IN THE SUPREME COURT OF FLORIDA

CLYDE TIMOTHY BUNKLEY,

Petitioner,

vs.

Case No. SC01-297
Lower Tribunal No. 2D99-4511

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

R. JOHN COLE, II, P.A.
46 N. Washington Blvd.
Suite 24
Sarasota, Florida 34236
(941) 365-4055
Florida Bar No. 191364

TABLE OF CONTENTS

CITATION OF AUTHORITY

PREFACE

That in this Brief the Petitioner, CLYDE TIMOTHY BUNKLEY, will be referred to as "Petitioner", and the State of Florida will be referred to as the "State". References to the Record on Appeal will be made by the designation (R page number). Page numbers utilized in this Brief arising from the trial of this matter will be referred to by the Court Reporter's page number which shall be designated (CR page number). The trial transcript attached to the original 3.850 Motion in this matter runs from (CR335 through CR465).

I.

STATEMENT OF THE CASE

Petitioner was convicted by jury on April 23, 1987 of Armed Burglary. He filed a notice of appeal of the Judgment and Sentence with the Second District Court of Appeal on April 26, 1988. His conviction was affirmed on February 17, 1989, under 2DCA 88-1376, *Bunkley v. State*, 539 So.2d 447 (Fla.2nd DCA 1989). Petitioner also pursued case 90-02568 which was stricken on October 1, 1990, *Bunkley v. State*, 569 So.2d 447 (Fla.2nd DCA 1990), and case 90-02681 which was affirmed October 10, 1990, *Bunkley v. State*, 569 So.2d 447 (Fla.2nd DCA 1990). Petitioner filed a petition to invoke all writs jurisdiction in the Florida Supreme Court which was denied on July 21, 1995, *Bunkley v. State*, 660 So.2d 712 (Fla. 1995).

Petitioner filed petitions for habeas corpus in United States District Court, Middle District, under case numbers 91-113-CIV-T-99B, and 96-405CIV-T-24C. These matters were disposed of by court orders dated June 30, 1993, and February 26, 1999, respectively.

On September 21, 1999, Petitioner filed a Rule 3.850 motion in the trial court which was dismissed by Order entered on October 21, 1999. The District Court of Appeals affirmed the trial court, and certified to this Court a question of great public

importance by its opinion of September 1, 2000, *Bunkley v. State*, 786 So.2d 510 (Fla.2nd DCA 2000).

This Court issued its order of October 8, 2001, granting the Petitioner's Motion for Belated Appeal as a Petition for Writ of Habeas Corpus. After briefs and oral argument, this Court entered its opinion on November 21, 2002, approving the decision of the District Court and answering the certified question in the negative. *Bunkley v. State*, 833 So.2d 739 (Fla. 2002).

On May 27, 2003, the Petitioner was granted leave by the Supreme Court of the United States to proceed in forma pauperis. On May 27, 2003, the Court granted the Petitioner's Petition for Writ of Certiorari, vacated the opinion of this Court, and remanded the cause for further proceedings consistent with its opinion. *Bunkley v. Florida*, 538 U.S. _____ (2003).

II.

STATEMENT OF THE FACTS

The United States Supreme Court by its opinion remanded this cause to this Court to answer the following:

> 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 2½ TO 3 INCHES FIT WITHIN SECTION 790.001(13)'S "COMMON POCKETKNIFE" EXCEPTION AT THE TIME HIS CONVICTION BECAME FINAL. *BUNKLEY V. FLORIDA*, 538 U.S. ___ (2003).

The record, as well as the factual recitation of this Court in its opinion, establishes that the blade of the pocketknife in Petitioner's possession, when he was apprehended and arrested for burglarizing a closed, unoccupied Western Sizzlin' Restaurant, was a closed, common pocketknife that had a blade of 2½ to 3 inches in length (CR345, 357). *Bunkley v. State*, 833 So.2d 739, 741 (Fla. 2002).

Petitioner was convicted of armed burglary based on his possession of this knife. This knife was found in the Petitioner's pocket, in a closed position, at the time of his arrest. The knife was not used during the course of the burglary. *Bunkley v. State*, 786 So.2d 510 (Fla. 2d DCA 2000). Petitioner's conviction and sentence became final in February, 1989.

