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CONSTITUTIONALITY OF DRUG POSSESSION AS A STRICT LIABILITY
CRIME: AN ANALYSIS OF FLORIDA'S DRUG STATUTE

by

DAVIS RONALD WATSON III

A thesis submitted in partial fulfillment of the requirements
for the Honors in the Major Program in Legal Studies
in the College of Health and Public Affairs
and in The Burnett Honors College
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Thesis Chair: C. Chad Cronon, J.D.

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ABSTRACT

The United States has a drug issue that is perpetually problematic. Efforts are being made on every level of government to reduce drug use and deter current and potential future users. Some of these efforts however are putting citizen's rights at risk in a manner that threatens the United States Constitution that hails over both the state and federal governments. My thesis will examine Florida's avant-garde approach to simplifying drug convictions through unprecedented legislation that has already been ruled unconstitutional on its face by the United States District Court for the Middle District of Florida. The decade long struggle will soon culminate in the Florida Supreme Court, and if found unconstitutional, could potentially impact thousands of inmates among other legal consequences.

Through literature review and case study I will discuss the history of this issue and conclude by discussing possible rulings of the Florida Supreme Court in *State v. Adkins*, SC11-1878 (2D11-4559, 2nd DCA). In addition, I will analyze the case timeline that led to the legislative action which is being called into question in *Adkins*. I hypothesize that the ruling in *Adkins* will declare Florida's drug statute unconstitutional; however, I further presume that the currently incarcerated defendants will continue to serve their sentences virtually unaffected by the ruling, with some extraordinary exceptions. First, I will discuss the underlying legal premises, succeeded by an analysis of all pertinent case law and literature to assess the constitutionality of Florida's drug statute to further support my hypothesis. My goal for this thesis is to give perspective to the layperson as well as contribute to the statewide legal community through my organization of the subject, and analysis of case law.

DEDICATION

To all my family, who has stood behind me, unfaltering, throughout my life, thank you.

To my wife, and best friend, Meg, I cannot express how supportive you have been throughout our marriage, especially when I decided to go back to college to pursue a legal career. All the time you missed me while I was working in my office will not have been in vain. Thank you for changing your life for me again and again... and again recently for law school.

To my parents, Ron and Julie, who have been incredibly supportive of my every endeavor, good or bad. I cannot thank you enough for all you have done for me; I will always remember how I got here. I promise to make you proud.

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To my beloved dogs, Louie and Maggie, who laid at my feet through countless hours of research and writing. Maggie was put down due to an aggressive liver disease the weekend before the defense of this thesis, I will miss her dearly. Louie will continue on without his best friend, lying at my feet alone through the next three years of law school.

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CHAPTER I: INTRODUCTION & CONCEPTS OF THE U.S. CONSTITUTION

Introduction

Since 1996, Florida has struggled with the provisions of its drug statute. Knowledge as a required element in proving guilt of possession of illicit substances, has first been ambiguous to legislative intent, then ruled to be included, then amended completely by the legislature, then ruled unconstitutional, and will finally be decided by the Florida Supreme Court later this year, 2012. Initial cases, beginning in 1996, were ruled by the Florida Supreme Court to include knowledge as an element of possession of controlled substances that must be proven to establish a conviction. Again in 2002, the Florida Supreme Court upheld their previous ruling from 1996. The question by thesis will address is: Will the Florida Supreme Court once again rule to coincide with previous decisions that knowledge must be an element of the State's drug statute? I hypothesize that indeed, it will. However, this time, the constitutionality of the statute itself is being called into question after being ruled unconstitutional by a Florida Federal Court. The stakes are higher, and because of the time that has lapsed, the adverse consequences of an unconstitutional ruling in support of my hypothesis will be much more severe.

I will first review several integral legal principles to give perspective to the layperson of all the underlying issues that will be discussed. This subject will be followed by an analysis of the case law which has led to the Florida Supreme Court's current position. Finally, I will discuss my prediction of the Florida Supreme Court's ruling to test the validity of my hypothesis, and thrash out various scenarios of the consequences of a constitutional and unconstitutional ruling.

14th Amendment to the United States Constitution

The United States Constitution is the cornerstone of American jurisprudence, and the essence of what makes American rights unique. Contained within the document are twenty-seven Amendments granting further rights to the citizens of our nation. In particular, one Amendment is integral to the support of this thesis, the Fourteenth Amendment.

The Fourteenth Amendment contains five sections, but I will focus on Section I, which states, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,” U.S. Const. Amend. XIV. The Amendment was introduced in 1866 and was ratified in 1868, three years after the assassination of President Abraham Lincoln and the end of the American Civil War. A primary supporting factor for the Amendment at the time was to guarantee recently freed slaves their freedom. Perhaps the most important verbiage in Section I is “States”, and “due process.” The Amendment applies to the States directly, thus granting more civil rights to all Americans, causing it to be the most cited Amendment in litigation.¹ The mention of due process however, subsequently entangles the Due Process Clause from the Fifth Amendment to the Due Process Clause from the Fourteenth Amendment through a series of criminal case law in the 20th century. Further, the Fourteenth Amendment gave way to applying the entire Fifth Amendment² to the States.

¹ According to the Library of Congress website.

² As well as the 1st through 8th Amendments.

Palko v. Connecticut (1937)

The initial case that questioned whether the Fifth Amendment should apply to the States is *Palko v. Connecticut*, 302 U.S. 319 (1937). Defendant Palko was convicted of second degree murder and given a life sentence. In accordance with state law, the State of Connecticut appealed and the Connecticut Supreme Court reversed the judgment and ordered a new trial.

Unfortunately for Mr. Palko, at his second trial, he was found guilty of first degree murder and sentenced to death. He petitioned and was granted certiorari³ by the United States Supreme Court. His argument is quite simple, and today's rule of law, whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth Amendment also.

The U.S. Supreme Court affirmed the first degree murder conviction and the death sentence. The Court's majority decision explains that there are requirements that can be met for a State to choose to omit certain pieces of the Fifth Amendment. While the Fourteenth Amendment explicitly applies to the states, the Fifth Amendment solely applies to the federal government. In this case, double jeopardy can be omitted by a State, which is not exclusively mentioned or applied in the Fourteenth Amendments. The Supreme Court takes the position that Connecticut state law allowing a second trial on the same facts does not violate fundamental principles of liberty and justice because it was only done to ensure a proper trial. Ten years later, the Supreme Court accepts a very similar case, *Adamson v. California*, 332 U.S. 46 (1947). Once again, the issue is due process of the Fourteenth Amendment applying to the Fifth Amendment, but concerning self-incrimination rather than double jeopardy in *Palko*.

³ A writ of certiorari is an order from a higher court directing a lower court to a record/case for review.

Adamson v. California (1947)

Defendant Adamson was convicted of first degree murder in California. He refused to testify and take the stand in his trial, as his rights permit; however as California State law permits, opposing trial counsel commented on this fact to the jury. On appeal, Defendant Adamson argues that the statute's allowance for opposing counsel to make such a comment is counter to the Fifth Amendment's prohibition on a defendant's compulsion to testify, and that the Fifth Amendment applies to the States through the Fourteenth Amendment.

Once again, the U.S. Supreme Court finds that the Due Process Clause of the Fourteenth Amendment does *not* include all of the federal Bill of Rights.⁴ Some of the most important legal notions of this case arise from Justice Black's dissenting opinion.⁵ "My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states...⁶ This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment," *Adamson v. California*, 332 U.S. 46 (1947). Justice Black believed that a selective process leaves too much discretion in the hands of the Court, and therefore all of the Bill of Rights should be included when applying to the States. Twenty-two years later, *Benton v. Maryland*, 395 U.S. 784 (1969), supports Justice Black's dissenting opinion.

⁴ I.e. Fifth Amendment protections against self-incrimination.

⁵ A dissenting opinion is a complete disagreement with the majority/ruling opinion.

⁶ "Another prime purpose was to make colored people citizens entitled to full equal rights as citizens despite what this Court decided in the Dred Scott case. *Scott v. Sandford*, 19 How. 393," Justice Black dissenting opinion.

***Benton v. Maryland* (1969)**

Defendant Benton was tried for larceny and burglary; he was acquitted on larceny, convicted of burglary, and sentenced to ten years in prison. After his conviction, the Maryland Court of Appeal decided *Schowgurow v. State*, 240 Md. 121 (1965)⁷, which ruled that the Maryland Constitution requiring all jurors to swear to the existence of God was unconstitutional. Since the jurors in *Benton* were selected under this unconstitutional provision, he was allowed to demand a new trial, and he elected to do so. In the second trial, the same larceny and burglary charges were imposed, and he was convicted on both.

Upon review of the U.S. Supreme Court, Justice Marshall wrote the majority opinion ruling that the second trial in *Benton* did constitute double jeopardy. Although Maryland's state constitution had no protections against double jeopardy, the Court ruled that the Due Process Clause of the Fourteenth Amendment integrates the Double Jeopardy Clause of the Fifth Amendment, and therefore can be enforced against the States. This decision explicitly overrules *Palko v. Connecticut*, 302 U.S. 319 (1937).

Due Process Clause

For over one hundred years preceding *Benton* in 1969, American citizens did not enjoy the full due process rights stated in the United States Constitution. Aside from some of the more explicit aspects of due process like self-incrimination, and double jeopardy, due process is a complicated concept and is subject to much interpretation and legal argument, but simply put, "aside from all else, 'due process' means fundamental fairness and substantial justice. *Vaughn v. State*, 3 Tenn.Crim.App. 54, 456 S.W.2d 879, 883." Black's Law Dictionary, 6th Edition, page 500.

⁷ This case is not significant for purposes of this thesis. It merely granted Benton a new trial.

The development of due process dates to King John of England and the Magna Carta in 1215 A.D.⁸ Clause 39 of the original Magna Carta states, “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.” Upon the divergence of the United States from England, due process dissolved in English common law, but is kept in the Fifth and Fourteenth Amendments to the United States Constitution. English common law re-names due process to similar concepts called natural justice and the rule of law.

Because the concept of American due process is broad, it gives the judicial branch of government an opportunity to define fundamental fairness and substantial justice, on a case by case basis, rather than left to the control of legislators. The notion of due process is vitally important to the support of this thesis upon the discussion of Florida’s drug statute.

Supremacy Clause

The Supremacy Clause of the United States Constitution is featured in Article VI, Section 2. It reads, “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.” As the Supremacy Clause applies, when the federal government is exercising powers enumerated by the U.S. Constitution, it prevails over conflicting or inconsistent state exercise of power.

