

No. _____

**In The
SUPREME COURT OF THE UNITED STATES**

JOHN ALBERT SCUDERO, JR.,
Petitioner

v.

STATE OF ALASKA,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE ALASKA SUPREME COURT**

APPENDIX VOL 1 OF 1

Phillip Paul Weidner
*Counsel of Record for
Petitioner*

WEIDNER &
ASSOCIATES, APC.
431 West 7th Ave., Ste.101
Anchorage, AK 99501
(907) 276-1200

phillipweidner@weidnerjustice.com

A. Cristina Weidner Tafs
SUSITNA LAW, LLC
911 W. 8th Ave., Suite 205
Anchorage, AK 99501
(907) 947-8888
49thstatelaw@gmail.com

Counsel for Petitioner

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THE SUPREME COURT OF THE STATE OF ALASKA

JOHN ALBERT SCUDERO)
JR.,)
Appellant,)Supreme Court No.
	)S-17549
	)Court of Appeals
	)No. A-12729
)
v.	)Superior Court No.
	)1KE-14-00672CR
STATE OF ALASKA)
	)<u>OPINION</u>
	)NO. 7544-July 23,
	)2021
Appellee.)
_____)

Certified Question and Jurisdiction Transfer from the Court of Appeals of the State of Alaska, on appeal from the District Court of the State of Alaska, First Judicial District, Ketchikan, Kevin Miller, Judge.

Appearances: Phillip Paul Weidner, Phillip Paul Weidner & Associates, Anchorage, and A. Cristina Weidner Tafs, Law Office of A. Cristina Weidner Tafs, Anchorage, for Appellant. Kathryn Vogel and Laura Emily Wolff, Assistant Attorneys General,

Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for Appellee. Curtis W. Martin, Law Offices of Curtis W. Martin, Palmer, and Christopher Lundberg, Haglund Kelley, LLP, Portland, Oregon, for Amicus Curiae Metlakatla Indian Community.

Before: Bolger, Chief Justice, Winfree, Maassen, and Carney, Justices. [Borghesan, Justice, not participating.]

MAASSEN, Justice.

I. INTRODUCTION

A member of the Metlakatla Indian Community, a federally recognized Indian tribe, was convicted of several commercial fishing violations in State waters and fined \$20,000. He. appealed his conviction and sentence to the court of appeals, which asked us to take jurisdiction of the appeal because of the importance of the primary issue involved: whether the defendant's aboriginal and treaty-based fishing rights exempt him from State commercial fishing regulations. The defendant also challenges several evidentiary rulings and the fairness of his sentence.

Because we hold that the State has authority to regulate fishing in State waters in the interests of conservation regardless of the defendant's claimed fishing rights, and because we conclude that the trial court did not abuse its discretion in its procedural rulings, we affirm the conviction. We also affirm the sentence as not clearly

mistaken, except for one detail on which the parties agree: the district court was mistaken to include a probationary term in the sentence. We remand the case for modification of the judgments to correct that mistake.

II. FACTS AND PROCEEDINGS

A. Facts

1. Background: The Metlakatla Indian Community

The Metlakatla Indian Community is a federally recognized tribe located on the only existing Indian reservation in Alaska.¹ Its Alaskan roots date from 1887, when about 800 citizens of the Tsimshian Nation migrated from British Columbia to the Annette Islands in southeastern Alaska.² Four years later Congress created

¹ See *John v. Baker*, 982 P.2d 738, 750 (Alaska 1999) (explaining that "'federal recognition 'institutionalizes the tribe's quasi-sovereign status' '" and "'permanently establishes a government-to-government relationship between the United States and the recognized tribe as a 'domestic dependent nation' '"")."

² *Atkinson v. Haldane*, 569 P.2d 151,153 (Alaska 1977).

the Annette Islands Reserve,³ the stated purpose of which was “simply to allow [the Metlakatla Indian Community] to remain [in the Annette Islands] under such rules and regulations as the Secretary of the Interior may impose, and give them some recognized footing at that place”.⁴

In 1916 President Wilson proclaimed that the waters within 3,000 feet of the Annette Islands were part of the Reserve, “to be used by the Indians as a source of supply for [an] intended cannery, 'under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.”⁵ Federal regulations provide that the fishery is “exclusively reserved for fishing by the members of the Metlakatla Indian Community and such other Alaskan Natives as

³ *Id.*; see also *Alaska Pac. Fisheries v. United States*, 248 U.S. 78,86 (1918).

⁴ *Metlakatla Indian Cmty., Annette Islands Reserve v. Egan*, 369 U.S. 45,53 (1962).

⁵ *Id.* At 48-49 (quoting 39 Stat. 1777); 25 C.F.R. § 241.2 (2021).

have joined or may join them in residence on the
aforementioned islands.”⁶

The United States Supreme Court has addressed fishing rights disputes between the State of Alaska and tribal communities several times. In *Metlakatla Indian Community, Annette Islands Reserve v. Egan*, the Court held that the Annette Islands Reserve was under the jurisdiction of the Secretary of the Interior, who had the authority to decide whether State regulations should apply within its borders.⁷ And in *Organized Village of Kake v. Egan*, with no reservation lands at issue, the Court held that the State could regulate the fishing activities of federally recognized tribal members in State waters, because the Court had “never held that States lack power to regulate the exercise of aboriginal Indian

⁶ 25 C.F.R. §241.2(b) The State may not require members of the Metlakatla Indian Community “to obtain a license permit...to fish in the water of the Annette Islands Reserve.” 25 C.F.R. § 241.2(c).

⁷ 369 U.S. at 53-56.

rights, such as claimed here, or of those based on occupancy.”⁸

2. Scudero's prior fishing cases

John Scudero is a member of the Metlakatla Indian Community and, as his brief in this appeal describes him, “a particularly strong and vocal supporter of the Metlakatla Community's right to subsistence and commercial fish outside the 3000-foot zone. “Scudero has engaged in “protest fishing” on other occasions, fishing in knowing violation of State fishing laws “as a protest and an exercise of his right to Free Speech and historic rights.”

Scudero describes his first act of protest fishing as involving “the herring fishery at Cat Island,” where he fished without the proper permits. In early 1994 he “staged a protest of the halibut rules and regulations

⁸ 369 U.S. 60,76 (1962).

under the bridge and in front of the channel near Juneau,” after first alerting the authorities of his intentions. As a result of these incidents Scudero was charged with two violations of the commercial fishing statutes, but the charges were ultimately dismissed. Later that year, according to Scudero, he responded to a call for help from a fellow fisherman who was being questioned by Alaska Fish and Game officers while fishing close to the boundary line of the Annette Islands Reserve. As Scudero describes it, he sped to assist his fellow fisherman, dropping his gill net in the water upon arrival at the scene. He was charged with and convicted of three violations of the commercial fishing laws, including commercial fishing in closed waters, commercial fishing without a permit, and trailing a gill net in closed waters.⁹ On appeal, the court of appeals recognized that

⁹ See *Scudero v. State*, 917 P.2d 683, 684 (Alaska App. 1996).

because Scudero “asserted that he acted with intent to protest an unfair or unjust law, not with intent to take fish for commercial disposition”, his defense, if accepted by the jury, would have negated an essential element of the two commercial fishing offenses.¹⁰ The court found that Scudero was plainly entitled to assert his defense before the jury but that he had been given an adequate opportunity to do so, and the court therefore affirmed his convictions.¹¹

In 2000 Scudero was again charged with commercial fishing without a permit. He entered a no-contest plea and was sentenced in 2002. Later in 2002 he was again charged with the same offense and entered a guilty plea; he was sentenced in 2003.

3. The current case

¹⁰ *Id.* At 686.

¹¹ *Id.* At 686,688.

The charges in this case arise from Scudero's fishing activities in 2014, when the Coast Guard found him fishing in State waters outside the Annette Island Reserve's exclusive fishing zone. He was charged under State law with fishing without a permit,¹² fishing in closed waters,¹³ and unlawful possession of fish.¹⁴

B. Current Proceedings

1. Trial

In January 2015 the district court held a one-day jury trial. A Coast Guard officer testified that he boarded Scudero's fishing vessel after he saw it fishing in closed waters outside the Annette Islands Reserve. The officer

¹² AS 16.43.140(a) (“A person may not operate gear in the commercial taking of fishery resources without a valid entry permit or a valid interim-use permit issued by the commission.”).

¹³ 5 Alaska Administrative Code (AAC) 33.310(c) (2021) (“Salmon may be taken by drift gillnets in the following location only during fishing periods established by emergency order that start on a Sunday and close by emergency order,” and the section at issue here “opens on the third Sunday of June.”).

¹⁴ 5 AAC 39.197 (2019) (“No person possess, purchase, sell, barter or transport fish within water subject to the jurisdiction of the state if that person knows or has reason to know that fish were taken or possessed in contravention of 5 AAC 035 AAC 39.”).

testified that Scudero admitted he did not have a permit, he had approximately 45 coho salmon on board, and "his intended plan was to take the fish and return to Metlakatla with them and sell them at the plant."

The parties disputed whether evidence of Scudero's prior convictions should be admitted. The court observed that the 1996 conviction was "very old" but concluded that, in combination with the 2002 and 2003 convictions, it was "highly probative on the intent issue." The court therefore admitted evidence of all three prior convictions.

Scudero testified that on September 23, 2014, he was "fishing to provide for [his] family like [he's] done for almost 40, 45 years." He began to describe the history of Native fishing rights, but the State objected on relevancy grounds. The court sustained the objection, allowing Scudero to testify "with respect to whether or not he was going to be selling the fish or what he was going to

do with the fish” but not about the historical background of his claimed rights.

Scudero's testimony went on to define "fishing to provide for [his] family" as “providing so that [his] family has a way of life that has been done by the Tsimshian people...from [time immemorial].” He explained that this “way of life” included "subsistence, bartering, commercial fishing and whatever ways ... we [subsist] of the land in Indian Country." He also testified that he told the Coast Guard he believed he “was not breaking the law” because he was allowed to fish at usual and custom[ary] places outside the [Annette Islands] Reserve.

On cross-examination Scudero again admitted knowing he was outside the Reserve's boundary and answered “yes” when asked if he was “engaged in commercial fishing.” He also agreed that he had been convicted before of violating the same fishing laws. When

asked if he thought his aboriginal rights included fishing without a permit in State waters, he cited federal Indian law and explained: “Under the reserved right[s] doctrine, when President Woodrow Wilson proclaimed 3,000 feet around Annette Island, at that time, he would have had to explicitly say that our rights were taken away from us, which they never were.”

The jury returned guilty verdicts on all three charges, and the court set a date for sentencing.

2. Sentencing

The court held a sentencing hearing in September 2016. The court considered the Chaney factors and applied a statutory aggravator because of Scudero's prior convictions under the same statutes.¹⁵ The court determined that jail time would not be a deterrent

¹⁵ See AS 12.55.005 (enumerating factors courts must consider in sentencing, following *State v. Chaney*, 477 P.2d 441,444 (Alaska 1970)).

and that fines were appropriate because of the crimes' economic nature. For commercial fishing without a permit, Scudero received a \$20,000 fine, the mandatory minimum¹⁶. The court also suspended his commercial fishing privileges and licenses for five years and imposed a one-year probationary period¹⁷. For each of the other two convictions Scudero received a fine of \$5,000 to run concurrently with the \$20,000 fine, as well as the same probationary period.

