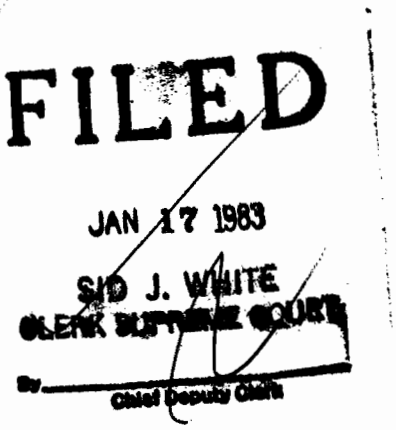

IN THE

SUPREME COURT OF FLORIDA

Case No. 63,001

CAPTAIN LOUIS S. LIVINGS, DISTRICT NINE SUPERVISOR, FLORIDA MARINE PATROL, AND STATE OF FLORIDA, DEPARTMENT OF NATURAL RESOURCES,

PETITIONERS,

v.

WENDELL DAVIS, GILBERT GREY, AND HARRY ROBERT JONES,

RESPONDENTS.

ON APPEAL FROM THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF FOR PETITIONERS

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STATEMENT OF THE CASE AND FACTS

The Respondents, Grey, Jones and Davis were charged on March 31, 1981, April 13, 1981 and May 2, 1981, respectively, by officers of the Florida Marine Patrol as agents for the Petitioners herein, with violations of Section 370.15(2)(a), Fla. Stat. (1979), which prohibited the taking or possession of small shrimp or prawn within or without the waters of this state (R-29, 30, 31). On June 3, 1981, the Respondents initiated this action by filing a Petition for Declaratory Judgment, Injunctive and Other Relief in the Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, Case No. 81-684-CA-17 (R 1-5).

The Respondents, on July 8, 1981, filed their Motion For Summary Judgment Or In The Alternative For An Order Staying Proceedings. (R 6-8). The Petitioners filed their answer to the petition on July 13, 1981 (R 11-13) and on November 24, 1981, the Petitioners filed their cross-motion for summary judgment (R 18-31). On January 27, 1982, the trial court entered its Final Judgment declaring that Florida Statute, Section 370.15(2)(a) [prior to the 1981 amendment] was unconstitutional based on the Supremacy Clause of the United States Constitution, insofar as the statute regulated the taking of shrimp outside the waters of Florida (R 32-37).

On appeal to the District Court of Appeal, Third District, the decision of the circuit court was affirmed, per

curiam, with one dissent (A-1). At the same time, the appellate court certified its decision to this Court as being in conflict with Department of Natural Resources v. Southeastern Fisheries Association, Inc., 415 So.2d 1326 (Fla. 1st D.C.A. 1982), pursuant to Article V, Section 3(b)(4) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(2)(vi). (A-2).

On December 22, 1982, the Petitioners filed their Notice To Invoke Discretionary Jurisdiction pursuant to Fla.R.App.P. 9.120(b). (A-3).

ARGUMENT

Issue Presented:

WHETHER THE FEDERAL FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976 PREEMPS ALL REGULATION OF FISHING BY THE STATE OF FLORIDA OUTSIDE FLORIDA'S TERRITORIAL SEAS.

The question facing the Court is a narrow one. Can a state regulate the fishing activities of its citizens beyond the state's territorial waters when there is no conflict with a federal regulatory scheme? Case law, federal statutory law and reasoned analysis require that the question be answered in the affirmative.

It is well established that a state, in matters affecting its legitimate interests, may regulate the conduct of its citizens on the high seas where no conflict with federal law is presented. Skiriotes v. Florida, 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193 (1941). Further, the Skiriotes court recognized that a state's interest in preserving nearby fisheries is sufficiently strong to permit extra-territorial enforcement of its laws (Skiriotes, 313 U.S. at 75, 61 S.Ct. at 928).

In the case at bar, the circuit court determined and the district court affirmed, based on Tingley v. Allen, 397 So.2d 1176 (Fla. 3d D.C.A. 1971), that the mere existence of the Fishery Conservation and Management Act of 1976, 16 U.S.C.,

Section 1801 et seq. (hereinafter called FCMA), triggers federal preemption of all fishery regulation outside a state's territorial waters. Stated another way, Tingley holds that upon enactment of the FCMA, all coastal states within the United States were thereafter prohibited from enforcing any state fishing law beyond the state's borders.

