HB

364

STATE OF ALASKA

1988 LEGISLATIVE SESSION

Bill Version: HB 364

Publish Date:

FISCAL NOTE

REQUEST

Revision Date:

Agency Affected: Public Safety

Title: An act relating to commercial fishing and providing for an effective date

BRU: Fish & Wildlife Protection

Sponsor: Rules - Governor's Request

Components:

Requestor: House Resources

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

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 Hattabi Dep Comm.

Date: 01/07/88

Agency: Public Safety

Distribution (by preparer):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

Original sponsor: Rules/Governor

IN THE HOUSE BY THE RESOURCES COMMITTEE

CS FOR HOUSE BILL NO. 364 (Resources)

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 AS 16.05.710(a) is repealed and reenacted to read: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 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 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 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).

HOUSE COMMITTEE REPORT

(9)

Date referred: 1/15/88 FURTHER 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 notes published _____

SIGNING DO PASS:

Adelheid Herrmann
Mike Navarre
Dick Shultz
Jan R Gutt

SIGNING OTHER RECOMMENDATIONS:

Lynn Hoffman

Adelheid Herrmann
Chairman's signature

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

pre 1982 - Strict liability assumed

1982 - Reynolds - strict liability must be specified

1983 - Board of Fisheries so specified

1985 - Berrun - if strict liability, only a violation (non-criminal fines)

[see chart]

1987 - Constantine - $300 is maximum fine for violation

1988 - HB 364 - would raise both non-criminal and criminal fines

[see chart]

	Violation	Misdemeanor
standard	strict liability (must just prove the act occurred)	negligence (must prove mental state)
jury	no	yes
public defender	no	yes
jail	no	up to one year
fine (maximum)	now: $300 bill: $6,000	now: $5,000* bill: $10,000*
forfeiture	now: fish, vessel, gear (discretionary) bill: must forfeit fish; may not forfeit vessel, gear	now: fish, vessel, gear, license (discretionary) bill: must forfeit fish; may forfeit vessel, gear, license

* higher in 4 specified cases

note: bill would establish rebuttable presumption that fish at site taken illegally

STATE OF ALASKA

1988 LEGISLATIVE SESSION

Bill Version: HB 364

Publish Date:

FISCAL NOTE

REQUEST

Revision Date:

Agency Affected: Public Safety

Title: An act relating to commercial fishing and providing for an effective date

BRU: Fish & Wildlife Protection

Sponsor: Rules - Governor's Request

Components:

Requestor: House Resources

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: Duke Nastoski by comm.

Date: 01/07/88

Agency: Public Safety

Distribution (by preparer):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

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.

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

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 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).

THE COURT OF APPEALS OF THE STATE OF ALASKA

ALECK CONSTANTINE,

Appellant,

v.

STATE OF ALASKA,

Appellee.

File No. A-1247

OPINION

DAVID BYAYUK,

Appellant,

v.

STATE OF ALASKA,

Appellee.

File No. A-1409

GEORGE KOKTELASH,

Appellant,

v.

STATE OF ALASKA,

Appellee.

File No. A-1414

[No. 717 - July 2, 1987]

Appeal in File No. A-1247 from the District Court of the State of Alaska, Third Judicial District, Naknek, John D. Mason, Judge. Appeal in File Nos. A-1409 and A-1414 from the District Court of the State of Alaska, Third Judicial District, Naknek, S. J. Buckalew, Jr., Judge.

Appearances: Lisa M. Fitzpatrick, Assistant Public Defender, and Dana Fabe, Public Defender, Anchorage, for Appellant Constantine. Barbara K. Brink, Assistant Public Defender, and Dana Fabe, Public Defender, Anchorage, for Appellants Koktelash and Byayuk. W. H. Hawley, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Harold M. Brown, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

COATS, Judge.
BRYNER, Chief Judge, concurring.
SINGLETON, Judge, dissenting.

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.

---

[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.

We concluded that the Board of Fisheries, in passing this regulation, intended to authorize 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]

---

[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.
>
> . . . .
>
> (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:

(footnote continued)

These penalties involve fines of up to $5,000 and the forfeiture of fish and gear.

(footnote continued)

> 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 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

(footnote continued)

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,

---

(footnote continued)

> 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.

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]

---

[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.

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.

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

---

[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.

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 (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 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 describec

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

---

[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.

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] The courts had just as consistently held violations to be strict-liability offenses. Doo-Noch-Keen, 2 Alaska at 628; see also

---

[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 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).

Rustad v. United States, 258 F.2d 563, 565-67 (9th Cir.), cert. denied, 358 U.S. 898 (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 outsice 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").

---

[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.

The majority offers no reasons why AS 16.05.190-.195, governing forfeitures, are 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 (footnote continued)

(footnote continued)

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,

(footnote continued)

(footnote continued)

284 (1943); United States v. Balint, 258 U.S. 250, 252 (1922). In fact, the first hint that strict liability in any circumstance might be unconstitutional came in Lambert v. California, 355 U.S. 225 (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 (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 (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 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 93.

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.

(footnote continued)

(footnote continued)

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, 705 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.
(footnote continued)

(footnote continued)

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.

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE COURT OF APPEALS OF THE STATE OF ALASKA

ANTONIN BERAN,

Appellant,

v.

STATE OF ALASKA,

Appellee.

File No. A-535

OPINION

[No. 506 - September 6, 1985]

GARY CARLOS,

Appellant,

v.

STATE OF ALASKA,

Appellee.

File No. A-679

PETER MOST,

Appeliant,

v.

STATE OF ALASKA,

Appellee.

File No. A-629

WILLIARD PARK,

Appellant,

v.

STATE OF ALASKA,

Appellee.

File No. A-630

RALPH BORS, Petitioner, v. STATE OF ALASKA, Respondent.	File No. A-668
ELIZABETH IANI and DAVID IANI, Petitioners, v. STATE OF ALASKA, Respondent.	File No. A-652
JOHN JENSEN, KURT KVERNICK, DENNIS O'NEILL. and LARRY HENDRICKS, Petitioners, v. STATE OF ALASKA, Respondent.	File No. A-638
PAUL MORENO and PAUL ZACKAR, Petitioners, v. STATE OF ALASKA, Respondent.	File No. A-658

506

SAM WHITTEN, ROBERT H. BLAKE, and MARK I. HUTTON, Petitioners, v. STATE OF ALASKA, Respondent.	File No. A-727

Appeal from the District Court of the State of Alaska, Third Judicial District: Cordova, John Bosshard, III, Judge, in File No. A-535; Dillingham, Geoffrey T. Comfort, Judge, in File Nos. A-629/630/679.

Petitions for Review from the District Court of the State of Alaska, Third Judicial District, Naknek: Victor D. Carlson, Judge, in File Nos. A-638/652/658/668; J. Justin Ripley, Judge, in File No. A-727.

Appearances: 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, Assistant 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, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, G. Scott Sobel, Assistant District Attorney, Russell S. Babcock, Assistant District Attorney, Victor C. Krumm, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for the State of Alaska.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

SINGLETON, Judge.
BRYNER, Chief Judge, concurring.
COATS, Judge, concurring.

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]

---

[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.

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).

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 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

---

[3]. Elizabeth and David Ianl 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.

[4]. We use the term "violation" as it is defined in AS 11.81.-900(b)(55):

> "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

(footnote continued)

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

---

(footnote 4 continued)

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, 570 P.2d 52 (Or. 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."

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.

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 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 and 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."

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 Linden 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.

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 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.

---

[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 was not sentenced to

(footnote continued)

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

---

(footnote 6 continued)

such a forfeiture. It is therefore not necessary for us to decide this question at this time. See also n.4 (regarding fines).

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]

---

[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

(footnote continued)

Alaska Statute 11.81.220 provides:

> 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
>
> . . . .

(footnote 7 continued)

> 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 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.

(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]

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

---

[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.

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 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

---

[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, 651 P.2d 1075 (Or. 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 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 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]

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.

---

[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 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).

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 Division 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 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).

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]

---

[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.

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] Alternatively, 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

---

[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.

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.

---

[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.

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 1244, 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 provision 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 Constitution. 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.

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 negli- ..t 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 933, 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.

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
PHONE: (907) 276-3550

☐ *1st NATIONAL CENTER*
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701
PHONE: (907) 452-1568

☐ *P.O. BOX K-STATE CAPITOL*
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

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

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

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

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.