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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. **SC13-318**

KERRICK VAN TEAMER, :

Respondent. :

____________________________/

ANSWER BRIEF OF RESPONDENT

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
v.	:	CASE NO. **SC13-318**
KERRICK VAN TEAMER,	:	
Appellee.	:	

__________________________/

ANSWER BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

This case is before the Court on discretionary review of the decision of the First District Court of Appeal in Teamer v. State, 108 So. 3d 664 (Fla. 1st DCA 2013). Citations to the Petitioner's Initial Brief will appear as "IB," followed by the appropriate page number, e.g., (IB,1).

STATEMENT OF THE CASE AND FACTS

Nothing added.

SUMMARY OF THE ARGUMENT

ISSUE I

Whether the mere discrepancy between the observed color of a vehicle and the color indicated on motor vehicle registration records establishes a reasonable suspicion of ongoing criminal activity.

Deputy Knotts had a hunch – but that's all he had.

ISSUE II

The imposition of felony punishment for the offense of trafficking in a controlled substance violates due process.

The imposition of felony punishment for an offense not requiring proof of mens rea (in this case, knowledge of the illicit nature of the substance) violates due process under the United States Constitution. The constitutional violation may be remedied by reduction of the sentence to a misdemeanor. See United States v. Wulff, 758 F. 2d 1121 (6th Cir. 1985) (imposition of felony punishment for an offense not requiring proof of mens rea or guilty knowledge violates due process; such offense may be punished only as a misdemeanor)(citing Staples v. United States, 511 U.S. 600 (1994)).

[**NOTE:** Mr. Teamer advances this issue in the alternative, in the event that the State prevails on ISSUE I, or if the Court declines to apply the exclusionary rule. This issue was preserved for appellate review by Teamer's motion to correct sentence pursuant to Rule 3.800(b)(2). This sentencing issue was not decided in State v. Adkins, 96 So. 3d 412 (Fla. 2012), in which this Court rejected a facial challenge to chapter 893 in its entirety. This issue represents a constitutional challenge to section 893.101, Florida Statutes, "as applied" to a case resulting in felony punishment for

an offense not requiring proof of mens rea, and comes within the scope of an "as applied" constitutional challenge as discussed in Justice Pariente's concurring opinion in State v. Adkins. The Court may consider this issue because this Court has jurisdiction of the entire case. See e.g., Williams v. State, 38 Fla. L. Weekly S99 (Fla. May 10, 2013)(although the district court did not "pass upon" the second certified question which therefore did not qualify as an independent basis for jurisdiction, the second certified question may be addressed because the Court has jurisdiction of the entire case); State v. T.G., 800 So. 2d 204, 210 n. 4 (Fla. 2001).]

ARGUMENT

ISSUE I

Whether the mere discrepancy between the observed color of a vehicle and the color indicated on motor vehicle registration records establishes a reasonable suspicion of ongoing criminal activity.

STANDARD OF REVIEW

In reviewing an order on motion to suppress, the appellate court reviews the trial court's factual findings for competent, substantial evidence. Connor v. State, 803 So. 2d 598, 608 (Fla. 2001). The application of the law to the facts is reviewed de novo. Id. In the present case the facts are undisputed. This case involves only the application of the law to the facts. The standard of review is, therefore, de novo.

MERITS

The district court correctly reasoned that the mere discrepancy between the observed color of Mr. Teamer's vehicle and motor vehicle records did not establish a reasonable suspicion of ongoing criminal activity. Specifically, the district court reasoned that the Fourth Amendment protects against unreasonable searches and seizures. In determining whether a seizure is reasonable, the courts must balance the officer's "concern" that a vehicle may be stolen or that the plates were swapped from

another vehicle against the citizen's right under the Fourth Amendment to travel on the roads free from governmental intrusions. Teamer v. State, 108 So. 3d 664, 667 (Fla. 1st DCA 2013)(citing State v. Diaz, 850 So. 2d 435, 439 (Fla. 2003)).

> The real test is one of reasonableness, which involves balancing the interests of the State with those of the motorist.

State v. Diaz, 850 So. 2d 435, 439 (Fla. 2003).

