No. 11-13515-GG

In the United States Court of Appeals for the Eleventh Circuit

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MACKLE VINCENT SHELTON,
Plaintiff-Appellee,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Florida

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AMICUS CURIAE BRIEF OF THE TEXAS PUBLIC POLICY FOUNDATION

IN SUPPORT OF PLAINTIFF-APPELLEE AND URGING THE COURT OF APPEALS TO AFFIRM

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The parties' amended certificates of interested persons appear to be complete with the following addition: Texas Public Policy Foundation, by and through Vikrant P. Reddy. The Texas Public Policy Foundation is a non-profit corporation organized under the laws of Texas and has no capital stock or other ownership.

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INTEREST OF AMICUS CURIAE

The Texas Public Policy Foundation is a non-profit, non-partisan research institute founded in 1989. Funded by thousands of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research. It has no capital stock or other ownership. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise throughout Texas and the U.S. by educating policymakers and the national public policy debate with academically sound research and outreach.

This case is of central concern to the Foundation because it concerns the erosion of mens rea, a constitutional and common law principle that serves as an essential check on government. The Foundation's Center for Effective Justice is a national leader in combating "overcrminalization," or the effort to regulate non-blameworthy business activity through criminal law. The erosion of mens rea is a significant aspect of overcriminalization, and the Foundation is mission-bound to oppose it because of the threat it presents to liberty and free enterprise.

The Foundation is authorized to file this brief because both parties have consented. *See* FED. R. APP. P. 29(a). No counsel from either party authored any portion of this brief. No fee was paid, nor will any be paid, to the Foundation for the preparation of this brief. *See id.* at 29(c)(5).

STATEMENT OF THE ISSUE

Whether Florida Statute § 893.13, as amended by Florida Statute § 893.101, is violative of due process and therefore unconstitutional because it removes the state's burden to demonstrate mens rea as an element of the underlying criminal offense.

SUMMARY OF ARGUMENT

Florida Statute § 893.13, as amended by Florida Statute § 893.101, improperly disregards over six centuries of Anglo-American legal tradition by removing the requirement that the state prove criminal intent, or "mens rea," as an element of the offense of trafficking illegal substances. As the District Court observed, the statute thus violates the due process guarantees of the U.S. Constitution, and the conviction of the appellee in this case was unconstitutional.

In addition to the constitutional issue involved, however, amicus curiae also notes that the long-term policy implications of this conviction are troubling. Criminal law is increasingly—and inappropriately—used to regulate thousands of ordinary business activities which few citizens know are illegal. A state that may ignore mens rea when prosecuting a serious crime such as trafficking will not hesitate to ignore mens rea when prosecuting these business "crimes."

A requirement that the State prove mens rea, a guilty mind, in addition to actus reus, a guilty act, is an essential check on government power. It is a constitutional requirement, and to ignore it is to invite troubling public policy consequences. We urge the Court of Appeals to affirm the District Court's order.

ARGUMENT

I. FLORIDA STATUTE § 893.13, AS AMENDED BY FLORIDA STATUTE § 893.101, IS AN UNCONSTITUIONAL VIOLATION OF DUE PROCESS BECAUSE IT LACKS A "MENS REA" ELEMENT

Florida Statute § 893.13, as amended by § 893.101, creates a strict liability criminal offense because it expressly dispenses with the traditional mens rea or scienter requirement:

> (1) The Legislature finds that the cases…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. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter.
>
> (3) In those instances in which a defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance. It is the intent of the legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption provided in this subsection.

FLA. STAT. § 893.101 (2011). The district court found that because this amendment removes the mens rea element, the statute is in violation the due process guarantees of the U.S. Constitution. *See Shelton v. Sec'y Dep't of Corr.*, 2011 U.S. Dist.

LEXIS 86898, *13 (M.D. Fla. July 27, 2011); U.S. CONST. amends. V & XIV, § 1; *see also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978) (finding that intent generally may not be established by mere "reliance on a legal presumption").[1] The district court explained that under the statute, "a person is guilty of a drug offense if he delivers a controlled substance without regard to whether he does so purposefully, knowingly, recklessly, or negligently." *See Shelton*, 2011 U.S. Dist. LEXIS 86898 at *7.