This holding is in direct conflict with Department of Natural Resources v. Southeastern Fisheries Association, Inc., 415 So.2d 1326 (Fla. 1st D.C.A. 1982). In Southeastern Fisheries, the court was called upon to rule on the constitutionality of Florida Statute, Section 370.1103, the fish trap law. One of the grounds urged for invalidation of the fish trap law was that the federal Fishery Conservation and Management Act, even in the absence of implementing regulations, preempted all regulation of fisheries by a state beyond its boundaries.

Following an analysis of Tingley, supra, and People v. Weeren, 607 P.2d 1279 (CAL 1980), cert. denied, 449 US 839, the Court stated:

> We are persuaded by the reasoning of the California Court[3]. There can be no doubt that Florida has a substantial interest in the preservation and protection of its vast and valuable marine resources. An array of commercial and sport fishing occurs within the boundaries of the Sunshine State, from bone fishing on the southern flats to oyster tonging in Apalachicola Bay. The instant statute, enacted by the Legislature after open and active public debate, is aimed at protecting a portion of this valuable economic resource. Following the lead of the California court, we have examined the applicable federal

> regulations[5] and find none relating to the use of fish traps. In the absence of federal regulation in this area, and in light of Florida's demonstrable state interest, we conclude the statute is constitutional . . ." 415 So.2d 1329.

Thus, the First District Court of Appeal reversed the decision of the circuit court which had invalidated the fish trap law. The Petitioners request the Court to examine the implications that the Tingley decision, if allowed to stand, will have on the conservation of one of Florida's most important natural resources.

The pertinent provisions of the FCMA which govern federal and state relations with regard to fishery management and set forth as follows:

> 16 U.S.C. Section 1812
>
> The United States shall exercise exclusive fishery management authority, in the manner provided for in this Act, over the following: (1) All fish within the fishery conservation zone.
>
> * * *
>
> 16 U.S.C. Section 1856
>
> (a) In general. Except as provided in subsection (b), nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.
>
> * * *

These provisions restate and reconfirm the vitality of the principles announced in Skiriotes, supra. The clear intent of the Congress contained in 16 U.S.C., Section 1856 was to recognize the states' continuing jurisdiction to regulate fisheries on the high seas where no inconsistent federal plan is in effect. If Congress desired to totally preempt regulation of all high seas fisheries, why then did it expressly provide for state regulation of state registered vessels outside of the state boundaries? Congress intended continued state regulation where no conflict with a federal plan exists. If the federal government has not developed a management plan to regulate a particular aspect of a fishery, and in many areas it has not, the invalidity of all state regulations would create the danger of wholly unregulated exploitation of a species on the high seas, resulting in the possible depletion of that species.

In rendering its decision in Tingley, the court was without the benefit of certain case authority which addressed the issue presented in unequivocable terms. In People v. Weeren, 163 Cal.Rptr. 255, 607 P.2d 1279 (Cal. 1980), cert. den., 449 U.S. 839 (1980), the highest court in California ruled that where no federal regulations had been promulgated, the state was free to regulate its citizens outside the territorial waters. In Weeren, a state statute prohibited the taking of broadbill swordfish with the assistance of spotter aircraft. Weeren was arrested in federal waters for violating the statute. The court reasoned that in the absence of any federal regulation of sword fish,

there could be no conflict with federal law. The analysis and the result were sound. If the statute was rendered invalid, then the species would be open to unfettered exploitation. That the United States Supreme Court denied certiorari is at least a tacit indication from the highest federal court that California correctly construed the FCMA's effect on state jurisdiction. See also Northwest Trollers Assoc. v. Moos, 89 Wash.2d 1, 568 P.2d 793 (Wash. 1977), in which the court in dicta stated that the state of Washington was free to regulate its offshore fishery provided that the state's regulations were consistent with regulations promulgated by the federal government.

