IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA	:	
Petitioner,	:	
VS.	:	CASE NO.SC03-1315
HENRY MAYNARD BARNUM,	:	
Respondent.	:	

ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
I PRELIMINARY STATEMENT	1
II STATEMENT OF THE CASE AND FACTS	1
III SUMMARY OF ARGUMENT	2
IV ARGUMENT	4
ISSUE PRESENTED/CERTIFIED QUESTION	
WHETHER THE ANALYSIS OF STATE v. KLAYMAN, 835 So.2d 248 (Fla. 2002), APPLIES WHEN AN ISSUE THAT THE SUPREME COURT HAS CLARIFIED REQUIRES RESOLUTION OF A DISPUTED FACTUAL MATTER?	
V CONCLUSION	29
CERTIFICATE OF SERVICE	29
CERTIFICATION OF FONT AND TYPE SIZE	29
[CHRONOLOGY]	30

TABLE OF CITATIONS

CASE	PAGE(S)
Amlotte v. State, 456 So.2d 448 (Fla. 1984)	22
Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)	6,13,15,16
Barnum v. State, 849 So.2d 371 (Fla. 1st DCA 2003)	4,5,7,8 Passim
Brown v. State, 565 So.2d 369 (Fla. 1st DCA 1990), review denied, 576 So.2d 285 (Fla. 1991)	26
Brown v. State, 634 So.2d 735 (Fla. 1st DCA 1994), app'd, 655 So.2d 82 (Fla. 1995)	25
Bunkley v. State, 833 So.2d 739 (Fla. 2002)	4
Bunkley v. Florida, ____ U.S. ____, 123 S.Ct. 2020, 155 L.Ed.2d 1046 (May 27, 2003)	4,16,17,20 Passim
Carpentier v. State, 587 So.2d 1355 (Fla. 1st DCA 1991), review denied, 599 So.2d 654 (Fla. 1992)	2,7,8,20,27
Castor v. State, 365 So.2d 701 (Fla. 1978)	12
Delgado v. State, 776 So.2d 233 (Fla. 2000)	22,23
Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992)	26
Fiore v. White, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001)	18,19,20,23

TABLE OF CITATIONS

CASE	PAGE(S)
Grinage v. State, 641 So.2d 1362 (Fla. 5th DCA 1994)	8,9,26
Holland v. State, 773 So.2d 1065 (Fla. 2000)	27
Iavocone v. State, 639 So.2d 1108 (Fla. 2d DCA 1994)	6,12,34
James v. State, 615 So.2d 668 (Fla. 1993)	26
Mancuso v. State, 636 So.2d 753 (Fla. 4th DCA 1995), app'd, 652 So.2d 370 (Fla. 1995)	9
Mercer v. State, 656 So.2d 555 (Fla. 1st DCA 1995)	9,11
Merritt v. State, 712 So.2d 384 (Fla. 1998)	14,15,19
Mills v. State, 822 So.2d 1284 (Fla. 2002)	14,15,19
Moreland v. State, 582 So.2d 618 (Fla. 1991)	4,5,22,24 Passim
Ree v. State, 565 So.2d 1329 (Fla. 1990)	25
Reed v. State, 837 So.2d 366 (Fla. 2002)	4,5,9,10,11
Smith v. State, 598 So.2d 1063 (Fla. 1992)	25
State v. Delva, 575 So.2d 643, 645 (Fla. 1991)	9,10,11
State v. Gray, 654 So.2d 552 (Fla. 1995)	22,23

State v. Grinage, 656 So.2d 457 (Fla. 1995) 26

State v. Iacovone, 660 So.2d 1371 (Fla. 1995) 8,18,19

TABLE OF CITATIONS

CASE	PAGE(S)
State v. Klayman, 835 So.2d 248 (Fla. 2002)	2,3,4,5 Passim
State v. McKinnon, 540 So.2d 111 (Fla. 1989)	14
State v. Overfelt, 457 So.2d 1385 (Fla. 1984)	14
State v. Rhoden, 448 So.2d 1013 (Fla. 1984)	26
State v. Stevens, 714 So.2d 347 (Fla.), cert. denied, 525 U.S. 985, 119 S.Ct. 452, 142 L.Ed.2d 405 (1998)	8,17
Stewart v. State, 420 So.2d 862 (Fla. 1982), cert. denied, 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 366 (1983)	11
Sweeney v. State, 722 So.2d 928 (Fla. 4th DCA 1998), review denied, 733 So.2d 517 (Fla. 1999)	4,5
Thomas v. State, 531 So.2d 708 (Fla. 1988)	27
Thompson v. State, 695 So.2d 691 (Fla. 1997)	2,3,4,5 Passim
Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980)	17,18,19, 22 Passim

STATUTES

Section 784.07, Fla. Stat.	7,14

OTHER AUTHORITIES

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ANSWER BRIEF OF RESPONDENT

I PRELIMINARY STATEMENT

Because the timing of events in this case vis-a-vis decisions in several related cases is rather complex, a chronology to this brief, which may assist the court.

II STATEMENT OF THE CASE AND FACTS

Respondent, Henry Maynard Barnum, accepts the state's statement of the case and facts insofar as it is supported by the record.

