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Shelton v. Secretary, Department of Corrections: A Constitutional Challenge to Florida's Drug Law

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SHELTON V. SECRETARY, DEPARTMENT OF CORRECTIONS: A CONSTITUTIONAL CHALLENGE TO FLORIDA'S DRUG LAW

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I. INTRODUCTION

Shelton v. Secretary, Department of Corrections, a recent federal district court case, has created a wave of constitutional challenges to Florida's Drug Abuse Prevention and Control Statute.[1] Decided in July 2011, the Federal District Court for the Middle District of Florida considered a facially constitutional challenge to Florida Statute section 893.13, Florida's Drug Abuse Prevention and Control Statute.[2] The court addressed the constitutional issue in *Shelton*, the 2002 amendment to Florida's Drug Abuse Prevention and Control Law, and held that Florida's amended drug statute had effectively created a strict liability crime. Because of its substantial penalties, social stigma, and overly broad nature, this law is incongruous with notions of due process.[3] This case note will address the analysis and effects of *Shelton* on Florida's state criminal courts, and it will propose effective remedies that would bring Florida's drug laws into conformity with the Constitution of the United States.

A. History of Florida's Drug Abuse Prevention and Control Law

Prior to 2002, Florida's Drug Abuse Prevention and Control Law stated the following:

> (1)(a) Except as authorized by this chapter and chapter 499, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance. Any person who violates this provision with respect to: 1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c) 4., commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
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> . . . .

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1. Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289 (M.D. Fla. 2011).
2. FLA. STAT. § 893.13 (2012).
3. *Shelton*, 802 F. Supp. 2d at 1296.

> (6)(a) It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. Any person who violates this provision commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.[4]

This Statute, by its lack of a specific *mens rea*, designates drug possession as a general intent crime.[5] A general intent crime is a crime that involves performing a particular act without intending a further act or a further result.[6] Prior to 1996, Florida case law held that where a crime was a general intent crime, the state need not prove criminal intent, and thus "guilty knowledge" is not a required element.[7] In *State v. Medlin*, the Florida Supreme Court elaborated that Florida case law sets out a rule that:

> Where a statute denounces the doing of an act as criminal without specifically requiring criminal intent, it is not necessary for the State to prove that the commission of such act was accompanied by criminal intent. It is only when criminal intent is required as an element of the offense that the question of 'guilty knowledge' may become pertinent in the State's case.[8]

However, in 1996, while deliberating on the issue of *mens rea* and guilty knowledge in reference to drug possession, the Florida Supreme Court in *Chicone v. State*, essentially grafted a guilty knowledge requirement onto Florida's Drug Possession Abuse and Control Statute.[9]

1. Knowledge of Illicit Nature: *Chicone v. State*

In *Chicone*, the petitioner was convicted of possession of cocaine and drug paraphernalia.[10] On appeal, he asserted that the trial court erred in refusing to instruct the jury that the state had to prove that he knew the substance he possessed

4. *Id.*; FLA. STAT. § 893.13(1)(a), (6)(a) (2000).
5. *See* BLACK'S LAW DICTIONARY (9th ed. 2009) *Mens rea* is defined as "guilty mind." *Id.* "The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime. . . . [A]n intention to do the act which is made penal by statute or by the common law." *Id.*
6. 21 AM. JUR. 2d *Criminal Law* § 118 (2013).
7. State v. Medlin, 273 So. 2d 394, 396 (Fla. 1973).
8. *Id.*
9. Chicone v. State, 684 So. 2d 736, 743 (Fla. 1996).
10. *Id.* at 737.

was cocaine, and the object he possessed was paraphernalia.[11] The court held that guilty knowledge or "knowledge of the illicit nature of the substance" is an essential element of the crime of possession, and "if specifically requested by a defendant, the trial court should expressly indicate to jurors that guilty knowledge means the defendant must have knowledge of the illicit nature of the substance allegedly possessed."[12]

The *Chicone* court was influenced by the proposition of law set forth in *Dennis v. United States.*[13] *The Dennis Court held that* "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."[14] The *Chicone* court concluded that good sense and the rule of common law favored a *scienter* requirement.[15] The court additionally noted that, "[a]s all agree, including the State, the legislature would not ordinarily criminalize the 'innocent' possession of illegal drugs. Silence does not suggest that the legislature dispensed with *scienter* here."[16]

The court, by analysis of *Staples v. United States*, recognized that applying a felony punishment to a strict liability offense was contradictory with the theory of public welfare offenses.[17] With such a harsh penalty and social stigma attached to the punishment, the lack of *mens rea* would result in a violation of the Due Process Clause of the Fourteenth Amendment.[18] By this reasoning the Court opined:

> We believe it was the intent of the legislature to prohibit the knowing possession of illicit items and to prevent persons from doing so by attaching a substantial criminal penalty to such conduct. Thus, we hold that the State was required to prove that Chicone knew of the illicit nature of the items in his possession.[19]

The court, therefore, affixed a two-faceted knowledge requirement onto the Statute: (1) the defendant must have knowledge of the presence of the substance; and (2) he or she must also be aware of its illicit nature.[20] Florida attorneys have understood the holding of *Chicone* to be multi-faceted.[21] The plain language of the Statute imposes no *mens rea* requirement.[22] Absent this requirement, the offense is a strict liability offense, which includes both innocent and innocuous conduct.[23]

11. *Id.* at 738.
12. *Id.* at 745–46.
13. Dennis v. United States, 341 U.S. 494, 500 (1951).
14. *Id.*
15. *Chicone*, 684 So. 2d at 743–44.
16. *Id.* at 744.
17. 511 U.S. 600 (1994).
18. *Chicone*, 684 So. 2d at 744.
19. *Id.*
20. *See generally Chicone*, 684 So. 2d 736.
21. *See* Richard M. Summa, *After* Chicone*: Blasting the Bedrock of Criminal Law*, 82 FLA. B.J. 28, 28 (2008).
22. *Id.*
23. *Id.*

Under *Staples*, the imposition of felony punishment for a strict liability offense violates due process.[24]

> It is presumed that the legislature did not intend to enact an unconstitutional statute; . . . it is necessary, therefore, to save the constitutionality of the possession of cocaine statute by inferring, as a matter of judicial construction, the *mens rea* element of knowledge of the illicit nature of the substance.[25]

2. After *Chicone—Scott v. State*

Subsequently in *Scott v. State*, the Florida Supreme Court re-affirmed *Chicone* and answered the following questions of law:

> Does the illegal possession of a controlled substance raise a rebuttable presumption (or inference) that the defendant had knowledge of its illicit nature? 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?[26]

The Florida Supreme Court answered both questions in the affirmative and held that "knowledge of the illicit nature of the contraband is an element of the crime of possession of a controlled substance, [and] a defendant is entitled to an instruction on that element."[27] The court further stated that "[i]t is error to fail to give an instruction even if the defendant did not explicitly say he did not have knowledge of the illicit nature of the substance."[28]

B. The Legislature's Response—Florida Statute Section 893.101

The Florida Legislature, displeased with the holdings in *Chicone* and *Scott*, reacted in 2002 with House Bill 1935.[29] It amended section 813.13, providing the following language:

> (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.

