Supreme Court of Florida

No. SC11-1878

STATE OF FLORIDA,
Appellant,

vs.

LUKE JARROD ADKINS, et al.,
Appellees.

[July 12, 2012]

CANADY, J.

In this case we consider the constitutionality of the provisions of chapter 893, Florida Statutes (2011), the Florida Comprehensive Drug Abuse Prevention and Control Act, that provide that knowledge of the illicit nature of a controlled substance is not an element of any offenses under the chapter but that the lack of such knowledge is an affirmative defense.

Based on its conclusion that section 893.13, Florida Statutes (2011)—which creates offenses related to the sale, manufacture, delivery, and possession of controlled substances—is facially unconstitutional under the Due Process Clauses of the Florida and the United States Constitutions, the circuit court for the Twelfth

Judicial Circuit issued an order granting motions to dismiss charges filed under section 893.13 in forty-six criminal cases. The circuit court reasoned that the requirements of due process precluded the Legislature from eliminating knowledge of the illicit nature of the substance as an element of the offenses under section 893.13. On appeal, the Second District Court of Appeal certified to this Court that the circuit court's judgment presents issues that require immediate resolution by this Court because the issues are of great public importance and will have a great effect on the proper administration of justice throughout the State. We have jurisdiction. See art. V, § 3(b)(5), Fla. Const.

For the reasons explained below, we conclude that the circuit court erred in determining the statute to be unconstitutional. Accordingly, we reverse the circuit court's order granting the motions to dismiss.

I. BACKGROUND

Section 893.13, part of the Florida Comprehensive Drug Abuse Prevention and Control Act, provides in part that except as otherwise authorized "it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance" or "to be in actual or constructive possession of a controlled substance." § 893.13(1)(a), (6)(a), Fla. Stat. (2011). Depending on the controlled substance involved and the circumstances of the offense, a violation of section 893.13 can be punished as a

misdemeanor, a third-degree felony, a second-degree felony, or a first-degree felony. See, e.g., § 893.13(1)(a)(1), (1)(a)(2), (1)(a)(3), (1)(b), Fla. Stat. (2011).

Section 893.13 itself does not specify what mental state a defendant must possess in order to be convicted for selling, manufacturing, delivering, or possessing a controlled substance. In Chicone v. State, 684 So. 2d 736 (Fla. 1996), this Court addressed whether section 893.13 should be interpreted to include a mens rea—that is, a "guilty mind"—element. In reviewing a conviction for possession of cocaine, this Court determined that "guilty knowledge" was one of the elements of the crime of possession of a controlled substance and that the State was required to prove that Chicone knew he possessed the substance and knew of the illicit nature of the substance in his possession. Id. at 738-41. This Court reasoned that the common law typically required "scienter or mens rea [as] a necessary element in the indictment and proof of every crime" and that the penalties facing defendants convicted under chapter 893, Florida Statutes, were much harsher than the usual penalties for crimes where a knowledge element is not required. Chicone, 684 So. 2d at 741. This Court further reasoned that the Legislature "would have spoken more clearly" if it had intended to not require proof of guilty knowledge to convict under section 893.13. Chicone, 684 So. 2d at 743.

More recently, in Scott v. State, 808 So. 2d 166 (Fla. 2002), this Court clarified that the "guilty knowledge" element of the crime of possession of a controlled substance contains two aspects: knowledge of the presence of the substance and knowledge of the illicit nature of the substance. 808 So. 2d at 169. In addition, this Court clarified that the presumption of knowledge set out in State v. Medlin, 273 So. 2d 394 (Fla. 1973), and reiterated in Chicone—that a defendant's knowledge of the illicit nature of a controlled substance can be presumed from evidence that the defendant had possession of the controlled substance—can be employed only in cases in which the State proves actual, personal possession of the controlled substance. Scott, 808 So. 2d at 171-72.

In response to this Court's decisions, the Legislature enacted a statute now codified in section 893.101, Florida Statutes (2011). Section 893.101 provides in full:

> (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.
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> (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.

(Emphasis added.) The statute thus expressly eliminates knowledge of the illicit nature of the controlled substance as an element of controlled substance offenses and expressly creates an affirmative defense of lack of knowledge of the illicit nature of the substance. The statute does not eliminate the element of knowledge of the presence of the substance, which we acknowledged in Chicone, 684 So. 2d at 739-40, and Scott, 808 So. 2d at 169.

Since the enactment of section 893.101, each of the district courts of appeal has ruled that the statute does not violate the requirements of due process. See Harris v. State, 932 So. 2d 551 (Fla. 1st DCA 2006); Burnette v. State, 901 So. 2d 925 (Fla. 2d DCA 2005); Taylor v. State, 929 So. 2d 665 (Fla. 3d DCA 2006); Wright v. State, 920 So. 2d 21 (Fla. 4th DCA 2005); Lanier v. State, 74 So. 3d 1130 (Fla. 5th DCA 2011).

The United States District Court for the Middle District of Florida recently concluded, however, that section 893.13 is unconstitutional because it does not require sufficient mens rea on the part of the defendant to sustain a conviction. See Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289 (M.D. Fla. 2011). First, the Middle District reasoned that to withstand constitutional scrutiny, section 893.13 should have provided lighter penalties, "such as fines or short jail sentences, not imprisonment in the state penitentiary." Shelton, 802 F. Supp. 2d at 1301 (quoting

Staples v. United States, 511 U.S. 600, 616 (1994)). Second, the Middle District reasoned that because of the substantial social stigma associated with a felony conviction, a conviction under section 893.13 should require a guilty mind. Shelton, 802 F. Supp. 2d at 1302. And third, assuming that a defendant could be convicted under section 893.13 for delivering or transferring a container without being aware of its contents, the Middle District concluded that section 893.13 violates due process by regulating potentially innocent conduct. Shelton, 802 F. Supp. 2d at 1305.

Citing Shelton as persuasive—not binding—authority, the circuit court in this case concluded that section 893.13 is facially unconstitutional because it violates the Due Process Clauses of article I, section 9 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution. The circuit court reasoned that the Legislature did not have authority to dispense with a mens rea element for a serious felony crime.

The State now appeals the circuit court's decision in this Court. The State asserts that section 893.13, as modified by section 893.101, is facially constitutional and that the circuit court therefore erred in granting the motions to dismiss.

II. ANALYSIS

In the following analysis, after acknowledging the applicable standard of review, we first consider the case law that discusses the broad authority of the legislative branch to define the elements of criminal offenses as well as the case law that recognizes that due process ordinarily does not preclude the creation of an offense without a guilty knowledge element. We then examine the limited circumstances in which the absence of a guilty knowledge element has resulted in a holding that the requirements of due process were not satisfied. Finally, we explain our conclusion that sections 893.13 and 893.101 do not violate due process.

"The constitutionality of a statute is a question of law subject to de novo review." Crist v. Ervin, 56 So. 3d 745, 747 (Fla. 2011). In considering a challenge to the constitutionality of a statute, this Court is "obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible." Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005) (quoting Fla. Dep't of Revenue v. Howard, 916 So. 2d 640, 642 (Fla. 2005)). "[A] determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid." Id.

