Case Nos. 12-5226/5582

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CORNELIUS DEMORRIS BLEWETT (12-5226)

and JARREOUS JAMONE BLEWITT (12-5582),

Defendants-Appellants,

On Appeal from the United States District Court
For the Western District of Kentucky

BRIEF *AMICUS CURIAE*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, *Amicus Curiae*, National Association of Criminal Defense Lawyers ("NACDL") makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation?

   No. NACDL is a not-for-profit professional association. It is not a publicly held company; does not have any parent corporation; and does not issue or have any stock.

2. Is there a publicly-owned corporation, not a party to the appeal, which has a financial interest in the outcome?

   No.

Dated: June 28, 2012

/s/ Douglas A. Berman
Attorney for *Amicus Curiae*

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL files numerous amicus briefs each year in the United States Supreme Court and other courts, in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In particular, NACDL has a long-standing institutional commitment to rational and humane sentencing practices that affirm the dignity of the individual, and files amicus briefs in cases which directly implicate those concerns.

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[1] All parties have consented to the filing of NACDL's brief as *amicus curiae* in support of the Appellants. Pursuant to Fed. R. App. P. 29(c)(5), counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

I. The Eighth Amendment prohibits excessive purposeless punishments now rejected in American laws and practices, as are pre-FSA crack sentences.

Though sentenced years ago, those serving lengthy prison terms based on the now-repealed 100-1 crack/powder cocaine sentencing scheme still have enforceable Eighth Amendment rights. As the Supreme Court stressed recently, "[p]risoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment." *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011). And the "Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions." *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012).

Because the Eighth Amendment's limit on excessive sanctions reflects "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), punishments once deemed proper and constitutional can later become unconstitutional due to social evolutions reflected in changed laws and practices. *See Roper v. Simmons*, 543 U.S. 551 (2005) (declaring unconstitutional execution of juvenile murderer, reversing contrary earlier Eighth Amendment holding, based on "the trend toward abolition of the juvenile death penalty"); *Atkins v. Virginia*, 536 U.S. 304 (2002) (declaring unconstitutional execution of mentally retarded murderer, reversing contrary

earlier Eighth Amendment holding, based on recent legislative activity and "consistency of the direction of change"). Consequently, this Court must judge whether the Blewetts' punishment may be excessive and unconstitutional "not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted [or when the 100-1 crack sentencing scheme was created in 1986], but rather ***by those that currently prevail***." *Atkins*, 536 U.S. at 311 (emphasis added).[2]

Due to evolution of societal and legal standards as evidenced by currently prevailing sentencing laws and practices at both the federal and state level – especially concerning the widely-discredited view that punishment for a small quantity of crack should be as severe as punishment for 100 times more powder

[2] Enforcing the Constitution's limit on excessive punishment is, of course, a critical judicial responsibility: the Framers included the Eighth Amendment in the Bill of Rights to ensure judges would serve as an integral check and final safeguard against government efforts to prosecute oppressively and to punish excessively. *See, e.g.*, *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010) (stressing Eighth Amendment requires a court to "determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution"); *Stanford v. Kentucky*, 492 U.S. 361, 382 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (stating courts have "a constitutional obligation ... to judge whether the nexus between the punishment imposed and the defendant's blameworthiness is proportional"); *see also Plata*, 131 S. Ct. at 1928 (explaining that "courts have a responsibility to remedy … [an] Eighth Amendment violation" when other government officials fail to act); Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 Iowa L. Rev. 69, 100-110 (2012) (setting forth detailed historical account of the Framers view of the Eighth Amendment as a "constraint on the federal government's power to punish").

cocaine – it is clear beyond doubt that now "there is a national consensus against the sentencing practice at issue" in this case. *Graham*, 130 S. Ct. at 2022. Consequently, this Court should recognize that at least some pre-FSA crack sentences may be unconstitutional and that a refusal to permit modification of these sentences pursuant to 18 U.S.C. § 3582(c)(2) could result in significant and enduring Eighth Amendment violations.

A. Society's standards reflected in modern legislation and practices demonstrate a national consensus against pre-FSA crack sentences.

