

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672

4723 HJUD HB 364

285

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

As was said in *Steckler v. United States*, (citation omitted):

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

284 U.S. at 393, 52 S.Ct. at 190, 76 L.Ed. at 359. This argument has subsequently been explained and clarified by the Second Circuit Court of Appeals in *United States v. Maybury*, 274 F.2d 899 (2d Cir. 1960); indeed, the *Maybury* case makes it clear that the federal rule on inconsistent jury verdicts can be supported only by this second rationale advanced in *Dunn*.¹⁸ Briefly stated, the argument may be paraphrased in the following manner. Since their very origins,

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

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

18. The *Maybury* case involved an inconsistency between a verdict of acquittal

juries have had the power, if not the right, to act irrationally. In the context of inconsistent jury verdicts, the traditional power of irrationality is essential, since it permits a jury to express its desire to act leniently toward certain defendants by convicting on only one of several counts. Without such power, a jury would have no assurance that a desire on its part to have an accused treated leniently would be heeded by the court.

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

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

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

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

378 F.2d at 422-423.¹⁹

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

An excellent illustration of this point can be found in the instant case. A study of the record of DeSacia's trial below reveals that, at some time after the jury had been charged and sent out to deliberate, the court called the jurors back to determine what their position was at that time. It is not clear from the record how long the jury had been out before it was first called back. At any rate, it is certain that at that par-

ticular time the jury was disposed six to five, with one undecided, as to the first count; no recent consideration had even been given to the second count. The jury was again sent out. At about 11:30 p. m., the court once again called back the jury to determine whether any progress was being made in reaching a verdict. With the exception of a single person all of the jurors felt that no progress had been made toward a solution.²¹

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

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

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

20. Mr. Justice Butler, in a lengthy dissenting opinion in *Dunn*, 284 U.S. 390, 394-407, 52 S.Ct. 189, 76 L.Ed. 358, 359-

366 (1932), attempted to show that, contrary to the view taken in the majority opinion, consistency in jury verdicts had long been required. For a similar historical argument, see, *Comments, Inconsistent Verdicts in a Federal Criminal Trial*, 60 *Colum.L.Rev.* 999 (1960).

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

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

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

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

words of Justice Butler, dissenting in *Dunn*:

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

284 U.S. at 402, 52 S.Ct. at 194, 76 L.Ed. 2d 363. The state argues, in this regard, that we would be asking too much of juries in criminal matters by requiring that they render, in all cases, strictly consistent verdicts. To this we reply that, in holding as we do today, we require only that verdicts not be strictly inconsistent. Appellant's conviction is reversed.

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

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

fence to be twice put in jeopardy of life or limb * * *".

22. See, *Jennings v. State*, 44 P.2d 652, 654 (Alaska 1965).

23. The double jeopardy clause of the fifth amendment to the Constitution of the United States provides: "[N]or shall any person be subject for the same of-

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

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

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

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

25. It is well settled that a defendant appealing his conviction waives his right to protection under the double jeopardy clause of the fifth amendment, *Ball v. United States*, 163 U.S. 662, 672, 16 S.Ct. 1102, 41 L.Ed. 300, 303 (1896).

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

27. The distinction between "collateral estoppel" and "res judicata" is not of tre-

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

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

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

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

mendous importance here. The two terms are frequently used interchangeably in the criminal law; to avoid confusion, we will speak consistently in terms of collateral estoppel. See Comment. 27 *Tex.L.Rev.* 231, 232-33 (1948).

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

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

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

332 U.S. at 578, 68 S.Ct. at 239, 92 L.Ed. at 184.²⁹ Most recently, the United States Supreme Court has held that, in light of *Benton v. Maryland*, *supra*, the rule of collateral estoppel is embodied in the fifth amendment as an adjunct to the constitutional guarantee of double jeopardy. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (April 6, 1970). In considering the significance of collateral estoppel in criminal cases, Mr. Justice Stewart, writing for the majority of the Court in *Ashe* noted:

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

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

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

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

30. See, e. g., *State v. Hoag*, 21 N.J. 406, 122 A.2d 628 (1956); *aff'd*, 350 U.S. 404, 78 S.Ct. 820, 2 L.Ed.2d 913 (1958); *State v. Orth*, 106 Ohio App. 35, 153 N.E.2d 304 (1957).

See also *Mayers and Yarbrough*, *New Trials and Successive Prosecutions*, 74 Harv.L.Rev. 1 (Nov.1960); *Comments*,

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

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

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

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

An Analysis of the General Verdict: Res Judicata Applied in Criminal Proceedings, 10 Hastings L.J. 404 (May 1959); *Comments*, Collateral Estoppel in a Criminal Prosecution—Effect of a Previous Acquittal of a Related Crime, 34 N.Y.U.L.Rev. 631 (March 1959).

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

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

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

In bringing this appeal, the appellant has successfully argued that the inconsistency between verdicts rendered his conviction meaningless. In our opinion, it would impose an unjustifiably harsh restriction on

the state to allow the appellant to argue, in the same breath, that his acquittal is of sufficient certainty to suit the purposes of collateral estoppel. There is simply no reason here to force the prosecution to run a perilous gauntlet of criminal procedure. Under these circumstances, to allow the appellant to invoke the rule of collateral estoppel would, as Judge Friendly stated in *Maybury*, "convert the guarantee of double jeopardy from a shield into a sword." 274 F.2d at 905.

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

DIMOND Justice (dissenting in part).

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

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

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

32. Although the majority of the court in *Maybury v. United States*, 274 F.2d 809 (2d Cir. 1960), decided against application of *res judicata* to prevent retrial of the conviction reversed in that case, *Maybury* does not bear directly upon the problem of the present case. Since the inconsistent verdicts in *Maybury* did not stem from counts alleging identical elements, the state could have, on retrial of the reversed conviction, sought to establish the elements of the crime without

resort to evidence used in the count upon which the appellant was acquitted. Thus, in *Maybury*, a holding on the basis of *res judicata* would have been, at that stage, premature.

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

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

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

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

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

It is also held that one appealing from a conviction of one offense may not be required, as a condition of appealing, to surrender his defense of double jeopardy as to

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

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

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

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

2. *Ashe v. Swenson*, 397 U.S. 436, 456, 90 S.Ct. 1189, 1200, 25 L.Ed.2d 469, 482 (No. 57, April 6, 1970) [Concurring

opinion of Justices Brennan, Douglas and Marshall].

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

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

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

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

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



Tracee THORSHEIM, Administratrix of the Estate of Stanley Thorshelm, deceased, Appellant,

v.

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

No. 1090.

Supreme Court of Alaska.

May 22, 1970.

Workmen's compensation proceeding. The Superior Court, Anchorage District, Edward V. Davis, J., affirmed Workmen's Compensation Board's denial of compensation, and claimant appealed. The Supreme Court, Boney, C. J., held that even if the Department of Administration, in

securing contracts for various departments of state, could be considered contractor within "contractor-under" provision of Workmen's Compensation Act, Department, in conducting bidding and in issuing contract, which required flying service to furnish state certain specified types of aircraft complete with fuel, pilot and maintenance, did not create contractor-subcontractor relationship between Department and flying service, and thus fact that flying service failed to carry workmen's compensation insurance did not render state liable as contractor under Workmen's Compensation Act for claim arising from death of flying service's pilot that occurred when agent of Department of Fish and Game was being flown on stream survey flight.

Affirmed.

Rabinowitz, J., dissented and filed opinion.

1. Workmen's Compensation \S 351

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

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

2. Workmen's Compensation \S 348

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

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

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

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

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

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

Affirmed.



STATE of Alaska, Petitioner,

v.

Wilder S. RICE and Cessna Finance Corporation, Respondents.

CESSNA FINANCE CORPORATION,
Cross-Petitioner,

v.

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

Nos. 4777, 4778.

Supreme Court of Alaska.

April 10, 1981.

Defendant was convicted before the District Court, Christopher Cook, J., of

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

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

First degree murder. A person who, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, rape, arson, robbery, or burglary kills another, is guilty of murder in the first degree, and shall

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

Affirmed in part; reversed in part.

Matthews, J., filed concurring opinion.

be sentenced to imprisonment for not less than 20 years to life.

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

1. Criminal Law ⇐20

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

2 Statutes ⇐241(1)

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

3. Constitutional Law ⇐48(1)

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

4. Game ⇐7

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

5. Constitutional Law ⇐258(3)

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

6. Courts ⇐91(1)

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

7. Constitutional Law ⇐303

Not to allow innocent owners and security holders of property forfeited under

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

8. Constitutional Law ⇐303

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

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

Wilder S. Rice, pro se.

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

OPINION

Before RABINOWITZ, C. J., CONNOR, BURKE and MATTHEWS, JJ., and DI-MOND, Senior Justice.

RABINOWITZ, Chief Justice.

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

ers in the forfeiture of equipment for game violations.

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

Rice appealed his conviction to the superior court on several grounds, including contentions that the regulation was void for vagueness and that some form of intent must be implied in the regulation he was convicted of violating. Meanwhile, Cessna

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

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

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

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

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

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

3. Specifically, the superior court stated:

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

4. AS 16.05.195 provides:

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

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

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

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

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

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

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

The petitions were granted⁵ and the cases consolidated. The first issue that must be considered is whether the superior court erred in requiring an element of mens rea in the offense for which Rice was convicted.

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

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

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

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

5. Petitions were granted in the criminal case under former Alaska R.App.P. 23(c)(3) and in the civil case under former Alaska R.App.P. 23(d). We concluded that review should be granted pursuant to former Alaska R.App.P. 24(a)(1) since the issues were, of such sub-

en."⁶ The district court denied the requested instruction, and Rice was convicted.

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

We recognized in *Speidel v. State*, 460 P.2d 77 (Alaska 1969), that consciousness of wrongdoing is an essential element of penal liability. 'It is said to be a universal rule that an injury can amount to a crime only when inflicted by intention—that conduct cannot be criminal unless it is shown that one charged with criminal conduct had an awareness or consciousness of some wrongdoing.' *Id.* at 78. . . .

Our opinion in *Speidel* stated that there are exceptions to the general requirement of criminal intent which are categorized as 'public welfare' offenses. These exceptions are a rather narrow class of regulation, 'caused primarily by the industrial revolution, out of which grew the necessity of imposing more stringent duties on those connected with particular industries, trades, properties, or activities that affect public health, safety or welfare.' *Speidel v. State, supra* at 78. The penalties for the infraction of these strict liability offenses are usually relatively small and conviction of them carries no great opprobrium. *J.* at 79.

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

stance and importance as to warrant deviation from normal appellate procedures.

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

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

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

involves a fish and game regulation might perhaps be considered by some to be sufficient to justify characterization of the subject offense as a strict liability offense.

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

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

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

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

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

9. Sayre grouped the categories as follows:

- (1) Illegal sales of intoxicating liquor;
 - (a) sales of prohibited beverage;
 - (b) sales to minors;
 - (c) sales to habitual drunkards;
 - (d) sales to Indians or other prohibited persons;
 - (e) sales by methods prohibited by law;
- (2) Sales of impure or adulterated food or drugs;
 - (a) sales of adulterated or impure milk;

- (b) sales of adulterated butter or oleomargarine;

- (3) Sales of misbranded articles;

- (4) Violations of anti-narcotic acts;

- (5) Criminal nuisances;

- (a) annoyances or injuries to the public health, safety, repose or comfort;

- (b) obstructions of highway;

- (6) Violations of traffic regulations;

- (7) Violations of motor-vehicle laws;

- (8) Violations of general police regulations, passed for the safety, health or well-being of the community.

Id. at 73 (footnote omitted).

10. *Id.*

11. *Id.* at 87-88.

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

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

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

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

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

thority undue discretion to determine the scope of its prohibitions.¹³

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

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

The second consideration is that a statute must give adequate notice to the ordinary citizen of what is prohibited. This principle involves basic fairness and was long ago enunciated by the United States Supreme Court in *Connally v. General Construction Co.* [269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322], stating:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

A statute in its broad contours may be subject to criticism for failure to give adequate notice as to all types of conduct which are punishable, but, when not involved with the 'overbreadth' problem,

of these [First Amendment] rights, so this consideration is not pertinent").

