IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

CASE NO. SC03-1315

vs.

HENRY MAYNARD BARNUM,

Respondent.
_____/

AMICUS CURIAE BRIEF OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (FACDL) IN SUPPORT OF THE RESPONDENT

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PRELIMINARY STATEMENT

The Florida Association of Criminal Defense Lawyers (FACDL) is a statewide organization of over 1,500 criminal defense lawyers, including both private attorneys and public defenders. The FACDL's interest in this case is to ensure a fair and constitutional adjudication of the issues in this case, which it believes to be of exceptional importance.

TABLE OF AUTHORITIES

SUMMARY OF ARGUMENT

This Court's decision in *Thompson* constituted a clarification in the law, not a change in the law. Therefore the traditional test for retroactive application of a new decision does not apply, and *Thompson* should be applied to Respondent and any other defendant that was convicted under Fla. Stat. § 784.07(3) without the State being required to prove beyond a reasonable doubt that the defendant had knowledge that the victim was a law enforcement officer.

The fact that there is a disputed factual matter or that Respondent may have been convicted had the jury been properly instructed is irrelevant. Therefore, this Court should answer the certified question in the affirmative.

Likewise, because this Court's decision in *Thompson* was merely a clarification of Fla. Stat. § 784.07(3), there is no issue of retroactivity and the traditional *Witt* test does not apply. Accordingly, the Fourth DCA's improperly applied that test in *Sweeney*. This Court should quash that decision and

resolve the certified conflict in favor of the result reached by the First DCA in *Barnum*.

ARGUMENT

THIS COURT'S DECISION IN THOMPSON v. STATE SHOULD BE APPLIED TO RESPONDENT AND ANY OTHER DEFENDANT THAT WAS CONVICTED UNDER SECTION 784.07(3), FLORIDA STATUTES, WITHOUT THE STATE BEING REQUIRED TO PROVE THAT THE DEFENDANT HAD KNOWLEDGE OF THE VICTIM'S STATUS AS A LAW ENFORCEMENT OFFICER.

In *Thompson v. State*, 695 So. 2d 691 (Fla. 1997), this Court held that knowledge of the victim's status as a law enforcement officer is a necessary element of attempted murder of a law enforcement officer under Fla. Stat. § 784.07(3). That decision should apply retroactively to any defendant that was convicted under § 784.07(3) without the State being required to prove beyond a reasonable doubt that the defendant had knowledge of the victim's status as a law enforcement officer. The decision in *Thompson* should be applied in that manner pursuant to this Court's decision in *Klayman v. State*, 835 So. 2d 248 (Fla. 2002), and the United States Supreme Court's decisions in *Fiore v. White*, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001),

and *Bunkley v. Florida*, 538 U.S. 835, 123 S.Ct. 2020, 155 L.Ed.2d 1046 (2003).

I. THIS COURT'S DECISION IN THOMPSON SHOULD APPLY TO THE RESPONDENT BECAUSE IT CONSTITUTED A CLARIFICATION OF THE LAW, NOT A CHANGE IN THE LAW.

This Court's decision in *Thompson* constituted a clarification in the law, not a change in the law. Therefore, the traditional test for retroactivity does not apply, and *Thompson* should be applied to Respondent and any other defendant that was convicted under § 784.07(3) without the State being required to prove that the defendant had knowledge that the victim was a law enforcement officer.

In *Thompson*, almost two years after Respondent's conviction became final, this Court held that knowledge of a victim's status as a law enforcement officer was a necessary element of the offense of attempted murder of a law enforcement officer under Fla. Stat. § 784.07(3). 695 So. 2d at 693. At the time *Thompson* was decided, the relevant portions of Fla. Stat. § 784.07 provided as follows:

> (2) Whenever any person is charged with knowingly committing an assault or battery upon a law enforcement officer . . . engaged in the lawful performance of his duties, the offense for which the person is charged shall be reclassified as follows: . . .
>
> (3) Notwithstanding the provisions of any other section, any person who is convicted

> of attempted murder of a law enforcement officer engaged in the lawful performance of his duty or who is convicted of attempted murder of a law enforcement officer when the motivation for such attempt was related, all or in part, to the lawful duties of the officer, shall be guilty of a life felony, punishable as provided in s. 775.0825.

