IN THE SUPREME COURT OF FLORIDA

CLYDE TIMOTHY BUNKLEY, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC01-297

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts with the following additions and corrections:

In the trial transcript, as attached to petitioner's motion for post-conviction relief, the knife in question, which had been admitted into evidence and was "published" to the jury, was described as follows by the arresting police officer:

> Okay. It's very simple. The blade opens like this (indicating). This is the sharp side and to close the blade -- it's a locking knife. Once it opens, unless you push down hard on this button, the blade will not close.
>
> It's a locked blade, which makes it a dangerous weapon for the simple fact that an average pocketknife, it 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.

(CR349-50)

Appellant testified at his trial regarding the nature of the knife:

> Q. And I'm not very familiar, but is a roofing shingle a tough piece of material to cut through?
>
> A. Yes, sir, it is.
>
> Q. And do you need a pretty good pocketknife to be able to cut through those materials?
>
> A. That was my purpose for having the knife. It's a little bit larger than a natural pocketknife, and that was the reason for it.

(CR438)

SUMMARY OF THE ARGUMENT

The certified question should be answered in the negative; the decision in L.B. v. State, 700 So.2d 370 (Fla. 1997), should not be applied retroactively. The decision in L.B. is an evolutionary refinement of the law, not a jurisprudential upheaval. The decision in L.B. fails the second and third prong of the of the Witt[1] test. L.B. does not establish a new rule of law that is constitutional in nature (second Witt criteria) and the decision does not have fundamental significance (third Witt criteria).

[1] Witt v. State, 387 So.2d 922 (Fla. 1990)

ARGUMENT

ISSUE

WHETHER THE DECISION IN L.B. v. STATE, 700 SO.2D 370 (FLA. 1997), THAT A FOLDING POCKETKNIFE WITH A BLADE OF FOUR INCHES OR LESS FALLS WITHIN THE STATUTORY EXCEPTION TO THE DEFINITION OF WEAPON FOUND IN § 790.001(13), SHOULD BE APPLIED RETROACTIVELY.

The question certified by the Second District Court of Appeals in Bunkley v. State, 768 So.2d 510 (Fla. 2d DCA 2000) should be answered in the negative - the holding in L.B. v. State, *supra*, should not be applied retroactively.

The Second District held that this Court's decision in L.B., *id.*, should not be applied retroactively because it believed the change in the law as set forth in L.B., *id.*, was one of "evolutionary refinement" as opposed to a "major constitutional change in the law". Bunkley, *supra*, at 511, relying upon Witt v. State, 387 So.2d 922 (Fla. 1990) and State v. Glenn, 558 So.2d 4 (Fla. 1990). The Second District was correct.

As this Court reasoned in State v. Callaway, 658 So.2d 983, 986-87 (Fla. 1995):

> Under *Witt*, a new rule of law may not be retroactively applied unless it satisfies three requirements. The new rule must (1) originate in either the Unites States Supreme Court or the Florida Supreme Court; (2) be constitutional in nature; and (3) have fundamental significance....
>
> The third requirement of the *Witt* analysis requires that the change of law have fundamental significance. *Witt*, 387 So.2d at 929. According to the *Witt* court, decisions

> which have fundamental significance generally fall into two broad categories: (a) those decisions such as *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), "which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties;" and (b) decisions such as *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), which "are of sufficient magnitude to necessitate retroactive application" under the threefold test of *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)...
>
> Under *Stovall*, consideration must be given to (i) the purpose to be served by the new rule; (ii) the extent of reliance on the old rule; and (iii) the effect that retroactive application of the rule will have on the administration of justice.

Clearly the decision in L.B., *supra*, satisfies the first requirement of Witt because it is a new rule of law that originated in the Florida Supreme Court. However, respondent takes the position that the decision in L.B. fails both the second and third requirements of Witt.

In L.B., *supra* at 372, this Court held that the failure of the legislature to define the term "common pocketknife" does not render that term unconstitutionally vague:

> The legislature's failure to define the term "common pocketknife" in section 790.001(13) does not render that term unconstitutionally vague. *See State v. Hagan,* 387 So.2d 943, 945 (Fla.1980) (where a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense). Moreover, a court may refer to a dictionary to ascertain the plain and ordinary meaning which the legislature intended to ascribe to the term. *See Gardner v. Johnson,* 451 So.2d 477, 478 (Fla.1984).

