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# THE JOHN MARSHALL LAW REVIEW

**Innocent Until Presumed Guilty:  
Florida's Mistreatment of Mens Rea  
and the Presumption of Innocence in  
Drug Possession Cases**

*Sean Mullins*

# INNOCENT UNTIL PRESUMED GUILTY: FLORIDA'S MISTREATMENT OF MENS REA AND THE PRESUMPTION OF INNOCENCE IN DRUG POSSESSION CASES

SEAN MULLINS\*

## I. INTRODUCTION

"[T]he law holds, that it is better that ten guilty persons escape, than that one innocent suffer."

– William Blackstone<sup>1</sup>

William Blackstone's quote, along with subsequent common law decisions, demonstrate that the presumption of innocence favoring the accused is a fundamental principle within criminal law.<sup>2</sup> This principle is exemplified in the case of *Rutskin v. State*.<sup>3</sup> In *Rutskin*, two United States Special Agents observed a suspicious package addressed to the residence of the defendant.<sup>4</sup> Upon further inspection, the agents found that the package contained marijuana and promptly applied for, and received, a search warrant granting access to the defendant's residence.<sup>5</sup> Two minutes after the delivery of the package, the agents entered the defendant's residence, presented the search warrant, and arrested

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\* J.D. Candidate, The John Marshall Law School, 2014; BA, Loyola University Chicago, 2011. I would like to thank Mark DeLancey, the best English professor at Loyola, without whose instruction on writing, this comment would not exist. Most importantly, I would like to thank my parents whose love, support, and company influence and inspire all that I do in my life.

1. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 420 (1962).

2. See, e.g., McKinley's Case, 33 State Tr. 275, 506 (1817) (stating "I conceive that this presumption is to be found in every code of law which has reason and religion and humanity for a foundation."); see also Coffin v. United States, 156 U.S. 432, 453 (1985) (stating that "[t]he principle that there is a presumption of innocence in favor of the accused in the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

3. *Rutskin v. State*, 260 So.2d 525 (Fla. Dist. Ct. App. 1972).

4. See *id.* at 525 (stating that the package was deemed suspicious as the return address was an A.P.O number marked Korea).

5. See *id.* at 526 (explaining that after obtaining the warrant, the agents kept the package under constant surveillance and arrested the defendant's two roommates).

the defendant for possession of marijuana.<sup>6</sup> However, as there was no evidence establishing that the defendant knew of the contents of the package, the prosecution could not overcome the presumption of innocence in favor of the accused, and the defendant was thus exonerated.<sup>7</sup>

While the decision of this case would be similarly decided in forty-eight states,<sup>8</sup> the Florida Supreme Court has recently upheld a statute<sup>9</sup> that would dispense with the presumption of innocence regarding knowledge of a substance's illicit nature.<sup>10</sup> The statute creates a permissive presumption that the accused knew the illegal nature of the substance in their possession.<sup>11</sup> Thus, under this statute, the defendant in *Rutskin* would not be able to rely on the traditional presumption of innocence in his favor. Rather, he would be required to bring forth an affirmative defense of lack of knowledge, rebutting the permissive presumption against him.<sup>12</sup> In essence, the legislature has been allowed to remove an element that has traditionally been present in drug possession cases and reintroduce it as an affirmative defense.<sup>13</sup> This presents two

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6. See *id.* (stating that the package had not been opened, nor had there been any attempt by the defendant to open it).

7. See *id.* at 527-28 (stating that the evidence was legally insufficient to determine that the defendant had knowledge that the package contained marijuana or other illegal substances).

8. See *State v. Adkins*, 96 So.3d 412, 423 (Fla. 2012) (Pariente, J., concurring) (stating that forty-eight of the fifty states, excluding Florida and Washington, continue to require knowledge of the substances illicit nature as an element of criminal narcotics offenses).

9. See *id.* (upholding FLA. STAT. ANN. § 893.101 and its elimination of the element requiring the defendant's knowledge of the illicit nature of the controlled substance in their possession).

10. See FLA. STAT. ANN. § 893.101(1) (West 2012) (stating that "[t]he Legislature finds that the cases of *Scott v. State* and *Chicone v. State* 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.").

11. See *id.* § 893.101(3) (stating as follows:

In those instances in which a defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption provided in this section.

12. See *id.* § 893.101(2) (stating that the defendant, in bringing an affirmative defense of lack of knowledge of illicit nature, must overcome a permissive presumption of knowledge).

13. See *State v. Bradshaw*, 152 Wash.2d 528, 542-46 (Wash. 2004) (Sanders, J., dissenting) (stating that contrary to a twenty-three year old precedent, the state of Washington does not require a knowing mens rea in criminal drug possession cases).

potential problems with the above-mentioned statute, section 893.101 of the Florida Comprehensive Drug Abuse and Prevention and Control Act. First, it appears to shift the burden of proof to the defendant, thus disregarding the long established principle of a presumption of innocence in favor of the accused, and opening up the possibility that innocent acts may be punished under the statute.<sup>14</sup> Second, in eliminating the element of knowledge of illicit nature, the statute additionally dispensed with the accompanying knowing mens rea from a felony crime punishable by a sizable prison term.<sup>15</sup>

Given these problems, section 893.13 and the clarifications in section 893.101 have come under criticism by the media, academics, and courts alike.<sup>16</sup> This Comment will go forward in analyzing the issue from the perspectives of both sides of the controversy. Part II of this Comment presents a brief history of mens rea along with the background and procedural history of section 893.13 and the relevant court holdings. Part III analyzes the arguments of the Florida Supreme Court in *State v. Adkins*,<sup>17</sup> alongside the most common arguments opposing the court's decision. Part IV proposes that, with the next step in the appellate process being the United States Supreme Court,<sup>18</sup> the Supreme

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14. See *Coffin*, 156 U.S. at 453 (stating that “[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

15. See *Adkins*, 96 So.3d at 415 (stating that violation of § 893.13 can be punished as a first-degree felony). The court also stated that conviction under the act can be punished by up to fifteen years imprisonment to life. *Id.* at 424 (Pariente, J., concurring).

16. See, e.g., Shelton v. Sec’y, Dept. of Corr., 802 F. Supp. 2d 1289 (M.D. Fla. 2011), *rev’d*, 691 F.3d 1348 (11th Cir. 2012) (holding § 893.13, as amended by § 893.101, unconstitutional); Rachel A. Lyons, *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, 363-80 (2012) (arguing the unconstitutionality of § 893.13 and § 893.101); see also John Schwartz, *Florida: Drug Laws Ruled Unconstitutional*, N.Y. TIMES (July 27, 2011), available at [http://www.nytimes.com/2011/07/28/us/28brfs-DRUGLAWSRULE\\_BRF.html?\\_r=0](http://www.nytimes.com/2011/07/28/us/28brfs-DRUGLAWSRULE_BRF.html?_r=0) (noting the backlash against section 893.13); Nathan Koppel, *Florida Judge Declares State’s Drug Law Unconstitutional*, WALL ST. J. L. BLOG (July 27, 2011, 6:31 PM), <http://blogs.wsj.com/law/2011/07/27/florida-judge-declares-sates-drug-law-unconstitutional/> (citing support for a finding of section 893.13 unconstitutional); Leslie Sammis, *Florida’s Drug Statutes Unconstitutional: Blame the Florida Legislature*, SAMMIS L. BLOG, <http://criminal-defense-attorney-tampa.blogspot.com/2011/08/floridas-drug-statutes-unconstitutional.html> (last visited Mar. 25, 2013) (discussing and criticizing section 893.13).

17. *Adkins*, 96 So.3d at 415.

18. See *Shelton v. Sec’y, Dep’t. of Corr.*, 691 F.3d 1348, 1349 (11th Cir. 2012) (reversing the decision of the district court and thus allowing the

Court should find section 893.13, as amended in section 893.101, unconstitutional. Assuming, *arguendo*, the Court determines the statute to be unconstitutional, this Comment then provides three potential courses of action for Florida's legislature moving forward.

