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STATEMENT REGARDING TYPE

The size and style of type used in this brief is a 12 point
Courier.

STATEMENT OF THE CASE AND FACTS

The Respondent Norris Williamson accepts as substantially correct the statements of case and fact presented by the Petitioner, State of Florida, except as may be noted immediately below or in the argument portion of this brief.

In this case the Second District Court of Appeal certified the same three questions of great public importance as in Lambert v. State, 24 Fla L. Weekly D695 (Fla. 2d DCA March 5, 1999): 1) Does Chicone v. State, 684 So. 2d 736 (Fla. 1996), recede from Medlin v. State, 273 So. 2d 395 (Fla. 1973)? 2) Does Chicone apply when the defense presents no evidence? and 3) Does Chicone create a new element to the crime of possession of a controlled substance?¹

The defendant in Lambert was found in possession of a glass pipe typically sold "at your neighborhood convenient stores," inside of which a chemist found a residue or "molecular" amount of cocaine. 24 Fla L. Weekly D695. In this case Mr. Williamson was found in possession of "some pills, which turned out to contain codeine." See Williamson (supra), 24 FLW D852, slip opinion at page 2. The pills were marked "Tylenol," underneath of which was the word "codeine." 24 FLW D852, slip opinion at page 4. A police analyst testified that she read the word "codeine" with a microscope. 24 FLW D852, slip opinion at page 4.

¹ See, Williamson v. State, 24 FLW D852 (Fla. 2d DCA March 31, 1999), slip opinion at pages 4-5.

In all other respects the Respondent accepts as substantially correct the statements of case and fact presented by Petitioner.

SUMMARY OF THE ARGUMENT

If only in a case like this a defendant should *not* be required to "present evidence" in order to qualify for the instruction noted in Chicone v. State. Such an interpretation would constitute a sweeping change in law, which would in turn severely impact the constitutional rights not to testify or present evidence.

That is, in cases where the state's own evidence is susceptible of a reasonable inference that the defendant did not have the necessary "guilty knowledge," a defendant is not required to present evidence in order to merit the Chicone instruction.

Then too, in Chicone this Court has already rejected the kind of "affirmative defense" argument that would require such presentation-of-evidence as is now suggested by Petitioner. See, 684 So. 2d 743-4. Put another way, being *required* to present evidence to qualify for a Chicone instruction is the functional equivalent of an argument already rejected in that case.

ARGUMENT

ISSUE

THE LOWER COURT ERRED IN DENYING THE REQUESTED CHICONE INSTRUCTION WHERE A REASONABLE JURY COULD FIND FROM THE STATE'S OWN EVIDENCE THAT, BECAUSE THE WORD "CODEINE" COULD ONLY BE READ WITH THE AID OF A MICROSCOPE, MR. WILLIAMSON DID NOT HAVE THE REQUIRED "KNOWING POSSESSION."
(As restated).

Mr. Williamson was charged with possessing a controlled substance, pills containing codeine. The dispositive facts were that the pills were clearly marked "Tylenol," while a separate marking "codeine" could only be read with a microscope. Since Tylenol is not a controlled substance, a reasonable inference from the state's own evidence was that, lacking a microscope, Mr. Williamson did not "knowingly" possess codeine.

As in Lambert, the Petitioner and Respondent both agree that two of the three certified questions can be answered in the negative, leaving only one issue to be resolved by this Court: whether a Chicone instruction can be denied if a defendant "presents no evidence." See, 24 Fla L. Weekly D695. That is, Petitioner wrote, "THE CHICONE OPINION DOES NOT RECEDE FROM MEDLIN," and that "CHICONE DOES NOT CREATE A NEW ELEMENT TO THE CRIME OF POSSESSION OF A CONTROLLED SUBSTANCE." See Petitioner's brief, pages 6-8, 10-12, emphasis added.