⁸ The Magna Carta was the first English document forced upon a King by his subjects. The document limits powers of the King and protects the privileges of the citizens.

There are two major issues discussed in this thesis that can be referenced back to the Supremacy Clause. In one instance, the Florida legislature amends its controlled substance statute to conflict with the Due Process Clause of the Fourteenth Amendment. In another, a Federal Court rules said state statute unconstitutional on its face, *Shelton v. Secretary, Dept. of Corrections*, 802 F. Supp. 2d 1289. However, it is a complicated concept for non-legal scholars to grasp when considering the Supremacy Clause.

In order to understand when and how the Supremacy Clause applies, one must understand the difference between binding/mandatory and persuasive authority. In general, the decision of a court will be binding authority for any court that is lower in the hierarchy. Decisions from a lower court are never binding on a higher court, but can be persuasive authority. While the United States Supreme Court is binding authority on all courts, both state and federal, lower federal courts are not necessarily binding on state courts. The United States Court of Appeals is binding on United States District Courts and other lower courts within the circuit. Likewise, United States District Courts are binding on special lower courts if they are within the same appellate jurisdiction.⁹ Most importantly though, the United States District Courts are not binding on state courts, even regarding federal issues. This concept is crucial to understanding that while the United States District Court for the Middle District of Florida has ruled a Florida statute unconstitutional; it is still up to the Florida Supreme Court to have the final ruling on this issue.

⁹ i.e. bankruptcy, territorial courts, etc.

CHAPTER II: OVERVIEW: MENS REA & STRICT LIABILITY CRIMES

Mens Rea & Actus Reus

In modern statutory law and at common law, there are two essential elements to nearly¹⁰ every crime: *actus reus* and *mens rea*. The former is the Latin phrase for “guilty/criminal act”, the latter, “guilty/criminal mind.” Simply put, in order for *actus reus* to occur, there must be an act. *Mens rea* on the other hand is more complex and the central issue applicable to this thesis; it is the mental element of a crime that is commonly referred to as knowledge or intent. “There are only two states of mind which constitute mens rea, and they are *intention*, and *recklessness*.” J.W. Cecil Turner, Kenny’s Outlines of Criminal Law 29-30 (16th ed. 1952). “One way the requirement of mens rea may be rationalized is on the commonsense view of justice that blame and punishment are inappropriate and unjust in the absence of choice,” Charles Whitebread, Christopher Slobogin, Criminal Procedure, An Analysis of Cases and Concepts, 217 (5th Ed. 2007).

“The general rule was that mens rea was a necessary element in the indictment and proof of every crime,” *United States v. Balint*, 258 U.S. 250, 251, 42 S. Ct. 301, 302, 66 L. Ed. 604 (1922). “This rule was subsequently followed in regard to statutory crimes even where the statutory definition did not expressly include mens rea in its terms,” *Id.* at 251-52; *Staples v. United States*, 511 U.S. 600, 114 S. Ct. 1793, 1805 n.1, 128 L. Ed. 2d 608 (1994).¹¹ (Stating presumption of mens rea has been applied not only to statutes codifying traditional common law offenses but also to offenses that are “entirely a creature of statute”)(Ginsburg, J., concurs).

¹⁰ Strict or Absolute Liability Crimes are the exception.

¹¹ Stating presumption of mens rea has been applied not only to statutes codifying traditional common law offenses but also to offenses that are “entirely a creature of statute,” (Ginsburg, J., concurring).

The English common law test to find criminal liability in a person is posed in the Latin phrase; *actus non facit reum nisi mens sit rea*, which means, “The act does not make a person guilty unless the mind is also guilty.”¹² Or Blackstone’s translation, “an unwarrantable act without a vicious will is no crime at all.” *Mens rea* is that vicious will, and essentially refers to the mental element of one’s blameworthiness entailed in choosing to commit a criminal wrong. Many crimes are defined by said mental element, for example, larceny is the taking of one’s personal property with the *knowledge* that it is not your own, and the *intent* of depriving the individual of their property permanently. Manslaughter is another example, although there is an absence of malice or premeditation, manslaughter is the killing of another by an act with the *awareness* of a substantial and unjustifiable risk of doing such an act. By the way these crimes are defined, the mental element is vital to the explanation of what society wants to make a criminal act. The adverse consequence of *mens rea* in the legal system then, is the creation of *mens rea* defenses such as mistake, accident, involuntary acts, etc., and as far as the law’s purpose, these defenses are relevant. By contrast, whether a defendant acted with regret, remorse, voluntary intoxication,¹³ etc., are only relevant circumstances left to be weighed by the judge when imposing sentence.

In criminal law, the concern is with the defendant’s level of intentionality, that is, what was intended, known, or should have been known at the time of the act/*actus reus*. “The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” *Dennis v. United States*, 341 U.S. 494, 500, 71 S. Ct. 857, 862, 95 L. Ed. 1137 (1951). Despite *mens rea* being the “rule” of American criminal law, the fact

¹² The phrase originates from Sir Edward Coke, Barrister, and Chief Justice of the King’s Bench 1613-1616.

¹³ Involuntary intoxication could be a defense.

that legislators are vested with the power to define elements of a crime, a problem is presented in reference to ambiguity within legislative intent. (In addition, of course, statutes defining crimes are to be strictly construed against the State and most favorably to the accused.¹⁴) On one hand, this is part of the balance of power between the three branches of government essential to our country's foundation. On another, legislative intent is the root issue that initiated the domino effect leading to the complete removal of *mens rea* from Florida's Drug Statute, Chapter 893, thus creating an unprecedented strict liability crime.

Strict Liability Crimes

Anyone that has ever received a speeding ticket is familiar with, and guilty of, a strict liability crime. "I'm sorry officer, I didn't *know* I was speeding," typically will not get you out of a ticket,¹⁵ even if it is completely true. That is because offenses like speeding, parking tickets, pollution, selling alcohol to a minor, or employing someone under the age of fourteen¹⁶ are crimes where knowledge is not a requirement to be guilty, there is no *mens rea* by definition. The act alone, the *actus reus*, is enough to be guilty of the crime.

Most cases involving strict liability crimes are less serious offenses, minor infractions or misdemeanors, and as such are discredited by society as not being "real crimes." Rarely, a strict liability crime can be classified as a felony, and statutory rape is one such crime. Although statutory rape laws vary greatly from state to state, the concept is the same: an adult that engages in sexual relations with a minor regardless of consent. In Florida, "A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the

¹⁴ See *Drain v. State*, 601 So. 2d 256, 261-262 (Fla. 5th DCA 1992).

¹⁵ If this line does get you out of a ticket, it is due to the Officer's discretion, not because it is a viable legal excuse.

¹⁶ Employing a person under the age of fourteen is only a crime in some jurisdictions. The age at which persons are employable varies throughout the United States.

second degree,” Fla. Stat. § 794.05.¹⁷ Statutory rape however, is perhaps the most severe instance of a strict liability crime.

The origin of strict liability crimes can be traced back to the Industrial Revolution. At that time, there was a certain need for regulation, thus early strict liability crimes were deemed public welfare offenses. Just as today, these categories included illegal sale of alcohol, sale of tampered food products, and traffic violations.¹⁸ According to Wayne LaFave, there are three areas in which there is some authority “to the effect that a strict-liability criminal statute is unconstitutional if 1. the subject matter of the statute does not place it in a narrow class of public welfare offenses, 2. the statute carries a substantial penalty of imprisonment, or 3. the statute imposes an unreasonable duty in terms of a person’s responsibility to ascertain the relevant facts.” Wayne R. LaFave, 1 Subst. Crim. L. § 5.5 (b) (2d ed. 2003) (citing several state supreme court decisions) (citations omitted).

Today, regulatory offenses or public danger offenses are still considered strict liability crimes. Typically, violations of regulatory offenses, such as certain aspects of employment law, carry small penalties and are much easier to enforce without *mens rea*. From a prosecutors viewpoint, this is ideal, not to mention that in turn, is more cost effective for taxpayers. When considering public welfare offenses, it can be justified when it is “1. deterring businesses from ignoring the well-being of consumers; 2. having to prove *mens rea* would further burden courts that are already overburdened; and 3. imposing strict liability is acceptable because the penalties involved in public welfare offenses are small and there is little social stigma,” Richard G. Singer,

¹⁷ Conviction of this crime in Florida can result in a prison sentence up to 15 years.

¹⁸ See Francis B. Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 73 (1933).

The Resurgence of Mens Rea: The Rise and Fall of Strict Criminal Liability, 30 B.C. L. Rev. 337, 389 (1989).

Although the United States has great respect for due process, society does not deem strict liability offenses as being a violation of due process. This paradigm has changed in Florida since May 2002 when possession of controlled substances was signed into law as a strict liability crime. Again, while the State sees an opportunity to quickly and easily attain convictions on drug offenders, removing *mens rea* also removes the safeguard that protects the truly innocent from wrongful convictions. In no other state in the United States of America is possession of a controlled substance a strict liability crime, and there is a simple reason why, it violates due process.

Currently, under Florida's strict liability drug laws, for example, a FedEx/UPS carrier delivering a package containing only one ounce of cocaine is guilty of a first degree felony "trafficking in cocaine" and is punishable by a mandatory minimum imprisonment term of three years and a fifty-thousand dollar fine. It does not take a legal scholar to distinguish that the law is inherently problematic for due process. To understand how Florida's drug laws became strict liability, *Chicone v. State*, 684 So. 2d 736 (1996) must first be analyzed.

CHAPTER III: CHICONE & SCOTT

Chicone v. State (1996)

The case that initiated the sequence of events leading to the elimination of *mens rea* in Florida Statute § 893 is *Chicone v. State*, 684 So. 2d 736 (1996). Jerry Jay Chicone III was convicted of a third degree felony possession of cocaine, inter alia¹⁹. On appeal, he argued that the trial court erred on two counts. First, by not alleging the essential element of knowledge and second, by not instructing the jury that the prosecution must prove he knew the substance he possessed was cocaine. *Chicone's* arguments relied on two cases, *State v. Dominguez*, 509 So. 2d 917 (Fla. 1987) and *Drain v. State*, 601 So. 2d 256 (Fla. 5th DCA 1992).