## II. BACKGROUND

### A. *Mens Rea in Criminal Law*

While the power to define the elements of crimes is generally left to the legislature,<sup>19</sup> there have necessarily been limits placed on the legislature's ability to remove facts and mental states previously deemed essential to constitute a criminal offense.<sup>20</sup> Despite the lack of a binding doctrine identifying mens rea as necessary in defining the elements of a crime,<sup>21</sup> the existence of a mens rea has generally been accepted as an unwritten rule throughout criminal law.<sup>22</sup> Thus, such limits are essential. Accordingly, the United States Supreme Court has firmly stated that the "ancient requirement" of mens rea in criminal law "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability to choose between good and evil."<sup>23</sup>

In accord with this view, the Supreme Court has gone on to

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possibility that the case be appealed to the United States Supreme Court).

19. See *Staples v. United States*, 511 U.S. 600, 604-05 (1994) (stating that definition of both elements and their accompanying mental state has traditionally been entrusted to the legislature); see also *United States v. Balint*, 258 U.S. 250, 251-52 (stating that while common law required a mens rea for all crimes, it is now recognized that the legislature may dispense with the mens rea and punish a crime without regard to mental state or intent).

20. See *Apprendi v. New Jersey*, 530 U.S. 466, 486 (2000) (imposing limits to a State's ability to "define away" facts previously required to convict); see also *State v. Oxx*, 417 So.2d 287, 289-90 (Fla. Dist Ct. App. 1982) (defining three constitutional constraints on a legislature's ability to dispense with mens rea). A mental state is required for crimes recognized at common law, statutes that would otherwise infringe on First Amendment rights, and crimes creating an affirmative duty to act and penalizing the failure to comply with the proscribed duty. *Id.*

21. See *Powell v. Texas*, 392 U.S. 514, 535 (1968) (stating that the United States Supreme Court has never established a constitutional doctrine requiring mens rea).

22. See *Morissette v. United States*, 342 U.S. 246, 251 (1952) (noting universal acceptance of the doctrine of mens rea at common law, as indicated by William Blackstone's famous statement that "to constitute any crime there must first be a 'vicious will'"); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)) (stating that "the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.").

23. See *Morissette*, 342 U.S. at 251 (proceeding to state that a guilty mind in criminal law is as instinctive as a child saying "I didn't mean to.").

state that a legislature's ability to dispense with mens rea and create strict liability crimes is limited to instances in which the crime's consequences are minor and do little harm to the offender's reputation.<sup>24</sup> Thus, section 893.13 – quintessentially a strict liability crime<sup>25</sup> – has come under scrutiny as it dispenses with mens rea while subsequently imposing heavy sanctions on offenders.<sup>26</sup>

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24. See *id.* at 257 (holding that strict liability crimes generally have small penalties and do not greatly damage the offender's reputation).

25. There is some debate as to the nature of § 893.13. The state attempts to make the claim that § 893.13 is not a strict liability crime. Initial Brief of Appellant at 17-22, *State v. Adkins*, 96 So.3d 412 (Fla. 2012) (No. SC11-1878) (2011 WL 6100868). Strict liability is defined as “[liability] that does not depend on actual negligence or intent to harm, but is based on an absolute duty to make something safe.” BLACK’S LAW DICTIONARY (9TH ED. 2009). Thus, the state attempts to argue that, as a strict liability crime determines liability irrespective of fault, the affirmative defense created in § 893.101(2), acknowledging a lack of knowledge and fault, established § 893.13 as something other than a strict liability crime. Initial Brief of Appellant, *supra* note 25, at 17. However, a determination of strict liability is made by reference to a statute’s elements rather than the available affirmative defenses. *Shelton*, 802 F. Supp. 2d at 1307. Thus, as § 893.101 removes all guilty knowledge, leaving only the innocent knowledge of possession, the statute would in fact create a strict liability crime. Brief of Appellees on the Merits at 4, *State v. Adkins*, 96 So.3d 412 (Fla. 2012) (No. SC11-1878) (2011 WL 6100868). Furthermore, both Washington and North Dakota, the only other two states to adopt drug possession statutes without a mens rea, admit that such a statute creates a strict liability crime. See *State v. Michlitsch*, 438 N.W.2d 175, 177 (N.D. 1989) (stating that the North Dakota unlawful possession statute creates a strict liability crime) *superseded* by statute as recognized in *State v. Mittledier*, 809 N.W. 2d 303 (N.D. 2011). See *Bradshaw*, 152 Wash.2d at 533 (acknowledging the strict criminal liability which the Washington drug possession statute imposes). Given the evidence in favor of considering drug possession a strict liability offense under § 893.13, for the purposes of this Comment, it will be presumed that the statute does create strict liability crimes.

The state further maintains that § 893.13 does not create a strict liability crime, but rather merely creates a general intent crime. Initial Brief of Appellant, *supra* note 25, at 19. General intent is defined as “[t]he intent to perform an act even though the actor does not desire the consequences that result.” BLACK’S LAW DICTIONARY (9th ed. 2009). More generally, however, recklessness is used as a definition for general intent. Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 368-69 (2001). Thus, a general intent crime punishes a person’s act and its consequences as the person already has knowledge of their actions probable consequences. See *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 523 (1994) (stating that knowledge of an actions probable consequences is a sufficient predicate for finding criminal liability in general intent crimes). However, as it is unsettled, and will be discussed further in this Comment, whether simple possession gives rise to knowledge of a substances nature, the state’s argument that § 893.13 is a general intent crime will not be decided as of now.

26. See *e.g.*, *Shelton*, 802 F. Supp. 2d at 1297 (criticizing § 893.13, as

Likewise, this disparity between the slight proof necessary to convict and the heavy punishment that comes with conviction has led Florida to become one of only two states to define felony drug possession as a strict liability crime.<sup>27</sup> Given this scrutiny, along with Florida's position as an outlier in regards to its strict liability approach to criminal drug possession, section 893.13 has garnered much attention and analysis from the courts. As such, the statute has a lengthy procedural history within the Florida court system.<sup>28</sup>

### B. Procedural History of Section 893.13

Section 893.13 of the Florida Comprehensive Drug Abuse Prevention and Control Act states that "it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver" or "to be in actual or constructive possession of a controlled substance."<sup>29</sup> The punishment for committing such an offense, dependent on the circumstances of the offense and the controlled substance at issue, can be up to a first-degree felony.<sup>30</sup> While a criminal statute permitting such significant punishments would generally specify the mental state an accused must possess in order for conviction,<sup>31</sup> section 893.13 is

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amended by § 893.101, and holding it to be unconstitutional).

27. Currently, Washington remains the only state other than Florida to not require knowledge of illicit nature of the controlled substance. *See Bradshaw*, 152 Wash.2d at 537-38 (stating that Washington's drug possession statute, WASH. REV. CODE ANN. § 69.50.603 (West 2013), does not require a knowing mens rea). North Dakota had previously treated drug possession as a strict liability crime. *See Michlitsch*, 438 N.W.2d at 177 (stating that the state's drug possession statute created a strict liability crime as it does not require that the accused had knowledge of the substances illicit nature). However, it later amended its statute to include a mens rea. *See* N.D. CENT. CODE ANN. § 19-03.1-23(1) (West 2011) (requiring a willful mens rea in drug possession cases). *See also* *State v. Bell*, 649 N.W.2d 243, 252 (N.D. 2002) (stating that the amended willful mens rea, including any conduct that is intentionally, knowingly, or recklessly done, makes it so that the offense is no longer a strict liability offense).

