No. 11-13515-G

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Appellant,

v.

MACKLE VINCENT SHELTON
Appellee,

Appeal from the United States District Court
Middle District of Florida

BRIEF ON BEHALF OF *AMICI CURIAE*

National Association of Criminal Defense Lawyers
Florida Association of Criminal Defense Lawyers
American Civil Liberties Union of Florida
Drug Policy Alliance
Cato Institute
Calvert Institute for Policy Research
Reason Foundation
Libertarian Law Council
and
38 Professors of Law[*]

IN SUPPORT OF APPELLEE

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[*] A complete list of law professor *Amici* appears at pages 5-6 of the brief.

CONTINUATION OF COVER

TODD FOSTER
COHEN & FOSTER , P.A.
201 E. Kennedy Blvd., Suite 1000
Tampa, FL 33602
(813) 225-1655
Counsel of Record

DAVID OSCAR MARKUS
MARKUS & MARKUS
40 NW 3rd Street
PH 1, Suite 1101
Miami, FL 33128
(305) 379-6667
Vice Chair, Amicus Committee
National Association of Criminal
Defense Lawyers

October 31, 2011

Of Counsel:

Norman L. Reimer, Esq. Executive Director
National Association of Criminal Defense Lawyers (NACDL)
1660 L Street, NW 12th Floor
Washington, DC 20036
(202) 872-8600

NACDL Staff Counsel:

Quintin Chatman
Ivan J. Dominguez
Tiffany M. Joslyn
Jack King

Nellie L. King
Florida Bar Number: 0099562
President, Florida Association of
Criminal Defense Lawyers
The Law Offices of Nellie L. King, P.A.
319 Clematis Street, Suite 107
West Palm Beach, FL 33401
(561) 833-1084

CONTINUATION OF COVER

Randall C. Marshall
Florida Bar Number: 181765
ACLU Foundation of Florida, Inc.
4500 Biscayne Blvd Ste 340
Miami, FL 33137-3227
(786) 363-2700
rmarshall@aclufl.org
Counsel for Amici ACLU of Florida, Inc.

Daniel N. Abrahamson
Director of Legal Affairs, Drug Policy Alliance
70 West 36th Street, 16th Floor
New York, NY 10018
(212) 613-8020

Timothy Lynch
Ilya Shapiro
Paul Jossey
Cato Institute
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200

George W. Liebmann
Calvert Institute for Policy Research, Inc.
8 West Hamilton Street
Baltimore, MD 21201
(410) 752 5887

Manuel S. Klausner
Reason Foundation
Chair, Libertarian Law Council
Law Offices of Manuel S. Klausner, P.C.
One Bunker Hill Building
601 West Fifth Street, Suite 800
Los Angeles, CA 90071
(213) 617-0414

Secretary, Florida Department of Corrections v. Mackle Shelton

Appeal No. 11-13515-G

CERTIFICATE OF INTERESTED PERSONS, CERTIFICATE PURSUANT TO FED. R. APP. P. 29, AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. Rule 26.1-1, I hereby certify that the following is a list of all persons and entities that have an interest in the outcome of this case:

1. American Civil Liberties Union of Florida, *Amicus* party
2. Baldwin, Professor Bridgette, Western New England University School of Law, Springfield, MA, *Amicus* party[*]
3. Bascuas, Professor Ricardo J., University of Miami School of Law, Coral Gables, FL, *Amicus* party
4. Bernhard, Professor Adele, Pace University School of Law, White Plains, NY, *Amicus* party
5. Bettinger-Lopez, Professor Caroline, University of Miami School of Law, Coral Gables, FL, *Amicus* party
6. Binder, Professor Guyora, University at Buffalo Law School, Buffalo, NY, *Amicus* party
7. Blasser, Professor Jennifer, Benjamin N. Cardozo School of Law, New

[*] All professors sign this brief in their individual capacity as legal educators and not on behalf of any institution, group, or association.

York, NY, *Amicus* party

8. Bondi, Pamela, Attorney General, State of Florida

9. Bonventre, Professor Vincent M., Albany Law School, Albany, NY, *Amicus* party

10. Birckhead, Professor Tamar R., University of North Carolina School of Law, Chapel Hill, NC, *Amicus* party

11. Cahill, Professor Michael, Brooklyn Law School, Brooklyn, NY, *Amicus* party

12. Calvert Institute for Policy Research, *Amicus* party

13. Cato Institute, *Amicus* party

14. Charity, Professor Matthew H., Western New England University School of Law, Springfield, MA, *Amicus* party

15. Corrente, Carmen, Assistant Attorney General, district court counsel to Secretary, Department of Corrections and Attorney General, State of Florida

