IN THE SUPREME COURT OF FLORIDA

SHAWN WASHINGTON,	:	
Petitioner,	:	
vs.	:	CASE NO. 96,028
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

AMENDED

PETITIONER'S INITIAL BRIEF ON THE MERITS

I PRELIMINARY STATEMENT AND CERTIFICATION OF FONT AND TYPE SIZE

This is an appeal from the per curiam affirmance with citations of the First District Court of Appeal. Washington v. State, 732 So.2d 1225 (Fla. 1st DCA June 9, 1999).

Petitioner, Shawn Washington, was convicted at jury trial of possession of cocaine and cannabis. Trial proceedings were held in Leon County before Circuit Judge J. Lewis Hall, Jr.

The one-volume record on appeal will be referred to as "R," and the one-volume trial transcript as "T."

This brief is typed in Courier New 12.

II STATEMENT OF THE CASE

Petitioner, Shawn Washington, was charged on December 2, 1996, in Leon County, with possession of cannabis with intent to sell and possession of crack cocaine (R 7). The information was amended the day of trial to charge possession with intent to sell as to both (R 10).

Trial was held January 31, 1997, two months after the information was filed. Just before trial before Judge Hall, Washington moved in limine to preclude evidence that Officer Perry is an expert in street narcotics, or to allow him to draw a correlation between Washington carrying a large amount of cash ($841) and narcotics, or that the area of 2525 Texas Street, Tallahassee, has "experienced a wave of shootings, fights, narcotics sales and other criminal activities" (R 38-39). The court refused to hear the motion pretrial on the ground it was untimely filed. Defense counsel explained the case had just been reassigned to him, and he filed the motion the day after assigned (T 5-7).

Petitioner's motions for judgment of acquittal were denied (T 78-79,90). Petitioner's requested special jury instructions:

> The state must prove beyond and to the exclusion of every reasonable doubt that at the time of arrest the defendant knew of the illicit nature of the content of the retrieved bag.
>
> A suspect's mere presence at a scene of a crime even with knowledge of the crime, and flight therefor [sic] alone is insufficient evidence to support guilt.

were denied (R 12). The judge said the points were covered by the standard instructions, and the first might constitute a comment on the evidence (T 91-92). On both counts, the jury found Washington guilty of the lesser-included offense of simple possession (R 34-36).

December 16, 1997, Washington was sentenced to 365 days in jail, concurrent, with credit for time served of 365 days (R 43-49). No defense attorney was present, nor did the judge inquire as to whether Washington wanted counsel (R 70). A motion for new trial was filed, but not ruled on, possibly because no defense counsel was present at sentencing.

The district court found the notice of appeal (R 56) was timely filed.

On appeal, the district court affirmed per curiam, citing three cases: Baskin v. State, 732 So.2d 1179 (Fla. 1st DCA 1999); Leaks v. State, 23 Fla. L. Weekly D1997, ____ So.2d ____ (Fla. 2d DCA Aug. 26, 1998); Scott, infra.

III STATEMENT OF THE FACTS

Over objection, Tallahassee Police Officer Chuck Perry testified he had made 2500 to 3000 drug-related arrests and had witnessed 4 to 5 times that many sales (T 26). Perry testified over objection as to how to distinguish crack cocaine for personal use from that for sale: a seller won't have paraphernalia on him; he will have a larger amount - an average of 3 grams - and depending on how much they've sold, anywhere from $50 on up. For personal consumption, the person usually has a "dime rock," a very small size (T 27-28). Crack costs about $100 a gram (T 28).

Perry has twice testified as an expert in the area of "street-level narcotics" (T 29). The defense objected to declaring Perry such an expert; the judge would not declare him to be an expert, because that would be a comment on the evidence (T 30). The prosecutor wanted Perry say that a large amount of cash found with drugs indicate sale; the court would not permit it (T 30-32). The defense objected to allowing the officer even to mention how much cash petitioner, Shawn Washington, had; the court overruled the objection (T 32-33).

On August 22, 1996, Perry was in a "position of concealment" on the 2500 block of Texas Street (T 33,35):

> We were there specifically for the sale of illegal narcotics. We had received information and I had crawled through the bushes with another officer. . .

(T 34). Washington moved to strike the testimony that Perry had received information on the ground it was hearsay; the

motion was denied (T 34). Perry testified he was in bushes about 20 feet from Washington, who was sitting on a guardrail (T 36-37).

A car stopped, and Washington - an amputee - hobbled up to the driver's side window and conversed with the driver:

> At that point, he walked back to the rail where he had been sitting, he reached into the bushes, retrieved a brown paper bag, reached into the. . .bag, took out a dime bag of cannabis, put the bag back in the bushes, and walked over to the driver's window. . . At that point, he exchanged the bag for money.

(T 38-39,56). Based on his experience, Perry suspected cannabis because it was an inch by inch bag containing a dark leafy material. Two other people were near Washington at the rail. All three walked away when police cars drove up (T 39-40).

Perry got out of the bushes, went right to where Washington had been, reached into the bushes and pulled out the paper bag. Perry admitted another man was also sitting on the rail making drug sales. The prosecutor asked if that man had drugs on him, or did he also hide them. The defense objected to the leading question, and the court overruled it (T 40). The other man had pulled a pill bottle out of the bushes and sold a piece of crack (T 41).

The paper bag contained four dime bags of marijuana and 9 pieces of crack in two plastic bags (3 in one; 6 in the other) (T 42-43). The defense stipulated that the substances were cocaine and cannabis. Over objection, Perry testified that Washington had $841 in cash on him (T 45). The following

colloquy occurred:

> Q: Officer, based on the items that you seized from the defendant and the money that you found with him, the large amount of cash, did you make a determination as to whether or not these drugs that you had taken were for personal consumption or for sale?
>
> MR. OSHO [defense counsel]: Your Honor --
> THE COURT: Sustained. That's sustained.
>
> BY MR. SCHULTE [prosecutor]: Officer, based on your experience, is it common to find individuals with large amounts of money with drugs on them that is for sale, as opposed to personal consumption.
>
> A: Yes.

(T 46).

Over objection, Perry testified that the 2.4 grams of crack in the bag would be worth about $240, and such an amount would be for sale (T 47). Over objection, Perry testified that someone who was using crack would have a small rock - a dime rock - while someone who was selling would have a large one - a $20 rock; these were $20 rocks (T 48). Over objection, Perry testified it was his decision to charge possession with intent to sell (T 50).

Asked if it was common to find "miscellaneous crack" or marijuana lying on the ground, Perry said:

> I would say the crack is more valuable than gold. And with people who are addicted to it, it's just not going to be left around. I've never found any just laying around[,]

in his 8 years with the COP [Community Oriented Police] squad (T 50).

On cross, Perry admitted that a person could buy, rather

than sell, $20 rocks (T 52-53). Three people were arrested in this incident, for which Perry wrote a single report. Perry said his written report mixed up the acts of D#1 (Washington) with those of D#2, but claimed his trial testimony was accurate (T 44-45,57-58). Perry admitted that less than 20 grams of marijuana is usually categorized as "possession," and the marijuana here weighed 9 grams (T 63).

FDLE lab analyst George Barrow was not able to develop any latent fingerprints from the plastic bags. He was able to develop one print from the brown paper bag, which he was unable to match to Washington, or to three other people identified to him (T 71-72).

For the defense, Shawn's mother, Caroline Washington, testified that she had given him $900 cash to paint his car. Shawn is disabled and unable to work (T 83). On cross, Ms. Washington said she was not sure of the date she gave him the money, but it was sometime in August (T 83-84). The money came from two settlements, one from an insurance company for the death of another son (T 86).

On rebuttal, Perry testified that, when arrested, Shawn said the cash was his disability money. He did not say his mother had given it to him (T 87).

IV SUMMARY OF ARGUMENT

Issue I: In Scott, the Fifth District incorrectly inter-

prets this court's decision in Chicone as creating a rebuttable presumption that an accused was aware of the illicit nature of contraband when the state offers proof of the prohibited act - here, possession. Scott incorrectly interprets Chicone to place on the accused the burden of explaining how he was unaware of the illicit nature in order to overcome the presumption and receive the Chicone knowledge instruction.

Scott incorrectly applied a harmless error analysis where the accused was unaware of the presence of the controlled substance and requests a Chicone jury instruction, but does not challenge the illicit nature of the controlled substance.

Issue II: The trial court erred reversibly in allowing Officer Perry to testify as to how to distinguish a drug seller from a drug user, and the error was not harmless. This court has said:

> Testimony concerning past crimes that did not involve the defendant cannot be intro-duced to demonstrate that the defendant committed the crimes...in the present case.

Nowtizke, infra. The Fourth District has put it thus:

> [E]very defendant has the right to be tried based on the evidence against him, not on the characteristics or conduct of certain classes of criminals in general.

Wheeler, infra. The only purpose of such general behavior evidence "is to place prejudicial and misleading inferences in front of the jury." Id.

V ARGUMENT

ISSUE I

THE TRIAL COURT ERRED REVERSIBLY IN FAILING TO GIVE A

REQUESTED JURY INSTRUCTION ON THE ESSENTIAL ELEMENT OF KNOWLEDGE OF THE ILLI-CIT NATURE OF THE CONTRABAND.

In Scott, a 4-1-4 decision on rehearing en banc, the Fifth District incorrectly interprets this court's decision in Chicone as creating a rebuttable presumption that an accused was aware of the illicit nature of contraband when the state offers proof of the prohibited act - possession, in the instant case. Chicone v. State, 684 So.2d 736 (Fla. 1996); Scott v. State, 722 So.2d 256 (Fla. 5th DCA 1998)(*on rehearing en banc*), review granted, 729 So.2d 394 (Fla. April 4, 1999). In the instant case, the district court affirmed per curiam, citing Scott.

Scott incorrectly interprets Chicone to place on the accused the burden of explaining how he was unaware of the illicit nature in order to overcome the presumption and receive the Chicone instruction. Scott also incorrectly applied a harmless error analysis where the accused was unaware of the presence of the controlled substance and requests a Chicone instruction, but does not challenge the illicit nature of the substance.

In Chicone, this court held that knowledge of the illicit nature of the contraband is an element of drug offenses, and the jury should be so instructed upon request by the defendant. In Scott, the Fifth District certified the following questions:

> Does the illegal possession of a controlled substance raise a rebuttable presumption (or inference) that the defendant had know-ledge 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?

In Chicone, this court held that, while it is not an express element of any drug crime, knowledge is an implicit element of all such crimes; and the standard jury instruction was deficient for failing to define it for the jury. 684 So.2d at 738 et seq.

Inter alia, this court said:

> We are also influenced by the fact that "[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."

Id. at 743, quoting Dennis v. United States, 341 U.S. 494, 500, 71 S.Ct. 857, 862, 95 L.Ed. 1137 (1951).

This court called Judge Cowart's opinion in State v. Oxx, 417 So.2d 287 (Fla. 5th DCA 1982), "perhaps the most comprehensive discussion of the issue." Chicone, 684 So.2d at 740. The issue in Oxx was whether a statute prohibiting possession of contraband in a county detention facility was unconstitutional due to the lack of a scienter element. The Fifth District held the constitutional issue was mooted because guilty knowledge was an element. The court said:

> . . .the trial court held that the failure of the statute to expressly require mens rea or scienter made unknowing possession a criminal offense. This is not correct. Knowledge of possession is generally consi-dered a part of the definition of posses-sion as used in criminal statutes making possession a crime. Section 893.13, Florida Statutes (1981), prohibiting the actual or constructive possession of a controlled substance, and its predecessors, have

> never specifically required "knowing" possession, yet possession has always been defined to include knowledge. . . A similar construc-tion has been placed on other criminal pos-session statutes. Although the legislature may punish an act without regard to any particular (specific) intent, the State must still prove general intent, that is, that the defendant intended to do the act prohibited.
>
> Proof of an act does raise a presumption that it was knowingly and intentionally done. However, **there is a distinction in presuming knowledge from actual possession and from constructive possession** in that the State can make out a prima facie case of knowledge by proof of actual or exclu-sive constructive possession, but proof of nonexclusive constructive possession alone is insufficient to justify an implication of knowledge. In the latter situation, the State must present some corroborating evi-dence of knowledge to establish a prima facie case. (emphasis added)
>
> In summary, the statute. . .is constitu-tional. Further, possession in the context of this statute means possession and know-ledge of the same, and [Oxx'] knowledge (or lack of knowledge) of his possession is, subject to an appropriate instruction, an issue for the jury.

Chicone, 684 So.2d at 741, quoting Oxx, 417 So.2d at 290-91 (footnotes omitted). The supreme court added:

> We concur in what we perceive to be the essential thrust of the Oxx opinion, that "guilty knowledge" must be established in a simple drug possession case.

Chicone, 684 So.2d at 741.

Petitioner, Shawn Washington, requested the following special jury instruction:

> The state must prove beyond and to the exclusion of every reasonable doubt that at the time of arrest the defendant knew of the illicit nature of the content of the retrieved bag[,]

citing Chicone; State v. Dominguez, 509 So.2d 917 (Fla. 1987); and State v. Medlin, 273 So.2d 394 (Fla. 1973) (R 12). The

court refused to give the special instruction, ruling the subject was adequately covered by the standard jury instruction and might constitute a comment on the evidence (T 91-92).

Instead, the jury below was instructed as follows:

> First, Shawn Washington possessed a certain substance. Element two, the substance was cannabis in Count I and the substance was crack cocaine in Count II. Element three, Shawn Washington had knowledge of the presence of the substance.

(T 128-29). The court gave an even more abbreviated instruction on simple possession:

> That offense is the same as the possession of the controlled substance with the intent to sell upon which I have previously in-structed you except that it does not con-tain the element of intent to sell. Other than that, they are the same. Possession, knowledge of the presence of the substance, and that the cannabis or crack cocaine was a controlled substance.

(T 130).

Of an instruction virtually identical to the first, this court said in Chicone, 684 So.2d at 745-46:

> While the existing jury instructions 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 illi-cit nature of the substance allegedly pos-sessed. We hold that the defendant was entitled to a more specific instruction as requested here. (footnote omitted)

It was no less error here for the trial court to refuse to give an instruction which correctly stated the law - that knowledge of the illicit nature is an element of both offenses charged.

In the district court below, the state conceded it was error to deny Washington's requested jury instruction that the

illicit nature of the substance was an element of the offense, but argued the error was harmless. According to the state, the error was harmless because Washington's defense was that the officer misidentified him, and a different person was involved with the paper bag containing drugs. Similar to the Fifth District's reasoning in Scott, the state argued that, because Washington did not claim ignorance of the illicit nature of the drug, he was not entitled to the jury instruction.

