IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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| STATE OF FLORIDA, | SECTION 14 |
| Plaintiff, | JUDGE MILTON HIRSCH |
| v. | CASE NUMBERS: |
| ROBERT WASHINGTON, | F11-11019; |
| MELALONSO CARROUTHERS, | F10-36703; |
| CORNELIOUS SMITH, | F11-14965; |
| TONIO BROWN, | F11-3312B; |
| JOSE RODRIGUEZ, | F11-14407; |
| DEON KILLINGS, | F10-36745; |
| SAM KERNEY, | F11-9743; |
| DARESSA STEINGER, | F11-14133; |
| WALTER GRAU, | F11-11135; |
| RENE TORRES, | F11-6919B; |
| PETER O'BRANOVICH, | F11-13861; |
| JARVORUS JACKSON, | F11-6159; |
| SAMUEL BROWN, | F11-13314; |
| GREGORY BUSSEY, | F11-17597; |
| ANTHONY FAIR, | F11-14038B; |
| DERRICK GUYTON, | F11-15382B; |
| MARIE LUZ, | F11-17098A; |
| HECTOR SANCHEZ, | F11-1967; F11-1968; |
| WILLIE STANLEY, | F11-3940B; |
| LAQCAUISE STANLEY, | F11-7696; |
| DONALD ST. PLITE, | F11-16898; |
| TAMARRIO TURNBULL, | F11-14038A; |
| RUBEN MERCADO, | F11-7238; |
| JUSTIN MAITNER, | F11-13292; |
| DENNIS HARRIS, | F11-15382A; |
| TREMAYNE WHIGHAM, | F10-10491; |
| TRAVONN RUSSELL, | F11-7869; |
| JIMMY FAUSTIN, | F11-16304A; |
| FREDERICK RUDOLPH, | F11-7943D; |
| JOSUE PIERRE, | F10-27154; F10-27155; |
| RUSSELL BRYANT, | F11-17226; |
| CARLOS SANTANA, | F11-17954; |
| JAMES SMITH, | F10-19203; F11-4781 |
| COREY BROWN, | F11-4226; |
| CRAIG JOHNSON, | F10-28945; |
| JOSE VELLOGIN, | F09-25144B; |

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| **MARCOZ VASQUEZ,** | **F11-14298;** |
| **RAUL BORGES-TABIA,** | **F10-24847A;** |
| **EDWARD SHEPPARD,** | **F11-17686** |

**Defendants.**

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## ORDER ON MOTIONS TO DISMISS

"[F]or there is nothing either good or bad, but thinking makes it so."

- William Shakespeare, The Tragedy of Hamlet, Prince of Denmark, Act II sc. 2

### I. Introduction

The 39 defendants captioned above are similarly circumstanced in that all are charged with violation of Fla. Stat. § 893.13. In light of the recent decision in *Shelton v. Department of Corrections*, No. 6:07-cv-839-Orl-35-KRS, 2011 WL 3236040 (M.D. Fla. July 27, 2011), finding §893.13 unconstitutional, all defendants move for dismissal. I have consolidated these cases for purposes of these motions only.

*Shelton* has produced a category-five hurricane in the Florida criminal practice community. A storm-surge of pretrial motions (such as those at bar) must surely follow. It is, therefore, essential that I adjudicate the present motions promptly. This order has been written in great haste and under great time pressure. As Mark Twain is alleged to have said: "If I'd had more time, I could have written you a shorter letter."[1]

### II. *Shelton*

Mackle Shelton was arrested on October 5, 2004, and charged with a long list of serious crimes. Among those crimes was delivery of cocaine in violation of Fla. Stat. § 893.13. *Shelton*, 2011 WL 3236040, at *3. Regarding that count, the trial jury was given the standard jury instruction, *viz.*, the jurors were charged that the prosecution was obliged to prove that Shelton delivered a

[1] I am indebted to Assistant State Attorney Christine Zahralban for submitting, under the same time pressure, a very scholarly memorandum in opposition to the present motions.

certain substance, and that the substance was cocaine. *Id.* "[T]he jury was not instructed as to knowledge as an element of that offense." *Id.*

Shelton was convicted and sentenced to 18 years in prison.[2] Having exhausted his direct and collateral appeals in the state-court system,[3] on May 18, 2007, Shelton moved for habeas relief pursuant to 28 U.S.C. 2254 in the United States District Court for the Middle District of Florida. *Id.* On July 27th, 2011, that court granted relief and found Fla. Stat. § 893.13 to be facially unconstitutional. *Shelton*, 2011 WL 3236040, at *1.

