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8 Stetson J. Advoc. & L. 97 (2021)

Florida's Prove Yourself Innocent Absurdity: Florida's Prescription Drug Affirmative Defense

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I. Introduction

97. Back in November 21, 2012, the Florida Supreme Court approved for use Standard Jury Instruction 3.6(n) — the so-called "prescription" defense.[2] The affirmative defense asserts that a controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription. Surprisingly, the Court was silent as to which side bears the burden of proof for affirmative defense, instead directing the trial judge to decide the issue and providing two alternatives – one where the burden of proof is on the defense, and another where the burden of proof is on the State. Thus, the standard jury instructions leave unresolved where the burden of proof lies, only pointing to the

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2 1 Fla. Standard Jury Inst. 3.6(n) (2020).

decision in *Dixon v United States*.[3] As of the date of this writing, very little guidance is available to the practitioner for navigating instruction 3.6(n). This article attempts to remedy that deficiency by proposing a useful framework by which trial courts and criminal law practitioners can understand and apply the seemingly contradictory instructions contained in 3.6(n).

II. Summary

98. When there is competent and substantial evidence in the record that tends to establish the prescription defense, the Court must instruct the jury on that defense. If the record includes only a bare allegation of prescription, the instruction placing the burden on the defense should be used. If the evidence includes details such as specific references to either the issuing doctor or the filling pharmacy, the instruction placing the burden on the State should be used.

III. A Brief Story

99. Mrs. Smith is bed-ridden and requires care by her loving husband of 20 years, Mr. Smith. The costs of the medical bills have all but bankrupted them, but they own their modest mobile home and the land that its sits on, and their homestead is protected from creditors in Florida. He occasionally drinks, and this has gotten him in trouble in the past. He cooks for her, bathes her and runs errands for her. Today, although he has been drinking, he drives to the store to pick up his wife's prescription of oxycodone. After buying the medicines, he takes the pill bottle and puts it in his pocket as he runs other errands. While on the way home from his last errand at Lowes, he tries to beat a yellow light, but is stopped by a police officer. The officer leans over next to his window and asks, "Do you have anything on you that I should know about?" Mr. Smith pulls the pill bottle out of his pocket and says, "Well, these are my wife's pills . . . ."

100. Mr. Smith is charged with trafficking in oxycodone, a second-degree felony with a minimum mandatory prison sentence of three years in prison. He is also charged with DUI. He cannot afford the bail, so he sits in jail. At arraignment, the assistant state attorney offers to "allow" him to plea to the reduced charge of possession of oxycodone, a third-degree felony, and be placed on probation for two years.

101. But Mr. Smith decries that he is helping his wife, and that he is only guilty of the DUI. His defense attorney advises him that there is something called an "affirmative defense" and that he was acting as an agent for the lawful prescription holder. So Mr. Smith decides to reject the offer and asks for a jury trial.

3 *Dixon v United States*, 548 U.S. 1 (2006).

102. Mr. Smith sits in jail for 10 months waiting for his trial.

103. When the trial date finally arrives, the assistant state attorney shows the jury that Mr. Smith was in possession of trafficking amounts of oxycodone, including the statements of Mr. Smith telling the officer that this was his wife's prescription. They also show his roadside sobriety exercises, which he failed. The defense attorney moves for a judgment of acquittal on the possession charge, since the state has not proven beyond a reasonable doubt that Mr. Smith did not possess the drugs lawfully. The assistant state attorney argues that he has met all of the elements, and that the burden is on the defense to prove that Mr. Smith possessed the drugs lawfully. The trial court denies the motion.

104. The defense puts on Mr. Smith, who tells his side of the story. His wife also testifies from her wheelchair, sobbing that she needs him to take care of her, and that life has been very hard for the last ten months while he was incarcerated, as her friends and family have not been able to give her the attention that her husband is able to. There is no state rebuttal to this testimony.

105. At closing arguments, the assistant state attorney argues that the burden is on the defense to prove that he possessed the prescriptions lawfully, and that the defendant and the wife have strong reasons to lie, and that she would do so because she is of familial relation to get him out of the fix he is in. The prosecutor contrasts that with the testimony of the officer, who has no reason to lie. This argument, although common in Florida, is improper.[4] The defense concedes the DUI but asks the jury to consider the testimony of the defendant and his wife. The jury convicts. He is sentenced to the minimum mandatory three years in prison.