Scudero appealed to the court of appeals. The court of appeals asked us to take jurisdiction of the appeal under AS 22.05.015(b) on grounds that "the case involves a significant question of law under the Constitution of the United States or under the constitution of the state or involves an issue of substantial public interest that

¹⁶ AS 16.4.970(g)(3).

¹⁷ The probationary periods are found in the written judgment although the court remarked at the sentencing hearing that no probation would be imposed. We address this inconsistency below.

should be determined by the supreme court.”¹⁸ We agreed to take jurisdiction.

III. STANDARD OF REVIEW

We review questions of law de novo.¹⁹ We review the trial court's evidentiary decisions for abuse of discretion, except for those evidentiary decisions that require determinations of law, which we review de novo.²⁰ We review criminal sentences under a “clearly mistaken” standard and give deference to the sentencing court.²¹

IV. DISCUSSION

Scudero’s main argument on appeal is that the State lacked jurisdiction to enforce its commercial fishing

¹⁸ *Scudero v. State*, No. A-12729 (Alaska Court of Appeals Order, Aug. 5, 2019) at 2. The court of appeals considered the jurisdiction issue raised by Scudero to be “a significant question of law” relating to question of state-wide importance- “the ability of the State to regulate fishing in its waters” and challenges to regulations based on Article VIII of the Alaska Constitution that “implicate[] issues beyond the criminal law and involve[] a vital part of our state’s economy.” *Id.*

¹⁹ *Ebli v. State, Dep’t of Corr.*, 451 P. 3d 382,387 (Alaska 2019).

²⁰ *Hess v. State*, 20 P.3d 1121,1123 (Alaska 2001).

²¹ *State v. Korkow*, 314 P.3d 560, 562 (Alaska 2013).

laws against him because his aboriginal fishing rights were not subject to State interference. He also challenges several evidentiary and procedural rulings from trial, as well as his sentence.

A. Aboriginal Or Reserved Fishing Right Do Not Preclude Enforcement Of Alaska's Commercial Fishing Laws In This Case.

Scudero argues that members of the Metlakatla Indian Community retain aboriginal fishing rights that predate Alaska statehood, permitting them to fish without interference in State waters. He argues that the Metlakatla Indians are in “a much stronger position, with broader sovereign, historic, and aboriginal rights” than members of other Alaska tribes because “the sovereign, historic, and aboriginal rights of the Tsimshian Natives of Metlakatla have been recognized by unilateral statute and presidential proclamation, and the Tsimshian Nation and its people have never relinquished, surrendered, or

modified” these rights by treaty or statute. Scudero argues that these rights permit members of the Tsimshian Nation to fish in State waters for subsistence purposes, which traditionally include bartering and other commercial activities. The Metlakatla Indian Community, as *amicus curiae*, supports Scudero's claim to unregulated fishing, arguing that its members have a “reserved right to fish, on a non-exclusive basis, in the off-reservation waters surrounding the Reserve.”

Scudero raises several important and unresolved questions about the status of aboriginal and reserved fishing rights for citizens of the Metlakatla Indian Community. But we do not need to reach those issues today; even assuming the existence of broad-off-reservation fishing rights, Scudero's appeal may be decided on the basis of well-established principles

governing the interrelationship of aboriginal or treaty-based rights and the State's police powers.

**1. The development of the
“conservation necessity”
principle**

We begin our analysis with the recognition that treaties, along with the United States Constitution and federal statutes, “are the 'supreme Law of the Land.”²² But “[e]ven where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation.”²³ Acceptable state regulation in this area is generally defined by reference to “conservation necessity.”²⁴ In *Tulee v. Washington*, Tulee, a member of the Yakima tribe, appealed his state-court

²² *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) (quoting Const. art, VI, cl. 2).

²³ *Organized Village of Kake v. Egan*, 369 U.S. 60, 75(1962).

²⁴ *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 205 (1999) (“This ‘conservation necessity’ standard accommodates both the State's interest in management of its natural resources and the [Indians'] federally guaranteed treaty rights.”); *People v. Patterson*, 833 N.E.2d 223, 224 (N.Y. 2005) (“In its ‘conservation necessity’ line of cases, the United States Supreme

conviction for catching salmon with a net outside the reservation without the license required by state law²⁵. Tulee challenged the validity of the licensing statute “on the ground that it was repugnant to a treaty made between the United States and the Yakima Indians,” which preserved to the tribe “the right of taking fish at all usual and accustomed places, in common with citizens of the Territory.”²⁶ He argued that the treaty gave him the right to fish “free from state regulation of any kind,¹¹ while the state argued that its regulation of fishing did not conflict with the treaty as long as “its license laws do not discriminate against Indians.²⁷”

The Supreme Court rejected both arguments, concluding that “the state's construction of the treaty is

Court has long experience in mediating between" Indian treaty rights and states' interest in regulating hunting and fishing within their borders.).

²⁵ 315 U.S. 681,682 (1942).

²⁶ *Id.* At 682-83.

²⁷ *Id.* At 683-84.

too narrow and the appellant's is too broad.”²⁸ The Court held “that while the treaty leaves the state with the power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here.”²⁹ The Court observed that the stated purpose of the licensing statute was both regulatory and revenue-producing, and that the regulatory purpose could be accomplished without charging a fee.³⁰ Because “the imposition of license fees is not indispensable to the effectiveness of a state conservation program,” it could not “be reconciled with a fair construction of the treaty,” and

²⁸ *Id.* At 684.

²⁹ *Id.* (footnote omitted).

³⁰ *Id.* At 685.

the state statute was therefore “invalid as applied” to Tulee.³¹

The Court cited these principles again in two later cases also involving Indian fishing rights in Washington. In *Puyallup Tribe v. Department of Game of Washington* (*Puyallup I*), the Court considered the state's attempt to regulate tribal members' use of set nets in freshwater streams; “[t]he nets used [were] concededly illegal if the laws and regulations of the State of Washington [were] valid.”³² The treaty at issue, like that in Tulee, reserved to the tribes “[t]he right of taking fish, at all usual and accustomed grounds and stations,....in common with all citizens of the Territory.”³³ The Court held that

³¹ *Id.* Because Scudero’s challenge in this case is to any State regulation at all, he does not separately address whether – assuming that the State may regulate his activities in the interest of conservation necessity – its imposition of licensing or permit fees as part of that regulatory scheme violates his aboriginal or treaty rights, as in Tulee. We therefore do not address this issue either.

³² 391 U.S. 392, 396 (1968)

³³ *Id.* St 395.

because “*the manner* in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty,” the state was allowed to regulate “the manner of fishing, the size of the take, the restriction of commercial fishing, and the like...in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against Indians.”³⁴ The case was returned to the trial court for determination of “[w]hether the prohibition of the use of set nets in these fresh waters was a 'reasonable and necessary'...conservation measure.”³⁵

Five years later, in *Department of Game of Washington v. Puyallup Tribe (Puyallup II)*, the Supreme Court held that the state could not limit steelhead fishing in the Puyallup River to hook and line given the tribes' traditional use of nets for that

³⁴ *Id.* at 398 (emphasis in original).

³⁵ *Id.* At 401-03.

species.³⁶ The Court observed that “[t]he ban on all net fishing in the Puyallup River for steelhead grant(s), in effect, the entire run to the sports fishermen,” which discriminated against the Indians; the Court ordered the state to make another attempt to fairly apportion the resource among user groups.³⁷ Justice Douglas, writing for the Court, provided further substance to the “conservation necessity” rationale for state regulation of resources otherwise subject to treaty rights:

Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.³⁸

³⁶ 414 U.S. 44, 46-47 (1973).

³⁷ *Id.* At 46-47, 48-49.

³⁸ *Id.* at 49; *cf. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. 1420, 1434-35 (W.D. Wis.1987)

The Ninth Circuit later expanded on Justice Douglas's observation, concluding, in the context of gray whale hunting, that a legislative goal of “species preservation” was not essential to a finding of “conservation necessity.”³⁹ The court found an acceptable conservation purpose in the federal Marine Mammal Protection Act's goal of making “informed, proactive decisions regarding the effect of marine mammal takes” - in that case, “[w]hether the Tribe's whaling will damage the delicate balance of the gray whale in the marine ecosystem”⁴⁰.

The Supreme Court has consistently applied the “conservation necessity” principle. It held in *Antoine v. Washington* that the “appropriate standards”

(observing that the two Puyallup “decisions are somewhat unclear and ... have been the target of criticism,” in part due to “their failure to explain the reason why the state may intrude for the particular purpose of conservation”).

³⁹*Anderson v. Evans*, 371 F. 3d 475, 499 (9th Cir. 2004).

⁴⁰ *Id.*

requirement for a valid conservation-based regulation—referred to in *Puyallup II*—“means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure,... *and* that its application to the Indians is necessary in the interest of conservation.”⁴¹ In the recent case of *Washington State Department of Licensing v. Cougar Den*, a plurality of the Court concluded that a state could not tax “a treaty-protected right...to travel on the public highway with goods for sale.”⁴² It cited *Tulee* and *Puyallup I* as helping to define the limits on its holding: that treaty rights are not absolute but may be constrained by state regulation in certain areas, such as conservation in the context of hunting and fishing rights.⁴³

⁴¹ 420 U.S. 194,207 (1975) (citing *Puyallup II*) (emphasis in original).

⁴² 139 S. Ct. 1000, 1015 (2019).

⁴³ *Id.*; *see also id.* at 1025 (Roberts, C.J., dissenting) (recognizing “conservation necessity” principle in context of hunting and fishing rights while arguing that plurality opinion too narrowly defined state’s authority to regulate for “health and safety” reasons); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1695 (2019) (observing that “States can

It is thus well settled that the State can regulate commercial fishing in its waters for conservation purposes, even by persons whose fishing rights are aboriginal and reserved by treaty. With this background, we turn to Scudero's case.

2. Scudero's convictions fall within the conservation necessity principle

impose reasonable and nondiscriminatory regulations on an Indian tribe's treaty-based hunting, fishing, and gathering rights on state land when necessary for conservation"); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 205 (1999) ("We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation."); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 682 (1979) (citing *Puyallup I* for proposition that "[a]lthough nontreaty fishermen might be subjected to any reasonable state fishing regulation serving any legitimate purpose, treaty fishermen are immune from all regulation save that required for conservation"); *United States v. Dann*, 873 F.2d 1189, 1200 (9th Cir. 1989) ("Even Indian treaty rights, when shared with others on the public lands or waters, are subject to reasonable regulation that is shown to be essential to the conservation of the common resources and does not discriminate against the Indians.").

The crimes of which Scudero was convicted are violations of the Limited Entry Act and of regulations enacted under the Act's authority.⁴⁴ The Alaska Legislature passed the Limited Entry Act in 1973 to regulate entry into State fisheries.⁴⁵ Alaska Statute 16.43.010(a) describes the legislative purpose:

It is the purpose of this chapter to promote the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry of participants into the commercial fisheries in the public interest and without unjust discrimination.⁴⁶

We have repeatedly recognized the Act's intertwined purposes of conserving fisheries resources and

⁴⁴ AS 16.43.140(a) (“operat[ing] gear in the commercial taking of fishery resources without a valid entry permit”); 5 AAC 33.310(c)(1)(B) (2020) (taking salmon by drift gillnet during closed period); 5 AAC 39.197 (possessing or transporting fish “taken or possessed in contravention of other regulations”).

⁴⁵ *See Grunert v. State*, 109 P.3d 924, 932-35 (Alaska 2005) (describing history of Limited Entry Act).