The federal court began by examining two principal cases from the Florida Supreme Court which construed § 893.13 prior to certain statutory changes in 2002. In *Chicone v. State*, 684 So.2d 736 (Fla. 1996), the supreme court held, apropos the *mens rea* element of § 893.13, "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 Chicone knew of the illicit nature of the items in his possession." *Chicone*, 684 So.2d at 744 (e.s.). And in *Scott v. State*, 808 So.2d 166 (Fla. 2002), the

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[2] Delivery of cocaine in violation of § 893.13 is a second-degree felony, § 893.13(1)(a)(1), Fla. Stat., ordinarily punishable by up to 15 years in prison. § 775.082(3)(c), Fla. Stat. Because Shelton was declared a habitual felony offender pursuant to Fla. Stat. § 775.084, however, his sentence was increased. *Shelton*, 2011 WL 3236040, at *3.

[3] Apparently Shelton's constitutional objection to § 893.13 was never adjudicated in the state courts. "[N]either of the [state-court] appellate decisions [*i.e.*, neither the decision on direct appeal nor the decision on appeal of the denial of post-conviction relief] analyzed or discussed the federal constitutional question." *Shelton*, 2011 WL 3236040, at *3. The *Shelton* opinion returned to this point for emphasis:

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

*Id.* at *4.

supreme court held that, "knowledge . . . is an element of the crime of possession of a controlled substance, a defendant is entitled to an instruction on that element, and . . . . it is error to fail to give an instruction." *Scott*, 808 So.2d at 172. "In direct and express response to the [Florida Supreme] Court's holdings in *Chicone* and *Scott*, in May 2002, the Florida legislature enacted amendments to Florida's Drug Abuse Prevention and Control Law." *Shelton*, 2011 WL 3236040, at *2. Specifically, the legislature created Fla. Stat. § 893.101, which provides in relevant part:

> (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.

§ 893.101, Fla. Stat. (internal citation omitted).

The purpose and effect of this legislative enactment was "expressly to eliminate *mens rea* as an element of a drug offense." *Shelton*, 2011 WL 3236040, at *1. Shelton's *habeas* claim was "that the State's affirmative elimination of *mens rea* . . . from th[e] felony offense[s defined by §893.13] violates [the] due process" clause of the 14th Amendment. *Id.* at *5.

The *Shelton* court began its analysis by citing landmark cases for bedrock principles of law: *Morissette v. United States*, 342 U.S. 246 (1952) for the proposition that, "[t]he requirement to prove some *mens rea* to establish guilt for conduct that is criminalized is firmly rooted" in our

jurisprudence, *Shelton*, 2011 WL 3236040, at *5; *Jones v. United States*, 526 U.S. 227 (1999) and *Patterson v. New York*, 432 U.S. 197 (1977) for the proposition that although the legislature has the authority to define and alter the elements of a criminal offense, it must do so within applicable constitutional constraints, *Shelton*, 2011 WL 3236040, at *5; *Staples v. United States*, 511 U.S. 600 (1994) for the proposition that strict liability crimes (such as § 893.13 subsequent to the 2002 legislative enactments) are constitutional if and only if the penalty imposed is slight, a conviction does not result in substantial stigma, and the statute defining the strict-liability crime regulates inherently dangerous or deleterious conduct, *Shelton*, 2011 WL 3236040, at *5. The court then tested the present version of § 893.13 against the three *Staples* factors.

As to the first two *Staples* factors – severity of punishment and of attendant social stigma – *Shelton's* analysis was uncomplicated and incontrovertible. The crime with which Shelton was charged, delivery of a relatively small amount of cocaine, is made a second-degree felony by the statute and is punishable by up to 15 years imprisonment.[4] This is logarithmically greater than any sentence ever found to be constitutionally permitted when attached to a strict liability crime. *See Shelton*, 2011 WL 3236040, at*7-8 (citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978) (three years imprisonment too severe); *United States v. Engler*, 806 F.2d 425 (3rd Cir. 1986) (two years imprisonment not too severe); *United States v. Wulff*, 758 F.2d 1121 (6th Cir. 1985) (two years imprisonment too severe)).

Regarding the social stigma that accompanies Shelton's judgment and sentence, the *Shelton* court wrote:

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[4] As noted *supra*, Shelton actually received an 18-year sentence because of his status as a habitual felony offender. But even a first-time offender would, under § 893.13, be amenable to sentencing to

> [T]here 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. As the Supreme Court noted, a felony is "as bad a word as you can give to a man or a thing." Convicted felons cannot vote, sit on a jury, serve in public office, possess a firearm, obtain certain professional licenses, or obtain federal student loan assistance. The label of "convicted felon," combined with a proclamation that the defendant is so vile that he must be separated from society for fifteen to thirty years, creates irreparable damage to the defendant's reputation and standing in the community. This social stigma precludes, for example, the ability of a convicted felon to reside in any neighborhood of his choosing or to obtain certain employment.

*Shelton*, 2011 WL 3236040, at *9 (internal citation omitted).

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up to 15 years.