The constitutional importance of mens rea in ensuring due process is rooted in the Western legal tradition and in American founding principles. *Dennis v. United States*, 341 U.S. 494, 500 (1951) (observing that proof of mens rea "is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence"); *see also* Brian W. Walsh and Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law* at 5 (2010). "The contention that an injury can amount to a crime only when intentionally inflicted 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

[1] For a general discussion of how the U.S. Supreme Court has developed a doctrine recognizing mens rea as a component of due process, *see generally,* 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).

consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250 (1952).

In 1993, the Eastern District of New York described the intellectual development of mens rea protections, from classical philosophy to medieval law to William Blackstone to the framers of the American Constitution:

> On either an historically based or a more fluid view of the content of the due process clause, the mens rea principle must be given constitutional effect. The various doctrines of culpability encompassed by the principle of mens rea are as deeply rooted as any fundamental rules of law still operative today. As already noted, the concept of mens rea can be traced to Plato and, since the Middle Ages, has been an integral part of the fabric of the English common law from which we have drawn our own criminal and constitutional analysis. The legal framework against which the Framers of the United States Constitution operated included a strong commitment to individual blameworthiness as the chief determinant of criminal liability. *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 423 (1958) ("In the tradition of Anglo American law, guilt of crime is personal. The main body of the criminal law, from the Constitution on down, makes sense on no other assumption."); *id.* at 434 (It is nonsensical to assume that "the views of Blackstone should be…cavalierly overridden in interpreting a Constitution written by men who accepted his pronouncements as something approaching gospel.").

United States v. Cordoba Hincapie, 825 F. Supp. 485, 515-16 (E.D.N.Y. 1993). The district court in this case noted that "the elimination of mens rea is atavistic and repugnant to the common law." *See Shelton*, 2011 U.S. Dist. LEXIS 86898 at *17, n. 7.

The U.S. Supreme Court has explained that strict liability offenses do exist for which proof of a culpable mental state is not required, but "the limited circumstances in which Congress has created and this Court has recognized such offenses attest to their generally disfavored status." *See U.S. Gypsum Co.*, 438 U.S. at 437 (citations omitted). Indeed, the court has repeatedly recognized that mens rea requirements are favored because they help to prevent the criminalization of unknowing mistakes. *See, e.g., Staples v. United States*, 511 U.S. 600, 617 (1994) (imposing a mens rea requirement on a firearms statute because the absence of a requirement would "criminalize a broad range of innocent conduct"); *Liparota v. United States*, 471 U.S. 419 (1985) (interpreting a statute prohibiting food stamp fraud to require a mens rea element); *United States v. Int'l Minerals & Chem. Corp*., 402 U.S. 558, 563-64 (1971) (suggesting that if a person shipping acid mistakenly thought that he was shipping distilled water, he would not be in violation of a statute criminalizing undocumented shipping of acids).

The amendment to Florida Statute § 893.13 that is at issue in this case, explicitly ignores these well-established precedents by moving the intent element to an affirmative defense. *See* FLA. STAT. § 893.101. In other words, the jury is instructed that there is a presumption of knowledge, i.e. a presumption in favor of the state and against the defendant regarding the validity of the affirmative defense.

See id. It is a pillar of the criminal law tradition that the burden to prove all elements of an offense lies with the state. *Patterson v. New York*, 432 U.S. 197, 215 (U.S. 1977). Under the Florida statute, the intent element, as it concerns whether a person knew or should have known a substance they possessed was an illegal substance, is no longer an element of the offense. *See* FLA. STAT. § 893.101. The mens rea element an affirmative defense, which shifts the burden to the defendant and the jury instruction takes it a step further in establishing a presumption of guilt. *Id.* "State legislatures [may] reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But *there are obviously constitutional limits* beyond which the States may not go in this regard." *Patterson*, 432 U.S. at 215 (emphasis added).