⁴⁶ AS 16.43.010 (“Purpose and findings of fact”).

maintaining a healthy fishing industry.⁴⁷ These purposes easily fall within the ambit of the “conservation necessity” principle. Whatever the status of Scudero's aboriginal and reserved rights, they do not shield him from the non-discriminatory operation of State fishing laws that are necessary for the conservation of the resource.

B. The District Court Did Not Err When It Prevented Scudero From Testifying About His Aboriginal Fishing Rights.

⁴⁷ See *Johns v. Commercial Fisheries Entry Comm'n*, 758P.2d 1256, 1263-64 (Alaska 1988) (explaining CFEC's decision to limit number of boats in certain fishery because of low level of fish as “in accord with the purposes of the Limited Entry Act”); *Simpson v. State, Commercial Fisheries Entry Comm'n*, 101 P.3d 605, 611 (Alaska 2004) (observing that “*Johns*...requires CFEC to meet the Act's two legislative purposes of enabling fishermen to receive adequate remuneration and conserving the fishery” (quoting *Johns*, 758 P.2d at 1263)); *Matson v. State, Commercial Fisheries Entry Comm'n*, 785 P.2d 1200, 1203 (Alaska 1990) (affirming CFEC's point system related to income dependence on fisheries consistent with and necessary “to the purpose of the Limited Entry Act to conserve the fishery resource by limiting entry while preventing unjust discrimination among applicants for permits”); *Wickersham v. State, Commercial Fisheries Entry Comm'n*, 680 P.2d 1135, 1142 (Alaska 1984) (stating that application deadline furthered Limited Entry Act's purpose by restricting number of people involved in each fishery, thereby providing economic benefit to fishermen and furthering conservation of resource).

When precluding Scudero from testifying about the history of the Metlakatla Indian Community and his claimed aboriginal fishing rights, the district court determined that the testimony was irrelevant to the charged offenses. Scudero argues that this ruling violated his due process, free speech, and jury trial rights.

“We review questions of law presented by the [trial] court's evidentiary rulings de novo” and other evidentiary questions for an abuse of discretion.⁴⁸ The State's objections to Scudero's testimony were based on relevance⁴⁹. As explained above, the State has the authority to enforce fishing laws necessary to conservation regardless of Scudero's aboriginal and treaty-based rights. And to the extent Scudero intended to

⁴⁸ Hess v. State, 20 P.3d 11212,1123 (Alaska 2001).

⁴⁹ Relevant evidence has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Murray E. Gildersleeve Logging Co. v. N Timber Corp., 670 P.2d 372, 381 (Alaska 1983) (quoting Alaska R Evid. 401).

testify about issues of law, the testimony would have been inadmissible, as instructing the jury on the law was the province of the court.⁵⁰

But Scudero argues that his testimony would have been relevant as evidence of his intent to “protest fish.” He points to the court of appeals opinion from his 1994 convictions, in which the court found that his intent to fish as a way of demonstrating political protest was an “integral aspect” of his defense.⁵¹ The court of appeals agreed in that case that Scudero should be permitted to testify that “he acted with intent to protest an unfair or unjust law, not with the intent to take fish for commercial disposition,” because this testimony, “if accepted by the

⁵⁰ See *Miller v. State*, 778 P.2d 593, 597 (Alaska App. 1989) (explaining that whether warrant was required to obtain blood sample was question of law “plainly beyond the competence of a lay witness”); see also Jury Instr. No. 1 given in *State v. Scudero*, No. IK.E- 14-672 CR (Alaska Super., Jan. 14, 2014) (“After you have heard all of the evidence, I will instruct you on the law that you must apply in reaching your verdict”).

⁵¹ *Scudero v. State*, 917 P.2d 683, 686 (Alaska App.1996).

jury, would have negated an essential element of the two commercial fishing offenses.”⁵²

Here, as in that earlier case, the intent necessary to convict for commercial fishing violations was “the intent of disposing of [the fish] for profit, or by sale, barter, trade, or in commercial channels”⁵³ Scudero admitted that was his intent. Regardless of whether he was also protest fishing, the intent necessary for his conviction was undisputed. The court did not abuse its discretion by excluding Scudero's testimony about the historical underpinnings of his intent to protest fish.⁵⁴

C. The District Court Did Not Abuse Its Discretion By Admitting Evidence Of Scudero's Prior Convictions.

⁵² *Id.*

⁵³ AS 16.05.940(5) (defining “commercial fishing”).

⁵⁴ On the same rationale we reject Scudero's argument that the trial court erred by denying him an evidentiary hearing “so he could present evidence from himself and other members of the Tsimshian Nation and the [Metlakatla Indian Community] regarding [their] traditional, indigenous, aboriginal fishing practices.”

Scudero also challenges the district court's decision to admit evidence of his 1996, 2002, and 2003 convictions for commercial fishing in State waters without a permit. “[T]rial judges have discretion to determine when prior bad act evidence, including evidence of prior convictions, is admissible at trial. This is a balancing test which trial judges perform under [Alaska] Evidence Rule 404(b)(I) and Evidence Rule 403.⁵⁵ Under Evidence Rule 404(b)(I), “evidence of other crimes, wrongs, or acts is not admissible if the sole purpose for offering the evidence is to prove the character of a person in order to show that the person acted in conformity therewith. It is, however, admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” And Evidence Rule 403 allows relevant evidence to be

⁵⁵ *Morrow v. State*, 80 P.3d 262, 267 (Alaska App. 2003).

excluded “if its probative value is outweighed by the danger of unfair prejudice.” We will reverse the trial court's balancing exercise only for an abuse of discretion.⁵⁶

Scudero argues that the prior convictions should have been excluded because they were more than ten years old, proved nothing other than that “he did it before and he's done it again,” and were therefore more prejudicial than probative. The district court acknowledged the convictions' age but did not believe that this significantly reduced their probative value with regard to Scudero's intent to illegally commercial fish. And it concluded that the convictions were not unfairly prejudicial because it was unlikely the jurors would convict Scudero “simply because there [were]...other priors,” and the court would instruct them not to do so.

⁵⁶ Adkinson v. State, 611 P.2d 528, 532 (Alaska 1980).

We conclude that there was no abuse of discretion in the admission of this evidence. Even if the convictions could have been unfairly prejudicial on the issue of Scudero's intent, any abuse of discretion in the court's Evidence Rule 403 balancing was necessarily harmless because of Scudero's own admissions about the intent necessary for conviction: that he was commercial fishing and that he knew he was fishing outside the exclusive zone without a permit. And finally, in explaining “other acts” evidence to the jury at the close of trial, the court instructed that “[t]he prosecution cannot meet its burden simply by showing that the defendant has committed similar acts in the past.”

“Ordinarily we presume that a jury follows the court's limiting instructions,”⁵⁷ and, without a compelling reason to think otherwise, we assume the jury did so here.

⁵⁷ *Dailey v. State*, 65 P.3d 891, 897 (Alaska App. 2003); see also *Bradley v. State*, 197 P.Jd 209, 216 (Alaska App. 2008) (applying

D. Scudero's Sentence Was Not Clearly Mistaken, With The Exception Of The Erroneous Imposition Of Probation.

As part of his sentence Scudero was required to pay concurrent fines for the three offenses totaling \$20,000. He first challenges the sentence by arguing that the court could not impose a fine without first inquiring about his ability to pay. But as the State correctly points out, this specific inquiry is no longer required.⁵⁸ The fine enforcement statute, AS 12.55.051, grants a right to a hearing upon request “at any time that the defendant is required to pay all or a portion of the fine; this adequately protects the defendant's due process right not to be imprisoned solely because of an inability to pay.”⁵⁹

presumption that jury followed cautionary instruction when judge mistakenly informed jury that defendant had been charged with felony DUI).

⁵⁸ *Dodge v. Municipality of Anchorage*, 811 P.2d 270, 272 (Alaska App.1994).

⁵⁹ AS 12.55.051(c) provides, in part: “A defendant who has been sentenced to pay a fine or restitution may request a hearing

Scudero's second argument is that a \$20,000 fine is so excessive and so disproportionate to his offenses that it violates both the Alaska and United States Constitutions, and that it “will chill and deter protest fishing.” He also argues that the court should have suspended the fine, and that it should not have suspended his fishing privileges because the offenses were economic and the punishment “could have a significant impact” on him

“Sentencing decisions are reviewed under the clearly mistaken standard, giving deference to the sentencing court. '[T]he clearly mistaken test implies a permissible range of reasonable sentences which a reviewing court, after an independent review of the record, will not modify.’⁶⁰ “Under this standard 'the

regarding the defendants' ability to pay the fine or restitution at any time that the defendant is required to pay all or a portion of the fine or restitution.”

⁶⁰ *State v. Korkow*, 314 P.3d 560,562 (Alaska 2013) (alteration in original) (citation omitted) (quoting *State v. Hodari*, 996 P.2d 1230, 1232 (Alaska 2000)).

sentence will be modified only in those instances where the reviewing court is convinced that the sentencing court was clearly mistaken in imposing a particular sentence.”⁶¹

Scudero's fine is neither excessive nor disproportionate to the offenses. The court imposed the statutory minimum fine, and judgments about the appropriate punishment for an offense belong in the first instance to the legislature.”⁶² The court of appeals explained in *McNabb v. State* why the legislature may have chosen to impose relatively large fines for violations of commercial fishing statutes: they reflect the heavily regulated nature of the industry, the large profits which can occur from illegal fishing, and the value of the resource to the citizens of the state. The fines imposed

⁶¹ *State v. -Tofelogo*, 444 P.3d 151, 155 (Alaska 2019) (quoting *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974)).”

⁶² *United States v. Bajakajian*, 424 U.S. 321, 336 (1998).

may be designed to punish violators and need not reflect the profit the defendant received from a violation.”⁶³

However, the parties agree on one error in the written judgments: each of them includes a one-year probationary term, even though the judge stated on the record at Scudero's sentencing hearing that probation would not be required. “As a general rule, when the terms of a defendant's sentence as stated in the court's written [judgment] differ from the terms of the sentence announced orally by the sentencing judge at the defendant's sentencing hearing, the oral sentence controls.”⁶⁴

We remand to the district court for removal of the probationary periods from the judgments. In all other respects, the sentence is not clearly mistaken.

V. CONCLUSION

⁶³ 820 P.2d 1294, 1298-99 (Alaska App. 1993).

⁶⁴ Marunich v. State, 151 P.3d 510, 514 (Alaska App. 2006)

We AFFIRM Scudero's convictions and REMAND to the district court for modification of the judgments to remove the probationary periods.

In the Supreme Court of the State of Alaska

John Albert Scudero Jr.	)Supreme Court
	)No. S-17549
Petitioner,)
	) Order
v.	)Petition for
	)Rehearing
)
State of Alaska,	)Date of Order:
	)10/22/2021
)
Respondent.)
)

Trial Court Case No. **1KE-14-00672 CR**

Before: Winfree, Chief Justice, Massen, and Carney, Justices, and Bolger, Senior Justice.* [Borghesan, Justice, not participating.]

On consideration of the Petition for Rehearing filed by the Petitioner on **08/02/2021**, and the Response filed by the Respondent on 08/24/2021, and on consideration of the motion for reconsideration of this court's 08/30/2021 order

* Sitting by assignment made under article IV, section 11 of the Alaska Constitution and Alaska Administrative Rule 23(a).

filed by the Petition as a “Request for En Banc Ruling” on
9/2/2021.

IT IS ORDERED:

The Petition for Rehearing and the motion for
reconsideration are both **DENIED**.

Entered at the direction of the court.