The final, and most analytically complex, prong of the *Shelton* opinion was the court's determination that § 893.13 regulates conduct that, far from being inherently deleterious or dangerous, is inherently innocent. The traditional Anglo-American rule, as noted by the *Shelton* court, is *actus non facit reum nisi mens sit rea* – the act does not make a person guilty unless the mind be also guilty. *Id.* at *1. In rare circumstances, however, the law "requires a man to find out present facts, as well as to foresee future harm, at his peril, although they are not such as would necessarily be inferred from the facts known." Oliver Wendell Holmes, The Common Law 58 (Dover ed. 1991) (1881).[5] When the law imposes such a duty, however, it must cast its net narrowly, restricting itself to situations in which any person should have known that, or at least felt obliged to inquire if, his conduct was regulated by the criminal law.

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

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[5] Thus it is a statutory offence in England to abduct a girl under sixteen from the possession of the person having lawful charge of her. If a man does acts which induce a girl under sixteen to leave her parents, he is not chargeable, if he had no reason to know that she was under the lawful charge of her parents, and it may be presumed that he would not be, if he had reasonable cause to believe that she was a boy. But if he knowingly abducts a girl from her parents, he must find out her age at his peril. It is no defense that he had every reason to think her over sixteen. So, under a prohibitory liquor law, it has been held that, if a man sells "Plantation Bitters," it is no defence that he does not know them to be intoxicating. And there are other examples of the same kind.

*Id.* at 58-9 (citations omitted). As discussed *infra*, the myriad forms of conduct proscribed by § 893.13 involve behaviors far more common and far less offensive than, in Justice Holmes's example,

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

> [T]here is a long tradition throughout human existence of lawful delivery and transfer of containers that might contain substances under innumerable facts and circumstances: carrying luggage on and off of public transportation; carrying bags in and out of stores and buildings; carrying book bags and purses in schools and places of business and work; transporting boxes via commercial transportation – the list extends *ad infinitum*. Under 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.

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the abduction of young women. *Cf. Feliciano v. State*, 937 So.2d 818 (Fla. 1st DCA 2006).

*Shelton*, 2011 WL 3236040, at *12.[6]

Because Fla. Stat. § 893.13 creates a strict liability offense – an offense that expressly eschews any form of *mens rea* – and because the crimes created by § 893.13 fail to meet any of the three conditions required for a strict-liability crime to satisfy constitutional Due Process standards, the *Shelton* court found the statute to be facially unconstitutional.

In the wake of *Shelton*, Florida prosecutors have taken the position that the holding in *Shelton* may be considered persuasive (or, in the prosecution's more dismissive locution of choice, *merely* persuasive) by, but is not binding on, Florida courts. I consider, then, first whether the *Shelton* decision is binding upon me; and second, assuming *arguendo* that it is not binding but "merely persuasive," whether I am persuaded by it.

### III. In the unique circumstances of this case, the opinion of the U.S. District Court in *Shelton* is binding.

Whether, in a context such as this one, the opinion of a federal court is binding upon state courts turns upon the application of two familiar principles. The first is that of federalism, sometimes referred to as "our federalism," *Younger v. Harris*, 401 U.S. 37, 44 (1971) (Black, J.), to emphasize its diacritical role in American jurisprudence. In the absence of an opinion from a Florida

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[6] Because Shelton was convicted under §893.13, his *habeas* claim was necessarily directed to the constitutionality or not of that statute; the court had no occasion to consider other, related Florida statutes. Section 893.13 concerns itself with small, "street-level" crimes of drug possession or delivery. Large-scale drug-dealing is regulated by Fla. Stat. § 893.135, the "trafficking" statute. Section 893.135 makes an interesting contrast with 893.13; the subsections of the former statute typically condemn and punish one who "*knowingly* sells, purchases, manufactures, delivers, or brings into this state," a controlled substance. Fla. Stat. § 893.135(1)(a) (e.s.). Thus a Florida prosecutor who seeks the conviction of an international drug kingpin must prove beyond all reasonable doubt that the defendant's drug-dealing was done knowingly and intentionally. If the same prosecutor seeks the conviction of a student in whose shared room at the frat house a "nickel bag" of marijuana is found; or of a car-pool commuter in whose SUV a single Valium pill for which he or she has no

appellate court determining the meaning of a Florida statute, the construction of that statute by a federal court would be instructive but not controlling. But once the statute has been authoritatively construed by the Florida appellate judiciary, that construction binds lower Florida courts as well as all other American courts (federal or sister-state) as to the meaning of that statute.

The second principle relevant to the issue at bar is that of federal supremacy, *see* U.S. Const. art. VI. Although the meaning of a given Florida statute is ultimately to be determined by Florida courts, the federal constitutionality of that statute is ultimately to be determined by federal courts.

It is undoubtedly true, then, that, "The rulings of lower federal courts [on matters of state law] are not binding on state courts, although they may be persuasive on a point of law." *Pignato v. Great Western Bank*, 664 So.2d 1011, 1015 (Fla. 4th DCA 1995). *Pignato* involved a proper understanding of Florida's intangible tax. Rejecting a construction regarding that tax appearing in a prior opinion of the United States Court of Appeals for the Eleventh Circuit, the *Pignato* court explained, "We do not consider ourselves bound by the Eleventh Circuit's decision, because it construes Florida law, not federal law." *Id.* at 1015.