"Enacting laws—and especially criminal laws—is quintessentially a legislative function." Fla. House of Representatives v. Crist, 999 So. 2d 601, 615

(Fla. 2008). "[T]he Legislature generally has broad authority to determine any requirement for intent or knowledge in the definition of a crime." State v. Giorgetti, 868 So. 2d 512, 515 (Fla. 2004). We thus have recognized that generally "[i]t is within the power of the Legislature to declare an act a crime regardless of the intent or knowledge of the violation thereof." Coleman v. State ex rel. Jackson, 193 So. 84, 86 (Fla. 1939). "The doing of the act inhibited by the statute makes the crime[,] and moral turpitude or purity of motive and the knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt." Id.

Given the broad authority of the legislative branch to define the elements of crimes, the requirements of due process ordinarily do not preclude the creation of offenses which lack a guilty knowledge element. This point was recognized long ago in United States v. Balint, 258 U.S. 250, 251 (1922), where the Supreme Court considered the imposition of criminal penalties—fines of up to $2000 or imprisonment for up to five years, or both—under section 9 of the Narcotic Act of 1914 where the indictment "failed to charge that [the defendants] had sold the inhibited drugs knowing them to be such." The Narcotic Act required "every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away" a substance containing opium or coca leaves to register and pay a tax. Narcotic Act of Dec. 17, 1914, ch. 1, § 1, 38 Stat. 785 (1914). The Narcotic Act prohibited possession of the specified drugs by any

unregistered person, subject to certain exceptions—including an exception for persons to whom the drugs "have been prescribed in good faith" by a registered medical professional. Narcotic Act of Dec. 17, 1914, ch. 1, § 8, 38 Stat. 785 (1914). The Act also provided that "possession or control" of the specified drugs "shall be presumptive evidence of a violation" of the statute. Id. As recognized by the Supreme Court, the statute did not make "knowledge an element of the offense." Balint, 258 U.S. at 251. Despite the substantial penalty for noncompliance with the Narcotic Act, the Supreme Court declined either to read a mens rea element into the Narcotic Act or to conclude that the lack of such an element in the Narcotic Act was unconstitutional.

The Balint court specifically rejected the argument that "punishment of a person for an act in violation of law when ignorant of the facts making it so, is an absence of due process of law." Id. at 252. The Supreme Court observed that "the state may in the maintenance of a public policy provide 'that he who shall do [proscribed acts] shall do them at his peril and will not be heard to plead in defense good faith or ignorance.'" Id. at 252 (quoting Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 70 (1910)). The Supreme Court explained that offenses lacking such a knowledge element were commonly "found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is

evidently upon achievement of some social betterment rather than the punishment of crimes as in cases of mala in se." Id.

The Balint court thus gave effect to the "manifest purpose" of the Narcotic Act—that is, "to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him." 258 U.S. at 254. The Supreme Court recognized that the statutory purpose was properly based at least in part on "considerations as to the opportunity of the seller to find out the fact and the difficulty of proof of knowledge." Id.

Since the Supreme Court's decision in Balint, both the Supreme Court and this Court have repeatedly recognized that the legislative branch has broad discretion to omit a mens rea element from a criminal offense. For example, in Staples, which reviewed a federal law criminalizing the unregistered possession of certain automatic firearms that did not expressly include or exclude a mens rea element, the Supreme Court explained that whether or not a criminal offense requires proof that a defendant knew of the illegal nature of his act "is a question of statutory construction" and that the "definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." 511 U.S. at 604 (quoting Liparota v. United States, 471 U.S. 419, 424 (1985)). Similarly, in United States v. Freed, 401 U.S.

601 (1971), and United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971), the Supreme Court rejected the view that due process required that mens rea elements be read into public safety statutes regulating the possession of unregistered firearms and the shipping of corrosive liquids.

Likewise in State v. Gray, 435 So. 2d 816 (Fla. 1983), this Court determined that the district court erred by construing a witness tampering statute to include scienter and intent elements, explaining:

> The problem with the district court's analysis is its failure to recognize that unless the law in question directly or indirectly impinges on the exercise of some constitutionally protected freedom, or exceeds or violates some constitutional prohibition on the power of the legislature, courts have no power to declare conduct innocent when the legislature has declared otherwise. Ah Sin v. Wittman, 198 U.S. 500, 25 S.Ct. 756, 49 L.Ed. 1142 (1905).
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> It is within the power of the legislature to declare conduct criminal without requiring specific criminal intent to achieve a certain result; that is, the legislature may punish conduct without regard to the mental attitude of the offender, so that the general intent of the accused to do the act is deemed to give rise to a presumption of intent to achieve the criminal result. The legislature may also dispense with a requirement that the actor be aware of the facts making his conduct criminal. A recent decision from the district court of appeal has recognized these principles. State v. Oxx, 417 So. 2d 287 (Fla. 5th DCA 1982).
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> The question of whether conviction of a crime should require proof of a specific, as opposed to a general, criminal intent is a matter for the legislature to determine in defining the crime. The elements of a crime are derived from the statutory definition. There are some authorities to the effect that infamous crimes, crimes mala in se, or common-law crimes may not be defined by the legislature in such a way as to dispense with the element of specific intent, but these authorities are suspect.

Gray, 435 So. 2d at 819-20 (some citations omitted).

In a limited category of circumstances, the omission of a mens rea element from the definition of a criminal offense has been held to violate due process. A salient example of such circumstance is found in the Supreme Court's decision in Lambert v. California, 355 U.S. 225 (1957), which addressed a Los Angeles municipal code provision requiring that felons present in the municipality for more than five days register with law enforcement. The code provision applied to "a person who has no actual knowledge of his duty to register." Id. at 227. In Lambert, the Supreme Court concluded that a legislative body may not criminalize otherwise entirely innocent, passive conduct—such as a convicted felon remaining in Los Angeles for more than five days—without sufficiently informing the population of the legal requirement. As a result, the Supreme Court concluded that the registration requirement then at issue could be enforced only when the defendant was aware of the ordinance. Still, the Supreme Court emphasized that in a situation where the lawmaking body seeks to prohibit affirmative acts, it can do so without requiring proof that the actor knew his or her conduct to be illegal:

> We do not go with Blackstone in saying that "a vicious will" is necessary to constitute a crime, for conduct alone without regard to the intent of the doer is often sufficient. There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition. But we deal here with conduct that is wholly passive—mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed. The rule that

> "ignorance of the law will not excuse" is deep in our law, as is the principle that of all the powers of local government, the police power is "one of the least limitable."

Lambert, 355 U.S. at 228 (emphasis added) (citations omitted).

In Giorgetti, this Court followed the holding of Lambert in invalidating Florida's sexual offender registration statutes. Because the defendant's alleged illegal conduct "was similar to the passive conduct discussed in Lambert, i.e., relocating residences and failing to notify the State within forty-eight hours," we determined that "as in Lambert, knowledge is required here to define the wrongful conduct, i.e., the defendant's failure to comply with a statutory requirement." Giorgetti, 868 So. 2d at 519.

