IN THE SUPREME COURT OF FLORIDA

CLYDE TIMOTHY BUNKLEY, **Petitioner,** **v.** **STATE OF FLORIDA,** **Respondent.**	**Case No. SC01-297** **L.T. No. 2D99-4511**

RESPONDENT'S ANSWER BRIEF ON THE MERITS ON REMAND FROM THE UNITED STATES SUPREME COURT

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STATEMENT OF THE CASE AND FACTS

In Bunkley v. Florida, 538 U.S. ___, 122 S.Ct. 2020, 155 L.Ed.2d 1046 (Fla. 2003), the U.S. Supreme Court set forth the following summary of facts and procedural history of this case:

> In the early morning hours of April 16, 1986, Bunkley burglarized a closed, unoccupied Western Sizzlin' Restaurant. Report and Recommendation in No. 91-113-CIV-T-99(B) (MD Fla), p 1. The police arrested him after he left the restaurant. At the time of his arrest, the police discovered a "pocketknife, with a blade of 2 ½ to 3 inches in length, . . . folded and in his pocket." 768 So. 2d 510 (Fla. App. 2000) *(per curiam).* "There is no evidence indicating Bunkley ever used the pocketknife during the burglary, nor that he threatened anyone with the pocketknife at any time." *Ibid.*
>
> Bunkley was charged with burglary in the first degree because he was armed with a "dangerous weapon"--namely, the pocketknife. Fla. Stat. §810.02(2)(b) (2000). The punishment for burglary in the first degree is "imprisonment for a term of years not exceeding life imprisonment." §810.02(2). If the pocketknife had not been classified as a "dangerous weapon," Bunkley would have been charged with burglary in the third degree. See 833 So. 2d 739, 742 (Fla. 2002). Burglary in the third degree is punishable "by a term of imprisonment not exceeding 5 years." Fla. Stat. §775.082(3)(d) (2002); see also 833 So. 2d, at 742. Bunkley was convicted of burglary in the first degree. He was sentenced to life imprisonment. In 1989, a Florida appellate court affirmed Bunkley's conviction and sentence. See 539 So. 2d 477. Florida law defines a "'weapon'" to "mean any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common

pocketknife.”" §790.001(13). Florida has excepted the "'common pocketknife'" from its weapons statute since 1901, and the relevant language has remained unchanged since that time. See 833 So. 2d, at 743.

In 1997, the Florida Supreme Court interpreted the meaning of the "common pocketknife" exception for the first time. In *L. B.* v. *State*, 700 So. 2d 370, 373 *(per curiam)*, the court determined that a pocketknife with a blade of 3 3/4 inches "plainly falls within the statutory exception to the definition of 'weapon' found in section 790.001(13)." The complete analysis of the Florida Supreme Court on this issue was as follows: "In 1951, the Attorney General of Florida opined that a pocketknife with a blade of four inches in length or less was a 'common pocketknife.' The knife appellant carried, which had a 3 3/4-inch blade, clearly fell within this range." *Ibid.* (citation omitted). The Florida Supreme Court accordingly vacated the conviction in *L. B.* because the "knife in question was a ‘common pocketknife’ under any intended definition of that term." *Ibid.* Justice Grimes, joined by Justice Wells, wrote an opinion agreeing with the majority's resolution of the case “in view of the Attorney General’s opinion and the absence of a more definitive description of a common pocketknife.” *Ibid*.

After the Florida Supreme Court issued its decision in *L. B.*, Bunkley filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 (1999). Bunkley alleged that under the *L. B.* decision, his pocketknife could not have been considered a "weapon" under §790.001(13). He therefore argued that his conviction for armed burglary was invalid and should be vacated because a "common pocketknife can not *[sic]* support a conviction involving possession of a weapon." App. to Pet. for Cert. C-2. The Circuit Court rejected Bunkley’s motion, and

> the District Court of Appeal of Florida, Second District, affirmed. 768 So. 2d 510.
>
> The Florida Supreme Court also rejected Bunkley's claim. It held that the *L. B.* decision did not apply retroactively. Under Florida law, only "jurisprudential upheavals" will be applied retroactively. 833 So. 2d, at 743 (internal quotation marks omitted). The court stated that a "jurisprudential upheaval is a *major* constitutional change of law." Id., at 745 (internal quotation marks omitted). By contrast, any "evolutionary refinements" in the law "are not applied retroactively." Id., at 744. The court then held that *L. B.* was an evolutionary refinement in the law, and therefore Bunkley was not entitled to relief. In a footnote, the Florida Supreme Court cited our decision in *Fiore* v *White, supra,* and held without analysis that *Fiore* did not apply to this case. See 833 So. 2d, at 744, n. 12.

Bunkley v. Florida, 122 S.Ct. 2020, *

This case is now on remand from the U.S. Supreme Court for a determination of whether, in light of this Court's decision in L.B. v. State, 700 So. 2d 370, 373 (Fla. 1997), Bunkley's knife fit within §790.001(13)'s "common pocketknife" exception at the time his conviction became final in 1989. Bunkley v. Florida, 123 S. Ct. 2020, 155 L. Ed. 2d 1046 (2003).

PRELIMINARY STATEMENT

This post-conviction appeal is on remand from the U.S. Supreme Court for a determination of whether the 'common pocketknife' exception to Florida's definition of a "'[w]eapon'" encompassed Bunkley's pocketknife at the time that his conviction became final in 1989. Bunkley v. Florida, 538 U.S. __, 123 S.Ct. 2020, 155 L.Ed.2d 1046 (2003). According to the U.S. Supreme Court's majority opinion, "[i]f Bunkley's pocketknife fit within the 'common pocketknife' exception to §790.001(13) in 1989, then Bunkley was convicted of a crime for which he cannot be guilty –- burglary in the first degree. However, if the 'stages' of §790.001(13)'s 'evolution' had not sufficiently progressed so that Bunkley's pocketknife was still a weapon in 1989, this case raises the issue left open in Fiore. [Fiore v. White, 531 U.S. 225, 148 L. Ed. 2d 629, 121 S. Ct. 712 (2001)]. Id. The question left open in Fiore is "when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review. See, Fiore, 531 U.S. at 226." Id.

SUMMARY OF THE ARGUMENT

Bunkley's folding buck knife, which had a thick, locking blade of less than 4 inches in length, did not fall within the "'common pocketknife'" exception of §790.001(13), at the time his conviction became final in 1989. The same underlying facts and arguments now relied upon by the petitioner –- that his conviction for armed burglary cannot stand because his buck knife had a blade of less than 4 inches -- have been previously presented and consistently resolved adversely to Bunkley, both at his jury trial, on direct appeal, in his prior state post-conviction proceedings, and on federal habeas corpus review. Nothing in the U.S. Supreme Court's opinion in Bunkley v. Florida, should change this Court's prior result in this case.

To the extent that petitioner claims that L.B. established a "bright-line" rule based solely on the length of the blade, which the State specifically disputes, it "did *not* state the law at the time of petitioner's conviction." See, Bunkley v. Florida, (dissenting opinion by Rehnquist, J.). The State respectfully submits that this Court has already answered the question of "whether *L.B.* correctly stated the common pocketknife exception *at the time he was convicted*" when this Court explained that "although some courts" [prior to the *L.B.* decision in 1997] "may have interpreted 'common pocketknife' *contrary to the holding in L.B.*, each court nevertheless sought

to comply with legislative intent and to rule in harmony with the law *as it was interpreted at that point in time."* 833 So. 2d at 745 (e.s.).