Clerk of the Appellate Courts

/s/ Meredith Montgomery

Meredith Montgomery

John Albert Scudero Jr. v. State of Alaska

Supreme Court No. S-17549

Order of 10/22/2021

Page 2

cc: Judge Miller
Trial Court Clerk
Publishers (Opinion #7544, 7/23/2021)

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Weidner, Phillip Paul

Weidner Tafs A. Cristina W.

Jay, Anna Ruth

Martin Curtis W.

Lundberg, Christopher

In the Supreme Court of the State of Alaska

John Albert Scudero Jr.	)Supreme Court
	)No. S-17549
)
Petitioner,	)Order
v.	)Transfer from Court of
	)Appeals Appellate
	)Rule 408
State of Alaska,)
	) Date of Order:
Respondent.	) 09/10/2019
)

Trial Court Case No. **1KE-14-00672 CR**
Court of Appeals No. A-12729

Before: Bolger, Chief Justice, Winfree, Stowers, Maassen,
and Carney Justices

On consideration of the Court of Appeals’s 8/5/2019
Order certifying Appeal No. A-12729 to this court,

IT IS ORDERED:

1. Transfer of the appeal is **ACCEPTED**.
2. The new case number is S-17549. The existing briefs filed by the parties will be transferred to the Supreme Court.
3. The following entities are invited to participate as *amicus curiae* and respond to the parties’ briefs: the United States, the Metlakatla Indian

Community, and the Native American Rights Fund. Notices of participation and entries of appearance should be filed with the Court on or before **9/20/2019**.

4. If *amicus curiae* will participate, the Clerk's Office will provide copies of the record and briefs, and formal briefs conforming to Appellate Rule 212 and excerpts conforming to Appellate Rule 210 Shall be filed. Briefing and excerpting shall proceed on the schedule prescribed in Appellate Rule 212(c)(9), and as indicated in the Notices distributed by the Clerk's Office. Parties to the appeal will have an opportunity to file responsive briefs.

5. Either party may request oral argument within the time allowed by Appellate Rule 505.

Entered by direction of the court.

Scudero Jr. v. State
Supreme Court No. S-17549
Order of 09/10/2019
Page 2

Clerk of the Appellate Courts

/s/ Meredith Montgomery
Meredith Montgomery

cc: Supreme Court Justices
Court of Appeals Judges
Ketchikan Trial Court Appeals Clerk
Judge Kevin Miller

Distribution:

Mail:

Weidner, Phillip Paul

Weidner Tafs, A. Cristina W.

Vogel, Kathryn Rebecca

Native American Rights Fund

Metlakatla Indian Community

United States

In the Supreme Court of the State of Alaska

John Albert Scudero, Jr.	)Supreme Court
	)No. S-17549
)
Petitioners,)
v.	)Order
)
State of Alaska,	)Date of Order:
	) 9/14/20
Respondent.)
)

Court of Appeals No. A-12729
Trial Court Case No. 1KE-14-00672 CR

On consideration of John Scudero Jr.'s 9/11/20 motion to take judicial notice of federal lawsuit by Metlakatla Indian Community, and with the State of Alaska Conditionally not opposing the motion.

IT IS ORDERED:

The motion is **GRANTED**.

Entered at the direction of an individual justice.

Clerk of the Appellate Courts

/s/ Ryan Montgomery-Sythe
Ryan Montgomery-Sythe
Chief Deputy Clerk

cc: Supreme Court Justices

Distribution:

E-Mail:

Weidner, Phillip Paul

Weidner Tafs, A. Cristina W.

Wolff, Laura Emily

Martin, Curtis W.

Lundberg, Christopher

In the Supreme Court of the State of Alaska
Return of Jurisdiction

To: Clerk of Court at Ketchikan Date: **10/26/2021**

Re: **John Albert Scudero Jr. v. State of Alaska**
Trial Court Case No.: 1KE-14-00672 CR
Supreme Court No. **S-17549**

The original on appeal is being retained by Records Management Services for storage.

No trial court exhibits/sealed items are being returned to the trial court.

Under Appellate Rules 507(b) and 512(a), jurisdiction of this case is returned to the trial courts effective **10/22/2021**.

Clerk of the Appellate Courts

/s/ Joyce Marsh
Joyce Marsh, Deputy Clerk

Distribution:

E-Mail:
Weidner, Phillip Paul
Weidner Tafs, A. Cristina W.

App. 48

Jay, Anna Ruth
Martin, Curtis W.
Lundberg, Christopher

In the Court of Appeals of the State of Alaska

John Albert Scudero Jr.	)Supreme Court
	)No. S-17549
)
Petitioner,	)Order
v.	)Certifying Appeal to the
	) Supreme Court
State of Alaska,)
	) Date of Order:
Respondent.	) August 5, 2019
)

Trial Court Case No. **1KE-14-00672 CR**

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges

John Albert Scudero Jr. is a member of the Metlakatla Indian Community, and he lives on the Annette Islands Reserve. The Metlakatla Indian Community is a federally recognized tribe. Scudero appeals his convictions in the district court for commercial fishing without a CFEC permit, commercial fishing in closed waters, and unlawful possession of illegally taken fish.

On appeal, Scudero primarily contends that federal statutes and case law, as well as a Presidential proclamation, provide the Metlakatla Indian Community with unfettered aboriginal fishing rights within their “historic domain”—that is, within all of the coastal waters of the State of Alaska. Scudero also asserts that none of the Metlakatla Indian Community’s “indigenous, sovereign, and historic” fishing rights were extinguished by the Alaska Native Claims Settlement Act of 1971 because the community “did not join with the other tribes in signing the treaty[.]” Scudero thus argues that the State of Alaska has no jurisdiction over him, and lacks the authority to limit his ability to fish in the coastal waters of Alaska, or to prosecute him for fishing in those waters.

Under AS 22.05.015(b), the Alaska Supreme Court may take jurisdiction of a case pending before this Court if this Court certifies the “the case involves a significant

question of law under the Constitution of the United States or under the constitution of [Alaska]”, or if the case “involves substantial public interest that should be determined by the supreme court.”

We believe that the jurisdictional issue raised by Scudero involves a significant question of law under Alaska constitution and “an issue of substantial public interest that should be determined by the supreme court.”

We come to this conclusion for two reasons.

First, the issue presented here - that is, the ability of the State of regulate fishing in its waters-relates to questions of state - wide importance, and the answers to these questions will have repercussions far beyond this individual case.

Second, the primary issue in this case involves a challenge to regulations based upon the Alaska Constitution, Article VIII. The case therefore implicates

issues beyond the criminal law and involves a vital part of our state's economy. Expertise in natural resources law and Indian law rather than criminal law would be particularly helpful.

Accordingly, we respectfully request that the Supreme Court accept our certification of this appeal under AS 22.05.015(b) and assume jurisdiction over this case.

Entered at the direction of the Court.

Clerk of the Appellate Courts

/s/ Ryan Montgomery-Sythe
Ryan Montgomery-Sythe, Chief Deputy Clerk

cc: Supreme Court Justices
Court of Appeals Judges
Judge Miller
Ketchikan Trial Court Appeals Clerk

Distribution:

A. Cristina Weider-Tafs
Law Office of A. Cristina Weidner-Tafs

310 K Street Ste 200
Anchorage, AK 99501

Phillip Paul Weidner
Weidner & Associates, APC
943 W. 6th Avenue, Suite 300
Anchorage, AK 99501

Kathryn Vogel
Assistant Attorney General
1031 W. 4th Ave., Ste 200
Anchorage, AK 99501

IN THE DISTRICT COURT FOR THE STATE OF
ALASKA FIRST JUDICIAL DISTRICT AT KETCHIKAN

STATE OF ALASKA,)
)
 Plaintiff,)
 v.)
)
JOHN A. SCUDERO, JR,)
)
 Defendant.) Case No.
) 1KE-14-00672 CR

ORDER ON PENDING MOTIONS

I have this case on motions to dismiss for a new trial and for an evidentiary hearing on the pending motions.

PROCEDURAL HISTORY AND FACTS:

Mr. Scudero is an Alaska Native and a member of the Annette Island Reserve, a federal Indian reservation.

On September 23, 2014, the United States Coast Guard contacted Mr. Scudero fishing with commercial gear in state waters outside of the Annette Island Reserve's 3,000 foot exclusive fishing zone. Mr. Scudero

told Kevin Smith, the Coast Guard law enforcement officer, that he was commercial fishing, did not have a CFEC permit, had fish on board and intended to sell the fish at the Annette Island Cannery.¹ On September 23, 2014, Mr. Scudero did not have a Commercial Fisheries Entry Commission permit. Further, on September 23, 2014, state waters were closed to commercial drift gill net fishing.

The State of Alaska charged Mr. Scudero with three fish and game misdemeanors. Count 1 charged Mr. Scudero with commercial fishing in state waters without a CFEC permit. Count 2 charged Mr. Scudero with operating commercial drift gill net gear in state waters when the season was not open to drift gill net commercial fishing. Count 3 charged that Mr. Scudero possessed

¹ Mr. Scudero testified at trial that he was commercial fishing and knew that he was in state waters.

salmon commercially taken in Alaska waters without a CFEC permit.

Mr. Scudero did not raise any defenses required under Criminal Rule of Procedure 16(c)(5) and the case proceeded to trial.

Trial occurred on January 14, 2015, and a jury convicted Mr. Scudero on all counts.

This case has been pending sentencing since trial.

On February 5, 2016, more than a year after trial, Mr. Scudero filed motions to dismiss and for a new trial. He has also requested an evidentiary hearing. The prosecution filed its opposition on February 16, 2016. After several extensions, Mr. Scudero filed his reply on June 3, 2016.

EVIDENTIARY HEARING:

I deny Mr. Scudero's request for oral argument and for evidentiary hearing. Oral argument in a criminal case is at the court's discretion. See Rule Crim. Proc 42(f)(3).

After reviewing the pending motions, I conclude that an evidentiary hearing and oral argument are not necessary. Mr. Scudero's arguments are not novel and the law related to his arguments is well settled. An evidentiary hearing is not necessary as the material fact necessary to decide the pending motions are not seriously in dispute.

LACK OF JURSDICTION OR PREEMPTION:

Mr. Escudero first argues that the State of Alaska does not have jurisdiction to prosecute him for commercial fishing without a CFES permit; commercial fishing during a time when the season was closed to commercial fishing; and unlawful possession of fish. The basis for Mr. Scudero's argument is that he as exercising his

aboriginal, sovereign, historic, statutory or treaty rights as an Alaska Native to fish.

Mr. Scudero's argument ignores a long line of case law beginning in the 16th century that has consistently held that, absent express federal law to the contrary, Native Americans going beyond reservation boundaries are generally subject to nondiscriminatory state law otherwise applicable to all citizens of the State.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-149; 93 S. Ct. 1267, 1270, 36 L. Ed.2d 114 (1973); *Solem v. Bartlett*, 465 U.S. 463, 467, 104 S. Ct. 1161, 1164, 79 L. Ed. 2d 443 (1984).

In 1896, the Supreme Court of the United States decided *Ward v. Race Horse* (1896) 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 and held that the State of Wyoming had the power to regulate the off-reservation killing of game by Native Americans.

In 1962, the Supreme Court in *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S. Ct. 562, 7 L.Ed2d 573 continued its precedent holding that the State of Alaska could apply its anti-fish trap law to Native fishing not within an Indian reservation.