Mr. Teamer had an interest in operating his vehicle free from unreasonable seizure or detention. The State had an interest in policing the unlawful transfer of a license plate from the assigned vehicle to an unauthorized vehicle, as proscribed criminally in section 320.261, Florida Statutes. The dispositive question is whether the mere discrepancy in color observed by Deputy Knotts established a "reasonable" suspicion of a violation of section 320.261, Florida Statutes, or theft of a motor vehicle.

The reasonableness of the officer's suspicion may be gauged by assessing the likelihood that such a color discrepancy will indicate of a violation of section 320.261, Florida Statutes, or theft. Painting one's vehicle is, of course, innocent conduct. The mere painting of one's vehicle is not indicative of unlawful transfer of a license plate or theft. If the State determined, as a matter of policy, that accurate registration records were useful in policing violations of the criminal law, the State

would have promulgated a regulation requiring owners to timely report a change in color of the vehicle. The State has no such regulation. In comparison, the State does require vehicle owners to report any change in their address within 20 days of such change. See, § 320.02(4), Fla. Stat. (2012). But even this requirement does not appear intended to aid in the enforcement of the criminal law.

The reasonableness of the officer's suspicion may also be gauged by examining the purpose of motor vehicle registration. Registration serves two basic purposes: (1) facilitation of revenue collection, and (2) facilitation of the State's interest in maintaining highway safety and enforcement of the civil traffic code. Motor vehicle registration is not specifically directed at enforcement of the criminal laws of the State of Florida. In comparison, registration of sex offenders is a regulation designed to protect the people of the State from violations of the criminal law and to aid in the prevention of crime and apprehension of criminal offenders. See, § 943.0435, Fla. Stat. (2012).

As noted by the State, the courts must evaluate the reasonableness of the officer's suspicion under the totality of the circumstances. The present case is most unusual, however, because the officer relied on only one articulable fact or circumstance - color discrepancy - to support his suspicion. In a futile search for corroborating circumstances, the State claims "Deputy Knotts did not stop

Respondent's vehicle solely because there was a discrepancy in color of the vehicle, but, instead, it was because of what the discrepancy represented." (IB,14). In this sense, the State suggests that the officer's speculative inference rises to the level of an articulable fact or circumstance which contributes to the totality of the circumstances. The crime suspected cannot be regarded as a fact or circumstance which serves to establish a reasonable suspicion of the crime suspected. This is a classic example of circular reasoning.

The State also assails the decision below with one principal weapon - mischaracterization. The State relies on the following pronouncement from the decision below:

> any discrepancy between a vehicle's plates and the registration may legitimately raise a concern that the vehicle is stolen or the plates were swapped from another vehicle.

(IB,15)(quoting Teamer v. State, 108 So. 3d 664, 667 (Fla. 1st DCA 2013). The State then mischaracterized the phrase "may legitimately raise a concern" by suggesting that the district court held that Deputy Knotts had a reasonable suspicion of criminal activity. (IB,15). The State then argued that the district court ignored its own finding out of concern for ensnaring an innocent motorist. (IB,15). The district court did not find that the officer had a "reasonable suspicion" of criminal activity. To the

contrary, the district court explained that

> the relevant inquiry is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of noncriminal acts."

Teamer v. State, 103 So. 3d at 667 (citing U.S. v. Sokolow, 490 U.S. 1, 10 (1989) (quoting Illinois v. Gates, 462 U.S. 213, 243-244, n.13 (1968)).

> However, an investigatory stop must be predicated on something more than an "inchoate and unparticularized suspicion or 'hunch.'"

Teamer v. State, 103 So. 3d at 667, citing Terry v. Ohio, 392 U.S. 1, 27 (1968)).

> The question before this court, therefore, is whether an inconsistency in color alone is a sufficient basis to support an officer's articulable and reasonable suspicion that a particular person is committing a crime *in the absence of any other suspicious behavior or circumstances* to allow a temporary seizure of a person for an investigatory stop.

Teamer v. State, 103 So. 3d at 667 (emphasis in original). The district court ultimately held that a "color discrepancy alone" does not warrant an investigatory stop and therefore held that Deputy Knotts did not have a "reasonable suspicion" of criminal activity. Teamer v. State, 103 So. 3d at 670. Contrary to the State's assertion, the district court did not ignore a finding of reasonable suspicion. The district court held that the deputy did not have a reasonable suspicion.

