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I. INTRODUCTION

At 6:15 a.m. in a small, rural South Florida town, the sun has barely broken the eastern horizon, and a blanket of humidity slowly suffocates the sweet scent of freshly born citrus blossoms. Jimmy, an eighteen-year-old honors student, gives a fourth go at starting his car. Anxious to get to class on time, he hurries inside the house to his twenty-two year old brother's room. "Mike, my car won't start. Can I use yours today? Just this once. I promise," he pleads. Mike, still hidden under the comfort of covers and shadows of curtains closed tightly, grunts in approval. Jimmy whisks away Mike's keys and shouts a hurried thanks, dashing out the front door to the driveway.

Somewhere before reaching school, Jimmy spots an alternating assault of blue and red lights in the rear view mirror. He pulls over, wondering why his day—just like his own car's engine—won't

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smoothly start. After a documentary exchange, the officer cites Jimmy for a broken taillight. But the officer recognizes this car, and announces that he'll need to take a peek inside. Without hesitation, Jimmy agrees. Tapping his feet on the grassy shoulder and focused on the day's academic adventures ahead, Jimmy wonders if he'll make it to his computer science class on time.

Thoughts of keyboard strokes and mouse clicks are quickly interrupted by the unexpected clank of handcuffs. The officer finds Mike's backpack in the passenger seat, which contains a bottle of Valium with the prescription label crudely scraped off.[2] Instead of heading to school, Jimmy is taken into custody for violating section 893.13 of the *Florida Statutes*, the state's Drug Abuse Prevention and Control Act ("DAPCA").[3]

Jimmy, standing confused and alone in the concrete confines of the local jail, mirrored the past position of Florida's primary controlled substances law: an unconstitutional exception reflecting confusion and prompting discord at every level of the state's judiciary system.

Freedom of contact, a fundamental principle espoused by our founding fathers, can turn criminal all too easily in the face of Florida's Drug Abuse Prevention and Control Act. Under DAPCA, Florida became the only state in the nation expressly to eliminate *mens rea* as an element of a drug offense.[4] Thus, DAPCA's propositions and penalties touch the lives of every Floridian—almost ironically, whether they touch an illegal substance or not. This article biographies the birth of DAPCA, examines its sudden fame over the past year, and explains why the Florida Supreme Court erroneously upheld DAPCA. Part I chronicles DAPCA's creation in the face of conflict between Florida's legislative and judiciary organs. Part II recounts the recent reexamination of the Act's constitutionality and conflicting treatment amongst Florida courts. Part III analyzes the Act's effects on law, practice, and practicality for Florida's justice system. Part IV reviews the importance of the DAPCA decision, evaluates the tools and techniques that Florida's Supreme Court used in heralding DAPCA, and discusses why the Court should have dealt the Act a constitutionally necessary and fatal blow.

2. *See* State v. Washington, 18 Fla. Weekly Supp. 1129 (Fla. 11th Cir. Ct. August 17, 2011) (Judge Milton Hirsch proposed a similar hypothetical.).

3. FLA. STAT. § 893.13 (1997).

4. Shelton v. Sec'y, Dep't of Corrs., 802 F. Supp. 2d 1289, 1293 (M.D. Fla. 2011), *rev'd*, No.11-13515, 2012 WL 3641008 (11th Cir. Aug. 24, 2012).

II. FLORIDA'S DRUG ABUSE PREVENTION AND CONTROL ACT: CHILD OF CONFLICT

On December 6, 2011, the Florida Supreme Court heard oral arguments in *State v. Adkins*, marking the third time the Court has contemplated the necessity of a *mens rea* requirement in Florida's drug possession and delivery laws.[5] A walk through the bitter battle between Florida's courts and legislature sets the stage for the importance of and need for finality established by the Supreme Court's ruling.

Prior to May 2002, Florida's primary drug control statute read as follows:

> (1)(a) Except as authorized by this chapter and chapter 499, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance. Any person who violates this provision with respect to:
> 1. A controlled substance named or described . . . commits a felony of the second degree . . . .
>
> . . .
>
> (6) (a) It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. Any person who violates this provision commits a felony in the third degree . . . .[6]

In seeing that the statute lacked a knowledge requirement, the Florida Supreme Court chimed in: "We believe it was the intent of the legislature to prohibit the knowing possession of illicit items . . . . Thus, we hold that the State was required to prove that [a defendant] knew of the illicit nature of the items in his possession."[7] In *Chicone v. State*, one of two cases prompting later action by the Florida legislature, the Florida Supreme Court further held that the trial court erred in denying the defendant's request for a special jury instruction addressing knowledge of the illicit nature of the substances at issue.[8]

Six years later, in 2002, the Florida Supreme Court once again highlighted the need for a knowledge requirement. In *Scott v. State*, the Court not only reiterated its holding in *Chicone*, but also declared that

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5. State v. Adkins, No. SC11 1878, 2012 WL 2849485 (Fla. July 12, 2012). The Florida Supreme Court first undertook constitutional challenges to DAPCA in *Chicone v. State*, 684 So. 2d 736 (Fla. 1997), and again in *Scott v. State*, 808 So. 2d 166 (Fla. 2002).

6. FLA. STAT. § 893.13 (1997).

7. Chicone v. State, 684 So. 2d 736, 744 (Fla. 1996).

8. *Id.* at 746.

"knowledge is an element of the crime of possession of a controlled substance," that "a defendant is entitled to an instruction on that element," and that "it is error to fail to give an instruction even if the defendant did not explicitly say he did not have knowledge of the illicit nature of the substance."[9]

By early 2002, the Florida Supreme Court voiced its opinion loudly and clearly. But a few months later, the Florida legislature, in "direct and express response" to *Chicone* and *Scott*, contravened the Court's conclusion and reacted by enacting amendments to DAPCA, codified as section 893.101 of the *Florida Statutes*.[10]

Florida Statute § 893.101 became effective May 13, 2002:

> (1) The 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.
>
> (2) The legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter.
>
> (3) In those instances in which a defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption provided in this subsection.[11]

In one sweeping motion, the Florida legislature flouted the state judiciary by transforming possession into a general intent crime, eliminating the *mens rea* requirement, and shifting the responsibilities of both State and defendant. The State no longer had to prove that the violator was aware of the contraband's illegal nature. The DAPCA amendment also forced the defendant to assert lack of knowledge as an affirmative defense, rather than an essential element of the crime to be proved by the State.[12] The recharacterization of knowledge as an affirmative defense was a "caveat" rather than a remedy—"[o]nce this door is opened . . . possession of the controlled substance will give rise to a permissive presumption that the possessor knew of the substance's illicit nature, and

9. Scott v. State, 808 So. 2d 166, 170–72 (Fla. 2002).

10. *Shelton*, 802 F. Supp. 2d at 1294.