Research reveals that only one federal court has authoritatively construed the effect of the FCMA on state jurisdiction to regulate fishing outside of its territorial waters. In Anderson Seafood, Inc. v. Graham, 529 F.Supp. 512 (N.D. Fla. 1982), the Plaintiff sought a declaration that Section 370.08(3), Fla. Stat. (prohibiting the use of purse seines to take food fish) was unconstitutional insofar as the statute applied beyond state waters. The Plaintiff argued that the federal supremacy clause, the FCMA and Tingley required that the statute be invalidated and its enforcement be enjoined. In denying Anderson's motion for preliminary injunction, the Court stated:

> Section 1801 also states a strong federal interest in fish management and that fish management requires unitary regulation.

> Congress, however, while prohibiting states from regulating fishing outside their boundaries, also provided for state regulation of fishing in the fishery conservation zone.
>
> 'No state may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such state.' 16 U.S.C., Section 1856(a) (Emphasis supplied by the Court).
>
> Congress's reservation of state authority to regulate fishing indicates it did not intend complete preemption. See, People v. Weeren, 163 Cal.Rptr. 255, 607 P.2d 1279 (Cal. 1980), cert. denied, 449 U.S. 839 (1980). This conclusion is buttressed by the fact that Florida's laws regulating fishing outside its boundaries have been on the books since 1953. Congress must be presumed to have been aware of existing state regulation. Yet its law contemplates continued regulation rather than completely forbidding it.
>
> Tingley v. Allen, 397 So.2d 1166 (Fla. 3d D.C.A. 1981), holds federal law has preempted state regulation of fishing in the fishery conservation zone. Its decision is based upon an interpretation of Title 16, United States Code, Section 1856(a), not upon Florida law. I simply do not agree with that court's decision, and since the question is one of federal law not state, I am not bound by it.

Following the court's order denying the motion for preliminary injunction, the plaintiff filed his notice of dismissal and on February 12, 1982, the case was dismissed.

Since the Anderson Court is the only federal court that has construed the FCMA's effect on state jurisdiction, Petitioners submit that the Anderson case is dispositive of the issue on appeal. This premise follows from the principle that federal decisions interpreting federal statutes are binding on

the state court's construction of the federal enactment. See, e.g. Seaboard Airline Railroad Company v. Strickland, 80 So.2d 914 (Fla. 1955); McCloskey v. Louisville & Nashville Railroad Company, 22 So.2d 481 (Fla. 1st D.C.A. 1960).

In the case at bar, the circuit court and the district court determined that the existence of the FCMA, in and of itself and without regard to whether rules had been promulgated thereunder, prohibits the state from regulating the shrimp fishery outside of state waters (R-35, 36). As in Tingley, there was no issue as to whether a federal plan conflicted with state law, since at the time of the Respondents' arrest there was no federal shrimp plan in effect. There can be no dispute that the vessels used by the Appellees were registered under the laws of Florida (R-25, 26, 27).

CONCLUSION

The State of Florida may enforce its laws against its citizens beyond the territorial waters in the absence of conflicting federal regulation. This proposition is predicated on the following:

1. The decision of the United State Supreme Court in Skiriotes v. Florida and the federal Fishery Conservation and Management Act permit state regulation of Florida citizens fishing in the waters beyond the state's boundaries.

2. The vessels used by the Plaintiffs herein were registered under the laws of Florida.

3. At the time of Plaintiffs' arrests for violation of Section 370.15(2)(a), Fla. Stat. (1979), there was no federal management plan regulating shrimp.

4. In the absence of a federal fishery management plan, there can be no conflict between state and federal fishery regulations.

5. The decision of Anderson v. Graham, et al., by the District Court for the Northern District of Florida, controls the interpretation of the FCMA relative to federal preemption and the decision of the First District court of Appeal in Southeastern Fisheries is properly in accord with that interpretation.

WHEREFORE, the Petitioners respectfully request the Court to confirm the holding in Southeastern Fisheries, supra, to disapprove the holding in Tingley v. Allen, supra, and to reverse and remand the decision in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief For Petitioners has been furnished by U.S. Mail to DAVID PAUL HORAN, ESQUIRE, 608 Whitehead Street, Key West, Florida 33040 and to WELLS D. BURGESS, ESQUIRE, Department of Justice, Todd Building, Room 639, Washington, D.C. 20530 this 17TH day of January, 1983.

KEVIN X. CROWLEY, ESQUIRE