24. *Id.*
25. *Id.*
26. Scott v. State, 808 So. 2d 166, 168 (Fla. 2002).
27. *Id.* at 171.
28. *Id.*
29. H.B. 1935, 2002 Leg., 258th Sess. (Fla. 2002).

> (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.
>
> (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.[30]

By enacting this Statute, the Legislature "expressly provides that knowledge of the illicit nature of a controlled substance is not an element of any offense under chapter 893."[31] However, because of the doctrine of separation of powers, the Legislature could not outright overrule the constitutional findings in *Chicone*.[32] The Legislature does, however, possess the authority to determine elements and defenses of a criminal offense.[33] The Statute, in effect, supersedes *Chicone* and shifts the burden of proof by re-designating the former element of guilty knowledge as an affirmative defense.[34]

II. A CONSTITUTIONAL CHALLENGE: *SHELTON V. SECRETARY DEPARTMENT OF CORRECTIONS*

Petitioner Mackle Vincent Shelton was arrested and charged with numerous criminal violations, including delivery of cocaine.[35] Shelton was found guilty on the cocaine charge, as well as four other charges.[36] Because of the 2002 amendment to Florida's Drug Abuse Prevention and Control Law, the jury was not instructed that illicit knowledge was an element of the offense.[37] Rather, the jury was

30. *See id.*

31. Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1307 (M.D. Fla. 2011) (citing *Miller v. State*, 35 So. 3d 162, 163 (Fla. Dist. Ct. App. 2010)).

32. *See generally* Marbury v. Madison, 5 U.S. 137 (1803).

33. *See* State v. Giorgetti, 868 So. 2d 512, 516 (Fla. 2004).

34. *See* Summa, *supra* note 21.

> The enactment of F.S. § 893.101, however, did not overrule *Chicone*. The legislature could not overrule the constitutional aspect of *Chicone* because the separation of powers doctrine confers upon the judiciary the sole authority to say whether a statute is constitutional. On the other hand, the legislature possesses the sole authority to determine the elements of a criminal offense. It is correct to state, therefore, that the enactment of F.S. § 893.101 superseded *Chicone*, but only in part. *Chicone's* ultimate holding, that the mens rea element will be inferred as a matter of judicial construction, may not stand.

Id.

35. *Shelton*, 802 F. Supp. 2d at 1295.

36. *Id.*

37. *Id.*; FLA. STAT. § 893.101 (2012).

simply instructed to determine: (1) whether Shelton delivered a certain substance, and (2) whether that substance was cocaine.[38]

Shelton exhausted his appeals for post-conviction relief and then petitioned for federal *habeas corpus* relief.[39] In his petition for *habeas corpus*, Shelton claimed "that [Florida Statute section] 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 [he] was sentenced. . . ."[40]

The Middle District of Florida, Orlando Division, granted Shelton's claim and reviewed it *de novo*, noting that:

> Florida's Fifth District Court of Appeal issued decisions affirming the rulings of the trial court without opinion and without a merits-based analysis of the federal constitutional claims, and thus its *per curiam* affirmances do not constitute an adjudication of Petitioner's facial challenge to the constitutionality of FLA. STAT § 893.13 on the merits. Therefore, no deference is due to the state court's decision.[41]

The District Court, applying the same *Staples*[42] analysis utilized in *Chicone*, held that section 893.13 is unconstitutional and facially invalid.[43] The Court reasoned that by enacting Florida Statute section 893.101, the State Legislature affirmatively eliminated the *mens rea* and *scienter* requirement from a felony offense and thus violated the petitioner's due process rights.[44]

A. The Strict Liability Standard—*Staples v. United States*

Under *Staples* and its progeny, a strict liability offense may be constitutional, but only "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."[45] The State in *Shelton* asserted that although it eliminated the *scienter* requirement from the Statute, it did allow for lack of knowledge as an affirmative defense.[46]

The *Shelton* court observed that state legislatures may shift the burden of proof to the defendant by naming an element as an affirmative defense, "[b]ut there are obviously constitutional limits beyond which the states may not go in this regard."[47] In addition, the *Shelton* court noted that "while the State is correct that the

38. *Shelton*, 802 F. Supp. 2d at 1295.
39. *Id.* at 1296.
40. *Id.*
41. *Shelton*, 802 F. Supp. 2d at 1297 (internal citations omitted).
42. *See* Staples v. United States, 511 U.S. 600 (1994).
43. *Shelton*, 802 F. Supp. 2d at 1297.
44. *Id.*
45. *Id.* at 1298.
46. *Id.* at 1306–07.
47. *Id.* at 1298 (quoting Patterson v. New York, 432 U.S. 197, 210 (1977)).

legislature has the authority to declare the elements of an offense, it 'must act within any applicable constitutional constraints in defining criminal offenses.'"[48] The *Shelton* court noted that public welfare offenses—those lacking a *mens rea*—are not unconstitutional *per se*, but may not be punished as felonies.[49] The *Shelton* court concluded that "[u]nder *Staples* and its progeny, the tripartite analysis for evaluating a strict liability offense under the strictures of the Constitution involves consideration of: (1) the penalty imposed; (2) the stigma associated with conviction; and (3) the type of conduct purportedly regulated."[50]

B. Shelton's Constitutional Claim—*Staples* Analysis

1. Harsh Penalty Imposed

The *Shelton* court held that the Statute in question violates due process because its penalties are severe.[51] The District Court reviewed the penalties attached to possession-related crimes and concluded that for such harsh penalties and high period of incarceration, Florida Statute section 893.13 does not pass constitutional muster.[52] The Court reasoned that:

> It cannot reasonably be asserted that the penalty for violating Florida's drug statute is 'relatively small'. A violation of § 893.13(1)(a)(1), for delivery of a controlled substance . . . is a second degree felony, ordinarily punishable by imprisonment for up to fifteen years. For habitual violent felony offenders . . . a violation of § 893.13 (1)(a)(1) is punishable by imprisonment for up to thirty years and includes a ten-year mandatory minimum sentence. Other provisions of Florida's drug statute subject offenders to even harsher penalties, including ordinary imprisonment for thirty years for first time offenders and life imprisonment for recidivists.[53]

Florida's drug Statute certainly has a severe penalty attached.[54] While some states similarly punish drug possession offenses as felonies with considerable penalties attached, other states have rejected such a draconian and unreasonable construction of the law because it criminalizes the "unknowing" possession of a controlled substance.[55] However, the *Shelton* court notes that Florida, by enactment of

48. *Id.* (quoting Jones v. United States, 526 U.S. 227, 241 (1999)).
49. *Shelton*, 802 F.Supp. 2d at 1300.
50. *Id.* (quoting Staples v. United States, 511 U.S. 600, 619 (1994)).
51. *Id.*
52. *Id.* at 1302.
53. *Id.* at 1300.
54. *See generally* FLA. STAT. §§ 893.03–13 (2012); FLA. STAT. § 775.
55. *See* GA. STAT. ANN. § 16–13–30 (C).