III.

ARGUMENT

ISSUE I

WHETHER THE DECISION IN *L.B. V. STATE*, 700 SO.2D 370 (FLA. 1997), CORRECTLY STATES THE LAW CONCERNING THE "COMMON POCKETKNIFE" EXCEPTION SET FORTH IN FLA. STAT. SECTION 790.001(13) AS IT EXISTED AT THE TIME PETITIONER'S CONVICTION BECAME FINAL IN FEBRUARY, 1989, SO THAT JUSTICE REQUIRES PETITIONER'S RELEASE UNDER *FIORE V. WHITE*, 531 U.S. 225 (2001).

IV.

ISSUE I

WHETHER THE DECISION IN *L.B. V. STATE*, 700 SO.2D 370 (FLA. 1997), CORRECTLY STATES THE LAW CONCERNING THE "COMMON POCKETKNIFE" EXCEPTION SET FORTH IN FLA. STAT. SECTION 790.001(13) AS IT EXISTED AT THE TIME PETITIONER'S CONVICTION BECAME FINAL IN FEBRUARY, 1989, SO THAT JUSTICE REQUIRES PETITIONER'S RELEASE UNDER *FIORE V. WHITE*, 531 U.S. 225 (2001).

In *Bunkley v. Florida*, 538 U.S. ____ (2003), the Supreme Court of the United States accepted certiorari of the Petitioner's case, and after reviewing the matter remanded it to this Court for reconsideration in light of its decision in *Fiore v. White*, 531 U.S. 225 (2001). The Court believed that this Court had failed to determine whether the "common pocketknife" exception to Florida's definition of a "weapon" encompassed Petitioner's pocketknife at the time that his conviction became final in February, 1989. *Bunkley v. Florida*, *supra*. Having reached that conclusion, the Supreme Court of the United States vacated the decision of this Court in *Bunkley v. State*, 833 So.2d 739 (Fla. 2002), and remanded to this Court with the direction that the Court reconsider whether the Petitioner's conviction should be vacated under the principals of *Fiore* in light of the fact that the pocketknife he possessed was 2½ to 3

inches long, and fit within the statutory interpretation of Florida Statute Section 790.001(13) relating to "common pocket knives", as determined by this Court in its decision in *L.B. v. State*, 700 So.2d 370 (Fla. 1997).

As such, the Petitioner stands before this Court urging it to reconsider its previous decision in this matter, and to apply *Fiore* accordingly. Specifically, Petitioner asserts that he was improperly convicted of a crime - armed burglary - for which he was not guilty. He argues that the trial court considering his case in 1987 did not understand the law as it existed in 1987 relating to the "common pocketknife" exception, which law was unchanged until his conviction became final in February, 1989, and that the trial court failed to properly apply the law to his case.

Said failure may well have arisen out of the fact that his counsel was not articulate in raising the appropriate issue in the trial court. However, under any circumstance, the Petitioner finds himself incarcerated on a life sentence when he should have been released over twelve years ago. Had the trial court understood the law, he would have been compelled to grant a judgment of acquittal at the conclusion of the State's case for its failure to adduce any evidence that the "common pocketknife" involved herein was used as a deadly weapon. Although there are numerous cases dealing with the use of a knife as a deadly weapon, decisions in the time period under consideration adhered to the essence of this Court's decision in

L.B., *supra*. However, the polestar precedent that existed in 1987 through 1989 was the Attorney General's opinion, *Op.Atty.Gen.* Fla. 051-358 (1951), which specifically declared that a knife of the type possessed by the Petitioner herein was not a deadly weapon under Florida Statute 790.001(13). This Attorney General's opinion was pivotal in this Court's decision in *L.B.*, 700 So.2d 370, 373 (Fla. 1997).

An analysis of the case law at the time of Petitioner's conviction demonstrates that the carrying of a "common pocketknife" by an individual, not used as a deadly weapon in a criminal episode, did not give rise to an increased penalty or a more serious charge. None of these decisions from the time period involved resulted in the conviction of an individual for an enhanced felony as a result of carrying a closed, common pocketknife in their pocket. Rather, the decisions that exist show that the concept of an armed crime involving a pocketknife was an issue to be resolved based on the use of the knife during the criminal event.