This Court has already determined that the decision in L.B. v. State, 700 So. 2d 370 (Fla. 1997) should not be applied retroactively, and the petitioner has offered no compelling reason for this Court to change its prior holding. Furthermore, according to the transcript of the petitioner's 1987 jury trial, the petitioner was armed with a buck knife which had a thick, locking blade and, although the blade alone was less than 4 inches in length, the knife was one which, as the petitioner admitted at trial, could cut a throat and could be considered a dangerous weapon. (TR459). As the federal district court concluded in denying the petitioner's 1991 habeas corpus petition, "[t]he evidence concerning the nature of the buck knife the petitioner carried clearly provided sufficient evidence for the jury to find that the petitioner was armed with a dangerous weapon." Petitioner's renewed "sufficiency of the evidence" claim is both procedurally barred and meritless. Ultimately, this case is merely a successive challenge to the sufficiency of the evidence which was presented at the petitioner's 1987 trial to sustain his conviction for armed burglary. Under the facts of this case, petitioner's conviction

does not violate due process or present the question left open by Fiore.

ARGUMENT

ISSUE ON REMAND

WHETHER, IN LIGHT OF THIS COURT'S DECISION IN L.B. v. STATE, 700 So. 2d 370 (Fla. 1997), BUNKLEY'S FOLDING BUCK KNIFE, WHICH HAD A THICK, LOCKING BLADE OF LESS THAN 4 INCHES IN LENGTH, FELL WITHIN THE "'COMMON POCKETKNIFE'" EXCEPTION OF §790.001(13), AT THE TIME HIS CONVICTION BECAME FINAL IN 1989?
(As restated by Respondent)

Standards of Review

Whether a decision of this Court must be applied retroactively is a pure question of law, subject to *de novo* review. Bunkley v. State, 833 So. 2d 739, 741 n.2 (Fla. 2002), *vacated on other grounds*, Bunkley v. Florida, 538 U.S. ___, 123 S. Ct. 2020, 155 L.Ed. 2d 1046 (2003).

The Due Process Clause requires the government to prove beyond a reasonable doubt every element of the crime with which a defendant is charged. See, Fiore v. White, 531 U.S. 225, 228-229 (2001). In this post-conviction appeal, the petitioner essentially renews his challenge to the sufficiency of the evidence to sustain his 1987 conviction for armed burglary. As this Court explained in Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002), in reviewing a motion for judgment of acquittal, a *de novo* standard of review applies. See Tibbs v. State, 397 So. 2d 1120 (Fla. 1981). "Generally, an appellate court will not reverse a conviction which is supported by competent,

substantial evidence. See Donaldson v. State, 722 So. 2d 177 (Fla. 1998); Terry v. State, 668 So. 2d 954, 964 (Fla. 1996). If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. See Banks v. State, 732 So. 2d 1065 (Fla. 1999)." Pagan, 830 So. 2d at 803.

Procedural Bar
Prior Challenges to Petitioner's Armed Burglary Conviction and Non-Retroactivity of L.B. v. State

Bunkley's folding buck knife, which had a thick, locking blade of less than 4 inches in length, did not fall within the "'common pocketknife'" exception of §790.001(13), at the time his conviction became final in 1989. The same underlying facts and arguments now relied upon by the petitioner –- that his conviction for armed burglary cannot stand because his buck knife had a blade of less than 4 inches -- have been previously presented and consistently resolved adversely to Bunkley; and nothing in the U.S. Supreme Court's opinion in Bunkley v. Florida, should change this Court's prior result in this case.

