No. SC07-1074

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

UNITED STATES OF AMERICA, et al.,
Defendants-Appellants.

v.

MAUREEN STEVENS, etc.,
Plaintiff-Appellee.

On Certified Question From The United States
Court of Appeals For The Eleventh Circuit

BRIEF FOR APPELLANT THE UNITED STATES OF AMERICA

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INTRODUCTION

Plaintiff is the widow of Robert Stevens, the first victim in a series of criminal attacks in the Fall of 2001, in which an unknown perpetrator sent anthrax through the mail. Plaintiff sued the United States (and also sued Battelle Memorial Institute, a private laboratory, in a subsequently consolidated case), alleging that the anthrax used by the perpetrator originally came from a United States Army Laboratory, and that the United States should be liable in negligence for the death of Mr. Stevens at the hands of the unknown attacker. The federal trial court in this case declined to dismiss plaintiff's complaint, although the court acknowledged there was "no precedent in American jurisprudence" for plaintiff's claim. RE 58:6.[1]

[1] Citations to "RE" refer to tabbed documents, and pages within those

Although there have been no similar cases involving biological organisms used as a weapon, Florida courts have repeatedly rejected efforts to hold manufacturers, sellers, or owners of firearms liable for injuries caused by third-party criminals who use guns to attack strangers. Plaintiff's theory would thus hold scientific researchers to a standard of potential liability that Florida law has declined to impose on those who own or sell guns. Such a major shift in Florida tort law would require abandoning the requirement of a "special relationship" in cases involving third-party criminal conduct, in favor of imposing an unprecedented duty to protect the general public from third parties. Florida courts, in accordance with the Restatement (Second) of Torts, have consistently enforced the special relationship requirement and have consistently rejected the notion of a duty to all. This Court should reaffirm that consistent body of case law and should decline to take the radical step urged by plaintiff.

STATEMENT OF THE CASE

1. Certified Question

This case comes before the Supreme Court on a question of Florida law certified by the United States Court of Appeals for the Eleventh Circuit. The federal appellate court stated the following certified question:

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documents, in the Record Excerpts filed by the United States in the United States Court of Appeals for the Eleventh Circuit, which have been provided to this Court.

> "Under Florida law, does a laboratory that manufactures, grows, tests or handles ultra-hazardous materials owe a duty of reasonable care to members of the general public to avoid an unauthorized interception and dissemination of the materials, and, if not, is a duty created where a reasonable response is not made where there is a history of such dangerous materials going missing or being stolen?" Op. 17.[2]

The Eleventh Circuit also stated that it did "not intend to restrict the issues considered by the state court," and noted that "discretion to examine this issue and other relevant issues lies with the state court." Op. 17.

2. Nature of the Case

Plaintiff Maureen Stevens sued the United States in federal district court under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq.*, a federal statute that looks to state law to determine whether the sovereign immunity of the United States has been waived and the federal government can be held liable in tort. *See* 28 U.S.C. § 2674 (United States may be liable "to the same extent as a private individual under like circumstances" under state law). Plaintiff's late husband, Robert Stevens, was the first of several victims across the Nation who were killed or injured by inhalation anthrax in a series of criminal attacks in the Fall of 2001. The Federal Bureau of Investigation has launched a massive investigation into those attacks, and the search for the perpetrator continues.

The complaint alleges that Mr. Stevens was exposed to anthrax bacteria derived from biological materials that were once held in a federal government laboratory, and

[2] Citations to "Op." refer to pages of the June 7, 2007, slip opinion of the Eleventh Circuit.

that the government failed to take appropriate precautions at the laboratory, or in sending the bacteria to another research facility, to prevent the unidentified perpetrator of the anthrax attack from obtaining the bacteria. The complaint does not allege that there was any relationship between Mr. Stevens and the laboratory, nor is there any allegation that the perpetrator had any relationship with the government.

The FTCA requires the federal courts to interpret Florida law, which imposes liability for negligence only if a defendant owed a duty of care to prevent harm to the victim. This Court has adopted the rule set forth in section 315 of the Restatement (Second) of Torts (1965), that a defendant has no duty to protect another person from the criminal acts of a third party, unless the victim and defendant had a special relationship (such as a common carrier and its passengers, or a landowner and its invitees). *See Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985).

The United States moved to dismiss the complaint on the ground that the government owed no duty to Mr. Stevens under Florida law. The federal district court denied the motion to dismiss, but recognized that plaintiff's theory of negligence liability is unprecedented, and accordingly certified the issue for interlocutory appeal. The court's decision offered two bases for rejecting § 315 and the Florida cases that rely on the no-duty rule. First, the court limited the scope of the no-duty rule, distinguishing between acts and omissions. Second, following New York law, and applying that state's policy-based allocation of risks, the court concluded that the

United States owed a duty to the general public to prevent such criminal attacks as the one that killed Mr. Stevens.

Both the government and a private laboratory (Battelle Memorial Institute, which has been named as defendant in a similar, consolidated suit filed by the same plaintiff) sought review of the trial court's threshold legal ruling. On appeal, the Eleventh Circuit concluded that "Florida law does not appear to have addressed and decided these issues" and accordingly certified the state-law question (set forth above) to this Court. Op. 17.

3. Restatement (Second) of Torts

This case involves the interpretation of provisions of the Restatement (Second) of Torts, which are set out here for the Court's convenience.

a. The United States principally relies on Restatement § 315, which provides:

> "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection." Restatement (Second) of Torts, § 315 (1965).

The Restatement's commentary makes clear that "[t]he rule stated in [§ 315] is a special application of the general rule stated in § 314." Restatement § 315, cmt. a. Section 314 in turn provides:

> "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."

