IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-389

THE STATE OF FLORIDA,

Petitioner,

vs.

ROBERTO RUIZ,

Respondent.

ON CERTIFIED REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

INITIAL BRIEF OF PETITIONER

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INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and the Appellee in the Third District Court of Appeal. Respondent, ROBERTO RUIZ, was the Defendant in the trial court and the Appellant in the Third District Court of Appeal. The parties will be referred to as Petitioner (or the State) and Respondent respectively. The symbol "R" denotes the record on appeal. The symbol “T” denotes minutes from the trial transcript. The letter “S” denotes the supplemental transcript.

STATEMENT OF THE CASE AND FACTS

By Amended Information dated September 15, 1999, Respondent was charged with two counts of sexual battery, one count of burglary with intent to commit a sexual battery or assault, and one count of kidnapping for crimes occurring on January 3, 1998. (R8-11). Respondent was convicted by jury verdict of two counts of battery as lesser included offenses of the two counts of sexual battery; burglary of a structure with an assault or battery; and kidnapping. (R83-86). Respondent was sentenced on November 16, 1999 to concurrent terms of 364 days for the two counts of battery and 131 months for both the burglary and

kidnapping. (R90-91,134-136). Respondent appealed his judgment and sentence to the Third District Court of Appeal on December 16, 1999. (R181).

On June 20, 2001, the Third District Court of Appeal issued an Opinion which, in pertinent part reversed and remanded Respondent's conviction for burglary. The initial ruling panel concluded that the trial court had erroneously denied Respondent's motion for a judgment of acquittal for the burglary offense based upon this Court's holding in Delgado v. State, 776 So.2d 233 (Fla. 2000). In so ruling, the panel noted an awareness to the creation of Section 810.015, Fla. Stat.(2001) which statute expressly nullified Delgado. While noting its awareness to the legislation, the initial ruling panel noted that because the instant crime was committed prior to February 1, 2000, the nullification was inapplicable.

The State moved for Rehearing, Rehearing En Banc, or alternatively, for Certification on June 28, 2001. The Court granted the motion for Rehearing En Banc on September 5, 2001 and heard this case in conjunction with Braggs v. State, No.3D99-2201. On February 13, 2002, the Third District Court of Appeal denied Rehearing in this case and certified the question of whether the governing statute set forth above legislatively overruled Delgado for crimes committed on or before July 1,

2001. See, Ruiz v. State,_____So.2d_____, 2002 WL 214760 (Fla. 3d DCA February 13, 2002). The Third District also certified the same question, En Banc, in Braggs rendered on the same date. See, Braggs v. State, ____So.2d____, 2002 WL 215474 (Fla. 3d DCA February 13, 2002). The Third District also stayed issuance of the mandate on February 27, 2002. By order rendered on February 26, 2002, this Court postponed its decision on jurisdiction and directed that the State's initial Brief be served on or before April 24, 2002 (after the grant of an extension).

The facts can be summarized as follows. Detective Hernandez investigated the assault inflicted upon Zoraya Cortina on the day after the attack. (T212-213,215). Hernandez observed blood spattered on the rug, and dresser and he indicated that Cortina's nose, eye, arm, and back were all bruised. (T214-215). Hernandez further testified that blood was spattered in a large amount. (T214).

Hernandez spoke to Respondent on January 4, 1998 and interviewed him at headquarters after administration of Miranda warnings. (T215-217). Respondent told Hernandez that he had a prior relationship with Cortina and he admitted that he went to her apartment on the day of the crime. (T218-219). Respondent denied hitting Cortina and told Hernandez that, while he noticed a bruise on Cortina's nose, she would not tell him about it.

(T219). Respondent also told Hernandez that he did not recall hitting Cortina. (T220).

On cross-examination, Hernandez stated that Respondent was arrested on January 4, 1998. (T223). Hernandez told Respondent that he was being accused of rape. (T237). Respondent told Hernandez that Cortina had called him and asked to come by her apartment to pick his things up. (T238). Respondent had moved out of the apartment on December 26, 1997. (T242).