Of course when we speak of a federal court "construing" a state statute, we mean that the federal court is attempting to make the statute's meaning or import clear where the statute's meaning or import has not been made clear previously. Undeniably a state supreme court is the final arbiter of the meaning of a state statute, and to the extent that cases such as *Pignato* make that point, they border on tautology. In *Shelton*, however, there was no point of state law for the federal court to construe, and the federal court engaged in no act of construction. The Florida Supreme Court held not once but twice that a criminal-intent requirement was lacking in § 893.13, unless one were to be

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prescription is found; no such proof need be offered.

judicially interpolated; and the Florida legislature then amended the statute to reject utterly the proposed interpolation. The *Shelton* court did not *construe* §893.13, *i.e.*, it did not attempt to make the statute's meaning clear where the statute's meaning had not been made clear previously. The *Shelton* court did no more than pose the question: Accepting that construction of the state statute which has been made manifestly clear by both the judicial and legislative branches of the state government, is that statute at odds with the Due Process Clause of the 14th Amendment to the federal constitution? That, to be sure, is purely a question of federal law; and the Florida Supreme Court has "recognize[d], of course, that state courts are bound by federal court determinations of *federal* law questions." *Mobil Oil Corporation v. Shevin*, 354 So.2d 372, 375 n. 9 (Fla. 1978) (England, J.) (emphasis in original) (citing *Ratner v. Arrington*, 111 So.2d 82 (Fla. 3d DCA 1959)).

In response to *Shelton*, the State Attorney's Office for the Eleventh Judicial Circuit has, in statements made to the press, referred to *State v. Dwyer*, 332 So.2d 333 (Fla. 1976), for the notion that Florida trial courts may never look to federal-court decisions for authoritative construction of Florida statutes. But *Dwyer* is a poor choice of authority. For the proposition that Florida appellate courts, and only Florida appellate courts, can propound controlling constructions of Florida statutes, *Dwyer* is not needed; 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. Indeed the holding of *Dwyer,* taken in the context in which that holding arose, compared with the holding in *Shelton*, taken in the context in which *that* holding arose, makes amply clear that *Shelton* is binding on Florida courts.

Prior to *Dwyer*, the Florida Supreme Court had held in *Bradshaw v. State*, 286 So.2d 4 (Fla.

1973) that Florida's disorderly conduct statute was constitutional.[7] The following year, however, in *Wiegand v. Seaver*, 504 F.2d 303 (5th Cir. 1974), the United States Court of Appeals for the Fifth Circuit[8] held the same statute to be unconstitutional. In reliance on *Wiegand* the circuit court for Charlotte County, Florida, then dismissed disorderly-conduct charges against Dwyer. *Dwyer*, 332 So.2d at 334.

On direct appeal the Florida Supreme Court remonstrated with the circuit court, reminding it that, "Where an issue has been decided in the Supreme Court of the state, the lower courts are bound to adhere to the Court's ruling when considering similar issues, even though the [lower] court might believe that the law should be otherwise." *Id.* at 335. What the trial court should have done was denied Dwyer's motion to dismiss in reliance on *Bradshaw*, perhaps expressing in its order a desire that the Florida Supreme Court reconsider its *Bradshaw* holding in light of *Wiegand*.

But this reminder to the trial court of the importance of *stare decisis* and of the judicial chain of command was *dicta*. The actual holding in *Dwyer* was:

> [T]he constitutional objection raised against Florida Statute § 877.03 by *Wiegand, supra*, has been cured. *Wiegand*, noting that this Court had not made a narrowing construction of the statute to exclude from its operation speech protected by the First Amendment, found the statute to be facially overbroad and held it unconstitutional. We have recently made the necessary construction. *White v. State*, 330 So.2d 3 (Fla. 1976).

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[7] Fla. Stat. § 877.03 provides that:

> Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor of the second degree.

[8] At that time the Fifth Circuit included Florida. The United States Court of Appeals for the Eleventh Circuit was not constituted until 1981. *See* http://www.ca11.uscourts.gov/about/index.php.

*Dwyer*, 332 So.2d at 335.

That the captioned language, and not the Supreme Court's lecture to the circuit court about the putatively non-binding nature of federal decisions on Florida courts, is the actual holding of *Dwyer* is underscored by *DeWald v. Wyner*, 674 So.2d 836 (Fla. 4th DCA 1996). In *DeWald*, "The county court for Palm Beach County" took the curious position "that § 877.03 is unconstitutional in light of *Wiegand* and that the Florida Supreme Court's later decision in *State v. Dwyer* does not authorize a contrary conclusion." *DeWald*, 674 So.2d at 837 (internal citations omitted). Reversing, the Fourth District traced the history of the relevant decisions, making clear what, precisely, *Dwyer* stands for:

> *Wiegand* found the [disorderly conduct] statute facially unconstitutional because it had not then been narrowed by authoritative judicial construction to preclude its use to punish protect speech. In *White*, however, the supreme court of our state made that authoritative construction. *Dwyer* merely reiterated that the statute was now valid with its previous limiting construction in *White* and, accordingly, the *Wiegand* holding was cured.