The petitioner's renewed challenge to the "sufficiency of the evidence" supporting his armed burglary conviction, based on the length of the knife's blade, has already been considered, and rejected, several times by the Florida courts. "[O]n direct appeal, petitioner specifically argued that a knife with a blade

of less than four inches was a "common pocketknife," and he cited the 1951 opinion letter issued by the Florida Attorney General on this issue. Brief for Appellant in No. 88-1376 (Fla Dist Ct App), pp 5-6. Petitioner also filed two motions for state postconviction relief challenging the sufficiency of the evidence with respect to the jury's conclusion that he was armed with a dangerous weapon. See Motion to Set Aside or Vacate Judgment and Sentence in No. 86-1070-CF-A-N1 (Fla Cir Ct), p 4; Petition to Invoke "All Writs" Jurisdiction in No. 85-778 (Fla Sup Ct), p 4." Bunkley v. Florida, dissenting opinion by Rehnquist, J., 123 S. Ct. 2020, at –-.[1] In addition, "Petitioner also unsuccessfully raised this claim twice in Federal District Court. See Report and Recommendation in No. 91-113-CIV- T-99(B) (MD Fla), p 5; Memorandum of Law in Support of Petition for Writ of Habeas Corpus under USC Section 2254 in No. 96-405-Civ.-T-24C (MD Fla), p 5." Id., at fn. 4.

[1]The State's motion to supplement, or in the alternative, submit an appendix containing the state and post-conviction exhibits which were furnished, upon request, to the U.S. Supreme Court in Bunkley v. Florida, No. 02-8636, is currently pending before this Court. Included among those exhibits are the complete transcripts from the petitioner's 1987 jury trial and a photocopy of the petitioner's open knife placed alongside a ruler. According to this photocopy, the thick blade actually measures 3 ½" in length and the knife, when opened, measures a total of 8" in length. (Supp. Ex. 1). If this Court denies the State's pending request to submit the identical exhibits provided, upon request, to the U.S. Supreme Court, the State relies on the transcript excerpts from the petitioner's jury trial which are already before this court.

In Florida, a two-year period of limitations exists for filing motions for post-conviction relief under Rule 3.850, Florida Rules of Criminal Procedure. An issue that was, or could have been, raised on direct appeal or *via* a timely Rule 3.850 motion is procedurally barred in a successive or untimely post-conviction motion or a state habeas corpus petition. See, Atwater v. State, 788 So. 2d 223, 227 (Fla. 2001). However, Rule 3.850(b)(2)provides an exception to the two-year time limitation for filing post-conviction motions where "a fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively." In this case, this Court already has determined that L.B. does *not* apply retroactively, 833 So. 2d at 745-746, and the petitioner has not offered any compelling basis for this Court to change its prior holding. Petitioner's challenge to his armed burglary conviction, based on the length of the knife blade, is procedurally barred.

Merits

Assuming, *arguendo*, that the petitioner's renewed "sufficiency of the evidence" challenge is not procedurally barred, the petitioner's knife did not fit within section 790.001(13)'s 'common pocketknife' exception, either at the time his conviction became final in 1989, or now. The State strongly disputes the petitioner's claim that his knife was merely a

'common pocketknife.' The petitioner, in fact, carried a 'weapon' under §790.001(13), Florida Statutes (1986). According to the transcript of the petitioner's jury trial, the prosecutor described the blade as being thick and approximately 4 inches long (TR418, 473). On cross-examination, petitioner acknowledged that the knife could cut a throat and could be considered a dangerous weapon (TR459). According to the arresting officer, it was "a good-sized buck knife" and the blade itself, which folded into the handle, was about 3 inches long (TR345, 349, 359). The blade locked in an open position and the arresting officer explained how this locking feature distinguished it from an average pocketknife:

> It's a locked blade, which makes it a dangerous weapon for the simple fact that an average pocket knife, if you stick something with it and you're not very good at what you do, the blade will close. The pocket knife has that safety feature, that it will close. This blade will not close unless you push down very hard on this spring.
> (TR345)

Ten years after the petitioner's jury trial, this Court decided the case of L.B. v. State, 700 So. 2d 370, 373 (Fla. 1997). In L.B., this Court held that §790.001(13), Florida Statutes (1995) was not unconstitutionally "void for vagueness." In addition, this Court found that L.B.'s pocketknife, which had a blade of 3 3/4 inches, plainly fell "within the statutory exception to the definition of 'weapon' found in §790.001(13)."