Initially the use of the pocketknife was for the trier of fact to determine. For instance, in *State v. Ortiz,* 504 So.2d 39 (Fla. 2nd DCA 1987), Ortiz was charged with possession of a concealed weapon by a convicted felon. The knife was a buck knife with a four-inch folding blade. *Id.* Ortiz' motion to dismiss pursuant to Fed.R.Crim.P. 3.190(c)(4) was granted by the trial court over the State's traverse. At the original hearing, Ortiz argued that the knife was a common pocketknife and fell

within the statutory exception in Section 790.001(13). *Id.* The trial Judge granted the motion on the theory that the additional facts alleged in the State's traverse would not be admissible into evidence, and therefore as a matter of law the State could not prove that the knife was not excepted from the exception provided by Section 790.001(13). The District Court reversed holding that whether a knife is a common pocketknife is a factual determination which needs to be made by the trier of fact, and not by way of a Rule 3.190(c)(4) motion. Finding that the trial court erred as a matter of law in determining the knife was a common pocketknife, the matter was remanded for trial. *Id.* Significantly, the DCA did not indicate that the matter needed to be decided by a jury, but merely by the trier of fact after the facts were known. Clearly, a judgment of acquittal should be entered by a trial court if it were to find, after the presentation of evidence, that the State had failed to prove that the knife was not a "common pocketknife" subject to the exception provided by the statute.

In the case of *McCoy v. State*, 493 So.2d 1093 (Fla. 4th DCA 1986), the District Court refused to vacate a conviction for aggravated assault with a deadly weapon when the weapon involved was a small pocketknife. *Id.* After the Appellant had been restrained by store employees, he broke free and pulled a small pocketknife out of his pocket. He opened the knife and began waving it at the employees, telling them to leave him alone. The employees testified that the Appellant did not try to stab or slash

them. Additional facts in that case indicated that the store manager believed that the Appellant was in great fear, and the Appellant testified that he had the knife in his possession for use at work in opening boxes.

The District Court believed that the trial court had properly denied McCoy's motions for judgment of acquittal as there was sufficient evidence for the jury to determine that the Appellant had committed an assault with a deadly weapon. *Id.* at 1095. This is consistent with the manner by which the case *sub judice* needed to be handled by the trial court. The State had an affirmative obligation to show the use of the pocketknife as a deadly weapon in order to go to the jury. In the case at bar, the evidence was a far cry from *McCoy, supra.* Evidence was adduced in *McCoy* that the knife was held in an open position and brandished in such a fashion as to have possibly created fear in others that they could be harmed by it. In the instant case, unlike *McCoy,* there is no proof that the weapon was carried or used in any fashion in the burglary or to threaten anyone; rather it was found in the Petitioner's pocket in the closed position. *Bunkley v. State,* 833 So.2d 739, 741 (Fla. 2002).

In *Gust v. State,* 558 So.2d 450 (Fla. 1st DCA 1990), the Court granted Appellant relief in an appeal pursuant to Rule 3.850 where his attorney had failed to effectively represent him in a case involving a key-chain knife that Appellant asserted was not used as a weapon in a robbery. In that case, he pled no contest to armed

robbery and was sentenced based on that charge. The First District found that a "common pocketknife" was excluded from the definition of a weapon in Section 790.001(13) (1985), Florida Statutes, and found that the State courts had utilized the statutory definition of weapon as contained in Section 790.001(13) to determine whether a particular item was a weapon for purposes of the armed robbery statute. *Id*.

Under that approach, the Court found that an item used in the course of a robbery could only qualify as a "weapon" if it is one of the objects specifically delineated in the statute or a deadly weapon. Therefore, they found that Appellant, who possessed only a key-chain knife during the course of the robbery, had not been effectively represented by his attorney as he was not advised concerning the likelihood of the key-chain knife qualifying as a weapon under the statute. The court stated that counsel had the affirmative obligation to fully explore whether the key-chain knife qualified as a weapon based on its usage as such in the robbery or whether it was specifically excluded from the status of a weapon in accordance with the statute. *Id*.