In Scott, the defendant claimed to be unaware that marijuana was concealed in his eyeglass case inside his locker in prison. The Fifth District relied on the fact that Scott's defense was that he did not knowingly possess the substance, rather than that he did not know of its illicit nature. This is similar to the instant case, where Washington claimed not to possess the bag, rather than that he did not know of the illicit nature of its contents.

Petitioner contends that Scott is rooted in faulty logic. In his motion for rehearing, Scott argued the court had misapprehended that illicit nature was an element of the crime - for which the burden of proof was on the state - and had instead treated it as an affirmative defense - for which the burden was on the defendant. That is, Scott contended the **state** was obliged to prove he knew of the illicit nature, rather than his being obliged to prove he did not, as would be the case if it were an affirmative defense. Id.

According to Scott, this court held in Medlin, supra:

> . . .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.

722 So.2d at 258. The court continued:

> . . .[a]lthough 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.

Id. Therefore, the court concluded:

> it appears that the defendant has the bur-den 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.

Id. The court compared the defendant's duty to explain his ignorance of illicit nature as "not unlike one found in posses-sion of recently stolen property who must explain why he did not know the property was stolen." Id.

This reasoning does not withstand analysis. First, the stolen property presumption was created by statute; there is no comparable legislative statement on this issue. While the legislature might have the authority - within constitutional limits - to provide that possession of stolen property is presumed to be with knowledge of the theft unless the defendant explains otherwise, there is no comparable right of the court to relieve the state of its obligation to prove each and every element of a crime.

According to Scott, a trial court need not instruct on illicit nature unless the defendant specifically denies know-ledge of illicit nature. Denying knowledge of illicit nature

requires, in the Fifth District's illustration, something along the lines of denying that one knows what cannabis looks like. If this were truly the standard, then hardly anyone could make the claim since, given the ubiquity of drug education, hardly any American over the age of 12 could seriously claim not to know what marijuana looks like. This holding is, however, contrary to well-established and longstanding case law.

Further, equating an instruction on an element of the offense to an instruction on the affirmative defense of entrapment is wrong not only due to the distinction between elements and affirmative defenses, and who bears the burden of proof, but also because entrapment seems to be a special case even among affirmative defense.

Scott contends that a defense that "I did not possess the substance, but if I did, I did not know it was cannabis," "is every bit as inconsistent" as arguing "I did not deal cocaine, but if I did, I was entrapped." Id. The implication is that no instruction on entrapment would be allowed, because it was inconsistent with another defense theory. Even if this is true, entrapment is a special case. The general rule is that "inconsistent" defenses are permitted. Instruction is precluded only where proof of one disproves the other, leading thus to an absence of proof as to one. For example, one cannot claim to have been in Cleveland at the time and also to have shot a man in self-defense.

Entrapment is a special case. Scott's theory that the act

must be admitted in order to get a jury instruction is indeed true in Florida of entrapment, but it is not true in the United States Supreme Court, and even in Florida, entrapment is unique in this regard. See Wilson v. State, 577 So.2d 1300 (Fla. 1991), in which Florida diverges from the U.S. Supreme Court's decision in Mathews v. United States, 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988).

Entrapment is not an appropriate comparison to an instruction on an element of the offense. Rather, the more appropriate comparison is to the general rule that "inconsistent" defenses are allowed. The Third District has put the rule thus:

> . . ."'inconsistencies in defenses in crim-inal cases are allowable so long as the proof of one does not necessarily disprove the other.'"

Mills v. State, 490 So.2d 204 (Fla. 3d DCA), review denied, 494 So.2d 1153 (Fla. 1986), quoting Mellins v. State, 395 So.2d 1207, 1210 (Fla. 3d DCA), review denied, 402 So.2d 613 (Fla. 1981), Mellins in turn quoting Stripling v. State, 349 So.2d 187, 191 (Fla. 3d DCA 1977), cert. denied, 359 So.2d 1220 (Fla. 1978). Applying that principle here, Washington's claim that he did not possess the bag does not disprove a claim that he did not know the illicit nature of its contents - of which he was convicted solely on a constructive possession theory.

The U.S. Supreme Court would agree with this approach. In Mathews, supra, the court acknowledged that instructions on defenses other than entrapment are not precluded because the

defenses are inconsistent, and especially noted the express provision for inconsistent defenses in the federal civil rules. Mathews, 99 L.Ed.2d at 61-62. Rule 8(e)(2), Federal Rules of Civil Procedure, provides in part:

> A party may also state as many separate claims of defenses as he has regardless of consistency and whether based on legal, equitable or maritime grounds.

Mathews, 99 L.Ed.2d at 62. The court said the absence of a cognate in the criminal rules was not intended to more severely restrict criminal defendants, but merely reflected the much less elaborate system of pleadings in the criminal system. Id.