In *Dominguez*, Antonio Dominguez accompanied another man, Joe Brooks, to a movie theater parking lot. In his testimony, Dominguez stated that he was under the impression that they were going to see a movie. Upon their arrival, Brooks drove around the parking lot until he saw another vehicle, parked nearby, and got into the other vehicle. Brooks then delivered nearly sixty grams of cocaine to the occupant of the other vehicle, and undercover police officer. Dominguez contended that he had no knowledge that the substance was cocaine or that Brooks was trafficking in drugs.

In *Drain*, James Drain was arrested on an outstanding warrant. When police officers searched him subsequent to his arrest, a substance was found in his pocket believed to be crack cocaine. After officers tested the substance however, it was found not to be a controlled substance, but wax. Drain was charged with possession with intent to sell an “imitation controlled substance.”

¹⁹ Latin legal term, among others. Defendant Chicone was also charged with possession of drug paraphernalia.

Judge Thompson of the Florida Fifth District Court of Appeals wrote the majority opinion in *Chicone*, stating that neither supporting case was valid legal argument. In his opinion, *Dominguez* does not apply because it involved a cocaine trafficking charge, which requires knowledge to be proven. Since *Chicone* was charged with possession, the statute does not require “knowledge” to be proven for a conviction. Judge Thompson also writes that *Drain* does not apply to *Chicone*. In *Drain*, the only issue referred to proper interpretation of Fla. Stat. § 817.564(3), which makes it unlawful for any person to possess with intent to sell any “imitation controlled substance.” In *Drain’s* case, at issue was wax imitating crack cocaine. “Those are not the facts here. This case involves simple possession. The State neither had to prove, nor allege in its information, that Chicone knew the substance he possessed was cocaine, or that he knew the object he possessed was drug paraphernalia,” *Chicone v. State*, 658 So. 2d 1007 (1994). The Florida Fifth District Court of Appeals found that the trial court did not err for reasons argued by Chicone, but resentenced on an unrelated matter regarding sentencing on a misdemeanor charge.

Upon review by the Florida Supreme Court, the decision of the Florida Fifth District Court of Appeals was quashed, and the court established that Jerry Chicone was entitled to a more specific jury instruction on knowledge, and the State must prove that a defendant had knowledge of the illicit nature of the items in possession. Judge Anstead authored the majority opinion with all but one Judge concurring.²⁰ The opinion outlines *Medlin*, *Frank*, and *Oxx* as primary supporting case law.

“We hold that guilty knowledge is part of the statutory offenses charged. Initially, we note that the state of the law on this issue is unclear, and many of the decisions discussing the

²⁰ ANSTEAD, J. KOGAN, C.J., and OVERTON, SHAW, GRIMES and HARDING, JJ., concur. WELLS, J., recused.

issue turn on the nature and extent of the proof required to prove possession of a contraband substance rather than the precise issue we address today. In addition, the cases often turn on whether actual possession or constructive possession²¹ is charged, with some decisions suggesting that guilty knowledge must be shown in constructive possession cases but not in actual possession cases,” *Chicone v. State*, 684 So. 2d 736 (1996). [For example, in *Green v. State*, 602 So. 2d 1306 (Fla. 4th DCA 1992), a panel of Judges wrote three separate opinions illustrating this uncertainty. The majority opinion found the evidence was sufficient to support for Green’s conviction of a small amount of cocaine. Judge Farmer authored the majority opinion that he found that knowledge is required in trafficking cases, but not “simple” drug possession cases. Judge Stone concurred but disputed the validity of Judge Farmer’s distinction. “In my judgment, the legislature's intent is that the evidence required and permissible inferences are the same for both possession and trafficking by possession, but for the additional required proof of the weight of the drugs,” *Green v. State*, 602 So. 2d 1306 (1992). Judge Glickstein dissented to the holding that the evidence was sufficient to establish Green’s knowledge.]

The Florida Supreme Court has been unclear on the issue of knowledge in drug possession cases since 1926 in *Reynolds v. State*. In a liquor possession case, *Reynolds* establishes that “there must . . . be a conscious and substantial possession by the accused, as distinguished from a mere involuntary or superficial possession,” *Reynolds v. State*, 92 Fla. 1038, 1041, 111 So. 285, 286 (1926). To illustrate the inconsistency since *Reynolds*, two cases from

²¹ When a suspect is in actual possession, the illicit substance is found on the person where no other person has equal access to said illicit substance, i.e. the suspect had the controlled substance on their person. In constructive possession, the suspect does not have immediate control over the illicit substance. To secure a conviction in a constructive possession case, the prosecution must prove beyond a reasonable doubt: 1. Defendant had dominion and control over the contraband. 2. Defendant *knew* contraband was present. 3. Defendant *knew* of the illicit nature of the contraband.

1973 can be compared, *State v. Medlin*, 273 So. 2d 394 (Fla. 1973) & *Smith v. State*, 279 So. 2d 27 (Fla. 1973).

Medlin is the most cited case pertaining to the argument that guilty knowledge is not an element of a simple possession crime, *State v. Williamson*, 813 So. 2d 61 (2002). The Florida Supreme Court held in *Medlin* that a jury question was presented as to whether the “defendant was aware of the nature of the drug involved.” *Id.* The effect of the holding is that the State establishes a prima facie case and sufficient proof that the “defendant was aware of the nature of the drug involved” to get the case to the jury. “*Medlin* stands for the proposition that evidence of actual, personal possession is enough to sustain a conviction. In other words, knowledge can be inferred from the fact of personal possession,” *Chicone v. State*, 684 So. 2d 736 (1996).

In *Smith* the Florida Supreme Court reversed a First District Court decision holding that the evidence was insufficient on the element of the defendant’s knowledge of the illicit drug. However, *Smith* involved constructive joint possession²² case which must be considered only in that context. “*Medlin* and *Smith* mirror much of the confusion in the case law on the issue of guilty knowledge in drug possession cases,” *Chicone v. State*, 684 So. 2d 736 (1996).

One of the clearest articulations of the reason why guilty knowledge is required in possession cases is written in *Frank v. State* by Judge Wiggins. “Scienter [*mens rea*] constitutes a factual issue to be resolved by the jury upon proper instructions as to the legal principles pertinent to its consideration. This is not a mere technicality in the law, but a legal principle which must be observed in order to safeguard innocent persons from being made the victims of unlawful acts perpetrated by others, and of which they have no knowledge. It is a safeguard

²² There were two defendants in *Smith*. The defendants were roommates involved in a marijuana possession charge.

which must be preserved in the interest of justice so that the constitutional rights of our citizens may be preserved. For these reasons it is our view that the error committed by the trial judge so infects the judgment that it should not be permitted to stand,” *Frank v. State*, 199 So. 2d 117 (Fla. 1st DCA 1967). “Our *Medlin* opinion expressly distinguished *Frank* because *Frank* involved constructive possession as opposed to the case of actual possession involved in *Medlin*,” *Chicone v. State*, 684 So. 2d 736 (1996).

Perhaps the most important case for supporting the *Chicone* decision is *State v. Oxx*. Judge Cowart’s majority opinion is the most comprehensive discussion on guilty knowledge being an essential element to prove drug possession crimes.

“In its order, the trial court held that the failure of the statute to expressly require mens rea or scienter²³ made unknowing possession a criminal offense. This is not correct. Knowledge of possession is generally considered a part of the definition of possession as used in criminal statutes making possession a crime. Section 893.13, Florida Statutes (1981), prohibiting the actual or constructive possession of a controlled substance, and its predecessors, have never specifically required "knowing" possession, yet possession has always been defined to include knowledge of the same. A similar construction has been placed on other criminal possession statutes. Although the legislature may punish an act without regard to any particular (specific) intent, the State must still prove general intent, that is, that the defendant intended to do the act prohibited.

Proof of an act does raise a presumption that it was knowingly and intentionally done. However, there is a distinction in presuming knowledge from actual possession and from constructive possession in that the State can make out a prima facie case of knowledge by proof of actual or exclusive constructive possession, but proof of non-exclusive constructive possession alone is insufficient to justify an implication of knowledge. In the latter situation, the State must present some corroborating evidence of knowledge to establish a prima facie case.

²³ Scienter is synonymous with mens rea.

In summary, the statute in the instant case is constitutional.²⁴ Further, possession in the context of this statute means possession and knowledge of the same, and appellee's knowledge (or lack of knowledge) of his possession is, subject to an appropriate instruction, an issue for the jury.” *State v. Oxx*, 417 So. 2d 287 (Fla. 5th DCA 1982).

Furthermore, the Florida Supreme Court in *Chicone* adds: “The group of offenses punishable without proof of any criminal intent must be sharply limited. The sense of justice of the community will not tolerate the infliction of punishment which is substantial upon those innocent of intentional or negligent wrongdoing; and the law in the last analysis must reflect the general community sense of justice,” *Chicone v. State*, 684 So. 2d 736 (1996). “The United States Supreme Court has stated that offenses that require no mens rea generally are disfavored, and has suggested that some indication of legislative intent, express or implied, is required to dispense with mens rea as an element of a crime,” *Staples*, 114 S. Ct. at 1797. At the time of *Chicone*, there is a lack of any suggestion that there is legislative intent to eliminate *mens rea*. The Florida Supreme Court held in *Chicone* that if the state legislature intended on making criminals out of people completely ignorant of the illicit nature of items in their possession thus subjecting them to prison terms, the legislature would be clearer in doing so.²⁵ Six years after *Chicone* in 2002, the state legislature retorts this opinion directly, finding that *Chicone* was decided contrary to legislative intent. The legislature also cites *Scott v. State*, 808 So. 2d 166 (2002) as primary supporting case law in their decision to remove *mens rea* from Florida Statute § 893.

²⁴ Florida Statute § 893 is found to be constitutional in 1981. This opinion changes post-2002, state legislature’s removal of mens rea.

²⁵ See *Staples*, 114 S. Ct. at 1804.

