047

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 80,679

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Santos M. Garcia,

Petitioner,

v.

Carmar Structural, Inc./FEISCO

Respondents

_____/

PETITIONERS REPLY BRIEF ON THE MERITS

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INTRODUCTION

For some reason, not evident to the undersigned, Respondents divided Petitioner's Point I into two points and relabeled Petitioner's Point II as Point III. In this brief, the original Point numbers, used in Petitioner's Initial Brief, are retained.

ARGUMENT

POINT I

THE APPLICATION OF THE 1990 OR 1991 AMENDMENTS TO CHAPTER 440, FLORIDA STATUTES, TO THIS JULY 5, 1990, ACCIDENT VIOLATES CONSTITUTIONAL MANDATES

There is no question that major differences exist in the handling of criminal and civil cases. This is correctly pointed out by Respondents in the area of page 10 of their brief. They cite American Trucking Associations, Inc. v. Smith, 496 U.S. 167, 110 S.Ct 2323, 110 L.Ed.2d 148 (1990), and Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987). They also attack the citation as an example by Petitioner of Miranda v. Arizona, 484 U.S. 436, 86 S.Ct. 1602 (1966). As will be discussed later in this brief, in the federal system, the analysis of the retroactivity question is very similar in both circumstances. Respondents do not, however, discuss citations including Hoffman v. Jones, 280 So.2d 431 (Fla.1973), which was a Florida civil case and which was held to be applied "prospectively only". See Lawrence v. Florida East Coast Railway, 346 So.2d 1012 (Fla.1977). It was applied to any cases still in the "system" at the time of the ruling.

Respondents cite American Trucking v. Smith, supra. In that case out of state truckers brought a class action suit in Arkansas

alleging that a highway tax bill violated the Commerce Clause. The trial court and Arkansas Supreme Court both ruled that the tax was constitutional based upon established United States Supreme Court precedent. However, while the judgment was on appeal, the United States Supreme Court in American Trucking Association, Inc. v. Scheiner, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987), overruled prior precedent and, the Court, subsequently vacated the Arkansas supreme court's judgment and remanded for further consideration in view of the new statement of law. The Arkansas supreme court thereupon decided that certain tax monies paid into the escrow fund should be refunded. The Court was asked to determine if the Arkansas supreme court had correctly applied a three prong test found in Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), as to whether Scheiner, supra, should be applied retroactively. The plurality, speaking through Justice O'Connor, determined that under the Chevron Oil three factor tests for retroactivity or non-retroactivity, Scheiner should not be applied retroactively for a part of the tax that was collected but should apply retroactively for another part of the tax. This was, in part, because Scheiner, clearly established a new principal of law expressly overruling an earlier case on which the Arkansas Legislature and Court relied. Secondly the purpose of the Commerce Clause did not dictate or require retroactive application of the new precedent since such application would not tend to defer future violations by the States. Thirdly, there would be substantial inequitable results through full retroactive application.

The Court stated that in the past when it had held state taxes unconstitutional it had been their practice to abstain from deciding the retroactive effects but leaving that to State courts to determine. The Court stated:

> "Our reasons for doing so have arisen from a perception based in considerations of federal-state comity:
>
> > "[T]his Court should not take it upon itself **in this complex area of state tax structures** to determine how to apply its holding: 'These refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce, were not addressed by the state courts. Also, the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law. **Also, resolution of those issues, if required at all, may necessitate more of a record than so far has been made in this case.** We are reluctant, therefore, to address them in the first instance.' " Tyler Pipe, supra, 483 U.S., at 252, 107 S.Ct., at 2822, quoting Bacchus, supra, 468 U.S., at 277, 104 S.Ct., at 3058." 496 U.S. at 176-177

Thus the Court has carved out state taxes as a somewhat unique area of the law of retroactivity. The Court did state that when questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. 496 U.S. at 177. The Court also stated:

> "Although the Court has recently determined that new rules of criminal procedure must be applied retroactively to all cases pending on direct review or not yet final, see Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987), retroactivity of decisions in the civil context "continues to be governed by the standard announced in [Chevron Oil]," id., at 322, n. 8, 107 S.Ct., at 713, n. 8; see also United States v. Johnson, 457 U.S. 537, 550, n. 12, 102 S.Ct. 2579, 2587, n. 12, 73 L.Ed.2d 202 (1982)." 496 U.S at 178

