IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,106



**THE STATE OF FLORIDA,**

Appellant,

vs.

**MATTHEW STEPANSKY,**

Appellee.

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AN APPEAL FROM THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT

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**REPLY BRIEF OF APPELLANT**

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## CERTIFICATE OF PRINT FONT

I hereby certify that the print font utilized in this Reply Brief of Appellant is Courier New, 12 point.

## STATEMENT OF THE CASE AND FACTS

The Appellant relies on the Statement of the Case and Facts as set forth in the Initial Brief of Appellant.

## SUMMARY OF ARGUMENT

The Appellant relies on the Summary of Argument set forth in the Initial Brief of Appellant.

## 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 Appellee's principal assertion is that Florida's territorial jurisdiction extends three miles from the coast and Florida's courts therefore lack jurisdiction as to matters occurring beyond that territorial limit. This simplistic argument has been routinely rejected by both the Supreme Court of the United States and this Court. In Skiriotes v. State of Florida, 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193 (1941), the Supreme Court held that Florida courts had jurisdiction to enforce Florida penal statutes as to Florida citizens for crimes occurring on the high seas, beyond the territorial limits of the State. If judicial

jurisdiction were coterminous with geographical jurisdiction, as argued by the Appellee, such a conclusion would have been impossible. This Court has likewise adhered to the principles of Skiriotes. See, Southeastern Fisheries Association, Inc. v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984).

The Appellee's argument is similarly repudiated by federal cases holding that state courts have concurrent jurisdiction with federal courts, for the purpose of entertaining actions under the Jones Act (Death on the High Seas Act), regarding wrongful deaths occurring on the high seas, beyond the state's geographical limits. See, Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 232, 106 S.Ct. 2485, 91 L. Ed. 2d 174 (1986) ("The recognition of concurrent state jurisdiction to hear DOHSA actions makes available to DOHSA beneficiaries a convenient forum for the decision of their wrongful death claims."); Pierpont v. Barnes, 892 F. Supp. 60, 61 (D. Conn. 1995) ("State courts have concurrent jurisdiction over DOHSA cases."); Rairigh v. Erlbeck, 488 F. Supp. 865 (D. Md. 1980); Hughes v. Unitech Aircraft Service, Inc., 662 So. 2d 999 (Fla. 4th DCA 1995); Chromy v. Lawrance, 285 Cal. Rptr. 400, 233 Cal. App. 3d 1521 (Cal. App. 1991). Once again, based upon the Appellee's simplistic assertion that a state's judicial jurisdiction can not extend to acts occurring beyond the state's geographical limits, such rulings as the foregoing would be implausible. The foregoing

cases also compel the conclusion that there is nothing in the federal constitution which mandates that state courts can not assert jurisdiction as to matters occurring beyond the geographical borders of the state. Thus, the notion that Florida courts lack jurisdiction as to acts occurring beyond Florida's territorial limits is clearly devoid of merit.

The Appellee next proceeds to argue that the federal government has asserted "exclusive" jurisdiction over the federal territorial seas, between the 3 and 12 mile distances from the coast, and that, as a result, it must likewise be inferred that federal courts have exclusive jurisdiction for matters beyond the 12-mile limit. See, Brief of Appellee, pp. 6-7. While this argument is irrelevant, since the offense in this case was on the high seas, not the federal territorial seas, it is also legally erroneous. The territorial seas of the United States, those beyond the three-mile limits of the individual states, are governed by the Outer Continental Shelf Lands Act, 43 U.S.C. s. 1331, et seq. Addressing personal injury actions occurring within those territorial seas, and interpreting the pertinent provisions of the OCSLA, the Supreme Court of the United States, in Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed. 2d 784 (1981), expressly held that state courts had concurrent jurisdiction. Thus, neither the pertinent statutes nor the federal

Constitution imposed any bar to the assertion of jurisdiction by state courts.[1] Furthermore, even if Congress did assert true exclusive jurisdiction over those territorial waters, to the exclusion of any action by the States, that would be a matter of federal statutory law, giving rise to federal preemption analysis, and the statutory assertion of jurisdiction over the 3-12 mile territorial belt would not have any bearing on more remote waters if Congress did not similarly act, to the exclusion of the individual states, in the more remote waters.[2]

The Appellee further asserts that Article I, Section 8, cl. 10 of the United States Constitution and Article III, Section 2 of the United States Constitution, both serve to vest exclusive jurisdiction in the federal government as to offenses committed on the high seas. See, Brief of Appellee, pp. 7-9. Neither of these provisions of the Constitution was relied upon by the lower Court.