106. Does this seem far-fetched, or could this really happen? Did the process fail, and if so, how?

IV. Current State of Affairs in Florida

107. This should be an easy question, with the charges being speedily resolved once a prescription is provided. Not in Florida. If the burden of proof is on the defense, then the prosecutor can: disbelieve the prescription holder, file charges, survive a 3.800(c)(4) motion to dismiss,[5] take the charge to jury trial, survive a judgement of acquittal motion,[6] and obtain a felony conviction — even though a valid prescription is actually

4 Steven N. Gosney, *Trial Techniques for a Florida Prosecutor — A Positive Prescription for Ethical Closing Arguments*, 42 AM. J. TRIAL ADVOC. 151 (2018).

5 *State v. Latona*, 75 So. 3d 394, 395 (Fla. 5th DCA 2011).

6 *Celeste v. State*, 79 So. 3d 898, 899–900 (Fla. 5th DCA 2012).

held by the Floridian. How is this so? Because the prosecutor can simply choose to disbelieve the Florida prescription holder. When the burden of proof is on the accused, all the prosecutor has to do is question the credibility of any defense evidence and the Court is obligated to submit the case to a jury, and the jury is free to convict an innocent person.

V. Standard Jury Instruction 3.6(n)

108. Section 893.13(6)(a) Florida Statutes states:

> 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 or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter.[7]

109. A valid prescription is an affirmative defense to prescription drug possession and trafficking in Florida.[8] "The prescription defense is clearly available to those who have a valid prescription written directly on their behalf for the pills in their possession."[9] However, as the commentary to the instructions note, It is undecided whether a defendant may rely on the prescription defense when he or she is charged with possession with intent. [10]

110. The prescription defense has also been extended to those acting on behalf of prescription drug holders, so that an agent of the prescription holder also has an affirmative defense to prescription drug possession and trafficking. This extension derives from sections 465.003(6)(2) and 893.04(2)(a), Florida Statutes (2020), which allow pharmacists to dispense prescription drugs to a patient's agent.[11] In the cases developing this area of law, the applicable legal theory is that the "agent" in possession of the controlled substance received express authority from the prescription holder.[12]

7 Fla. Stat. §{} 893.13(6)(a) (2020).

8 *Ramirez v. State*, 125 So. 3d 171, 175 (Fla. 4th DCA 2013).

9 *McCoy v. State*, 56 So. 3d 37, 39 (Fla. 1st DCA 2010).

10 See *Celeste v. State*, 79 So. 3d 898 (Fla. 5th DCA 2012).

11 Fla. Stat. §{} 465.003(6)(2); Fla. Stat. §{} 893.04(2)(a); *McCoy v. State*, 56 So. 3d 37, 39 (Fla. 1st DCA 2010).

12 *Ayotte v. State*, 67 So.3d 330, 331 (Fla. 1st DCA 2011).

111. Florida case law defines the agency relationship in this context broadly, and agency can be implicitly inferred from the circumstances.[13] In other words Florida law excuses the innocent or lawful possession of a controlled substance, either because the controlled substance was prescribed to the possessor or because the possessor was keeping it for the prescription holder.[14] Restated, express authority is not required to create a valid agency relationship; rather, the prescription holder may provide his or her agent with implied authority to act, or in the example above, hold the pills.[15] In such circumstances, implied authority may be inferred from the facts and circumstances surrounding the parties' relationship.[16]

112. As the Court in *McCoy*, explained:

> In determining whether the defense is available in these situations, the language of the statute combined with existing state pharmaceutical laws are instructive. Specifically, the use of the term "lawfully obtained" in the statute can be read as authorizing possession to only those individuals who have a legally recognized reason for the possession. Pursuant to section 465.003(6), Florida Statutes (2008), pharmacies may lawfully dispense medications to a consumer or his or her agent. Further, a pharmacist may dispense a schedule III controlled substance "when the pharmacist or pharmacist's agent has obtained satisfactory patient information from the patient or the patient's agent."[17] Thus, schedule III controlled substances may be "lawfully obtained" by an agent of the prescription holder who can provide "satisfactory patient information." An agent is "[o]ne who is authorized to act for or in place of another."[18]

113. To standardize this defense, the Florida Supreme Court promulgated the following standard jury instructions for use by criminal law practitioners:

> It is a defense to the charge of [possession] [trafficking via possession] for a person to possess a controlled substance which [he] [she] 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. [19]

114. The commentary to the 3.6(n) defense contains the following advisories:

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13 *Ramirez v. State*, 125 So. 3d 171, 176 (Fla. 4th DCA 2013).