Dr. Vivian Sanchez also testified. (T249). Dr. Sanchez was an emergency room physician at Pan American Hospital at the time of the incident. (T249). Dr. Sanchez treated Cortina on January 5, 1998 and observed a bruise to the nose and right orbital area of the eye and dried blood in Cortina's nose. (T252). X-ray examination of the nose revealed a non-displaced fracture of the tip of the nose. (T253).

Cortina testified. (T261). Cortina stated that she dated Respondent from march to December of 1997. (T266). Respondent moved in with her on October 24, 1997 and moved out in December of 1997 because they were having problems. (T267-270). Respondent called her during the early morning hours of January 3, 1998 and asked to pick up his things from the apartment. (T270-271). Cortina told him to come by in the afternoon. (T271).

Respondent arrived unexpectedly at 10 a.m. on January 3, 1998. (T275). Raul, a friend of Cortina's, had come by earlier with a loaf of bread and some milk and asked to take a nap. (T273). Cortina permitted Raul to use her bedroom. (T273).

When Respondent arrived, Cortina let him in and told him that Raul was sleeping in her bed. (T276). Respondent told Raul to get dressed and after doing so, Raul left. (T277-278). Respondent then told Cortina's son that both Respondent and Cortina needed to talk in the bedroom. (T278).

Respondent shut the bedroom door and locked it. Respondent then hit Cortina across the nose and continued hitting her. (T279). Blood began running down Cortina's nose and Respondent told her not to play behind his back. (T280). Cortina screamed for her children to call 911, but Respondent covered her mouth and then forcibly pulled her into the bathroom. (T281-282). While in the bathroom, Respondent grabbed some peroxide toothpaste, and after placing it on his penis, forced his penis into Cortina's anus. (T283-284). Respondent made it a point to tell Cortina that "this is how Fidel treats his women in Cuba." (T284). Respondent ejaculated after five or ten minutes. (T285).

Respondent then took Cortina back to the bedroom and, while covering her mouth, raped and sodomized her again in bed.

(T286-287). Respondent then proceeded to bring Cortina back to the bathroom and while holding the bathroom door from the bedroom (while Cortina was in the bathroom), called his boss to tell him that he would be late for work because Cortina had a seizure. (T288-289). Respondent told Cortina that if she called the police, he would kill her. (T290).

Cortina took a shower after Respondent left. (T290). After visiting her mother later in the day and advising her what had taken place, Cortina reported the incident on the next morning. (T292-293).[1] Cortina was examined by Dr. Rao at the Jackson Memorial Rape Treatment Center on January 4, 1998. (T360-361). The examination revealed facial injuries and otherwise noted a normal pelvic and anal examination. (T366-367,370).

After the State rested, Respondent moved for a judgment of acquittal with respect to both the burglary and kidnapping counts. (T390). The trial court denied the motion, noting especially for the kidnapping that Respondent had moved Cortina

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[1]Cortina's testimony was corroborated to a large degree from the testimony of her son. (S3). Cortina's son was five years old at the time of the incident. He identified Respondent and stated that Respondent went into the bedroom with his mother and he heard fighting. (S5,8-9). Cortina told him to call 911, but he did not know how to do so. (S9). Cortina's son also stated that his mother was bleeding from the nose when she left the bedroom. (S10). This testimony was presented by videotape and Cortina's son told the trial judge that he knew the difference between the truth and lies. (S3-4).

from both the bedroom to the bathroom, and back to the bedroom, and then back to the bathroom, all of which helped to both keep her confined and prevent detection. (T393).

Respondent took the stand in his defense. (T399). Respondent testified that he moved in with Cortina in October of 1997 and moved out in December of 1997. (T403). Respondent noted that he left some of his belongings when he left and Cortina called him to retrieve them. (T406). Respondent picked up these belongings on the day in question and he arrived at 10 a.m. at which time Cortina let him into the apartment. (T408,410). Respondent observed a naked man in the bedroom and the man left after getting dressed. (T411-414). After placing some of his things in his car, Respondent testified that he was invited into the bedroom by Cortina. (T414).

Cortina told Respondent that she was sorry, but Respondent then hit Cortina in the face two or three times. (T415-416). Respondent stated that he did not barricade the bedroom or bathroom door and that he made no threats and did not engage in sex. (T416-418). The authorities questioned Respondent the next day. (T419). Respondent denied that he had either raped, burglarized, or engaged in the kidnapping of Cortina. (T422). Respondent did acknowledge that he lied to Detective Hernandez about not remembering if he had hit Cortina. (T423).

Afer the defense rested, Respondent renewed his motion for a judgment of acquittal for the kidnapping count by arguing that the acts have to be separate and apart from the sexual batteries or burglaries. (T480-481). The trial court again denied the motion. (T482-483).

As previously noted, the jury returned a verdict convicting Respondent of two counts of battery as a lesser offense of sexual battery, and guilty as charged for burglary and kidnapping. The Third District Court of Appeal reversed the conviction for burglary and certified the following question to this Court as one of great public importance:

WHETHER SECTION ONE OF CHAPTER 2001-58, LAWS OF FLORIDA, HAS LEGISLATIVELY OVERRULED DELGADO V. STATE, 776 So. 2d 233 (Fla. 2000) FOR CRIMES COMMITTED ON OR BEFORE JULY 1, 2001.

POINT ON APPEAL

I. WHETHER SECTION ONE OF CHAPTER 2001-58, LAWS OF FLORIDA, HAS LEGISLATIVELY OVERRULED DELGADO V. STATE, 776 So. 2d 233 (Fla. 2000) FOR CRIMES COMMITTED ON OR BEFORE JULY 1, 2001?

SUMMARY OF THE ARGUMENT

Chapter 2001-58, Section 1, Laws of Florida clearly applies to this case. In this piece of legislation, the Legislature nullified the holding of this Court in Delgado v. State, 776 So.2d 233,240 (Fla. 2000). The nullification of Delgado does not, as Respondent now urges, run afoul of the Separation of Powers doctrine. The nullification merely restored the state of the law to what it had been prior to Delgado for crimes of burglary committed on or before July 1, 2001. This law was supported, as reflected in the legislation itself, by a multitude a case law precedent from both this Court (dating back to 1983) and that of the Third District Court of Appeal as rendered in Ray v. State, 522 So.2d 963 (Fla. 3d DCA 1988). The Legislature merely acted to swiftly respond to this Court's apparent misinterpretation of legislative intent for "consent entry" burglaries by nullifying Delgado in the first legislative session after the decision became final.

Additionally, even if this Court were to decide the first point against the State, it is submitted that this Court should recede from Delgado. Both settled principles of stare decisis and the now expressed intent of the Legislature set forth in Chapter 2001-58, run afoul of the conclusion of the four member majority of this Court in Delgado. In light of these facts, this Court should reexamine the soundness of its holding in

Delgado and follow the well reasoned dissenting opinion of Chief Justice Wells as outlined in the Delgado dissent.

Finally, there is no violation of the Ex Post Facto Clause in applying the legislation to this case. Respondent's conduct amounted to a crime under case law precedent of both this Court and the Third District's precedent in Ray at the time of Respondent's trial. Indeed, all the legislation did was to restore the law of burglary to what it was before being changed by the Delgado opinion. Any "decriminalization" of conduct flowing from Delgado resulted from the action of this Court and not the passage of legislation. A legislative restoration of the law is not a change in the law nor can it be interpreted as an increase in punishment for the crime of burglary. Ex Post Facto Clause analysis is inapplicable because the legislature merely "recriminalized," as supported by 17 years of prior judicial precedent, what the Delgado majority "decriminalized."

ARGUMENT

I. SECTION ONE OF CHAPTER 2001-58, LAWS OF FLORIDA, HAS LEGISLATIVELY OVERRULED DELGADO V. STATE, 776 So. 2d 233 (Fla. 2000) FOR CRIMES COMMITTED ON OR BEFORE JULY 1, 2001.

A. LEGISLATIVE INTENT

The initial directive set forth by the question certified by the Third District Court of Appeal is whether Section 1 of Chapter 2001-58 has legislatively overruled Delgado. The State submits that it does. Respondent argued in the Third District Court of Appeal that application of the enactment here runs afoul of the separation of powers doctrine. This argument, however, ignores that the Delgado decision overruled 17 years of prior judicial precedent interpreting the burglary statute. The Legislature never attempted to abrogate any of those rulings because they were consistent with the legislative intent.

On May 25, 2001, the Governor signed HB 953. HB 953 creates Section 810.015, Fla. Stat.(2001), providing for a retroactive operation to February 1, 2000 (two days prior to the rendering of the initial Delgado decision)[2]; and further clarifying the definition of burglary to nullify the holding of Delgado. HB 953 further prospectively amends the definition of burglary set forth in Section 810.02, for offenses committed subsequent to July 1, 2001. Both of these actions must be understood to

[2]The initial opinion of this Court in Delgado was rendered on February 3, 2000. See, Delgado v. State, ___So.2d___, 25 Fla. L. Weekly S79 (Fla. February 3, 2000).

properly assess the scope of the enactment underlying HB 953.

The prospective amendment, effective subsequent to July 1, 2001, amends the definition of burglary to include within the definition of burglary, notwithstanding a licensed or invited entry into a dwelling, structure or conveyance, one who remains either (a) surreptitiously, with the intent to commit an offense therein; (b) after permission to remain therein has been withdrawn, with intent to commit an offense therein; or (c) to commit or attempt to commit a designated forcible felony defined under Section 776.08. This measure is obviously designed to encompass certain culpable conduct where the actor, while initially invited or licensed to be in the structure, nevertheless remains therein either surreptitiously with an intent to commit an offense; after permission has been withdrawn, with an intent to commit an offense; or in attempting or committing a forcible felony defined under Section 776.08.

In addition to prospectively amending the burglary statute to encompass the type of conduct set forth above, the Legislation also creates Section 810.015, Fla. Stat.(2001) to cover offenses committed on or before July 1, 2001, including the offense committed in this case. Section 810.015 contains a retroactive date to February 1, 2000 in order to nullify the holding of Delgado. The February 1, 2000 date is significant,

because it reflects a time period two days prior to the initial rendering of the Delgado decision on February 3, 2000. The purpose of HB 953 is set forth in the House Summary provided with the legislation. The clearly indicated legislative purpose was to revise the definition and criteria of burglary to correct a court opinion (i.e., Delgado) determined to be contrary to legislative intent and prior Florida case law. HB 953 also retains the current definition of burglary for offenses committed on or before July 1, 2001 (such as that committed by Defendant here) and revises the definition for offenses committed after July 1, 2001, to clarify the distinction between merely entering a dwelling, structure, or conveyance with intent to commit an offense and remaining, surreptitiously or after permission to remain has been withdrawn.

The Third District's initial panel Opinion in this case expressly noted that Delgado was nullified, but noted that the nullification was limited to February 1, 2000, and, therefore, not applicable because the crime here occurred prior to that date.[3] The initial panel Opinion simply misconstrued the

[3]February 1, 2000 was the selected date because the Florida Supreme Court had noted that its rule would not apply retroactively to cases that were final before it was issued. See, Delgado v. State, 776 So.2d 233,241 (Fla. 2000). The February 1, 2000 operative date also reflects a time period two days prior to the rendering of the initial decision in Delgado.

purpose and meaning of the legislation. It is clear from the statute that the Legislature intended that Delgado be a nullity (it simply does not exist), that the statute as passed be retroactive to February 1, 2000, two days before the initial Delgado decision was decided. The obvious purpose was to return the state of the law to what it had been prior to the time when Delgado was decided. This is so because the legislation makes crystal clear that this Court was incorrect in assessing legislative intent in the Delgado decision.

This obvious interpretation is clearly supported from the examination of the legislation itself:

"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 SC88638 be nullified. It is

further the intent of the Legislature that S. 810.02(1)(a) be construed in conformity with Raleigh v. State, 705 So.2d 1324 (Fla. 1997); Jimenez v. State, 703 So.2d 437 (Fla. 1997); Robertson v. State, 699 So.2d 1343 (Fla. 1997); Routly v. State, 440 So.2d 1257 (Fla. 1983); and Ray v. State, 522 So.2d 963 (Fla. 3d DCA 1988). This subsection shall operate retroactively to February 1, 2000."

The Third District took up the issue En Banc in Braggs, and concluded, albeit incorrectly, that Section 1 of Chapter 2001-58 is merely a statement of intent that the Delgado decision should be nullified.[4] See, Braggs v. State, supra.

Through the process of nullification, the Legislature made it clear that this Court misinterpreted legislative intent in the Delgado ruling. This Court has also acknowledged this fact in Jimenez v. State,____So.2d ____, 26 Fla. L. Weekly S625 (Fla. September 26, 2001). The Legislature clarified the burglary statute at the first full legislative session after Delgado was decided (and which decision changed the long standing interpretation of the burglary statute under prior case law

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[4]The Third District did, however, certify the issue of whether the operative legislation overruled Delgado and all of the Opinions, majority, concurring, and dissenting all seemed to agree that this Court was quite likely to recede from Delgado in light of Jimenez v. State, ___So.2d____, 26 Fla. L. Weekly S625 (Fla. September 26, 2001).

cited in the legislation here). The Legislature did not change the text of the burglary statute for crimes committed before the clarification. Instead, with respect to burglaries committed on or before July 1, 2001, the Legislature only enacted Section 810.015, Fla. Stat. (2001), which provides statements of legislative intent regarding the meaning of the text of the burglary statute in effect at the time when the crime was committed. The Legislature acted with promptness and specificity by making it abundantly clear that this Court had misconstrued legislative intent and that a defendant did commit a burglary by remaining in a dwelling after beginning a violent attack on its occupants. As such, Chapter 2001-58, Section 1, Laws of Florida clearly applies to this case.

The State recognizes, of course, that Respondent argues that the Legislature has acted in violation of the Separation of Powers doctrine in enacting this legislation. This argument misses the mark. The legislation merely nullifies the Delgado decision. Delgado overruled 17 years of prior legal precedent running directly contrary to Delgado's holding. This fact was also noted in the dissenting opinion of Chief Justice Wells in Delgado itself.[5] The Legislature, obviously aware of the string

[5]As noted in Sub-Point B, infra, the dissenting Opinion of Chief Justice Wells, coupled with the legislative declaration of intent, provides very strong policy reasons for receding

of precedent previously designated herein, never needed to clarify its intent during this time frame because the decisions properly applied legislative intent. It was only after Delgado was rendered, a decision that admittedly overruled such prior precedent, that the Legislature was called upon to rectify the issue. It did so at the very first session after Delgado had become final. The legislature had no reason to clarify its intent after the rulings prior to Delgado because all of those decisions correctly applied the legislative intent. Indeed, if any such encroachment incurred between the two branches of government, a much stronger case could be made that it was the slim four to three majority of Delgado that encroached upon the Legislature in overruling 17 years of prior judicial precedent to the contrary. Of course, this Court's majority did not have the express declaration of legislative intent that now is set forth in Section 1 of Chapter 2001-58. This Court does, however, have that express declaration now. In fact, as recent as September 26, 2001, this Court noted that it would not apply Delgado retroactively. See, Jimenez v. State, _____So.2d____, 26 Fla. L. Weekly S625. This Court further noted in Jimenez that Chapter 2001-58, Section 1 had resulted in the Legislature declaring that the Supreme Court's interpretation of the

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from Delgado.

burglary statute in Jimenez v. State, 703 So.2d 437 (Fla. 1997), was in harmony with legislative intent.[6] In sum, therefore, Chapter 2001-58, Section 1 clearly applies to this case and its application is not in contravention of the Separation of Powers doctrine.

B. THIS COURT SHOULD RECEDE FROM DELGADO.

Even if this Court concludes that the legislation itself cannot directly nullify Delgado the State submits that this Court should recede from its holding. The underpinnings of Delgado are based upon an assessment of legislative intent surrounding the interpretation of the "remaining in" section of the burglary statute. The Delgado majority construed that intent to apply only in situations where the "remaining in" was done surreptitiously. In deciding Delgado, this Court's four member majority receded from prior precedent of this Court and acknowledged that the decision was not undertaken lightly. The rationale for the ruling, however, rested on a now exposed erroneous assessment of legislative intent. By reason of this fact, the Court should recede from Delgado.

As noted by Chief Justice Wells in dissent in Delgado, the law with respect to the remaining in portion of the burglary

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[6]The State submits that this pronouncement in Jimenez, albeit in dicta, strongly indicates that Chapter 2001-58, Section 1, Laws of Florida should be upheld by this Court.

statute had been settled in 1983 in Routly v. State, 440 So.2d 1257 (Fla. 1983). Delgado v. State, supra, 776 So.2d at p.242 (Wells, C.J., dissenting). With respect to the withdrawal of the "remaining in" consent, both Ray v. State, 522 So.2d 963,965 (Fla. 3d DCA 1988) and this Court's decisions in Raleigh v. State, 705 So.2d 1324,1329 (Fla. 1997); Jimenez v. State, 703 So.2d 437,440 (Fla. 1997) and Robertson v. State, 699 So.2d 1343,1346-1347 (Fla. 1997) all supported application of the law as it existed for withdrawal of consent prior to Delgado. It is a basic rationale of stare decisis, that the unsettling of well established legal principles works an extreme disruption in the criminal justice system. The Delgado majority obviously considered this fact since it noted that it did not undertake to recede from this line of precedent lightly. Nevertheless, it did so under the rationale that the legislative intent supported its ruling, a premise that the Legislature quickly dispelled as contrary to that intent in its swift nullification of Delgado. Such an act calls for a reexamination of the issue and upon this assessment, the State submits that the dissenting opinion of Chief Justice Wells persuasively sets forth grounds for receding from Delgado.

Additionally, this Court's recent ruling in Jimenez v. State, supra, 26 Fla. L. Weekly S625, clearly acknowledged that

it had misconstrued the legislative intent of the burglary statute in deciding Delgado. The State submits that this Court has already implicitly receded from Delgado in Jimenez although it did not expressly state so therein. Of course, the Court herein did not have to expressly state so in Jimenez because it also ruled that Delgado would not be applied retroactively. This Court did, however, expressly offer the legislative intent comment as an additional basis for denying Jimenez relief. In light of its pronouncement in Jimenez, this Court should directly and expressly recede from Delgado now. By doing so, this Court can give direct effect to the true intent of the Legislature and be assured that it has not misconstrued that intent because the Legislature has now spoken.

The State further notes that there is an additional policy reason for receding and upholding Defendant's burglary conviction here. Defendant was charged, convicted, and sentenced for the burglary well before either Delgado decision was rendered. This case, therefore, was in the appellate pipeline when both Delgado I and Delgado II were rendered. This case was also in the same appellate pipeline when the Legislature clarified its intent and nullified Delgado. It makes no sense, from a policy standpoint, that had the appellate process concluded a little faster in this case (i.e., before the

Delgado decisions were rendered), Defendant's burglary conviction would stand. Conversely, the State has now lost that burglary conviction based upon this Court's inaccurate assessment of the Legislature's expressed consent of the subject statute. In light of these facts, this Court should recede from Delgado.

C. EX POST FACTO CLAUSE ANALYSIS.

An issue also arose in the Third District as to whether application of Chapter 2001-58, Section 1, Laws of Florida to this case would violate the Ex Post Facto Clause. Respondent argued that it did and the concurring Opinion of Chief Judge Schwartz, joined by Judge Jorgenson, concluded that it did. The State submits that this argument is clearly without merit.

An Ex Post Facto law is one which criminalizes or punishes more severely, conduct which occurred before the existence of the law. U.S. Const., Art. I, Section 9; Fla. Const. Art. I, Section 10. Both utilize a two prong test to assess a violation: first, whether the law is retrospective in effect; and second, whether the law alters the definition of criminal conduct or increases the penalty by which a crime is punishable. California Dept. of Corrections v. Morales, 514 U.S. 499 (1995);

Gwong v. Singletary, 683 So.2d 112 (Fla. 1996). Here, while the enactment has a component applied retroactively, it does nothing more than to restore the law of burglary to what it was before being altered by Delgado. The "decriminalization" of conduct occurred as a result of Court action, not the passage of legislation. A legislative restoration of law should not be reasonably construed as a legislative change in law which criminalizes lawful conduct. Likewise, it could not be reasonably construed as an increase in punishment for the conduct proscribed. In short, Ex Post Facto analysis is inapplicable because the Legislature is merely "recriminalizing" what the Delgado majority "decriminalized."

Because the amendment here was enacted immediately after this Court had revisited the interpretation of the subject burglary statute, a court can consider the amendment as a legislative interpretation of the original law and not as a substantive change. Lowry v. Parole and Probation Comm'n, 473 So.2d 1248,1250 (Fla. 1985).

A parallel analogy can be illustrated from Trotter v. State, 690 So.2d 1234 (Fla. 1996). In Trotter's original direct appeal of a death penalty sentence, this Court reversed the death sentence, finding that being on community control did not satisfy the under a sentence of imprisonment aggravator.

Trotter v. State, 576 So.2d 691,694 (Fla. 1990). Immediately after the 1990 decision, the Legislature amended the applicable statute, Section 921.141(5)(a), Fla. Stat.(1991), to provide that the under a sentence aggravator did include being on community control. At resentencing, the trial court again found this aggravator applicable to Trotter. On appeal, this Court rejected the contention that the application of this aggravator violated the Ex Post Facto Clause because it was a refinement to the statute; not a substantive change. Trotter v. State, supra, 690 So.2d at p.1237. In so holding, this Court noted that given the specificity and promptness of the amendment, not applying the amendment would result in manifest injustice to the State by perpetuating an anomalous and incorrect application of the statute.

Another excellent analogy supporting the State's position on this point is illustrated in State v. Lanier, 464 So.2d 1192 (Fla. 1985). In Lanier, the defendant was charged with unlawful sexual assault upon a child under the age of 14, by engaging in sexual intercourse with the child. The Third District Court of Appeal dismissed the charges on the grounds that the applicable statute did not apply to consensual acts of sexual intercourse. Lanier v. State, 443 So.2d 178 (Fla. 3d DCA 1983). After the decision of the Third District Court of Appeal, the Legislature

amended the governing statue to cover consensual intercourse with a minor as culpable conduct. This Court's decision rendered after the intervening legislation noted that because the Legislature clarified existing law, the defendant was required to answer to the criminal charges and the District Court of Appeal decision was quashed. State v. Lanier, supra, 464 So.2d at p.1193. The same rationale should apply here.

Here, as previously described, the Legislature acted with swift promptness and specificity in correcting what it determined to be an obviously incorrect assessment of legislative intent under the Delgado holding. It enacted the subject legislation to correct and clarify that interpretation and nullified the ruling in Delgado to wipe it off the books. There is no Ex Post Facto prohibition in doing so.

CONCLUSION

WHEREFORE, based upon the foregoing argument and citations of authority, the State respectfully requests that this Court disapprove of the decision of the Third District Court of Appeal, answer the certified question in the affirmative and recede from Delgado.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **INITIAL BRIEF OF PETITIONER** was mailed to **MAY L. CAIN, ESQ.**, Kislak National Bank Building, 1550 N.E. Miami Gardens Drive, Suite#304, North Miami Beach, FL., 33179, on this ___ day of April, 2002.

_____

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CERTIFICATE OF TYPE SIZE

I HEREBY CERTIFY that 12 point Courier New type size was utilized to prepare this Brief in full compliance with Fla. R. App. P. 9.210(a)(2).

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FRANK J. INGRASSIA