Scott v. State (2002)

The significance of Defendant Bobby Scott's case begins when he was already incarcerated in late 1998. Upon a random search of his cell, inside his locker cannabis was discovered concealed in his eyeglass case. Scott was convicted of possession of contraband in a correctional facility. In Scott's testimony at trial, he claimed that someone broke into his locker, stole jewelry, and planted the cannabis in his eyeglass case. While Scott contends that he did not know that the cannabis was in his eyeglass case contained within his locker, this is very different from claiming that he did not know the substance concealed was cannabis. On appeal, he argued that his conviction should be set aside because there was insufficient evidence to prove guilt based on the lack of proof that he had exclusive possession of the cannabis or that he had knowledge of the cannabis. Scott further contended that the court erred in not instructing the jury²⁶ that knowledge of the illicit nature of the substance is a necessary element to secure a conviction. The Fifth District Court of Appeals of Florida upheld the conviction holding that there was sufficient evidence to prove Scott's possession and guilt.²⁷

Judge Harris of the Fifth District Court of Appeals of Florida wrote the majority opinion for *Scott v. State*, 722 So. 2d 256 (1998). Scott relied heavily upon *Chicone*, but Judge Harris explains why *Chicone* does not necessarily apply, and if it does, it is only harmless error. Scott argues that *Chicone* made knowledge of the illicit nature of the substance possessed an element of the offense rather than an affirmative defense. Therefore, the State must prove that Scott knew that the substance was cannabis even though he never raised that issue, thus his request for special jury instruction is required by *Chicone*. "But in *Chicone*, possession was not challenged;

²⁶ Per his request. Request was denied.

²⁷ The Florida Supreme Court subsequently overruled the Fifth District Court decision.

the only issue presented for jury determination was whether the defendant was aware of the illicit nature of the thing possessed. Thus, the Florida Supreme Court has not yet decided whether a special instruction concerning defendant's knowledge is required if he challenges only his possession of the substance,” *Scott v. State*, 722 So. 2d 256 (1998). As previously discussed, it is important to understand that *Chicone* does not create a new element to possession crimes that must be proven. Rather, *Chicone* recognizes that the state legislature has the ability to define the elements of a crime, and since the legislature had no indication of something otherwise, *mens rea* is a necessary concept of possession.

“An argument that, ‘I did not possess the substance but had I possessed the substance, I would not have known it was cannabis’ is every bit as inconsistent as the argument: ‘I didn’t deal in cocaine but if I did, I was entrapped.’²⁸ The jury would understand that to argue the alternative position, one must concede the former. In this case, Scott recognized this dilemma and chose not to argue the alternative position that he was unaware of the nature of the substance to the jury. Although this was sound defense strategy, since Scott chose to argue only that he did not possess the substance, was it reversible error not to instruct on a position he chose not to support, by way of explanation, to the jury? And the State did prove, as it must prove all elements of an offense, that Scott knew the illicit nature of the substance by the operation of an unanswered presumption (or inference) raised by proof that he possessed the substance,” *Scott v. State*, 722 So. 2d 256 (1998). “Even if under *Chicone* the court should have given the requested instruction, its failure to do so, when the presumption of Scott's knowledge of the illicit nature of the contraband was not explained during trial, is harmless error. In this case, unlike *Chicone*, there was no factual

²⁸ See *Walker v. State*, 701 So. 2d 1258 (Fla. 5th DCA 1997).

basis to create an issue as to whether Scott knew of the illicit nature of the substance in order to warrant the requested instruction,” *Id.* In conclusion of the Fifth District Court of Appeals of Florida opinion, the court certified three questions to be of great public importance that would be subsequently answered by the Florida Supreme Court:

1. Does the illegal possession of a controlled substance raise a rebuttable presumption²⁹ (or inference) that the defendant had knowledge of its illicit nature?

2. If so, if the defendant fails to raise the issue that he was unaware of the illicit nature of the substance, is he nevertheless entitled to a *Chicone* instruction?

3. Can the failure to give the requested instruction be harmless error?

“For the reasons stated below, we answer questions one and three in the negative and question two in the affirmative. In answering these questions we hold that the defendant's knowledge of the illicit nature of the controlled substance is an element of the offense of possession, and an instruction that the State must prove this element must be given as a part of the standard jury instructions. Thus, we quash³⁰ the district court's decision and remand for a new trial,” *Scott v. State*, 808 So. 2d 166 (2002).

The Florida Supreme Court holds that the Fifth District Court of Appeals has misinterpreted *Chicone* and *Medlin*.³¹ “The Fifth District stated in reference to the presumption of knowledge that ‘although *Chicone* places the burden of proof on the State to prove knowledge of the illicit nature of the contraband, it does not, at least expressly, overrule the *Medlin* presumption.’ *Scott v. State*, 722 So. 2d at 258. The Fifth District... has interpreted our opinion in

²⁹ an assumption of fact accepted by the court until disproved, all presumptions are rebuttable.

³⁰ to annul or set aside.

³¹ The Florida Supreme Court acknowledges that several other district courts of appeal have also misinterpreted *Chicone*.

State v. Medlin, 273 So. 2d 394 (Fla. 1973), to say that the doing of the act, i.e., possessing the controlled substance, raises a rebuttable presumption that the possessor was aware of the nature of the drug possessed. Finally, the Fifth District opined that any failure to give the requested instruction was harmless error because Scott's defense was not based on lack of knowledge of the illicit nature of the substance,” *Scott v. State*, 808 So. 2d 166 (2002).

A vast amount of the Florida Supreme Court’s majority opinion in *Scott* reiterates their holding in *Chicone*, namely, that guilty knowledge is an element of possession of a controlled substance as well as possession of drug paraphernalia.³² Further, that guilty knowledge requires two elements, knowledge of the presence of the substance, and knowledge of the illicit nature of the substance. “In the final analysis we clearly said both knowledge of the presence of the substance and knowledge of the illicit nature of the substance are essential elements of the crime of possession of an illegal substance. Thus, we found the State was required to prove that *Chicone* knew of the illicit nature of the items in his possession,” *Scott v. State*, 808 So. 2d 166 (2002). Therefore, just as the State had to prove knowledge in *Chicone*, the State must prove knowledge in *Scott* as well. In addition, *Chicone* establishes that lack of knowledge of the illicit nature of the substance cannot be used as an affirmative defense. Furthermore, it is indicated in *Chicone* that if the defendant requests a special jury instruction, it is required. “It is implicit in this holding that the standard jury instructions on possession do not adequately inform the jury of the "illicit nature of the substance" requirement of the guilty knowledge element,” *Chicone*, 684 So. 2d at 745-746.

³² “While the charged crime in the present case is possession of contraband in a correctional facility (Fla. Stat. § 944.47 (1995)) and the charged crimes in *Chicone* were possession of cocaine and possession of drug paraphernalia, we note that elements of these offenses are substantially identical,” *Scott v. State*, 808 So. 2d 166 (2002).

Simply put, knowledge of the illicit nature of a substance is an element of the crime of possession of a controlled substance, the accused is entitled to a jury instruction on said element (especially if requested), and it is reversible error to fail to instruct on that element. Even if the defendant did not specify that he did not have knowledge of the illicit nature, it is still reversible error to fail to give a special jury instruction. “The Fifth District's view that any error was harmless because the jury found Scott to be in exclusive control and thus properly inferred knowledge begs the question. How could the jury infer guilty knowledge without being properly instructed on the element of knowledge as well as being instructed on when knowledge can be inferred? The defendant in this case requested a *Chicone* instruction. The trial court denied that request; the denial was reversible error,” *Scott v. State*, 808 So. 2d 166 (2002).

It is important to note however, that Chief Justice Wells wrote the dissent in *Scott*. He writes that he would have affirmed the decision of the Fifth District Court of Appeals of Florida, and specifically would answer the three questions presented (in bold above) in the complete opposite of the majority opinion. “I write further because I conclude that the majority's opinion will further complicate issues which have resulted from what I believe are problems in the opinion by this Court in *Chicone v. State*, 684 So. 2d 736 (Fla. 1996). I conclude *Chicone* is internally conflicted on the vital question of whether the Court or the Legislature defines elements of crimes. I find the Fifth District's reading of *Chicone* to be a fair reading of it and that the present majority fails to explain why it is not,” *Scott v. State*, 808 So. 2d 166 (2002). Chief Justice Wells acknowledges that he fails to see how the legislature is vested with the authority to define elements of a crime, but when an element is not included, the Florida Supreme Court corrects this by writing the element into the definition of the crime. He contends that lack of

knowledge should be an affirmative defense, which by implication, also disagrees with the majority opinion of *Chicone*. However, the most disturbing aspect of Chief Justice Wells' dissent is that he favored the legislature to amend the statute to say that possession of contraband on its face should give rise to the presumption of knowledge. Therefore, if someone is in possession of an illicit substance, that alone would constitute knowledge of being in possession, and if knowledge is presumed, it does not have to be proven... alas; knowledge/ *mens rea* has been removed altogether.

Because the Florida Supreme Court has taken it upon itself to write elements into a crime, he believes this gives rise to many complications, and to that degree, I agree. But his premise that the Florida Supreme Court should not write elements into statutory crimes is a falsity. I respectfully disagree with Chief Justice Wells, particularly on the grounds of lack of knowledge being an affirmative defense. Aside from the fact that a defendant would have to prove a lack of knowledge, thus creating a quasi shift in burden, this leaves too much room for the truly innocent to be wrongly convicted. Unfortunately, even though Chief Justice Wells' opinion is the dissent, the state legislature must have been following closely, because his opinion is heavily quoted in the state legislature, which subsequently removed *mens rea* from Florida's drug statute later in 2002.

CHAPTER IV: 2002 FLORIDA LEGISLATURE: MENS REA

House Bill 1935

Only a couple of months after the Florida Supreme Court's ruling in *Scott*, the House of Representative Committee on Crime Preventions, Corrections and Safety along with primary sponsor, Representative Bilirakis³³, proposed House Bill 1935, which explicitly overturns *Chicone* and *Scott*. In addition, the bill removes *mens rea* from Florida's controlled substance statute, creates an affirmative defense when lack of knowledge is proposed, and when such an affirmative defense is raised, also gives rise to a permissive presumption that the possessor knew of the illicit nature of the substance. In instances where the defendant raises said affirmative defense, the jury will be given instruction as to the permissive presumption. House Bill 1935 reads in its entirety as follows:

“Section 1. Section 893.101, Florida Statutes, is created to read:

893.101 Legislative findings and intent.--

- (1) The Legislature finds that the cases of *Scott v. State*, Slip Opinion No. SC94701 (Fla. 2002) and *Chicone v. State*, 684 So.2d 736 (Fla. 1996), holding that the state must prove that the defendant knew of the illicit nature of a controlled substance found in his or her actual or constructive possession, were contrary to legislative intent.
- (2) The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter.

³³ Co-Sponsors of HB 1935 include: Gelber; Cantens; Heyman; Kyle; Bense; Carassas; Needelman

(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.

