OA 6-20-88

IN THE SUPREME COURT
STATE OF FLORIDA

RAFFIELD FISHERIES, INC.
and EUGENE RAFFIELD,

Petitioners,

vs. CASE NO: 71,677

STATE OF FLORIDA,

Respondent.
_____/

PETITIONERS' INITIAL BRIEF

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STATEMENT OF THE CASE AND THE FACTS

On June 25, 1986 Raffield Fisheries received permit number RD-001, from the U.S. Dept. of Commerce, to catch red drum by purse seine in the Exclusive Economic Zone (EEZ) off the State of Louisiana. A copy of this permit is attached as Appendix A.

The EEZ is the area between the territorial waters of the states and the 200 mile limit claimed by the United States. These waters are commonly known as "Federal Waters." This zone is created by the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801, et. seq.

The permit in question was one of a number issued by the National Oceanographic and Atmospheric Administration (NOAA) of the U.S. Dept. of Commerce, under an emergency rule that imposed a total quota of 1 million pounds of red drum to be caught in the EEZ. A copy of this rule is attached as Appendix G to this brief.

The "Fishermans Pride", a vessel owned by Raffield Fisheries, participated in the catch. Permission was given by Raffield Fisheries to allow a person with the U.S. Dept. of Commerce to board the Fisherman's Pride and act as an observer during the time the fish were being caught. After the fishery was closed, the U.S. Dept. of Commerce acknowledged the cooperation of Raffield Fisheries and thanked it for its assistance and help to the Department. A copy of this acknowledgment is attached as Appendix B.

Pursuant to this permit the Fisherman's Pride caught many thousands of pounds of red drum in the EEZ off the coast of Louisiana, with the blessing and gratitude of the U.S. Dept. of Commerce. All these fish were caught by purse seine, several hundred miles from the territory of the State of Florida. The permit issued by the U.S. Dept. of Commerce specifically states the method of catch: "directed net fishery."

After the fish were caught, they were landed in Venice, Louisiana and trucked to Port St. Joe, Florida, where a battalion of Marine Patrol officers charged the Petitioners with possession of food fish taken by purse seine in violation of §370.08(3), F.S.

In June of 1986, when the Fisherman's Pride caught and landed its red drum off Louisiana, it was not illegal to commercially catch, possess or sell red drum in Florida, except for the purse seine law restrictions in §370.08(3), F.S., which is the subject of this appeal. The only other restriction in effect was a ban on catch or possession of oversized, native red drum. Neither Petitioner was charged with violation of this restriction.

For many years the U.S. Dept. of Commerce, NOAA, under the authority of the Magnuson Act, 16 U.S.C. 1801, et. seq., has studied the status of red drum in the EEZ in the Gulf of Mexico.

In 1984 a study was released by the Gulf Council of NOAA regarding the status of red drum in the Gulf of Mexico. That report concluded no limitation on the catch of red drum in the EEZ was justified. As a consequence, the U.S. Dept. of Commerce determined no limitation of the catch of red drum would be accomplished by that agency. See Appendix C to Petitioners' brief.

When the U.S. Dept. of Commerce has determined to limit catch in the EEZ it adopts a Fisheries Management Plan, as described in the Magnuson Act, 16 U.S.C. 1853. When the emergency rule under which Raffield Fisheries participated was adopted by NOAA, it did not open the fishery, it began the process of restricting it, while the Department of Commerce studied whether a Fisheries Management Plan was justified.

Between January 1984 and until the emergency rule expired, the U.S. Dept. of Commerce had made a studied and conscious decision that no limitation of harvest of red drum in the EEZ was needed or justified. See Appendix C, at p. 19.

As Jack Brawner, the Director of the Southeast Region of the National Marine Fisheries Service, NOAA, U.S. Dept. of Commerce, testified before the Congressional Subcommittee on Fisheries and Wildlife on June 2, 1986:

> The profile was completed in January 1984, but did

> not indicate any problems in the fishery of sufficient magnitude to warrant the development of a management plan. It did, however, serve to point up a number of data gaps that would be needed to be bridged in order for the Council and the Gulf States to construct a rational management system for the fishery.
>
> Based upon the information available at that time, the Gulf of Mexico Fishery Management Council formally concluded that no need existed to develop a fishery management plan to regulate the redfish fishery in the fisheries conservation zone of the Gulf of Mexico.

[Appendix C, at p. 191

Further, before that same Congressional Subcomittee, also appeared Craig O'Conner, the General Counsel of the National Marine Fisheries Service, who testified as follows:

> There are certain State laws in existence which arguably could have a significant effect, if you will, on the regulation of this resource to the extent that they may address the activities of State-registered vessels, but we are in the unfortunate situation of being in a position where the Federal Government has taken an action and that action was to conclude in one form or another that no management was necessary in the fishery conservation zone for redfish, and what in effect that did was render null and void the application

> of State laws to activities applying in the fishery conservation zone.
>
> As you are well aware, the Magnuson Act precludes direct or indirect regulation by States of the fishing activities occurring in the FCZ if those regulations are in conflict with the Federal pronouncements with regard to that fishery.

[Appendix C, at p. 22]

In the words of the persons who administer the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801, et. seq., in the opinion of the National Marine Fisheries Service, at least since 1984, the U.S. Government had preempted any powers the states may have had over its fishermen to restrict activities in the EEZ, through the enforcement of state laws.

That is the interpretation given by the persons who implement the Magnuson Act as to the significance of their decision, in January 1984, not to adopt a management plan for red drum in the EEZ within the Gulf of Mexico.

Since 1984 the decision of the Federal Government was not to restrict the catch of red drum in the EEZ. The adoption of the emergency rule started the process of restricting the total harvest.

The emergency rule contained the following language at §653.3(d): "These regulations will not be construed

to supersede any State law which prohibits the landing or possession within the jurisdiction of that State of any red drum." At that time, as noted, Florida had a limitation on catch of oversized red drum, caught in Florida waters (Rule 46-22.003(2), F.A.C.; other states, such as Texas, forbade the commercial sale of native red drum.

