Florida Law Review

Volume 66 | Issue 4 Article 5

February 2015

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GUILT WITHOUT *MENS REA*: HOW FLORIDA'S ELIMINATION OF *MENS REA* FOR DRUG POSSESSION IS CONSTITUTIONAL

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Abstract

The Florida Comprehensive Drug Abuse Prevention and Control Act is almost unique among criminal drug statutes in the United States. Like all states, Florida prohibits the possession, sale, and delivery of certain controlled substances. However, a recent revision of the Florida Comprehensive Drug Act removed Florida's burden of proving one aspect of defendants' *mens rea* in drug cases. Although several cases have challenged the Florida Comprehensive Drug Act for disregarding the traditional role of *mens rea* in criminal law and for subjecting innocent people to prosecution, the state of Florida continues to prosecute and obtain convictions under the statute.

This Note addresses the constitutionality of the Florida Comprehensive Drug Act, specifically in light of the Due Process Clause of the U.S. Constitution. Part I examines the legislative history of the Florida Comprehensive Drug Act and courts' application of the Act. Part II analyzes state and federal cases with differing views about the statute's constitutionality. Part III argues that under existing U.S. Supreme Court precedent the Florida Comprehensive Drug Act is constitutional and does not exceed the limits of the Due Process Clause. Finally, Part IV explores the likely future of the Florida Comprehensive Drug Act and some principles that limit its perceived impact. This Note concludes by suggesting that the U.S. Supreme Court should defer to the discretion of state legislatures in eliminating the *mens rea* element from criminal statutes except in the most egregious cases.

* J.D. 2014, University of Florida Levin College of Law. I would like to thank my mother, father, and sister for their unfailing love, counsel, and support. Many others encouraged me throughout the writing process, and I deeply appreciate their support as well. Lastly, I wish to express gratitude to the *Florida Law Review* and its members for providing this opportunity and for assisting in the publication of this work.

INTRODUCTION

A Florida college student asks a friend to help him move into a new apartment across town. The friend gladly agrees to help and fills his pickup truck with the student's boxes. Without his friend's knowledge, the moving student hides some cocaine in one of the student's boxes. As the friend is transporting the boxes to the student's new apartment, the police pull over the friend on a highway for driving six miles per hour over the speed limit. The police officer on scene happens to be a K-9 handler, and the officer directs his police dog to sniff the friend's truck for narcotics because the officer knows that drug traffickers frequently use the highway. As the police dog passes the truck, the dog alerts to the presence of illegal drugs. Upon opening one of the boxes, the officer discovers the hidden cocaine. Under the Florida Comprehensive Drug Abuse Prevention and Control Act (Florida Comprehensive Drug Act or Act), a defendant's knowledge of the illicit nature of the substance in his or her possession is not an element of drug offenses, which include the sale, purchase, manufacture, delivery, and possession of controlled substances.[1] In eliminating the need to establish a defendant's knowledge of a controlled substance's illicit nature, the Florida Legislature (Legislature) has eliminated, at least in part, an element of *mens rea* from drug offenses,[2]

1. *See* FLA. STAT. §§ 893.01, .13, .101(1) (2013).

2. *See id.* § 893.101; Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1295, 1297 (M.D. Fla. 2011) (concluding that the Act expressly eliminated the *mens rea* element from drug

while still requiring proof of a defendant's *mens rea* or guilty mind for nearly all other serious crimes.[3] As a result, critics of the Florida Comprehensive Drug Act would claim that the Act empowers the state of Florida (State) in the foregoing hypothetical case to prosecute the friend for a felony even though the friend was unknowingly in possession of the cocaine.[4]

The possibility of the State convicting someone of a felony without having to prove that person's *mens rea* strikes many as unjust, and more actionably, as unconstitutional.[5] One U.S. district court has held the Florida Comprehensive Drug Act to be facially unconstitutional pursuant to the Due Process Clause of the U.S. Constitution because the Act's application could lead to the conviction of innocent people.[6] Even if prosecutors exercise discretion by not charging individuals who possess drugs in circumstances suggesting the possession is inadvertent, this application of the Act would not save the Act if the Act were facially unconstitutional.[7] However, all of Florida's state appellate courts, including the Florida Supreme Court, have upheld the constitutionality of the Act.[8] Thus, the Act

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offenses, creating a strict liability crime), *rev'd*, 691 F.3d 1348 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1856 (2013); State v. Adkins, 96 So. 3d 412, 416 (Fla. 2012) (acknowledging that while the Act eliminated knowledge of the illicit nature of the controlled substance as an element of drug offenses, it did not eliminate the element of knowledge of the substance's presence).

3. *Shelton*, 802 F. Supp. 2d at 1297–300. *See generally* Rachel A. Lyons, Comment, *Florida's Disregard of Due Process Rights for Nearly a Decade: Treating Drug Possession as a Strict Liability Crime*, 24 ST. THOMAS L. REV. 350, 361–64 (2012) (discussing constitutional requirements for *mens rea*). The doctrine of *mens rea* is deeply rooted in common law principles, and proving a defendant's *mens rea*, that is, a defendant's guilty mind, was once an absolute requirement for criminal liability. STEVEN SAMUEL NEMERSON, PHILOSOPHICAL AND LEGAL FOUNDATIONS OF STRICT LIABILITY 50 (Univ. Microfilms 1973) (Ph.D. dissertation, City University of New York). The element of *mens rea* is meant to ensure the culpability of those convicted. *See* JAMES B. BRADY, THE DOCTRINE OF *MENS REA*: A STUDY IN LEGAL AND MORAL RESPONSIBILITY, at v (Univ. Microfilms 1971) (Ph.D. dissertation, University of Texas at Austin). For example, culpable acts sufficient to establish *mens rea* under the Model Penal Code include those done purposely, knowingly, recklessly, or negligently. *See id.* at 230–31. For greater discussion of the role of *mens rea* in criminal law, see *infra* Section III.A.

4. The charged offense could be either mere possession or possession with intent to sell or deliver. *See* FLA. STAT. §§ 893.13(6)(a), (1)(a)(1); *see also Adkins*, 96 So. 3d at 432 (Perry, J., dissenting) (describing a similar hypothetical). This Note contends that the State would not be able to successfully prosecute the friend under the Act. *See infra* Conclusion.

5. *See Shelton*, 802 F. Supp. 2d at 1300–03, 1308; Richard M. Summa, *After* Chicone*: Blasting the Bedrock of the Criminal Law*, FLA. B.J., Apr. 2008, at 28, 30; Lyons, *supra* note 3, at 378–80.

6. *Shelton*, 802 F. Supp. 2d at 1308.

7. *See* Lyons, *supra* note 3, at 380–81. By definition, a facially unconstitutional law is invalid under every set of circumstances.

8. *Adkins*, 96 So. 3d at 416, 423; Lanier v. State, 74 So. 3d 1130, 1131 (Fla. Dist. Ct. App. 5th 2011); Harris v. State, 932 So. 2d 551, 552 (Fla. Dist. Ct. App. 1st 2006); Taylor v. State, 929 So. 2d 665, 665 (Fla. Dist. Ct. App. 3d 2006); Wright v. State, 920 So. 2d 21, 25 (Fla. Dist. Ct. App. 4th 2005); Burnette v. State, 901 So. 2d 925, 927–28 (Fla. Dist. Ct. App. 2d 2005).

remains in force.[9] But questions concerning the Act's validity linger, and the Eleventh Circuit Court of Appeals or the U.S. Supreme Court may eventually rule on the merits of the Act's constitutionality.[10]

To be clear, this Note does not address the wisdom or desirability of eliminating a *mens rea* element from drug offenses. Instead, this Note evaluates the validity of the Florida Comprehensive Drug Act under the Due Process Clause of the U.S. Constitution.[11] It is the Due Process Clause that "places limitations on states' police power to impose criminal punishment for conduct where *mens rea* need not be pleaded or proven."[12] This Note begins in Part I by introducing the legislative history of the Florida Comprehensive Drug Act and by reviewing courts' application of the Act. Part II analyzes three court decisions, two federal and one state, that provide three different conclusions about the Act's constitutionality. Part III lays out the constitutional requirements for *mens rea* under U.S. Supreme Court precedent and argues that the Florida Comprehensive Drug Act eliminates *mens rea* from drug offenses in a manner not materially different from how other serious crimes dispense with *mens rea*. Finally, Part IV explores the likely future of the Florida Comprehensive Drug Act and identifies safeguards that limit the Act's perceived impact.

I. THE FLORIDA COMPREHENSIVE DRUG ACT

The Florida Comprehensive Drug Act criminalizes the sale, purchase, manufacture, delivery, and possession of controlled substances.[13] The Act defines the class of controlled substances by reference to schedules within the Act that list a number of chemical stimulants, depressants, and other

9. *See* Shelton v. Sec'y, Dep't of Corr., 691 F.3d 1348, 1355–56 (11th Cir. 2012) (reversing the district court decision that declared the Act unconstitutional), *cert. denied*, 133 S. Ct. 1856 (2013); *Adkins*, 96 So. 3d at 423 (finding that the Act was constitutional and reversing a state circuit court's decision to dismiss cases pending under the Act).

10. *See Shelton*, 691 F.3d at 1355–56 (reversing the district court's determination that the Act was unconstitutional but never reaching the merits of the Act's validity); Lyons, *supra* note 3, at 380 (calling for the Eleventh Circuit and the U.S. Supreme Court to rule on the validity of the Act).

11. Specifically, the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."). The Act could be challenged under other constitutional provisions like the Cruel and Unusual Punishment Clause for disproportionately imposing prison sentences on defendants who lack culpability, but the effect of other provisions is not the focus of this Note. *See* John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 654–55, 712 (2012) (arguing that legislatures have violated the Constitution's procedural protections for criminal defendants by eliminating *mens rea* elements, reclassifying those elements as affirmative defenses, and imposing severe punishments for minor crimes).

12. Lyons, *supra* note 3, at 371 (citing Patterson v. New York, 432 U.S. 197, 210 (1977)).

13. FLA. STAT. § 893.13 (2013). The Act does contain exceptions for licensed manufacturers and distributors of controlled substances, medical professionals who handle controlled substances in the course of their work, and individuals who possess controlled substances with valid prescriptions. *Id.* §§ 893.04–.06, .08, .13(6)(a).

intoxicants according to their accepted medical use and their potential for abuse.[14] Depending on the controlled substance and the circumstances of the criminal offense, a violation of the Act is punishable as a first-degree misdemeanor, a third-degree felony, a second-degree felony, or a first-degree felony.[15] To illustrate the range of penalties under the Act, a first-time offender convicted of cocaine possession, a third-degree felony, could face a prison sentence of up to five years,[16] while a first-time offender convicted of selling more than ten grams of heroin, a first-degree felony, could spend up to thirty years in prison.[17] At the same time, a habitual felony offender convicted of selling the same amount of heroin could serve up to life in prison.[18]

Interestingly, the provision of the Florida Comprehensive Drug Act that eliminates a *mens rea* element from drug offenses was not always a component of the Act.[19] This Part introduces the Act's legislative evolution and then focuses on how Florida's courts have applied the *mens rea* provision in drug possession cases. This Note focuses primarily on the Act's application in drug *possession* cases because drug possession cases involve conduct that is more likely to be innocent than the conduct in other drug offenses.[20] Section I.A examines a previous version of the Act, which was silent on the *mens rea* required to prove drug possession. Section I.B then analyzes the current version of the Act, which expressly eliminates the requirement that defendants know of the illicit nature of the controlled substance in their possession. Finally, Section I.C concludes by looking at how Florida's courts have applied the provision eliminating *mens rea* in practice.