III SUMMARY OF ARGUMENT

Which is more acceptable - convicting a defendant of a crime where the state failed to prove a prima facie case, or convicting a defendant of a crime where one of the elements was disputed, and the jury was not instructed that it had to find the element? Respondent contends that convictions in both situations violate due process and both are constitutionally impermissible.

The first scenario was the issue in State v. Klayman, infra. This court held the conviction violated due process and applied controlling caselaw retroactively. The second scenario is the issue in the instant case. Respondent, Henry Barnum, was charged with attempted murder of a law enforcement officer (LEO). Whe-ther he knew the man was a LEO was disputed at trial, but the jury was not instructed that knowledge was an element.

At the time of Barnum's trial, the First District had held knowledge was not an element. By the time his direct appeal became final, there was conflict on the issue with another dis-trict court, but the First District did not certify conflict or a question. This court eventually held that knowledge was an element. Thompson. Barnum seeks new trial under Thompson on the grounds of fundamental fairness and that his conviction violated due process.

Because both scenarios violate due process, the answer to

the certified question is yes.

IV ARGUMENT

ISSUE PRESENTED/CERTIFIED QUESTION

WHETHER THE ANALYSIS OF STATE v. KLAYMAN, 835 So.2d 248 (FLA. 2002), APPLIES WHEN AN ISSUE THAT THE SUPREME COURT HAS CLARIFIED REQUIRES RESOLUTION OF A DISPUTED FACTUAL MATTER?

Standard of review

Respondent agrees with the state that the standard of review is de novo.

Argument

Which is more acceptable - convicting a defendant of a crime where the state failed to prove a prima facie case, or convicting a defendant of a crime where one of the elements was disputed, and the jury was not instructed that it had to find the element? Respondent contends that convictions in both situations violate due process and both are constitutionally impermissible.

The first scenario - failure to prove a prima facie case - was the issue in State v. Klayman, 835 So.2d 248 (Fla. 2002), Klayman involved a drug trafficking statute and will be discussed in detail later. This court held the conviction violated due process, and applied the controlling caselaw retroactively. The second scenario - failure to instruct on a disputed element - is the issue in the instant case. Because both scenarios violate due process, the answer to the certified question is yes.

The district court's opinion

In Thompson v. State, 695 So.2d 691 (Fla. 1997), this court held that knowledge the victim is a law enforcement officer (LEO) is an element of the crime of attempted murder of a LEO. In respondent, Henry Barnum's, trial for attempted murder of a LEO, whether Barnum knew the man was an officer was disputed. The prosecutor conceded this point at the 3.850 hearing, Barnum v. State, 849 So.2d 371, 373 (Fla. 1st DCA 2003). Yet the jury was not instructed that knowledge was an element of the crime.

In Sweeney v. State, 722 So.2d 928 (Fla. 4th DCA 1998), review denied, 733 So.2d 517 (Fla. 1999), the Fourth District held that Thompson did not apply retroactively, but Barnum con-tends the facts of Sweeney are distinguishable in that knowledge did not appear to be disputed in that case. If not distinguish-able, the decision is in error.

In its opinion below, the First District said the question was whether Thompson applied retroactively to Barnum's trial. The court held that it did. The court noted that the failure to instruct on a disputed issue is fundamental error. Barnum, 849 So.2d at 373 n.2, citing Reed v. State, 837 So.2d 366 (Fla. 2002). The court rejected Sweeney because the Fourth District did not consider Moreland v. State, 582 So.2d 618 (Fla. 1991), which held that a person in a situation like Barnum's was entitled to relief on the principle of fundamental fairness. 849 So.2d at 374.

Moreland will be discussed in detail later.

The district court also considered whether Thompson was a "change" or a "clarification" in the law under Klayman and Bunk-ley v. State, 833 So.2d 739, overruled by Bunkley v. Florida, ____ U.S. ____, 123 S.Ct. 2020, 155 L.Ed.2d 1046 (May 27, 2003). The court said the analysis indicated that Thompson was a clari-fication, but the court was "unable to reconcile Thompson with either category" because both Klayman and Bunkley involved suffi-ciency of the evidence and not factually disputed matters. Barnum, 849 So.2d at 374-75.

Respondent contends that distinction does not change the outcome in his case.

The state's initial brief on the merits

First, to summarize the district court's opinion, it relied on Thompson, Reed and Moreland, it considered Klayman and Bunkley and rejected Sweeney. The state's arguments in this court are rather different from its earlier arguments. In the district court, the state relied on Sweeney, and the First District certi-fied both a question and conflict with Sweeney. In its initial brief in this court, the state appears to have abandoned Sweeney, or at least made no argument on it; does not cite or acknowledge Reed or Bunkley; in an argument made for the first time on rehearing, argues Thompson is moot and no longer applies; and Klayman is distinguishable.

The state does not clearly acknowledge that knowledge is an element of the crime under Thompson. Instead, the state argues the certified question is moot. According to the state's argu-ment made for the first time on rehearing, this court has held the LEO element is an enhancement element and not an element of a substantive crime. According to the state, therefore, the jury does not have to find the element, this is an Apprendi claim, and Apprendi is not retroactive. Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Respondent will address the fallacies in this argument later.