The State's argument invites this Court to descend a slippery slope. Suppose the registration records reasonably suggest that a particular vehicle is owned by a female, i.e., Jane Doe. A police officer then observes the specific vehicle being driven by a man. Does the officer have a reasonable suspicion that the vehicle is stolen because it is being driven by someone other than the owner? No, because the competing innocence inference that someone other than the owner has permission to drive the vehicle is reasonable. Suppose a Miami police officer observes a car with Georgia license plates. Does the officer have a reasonable suspicion that the car is stolen because the car is "not where it belongs?" No, because the competing innocent inference is that the car was driven lawfully to Miami from Georgia. Suppose the records indicate that a particular vehicle is registered to an owner who resides at 122 Elm Street in Tallahassee, Florida. The particular vehicle, however, is seen parked in a driveway at 16 Oak Street in Pensacola. Does the officer have a reasonable suspicion that the vehicle is stolen because it is "not where it belongs." No, because the competing innocent inference is that the owner drove the car to Oak Street in Pensacola. Similarly, the fact that the color of Mr. Teamer's vehicle did not match the color noted on registration records did not give rise to a reasonable suspicion of criminal activity because the competing innocent inference that he painted the vehicle was reasonable (particularly in light of the fact that he had no obligation to report the

change in color). These examples demonstrate that a single observed inconsistency with motor vehicle registration records is not a "reasonable" predictor of criminal activity.

The sole fact of a discrepancy between the color observed and the color noted on vehicle registration records is not enough to establish a reasonable suspicion of criminal activity. Deputy Knotts had a hunch - but that's all he had. Mr. Teamer asks the Court to adopt the well reasoned opinion of the district court below and to disapprove the contrary expression found in Aders v. State, 67 So. 3d 368 (Fla. 4th DCA 2011).

Good faith exception

The Petitioner argues, in the alternative, that application of the exclusionary rule "would serve little purpose." (IB,19). The "law available to the officer," Aders, permitted the stop of Teamer's vehicle based solely on the discrepancy in color. (IB,19).

> The exclusionary rule would not provide deterrence in the instant case because the officer in the instant case relied on the legal authority of the Fourth District and could not anticipate the law would change.

(IB,19). This argument is misplaced for two reasons: (1) this specific argument was not preserved for review; and (2) the officer could not have "relied" on Aders because

the officer stopped Teamer's vehicle more than a year prior to the issuance of the Aders decision.

The Petitioner's claim of "good faith exception" was not preserved for review. The specific claim that the exclusionary rule is not appropriate in this case was not argued to the trial court. Nor was it argued to the district court. It is argued for the first time in this Court. As such, the State waived this argument.

Neither should the State be heard to argue that the trial court's decision to admit the evidence should be affirmed under the "tipsy coachman" or "right for any reason" rule. The trial court's "ruling" was not that the evidence should be admitted. The trial court's "ruling" was that Deputy Knotts had "reasonable suspicion" to stop Mr. Teamer's vehicle. There is no other basis *in the record* to determine that Deputy Knotts had reasonable suspicion to justify the vehicle stop such as to support application of the tipsy coachman doctrine.

Second, there is no basis in the record to find that Deputy Knotts relied on Aders v. State, 67 So. 2d 368 (Fla. 4th DCA 2011), to justify the stop of Teamer's vehicle. The State's position may be premised upon Davis v. United States, 131 S. Ct. 2419, 180 L.Ed.2d 285 (2011), although the State failed to cite Davis. In Davis, the Supreme Court of the United States held:

> Evidence obtained during a search conducted in reasonable

> reliance on binding precedent is not subject to the exclusionary rule.

Davis v. United States, 131 S. Ct. at 2429. Davis has no application to the present case because the Aders decision was issued on July 27, 2011, whereas the stop of Mr. Teamer's vehicle occurred on June 22, 2010, more than one year prior to the issuance of the Aders decision. (R.I,3; II,21,48). It is clear that Deputy Knotts could not have stopped Mr. Teamer's vehicle in "reasonable reliance" of the Aders decision.

For these reasons the Court should reject the State's plea to abstain from applying the exclusionary rule.

ISSUE II

The imposition of felony punishment for the offense of trafficking in a controlled substance violates due process.

STANDARD OF REVIEW

This is a legal issue to be reviewed de novo.