A. *The Act as Interpreted: An Implied Element of* Mens Rea

Like the current Act, the previous version of the Florida Comprehensive Drug Act criminalized the possession of controlled substances.[21] Under

14. *Id.* § 893.03. Some of the more well-known controlled substances under the Act include heroin, morphine, amphetamines, cocaine, cannabis (marijuana), and prescription-strength narcotics. *Id.* For the purposes of this Note, all uses of the term "drug" are meant to be synonymous with the term "controlled substance."

15. *Id.* § 893.13.

16. *See id.* §§ 893.13(6)(a), 775.082(3)(d).

17. *See id.* §§ 893.13(1)(b), 775.082(3)(b).

18. *See id.* §§ 893.13(1)(b), 775.084(4)(a)(1), (1)(a) (defining a habitual felony offender, in effect, as a defendant previously convicted of at least two felonies and who either committed the latest felony while serving a prison sentence or within five years of the previous felony conviction).

19. *See id.* § 893.101; Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1294–95 (M.D. Fla. 2011), *rev'd on other grounds*, 691 F.3d 1348 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1856 (2013).

20. This is in the interest of considering the strongest arguments against the Act. Intuitively, it is easier to conceive of a defendant unknowingly possessing a controlled substance than to conceive of a defendant unknowingly selling a controlled substance.

21. *See Shelton*, 802 F. Supp. 2d at 1293–94 (citing FLA. STAT. § 893.13(6)(a) (2000)).

both versions of the Act, actual or constructive possession of a controlled substance is unlawful.[22] However, unlike its successor, the previous version of the Act was silent on the requisite *mens rea* to obtain a conviction for drug possession.[23] Thus, rather than expressly requiring the State to prove a defendant's knowledge of the illicit nature of a controlled substance, the previous statute prohibiting drug possession simply read as follows:

> 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.[24]

Nevertheless, the Florida Supreme Court, in *Chicone v. State*, concluded that the Legislature intended the foregoing language to require that defendants have knowledge of the illicit nature of the controlled substance in their possession in order to be convicted of drug possession.[25] The *Chicone* court cited a common law rule that "*mens rea* was a necessary element in the indictment and proof of every crime."[26] The court also noted that courts have followed this rule by implying an element of *mens rea* into criminal statutes whenever a statute does not expressly include a *mens rea* element.[27]

Additionally, the *Chicone* court pointed out that the penalties for

22. *Compare id.* (citing FLA. STAT. § 893.13(6)(a) (2000)), *with* FLA. STAT. § 893.13(6)(a) (2013). For actual possession, the controlled substance must (1) be in the defendant's hands or on the defendant's person, (2) be in a container in the defendant's hands or in a container on the defendant's person, or (3) be in the "ready reach" of the defendant and in the defendant's control. Harris v. State, 954 So. 2d 1260, 1262 (Fla. Dist. Ct. App. 5th 2007) (citing Finklea v. State, 920 So. 2d 156 (Fla. Dist. Ct. App. 1st 2006)); *see also In re* Standard Jury Instructions in Criminal Cases (No. 2005-3), 969 So. 2d 245, 248 (Fla. 2007) (adopting a jury instruction on actual possession). If there is insufficient evidence of a defendant's actual possession, the State can establish a defendant's constructive possession by showing that the defendant knew that the controlled substance was in the defendant's presence and that the defendant had the ability to exercise control of the controlled substance. Williams v. State, 110 So. 3d 59, 62 (Fla. Dist. Ct. App. 2d 2013); *see also In re Standard Jury Instructions*, 969 So. 2d at 248–49 (adopting a jury instruction on constructive possession). This Note addresses the impact of the theory of constructive possession on the Act's constitutionality *infra* in Section III.C.

23. *See Shelton*, 802 F. Supp. 2d at 1293–94.

24. *See* Chicone v. State, 684 So. 2d 736, 737 n.1 (Fla. 1996) (quoting FLA. STAT. § 893.13(6)(a) (1995)), *superseded in part by statute*, FLA. STAT. § 893.101 (2013). The current version of FLA. STAT. § 893.13(6)(a) reads identically; however, as discussed below, the Legislature enacted a new section altering the interpretation of § 893.13.

25. *See Chicone*, 684 So. 2d at 744.

26. *Id.* at 741 (citing United States v. Balint, 258 U.S. 250, 251 (1922)).

27. *Id.* (citing *Balint*, 258 U.S. at 251–52).

violating the Act, which included possible imprisonment, were not comparable to those for other criminal statutes that lacked a *mens rea* element.[28] Because the Legislature did not clearly signal its intent to eliminate knowledge as an element of drug possession, the court determined that the Legislature did not intend to prosecute those who were ignorant of the illicit nature of the controlled substance in their possession.[29] The Florida Supreme Court later reaffirmed the holding in *Chicone*—that knowledge of the illicit nature of the substance is an element of drug possession—in *Scott v. State*.[30] Thus, through its construction of the Florida Comprehensive Drug Act, the Florida Supreme Court held that the State had to prove a defendant knew that the substance he or she possessed was illicit even though the Act, on its face, prohibited drug possession without reference to *mens rea*.[31]

B. *The Act as Amended: An Assertion of Legislative Intent*

In response to the judicial interpretation of the Florida Comprehensive Drug Act, the Florida Legislature amended the Act in 2002 to expressly eliminate an element of *mens rea* from drug offenses[32]:

> (1) The Legislature finds that the cases of *Scott v. State*, [808 So. 2d 166] (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.
> (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

28. *Id.* at 742–43.

29. *Id.* at 743.

30. 808 So. 2d 166, 169–70 (Fla. 2002) (confirming that both knowledge of the presence of the substance and knowledge of the substance's illicit nature compose the *mens rea* element of drug possession), *superseded in part by statute*, FLA. STAT. § 893.101 (2013).

31. *See Chicone*, 684 So. 2d at 741–44.

32. *See* FLA. STAT. § 893.101; Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1294–95 (M.D. Fla. 2011), *rev'd*, 691 F.3d 1348 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1856 (2013).

> shall be instructed on the permissive presumption provided in this subsection.[33]

In clarifying its intent, the Florida Legislature repudiated the Florida Supreme Court's decisions in *Chicone* and *Scott*, and removed the State's burden of proving a defendant's knowledge of the controlled substance's illicit nature for drug offenses.[34] However, neither the previous version of the Act nor the Act as amended eliminated the State's burden of proving a defendant's knowledge of the substance's presence; thus, the amendment preserved at least one element of *mens rea* in the Act.[35]

Along with partially eliminating an element of *mens rea* from drug offenses, the 2002 amendment also crafted an affirmative defense to permit defendants to raise their lack of knowledge of a controlled substance's illicit nature.[36] Yet the affirmative defense comes at a cost. If a defendant asserts the affirmative defense and puts his or her knowledge at issue, the defendant's possession of a controlled substance—either actual or constructive—generates a permissive presumption that the defendant knew of the controlled substance's illicit nature.[37] In other words, the jury may—not must—infer the defendant's knowledge of the controlled substance's illicit nature merely from the defendant's possession of that substance.[38] Part of the debate about the Act's constitutionality relates to this affirmative defense and whether it impermissibly shifts the burden of proving a lack of knowledge to defendants.[39]

C. *The Act as Applied: A Sample of Cases*

Through judicial construction, courts have immense power to save an otherwise objectionable statute by reading a missing element into that

33. FLA. STAT. § 893.101 (emphasis added).

34. *See id.* § 893.101(1)–(2); *Shelton*, 802 F. Supp. 2d at 1294–95; State v. Adkins, 96 So. 3d 412, 416 (Fla. 2012).

35. *See Adkins*, 96 So. 3d at 416; *see also* FLA. STAT. § 893.101(1) (noting the specific holdings of *Scott* and *Chicone* focusing on *knowledge of illegality* were contrary to the Legislature's intent).

36. FLA. STAT. § 893.101(2); *Shelton*, 802 F. Supp. 2d at 1294; *Adkins*, 96 So. 3d at 416.

37. FLA. STAT. § 893.101(3).

38. Wright v. State, 920 So. 2d 21, 24–25 (Fla. Dist. Ct. App. 4th 2005); *see* FLA. STAT. § 893.101(3); *infra* Section I.C.

39. *Compare Shelton*, 802 F. Supp. 2d at 1307 (discussing one possible interpretation of the Act as shifting the burden of proving a lack of knowledge to the defendant), *with Wright*, 920 So. 2d at 24–25 (disagreeing with the characterization that the affirmative defense improperly shifts the burden to the defendant), *and Adkins*, 96 So. 3d at 422–23 (concluding that the affirmative defense does not unconstitutionally shift the burden of proof of a crime to the defendant or eliminate the presumption of innocence). For more discussion of the affirmative defense, see *infra* Section III.C and Part IV.

statute.[40] Accordingly, the Act's constitutionality depends in large part on courts' interpretation of the Act's express elimination of a *mens rea* element. Whether courts have interpreted the Act to create strict liability crimes that could lead to the conviction of innocent people,[41] or whether courts have interpreted the Act to maintain at least one *mens rea* element is critical in determining the Act's compliance with due process.[42] Consulting the standard jury instructions for the drug offenses prohibited under the Act and reviewing trial court cases that involve those offenses provide the most realistic insight into this inquiry.

The standard jury instructions for the Act's drug offenses are one of the most useful tools for interpreting the Act because the instructions serve as the Florida Supreme Court's—namely its recommending committee's—preferred explanation of the Act's provisions.[43] For example, the standard jury instructions for drug possession clearly explain that in the ordinary course of proving that offense the State does not have to prove the defendant's *mens rea* with respect to the controlled substance's illicit nature.[44] Instead, the State must prove only three elements to obtain a conviction for drug possession: (1) the defendant possessed a substance, (2) the substance the defendant possessed was a controlled substance, and (3) the defendant had knowledge of the substance's presence.[45] However, if the defendant puts his or her lack of knowledge of the substance's illicit nature at issue by raising the affirmative defense, the standard jury instructions then assign the burden of proving the defendant's mental state to one of the parties.[46] According to the standard jury instructions, once the defendant raises the affirmative defense the court should instruct the jury as follows:

> [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.
>
> If from the evidence you are convinced that (defendant) knew of the illicit nature of the controlled substance, and all

40. *See* Chicone v. State, 684 So. 2d 736, 743–44 (Fla. 1996), *superseded in part by statute*, FLA. STAT. § 893.101 (2013).

41. *See Shelton*, 802 F. Supp. 2d at 1295.

42. *See Adkins*, 96 So. 3d at 416.

43. *See In re* Standard Jury Instructions in Criminal Cases (No. 2005-3), 969 So. 2d 245, 246–47 (Fla. 2007).

44. *See id.* at 257–58.

45. *Id.* at 257. The jury instructions specify that the State must prove the third element only when possession is charged. *Id.* For other drug offenses, a separate finding of a defendant's knowledge of a substance's presence is unnecessary because, logically, a defendant could not sell, purchase, manufacture, or deliver a substance without first knowing that the substance was present.

46. *See id.* at 258.

