

## ARTICLES

### MENS REA AND CONSTITUTIONAL LAW: A REPORT CARD FOR THE FLORIDA SUPREME COURT IN *STATE v. ADKINS*

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The Florida Supreme Court's decision in *State v. Adkins*<sup>1</sup> was more widely anticipated than most state supreme court cases interpreting drug possession statutes, because of the checkered history of Florida's possession law. As originally enacted, Section 893.13 of the Florida Statutes was ambiguous regarding its mental requirement, so in *Chicone v. State*<sup>2</sup> the Supreme Court read into the statute a requirement that (in the words of the *Adkins* plurality) the defendant "knew he possessed the substance and knew of the illicit nature of the substance in his possession."<sup>3</sup> The State legislature disagreed, however, enacting Section 893.101, which provides "that knowledge of the illicit nature of a controlled substance is not an element of any offense . . . [; however, the] lack of knowledge of the illicit nature of a controlled substance is an affirmative defense."<sup>4</sup> This action produced a withering wave of criticism from the defense bar, led by the National Association of Criminal Defense Lawyers, criticizing Florida for making drug possession a strict liability

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1. 96 So. 3d 412 (Fla. 2012).

2. 684 So. 2d 736, 737 (Fla. 1996).

3. 96 So. 3d at 415 (plurality). See *Scott v. State*, 808 So. 2d 166, 172 (Fla. 2002) (reaffirming *Chicone*).

4. Fla. Stat. § 893.101(2) (2013). The statute also provides that if the defendant relies on the affirmative defense, proof of possession gives rise to a "permissive presumption" of knowledge of its illicit nature, and the court must instruct the jury on this presumption. *Id.* at § 893.101(3).

offense.<sup>5</sup> When a federal district court in Florida accepted this argument, declaring the statute unconstitutional as amended,<sup>6</sup> the stage was set for a momentous decision from the Florida Supreme Court.

Well, the justices blew it. A fractured Court produced a three-justice plurality opinion, two concurrences in the result (one with opinion and one without), and two dissents (one with opinion and one without). This judicial train wreck brought out the grader in me; what follows is my assessment of each of the justices' seriously flawed efforts.

### I. CANADY, POLSTON, AND LABARGA: C-

The most perceptive point made in the plurality opinion—authored by Justice Canady and joined by Chief Justice Polston and Justice LaBarga—appears early, as Justice Canady notes that Section 893.101 “does not eliminate the element of knowledge of the presence of the substance,” but only knowledge of the substance’s illicit nature.<sup>7</sup> This distinction could have been used to craft a narrow opinion denying the imputation of strict liability and limiting the impact of the legislature’s amendment, which all of the Court might have supported. Indeed, all of the hypotheticals of inadvertent possession mentioned in Justice Perry’s dissent could be characterized as a lack of knowledge of the presence of the substance, as opposed to lack of knowledge of the substance’s illicit nature.<sup>8</sup> But this opportunity to form a majority opinion was spurned.

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5. See e.g. Norman L. Reimer, *Focus on Florida: A Report and a Case Expose a Flawed Justice System*, 35 *Champion* 7, 8 (Sept. 2011) (deriding the Florida legislature’s stripping of the intent requirement “from one of the most serious of felony offenses”); Norman L. Reimer, *Intentionally ‘Without Intent’—Florida vs. Mens Rea*, 35 *Champion* 7, 7 (Feb. 2001) (stating that Florida has breached one of the most essential facets of our criminal justice system).

6. *Shelton v. Secretary, Dep’t of Corrects.*, 802 F. Supp. 2d 1289, 1315 (M.D. Fla. 2011), *rev’d*, 691 F.3d 1348 (11th Cir. 2012) (stating that the Anti-Terrorism and Effective Death Penalty Act requires deference to state court decision).

7. *Adkins*, 96 So. 3d at 416 (plurality).

8. This includes a person with drugs that another has placed in his or her luggage, shopping or book bag, purse, box or package, home, pill bottle, or car. See *id.* at 431–432 (Perry, J., dissenting) (describing a number of such hypothetical scenarios); *id.* (detailing Justice Perry’s sixteen examples of innocent possession). These defendants can all claim lack of knowledge of the presence of the substance. The holder of the pill bottle may know that there is something in the bottle, but if he or she thinks it is aspirin rather than oxycodone, that person lacks knowledge of the presence of oxycodone.