The federal emergency rule did not, as it could have, preempt the effectiveness of state laws over fish caught within the territorial waters of the states.

The trial court, by order of Judge Taunton, (R. Vol. I, p. 179) held Section 370.08(3) to be unconstitutional, and dismissed all charges. Among the reasons given by that court was that because the fish were legally caught, pursuant to a permit issued by the U.S. Dept. of Commerce, the State of Florida could not make what was legal and lawful under federal law illegal.

Further, Judge Taunton recognized that the 1 million pounds of red drum allowed by the emergency rule, issued by the U.S. Dept. of Commerce, would be caught whether or not Raffield Fisheries had participated in the catch. Judge Taunton questioned whether Florida's legitimate interest allowed the purse seine law to be applied where it would only work to keep a lawfully captured fish from being used in commerce within the State of Florida.

Assuming the purse seine law to have a legitimate purpose, Judge Taunton wondered what valid reason would be served by making possession of such fish illegal under these circumstances.

Further, because the law makes no distinction between food fish in which Florida has a legitimate interest and those fish in whether it does not, Judge Taunton found the statute to be fatally defective.

Judge Taunton was persuaded in part on this point by depositions taken of high officials of the Florida Marine Patrol. Transcripts of those depositions were filed with the Court and are in the record, in R. Vol. II and Vol. IV.

Colonel Ellingsen, the Director of the Florida Marine Patrol, gave testimony on the question of under what circumstances Florida's purse seine law operates on activities outside the territory of the State of Florida.

According to Colonel Ellingsen, as he testified on pages 11-14, of this deposition, (R. Vol. 11) as to how far from the territorial boundaries of the State of Florida the State could reach in the enforcement of the statute in question, he stated he didn't think the issue was one of distance, per se. In Colonel Ellingsen's opinion the enforcement of the statute in question, Florida's purse seine law, outside its territorial boundaries, was whether

Florida ''has an interest in that particular fishery."

(R. Vol. 11, p. 11) In explaining his answer Colonel Ellingsen by hypothetical stated:

> If someone said a Florida purse seine boat were catching salmon off the coast of Alaska, I don't think that would that the State of Florida would have a legitimate interest in that fishery. But, if somebody were catching kingfish, Spanish mackeral, or redfish, or perhaps even mullet, a species that would be a concern, and what I think would be a legitimate interest to the State of Florida, we would review that and look at it.

Colonel Ellingsen also interpreted the possession, prohibitions in the Florida purse seine law to only apply to fish indigenous to the State of Florida. As he testified on page 16 of his deposition:

> Q: So it has to be a Florida fish or fish that's part of our own fishery?
>
> A: The example I used before, salmon off the coast of Alaska, we would not be - we would not investigate that.
>
> Q: That's because it's not a Florida fish?
>
> A: That's my interpretation (p. 16, Ellingsen depo.)

In addition to Colonel Ellingsen, Colonel Clifford S. Kidd's deposition was taken. He is Deputy Director

of the Florida Marine Patrol. . Colonel Kidd's understanding of the extraterritorial effect of Florida's purse seine law was that it would be a violation even for a Florida resident and a Florida vessel to purse seine for food fish off Nova Scotia, (R. Vol. IV, p. 73) and that it would be a violation no matter where in the world such fish were caught; that it would not be a violation for someone who was not a Florida resident, not in a Florida vessel, using a purse seine to catch food off Nova Scotia. (R. Vol. IV) However, in Kidd's opinion, any purse seined food fish, regardless of where they were caught or who caught them, or from what type of vessel, could not be legally offered for sale in the State of Florida. (R. Vol. IV, pp. *74-75)*

Judge Taunton found that where even the law enforcement officers could not believe this act would reasonably apply to fish not native to Florida, despite the clear language of the statute, that the act was impermissibly vague.

He also could not see any legitimate local purpose to be served by this statute, particularly in this case. As the fish in question were legally caught by authority of a federal permit, Judge Taunton reasoned that the effect of the law was to deny these fish to commerce to Floridians, but allow them to the rest of the nation. As the 1 million pound quota was to be caught with or without the participation of Florida fishermen, he found the law to also violate the Commerce Clause.

Throughout this case the State has not maintained that the fish in question were caught illegally. Since the catching, by purse seine, was done with the benefit of a federal permit, the State does not apparently contend that Florida's purse seine law could make that activity illegal. See State's Response to Motion to Dismiss, at R. 58.

The State appealed Judge Taunton's decision to the District Court of Appeal, First District of Florida. On October 20, 1987, the court issued its decision, reversing Judge Taunton. Rehearing was denied on December 7, 1987.

In its opinion, the District Court of Appeal found there was no federal preemption of the State's purse seine law; that §370.08(3) did not violate the Federal Commerce Clause as the purpose of the law was "protecting the state's supply of food fish." (Slip opinion, p. 5)

Further, the District Court of Appeal did not find the statute to be void for vagueness as the possession of purse seined fish was clearly forbidden.

Finally, the court below saw no equal protection problems in this case, even though the fish were legally caught, the court was not disturbed that it applied only to Floridians and not to citizens of other states. On this point the District Court of Appeal stated:

> Similarly, we find no violation of the equal protection clause

by the statute in question, as it regulates the taking of food fish by Florida citizens outside the territorial waters of the state in order to enforce a matter for which the state has a legitimate interest - the conservation of the fishery resource.

(Slip opinion, p. 7)

SUMMARY OF ARGUMENT

Petitioners, Eugene Raffield and Raffield Fisheries, are in the business of catching, processing and selling fish. Criminal charges were filed against them for possessing food fish (red drum) which had been caught by purse seine in apparent violation of §370.08(3), F.S.

This statute forbids any person from catching food fish, anywhere in the world, by purse seine and forbids any person from possessing, for sale, any fish so caught. Petitioners believe this statute is invalid and unenforceable.

The fish were caught in federal waters off Louisiana, pursuant to a specific permit issued by the U.S. Department of Commerce for that purpose. That permit was issued in conformity with a rule adopted by the U. S. Department of Commerce. The fish were landed in Venice, Louisiana, not in Florida.

Catching of redfish in federal waters is regulated by the U.S. Department of Commerce pursuant to the Magnuson Act, 16 U.S.C. 1801. The state law cannot be applied to activities authorized by the U.S. Government as that would be a direct conflict with applicable federal law. The state cannot forbid what the Federal Government allows, particularly where, as here, the relevant federal statutes gives the United States exclusive authority over the fishery.

Further, Florida law is an improper restraint on commerce between the states as it would prevent redfish, legally caught under federal rules and a permit, from being transported into and possessed within this state. It is in violation of the Commerce Clause of the U.S. Constitution.

When a state law forbids an article, such as fish, from entering a state, it is clearly discriminatory. To be valid in such a circumstance the statute must pass the "strict scrutiny'' test: 1) The law must serve a legitimate local purpose; and 2) there must be no less discriminatory alternative available. This statute fails both parts of the strict scrutiny test. Because the statute is so broad, its prohibitions extend to fish not ever found in Florida and to products, such as canned sardines, anchovies, etc., that Florida has no interest in banning. Further, if Florida needs to protect a species of fish it may do so by rule of the State Marine Fisheries Commission. This would be a much less restrictive alternative to the statute.

The law is much too broad to be valid, and leads everyone who would interpret it in a reasonable fashion to be hopelessly confused and to guess as to its meaning, particularly where, as here, the activities took place hundreds of miles from Florida. This violates due process standards.

This statute prohibits activities that are totally harmless to the interests of the state. It goes beyond the legitimate restraints on the police power of a state.

Also, the law would discriminate against Florida citizens who desire to participate in this fishery, and allow citizens of other states to enjoy those benefits with impunity from the criminal penalties in the statute. This violates equal protection standards.

Further, the United States has not consented to state regulation in this area. The U.S. Department of Commerce has on several occasions stated the federal laws at issue here totally preempt all conflicting fishing, landing and possession laws that would apply to fish caught in these federal waters.

POINT I

FLORIDA'S PURSE SEINE LAW, SECTION 370.08(3) GOES BEYOND THE LEGITIMATE INTERESTS OF THE STATE TO PROTECT ITS LOCAL RESOURCES

The District Court of Appeal presumed the purpose of Florida's purse seine law was to promote the conservation of the "fishery resource." For purposes of this appeal the Petitioners agree that is the purpose of the statute in question. It is the only logical reason why any state would pass a law that limits and restricts fishing gear and the possession of fish caught by such prohibited gear. But the District Court of Appeal's analysis of this case ignored the question of whether the statute goes beyond the state's valid interests.

The District Court only considered half the question of the potential due process infirmities of the statute in question. The Court considered that since the act clearly forbade possession of purse seined fish it was not vague. However, as was stated in NAACP v. Button, 371 U.S. 415, 432-33 (1963): "The objectional quality of . . . overbreadth does not depend upon absence of fair notice of prohibited conduct, but upon the danger of tolerating penal penalties for a broad range of behavior and the improper application of a statute to conduct what is otherwise not objectionable."

In the case of Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980) the United States Circuit Court of Appeals struck down Dade County's loitering ordinance, not because it was vague but because it invaded the area of protected freedoms. As the Court stated in Sawyer, supra:

> However, the fact that an enactment provides adequate notice of the acts it prohibits does not absolve it of the vice of overbreadth.

p. 315.

If the statute in question goes beyond reaching the protection of legitimate or justified state interests, it is overly broad and must be stricken regardless of its purpose.

Surely the State of Florida has no compelling state interests in banning any fish from the world's oceans from being caught by purse seine and to prohibit the possession of all such fish for purposes of sale within the state. As the First District Court of Appeal stated in its opinion below, the State's legitimate interests are the conservation of its fishery resource. However, the act in question clearly goes beyond the protection of those interests. Under Florida Statutes it is as much a violation to purse seine redfish in the Gulf of Mexico as it is to catch salmon off the coast of Alaska with a purse seine and transport such fish into the State of Florida for purposes of sale.

As this Court has stated in many cases, one of which is Conner v. Cone, 235 So.2d 492 (Fla. 1970), if a statute goes beyond protecting the valid interests of the state to insure the health, safety and welfare of its citizens the act is arbitrary and is a denial of due process as well as equal protection guarantees in the Federal and State Constitutions.

The ban in §370.08(3), Florida Statutes, forbidding any person, not just Florida citizens, from using a purse seine, within or without waters of the State of Florida, means that under Florida law it is illegal to catch a food fish with a purse seine anywhere in the world. The law further makes it illegal to possess, for purposes of sale, any food fish caught by this apparatus.

The Petitioners here in this case are charged with violation of the possession part of that statute. As noted above, had they possessed sardines caught off the coast of Peru by purse seine or any such fish from the four corners of the world, they would be equally guilty under this statute. Clearly, the statute suffers from the fatal defect of overbreadth as it proscribes conduct that is unquestionably beyond any valid exercise of the State's police powers.

The infirmity of the act in question is more apparent when one contrasts the statute and facts in this case with those situations where the courts have found

the states to be within their police powers to prohibit fishing outside its boundaries.

In Skiriotes v. State of Florida, 313 U.S. 69, 61 S.Ct. 924, 85 L. Ed 1193 (1941), the U.S. Supreme Court found that Florida could prohibit its citizens from using diving equipment to commercially harvest sponges from outside its territorial waters.

In Skiriotes the law in question was limited to a single species of marine animals: sponges that were native to Florida waters and were under protection of the act.

In Felton v. Hodges, 374 F.2d 337 (5th Cir. 1967), the U.S. Fifth Circuit Court of Appeal upheld a Florida law banning crayfish traps used outside its territorial waters. The court noted that the crayfish being taken from where "the crayfish in this area move freely in and out of Florida's territorial waters, so that any taking of them would clearly have an effect upon the State's conservation efforts." (at p. 339)

The court stated further: "Under these circumstances, we think it apparent that the State has an interest sufficient to enable it to subject appellant, one of its own citizens, to the conservation regulations which it sought to enforce here." (at p. 339) However, one must note in Skiriotes and Hodges the U.S. Government had not exercised its paramount powers to regulate commerce over those fisheries.