16. Dervan, Professor Lucian E., Southern Illinois University School of Law, Carbondale, IL, *Amicus* party

17. Drug Policy Alliance, *Amicus* party

18. Dunlap, Professor William V., Quinnipiac University School of Law, Hamden, CT, *Amicus* party

19. Felman, James, district court and appellate counsel to Mackle Shelton

20. Florida Association of Criminal Defense Lawyers, *Amicus* party

21. Foster, Todd, district court and appellate counsel to *Amici*

22. Frank, Professor Sally, Drake University Law School, Des Moines, IA, *Amicus* party

23. Freedman, Professor Monroe H., Hofstra University School of Law, Hempstead, NY, *Amicus* party

24. Gershman, Professor Bennett L., Pace Law School, White Plains, NY, *Amicus* party

25. Golik, Tomislav, Assistant Public Defender, Fifth District Court of Appeal Counsel to Mackle Shelton

26. Green, Professor Bruce, Fordham University School of Law, New York, NY, *Amicus* party

27. Heidt, Wesley, appellate counsel to Secretary, Florida Department of Corrections

28. Heller, Michelle, Assistant State Attorney, circuit court counsel to State of Florida

29. Horwitz, Professor Andrew, Roger Williams University School of Law, Bristol, RI, *Amicus* party

30. Howell, Professor Babe, CUNY School of Law, Flushing, NY, *Amicus* party

31. Hutchins, Professor Renee, University of Maryland School of Law, Baltimore, MD, *Amicus* party

32. King, Professor John D., Washington & Lee University School of Law, Lexington, VA, *Amicus* party

33. Kirchmeier, Professor Jeffrey L., CUNY School of Law, Flushing, NY, *Amicus* party

34. Klein, Professor Richard Daniel, Touro College Jacob D. Fuchsberg Law Center, Central Islip, NY, *Amicus* party

35. Knepper-Stephans, Professor Kelly S., *Amicus* party

36. Kreit, Professor Alex, Thomas Jefferson School of Law, San Diego, CA, *Amicus* party

37. Lee, Professor Donna Hae Kyun, CUNY School of Law, Flushing, NY,

Amicus party

38. Libertarian Law Council, *Amicus* party

39. Markel, Professor Dan, Florida State University College of Law, Tallahassee, FL, *Amicus* party

40. Markus, David, Vice Chair, Amicus Committee, National Association of Criminal Defense Lawyers

41. Meeks, Gregory, circuit court counsel to Mackle Shelton

42. Moreno, Clarisse M., appellate counsel to Mackle Shelton

43. National Association of Criminal Defense Lawyers, *Amicus* party

44. Podgor, Professor Ellen S., Stetson University College of Law, Gulfport, FL, *Amicus* party

45. Polodna, The Honorable Scott, Circuit Court Judge, Ninth Judicial Circuit

46. Rayner, Professor Martha, Fordham University School of Law, New York, NY, *Amicus* party

47. Reason Foundation, *Amicus* party

48. Robbins, Professor Ira P., American University Washington College of Law, Washington, DC, *Amicus* party

49. Roberts, Professor Jenny M., American University Washington College of Law, Washington, DC, *Amicus* party

50. Rotunda, Professor Ronald, Chapman University School of Law, Orange, CA, *Amicus* party

51. Rozelle, Professor Susan D., Stetson University College of Law, Gulfport, FL, *Amicus* party

52. Saltzburg, Professor Stephen A., The George Washington University Law School, Washington, DC, *Amicus* party

53. Schilling, Christopher, Assistant Public Defender, circuit court counsel to Mackle Shelton

54. Schroeder, Professor William A. Southern Illinois University School of Law, Carbondale, IL, *Amicus* party

55. Scriven, The Honorable Mary, United States District Judge

56. Seigel, Professor Michael L., University of Florida Levin College of Law, Gainesville, FL, *Amicus* party

57. Shanks, Professor Laurie, Albany Law School, Albany, NY, *Amicus* party

58. Shelton, Mackle, Appellee

59. Strickland, The Honorable Stan, Circuit Court Judge, Ninth Judicial Circuit

60. Tucker, Kenneth, Secretary of the Florida Department of Corrections

61. Uphoff, Professor Rodney, University of Missouri School of Law, Columbia, MO, *Amicus* party

62. Yanes, Katherine Earle, district court and appellate counsel to Mackle Shelton

63. Yaroshefsky, Professor Ellen C., Benjamin N. Cardozo School of Law, New York, NY, *Amicus* party

Pursuant to Federal Rule of Appellate Procedure 29(a), *amici curiae* certify that the parties have consented to the filing of this brief. Also, pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici curiae* certify that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amici* and its counsel, make a monetary contribution to the preparation and submission of this brief.

Pursuant to Federal Rule of Appellate Procedure 26.1(a) and 11th Cir. R. 26.1-1, corporate *amici curiae* certify that no corporate *amicus curiae* on this brief has a parent corporation and no corporate *amicus curiae* on this brief has any

publicly held corporation that owns 10% or more of its stock. There is no such corporation as relates to any corporate *amicus curiae* on this brief.

____/s/ Todd Foster_____
Todd Foster
COHEN & FOSTER, P.A.
Counsel of Record

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INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a not-for-profit professional organization that represents the nation's criminal defense attorneys. NACDL is the preeminent organization advancing the institutional mission of the nation's criminal defense bar to ensure the proper and fair administration of justice, and justice and due process for all persons accused of crime. Founded in 1958, NACDL has a membership of more than 10,000 direct members and an additional 40,000 affiliate members in all 50 states and 28 nations. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and accords it representation in the House of Delegates. In furtherance of its mission to safeguard the rights of the accused and champion fundamental constitutional rights, NACDL frequently appears as *amicus curiae* before the United States Supreme Court as well as numerous federal and state courts throughout the nation.

The issue of the intent – or *mens rea* – requirement in the criminal law is one NACDL has recently addressed in an in-depth, joint study and report with The Heritage Foundation. *See* Brian W. Walsh and Tiffany M. Joslyn, *Without Intent:*

How Congress Is Eroding the Intent Requirement in Federal Law (2010), *available at www.nacdl.org/withoutintent*. The report evidences concern across a broad ideological spectrum with the evisceration of traditional intent requirements.

The Florida Association of Criminal Defense Lawyers (FACDL) is a statewide organization representing over 1,500 members, all of whom are criminal defense practitioners. FACDL's unique body of real world experience and depth and breadth of knowledge and training in the field of criminal law places it in a position to be of assistance to the Court in the disposition of this case and in the consideration of its impact on future cases. As an organization whose members overwhelmingly represent Florida defendants, FACDL has a particular interest in the issue before the Court.

The ACLU is a nationwide nonpartisan organization of nearly 500,000 members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the state and federal Constitutions. The **ACLU of Florida, Inc.** is its state affiliate and has approximately 25,000 members in the State of Florida also dedicated to the principles of liberty and equality embodied in the United States Constitution and the Florida Constitution. The ACLU and its affiliates have long been committed to protecting constitutional rights where criminal charges are

involved.