Instead the plurality opinion launches a lengthy justification of the use of strict liability in criminal statutes,<sup>9</sup> relying first on the United States Supreme Court's 1922 decision in *United States v. Balint*,<sup>10</sup> supplemented by the Court's 1971 decisions in *United States v. Freed*<sup>11</sup> and *United States v. International Minerals & Chemical Corp.*<sup>12</sup> Justice Pariente's concurrence in the judgment amply explains the limited relevance of these decisions, as they deal with largely regulatory "public welfare offenses," as opposed to statutes like Florida's principal tool in the War on Drugs.<sup>13</sup>

Despite this shaky foundation, the plurality goes on to distinguish the rather more prominent Supreme Court cases questioning strict liability in criminal cases: *Lambert v. California*,<sup>14</sup> *Smith v. California*,<sup>15</sup> and *United States v. X-Citement Video, Inc.*<sup>16</sup> *Smith* and *X-Citement Video* are different because the statutes in those cases potentially infringed on free expression while "[S]ections 893.13 and 893.101 . . . do not interfere with any constitutionally protected rights."<sup>17</sup> *Lambert* is

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To the argument that this construction of "substance" leaves no scope for the affirmative defense, one response is that the defense applies to the defendant who thought that his or her possession of oxycodone was not a crime, perhaps because of the existence of an ambiguous prescription or because of a mistake of law.

9. *Id.* at 417–418 (plurality).

10. 258 U.S. 250, 254 (1922) (upholding strict liability for failing to register and pay tax on the distribution of certain drugs, despite a maximum potential sentence of five years' imprisonment).

11. 401 U.S. 601, 609 (1971) (upholding strict liability regarding the possession of unregistered firearms).

12. 402 U.S. 558, 565 (1971) (upholding strict liability regarding the shipping of corrosive fluids).

13. See *Adkins*, 96 So. 3d at 425–427 (Pariente, J., concurring in the result) (quoting a 1993 federal district court discussion of *Balint*: "The statute [upheld in *Balint*] . . . predated the era during which all possession and sale of drugs came to be regarded as serious crimes." *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 507 (E.D.N.Y. 1993)).

The plurality also cites *State v. Gray*, 435 So. 2d 816, 819–820 (Fla. 1983), as support for strict liability in serious crimes (witness tampering in *Gray*), but as the portion of the *Gray* opinion quoted by the plurality shows, the case deals not with the propriety of strict liability, but rather with whether the witness tampering statute requires general or specific intent. *Id.* at 418–419.

14. 355 U.S. 225, 229 (1952) (explaining that the crime of failure to register as a felon requires knowledge of duty to register).

15. 361 U.S. 147, 152 (1959) (penalizing possession of obscene material requires knowledge of material's obscenity).

16. 513 U.S. 64, 65–66 (1994) (criminalizing possession of child pornography requires knowledge of underage status of participant).

17. *Adkins*, 96 So. 3d at 421 (plurality).

distinguishable<sup>18</sup> because it involved “inaction,” i.e., failure to register, while Florida’s drug statutes require an “affirmative act”<sup>19</sup>—though one may question how affirmative the act of possession is,<sup>20</sup> especially constructive possession.<sup>21</sup>

Another set of opinions, this time from the State Supreme Court’s own precedents, proved more difficult to distinguish. As quoted by the plurality, *Schmitt v. State*<sup>22</sup> holds that “a due process violation occurs if a criminal statute’s means is not rationally related to its purposes and, as a result, it criminalizes innocuous conduct.”<sup>23</sup> Similarly, *In re Forfeiture of 1969 Piper Navajo*,<sup>24</sup> *State v. Saiez*,<sup>25</sup> *State v. Walker*,<sup>26</sup> and *Delmonico v. State*<sup>27</sup> struck down, as not reasonably related to a legitimate legislative purpose, statutes that criminalized possession of items that may be held lawfully but that did not require proof of intent to use the item illegally. Together these cases seem to require proof of knowledge of the illicit nature of a possessed drug, which would otherwise be “innocuous conduct,” the punishment of which would not be reasonably related to any legitimate goal of the legislature.

The plurality distinguishes these cases with the assertion that “[S]ections 893.13 and 893.101—unlike the provisions we invalidated in *Schmitt*, *1969 Piper Navajo*, *Saiez*, *Walker*, and

18. See also *State v. Georgetti*, 868 So. 2d 512, 519 (Fla. 2004) (requiring knowledge of the obligation to register in the prosecution of a sex offender for failure to register). This case is distinguished on the same ground.