The exceptions to the no-duty rule in § 315 are set out in §§ 314A, 316-320. They provide exceptions for special relationships between the defendant and victim -- such as the relationship between a common carrier and its passengers, an innkeeper and his guests, a landowner and her invitees, or an institution (such as a prison, hospital, or school) and those subject to the institution's custody. *See* Restatement §§ 314A, 320. They also provide exceptions to the no-duty rule for special relationships between the defendant and a third-party tortfeasor -- such as the relationship between a parent and a minor child, an employer and employee, or an institution and someone in the custody of that institution -- when the defendant is on notice of the risk and has the authority and the opportunity to exercise control over the tortfeasor. *See* Restatement §§ 316-319.

b. Plaintiff has cited other provisions of the Restatement, including §§ 302, 302A, and 302B. Section 302 provides:

> "A negligent act or omission may be one which involves an unreasonable risk of harm to another through either
>
> (a) the continuous operation of a force started or continued by the act or omission, or
>
> (b) the foreseeable action of the other, a third person, an animal, or a force of nature." Restatement § 302.

Restatement §§ 302A and 302B provide that "[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through" either the "negligent or reckless conduct of the other or a

third person," § 302A, or "the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal," § 302B.

The commentary emphasizes the limited purpose of § 302:

> "This Section is concerned only with the negligent character of the actor's conduct, and not with his duty to avoid the unreasonable risk. . . . If the actor is under no duty to the other to act, his failure to do so may be negligent conduct within the rule stated in this Section, but it does not subject him to liability, because of the absence of duty." Restatement § 302, cmt. a.

Both §§ 302A and 302B expressly incorporate that comment. *See* Restatement § 302A, cmt a ("This Section is a special application of the rule stated in § 302(b). Comment a to that Section is equally applicable here."); Restatement § 302B, cmt a (same).

STATEMENT OF FACTS

This case remains at the pleading stage, so the federal courts have accepted the facts as pleaded in the complaint as true for purposes of the threshold motion to dismiss. If the case were to proceed, the government would dispute many of the allegations.

1. Robert Stevens died on October 5, 2001, a victim of an unknown assailant who sent anthrax bacteria through the mail to Mr. Stevens' workplace. The complaint does not speculate about the identity of the killer.

The complaint originally sought recovery on both strict liability and negligence theories, alleging that the government was liable in tort simply due to its undertaking to own, manage, and experiment with anthrax bacteria, which the complaint describes

throughout as "ultra-hazardous." RE 1:2-5, 7; *see also* Op. 4 & n.1. Plaintiff eventually conceded that the FTCA does not waive the sovereign immunity of the United States for strict liability claims, and the trial court dismissed that count. *See* RE 47:2 n.1.

The remaining negligence count alleges that the government failed to take steps plaintiff believes were necessary to keep anthrax bacteria from falling into the hands of potential criminals. *See* RE 1:6-7. The complaint reiterates, both by incorporation and expression, the foundation of the strict liability count -- the assertion that anthrax was an "ultra-hazardous material" -- and further asserts that the government was required to exercise "the highest degree of care" in its "handling, storage, use, or possession" of that material. *Id.* at 1:5.

Without explanation, the complaint asserts that the United States "owed a duty of care and in fact, the highest degree of care," in virtually every facet of the work (including hiring, security screening, and workplace security, as well as the handling of and experimenting with anthrax bacteria) performed at a U.S. Army research laboratory located in Fort Detrick, Maryland. *See id.* at 1:5-6. The complaint does not identify any class or category of individuals to whom the government owed this asserted duty of care, nor does the complaint identify any special relationship between Mr. Stevens and the Army laboratory, or any other component of the government, that could give rise to such a duty. Finally, the negligence count alleges a number of failures or omissions by the government in its operation of the Army laboratory that

allegedly made possible the criminal act that led to the death of Mr. Stevens. *See id.* at 1:6-7.

2. The United States moved to dismiss the complaint on the ground that plaintiff failed to state a claim under Florida law because the government owed no duty to protect Mr. Stevens from an unidentified third-party killer, even if the complaint's allegations (that the killer used anthrax derived from a government laboratory source) were true.

The federal district court denied the motion to dismiss the negligence count (as noted above, the court granted, and plaintiff did not oppose, the motion to dismiss plaintiff's strict liability claim). The court recognized that this Court looks to the Restatement (Second) of Torts, and concluded that the Restatement, §§ 302, 302A, and 302B, can be read to impose a duty of care based on the district court's reading of the complaint to allege that the government committed "affirmative acts (ownership and handling of biohazards), which . . . give rise to a corresponding duty to protect all others exposed to any 'unreasonable risk of harm' arising out of that activity." RE 47:10. The trial court asserted that Restatement §§ 302, 302A, and 302B generally "attach to acts of *commission*, which historically generate a broader umbrella of tort liability than acts of *omission*, which are the subject of §§ 315 and 314A," on which the government principally rested its duty argument. RE 47:9. The court cited only one Florida case for this theory: *Shurben v. Dollar Rent-A-Car*, 676 So. 2d 467 (Fla. 3d DCA 1996). *See* RE 47:10; Op. 6-9.

The federal district court alternatively held that Restatement § 315 could be read to impose a duty of care to protect members of the general public against a criminal attack using biohazards such as the anthrax bacteria. The court acknowledged that Restatement § 314 "recognizes a general rule of non-liability based on a failure to warn or guard against third-party misconduct (in the nonfeasance or acts of omission arena)," and that § 315 sets out "certain exceptions or 'special applications' of the rule which operate to limit its application." RE 47:12. The court conceded that "plaintiff in this case does not fit within any of the relationships specifically referenced by the Restatement at [§ 315(a)] or by existing Florida case law," RE 47:15, but nevertheless concluded that the government was under a duty to protect "the public at large which is realistically and foreseeably at risk in the event that a deadly organism or contagion is released," *id.* at 47:17. The trial court cited no Florida case law in support of that holding, and relied solely on a decision from a federal court interpreting New York law. *See id.* at 47:15-18 (citing *In re September 11 Litigation*, 280 F. Supp. 2d 279 (S.D.N.Y 2003)); Op. 9-11.

The trial court certified the order for interlocutory appeal to the Eleventh Circuit. *See* RE 58:4-8. The court characterized the question at issue as:

> "Under Florida law, does a laboratory that manufactures, grows, tests and handles ultra-hazardous viruses and germs, having a history of missing or unaccounted for samples, owe a duty of reasonable care to members of the general public to avoid an unauthorized interception and dissemination of the biohazards, either (1) under [§] 302B of the Restatement of Torts (Second), without the presence of an underlying § 315 'special relationship?' or (2) under application of § 315 of the

> Restatement, on the premise that it stands in "special relationship" with members of the general public foreseeably placed at risk of contamination in the event of an unintentional or intentional release of the biohazards?" RE 58:8.