The Court then discussed the Chevron Oil test. It was stated:

> "That test has three parts:
>
> > "First, the decision to be applied nonretroactively must

> establish a new principle of law[1], either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, ... we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we [must] weig[h] the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." 404 U.S., at 106-107, 92 S.Ct., at 355 (citations and internal quotations omitted)." 496 U.S at 179

While this Court is not bound by the Chevron analysis, it should be influential in resolving the question of what the "prospective only" really means in the context of Scanlan. Petitioner maintains that as a matter of constitutional law, since there is a fundamental right involved, one explicitly given by both constitutions, In Re Estate of Greenberg, 390 So.2d 40 (Fla.1980), appeal dismissed sub nom. Pincus v. Estate of Greenberg, 450 U.S. 961, 101 S.Ct. 1475, 67 L.Ed.2d 610 (1981), the right to have contracts unimpaired by state legislation and state action, Article I, §10, of the Constitution of the State of Florida and Article I, §10, of the Constitution of the United States, that any "prospective only" ruling dealing with a fundamental right must be construed as narrowly as possible.

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[1] Petitioner understands that the "prospective only" decision was made in Scanlan, supra. Petitioner does not seek reconsideration of that issue. The extent and meaning of the "prospective only" edict is unclear as evidenced by the opinion for which review is sought here. That meaning and scope should be influenced by some, if not all, of the same considerations which are involved in the present discussion. Here ther was no "law-changing" decision, only the application of the same provision which had been applied in the same way before.

In the case at bar, no prior precedent was overruled. Indeed, prior precedent dealing with the "single subject matter" provision of the constitution of the State of Florida, was applied as it had been for many years and in many cases[2]. Secondly, a holding that any accident occuring in the "window" period when the 1990 act was

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[2] In determining that issue in Scanlan, this Court stated:

> "Next, we address Scanlan's claim that chapter 90-201 is facially unconstitutional because it violates the single subject requirement. Article III, section 6 of the Florida Constitution states in pertinent part that "every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." The purpose of this constitutional prohibition against a plurality of subjects in a single legislative act is to prevent "logrolling" where a single enactment becomes a cloak for dissimilar legislation having no necessary or appropriate connection with the subject matter. *State v. Lee*, 356 So.2d 276 (Fla. 1978). The act may be as broad as the legislature chooses provided the matters included in the act have a natural or logical connection. *Chenoweth v. Kemp*, 396 So.2d 1122 (Fla. 1981).
>
> We agree with the trial court that chapter 90-201 violates the single subject requirement and is unconstitutional. Chapter 90-201 essentially consists of two separate subjects, i.e., workers' compensation and international trade. While Martinez contends that these subjects are logically related to the topic of comprehensive economic development, we can find only a tangential relationship at best to exist. We recognize that legislative acts are presumed constitutional and that courts should resolve every reasonable doubt in favor of constitutionality. *See State v. Kinner*, 398 So.2d 1360 (Fla. 1981); *Hanson v. State*, 56 So.2d 129 (Fla. 1952). More-over, we have held that, despite the disparate subjects contained within a comprehensive act, the act did not violate the single subject requirement because the subjects were reasonably related to the crisis the legislature intended to address. *Burch v. State*, 558 So.2d 1 (Fla. 1990) (1987 Crime Prevention and Control Act); *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987) (1986 Tort Reform and Insurance Act). In the instant case, however, the subjects of workers' compensation and international trade are simply too dissimilar and lack the necessary logical and rational relationship to the legislature's stated purpose of comprehensive economic development to pass constitutional muster. *See Bunnell v. State*, 453 So.2d 808 (Fla. 1984)." 582 So.2d at 1172

still the most recent enactment would send the wrong message to the Legislature. It would indicate that no matter what they enacted in violation of a specific constitutional provision, when that provision was a "procedural" one, all will be "forgiven" if they just readopt it later. This renders meaningless any such provision. The Legislature has certain constitutional responsibilities. If it violates one of them, the chips must fall where they may[3]. As previously argued, it is not within the purview of this Court's jurisdiction to "forgive" a constitutional transgression by any branch of government.