11. FLA. STAT. § 893.101 (2002).

12. Wright v. State, 920 So. 2d 21, 24 (Fla. 4th DCA 2005).

the jury instructions will include this presumption."[13] The defendant, in asserting knowledge as an affirmative defense, now faced a two-fold danger: First, that the jury would hear the presumption of knowledge, and second, a heightened difficulty in rebutting both the presumption and its accompanying prejudice.[14]

III. Recounting the Act's Recent Rise to Fame

Nearly a decade later, in July, 2011, the conflict between Florida's judicial and legislative branches—a sleeping giant of statewide proportion—was reawakened once again. Florida's state and federal courts began to stir over DAPCA's constitutionality, focusing primarily on its relation to a defendant's Due Process rights.

A. *The Storm Reawakens:* Shelton v. Secretary, Department of Corrections

"'Actus non facit reum nisi mens sit rea'—except in Florida," wrote Judge Mary Scriven, opening her opinion in *Shelton v. Secretary, Department of Corrections* with a bold declaration of the eyebrow-raising uniqueness of the state's Act.[15] Her decision, arising from the United States District Court for the Middle District of Florida, "produced a category-five hurricane in the Florida criminal practice community."[16] Judge Scriven characterized the 2002 DAPCA amendment as a "draconian and unreasonable construction of the law" that refashioned the statute into a strict liability crime "without regard to whether [someone delivered a controlled substance] purposefully, knowingly, recklessly, or negligently."[17] Accordingly, because it stripped the statute of a *mens rea* requirement, Judge Scriven held that DAPCA was both unconstitutional and violative of the Due Process Clause.[18]

Unlike Jimmy, this article's innocent and unknowing protagonist, the defendant, Mackle Vincent Shelton, was harmed under the Act for a different reason. Shelton was arrested in 2004 and charged with eight counts, including the delivery of cocaine.[19] Pursuant to the post-2002

13. *Id.*

14. *See id.*

15. *Shelton*, 802 F. Supp. 2d at 1293. ("The act does not make a person guilty unless the mind also be guilty.")

16. *Washington*, *supra* note 2 at 1129.

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

18. *See id.* at 1297.

19. *Id.* at 1295. In addition to the delivery charge, Shelton was charged with three counts of aggravated assault with a deadly weapon, one count of fleeing or attempting to elude a law enforcement officer, driving while license suspended, reckless driving causing damage to a property or person, and two counts of criminal mischief. *Id.*

DAPCA amendment of § 893.101, *Florida Statutes*, the jury was not instructed that knowledge was an element to the offense. Instead, under the revised DAPCA, Shelton was dealt the burden of rebutting the presumption of knowledge by raising an affirmative defense. Shelton was convicted of the delivery charge without the jury being required to consider his intent.[20]

Instead, the state had to prove only two elements beyond a reasonable doubt: "[1] that Mackle Vincent Shelton delivered a certain substance; and [2] that the substance was cocaine."[21] Shelton's appeals were denied by both the trial court and Florida's Fifth District Court of Appeal, and arrived in federal court through his petition for federal habeas corpus relief.[22] Lower courts ignored Shelton's claim that DAPCA was unlawfully transforming the state law into a strict liability offense by eliminating a *mens rea* requirement.[23] Yet Judge Scriven found this claim too important to be ignored, and found DAPCA facially unconstitutional.[24]

The *Shelton* court found it impermissible that "[u]nder Florida's statute, that conduct is rendered immediately criminal if it turns out that the substance is a controlled substance, without regard to the deliverer's knowledge or intent."[25] First, Judge Scriven stressed that the *mens rea* requirement for proving guilt in criminalized conduct "is firmly rooted in Supreme Court jurisprudence."[26] Citing powerful language in *Morissette v. United States*, Judge Scriven emphasized "it is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[27] Judge Scriven further underscored the inextricable relation of a *mens rea* requirement to American criminal jurisprudence:

> A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. To constitute any crime there must first be a "vicious will."[28]

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20. *See id.* at 1293.
21. *Id.* at 1296.
22. *Shelton*, 802 F. Supp. 2d at 1296.
23. *See id.*
24. *See id.*
25. *Id.* at 1305.
26. *Id.* at 1297.
27. *Shelton*, 802 F. Supp. 2d at 1297 (citing Morissette v. United States, 342 U.S. 246, 250 (1952)).
28. *Id.*

The *Shelton* court continued its espousal of a vicious will requirement by pointing to states like North Dakota and Louisiana, whose Supreme Courts have recognized the necessity of the *mens rea* requirement.[29]

Shifting focus and setting her sights on the Florida legislature, Judge Scriven proceeded to acknowledge the freedom of state legislatures to enact strict liability crimes, "but not without severe constraints and constitutional safeguards."[30] The story of *Shelton* recognized that "rare" occasion when a legislature is silent to a knowledge requirement, giving rise to a judicial responsibility to "engraft a knowledge requirement to cure the state's infirmity and follow the common-law presumption" barring punishment without proof of knowledge.[31] In the legacy of *Chicone* and *Scott*, *Shelton* represented another attempt by Florida courts to cure the faults of the Florida legislature.

In analyzing the constitutionality of DAPCA, Judge Scriven looked to the Supreme Court's decision in *Staples v. United States*.[32] The *Staples* court held that a *mens rea* requirement is a rule rather than an exception when a statute is otherwise silent.[33] This requirement was necessary for two reasons: First, to protect punishment of the innocent, and second, to protect from stigma associated with hard penalties.[34]

The *Staples* standard for strict liability crimes applies a three-prong test holding strict liability crimes constitutional only if: (1) the penalty imposed is slight; (2) if a conviction does not result in substantial stigma; and (3) if the statute regulates inherently dangerous or deleterious conduct.[35] Before applying the *Staples* test, Judge Scriven noted that strict liability offenses are usually "accorded a generally disfavored status," unless enacted for public welfare regulating "inherently dangerous items/conduct and which provide for only slight penalties, such as fines or short jail sentences."[36]

Shelton showed that DAPCA clearly fails each of the three prongs promulgated in *Staples*. Under the first prong—if the penalty imposed is slight—the penalty under DAPCA is contrastingly substantial. Those found guilty under DAPCA face a second-degree felony warranting up

29. Since 1989, the culpability requirement of "willfully" has been an element of the offense of possession of a controlled substance. State v. Bell, 649 N.W. 2d 243, 252 (N.D. 2002). The Louisiana Supreme Court recognized that crafting possession law into a strict liability crime impermissibly allowed an innocent person to be convicted "without ever being aware of the nature of the substance he was given." State v. Brown, 389 So. 2d 48, 51 (La. 1980).

30. *Shelton*, 802 F. Supp. 2d at 1298.

31. *Id.*

32. Staples v. United States, 511 U.S. 600 (1994).

33. *See id.* at 605.'

34. *See id.* at 616.

35. *See Shelton*, 802 F. Supp. 2d at 1298.

