IN THE SUPREME COURT OF FLORIDA

CARLTON FRANCIS,

Appellant,

v. CASE NO. 94,385

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA
(CRIMINAL DIVISION)

SUPPLEMENTAL BRIEF OF APPELLEE

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Counsel certifies that this brief was typed using Courier New 12 or larger.

SUMMARY OF THE ARGUMENT

1. Francis' belated claim that the State failed to prove non-consensual entry, and therefore burglary, fails because consent to enter is an affirmative defense that must be raised by the defendant. Francis raised no such defense at trial; his defense was that he did not enter the victims' home at all, or commit any of the crimes that occurred there. In these circumstances, the State had no burden to prove nonconsensual entry.

2. With or without burglary, the evidence is sufficient to support Francis' convictions for first degree murder, under a theory of premeditated murder or felony murder with robbery as the underlying felony.

3. Because four valid aggravating circumstances exist in this case with or without burglary, Francis' death sentence is valid.

4. This Court should reconsider its recent decision in Delgado v. State. The State must strenuously object to settled law being overturned without consideration by the full Court and without the State having been given the opportunity to brief and argue the issue. Furthermore, it is appropriate for "burglary" to apply where the defendant has committed a crime in another's residence after consent to remain has been withdrawn and the State objects to the burglary statute being judicially rewritten to create an irrefutable presumption of consent to remain on another's premises unless defendant remains "surreptitiously."

ARGUMENT

POINT I

THE STATE BORE NO BURDEN TO DISPROVE CONSENSUAL ENTRY BY FRANCIS INTO THE VICTIMS' HOME BECAUSE CONSENT TO ENTER IS AN AFFIRMATIVE DEFENSE WHICH WAS NOT RAISED BY THE DEFENDANT AT TRIAL

Relying on the lack of evidence of forced entry, Francis argues for the first time in his reply brief that he may have been invited into the victims' home and therefore he cannot be convicted of burglary under this Court's recent decision in Delgadov. State, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000).

The State would note, first, that under Fla. R. App P. 9.210(d) reply briefs are for responding to and rebutting arguments presented in the answer brief. In civil cases particularly, appellate courts have routinely refused to consider issues raised for the first time in a reply brief, even if properly preserved for appeal. See, e.g., General Mortg. Ass. V. Campolo Realty & Mortg. Corp., 678 So.2d 431 (Fla. 1st DCA 1996); Snyder v. Volkswagon of America, 574 So.2d 1161 (Fla. 4th DCA 1991). Courts have also declined to address arguments made for the first time in reply briefs in criminal cases. See Wood v. State, 717 So.2d 617 (Fla. 1st DCA 1998)(refusing to address constitutional argument made for the first time in defendant's reply brief). But see Saldana v. State, 634 So.2d 201 (Fla. 3d DCA 1994)(addressing, and finding meritless, argument "belatedly" urged by the defendant in his reply

brief). The State would argue here that any issue of consensual entry into the victims' home is procedurally barred for Francis' failure to raise it in his initial brief.

Should this Court disagree, the issue is still barred for failure to preserve it for appeal. Francis never admitted at trial that he entered the victims' home the day of the murder, by invitation or otherwise, and while he did argue that the evidence was insufficient to support his conviction for burglary (because it allegedly failed to establish that he entered the victims' home), he never raised the affirmative defense of consensual entry.

"This Court has construed the consent clause of the burglary statute (beginning with "unless") to be an affirmative defense." Miller v. State, 24 Fla. L. Weekly S155 (Fla. July 16, 1998). "Thus, the *burden is on the defendant to establish there was consent*." Ibid. (Emphasis supplied.) Accord, Delgado at S80. Under this Court's precedents, including the very case on which Francis here relies, *Francis*, not the State, bore the burden to raise the defense *and* to "establish" that he "was an invitee." Delgado. He failed to do so.

The defense theory of innocence at trial was *not* that Francis had been invited into the victims' home, but, rather, that *he had not been there at all and had neither murdered the victims nor taken anything from them*. This theory was expressed not only by defense counsel in making the motion for judgement of acquittal,

but also in closing argument.[1] At no time, did defense counsel (or Francis himself) argue or contend an affirmative defense of invitation to enter.[2]

Furthermore, while a theory of defense may be established from the state's evidence or concession, see e.g., Miller, supra, and Coleman v. State, 592 So.2d 300, 302 (Fla. 2d DCA 1991), not only was invitation *not* a proffered theory of defense at trial, but there was no evidence offered by either party at trial which would establish invitation. While the lack of evidence of a forced entry may be consistent with invited entry, it is also consistent with various scenarios of nonconsensual entry, including, but not limited to (a) the defendant entered without any invitation via an unlocked front door or (b) the defendant used a key which the victims normally left outside to unlock the front door, or (c) the defendant simply pushed his way into the house after the victims

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[1] By way of specific example, the State would note that in his closing argument, defense counsel, after reading the language of the indictment charging burglary, contended: "There is no evidence that he [Francis] entered that house that day, period. There is nothing to suggest that. There is no evidence that he went in there, and went in there with the intent to commit a theft" (20R 1872).

[2] This Court has held that an affirmative defense "assumes the charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question.... In effect, an affirmative defense says, 'Yes, I did it, but I had a good reason.'" State v. Cohen, 568 So.2d 49, 51-52 (Fla. 1990). Francis certainly never did that; nor did he admit entering the victims' home but claim that he was invited to do so. Nor did he even claim that he did NOT enter the victims' home, but that whoever did was invited in.

opened the door in response to the defendant having rung the doorbell.