This Court reasoned that subsection (2) of Section 784.07 and the second part of the sentence in subsection (3) clearly require that a defendant have knowledge that his victim was an officer, and that it would be illogical and unreasonable to require knowledge in those subsections of the statute, but not in the first part of subsection (3). The Court further reasoned that the language of subsection (3) implicates a knowledge requirement because "a conviction for the offense of attempt has always required proof of the intent to commit the underlying crime." Finally, the Court stated that in the absence of clear intent to the contrary, and based on the substantial penalty for the offenses addressed in Fla. Stat. § 784.07, construing subsection (3) to not require knowledge of the victim's status as a law enforcement officer would be contrary to a basic tenet of statutory construction and to the rule of lenity. *Thompson*, 695 So. 2d at 692-93.

Subsection (3) of Fla. Stat. § 784.07 was added by the legislature in 1988. Section 55, Chapter 88-381, Laws of

Florida. Prior to its decision in *Thompson*, the Florida Supreme Court had not previously addressed whether the State had to prove that a defendant charged under Fla. Stat. § 784.07(3) had knowledge that his victim was a law enforcement officer.

In *Fiore*, the United States Supreme Court, on federal habeas review, held that a defendant's state court conviction violated due process because it was obtained without the State having to prove one of the basis elements of the crime beyond a reasonable doubt. The Court distinguished between decisions that made clarifications in the law and those which announced changes in the law. *Fiore*, 531 U.S. at 228-29.

Prior to reaching its decision, the Court certified a question to the Pennsylvania Supreme Court. The U.S. Supreme Court inquired as to the state of the law at the time that the defendant was convicted in light of a recent decision of the Pennsylvania Supreme Court interpreting the statute under which the defendant was charged. The Pennsylvania Supreme Court replied that its recent decision had merely clarified the relevant statute and that its interpretation of the law in that case was the law of Pennsylvania at the time that the defendant was convicted. *Id*.

Based on the response of the Pennsylvania Supreme Court, the U.S. Supreme Court concluded that the defendant's conviction

violated due process. The Court reasoned that, because the recent decision of the Pennsylvania Supreme Court was not new law, there was no issue of retroactivity. Therefore, the Court concluded that the conviction was unconstitutional because it was obtained without the State being required to prove one of the basic elements of the charged offense. *Id*.

Subsequently, in *Klayman v. State*, 835 So. 2d 248 (Fla. 2002), this Court, based on *Fiore*, held that "if a decision of a state's highest court is a clarification in the law, due process considerations dictate that the decision be applied in all cases, whether pending or final, that were decided under the same version (i.e., the clarified version) of the applicable law. Otherwise, courts may be imposing criminal sanctions for conduct that was not proscribed by the state legislature." *Klayman*, 835 So. 2d at 252.

In reaching its decision, this Court specifically distinguished clarifications in the law from changes in the law that only apply retroactively if they pass the test established in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). The Court stated that a clarification in the law is a decision of this Court that says what the law has been since the time of enactment. The Court continued, stating that "a simple clarification in the law does not present an issue of retroactivity and thus does not

lend itself to a *Witt* analysis." *Klayman*, 835 So. 2d at 252-53.

In further distinguishing a clarification from a change in the law, this Court reasoned that where the decision is silent or ambiguous on this point, we should look to the statute to discern its intent. The Court stated that where a statute does not cede discretion to this courts either directly or indirectly, by using language such as "may", "reasonable", or "probable cause", but uses definitive language, the legislature intends that the statute be applied as enacted. The Court concluded that a decision confirming the original intent of such a statute is a clarification of that law. *Id*. at 253, n.9, n.10.