However, in L.B., this Court specifically cautioned that, *"neither the Attorney General nor this Court maintains that four inches is a bright line cutoff for determining whether a particular knife is a 'common pocketknife.' We merely hold that appellant's knife fits within the exception to the definition of weapon found in section 790.001(13)."* L.B., 700 So. 2d. at 373, n.4 (e.s.) This Court has already concluded that its decision in L.B., decided after petitioner's conviction became final, did *not* apply retroactively. Bunkley, 833 So. 2d at 743-746. And, as Justice Rehnquist's dissenting opinion noted in Bunkley v. Florida, this court has already concluded "that *L. B.* did *not* state the law at the time of petitioner's conviction."

In this Court's prior opinion in Bunkley, this Court found that "although some courts" prior to *L. B.* "may have interpreted 'common pocketknife' *contrary to the holding in L. B.*, each court nevertheless sought to comply with legislative intent and to rule in harmony with the law as it was interpreted at that point in time." (e.s.) 833 So. 2d at 745. In other words, in response to the inquiry regarding "when" a change in the law occurred –- any change occurred when L.B. was decided in 1997. More importantly, this Court's decision in L.B. did not establish a "bright-line" cutoff for determining whether a particular knife is a "common pocketknife." Instead, this Court merely held that [L.B.'s] knife "fits within the exception to

the definition of weapon found in section 790.001(13)." 700 So. 2d. at 373, n.4 (e.s.) Thus, the State submits that this petitioner's folding buck knife, with a thick, locking blade of less than 4 inches, qualified as a "weapon" under §790.001(13), both at the time of his conviction in 1987, and subsequent to this Court's decision in L.B.

In contending that he never should have been convicted of "armed" burglary, the petitioner cites extensively to Arroyo v. State, 564 So. 2d 1153 (Fla. 4th DCA 1990). (Brief of Petitioner at 11, 12, 13, 14, 15, 16). In Arroyo, the court held that a pocketknife can be a dangerous weapon under the armed burglary statute. Petitioner asserts that Arroyo required that his knife be "used as a deadly weapon or in such fashion as to cause death or great bodily harm" in order to sustain his conviction for armed burglary. (Brief of Petitioner at 14). However, contrary to petitioner's assertion, Florida law did not impose this additional "use" requirement as alleged by the petitioner. In fact, in 1991, the petitioner filed a federal petition for writ of habeas corpus petition in which he raised this identical claim and relied, without success, on Arroyo. In Bunkley v. Crosby, U.S.D.C. No. 91-113-CIV- T-99(B), the federal court specifically found that the "evidence concerning the nature of the buck knife the petitioner carried clearly provided sufficient evidence for the jury to find that the petitioner was

armed with a dangerous weapon." Furthermore, as the federal court painstakingly explained:

> The petitioner's challenge to the jury's finding that he was armed with a dangerous weapon begins with the definition of the term "weapon" in the separate chapter on weapons and firearms. "Weapon" is defined there to mean "any dirk,...or other deadly weapon, except a firearm or a common pocketknife." Fla. Stat. §790.001(13) In contending that he was carrying only a common pocketknife, the petitioner does not say that the definition in §790.001(13) directly establishes that he was not armed with a dangerous weapon. The petitioner recognizes, rather, that Florida cases, such as Arroyo v. State, 564 So.2d 1153 (Fla. App. 1990), have held that a pocketknife can be a dangerous weapon under the armed burglary provision (Doc. 2, pp. 1-2). He argues, however, that, where a pocketknife is the weapon at issue, the prosecution must show that the pocketknife was used in a manner likely to cause death or great bodily injury (see Doc. 2, p.4). The petitioner argues further that the prosecution did not present any evidence showing use, or attempted use, of the knife. This argument has two fundamental flaws.
>
> In the first place, the petitioner was not carrying a common pocketknife. Rather, in the words of the arresting officer, the petitioner had "a good-sized buck knife" (Tr. 345). That officer said that the blade, which folded into the handle, was about 2-1/2 to 3 inches long (Tr. 349, 359).[3] Significantly, the blade locked in the open position (Tr. 349-350). The arresting officer explained at trial how

