

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

REPLY 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.

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 Justice Wells as outlined in the Delgado dissent. Respondent ignores this argument advanced by the State.

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."

Finally, there is no merit to the issue raised that the kidnapping conviction must be reversed. First, this Court lacks jurisdiction to determine this issue as the question certified to the Court is raised solely with respect to whether Chapter 2001-58, Laws of Florida has legislatively overruled Delgado v. State, 776 So.2d 233 (Fla. 2000). This being the case, the kidnapping issue simply is not before the Court. In any event, the conviction for kidnapping is supported under both the test set forth in Faison v. State, 426 So.2d 963 (Fla. 1983) and the fact that the charging information for kidnapping here alleges that the conduct both facilitated the commission of the sexual battery and burglary felonies and that the conduct inflicted

bodily harm or terrorized the victim.

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 argues that the legislation violates the separation of powers doctrine. The fallacy in this argument is that it is the legislature which defines crimes and the courts that interpret the legislation. Simply stated, the Legislature simply set forth its clear intent in the enactment to let the Court know that it was wrong in assessing intent. The separation of powers argument also 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.

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, 810 So.2d 511 (Fla. 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 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 Separation of Powers 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 Justice Wells in Delgado itself.¹ The Legislature, obviously aware of the string 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

¹As noted in Sub-Point B, infra, the dissenting Opinion of Justice Wells, coupled with the legislative declaration of intent, provides very strong policy reasons for receding from Delgado.

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, supra. 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 burglary statute in Jimenez v. State, 703 So.2d 437 (Fla. 1997), was in harmony with legislative intent.² 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. Respondent ignores the State's argument in this respect and failed to even address it in the answer brief. The underpinnings of Delgado are based upon an assessment of legislative intent surrounding the interpretation of the "remaining in" section of the burglary

²The 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. 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 Justice Wells in dissent in Delgado, the law with respect to the remaining in portion of the burglary 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 Justice Wells persuasively sets forth grounds for receding from Delgado.

Additionally, this Court's recent ruling in Jimenez v. State, supra, 810 So.2d 811, 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.

Respondent further argues that the legislation violates the Ex Post Facto Clause. 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).

Respondent has made no attempt to distinguish the authority that the State relies upon to support its argument that the legislation is not an Ex Post Facto violation. See, Trotter v. State, 690 So.2d 1234 (Fla. 1996) and State v. Lanier, 464 So.2d 1192 (Fla. 1985). The Court is referred to the State's Initial Brief at pages 21-22 for an excellent discussion of these two cases.

II. THIS COURT LACKS JURISDICTION TO HEAR THE ISSUES RAISED WITH RESPECT TO THE KIDNAPPING CONVICTION AND THE ISSUES ARE WITHOUT MERIT.

Respondent further argues that the kidnapping conviction must be reversed because there was insufficient evidence to support it under Faison and that the State must elect between kidnapping and the other felonies. This issue is without merit.

First, this Court lacks jurisdiction to hear this particular issue. Article V, Section 3(b)(4) of the Florida Constitution vests this Court with discretionary jurisdiction to review any decision of the District Court of Appeal that passes upon a question certified by it to be of great public importance. See also, Weiland v. State, 732 So.2d 1044 (Fla. 1999). Here, that question is solely related to whether the legislation at issue overrules Delgado. That issue relates only to the burglary

conviction.

In any event, the issue is without merit. The State charged Respondent with kidnapping under conduct that both facilitated a sexual battery or burglary and conduct that inflicted bodily harm or terror upon the victim. (R11). Section 787.01, Fla. Stat. 91997) is the governing statute for kidnapping and it provides, inter alia:

"(1)(a) The term 'kidnapping' means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to:

* * *

2. Commit or facilitate commission of any felony.

3. Inflict bodily harm upon or to terrorize the victim or another person."

Intent to inflict bodily harm or to terrorize the victim (as is reflected by the facts here) since the victim's nose was broken and she was raped and sodomized against her will, all of which while she was confined in her bedroom and bathroom and isolated from help. Any one of these facts satisfies subsection 3 of the statute set forth above and the Faison test does not apply to the "terrorize" subsection of the kidnapping statute. See, Carter v. State, 762 So.2d 1024 (Fla. 3d DCA 2000); Bedford v. State, 589 So.2d 245,251 (Fla. 1991). For this reason alone,

the motion for a judgment of acquittal was properly denied for the kidnapping count.

There is also sufficient evidence under the Faison test. The record reveals, in a light most favorable to the State, that Respondent confined the victim to her bedroom and locked the door. (T279). He then began to strike her face. (T279). While Cortina screamed, Respondent moved her into the bathroom, a more secluded area, and then sexually assaulted her. (T282-284). After this act, he moved Cortina back into the bedroom and repeated the act. (T286). Later, when he called his employer, he brought Cortina back into the bathroom and locked her in by forcibly holding the door in the bedroom while he made the call. (T288-289). All of these acts made it more likely that the acts of violence and confinement would not be detected. They also support denying the motion for judgment of acquittal under existing cases. See, Carter v. State, supra (defendant robbed victim at gunpoint in public exercise area of apartment and then directed her to an area three feet away in nearby hallway to avoid detection); Faison v. State, supra (defendant dragged one of victims from front window desk to rear of office where sexual assault occurred and then forced victim into nearby restroom for an additional act of rape); Nino v. State, 744 So.2d 528 (Fla. 3d DCA 1999) (defendant forced victim from

hallway of a fast food restaurant into restroom to accomplish sexual assault); Lamarca v. State, 515 So.2d 309 (Fla. 3d DCA 1987)(defendant entered ladies room in a store and forced victim into restroom stall to commit sexual assault). Accordingly, the motion for a judgment of acquittal was properly denied for the kidnapping count.

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 **REPLY 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 July, 2002.

FRANK J. INGRASSIA

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).

FRANK J. INGRASSIA