19. *Adkins*, 96 So. 3d at 420–421 (plurality).

20. See e.g. *State v. Green*, 789 So. 2d 1180, 1180 (Fla. 5th Dist. App. 2001) (carrying another’s gun from house to truck during a move constitutes possession by convicted felon).

21. See generally Charles H. Whitebread II & Ronald Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 Va. L. Rev. 751 (1972).

22. 590 So. 2d 404, 413 (Fla. 1991) (disallowing prosecution for possessing a depiction of physical contact with a minor’s genitals or other private areas, clothed or unclothed).

23. *Atkins*, 96 So. 3d at 420 (plurality) (citing *Schmitt v. State*, 590 So. 2d 404, 413 (Fla. 1991)).

24. 592 So. 2d 233, 236 (Fla. 1992) (disallowing confiscation of airplanes containing extra fuel capacity).

25. 489 So. 2d 1125, 1126 (Fla. 1986) (holding that the crime of possessing credit card embossing machines requires proof of intent to use the machine illegally).

26. 461 So. 2d 108, 108 (Fla. 1984) (adopting Chief Judge Grimes’ opinion in *State v. Walker*, 444 So. 2d 1137 (Fla. 2d Dist. App. 1984), which found that possessing lawfully obtained drugs not in original packaging without proof of any other illegality is unconstitutional).

27. 155 So. 2d 368, 370 (Fla. 1963) (possessing spearfishing equipment in Monroe County is only a crime if there is proof of intent to use equipment illegally).

*Delmonico*—are rationally related to the Legislature’s goal of controlling substances that have a high potential for abuse.”<sup>28</sup> Justice Canady’s support for this statement betrays it as a bald ipse dixit. Possession of a controlled substance without proof of knowledge of its nature, writes the plurality, is not innocuous conduct—though that seems exactly what the Florida Supreme Court held in *Walker* when it adopted a district court of appeal opinion that possession of a controlled substance not in its original packaging was unconstitutional “[w]ithout evidence of [other] criminal behavior.”<sup>29</sup> Even more surprising are these statements. First, “[t]here is no constitutional right to possess contraband. . . . Nor is there a protected right to be ignorant of the nature of the property in one’s possession.”<sup>30</sup> Yet as Justice Perry’s dissent demonstrates, there are countless situations in which one can blamelessly be in unknowing possession of a controlled substance, situations that common sense—and the Due Process Clause—suggest deserve protection.<sup>31</sup> Second, “a person in possession of a controlled substance should be aware of the nature of the substance as an illegal drug.”<sup>32</sup> Huh? One can easily possess even valuable items without being aware of their nature. Third, “possession without awareness of the illicit nature of the substance is highly unusual.”<sup>33</sup> Perhaps (though Justice Perry disagrees<sup>34</sup>), but possession without awareness is precisely the focus of the challenge raised in *Adkins*.

According to the plurality, the statute’s affirmative defense, which it easily finds constitutional, adequately addresses the

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28. 96 So. 3d at 421 (plurality).

29. *Walker*, 444 So. 2d at 1140. One could argue against the broad concept of substantive due process exercised in *Walker* and its kindred Florida Supreme Court decisions; see *infra* n. 70 and accompanying text (detailing the freewheeling approach of court opinions regarding substantive due process), but the plurality did not choose this straightforward path, instead distinguishing the cases on quite flimsy grounds.

30. *Atkins*, 96 So. 3d at 421 (plurality).

31. See *supra* n. 8 and accompanying text (showing examples of innocent possession of illicit substances); see also *Unwitting Drug Mule Sues Ford*, Houston Chron., updated July 31, 2013, 7:54 a.m. (available at <http://www.chron.com/cars/article/Unwitting-South-TX-drug-mule-sues-Ford-Motor-Co-4697508.php>) (discussing the situation where drug traffickers hid marijuana in Magallanes’ truck, using replacement keys supplied by a Ford dealership; Magallanes’ drug conviction in a federal court in Texas was subsequently overturned).

32. *Atkins*, 96 So. 3d at 421 (plurality).

33. *Id.* at 421–422.