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

14. See, e. g., *Larson v. State*, 564 P.2d 365, 372 (Alaska 1977) ("The criminal acts with which Larson was charged do not involve the exercise

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

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

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

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

[5] We note, additionally, that an alternative analysis compels the same result. Under the Alaska Constitution, "[s]ubstantive due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose." *Con-*

16. 5 AAC 31.090(c) provides:

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

5 AAC 32.090(c) provides:

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

5 AAC 34.090(c) provides:

(c) It is unlawful for any person to possess, purchase, sell, barter, or transport king crab

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

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

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

within the state or within waters subject to the jurisdiction of the state if that person knows or has reason to know that such king crab were taken or possessed in contravention of the regulations of this chapter.

These regulations were promulgated pursuant to AS 16.10.210 which provides:

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

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

Cite as, Alaska, 626 P.2d 104

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

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

As that Court observed, the history of forfeiture is deeply rooted in the common law with even Biblical origins.¹⁹ It has received widespread use and approval throughout the history of American jurisprudence.²⁰ "Despite this proliferation of

forfeiture enactments, the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."²¹

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

18. See note 4 *supra*.

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

20. [A]lmost immediately after the adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to forfeiture under federal law, as were vessels used to deliver slaves to foreign countries, and somewhat later those used to deliver slaves to this country. The enactment of forfeiture statutes has not abated; contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise.

416 U.S. at 683, 94 S.Ct. at 2092, 40 L.Ed.2d at 468 (footnote omitted).

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

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

23. [I]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent.

416 U.S. at 689, 94 S.Ct. at 2094, 40 L.Ed.2d at 471.

24. *Id.* (footnote omitted).

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

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

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

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

This passage clearly suggests that under federal constitutional due process, forfeiture of the interest of an innocent security holder, rather than that of an owner, is not violative of substantive due process, and does not come under the exception noted above. Several federal courts²⁷ and state courts²⁸ have so held.

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

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

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

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

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

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

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

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

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

29. AS 16.05.195(e) provides:

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

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

(d) If an item specified in AS 16.05.190(a) is forfeited, a claimant who holds an interest in the item and has filed a timely claim, may petition the court in which the action is pending for remittance of his interest upon showing at a hearing before the court as trier of fact that

(1) he holds a valid interest in the item and
(2) he was not a consenting party to nor privy to the illegal act.

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

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

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

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

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

contracts. 19 CFR § 171.13(b). See also 18 U.S.C. § 3617(b) establishing standards for judicial remission and mitigation of forfeitures resulting from violations of the internal revenue laws relating to liquor.³¹

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

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

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

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

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

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

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

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

What purpose is left then to forfeiture if it is not to destroy and expiate the offending res? One purpose is to prevent possible use of the property in further illicit acts.³⁴ This purpose is well served when the seized property is not returned to the offender. It is not served when the interests of innocent non-negligent third parties are left unprotected or uncompensated. All that remain as purposes for forfeiture are the goals generally advanced for penal measures.³⁵

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

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

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

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

If this is accurate, then what purpose is served by punishing the owner who has done all that reasonably could be expected to prevent illegal use? Or in punishing a security holder who has an interest in the forfeited item and has done everything possible to prevent its illegal use, especially considering the minimal control that a security holder has over an item whose ownership is in the hands and direct control of another? The Supreme Court, in *Pearson Yacht*, stated that as to secured creditors, "confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."³⁶ We think that limits must be recognized as to the care a creditor can be required to take to safeguard a security interest. We think that if a party can show "the manner in which the property came into possession of such other person" and that "prior to parting with the property he did not know, nor have reasonable cause to believe, [either] that the property would be used to violate [the law, or] . . . that the violator had a criminal record or a reputation for commercial crime,"³⁷ substantive due process under the Alaska Constitution requires that a procedure be available for remission of the forfeited item.

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

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

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

37. 19 CFR § 171.13(a).

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

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

AFFIRMED in part; REVERSED in part.

BOOCHEVER, J., not participating.

MATTHEWS, Justice, concurring.

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

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

The alternative reason set out by the majority strikes down the regulation because it has no reasonable relation to a legitimate governmental purpose. Once again, this is at best a tangential expression of what is wrong with the regulation. There certainly is a legitimate government interest in preventing the unlawful killing

of game, and imposing strict forfeiture or criminal fines on persons who transport unlawfully killed game bears a relationship to the accomplishment of that purpose.

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

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

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

Likewise, in the recent case of *Hentzner v. State*, 612 P.2d 821, 825 (Alaska 1980), we noted that the "'general conditions of penal liability' require 'not only the doing of some act by the person to be held liable, but also the existence of a guilty mind during the commission of the act.'"

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

38. The state argues that Cessna had not done anything more than a routine credit check. However, it seems that Rice had neither a prior criminal record nor a record or reputation as a game law violator. If the inquiry would have revealed nothing, the loan was made in good

faith. If Cessna had no knowledge that Rice was a violator of the game laws and was not negligent in its inquiry, it is entitled to remission. Cf. *United States v. One 1972 Ford Pickup Truck*, 374 F.Supp. 413, 415 (E.D.Tenn. 1973).

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

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

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

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

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



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

MUNICIPALITY OF ANCHORAGE.

Petitioner,

v.

James A. BROWN, Respondent.

No. 5645.

Court of Appeals of Alaska.

April 9, 1981.

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

Reversed and remanded.

Automobiles § 144.2(7)

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

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

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

3. *Id.* at 72.

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

The decision of the trial court is accordingly

AFFIRMED.



Edward STORK, Appellant,

v.

STATE of Alaska, Appellee.

No. 2708.

Supreme Court of Alaska.

Jan. 26, 1977.

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

Reversed and remanded.

Erwin, J., dissented and filed statement.

1. Criminal Law ⇐1038.1(4)

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

2. Homicide ⇐74

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

3. Homicide ⇐309(1), 340(1)

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

4. Criminal Law ⇐1038.2

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

5. Criminal Law ⇐781(1)

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

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

6. Criminal Law ⇐781(1), 1173.2(7)

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

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

7. Criminal Law ⇌ 338(7)

In manslaughter prosecution, prosecutor's questions regarding whether defendant had paid hospital bills of victim, his wife, or had supported their children after wife's death were improper in that their probative value was outweighed by their prejudicial effect. AS 11.15.040.

8. Constitutional Law ⇌ 268(8)

Due process is violated when prosecution calls attention to silence of accused at time of arrest. U.S.C.A.Const. Amend. 5.

Terry C. Aglietti, Edgar Paul Boyo & Associates, P. C., Anchorage, for appellant.

Glen C. Anderson, Asst. Dist. Atty., and Joseph D. Balfe, Dist. Atty., Anchorage, Avrum M. Gross, Atty. Gen., Juneau, for appellee.

OPINION

Before BOOCHEVER, C. J., and RARINOWITZ, CONNOR, ERWIN and BURKE, JJ.

BURKE, Justice.

In this case, Edward Stork appeals his manslaughter conviction. The indictment which issued on April 18, 1975 charged Stork with killing his common law wife, Ethel, "by shooting her with a handgun." On August 18, 1975, a jury found Stork guilty of manslaughter, as defined by AS 11.15.040.¹

The state presented to the jury the theory that Stork had killed his wife in the midst of a heated argument. In addition to evidence of an argument occurring immediately before the shooting, the state offered

proof that Stork and his wife had for some time been experiencing marital difficulties, that Stork had a proclivity towards violence and had broken his wife's nose a week prior to her death, and that he was intoxicated at the time that he shot Ethel Stork. A ballistics expert testified that the weapon used in the shooting was functioning normally and that it had been fired at a distance of approximately six inches from the victim. The state also adduced testimony that Stork had told three different exculpatory versions of the shooting to various neighbors and relatives. Stork, on the other hand, testified that the gun had accidentally discharged while he was removing its clip, causing his wife's death.

Stork has raised five issues on appeal. We turn first to his contention that the trial court erroneously instructed the jury on the elements required to convict him of manslaughter. The court gave two manslaughter instructions, one of which set out the substance of AS 11.15.080, which provides that manslaughter embraces a killing by culpable negligence.² In its instruction, however, the trial court omitted the term "culpable" and instructed the jury only that negligent performance of a lawful act can constitute manslaughter. The instruction of which appellant complains provided:

Manslaughter embraces a killing without malice and intent, in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily injury, or in doing negligently some lawful act, or in omitting to perform a legal duty. It is the unlawful killing of a human being without intent to kill or inflict the injury causing death, committed accidentally in the commission of some unlawful act not felonious, or in the improper or negligent performance of an act lawful in itself. (Jury instruction no. 7) (emphasis added)

1. AS 11.15.040 provides:

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

2. AS 11.15.080 provides:

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

[1] Stork's attorney failed to object to this instruction at trial, and normally this failure would preclude our consideration of the point on appeal. Alaska Criminal Rule 30(a);³ *Evans v. State*, 550 P.2d 830, 843 (Alaska 1976). Pursuant to Alaska Criminal Rule 47(b),⁴ however, this court may notice "plain errors" or "defects affecting substantial rights" which were not previously brought to the attention of the trial court, and the plain error rule in effect provides an exception to the provisions of Criminal Rule 30(a). *Dimmick v. State*, 449 P.2d 774, 776 (Alaska 1969). We noted in *Dimmick* that the plain error exception should be exercised only "where necessary to prevent a miscarriage of justice." In the case before us, such a necessity exists.

The state has advanced the argument that since it presented to the jury no evidence tending to support a theory of negligent manslaughter, the omission in the instruction was not prejudicial to appellant. It concedes that if it had submitted the case to the jury on a negligence theory, an instruction distinguishing culpable negligence from ordinary negligence would have been necessary.

The state overlooks the fact that in final argument the prosecutor did argue an alternative theory of negligence, saying:

So, if you found that he didn't intend to kill his wife or it wasn't in the heat of passion but that he carelessly and heedlessly handled a weapon or that he was in possession of a weapon, a 22, and did things when he was intoxicated, you will still find manslaughter. In other words this is an accident that shouldn't have happened and it happened maybe because he was intoxicated. But you will

have to review the evidence to decide what were the facts and what were the causes. But in Alaska the . . . you will be instructed that the . . . manslaughter is either voluntary or involuntary and there's no requirement either way.

[2] In addition, the state fails to discuss the fact that Stork's own testimony placed the question of negligence before the jury. Stork testified that the gun went off accidentally, while he was unloading it. Thus, even if the jury chose to believe Stork's testimony, it could have convicted him of manslaughter under the court's instruction that negligent performance of a lawful act constitutes manslaughter. However, under our manslaughter provision, proof of ordinary negligence, not amounting to a reckless and wanton disregard of the consequences to others, is not sufficient to support a conviction for manslaughter. A degree of conduct "more reckless and wanton than would be involved in ordinary negligence is required" to constitute culpable negligence. *DeSacia v. State*, 469 P.2d 369, 372 (Alaska 1970).

[3] Under these circumstances, the trial court's omission of the term "culpable" in its instruction on negligent manslaughter and its failure to give an instruction which delineated for the jury the difference between ordinary and culpable negligence substantially prejudiced the appellant and constitutes plain error. Since it is quite possible that these omissions contributed to the jury's verdict, reversal is required. *Love v. State*, 457 P.2d 622 (Alaska 1969). See also *Thomas v. State*, 522 P.2d 528 (Alaska 1974).

5. Alaska Criminal Rule 30(a) provides:

(a) *Requested Instructions—Objections.* At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which

he objects and the grounds of his objections. Opportunity shall be given to make the objection out of the hearing of the jury by excusing the jury or hearing objections in chambers.

4. Rule 47(b), Alaska Rules of Criminal Procedure provides:

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

The second issue raised by this appeal involves the trial court's failure to instruct the jury that the defendant's admissions should be viewed with caution, as mandated by Criminal Rule 30(b)(2). This case was tried before Criminal Rule 30(b) was amended in December, 1975, and at the time of trial it provided in pertinent part:

The court shall instruct the jury on all matters of law which it considers necessary for the jury's information in giving their verdict, and whether or not requested to do so, shall give the following basic instructions on all proper occasions:

* * * * *

(2) That the testimony of an accomplice ought to be viewed with distrust and the oral admissions of a party with caution.

[4] Although Stork's attorney neither requested that an instruction concerning his client's admissions be given nor objected to the court's failure to give such an instruction, we have on previous occasions held that the failure to give a mandatory instruction is an error which we must notice on appeal. *Kristich v. State*, 550 P.2d 796, 800-01 (Alaska 1975); *Anthony v. State*, 521 P.2d 486, 489-90 (Alaska 1974).