The trial court acknowledged that such a theory "finds no precedent in American jurisprudence." *Id.* at 58:6; *see* Op. 12-13.

The trial court also explained that the Federal Bureau of Investigation (FBI) is in the midst of an extensive investigation into the anthrax attacks, in an effort to identify and charge the perpetrator or perpetrators. Plaintiff seeks to litigate the very questions the FBI is currently investigating, and the court expressed concern that litigation of plaintiffs' claim could result in "possible impairment or compromise" of both the ongoing investigation and the "sensitive national security interests" that are also present in this case, which involves allegations concerning the use of a biological agent as a weapon. *Id.* at 58:7.

3. Following briefing and argument, the Eleventh Circuit certified the question of state law to this Court. The federal appellate court reviewed the complaint's factual allegations and the procedural history of the litigation. *See* Op. 3-13. The court described the "central issue" as "what duties exist under Florida law to protect members of the general public where an organization creates a significant risk by using anthrax or another ultra-hazardous material." Op. 16.

The federal court acknowledged that "Florida case law . . . fails to fit neatly into the complex factual pattern at hand." *Id.* The court offered two hypothetical questions that it apparently viewed as unprecedented -- asking whether a gun store

owner, accused of negligence for leaving a "door unlocked at night, knowing that guns had been stolen in the past," should be "free from liability if an unknown third party was killed by a criminal using one of the stolen guns," and whether a construction company should be liable "if an unknown third party used [dynamite stolen from the company] to blow up a building." Op. 16.

In the absence of controlling state-court precedent, the federal appellate court certified the state-law question (set forth above) to this Court.

SUMMARY OF ARGUMENT

Plaintiff's theory of liability, if accepted, would vastly expand the scope of Florida negligence law, subjecting a research laboratory (whether private or governmental) to potential liability if any substance from the facility is later used as a weapon in a criminal attack. The courts of this state have repeatedly rejected similar claims concerning vehicles and firearms. Plaintiff's claim in this case should likewise be rejected.

Like nearly every other state, Florida law requires a showing that a defendant in a negligence action owed a duty of care to protect the victim. And, following the "special relationship" rule of the Restatement (Second) of Torts, this Court and others in Florida have recognized that there is no duty to protect a stranger from a criminal attack by another stranger. That fundamental principle controls this case, and the Court should reaffirm the many decisions that conclude there is no duty in such a circumstance.

Plaintiff concedes that there is no special relationship here, either between the United States and Mr. Stevens, or between the government and the killer. There is thus no basis for applying any of the established exceptions to the no-duty rule. Instead of trying to come within those exceptions, plaintiff tries to escape the effect of the no-duty rule by limiting its scope. But none of plaintiff's arguments withstands scrutiny.

In the context of third-party criminal conduct addressed by Restatement §§ 314-320, mere foreseeability is not enough to establish a duty of care supporting a negligence claim. Foreseeability may determine the extent of a duty where third-party criminal conduct is not involved, but only a special relationship with either the victim or the criminal can give rise to a duty to prevent third-party criminal conduct. In effect, under § 315's no-duty rule, third-party criminal conduct harming a stranger is unforeseeable as a matter of law, because the existence of a duty turns on the nature of the relationship between the defendant and the victim or the criminal, rather than the factual foreseeability of the criminal conduct.

Neither the Restatement nor the jurisprudence of the Florida courts supports plaintiff's suggestion that the no-duty rule is limited to allegations of actions, rather than omissions. The distinction is legally untenable in cases like this one, as demonstrated by plaintiff's complaint, which by its terms alleges omissions (failures to act), although the federal district court apparently read it otherwise. As this case demonstrates, plaintiff's argument would allow easy evasion of the no-duty rule.

Nor can the no-duty rule's exception for a special relationship be squared with liability based on an undifferentiated duty to the general public. The government laboratory had no relationship with Mr. Stevens. Imposing a duty here thus would not be a modest expansion of the relationships deemed "special," but rather a fundamental abrogation of the requirement of a special relationship in favor of an unabashed regime of duties owed by all to all. But this Court has rejected such a massive expansion of negligence actions.

The only authority that supports plaintiff's argument comes from case law that developed the jurisprudence of strict liability. But this case raises solely a negligence claim, and this Court should reject plaintiff's efforts to blur the line between the two causes of action, especially as plaintiff has acknowledged that Congress has not permitted strict liability claims to be brought against the United States.

STANDARD OF REVIEW

This Court undertakes a de novo review of the purely legal question presented here: "It is a question of law whether any duty in tort exists." *Robert-Blier v. Statewide Enters., Inc.*, 890 So. 2d 522, 523 (Fla. 4th DCA 2005).

ARGUMENT

I. FLORIDA LAW IMPOSES NO DUTY TO PROTECT A STRANGER FROM A THIRD PARTY'S CRIMINAL CONDUCT.

This Court, like the courts of virtually every other state, requires that a negligence plaintiff must prove that the defendant owed a duty to protect the victim from harm, in addition to proving that the defendant breached that duty by behaving

negligently and that the victim's injuries were proximately caused by that breach. One of the four traditional elements of "a cause of action based on negligence" is "'[a] duty, or obligation recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks.'" *Clay Electric Cooperative, Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003) (quoting Prosser and Keeton on the Law of Torts 164-165 (W. Page Keeton ed., 5th ed. 1984)). The duty element must be established as a threshold matter: "A threshold issue in negligence is whether defendant owed any duty to the plaintiff." *Robert-Blier*, 890 So. 2d at 523.