In this case, Mr. Scudero was in state waters outside of the Annette Island Reserve. As a result, Mr. Scudero was subject to Alaska's fish and game statutes and regulations. He has not identified any "express federal law to the contrary". Thus, Alaska has jurisdiction over Mr. Scudero as well as the conduct alleged in the complaint.

Therefore, I must deny Mr. Scudero's motion to dismiss.

NEW TRIAL:

Alaska Criminal of Procedure 33 states:

(a) Grounds. The court may grant a new trial to a defendant if required in the interest of justice. (b) Subsequent

Proceedings. If trial was by the court without a jury, the court may vacate the judgment if entered, take additional testimony and enter a new judgment. (c) Time for Motion. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within 180 days after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilt, or within such further time as the court may fix during the 5-day period.

Mr. Scudero asserts two grounds for a new trial.

First, he claims that the prosecutor improperly questioned him about his prior convictions. Second, he argues that I prevented him from testifying about historic fishing practices that would have established a lack of jurisdiction and would also have been relevant to s intent. I deny Mr. Scudero's request for a new trial.

My primary reason for denying Mr. Scudero's motion for a new trial is that he waited over a year after

the jury's verdicts to file his motion. However, even if he had timely filed his motion, he has not shown that a new trial is required in the interest of justice.

Mr. Scudero asserts no authority on why I was mistaken in admitting his prior convictions for commercial fishing without a CFEC permit other than a reference that the evidence was more prejudicial than probative. I found that the evidence was admissible under 404(b)(1) and also found that the evidence's probative value outweighed any danger of unfair prejudice. I also gave the jury a cautionary instruction related to the prior conviction evidence. See instruction 14. I find no error in admitting that evidence.

Mr. Scudero next argues that he is entitled to a new trial because I limited his ability to testify about historical fishing practices. He contends that the

historical fishing practice evidence was relevant to jurisdiction and his intent.

As the prosecution points out, jurisdiction is a legal issue for the court and not an issue for the jury. As for Mr. Scudero's intent, he testified that he was commercial fishing and intended to sell fish. As a result, I conclude that exclusion of this evidence was not error.

CONCLUSION:

For the reasons stated above, Mr. Scudero's motions to dismiss, for a new trial and for an evidentiary hearing are denied.

Entered this 22nd day of June, 2016

/s/ Kevin Miller
Kevin G. Miller
District Court Judge.

I certify that on 6-22-16 a copy of this order was:
Dist. to: Deft's Atty Weidner; DA

Clerk: /s/ NJ

**IN THE DISTRICT COURT FOR THE STATE OF
ALASKA AT KETCHIKAN**

STATE OF ALASKA CASE NO. 1KE-14-672 CR
vs. SCUDERO, JOHN ALBERT JR. ATN: 114828588
CTN: 001
DOB: 5/24/1957 DL/ID: 0572531 ST: AK
APSI9N: 0572531

JUDGMENT - FISH AND GAME

Date of Offense: 9/23/2016
Statute/Reg. AS 16.43.140(a)
Offense Charged: No CFEC Permit
 Misdemeanor Violation

PLEA: Not Guilty Guilty No Contest
TRIAL: Court Jury

The defendant was found and adjudged:
 GUILTY of the offense named above.

SENTENCE

Direct Court Orders:

- POLICE TRAINING SURCHARGE: \$50 to be paid within 10 days.
- JAIL SURCHARGE: \$100 with \$100 suspended.
- FINE \$20,000 to be paid by 9/19/2017.

Defendant commercial fishing privileges and licenses are suspended for 5 years.

PROBATION. Defendant is placed on probation for 1 year, subject to the following conditions:

- Comply with all direct court orders listed above by the deadline stated.
- Commit no fish and game violations during the probation period.
- Commit no commercial fishing violations during the probation period.

09/19/2016
Effective Date

/s/ Kevin G. Miller
Judge Kevin G. Miller

I certify that on 9/30/2016 a copy of this order was distributed by TJ to:

E-Mailed: DA Deft's Atty WEIDNER AST KPD
KCC Records

Deft. By Mail

Faxed Comm. Fisheries Entry Comm. (789-6170) (all violations under AS16.43)

**IN THE DISTRICT COURT FOR THE STATE OF
ALASKA AT KETCHIKAN**

STATE OF ALASKA CASE NO. 1KE-14-672 CR
vs. SCUDERO, JOHN ALBERT JR. ATN: 114828588
CTN: 002
DOB: 5/24/1957 DL/ID: 0572531 ST: AK
APSI9N: 0572531

JUDGMENT - FISH AND GAME

Date of Offense: 9/23/2016
Statute/Reg. 5 AAC 33.310(c)(1)(B)
Offense Charged: Commercial Fish Closed Season
 Misdemeanor Violation

PLEA: Not Guilty Guilty No Contest
TRIAL: Court Jury

The defendant was found and adjudged:
 GUILTY of the offense named above.

SENTENCE

Direct Court Orders:

POLICE TRAINING SURCHARGE: \$50 Concurrent
with CTN 001.
 JAIL SURCHARGE: \$100 with \$100 suspended
Concurrent with CTN 001.

FINE \$5,000 to be paid by 9/19/2017. Concurrent with CTN 001.

Defendant commercial fishing privileges and licenses are suspended for 5 years.

PROBATION. Defendant is placed on probation for 1 year, subject to the following conditions:

Comply with all direct court orders listed above by the deadline stated.

Commit no fish and game violations during the probation period.

Commit no commercial fishing violations during the probation period.

09/19/2016
Effective Dated

/s/ Kevin G. Miller
Judge Kevin G. Miller

I certify that on 9/30/2016 a copy of this order was distributed by TJ to:

E-Mailed: DA Deft's Atty WEIDNER AST KPD
KCC Records

Deft. By Mail

Faxed Comm. Fisheries Entry Comm. (789-6170) (all violations under AS16.43)

**IN THE DISTRICT COURT FOR THE STATE OF
ALASKA AT KETCHIKAN**

STATE OF ALASKA CASE NO. 1KE-14-672 CR
vs. SCUDERO, JOHN ALBERT JR. ATN: 114828588
CTN: 003
DOB: 5/24/1957 DL/ID: 0572531 ST: AK
APSI9N: 0572531

JUDGMENT - FISH AND GAME

Date of Offense: 9/23/2016
Statute/Reg. 5 AAC 39.197
Offense Charged: Commercial Fish Closed Season
 Misdemeanor Violation

PLEA: Not Guilty Guilty No Contest
TRIAL: Court Jury

The defendant was found and adjudged:
 GUILTY of the offense named above.

SENTENCE

Direct Court Orders:

POLICE TRAINING SURCHARGE: \$50 Concurrent
with CTN 001.
 JAIL SURCHARGE: \$100 with \$100 suspended
Concurrent with CTN 001.

FINE \$5,000 to be paid by 9/19/2017. Concurrent with CTN 001.

Defendant commercial fishing privileges and licenses are suspended for 5 years.

PROBATION. Defendant is placed on probation for 1 year, subject to the following conditions:

Comply with all direct court orders listed above by the deadline stated.

Commit no fish and game violations during the probation period.

Commit no commercial fishing violations during the probation period.

09/19/2016
Effective Dated

/s/ Kevin G. Miller
Judge Kevin G. Miller

I certify that on 9/30/2016 a copy of this order was distributed by TJ to:

E-Mailed: DA Deft's Atty WEIDNER AST KPD
KCC Records

Deft. By Mail

Faxed Comm. Fisheries Entry Comm. (789-6170) (all violations under AS16.43)

IN THE DISTRICT/SUPERIOR COURT FOR THE
STATE OF ALASKA FIRST JUDICIAL DISTRICT AT
KETCHIKAN

STATE OF ALASKA,	)Trial Court Case
	)No.: 1KE-14-00672 CR
)
State of)
Alaska,	)Appeal Court Case
	)No.: <u>A-12729.</u>
v.)
	)<u>Supreme Court</u>
	)<u>No. S-17549</u>
)
JOHN A. SCUDERO, JR,	)ORDER UPON
	)CONCLUSION OF
	)APPEAL IN CRIMINAL,
	)ALCOHOL
Defendant.	)UNDERAGE, OR
	)MINOR OFFENSE
	)CASE

Date of appellate court decision: 10/22/2021
Date of jurisdiction returned to the trial court, pursuant
to Appellant Rule 512: 10/22/2021
Date received by the trial court: 10/27/2021
 Jurisdiction retained by the appellate court

ORDER

This order applies to the offenses listed in the chart
below. The dispositions of the other offenses in the case
remain unchanged.

CTN	Offense	Modifier	Appeal Decision
<u>001</u>	<u>No CFEC Permit</u>	_____	<input checked="" type="checkbox"/> Conviction Affirmed

	<u>AS</u> <u>16.43.140(a)</u>		<input type="checkbox"/> Remanded for re-sentencing only <input checked="" type="checkbox"/> Remanded for modification <input type="checkbox"/> Conviction Reversed
<u>002</u>	<u>No CFEC Permit</u> <u>AS</u> <u>16.43.140(a)</u>	_____	<input checked="" type="checkbox"/> Conviction Affirmed <input type="checkbox"/> Remanded for re-sentencing only <input checked="" type="checkbox"/> Remanded for modification <input type="checkbox"/> Conviction Reversed
<u>003</u>	<u>No CFEC Permit</u> <u>AS</u> <u>16.43.140(a)</u>	_____	<input checked="" type="checkbox"/> Conviction Affirmed <input type="checkbox"/> Remanded for re-sentencing only <input checked="" type="checkbox"/> Remanded for modification <input checked="" type="checkbox"/> Conviction Reversed

Pursuant to the appeal decision, the judgment/order dated 9/19/2016 has been:

- AFFIRMED**, All stays in this matter are lifted.
 - All fines, surcharges, restitution and other costs related to the offense that were affirmed are due: as previously ordered.
 - on _____,

- No further proceedings are required. All exhibits submitted in this case will be Returned pursuant to Administrative Bulletin 9.

- Other: _____
- REMANDED.** The case is reopened for the reason indicated below. The status of costs will be determined at the hearing in the Calendaring Notice below.
- For re-sentencing.
- The appellate court has remanded for further fact-finding. The parties will advise the court within _____ day whether (1) there is a sufficient evidence in the existing record to enable the trial court to make the requested findings or (2) a hearing should be held to receive further evidence.
- Other: Amended judgments will issue removing probationary periods and terms.
- CONVICTION REVERSED.** The judgment is vacated and the case is reopened. The status of costs will be determined at the hearing listed in the Calendaring Notice below.
- The defendant is released from custody only as to the offenses listed in the chart at the beginning of this order as "Conviction Reversed".
- Other: _____

CALENDARING NOTICE	
Hearing:	Location:

Date:	Courtroom:
Time:	Judge:

November 29, 2021
Effective Date

/s/ Kevin G. Miller
Judge Kevin G. Miller

I certify that on 11/30/21
a copy of this order was
sent to:
 District Attorney
 Defense Attorney
 Defendant
 DOC/Adult Probation
 Trial Court
Accounting
 Exhibit Clerk
Clerk/Judicial Assistant:
TJones

IN THE SUPREME COURT FOR THE STATE OF ALASKA

JOHN A. SCUDERO, JR.,)
)
Appellant,)
v.)
	)Supreme Court
	)No.: S-17549
STATE OF ALASKA,)
)
Appellee)
)

Superior Court No. 1KE-14-00672CR
Court of Appeals No. A-12729

APPELLANT’S MOTION UNDER RULE 506 (b) FOR PERMISSION TO FILE FURTHER BRIEFS AND MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING/APPELLANT’S MOTION PURSUANT TO APPELLATE RULE 506 (b) FOR ORAL ARGUMENT AS TO PETITION FOR REHEARING

<p>VRA Certification</p> <p>I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.</p>

Comes Now Appellant, John A. Scudero Jr., by and through the Counsel, Phillip Paul Weidner and Anna

Cristina Weidner Tafs and hereby moves, pursuant to Alaska Supreme Court Rule of Appellate Procedure 506(b) for the following relief: ¹

1. For permission to file further Memoranda and or Briefing in support of his Petition For Rehearing Pursuant To Rule 506(a)(1)(2) and (3) which was timely filed on August 2, 2021

2. For the Court to grant, and conduct, oral argument is to said Petition For Rehearing, after said briefing is completed, with appropriate briefing, by Appellant, responsive briefing by the Appellee State of Alaska, and a Reply Brief by Appellant.

