IN THE SUPREME COURT OF FLORIDA

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

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

PETITIONER'S REPLY BRIEF

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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_____	)	

ARGUMENT

IN RESPONSE TO THE RESPONDENT'S ASSERTION THAT THE JURY INSTRUCTION CLAIM WAS NOT PROPERLY PRESERVED BELOW; THAT THE JURY WAS PROPERLY INSTRUCTED; AND THAT IF ERROR OCCURRED, IT WAS HARMLESS ERROR.

Respondent initially argues that, because defense counsel failed to submit a written jury instruction, the failure of the trial court to give a special Chicone jury instruction requested by defense counsel was waived by defense counsel not submitting a written special jury instruction to the trial court. (Respondents' brief pages 5-6) Petitioner would first submit that this argument, itself, has been waived by the Respondent since it was never argued by the Respondent to the Fifth District in this case or by the prosecutor below at trial. Brown v. State, 636 So. 2d 174 (Fla. 2nd DCA 1994); State v. Wells, 539 So. 2d 464 (Fla. 1989) Certainly the Fifth District did not make the

determination in the instant opinion on review before this Court that any waiver occurred. Indeed, the Fifth District directly found that a Chicone special jury instruction was requested by defense counsel at trial. Scott v. State, 722 So. 2d 256, 257 (Fla. 5th DCA 1998)

Petitioner would further submit that Respondent's reliance on Watkins v. State, 519 So. 2d 760 (Fla. 1st DCA 1988) and Florida Criminal Rule of Procedure 3.390 (c) is misplaced. Defense counsel expressly requested a special jury instruction based on this Court's clear language in Chicone v. State, 684 So. 2d 736 (Fla. 1996), that "...if specifically requested by a defendant, the trial court should expressly indicate to the jurors that guilty knowledge means the defendant must have knowledge of the illicit nature of the substance allegedly possessed." Id. At 745-746. (T 312-314; Vol. 3) Moreover, in Wilson v. State, 344 So. 2d 1315 (Fla. 2nd DCA 1977), the Second District Court of Appeal explained that the trial court's response that defense counsel's orally requested special jury instruction would be not given renders unnecessary the submission of a written special jury instruction in order to preserve the error for appellate review. Thus, Respondent's claim made in its brief that "[w]hile counsel discussed Chicone and discussed the jury instructions, a specific instruction was never requested," is inaccurate and any issue concerning the necessity of a "written" special jury instruction has been waived below by the

Respondent as well as by the trial court's denial of defense counsel's orally requested specific Chicone jury instruction. (T 311-315; Vol. 3)

Respondent next argues that the jury was properly instructed. (Respondents' brief pages 6-7) This assertion is completely refuted by this Court's reasoning expressed in Chicone, supra. Specifically, this Court recognized that while "...the existing [Medlin] standard jury instructions [given by the trial court sub judice] are adequate in requiring 'knowledge of the presence of the substance,' we agree that, if specifically requested by a defendant, the trial court should expressly indicate to jurors that guilty knowledge means the defendant must have knowledge of the illicit nature of the substance allegedly possessed." [Footnote omitted] [emphasis added] Id. at 745-746.

Petitioner would also point out that the very heart of this Court's decision in Chicone lies in the following language: "... the requirement of guilty knowledge 'must be observed in order to safeguard innocent persons from being made the victims of unlawful acts perpetrated by others, and which they have no knowledge." [Citation omitted] [emphasis added] Id. at 743. The Respondent, as well as the Fifth District, essentially place a straight jacket on the application of this Court's decision in Chicone to situations, such as in the Petitioner's case sub judice, where the defense proffered at trial is that the controlled substance contraband was "planted" on the defendant

without the defendant's knowledge.

Although the Fifth District and Respondent rely on this Court's earlier decision in State v. Medlin, 273 So. 2d 394 (Fla. 1973), this Court has directly amended its holding in Medlin in Chicone, supra, by expressly permitting defense counsel to request a Chicone special jury instruction as to the accused's guilty knowledge of the illicit contraband. According to the Respondent's contention, the failure of the trial court to give a Chicone special jury instruction would be "harmless" in all cases were the defense proffered at trial was that the illicit contraband had been "planted" on the accused, merely because the accused does not dispute what the illicit contraband is. Petitioner would submit that this interpretation of Chicone is inaccurate and a much too limited reading of the meaning of a "knowing" possession as outlined in Chicone. This is why Respondent's reliance on Ryals v. State, 716 So. 2d 313 (Fla. 4th DCA 1998) is similarly misplaced. (Respondents' brief page 10) That case dealt with the issue of a special Chicone jury instruction being requested in a situation involving the charge of delivery or sale of cocaine and not the mere possession of a controlled substance. Id., 313-315.

Petitioner would, therefore, disagree with the "harmless error" analysis presented by the Respondent and by the Fifth District in the instant decision, which is premised upon there being "no factual basis to create an issue as whether Scott knew

of the illicit nature of the substance" Scott, supra. (Respondents' brief page 10) Such an interpretation flies directly in the face of the Petitioner's submitted defense as to the contraband being planted in his eyeglass case found in his prison locker without his knowledge. Accordingly, the failure of the trial court to give Petitioner's special Chicone jury instruction requires that this Court quash the decision of the Fifth District and remand this cause for a new trial.

CONCLUSION

Based on the authorities cited herein, and in Petitioner's initial brief on the merits, Petitioner 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,

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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, Wakulla Correctional Institution, 3000 P.M.B., Crawfordville, FL 32327, on this 24th day of March 1999.

_____
SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER