IN THE SUPREME COURT OF FLORIDA

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| BOBBY SCOTT,<br><br>Petitioner,<br><br>vs.<br><br>STATE OF FLORIDA,<br><br>Respondent. | ) | S. CT. CASE NO. 94,701<br><br>5th DCA Case No. 97-2333 |

**ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, AND THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR PUTNAM COUNTY, FLORIDA**

# PETITIONER'S INITIAL BRIEF ON THE MERITS

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SEVENTH JUDICIAL CIRCUIT

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## STATEMENT OF THE CASE

Petitioner, Bobby Scott, was charged by the State, in an information filed on January 6, 1997, with introduction or possession of contraband in a correctional facility. (R 2) The Appellant proceeded to jury trial on July 8-9, 1997, before Circuit Judge Stephen Boyles. (T 1-374; Vols. 2-3) At the close of the State's case, and again, at the close of all the evidence, defense counsel made a motion for judgment of acquittal. (T 130-1, 309, 325; Vols. 2 and 3) The trial court denied the motion for judgment of acquittal. (T 131, 309, 325; Vols. 2 and 3)

The jury returned a guilty verdict as to the charged offense. (R 21; Vol. 1; T 369-71; Vol. 3) A motion for a new trial was denied by the trial court on August 21, 1997. (R 23, 67; Vol. 1) Petitioner received a sentence of 55 months incarceration. (R 52-7, 67-8; Vol. 1)

Petitioner timely filed a notice of appeal on August 25, 1997. (R 45; Vol. 1) The Office of the Public Defender was appointed to represent the Petitioner in this appeal on August 26, 1997. (R 50-1; Vol. 1)

The Fifth District Court of Appeal affirmed Petitioner's conviction, but reversed Petitioner's sentences, upon rehearing en banc. Scott v. State, 23 Fla. L. Weekly D2715 (Fla. 5th DCA December 11, 1998). Specifically, the Fifth District held:

...

> ON REHEARING EN BANC
>
> [Original Opinion at 23 Fla. L. Weekly D1954b]
>
> (HARRIS, J.) We grant rehearing *en banc* and substitute the following opinion.
>
> Scott appeals his conviction and sentence for possession of contraband in a correctional facility. We affirm his conviction but reverse for re-sentencing.
>
> A random search of Scott's locker located in his cell revealed cannabis hidden inside his eyeglass case. He contends his conviction should be set aside because there was insufficient evidence to establish his exclusive possession of the cannabis or that he had knowledge that the cannabis was in his locker. We believe that there was sufficient evidence that Scott "possessed" the cannabis secreted in his eyeglass case found in his locker.
>
> Scott also contends the court erred in not giving his requested instruction that in order to convict, the jury must find that Scott had knowledge of the illicit nature of the substance. While we agree that such instruction *may* be required by *Chicone*, we find that such error, if error there was, was harmless. Scott's position at trial was that he was unaware that the cannabis was concealed

within his eyeglass case located within his locker and not that he did not know the substance thus concealed was cannabis. In his testimony, Scott claimed that someone broke into his locker, stole some jewelry, and planted the illegal substance in his eyeglass case.

In his motion for rehearing, Scott urges that we misapprehended the *Chicone* holding which made knowledge of the illicit nature of the item possessed an "element" of the offense as opposed to an affirmative defense. In other words, Scott contends that the burden was on the State to prove that Scott knew the substance was cannabis even if he did not raise the issue and thus his requested instruction concerning his knowledge of the illicit nature of the substance was required by *Chicone*. But in *Chicone*, possession was not challenged; the only issue presented for jury determination was whether the defendant was aware of the illicit nature of the thing possessed. Thus the Supreme Court has not yet decided whether a special instruction concerning defendant's knowledge is required if he challenges only his possession of the substance.