> of the elements of the charge have been proved, you should find (defendant) guilty.
>
> If you have a *reasonable doubt* on the question of whether (defendant) knew of the illicit nature of the controlled substance, you should find (defendant) not guilty.[47]

Nevertheless, a trial court is not required to submit these standard instructions to the jury, and the court can modify them in consultation with the parties.[48]

A number of cases illustrate how the Act's elimination of a *mens rea* element functions in practice.[49] The Florida Fourth District Court of Appeal in *Wright v. State* construed the Act to transform drug offenses into general intent crimes for which the State did not have to prove that defendants were aware that the substance in their possession was illegal.[50] Other courts have confirmed that despite the Act's elimination of the *mens rea* element for the controlled substance's illicit nature, the Act did not remove the *mens rea* element for the controlled substance's presence.[51] Thus, for example, to obtain a conviction for cocaine possession "the [S]tate must prove that the defendant knew that he [or she] possessed a substance, which was in fact cocaine, but the [S]tate does not have to prove that the defendant knew it was cocaine."[52]

Also, Florida's courts have consistently instructed juries on the Act's affirmative defense, which permits defendants to raise their lack of knowledge about the controlled substance's illicit nature as a defense.[53] In practice, asserting the affirmative defense to a charge of cocaine possession would not entail the defendant claiming to be unaware of cocaine's illegality, an ignorance of law; rather, the defendant would claim to be unaware that the substance in his or her possession was cocaine, an

47. *Id.* (emphasis added). Since reasonable doubt on the issue of the defendant's knowledge benefits the defendant, the ultimate burden of proving the defendant's knowledge may, as a practical matter, rest with the prosecution when the defendant raises the affirmative defense.

48. *See id.* at 247.

49. Because trial court judgments are often not reported in Florida, reference to appellate court cases is necessary.

50. *See* Wright v. State, 920 So. 2d 21, 24–25 (Fla. Dist. Ct. App. 4th 2005). *Contra* Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1295 n.5, 1300 (M.D. Fla. 2011) (characterizing the Act as creating a strict liability crime and thus not a general intent crime), *rev'd on other grounds by* 691 F.3d 1348 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1856 (2013).

51. *See* State v. Adkins, 96 So. 3d 412, 416 (Fla. 2012); Miller v. State, 35 So. 3d 162, 163 (Fla. Dist. Ct. App. 4th 2010) (demonstrating the use of the standard jury instructions); State v. Barnett, No. 11-CF-003124, 2011 WL 3648492, at *3 (Fla. Cir. Ct. Aug. 12, 2011) (explaining that the State does not have to prove that defendants know a substance is illicit to convict them).

52. *Miller*, 35 So. 3d at 163.

53. *See* FLA. STAT. § 893.101(2) (2013).

ignorance of fact.[54] The court in *Wright* discussed the affirmative defense at length, noting that the defendant's knowledge of the controlled substance's illicit nature only became an issue in a case if the defendant asserted the affirmative defense.[55] Consistent with the Act, the court advised that once the defendant raised the affirmative defense, the defendant's actual or constructive possession permitted the jury to presume that the defendant knew of the controlled substance's illicit nature.[56] Although it is the defendant's responsibility initially to present evidence that supports the affirmative defense and to request that the court instructs the jury on the defense,[57] the State bears the burden to overcome the affirmative defense by proving beyond a reasonable doubt that the defendant knew of the controlled substance's illicit nature.[58] Florida's courts have enforced an entitlement to the affirmative defense instruction when a defendant introduces supporting evidence.[59]

II. STATUS OF THE ACT: DISAGREEMENT AMONG THE COURTS

Although the Florida Comprehensive Drug Act faced numerous challenges in Florida's appellate courts after its amendment in 2002,[60] the Act withstood the initial onslaught and the State continued to bring prosecutions under the Act.[61] Part II of this Note surveys three cases that play a significant role in the interpretation and enforcement of the Act. Section II.A analyzes *Shelton v. Secretary, Department of Corrections*, a case from the U.S. District Court for the Middle District of Florida that held the Act to be unconstitutional.[62] Section II.B discusses the Florida

54. *See Miller*, 35 So. 3d at 163 & n.1 (noting the long-standing principle in criminal law that "ignorance of the law is not an excuse").

55. *See Wright*, 920 So. 2d at 24.

56. *See id.* (citing FLA. STAT. § 893.101(3)) ("The knowledge element does not need to be proven, but if the defendant puts it at issue, then the jury is going to hear about it, and the defendant must work to rebut the presumption.").

57. *See Miller*, 35 So. 3d at 163–64 (noting that the defendant "presented at least some evidence in support of this affirmative defense" and thus was entitled to the affirmative defense jury instruction); *Wright*, 920 So. 2d at 25 (noting that there must be sufficient evidence for the jury to find that the defense has been proven before a defendant is entitled to an affirmative defense jury instruction); *cf., e.g.*, Carreras v. State, 81 So. 3d 590, 591 (Fla. Dist. Ct. App. 5th 2012) (affirming a case in which the trial court properly instructed the jury on the affirmative defense).

58. *See* Flagg v. State, 74 So. 3d 138, 140–41 (Fla. Dist. Ct. App. 1st 2011).

59. *See Miller*, 35 So. 3d at 163–64 (reversing the trial court for failing to instruct the jury on the affirmative defense when the defendant "presented at least some evidence in support of [the] affirmative defense").

60. *See supra* note 8 and accompanying text.

61. *See* Shelton v. Sec'y, Dep't of Corr., 691 F.3d 1348, 1355–56 (11th Cir. 2012) (reversing the district court's judgment finding the Act unconstitutional), *cert. denied*, 133 S. Ct. 1856 (2013); State v. Adkins, 96 So. 3d 412, 423 (Fla. 2012) (holding the Act constitutional).

62. Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1308 (M.D. Fla. 2011), *rev'd*, 691 F.3d 1348 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1856 (2013).

Supreme Court's opinion in *State v. Adkins*, which came to the opposite conclusion.[63] Finally, Section II.C reexamines *Shelton* on appeal to the U.S. Court of Appeals for the Eleventh Circuit, where the Eleventh Circuit reversed the Middle District but did not decide the underlying constitutional issue.[64]

A. *Unconstitutional in Federal Court:* Shelton v. Secretary, Department of Corrections

Despite numerous state courts in Florida upholding the Florida Comprehensive Drug Act, the U.S. District Court for the Middle District of Florida declared the Act unconstitutional in *Shelton v. Secretary, Department of Corrections*, casting considerable doubt upon the Act's validity.[65] Ultimately, the court in *Shelton* found the Florida Comprehensive Drug Act facially unconstitutional for violating the Due Process Clause of the U.S. Constitution.[66]

Reaching the Middle District on a federal habeas petition,[67] *Shelton* provided a rare opportunity to dispute the constitutionality of a state law in federal court. The petitioner in *Shelton* was originally convicted in the state trial court for the delivery of cocaine, and the trial court sentenced the petitioner to eighteen years imprisonment.[68] The petitioner did not raise his lack of knowledge as to the illicit nature of a controlled substance as an affirmative defense at trial.[69] Thus, pursuant to the Florida Comprehensive Drug Act, the judge never instructed the jury that knowledge of the illicit nature of the controlled substance was an element of the charged offense.[70] To convict the petitioner, the State had to prove only that the petitioner delivered a substance and that the substance was cocaine.[71] The petitioner in *Shelton* principally based his request for habeas relief on the grounds that the Florida Comprehensive Drug Act was "facially unconstitutional

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

64. *Shelton*, 691 F.3d at 1355–56.

65. *See Shelton*, 802 F. Supp. 2d at 1308; Lyons, *supra* note 3, at 368–71. Although the U.S. District Court for the Middle District of Florida declared the Act unconstitutional, most Florida courts continued to uphold the Act in the wake of the *Shelton* decision. *See* Flagg v. State, 74 So. 3d 138, 140–41 (Fla. Dist. Ct. App. 1st 2011).

66. *Shelton*, 802 F. Supp. 2d at 1308.

67. *Id.* at 1293, 1296. State court prisoners can only challenge the legality of their imprisonment by petitioning a federal court for habeas corpus relief if they first have exhausted the state appeals process. *See* 28 U.S.C. § 2254(b)(1)(A) (2006). The petitioner in *Shelton* exhausted his state remedies by unsuccessfully appealing his conviction and by filing a motion for post-conviction relief, which the Florida Fifth District Court of Appeal eventually denied. *See Shelton*, 802 F. Supp. 2d at 1296.

68. The lengthy prison sentence was due to the petitioner's classification as a habitual felony offender. *Shelton*, 802 F. Supp. 2d at 1296.

69. *Id.* at 1293 n.1.

70. *See id.* at 1295.

71. *Id.* at 1295–96.

because it entirely eliminate[d] *mens rea* as an element of a drug offense and create[d] a strict liability offense."[72]

The Middle District in *Shelton* began its analysis by assuming that the Act created a strict liability offense since it eliminated the State's burden to establish the defendant's *mens rea*.[73] Furthermore, the court determined that the Act violated due process because the Act imposed severe penalties on defendants, created a substantial social stigma for those convicted, and regulated inherently innocent conduct.[74] Specifically, the court found that the Act imposed harsh penalties beyond those that enforceable strict liability statutes contained.[75] Under the Act, delivery of a controlled substance, the offense at issue, constituted a second-degree felony, and a conviction subjected a nonhabitual offender to a term of imprisonment up to fifteen years.[76] In the court's view, branding someone a convicted felon and potentially sentencing him or her to fifteen years imprisonment "create[d] irreparable damage to the [person]'s reputation and standing in the community."[77] Lastly, the court framed the scope of the Act's regulation to encompass not just the delivery of controlled substances but also the delivery of any substance, conduct that could be entirely innocent.[78] The court believed that a delivery-person who unintentionally delivered controlled substances via commercial shipping would be committing crimes under the Act notwithstanding the deliverer's lack of knowledge.[79]

Moreover, the court concluded that the affirmative defense provision did not stop the Act from creating a strict liability crime because, in the court's view, the absence of *mens rea* in a statute's elements conclusively meant that the statute imposed strict liability, and the Act lacked a *mens rea* element.[80] Lastly, the court found that treating knowledge as an element only when defendants raised a lack of knowledge as an affirmative defense would unconstitutionally (1) shift the burden of proving an element of the offense to defendants and (2) dispense with the fundamental presumption of innocence.[81] Thus, the court held that either the Act did not have a *mens rea* element and unlawfully created a strict liability crime, or

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72. *Id.* at 1296.

73. *See id.* at 1297.

74. *See id.* at 1300–06 (applying the test from *Staples v. United States*, 511 U.S. 600, 619–20 (1994), to determine the constitutionality of a strict liability offense).

75. *See id.* at 1300.

76. *See id.*

77. *Id.* at 1302.

78. *See id.* at 1305.

79. *See id.* This belief is mistaken. The *Shelton* court failed to acknowledge that the Act required the State to prove one element of *mens rea*, namely the defendant's knowledge of the controlled substance's presence. *See supra* note 35 and accompanying text.

80. *See Shelton*, 802 F. Supp. 2d at 1306–07.