The Drug Policy Alliance (DPA) is a national nonprofit organization that promotes policy alternatives to the drug war that are grounded in science, compassion, health, and human rights. DPA's goal is to advance policies that reduce the harms of both drug misuse and drug prohibition, and seek solutions that promote safety while upholding the sovereignty of individuals over their own minds and bodies. DPA works to end drug policies predicated on arresting, convicting, incarcerating, disenfranchising, and otherwise harming millions of nonviolent people. To this end, DPA has consistently opposed the imposition of punitive sanctions on low-level, nonviolent drug law offenders as costly and counterproductive.

The **Cato Institute** was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was created in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Center publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs.

The Calvert Institute for Policy Research, Inc. is a think tank based in Baltimore that has published a number of papers and conference proceedings on criminal law and "drug war" issues. It is concerned with the burden placed on court and prison systems by overcriminalization of minor offenses, to the detriment of the ability of society to punish, prevent, and deter serious crimes of violence.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing ***Reason*** magazine, as well as commentary on its websites, www.reason.com, www.reason.org, and www.reason.tv, and by issuing policy research reports that promote choice, competition, and a dynamic market economy as the foundation for human dignity and progress. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases, such as this, that raise significant constitutional issues.

Libertarian Law Council ("LLC") is a Los Angeles-based organization of lawyers and others interested in the principles underlying a free society, including

the right to liberty and property. Founded in 1974, the LLC sponsors meetings and debates concerning constitutional and legal issues and developments; it participates in legislative hearings and public commentary regarding government curtailment of choice and competition, economic liberty, and free speech; and it files briefs *amicus curiae* in cases involving serious threats to liberty.

Bridgette Baldwin, Western New England University School of Law, Springfield, MA; Ricardo J. Bascuas, University of Miami School of Law, Coral Gables, FL; Adele Bernhard, Pace University School of Law, White Plains, NY; Caroline Bettinger-López, University of Miami School of Law, Coral Gables, FL; Guyora Binder, University at Buffalo Law School, Buffalo, NY; Jennifer Blasser, Benjamin N. Cardozo School of Law, New York, NY; Vincent M. Bonventre, Albany Law School, Albany, NY; Tamar R. Birckhead, University of North Carolina School of Law, Chapel Hill, NC; Michael Cahill, Brooklyn Law School, Brooklyn, NY; Matthew H. Charity, Western New England University School of Law, Springfield, MA; Lucian E. Dervan, Southern Illinois University School of Law, Carbondale, IL; William V. Dunlap, Quinnipiac University School of Law, Hamden, CT; Sally Frank, Drake University Law School, Des Moines, IA; Monroe H. Freedman, Hofstra University School of Law, Hempstead, NY; Bennett L. Gershman, Pace Law School, White Plains, NY; Bruce Green, Fordham University School of Law, New York, NY; Andrew Horwitz, Roger Williams University School of Law, Bristol, RI; Babe Howell, CUNY School of Law, Flushing, NY; Renée Hutchins, University of Maryland School of Law, Baltimore, MD; John D. King, Washington & Lee University School of Law, Lexington, VA; Jeffrey L. Kirchmeier, CUNY School of Law, Flushing, NY; Richard Daniel Klein, Touro College Jacob D. Fuchsberg Law Center, Central Islip, NY; Kelly S. Knepper-Stephens; Alex Kreit, Thomas Jefferson School of Law, San Diego, CA; Donna Hae Kyun Lee, CUNY School of Law, Flushing, NY; Dan Markel, Florida State University College of Law, Tallahassee, FL; Ellen S. Podgor, Stetson University College of Law, Gulfport, FL; Martha Rayner, Fordham University School of Law, New York, NY; Ira P. Robbins,

American University Washington College of Law, Washington, DC; Jenny M. Roberts, American University Washington College of Law, Washington, DC; Ronald Rotunda, Chapman University School of Law, Orange, CA; Susan D. Rozelle, Stetson University College of Law, Gulfport, FL; Stephen A. Saltzburg, The George Washington University Law School, Washington, DC; William A. Schroeder, Southern Illinois University School of Law, Carbondale, IL; Michael L. Seigel, University of Florida Levin College of Law, Gainesville, FL; Laurie Shanks, Albany Law School, Albany, NY; Rodney Uphoff, University of Missouri School of Law, Columbia, MO; Ellen C. Yaroshefsky, Benjamin N. Cardozo School of Law, New York, NY

Amici are also 38 professors of law from across the United States. They sign this brief in their individual capacity as legal educators and not on behalf of any institution, group, or association. Their sole purpose is a shared interest in the preservation of a fundamental principle of American criminal jurisprudence: the *mens rea* requirement. The professors believe Florida's wholesale elimination of a *mens rea* requirement in the statute prohibiting possession, sale, or delivery of a controlled substance violates the due process clause of the Fourteenth Amendment and is inconsistent with basic norms and principles underlying a just and fair legal system.

STATEMENT OF ISSUE PRESENTED

Whether the drug offenses under Florida Statute §893.13, whose *mens rea* or intent requirements were affirmatively and specifically excised by the legislature in 2002, violate due process protections under the U.S. Constitution.

SUMMARY OF ARGUMENT

A core principle of the American justice system is that no individual should be subjected to condemnation and prolonged deprivation of liberty unless he acts with a criminal intent. The essential nexus between a culpable mental state and the wrongful act provides a moral underpinning for criminal law that predates the founding of the United States and is constitutionally compelled in any circumstance in which a significant penalty may be imposed. While *amici* are concerned about the gradual dilution of *mens rea* requirements, Florida's evisceration of an intent requirement for the possession, sale, or delivery of controlled substances takes this trend to an unprecedented extreme. In so doing, Florida Statute § 893.13 violates the due process provisions of the United States Constitution. This extraordinary departure from traditional notions of justice for crimes that carry harsh punishment, up to and including life imprisonment, also departs from the core underpinnings of the American justice system and, as recognized by the district court below, has "Florida stand[ing] alone in its express elimination of *mens rea* as an element of a drug offense." Opinion below, slip op. at 4.