A. There Is No Duty To Protect A Third Party From A Criminal Attack By A Stranger.

In this case, Mr. Stevens' death was directly caused not by the alleged negligence of the Army laboratory, but by the criminal conduct of a third party who allegedly obtained anthrax originating at some point with the laboratory and who then mailed anthrax to Mr. Stevens' employer. In those circumstances, the courts of this state have recognized that a defendant "generally has no duty to take precautions to protect another against criminal acts of third parties." *Gross v. Family Servs. Agency, Inc.*, 716 So. 2d 337, 338 (Fla. 4th DCA 1998), *aff'd sub nom. Nova Southeastern Univ., Inc. v. Gross*, 758 So. 2d 86, 90 (Fla. 2000), quoted in *T.W. v. Regal Trace, Ltd.*, 908 So. 2d 499, 503 (Fla. 4th DCA 2005). "Florida courts have long been loath[] to impose liability based on a defendant's failure to control the conduct of a third party." *Boynton v. Burglass*, 590 So. 2d 446, 448 (Fla. 3d DCA 1991) (en banc)

(citing, *e.g.*, *Bankston v. Brennan,* 507 So. 2d 1385 (Fla.1987) (social host not liable for serving alcoholic beverages to individual who then injures another); *see also, e.g.*, *Michael & Philip, Inc. v. Sierra*, 776 So. 2d 294, 297 (Fla. 4th DCA 2000) ("The general rule under common law is that there is no duty to prevent the misconduct of third persons."), *review denied*, 792 So. 2d 1215 (Fla 2001); *Paddock v. Chacko*, 522 So. 2d 410 (Fla. 5th DCA 1988) (psychiatrist had no duty to forcibly detain patient who later attempted to commit suicide), *review denied*, 553 So. 2d 168 (Fla. 1989); *Vic Potamkin Chevrolet, Inc. v. Horne*, 505 So. 2d 560 (Fla. 3d DCA 1987) (automobile dealer not liable for buyer's negligent driving once ownership of automobile transferred to buyer), *approved*, 533 So. 2d 261 (Fla. 1988)).

The Restatement (Second) of Torts articulates this principle in § 315: "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless" the defendant has a special relationship with either the victim or the third-party attacker. And this Court has articulated, as one of "the basic principles" of Florida law, the doctrine that "there is no common law duty to prevent the misconduct of third persons." *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985) (citing Restatement § 315). A Florida appellate court recently reiterated this principle. Family members of a victim of gun violence sued the distributor of the firearm used in the crime. The Fourth District Court of Appeal pointed out that "there is no duty to prevent the misconduct of a third party absent a special relationship." *Grunow v. Valor Corp.*, 904 So. 2d 551, 555 (Fla. 4th DCA), *review denied*, 918 So. 2d 292 (Fla. 2005).

That well-established principle controls here. Plaintiff does not dispute that Mr. Stevens was killed in a criminal attack by an unknown assailant. And plaintiff points to no special relationship that would give rise to a duty to protect Mr. Stevens.

B. Plaintiff Does Not Come Within The Exceptions To The No-Duty Rule.

The only recognized exceptions to the no-duty rule turn on the existence of a "special relation[ship]" between the defendant and either the criminal actor or the victim. Florida courts have recognized two categories of exceptions, as stated in Restatement § 315(a)-(b):

> "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection." Restatement (Second) of Torts, § 315, quoted in, *e.g.*, *Garrison Retirement Home Corp. v. Hancock*, 484 So. 2d 1257, 1261 (Fla. 4th DCA 1985).

The Restatement is clear: In the absence of such a "special relation" there is "no duty," and thus no action in negligence.

Restatement § 315(b) describes a category of special relationships between a defendant and the plaintiff (or decedent), which create a duty of protection owed directly to a victim. A small number of specific, formal relationships give rise to such duties, including a common carrier to its passengers, an innkeeper to his guests, a landowner to her invitees, and a public custodian (such as a prison or hospital) to

those in its custody or care. *See* Restatement § 314A; *Kaisner v. Kolb*, 543 So. 2d 732, 734-735 (Fla. 1989) (police owed duty to motorist detained or otherwise in custody when vehicle ordered to stop on roadside). Otherwise, such a relationship will be found only if the defendant affirmatively "undertake[s] the responsibility to protect" the victim. *Ochran v. United States*, 273 F.3d 1315, 1318 (11th Cir. 2001); *see also* Restatement § 320.

The federal appellate court here observed that "Florida courts have expanded the categories of 'special relationships' for purposes of liability beyond those few listed as examples in § 314A of the Restatement." Op. 9. But those cases -- finding that a school owes a duty of care to students in some circumstances -- do not support finding such a special relationship here. *See Nova Southeastern Univ., Inc. v. Gross*, 758 So. 2d 86, 90 (Fla. 2000); *Rupp v. Bryant*, 417 So. 2d 658, 667 (Fla. 1982), cited in Op. 10. Mr. Stevens had *no* relationship with the federal government, let alone with the Army laboratory whose conduct is at issue in this case. The trial court acknowledged as much, conceding that "there is no 'special relationship' between the parties that independently imposes a duty to warn or guard against [the alleged] misconduct." RE 47:10-11.

The Restatement also recognizes, in § 315(a), that a defendant may have a special relationship with a perpetrator of a crime (or an intentional tortfeasor), when the defendant has the right and ability to control the conduct of the wrongdoer. For example, a parent and a minor child may have such a relationship, and the parent is obliged to exercise reasonable care to control the child when able to do so, thereby

protecting others from the foreseeable intentional conduct -- even criminal conduct -- of the child. *See* Restatement § 316. Other examples exist, including, in some circumstances, an employer and his employee, but they are narrowly confined, as Florida courts have emphasized. *See, e.g., Garrison Retirement Home Corp. v. Hancock*, 484 So. 2d 1257, 1261 (Fla. 4th DCA 1985) ("The special relations referred to in [§ 315(a)] are parent-child, master-servant, land possessor and custodian of a person with dangerous propensities.") (citing Restatement §§ 316-319). A duty does not arise out of a special relationship unless the defendant has an extensive ability to control the perpetrator's conduct. *See*, *e.g.*, *Lott v. Goodkind*, 867 So. 2d 407 (Fla. 3d DCA 2003) (per curiam) (control must be tantamount to custody over perpetrator to give rise to a duty from a special relationship); *Aguila v. Hilton, Inc.*, 878 So. 2d 392, 396 (Fla. 1st DCA), *review denied*, 891 So. 2d 549 (Fla. 2004); *Lighthouse Mission of Orlando, Inc. v. Estate of McGowen*, 683 So. 2d 1086, 1088-1089 (Fla. 5th DCA 1996) (halfway house had no duty to protect 11-year-old neighbor from rape and murder by halfway house resident who was a convicted child molester, because halfway house did not stand in a special relationship with either the victim or the perpetrator, who was only a tenant and "was not in the custody or control of" the halfway house operator), *review denied*, 697 So. 2d 510 (Fla. 1997); *Boynton*, 590 So. 2d at 449. Plaintiff here has not alleged any such special relationship between the United States and Mr. Stevens' murderer.[3]