36. *Id.* at 1300.

to fifteen years' imprisonment, while habitual offenders face up to thirty years with a ten-year minimum mandatory sentence.[37] "No strict liability statute carrying penalties of the magnitude of [the Act] has ever been upheld under federal law," noted Judge Scriven.[38] She points to *United States v. Heller*, where the Sixth Circuit Court of Appeals evaluated an interstate kidnapping statute that, like DAPCA, lacked a *mens rea* requirement and imposed a twenty-year maximum penalty.[39] The *Heller* court held that *mens rea* element must be inferred by judicial construction as not to offend Due Process: "[I]f Congress attempted to define a *malum prohibitum* offense that placed an onerous stigma on an offender's reputation and that carried a severe penalty, the Constitution would be offended . . . ."[40] Accordingly, the *Shelton* court held that "the penalties imposed by Florida's strict liability drug statute are too severe to pass constitutional muster . . . doubly so when considered in conjunction with the other two factors."[41]

By branding both first-time and habitual offenders as felons, DAPCA fails the second prong of the *Staples* test, too. The *Shelton* court found that punishment under the Act resulted in substantial stigma. "There can be little question that a conviction for a second degree felony coupled with a sentence of fifteen to thirty years tends to 'gravely besmirch' a person's reputation."[42] Judge Scriven highlighted everyday personal and professional privileges enjoyed by most citizens but denied outright to felons—vote, sit on a jury, serve in public office, obtain certain professional licenses, and receive federal student loans.[43] "The label of 'convicted felon' combined with a proclamation that the defendant is so vile that he must be separated from society for fifteen to thirty years, creates irreparable damage to the defendant's reputation and standing in the community," noted Judge Scriven.[44] Thus, the stigma dealt by DAPCA is anything but slight.

Florida's Act ultimately fails the third and final prong of the

37. *See id.*

38. *Id.* at 1300. Circuits have varied in deciding of how long a sentence for a strict liability crime is too long. One example includes the Migratory Bird Treaty Act, which, like DAPCA, also lacks a knowledge requirement. *See* United States v. Wulff, 758 F.2d 1121 (6th Cir. 1985) (holding maximum penalty two years' imprisonment as unconstitutional under the felony provision of the Migratory Bird Treaty Act); *see also* United States v. Engler, 806 F.2d 425 at 435 (3rd Cir. 1986) (holding two years' imprisonment as permissible, only as a part of a regulatory measure "in the interest of public safety, which may well be premised on the theory that one would hardly be surprised to learn that [the prohibited conduct] is not an innocent act.").

39. United States v. Heller, 579 F.2d 990 (6th Cir. 1978).

40. *Id.* at 994.

41. *Shelton*, 802 F. Supp. 2d at 1302.

42. *Id.*

43. *See id.*

44. *Id.*

Staples test. The statute does not regulate inherently dangerous conduct; in fact, it does just the opposite by regulating innocent conduct. Judge Scriven looked to the most significant and final failure of DAPCA under two lenses: First, unnecessarily broad criminalization, and second, a threat to traditional forms of societal interaction. Under the first lens, the *Shelton* court looked to jurisprudential history on types of strict liability statutes found unconstitutional: "Where laws proscribe conduct that is neither inherently dangerous nor likely to be regulated, the Supreme Court has consistently either invalidated them or construed them to require proof of *mens rea* in order to avoid criminalizing 'a broad range of apparently innocent conduct.'"[45] Simply put, DAPCA cannot survive constitutional scrutiny in relation to the conduct it regulates—the delivery of *any* substance.[46] The *Shelton* court supported its opposition to DAPCA's catch-all criminalization by pointing to the long tradition of the exchange of goods in all forms of human interaction, including public transportation, commerce, schools, and work. The *Shelton* court then contrasted the possession and delivery of illicit goods with Supreme Court precedent on inherently dangerous conduct like possession of hand grenades[47] and selling poisoned food,[48] concluding that DAPCA still fails to pass constitutional muster.[49]

Judge Scriven then turned her attention to the State, who contended that DAPCA does not constitute a strict liability offense because the defendant can raise lack of knowledge as an affirmative defense. She held that the affirmative defense option did not transform the statute into something other than strict liability and, instead, leaves the State "hoisted on its own petard."[50] The legislature further acted unconstitutionally in prompting the State to shift the burden of proof of the essential *mens rea* element to the defendant, because the State's responsibility

45. Liparota v. United States, 471 U.S. 419, 426 (1985) (holding that state legislatures were bound by constitutional constraints; specifically, the charged offense of unlawfully acquiring food stamps required proof that the accused knew the stamps were acquired unlawfully.).

46. *See Shelton*, 802 F. Supp. at 1305.

47. *See generally* United States v. Freed, 401 U.S. 601, 609 (1971) (upholding a ten-year maximum sentence for possession of hand grenades without a *mens rea* requirement because "one would hardly be surprised to learn that possession of hand grenades is not an innocent act.").

48. *See generally* United States v. Balint, 258 U.S. 250, 252 (1922) ("Where one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells.").

49. *See Shelton*, 802 F. Supp. at 1305. Judge Scriven later wrote that because the statute, amongst other reasons, "regulates and punishes otherwise innocuous conduct without proof of knowledge or other criminal intent, the Court finds it violates the due process clause and that the statute is unconstitutional on its face." *Id.* at 1308.

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

firmly remains to prove every element beyond a reasonable doubt.[51] Judge Scriven contended that characterizing *mens rea* as an affirmative defense "purport[ed] to dispense with the fundamental precept underlying the American system of justice—the presumption of innocence."[52] In sum, DAPCA forces the charged, innocent or not, to make a Hobson's Choice: Plead guilty, or go to trial where he is presumed guilty because he is in fact guilty of the statute's two elements; then, because the state presumes knowledge, having to overcome the seemingly insurmountable obstacle of proving his innocence for lack of that unconstitutionally presumed knowledge.[53] Through her decision in *Shelton*, Judge Scriven boldly "decline[d] to grant the State broad, sweeping, authority" to improperly eliminate the *mens rea* requirement in Florida's drug laws, declaring DAPCA unconstitutional and igniting an impetus for statewide change.[54]

B. *A Change in Direction:* Cook v. United States and United States v. Bunton

Nearly two months after Judge Scriven charged the legislature with an unconstitutional stripping of rights in *Shelton*, a second Middle District authority, Judge Elizabeth Kovachevich, altered the course for change in *Cook v. United States*. Myron Bobo Cook was found guilty of three charges: One count of conspiracy to possess with intent to distribute fifty grams or more of crack cocaine, and two counts of possession with intent to distribute crack cocaine.[55] Cook sought to amend his motion to vacate based on *Shelton*, contending that he was innocent of his convictions under DAPCA.[56] Cook argued that he had one calendar year from the time his prior conviction was vacated to file his motion.[57] However, Judge Kovachevich rejected Cook's claims, sending him to state court to obtain relief before the District Court would consider granting relief by *Shelton*.[58]

Although the *Cook* court argued its denial of the appellant's motion on procedurally time-barred grounds, its recognition of but refusal to adopt the landmark decision in *Shelton* foreshadowed the blanket denial

51. *See* United States v. Morissette, 342 U.S. 246, 256 (1952); *see also* United States v. Blankenship, 382 F.3d 1110, 1127 (11th Cir. 2004) ("A defendant is never obligated to prove anything to a jury.").

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

53. *See id.* at 1308.