Thirdly, the "inequities" that are involved in restricting the "prospective only" nature of the Scanlan ruling to preclude relitigation of those cases which are final but to allow litigation of those cases under the 1989 statute are minimal, at best, if they exist at all. Indeed, Respondents discuss none of any importance. All that is involved is some money, and not a lot, at that. This is not, as in the tax case as cited by Respondents, where the government has collected funds, designated their spending and signed contracts of its own, on behalf of the People, for the use of those funds. That situation creates a quagmire which adversely affects all citizens. In the case at bar no one is affected other than some insurance carriers who will have to pay some additional benefits and, even then, not much. In the case at bar its an additional 2.67% of a compensation rate which comes to only a few dollars per week. This small amount is certainly more important to

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[3] "We must never forget, that it is a constitution we are expounding" McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L.Ed. 579 (1819).

the injured worker than to the carrier. See Parker v. Brinson Construction Co., 78 So.2d 873 (Fla. 1955)[4]. The adjustments in this type of case, when compared to the overall workers' compensation system are de minimis. It should be remembered that these carriers have already paid a compensation rate based on a 64% as opposed to 66.67% of Claimant's average weekly wage subject to a maximum compensation rate. The American Trucking v. Smith Court, in applying the third part of the Chevron Oil test, stated:

> "Where a State can easily foresee the invalidation of its tax statutes, its reliance interests may merit little concern, see McKesson, --- U.S., at ---- - ----, ----, 110 S.Ct. at 2254-2255, 2257. By contrast, because the State cannot be expected to foresee that a decision of this Court would overturn established precedents, the inequity of unsettling actions taken in reliance on those precedents is apparent. Although at this point the burden that the retroactive application of Scheiner would place on Arkansas cannot be precisely determined, it is clear that the invalidation of the State's HUE tax would have potentially disruptive consequences for the State and its citizens. **A refund, if required by state or federal law, could deplete the state treasury, thus threatening the State's current operations and future plans.** Presumably, under McKesson, the State would be required to calculate and refund that portion of the tax that would be found under Scheiner to discriminate against interstate commerce, with the attendant potentially significant administrative costs that would entail. As McKesson makes clear, the State could also attempt to provide relief by retroactively increasing taxes on the favored taxpayers to cure any violation. But this too would entail substantial administrative costs and could at some point run into independent constitutional restrictions. See --- U.S., at ----, n. 23, 110 S.Ct., at 2252, n. 23 ("[B]eyond some temporal point the retroactive imposition of a significant tax burden may be 'so harsh and oppressive as to transgress the constitutional limitation' "). Moreover, such an approach would unfairly penalize favored taxpayers for the State's failure to foresee that this Court would **overrule established precedent.** Although in the future States may be able to protect their fiscal stability by imposing procedural requirements on taxpayer actions, see McKesson, --- U.S., at ----, ----, 110

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[4] There this Court took judicial notice that persons who work for wages and particularly small wages, are dependent upon such wages for their immediate livelihood.

S.Ct., at 2254, 2257, such prospective safeguards do not affect the inequities of retroactive application of Scheiner. Nor can Arkansas be faulted for continuing to rely on its statute after its highest state court upheld the constitutionality of the tax." 496 U.S. 182-183

The Court further stated:

"In determining whether a decision should be applied retroactively, this Court has consistently given great weight to the reliance interests of all parties affected by changes in the law. See, e.g., Cipriano v. City of Houma, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900-01, 23 L.Ed.2d 647 (1969) ("Significant hardships would be imposed on cities, bondholders, and other connected with municipal utilities if our decision today were given full retroactive effect"). To the extent that retrospective application of a decision burdens a government's ability to plan or carry out its programs, the application injures all of the government's constituents. These concerns have long informed the Court's retroactivity decisions. The Court has used the technique of prospective overruling (accompanied by a stay of judgment) to avoid disabling Congress' bankruptcy scheme, see, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982), and has refused to invalidate retrospectively the administrative actions and decisions of the Federal Election Commission, see Buckley v. Valeo, 424 U.S. 1, 142-143, 96 S.Ct. 612, 693-694, 46 L.Ed.2d 659 (1976). The Court has also declined to provide retrospective remedies which would substantially disrupt governmental programs and functions. See, e.g., Lemon v. Kurtzman, 411 U.S. 192, 209, 93 S.Ct. 1463, 1473-74, 36 L.Ed.2d 151 (1973) (Lemon II) ("[S]tate officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful") (plurality opinion); see also Reynolds v. Sims, 377 U.S. 533, 585, 84 S.Ct. 1362, 1393- 94, 12 L.Ed.2d 506 (1964) ("[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid"); Allen v. State Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969). The retrospective invalidation of a state tax that had been lawful under then- current precedents of this Court threatens a similar disruption of governmental operations. Therefore, our refusal here to retroactively invalidate legislation that was lawful when enacted is in accord with our previous determinations of how best to give effect to new constitutional decisions." 496 U.S. 185-186