Section 2. This act shall take effect upon becoming a law.”

When the bill was put to a vote in the House of Representatives, it passed 115-0. Upon passing the House, the bill moved to the Senate as companion bill SB 2300.

Senate Bill 2300

Senate Bill 2300 was sponsored by the Senate Criminal Justice Committee and Senator Charlie Crist. The bill passed in the Senate by a vote of 27-10. The Senate Staff Analysis and Economic Impact Statement³⁴ summarizes the bill and discusses the effect of the proposed changes to the controlled substances statute.

The summary briefly reviews the holding in *Chicone* and *Scott*, but quickly leads into Chief Justice Wells’ dissenting opinion: “The present majority, by now assuming that this Court can write elements of crimes, has opened the door to many complications. I believe the Legislature should close this particular one by amending the statute to say that possession of contraband gives rise to a presumption of knowledge. More importantly, I believe that this Court should not write elements into statutory crimes,” *Scott v. State*, 808 So. 2d 166. It is obvious that the state legislature supports this opinion, as it is exactly the action taken.

³⁴ Analysts: Erickson; Forgas. Staff Directors: Cannon; Johnson.

The Senate Staff Analysis Statement then acknowledges the foreseeable consequences of enacting the bill into law: wrongful convictions of innocent defendants. “Accordingly, there could be situations where the Committee Substitute results in the prosecution of individuals:

1. who do not know that what they actually possess is a controlled substance (the mail carrier who delivers a package containing cocaine, as noted in *Chicone*); or

2. who do not know that what they constructively possess is a controlled substance (a driver of a car whose passenger has placed prescription pills of valium, which are prescribed to someone other than the driver or passenger, under a seat or in the glove box).

Of course, the Committee Substitute does allow the defendant to raise lack of knowledge as an affirmative defense. In this situation, the defendant will have the burden of proof to prove that he or she did not know the substance was illicit. This burden will be compounded by the fact that the defendant will have to overcome a presumption that he or she knew the substance was illicit,” Committee Substitute for SB 2300.

Although it is certain that the State has the burden of proof in proving the possession of the controlled substance, should their burden end there and shift to the defendant on the subject of knowledge? Certainly not. It is apparent that the legislature was attempting to shortcut convictions on controlled substance charges. Unfortunately, while the Florida legislature was thinking how to be tough on crime, the legislature was misguided when considering due process and the subsequent legal ramifications. Regardless however, on May 13, 2002, Governor Jeb Bush signed the bill into law, effective immediately. At that moment, Florida became the only state in the nation to expressly eliminate *mens rea* as an element of a drug offense, Nathan

Koppel, Florida Judge Declares State's Drug Law Unconstitutional, The Wall Street Journal,
July 27, 2011.

CHAPTER V: FLORIDA FEDERAL COURT RULES UNCONSTITUTIONAL

Shelton v. Secretary, Department of Corrections (2011)

Mackle Vincent Shelton was arrested on October 5, 2004, and charged with a long list of serious crimes³⁵, most notably, delivery of cocaine in violation of Fla. Stat. § 893.13. Shelton's jury trial concluded on June 1, 2005 and he was convicted on five counts, including the delivery of cocaine.³⁶ On that count, the trial jury was given the standard jury instruction. The jury was to find that the prosecution had proven two elements: 1. that Shelton delivered a certain substance and 2. that the substance was cocaine. The jury received no instruction relating to knowledge as an element of the offense. Shelton was convicted and sentenced to eighteen years in prison.³⁷

Shelton's ensuing appellate process within the state-court system was unusual. On the constitutional objection to Fla. Stat. § 893.13, the state courts³⁸ never adjudicated, and Florida's Fifth District Court of Appeals issued a decision which affirmed the trial court ruling without writing an opinion or a merit-based analysis of the federal constitutional claims.³⁹ Thus, once Shelton had exhausted the appeals in the state-court system, he moved for habeas relief pursuant to 28 U.S.C. 2254 in the United States District Court for the Middle District of Florida [herein referred to as the Federal Court] on May 18, 2007.⁴⁰ On July 27, 2011, the Federal Court granted relief and Judge Mary Scriven wrote the majority opinion finding that Fla. Stat. § 893.13 is facially unconstitutional.

³⁵ Nine counts: three counts of aggravated assault with a deadly weapon (Counts I-III); delivery of cocaine (Count IV); one count of fleeing or attempting to elude a law enforcement officer (Count V); driving while license suspended (Count VI); reckless driving causing damage to property or a person (Count VII); and, two counts of criminal mischief (Counts VIII and IX).

³⁶ Shelton was found guilty on Counts IV, V, VI, VII, & IX.

³⁷ Delivery of cocaine is a second-degree felony and is normally punishable by up to fifteen years in prison; however, Shelton was declared a habitual felony offender, and his sentence was increased accordingly.

³⁸ See *Shelton v. State*, 951 So. 2d 856; see also *Shelton v. State*, 932 So. 2d 212.

³⁹ Per curiam affirmances do not constitute adjudication.

⁴⁰ USDC for the Middle District of Florida is located in Orlando, FL.

The Federal Court began by analyzing two applicable Florida Supreme Court cases, *Chicone* and *Scott*. Upon review, the Federal Court determined that the purpose of *Chicone* and *Scott* was to establish that knowledge is an element of the crime of possession, that a defendant is entitled to a special jury instruction on that element, and that it is error to fail to give such an instruction. Additionally, the purpose of the state legislature's creation of Fla. Stat. § 893.101 was to eliminate *mens rea* as an element to controlled substance crimes, thus directly overturning *Chicone* and *Scott*.

As Eleventh Judicial Circuit for Miami-Dade County Judge Milton Hirsch wrote, “*Shelton* has produced a category-five hurricane in the Florida criminal practice community. A storm-surge of pretrial motions must surely follow.” Of course, Judge Hirsch is correct on both counts as he was writing in response to joint Motions to Dismiss which incorporated 39 different defendants all basing their motions on the ruling of *Shelton*. In November 2011, The National Association of Criminal Defense Lawyers (NACDL), the Florida Association of Criminal Defense Lawyers, the American Civil Liberties Union of Florida, the Drug Policy Alliance, the Calvert Institute for Policy Research, the Cato Institute, the Reason Foundation, the Libertarian Law Council, and 38 law professors⁴¹ submitted a joint amicus curiae⁴² brief in support of *Shelton*.

Opinion of Judge Scriven in Support of *Shelton*

Shelton [herein also referred to as Petitioner] cites nine claims as basis for granting habeas relief.⁴³ “In claims two through nine, Petitioner alleges: (a) his habitual felony offender

⁴¹ From 27 various Law Schools nationwide.

⁴² Amicus Curiae means “friend of the court.” Simply, a legal scholar or group offering their opinion to the court.

⁴³ “The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law.” *Harrington v. Richter*, 131 S. Ct. 770, 780 (2011).

classification is illegal for an offense related to drug possession; (b) ineffective assistance of counsel for failure to raise illegal sentence issues; (c) ineffective assistance of counsel for failure to object to prosecutorial misconduct during closing; (d) ineffective assistance of counsel for failure to argue reasonable doubt; (e) ineffective assistance of counsel for failure to conduct effective cross-examination of state witnesses to elicit exculpatory evidence; (f) ineffective assistance of counsel regarding cumulative errors caused by counsel's lack of effectiveness; and (g) denial of due process and equal protection by the state court for refusing to permit filing of a motion to correct illegal sentence in the trial court," *Shelton v. Secretary, Dept. of Corrections*, 802 F. Supp. 2d 1289. Claims two through nine were all denied. Although they are discussed in Judge Scriven's opinion, they are not relevant to this thesis, nor were they sufficient reasons to effect his convictions or sentence. Claim one however, was granted. "Of initial importance here is ground [claim] one, Petitioner's claim that Fla. Stat. § 893.13 is facially unconstitutional because it entirely eliminates mens rea as an element of a drug offense and creates a strict liability offense under which Petitioner was sentenced to eighteen years in prison," *Shelton v. Secretary, Dept. of Corrections*, 802 F. Supp. 2d 1289.

Judge Scriven's opinion as to why Fla. Stat. § 893.13 is unconstitutional via violation of the Due Process Clause of the Fourteenth Amendment is supported by three premises, but each violates due process separately. First, that it violates due process because its penalties are too severe. Second, it violates due process because it creates substantial social stigma. Third, it violates due process because it regulates inherently innocent conduct. She acknowledges that the state is vested with the power to punish without proving intent, but not without constitutional constraints and safeguards, as found in *Patterson*.

In *Patterson v. New York*, the Supreme Court evaluated the state's requirements for asserting the affirmative defense of acting under severe emotional distress regarding the state's murder or manslaughter statutes. As the Supreme Court explained: "The Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

This view may seem to permit state legislatures to 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 v. New York*, 432 U.S. 197, 210 (1977). It has been a long held precedent that any state legislature "must act within any applicable constitutional constraints in defining criminal offenses," *Jones v. United States*, 526 U.S. 227, 241 (1999). Although there have been strict liability crimes that have been held constitutional, *Staples* established a three prong test. "If 1. the penalty imposed is slight; 2. a conviction does not result in substantial stigma; and 3. the statute regulates inherently dangerous or deleterious conduct, then the strict liability crime may be held constitutional," *Staples v. United States*, 511 U.S. 600 (1994). It is apparent that Judge Scriven considered all three of these aspects as it applies to Fla. Stat. § 893.