ARGUMENT

FLORIDA STATUTE § 893.13 (AS AMENDED BY § 893.101) IS UNCONSTITUTIONAL ON ITS FACE AND CONTRARY TO PUBLIC POLICY AND CENTURIES OF COMMON LAW TRADITION.

I. Florida's Strict Liability "Drug Abuse Prevention and Control" Law Is Inconsistent with Supreme Court Jurisprudence and Is a Violation of the Due Process Clause of the Fourteenth Amendment.

A. The Florida Legislature's Express Removal of the Element of *Mens Rea* for Violations of the Controlled Substance Law Is Sweeping and Nearly Unprecedented in American Jurisprudence.

Florida's statutes prohibiting the possession, sale, or delivery of a controlled substance do not require the State to prove that a defendant knew she possessed, sold, or delivered a controlled substance. *See* Fla. Stat. § 893.101 (May 13, 2002). The Florida Legislature expressly enacted § 893.101 in response to two Florida Supreme Court decisions involving simple possession:

> (1) The Legislature finds that the cases of *Scott v. State*, Slip Opinion No. SC94701 (Fl 2002) and *Chicone v. State*, 684 So. 2d 736 (Fla. 1996) holding that the state must prove that the defendant knew of the illicit nature of a controlled substance found in his or her actual or constructive possession, were contrary to legislative intent.
>
> (2) The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this Chapter….

Fla. Stat. § 893.101. In expressly removing the *mens rea* requirement, the Florida legislature made clear its intent "to make criminals out of people who were wholly

ignorant of the offending characteristics of items in their possession, and subject them to lengthy prison terms[.]…render[ing] criminal a mail carrier's unknowing delivery of a package which contained cocaine[.]" *See Chicone*, 684 So. 2d at 743. Indeed, the jury in this case was instructed that "to prove the crime of delivery of cocaine, the state must prove the following two elements beyond a reasonable doubt: that Mackle Vincent Shelton delivered a certain substance; and, that the substance was cocaine." (Tr. at 338). This application is also reflected in the changes to the Florida Standard Jury Instructions following the enactment of § 893.101.

As recognized by the district court below, this law has "Florida stand[ing] alone in its express elimination of *mens rea* as an element of a drug offense." Opinion below, slip op. at 4. In this case, the Appellee was eligible for 30 years, and sentenced to 18 years, under this strict liability offense.[1]

So sweeping is Florida's elimination of the *mens rea* requirement for this offense that it patently contravenes the stated "General Purposes" of the entire Florida Criminal Code. Those purposes include "giv[ing] fair warning to the

[1] The draconian penalties provided for in the statute here go further and implicate mandatory minimums in the context of a habitual offender in Florida. *See* Fla. Stat. § 775.084(4)(b).

people of the state in understandable language of the nature of the conduct proscribed and of the sentences authorized upon conviction[,]" "defin[ing] clearly the material elements constituting an offense and the accompanying state of mind or criminal intent required for that offense[,]" and "safeguard[ing] conduct that is without fault or legitimate state interest from being condemned as criminal." Fla. Stat. § 775.012 (2)-(3), (5). Of course, since no *mens rea* at all is required, the "fair warning" purpose described in the Florida Code is meaningless, as this component of due process cannot be met under a law which criminalizes the wholly innocent conduct of, for example, a postal worker delivering a mailed package containing a controlled substance.[2] In enacting such a strict liability

[2] Whether the State assures the Court that it would never apply the statute in this manner is irrelevant.

> Not to worry, the Government says: The Executive Branch construes § 48 to reach only "extreme" cruelty, Brief for United States 8, and it "neither has brought nor will bring a prosecution for anything less," Reply Brief 6–7. The Government hits this theme hard, invoking its prosecutorial discretion several times. *See id*., at 6–7, 10, and n.6, 19, 22. But the First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly. Cf. *Whitman v. American Trucking Assns. Inc.*, 531 U. S. 457, 473, 121 S.Ct. 903 (2001).

United States v. Stevens, 130 S.Ct. 1577, 1591 (2010) (holding unconstitutional as

criminal law, the State of Florida has failed to "safeguard" innocent conduct, a core purpose of the Criminal Code.

Ultimately, the State can point to no authority that would permit a Legislature's wholesale elimination of *mens rea* requirements in the criminal law. The omission of any *mens rea* element runs counter to core principles of justice found in the common law and enshrined by the due process clause of the United States Constitution. U.S. Const. amend. V and XIV. And yet, the Florida legislature did precisely that to chapter 893 of its criminal code treating the possession, sale or delivery of controlled substances. If the State prevails and this Court finds constitutional a strict liability statute under which draconian prison sentences are available, there is nothing to prevent legislatures from undertaking a sweeping, wholesale elimination of any *mens rea* requirements in their criminal law.

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overbroad the federal statute that punished the distribution of animal cruelty videos).

B. The Florida Statute Is Unconstitutional Because the Harsh Penalties Far Exceed the Strict Liability Offense Rubric of Supreme Court Decisions or Common Law.

To whatever limited extent the Supreme Court has permitted strict criminal liability, the scope of the Florida statute and the resulting penalties far exceed the constitutional limits. The imposition of an 18-year sentence, without requiring proof of a culpable mental state, offends fundamental notions of justice.

