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IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,106

THE STATE OF FLORIDA,

Appellant,

vs.

MATTHEW STEPANSKY,

Appellee.

AN APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF APPELLANT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Matthew Stepansky was charged by information with one count of burglary and one count of attempted sexual battery.[1] The alleged offenses occurred on board a vessel, the M/V Atlantic, a Liberian registered cruise ship, approximately 100 miles off the coast of Florida, in international waters. (See Appendix to Petition for Writ of Prohibition (Fifth District Court of Appeal), A2, A7). The vessel is fully owned by Premier Cruise Lines, Ltd., of the British West Indies. (See Appendix to Petition for Writ of Prohibition, A8). The defendant and the victim are both United States citizens, although neither resides in the State of Florida. (See Appendix to

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[1] As of the time of the filing of this Brief of Appellant on the Merits, there is neither a record on appeal nor an index to the record on appeal. As this appeal is commenced pursuant to Rule 9.030(a)(1)(A)(ii), Florida Rules of Appellate Procedure, the Brief of Appellant is due within 20 days from the notice of appeal, under Rule 9.110(j), Florida Rules of Appellate Procedure. However, the record on appeal, under that same rule, is not due to be prepared or transmitted until 60 days from the filing of the notice of appeal. Furthermore, since the case in the Fifth District Court of Appeal was an original writ proceeding, there was no record on appeal from the trial court, and the ultimate record on appeal in this Court will consist solely of the submissions to the Fifth District Court of Appeal: petition for writ of prohibition; response to petition; appendixes to petition and response; orders of Fifth District, etc.

Due to the absence of an index to the record on appeal as of this time, the Appellant is submitting the Brief of Appellant on the basis of references to the relevant documents. Should this Court desire an amended brief, with better record references, the State will submit one at such time as the Clerk of the Fifth District Court of Appeal prepares and transmits the record on appeal and index to record on appeal.

Petition for Writ of Prohibition, A8).

The prosecution, in the trial court, proceeded solely on the basis of section 910.006(3)(d), Florida Statutes.[2]

In the trial court, the defendant filed a motion and amended motion to dismiss for lack of jurisdiction, alleging that the alleged incidents occurred on the high seas, beyond the limits of Florida's territorial waters. (See Appendix to Petition for Writ of Prohibition, A2). The sole basis for the motion to dismiss was that the federal preemption doctrine precluded the State of Florida from exercising jurisdiction as to crimes committed on vessels on the high seas, insofar as federal legislation permitted the alleged crimes to be prosecuted under federal law, in federal courts.[3]

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[2] That section, entitled "State special maritime criminal jurisdiction," provides, in relevant part, that Florida's special maritime criminal jurisdiction extends "(3) to acts or omissions on board a ship outside of the state under any of the following circumstances: . . . (d) The act or omission occurs during a voyage on which over half of the revenue passengers on board the ship originally embarked and plan to finally disembark in this state, without regard to intermediate stopovers."

[3] In the amended motion to dismiss in the trial court, the claim was summarized as being that "the long-standing Doctrine of Preemption, derived from the Supremacy Clause of the U.S. Constitution, recognizes that Congress, through its Maritime Laws, expressly pre-empts Florida's authority to assert jurisdiction for crimes alleged to have occurred on the high seas and beyond the territorial seas of the coastal states." (Appendix to Petition for Writ of Prohibition, App. 2, p. 2).

Prior to the hearing on the motion to dismiss, the defendant filed several requests for judicial notice, asking the court to take notice of the following facts: 1) that the alleged offense occurred on board the M/V Atlantic, at a distance of 100 nautical miles from the United States coast; 2) that the M/V Atlantic is a motor vessel duly registered in Liberia. (See Appendix to Petition for Writ of Prohibition, A7, A8). The State sought stipulations as to the following facts: 1) that the alleged offenses occurred on the M/V Atlantic, during a voyage on which over half of the revenue passengers on board originally embarked and planned to finally disembark in Florida, without regard to intermediate stopovers; 2) that the incident occurred within international waters; and 3) that the victim and defendant were both revenue passengers on board the vessel (See Appendix to Petition for Writ of Prohibition, A10, A11). At a hearing in the trial court, on the motion to dismiss, the foregoing facts were stipulated to, for the purpose of the hearing on the motion to dismiss. (See Transcript, April 28, 1997, pp. 4-11).

In the trial court, the State filed a written Response to Motion to Dismiss for Lack of Jurisdiction. (See Appendix to Response to Petition for Writ of Prohibition, B1-B35). This Response contained the State's argument regarding the inapplicability of the federal preemption doctrine. The parties

also filed supplemental pleadings related to the motion to dismiss. (See Appendix to Petition A3; Appendix to Response to Petition, C1-C10). On June 11, 1997, the trial court entered a written order denying the defendant's motion to dismiss. (See Appendix to Petition, 13).

Stepansky next proceeded to file a petition for writ of prohibition in the Fifth District Court of Appeal, asserting that the trial court lacked jurisdiction to proceed with this action. (See Petition). In that petition, Stepansky presented four arguments: 1) Florida's jurisdictional statute violates the "flag state rule" of the 1958 Convention on the High Seas; 2) Florida's statute is preempted by federal law; 3) Florida's jurisdictional statute purports to extend beyond the legal jurisdiction of the State of Florida; and 4) Florida's jurisdictional statute violates the due process clause of the Constitution. Id. In a written Response to Petition for Writ of Prohibition and Supplemental Response to Petition for Writ of Prohibition, the State responded to those assertions and other related matters. (See Response to Petition).[4]

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[4] The State's Supplemental Response was filed in response to an order of the Fifth District Court of Appeal seeking supplemental briefing on "the issue of whether the United States Government can assume jurisdiction over crimes committed by or against American nationals on foreign flag vessels in international waters, pursuant to 18 U.S.C. section 7(8), in light of the treaty obligations of the United States." (See Supplemental Response to Petition

On March 4, 1998, the Fifth District Court of Appeal filed its opinion, holding that section 910.006(3)(d), Florida Statutes, is facially unconstitutional and unconstitutional as applied to the facts of the case. The Court's opinion, in relevant part, states:

> . . . The true question is: what is the authority of the State of Florida to enact a statute purporting to exercise criminal jurisdiction over an act occurring on the high seas on a foreign flag vessel?
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> As we read the 1994 federal legislation, it pertains only to federal criminal jurisdiction, not to state criminal jurisdiction. [FN 3] Whatever may be the validity *vel non* of the federal legislation in light of present day international law, an issue not before us, we do not see that legislation as authorizing the extension of the territorial boundaries of Florida. It seems clear that section 910.006(3)(d), as applied in this case, is violative of international law and the treaty obligations of the United States. Although there is authority for the United States to assert extraterritorial jurisdiction over its nationals, there simply is no basis for such an extension by a political subdivision of the United States in regard to the territory of a foreign country - and the flagship of another country is just that. The State of Florida is constitutionally prohibited from entering into a treaty with Liberia in respect to jurisdiction of crimes on the high seas. See Article 1, section 10 of the United States Constitution. [FN 4]
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> Accordingly, we find that section 910.006(3)(d), Florida Statutes, was enacted by the Florida Legislature without the

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(February 23, 1998); Order of Fifth District Court of Appeal, February 13, 1998). Stepansky did not file any supplemental pleading directed towards that issue.

> constitutional authority to do so, thereby intruding upon the exclusive province of Congress and the President as delineated by Article I, section 10 of the United States Constitution. Cf. Zscherning [sic] v. Miller, 389 U.S. 429 (1968). There is no showing, and no argument presented to us, that any treaty ceding such power to Florida has been executed between Liberia and the United States.