[3] Plaintiff does not allege that the perpetrator was an employee of the federal government, and such a claim would be barred by the FTCA as a "claim arising out of

C. Foreseeability Alone Does Not Create A Duty To Prevent Third-Party Criminal Conduct.

Plaintiff has sought to avoid the no-duty rule in § 315 by suggesting that a duty can be found by asking whether Mr. Stevens' murder was foreseeable. The law is clear, however, both in the Restatement and in Florida case law, that foreseeability by itself cannot establish a duty where third-party criminal conduct is involved.

To be sure, foreseeability is often a relevant inquiry in determining whether a duty should be imposed. This Court has explained that "[t]he duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others." *McCain v. Florida Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992). But *McCain* did not involve a third-party's criminal conduct, and Florida courts unanimously recognize that foreseeability by itself is not enough to find a duty in the context of third-party criminal conduct.

"[A] legal duty is not established by evidence of foreseeability alone." *Aguila*, 878 So. 2d at 396. In *Aguila,* the court held that a motel owed no duty to an individual who died in a collision with an intoxicated driver, who had been ordered to leave a motel room by a security guard. The court in that case observed "there is no relationship between the defendant and the plaintiff" that would support imposition of a duty under Florida law. *Aguila,* 878 So. 2d at 397; *see also id.* at 399 ("In the absence of a special relationship, the fact that a defendant realizes or should realize

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assault, battery," or other intentional torts. 28 U.S.C. § 2680(h).

that an action on his or her part is required to ensure the safety of another person does not alone create a duty to take that action.") (citing Restatement § 314). Thus, the courts have recognized that "[f]oreseeability, alone, does not define duty -- it merely determines the scope of the duty once it is determined to exist." *Grunow*, 904 So. 2d at 556.

The legal rule that a duty to prevent third-party criminal conduct turns on the existence of a special relationship rather than foreseeability makes sense because a person usually has no reason to anticipate that a third party will intentionally take advantage of one person's conduct to harm another. That is particularly so when the intentional conduct is a crime, "since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law." *See* Restatement (Second) of Torts § 302B, cmt. d; *see also Trespalacios v. Valor Corp.*, 486 So. 2d 649, 651 (Fla. 3d DCA 1986) (manufacturers and distributors of firearms have no "duty to prevent the sale of handguns to persons who are likely to cause harm to the public"). Criminal conduct is thus different from mere negligence, or the actions of children. *Cf.* Op. 8 (citing Restatement (Second) of Torts, § 302B, cmt. c, in which children unknowingly cause injury with dynamite).

Restatement §§ 314-320 make clear that foreseeability alone is not sufficient to establish a duty to prevent a third-party's tortious conduct, absent a special relationship. The two exceptions to § 315's no-duty rule are for (a) special relationships of control, and (b) special relationships of protection; there is no third exception triggered merely by foreseeability. Accordingly, foreseeability of third-

party criminal conduct is irrelevant where no special relationship exists. Put differently, third-party criminal conduct harming a stranger is in effect unforeseeable as a matter of law. Thus, plaintiff cannot avoid the no-duty rule by asserting that a criminal attack was foreseeable.[4]

D. Florida Courts Have Applied The No-Duty Rule In Analogous Cases.

The decisions of Florida courts make clear that an owner, seller, or manufacturer of such potential weapons as guns or motor vehicles is not liable in negligence for a subsequent criminal attack by an unrelated third party. There is no dearth of cases in this state (and others) in which victims of gun attacks seek to impose tort liability on sellers or prior owners of the weapons. Florida courts have

[4] In any event, plaintiff's assertion of foreseeability in the circumstances alleged here defies credence. Plaintiff does not allege any prior civilian attack using anthrax as a weapon. And even if plaintiff could make allegations of prior attacks, courts have refused to find a duty to prevent an attack absent a special relationship. *See Gaines-Tabb v. ICI Explosives USA, Inc.*, 995 F. Supp. 1304, 1316-1318 (W.D. Okla. 1996). In *Gaines-Tabb*, the court considered allegations of prior terrorist attacks using the fertilizer ammonium nitrate (*id.* at 1310 n.6), but nevertheless concluded that "Defendant had no duty to anticipate and guard against the intentional and criminal misconduct of others and specifically that of the person or persons whose acts caused the injuries of which Plaintiffs complain." *Id.* at 1318.

consistently refused to recognize such claims. *See*, *e.g.*, *Grunow*, 904 So. 2d 551 (no duty because no special relationship between wholesale distributor of gun and victim or attacker); *Keenan v. Oshman Sporting Goods, Co.*, 629 So. 2d 210 (Fla. 5th DCA 1993) (per curiam) (affirming summary judgment that Florida law imposed no duty on store to prevent theft of guns from defective display case); *id.* at 210-211 (Dausch, J., dissenting) (dissenting and unsuccessfully urging position that "all sellers of handguns owe an extraordinary duty to the public at large to prevent the theft of their wares"); *Trespalacios v. Valor Corp. of Florida*, 486 So. 2d 649, 651 (Fla. 3d DCA 1986) (dismissing claims against distributor and manufacturer of "riot and assault" rifle used to commit murder because "neither the manufacturer or the distributor had a duty to prevent the sale of handguns to persons likely to cause harm to the public"); *Mathis v. American Fire & Cas. Co.*, 505 So. 2d 652 (Fla. 2d DCA 1987) (husband is not liable to shooting victim when he accidently leaves gun in glove compartment of automobile and wife uses gun to shoot third party).