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[1] Furthermore, 43 U.S.C. s. 1333(2)(A) provides that the civil and criminal laws of the individual states adjacent to these territorial waters are applicable to the extent that they are not inconsistent with any other federal laws or regulations. Thus, not only do state courts have the right to assert concurrent jurisdiction as to matters arising in such territorial seas, but, state legislatures have a substantial role in enacting laws applicable in such seas.

[2] It should also be noted that international law, as applied to the high seas, is not concerned as to how a federal government divides its judicial jurisdiction between state and federal courts. That is solely a matter of domestic constitutional or statutory law. Restatement of the Law Third, The Foreign Relations of the United States (1987), Comment, s. 402(k), pp. 241-42.

Article III, Section 2 provides that the judicial power of the United States courts shall extend to "all Cases of admiralty and maritime Jurisdiction." Congress, pursuant to that jurisdiction, has vested "original jurisdiction, exclusive of the courts of the States," in the federal courts, for civil admiralty or maritime actions. 28 U.S.C. s. 1333. Notwithstanding such "exclusive" jurisdiction, the Supreme Court of the United States has held that the only aspect of admiralty and maritime jurisdiction which is vested exclusively in the federal courts is civil actions 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); Offshore Logistics, Inc., 477 U.S. at 222 (concurrent jurisdiction of state courts as to admiralty and maritime claims). Thus, the Supreme Court of the United States, addressing the constitutional admiralty power vested in the United States Congress and federal courts, has clearly stated that this is not exclusive:

> 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.

Askew v. American Waterways Operators, 411 U.S. 325, 341, 93 S.Ct. 1590, 36 L.Ed. 2d 280 (1973). "Even though Congress has acted in

the admiralty area, state regulation is permissible, absent a clear conflict with the federal law." Id. See also, Initial Brief of Appellant, pp. 36-37. If Article III, section 2 vested the "exclusive jurisdiction" which the Appellee contends, the numerous cases from the Supreme Court of the United States recognizing the concurrent jurisdiction of state courts as to admiralty and maritime matters would have been an impossibility.

Article I, Section 8, cl. 10 of the United States Constitution, grants Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." Once again, this clause did not vest the federal judiciary with "exclusive" jurisdiction of felonies committed on the high seas.

United States v. Arjona, 120 U.S. 479, 7 S.Ct. 628 (1887), is one of the few cases to construe Article I, Section 8, although its emphasis is on "offenses against the law of nations," as opposed to felonies committed on the high seas. With respect to offenses against the law of nations, the Arjona Court expressly held that the Constitution "does not prevent a state from providing for the punishment of the same thing." 120 U.S. at 487. That was a reference to statutory offenses created by the United States Congress - the states had the same power, and Article I, Section 8

was not "exclusively" federal. See also, Hoopengarner v. United States, 270 F. 2d 465, 471 (6th Cir. 1959) (recognizing concurrent jurisdiction of state courts as to offense committed on the high seas).

As to the language regarding piracies and felonies committed on the high seas, the little history that exists compels the conclusion that except as to acts of piracy, this constitutional clause was not intended to apply to crimes committed on foreign vessels on the high seas. See, United States v. Furlong, 18 U.S. (5 Wheat.) 184, 5 L. Ed. 64 (1820); 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. Palmer, 16 U.S. (3 Wheat.) 610, 4 L. Ed. 471 (1818). Notwithstanding federal statutes which purported to extend federal jurisdiction to felonies committed on the high seas, jurisdiction for such offenses committed on foreign vessels did not exist, except for piracies.[3]

Article I, Section 8 of the United States Constitution "was adopted to carry out a resolution of the [Constitutional] Convention 'that the national legislature ought to possess the

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[3] This is embellished upon at greater length in the Response to Petition for Writ of Prohibition filed in the Fifth District Court of Appeal below, which Response is included in the Record on Appeal herein at R. 124, 132-39. See, Response, pp. 9-16.