28. *See, e.g., Tolbert v. State*, 925 So.2d 1148 (Fla. Dist. Ct. App. 2006) (adjudicating the constitutionality of § 893.13); *Little v. State*, 77 So.3d 722 (Fla. Dist. Ct. App. 2011); *Parker v. State*, 77 So.3d 707 (Fla. Dist. Ct. App. 2011) (same); *Wright v. State*, 920 So.2d 21 (Fla. Dist. Ct. App. 2005) (same); *Edwards v. State*, 77 So.3d 676 (Fla. Dist. Ct. App. 2011) (same); *Flagg v. State*, 74 So.3d 138 (Fla. Dist. Ct. App. 2011); *Johnson v. State*, 37 So.3d 975 (Fla. Dist. Ct. App. 2010) (same); *Miller v. State*, 35 So.3d 162 (Fla. Dist. Ct. App. 2012) (same); *Smith v. State*, 901 So.2d 1000 (Fla. Dist. Ct. App. 2005) (same).

29. FLA. STAT. ANN. §§ 893.13(1)(a), (6)(a).

30. *See, e.g.,* FLA. STAT. ANN. §§ 893.13(1)(b), (6)(c) (stating that section 893.13 may be punished as a felony).

31. *See, e.g., Morissette*, 342 U.S. at 257 (stating that a legislature's ability



silent on such a mens rea.<sup>32</sup> As such, the Florida courts initially approached the statute by interpreting the legislative intent as to what mens rea, if any, was proper within the context of the act.<sup>33</sup>

The first time a Florida court undertook this interpretation was in *Chicone v. State*,<sup>34</sup> a 1996 case dealing with felony possession of cocaine.<sup>35</sup> The court held that guilty knowledge was to be a part of the statute, as simple proof of the act of possession does not give rise to a presumption that the act was done with either knowledge or intent.<sup>36</sup> Additionally, noting the large penalties imposed for violations of the statute, the court found that some type of mental state must have been intended by the legislature.<sup>37</sup> Accordingly, the court determined – based upon their interpretation of the legislature’s intent<sup>38</sup> – that the State bears the burden of proving knowledge of both possession and illicit nature.<sup>39</sup>

In *Scott v. State*,<sup>40</sup> the Florida Supreme Court reaffirmed *Chicone* stating that the burden rests on the prosecution to prove both knowledge of possession as well as knowledge of the nature of the substance.<sup>41</sup> The *Scott* court also clarified that a presumption of knowledge, as previously established in the Florida Supreme Court case of *State v. Medlin*,<sup>42</sup> can only be made in cases of

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to dispense of mens rea is generally limited to crimes for which the penalty is relatively small); see also *Liparota v. United States*, 471 U.S. 419, 426 (1985) (stating that crimes without a requisite mental state have a “generally disfavored status.”).

32. See FLA. STAT. ANN. § 893.13(6)(a) (neglecting to define any mens rea for criminal drug possession offenses).

33. See generally *Chicone v. State*, 684 So.2d 736 (Fla. 1996) (interpreting the legislature’s intent as to the requisite mental state in § 893.13).

34. *Id.*

35. See *id.* (finding a knowing mens rea in its interpretation of FLA. STAT. ANN. § 893.13).

36. *Id.* at 738-40 (stating that guilty knowledge must be established in drug possession cases as constructive possession is insufficient in determining whether the defendant had knowledge of a substance’s illicit nature).

37. See *id.* at 742-43 (stating that the large penalties associated with § 893.13 violations are not consistent with crimes that do not require a mens rea).

38. See *id.* at 744 (noting that the background of the common law preference for mens rea led them to believe that the legislature intended such a requisite mental state).

39. See *id.* at 745-46 (overturning the holding of the lower court as they did not require that the state prove both knowledge of possession and the illicit nature of the possessed items or substances).

40. *Scott v. State*, 808 So.2d 166 (Fla. 2002).

41. See *id.* at 172 (expressly reiterating the holding of *Chicone* by requiring the state to prove knowledge of possession as well as knowledge of the substances illicit nature).

42. See *State v. Medlin*, 273 So.2d 394, 397 (Fla. 1973) (holding that, in a case for possession of barbituates, proof that the accused committed the

actual, personal possession of a controlled substance.<sup>43</sup> In making this distinction, the court stated that only with evidence of personal possession of a substance could one logically infer knowledge of the illicit nature of the substance.<sup>44</sup>

In response to these cases, the Florida Legislature enacted section 893.101,<sup>45</sup> explicitly stating that the *Scott* and *Chicone* holdings, requiring knowledge of illicit nature of the controlled substance as an element of section 893.13, were contrary to legislative intent.<sup>46</sup> In opposing the holdings of the prior cases, the statute stated that knowledge of the illicit nature was not an element of drug possession offenses under section 893.13.<sup>47</sup> Rather, lack of knowledge in drug possession offenses became an affirmative defense.<sup>48</sup> In bringing such an affirmative defense, the legislature stated that possession, regardless of its character as either actual or constructive, leads to a permissive presumption that the defendant knew of the illicit nature of the substance in his or her possession.<sup>49</sup> Essentially, in dispensing with knowledge of the illicit nature as an element and replacing it with a permissive presumption of knowledge, the legislature allowed for the State's sole remaining burden to be proof of knowledge of possession.<sup>50</sup>

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prohibited act allowed for the state to presume that the act was done both knowingly and intentionally).

43. See *Scott*, 808 So.2d at 171 (stating that a proper reading of both *Medlin* and *Chicone* demonstrates that knowledge of illicit nature may only be presumed in cases of actual, personal possession).

44. See *id.* at 171-72 (stating that only evidence of personal or actual possession is enough to sustain a conviction in a § 893.13 criminal possession case).

45. See FLA. STAT. ANN. § 893.101 (amending and clarifying legislative intent regarding § 893.13).

46. See *id.* § 893.101(1) (stating that “[t]he Legislature finds that the cases of *Scott v. State*. . . and *Chicone v. State*. . . 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.”)

47. *Id.* § 893.101(2).

48. See *id.* (stating that “[t]he 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.”).

49. See *id.* § 893.101(3):

In those instances in which a defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption as provided in this subsection.

50. See *Adkins*, 96 So. 3d at 416 (stating that FLA. STAT. ANN. § 893.101

Following the enactment of Section 893.101, each of the Florida District Court of Appeals upheld the constitutionality of the statute.<sup>51</sup> Despite this unanimous in-state support, the United States District Court for the Middle District of Florida, in *Shelton v. Secretary of the Department of Corrections*,<sup>52</sup> concluded that the statute was facially unconstitutional.<sup>53</sup> In reaching this conclusion, the court found that the lack of a mens rea rendered the statute a violation of due process as it created a strict liability offense with severe penalties and stigma attached,<sup>54</sup> as well as opened up the possibility of criminalizing wholly innocent conduct.<sup>55</sup> Thus, noting that a finding to the contrary would begin a slippery slope of eliminating mens rea from serious crimes,<sup>56</sup> the court declared Section 893.13, as amended in Section 893.101, unconstitutional.<sup>57</sup> Since the *Shelton* decision,<sup>58</sup> those opposing section 893.101 have

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does not eliminate knowledge of possession as an element of the crime).

51. See *Harris v. State*, 932 So.2d 551, 552 (Fla. Dist. Ct. App. 2006) (upholding the constitutionality of § 893-101 under the Florida and United States constitutions); *Burnette v. State*, 901 So.2d 925, 927 (Fla. Dist. Ct. App. 2005) (same); *Taylor v. State*, 929 So.2d 665, 665 (Fla. Dist. Ct. App. 2006) (same); *Wright v. State*, 920 So.2d 21, 25 (Fla. Dist. Ct. App. 2005) (same); *Lanier v. State*, 74 So.3d 1130, 1130 (Fla. Dist. Ct. App. 2011) (same).

52. *Shelton*, 802 F. Supp. 2d. at 1307.

53. See *id.* at 1297 (stating that § 893.13 is facially unconstitutional, as it creates a strict liability crime with severe penalties, social stigma, and potential criminalization of innocent conduct).

54. See *id.* at 1300 (stating that no strict liability crime with like penalties has ever been upheld as constitutional under federal criminal law). The court also stated that a felony, a punishment for violation of Section 893.13, creates a significant social stigma. *Id.* at 1302; see also *Staples*, 511 U.S. at 617-18 (stating that strict liability crimes are generally found constitutional only if the penalties are slight and do not injure the offender's reputation).

