

IN THE SUPREME COURT OF FLORIDA

CASE NO: SCO2-389

LOWER CASE NO. 3D99-3187

THE STATE OF FLORIDA,

Petitioner,

vs.

ROBERTO RUIZ,

APPELLEE.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

BENNETT H. BRUMMER, PUBLIC DEFENDER
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street, 5th Floor
Miami, Florida 33125
305-545-1600

and

MAY L. CAIN, ESQUIRE

304

Special Assistant Public Defender
CAIN & SNIHUR
Kislak National Bank Building
1550 N.E. Miami Gardens Drive, Suite

North Miami Beach, Florida 33179
305-956-9000
Fla. Bar No. 301310

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

<u>Page</u>		
	TABLE OF CITATIONS	
ii		
	INTRODUCTION	1
	STATEMENT OF THE CASE AND FACTS	
2		
	SUMMARY OF THE ARGUMENT	
17		
	ARGUMENT	
	I.	18

SECTION 810.105, FLA. STAT. (2001) DOES NOT APPLY TO THIS CASE BECAUSE IT IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE SEPARATION OF POWERS PROVISIONS OF ARTICLE 2, SECTION 3 OF THE FLORIDA CONSTITUTION.

II.

25

ANY APPLICATION OF SECTION 810.105, FLA. STAT. (2001) IS BE VIOLATIVE OF THE EX POST FACTO CLAUSES OF THE FLORIDA CONSTITUTION AND THE CONSTITUTION OF THE UNITED STATES.

III.

28

THE TRIAL COURT ERRED BY ITS DENIALS OF THE APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL ON (A): THE KIDNAPPING COUNT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION FOR KIDNAPPING WHERE THE MOVEMENT INVOLVED WAS SLIGHT AND INHERENT IN THE OTHER CRIMES CHARGED, AND (B) ON THE BURGLARY CHARGE WHERE THE EVIDENCE WAS INSUFFICIENT THAT THE APPELLANT ENTERED WITH THE INTENT TO COMMIT A CRIME.

CONCLUSION

35

CERTIFICATE OF SERVICE

35

CERTIFICATE OF TYPE SIZE

36

TABLE OF CITATIONS

CASES

PAGES

Allen v. Butterworth, 756 So. 2d 52 (Fla.2000)

23

Beazell v. Ohio, 269 U.S. 167, 169-70, 46 S. Ct. 68, 68-69, 70 L. Ed. 2d 216 (1925)

26

Berry v. State, 668 So. 2d 967 (Fla. 1996)

29

Brown v. State, 719 So. 2d 955 (Fla. 4th DCA, 1998)

31

Bruce v. State, 612 So. 2d 632 (Fla. 3d DCA, 1993)

31

Cannon v. State, 102 Fla. 928, 136 So. 695 (1931)

19

Carawan v. State, 515 So. 2d 616 (Fla. 3d DCA 1994)

rev. den. 649 So. 2d 870 (Fla. 1994)

23

Collins v. Youngblood, 497 U.S. 37, 42, 110 S. Ct. 2715, 2719, 111 L. Ed. 2d 20 (1990)

18

Delgado v. State, 776 So. 2d 233 (Fla. 2000)

18

Faison v. State, 426 So. 2d 963 (Fla. 1983)

29

Goff v. State, 616 So. 2d 551 (Fla. 2d DCA, 1993)

31

In re Alkire's Estate v. Smith, 198 So. 2d 475 (Fla. 1940)

22

Jones v. State, 652 So. 2d 967 (Fla. 3d DCA, 1995)

30

Locke v. Hawkes, 595 So. 2d 32 (Fla. 1992)

23

Lynce v. Mathis, 519 U.S. 433, 117 S. Ct. 891,
137 L. Ed. 2d 63 (1997)

26

Means v. Northern Chyenne Tribal Court, 154 F. 3d 94
(9th Cir. 1998) 18

Miller v. State, 733 So. 2d 955 (Fla. 1999)

19

Nino v. State, 744 So. 2d 528 (Fla. 3d DCA, 1999)

31

Office of the State Attorney of the Fourth Judicial

Circuit

of Florida v. Parrotino, 628 So. 2d 1097, 1099, (Fla.
1993) 22

Ray v. State, 522 So. 2d 963 (Fla. 3d DCA, 1988)

19

Richardson v. Moore, 754 So. 2d 64 (Fla. 3d DCA 2000)

25

Simmons v. State, 36 So. 2d 207 (Fla. 1948)

21

ii

Simms v. Department of Health and Rehabilitative Services,
641 So. 2d 957 (Fla. 3d DCA 1994)

22

State v. Smith, 547 So. 2d 613 (Fla. 1989)

23

State v. Hicks, 421 So. 2d 510 (Fla. 1982)

19

State v. High, 281 So. 2d 356, 357 (Fla. 1973)

19

State v. Hootman, 709 So. 2d 1357, 1359 (Fla. 1998)

25

State v. Lyons, Florida Supreme Court Case no. SC01-1704

24

Walker v. Bentley, 678 So. 2d 1265 (Fla. 2d DCA 1995)

23

White v. Johnson, 59 So. 2d 532 (Fla. 1952)

OTHER AUTHORITIES:

Section 787.01, Fla. Stat.

29

Section 810.105, Fla. Stat. (2001)

18, 21

Article 2, Sec. 3, Fla. Const.

21

Article I, Section 10, Fla. Const.

17

Article I, Section 10, United States Constitution

17

IN THE SUPREME COURT OF FLORIDA

CASE NO: SCO2-398

THE STATE OF FLORIDA,

Petitioner,

vs.

ROBERTO RUIZ,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

INTRODUCTION

The Respondent, Roberto Ruiz, was the Defendant in the trial court, the Circuit Court of the Eleventh Judicial Circuit, In and For Miami-Dade County, Florida and the

Appellant in the Third District Court of Appeal of Florida. The Petitioner, The State of Florida, was the prosecution. In this brief, the parties will be referred to both as they appear herein.