54. *Id.*

55. *See* Cook v. United States, Nos. 8:02-cr-243-T-17MAP, 8:11-cv-1113-T-17MAP, 2011 WL 4435084, at *1 (M.D. Fla. Sept. 23, 2011).

56. *See id.* at *5.

57. *See id.*

58. *See id.*

and disagreement over DAPCA's constitutionality in Florida's state courts. Instead of boldly siding with *Shelton* and, in doing so, strengthen support for the law's unconstitutionality, Judge Kovachevich simply glossed over the Act's unconstitutionality, effectively passing the buck for later courts to decide.[59]

A few weeks after the *Cook* court declined to follow *Shelton*, a second Middle District judge issued an opinion contradicting the controversial *Shelton* holding. In *United States v. Bunton*, Judge James Moody held that DAPCA comported with the Due Process Clause, primarily because the Act regulated a public welfare offense.[60] Accordingly, Judge Moody found that a *mens rea* element was not required.[61] From a policy perspective, the *Bunton* court emphasized the Act's importance and effectiveness in fighting the "war on drugs."[62] Further, Judge Moody felt that knowledge was a reasonable inference.[63] Judge Moody recognized the possibility of criminalizing truly innocent conduct, but felt the affirmative defense of lack of knowledge "help[ed] ameliorate this concern" and "d[id] not violate due process by abrogating the State's burden of proving the defendant's guilt beyond a reasonable doubt."[64] Instead, Judge Moody took solace in the Florida Standard Jury Instructions: "'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.'"[65] But jury instructions are not an adequate safeguard of a defendant's constitutional rights when Due Process violations are possibly in play.

C. *Disagreement and Discord: Split Amongst the Florida Circuits*

Yet disagreement over DAPCA was not confined to the District Courts; simultaneously, state courts from the Panhandle to the Everglades wrangled with the right way to interpret the Act following the *Shelton* call for change.

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59. *See id.* at *5. Judge Kovachevich, instead of considering the constitutionality of DAPCA under *Shelton*, merely mentions *Shelton* as the basis for Cook's motion to amend his motion to vacate.

60. *See* United States v. Bunton, No. 8:10-cr-327-T-30EAJ, 2011 WL 5080307, at *8 (M.D. Fla. Oct. 26, 2011).

61. *See id.* "In light of this surviving element of knowledge and upon consideration of Supreme Court precedent regarding the constitutionality of public welfare offenses, the Court holds that [DAPCA] comports with the Due Process Clause . . . ." *Id.* at *1.

62. *Id.* at *8.

63. *Id.* "It bears repeating that common sense dictates . . . that one can reasonably infer guilty knowledge when a defendant is in possession of an illegal substance and knows of the substance's presence." *Id.*

64. *Id.*, citing Burnette v. State, 901 So. 2d 925, 927–28 (Fla. 2d DCA 2005).

65. *Id.* at *9, citing *In re Standard Jury Instructions in Criminal Cases*, 969 So. 2d 245 (Fla. 2007).

1. THE ELEVENTH CIRCUIT: TWO SIDES OF THE SAME BENCH

In the three months after *Shelton*, courts statewide quickly acted in both affirmance and denial of the Middle District holding. The Eleventh Judicial Circuit found its judges in direct disagreement, while judges in the First, Second, and Fourth District Courts of Appeal struggled to reach a consensus on the constitutionality of DAPCA.

During the second week of August 2011, the Eleventh Judicial Circuit in Miami-Dade County found itself straddling both sides of the DAPCA constitutionality debate. Supporting *Shelton* was Judge Milton Hirsch, who wrote a total espousal of Judge Scriven's recommendations in *State v. Washington*.[66] In opposition was Judge Jorge Cueto, who eviscerated *Shelton*'s treatment of the Act in *State v. Anderson*.[67]

Judge Cueto's decision expressly "decline[d] the Defendant's invitation to ignore the very law that [the] Court ha[d] been sworn to uphold."[68] Instead, Judge Cueto cited *State v. Dwyer*, holding that the Middle District decision in *Shelton* was not binding: "A decision of a Federal District Court, while persuasive if well reasoned, is not by any means binding on the courts of the state," and that only the state's Supreme Court could definitively hold DAPCA constitutional or otherwise.[69] Judge Cueto further noted that even if a federal court rejected a state law's constitutionality based on a *Staples* analysis, especially in the absence of guidance from the state's Supreme Court, the state court's ruling will hold "unless or until the United States Supreme Court decides the issue."[70] Judge Cueto's observation foreshadowed the cases to come.

The *Anderson* court interpreted *Shelton* as inapplicable to state courts in light of the District Courts of Appeal's adoption of the Act's constitutionality. "Every District Court of Appeal," Cueto claimed, "has examined the constitutionality of section 893.13, Florida Statutes, and determined that the statute is constitutional both on state *and* federal constitutional grounds."[71] Judge Cueto pointed to *Johnson v. State*, in which the First District Court of Appeal held that the *Staples* analysis was inapplicable, because Florida's legislative intent was "clearly

66. *See Washington*, *supra* note 2 at 1129. Judge Hirsch's decision would provide a strong theoretical foundation and linguistic elucidation for Florida Supreme Court Justice Perry's future dissent. *See* Part V.C, *infra*.

67. *See* State v. Anderson, No. F99-12435(A), 2011 WL 3904082 (Fla. Cir. Ct. Aug. 11, 2011).

68. *Id.*

69. *Id.* (quoting State v. Dwyer, 332 So. 2d 333, 335 (Fla. 1976)).

70. *Id.*

71. *Id.*

expressed" in section 893.13.[72] He further illustrated the District Courts of Appeal's support for the Act with *Wright v. State*, where the Fourth District Court of Appeal found the statute constitutional under state and federal grounds, particularly because of "the rational relationship between the governmental interest in addressing the drug problem and the elimination of the difficult-to-prove element of knowledge of a substance's illicit nature."[73] Later decisions by the District Courts of Appeal acknowledged the legislature's broad discretion in crafting the Act, as well as its constitutionality with regard to the greater goal of public policy.[74]

While the *Anderson* court remained steadfast in its adherence to Florida precedent and hesitant to side with *Shelton*, it is notable that the District Courts of Appeal decisions from which Cueto based his opinion were from 2005,[75] 2006,[76] and 2007.[77] The bitter battle within Florida's Eleventh Circuit and the growing frequency of the issue's appearance in the District Courts of Appeal represented an increasingly loud call for change, and amplified the need for a definitive decision by the Florida Supreme Court.

Only six days after *Anderson*, Judge Milton Hirsch made wake in the Eleventh Circuit.[78] Before him were thirty-nine defendants, all charged with violations under DAPCA.[79] Judge Hirsch predicted and acknowledged "a storm-surge of pretrial motions" following the *Shelton* decision, and accordingly consolidated the cases before him in an effort to make a bold and striking statement about the Act's constitutionality.[80] The *Washington* court walked through the *Shelton* court's *Staples* analysis, finding DAPCA's failure to meet the first two factors "uncomplicated and incontrovertible."[81] Judge Hirsch's disembowelment of

72. Johnson v. State, 37 So. 3d 975 (Fla. 1st DCA 2010) (holding that the *Staples* analysis applied only when the intent of the state legislature was not explicit in its reasoning for eliminating the *mens rea* requirement).