The Court discussed the dichotomy between retroactive

application of criminal precedent and civil precedent and stated:

> "The principles underlying the Court's civil retroactivity doctrine can be distilled from both criminal and civil cases considering this issue. When the Court concludes that a law-changing decision should not be applied retroactively, its decision is usually based on its perception that such application would have a harsh and disruptive effect on those who relied on prior law. See, e.g., Chevron Oil, 404 U.S., at 107, 92 S.Ct., at 356. In order to protect such reliance interests, the Court first identifies and defines the operative conduct or events that would be affected by the new decision. Lower courts considering the applicability of the new decision to pending cases are then instructed as follows: If the operative conduct or events occurred before the law-changing decision, a court should apply the law prevailing at the time of the conduct. If the operative conduct or events occurred after the decision, so that any reliance on old precedent would be unjustified, a court should apply the new law.[5] See generally Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N.Y.U.L.Rev. 631 (1967) (describing this technique).
>
> The Court expressly relied on this doctrine in a criminal case, Jenkins v. Delaware, 395 U.S. 213, 89 S.Ct. 1677, 23 L.Ed.2d 253 (1969). As the Court observed, a number of decisions prior to Jenkins had declined to apply a new rule retroactively when the "point of initial reliance," that is, "the point at which law enforcement officials relied upon practices not yet proscribed," id., at 218-219, n. 7, 89 S.Ct., at 1680, n. 7 (quotation omitted), occurred prior to the date of the law-changing decision. See, e.g., Halliday v. United States, 394 U.S. 831, 831, 89 S.Ct. 1498, 1498, 23 L.Ed.2d 16 (1969) (new rule not applicable to guilty pleas accepted before date of law-changing decision); Desist v. United States, 394 U.S. 244, 254, 89 S.Ct. 1030, 1036, 22 L.Ed.2d 248 (1969) (new rule not applicable to electronic surveillances conducted before date of law-changing decision); Fuller v. Alaska, 393 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212 (1968) (new rule not applicable to tainted evidence introduced before date of law-changing decision). Jenkins concluded that " 'focusing attention on the element of reliance' " in making nonretroactivity decisions was " 'mere consistent with the fundamental justification for not applying newly enunciated constitutional principles retroactively.' " 395 U.S., at 219, n. 7, 89 S.Ct., at 1680, n. 7, quoting

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[5] Here Petitioner maintains that the "operative conduct" is the adjudication. Respondents maintain that it is the accident, itself. Such an interpretation would require the application of any unconstitutional act where the invalidation was not retroactively applied. In American Trucking v. Smith the "operative conduct" was the collection of the tax, not the passing of the Act imposing the tax. That is why some refunds were mandated.

Schaefer, supra, at 646.

The Court has relied on the same reasoning in the civil arena. In decisions invalidating state election provisions, the Court has focused on the conduct or events that should not be invalidated by its law-changing decisions. In Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969), for example, the Court struck down Louisiana's provisions for bond-authorization elections as violative of the Equal Protection Clause. However, to avoid frustrating the expectations of parties who relied on prior law, the Court held that courts should not invalidate a State's election or bonds if the bond authorization process had been completed, i.e., if the election had not been timely challenged under state law and the bonds were ready to be issued, before the date of the decision in Cipriano. See 395 U.S., at 706, 89 S.Ct., at 1900 ("[W]e will apply our decision in this case prospectively. That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision ") (emphasis added). Although the Court looked to the state limitations period to determine when the authorization process was complete, the Court did not hold that this period should be adopted as a time bar for raising equal protection challenges to state elections in federal court. Rather, the Court only held that bonds ready for issuance prior to the date of Cipriano could not be invalidated under the rule established in that decision. Similarly, in Phoenix v. Kolodziejski, 399 U.S., at 213-215, 90 S.Ct., at 1677-1678, the Court held that its ruling that the state election laws at issue were unconstitutional should not be applied retroactively where the bond authorization process had been completed prior to the date of the Court's decision. See 399 U.S., at 214, 90 S.Ct., at 1678 ("[O]ur decision in this case will apply only to authorizations for general obligations bonds that are not final as of June 23, 1970, the date of this decision"). See also Hill v. Stone, 421 U.S. 289, 301-302, 95 S.Ct. 1637, 1645, 44 L.Ed.2d 172 (1975) (holding that the law-changing decision should not apply where the authorization to issue securities became final prior to the date of the decision).