Florida courts have imposed analogous limitations on claims involving vehicles. Even though Florida law imposes strict liability on a motor vehicle owner for tortious injuries to a third party caused by a thief subsequently operating the vehicle *negligently*, "when a vehicle is used in a weapon-like manner with the intent to inflict physical injury, imputed liability under the doctrine ends." *Burch v. Sun State Ford*, 864 So. 2d 466, 472 (Fla. 5th DCA), *review dismissed*, 889 So. 2d 778 (Fla. 2004). Thus, although Florida law has long held that automobiles are dangerous instrumentalities, this state's courts have recognized that the no-duty rule precludes

liability for a criminal attack by a third-party using a dangerous instrumentality *as a weapon*, as in this case.

The federal appellate court here stated that "Florida law does not appear to have addressed and decided" the hypothetical questions posed in its opinion, concerning the liability of a gun store owner or a construction company. Op. 17. But cases such as *Grunow* and *Keenan* demonstrate that Florida courts have addressed those questions concretely, and have concluded that the no-duty rule applies, absent a special relationship. This Court should reaffirm those principles of Florida law.

II. PLAINTIFF CANNOT AVOID THE NO-DUTY RULE.

Plaintiff has not alleged any relationship between the United States and Mr. Stevens or his murderer that would come within the terms of the Restatement and permit an exception to the no-duty rule in § 315. In the absence of such a special relationship, the federal district court instead suggested two possible theories that would avoid the no-duty rule. First, the court limited the scope of § 315's no-duty rule to allegations of failure to act -- omissions rather than affirmative conduct. Under that dichotomous approach, questions of duty with respect to allegations of negligence by affirmative acts would be controlled instead by Restatement §§ 302, 302A, and 302B. *See* Op. 7-9; RE 47:8-12. Alternatively, the court held that plaintiff could show a duty of care owed by a laboratory toward "the general public." Op. 11; RE 47:17. This latter theory was based, not on Florida law, but on a case decided under the law of New York, concluding that a defendant can be deemed to owe a duty of care to a victim on the theory that the defendant was "in the best position to provide reasonable

protection against" the criminal attack. Op. 11 (citing *In re September 11 Litigation*, 280 F. Supp. 2d 279 (S.D.N.Y. 2003)); *see also* RE 47:16-18.

Neither of those approaches finds support in the law of Florida, and this Court should reject them.

A. The Act/Omission Distinction Does Not Avail Plaintiff.

1. The federal district court sought to distinguish between "acts of *commission*, which historically generate a broader umbrella of tort liability than acts of *omission*." RE 47:9. The distinction by itself is unremarkable, but the court went further, first ascribing to the Restatement an intention to subject the two categories to separate regimes of duty, then interpreting plaintiff's complaint in this case to allege affirmative acts rather than mere omissions. That decision was wrong on both counts.

The court concluded that "acts of commission" are subject to the "duties described" in Restatement §§ 302, 302A, and 302B, while "acts of omission . . . are the subject of §§ 315 and 314A." RE 47:9. But neither the text of, nor the commentary to, the Restatement supports the dichotomy between acts and omissions. The decisions of Florida courts likewise do not adopt such a distinction.

Restatement §§ 302, 302A, and 302B make plain that they are not intended to address questions of duty at all, let alone to support a distinction in the types of duty applicable as between acts and omissions. "This Section is concerned only with the negligent character of the actor's conduct, and *not with his duty to avoid the unreasonable risk*." Restatement § 302, cmt. a (emphasis added). Thus, the federal district court fundamentally erred in ascribing to §§ 302, 302A, and 302B the role of

"describ[ing]" tort "duties." RE 47:9. Remarkably, the trial court twice quoted that comment, including the sentence quoted above, *see* RE 47:10, 58:2, but failed to recognize that the comment plainly states that § 302 has no role in the duty inquiry.

Moreover, Restatement § 302 by its express terms refers to "[a] negligent *act or omission*." Restatement (Second) of Torts § 302 (1965) (emphasis added); *see* also *id.* § 314, cmt. b (§ 314's reference to an actor "includes, therefore, one whose conduct consists of failure to act as well as one who does act"); *id.* § 315, cmt. a ("The rule stated in this Section is a special application of the general rule stated in § 314."). Thus, the Restatement cannot be said to prescribe different rules governing the determination of duty depending on whether the alleged negligence took the form of acts or omissions.

The decisions of Florida courts likewise do not support the federal district court's approach. That court cited only one Florida case in its discussion of the Restatement. *See* RE 47:10-11 (citing *Shurben v. Dollar Rent-A-Car*, 676 So. 2d 467 (Fla. 3d DCA 1996)). But the trial court's conclusion misreads *Shurben*, and has been specifically rejected by a more recent Florida appellate court decision. *See K.M. ex rel. D.M. v. Publix Super Markets, Inc.*, 895 So. 2d 1114 (Fla. 4th DCA 2005). *K.M.* clarified that the sole avenue for imposing a duty under Florida law to prevent third-party criminal conduct is found in Restatement § 315; the court in *K.M.* expressly rejected the notion (relied on by the trial court here) that *Shurben* can be read to rely instead on § 302B. *See K.M.*, 895 So. 2d at 1116 ("K.M. contends that this case falls under section 302B . . .. However, the section 302B negligence standard applies only

if the actor is under a duty to avoid the unreasonable risk."); *id.* at 1118 ("When this court has recognized a duty to take precautions against the criminal acts of third parties, it has required the existence of a 'special relationship.'") (citing *Gross*, 716 So. 2d at 339).

The court in *K.M.* emphasized that "[t]he special relationship test is a limitation on the scope of one's liability for the intentional acts of third parties." 895 So. 2d at 1119. And that case reaffirmed the general rule that a party has no legal duty to "prevent the misconduct of third persons." *Id.* at 1117 (quoting *Michael & Philip*, 776 So. 2d at 297). Contrary to the trial court's reliance here on *Shurben* as an *exception* to the § 315 requirement of a special relationship, the *K.M.* court explained that *Shurben*'s finding of a duty was instead based on the existence of a special relationship. *See K.M.*, 895 So. 2d at 1118-1119 ("that case demonstrated a special relationship between the plaintiff and the defendant that does not exist in this case"; "The special relationship in *Shurben* was the customer-rental agency relationship."). *K.M.* leaves no doubt that the trial court's decision here is inconsistent with Florida law.