Thus as in Lambert the Petitioner's sole contention is that the Chicone instruction cannot be compelled unless a defendant "presents evidence." Put another way, the Petitioner would require a defendant in all such cases to choose between his constitutional rights not to testify or otherwise present evidence, and his right to a full and fair set of jury instructions. Put yet another way, the state would require any such defendant to *give up* substantial constitutional rights where - as here - his sole defense is that he "had no idea" what the item possessed may have contained. (See, Williamson (supra), 24 FLW D852, slip opinion at page 4.)

Petitioner began by saying actual exclusive possession gives rise to a rebuttable presumption or inference that the possessor knew of the illicit nature of the substance possessed. Petitioner's brief, page 5. The Respondent would agree that such possession *can* give rise to such an inference, as for example if a defendant was found in the exclusive possession of a baggie of crack cocaine. But that was not the case here. Here the defendant was found in possession of pills clearly marked "Tylenol," while the marking "codeine" could only be seen with the help of a microscope.

So as amended, the Petitioner's contention should properly read, "Actual exclusive possession *can* give rise to a rebuttable presumption or inference that Respondent knew the illicit nature of the substance he possesses." (Emphasis added.)

Thus it may well be that in a trial where the state's evidence establishes a defendant's actual possession of a baggie of crack cocaine, he might have to "present evidence" in order to require a Chicone instruction. But that question is beyond the scope of the narrow issue raised in both this case and in Lambert.

In both cases the state's own evidence gave rise to a valid issue whether the possessor knew of the illicit nature of the substance possessed. In Lambert the trace, residual or "molecular" amount of contraband was found inside a pipe commonly sold at "convenient stores." In this case Mr. Williamson was found in possession of pills clearly marked "Tylenol," and much less clearly marked "codeine," a word that could only be read with the aid of a microscope. Thus in both cases the state's own evidence was susceptible of a reasonable interpretation the defendant did *not* have "knowledge of the illicit nature of the substance allegedly possessed." See Williamson, slip opinion at page 4.

Again, it may well be that in some such cases a defendant might be required to "present evidence" in order to get a Chicone instruction, but that is beyond the scope of *this* proceeding.

But in both this case and in Lambert the second certified question might be better re-worded before being answered in the affirmative. That is, the question might be reworded: "DOES CHICONE APPLY WHEN THE DEFENSE PRESENTS NO EVIDENCE BUT THE STATE'S OWN EVIDENCE IS SUSCEPTIBLE OF A REASONABLE INTERPRETATION THAT THE

DEFENDANT MAY NOT HAVE HAD KNOWLEDGE OF THE ILLICIT NATURE OF THE SUBSTANCE ALLEGEDLY POSSESSED?" As reworded that limited question could then be answered in the affirmative, leaving to another time the issue whether the Chicone instruction applies in *other* cases where a defendant presents no evidence.

As noted in Lambert, the State would force a defendant in such cases to choose between the constitutional rights not to testify or present evidence or having his jury fully instructed on relevant law. The Petitioner would hold that as a matter of law that a defendant is *not* entitled to a Chicone instruction if he "presents no evidence," no matter how weak the state's case may be.

Up until now *every* defendant has had the right to argue to a jury that the state has simply failed to prove guilt beyond a reasonable doubt. The Petitioner would apparently carve out a sweeping new exception to that general rule, and would require that defendants in drug-possession cases *must* present evidence in order to receive a full and proper jury instruction.

But this Court need not address such sweeping issues because this case presents the *narrow* issue whether a Chicone instruction can be properly denied where the state's evidence is as weak as it was here. If only in this case, Mr. Williamson should not have been required to give up his right not to testify or be forced to present evidence. This was because the state's own evidence was

susceptible of a reasonable interpretation that he simply did not know of the presence of the contraband codeine.

In making his request for what would amount to a sweeping new change in constitutional law, the Petitioner cited Scott v. State, 722 So. 2d 256 (Fla. 5th DCA 1998). Petitioner's brief, pages 8-10.

Petitioner cited this case for the proposition that before such a defendant can be entitled to a Chicone instruction, "there must 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." Petitioner's brief, page 9. "In other words," the Petitioner indicated, there must be something "in evidence to rebut the inference that Respondent knew the illicit nature of the substance." Petitioner's brief, page 10. In still further words (the Petitioner indicated), there must be some "factual basis to create an issue as to whether Williamson knew of the illicit nature of the substance." Petitioner's brief, pages 8-10.