PRESERVATION

The sentence imposed violated appellant's federal and state constitutional rights to due process of law. The sentence of 6 years in prison for trafficking in a controlled substance exceeds the maximum sentence that may be constitutionally imposed for an offense not requiring proof of mens rea, in accordance with the principles expressed in Staples v. United States, 511 U.S. 600 (1994). "A sentence that patently fails to comport with statutory or constitutional limitations is by definition illegal" within the meaning of Rule 3.800(a). State v. Mancino, 714 So. 2d 429 (Fla. 1998). An "illegal" sentence may be preserved for appellate review via Rule 3.800(b)(2).

> A motion to correct any sentencing error, including an illegal sentence, may be filed as allowed by this subdivision.

Rule 3.800(b)(2); see, Jackson v. State, 983 So. 2d 562, 573 (Fla. 2008); Flowers v.

State, 965 So. 2d 1233 (Fla. 1st DCA 2007); James v. State, 932 So. 2d 431 (Fla. 3d DCA 2006); Holland v. State, 882 So. 2d 510 (Fla. 4th DCA 2004).

This issue was preserved for direct appeal by Mr. Teamer's motion to correct sentence pursuant to Rule 3.800(b)(2), and the trial court's ruling thereon. Mr. Teamer also argued this issue in the district court.

MERITS

[**NOTE:** This argument is not foreclosed by State v. Adkins, 96 So. 3d 412 (Fla. 2012), because this specific argument was neither raised nor decided in Adkins. This is an "as applied" constitutional challenge within the scope of the concurring opinion of Justice Pariente in State v. Adkins.]

In Chicone v. State, 684 So. 2d 736 (Fla. 1996), the supreme court held, as a matter of statutory construction, that the state must prove beyond a reasonable doubt that the possessor of cocaine knew of the illicit nature of the item in his possession. In this sense, Chicone was consistent with the earlier supreme court opinion in State v. Dominguez, 509 So. 2d 917 (Fla. 1987), which held in a trafficking case that the state must prove as an element of the offense that the defendant knew the substance was cocaine.

The holding of Chicone is multi-faceted: **(1)** the plain language of the possession of cocaine statute imposes no *mens rea* requirement, Id. at 742 (text

accompanying note 10); **(2)** absent *mens rea*, possession of cocaine is a strict liability offense, Id. at 739, quoting Frank v. State, 199 So. 2d 117 (Fla. 1st DCA 1967), and Rutskin v. State, 260 So. 2d 525 (Fla. 1st DCA 1972), 743, quoting Liparota v. United States, 471 U.S. 419, 426 (1985), 743, n.11; **(3)** the imposition of felony punishment for a strict liability offense violates due process, Id. at 742-743, citing United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); Staples v. United States, 511 U.S. 600, 617-618 (1994); **(4)** it is presumed that the legislature did not intend to enact an unconstitutional statute, Id, at 744; **(5)** it is necessary, therefore, to "save" the constitutionality of the possession of cocaine statute by inferring, as a matter of judicial construction, the *mens rea* element of knowledge of the illicit nature of the substance, Id. at 741-744.

After Chicone the Florida legislature came to the view, at least with respect to controlled substances, that the *mens rea* requirement, the bedrock principle of Anglo-American criminal law, was no longer a sound public policy. The legislature dispensed with the *mens rea* requirement by enacting section 893.101, Florida Statutes. Section 893.101(1), Florida Statutes, states that the holding of Chicone - that the state must prove that the defendant knew of the illicit nature of the substance - was "contrary to legislative intent." Section 893.101(2), Florida Statutes, provides:

> 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.

The enactment of section 893.101, Florida Statutes, however, did not "overrule" Chicone. The legislature could not "overrule" the constitutional aspect of Chicone because the separation of powers principle confers upon the judiciary the sole authority to determine whether a statute is constitutional. Marbury v. Madison, 5 U.S. 137 (1803); Bush v. Schiavo, 885 So. 2d 321, 329-30; § 20.02(1), Florida Statutes (2002). On the other hand, it is the legislature which possesses the sole authority to determine the elements of a criminal offense. Giorgetti v. State, 868 So. 2d 512, 516 (Fla. 2004). It is correct to say, therefore, that the enactment of section 893.101, Florida Statutes, "superseded" Chicone, but only in part. Chicone's ultimate holding, that the *mens rea* element will be inferred as a matter of judicial construction, may not stand.

