

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

FRANKIE BROWN, JR.)

Petitioner,)

v.)

STATE OF FLORIDA,)

Respondent.)

Case No. 2D11-5114

Opinion filed November 30, 2011.

Petition Alleging Ineffective Assistance of
Appellate Counsel. Hillsborough County;
Thomas P. Barber, Judge.

Frankie Brown, Jr., pro se.

PER CURIAM.

Frankie Brown, Jr., in his petition filed pursuant to Florida Rule of Appellate Procedure 9.141(c), alleges that his appellate counsel was ineffective in failing to argue that section 893.13, Florida Statutes (2008), is unconstitutional on its face based on the reasoning of the Federal District Court in Shelton v. Secretary, Department of Corrections, — F. Supp. —, 23 Fla. L. Weekly Fed. D11 (M.D. Fla. Jul. 27, 2011), which held that the statute improperly eliminated mens rea as an element of

a drug offense. In this instance, the direct appeal mandate issued on December 12, 2010, which was six months prior to the issuance of Shelton. "The ineffectiveness of appellate counsel cannot be based upon the failure of counsel to assert a theory of law which was not at the time of the appeal fully articulated or established in the law." Brown v. State, 25 So. 3d 78, 80 n.3 (Fla. 2d DCA 2009) (quoting Alvord v. State, 396 So. 2d 184, 191 (Fla. 1981)). Accordingly, we deny relief.

Petition denied.

ALTENBERND, CASANUEVA, and KELLY, JJ., Concur.