73. Wright v. State, 920 So. 2d 21, 23–24 (Fla. 4th DCA 2005).

74. Judge Cueto references Harris v. State, 932 So. 2d 551 (Fla. 1st DCA 2006) (quoting State v. Grey, 435 So. 2d 816, 819–20 (Fla. 1983); "If is within the power of the legislature to declare conduct criminal without requiring specific criminal intent to achieve a certain result; that is, the legislature may punish conduct without regard to the mental attitude of the offender, so that the general intent of the accused to do the act is deemed to give rise a presumption of intent to achieve the criminal results.").

75. *See Burnette*, *supra* note 64.

76. *See* Harris v. State, 932 So. 2d 551 (Fla. 1st DCA 2006).

77. *See* Taylor v. State, 929 So. 2d 665 (Fla. 3d DCA 2006), *rev. denied*, 952 So. 2d 1191 (Fla. 2007).

78. *Washington*, *supra* note 2. Judge Hirsch issued his order on August 17, 2011. *Id.* Judge Cueto's *Anderson* order was issued on August 11. *Anderson*, *supra* note 67.

79. *See Washington*, *supra* note 2 at 1129.

80. *Id.*

81. *Id.* at 1130.

DAPCA was founded on its dangerously broad criminalization of "inherently innocuous, rather than . . . inherently dangerous" activity:[82] "[DAPCA] does not penalize the intentional possession or delivery of drugs, or the knowing possession or delivery of drugs; it punishes the possession or delivery of drugs, however unintentional, however unknowing."[83] Like Judge Scriven, Judge Hirsch found the Florida legislature's broad-sweeping criminalization troublingly wide.

The *Washington* court then turned to its point of departure from the *Anderson* decision to consider whether the *Shelton* decision was binding precedent.[84] Judge Hirsch, looking to both federalism and statutory construction, found that the *Shelton* court did not engage in statutory construction.[85] Rather, it sought to resolve an apparent constitutionality conflict between the twice-reiterated opinion of the Florida Supreme Court and the reactionary amendment promulgated by the state legislature. "That, to be sure, is purely a question of federal law," wrote Judge Hirsch, "and the Florida Supreme Court has 'recognize[d], of course, that state courts are bound by federal court determinations of *federal* law questions."[86] Accordingly, Judge Hirsch found the *Shelton* decision binding on the *Washington* court, as well as all other Eleventh Circuit courts, including the *Anderson* court.[87]

The *Washington* court rejected both the State and *Anderson* court's rationale for discarding *Shelton* through the Florida Supreme Court's decision in *Dwyer*. "For the proposition that, once Florida courts have authoritatively construed a Florida statute, federal courts cannot determine whether that statute (thus construed) violates the federal Constitution, *Dwyer* will not serve."[88] Instead, *Dwyer* "makes amply clear" that *Shelton* is indeed binding on state courts because of their procedural differences.[89] In *Dwyer*, the Florida Supreme Court found a statute unconstitutional; soon after, a federal court then, in the absence of a limiting construction, found the same statute unconstitutional.[90] In response, the Florida Supreme Court supplied the limiting construction, barring any state court from finding the statute unconstitutional.[91] *Shelton*, however, like *Chicone* and *Scott*, dealt with a statute for which

82. *Id.*
83. *Id.*
84. *Id. Anderson* was entered on August 11, 2011, and *Washington* was entered on August 17, 2011. *Id.*
85. *See id.* at 1129.
86. *Id.* at 1131 (citing Mobil Oil Corp. v. Shevin, 354 So. 2d 372, 375 n.9 (Fla. 1978)).
87. *See id.*
88. *Id.*
89. *Id.*
90. *See id.*
91. *See id.*

the Florida Supreme Court had supplied limiting constructions so the statute would comply with constitutional Due Process. The legislature's adverse reaction effectively voided the limiting constructions. Thus, unlike *Dwyer*, the federal court in *Shelton* was continuing the judiciary's power-balancing legacy of *Chicone* and *Scott*.[92]

The *Washington* court acknowledged that although several of Florida's District Courts of Appeal considered the DAPCA issue, none decided precisely whether the Act was unconstitutional under the Due Process Clause.[93] Instead, higher courts merely glossed over the constitutionality issue, deciding the cases on other grounds. In the absence of a decision from the appellate courts on the Due Process claims against DAPCA, the *Washington* court found itself bound to the *Shelton* conclusion, achieved through the *Staples* tripartite analysis.[94]

The *Washington* court took another bold step in evaluating the policy perspective behind the Act. "Even in those rare instances in which the law creates and enforces strict liability crimes, choice is not taken out of the equation entirely; it is simply more attenuated from the consequence that the law seeks to prevent."[95] Judge Hirsch offered the example of a defendant convicted of drunk driving, who, choosing to drink and subsequently choosing to drive, is punished for the injury his choices cause, even if he never directly chose to cause the resulting injury.[96] He also posited the example of c-level executives who choose to reap the rewards of traffic in hazardous wastes and are then punished for the harm caused by the waste, even though the executives never chose to cause that harm.[97] Judge Hirsch analogized these situations to a defendant who may be punished for the harm caused by the use of cocaine, even though he never chose to cause the specific harm through his choice to possess or deliver the substance.[98] Judge Hirsch contrasted this essential element of choice with the broad trap set by the lack of knowledge under DAPCA: "It reaches beyond those who willfully do wrong, beyond those who negligently do wrong, beyond those who carelessly do wrong, and includes within its wingspan those who meant no wrong."[99] The *Washington* court noted the importance of "what we intend" as the "state of mind that distinguishes non-culpable from culpa-

92. *See id.*
93. *See id.* at 1133.
94. *See id.*
95. *Id.*
96. *See id.*
97. *See id.*
98. *See id.* Similarly, Jimmy, this article's protagonist, may have chosen to temporarily possess his brother Mike's car, but never actively chose to possess the contraband-containing backpack, and certainly never chose to cause the harm the Valium pills may have caused.
99. *Id.*

ble" behavior, and criticized DAPCA—and thus, the Florida legislature—for failing to make the same distinction.[100] Following in suit of *Shelton*, Judge Hirsch ruled DAPCA unconstitutional as violative of Due Process.[101]

Judge Hirsch also highlighted a revealing distinction between DAPCA and Florida's trafficking statute, section 893.135.[102] The trafficking statute explicitly seeks to condemn one who "knowingly sells, purchases, manufactures, or brings into this state" a controlled substance.[103] While the state does not have the burden of proving knowledge for simple possession or delivery, it must prove knowledge beyond a reasonable doubt in trafficking cases.