In the constitutional evaluation of punishments, courts are to be "guided by objective indicia of society's standards, as expressed in legislative enactments and state practice," as well as an "understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose." *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008). Moreover, the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins*, 536 U.S. at 311-13; *see also Miller*, 132 S. Ct. at 2463 (Roberts, C.J., dissenting) (stressing importance of legislative enactments as "tangible evidence of societal standards … to determine whether there is a 'consensus against' a given sentencing practice"). As detailed below, the tangible objective evidence of societal standards reflected in the laws and practices of both federal and state criminal justice systems demonstrates a clear and unmistakable

consensus against disproportionately lengthy pre-FSA prison sentences imposed on those convicted of offenses involving small quantities of crack cocaine.

1. The federal sentencing system. Through passage of the Fair Sentencing Act of 2010 (FSA), Congress significantly reduced the sentences mandated and recommended for all crack offenses (1) by raising by over 500% the quantity of crack triggering five- and ten-year minimum sentences, and (2) by ordering the U.S. Sentencing Commission to reduce all crack guideline sentences through emergency amendments to be promulgated "as soon as practicable." *See* Sections 2 & 8 of FSA. As the Supreme Court has explained, this landmark legislation reflected Congress' formal response to "the Commission and others in the law enforcement community strongly criticiz[ing] Congress' decision to set" crack sentences so high relative to powder cocaine sentences and Congress having "specifically found in the Fair Sentencing Act that [each pre-FSA crack] sentence was unfairly long." *Dorsey v. United States*, 132 S. Ct. 2321, 2328, 2333 (2012). In other words, passage of the FSA is a clear, bold and unmistakable legislative statement by our nation's representatives that pre-FSA crack sentences were unnecessarily severe, unfair and excessively long.[3]

[3] The FSA's across-the-board sentence reductions are special proof of societal views on the excessive severity of pre-FSA crack prison terms in light of: (1) "the overwhelming bipartisan support" for the FSA, as noted by Rep. Hoyer of Maryland, because "whatever their opinions on drug policies, members of law enforcement, community advocates, and Members of Congress overwhelmingly

While the text of the FSA provides the clearest objective evidence of the national consensus against the extreme pre-FSA crack sentencing provisions, federal practices, reflected in the work of other branches both before and after the FSA's passage, confirm that the now-repealed 100-1 crack/powder cocaine sentencing scheme has long been rejected by all significant federal sentencing decision-makers. This reality is evidenced most prominently by:

- the 2007 U.S. Sentencing Commission report on cocaine sentencing stressing that "cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups." U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* at 2 (May 2007);

- the 2009 U.S. Department of Justice official statement at a Senate hearing in which the Assistant Attorney General urged "completely eliminat[ing] the sentencing disparity between crack and powder cocaine" by reducing crack penalties to equal powder cocaine penalties. Statement of Lanny A. Breuer, Assistant Attorney General, U.S. Department of Justice, Before the U.S. Senate Committee on the Judiciary, Subcommittee on Crime and Drugs at 10-11 (Apr. 29, 2009);

- the 2011 U.S. Sentencing Commission decision to make the new reduced crack guidelines promulgated in response to the FSA retroactively applicable to all previously sentenced crack defendants ***and*** the absence

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support" changing crack sentencing, 156 Cong. Rec. H6196-01, H6203 (2012); and (2) the reality that, as documented by Families Against Mandatory Minimums (FAMM), nearly all modern statutory reforms increase sentences and Congress has "created, increased, or expanded" mandatory minimum sentences over 200 times between 1987 and 2012. *FAMM Report* (Aug. 6, 2012), *at* http://www.famm.org/Repository/Files/Chart%20Fed%20MMs%20by%20Number%20Passed%20Per%20Yr%208.6.12.pdf.

of any congressional opposition to this decision. *See* U.S.S.C. Guidelines Amendment 759 (June 2011).

- the decisions by hundreds of federal judges in many thousands of cases to use their statutory discretion under 18 U.S.C. § 3582(c)(2) to reduce final sentences previously imposed under the pre-FSA crack guidelines. *See* U.S. Sentencing Commission, *Preliminary Crack Retroactivity Data Report on the Fair Sentencing Act* (April 2013).

It is not merely notable, but of great constitutional import, that virtually every federal criminal justice actor has in virtually every possible way acted in the last half-decade to demonstrate and vindicate the consensus view that pre-FSA crack sentences were excessively long. Significantly, in recent Eighth Amendment cases such as *Miller* and *Graham* and *Kennedy* and *Roper* and *Atkins*, the Supreme Court found unconstitutional extreme sentences that were still being *vigorously defended* by the jurisdictions which imposed them. Here, in sharp contrast, not only have the pre-FSA crack sentences imposed on the Blewetts been repealed by Congress, it is near impossible to find a single modern federal criminal justice decision-maker who will voice any substantive defense of the pre-FSA 100-1 crack sentencing structure.