[5] We consider first the threshold question of whether Stork's differing exculpatory versions of the shooting constituted oral admissions. On various occasions, Stork related three different exculpatory versions of the cause of his wife's death. He told one neighbor that the gun fell and went off; he told another neighbor that the weapon discharged as he was cleaning it; and he told his wife's brother-in-law that he was unloading the gun when it fired accidentally. The state argues that these inconsistent statements did not constitute admissions since they were exculpatory in nature. If the state is correct, and there were no oral admissions in evidence, the trial court was not required to instruct under Criminal Rule 30(b)(2). See *Avery v. State*, 514 P.2d 637, 644 (1973).

5. McCormick does point out that while some authorities view exculpatory statements which tend to imply guilt as admissions against inter-

In his treatise on Evidence, McCormick distinguishes between confessions and admissions and points out that an admission need not be an acknowledgment of facts which directly establish the defendant's guilt. Statements which are intended to prove innocence but which, when proven untrue, imply guilt are admissions.

[An admission exists where] the mere making of the assertion (without regard to its truth) tends to prove guilt. For example, in a conspiracy trial evidence was introduced that one defendant had denied knowing the other defendants on a given date. This was an admission because the assertion, when considered with other proof which tended to show it was erroneous, indicated consciousness of guilt and therefore permitted an inference of actual guilt. McCormick, *Evidence*, 2d Ed., § 146, p. 310, citing *Williamson v. United States*, 310 F.2d 192, 199 (9th Cir. 1962).⁵

Stork's conflicting versions of the cause of his wife's death follow the same pattern as the example given by McCormick. They constituted admissions because when considered together and compared with Stork's testimony at trial, they could have been interpreted by the jury as an attempt to cover up the truth and as proof of Stork's consciousness of guilt.

[6] The issue for determination thus becomes whether the trial court's failure to give the mandatory instruction constituted reversible error. In three of our previous decisions we have discussed this issue in some detail, and our analysis in all three cases centered on the importance of the admission or the accomplice's testimony to the government's case and its impact on the jury's verdict. In *Bakken v. State*, 489 P.2d 120 (Alaska 1971), the defendant, charged with statutory rape, had allegedly made comments to his friend regarding the size of the prosecuting witness' vagina. We found that the friend's testimony "assumed

est others place exculpatory statements in a separate category. See *State v. Cobb*, 2 Ariz. App. 71, 406 P.2d 421, 423 (1965).

a crucial role in the conviction of Bakken,"⁶ and held that the trial court's failure to give the mandatory instruction was obviously prejudicial, "given the closeness of the case and the importance of Johansen's testimony concerning Bakken's purported admission. . . ." ⁷ In *Anthony v. State*, 521 P.2d 486 (Alaska 1974) we used a similar analysis. In that case, an accomplice's testimony was the only evidence placing Anthony at the scene of the crime and reliably demonstrating his motive or guilty knowledge. We held that "because the testimony alone was a substantial factor leading to Anthony's conviction, the conclusion that the failure properly to instruct under Criminal Rule 30(b)(2) constituted prejudicial error is inescapable."⁸ In *Kristich v. State*, 550 P.2d 796 (Alaska 1976), however, we found that the failure to instruct regarding an admission by the defendant was not prejudicial error. The defendant in that case told police that "the roll," house money in a gambling operation, was across the street. We held that in view of all the other evidence of maintenance of a gambling operation at the defendant's house, including early morning arrivals at the house, the sound of chips, gambling paraphernalia found on the premises, and money on a bar with people gathered around it, the admission did not appreciably affect the jury's verdict.

The facts of the case now before us fall somewhere between those in *Bakken* and *Anthony*, where the admission or accomplice's testimony essentially comprised the state's entire case, and those in *Kristich*, where other evidence of a gambling operation was plentiful. We conclude that the testimony of three witnesses regarding Stork's three conflicting versions of the shooting was a substantial factor leading to his conviction, especially since the prosecutor repeatedly emphasized this testimony in both his opening and closing arguments. Under the test for harmless error articulated in *Love v. State*, 457 P.2d 622, 632 (Alaska 1967), we cannot fairly say that the trial

court's omission of the mandatory instruction "did not appreciably affect the jury's verdict." The trial court's failure to give the Rule 30(b)(2) instruction constituted prejudicial error.

Because additional issues raised in this appeal may come up again during retrial of the case, we consider two points which would not otherwise be dispositive.

[7] First, Stork contends that the prosecutor's questions regarding whether Stork had paid Ethel Stork's hospital bills or had supported their children after Ethel's death were improper. The trial court disallowed the question concerning payment of the hospital bills, but permitted the question regarding payment of child support. Although the state argues that these questions constituted proper cross-examination and were designed only to impeach Stork's testimony that he had a close and caring relationship with his family, we find their probative value to be outweighed by their prejudicial effect. See generally *Poulin v. Zartman*, 542 P.2d 251, 260 (Alaska 1975).

[3] Second, the appellant argues that repeated questioning regarding his failure to give a statement to the police was prejudicial error. Although Stork's attorney may have waived his client's fifth amendment rights by failing to object to this line of questioning, we need not reach the issue of plain error, due to our resolution of the other issues in this case. We do note, however, that due process is violated when the prosecution calls attention to the silence of the accused at the time of arrest. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 10 L.Ed.2d 694 (1966). Justice White confronted this issue in his concurring opinion in *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975).

When a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it

6. 489 P.2d at 123

7. 489 P.2d at 125.

8. 521 P.2d at 492.

seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. 422 U.S. at 182-83, 95 S.Ct. at 2139.

We need not treat the sentencing issue which appellant has raised in this case.

REVERSED and REMANDED.

ERWIN, Justice, dissenting.

I dissent. I do not think this case is an appropriate one¹ in which to exercise the doctrine of plain error and to waive the requirement of Criminal Rule 30(a) requiring the appellant to object to the instruction in the trial court before his claim of error is considered on appeal.



INTERIOR CREDIT BUREAU,
INC., Appellant,

v.

Vernon BUSSING a/k/a Vern C.
Bussing, Appellee.

No. 2822.

Supreme Court of Alaska.

Jan. 31, 1977.

Assignee of creditor brought suit against debtor. The Superior Court, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, J., granted the debtor's motion to confirm a settlement agreement and assignee of creditor appealed. The Supreme Court, Boochever, C. J., held that where there was no dispute as to the material terms of an oral settlement stipulation,

the stipulation was enforceable where both parties admitted either in a writing filed with the clerk or orally in open court that the settlement had been reached.

Affirmed.

1. Appeal and Error ⇌ 761

Argument not in points on appeal and not raised in trial court would not be considered by Supreme Court.

2. Stipulations ⇌ 6, 7, 9

Purpose of rule providing that stipulations between parties or their attorneys will be recognized only when made in open court, or when made in writing and filed with clerk, is to avoid expending court resources to resolve arguments as to existence and terms of oral settlement agreements. Rules of Civil Procedure, rule 81(e).

3. Compromise and Settlement ⇌ 2 Stipulations ⇌ 1

Stipulations and settlements are favored in law because they simplify, shorten and settle litigation without taking of valuable court resources. Rules of Civil Procedure, rule 81(e).

4. Stipulations ⇌ 7

Where there was no dispute as to material terms of oral settlement stipulation, stipulation was enforceable where both parties admitted either in writing filed with clerk or orally in open court that settlement had been reached. Rules of Civil Procedure, rule 81(e).

Peter J. Aschenbrenner, Fairbanks, for appellant.

Thomas P. Blanton, Fairbanks, for appellee.

OPINION

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR and BURKE, JJ.

BOOCHEVER, Chief Justice.

In this appeal, Interior Credit Bureau (ICB) challenges the enforceability of an

1. See Erwin, J., dissenting, *Bakken v. State*, 489 P.2d 120, 127 (Alaska 1971).

Pat Malone

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

1031 W 4th AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

March 10, 1988

1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701
PHONE: (907) 452-1668

Representative Sam Cotten
Representative Adelheid Herrmann
Co-Chairmen, House Resources Committee
P. O. Box V
Juneau, AK 99811

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

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

Representative Sam Cotten
Representative Adelheid Herrmann

March 10, 1988
Page 2

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

Representative Sam Cotten
Representative Adelheid Herrmann

March 10, 1988
Page 3

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 specifying 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

Representative Sam Cotten
Representative Adelheid Herrmann

March 10, 1988
Page 4

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 definition 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

Representative Sam Cotten
Representative Adelheid Herrmann

March 10, 1988
Page 5

finer 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.

Representative Sam Cotten
Representative Adelheid Herrmann

March 10, 1988
Page 6

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.

COMPARISON - existing law v. CSHB 364 (Judiciary)		
	Violation	Misdemeanor
standard	now: strict liability HB364: same	negligence same
jury	now: no HB364: same	yes same
public defender	now: no HB364: same	yes same
jail	now: no HB364: same	up to one year same
fines (maximum)	now: \$ 300 HB364: \$ 3,000 1st offense \$ 6,000 2nd or subsequent offense	\$ 5,000 \$ 15,000 * larger potential fine in "big 4" cases and/or for 3-time offenders
forfeiture and suspension	<p>now: AS.16.05.190 calls for discretionary forfeiture of gear, mandatory forfeiture of fish in violation or misdemeanor cases. AS 16.05.195 calls for discretionary forfeiture in misdemeanor cases.</p> <p>AS 16.05.710(a) allows for forfeiture & suspension of "licenses", it's unclear as to whether this means crewmember licenses OR limited entry permits, also unclear as to whether a CRIMINAL conviction is required for forfeiture of these licenses. (this subsection was written in 1960, long before limited entry permits existed)</p>	
	HB 364: FISH: Upon conviction, fish are forfeited in either strict liability or misdemeanor cases. However, bill establishes rebuttable presumption that fish were taken illegally. If defendant can prove some or all of the fish were not taken illegally, they can get them (or their fair market value) back. The defendant must prove this by a preponderance of the evidence.	
	EQUIPMENT: vessel or gear CANNOT be forfeited	Vessel or gear MAY be forfeited by court
	LICENSE OR PERMIT: CANNOT be suspended.	License and/or permit MAY be suspended for up to 1 year for a first or second misdemeanor conviction, SHALL be suspended for up to 3 years for a third or subsequent conviction. Cannot be transferred or sold while suspended.

The reason for HB 364 is this: recent court of appeals decisions have seriously reduced the deterrant effect of penalties for commercial fishing offenses. The pertinent court cases are:

Reynolds v. State (1982)
Beran v. State (1985)
Constantine v. State (1987)

In Reynolds v. State, the court refused to hold a commercial fisherman "strictly liable" for his conduct, requiring the state to prove at least a culpable mental state of negligence to establish a criminal offense. The court did suggest, indirectly, that the legislature could enact a "strict liability" violation category if it wished.

Subsequently, the Board of Fish adopted regulations establishing strict liability as an applicable mental state for commercial fishing violations.

In Beran v. State, the court affirmed that the legislature had authorized the Board to make the breach of commercial fishing regulations a "violation", but that this strict liability offense could not lead to "criminal penalties". In this particular case, "criminal penalties" was defined as a jail sentence. The court indicated it would uphold the fine of \$2500.

In Constantine v. State, because they lacked other legislative definition, the court concluded that a "violation" in a commercial fishing case would also fall under the definition of "violation" for criminal procedure, and applied AS 12.55.035(b)(5), which limits fines to \$300. If the state wished to impose a larger fine, it would have to prove negligence mens rea, and prosecute the case as a criminal offense, rather than relying on the strict liability.

Through all these cases, the court did not address, or else they upheld, forfeiture of the fish taken as a result of the offense.

CS HB 364 (Judiciary) accomplishes the following:

Bill Sec 1.

Revised AS 16.05.170 (a): Clarifies that the court may suspend a commercial fishing license and/or limited entry permit for a criminal conviction (not a strict liability conviction).

Bill Sec. 2.

Revised AS 16.05.710: Clarifies that while a permit is suspended, a

card may not be issued and the permit may not be transferred or sold, also clarifies the definition of licenses and permits.

Bill Sec. 3.

New AS 16.05.722: Establishes strict liability offenses as violations, and sets penalties. Clarifies existing law that upon conviction, forfeiture of illegally taken fish (or their fair market value) is mandatory.

Note: it is a "rebuttable presumption" that the fish on board or at the site were taken illegally. If the defendant can prove the contrary by a preponderance of the evidence, they can reclaim all or part of the fish (or their fair market value).

