IN THE SUPREME COURT OF FLORIDA

FOURTH DISTRICT

GEORGE WRIGHT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC _____
	)	L. T. NO. 4D04-499
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

PETITIONER=S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and appellee in the lower courts. In this brief the parties will be referred to as they appear before the Court.

STATEMENT OF THE CASE AND FACTS

Petitioner, convicted of possessing cocaine and sentenced to two years in prison, sought review in the Fourth District Court of Appeal, asserting, on substantive due process grounds, that section 893.101, Florida Statutes (2003)[1], amended to remove

[1] Section 893.101 reads:

> **893.101. Legislative findings and intent**
>
> (1) The Legislature finds that the cases of *Scott v. State*, Slip Opinion No. SC94701 (Fla. 2002) and *Chicone v. State*, 684 So.2d 736 (Fla. 1996), holding that the state must prove that the defendant knew of the illicit nature of a controlled substance found in his or her actual or constructive possession, were contrary to legislative intent.
>
> (2) The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter.
>
> (3) In those instances in which a defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or

guilty knowledge as an element of possession of a controlled substance and adding lack of knowledge of the illicit nature of a controlled substance as an affirmative defense, was facially unconstitutional. *Wright v. State*, No. 4D04-499 (Fla. 4th DCA June 15, 2005). Summarizing petitioner=s argument, the district court said, A[h]e characterizes the statute as removing an element of a crime, here the *mens rea* of guilty knowledge, and making the lack of it an affirmative defense, thereby improperly shifting to a defendant the burden to disprove.@ *Id.* Slip op. at 1-2. The district court

disagreed with petitioner=s argument stating:

> We recognize that a poorly drawn piece of legislation can create an Aillusory@ affirmative defense, requiring a defendant to attempt to prove the case for his or her innocence, but allowing no chance of success. However, such is not the case in this instance. This statute removes

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> constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption provided in this subsection.

> guilty knowledge as an element, but does not require the defendant to prove or disprove knowledge. It is optional to raise lack of knowledge as a defense. The statute simply provides that once this defense is utilized, a permissive presumption attaches, allowing the jury to draw an inference from the facts. It is mandatory and conclusive presumptions that are prohibited. *Fitzgerald v. State*, 339 So. 2d 209, 211 (Fla. 1976). Further, there is a rational purpose for this presumption, and it is tied to a legitimate governmental interest. Accordingly, we reject Appellant=s substantive due process challenge to the facial constitutionality of section 893.101, Florida Statutes, expressly declaring it valid.

Id. at 2.[2]

Notice to invoke the discretionary jurisdiction of this Court was timely filed on July 12, 2005. This jurisdictional brief now follows.

SUMMARY OF THE ARGUMENT

POINT ON APPEAL

This Court has discretionary jurisdiction under article V, section 3(b)(3), Florida Constitution, to review *Scott v. State*, 30 Fla. L. Weekly D1444b (Fla. 4th DCA June 8, 2005), because the decision expressly declares valid section 893.101, Fla. Stat. (2003). Section 893.101, Fla. Stat. (2003), relieves the State of its burden of proving in a drug possession case the illicit knowledge element, requiring instead that the defendant

[2] The district court first rendered its opinion on May 4, 2005. The instant opinion was rendered pursuant to a timely filed motion for rehearing.

disprove the element under the Aaffirmative defense@ label. This Court should exercise its discretion and accept review because the constitutionality of section 893.101, Fla. Stat. (2003), is an important issue of statewide significance. Drug possession cases make up a large share of Florida=s criminal justice caseload and section 893.101, Fla. Stat. (2003), affects every case. Moreover, United States Supreme Court authority strongly suggests that this statute is unconstitutional.

ARGUMENT

POINT ON APPEAL

THIS COURT HAS DISCRETIONARY JURISDICTION BECAUSE THE DISTRICT COURT OF APPEAL=S DECISION EXPRESSLY DECLARES VALID SECTION 893.101, FLA. STAT. (2003).

This Court has discretionary jurisdiction to review Aany decision of a district court of appeal that expressly declares valid a state statute[.]@ Art. V, ' 3(b)(3), *Fla. Const.*; *Fla. R. App. P.* 9.030(a)(2)(A)(I). Here, the district court of appeal=s decision expressly declares valid section 893.101, Fla. Stat. (2003).

Because the district court of appeal=s decision expressly declares valid section 893.101, Fla. Stat. (2003), this Court has discretionary jurisdiction to review this case pursuant to article V, section 3(b)(3), Florida Constitution. This Court should exercise its discretion and accept review because the constitutionality of section 893.101 is an important issue of statewide significance. Drug possession cases make up a large share of

Florida=s criminal justice caseload and section 893.101 affects every case. Moreover, United States Supreme Court authority strongly suggests that this statute is unconstitutional.

As noted in the district court=s decision, section 893.101 removes illicit knowledge as an element of a possession offense and makes the lack of such knowledge an affirmative defense to be proved by the defendant. But due process requires the state to prove the elements of an offense beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), and it places limits on a state=s authority to Areallocate burdens of proof by labeling as affirmative defenses at least some elements of the crime now defined in their statutes.@ *Patterson v. New York*, 432 U.S. 197, 210 (1977). *See also Jones v. United States*, 526 U.S. 227, 241-42 (1999)(recognizing limit on state=s authority to omit traditional elements from definition of crimes and instead require accused to disprove such elements.)