2. State sentencing systems. Though the evidence marshaled above concerning the actions and views of federal actors demonstrates a national consensus against pre-FSA crack sentences, state laws provide still further "objective indicia of society's standards" having categorically rejected punishment

of a small quantity of crack as severely as 100 times more powder cocaine. As the U.S. Sentencing Commission reported as of 2007:

> The overwhelming majority of states do not distinguish between powder cocaine and crack cocaine offenses. Only 13 states have some form of distinction between crack cocaine and powder cocaine in their penalty schemes [and none have a quantity of crack punished comparably to 100 times more powder cocaine]. Iowa, the only state reported in the 2002 Commission Report as providing a 100-to-1 drug quantity ratio between powder cocaine and crack cocaine, reduced its drug quantity ratio to 10-to-1 for cocaine offenses in its statutory scheme.

U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* 98-99 (May 2007); *see also id.* at 104-07 (detailing that nearly all 13 states which make a crack/powder sentencing distinction have adopted a quantity ratio of 10 to 1 or lower).[4]

As the Supreme Court has explained, in Eighth Amendment analysis of the objective evidence of evolving standards of decency, "the number of these States [which reject the punishment at issue] is significant, [as is] the consistency of the direction of change." *Roper*, 543 U.S. at 565-66.[5] Federal defendants like the

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[4] Notably, Missouri had the largest crack/powder disparity in its sentencing laws after the FSA reduced the disparity in federal law, but in 2012 the Missouri legislature reduced state crack sentences significantly. *See* Associated Press, *Missouri Lawmakers Trim Disparity Crack, Cocaine Sentencing*, May 18, 2012.

[5] Of additional constitutional significance, state policymakers in recent years have begun to reject and reverse more broadly severe mandatory sentencing provisions for a wide range of drug offenses and drug offenders. *See* Marc Mauer & Ryan S. King, The Sentencing Project, *A 25-Year Quagmire: The "War On Drugs" and Its Impact on American Society* at 25-26 (Sept. 2007) (detailing "evolving momentum for reform" as "legislative bodies [have been] reconsidering the wisdom of

Blewetts who received long crack sentences based on the 100:1 pre-FSA sentencing ratio not only would no longer receive such excessive sentences in the federal system today, but in *every single state in the United States*, the Blewetts would not be subject an extreme sentencing structure punishing offenses involving a small quantity of crack as severely as offenses involving 100 times more powder cocaine. *Cf. Kennedy*, 554 U.S. at 426 (finding punishment excessive under the Eighth Amendment in part because defendant could not have received contested punishment "in 45 jurisdictions"); *Solem v. Helm*, 463 U.S. 277, 299-303 (1983) (finding Eighth Amendment violation when offender "has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State"); *see also* Mannheimer, *Cruel and Unusual Federal Punishments*, *supra*, 98 Iowa L. Rev. at 100-126 (explaining why the most appropriate way to "operationalize [the Framers'] view of the Cruel and Unusual Punishments Clause [is] as both a reservation of state sovereignty and as a reference to state common law on criminal punishments" so as to limit any severe federal punishment which would be excessive in reference to state sentencing laws and norms).

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mandatory sentencing laws" for drug offenses); Families Against Mandatory Minimums, *Recent State-Level Reforms to Mandatory Minimum Laws*, *at* http://www.famm.org/state.aspx (last updated Feb. 2013) (listing 19 states having significantly reformed mandatory minimum sentencing laws in recent years).

Because the Eighth Amendment "guarantees individuals the right not to be subjected to excessive sanctions," *Miller*, 132 S. Ct. at 2463, and because it is clear beyond any doubt that now "there is a national consensus against the sentencing practice at issue" in this case, *Graham*, 130 S. Ct. at 2022, this Court should recognize that at least some pre-FSA crack sentences may be unconstitutional. (As explained *infra* Part II, this Court need not (though certainly could) in this case issue a broad ruling declaring all pre-FSA crack sentences to be unconstitutional; this Court could opt just to revise the panel decision to explain that a refusal to permit modification of the Blewetts' sentences pursuant to 18 U.S.C. § 3582(c)(2) could result in significant and enduring Eighth Amendment violations.)