As noted, in cases where a defendant is shown to have exclusively possessed a baggie of crack cocaine, the Petitioner *might* be correct. But in this case the state's own evidence constituted a factual basis from which any jury might reasonably infer that Mr. Williamson did not have the required guilty knowledge. Thus this Court need not consider - either in this case or in Lambert - whether in *some* cases a defendant might be forced

to choose between such competing rights. In this case the state's own evidence gave rise to a reasonable interpretation that the defendant did not have guilty knowledge.

Again, there may indeed be some cases where the evidence is so strong that a defendant's failure to present evidence may preclude the right to a Chicone instruction. But that issue is not before this Court here. The narrow issue *here* is whether a requested Chicone instruction can be properly denied where the state's own evidence is susceptible of an interpretation by a reasonable jury that the state failed to prove the defendant's *knowledge* of the presence of the felony contraband.

It should also be pointed out that Scott (*supra*) was clearly distinguishable on its facts. There a search of the defendant's locker in a correctional facility revealed marijuana secreted inside his eyeglass case. 722 So. 2d 257. On review, the district court agreed with Chicone's holding that the standard instructions are adequate *unless* a defendant asks for a more specific instruction, "regarding knowledge of the illicit nature of the substance." 722 So. 2d 257. But - the Court said - before such an instruction can be *required*, there must 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." 722 So. 2d 257.

In other words, the Fifth District apparently said that before such an instruction can be required there must be some "evidence" to warrant the instruction. And in Scott the court properly found there was no such reasonable evidence or inference. That is, the Fifth District said such a request was subject to harmless error analysis and that in the case before it, "unlike Chicone, there was no factual basis to *create an issue* as to whether Scott knew of the illicit nature of the substance." 722 So. 2d 258, emphasis added.

But in Mr. Williamson's case there was such a factual basis. The state's own evidence "created an issue" whether the state had proven Mr. Williamson knew of the presence of codeine, where the pills were clearly marked "Tylenol" and the word "codeine" could only be seen with a microscope. That situation is a far cry from the significant amount of contraband found inside a closed eyeglass case, inside a closed locker, inside a prison, as occurred in Scott. See, 722 So. 2d 257. Suffice it to say that if the analysis in Scott is not simply wrong, it is at the very least factually distinguishable from this case and from Lambert.

In light of the foregoing, this Court should answer the first and third certified questions in the negative, since both the Petitioner and the Respondent agree on those points. This Court should then answer the second certified question in the affirmative, and affirm the Second District's decision.

This Honorable Court could affirm the Second District's opinion and answer the second certified question in the affirmative² based on the foregoing analysis alone. However, in the interests of completeness the Respondent will provide this Court with the following additional analysis, similar to that presented in the Respondent's brief in Lambert.

Specifically, in Chicone this Court began by saying "guilty knowledge is an element of possession of a controlled substance," while adding that in the case before it the "State was not required to allege guilty knowledge in the Information."³ 684 So. 2d 738. The Court noted that the "state of law on this issue is unclear ... with some [prior] decisions indicating that guilty knowledge must be shown in constructive possession cases but not in actual possession cases." 684 So. 2d 738.

The Court began with the statement in Medlin that to prosecute for possession of contraband there must be a conscious and substantial possession as distinguished from a "mere involuntary or

² For example, "Chicone does apply even if a defendant presents no evidence." If this case doesn't provide a sufficient basis for that holding, this Court could hold in the alternative that "Chicone applies when the state's evidence is itself subject to an interpretation that the state has failed to prove its case."

