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 REPLY BRIEF ON THE MERITS ON REMAND FROM THE UNITED STATES SUPREME COURT

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CITATION OF AUTHORITY

I.

STATEMENT OF THE CASE AND FACTS

Petitioner relies upon the previous Statement of the Case and Statement of Facts filed herein, and as supplemented in the State's Answer Brief.

II.

SUMMARY OF THE ARGUMENT

ISSUE I

WHETHER THE DECISION IN *L.B. V. STATE*, 700 SO.2D 370 (FLA. 1997), CORRECTLY STATES THE LAW CONCERNING THE "COMMON POCKET KNIFE" 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).

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 POCKET KNIFE" 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 its Answer Brief, the State attempts to raise issues that should be precluded from argument by this Court's and the Supreme Court's decisions in the preceding Bunkley cases. The State argues that there is a procedural bar to raising a challenge to Petitioner's conviction based on the Petitioner's prior pursuit to overturn his conviction. In fact, the State in its Reply Brief cites extensively from the records of the District Court actions seeking habeas relief from Petitioner's conviction. However, this argument lacks merit as the appeals which are now relied upon by the State were filed prior to this Court's opinion in *L.B. v. State, 700 So.2d 370(Fla. 1997),* and the US Supreme Court's decision in *Fiore v. White, 531 U.S. 225, 121 S.Ct. 712, 148 L. Ed. 2d 629 (2001).* The prior appeals do not constitute a procedural bar in this

matter as a result of the forgoing opinions. Rather, the Supreme Court indicated that this Court committed an error of law by not addressing whether a *Fiore* analysis of the *L.B.* decision means that Petitioner was convicted of a crime - armed burglary - for which he may not be guilty. *Bunkley v. Florida*, 123 S.Ct. 2020, 2022 (2003).

The Court indicated that an analysis was needed under *Fiore v. White*, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001). As such, the procedural bar argument presented by the State is without merit. *Bunkley v. State, supra*.

Next, the State attempts to reargue the nature and quality of the pocketknife carried by Mr. Bunkley. This Court found that the knife Mr. Bunkley carried on the night of the burglary was a common pocketknife with a blade of 2½ to 3 inches, which was folded and in his pocket. *Bunkley v. State*, 833 So.2d 739, 741 (Fla. 2002). Therefore, the State is foreclosed from attempting to again relitigate the nature of the knife involved in this matter. Although Petitioner asserts that the pocketknife involved herein is in deed a "common pocketknife" as this Court found previously, Petitioner has never suggested that but for the existence of the decision in *L.B.*, would he be entitled to challenge the finality of his conviction. Rather, it is the existence of *L.B.* that permits him to raise these issues.

Further, the Petitioner has never asserted that the common pocketknife involved in this matter was incapable of being used to "slit a throat" or to otherwise harm

someone. Every common pocketknife has that ability. That is not the import of this Court's decision in *L.B.* Rather, the Court established a "bright line" definition of a common pocketknife that courts were to rely upon in deciding cases. The argument of the State in its brief at page 12, that L.B. did not establish a bright line test is not correct as the State fails to include the final sentence of the footnote, which stated that the decision did not address whether a pocketknife with a blade length in excess of four inches could be called "common" L.B. at 373, n.4. Further, decisions subsequent to *L.B.* have in fact made clear that the decision in *L.B.* is controlling. Although *J.D.L.R. v. State*, 701 So.2d 626 (Fla. 3rd DCA 1997), seems to run contrary to the decision, it is the only decision so doing.

The State inappropriately cites *R.L.S. v. State*, 732 So.2d 39 (Fla. 2nd DCA 1999), as a case that attempted to distinguish *L.B.* A review of *R.L.S.* shows that that is hardly true. Rather, the District Court remanded the case to the trial court to apply *L.B.* as that court had analyzed the "common pocketknife" exception prior to the decision in *L.B.* being entered. *Id.*

Rather, the issue that the State avoids is that in the period of 1987 through 1989 when Petitioner's conviction became final, the law of this State was heavily weighted in holding that a common pocketknife was not a deadly weapon, and the courts only permitted the issue to go to the jury where the knife was used as a weapon. The cases

cited in Petitioner's Brief on the Merits support the proposition that decisions in the period involved treated the determination of a "common pocketknife" as something that a court should make after hearing the facts, and only permit the issue to go to the jury if the knife was not a common pocketknife. *L.B., supra,* has not changed that nor has the U.S. Supreme Court's decision in *Bunkley, supra*. Rather, they clarified the law, and the remand was for a consideration of the *Fiore* analysis as raised by Justice Pariente in her dissent in the original *Bunkley* decision. The analysis, based on the cited decisions, shows that the Petitioner had been improperly convicted, and has been incarcerated for over 17 years for a third degree felony. None of the cases cited by the State change that fact nor do any of the cases cited by the State seriously challenge that the law in this state required the trial court to enter a judgment of acquittal if the pocketknife involved was a common one. *See:* Petitioner's Brief on the Merits.

As such, this court has an obligation to apply a *Fiore v. White* analysis to this case, and to direct the release of the Petitioner from custody, and to order the judgment and sentence against him corrected by reducing his conviction from armed burglary to simple burglary. Any other result denies the Petitioner due process of law, and condemns him to a life sentence for a crime he did not commit. Petitioner urges this Court to direct Petitioner's release from incarceration.

IV.

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.

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V.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply Brief has been sent by U.S. Mail to Katherine V. Blanco, Assistant Attorney General, Office of the Attorney General, 3507 E. Frontage Rd., #200, Tampa, FL, 33607-7013, on this the ____ day of August, 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).

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R. JOHN COLE, II, ESQ.