The Supreme Court has also concluded that the omission of a scienter element from the definition of a criminal offense can result in a due process violation where the omission results in criminalizing conduct protected by the First Amendment of the United States Constitution. For example, in Smith v. California, 361 U.S. 147 (1959), the Supreme Court determined that a scienter element was required in an ordinance making it illegal for any person to have in his possession any obscene or indecent writing in a place of business where books are sold. The Supreme Court reasoned that without such an element, the ordinance would cause a bookseller "to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of

constitutionally protected as well as obscene literature." Id. at 153. Similarly, in United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), the Supreme Court construed the modifier "knowing" in the Protection of Children Against Sexual Exploitation Act to apply to the element of the age of the performers. The Supreme Court explained that because nonobscene, sexually explicit materials involving persons over the age of seventeen are protected by the First Amendment, "a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts," and it was "therefore incumbent upon [the court] to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress." Id. at 78.

In Schmitt v. State, 590 So. 2d 404, 413 (Fla. 1991), we concluded that "a due process violation occurs if a criminal statute's means is not rationally related to its purposes and, as a result, it criminalizes innocuous conduct." Specifically, we considered a statute prohibiting the possession of a depiction involving "actual physical contact with a [minor] person's clothed or unclothed genitals, pubic area, buttocks, or if such person is a female, breast." Id. at 408 (quoting § 827.071(1)(g), Fla. Stat. (1987)). We held that the statute violated due process because it criminalized family photographs of innocent caretaker-child conduct, such as bathing the child or changing a diaper. While Florida's civil child abuse statute expressly excluded from the definition of sexual child abuse physical

contact that "may reasonably be construed to be a normal caretaker responsibility," the criminal statute declared depictions of such acts to be a felony. Id. at 413 (quoting § 415.503(17)(d), Fla. Stat. (1987)).

In In re Forfeiture 1969 Piper Navajo, 592 So. 2d 233, 235 n.6 (Fla. 1992), this Court concluded that the Legislature could not authorize the confiscation of airplanes based on the presence of additional fuel capacity—where extra fuel capacity was not "the exclusive domain of drug smugglers." This Court reasoned that such an action would impinge on protected property rights. Id. at 236. Similarly, this Court determined that statutes criminalizing the possession of embossing machines, lawfully obtained drugs not in their original packaging, and spearfishing equipment—without requiring proof of intent to use the items illegally—were not reasonably related to achieving a legitimate legislative purpose and interfered with the property rights of individuals who used those items for noncriminal purposes. See State v. Saiez, 489 So. 2d 1125 (Fla. 1986); State v. Walker, 444 So. 2d 1137 (Fla. 2d DCA), aff'd, 461 So. 2d 108 (Fla. 1984) (adopting district court of appeal's opinion); Delmonico v. State, 155 So. 2d 368 (Fla. 1963).

The provisions of chapter 893 at issue in the present case are readily distinguishable from those cases in which definitions of particular criminal offenses were found to violate the requirements of due process. The rationale for

each of those cases is not applicable to the context of controlled substance offenses under Florida law.

Sections 893.13 and 893.101 do not trigger the concern raised in Lambert and Giorgetti. The statutes do not penalize without notice a "failure to act [that absent the statutes] otherwise amounts to essentially innocent conduct," such as living in a particular municipality without registering. Giorgetti, 868 So. 2d at 517 (quoting Oxx, 417 So. 2d at 290). Rather than punishing inaction, to convict under section 893.13 the State must prove that the defendant engaged in the affirmative act of selling, manufacturing, delivering, or possessing a controlled substance. The controlled substance statutes are further distinguishable from the statutes in Lambert and Giorgetti—which would impose criminal liability for failing to register regardless of the defendant's knowledge of the regulation and his or her status—because in section 893.101 the Legislature has expressly provided that a person charged under chapter 893 who did not have knowledge of the illegality of his or her conduct may raise that fact as an affirmative defense.

Furthermore, sections 893.13 and 893.101—unlike the provisions we invalidated in Schmitt, 1969 Piper Navajo, Saiez, Walker, and Delmonico—are rationally related to the Legislature's goal of controlling substances that have a high potential for abuse, and the statutes do not interfere with any constitutionally protected rights. The Legislature tailored section 893.13 to permit legitimate,

medical uses of controlled substances but to prohibit non-medically necessary uses of those substances. Section 893.13 expressly excludes from criminal liability individuals who possess a controlled substance that "was lawfully obtained from a practitioner or pursuant to a valid prescription," § 893.13(6)(a), Fla. Stat. (2011), and the following persons and entities who handle medically necessary controlled substances as part of their profession: pharmacists, medical practitioners, hospital employees, government officials working in their official capacity, common carriers, pharmaceutical companies, and the employees and agents of the above, § 893.13(9), Fla. Stat. (2011).

Because there is no legally recognized use for controlled substances outside the circumstances identified by the statute, prohibiting the sale, manufacture, delivery, or possession of those substances without requiring proof of knowledge of the illicit nature of the substances does not criminalize innocuous conduct or "impinge[] on the exercise of some constitutionally protected freedom." Gray, 435 So. 2d at 819. Because the statutory provisions at issue here do not have the potential to curtail constitutionally protected speech, they are materially distinguishable from statutes that implicate the possession of materials protected by the First Amendment, such as those at issue in Smith and X-Citement Video. There is no constitutional right to possess contraband. "[A]ny interest in possessing contraband cannot be deemed 'legitimate.'" Illinois v. Caballes, 543

U.S. 405, 408 (2005) (quoting United States v. Jacobsen, 466 U.S. 109, 123 (1984)).

Nor is there a protected right to be ignorant of the nature of the property in one's possession. See Turner v. United States, 396 U.S. 398, 417 (1970) ("'Common' sense tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled.") (emphasis added) (citation and footnotes omitted); Balint, 258 U.S. at 254 (upholding as constitutional a statute that "require[d] every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute"). Just as "common sense and experience" dictate that a person in possession of Treasury checks addressed to another person should be "aware of the high probability that the checks were stolen," a person in possession of a controlled substance should be aware of the nature of the substance as an illegal drug. Barnes v. United States, 412 U.S. 837, 845 (1973). Because controlled substances are valuable, common sense indicates that they are generally handled with care. As a result, possession without awareness of the illicit nature of the substance is highly unusual. See United States v. Bunton, No. 8:10-cr-327-T-30EAJ, 2011 WL 5080307, at *8 (M.D. Fla. Oct. 26, 2011) ("It bears repeating that common sense dictates, given the numerous drug polic[i]es that are designed to discourage the production, distribution, and

consumption of illegal drugs, that one can reasonably infer guilty knowledge when a defendant is in possession of an illegal substance and knows of the substance's presence. In other words, having knowledge of the presence of the substance should alert the defendant to the probability of strict regulation.").

Any concern that entirely innocent conduct will be punished with a criminal sanction under chapter 893 is obviated by the statutory provision that allows a defendant to raise the affirmative defense of an absence of knowledge of the illicit nature of the controlled substance. In the unusual circumstance where an individual has actual or constructive possession of a controlled substance but has no knowledge that the substance is illicit, the defendant may present such a defense to the jury.