The federal court of appeals apparently would disregard *K.M.*'s reading of *Shurben*, noting that "[t]he court in *Shurben* . . . relied on § 302B of the Restatement in reaching its decision, not § 315." Op. 8-9 n.5. But that begs the very question whether those two provisions of the Restatement are intended to govern the duty inquiry in separate categories of acts and omissions. As we have shown above, the text and commentary of the Restatement refute such a distinction. And *Shurben*'s

citation to § 302B therefore does not preclude a reading of that decision as consistent with the no-duty rule in § 315. Nor is it significant for this purpose that *Shurben* did not expressly state "that the decision rested on the existence of such a [special] relationship." Op. 9. *K.M.* correctly interprets and reconciles *Shurben* with the body of Florida tort law. As we have explained, *Shurben* does not support the distinction between acts and omissions.

There is good reason that neither the Restatement nor this state's case law supports the distinction relied on by the federal district court. The proffered distinction between acts and omissions does not offer any clear demarcation and would thus frustrate the courts' obligation to provide reasoned decision-making. Plaintiffs can readily recast most claims to characterize a defendant's negligence as involving an affirmative act. The federal court's approach is thus a roadmap for evasion of the no-duty rule in § 315. Nor would such a distinction advance the policies of Florida tort law.

The malleable distinction between acts and omissions demonstrates the inadequacy of such an approach. *See, e.g.*, *White v. Rochford*, 592 F.2d 381, 384 (7th Cir. 1979) (referring to "the tenuous metaphysical construct which differentiates sins of omission and commission"). This Court has elsewhere recognized that such distinctions are unworkable: "In theory, the difference between misfeasance and nonfeasance, action and inaction is quite simple and obvious; however, in practice it is not always easy to draw the line and determine whether conduct is active or passive." *Johnson v. Davis*, 480 So. 2d 625, 628 (Fla. 1985).

That concern is particularly apparent here: the complaint itself describes the government's alleged negligence by asserting that "the Defendant failed to" take certain steps that plaintiff asserts were required -- *i.e.*, omitted to act. RE 1:6-7. By the complaint's own terms, this case turns on allegations of negligence by *omission* or failure to act. But the trial court concluded that the complaint could be read instead to "effectively allege[] the commission of affirmative acts (ownership and handling of biohazards)." *Id.* at 47:10. The purported distinction between acts and omissions should be rejected not only because it is unsustainable in legal and logical terms, but also because it simply does not apply to the allegations in plaintiff's own complaint in this case.

2. Nor is there any exception to, or alteration of, the duty element merely because plaintiff here alleged that samples of anthrax had gone missing or been stolen in the past from the Army laboratory. The question certified by the federal appellate court refers to those allegations. *See* Op. 17. It is unclear whether those allegations remain in the case at this stage, but they are in any event irrelevant to the duty inquiry.[5]

[5] Plaintiff alleged such losses, some nine years before the attack on Mr. Stevens, in the strict liability count of her complaint, *see* RE 1:3, which was dismissed after plaintiff conceded that the FTCA did not waive the sovereign immunity of the United States from strict liability claims.

As this Court has recognized, the duty element is distinct from the separate inquiries into whether conduct was negligent and whether that negligence was the proximate cause of injury to plaintiff. *See, e.g.*, *Clay Electric*, 873 So. 2d at 1185. As we have explained, mere foreseeability (absent a special relationship) cannot create a duty to prevent a third-party criminal attack on a stranger. Nor do allegations of negligence create such a duty, unless there is a special relationship. It is therefore irrelevant to the legal inquiry into duty whether earlier events could have created the kind of factual foreseeability plaintiff apparently seeks to describe. In any event, the intervening actions of a criminal attacker are not generally foreseeable, as a matter of law, and mere allegations of negligence do not alter that principle. *See, e.g.*, *Grunow*, 904 So. 2d at 556 ("Further, we do not find Brazill's criminal conduct to be a foreseeable event which Valor should have expected.")

Finally, as we explain below, there is no identifiable class of potential victims from such an attack. Even the federal courts expressly acknowledge that any duty that could be potentially relevant to plaintiff's claims here would necessarily be owed to the general public as a whole. *See* Op. 17; RE 47:15. But Florida tort law does not create such an immense duty to all.

B. There Is No Duty To The General Public.

1. The federal trial court alternatively suggested that the "special relation[ship]" required by Restatement § 315 need not be special at all, and need not even be an identifiable relationship. Under that view, plaintiff's claim is based on a laboratory's alleged breach of a duty of care to protect the public as a whole. That

conclusion is unsustainable in light of the clear holdings of this Court and the intermediate Florida appellate courts, rejecting the notion of an undifferentiated duty to all, and also rejecting the kind of freewheeling policy determinations of risk allocation that led a federal court to conclude that New York law would allow such an expansive conception of duty in tort.

The federal district court acknowledged that Restatement § 314 "recognizes a general rule of non-liability based on a failure to warn or guard against third-party misconduct,"[6] and that § 315 sets out "certain exceptions or 'special applications' of the rule which operate to limit its application." RE 47:12. The court likewise acknowledged that "plaintiff in this case does not fit within any of the relationships specifically referenced by the Restatement at [§ 315(a)] or by existing Florida case law," but nevertheless read § 315 to impose a duty of care to protect "the public at large which is realistically and foreseeably at risk in the event that a deadly organism or contagion is released." *Id.* at 47:15, 47:17. The district court cited as authority only a New York federal trial court decision. *See id.* at 47:15-18 (citing *September 11*, 280 F. Supp. 2d 279).