The symbol "R" will be used to refer to portions of the Record on Appeal. The symbol "T" will be used to refer to the court reporter's transcripts included in the record on appeal. The symbol "S" and "S1" will be used to refer to the court reporter's transcripts dated 9/21/99 and 11/16/99 which are attached to the Appellant's Motion to Supplement Record on Appeal filed with (and granted by) the Third District Court of Appeal of Florida.

STATEMENT OF THE CASE AND FACTS

The Respondent, Roberto Ruiz was charged by amended information filed September 15, 1999, with the following:

Count I: Sexual Battery (anal) upon Zoraya Cortina, on January 3, 1998, with force in violation of Sections 794.011(3) and 775.087, Fla. Stat.

Count II: Sexual Battery (vaginal) upon Zoraya Cortina, on January 3, 1998, with force in violation of Sections 794.011(3) and 775.087, Fla. Stat.

Count III: Burglary of an occupied dwelling of Zoraya Cortina, with an intent to commit an offense therein, to wit: assault and/or battery and/or sexual battery, and in the course of committing same making an assault or battery or sexual battery upon her, on January 3, 1998, in violation of Section 810.02(2)(a), Fla. Stat.

Count IV: Kidnapping of Zoraya Cortina with the intent to commit and/or facilitate the commission of sexual battery and/or felony battery in violation of Sections 787.01 and 775.087, Fla. Stat. (R. 8-11).

A jury trial began before the Honorable Marc Schumacher, Jr. on September 21, 1999. (T. 1).

Detective Ralph Hernandez of the Miami-Dade Police Department sexual crimes bureau testified that he went to Zoraya Cortina's house and took the initial report. (T. 213). When he arrived at the house, he saw Cortina and her two children. (T. 214). There was blood on the

dresser, rug and comforter. (T. 214). He requested that the crime scene unit respond, because Ms. Cortina had visible bruises to her nose, eye, arm and back. (T. 215). The alleged incident occurred on Saturday night and he responded on Sunday morning. (T. 215). Afterwards, Hernandez went to where the Respondent was working as a roaming security guard. (T. 215-216). The Respondent was a suspect when Hernandez went to see him. (T. 216). Back at his office in an interview room, Hernandez read the Respondent his Miranda rights. (T. 217). Most of the Respondent's story was similar to Cortina's. (T. 218). The Respondent's statement was related to the jury by the detective without defense objection or motion to suppress. (T. 218).

Hernandez related that the Respondent told him that he and Cortina had a short relationship. (T. 218). They met when the Respondent was working at another complex as a security guard. (T.218). The Respondent was at Cortina's apartment on the date of the incident. (T. 219). The Respondent told Hernandez that Cortina had bruises on her

nose when he arrived and he did not see other injuries. (T. 219). She did not want to talk about it so he did not push her. (T. 219). The Respondent denied hitting Cortina. (T. 219). Then he said that he did not remember hitting her. (T. 220). According to Hernandez, the Respondent called Cortina to tell her that he was coming over to retrieve his personal belongings. (T. 220). She had company when he arrived. (T. 221). The Respondent stated that he had to call his employer to tell them that he would be late and had to go in late. (T. 221). He denied that he and Cortina had sexual relations on that date but admitted that they did have sex on prior occasions. (T. 221).

On cross examination, Hernandez testified that he remembered a child telling him about a naked man in the bedroom at the time that the Respondent came to the apartment. (T. 222). The original report to the police was a domestic violence call. (T. 229). Cortina's mother told her to call the police. (T. 231). Cortina called the police on Sunday morning rather than on Saturday. (T.

231). Mr. Mendez was at the apartment with Cortina on that day. (T. 232). The Respondent did not resist and was cooperative. (T. 235). Hernandez was not aware that Cortina was taking medication when he took her statement. (T. 241). The Respondent told him that he knew Cortina since 1995. (T. 241). However, their relationship did not begin until April or May, 1997. (T. 241). The Respondent moved in with Cortina in November, 1997 and at her request, moved out in December, 1997. (T. 242). They had no contact between December 26, 1997 and January 3, 1998 (the date of the alleged incident). (T. 242). The Respondent made arrangements to pick up his belongings at no specific time. (T. 244). The Respondent denied striking Cortina or having sex with her on that date. (T. 245). Cortina was taken to the Rape Treatment Center and items were collected for the rape kit. (T. 248).

Dr. Vivian Sanchez, internal medicine physician at Pan American Hospital testified as an expert witness for the State. (T. 251). On January 5, 1998 she saw Cortina. (T. 252). Cortina made a statement that she received the

injury from her boyfriend. (T. 252). She had a broken nose. (T. 253). On cross examination, she testified that Cortina was taking Dilantin which is a prescription given by physicians that is anti-epileptic medication which can cause sleepiness. (T. 257). On redirect examination Dr. Sanchez testified that Cortina's injuries were not consistent with someone who suffered a seizure. (T. 259).

Zoraya Cortina testified that she lived at her address for two years with her two children, Hansel and Raul Gonzalez who are ages six and seven. (T. 262). Because of epilepsy she went to Palmetto in special education classes. (T. 263). She works at Publix as a bagger. (T. 263). She knows the Respondent as he was a security guard at her apartment. (T. 264). Her friend Raul lived there as well. (T. 264). Raul is 6'1"-6'2", big and muscular. (T. 265). She was never romantically involved with Raul. (T. 265). The Midway apartments where her mother resides is 10 blocks away from her residence. (T. 265). Cortina has known the Respondent for a long time. (T. 266). She met him as a security guard where she lived between March

and December, 1996. (T. 266). She dated him in 1996 or 1997. (T. 266). She knew the Respondent two years prior to dating him. (T. 266). He moved in with her October 24, 1997 the day she moved into the Fountainbleu Apartments. (T. 267). The Respondent did not pay rent, electric, or for food. (T. 268). He had a key to the apartment. (T. 268). They shared a bedroom. (T. 268). She was not working. (T. 268). He worked as a security guard. (T. 268). She volunteered at Jackson Memorial Hospital. (T. 268). They lived together from October through December. (T. 269). At that time, the Respondent told her that his uniform was missing from the closet. (T. 269). Her mother had a key to the apartment in case she has a seizure. (T. 268). The Respondent accused her mother of taking uniforms and clothing from the apartment. (T. 268-269). His uniforms, her comforter and a black dress he had given her were missing. (T. 269). The Respondent moved out sometime in December. (T. 270). He left underwear, socks and shirts. (T. 270). When they broke up they were still on friendly terms. (T. 270).