2. Florida's District Courts of Appeal: Siding Against *Shelton*

In October 2011, the First District Court of Appeal disregarded the *Shelton* decision in deciding *Flagg v. State*.[104] Isaac Flagg was stopped in Gainesville for riding a bicycle without a light when police found crack on his person.[105] Flagg was charged under DAPCA, pled guilty, and was sentenced accordingly.[106] On appeal and in light of *Shelton*, Flagg argued his conviction was invalid under DAPCA's unconstitutionality.[107]

"We see no reason to recede from our settled precedent simply because one federal judge has a different view of the law than this court," announced the *Flagg* court.[108] Instead of analyzing the constitutional issue, the *Flagg* court rejected *Shelton*'s characterization of the affirmative defense provision as its rationale for dissent: "[B]ecause lack of knowledge is not a defense to a true strict liability crime, the availability of the affirmative defense . . . undermines the essential premise in *Shelton* that the offenses in [DAPCA] are strict liability crimes" punishable as felonies.[109] Further, the *Flagg* court avoided analyzing the con-

100. *Id.*

101. *Id.* "Like the court in *Shelton*, I find that Florida Statute § 893.13 is facially violative of the Due Process Clause of the 14th Amendment to the United States Constitution . . . ." *Id.*

102. *Id.* at 1134, n.6.

103. Fla. Stat. § 893.135 (1997).

104. *See* Flagg v. State, 74 So. 3d 138 (Fla. 1st DCA 2011).

105. *See id.* at 139.

106. *See id.*

107. *See id.* at 140.

108. *Id.*

109. *Id.* at 141. The *Flagg* court also sought to reinforce the Second District's decision in *Adkins* and promote the administration of justice statewide by citing Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) (holding "in the absence of interdistrict conflict, district court decisions bind all Florida trial courts."). *Id.*

stitutional claim by noting that the Second District Court of Appeal certified the issue to the Florida Supreme Court. By upholding DAPCA's constitutionality and acknowledging its anticipation of the Supreme Court's decision, the *Flagg* court "preserve[d] the status quo" within the First District Court of Appeal.[110] Absent further guidance from the Florida Supreme Court, defendants in the First District Court of Appeal would not have the *Shelton* safeguard at their disposal.

One month later, the Fourth District Court of Appeal also refused to address the constitutionality claims in *Shelton*. Like the *Flagg* court, the court in *Maestas v. State* found *Shelton*'s claim that DAPCA converted drug offenses into strict liability crimes unpersuasive, instead holding that the Act was constitutional, and "merely abrogated the additional 'knowledge of illicit nature' element" added by *Chicone*.[111] Like *Anderson*, the *Maestas* court looked to *Wright v. State* and *Burnette v. State* as controlling case law in declining to adopt the *Shelton* court's ruling.[112]

On September 28, 2011, the Second District Court of Appeal seized the opportunity to certify the DAPCA issue to the state Supreme Court through *State v. Adkins*:

> Until this important constitutional question is resolved by the Florida Supreme Court, prosecutions for drug offenses will be subject to great uncertainty throughout Florida. Moreover, cases pending on appeal and on motions for postconviction relief will be subject to similar uncertainty. It will be difficult to reach a final resolution in many of these cases until the issue is resolved. Finally, if the ruling in this order is ultimately affirmed by the supreme court, it is possible that hundreds or even thousands of inmates will be eligible for immediate release.[113]

The Second District Court of Appeal further emphasized that conflicting interpretations of DAPCA "require[d] immediate resolution by the Supreme Court because the issues are of great importance and will have a great effect on the proper administration of justice throughout the state."[114] The Second District Court of Appeal highlighted divergent opinions across the state's circuit courts, noting that "this issue . . . will undoubtedly be raised in every felony division in all twenty circuits" and, as illustrated in the Eleventh Circuit, that "it is clear from the . . . above-cited cases that judges will take at least two different approaches

110. *Id.*

111. Maestas v. State, 76 So.3d 991 (Fla. 4th DCA 2011).

112. *See id.* at 995.

113. *See* State v. Adkins, 71 So. 3d 184, 185 (Fla. 2d DCA 2011).

114. *Id.* at 185.

to the issue."[115] The *Adkins* court asserted it was ill-suited to decide such a crucial issue, which had been "fully briefed and thoroughly discussed" in both the present case and its companion cases around the state.[116] In an effort to seek prompt statewide resolution to the DAPCA conflict and relieve the backlog prompted by the *Shelton* opinion, the *Adkins* court certified the issue with it sights set on a resolution to the Act's constitutional question.

IV. LAW, PRACTICE, AND PRACTICALITY

The potential changes in Florida's criminal code sparked by *Shelton* affect petitioners, practitioners, and judiciary actors alike.

Administratively, the *Shelton* opinion prompted an onslaught of motions and appeals from defendants around the state who now contended their convictions under DAPCA were unconstitutional. This sudden Achilles' heel to judicial efficiency posed a threat to the timely disposal of an already crowded docket. In his *Washington* opinion, Judge Hirsch noted that the thirty-nine defendants at issue "are unworthy, utterly unworthy, of this windfall exoneration," but reconciled his decision with the words of Justice Frankfurter: "History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end."[117]

Like the *Washington* court, the *Flagg* court underscored the upset in the Florida justice system caused by *Shelton*.[118] It called for the need of "an expeditious decision from the Supreme Court addressing [DAPCA's] constitutionality" to "promote the consistent administration of justice by resolving the issue for the trial courts, thereby allowing drug prosecutions to proceed."[119] The *Adkins* court echoed the sheer numerical need for resolution of the issue, citing the possibility that "hundreds or even thousands of inmates [would] be eligible for immediate release" upon the Act's reversal.[120] Undoubtedly, judges and defendants around the state eagerly awaited the Florida Supreme Court's decision in *State v. Adkins*.

In a brief filed by the National Association of Criminal Defense Lawyers, Florida attorneys amplified the practitioner's perspective for prompt adjudication of DAPCA's constitutionality. They began by recognizing the threat posed by DAPCA to the integrity of Florida law:

115. *Id.*

116. *Id.* at 186.

117. *Washington*, *supra* note 2 at 1133 (quoting Davis v. United States, 328 U.S. 582, 597 (1946) (Frankfurter, J. dissenting)).

118. *See Flagg*, 74 So. 3d at 141.

119. *Id.*

120. *Adkins*, 71 So. 3d at 185.

"[S]o sweeping is Florida's elimination of the *mens rea* requirement for this offense that it patently contravenes the stated 'General Purposes' of the entire Florida Criminal Code."[121] The brief's authors alleged that DAPCA failed to give adequate warning to those charged of the nature of the conduct proscribed, was impermissibly vague in defining the material elements of the charged offense, and simply did not adequately safeguard "conduct that is without fault or legitimate state interest from being condemned as criminal."[122] The brief's authors reject the State's contention that the State would never apply the statute in such a situation.[123]

Further, the brief's authors echo sentiments in *Shelton* and *Washington*, espousing the floodgates argument: "[I]f this court finds constitutional a strict liability statute under which draconian prison sentences are available, there is nothing to prevent future legislatures from undertaking a sweeping, wholesale elimination of any *mens rea* requirements in their criminal law." In addition to cautioning the Court on the chipping away of rights, the practitioners characterize the penalties imposed by DAPCA, without proof of a culpable mental state, as "offen[ding] fundamental notions of justice."[124]

Under DAPCA, potential defendants are faced not only with up to thirty years imprisonment and a felony conviction, but are also tasked with "an unreasonable duty in terms of a person's responsibility to ascertain the relevant facts."[125] If Jimmy, this article's opening protagonist, was delivering a sealed envelope from a teacher to the school principal's office—an envelope that contained, amongst legitimate papers, a small bag of cocaine or a few painkillers without the proper prescription—he cannot be expected to break the seal to inspect the package as a precaution to avoid potential criminal charges. Similarly, in borrowing his older brother's car, he cannot be expected to conduct a detailed sweep for illegal substances before making his way to school.

