IN THE SUPREME COURT OF FLORIDA

CLYDE TIMOTHY BUNKLEY,

Petitioner,

vs.

Case No. SC01-297
Lower Tribunal No. 2999-4511

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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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 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 had case 90-02568 which was stricken 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 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 through present counsel filed a 3.850 motion in the trial court which was dismissed by Order entered on October 21, 1999. He appealed the denial to the Second Court of Appeals unsuccessfully. The Court of

Appeals certified to this Court a question of great public importance via its opinion of September 1, 2000, *Bunkley v. State*, 786 So.2d 510 (Fla.2nd DCA 2000). Thereafter, counsel for Petitioner filed a belated notice to invoke Supreme Court jurisdiction.

This Court dismissed Petitioner's Motion to file a belated Notice to Invoke by Order entered on February 13, 2001, On or about February 23, 2001, counsel for Petitioner filed a Motion for Rehearing of this Court's Order Dismissing Belated Notice to Invoke Discretionary Jurisdiction of Supreme Court.

Upon Petitioner's filing of his Motion for Rehearing, this Court issued its Order of April 23, 2001, treating Petitioner's Motion for Rehearing as a petition for writ of habeas corpus and directing Respondent to file its response. Subsequently, this Court issued its order of October 8, 2001, granting the Petitioner's 's Motion for Belated Appeal as a Petition for Writ of Habeas Corpus and entered its briefing schedule.

II.

STATEMENT OF THE FACTS

The District Court rendered its opinion that is the basis of this appeal on September 1, 2000, and certified, as a question of great public importance, the following:

> SHOULD 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 FALL WITHIN THE STATUTORY EXCEPTION TO THE DEFINITION OF A "WEAPON" FOUND IN SEC. 790.001(13), BE APPLIED RETROACTIVELY?

The record, as well as the factual recitation of the District Court in its opinion, support the factual allegation that the blade of the pocketknife in Petitioner's possession when he was arrested and subsequently convicted by jury of armed burglary on April 23, 1987, was less than four inches. After conviction he was sentenced to life with the Department of Corrections. The Petitioner broke into a closed, unoccupied Western Sizzlin' Restaurant in the early morning hours, and was apprehended after leaving the structure with a common pocketknife in his possession (CR345). The knife involved had a blade of 2½ to 3 inches in length (CR357).

Although there is no exact measurement of the knife in the record, the Respondent contacted the Office of Karen E. Rushing, Clerk of Court for Sarasota County, Florida, and spoke to a records custodian that verified the knife had been retained in the physical property room of the Clerk's office and was still available for viewing.[1] The Clerk further advised the Respondent that the blade appeared to be 3-3.5" in length, absent the blade connector and handle.[2]

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. Nor was the knife used in any manner during the course of the burglary of the "unoccupied Western Sizzlin' Restaurant in the early morning hours." Bunkley v. State, 768 So.2d 510 (Fla. 2d DCA 2000).

[1]The knife was introduced at trial in Case No. 86-1070-CF-A-N1, in Sarasota County, Florida, as State's Exhibit #3, listed as "knife." The knife is further identified by the Record Management Division of the Sarasota County Clerk's Office as "PT#37157." Should the Court wish, in its own discretion, to direct the Clerk's Office by Order to transmit this physical piece of evidence for direct viewing, the foregoing information is provided.

[2]See Respondent's Response to Petitioner's Writ of Habeas Corpus filed with this Court on or about May 7, 2001, at page 4.

ARGUMENT

ISSUE I

SHOULD 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 FALL WITHIN THE STATUTORY EXCEPTION TO THE DEFINITION OF A "WEAPON" FOUND IN SEC. 790.001(13), BE APPLIED RETROACTIVELY?

ISSUE I

SHOULD 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 FALL WITHIN THE STATUTORY EXCEPTION TO THE DEFINITION OF A "WEAPON" FOUND IN SEC. 790.001(13), BE APPLIED RETROACTIVELY?