*Chicone* does not hold that knowledge of the illicit nature of the substance is an independent element of the charge for which a special instruction must always be given. Instead, the *Chicone* court recognized the authority of the legislature to determine the elements of a crime and adopted the view that since the legislature did not indicate otherwise, scienter (knowing the illicit nature of the substance) was implicit in the concept of possession (how can one knowingly possess an illegal drug unless one knows the substance possessed is an illegal drug?). For this reason, the court held that the standard jury instruction on possession is adequate unless the defendant requests a more specific instruction regarding knowledge of the illicit nature of the substance. However,

we urge, implicit in the right to have the jury instructed on this more specific issue is the requirement that there be something before the jury that responds to the presumption or inference that the defendant is aware of the illicit nature of the substance created by the proof of possession of the substance.

An argument that, "I didn't possess the substance but had I possessed the substance, I would not have known it was cannabis" is every bit as inconsistent as the argument: "I didn't deal in cocaine but if I did, I was entrapped." *See Walker v. State*, 701 So. 2d 1258 (Fla. 5th DCA 1997). The jury would understand that to argue the alternative position, one must concede the former. In our case, Scott recognized this dilemma and chose not to argue the alternative position that he was unaware of the nature of the substance to the jury. Although this was sound defense strategy, since Scott chose to argue only that he did not possess the substance, was it reversible error not to instruct on a position he chose not to support, by way of explanation, to the jury?

And the State did prove, as it must prove all elements of an offense, that Scott knew the illicit nature of the substance by the operation of an unanswered presumption (or inference) raised by proof that he possessed the substance.

In *State v. Medlin*, 273 So. 2d 394 (Fla. 1973), the Supreme Court held that proof that the defendant committed the prohibited act (delivery of a controlled substance) raised a rebuttable presumption that the defendant was aware of the nature of the drug delivered. Although *Chicone* places the burden of proof on the State to prove knowledge of the illicit nature of the contraband, it does not, at least expressly, overrule the *Medlin* presumption. Therefore, it appears that the defendant has the burden of going forward with an explanation as to why he

> was unaware of the illicit nature of the substance (man, I don't know what cannabis looks like) in order to overcome this presumption. In this regard, the defendant's obligation seems not unlike one found in possession of recently stolen property who must explain why he did not know the property was stolen. Section 812.022(2), Florida Statutes (1997); *Currington v. State*, 711 So. 2d 218 (Fla. 5th DCA 1998); *J.J. v. State*, 463 So. 2d 1168 (Fla. 3d DCA 1984). Scott's testimony that someone planted the cannabis in his locker, not believed by the jury, does not negate his knowledge of the illicit nature of the substance presumed by the jury's determination that he knowingly possessed the cannabis.
>
> Even if under *Chicone* the court should have given the requested instruction, its failure to do so, when the presumption of Scott's knowledge of the illicit nature of the contraband was not explained during trial, is harmless error. In this case, unlike *Chicone*, there was no factual basis to create an issue as to whether Scott knew of the illicit nature of the substance in order to warrant the requested instruction. [Footnotes excluded]

... Id. At D2715

In addition, the Fifth District Court of Appeal certified the following questions of great public importance:

> Because of *Chicone*, we certify the following questions as being of great public importance:
>
> DOES THE ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE RAISE A REBUTTABLE PRESUMPTION (OR INFERENCE) THAT THE DEFENDANT HAD KNOWLEDGE OF ITS ILLICIT NATURE? IF SO, IF THE DEFENDANT FAILS TO RAISE THE ISSUE THAT HE WAS UNAWARE OF THE ILLICIT NATURE OF THE SUBSTANCE, IS HE