The state also argues that fundamental fairness does not apply because Barnum did not request the instruction on knowledge in the trial court. However, the state is silent on the princi-ple that the failure to instruct on a disputed element is funda-mental error, and the error was raised on direct appeal and rehearing.

Knowledge is an element

Since the state did not concede it, and respondent cannot know whether this court believes this to be open question, he must argue that knowledge the victim is a LEO is an element of the crime of attempted murder of a LEO.

Reclassification because a crime was committed on a LEO requires the jury to be instructed on the following elements:

> 4. (Victim) was at the time a [law enforcement officer [LEO][firefighter].

> 5. (Defendant) knew (victim) was a [LEO] [firefighter].
>
> 6. At the time of the [crime] (victim) was engaged in the lawful performance of [his] [her] duties.
>
> The court now instructs you that (name of official position of victim designated in charge) is a [LEO] [firefighter].
>
> Note to judge: *In giving this sentence, do not refer to the victim by name. The instruction must state the class of officers to which the victim belongs, e.g., probation officer, correctional officer.*

Fla. Std. Jury Insts. (Crim.) for offenses of assault on a LEO; aggravated assault on a LEO; battery on a LEO; aggravated battery on a LEO, all defined under section 784.07, Florida Statutes. These are the standard jury instructions now, and they were the jury instructions for assault and battery on a LEO at the time of the crimes at issue here in 1992.

Barnum's jury was instructed as to the main charge and the lesser-included charge containing the LEO element that the state must prove beyond a reasonable doubt:

> Florida Highway Patrol Trooper Roy Swatts was a law enforcement officer engaged in the lawful performance of his duty.

(T2 298-99).

So, the only exception to the LEO findings for assault and battery and aggravated assault and aggravated battery, ever, was for attempted murder of a LEO, per Carpentier and a few other district court cases. Carpentier v. State, 587 So.2d 1355 (Fla. 1st DCA 1991), review denied, 599 So.2d 654 (Fla. 1992). Neither Carpentier nor the crime itself was very

long-lasting. As the district court pointed out, the legislature created the crime of attempted murder of a LEO in 1988 and ended it in 1995. Barnum at n. 1.

As to Carpentier's longevity, or lack of it, it was decided in 1991. Within 3 years, there was conflict with all its hold-ings in Iavocone v. State, 639 So.2d 1108 (Fla. 2d DCA 1994) (attempted murder of LEO is divided into degrees; 25-year manda-tory minimum applies only to attempted first) and Grinage v. State, 641 So.2d 1362 (Fla. 5th DCA 1994)(knowledge is an ele-ment). This court resolved the conflict against Carpentier in State v. Iacovone, 660 So.2d 1371 (Fla. 1995), holding attempted murder of a LEO was divided into degrees and the 25-year manda-tory minimum applied only to attempted first-degree murder of a LEO. This court has applied Iacovone - involving the same sta-tute, but not the same section, as the instant case - retroac-tively. State v. Stevens, 714 So.2d 347 (Fla. 1998), cert. denied, 525 U.S. 985, 119 S.Ct. 452, 142 L.Ed.2d 405 (1998).

Less than two years after Iacovone, Thompson held that knowledge is an essential element, effectively overruling the remaining holding of Carpentier:

> The court reasoned that section 784.07(2), pertaining to assault or battery upon a law-enforcement officer, expressly required the state to prove that the offense was "knowingly" committed upon an officer, and it would be "illogical and unreasonable" to dispense with such element when proving attempted murder of an officer under subsection (3). Id. at 692.

Barnum, 849 So.2d at 373.

Failing to instruct on disputed element is fundamental error; fundamental error violates due process

Because the state argued it was not error to omit an instruction on knowledge, respondent must first argue it was fundamental error.

Knowledge was a disputed element at trial, as the prosecutor conceded at the 3.850 hearing, 849 So.2d at 373, and the issue was raised on direct appeal and rehearing. At the time the First District decided the direct appeal, its holding was in conflict with Grinage, but the court did not write on the issue. On rehearing, Barnum asked the court to certify conflict or a ques-tion, but the court denied rehearing without comment. Id.

The law is well-settled that failure to instruct the jury on a disputed element is fundamental error. That is, the error can be raised for the first time on direct appeal, even where trial counsel did not request the instruction. Reed; State v. Delva, 575 So.2d 643 (Fla. 1991); see also Mercer v. State, 656 So.2d 555 (Fla. 1st DCA 1995); Mancuso v. State, 636 So.2d 753 (Fla. 4th DCA 1995), app'd, 652 So.2d 370 (Fla. 1995)(knowledge element of leaving scene of accident with injury or death).

In Mercer, the defendant was charged with obtaining a controlled substance with a forged prescription. Mercer

testified that she did obtain the medication, but did not know the pre-scription was forged. The trial court instructed the jury in accordance with the standard jury instructions, which omitted the element that Mercer must have knowledge of the forgery, and the jury convicted.