Also, it makes it clear that for a strict liability offense, the defendant is not allowed a jury trial or public defender (the same as a "violation" under criminal code).

New AS 16.05.722: Raises the maximum fine for a criminal commercial fishing conviction from \$5,000 (established in 1924) to \$15,000, more accurately reflecting the current value of commercial fishing offenses. Also states that forfeiture of fish is mandatory upon conviction, and allows for the same "rebuttable presumption" as in strict liability offenses. As in existing law, forfeiture of gear or vessels is up to the discretion of the court.

If the conviction is for one of the following (referred to as the "big four"), the court MAY impose an additional fine equal to the gross value of the fish:

1. Commercial fishing in closed waters,
2. Commercial fishing during a closed period or season,
3. Commercial fishing with illegal gear,
4. Commercial fishing without a limited entry permit or the permit holder present, if required by law or regulation.

Additionally, if it is the defendant's THIRD criminal conviction of one of the "big four" listed above, the court SHALL impose a fine equal to three times the gross value of the fish, or \$10,000, whichever is greater.

Bill Sec.'s 4 and 5 make the proper technical amendments to existing statutes.

Bill Sec. 6 is the effective date clause.

PRESENT LAW

AS 16.05.720:

All violations of AS 16.05.480-16.05.690 are **misdemeanors** punishable by:

- a) fine up to \$5000
- b) up to 1 year in prison

Additional penalties:

AS 16.05.710:
forfeiture of commercial fishing license for up to one year (1st & 2nd conviction);
up to three years (3rd conviction)

AS 16.05.190:
equipment used in violation of F & G statutes and regulations **may be seized and may be forfeited** after conviction in a criminal case under AS 16.05.195 (a)(1) or in a civil proceeding under AS 16.05.195(a)(2).

HB 364

AS 16.05.720 is repealed.

New sec. 16.05.723, provides that one who **negligently** violates 16.05.44-16.05.690 is guilty of a **misdemeanor** and is punishable by:

- a) a fine up to \$15,000
- b) up to 1 year in prison

Additional penalties:

AS 16.05.710:
amended to include possible forfeiture of limited entry permits and interim use permits. Only **misdemeanor** convictions subject offender to possible forfeiture of licenses & permits.

AS 16.05.190: no change.
(Note: this section makes reference to forfeiture upon conviction for a violation of F & G statutes and regulations. This presumably means that the forfeiture applies regardless

CSHB 364

AS 16.05.720 is repealed.

Same as HB 364

Same as HB 364

Same as HB 364

Additional penalties:

Same as HB 364, except 3-year license suspension/forfeiture kicks in at second conviction.

Same as HB 364

Under AS 16.05.190, fish may be seized under a valid search. Upon conviction, the fish are forfeited, according to the statute.

Under AS 16.05.195, fish taken, transported or possessed in violation of Title 16 or F & G regulations may be forfeited after conviction in a criminal case or in a civil proceeding.

If convicted of one of the "BIG 4" violations, in addition to all other penalties, the violator is punishable by a fine of not less than the gross value to the fisherman of the fish found on the vessel or at the fishing site at the time of the violation. If it's a 3rd conviction, in addition to the possible license forfeiture under AS 16.05.710, the fine is not less than three times the gross value of the fish or \$10,000., whichever is greater.

of the offender's mental state.)

AS 16.05.195: no change. (Note: 16.05.723 itself requires the court to forfeit any fish taken in connection with the violation (or its fair market value). There is a rebuttable presumption that fish found on board or at the site were taken in violation of the law. The Court may not use both .195 and .723 to make a double forfeiture

If convicted of one of the "Big 4" offenses prosecuted as a misdemeanor, the additional fine for gross value of the fish remains as in existing law.

AS 16.05.195 not amended, but 16.05.723 gives Court discretion to forfeit fish.

Same as HB 364, except that "gross value" fines are discretionary with the Court.

The Court of Appeals has ruled that, absent authorization from the Legislature, the penalties for any offenses prosecuted under a strict liability theory may not include imprisonment, and that fines may not exceed \$300.

New section 16.05.722 provides that that a person who offends with no culpable mental state is guilty of a violation and is punishable by:

- a) a fine of up to \$6,000
- b) mandatory forfeiture of fish taken in connection with the violation.

There is no jury trial and no public representation.

Same as HB 364, except Court may impose the following:

- a) \$3,000 fine for 1st conviction
\$6,000 fine for 2nd and subsequent convictions.
- b) additional fine of 50% of value of fish on board or at site at time of violation. (1st conviction)
additional fine of full value of fish (2nd and subsequent convictions)

MEMORANDUM

State of Alaska

DEPARTMENT OF LAW/CRIMINAL DIVISION

TO: RONALD W. LORENSEN
Deputy Attorney General
Juneau

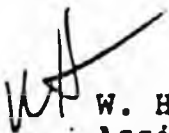
DATE: August 18, 1987

COMMISSIONER'S OFFICE
RECEIVED
TELEPHONE NO.
AUG 24 1987
SUBJECT:

THRU:

Application of
Strict Liability
to Fish and Game
Offenses

DEPARTMENT OF FISH AND GAME

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

Ron Lorensen

August 18, 1987
Page 2

"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 net 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 net for salmon at the right time and place can result in the catch of \$15,000.00 worth of fish. Thus, larger fines, as well as imprisonment, and forfeitures of fishing vessels should be available as penalties for these more serious violations.

Finally, if the foregoing legislation is offered, the other penalty provisions in Title 16 should be reviewed and possibly harmonized.

cc: Liza McCracken
Charles Merriner
Larri I. Spengler
Don W. Collinsworth ✓
Capt. Jack Jordan

WHH/jgm

MEMORANDUM

State of Alaska

Department of Law

TO: Honorable Don Collinsworth
Commissioner
Dept. of Fish & Game

THRU:

FROM: Larri Irene Spengler
Assistant Attorney General
Natural Resources Section-Juneau

DATE: July 14, 1987

FILE NO.:

TELEPHONE NO.:

465-3600

SUBJECT:

Constantine v.
State (maximum fine
strict liability
violations \$300)

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

Hon. Don Collinsworth
Dept. of Fish and Game

July 14, 1987
page 2

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



APR 5 1988

Alaska Court System
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR

303 K Street
Anchorage, Alaska 99501

March 29, 1988

Representative John Sund
Chair
House Judicial Committee
Box V
Juneau, Alaska 99811

Re: Fish and Game Bail Forfeiture Schedule

Dear Representative Sund:

The Supreme Court has adopted the changes in the Fish and Game Bail Forfeiture Schedule which were recently recommended to it. Attached is a copy of Supreme Court Order No. 892 which amends Administrative Rule 43.2 effective April 1. I have marked on it the new offenses being added by this amendment.

Thank you for your assistance with the revision of the schedule.

Sincerely,

Susan Miller
Office of Special Projects
Tel: 264-8229

Attachment

SM:gah

IN THE SUPREME COURT FOR THE STATE OF ALASKA
ORDER NO. 892

Revision of Administra-
tive Rule 43.2, Fish and
Game Bail Forfeiture
Schedule to add five
offenses.

IT IS ORDERED:

Administrative Rule 43.2 is revised as follows:

Administrative Rule 43.2. Fish and Game Bail Forfeiture
Schedule.

Pursuant to AS 16.05.165(b), the following fish and game offenses are appropriate for disposition without court appearance upon payment and forfeiture of the bail amounts listed. If a person charged with one of these offenses appears in court and is found guilty, the penalty imposed for the offense may not exceed the bail amount for that offense listed below. An offense for which a bail forfeiture amount has been established shall be charged on a citation which meets the requirements of District Court Criminal Rule 8(c) and shall not be filed, numbered or processed as a criminal case.

<u>Statute or Regulation</u>	<u>Description of Offense</u>	<u>Bail</u>
AS 16.05.330(a)	Sport fishing without license in possession	\$ 75
AS 16.05.330(a)	Hunting without license in possession	100
AS 16.05.340(a)(17)(A)	Taking waterfowl without state duck stamp	75
AS 16.05.480(a)	Crewmember Fishing License Required	150
AS 16.05.490(a)	Vessel License Required	200
AS 16.05.520(e)	Vessel Number Plate	75
AS 16.05.680(1)	Employ Unlicensed Crew	150
5 AAC 39.119	Vessel Identification	100

These
are the
five
offenses
being
added.

5 AAC 56.015(b)	Failure to record king salmon or rainbow/steelhead trout landing (freshwaters of the Kenai penninsula)	100
5 AAC 58.015(b)	Failure to record king salmon or rainbow/steelhead trout landing (Cook Inlet-Resurrection Bay saltwater area)	100
5 AAC 61.015(b)	Failure to record king salmon landing (freshwaters of the Susitna-West Cook Inlet area)	100
5 AAC 75.020	Sport fishing with more than one line	100
5 AAC 75.022(a)(1)	Using fixed or weighted hook - freshwater	100
5 AAC 75.022(a)(2)	Multiple hook with gap larger than $\frac{1}{2}$ " - freshwater	50
5 AAC 75.022(a)(4)	Unauthorized use of spear - sport fishing	100
5 AAC 75.022(a)(5)	Unauthorized use of arrow - sport fishing	100
5 AAC 75.022(c)	Attempt to snag - freshwater	100
5 AAC 75.022(c)	Fail to release - freshwater	100
5 AAC 92.010	Harvest ticket not in possession; fail to validate	100
5 AAC 92.012(a)	Taking waterfowl without federal duck stamp	75
5 AAC 92.012(a)	Unsigned federal duck stamp	25
5 AAC 92.018	Unsigned state duck stamp	25
5 AAC 92.020	Fail to submit required report	75

SUPREME COURT ORDER NO. 892
EFFECTIVE DATE: April 1, 1988
PAGE THREE

5 AAC 92.052(14)	Failure to submit registration permit hunt report	50
5 AAC 92.075(e)(1)	Taking migratory birds with shotgun capable of holding more than 3 shells	50
5 AAC 92.100(a)(1), (2) & (3)	Taking migratory birds by illegal methods	100
5 AAC 92.100(b)	Transportation of migratory bird without fully feathered wing or head attached	50
5 AAC 92.100(c)	Taking migratory birds before or after legal shooting hours	\$50 plus \$2/minute
5 AAC 92.150(a)	Possess mountain sheep without both horns	100
5 AAC 92.150(b)	No evidence of sex attached	100
5 AAC 92.165	Fail to seal bear or possess unsealed bear skin or skull	100
5 AAC 92.170	Fail to seal wolf, wolverine, lynx	100
5 AAC 92.200(d)	Fail to submit required report	75
5 AAC 92.230	Feeding game	50
5 AAC 92.410(b)	Fail to submit required report	75

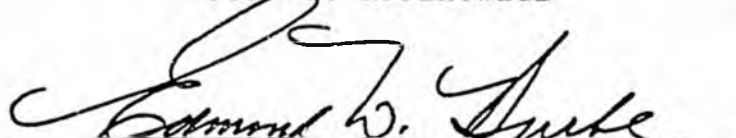
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EFFECTIVE DATE: April 1, 1988

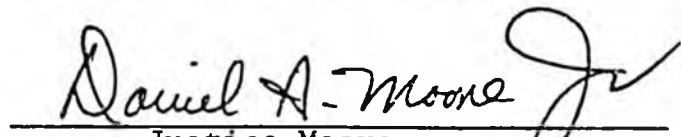
SUPREME COURT ORDER NO. 892
EFFECTIVE DATE: April 1, 1988
PAGE FOUR


Chief Justice Matthews

Justice Rabinowitz


Justice Burke


Justice Compton


Justice Moore

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

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SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550

DEPARTMENT OF PUBLIC SAFETY
COMMISSIONER'S OFFICE
Juneau, Alaska

1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701-4679

APR 25 1988

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

April 22, 1988

Hon. John Sund, Chairman
House Judiciary Committee

Hon. Fran Ulmer, Vice-Chairman,
House Judiciary Committee

Members, House Judiciary Committee

Re: HCS HB 364 (Commercial Fisheries)

Dear Representatives:

This letter addresses concerns our department has with certain aspects of the House Resources Committee substitute for HB 364, relating to commercial fishing violations. We would like your committee to be aware of potential effects of some of these amendments.