> NEVERTHELESS ENTITLED TO A *CHICONE* INSTRUCTION? CAN THE FAILURE TO GIVE THE REQUESTED INSTRUCTION BE HARMLESS ERROR?
>
> The State concedes error in the score sheet and we remand for its correction and for re-sentencing.
>
> AFFIRMED in part; REVERSED in part, and REMANDED for re-sentencing. (GRIFFIN, C.J., SHARP, W., and PETERSON, JJ., concur, GOSHORN, J., concurs in result. DAUKSCH, J., dissents in part; concurs in part, with opinion in which COBB, THOMPSON, and ANTOON, JJ., concur.) (DAUKSCH, J., dissents in part; concurs in part.) I respectfully dissent.
>
> *Chicone* has held that knowledge is an element of the offense of possession. Not to instruct the jury on an element of the offense cannot be harmless error, in my opinion. *See Williams v. State*,366 So. 2d 817 (Fla. 3d DCA), cert. denied, 375 So. 2d 912 (Fla. 1979); G*erds v. State*, 64 So. 2d 915 (Fla. 1953)(failure to correctly and intelligently instruct a jury as to each element of the offense which the state is required to prove cannot be treated with impunity under the guise of harmless error).
>
> I concur with the majority decision to certify the question. (COBB, THOMPSON, and ANTOON, JJ., concur.) [Footnotes omitted]

Id. At 2715-17. Notice to seek Discretionary Jurisdiction with this Court was filed by Petitioner on January 8, 1999.

## STATEMENT OF THE FACTS

Correctional Officer Randall Smith testified that on August 13, 1996, he and Officer Kenneth Taylor conducted a routine search for contraband in the jail cell shared by the Petitioner with inmate Tamar Channelle. (T 17-20; Vol. 2) According to Smith, both the Petitioner and Tamar were paged and, when they arrived back at their cell, they were told to open their lockers, followed by Officers Smith and Taylor searching their lockers. (T 21-3, 317-18; Vols. 2 and 3) Smith further testified that upon Officer Taylor searching the Appellant's locker while the Petitioner and Tamar were just outside the cell door in the hallway, Taylor exhibited three small pieces of paper wrapped up inside the Petitioner's eyeglass case. (T 23-4, 317; Vols. 2 and 3) The contents of the papers were tested and yielded a positive result for cannabis. (T 25; Vol. 2)

Officer Kenneth Taylor, the confinement officer for the E dormitory, testified that when he searched the Petitioner's locker he found the cannabis in the Petitioner's eyeglass case inside two little white pieces of paper. (T 49-53; Vol. 2) When the Petitioner, according to Officers Taylor and Smith, appeared upset that his cell was being searched and asked why the search was being done, he was restrained by a Lieutenant Toarmino handcuffing him. (T 46-7, 317-18; Vols. 2 and 3) Once the cannabis was shown to Lieutenant Toarmino, according to Smith,

the Petitioner stated: "that's not my stuff." (T 319-20; Vol. 3) Subsequent to this, according to Officer Taylor, the Petitioner was placed into the confinement center. An inventory of the Petitioner's property was then completed, outside of the Petitioner's presence, after which the Petitioner signed the property inventory sheet. (T 54-8; Vol. 2)

Inspector Kenneth Crawford testified that he became involved approximately the day of or the day after the incident when he received the evidence of the substance recovered during the room search after it was placed in the evidence drop box by Officer Taylor and Smith. (T 79; Vol. 2) The Petitioner was also interviewed by Crawford subsequent to the Petitioner's cell being searched. (T 85; Vol. 2) According to Crawford, the Petitioner stated during the interview that he was present during the search of his cell but he could not see into the cell room at the time. (T 92; Vol. 2) After giving the Lieutenant the combination to his lock, the Petitioner stated in the interview that he did not see who opened the locker and did not know if the locker was already opened. (T 92; Vol. 2) The Petitioner additionally indicated in the interview that the eyeglass case and the eyeglasses recovered by the police were his, but he did not recognize any of the other items shown to him. (T 93; Vol. 2) The Petitioner also denied that he ever had been or was presently involved in the use of narcotics at the Putnam Correctional Institution or any other

institution and stated that the fact he had some valuable jewelry missing. This led him to believe that the person who took the jewelry must have put the cannabis in his locker. (T 93-4; Vol. 2) The Petitioner then stated in the interview that he normally would keep the combination lock on his locker except when he would take a shower. (T 94; Vol. 2) Finally, Crawford testified that, prior to the interview, he had not received a report of any stolen property by the Petitioner. (T 96-7; Vol. 2)