81. *See id.* at 1307.

the Act did have a *mens rea* element and unlawfully shifted the burden of proof on that element to defendants.[82]

B. *Constitutional in State Court:* State v. Adkins

Although *Shelton*, a case from a federal district court, was not binding on Florida's state courts,[83] the Middle District's reasoning in *Shelton* began to persuade some judges in Florida's trial courts.[84] In one case, *State v. Adkins*, a state circuit court cited *Shelton* as persuasive authority in holding that the Florida Comprehensive Drug Act was unconstitutional under the Due Process Clause.[85] The circuit court reasoned that due process precluded the Legislature from eliminating a *mens rea* element from a serious felony, and consequently, the court granted motions to dismiss in forty-six prosecutions for drug offenses.[86] Given the potential effect on thousands of drug cases in Florida, the State appealed the dismissals, a Florida district court of appeal then certified the issue for immediate resolution, and *Adkins* quickly came before the Florida Supreme Court.[87] In contrast to the Middle District in *Shelton*, the Florida Supreme Court in *Adkins* held that the Act did not violate any constitutional requirement of due process.[88]

The Florida Supreme Court began its analysis in *Adkins* by recognizing that the broad authority of the Legislature to define the elements of crimes extended to the creation of crimes that lacked a *mens rea* element.[89] The court then distinguished the Act from other criminal statutes that lacked a *mens rea* element and that the U.S. Supreme Court or the Florida Supreme Court found to be unconstitutional.[90] One case that the court distinguished was *Lambert v. California*, in which the U.S. Supreme Court held that it was a violation of due process for an ordinance to criminalize otherwise innocent and passive conduct without proof that the defendant knew his or her conduct was illegal.[91] Yet the Florida Supreme Court noted that the

82. *Id.*

83. Flagg v. State, 74 So. 3d 138, 140 & n.2 (Fla. Dist. Ct. App. 1st 2011) ("Even though lower federal court rulings may be in some instances persuasive, such rulings are not binding on state courts." (quoting State v. Dwyer, 332 So. 2d 333, 335 (Fla. 1976)) (internal quotation marks omitted)); *see* State v. Adkins, 96 So. 3d 412, 416 (Fla. 2012) (noting the circuit court cited *Shelton* as persuasive authority).

84. *See Adkins*, 96 So. 3d at 416; State v. Adkins, 71 So. 3d 184, 185 (Fla. Dist. Ct. App. 2d 2011), *certifying questions to* 96 So. 3d 412 (Fla. 2012), *rev'g* No. 2011 CF 002001, 2011 WL 9369771 (Fla. Cir. Ct. Sept. 16, 2011).

85. *See Adkins*, 96 So. 3d at 416; *Adkins*, 71 So. 3d at 185.

86. *See Adkins*, 96 So. 3d at 414, 416.

87. *See id.* at 414; *Adkins*, 71 So. 3d at 184–85.

88. *See Adkins*, 96 So. 3d at 423.

89. *See id.* at 417 (citing United States v. Balint, 258 U.S. 250, 251 (1922)).

90. *See id.* at 419–21.

91. *See id.* at 419 (citing Lambert v. California, 355 U.S. 225, 229–30 (1957)). In *Lambert*, a Los Angeles city ordinance required felons who were present in the city for more than five days to

U.S. Supreme Court qualified its holding in *Lambert* by stating, "[Affirmative] 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."[92]

The Florida Supreme Court then explained two additional circumstances in which the lack of a *mens rea* element was constitutionally impermissible. According to the court, omitting a *mens rea* element from a criminal offense violated due process if the criminalized conduct was protected by the First Amendment or another constitutional right.[93] Also, a statute employing means not rationally related to its purpose would run afoul of due process if the statute criminalized innocuous conduct in the process.[94]

Ultimately, the Florida Supreme Court decided that the Florida Comprehensive Drug Act violated none of the three preceding constitutional limits.[95] The court found that the Act punished neither passive nor otherwise innocent conduct.[96] Instead, the court noted, "[T]o convict under [the Act] the State must prove that the defendant engaged in the affirmative act of selling, manufacturing, delivering, or possessing a controlled substance."[97] The court pointed out that the Act allowed individuals with valid prescriptions and those who handle controlled substances as part of their profession, such as pharmacists, doctors, hospital employees, and common carriers, to possess controlled substances without criminal liability.[98] Furthermore, the court determined that the Act was rationally related to the Legislature's intention to control substances

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register with law enforcement. 355 U.S. at 226. Failing to register constituted a crime. *Id.* Since the ordinance contained no element of *mens rea*, felons' knowledge of the duty to register was not necessary to convict them. *See id.* at 227. The defendant in *Lambert*, a seven-year resident of Los Angeles, committed a felony while living in Los Angeles, but she never registered her status as a felon with law enforcement. *Id.* at 226. After the police discovered the defendant's failure to register, the defendant was charged, convicted, fined $250, and sentenced to three years of probation. *Id.* at 226–27. The defendant claimed to have no knowledge of the registration requirement. *Id.* at 227. See Section III.A for additional discussion and analysis of *Lambert*.

92. *See Adkins*, 96 So. 3d at 419 (emphases omitted) (quoting *Lambert*, 355 U.S. at 228).

93. *See id.* at 419–20 (citing Smith v. California, 361 U.S. 147, 153 (1959) (determining that a statute criminalizing the possession of an obscene writing in a bookstore required an element of *mens rea* because the statute restricted the distribution of constitutionally protected literature as well)).

94. *See id.* at 420 (citing Schmitt v. State, 590 So. 2d 404, 413 (Fla. 1991) (holding that a Florida statute that prohibited the possession of a depiction of physical contact with a minor's genitals, buttocks, or breast violated due process because it criminalized photographs of innocent conduct such as the bathing of one's child)).

95. *See id.* at 420–21.

96. *See id.* at 420.

97. *Id.* at 420–21.

98. *See* FLA. STAT. § 893.13(6)(a), (9) (2013); *Adkins*, 96 So. 3d at 421.

with a high potential for abuse.[99] Finally, the court did not consider the Act to interfere with any constitutionally protected right because "[t]here is no constitutional right to possess contraband,"[100] and there is no "right to be ignorant of the nature of the property in one's possession."[101] The majority of the court believed that possession of a controlled substance without awareness of its illicit nature would be "highly unusual" or indicate deliberate ignorance of its illegality because it found that those who handle controlled substances generally do so with care.[102]

The Florida Supreme Court's analysis of the Florida Comprehensive Drug Act also addressed the operation and validity of the Act's affirmative defense provision, which permits defendants to raise their lack of knowledge about the illicit nature of the substance in their possession.[103] The court was satisfied that the availability of the affirmative defense obviated any worry that innocent conduct would be prosecuted.[104] In the event that a person possessed a controlled substance but did not know that the substance was illicit, the court suggested that the person could successfully raise his or her lack of knowledge as a defense.[105]

Relying on U.S. Supreme Court precedent holding that an affirmative defense is permissible as long as it does not require a defendant to negate facts that the State must prove to obtain a conviction, the *Adkins* court concluded that the Act's affirmative defense did not unconstitutionally shift the burden of proof to the defendant.[106] Since the State was not required to prove a defendant's knowledge of the substance's illicit nature under the Act, the court declared that a defendant raising his or her lack of knowledge as an affirmative defense bore no burden to refute any part of the State's case.[107] The court reasoned alternatively that because the Act's affirmative defense did not logically preclude a defendant from conceding all elements of the crime while raising the "separate issue" of his or her lack of knowledge of the controlled substance's illicit nature, the affirmative defense was constitutional.[108]

Although five justices of the Florida Supreme Court voted to uphold the constitutionality of the Act in *Adkins*, the arguments of the concurring and dissenting opinions are instructive as well.[109] In the concurrence, Justice

99. *See Adkins*, 96 So. 3d at 421.
100. *Id.*
101. *Id.* (citing Turner v. United States, 396 U.S. 398, 417 (1970)).
102. *See id.* at 421–22.
103. *See id.* at 422–23.
104. *Id.* at 422.
105. *Id.*
106. *See id.* at 422–23 (citing *Patterson v. New York*, 432 U.S. 197 (1977)).
107. *See id.* at 423.
108. *See id.* (citing *Patterson*, 432 U.S. at 207).
109. *Id.* Chief Justice Polston and Justice Labarga joined the opinion of Justice Canady. Justices Pariente and Lewis concurred in the result, and Justices Perry and Quince dissented. *See id.*

Barbara Pariente agreed with the majority that the Act was facially constitutional—that there were at least some circumstances in which the Act could be applied constitutionally—but Justice Pariente would not foreclose an as-applied challenge to the Act.[110] Justice Pariente contended that the facial validity of the Act was preserved only because the Act (1) continued to require the State to prove the defendant's knowledge of the controlled substance's presence, and (2) permitted a defendant to assert a lack of knowledge of the controlled substance's illicit nature as an affirmative defense.[111]

In the dissent, Justice James Perry rejected the majority's claims that (1) inadvertent possession of controlled substances was unusual, and (2) the risk of criminalizing innocent conduct was largely nonexistent.[112] Justice Perry cited a number of scenarios in which he believed that a third party could transfer a controlled substance to an unknowing individual who could then be convicted under the Act.[113] Moreover, the availability of the affirmative defense failed to alleviate Justice Perry's concern that innocent people would be convicted because, in his view, the affirmative defense placed a burden on genuinely innocent individuals and robbed them of the presumption of innocence.[114] Lastly, Justice Perry predicted that by

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at 414, 423. Justice Pariente authored the concurrence, and Justice Perry authored the dissent. *See id.* at 423, 431.

110. *Id.* at 424 (Pariente, J., concurring in result). Justice Pariente asserted that constitutional restraints like due process ordinarily prevent the Legislature from writing a criminal statute that lacks a *mens rea* element if the crime carries a substantial punishment. *Id.* at 424–25. Justice Pariente also qualified her concurrence because the Act authorized the jury to presume that a defendant had knowledge of the substance's illicit nature after the defendant asserted the affirmative defense, and thus, the permissive presumption preserved the possibility that a person inadvertently possessing a controlled substance could be convicted under the Act. *Id.* at 430–31. Justice Pariente pointed out that if a defendant did not know a substance in his or her possession was illicit, then that defendant would not reasonably know that the substance was subject to regulation. *See id.* at 427.

111. *See id.* at 424.

112. *Id.* at 431–32 (Perry, J., dissenting). Justice Perry argued that the Act was overly broad and would likely punish "normally diligent" individuals rather than someone practicing deliberate ignorance. *Id.* Justice Perry believed that only a strong *mens rea* element would prevent the conviction of the innocent. *See id.* at 432.

