

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-524

LOWER CASE NO.: 3D99-2201

STATE OF FLORIDA,

Petitioner,

-vs-

CURLEY BRAGGS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, **THE STATE OF FLORIDA**, petitions for discretionary review of a decision of the Third District Court of Appeal certified as having passed on a question of great public importance. The State of Florida was the appellee in the district court and Respondent, **CURLEY BRAGGS**, was the Appellant. In this brief, the parties will be referred to as they appear before this Court. The symbol "R" refers to the record on appeal and the symbol "T" refers to the transcript of Respondent's trial. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On May 10, 1995, Petitioner was indicted for Burglary with an Assault or Battery, First Degree Murder and Armed Robbery. (R. Vol. 1, p. 4-6). Petitioner entered a not guilty and the case proceeded to trial by jury.

On April 19, 1995 Omni Stevenson returned home from school between four and five o'clock in the afternoon to find her grandmother, Ruby Stevenson, laying dead in a pool of blood on her bathroom floor. (T. Vol. 5, p. 960, 963-969). Prior to discovering her grandmother's body, Omni let herself into the house through the two front doors, one was a bar-door and the other was the inside front door. (T. Vol. 5, p. 964). The inside front door was usually open as Ruby Stevenson would normally be standing by that door awaiting Omni's return from school. (T. Vol. 5, p. 964). Omni noticed that her grandmother's bedroom had been ransacked. (T. Vol. 5, p. 965-966). Omni noticed that a calendar that her grandmother usually kept pinned on the side of her armoire was lying on the bed. (T. Vol. 5, p. 966). On discovering her grandmother's body, Omni ran next door to her Aunt Casandra's house. (T. Vol. 5, p. 969). Although she did not know it then, Omni's bicycle was missing. (T. Vol. 5, p. 961-962, 969-970).

Casandra Andrews was asleep when Omni came banging on her

door. (T. Vol. 5, p. 975, 999-1000). She woke up "real scared" and ran to the door. (T. Vol. 5, p. 1000). Omni told her to come quick because "Grandmama is dead." She also told her to call 911. (T. Vol. 5, p. 1000). Casandra called 911 and followed Omni next door to her mother's house. (T. Vol. 5, p. 1000).

Casandra found her mother lying on the bathroom floor. (T. Vol. 6, p. 1002). Although she knew that her mother was dead, Casandra sat on the toilet seat and began to talk to her mother and stroke her arm. (T. Vol. 6, p. 1002-1003). She got a towel and covered her mother's body. (T. Vol. 6, p. 1004).

Casandra noticed that her mother's bedroom, which was usually kept "nice and immaculate", had been ransacked. (T. Vol. 6, p. 1001). She noticed that her mother's jewelry box was lying empty on the floor. (T. Vol. 6, p. 1009, 1010-1011). Omni's bedroom was also in disarray. (T. Vol. 6, p. 1010).

Ms. Andrews testified that she last saw her mother between eight and eight-fifteen that morning when she went to collect her son. (T. Vol. 5, p. 985-986). She testified that at that time, her mother was dressed in shorts and a T-shirt and was cleaning the house. (T. Vol. 5, p. 986-987).

Mrs. Andrews testified that her mother was very security conscious. She had burglar bars around all the windows,

including the sliding glass doors. (T. Vol. 5, p. 980, 987-988). There was a gated door at the front of the house which her mother always kept locked. (T, Vol. 5, p. 980). Ms. Stevenson did not let strangers into her home. (T. Vol. 5, p. 988). She would normally greet visitors through the locked gated front entrance. (T. Vol. 5, p. 988). There was no sign of forced entry into the house. (T. Vol. 6, p. 1094). The house keys were under Ms. Stevenson's body. (T. Vol. 6, p. 1021).

Mrs. Andrews testified that her mother owned a lot of jewelry which she kept in the jewelry box in her bedroom. (T. Vol. 5, p. 982, 1011). She testified that her mother was not in the habit of giving her jewelry away, but that she sometimes loaned some pieces out. (T. Vol. 6, p. 1012, 1015). Mrs. Andrews identified some pieces of jewelry admitted into evidence as belonging to her mother. (T. Vol. 6, p. 1016).

Mrs. Andrews testified further that her mother kept a calendar tacked onto the side of the armoire in her bedroom. (T. Vol. 6, p. 1013). She testified that her mother occasionally loaned money out to people. (T. Vol. 6, p. 1012). She testified that her mother would make a notation of the name, date and amount loaned. (T. Vol. 6, p. 1012-1013). She testified that when the money was repaid, her mother would write

"PD" or "paid" by the name. (T. Vol. 6, p. 1015). Her mother would record any loan of jewelry in the same manner. (T. Vol. 6, p. 1015).

Mrs. Andrews identified the calendar admitted into evidence as belonging to her mother. (T. Vol. 6, p. 1013-1014). Mrs. Andrews testified that her mother's calendar reflected that on March 27, 1995, she made a one hundred dollar loan to "Nokey." (T. Vol. 6, p. 1014). She testified that Nokey's full name is Curly Nokey Braggs. (T. Vol. 6, p. 1017). She identified Petitioner as Nokey. (T. Vol. 6, p. 1017).

On cross-examination Mrs. Andrews testified that she had an "uneasy" feeling that something was "going on" the night before her mother was killed. (T. Vol. 6, p. 1033). She testified that while she was stroking her mother's arm "something" told her that Petitioner killed her mother. (T. Vol. 6, p. 1033). Mrs. Andrews admitted that on the same day that her mother was killed she told her sister, Jeanette, and her husband, Israel Andrews, Jr., that Petitioner killed her mother. (T. Vol. 6, p. 1034-1035). She admitted that she told the detective that she thought that Petitioner was the one who killed her mother. (T. Vol. 6, p. 1036).

In explaining Petitioner's relationship to her family, Mrs. Andrews testified that her grandfather was first married to

Charlena before he married Ruby, her mother. (T. Vol. 6, p. 1036). Her grandfather and Charlena had a daughter together, Cornell. Cornell married Curly Braggs, Senior. Petitioner was the product of that marriage. (T. Vol. 6, p. 1036-1037). Mrs. Andrews testified that at the time her mother told her of Petitioner's existence and wanted her to meet Petitioner, she did not want to be bothered. She testified that she did not want Petitioner referring to her mother as "Grandmother." (T. Vol. 6, p. 1039-1043). She admitted that she had no evidence that Petitioner was involved in her mother's murder. (T. Vol. 6, p. 1043).

Officer Rivera responded to the 911 call. (T. Vol. 6, p. 1055-1058). Omni was in front of the house screaming hysterically. (T. Vol. 6, p. 1058). Casandra showed him the body. (T. Vol. 6, p. 1059).

There was a conspicuous gaping wound in the front of Ruby Stevenson's neck. (T. Vol. 7, p. 1218, 1226). The wound extended from the middle of her neck all the way across to the left side of her neck. (T. Vol. 7, p. 1226). The muscle on the left side of her neck was completely severed. (T. Vol. 7, p. 1226). There was also a stab wound on the left side of the back of her neck. (T. Vol. 7, p. 1227, 1234). She had no defensive wounds. (T. Vol. 7, p. 1245). Ms. Stevenson was stabbed in the

back of her neck as she stood at the bathroom sink. Her throat was sliced open when she fell to the floor. (T. Vol. 7, p. 1254-1257). Ms. Stevenson could have been killed with a folding knife that was found in an eye glasses case on the bed in the bedroom that Ms. Stevenson used for storage. (T. Vol. 7, p. 1203-1206, 1251-1252). Ms. Stevenson was killed during the daylight hours. (T. Vol. 7, p. 10).

Numerous fingerprints were lifted from the crime scene, including from the toilet seat. None of the fingerprints matched Ms. Stevenson and none of them matched Petitioner. (T. Vol. 8, p. 1501-1504). The DNA analyses of the blood samples taken from the crime scene matched Ms. Stevenson's DNA, except for one sample. (T. Vol. 8, p. 1586-1590). All of the samples taken from the bathroom matched Ms. Stevenson. (T. Vol. 8, p. 1586-1589). Samples taken from drops of blood found by Ms. Stevenson's bed, on the floor outside her bedroom and on the floor in the hallway and outside the door of the spare bedroom used for storage all matched Ms. Stevenson. (T. Vol. 8, p. 1589-1590).

The DNA analysis of a sample taken from the hallway floor south of the bathroom doorway indicated that there was a mixture of Ms. Stevenson's DNA with a male's DNA. Petitioner was not the source of that DNA. (T. Vol. 8, p. 1590-1591). However,

the DNA expert testified that it was impossible to discern the type of DNA -- he could not tell whether it was from saliva, sweat or other bodily fluid or tissue. (T. Vol. 8, p. 1591-1593).

Detective Surman testified that several police officers and the fire rescue team had been through the crime scene before it was cordoned off. (T. Vol. 9, p. 1606-1608).

Charles Maez lived in close proximity to Ms. Stevenson. (T. Vol. 7, p. 1297). He also lived about one and a half blocks from Petitioner's relatives. (T. Vol. 7, p. 1290, 1299). Over the years, Mr. Maez would frequently see Petitioner walking from the bus stop, pass his house, to visit his relatives. (T. Vol. 7, p. 1299-1300).

On the day that Ms. Stevenson was killed, Mr. Maez saw Petitioner riding a girl's bicycle through a shortcut past his house. (T. Vol. 7, p. 1300, 1302). Petitioner was traveling in the direction from Ms. Stevenson's house. (T. Vol. 7, p. 1301). According to Mr. Maez, Petitioner was shirtless and looked nervous, he was sweaty and looked "bug-eyed" and "stressed out." (T. Vol. 7, p. 1300, 1303-1304). They greeted each other and Petitioner dismounted the bicycle, laid it by the fence and walked off into a wooded area close to Mr. Maez's house. (T. Vol. 7, p. 1304-1305). Mr. Maez testified that Petitioner

removed a brown bag from his pants pocket and placed it by the corner of the fence. (T. Vol. 7, p. 1306). Mr. Maez could hear the contents of the bag jingling, like metal hitting metal. (T. Vol. 7, p. 1306-1307). Petitioner returned, picked up the bicycle and rode off. (T. Vol. 7, p. 1309). Mr. Maez was not too curious about the bag and did not look into it. (T. Vol. 7, p. 1309).

On cross-examination Mr. Maez was impeached with his deposition testimony wherein he stated that Petitioner was riding a boy's bicycle. (T. Vol. 7, p. 1312-1313). He was also impeached with his statement to the police wherein he stated that he did not see what Petitioner had in his hand and did not see what Petitioner did by the fence because he did not pay any attention to Petitioner. (T. Vol. 7, p. 1315-1317, 1324). However, on redirect examination he testified that the bicycle did not have the "boy's bar." (T. Vol. 7, p. 1320).

Brenda Robinson, Petitioner's ex-girlfriend, testified that she saw Petitioner sometime in the afternoon on April 19, 1995. (T. Vol. 7, p. 1334). She testified that Petitioner visited her, he was wearing only a pair of shorts. He wore no shirt and no shoes and was riding a girl's bicycle. (T. Vol. 7, p. 1335). At that time Petitioner was acting strangely. (T. Vol. 7, p. 1336). Ms. Robinson testified that Petitioner offered her a

pair of earrings, but she did not accept them because they had already broken off the relationship. (T. Vol. 7, p. 1336-1337).

Ms. Robinson testified that a few days after Petitioner offered her the earrings, before he was arrested, Detective Surman interviewed her concerning the earrings. She described the earrings to the detective and he drew a sketch of them from her description. (T. Vol. 7, p. 1338). She identified the sketch which was admitted into evidence. (T. Vol. 7, p. 1338).

Ms. Robinson testified that a few days after that two detectives took her to an apartment in Homestead where Petitioner was being questioned. (T. Vol. 7, p. 1339). She testified that the officers showed her the earrings that Petitioner had offered her on April 19th. (T. Vol. 7, p. 1339). She identified the earrings already admitted into evidence. (T. Vol. 7, p. 1339).

Eddie Williams, Ms. Robinson's brother, was friends with Petitioner and considered him family because Petitioner was dating his sister. (T. Vol. 7, p. 1364). Mr. Williams testified that on the night of April 19, 1995, Petitioner visited with him at his job site. He testified that Petitioner showed him a pair of earrings. He testified that Petitioner told him

that he offered the earrings to his sister but that she refused to take them. (T. Vol. 7, p. 1366-1368). He testified that Petitioner left but that he returned later and slept at the job site. (T. Vol. 7, p. 1369). He testified that Petitioner was using a girl's bicycle. (T. Vol. 7, p. 1366).

Mr. Williams testified that the following day Petitioner's stepfather sought his assistance to communicate with Petitioner. (T. Vol. 7, p. 1370-1371). According to Mr. Williams, Petitioner was pacing by a park and crying such that his parents could not get through to him. (T. Vol. 7, p. 1370).

Mr. Williams witnessed Petitioner's arrest. (T. Vol. 7, p. 1376). He testified that he saw Petitioner remove some jewelry and a crack pipe from his pocket. (T. Vol. 7, p. 1376-1377). He testified that the following day, a detective showed him the earrings that Petitioner had shown him the day before. (T. Vol. 7, p. 1377). Mr. Williams identified the earrings admitted into evidence. (T. Vol. 7, p. 1378).

Willie Peterson testified that at about eight o'clock in the morning of April 20, 1995, Petitioner offered to sell him a diamond ring. (T. Vol. 8, p. 1405-1406). He testified that at that time, Petitioner had a girl's bicycle. (T. Vol. 8, p. 1405). He testified that Petitioner removed several pieces of jewelry from his shorts pocket, slipped the ring on his pinky

finger and "flashed" it. (T. Vol. 8, p. 1405-1407). He testified that when he refused to buy the ring, Petitioner became upset and rode off on the bicycle. (T. Vol. 8, p. 1407-1408). Mr. Peterson identified the jewelry admitted into evidence as the jewelry Petitioner showed him on April 20th. (T. Vol. 8, p. 1408-1409).

The evening after Ms. Stevenson was killed Willie Woods, Petitioner's stepfather, found Petitioner crying on the porch of their home. (T. Vol. 8, p. 1479). It seemed to Mr. Woods that Petitioner was worried about something. Mr. Woods confirmed that he asked Mr. Williams to talk to Petitioner to find out why he was upset and crying. (T. Vol. 8, p. 1479).

Detective Surman testified that they went to Petitioner's mother's house to inquire of Petitioner. (T. Vol. 9, p. 1618-1619). He testified that they saw Petitioner walking down the street. (T. Vol. 9, p. 1620). He testified that when Petitioner saw them, he crossed the street and held his shirt up over his head. (T. Vol. 9, p. 1621-1622). Petitioner stopped when the officers ordered him to stop. (T. Vol. 9, p. 1624). Petitioner was wearing shorts and the front pocket was "bulging" out. (T. Vol. 9, p. 1624). Petitioner eventually removed from his pocket the jewelry that was previously admitted into evidence.

Petitioner gave a post-arrest statement. (T. Vol. 9, p. 1638-1639). In that statement, Petitioner said the he got the jewelry during the night of Thursday, April 20, 1995 when he burglarized a house in Earlington Heights in Liberty City. (T. Vol. 9, p. 1639). According to Petitioner, he was smoking drugs with some friends, they ran out of drugs, so he burglarized the house to get money to buy more drugs. (T. Vol. 9, p. 1640-1641). Petitioner, however, could not identify the house. (T. Vol. 9, p. 1641). Petitioner claimed that he spent most of the day on Wednesday April 19, 1995 with Eddie Williams. (T. Vol. 9, p. 1641-1642). Mr. Williams did not confirm Petitioner's alibi. (T. Vol. 9, p. 1642).

During closing argument, defense counsel argued to the jury that the State presented no evidence connecting Petitioner to the crimes. Defense counsel argued that Petitioner was made a scapegoat by the victim's family because they did not like him. Defense counsel argued that the DNA evidence established that an unknown male could have committed the crimes. (T. Vol. 9, p. 1717). Regarding Petitioner's statement, defense counsel told the jury that it should reject the statement as being untrustworthy. (T. Vol. 9, p. 1730-1732). Defense counsel conceded that all three crimes were committed by the same person. He told the jury:

We only have one group of crimes that all run together. The burglary, the robbery, and the homicide. And I submit to you that you must acquit Mr. Braggs of all three of those crimes to find that he committed the burglary. It wouldn't make any sense to acquit him on the robbery and the homicide see, there is proof that he did it or not.

(T. Vol. 9, p. 10).