The Respondent called her in the early morning (4:00 a.m.) to make arrangements to pick up his things. (T. 271). She was sleeping at the time of his call. (T. 271). He called her from his work. (T. 271). The Respondent told her that he lost her keys from his keychain and asked if he could come by to pick up his clothes and she told him that he could do so later in the afternoon. (T. 272).

At 6:00 a.m on January 3, Raul called Cortina and asked her if she needed a loaf of bread and a gallon of milk. (T. 273). He came over to her house in the morning with the bread and milk, and asked her if he could lie down and relax because he was kind of drunk. (T. 273). She told him that he could shower and lay down (in her bedroom). (T. 273). Raul is a bouncer at Porkies and this was a Saturday. (T. 273). She closed the bedroom door and played Nintendo with her children. (T. 274).

The Respondent came to her apartment at 10:00 a.m. and surprised her. (T. 275). She looked through the peep hole and opened the door because it was him. (T. 276). She

never had a problem with the Respondent. (T. 276). When the Respondent entered, she told him that a friend of hers was in the bedroom taking a nap. (T. 276). The Respondent knew Raul. (T. 277). Raul had lived at the Midway Club and the Respondent knew him from when he worked as a security guard there. (T. 277). When Cortina looked into the bedroom she did not see Raul. (T. 277). The Respondent entered the bedroom to retrieve his belongings and called to Cortina and told her that Raul was sleeping naked in the bedroom. (T. 277). Cortina was surprised to see Raul sleeping in her bedroom completely naked. (T. 278). The Respondent told Raul to get dressed and leave because he came to get his property. (T. 278). Raul got dressed and left. (T. 278). The Respondent told Cortina's son that he and Cortina had to go into the bedroom to talk. (T. 279). When they went into the bedroom they sat and the Respondent said that they needed to talk. (T. 279). When she stood up he swung his right hand and hit her across the nose with his ring. (T. 279). He shut the door and locked it. (T. 279). Blood was coming out of her

nose and it was all over the wall, dresser and rug. (T. 280). The force of the blow forced her to the ground and he kept hitting her and said she should not play behind his back. (T. 280). She told him she was not playing behind his back. (T. 280). The Respondent was hitting her while she was on the bed. (T. 280). She told the Respondent to stop and leave. (T. 281). He refused. (T. 281). The Respondent hit her with a closed fist and slaps and she tried to escape but he told her not to leave. (T. 281). He kept hitting her. (T. 281). She called her children and said to please call 911 the Respondent is hitting me. (T. 281). The Respondent covered her mouth so she would not scream. (T. 282). The Respondent grabbed toothpaste from the bedroom and forcibly took her into the bathroom where he pulled her around and told her to come her for a minute. (T. 282). She tried to push him away. (T. 282). She testified that the Respondent raped her until 11:45. (T. 285). They were in the bathroom for five to ten minutes then he took her to the bedroom. (T. 285). She felt very bad. (T. 286). He told her to get on

the bed and lay on her stomach because he was going to do it again. (T. 286). The Respondent did it to her again on the bed. (T. 286). He turned her around and she screamed to her children again to call 911 but they did not, and he covered her mouth. (T. 286). He hit her on her face and held onto her hair. (T. 287). When he finished her told her to go the bathroom. (T. 288). He was going to make a telephone call. (T. 288). He grabbed her hand and pushed her into the bathroom, closed the bathroom door and held it so she could not escape. (T. 288). He called his boss and told him that he was going to be late for work as his girlfriend was having a seizure. (T. 289). She screamed that he's beating me up. (T. 289). He left her in the bathroom for five minutes. (T. 289). He started to get dressed and told her to stay there because he did not want her to know the car he was driving. (T. 289). He told her if she called the cops he would come back and hurt or kill her. (T. 290). She went into the bathroom and took a shower. (T. 290). She got dressed, made the bed and went to the movies with her children. (T. 291). After the

movies she went to her mother's house. (T. 292). She told her mother about the incident and her mother took her to her house. (T. 292). The next morning she called the police because her mother begged her to do so. (T. 292). The police took her to Jackson Memorial Hospital Emergency Room and the next day she went to Pan American Hospital because her nose was "busted." (T. 294-295).

On cross examination she testified that Raul was drunk when he came to her apartment and that she had never seen Raul drunk before that date. (T. 303-304). On the date of the incident the Respondent had a key to the apartment. (T. 306). A couple of days later she changed the locks. (T. 306). The Respondent moved out on December 26 and it was her idea that he move out. (T. 307). She suggested that they stop seeing each other because she could not handle the stress. (T. 308). The Respondent did not run after she told the children to call the police. (T. 316). She knew the car he drove. (T. 318). When she went to her mother's home on January 3 her mother did not call the police or take her to the hospital. (T. 326). On the

telephone she told the officer she was beaten up, she did not tell him that she was sexually assaulted. (T. 327).

Dr. Simmons testified that she worked at the Rape Treatment Center since 1986. (T. 360). It was stipulated that she was qualified to render an opinion. (T. 360). She is the director of the Rape Treatment Center. (T. 361). Dr. Rao examined Cortina. (T. 361). Simmons reviewed Dr. Rao's report. (T. 361). Cortina told Dr. Rao that the incident occurred the day before at 11:00 a.m. (T. 364). She told Dr. Rao that if she screamed or told the kids that he would kill her. (T. 364). She told Dr. Rao that he hit her, she resisted and he had no weapons. (T. 364). She told Dr. Rao that there was anal and vaginal/penile penetration and he put toothpaste on his penis. (T. 365). Dr. Rao found no trauma. (T. 366). The pelvic exam was normal. (T. 366). Dr. Rao took forensic specimens for DNA testing. (T. 367). If someone bathes or has gone to the bathroom there is not as much evidence. (T. 368). Her nose injury was consistent with the fact that she said he hit her. (T. 370). On cross-examination

Dr. Simmons testified that the specimens were turned over to the police. (T. 371). She also testified that nothing in the report showed that there was seaman belonging to the defendant. (T. 372).