Francis is belatedly relying on evidence essentially neutral on the question of invitation to argue for the first time in his reply brief on appeal that the State failed to disprove an affirmative defense he never even tried to raise or prove at trial. Put another way, he now bases his sufficiency-of-the-evidence argument on the very same lack of evidence on the subject of consent which is the result of *his failure to assert or prove his affirmative defense*. But he simply cannot prevail on a claim that the State failed to rebut an affirmative defense he never raised; under settled law, the State had no obligation to disprove a non-existent affirmative defense. See, e.g., Strachn v. State, 661 So.2d 1255, 1256 (Fla. 3d DCA 1995) ("It is true, as urged, that there was no evidence adduced at trial that the defendant did not have Howard Johnson's consent to be on the premises or to enter the subject motel room; this is of no significance, however, as it is settled that the complainant's non-consent to the charged entry is not an essential element of the offense of burglary. To the contrary, consent to the subject entry is an affirmative defense to burglary, and no evidence was ever adduced below that the defendant had Howard Johnson's consent to be on the motel premises or to enter the motel room in question."); Linehan v. State, 476 So.2d 1262, 1264 (Fla. 1985) (where defendant fails to come forward with

evidence of voluntary intoxication sufficient to show he is unable to form the necessary intent, no instruction on affirmative defense of voluntary intoxication is required); Williams v. State, 468 So.2d 447, 449 (Fla 1st DCA 1985) (in passing on judgment of acquittal, court must first determine whether defendant produced competent evidence of affirmative defense).

Because Francis never raised the affirmative defense of invited entry or offered any evidence establishing such, the State had no burden to prove non-invited entry beyond a reasonable doubt.[3]

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[3] Because Francis failed to raise or prove this defense prima facie, he loses on this issue even if, had he done so, the burden of proof would have shifted to the state to disprove the defense beyond a reasonable doubt. Where the ultimate burden of proof lies as to an affirmative defense properly raised and proved prima facie is a matter of some appellate inconsistency. ***Compare*** Delgado (burden is on the defendant in burglary case to establish consent); Miller (same); Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990)("we see no reason not to treat entrapment like any other affirmative defense in Florida by placing the burden of proving that defense on the defendant"); Molina v. State, 561 So.2d 425 (Fla. 3d DCA 1990)(defendant in criminal case has burden of proving affirmative defense); and Toro v. State, 712 So.2d 423 (4th DCA 1998)(state not required to disprove beyond a reasonable doubt exceptions to bigamy statute which were affirmative defenses to crime of bigamy) ***with*** Wright v. State, 442 So.2d 1058 (Fla. 1st DCA 1983)("Simply because the exception is an affirmative defense, however, does not mean that the ultimate burden of proof of the exception shifts to the defendant."); Coleman v. State, supra (in burglary case, defendant has initial burden of establishing existence of affirmative defense of consent, but thereafter the burden shifts to the state to disprove the defense beyond a reasonable doubt); and Hansman v. State, 679 So.2d 1216 (Fla. 4th DCA 1996)(in burglary case, defendant has initial burden of establishing defense of consent, but then burden shifts to state to disprove the defense beyond a reasonable doubt).

POINT II

EVEN IF THE EVIDENCE IS INSUFFICIENT TO SUPPORT BURGLARY, ANY ERROR IN INSTRUCTING THE JURY ON FELONY MURDER/BURGLARY IS HARMLESS.

While Francis does not contend that his murder conviction was impacted by any alleged error in instructing the jury as to felony murder in the commission of a burglary, the State would note that even if the evidence is insufficient to support a burglary finding, the jury was also instructed on premeditated murder (5R 688) and felony murder/robbery (5R 689). Because the evidence is sufficient to support Francis' first-degree murder conviction under either of these two theories, any error in instructing the jury as to felony murder/burglary is harmless as a matter of law. Delgado at 24 Fla. L. Weekly S82; Jones v. State, 24 Fla. L. Weekly S535, S538 (Fla. Nov. 12, 1999); Mungin v. State, 689 So.2d 1026 (Fla. 1995); Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991).

POINT III

FRANCIS' DEATH SENTENCE WAS NOT IMPACTED BY ANY ALLEGED INSUFFICIENCY OF THE EVIDENCE TO SHOW BURGLARY

Nor is there any merit to Francis' contention that any alleged insufficiency of the evidence to establish burglary is significant to the jury's sentencing recommendation. Francis argues it would be significant because "the contemporaneous felonies were found to

be an aggravator in this case, and the jury was instructed that armed burglary constituted a contemporaneous violent felony." Reply Brief at 2.

As a matter of clarification, the trial judge did not instruct the jury as to the aggravator of murder committed during the course of an enumerated felony, even though in the court's view that aggravator was supported by the evidence, but instructed the jury only as to the financial gain aggravator only "so we don't run the risk that [the robbery and burglary are] being considered twice" (22R 2152).

The jury *was* instructed on the aggravator of prior conviction of a capital or violent felony, and the jury was told that murder is a capital felony and that robbery and burglary with an assault or battery are violent felonies (23R 2292-93). At the time of the sentencing, of course, Francis had been convicted not only of burglary, but also of the murder and robbery of two different victims. Thus, the prior violent felony aggravator was indisputably established with or without the burglary, and by convictions for offenses that are more serious than burglary. Moreover, the evidence established the existence of three additional aggravating circumstances charged to the jury, i.e., murder for pecuniary gain, murders were HAC, and the victims were particularly vulnerable due to advanced age. Therefore, with or without burglary, there were four valid aggravators presented to

the jury. In addition, as noted previously, the trial court found four statutory aggravating factors, *none* of which depend *at all* upon burglary: prior *capital* felony conviction (the *murders*), HAC, murder committed during robbery and victims were particularly vulnerable due to advanced age (8R 1316-18).