legislative rights vested in Congress by the [Articles] of Confederation.' Its primary purpose and effect was to transfer to the newly organized government the powers in admiralty matters previously vested in the Confederation." United States v. Flores, 289 U.S. 137, 147, 53 S.Ct. 580, 77 L.Ed. 1086 (1933). Article IX of the Articles of Confederation granted Congress the power of "appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures. . . ." However, this power was never exercised by the Congress of the Confederation. Robertson, D., Admiralty and Federalism (Mineola, N.Y.: The Foundation Press 1970), p. 100 at n. 17 (citing Gilmore and Black, The Law of Admiralty (1957), p. 10). It further appears that during the period of the Confederation, state admiralty courts existed, and exercised substantial jurisdiction. See, Casto, W., "The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates," 37 Amer. J. Legal History 117, 126-29 (1993); Robertson, supra, pp. 98-103. There is no basis for concluding that the provision in the Articles of Confederation was intended to apply to felonies, other than piracies, committed on foreign vessels on the high seas. The subsequent legal history clearly suggests that the contrary was true.

Thus, it is significant that the instant case involves an

offense committed on a foreign vessel, as will frequently be the case on cruise ships embarking from Florida ports. There is no basis for believing that any of the federal constitutional provisions were ever intended to apply to offenses on such vessels on the high seas, except for acts of piracy. Nor is there any basis for concluding that the constitutional provisions were intended to be exclusive.

The Appellee next engages in an interpretation of the provisions of 18 U.S.C. s. 7. See, Brief of Appellee, pp. 9-10. The State has fully addressed these provisions in its Initial Brief herein. The State would note that to the extent the Appellee is relying on Pub. L. 104-132, Title IX, s. 901(a), Apr. 24, 1996, 110 Stat. 1317, for an assertion of the exclusivity of federal jurisdiction, a) that provision pertains only to territorial seas, not to high seas; b) that provision simply gives Congress the right to act; it says nothing regarding exclusive jurisdiction; and c) any argument based upon federal penal statutes existing as to offenses on the high seas must be subjected to federal preemption analysis, as the State has done in its Initial Brief herein. Although the Appellee has chosen to make an argument predicated upon the existence of federal penal statutes, conspicuously absent from the Brief of Appellee is any federal preemption argument. As detailed in the State's Initial Brief, the federal statutes

asserting penal jurisdiction on the high seas do not preempt comparable state laws as there is no conflict between them and no express preemption in the federal statutes. Thus, 18 U.S.C. s. 3231, while providing that federal district courts have exclusive jurisdiction as to the enforcement of federal penal laws, further provides that state courts retain jurisdiction to enforce state penal laws as to the same matters: "Nothing in this title [18: federal penal laws] shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

The Appellee further relies on the "flag state" principle. This, too, is fully addressed in the State's Initial Brief of Appellee. The State would note the inherent absurdity of the Appellee's flag-state-rule argument. If the argument of exclusive jurisdiction of the flag-state as argued by the Appellee had any merit, that argument would likewise preclude the federal government from taking action as to crimes committed on foreign vessels which affect the United States. Since the Appellee is arguing, in part, that the existence of federal penal statutes should render this a matter within federal judicial jurisdiction, the Appellee's argument is both internally inconsistent and self-defeating.

As to the flag-state principle itself, the following points,

derived from the Initial Brief of Appellant, are reiterated: 1) that principle pertains to extraterritorial prosecutions; 2) when an offense affects a state other than the flag-state, the assertion of jurisdiction by the non-flag-state's courts is not extraterritorial in nature; it is an assertion of that state's own territorial jurisdiction.

The foregoing discussion leads back to the effects doctrine, which is also delineated in the Initial Brief herein. The Brief of Appellee, p. 11, asserts that "the effects doctrine is only available to a sovereign in the international arena." That principle is not supported by any citation. The Appellee subsequently cites Section 1 of the Restatement for the proposition that individual states such as Florida do not enjoy "international sovereignty and nationhood. . . ." Id. That is an utter irrelevancy and misses the point - one which is expressly addressed in a more applicable provision of the Restatement. The exercise of judicial jurisdiction by a state court within a federal system is not an exercise in international sovereignty and nationhood. As previously noted in this Brief, p. 4 at n. 2, supra, and, as quoted in the Initial Brief of Appellant, the Comment to section 402(k) of the Restatement provides:

> International law normally is not concerned with how authority to exercise jurisdiction is allocated within a state's domestic constitutional order. Whether a

> State [i.e., an individual state such as Florida] 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, Comment, s. 402(k), pp. 241-42 (emphasis added). Thus, to whatever extent the United States can act under principles of international law, including the effects doctrine, the State of Florida may likewise act as far as international law is concerned.