*DeWald*, 674 So.2d at 839.

*Shelton* appears in a litigation context almost diametrically opposite to that of *Dwyer*. As the *Shelton* court carefully notes, the Florida Supreme Court held in both *Chicone v. State*, 684 So.2d 736 (Fla. 1996) and *Scott v. State*, 808 So.2d 166 (Fla. 2002) that criminal intent was part of the *corpus delicti* of every drug crime referenced in Fla. Stat. §893.13, and that every defendant was entitled to have the jury so instructed. *Shelton*, 2011 WL 3236040, at *1. In direct response to these cases, "[o]n May 13, 2002, the Florida Legislature enacted changes to" the statutory law. *Id.* The purpose and effect of the legislative changes was "expressly to eliminate *mens rea* as an element of a drug offense." *Id.*

Compare the sequence of events: In *Dwyer*, the state supreme court found a statute constitutional. A federal court then held that, absent a limiting construction of that statute by that supreme court, the statute was unconstitutional. The state supreme court then supplied the limiting construction. For a state trial court then to find the statute unconstitutional was wrong in any number of ways – with or without reference to the precedential value of federal case law. By contrast, in *Shelton*, the state supreme court had (in *Chicone* and *Scott*) imposed limiting constructions in order to bring a statute into conformity with the requirements of Due Process. The legislature then recast the statute to make it clear beyond peradventure that the supreme court's limiting construction was being rejected and rendered a nullity. In finding the amended statutes unconstitutional, the *Shelton* federal court was simply picking up where the *Chicone* and *Scott* state courts had left off. On what doctrinal or precedential theory could a Florida state court *not* follow *Shelton*?

The prosecution, in its memorandum in opposition to the present motions, makes heroic efforts to interpret Florida cases such as *Johnson v. State*, 37 So.3d 975 (Fla. 1st DCA 2010); *Harris v. State*, 932 So.2d 551 (Fla. 1st DCA 2006); *Taylor v. State*, 929 So.2d 665 (Fla. 3d DCA 2006); *Wright v. State*, 920 So.2d 21 (Fla. 4th DCA 2005); and *Burnette v. State*, 901 So.2d 925 (Fla. 2d DCA 2005), as having considered and rejected a 14th Amendment/Due Process challenge to §893.13. That is more weight than those cases will bear. True, the locution "due process" appears somewhere or other in almost all of these cases. (*Taylor* makes no reference to it). But there are many sources of due process in American jurisprudence. The 14th Amendment to the United States Constitution obliges all the states to secure due process of law to all Americans. Art. I §9 of the Florida Constitution obliges the State of Florida to secure due process of law to all Floridians. And the common law may be a source of protection of due-process rights as well, *see gen'ly State ex rel. Lanz*

*v. Dowling*, 110 So. 522, 523-524 (Fla. 1926). Although the demised Florida cases make some reference to "due process" or "substantive due process," *e.g., Wright*, 920 So.2 at 23, none particularizes the source of due process upon which it relies. In the absence of such particularization I am obliged as a Florida trial court to presume that Florida appellate courts relied upon a Florida-law-based guarantee of due process, whether constitutional or common-law. No Florida case has decided the issue presently before me: whether §893.13 is unconstitutional *by operation of the 14th Amendment to the federal Constitution.* The *Shelton* court reached the same conclusion: "[N]o Florida appellate [court] ... has addressed the constitutionality of [§893.13] under the federal Constitution," *Shelton*, 2011 WL 3236040, at *12; and the Florida cases that appear to give passing consideration to the issue of the constitutionality or not of the statute "contain no analysis of or citation to the tripartite constitutional analysis" required by *Staples* and other U.S. Supreme Court authorities, and employed in *Shelton. Id.*[9] *See also supra* note 3. Accordingly, I am bound to follow *Shelton's* holding that §893.13 violates the 14th Amendment's due process guarantee.

**IV. Even if treated as "merely persuasive," the conclusion in *Shelton* – that Fla. Stat. §893.13 violates Due Process by criminalizing conduct in the complete absence of *scienter* – is irrefragable.**

In his federal habeas petition, Mr. Shelton claimed not merely that Fla. Stat. § 893.13 was unconstitutional as applied to him. He went further, claiming that the statute is facially

[9] Use by the Florida courts of the trope, "substantive due process" confirms me in my conclusion that the Florida courts were relying on Florida constitutional or common law, rather than federal constitutional law, in their analysis. The term of art "substantive due process" has fallen very much out of fashion in federal jurisprudence. *See, e.g.,* David P. Currie, The Constitution in the Supreme Court: The Second Century 1888 – 1986 287 (1990) ("the [United States Supreme] Court ha[s] not taken an argument . . . of substantive due process seriously since 1936").

unconstitutional. *Shelton*, 2011 WL 3236040, at *3.