14 *Buhs v. Florida*, 17-14117-CIV, 2018 WL 10323607, at *14 (S.D. Fla. Jan. 11, 2018).

15 *Masuda v. Kawasaki Dockyard Co.*, 328 F.2d 662, 664–65 (2d Cir. 1964).

16 *Thomkin Corp. v. Miller*, 156 Fla. 388, 390 (1945).

17 Fla. Stat. §{} 893.04(2)(a) (2020).

18 BLACK'S LAW DICTIONARY 68 (8th ed. 2004).

19 1 FLA. STANDARD JURY INST. 3.6(n) (2020).

> Like all affirmative defenses[20] and pursuant to Fla. Stat. § 893.10(1), the burden of going forward with evidence of the 'controlled substance was lawfully obtained' defense is upon the defendant. Fla. Stat. §§ 893.10(1), 893.13(6)(a), and 499.03(1) are silent, however, as to the burden of persuasion for the affirmative defense. There is no case law, as of October 2018, as to (1) which party bears the burden of persuasion of the affirmative defense and (2) the standard for the burden of persuasion. Under the common law, defendants had both the burden of production and the burden of persuasion on an affirmative defense by a preponderance of the evidence.
>
> The Florida Supreme Court has often decided, however, that once a defendant meets the burden of production on an affirmative defense, the burden of persuasion is on the State to disprove the affirmative defense beyond a reasonable doubt (e.g., self-defense and consent to enter in a burglary prosecution). In the absence of case law, trial judges must resolve the issue via a special instruction. See the opinion in *Dixon v. United States*,[21] for further guidance.

115. The Florida Jury Instruction on the affirmative defense of prescription then presents two choices:

1. If the burden to prove the affirmative defense is on the defendant under the preponderance of the evidence standard:

   > If you find the defendant proved by a preponderance of the evidence that [he] [she] lawfully obtained the controlled substance 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, you should find [him] [her] not guilty of [possession of a controlled substance] [trafficking via possession]. If the defendant did not prove by a preponderance of the evidence that [he] [she] lawfully obtained the controlled substance 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, you should find [him] [her] guilty, if all the elements of the charge have been proven beyond a reasonable doubt.[22]

2. Or, if the burden of disproving the affirmative defense is on the State under the beyond a reasonable doubt standard.

   > If you find that the State proved beyond a reasonable doubt that the defendant did not lawfully obtain the controlled substance from a practitioner or

20 1 Fla. Standard Jury Inst. 3.6(g) (2020).

21 *Dixon v. United States*, 548 U.S. 1 (2006).

22 1 Fla. Standard Jury Inst. 3.6(n)(2020).

> pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice, you should find [him] [her] guilty, if all of the elements of the charge have also been proven beyond a reasonable doubt. However, if you have a reasonable doubt as to whether the defendant lawfully obtained the controlled substance 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, you should find [him] [her] not guilty of [possession of a controlled substance] [trafficking via possession].[23]

116. But which instruction should be given and when? Objective standards are clearly needed to insure consistent application of the law across Florida. While the comment to the instruction refers practitioners to the opinion in *Dixon v. United States*,[24] for further guidance, that case does not provide sufficient practical tips to be helpful. In order to fill this gap, the following framework for applying 3.6(n) is offered.

VI. Comparison with Other Affirmative Defenses

117. At common law, the burden of proving

> affirmative defenses — indeed, "all ... circumstances of justification, excuse or alleviation" — rested on the defendant.[25] This common-law rule accords with the general evidentiary rule that "the burdens of producing evidence and of persuasion with regard to any given issue are both generally allocated to the same party."[26]

118. For example, the defense of duress (and its companion necessity) allows the defendant to "avoid liability ... because coercive conditions or necessity negates a conclusion of guilt even though the necessary mens rea was present."[27] These defenses concede that a necessary mens rea was formed, but that additional factors may excuse conduct that would otherwise be punishable. Therefore, the existence of duress normally does not controvert any of the elements of the offense itself.[28] Instead, it adds a factor that, if found, excuses the conduct. Thus, Florida requires the defense to prove duress and necessity.[29] Thinking about the defense, duress usually requires additional facts to be

23 1 Fla. Standard Jury Inst. 3.6(n)(2020).