By the enactment of section 893.101, Florida Statutes, the legislature eliminated the mens rea requirement from all chapter 893 offenses. For example, suppose that Mrs. Jones asks her husband to carry an item across the street to her neighbor, Mrs. Smith. The item is a clear plastic bag containing a white powdery substance. Mr. Jones does not inquire as to the nature of the substance, and it appears

to him to be ordinary table salt. While crossing the street Mr. Jones encounters a police officer who, in a consensual encounter, requests to examine the bag. After a consensual examination and field test, the substance is found to be cocaine. Under the section 893.101 clarification, Mr. Jones may be found guilty of possession of cocaine despite his lack of criminal intent.

The elimination of the mens rea requirement carries implications pursuant to the due process clauses of the federal and state constitutions. See State v. Oxx, 417 So. 2d 287, 289 (Fla. 5th DCA 1982)(power of legislature to dispense with *mens rea* and punish irrespective of criminal intent limited by constitutional constraints); United States v. Cordoba-Hincape, 825 F.Supp. 485, 515-518 (E.D. New York 1993); United States v. Heller, 579 F.2d 990 (6th Cir. 1978). As a general rule convictions for offenses not requiring proof of mens rea, also known as public welfare offenses, carry relatively light penalties and the conviction does no grave damage to the offender's reputation. Staples v. United States, 511 U.S. 600, 617-618 (1994) (citing Morisette v. United States, 342 U.S. 246, 256 (1952)). Accordingly the Supreme Court, in Staples, held that a felony conviction and imprisonment for ten years would be "incongruous" with a strict liability offense. Staples, 511 U.S. at 617. In State v. Giorgetti, 868 So. 2d 512 (Fla. 2004), the Florida Supreme Court held the Florida sex offender registration statute must be construed to carry a *mens rea* requirement

because a felony conviction and sentence of 6 ½ years was incompatible with conviction for a strict liability offense. In so holding, the Florida Supreme Court also recognized that the requirement of criminal intent is less necessary where the penalties commonly are relatively small and conviction does no grave danger to the offender's reputation. Id. at 517, quoting Francis Bowes Sayre, Public Welfare Offenses, 33 Columb. L. Rev. 55, 72 (1933)(stating that it is a "cardinal principle" of public welfare offenses that the penalty not be severe). In United States v. United States Gypsum Co., 438 U.S. 422 (1978), the Supreme Court opined that imposition of a felony conviction and sentence of three years imprisonment was inconsistent with an offense not requiring proof of *mens rea*.

Given that a felony conviction and sentence of 6 years imprisonment is incongruous with a conviction for an offense not requiring proof of mens rea, the question presented is what is the maximum sentence permissible, consistent with due process, for the offenses for which appellant was convicted? The correct analytical framework was discussed in Staples v. United States, 511 U.S. 600 (1994). First, the stigma that attaches to a "felony" conviction is inconsistent with an offense not requiring proof of mens rea. The authority is clear.

> [P]unishing a violation as a felony is simply incompatible with the theory of the public welfare offense.

Chicone, 684 So. 2d at 742, quoting Staples, 511 U.S. at 617-618. Furthermore, the Supreme Court of the United States noted a number of cases approving of relatively short jail sentences as punishment for strict liability offenses, i.e., six months and three months. Staples, 511 U.S. at 616, citations omitted; see also, Tart v. Commonweath of Massachusetts, 949 F.2d 490 (1st Cir. 1991)(maximum of thirty days imprisonment for strict liability offense does not violate due process); United States v. Heller, 579 F.2d 990, 994 (6th Cir. 1978)(maximum term of incarceration for strict liability offense is one year).

Also helpful is the test for finding a due process violation:

> The elimination of the element of criminal intent does not violate due process where (1) the penalty is relatively small, and (2) where conviction does not gravely besmrich.

United States v. Wulff, 758 F.2d 1121, 1124 (6th Cir. 1985)(citing Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960)). See also, United States v. Cordoba-Hincape, 825 F.Supp. 485 (E.D. New York 1993)(exhaustive analysis of constitutional dimensions of *mens rea* principle, strict liability offenses, and describing statutory rape as an exception to the rule limiting penalties for strict liability offenses).