The jury convicted Petitioner of the burglary with an assault or battery without a deadly weapon, guilty of second degree murder as the lesser included offense to the first degree murder charge, and guilty of armed robbery without a weapon. (T. Vol. 10, p. 1839-1841). In entering adjudication the court observed that the jury's verdict regarding the robbery charge was nonsensical. Consequently, the court entered adjudication of guilty of strong-armed robbery as the lesser charge to the armed robbery conviction. (T. Vol. 10, p. 1843; R. Vol. 3, p. 449-150). Following a sentencing hearing the court sentenced Petitioner as a habitual violent felony offender to concurrent life imprisonment for the burglary and murder convictions and thirty (30) years for the robbery conviction. (R. Vol. 3, p. 463-467).

Petitioner appealed his convictions to the Third District Court of Appeal. Petitioner argued, *inter alia*, that the evidence adduced at trial was insufficient to support his

burglary conviction because there was no sign of a forced entry. The Third District heard the case *en banc* to consider whether the legislature, by enacting section 1, chapter 2001-58, Laws of Florida, [hereinafter "The Act"], effectively overturned the decision in *Delgado v. State*, 776 So. 2d 233 (Fla. 2000). (Opinion at p. 2). The court acknowledged that in the Act the legislature expressed its intent that the decision in *Delgado* be completely nullified. Nevertheless, the court held that the legislative intent expressed in the Act was directed to the Florida Supreme Court and was not intended to itself overturn *Delgado* because only the Supreme Court can overrule *Delgado*. (Opinion at p. 6). The court concluded that the proper procedure was for it to certify the question. Consequently, the court has certified the follow question 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.

ISSUE 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 ARGUMENT

In *Delgado v. State*, this Court held that the "remaining in" language of the burglary statute applies only to situations where the "remaining in" was done surreptitiously. By that decision, this Court unsettled the long standing interpretation of the burglary statute. At the next legislative session that it could, the Legislature enacted Chapter 2001-58, Laws of Florida. By its expressed and unambiguous language, Chapter 200-58, § 1 completely nullified the decision in *Delgado*.

In the decision below, the court was of the opinion that only this Court can overrule a decision from this Court. However, this Court has already implicitly receded from *Delgado* in *Jimenez v. State*. In that case, in rejecting the defendant's *Delgado*-based claim, this Court acknowledged that the Legislature had indicated that *Delgado* was wrongly decided.

Nevertheless, should this Court find that the Act did not overrule *Delgado*, and that this Court did not overrule *Delgado* in *Jimenez*, this Court should now recede from *Delgado*. Prior to *Delgado*, the law with respect to the "remaining in" part of the burglary statute had been long settled by this Court. Giving effect to *Delgado* to any pending case would not only perpetuate an erroneous decision, but would also create havoc in the

criminal justice system. The defendant in *Delgado* committed his crime in 1990. The defendant in *Jimenez* committed his burglary in 1992. This Court found that Jimenez's burglary conviction was proper. Yet, according to *Delgado*, that same conduct was not a burglary in 1990. The injustice of such a result is obvious, Jimenez is convicted because he was promptly prosecuted while Delgado is rewarded because he evaded prompt prosecution.

The nullification of *Delgado* applies to this case. Chapter 2001-58, § 1, provides that the nullification of *Delgado* is retroactive to February 1, 2000, two days before the initial *Delgado* decision of February 3, 2000. In that decision this Court unsettled the law. The Legislature chose this date because it intended to "resettle" the law with respect to pending burglary cases. In the instant case, Defendant's conviction was pending when *Delgado* was decided. Consequently, Chapter 2001-58, § 1 applies to this case.

Application of Chapter 2001-58, § 1 to this case does not violate the ex post facto clause. The Act merely corrects an erroneous decision. The Act affects no change to Defendant's position from the time he committed his offense. At that time, *Delgado* was not decided and there was not dispute that Defendant's conduct was in fact a burglary.

Thus, this Court should answer the certified question in the affirmative and quash the district court's decision and remand the cause to the district court with directions to reinstate Defendant's burglary conviction.

