

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :
Appellant, :
v. : Case No. SC11-1878
LUKE JARROD ADKINS, ET AL., :
Appellees. :
_____ :

ON APPEAL FROM THE CIRCUIT COURT, IN AND FOR MANATEE COUNTY, STATE OF FLORIDA, PURSUANT TO ARTICLE V, SECTION 3(B)(5) OF THE FLORIDA CONSTITUTION

BRIEF OF *AMICI CURIAE* National Association of Criminal Defense Lawyers, American Civil Liberties Union of Florida, Drug Policy Alliance, Cato Institute, Reason Foundation, Libertarian Law Council, and 25 Professors of Law*
IN SUPPORT OF APPELLEES

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

November 28, 2011

* A complete list of law professor *Amici* appears at pages 3-4 of the brief.

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,
and Jack King

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

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

TABLE OF CONTENTS

TABLE OF CONTENTS iv

TABLE OF CITATIONS vi

INTEREST OF *AMICI CURIAE*..... 1

SUMMARY OF ARGUMENT..... 4

ARGUMENT..... 5

 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 Clauses of the Fifth and Fourteenth Amendments. 5

 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. 5

 B. The Florida Statute Is Unconstitutional Because the Harsh Penalties
Far Exceed the Strict Liability Offense Rubric of Supreme Court Decisions or
Common Law. 9

 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 clauses of the U.S. Constitution..... 9*

2. *The possession, sale, or delivery of controlled substances is not a public welfare offense.* 13

3. *The Florida law imposes an unreasonable duty in terms of a person's responsibility to ascertain the relevant facts.*..... 15

II. Elimination of the *Mens Rea* Element Is Atavistic and Repugnant to the Common Law..... 16

CONCLUSION 20

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

TABLE OF CITATIONS

Cases

<i>Blumberg v. USAA Cas. Ins. Co.</i> , 790 So.2d 1061 (Fla. 2001)	7
<i>Chicone v. State</i> , 684 So. 2d 736 (Fla. 1996)	6
<i>Lambert v. California</i> , 355 U.S. 225, 78 S.Ct. 240 (1957)	15, 16, 20
<i>Liparota v. United States</i> , 471 U.S. 419, 105 S.Ct. 2084 (1985)	11
<i>Morissette v. United States</i> , 342 U.S. 246, 72 S.Ct. 240 (1952)	9, 11, 15
<i>Scott v. State</i> , 808 So. 2d 166 (Fla. 2002).....	5
<i>Shelton v. Secretary, Dept. of Corrections</i> , 23 Fla. L. Weekly Fed. D11 (M.D. Fla. July 27, 2011).....	6
<i>Staples v. United States</i> , 511 U.S. 600, 114 S.Ct. 1793 (1994)	10, 11, 12
<i>State v. Brown</i> , 389 So. 2d 48 (La. 1980).....	15
<i>United States v. Stevens</i> , 130 S. Ct. 1577 (2010)	8
<i>United States v. United States Gypsum Co.</i> , 438 U.S. 422, 98 S.Ct. 2864 (1978). 11	
<i>United States v. X-Citement Video, Inc.</i> , 513 U.S. 64, 115 S.Ct. 464 (1994)	12
<i>Whitman v. American Trucking Assns. Inc.</i> , 531 U. S. 457, 121 S.Ct. 903 (2001)..	8

Statutes

§ 775.012, Fla. Stat. (2011)..... 7

§ 893.101, Fla. Stat. (2011)..... 5, 6

§ 893.13, Fla. Stat. (2011)..... 5, 6

18 U.S.C. § 2252 (2008) 12

Other Authorities

Bacon, *Collection of Some Principle Rules and Maxims of the Common Law*, Reg. 15 (1630)..... 19

4 William Blackstone, *Commentaries* *20-21 (1769)..... 19, 20

Bracton, *De Legibus et Consuetudinibus Angliae* (On the Laws and Customs of England) (ca. 1250)..... 18

Coke, *Third Institute* 6 (1641) 18

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 (1981)..... 11

Oliver Wendell Holmes, *The Common Law* 4 (1881) 16

Wayne R. LaFave, 1 Subst. Crim. L. § 5.5 (b) (2d ed. 2003)..... 13

Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107.... 11

Francis B. Sayre, <i>Mens Rea</i> , 45 Harv. L. Rev. 974 (1932)	17, 18
Francis B. Sayre, <i>Public Welfare Offenses</i> , 33 Colum. L. Rev. 55 (1933)	13
Selden Society, <i>Select Pleas of the Crown</i> , No. 114 (1887).....	18
Richard G. Singer, <i>The Resurgence of Mens Rea: The Rise and Fall of Strict Criminal Liability</i> , 30 B.C. L. Rev. 337 (1989).....	14
Richard Singer and Douglas Husak, <i>Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer</i> , 2 Buff. Crim. L. Rev. 850 (1999)..	11

U.S. Constitution

U.S. Const. amend. V	8
U.S. Const. amend. XIV	8

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. 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. NACDL frequently appears as *amicus curiae* before the United States Supreme Court as well as numerous federal and state courts throughout the nation.

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.

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.

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. 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.

Adele Bernhard, Pace University School of Law, White Plains, NY; Guyora Binder, University at Buffalo Law School, Buffalo, NY; Tamar R. Birckhead, University of North Carolina School of Law, Chapel Hill, NC; Vincent M. Bonventre, Albany Law School, Albany, NY; Michael Cahill, Brooklyn Law School, Brooklyn, NY; 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; Jeffrey L. Kirchmeier, CUNY School of Law, Flushing, NY; Richard Daniel Klein, Touro College Jacob D. Fuchsberg Law Center, Central Islip, NY; Alex Kreit, Thomas Jefferson School of Law, San Diego, CA; Donna Hae Kyun Lee, CUNY School of Law, Flushing, NY; 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; Ronald Rotunda, Chapman University School of Law, Orange, CA;

Susan D. Rozelle, Stetson University College of Law, Gulfport, FL; 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 25 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 clauses of the Fifth and Fourteenth Amendments and is inconsistent with basic norms and principles underlying a just and fair legal system.