(Appendix to Brief, 4-6) (emphasis added) (footnotes omitted).

The State timely filed a motion for rehearing, addressing several of the points raised in the lower Court's opinion. (See Motion for Rehearing, filed March 17, 1998). On March 27, 1998, the lower Court denied the motion for rehearing. (See Order, March 27, 1998).

On May 8, 1998, after the lower Court issued its mandate, and after the time for filing an appeal to this Court had expired, the State filed a Motion to Recall Mandate and Reissue Order Denying Rehearing, on the grounds that counsel for the State had not received the order denying the motion for rehearing and had not learned of it until May 7, 1998. (See Motion to Recall, filed May 8, 1998). On May 20, 1998, the lower Court granted the Motion to Recall Mandate and Reissue Order Denying Rehearing. (See Order, May 20, 1998). The March 27th order denying rehearing and the April 15th mandate were withdrawn, and the order denying the motion for rehearing were then denied, as of May 20, 1998. Id.

The State then filed a Notice of Appeal, seeking review in this Court, on the basis of the mandatory appellate jurisdiction, under Rule 9.030(a)(1)(A)(ii), Florida Rules of Appellate Procedure, insofar as the lower Court declared a state statute invalid.

SUMMARY OF ARGUMENT

The lower Court erred in finding that Section 910.006(3)(d) is unconstitutional. As long as no specific provision of the federal Constitution prohibits Florida from asserting such jurisdiction, the statute is a proper exercise of jurisdiction. The treaty clause of the Constitution, on which the lower Court relies, simply prohibits Florida from entering into treaties. Florida has not entered into any treaty. Nor does the statute violate any of the United States government's treaty obligations, as established doctrines of international law - i.e., the effects doctrine - entitle Florida or any other state to assert jurisdiction notwithstanding the "flag state" rule of the Convention on the High Seas. The question of which courts within a federal government - federal or state - assert jurisdiction, is purely a question of domestic law; not international law.

ARGUMENT

THE LOWER COURT ERRED IN HOLDING THAT THE FLORIDA LEGISLATURE LACKED THE CONSTITUTIONAL AUTHORITY TO ENACT SECTION 910.006(3)(d), FLORIDA STATUTES.

The right of the State of Florida to prosecute crimes occurring on the high seas is a question which is governed by the United States Constitution. Under principles of federalism, if the Constitution does not prohibit an individual state from engaging in certain actions, the State is not precluded from acting. International law is not concerned with the question of which governmental entity within a federal government engages in any particular action.

While the Supremacy Clause of the United States Constitution renders the international treaty obligations of the United States binding upon Florida, section 910.006(3)(d), Florida Statutes does not violate either the flag state principle or the 1958 Convention on the High Seas. International law recognizes the principle that an offense occurring on one nation's territory, including a vessel, may be prosecuted in the courts of another nation, if the offense has an effect on the latter nation. When such a prosecution is undertaken by the latter state, it is not extraterritorial in nature. Rather, since the offense has an effect on the latter

state, the prosecution of the offense by the latter state is simply an adjunct to that state's own territorial jurisdiction. As long as such a qualifying effect on Florida exists, neither international law nor any United States' treaty obligations determine which American courts may prosecute the offense.

A. Florida and Federal Legislation

In 1989, Florida enacted section 910.006, Florida Statutes, defining the state's "special maritime criminal jurisdiction." That statute extends the criminal jurisdiction of Florida beyond the territorial limits of the state, in the enumerated and limited circumstances specified in the statute, in which the State of Florida has a substantial nexus to the criminal act. The prosecution in the instant case was based on section 910.006(3)(d), which extends Florida's criminal jurisdiction "to acts or omissions on board a ship outside of the state" if "[t]he act or omission occurs during a voyage on which over half of the revenue passengers on board the ship originally embarked and plan to finally disembark in this state, without regard to intermediate stopovers." Other acts which serve to extend the criminal jurisdiction of Florida, although not at issue in this case, include situations in which the suspect is a resident of Florida, the victim of a violent offense is a resident of Florida, the master of the ship commits a suspect to the custody of the State of Florida, or the state in whose

territory the act occurred requests the exercise of jurisdiction by Florida. Section 910.006(3), Florida Statutes. A careful reading of section 910.006 compels the conclusion that all of the factors upon which Florida's special maritime jurisdiction may be based are factors establishing a substantial nexus between the offense and the assertion of jurisdiction by Florida.

Florida's statute is a narrowly tailored statute which is designed, in large part, to enable Florida to act as a court of last resort, when other states, whether the flag state or the federal government, are either unable or unwilling to act. Thus, section 910.006(4) provides: ". . . No person shall be tried under this section if that person has been tried in good faith for substantially the same act or omission." Similarly, section 910.006(5)(a)(a) provides: "This section is not intended to assert priority over or otherwise interfere with the exercise of criminal jurisdiction by the United States, the flag state, or the state in whose territory an act or omission occurs."

The statute does not permit Florida to commence a prosecution based on any penal statute which may exist in the State of Florida. Rather, Florida may prosecute for offenses, in the limited, enumerated circumstances set for the 910.006(3)(d), only if "the criminal laws of the United States prohibit substantially the same

act or omission on board ships of the United States registry outside of the territory of the United States." Thus, if the Florida legislature or a county or city commission enacts an obscure statute or ordinance, for which there is no comparable federal penal statute, section 910.006 will not permit Florida to prosecute the offense.[5]

A further significant point about Florida's statute is that it expressly incorporates pertinent provisions of international law, mandating that the statute be construed in a manner consistent with international law. Thus, section 910.006(5)(a)(2) provides: "This section shall be administered in a manner consistent with international law, with the primary responsibility of the flag state for the maintenance of order on board ship, and with the responsibilities of the Federal Government under the Constitution, treaties, and laws of the United States."

In 18 U.S.C. s. 7, the United States Congress has defined the term "special maritime and territorial jurisdiction of the United States." As a result of that definition, whenever a substantive criminal offense provides that it falls within the "special

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[5] The statute also specifically provides that "[n]othing in this section shall be deemed to: . . . 4. Prohibit the operation of gambling, games of chance, or other gambling activities otherwise allowable outside the territorial waters of the State of Florida." Section 910.006(5)(b)(4), Florida Statutes.

maritime and territorial jurisdiction of the United States," that substantive criminal offense may be prosecuted in federal courts. By way of example, 18 U.S.C. s. 2241(a), defining aggravated sexual abuse, provides that "[w]hoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act . . . [with an ensuing definition of the elements constituting the prohibited act], or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both." Title 18 includes a vast array of criminal offenses under federal law; many of them include language such as that contained in section 2241(1), specifically subjecting the offense to prosecution under the special maritime and territorial jurisdiction of the United States.

Since 1994, the federal government clearly has jurisdiction to prosecute offenses occurring on foreign vessels on the high seas, when committed by or against a national of the United States. 18 U.S.C. s. 7(8).[6] Prior to 1994, it is unclear whether the federal

[6] 18 U.S.C. s. 7(8) includes, within the special maritime and territorial jurisdiction of the United States, "To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States." The federal statute is broader than Florida's, to the extent that the scheduled departure and/or arrival need not be based on any percentage of revenue paying passengers embarking or disembarking. The federal statute is narrower than Florida's,

government ever had any statutory basis upon which to commence such prosecutions. 18 U.S.C. s. 7(7), enacted in 1984, extended the federal special maritime jurisdiction to "any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States." Significant doubts exist as to whether that provision was intended to apply to offenses committed on foreign vessels. See, Benedict on Admiralty (Matthew Bender, N.Y. 1995 ed.), s. 112 at pp. 9-7, n. 8 and 9-22.4. Contra, Lowenfeld, "United States Law Enforcement Abroad," 83 Amer. J. Int. L. 880, 887-88 (1989). Prior to 1984, if not 1994, it is clear that the federal government never had any statutory authority to prosecute offenses occurring on foreign vessels on the high seas.[7]

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as it permits prosecutions only when the offenses are committed by or against American nationals.