"It cannot reasonably be asserted that the penalty for violating Florida's drug statute is 'relatively small,'" *Shelton v. Secretary, Dept. of Corrections*, 802 F. Supp. 2d 1289. As previously stated, a conviction under Fla. Stat. § 893.13 is punishable as a second-degree felony, imprisonment up to fifteen years. As Shelton was convicted as a habitual felony offender, he

could have been facing imprisonment up to thirty years, ten years of which would be a mandatory minimum. Other aspects of Fla. Stat. § 893.13 can carry even more severe imprisonment penalties, such as thirty years for first time offenders and life imprisonment for recidivists (recurring offenders.)⁴⁴ Although terms like “relatively small,” “too harsh,” or “slight penalty” are relative terms, the Supreme Court has defined where the magnitude of strict liability crimes becomes extravagant. In *Gypsum*,⁴⁵ the Supreme Court held that a penalty of up to three years imprisonment and a fine not to exceed one-hundred thousand dollars is too harsh for a strict liability offense. For another example, “in *United States v. Wulff*, 758 F.2d 1121 (6th Cir. 1985), the Sixth Circuit concluded the felony provision of the Migratory Bird Treaty Act (“MBTA”) was unconstitutional where the maximum penalty was two years’ imprisonment. Specifically, the Sixth Circuit recognized that a two-year sentence was not “relatively small” and that a felony conviction “irreparably damages one’s reputation.” *Id.* at 1125,” *Shelton v. Secretary, Dept. of Corrections*, 802 F. Supp. 2d 1289. However, in this case, the Third Circuit Court eventually upheld the constitutionality of the MBTA’s two-year imprisonment penalty. Regardless though, if a two-year imprisonment term is where certain courts begin to draw the line, it is still abundantly clear that a felony strict liability crime such as the one at hand that carries a fifteen-year imprisonment sentence is “too harsh.” Additionally, “as Petitioner so aptly explained, ‘a ruling upholding penalties on the order permitted by the statute would leave literally nowhere else to go to draw a meaningful Constitutional line. Even if there is uncertainty about precisely where this line is drawn, that hardly matters here because by any measure

⁴⁴ “See, e.g., Fla. Stat. § 893.13(1)(b) (delivery of more than 10 grams of a schedule I substance); § 893.13(1)(c) (delivery of cocaine within 1,000 feet of a child care facility, school, park, community center, or public recreational facility),” *Shelton v. Secretary, Dept. of Corrections*, 802 F. Supp. 2d 1289.

⁴⁵ *United States v. United States Gypsum Co.*, 438 U.S. 442 (1978)

sentences of fifteen years to life are on the wrong side of it,” *Shelton v. Secretary, Dept. of Corrections*, 802 F. Supp. 2d 1289.

As Judge Scriven’s second point as to how Fla. Stat. § 893.13 violates due process, it creates a substantial social stigma.⁴⁶ In Shelton’s case, he “gravely besmirched” his reputation long before the issue at hand, as he is a Habitual Violent Felony Offender. Although this is true, and roughly the only statement offered by the state on this subject, Judge Scriven holds that Shelton’s prior criminal history here is irrelevant. The Supreme Court has said that a felony is “as bad a word as you can give to a man or thing.” *United States v. Morissette*, 342 U.S. 246 (1952). “Convicted felons cannot vote, sit on a jury, serve in public office, possess a firearm, obtain certain professional licenses, or obtain federal student loan assistance. The label of ‘convicted felon’ combined with a proclamation that the defendant is so vile that he must be separated from society for fifteen to thirty years, creates irreparable damage to the defendant’s reputation and standing in the community... The Court finds, therefore, if it does not go without saying, that a felony conviction under Florida’s strict liability drug statute gravely besmirches an individual’s reputation,” *Shelton v. Secretary, Dept. of Corrections*, 802 F. Supp. 2d 1289.

Finally, Fla. Stat. § 893.13 violates due process because it regulates inherently innocent conduct. “Florida’s strict liability drug statute [also] runs afoul of due process limits when viewed from the perspective of the nature of the activity regulated,” *Shelton v. Secretary, Dept. of Corrections*, 802 F. Supp. 2d 1289. In instances where laws are neither dangerous nor regulated, the Supreme Court has been consistent in invalidating them, or to require proof of *mens rea* to avoid criminalizing “a broad range of apparently innocent conduct.” *Liparota v.*

⁴⁶ a mark of disgrace or infamy; a stain or reproach, as on one's reputation.

United States, 471 U.S. 419, 426 (1985). “Under this reasoning, not even a small criminal penalty may constitutionally be imposed without proof of guilty knowledge where the conduct at issue includes a wide array of innocuous behavior or behavior not inherently likely to be regulated⁴⁷...Under this analytical framework, Fla. Stat. § 893.13 cannot survive constitutional scrutiny when considered in relation to the conduct it regulates—the delivery of any substance,” *Shelton v. Secretary, Dept. of Corrections*, 802 F. Supp. 2d 1289. There are infinite reasons why people may deliver or transport containers and infinite substances that could be contained within. In the context of Fla. Stat. § 893.13, if the substance contained is illicit, that behavior immediately becomes criminal without regard for the individuals knowledge and/or intent. This clearly bypasses constitutional safeguards, and leaves Floridians vulnerable to wrongful convictions, or if nothing else, a difficult trial with a shifted burden of proof under an affirmative defense. “As the Court explained in *Patterson*, 432 U.S. at 210, even if the legislative bodies choose to eliminate elements from criminal offenses ‘there are obviously constitutional limits beyond which the States may not go in this regard.’ (Emphasis added). The State of Florida exceeded those bounds in this instance,” *Shelton v. Secretary, Dept. of Corrections*, 802 F. Supp. 2d 1289.

Opinion of Judge Scriven in Rebut to Respondents

“In a final effort to salvage § 893.13, Respondents suggest any constitutional infirmity should be overlooked because: 1. the defendant may raise lack of knowledge as an affirmative defense, rendering the statute something other than a strict liability offense; or, alternatively, 2. ‘it is difficult to conceive of large numbers of people ‘innocently’ selling or purchasing flour and

⁴⁷ See *Lambert v. California*, 355 U.S. 225 (1958).

sugar in plastic baggies for cash on a street-corner,” *Shelton v. Secretary, Dept. of Corrections*, 802 F. Supp. 2d 1289.

In what Judge Scriven calls a “vacillating and legally unsupported argument,” it is the contention of the state that whether the statute results in a strict liability crime cannot be answered in “a simple ‘yes’ or ‘no’.” The statute⁴⁸ however, reads very clearly: “knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter.” The state argues that in this case, if an affirmative defense can be raised, it is not a strict liability crime. Judge Scriven disagrees for two reasons:

“First, even if knowledge could be properly relegated to an affirmative defense for such an onerous felony as drug distribution, it does not change the character of the statute from a strict liability statute. Whether a statute is viewed as one of strict liability is determined by reference to its elements not available affirmative defenses.

Second, if this averment is offered to suggest that knowledge becomes an element of the offense if raised by the Defendant as an affirmative defense, the State is hoisted on its own petard. By the plain import of the statute, the Defendant bears the burden of raising and proving the affirmative defense of knowledge, and the State enjoys a presumption against the proof that a Defendant might proffer. But, as the State well knows, it cannot shift the burden of proof to a Defendant on an essential element of an offense... What is more, if this affirmative defense is somehow transformed into an element of the offense, it would fail constitutional review for the additional reason that it purports to dispense with the fundamental precept underlying the

⁴⁸ Fla. Stat. § 893.101(2).

American system of justice—the ‘presumption of innocence.’” *Shelton v. Secretary, Dept. of Corrections*, 802 F. Supp. 2d 1289.

Judge Scriven contends knowledge in the statute cannot both be an affirmative defense *and* an element to the offense. It has been made very clear through legislation and the state courts that Fla. Stat. § 893 is a strict liability crime.

The state’s other major premise as to why Fla. Stat. § 893 is not a strict liability crime that regulates inherently innocent conduct is that “the possession of cocaine is never legal,” and imposing severe imprisonment punishments without a knowledge requirement is the risk that drug dealers take when deciding to involve themselves in controlled substance crimes. This supports the hypothesis of Professor Kadish; strict liability offenses are often a backhanded retort - “tough luck” to those who involve themselves in criminal activity. Sanford H. Kadish, *Excusing Crime*, 75 Cal. L. Rev. 257, 267-68 (1987). However, in the context of Florida’s drug statute, it is not “drug dealer beware,” but “citizen beware,” although the state does not see it as so. Unfortunately, those citizens that may be charged under this statute will face trial as guilty until presumed innocent. “Because Fla. Stat. § 893.13 imposes harsh penalties, gravely besmirches an individual’s reputation, and regulates and punishes otherwise innocuous conduct without proof of knowledge or other criminal intent, the Court finds it violates the Due Process Clause and that the statute is unconstitutional on its face,” *Shelton v. Secretary, Dept. of Corrections*, 802 F. Supp. 2d 1289.

CHAPTER VI: FLORIDA SUPREME COURT ADDRESSES SHELTON

The ruling in *Shelton* and Judge Scriven's opinion is a major step in correcting Fla. Stat. § 893 to coincide with constitutional due process. Unfortunately though, because federal district courts are not binding on state courts, this is far from the final step.⁴⁹ The Florida Supreme Court can (but not certainly will) use Judge Scriven's opinion to make a ruling as to the constitutionality of Fla. Stat. § 893, but only as persuasive authority. The Florida Supreme Court had to wait for its own case to surface to make a ruling though, which came less than one year later in *State v. Adkins*. The question then is - will the Florida Supreme Court abide by their previous rulings in *Chicone* and *Scott* and Judge Scriven's opinion in *Shelton*? Oral arguments have been heard in *Adkins*, but it is not currently on the Florida Supreme Court docket for final opinion, although it is expected to begin later in 2012.

State v. Adkins, et al. (2012)

Unlike every previous case discussed, there are no "case facts" for *Adkins*. Instead, *Adkins* is a group of forty-two defendants from forty-six separate criminal proceedings in the Circuit Court for the Twelfth Judicial Circuit in Manatee County, Florida. The Twelfth Judicial Circuit Court has granted all forty-two defendant's motion to dismiss on grounds that Fla. Stat. § 893.13 is unconstitutional. The Twelfth Judicial Circuit Court's decision is primarily based on Judge Scriven's opinion in *Shelton v. Secretary, Dept. of Corrections*, 802 F. Supp. 2d 1289.

The State of Florida appealed the Twelfth Judicial Circuit Court's decision to dismiss, which sent *Adkins* to the Second District Court of Appeal of Florida. However, the placement of this case creates problems for the Second District Court of Appeals to make any decision. "If this

⁴⁹ Although there is case law that refutes this point, it is the generalization and the practical application in this case. See *Gerstein v. Pugh*, 420 U.S. 103 (1975).

court were to review this decision and agree with the circuit court, our decision would be binding statewide and could affect literally thousands of past and present prosecutions throughout the state,”⁵⁰ *State v. Adkins*, 71 So. 3d 184. “The ruling of the circuit court in this case would appear to control pending drug prosecutions in only one felony division of the Twelfth Judicial Circuit Court. This issue, however, will undoubtedly be raised in every felony division in all twenty circuits... It is entirely possible that many circuits will find themselves in the untenable situation of having two or more felony divisions taking opposite positions on this issue,” *Id.*

“Until this important constitutional question is resolved by the Florida Supreme Court, prosecutions for drug offenses will be subject to great uncertainty throughout Florida. Moreover, cases pending on appeal and on motions for post-conviction relief will be subject to similar uncertainty. It will be difficult to reach a final resolution in many of these cases until the issue is resolved. Finally, if the ruling in this order is ultimately affirmed by the supreme court [Florida Supreme Court], it is possible that hundreds or even thousands of inmates will be eligible for immediate release,” *Id.*

“This court is doubtful that any benefit derived from the additional legal reasoning contained in opinions prepared by this court and other district courts would outweigh the cost associated with the delay required to prepare those written opinions,” *Id.* In other words, the Second District Court of Appeals should not take the time to write opinions, and even if it did, the consequences would only create further problems. Thus, the Florida Supreme Court was obligated to take jurisdiction and make a final decision.