55. See *Shelton*, 802 F. Supp. 2d at 1297 (noting the possibility that Section 893.13 will criminalize innocent behavior in finding it unconstitutional); see also *Lambert v. People of the State of Cal.*, 355 U.S. 225, 229 (1957) (stating a disapproval of punishing innocent conduct).

56. See *Shelton*, 802 F. Supp. 2d. at 1301 (citing *United States v. Engler*, 806 F.2d 425, 435 (3d Cir. 1986) (stating that allowing even a two year imprisonment as punishment for a strict liability crime begins a slippery slope of allowing severe sanctions for such strict liability crimes).

57. See *Shelton*, 802 F. Supp. 2d at 1315-16 (entering a declaratory judgment, pursuant to Rule 57 of the Federal Rules of Civil Procedure, declaring § 893.13 and its amendments unconstitutional).

58. This decision has since been overturned by the United States Court of Appeals Eleventh Circuit in *Shelton v. Secretary, Department of Corrections*, 691 F.3d 1348, 1354 (11th Cir. 2012). However, the Eleventh Circuit expressed no view towards the holding of the district court, overturning their ruling solely as they did not meet their burden of proving that the state decision was directly contrary to United States Supreme Court precedent. *Id.* at 1354-55. As the District Court's reasoning has not come into question, it continues to have value in the discussion of Section 893.13.

relied upon the case heavily,<sup>59</sup> despite its purely persuasive, non-binding nature.<sup>60</sup>

Noting the inconsistent enforcement of Section 893.13,<sup>61</sup> Florida's Second District Court of Appeal issued certification on the issue of the constitutionality of Section 893.13,<sup>62</sup> pursuant to Florida Rules of Appellate Procedure, Rule 9.125.<sup>63</sup> Upon reviewing the case, the Florida Supreme Court held section 893.13 to be constitutional<sup>64</sup> on three bases: (1) courts have historically deferred to the legislature in creating elements of crimes without mens rea;<sup>65</sup> (2) innocent acts were not be punished under the act due to the affirmative defense of lack of knowledge;<sup>66</sup> and (3) the statute did not violate due process by removing the mens rea element of knowledge.<sup>67</sup>

### III. ANALYSIS

Despite the Florida Supreme Court's decision holding Section 893.13 of the Florida Comprehensive Drug Abuse Prevention and Control Act constitutional,<sup>68</sup> dissenters to the statute remain.<sup>69</sup> Accordingly, every argument posited in favor of the

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59. See, e.g., Answer Brief of Appellees on the Merits, *State v. Adkins*, 96 So.3d 412 (Fla. 2012) (No. SC11-1878) (2011 WL 6100867) (relying on *Shelton* throughout the brief).

60. See *State v. Anderson*, 2011 WL 3904082 (Fla. Cir. Ct. 2011) (noting that the *Shelton* decision in the United States District Court for the Middle District of Florida is not binding on state courts).

61. Florida's Twelfth Judicial Circuit granted the dismissal of forty-two defendants based on the reasoning of *Shelton*, and in direct contradiction of numerous other circuits. *State v. Adkins*, 71 So.3d 184, 185 (Fla. Dist. Ct. App. 2011). Additionally, Florida's Second District Court of Appeal noted that the current, varied decisions of the Circuit Courts allow for unequal application of the statute and thus, uncertain prosecution throughout the state. *Id.*

62. See *Adkins*, 71 So.3d at 186 (certifying the issue of the constitutionality of Section 893.13 due to inconsistent prosecution and application of the statute).

63. Fla.R.App.P. Rule 9.125 (2012).

64. The decision came down with a five to two majority declaring § 893.13 constitutional. *Adkins*, 96 So.3d at 423.

65. See *Adkins*, 96 So.3d at 418-23 (stating that it is within the legislature's power to remove the mens rea of knowledge of illicit nature in drug possession cases under § 893.13).

66. See *id.* at 422 (stating that the affirmative defense of lack of knowledge obviates any concern that innocent individuals may be convicted under § 893.13).

67. See *id.* at 423 (stating that the Legislature did not violate due process as making knowledge of the illicit nature of a controlled substance an affirmative defense rather than an element of the crime does not unconstitutionally shift the burden of proof to the defense).

68. *Id.*

69. See, e.g., 96 So.3d at 431 (Perry, J., dissenting) (finding, contrary to the majority, § 893.13, as amended in 893.101, to be unconstitutional).

constitutionality of Section 893.13 likewise has an antithesis supplied by those opposing the statute. This section will address both sides of the matter regarding the three main issues relating to the constitutionality of Section 893.13: (1) the court's deference to the legislature in creating crimes; (2) the punishment of innocent acts; (3) and the constitutionality of the statute in accordance with due process.

*A. The Role of Judicial Deference to the Legislature in Creating Crimes Without Mens Rea*

*1. The Holding of the Florida Supreme Court*

The Florida Supreme Court argued that courts have generally deferred to the legislature regarding its ability to create criminal laws that dispense with the requisite guilty mind.<sup>70</sup> This deference stemmed from the principle that the court is to presume challenged legislative acts are constitutional and construe them as such whenever possible.<sup>71</sup> Thus, in order to find Section 893.13 facially unconstitutional, there must not have been any set of circumstances under which the statute could be constitutionally applied.<sup>72</sup>

After setting this basis, the court turned to the case of *United States v. Balint*.<sup>73</sup> This case dealt with the Narcotics Act of 1914,<sup>74</sup> requiring any person who produced, sold, or distributed narcotics to register and pay a federal tax.<sup>75</sup> Under the act, sale of any of the specified narcotics was presumptive evidence of a violation,<sup>76</sup> and, as such, knowledge was not an element of the offense.<sup>77</sup> The *Balint* court held this act constitutional as, in furthering public policy, the legislature may require that in performing a proscribed act, the actor did so "at his own peril" without ignorance as a defense.<sup>78</sup>

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70. *See id.* at 417 (stating that given the Legislature's broad authority to define a crime's elements, it is generally not precluded from creating offenses without a requisite guilty knowledge).

71. *See id.* at 416-17 (stating that the court "is obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible").

72. *Id.*

73. *United States v. Balint*, 258 U.S. 250 *passim* (1922). *See Adkins*, 96 So.3d at 4417-18 (discussing the *Balint* case and its application to the present circumstances).

74. *See Balint*, 258 U.S. at 251 (stating that the defendants were indicted under the Narcotic Act of 1914).

75. Narcotic Act of 1914, ch. 1, § 1, 38 Stat. 785 (1914).

76. *Id.*

77. *See Balint*, 258 U.S. at 251 (stating that the Narcotic Act of 1914 did not make knowledge an element of an offense under the Act).

78. *See id.* at 252 (stating that under certain circumstances an actor acts at his own peril and will not be afforded the ability to claim good faith or

Applying this to Section 893.13, the Florida Supreme Court stated that *Balint* represented the recognized notion that a legislature has a broad discretion to omit mens rea,<sup>79</sup> particularly in public safety statutes regulating dangerous materials,<sup>80</sup> regardless of the statute's sizable penalties.<sup>81</sup> Thus, given the general deference to the legislature in defining the requisite mens rea, along with increased deference regarding activities relating to public safety, such as drug trafficking, the court deferred to the legislative intent as stated in section 893.101.

## 2. *The Case Against Section 893.13*

The crux of the Florida Supreme Court's decision regarding Section 893.13 is their mistaken reliance on regulatory, public welfare cases that do not apply to Section 893.13.<sup>82</sup> Public welfare offenses are those offenses that deal with the type of conduct that a reasonable person should recognize is subject to strict regulation.<sup>83</sup> Thus, these offenses usually deal with negligence in regards to a duty imposed by a regulation, the violation of which merely creates a probability of danger without any actual harm to

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ignorance of law).