As to the application of the effects doctrine itself, the State would again rely on its Initial Brief of Appellant, other than noting that the Appellee has improperly minimized and misconstrued the economic effects involved. The effects doctrine clearly contemplates economic impacts on the state asserting jurisdiction. Initial Brief of Appellant, pp. 24-25. This is not simply a question of the vessel being owned by a foreign corporation, as argued by the Appellee. Brief of Appellee, p. 12. Rather, this is a question of the potentially devastating impact that unprosecuted, violent offenses may have on the tourist industry of Florida, both in terms of the potential loss of tens of millions of dollars due to adverse publicity from the inability to prosecute such crimes, and, the potential loss of hundreds or

thousands of jobs in any tourist-oriented locale. Furthermore, the effect is not simply economic. Tourists, who have chosen to avail themselves of access to Florida's ports, for both embarking and disembarking, are adversely affected and they typically look to local law enforcement authorities to both investigate and prosecute. It can also reasonably be assumed that, to the extent such tourists are residents of any of the other 49 American states, officials in those jurisdictions would be pleased to see some governmental entity, such as Florida, looking out for the interests of those States' residents when both the flag-state and federal government are remiss in acting or otherwise acquiescing in the prosecution by the State of Florida.

The Appellee also asserts the interests of due process and "neutral federal courts." Due process is simply a question of the existence of a sufficient nexus between the offense and the State asserting jurisdiction, and, when principles of international law are satisfied, as they are when the effects doctrine established the requisite connection, due process principles are likewise satisfied. United States v. Davis, 905 F. 2d 245, 248-49 (9th Cir. 1990); United States v. Caicedo, 47 F. 3d 370, 372 (9th Cir. 1995). As to the Appellee's emphasis on the need for "neutral" federal courts, that is little more than a repugnant attack on the independence and character of Florida's judiciary. As to the

Appellee's emphasis on the need for "uniformity" in admiralty law, as previously detailed in both this Brief and the Initial Brief, state laws may apply in admiralty as long as they do not conflict with federal law - that provides for "uniformity." No such conflict exists here. Furthermore, Florida's statute expressly provides that Florida may prosecute such crimes on the high seas only to the extent that federal statutes exist which would permit the federal government to prosecute a substantially similar offense on American vessels. See, s. 910.006(4), Florida Statutes. No greater degree of uniformity could exist than that.

Lastly, the conspicuous omissions from the Brief of Appellee should be duly noted. First, although the lower Court relied on the treaty clause of Article I, Section 10 of the United States Constitution, the Brief of Appellee does not even attempt to defend that theory. Likewise, the Brief of Appellee does not attempt to justify the lower Court's reliance on the foreign affairs doctrine of Zschernig v. Miller, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed. 2d 683 (1968). Presumably, the absence of those assertions in the Brief of Appellee connotes the Appellee's concurrence with the State's argument in its Initial Brief herein that the lower Court erred in relying on those doctrines. Similarly, although the Appellee presents an argument based on federal statutory law, the Appellee has not presented any argument on the federal preemption doctrine.

Absent federal preemption analysis, a federal statutory argument is meaningless since federal statutes may exist either to the exclusion of similar state statutes or concurrently with the state statutes.

## CONCLUSION

Based on the foregoing, the decision of the lower Court should be reversed.

Respectfully submitted,

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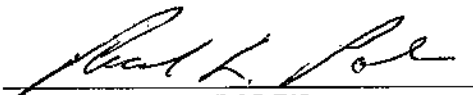
Attorney General



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant was mailed this 31st day of July, 1998 to ROBIN C. LEMONIDIS, Esq. and BOB R. CHERRY, Esq., O'Brien, Riemenschneider, Kancilia & Lemonidis, P.A., 1686 West Hibiscus Boulevard, Melbourne, Florida 32901.

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