34. *Infra* nn. 62–63 and accompanying text.

problem of unknowing possession.<sup>35</sup> The plurality's broad reasoning in support of strict liability, however, would justify a statute without any affirmative defense. Given the propensity of the Florida legislature to expand liability for drug possession, as evidenced by the statutes at issue in *Adkins*, nothing in the plurality opinion would prevent the legislature from abolishing the affirmative defense, instead relying on prosecutorial discretion to deal with cases of unknowing possession. That is a danger against which the plurality offers no protection.

## II. PARIENTE: C+

Justice Pariente's concurrence in the result begins by noting that Florida's criminalization of unknowing possession of a controlled substance is "clearly out of the mainstream."<sup>36</sup> Only Washington mimics Florida's position but avoids the "staggering penalties" that Florida imposes without proof of knowledge of the substance's illicit nature.<sup>37</sup> Nevertheless, the Justice concurs in the plurality's result, because of the existence of the affirmative defense.<sup>38</sup>

This result is curious because Justice Pariente so powerfully refutes the plurality's reasoning regarding strict liability in criminal statutes. She demonstrates at length that the plurality's reliance on *Balint*, *Freed*, and *International Minerals & Chemical Corporation* is misplaced, delving deeply into *Balint*'s history,<sup>39</sup> while using the United States Supreme Court's 1952 decision in *Morissette v. United States*,<sup>40</sup> as well as a treatise written by Professor Wayne LaFave, "a leading authority in the area of criminal law," to establish the fundamental primacy of mens rea.<sup>41</sup>

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35. *Atkins*, 96 So. 3d at 422 (plurality); see also *id.* at 421 (stating that a person in possession of a substance would almost necessarily have to know that it was illegal to do so).

36. *Id.* at 423 (Pariente, J., concurring in result).

37. *Id.* at 423-424 n. 1.

38. *Id.* at 424. Justice Pariente also emphasizes that the prosecution must prove the defendant's knowledge of the presence of the substance. *Id.* at 424-425; *supra* nn. 8-12 and accompanying text.

39. *Id.* at 425-427; *supra* n. 15 and accompanying text.

40. 342 U.S. 246 (1952).

41. *Atkins*, 96 So. 3d at 428 n. 5 (Pariente, J., concurring in result) (citing *Morissette*, 342 U.S. at 246).

What saves the statute, according to Justice Pariente, is the existence of the affirmative defense. Following similar holdings of the Washington and North Dakota Supreme Courts,<sup>42</sup> she concludes that “[a]n affirmative defense that affords the defendant with an opportunity to place his or her culpability at issue hampers the concerns of innocent criminalization and a violation of due process.”<sup>43</sup> The use of the verb “hampers” suggests that these concerns continue to exist but are sufficiently abated. As a principal abatement, Justice Pariente points out that once the defendant asserts the affirmative defense, “the trial court must then instruct the jurors to find the defendant ‘not guilty’ if they ‘have a reasonable doubt on the question of whether [the defendant] knew of the illicit nature of the controlled substance.’”<sup>44</sup> Thus a defendant who can raise a reasonable doubt about knowledge of the nature of the substance possessed should be entitled to an acquittal—which seems tantamount to requiring the prosecution to prove such knowledge beyond a reasonable doubt.

There are considerable problems with this variation on the argument of “no harm, no foul.” First, like the plurality,<sup>45</sup> Justice Pariente assumes that the legislature will not repeal the affirmative defense. Her concurrence in the judgment, however, provides support for such legislative action: while arguing in a footnote that shifting the burden of persuasion to the defendant is not unconstitutional, she comments that “removing a component of mens rea from the offense does not amount to shifting the burden of proof; rather, the Legislature has chosen to redefine what conduct amounts to an offense under the Act.”<sup>46</sup> If the legislature has this broad power to redefine the crime, what reasoning would prevent Florida’s legislators from deciding that the affirmative defense was a mistake and should be repealed?

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42. *Id.* at 429–430 (citing *State v. Holte*, 631 N.W.2d 595 (N.D. 2001) (reading an affirmative defense into a strict liability statute); *State v. Michlitsch*, 438 N.W.2d 175 (N.D. 1989) (same); *State v. Bradshaw*, 98 P.3d 1190 (Wash. 2004) (same); *City of Kennewick v. Day*, 11 P.3d 304 (Wash. 2000) (same); *State v. Cleppe*, 635 P.2d 435 (Wash. 1981) (same)). As noted by Justice Pariente, North Dakota subsequently amended its drug possession statute to require mens rea. *Id.* at 429.