113. *Id.* at 431–32. The first scenario involves a person that hides his drugs in a classmate's backpack to avoid detection. *Id.* The second scenario involves a delivery person transporting a package containing an unprescribed prescription drug. *Id.* at 432. The third scenario involves a student with a roommate who, unknown to him, hides drugs in the common area. *Id.* The fourth scenario involves a mother with a prescription pill bottle in her purse that actually contains illegal drugs that her daughter placed there. *Id.* Justice Perry then quoted the circuit court's opinion listing even more examples and then gave "examples of innocent possession [that] spr[a]ng easily and immediately to mind." *Id.*

114. *Id.* at 433. Because the judge instructs the jury that it may presume the defendant's knowledge of the substance's illicit nature upon the defendant's request for the affirmative defense instruction, Justice Perry feared that innocent people could be convicted in many cases and sentenced to lengthy terms of imprisonment. *See id.* at 433–34.

upholding the Act the majority would embolden the Legislature to eliminate the *mens rea* element from a number of other criminal statutes that had severe penalties.[115] As a result, Justice Perry would have held the Act to be facially unconstitutional for offending notions of due process and for discarding fundamental principles such as the presumption of innocence and the burden of proof.[116]

C. *A Lack of Clearly Established Federal Law:* Shelton *Revisited*

Following the decision of the Florida Supreme Court in *Adkins*, the federal courts had a second opportunity to resolve the constitutionality of the Florida Comprehensive Drug Act when the Eleventh Circuit Court of Appeals heard *Shelton* on appeal.[117] In properly deferring to the Florida Supreme Court's interpretation of the Act as definitive,[118] the Eleventh Circuit accepted that the Act did not completely dispense with every *mens rea* element.[119] Because *Shelton* reached the Middle District on a habeas petition, the standard of review limited the Middle District to granting relief only if the original decision of the state court was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."[120] Thus, the Eleventh Circuit reviewed whether the petitioner presented the Middle District with U.S. Supreme Court precedent that clearly established that the partial elimination of *mens rea* from a criminal statute violated the Due Process Clause.[121]

Although *Adkins*, as a state case, was not binding on the Eleventh Circuit in *Shelton*, the Eleventh Circuit took notice of the margin of the justices in *Adkins* and commented on the improbability that five justices of the Florida Supreme Court unreasonably applied clearly established federal law.[122] Rather than combing through every subtlety of relevant precedent, the Eleventh Circuit extracted one general principal from the U.S. Supreme Court's cases on *mens rea*: "[L]egislatures have 'wide latitude . . . to declare an offense and to exclude elements of knowledge and diligence from its definition,' but they still must 'act within any applicable constitutional constraints' when defining the elements of a [sic] criminal

115. *See id.* at 434.

116. *See id.* at 434–35.

117. *See* Shelton v. Sec'y, Dep't of Corr., 691 F.3d 1348, 1351–52 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1856 (2013).

118. *Id.* at 1350 (citing Wisconsin v. Mitchell, 508 U.S. 476, 483 (1993)) (stating that federal courts are bound to a state court's interpretation of a state statute).

119. *See id.* at 1350–51 (accepting that the Act did not eliminate the requirement that defendants have knowledge of the controlled substance's presence).

120. *Id.* at 1353–54 (quoting 28 U.S.C. § 2254(d)(1) (2006)) (internal quotation marks omitted).

121. *Id.* at 1354.

122. *See id.* Although this seems to be a fallacious appeal to the majority, it is logical in light of the incredibly deferential standard of review for habeas cases.

offenses."[123] Furthermore, the Eleventh Circuit emphasized that the U.S. Supreme Court had only once held a criminal statute to be unconstitutional under the Due Process Clause for lacking a *mens rea* element.[124] In the judgment of the Eleventh Circuit, the Florida Comprehensive Drug Act was distinguishable from the statute the U.S. Supreme Court found unconstitutional in *Lambert* because the Act only criminalized affirmative conduct, because the Act required proof of the defendant's knowledge of the controlled substance's presence, and because the Act made an affirmative defense available to the defendant.[125] Because of these differences and because no other U.S. Supreme Court precedent resolved the issue that the Florida Comprehensive Drug Act presented, the Eleventh Circuit was unable to conclude that Florida's adjudication of the underlying case was unreasonable; thus, the Eleventh Circuit reversed the decision of the Middle District.[126]

The Eleventh Circuit's decision in *Shelton* highlights the novelty of the Florida Comprehensive Drug Act and the confusion surrounding its meaning and operation.[127] The Eleventh Circuit's decision was extremely narrow; the court concluded only that federal law, in the form of U.S. Supreme Court precedent, was not clear enough to hold that the Florida court's conviction of the defendant under the Act "was contrary to, or involved an unreasonable application of," the Due Process Clause.[128] However, the Eleventh Circuit did not make an explicit ruling on the constitutionality of the Act.[129] The Eleventh Circuit's only disagreement with the district court in *Shelton* was on the issue of whether the district court should have reached the merits of the Act's constitutionality under the standard of review for habeas petitions.[130] Thus, the Eleventh Circuit's decision in *Shelton* left the issue of the Act's constitutionality unresolved in federal court.[131]

III. THE LIMITS OF STRICT LIABILITY UNDER THE DUE PROCESS CLAUSE

The central thesis of the Middle District's decision in *Shelton* was that the Florida Comprehensive Drug Act was a strict liability statute because

123. *Id.* (alteration in original) (footnotes omitted) (quoting Lambert v. California, 355 U.S. 225, 228 (1957), and Liparota v. United States, 471 U.S. 419, 424 n.6 (1985)).

124. *Id.* at 1354 (citing *Lambert*, 355 U.S. 225).

125. *See id.* at 1355.

126. *Id.* at 1355–56.

127. *See id.* at 1355.

128. *See id.* at 1353–55.

129. *Id.* at 1355.

130. *See id.* at 1353–54.

131. *See id.* at 1355.

the Act eliminated the State's burden to prove a defendant's *mens rea*.[132] Yet determining that any statute imposes strict liability can be difficult due to inconsistent definitions of what amounts to strict liability in borderline cases.[133] Therefore, deciding whether the Act is constitutional should rest not on arbitrarily classifying the Act as a strict liability statute but rather upon a close examination of due process requirements for *mens rea*.[134] Part III of this Note analyzes the Act's constitutionality in light of the U.S. Supreme Court's precedent on due process. To lay the proper foundation, Section III.A establishes the historical role of *mens rea* in criminal law and the minimum *mens rea* required to satisfy due process. Section III.B compares the Florida Comprehensive Drug Act to similar drug statutes from other states and to other strict liability crimes that have withstood constitutional challenge. Finally, Section III.C argues that the Act, when properly interpreted, does not violate due process and is constitutional as a result.

A. *The Traditional and Evolving Roles of Mens Rea*

One statement effectively captures the traditional justification for *mens rea* in criminal law: "Actus non facit reum nisi mens sit rea."[135] The U.S. Supreme Court has similarly recognized that for conduct to be criminal there must be a "vicious will" behind the conduct.[136] Furthermore, in *Lambert v. California*, the seminal case on due process requirements for *mens rea*, the U.S. Supreme Court held that criminalizing the mere failure to register as a felon without proof of *mens rea* violated due process because failing to register was otherwise innocent and entirely passive.[137] Finally, numerous courts have signaled their agreement with the notion that "*mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."[138] Courts apply this rule by reading a *mens rea* element into a criminal statute if the statutory definition

132. *See* Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1297 (M.D. Fla. 2011), *rev'd*, 691 F.3d 1348 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1856 (2013).

133. *See* A.P. Simester, *Is Strict Liability Always Wrong?*, *in* APPRAISING STRICT LIABILITY 21, 22–23 (A.P. Simester ed., 2005).

134. *See* United States v. Bunton, No. 8:10–CR–327–T–30EAJ, 2011 WL 5080307, at *5 (M.D. Fla. Oct. 26, 2011).

135. "The act does not make a person guilty unless the mind be also guilty." *E.g.*, *Shelton*, 802 F. Supp. 2d at 1293 & n.2.

136. *See* Morissette v. United States, 342 U.S. 246, 251 (1952) (internal quotation marks omitted).

137. Lambert v. California, 355 U.S. 225, 227–30 (1957).

138. Staples v. United States, 511 U.S. 600, 605 (1994) (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 436 (1978)) (internal quotation marks omitted); State v. Adkins, 96 So. 3d 412, 424–25 (Fla. 2012) (quoting *U.S. Gypsum Co.*, 438 U.S. at 436); Chicone v. State, 684 So. 2d 736, 743 (Fla. 1996) (quoting Dennis v. United States, 341 U.S. 494, 500 (1951)), *superseded in part by statute*, FLA. STAT. § 893.101 (2013); *see Morissette*, 342 U.S. at 250–51.

of a crime does not expressly include *mens rea* among its elements.[139] Therefore, the U.S. Supreme Court has noted that offenses that do not require *mens rea* are generally disfavored and that legislatures must explicitly indicate their intent to dispense with the *mens rea* element to avoid courts reading it into a statute.[140]

Although the traditional and enduring presence of *mens rea* in criminal law cannot be seriously doubted,[141] due process requirements for *mens rea* are more nuanced than the foregoing axioms convey. One law professor captured the difficulty of understanding the Court's *mens rea* jurisprudence by counseling that "[m]ens rea . . . is not a constitutional requirement, except sometimes."[142] Even in *Lambert*, which strongly defended the role of *mens rea*, the U.S. Supreme Court noted the discretion of legislatures to exclude *mens rea* elements from criminal statutes.[143] And unlike other legislatures,[144] the Florida Legislature expressly signaled its intent to dispense with an element of *mens rea* in the Act.[145]

Additionally, the public welfare offense doctrine exempts a whole category of criminal statutes from having to contain a *mens rea* element.[146] Under the public welfare offense doctrine, prosecutions of public welfare offenses do not require proof of the defendant's *mens rea* as long as the defendant should have known that the prohibited conduct was inherently dangerous and subject to stringent public regulation.[147] Because they criminalize conduct without regard for the defendant's *mens rea*, public welfare statutes impose strict liability.[148] Violations of public welfare statutes usually result in slight penalties such as fines or short jail sentences because public welfare offenses are designed to regulate conduct, not to punish.[149] Nevertheless, with the development of modern society and an increased need for regulation, the number and variety of public welfare offenses has grown to a point where legislatures have removed the *mens*

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139. *See Morissette*, 342 U.S. at 252; *Chicone*, 684 So. 2d at 741 (citing United States v. Balint, 258 U.S. 250, 251–52 (1922)).

140. *See Staples*, 511 U.S. at 606 (citing Liparota v. United States, 471 U.S. 419, 426 (1985), and *U.S. Gypsum*, 438 U.S. at 438).

141. Even courts upholding the Act acknowledged the role of *mens rea*. *See Adkins*, 96 So. 3d at 424–25 (Pariente, J., concurring in result); United States v. Bunton, No. 8:10–CR–327–T–30EAJ, 2011 WL 5080307, at *6 (M.D. Fla. Oct. 26, 2011).

142. Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 107.

143. Lambert v. California, 355 U.S. 225, 228 (1957).

144. *See Staples*, 511 U.S. at 605; *Lambert*, 355 U.S. at 227; *Morissette*, 342 U.S. at 250.

145. *See* FLA. STAT. § 893.101(2) (2013).

146. *See* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 322–23 (2003).

147. *See id.* at 330.

148. *See id.* at 323–24.

149. *See* Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1300 (M.D. Fla. 2011), *rev'd*, 691 F.3d 1348 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1856 (2013); Carpenter, *supra* note 146, at 327.

rea element from numerous crimes.[150] Historical public welfare offenses include the sale of impure food and the violation of traffic laws—offenses that directly affect the health and safety of the community but do not carry significant penalties.[151]

Critics of the Florida Comprehensive Drug Act, however, insist that the public welfare offense doctrine cannot justify the Act's imposition of strict liability.[152] Under the U.S. Supreme Court's analysis from *Staples v. United States*, the public welfare offense doctrine is inapplicable to a statute that lacks a *mens rea* element if (1) the statute's penalty amounts to a felony, (2) conviction under the statute creates a substantial social stigma, and (3) the statute regulates inherently innocent conduct.[153] As Section II.A previously noted, the Middle District in *Shelton* determined that the Legislature could not classify the Act as a public welfare statute because (1) penalties for violating the Act were severe and could include life imprisonment,[154] (2) the State could designate a person convicted under the Act as a felon and such a designation would "gravely besmirch" that person's reputation,[155] and (3) the Act regulated "the delivery of any substance"—innocent conduct that was not inherently dangerous.[156] Consequently, the Middle District declared that it would not apply the public welfare offense doctrine to uphold the Act and its elimination of a *mens rea* element.[157]

B. *A Survey of Other States and Other Strict Liability Crimes*

Although the Florida Comprehensive Drug Act's partial elimination of *mens rea* places the Act in the overwhelming minority of drug statutes, Florida's elimination of a *mens rea* element for drug possession is not unique in the United States.[158] At least one other jurisdiction, Washington state, currently has a similar statute that has been upheld in its courts.[159]

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150. *See* Carpenter, *supra* note 146, at 324, 327–28.