The district court found the omission to be fundamental error and reiterated that the standard instructions are only a guide and "cannot relieve the trial court of its responsibility to charge the jury correctly." 656 So.2d at 556, n.1:

> The failure. . .to charge the jury that the state had to prove intent and knowledge on the part of [Mercer] relieved the state of its burden of proving the essential elements of the charged offense, deprived [Mercer] of her sole theory of defense, and may have resulted in an impermissible conviction for a non-existent crime.

656 So.2d at 556.

Similarly, in Reed, this court reiterated its holding in Delva that:

> . . .the failure to use the correct definition is fun-damental error in cases in which the essential element. . .was disputed at trial. This conclusion is required by and follows our decision in State v. Delva. . .**In Delva, we held that it was fundamental error to give a standard jury instruction which contained an erroneous statement as to the knowledge element of the charged crime.** We expressly recognized a distinction regarding fundamental error between a disputed element of a crime and an element of a crime about which there is no dis-pute. . .We answered affirmatively as to a disputed element and then said: "Failing to instruct on an ele-ment of the crime over which the record reflects there was no dispute is not fundamental error...." Id. at 645. (emphasis added)

Reed, 837 So.2d at 369. The court continued:

> We rephrased the certified question because whether the evidence of guilt is overwhelming or whether the prose-cutor has or has not made an inaccurate instruction a feature of the prosecution's argument are not germane to whether the error is fundamental. It is fundamental error if the inaccurately defined. . . **element is dis-puted. . .and the inaccurate definition "is pertinent or material to what the jury must consider in order to convict."** Stewart, [infra, 420 So.2d at 863]. Other-wise, the error is not fundamental error. Because the inaccurate definition of malice reduced the State's burden of proof, the inaccurate definition is material to what the jury had to consider to convict [Reed]. Therefore, fundamental error occurred in the present case if the inaccurately defined term "maliciously" was a disputed element in the trial of this case. (emphasis added; cites omitted)

Id.

Similarly, Mercer held that omitting the knowledge element "relieved the state of its burden of proving the essential elements of the charged offense." 656 So.2d at 556. In the instant case, the issue of whether Barnum knew the alleged victim was an officer was disputed. The failure to instruct the jury to determine whether Barnum knew the man was a law enforcement officer was "pertinent or material to what the jury must consider in order to convict." Reed. While Reed was decided after Barnum's trial, Delva and Stewart v. State, 420 So.2d 862 (Fla. 1982), cert. denied, 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 366 (1983), predated his trial and correctly state the law on which he relies.

Harmless error review does not apply:

> . . .we take this occasion to clarify that

> fundamental error is not subject to harmless error review. By its very nature, fundamental error has to be considered harmful. If the error was not harmful, it would not meet our requirement for being fundamental. Again, we refer to what we said in Delva, 575 So.2d at 644-45:
>
> > Instructions ... are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred. Castor v. State, [supra]; Brown v. State, 124 So.2d 481 (Fla. 1960). To justify not imposing the contemporane-ous objection rule, "the error must reach down into the validity of the trial itself to the extent that a ver-dict of guilty could not have been obtained without the assistance of the alleged error." Brown, 124 So.2d at 484. In other words, "fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." Stewart, [supra].
> >
> > Thus, for error to meet this standard, it must follow that the error prejudiced the defendant. Therefore, all fundamental error is harmful error.

837 So.2d at 369-70. While the court cautioned that not all harmful error is fundamental,

> . . .**the malice element was disputed at trial**. There-fore, fundamental error occurred when the trial court instructed the jury using the erroneous definition for "maliciously." (emphasis added)

Id. at 370. Likewise, knowledge was disputed at Barnum's trial. Therefore, fundamental error occurred when the trial court failed to instruct the jury that knowledge was an element of the crime. The result is that the jury could have convicted Barnum if the jury found Trooper Swatts was a law enforcement officer, without regard to whether it believed that fact was known by Barnum.

Moreover, by definition, fundamental error is a due

process violation:

> For an error to be so fundamental that it may be urged on appeal though not properly preserved below, the asserted error must amount to a denial of due process. State v. Smith, 240 So.2d 807 (Fla. 1970).

Castor v. State, 365 So.2d 701, 704 n.7 (Fla. 1978).

Omission of a jury instruction on knowledge was fundamental error and a due process violation. As a fundamental error, it could be raised for the first time on direct appeal, which it was, but the district court did not address the issue.

The state's argument - Apprendi; reclassification/enhancement vs. substantive element

For the first time on rehearing in the district court and again in this court, the state argued that the LEO element of attempted murder of an LEO is not an element of a substantive offense, but rather is a sentence enhancement/reclassification element. According to the state, that makes respondent's claim an Apprendi issue, and Apprendi is not retroactive. The district court did not address this issue except to deny rehearing without comment.

There are several fallacies in the state's Apprendi argument. As argued previously, in every other crime reclassified because the victim is a LEO, the standard jury instructions explicitly require the jury to find knowledge. This fact is contrary to the state's Apprendi argument here that the jury

does not have to be instructed on the knowledge element.