The relationship between Chicone and section 893.101, Florida Statutes, invites the following syllogism. The imposition of felony punishment for an offense

not requiring proof of mens rea is unconstitutional; trafficking in a controlled substance is an offense not requiring proof of mens rea; the offense of trafficking in a controlled substance is, therefore, unconstitutional. While the syllogism seems logical, the particulars of the law demonstrate that it not entirely correct in the legal sense. In United States v. Balint, 258 U.S. 250 (1922), the Supreme Court held that a charging document was not legally deficient for failing to allege *mens rea* in the charge of a criminal offense. Specifically, the Supreme Court held that a tax revenue statute may impose criminal penalties as a means of narcotics regulation without requiring proof that the defendant knew that the narcotics he sold were of the type proscribed by the statute. The imposition of criminal penalties for violations of public welfare regulations does not violate due process. Id. The rationale supporting criminal punishment for public welfare offenses states that such punishment is necessary, or at least helpful, in protecting the public from the negligence of those who deal in dangerous items. Francis Bowes Sayre, Public Welfare Offenses, 33 Columb. L. Rev. 55 (1933).

In Balint, the Supreme Court considered the constitutionality, vel non, of the omission of mens rea from the elements of a federal drug regulation. In Balint, however, the Supreme Court was not presented with any question concerning the appropriateness of sentence upon conviction. Rather, Balint presented an issue

arising at the pleading stage. The question was whether the indictment was legally insufficient for failing to allege that the defendants knew that the substance they sold was opium. Resolving the question, the Supreme Court held that regulations enacted in furtherance of the police power, i.e., public welfare offenses, do not necessarily adhere to the common law requirement of proof of mens rea. In reviewing the text of the taxing statute, the Court observed that the "manifest purpose" of the statute was to regulate the business of dealing in dangerous drugs and to enforce the regulation by criminal penalty. Under such circumstances, the Court concluded, Congress intended to dispense with the traditional common law mens rea requirement. Thus, the Court held that the failure to allege mens rea in the charging document did not constitute a denial of due process.

Balint does not control the present issue because the Supreme Court, in Balint, did not consider whether the imposition of felony punishment would affect the constitutional inquiry. In Balint, the defendant had not yet been convicted, much less sentenced. The constitutionality of felony punishment for a strict liability offense was not ripe for review and, therefore, not decided.

United States v. Freed, 401 U.S. 601 (1971), and Shelvin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910), are cases of the same ilk. In Freed, the Supreme Court ruled that the trial court erred in dismissing the indictment charging a violation

of the National Firearms Act for failure to allege scienter, i.e., knowledge that the hand grenades in the defendant's possession were not registered under the Act. While holding that the indictment need not allege scienter, or mens rea, the Court did not hold that felony punishment would be constitutional because that issue was not ripe for adjudication; the defendant had not yet been convicted and sentenced.

It is notable that Freed and Staples involved applications of the same federal statute, 26 U.S.C. § 5861(d). In Freed, mens rea was not required. In Staples, mens rea was required. The only means of harmonizing these seemingly contradictory results is by realizing that the constitutionality of felony punishment for a strict liability offense was not actually at issue in Freed, since that case was still at the pleading stage when presented to the Supreme Court.

In Shelvin-Carpenter Co. v. Minnesota, the statute at issue authorized both civil damages and felony punishment depending upon the degree of the defendant's culpability for trespass and harvesting of timber on state lands. Id., 218 U.S. at 62, n.1. The defendant, however, was held liable only for monetary damages. Id., 218 U.S. at 64. The Court's holding that mens rea need not be alleged or proven did not constitute approval of felony punishment for an offense not requiring proof of mens rea. See also, Stepniewski v. Gagnon, 732 F. 2d 567 (7th Cir. 1984).

Also relevant in this context are United States v. Dotterweich, 320 U.S. 277

(1943), and United States v. Park, 421 U.S. 658 (1975). In each of these cases, the Supreme Court held that convictions for misdemeanor regulatory offenses did not violate due process. In Dotterweich, the defendant was found guilty of shipping adulterated food in violation of a federal act. The Court ruled that the defendant may be liable for the acts of his corporation, even without a showing of mens rea on his part. But the offense of conviction was a misdemeanor. In Park, the defendant was likewise convicted under the Federal, Food, Drug, and Cosmetic Act, for holding adulterated food for sale. As in Dotterweich, the Court ruled that the defendant could be convicted based upon the acts of his corporation even without a showing of mens rea on his part. Again, the offense of conviction was a misdemeanor. The Court's opinion makes clear that the act also provided, in particular circumstances, for felony punishment, but the felony provision was not at issue in Park.