79. See *Adkins*, 96 So.3d at 417 (stating that since *Balint*, courts have reiterated the holding that the legislative branch has broad discretion in omitting mens rea from crimes). The court then proceeded to give more recent examples of this principle. *Id.* See, e.g., *Staples v. United States*, 511 U.S. 600, 604 (1994) (reviewing a federal law criminalizing unregistered possession of automatic firearms that did not state an express mens rea and stating that the accused's knowledge of the illegal nature of an act for convictions is a "question of statutory construction," as the definition of the requisite mens rea is to be entrusted to the legislature).

80. See, e.g., *United States v. Int'l. Minerals & Chem. Corp.*, 402 U.S. 558, 564-65 (1971) (holding that knowledge of the act's illegal nature was not required for a statute regulating the transport of dangerous acids in interstate commerce). See also *United States v. Freed*, 401 U.S. 601, 616 (1971) (holding that no knowledge of the act's illegal nature was required for conviction for the unregistered possession of a hand grenade). The court made this decision by noting that the regulatory area regarding acts related to public health, safety, and welfare were an accepted exception to the requirement of mens rea. *Id.* at 607.

81. See *Adkins*, 96 So.3d at 417 (stating that the Narcotic Act of 1914 imposed penalties of fines up to \$2000 or up to five years in prison).

82. See *id.* at 426-27 (Pariente, J., concurring) (stating that three cases relied upon by the majority, *Balint*, *International Minerals*, and *Freed*, are public welfare cases).

83. *Liparota v. United States*, 471 U.S. 419, 433 (1985). See also Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U.L. REV. 313, 327 (2003) (giving examples of public welfare offenses including sales of adulterated foods, illegal sales of liquor, sales of misbranded or mislabeled articles, violations of anti-narcotic acts, criminal nuisances, violations of traffic regulations and motor-vehicle laws, and violations of general regulations regarding community health and safety).

individuals or property.<sup>84</sup> Additionally, and perhaps most notably, public welfare offenses come with reasonably small penalties and do not damage the reputation of the offender.<sup>85</sup>

Section 893.13 clearly does not fall within this line of offenses. First and foremost, while public welfare offenses simply heighten the duty of those who have knowledge that they are participating in dangerous activities,<sup>86</sup> Section 893.13 criminalizes the simple act of possession, regardless of whether the possessor knows the substance to be dangerous or not.<sup>87</sup> For example, in *Balint*, those punished under the act for failure to register already had the predicate knowledge that they were selling narcotics, an activity that a reasonable person should realize the government regulates.<sup>88</sup> However, under Section 893.13, predicate knowledge that would put a person on notice of the potential illegality of their action is not required.<sup>89</sup> It cannot be said that common sense dictates that whatever is in a person's possession, whether actual or constructive, is inherently dangerous or illicit so as to put that person on notice of potential regulation by the state.<sup>90</sup> Accordingly, Section 893.13 is distinguishable from the cases cited by the Florida Supreme Court dealing with the knowing trafficking of narcotics,<sup>91</sup> possession of hand grenades,<sup>92</sup> and transit of acids.<sup>93</sup> In contrast to those cases, Section 893.13 does not necessarily deal with situations in which the accused is previously put on notice of the dangerous, and thus likely illegal, nature of their actions.

Section 893.13 is further distinguishable from the public welfare cases relied upon by the Florida Supreme Court as it is not

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84. *Morissette*, 342 U.S. at 245. See also MODEL PENAL CODE § 2.05 (2011) (stating that culpability requirements prohibiting strict liability do not apply in noncriminal offenses employed for regulatory purposes and for which the sanction is more severe than a fine).

85. *Morissette*, 342 U.S. at 256.

86. *Staples*, 511 U.S. at 629 (Steven, J., dissenting).

87. See FLA. STAT. ANN. § 893.101(1) (stating that knowledge of the substance's illicit nature is not required for conviction).

88. See *Balint*, 258 U.S. at 254 (stating that those persons who knowingly deal in drugs must "ascertain at their own peril" whether their actions come under governmental regulation).

89. See FLA. STAT. ANN. § 893.101(1) (stating that Section 893.13 does not require knowledge of the illicit nature of the controlled substance for conviction).

90. See *Adkins*, 96 So.3d at 432 (Perry, J., dissenting) (stating that as possession is such a basic part of human life, it is not difficult to imagine numerous situations in which a person could unknowingly have a controlled substance imparted upon them). The Judge then goes on to give multiple examples. *Id.* at \*17-18.

91. *Balint*, 258 U.S. 250 (discussing the trafficking of narcotics).

92. *Freed*, 401 U.S. 601 (discussing possession of hand grenades).

93. *Intl. Minerals & Chem Corp.*, 402 U.S. 558 (discussing the transit of acids).

regulatory in nature,<sup>94</sup> has penalties that exceed those allowed in public welfare offenses,<sup>95</sup> and significantly harms one's reputation.<sup>96</sup> Thus, given the obvious differences between Section 893.13 and public welfare offenses, along with modern view of the courts that such an offense cannot be defined as a public welfare offense,<sup>97</sup> the Florida Supreme Court incorrectly relied upon public welfare cases in coming to its determination to defer to the legislature and dispense with mens rea.

*B. The Potential for Punishment of Innocent Conduct Under Section 893.13*

*1. The Holding of the Florida Supreme Court*

In addressing the potential of punishing wholly innocent conduct, a major concern of those opposing Section 893.13,<sup>98</sup> the Florida Supreme Court states their view in a single paragraph of the decision. The court simply and briefly remarks that any possibility of criminalizing wholly innocent conduct is avoided by the Section 893.101(2) provision allowing defendants to raise an affirmative defense of lack of knowledge.<sup>99</sup>

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94. See FLA. STAT. ANN. § 893.13 (listing the statute as a crime rather than a regulation).

95. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) (stating that penalties of up to ten years of prison are too large for public welfare offenses); *Staples*, 511 U.S. at 616 (distinguishing the statute in question from public welfare cases as its penalties of up to ten years were not compatible with the light penalties afforded to public welfare offenses); see also *Shelton*, 802 F. Supp. 2d at 1300 (stating that no strict liability statute with penalties as great as those in FLA. STAT. ANN. § 893.13 has ever been upheld under federal law). The court further notes that one federal Circuit Court has even stated that a strict liability felony with a two-year penalty places the establishment of strict liability crimes on a slippery slope. *Id.* at 1301.

96. See *Morissette*, 342 U.S. at 249 (stating that with the infamy surrounding it, felony is "as bad a word as you can give to man").

97. See *United States v. Cordoba Hincapie*, 825 F.Supp 485, 497 (stating that modern drug offenses could no longer be defined as public welfare offenses). Additionally, the Washington Supreme Court, the only other court to permit a strict liability drug possession statute, has stated that such a statute is not a public welfare offense. See *Bradshaw*, 152 Wash.2d at 540 (Sanders, J., dissenting) (stating that the creation of strict liability crimes, such as Washington's drug possession offense, is usually limited to strict liability crimes).

98. See Answer Brief of Appellees on the Merits, *supra* note 59, at 13 (dedicating a section of the brief to the topic of § 893.13 criminalizing innocent conduct).

99. See *Adkins*, 96 So.3d at 422 (stating that "any concern that entirely innocent conduct will be punished with a criminal sanction under chapter 893 is obviated by the statutory provision that allows a defendant to raise the affirmative defense of an absence of knowledge of the illicit nature of the illicit



## 2. *The Case Against Section 893.13*

The United States Supreme Court has previously stated that “a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.”<sup>100</sup> Section 893.13 falls within this category of laws because, by not requiring knowledge of the illicit nature of a controlled substance for conviction,<sup>101</sup> the statute may punish a person for mere possession, an action innocent in most circumstances. While the majority in *Adkins* was content to assume that such a possibility of injustice was alleviated by the affirmative defense of lack of knowledge, Justice Pariente’s concurrence admitted that innocent conduct may still be punished under the statute, with the affirmative defense merely reducing the chance of such an occurrence.<sup>102</sup> As the United States Supreme Court has previously held it unthinkable to subject innocent citizens to the possibility of penalties of up to ten years imprisonment,<sup>103</sup> it is clear that enforcement of Section 893.13, with penalties of up to life imprisonment,<sup>104</sup> is likewise unthinkable given the possibility of conviction based on wholly innocent conduct.