The Court's practice of focusing on the operative conduct or events is implicit in our other retroactivity decisions. In England v. Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), the Court established a new rule that a party remitted to the state courts by a district court's abstention order could not subsequently return to the district court if he had voluntarily litigated his federal claims in state court. The Court did not apply this rule to the case pending before it, because the individuals there had relied on

prior law in litigating their federal claims in state court. Id., at 422, 84 S.Ct., at 468. In Allen v. State Board of Elections, 393 U.S. 544, 571-572, 89 S.Ct. 817, 834-835, 22 L.Ed.2d 1 (1969), the Court declined to set aside elections conducted pursuant to invalid election laws, as the operative event--the elections--had been valid under law preceding the decision in Allen. When considering the retroactive applicability of decisions newly defining statutes of limitations, the Court has focused on the action taken in reliance on the old limitation period-- usually, the filing of an action. Where a litigant filed a claim that would have been timely under the prior limitation period, the Court has held that the new statute of limitation would not bar his suit. See Saint Francis College v. Al-Khazraji, 481 U.S. 604, 608-609, 107 S.Ct. 2022, 2025-2026, 95 L.Ed.2d 582 (1987); Chevron Oil, 404 U.S., at 107-109, 92 S.Ct., at 355- 357.

As these cases indicate, the Court has not followed the dissent's approach in the civil sphere. In none of the cases discussed above did the Court indicate that the critical factor for determining the retroactive applicability of a decision was the time when principles of res judicata or a time bar precluded further litigation. Rather, the Court's retroactivity doctrine obliged courts to apply old law to litigants before them if the operative conduct or events had occurred prior to the new decision. In this case, we merely apply these well-established principles of civil retroactivity. Here, we define the operative conduct as Arkansas' flat taxation of highway use in reliance on this Court's pre-Scheiner cases. Ante, at 2335-2336. We then decline to apply Scheiner retroactively to invalidate taxation on highway use prior to the date of that decision." 496 U.S. at 191-194

The citations in Respondents' Brief regarding that difference are inapposite here as that discussion by the Court in American Trucking v. Smith, supra, dealt with "law changing" decisions. See 496 U.S. at 191-194. It can not be stressed too much that the Scanlan case was not a "law changing" decision. It was simply, as shown from the quoted materials, an application of a constitutional provision in the manner which has been applied many times in the past.

Respondents state "the date of accident must control the rights of the parties". That is absolutely correct and all that

Petitioner seeks to enforce. On the date of this accident the only Act in place in workers' compensation law which could pass constitutional muster, was the 1989 statute which provided greater benefits with a 95%-85% wage loss calculation formula, Section 440.15, Florida Statutes (1989), as opposed to the 80%-80% formula in place in the voided 1990 Statute. The substantive character of this change is obvious since the arithmetic calculation shows an benefit rate of 80.75% of the average weekly wage, subject to the maximum compensation rate, as compared to a benefit rate of 64% of the average weekly wage, subject to the maximum compensation rate. This Claimant is not at the maximum compensation rate, (R. 15), and thus has a real interest here.

As previously argued, Lawrence v. Florida East Coast Railway, 346 So.2d 1012 (Fla.1977), the Court ruled that special verdict forms were required in all jury trials involving comparative negligence in the wake of Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). This ruling was held to be prospective only, 346 So.2d at 1017. It was applied to all cases not tried as of the date of the Lawrence decision. In State v. Statewright, 300 So.2d 674 (Fla. 1974), the decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), was held to be prospective only ("the ruling in *Miranda* has been expressly held NOT to be retroactive. Johnson v. N.J., 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966)" 300 So.2d at 676), but this Court held that it applied to cases not yet tried and where the interrogation had occurred prior to the Miranda ruling. That would seem to be on point as the DCA proceeding was the only "trial" where the issue could be raised. Sasso v. Ram

Property Management, 431 So.2d 204 (Fla.1st DCA 1983), affirmed, 452 So.2d 932 (Fla.1984)[6]. Certainly the acceptance of the present constitutional arguments to this case which was tried after the date of Scanlan and for which the order was not rendered until July 17, 1991, (R. 49), is consistent with the Scanlan "prospective only" edict.

