



## Bureaucracy Abuse: Fishing for Criminal Convictions

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Michael Waterfield is a 67-year-old lifelong fisherman. He has been fishing commercially since 1974 when he first received his North Carolina commercial fishing license. For the last several years, Michael has been fighting stage four throat cancer. He has had tumors removed and relied on a feeding tube. In November 2016, he was undergoing chemotherapy from 8:00am to 3:00pm, plus an hour of radiation treatment. On November 21, 2016, Michael became ill and tried to drive home, a decision he himself describes as a “mistake.” On his way home that night, Michael wrecked his truck and could not retrieve fishing nets he had placed in the water before becoming ill.

While Michael was sick, a marine fisheries officer found the nets he was too ill to pull out of the water. The officer measured the nets. Although nets of the size Michael used were not unlawful, a proclamation of the Marine Fisheries Director that went into effect the previous month declared that such nets could not be left “unattended.” Several days later, Michael was later cited by a

marine fisheries officer for the unattended gill alleging Michael:

did unlawfully and *willfully* engage in a commercial fishing operation use a vessel [sic] of which defendant was in charge by using using [sic] unattended gill nets with a mesh length of 3 inches through 33/4 inches in violation of proclamation M-23-16 II(c).

The same day the officer cited Michael for the gill nets, the officer found crab pots which Michael had also been too sick to pull out of the water. Ten days later, the officer again saw the crab pots. About a week later, the officer decided to cite Michael for two crab pot violations. One count alleged he “unlawfully and *willfully* [left] crab pots in coastal fishing waters which contain[ed] edible species not fit for human consumption,” and the other count alleged he “unlawfully and *willfully* use[d] crab pots in coastal fishing waters for more than 5 consecutive days when such devices were not being employed in a fishing operation[.]”

Michael went to trial on November 7, 2018. The only witness against him was the officer who cited him. Michael testified in his own defense:

I went home, and I told [my son], I said, I got to go back to them nets, and I got up, and I had two nets out at Perquimans. I went — I got one. I couldn't get the other one. I couldn't get it.

Q. What happened?

A. I was just sick.

Q. What happened with that first one?

A. I was sick. I was sick. So, anyway, I went back home. I come back the next morning, and I run into [the marine fisheries officer], and I went and was fishing the net, and I seen the boat down the bay, and he comes up to me, and he said, Where's . . . your son at? You ought not be out here by yourself. . . I said, I got sick last night, wrecked my truck. All I want to do is get my nets up and — I don't know. He might have thought I was irate. I have to talk loud because I know people can't understand me, you know, and it was a little windy. And so anyway, I told him what happened and that — that is why he asked [my son] was I in the hospital or something. So they all knew I had cancer and all and, you know, but I got sick. I couldn't help it. I come back and tried to get the net. I got one of them; couldn't get the other one.

Michael was convicted of the gill net violation and one of the crab pot

violations. He was sentenced to 20 days in jail (suspended for one year of supervised probation) and ordered to pay a \$200 fine. He appealed.

The North Carolina Court of Appeals faced the issue of whether the trial court erred in failing to provide a mens rea instruction to the jury.

Traditionally, a crime has two components: an unlawful act (the *actus reus*) and a culpable mental state (the *mens rea*). Criminal law rests on a "common law resumption against criminal liability without a showing of mens rea." *State v. Huckelba*, 240 N.C. App. 544, 552, 771 S.E.2d 809, 816, *rev'd on other grounds for reasons stated in dissent*, 368 N.C. 569, 780 S.E.2d 750 (2016). Different offenses require the government to prove different mental states. Common mens rea include "knowingly" or "knowing," "intentionally" or "intentional," "recklessly" or "reckless," "negligently" or "negligent," or "willfully" or "willful."

But legislatures, especially in the 20th and 21st centuries, have often undertaken to impose criminal liability for conduct unaccompanied by fault." Wayne R. LaFare, *Criminal Law* § 5.5, at 272 (4th ed. 2003). Like many states, North Carolina has relaxed or even eliminated the requirement of a *mens rea* for some offenses. Offenses for which there is no mens rea requirement are known as "strict liability" offenses. Since at least 1961, courts have recognized the General Assembly may create strict liability offenses where it clearly

abrogates the common law tradition requiring a mens rea. *See State v. Hales*, 256 N.C. 27, 30 (1961).

Not all crimes and the elements of them are codified in statute by the General Assembly. Administrative agencies often promulgate rules and regulations that carry criminal penalties. Nearly without exception, administratively created criminal offenses lack explicit language about mens rea. Often these rules and regulations touch on ordinary work and life activities. The growth of regulatory crimes, crafted by unelected agency officials, is part of a larger trend of overcriminalization, part of the “gotcha!” mentality rampant in big government.