43. *Atkins*, 96 So. 3d at 430.

44. *Id.* (quoting Fla. Stand. Jury Instr. (Crim.) 25.2 (2012)).

45. *Supra* n. 42 and accompanying text.

46. *Atkins*, 96 So. 3d at 430 n. 7 (Pariente, J., concurring in result).

But even more likely is a legislative decision to modify the burden of persuasion regarding the affirmative defense, which highlights the second defect in Justice Pariente's "no harm, no foul" argument. The statute itself is silent regarding the burden of persuasion; the pattern instruction quoted in the concurrence relied, no doubt, on Florida's (judge-made) default rule that absent a contrary statement by the legislature, an affirmative defense must be disproved beyond a reasonable doubt.<sup>47</sup> The Florida legislature could override that decision, as it has done regarding the defenses of entrapment and insanity.<sup>48</sup>

A third defect of the "no harm, no foul" approach—one that applies even if the Florida legislature leaves intact the affirmative defense and its burden of persuasion rules—is that it disregards one of the few clear lines left in thinking about criminal law: the concept of the elements of the offense. The constitutionality of a statute, whether under the Due Process Clause, the Eighth Amendment, or any other constitutional provision, ought to be judged from the perspective of those elements, without regard to affirmative defenses.<sup>49</sup> To do otherwise pulls one down a slippery slope that ends, as the United States Supreme Court, through Justice Lewis Powell, once suggested, with the legislature defining "felonious homicide," punishable by life imprisonment, as causing the death of another,

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47. See *Smith v. State*, 826 So. 2d 1098, 1099 (Fla. 5th Dist. App. 2002) (discussing the burden of proof).

48. See Fla. Stat. § 775.027 (stating that the insanity defense requires proof by clear and convincing evidence); Fla. Stat. § 777.201 (stating that the entrapment defense requires proof by a preponderance); but cf. *Munoz v. State*, 629 So. 2d 90, 101 (Fla. 1993) (limiting the preponderance requirement in entrapment defense to proof of government inducement).

One could argue that the legislature has already lowered the burden on the prosecution by requiring a jury instruction that proof of possession gives rise to a "permissive presumption" of knowledge of the substance's illicit nature. See *supra* n. 4 (detailing Fla. Stat. § 893.101). This "thumb on the scale" instruction seems designed to ease the State's path to a conviction, i.e., to lower its burden of persuasion. See generally Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harv. L. Rev. 1187, 1215–1216 (1979) (detailing two kinds of permissive inferences).

49. See generally John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1365–1388 (1979) (applying the United States Constitution to *In re Winship*, 397 U.S. 358 (1970)). "The constitutional focus should be . . . on what state law required the government to prove in order to establish liability in the first instance. [The Constitution] should be taken to require proof beyond a reasonable doubt of a constitutionally adequate basis for the punishment authorized." *Id.* at 1381.



but with the affirmative defense that the defendant caused the death neither intentionally nor recklessly.<sup>50</sup>

Justice Pariente's concurrence notes the manifold problems with the Florida drug statutes' embrace of strict liability, but then airily dismisses them, because of the affirmative defense. She repeatedly states that she stands ready to assist any defendant truly disadvantaged by the statutory provisions,<sup>51</sup> but seems to have deprived herself of all of the logical tools with which to do so.

### III. PERRY: D

Dissenting, Justice Perry could have written a careful opinion, distinguishing the plurality's strict liability precedents as Justice Pariente does,<sup>52</sup> and relying on the due process decisions to which the plurality gives such short shrift.<sup>53</sup> Instead, following the lead of the National Association of Criminal Defense Attorneys and other amici,<sup>54</sup> the dissent launches a blustery indictment against the statute, as if it had no mens rea requirement at all.<sup>55</sup>

According to Justice Perry, the plurality opinion "shatters bedrock constitutional principles,"<sup>56</sup> "breaks . . . sacred law,"<sup>57</sup> "sets alarming precedent, . . . offends all notions of due process, and threatens core principles of the presumption of innocence and burden of proof."<sup>58</sup> Moaning, "What will become of the innocent?,"<sup>59</sup> the dissent exclaims, "Oh brave new world! . . . 'Brave' indeed, in the most foreboding sense of that word."<sup>60</sup> As any

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50. *Mullaney v. Wilbur*, 421 U.S. 684, 698–699 (1975); see also *Patterson v. New York*, 432 U.S. 197, 224 n. 8 (1977) (Powell, J., dissenting) (explaining when a state statute would pass muster).