In *Apprendi v. New Jersey*, 530 U.S. 465 (2000), the Court held that when a defendant=s motivation for possessing a weapon increases the penalty for a weapons offense, that motivation is an element that must be submitted to the jury and proved beyond a reasonable doubt; the state is not free to label that motivation a Asentencing factor@ that is proved to the judge using a preponderance of the evidence standard. When the dissent in *Apprendi* suggested that the state could simply presume the motivation and require the defendant to disprove it in order to receive a lesser sentence, the majority

responded as follows: A[I]f New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not, post, at 2390), we would be required to question whether the revision was constitutional under this Courts prior decisions.@ *Apprendi*, 530 U.S. at 49 n.16 (*citing Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*). This case raises that question.

As if following the dissent=s suggestion in *Apprendi*, Florida has reversed the burden of the illicit knowledge finding (effectively assuming that a defendant who possesses a controlled substance knows the illicit nature of it) and requires the defendant to disprove such knowledge in order to be acquitted. But as noted above, there is a limit on the State=s authority to omit traditional elements from the definition of crimes and instead require the accused to disprove such elements.

Knowing that one possesses an illegal substance, or Aillicit knowledge,@ is a traditional element that must be proved by the State because it is a mens rea element. In fact, the illicit knowledge element has a better Atraditional@ element pedigree than *Apprendi=s* Apurpose to intimidate on the basis of race@ element. This is because the Apurpose to intimidate@ element had never been recognized as an element by New Jersey courts, yet the Supreme Court recognized that it was an element because it was a form of mens rea:

> By its very terms, this statute mandates an examination of the

> defendant=s state of mind--a concept known well to the criminal law as the defendant=s mens rea. It makes no difference in identifying the nature of this finding that Apprendi was also required, in order to receive the sentence he did for weapons possession, to have possessed the weapon with a Apurpose to use [the weapon] unlawfully against the person or property of another,@ ' 2C:39-4(a). A second mens rea requirement hardly defeats the reality that the enhancement statute imposes of its own force an intent requirement necessary for the imposition of sentence. On the contrary, the fact that the language and structure of the Apurpose to use@ criminal offense is identical in relevant respects to the language and structure of the Apurpose to intimidate@ provision demonstrates to us that it is precisely a particular criminal mens rea that the hate crime enhancement statute seeks to target. The defendant=s intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense Aelement.@

Apprendi, 530 U.S. at 492-493 (footnotes omitted).

Moreover, it is no answer to suggest that because the Legislature could eliminate the illicit knowledge element, then it does not offend due process to require the defendant to disprove it. The Court rejected the same type of challenge in *Apprendi*, 530 U.S. at 490 n. 16 (responding to suggestion that state could get around Court=s holding by raising maximum penalties, Court stated: AOur rule ensures that a State is obliged >to make its choices concerning the substantive content of its criminal laws with full awareness of the consequences, unable to mask substantive policy choices= of exposing all who are convicted to the maximum sentence it provides.... So exposed, >[t]he political check on potentially harsh legislative action is then more likely to operate.=@ (c.o.)).

In addition, because the illicit knowledge element is the difference between guilt and innocence, the constitutionality of section 893.101 is even more suspect. *Patterson*, 432 U.S. at 226 (AThe Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma. *The requirement of course applies a fortiori if the factor makes the difference between guilt and innocence.*@(e.s.)).

At present illicit knowledge of the controlled substance is a fact designated by the Legislature as one that determines criminal liability; if that fact is present, the defendant is guilty and may be sent to prison, and if it is not present, the defendant is not guilty and must be acquitted. Stated differently, Florida imposes criminal sanctions only on those who choose to possess a controlled substance, not on those who happen to possess a controlled substance. That choice is the mens rea or criminal intent, which is, as the Supreme Court stated, Aas close as one might hope to come to a core criminal offense >element.=@ *Apprendi*, 530 U.S. at 493. Accordingly, due process commands that that Acore criminal offense >element=@ be proved by the State beyond a reasonable doubt.

Section 893.101 demonstrates that any offense element can be re-labeled an affirmative defense. But *Apprendi* teaches that labels do not control. Indeed, the distinction between elements and defenses is one of those difficult issues that Agenerates the >deep structure= of all systems of criminal law.@ George P. Fletcher, *Basic Concepts of Criminal Law* 5, 93-110 (Oxford U. Press 1998). This Court should accept review

and attempt to work out this distinction.

CONCLUSION

Petitioner respectfully requests this Court to accept review and order briefing on the merits.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Mr. Myra J. Fried, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401 and by U. S. Mail to Mr. George Wright, 718 Northwest 8th Avenue, Pompano Beach, FL, 33060 this ___ day of July, 2005.

_____
David John McPherrin
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Florida Bar No. 0861782

CERTIFICATE OF FONT SIZE

In accordance with *Florida Rule of Appellate Procedure* 9.210, petitioner hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately.

David John McPherrin

Attorney for George Wright