Even if the state were correct that this court has ruled that the LEO element is a reclassification/sentencing enhancement element, rather than an element of a substantive offense, that makes no difference to Barnum's claim. The error in the state's reasoning is that Florida required the jury to find reclassifica-tion elements long before Apprendi came along.

In 1984, on the question of when the trial court could reclassify or enhance a sentence for use of a firearm, this court said:

> The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, **it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode**. To allow a judge to find that an accused actually pos-sessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provi-sions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscar-riage of justice. . . (emphasis added)

State v. Overfelt v. State, 457 So.2d 1385, 1387 (Fla. 1984); see also State v. McKinnon, 540 So.2d 111 (Fla. 1989). Respondent contends this rule applies to the knowledge element here, which is demonstrated objectively by the fact that the standard jury instructions for all other crimes enhanced by being committed on an LEO have always expressly required the jury to find knowledge. The state argues that Barnum is

no longer entitled to relief under Thompson because in Merritt v. State, 712 So.2d 384 (Fla. 1998), this court held that section 784.07 was an enhancement statute rather than defining a substantive offense (State's Brief (SB), p. 12). This argument is wrong. First, both Merritt and Mills, a subsequent case on which the state relies, are inappo-site because neither addresses whether the jury must be instruc-ted on the knowledge element. Mills v. State, 822 So.2d 1284 (Fla. 2002). Second, both cases involved attempted or completed assault or battery on a LEO. As explained above, the standard jury instructions for those crimes expressly require the jury to find knowledge, so it is unlikely there would be a question as to whether the jury had to be instructed on knowledge. In no way does either case support the state's argument here.

Merritt and Mills involved, respectively, the questions of 1) whether attempts (assault or battery) on a LEO could be reclassified where the enhancement/reclassification statute did not expressly apply to attempts (held: statute does not permit reclassification of attempts), and 2) whether dual enhancement first due to the LEO element and second under the habitual offender statute violated double jeopardy (held: no, it does not). Neither case addressed whether the jury had to find knowledge, and unlike attempted murder of a LEO, all the crimes involved require the jury to find knowledge.

The substantive/enhancement element distinction is meaning-less since Florida requires the jury to find knowledge, whether it is a "substantive" or "enhancement" element. The state cited no case which held the jury did not have to be instructed, or that the jury did not have to make the requisite finding. Mer-ritt and Mills did not consider such an issue. Neither case even cited Thompson, which makes it not very compelling when the state argues that those cases overruled Thompson.

The state's argument makes an untenable distinction between knowledge for all other crimes committed on a LEO - which requires a jury instruction/finding - and the **identical** knowledge element in the now-defunct crime of attempted murder on a LEO - where, according to the state, relying on cases which did not consider the issue, it is not an element. Although all other crimes committed on LEOs expressly required - long before Appren-di - the jury to find the defendant knew the victim was an LEO, the state argues that very same knowledge was not an element of attempted murder on a LEO because of Apprendi.

The state offers no explanation for how cases involving sentencing and not the jury instruction control on the question of the jury instruction on a disputed element. The state does not explain how this is an Apprendi issue; it merely claims that it is. This is not a viable argument, and

it does not address glaringly different treatment of the **same element** in other crimes against LEOs; this court should reject it.

Retroactivity/due process

The First District below characterized this issue as whether Thompson should apply retroactively. 849 So.2d at 372. Under-signed counsel is not sure that is a proper characterization. Even if it is, it does not change the outcome, as the district court held.

First, Klayman and the United States Supreme Court's deci-sion in Bunkley could be read as characterizing this type of issue as a due process violation, to which retroactivity does not apply. Bunkley v. Florida, supra.[1] Second, assuming arguendo this issue is properly characterized as retroactivity, this case is in a similar procedural posture to the small group of cases where the defendant was granted relief on fundamental fairness grounds, without regard to retroactivity.

Assuming arguendo this court finds retroactivity to be at issue, respondent will argue two retroactivity claims separately, one under Witt; the other, a fundamental fairness claim based on the fact the issue was raised on direct appeal.

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[1]Counsel understands Bunkley, no. SC01-297, to be pending oral argument in this court on remand from the U.S. Supreme Court, on October 7, 2003.

Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980).

A.

Witt/Klayman/Bunkley

The Witt test for retroactivity requires that a case 1) emanate from the U.S. Supreme Court or the Florida Supreme Court, 2) be constitutional in nature, and 3) constitute a development of fundamental significance. See Stevens, supra, 714 So.2d at 349 (Harding, J., concurring).

After Klayman and Bunkley v. Florida, retroactivity is not what it used to be. It now appears that cases which the court would have previously subjected to a Witt analysis must now be subdivided into "changes" in the law, to which Witt may still apply, and "clarifications" of the law to which Witt does not apply.

Under Klayman and Bunkley v. Florida, Thompson's holding that knowledge the victim is law enforcement officer is an element of the crime is a "clarification" and not a change in the law. In any event, Thompson must apply to Barnum's case, whether the process is characterized as a Witt analysis or not. Because the failure to instruct on a disputed element is a due process violation, this issue is in a special position vis-a-vis Witt, a point made in the context of a sufficiency issue by the U.S. Supreme Court in Bunkley and Fiore v. White, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001), and in

this court's opinion in Klayman, in which this court relied on Fiore in finding that Klayman's conviction may have violated due process.