The Court referenced *State v. Iacovone*, 660 So. 2d 1371 (Fla. 1995) as a decision which merely clarified a statute. In *Iacovone*, the Court held, based on the rules of statutory construction, that the provisions in Fla. Stat. §§ 784.07(3) and 775.0825, making attempted murder of a law enforcement officer a life felony with a 25-year mandatory minimum sentence, only apply to attempted first-degree murder, not attempted second and third-degree murder. *Klayman*, 835 So. 2d at 253-54.

In referencing *Iacovone* and other cases which involved clarifications in the law under *Fiore*, this Court stated that those cases involved situations where the legislature used

language that was intended to be clear on its face. This Court reasoned that "[t]he key consideration is that, in construing the statutes contrary to legislative intent, *the courts imposed criminal sanctions without criminal authority* – i.e, they imposed criminal sanctions where none were intended. The rulings thus violated the Due Process Clause and all defendants convicted or sentenced without statutory authority were entitled to relief." *Klayman*, 835 So. 2d at 254.

Recently, in *Bunkley v. Florida*, 538 U.S. 835, 123 S.Ct. 2020, 155 L.Ed.2d 1046 (2003), the U.S. Supreme Court, based on *Fiore*, reversed a decision of this Court. In *Bunkley*, this Court had denied a defendant postconviction relief by refusing to apply *L.B. v. State*, 700 So. 2d 370 (Fla. 1997), retroactively. The U.S. Supreme Court held that despite the fact that the decision did not meet the normal test for retroactive application under Florida law, due process precluded a state from convicting a person without all the elements of the crime beyond a reasonable doubt. 123 S.Ct. at 2022-23.

The U.S. Supreme Court reasoned that this Court's recent decision in *L.B.*, interpreting the meaning of "common pocketknife", may have rendered the defendant's conviction, which became final in 1989, invalid. The definition of "common pocketknife" was relevant to determine whether the defendant was

carrying a "weapon", or whether the pocketknife he was carrying fit into the "common pocketknife exception" to Fla. Stat § 790.001(13), the applicable statute. The U.S. Supreme Court stated that the relevant inquiry was whether this Court's interpretation of "common pocketknife" was the valid law at the time the defendant's conviction became final. The U.S. Supreme Court specifically noted that the *L.B.* decision was the first time that this Court had interpreted the "common pocketknife exception", and that this Court's interpretation of the exception included the knife the defendant was carrying. Thus, the U.S. Supreme Court concluded that, without further clarification from the Florida Supreme Court, it remained unclear whether the *L.B.* decision correctly stated the "common pocketknife exception" at the time the defendant was convicted. *Bunkley*, 123 S.Ct. at 2023-24.

In the instant case, the First DCA considered the application of K*layman* to Respondent's case, but concluded that it did not apply.[1] The district court acknowledged the distinction between clarifications and changes in the law established in *Klayman*, but concluded that the *Thompson* decision

[1] Although the First DCA's decision in this case was rendered six days after the U.S. Supreme Court's decision in *Bunkley*, the First DCA's decision cites to this Court's 2002 opinion in *Bunkley v. State*, 833 So. 2d 739 (Fla. 2002).

failed to fit into either category. The district court conceded that § 784.07(3) "did not contain the broad terms evincing that the legislature expected the courts to engage in judicial construction, but instead used language that was intended to include a knowledge requirement from the date of the law's enactment, which, under *Klayman*, would indicate that the court in *Thompson* was simply clarifying the meaning of the statute. *Barnum*, 849 So. 2d at 374.

The district court, however, also cited *Klayman* for the proposition that, in deciding the applicability of a decision to final cases, "a key consideration is whether prior case law shows that the lower courts were imposing criminal sanctions under the statute where none were intended." The district court stated that the instant case is distinguishable from the cased cited by this Court in *Klayman* as examples of decisions that clarified rather than changed the law. The district court reasoned that in the cited examples, unlike the instant case, "it could be readily determined from the record that the convictions or sentences imposed contrary to the statutes in question as a matter of law, and did not involve factually disputed matters." The district concluded by stating that "it cannot be said in this case that the trial court imposed a criminal sanction where none was intended, because the jury

might have convicted Barnum of attempted murder of a law-enforcement officer if it had been properly instructed." *Barnum*, 849 So. 2d at 375.