In Delgado itself, this Court found the death sentence imposed for the murder of Ms. Rodriquez valid even after striking the aggravator that the murder was committed during the course of a burglary, because two aggravators remained: prior violent felony and HAC. Id at S85. In this case, no aggravators fail even if burglary is removed from consideration, and four valid aggravators remain in support of the death sentence. Thus, the death sentences imposed upon Carlton Francis are proportionally warranted even if the Court disagrees with the State's arguments above concerning the sufficiency of the evidence to support burglary.

POINT IV

THIS COURT SHOULD RECONSIDER ITS DELGADO DECISION, AND RETURN TO SETTLED PRE-DELGADO LAW CONCERNING BURGLARY

In Delgado, this Court overruled settled precedent and held for the first time that an invitee whose presence on the premises is known to the host has a "complete defense to the charge of burglary." Id. at S80. This Court limited the applicability of the phrase "remaining in" found in Florida's burglary statute to

those "situations where [after invited entry] the remaining in was done surreptitiously." Id. at S82.

The State has filed a motion for rehearing in Delgado. Because this decision is not final, and because the full Court has not yet considered this issue, the State would take this opportunity to urge this Court to withdraw its decision in Delgado and reinstate settled pre-Delgado law concerning burglary. The State would incorporate by reference all pertinent arguments made by the State in its motion for rehearing. For convenience of opposing counsel, a copy of the State's motion for rehearing in Delgado is attached to this brief as Exhibit "A." In addition, the State would make a few additional points here.

First, the State would note that the issue addressed in Delgado was neither raised in the trial court nor raised or briefed on appeal, and was considered by only five members of this Court and decided by a bare majority. The State would respectfully submit that is it inappropriate for this Court to overturn well settled law under such circumstances, especially when the issue is one having potentially grave impact not only on cases yet to be tried, but also those already tried under seemingly well-settled precedent.

Second, while the State recognizes that even the best-conceived and articulated legislation may on occasion need judicial clarification and interpretation, the State would respectfully

submit that this Court went beyond clarification and interpretation in Delgado, and has in fact simply rewritten the statute to reach a result not contemplated by the legislature and not required by the Constitution. The burglary statute proscribes either entering or remaining in a dwelling with the intent to commit a crime. Consent to both entering and remaining is an affirmative defense under the statute, which, if raised by the defendant, may be rebutted by the State. This Court's Delgado decision in effect gives conclusive effect to a consent to enter and deprives the State of any opportunity to prove that there was no consent to "remain in" for the purpose of committing a crime, notwithstanding the seemingly plain language of the statute to the contrary. Under Delgado, only a surreptitious "remaining in" can constitute a burglary; if the owner of the premises knows of the presence of the defendant, the defendant cannot commit a burglary no matter how vociferously the owner protests the defendant's remaining on the premises. Put another way, under Delgado, the owner's initial consent to enter can never be withdrawn, no matter how quickly she realizes her mistake and withdraws such consent and no matter how strongly the evidence establishes such withdrawal of consent. For reasons argued in the attached Delgado motion for rehearing, the State would contend that this result was never intended by the legislature.

Third, it may well be that Florida's burglary statute, as interpreted prior to Delgado, is broader than that proposed in the Model Penal Code. The State would respectfully suggest, however, that Florida's legislature is not bound by the recommendations (and they are no more than that) of the Model Penal Code, but only by the Constitutions of the United States and the State of Florida. A legislature may wish to consult the Model Penal Code when it is considering criminal legislation, but surely it is not bound by the Model Code's recommendations and may enact criminal laws either broader or more restrictive in scope than contemplated in the Model Code.

Fourth, among the parade of horribles this Court advances as justification for rewriting the burglary statute is the possibility that a lesser crime will be converted to burglary just because it is committed in a dwelling belonging to another. The State respectfully would suggest that it is not inappropriate to increase the severity of a crime depending on where it is committed. After all, burglary statutes traditionally have done just that by increasing penalties for crimes committed in another's house. Furthermore, even if "burglary" as it has been defined may on occasion lead to "absurd" results, as this Court suggests, Delgado at S82, the remedy fashioned by this Court, the State would respectfully submit, goes way beyond what is necessary to exclude merely those "absurd" results. If Delgado stands, it will exclude

perfectly appropriate findings of burglary in many cases, including, for example, cases in which a defendant goes to his victims' home intending to commit a violent crime therein, and then, upon entry, commits the intended violent crime, under "circumstances especially likely to terrorize occupants," Delgado at S81 (quoting the commentary to the Model Penal Code describing the kind of cases which should be burglary). Delgado itself, the State would contend, is precisely such a case, and so is the instant case. The evidence in this case amply demonstrates that Carlton Francis went to the victims' home intending to rob and murder them, and that, after entering their home, he did rob and murder them in a manner "especially likely to terrorize" them. The State would suggest that this is exactly the kind of conduct which "the Legislature intended to criminalize ... as burglary," Delgado at S82, and this is so whether or not the poor victims, totally unaware of Francis' evil intent, initially invited him into their home.

For all of these reasons, as well as those advanced by the State in its motion for rehearing in Delgado, the State would ask this Court to withdraw its opinion in Delgado and to reinstate previous, settled law on the subject.