To the government's argument that allowing inconsistent defenses would encourage perjury, the court said this was not true in all cases, including the case then before the court. Even where the defendant might commit perjury, "practical consequences" - inconsistent defenses would destroy his credibility - make the assertion of inconsistent defenses a poor strategic choice. Mathews, 99 L.Ed.2d at 62-63, quoting United States v. Demma, 523 F.2d 981, 985 (9th Cir. 1975) (en banc).

Petitioner turns next to Scott's discussion of Medlin. In the context of sufficiency of the evidence rather than jury instructions, Medlin said knowledge and intent could be presumed from doing the prohibited act of sale or delivery. Even though Chicone held illicit nature was an element - which places the burden of proof on the state - Scott held that Chicone did not overrule the Medlin presumption of knowledge and intent. Petitioner contends this view is insupportable in

light of the fact that Chicone otherwise receded from Medlin, and the instant case involves constructive possession, not sale or delivery.

Medlin was charged with giving a barbiturate to a 16-year-old girl. This court said:

> [Medlin] is charged with. . .unlawfully delivering. . .a barbiturate or central nervous system stimulant. Proof that defendant committed the prohibited act raised the presumption that the act was knowingly and intentionally done. Defen-dant then sought to prove lack of knowledge as to the nature of the drug delivered to Cathy Driggers. But the testimony of the Driggers girl, that he told her one capsule would make her 'go up' and another pill was to be taken when she came down from the high, is evidence that defendant was aware of the nature of the drug involved. The proper arbiter was the jury.

273 So.2d at 397. The court continued:

> To reiterate, **the State was not required to prove knowledge or intent since both were presumed from the doing of the prohibited act.** Defendant's attempt, by way of defense, to prove lack of knowledge was rebutted by the Driggers girl's testimony which the jury was entitled to accept over that of the defendant. (emphasis added)

Id.

Medlin said the state did not have to prove intent or knowledge because both were presumed from the act itself. Such a presumption relieves the state of the burden of proof of those elements. Twenty-three years later, Chicone stated clearly and unambiguously that illicit nature is an element of the offense on which the jury must be instructed.

Because both elements were proved in Medlin, the outcome there might still be affirmed today, but the erroneous failure to require proof of and instruction on all the elements of the

offenses cannot be forgiven in the instant case. Rather, Medlin and Chicone are inconsistent on this point and cannot be reconciled. Contrary to Scott, therefor, Medlin's presumption did not survive a contrary ruling in Chicone, at least as to simple possession.

It is conceivable a presumption may be permitted from sale or delivery which is not permitted from possession, especially but not only, from constructive possession. That may explain why this court denied review in Ryals v. State, 716 So.2d 313 (Fla. 4th DCA), review denied, 727 So.2d 910 (Fla. 1998), in which the Fourth District said:

> Cocaine was asked for and cocaine was delivered and sold. No jury of reasonable persons could have concluded that [Ryals] did not know the substance being delivered was cocaine. Not only has [Ryals] failed to demonstrate prejudicial error, but also it is clear beyond a reasonable doubt that the error was harmless.

Id. Unlike Ryals, no cocaine was asked for or sold here. Absent this crucial fact, the conclusion that followed - that no reasonable jury could have concluded Ryals did not know the substance was cocaine - fails when applied to the far less conclusive evidence against Washington. Nothing was asked for here, nothing delivered, nothing sold, and it is only a constructive possession theory that links Washington to contraband **not** in his possession.

The officer testified below that he personally saw Washington sell a leafy substance he believed to be marijuana, but he did not retrieve it, and cannot be certain what it was, as

it was only seen from a distance. The officer did not claim to see Washington personally possess crack cocaine, and the cocaine charge was based on a theory of constructive possession of cocaine found in the bag the officer seized from the bushes.

Even more so as to the alleged cocaine possession, given the limited evidence of constructive possession, the failure to give the requested jury instruction on the illicit nature of the drug was not harmless, as it could have changed the jury's view of the evidence. Petitioner was entitled to his requested instruction, and this defense was not inconsistent with any other defense such that the requested instruction could lawfully be denied. A defendant's entitlement to a jury instruction on the affirmative defense of entrapment is not comparable to entitlement to instruction on an element of the offense, and Scott's equation of these two types of instruction was incorrect.

As a policy matter, this issue cannot be subject to harmless error analysis, and in any event, it was not harmless in Washington's case. If this court does not order trial courts to give requested jury instructions on an element of the offense, then it will live to see the decision whether to give standard jury instructions on the elements of the offense narrowly calibrated based on the prosecutor's and the trial judge's narrowest view of the accused's defense. Such a situation would destroy due process and fair trial.

As a policy matter, requested instructions on elements of

the offense **must** be given, without regard as to the actual defense. As the dissent pointed out, "Not to instruct the jury on an element of the offense cannot be harmless error." Scott, 722 So.2d at 259 (Dauksch, J., dissenting and concurring in part).