The knife involved is unarguably within the definition of a common pocketknife as defined by the Attorney General . ***Op. Atty Gen.* Fla. 051-358 (1951)**. The trial testimony demonstrates that the pocketknife was folded and in the Petitioner's pocket at the time of his arrest, and there is no evidence that Petitioner used the pocketknife during the burglary (CR 346, 358-359). However, the trail Judge incorrectly permitted the jury to consider the issue of the knife as a weapon, even though it was not as a matter of law (CR422-423).

Despite several post-conviction attempts to overturn his conviction for armed burglary, Petitioner has been unsuccessful as no opinion of this Court had held that a "common pocketknife" cannot be a deadly weapon under the law of this State. However, in ***L.B. v. State*, 700 So.2d 370(Fla. 1997)**, this Court adopted the Attorney General's approach expressed in ***Op. Atty Gen.* Fla. 051-358 (1951)** that a common pocketknife cannot be a deadly weapon. ***L.B.*** was convicted of possessing a weapon on school property as the trial court found that the knife involved was too large to be

considered a "common pocketknife" and therefore was a "weapon." The Second District vacated the trial court's order and remanded the case for a new trial holding that Florida Statutes Section 790.001(13) was unconstitutionally vague as it excluded the term "common pocketknife" from the definition of a weapon without providing a definition of same. *Id*.

In overruling the Second District, this Court stated that although Florida Statute 790.001(13) was not "a paradigm of legislative drafting," it believed that the term "common pocketknife " was not so vague as to make it impossible for people of ordinary intelligence to understand what the forbidden conduct in the statute was. In its analysis this Court turned to the Attorney General's opinion entered in 1951, *supra*, and stated that words not defined in a statute should be given their common meaning, and held that **L.B.**'s knife fell within the statutory exception to the definition of a weapon as defined in Florida Statute 790.001(13) based on the Attorney General's opinion which stated that a common pocketknife was one with a blade that was four (4) inches in length or less. ***L.B., supra***.

Since **L.B.**, Courts have considered the definition of a common pocketknife, and have defined what it would be. For instance, in ***J.D.L.R. v. State*, 701 So.2d 626 (3rd DCA Fla. 1997)**, the Court declined to find a common pocketknife where the

knife in question had "weapon like" characteristics that arguably took it out of the "common pocketknife" category. In ***J.D.L.R.***, the knife had a notched combat-style grip and a large metal hilt guard to prevent the user's fingers from sliding onto the blade. *Id.* The Court went on to say that the common pocketknife in ***L.B.*** was described as a folding "buckknife" with a 3 3/4 inch blade and an overall length of 8 ½ inches. Finding that these distinctions turned the knife in ***JDLR*** into a weapon, it found that the common pocketknife exception did not apply. *Id.* In the instant case, the knife involved is a "common pocketknife" as it is capable of folding, and does not have any notched style grips or protective hilt. See also, ***R.L.S. v. State*****, 732 So.2d 39 (2nd DCA Fla., 1999)**.

Armed burglary requires that an individual be armed with a deadly weapon. In the instant case, the Petitioner only had a common pocketknife in his possession. Prior to the decision in ***L.B.***, the courts had no guidance from this Court in making a factual determination on the issue, and only had the Attorney General's opinion. Since ***L.B.***, a bright line test defining a common pocketknife has existed, which has been recognized by the First District in ***Walls v. State*****, 730 So.2d 294 (1st DCA Fla., 1999)**, which sets out the *"per se"* rule of ***L.B.*** as a blade of four inches or less on a knife being carried in the folded position. *Id.*

The ***L.B.*** bright line test is a significant constitutional departure from previous law. As such it should be retroactively applied as was done in the case of ***R.L.S.,*** *supra.* ***R.L.S.*** was reversed to give the trial court the benefit of ***L.B.***, in reaching its decision on the nature of the knife involved.