Michael Waterfield, the commercial fisherman described at the beginning of this piece, shows just what a mess this pattern of criminalization creates.

Michael was convicted of crimes--he left gill nets and crab pots unattended for too long under rules promulgated by the Marine Fisheries Commission and its Director.<sup>1</sup> At his trial, Michael argued that he was not guilty because he did not willfully break the relevant rules. He was gravely sick with advanced cancer, hurt in a car wreck, and unable to attend his fishing equipment. Even though the citations charged Michael with “willful”

violations, the trial court didn’t instruct the jury that it had to find Michael “willfully” left his equipment in order for it to convict him. The jury convicted him and he appealed.

At the Court of Appeals, Michael argued that the judge should have told the jury the State had to prove he had “willfully” broken the law. Attorneys for the state argued that the offense is a strict liability crime and the case didn’t depend on whether Michael acted “willfully.”

As the Court of Appeals recognized, the crimes charged in this case might be construed as imposing strict liability had they been enacted by the legislature. But Michael was not convicted of statutory crimes created by the General Assembly, he was charged with and convicted of violations of administrative agency rules. Although the General Assembly has authorized administrative agencies to create rules and has determined that violations of those rules may be punished as misdemeanors, the General Assembly has not clearly eliminated the mens rea requirement generally associated with criminal offenses. Absent a clear legislative intent to abrogate the presumption against the imposition of strict liability, a crime cannot be

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<sup>1</sup> Michael’s gill net violation was premised upon a violation of a proclamation of the Director of Marine Fisheries, in the exercise of twice-delegated authority. That proclamation, effective less than a month earlier, declared that “It is

unlawful to use unattended gill nets with a stretched mesh length of 3 inches through 3 3/4 inches.” N.C. Division of Marine Fisheries, Proclamation M-23-2016.

committed without some level of *mens rea*.

The General Assembly has enabled the Marine Fisheries Commission “to authorize, license, regulate, prohibit, prescribe, or restrict all forms of marine and estuarine resources in coastal fishing waters” and to regulate the “time, place, character, or dimensions of any methods or equipment that may be employed in taking fish.” N.C.G.S. § 113-182(a)(1)–(3). The General Assembly has also permitted the Commission to “delegate to the Fisheries Director the authority to issue proclamations suspending or implementing . . . particular rules of the Commission[.]” N.C.G.S. § 113-221.1(b). That means that a group of unelected officials on the Marine Fisheries Commission can create regulations and a single unelected bureaucrat (the Fisheries Director) can change those regulations with a proclamation.

N.C.G.S. § 113-135(a) states that any person who violates rules adopted by the Marine Fisheries Commission is guilty of a Class 2 or 3 misdemeanor. That statute does not say anything about the mental state required for conviction. It does not require the offense be committed “knowingly” or “willfully” or “deliberately” or any other “-ly.” Just forgetting a fishing net is a crime. A violation of rules that can be changed by the Fisheries Commission or its director issuing a proclamation can result in a criminal conviction and jail time.

The Court of Appeals wrote an opinion sympathetic to Michael but affirming his

conviction. The Court of Appeals wrote that Michael “presented a series of compelling arguments for why the proliferation of these strict liability crimes undermines foundational principles of our State’s criminal law jurisprudence.” The decision hinged largely on the wording in the statute making a violation of the rules a misdemeanor.

The Court of Appeals’ decision essentially lets regulatory bodies, including a single official, create strict liability crimes at will. But the power to abrogate the common-law *mens rea* requirement rests with our General Assembly, not administrative agencies. *Hales*, 256 N.C. at 30, 122 S.E.2d at 77. A review of the statutes doesn’t suggest the General Assembly intended to let administrative agencies continuously create countless strict liability crimes carrying serious penalties, including incarceration. Agencies do not possess the legislative power to unilaterally abrogate the common-law *mens rea* requirement merely by promulgating regulations lacking explicit mental state language. And administrative agencies should not be “asked to make important policy choices that might just as easily be made by the legislature.” *In re Appeal of Broad & Gales Creek Cmty. Assoc.*, 300 N.C. 267, 273, 266 S.E.2d 645, 651 (1980); N.C. Const. art. II, § 1.

Michael’s case is now at the North Carolina Supreme Court. We won’t know for months whether our state’s highest court will agree with the Court of Appeals or whether the Supreme Court

will reverse and hold that administrative bodies lack the authority to create strict liability offenses in the absence of explicit statutory authorization. Whatever the outcome of Michael's appeal, the General Assembly should closely examine the use (and abuse) of administratively created criminal offenses.

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### **About the Author**

Jeanette Doran has served as President and General Counsel of the North Carolina Institute for Constitutional Law since returning to the Institute to reorganize and restart the organization in July 2019.

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