24 *Dixon v. United States*, 548 U.S. 1 (2006).

25 *Dixon v. United States*, 548 U.S. 1, 8 (2006).

26 *Tyler v. State*, 131 So. 3d 811, 813 (Fla. 1st DCA 2014) (quoting 2 J. Strong, McCormick on Evidence § 337 (5th ed. 1999)).

27 *United States v. Bailey*, 444 U.S. 394, 402 (1980).

28 *Dixon v. United States*, 548 U.S. 1, 7 (2006).

29 1 Fla. Standard Jury Inst. 3.6(k) (2020).

adduced that are not elements of a crime. The circumstances of the duress are generally going to be within the unique knowledge of the defendant in a criminal case.

119. Under the same reasoning, the law requires the defense to prove insanity. As in necessity and duress, insanity requires facts that are particularly in the knowledge of the defense. Prior to June 19, 2000, the burden of proof was on the defendant to present evidence of his or her insanity. Once the defendant introduced evidence raising a reasonable doubt of his or her sanity, the presumption of sanity disappeared, and the burden of proof shifted to the prosecution to prove the defendant's sanity beyond a reasonable doubt.[30] As of June 19, 2000 by statute, this burden was shifted to the defendant who now has the burden of proving the defense of insanity by clear and convincing evidence.[31]

120. Conversely, when knowledge is an element that the State must prove, then the burden remains with the State. For example, in *Oliver v. Florida*, the Court held that the defense of lack of knowledge required the following special jury instruction: "Before you can find the Defendant guilty of possession of cocaine, you must find beyond all reasonable doubt that the Defendant had knowledge that the pipes contained cocaine."[32] The reasoning behind Oliver is that knowledge is an element within the charged crime that must be proved by the State under the beyond a reasonable doubt standard.[33]

121. Another instructive case is *Wright v. State*,[34] the "screwdriver case." In this case, an inmate was prosecuted for possession of a weapon by state prisoner for possessing a screwdriver in a correctional facility. The defense raised the affirmative defense that the inmate was rightfully possessed of the screwdriver, as he had been issued the tool by the prison for the purpose of investigating manhole covers on the prison grounds. The Court held that once the affirmative defense of rightful possession had been validly raised by the defense, the State must disprove the rightful possession beyond a reasonable doubt. The State introduced no evidence from which it could be inferred that appellant was not authorized to possess the screwdriver. Therefore, the evidence failed to exclude every reasonable hypothesis of innocence, and the trial court erred in denying appellant's motion for a judgment of acquittal. This case can be directly analogized to the situation where one possesses prescription drugs. Prescription drugs may or may not be legal to possess, depending on whether authorization exists. If the defense brings forward evidence that the affirmative defense of rightful possession exists, then the State must be required to disprove rightful possession. Failure to do so would result in unconstitu-

30 *Yohn v. Florida*, 476 So. 2d 123, 128 (Fla. 1985).

31 Fla. Stat. §{} 775.027(2) (2020).

32 *Oliver v. Florida*, 707 So. 2d 771, 772–73 (Fla. Dist. Ct. App. 1998).

33 See *Leaks v. State*, 748 So. 2d 285, 287 (Fla. 2d DCA 1998).

34 *Wright v. State*, 442 So. 2d 1058 (Fla. 1st DCA 1983).

tional burden shifting. Note that the ability to disprove the authorization is narrow and within the State's control, given due diligence.

122. While greatly impacted by statutory enactments, Florida's law of self-defense requires the State to disprove self-defense.[35] Applying this framework to a self-defense case, in *Spicer v. State*, the court found that once an affirmative defense of self-defense was validly raised by the defense, the State had the burden of proving beyond a reasonable doubt that the affirmative defense does not exist.[36]

123. With that background in mind, the following framework is suggested.

VII. Threshold Burden of Production Should be on the Defense

124. The threshold burden of production should be on the defense. In order to shift the burden, the defense must notify the State of certain specifics as to the source of the prescription — enough so that the State can rebut the prescription. For example, a mere assertion of prescription should not be enough to gain the benefit of the burden shift. Instead, the defense should be required to disclose the identity of the practitioner, or otherwise assert the source of the prescription, either the prescribing doctor or the issuing pharmacy. In an agency situation, the source of the prescription and the identity of the person providing permission should be provided to the State. Absent these specifics, the burden of proof should remain with the defense, as the mere allegation of prescription, without more, does not provide adequate notice to the State of what they must refute. Further, without specifics, the State must disprove an impossibly wide range of possibilities.