In this sense, DAPCA does not protect public welfare; it threatens the very interactions that make the American public free to associate without fear of unpredictable criminal consequence. "Wholly passive, innocent, or no conduct whatsoever . . . is precisely what the State of Florida has permitted to be targeted by the stripping of any *mens rea*

121. Brief for Luke Jarrod Adkins, et al. at 7, as Amici Curiae Supporting Appellees, State v. Adkins, (Fla. S. Ct.) (November 28, 2011) (No. SC11-1878).

122. *Id.* The brief's authors employ the following example: Under DAPCA, the law finds guilty the "wholly innocent conduct" of a postal worker who delivers a mailed package containing a controlled substance. *Id.*

123. *Id.* at n.2.

124. *Id.* at 9.

125. *Id.* at 13.

requirement at all from its controlled substance law."[126] The brief's authors further characterize DAPCA as "an atavistic throwback to the barbarism of the dark ages" and "repugnant to the civilized common law as understood by American lawyers and the nation's founders in 1787."[127]

V. DEATH TO DAPCA

The Florida Supreme Court accepted the Second District Court of Appeal's invitation to dance with DAPCA once again.[128] On December 6, 2011, the Florida Supreme Court heard oral arguments in the case of *State v. Adkins*.[129] As the old adage goes, "the third time's a charm," and following *Chicone* and *Scott*, *Adkins* marked the Florida Supreme Court's third encounter with the provisions of Florida's possession and delivery of controlled substance laws. Following oral arguments, defendants, advocates, and other interested parties statewide awaited the Florida Supreme Court's decision for eight months. On July 12, 2012, the Florida Supreme Court announced its decision: DAPCA was wholly constitutional.[130] This section addresses the four factors necessitating an expeditious and definitive decision on DAPCA's constitutionality, analyzes the Florida Supreme Court's erroneous decision in upholding the statute, and underscores why the Court should have dealt DAPCA a fatal blow.

A. *Four Factors for Finality*

Four primary factors revealed that the time was ripe for the Court to announce a game-changing decision. First, the deluge of cases and cross-circuit controversy brought about by the *Shelton* decision in such a short period of time denoted the importance of the Act's constitutionality as perceived by both the state's judicial actors and its prosecution and defense advocates.

Second, the issue's third appearance in the state's Supreme Court, complemented by the legislature's hasty 2002 amendment, underscored the desperate need for definitive resolution on the necessity of a *mens rea* requirement, and a final end to a seemingly childish contest by the state legislature to circumscribe the interpretive authority of the judiciary. Before the Supreme Court decision, District Courts of Appeal

126. Brief for Adkins, et al., *supra* note 122, at 16.

127. *Id.* at 20.

128. *Adkins*, *supra* note 5.

129. News Release, Nat'l Ass'n of Criminal Def. Lawyers, Florida Supreme Court Hears Argument on State's Strict Liability Felony Drug Law (December 6, 2011) (*available at* http://www.nacdl.org/NewsReleases.aspx?id=23222&libID=23192).

130. *Adkins*, *supra* note 5.

remained visibly timid to tackle the constitutionality issue, but were vocal in skirting—or at a bare minimum, acknowledging—its existence. This silent cry for help from District Courts further amplified the need for guidance from the State's highest court.

Third, thousands of defendants and their families, those actually touched by the Act's provisions, awaited adjudication of their potential exoneration. Both the systematic and practical stress exerted by the figurative hold placed on cases pending a decision on the DAPCA issue was fundamentally unfair to the very people affected most by the statute.

Lastly, 2012 is an election year. The Court's decision on DAPCA will undoubtedly prompt important dialogue amongst candidates and incumbents on alternative, less offensive, and more effective means of punishing those truly knowingly guilty of possessing and delivering criminalized substances.

In light of these four factors, the Supreme Court should have sentenced DAPCA's elimination of a *mens rea* requirement to death once and for all. The Court should have championed and mandated the inclusion of a *mens rea* requirement. Amongst other consequences, holding otherwise triggers the fear that the Court might grant the legislature the green light to remove previously established *mens* rea elements in other state statutes.

B. *A Statute Spared, Erroneously*

The Florida Supreme Court did an about-face with *Adkins*, changing course from its earlier espousal of a *mens rea* requirement in *Chicone* and *Scott*. This time, the Court sided with the legislature in ruling DAPCA constitutional.

The Florida Supreme Court began its decision in *Adkins* by chronicling its own history with DAPCA, including its espousal of mens rea as a "necessary element" in *Chicone* and the knowledge of both presence and illicit nature as required under *Scott*.[131] It recognized the legislature's response in the form of the 2002 amendment, then cited rulings from each of the state's five District Courts of Appeal holding DAPCA did not violate the requirements of Due Process.[132] At the circuit court level, *State v. Adkins* cited *Shelton* as persuasive, non-binding authority that DAPCA was indeed unconstitutional.[133] The Second District Court of Appeal quickly certified the case to the Florida Supreme Court.[134]

In using *Adkins* as a vehicle to rule DAPCA constitutional, the

131. *Adkins*, *supra* note 5, at *1–2.
132. *Id.* at *2.
133. *See id.*
134. *Adkins*, 71 So. 3d at 186.

Florida Supreme Court looked to three sources: First, the legislature's "broad authority" to define the elements of criminal offenses; second, case law recognizing that "due process ordinarily does not preclude the creation of an offense without a guilty knowledge element"; and third, situations when the absence of a guilty knowledge element constituted a violation of due process.[135] The Court, in a stark departure from *Chicone* and *Scott*, employed caselaw dating back nearly three decades in deferring to the discretion of the state legislature:

> It is within the power of the legislature to declare conduct criminal without requiring specific criminal intent to achieve a certain result; that is, the legislature may punish conduct without regard to the mental attitude of the offender, so that the general intent of the accused to do the act is deemed to give rise to a presumption of intent to achieve the criminal result. The legislature may also dispense with a requirement that the actor be aware of the facts making his conduct criminal.[136]

The Court openly subjected itself to the whims of the state legislature. The Court did, however, acknowledge situations where the elimination of a scienter element offended Due Process, including criminalizing entirely passive conduct,[137] criminalizing conduct protected by the First Amendment,[138] and when innocuous conduct is criminalized by a statute whose means is not rationally related to its purposes.[139] Here, the Court failed to find that conduct governed by DAPCA "amount[ed] to essentially innocent conduct"; instead, the Court defended the statute as "rationally related to the Legislature's goal of controlling substances that have a high potential for abuse."[140] The Court denied any possible impingement on constitutionally protected freedoms: "[T]here is no constitutional right to possess contraband."[141] "Nor," the Court continued, "is there a protected right to be ignorant of the nature of the property in

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135. *Adkins*, *supra* note 5, at *3.