In Klayman, this court held that its "clarification" of a drug trafficking statute, which would preclude Klayman's convic-tion, must be applied retroactively. The court held that convic-tion based on facts which do not constitute the crime - i.e., the facts are insufficient to make a prima facie case - is a due process violation. The court did not vacate Klayman's convic-tion outright, but remanded for an evidentiary hearing to determine whether his claim were legally valid.

The court said:

> Although Florida courts have not previously recognized the Fiore distinction between a "clarification" and "change," we conclude that this distinction is benefi-cial to our analysis of Florida law. Previously, this Court analyzed such cases strictly under Witt. . . and used the term "change" broadly to include what in fact were both clarifications and true changes. As ex-plained in Fiore, however, a simple clarification in the law does not present an issue of retroactivity and thus does not lend itself to a Witt analysis.[8] Whereas Witt remains applicable to "changes" in the law, Fiore is applicable to "clarifications" in the law.

Klayman, 835 So.2d at 252-53. Klayman cited Iacovone as an example of a "routine clarification":

> For instance, although this Court held that the follow-ing decisions warranted retroactive application under Witt, the decisions when viewed in light of Fiore appear to be routine statutory "clarification" cases, not "major constitutional changes of law" as required by Witt: (1) State v.

> Iacovone, [supra](. . .enhanced penalties for attempted second- and third- degree murder of [an LEO] were not authorized by statute); (2) Hale v. State, 630 So.2d 521 (Fla. 1993)(. . .consecu-tive habitual offender sentences for crimes arising from a single criminal episode were not authorized by statute); and (3) Palmer v. State, 438 So.2d 1 (Fla. 1983)(. . .consecutive mandatory minimum sentences for use of a firearm in crimes arising from a single crimi-nal episode were not authorized by statute). See Ste-vens, [supra](applying Iacovone retroactively); State v. Callaway, 658 So.2d 983 (Fla. 1995)(applying Hale retroactively); Bass v. State, 530 So.2d 282 (Fla. 1988)(applying Palmer retroactively).

835 So.2d at 253, n.8. As noted above, Iacovone involves the same statute - but not the same issue - as the instant case, and this court has already held Iacovone to be retroactive. Stevens. Further, the court held a "clarification is a decision of this Court that says what the law has been since the time of enactment." 835 So.2d at 253. That is the rule which applies here. It is also how the state characterized Fiore and Klayman[2] in its merit brief here:

> These cases are best explained in terms of statutory interpretation. When the legislature has not changed the terms of a statute, and the court interprets a term in the statute, the term must have the same meaning from the inception of the statute. Therefore, such application should always be applied retroactively.

(SB-10). The state follows by explaining Witt (SB-10), but then goes off on its argument that knowledge is not an element, based on Merritt and Mills. With all due respect,

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[2]The state did not cite either Bunkley decision in its brief on the merits.

the state's argument supports Barnum's position.

In Thompson, this court interpreted the statute for the first time. In looking back, the only reasonable conclusion is that knowledge has always been, since the inception of the statute, an element of the offense, notwithstanding a contrary ruling by the First District in Carpentier. Because it was a disputed element in Barnum's case, and the jury was not instructed, his conviction violates due process.

Although Bunkley is, like Klayman, a sufficiency case, Bar-num's position is also supported by the U.S. Supreme Court in Bunkley, which was decided shortly before the district court's opinion issued below.

In reversing this court, the U.S. Supreme Court held that due process under Fiore, supra, requires that, when a defendant in a post-conviction motion seeks to benefit from a new judicial interpretation of a criminal statute casting doubt on the suffi-ciency of the evidence, the state court must determine the statute's meaning at the time the offense was committed, i.e. whether the evidence was sufficient at that time, and that is a question of due process, to which the issue of retroactivity does not apply.

The U.S. Supreme Court agreed with Justice Pariente's dissent in Bunkley v. State, 833 So.2d 739 (Fla. 2002):

> Fiore controls the result here. As Justice Pariente stated in dissent, "application of the due process principles of Fiore" may render a retroactivity analy-sis "unnecessary." 833 So.2d, at 747. The

> question here is not just one of retroactivity. Rather, as Fiore holds, "retroactivity is not at issue" if the Florida Supreme Court's interpretation of the "common pocketknife" exception in L.B. [v. State, 700 So.2d 370 (Fla. 1997)] is "a correct statement of the law when [Bunkley's] conviction became final." 531 U.S., at 226, 121 S.Ct. 712. The proper question under Fiore is not whether the law has changed. Rather, Fiore requires that the Florida Supreme Court answer whether, in light of L.B., Bunkley's pocketknife of 2 ½ to 3 inches fit within § 790.001(13)'s "common pocketknife" exception at the time his conviction became final.

Bunkley v. Florida, 123 S.Ct. at 2023.