The dissent noted that in Gerds v. State, 64 So.2d 915 (Fla. 1953), this court held the failure to instruct correctly and intelligently on each element which the state is required to prove "cannot be treated with impunity under the guise of harmless error." Id. If it could be treated as harmless error, then the standard jury instructions would no longer be standard, but would become open to dispute in every case depending on the prosecutor's and the judge's view of the accused's defense.

As a practical matter, excluding the jury instruction was not harmless. After it has been endlessly debated by the courts, there may appear to be some inconsistency between defenses that "I didn't have it," and "If I did have it, I didn't know it was crack." In a real-life jury room, however, the jury's deliberations may very well differ depending on whether the jurors must ask themselves:

1) Did he have it?
That is, was it on his person, or in his car or his house, or as here, in a bag in the bushes, with other people selling from the same bush?

2) Did he know it was there, and if so, did he have dominion and control?

3) Was it crack cocaine?

or whether they must ask themselves:

1) Did he have it?
Was it on his person, or in his car or his house, or in a bag in the bushes, with other people selling from the same bush?

2) Did he know it was there, and if so, did he have dominion and control?

3) Was it crack cocaine?

AND

4) How do we know he knew it was crack?

Petitioner was entitled to his requested jury instruction, the Scott opinion is ill-conceived, and this court must reverse and remand for new trial.

ISSUE II

THE TRIAL COURT ERRED REVERSIBLY IN ALLOW-ING THE POLICE OFFICER TO TESTIFY AS TO THE GENERAL CHARACTERISTICS OF A DRUG SELLER AS DISTINGUISHED FROM A DRUG USER.

There is no question but that the officer's testimony as to how to distinguish drug sellers from users was error; the only question for this court is whether it was harmless.

Once this court acquires jurisdiction over a case, its jurisdiction extends to all issues. Feller v. State, 637 So.2d 911, 914 (Fla. 1994); Trushin v. State, 425 So.2d 1126 (Fla. 1982). If this court were to grant relief in Issue I, it would order a new trial. If Washington were to be tried again, this court should address the issue of allowing the officer to tes-tify as to the general characteristics of a drug seller as distinguished from a user.

The district court affirmed per curiam, without comment, except for citing Baskin v. State, 732 So.2d 1179 (Fla. 1st DCA 1999). Baskin held the admission of similar evidence was error, but the error was harmless. Petitioner agrees it was error, but contends it was not harmless.

The precise question for the court is whether improper evidence of the characteristics of a drug dealer becomes harmless when the jury acquits the defendant of possession with intent to sell and convicts him only of simple possession. As will be explained, petitioner contends his conviction of lesser offenses did not render the error harmless.

At trial, over objection, the trial court allowed Officer Perry to testify as to the general characteristics of a drug seller as distinguished from a drug user: 1) a seller won't have paraphernalia on him (petitioner Washington did not have paraphernalia); 2) for personal consumption, the person usually has a "dime rock," a very small size (T 27-28), while Washington had the larger $20 rocks, and someone who was selling would have $20 rocks (T 48); 3) a seller will have a larger amount - 1 to 5 grams with an average of 3 grams (Washington had 2.4 grams - an amount which meant it was for sale rather than personal consumption, according to the officer (T 27-28,47-48); 4) depending on how much they've sold, anywhere from $50 on up (Washington had $841 on him) (T 28), and 5) it was Perry's decision to charge it as possession with intent to sell (T 50).

In closing, the prosecutor argued that "a user wouldn't

possess this many rocks at one time" (T 101). The prosecutor also argued:

> Officer Perry also told you in his experi-ence sellers carry large amounts of cash on them. The defendant had, with this crack cocaine, I think he said over $250 worth of drugs right here and he had $840 in cash, in small bills, on him.
>
> Now, you all use your own good common sense. Small bills, you're selling $10, $20 rocks of crack cocaine, what does that mean? He was selling.

(T 102). The prosecutor also argued:

> Officer Perry also told you the reason they were down on Texas Street is because they had had some problems down there. Now think about this, ladies and gentlemen. The guy's got $840 in cash on him and where does he go with that money? Out into the street where Officer Perry tells you we're in that area because we've had problems, we've had complaints from down there, so go take it into a rough neighborhood, where there's crime going on, that's where you're going to walk around with that much money on you? Maybe there's a good chance that you're going to get robbed? Yeah, but he's selling crack cocaine, so that's not a con-sideration for him. That's where his money is coming from, because he doesn't work and he doesn't go to school. His mom told you that. So that's how he makes money.

(T 103-04).