CONCLUSION

Based upon the foregoing as well as all matters contained in the State's Answer Brief in this case, the State respectfully asks this Court to affirm Francis' conviction and sentences.

Respectfully submitted,

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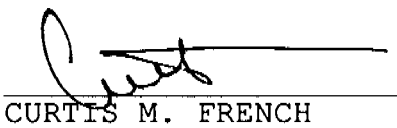
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Peter Grable, 804 N. Olive Avenue, 1st Floor, West Palm Beach, FL 33401, this 24th day of March, 2000.



CURTIS M. FRENCH
Assistant Attorney General

Appendix "A"

IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,638

JESUS DELGADO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.
_____/

MOTION FOR REHEARING

The State of Florida hereby moves the Court for rehearing and/or clarification on the grounds that the Court's opinion herein not only ***rewrites*** the Florida statute on burglary, but departs from the ***fundamental*** rules of statutory construction, ***recedes*** from decades of well established precedents, and eviscerates the common law doctrine of burglary and the "castle doctrine," all based upon a premise which was neither raised in the trial court nor briefed on appeal, and seeks oral argument before the current Court.[1] In support of said motion, the Appellee states:

1) The opinion was released on February 3, 2000. Delgado v. State, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000).[2] The opinion

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[1] Four members of the Court joined in the opinion. The fifth member of the Court, Justice Wells, dissented from this portion of the opinion. Justices Lewis and Quince are not mentioned as having joined any opinion. Likewise, former Justices Kogan and Overton, who participated in the oral argument of this cause, do not appear either.

[2] This Court granted both parties' joint motion for an extension of 15 days to file motions for rehearing.

states: "[T]he issue for this Court to consider is whether the phrase 'remaining in' found in Florida's burglary statute should be limited to situations where the suspect enters lawfully and subsequently secretes himself or herself from the host. Up until now, Florida courts have refused to make such a limiting interpretation." 25 Fla. L. Weekly at S81. The opinion expressly recognized that, in Ray v. State, 522 So. 2d 963, 965 (Fla. 3d DCA 1988), that court interpreted the plain language enacted by the legislature, "Burglary means entering or remaining in a structure or conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." The Delgado opinion noted that the court in Ray "developed the idea that ***consent can be withdrawn***: 'Otherwise stated, once consensual entry is complete, a consensual "remaining" begins, and any burglary conviction must be bottomed on proof that consent to "remaining in" has been withdrawn.'" 25 Fla. L. Weekly at S81 (emphasis added). The Delgado opinion also recognized that the Ray court "pointed out that ***the word surreptitiously does not appear in the statute and that a court should not inject words into statutes that were not placed there by the legislature.***" 25 Fla. L. Weekly at S82 (emphasis added).

Nonetheless, the Delgado opinion held that the "interpretation of Florida's burglary statute is to hold that the 'remaining in' language applies only in situations where the remaining in was done surreptitiously." 25 Fla. L. Weekly at S82. The four (4) member majority based this revision of Florida's statute upon the opinion of one trial level judge in the New York case of People v. Hutchinson, 477 N.Y.S. 2d 965, 968 (Sup. Ct. 1984), reasoning that: "Of course, the New York statute does not contain the word surreptitiously, yet the New York courts have concluded that the statute should be limited to such situations." Id. Indeed, the Delgado opinion adopted the New York case's statement that, "once a person is lawfully on the premises, ***'there must be something more to establish termination of license than . . . an order to leave after a criminal intention is manifested***". 25 Fla. L. Weekly at S81 (emphasis added). The Delgado opinion holds that this interpretation is "consistent with the original intention of the burglary statute. In the context of an occupied dwelling, burglary was not intended to cover the situation where an invited guest turns criminal or violent." 25 Fla. L. Weekly at S82. The opinion at issue then expressly recedes from Ray and the Florida Supreme Court's precedents expressly adopting Ray, such as Raleigh v. State,705 So. 2d 1324 (Fla. 1997); Jimenez v. State, 703 So. 2d 437 (Fla. 1997); and Robertson v. State, 699 So. 2d 1343 (Fla. 1997). 25 Fla. L. Weekly at S82.

The issue phrased by this Court and quoted above was never raised in either the trial court or on appeal before this Court. The Appellant never addressed the wording of Florida's statute; never requested that this Court insert the word "surreptitiously" in the statute; never once mentioned Ray or any of this Court's precedents receded from in Delgado; and never cited New York's or any other jurisdiction's law in support of the interpretation now adopted by the four (4) member opinion in Delgado.

In light of the absence of an adequate opportunity for briefing the issue addressed by the ***entire*** Court, the State respectfully requests that the instant motion be considered by the Court, and that it be granted an opportunity for supplemental briefing and oral argument. As seen below, the holding herein is contrary to the ***fundamental*** rules of statutory construction, well-established in Florida and in accordance with the United States Supreme Court precedent. Moreover, the New York case relied upon interprets a statute which contains ***different*** essential elements than those of the Florida statute. Most importantly, while this Court has ***limited*** Florida's legislative intent on the basis that the definition of ***common law*** burglary has been "expanded as a result of judicial interpretation and legislation," 25 Fla. L. Weekly at S80, it has entirely ignored the fact that the fact pattern of the instant case is a classic ***common law*** burglary. The

instant case, inter alia, involves the undisputed "breaking of inner doors" in an occupied home, at night time!