Our first and foremost concern is with the HCS amendments to Section 3 of the bill regarding forfeiture of fish on board or at the site of the violation (page 2, line 15 of the 4/20/88 work draft). The HRC substitute provides that upon a first conviction for a strict liability violation the court "may" (not "shall") impose a fine equal to 50 percent of the value of the fish found on board the vessel or at the site. This language departs from that in HB 364, which provides that upon conviction

the court "shall" forfeit the fish on board or at the site and creates a presumption, rebuttable by the violator, that all fish on board were taken illegally. The problem with the CS language is two-fold, and relates to the fact that the fine is not tied to illegally taken fish: (1) it could allow a violator to keep illegally taken fish, and (2) it might result in a fine so high as to be "criminal in nature" and hence invalid as a penalty for a non-criminal violation, as explained below.

Under existing law, AS 16.05.190, upon conviction of a fish or game violation, all illegally taken fish "are forfeited to the state." This is universally understood to mean that all illegally taken fish must be forfeited by the court. This result stems from the fact that fish (and game) are public trust resources that belong to all the citizens of the state; they may only be reduced to private possession if lawfully taken. (See, Alaska Const. art. VIII, sec. 3 and AS 16.06.920(a)). Fish unlawfully taken do not rightfully belong to the offender.

What the HB 364 language did was address the problem inherent in requiring the state to prove which fish on board were the illegally taken ones. The creation of the rebuttable presumption that all fish on board or at the site were illegally taken placed the burden of showing which fish were not illegally taken on the person most likely to have the information -- the fisherman. The HB 364 provision was modeled after the federal Magnuson Fishery Conservation and Management Act.

The CS language does not address forfeiting fish at all, but allows a discretionary fine of up to 50 percent of the "value" (rather than "fair market value") of all fish on board or at the site -- regardless of whether they were illegally taken. Under this provision, if the entire catch were taken, for example, in closed waters, the court could only impose, in addition to the \$3,000.00 maximum fine for a first offender, a fine of up to one-half of the value of the catch -- leaving the fisherman with half a boat load of illegally taken fish.

In Constantine v. State, 739 P.2d 188 (Alaska App. 1987), the court acknowledged the validity of forfeiting illegally taken fish in the context of a strict liability violation. What that case and its predecessors held, however, was that it would violate constitutional principles of due

process to impose, in a non-criminal violation case, a fine so high as to be "criminal in nature" as viewed by community standards. The HCS language would allow a court to impose, in addition to the maximum strict liability fine of \$3,000.00 (first offense) or \$6,000.00 (subsequent offense)(which maximum amount was selected in HB 364 as being non-criminal in nature), an additional fine, not tied to a showing of illegally taken fish, that could well exceed the maximum fine for the violation. For example, a crab vessel could have a catch of \$100,000.00 worth of crab on board. If the skipper were convicted of a violation of having sub-legal sized crab on board, a court could, under the CS language, fine the skipper \$50,000.00 without this necessarily representing the illegally taken crab. We strongly urge this committee to replace the original HB 364 language regarding forfeiting fish or their fair market value, or at the very least, substituting language reflecting current law -- mandatory forfeiture of illegally taken fish.

A second concern we have with the CS is the deletion of the provision that in a non-criminal violation the violator is entitled to a court trial only -- not a jury trial -- and is not entitled to defense at public expense. The implication from the HRC's deletion of this language may be that a fisherman would be entitled to a jury trial at public expense for a non-criminal violation. This would depart from provisions for all violations in Title 11 (criminal code -- see AS 11.81.900(56)) and would be both unworkable and expensive.

A third problem with the CS language is deletion of the definition of negligence. The implication from deletion may be that the committee intends to require the state to prove criminal negligence as defined in Title 11 -- a "gross deviation" from the standard of care. Such a result would deviate from the standard of negligence trial courts presently require and from the standard the Alaska Supreme Court articulated in State v. Rice, 626 P.2d 104, 110 (Alaska 1981). Representatives of our office have previously testified on HB 364 explaining that the definition of negligence reflects the standard of negligence currently required by trial judges, and explaining the great difficulty of proving a "gross deviation" as defined in AS 11.81.900(4). We urge this committee to reinsert the definition of negligence in HB 364, or at least clarify that the deletion of

the definition is not intended to mean the Title 11 definition applies.

Although the three above-noted problems with the CS are our greatest concerns, there are some additional changes with which we have difficulty.

First, the CS changes the 364 provisions regarding forfeiture or suspension of commercial fisheries licenses and limited entry permits in a manner that is more restrictive than current law. Work draft, page 1, lines 16 -- 27. The HB 364 language was intended merely to clarify some confusing language in existing AS 16.05.710(a) and address the functional or procedural differences between commercial fishing licenses and limited entry permits.

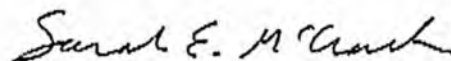
The current AS 16.05.710, as interpreted by our department, allows for suspension of a fisherman's commercial fishing license and limited entry permit (because a limited entry permit is a commercial fishing license -- see AS 16.05.480). The CS language is rather confusing, but appears to give the court, in a misdemeanor case, the authority to either forfeit a commercial fishing license and the right to apply for a limited entry permit or to suspend a permit but not to prohibit the person from applying for or buying another one. We recommend that your committee reinsert the more clear language in original HB 364.

Finally, we note that the CS is less strict than existing law regarding imposing a fine equal to the value of fish on board for certain violations (page 3, line 15 and page 4, line 3).

Thank you for the opportunity to comment on this bill. We consider the need to address commercial fishing penalty provisions a very high priority in order to help protect our important public trust resources. We believe it is essential for certain modifications to be made in the CS language in order to

have a workable final bill. If we can be of any further assistance to your committee, please let us know.

Sincerely yours,
GRACE BERG SCHAIBLE
ATTORNEY GENERAL



By: Sarah E. McCracken
Assistant Attorney General

SEM/rlr
SEM1
a:sund,sem

9

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REPORT

(9)

Date referred: 1

REFERRALS: Judiciary

DATE: 4-20-88

The Resources Committee has considered HB 364

"An Act relating to commercial fishing violations; and providing for an effective date."

RECOMMENDS:

- replace with CS HB 364 (Res) the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note
- zero with analysis same as previous zero fiscal note^s published _____

SIGNING DO PASS:

Adelheid Herrmann
John R. ...
Mike ...
Kevin ...
Dick ...
Chip ...
Jan R ...

SIGNING OTHER RECOMMENDATIONS:

Lynn Hoff

Adelheid Herrmann
 Chairman's signature

John L. GRAYBILL, Appellant,
v.
STATE of Alaska, Appellee.
No. 2386.

Supreme Court of Alaska.
Jan. 23, 1976.

Defendant was convicted in the Superior Court, Third Judicial District, Anchorage, C. J. Occhipinti, J., of possession and attempted transportation of bear hide by airplane, and he appealed. The Supreme Court, Connor, J., held that superior court had authority to order forfeiture of aircraft used in violation of game laws.

Affirmed.

1. Forfeitures ⇨ 1

Forfeiture is civil remedy unless otherwise provided by statute. AS 16.05.190, 16.05.195(a).

2. Forfeitures ⇨ 3

Superior Court had authority in prosecution of defendant for attempted transportation of bear hide by airplane to order forfeiture of aircraft. AS 16.05.190, 16.05.900, 16.05.920.

LeRoy J. Barker, Robertson, Monagle, Eastaugh & Bradley, Anchorage, for appellant.

1. The airplane was referred to in the complaint as a "Piper Aircraft No. N3373B."

2. AS 16.05.920 provides in part:

"(a) Unless permitted by this chapter or by regulation made under this chapter, it is unlawful for a person to take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game or marine aquatic plants, or any part of fish, game or aquatic plants, or a nest or egg of fish or game."

3. This was the sentence imposed by the trial judge in open court. We note, however, that both the judgment and order of probation of 24 August 1972 and the amended judgment and order of probation of 14 February 1973 reflect conviction on only the possession count, and impose revocation of the hunting license and forfeiture of the aircraft as special conditions of probation. The record shows that

Avrum M. Gross, Atty. Gen., Juneau, Joseph D. Balfé, Dist. Atty., Stephen G. Dunning, Asst. Dist. Atty., Anchorage, for appellee.

Before BOOCHEVER, Chief Justice, and RABINOWITZ, CONNOR, ERWIN and BURKE, Justices.

OPINION

CONNOR, Justice.

This appeal questions the procedure by which an aircraft was ordered forfeited because it was used in violation of the game laws.

Appellant Graybill was charged on two counts: (I) possession and (II) attempted transportation of a bear hide by airplane¹ when not permitted to do so by applicable regulations, in violation of AS 16.05.920.² After a jury trial, Graybill was convicted on both counts. On Count I (possession) he was given a six-month suspended sentence. On Count II (attempted transportation) he was sentenced to a one-year revocation of his hunting license and forfeiture of his aircraft.³

Following his conviction, Graybill appealed to this court, urging that the superior court lacked the authority in a criminal proceeding to order a forfeiture of the aircraft.⁴ We dismissed the appeal as

the jury returned a guilty verdict as to both counts, and Graybill does not dispute conviction for both possession and attempted transportation. The trial judge carefully considered the form by which he imposed sentence in court. We must remand the case to allow entry of judgment, pursuant to Alaska R. Crim.P. 36 concerning clerical mistakes, in accordance with the sentence actually imposed in open court. Therefore, we do not reach the issue of whether forfeiture of an aircraft could validly be imposed as a special condition of probation.

4. In superior court Graybill challenged the modification of his probation order to include specifications as to which aircraft was to be forfeited. His argument there was that AS 16.05.900 provides for penalties of up to \$1,000 fine and six months imprisonment, but

SUPERIOR COURT LIBRARY

untimely,⁵ and suggested that Graybill proceed under Alaska R.Crim.P. 35(b) for post-conviction relief. He did so, but the state prevailed in superior court by way of summary disposition pursuant to Alaska R.Crim.P. 35(g)(3). From that summary disposition Graybill brings this second appeal.

Graybill's appeal rests upon his reading of the forfeiture section of AS 16.05.190, which in relevant part states:

"[A]ircraft . . . seized under the provisions of this chapter . . . , unless forfeited by order of the court, shall be returned"

While he does not deny that aircraft can be forfeited under the statute, Graybill contends that the proviso "unless forfeited by court order" refers to an order rendered pursuant to a civil proceeding in rem against the aircraft, and does not include sentences imposed upon offenders as part of criminal proceedings.

Graybill relies on *United States v. Polastrine*, 8 Alaska.Rpts. 104 (D.Ak.1929),

that section does not provide for forfeiture of the aircraft. Forfeiture is provided for in AS 16.05.190, which provides:

"Guns, traps, nets, fishing tackle, boats, aircraft, automobiles or other vehicles, sleds, and other paraphernalia used in or in aid of a violation of this chapter, or rule or regulation of the department may be seized under a valid search, and all fish and game, or parts of fish and game, or nests or eggs of birds, taken, transported, or possessed contrary to the provisions of this chapter, or rule or regulation of the department shall be seized by any person designated in § 150 of this chapter. Upon conviction of the offender or upon judgment of the court having jurisdiction that the item was taken, transported, or possessed in violation of this chapter or rule or regulation of the department, all fish and game, or parts of them are forfeited to the state and shall be disposed of as directed by the court. . . . Guns, traps, nets, fishing tackle, boats, aircraft, or other vehicles, sleds, and other paraphernalia seized under the provisions of this chapter, or rule or regulation of the department, unless forfeited by order of the court, shall be returned, after completion of the case and payment of the fine, if any."

5. *Graybill v. State*, 522 P.2d 530 (Alaska 1974).

which interpreted the territorial predecessor to AS 16.05.190.⁶ The court there said:

". . . [N]o criminal court has the jurisdiction upon conviction of an offender for violation of the act to enter a decree of forfeiture, where a forfeiture is not prescribed as part of the penalty, but such procedure can be had legally only after a full hearing upon motion and opportunity to defend." 8 Alaska at 109.

Since the penalty provision, AS 16.05.900,⁷ applicable to the statute under which he was convicted, AS 16.05.920(a),⁸ does not mention forfeiture as part of the prescribed penalty, Graybill argues that the state must file a separate action in rem. See *United States v. \$3,236*, 167 F.Supp. 495, 498 (D.Alaska 1958) (*dictum*).⁹

[1,2] Under the territorial statute, the United States Attorney was required to institute an in rem action for forfeiture of seized property.¹⁰ In 1959 the Alaska legislature enacted a statute substantially sim-

6. 48 U.S.C. § 192 *et seq.*

7. AS 16.05.900(a) provided in part:

"A person who violates §§ 830, 870-895, or 920 of this chapter or any rule or regulation promulgated under this chapter is guilty of a misdemeanor and, upon conviction, is punishable by a fine of not more than \$1,000 or by imprisonment for not more than six months, or by both"

8. See note 2, *supra*.

9. Graybill also relies on *Rubino v. State*, 301 P.2d 946 (Alaska 1964). That case is not helpful here, for there forfeiture was disallowed because the state had failed to seize Rubino's nets at the time of his arrest. Here Graybill's airplane was seized when he was arrested.

10. 48 U.S.C. § 201 provides in part:

"It shall be the duty of the United States attorney for the division . . . in which any . . . aircraft . . . has been seized because used in the transportation of any wild animal, game fish, wild bird, or part thereof, or any nest or egg of such bird, illegally bought, sold, or possessed contrary to the provisions of [this title], to institute an action in rem against it for the forfeiture thereof to the United States in any case in which the disposition of such article is not involved in a criminal prosecution."

ilar to the law applied to Graybill.¹¹ The territorial law providing for forfeiture exclusively by mandatory in rem action was specifically repealed.¹² Thus Graybill's reliance on Alaska territorial cases is misplaced. While we agree that forfeiture is a civil remedy unless otherwise provided by statute, we believe that AS 16.05.190 as it applied to Graybill did so provide.

AS 16.05.190¹³ distinguishes between mandatory forfeiture of contraband (fish, game, birds) upon conviction, and discretionary forfeiture of paraphernalia (guns, traps, aircraft, etc.). Such paraphernalia "unless forfeited by order of the court, shall be returned, after completion of the case and payment of the fine, if any." Since the "case" and "fine" referred to in this section concern criminal proceedings, we find it reasonable to interpret an "order of the court" as likewise referring to orders rendered subsequent to a criminal conviction, as well as those following a separate civil action. The distinction which the legislature sought to draw between contraband and paraphernalia is between mandatory and discretionary forfeiture, not between requiring criminal or civ-

il forfeiture proceedings as Graybill contends.¹⁴

It is commonly understood that forfeitures, even when civil in form, are basically criminal in nature.¹⁵ At least one other state has held that a statute providing for forfeitures authorized either criminal or civil proceedings.¹⁶ No case from any other jurisdiction has been cited to us which requires a separate in rem proceeding to effect a valid forfeiture, absent a specific statutory provision similar to that provided under Alaska territorial law.¹⁷ Furthermore, we do not understand how such a separate civil proceeding, if judicially implied, could benefit Graybill.¹⁸ Any arguments available to him to prevent forfeiture could have been presented in the context of his criminal trial and sentencing.¹⁹ Thus we find that it was not necessary for the state to institute a separate civil in rem proceeding against Graybill's aircraft. The order of the trial judge is affirmed and the case remanded for entry of judgment in accordance with the sentence imposed.²⁰

Affirmed.

Act No. 78 of 1946), a construction not present in the Alaska statute. The court stated in dictum that the language "may be forfeited by order of the court" referred to an order following a criminal proceeding under the Louisiana statute, 36 So.2d at 2-3. That statute has since been codified into two sections, 56 La.Rev.Stat. §§ 507, 508.

11. Ch. 94 SLA 1959 § 23.

12. Ch. 94 SLA 1959 Art. IV, § 1; see Annot., ACLA 1949 630-10-1 (Cum.Supp.1958, Supp. 1959); ACLA 639-6-16.

13. Quoted note 4, *supra*.

14. Since Graybill's conviction, the legislature has clarified the statute with the enactment of the present AS 16.05.195(a), which explicitly provides for forfeiture alternatively through civil or criminal proceedings.

15. *Boyd v. United States*, 116 U.S. 616, 634, 6 S.Ct. 524, 29 L.Ed. 746 (1886); *Compton v. United States*, 377 F.2d 408, 411 (8th Cir. 1967). Their purpose is to penalize commission of offenses. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965); *United States v. One 1960 Ford Four-Door Galarie Sedan*, 202 F.Supp. 841, 843 (E.D.Tenn.1962), and to deter future infractions. *People v. Reulman*, 62 Cal.2d 92, 41 Cal.Rptr. 290, 293 (1964).

16. *Department of Wildlife & Fisheries v. The Trawler Baltimore*, 213 La. 956, 36 So.2d 1 (1948), holding forfeiture of a fishing trawler in a civil proceeding proper, despite the fact that it was not preceded by a criminal trial. The court relied on the separate sections of La.Act No. 143 of 1942 § 17 (ns amended by

17. Appellant cites *People ex rel. Hanrahan v. One 1965 Oldsmobile*, 52 Ill.2d 37, 284 N.E.2d 646 (1972); *State v. Kaufman*, 201 N.W.2d 722 (Iowa 1972) (see Iowa Code Ann. § 751.16.3); *Commonwealth v. One 1970 2 Dr. II. T. Lincoln Automobile*, 212 Va. 597, 186 S.E.2d 279 (1972); *Vasile v. District of Columbia*, 296 A.2d 443 (D.C.App. 1972); *Gatewood v. State*, 264 Md. 301, 285 A.2d 623 (1972). In each of these cases a statute explicitly required separate forfeiture proceedings.

18. This is especially true in light of the doctrine of collateral estoppel, which would prevent retrial of the crucial issues.

19. Indeed, Graybill's counsel requested, and the court granted, the return of certain items (two pair of snowshoes, a shotgun, two pairs of coveralls, and snowpack boots) which were not properly forfeitable under the statute.

20. See note 3, *supra*.

AS 16.05.--- Seizure, forfeiture, and disposition of catch and equipment. (a) All equipment used in or in aid of a violation this title, or a regulation adopted under it, may be seized and forfeited to the state, and all catch taken, transported or possessed contrary to the provisions of this title shall be seized and forfeited to the state

(1) upon conviction of the offender in a criminal proceeding in a court of competent jurisdiction.

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

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

(d) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value of catch transported, or possessed contrary to the provisions of this title or a regulation adopted under it.

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

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

(g) For the purposes of forfeiture of catch in this section, it is a rebuttable assumption that all catch found in possession of the defendant at the time of the offense were taken or retained in violation of this title, or a regulation adopted under it. It is the defendant's burden to prove the contrary by a preponderance of the evidence.

(h) An item forfeited under this section shall be disposed of at the discretion of the department. If sold, the proceeds of the sale shall be transferred to the proper state officer for deposit in the general fund. Before the department disposes of an aircraft it shall consider transfer of ownership of the aircraft to the Alaska Wing, Civil Air Patrol.

AS 16.05.--- Definitions. For the purposes of AS 16.05.---(above) "equipment" includes guns, traps, nets fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear, and "catch" includes all fish and game or parts of fish and game or nests or eggs of birds taken.

Repeals 16.05.190 - 195

HOUSE COMMITTEE REPORT

(7)

Date referred: 4/21/88

FURTHER REFERRALS:

DATE: April 26, 1988

The Judiciary Committee has considered HB 364

"An Act relating to commercial fishing violations; and providing for an effective date."

RECOMMENDS:

- replace with CS HB 364 (Jud) the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published 1/15/88
- zero with analysis

SIGNING DO PASS:

[Signature]

[Signature]

[Signature]

[Signature]

SIGNING OTHER RECOMMENDATIONS:

Chairman's signature

[Signature]

Original sponsor: Rules/Governor

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 364 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to commercial fishing violations;
7 and providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 16.05.710(a) is repealed and reenacted to read:

10 (a) A person convicted of a misdemeanor for violating AS 16.05.-
11 440 - 16.05.690 or a federal or state commercial fishing statute or
12 regulation is, in addition to other penalties provided by law, subject
13 to the following penalties:

14 (1) upon a first or second conviction the court may sus-
15 pend, for a period of not more than one year,

16 (A) the person's commercial fishing license and the
17 right to obtain a limited entry permit; or

18 (B) one or more of the person's limited entry permits
19 and the person's right to obtain a commercial fishing license;
20 and

21 (2) upon a third or subsequent conviction the court shall
22 suspend, for a period of not more than three years,

23 (A) the person's commercial fishing license and the
24 right to obtain a limited entry permit; or

25 (B) one or more of the person's limited entry permits
26 and the person's right to obtain a commercial fishing license.

27 * Sec. 2. AS 16.05.710 is amended by adding new subsections to read:

28 (c) During the period for which a limited entry permit is sus-
29 pended under (a) of this section a permit card may not be issued and

1 the permit may not be transferred or sold.

2 (d) In this section

3 (1) "commercial fishing license" includes a crew member
4 license;

5 (2) "limited entry permit" includes an interim use permit.

6 * Sec. 3. AS 16.05 is amended by adding new sections to read:

7 Sec. 16.05.722. STRICT LIABILITY COMMERCIAL FISHING PENALTIES.

8 (a) A person who without any culpable mental state violates AS 16.-
9 05.440 - 16.05.690, or a regulation of the Board of Fisheries or the
10 department governing commercial fishing, is guilty of a violation and
11 upon conviction is punishable by a fine of not more than

12 (1) \$3,000 for a first conviction; and

13 (2) \$6,000 for a second or subsequent conviction.

14 (b) In addition, the court shall order forfeiture of any fish,
15 or its fair market value, taken or retained as a result of the commis-
16 sion of the violation. For purposes of this subsection, it is a
17 rebuttable presumption that all fish found on board a fishing vessel
18 used in or in aid of a violation, or found at the fishing site, were
19 taken or retained in violation of AS 16.05.440 - 16.05.690 or a com-
20 mercial fisheries regulation of the Board of Fisheries or the depart-
21 ment. It is the defendant's burden to show by a preponderance of the
22 evidence that fish on board or at the site were lawfully taken and
23 retained.

24 (c) A person charged with a violation under this section is
25 entitled to a trial by court but not by jury, and is not entitled to
26 representation at public expense.

27 Sec. 16.05.723. MISDEMEANOR COMMERCIAL FISHING PENALTIES. (a)

28 A person who negligently violates AS 16.05.440 - 16.05.690, or a
29 regulation of the board of fisheries or the department governing

1 commercial fishing, is guilty of a misdemeanor and in addition to
2 punishment under other provisions in this title, including AS 16.05.-
3 195 and 16.05.710, is punishable upon conviction by a fine of not more
4 than \$15,000 or by imprisonment for not more than one year, or by
5 both. In addition, the court shall order forfeiture of any fish, or
6 its fair market value, taken or retained as a result of the commission
7 of the violation, and the court may forfeit any vessel and any fishing
8 gear, including any net, pot, tackle, or other device designed or
9 employed to take fish commercially, that was used in or in aid of the
10 violation. Any fish, or its fair market value, forfeited under this
11 subsection may not also be forfeited under AS 16.05.195. For purposes
12 of this subsection, it is a rebuttable presumption that all fish found
13 on board a fishing vessel used in or in aid of a violation, or found
14 at the fishing site, were taken or retained in violation of
15 AS 16.05.440 - 16.05.690 or a commercial fisheries regulation of the
16 board of fisheries or the department, and it is the defendant's burden
17 to show by a preponderance of the evidence that fish on board or at
18 the site were lawfully taken and retained.

19 (b) If a person is convicted under this section of one of the
20 following offenses, then, in addition to the penalties imposed under
21 (a) of this section, the court may impose a fine equal to the gross
22 value of the fish found on board or at the fishing site at the time of
23 the violation:

- 24 (1) commercial fishing in closed waters;
25 (2) commercial fishing during a closed period or season;
26 (3) commercial fishing with unlawful gear, including a net,
27 pot, tackle, or other device designed or employed to take fish commer-
28 cially; or
29 (4) commercial fishing without a limited entry permit

1 holder on board if the holder is required by law or regulation to be
2 present.

3 (c) If, within the 10 years preceding an offense, a person has
4 been convicted two or more times of a misdemeanor offense listed in
5 (b) of this section or under former AS 16.05.720, then, upon a con-
6 viction of that person under this section for an offense listed in (b)
7 of this section, and in addition to the penalties imposed under (a) of
8 this section, the court shall impose a fine equal to three times the
9 gross value of the fish found on board or at the fishing site at the
10 time of the offense, or a fine equal to \$10,000, whichever is greater.

11 * Sec. 4. AS 16.05.925 is amended to read:

12 Sec. 16.05.925. PENALTY FOR VIOLATIONS. Except as provided in
13 AS 16.05.430, 16.05.722, 16.05.723, [16.05.720,] 16.05.831, and 16.-
14 05.860, a person who violates AS 16.05.920, or a regulation adopted
15 under this chapter or AS 16.20, is guilty of a class A misdemeanor.

16 * Sec. 5. AS 16.05.720 is repealed.

17 * Sec. 6. This Act takes effect immediately under AS 01.10.070(c).
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go0288hL
Hein
4/26/88

Original sponsor: Rules/Governor

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 364 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to commercial fishing violations;
7 and providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 16.05.710(a) is repealed and reenacted to read:

10 (a) A person convicted of a misdemeanor for violating AS 16.05.-
11 440 - 16.05.690 or a federal or state commercial fishing statute or
12 regulation is, in addition to other penalties provided by law, subject
13 to the following penalties:

14 (1) upon a first ~~or~~ second conviction the court ^{existing} may
15 suspend, for a period of not more than one year,

16 (A) the person's commercial fishing license and the
17 right to obtain a limited entry permit; or

18 (B) one or more of the person's limited entry permits
19 and the person's right to obtain a commercial fishing license;
20 and

21 (2) upon a third or ^{ceiling} subsequent conviction the court ^{new} shall
22 suspend, for a period of not more than three years,

23 (A) the person's commercial fish : license and the
24 right to obtain a limited entry permit; or

25 (B) one or more of the person's limited entry permits
26 and the person's right to obtain a commercial fishing license.

27 * Sec. 2. AS 16.05.710 is amended by adding new subsections to read:

28 (c) During the period for which a limited entry permit is sus-
29 pended under (a) of this section a permit card may not be issued and

1 the permit may not be transferred or sold.

2 (d) In this section

3 (1) "commercial fishing license" includes a crew member
4 license;

5 (2) "limited entry permit" includes an interim use permit.

6 * Sec. 3. AS 16.05 is amended by adding new sections to read:

7 Sec. 16.05.722. STRICT LIABILITY COMMERCIAL FISHING PENALTIES.

8 (a) A person who without any culpable mental state violates AS 16.-
9 05.440 - 16.05.690, or a regulation of the Board of Fisheries or the
10 department governing commercial fishing, is guilty of a violation and
11 upon conviction is punishable by a fine of not more than

12 → (1) \$3,000 for a first conviction; and

13 → (2) \$6,000 for a second or subsequent conviction.

14 (b) In addition, the court shall order forfeiture of any fish,
15 or its fair market value, taken or retained in any manner in connec-
16 tion with or as a result of the commission of the violation. For
17 purposes of this section, it is a rebuttable presumption that all fish
18 found on board a fishing vessel used in or in aid of a violation, or
19 found at the fishing site, were taken or retained in violation of
20 AS 16.05.440 - 16.05.690 or a commercial fisheries regulation of the
21 Board of Fisheries or the department. It is the defendant's burden to
22 show by a preponderance of the evidence that fish on board or at the
23 site were lawfully taken and retained.

24 (c) A person charged with a violation under this section is
25 entitled to a trial by court but not by jury, and is not entitled to
26 representation at public expense.

27 Sec. 16.05.723. MISDEMEANOR COMMERCIAL FISHING PENALTIES. (a)

28 A person who negligently violates AS 16.05.440 - 16.05.690, or a
29 regulation of the board of fisheries or the department governing

15,000 Flyer

1 commercial fishing, is guilty of a misdemeanor and in addition to
2 punishment under other provisions in this title, including AS 16.05.-
3 195 and 16.05.710, is punishable upon conviction by a fine of not more
4 than \$15,000 or by imprisonment for not more than one year, or by
5 both. In addition, the court shall order forfeiture of any fish, or
6 its fair market value, taken or retained in any manner in connection
7 with or as a result of the commission of the violation, and the court
8 may forfeit any vessel and any fishing gear, including any net, pot,
9 tackle, or other device designed or employed to take fish commercial-
10 ly, that was used in or in aid of the violation. Any fish, or its
11 fair market value, forfeited under this section may not also be for-
12 feited under AS 16.05.195. For purposes of this section, it is a
13 rebuttable presumption that all fish found on board a fishing vessel
14 used in or in aid of a violation, or found at the fishing site, were
15 taken or retained in violation of AS 16.05.440 - 16.05.690 or a com-
16 mercial fisheries regulation of the board of fisheries or the depart-
17 ment, and it is the defendant's burden to show by a preponderance of
18 the evidence that fish on board or at the site were lawfully taken and
19 retained.

20 (b) If a person is convicted under this section of one of the
21 following offenses, then, in addition to the penalties imposed under
22 (a) of this section, the court may impose a fine equal to the gross
23 value of the fish found on board or at the fishing site at the time of
24 the violation:

- 25 (1) commercial fishing in closed waters;
26 (2) commercial fishing during a closed period or season;
27 (3) commercial fishing with unlawful gear, including a net,
28 pot, tackle, or other device designed or employed to take fish commer-
29 cially; or

1 (4) commercial fishing without a limited entry permit
 2 holder on board if the holder is required by law or regulation to be
 3 present.

4 (c) If, within the 10 years preceding an offense, a person has
 5 been convicted two or more times of an offense listed in (b) of this
 6 section, ~~regardless of whether the convictions are under this section,~~
 7 ~~under AS 16.05.722, or under former AS 16.05.720,~~ then, upon a con-
 8 viction of that person under this section ~~for an~~ violation listed in
 9 (b) of this section, and in addition to the penalties imposed under
 10 (a) of this section, the court ~~may~~ shall impose a fine equal to three times
 11 the gross value of the fish found on board or at the fishing site at
 12 the time of the ~~violation~~ offense, or a fine equal to \$10,000, whichever is
 13 greater. *existing laws shall*

14 * Sec. 4. AS 16.05.925 is amended to read:

15 Sec. 16.05.925. PENALTY FOR VIOLATIONS. Except as provided in
 16 AS 16.05.430, 16.05.722, 16.05.723, [16.05.720,] 16.05.831, and 16.-
 17 05.860, a person who violates AS 16.05.920, or a regulation adopted
 18 under this chapter or AS 16.20, is guilty of a class A misdemeanor.

19 * Sec. 5. AS 16.05.720 is repealed.

20 * Sec. 6. This Act takes effect immediately under AS 01.10.070(c).

go0288hB
Hein
4/20/88

Original sponsor: Rules/Governor

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 364 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to commercial fishing violations
7 and providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 16.05.710(a) is repealed and reenacted to read:

10 (a) A person convicted of a misdemeanor for violating AS 16.05.-
11 440 - 16.05.690 or a federal or state commercial fishing statute or
12 regulation is, in addition to other penalties provided by law, subject
13 to the following penalties:

14 (1) upon a first conviction the court may, for a period of
15 not more than one year,

16 (A) forfeit the person's commercial fishing license
17 and the right to obtain a limited entry permit; or

18 (B) suspend one or more of the person's limited entry
19 permits and forfeit the person's right to obtain a commercial
20 fishing license; and

21 (2) upon a second or subsequent conviction the court may,
22 for a period of not more than three years,

23 (A) forfeit the person's commercial fishing license
24 and the right to obtain a limited entry permit; or

25 (B) suspend one or more of the person's limited entry
26 permits and forfeit the person's right to obtain a commercial
27 fishing license.

28 * Sec. 2. AS 16.05.710 is amended by adding a new subsection to read:

29 (c) In this section

1 (1) "commercial fishing license" includes a crew member
2 license;

3 (2) "limited entry permit" includes an interim use permit.

4 * Sec. 3. AS 16.05 is amended by adding new sections to read:

5 Sec. 16.05.722. STRICT LIABILITY COMMERCIAL FISHING PENALTIES.

6 (a) A person who without any culpable mental state violates AS 16.-
7 05.440 - 16.05.690, or a regulation of the Board of Fisheries or the
8 department governing commercial fishing, is guilty of a violation and
9 upon conviction is punishable by a fine of not more than

10 (1) \$3,000 for a first conviction; and

11 (2) \$6,000 for a second or subsequent conviction.

12 (b) In addition to the penalties imposed under (a) of this
13 section, the court may

14 (1) for a first conviction, impose a fine equal to 50
15 percent of the value of the fish found on board or at the fishing site
16 at the time of the violation; and

17 (2) for a second or subsequent conviction, impose a fine
18 equal to the value of the fish found on board or at the fishing site
19 at the time of the violation.

20 Sec. 16.05.723. MISDEMEANOR COMMERCIAL FISHING PENALTIES. (a)

21 A person who negligently violates AS 16.05.440 - 16.05.690, or a
22 regulation of the board of fisheries or the department governing
23 commercial fishing, is guilty of a misdemeanor and in addition to
24 punishment under other provisions in this title, including AS 16.05.-
25 195 and 16.05.710, is punishable upon conviction by a fine of not more
26 than \$15,000 or by imprisonment for not more than one year, or by
27 both. In addition, the court may order forfeiture of any fish, or its
28 fair market value, taken or retained in any manner in connection with
29 or as a result of the commission of the violation, and the court may

1 forfeit any vessel and any fishing gear, including any net, pot,
2 tackle, or other device designed or employed to take fish commercial-
3 ly, that was used in or in aid of the violation. Any fish, or its
4 fair market value, forfeited under this section may not also be for-
5 feited under AS 16.05.195. For purposes of this section, it is a
6 rebuttable presumption that all fish found on board a fishing vessel
7 used in or in aid of a violation, or found at the fishing site, were
8 taken or retained in violation of AS 16.05.440 - 16.05.690 or a com-
9 mercial fisheries regulation of the board of fisheries or the depart-
10 ment, and it is the defendant's burden to show by a preponderance of
11 the evidence that fish on board or at the site were lawfully taken and
12 retained.

13 (b) If a person is convicted under this section of one of the
14 following offenses, then, in addition to the penalties imposed under
15 (a) of this section, the court may impose a fine equal to the gross
16 value of the fish found on board or at the fishing site at the time of
17 the violation:

18 (1) commercial fishing in closed waters;
19 (2) commercial fishing during a closed period or season;
20 (3) commercial fishing with unlawful gear, including a net,
21 pot, tackle, or other device designed or employed to take fish commer-
22 cially; or

23 (4) commercial fishing without a limited entry permit
24 holder on board if the holder is required by law or regulation to be
25 present.

26 (c) If, within the 10 years preceding an offense, a person has
27 been convicted two or more times of an offense listed in (b) of this
28 section, regardless of whether the convictions are under this section,
29 under AS 16.05.722, or under former AS 16.05.720, then, upon a

1 conviction of that person under this section for a violation listed in
 2 (b) of this section, and in addition to the penalties imposed under
 3 (a) of this section, the court may impose a fine equal to three times
 4 the gross value of the fish found on board or at the fishing site at
 5 the time of the violation, or a fine equal to \$10,000, whichever is
 6 greater.

7 * Sec. 4. AS 16.05.925 is amended to read:

8 Sec. 16.05.925. PENALTY FOR VIOLATIONS. Except as provided in
 9 AS 16.05.430, 16.05.722, 16.05.723, [16.05.720,] 16.05.831, and 16.-
 10 05.860, a person who violates AS 16.05.920, or a regulation adopted
 11 under this chapter or AS 16.20, is guilty of a class A misdemeanor.

12 * Sec. 5. AS 16.05.720 is repealed.

13 * Sec. 6. This Act takes effect immediately under AS 01.10.070(c).
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Constantine
739 P22 188
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See Transmittal
AK APP '87
705 P22
1280
AK APP '87

BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

1 IN THE HOUSE

2

HOUSE BILL NO. 364

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

*See Robinson's
Letter*

6

For an Act entitled: "An Act relating to commercial fishing violations;

7

and providing for an effective date."