The First DCA's conclusion that this Court's decision in Klayman does not apply to *Thompson* is in error. The district court correctly noted, however, that the language of Fla. Stat. § 784.07(3) indicates that the legislature intended to include a knowledge requirement from the date of enactment, and thus, that *Thompson* was merely clarifying legislative intent. As in the *Hayes* decision addressed in *Klayman* and the *L.B.* decision addressed in *Bunkley*, this Court's decision in *Thompson* was the first time that it had been asked to construe § 784.07(3) in this manner. Prior to *Thompson*, this Court had never considered whether knowledge was a necessary element of an offense charged under the first sentence of subsection (3). As noted by the district court, there is absolutely no discretionary language in Fla. Stat. § 784.07(3). Thus, the legislature intended that the statue be applied as enacted, and this Court's first interpretation of the statute is a clarification of the legislature's original intent.

Moreover, as in *Iacovone*, cited by this Court as a decision in which a clarification in the law was made, this Court reached its decision in *Thompson* based on the rules of statutory

construction. Under those rules, it is a court's duty to give effect to legislative intent. *See Iacovone*, 660 So. 2d at 1373.

The district court erred when it concluded that *Klayman* did not apply to Respondent's case because it involves a factually disputed matter and he may have been convicted had the jury been properly instructed. In reaching its conclusion, the district court appears to have misconstrued a portion of one phrase used by this Court in *Klayman*.

As previously asserted, in *Klayman*, this Court stated that "[t]he key consideration is that, in construing the statutes contrary to legislative intent, *the courts imposed criminal sanctions without criminal authority* – i.e, they imposed criminal sanctions where none were intended." The district court used the second, un-italicized portion of that reasoning to supports its conclusion that *Klayman* does not apply to Respondent's case.

The fact remains that, pursuant to *Thompson*, at the time Respondent was convicted, the law required that the State prove beyond a reasonable doubt that the defendant had knowledge the victim was a law enforcement officer to support a conviction under Fla. Stat. § 784.07(3). The decisions in *Fiore*, *Klayman*, and *Bunkley* clearly establish that the *Thompson* decision was a

clarification of the law as it stood from the time it was enacted. Thus, there is no issue of retroactivity and the test established by this Court in ***Witt*** does not apply.

Therefore, allowing a conviction under § 784.07(3) to stand without the state being required to prove that the defendant had the required knowledge of the victim's status as a law enforcement officer would being allowing the courts to impose criminal sanctions without statutory authority. Additionally, it is clear the legislature did not intend for criminal sanctions to be applied in the absence of the State being required to prove all the essential elements of a charged offense. It is well-established that the Due Process Clause prohibits a state from convicting a person of a crime without proving all the elements of that crime beyond a reasonable doubt. *See Bunkley*, 123 S.Ct. at 2023; *Fiore*, 531 U.S. at 228-29; *See also Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (due process requires that a criminal defendant is entitled to a jury determination that he is guilty of every element of the offense for which he is charged, beyond a reasonable doubt).

The fact that there is a disputed factual matter or that the Respondent may have been convicted had the jury been properly instructed is irrelevant. The district court's refusal to apply K*layman* on that basis improperly interjects a harmless error

standard into the determination of whether a decision should be applied retroactively. There is absolutely no basis in *Fiore*, *Klayman*, or *Bunkley* for the inclusion of such a standard. Additionally, the fact that a defendant is awarded a new trial based on a retroactive application of *Thompson* would not preclude the State from seeking a new conviction in a trial where the jury was properly instructed.