B. There is no evident legitimate penological justification for preventing *only* less-serious, low-quantity crack offenders from being eligible for sentencing modification of pre-FSA sentences under 18 U.S.C. § 3582(c)(2).

Critically, a punishment scheme may violate the Eighth Amendment not only when there is a national consensus against the sentencing practice at issue, but also if and when "such a scheme poses too great a risk of disproportionate punishment." *Miller*, 132 S. Ct. at 2469; *see also, e.g., Graham*, 130 S. Ct. at 2021 ("The concept of proportionality is central to the Eighth Amendment."); *Solem*, 463 U.S. at 286 ("The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century."). And, as the Supreme Court has recently emphasized, "a sentence lacking any legitimate penological

justification is by its nature disproportionate to the offense." *Graham*, 130 S. Ct. at 2028.

A sentencing scheme which denies the Blewetts and similar less-serious, low-quantity crack offenders the opportunity to apply for sentence modifications under 18 U.S.C. § 3582(c)(2) based on the FSA's more lenient crack sentencing provisions necessarily "poses too great a risk of disproportionate punishment" to withstand constitutional scrutiny. Indeed, Amicus respectfully suggests that the Government is likely unable to identify *any* legitimate penological justification for requiring less-serious, low-quantity crack offenders (and only less-serious, low-quantity crack offenders) to serve out the full duration of now-repealed, excessive pre-FSA mandatory minimum sentences – especially given that all more-serious, higher-quantity crack offenders have been eligible to receive the retroactive benefits of more lenient post-FSA sentencing guidelines.

As noted above, the U.S. Sentencing Commission decided to make its more lenient post-FSA crack guidelines retroactively applicable to all defendants previously sentenced under the pre-FSA crack guidelines. *See* U.S.S.C. Guidelines Amendment 759 (June 2011). The Commission unanimously voted to enable all more-serious, higher-quantity crack offenders still serving prison sentences pursuant to the pre-FSA crack guidelines to retroactively benefit from the more lenient post-FSA guidelines because, in its words, "the Commission determined

that the statutory purposes of sentencing are best served by retroactive application" of the new lenient crack guidelines to these more-serious, higher-quantity crack offenders. U.S. Sentencing Commission, News Release, *U.S. Sentencing Commission Votes Unanimously to Apply Fair Sentencing Act of 2010 Amendment to the Federal Sentencing Guidelines Retroactively* at 2 (June 30, 2011).

In operation, the Commission's crack-guideline retroactivity decision entailed that judges would have authority pursuant to 18 U.S.C. § 3582(c)(2) to consider, for each individual (more-serious, higher-quantity) crack offender sentenced based on the pre-FSA guideline sentences, whether to modify a final sentence in light of the legitimate penological justifications Congress set out in 18 U.S.C. § 3553(a)(2). All that the *Blewett* panel decision entails is extending that judicial case-by-case sentence modification authority to less-serious, lower-quantity crack offenders whose sentences were set and dictated by the pre-FSA crack *mandatory minimum provisions* rather than by the pre-FSA crack *guidelines*. The *Blewett* panel decision does not automatically reduce any sentences, it merely authorizes judges in comparable (but less serious) crack cases to decide whether the legitimate penological justifications set out in 18 U.S.C. § 3553(a)(2) can still justify requiring a particular crack offender to serve out the full duration of his pre-FSA mandatory minimum sentence.

The U.S. Sentencing Commission obviously found wanting and insufficient any purported penological claims for denying retroactive modification of finalized prison sentences imposed on all more-serious, higher-quantity crack offenders subject to pre-FSA guideline sentences. With that expert body having concluded that the "statutory purposes of sentencing are best served by retroactive application" of the new crack guidelines to more-serious, higher-quantity crack offenders, it is hard to imagine what legitimate penological justification might now be marshaled by the Government for denying the opportunity for retroactive modification of prison sentences imposed on less-serious, lower-quantity crack offenders subject to pre-FSA mandatory minimum sentences. Unless the Government can put forward legitimate penological justifications for refusing the Blewetts (and similar less-serious, lower-quantity crack offenders) the opportunity to apply for sentence modifications under 18 U.S.C. § 3582(c)(2) based on the FSA's more lenient crack sentencing provisions, their sentences are "by [their] nature disproportionate to the offense," *Graham*, 130 S. Ct. at 2028, and a purposeless mandate that they serve out the full duration of now-repealed, excessive pre-FSA mandatory minimum sentences would result in significant and enduring Eighth Amendment violations.[6]

[6] The Government may not be able to put forward even a "rational basis" for preventing *only* less-serious, lower-quantity crack offenders from being eligible for sentencing modification of pre-FSA sentences under 18 U.S.C. § 3582(c)(2), and

II. The sentence modification provisions of 18 U.S.C. § 3582(c)(2) and Guideline policy statements provide an effective and appropriate means to address and remedy the Eighth Amendment concerns in this case.