This Motion is made on the grounds, under Rule 506, the Court can request said Memoranda and Briefs, in support of the Petition for Rehearing. As set out in the

¹ An Individual Justice of the Alaska Supreme Court has now ordered the State of Alaska to respond to the Petition For Rehearing by 8/16/2021 (see Exhibit A).

Petition for Rehearing, given the important issues, grounds exist for allowing appropriate further Memoranda, and Briefing, which should be allowed, and filed, for the Court to be duly advised with oral argument as to same.

That is, under Appellate Rule 506(a), as to the Court, “reaching its decision”;

- (1) The court has overlooked, misapplied or failed to consider a statute, decision or principle directly controlling; or
- (2) The court has overlooked or misconceived some material fact or proposition of law; or
- (3) The court has overlooked or misconceived a material question in the case.

The central errors in the Court doing so, are crystallized in the first sentence of the Petition for Rehearing.

Where Natives/Indians such as Mr. Scudero have such “broad off reservation”

treaty or aboriginal fishing rights (as this court assumed), while it may be that

for conservation purposes, means/methods (even perhaps seasons) regulations

may be applied without discrimination, i.e., “across the board”, there cannot be

a “limited entry” prohibition to foreclose such vested Metlakatla Native/Indians

participation. [Petition at Page 1]

Thus, while the Court assumed “broad off reservation” treaty or aboriginal fishing rights for an Native/Indian such as Mr. Scudero, that is members of the Metlakatla Tribe/Tsimshian Nation, where Natives/Indians such as Mr. Scudero have such “broad off reservation” treaty or aboriginal fishing rights (as this

court assumed), while it may be that for conservation purposes, means/methods (even perhaps seasons) regulations may be applied, without discrimination, i.e., “across the board”, there cannot be a “limited entry” prohibition to foreclose such vested Metlakatla Native/Indians participation.

The Court confused US Supreme Court, and Ninth Circuit Authorities, as to “conservation necessity” and also applicable authority as to Tribal/Treaty Rights and Aboriginal Rights, which authority is clear, that while certain state regulations of hunting and fishing for conservation purposes, as to “methods and means”, and even perhaps “seasons” can be imposed across-the-board on all citizens, there cannot be an actual prohibition or interference with such Native/Indian Vested Fishing Rights, i.e. the rights of Mr. Scudero, be whatever the

origin, from Treaties, Statute, Presidential Proclamation,
and most importantly Aboriginal Rights.

Accordingly, is crucial of the Court to allow such
additional Memorandum and Briefing and be duly
advised in Oral Argument.

A proposed Order to grant said permission, and Oral
Argument is included.

RESPECTFULLY SUBMITTED this 4th day of
August 2021.

WEIDNER & ASSOCIATES, APC
Counsel for Appellant

By: *s/Phillip Paul Weidner*
Phillip Paul Weidner
ABA No. 7305032

RESPECTFULLY SUBMITTED this 4th day of
August 2021.

SUSITNA LAW, LLC
Counsel for Appellant

By: s/Phillip Paul Weidner for
A. Cristina Weidner Tafs
ABA No. 0011089

CERTIFICATE OF SERVICE

This is to certify that on the 4th day of August 2021,
a true and correct copy of the foregoing was sent via email.

Anna Jay
OFFICE OF THE ATTORNEY GENERAL
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
Anna.jay@alaska.gov

Curtis W. Martin
LAW OFFICES OF CURTIS W. MARTIN
263 S. Alaska Street
Palmer, AK 99645
Curt@CurtMartinLaw.com

Christopher Lundberg
HAGLAND KELLEY, LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
clundberg@hk-law.com

s/Maria Martinez

IN THE SUPREME COURT FOR THE STATE OF ALASKA

JOHN A. SCUDERO, JR.,)
)
Appellant,)
v.)
	)Supreme Court
STATE OF ALASKA,	)No.: S-17549
)
Appellee)
)

Superior Court No. 1KE-14-00672CR
 Court of Appeals No. A-12729

APPELLANT'S PETITION FOR REHEARING
PURSUANT TO RULE 506 (a)(1)(2) AND (3)

<p>VRA Certification</p> <p>I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.</p>

App. 81

RESPECTFULLY SUBMITTED this 2nd day of
August 2021.

WEIDNER & ASSOCIATES, APC
Counsel for Appellant

By: *s/Phillip Paul Weidner*
Phillip Paul Weidner
ABA No. 7305032

RESPECTFULLY SUBMITTED this 2nd day of
August 2021.

SUSITNA LAW, LLC
Counsel for Appellant

By: *s/Phillip Paul Weidner for*
A. Cristina Weidner Tafs
ABA No. 0011089

Where Natives/Indians such as Mr. Scudero have “broad off reservation” treaty or aboriginal fishing rights (as this court assumed), while it may be that for conservation purpose, means/methods (even perhaps seasons) regulations may be applied without discrimination, i.e., “across the board”, there cannot be a “limited entry” prohibition to foreclose such vested Metlakatla Native participation.

While Court “assumed the existence of broad off-reservation fishing rights” (E.A.) Court held it could decide (i.e. deny) appeal re merits, solely on “basis of well-established principles governing the interrelationship of aboriginal or treaty-based rights and the State’s police powers”; and did so on an erroneous basis of “conservation purposes, even [as to] persons whose fishing rights are aboriginal and reserved by treaty” (Slip Opinion 15).

Court incorrectly applied principle of “conservation

necessity”, holding Alaska Legislature Limited Entry Act of 1973, could preclude Scudero’s rights given “...intertwined purposes of conserving fisheries resources and maintaining a healthy fishing industry” (footnote omitted); further holding “Whatever the status of Scudero’s aboriginal and reserved rights, they do not shield him from the non-discriminatory (sic) operation of State fishing laws that are necessary for the conservation of the resource” (SO 16).

This violated Rule 506 (a)(1)(2) and (3); As it “ducked and avoided”, issues of multiple source(s) nature of Mr. Scudero’s rights; 1) Treaty and U.S. Congress Legislation, and Presidential Proclamation; 2) Aboriginal rights which have never been relinquished or ceded away by Metlakatla Tribe and Reserve and Sovereign Tsimshian Nation¹.

¹ Said rights being preserved and not relinquished under Alaska Native Claims Settlement Act [Metlakatla Natives Tribe, and

Slip Opinion is mishmash misapplication of cited case authority, concerning tribal/sovereign rights, treaty rights, congressional statutory rights, presidential proclamation rights, aboriginal rights, and prohibition against discrimination against Natives with vested rights such as Mr. Scudero: Under guise of “conservation necessity”; which here is discriminatory prohibition against “unpermitted” Metlakatla/Tsimshian Natives from commercial fishing at all, for halibut or salmon, etc., in Alaskan waters “Off Reservation”, by any means, in any seasons, or in any areas. Natives of Metlakatla Tribe/Tsimshian Sovereign Nation such as Mr. Scudero, have certain quasi-treaty rights, and/or statutory/congressional rights, presidential proclamation

Tsimshian Nation, opted out of that Act and never relinquished their Aboriginal rights to fish in their traditional and customary places (i.e., where Mr. Scudero was fishing) for subsistence, which included commercial activity and barter]. Said Metlakatla/Tsimshian Tribal and Sovereign Status was recognized at Slip Opinion, footnote 1, citing *John v. Baker*, 982 P.2d 738, 750 (Alaska 1999).

rights, under 1891 statute, creating Annette Island Reserve, and President Wilson's 1916 Proclamation. All Metlakatla Tribe/Tsimshian Natives also have vested aboriginal rights, which have never been relinquished, ceded, abandoned, or given up².

Doctrine of "conservation necessity", i.e., principal inappropriately relied upon by Court, under cited case authority, only applies to treaty rights. Aboriginal rights are not addressed by cited authority; may not be so abrogated due to "conservation necessity"³.

² Alaska Native Claims Settlement Act recognized Alaska Tribes/Natives historical aboriginal rights, and settled same as to participating tribes, but Metlakatla/Tsimshian Natives opted out. See, e.g., Robert T. Anderson, *The Katie John Litigation: A Continuing Search for Alaska Native Fishing Rights after ANCSA*, Arizona State Law Journal, Vol. 51, No. 3 (2019), and 9th Circuit, and U.S. Supreme Court cases cited at note 1 therein. See also, Robert T. Anderson, *Sovereignty and Subsistence: Native Self-Government and Rights To Hunt Fish and Gather After ANCSA*, 33 Alaska Law Review 187 (2016).

³ Especially not so voided, as here, with such flat prohibition as to Metlakatla/Tsimshian Natives fishing at all in "off reservation" Alaska waters without a limited entry permit. In that regard, the limited impact of allowing small band of Metlakatla Natives fishermen such as Mr. Scudero to exercise their aboriginal rights,

Doctrine of “conservation necessity”, even if it could be applied to aboriginal rights, as opposed to treaty rights, under the case authority, clearly cannot justify any discrimination against, or flat prohibition or preclusion of the “unpermitted” Metlakatla/Tsimshian Natives from fishing without a limited entry permit “off reservation”. Cases cited in SO, which address state regulations, that have been upheld as reasonable re conservation, only deal with means and methods of harvest or times of harvest (not such discriminatory prohibition)⁴.

By its very terms, Alaska Limited Entry Fisheries Act, discriminates against “unpermitted” Natives such as Mr. Scudero, who do not have limited entry permits, and

cannot truly be claimed to have any serious impact on conservation of salmon or halibut, etc. in Alaska.

⁴ *Anderson v. Evans*, 371 F.3d 475, 499 (9th Cir. 2004), dealt with a quota requirement under the Marine Mammal Protection Act of regulation of taking gray whales and applied across the board to all persons with no discrimination as to harvest re “limited permits”.

prohibits them absolutely from fishing for salmon or halibut in Alaska waters outside the preserve by any commercial method including doing so for subsistence or bartering in their traditional ways (which Mr. Scudero was doing). Note it is significant, as to quasi-treaty rights or congressional statute rights and presidential proclamation rights, it was precisely for native commercial fishing purposes, that the Reserve was created, and exists, and those rights were granted. As discussed by Amicus Briefing of the Metlakatla Indian Community in this case, and related pleadings in U.S. District Court Alaska, *Metlakatla Indian Community v. Dunleavy*, et al., 5:20-cv-00008-JMK, related off reservation related fishing must be allowed⁵.