18 U.S.C. s. 7(8) was enacted in 1994. See, 108 Stat. 2021 (Pub. L. 103-322, Title XII, s. 120002, Sept. 13, 1994). It was enacted due to difficulties which the federal government had previously had in asserting jurisdiction as to such offenses, as evidenced by a Presidential Message, addressing a prior proposed version of the same statute. See, Message from the President, House Doc. 102-58, 102d Cong., 1st Session, Doc. Y1.1/7:102-58. (See Appendix to Response to Petition for Writ of Prohibition, G1-G27). The federal government was concerned that offenses were remaining unprosecuted when they occurred on foreign vessels, by or against American nationals, because the flag states were showing little interest in prosecuting such offenses. Id.

[7] While 18 U.S.C. s. 7(1) includes, within the federal special maritime and territorial jurisdiction, "the high seas," that provision is limited to "any vessel belonging in whole or in part to the United States or any citizen thereof. . . ." That provision, which has language which can be traced back to 1790, does not apply to foreign vessels, and the vessel in the instant case is wholly owned by Premier Cruise Lines, Ltd., a citizen of

B. Federalism

The lower Court's opinion initially raises the question of "the authority of the State of Florida" to enact section 910.006(3)(d). This is simply a question of federalism. If the federal constitution does not prohibit Florida from acting, Florida has the authority. Neither Article I, Section 10 of the United States Constitution (the treaty clause), nor Article VI of the United States Constitution (the supremacy clause), nor any other provision of the federal constitution, prohibits Florida from enacting the statute at issue herein. Under such circumstances Florida's statute is not contrary to the United States Constitution.

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the British West Indies. For a more detailed history of the federal statutory language regarding the high seas being traced back to 1790 and being limited to American owned or registered vessels, see: Act of April 30, 1790, chap. 9, s. 8, 1 Stat. at L. 112, 113; Act of March 3, 1825, chap. 65, s. 4, 4 Stat. at L. 115; Revised Statutes of 1874, s. 5339, et seq., 18 Stat. at L. 1042-50; Act of September 4, 1890, chap. 874, 26 Stat. at L. 424; 35 Stat. at L. 1142, c. 321, s. 272; Special Joint Committee on the Revision of the Laws, 60th Congress, 1st Session, Senate Report 10, part I, p. 10 (1908) (See Appendix to Response to Petition for Writ of Prohibition, E6 - E8); United States v. Flores, 289 U.S. 137, 53 S.Ct. 580, 77 L.Ed. 1086 (1933); United States v. Holmes, 18 U.S. (5 Wheat.) 412, 5 L.Ed. 122 (1820); United States v. Klintock, 18 U.S. (5 Wheat.) 144, 5 L.Ed. 55 (1820); United States v. Kessler, 26 F. Cas. 766 (C.C.D. Pa. 1829) (No. 15,528); United States v. Palmer, 16 U.S. 610 (3 Wheat.), 4 L. Ed. 471 (1818); United States v. Lewis, 36 F. 450 (D. Or. 1888); United States v. Rodgers, 250 U.S. 249, 14 S.Ct. 109, 37 L.Ed. 1071 (1893).

A more detailed discussion of the foregoing principles is included in the State's Response to Petition for Writ of Prohibition, filed in the Fifth District Court of Appeal below, at pp. 8-20.

While the powers of the federal government, under the Constitution, are limited to those which are affirmatively authorized by the Constitution, "[s]tate actions, in contrast, are valid as a matter of federal constitutional law unless *prohibited*, explicitly or implicitly, by the Constitution." Tribe, L., American Constitutional Law (2d ed. 1988 Mineola, New York), s. 5-2, p. 298. Thus, the tenth amendment to the United States Constitution provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." See also, Gregory v. Ashcroft, 501 U.S. 452, 457-59, 111 S.Ct. 2395, 115 L.Ed. 2d 410 (1991) ("The Constitution created a Federal Government of limited powers. . . . The States thus retain substantial sovereign authority under our constitutional system."); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546, 549, 105, S.Ct. 1005, 83 L.Ed. 2d 1016 (1985) ("The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the commonweal, no matter how unorthodox or unnecessary anyone else - including the judiciary - deems state involvement to be." and, "The States unquestionably do 'retai[n] a significant measure of sovereign authority.'. . . They do so, however, only to the extent that the Constitution has not divested them of their original powers and those transferred

those powers to the Federal Government."); New York v. United States, 505 U.S. 144, 188, 112 S.Ct. 2408, 120 L.Ed. 2d 120 (1992) ("States are not mere political subdivisions of the United States. . . . The Constitution instead 'leaves to the several States a residuary and inviolable sovereignty,' The Federalist No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment."); United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 115 S.Ct. 1842, 131 L.Ed. 2d 881, 899 (1995) (discussing how Chief Justice John Marshall, in Sturges v. Crowinshield, 4 Wheat 122, 193 (1819), endorsed Alexander Hamilton's reasoning in The Federalist No. 32, "that the plan of the Constitutional Convention did not contemplate '[a]n entire consolidation of the States into one complete national sovereignty,' but only a partial consolidation in which 'the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.'" Thus, if the treaty clause of Article I, section 10, the supremacy clause of Article VI, or the general foreign affairs powers of the federal government under the Constitution, do not, expressly or implicitly, preclude an individual state from acting, such power remains with the individual state.

The Restatement of the Law on the Foreign Relations of the

United States expressly addresses the issue of the rights of individual states of the United States to prosecute crimes occurring on the high seas:

> *k. Exercise of jurisdiction by a State of the United States.* Since international and other foreign relations law are the law of the United States, under the Supremacy Clause of the Constitution an exercise of jurisdiction by a State that contravenes the limitations of ss. 402-403 is invalid. See s. 111 and Comment d to that section. A contention that an exercise of jurisdiction by a State violates international or other foreign relations raises a federal question. See s. 111 and Comment e and Reporters' Notes 3 and 4 thereto.
>
> International law normally is not concerned with how authority to exercise jurisdiction is allocated within a state's domestic constitutional order. Whether a State may exercise jurisdiction that the United States is entitled to exercise under international law is, therefore, generally a question only of United States law. Subject to constitutional limitations, a State may exercise jurisdiction on the basis of territoriality, including effects within the territory, and, in some respects at least, on the basis of citizenship, residence, or domicile in the State.

Restatement of the Law Third, The American Law Institute Restatement of the Law, The Foreign Relations of the United States (1987), Comment, s. 402(k), pp. 241-42 (emphasis added). Thus, the Restatement recognizes a general right of the 50 individual states to assert some forms of jurisdiction which, by a matter of definitional necessity, would entail assertions of jurisdiction beyond the state's territorial limits.