Because we conclude that the Legislature did not exceed its constitutional authority in redefining section 893.13 to not require proof that the defendant knew of the illicit nature of the controlled substance, we likewise conclude that the Legislature did not violate due process by defining lack of such knowledge as an affirmative defense to the offenses set out in chapter 893. The Legislature's decision to treat lack of such knowledge as an affirmative defense does not unconstitutionally shift the burden of proof of a criminal offense to the defendant.

In Patterson v. New York, 432 U.S. 197, 207 (1977), the Supreme Court concluded that the New York legislature's decision to define extreme emotional

disturbance as an affirmative defense to the crime of murder was permissible because the defense did "not serve to negative any facts of the crime which the State is to prove in order to convict of murder" but instead "constitute[d] a separate issue on which the defendant is required to carry the burden of persuasion." The Supreme Court explained that because the fact constituting the affirmative defense was not logically intertwined with a fact necessary to prove guilt, the affirmative defense did not "unhinge the procedural presumption of innocence." Id. at 211 n.13 (quoting People v. Patterson, 347 N.E.2d 898, 909 (N.Y. 1976) (Breitel, C.J., concurring), aff'd, 432 U.S. 197 (1977)).

This Court applied similar reasoning in State v. Cohen, 568 So. 2d 49 (Fla. 1990). In Cohen, this Court reviewed a statutory affirmative defense to Florida's witness-tampering statute. The affirmative defense required Cohen to prove that he engaged in lawful conduct and that his sole intention was to encourage, induce, or cause the witness to testify truthfully. Id. at 51. This Court concluded that the supposed affirmative defense was merely an illusory affirmative defense. This Court explained that the purported affirmative defense was illusory because Cohen could not logically both raise the affirmative defense and concede the elements of the crime. By attempting to prove the affirmative defense that he had acted lawfully with the intent to encourage the witness to testify truthfully, Cohen would necessarily negate the State's theory that he illegally contacted a witness, as

opposed to conceding the State's charges. Thus, the purported affirmative defense unconstitutionally placed a burden on Cohen—as a defendant—to refute the State's case. Id. at 52.

Here, the Legislature's decision to make the absence of knowledge of the illicit nature of the controlled substance an affirmative defense is constitutional. Under section 893.13, as modified by section 893.101, the State is not required to prove that the defendant had knowledge of the illicit nature of the controlled substance in order to convict the defendant of one of the defined offenses. The conduct the Legislature seeks to curtail is the sale, manufacture, delivery, or possession of a controlled substance, regardless of the defendant's subjective intent. As a result, the defendant can concede all elements of the offense but still coherently raise the "separate issue," Patterson, 432 U.S. at 207, of whether the defendant lacked knowledge of the illicit nature of the controlled substance. The affirmative defense does not ask the defendant to disprove something that the State must prove in order to convict, but instead provides a defendant with an opportunity to explain why his or her admittedly illegal conduct should not be punished. "It is plain enough that if [the sale, manufacture, delivery, or possession of a controlled substance] is shown, the State intends to deal with the defendant as a [criminal] unless he demonstrates the mitigating circumstances." Patterson, 432

U.S. at 206. Thus, the affirmative defense does not improperly shift the burden of proof to the defendant.

III. CONCLUSION

In enacting section 893.101, the Legislature eliminated from the definitions of the offenses in chapter 893 the element that the defendant has knowledge of the illicit nature of the controlled substance and created the affirmative defense of lack of such knowledge. The statutory provisions do not violate any requirement of due process articulated by this Court or the Supreme Court. In the unusual circumstance where a person possesses a controlled substance inadvertently, establishing the affirmative defense available under section 893.101 will preclude the conviction of the defendant. Based on the foregoing, we conclude that the circuit court erred in granting the motions to dismiss and we reverse the circuit court's order.

It is so ordered.

POLSTON, C.J., and LABARGA, J., concur.
PARIENTE, J., concurs in result with an opinion.
LEWIS, J., concurs in result.
QUINCE, J., dissents.
PERRY, J., dissents with an opinion.

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

PARIENTE, J., concurring in result.

Forty-eight states, either by statute or judicial decision, require that knowledge of a controlled substance—mens rea ("guilty mind")—be an element of a criminal narcotics offense.[1] Despite the Legislature's elimination of knowledge of the illicit nature of the controlled substance as an element of a drug-related offense, conviction for such an offense under the Florida Comprehensive Drug Abuse Prevention Act (Act) can subject a defendant to staggering penalties, ranging from punishment of up to fifteen years' imprisonment to life in prison for recidivists.

I share Justice Perry's concerns about the Act's harsh application to a potentially blameless defendant, but in my view, these legitimate concerns do not render the Act facially unconstitutional; that is, under no set of circumstances can

1. A national survey reveals that Florida's drug law is clearly out of the mainstream. Except for Washington, which eliminates mens rea for simple drug possession offenses, and now Florida, the remaining forty-eight states require knowledge to be an element of a narcotics possession law, either by statute or by judicial decision. See State v. Bradshaw, 98 P.3d 1190, 1196 (Wash. 2004) (Sanders, J., dissenting) (noting that at least forty-eight states have adopted the Uniform Controlled Substance Act and all but two expressly require knowledge to be proved as an element of unlawful possession); Dawkins v. State, 547 A.2d 1041, 1045, 1046 n.10 (Md. 1988) ("In surveying the law of other states that have adopted the Uniform Controlled Substances Act, we note that the overwhelming majority of states, either by statute or by judicial decision, require that the possession be knowing"; "Most states addressing the issue of possession of controlled substances hold that the accused must not only know of the presence of the substance but also of the general character of the substance.").

the Act be constitutionally applied. Although I concur in the result reached by the majority, I write separately to emphasize the very narrow basis for my concurrence.

The Act is facially constitutional only because it (1) continues to require the State to prove that a defendant had knowledge of the presence of the controlled substance as an element of drug-related offenses and (2) expressly authorizes a defendant to assert lack of knowledge of the illicit nature of the controlled substance as an affirmative defense. Both aspects reduce the likelihood that a defendant will be punished for what could otherwise be considered innocent possession and save this Act from facial invalidity. However, because of genuine constitutional concerns that notwithstanding the availability of an affirmative defense, the Act could be unconstitutionally applied to a specific defendant by criminalizing innocent conduct while subjecting him or her to a substantial term of imprisonment, I would not foreclose an individual defendant from raising an as-applied challenge to the Act on due process grounds. In short, it would be difficult to uphold the Act, which codifies felony offenses with substantial penalties, against a constitutional attack when mounted by a person who possessed a controlled substance unwittingly or without knowledge of its illicit nature.