[3]*The prosecutor described the blade as being thick and approximately 4 inches long (Tr. 418, 473). Since the knife was admitted in evidence, the jurors could examine it for themselves.*

this feature distinguished it from a pocketknife (Tr. 350):

> It's a locked blade, which makes it a dangerous weapon for the simple fact that an average pocket knife, if you stick something with it and you're not very good at what you do, the blade will close. The pocket knife has that safety feature, that it will close. This blade will not close unless you push down very hard on this spring.

The petitioner on cross-examination acknowledged that the knife could cut a throat and could be considered a dangerous weapon (Tr. 459). Consequently, assuming that the prosecution would have had to make a greater showing if the petitioner simply had a common pocketknife, the evidence demonstrated that the petitioner had something more dangerous than a common pocketknife.

Moreover, the petitioner's theory that the prosecution had to show that he used, or attempted to use, the knife is not the law of Florida, at least as applied in the petitioner's case. In accordance with the Florida standard jury instructions, the trial court, without objection, defined "dangerous weapon" as "any weapon that, taking into account the manner in which it is used, is likely to produce death or great bodily harm" (Tr. 493). Moreover, when the jury requested further instructions concerning use of the weapon, the trial court instructed it as follows (Tr. 514):

The fact that the defendant does not actually employ the weapon is not the gravamen of this enhanced offense. There is no requirement that the state must show the person charged intended or was willing to use such weapon in the furtherance of the crime being committed.

This supplemental instruction was challenged on appeal by the petitioner, but, as indicated, his armed burglary conviction was affirmed.

The supplemental jury instruction, as implicitly approved on appeal, establishes that, in the petitioner's circumstances, there was no legal

> requirement that the prosecution show that the knife was actually used, or attempted to be used, in a manner likely to cause death or great bodily injury. Rather, Florida law simply required the jury to consider the likelihood of the knife producing death or great bodily injury. See State v. Nixon, 295 So.2d 121 (Fla. App. 1974)(pocketknife); Bass v. State, 232 So.2d 25 (Fla. App. 1970)(unloaded gun). The evidence concerning the nature of the buck knife the petitioner carried clearly provided sufficient evidence for the jury to find that the petitioner was armed with a dangerous weapon.

Report and Recommendation, Bunkley v. Dugger, Case No. 91-113-Civ-T-99(B), at pp. 4-6.

Petitioner recognizes that the appellate court in State v. Ortiz, 504 So. 2d 39 (Fla. 2d DCA 1987) reversed a trial court's order dismissing a charge of possession of a concealed weapon by a convicted felon where the trial court held, as a matter of law, that the knife in question was a common pocketknife. The knife seized from Ortiz was a closed Buck-type folding knife with a four-inch blade and, when fully extended and locked, measured almost nine inches. As the Second District Court explained in 1987, "[t]he legislature in creating the exemption for a common pocketknife did not define what constitutes such a knife. Therefore, whether a knife is a 'common pocketknife' ordinarily involves a factual determination which may not be made by a trial court in proceedings under rule 3.190(c)(4)." Id. Moreover, as the Court in Ortiz pointed out, "[i]f this knife had a fixed blade instead of a folding blade, it may well have been classified as a "dirk," under section 790.001(13).

Thus, the trial court erred in concluding, as a matter of law, that the knife carried by Ortiz was a "common pocketknife." Id. In light of the 1987 decision in Ortiz, petitioner admits that resolution of this issue in Florida has historically been a question for the trier of fact (a jury or the judge in a case tried without a jury) to determine whether a criminal defendant's pocketknife is a 'common pocketknife.'