1. A criminal offense that carries a substantial term of imprisonment and does not require proof of a culpable mental state violates the due process clause of the U.S. Constitution.

The Supreme Court has held that, as a general matter, the penalties imposed for public welfare offenses for which the imposition of strict liability is permitted "commonly are relatively small, and conviction does not grave damage to an offender's reputation." *Morissette v. United States*, 342 U.S. 246, 256, 72 S.Ct. 240 (1952). The Court in *Morissette* was clear about why the imposition of strict liability in the criminal law is traditionally disfavored:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,'

> and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Id. at 250-51 (citations omitted).

It is rare for a legislative body to expunge knowledge or intent from a felony statute, as the Florida Legislature did here. Opinion below, slip op. at 10. In the seminal case on this issue, *Staples v. United States*, 511 U.S. 600, 114 S.Ct. 1793 (1994), the Court suggested that felony-level punishment for a strict liability offense would be unconstitutional. "Close adherence to the early cases … might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense. In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare rationale to interpret any statute defining a felony offense as dispensing with *mens rea*." *Id.* at 618. In *Staples*, the Court found that the National Firearms Act's prohibition against possession of an unregistered machine gun was silent as to the required *mens rea*, but was not an offense of a "public welfare" or "regulatory" nature sufficient for the Court to infer that Congress intended to entirely dispense with a *mens rea* requirement. *Id.* While insisting that its holding is a narrow one, the Court nevertheless also invoked the potential 10-year sentence under the

provision of the Firearms Act at issue in its analysis to hold that "to obtain a conviction, the Government should have been required to prove that petitioner knew of the features of his AR-15 that brought it within the scope of the act." *Id.* *Staples* declined to establish a bright-line rule concerning the relationship between the duration of the potential incarceration under a criminal statute and the availability of strict liability as an option for the legislature. *Id.* at 619-20 ("'Neither this court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not.'" (*quoting* *Morissette*, 342 U.S. at 260)). But in light of *Morissette* and its progeny, it is clear that statutes establishing criminal strict liability with no culpable mental state are strongly disfavored.[3]

[3] Scholars and commentators have long recognized the constitutional dimension of the *mens rea* element in the criminal law. *See* C. Peter Erlinder, *Mens Rea, Due Process, and the Supreme Court: Toward a Constitutional Doctrine of Substantive Criminal Law*, 9 Am. J. Crim. L. 163, 175 & 191 (1981); Richard Singer and Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 Buff. Crim. L. Rev. 850, 943 (1999); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107 ("Mens Rea is an important requirement, but it is not a constitutional requirement, except sometimes."). As a result, courts often interpret ostensibly strict liability statutes using the doctrine of constitutional avoidance, reading a *mens rea* requirement into criminal laws that are silent or unclear as to that element of the offense in

Furthermore, early in the term following *Staples*, the Supreme Court decided against strict liability in a case under the Protection of Children Against Sexual Exploitation Act, another case in which a ten-year sentence was possible. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S. Ct. 464 (1994). "*Staples*' concern with harsh penalties looms equally large respecting [18 U.S.C.] § 2252: Violations are punishable by up to 10 years in prison as well as substantial fines and forfeiture." *Id.* at 72, 78 (holding that "the term 'knowingly' in § 2252 extends both to the sexually explicit nature of the material and to the age of the performers").

Appellant's effort to distinguish *Staples* and *X-Citement Video* by asserting that the Supreme Court in those cases was not addressing criminal statutes that expressly removed any intent requirement whatsoever, but rather statutes that were

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order to avoid declaring them unconstitutional. This practice reveals the underlying common law and constitutional grounding of the *mens rea* element of criminal offenses. Even under Professor Packer's rubric, "sometimes" certainly must embrace a potential life sentence. *See, e.g.*, *Staples v. United States*, 511 U.S. 600, 605 (1994) ("'[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" (*quoting United States v. United States Gypsum Co.*, 438 U.S. 422, 436, 98 S.Ct. 2864 (1978))); *Liparota v. United States*, 471 U.S. 419, 426, 105 S.Ct. 2084 (1985) (finding that ambiguity concerning the *mens rea* of criminal statutes should be resolved in favor of lenity, and emphasizing that "[t]his construction is particularly

either silent or unclear, is a red herring. The entire judicial exercise of construing statutes is driven by the paramount concern that the statute be read and applied in a manner to avoid unconstitutionality. *See note 3 supra.* In both *Staples* and *X-Citement Video,* the Supreme Court discussed at length the importance of the *mens rea* requirement in the law in finding criminal statutes with potential 10-year penalties in both cases as presumptively requiring the state to prove intent.

2. The possession, sale, or delivery of controlled substances is not a public welfare offense.

Strict liability offenses arose with the need for regulation during the Industrial Revolution. The early strict liability offenses, called public welfare offenses, imposed duties on individuals connected with certain industries that affected public health and welfare. Included within the public welfare offenses category are the illegal sale of alcoholic beverages, sale of impure or adulterated food, violations of traffic regulations and motor vehicle laws, and sale of misbranded articles. *See* Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 73 (1933). Wayne LaFave identifies the following three arenas in which there is some authority "to the effect that a strict-liability criminal statute is

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appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct").

unconstitutional if (1) the subject matter of the statute does not place it 'in a narrow class of public welfare offenses,' (2) the statute carries a substantial penalty of imprisonment, or (3) the statute imposes an unreasonable duty in terms of a person's responsibility to ascertain the relevant facts." Wayne R. LaFave, 1 Subst. Crim. L. § 5.5 (b) (2d ed. 2003) (citing several state supreme court decisions) (citations omitted). In this case, the Appellee is faced with a statute that imposes both a substantial penalty of imprisonment – 18 years – and an unreasonable duty in terms of a person's responsibility to ascertain the relevant facts.