136. *Id.* at *5, citing State v. Gray, 435 So. 2d 816, 819 (Fla. 1983).

137. Adkins, *supra* note 5, at *6. In *State v. Giorgetti*, 868 So. 2d 512 (Fla. 2004), the Florida Supreme Court held that the State was required to prove that a sex offender knew of the requirement to register before being held criminally liable for failing to comply with the state's registration requirements.

138. *Adkins*, *supra* note 5, at *6, citing Smith v. California, 361 U.S. 147 (1959) (holding that a scienter element was required in an ordinance criminalizing the possession of obscene or indecent writing in places of business where books are sold).

139. *Adkins*, *supra* note 5, at *6, citing Schmitt v. State, 590 So. 2d 404 (Fla. 1991) (holding that a Florida statute criminalizing possession of depictions of physical contact with a minor person's clothed or unclothed genitals violated Due Process in rendering wholly innocent family photographs of caretaker-child conduct a felony).

140. *Adkins*, *supra* note 5, at *7.

141. *Id.* at *8.

one's possession."[142] Championing the role of common sense, the Supreme Court looked to the Middle District's decision in *Bunton* to declare that "possession without awareness of the illicit nature of the substance is highly unusual."[143]

The Florida Supreme Court also upheld the constitutionality of the affirmative defense available to defendants. "The affirmative defense does not ask the defendant to disprove something that the State must prove in order to convict, but instead provides a defendant with an opportunity to explain why his or her admittedly illegal conduct should not be punished."[144] The Court rationalized the remedy of an "opportunity to explain" as constitutionally appropriate by isolating the legislature's goal in curtailing the sale, manufacture, delivery, and possession of substances from the defendant's "subjective intent" in engaging in such conduct.[145] Yet this separation between conduct and intent amounts to an assertion that intent, thoughts, and motivation bear no consequence on actions.[146] Rather than consider the plausible situation of inadvertent possession, the Court brushes aside the importance of innocent victims, and simply points to the affirmative defense as the sole curative measure.[147]

C. *Death to DAPCA, Revisited*

Striking down DAPCA would have sent a strong, cautionary, and disciplinary message to the state legislature—that it must balance its broad discretion with constitutional rights afforded to citizens. Casting aside the majority's "foundation of flawed common sense," Justice Perry's dissent reached the correct decision in declaring that the majority's opinion "shatter[ed] bedrock constitutional principles."[148] In a practical, real-life approach, Justice Perry looked to the everyday examples of possession and delivery cited in *Washington* and *Shelton*, and included other anecdotes from *Adkins*:

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142. *Id.*

143. *Id.* "Just as 'common sense and experience' dictate that a person in possession of Treasury checks addressed to another person should be 'aware of the high probability that the checks were stolen, a person in possession of a controlled substance should be aware of the nature of the substance as an illegal drug." *Id.*, quoting Barnes v. United States, 412 U.S. 837, 845 (1973). The Court also links the supposedly obvious value of contraband to a common sense awareness of its presence: "Because controlled substances are valuable, common sense indicates that they are generally handled with care." *Id.* at *8.

144. *Id.* at *9.

145. *Id.*

146. Imagine if motive was declared independent of evidentiary analysis! This would surely prompt a worldwide Wigmorean uproar.

147. *Adkins*, *supra* note 5, at *10.

148. *Id.* at *17.

> a letter carrier who delivers a package containing unprescribed Adderall; a roommate who is unaware that the person who shares his apartment has hidden illegal drugs in the common areas of the home; a mother who carries a prescription pill bottle in her purse, unaware that the pills have been substituted for illegally obtained drugs by her teenage daughter, who placed them in the bottle to avoid detection.[149]

Justice Perry posited more examples of his own:

> a driver who rents a car in which a past passenger accidentally dropped a baggie of marijuana under the seat; a traveler who mistakenly retrieves from a luggage carousel a bag identical to her own containing Oxycodone; a helpful college student who drives a carload of a friend's possessions to the friend's new apartment, unaware that a stash of heroin is tucked within those possessions; an ex-wife who is framed by an ex-husband who planted cocaine in her home in an effort to get the upper hand in a bitter custody dispute.[150]

The possibilities are, indeed, "endless," and applicable to more innocent citizens than contemplated by the majority.[151] The number, variety, and plausibility of these everyday occurrences not only underscore DAPCA's impermissibly wide scope, but also destroy the majority's characterization of the statute's criminalization of innocent conduct as "unusual."[152]

The dissent recognizes the difficulty of employing the statutorily afforded affirmative defense: "[It] is hardly a friendly opportunity; rather, it is an onerous burden that strips defendants—including genuinely innocent defendants—of their constitutional presumption of innocence."[153] The dissent analyzed the Hobson's Choice discussed in Part III.A, *supra*, in recognizing the difficulties faced by an innocent defendant who must not only prove his affirmative defense, but also face a jury instructed on the permissive presumption of knowledge.[154] In adopting the stance assumed by *Shelton*, *Washington*, and other decisions statewide declaring DAPCA unconstitutional, the dissent concluded with a powerful rejection of the majority's decision: "The majority opinion sets alarming precedent, both in the context of section 893.13 and beyond. It makes neither legal nor common sense to me, offends all notions of due process, and threatens core principles of the

149. *Id.* at *18.

150. *Id.*

151. *Id.*

152. *Id.* at *10.

153. *Id.* at *19. Justice Perry cites Coffin v. United States, 156 U.S. 432, 453 (1895), in calling this presumption "axiomatic," "elementary," and core to "the foundation of the administration of our criminal law." *Id.*

154. *Id.* at *20.

presumption of innocence and burden of proof."[155] Accordingly, in the best interests of Floridians, DAPCA deserved to die.

VI. CONCLUSION

The criminalizing net cast by DAPCA is simply too wide, too unfair, too unclear, and wholly unconstitutional. The fruits of the current Act cannot be championed as victories in the war against drugs, but rather as successes in a climate where the chances of unconstitutional conviction are high. Striking down DAPCA and mandating a *mens rea* requirement is healthy for all actors involved: judges are relieved from choosing to side with a certain court or state legislatures and can promptly adjudicate pending claims, prosecutors have a clear set of elements of a crime which they must prove beyond a reasonable doubt, and those awaiting criminal proceedings are aware of the precise constitutional protections and remedies available.

Systematic concerns aside, the constitutionality of the Act can be reduced to the fundamental American principle of fairness. Yet, the Florida Supreme Court shirked its responsibility to restore the state's citizens' freedom of contact without fear of criminal misconduct, so that stories like that of Jimmy, the innocent student facing conviction without consideration of *mens rea*, remain just that—distant hypotheticals, not the Due Process-denying reality of a faulty, facially unconstitutional state statute.

155. *Id.* at *21.