⁵ Note, there may be separate questions, as to whether Mr. Scudero could have been prosecuted for fishing in a “conservation/season” closed area, as opposed to being prosecuted for fishing in an unclosed but “limited permit only area”. As set out in Amicus Briefing, given establishment of the Reserve (which is a “sanctuary and not a cage”), there are certain quasi-treaty rights and

Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962) (cited at SO 4, 10) re U.S. Supreme Court dicta, as to State’s possible power to regulate the exercise of aboriginal Indian rights re hunting and fishing dealt with only means for commercial fishing (i.e., fish traps) and not a discriminatory prohibition, i.e., such prohibition as here under a limited entry permit system which discriminates against Natives such as Mr. Scudero, i.e., an absolute prohibition against such “unpermitted” Metlakatla/Tsimshian Natives fishing for salmon or halibut etc., off reserve without a permit⁶. *Tulee v. Washington*, 315 U.S. 681, 682 (1942) (SO 10), recognized

congressional statutory rights for natives such as Mr. Scudero, to fish in related off reserve adjacent waters, without limited entry permit(s), off reservation (*See*, SO 9).

⁶ Scudero’s Appellate Briefing alerted this Court to distinction between non-discriminatory conservation regulations, re methods, means, season, etc., and an inappropriate total ban, i.e., discrimination prohibition as here (*See*, Scudero Reply Br. at pp. 2-3, 12, 13). Same analysis applies re SO cited US. Supreme Court cases at pg. 14, note 43.

even under treaty rights, states could not require a permit or permit fee. *See also, Grunert v. State*, 109 P.3d 924, 932-35 (Alaska 2005) (SO 15) as to the prohibition against interfering with traditional native rights, be they treaty, statutory, or aboriginal. *Antoine v. Washington*, 420 U.S. 194, 207 (1975) (SO 14), dealt with a 1891 agreement between the U.S. Executive Branch and the Confederated Tribes of the Colville Indian Reservation, and was square holding, re treaty rights, that notwithstanding the abolishment of the “contract by treaty method”, by Congress in 1872, that Legislation in 1891 passed by Congress, gave vested rights to fish (thus as did here the 1891 Annette Islands Reserve Congressional Act). The two U.S. Supreme Court “*Puyallup*” cases of 1973 and 1968 (SO 12), establish clearly, that even as to treaties, the State of Washington could not discriminate against natives, even as to method and means of harvest (without

a prohibition as here). *Minnesota v. Mille Lac Band of Chippewa Indians*, 526 U.S. 172, 205 (1999) (SO 10), likewise, dealt only with treaty rights and conservation management re recognized treaty rights, and held unless they were specifically relinquished or revoked by congressional action (i.e., as in this case not so relinquished or revoked), they were still preserved; and distinguished the “Red Horse” cases. *Washington State Department of Licensing v. Cougar Den*, 139 S. Ct. 1000, 1015 (2019) (SO 14), upheld sanctity of treaty rights, as to a “gas tax” imposed upon fuel re ground transportation be used for Indian use of road.

It is crystal clear, SO is in error, in many respects including “ducking the issues” on aboriginal rights, and further upholding an Alaska State regulatory scheme, under the guise of “conservation necessity”, when it is in fact, total discrimination and total fishing off reservation

prohibition, against “unpermitted” Metlakatla/Tsimshian Natives, such as Mr. Scudero who have vested rights under the treaties, congressional act, and presidential proclamation, and most importantly still vested aboriginal rights to fish⁷.

s/Phillip Paul Weidner *Phillip Paul Weidner for*
Phillip Paul Weidner A. Cristina Weidner Tafs

⁷ As reflected by the Amicus Curiae Briefing of the Metlakatla Indian Community, not only as noted, do the Metlakatla/Tsimshian Natives have treaty rights to fish in certain related off reservation water but the Limited Entry Act, de facto, in fact, discriminated against Metlakatla/Tsimshian Natives, re obtaining permits, as their “reservation fishing history” did not count for qualifying points for limited entry permits. Those rights cannot be prohibited under the Alaska Limited Fisheries Act as a purported regulatory means of conservation necessity (which regulations and statutes do not merely regulate in a nondiscriminatory fashion the means and methods of fishing or seasons or areas of fishing), but stand as absolute prohibition for “unpermitted” Metlakatla/Tsimshian Natives who do not have a limited entry permit, from taking any halibut or salmon in Alaska waters by fishing boats and traditional commercial gear, even for subsistence purposes or traditional bartering or commercial activities which is their historical and vested right to do).

**IN THE SUPREME COURT FOR THE STATE OF
ALASKA**

JOHN A. SCUDERO, JR.,)
)
Appellant,)
v.)
)
STATE OF ALASKA,)
)
Appellee)

Supreme Court No. :S-17549
Superior Court No. 1KE-14-00672CR
Court of Appeals No. A-12729

**On Appeal from Superior Court First Judicial District at
Anchorage, No, 1KE-14-00672 CR The Honorable Kevin
Miller, Judge**

**AMICUS CURIA BRIEF OF METLAKATLA INDIAN
COMMUNITY**

VRA Certification

<p>I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.</p>
--

Curtis W. Martin (Bar No. 0311060)
Law Offices of Curtis W. Martin
263 S. Alaska Street
Palmer, AK 99645
Local Counsel for Amici Curiae

/s/ Christopher Lundberg
Christopher Lundberg (pro hac vice)
Hagland Kelly, LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
(503) 225-0777

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PROVISIONS RELIED UPON

**Act of March 3, 1891, ch. 561 § 15, 26 Stat. 1095, 1101
(formerly codified at 48**

**U.S.C. § 358 and transferred to 25 U.S.C. § 495 prior to
deletion from the Code).**

Annette Islands reserved for Metlakahtla Indians

Until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska on the north side of Dixon's entrance, is set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Metlakatla Indian Community ("the Community") appreciates the Court's invitation to file this brief as Amicus Curiae - and the opportunity to explain a significant error in the State's argument. The State has wrongly asserted a so-called "fatal flaw" in Mr. Scudero's argument, which the State characterized as a purported absence of any federal authority for members of the Community to commercially fish off-reservation, where Mr. Scudero's and other Community members' ancestors fished, free of State interference.

Federal authority does exist in the form of a reserved right: When Congress established the Annette Islands Reserve in 1891, it reserved for Metlakatlans the right to fish in waters surrounding the Annette Islands, which the Community asserts extend into the fishing areas currently designated by the Alaska Department of

Fish and Game as Areas 1 and 2.¹ President Wilson's Proclamation of 1916 enhanced that reserved right by establishing an exclusive fishery for the Community's protection. However, that Proclamation did not diminish or affect in any way the off-reservation fishing rights reserved by Congress. For all practical purposes, those rights were unlawfully extinguished with the State's passage of its limited entry regulatory program in 1973 and the State's refusal to credit the Community's on-reservation catch for purposes of issuing related permits.

¹ The timing of Mr. Scudero's case is coincidental in that the Community has prepared a lawsuit for filing in federal district court in the near future that will seek to restore the full scope of the Community's reserved fishing rights. In that lawsuit, the Community will present substantial evidence from the late nineteenth and early twentieth centuries showing that the Metlakatans, the Federal Government, and the Territory of Alaska all recognized the Community's off-reservation fishing rights.

Accordingly, the Community strongly supports the right of its members - including Mr. Scudero - to fish in the waters surrounding the Reserve free of State interference. As explained below, under the proper analytical framework, it is clear that the Community has a reserved right to fish, on a non-exclusive basis, in the off-reservation waters surrounding the Reserve.

ARGUMENT

In 1891, by way of a statute, Congress established the Annette Island Reserve. Act of March 3, 1891, ch. 561 § 15, 26 Stat. 1095. Similar to a treaty, the statute creating the Reserve also created rights benefitting the Community, including off-reservation rights, necessary to fulfill the purpose of the reservation. *Confederated Tribes of Chehalis v. State of Wash.*, 96 F.3d 334, 342-3 (9th Cir. 1996). In determining the scope of the Community's rights, which were unarticulated in the statute itself, a

court "must consider the [statute], the circumstances surrounding [its] creation, and the history of the [Metlakatlangs] for whom [the reservation was] created." *Id.* at 342. In other words, the Chehalis court announced the principle that reserved rights are created - even where a statute was silent on the subject - if the existence of the rights is clear from the circumstances surrounding the creation of the reservation. *Id.* Here, Congress reserved an island in southeast Alaska for the Metlakatlangs (a fishing people who had historically engaged in the commercial fish trade) for the purpose of establishing a self-sustaining and permanent community. The fulfillment of that purpose would have been impossible if the Reserve did not include associated fishing rights. In turn, the Metlakatlangs obviously understood the Reserve to be facilitating rather than restricting their traditional fishing

lifestyle and economy. Indian law canons of construction applicable to this dispute support that conclusion. In that regard, those canons require this Court to consider the statute creating the Annette Islands Reserve in light of "the unique trust relationship between the United States" and the Metlakatlans. *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 1258, 84 L.Ed.2d 169 (1985). Additionally, statutes, executive orders, and treaties creating reservations must be liberally construed in favor of establishing Indian rights, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767, 105 S.Ct. 2399, 2404, 85 L.Ed.2d 753 (1985), and "ambiguities must be resolved in favor of the Indians." *Parrava v. Babbitt*, 70 F.3d 439, 544 (9th Cir. 1995). Notably, the scope of the rights associated with establishing a reservation must be interpreted as the Indians themselves, at the time of the reservation's

creation, would have understood them. *Id.* In the light of Chehalis, those canons only reinforce the conclusion that Congress would not have created the Reserve without adequate fishing rights, and that the Metlakatians necessarily would have understood that the Reserve included such rights.

In fact, in 1922, six years after President Wilson's proclamation of 1916, the Territory of Alaska submitted an Answer to Complaint in Intervention in which it recognized the mutual understanding of the United States and the Community as to the Community's off-reservation fishing rights, as follows:

That the inhabitants of Annette Island, ever since their settlement on said Island, have been and yet are in the habit of fishing outside of said reserve, and a large percentage of the fish canned from year to year by the defendant company was caught in waters outside of said reserve; that during the year 1919 at least 130,000 salmon canned by the defendant company at

its cannery on Annette Island were caught by residents of Metlakahtla in waters outside the reserve; ... and the right of the inhabitants of said Annette Island reserve to catch fish outside of the reserve, and to engage in any other business outside of the reserve, has always been and is now recognized by the intervenor and by the Government of the United States, and such right is and at all times has been claimed by the said Metlakahtla people.

Answer to Complaint in Intervention, Secretary of the Interior, for and on behalf of the people of the Annette Island Reserve at 4-5, *Territory of Alaska v. Annette Island Packing Company*, No. 2023-A (District Court for the District of Alaska, April 4, 1921). Notably, in that case, the Court ultimately held that the Territory could not interfere with the reserved rights of the Metlakahtlans. *See Territory v. Annette Island Packing Co.*, 6 Alaska 585,611 (D. Alaska 1922), *aff'd sub nom. Territory of Alaska v. Annette Island Packing Co.*, 289 F. 671 (9th Cir.1923) ("... [I]t would not be open to the territory to

question the use of any portion of the reserve by the political department of the government in furtherance of the intention of Congress.").