Retroactivity should be given to ***L.B.***, as this is a not mere evolution in the criminal law of this State. Rather, ***L.B.*** is a jurisprudential upheaval in the law of constitutional proportions which needs to be applied retroactively by this Court. Although the Second District declined to extend the opinion in ***L.B.*** by giving it retroactive effect, the Petitioner urges this Court to so do under its opinion in ***Dixon v. State*****, 730 So.2d 265 (Fla. 1999).**

In ***Dixon***, this Court reasserted its reliance on ***State v. Calloway*****,** 658 So.2d 983 (Fla. 1995) in making the analysis needed for applying a decision retroactively. As indicated in ***Dixon***, one of the underlying concerns in ***Calloway*** was ensuring fundamental fairness and uniformity in sentences between similarly situated prisoners. ***Dixon*** at 267. Adhering to the principles enunciated in the Second District's decision in ***Calloway*****, 642 So.2d 636 (Fla. 2nd DCA 1994)**, the majority opinion agreed that the failure to give retroactive application in ***Calloway*** would result in some prisoners serving sentences twice as long as those imposed on similarly situated prisoners, and would be manifestly unfair to that class of prisoner. ***Calloway*** at 986.

Calloway, in concluding that the decision in ***Hale v. State***, 630 So.2d 521 (Fla. 1993) significantly impacted a Defendant's constitutional liberty interest, essentially determined that a decision that would alter a sentence is an interest that could give rise to retroactive application. Therefore, the Court said that the sentencing issues raised in ***Hale*** satisfied the first prong of the analysis announced in ***Witt v. State***, 387 So.2d 922 (Fla. 1980). ***Calloway*** at 986. Further, the Court stated that retroactive application of the rule announced in ***Hale*** would have no serious adverse effect upon the administration of justice. Courts would not be required to overturn convictions and delve extensively into state records to apply the rule. The Court held that the administration of justice would be more detrimentally affected if criminal defendants who had the misfortune to be sentenced during the six year window between the amendment of Section 775.084 and the decision in ***Hale*** were required to serve sentences two or more times as long as similarly situated defendants who happened to be sentenced after ***Hale***. *Id.* at 987.

The ***Calloway*** decision was not receded from in ***Dixon***, but was reaffirmed. The only modification of ***Calloway*** was the determination of the calculation period for the two year window of opportunity within which to file petitions seeking relief under ***Hale***. ***Dixon*** at 267, 269.

In the instant case, the Petitioner finds himself in significantly similar circumstances to Hale and Calloway in that he has been sentenced to life while carrying a common pocketknife folded in his pocket while Hale and Calloway received consecutive habitual felony offender sentences arising from a single criminal episode. Clearly, the decision in ***L.B.*** and ***Walls****, supra*, would prohibit the Petitioner's sentence were he to be sentenced today. As such, he has been sentenced to life for what is now a five year, third degree felony.

As in ***Calloway***, the application of ***L.B.*** retroactively is a simple task for Courts, and would have no serious adverse affect upon the administration of justice. As in ***Calloway***, the record will normally be clear, and a determination concerning the length of the pocketknife, and how the pocketknife was used during the alleged burglary easy to make. At most, as in this matter, the court or prosecuting attorney can contact the Clerk's office, and clear up any confusion concerning the length of the knife blade.

Cases such as ***Calloway*** and ***L.B***. are bright line cases that do not require a great deal of judicial involvement in sorting through old closed records, and can be simply handled by the trial courts in this State without significant effort. Further, it is doubtful that there are many inmates serving a life sentence for carrying a common pocketknife during a burglary presently in the Department of Corrections.

Therefore, the application of ***L.B.*** is consistent with this Court's decision in ***State v. Glenn***, 584 So.2d 4 (Fla. 1990), in which the Court indicated that the doctrine of finality should be abridged only when a more compelling objective, such as insuring fairness and uniformity in individual adjudications, is present. In ***Glenn*** the Court cited instances of which it declined to find retroactivity appropriate, and none of those rose to the level of requiring an inmate to serve a life sentence for what is in essence a third degree felony. ***Calloway*** and ***Dixon*** support the retroactivity of ***L.B***. as a necessity, rather than a luxury, in order to ensure fairness to the Petitioner and any who might be in his class.