This court went on to say:

> [w]e can infer that the legislature's intended definition of "common pocketknife" was: "A type of knife occurring frequently in the community which has a blade that folds into the handle and that can be carried in one's pocket." We believe that in the vast majority of cases, it will be evident to citizens and fact-finders whether one's pocketknife is a "common" pocketknife under any intended definition of that term. We need not be concerned with odd scenarios construing smaller but more expensive knives as "uncommon." As the United States Supreme Court has observed, "[s]uch straining to inject doubt as to the meaning of words where no doubt would be felt by the normal reader is not required by the 'void for vagueness' doctrine, and we will not indulge in it." (Citation omitted)

L.B., *id.*

The fact that a pocketknife may have a blade that is less than 4 inches long, does not in and of itself establish what the petitioner calls "a bright line rule" that it is a common pocketknife even though this Court in L.B., *id.* at 373, held that since the knife in question in that particular case falls within the statutory exception found in §790.001(13) to the definition of "weapon" adopting the 1951 Attorney General opinion which opined that a pocketknife with a blade of four inches in length or less was a "common pocketknife".

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 relying upon L.B. and argued that the knife was a common pocket knife. The

trial court denied the motion observing that the knife in question had certain "weapon-like" characteristics that took it out of the "common pocketknife" category. The knife in question was described to the trial court as having a pointed 3½ inch blade with a notched handle and large metal hilt guard while the knife in L.B. was merely described as a folding buck knife with a 3¾ inch blade. The state was allowed to argue that the knife was indeed a weapon. The Third District agreed with the trial judge that the knife did not fall within the Florida Supreme Court's definition of a "common pocketknife":

> 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., *id.* at 627)

L.B. is evolutionary refinement of the law rather than a "jurisprudential upheaval" because it is not one of major constitutional change. 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 is less than 4 inches in length. In the instant case there was testimony that the knife in question was distinguished from a common pocketknife because of the

distinctive feature of it having a locked blade:

> Okay. It's very simple. The blade opens like this (indicating). This is the sharp side and to close the blade -- it's a locking knife. Once it opens, unless you push down hard on this button, the blade will not close.
>
> It's a locked blade, which makes it a dangerous weapon for the simple fact that an average pocketknife, it 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.

(CR349-50)

Furthermore, the appellant, himself, testified that he used the knife to cut through roofing materials and that it was a little bit larger than a natural pocketknife so as to be able to cut through tough pieces of roofing material:

> Q. And I'm not very familiar, but is a roofing shingle a tough piece of material to cut through?
>
> A. Yes, sir, it is.
>
> Q. And do you need a pretty good pocketknife to be able to cut through those materials?
>
> A. That was my purpose for having the knife. It's a little bit larger than a natural pocketknife, and that was the reason for it.

(CR438)

Regarding the lack of fundamental significance (the third prong of Witt), respondent would call this Court's attention to Justice Harding's reasoning in State v. Stevens, 714 So.2d 347,

350-351 (Fla. 1998):

> An example of a case that does not satisfy the third prong of *Witt* is *State v. Gray,* 654 So.2d 552 (Fla.1995). In *Gray,* we held that the crime of attempted felony murder was logically impossible. We recently decided that *Gray* should not be applied retroactively. See *State v. Woodley,* 695 So.2d 297 (Fla.1997). Although *Gray* was decided by this Court, and may have involved matters that were constitutional in nature, it was not a change of fundamental significance, especially in light of the three *Stovall* factors. The purpose of the rule announced in *Gray* was to prevent the State from obtaining a conviction of a crime which necessitates the finding of an intent without having to prove intent. However, the law in *Gray* had been in effect for approximately eleven years and had been upheld by this Court on a previous occasion. (citation omitted). There was extensive reliance on the old rule, which created settled expectations regarding the law in this area. In addition, a retroactive application of the decision in *Gray* would have a negative impact on the administration of justice. Because the law had been valid for such a long period of time, numerous individuals were convicted under it. Retroactive application would require hundreds of new trials, which would require expensive and timely preparation for old cases and necessitate the relocating of witnesses and evidence--in some cases for crimes that occurred a decade before. When all of these factors are considered together, it becomes obvious that *Gray* does not meet the "change of fundamental significance" prong of the *Witt* test because of the negative impact that such a change would have on the administration of justice. For these reasons, *Gray* was not applied retroactively. Anytime a court wrestles with the question of whether or not a case should be applied retroactively, there are two competing interests: the interest of decisional finality on the one hand, as compared to the interest of individual fairness on the other. In some cases, where the strain on the system would be

> so great if retroactive application were to be given--based in part on the reliance on the old rule, the interest of decisional finality prevails over all other interests.

