IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,677

EUGENE RAFFIELD AND RAFFIELD FISHERIES, INC.

APPELLEES/PETITIONERS

VS.

STATE OF FLORIDA

APPELLANT/RESPONDENT

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE FIRST DISTRICT OF FLORIDA

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

The Respondent generally accepts Petitioner's statement of the case. However, Raffield's Statement of the facts omits significant information necessary to determine whether to accept jurisdiction.

Raffield was charged with violation of §370.08(3), Florida Statutes, for the possession, on land and in Florida, of over 80,000 pounds of redfish caught with a purse seine. The fish had been processed, or loaded for re-shipment, at Raffield's extensive facility in Port St. Joe. State v. Raffield, 515 So.2d 283, 284 (Fla. 1st DCA 1987). (Appendix I) The same federal emergency regulations under which Raffield obtained a permit expressly warned Raffield he could be subject to other state statutes, and expressly preserved operation of state landing laws such as §370.08(3). Id. at 285. See "Emergency Interim Rule" for the Drum Fishery of the Gulf of Mexico, 51 Fed. Reg. 2355, 23553 (June 30, 1986) codified as 50 CFR §653.3 (App. 11, p. 5). Neither a fishery management plan nor final regulations were in effect when Raffield was arrested. State v. Raffield, supra at 285, n. 1.

SUMMARY OF ARGUMENT

The First District's decision does not conflict with any decision of this Court. Rather, the lower court followed the correct rule of law announced in Livings V. Davis, 465 So.2d 507 (Fla. 1985), and did not expressly or directly conflict with this Court's decision in Southeastern Fisheries Association, Inc. V. Department of Natural Resources, 453 So.2d 1351 (Fla. 1984).

The State agrees with petitioner that the First District expressly construed the state and federal constitutions, and declared a state statute to be valid. Nevertheless, since that court's conclusions announced no new principles of law, and were solidly anchored in long established decisions of the U.S. Supreme Court and recent decisions by this Court, and further review should be denied.

ARGUMENT

ALTHOUGH THIS COURT HAS JURISDICTION BECAUSE THE LOWER COURT CONSTRUED CONSTITUTIONAL PROVISIONS IN UPHOLDING A STATE LAW, FURTHER REVIEW SHOULD BE DENIED.

The State recognizes the lower court expressly construed constitutional provisions in upholding the applicability of Section 370.08(3), Florida Statutes, for Raffield's possession of over 80,000 pounds of redfish caught by purse seine. The State urges this Court to decline jurisdiction as the lower court correctly relied upon long-standing case law of the United States Supreme Court and decisions of this Court. No new principles of law, or any intricate interpretations of prior court decisions, were announced. Furthermore, the lower court's opinion did not conflict with any decision of this Court or other district appellate courts.

1. The First District's Holding Does Not Expressly or Directly Conflict With Any Decision of This Court on the Same Question of Law.

The First District found that federal regulations expressly preserved operation of Section 370.08(3), Florida Statutes, which prohibits possession of food fish caught by purse seine net. State v. Raffield, 515 So.2d 283, 285 (Fla. 1st DCA 1987). This prominent fact distinguishes the lower court's holding from Southeastern Fisheries Association, Inc. v. Department of Natural Resources, 453 So.2d 1351 (Fla. 1984). Because state law was

expressly preserved from preemption, there can be no conflict with any of this Court's decisions on when preemption occurs. In Southeastern Fisheries, this Court considered the application of **5370.1105,** Florida Statutes (Supp. **1980)** (fish-trap prohibition), to persons fishing beyond Florida's territorial boundaries. This Court found no clear expression by the legislature that the statute was intended to apply in federal waters, and therefore held that it did not apply. **453** So.2d at **1355.** Consequently, discussion of preemption of state law by conflicting federal regulations in Southeastern is dicta. However, the dicta states the correct rule of law on preemption: The "state's authority to regulate in these [federal] waters is only by the consent and acquiescences of the federal government." Id. This rule of law was properly followed below and no conflict exists.

The lack or withdrawal of federal consent was more squarely confronted in Livings v. Davis **465** So.2d **507** (Fla. **1985).** There, Davis and other shrimp fishermen were charged with violating **§370.15(2)** (a), Florida Statutes **(1979),** which prohibited the taking or possession of small shrimp "within or without the waters of this state". (Emphasis supplied). The shrimp fishermen were charged on March **31,** April **13** and May 2, **1981,** obviously before preemptive federal regulation took effect on May 20, 1981 (Id. at **508-509).** This Court found that the federal statute (the "Magnuson Act" or MFCMA) alone did not preempt state law, and that absent conflict arising upon adoption of federal

regulations, Florida was not precluded from enforcing its small shrimp ban in federal waters. Id. at 509.

The First District, citing Livings, followed this rule of law and stated: "the adoption of the Magnuson Act...did not preempt the right of the State of Florida to regulate commercial fishing outside its territorial limits" Raffield, 515 So.2d at 284. Moreover, the court noted that the emergency rule in effect when the charged offenses occurred did not supersede any state landing laws which apply to red drum. Id at 285, citing 51 Fed.Reg. 23551, 23553. (App. 11, p. 5). Significantly, the court stated: "At that point in time, there was no preemption of state regulation affecting the landing of redfish." Id.