The importance of finality, repose and conserving scarce judicial resources have long prompted worries about too readily permitting defendants to seek repeatedly to assail final convictions and sentences based on new criminal laws or constitutional rulings. Nevertheless, Congress expressly created, through the statutory sentence modification provisions of 18 U.S.C. § 3582(c)(2), an important and effective judicial mechanism to revise sentences in those cases in which new laws reflect a considered determination that some sentences, though final, are no longer just and effective. Cleverly, this statutory modification provision is both modest and targeted to address only truly unjust sentences: courts have statutory authority to reduce terms of imprisonment only for deserving defendants still in prison who were sentenced based on provisions subsequently made less severe and made retroactive by the U.S. Sentencing Commission. Through 18 U.S.C. § 3582(c)(2), Congress recognized the need for, and expressly created, a refined and targeted remedy for the various problems and harmful consequences that can arise if undue emphasis is placed on the finality of previously imposed long prison

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the Blewetts may thus also have a compelling Due Process claim for relief in this case. Critically, though, even if the Government can concoct a "rational basis" which would be served by denying relief to the Blewetts in order to deflect Fifth Amendment claims, the Government must articulate legitimate *penological* justifications in order to defeat the Blewetts' Eighth Amendment claim.

sentences rather than the justness and effectiveness of these sentences. *See generally* Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 Wm. & Mary L. Rev. 465 (2010) (documenting benefits of judicially-supervised sentence modification schemes); Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality"*, 2013 Utah Law Review __ (forthcoming) (explaining how criminal justice goals can be better served if courts more frequently remedy "wrongful incarceration") .

Formally and functionally, the *Blewett* panel decision does not amount to a blanket declaration that all pre-FSA sentences are unconstitutional, although the Eighth Amendment arguments set forth in Part I suggest a broad constitutional ruling may well be justified in this case. Rather, the *Blewett* panel decision seems to just prudentially extend the applicability of the sentence modification mechanism created by Congress to less-serious, lower-quantity crack offenders whose sentences were dictated by the pre-FSA mandatory minimum sentences on terms identical to the sentence modification opportunity given to more-serious, higher-quantity crack offenders sentenced under the pre-FSA guideline sentences. In other words, though Part I above contends that a broad Eighth Amendment ruling may be justified in response to substantive challenges to pre-FSA crack sentences, the *Blewett* panel decision appears to stand principally for the more

modest determination that at least some pre-FSA crack sentences may be unconstitutional and that a refusal to permit modification of these sentences pursuant to the statutory mechanism of 18 U.S.C. § 3582(c)(2) could result in significant and enduring Eighth Amendment violations. Because the *Blewett* panel ruling simply authorizes judges in (less serious) crack cases to decide whether the legitimate penological justifications set out in 18 U.S.C. § 3553(a)(2) can still justify requiring a particular crack offender to serve out the full duration of his pre-FSA mandatory minimum sentence, the ruling is arguably more in keeping with Congress' approach toward balancing finality interests with sentencing justice than would a refusal to permit modification of these sentences pursuant to 18 U.S.C. § 3582(c)(2). Moreover, because a reversal of the *Blewett* panel ruling could and likely would result in significant and enduring Eighth Amendment violations, the panel decision should stand.

CONCLUSION

For the foregoing reason, the Eighth Amendment provides support for the *Blewett* panel ruling, and this Court need not and should not order rehearing en banc of that decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rules of Appellate Procedure 29(c)-(d) and 32(a)(7)(B)(i). This brief was prepared in Microsoft word, using Times New Roman 14-point font. According to the word count function, the word count, including footnotes and headings, is 3995.

/s/ Douglas A. Berman
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CERTIFICATE OF SERVICE

It is hereby certified that on June 28, 2013, the foregoing brief was electronically filed with the Clerk of the Court by using the ECF system. Counsel for the appellants and appellees are registered ECF users and will be served by the ECF system.

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