The main distinction between the instant case and Bunkley is that the issue here is not sufficiency of the evidence, but rather, the failure to instruct the jury on a disputed element. Due process principles are the same in both situations - suffi-ciency and jury instructions. Thompson correctly stated the law, knowledge was an element at the time of Barnum's alleged offense, and it did not matter whether it was an element of a substantive offense or for reclassification, only that the jury was not instructed on a disputed element.

The U.S. Supreme Court also said:

> . . .the Florida Supreme Court's decision in L.B. cast doubt on the validity of Bunkley's conviction. For the first time, the Florida Supreme Court interpreted the common pocketknife exception, and its interpretation covered the weapon Bunkley possessed at the time of his offense. In the face of such doubt, Fiore entitles Bunkley to a determination as to whether L.B. correctly stated the common pocketknife exception at the time he was convicted.

Bunkley, 123 S.Ct. at 2023. The court concluded:

> The proper question under Fiore is not just *whether* the law changed. Rather, it is *when* the law changed. (emphasis in original)

123 S.Ct. at 2023-24.

Barnum's case diverges from Bunkley at this point, for his case does not involve a "change" or evolution in the law. Thomp-son was this court's first ruling on the knowledge element, mean-ing knowledge was an element from the beginning. Properly viewed, the statute **always** required proof the defendant knew the victim was a law enforcement officer. There was no evolution of this issue. Because his jury was not instructed on this disputed element, Barnum was denied due process of law.

The change versus clarification dichotomy also explains why a Witt analysis does not apply in a situation like Barnum's. First, Witt applies only to a "change" in the law, a "jurispru-dential upheaval," and neither to a "clarification," nor an "evolutionary refinement," as opposed to "upheaval." The First District found that neither of these provide useful models for Barnum's situation, and relied instead on the fundamental fair-ness model of Moreland, which will be discussed later.

Thompson was this court's first interpretation of whether attempted murder of a LEO has a knowledge element, and that holding has never changed. Under Bunkley and Klayman, Thompson must be viewed as a clarification and not a change in

the law. Where the court truly changes the law - as, for example, in Gray and Delgado - the court will apply a Witt analysis to decide whether the decision will apply retroactively. In Amlotte v. State, 456 So.2d 448, 450 (Fla. 1984), this court recognized the crime of attempted felony murder. In State v. Gray, 654 So.2d 552 (Fla. 1995), the court **changed the law** and held the crime of attempted felony murder does not exist in Florida. Before Del-gado, this court recognized the crime of burglary by remaining in. In Delgado, this court **changed the law**, receded from its previous cases, and held that burglary by remaining occurred only when the remaining was surreptitious. Delgado v. State, 776 So.2d 233 (Fla. 2000). Thus, Gray and Delgado, in terms of Witt, are true changes in the law, but Thompson is not.

Further, although the issue here may be a type of retroac-tivity question, it is not “true” retroactivity, in that Barnum is not asking to apply caselaw to him which he never raised before. Rather, he is asking for the application to him of law which could have and should have resulted from his direct appeal. That is, conflict existed at the time his direct appeal became final. Had the district court certified conflict, he would have obtained relief on direct appeal. Witt does not apply to his situation.

Further, as the U.S. Supreme Court held in Bunkley and as this court held in Klayman, following Fiore, where the

conviction violates due process, retroactivity does not apply.

B. Fundamental fairness

Barnum is also entitled to relief on the ground of fundamental fairness because he preserved the issue on direct appeal. In a small number of cases, Florida courts have held it would be fundamentally unfair to deny relief to a defendant who raised an issue on appeal which was eventually decided in his favor, but the timing of his case was such that he did not receive relief on direct appeal. The First District held that fundamental fairness required that Thompson be applied to Barnum's case, citing Moreland, supra:

> The supreme court stated in Moreland that fundamental fairness may require the retroactive application of a decision, even when a Witt analysis might favor fin-ality. Moreland was convicted of first-degree murder and sentenced to life in prison. He claimed at trial and on appeal that African Americans had been uncon-stitutionally excluded from his jury pool pursuant to an administrative order dividing Palm Beach County into eastern and western jury districts. While his appeal was before the Fourth District, a defendant who was convicted of murder and sentenced to death in Palm Beach County raised the same issue on appeal to the supreme court. After the Fourth District affirmed Moreland's conviction and sentence without an opinion, the supreme court issued Spencer v. State, 545 So.2d 1352 (Fla. 1989), holding that the jury districts in Palm Beach County were unconsti-tutional.
>
> Moreland filed a motion under rule 3.850, asking to have his conviction and sentence vacated under

> Spencer. The trial court applied Spencer retroac-tively, but the Fourth District concluded that it was an evolutionary refinement under Witt that could not be made retroactive. The supreme court agreed that Spencer was not a major jurisprudential change, but nevertheless reversed, stating that it would apply the case to Moreland's situation based upon fundamen-tal fairness and uniformity of adjudications. "If Moreland had been sentenced to death, he would have appealed to this Court, rather than the district court, and would have obtained the same relief as Spencer[,]" and it would be fundamentally unfair to deny the same relief to Moreland "because his sen-tence directed his appeal to a court other than this one." Moreland, 582 So.2d at 620.