A) Failure To Consider Fundamental Rules of Statutory Construction

For in excess of forty (40) years in Florida, it has been well established "that a ***fundamental*** principle of statutory construction," is that "failure by the legislature to amend a statute which has been construed . . . in [a judicial decision] amounts to legislative acceptance or approval of the construction rendered in the earlier case." Johnson v. State, 91 So. 2d 185, 187 (Fla. 1956). "Moreover, . . . long [legislative] acquiescences in a particular [judicial] construction are entitled to great weight." Id., citing with approval, City of Panama v. Phelps, 101 U.S. 453 (1879), Toulson v. New York Yankees, Inc., 346 U.S. 356 (1953); see also, Collins Investment Co. V. Metropolitan Dade County, 164 So. 2d 806, 809 (Fla. 1964) ("When a statutory provision has received a definite judicial construction, a subsequent reenactment amounts to a legislative approval of the judicial construction."); Williams v. Jones, 326 So. 2d 425, 435 (Fla. 1975), appeal dismissed, 429 U.S. 803 (1976); Holmes County School Board v. Duffell, 651 So. 2d 1176, 1178 (Fla. 1995).

The Delgado opinion recognized that it is uncontroverted that the Ray Court, in 1988, expressly interpreted the words "remaining in" contained in Florida's burglary statute, and concluded that

"surreptitious" remaining was neither intended nor required by the legislature; and that the affirmative defense of consent to enter another's home was revocable, either by direct evidence - such as an express order to an invitee/licensee - or, by circumstantial evidence such as a struggle by the host against the invitee/licensee. The Ray holding was in accordance with this Court's 1983 holding in Routly v. State, 440 So. 2d 1257, 1262 (Fla. 1983), and subsequently followed not only by every district court of appeal in this state, but also expressly adopted and followed by this Court in Robertson, Raleigh, and Jimenez, supra.

In the course of the fifteen (15) years since this Court's decision in Routly, the Court's decision in Ray and the latter's express adoption by all of the courts in this State, the legislature has convened on a yearly basis and revised the burglary statute repeatedly, without ever having amended the words "remaining in," nor enacting any provision to cast doubt upon the judicial construction in Ray. The Court's opinion herein, however, seemingly and inexplicably receded from the aforesaid fundamental principles of statutory construction, without so much as mentioning, let alone explaining, such action.

B) Common Law Burglary and Evisceration of the Castle Doctrine

As noted previously, this Court, in reliance upon the New York case of People v. Hutchinson, held that, "In the context of an

occupied dwelling, burglary was not intended to cover the situation where an invited guest turns criminal or violent." 25 Fla. L. Weekly at S82. The Court placed much reliance upon "examining the origins of the crime of burglary," and noted with approval that at "common law, burglary was defined as breaking and entering the dwelling house of another at night with the intent to commit a felony therein." 25 Fla. L. Weekly at S80. In fact, the instant case presents a classic case of burglary under "common law," which the Court has entirely failed to address.

At common law, and indeed in Florida's pre-1975 burglary statute patterned after the common law requirements of "breaking and entering," "the ***breaking of an inner door or structure within an open building*** constitutes a breaking" for the purposes of burglary. Cartey v. State, 337 So. 2d 835, 837 (Fla. 2d DCA 1976). As noted by then Judge Grimes, citing Perkins on Criminal Law, ch. 3, sec. 1 (1957), "[t]he breaking is not limited to an outside door or window. If the outside door is open but the felonious design requires entrance into a part of the building which is closed, the making of an opening into that part of the house is a breaking." 337 So. 2d at 836.

In the instant case, the Court stated: "there is no question but appellant was invited to enter the victims' home." 25 Fla. L.

Weekly at S82.[3] The Court ignored the fact that, although the front door to the victims' house was open and evinced no signs of forced entry, the victims' bodies were found inside their garage. 25 Fla. L. Weekly at S79. It was uncontroverted that the living areas of the house were separated by a "wooden door" to the garage. Id. This door was, "cracked in the center and its hinges were broken." Id. The expert testimony at trial was that the damage to this broken door, in an otherwise immaculate household, was consistent with the defendant having pushed against this door from the outside, while the victims were trying to hold the door intact from the inside. (T. 683-84; 735-36). Even assuming arguendo that the Court was correct in holding that the Defendant was "invited" through the front door, the breaking of the garage door once inside the house constituted a classic case of burglary, even at common law. As noted by Judge Grimes in Cartey, the case of State v. Burke, 462 S.W. 2d 701 (Mo. 1971), provides a "comprehensive

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[3] In fact, the State's position at trial was that there was no "invitation." The entry had been effected at approximately 10:00 p.m., while the female victim was in her nightgown and robe, and the male victim was in his bare feet, wearing only his shorts. (T. 695, 691). Moreover, there were no signs whatsoever of any kind of social gathering in the living area of the house. The State's theory was that the victims had unlocked their front door, whereupon they had been immediately confronted by the Defendant, who had pointed his gun, with a homemade silencer attached, at them. (T. 1439-43). The victims had not even had the chance to retrieve the keys and lock their front door. The front door was open, with the keys still inside the lock, when the victims' bodies were found in their garage the next morning. Id. The testimony at trial was that the victims were extremely security conscious and would not have left their door open. (T. 566-575).

discussion" of the law on this subject, and after citing multiple cases in multiple jurisdictions in support, including the Pamphlet Laws (Laws of 1850, 1893), holds:

> The conclusion that breaking an inner door is burglary under a statute such as ours is in accord with the statement in 12 C.J.S. Burglary s 6, p. 671, as follows: 'If a person enters a house through an open door or window, and breaks or opens an inner door, window, or other obstruction, with intent to commit a felony, or <u>if a person, being lawfully in a house, enters a room which he has no right to enter, with felonious intent, by breaking or opening an inner door, it is as much burglary as if he had entered by breaking an outer door or window. Such a breaking is a breaking and entering of the house</u>. This rule generally applies under statutes punishing the breaking and entering of dwelling houses and other buildings, as well as at common law; but sometimes a statute defining burglary expressly or impliedly requires that the breaking shall be an exterior one, and under such a statute, entering through an open outer window, followed by a technical breaking by opening a closed inner door, will not constitute the offense.'
>
> Likewise, in 13 Am.Jr.2d, Burglary, s 21, p. 332, it is stated: 'If a person enters a building through an open door or window, it does not constitute a burglarious entry at common law, but if he afterward breaks an inner door with the necessary intent, he may be prosecuted for burglary.'
>
> As indicated in the quotation from State v. Scripture, the rule at common law was that such a breaking of an inner door is burglary. In 2 East, P.C. 488, it is stated: 'But though a thief enters a dwelling house in the night-time through the outer door being left open, or by an open window; yet if when within the house he turn the key of or unlatch a chamber door with intent to commit felony, this is

burglary ***.

462 S.W.2d at 706-707 (emphasis added).

Not only is the "breaking of an inner door" in the instant case a classic case of burglary at common law, but even the State of New York, which forms the basis for this Court's reasoning, has recognized this rule. See, People v. Smith, 534 N.Y.S.2d 1021 (N.Y. App. Div. 1988) ("the fact that the defendant was properly in the common areas of the house did not give him a license to enter the locked room of another tenant (citations omitted); People v. Pena, 575 N.Y.S.2d 575 (N.Y. App. Div. 1991) (burglary where defendant entered a locked workroom in an open building); People v. McNair, 475 N.Y.S. 2d 1006 (N.Y. Crim. Ct. 1984) (an "invitation" to general areas of a building "plainly did not encompass the right to force open" the entrance to a non-public portion of the building); People v. Niepoth, 390 N.Y.S. 2d 663 (N.Y. App. Div. 1977) (an "invitee" to an inn was properly found guilty of burglary where he passed through "doors that were closed," on the second floor). A number of other jurisdictions have also recognized the rule. See State v. Cookson, 293 A.2d 780 (Me. 1972); State v. Wilson, 1 NJL 439 (N.J. 1793); Bowie v. State, 401 S.W. 2d 829 (Tex. Crim. 1966); State v. Scripture, 42 N.H. 485 (N.H. 1861);State v. Clark, 42 Vt. 629 (1870); State v. Curtis, 424 N.W. 2d 719 (Wis. App. 1988); State v. Allen, 955 P.2d 403 (Wash. App. 1978); People v. Thomas,

235 Cal. App. 3d 899 (1991).

Indeed, the Model Penal Code, so heavily relied upon by the Delgado Court, also recognizes that the forcing of an inner door, after lawful general entry to premises, constitutes a burglary, by definition:

> (1) Burglary defined. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with puprose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.

Model Penal Code, s. 222.1(1) 60-61 (1980); 25 Fla. L. Weekly at S80-81. The comments to the Code explain that the above definition of "unprivileged entry," "takes a middle ground between the common law requirement of 'breaking and entering' and the complete elimination of that requirement in some states." Id. Cmt. 3 at 68-69.

Likewise, the "scholars" relied upon by the Delgado Court, 25 Fla. L. Weekly at S81, also agree that, "A breaking occurs if a part of the house was opened even though the original entry into the structure was gained without a breaking." 2 Wayne R. LaFave & Austin W. Scott,Jr., *Substantive Criminal Law*, s. 8.13(a) at 466; see also, Wharton's Criminal Law s.318, at 228-30 (15th ed. 1995) (" a break may occur within a dwelling house. Thus although there is no break when a defendant enters the house through a wide-open

door, there is a break if he opens a closed inner door, such as a bedroom, with the intent to commit a felony therein.").

As is abundantly clear from the above, the instant case of forcing an inner door in a residential home, even assuming an initial lawful entry, satisfies the common law requirements of breaking and entering for burglary. While relying upon the ***"middle ground" that the Penal Code and scholars have urged between common law and statutes which permit any "entering" regardless of "breaking," the Court has abolished the classic common law definition of burglary.***

The State agrees that "burglary was intended to criminalize the conduct of a suspect who terrorizes, shocks, or surprises the unknowing occupant." 25 Fla. L. Weekly at S82. However, the State can not conceive of a more terrorizing scenario than that in the instant case, where the victims, after opening the front door of their home at night and in their night clothes, were confronted with an acquaintance who pulled a gun, with a homemade silencer attached. The victims sought refuge in their garage and were holding the door to said structure closed, so as to keep out the defendant, while the latter broke this door in order to commit a vicious and prolonged attack on them by shooting, stabbing and beating them to death. The Court's holding herein is contrary to

the "basic premise in our law that the house is a special place of protection and security." Weiand v. State, 24 Fla. L. Weekly S124, quoting State v. Bobbitt, 415 So. 2d 724, 727 (Fla. 1982). The cavalier extension of Miller v. State, 733 So. 2d 955 (Fla. 1999), a case involving ***a grocery store open to the general public***, to residential premises, is unwarranted. The mere act of opening one's front entry door is not an invitation to the general public.[4] Moreover, any person in his home can ordinarily be expected to be just as terrorized by an invitee who suddenly brandishes a weapon, as he would by an unknown intruder who barges in, brandishing the same weapon. The fear for loss of one's life will not be diminished by the fact that the identity of the perpetrator is previously known. The loss of the sense of privacy and safety in one's own home - one's safe, secure, castle - will not be any less by virtue of having permitted a perceived friend or acquaintance to enter before the weapon is drawn.