⁵⁰ See *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) (recognizing that “in absence of interdistrict conflict, district court decisions bind all Florida trial courts”); *Chapman v. Pinellas Cnty.*, 423 So. 2d 578 (Fla. 2d DCA 1982) (same).

Oral Arguments

On December 6, 2011, the Florida Supreme Court heard oral arguments in *State v. Adkins*, SC11-1878. Assistant Attorney General, Diana Bock argued on behalf of the State, and Assistant Public Defender, Matthew Bernstein argued on behalf of *Adkins*. Bock argued first.

Justice Pariente immediately began discussing various situations that may involve innocent behavior, such as the mail carrier hypothetical. Her initial question was whether the statute would be constitutional if the affirmative defense were not an included possibility. Of course, Bock stated that it would be, and that the statute is not a strict liability crime because of the affirmative defense. Upon further discussion of the affirmative defense, it became evident that the burden of proof would shift to the defendant in such a situation. However, Justice Pariente questions if that is a practical situation in cases where the defendant may lack competency to testify. Chief Justice Canady additionally notes that the affirmative defense is the “salient factor that sets the statute apart from some other cases where concerns have been raised about ensnaring the innocent.”

Justice Labarga at this point finally acknowledges the problem with the affirmative defense, which lies within the jury instruction. When a defendant raises an affirmative defense, the jury can then presume that the defendant (whether in actual or constructive possession) had knowledge of the illicit nature of the substance, thus “bringing us back to square one.” Bock then denotes that the presumption is rebuttable, to which Justice Quince exclaims, “Well how?”

“If I come into the courtroom and say, ‘well I thought this was oregano, not marijuana,’ and the jury then get the instruction that they can presume that I knew it was marijuana, who are they to believe?” says Justice Quince.

Justice Pariente then goes on to say that “if a defendant can raise an affirmative defense, would that not shift the burden of proof to the defendant? Then the burden shifts back to the State?” Bock stated that if the defendant raised an affirmative defense, they must convince the jury by a preponderance of the evidence that they did not have knowledge of the illicit nature of the substance. If the defendant convinced the jury, the burden would then shift back to the State. When Justice Pariente asked if there would be a jury instruction as to this fact, Bock replied that she was unsure, and that maybe the jury instructions should be altered. “Don’t you think that is something we should be sure of... when the constitutionality of the statute is hinging on the affirmative defense and the jury instructions?” Finally Bock concedes that if better jury instructions are needed, that is something that should be addressed.

As to the practicality of raising the affirmative defense, Justice Perry says that it does not make much sense. “Every criminal says, ‘well, I didn’t know.’ So, realistically, how do you prove this? Do you get someone [co-conspirator/fellow criminal] to come in and say, ‘well, he didn’t know that I sent him an illegal substance,’ you think this person would incriminate themselves?” Bock replied, “Well you certainly could.” Justice Perry says, “This doesn’t make a lot of sense to me. The burden should be on the state to prove that he knew it [the illicit nature of the substance].”

Justice Perry then reverts back to a previous scenario where a person [that legitimately has no knowledge] is given a box of spices that contains marijuana. Justice Perry asks, “If someone gives you a box of spices that contains an illegal substance, and you are not familiar with that substance, how are you to know?” To which Bock replies, “Well if it has been detected and you have been charged, you have knowledge right then, and you know what you have to do

[raise an affirmative defense at trial].” Justice Pariente and Bock then discuss the legislature’s intent as to the degree of violating due process.

Bock responds in her final statements, “The question is whether or not the legislature has exceeded their authority by removing the judicially engrafted element. But what you have to look at is the boundary, which is the due process boundary, and no court, either State or Federal, and when I say that I don’t mean Judge Scriven or the other two circuit court judges, but all the other courts have said, ‘there is no bright line for due process’ and this is a public welfare law, so that line is pushed back just a little bit more because of the nature of this crime.”⁵¹

Bernstein then begins his argument. He swiftly addresses a previous question of Chief Justice Canady, stating that the availability of an affirmative defense does not render the statute constitutional because it “unhinges the presumption of innocence that is traditionally afforded to defendants, the affirmative defense in essence forces defendants to testify to present evidence to show that they did not have knowledge of the illicit nature of the substance, when the *mens rea* of the crime is a constitutionally required element to these offenses.” Justice Canady does not respond, instead, Justice Pariente acknowledges that Bernstein is right if the Court has to worry about the affirmative defense. Justice Pariente then skips to the cases that found laws unconstitutional that involved circumstances that involved a possible non-criminal act.

“If you possess an illegal substance, even if you don’t know, or say you don’t know that it was illegal, there is not set of circumstances where it is legal to possess an illegal substance, correct? ...Isn’t it constitutional because there is no way you can legally possess an illegal

⁵¹ Within this statement, Bock has contradicted her previous assertion which is that the statute is not a strict liability crime when she acknowledges that it is a public welfare offense. As previously stated in Chapter II, strict liability crimes are public welfare offenses.

substance?” says Justice Pariente. Bernstein argues that does not make it constitutional, because the way the statute is written, “it forces individuals to inspect everything they own and are handed all the time, so it criminalizes a broad swath of innocent activity.”

Chief Justice Canady then joins in with two premises he considers to be the reality of most ordinary situations. First, that people that own these illicit substances typically do not just go casting them about at random. He states that because these items are very valuable, people will only give them up for money or something else of value. Second, that people know what they have, i.e. what you may have in your brief case or your car. However, he does concede that there are exceptions to these situations, but they are extraordinary circumstances. To that extent, he believes the scheme of the statute makes sense because it recognizes the reality of most situations while also recognizing the extraordinary circumstances. The affirmative defense allows an out in those extraordinary situations. Chief Justice Canady explains that this is the root of the legislature’s intention based on the reality of drugs, while providing individuals with extraordinary circumstances an affirmative defense. At that time, Justice Lewis quickly and briefly joins in and notes that as a facial constitutional issue, Bernstein’s argument is not persuasive.

Chief Justice Canady further exclaims that this is a statutory offense, not a common law offense, and since the legislature is vested with the power to define the elements of the crime. Bernstein explains that although this is true, the United States Supreme Court has held that there are constitutional limits as to the extent of which a legislature can define those elements.

The argument then jumps to the issue of the elements at which the state has to prove. Justice Quince asks, “If the state must prove that the defendant knew they were in possession of

an illicit substance, and that the substance was illegal, what is wrong with that?” Bernstein tries to explain that it then incorporates a broad range of innocent activity, to which Justice Pariente retorts that the range is not broad, and that as Justice Lewis had said, there is no case that shows an innocent person had been duped. Justice Pariente explains that the majority of these cases would be proven the same way with the old law,⁵² with the same result, a conviction. Further, that the affirmative defense is in place for this reason.

Bernstein then reiterates a previous point that it turns upside down the presumption of innocence by requiring the defendant to present evidence. Before the law was changed, the state had to prove knowledge of the illicit nature beyond a reasonable doubt, and the jury was instructed to the fact of that element. “Now for the defendant to benefit from the affirmative defense, and to overcome the presumption, the defendant has to put on some evidence. As opposed to before, when the defendant could sit silently relying on his/her presumption of innocence and the jury could still find him/her not guilty if the State did not prove beyond a reasonable doubt that the defendant had knowledge of the illicit nature of the substance.” With that, Bernstein concludes by stating that because of the pervasive nature of drugs, specifically prescription drugs, it would be possible in an everyday situation that when someone asks another to borrow a Tylenol, that individual may give the other vicodin or some other controlled substance without that individuals knowledge of the illicit nature of the substance. Subsequently, Bernstein asks the Florida Supreme Court to affirm the trial court’s order and to declare Fla. Stat. § 893.13 unconstitutional on its face.

⁵² Fla. Stat. § 893.13 prior to 2002.

Bock then re-takes the podium for her rebuttal. Bock declares that since 1971, this State has been at war with drugs, and that each citizen has been called to duty in that war. She describes that it is the responsibility of each citizen to know what they possess. “It is their responsibility to know when they have taken possession of something illicit, it is their responsibility to find out if they have taken possession of something illicit.” Justice Quince interjects, “then this really is a strict liability crime?” Bock responds that she does not think that it is because of the affirmative defense. Justice Quince responds by stating that the affirmative defense is just as bad as the State having to prove knowledge of the illicit nature of the substance, acknowledging that it is very difficult to do either. However, she further indicates that it is still up to the State to prove since it is the State that brings the charge; the State has the burden to prove that the defendant is culpable.

Bock concludes, “We cannot reach into the mind of a defendant and know what he knew or didn’t know. That information is exclusively in the possession of the defendant himself. The affirmative defense gives him the key he needs to unlock that door, we don’t have that ability. This is a war. This is a tool that we have been given by the legislature. They have articulated it with no room for a mistake. Now the question is, have they gone too far, have they reached the line of due process? I would argue they have not.” Bock then asks that the trial court be overturned, the information reinstated, and the trial moves forward.

CHAPTER VII: CONCLUSION

Supreme Court Ruling Prediction

At the beginning of my research, I believed that the Florida Supreme Court's rulings in *Chicone* and *Scott*, as well as the United States District Court's (for the Middle District of Florida) opinion in *Shelton* would carry great weight in the Florida Supreme Court's ruling in *Adkins*. However, at the conclusion, I am less certain of how much weight those decisions will carry in the decision in *Adkins*. While I disagree with many of the topics⁵³ (as a matter of relevance) discussed in oral arguments of *Adkins*, it does not take away from the fact that *Chicone*, *Scott*, and *Shelton* were hardly mentioned by any of the Justices, Assistant Attorney General Bock, or Assistant Public Defender Bernstein.