Sergeant Charles Williams testified that he is the property room sergeant in the Putnam County Correctional Facility. (T 110-111; Vol. 2) He further testified that he received as part of his duties the inventory list signed by the Petitioner on September 4, 1996, which was also signed by Officers Earl Brown and Kenneth Taylor on August 13, 1996. (T 111-115; Vol. 2; R 20; Vol. 1) According to Williams, the Petitioner did not report any missing property. (T 116; Vol. 2) In addition, Williams testified that the Petitioner was issued a lock at the county facility and given a combination for the lock by another officer. (T 118, 122; Vol. 2) Sergeant Williams further testified that he inventoried the Petitioner's property when the Petitioner was initially brought to the Putnam Correctional Institution on May 30, 1996, which reflected that the Petitioner's jewelry consisted of a watch, a ring, and a necklace. (T 119-20; Vol. 2)

Leonard Green, who was an inmate at the time the Petitioner

was incarcerated, testified that there were approximately 68 individuals housed in the E dormitory where the Petitioner resided. (T 133-4; Vol. 2) He further testified that the door to the Petitioner's E cell block was not always locked and was accessible to those inmates who were housed in the same dormitory. (T 139-40, 147-8; Vol. 2) Mr. Green additionally testified to an occurrence when some cannabis had been found in his unlocked locker. (T 140-2; Vol. 2) There were also gaps in the locker boxes testified to by Green and by Inspector Crawford. (T 100-1, 143-4; Vol. 2)

Tommy Green testified that he too was an inmate at Putnam Correctional Facility housed in the E dormitory which he estimated housed 180 inmates. (T 149-50; Vol. 2) Tommy similarly testified that if he locked his lock box and pulled it out, there would be a gap of roughly an inch and a half to two inches with some of the boxes having larger gaps. (T 151-2; Vol. 2) Due to some of the locker drawers having these gaps, according to Tommy, if they are pulled a little bit out, it would enable someone to get something out of the drawer. Nor would the drawer shut all the way when it is pushed back according to Tommy. (T 152; Vol. 2) In addition, Tommy testified that somebody had broken into his locker and stolen a gold chain after he had locked the drawer and that he was aware of some inmates being set up at the Putnam Correctional Institution by having cannabis planted in their cell

locker drawers. (T 153-4, 164, 165; Vol. 2) Tommy also testified that occasionally the locks on the inmates drawers would be taken off by someone using a soda can top, and after taking everything out of the drawer, the lock would be placed back on the drawer to appear as if nothing had happened. (T 154-5; Vol. 2) As for what Tommy personally witnessed, he stated he has seen other inmates unlock a cell drawer in this manner. (T 157; Vol. 2) He did not have any knowledge of the Petitioner smoking cannabis and has seen the Petitioner refuse cannabis when it was offered to him by other inmates and never saw the Petitioner smoking cannabis, cigarettes, or cigars. (T 157-9; Vol. 2) As for the Petitioner's cell mate, Tamar Channelle, however, he was known by Tommy to have smoked cannabis based upon Tommy actually seeing Tamar smoking cannabis. (T 158; Vol. 2)

When Tommy was asked about how he became aware of the locked cell boxes being opened with a pop top, he testified that he had befriended an inmate, named Hudson, who went through other inmates' locked cell drawers and remove money and various items which Hudson would sell, particularly if it was jewelry. (T 159-60; Vol. 2) Finally, Tommy testified that he had seen the Petitioner wearing jewelry, specifically, a St. Elijah chain, a watch, and a ring, and was told by the Petitioner when, the Petitioner was in confinement, that some of the Petitioner's jewelry was stolen from his cell drawer. (T 161, 168; Vol. 2)