8

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*AK Constitution
Art VIII*

9

* Section 1. AS 16.05.710(a) is amended to read:

10

(a) Upon a first or second misdemeanor conviction of a person

Allocation

11

for a violation of AS 16.05.440 -- ~~16.05.690~~ [16.05.720] or a federal

12

or state law or regulation for the conservation or development [PKO-

*or -
development?
enhancement*

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TECTION] of the commercial fish of the state, the court may, in addi-

*Forfeit
How
long?*

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tion to the penalty otherwise imposed by law, forfeit the person's

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right to hold or obtain a commercial fishing license or to obtain an

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interim use or limited entry permit [OF THE PERSON] for a period of

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Right
to
obtain?*

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one year, or, if the person holds an interim use or limited entry

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permit, suspend one or more of the person's permits for a period of

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one year. Upon a third or subsequent conviction, the court may, in

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addition to the penalty otherwise imposed by law, forfeit the person's

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right to hold or obtain a commercial fishing license for a period not

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to exceed three years, or if the person holds an interim use or limit-

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ed entry permit, suspend one or more of the person's permits for a

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period not to exceed three years. During the period that an interim

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use or limited entry permit is suspended, a permit card may not be

26

issued and the permit may not be transferred or sold.

27

* Sec. 2. AS 16.05.710 is amended by adding a new subsection to read:

28

(c) In this section "commercial fishing license" includes a

29

crewmember license.

1 * Sec. 3. AS 16.05 is amended by adding new sections to read:

2 Sec. 16.05.722. STRICT LIABILITY COMMERCIAL FISHING PENALTIES.

3 (a) A person who without any culpable mental state violates
4 AS 16.05.440 -- 16.05.690, or a regulation of the board of fisheries
5 or the department governing commercial fishing, is guilty of a vio-
6 lation and upon conviction is punishable by a fine of not more than
7 \$6,000. In addition, the court shall order forfeiture of any fish, or
8 its fair market value, taken or retained in any manner in connection
9 with or as a result of the commission of the violation. For purposes
10 of this section, it is a rebuttable presumption that all fish found on
11 board a fishing vessel used in or in aid of a violation, or found at
12 the fishing site, were taken or retained in violation of AS
13 16.05.440 -- 16.05.690 or a commercial fisheries regulation of the
14 board of fisheries or the department. It is the defendant's burden to
15 show by a preponderance of the evidence that fish on board or at the
16 site were lawfully taken and retained.

17 (b) A person charged with a violation under (a) of this section
18 is entitled to a trial by court but not by jury, and is not entitled
19 to representation at public expense.

20 (c) The state must prove the commission of a violation of this
21 section by a preponderance of the evidence.

22 Sec. 16.05.723. MISDEMEANOR COMMERCIAL FISHING PENALTIES. (a)

23 A person who negligently violates AS 16.05.440 -- 16.05.690, or a
24 regulation of the board of fisheries or the department governing
25 commercial fishing, is guilty of a misdemeanor and in addition to
26 punishment under other provisions in this title, including
27 AS 16.05.195 and 16.05.710, is punishable upon conviction by a fine of
28 not more than \$15,000 or by imprisonment for not more than one year,
29 or by both. In addition, the court shall order forfeiture of any

*Reason
Clear
+
conviction?*

1 fish, or its fair market value, taken or retained in any manner in
2 connection with or as a result of the commission of the violation, and
3 the court may forfeit any vessel and any fishing gear, including any
4 net, pot, tackle, or other device designed or employed to take fish
5 commercially, that was used in or in aid of the violation. Any fish,
6 or its fair market value, forfeited under this section may not also be
7 forfeited under AS 16.05.195. For purposes of this section, it is a
8 rebuttable presumption that all fish found on board a fishing vessel
9 used in or in aid of a violation, or found at the fishing site, were
10 taken or retained in violation of AS 16.05.440 -- 16.05.690 or a
11 commercial fisheries regulation of the board of fisheries or the
12 department, and it is the defendant's burden to show by a preponder-
13 ance of the evidence that fish on board or at the site were lawfully
14 taken and retained.

15 (b) If a person is convicted under this section of one of the
16 following offenses, then, in addition to the penalties imposed under
17 (a) of this section, the court shall impose a fine equal to the gross
18 value of the fish found on board or at the fishing site at the time of
19 the violation:

- 20 (1) commercial fishing in closed waters;
- 21 (2) commercial fishing during a closed period or season;
- 22 (3) commercial fishing with unlawful gear, including a net,
23 pot, tackle, or other device designed or employed to take fish commer-
24 cially; or
- 25 (4) commercial fishing without a limited entry permit
26 holder on board if the holder is required by law or regulation to be
27 present.

28 (c) If, within the (10 years) preceding an offense, a person has
29 been convicted two or more times of an offense listed in (b) of this

1 section, regardless of whether the convictions are under this section,
2 under AS 16.05.722, or under former AS 16.05.720, then, upon a con-
3 viction of that person under this section for a violation listed in
4 (b) of this section, and in addition to the penalties imposed under
5 (a) of this section, the court shall impose a fine equal to three
6 times the gross value of the fish found on board or at the fishing
7 site at the time of the violation, or a fine equal to \$10,000, which-
8 ever is greater.

9 (d) In this section, to be "negligent" means ^{a gross} to deviate from the
10 standard of care that a reasonable person involved in commercial
11 fishing would observe in the situation.

Accidental
Conduct
See case law
Reynolds

12 * Sec. 4. ~~AS 16.05.925 is amended to read:~~

13 Sec. 16.05.925. PENALTY FOR VIOLATIONS. Except as provided in
14 AS 16.05.430, 16.05.722, 16.05.723, [16.05.720,] 16.05.831, and
15 16.05.860, a person who violates AS 16.05.920, or a regulation adopted
16 under this chapter or AS 16.20, is guilty of a class A misdemeanor.

17 * Sec. 5. AS 16.05.720 is repealed.

18 * Sec. 6. This Act takes effect immediately under AS 01.10.070(c).

① Allocation Regs vs Conservation Regs
- Loss of License For violation of ①
② Raises street liability \$300 → \$6,000 + Misdemeanor
- ~~\$10,000~~ 10,000

Section 1.

AS 16.05.710 is repealed and reenacted to read:

(a) Upon a first misdemeanor conviction of a person for a violation of AS 16.05.440 -- 16.05.690 or a federal or state law or regulation governing commercial fishing, the court may, in addition to the penalty imposed by law,

(1) forfeit the person's right to hold or obtain a commercial fishing license, or limited entry permit for a period of up to one year, if the person does not hold a limited entry permit, or

(2) if the person holds a limited entry permit, suspend the person's permit for a period of up to one year.

(b) Upon a second or subsequent misdemeanor conviction of a person for a violation of AS 16.05.440 -- 16.05.690 or a federal or state law or regulation governing commercial fishing, the court may, in addition to the penalty imposed by law,

(1) forfeit the person's right to hold or obtain a commercial fishing license or limited entry permit for a period of up to three years, if the person does not hold a limited entry permit, or

(2) if the person holds an interim use or limited entry permit, suspend the person's permit for a period of up to three years.

During the period that a limited entry permit is suspended, a permit card may not be issued and the permit may not be transferred or sold.

(c) In this section "commercial fishing license" includes a crewmember license, and "limited entry permit" includes an interim use permit.

Page 2

AS 16.05 is amended by adding new sections to read:

Sec. 16.05.722. STRICT LIABILITY COMMERCIAL FISHING PENALTIES.

(a) A person who without any culpable mental state

violates AS 16.05.440 -- 16.05.690, or a regulation of the board of fisheries or the department governing commercial fishing, is guilty of a violation and upon conviction is punishable by a fine of not more than

- (1) \$3,000 for a first conviction;
- (2) \$6,000 for a second or subsequent conviction.

(b) In addition to the penalties imposed under (a) of this section, the court may

(1) for a first conviction, impose a fine equal to 50 percent of the value of the fish found on board or at the fishing site at the time of the violation;

(2) for a second or subsequent conviction, impose a fine equal to 100 percent of the value of the fish found on board or at the fishing site at the time of the violation.

Suggested changes for Pages 2 -4, Misdemeanor Commercial Fishing Penalties:

Page 3, line 17: delete "shall", insert "may"

Page 4, line 5: delete "shall", insert "may"

Page 4, delete subsection (d).

April 15, 1988

M E M O R A N D U M

TO: Ed Hein
LAA Legal Services

FROM: Rep Mike Navarre

SUBJECT: HB 364, Relating to penalties for commercial fishing violations.

Attached is some draft language I would like to incorporate into a "blank committee" CS for HB 364. Feel free to alter the drafting style if it isn't suitable, but please retain these concepts in the language:

Under Section 1 of the bill, the idea is this:

For a misdemeanor conviction, if the person does not have a interim use or limited entry permit, they forfeit their commercial fishing (crewmember) license for a time (up to 1 or 3 years, depending on the conviction). They also cannot obtain an interim use or limited entry permit during that period.

If they do hold an interim use or limited entry permit, it is suspended, and they forfeit the right to obtain a crewmember license for the same time period.

Relating to this: Should the language referring to limited entry permits simply be "entry permits"? The Fisheries Entry Commission also issues permits in unlimited fisheries. Can't these be suspended also?

In Section 2 of the bill, we are staying with the basic concept established by the department, setting penalties for strict liability offenses. The idea is to initiate self-enforcement, by providing a deterrent. However, the defendant still retains the right to a jury trial and public defender, and the fine is set at a maximum of \$3,000 for a first offense and \$6,000 for a second or subsequent offense.

In a similar vein, the fish are not automatically forfeit. Instead, the court would have the discretionary power (depending, we hope, on the severity of the violation) to impose an additional fine, equal to half (for a first offense) or all (on a second or subsequent offense) the market value of the fish on board or at the site when the violation was committed.

Section 3 of the bill - the only changes suggested are the following:

Page 2, line 29: delete "shall", insert "may"

Page 3, line 5: delete "shall", insert "may"

Page 4, line 5: delete "shall", insert "may"

Page 4: delete subsection (d).

Please contact Pat Malone of my staff if you have any questions.

Thanks.

Amendments to CS HB 364(Resources).

Page 1:

Insert new bill Section 1 & 2, revised AS 16.05.190 - 195. -
renumber other bill sections accordingly.

Other changes, page 1:

line 14: insert "or second"

line 16: delete "forfeit", replace with "suspend"

line 19: delete "forfeit"

line 21: delete "second", replace with "third"

line 23: delete "forfeit", replace with "suspend"

line 26: delete "forfeit"

explanation: returns to existing law's requirement of 3 or more
convictions for a three year suspension, makes language regarding
license and permit suspensions more consistent.

Page 2:

line 11: after the word "violation", insert "as defined in
AS 11.81.900(b)(56),"

explanation: clarifies that a strict liability offense (no culpable
mental state required) does not entitle offender to jury trial and
public defender.

Delete lines 15 - 22.

Page 3:

Delete lines 1 - 15, beginning with the words "In addition,"

Explanation: Seizure and forfeiture of catch for both strict
liability and misdemeanor offenses are now handled under revised
AS 16.05.190 - 195.

other changes requested by Departments of Public Safety & Law:

Page 3, line 18: change "may" to "shall"

Page 4, line 6: change "may" to "shall"

Reinsert the definition of negligence as in original HB 364.

AS. 16.05.195 is repealed and reenacted to read:

AS 16.05.190 Seizure, forfeiture, and disposition of catch and equipment. (a) All equipment used in or in aid of a violation this title, or a regulation adopted under it, may be seized and forfeited to the state, and all catch taken, transported or possessed contrary to the provisions of this title shall be seized and forfeited to the state

(1) upon conviction of the offender in a criminal proceeding in a court of competent jurisdiction.

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

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

(d) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value of catch transported, or possessed contrary to the provisions of this title or a regulation adopted under it.

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

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

(g) For the purposes of forfeiture of catch in this section, it is a rebuttable presumption that all catch found in possession of the defendant at the time of the offense were taken or retained in violation of this title, or a regulation adopted under it. It is the defendant's burden to prove the contrary by a preponderance of the evidence.

(h) An item forfeited under this section shall be disposed of at the discretion of the department. If sold, the proceeds of the sale shall be transferred to the proper state officer for deposit in the general fund. Before the department disposes of an aircraft it shall consider transfer of ownership of the aircraft to the Alaska Wing, Civil Air Patrol.

AS 16.05.195 is repealed and reenacted to read:

AS 16.05.195 Definitions. For the purposes of AS 16.05.190, "equipment" includes guns, traps, nets fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear, and "catch" includes all fish and game or parts of fish and game or nests or eggs of birds taken.

FISCAL NOTE

REQUEST

Revision Date: Agency Affected: Public Safety
 Title: An act relating to commercial BRU: Fish & Wildlife Protection
fishing and providing for an effective
date
 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: *Walter H. ...* Date: 01/07/88
 Agency: Public Safety

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