Also decided in 1990 was the case of *Arroyo v. State*, 564 So.2d 1153 (Fla. 4th DCA 1990). Arroyo was found inside an apartment in the early morning hours holding an open pocketknife. He made no threatening gestures while there, and left after

receiving permission to do so from the female occupants of the apartment. The court, in reviewing whether a pocketknife could be a dangerous weapon under the statute in effect in 1989, found that it could depending on its use. *Id.* at 1154. However, the court found that it was not used as such by following the procedure of other Florida courts in utilizing the statutory definition of "weapon" provided in Section 790.001(13) in determining whether a particular object constitutes a weapon for purposes of the various criminal statutes. It saw no reason not to apply the same analysis to the armed burglary statute, finding the State had the burden of proof on the issue of use as a weapon. *Id.*

In reviewing the case, it noted the decision in *State v. Nixon*, 295 So.2d 121 (Fla. 3rd DCA 1974) wherein that Court found that a pocketknife, although excluded from the enumerated weapons in the statute, could be used as a deadly weapon. It found that the legislature had excluded "common pocket knives" so that ordinary citizens would not be charged with a crime when carrying such knives for their own convenience and for useful purposes unrelated to criminal activity. *Id.* The court reasoned that the pocketknife in the *Arroyo* case could be used as a dangerous weapon if it was used in a manner likely to produce death or great bodily injury. Despite the fact that the Appellant was standing with the open pocketknife in his hand in the apartment of two females in the early morning hours, the Court found that the knife

was not used in that way. Rather, it noted that it was the State's burden to prove "beyond a reasonable doubt" that the Appellant was carrying a "dangerous weapon". In the context of a pocketknife, it found that it "required proof that it was used in a manner likely to cause death or great bodily harm." *Id.* at 1155. Without that evidence having been presented to a jury, the defendant should have been acquitted of the attempted armed burglary charge, and only convicted of the lesser offense of attempted burglary. *Id.* Clearly, the decision in *Arroyo* supports the proposition that the law in existence at the time of the Petitioner's conviction becoming final was that the pocketknife in the case before this Court was not a deadly weapon, and the jury should not have been allowed to consider that issue. The trial court had an obligation to enter a judgment of acquittal on the armed burglary charge. *See also: Mims v. State*, 662 So.2d 962 (Fla. 5th DCA 1995).

Likewise in *State v. Tremblay*, 642 So.2d 64 (Fla. 4th DCA 1994) that Court, in reviewing the dismissal of charges against the defendant, found that dismissal by the trial court, after a motion hearing, was appropriate where the weapon was not used as a deadly weapon for purposes of the concealed weapon statute. Although this involved an ice pick under Florida Statute Section 790.001(13), the analysis is similar to that involved in the instant case in that the ice pick was found with its butt sticking out from under the front armrest of the individual's car. The reviewing tribunal found

that where there was not substantial competent evidence that the Appellant used the ice pick in a threatening manner, then the ice pick cannot qualify as a concealed weapon under the statute. *Id.* at 66.

Similarly, in the instant case, there is not an iota of evidence that the pocketknife herein was used as a weapon or even used in the burglary that was committed by the Petitioner. *Bunkley v. State,* 833 So.2d 739, 741 (Fla. 2002). As such, the law in effect in the State of Florida in the time period between 1987 and 1989 required that the alleged weapon be used as a deadly weapon or in such a fashion as to cause death or great bodily harm. *Arroyo, supra*, *Mims, supra.* As such, the Petitioner was improperly convicted for a crime he did not commit. Also, it is clear that the trial court had an obligation to acquit Petitioner, and not permit the matter of the weapon to be resolved by a jury.