The analysis in ***Witt v. State***, 387 So.2d 922 (Fla. 1980), further bolsters the position of the Petitioner that this is a change in the law of such constitutional proportion that a retroactive application is necessary. This Court in ***Witt*** indicated that it was following the rule announced in ***Stovall v. Denno***, 388 U.S. 293, 297, 87 SC 1967, 1970, 18 L.Ed.2d 1199 (1967) in which a three-pronged test was announced for determining the retroactive application of a principal of law. Essentially, the first prong is the purpose to be served by the new rule. In the instant case, the effect of the new rule would be to bring proportionality in sentences between all inmates situated in a Florida prison who are there for conviction of burglary relating to the carrying of a pocketknife during the course of same. As such, the rule promotes fairness and

proportionality in sentencing among inmates, and eliminates disproportionate sentencing thereby guaranteeing the Petitioner's constitutional liberty interests.

The second prong of the test is the extent of reliance on the old rule. In the instant case, as this is a change giving rise to a different result in sentencing, reliance by law enforcement is nonexistent, and an inappropriate reliance by the Courts would create a constitutional impediment to fairness under the Eighth Amendment to the United States Constitution as made applicable to the State via the due process and equal protection clauses of the Fourteenth Amendment. Reliance on the old rule works a disadvantage to inmates situated such as the Petitioner, and therefore reliance is inappropriate.

The third prong of the test is the effect on the administration of justice as a result of retroactive application. In the instant case, the Petitioner would suggest that there is no real effect on the administration of justice as a very limited class of cases would be involved, and all of these are capable of being decided on a "bright line" test based on the length of the pocketknife, and the use made of the pocketknife during the commission of the burglary. Both something easily discernible in the record. The application of the rule of ***L.B.*** retroactively would normally not require evidentiary hearings; would not unduly burden the Courts and would ensure proportionality in sentencing that is necessary to an efficient administration of justice.

As this Court stated in ***Witt***, the application of a rule retroactively involves major constitutional changes of law, and specific determinations need to be made on a case by case basis. *Id.* at 929. As this Court has indicated, constitutional changes normally fall into two broad categories. The first of those changes deals with the change of law which places beyond the authority of the state the power to regulate certain conduct or impose certain penalties. ***Witt*** at 929. Clearly, the decision in ***L.B***. eliminates the penalty imposed upon the Petitioner as one beyond the power of the Court to impose, and as such is a change of law that should be given retroactive application. Alternatively, as is demonstrated above, the rule of ***L.B.*** clearly meets the three prong test set forth in ***Witt*** and ***Stovall v. Denno*** for retroactivity.

In the case *sub judice*, retroactive application compels the lower court to sentence the Petitioner to the same period of incarceration that he would receive in this case at this time, and effectively would reduce his sentence from life to five years. Considering the Petitioner has now served approximately 17 years in this case, it is appropriate to provide retroactive application of this law to cause the release of the Petitioner from the Department of Corrections.

As such, the undersigned would urge this Court to grant retroactive application to the decision in ***L.B.***, and to order the Petitioner's immediate release from the Department of Corrections as he has served far more time than he would have had

the trial court applied the Attorney General's 1951 opinion (***Op. Atty Gen. Fla***. 051-358 [1951]) in this case. As this Court has stated:

> Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." ***Witt*** at 925.

IV.

CONCLUSION

Petitioner respectfully requests that this Court grant Petitioner's Petition for Writ of Habeas Corpus as the decision in ***L.B. v State*** is of sufficient magnitude as to require its retroactive application to cases such as Petitioner's in that it establishes a bright line test of such constitutional magnitude as to change the sentencing requirements placed upon the trial courts of Florida so as to ensure that the Petitioner and others in his situation receive sentences which are proportionate to that which would be imposed on like sentenced defendants as of this date.

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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 Ha T. Dao, Esq., and Diana K. Bock, Esq., Assistant Attorneys General, Office of the Attorney General, 2002 N. Lois Ave., Suite 700, Tampa, FL, 33607, on this the ____ day of October, 2001.

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).

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R. JOHN COLE, II, ESQ.