

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

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

	<u>Page</u>
Citation of Authority	ii
Statement of the Case and Facts	1
Summary of the Argument	2
Argument	3
Conclusion	7
Certificate of Service	8

CITATION OF AUTHORITY

<u>Case</u>	<u>Page</u>
<i>L.B. v. State</i> , 700 So.2d 370 (Fla. 1997)	2, 3, 4, 5, 6, 7
<i>Singletary v. State</i> , 322 So.2d 551 (Fla. 1975)	4
<i>State v. Calloway</i> , 658 So.2d 983 (Fla. 1995)	3, 6
<i>State v. Iacovone</i> , 660 So.2d 1371 (Fla. 1995)	3
<i>State v. Stephens</i> , 714 So.2d 347 (Fla. 1998)	3, 6

Statutes

<i>Florida Statutes</i> , Section 790.001(13)	3
---	---

STATEMENT OF THE CASE AND FACTS

Petitioner relies upon the previous Statement of Case and Statements of Facts filed herein.

SUMMARY OF THE ARGUMENT

The certified question should be answered in the affirmative:

THE DECISION IN L.B. V. STATE, 700 SO.2D 370 (FLA. 1997), SHOULD BE GIVEN RETROACTIVE APPLICATION. THE DECISION IN L.B. IS A DECISION OF CONSTITUTIONAL SIGNIFICANCE THAT SHOULD BE GIVEN RETROACTIVE APPLICATION.

ARGUMENT

ISSUE

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 Petitioner limits his argument to an analysis of the decision in State v. Stephens, 714 So.2d 347 (Fla. 1998), in which the State attempts to show that L.B. should not be given retroactive application. Stephens gave retroactive application to a decision of this Court that held that the sentencing requirements relating to attempted second or third degree murder of a law enforcement officer would yield absurd results. These results were unconstitutional, and retroactive application was necessary, and therefore the application of the decision in State v. Iacovone, 660 So.2d 1371 (Fla. 1995) was applied retroactively as it met all the requirements of State v. Calloway, 658 So.2d 983 (Fla. 1995).

Although the majority opinion was relatively brief, Justice Harding’s concurring opinion bolsters Petitioner’s apparent case for retroactive application of L.B. . First, Justice Harding made clear that the decision being considered for

retroactive application does not need to be decided on a constitutional basis in order to meet the requirement that it be one of constitutional proportion. Justice Harding pointed out that many decisions are not based on a constitutional provision, although the import of the decision is clearly constitutional. Rather, as Justice Harding pointed out, the decision in *Singletary v. State*, 322 So.2d 551 (Fla. 1975) compels an appellate Court to avoid holdings that are constitutional in nature when it is possible to rely upon some other basis in deciding the case. As such, the decision in *L.B.* is clearly constitutional in nature, although not having cited specifically the constitutional sections, it clearly impacts the due process and equal protection clauses of the Constitution of the United States as well as the Eighth Amendment dealing with cruel and unusual punishment, and the like provisions of the Florida Constitution. Therefore *L.B.* is a case of constitutional significance.

Further, the State argues that the decision should not be given retroactive effect because of prior reliance upon the statute. This Court held in *L.B.* that the statute was not constitutionally vague which does not change the need for retroactive application. The Petitioner has suffered a major deprivation of liberty by the inappropriate application of the statute to his case. The pocketknife in this case was conceded by the State in its original Response to Petitioner's Writ of Habeas Corpus

with a Certificate of Service bearing a date of May 7, 2001, to be a common pocketknife, to which the decision in L.B. applied. Further, were this Court to feel that there is some need to examine the pocketknife in question, that knife can be sent by the Clerk of the Circuit Court of Sarasota County, Florida, and brought to this Court for its own examination. The knife involved in the instant case is indeed a pocketknife based on the decision in L.B.. The need for fundamental fairness far outweighs the hackneyed argument that the age of the law protects it from retroactive application of the decision in L.B. in that no “new trials” would be required in that a review of existing transcripts or an examination of the evidence would permit the Court to make a determination without a new trial or contacting any lost or missed witnesses, as to whether or not a common pocketknife was involved in the case. The Petitioner found himself being tried by a Court that did not properly apply the laws of the State of Florida as it related to this issue. This County Court Judge while sitting as a Circuit Court Judge did not make the determination as to the nature of this pocketknife prior to permitting the case to go to the jury, as he should have. Rather, the Petitioner is the victim of an overzealous prosecutor who did not look at the knife in question properly, and accept that it was merely a common pocketknife. As such, fundamental fairness requires that the conviction of the Petitioner be reversed, and

that L.B. be applied retroactively to permit the Petitioner's release from state prison after serving seventeen (17) years for what is a third degree felony. Any other result serves to perpetrate an injustice upon the Petitioner by an inappropriate application of the law to his case, and this Court has repeatedly held that fundamental fairness to a Petitioner is a guiding light in a determination of retroactive application of case law. See e.g. Stephens, supra, Calloway, supra.

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 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.

R. JOHN COLE, II, P.A.

—
R. JOHN COLE, II, ESQ.

Florida Bar No. 191364

Attorney for Petitioner

46 N. Washington Blvd., Suite 24

Sarasota, FL 34236

(941) 365-4055

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Reply Brief has been sent by U.S. Mail to Ronald Napolitano, Esq., Assistant Attorneys General, Office of the Attorney General, 2002 N. Lois Ave., Suite 700, Tampa, FL, 33607-2367, on this the ____ day of January, 2002.

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, ESQ.