Being one among a distinct minority of states to eliminate an element traditionally included in criminal offenses does not, of course, render Florida's

drug law unconstitutional. After all, this Court's task is not to decide whether the Legislature has made a wise choice—or even one in keeping with the overwhelming majority of jurisdictions—when defining the elements of drug-related offenses. Rather, we must determine whether the Legislature deprived defendants of due process of law under the United States and Florida Constitutions by omitting knowledge of the illicit nature of a controlled substance as an element of the offense.[2] When reviewing the constitutional validity of a statute, we must remain mindful of the United States Supreme Court's consistent recital of the notion that the "existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."[3] The inclusion of mens rea as an essential element of an offense is a mechanism that safeguards against the criminalization of innocent conduct. As this Court has recognized, "scienter is often necessary to comport with due process requirements," and the elimination of

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2. The due process language used in article I, section 9, of the Florida Constitution is virtually identical to the language used in the Fifth and Fourteenth Amendments to the United States Constitution. Cf. State v. Hoggins, 718 So. 2d 761, 770 (Fla. 1998) (holding that an accused's right to remain silent under article I, section 9, of the Florida Constitution precluded the use of post-arrest, pre-Miranda silence to impeach a defendant's testimony at trial even though the Federal Due Process Clause permitted such a use).

3. United States v. U.S. Gypsum Co., 438 U.S. 422, 436 (1978) (quoting Dennis v. United States, 341 U.S. 494, 500 (1951)); see also Staples v. United States, 511 U.S. 600, 605 (1994) (reciting the same).

this element "from a criminal statute must be done within constitutional constraints." State v. Giorgetti, 868 So. 2d 512, 518, 520 (Fla. 2004). Therefore, laws that dispense with the requirement of mens rea require very close judicial scrutiny to ensure their compliance with what the Constitution commands.

Initially, I recognize, as does the majority, that the Legislature's 2002 amendment to the Act abrogated only the requirement that the State prove a defendant had knowledge of the illicit nature of the controlled substance. See ch. 2002-258, § 1, Laws of Fla. (codified at § 893.101(2), Fla. Stat. (2002)). Significantly, the State still bears the burden of proving a defendant's knowledge of presence in order to establish a defendant's actual or constructive possession of the controlled substance. See Maestas v. State, 76 So. 3d 991, 994-95 (Fla. 4th DCA 2011). Therefore, I agree that "the statute does not punish strictly an unknowing possession or delivery," id. at 995, thereby saving the Act from being unconstitutionally applied to defendants where knowledge of the presence of the substance is unknown. Cf. United States v. Garrett, 984 F.2d 1402, 1411 (5th Cir. 1993) (noting that "a serious due process problem would be raised by application of [a statute criminalizing gun possession on an aircraft], which carries fairly substantial penalties, to someone who did not know and had no reason to know that he was carrying a weapon").

On the other hand, I disagree with the majority's broad pronouncement that

due process will not ordinarily preclude the Legislature from creating criminal offenses that dispense with the mens rea requirement. See majority op. at 8. The majority's analysis upholding the constitutionality of the Act is flawed because it appears to be based on whether the Legislature has a rational basis for imposing criminal liability. In fact, there are constitutional limitations on the Legislature's ability to create crimes that dispense with mens rea and in effect criminalize actions that could be characterized as innocent conduct where such crimes carry substantial penalties.

The majority's reliance on several cases from the United States Supreme Court to reach that broad pronouncement is misplaced and fails to discuss the fact that courts and commentators have expressed serious concerns about the constitutionality of criminal statutes that eliminate mens rea as an element of a criminal offense.

The majority affords great significance to the Supreme Court's 1922 decision in United States v. Balint, 258 U.S. 250 (1922), as standing for the proposition that due process does not, as a general matter, preclude the creation of offenses lacking a guilty knowledge element. See majority op. at 8-10. But unlike the drug law at issue here criminalizing clandestine drug deals, the public welfare Narcotic Act of 1914 under scrutiny in Balint was a "taxing act" that regulated and taxed the legal distribution of drugs to secure "a close supervision of the business

of dealing in these dangerous drugs." 258 U.S. at 253-54. There, the defendants knew they were distributing drugs (a derivative of opium and coca leaves), they just did not know that the substances at issue were regulated as narcotics and had to be distributed pursuant to a written order form. See id. at 251. Knowledge that the substances seeking to be distributed were in fact regulated was not an element of the offense. See id.; see also Staples v. United States, 511 U.S. 600, 606 (1994) (acknowledging that the Narcotic Act discussed in Balint "required proof only that the defendant knew he was selling drugs, not that he knew that the specific items he had sold were 'narcotics' within the ambit of the statute").

The Supreme Court upheld the Narcotic Act, rejecting the argument that "punishment of a person for an act in violation of law when ignorant of the facts making it so" violated due process. Balint, 258 U.S. at 252. The Court in Balint reasoned that the act was much more similar to "regulatory measures" designed for "social betterment" than to those designed for "punishment." Id. Concluding that knowledge was not an aspect of this element of the offense, the Court held that the "manifest purpose" of the act was "to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him," using a criminal penalty merely "to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic." Id. at

254.

Notably, when examining the statute in Balint contextually, at least one court has more recently observed that Balint no longer has any application as a case about strict liability and narcotics given the serious nature of contemporary drug laws:

> [T]he statute must be understood in context. It predated the era during which all possession and sale of drugs came to be regarded as serious crimes. Aside from its penalty, it fairly can be characterized as a regulation. It required manufacturers and distributors of certain narcotics to register with the IRS, pay a special tax of one dollar per year and record all transactions on forms provided by the IRS. [Narcotic Act of 1914, Pub. L. No. 223,] §§ 1-3 and 8[, 38 Stat. 784 (1914)].
>
> As a case about strict liability and narcotics, Balint has no application today. Prior to the [Narcotic] Act narcotics had been freely available without prescription. This change by tax statute was a first modest transitional step towards the present complex and serious criminal statutes dealing with narcotics offenses. They have come to be treated as among the most serious of crimes in the federal criminal code. See, e.g., 21 U.S.C. §§ 960 (mandatory minimum sentences as high as 10 years for certain drug offenses); 848(e) (possible sentence of death for drug offenses in which killing results).

United States v. Cordoba-Hincapie, 825 F. Supp. 485, 507 (E.D.N.Y. 1993).

The majority similarly relies upon United States v. Freed, 401 U.S. 601 (1971), and United States v. International Minerals and Chemical Corp., 402 U.S. 558 (1971), for the conclusion that the Supreme Court has rejected the view that due process mandates that a mens rea element be read into public safety statutes regulating the possession of unregistered firearms and the shipping of corrosive

liquids. However, the matters involved in Freed and International Minerals—and even Balint—placed those cases squarely within the realm of traditional public welfare offenses regulating conduct of a particular nature.

By contrast, in Staples, another decision cited by the majority, the Supreme Court declined to apply the public welfare rationale to the statute under review due in part to the fact that it imposed a penalty of up to ten years' imprisonment for a felony offense. See 511 U.S. at 616-18. Indeed, the Court in Staples specifically distinguished "the cases that first defined the concept of the public welfare offense," which "almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary." Id. at 616.