> Except as otherwise provided, any person who violates subsection (a) of this Code section with respect to a controlled substance in Schedule I or a narcotic drug in Schedule II shall be

section 893.101, "stands alone in its express elimination of *mens rea* as an element of a drug offense."[56]

2. Florida Statute Section 893.13 Violates Due Process Because It Creates a Substantial Social Stigma

The District Court recognized the severe stigma that a felony conviction can give to a defendant. The negative social effects of a felony conviction are devastating to an individual because a felony "is as bad a word as you can give to [a] man or thing."[57] The court addressed the substantial effects a felony conviction can have upon one's individual liberties and it also noted that the State had little argument to offer on this point.[58] The court is undoubtedly correct on this aspect. A drug possession conviction leads to substantial social stigma, "gravely besmirches" the defendant's reputation, and also imposes a significant burden on those released from incarceration.[59] Severe drug and social policies may cause restrictions on employment, housing, education, welfare, mental health and substance abuse treatment, and can make it exceedingly difficult for released offenders to succeed.[60]

3. Florida Statute Section 893.13 Violates Due Process Because It Regulates Inherently Innocent Conduct

The *Shelton* court notes that while the Supreme Court has upheld statutes regulating inherently dangerous conduct without requiring *mens rea* as to *every element*, such instances involved at least *some element* that had a *mens rea* requirement.[61] The *Shelton* court distinguished the United States Supreme Court case of *United States v. Balint*, in which the Court found that the Statute at issue[62] "was not

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> guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than 15 years.

Id.

56. Shelton v. Sec'y Dep't of Corr., 802 F.Supp. 2d 1289, 1295 (M.D. Fla. 2011); *see e.g.*, State v. Bell, 649 N.W.2d 243, 252 (N.D. 2002) (noting the legislature amended North Dakota's drug laws in 1989 to include the culpability requirement of "willfully" as an element of the offense of possession of a controlled substance, thereby eliminating possession as a strict liability offense); *see also* State v. Brown, 389 So. 2d 48, 51 (La. 1980) (concluding drug possession cannot be a strict liability crime because it would impermissibly criminalize unknowing possession of a controlled substance and permit a person to be convicted "without ever being aware of the nature of the substance he was given").

57. Morissette v. United States, 342 U.S. 246, 260 (1952).

58. *Shelton*, 802 F. Supp. 2d at 1302. ("[The court noted that] [c]onvicted 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.").

59. *Id.*

60. For more discussion see Julia van Olphen, Michele J. Eliason, Nicholas Freudenberg & Marilyn Barnes, *Nowhere To Go: How Stigma Limits the Options of Female Drug Users After Release From Jail*, SUBSTANCE ABUSE TREATMENT, PREVENTION & POLICY (May 8, 2009), *available at* http://www.substanceabusepolicy.com/content/4/1/10.

61. *Shelton*, 802 F.Supp. 2d at 1300.

62. Harrison Anti-Narcotic Act of 1914, 21 U.S.C. § 174.

a true strict liability statute because it required proof that the defendant knew that he was selling 'dangerous narcotics.'"[63] In *Balint*, the Supreme Court held that due process was satisfied without knowing that the specific narcotics he was dealing were regulated because

> where one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells.[64]

By contrast, the *Shelton* court held that Florida's Statute does not require even a *de minimus* showing that the defendant knew he was dealing with an illicit substance.[65] The District Court also reasoned under *Staples* that the Supreme Court might suggest that

> "punishing a violation as a felony is simply incompatible with the theory of the public welfare offense," and that "absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*."[66]

III. HAS FLORIDA STATUTE SECTION 893.101 REALLY ELIMINATED A *MENS REA* REQUIREMENT?

Specifically, Florida's jury instructions provide that in order to establish the crime of Drug Possession, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) possessed a certain substance.
2. The substance was ([the] specific substance alleged).
3. (Defendant) had knowledge of the presence of the substance.[67]

Under the current Statute, the prosecution is still required to prove that the defendant had knowledge of the presence of the substance.[68] However, under the current scheme of case law, knowledge is often presumptive.[69]

63. *Shelton*, 802 F.Supp 2d at 1303 (quoting Balint v. United States, 258 U.S. 250, 252–53 (1922)).
64. *Balint*, 258 U.S. at 252–53.
65. *Shelton*, 802 F.Supp. 2d at 1304.
66. *Id.* at 1305 (quoting *Staples*, 511 U.S. at 618).
67. FLA. STD. JURY INST. § 25.7. Note that this statute only requires proof of actual or constructive possession, and knowledge of the substance's presence. *Id. Cf.* FLA. STD. JURY INST. § 25.2 (requiring intent to sell, manufacture, or purchase).
68. *See* Willis v. State, 320 So. 2d 823, 825 (Fla. Dist. Ct. App. 1975).
69. *See id.* If a person has exclusive possession of a controlled substance, knowledge of its presence may be inferred or assumed; *see also* Brown v. State, 428 So. 2d 250, 251–52 (Fla. 1983) (describing that drugs were scattered about the house and considered "in plain view" which constituted sufficient evidence to support conviction for constructive possession as to the owner or lessee); *see also* State v. Williams, 742 So. 2d 509, 512 (Fla.

Consider two hypothetical situations in which a defendant is in actual or exclusive constructive possession of the substance: (1) an unknowing defendant holds a package that contains a controlled substance for a friend; and (2) a drug dealer mails a package of marijuana to the wrong address and it ends up at the defendant's home. In both examples, whether the defendant is holding it on his person or in a conveyance such as a vehicle or house, both circumstances are sufficient to sustain a conviction regardless of whether the defendant possesses knowledge of the package's contents. Knowledge is inferred because of the actual or exclusive constructive possession of the package. Therefore, the "knowing" element in section 893.13 does not satisfy the requirement of *mens rea*.[70] There is no burden on the State to prove that the defendant *intended* or even *actually knew* of the controlled substances in his possession as this element is often presumptive.

As noted in *Shelton*, the Statute criminalizes innocent conduct such as simply carrying or holding the property of another.[71] District Judge Mary S. Schriven elaborated that:

> To state the obvious, there is a long tradition throughout human existence of lawful delivery and transfer of containers that might contain substances under innumerable facts and circumstances: carrying 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*.[72]

"Where laws proscribe conduct that is neither inherently dangerous nor likely to be regulated, the Supreme Court has consistently either invalidated them, or construed them to require proof of *mens rea* in order to avoid criminalizing 'a broad range of apparently innocent conduct.'"[73] Thus, by adding the 2002 amendment to section 893.13, the Florida Legislature has essentially done away with guilty knowledge, and has effectively created a strict liability statute that criminalizes innocuous conduct in certain circumstances.

The *Shelton* court discussed the State's assertion that the possession offense is not a strict liability crime because the defendant may raise lack of knowledge as an affirmative defense.[74] The court cited two reasons why this contention fails:[75] (1)

Dist. Ct. App. 1999) ("Knowledge of possession may be presumed or inferred where the State offers evidence of actual possession or exclusive constructive possession.").

70. *Shelton*, 802 F. Supp. 2d at 1305.

71. *Id.*

72. *Id.*

73. *Id.* at 1303 (*citing* Liparota v. United States, 471 U.S. 419, 426 (1985)).

74. Under the Florida Standard Jury Instructions, the State is permitted to instruct the jury that they are permitted to assume that a defendant was aware of the illicit nature of a controlled substance if he was in actual *or* constructive possession of the substance. FLA. STD. JURY INST. § 25.7.

> Knowledge of the illicit nature of the controlled substance is not an element of the offense of [insert name of offense charged]. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense. (Defendant) has raised this affirmative defense. However, you are permitted to presume that (defendant) was aware of the illicit nature of the con-

whether a statute is a strict liability offense should be determined by its elements, not affirmative defenses to it;[76] and (2) a defendant possesses the burden of proof on an affirmative defense while the State enjoys a presumption against it.[77] The *Shelton* court cited *Patterson v. New York*, in which the United States Supreme Court discussed constitutional safeguards of due process and reiterated the basic proposition of American criminal law: "A State must prove every ingredient of an offense beyond a reasonable doubt."[78] In *Patterson*, the Supreme Court held that the State "may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements is the offense."[79] This "shifting of the burden of persuasion" is presumed "impermissible under the Due Process Clause."[80]

The *Shelton* court reconciled *Patterson* with *Staples* and held that while the State is free to eliminate a *mens rea* requirement, it must still conform to the constitutional safeguards of due process.[81] While the Florida Legislature has the authority to manipulate or eliminate elements of criminal offenses, it has exceeded the bounds of constitutional safeguards by eliminating *mens rea* in section 893.13:

> More importantly, the Supreme Court's dicta in *Staples* that a legislature is free to eliminate *mens rea* in defining the elements of an offense does not dispense with its prior holdings requiring constitutional scrutiny of any such promulgation. As the Court explained in *Patterson*, 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."*** The State of Florida exceeded those bounds in this instance.[82]

Shelton is correct in its analysis of the Supreme Court's decisions in *Staples* and its progeny. The Statute constitutes a strict liability crime that has both a severe punishment and a strong social stigma attached to it. This is undeniably true. The Statute is also overly broad and often criminalizes inherently innocuous conduct.[83] Simply by being in actual or constructive possession of a package containing illicit contents—regardless of intent or knowledge of the package's contents—can lead to a felony conviction under Florida law. Although the legislature has shifted the "guilty knowledge" element to an affirmative defense, when it comes to the current

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trolled substance if you find that (defendant) was in actual or constructive possession of the controlled substance.

Id.

75. *Shelton*, 802 F. Supp. 2d at 1307.
76. *Id.*
77. *Id.*
78. *Id.* (citing Patterson v. New York, 432 U.S. 197, 215 (1977)).
79. *Id.*
80. *Id.*
81. *Shelton*, 802 F. Supp. 2d at 1306.
82. *Id.* (citing Patterson v. New York, 432 U.S. 197, 210 (1977)) (emphasis added) (internal citations omitted).
83. *Shelton*, 802 F. Supp. 2d at 1297.

scheme of case law, defendants have little to no affirmative defenses available to them.

IV. So What Now? What Effect Does *Shelton* Have—Is *Shelton* Binding on Florida's Courts? If Not, Should It be Persuasive?

Shelton has caused a whirlwind of decisions in Florida's circuit courts. Courts have offered various conflicting opinions on whether or not *Shelton* is binding and whether or not they agree with *Shelton*'s analysis.[84] Initially, this case caused drastically inconsistent judgments across Florida's county and circuit courts.[85] However, a few district courts of appeal have spoken on the issue and offered clarification.[86] The Florida Supreme Court and the 11th Circuit have also rendered opinions on the issue.[87] As it stands now, the state courts must disregard *Shelton* until it is addressed by the Supreme Court of the United States.

A. Circuit Court Confusion

The Eleventh Judicial Circuit, faced with thirty-nine defendants' motions to suppress pursuant to *Shelton*, agreed with the District Court's ruling and found the opinion to be binding upon the state courts.[88] The court analyzed the *Staples* factors discussed in *Shelton* and agreed with its findings:

> As to the first two *Staples* factors—severity of punishment and of attendant social stigma—*Shelton*'s analysis was uncomplicated and incontrovertible. The crime with which Shelton was charged, delivery of a relatively small amount of cocaine, is made a second-degree felony by the statute and is punishable by up to 15 years imprisonment. This is logarithmically greater than any sentence ever found to be constitutionally permitted when attached to a strict liability crime.[89]

The Eleventh Judicial Circuit agreed with *Shelton*'s contention that section 893.13 is overly broad. The court recognized that the Statute does not penalize intentional possession or delivery—or even knowing possession—but equally punishes those who unintentionally engage in the act.[90] As to whether or not *Shelton* is

84. *See infra* Part IV(a)–(d).
85. *See infra* Part IV(a).
86. *See infra* Part IV(b)
87. *See infra* Part IV(c)(d).
88. State v. Washington, 18 Fla. L. Weekly Supp. 1129a (Fla. 11th Cir. Ct. Aug. 17, 2011) (citing Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289 (M.D. Fla. 2011)).
89. *Id.*
90. The Eleventh Judicial Circuit went on to note:

> According to *Shelton*, § 893.13 casts much too broad a net. It does not penalize the intentional possession or delivery of drugs, or the knowing possession or delivery of drugs; it punishes the possession or delivery of drugs, however unintentional, however unknowing. It

binding, the Eleventh Judicial Circuit reasoned that "the Florida Supreme Court has 'recognize[d], of course, that state courts are bound by federal court determinations of *federal* law questions.'"[91] The Eleventh Circuit recognized that rulings of lower federal courts on matters of state law are not binding on state courts; however, it reasoned that the *Shelton* court was not construing section 893.13 as to an issue of interpretation, but it held that the Statute is at odds with the Due Process Clause of the Fourteenth Amendment—clearly a federal constitutional issue.[92]