Furthermore, the majority’s reliance on the affirmative defense of lack of knowledge is misplaced as the defense has been misapplied within the Florida courts on numerous occasions.<sup>105</sup>

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nature of the controlled substance”); FLA. STAT. ANN. § 893.101(3) (creating an affirmative defense of lack of knowledge).

100. *Lambert*, 355 U.S. at 229.

101. *See* FLA. STAT. ANN. § 893.101(1) (stating that the requirement of knowledge of the illicit nature of a controlled substance is contrary to legislative intent).

102. *See Adkins*, 96 So.3d at 424. (Pariente, J., concurring) (noting that the statute could still be applied unconstitutionally, subjecting an innocent person to imprisonment). The Justice goes on to admit that, given this possibility, it would be difficult for § 893.13 to stand up to a challenge on due process grounds brought by a person who possessed a controlled substance unwittingly and without knowledge of its nature. *Id.*

103. *See Staples*, 511 U.S. at 615 (finding a mens rea in an otherwise ambiguous statute due to the possibility that the statute would otherwise subject law-abiding citizens to penalties of up to ten years imprisonment).

104. *See Adkins*, 96 So.3d at 415 (stating that violation of § 893.13 can be punished as a first-degree felony). The court also stated that conviction under the act can be punished by fifteen years imprisonment to life. *Id.* at 424 (Pariente, J., concurring).

105. *See, e.g., Burnette*, 901 So.2d at 927 (finding that the improper jury instruction regarding the affirmative defense for lack of knowledge constituted reversible error). The instruction given by the Judge failed to inform the jury that lack of knowledge of the substance’s illicit nature was even a defense to his charges. *Id.* at 928. *See also* *Smith v. State*, 901 So.2d 1000, 1001 (Fla. Dist. Ct. App. 2005) (demonstrating confusion between the defense attorney and the judge on whether the jury instruction on the affirmative defense must

Given this misapplication along with the inability to truly obviate the issue of punishment of innocent acts, it is evident that the affirmative defense of lack of knowledge does not alone address the issue of conviction based on innocent conduct. Thus, section 893.13 cannot be found constitutional as it allows conviction based upon wholly innocent conduct.

*C. The Constitutionality of Section 893.13 in Accordance with Due Process*

*1. The Holding of the Florida Supreme Court*

In compliance with due process, the prosecution must convince the jury beyond a reasonable doubt of every element of a crime.<sup>106</sup> In holding that section 893.13 requires the prosecution to meet this burden, the court relies on *Patterson v. New York*,<sup>107</sup> in which the Supreme Court held that defining extreme emotional disturbance as an affirmative defense to murder did not violate due process.<sup>108</sup> The court allowed such a defense as it did not seek to negate the facts of the crime that the state must prove, but rather introduced a separate issue on which the defense must bear the burden.<sup>109</sup>

Thus, in order to bring a valid affirmative defense, the accused essentially admits all of the elements of the crime, stating innocence on separate grounds.<sup>110</sup> Accordingly, as the state is no longer required to prove knowledge of the illicit nature of a substance as an element of a Section 893.13 offense,<sup>111</sup> it is not a due process violation to allow a defense of lack of knowledge, as it

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be requested or is presented regardless).

106. In re Winship, 397 U.S. 358, 361 (1970).

107. See *Adkins*, 96 So.3d at 422 (citing to and explaining *Patterson*).

108. See *Patterson v. New York*, 432 U.S. 197, 210 (1977) (declining to adopt the view that the prosecution must negate every affirmative defense brought, as allowing for the affirmative defense of extreme emotional disturbance did not violate due process).

109. *Id.* at 207.

110. See *id.* (stating that an affirmative defense does not look to negate the facts or elements proved by the prosecution, but merely raises a distinct reasoning for which the defense should be found innocent); *Adkins*, 96 So.3d at 422 (stating that bringing an affirmative defense concedes the elements of the offense but allows the defense to explain why his or her otherwise illegal conduct should go unpunished); see also *Sandstrom v. Montana*, 442 U.S. 510, 515 (1979) (stating that under the burden of production is to be the burden of allocation for affirmative defenses). Thus, an affirmative defense cannot challenge the elements of the crime or else it would place the burden of persuasion, rather than simple production, on the defense. *Id.*

111. See FLA. STAT. ANN. § 893.101(3) (establishing a presumption that the accused had knowledge of the illicit nature of the controlled substance).

does not serve to negate any element of the offense.<sup>112</sup> The Florida Supreme Court thus held Section 893.13, as amended by section 893.101(2), constitutional, as the affirmative defense does not violate due process.<sup>113</sup>

## 2. *The Case Against Section 893.13*

The presumption of innocence in favor of the accused is one of the most significant and fundamental principles of criminal law.<sup>114</sup> In allowing possession, particularly constructive possession, to give rise to a presumption of knowledge of the illicit nature of the substance,<sup>115</sup> Section 893.101 threatens this principle and renders Section 893.13 unconstitutional. While permissive presumptions are constitutional,<sup>116</sup> limits have necessarily been placed on a legislature's power to substitute what were previously elements of a crime with presumptions.<sup>117</sup> In accordance with these limits, a presumption must not undermine a jury's responsibility as fact finder.<sup>118</sup>

The presumption at issue does in fact undermine the responsibility of the jury as a presumption, even if rebuttable, may indicate to a reasonable juror that the defense bears the

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112. See *Adkins*, 96 So.3d at 422 (stating that the affirmative defense for lack of knowledge is constitutional as knowledge is no longer an element of a § 893.13 offense).

113. See *id.* (stating that § 893.13 is constitutional as its accompanying affirmative defense allows for the concession of all elements of the offense while simultaneously bringing a defense on a separate issue).

114. See *Coffin*, 156 U.S. at 453 (stating that “[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”). The case goes on to discuss that this principle of the presumption of innocence to the laws is derived from law as old as that of the ancient Greeks and Romans. *Id.* at 454.

115. See FLA. STAT. ANN. § 893.101(3) (stating that “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”).

116. See *Cnty. Ct. of Ulster Cnty., N. Y. v. Allen*, 442 U.S. 140, 156 (1979) (stating that inferences and presumptions are staples of the adversary court system in the United States).

117. See *Morissette*, 342 U.S. at 275 (holding that Congress' power to facilitate convictions through the substitution of presumptions for proof is limited).

118. See *Cnty. Ct. of Ulster Cnty.*, 442 U.S. at 156 (stating that the presumption must not undermine a jury's responsibility at trial to find all of the ultimate facts of an offense beyond a reasonable doubt); see also Theodore A. Gottfried & Peter G. Baroni, *Presumptions, Inferences, and Strict Liability in Illinois Criminal Law: Preempting the Presumption of Innocence?*, 41 J. MARSHALL L. REV. 715, 724 (2008) (stating that a presumption's constitutionality depends in part upon the degree to which the presumption hinders the jury's responsibility at trial).

affirmative burden of proving lack of knowledge once the prosecution proves the underlying fact of possession.<sup>119</sup> If a juror were to reasonably come to this conclusion, a possibility in this case, the presumption would unconstitutionally shift the burden of persuasion to the defense.<sup>120</sup>

Furthermore, a permissive presumption is constitutional only if the presumed conclusion is reasonably justified by the underlying facts proven by the state.<sup>121</sup> As there is no rational or common sense parallel between the mere act of possession and knowledge of illicit nature,<sup>122</sup> particularly in cases of constructive possession,<sup>123</sup> the presumption created by Section 893.101(3) is not logically established by the underlying facts to be proven by the state, and thus violates due process.<sup>124</sup>

Accordingly, while the affirmative defense is constitutional, the permissive presumption that it violates due process by impermissibly undermining the fact-finding responsibilities of the jury. Thus, Section 893.13, as amended in Section 893.101, is

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119. See *Francis v. Franklin*, 471 U.S. 307, 318 (1985) (stating that a juror may incorrectly determine that presumptions that may be rebutted create an affirmative burden of persuasion for the defense once the state proves the fact underlying the presumption). This would create an unconstitutional presumption, shifting the burden of proof to the defense. *Id.* See also *Morissette*, 342 U.S. at 275 (stating that a permissive presumption allowing a juror to assume intent from a single fact prejudices a conclusion that should be properly reached by the juror's own determination).

