IN THE SUPREME COURT OF FLORIDA

RAYMOND EDWARD BARNES, :

Petitioner, :

VS. :

STATE OF FLORIDA, :

Respondent. :

ORIGINAL

CASE NO. SC02-1413
(1D01-84)

JURISDICTIONAL BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER #0513253
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
I. STATEMENT OF THE CASE AND FACTS	1
II. SUMMARY OF THE ARGUMENT	2
III. ISSUE PRESENTED	3
THE COURT SHOULD ACCEPT THIS CASE TO PROMOTE UNIFORMITY OF DECISIONS.	
IV. CONCLUSION	7
CERTIFICATE OF SERVICE	7
CERTIFICATE OF FONT SIZE	7
APPENDIX	

TABLE OF CITATIONS

CASE	PAGE(S)
Barnes v. State, 815 So.2d 745 (Fla. 1st DCA May 2, 2002)	1
Chicone v. State, 684 So.2d 736 (Fla. 1996)	3,4
Jollie v. State, 405 So.2d 418 (Fla. 1981)	2,3
Reed v. State, 783 So.2d 1192 (Fla. 1st DCA 2001), review granted, no. SC01-1238 (Fla. Oct. 16, 2001)	1,2,3,5,6
State v. Medlin, 273 So.2d 394 (Fla. 1973)	1,3,4,6
State v. Williamson, 813 So.2d 61, 64-65 (Fla. 2002)	4,6
RULES	
Rule 9.030(a)(2)(A)(iv), Fl.R.App.P.	2
AMENDMENTS AND CONSTITUTIONS	
article V, § 3(b)(3), Florida Constitution	2

IN THE SUPREME COURT OF FLORIDA

RAYMOND EDWARD BARNES,	:	
Petitioner,	:	
VS.	:	CASE NO. (1D01-84)
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

JURISDICTIONAL BRIEF OF PETITIONER

I STATEMENT OF THE CASE AND FACTS

This is an appeal from the decision of the First District Court of Appeal. Barnes v. State, 815 So.2d 745 (Fla. 1st DCA May 2, 2002), rehearing denied June 17, 2002. The court per curiam affirmed, citing State v. Medlin, 273 So.2d 394 (Fla. 1973), and Reed v. State, 783 So.2d 1192 (Fla. 1st DCA 2001), review granted, no. SC01-1238 (Fla. Oct. 16, 2001). Reed is pending review in this court.

II SUMMARY OF THE ARGUMENT

Under Jollie v State, infra, the citation by the district court to a case pending a decision in this court creates conflict jurisdiction under article V, § 3(b)(3), Florida Constitution and Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. Because this court has accepted Reed for review, it should also accept this case for review, in order to promote uniformity of decisions and to serve the interests of justice.

III ARGUMENT

ISSUE PRESENTED

THE COURT SHOULD ACCEPT THIS CASE TO PROMOTE UNIFORMITY OF DECISIONS.

Petitioner, Raymond Edward Barnes, was convicted at jury trial of possession of Lortab, a controlled substance.

The First District court affirmed per curiam, citing Reed - which held an erroneous child abuse instruction was not fundamental error - and Medlin - which involved a presumption of knowledge in a drug delivery case. This type of opinion, called a "PCA cite" creates a type of discretionary conflict jurisdiction recognized by this court in Jollie v. State, 405 So.2d 418 (Fla. 1981). Jollie recognized that a conflict existed, even where the district court did nothing more than per curiam affirm with a citation, as long as the cited case was pending in this court. Reed is pending review in this court. Thus, this court has jurisdiction.

While the fact that Reed is pending review establishes this court's jurisdiction over the instant case, petitioner wishes to briefly explain his situation more fully.

In Chicone, this court held that possession of a controlled substance had two scienter elements - knowledge the substance was present and knowledge of its illicit nature - and the jury should be instructed on both. Chicone v. State, 684 So.2d 736 (Fla. 1996). In the instant case, the First District affirmed citing only Medlin, a much older case than the more recent Chicone. This court explained the relationship

between Chicone and Medlin in State v. Williamson, 813 So.2d 61, 64-65 (Fla. 2002):

> In Chicone, this Court plainly stated: "Medlin stands for the proposition that evidence of actual, personal possession is enough to sustain a conviction. In other words, knowledge can be inferred from the fact of personal possession." In fact, the court in Medlin specifically stated: "Proof that defendant committed the prohibited act raised the presumption that the act was knowingly and intentionally done."
>
> While a conviction may be sustained in a personal possession case based on the Medlin presumption, **the presumption may not be sufficient when there is other evidence which tends to negate the presumption.** In this case, the State's own evidence, through the testimony of the crime lab analyst, demonstrated that Williamson may not have been aware of the ingredients in the pills he had taken [Tylenol with codeine] since the word "codeine" could only be read with the help of a microscope. At . . .trial, the analyst testified that the pills were in a pill bottle when she received it. . .she could not read the word codeine on the pills without the help of a microscope. The district court found this evidence supported Williamson's defense that he had no knowledge of the illicit nature of the pills.
>
> Based on the foregoing. . .the trial court should have given the Chicone jury instruction as requested and. . .based on Williamson's defense of lack of knowledge of the illicit nature of the pills. . .the error was not harmless. (emphasis added; cites omitted)