Unlike the possession or delivery of substances one does not know to be illicit (an innocent act), certain items of property regulated by public welfare statutes, such as unlicensed hand grenades (Freed), corrosive liquids (International Minerals), and legalized narcotics (Balint), by their very nature suggest that a reasonable person should know the item is subject to public regulation and may seriously threaten the community's health or safety. See Liparota v. United States, 471 U.S. 419, 432-33 (1985) (describing "public welfare offenses" as rendering "criminal a type of conduct that a reasonable person should know is subject to stringent public regulation or may seriously threaten the community's health or

safety" and citing Freed, International Materials, and Balint for support).

Accordingly, Freed, International Minerals, and Balint are of limited precedential value because the Act at issue in the present case could not, in my view, be deemed a public welfare statute as that term has been used and imposes substantial felony penalties for drug-related offenses where the accused might be unaware of the illicit nature of the substance of which he or she is in possession. See Cordoba-Hincapie, 825 F. Supp. at 497 (concluding that modern, anti-drug offenses could no longer be characterized as public welfare offenses); Dawkins, 547 A.2d at 1047 (concluding that the prohibition against possessing a controlled dangerous substance, such as heroin or cocaine, "is regarded as a most serious offense," the purpose of which was not to regulate conduct but to punish and deter behavior). But see United States v. Bunton, No. 8:10-cr-327-T-30EAJ, 2011 WL 5080307, at *8 (M.D. Fla. Oct. 26, 2011) (concluding that because the criminal offenses enumerated in Florida's drug law are public welfare offenses, mens rea was not a required element).

I recognize that "[t]here is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition." Lambert v. California, 355 U.S. 225, 228 (1957). This discretion is not unbridled, however. The complementary principle is that legislative bodies must "act within any applicable constitutional constraints" when defining the elements of an

offense. Liparota, 471 U.S. at 424 n.6; see also Giorgetti, 868 So. 2d at 518, 520.

Although neither the United States Supreme Court nor any other court "has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not," Staples, 511 U.S. at 620 (quoting Morissette v. United States, 342 U.S. 246, 260 (1952)), the requirement that an accused act with a culpable mental state is an axiom of criminal jurisprudence that must be emphasized. As Justice Jackson stated when writing for the Supreme Court in Morissette:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.' Common-law commentators of the Nineteenth Century early pronounced the same principle . . . .

342 U.S. at 250-51 (footnotes omitted).

Since Morissette, the Supreme Court has oft repeated that the "existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." U.S. Gypsum Co., 438 U.S. at 436 (quoting

Dennis, 341 U.S. at 500); see also Staples, 511 U.S. at 605 (reciting the same). And in applying this principle, the Supreme Court has likewise recognized that offenses dispensing with mens rea are generally disfavored. Staples, 511 U.S. at 606.[4] Therefore, the Supreme Court's reluctance to devise a precise line does not mean that limitations do not exist where the criminal laws of a state are non-regulatory in nature and have the potential to subject a defendant to substantial punishment for conduct that might be entirely innocent or where the defendant lacks culpability.

In fact, some state courts over the years have pointed out the constitutional dimension of mens rea when confronting drug laws similar to the one the Court addresses in this case, stressing that due process would prevent the sanctioning of blameless conduct. See, e.g., State v. Brown, 389 So. 2d 48, 50-51 (La. 1980) (declaring a portion of a state statute criminalizing the "unknowing" possession of a dangerous controlled substance unconstitutional because there could be a circumstance where a conviction would result notwithstanding the accused never being aware of the nature of the substance); Walker v. State, 356 So. 2d 672, 674 (Ala. 1977) (reading into the state's controlled substances statute a knowledge

4. In a similar vein, lower courts and contemporary scholars have characterized the guilty knowledge requirement as a fundamental tenet of criminal law. See, e.g., Cordoba-Hincapie, 825 F. Supp. at 495-96; Garnett v. State, 632 A.2d 797, 801 (Md. 1993).

component because "the desirability of efficient enforcement of regulatory statutes must give way to the traditional requirement that criminal sanction be imposed only for blameworthy conduct in order to comply with the requirements of due process of law").[5]

Absent from the statutes addressed by the courts in Brown and Walker, however, was the availability of any affirmative defense like the one available under Florida's drug law. Notably, the two states that have gone further than Florida by eliminating knowledge, including knowledge of possession, entirely from the offense of possession of a controlled substance—Washington and North Dakota—have recognized that allowing a defendant to raise the affirmative defense of lack of knowledge spares those state statutes from constitutional attack.

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5. Professor LaFave, who is considered to be a leading authority in the area of criminal law, has also offered in his substantive criminal law treatise the observation that "some authority is to be found 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." 1 W. LaFave, Substantive Criminal Law § 5.5(b) at 389-90 (2d ed. 2003) (footnotes omitted). In addition, some federal precedent holds that a felony statute prescribing substantial penalties for conviction will subject the defendant to significant social stigma and violates due process unless it requires the State to prove intent or knowledge. See, e.g., United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985) (holding that a felony provision of the Migratory Bird Treaty Act, which did not require proof of scienter, violated due process because the crime was not one known at common law, had a maximum penalty of two years' imprisonment or fine of $2,000, and created a felony conviction that irreparably damages reputation).

See City of Kennewick v. Day, 11 P.3d 304, 309 (Wash. 2000) (observing that the "unwitting possession defense is unique to Washington and North Dakota").

Before the North Dakota law was amended to include willfulness,[6] the state supreme court held that the pre-amended version of North Dakota's controlled substance law, which prohibited possession of a controlled substance with intent to deliver, was constitutional despite imposing strict liability. See State v. Michlitsch, 438 N.W.2d 175, 178 (N.D. 1989). In adhering to this conclusion that the Legislature intended the possession of a controlled substance and possession with intent to deliver to constitute strict liability offenses, the court did note that as applied, "it would be difficult to sustain these statutory provisions, the violation of which are punishable as felonies in many circumstances, against a constitutional attack when mounted by a person who possessed the controlled substance unwittingly." Id. (emphasis added). Thus, the court in Michlitsch held that an affirmative defense that the defendant unwittingly or unknowingly possessed the controlled substance was "a logical accommodation which recognizes the reasons for both the legislative designation of the crimes as strict liability offenses and the constitutional interests of the accused." Id.; see also State v. Holte, 631 N.W.2d 595, 599 (N.D. 2001) (holding that because it was possible for a person to be

6. See N.D. Cent. Code § 19-03.1-23 (2012); see also State v. Mittleider, 809 N.W.2d 303, 306 (N.D. 2011).

convicted of the strict liability offense of violating a domestic violence protection order based on innocent or mistaken conduct, a Michlitsch-type affirmative defense instruction could be given under appropriate circumstances).

Like the Supreme Court of North Dakota, the Supreme Court of Washington has rejected the argument that a mens rea element must be read into that state's drug possession statute. See Bradshaw, 98 P.3d at 1195. However, as in North Dakota, in Washington unwitting possession is an affirmative defense in simple possession cases because such a defense "ameliorates the harshness of the almost strict criminal liability [the] law imposes for unauthorized possession of a controlled substance." State v. Cleppe, 635 P.2d 435, 439 (Wash. 1981) (reaffirmed by Bradshaw, 98 P.3d at 1195). The affirmative defense in Washington "is supported by one of two alternative showings: (1) that the defendant did not know he was in possession of the controlled substance; or (2) that the defendant did not know the nature of the substance he possessed." Day, 11 P.3d at 310 (citations omitted).