120. See *Franklin*, 471 U.S. at 317 (stating that shifting of the burden of persuasion through the use of presumptions regarding a fact that must be proved or presumed is a violation of the due process clause); see also 9A Fed. Proc., L. Ed. § 22:1477 (stating that under the burden of production, the standard burden of allocation for affirmative defenses, the prosecution nonetheless retains the final burden of proof).

121. See *Franklin*, 471 U.S. at 314-15 (stating that a permissive inference violates due process if the suggested conclusion is not justified by the facts proven before a jury); see also *Gottfried & Baroni*, *supra* note 118, at 724 (stating that the constitutionality of a presumption is dependent on the strength of the connection between the presumption and its underlying facts).

122. See *Adkins*, 96 So.3d at 431 (Perry, J., dissenting) (stating that there is not an overriding common sense connection between possession and knowledge of illicit nature due to the numerous instances of innocent possession); see also *Scott*, 808 So.2d at 171 (stating that in cases of constructive possession, there is not a presumption of knowledge of illicit nature).

123. See, e.g., *Cnty. Ct. of Ulster Cnty.*, 442 U.S. at 168 (Powell, J., dissenting) (stating that a person's mere presence in a vehicle where a handgun is present, i.e., constructive possession, does not give rise to a presumption that the person possesses the weapon).

124. See *Morissette*, 342 U.S. at 275 (stating that presumptions that are not logically established by the underlying facts of the case conflict with the presumption of innocence by giving the underlying facts an artificial, fictional effect).

unconstitutional.

#### IV. PROPOSAL

While the Florida Supreme Court has held in favor of Section 893.13 of the Drug Abuse Prevention and Control Act, it is likely that the debate over the constitutionality of the act is not yet settled.<sup>125</sup> With the Eleventh Circuit<sup>126</sup> overturning the *Shelton*<sup>127</sup> holding without addressing the actual constitutionality of the act,<sup>128</sup> it remains a possibility that the case will be appealed to the United States Supreme Court.<sup>129</sup>

Were the Supreme Court to grant certiorari, it should reverse the holding of the Eleventh Circuit, and find Section 893.13, as amended in Section 893.101, unconstitutional. With the possibility that it may lead to prosecution of wholly innocent conduct,<sup>130</sup> Section 893.13 appears to be a statute against citizens as a whole rather than one against the criminal conduct it was created to punish. Furthermore, the amendments in 893.101 prejudice the defendant by presuming guilt on a fact historically<sup>131</sup> and currently left to the jury.<sup>132</sup> Section 893.13 sets a misguided

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125. *Adkins*, 96 So.3d at 414.

126. *See Shelton*, 691 F.3d at 1356 (reversing the holding of the United States District Court for the Middle Circuit of Florida finding section 893.13 unconstitutional).

127. *Shelton*, 802 F. Supp. 2d at 1316 (entering a declaratory judgment declaring section 893.13, as amended in section 893.101, unconstitutional).

128. *See Shelton*, 691 F.3d at 1355 (stating that the Court's decision expresses no view on the underlying constitutional question regarding section 893.13). The Court overturned the lower court's holding solely on the basis that proper deference was not given to the state court's decision. *Id.* at 1355. As the state court's decision was not "contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court," that decision finding section 893.13 to be constitutional could not be overturned by the Federal District Court. *Id.* at 1352.

129. *See id.* (stating that petitioner faces a substantially high threshold in seeking to overturn a state supreme court in a United States District Court). This threshold is only met if the petitioner can show that the state court's holding was unjustified "beyond any possibility for fair-minded disagreement." *Id.* Given this high standard set for federal court review, it is unlikely for a state court's finding to be overturned by any court other than the United States Supreme Court. *See id.* (emphasizing the deference that lower federal courts must give to state court decisions being reviewed).

130. *See Adkins*, 96 So.3d at 431 (Pariente, J., concurring) (noting that the statute could still be applied unconstitutionally, subjecting an innocent person to imprisonment).

131. *See Morissette*, 342 U.S. at 275 (stating that a permissive presumption prejudices a conclusion generally left to the jury). In doing so, such a presumption contradicts the overarching presumption of innocence in favor of the accused. *Id.*

132. *See supra* note 27 (discussing the history of strict liability drug possession offenses and stating that Washington remains the sole state

precedent of allowing legislatures to simply eliminate difficult-to-prove mens rea elements from crimes and replace them with affirmative defenses that are equally,<sup>133</sup> if not more difficult,<sup>134</sup> to prove for the defendant.<sup>135</sup> If Section 893.13 were upheld as constitutional, this precedent would give the legislature nearly unchecked power to side step due process and the reasonable doubt standard by substituting proof with presumptions,<sup>136</sup> thus shifting the state's burden to the defense. However, if the United States Supreme Court were to review Section 893.13 and rightly find it unconstitutional, three possible courses of action exist in remedying the statute.

A. *Amend Section 893.13 to Include a Knowing Mens Rea*

Were Section 893.13 to be found unconstitutional, the most obvious course of action would be to simply strike Section 893.101 and amend section 893.13 to include a knowing mens rea regarding the illicit nature of the controlled substance. This would clearly and easily resolve the issues associated with the act as it is currently amended while also making Section 893.13 compatible with Florida case law decided prior to the Florida Supreme Court's holding in *State v. Adkins*.<sup>137</sup> Furthermore, this solution would align Florida with the other forty-eight states that currently require knowledge of illicit nature as an element in their respective criminal drug possession statutes.<sup>138</sup>

However, in effectuating this remedy, the legislature would

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outside of Florida to enforce such a crime).

133. See *Shelton*, 802 F. Supp. 2d at 1308 n.12 (noting that if the legislature is allowed to eliminate the element of mens rea from a criminal statute with such large penalties, it sets a precedent allowing the legislature to affect most all statutes in a similar manner); see also *Adkins*, 96 So.3d at 431 (Perry, J., dissenting) (characterizing the precedent set by the majority as alarming as it threatens the core criminal law principles of due process, the presumption of innocence, and the burden of proof).

134. See *id.* (emphasizing the burden placed upon the defendant, both financially and in presenting favorable evidence, in bringing forth an affirmative defense).

135. See Initial Brief of Appellant, *supra* note 25, at 43 (admitting that through Section 893.13, the state is attempting to remove a difficult-to-prove element from criminal possession offenses).

136. See *Shelton*, 802 F. Supp. 2d at 1308 n.12 (stating that the precedent set by Section 893.13 would allow the legislature to define at their pleasure the elements of almost any statute).

137. See, e.g., *Chicone*, 684 So.2d at 745-46 (reading a knowing mens rea into section 893.13).

138. See *Adkins*, 96 So.3d at 423 (Pariente, J., concurring) (stating that forty-eight of the fifty states require knowledge of the illicit nature of a the substance as an element of criminal narcotics offenses).

directly contradict its own previously stated intent.<sup>139</sup> As the legislature may be opposed to simply dismissing its previous conclusion regarding the issue of knowledge in Florida's criminal possession statute, it is likely that a more compromised approach would be favored were Sections 893.13 and 893.101 deemed unconstitutional.