151. *See id.* at 327.

152. *See Shelton*, 802 F. Supp. 2d at 1300; Lyons, *supra* note 3, at 374–78.

153. *See Shelton*, 802 F. Supp. 2d at 1305 (citing Staples v. United States, 511 U.S. 600, 616–18 (1994) (applying the analysis to a statute prohibiting the possession of an unregistered machine gun that imposed harsh penalties, branded those convicted under it to be felons, and would have otherwise affected innocent people)).

154. *See id.* at 1302.

155. *See id.*

156. *See id.* at 1305.

157. *See Staples*, 511 U.S. at 618.

158. *See Shelton*, 802 F. Supp. 2d at 1295 & n.4 (noting that Washington state has removed its *mens rea* requirement by implication); *Adkins*, 96 So. 3d at 423 & n.1 (stating that forty-eight states require proof of a defendant's knowledge of a substance's illicit nature).

159. *See* State v. Bradshaw, 98 P.3d 1190, 1193–94 (Wash. 2004). Despite Washington's recent legalization and regulation of cannabis (marijuana) possession by adults twenty-one and older, its drug possession statute continues to apply to all other controlled substances. WASH. REV. CODE § 69.50.4013 (2013).

North Dakota previously had such a statute as well, but its legislature has since restored the *mens rea* element.[160] While similar to the Florida Comprehensive Drug Act, the Washington statute differs from the Act by eliminating the *mens rea* element for drug possession alone—rather than for all drug offenses, and by silently omitting the *mens rea* element—rather than expressly doing so.[161] Despite the statute's silence on *mens rea*, Washington's courts have interpreted that silence to permissibly eliminate the *mens rea* element for drug possession in light of the statute's legislative history.[162] Before the North Dakota legislature amended its drug possession statute to require a *mens rea* of willfulness, North Dakota's courts interpreted the statute to not require proof of *mens rea*.[163] However, the Supreme Court of North Dakota held that, because the statute lacked a *mens rea* element, a defendant would be entitled to an affirmative defense instruction if there were sufficient evidence of the defendant's lack of knowledge and if the defendant requested the instruction.[164] Thus, in that court's mind, the availability of an affirmative defense permitted what would have been an otherwise unconstitutional elimination of *mens rea*.[165]

Additionally, strict liability felonies are far from unprecedented. There are several serious non-drug crimes that lack *mens rea* elements and do not qualify as traditional public welfare offenses but nevertheless satisfy due process. Two of the more well-known crimes that fit this description are felony murder and statutory rape.[166] The felony murder rule enables a jury to convict a defendant of murder without the defendant possessing any intent to kill the victim as long as the victim's death occurred during the defendant's commission of a felony.[167] Since no showing of *mens rea* is necessary as to the element of causing a death, felony murder is a strict liability crime.[168] Even if a substantial number of legal theorists criticize the felony murder rule, receiving a conviction for felony murder remains possible in forty-three states.[169] The majority of states have prosecuted

160. *See Shelton*, 802 F. Supp. 2d at 1295 n.4 (noting that North Dakota previously had a similar statute); State v. Bell, 649 N.W.2d 243, 252 (N.D. 2002).

161. *See Shelton*, 802 F. Supp. 2d at 1295 n.4; *Bradshaw*, 98 P.3d at 1194.

162. *See Bradshaw*, 98 P.3d at 1194 (noting that the legislature omitted the default words of "knowingly or intentionally" from the model Uniform Controlled Substances Act and that the legislature amended the statute seven times without adding a *mens rea* element).

163. *See Bell*, 649 N.W.2d at 252.

164. *See id.* (citing State v. Michlitsch, 438 N.W.2d 175, 177 (N.D. 1989)).

165. *See Michlitsch*, 438 N.W.2d at 176–79.

166. *See* Carpenter, *supra* note 146, at 362; Alan C. Michaels, *Imposing Constitutional Limits on Strict Liability: Lessons from the American Experience*, *in* APPRAISING STRICT LIABILITY, *supra* note 133, at 219, 221.

167. *See* Anup Malani, *Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data*, N.Y. TIMES 1, http://www.nytimes.com/packages/pdf/national/malani.pdf (last visited Aug. 19, 2014).

168. *See* Michaels, *supra* note 166, at 220.

169. *See* Malani, *supra* note 167, at 1.

statutory rape as a strict liability crime as well.[170] A typical statutory rape statute prohibits sexual intercourse with an individual under the age of consent regardless of the defendant's *mens rea* with regard to the victim's age.[171] Being convicted of statutory rape carries severe penalties, and many jurisdictions classify statutory rape as a felony.[172] Although laws against statutory rape are not without controversy, courts have largely upheld them by concluding that their harsh sentences are proportionate to the offending conduct and that strict criminal liability is not necessarily a denial of due process.[173]

C. *Due Process Analysis and the Act's Constitutionality*

The conclusion, reached by the Middle District in *Shelton* and by others, that the Florida Comprehensive Drug Act violates the Due Process Clause is based on a number of misapprehensions about the Act's operation and about due process requirements for *mens rea*. One of the most fundamental misinterpretations of the Act stems from the failure to recognize that the Act initially had two *mens rea* elements: knowledge of the controlled substance's presence and knowledge of the controlled substance's illicit nature.[174] By assuming that the pre-2002 Act contained only one *mens rea* element, the Middle District erroneously determined that the amended Act entirely eliminated the need to prove *mens rea* and thus created a strict liability crime.[175] In reality, after the Legislature eliminated the requirement for the State to prove a defendant's knowledge of the controlled substance's illicit nature, the State still had the burden to prove a defendant's *mens rea* with respect to the presence of the controlled substance.[176]

Critics also misconstrue the Act's affirmative defense by believing that the affirmative defense shifts the burden of proof to the defendant and eliminates the presumption of innocence.[177] The Act operates such that the defendant's knowledge of the controlled substance's illicit nature becomes an element of the offense only if the defendant decides to affirmatively

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170. Carpenter, *supra* note 146, at 317–18; *see* Morissette v. United States, 342 U.S. 246, 251 n.8 (1952); Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1295 n.5 (M.D. Fla. 2011), *rev'd*, 691 F.3d 1348 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1856 (2013).

171. *See* Carpenter, *supra* note 146, at 316–17.

172. *See id.* at 339–40, 374.

173. *See id.* at 351, 374–75; *see also* Michael M. v. Superior Court, 450 U.S. 464, 467 n.1 (1981).

174. *See* State v. Scott, 808 So. 2d 166, 169–70 (Fla. 2002), *superseded in part by statute*, FLA. STAT. § 893.101 (2013).

175. *See* Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1295 (M.D. Fla. 2011), *rev'd*, 691 F.3d 1348 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1856 (2013).

176. *See* State v. Adkins, 96 So. 3d 412, 416 (Fla. 2012).

177. *See Shelton*, 802 F. Supp. 2d at 1307.

claim a lack of such knowledge.[178] In all other cases, the defendant's knowledge of the controlled substance's illicit nature is simply irrelevant, and neither party need prove such knowledge or the lack of it.[179] However, when a defendant raises the affirmative defense and puts his lack of knowledge about the controlled substance's illicit nature at issue, the State carries the additional burden of proving that aspect of the defendant's knowledge beyond a reasonable doubt.[180] In other words, defendants can make their knowledge of the controlled substance's illicit nature an element of drug offenses by asserting the affirmative defense. However, if a defendant asserts the affirmative defense, the jury can presume the defendant's knowledge of the controlled substance's illicit nature based on the defendant's actual or constructive possession of the controlled substance.[181] This permissive presumption and the affirmative defense giving rise to it do not shift to the defendant the burden of proving his or her lack of knowledge; if the jury has a reasonable doubt as to the defendant's knowledge of the controlled substance's illicit nature, it should find the defendant not guilty.[182]

Many of the hypotheticals that critics of the Act cite as subjecting innocent people to prosecution and conviction are cases in which the State could establish possession only under a theory of constructive possession.[183] Driving these hypotheticals is the mistaken belief that since a person need only be in the presence of a controlled substance in order to be in constructive possession of it, the wrongful conviction of an innocent person who was in the wrong place at the wrong time is a strong possibility. Yet, to establish constructive possession under the Act, the State must prove more than that the defendant was in the presence of a

178. *See* FLA. STAT. §§ 893.101(2)–(3); *In re* Standard Jury Instructions (No. 2005-3), 969 So. 2d 245, 258 (Fla. 2007) (stating that a defendant's knowledge of the controlled substance's illicit nature is not an element of any offense under the Act but also stating that once a defendant raises the affirmative defense the State must prove the defendant's knowledge of the controlled substance's illicit nature beyond a reasonable doubt).

179. *See* FLA. STAT. § 893.101(2) (stating that a defendant's knowledge of the controlled substance's illicit nature is not an element of any offense under the Act); *In re Standard Jury Instructions*, 969 So. 2d at 258 (omitting a defendant's knowledge of the controlled substance's illicit nature as an element of drug possession that the State must prove).

180. *See Adkins*, 96 So. 3d at 430 (Pariente, J., concurring in result); *In re Standard Jury Instructions*, 969 So. 2d at 258. This additional burden does not affect the State's burden to prove the defendant's knowledge of the substance's presence. *See id.* at 257.

181. FLA. STAT. § 893.101(3); *see Adkins*, 96 So. 3d at 430 (Pariente, J., concurring in result); *In re Standard Jury Instructions*, 969 So. 2d at 258.

182. As explained earlier, the State bears the burden of proving the defendant's knowledge of the controlled substance's illicit nature if the defendant raises the affirmative defense. *See In re Standard Jury Instructions*, 969 So. 2d at 258.

183. *See supra* note 113. Most of these scenarios do not implicate actual possession because the controlled substance is not in the defendant's hand or on the defendant's person. *See supra* note 22.

controlled substance; the State must also prove the defendant's knowledge of the controlled substance's presence.[184] Furthermore, if a defendant does not have exclusive possession of a controlled substance, the jury cannot infer that the defendant knew of its presence.[185] For example, if the police stopped a car with two occupants and found marijuana in the center armrest, an area either occupant could easily access, a jury could not infer either occupant's knowledge of the marijuana, and the State would have to independently prove that knowledge.[186] Accordingly, innocent defendants are not at greater risk of being wrongfully convicted in constructive drug-possession cases.