Barnum, 849 So.2d at 374. The district court below reached a similar conclusion as to Barnum:

> In the case at bar, if this court had certified con-flict with Grinage in Barnum's direct appeal, the supreme court could have considered Barnum's case, decided it in the manner it did Thompson, and reman-ded for a new trial. We therefore reverse. . .

Id.

Other cases also demonstrate fundamental fairness. For example, in Brown v. State, 634 So.2d 735 (Fla. 1st DCA 1994), app'd, 655 So.2d 82 (Fla. 1995), the defendant argued on direct appeal that his guidelines departure sentence was illegal because written reasons were not entered contemporaneously. This court agreed, in Ree v. State, 565 So.2d 1329 (Fla. 1990), but the court held Ree would apply prospectively only, so Brown's direct appeal was affirmed. "Subsequently, in Smith v. State, 598 So.2d 1063, 1066 (Fla. 1992), this court modified Ree, and held"

> any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final....
>
> Our decision today requires us to recede in part from Ree to the extent that we now hold that Ree shall apply to all cases not yet final when mandate issued after rehearing in Ree.

Brown then filed a 3.850 motion, which the trial court denied because his judgment and sentence became final before Smith. The First District reversed:

> Even though this court's decision was correct under the law as it existed at the time, Smith requires that we reverse and remand this case for re-sentenc-ing within the guidelines.

634 So.2d at 736. When the state appealed, this court affirmed. Although none of the Brown decisions address the issue of preservation, the case dates from a time when this type of sentencing error could be raised for the first time on appeal as fundamental error. See State v. Rhoden, 448 So.2d 1013 (Fla. 1984); see also Brown v. State, 565 So.2d 369 (Fla. 1st DCA 1990), review denied, 576 So.2d 285 (Fla. 1991).

The ultimate result in Brown illustrates how unfair the result was in Barnum's direct appeal, which the district court recognized when it commented that the result in Barnum's direct appeal would have been different had the district court certi-fied conflict with Grinage. 849 So.2d at 374. But for the First District declining to certify

conflict or a question, this case would have been decided in accordance with this court's decisions in Grinage and Thompson.

James v. State, 615 So.2d 668 (Fla. 1993) is another exam-ple of fundamental fairness. In Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), the U.S. Supreme Court declared Florida's instruction on the heinous, atrocious, or cruel capital aggravator inadequate. This Court held that

> James. . .objected to the then-standard instruction at trial, asked for an expanded instruction, and argued on appeal against the constitutionality of the instruction his jury received. Because of this it would not be fair to deprive him of the Espinosa ruling. (cite and footnote omitted)

James, 615 So.2d at 669.

The state argues that, unlike Moreland, Barnum did not preserve the issue in the trial court (SB-13-14), thus he is entitled to no relief. Respondent contends this argument is in error. First, because of Carpentier's holding that knowledge was not an element, defense counsel did not ask for the instruction at trial. Given this severe limitation on the defense, counsel tried to fit the dispute over knowledge into the "attempt" instruction. On this question, the Fifth District said:

> How could Grinage have intended to murder (felony or otherwise) a "[LEO] ... engaged in the lawful perfor-mance of his duty," if he did not know that Boaz was, in fact, a police officer? (emphasis added)

Grinage, 641 So.2d at 1365. This language is very similar to the argument trial counsel made in the instant case on behalf of Barnum (T2 233,240-43,249). As this court has held, "To establish attempt, the State must prove a specific intent to commit a particular crime. . ." Holland v. State, 773 So.2d 1065, 1071 (Fla. 2000), citing Thomas v. State, 531 So.2d 708, 710 (Fla. 1988). Because of the very close identification between knowledge and the specific intent necessary to prove attempt, it cannot be said that this issue was not preserved for appeal.

Second, the state's argument fails to acknowledge that Moreland did not involve either fundamental error or jury instructions. As the district court noted below, failure to instruct on a disputed element is fundamental error which can be raised for the first time on appeal. Barnum did raise the failure to instruct on direct appeal. Thus, he is entitled to relief on fundamental error and/or fundamental fairness grounds.

Conclusion

Because knowledge was disputed, this court's decision in Thompson is of constitutional magnitude here, and the failure to give a jury instruction on knowledge deprived Barnum of due process and a fair trial.

Respondent believes he is making a due process argument and not a retroactivity argument, but even if he were asking

for Thompson to be applied retroactively, his claim should be granted because the error was fundamental and raised on direct appeal.

If Barnum had been tried after Thompson was decided, there is no question but that he would be entitled to a jury instruc-tion on knowledge. Even though he was tried before Thompson was decided, the missing jury instruction was fundamental error in his case and he raised it on direct appeal, thus he is entitled to new trial.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court hold he was entitled to a jury instruction on the knowledge element and remand for new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to Trisha Meggs Pate, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Henry Barnum, inmate no. 893207, Gulf Correctional Institution, 699 Ike Steele Road, Wewahitchka, FL 32465 , this _____ day of October, 2003.

CERTIFICATION OF FONT AND TYPE SIZE

This brief is typed in Courier New 12.