The State Attorney's Office for the Eleventh Circuit referred to *State v. Dwyer* when arguing that federal courts are not authoritative for construction or interpretation of Florida statutes.[93] However, Judge Milton Hirsch for the Eleventh Judicial Circuit of Florida took the position that *Dwyer* is inapplicable and a "poor choice of authority."[94] Judge Hirsch reconciled *Shelton* with *Dwyer,* and declared that in *Shelton*, the Florida Supreme Court had already imposed limiting constructions in order to bring the state Statute into conformity with the constitutional requirements of Due Process.[95] The legislature then reacted and rendered those decisions in *Chicone* and *Scott* null.[96] The Eleventh Circuit reasoned that in *Shelton*, the "federal court was simply picking up where the *Chicone* and *Scott* state courts had left off."[97] Furthermore, the Eleventh Circuit took the view that even if treated as "merely persuasive," *Shelton's* conclusion that section 893.13 violates due process by criminalizing conduct in the complete absence of *scienter* "is irrefragable."[98] The foremost argument for the Statute's unconstitutionality is that section 893.13 does not punish those who choose to deliver controlled substances, but punishes those who possess them whether or not they choose to do so.[99]

The Thirteenth Judicial Circuit of Florida takes the opposite view and disagrees with this reasoning—not on the issue of whether *Shelton* is binding—but that Florida's Statute is *not* unconstitutional.[100] In *Barnett*, the Thirteenth Circuit Court reasoned that in *Chicone* "the court was *not* choosing between a strict liability inter-

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punishes an activity—*e.g.*, carrying a package—that is inherently innocuous, rather than one that is inherently dangerous. It punishes the act of possession or delivery *simpliciter.*

Id.

91. *Id.* (citing Mobil Oil Corp. v. Shevin, 354 So. 2d 372, 375 n.9 (Fla. 1978)).
92. *Shelton*, 802 F. Supp. 2d at 1302–03.
93. *See generally* State v. Dwyer, 332 So. 2d 333 (Fla. 1976).
94. State v. Washington, 18 Fla. L. Weekly Supp. 1129a (Fla. 11th Cir. Ct. Aug. 17, 2011).
95. *Id.*
96. *Id.*
97. *Id.*

No Florida case has decided the issue presently before me: whether § 893.13 is unconstitutional *by operation of the 14th Amendment of the federal Constitution.* . . . the Florida cases that appear to give passing consideration to the issue of constitutionality or not of the statute "contain no analysis of or citation to the tripartite constitutional analysis" required by *Staples* and other U.S. Supreme Court authorities, and employed in *Shelton.* Accordingly, I am bound to follow *Shelton*'s holding that § 893.13 violates the 14th Amendment's due process guarantee.

Id. (internal citations omitted).

98. *Id.*
99. *Id.*
100. *See* State v. Barnett, 18 Fla. L. Weekly Supp. 1127a (Fla. 13th Cir. Ct. Aug. 12, 2011).

pretation and an interpretation engrafting a knowledge element: it was choosing between two interpretations that each had a knowledge element, with the difference being how specific the knowledge element needed to be."[101] The Thirteenth Circuit concluded that the 2002 enactment of section 893.101 did not eliminate the element of knowledge entirely and that *Shelton* did not question due process standard for the remaining knowledge element.[102] The court also reasoned "actual practice in Florida courts does include a general intent *scienter* requirement."[103]

B. Appellate Review

As for appellate decisions, the Second District Court of Appeal was the first appellate court to speak on the issue. The court recognized the inconsistencies in the circuit court opinions and issued a Certification Order Requiring Immediate Resolution by the Supreme Court.[104] The Second District observed the fact that rendering an opinion on the issue would be binding on all state courts, yet avoided making a ruling by stating that the Florida Supreme Court would be best suited to make such a judgment.[105]

The Fourth District Court of Appeal, in a *per curiam* decision, denied challenges to the Statute in light of *Shelton* and opined, "This court previously addressed the very same issue raised in *Shelton* in *Williams v. State*, and upheld the drug possession statute as constitutional."[106]

The First District Court of Appeal offered a binding decision.[107] The court recognized in *Flagg v. State* that although the Second District had certified the issue for immediate resolution by the Florida Supreme Court,

> a definitive statement from this court reaffirming the constitutionality of § section 893.13 notwithstanding *Shelton* will promote the consistent administration of justice by resolving the issue for the

101. *Id.*
102. *Id.*
103. *Id.*
104. State v. Adkins, 71 So. 3d 184 (Fla. Dist. Ct. App. 2011).
105. *Id.* at 185.

> Section 893.13 is the criminal statute most commonly used in Florida to enforce our laws against the manufacture, possession, and sale of illegal drugs. The ruling of the circuit court in this case would appear to control pending drug prosecutions in only one felony division of the Twelfth Circuit. This issue, however, will undoubtedly be raised in every felony division in all twenty circuits. It is clear from the four above-cited cases that judges will take at least two different approaches to the issue. 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. . . . .
>
> Until this important constitutional question is resolved by the Florida Supreme Court, prosecutions for drug offenses will be subject to great uncertainty throughout Florida.

Id.

106. Holmes v. State, 74 So. 3d 138 (Fla. Dist. Ct. App. 2011) (citing Williams v. State, 45 So. 3d 14, 15–16 (Fla. Dist. Ct. App. 2010)) (internal citations omitted).
107. *See generally* Flagg v. State, 74 So. 3d 138 (Fla. Dist. Ct. App. 2011).

> trial courts, thereby allowing drug prosecutions to proceed, at least until the supreme court or another district court weighs in on the issue.[108]

The court in *Flagg* denied petitioner's motion to suppress on the basis that *Shelton* is neither binding nor persuasive on Florida courts.[109] The court reasoned that the Statute does require the defendant to establish innocence by proving a lack of knowledge.[110] The court stated "rather, the statute provides that 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 drugs."[111] Thus, because this defense is available to defendants who are accused of violating this Statute—a defense not available to "true strict liability crimes"—it undermines the proposition in *Shelton*.[112]

Although *Flagg* notes that knowledge of the illicit nature of the controlled substance is an affirmative defense and the jury is permitted to find the defendant not guilty if there is a question of whether a defendant had such knowledge, this defense is illusory in most cases.[113] The Florida Standard Jury Instructions provide that the jury is permitted to find that a defendant had such knowledge if he was in actual or constructive possession of the substance and knowledge is to be inferred if the defendant was in exclusive possession.[114]

However, the court did note that the petitioner was still able to preserve his constitutional claim for appellate or federal review, but the decision will preserve the status quo until the Florida Supreme Court has weighed in on the issue.[115] The court also observed that district courts may still continue to take opposing sides in the discussion, but this district's decision remains binding on all state courts.[116]

Since *Flagg*, the First District Court of Appeal has routinely denied *Shelton* challenges.[117] However, other district courts have also offered their opinions. The

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108. *Id.* at 141.
109. *Id.* at 140.
110. *Id.*
111. *Id.*
112. *Id.* at 141.
113. *See generally* Willis v. State, 320 So. 2d 823, 823 (Fla. Dist. Ct. App. 1975).
114. FLA. STD. JURY INSTR. 25.7.
115. Flagg v. State, 74 So. 3d 138, 141 (Fla. Dist. Ct. App. 2011).
116. *Id.*

> Of course, defendants remain free to raise the constitutional argument to preserve the issue for appellate or federal review, but this decision will at least preserve the status quo until the supreme court addresses the issue, and it should also address the Second District's legitimate concern in *Adkins* that, without a definitive ruling from a higher court, different circuits (or even different judges in the same circuit) may continue to take opposite positions on the issue. *See Pardo v. State*, 596 So.2d 665, 666 (Fla. 1992) (recognizing that "in the absence of interdistrict conflict, district court decisions bind all Florida trial courts").