There is no question that this evidence was inadmissible, and the closing argument improper, and the First District did not hold otherwise. In Nowitzke v. State, 572 So.2d 1346, 1355 (Fla. 1990), this Court said:

> . . .the state attorney elicited irrelevant and prejudicial rebuttal testimony about the criminal behavior patterns of drug addicts from Roy Hackle, one of the arrest-ing officers. Over numerous defense objec-tions, Hackle testified that he knew drug addicts who both stole from their families to support their drug habits and committed homicides in connection with narcotics deals. (footnote omitted)

The court held:

> This entire line of questioning was com-pletely improper. Testimony concerning past crimes that did not involve the defendant cannot be introduced to demon-strate that the defendant committed the crimes at issue in the present case. (cites omitted)

Id. at 1355-56. The court continued:

> The only purpose of such testimony is to place prejudicial and misleading inferences in front of the jury. (cites omitted)

Id.

Similarly, in Dawson v. State 585 So.2d 443, 445 (Fla. 4th DCA 1991), the Fourth District said:

> The arresting officer testified that [Daw-son] admitted smoking crack cocaine on the night of the crime and also testified that people on crack generally rob and steal to get money to buy more crack. The officer then testified that he knew of cases where people on crack have robbed their own grandmothers. Evidence of this sort should not have been admitted. Nowitzke, [supra]. "The only purpose of such testimony is to place prejudicial and misleading inferences in front of the jury." Id. at 1356.

In Wheeler v. State, 690 So.2d 1369, 1371 (Fla. 4th DCA 1997), the Fourth District

> held that the court erred by allowing an officer to testify about the cocaine-sell-ing reputation of the area in which defen-dant was arrested, and about general drug dealer behavior. . . This court admonished the trial court for allowing such testi-mony, stating:
>
> We have repeatedly condemned the admission of testimony by police officers about gene-ral behavioral patterns of drug dealers. **"[E]very defendant has the right to be tried based on the evidence against him, not on the characteristics or conduct of certain classes of criminals in general." The only purpose of the testimony regarding criminal behavioral patterns "is to place prejudicial and misleading inferences in front of the jury."**

(citations omitted; emphasis added)

In Dean v. State, 690 So.2d 720 (Fla. 4th DCA 1997), the defense was that

> the defendant was unaware of the cocaine in his luggage. In support of this defense, counsel pointed to defendant's voluntary consent to the search and the fact that he was not carrying a large quantity of money at the time of his arrest.
>
> Over repeated objections from defense coun-sel, the prosecution elicited testimony from the detectives about their past exper-ience with the general behavior of drug traffickers, including that: (1) people often consent to a search of their luggage, even when it contains contraband; (2) "mules" carrying contraband sometimes do not carry much money and generally are not paid until delivery; and (3) people travel-ing with a false name on their tickets generally are involved in illegal activity.

Id. at 721. "During closing argument, the prosecutor empha-sized the testimony concerning the general practices of drug dealers and mules." Id. at 722.

The district court held:

> This court has repeatedly condemned testi-mony about behavior patterns of criminals, including drug dealers, based upon an offi-cer's observations in other cases.

Id. at 722-23. The court continued:

> General criminal behavior testimony is not allowed as substantive proof of. . .guilt because "every defendant has the right to be tried based on the evidence against him, not on the characteristics or conduct of certain classes of criminals in general."

Id. at 723, quoting Lowder v. State, 589 So.2d 933, 935 (Fla. 3d DCA 1991), dism., 598 So.2d 78 (Fla. 1992). The court said:

> In Lowder, the court found reversible error where the detective was allowed to testify that "[p]eople who sell narcotics usually have cash in their pocket."

Dean, 690 So.2d at 723.

In Thomas v. State, 673 So.2d 156 (Fla. 4th DCA 1996), the court said:

> . . .the defendant claimed that he had abandoned his intent to sell cocaine and had simply stood by while another indivi-dual completed the transaction. This court reversed his conviction based upon imper-missible testimony from the detective that often one individual is actually in posses-sion of the drugs while another person collects the money.

In Hargrove v. State, 431 So.2d 732 (Fla. 4th DCA 1983),

> we condemned testimony of a police officer that based on his experience, the post-arrest statement that "I don't mess with the stuff" was a phrase uttered frequently by drug dealers to throw suspicion off themselves. In condemning the testimony, this court found that "[t]he implications to be drawn from the exchange are obvious. They are equally irrelevant."

Dean, 690 So.2d at 723. The court continued:

> We emphasize once again why the type of testimony allowed in this case is impermis-sible and highly prejudicial. Even if such testimony were marginally relevant, it would be substantially outweighed by the "danger of unfair prejudice." See § 90.403, Fla.Stat.(1995). The danger is that this type of testimony allows a jury to consider not only the facts relevant to that defendant's case but also events at other points in time unrelated to the defendant's conduct. The jury is asked to infer that because defendant's behavior was similar to the behavior of other drug deal-ers that the officer had previously arres-ted or observed, defendant must likewise be guilty. The only purpose of testimony regarding criminal behavior patterns "is to place prejudicial and misleading inferences in front of the jury."

Id., citing Nowitzke, supra.