The State rested. (T. 387). The defense made a Motion for Judgment of Acquittal stating that as to the burglary, the consent to enter was not adequately withdrawn. (T. 390). The defense also argued that the confinement was not sufficient independent movement under Faison v. State, to constitute kidnapping, but was of the kind of movement inherent in the other alleged crimes. (T. 390). The Motion for Judgment of Acquittal was denied by the trial court. (T. 392, 393). The Court found that there were elements separate and apart from the battery itself to constitute kidnapping. (T. 392).

The Respondent, Roberto Ruiz testified in his own behalf. (T. 398). He stated that he is 38 years old and has worked security since 1995. (T. 399). He wears a uniform, badge and has a security license. (T. 400). He does not have a weapons license and does not carry a

firearm. (T. 400). He knows Ms. Cortina. (T. 400). He did not date her when he worked at the Midway Apartments. (T. 400-401). At the end of April, beginning of May, 1997 he saw Cortina again. (T. 401). He was riding in his car and saw her with her two children on a bus bench. (T. 402). He offered her a ride. (T. 402). They began to date. (T. 402). At the end of October, 1997 she moved to another apartment. (T. 403). He helped her move and he moved in with her. (T. 403). They shared her bedroom. (T. 403). They lived together for between one and one-half months. (T. 403). They separated because his security uniform was missing from the apartment as was some of her belongings. (T. 403). They broke up. (T. 403). He gave her the key, picked up his uniforms and went to live with a friend. (T. 404). He worried about his uniforms missing because anyone could use it not for security and his job status could be affected. (T. 404). He has to report any missing uniform to his employer. (T. 404). He agreed with Cortina to move out. (T. 406). He left a majority of his things in the apartment. (T. 406). She called him to tell

him to retrieve his belongings. (T. 406). She left messages on his answering machine. (T. 407). He worked the midnight shift until 7:00 a.m. (T. 407). He returned Cortina's telephone call late, when he got the message. (T. 407). Cortina did not specify a time for the Respondent to retrieve his belongings. (T. 407-408). He went home to bathe, sleep and change his clothing. (T 408-409). He had to be present in Hialeah at 11:00 a.m. for another job so he went to her house at 10:00 a.m. (T. 408). He drove his car to her apartment. (T. 409). This was the same car he drove when they lived together. (T. 409). She knew what car he drove. (T. 409). He drove in and parked in the lot. (T. 409).

He knocked on the door and she answered the door. (T. 410). She did not seem surprised or frightened. (T. 410). The atmosphere was normal. (T. 410). She told him that someone was in the bedroom and he did not believe her. (T. 411). He went into the bedroom to get his things. (T. 411). He would not have opened the door if he believed that anyone was there. (T. 412). When he opened the door,

he saw a man completely naked, in bed. (T. 412). He left the bedroom right away and asked Cortina to ask the man to get dressed or to collect his belongings, and he waited for her in the living room. (T. 412).

The man got dressed in about five to 10 minutes. (T. 413). The Respondent was waiting outside of the apartment. (T. 413). He re-entered the apartment when the man left. (T. 413). Cortina invited the Respondent back into the apartment. (T. 414). He went to the bedroom to get his things. (T. 415). They both told each other that they were sorry about the relationship. (T. 415). He was embarrassed, but not jealous, that she had a man in her bed. (T. 415). He was in fear of the man because he thought it was a trap. (T. 415). She told him that she loved him and the Respondent slapped her in the face two to three times. (T. 416). She was bleeding and he offered to help her and even to take her to the hospital. (T. 416). She was crying and she called for her children to call 911. (T. 416).

The Respondent stated that he did not barricade the

door and did not hold Cortina hostage in any way. (T. 417). He called his job to let them know that he would be late. (T. 417). He was supposed to work from 11:00 a.m. until 7:00 p.m. and he was at Cortina's apartment at 10:30 a.m. which was 15-20 minutes from his jobsite. (T. 417). He had no plan to beat or kidnap Cortina. (T. 418). He denied having intercourse with Cortina either vaginally or anally. (T. 418). He denied threatening her if she were to call the police. (T. 418). He got to work at 2:00 p.m. and went to work the following day. (T. 418).

The police came to the Hialeah jobsite and he cooperated with the police. (T. 419). The police told him what he was charged with and did not permit him to drive his own car. (T. 419-420). He was handcuffed in the police car. (T. 420). He talked to Detective Hernandez who told him that he did not believe him. (T. 421). Hernandez asked the Respondent questions about the relationship and the Appellant denied raping Cortina. (T. 422). He did not tell Hernandez that he hit Cortina because he was scared and afraid. (T. 422). The detective

would not have believed the Respondent even if he told the truth. (T. 422). On cross examination, the Respondent testified that Hernandez spoke with him in Spanish. (T. 424-425). He knew that he did not have to say anything but decided to speak to the detective. (T. 425). He admitted he was in her apartment and that her son was there with his little brother. (T. 426). He admitted that there was another man there. (T. 426). He spent between one and two hours there. (T. 430). The blood on the Respondent's tee shirt was from Cortina. (T. 433). On redirect examination the Respondent testified that he did not request an attorney when speaking to Hernandez. (T. 435-436).

The defense rested. (T. 437). The Respondent renewed its previous motions for Judgment of Acquittal and all other motions as to all counts. (T. 438). The court denied the renewed motion for Judgment of Acquittal and reaffirmed all prior rulings. (T. 439).

A conference on instructions was held. (T. 439-448). There were no objections to the instructions. (T. 448).

Both sides presented closing argument. (T. 449-478). During his closing argument, the defense attorney argued that the Respondent was only guilty of battery. (T. 455). He argued that the results of the laboratories show that when the samples were analyzed, all samples from Cortina's person were negative for bodily fluids, hair, DNA, etc. from the Respondent. (T. 457).

After an overnight recess, the Respondent renewed his motions for judgment of acquittal and objected to the kidnapping instruction. (T. 479). The defense made a motion for the State to elect whether it was proceeding on the charge of sexual battery and the other charges of burglary with an assault versus the kidnapping charge. (T. 480). The defense argued that the jury would have no way to figure out whether the movement was merely incidental or inherent in the alleged felony charge. (T. 481). Defense counsel argued that there is no elaboration and no instruction as to what this all means. (T. 481). The defense also objected to the language about entered and/or remained in the burglary instruction as the Respondent

entered with consent. (T. 482). The court denied the defense motions. The court made a finding that since the Respondent was in Cortina's apartment for approximately two hours, the nature of the kidnapping offense is not merely incidental to the felony of sexual battery. (T. 482-483). The court therefore denied the Respondent's Motions for Judgment of Acquittal. (T. 483).

The jury returned a verdict of guilty of battery, a lesser included offense on Counts I and II; guilty of burglary with an assault or battery, as charged in Count III and guilty of kidnapping as charged in Count IV. (T. 517). The jury was polled. (T. 518). The court found the Respondent guilty and adjudicated him guilty. (T. 519). The Respondent has no prior record so the court ordered a Pre-Sentence Investigation. (T. 519).

The sentencing occurred on November 16, 1999. (S1. 1). The prosecutor stated that the guidelines range is 10.98 to 17.93 years. (S1. 7). The defense agreed that the State Attorney's calculations of 79.05 to 131.75 months was correct. (S1. 7). The probation officer recommended

76 months. (S1. 8). The probation officer's alternate recommendation was three years state prison followed by two years of community control. (S1. 8). The Court sentenced the Respondent to one year, credit time served, on Counts I and II, the misdemeanor counts. (S1. 12). The Court denied enhancement requested by the state but sentenced the Respondent to 131.75 months in state prison on counts III and IV, both counts to run concurrent with each other and the other counts. (S1. 12).

The Public Defender was appointed for purposes of appeal. (S1. 12). A timely Notice of Appeal was filed. (R. 181). On June 20, 2001, The Third District Court of Appeal reversed and remanded the burglary conviction on the basis of the decision in Delgado v. State, 776 So. 2d 233 (Fla. 2000) and affirmed the other convictions. (See Petitioner's Appendix "A"). On February 13, 2002 the Third District Court of Appeal denied the State's Motion for Rehearing but substituted an opinion which certified the question which is an issue herein.

SUMMARY OF THE ARGUMENT

The legislature of the State of Florida cannot "legislatively" overrule a decision of the Supreme Court

of Florida retroactively. Section 810.105, Fla. Stat. (2001) is unconstitutional since it violates Article 2, Section 3, of the Florida Constitution, separation of powers of government.

Further, Section 810.105, Fla. Stat. (2001) is violative of Article I, Section 10 of the Florida Constitution and Article I, Section 10 of the Constitution of the United States, as it constitutes an ex post facto law since it was passed to apply retroactively and changes the substantive law of burglary.

The trial court erred by its denial of the Respondent's Motions for Judgment of Acquittal where the movement of the alleged kidnapping was of the kind that was inherent in the sexual batteries alleged (the Respondent was convicted of battery as a lesser included offense on both counts) and the evidence was insufficient to establish burglary. Therefore, the motions for judgment of acquittal on the kidnapping and burglary charges should have been granted.

ARGUMENT

I.

SECTION 810.105, FLA. STAT. (2001) DOES NOT APPLY TO THIS CASE BECAUSE IT IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE SEPARATION OF POWERS PROVISIONS OF ARTICLE 2, SECTION 3 OF THE FLORIDA CONSTITUTION.

Section 810.105, Fla. Stat. (2001) is unconstitutional because it violates the separation of powers provisions of the Florida Constitution contained in Article 2, Sec. 3. While a legislative body is free to amend laws it believes a court has misinterpreted, it cannot "recede" from the opinion of such a court. See Means v. Northern Cheyenne Tribal Court, 154 F. 3d 941, 946 (9th Cir. 1998). The Respondent will discuss some legislative and judicial history with respect to the burglary statute, prior to

making the Article 2, Sec. 3, argument, as it is very relevant to this Court's decision in this matter.

The Respondent herein was charged by amended information filed on September 15, 1999 and convicted of a burglary allegedly occurring on January 3, 1998. (R. 8-11). This was prior to the enactment of the subject statute. However, for the constitutional reasons contained herein it should not be applied retroactively, as will be discussed in issue II herein.

With respect to the burglary conviction, it was the Respondent's position before the Third District Court of Appeal that the case of Delgado v. State, 776 So. 2d 233 (Fla. 2000) is controlling. In Delgado this Court recognized that when an individual enters a home with consent, and later turns violent, that this sudden turn of events does not mean that every time a crime is committed inside of a home it is also a burglary. This Court reviewed the long and tortured history of burglary cases in this state including the case of Miller v. State, 733 So. 2d 955 (Fla. 1999) and the Third District Court of

Appeal's decision in Ray v. State, 522 So. 2d 963 (Fla. 3d DCA, 1988) which discussed the "remaining in" portion of Florida's burglary statute, Section 810.02, Fla. Stat. In Ray, the Third District Court of Appeal noted in pertinent part, in footnote 3:

The definition of burglary at common law included breaking **and** entering with the intent to commit a felony. Burglary was thus conceived of as an invasion of the right of habitation or of the possessory property rights of another. Cannon v. State, 102 Fla. 928, 136 So. 695 (1931); State v. Hicks, 421 So. 2d 510 (Fla. 1982). The breaking requirement--that is, "the actual or constructive use of some force against a part of a building in effecting an **unconsented** entry," State v. High, 281 So. 2d 356, 357 (Fla. 1973) (emphasis in original)--meant that initial entry had to be trespassory. As Professor LaFave notes, "[t]he law was not ready to punish one who had been 'invited' in any way to enter the dwelling. The law sought only to keep out intruders, and thus anyone given authority to come into the house could not be committing a breaking when he so entered." 2 W. LaFave & A. Scott, Substantive Criminal Law, Sec. 8.13, at 464-65(1986) (footnote omitted).

Because a host of absurd distinctions grew up around the breaking requirement, many states, including Florida, simply excised or omitted it from their statutes. See 2 W. LaFave & A. Scott, **supra**, at 466, 477. Although Florida has eliminated the "breaking" requirement, the entry must still be unlawful, thus retaining the

trespassory aspect of the crime. Thus, consent to entry is a defense to this charge. State v. Hicks, 421 So. 2d 510. Ray at page 964.

This Court was concerned about the situation where the suspect enters lawfully and subsequently secrets himself or herself from their host. Delgado at 238. This Court agreed with the Third District Court of Appeal's reasoning wherein the appellate Court noted that a person would not ordinarily tolerate another remaining in their home in order to commit a crime, so that the consent to enter would be withdrawn and the defendant would be unlawfully remaining in the home pursuant to the burglary statute. However, this Court noted that if such reasoning were to be applied, any crime, including misdemeanors, committed on another's property that would not normally qualify as felonies would suddenly become burglary. Delgado at 237-238. In Delgado it is noted (as many Florida cases hold) that consensual entry is an affirmative defense to the charge of burglary and the burden is on the defendant to establish that there was consent to enter, and that this affirmative defense can also be established by the

evidence presented by the State. Delgado at 238.

This Court stated that the question before the Court is "whether the Legislature intended to criminalize the particular conduct in this case as burglary when it added the phrase 'remaining in' to the burglary statute." Delgado, infra. In answering this question, this Court determined that the "remaining in" clause and the "unless" clause of the burglary statute is limited to the defendant who "surreptitiously remains." Delgado at page *.

In Delgado, this Court **interpreted** the statute passed by the Legislature. This Court acted in good faith and did its job. If the legislature had been more specific in its legislation, at that time, there would not have been a need for judicial interpretation. The Legislature cannot now amend a statute retroactively that has an effect on substantive legal rights, due to its own lack of specificity. It is constitutionally unacceptable for the legislature to overrule a decision of this Court retroactively. Such legislative action violates the fundamental principal of separation of powers as contained

in Article 2, Sec. 3, of the Florida Constitution which provides:

Sec. 3 Branches of Government

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

No one branch of government has the right to invade the sphere of another branch of state government. White v. Johnson, 59 So. 2d 532 (Fla. 1952). In Simmons v. State, 36 So. 2d 207 (Fla. 1948), at 208, the Supreme Court of Florida held:

The preservation of the inherent powers of the three branches of government--legislative, executive, and judicial--free from encroachment or infringement by one upon the other, is essential to the safekeeping of the American system of constitutional rule.

This statement is found (11 Am.Jr., p.908):

"Any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional."

With respect to HB 953 (Chapter 2001-58, Sec. 1, Laws of Florida) herein, it should be noted that the

Legislature passes a statute which states:

Section 1. Section 810.015, Florida Statutes, is created to read:

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. SC 88638 be nullified. It is further the intent of the Legislature that s. 810.02(1)(a) be construed in conformity with Raleigh v. State, . . . This subsection shall operate retroactively to February 1, 2000.

This piece of legislation purports to overrule this Court and affirm certain other cases decided by the courts of Florida. If ever there was an example of one branch of government invading the sphere of another, this is it. By this legislation, the Legislature is engaging in judicial interpretation of its own prior statute retroactively. It has been held that the Separation of Powers Clause

prohibits the unlawful encroachment by one branch of government upon the powers of another branch. Simms v. Department of Health & Rehabilitative Services, 641 So. 2d 957 (Fla. 3d DCA 1994) rev. den. 649 So. 2d 870 (Fla. 1994). See also Office of the State Attorney of the Fourth Judicial Circuit of Florida v. Parrotino, 628 So. 2d 1097, 1099, (Fla. 1993); In re Alkire's Estate v. Smith, 198 So. 2d 475, 483 (Fla. 1940). In Simms, it was held that with respect to child custody proceedings, the fact that one branch of government has inherent authority does not mean that another branch does not. A test to determine same was announced by the Third District Court of Appeal in Simms, and that is to consider the "essential nature and effect of the governmental authority to be performed." id. at page 961.

The legislature's retroactivity language in the subject statute was expressly intended to overrule this Court's holding in Delgado. The operative date for retroactive application was February 1, 2000, two days prior to this Court's decision in Delgado. In State v.

Smith, 547 So. 2d 613 (Fla. 1989) this Court addressed a similar situation where the legislature attempted to overturn this Court's prior ruling in Carawan v. State, 515 So. 2d 616 (Fla. 1987). After the Carawan decision, the legislature passed an amendment to "override the interpretation [this Court] adopted in Carawan and to restore the legislative intent...pre-Carawan." Smith at 616. This Court rejected the retroactivity of the legislative enactment intended to abrogate Carawan on the basis of both ex post facto application and separation of powers prohibitions.

The essential nature of the judiciary is to interpret statutes and the constitution. Locke v. Hawkes, 595 So. 2d 32 (Fla. 1992). If we permit the Legislature to overrule our courts, particularly our Supreme Court, there is no separation of the Judicial branch from the Legislative branch of our government.

In Allen v. Butterworth, 756 So. 2d 52 (Fla.2000) this Court held that as a general rule, whatever power is conferred upon the courts by the Constitution cannot be

enlarged or abridged by the Legislature. See also Walker v. Bentley, 678 So. 2d 1265 (Fla. 2d DCA 1995) (quoting Simmons v. State, 160 Fla. 626, 628, 36 So. 2d 207, 208 (Fla. 1948): "Any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional").

It should also be noted that the case of State v. Lyons, FSC Case no. SC01-1704 is presently pending in this Court with the issue as raised in the Petitioner/State's Brief on Jurisdiction being:

whether the Second District Court of Appeal, in denying rehearing based upon an opinion of the Third District, misapprehended the import and meaning of the Florida Legislature's nullification of Delgado, and thus is in conflict with prior Florida Supreme Court precedent.

This Court has not yet ruled on the jurisdictional issue to date.

In conclusion, permitting the Legislature to overrule the Supreme Court of Florida in a matter of judicial interpretation of a statute violates the separation of powers doctrine contained in Article 2, Sec. 3 of the

Florida Constitution and renders the statute unconstitutional and inapplicable to the case at bar.

II.

ANY APPLICATION OF SECTION 810.105, FLA. STAT. (2001) IS BE VIOLATIVE OF THE EX POST FACTO CLAUSES OF THE FLORIDA CONSTITUTION AND THE CONSTITUTION OF THE UNITED STATES.

The application of Section 810.105, Fla. Stat. (2001) violates the prohibition of ex post facto laws provided in

Article I, Section 10 of the Florida Constitution and Article I, Section 10 of the United States Constitution.

Article I, Section 10 of the Florida Constitution provides:

No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

The application of this amended burglary statute to the case at bar, retroactively, constitutes an ex post facto application of this statute. The statutes in effect at the time of the commission of a crime controls as to the offenses for which the perpetrator can be convicted as well as the punishments which may be imposed. State v. Smith, 547 So. 2d 613, 616 (Fla. 1989). In the case of Richardson v. Moore, 754 So. 2d 64 (Fla. 3d DCA 2000) the Third District Court of Appeal held the application of the habitual violent felony offender statute, which was amended to add aggravated battery as a qualifying offense, to defendant convicted of aggravated battery occurring before the effective date of the amendment to have violated the prohibition against ex post facto laws.

In State v. Hootman, 709 So. 2d 1357, 1359 (Fla. 1998)

this Court held that an ex post facto laws is one which:

punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed." citing Collins v. Youngblood, 497 U.S. 37, 42, 110 S. Ct. 2715, 2719, 111 L. Ed. 2d 20 (1990)(quoting Beazell v. Ohio, 269 U.S. 167, 169-70, 46 S. Ct. 68, 68-69, 70 L. Ed. 2d 216 (1925).

See also Lynce v. Mathis, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997) wherein the United States Supreme Court held that in order for a law to be ex post facto, it must be "retrospective" meaning that it must apply to "events occurring before its enactment" and must "disadvantage the offender affected by it 'by altering the definition of criminal conduct or increasing the punishment for the crime."

According to Hootman at page 1359 the necessary inquiry is whether a change in the law "alters the definition of criminal conduct or increases the penalty by which a crime is punishable..." In the case at bar, it is

clear on its face that the Legislature is attempting to retroactively re-interpret its own statute which clearly changes the definition of the crime of burglary as interpreted by this Court in Delgado.

Mr. Ruiz entered the alleged victim's residence with consent and with her permission. In fact, she believed that he still had her key. There was no issue as to the entering. The burglary statute was interpreted by this Court in Delgado and applied to the facts of Mr. Ruiz's case by the Third District Court of Appeal, for a finding that his burglary conviction should be reversed.

The purported clarification of the legislative intent set forth in the amended burglary statute is not a clarification, but rather a substantive revision to the burglary statute which expanded the definition of burglary further than it was expanded at the time of the alleged commission of this offense. The legislature has no authority to first, trample on judicial authority, and next to make a law that effects substantive criminal law and apply it retroactively. There are at least two

constitutional prohibitions that this law violates. It is unconstitutional on its face and as applied in the case at bar.

III.

THE TRIAL COURT ERRED BY ITS DENIALS OF THE RESPONDENT'S MOTIONS FOR JUDGMENT OF ACQUITTAL ON (A): THE KIDNAPPING COUNT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION FOR KIDNAPPING WHERE THE MOVEMENT INVOLVED WAS SLIGHT AND INHERENT IN THE OTHER CRIMES CHARGED, AND (B) ON THE BURGLARY CHARGE WHERE THE EVIDENCE WAS INSUFFICIENT THAT THE RESPONDENT ENTERED WITH THE INTENT TO COMMIT A CRIME.

The Respondent was charged in a four count information with two counts of sexual battery, one count of burglary with an assault and/or battery and/or sexual battery and kidnapping with the intent to commit a sexual battery and/or felony battery. (R. 8-11). Motions for judgment of acquittal were made, renewed, and denied as to the burglary and kidnapping charges. (T. 390, 392, 438-439, 479). During the motions for judgment of acquittal the defense argued that the confinement in the kidnapping charge was insufficient to sustain a conviction for kidnapping as it was the kind inherent in the offenses.

(T. 390-392). The defense also argued when it renewed the motions for judgment of acquittal that the state should be required to elect between the sexual battery and burglary charges and the kidnapping charge. (T. 480).

With respect to the burglary charge the defense argued that there was an insufficient showing where the Respondent entered with consent, that he remained without consent or that consent was adequately withdrawn. (T. 390, 482). The court made a finding that the confinement was not merely incidental to the sexual battery and therefore denied the renewed motion for judgment of acquittal. (T. 482-482).

The Respondent was convicted of battery, a lesser included offense of the sexual batteries charged in Counts I and II. (T. 517). He was also convicted of the burglary and kidnapping charges. (T. 517).

With respect to the kidnapping conviction, the trial court erred when it denied the Respondent's motions for judgment of acquittal. In 1983, this Court in Faison v. State, 426 So. 2d 963 (Fla. 1983) adopted a test to

determine whether a defendant's actions satisfied the requirements for a conviction of kidnapping pursuant to Section 787.01, Fla. Stat. Under Faison, at page 965 this Court held:

[I]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:

(a) Must not be slight, inconsequential and merely incidental to the other crime;

(b) Must not be of the kind inherent in the nature of the other crime;

(c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

In Berry v. State, 668 So. 2d 967 (Fla. 1996) this Court again addressed the issues raised in Faison. This Court held at page 969 that "there can be no kidnapping where the only confinement involved is the sort that, though not necessary to the underlying felony, is likely to naturally accompany it." This Court noted that if

Berry and the other had confined the victims of the alleged robbery at gunpoint, or if they had moved the victims to another room in the apartment, closed the door, and ordered them not to come out, the kidnapping conviction could not stand. Berry at page 969. This Court noted that where the robber ties up the victims and leaves without untying them or locks them in a room or closet so that the confinement continued after the robbery had ceased, that would be kidnapping. Berry at page 969. The Court noted that by binding the victims, a kidnapping had occurred since tying up the victims was not necessary to commit the robbery. Barry at page 969-970.

In the case at bar, the facts constituting the alleged kidnapping and burglary are set forth in the Respondent's Statement of the Case and Facts so will not be recited herein again.