The Reporters' Notes to s. 402 of the Restatement elaborate upon this:

> 5. *Exercise of jurisdiction by States of the United States.* Under United States law, any exercise of jurisdiction to prescribe by a State is subject to applicable Constitutional limitations, notably Article I, Section 10, and to the supremacy of United States treaties and laws. States are also precluded from exercising jurisdiction where Congress has "occupied the field." *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941) (State alien registration law invalid because preempted by federal statute). States are also barred from "intruding" on the exclusive national authority in foreign affairs. Zschernig v. Miller, 389 U.S. 429, 432, 88 S.Ct. 664, 19 L.Ed. 2d 683 (1968). See s. 1, Reporters' Note 5.
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> Subject to these limitations, exercise of jurisdiction to prescribe by States is governed by the same principles whether the exercise of jurisdiction has international or inter-State implications. States of the United States generally exercise jurisdiction on the basis of territoriality, including effects within the State. See Strassheim v. Daily, 221 U.S. 280, 285, 31 S.Ct. 558, 560, 55 L.Ed. 735 (1911). A State may not apply its laws to a person outside its territory merely on the basis that he a national of the United States, but it may apply at least some laws to a person outside its territory on the basis that he is a citizen, resident, or domiciliary of the State. Cases that have upheld such exercises of jurisdiction, however, have generally involved acts or omissions that also had effect within the State. See, *e.g.*, State v. Tickle, 238 N.C. 206, 77 S.E. 2d 632 (1953), *certiorari denied*, 346 U.S. 938, 74 S.Ct. 378, 98 L.Ed. 426 (1954) (punishment of out-of-State father for non-support of children in the State). See also Skiriotes v. Florida, 313 U.S. 69 (1941) (upholding conviction by Florida of a citizen

> of that State for sponge fishing on the high seas by means prohibited by State law); Model Penal Code s. 1.03(e)-(f) (1985); George,"Extraterritorial Application of Penal Legislation," 64 Mich. L. Rev. 609 (1966).
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> In exercising jurisdiction to prescribe, a State must take account also of constitutional and other limitations governing judicial enforcement of its laws, particularly in criminal cases. See s. 422, Reporters' Note 2.

Restatement, s. 402, Reporters' Note 5, pp. 243-44.

In line with the above general principles, the Model Penal Code of the American Law Institute (Philadelphia 1985), includes a provision regarding territorial limitations on a state's jurisdiction, and that provision expressly contemplates that actions occurring outside the state's territorial limits could result in an assertion of criminal jurisdiction by the state. Section 1.03(3) provides:

> (1) Except as otherwise provided in this Section, a person may be convicted under the law of this State for an offense committed by his own conduct or the conduct of another for which he is legally accountable if:
>
> . . .
>
> (f) the offense is based on a statute of this State that expressly prohibits conduct outside the State, when the conduct bears a reasonable relation to a legitimate interest of this State and the actor knows or should know that his conduct is likely to affect that interest.

(emphasis added). The commentary to this provision of the Model

Penal Code notes that as of 1985, 12 states had enacted comparable statutory clauses. See, Model Penal Code, p. 55, n. 64. While the foregoing language does not refer to crimes on the high seas, the language used by the Model Penal Code is certainly broad enough to contemplate that possibility when the acts involved are reasonably related to a legitimate interest of the State. Furthermore, the concept embodied within the Model Penal Code's language, as well as that of the States which have enacted the comparable provision, is inconsistent with this Court's conclusion that a State's penal jurisdiction is limited to its territorial borders.[8]

C. Flag State Principle and the 1958 Convention on High Seas

The lower Court's initial conclusion is that section 910.006(3)(d) violates international law and the treaty obligations of the United States" because "there simply is no basis for such an extension by a political subdivision of the United States in regard to the territory of a foreign country - and the flagship of another country is just that." Slip opinion, p. 5. In asserting that the statute violates American "treaty obligations," the lower Court, without expressly saying as much, is predicating its holding on

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[8] As developed infra, in the discussion of federal preemption, as well as in the more extensive discussion of that issue in the Response to Petition to Writ of Prohibition, pp. 20-42, in the Fifth District Court of Appeal, state courts clearly have substantial concurrent jurisdiction with federal courts with respect to maritime matters.

Article VI of the United States Constitution, the supremacy clause, pursuant to which the United States Constitution, Congressional enactments, and American treaties are the supreme law of the land. The only treaty referred to in the lower Court's opinion is the Convention on the High Seas of 1958, 13 U.S.T. 2312, T.I.A.S. No. 520. In particular, Article 6, Section 1 of that Convention provides that:

> Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas.

As set forth in the preamble to the 1958 Convention on the High Seas, the Convention was simply an effort "to codify the rules of international law relating to the high seas." The Convention was not changing existing principles of international law; it was simply codifying the existing principles.[9]

While existing principles of international law had long recognized the principle that jurisdiction over offenses occurring

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[9] The 1982 United Nations Convention on the Law of the Sea, which has been signed, but not ratified, by the United States, and which has not been ratified by Liberia, contains comparable language as to the flag state rule in Article 92. 21 International Law Materials 1261 (1982). The executive branch of the United States government has expressly recognized and applied some provisions of the 1982 Convention, such as the 12-mile territorial limit. See Presidential Proclamation No. 5928, 54 F.R. 777 (Dec. 27, 1988); 43 U.S.C. s. 3131 (Supp.).

on vessels on the high seas rested with the flag state,[10] the flag state principle has always been subject to numerous well-recognized exceptions under both international law and under the 1958 Convention. The lower Court's opinion completely fails to discuss the applicability of those exceptions or, alternatively, to set forth any cogent reasons why those exceptions to the flag state rule are not applicable. The lower Court's conception of the law, which begins and ends with the flag state principle, is both simplistic and erroneous.

As previously noted in the extensive quotes from the Restatement on Foreign Affairs, territorial limits to prosecuting criminal offenses yield, under international law, to the principle that a state other than the one on whose territory the offense occurred may prosecute such an offense if it has an effect within the prosecuting state. While the flag state principle is designed, as a general rule, to prohibit extraterritorial prosecutions, when a prosecution is commenced under the "effects" doctrine, such an assertion of jurisdiction is not extraterritorial in nature and does not involve either the flag state convention or international law. This doctrine is articulated in Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F. 2d 909, 922-23 (D.C. Cir. 1984):

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[10] See, United States v. Flores, 289 U.S. 137, 53 S.Ct. 580, 77 L.Ed. 1086); United States v. Rodgers, 250 U.S. 249, 14 S.Ct. 109, 37 L.Ed. 1071 (1893).

> It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory. The traditional example of this principle is that of the transnational homicide: when a malefactor in State A shoots a victim across the border in State B, State B can proscribe the harmful conduct. To take a more likely example, embezzlement or unauthorized access to computerized financial accounts can certainly be controlled by the territory where the accounts are located, even though the thief operates by telephone from a distant territory. Other examples are easily multiplied.
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> . . . As long as the territorial effects are not so inconsequential as to exceed the bounds of reasonableness imposed by international law, prescriptive jurisdiction is legitimately exercised.
>
> The territorial effect is not an extraterritorial assertion of jurisdiction. Jurisdiction exists only when significant effects were intended within the prescribing territory. . . .

(emphasis added). While the Laker case speaks in terms of an effect which was "intended" within the prescribing territory, the general principle, as set forth in the Restatement of the Law, is not so limited, and applies whenever the effect is produced or when it is intended:

> Subject to s. 403, a state has jurisdiction to prescribe law with respect to
>
> . . .
>
> (1)(c) conduct outside its territory that has or is intended to have substantial effect within its territory.

Restatement of the Law Third, The Foreign Relations of the United

States (1987), s. 402, p. 237. The same section makes it clear that when a state is acting with respect to its own nationals, the regulation of their conduct, even if occurring on foreign soil, is part of the prescribing state's own territorial jurisdiction and is not extraterritorial in nature. Id., section 402(2). Thus, as noted in comment d to section 402: "Jurisdiction with respect to activity outside the state, but having or intended to have substantial effect within the state's territory, is an aspect of jurisdiction based on territoriality, although it is sometimes viewed as a distinct category." Id. at p. 239. "This Restatement takes the position that a state may exercise jurisdiction based on the effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable under s. 403." Id. Thus, the limitation is one of reasonableness. Section 403 then proceeds to define the factors for determining "reasonableness" for the purpose of asserting such territorial jurisdiction:

> (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
>
> (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity take place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally

> responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
>
> (e) the importance of the regulation to the international, political, legal, or economic system;
>
> (f) the extent to which the regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
>
> (h) the likelihood of conflict with regulation by another state.

