

IN THE SUPREME COURT OF FLORIDA

MAURICE L. FLOYD, )  
)  
)  
Appellant, )  
)  
vs. )  
)  
STATE OF FLORIDA, )  
)  
Appellee. )  
\_\_\_\_\_)

CASE NUMBER SC95-824

APPEAL FROM THE CIRCUIT COURT  
IN AND FOR PUTNAM COUNTY, FLORIDA

**AMENDED SUPPLEMENTAL BRIEF OF APPELLANT**

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PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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CASE NO. SC95-824

**PRELIMINARY STATEMENT**

In accordance with this court’s order issued April 10, 2002, appellant submits the following supplemental brief, addressing the issue of the impact and applicability of Delgado v. State, 776 So.2d 233 (Fla. 2000), and chapter 2001-58, Laws of Florida, on the instant case. Appellant clearly raised the issue and argued the applicability of Delgado v. State, 776 So. 2d 233 (Fla. 2000), in Point I of his initial brief. As such, Appellant will focus here on the impact, if any, of chapter 2001-58, Laws of Florida. Although Florida Rule of Appellate Procedure 9.210 requires a summary of the argument only in initial and answer briefs, at the request of this Court, Appellant has included a summary of the argument in this amended supplemental brief.

## **SUMMARY OF THE ARGUMENT**

Appellant's offense occurred in 1998 and his conviction and sentence were rendered in 1999. Appellant clearly raised a Delgado issue in his initial brief after the issuance of the Delgado opinion. This Court held that Delgado would not apply to convictions that had already become final. Since appellant's conviction has yet to become final, Delgado applies to his case. Appellant's case does not even fall within the purported effective date of Chapter 2001-58. If necessary, this Court should rule that Chapter 2001-58 violates the constitutional prohibitions against *ex post facto* laws to the extent it purports to apply retroactively to February 1, 2000. Even so, the amended statute would have no effect on Delgado's applicability to appellant's case.

## ARGUMENT

APPELLANT’S CONVICTION OCCURRED IN 1999 BUT IS NOT FINAL, THUS HE BENEFITS FROM THIS COURT’S HOLDING IN DELGADO. EVEN SO, TO THE EXTENT IT PURPORTS TO APPLY RETROACTIVELY, 2001-58 VIOLATES CONSTITUTIONAL PROHIBITIONS AGAINST *EX POST FACTO* LAWS.<sup>1</sup>

Chapter 2001-58, Laws of Florida, provides in pertinent part as follows:

810.015. Legislative findings and intent; burglary

(1) The Legislature finds that the case of *Delgado v. State*, Slip Opinion No. SC88638 (Fla. 2000) was decided contrary to legislative intent and the case law of this state relating to burglary prior to *Delgado v. State*. The Legislature finds that in order for a burglary to occur, it is not necessary for the licensed or invited person to remain in the dwelling, structure, or conveyance surreptitiously.

(2) It is the intent of the Legislature that the holding in *Delgado v. State*, Slip Opinion No. SC88638 be nullified. It is further the intent of the Legislature that s. 810.02(1)(a) be construed in conformity with *Raleigh v. State*, 705 So. 2d 1324 (Fla. 1997); *Jimenez v. State*, 703 So. 2d 437 (Fla. 1997); *Robertson v. State*, 699 So. 2d 1343 (Fla. 1997); *Routly v. State*, 440 So. 2d 1257 (Fla. 1983); and *Ray v. State*, 522 So. 2d 963 (Fla. 3rd DCA, 1988). This subsection shall operate retroactively to February 1, 2000.

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<sup>1</sup> *Delgado v. State*, 776 So.2d 233 (Fla. 2000).

Chapter 2001-58 also amends the definition of burglary for offenses committed after July 1, 2001. (For offenses committed before July 1, 2001, the law purports to reaffirm the existing definition, presumably as interpreted by section 810.015 above.) Initially, appellant points out that his offense occurred in 1998 while his conviction and sentence were rendered in 1999. Appellant nevertheless appealed and argued the applicability of Delgado to his case. See Initial Brief Point I. As such, the legislature's attempt to nullify this Court's holding in Delgado has no effect on appellant's case as evidenced by the very language of the statutory amendment. Appellant's conviction is not final, thus he clearly benefits from this Court's holding in Delgado.<sup>2</sup> Nevertheless, appellant will address the *ex post facto* aspect of the legislature's action.

Unconstitutional *ex post facto* law

The underlined portion of the new statute is a classic example of an *ex post facto* law, and as such violates Article I, section 10 of the United States Constitution, and Article I, section 10 of the Florida Constitution.

Article I, section 10 of the United States Constitution provides, in pertinent

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<sup>2</sup> In Jimenez v. State, 810 So.2d 511 (Fla. 2001), this Court refused to apply Delgado retroactively in post-conviction, where Jimenez's convictions were final prior to the release of the Delgado opinion. This Court's additional comment that the legislature declared that Delgado was decided contrary to legislative intent was unnecessary to its holding and was thus pure *obiter dictum*.



part: “No State shall . . . pass any . . . *ex post facto law* . . . .” Article I, section 10 of the Florida Constitution provides, in pertinent part: “**Prohibited laws.**--No . . . *ex post facto law* . . . shall be passed.”

The *ex post facto* clause is “aimed at laws that retroactively alter the definition of crimes or increase the punishment for criminal acts.” See California DOC v. Morales, 514 U.S. 499 (1995). Further, a “legislature cannot stiffen the standard of punishment applicable to crimes that have already been committed.” Id. The purpose of the *ex post facto* clause is to ensure that fair warning is given of the effect of legislative enactments, so that individuals may rely on their meaning until explicitly changed. See Miller v. Florida, 482 U.S. 423, 430 (1987) (holding application of sentencing statute to crimes committed before statute’s effective date violated *ex post facto* clause).