After analyzing the oral arguments made before the Florida Supreme Court, it is abundantly clear that the Florida Supreme Court is divided on this issue which makes any educated guess as to the outcome of *Adkins* mere speculation. My prediction though hinges on the one Florida Supreme Court Justice that did not say one word during the oral arguments of *Adkins*, Justice Polston. My hypothesis is that Chief Justice Canady along with Justice Lewis will find the statute constitutional. Additionally, I presume that Justice Perry and Justice Quince will disagree and find the statute unconstitutional. I am less certain of Justice Labarga and Justice Pariente, but I believe that Justice Labarga will find the statute unconstitutional, and Justice Pariente will side with Chief Justice Canady and Justice Lewis finding the statute constitutional. This leaves Justice Polston to be the swing vote in my hypothesis. I find it likely though that

⁵³ The Florida Supreme Court emphasized the affirmative defense aspect as it greatly impacted the constitutionality of the statute. I disagree. Knowledge of the illicit nature of the substance was not given enough thought in oral arguments in *Adkins* in my opinion.

Justice Polston will side with Chief Justice Canady and find the statute constitutional, although this may counter my initial hypothesis.

It is known that this is a matter of great public importance, and the Florida Supreme Court needed to resolve this issue quickly. The fact that they have stalled more than six months since oral arguments can support the premise that the Florida Supreme Court is divided on this issue, as it has acknowledged that it is highly complex.

Implications of a Constitutional Ruling

Although a constitutional ruling runs adverse to my hypothesis, and the end result I would like, it is a great possibility. *Adkins*, or a similar case challenging the constitutionality of Florida's drug statute, could take a variety of paths. On one hand, it could simply end the discussion, at least for a period of a few years. On another, the case reaching the United States Supreme Court is not impossibility. Additionally, but most unlikely, the Florida legislature could take it upon themselves to again amend the statute.

For the immediate future, a constitutional ruling is the least convoluted, and is certainly favorable in the back of the minds of many of the Florida Supreme Court Justices, surely some more than others. The most apparent reason being the alternative, an unconstitutional ruling, which could have even more complex legal ramifications. This is not to suggest that Florida Supreme Court Justices look to simply the outreaching consequences of their rulings and opinions, but as a matter of practicality in this case, I presume it is certainly being considered. For this reason, I believe that it is in the interest of the Florida Supreme Court to attempt to find any reason to uphold Fla. Stat. § 893.13.

In the meantime, the citizens of Florida will continue to live under a "citizen beware" statute. While this law does not have a great affect on society as a whole, and is not getting much

recognition outside of the legal community, it nevertheless puts innocent law-abiding citizens at risk. Just because the statute may be ruled constitutional, does not mean that the impact of due process on society will not be diminished.

Implications of an Unconstitutional Ruling

As the Second District Court of Appeals stated, it is possible that an unconstitutional ruling will call for the immediate release of hundreds or even thousands of inmates across Florida.⁵⁴ More likely though, the result could entitle those currently incarcerated to a new trial, which would obviously create a burden on the state court system. Defendants that have already served their sentences and have been released may be somewhat easier to accommodate by expunging and sealing records or by other means of erasing the convictions. There are also other defendants though that are or have been incarcerated by other statutes in addition to Fla. Stat. § 893.13, in which case they may continue to serve out their sentences seemingly unaffected by an unconstitutional ruling.

Aside from the circumstances that may affect various defendants and inmates, an unconstitutional ruling will once again bring balance to Florida's drug laws. Presumably, it is true that most cases involving drug charges regard a defendant that is guilty of the alleged charge. However, constitutional due process is not in place to help the State gain more and/or easier convictions, but to safeguard innocent citizens from wrongful prosecution. As Justice William O. Douglas,⁵⁵ of the United States Supreme Court said in *Henry v. United States*, 361 U.S. 98 (1959), "it is better, so the Fourth Amendment teaches us, that the guilty sometimes go

⁵⁴ Future research is needed to establish the exact number of affected inmates. This statistic does not currently exist.

⁵⁵ Justice Douglas is the longest serving Justice in United States Supreme Court history, just over thirty-six and a half years.

free than the citizens be subject to easy arrest.” I believe this quote is analogous here, and I would take this a step further to say that as the Fourteenth Amendment teaches us, it is better that due process protects all citizens than allows for safeguards to be removed to give the State easy convictions.

REFERENCES

- Palko v. Connecticut*, 302 U.S. 319 (1937)
- Adamson v. California*, 332 U.S. 46 (1947)
- Benton v. Maryland*, 395 U.S. 784 (1969)
- Chicone v. State*, 684 So. 2d 736, 745-746 (Fla. 1996)
- Chicone v. State*, 658 So. 2d 1007 (1994)
- Scott v. State*, 808 So. 2d 166 (2002)
- Scott v. State*, 722 So. 2d 256, 258 (1998)
- Shelton v. Secretary, Dept. of Corrections*, 932 So. 2d 212 (2011)
- Shelton v. Secretary, Dept. of Corrections*, 802 F. Supp. 2d 1289 (2011)
- State v. Adkins*, 2D11-4559 (2011)
- State v. Adkins*, SC11-1878 (2012)
- State v. Adkins*, 71 So. 3d 184 (2012)
- United States v. Balint*, 258 U.S. 250, 251, 42 S. Ct. 301, 302, 66 L. Ed. 604 (1922)
- Staples v. United States*, 511 U.S. 600, 114 S. Ct. 1793, 1805 n.1, 128 L. Ed. 2d 608 (1994)
- Dennis v. United States*, 341 U.S. 494, 500, 71 S. Ct. 857, 862, 95 L. Ed. 1137 (1951)
- Drain v. State*, 601 So. 2d 256 (Fla. 5th DCA 1992)
- State v. Dominguez*, 509 So. 2d 917 (1987)
- Green v. State*, 602 So. 2d 1306 (Fla. 4th DCA 1992)
- Reynolds v. State*, 92 Fla. 1038, 1041, 111 So. 285, 286 (1926)
- State v. Medlin*, 273 So. 2d 394 (Fla. 1973)
- Smith v. State*, 279 So. 2d 27 (Fla. 1973)
- State v. Williamson*, 813 So. 2d 61 (2002)

Frank v. State, 199 So. 2d 117 (Fla. 1st DCA 1967)

State v Oxx, 417 So. 2d 287 (Fla. 5th DCA 1982)

Walker v. State, 701 So. 2d 1258 (Fla. 5th DCA 1997)

Patterson v. New York, 432 U.S. 197, 210 (1977)

Jones v. United States, 526 U.S. 227, 241 (1999)

United States v. Wulff, 758 F.2d 1121 (6th Cir. 1985)

United States v. Morissette, 342 U.S. 246 (1952)

Liparota v. United States, 471 U.S. 419, 426 (1985)

Lambert v. California, 355 U.S. 225 (1958)

Gerstein v. Pugh, 420 U.S. 103 (1975)

Henry v. United States, 361 U.S. 98 (1959)

State v. Dwyer, 332 So.2d 333 (1976)

Reynolds v. State, 3D06-1694 (Fla. 3rd DCA 2008)

Vaughn v. State, 3 Tenn.Crim.App. 54, 456 S.W.2d 879, 883." Black's Law Dictionary, 6th Edition, page 500

Brief for the FACDL as Amicus Curiae, *Florida v. Adkins*, SC11-1878

Brief of Appellant, *Gonzalez v. Florida*, 2D10-3209

State's Response to Defendant's Motion to Dismiss Based Upon the Alleged Unconstitutionality of the Drug Statutes, *Florida v. Nelson*, 10-1420CFMA, *Florida v. Norman*, 10-1420CFMB

United States Constitution, Amend. V, Amend. XIV

28 United States Code 2254

Magna Carta (England 1215)

H.R. 1935, 1st Reg. Sess. (Fl. 2002)

S.B. 2300, 1st Reg. Sess. (Fl. 2002)

Fla. Stat. § 893.13

Fla. Stat. § 893.101

Fla. Stat. § 893.101(2)

Fla. Stat. § 794.05

Fla. Stat. § 817.564(3)

Black's Law Dictionary (Deluxe 7th Ed. 1999)

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

Richard G. Singer, The Resurgence of Mens Rea: The Rise and Fall of Strict Criminal Liability, 30 B.C. L. Rev. 337, 389 (1989)

Sanford H. Kadish, Excusing Crime, 75 Cal. L. Rev. 257, 267-68 (1987)

J.W. Cecil Turner, Kenny's Outlines of Criminal Law 29-30 (16th Ed. 1952)

Charles Whitebread, Christopher Slobogin, Criminal Procedure, An Analysis of Cases and Concepts, 217 (5th Ed. 2007)

Richard M. Summa, After Chicone: Blasting the Bedrock of the Criminal Law, Florida Bar Journal, April 2008

Targeted News Services, NACDL, Florida Supreme Court Hears Arguments on State's Strict Liability Felony Drug Law, December 6, 2011

Restore Due Process to Drug Cases, Tampa Bay Times, November 24, 2011, at 14A

John Woodrow Cox, Florida Supreme Court to Rule on Disputed Drug Law, Tampa Bay Times, September 30, 2011, at 3B

John Woodrow Cox, Judge Backs Drug Law; Fight Goes On, Hernando Times, September 22, 2011, at 1

John Woodrow Cox, Drug Law Under Attack, Tampa Bay Times, September 1, 2011, at 1B

Kameel Stanley, Curtis Krueger, John Barry, Drug Ruling Jolts System, Tampa Bay Times, August 5, 2011, at 1B

Due Process Restored to Drug Law, Tampa Bay Times, July 30, 2011, at 12A

Kameel Stanley, State Drug Law Ruled Unconstitutional, Tampa Bay Times, July 29, 2011, at 1A

Mark Rankin, An Illegal, Misguided Law, Tampa Tribune, August 25, 2011, at 13

Tom Brennan, Local Judge Upholds State Law in Drug Prosecutions, Tampa Tribune, August 12, 2011, at 3

Tom Brennan, Drugs Laws Struck Down, Tampa Tribune, July 29, 2011, at 6

Chris Olwell, Supreme Court Weighs Florida Drug Law, The News Herald Blog, December 7, 2011

Nathan Koppel, Florida Judge Declares State's Drug Law Unconstitutional, The Wall Street Journal Blog, July 27, 2011