For public welfare offenses, the prosecution need only prove that an illegal act occurred. Justifications for strict liability in the context of public welfare offenses include (1) deterring businesses from ignoring the well-being of consumers; (2) having to prove *mens rea* would further burden courts that are already overburdened; and (3) imposing strict liability is acceptable because the penalties involved in public welfare offenses are small and there is little social stigma. *See* Richard G. Singer, *The Resurgence of Mens Rea: The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. Rev. 337, 389 (1989).

These justifications, however, are not valid when applied to eliminating the

mens rea element for the criminal possession, sale, or delivery of controlled substances. "[T]he actual enforcement of strict liability statutes in the public welfare realm … has increasingly become based upon some kind of *mens rea*." *Id.* at 392. Moreover, the position that strict liability is desirable because it is efficient fails to note that "courts often look to *mens rea* in assessing the penalty to be imposed" and if they fail to make such an inquiry, "the solution is not to distort the criminal process, but to label such offenses by some other nomenclature." *Id.* This latter viewpoint is evident in the Model Penal Code. Model Penal Code and Commentaries § 205 (1985). While public welfare offenses generally carry small monetary fines, drug possession, sale, or delivery offenses, as in Appellee Shelton's case, can carry penalties that are quite severe. An 18-year sentence should not be imposed without an accompanying determination that the accused had the intent to commit the crime for which he was charged.

3. The Florida law imposes an unreasonable duty in terms of a person's responsibility to ascertain the relevant facts.

Finally, the duty imposed on individuals by Florida's controlled substance law as a strict liability statute is inherently unreasonable. In 1980, the Louisiana Supreme Court faced the question of the constitutionality of the Louisiana

controlled substance law's express language permitting the prosecution of possessory offenses even where the accused only "unknowingly" possessed the offending substance. That court, applying the U.S. Supreme Court's decision in *Morissette*, held that drug possession could not be a strict liability crime, as it "requires little imagination to visualize a situation in which a third party hands the controlled substance to an unknowing individual who then can be charged with and subsequently convicted for violation of [this law] without ever being aware of the nature of the substance he was given." *State v. Brown*, 389 So. 2d 48, 51 (La. 1980) (finding that such a "crime" offends the conscience and concluding that "the 'unknowing' possession of a dangerous drug cannot be made criminal").

Florida's strict liability felony drug laws are, in the context of the unreasonable duty analysis, much like the strict liability Los Angeles felon registration ordinance in *Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240 (1957). In that case, the Supreme Court ruled that the Los Angeles strict liability ordinance was unconstitutional because the lack of a *mens rea* requirement rendered it a violation of constitutional due process protections. *Lambert*, 355 U.S. at 228-29 (1957) (while announcing that there is "wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its

definition[,]" the Court held that would not extend to "wholly passive" conduct, such as the failure to register). Wholly passive, innocent, or no conduct whatsoever, though, is precisely what the State of Florida has permitted to be targeted by the stripping of any *mens rea* requirement at all from its controlled substance law.

The absence of Supreme Court precedent marking a clear and unambiguous line dividing constitutional from unconstitutional strict liability offenses provides no sanctuary for Florida's strict liability felony drug laws. There is such a dividing line. And wherever that line precisely exists, there can be no doubt that Florida's law is squarely on the unconstitutional side.

C. Florida's Alternative Contention That the Statute Does Not Establish "Strict Liability" Offenses Given the Availability of an Affirmative Defense Urges a Rule of Law That Would Violate Supreme Court Precedent That a State Cannot Shift the Burden of Proof to the Defendant to Disprove an Essential Element of an Offense.

At its core, Appellant's alternative argument is that Florida Statute § 893.13 is constitutional because even though it presumes the guilty intent of the accused, it affords that "presumed guilty" individual the opportunity to prove his or her innocence via an affirmative defense. The State argues that the availability of an affirmative defense to a presumption of guilty intent takes the statute out of the

category of strict liability and, hence, out from under the controlling Supreme Court precedent discussed above.

But a state may not constitutionally presume the *mens rea* element of a crime. *See Patterson v. New York*, 432 U.S. 197, 215, 97 S.Ct. 2319 (1977) ("*Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense…. Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause" (*citing Mullaney v. Wilber*, 421 U.S. 684, 95 S.Ct. 1881 (1975). Appellant discusses *Patterson* at length, suggesting to this Court that *Patterson* supports its claim that an otherwise constitutionally defective strict liability offense is rendered neither strict liability nor constitutionally defective so long as there is an opportunity for an accused to affirmatively defend against a presumption of guilty intent *ab initio*. But in *Patterson*, the issue was not whether the state had to prove the element of intent, nor whether guilty intent was presumed. In that murder conviction, the state properly bore the burden of proving the element of intent beyond a reasonable

doubt. The burden to prove intent to commit the offense was in the statute and it was in the jury instructions. *Id.* at 198-200. The issue presented in *Patterson* was only whether the opportunity to prove mitigating circumstances justifying a reduction from second-degree murder to first-degree manslaughter satisfied due process requirements where that opportunity was provided in the form of an affirmative defense of acting under the influence of extreme emotional distress to be proven by a preponderance of the evidence. *Id.* at 200.

Not only does *Patterson* not support the alternative position of Appellant in this case, it completely undermines it. Appellant wholly misconstrues *Patterson* in suggesting that Florida's felony drug laws may constitutionally presume a guilty intent that can only be overcome by imposing an affirmative burden on an accused to prove his own innocence. This reallocation of the burden of proof not only runs afoul of core constitutional notions of due process, it also directly ignores precisely what the Supreme Court warned against in the *Patterson* opinion itself:

> This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined by their statutes. But there are obviously constitutional limits beyond which States may not go in this regard. '[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' The legislature cannot 'validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the

existence of all the facts essential to guilt.'

Patterson at 210 (citations omitted).