Id., section 403, pp. 244-45.[11] Applying such factors to the instant case, the reasonableness of Florida's exercise of jurisdiction should become clear. First, as noted in the introduction to Florida's jurisdictional statute, this State has compelling interests at stake related to the protection and security of tourists and to the economic well-being of tourist-

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[11] The United States Supreme Court has recognized both the effects doctrine and the Restatement principles. See, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed. 2d 612 (1993).

related industries which would be adversely affected if other states with jurisdiction to prosecute such crimes choose not to do so. Although the flag state may have primary jurisdiction for offenses on its vessels, the connection of the cruises to such states is often tenuous at best, with the prosecution of crimes in such states being a matter of great inconvenience for all parties involved. There is no likelihood of any conflict with any other state, since Florida's statute indicates that Florida is not asserting primacy and if any other state does prosecute the case in good faith, Florida loses its right to do so. Florida's statute is also consistent with principles of international law since it expressly provides that the jurisdictional statute "shall be administered in a manner consistent with international law. . . and with the responsibilities of the Federal Government under the Constitution, treaties and laws of the United States.[12] Thus,

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[12] The foregoing principles regarding a significant effect on the State asserting jurisdiction are also consistent with due process analysis under the federal constitution, as federal case law recognizes the propriety of extraterritorial prosecutions of crimes when there is a sufficient nexus between the defendant and the state asserting the jurisdiction. United States v. Davis, 905 F. 2d 245, 248-49 (9th Cir. 1990) ("In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States . . . so that such application would not be arbitrary or fundamentally unfair." The "nexus requirement . . . is grounded on the international law principles applicable to foreign flag vessels."); United States v. Caicedo, 47 F. 3d 370, 372 (9th Cir. 1995) ("[p]rinciples of international law are 'useful as a rough guide' in determining whether application of the statute would violate due process.").

Florida's assertion of jurisdiction is pursuant to its own territorial jurisdiction; it is not extraterritorial in nature; it does not implicate the flag state rule or the 1958 Convention; and it is consistent with principles of international law.

The effects doctrine derives, in large part, from the Case of the S.S. "Lotus", [1927] P.C.I.J., Ser. A, No. 10. In the Lotus case, after a collision between French and Turkish vessels, resulting in the deaths of several victims on the Turkish vessel, the Turkish government commenced a prosecution of a French officer from the French vessel, charging him with criminal liability for the acts resulting in the deaths of the Turkish victims. The French government protested, asserting, inter alia, that what transpired on the French vessel fell within the limitations of the flag state rule's exclusive jurisdiction of the flag state in which the offense occurred - i.e., France. The Permanent Court of International Justice rejected this claim, relying on the above quoted "effects" doctrine. Thus, the Court pointed out that "[t]he territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty." Id. at 20. The Court then set forth the effects doctrine, pursuant to which the offense, which has an effect on the non-flag state, is the subject of the non-flag state's own territorial jurisdiction. Id. at 23-24. Thus, the flag

state rule had no applicability. Id. at 24-25.[13]

In view of the foregoing, questions of whether the flag state rule is being violated and whether Florida can assert extraterritorial jurisdiction vis-a-vis principles of international law, arise only as to those offenses presenting facts which do not satisfy the effects doctrine.[14] It is only in cases where the

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[13] With respect to either "collisions" or "other incidents of navigation," both Article 11 of the 1958 Convention and Article 97 of the 1982 Convention have limited S.S. Lotus, in part, limiting jurisdiction to the flag state or the state of which the offender is a national. Offenses between passengers on a vessel are not collisions or incidents of navigation, as they do not pertain to the manner in which the vessel is being operated. Additionally, the defendant herein is an American national and Florida courts are American courts.

[14] Thus, several exceptions exist, under international law, which permit extraterritorial assertions of jurisdiction, above and beyond the effects doctrine:

> International law generally recognizes five theories of criminal jurisdiction: 1) territorial - within the state's territorial borders; 2) nationality - as applied to nationals, wherever located; 3) passive personality - as applied to those who commit crimes against nationals, wherever located; 4) protective - applied to acts that have a potentially adverse effect on the state's security and governmental interests, wherever committed; and 5) universal - applied by any state to acts, wherever committed, regarded as heinous crimes.

United States v. Wright-Barker, 784 F. 2d 161, 167 at n. 5 (3d Cir. 1986). The same principles are described somewhat differently in United States v. Vasquez-Velasco, 15 F. 3d 833, 840 (9th Cir. 1994).

As the foregoing concepts are assertions of extraterritorial jurisdiction, they are inapplicable when the effects doctrine, as set forth in the Restatement and the S.S. Lotus case is satisfied,

effects doctrine is not satisfied that the principles of the flag state rule and the exceptions discussed in footnote 10, supra, would be applicable. Even in those cases, the flag state rule would still not constitute a bar to a prosecution by Florida for several reasons. First, international treaties are to be interpreted "narrowly," so as to preclude any unintended waivers of sovereign rights. Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F. 3d 634, 638-39 (5th Cir. 1994). Limitations upon sovereign states rights to prescribe are not presumed. S. S. Lotus, supra, at 18. See also, In the Matter of the Extradition of Demjanjuk, 612 F. Supp. 544, 555 (N.D. Ohio 1985) ("International law does not generally prohibit the application of a state's laws (so-called 'jurisdiction to prescribe') or the jurisdiction of its courts ('jurisdiction to enforce') over non-citizens or acts committed outside of its territory. . . . Rather, states have a 'wide measure of discretion which is only limited in certain cases by prohibitive rules.' . . . In other cases, every state remains 'free to adopt the jurisdictional principles which it regards as best and most suitable.'. . ."). Thus, when a party objects to the assertion of extraterritorial jurisdiction, vis-a-vis international law, that party bears the burden of showing an affirmative prohibition in the laws of the prescribing or prosecuting state.

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as the effects doctrine permits an assertion of jurisdiction as an adjunct to the territorial jurisdiction of the affected state.

No such affirmative prohibition appears in the laws or treaties of the United States, let alone Florida. The general assertion of the flag-state principle in the 1958 Convention is not the equivalent of such an affirmative prohibition. While much of the foregoing discussion relates to relations between sovereign states in the international arena, as previously set forth herein, international law has no concerns as to which courts, within a federal government, assert jurisdiction, as that is purely a question of domestic law.

Moreover, even if, for the sake of argument, there had been a violation of the 1958 Convention, it is a well-established principle that an individual defendant in a criminal prosecution lacks standing to assert alleged violations of international treaties; only the signatory nations can assert such objections, and there is no record of any such objection from Liberia in the instant case. See, e.g., United States v. Postal, 589 F. 2d 862, 878 (5th Cir. 1979); United States v. Gonzalez, 776 F. 2d 931, 938 (11th Cir. 1985); United States v. Cadena, 585 F. 2d 1252, 1260-61 (5th Cir. 1978); United States v. Noriega, 808 F. Supp. 791, 799 (S.D. Fla. 1992); United States v. Zabaneh, 837 F. 2d 1249, 1268 (5th Cir. 1988).