Although claims of facial unconstitutionality are rare in any context, they are most common in First Amendment jurisprudence. Federal courts have been more receptive ("more" being, as ever, a relative term) to claims of facial unconstitutionality on grounds of First Amendment overbreadth than they have been to other claims of facial unconstitutionality, because of the importance of avoiding "an impermissible risk of suppression of ideas." *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 889 (6th Cir. 2000) (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223-4 (1990)(plurality opinion); *see also United States v. Frandsen*, 212 F.3d 1231, 1236 (11th Cir. 2000) (citing *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998)). Shelton's claim, of course, raised no First Amendment issues.

Another genre of claims of facial unconstitutionality is those made, not pursuant to the First Amendment, but to the Due Process Clause of the 14th Amendment, typically but not necessarily on grounds of vagueness.[10] It is a nice question whether, to bring such a Due Process claim (whether on grounds of vagueness or otherwise), the claimant must allege that there can exist *no* factual circumstances to which the challenged statute could be constitutionally applied.

In *City of Chicago v. Morales*, 527 U.S. 41 (1999), the Court dealt with a city ordinance directed at the problem of street gangs. The challenged ordinance had four elements:

> First, [a] police officer must reasonably believe that at least one of . . . two or more persons present in a "public place" is a "criminal street

[10] As noted, overbreadth is exclusively a First Amendment doctrine. Vagueness, which is a very different thing, may arise in a variety of contexts. To employ the example favored by generations of law professors to distinguish these two constitutional concepts: A statute providing that, "All conduct which the legislature is duly and constitutionally empowered to criminalize is hereby made criminal" would not be overbroad at all, but would be the epitome of vagueness.

> gang member." Second, the persons must be "loitering," which the ordinance defines as "remain[ing] in any one place with no apparent purpose." Third, the officer must then order "all" of the persons to disperse and remove themselves "from the area." Fourth, a person must disobey the officer's order. If any person, whether a gang member or not, disobeys the officer's order, that person is guilty of violating the ordinance."

*Morales*, 527 U.S. at 47. The Court struck down the statute on Due Process vagueness grounds.

In an animated dissent, Justice Scalia cited *United States v. Salerno*, 481 U.S. 739, 745 (1987) for the proposition that:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the *challenger must establish that no set of circumstances exists under which the Act would be valid.* That fact that [a legislative Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.

*Morales*, 527 U.S. at 78-9 (Scalia, J., dissenting) (emphasis in original); *see also id.* at 74 ("When a facial challenge is successful, the law in question is declared to be unenforceable in *all* its applications, and not just in its particular application to the party in suit"); *id.* at 77-78 ("we have . . . required the facial challenge[r] to . . . . establish that the statute was *unconstitutional* in all its applications") (emphasis in original).

Writing for the plurality, Justice Stevens replied that:

> To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself (even though the defendants in that case did not claim that the statute was unconstitutional as applied to them, the Court nevertheless entertained their facial challenge). . . .
>
> We need not, however, resolve the viability of *Salerno's* dictum, because this case comes to us from a state – not a federal – court. . . . [T]he threshold for facial challenges is a species of third party (*jus*

> *tertii*) standing, which we have recognized as a prudential doctrine and not one mandated by Article III of the Constitution. . . . When a state court has reached the merits of a constitutional claim, invoking prudential limitations on the respondent's assertion of *jus tertii* would serve no functional purpose. . . .
>
> Whether or not it would be appropriate for federal courts to apply the *Salerno* standard in some cases – a proposition which is doubtful – state courts need not apply prudential notions of standing created by this Court. . . . Justice Scalia's assumption that state courts must apply the restrictive *Salerno* test is incorrect as a matter of law; moreover, it contradicts essential principles of federalism.

*Id.* at 55 n.22 (internal citations and quotation marks omitted).

The Supreme Court's internecine conflict between the *Salerno* faction and the *Morales* faction persists, and is a matter of profound concern to lower federal courts. *See, e.g., United States v. Rybicki*, 354 F.3d 124, 130-132 (2nd Cir. 2003); *United States v. Torres*, 566 F.Supp.2d 591, 596 n.1 (W.D. Tex. 2008). It need not be a matter of concern here, however; and this for two reasons.

First, as Justice Stevens points out in *Morales*, prudential rather than jurisdictional concerns militate against broad and ready federal adjudication of challenges to the facial constitutionality of state statutes. When state courts pass upon the constitutionality of their own statutes, no such prudential considerations are present. If anything, prudential concerns point in the opposite direction: state courts, whose interpretations of state statutes are dispositive, must provide a forum for prompt and effective determination of such challenges.