Yet that is precisely what the Florida statute does. Accordingly, Appellant disregards the Supreme Court's admonition and buttresses this flawed argument by selectively excerpting and misconstruing Supreme Court precedent and secondary source authority to argue that the availability of an affirmative defense cures the constitutional defect of relieving the state's burden to prove intent.

To support its claim that "[i]f a defendant is allowed to raise his blamelessness as an affirmative defense, then fault is being considered and the crime is not a strict liability crime[,]" (Appellant's Br. at 23), the state claims that the U.S. Supreme Court in *Morissette* defined a true strict liability crime as one where "the guilty act alone makes out the crime." But in rejecting the government's argument in *Morissette* that Congress's silence on intent in a statute against conversion of government property, punishable by up to 10 years imprisonment, meant it was intended to be a strict liability offense, the Supreme Court warned:

> The Government asks us by feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of

> such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries.

Morissette at 263. Moreover, the very reason the Supreme Court found no due process violation in *Patterson* was because the affirmative defense "does not serve to negative any facts of the crime which the State is to prove in order to convict…. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion[.]" *Patterson* at 207. Here, there is no question that Florida Statute § 893.13 does not include an element of intent to be proven by the state – that is its very constitutional defect. The existence of an affirmative defense of lack of knowledge does not negate an element that the state must prove and it does not operate to change the strict liability character of the law.

In addition, Appellant (at 24) suggests that noted 20th century commentator and Harvard Law Professor Francis B. Sayre embraced the wholesale shifting to defendant of the burden of proof of his or her innocent intent for crimes involving a substantial term of imprisonment. But the complete context makes a very different point:

> It is fundamentally unsound to convict a defendant for a crime involving a substantial term of imprisonment without giving him the opportunity to prove that his action was due to an honest and reasonable mistake of fact or that he acted without guilty intent. If the public danger is widespread and serious, the practical situation can be

> met by shifting to the shoulders of the defendant the burden of proving a lack of guilty intent. But the traditional requirement of a *mens rea* as a requisite for criminality still constitutes a necessary and important safeguard in criminal proceedings and, except in the case of public welfare offenses involving light penalties, should be scrupulously maintained.
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> * * *
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> …. But courts should scrupulously avoid extending the doctrines applicable to public welfare offenses to true crimes. To do so would sap the vitality of the criminal law.

Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 82-84 (1933)

The statute adopted by the Florida Legislature and the rule of law urged on this Court by Appellant instantly turn the American criminal justice system's core principle of "innocent until proven guilty" on its head. Upholding Florida's strict liability drug laws, with the severe punishments that accompany them, up to and including life in prison, would unquestionably open the door to the elimination by legislatures of the *mens rea* elements of innumerable offenses with equal or lighter potential terms of imprisonment, including the very types of offenses the U.S. Supreme Court has previously declined to construe as strict liability offenses. Appellant's attempt to cure this problem by arguing that *mens rea* remains an element of the offense so long as there is the availability of an affirmative defense of lack of knowledge is equally offensive to this core notion of American justice.

It amounts to a request for this Court to authorize a criminal justice system in which due process rights are satisfied so long as an accused has some opportunity to prove his or her innocence in the face of presumed guilt.

II. Elimination of the *Mens Rea* Element Is Atavistic and Repugnant to the Common Law.

Florida's attempt to strip the requirement of a culpable mental state from some of the most serious offenses known to the law violates well-established principles that predate the adoption of the American Constitution and would return to principles not seen in the English common law antecedents of the American justice system since medieval times. The element of *mens rea* evolved in the common law to distinguish criminal culpability from accident and trespass. More than a century ago, the American jurist Oliver Wendell Holmes wrote, "I do not know any very satisfactory evidence that a man was generally held liable either in Rome or England for the accidental consequences even of his own act." Holmes, *The Common Law* 4 (1881).

Justice Holmes, however, did not peer far enough back into the Dark Ages. Indeed, under early Anglo-Saxon law a man was liable for every homicide he committed, whether intended or not intended (*voluns aut nolens*), unless committed under the king's warrant or in pursuit of justice (trial by combat).

"What the recorded fragments of early law seem to show is that a criminal intent was not always essential for criminality and many malefactors were convicted on proof of causation without proof of any intent to harm." Francis B. Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 976-82 (1932). Sayre traces the origins of *mens rea* in English common law to two influences: the rediscovery of Roman law, resuscitated in the universities across Europe, and an increasing influence of canon law, which emphasized *moral* guilt. The Roman notions of *dolus* (evil intent) and *culpa* (fault) were experiencing a secular revival (and attempts were made to graft them into English common law), while at the same time, the church's measurement of magnitude of sins depended largely on the penitent's state of mind. Under canon law, the mental element was the real criterion of guilt, and the concept of subjective blameworthiness as the foundation of legal guilt was making itself felt. "Small wonder then that our earliest reference to *mens rea* in an English law book is a scrap copied in from the teachings of the church," Sayre observed. *Id.* at 983.

By the 13th century, culpability was becoming entwined with evil intent (*dolus*) or the lack thereof. Cases were brought in which the penalty for felony (death) seemed unwarranted or repugnant to the jury, and were referred to the king

for pardon. In 1203, a case was noted in which "Robert of Herthale, arrested for having in self-defense slain Roger, Swein's son, who had slain five men in a fit of madness, is committed to the sheriff that he may be in custody as before, for the king must be consulted about this matter." Selden Society, *Select Pleas of the Crown*, NO. 114 (1887) (cited in Sayre, *Mens Rea*, *supra*, at 980, n.17).