51. *Atkins*, 96 So. 3d at 424, 430–431 (Pariente, J., concurring in result).

52. *Supra* nn. 38–39 and accompanying text.

53. *Supra* nn. 23–33 and accompanying text.

54. *Supra* n. 5 and accompanying text.

55. For a discussion of the mental requirement remaining in the statute after its amendment, see *supra* n. 8 and accompanying text.

56. *Atkins*, 96 So. 3d at 431 (Perry, J., dissenting).

57. *Id.* at 434.

58. *Id.* at 435.

59. *Id.* at 433 (quoting *Coffin v. United States*, 156 U.S. 432, 455 (1895)).

60. *Id.* at 434 (quoting *State v. Washington*, 18 Fla. L. Weekly 1129, 1134 n. 14 (11th Cir. 2011), *rev'd*, 2012 WL 2400879 (Fla. 2d Dist. App. 2012)).

persuasive writer ought to know, such an over-the-top performance convinces only those who are already in agreement.

Amidst the bluster, however, are some pearls. Justice Perry presents sixteen different examples of innocent possession, all of them satisfying the elements of the statute, adding that the list of potential situations is “endless.”<sup>61</sup> This enumeration powerfully questions the plurality’s assertion that innocent possession is rare.<sup>62</sup> He also implicitly questions the concurrence’s “no harm, no foul” reasoning<sup>63</sup> by discussing the practical burdens of raising the affirmative defense (“conducting discovery, calling witnesses, and otherwise crafting a case”<sup>64</sup>) and the possibility of pleading guilty to a lesser, but still unjustified, charge in order to avoid those burdens and the risk of their failure.<sup>65</sup>

Justice Perry might have woven these elements into the careful opinion outlined above, but he chose not to. Instead, he bought into the overblown rhetoric with which the defense bar had attacked Florida’s drug law and ended up preaching to that choir only.

#### IV. QUINCE: C

Justice Quince dissented without an opinion. She deserves credit for not joining Justice Perry’s dissent, for the reasons mentioned above, but wasted the dissenter’s crucial opportunity to influence the future course of law by clearly stating her views. As one who spent her career in the criminal justice system on the side of the State, her reasons for finding the statute unconstitutional would have been particularly illuminating, but she kept us in the dark.

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61. *Id.* at 431–432.

62. *Id.* at 431.

63. *See supra* nn. 36–51 and accompanying text (detailing the explanation behind Justice Pariente’s concurrence).

64. *Atkins*, 96 So. 3d at 433 (Perry, J., dissenting).

65. *Id.* at 431–432 (explaining *Shelton*, 802 F. Supp. 2d at 1308). The jury instruction presuming knowledge of the substance’s illicit nature from its possession, *see supra* nn. 4, 48 (emphasizing the legislative crafting of the law), despite its “permissive” status, adds to the pressure to plead, *see Atkins*, 96 So. 3d at 431, 434 (Perry, J., dissenting) (explaining scenarios of innocent possession and how a suspect might react).

## V. LEWIS: F

An even greater disappointment is Justice Lewis' decision to concur in the result without writing an opinion. Not only are we deprived of his reasoning, but his position in the case was crucial.<sup>66</sup> If Justice Lewis had mostly agreed with the plurality, that opinion would have seemed to express the views of a majority. If on the other hand his position had been close to Justice Pariente's, her concurrence would have been the controlling opinion, as it would have provided the fourth (and fifth) vote for upholding the statute. If instead Justice Lewis' reasoning had put him somewhere between the plurality and Justice Pariente, his opinion would have been controlling as the fourth vote for the statute.

Surely one of a justice's paramount duties is to make the law clear, and by that standard Justice Lewis failed miserably. We simply do not know what the law is following *Adkins*: Does the plurality opinion control? Justice Pariente's concurrence? Or some unknown position lying between the plurality's reasoning and Justice Pariente's? Justice Lewis' inaction leaves us with these paralyzing questions.