In Coon v. Board of Public Instruction of Okaloosa County, 203 So.2d at 497 (Fla. 1967), a bond validation proceeding cited by Respondents, it had been ruled on a petition for issuance of bonds. This Court discussed the issues involved and stated:

> "By an opinion filed May 31, 1967, since withdrawn, we held that the failure to have on file a petition containing the names of 10% of the then qualified freeholders when the second resolution was adopted on September 20, 1966, was fatal to the November 8, 1966, election held pursuant to that resolution. We, at that point, felt that the legislative intent, exhibited by Section 230.23(11) (d), Florida Statutes, F.S.A., supported the conclusion there reached. For the record it should be noted that Justices Roberts, Drew and Ervin dissented on the authority of State ex rel. Evans v. Barker, 121 Fla. 350, 163 So. 695 (1935), and, Board of Public Instruction for Escambia County v. State, 122 Fla. 19, 164 So. 516 (1935).
>
> While a petition for rehearing was pending, the Legislature enacted Chapter 67-1809 (H.B. 3296) which became law on July 10, 1967. On July 19, 1967, we granted rehearing, withdrew our opinion of May 31, 1967, and remanded the whole matter to the Chancellor for reconsideration in the light of the 1967 Statute. Chapter 67-1809, supra, is simply a curative statute purporting to validate the bond issue now in question.

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[6] "The issue raised on appeal involves the facial constitutionality of the statute, and such an issue is not cognizable by a deputy commissioner. Accordingly, it would have been futile to raise the issue below. Therefore, we recognize a very narrow exception to the rule stated in *Sunland Hospital*, requiring preservation of an issue for appellate review. The fact that the issue raised on appeal is strictly constitutional in nature and the statute's application formed the basis for the deputy's denial of permanent disability wage-loss benefits is sufficient to permit appellate review." 431 So.2d at 207-208

> The matter recurred before the Chancellor upon remand in the instant case. By his decree he sustained the cited 1967 Statute and for a second time approved the validity of the proposed bonds. It is this decree which we now have for review.
>
> It is now contended that the curative statute is itself unconstitutional. Appellant claims that it violates Article III, Section 20, Florida Constitution F.S.A. because it allegedly is a local act regulating the duties of a class of county officers. He claims that it violates Article III, Section 16, Florida Constitution because the body of the Act is much broader than the title. Finally, it is claimed that the statute, even though valid, does not correct the defects detected in the original proceeding. Appellants Coon, et al., who initially contested the validity of the bonds, have now perfected this appeal." 203 So.2d at 498

The principal holding in the case was stated:

> "The defects which initially afflicted the proposed bond issue were merely procedural. The Legislature could have dispensed with those procedural requirements in their entirety. By a curative statute the Legislature has the power to ratify, validate and confirm any act or proceeding which it could have authorized in the first place." 203 So.2d at 498

That is certainly the law in Florida and makes perfect sense. However, in that case there were no contractual obligations in existence which were in any way affected by the Legislature's subsequent action. In the case at bar there are. Sullivan v. Mayo, 121 So.2d 424 (Fla.1960); Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla.1977). That may have been a reason why there were no obligation of contracts issues raised in that case. The ruling certainly might have been different had those factors been involved. As it was, the selling of any of those bonds would have been illegal in the first place until the defect was cured.

Petitioner is not seeking this Court, as Respondents suggest, reconsider its ruling in Scanlan, supra. All that he requests is that there be some definition or meaning given to the term "prospective only", consistent with the specifically expressed

rights involved. Since there is a fundamental, specifically stated constitutional right involved Petitioner requests that the most restrictive meaning possible be given to the Scanlan "prospective only" edict.

CONCLUSION

The opinion of the District Court of Appeal, First District, should be quashed, the Judge's Order reversed and the Claimant found entitled to the full amount of his compensation rate. Both of the certified questions should be answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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