In Staples v. United States, 511 U.S. 600 (1994), the Supreme Court strongly implied that the imposition of felony punishment for an offense not requiring proof of mens rea would be unconstitutional.

> Close adherence to the early cases . . . might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense. In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare rationale to interpret any statute defining a felony offense as dispensing with *mens rea*.

Id. at 618. In Chicone, the Florida Supreme Court likewise stated that the imposition of felony punishment was "incongruous with crimes that require no *mens rea*." Chicone, 684 So. 2d at 743.

The legislative insistence that a conviction for possession of a controlled substance does not require proof of *men rea* seems to compel the conclusion that the statute is unconstitutional. Chicone held, in part, that the possession statute was unconstitutional for lack of *mens rea*. The enactment of section 893.101, Florida Statutes, simply confirmed the judicial determination that the possession statute, by its plain language, did not require *mens rea*. The legislature cannot "overrule" the constitutional ruling of the judiciary. Ergo, the possession statute is unconstitutional. But that does not end the inquiry.

After finding the possession statute unconstitutional the supreme court, in Chicone, "saved" the statute by inferring a *mens rea* requirement. Since the judiciary can no longer save the possession statute by inferring a *mens rea* element, the question next presented is whether the judiciary can save the possession statute by alternative means. This question must be answered affirmatively.

The constitutional right of substantive due process protects a number of interests including the availability or harshness of punishment or other remedies imposed against citizens by government actors. Westerhide v. State, 831 So. 2d 93,

104 (Fla. 2002)(citing Dept. of Law Enforcement v. Real Property, 588 So. 2d 957, 960 (Fla. 1991)). The imposition of felony punishment is incompatible with the theory supporting the public welfare offense. The tension between the punishment and the theory may be resolved, however, by mitigating the punishment available for violation of the public welfare offense. Relevant precedent is found in the federal decisions. In United States v. Wulff, 758 F.2d 1121, 1124 (6th Cir. 1985), the circuit court concluded that the district court properly dismissed an indictment charging a felony violation of the Migratory Bird Treaty Act. The court concluded that a felony prosecution was not permissible because the statute did not require *mens rea*, and the potential penalty of a felony conviction and two year imprisonment would violate due process. The circuit court, however, cited United States v. St. Pierre, 578 F.Supp. 1424, 1429 (D.S.D. 1983), for the proposition that a conviction may be sentenced pursuant to the misdemeanor provision of the Act. These federal authorities are perfectly consistent with Chicone.

From the above authorities, Mr. Teamer distills the following rules. No offense under chapter 893, Florida Statutes, requires proof of mens rea or criminal intent.[1]

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[1] In the present case, the jury was erroneously instructed, without objection, on a fourth element of trafficking - "Kerrick Van Teamer knew that the substance was cocaine" (knowledge of the illicit nature of the substance). (R.I,71; II,142). This instruction was erroneous and in contradiction of Hernandez v. State, 56 So.

Defendants who act without criminal intent may be convicted under chapter 893. However, since Mr. Teamer's offense of conviction may encompass innocent conduct, the maximum punishment available consistent with due process is the misdemeanor punishment of imprisonment not to exceed one year.

CONCLUSION

Based upon the argument and authority presented in ISSUE I, Mr. Teamer respectfully requests that the Court approve the decision of the district court below and lift the Stay of the District Court's Mandate. Based upon the argument and authority presented in ISSUE II Mr. Teamer requests, in the alternative, that the Court vacate his sentence and remand with instructions to impose misdemeanor punishment.

3d 752, 758 n. 5 (Fla. 2010). This erroneous instruction must be considered a nullity because neither the parties by stipulation, nor the trial court, possesses the authority to "rewrite" the law by adding or subtracting elements of the criminal offense.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Jay Paul Kubica, Office of the Attorney General, the Capitol, at crimapptlh@myfloridalegal.com, as agreed by the parties, and by U.S. Mail to Appellant, Mr. Kerrick Van Teamer, DOC # P12434, Santa Rosa Correctional Institution, 5850 E Milton Rd., Milton, FL 32583-7914, on this 22nd day of July, 2013.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Times New Roman, 14 point.

Respectfully submitted,

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