up to one year, if the person does not hold a limited entry permit, or

(2) if the person holds a limited entry permit, suspend the person's permit for a period of up to one year.

(b) Upon a second or subsequent misdemeanor conviction of a person for a violation of AS 16.05.440 -- 16.05.690 or a federal or state law or regulation governing commercial fishing, the court may, in addition to the penalty imposed by law,

(1) forfeit the person's right to hold or obtain a commercial fishing license or limited entry permit for a period of up to three years, if the person does not hold a limited entry permit, or

(2) if the person holds an interim use or limited entry permit, suspend the person's permit for a period of up to three years.

During the period that a limited entry permit is suspended, a permit card may not be issued and the permit may not be transferred or sold.

(c) In this section "commercial fishing license" includes a crewmember license, and "limited entry permit" includes an interim use permit.

AS 16.05 is amended by adding new sections to read:

Sec. 16.05.722. STRICT LIABILITY COMMERCIAL FISHING PENALTIES.

(a) A person who without any culpable mental state

violates AS 16.05.440 -- 16.05.690, or a regulation of the board of fisheries or the department governing commercial fishing, is guilty of a violation and upon conviction is punishable by a fine of not more than

(1) $3,000 for a first conviction;
(2) $6,000 for a second or subsequent conviction.

(b) In addition to the penalties imposed under (a) of this section, the court may

(1) for a first conviction, impose a fine equal to 50 percent of the value of the fish found on board or at the fishing site at the time of the violation;

(2) for a second or subsequent conviction, impose a fine equal to 100 percent of the value of the fish found on board or at the fishing site at the time of the violation.

Suggested changes for Pages 2 -4, Misdemeanor Commercial Fishing Penalties:

Page 3, line 17: delete "shall", insert "may"

Page 4, line 5: delete "shall", insert "may"

Page 4, delete subsection (d).

April 15, 1988

M E M O R A N D U M

TO: Ed Hein
LAA Legal Services

FROM: Rep Mike Navarre

SUBJECT: HB 364, Relating to penalties for commercial fishing violations.

Attached is some draft language I would like to incorporate into a "blank committee" CS for HB 364. Feel free to alter the drafting style if it isn't suitable, but please retain these concepts in the language:

Under Section 1 of the bill, the idea is this:

For a misdemeanor conviction, if the person <u>does not</u> have a interim use or limited entry permit, they forfeit their commercial fishing (crewmember) license for a time (up to 1 or 3 years, depending on the conviction). They also cannot obtain an interim use or limited entry permit during that period.

If they <u>do</u> hold an interim use or limited entry permit, it is suspended, and they forfeit the right to obtain a crewmember license for the same time period.

> Relating to this: Should the language referring to limited entry permits simply be "entry permits"? The Fisheries Entry Commission also issues permits in unlimited fisheries. Can't these be suspended also?

In Section 2 of the bill, we are staying with the basic concept established by the department, setting penalties for strict liability offenses. The idea is to initiate self-enforcement, by providing a deterrent. However, the defendant still retains the right to a jury trial and public defender, and the fine is set at a maximum of $3,000 for a first offense and $6,000 for a second or subsequent offense.

In a similar vein, the fish are not automatically forfeit. Instead, the court would have the discretionary power (depending, we hope, on the severity of the violation) to impose an additional fine, equal to half (for a first offense) or all (on a second or subsequent offense) the market value of the fish on board or at the site when the violation was committed.

Section 3 of the bill - the only changes suggested are the following:

Page 2, line 29: delete "shall", insert "may"

Page 3, line 5: delete "shall", insert "may"

Page 4, line 5: delete "shall", insert "may"

Page 4: delete subsection (d).

Please contact Pat Malone of my staff if you have any questions.

Thanks.

Amendments to CS HB 364(Resources).

Page 1:

Insert new bill Section 1 & 2, revised AS 16.05.190 - 195. - renumber other bill sections accordingly.

Other changes, page 1:

line 14: insert "or second"

line 16: delete "forfeit", replace with "suspend"

line 19: delete "forfeit"

line 21: delete "second", replace with "third"

line 23: delete "forfeit", replace with "suspend"

line 26: delete "forfeit"

explanation: returns to existing law's requirment of 3 or more convictions for a three year suspension, makes language regarding license and permit suspensions more consistent.

Page 2:

line 11: after the word "violation", insert "as defined in AS 11.81.900(b)(56),"

explanation: clarifies that a strict liability offense (no culpable mental state required) does not entitle offender to jury trial and public defender.

Delete lines 15 - 22.

Page 3:

Delete lines 1 - 15, beginning with the words "In addition,"

Explanation: Seizure and forfeiture of catch for both strict liability and misdemeanor offenses are now handled under revised AS 16.05.190 - 195.

<u>other changes requested by Departments of Public Safety & Law:</u>

Page 3, line 18: change "may" to "shall"

Page 4, line 6: change "may" to "shall"

Reinsert the definition of negligence as in original HB 364.

AS. 16.05.195 is repealed and reenacted to read:

AS 16.05.190 Seizure, forfeiture, and disposition of catch and equipment. (a) All equipment used in or in aid of a violation this title, or a regulation adopted under it, may be seized and forfeited to the state, and all catch taken, transported or possessed contrary to the provisions of this title shall be seized and forfeited to the state

(1) upon conviction of the offender in a criminal proceeding in a court of competent jurisdiction.

(2) upon judgement of a court of competent jurisdiction in a proceeding in rem that an item specified above was used in or in aid of a violation of this title or a regulation adopted under it.

(c) Items specified under (a) of this section may be forfeited under this section regardless of whether they were seized before instituting the forfeiture action.

(d) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value of catch transported, or possessed contrary to the provisions of this title or a regulation adopted under it.

(e) It is no defense that the person who had the item specified in (a) of this section in possession at the time of its use and seizure has not been convicted or aquitted in a criminal proceeding resulting from or arising out of its use.

(f) Forfeiture may not be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased the item innocently and in good faith shall be on the purchaser.

(g) For the purposes of forfeiture of catch in this section, it is a rebuttable presumption that all catch found in possession of the defendant at the time of the offense were taken or retained in violation of this title, or a regulation adopted under it. It is the defendant's burden to prove the contrary by a preponderance of the evidence.

(h) An item forfeited under this section shall be disposed of at the discretion of the department. If sold, the proceeds of the sale shall be transferred to the proper state officer for deposit in the general fund. Before the department disposes of an aircraft it shall consider transfer of ownership of the aircraft to the Alaska Wing, Civil Air Patrol.

AS 16.05.195 is repealed and reenacted to read:

AS 16.05.195 Definitions. For the purposes of AS 16.05.190, "equipment" includes guns, traps, nets fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear, and "catch" includes all fish and game or parts of fish and game or nests or eggs of birds taken.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

Bill Version: HB 364
Publish Date:

FISCAL NOTE

REQUEST
Revision Date:
Title: An act relating to commercial fishing and providing for an effective date
Sponsor: Rules - Governor's Request
Requestor: House Resources

Agency Affected: Public Safety
BRU: Fish & Wildlife Protection
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING:: (Thousands of Dollars)

GENERAL FUNDS	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Colonel Jack Jordan
Phone: 269-5532
Division: Fish & Wildlife Protection
Date: 01/07/88

Approved by Commissioner: Dave Hostetler (for Comm.)
Date: 01/07/88
Agency: Public Safety

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