All of the foregoing cases make it clear that the definition accorded to a pocketknife in that time period was similar to that given it by this Court in *L.B.*, *supra*. This Court adopted the Attorney General's 1951 opinion in *L.B.*, and held that it was the appropriate standard for reviewing pocketknife cases. It would appear, at least in the 1987 through 1994 period, that the courts of this State, while not giving voice to their adherence to the Attorney General's opinion, all essentially followed it, and only permitted a jury to consider the issue of a pocketknife as a weapon if it was shown to

have been used as a dangerous weapon or so as to cause great bodily harm or death. It is clear from a review of the case law, that when a common pocketknife was not used in a threatening fashion, the courts were quick to grant relief to the person seeking it as a result of having been improperly convicted. *See, e.g. Gust v. State, supra.* Further, none of the opinions cited indicate that a jury should make the decision, but rather found that when there was no credible evidence of the use of the knife as a weapon, relief should be granted by the trial court.

In the instant case, the Petitioner was denied appropriate relief by the trial court by its not granting judgments of acquittal as the case law and *L.B., supra,* required for the charge of armed burglary based on the failure of the State to adduce any evidence that the pocketknife he was carrying was used as a dangerous weapon or to do great bodily harm or cause death to another. As such, this Court's decision in *L.B.*, combined with the 1951 Attorney General opinion *Op.Atty.Gen.* 051-358 (1951) indicate that Petitioner was convicted of a crime which he did not commit.

This is further buttressed by the decision of *J.W. v. State*, 28 *Fla.Law Weekly* D1446 (Fla. 4th DCA 2003). There, the Court looked back at the decision in *Arroyo*, *supra*, and recognized that a pocketknife, while conceivably capable of constituting a dangerous weapon if actually used in "a manner likely to produce death or great bodily injury", was held in *Arroyo* not to qualify as a dangerous weapon for purposes

of the armed burglary statute unless so used. In *J.W.*, as in *Arroyo*, an individual had broken into an occupied home causing the occupant to become frightened. In *J.W.*, the Appellant fled with the open pocketknife in his hand without making any threats to the occupant of the dwelling. *Id.* In his concurring opinion, Judge Stone pointed out that the Court was bound to reverse the conviction of J.W. based on the *Arroyo* decision, but suggested the legislature should look at the statutory definition of the common pocketknife as a weapon. He was concerned that it was left to a jury to determine whether an unloaded b.b. gun is a dangerous weapon when carried in the course of a crime, but that it was incumbent upon the courts to prohibit a jury from having any involvement in the determination of whether a pocketknife was used as a weapon. *Id.* This further strengthens the argument that the state of the law now and at the time of Petitioner's conviction became final required the granting of a judgment of acquittal if the State did not prove that the pocketknife was used in a dangerous fashion.

Although this Court in its original *Bunkley* decision elected not to grant retroactivity to the *L.B.* decision, Petitioner should be granted relief on this remand from the United States Supreme Court as *Fiore* holds that the due process clause of the Fourteenth Amendment forbids a state to convict a person of a crime without proving all the elements of that crime beyond a reasonable doubt. *Fiore v. White,* 121

S.Ct. 712, 714. As in *Fiore*, the Petitioner in this case is not guilty of possessing a weapon during the course of the burglary, and therefore could not be found guilty of an armed burglary at the time of his conviction in 1987, and his conviction should not have been affirmed in February, 1989. To do so violated the due process clause as interpreted by *Fiore*. Likewise, this Court's decisions hold that due process violations need to be applied to final cases as a result of the nature of the case and the evolution of the law. Although this Court indicated in its original *Bunkley* decision that the law relating to weapons had been in a state of flux for a hundred years, the foregoing decisions show that the law was clear that a pocketknife was not a dangerous weapon for purposes of the armed burglary statute unless it was used as a dangerous weapon or in a deadly fashion at the time of Petitioner's conviction. Further, the State was and is required to adduce proof of that beyond a reasonable doubt. In the instant case, the proof is that the knife involved was carried by the Petitioner in his pocket in a closed position. *Bunkley v. State*, 833 So.2d 739, 741 (Fla. 2002).

As this Court indicated in *Moreland v. State*, 582 So.2d 618 (Fla. 1991), there is a fundamental fairness issue in cases of this type, and that concept must be considered in making a determination to apply any decision retroactively. *Id* at 619. Further, this Court stated that "the doctrine of finality should be abridged only when a more compelling objective appeared, such as ensuring fairness and uniformity of

individual adjudications". *Witt v. State*, 387 So.2d 922, 931 (Fla. 1980). *See, also*: *Barnum v. State*, 28 *Fla. Law Weekly* D1314 (Fla. 1st DCA 2003).

