

# 'Making' or 'discovering' law makes big difference

By this time, I am sure you are tired of reading about all the "landmark" U.S. Supreme Court opinions that came down like an avalanche last month.

So today I would like to talk about perhaps the most obscure criminal decision handed down by the Supremes last term. Yet I believe its significance is in inverse proportion to its renown.

The case is *Bunkley v. Florida*, 123 S.Ct. 2020 (2003). It was decided per curiam, without any briefing or oral argument, on May 27.

In 1986, Clyde Bunkley bungled the burglary of a restaurant. When he was arrested shortly afterward, the police discovered a pocketknife with a blade of no more than 3 inches folded in his pocket. The maximum sentence for ordinary burglary was five years imprisonment. But because the pocketknife was deemed a "dangerous weapon," Bunkley was charged and convicted of burglary in the first degree and given life imprisonment. His conviction and sentence were affirmed in 1989.

Is a pocketknife with a 3-inch blade a "weapon" under Florida law? Since 1901, a Florida statute had exempted the "common pocketknife" from its definition of a "weapon." However, the Florida Supreme Court had never interpreted the phrase "common pocketknife" until 1997. At the time it held that a pocketknife with a blade of 3 3/4 inches was a "common pocketknife" and thus not a "weapon" under Florida law. *L.B. v. State*, 700 So.2d 370 (Fla. 1997). In reaching this decision, it cited a 1951 opinion from the Florida attorney general that said a pocketknife with a blade of 4 inches or less was a "common pocketknife" and thus not a "weapon" under Florida law.

Relying on *L.B.*, Bunkley filed for post-conviction relief. The Florida Supreme Court denied the petition. It held that under Florida law only "jurisprudential upheavals" were applied retroactively. It characterized its decision in *L.B.* as merely an "evolutionary refinement"; thus, Bunkley was not entitled to relief.

Bunkley then filed a petition for a writ of certiorari in the U.S. Supreme Court. The court granted the writ, vacated the judgment and remanded the



## Criminal Procedure

By Timothy P. O'Neill

O'Neill is a professor of law at The John Marshall Law School in Chicago. He served from 1989 to 1999 as reporter to the Illinois Supreme Court Committee on Pattern Jury Instructions in Criminal Cases.

case to the Florida Supreme Court.

In doing so, the Supreme Court relied on its recent decision in *Fiore v. White*, 531 U.S. 225 (2001) (per curiam). Fiore was convicted under a Pennsylvania criminal statute. After his conviction became final, the Pennsylvania Supreme Court decided a case that included an interpretation of the statute; under this interpretation, Fiore could not have been convicted.

After being denied relief in Pennsylvania state courts, Fiore convinced the U.S. Supreme Court to grant certiorari to decide whether the U.S. Constitution ever compels a state to apply a new interpretation of a state criminal statute retroactively to cases on collateral review. Yet before deciding the case, the court certified a question to the Pennsylvania Supreme Court asking whether the court's interpretation of the statute stated the correct interpretation of Pennsylvania law at the time Fiore was convicted. The Pennsylvania Supreme Court responded that it had merely clarified the plain language of the statute.

Armed with this answer, the U.S. Supreme Court held that the case did not require any retroactivity analysis; retroactivity is an issue only when there has been a change in the law. Here, the Pennsylvania Supreme Court had not changed the law, but had merely announced what the statute plainly said. Therefore, Fiore's conviction was reversed simply because the due process clause forbids the conviction of anyone when the state has failed to prove every element beyond a

reasonable doubt.

The majority in *Bunkley* begins its analysis by simply stating, "*Fiore* controls the result here." The court said it was not enough for the Florida Supreme Court to say that its 1997 decision in *L.B.* was an "evolutionary refinement." Rather, the court remanded the case for the Florida Supreme Court to answer "whether the law in 1989 defined Bunkley's ... pocketknife as a 'weapon.'"

The court said, "The proper question under *Fiore* is not just *whether* the law changed. Rather, it is *when* the law changed." (Emphasis in original.) It remanded for the Florida Supreme Court to decide just what the law was when Bunkley's case was reviewed in 1989.

Criminal lawyers should pay careful attention to *Bunkley*. When appellate courts "gloss" statutes, practitioners must ask whether this gloss affects convictions that have become final. If the interpretation would mean that a previously convicted defendant should never have been convicted, the defendant can challenge his conviction not under "retroactivity," but under a simple due process rationale under *Bunkley* and *Fiore*. The key will be whether the judicial gloss creates new law or whether it merely is the discovery of what the law has always been.

Interestingly, this issue relates to one of the most profound debates in the history of legal philosophy. It concerns the very nature of law and judging. For Blackstone in the 18th century, the judge's role was merely to discover what the law was. Albert Alschuler has written that "Blackstone's theory [was] that the law, given by God Himself, was immutable and eternal and judges had only to discover its contents." Albert W. Alschuler, "Rediscovering Blackstone," 145 U. Penn. L.Rev. 1, 17 (1996). This is known as the "declaratory" theory of jurisprudence: judges do not make law, but merely discover and declare what law already is.

This theory was attacked by legal positivists such as John Austin and H.L.A. Hart. They saw courts playing a more active role. Hart wrote that courts must face situations where the issues

exist "at the margin of rules"; in those situations courts indeed must "make" law, and not simply "discover" it. H.L.A. Hart, "The Concept of Law," p. 132 (1962).

*Bunkley* will force a state court to decide whether a particular decision is "declaring" law in the Blackstone sense or "making" law in the Austin-Hart sense. If it chooses the former, it is announcing that criminal convictions that were thought to be "final" are not final after all. Because *Bunkley* poses a threat to the finality of criminal convictions, it is not surprising that Chief Justice William H. Rehnquist and Justices Anthony M. Kennedy and Clarence Thomas all dissented.

But what is equally interesting is who did not join them: Justice Antonin Scalia. In collateral review cases, Scalia is normally "Mr. Finality." Yet there was another issue that may have influenced his decision here: there has often been a "Blackstone streak" running through Scalia's opinions.

"I am not so naive," Scalia has written, "as to be unaware that judges in a real sense 'make' law. But they make it as judges make it, which is to say as though they were 'finding' it ... discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

He has also said, "To hold a governmental act to be unconstitutional is not to announce that we forbid it, but that the Constitution forbids it... [Either the statute] was unconstitutional, or it was not; if it was, then so is enforcement of all identical statutes in other states whether occurring before or after our decision." *American Trucking Association v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring).

No wonder he joined the *Bunkley* majority in demanding that the Florida Supreme Court explain exactly what its position is on the "common pocketknife" exception.

*Bunkley* may result in more courts announcing that they are "discovering" rather than "making" law. And the consequence may be more convictions reversed on collateral review. And for this defense attorneys should thank William Blackstone and Antonin Scalia.