Id.

117. *See* Thompson v. State, 74 So. 3d 1132, 1133 (Fla. Dist. Ct. App. 2011) ("[A]ppellant argued that his convictions were unconstitutional and urged this court to adopt the reasoning of *Shelton v. Secretary, Department of Corrections*. For the reasons explained in *Flagg v. State*, we court reject the reasoning and holding in *Shelton*.) This court explained in *Young v. State*, 75 So. 3d 351 (Fla. Dist. Ct. App. 2011), "[W]e have previously rejected

Fourth District Court of Appeal, in *Maestas v. State*, also found *Shelton* unpersuasive and denied the petitioner's appeal.[118] The court re-analyzed *Chicone* and distinguished knowledge of the presence of the substance from knowledge of its illicit nature.[119] The court's argument in *Maestas* is that the presumption that a defendant knew the illicit nature of the substance does not apply if a defendant is unaware of the presence of the substance.[120] Several recent appellate cases have followed this reasoning.[121]

However, section 893.101's classification of drug possession as a general intent crime does not require the State to prove that the defendant knew his conduct was illegal, instead it forces the defendant to assert lack of guilty knowledge as an affirmative defense.[122] In the case of exclusive possession, the Statute requires that knowledge be presumed.[123] Florida cases have consistently upheld this proposition of law.[124] Under the current scheme of Florida case law and statutory regulations, many defendants are without relief because they have to prove this affirmative defense.[125] Doctrines, such as the "plain view" doctrine and exclusive possession, have routinely been used to presume knowledge.[126] Similarly, dominion and control in constructive possession cases have been used to uphold convictions regardless of whether the defendant knew of the illicit nature of the substance.[127] Thus, lack of *scienter* as an affirmative defense leaves defendants with little to no relief. The "illicit knowledge" defense is nothing short of a mirage for most defendants.

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this argument and are not inclined to reconsider it; further, *Shelton* is not binding on this court." S*ee also* Holmes v. State, 74 So. 3d 138 (Fla. Dist. Ct. App. 2011).

118. *See generally* Maestas v. State, 76 So. 3d 991 (Fla. Dist. Ct. App. 2011).

119. *Id.* at 994 ("Lack of knowledge of the illicit nature of a substance is distinct from lack of knowledge of the presence of the substance.").

120. *Id.* Florida Statute section 893.101 recognizes that "actual or constructive possession" must be found for the presumption to apply. *See also* FLA. STD. JURY INSTR. (Crim.) 25.7 ("[Y]ou are permitted to presume that (defendant) was aware of the illicit nature of the controlled substance *if you find that (defendant) was in actual or constructive possession of the controlled substance*.") (emphasis added). The State must prove knowledge of presence in order to establish actual or constructive possession. Thus, the permissive presumption that a defendant knew the illicit nature of the substance does not apply if a defendant is unaware of the presence of the substance.

121. *See generally* Adams v. State, 76 So. 3d 367 (Fla. Dist. Ct. App. 2011); King v. State, 76 So. 3d 1069 (Fla. Dist. Ct. App. 2011); Smith v. State, 77 So. 3d 840 (Fla. Dist. Ct. App. 2012).

122. Wright v. State, 920 So. 2d 21, 24 (Fla. Dist. Ct. App. 2005). "The statute does two things: it makes possession of a controlled substance a general intent crime, no longer requiring the state to prove that a violator be aware that the contraband is *illegal*, and, second, it allows a defendant to assert lack of knowledge as an affirmative defense." *Id.* (emphasis added).

123. FLA. STD. JURY INSTR. §25.7.

124. *See* Gartrell v. State, 626 So. 2d 1364, 1366 (Fla. 1993) (citing Frank v. State, 199 So. 2d 117, 120 (Fla. Dist. Ct. App. 1967) (holding that knowledge of possession may be inferred from the defendant's exclusive possession of the substance)).

125. *Wright*, 920 So. 2d at 24.

126. *See* Lee v. State, 835 So. 2d 1177, 1180 (Fla. Dist. Ct. App. 2002) (holding that evidence that defendant had sole possession and control of vehicle when arrested, and that marijuana cigarette was later found during course of inventory search of vehicle, was sufficient to prove a prima facie case of possession of marijuana); *see also* Brown v. State, 428 So. 2d 250, 251 (Fla. 1983) (even in a case of joint occupancy, where drugs were found in "plain view" in common areas of the house, knowledge and dominion and control were presumed and this was sufficient evidence for a conviction).

127. *See Lee*, 835 So. 2d at 1180; *Brown*, 428 So. 2d at 251.

C. The Florida Supreme Court

The Florida Supreme Court granted review of the Second District Court of Appeal's case *State v. Adkins*.[128] Undeniably, this is an important question for resolution by the Florida Supreme Court. Uniformity of state law is important to the framework of jurisprudence. Without resolution, appellate courts would have continued to make conflicting judgments about the applicability of section 893.13, a frequently violated statute.[129] However, the Court got this important question grossly wrong.

In *Adkins*, the Florida Supreme Court considered "case law that discuss[ed] the broad authority of the legislative branch to define the elements of criminal offenses."[130] In the Court's opinion, this "case law recognizes that due process *ordinarily* does not preclude the creation of an offense without a guilty knowledge element."[131] The Florida Supreme Court looked to the United States Supreme Court case of *Balint v. United States*.[132] In *Balint*, the Supreme Court upheld the Narcotic Act of December 17, 1914, an act that created a strict liability crime for manufacturing, importing, dealing, and distributing opium or coca leaves.[133] The Court looked to *Balint* to uphold its proposition that the legislature has broad discretion to define criminal offenses.[134] The Court also looked to several other cases where the elimination of *mens rea* has been found to be in violation of due process.[135] The Court distinguished these cases from the *Adkins* case and found that because the facts of *Adkins* were not a match to any of the facts in the cited case law, no due process violation has arisen in the case at bar.[136]

It is true that the Supreme Court has upheld strict liability schemes for public welfare offenses.[137] However, the Florida Supreme Court ignored the *Staples* tripartite analysis to determine the Statute's constitutionality. The *Staples* case provides a clear analysis for determining whether a strict liability offense comports with due process.[138] The Court mentioned *Staples*, but failed to follow its analysis. Rather, the Court looked to cases that were off point in an effort to support its conclusion.[139] The test should have been the *Staples* tripartite analysis: (1) the penalty

128. State v. Adkins, 96 So. 3d 412, 414 (Fla. 2012).

129. *The Facts About Mandatory Minimum Drug Laws in Florida: A Failure of Public Safety, Public Health, and Fiscal Responsibility*, FAMILIES AGAINST MANDATORY MINIMUMS, *available at* http://www.famm.org/Repository/Files/FL%20General%20MM%20fact%20sheet%20_8-27-09_.pdf (last visited Feb. 25, 2013) (stating that in 2007 and 2008, almost 30% of people entering prisons did so for a drug offense and that 20% of the prison population, over 20,000 people, were serving time for a drug offense).