The court also held:

> Testimony about other drug transactions is also condemned based upon the rule of "res inter alios acta" which forbids the intro-duction against an accused of evidence of collateral facts which by

> their nature are incapable of affording any reasonable pre-sumption or inference as to the principal matter in dispute, the reason being that such evidence would be to oppress the party affected, by compelling him to be prepared to rebut facts of which he would have no notice under the logical relevancy rule of evidence, as well as prejudicing the accused by drawing away the minds of the jurors from the point in issue.

Id., citing Gillion v. State, 573 So.2d 810, 812 (Fla. 1991), (Barkett, J. specially concurring) (citing Watkins v. State, 121 Fla. 58, 61, 163 So. 292, 293 (1935)).

In Lowder, supra, the court applied this rule to prohibit testimony by the police officer to the effect that a person carrying cash must be drug dealing:

> There is no rational basis for a policy . . .that from the possession of a relatively small amount of cash [$1290] it may be in-ferred, as a matter of expertise, that one is a criminal. Carrying cash, rather than a credit card, may have much to do with socio-economic status and cultural back-ground. There may be many other reasons why people carry cash; for example, cash buying is the choice of those who prefer that their private spending habits not be monitored by easily accessible computers.

589 So.2d at 936.

In addition, contrary to Perry's claim that possession of 2.4 grams of cocaine is evidence of intent to sell, both the United States Supreme Court and Florida courts have held to the contrary. See, e.g., Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970) (14.68 gram mixture of cocaine and sugar; quantity does not prove intent to sell); McCullough v. State, 541 So.2d 720 (Fla. 4th DCA 1989) (15 crack rocks, weighing 6.15 grams, quantity does not prove intent to sell).

Officer Perry's testimony about the general characteris-

tics of a drug seller as distinguished from a drug user, fits well within the category of prohibited evidence. The prosecutor compounded the error by focusing on this improper evidence in closing argument:

> a user wouldn't possess this many rocks at one time. . .

(T 101).

> Officer Perry also told you in his experi-ence sellers carry large amounts of cash on them. The defendant had. . . over $250 worth of drugs right here and he had $840 in cash, in small bills, on him.
>
> Now, you all use your own good common sense. Small bills, you're selling $10, $20 rocks of crack cocaine, what does that mean? He was selling.

(T 102).

> Officer Perry also told you the reason they were down on Texas Street is because they had had some problems down there. Now think about this. . . The guy's got $840 in cash on him and where does he go with that money? Out into the street where Officer Perry tells you we're in that area because we've had problems, we've had complaints from down there, so go take it into a rough neighborhood, where there's crime going on, that's where you're going to walk around with that much money on you? Maybe there's a good chance that you're gong to get robbed? Yeah, but he's selling crack cocaine, so that's not a consideration for him. That's where his money is coming from, because he doesn't work and he does-n't go to school. His mom told you that. So that's how he makes money.

(T 103-04).

This discussion of typical drug dealer behavior is exactly what is prohibited by the plethora of cases discussed. It violates the rule that

> [E]very defendant has the right to be tried based on the evidence against him, not on the characteristics or conduct of certain classes of criminals in

general.

Wheeler, 690 So.2d at 1371.

Further, the error was not harmless, even though the jury acquitted Washington of possession with intent to sell. Washington hardly had exclusive possession of the bag in the bushes. At least two other people nearby, who were arrested at the same time. In his written report, the officer attributed to someone else some of the acts which at trial he attributed to Washington. He said he had made a mistake in his report and had notified the state attorney's office.

While the officer claimed to have seen a sale of marijuana, he did not claim to have seen Washington sell or even touch crack cocaine. Therefore, his conviction can arise only from an inference that, if Washington sold marijuana from the bag, he must have known what else was in it. To put it another way, the conclusion that Washington possessed cocaine would have to be based on a theory of constructive possession, as there was no direct evidence of possession.

Especially in the absence of direct evidence of possession, improper evidence, the "only purpose" of which

> is to place **prejudicial and misleading** inferences in front of the jury[,] (emphasis added)

Nowitzke, 572 So.2d at 1356, cannot be harmless. Rather, the prejudice and misleading inferences of the improper evidence pervaded the whole trial, rendering it fundamentally unfair, especially as to the cocaine charge, of which there was no direct evidence. There is a reasonable possibility the jury

might have acquitted Washington altogether, especially of the cocaine charge, on the question of whether he possessed it all, but for the improper evidence.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this court reverse his conviction and remand for new trial, with directions that no evidence may be admitted on the general characteristics of drug sellers versus drug users, and the jury be instructed that knowledge of its illicit nature is an essential element of possession of cocaine and cannabis.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Shawn Washington, inmate no. N02407, Lawtey Correctional Institution, P.O. Box 229, Lawtey, FL 32058-0229, this _____ day of November, 1999.

KATHLEEN STOVER

IN THE SUPREME COURT OF FLORIDA

SHAWN WASHINGTON, :

Petitioner, :

v. : CASE NO. 96,028

STATE OF FLORIDA, :

Respondent. :

_____/

AMENDED PETITIONER'S INITIAL BRIEF ON THE MERITS

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APPENDIX