Florida's purse seine law, however, is not limited to certain single species of fish. It forbids all possession of almost any fish if caught by purse seine. No genuine or valid purpose for why all the world's fish so caught are contraband in Florida is discernable.

How is the public suppose to know, when the fish are caught hundreds or thousands of miles from Florida, if whether they can be legally possessed for sale? If Florida can only claim a legitimate interest to regulating the catch of fish that may move into its waters, how will the public know, except by guessing, which fish so qualify?

The exercise of the state's police powers must be in the interest of achieving a public purpose that promotes the general welfare. United Gas Pipe Line Co. v. Bevis, 336 So.2d 560 (Fla. 1970); Eskind v. Vero Beach, 159 So.2d 209 (Fla. 1963); Pinellas Co. v. Dynamic Investments, Inc., 279 So.2d 97 (Fla. 2d DCA 1973).

Further, the exercise of the state's powers must be reasonably related to a public purpose not unduly restrictive of innocent behavior. United Gas Pipe Line Co. v. Bevis, supra.

As the court stated in Eskind v. Vero Beach, supra, at p. 212:

> When there is no reasonably identifiable rational relationship between the demands of the public welfare and the restraint

> upon private business, the latter will not be permitted to stand.

It is a clear fact that many of the world's fish are commonly caught by purse seine. The purse seine is the only means to catch small deep water fish such as herring, sardines and anchovies. It also is commonly used to catch a variety of other fish everywhere in the world.

If restraints placed in a statute are not rationally related to a legitimate state interest, it is void. State v. Walker, 440 So.2d 1137 (Fla. 2d DCA 1984); Laskey v. State Farms Insurance Co., 296 So.2d 9 (Fla. 1974).

This statute creates guesswork from even the professionals who enforce it in this case.

These questions are best illustrated by the depositions of Col. Donald Ellingsen, Director of the Florida Marine Patrol, and Lt. Col. Clifford Kidd, Deputy Director of the Marine Patrol. Both men had different interpretations of this law and different ideas as to when a violation occurs.

Col. Ellingsen testified in his deposition that a purse seine violation occurs if "Florida has an interest in that particular fishery.'' (R. Vol. II, p. 11). Col. Ellingsen's understanding was that if Florida had a "legitimate interest'' in the fish, then the statute applied to purse seining activities. (R. Vol. II, p. 12).

While Col. Ellingsen believed that a Florida vessel purse seining salmon off Alaska did not violate Florida law because of lack of a legitimate interest, (R. Vol. II, p. 12), Lt. Col. Kidd assumed that a Florida vessel violated the statute when purse seining food fish off Nova Scotia. (R. Vol. IV, p. 73). Col. Kidd's interpretation did not include a legitimate interest element; he would enforce the law no matter what species of fish were involved. However, he was unsure if a retailer, such as Winn Dixie, violated the statute when offering purse seined sardines for sale. (Id. at 75)

Clearly, if the director and deputy director of the Marine Patrol are unable to read the statute and determine why, when, where and to whom it applies, the average fisherman will be left to guess. For example, could the Defendants' vessel fish off of Cape Hatteras for redfish with purse seines? If so, could they place the catch on trucks and send the catch to Port St. Joe for processing? If not redfish, could purse seined bluefish from Chesapeake Bay be processed in Port St. Joe? Could Raffield Fisheries have bought a truck load of purse seined salmon from Washington State and brought them to Port St. Joe for distribution?

This statute offers no definition to the fisherman when he plans his season. This leads to the prosecution

of innocent behavior. Statutes which are not drafted narrowly enough to apply to issues genuinely of interest to the state are void. See, Cramp v. Board of Public Instruction of Orange County, Fla. 368 U.S. 278 (1961); Marrs v. State, 413 So.2d 774 (Fla. 1st DCA 1982).

Lack of Clear Objective

Due process also requires that a statute "bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary, or oppressive." Johns v. May, 402 So.2d 1166 (Fla. 1981). "Since the basic principle of substantive due process is to protect the individual from an abusive exercise of governmental powers. . . legislation must not arbitrarily state that actions which are inherently and generally innocent shall constitute criminal offenses." State v. Walker, 440 So.2d 1137 (Fla. 2d DCA 1984); City of St. Petersburg v. Calbeck, 114 So.2d 316 (Fla. 2d DCA 1959).

This statute applies to all waters of the world, much further than the legitimate interests of the state. Furthermore, the prohibition on purse seines is an arbitrary exercise of legislative authority, in this case, since it does not achieve the legislative objective of protection of a resource. In the federal quota fishery, one million pounds of fish were caught and would have been caught even if Florida boats had been confined to port. The statute

has been applied only to Florida citizens and enforcement is thus discriminatory and oppressive.

In Bethel1 v. Florida Dept. of Natural Resources, slip opinion (S.D. Fla., Sept. 29, 1983) (Order Granting Plaintiff's Motion for Summary Judgment) (Appendix "D") the United States District Court indicated that a limited application of Section 370.1105, F.S., only to Florida-registered vessels would deny Florida citizens of their right to equal protection. The court reasoned that such an application would allow non-Florida boats to use fish traps in the EEZ while Florida-registered vessels would be prohibited from doing so. Id. at 3.

Similarly, in Southeastern Fisheries Association, Inc. v. Livings, slip opinion (S.D. Fla. 1983) (Appendix "C") (Order Granting Plaintiffs' Motion for Temporary Restraining Order), the court stated that if Section 370.08(3), F.S., were applied only to Florida vessels, it would run afoul of the equal protection rights of Florida citizens. While vessels from other states would be allowed to use purse seines in the EEZ through specific federal authorization, Florida vessels would be prohibited from reaping the same benefits. Id. at 6 & 7.

