IN THE SUPREME COURT
STATE OF FLORIDA

RAFFIELD FISHERIES, INC.,
and EUGENE RAFFIELD,

Petitioners,

vs.

CASE NO: 71,677

STATE OF FLORIDA,

Respondent.

PETITIONERS' REPLY BRIEF

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POINT I

THIS APPEAL HAS NOTHING TO DO WITH THE STATUS OF RED DRUM IN FLORIDA

Florida Statute 370.08(3) does not forbid possession of red drum. It makes possession of any food fish, if caught in a purse seine, illegal.

On page 3 of its brief the State argues that red drum stocks are depleted and "so threatened." This brings out the true reason for this prosecution. The State strongly disagreed with the U.S. Dept. of Commerce's decision when it adopted the emergency rule on June 30 of 1986 allowing the catch of 1 million pounds of red drum. The State believed the fishery should have been closed, not left open to further harvest.

The prosecution of Raffield was the State of Florida's way of expressing its displeasure with the U.S. Dept. of Commerce's decision to allow a quota catch of 1 million pounds of red drum in the Gulf of Mexico.

It is totally irrelevant to this appeal whether red drum are in abundant or short supply. The U.S. Government allowed 1 million pounds to be caught in June-July, 1986. Whether or not the State of Florida was displeased with that decision is beside the point. Once the permits were issued those million pounds were to be caught and processed. Under the Magnuson Act, there was nothing the State could have done to stop

that fishing, as the Federal Government has exclusive authority over the fisheries in those waters.

The State's argument, on page 13 of its Answer Brief, as to whether the State must wait until "the total decimation of the redfish fishery must occur" before it may act to protect its interests, begs the question. (It is also a red herring, a different fish of the same color.)

The State cannot control how the EEZ is regulated by the government of the United States. In this instance the State could not prevent 1 million pounds of fish from being caught.

Further, the State, in the exercise of the powers of the Florida Marine Fisheries Commission can put quotas on the catch and possession of red drum in state waters.

But the State cannot force the U.S. Government to manage the fisheries within the EEZ in a manner that pleases Florida.

On page 13 of its brief the State suggests that Florida's purse seine law is one of the "lease restrictive statutory methods of preventing the collapse of the redfish fishery." That statement also begs the question. It is also untrue.

It is an attempt of the State to patronize this court with the contention that the purse seine law is the only way to "save the redfish." The state purse seine law applies to mullet

as well as sturgeon and red drum. The Federal Government manages the fish in the EEZ.

Page 13 of the State's brief starts with the statement: "There is a crisis in redfish management in Florida." Petitioner is uncertain as to what this statement has to do with this appeal. If redfish were on the verge of extinction, would that make the State's arguments any better? Clearly, such statements are designed to inflame the court's perception of the issues in this case against the Petitioners. Petitioners can only respond that they earn their living by fishing, a noble effort that has been honored for at least since Biblical times.

Something is wrong when the Federal Government can give a commercial fisherman a permit to fish in federal waters, and the state then prosecute him for having caught and kept those fish. Had the Petitioners caught the fish, killed them, and then dumped them back into the Gulf of Mexico, they could not have been charged with a violation of Section 370.08(3), F.S. The same would apply to had the fish been sold in Louisiana. Only by bringing these fish, legally caught, into Florida, did the Petitioners subject themselves to this prosecution.

On page 15 of the State's Answer Brief it is claimed that this law only applies to fish caught on Florida vessels or "knowingly possessed" in Florida. Nothing in this statute supports this contention. The State is only trying to downplay

the excessiveness of the reach of this statute. The statute forbids the possession of food fish caught by purse seine, regardless of where they were caught or who caught them.

The State of Florida can protect the redfish by rule of the Marine Fisheries Commission, established under Chapter 370, F.S. That Commission can place a closed season on fish, put daily or seasonal quotas on catch, limit sale, and in every other way limit harvest as needed to protect the species.