Earl Brown, a.k.a. Jonathan Green, also an inmate at the Putnam Correctional Institution, testified that he was housed in the E dormitory along with the Petitioner. (T 172-3; Vol. 2) He further testified that approximately a year after he arrived at the Putnam Correctional Institution, he went to the library and someone broke into his locker and stole a gold chain and a ring. (T 175; Vol. 2) When he discovered that his locker had been broken into, he also found a piece of a soda can which had been torn off and slipped down in between the rollers of the lock to the drawer. (T 175-6; Vol. 2) Earl also testified that he had been shown by another individual at Putnam Correctional Institution how the individual utilized this method to open a lock on a cell drawer, but he did not actually see the individual break into another inmate's cell drawer. (T 176; Vol. 2) To prevent against someone breaking into his locker in the future, Earl testified that he was given a little spring by an individual in maintenance to place into the lock and has had no one break into his locker since then. (T 179, 182; Vol. 2) Earl additionally stated that he has seen the Petitioner wear a chain and medallion on the compound, but did not recall seeing the Petitioner's ring or watch, and was aware of the Petitioner's jewelry being taken from the Petitioner's locker. (T 179-80; Vol. 2) As for Tamar Channelle, Earl testified that he has seen Tamar a couple of times in the recreational yard smoking

cannabis, but had never seen or heard of the Petitioner smoking cannabis. (T 180-1; 190-1; Vol. 2) Finally, Earl testified that he was aware of approximately four other inmates who have had the locks on their cell drawers picked, including inmate Tommy Green, although he did not personally see the locks being picked. (T 183-4; Vol. 2)

Sammy Harris testified that at the time of the incident he too was housed in the Petitioner's E dormitory on floor A, and has been at the Putnam Correctional Institution for seven years. (T 195; Vol. 3) He further testified that anyone has access to the cells in the E dormitory on either A or B floors. However, if an inmate, who was not invited and who did not live on the same wing of the dormitory, were caught in the cell, the inmate would receive a disciplinary action. (T 196-7; Vol. 3) In addition, Mr. Harris testified that he had told Inspector Crawford twice about catching four or five unidentified inmates breaking into the cell lockers. (T 199-200, 214; Vol. 3) On one of the occasions, according to Harris, that he told Inspector Crawford about the locker thefts, it was also when he was made aware of the Petitioner's locker being broken into and some jewelry removed. (T 200; Vol. 3) He also testified that, when he locked his own locker, there was a gap and that there was a gap on most all of the lockers at the Putnam Correctional Institution. (T 201; Vol. 3)

As for the Petitioner's jewelry, Harris testified that he had seen the Petitioner wearing a gold chain, watch, and ring prior to the date of the incident on August 13, 1997. (T 201-2; Vol. 3) Harris explained as well that a "houseman" would go into the individual cells to mop floors and wipe windows which permitted them to go anywhere in the entire dormitory. (T 203; Vol. 3) Harris similarly testified that he was aware of individuals picking the cell drawer locks with a piece of a soda can, which would show no damage to the lock, which he witnessed being done approximately three or four times. He also successfully picked his own lock as a test. (T 204-5; Vol. 3) According to Harris, an inmate can also request from an officer at the facility to enter an individual cell of another inmate without the officer checking whether the inmate was permitted to enter that particular cell block. (T 206-7, 213-14; Vol. 3) Finally, Harris testified that he too saw Tamar Channelle smoking cannabis on a regular basis in and about the Putnam Correctional Institution compound, and that Tamar had a disciplinary confinement for smoking cannabis, but that he never saw the Petitioner smoke cannabis or anything else. (T 224-6; Vol. 3)

Robert Shelton testified that he was housed at the time of the incident in the E dormitory. (T 228-9; Vol. 3) He also testified that other inmates, who occupy the same dormitory, would have access to the dormitory area. (T 230-1; Vol. 3)