Second, any movant who invokes *Shelton* satisfies even the exacting standard of *Salerno*, *i.e.*, he alleges that there exists no set of facts pursuant to which § 893.13 can be constitutional. As the Florida legislature has made abundantly clear, *mens rea* – knowledge, intent, or the like – is *never* "an element of any offense" defined in § 893.13. Fla. Stat. § 893.101(2). The prosecution is never

obliged to plead – much less to prove beyond and to the exclusion of reasonable doubt to a trier of fact – that a defendant charged with any offense within the compass of § 893.13 had any culpable intent. The facts of a given case make no difference. Evidence of a particular defendant's *scienter* may or may not be available, but the prosecution is obliged neither to present such evidence nor to plead its existence. Either this practice is always constitutional or it never is; and so, because the facts of a given case matter not at all, a movant who invokes *Shelton* necessarily claims that there exists no set of facts pursuant to which § 893.13 can be constitutional. He makes this claim as a matter of law.[11] Whether or not his claim is meritorious, his allegations are sufficient to entitle him to an adjudication, even under the difficult *Salerno* standard.

What remains is to consider the merits of the *Shelton* analysis. That § 893.13 defines strict-liability crimes is really not open to discussion. It is a rarity for the Florida legislature, or indeed any legislature, to make express reference to a reported opinion and expressly to adopt or reject that opinion.[12] Precisely that happened here. The Florida Supreme Court held not once but twice that *mens rea* ought to be interpolated into a particular statute. The Florida legislature, referencing those two holdings, passed legislation clearly and categorically rejecting the interpolation of *mens rea* into

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[11] A movant invoking *Shelton* alleges that his Due Process rights are violated, not because he did not know that he was possessing or delivering a controlled substance, but because the prosecution is not required to plead and prove that he knew he was possessing or delivering a controlled substance. That allegation is always true as a matter of law – whether or not a particular defendant had culpable knowledge as a matter of fact. And that being the case, the *Salerno* requirement is met: no set of facts involving prosecution under § 893.13 can be conjured up as to which a *Shelton* claim would not be applicable. Thus it makes no difference for purposes of applying *Salerno* that in many, no doubt the prohibitive majority of, cases the defendants knew perfectly well that they were possessing or delivering controlled substances.

[12] *But see* Fla. Stat. § 933.19, adopting *Carroll v. United States*, 267 U.S. 132 (1925); and §810.015, rejecting *Delgado v. State*, 776 So.2d 233 (Fla. 2000) and other case authorities.

that particular statute. It is undeniably the intention of the legislature that §893.13 create and define, and be understood as creating and defining, strict-liability crimes.

The Due Process Clause of the 14th Amendment to the United States Constitution places limits on the power of the states to impose criminal punishment for conduct as to which criminal intent need not be pleaded or proven. *Staples'* triune test giving effect to those Due Process limitations – a test employed by all courts construing this provision of the federal Constitution – is sedulously set out in *Shelton.* As to the first two prongs of the test, there is little room for debate: no serious suggestion can be made that the punishments and obloquy that accompany conviction under § 893.13 are anything less than severe.

The final consideration is whether the statute casts its net so broadly as to constitute a trap for innocent conduct, and for those who engage in innocent conduct. As the passages from Justice Holmes referenced *supra* at ___ and n.5 illustrate, some conduct is so inherently dangerous that the law-maker is justified in "require[ing] a man to find out present facts, as well as to foresee future harm, at his peril, although they are not such as would necessarily be inferred from the facts known." Perhaps the most common example in Florida law is that of DUI manslaughter, Fla. Stat. § 316.193(3). The perils of drinking and driving are so great that the law is justified in obliging the drunk who gets behind the wheel to submit to punishment for any adverse consequences that follow, whether he intended those consequences or not.

Traditionally the Anglo-American criminal law has proceeded on the premises that we are each free to make our own choices, and we are each responsible for the choices we make. 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. The defendant who chooses to drink and then chooses to drive is punished for the death or injury that his drunken driving causes, even if he never chose to cause that death or that injury. The corporate officers who choose to profit from traffic in hazardous wastes are punished for the harm caused by those wastes, even if those officers never chose that harm. So, too, the law might punish those who choose to possess or deliver cocaine, even if they never chose to inflict the harm that follows from the use of that cocaine. But § 893.13 does not punish those who choose to possess or deliver cocaine; it punishes those who possess or deliver cocaine, whether they chose to do so or not.

And that is the point: Section 893.13 does not punish the drug dealer who possesses or delivers controlled substances. It punishes *anyone* who possesses or delivers controlled substances – however inadvertently, however accidently, however unintentionally. 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. As the *Shelton* court rightly notes, the simple acts of possession and delivery are part of daily life. Each of us engages in actual possession of all that we have on our person and in our hands, and in constructive possession of all that we own, wherever it may be located.[13] Each of us engages in delivery when we hand a colleague a pen, a