By the early 17th century, *mens rea* had become so firmly established in England as an element of murder and some lesser crimes, such as knowingly possessing stolen goods (without the evil mind, possession of stolen goods was a civil offense),[4] that Sir Edward Coke memorialized the maxim, "*Actus non facit reum nisi mens sit rea*." Coke, *Third Institute* 6 (1641) ("the act does not make a person guilty unless the mind be also guilty"). Likewise, Lord Bacon wrote in his own *Maxims*, "All crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact." Bacon, *Collection of Some Principle Rules and Maxims of the Common Law*, Reg. 15 (1630) ("*In*

[4] Indeed, the use of *mens rea* to help distinguish the felony of larceny from civil trespass began to emerge a century earlier. Bracton, who wrote and edited the treatise *De Legibus et Consuetudinibus Angliae* (On the Laws and Customs of England) (ca. 1250), borrowing heavily from Roman law, laid down *animus furandi* (literally, "intent to steal") as one of the requisites of the felony of larceny. Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 999 (1932). Henry of Bratton (c. 1210-

criminalibus sufficit generalis malitia intentionis cum facto parus gradus").

The early English colonists brought the key concepts of *actus reus* and *mens rea* to the New World. More than a century later, when it became necessary for the American people to dissolve the political bonds which connected them with their fellow Englishmen across the sea, the common book in virtually every courthouse and law office from Massachusetts to Georgia was William Blackstone's *Commentaries*.

Blackstone summarized the importance of the *mens rea* element in the criminal laws of England and the Colonies just seven years before American independence:

> Indeed, to make a complete crime, cognizable by human laws, there must be both a will and an act.... And, as a vicious will without a vicious act is no civil crime, so on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.

4 William Blackstone, *Commentaries* *20-21 (1769).

Mistake of fact was also a proper plea rendering a harmful act noncriminal when this country was founded. As unknowing possession of stolen goods was

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1268), (known as Bracton) was a clergyman and judge on the *coram rege*, later known as the King's Bench, from 1247-50 and 1253-57.

only civilly actionable in Coke's England, Blackstone summarized the law as exempting ignorance of a significant fact (as opposed to ignorance of the law) from criminal liability:

> [I]gnorance or mistake is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here deed and the will acting separately, there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law.

Id. at 27; *see Lambert*, 355 U.S. at 229-30. Similarly, unknowing possession or delivery of a controlled substance, without "vicious will" or under mistake of fact does not "form a criminal act."

The legislature's removal of the element of *mens rea* from § 893 of the Florida Criminal Law is not only an atavistic throwback to the barbarism of the Dark Ages, it is repugnant to the civilized common law as understood by American lawyers in 1776 and the nation's founders in 1787.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court affirm the July 27, 2011, Order of the U.S. District Court for the Middle District of Florida finding Fla. Stat. § 893.13 "unconstitutional on its face."

Respectfully submitted,

___/s/ Todd Foster_____

TODD FOSTER
COHEN & FOSTER, P.A.
201 E. Kennedy Blvd., Suite 1000
Tampa, FL 33602
(813) 225-1655
Counsel of Record

DAVID OSCAR MARKUS
MARKUS & MARKUS
40 NW 3rd Street
PH 1, Suite 1101
Miami, FL 33128
(305) 379-6667
Vice Chair, Amicus Committee
National Association of Criminal Defense Lawyers

October 31, 2011

Of Counsel:

Norman L. Reimer, Esq. Executive Director
National Association of Criminal Defense Lawyers (NACDL)
1660 L Street, NW 12th Floor
Washington, DC 20036
(202) 872-8600

NACDL Staff Counsel:

Quintin Chatman
Ivan J. Dominguez
Tiffany M. Joslyn
Jack King

Nellie L. King
Florida Bar Number: 0099562
President, Florida Association of Criminal Defense Lawyers
The Law Offices of Nellie L. King, P.A.
319 Clematis Street, Suite 107
West Palm Beach, FL 33401
(561) 833-1084

Randall C. Marshall
Florida Bar Number: 181765
ACLU Foundation of Florida, Inc.
4500 Biscayne Blvd Ste 340
Miami, FL 33137-3227
(786) 363-2700
rmarshall@aclufl.org
Counsel for Amici ACLU of Florida, Inc.

Daniel N. Abrahamson
Director of Legal Affairs, Drug Policy Alliance
70 West 36th Street, 16th Floor
New York, NY 10018
(212) 613-8020

Timothy Lynch
Ilya Shapiro
Paul Jossey
Cato Institute
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200

George W. Liebmann
Calvert Institute for Policy Research, Inc.
8 West Hamilton Street
Baltimore, MD 21201
(410) 752 5887

Manuel S. Klausner
Reason Foundation
Chair, Libertarian Law Council
Law Offices of Manuel S. Klausner, P.C.
One Bunker Hill Building
601 West Fifth Street, Suite 800
Los Angeles, CA 90071
(213) 617-0414

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B), as required by FRAP 29(c), and FRAP 29(d). This brief contains 6,946 words excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii). This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word 1997-2003 in 14-point Times New Roman font.

/s/ Todd Foster
Todd Foster
COHEN & FOSTER, P.A.
Counsel of Record

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief of *Amici Curiae* has been furnished by U.S. Mail on October 31, 2011, to:

Wesley Heidt, Esquire
Assistant Attorney General
444 Seabreeze Blvd., Suite 500
Daytona Beach, FL 32118

James E. Felman, Esquire
Katherine Earle Yanes, Esquire
Clarisse Moreno, Esquire
Kynes, Markman & Felman, P.A.
P.O. Box 3396
Tampa, FL 33601-3396

I further certify that on October 31, 2011, a copy of this Brief of *Amici Curiae* has been uploaded at ww.call.uscourts.gov and filed with the Court in PDF format in accordance with 11th Cir. R. 31-5, and the original and six copies were furnished to the Court by U.S. Mail.

____/s/ Todd Foster_____
Todd Foster
COHEN & FOSTER, P.A.
Counsel of Record