Shelton further stated if the attending officer did not feel like checking the dormitory list, the officer would open the door to the dormitory without paying attention to who the inmate was requesting that the dormitory door be opened. (T 231; Vol. 3) As for the locked boxes in the cell, Shelton testified that it was easy to pull the locker out a little bit yielding a gap in between the bed frame and drawer allowing someone to put something in the drawer or fish something out. (T 231; Vol. 3) In addition, Shelton stated that during the time he has been at the Putnam Correctional Institution, inmates have been set up by planting something in the inmates' cell or their locker drawers. (T 231-2; Vol. 3) To protect his locker, Shelton similarly used a spring which he placed inside his lock preventing someone from sticking what he coined a "thumb buster" inside the lock. (T 232-3; Vol. 3) He also recalled seeing the Petitioner wearing something gold. (T 234; Vol. 3) Shelton further testified to his own prior experience when his cell mate had taped cannabis up under his cell bunk. (T 234-6; Vol. 3)

As for Shelton's knowledge of the Petitioner smoking or possessing cannabis, Shelton stated that he never saw the Petitioner smoke cannabis and never heard about the Petitioner smoking cannabis. (T 237-8; Vol. 3) Shelton did, however, see Tamar smoke cannabis, including when Shelton himself smoked cannabis with Tamar on the Putnam Correctional Institution

facility. (T 238; Vol. 3)

The Petitioner described his jewelry as including a gold link chain, with a St. Lazarus charm, a nugget ring, and a Giavanni gold watch. (T 267; Vol. 3) He testified that when he entered the Jackson Correctional Institution, he did not have his watch until he received a package permit in December of 1995. (T 267-9; Vol. 3) When he arrived at Putnam Correctional Institution, he further stated he received a lock to secure his personal items. (T 269-70; Vol. 3) As for the date of the incident, the Petitioner testified that he was working in food service at the same time Tamar was his cell mate. (T 273-5; Vol. 3) The Petitioner additionally stated that when he attempted to return to his cell after working in food service, he was stopped by Officer Smith who placed him in handcuffs after first searching him along with Tamar. (T 275-6, 297; Vol. 3) Tamar was also placed into handcuffs according to the Petitioner. (T 276; Vol. 3) Officer Toarmino then asked the Petitioner for his lock combination, which he provided to the officers. The Petitioner further testified that he was not nervous, agitated, or upset, but was calm. (T 277; Vol. 3) According to the Petitioner, he and Tamar were next taken to a laundry room, striped searched, and then placed into a cage prior to the Petitioner being placed into administrative confinement. (T 278-81; Vol. 3) The Petitioner subsequently explained to Inspector Crawford and

testified that he was unable to witness the officers searching his locker and that he had valuable jewelry missing which he discovered when Officer Taylor brought him his property inventory list dated August 13, 1996. (T 282-4, 299; Vol. 3)

As for the circumstances of the officer finding cannabis in the Petitioner's case, the Petitioner testified that he felt he was set up since he did not "mess with" cannabis, did not do so during the entire time he has been incarcerated, and, from what he knew, there was no cannabis in his locker. (T 285; Vol. 3) The Petitioner also explained that while he was not initially upset, after he signed the property inventory sheet upon being placed into confinement, he was upset for being charged with something he had no knowledge of. As a result of this, the Petitioner testified he just glanced at the inventory sheet and signed it without reading it. (T 285-6; Vol. 3) Approximately 20 seconds after Officer Taylor walked away, the Petitioner noticed that his jewelry was missing on the inventory sheet so he yelled for Officer Taylor to come back to the confinement area, which Officer Taylor did. (T 286; Vol. 3) The Petitioner next testified that he then informed Officer Taylor his property inventory sheet failed to list his jewelry. (T 287; Vol. 3)

After being released from confinement, according to the Petitioner, he was instructed by Sergeant Charlie Williams to have Officer Taylor prepare an incident report which was done by

Taylor in the Petitioner's presence. (T 287; Vol. 3) Finally, Petitioner testified that he believed the individual who stole his jewelry also planted the cannabis in his locker since his being placed into confinement prevented him from locating the jewelry before it was moved off the correctional facility. (T 288-91; Vol. 3)