In the case at bar, the Defendant Raffield is a Florida citizen who operates with Florida-registered vessels. Because the Florida Marine Patrol has only enforced

Section 370.08(3) against Florida citizens in this case, the Defendants' equal protection rights have been violated. The statute unlawfully discriminates against Florida citizens, and as such, is unconstitutional.

POINT II

THE ENFORCEMENT OF SECTION 370:08(3) TO FISH CAUGHT IN FEDERAL WATERS HAS BEEN PREEMPTED BY THE UNITED STATES MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT

All fish in question in this case were caught off the State of Louisiana, in Federal waters. By "Federal Waters" Appellees are referring to the Fishery Conservation Zone (FCZ) (Now called Exclusive Economic Zone or EEZ) created by the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801, et. seq., otherwise known as the Magnuson Act. This zone extends from the limits of the coastal states territorial waters out 200 nautical miles. Within this zone, the act states, at 16 U.S.C. 1812: "The United States shall have exclusive fishery management authority. . . over all fish within the fishery conservation zone." (emphasis supplied)

The language above quoted is clear and unambiguous. There is to be one set of applicable regulations and standards that apply to the EEZ: those of the U.S. Government. Turning to that, it is particularly specific in this case that the U.S. Government, by emergency regulation, adopted on June 25, 1986, permitted the catch of 1 million pounds of red drum in the EEZ for 90 days. (51 Fed. Reg. 23551, June 30, 1986) On June 25, 1986 the U. S. Department of Commerce issued to Raffield Fisheries, Inc., as well as

other commercial fishing ventures, a permit to catch red drum in the EEZ, by purse seine. A copy of this permit (R. Vol. I, p. 37) is attached as Appendix A. Note the permit specifically states the method of catch: directed net fishery.

In other words, at all times where the information charges the crime to have occurred, the Appellees had the specific permission of the U.S. Department of Commerce to catch and possess those fish and to do by purse seine.

The policy behind preemption is that there are certain regulatory fields that the Federal Government should occupy. The reason for such is that unified regulation of the field is necessary. Leaving state regulations in place would create uneven results detrimental to the unified nation. See Gibbons v. Ogden, 9 Wheat. 1 (1824). Both federal regulations and federal statutes can preempt a conflicting state statute. Fidelity Federal Savings and Loan Assn. v. De La Cuesta, 458 U.S. 141, (1982); United States v. Shimer, 367 U.S. 374 (1961).

Federal preemption of the regulation of commerce between the states can occur in either of two ways: by the Secretary of Commerce adopting regulations for the fishery, or by an affirmative determination that no regulations should be imposed at all. Ray v. Atlantic Richfield, 435 U.S. 151, at 172 (1978).

The Gulf of Mexico Fishery Management Council has addressed the status of redfish in the EEZ in the Gulf of Mexico. That inquiry has examined the status of the resource, the methods of harvest (purse seine) and whether there is a need for limitations on commercial catch.

Clearly, that Council determined, at least as early as June, 1984, that red drum in the EEZ have not needed the imposition of regulations limiting harvest or restricting means or methods of catch. (See statements of Brawner and O'Conner at Congressional hearing, Appendix C, pp. 19-22). This has been an affirmative regulatory decision of the Council.

In the words of Craig O'Conner, counsel to the National Marine Fisheries Service, the effect of their decision not to adopt a fisheries management plan in the EEZ, in 1984, effectuated preemption of state law to the fish in question caught in the EEZ. O'Conner stated:

> . . . but we are in the unfortunate situation of being in a position where the Federal Government has taken an action and that action was to conclude in one form or another that no management was necessary in the fishery conservation zone for redfish, and what in effect that did was render null and void the application of State laws to activities applying in the fishery conservation zone. (Appendix C, at p. 22)

The U.S. Supreme Court, in a decision prior to Ray v. Atlantic Richfield, supra, has stated that ''where the failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," individual states are not at liberty to adopt conflicting statutes or regulations. See, Bethlehem Steel Co. v. New York Labor Relations Board, 330 U.S. 767, 774, 67 *So.* Ct. 1026, 1030, 91 L. Ed. 1234 (1947).

The testimony of Mr. Brawner indicates the N.M.F.S. determined not to restrict the catch of redfish in the EEZ in 1984. Brawner outlined how the Gulf Council studied red drum and prepared a profile, in January 1984, of the fishery. That profile indicated no need to limit catch, and because of those studies no limitation was implemented.

Where the actions of federal policymakers take on the character of an affirmative decision on the subject, no conflicting state regulation can be enforced. Ray v. Atlantic Richfield, supra.

The application of these doctrines in *Ray,* supra, is illustrative of the similarity to the case in point. In Ray, supra, the U.S. Coast Guard examined oil tanker shipping through Puget Sound and, among other things, decided no restriction on tanker size was necessary. The U.S. Coast

Guard, therefore, did not adopt a rule on maximum tanker size for Puget Sound. The State of Washington did adopt such a limitation, which the U.S. Supreme Court held to be invalid, on the basis of federal preemption.

Even though there was no federal regulation on the point, the state regulation was stricken because of the fact that the federal agency had determined no such regulation was necessary. That decision took on the character of a regulation on the point; to allow the state regulation to stand would be to allow the state to conflict with and supersede a decision by the federal regulatory agency on the same issue.

In the information before this Court, Section 370.08(3), F.S., suffers the same infirmities as did Washington State's attempt to limit tanker traffic in Puget Sound. Here, the U.S. Dept. of Commerce has specifically determined, prior to the rule allowing the purse seine catch, no limitation on the catch of red drum by purse seine or any other means was necessary in the EEZ in the Gulf of Mexico.

Section 370.08(3), F.S., forbids the taking of fish, by purse seine, anywhere in the world, including the EEZ in the Gulf of Mexico. If the Florida statute at issue here can be enforced in the EEZ under these circumstances, every coastal state along the Gulf of Mexico could adopt similar laws; if one can do so they all could. This would

permit the individual states to block federal fishery management decisions in the EEZ. Such a result would be absolutely in violation of the U.S. Government's supreme power to regulate commerce and its preemption of the management of red drum in the EEZ.