Finally, this Court' s decision in *State v. Klayman*, 835 So.2d 248 (Fla. 2002) gives credence to the fact that the Petitioner herein is entitled to a retroactive application of the decision in *L.B.* In *Klayman*, decided shortly after the decision was rendered in *Bunkley*, this Court did a *Fiore* analysis involving possession of hydrocodone. This Court indicated that it would adopt the *Fiore* analysis when a clarification in the law did not give rise to retroactivity under *Witt*, but would, of necessity, need to be applied to a clarification in the law to insure due process. *Id.* at 252. The Court stated:

> "It thus is clear under *Fiore* that, if a decision of a state's highest court is a clarification in the law, due process considerations dictate that the decision be applied in all cases, whether pending or final, that were decided under the same version (i.e., the clarified version) of the applicable law. Otherwise, courts may be imposing criminal sanctions for conduct that was not proscribed by the state legislature.
>
> Although Florida courts have not previously recognized the *Fiore* distinction between a "clarification" and "change," we conclude that this distinction is beneficial to our analysis of Florida law. Previously, this court analyzed such cases strictly under *Witt v. State*, 387 So.2d 922 (Fla. 1980), and used the term "change" broadly to include what in fact were both clarifications and true changes. As explained 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. Whereas *Witt* remains applicable to "changes" in the law, *Fiore* is applicable to "clarifications" in the law." *Id. at 252*.

This Court further indicated that in this type of analysis if:

> ". . .[T]he legislature used language that was intended to be clear on its face. The problem. . . arose when lower courts construed the statutory language in a manner that was contrary to legislative intent. The key consideration is that, in construing the statutes contrary to legislative intent, the courts imposed criminal sanctions without statutory authority–i.e., they imposed criminal sanctions where none were intended. The rulings thus violated the Due Process Clause and all defendants convicted or sentenced without statutory authority were entitled to relief." *Id.* at 253

As such, in the case at bar, the exception for a common pocketknife has existed since 1903, the Attorney General opinion in 1951 confirms that the knife in this matter was not a weapon as mandated by the statute and the various appellate court decisions around the time when this case first arose all agreed that there must be a showing that the knife was used as a deadly weapon in order to sustain a conviction. Therefore, under this Court's decision in *Klayman*, although the decision in *L.B.*, may be a clarification of the law, it should be granted retroactive application to the Petitioner herein as clearly the state of the law in 1987 through 1989 is as this Court found it in *L.B. supra.* As indicated in *Fiore,* this clarification of law should be applied to final cases such as the Petitioner's in order to avoid a violation of the due process clause

of the United States Constitution as well as those similar clauses found in the Florida Constitution. *Fiore v. White*, 531 U.S. 225, 229, 121 S.Ct. 712, 714 (2001). To do otherwise would continue the incarceration of the Petitioner for a crime he did not commit, and for which he should not have been convicted.

V.

CONCLUSION

Petitioner respectfully requests that this Court grant Petitioner the relief sought herein under *Fiore v. White*, 531 U.S. 225 (2001) and apply *L.B. v. State*, 700 S.2d 370 (Fla. 1997) to Petitioner's case in that Petitioner is being held in violation of his rights under the due process clause of the Fourteenth Amendment to the U.S. Constitution, and like provisions of the Florida Constitution for a crime he did not commit.

R. JOHN COLE, II, P.A.

R. JOHN COLE, II, ESQUIRE
Florida Bar No. 191364
Attorney for Petitioner
46 N. Washington Blvd., Suite 24
Sarasota, FL 34236
(941) 365-4055

VI.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Brief on the Merits has been sent by U.S. Mail to Office of the Attorney General, 2002 N. Lois Ave., Suite 700, Tampa, FL, 33607, on this the ____ day of July, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point font Times New Roman, in compliance with Fla.R.App.P. 9.210(a)(2).

_____

R. JOHN COLE, II, ESQUIRE