## VI. SAMPLE ANSWERS

Students frequently want to see what would have gotten an A. As previously suggested,<sup>67</sup> I would have given an A to an opinion construing the statute narrowly, so that the State would have to prove knowledge in cases of innocent possession like those cited in Justice Perry's dissent. Such an opinion would have had to confront the claim that this construction flouts the intent of the Florida legislature, but an adequate response would be the

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66. See generally Harry Lee Anstead et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 *Nova L. Rev.* 431, 460–461 (2005) (footnote omitted) (“A separate opinion that concurs in result, only can constitute the fourth vote necessary to establish a decision under the Florida Constitution, but the effect in such a case is that there is no majority opinion of the Court and thus no precedent beyond the specific facts of the controversy at hand.”).

An additional error of both Justices Pariente and Perry is that they refer to the plurality's reasoning as the opinion of a “majority.” 96 So. 3d at 425 (Pariente, J., concurring in result); *id.* at 431 (Perry, J., dissenting).

67. See *supra* nn. 8–13 and accompanying text (describing the differences in the opinions).

doctrine of constitutional avoidance, that before facing serious constitutional issues, a court should be absolutely certain that the legislature wishes to raise those issues.<sup>68</sup>

Other opinions earning an A would have directly confronted the due process holdings in *Schmitt v. State, In re Forfeiture of 1969 Piper Navaho*, *State v. Saiez*, *State v. Walker*, and *Delmonico v. State* regarding the criminalization of “innocuous conduct.”<sup>69</sup> An opinion upholding the statute could have cast doubt on these decisions, perhaps even overruling one or more of them, because of the freewheeling concept of substantive due process they exemplify.<sup>70</sup> Conversely, an opinion could have struck down the statute squarely relying on these cases.<sup>71</sup>

A final candidate for an A (perhaps even an A+) would have been an opinion relying not on due process, but on the protection against cruel and unusual punishment. Such an opinion would begin by outlining the United States Supreme Court’s confused doctrine regarding the burden of persuasion, which appears to allow the legislature to translate any element of an offense into an affirmative defense.<sup>72</sup> The opinion would next note that the only sensible way to limit this power is to apply the cruel and unusual punishment analysis to the elements of the offense, without regard to any affirmative defenses.<sup>73</sup> Finally, the opinion would note that it is certainly cruel and unusual to impose any

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68. See e.g. *Jones v. United States*, 526 U.S. 227, 239–240 (1999) (explaining that courts will interpret statutes to not implicate the United States Constitution when they can).

69. See *supra* nn. 24–27 and accompanying text (detailing the cases the plurality uses).

70. The United States Constitution’s Due Process Clause probably would not be construed so broadly, see *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (holding that “[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended”), but there is a persuasive argument that similar state constitutional provisions should be given wider scope, see generally William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535, 550 (1986) (describing the Due Process Clause as being a “floor” of protection that states build upon).

71. Justice Perry’s dissent cites none of these cases; neither does Justice Pariente’s concurrence in the result.

72. *Supra* n. 50 and accompanying text; see generally Jeffries & Stephan, *supra* n. 49, at 1334–1335 (describing affirmative defenses and the shifting burden of proof).

73. See Jeffries & Stephan, *supra* n. 49, at 1365–1388 (detailing various ways the United States Constitution is applied to criminal law); *supra* n. 51 and accompanying text (arguing that the constitutionality of a law should be examined only in light of the constitutional provisions in question).

criminal penalty in cases of possession without knowledge of the illicit nature of the item possessed.<sup>74</sup>

### VII. ON SECOND THOUGHT

When the average grade given is somewhere south of C-, a professor should wonder whether he is being too harsh. Maybe Justice Pariente's C+ could be moved to a B- and the plurality's C- to a straight C. Justice Quince's C could be a C+, and Justice Perry's D could become a C-.

But, what to do with Justice Lewis' F? On reconsideration, perhaps there was insight in his apparent failure. Perhaps he surveyed what his colleagues had written and decided to give none of it precedential value, to leave the matter to another day, maybe in his Court, maybe in another. After all, you can't fix a train wreck, but sometimes you can walk away from it. I'm feeling generous: change his F to an A-.

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74. *Cf. Robinson v. Cal.*, 370 U.S. 660, 667 (1962) (finding that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold"). How different is coming into possession of property without knowledge of its illicit nature from coming into possession of the bacteria or virus that causes a cold? This opinion could also note that its reasoning supports the results in *Schmitt*, 1969 *Piper Navajo*, *Saiez*, *Walker*, and *Delmonico*.