In looking at Faison and Berry and the three pronged test announced in Faison, the alleged sexual batteries (which were reduced by the jury to simple batteries) were not made easier to commit nor did they facilitate escape,

due to any movement or confinement by the Respondent. All movement in the instant case was slight, inconsequential and merely incidental to the alleged sexual batteries (as reduced to batteries). The movement testified to by Cortina was inherent in the nature of two counts of alleged sexual battery and/or burglary with the intent to commit battery. Finally, the confinement did not have any significance independent of the other crimes so that it made the other alleged crimes substantially easier of commission or substantially lessened the risk of detection. See also Jones v. State, 652 So. 2d 967 (Fla. 3d DCA, 1995) wherein the Third District Court of Appeal held that moving an alleged victim to a back office to open a safe was insufficient movement to sustain a kidnapping conviction (citing Bruce v. State, 612 So. 2d 632 (Fla. 3d DCA, 1993; Goff v. State, 616 So. 2d 551 (Fla. 2d DCA, 1993)). In Brown v. State, 719 So. 2d 955 (Fla. 4th DCA, 1998) pointing a gun at a girl and her mother, and putting them into a bedroom closet near the back of the store did not constitute kidnapping (citing

Griffin v. State, 705 So. 2d 572 (Fla. 4th DCA, 1998). While the Respondent is not unmindful of Nino v. State, 744 So. 2d 528 (Fla. 3d DCA, 1999) the facts were distinguishable from the case at bar. In Nino the alleged victim was held in a public restroom where he escaped detection by the movement of the alleged victim. In the case at bar, the Respondent was convicted of battery and not sexual battery. The movement in the instant case was inherent in the offenses of battery.

With respect to the burglary conviction, the case of Delgado v. State, should remain controlling. In Delgado at page 239, this Court recognized that when an individual enters a home with consent, and later turns violent, that this sudden turn of events does not mean that every time a crime is committed inside of a home it is also a burglary. This Court reviewed the long and tortured history of burglary cases in this state including the case of Miller v. State, 733 So. 2d 955 (Fla. 1999) and Ray v. State, 522 So. 2d 963 (Fla. 3d DCA, 1988) which discussed the "remaining in" portion of Florida's burglary statute,

Section 810.02, Fla. Stat. This Court was concerned about the situation where the suspect enters lawfully and subsequently secrets himself or herself from their host. Delgado. This Court noted that if such reasoning were to be applied, any crime, including misdemeanors, committed on another's property that would not normally qualify as felonies would suddenly become burglary. Delgado, at 239.

This Court stated that the question before the Court is "whether the Legislature intended to criminalize the particular conduct in this case as burglary when it added the phrase 'remaining in' to the burglary statute." Delgado at page 237. In answering this question, this Court determined that the "remaining in" clause and the "unless" clause of the burglary statute is limited to the defendant who "surreptitiously remains." Delgado at page 237. In Delgado it is noted (as many Florida cases hold) that consensual entry is an affirmative defense to the charge of burglary and the burden is on the defendant to establish that there was consent to enter, and that this

affirmative defense can also be established by the evidence presented by the State. Delgado at page 240. In the case at bar, it was established by the State through the testimony of Zoraya Cortina. There was no dispute that Cortina consensually permitted the Respondent to enter her apartment in order to retrieve his belongings. She testified that she looked through her peep hole, him, and let him in because he was who he was. (T. 276). Once the Respondent meets the burden of establishing consensual entry into the home, and he does not remain surreptitiously, he has shown that the evidence is insufficient to sustain a burglary conviction. In the case at bar, as in the Delgado case, the Respondent's conduct does not amount to a burglary.

Further, taking the Delgado case to its logical conclusion, the kidnapping statute does the same thing as the burglary statute, by the manner in which it has been interpreted by the courts, by turning any crime that involves movement or confinement into a kidnapping.

The kidnapping and burglary convictions must be

reversed. In the event that this Court does not believe that the kidnapping charge should be reversed as well, then the Respondent should be entitled to a new trial on the kidnapping charge without the prejudicial burglary instruction being given.

In the case at bar, the defense made a motion to have the State elect which theory it was going to proceed upon, which was denied. (T. 480). The defense objected to the "entered or remained in" portion of the jury instruction on burglary where the Appellant entered with consent. (T. 482). The jury was instructed on the charge of burglary when the motion for judgment of acquittal should have been granted. This case, like Delgado is not a case where there was merely insufficient evidence to support the burglary charge, but a "case where the jury was instructed that a defendant can be found guilty of burglary, even if the initial entry was consensual, if the victim[s] later withdrew [their] consent." Delgado at page 241. In the case at bar, the same instruction was given to the jury over the defense

objection at the charge conference. There is no way to determine how the giving of this instruction prejudiced the jury with respect to the kidnapping charge. As a result, the burglary and kidnapping convictions should be reversed. If both charges are not reversed, then there should be a new trial on either of the remaining charges as the jury was instructed on both charges.

CONCLUSION

For the foregoing reasons and authorities, Section 2001-58, Sec. 1, Laws of Florida should be held to be unconstitutional and the Respondent's convictions should be reversed.

Respectfully submitted,

BENNETT H. BRUMMER, PUBLIC
DEFENDER

Eleventh Judicial Circuit
1320 N.W. 14th Street, 5th Floor
Miami, Florida 33125

and

#304

CAIN & SNIHUR
Attorneys for Appellant
Kislak National Bank Building
1550 N.E. Miami Gardens Drive,

North Miami Beach, Florida 33179
305-956-9000

By: _____

May L. Cain
Special Assistant Public

Defender

Fla. Bar No: 301310

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant was mailed to the Frank J. Ingrassia, Esquire, Office of the Attorney General Department of Legal Affairs, 110 S.E. 6th Street - 9th Floor, Fort Lauderdale, Florida 33301 and the Office of the Public Defender, 1320 N.W. 14th Street, 5th Floor, Miami, Florida 33125 this 6th day of June, 2002.

MAY L. CAIN

CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel files this certificate of compliance and hereby certifies that the Initial Brief of the Appellant is submitted in Courier New 12 point.

May L. Cain