D. Article I, Section 10 (Treaty Clause)

The lower court's opinion further holds that Florida's statute violates Article I, section 10 of the United States Constitution, since Florida "is constitutionally prohibited from entering into a treaty with Liberia in respect to jurisdiction of crimes on the high seas," and since the statute "intrud[es] upon the exclusive province of Congress and the President as delineated by Article I, section 10 of the United States Constitution." Slip op. at p. 5. Very simply, Florida has not violated Article I, section 10. Article I, Section 10 simply prohibits individual states from entering into treaties. Insofar as Florida has not entered into any treaty, Florida has obviously not violated Article I, section 10. See, In re Tiburcio Parrott, 1 F. 481 (C.C. Cal. 1880) (states surrendered treaty-making power to federal government); United States v. State of Michigan, 471 F. Supp. 192 (D. Mich. 1979), remanded on other grounds, 623 F. 2d 448 (6th Cir. 1980). As to the implication in the lower court's opinion that Florida could only exercise the jurisdiction which it is asserting if a treaty between the United States and Liberia specifically conferred such jurisdiction on Florida, that assertion most certainly does not derive from Article I, section 10. Indeed, as detailed previously herein, that is purely a question of domestic constitutional law, and is of no concern under international law.

In conjunction with the lower Court's reliance on Article I,

section 10, there is a citation to Zschernig v. Miller, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed. 2d 683 (1968). By citing Zschernig, the lower Court appears to be stating that Florida's assertion of jurisdiction in this case is really a matter of foreign affairs, and foreign affairs are the exclusive domain of the federal government. A careful reading of Zschernig discloses numerous distinctions between it and the instant case and further compels the conclusion that Florida, in this case, has not intruded into the domain of foreign affairs.

First, as noted above, in the quoted portions of the Restatement of Law, the question of which courts of a nation - federal or state - can exercise such jurisdiction is a domestic question; not one of international law or foreign affairs. In Zschernig, Oregon had enacted a statute which, in part, precluded foreign heirs from receiving proceeds of Oregon estates unless they could do so "without confiscation." 389 U.S. at 430, n. 1. This legislation, which had been enacted in the 1950's, was viewed by the Supreme Court as an effort by the State of Oregon to engage in cold war politics, as the clause "without confiscation" opened the door to state inquiries into the nature of the government of the nation in which the foreign heir resided. Foreign heirs in communist nations would thus be absolutely barred. Thus, Oregon case law pertaining to the statute made it appear "that foreign

policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata." 389 U.S. at 437. Similarly, state court decisions were deemed to "radiate some of the attitudes of the 'cold war,' where the search is for the 'democracy quotient' of a foreign regime as opposed to the Marxist theory." 389 U.S. at 435.

What is of greater significance is that the Supreme Court refused to reexamine, and left intact, its prior decision in Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633 (1947). Clark involved state legislation which simply created a reciprocal arrangement - foreign heirs could receive portions of Californian estates as long as California residents had the comparable right in the foreign nation. Summarizing the Clark decision in Zschernig, the Court stated that the "general reciprocity clause did not on its face intrude on the federal domain." 389 U.S. at 433. This was so even though it would have "'some incidental or indirect effect in foreign countries.'" Id., quoting Clark, 331 U.S. at 517. So, too, any effect on foreign countries as a result of Florida's legislation is at most incidental or indirect. The legislation grants to the state courts the power to do no more than the federal courts could do. That means that crimes occurring on foreign flag vessels are already subject to the possibility of American jurisdiction; it is just a question of which court or courts will

be able to pursue the case. Second, in many cases arising under Florida's statute, neither the defendants nor the victims will be foreign, thus minimizing any potential concerns of the foreign state. Similarly, in many such cases, the foreign state, although very possibly aware of the fact of the prosecution in Florida, will remain silent, implicitly acquiescing, while refraining from any diplomatic protest to either the United States government or the government of the State of Florida.[15]

E. Federal Preemption and State Jurisdiction in Admiralty

As can be seen from the pleadings in the state trial court, the principal, if not only, claim raised by the defendant was that

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[15] Professor Henkin suggests several possible ways in which Zschernig might ultimately be interpreted by the United States Supreme Court:

> . . . It may prove that *Zschernig v. Miller* excludes only state actions that reflect a state policy critical of foreign governments and involve 'sitting in judgment' on them. . . . Or was the Court suggesting different lines - between state acts that impinge on foreign relations only 'indirectly or incidentally' and those that do so directly or purposefully? Between those that 'intrude' on the conduct of foreign relations and those that merely 'affect' them? Difficulties with similar formulae in the Commerce Clause cases may yet lead instead to doctrines like those that grew there: . . . the courts will balance the state's interest in a regulation against the impact on U.S. foreign relations.

Henkin, Foreign Affairs and the United States Constitution, (2d ed. Oxford 1996), p. 164. All of the foregoing interpretations of Zschernig would leave room for individual states to act as Florida has in this case.

of federal preemption. The Fifth District did not reach the federal preemption issue, finding, instead, that Florida lacked the right to assert jurisdiction separate and apart from any federal preemption claim. Should the State's position on the previous issues addressed herein be accepted, the federal preemption issue would again be viable and would need to be addressed. While this Court could conceivably remand this case to the Fifth District to enable that Court to make an initial determination on the federal preemption issue, it is not necessary to do so, as the issue does not need any factual development; it is purely a legal issue - one which the parties fully briefed in both the Fifth District and the trial court. Furthermore, separate and apart from the judicial economy of addressing the preemption issue at this time, it will also be seen that many of the federal preemption cases will touch upon the right of individual states to act in the area of admiralty law, and, as such, the cases will shed further light on the preceding issues.

Federal preemption analysis entails three distinct possibilities - express preemption; implied preemption (where Congress thoroughly dominates the field); or conflict between state and federal legislation. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed. 2d 407 (1992). The paramount question in any federal preemption analysis is Congressional

intent. Id. See also, Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218, 113 S.Ct. 1190, 122 L.Ed. 2d 565 (1993); Department of Revenue of Oregon v. ACF Industries, Inc., 510 U.S. 332, 114 S.Ct. 843, 127 L.Ed. 2d 165 (1994).

In the context of admiralty and maritime issues, however, most federal courts have applied a more restrictive preemption doctrine, finding that it applies only if the state legislation conflicts or interferes with the federal legislation. See, e.g., Pacific Merchant Shipping Association v. Aubry, 918 F. 2d 1409, 1422 (9th Cir. 1990) ("Our review of relevant case authority leads us to conclude that the general rule on preemption in admiralty is that states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not *actually conflict* with federal law or *interfere* with the *uniform working* of the maritime legal system."); Southworth Machinery Co. v. F/V Corey Pride, 994 F. 2d 37, 41 (1st Cir. 1993) ("Thus, where the subject-matter falls within the admiralty jurisdiction, state law may 'supplement' federal maritime law but may not directly contradict it."); Floyd v. Lykes Bros. Steamship Co., Inc., 844 F. 2d 1044, 1047 (3d Cir. 1988) (same); New Hampshire Insurance Co. v. Martech

USA, Inc., 993 F. 2d 1195 (5th Cir. 1993) (same).[16] Thus, in Askew v. American Waterways Operators, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed. 2d 280 (1973), the Supreme Court addressed the question of "whether a State constitutionally may exercise its police power respecting maritime activities concurrently with the Federal Government." 411 U.S. at 337. Federal admiralty jurisdiction was limited:

> . . . While Congress has extended admiralty jurisdiction beyond the boundaries contemplated by the Framers, it hardly follows from the constitutionality of that extension that we must sanctify the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the States.

411 U.S. at 341.

As noted above, one basis for federal preemption is the existence of an actual conflict between state and federal law. Cipollone, 505 U.S. at 516-17. Such a conflict exists "when it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248, 104 S.Ct. 615, 78 L.Ed. 2d 443 (1984).

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[16] It should be noted that the application of criminal laws on the high seas is deemed to be part of admiralty law. See, United States v. Flores, 289 U.S. 137, 150-51, 53 S.Ct. 58, 77 L.Ed. 1091 (1933); De Lovio v. Boit, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776).