Both Southeastern Fisheries, at p. 1354, and Livings, at p. 509, rely on long-established law delineated in Skiriotes V. Florida, 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193 (1941). The Skiriotes Court recognized that a state could regulate its citizens' conduct in federal waters (sponge diving) absent conflict with federal law. The First District cited Skiriotes in finding no equal protection violation through Florida's enforcement of the possession bar in §370.08(3), Florida Statutes.

Therefore, this Court does not have discretionary jurisdiction based on alleged conflict between the lower court's opinion and other decisions of this Court or other courts. See

Potter v. McCullers, 505 So.2d 510 (Fla. 3d DCA 1987). No preemption of Florida's extra-territorial enforcement of general shrimping prohibition in S370.151, Florida Statutes.)

2. The District Court Properly Relied Upon Controlling Precedent to Correctly Construe Constitutional Provisions Upholding State Law, And This Court Should Decline Review.

The district court correctly rejected the county court's ruling that Section 370.08(3), Florida Statutes, violated the Due Process Clause of the state and federal constitutions. Raffield, 515 So.2d at 286. The district court relied upon this Court's holding in Gardner v. Johnson, 451 So.2d 477, 478 (Fla. 1986), that small variances in interpretation do not render a statute unconstitutional if the law apprises "a person of common intelligence of the activity sought to be proscribed". Thus, this Court would be unnecessarily reaffirming this proposition were it to accept jurisdiction. The statute unquestionably apprises persons of common intelligence that possession of certain fish, caught by purse seine net, is prohibited in Florida. The District Court correctly construed the Due Process Clause to permit a law such as Section 370.08(3) which "plainly states" that Petitioner may not possess food fish for sale or shipment, taken by purse seine net. Raffield's prohibited conduct was no different than possessing any other contraband, and this Court need not reaffirm the District Dourt's proper reasoning.

Similarly, the District Court correctly held that the

statute did not violate the Equal Protection Clause. Raffield at page 286. The District Court relied on Skiriotes in holding that:

> A state may constitutionally govern the conduct of its citizens from the high seas [where] the state has a legitimate interest...[We] find no violation of this equal protection clause by the statute in question, as it regulates the taking of food fish...in order to enforce...a legitimate interest--the conservation of the fishery resource.

Id. This Court need not accept jurisdiction merely to reaffirm the above principle established by the highest court of the land over forty years ago. Skiriotes v. Florida, 313 U.S. 69, 77 , 61 S.Ct. 924, 929, 85 L.Ed. 1193, 1200 (1941). Finally, the District Court did not expressly construe the equal protection clause regarding Petitioner's meritless selective enforcement claim. The lower court did not specifically address the selective enforcement claim. 515 So.2d at 286.

This Court need not review a lower court opinion which correctly relies upon this Court's precedent and case law of the United States Supreme Court. As noted in the argument against conflict jurisdiction, the First District followed Skiriotes to refute the equal protection challenge. It relied on this Court's decision in Gardner v. Johnson, 451 So.2d 477-479 (Fla. 1984) to refute the vagueness and due process claims. Relying primarily on Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 56 S.Ct. 513,

80 L.Ed. 772 (1936), it found no undue burden on interstate commerce, also citing this Court in State v. Millington, 377 So.2d 685, 688 (Fla. 1979). Relying on Livings v. Davis, supra, it denied that preemption by federal law occurred. This Court should decline jurisdiction.

CONCLUSION

The lower court's opinion is clear and sufficient. It does not conflict with state or federal court decisions. Its application to fishing in federal waters was expressly mandated by the Legislature in **1969**, when the "within or without waters of this state" language was added. See Chapter **69-231, s.l,** Laws of Florida.

Although the First District construed federal and state constitutional provisions to conclude the statute is valid, it announced no new principles of law and relief upon long-standing precedent. It relied upon facts that were admitted by Raffield, or obvious from the face of relevant law (e.g., that the federal emergency regulations expressly preserved state landing laws). The Raffield decision is in accord with a **1987** decision by the Third District. A small but sound body of law is emerging at the district court level. Further review by this Court is unnecessary. Therefore, Raffield's petition should be DENIED.

Respectfully submitted,

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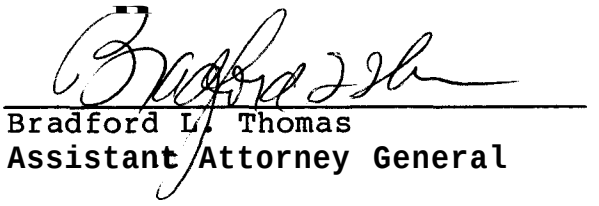
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction has been forwarded to Kenneth G. Oertel, Post Office Box 6507, Tallahassee, FL 32314-6507, via U. S. Mail, this 28th day of January 1988.



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