³ In Footnote 2 the Court said crimes of possession may be either actual or constructive. But (Respondent suggests), there may be some "in between" cases like the one here. Here the codeine was effectively "secreted" in a pill clearly marked as Tylenol, and so it is unclear whether the possession was actual or constructive.

superficial possession." 684 So. 2d 738. The Court noted that in later opinions "we have not been entirely clear on the issue:"

Medlin is the case most cited for the proposition that guilty knowledge is *not* an element of a simple possession crime. However, by our holding, we substantially begged the question of the nature of the guilty knowledge required by the statute. We held in Medlin that a jury question was presented as to whether the "defendant was aware of the nature of the drug involved" [which was] sufficient proof that the "defendant was aware of the nature of the drug" to get the case to the jury.

684 So. 2d 739, emphasis added. The Court noted that shortly after Medlin it reached an apparently-contrary decision in Smith v. State, 279 So. 2d 27 (Fla. 1973), with the result that "Medlin and Smith mirror much of the confusion in the case law on the issue of guilty knowledge in drug possession cases." 684 So. 2d 739.

This Court then recognized that in Frank v. State, 199 So. 2d 117 (Fla. 1967) it expressly said knowledge of the illicit nature of the substance was an element of the crime of possession:

Scienter constitutes a factual issue to be resolved by the jury *upon proper instruction* as to the legal principles pertinent to its consideration. This is not a mere legal technicality of the law, but a legal principle which must be observed... It is a safeguard which must be preserved in the interests of justice... For these reasons it is our view that the error committed by the trial judge so infects the judgment that it should not be permitted to stand.

684 So. 2d 739, emphasis added. The Court then cited State v. Oxx, 417 So. 2d 287 (Fla. 5th DCA 1982), for the comprehensive analysis provided by Judge Cowart and for the following:

[T]he 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... 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 the latter situation, the State must present some corroborating evidence of knowledge to establish a prima facie case.

684 So. 2d 740. This passage *seems* to indicate that there is a dispositive legal distinction between actual and constructive possession. From that inference the Petitioner now seems to argue that a Chicone instruction can be required in constructive-possession cases but *not* in actual-possession cases.

But as noted above, this seems to be a distinction without a difference, at least in some cases like the one presented here.

That is, the Respondent suggests that the Chicone instruction depends not so much on actual or constructive possession, or on whether a defendant does or doesn't present evidence. The Respondent suggests the instruction must be given in any case where failing to do so would deny a defendant the fair opportunity to have the jury *weigh* the evidence. In turn, "having the jury fairly and fully weigh the evidence" necessarily includes weighing either a defense that the accused didn't know of the presence of the contraband, or the alternate and time-honored defense that the state simply failed to carry its burden of proof, or both.

In Chicone the Court went on to note that the common law rule was that scienter was a necessary element of every crime, which the Court said was a rule followed in "statutory crimes even where the statutory definition did not expressly include scienter in its

terms." 684 So. 2d 741. Further, the Court said statutes defining crimes must generally be construed most favorably to the accused. 684 So. 2d 741. And the Court recognized that determining scienter as an essential element of a statutory crime is a question of legislative intent. 684 So. 2d 741.

After concluding the "mala in se/mala prohibita" method of finding legislative intent was "of little help here," the Court agreed with the method where offenses leading to substantial penalties are *presumed* to include a requirement of proof of scienter "in the absence of an express contrary intent." 684 So. 2d 741-2. The Court said offenses listed in section 893 are "incongruous with crimes that require no mens rea." 684 So. 2d 742-3.

This Court further noted the mens rea requirement was the *rule* rather than the exception in Anglo-American criminal jurisprudence, and said offenses requiring no mens rea are "generally disfavored," and again said in the absence of a clear legislative intent, it was reluctant to adopt such a sweeping interpretation as would criminalize a broad range of apparently-innocent conduct:

The group of offenses punishable without proof of any criminal intent must be sharply limited. The sense of justice of the community will not tolerate the infliction of punishment which is substantial upon those innocent of intentional or negligent wrongdoing...

684 So. 2d 743-4. The Court said even the State in that case agreed the Legislature would not ordinarily criminalize innocent

possession of illegal drugs, and "[s]ilence does not suggest that the legislature dispensed with scienter here." 684 So. 2d 743-4.⁴

This Court then ruled that even though in such cases the state did not have to specifically charge such guilty knowledge in the Information, the trial judge must still charge the jury fully and correctly, and when he or she "excludes a fundamental and necessary ingredient of law required to substantiate the particular crime, such failure is tantamount to a denial of fair and impartial trial." 684 So. 2d 744-5, emphasis added.