*B. Apply the Amendments of Section 893.101 Solely To  
Misdemeanor Cases of Criminal Drug Possession*

A second course of action, in the event that Section 893.13 was found unconstitutional, would be for the legislature to apply the amendments of section 893.101,<sup>140</sup> which essentially make Section 893.13 a strict liability crime, only to cases of misdemeanor possession. In limiting the cases in which this amendment applies solely to those misdemeanors with relatively small penalties, the legislature would align Florida's statute with Supreme Court precedent stating that strict liability crimes must have small punishments that do not gravely injure the reputation of the offender.<sup>141</sup> Given the less serious nature of misdemeanors, along with the relatively light punishments associated with them,<sup>142</sup> it is evident that it is well within the discretion of the legislature to dispense with mens rea, and create strict liability crimes in such cases.

While the legislature may favor this course of action as it supports the state's goal of efficient prosecution,<sup>143</sup> even if only in a select number of cases, limiting the presumption to misdemeanor cases continues to present the problems previously stated. Most notably, even if it was limited, application of the presumption of knowledge could still result in the conviction of innocent conduct.<sup>144</sup> Likewise, the previously discussed due process abuses

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139. See FLA. STAT. ANN. § 893.101(1) (stating that it is the intent of the legislature to dismiss with knowledge of illicit nature as an element of Florida criminal possession offenses).

140. See *supra* notes 46-49 (laying out the sections of 893.101 dispensing of the element of knowledge of illicit nature, creating an affirmative defense of lack of knowledge, making a permissive presumption of knowledge).

141. See *Morissette*, 342 U.S. at 257 (stating that strict liability crimes have small penalties and do not greatly damage the offender's reputation).

142. BLACK'S LAW DICTIONARY (9th ed. 2009) (stating that, as less serious crimes, misdemeanors are generally punished only by fine or a brief term in jail).

143. See Initial Brief of Appellant, *supra* note 25, at 43 (admitting that the state seeks to eliminate the difficult to prove element of knowledge of a substance's illicit nature, presumably to promote efficient prosecution and speed conviction).

144. See *supra* Part III.B.2 (discussing the possibility of the punishment of innocent conduct under Section 893.13 as amended by Section 893.101).

would continue to exist,<sup>145</sup> albeit in a lesser number of cases and with lesser ramifications on the convicted. Given these concerns with this remedy of Section 893.13, it is likely that a third remedy, previously recognized by the Florida state courts, would be the preferable option.

*C. Apply the Presumption Only in Cases of Actual, Personal Possession*

A third course of action in remedying section 893.13 would be to adopt the logic of the Florida case, *State v. Medlin*.<sup>146</sup> *Medlin* dealt with a defendant charged with criminal possession and delivery of a barbiturate.<sup>147</sup> The applicable statute, Florida Statutes Section 404.02,<sup>148</sup> much like Section 893.13, prohibits “the actual or constructive possession” of the drugs controlled under the law.<sup>149</sup> With the statute silent as to a mens rea or requisite intent,<sup>150</sup> the court stated that, as the defendant was in actual possession of the drug, the state was not required to prove that he had specific knowledge of the contents of the drugs.<sup>151</sup> Rather, based off his actual possession, it was to be presumed that the defendant acted knowingly.<sup>152</sup> Thus, the *Medlin* court essentially applied the permissive presumption and affirmative defense created in Section 893.101, yet limited them solely to cases of actual, personal possession.<sup>153</sup>

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145. See *supra* Part III.C.2 (discussing the due process ramifications of Section 893.13 as amended by Section 893.101).

146. *Medlin*, 273 So.2d 394.

147. See *id.* at 395 (stating that the defendant was charged with the unlawful delivery of a barbiturate or stimulant). While the drug itself was not illegal, it was obtained illegally without a prescription. *Id.*

148. FLA. STAT. ANN. § 404.02 (West 2012).

149. See *id.* (declaring unlawful “the actual or constructive possession or control of a barbiturate, central nervous system stimulant, or other drug controlled by this law by any person.”). Section 893.13 is near parallel in stating that “it is unlawful for any person to be in actual or constructive possession of a controlled substance.” FLA. STAT. ANN. § 893.13(6)(a).

150. See FLA. STAT. ANN. § 404.02 (failing to define the requisite intent or mens rea for conviction). As previously discussed, section 893.13 is likewise silent as to intent. FLA. STAT. ANN. § 893.13(6)(a).

151. See *Medlin*, 273 So.2d at 396 (stating that given the defendant’s actual possession of the drug, the state is not required to prove intent to violate the statute).

152. See *id.* at 397 (stating that proof that the defendant did the prohibited act gives rise to a presumption that the act was done both knowingly and intentionally). Following this presumption, the defendant was then allowed to bring up the issue of lack of knowledge as an affirmative defense, as in section 893.101. *Id.*

153. See *Scott*, 808 So.2d at 171 (stating that a proper reading of both *Medlin* demonstrates that knowledge of illicit nature may only be presumed in cases of actual, personal possession).



Limiting the application of section 893.101 solely to these instances of actual, personal possession, remedies Section 893.13 as it creates a logical bridge between the underlying act of possession and the corresponding presumption of knowledge of illicit nature.<sup>154</sup> While mere constructive possession does not logically give rise to a presumption of knowledge,<sup>155</sup> it is rational to presume that a person with actual, personal possession of an object would have direct knowledge, or at least the ability to obtain such knowledge, of the nature of the object.<sup>156</sup>

Thus, this remedy would resolve injustices, such as those discussed in the introduction to this Comment, in which individuals are presumed to have knowledge of a substance solely for being present in the same area as the substance. Likewise, while not completely curing the wrong, this remedy would limit the application of Section 893.13 as a strict liability crime to a lesser number of cases, while still allowing for the desired efficiency of prosecution in cases of actual possession. While in no way perfect, of the three remedies presented, this remedy would likely be the most favored by the legislature and courts alike as it clears up many of the constitutional issues<sup>157</sup> of Section 893.13

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154. See *Franklin*, 471 U.S. at 314-15 (stating that a permissive inference violates due process if the suggested conclusion is not justified by the facts proven before a jury); see also Gottfried, *supra* note 118, at 724 (stating that the constitutionality of a presumption is dependent on the strength of the connection between the presumption and its underlying facts).

155. See, e.g., *Cnty. Ct. of Ulster Cnty.*, 442 U.S. at 168 (Powell, J., dissenting) (stating that a person's mere presence in a vehicle where a handgun is present, i.e. constructive possession, does not give rise to a presumption that the person possesses the weapon) see also *Medlin*, 273 So.2d at 396 (differentiating between constructive possession and actual possession cases in creating a presumption of knowledge of a substance's nature).

156. See *id.* (finding a rational relation between actual possession of a substance and knowledge of the substance's nature). Courts have found this rational relation to be especially true in cases regarding possession of illegal drugs, as is the case here. See, e.g., *Barnes v. United States*, 412 U.S. 837, 845 (1973) (stating that common sense dictates that a person possessing a controlled substance should be aware of the substance's nature); *United States v. Bunton*, 8:10-cr-327-T-30EAJ, 2011 WL 5080307, at \*8 (M.D. Fla. Oct 26, 2011) (stating that as controlled substances are valuable and usually handled with care, common sense indicates that a person possessing such a controlled substance has knowledge of the substance's nature).

157. See *Lambert*, 355 U.S. at 228 (stating that the legislature may not dispense of mens rea if doing so would criminalize wholly passive conduct). While not the crux of either side's argument, this exception to the legislatures crime is brought up in the discussion of section 893.13. See, e.g., *Adkins*, 96 So.3d at 427 (discussing *Lambert* in relation to section 893.13). In applying the presumption of knowledge solely to cases of actual possession, the *Lambert* exception to creating strict liability crimes would be avoided; while the argument could be made that constructive possession is passive conduct, actual, personal possession is inherently an overt action.

while preserving some of the prosecutorial goals of Section 893.101.

#### V. CONCLUSION

While the legislature has the power to formulate crimes, their elements, and the accompanying mens rea, this power cannot be without limits. If the constitutionality of Section 893.13 were to go before the United States Supreme Court, a precedent could be set defining these limits. In adopting one of the above proposals, the Supreme Court could help distinguish the guilty from the innocent rather than allow the legislature to presume them the same.