I agree with the reasoning of the North Dakota and Washington state courts. As has been articulated, it would be "fundamentally unsound to convict a defendant for a crime involving a substantial term of imprisonment without giving him the opportunity to prove that his action was due to an honest and reasonable mistake of fact or that he acted without guilty intent." LaFave, supra § 5.5(d) at

393 n.51 (quoting Francis B. Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 82 (1933)).

An affirmative defense that affords the defendant with an opportunity to place his or her culpability at issue hampers the concerns of innocent criminalization and a violation of due process. Similar to the judicially recognized affirmative defenses of mistake of fact in North Dakota and Washington, where the accused believes he or she possesses or is delivering an innocuous substance in Florida, the accused may—but is not required to—assert the affirmative defense enumerated under section 893.101(2), Florida Statutes (2011), of "lack of knowledge of the illicit nature" of the controlled substance. Moreover, when this defense is asserted, the trial court must then instruct the jurors to find the defendant "not guilty" if they "have a reasonable doubt on the question of whether [the defendant] knew of the illicit nature of the controlled substance." Fla. Std. Jury Instr. (Crim.) 25.2. That is, if the defense is raised, the State has the burden to overcome the defense by proving beyond a reasonable doubt that the defendant knew of the illicit nature of the substance.

Therefore, although the Act is not a public welfare statute like the statutes reviewed in Balint, Freed, or International Minerals, and it imposes harsh penalties, this statutorily authorized affirmative defense, when read in conjunction with the applicable jury instruction, ameliorates the concern that the statute criminalizes

truly innocent conduct and saves the Act from a facial due process challenge.[7] In short, the Act does not codify true strict liability crimes because the Legislature has expressly allowed the defendant to place his or her lack of knowledge of the illicit nature of the substance at issue as a complete defense.

But, there is an important caveat. Given that the jury is also permitted to presume the defendant was aware of the illicit nature of the controlled substance just because he or she was in possession of that substance, even when the affirmative defense is raised, see Fla. Std. Jury Instr. (Crim.) 25.2, I do not foreclose the possibility for a defendant to claim on an as-applied basis that his or her innocent possession of an illicit substance was criminalized. A serious due process problem would be raised by application of the Act to this latter scenario. Cf. Liparota, 471 U.S. at 426 (construing a statute to include mens rea, noting that

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7. I emphasize that requiring the defendant to establish lack of knowledge of the illicit nature of the controlled substance, as opposed to requiring the State to prove the presence of such knowledge, does not impermissibly shift the burden of proof to the defendant. A state cannot require a defendant to prove the absence of a fact necessary to constitute a crime, see Mullaney v. Wilbur, 421 U.S. 684, 684-85, 701 (1975), and the State must prove each element of the charged crime beyond a reasonable doubt, see In re Winship, 397 U.S. 358, 362 (1970). However, removing a component of mens rea from the offense does not amount to shifting the burden of proof; rather, the Legislature has chosen to redefine what conduct amounts to an offense under the Act. See Stepniewski v. Gagnon, 732 F.2d 567, 571 (7th Cir. 1984) (concluding that by removing the element of intent from a criminal statute, the state legislature did not impermissibly shift the burden of proof because the legislature simply redefined the conduct that violates the statute).

"to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct").

In sum, I concur in upholding the statute against a facial challenge because the Act continues to require the State to prove knowledge of presence of the illicit controlled substance and authorizes an affirmative defense of lack of knowledge of the illicit nature of that substance. However, I would not foreclose an as-applied challenge to the Act on due process grounds.

PERRY, J., dissenting.

I respectfully dissent. I cannot overstate my opposition to the majority's opinion. In my view, it shatters bedrock constitutional principles and builds on a foundation of flawed "common sense."

Innocent Possession

The majority pronounces that "common sense and experience" dictate that "a person in possession of a controlled substance should be aware of the nature of the substance as an illegal drug" and further that, "[b]ecause controlled substances are valuable, common sense indicates that they are generally handled with care. As a result, possession without awareness of the illicit nature of the substance is highly unusual." Majority op. at 18.

But common sense to me dictates that the potential for innocent possession is not so "highly unusual" as the majority makes it out to be.

> [T]he simple acts of possession and delivery are part of daily life. Each of us engages in actual possession of all that we have on our person and in our hands, and in constructive possession of all that we own, wherever it may be located. Each of us engages in delivery when we hand a colleague a pen, a friend a cup of coffee, a stranger the parcel she just dropped.

State v. Washington, 18 Fla. L. Weekly Supp. 1129, 1133 (Fla. 11th Cir. Ct. Aug. 17, 2011) (footnote omitted), rev'd, No. 3D11-2244 (Fla. 3d DCA June 27, 2012). "[C]arrying luggage on and off of public transportation; carrying bags in and out of stores and buildings; carrying book bags and purses in schools and places of business and work; transporting boxes via commercial transportation—the list extends ad infinitum." Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1305 (M.D. Fla. 2011).

Given this reality, "[i]t requires little imagination to visualize a situation in which a third party hands [a] controlled substance to an unknowing individual who then can be charged with and subsequently convicted . . . without ever being aware of the nature of the substance he was given." State v. Brown, 389 So. 2d 48, 51 (La. 1980) (finding that such a situation offends the conscience and concluding that "the 'unknowing' possession of a dangerous drug cannot be made criminal"). For example,

> [c]onsider the student in whose book bag a classmate hastily stashes his drugs to avoid imminent detection. The bag is then given to another for safekeeping. Caught in the act, the hapless victim is guilty based upon the only two elements of the statute: delivery (actual, constructive, or attempted) and the illicit nature of the substance. See

> FLA. STAT. §§ 893.02(6), 893.13(1)(a). The victim would be faced with the Hobson's choice of pleading guilty or going to trial where he is presumed guilty because he is in fact guilty of the two elements. He must then prove his innocence for lack of knowledge against the permissive presumption the statute imposes that he does in fact have guilty knowledge. Such an outcome is not countenanced under applicable constitutional proscriptions.

Shelton, 802 F. Supp. 2d at 1308. The trial court order presently under review provides even more examples of innocent possession: a letter carrier who delivers a package containing unprescribed Adderall; a roommate who is unaware that the person who shares his apartment has hidden illegal drugs in the common areas of the home; a mother who carries a prescription pill bottle in her purse, unaware that the pills have been substituted for illegally obtained drugs by her teenage daughter, who placed them in the bottle to avoid detection. State v. Adkins, Nos. 2011 CF 002001, et al., slip op. at 14 (Fla. 12th Cir. Ct. Sept. 14, 2011).