The defense presented to the jury at Barnes's trial was that his stepfather had given Barnes the Lortab - the stepfather had a prescription - for pain, without telling him what it was. Thus, Barnes did not know it was a controlled substance. The jury was given the standard jury instruction which, despite Chicone, continues to omit an instruction on the knowledge of illicit nature element. Because knowledge was a disputed issue, Barnes argued on appeal, supported by substan-

tial case law, that the omitted instruction was fundamental error.

In Reed, the First District held that giving an incorrect jury instruction on the definition of "malicious" on the charge of child abuse by malicious punishment was not fundamental error. The basis of the decision appears to be in the following two points. First:

> If the challenged instructions define either a nonexistent crime or totally fail to address an element of a crime, the alleged error may be considered to be fundamental. The instant case involves an alleged inaccurate definition of an element of a crime rather than a total failure to address a necessary element. (cites omitted)

783 So.2d at 1197. Second:

> In light of the overwhelming evidence of guilt and the fact that the prosecutor did not misuse the incorrect instruction, we are convinced beyond a reasonable doubt that any jury instruction error in the case is harmless. We therefore affirm.

Id. However, the majority certified a question:

> We are aware, however, that certain cases cited by the dissent may suggest that fundamental error occurs any time an element of a crime is inaccurately defined for the jury. While we reject the proposition that these cases stand for such an inflexible rule, in order to avoid confusion, we certify the following question to be one of great public importance:
>
> IS THE GIVING OF A STANDARD JURY INSTRUCTION WHICH INACCURATELY DEFINES A DISPUTED ELEMENT OF A CRIME FUNDAMENTAL ERROR IN ALL CASES EVEN WHERE THE EVIDENCE OF GUILT IS OVERWHELMING AND THE PROSECUTOR HAS NOT MADE THE INACCURATE INSTRUCTION A FEATURE OF HIS ARGUMENT?

Id. at 1198. This court has granted review in Reed.

Petitioner's position is that the district court erred in basing its decision on Reed, because his case involves not

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court exercise its discretion to accept jurisdiction of this case and order briefing on the merits.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
Fla. Bar No. 0513253
Assistant Public Defender
Leon County Courthouse
301 S. Monroe, Suite 401
Tallahassee, Florida 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to Robert L. Martin, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to Mr. Raymond Edward Barnes, inmate no. 089286, Bay Correctional Institution, 5400 Bayline Road, Panama City, FL 32404, this 21 day of June, 2002.

CERTIFICATION OF FONT AND TYPE SIZE

This brief is typed in Courier New 12.

KATHLEEN STOVER

merely an inaccurate instruction - assuming arguendo that an inaccurate instruction is a valid distinction - but rather, a "wholly omitted" instruction **on a disputed element**. Nor was the evidence overwhelming. Further, assuming arguendo the Medlin presumption could make the wholesale omission of an instruction on an element harmless given appropriate facts, it was not harmless here. Rather, this case is analogous to Williamson, in which the defendant offered a defense to the element of guilty knowledge. Where the defendant offers such a defense, Williamson held the state could **not** rely on the presumption. Thus, the district court also misapplied Medlin.

Because the district court has held the instant case involves the same issue as Reed, and Reed is pending review in this court, petitioner requests that this court also review his case to promote uniformity of decisions.

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court exercise its discretion to accept jurisdiction of this case and order briefing on the merits.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
Fla. Bar No. 0513253
Assistant Public Defender
Leon County Courthouse
301 S. Monroe, Suite 401
Tallahassee, Florida 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to Robert L. Martin, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to Mr. Raymond Edward Barnes, inmate no. 089286, Bay Correctional Institution, 5400 Bayline Road, Panama City, FL 32404, this 21 day of June, 2002.

CERTIFICATION OF FONT AND TYPE SIZE

This brief is typed in Courier New 12.

KATHLEEN STOVER

Appendix A

District Court of Appeal of Florida,
First District.

Raymond Edward BARNES, Appellant,
v.
STATE of Florida, Appellee.

No. 1D01-0084.

May 2, 2002.

An appeal from the Circuit Court for Santa Rosa County, Ronald W. Swanson, Judge.

Nancy A. Daniels, Public Defender and Kathleen Stover, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General and Robert L. Martin, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

***746** *See State v. Medlin,* 273 So.2d 394 (Fla.1973); *Reed v. State,* 783 So.2d 1192 (Fla. 1st DCA), *rev. granted* (Fla. Oct. 16, 2001).

BOOTH, BROWNING and POLSTON, JJ. concur.

815 So.2d 745, 27 Fla. L. Weekly D1028

END OF DOCUMENT