C) Reliance Upon The New York Statute Instead Of Ray's Construction of the Florida Statute Is Unwarranted

As noted previously, the Court has relied upon the New York case of People v. Hutchinson to reinterpret Florida's burglary statute. First, the Court has ignored the fact that New York's

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[4] The State would note that only approximately one month prior to the issuance of the instant opinion, the Court expressly rejected any extension of Miller to residential premises based upon the above reasoning. See Zack v. State, 25 Fla. L. Weekly S19a, 22 (Fla. January 6, 2000).

statute contains different statutory elements of the crime of burglary than does Florida's statute. New York's statute requires an "unlawful entry or remaining," which is defined as entry or remaining that is without license or privilege. People v. Hutchinson, 477 N.Y.S. 2d at 966; People v. Gaines, 546 N.E.2d 913, 914 (N.Y. 1989); McKinney's New York Penal Law, s. 140.00(5). The "unlawful" remaining or lack of consent is an ***element*** of the crime which must be proven by the State. Id. In contrast, Florida's statute does not require an "unlawful" entry or remaining, as it simply prohibits entering or remaining with intent to commit an offense, regardless of whether the "remaining" is, in and of itself, "unlawful." Indeed, consent or privilege to enter or remain is an ***affirmative defense*** under Florida law. State v. Hicks, 421 So. 2d 510 (Fla. 1982); Delgado, 25 Fla. L. Weekly at S80. Reliance upon New York case law is thus an improper basis for construing a distinctive Florida statute.

Moreover, the decision in Hutchinson is merely the opinion of a single trial court judge; it was not even an appellate court opinion. Although the case was subsequently affirmed by an intermediate appellate court, 503 N.Y.S. 2d 702 (N.Y. App. 1986), the affirmance was per curiam, with no indication of what issues were raised on appeal. Most significantly, the ruling in Hutchinson is simply contrary to the overwhelming weight of

authority from other jurisdictions, whose opinions are consistent with Ray, and are summarized at pp. 18-19, infra. In short, there is no compelling reason for deferring to such a decision.[5]

More importantly, the Court's holding that once a homeowner opens his door, she can not ask the invitee to leave, is contrary to the basic tenets of our law. The Court's holding in Delgado that any initial consent, regardless of scope, can not be undone, even in the face of an express order to "get out," is tantamount to elevating the affirmative defense of consent to an "irrebuttable" essential element of burglary. The very notion that one can not have control of one's home by asking an invitee to leave is

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[5] The Delgado Court also cited the New York appellate court opinion of People v. Gaines. However, any reliance upon this case is unwarranted, as it did not even involve a "remaining in" scenario, "surreptitiously" or otherwise. It was undisputed that Gaines' initial entry was unlawful. The question in Gaines involved the point in time where the separate element of criminal intent had to be formed. Moreover, Gaines did not involve residential premises, but rather a warehouse. The State would note that even the New York statute pertaining to commercial premises expressly provides that there is no license or privilege to remain when a person "***defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or other authorized person.***" McKinney's New York Penal Code, s. 140.00(5) (1999). Neither the Court in Gaines, nor any other New York court, has disregarded this statutory provision. Indeed, the Gaines Court expressly stated: "In order to be guilty of burglary for unlawful remaining, a defendant must have entered legally, ***but remain for the purpose of committing a crime after authorization to be on the premises terminates.***" 546 N.E. 2d at 915 (emphasis added). Thus, the Delgado opinion's statement that even an "express command" by a homeowner is not sufficient, 25 Fla. L. Weekly at S81, in no way derives any legitimacy from the Gaines appellate court.

contrary to the "basic premise in our law that the house is a special place of protection and security." Weiand v. State, 24 Fla. L. Weekly S124, quoting, State v. Bobbitt, 415 So. 2d 724, 727 (Fla. 1982). Indeed, one can but wonder what protections remain for the victims of domestic violence, at issue in Weiand, now that these victims have lost any recourse when they ask an abusive spouse to leave. As a result of the Court's holding in Delgado, in every case where an intruder enters a home in Florida, but there is no evidence of a "forced" initial entry, there is now a presumption of "consent," which in turn can not be rebutted, as the Court has held it to be "a complete defense to the charge of burglary." 25 Fla. L. Weekly at S80. Such a radical rewriting of the burglary statute by judicial fiat is unwarranted.

The State respectfully submits that the decision in Ray and its progeny should be adhered to. Whereas Ray held that "[i]t is undeniably true that a person would not ordinarily tolerate another person remaining in the premises and committing a crime," 522 So. 2d at 965, this Court has turned that around, and inquired why indicia of withdrawn consent, as required by the Ray court, were necessary, since the initial assumption would not "logically" necessitate such further evidence. Delgado, 25 Fla. L. Weekly at S81. The State respectfully submits that Ray is, in fact, completely rational in this respect.