Therefore, this Court should answer the certified question in the affirmative and *Thompson* should be applied to the Respondent's case based on both the doctrine of fundamental fairness and the rationale of *Fiore*, *Klayman*, and *Bunkley*. This Court's decision in *Klayman* should apply in all cases whether or not the clarified issue requires the resolution of a disputed factual matter. Accordingly, the Respondent and any other defendant that may have been convicted under Fla. Stat. § 784.07(3) without the State being required to prove beyond a reasonable doubt that the defendant was aware that the victim was a law enforcement office should be entitled to relief.

As this Court did in *Klayman*, this Court should give all defendants who were convicted under those facts two years from the date of its opinion in this case to seek postconviction relief under *Thompson*. *Klayman*, 835 So. 2d at 254 n.13; *See also Dixon v. State*, 730 So. 2d 265, 268-69 (Fla. 1999) (limited

number of opinions given retroactive effect and uncertainty which surrounds issue of retroactivity makes it reasonable to provide eligible defendants with two-year time from date of decision announcing retroactivity).

II. THIS COURT'S DECISION IN KLAYMAN HAS EFFECTIVELY OVERRULED THE FOURTH DCA'S DECISION IN SWEENEY.

In addition to the question certified to this Court by the First DCA, the district court also certified conflict with the Fourth DCA's opinion in *Sweeney v. State*, 722 So. 2d 928 (Fla. 4th DCA 1998). In *Sweeney*, the Fourth DCA was asked to determine whether this Court's decision in *Thompson* should be applied retroactively to a defendant seeking postconviction relief.

The district court held that this Court's decision in Thompson would not be applied retroactively. The district court applied the three-prong test for retroactivity established by this Court in *Witt*. Under *Witt*, for a case to apply retroactively, it must (1) emanate from the United States Supreme Court or the Florida Supreme Court; (2) be constitutional in nature, and (3) constitute a development of fundamental significance. *Sweeney*, 722 So. 2d at 930.

The district court concluded that the first prong was established, but refused to apply *Thompson* retroactively because

it concluded that the decision was not constitutional in nature. The district court reasoned that "the *Thompson* court merely applied principles of statutory construction in holding that the statute implicitly requires a factual finding that the defendant have knowledge of the victim's status." *Sweeney*, 722 So. 2d at 930-31.

As previously asserted, pursuant to *Fiore*, *Klayman*, and *Bunkley*, there is a clear distinction between clarifications in the law and changes in the law. The *Witt* test for retroactivity applies to changes in the law, but does not apply where an opinion of the U.S. Supreme Court or this Court merely clarifies the original intent of a criminal statute. *See Klayman*, 835 So. 2d at 252-53.

Therefore, since this Court's decision in *Thompson* was merely a clarification of Fla. Stat. § 784.07(3) as it stood from the time it was enacted, there is no issue of retroactivity and the *Witt* test does not apply.[2] Accordingly, since the Fourth DCA improperly applied the *Witt* test in *Sweeney*, this Court should quash that decision and resolve the certified conflict in favor of the result reached by the First DCA in *Barnum*.

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[2] The FACDL submits that this Court's decision in *Thompson* also satisfies the W*itt* test for retroactivity, but does not expound on that issue because it is outside the scope of the issues on which it was granted leave to file a brief.

CONCLUSION

Based on the foregoing, this Court should answer the certified question in the affirmative. This Court's decision in *Klayman* should apply in all cases, whether or not the clarified issue requires the resolution of a disputed factual matter. Additionally, this Court should resolve the conflict between the First DCA's decision in *Barnum* and the Fourth DCA's decision in

Sweeney in favor of the result reached in *Barnum*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail delivery to Trish Meggs Pate, Assistant Attorney General, the Capitol, Suite PL-01, Tallahassee, FL 32399-1050, and Kathleen Stover, Assistant Public Defender, Leon

County Courthouse, 301 S. Monroe, Suite 401, Tallahassee, Florida 32301, on this 30th day of December, 2003. . .

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is submitted in Courier New 12-point font and thereby complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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