Finally the Court noted that while in Chicone's trial the judge gave the standard instructions on possession, he should have also given the proffered instruction requiring proof that among other things, "the substance he possessed was known to him to be cocaine." 684 So. 2d 745. This was because (the Court indicated) the standard instructions are adequate in most cases but a defendant is entitled to a "more specific instruction" if he requests. 684 So. 2d 745-6. Specifically, the Court quashed the failure to give the requested instruction because doing so meant

⁴ This Court also disagreed with a state contention that lack of knowledge should be considered an affirmative defense, as would apparently require such "presentation of evidence" as is suggested by Petitioner in this case. See, 684 So. 2d 743-4.

Put another way, it appears that being *required* to present evidence to qualify for a Chicone instruction is the equivalent of an "affirmative defense" argument that has already been rejected.

the state "did not have to prove that Chicone knew of the illicit nature of the items he possessed." 684 So. 2d 746.⁵

If only in cases where the state's proof is as weak as it was here,⁶ no defendant should be forced to choose between his right to have the judge correctly and accurately instruct the jury,⁷ and his constitutional rights not to testify or present evidence. If nothing else, the sweeping interpretation of law advanced by the Petitioner would nullify the hallowed and time-honored defense that the state has simply "failed to prove its case."

Turning to the case which led to the confusion clarified by Chicone, the defendant in Medlin⁸ delivered a barbiturate capsule to a sixteen-year-old girl, telling her "it would make her 'go up,'" while also giving her another pill for "when she came down from the high created by the capsule." This Court properly ordered the defendant's conviction reinstated, after disagreeing with the

⁵ The Court added, "consistent with Medlin, the present instructions also note the inference of knowledge that may be appropriately drawn in cases of actual possession." 684 So. 2d 746, footnote 14. But in this case, because Mr. Williamson possessed pills clearly marked "Tylenol" - a common brand name - inside of which the codeine was "secreted," his case is closer to one of constructive rather than actual possession.

⁶ That is, cases where the state's own evidence is susceptible of a factual interpretation favoring the defense.

⁷ Including instructions on *all* essential and necessary elements of the crime charged. See Chicone, at 745.

⁸ Medlin v. State, 273 So. 2d 395 (Fla. 1973).

district court's opinion that the state hadn't proven he "had knowledge" that the pill contained contraband. 273 So. 2d 395.

In that case this Court distinguished actual from constructive possession, then said in the case before it the state wasn't required to prove what was later called "guilty knowledge" in Chicone. See, 273 So. 2d 395. Specifically, this Court said the proof that Medlin committed the charged act raised a sufficient presumption "that the act was knowingly and intentionally done," especially given the girl's testimony as to Medlin's statements to her which constituted "evidence that defendant was aware of the nature of the drug involved." 273 So. 2d 395.

In light of the foregoing (the Respondent suggests), Chicone simply means that where the evidence at trial raises a fairly-debatable issue of fact, that issue must generally be resolved by the jury, subject to a full and fair set of instructions by the trial judge. The Respondent further suggests this precept holds true even if that evidence is supplied exclusively by the state. Put another way, Chicone does *not* mean a defendant must as a matter of law waive substantial constitutional rights in order to qualify for a full and fair set of jury instructions.

To summarize, Mr. Williamson should *not* have been required to present evidence before being entitled to a full and fair instruction to the jury, listing every necessary element of the crime, including his knowledge of the presence of the codeine. In light

of the case-law and other authority cited above, this Court should affirm the opinion of the Second District Court of Appeal, while answering the first and third certified questions in the negative, and the second certified question in the affirmative.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, the Respondent respectfully requests that this Honorable Court affirm the decision rendered by the Second District Court of Appeal, and further answer the first and third certified questions in the negative, and the second certified question in the affirmative.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Johnny T. Salgado, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of February, 2000.

Respectfully submitted,

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