See also, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 10 L.Ed. 2d 248 (1963); Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). This entails a two-step process: construing the pertinent state and federal statutes and then determining whether they are in conflict. Perez v. Campbell, 402 U.S. 637, 644, 91 S.Ct. 1704, 29 L.Ed. 2d 233 (1971). The focus is on state laws which are contrary to, or interfere with, federal laws. Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317, 101 S.Ct. 1124, 1130, 67 L.Ed. 2d 123 (1988); Felder v. Casey, 487 U.S. 131, 138, 108 S.Ct. 2302, 101 L.Ed. 2d 123 (1988). The question is whether both regulations "can be enforced without impairing the federal superintendence of the field. . . ." Florida Lime & Avocado Growers, 373 U.S. at 142.[17]

No such actual conflict exists in the instant case. Neither the Florida nor federal statutes purport to preclude either governmental entity from acting under its own statutes. As

[17] Numerous examples of such conflict analysis exist. See, Silkwood, supra; Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed. 2d 752 (1983);DeCanas v. Bica, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed. 2d 43 (1976); Florida Lime and Avocado Growers, supra; Felder v. Casey, supra; Perez v. Campbell, supra; Wisconsin Public Intervenor v. Mortimer, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed. 2d 532 (1991); California Coastal Commission v. Granite Rock Co., 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed. 2d 577 (1987).

previously noted, Florida's statute expressly provides that if another state, including the federal government, undertakes a prosecution of the case, Florida, by the terms of its own statute, loses the right to engage in such a prosecution.[18] Furthermore, not only does the federal special maritime jurisdiction statute, 18 U.S.C. s. 7, fail to provide any such express prohibition as to the individual states,[19] but, elsewhere in Title 18, there is an express statement of Congressional intent to the contrary, asserting that nothing in Title 18 is intended to prohibit the states from enacting and enforcing their own penal laws. In 18 U.S.C. s. 3231, the jurisdiction of the federal district courts is defined:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
>
> Nothing in this title shall be held to take away or impair the jurisdiction of the

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[18] Likewise, nothing in Florida's statute could ever preclude the federal government from undertaking a prosecution. Even if Florida had already undertaken a prosecution, the dual sovereignty exception to the double jeopardy clause of the United States Constitution would enable the federal government to prosecute such offenses under federal law. See, Heath v. Alabama, 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed. 2d 387 (1985); United States v. Wheeler, 435 U.S. 313, 320, 98 S.Ct. 1079, 55 L.Ed. 2d 303 (1978); United States v. Lanza, 260 U.S. 377, 381-82, 43 S.Ct. 141, 67 L.Ed. 314 (1922); Brown v. United States, 551 F. 2d 619 (5th Cir. 1977).

[19] The presidential message on the origins and purpose of 18 U.S.C. s. 7(8) is the clearest indica of the intent behind that statute. See, p. 13, supra. Congress was simply providing a convenient forum for the prosecution of crimes occurring on the high seas on foreign vessels, since the flag states were often not cooperative in prosecuting the crimes.

courts of the several States under the laws thereof.

(emphasis added). The first sentence of s. 3231 prohibits state courts from enforcing federal penal laws. See, e.g., United States v. Tedder, 787 F. 2d 540, 542 (10th Cir. 1986). The second sentence, however, makes it clear that the states are free to enact and enforce their own penal statutes, and "[n]othing in this title [title 18]," shall impair that right of the states. Thus, since the special maritime jurisdiction of the federal government is a part of Title 18, and all of the substantive criminal offenses are likewise a part of Title 18, not only does 18 U.S.C. s. 7 fail to expressly prohibit state action, but, 18 U.S.C. s. 3231 expressly leaves the states the right to enact their own penal statutes.

What emerges from the foregoing is that Florida and federal statutes are not in actual conflict, and, Congressional intent, which is paramount, has expressly decreed that no such preemption shall exist. Thus, express preemption does not exist.

The last possible manner of finding preemption is inferred preemption, based upon a scheme of federal regulation which "is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S.Ct. 2371, 85 L.Ed. 2d 714 (1985)

"Pre-emption of a whole field also will be inferred where 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" Id.

As Congressional intent is paramount, and as maritime/admiralty preemption questions are restricted to questions of actual conflict, this last form of preemption should not even be at issue. Nevertheless, it will be seen that no such comprehensiveness of a scheme or dominance of the federal interest can be found in the context of the application of criminal laws to crimes occurring on foreign vessels on the high seas. As detailed in the prior history of the evolution of federal laws regarding crimes on the high seas on foreign vessels, the federal government did not clearly undertake any such regulation until 1994, with the adoption of 18 U.S.C. s. 7(8), with one ambiguous prior effort (18 U.S.C. s. 7(7)) in 1984. All predecessor statutes applied only to crimes occurring on American vessels on the high seas. See, pp. 12-14, supra;Response to Petition for Writ of Prohibition (in Fifth District Court of Appeal), pp. 8-20, 31-33. The purpose of the federal legislation was simply to prevent the prosecution of such crimes from slipping through the cracks, where foreign flag states were either uncooperative or where the logistical difficulties of prosecuting the crimes in the foreign flag states were too

difficult to overcome. Id. Message from the President, House Doc. 102-58. That intent is clearly consistent with the exercise of concurrent jurisdiction the part of states, such as Florida, which have their own penal statutes, and which provide the convenient forum that Congress was seeking.

The cases which touch on questions of concurrent state and federal jurisdiction to either entertain law suits or to enact legislation regarding maritime and admiralty matters compel the conclusion that the states have been left with a very broad area in which they are permitted to act.

The most significant case to touch upon the foregoing matters is Skiriotes v. State of Florida, 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193 (1941), in which the Court held that the State of Florida had the right to enact and enforce penal statutes regulating fishing, and to enforce those statutes as to its own citizens on the high seas. Among other things, Skiriotes establishes the principle that an individual state's territorial limits are not an absolute barrier to the assertion of criminal jurisdiction. While Skiriotes dealt only with the question of the applicability of the state statute to the State's own citizens, insofar as those who travel in or through the State, whether as tourists or temporary visitors, subject themselves to the State's

laws during their stays, the same reasoning would certainly be applicable to tourists who come to Florida for the purpose of taking cruises leaving from Florida ports.

One federal appellate court, in Hoopengarner v. United States, 270 F. 2d 465, 471 (6th Cir. 1959), expressly held that the state and federal governments have concurrent jurisdiction to enforce criminal statutes for crimes occurring on the high seas:

> . . . The fact that an offense can be prosecuted at common law in a state court does not oust the maritime jurisdiction of a federal court. . . . A federal court, under the maritime jurisdiction of the United States, may have jurisdiction over an offense, even though the state courts have concurrent jurisdiction. The Propeller Genesee Chief v. Fitzhugh, 12 How. 443, 458, 53 U.S. 443, 458, 13 L.Ed. 1058. Were there any doubt as to this principle, federal jurisdiction over offenses committed on the 'high seas,' which would include the Great Lakes and their connecting waters, would prevail; but, in our view, there is no such doubt.

270 F. 2d at 471. Even one of the cases relied upon by the defendant herein, in the lower court proceedings, Murray v. Hildreth, 61 F. 2d 483, 485 (5th Cir. 1932), while discussing crimes committed on territorial waters off the coast, included language reflecting the view of the Court that as to crimes on the high seas, there was no reason why such jurisdiction could not be concurrent between the state and federal governments.