Indeed, examples given by the Court, intended as a refutation of Ray's reasoning, demonstrate their fallacy. The Court's first hypothetical is where a host of a party catches a guest smoking marijuana. 25 Fla. L. Weekly at S82. Should the withdrawal of consent be inferred from an ordinary lack of tolerance for crime? Perhaps the owner and guest had routinely indulged in drug use together and the guest thus reasonably believed that the owner was, as always, consenting to such drug use. The need for the second step in Ray, the evidence of withdrawn consent, thus serves a useful purpose. The host has the right to ask the guest to leave, once he is aware of the criminal intent. If he does so, and the invitee persists in continuing his criminal actions, despite knowledge that any prior consent has been withdrawn, and does not leave, then there is a burglary. The same is true with this Court's next example - the invitee paying for the pizza delivery with a bad check. 25 Fla. L. Weekly at S82. Since there is no reasonable way for knowing that the check is bad until it actually bounces, it is hard to conceive of a situation where the owner of the premises actually knows that such an offense is even being committed. The concept of "ordinary" lack of tolerance for crime, as espoused in Ray, can hardly be deemed to apply to a hypothetical fact pattern which, far from being "ordinary," verges on the absurd.

The third example given by this Court is the fear that any second-degree murder committed in the premises, in the presence of the owner, will be transformed into a first-degree felony murder. Such a situation presents various possibilities. If the host, aware of the murderer's intention to kill, either orders the murderer/guest to leave, or struggles with the person to prevent the murder, it would certainly not be unreasonable to construe consent to enter as having been terminated. Such a case is easily distinguished from one in which the host simply watches the murder being committed, without advance notice, without opportunity to order the guest out, and without opportunity to struggle, or demonstrate by other actions, that the crime should not be committed on the host's premises.

Consistent with the foregoing, the Ray reasoning has been adopted by many other jurisdictions. For example, the majority, in Davis v. State, 737 So. 2d 480, 484 (Ala. 1999), permits a conviction for burglary based upon withdrawn consent, where there is evidence of a struggle, while reiterating "that the evidence of a commission of a crime, standing alone, is inadequate to support the finding of an unlawful remaining, but evidence of a struggle can supply the necessary evidence of an unlawful remaining."[6] See

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[6] By contrast, the majority opinion in this case aligns itself with the ***dissenting*** judge in Davis.

also State v. Walker, 600 N.W. 2d 606, 609 (Iowa 1999) (A "victim need not expressly revoke his or her consent to the defendant's presence; it is sufficient that the victim's actions give the defendant reason to know that such consent has been withdrawn. If the defendant remains on the premises after having reason to know he has no right to do so, he has 'remained over' and, if, during the time he unlawfully remains on the premises, he forms the requisite intent to commit a felony, assault or theft, the defendant has committed a burglary."); People v. Ager, 928 P. 2d 784, 790 (Colo. App. 1996) (evidence of victim/owner's struggle with prior invitee was sufficient evidence to show withdrawal of authority to remain); State v. Felt, 816 P. 2d 1213, 1214 (Or. App. 1991) (A jury may find that the defendant's privilege to be on the premises has been revoked even though the victim did not expressly tell the defendant to leave. A victim's resistance to the defendant's actions gives the defendant reason to know that the victim is no longer willing to have the defendant remain on the premises.); State v. Collins, 751 P. 2d 837, 841 (Wash. 1988) (same); State v. Steffen, 509 N.E. 2d 383, 389 (Ohio 1987) (same); Hambrick v. State, 330 S.E. 2d 383, 385-86) (Ga. App. 1985) (same); Delgado, 25 Fla. L. Weekly at S86 (Wells, J., concurring in part and dissenting in part); Ray, 522 So. 2d at 966 (and cases cited therein, including, ***apart*** from the jurisdictions cited above, decisions from California, Connecticut, the District of Columbia,

Illinois, Kansas, Kentucky, and South Dakota).

Finally, the Court has also attacked the reasoning of Ray for failing to give meaning to the term "unless" as it appears in the Florida burglary statute. The statute provides that a burglary has been committed "unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." Contrary to the assertion that "unless" has been rendered meaningless by permitting the withdrawal of consent, at least two distinct meanings remain for the term "unless." First, it is the term "unless" which serves the function of rendering consent an affirmative defense, rather than having an absence of consent be an element of the offense. State v. Hicks, 421 So. 2d at 512. Second, as a factual matter, the term "unless" will still be operative in those cases in which there is no express withdrawal of consent and no circumstantial withdrawal of the consent; ***the commission of the offense within the premises will not serve, in and of itself, to establish the withdrawal of the consent.*** See, Ray, 522 So. 2d at 966-67; Davis, supra.

CONCLUSION

In view of the foregoing, it should be concluded that the opinion herein has erroneously receded from the principles set forth in Ray and its extensive progeny. As to the issue of whether

Ray should be overruled, and whether the words "surreptitiously remain" should be read into Florida's burglary statute, the opinion of the Court herein should be withdrawn, and the principles enunciated in Ray should be adhered to. At a minimum, it is alternatively submitted that full supplemental briefing and oral argument, on such a significant issue, would be appropriate. Furthermore, based upon the force used on the interior garage door during a struggle, the common law burglary in this case should be affirmed. Finally, the opinion should also be corrected to reflect that the death sentence for the killing of Tomas Rodriguez is valid, as the court invalidated that sentence on the sole ground that the burglary aggravator should be stricken. Once the burglary aggravator is restored in accordance with the foregoing rationale, the balance of the aggravating and mitigating factors reflect that the second death sentence was proportional.

WHEREFORE, the State submits that the opinion of the Court herein should be withdrawn, for further proceedings consistent with the arguments set forth above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Rehearing was mailed this 6th day of March, 2000, to REV. MELODEE A. SMITH, Esq., 5236 S.W. 3rd Avenue, Cape Coral, Florida 33914, and ROY D. WASSON, Esq., Gables One Tower, Suite 450, 1320 S. Dixie Highway, Miami, Florida 33146.

for [signature]
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