Mens rea requirements are important checks on government power, and that is presumably why the Supreme Court has tended to view mens rea as a component of due process. *See U.S. Gypsum Co.*, 438 U.S. at 437. This component of due process is disregarded under Florida Statute § 893.13, and thus the statute is unconstitutional, and the district court was correct to strike it down.

II. ELIMINATING THE STATE'S REQUIREMENT TO PROVE MENS REA FOR A SERIOUS CRIME SUCH AS TRAFFICKING WILL LEAD TO THE FURTHER EROSION OF MENS REA ELEMENTS IN OTHER, LESS-SERIOUS CRIMES, PARTICULARLY THOSE RELATING TO ORDINARY

BUSINESS ACTIVITIES

As part of a phenomenon frequently labeled "overcriminalization," mens rea requirements have been eroding in criminal statutes throughout the United States for decades, and Florida Statute § 893.13 is only one example. Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U.L. REV. 703, 726 (2005). In the 109th Congress (extending from January 3, 2005 to January 3, 2007), "over 57 percent of the offenses considered…contained inadequate mens rea requirements." *See* Walsh and Joslyn, *Without Intent* at 3-4. Several of the most prominent federal judges in the United States have criticized this move toward statutes that are drafted without adequate mens rea protections and toward a legal culture in which prosecutors increasingly disregard existing mens rea requirements.

In a 2010 case, for example, prosecutors made virtually no effort to prove that the defendant knew or should have known that selecting a particular method of accounting for reporting corporate figures to stockholders was illegal. *United States v. Goyal*, 629 F.3d 912, 922 (9th Cir. 2010). The defendant's conviction was reversed on appeal, and Judge Alex Kozinksi wrote a blistering concurrence:

> This case has consumed an inordinate amount of taxpayer resources, and has no doubt devastated the defendant's personal and professional life….This is just one of a string of recent cases in which courts have found that federal prosecutors overreached by trying to stretch criminal law beyond its proper bounds. Criminal law should clearly

> separate conduct that is criminal from conduct that is legal…not only because of the dire consequences of a conviction—including disenfranchisement, incarceration and even deportation—but also because criminal law represents the community's sense of the type of behavior that merits the moral condemnation of society. When prosecutors have to stretch the law or the evidence to secure a conviction, as they did here, it can hardly be said that such moral judgment is warranted.

Id. at 922 (Kozinksi, J., concurring).

Another prominent judge, Richard Posner, has argued that it is unreasonable and unjust to expect that all citizens be knowledgeable about the thousands of criminal laws now in existence. In a 1998 case, for example, a defendant argued that he did not know he was required to relinquish a firearm after a restraining order had been issued against him several years before, nor had he been notified of this requirement by the court. *See United States v. Wilson*, 159 F.3d 280, 280-81 (7th Cir. 1998). He was nevertheless prosecuted and convicted. *See id.* Justice Posner dissented:

> We want people to familiarize themselves with the laws bearing on their activities. But a reasonable opportunity doesn't mean being able to go to the local law library and read Title 18. It would be preposterous to suppose that someone from Wilson's milieu is able to take advantage of such an opportunity. If none of the conditions that make it reasonable to dispense with proof of knowledge of the law is present, then to intone "ignorance of the law is no defense" is to condone a violation of fundamental principles for the sake of a modest economy in the administration of criminal justice.

Id. at 296 (Posner, J., dissenting).

Perhaps most prominently, Justice Antonin Scalia has criticized the trend towards overcriminalization and weakened mens rea requirements by writing that, "[i]t should be no surprise that as the volume [of criminal laws] increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution." *See Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting). "In the field of criminal law, at least," Scalia continued in his dissent, "it is time to call a halt." *Id.*

This troubling trend, observed by these prominent jurists, is particularly noticeable in statutes that create business-related criminal offenses. *See* Marie Gryphon, *It's a Crime?: Flaws in Federal Statutes that Punish Standard Business Practice* at 2-6 (Manhattan Institute Civil Justice Report: Nov. 2009). "[C]riminalizing business conduct raises special concerns because the prohibited behaviors are often hard to distinguish from the kinds of productive activities that businesspeople are obligated to engage in." *Id.* at 2-3.