For the State to say that the purse seine law is he least restrictive way to protect redfish ignores how the Florida Marine Fisheries Commission can limit the take of this or any other fish. In fact, the Marine Fisheries Commission has adopted a number of rules on setting limits on redfish over mackerel, trout, etc., over the past two years. In fact, harvest of red drum is closed by rule of the Florida Marine Fisheries Commission.

The State's argument also ignores how it is contradicted by the legislative repeal of the purse seine law, Section 370.08(3), F.S. As pointed out in the Petitioner's Initial Brief, the purse seine law has been repealed. That repeal was effective on July 1, 1985 but does not go into effect until "appropriate" rules are adopted.

It is clear that had the Legislature believed that the purse seine law was essential to "save" any fish it would not

have repealed it and allowed administrative rules to act as a satisfactory substitute. The zeal for the preservation of this law is certainly not shared by the Florida Legislature.

Much of the State's argument goes as follows: The redfish needs protection; Section 370.08(3), F.S., the purse seine law, was applied in this instance to a catch of redfish; therefore, the application of the law was proper as being applied to a fish in which Florida has a legitimate interest.

This is similar to an argument that a vague law forbidding **"loitering"** is permissible, if it is applied against persons who may be selling drugs. See Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980); Eskind v. City of Vero Beach, 159 So.2d 211 (Fla. 1963).

Would the State's argument be the same if the purse seine law was applied to mullet, a fish in plentiful supply? If the law is valid, the species of fish caught is irrelevant. If the law is invalid the same is true; the species of fish captured in the net makes no difference.

The State's position, if correct, would allow the State to apply it to species for which it was **"concerned."** This takes one right back to the testimony of Colonel Ellingson and Lieutenant Colonel Kidd of the Florida Marine Patrol who would apply that standard to determine when and where the purse seine law would apply.

Surely, the State of Florida cannot maintain a standard of criminal law that changes from species of fish to fish depending on whether the State is "concerned" about a particular species.

This does not qualify as a legitimate State interest, as the interest is totally dependent upon a subjective determination to justify criminal prosecution.

POINT II

PREEMPTION HAS OCCURRED BY THE FEDERAL GOVERNMENT OVER THE ACTIVITIES IN THIS CASE

The State points to language in the emergency rule in question in this case to argue that preemption has not occurred, as, in the State's interpretation of this language, state enforcement of possession and landing laws was preserved.

The Petitioner believes the State places too much reliance on this "savings clause."

First, in the opinion of the people who wrote this rule and who interpret and apply the Magnuson Act, preemption of state laws to activities in the EEZ had occurred prior to the adoption of the emergency rule.

Both Jack Brawner, the regional administrator, and Craig O'Connor, the general counsel for the National Marine Fisheries Service, testified before a congressional committee on this question on June 2, 1986, the same month the emergency rule was adopted.

Mr. O'Connor testified that preemption occurred in 1984, when the National Marine Fisheries Service determined red drum did not require federal management. In Mr. O'Connor's words: 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)

Further, that same federal agency later published rules that repeated the earlier statements of the officials of the Federal Marine Fisheries Service. That stated:

> "A state will continue to be able to regulate the catching, retention or disposition of red drum harvested in its waters as it sees fit, consistent with its laws and constitution, and the Constitution of the United States. 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." (Federal Register, Vol. 51, No. 247, at p. 46676, in Appendix F)

Surely, the statements in the emergency rule, as interpreted by the State in its brief, conflict with the earlier and later statements of these federal officials. The only way to reconcile these statements is to conclude that the savings clause was intended to clarify that the Federal Government was not preempting the enforcement of state law to activities that took place in state waters.

Further, the "savings clause" should be strictly construed in this, a criminal case. As the State quotes the emergency rule, it will not be construed to supersede state laws that prohibit landing or possession within the jurisdiction of

the state of any red drum. Section 370.08(3) does not forbid the possession of red drum. It forbids, for purposes of sale, the possession of food fish if caught by purse seine, regardless of species.