Further, this is a criminal charge. For whatever reason, the State has chosen not to seek a civil remedy such as an injunction, but follows a path of using its awesome powers to charge the Defendants with criminal violations. That is the State's choice, but it must accept the restrictions that accompany its burden in criminal cases.

The first is that in criminal cases all applicable statutes are interpreted strictly against the State and in favor of the person charged with the violation, Prussian v. United States, 282 U.S. 675 (1931); State v. Wershow, 343 So. 2d 605 (Fla. 1977). In this matter only a plain reading of the applicable statutes is necessary. 16 U.S.C. 51812 plainly vests the United States with exclusive jurisdiction over the fish and fishing in the EEZ.

It is plain that the Florida statute in question, Section 370.08(3), is not a statute that attempts to regulate fishing vessels of the state, but, by its terms, applies to all persons, anywhere in the world, who would catch or transport food fish caught by purse seine. Florida Statute 370.08(3) therefore is not enforceable in the EEZ,

for to do so would be contrary to the express terms of the Fishery Conservation and Management Act, particularly 16 U.S.C. 51812.

The Florida Supreme Court has recognized that the State's fisheries laws may not apply beyond the territorial waters of the state where the Federal Government has preempted regulation. In Southeastern Fisheries Association v. Department of Natural Resources, 453 So.2d 1351 (Fla. 1984) the court determined that by passage of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801, et. seq. (1976) Congress had asserted federal control over waters in the Fishery Conservation Zone.

The Florida Supreme Court specifically stated:

> The state's authority to regulate in those waters is only by the consent and acquiescence of the federal government. at p. 1355.

The court concluded in that case that the State of Florida could not forbid the use of fish traps in the EEZ even though the state made it unlawful to possess such traps within the state. The court also ruled that in order to prosecute for unlawful possession of such traps, the state must, as an element of such crime, prove an intent to use the traps in the state's territorial waters.

The same rationale the Florida Supreme Court used in Southeastern Fisheries Association v. Department

of Natural Resources, supra, applies to the application of Florida's "purse seine" law which is the underlying charge in this indictment.

The Florida Supreme Court ruled that even though the state law made the fish trap an illegal apparatus, the state could not prevent its citizens from using them in the EEZ, as the Federal Government allowed their use in that zone.

This reasoning applies to purse seines. The State of Florida seeks to ban their use in the EEZ, hundreds of miles from the limits of Florida's territorial boundaries, by criminal prosecution. All this is at a time when the Federal Government decided it would allow the catching of fish, including red drum, within the EEZ, by purse seine. The Federal Government adopted a rule to that effect, and implemented the rule by issuing a permit to these defendants.

The state law and the decisions of the federal managers are not reconcilable. Under these circumstances even the Florida Supreme Court recognizes total preemption of the attempted extraterritorial application of a state statute in the EEZ.

The United States Has not Consented to the Enforcement of §370.08(3), F.S. in Federal Waters

The State, through the criminal charges filed, seeks to forbid the same fishing in the EEZ that the Federal

Court has specifically sanctioned. If Florida's statute can be enforced under these circumstances then other coastal states could enact and enforce similar laws.

The potential conflict raised between the predominance of state and federal law in this case is not just speculation by the Appellees. The United States itself recognizes that if the various states can enforce landing and possession laws to fishing otherwise legally conducted in federal waters, the states could nullify federal management of these waters.

This was specifically acknowledged in the Federal Register by the U.S. Dept. of Commerce, Fed. Reg. Vol. 51, No. 247, Dec. 24, 1986, pp. 46675-46682.

A copy of this publication is attached as Appendix G.

In the Federal Register, as a predicate to the publication of the permanent rules regulating the catch of red drum in the Exclusive Economic Zone (EEZ), the U.S. Dept. of Commerce gave an explanation of the purpose and justification of the rules.

On the question of whether red drum caught in federal waters should be subject to state landing or possession laws, the U.S. Dept. of Commerce states at p. 46676 of the above-referenced Federal Register:

> To do this would require that the regulations applicable in the EEZ be modified for each fisherman according

> to his domicile, the place of landing and the ultimate destination of the fish landed.

The publication goes on to say:

> The Federal Government has a responsibility to manage fisheries in the EEZ. Nevertheless, state laws would effectively nullify Federal fishing regulations in the EEZ if states could prohibit not only the landing of fish caught in state waters, but the landing of fish legally caught in the EEZ under federal regulations.

Clearly, the above espouses a determination by the United States Department of Commerce that Federal Management Plans not be at the mercy of the laws of individual states.

The U.S. Dept. of Commerce further states on page 46677 of this December 24, 1986 edition of the Federal Register:

> On the other hand, it would not ordinarily be fair, absent circumstances justifying such treatment, to apply different rules to people fishing in the EEZ based solely upon their state of citizenship.
>
> ******
>
> However, it is impossible to harmonize federal law with the laws of each of the states on the Gulf of Mexico when these state laws

differ significantly from each other.

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Landings of red drum lawfully harvested in the EEZ by gill nets, trammel nets, and purse seines are exempt from state landing possession and sales laws. [Emphasis added]

Clearly, the U.S. Dept. of Commerce does not interpret applicable federal law to allow the enforceability of Florida's purse seine law to red drum caught in federal waters. In fact, the above-quoted statements demonstrate a purpose to maintain the supremacy of the United States to regulate interstate commerce in this area by unequivocally stating that: "Landings of red drum lawfully harvested in the EEZ by . . . purse seines are exempt from state landing, possession and sales laws." [Emphasis added]

The District Court of Appeal in the decision below erroneously construed a savings clause within the emergency rule in question. See p.4 of the slip opinion of the court below.

While the emergency rule stated it "does not supersede any state landing or possession law which apply to red drum," the lower court misconstrued the meaning of that clause.

It must be remembered that when the U.S. Government preempts state action and power over a fishery, it may do so in federal and state waters. Just as the decision of the Coast Guard not to regulate tanker traffic in the

territorial waters of the State of Washington preempted all state powers on that subject, the N.M.F.S. could, if it so desired, preempt all state regulations over red drum in state waters. The savings clause relied upon by the District Court of Appeal left state powers over fish caught in state waters intact.

