

2343j (9915T)

SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE TERM; 9th and 10th JUDICIAL DISTRICTS

PRESENT: FLOYD, P.J., DOYLE and WINICK, J.J.

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THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

NO. 2001-797 S CR
DECIDED JUL 2 2002

JOSEPH J. GRUCCI,

Respondent.

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Appeal by the People from an order of the District
Court, Suffolk County (E. Pines, J.), dated May 2, 2001,
dismissing the accusatory instrument as being
jurisdictionally defective (188 Misc 2nd 584).

Order unanimously affirmed.

Environmental Conservation Law 13-0311 (7)
provides that "No person shall take shellfish. in any quantity

2343J

RE: PEOPLE v. JOSEPH J. GRUCCI
NO. 2001-797 S CR

during the time that such digger's permit privileges have been revoked or suspended." "Taking" and "take" are defined under ECL 11-0103 to "include pursuing, shooting, hunting, killing, capturing, trapping, snaring and netting fish, wildlife, game, shellfish, crustacea and protected insects, and all lesser acts such as disturbing, harrying or worrying, or placing, setting, drawing or using any net or other device commonly used to take such animal. Whenever any provision of the Fish and wildlife Law permits 'taking', the taking presumably is by a lawful means and in a lawful manner

The accusatory instrument herein alleged that the defendant was working in a joint effort to commercially harvest razor clams with other permitted diggers and was observed "culling" the claims while the others were digging the clams. The term "cull" or "culling", while not defined in the Environmental Conservation Law, has been defined, inter alia, to mean: "1.) to choose; select; pick. 2.)to gather the choice things or parts from. 3.) to collect; gather; pluck" (Random House, Webster's Unabridged Dictionary (2d ed] October 1999, at 407)

2343J

RE: PEOPLE v. JOSEPH J. GRUCCI
NO. 2001-797 S CR

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As the foregoing definitions reveal, the "take" or "taking" of clams is different from the "culling", or separating out the clams. Under the facts outlined in the accusatory instrument, it appears that the two "other permitted diggers" were in fact "digging" or "taking" the clams while the defendant was simply "culling" or separating the clams aboard the vessel that had already been "taken." Inasmuch as the "other permitted diggers" were licensed and therefore not in violation of ECL 13-0311 (7) the mere sorting of the clams by defendant did not constitute a violation of said section.

We note that the District Court, after concluding that the riparian rights to the site where the alleged violation occurred vested in the Town of Brookhaven, held that the taking of clams was not subject to regulation by the State. The court based its finding on the belief that since the clams we're not ferae naturae, the ownership of clams vested in the owner of the riparian right, here the Town.

2343j

RE: PEOPLE v. JOSEPH J. GRUCCI
NO. 2001-797 S CR

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It is our opinion that this court's holding in People v. Dunn 159 Misc 2d 536) is controlling. In Dunn, this court, citing People v. Morrison (194 NY 175, 177) noted that clams are in the nature of ferae naturae and that private ownership thereof may only held if the clams are reclaimed from nature and transplanted to a bed where none grew naturally, and the bed is marked out by stakes as to show they are in the possession of a private owner. Since that is not the situation herein, the ownership of the claims is vested in the State (see, ECL 11-0105) and they are therefore a proper subject of regulation by the State. (see, ECL 11-0108, ECL 11-0107(1)).