Several other cases can be found in which state courts have successfully prosecuted defendants for crimes occurring on the high seas. Keen v. State, 504 So. 2d 396 (Fla. 1986); Commonwealth v. Macloon, 101 Mass. 1, 100 Am. Dec. 89 (1869); Tyler v. Michigan, 7 Mich. 161 (1859). Reliance by the defendant herein on Mounier v. State, 178 So. 2d 714 (Fla. 1965), is misplaced. While that case prohibited the State from prosecuting the offense of spearfishing, when committed beyond the three-mile territorial limit, and thus committed on the high seas, that case arose prior to the enactment of section 910.005 (1970) or section 910.006 (1989). As a result, there was no statutory basis, at the time of Mounier, for the State to act as it did. Currently, the statutes do exist which vest jurisdiction in Florida's courts.

Many other cases have touched on the concurrent jurisdiction of state and federal courts to act in the area of admiralty, both as to entertaining legal actions and as to enacting statutes. This is so even though 28 U.S.C. s. 1333 purports to vest "original jurisdiction, exclusive of the courts of the States," in the federal courts, for civil admiralty or maritime actions. Notwithstanding the express statutory assertion exclusive federal jurisdiction, the doctrine was subsequently developed which limited the federal courts' exclusive jurisdiction to cases in which in rem remedies were sought, as opposed to in personam remedies. The Moses

Taylor, 71 U.S. (4 Wall.) 411, 431, 18 L.Ed. 397 (1866); Madruga v. Superior Court of the State of California, 346 U.S. 556, 74 S.Ct. 298, 98 L.Ed. 290 (1954). Both state and federal courts have been deemed to have concurrent jurisdiction over Jones Act claims, regarding wrongful deaths occurring on the high seas. Engel v. Davenport, 271 U.S. 33, 46 S.Ct. 410, 70 L.Ed. 813 (1926); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 232, 106 S.Ct. 2485, 91 L.Ed. 2d 174 (1986). See also, American Dredging Co. v. Miller, 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed. 2d 285 (1994) (federal Jones Act regarding suits for deaths on the high seas, did not preempt state laws regarding forum non conveniens in such actions); Wilburn Boat Co. v. Fireman's Fund Insurance Co., 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955) (state laws regarding warranties were applicable in admiralty actions); Romero v. International Terminal Co., 358 U.S. 354, 373, 79 S.Ct. 468, 3 L.Ed. 2d 368 (1959) (the need for uniform federal maritime law "still leaves the States a wide scope. . . ."); Just v. Chambers, 312 U.S. 383, 388, 61 S.Ct. 687, 85 L.Ed. 903 (1941) (approving The City of Norwalk, 55 F. 98 (S.D. N.Y. 1893), which held that a State may supplement federal maritime law provided it was not hostile to federal legislation).

In yet another comparable area, the Supreme Court has held that the state and federal courts have concurrent jurisdiction regarding personal injury and indemnity cases arising under the

Outer Continental Shelf Lands Act, notwithstanding federal statutory language asserting that the Outer Continental Shelf is an area of "exclusive federal jurisdiction." Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 479-81, 101 S.Ct. 2870, 69 L.Ed. 2d 784 (1981). Not only do the state courts have concurrent jurisdiction for actions arising under the federal law, but, notwithstanding the OCSLA, state law was permitted to control "to the extent that it is not inconsistent with applicable federal laws or regulations." Offshore Logistics, Inc., supra, 477 U.S. at 271. This was true even though the federal government was deemed sovereign as to the areas controlled by the OCSLA.[20] See also, Askew

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[20] The OCSLA legislation, 43 U.S.C. s. 1312, et seq., provides further support for the State's right to act in various maritime related matters. That enactment applies to "submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the seabed appertain to the United States and are subject to its jurisdiction and control." A review of 43 U.S.C. s. 1301 compels the conclusion that 43 U.S.C. s. 1331 (which is part of the OCSLA), relates to submerged lands, beyond the territorial limit, and thus relates to lands under the high seas. In a related provision of the OCSLA, Congress expressly recognized the authority of the states to act:

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf. . . .

v. American Waterways Operators, supra, 411 U.S. at 337-43 (Florida's Oil Spill Prevention and Pollution Control Act, pertaining to Florida's territorial waters, was not preempted by federal regulatory legislation affecting the same waters); Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed. 2d 852 (1960) (extensive and comprehensive federal regulations regarding ships and shipping were not deemed to preempt state legislation regarding pollution by such ships, even when related to ships engaged in interstate commerce, noting that "the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government." 362 U.S. at 442).

What emerges from the foregoing is that individual states have been accorded wide latitude, both by the Supreme Court and pertinent federal legislation, to assert jurisdiction, both by state courts and state legislative enactments, for maritime matters extending beyond the state's territorial limits, for both civil and criminal matters. Such case law and legislation undermine not only any assertion of federal preemption, but further undermine any assertion that the United States Constitution prohibits the state

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43 U.S.C. s. 1332(2)(A). See also, Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed. 2d 360 (1969) (federal law, supplemented by state law of adjacent state, is applied to areas governed by the OCSLA).

from acting.

CONCLUSION

Section 910.006(3)(d), Florida Statutes, is of limited scope. It is a stop-gap measure, designed to take effect when neither the flag state nor the United States government is acting in a particular case. The statute expressly notes the primacy of the jurisdiction of both the flag state and the United States in any given case. However, when those governments fail to act and are not affirmatively objecting to actions taken by the State of Florida in pursuing a prosecution, this State does have compelling interests to justify the assertion of such residual jurisdiction. Upon leaving the cruise ships, the typical victim's contacts will be with local law enforcement officers - not foreign law enforcement officers and not federal law enforcement officers. The types of cases which will typically arise - thefts, robberies, burglaries, sexual batteries - will be of a common nature found in every day prosecutions by state prosecutors; such cases will not be representative of common federal prosecutions.

Not only are Florida law enforcement officials and prosecutors in a better position to deal with such common offenses, but, the

effect of such offenses bears a much more direct effect on Florida than any other governmental entity. The flag state, typically thousands of miles away, has only the tenuous relationship by virtue of the ship's registration. The crime on the vessel typically does not have an effect on the flag state or the people of the flag state. By contrast, the offense on the vessel will typically have such an effect on Florida, whether by involvement of Florida residents as either defendants or victims, or, more generally, by the devastating, adverse impact that an inability to prosecute could have on Florida's tourist industry. The effects which Florida suffered, in recent years, from a small number of high-profile land-based violent offenses committed against both German and English tourists are all too well known, and clearly demonstrate Florida's substantial interest in being able to prosecute crimes occurring on cruise ships which have a substantial nexus to Florida, as a majority of the passengers must embark and disembark in Florida. Under such circumstances, Florida's residual exercise of jurisdiction is both reasonable and consistent with both the United States Constitution, the United States' treaty obligations, and general principles of international law. For such reasons, the decision of the Fifth District Court of Appeal should

be reversed.

Respectfully submitted,

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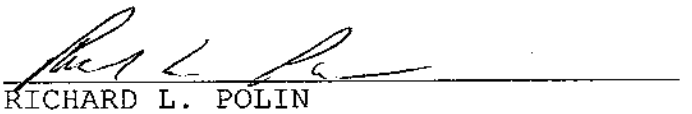

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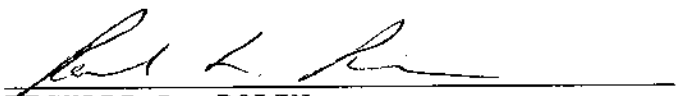
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant was mailed this 15th day of June, 1998 to ROBIN C. LEMONIDIS, Esq., and BOB R. CHERRY, Esq., O'Brien, Riemenschneider, Kancilia & Lemonidis, P.A., 1686 West Hibiscus Blvd., Melbourne, Florida 32901.



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