## SUMMARY OF ARGUMENT

The Fifth District's instant en banc opinion incorrectly interprets this Court's decision in Chicone v. State, 684 So. 2d 736 (Fla. 1996) to raise a "rebuttable presumption" that an accused was aware of the nature of the contraband possessed or delivered when the State offers proof that an accused committed the prohibited acts of either delivery of a contraband controlled substance **or** possession of a contraband controlled substance. The Fifth District further incorrectly interprets, in the decision on review, this Court's holding in Chicone to place the burden on the accused to go forward with an explanation as to why the accused was unaware of the illicit nature of the contraband substance possessed in order to overcome this presumption and to receive a special Chicone jury instruction. Finally, the Fifth District incorrectly applied a "harmless error" analysis to the factual circumstances where an accused, such as the Petitioner, was unaware of the presence of the contraband controlled substance and requests a Chicone jury instruction when the accused does not challenge the illicit nature of the contraband controlled substance,even if the accused is charged with only possessing, but not selling or delivering, the contraband.

## ARGUMENT

THE INSTANT EN BANC DECISION INCORRECTLY APPLIES AND INTERPRETS Chicone v. State, 684 So. 2d 736 (Fla. 1996) AND THE CERTIFIED QUESTIONS BY THE FIFTH DISTRICT SHOULD BE ANSWERED IN THE NEGATIVE.

The en banc instant decision incorrectly holds that the Petitioner had the burden to go forward with an explanation as to why he was unaware of the illicit nature of the contraband substance he was found only to possess. Scott v. State, 23 Fla. L. Weekly D2715, 2716 (Fla. 5th DCA December 11, 1998). Specifically, the Fifth District incorrectly interpreted this Court's decision in Chicone v. State, 684 So. 2d 736 (Fla. 1996) to render as "harmless error" the trial court's failure to give defense counsel's special requested instruction under Chicone that the Petitioner must have had knowledge of the illicit nature of the contraband substance allegedly possessed. Id., 745-746. (T 311-312, 315, 359; Vol. 3) Consequently, the Fifth District incorrectly applied and interpreted this Court's decision in Chicone to conclude that, because the Petitioner did not challenge the illicit nature of the contraband controlled substance which was found concealed in the Petitioner's eyeglass case in his prison cell locker, the trial court's failure to give the specially requested Chicone instruction to jury that the State must establish the Petitioner's *knowledge* of the illicit nature of the contraband substance allegedly possessed did not

warrant a reversal for a new trial. Scott, supra.

This Court held in Chicone, in spite of the existing jury instructions being adequate in requiring "knowledge of the presence of the substance," that, if specifically requested by an accused, the trial court should expressly indicate to the jurors that guilty knowledge means the accused must have knowledge of the illicit nature of the substance allegedly possessed. Id., 745-6. Most importantly, this Court ultimately held in Chicone that the failure of the trial court to grant defense counsel's request for such a specific jury instruction on knowledge amounts to reversible error for a new trial. Id., 746.

The trial court's failure to properly instruct the jury in the instant case, based on the specific jury instruction requested by defense counsel under the principles announced in Chicone, denied the Petitioner from having his guilt or innocence decided by a jury provided with the most precise definition of the applicable *mens rea* at issue, i.e., guilty knowledge, in order to establish the Petitioner's possession of the charged cannabis contraband. In effect, the Petitioner was prevented by the trial court from having a more enlightened jury concerning the definition of one of the most critical elements of the charged offense for which he stood accused of, namely, that guilty knowledge means possession and knowledge of the same. Id., 740.

Although the Fifth District focused on this Court's earlier decision in State v. Medlin, 273 So. 2d 394 (Fla. 1973), as this Court later noted in Chicone, supra:

> "...[W]e held [in Medlin] the State established a prima facie case and sufficient proof that the 'defendant was aware of the nature of the drug to get the case to the jury. That's a far cry from holding that guilty knowledge is unnecessary."