Several environmental statutes, for example, dispense with mens rea requirements. *See, e.g., United States v. White Fuel Corp.*, 498 F.2d 619, 621 (1st Cir. 1974) (involving the reduction of mens rea requirements in The Refuse Act);

United States v. Buckley, 934 F.2d 84, 87 (1974) (involving the reduction of mens rea requirements in the Clean Air Act and Comprehensive Environmental Response, Compensation and Liability Act); *United States v. Rollins*, 706 F. Supp. 742, 743 (D. Idaho 1989) (involving the reduction of mens rea requirements in the Migratory Bird Act).[2]

Still another statute—one intended to prevent individuals from fraudulently claiming to have won a military decoration—provides inadequate mens rea protections for collectors who buy, sell, exchange, or ship military decorations without any intention of fraudulently claiming to have won the decoration. *See* Walsh and Joslyn, *Without Intent* at 17 (*citing* 18 U.S.C § 704(a)). Another offense provides inadequate mens rea protections for individuals who make "false statements" on an application for medical benefits. *See id.* at 16 (*citing* H.R. 3192, 109th Cong. § 107(1) (2005)). Because the statute contains no mens rea element, it may be used to prosecute typographical errors. *See id.* In one notorious case, three lobster fishermen in Florida were prosecuted for violating a Honduran law criminalizing the packaging of lobsters in plastic bags, rather than cardboard boxes. *See United States v. McNab*, 324 F.3d 1266 (11th Cir. 2003), *modified and*

[2] These notable examples are taken from Timothy Lynch, *Polluting Our Principles: Environmental Prosecutions and the Bill of Rights*, in *Go Directly to Jail: The Criminalization of Almost Everything* 57-58 (Gene Healy ed., 2004).

reh'g denied, 2003 U.S. App. Lexis 10708, *3 (11th Cir. May 29, 2003). Due to weak mens rea protections in the law, the fishermen's argument that they did not know about the obscure law was ignored. *Id.* at *14.

Furthermore, it is difficult to overstate the ramifications of overcriminalization on swelling prison populations, state budgets, and civil society. "The ancillary expenses of overcriminalization should be considered as well—not only the more than twenty thousand dollars per year that is spent to incarcerate each inmate, but also the financial, emotional, and social costs when otherwise productive individuals are unable to contribute to society." Luna, *Overcriminalization*, 54 AM. U.L. REV. at 726 (*citing* James J. Stephan, *State Prison Expenditures, 2001*, Bureau of Justice Statistics Special Report 1 (2004)).

Florida Statute § 893.13 is a part of this troubling trend towards eroding mens rea protections. If a state is willing to ignore mens rea requirements when filing a serious charge such as trafficking—a charge for which incarceration is justified if the defendant is convicted—then it will hardly seem controversial to ignore mens rea requirements when prosecuting minor business "crimes." "As Judge Benjamin Cardozo once quipped, once a principle or precedent gets established, it is usually taken to the 'limit of its logic.'" Timothy Lynch, *Blameworthiness and Intent* in *One Nation Under Arrest* 160 (Paul Rosenzweig &

Brian W. Walsh, eds., 2010).

CONCLUSION

Florida Statute § 893.13, as amended by § 893.101, improperly disregards extensive precedent and tradition by removing mens rea as an element of the offense of trafficking illegal substances. This statute is therefore unconstitutional and the district court's order to strike it down should be affirmed.

Amicus curiae further urges the Court to consider the ramifications of failing to affirm the district court. Criminal law is increasingly used to regulate thousands of ordinary business activities which few citizens realize are illegal. A state that may ignore mens rea when prosecuting a heinous offense such as trafficking will not hesitate to ignore mens rea when prosecuting business "crimes." The damage to both personal and economic liberty will be significant.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance) contains 3,062 words as determined by the word-counting feature of Microsoft Word 2010 in 14-point Times New Roman.

Executed this 31st day of October, 2011.

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I hereby certify that on this 31st day of October, 2011, I have electronically filed the foregoing with the Clerk of the Court which will send a notice of electronic filing to:

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