Applying Justice Harding's method of analyzing the three Stovall factors in the instant case, respondent submits that this Court's decision in L.B. also fails the Stovall test for establishing that the "change of law have fundamental significance" (characterized as the third prong of Witt).

As stated earlier, the decision in L.B. does not establish a "new rule" or a bright line holding that because a pocketknife has a blade of less than 4 inches it must be considered a "common pocketknife" in all cases. *See* J.D.L.R., *supra*. As this Court pointed out in L.B. , the failure to define the term "common pocket knife" does not make the statute constitutionally vague. *Id.* at 372. Further, this Court stated:

> We believe that in the vast majority of cases, it will be evident to citizens and fact-finders whether one's pocketknife is a "common" pocketknife under any intended definition of that term. We need not be concerned with odd scenarios construing smaller but more expensive knives as "uncommon."

Id.

Therefore, analyzing L.B. under the first consideration of Stovall "the purpose to be served by the new rule", it is clear that L.B. does not establish a new rule of law making any pocketknife that is less than 4 inches in length fall under the common exception of a "common pocketknife."

When one looks at the second consideration of Stovall "the extent of reliance on the old rule", the history of §790.001(13), Fla. Stat., shows that it was derived from Ch. 4929, Laws of Florida (1901) when the Florida legislature first enacted a statute prohibiting the carrying of concealed weapons:

> *Be it Enacted by the Legislature of the State of Florida:*
>
> Section 1. That whoever shall secretly carry arms of any kind on or about his person, or whoever shall have concealed on or about his person, any dirk, pistol, metallic knuckles, slung shot, billie or other weapon, except a common pocketknife, shall upon conviction, be punished by imprisonment of not less than three months nor exceeding six months, or by a fine of not less than one hundred dollars nor exceeding five hundred dollars, or by both such fine and imprisonment.

(Emphasis added)

The undefined exception for "common pocketknife" was left for fact finders to determine for over 97 years. The failure to define the term "common pocketknife" was apparently never challenged until the L.B. case and even then this Court felt that the failure to define the term did not make it constitutionally vague and that fact finders could determine for themselves what constitutes an "uncommon" pocketknife. Accordingly, the old standard (relying upon the norms of the community", L.B., *id.* at 372, was relied upon for over 97 years.

Regarding the third consideration of Stovall ,"the effect that retroactive application will have on the administration of

justice", respondent submits that if this Court were to determine first that its decision in L.B. is constitutional in nature (second step in Witt) and that its decision in L.B. sets for a bright line rule requiring that any pocketknife under 4 inches in length falls under the common pocketknife exception of §790.001(13), then the effect of retroactive application of such a bright line rule would have an unacceptable effect on the administration of justice.

Through all these many years since 1901, cases were prosecuted and convictions were obtained even though the term "common pocketknife" was not defined and finders of fact may have determined that a pocketknife under 4 inches in length was not a common pocketknife. Retroactive application of such a bright line rule would require relocating witnesses, and reviewing evidence, which after many years probably no longer exit. In fact, the trial transcripts themselves for many cases have probably been destroyed.

When all the factors of Stovall are considered, it is clear that L.B. does not meet the "change of fundamental significance" prong of the Witt test.

Respondent also submits that the holding in L.B. fails the second prong of Witt, that the new rule must be "constitutional in nature"). Respondent submits that the holding in L.B. is not constitutional in nature. First of all to the extent that this Court's decision might be considered constitutional in nature, respondent would again point out that the Court did not find that the failure to define the term "common pocketknife" was

constitutionally vague. The Court's reasoning in L.B. that a pocketknife under 4 inches in length is under any intended definition a "common pocketknife" was merely a question of statutory construction not a question of constitutional law. Second, again, as stated earlier, respondent submits that this Court's decision in L.B. did not set a "new rule" or as petitioner calls it a "bright line rule". Other characteristics of the knife may still make it an "uncommon" pocketknife. *See* J.D.L.R., *supra*.

CONCLUSION

Respondent respectfully requests that this Honorable Court approve the opinion of the lower court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to R. John Cole, II, Esq., 46 N. Washington Blvd., Suite 24, Sarasota, Florida 34236, this ____ day of December, 2001.

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*).

Respectfully submitted,

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