Chicone v. State, 684 So. 2d at 739 (Fla. 1996) [Emphasis added] In fact, this Court expressly approved in Chicone the longstanding legal principle that knowledge of the illicit nature of the substance possessed is an element of the crime of possession. Id., 739. Most importantly, this Court stressed in Chicone, directly contrary to the Fifth District's interpretation of Chicone in the instant case, the following:

...

> "...[T]he state contends that the lack of knowledge of the illicit nature of the item possessed should be raised and proven as an affirmative defense. We disagree. Nowhere has the legislature provided for such an affirmative defense. Furthermore, if the statute did not require guilty knowledge, then obviously a person who possessed an illicit object even without knowledge of its illicit nature would be as guilty of violating the statute (that had no scienter requirement) as one who did have knowledge...

Id. At 744.

In sum, the heart of this Court's decision in Chicone, which the Fifth District misapplied in this cause, is that an accused is entitled to a specially requested Chicone jury instruction, when the accused's defense is that he or she was unaware of the presence of the contraband found to be in his or her possession. This is true regardless of the fact that the defense offered at trial by the accused is that the contraband he or she is found to be in possession of was "planted" on the accused by someone without the knowledge of the accused.

Petitioner further acknowledges that, recently, the Fourth District held in Ryals v. State, 716 So. 2d 313 (Fla. 4th DCA 1998), that a "harmless error" analysis could be applied to a situation where an accused is charged with the sale or delivery of a contraband controlled substance. In Ryals, however, the Fourth District expressly relied on the factual circumstances in that particular case which involved evidence that "[c]ocaine was asked for and cocaine was delivered and sold. No jury of reasonable persons would have concluded that [the] appellant did not know the substance was cocaine." Id. [Emphasis added] Judge William Owen also clearly pointed out in his specially concurring opinion:

> "[i]f [Mr. Ryals] had been charged with simple possession, I would certainly agree that proof of his knowledge of possession as well as his knowledge of the illicit nature of the substance would have been required. [Emphasis added]

Id. Petitioner would, therefore, submit that the factual circumstances of the case sub judice,involving only the alleged possession of a contraband controlled substance,along with the Petitioner's defense that he was not aware that the contraband controlled substance was in his eyeglass case, mandates that the trial court should have given Petitioner's requested Chicone jury instruction. (T 282-4, 285-291, Vol. 3) See also Oliver v. State, 707 So. 2d 771 (Fla. 2nd DCA 1998).

Finally, Petitioner would urge this Court, in addition to the aforementioned arguments, to adopt the position of Judge Dauksch, Judge Thompson, Judge Cobb, and Judge Antoon, all of whom agreed in the disenting opinion sub judice, that this Court's decision in Chicone establishes knowledge as an element of the offense of possession. Scott, supra. Moreover, the instant decenting opinion stressed that "[n]ot to instruct the jury on an element of the offense cannot be harmless error..." Id. At D2716. See also Williams v. State, 366 So. 2d 817 (Fla. 3d DCA), cert. denied, 375 So. 2d 912 (Fla. 1979); Gerds v. State, 64 So. 2d 915 (Fla. 1953) Accordingly, this Court should quash the instant decision by the Fifth District, answer the certified questions in the negative, and remand this cause for a new trial.

## CONCLUSION

The Petitioner, Bobby Scott, respectfully requests this Honorable Court to answer the certified questions in the negative, quash the decision of the Fifth District Court of Appeal, and remand this cause for a new trial.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER
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COUNSEL FOR PETITIONER

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is 12 point Courier New, a font that is not proportionally spaced.

_____
SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Mr. Bobby Scott, DC # 673065, H 3103 L, 3000 P. M. B., Crawfordville, FL 32327, on this 12th day of February 1999.

_____
SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| BOBBY SCOTT, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | S. CT. CASE NO. 94,701 |
| | ) | |
| STATE OF FLORIDA, | ) | DCA CASE NO. 97-2333 |
| | ) | |
| Respondent. | ) | |
| _____ | ) | |

# MERIT BRIEF OF PETITIONER

## APPENDIX

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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