Similarly, in two cases, the United States Supreme Court has held that the statute creating the Annette Islands Reserve also reserved a fishing right. In *Alaska Pacific Fisheries Company v. United States*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918), the Supreme Court acknowledged that Metlakatians were a fishing people who "could not sustain themselves" without fishing rights. The Court held that "the use of the adjacent fishing grounds was equally essential" to the purpose of the Annette Islands Reserve, which the Court viewed as providing Metlakatians with the means to become self-sustaining. *Id.* In *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 82 S.Ct. 552, 7 L.Ed. 262 (1962), the Supreme Court also recognized that the Metlakatlan

depended on fishing for their livelihood and that Congress had reserved their fishing rights by creating the Annette Islands Reserve.²

CONCLUSION

The Metlakatla Indian Community has a reserved non-exclusive right to fish outside of the Reserve under the Chehalis framework. The United States Supreme Court and this Court have both found that

² The State erroneously implies that under *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962), it has the right to regulate the Community's fishing rights. In that case, the Court specifically distinguished reserved rights of the Community from the claims being made by Kake and Angoon, as follows: "The situation here differs from that of the Metlakatlans in that neither Kake nor Angoon has been provided with a reservation" *Id.* at 62. Far from supporting the State's position, *Organized Village of Kake* and *Metlakatla Indian Community vs. Egan* stand for the well-accepted proposition that state cannot destroy federally reserved fishing rights of a tribe. In *Atkinson v. Haldene*, 569 P.2d 151, 156 (Alaska 1977), this Court similarly recognized "that the reservation status of the Metlakatla Indian Community sets them apart from other Alaska Natives and that the status of the Metlakatla Indian Community" granted them special rights.

the purpose of the Reserve was to create a self-sustaining community, which, given the Reserve's geography, requires access to fishing sites in the off-reservation waters surrounding the Reserve. The State's argument to the contrary is based on a flawed analysis, and ignores the history of the Metlakatans and the purpose of the Annette Islands Reserve.

At this time, the Community does not intend to move to appear at oral argument. However, the Community respectfully offers to do so if the Court feels that the Community's perspective would assist it in resolving this important matter.

Respectfully submitted at Anchorage, Alaska this 28th day of October 2019.

HAGLUND KELLEY, LLP:

/s/ Christopher Lindberg
Christopher Lundberg (*pro hac vice*)

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Haglund Kelley, LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
(503) 228-0777

Curtis W. Martin (Bar No. 0311060)
Law Offices of Curtis W. Martin
263 S Alaska Street
Palmer, AK 99645
(907) 746-9800
Local Counsel for Amici Curiae

UNITED STATES STATUTES

18 U.S.C. § 1162

State jurisdiction over offenses committed by or against Indians in the Indian country (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of Indian country affected

Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended
California	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement,

or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

(d) Notwithstanding subsection (c), at the request of an Indian tribe, and after consultation with and consent by the Attorney General--

(1) sections 1152 and 1153 shall apply in the areas of the Indian country of the Indian tribe; and

(2) jurisdiction over those areas shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments.

25 U.S.C § 495 (1988)

Annette Islands reserved for Metlakatla Indians

Until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska on the north side of Dixon's entrance, is set apart as a reservation for the use of the Metlakatla Indians, and those people known as Metlakatlan's who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior.

(Mar. 3, 1891, ch. 561, § 15, 26 Stat. 1101.)

43 U.S.C. § 1618 (a)

Reservations: revocation excepted reserve; acquisition of title to surface and subsurface estates in reserve; election of Village Corporations

(a) Notwithstanding any other provision of law, and except where inconsistent with the provisions of this chapter, the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, including those created under section 497 of title 25, are hereby revoked subject to any valid existing rights of non-Natives. This section shall not apply to the Annette Island Reserve established by section 495 of title 25 and no person enrolled in the Metlakatla Indian community of the Annette Island Reserve shall be eligible for benefits under this chapter.

PRESIDENTIAL PROCLAMATION

39 Stat. 1777 (1916).

"WHEREAS it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery [on Annette Island];

Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the power vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet, from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation; also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the

Metlakahtlans and such other Alaska natives as have joined them or may join them in residence on these islands, to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.").

UNITED STATES REGULATIONS

25 CFR § 241.2 Annette Islands Reserve; definition; exclusive fishery; licenses.

(a) Definition. The Annette Islands Reserve is defined as the Annette Islands in Alaska, as set apart as a reservation by section 15 of the Act of March 3, 1891 (26 Stat. 1101, 48 U.S.C. sec. 358), and including the area identified in the Presidential Proclamation of April 28, 1916 (39 Stat. 1777), as the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the broken line upon the diagram attached to and made a part of said Proclamation; and also the bays of said islands, rocks, and islets.

(b) Exclusive fishery. The Annette Islands Reserve is declared to be exclusively reserved for fishing by the members of the Metlakatla Indian Community and such other Alaskan Natives as have joined or may join them in residence on the aforementioned islands, and any other person fishing therein without authority or permission of the Metlakatla Indian Community shall be subject to prosecution under the provisions of section 2 of the Act of July 2, 1960 (74 Stat. 469, 18 U.S.C. sec. 1165).

(c) Licenses. Members of the Metlakatla Indian Community, and such other Alaskan Natives as have joined them or may join them in residence on the aforementioned islands, shall not be required to obtain a license or permit from the State of Alaska to engage in fishing in the waters of the Annette Islands Reserve.

**Act of March 3, 1891, ch.561 § 15, 26 Stat. 1095, 1101
(formerly codified at 48 U.S.C. § 358 and transferred to 25
U.S.C. § 495 prior to deletion from the Code). Annette
Islands reserved for Metlakahtla Indians**

Until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska on the north side of Dixon's entrance, is set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior.

ALASKA STATUTES

AS 16.05.723(a). Misdemeanor commercial fishing penalties

(a) A person who negligently violates AS 16.05.440 - 16.05.690, or a regulation of the Board of Fisheries or the department governing commercial fishing, is guilty of a misdemeanor and in addition to punishment under other provisions in this title, including AS 16.05.195 and 16.05.710, is punishable upon conviction by a fine of not more than \$15,000 or by imprisonment for not more than one year, or by both. In addition, the court shall order forfeiture of any fish, or its fair market value, taken or retained as a result of the commission of the violation, and the court may forfeit any vessel and any fishing gear, including any net, pot, tackle, or other device designed or employed to take fish commercially, that was used in or in aid of the violation. Any fish, or its fair market value,

forfeited under this subsection may not also be forfeited under AS 16.05.195. For purposes of this subsection, it is a rebuttable presumption that all fish found on board a fishing vessel used in or in aid of a violation, or found at the fishing site, were taken or retained in violation of AS 16.05.440 - 16.05.690 or a commercial fisheries regulation of the Board of Fisheries or the department, and it is the defendant's burden to show by a preponderance of the evidence that fish on board or at the site were lawfully taken and retained.

AS 16.05.940. Definitions.

(2) "barter" means the exchange or trade of fish or game, or their parts, taken for subsistence uses

(A) for other fish or game or their parts; or

(B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature;

(5) "commercial fishing" means the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels; the failure to have a valid subsistence permit in possession, if required by statute or regulation, is considered prima facie evidence of commercial fishing if commercial fishing gear as specified by regulation is involved in the taking, fishing for, or possession of fish, shellfish, or other fish resources;

(32) "subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources by a resident domiciled in a rural area of the state for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

AS 16.43.140(a) Permit Required

(a) A person may not operate gear in the commercial taking of fishery resources without a valid entry permit or a valid interim-use permit issued by the commission.

(b) A permit is not required of a crewmember or other person assisting in the operation of a unit of gear engaged in the commercial taking of fishery resources as long as the holder of the entry permit or the interim-use permit for that particular unit of gear is at all times present and actively engaged in the operation of the gear.

(c) A person may hold more than one interim-use or entry permit issued or transferred under this chapter only for the following purposes:

- (1) fishing more than one type of gear;
- (2) fishing in more than one administrative area;
- (3) harvesting particular species for which separate interim-use or entry permits are issued;
- (4) if authorized by regulations of the commission, fishing an entire unit of gear in a fishery in which the commission has issued entry permits for less than a unit of gear under AS 16.43.270(d); under this paragraph, a person may not hold more than two entry permits for a fishery; however, the person may not
 - (A) fish more than one unit of gear in the fishery; or
 - (B) acquire a second entry permit for the fishery after the person has acquired an entry permit that authorizes the use of an entire unit of gear in the fishery;
- (5) consolidation of the fishing fleet for a salmon fishery; however, a person may hold not more than two entry permits for a salmon fishery under this paragraph, but the person who holds two entry permits for a salmon fishery may not engage in fishing under the second entry permit.

AS 16.43.970 (Excerpt)

(g) A person who violates the provisions of AS 16.43.140(a) is

(1) upon a first conviction, guilty of a class B misdemeanor and may be sentenced to a definite term of imprisonment of not more than 90 days, or forfeiture of the person's fishing vessel, or both, and shall be sentenced to a fine of not less than \$5,000 nor more than \$10,000 and loss of commercial fishing privileges under (i) of this section;

(2) upon a second conviction, guilty of a class A misdemeanor and may be sentenced to a definite term of imprisonment of not more than one year, and shall be sentenced to a fine of not less than \$10,000 nor more than \$20,000, forfeiture of the person's fishing vessel, and loss of commercial fishing privileges under (i) of this section;

(3) upon a third or subsequent conviction, guilty of a class A misdemeanor and may be sentenced to a definite term of imprisonment of not more than one year, and shall be sentenced to a fine of not less than \$20,000 nor more than \$50,000, forfeiture of the person's fishing vessel, and loss of commercial fishing privileges under (i) of this section.

(h) A person convicted of violating the provisions of AS 16.43.140(a) forfeits the value of the fishery resources found on board the person's vessel at the time of the violation.

<Text of subsec. (i) effective until December 30, 2018.>

(i) Upon the conviction of a person or entity for an offense described under (a), (b), or (g) of this section, the court shall immediately notify the commission of the conviction. The notice provided by the court shall be accompanied by an order suspending commercial fishing privileges and revoking commercial fishing permits under (a) of this

section, as appropriate. The commission shall, upon receipt of

- (1) an order from the court under (a) of this section, suspend the commercial fishing privileges of a person or entity for the period set by the court and revoke commercial fishing permits held by the person or entity as directed by the court;
- (2) a notice from the court that a person or entity has been convicted of a third or subsequent violation of (a) of this section, suspend all commercial fishing privileges of the person or entity for a period of three years from the date of conviction and revoke all commercial fishing permits held by the person or entity;
- (3) a notice from the court that a person or entity has been convicted of a violation described under (b) of this section, suspend all commercial fishing privileges of the person or entity for a period of three years from the date of conviction and revoke all commercial fishing permits held by the person or entity;
- (4) a notice from the court that a person has been convicted of a violation described under (g)(1) of this section, suspend all commercial fishing privileges of the person for a period of one year from the date of conviction;
- (5) a notice from the court that a person has been convicted of a violation described under (g)(2) of this section, suspend all commercial fishing privileges of the person for a period of two years from the date of conviction;
- (6) a notice from the court that a person has been convicted of a violation described under (g)(3) of this section, suspend all commercial fishing privileges of the person for a period of five years from the date of conviction.

ALASKA ADMINISTRATIVE CODE

**5 AAC 33.310. Fishing Seasons and Periods for Net Gear
(Excerpt)**

(c) Salmon may be taken by drift gillnets in the following locations only during fishing periods established by emergency order that start on a Sunday and close by emergency order:

(1) District 1:

(A) Section 1-A;

(B) Section 1-B opens on the third Sunday of June;

5 AAC 39.197 Unlawful possession of fish

5 AAC 39.197. Unlawful Possession of Fish.

No person may possess, purchase, sell, barter or transport fish within the state or within water subject to the jurisdiction of the state if that person knows or has reason to know that fish were taken or possessed in contravention of 5 AAC 03 - 5 AAC 39.

Alaska Admin. Code tit. 5, § 39.197