“[T]o fall within the *ex post facto* prohibition, two critical elements must be present: first, the law ‘must be retrospective, that is, it must apply to events occurring before its enactment’; and second, ‘it must disadvantage the offender affected by it.’” Id. See also Weaver v. Graham, 450 U.S. 24 (1981)(statute reducing amount of gain-time held *ex post facto* violation when applied to person whose crime was committed before enactment of statute). “A law is retrospective if it ‘changes the legal consequences of acts completed before its effective date.’” Id.

The Court has held that no *ex post facto* violation occurs if the “change does not alter substantial personal rights, but merely changes modes of procedure which do not affect matters of substance”; that is, “if the change in the law is merely procedural, and does not ‘increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt,’” Miller, 482 U.S. at 430, 433.

Chapter 2001-58 meets both prongs of the test for an *ex post facto* law. It purports to apply retrospectively, that is, to events that occurred before its enactment, and there can be no doubt it disadvantages the offender affected by it. Further, it does alter substantial personal rights, and does not merely change a mode of procedure; it plainly operates to “change the ingredients of the offense or the ultimate facts necessary to establish guilt.” Id.

After the conviction and sentence for burglary in the present case, the applicable law was subsequently articulated by this Court in Delgado v. State, 776 So. 2d 233 (Fla. 2000)<sup>3</sup>. That case provided that in interpreting Florida’s burglary statute, the “remaining in” language applies only in situations where the remaining

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<sup>3</sup>This Court in Delgado specifically stated that its ruling would not apply retroactively to convictions that had become final; however, appellant’s conviction has not yet become final, thus Delgado is applicable to the present case. Appellant’s case is still in the “pipeline.”

was done surreptitiously. As argued in the initial brief in this case, that was not the situation in this case, and the “remaining in” theory should not have been submitted to the jury as one of the possible bases for conviction.

The new law, which purports to overrule Delgado as to the substantive definition of the crime of burglary, was approved on May 25, 2001, after appellant’s conviction and sentence, and even after all the briefs had been filed in this case. Its application in this case would be retrospective, i.e., it would change the legal consequences of acts completed before its effective date, and it would disadvantage the offender by subjecting him to punishment for what would be, in effect, a different crime; a crime defined differently than the one that existed when appellant was tried and convicted; a crime that could be proved on a factual basis that the law in effect at the time expressly did not permit.

“Legislatures may not retroactively alter the definition of crimes . . . .” Collins v Youngblood, 497 U.S. 37, 43. That is exactly what the legislature has attempted to do with Chapter 2001-58. To the extent Chapter 2001-58 purports to apply retroactively to February 1, 2000, it constitutes an *ex post facto* violation.

Several recent Florida district court cases provide further authority in support of appellant’s argument. In Miranda v. State, 793 So. 2d 1042 (Fla. 3d

DCA 2001), the trial court declined to sentence the defendant, who had been convicted of burglary of an unoccupied dwelling, as a prison releasee reoffender (“PRR”), based on the Florida Supreme Court’s recent ruling that the PRR statute did not apply to that offense. See State v. Huggins, 802 So. 2d 276 (Fla. 2001).

The State sought to have the statute applied based on a recent amendment to Section 775.082(9)(a)(1), effective July 1, 2001, which the State characterized as merely a clarification of existing law. Basically, the amendment provided that burglary of an unoccupied dwelling was covered by the PRR law.

The Third DCA rejected that characterization, because “[o]n the date the crime was committed, it was simply not clear from the statute, as it was in effect at the time, that the burglary of an unoccupied dwelling would subject the defendant to sentencing under the PRRPA,” and “such statutory changes should not be applied retroactively to increase a defendant's sentence.” The court further stated that “[i]t is firmly established law that the statutes in effect at the time of commission of a crime control as to the offenses for which the perpetrator can be convicted, as well as the punishments which may be imposed.” [citations omitted]

The DCA also concluded that if the amended statute were given retroactive effect, it would result in additional punishment for appellant, running afoul of the *ex post facto* clauses of the state and federal constitutions. The DCA cited Weaver

v. Graham and Miller v. Florida in its analysis. The Fourth DCA followed the Third DCA's Miranda decision in State v. Eldredge, 801 So. 2d 965 (Fla. 4<sup>th</sup> DCA). See also Rock v. State, 800 So.2d 298 (Fla. 3<sup>rd</sup> DCA 2001).

Article I, Section 9, of the Florida Constitution, provides additional support for appellant's position. That section provides:

Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

Appellant asserts that this provision precludes the Florida legislature from enacting any criminal legislation with retrospective application. In a broad sense, application of Chapter 2001-58 to appellant's case would unconstitutionally affect his prosecution and punishment.

## CONCLUSION

Appellant's offense occurred in 1998 and his conviction and sentence were rendered in 1999. Appellant clearly raised a Delgado issue in his initial brief after the issuance of the Delgado opinion. This Court held that Delgado would not apply to convictions that had already become final. Since appellant's conviction has yet to become final, Delgado applies to his case. Appellant's case does not even fall within the purported effective date of Chapter 2001-58. If necessary, this Court should rule that Chapter 2001-58 violates the constitutional prohibitions against *ex post facto* laws to the extent it purports to apply retroactively to February 1, 2000. Even so, the amended statute would have no effect on Delgado's applicability to appellant's case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Maurice L. Floyd, #V01514, Union Correctional Institution, 7819 N.W. 228<sup>th</sup> St., Raiford, FL 32026-4210, this 2nd day of May, 2002.

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CHRISTOPHER S. QUARLES  
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**CERTIFICATE OF FONT**

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

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