125. In support of the burden of production is Florida's Rule 3.200 governing alibi. The affirmative defense of prescription could be properly characterized as an alibi, and the notice requirements of the alibi should be respected. Rule 3.200 requires that, upon written demand of the prosecutor, the defense provide specifics at least 10 days before trial, including witnesses who would tend to establish the alibi. Note that Rule 3.200 also requires the prosecutor to file a witness list of names and addresses of witnesses that they intend to use as rebuttal.[37]

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35 1 Fla. Standard Jury Inst. 3.6(g) (2020).

36 *Spicer v. State*, 22 So. 3d 706, 707 (Fla. 5th DCA 2009).

37 Fla. R. Crim. P. 3.200 (2019)

126. Comparing self-defense to the threshold burden of production in a prescription case, it becomes clear why the burden should remain with the defense until the threshold specificity is met. In a self-defense case, the situation is clear — the parties to the action are known, the time and facts of the altercation are specific. In a prescription case, the State only knows that the accused has possession of a drug, and that a prescription may exist. Thus, the defense is obligated to provide to the State the specifics of the prescription before the burden would shift to the State. This could be done informally or formally. For example, a defendant could provide specifics during his initial interactions, or the prescription could even be present on a bottle seized during the initial encounter. Likewise, a defense attorney who has a valid prescription defense could provide a formal written notice to the State of the specifics of the prescription, such as the prescribing doctor, the issuing pharmacy, or the identity of the prescription holder who provided the agency authority for the accused to possess their prescription.

127. At trial, the judge would have to weigh the sufficiency of the notice to the State to decide where the burden of proof resides. A formal notice by the defense containing specifics would seem to be the safest way for the defense to assure that the State bears the burden. However, once this burden of production is met, the State should be required to refute the prescription defense beyond a reasonable doubt.

VIII. Then Burden of Proof Should be on the State

128. Placing the burden of proof on the State protects the innocent. Using the facts in the story recited at the beginning, there should be two checks on the wrongful conviction. First, the prosecutor should have to come up with some evidence to contradict the defendant's reasonable hypothesis of innocence. If the burden is on the State, failure to do so would result in a granting of the motion for judgment of acquittal. If the burden is on the defense, prosecutors would only have to show actual possession of the prescription drug to overcome an initial motion for judgment of acquittal at the close of the state's case in chief. No matter what the defense presents to the jury, since the burden of proof is on the defense to prove the prescription by a preponderance of the evidence, the jury would be free to disregard the defense's evidence and convict. On appeal the prescription holder would also lose, since for the purposes of appeal the court must draw every conclusion and inference therefrom in favor of the state.[38] Indicia of illegal possession will be present in true unlawful possession cases. For example, in a case of illegal possession, pills would be held loosely or within unusual packaging; the pills would be present with other drug paraphernalia, there would be no relationship, or a distant relationship, between the prescription holder and the defendant, the pills were being sold, etc.

38 *Codie v. State*, 313 So. 2d 754, 757 (Fla. 1975).

129. Practicality would also dictate that the burden should be on the prosecution. In cases where the defendant is innocent, burden shifting to the defense runs a very high risk of wrongful conviction. Prescription drugs have many legal uses and are lawfully possessed by millions of individuals every day. It is not, comparatively, a substance (such as methamphetamine) that has no lawful use in any circumstance. Innocent possessors of prescription medications will usually be close family members or friends. The prosecution will be able to impeach the credibility of those persons as being close to the defendant and willing to lie or make up a story to protect a defendant. When the burden is shifted to the defense, a skeptical jury can discount the testimony of the persons who are in a position to exonerate an innocent person such as loved ones. Therefore, shifting the burden to the defendant to prove his innocence runs a high risk of wrongful conviction.

130. Whether the State must disprove an affirmative defense beyond a reasonable doubt turns on whether the affirmative defense tends to negate an element of the crime alleged. Supporting this proposition is the case *Jackson v. Virginia*.[39] In *Jackson*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires the prosecution to bear the burden of production for all essential elements of the offense. A jury must always be instructed that the prosecution must establish every element of the offense beyond a reasonable doubt. Thus, where a defense serves to negate an element, the defendant cannot, as a practical matter, be made to bear the burden of production. This has been recognized in Florida under Standard Jury Instruction (Criminal) 3.7 that reads "The defendant is not required to present evidence or prove anything."