SUMMARY OF ARGUMENT

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.

ARGUMENT

FLORIDA STATUTE § 893.13 (AS AMENDED BY § 893.101) IS UNCONSTITUTIONAL ON ITS FACE AND CONTRARY TO 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 Clauses of the Fifth and Fourteenth Amendments.

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* § 893.101, Fla. Stat. (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....

§ 893.101, Fla. Stat. Section 893.101 is reflected in the changes to the Florida Standard Jury Instructions. For example, in cases concerning the purchase, sale or delivery of controlled substances, the Florida Standard Jury Instructions now call for the jury to determine only two things -- whether defendant purchased, sold or delivered a certain substance and whether the substance was illicit in nature. There is no *mens rea* requirement at all. As recognized by the U.S. District Court for the Middle District of Florida, this law has “Florida stand[ing] alone in its express elimination of *mens rea* as an element of a drug offense.” *Shelton v. Secretary, Dept. of Corrections*, 23 Fla. L. Weekly Fed. D11, 2011 WL 3236040, *2 (M.D. Fla. July 27, 2011).¹

¹ While the State of Florida in this state court matter is now claiming that § 893.13 is a general intent statute with a knowledge requirement, in *Shelton* the State made a very different argument. To wit, in the federal proceedings in *Shelton*, the State claimed that § 893.13 did not create a strict liability offense because “a defendant charged with a violation of Florida’s drug statute may assert that he did not know that he possessed drugs by raising the affirmative defense of lack of knowledge.” *Id.* (on appeal to the Eleventh Circuit), Initial Brief of Appellant at 24. Of course, that contention is without merit as it would violate Supreme Court precedent that a

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 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." § 775.012 (2)-(3), (5), Fla. Stat. (2011). 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

state cannot shift the burden of proof to the defendant to disprove an essential element of an offense. For a full discussion of this issue, see brief of *amicus curiae* the Florida Association of Criminal Defense Lawyers in the instant matter. In any event, this court has recognized the impropriety of asserting such inconsistent positions in separate judicial proceedings. *See Blumberg v. USAA Cas. Ins. Co.*, 790 So.2d 1061, 1066 (Fla. 2001).

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

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 clauses of the United States Constitution. U.S. Const. amend. V and XIV. If this Court finds constitutional a strict liability statute under which draconian prison sentences are available, there is nothing to prevent future legislatures from undertaking a sweeping, wholesale elimination of any *mens rea* requirements in their criminal law.

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 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 availability under the statute of a 30-year sentence, or perhaps life for a “habitual offender,” 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 clauses 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 (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 (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. 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

Furthermore, early in the term following *Staples*, the Supreme Court

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 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 (1978))); *Liparota v. United States*, 471 U.S. 419, 426 (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 appropriate where, as here, to

decided against strict liability in a case under the Protection of Children Against Sexual Exploitation Act, another case in which a 10-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 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.

interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct”).

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 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, Appellees are faced with a statute that imposes both a substantial penalty of imprisonment – up to 30 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.*

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 (1957). In that case, the Supreme Court ruled that the 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.

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

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). 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.

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 onto English common law), while at the same time, the church's measurement of the magnitude of a sin 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

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. 1210-1268), (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.

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 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. By the time of the Declaration of Independence, 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

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 Chapter 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 and the nation's founders in 1787.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court find Fla. Stat. § 893.13 facially unconstitutional.

Respectfully submitted,

TODD FOSTER
COHEN & FOSTER, P.A.
Florida Bar No.: 0325198
201 E. Kennedy Blvd., Suite 1000
Tampa, FL 33602
(813) 225-1655
Counsel of Record

DAVID OSCAR MARKUS
MARKUS & MARKUS
Florida Bar No.: 0119318
40 NW 3rd Street
PH 1, Suite 1101
Miami, FL 33128
(305) 379-6667
Vice Chair, Amicus Committee
National Association of Criminal
Defense Lawyers

November 28, 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

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 SERVICE

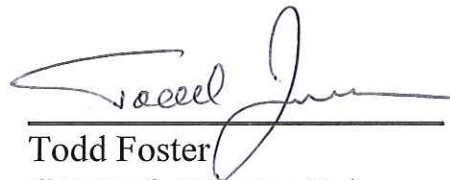
I certify that a true and correct copy of the foregoing Brief of *Amici Curiae* has been furnished by U.S. Mail on November 28, 2011, to:

Robert J. Krauss
Chief Assistant Attorney General
Concourse Center #4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607

James Marion Moorman
Public Defender
Tenth Judicial Circuit
P.O. Box 9000 – Drawer PD
Bartow, Florida 33831

Matthew D. Bernstein
Assistant Public Defender
Tenth Judicial Circuit
P.O. Box 9000 – Drawer PD
Bartow, Florida 33831

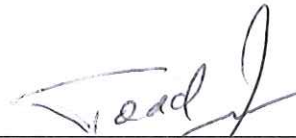
Arthur I. Jacobs
Jacobs Scholz & Associates, LLC
961687 Gateway Blvd., Suite 201-I
Fernandina Beach, Florida 32034

A handwritten signature in black ink, appearing to read "Todd Foster", written over a horizontal line.

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

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.



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