The additional cases which are now cited by Bunkley do not address the definition of weapon and the elements of petitioner's armed burglary offense. For example, in McCoy v. State, 493 So. 2d 1093 (Fla. 4th DCA 1986), the defendant was charged with aggravated assault with a deadly weapon and the issue was whether the "small pocketknife" qualified as a "deadly weapon" because of the way it was used during the *aggravated assault*, *i.e.*, "in a way likely to cause death or great bodily harm." In Gust v. State, 558 So.2d 450 (Fla. 1990), the defendant used a 'key-chain knife' to commit an armed robbery. The question was whether trial counsel was ineffective in failing to investigate whether the knife was used as a "deadly" weapon in the *armed robbery*.

In State v. Nixon, 295 So. 2d 121 (Fla. 3d DCA 1974), an aggravated assault case, the Third District Court recognized that a pocket knife can be a "deadly weapon." Indeed, the federal court relied, in part, on the 1974 Nixon case in denying

Bunkley's 1991 habeas corpus petition. Furthermore, as the Third District Court explained in Nixon, "[w]hether an object used as a weapon i*n an assault* is a deadly weapon is a factual question to be resolved by the finder of facts at trial, and is to be determined upon consideration of its likelihood to produce death or great bodily injury. . . . It is common knowledge that in certain circles pocket knives are used by assailants with deadly weapon effect as frequently, if not more frequently than are firearms." Nixon, 295 So. 2d at 122-123 (e.s.).

In J.W. v. State, 28 Fla. L. Weekly D1446 (Fla. 4th DCA June 18, 2003), it does not appear that it was disputed that the juvenile's knife was anything other than a 'common pocketknife.' However, in the instant case, there was evidence presented that the petitioner's knife was not a 'common pocketknife.' There was no need for the State to prove that the knife was being used as a *deadly* weapon because the petitioner's knife was not a 'common pocketknife,' and, therefore, possession of this dangerous weapon, alone, was sufficient to convict the defendant of armed burglary. The case of Mims v. State, 662 So.2d 962, 963 (Fla. 5th DCA 1995), which is cited without comment by Bunkley, is clearly favorable to the State. Mims argued that because the knife he carried was a pocketknife and because there is no evidence that it had been used in a manner likely to cause death or great bodily harm, he could not be convicted for an

"armed burglary." In rejecting the defendant's argument, the Court explained, "the real question is whether the knife carried by appellant in this case was a "'dangerous weapon,'" and, as the court in Mims, noted:

> Not all knives that fold are "common pocket knives and not all knives that fit into a pocket are "common pocketknives." The jury was instructed that a dangerous weapon is "any weapon that, taking into account the manner in which it is used, is likely to produce death or great bodily." The jury heard testimony about the knife, observed the knife, followed the instructions it was given and found the defendant guilty of attempted burglary while armed with a dangerous weapon. There is no basis to reverse their decision.

In the instant case, the jury, in 1987, determined that the knife carried by Bunkley qualified as a dangerous weapon and, therefore, his armed burglary conviction was properly upheld on direct appeal, *and* in his prior state post-conviction proceedings, *and* on subsequent federal habeas corpus review. Bunkley's current, successive challenge to his 1987 armed burglary conviction is both procedurally barred and without merit.

Bunkley's reliance on State v. Tremblay, 642 So. 2d 64 (Fla. 4th DCA 1994) is also misplaced. Trembley involved a charge of possession of a concealed weapon by a convicted felon. Under §790.001(3), a concealed weapon means "any dirk, metallic knuckles, slingshot, billie, tear gas gun, chemical weapon or

device, or other deadly weapon carried on or about a person in such a manner as to conceal the weapon from the ordinary sight of another person." Tremblay involved the question of whether an ice pick constituted a concealed weapon. However, the issue in the instant case is whether the petitioner's knife fell within the exception of a 'common pocketknife' at the time of his conviction. Tremblay interpreted a different statute and its holding has no bearing on the underlying issue to be addressed in this case.