That is the only reasonable interpretation of that clause. This can be seen clearly from the statements of the administrators of the N.M.F.S., both before and after the adoption of the emergency rule. On June 2, 1986 Jack Brawner and Craig O'Conner testified before a Congressional committee that preemption in the EEZ had already occurred to all red drum caught in those waters. (See Appendix C, pp. 19-22)

After the emergency rule was adopted, as described above, the U.S. Department of Commerce published, in the Federal Register, its interpretation of whether state landing and possession laws could lawfully co-exist with federal supremacy to all fish lawfully harvested in the EEZ. The Dept. of Commerce emphatically stated that such state laws could not be enforced to fish caught in the EEZ.

This is the interpretation of the United States Dept. of Commerce as to the applicability of the federal law which it is directly responsible to enforce and implement.

An agency's interpretation of its laws is given great weight by the courts. This is true both under Florida and federal law. Ray Vaillie Trash Hauling, Inc. v. Kleepe, 447 F.2d 696 (5th Cir. 1973); FDIC v. Sumner Financial Corp., 451 F.2d 898 (5th Cir. 1971); Craig Funeral Home, Inc. v. State Farm Mutual Auto Insurance, 280 F.2d 337 (5th Cir. 1960); Organized Fishermen of Florida v. Watt, 590 F. Supp. 805 (S.D. Fla. 1984).

Again, this concisely demonstrates the U.S. Dept. of Commerce, responsible for the study and regulation of all fisheries in the EEZ, does not believe or interpret applicable United States law to allow the states to enforce laws that would conflict with federal regulations in this area.

Therefore, it is unnecessary to determine in this case whether the Federal Government has the discretion to forego the exercise of its supreme and exclusive powers to regulate commerce particularly with regard to fishing in the EEZ, for it has clearly determined not to waive those powers. The United States has determined its regulations cannot permit the enforcement of conflicting state laws applying to activities in the EEZ. Quite specifically, the United States has stated its regulations shall supersede state laws in those areas, not only with regard to fishing, but to also landing, possession and sale.

POINT III

THE ENFORCEMENT OF SECTION 370.08(3) IN THIS CASE IS BARRED BY THE SUPREME POWER OF THE UNITED STATES TO REGULATE COMMERCE

While it is well settled that states are able to protect resources within their jurisdiction, it must be done "only in ways consistent with the basic principle that the pertinent economic unit is the Nation . . . and that when [wildlife] become an article of commerce, [its] use cannot be limited to the citizens of one state." Hughes v. Oklahoma, 441 U.S. 322, 339 (1979) (citations omitted).

Florida's purse seine law is not limited to vessels registered within the State of Florida, nor to citizens of the state. The prohibitions in the law extend to outside the territorial sea and apply to all persons that use purse seines, and to all "food fish" caught by such means.

A person who brings any purse seined fish into Florida for purposes of sale can be subjected to the penalties in the statute. This is clearly a discriminatory statute as it applies only to fish caught by one means and not any other.

Recently the U.S. Supreme Court stated the basic rule regarding state wildlife laws that affect interstate commerce. Where a statute clearly discriminates against certain users of interstate commerce, a "strict scrutiny"

test is applied. Maine v. Taylor, 447 U.S. 943, 91 L. Ed. 2d 110, 106 S.Ct. 2440 (1986).

In Maine v. Taylor, supra, a Maine statute forbade the importation of live baitfish. The U.S. Supreme Court held that such a statute clearly discriminated against baitfish dealers.

Under such a circumstance a two part test must be met for the statute to be upheld. The State must prove:
1) that the law serves a legitimate local purpose; and
2) that there are no less discriminatory alternatives available.

The U.S. Supreme Court had no problem with the fact that the Maine baitfish law was discriminatory as it restricted interstate trade in the most direct manner possible, by blocking all imports at the state's border.

However, in Maine's case the court found the ban on imported live baitfish did meet the two pronged ''strict scrutiny'' test. The court found there was a legitimate purpose to the act in Maine's fear of having diseased imported baitfish from infecting native stocks. No lesser discriminatory alternative was demonstrated reasonably possible.

The strict scrutiny test originated from the decision in Hughes v. Oklahoma, 441 U.S. 322 (1979). In Hughes the court held an Oklahoma statute that forbade shipping minnows outside the state was repugnant to the Commerce Clause. Among other things, the court held that

when a wild animal becomes an article of commerce, its use cannot be limited to the citizens of one state to the exclusion of citizens of another state. (at pp. *338, 339)*

In the statute before this Court the prohibitions apply against the possession of any kind of food fish, from any part of the globe, caught by purse seine. The law is clearly discriminatory, for in the same manner as in Maine v. Taylor, supra, and Hughes v. Oklahoma, supra, it restricts all such interstate trade at the state's border.

The discriminatory nature of this law can be easily illustrated by a hypothetical example. Suppose, Raffield Fisheries had caught several loads of red drum by gill net in addition to those it caught by purse seine while fishing off Louisiana under the permit issued by the U.S. Dept. of Commerce.

Section 370.08(3) would allow the dead fish caught by gill net to enter the state, while stopping the import of those caught by purse seine at the state's border. The identical fish, both caught by federal permit, would be given totally different treatment by the operation of this law.

It is the State's burden to show that this statute is a reasonable exercise of the State's powers, for as the U.S. Supreme Court stated in Hughes v. Oklahoma, supra:

> The burden to show discrimination rests on the party challenging

> the validity of the statute, but when discrimination against commerce is demonstrated, the burden falls on the state to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake. Furthermore, when considering the purpose of a challenged statute, [the] description or characterization given it by the legislature or the courts of the State, but will determine for itself the practical impact of the law.

Hughes v. Oklahoma, 441 U.S. at 336 (citations omitted.

There can be no question but that this statute goes overboard in restricting commerce. It could achieve a valid conservation purpose by listing species to be protected and catch quotas.