A careful review of the limited *mens rea* requirements that do exist confirms that the Florida Comprehensive Drug Act is constitutional. While *Lambert* acknowledged the broad discretion of legislatures to exclude elements of knowledge from criminal statutes,[187] states must still respect constitutional limits.[188] Unlike the ordinance in *Lambert*, which was silent on the requisite *mens rea* and therefore invited the U.S. Supreme Court to read a *mens rea* element into it,[189] the Florida Comprehensive Drug Act contained an overt statement from the Legislature signaling its intent to eliminate one element of *mens rea* from the Act.[190] The U.S. Supreme Court has never struck down a criminal statute for violating due process on the grounds that a *mens rea* element was constitutionally required.[191] Rather than unconstitutionally criminalizing innocent and passive conduct, the Act prohibits the active possession of drugs without infringing upon a constitutionally protected right.[192]

Applying the *Staples* analysis to the Florida Comprehensive Drug Act is

184. *See* Maestas v. State, 76 So. 3d 991, 995 (Fla. Dist. Ct. App. 4th 2011); *In re Standard Jury Instructions*, 969 So. 2d at 258. For that matter, knowledge of presence is needed for actual possession as well, *Maestas*, 76 So. 3d at 995, and remains a separate element from possession, *In re Standard Jury Instructions*, 969 So. 2d at 257.

185. Byers v. State, 17 So. 3d 825, 827 (Fla. Dist. Ct. App. 2d 2009); *In re Standard Jury Instructions*, 969 So. 2d at 258.

186. Williams v. State, 110 So. 3d 59, 63 (Fla. Dist. Ct. App. 2d 2013) (describing a similar scenario); *see Byers*, 17 So. 3d at 827.

187. *See supra* text accompanying note 143.

188. *See* Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1298 (M.D. Fla. 2011) (citing Patterson v. New York, 432 U.S. 197, 210 (1977)), *rev'd*, 691 F.3d 1348 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1856 (2013); State v. Adkins, 96 So. 3d 412, 419–21 (Fla. 2012).

189. *See* Lambert v. California, 355 U.S. 225, 227 (1957); *see also* United States v. Balint, 258 U.S. 250, 251–52 (1922).

190. FLA. STAT. § 893.101(2) (2013) ("The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter.").

191. Although the Supreme Court has invalidated criminal statutes that lack *mens rea* elements, like the ordinance in *Lambert*, it has done so based on rationales other than a general constitutional requirement of *mens rea* for criminal punishment. *See* Stinneford, *supra* note 11, at 693.

192. *See Adkins*, 96 So. 3d at 420–21.

not as straightforward as the Middle District suggests either. First, there is uncertainty concerning the definition of strict liability or what constitutes a strict liability crime.[193] The Florida Supreme Court concluded, and the Eleventh Circuit accepted, that the Act preserved one element of *mens rea* but eliminated another, which could indicate either the existence of a strict liability crime or a general intent crime.[194] In addition, it is possible that the Act could be upheld under the public welfare offense doctrine.[195] The U.S. Supreme Court's language in *Staples* leaves open the possibility that a felony could be designated as a public welfare offense: "Close adherence to the early cases described above might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense. . . . We need not adopt such a definitive rule of construction to decide this case, however."[196] *Staples* also emphasized that no court had developed a bright-line test to distinguish crimes that do not require proof of *mens rea* from crimes that do.[197]

In fact, the logic of the public welfare offense doctrine could easily accommodate the Act because the regulation of controlled substances is rationally related to preserving public welfare.[198] In a separate case from the Middle District, a judge acknowledged the Florida Legislature's concern about the public health implications from controlled substances in Florida.[199] Strong evidence exists to support the inherent dangerousness of controlled substances: in 2007 nearly 3,000 people died from drug use in

193. *See Shelton*, 802 F. Supp. 2d at 1303 (asserting that statutes that include some *mens rea* requirement do not create purely strict liability offenses); United States v. Bunton, No. 8:10–CR–327–T–30EAJ, 2011 WL 5080307, at *5 (M.D. Fla. Oct. 26, 2011) (suggesting that the Act's elimination of one element of *mens rea* created a general intent crime, rather than a strict liability crime); Michaels, *supra* note 166, at 220 (including, as one possible definition of strict liability, crimes that do not require proof of *mens rea* as to just one material element).

194. *See* Shelton v. Sec'y, Dep't of Corr., 691 F.3d 1348, 1350 n.9, 1350–51 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1856 (2013) (accepting the *Adkins* interpretation as definitive); *Adkins*, 96 So. 3d at 416.

195. *See Bunton*, 2011 WL 5080307, at *8.

196. Staples v. United States, 511 U.S. 600, 618 (1994). *Contra Adkins*, 96 So. 3d at 427.

197. *Staples*, 511 U.S. at 619–20 (quoting Morissette v. United States, 342 U.S. 246, 260 (1952)) (internal quotation marks omitted) (stating that no court "ha[d] 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").

198. *See Adkins*, 96 So. 3d at 421 (noting that the statute serves the Legislature's goal of controlling substances that have a high potential for abuse and that the statute permits legitimate medical uses of controlled substances). Recently, some states, through their electorate or their legislature, have legalized the recreational use of cannabis (marijuana) and have therefore determined that the criminalization of that controlled substance, in fact, diminishes the public welfare. *See* Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES (Nov. 7, 2012), http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html.

199. *See Bunton*, 2011 WL 5080307, at *8 (quoting State v. Beattie, No. 2011CF004718AXX (Fla. Cir. Ct. Sept. 6, 2011)).

Florida,[200] and drug use drained $193 billion from the U.S. economy due to increased criminal justice spending, increased healthcare costs, and decreased productivity at work.[201] By eliminating an element of *mens rea* from drug offenses, the Florida Legislature incentivized individual responsibility and refused to excuse defendants' deliberate ignorance.[202] As with other public welfare offenses, the Legislature made a judgment that people should take care to know of the illicit nature of controlled substances in their possession and that controlled substances are subject to strict regulation.[203] Ignorance of these facts would be deliberate ignorance, a culpable mental state.[204]

Anglo-American jurisprudence supports the recognition of deliberate ignorance or willful blindness as a criminally culpable mental state.[205] In *United States v. Jewell*, the Ninth Circuit Court of Appeals addressed the *mens rea* requirements for drug possession under the Comprehensive Drug Abuse Prevention and Control Act of 1970,[206] the federal statute that served as the model for the Florida Comprehensive Drug Act.[207] The trial court had instructed the jury that, under the federal statute, the government had to prove that the defendant knowingly possessed the controlled substance, but that

> [t]he Government can complete their burden of proof by proving, beyond a reasonable doubt, that if the defendant was not actually aware that there was marijuana in the vehicle . . . his ignorance in that regard was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth.[208]

The Ninth Circuit approved the preceding jury instruction, holding that

200. *See* Office of Nat'l Drug Control Policy, *Florida Drug Control Update*, THE WHITE HOUSE 1 (2011), http://www.whitehouse.gov/sites/default/files/docs/state_profile_-_florida.pdf.

201. Nat'l Drug Intelligence Ctr., *The Economic Impact of Illicit Drug Use on American Society*, U.S. DEP'T OF JUST. ix (2011), http://www.justice.gov/archive/ndic/pubs44/44731/44731p.pdf.

202. *See Adkins*, 96 So. 3d at 421–22.

203. *See id.*

204. *See id.*; *see also* Carpenter, *supra* note 146, at 330.

205. *See* United States v. Jewell, 532 F.2d 697, 699 (9th Cir. 1976) (en banc).

206. *See id.* at 697–98. The defendant in *Jewell* was stopped while entering the United States with 110 pounds of marijuana in a secret compartment in his car. *Id.* at 698. At trial, the defendant testified that he did not know about the marijuana's presence, but the defendant did admit that someone asked him to drive the car to the United States for $100. *Id.* at 698–99, 699 nn.1–2. The defendant was convicted of both importing and possessing a controlled substance. *Id.* at 705 (Kennedy, J., dissenting).

207. Forlaw v. Fitzer, 456 So. 2d 432, 434 (Fla. 1984).

208. *Jewell*, 532 F.2d at 700 (quoting the trial court).

deliberate ignorance was equally as culpable as actual knowledge.[209] According to the Ninth Circuit, acts done knowingly included acts that defendants did with an awareness of the high probability of the existence of the fact in question.[210] The court also noted that requiring proof of actual knowledge would allow defendants to claim deliberate ignorance as a defense and thus thwart the federal drug statute's purpose of eliminating "the growing menace of drug abuse in the United States."[211] As a result, everyone who consciously avoids learning that they are in possession of drugs satisfies the federal statute's knowledge requirement. The court concluded its analysis by declaring, "No legitimate interest of an accused is prejudiced by such a standard . . . ."[212]

Although the federal drug statute in *Jewell* did not expressly eliminate an element of *mens rea* from the crime of drug possession like the Act did, and although the jury instructions in *Jewell* differ from the Act's standard jury instructions,[213] *Jewell* is useful for showing how another court analyzed *mens rea* requirements in the context of drug offenses. Like the statute in *Jewell*, the Florida Comprehensive Drug Act requires *mens rea* to reach at least the level of deliberate ignorance to support a conviction.[214] By requiring the State to prove that a defendant possessed a controlled substance, by requiring the State to prove that the defendant knew of the controlled substance's presence, and by allowing the defendant to raise his or her lack of knowledge as an affirmative defense, the Act ensures that only those with sufficient *mens rea*—those who know or should know that they possess a controlled substance—are convicted.[215]

The threshold to establish *mens rea* has been trending downward with respect to other crimes as well.[216] One example of this trend is the Patient Protection and Affordable Care Act's application of a new "general intent

209. *See id.* at 700, 704.

210. *Id.* at 700–01 (quoting MODEL PENAL CODE § 2.02(7) (Proposed Official Draft 1962)) ("When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.").

211. *Id.* at 703 (quoting H.R. REP. NO. 91-1444, pt. 1, at 593 (1970)) (internal quotation marks omitted).

212. *Id.* at 704.

213. *Compare In re* Standard Jury Instructions (No. 2005-3), 969 So. 2d 245, 258 (Fla. 2007), *with Jewell*, 532 F.2d at 700.

214. *See* State v. Adkins, 96 So. 3d 412, 421–22 (Fla. 2012).

215. *See id.* at 421 (using similar language as *Jewell* to assert that such a person would be "aware of the high probability" that he or she possessed a controlled substance). This standard avoids running afoul of the culpability principle—that "it is unjust to impose punishment in the absence of culpability"—because such defendants would be acting with *mens rea*. *See* Stinneford, *supra* note 11, at 689.

216. *See* Elizabeth R. Sheyn, *Toward a Specific Intent Requirement in White Collar Crime Statutes: How the Patient Protection and Affordable Care Act of 2010 Sheds Light on the "General Intent Revolution,"* 64 FLA. L. REV. 449, 450, 453, 466–67 (2012).

to deceive" standard, rather than the traditional "specific intent to defraud" standard, to several health care fraud statutes.[217] Although such an evolution does not go so far as to eliminate the *mens rea* element,[218] lower requirements of *mens rea* indicate legislatures' increased willingness to diminish the role of *mens rea* and courts' increased deference to legislative discretion.[219] As noted, courts have upheld strict liability crimes with serious penalties, such as felony murder and statutory rape.[220] As long as courts continue to uphold these statutes, there is no reason for a court to treat the Act differently when there is an absence of clearly established federal law on *mens rea* requirements.[221]

Nevertheless, critics of the Act might argue that innocent people should not have to endure the threat of being convicted of a serious crime if a jury fails to understand any component of the Act, including the remaining *mens rea* element, the affirmative defense, the permissive presumption, and the ultimate burden of proof.[222] But such critics would be ignoring the fact that it is possible for a jury to convict an innocent person of any crime if that jury does not correctly apply the law. The theoretical possibility that a jury wrongfully convicts an innocent person is a risk that affects the Act just as it affects all other criminal statutes.

IV. THE FUTURE OF THE ACT AND LIMITING PRINCIPLES

One of the greatest concerns of critics of the Florida Comprehensive Drug Act is that courts, by upholding the Act, may embolden the Legislature to eliminate *mens rea* elements from other crimes en masse.[223] Rather than defending legislatures' unlimited discretion to define the elements of crimes, Part IV argues that the U.S. Constitution and the Act itself contain safeguards to prevent the encroachment of strict liability into criminal law. One limit on legislative power is the rule that courts will not recognize the elimination of *mens rea* from a criminal statute with severe penalties unless the legislature makes its intent to do so explicit.[224] If a legislature were to merely omit the *mens rea* element from a serious offense, courts would imply a *mens rea* element into the statute.[225]

217. *Id.* at 450.

218. *See id.* at 450, 453 (concluding that the new standard creates a general intent crime that punishes recklessness).

219. *See id.* at 453, 467.

220. *See supra* Section III.B.

221. *See* Shelton v. Sec'y, Dep't of Corr., 691 F.3d 1348, 1354–55 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1856 (2013).

222. *See* State v. Adkins, 96 So. 3d 412, 433–34 (Fla. 2012) (Perry, J., dissenting).

223. *See id.* at 434.

224. *See* Chicone v. State, 684 So. 2d 736, 743 (Fla. 1996), *superseded in part by statute*, FLA. STAT. § 893.101 (2013).

225. *See id.* at 741. Washington's drug possession statute had an unambiguous legislative history in addition to its silent omission of *mens rea*. *See supra* note 162.

However, by passing the Florida Comprehensive Drug Act through the deliberative legislative process and by clearly expressing its intent to eliminate an element of *mens rea* from the Act's drug offenses, the Florida Legislature gave adequate notice of the change in law and did not offend due process.

The Act's affirmative defense serves as a safeguard against the conviction of innocent people as well. The Florida Supreme Court in *Adkins* went as far as to suggest that the Act's affirmative defense was the provision that saved the Act's constitutionality since it ensured the innocent could successfully raise their lack of knowledge as an affirmative defense.[226] Whether the Act would survive constitutional scrutiny without the affirmative defense provision is unclear.[227] Regardless, the affirmative defense provides another layer of protection for the genuinely innocent. Once a defendant raises the affirmative defense, the prosecution bears the burden of proving, beyond a reasonable doubt, that the defendant knew of the controlled substance's illicit nature.[228] No burden shifts to the defendant to prove his or her innocence at any time.[229] Lastly, the Act includes an additional safeguard by requiring proof of *mens rea* with respect to the presence of the controlled substance.[230] Thus, in all cases the State must prove that a defendant was aware of the controlled substance's presence, whether possession of that substance was actual or constructive.[231] This remaining element of *mens rea* ensures that any convicted defendant's culpability rises at least to the level of deliberate ignorance or willful blindness.[232]

While sufficient justification exists to defend the Act—including the Legislature's authority to define the elements of a crime, the public welfare offense doctrine, the existence of similar strict liability crimes, and the availability of the affirmative defense—one theory may undermine the Act's constitutionality and prevent the greater erosion of *mens rea* from criminal law. According to Professor Alan C. Michaels, crimes that lack a *mens rea* element are constitutionally permissible as long as they comply with the constitutional innocence principle.[233] The constitutional innocence

226. *See Adkins*, 96 So. 3d at 422.

227. *Compare id.* at 424 (Pariente, J., concurring in result) (concluding that the Act was facially constitutional only because the availability of the affirmative defense and because knowledge of the presence of the substance was still an element), *with* United States v. Bunton, No. 8:10–CR–327–T–30EAJ, 2011 WL 5080307, at *9 (M.D. Fla. Oct. 26, 2011) (noting that the Supreme Court upheld other strict liability statutes that did not have affirmative defenses).

228. *See supra* text accompanying note 47.

229. *See Adkins*, 96 So. 3d at 422; *supra* Section III.C.

230. *See Adkins*, 96 So. 3d at 416.

231. *See id.*; Maestas v. State, 76 So. 3d 991, 995 (Fla. Dist. Ct. App. 4th 2011); *In re* Standard Jury Instructions (2005-3), 969 So. 2d 245, 257 (Fla. 2007).

232. *See supra* text accompanying notes 102 and 215.

233. *See* Michaels, *supra* note 166, at 221.

principle asserts that the imposition of strict liability violates the Constitution "if the other elements of the crime, with the strict liability element excluded, could not themselves be made a crime. Otherwise, strict liability is constitutional."[234] As a result, the appropriate inquiry regarding the Act's constitutionality is whether a statute that prohibited the knowing possession of a substance would be constitutional.[235] It seems obvious that the Legislature could not make the possession of any substance, even a harmless one, illegal. Therefore, a statute criminalizing the possession of controlled substances with a strict liability element as to the illicit nature of the substance would likely violate the constitutional innocence principle and be unconstitutional.[236] Similarly, a statute that imposed strict liability for the possession of an obscene book would be unconstitutional because a statute that prohibited the knowing possession of a book would be unconstitutional on First Amendment grounds.[237] However, the constitutional innocence principle may be more aspirational than it is descriptive of the current state of the law. The principle appears to conflict with the criminalization of statutory rape, which has a strict liability element as to the victim's age but requires the sexual intercourse to be performed knowingly. Because a statute that prohibited knowing sexual intercourse would be likely found unconstitutional on some grounds, scholars must either bite the bullet and oppose the criminalization of statutory rape, which many do, or they must reject the constitutional innocence principle. Although the constitutional innocence principle can coherently account for many decisions of the U.S. Supreme Court on due process requirements for *mens rea*, the U.S. Supreme Court has not formally articulated the constitutional innocence principle as the rationale behind its strict liability jurisprudence.[238]

More than ten years after it was amended, the Florida Comprehensive Drug Act remains a powerful law enforcement tool despite facing constitutional challenges. Over the same period, other states have largely declined to follow Florida's lead in partially eliminating the *mens rea* requirement from drug offenses.[239] Although this Note contends that the Florida Comprehensive Drug Act stands on constitutional grounds, the Florida Legislature could foreclose the debate by amending the Act to restore the missing *mens rea* element just as the North Dakota legislature did.[240] Also, the U.S. Supreme Court could one day grant certiorari to a case similar to *Shelton* and take the opportunity to clarify the constitutional

234. *Id.* at 221–22.

235. *See id.* at 222.

236. *Cf. id.* (applying the constitutional innocence principal to a statute that criminalized the possession of unregistered hand grenades, where the defendant was strictly liable on the registration element).

237. *See id.*

238. *Id.*

239. *See* State v. Adkins, 96 So. 3d 412, 423 (Pariente, J., concurring in result).

240. *See* State v. Bell, 649 N.W.2d 243, 252 (N.D. 2002).

requirements for *mens rea* in criminal statutes. However, the U.S. Supreme Court's choice to date to not set specific prohibitions on strict liability offenses suggests that the Court will likely not consider such a case.[241] Without guidance from the U.S. Supreme Court, significant discretion will remain with state legislatures to define the elements of crimes. As the Eleventh Circuit concluded in *Shelton*, there is no clearly defined constitutional requirement of *mens rea*.[242] Therefore, the Florida Comprehensive Drug Act cannot be in danger of violating a constitutional requirement that does not exist. As a practical matter, however, if the Act did not contain internal safeguards such as the affirmative defense and the remaining element of *mens rea*, courts would be more inclined to identify constitutional issues with the Act.[243]

CONCLUSION

At first glance, the Florida Comprehensive Drug Act appears to be a significant departure from the principles of Anglo-American jurisprudence. The Act eliminates the State's burden to prove defendants' knowledge of a controlled substance's illicit nature in drug cases. The Act's opponents allege that if defendants raise the affirmative defense, then they must prove their lack of knowledge. Once a defendant raises the defense, the judge then instructs the jury that it can presume that the defendant knew the illicit nature of the substance in his or her possession. From this portrayal of the Act, it appears that defendants are presumed guilty from the outset. Yet, as this Note has explained, the effect of the Act's partial elimination of *mens rea* is much less drastic than initial appearances may suggest.

The hypothetical scenario in this Note's Introduction described the case of an innocent friend who faced potential prosecution for the possession of a controlled substance when someone else's cocaine was in his vehicle unbeknownst to him. However, in the innocent friend hypothetical and in the hypotheticals that Justice Perry cited in his *Adkins* dissent, each defendant clearly lacked knowledge of the controlled substance's presence, knowledge that the State would have to prove to establish either actual or constructive possession. Thus, these hypotheticals, which initially appear to be strong constructive possession cases, are seriously flawed since the State would not be able to prove the defendants' knowledge of the controlled substance's presence without additional evidence. Even if the State decided to prosecute those cases, the defendants would prevail by asserting the affirmative defense and therefore requiring the State to prove their knowledge of the controlled substance's illicit nature beyond a reasonable doubt.

241. *See* Michaels, *supra* note 166, at 223, 225.

242. *See* Shelton v. Sec'y, Dep't of Corr., 691 F.3d 1348, 1354–55 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1856 (2013).

243. *See Adkins*, 96 So. 3d at 422; *id.* at 424 (Pariente, J., concurring in result).

Although the Florida Comprehensive Drug Act is only one of two drug possession statutes in the United States to eliminate a *mens rea* element, the Act respects the limited requirements for *mens rea* that exist under the Due Process Clause. There are a number of bases to support the Act's constitutionality: the Act's preservation of one element of *mens rea*, the Legislature's discretion to define the elements of an offense, the public welfare offense doctrine, the continued prosecution of other serious strict liability crimes, and the availability of the Act's affirmative defense. Meanwhile, there is no countervailing argument grounded in U.S. Supreme Court precedent that justifies the invalidation of the Act without stretching the holdings of cases too far beyond their facts.

While other states may not be rushing to adopt drug possession statutes similar to the Act—considering some have taken steps toward selective legalization—other criminal statutes that eliminate *mens rea* will likely increase in number unless the U.S. Supreme Court establishes clearer constitutional requirements for *mens rea* in criminal law. State legislatures may be motivated to pass criminal statutes similar to the Act out of a desire to simplify the law for jurors, to make the statutory language conform to the intent of the law, to maximize the efficient treatment of similar cases, to reduce the assertion of frivolous defenses, to prioritize the prosecution of certain crimes, or even perhaps to decrease the state's barriers to obtaining convictions. Nevertheless, the U.S. Supreme Court may decline to intervene in the interest of deferring to state legislatures on the grounds of federalism and federalism's core benefits of promoting local control and experimentation. If the U.S. Supreme Court does reengage, the foundation of its strict liability jurisprudence should be a rule that is easily and consistently applied to all criminal offenses regardless of their historical support.

The U.S. Supreme Court's current approach of sparingly reviewing the constitutionality of strict liability criminal statutes is the preferred one. Although the Court could provide additional guidance on due process requirements for *mens rea*, the U.S. Supreme Court should allow state legislatures to exercise their discretion in declaring criminal offenses and excluding elements of knowledge from those offenses. Reviewing the constitutionality of any purportedly strict liability criminal statute, except one that criminalized the most innocuous conduct, would disrupt the settled state of the law and inject uncertainty into the criminal justice system. Likewise, the Florida Comprehensive Drug Act, which criminalizes inherently dangerous conduct and ensures that defendants are criminally culpable, does not provide the ideal circumstances for the U.S. Supreme Court to define the limits of strict liability in criminal law.