130. *Adkins*, 96 So. 3d at 416.

131. *Id.*

132. *Id.* at 417 (citing United States v. Balint, 258 U.S. 250, 251 (1922)).

133. *Balint*, 258 U.S. at 251.

134. *Adkins*, 96 So. 3d at 418.

135. *Id.* at 419. (citing Lambert v. California, 355 U.S. 225 (1957); Smith v. California, 361 U.S. 147 (1959)).

136. *Adkins*, 96 So. 3d at 423.

137. *Balint*, 258 U.S. at 251.

138. *See* Staples v. United States, 511 U.S. 600 (1994).

139. *See* Shelton v. Sec'y Dep't of Corr., 802 F. Supp. 2d 1289, 1307 (M.D. Fla. 2011) (citing Patterson v. New York, 432 U.S. 197, 215 (1977) ("A State must prove every ingredient of an offense beyond a reasonable doubt . . . it may not shift the burden of proof to the defendant by presuming the ingredient upon proof of the other

imposed; (2) the stigma associated with conviction; and (3) the type of conduct purportedly regulated.[140] This test provides a clear set of standards to test the constitutionality of a strict liability crime. The legislature does have broad power to define the elements of a crime, however, under a strict liability analysis, the crime must comport with constitutional notions of due process.[141]

Additionally, the Court failed to recognize that this legal scheme effectively removes the affirmative defense of knowledge. The case law pertaining to constructive possession lends itself to the possibility of presumed knowledge in certain cases. Thus, the "affirmative defense" of lack of knowledge is routinely unavailable. The Court also failed to recognize the severity of punishment under Florida's Criminal Code. Under the 1914 Narcotics Act, a defendant could face fines of up to $2,000 and/or imprisonment for up to five years.[142] Under the Florida Statutes, a defendant could face a term of imprisonment of up to fifteen years, and/or a fine of up to $10,000.[143] Clearly, the punishments under Florida's Statutes are more severe than the "public welfare" punishments described in the 1914 Narcotics Act, and thus should receive greater constitutional scrutiny under *Staples*. While the Court relied upon case law that upheld legislative discretion to proscribe crimes and case law that upholds public welfare offenses, it failed to apply the correct legal standard.

D. Eleventh Circuit Court of Appeal

The Florida Supreme Court spoke on the issue in *Adkins* and offered clarification for Florida's judiciary. However, the government appealed *Shelton* to the Eleventh Circuit Court of Appeal.[144] The Eleventh Circuit continued to ignore the tripartite analysis set out in *Staples*. Instead, the Eleventh Circuit focused on the standard of review for federal courts.[145] The Eleventh Circuit applied the Antiterrorism and Effective Death Penalty Act (AEDPA) deference.[146] Under this legal scheme,

> a federal court may not grant a petitioner *habeas corpus* relief on a claim that was adjudicated on the merits by the state court unless the state court decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as deter-

elements of the offense. . . . Such shifting of the burden of persuasion with respect to a fact which the State deems so important must be either proved or presumed is impermissible under the Due Process Clause."); Morisette v. United States, 342 U.S. 246, 256 (1952) (emphasizing the law endows the accused with an "overriding presumption of innocence . . . which extends to every element of the crime."); U.S. v. Blakenship, 382 F.3d 1110, 1127 (11th Cir. 2004) ("[A] defendant is never obligated to prove anything to a jury, and a jury is entitled to believe a defendant's claims regardless of whether he offers proof to substantiate them.").

140. *Shelton*, 802 F. Supp. 2d at 1298 (citing *Staples*, 511 U.S. at 620).
141. *See Staples*, 511 U.S. at 611–19.
142. Harrison Anti-Narcotic Act of Dec. 17, 1914, ch. 1, § 9, 38 Stat. 785 (1914).
143. *See* FLA. STAT. §775.082; FLA. STAT. § 775.083; FLA. STAT. § 893.13.
144. *Shelton*, 691 F.3d at 1350.
145. *Id.* at 1353.
146. *Id.* at 1352.

> mined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[147]

Consequently, the court never reached the issue of whether the Statute complied with due process, but rather focused on the issue of whether *habeas corpus* could be granted to the petitioner.[148] The court found that, although it was a *per curiam* opinion, *Shelton's* Fifth District Court of Appeal's case was "an 'adjudications on the merits' entitled to AEDPA deference."[149] Thus, *habeas corpus* relief could not be granted unless the decision was contrary to, or an unreasonable application of, clearly established federal law.[150] The court found that Florida's Fifth District did not unreasonably apply clearly established federal law.[151] The court noted that "'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'"[152] Therefore, the court never answered the question of whether the state court's interpretation of federal law was incorrect—but applied a higher threshold—whether or not it was *unreasonable*.

V. REMEDIES FOR THE *SHELTON* PROBLEM

A. Supreme Court Review

Certainly, this is an important question for resolution by the United States Supreme Court. The petitioner in *Shelton* has recently filed for *certiorari* with the Supreme Court.[153] The Supreme Court should find *Shelton*'s reasoning quite persuasive. Prior to the Legislature's enactment of section 813.101, the Florida Supreme Court has opined on the issue, reached the same result as *Shelton*, and used the same constitutional analysis.[154] Is there any real reason to give deference to section 813.101's legislative findings in light of a constitutional due process violation? Especially in a time of shrinking state budgets and resources, the State should not be shifting the burden of proof onto defendants to prove their innocence.[155]

The Florida Supreme Court should return to the *Chicone* era interpretation of section 893.13 and declare section 893.101 unconstitutional. Alternatively, it could graft a more effective affirmative defense into the Statute. The court could accom-

147. *Id.*
148. *Id.* at 1352–53.
149. *Id.* at 1353.
150. *Shelton*, 691 F.3d at 1353.
151. *Id.*
152. *Id.* at 1352.
153. Petition for Writ of Certiorari, Shelton v. Sec'y, Fla. Dep't of Corr., No. 12-7430, 2012 WL 6969292 (U.S.S.C. Nov. 20, 2012).
154. *See generally* Chicone v. State, 684 So. 2d 736 (Fla. 1996).
155. Morissette v. United States, 342 U.S. 246, 256 (1952) (emphasizing the law endows the accused with an "overriding presumption of innocence . . . which extends to every element of the crime."); United States v. Blankenship, 382 F.3d 1110, 1127 (11th Cir. 2004) (recognizing that "[a] defendant is never obligated to prove anything to a jury, and a jury is entitled to believe a defendant's claims regardless of whether he offers proof to substantiate them").

plish this by reconsidering Florida's opinions that provided a presumption of knowledge in exclusive possession or "plain view" cases. By providing a defendant with a more effective affirmative defense, this could bring section 893.13 within the limits of due process. However, the easiest and most efficient solution to the problem is to return to the Florida Supreme Court's holdings in *Chicone* and *Scott* and to re-graft a *scienter* requirement into the Statute.