[13] As to the crime of possession, and particularly as to the crime of constructive possession, the due process problem resulting from the failure of the statute to require an intent-state is particularly vexing. The "*actus reus*" of possession is not an act at all, but a state of being. I may but need not act to *take* possession of an object; but having taken possession of it, I can and do continue to possess it, without doing any act at all. Inaction will result in my continued possession. Action is required to divest myself of the object, and thus terminate my possession. And constructive possession requires neither action nor even a state of being; the law *presumes* the existence of a state of being upon the basis of which it declares me in possession of something. Thus a crime of constructive possession under §893.13 can be committed by one who neither intends to possess nor acts to acquire possession. For the proposition that courts have a due process obligation to be vigilant against conviction upon such an evanescent predicate, *see United States v. Herron*, 567 F.2d 510, 520-521 and esp. at n. 7 (D.C. Cir. 1977) (Bazelon, C.J., concurring).

friend a cup of coffee, a stranger the parcel she just dropped. What distinguishes innocent possession and innocent delivery from guilty possession and guilty delivery is not merely what we possess, not merely what we deliver, *but what we intend.* As to that – as to the state of mind that distinguishes non-culpable from culpable possession or delivery – § 893.13 refuses to make a distinction. The speckled flock and the clean are, for its purposes, all one.

The prosecution argues that any due process problem is cured because subsections (2) and (3) of § 893.101 hold open the prospect of a defendant asserting and proving his innocent intent-state as an affirmative defense. Subsection (2) provides that, "[K]nowledge 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." Subsection (3) provides that:

> In those instances in which a defendant asserts the affirmative defense [of lack of knowledge or intent], 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. ... [I]n those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption.

If the due process problems anent § 893.13 are obviated by the inclusion of a statutory provision pursuant to which the defendant is called upon to assert and establish his innocent intent-state (over a jury instruction that *actus reus* implies *mens rea*, and that such an implication is sufficient to justify conviction), I see no reason why all *malum prohibitum* crimes cannot be recast in the same fashion.[14] But this prosecutorial argument, however deftly made, is simply a different way

[14] And why stop with *mala prohibita*? At common law, burglary consisted of trespass to a home at night, with intent to commit a felony therein. William Blackstone, IV Commentaries on the Laws of England 224 (Univ. of Chicago ed. 1979) (1769) (citing Sir Edward Coke, 3 Institutes 63). Although the common law allowed some wiggle-room regarding the requirement of a home, Blackstone at 224

of saying that the due process test appearing in the *Staples* line of cases – and indeed the guarantee of due process itself – ought to be abandoned with respect to the very category of prosecutions which that line of cases, and that guarantee, are intended to police. I know of no authority that would justify such a far-ranging departure from traditional understandings of due process; the prosecution cites none; and I decline to invent any. The legislature has power to define crimes and the elements thereof, but it must do so subject to constitutional limitations. The constitutional limitations on the legislature's power to dispense with a *mens rea* requirement as to strict-liability crimes are detailed hereinabove. It would be the exaltation of form over substance to hold that those limitations can be dispensed with (or defeated by an end-run) by making a shibboleth of the form of words, "affirmative defense."

## V. Conclusion

The immediate effect of the present order is the dismissal of charges against all movants –

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("it does not seem absolutely necessary, that it should in all cases be a ... house"), it was adamant on the requirement of intent. "As to the intent, it is clear, that such breaking and entry must be with a felonious intent, otherwise it is only a trespass." *Id.* at 227. If § 893.13, taken together with § 893.101, is constitutional, why could not burglary be defined and prosecuted in the same fashion? The prosecution, in its case in chief, would need to prove only a trespass; the defendant could then go forward on an affirmative defense, *e.g.*, that he entered the dwelling or structure not to rape or kill, but to seek shelter from the elements in what he thought was an abandoned house, or for some other innocent (or at least non-felonious) purpose; and the jury would be instructed that the fact of trespass alone gives rise to a presumption of intent to burgle sufficient to justify conviction. By a parity of reasoning, intent could be read out of all crimes, and rendered no part of the criminal law.

Then the same legerdemain could be worked upon the requirement of *actus reus*. Homicide will be redefined to consist of, "being found within X feet" or yards, or miles, "of a dead body, within Y minutes" or hours, or days, "of the time of death. It is an affirmative defense to this crime that the defendant did not wield the instrument of death. If the defendant presents such an affirmative defense, however, the jury shall be instructed that the defendant's presence within the requisite distance from the decedent within the requisite time-period gives rise to a permissive presumption that the defendant did in fact wield the instrument of death, which presumption shall be sufficient to justify conviction." Oh brave new world!

the overwhelming majority of whom may have known perfectly well that their acts of possession or delivery were contrary to law. Viewed in that light, these movants are unworthy, utterly unworthy, of this windfall exoneration. But as no less a constitutional scholar than Justice Felix Frankfurter observed, "It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end." *Davis v. United States*, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting).

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; and, accordingly, that any prosecution brought pursuant to that statute is subject to dismissal.

SO ORDERED, in chambers in Miami, Miami-Dade County, Florida, this 17th day of August, 2011.

**MILTON HIRSCH**
**CIRCUIT COURT JUDGE**

Copies to: all counsel of record.