131. Under the analysis of Dixon, if the affirmative defense goes to the evidence required to be adducted by the prosecution, then the burden of proof should be upon the prosecution. If the affirmative defense instead requires a separate proof, then the burden is on the defense who is asserting the avoidance.

132. In the statute at issue here,[40] whether a person is lawfully or unlawfully possessing the substance is an element of the crime.[41] Thus, the proof of illegal possession is an element of proof in the crime of possession of a controlled substance. Therefore, applying Dixon to the affirmative defense at issue here, the burden of proof should be upon the State. Once the affirmative defense is sufficiently raised, the State should be required to prove illegal possession beyond a reasonable doubt.

39 *Jackson v. Virginia*, 443 U.S. 307 (1979).

40 Fla. Stat. §{} 893.13(6)(a) (2020).

41 *McCoy v. State*, 56 So. 3d 37, 39 (Fla. 1st DCA 2010).

IX. Rule of Lenity and the Constitution

133. The "rule of lenity" is a "deeply-rooted common law principle of statutory construction requiring strict interpretation of ambiguous criminal statutes in favor of the accused."[42] Put another way, "if there is a reasonable construction of a penal statute favorable to the accused, the court must employ that construction."[43] Applied to the prescription drug defense, the trial court should err on the side of placing the burden on the State when the facts narrow the field of circumstance sufficiently for the State to be able, with due diligence, disprove the allegation. Unduly detailed descriptions, technicalities, or additions to the minimal notice requirements laid out above should not be demanded of the defense.

134. The State must retain the burden of proof in drug trafficking statutes to avoid Constitutional problem of strict liability. Instructive is the commentary in *Maestas v. State*.[44] In *Maestas*, the Court upheld the constitutionality of the drug trafficking statutes by reasoning that the State retains the burden in drug trafficking cases. Under the reasoning of *Maestas*, in order to retain the constitutionality of the prescription drug statutes, once validly raised, the State must retain the burden to overcome the prescription defense by proving beyond a reasonable doubt that a person is not lawfully possessed.

135. As *Maestas* states:

> [T]he existence of the affirmative defense set out in section 893.101 undermines the notion that the legislature has created a strict liability crime. To this point, we agree with the reasoning set forth by the First District in its recent opinion of *Flagg v. Florida*:
>
>> [Shelton] misperceives the operation of the affirmative defense in section 893.101. The statute does not, as Shelton implied, require the defendant to establish his innocence by proving a lack of knowledge . . . ; rather, the statute provides that if the defense is raised, the state has the burden to overcome the defense by proving beyond a reasonable doubt that the defendant knew of the illicit nature of the drugs. Furthermore, because lack of knowledge is not a defense to a true strict liability crime, the availability of the affirmative defense in section 893.101 undermines the essential premise in Shelton that the offenses in section 893.13 are strict liability crimes that may not be constitutionally punished as felonies.[45]

42 *Macchione v. State*, 123 So. 3d 114, 120 (Fla. Dist. Ct. App. 2013).

43 *Wallace v. Florida*, 860 So. 2d 494, 497–98 (Fla. 5th DCA 2003).

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

45 *Flagg v. State*, 74 So.3d 138, 140–41 (Fla. 1st DCA 2011).

136. Thus, the Constitutionality of the statute is maintained by requiring a low threshold of production on the defense, and requiring the State disprove the affirmative defense beyond a reasonable doubt.

X. Practical Application

137. Applying the model described above, the formulation would be as follows: In order to instruct on the prescription affirmative defense, the trial court must determine whether there is competent and substantial evidence in the record that tends to establish the defense. Once the court identifies competent and substantial evidence supporting the prescription defense, the trial court must instruct the jury on the prescription defense. If the evidence includes only a bare allegation of prescription, the instruction placing the burden on the defense should be used. If the evidence includes specific verifiable information such as references to either the issuing doctor or the filling pharmacy, the instruction placing the burden on the State should be used. Note that the evidence establishing an affirmative defense can exist in the State's case in chief and does not necessarily require the defense to put on any evidence. Often, though, the defense does put on additional evidence in order to establish the existence of the affirmative defense. In order to overcome a motion for judgment of acquittal, the State must, through rebuttal or inference in its case in chief, produce evidence that would prove beyond a reasonable doubt the non-existence of the affirmative defense.