The lower courts have applied the wrong legal framework to this question. Yes, public welfare offenses have been upheld as strict liability crimes. However, since the penalties for the crimes are so severe, the social stigma attached to a drug conviction is so crushing, and because the Statute has a tendency to regulate innocuous conduct, the Statute should be found facially unconstitutional. The lower courts have also failed to review the case law by eliminating the so-called "affirmative defense" of lack of knowledge.[156] It is clear that in cases of exclusive possession, or "plain view," this defense is wholly inapplicable.[157] Because the scheme of constructive possession cases in Florida eliminate the affirmative defense of lack of knowledge, section 893.101 not only shifts the burden of proof to the defendant on this issue, but fully eliminates any sort of *mens rea* element.[158] This is not a case of "partial" elimination of a *mens rea* element. Rather, under Florida's current legal framework, it is a full elimination—making it a strict liability crime. Thus, the Florida Supreme Court should apply the *Staples* analysis discussed above. If the court applies this *Staples* analysis, it would unquestionably find that this Statute—and the current legal scheme eliminating an affirmative defense—is in violation of due process.

B. Legislative Remedies

If the Legislature does not wish to repeal section 893.101, lowering penalties may be a viable alternative. The penalties for drug possession or sale in Florida are high. As of now, possession of any controlled substance listed in section 893.03 could result in a first, second, or third-degree felony depending on the scheduling.[159] First-degree felonies can be punishable by up to a life sentence of incarceration.[160] For trafficking, conspiracy, and repeat offenders, Florida has minimum-mandatory sentencing guidelines.[161] Marijuana possession of less than twenty grams is considered a first-degree misdemeanor punishable by up to a year in prison or a $1,000 fine.[162]

The best solution to the "strict liability" issue in *Shelton* may lie with the Florida Legislature: a shift to the drug court model for sentencing of drug possession and trafficking crimes. Most Florida courts today are moving toward the drug court

156. *See supra*, notes 69–70 and accompanying text.
157. *See supra*, note 70 and accompanying text.
158. *Id.*
159. FLA. STAT. § 893.03; FLA. STAT. § 893.13; FLA. STAT. § 893.06.
160. FLA. STAT. § 775.082.
161. FLA. STAT. § 893.135.
162. FLA. STAT. § 893.13(6)(b); FLA. STAT. § 775.083.

model for misdemeanor drug offenses. Drug courts are a viable and effective method to achieve the State's goals of deterring drug addiction and saving money on high incarceration rates. These programs include mandatory drug testing, counseling, judicial monitoring, as well as a wide range of alternative sentences.[163] By statutorily changing the sentencing guidelines for first time drug offenders, the state could steer more defendants into these effective programs and save the state large sums of taxpayer dollars. In 2009, the cost of housing an inmate was $19,469 per year.[164] By placing more defendants in drug court or pre-trial diversion programs, the costs shift from the state to the defendant, as defendants are held responsible for keeping up with the cost of their program. Research has indicated that both the programs' treatment and supervision components are significant factors in reducing prison admissions.[165] This is because of the more demanding requirements of drug courts and the larger incentives for defendants to refrain from criminal activity.[166]

Currently, however, Florida has not expanded its drug court eligibility program to prison bound defendants.[167] The Legislature could redress the problem in *Shelton* with expanding the drug court program to non-violent drug offenders with felony convictions.[168]

Stakeholders indicated that there is strong incentive for such offenders to participate in the post-adjudicatory drug court programs as a means of avoiding incarceration. . . . Legislature could change the statute to allow drug courts to serve offenders with a non-violent criminal history and a sentencing score in the low range for mandatory prison, for example between 44 and 60 points. Our analysis of 2007 prison admissions identified 1,972 non-violent offenders with identified drug treatment needs who received sentencing scores between 44 and 60. Florida law previously allowed but currently prohibits judges from using an offender's substance abuse addiction to justify a non-prison alternative for offenders who score over 44 points. The Legislature could remove this exclusion from statute to permit judges, in their discretion, to place appropriate offenders into drug court.[169]

Extending the drug court model to felony convictions for drug offenses would dramatically reduce the harsh penalties Florida currently provides for within its statutory scheme. A simple and modern statutory change to Florida's drug law could bring section 893.13 back into conformity with the constitutional safeguards of due process. This simple solution can achieve two functional goals: (1) fully redress the constitutional challenges brought by *Shelton*, by reducing the harsh

163. For more information *see Supreme Court Task Force on Treatment-Based Drug Courts,* FLORIDA'S ADULT DRUG COURT (April, 2007) *available at* http://www.flcourts.org/gen_public/family/drug_court/bin/toolkit.pdf.

164. Florida Department of Corrections 2009–2010 Budget, *available at* http://www.dc.state.fl.us/pub/annual/0910/budget.html (last visited Feb. 5, 2013).

165. *State Drug Courts Could Expand to Target Prison Bound Adults*, Office of Program Policy Analysis and Government Accountability, Rep. No. 09-13 (March, 2009), *available at* http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0913rpt.pdf.

166. *Id.*

167. *Id.* at 5.

168. *Id.* at 6.

169. *Id.*

penalties and stigma attached to drug convictions; and (2) save the state significant wealth, capital, labor, and resources in a time of economic uncertainty.

VI. CONCLUSION

Undoubtedly this Statute is a violation of due process as it creates a scheme of extremely harsh penalties. Florida has minimum-mandatory sentencing for certain drug trafficking offenses, which can give defendants up to fifteen years in prison in addition to a $10,000 fine. The social stigma attached to drug related offenses is also extraordinarily harsh. Many defendants cannot find jobs after being released and will have the stigma of a drug conviction attached to them for life. The Statute also regulates innocuous conduct. There are situations in which the "affirmative defense" of knowledge cannot be utilized. These situations are constructive possession settings, where knowledge can be presumed in cases of "plain view" and "exclusive possession." A defendant, who is unknowingly transporting drugs in his or her vehicle and is the only person inside the vehicle, may not raise the affirmative defense of lack of knowledge. The affirmative defenses "available" to defendants in these situations are no more than "smoke and mirrors." It is not a partial elimination of *mens rea*, which *is* in the description of the legislature to proscribe, but rather a full elimination of a vital criminal element. Thus, under the *Staples* tripartite analysis section 893.13 is facially unconstitutional. Unfortunately, the Florida Supreme Court and the Eleventh Circuit have either avoided the issue or incorrectly applied the applicable federal law to the issue. Hopefully, the Supreme Court will find that this type of criminal scheme is not only unconstitutional, but is a rather severe and ineffective way of curbing abuse.