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burden to prove each element of the offense beyond and to the exclusion of every reasonable doubt. Although the jury decided this issue adversely to the appellant below, they based their decision on erroneous jury instructions that included the “remaining in” language. In fact, appellant’s indictment charged felony-murder by specifying that Floyd “did then and there unlawfully enter **or remain** in a certain dwelling...without the consent of Mary Goss... while harboring the intent to commit the offense of murder...”. (I 11) Emphasis added. Where the jury’s verdict on this issue was based on a misleading indictment and erroneous jury instructions, their finding cannot stand.

Appellee concedes that Delgado applies to appellant’s case in terms of timing. “Thus, if Delgado was not nullified by Chapter 2001-58, or receded from in Jimenez,<sup>2</sup> it appears to apply to Floyd’s case.” (State’s Supplemental Answer Brief, p.4) However, in addition to arguing that Delgado does not apply based on the facts of appellant’s case, the state also contends that Delgado is a nullity where this Court apparently misconstrued the subsequently revealed legislative intent. As previously pointed out in the Amended Supplemental Initial Brief, appellant’s offense occurred in 1998 while his conviction and sentence were rendered in 1999. As such, the legislature’s attempt to nullify this Court’s holding in Delgado has no

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<sup>2</sup> Jimenez v. State, 810 So.2d 511 (Fla. 2001).

effect on appellant's case as evidenced by the very language of the statutory amendment, i.e., "This subsection shall operate retroactivity to February 1, 2000." Chapter 2001-58, Laws of Florida.

Nevertheless, this Court has faced similar situations where the legislature has attempted to override decisions of Florida courts by adding a specific statement of legislative intent. See, e.g. State v. Smith, 537 So.2d 613 (Fla. 1989)[relating to double jeopardy and this Court's opinion in Carawan v. State, 515 So.2d 161 (Fla. 1987)]. Nevertheless, a subsequent expression of legislative intent could not be retroactively applied. State v. Smith, 547 So.2d 613 (Fla. 1989)

Perhaps Judge Zehmer said it best in Felts v. State, 537 So.2d 1002, 1003 (Fla.1st DCA 1988) (Zehmer J. (concurring and dissenting)):

Without unduly belaboring our points of difference, it is my view that the 1987 legislative amendment to the sentencing guidelines cannot be construed as a declaration of original legislative intent that simply clarifies rather than changes its prior statutory language. The supreme court decisions rendered prior to enactment of this amendment have given the original statutory language a different construction which has been applied in thousands of cases, some still pending but many now closed. Unless we intend to abandon all stability in determining the meaning and effect of statutory law, see > Hall v. State, 511 So.2d 1038 (Fla. 1st DCA 1987), rev. pending, No. 71,078 (Fla.), at least the supreme court's construction of a statute must be treated as the final

declaration of what the statute means. Once the highest court of this state has said what the statute means, that must be the law until it is changed, not retroactively clarified, by the legislature, or until the supreme court is subsequently confronted with substantial grounds not originally considered that require it to confess error and overrule or recede from its prior opinion.

## 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.

Respectfully submitted,

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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CHRISTOPHER S. QUARLES  
ASSISTANT PUBLIC DEFENDER  
FLORIDA BAR NO. 0294632  
112 Orange Avenue, Suite A  
Daytona Beach, FL 32114  
(904) 252-3367

ATTORNEY FOR APPELLANT



**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 Mr. Maurice Lamar Floyd, #V01514, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 22<sup>nd</sup> day of May, 2002.

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CHRISTOPHER S. QUARLES  
ASSISTANT PUBLIC DEFENDER

**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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CHRISTOPHER S. QUARLES  
ASSISTANT PUBLIC DEFENDER