Florida can claim no legitimate purpose for this statute, for it is in no way limited to Florida's interests in protecting its fish or wildlife resources. The statute applies to all the world's fish, not just Florida's. Florida's law, which is rarely enforced, literally stops all sardines, anchovies, most salmon and a variety of all other fish from being legally brought into the state. This is so regardless of whether the fish is native to Florida, is scarce or abundant or needs a limitation of harvest. The

fish in this case were already dead, caught pursuant to Federal law, the paramount law of the land.

Therefore, the law fails the first part of the two part "strict scrutiny" test, as it goes beyond meeting a legitimate local interest.

Second, presuming the purpose of Florida's purse seine law is to prevent overharvesting of fish, there is certainly a less restrictive alternative. In fact, that alternative now exists and has been part of Florida's statutes for a number of years.

The purse seine law, §370.08(3), was enacted in the 1950s. Since that time, the legislature, through 5370.026, F.S., has created the Marine Fisheries Commission and has given it the authority to adopt rules and regulations, pursuant to 5370.027, F.S., restricting, among other things, prohibited gear, bag limits, size limits, protected species, species that may not be sold, and other subjects.

Plainly, the State Marine Fisheries Commission can accomplish every legitimate purpose in protecting Florida's fisheries that are reasonable and necessary by adopting particular rules that are specific to individual species.

In fact, §370.08(3), the purse seine law, is repealed, by statute passed in 1985, whenever the Governor and Cabinet adopt appropriate rules, which has not yet occurred. See footnote 1 to 5370.08, F.S. (1987). This

demonstrates that even Florida's legislature no longer sees the need for the blanket prohibitions in §370.08, F.S., as soon as specific rules are adopted.

This clearly demonstrates that Florida has it within its power to adopt precise rules, through the Marine Fisheries Commission, that would carefully regulate the fisheries of the state, not operate with the sledge hammer, overbroad results this statute achieves.

In fact, these rules can be adopted by the Executive Branch of State Government; through its statutory delegation. It need not wait until the legislature meets to enact a proper law.

This is a clear statement that Florida's purse seine law also fails the second part of the "strict scrutiny" test. Subsequent state law has created the apparatus to take a more specific approach, through rulemaking, to determine what gear is allowed and when a fish needs further protection.

In fact, the Marine Fisheries Commission attempted to adopt a rule banning the sale of red drum in Florida, which rule was considered by the First District Court of Appeal in State, Marine Fisheries Commission v. Organized Fishermen of Florida, 503 So.2d 935 (Fla. 1st DCA 1987). This rule was eventually rejected by the Governor and Cabinet.

Since that time other rules dealing with red drum have been adopted by the Florida Marine Fisheries Commission and approved by the Governor and Cabinet.

Other fish, such as mackeral, are restricted as to gear and limits of catch, size limits, etc. This is all accomplished by rules of the Florida Marine Fisheries Commission and have the force of law. 5370.028, F.S.

Not only can Florida adopt less discriminatory alternatives than the total ban on purse seined fish, it has, by statute, created the apparatus to do so, and has adopted many rules that achieve no more than legitimate local purposes, as required by the decision in Hughes v. Oklahoma, supra.

Indeed, this statute has been reviewed in federal court and there was found to be a substantial likelihood that Section 370.08(3), F.S., is unconstitutional.

In Southeastern Fisheries Association, Inc. v. Livings, slip opinion (S.D. Fla. 1983) (Order granting Plaintiffs' Motion Temporary Restraining Order, Appendix "D"), the court stated: "[T]he state's application of section 370.08(3) to out-of-state vessels would constitute an unauthorized interference with commerce between the states in violation of the Commerce Clause." Id. at 6. Accordingly, a temporary restraining order was issued by the court in order to restrict the enforcement of the statute. Id. at 8.

The analysis of the United States District Court in that case is instructive as applied to this case:

> Under Plaintiff's Southeastern Fisheries, et. al. interpretation of Section 16 U.S.C. 1856(a) boats from states other than Florida would be able to leave from Florida ports, enter the FCZ, use purse seines to make their catches, return to Florida ports, and unload their catches while Florida-registered vessels would be prevented from doing any of the above. At oral argument, counsel for the State informed the Court that boats registered in other states would likewise be prohibited from the use of purse seines in violation of Section 370.08(3). However, the State's application of Section 370.08(3) to out-of-state vessels would constitute an unauthorized interference with commerce between the states in violation of the Commerce Clause. On the otherhand, it is neither fair nor equitable to allow boats registered in other states to reap the benefits of the Act open to them while Florida vessels are prohibited from the same conduct. Since Congress has permitted the use of purse seines in the FCZ by all vessels, Fldorida may not now prohibit its citizens' vessels from engaging in the type of fishing Congress has specifically allowed without violating the Plaintiffs' (and other Florida citizens') right to equal protection. [Emphasis supplied]

Id. at pp. 6-7.

As applied in the case sub judice, the Florida statute is likewise in violation of the Commerce Clause. The Defendants were charged with possession of redfish caught with a purse seine. The fish in question were trucked into Florida after being caught in the EEZ and landed in Louisiana. Full enforcement of the statute in this manner would have the direct effect of banning all commercial importation of food fish (except tuna and menhaden) caught with purse seines. This burden on interstate commerce would be at odds with the Commerce Clause and the advancement of any local purpose does not justify the excessive burden Florida has placed on interstate commerce. All enforcement of the purse seine statute must be viewed as unconstitutional, and as such, the arrest and prosecution of the Defendants must be viewed as unconstitutional.

CONCLUSION

Petitioners respectfully request that this court determine that the enforcement of §370.08(3), F.S., in this case is an invalid exercise of the State's police powers and that §370.08(3) is unconstitutional on its face.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Petitioners has been furnished by ~~U. S. Mail~~ hand delivery to Bradford L. Thomas, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050 and to Charles R. McCoy, Assistant General Counsel, Department of Natural Resources, 3900 Commonwealth Boulevard, Suite 1003, Douglas Building, Tallahassee, FL 32399 on this 15th day of April, 1988.

KENNETH G. OERTEL