> As the examples illustrate, even people who are normally diligent in inspecting and organizing their possessions may find themselves unexpectedly in violation of this law, and without the notice necessary to defend their rights. The illegal drugs subject to the statute include tablets which can also be and are commonly and legally prescribed. A medicine which is legally available, can be difficult for innocent parties to recognize as illegal, even if they think they know the contents. For example, the mother of the teenage daughter carries the pill bottle, taking it at face value as a bottle for the pills it ought to contain, even during the traffic stop at which she consents to [a] search of her belongings, confident in her own innocence. These examples represent incidents of innocence which should be protected by the requirement of [a] mens rea element, particularly given the serious penalties for the crime of drug possession required under Florida law.

Id. at 14-15. Other examples of innocent possession spring easily and immediately to mind: a driver who rents a car in which a past passenger accidentally dropped a baggie of marijuana under the seat; a traveler who mistakenly retrieves from a luggage carousel a bag identical to her own containing Oxycodone; a helpful college student who drives a carload of a friend's possessions to the friend's new apartment, unaware that a stash of heroin is tucked within those possessions; an ex-wife who is framed by an ex-husband who planted cocaine in her home in an effort to get the upper hand in a bitter custody dispute. The list is endless.

The majority nevertheless states that there is not "a protected right to be ignorant of the nature of the property in one's possession," elaborating that " '[c]ommon' sense tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled." Majority op. at 18 (quoting Turner v. United States, 396 U.S. 398, 417 (1970)). But the above examples, and surely countless others, do not involve such a "studied ignorance." Rather, they involve genuinely innocent citizens who will be snared in the overly broad net of section 893.13. And therein lies the point:

> Section 893.13 does not punish the drug dealer who possesses or delivers controlled substances. It punishes anyone who possesses or delivers controlled substances—however inadvertently, however accidentally, however unintentionally. . . . What distinguishes innocent possession and innocent delivery from guilty possession and guilty delivery is not merely what we possess, not merely what we

> deliver, but what we intend. As to that—as to the state of mind that distinguishes non-culpable from culpable possession or delivery—§ 893.13 refuses to make a distinction. The speckled flock and the clean are, for its purposes, all one.

Washington, 18 Fla. L. Weekly Supp. at 1133.

Presumption of Innocence and Burden of Proof

The majority rather cavalierly offers that, "[i]n the unusual circumstance where a person possesses a controlled substance inadvertently, establishing the affirmative defense available under section 893.101 will preclude the conviction of the defendant." Majority op. at 22. As discussed at length above, I do not agree that innocent possession is such an "unusual circumstance." Moreover, the majority's passing reference to simply "establishing the affirmative defense" implies that it is an inconsequential and easy thing to do. The majority further minimizes the enormity of the task, making it seem even friendly, in stating that "[t]he affirmative defense does not ask the defendant to disprove something that the State must prove in order to convict, but instead provides a defendant with an opportunity to explain why his or her admittedly illegal conduct should not be punished." Id. at 21.

But the affirmative defense at issue is hardly a friendly opportunity; rather, it is an onerous burden that strips defendants—including genuinely innocent defendants—of their constitutional presumption of innocence. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law,

axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895). It is as ancient as it is profound:

> Numerius [was on trial and] contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, "a passionate man," seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, "Oh, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?" to which Julian replied, "If it suffices to accuse, what will become of the innocent?"

Id. at 455. "What will become of the innocent?" The answer to that question in the present context is as inevitable as it is disturbing. Under the majority's decision and the above examples, the innocent will from the start be presumed guilty. The innocent will be deprived of their right to simply deny the charges and hold the State to its burden of proving them guilty beyond a reasonable doubt. The innocent will instead be forced to assert an affirmative defense, whereupon "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." § 893.101(3), Fla. Stat. (2011).

The innocent will then have no realistic choice but to shoulder the burden of proof and present evidence to overcome that presumption. See generally Stimus v. State, 995 So. 2d 1149, 1151 (Fla. 5th DCA 2008) (recognizing that a defendant who raised an affirmative defense "had the burden to establish the defense and

present evidence" regarding same). The innocent will thus have to bear the considerable time and expense involved in conducting discovery, calling witnesses, and otherwise crafting a case for their innocence—all while the State, with its vastly superior resources, should be bearing the burden of proving their guilt.

The innocent will then hear their jury instructed on the permissive presumption that they knew of the illicit nature of the substance in question. § 893.101(3), Fla. Stat. (2011). Finally, the innocent—in I fear far too many cases—may be found guilty, convicted, and sentenced to up to life in prison. See Shelton, 802 F. Supp. 2d at 1302 ("Sentences of fifteen years, thirty years, and life imprisonment [possible under section 893.13] are not by any measure 'relatively small.' ").

Such convictions and sentences will be a disgrace when, on a profoundly foundational level, "the law holds that it is better that ten guilty persons escape than that one innocent suffer." Coffin, 156 U.S. at 456 (quoting 2 William Blackstone, Commentaries *357). The majority opinion breaks that sacred law and, as discussed below, threatens bedrock principles of the presumption of innocence and burden of proof in contexts well beyond the one at hand.

Slippery Slope

As in the present case, the effect of the trial court order in Washington would be the dismissal of charges against all the defendants at issue—"the

overwhelming majority of whom may have known perfectly well that their acts of possession or delivery were contrary to law." 18 Fla. L. Weekly Supp. at 1133.

> Viewed in that light, these movants are unworthy, utterly unworthy, of this windfall exoneration. But as no less a constitutional scholar than Justice Felix Frankfurter observed, "It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end."

Id. (quoting Davis v. United States, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting)). In this vein, the court in Shelton noted with some consternation that

> if the Florida legislature can by edict and without constitutional restriction eliminate the element of mens rea from a drug statute with penalties of this magnitude, it is hard to imagine what other statutes it could not similarly affect. Could the legislature amend its murder statute such that the State could meet its burden of proving murder by proving that a Defendant touched another and the victim died as a result, leaving the Defendant to raise the absence of intent as a defense, overcoming a permissive presumption that murder was the Defendant's intent? Could the state prove felony theft by proving that a Defendant was in possession of an item that belonged to another, leaving the Defendant to prove he did not take it, overcoming a permissive presumption that he did?

802 F. Supp. 2d at 1308 n.12 (citation omitted); see also Norman L. Reimer, Focus on Florida: A Report and a Case Expose a Flawed Justice System, The Champion, Sept. 2011, at 7, 8 ("The singularly extraordinary effort by the Florida Legislature to strip intent requirements from one of the most serious of felony offenses [under section 893.13] was an extreme example of the trend toward the dilution of intent requirements.") (footnote omitted). Making similar observations, the court in

Washington lamented, "Oh brave new world!" 18 Fla. L. Weekly Supp. at 1134 n.14.

Conclusion

"Brave" indeed, in the most foreboding sense of that word. The majority opinion sets alarming precedent, both in the context of section 893.13 and beyond. It makes neither legal nor common sense to me, offends all notions of due process, and threatens core principles of the presumption of innocence and burden of proof. I would find section 893.13 facially unconstitutional and affirm the trial court order under review.

Certified Judgments of Trial Courts in and for Manatee County – Scott MacKenize Brownell, Judge - Case No. 2011CF002001 - An Appeal from the District Court of Appeal, Second District, Case No. 2D11-4559

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As Amici Curiae