Petitioner also is not entitled to belated post-conviction relief under this Court's decision in State v. Klayman, 835 So. 2d 2248 (Fla. 2002). In Klayman, this Court held that its decision in Hayes v. State, 750 So. 2d 1 (Fla. 1999) must be given retroactive effect. In Klayman, this Court held that, under section 893.135(1)(c)1, trafficking in a Schedule III drug or mixture thereof was never intended by the Legislature to be a crime. However, this Court, in L.B. was not, to paraphrase the language used in Fiore, clarifying the common pocketknife exception to the plain language of §790.001(13), Florida Statutes (1985) *as it existed at the time of Bunkley's conviction*.

Unlike Fiore, where the state court convicted the defendant without statutory authority, at the time of the petitioner's 1987 conviction, there was no dispositive blade length

limitation on what constituted a "common" pocketknife. Consequently, finding the petitioner guilty of armed burglary with a buck knife which had a blade length of less than 4 inches did not result in a conviction without legislative authority. And, even today, the State submits that the single fact that the blade of the petitioner's knife was less than 4 inches in length does not, *ipso facto*, mean that it must be deemed a 'common pocketknife' under L.B., as the post-L.B. cases have demonstrated.

For instance, in J.D.L.R. v. State, 701 So. 2d 626 (Fla. 3d DCA 1997), the defendant sought to dismiss his delinquency petition and adjudication for carrying a weapon on school grounds. J.D.L.R. relied upon L.B. and argued that his knife was a common pocketknife. The trial court denied the motion and observed that the knife in question had certain "weapon-like" characteristics that took it out of the 'common pocketknife' category. The knife was described to the trial court as having a pointed 3½ inch blade with a notched handle and large metal hilt guard. The Third District agreed with the trial judge that the knife did not fall within the definition of a 'common pocketknife' and explained:

> We agree with the trial judge that J.D.L.R.'s knife does not fall within the Supreme Court's definition of "common pocketknife" –- "a type of knife occurring frequently in the community which has a blade that folds into the handle and can be

> carried in one's pocket." . . . It is, indeed, a "pocketknife", but it is not a "common" knife. As the trial judge pointed out, its distinctive features are not those characteristic of the typical, ordinary, frequently-occurring pocketknife, but rather are characteristic of a weapon.

J.D.L.R., at 627

Subsequent to L.B., fact finders (juries or judges in non-jury cases) will still have to consider characteristics of the knife other than the fact that its blade alone is less than 4 inches in length. L.B. did not establish a bright-line holding that every folding knife which has a blade of less than 4 inches automatically must be considered a 'common pocketknife.' *See*, J.D.L.R.; R.L.S. v. State, 732 So. 2d 39 (Fla. 2d DCA 1999) (remanding to the trial court to consider whether the knife possessed by the juvenile was a common pocketknife pursuant to L.B. or an uncommon knife that meets the criteria of a weapon); Westerheide v. State, 831 So. 2d 93 (Fla. 2002) (citing L.B. for the proposition that a statute is not unconstitutional because seemingly inconsistent conclusions can be reached by applying the same statutory terminology.) Ultimately, this case is merely a successive challenge to the sufficiency of the evidence presented at the petitioner's 1987 jury trial; and the petitioner's conviction does not violate due process and does not present the question left open by Fiore.

CONCLUSION

Respondent requests that this Court hold that Bunkley's buck knife, which had a thick, locking blade of less than 4" in length, did not fall within the "common pocketknife" exception of §790.001(13) at the time his conviction became final in 1989.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to John Cole, II, Esq., 46 N. Washington Blvd., Suite 24, Sarasota, FL 34236, this ____ day of August, 2003.

_____
KATHERINE V. BLANCO
Assistant Attorney General

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this pleading is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(*l*).

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Assistant Attorney General