The trial court's holding is unsupported by Florida law, and it flies in the face of the limiting principle emphasized by the courts of Florida that a tort-law duty of care must be specific and circumscribed. Plaintiff does not dispute that Mr. Stevens was a

[6] The court added a parenthetical reference to misconduct "(in the nonfeasance or acts of omission arena)," but neither the Restatement nor Florida case law supports such a distinction between acts and omissions. *See supra*, 24-28.

complete stranger to the Army laboratory; indeed, the complaint does not allege that Mr. Stevens had any actual relationship with the federal government of any kind or degree. Mr. Stevens was, as the trial court acknowledged, simply a "member[] of the general public," RE 47:15, and the government could owe a duty of care to Mr. Stevens only if it owed a duty as well to *every* member of the public. Florida courts have resoundingly rejected the notion of an actionable duty owed to the public as a whole.

Florida law requires that a tort duty be specific -- it must be owed by the defendant to the victim in particular or to an identifiable class of individuals, not to the public at large. "A duty to all is a duty to no one." *Storm v. Town of Ponce Inlet*, 866 So. 2d 713, 715 (Fla. 5th DCA), *review denied*, 879 So. 2d 624 (Fla. 2004) (quoting *Babcock v. Mason County Fire Dist. No. 6*, 30 P.3d 1261, 1267 (Wash. 2001)); *accord*, *Ochran*, 273 F.3d at 1317 (applying Florida law in FTCA claim); *see also Vann v. Department of Corrections*, 662 So. 2d 339, 340 (Fla. 1995) (prisoner murdered victim after escaping from prison that was allegedly negligently secured; prison owed no duty to victim, because "where there is only a general duty to protect the public, there is no duty of care to an individual citizen") (quoting *Everton v. Willard*, 468 So. 2d 936, 938 (Fla. 1985)). The federal district court's decision here improperly found a "special relationship" where there is no relationship at all.

The only case law cited by the trial court in its discussion of Restatement § 315 was *September 11*, 280 F. Supp. 2d 279, which concluded that airlines owed a duty of care to protect people and property on the ground from the effects of hijackers'

crashing planes. But that decision is contrary to settled Florida law. The *September 11* decision found a tort duty by asking and answering different questions than those posed by Florida law. The *September 11* court did not mention § 315 or the "special relationship" doctrine; Florida's courts, however, have expressly adopted § 315 and have adhered to the rule that there is no duty to prevent third-party misconduct absent a special relationship.

The *September 11* court found a duty of care to ground victims, not by holding that the aviation defendants had a special relationship of protection with the ground victims (as required by § 315 under Florida law), but rather by invoking open-ended policy-based concepts of risk allocation that have no place in Florida law. *See September 11*, 280 F. Supp. 2d at 290 (describing "policy-laden" approach as requiring a "balancing [of] factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability"). Florida courts have rejected such an approach, holding that the legislature, not the courts, should undertake any balancing of policy considerations. *See, e.g.*, *Grunow*, 904 So. 2d at 557 ("While Grunow's proposed theory of duty may sound reasonable, the legislature is better suited and can more appropriately address this issue, which would necessarily include a societal cost/benefit analysis.").

Florida courts have refused to impose tort duties to prevent third-party misconduct, even when faced with egregious and sympathetic claims that a risk-

allocation approach might have permitted. *See, e.g., Lighthouse Mission*, 683 So. 2d 1086 (because halfway house did not stand in a special relationship with either the victim or the perpetrator, there was no duty to protect 11-year-old neighbor from rape and murder by halfway house resident who was a convicted child molester); *Grunow*, 904 So. 2d at 555 (in absence of special relationship between manufacturer and victim or perpetrator, gun manufacturer did not owe duty to teacher who was shot and killed by student).

Given the Florida courts' reluctance to expand the concept of a "special relationship" beyond the situations recognized in the Restatement, and the repeated rejection by this state's courts of a notion of a duty to all, there is no support for the trial court's conclusion that Florida law would impose a duty on the government to prevent third-party misconduct, where such a duty would have to run from the government to complete strangers located anywhere and everywhere.

2. Plaintiff has persistently described her claim in terms of the asserted "ultra-hazardous" nature of anthrax, stating in the complaint that the United States "owed a duty of care . . . based upon [the] inherently dangerous nature" of anthrax. RE 1:6. Plaintiff's use of the term "ultra-hazardous" betrays her effort to revive the strict liability claim under a negligence heading. The trial court dismissed plaintiff's original strict liability claim, and this Court should not permit plaintiff to avoid either Congress's decision not to waive sovereign immunity from strict liability claims or the strictures of Florida tort law governing negligence claims. *See, e.g., Laird v. Nelms*,

406 U.S. 797, 802 (1972) (rejecting a plaintiff's attempt to "dress[] up the substance of strict liability for ultrahazardous activities in the garments of common law trespass").

In federal court, plaintiff argued that a duty should be imposed in this negligence case because anthrax was like a dangerous animal whose release or escape resulted in strict liability in older cases such as *Loftin v. McCrainie*, 47 So. 2d 298 (Fla. 1950). Similarly, plaintiff argued that the anthrax attack should be treated like escaped hazardous material, such as a leak or spill from a factory or storage facility. *See Pensacola Gas Co. v. Pebley*, 5 So. 593 (Fla.1889); *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868). But such claims are well understood to sound in strict liability, not negligence. *See, e.g., Great Lakes Dredging and Dock Co. v. Sea Gull Operating Corp.*, 460 So. 2d 510, 512 (Fla. 3d DCA 1984) ("Florida courts have adopted the doctrine of strict liability for ultrahazardous or abnormally dangerous activity as established by *Rylands v. Fletcher*") (also citing *Pensacola Gas*). And those cases in any event did not involve third-party misconduct and thus say nothing about the question presented here -- whether a laboratory operator owes a duty of care to prevent a criminal attack by a third party on a stranger.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the negative, confirming that Florida law does not impose a duty of care to prevent a third-party's criminal attack on a stranger.

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 1st day of August, 2007, served two copies of the foregoing Brief For Appellant The United States of America, by sending them by First Class Mail, postage prepaid, to counsel listed below.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.210(a)(2), I hereby certify that the foregoing Brief for Appellant the United States of America complies with the font requirements of Fla. R. App. P. 9.210(a)(2),

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