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.**

In *Delgado v. State*, 776 So. 2d 233 (Fla. 2000), this Court held that the "remaining in" language of the burglary statute, section 810.02(1), Florida Statutes,¹ applies only to situations where the "remaining in" was done surreptitiously. *Id.* at 240. Thus, "[i]n the context of an occupied dwelling, burglary was not intended to cover the situation where an invited guest turns criminal or violent." *Id.* In so holding, this Court expressly receded from the decisions in *Raleigh v. State*, 705 So. 2d 1324 (Fla. 1997) (evidence that victim was shot several times and beaten viciously sufficient to show that consent to remain was withdrawn); *Robertson v. State*, 699 So. 2d 1343 (Fla. 1997) (evidence that victim was bound, blindfolded, suffocated by bra shoved down her throat and strangled sufficient to show that

¹Section 810.02(1), Fla. Stat. (1989), provides:
Burglary means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

consent to remain was withdrawn); and *Jimenez v. State*, 703 So. 2d 437 (Fla. 1997) (evidence that victim was beaten and repeatedly stabbed sufficient to show that consent to remain was withdrawn). *Delgado v. State*, 776 So. 2d 233 at 241.

A

THE LEGISLATURE INTENDED CHAPTER 2001-58, § 1 TO NULLIFY DELGADO

In response to *Delgado*, the Legislature enacted chapter 2001-58, § 1 Laws of Florida. Chapter 2001-58, § 1 provides:

(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. 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); *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.

(3) It is further the intent of the Legislature that consent remain an affirmative defense to burglary and that the

lack of consent may be proven by circumstantial evidence.

Chapter 2001-58, § 1, Laws of Florida (2001). By its expressed and unambiguous language, Chapter 2001-58, § 1 completely nullified *Delgado*.

The Legislature explicitly made the Act retroactive to February 1, 2000, two days before the initial *Delgado*² decision of February 3, 2000. By making the act retroactive to two days before *Delgado*, the Legislature clearly intended a return to the state of law prior to *Delgado*. In fact, the legislative history reflects that this date was, in fact, chosen because it was the Legislature's intent to restore the prior, long-standing interpretation of the burglary statute. Final Staff Analysis on HB953, Committee on Crimes Prevention, Corrections & Safety, at 1, 4 (Jun. 26, 2001) ("[T]he bill is a legislative restoration of the law of 'remaining in' burglaries to what it was prior to the Delgado opinion. The purpose of this provision is to 'resettle' the law with respect to pending burglaries and leave them undisturbed by the Delgado decision."

Clearly then, by its clear and unambiguous language the Legislature intended for Chapter 2001-58, § 1 to nullify

²The initial opinion in *Delgado* was issued on February 3, 2000. See *Delgado v. State*, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000).

Delgado.

In the decision below, the Third District acknowledged that the legislature intended that the *Delgado* decision be completely nullified. (Opinion at p. 6). Nevertheless, the court was of the opinion that because only this Court can overrule a decision from this Court, the legislative intent expressed in the Act was only a suggestion to this Court to nullify *Delgado*. (Opinion at p. 6). The State contends, however, that the Legislature in fact overruled *Delgado*.

The law with respect to the "remain in" part of the burglary statute has been settled in this State since as early as 1983 when this Court decided *Routly v. State*, 440 So. 2d 1257 (Fla. 1983). Since then, this Court has affirmed and reaffirmed that interpretation of the statute. See e.g., *Raleigh v. State*, *supra*.; *Jimenez v. State*, *supra*. The Legislature has had the opportunity every year since then to amend the statute if that interpretation was not in accord with legislative intent.

"It is a well-established rule of statutory construction that when a statute is reenacted, the judicial construction previously placed on the statute is presumed to have been adopted in the reenactment." *Burdick v. State*, 594 So. 2d 267, 271 (Fla. 1992). "Indeed, where a statute is re-enacted, and the judicial construction thereof presumed to have been adopted

in the re-enactment, the Courts are barred and precluded from changing the earlier construction." *Deltona Corp. v. Kipnis*, 194 So. 2d 285, 297-298 (Fla. 2d DCA 1966). See also, *Rabinowitz v. Keefer*, 132 So. 297 (Fla. 1931); *Grimes v. State*, 64 So.2d 920 (Fla.1953).

Clearly then, when this Court receded from the settled law, in *Delgado*, it not only reinterpreted the statute, it affected a substantive change in the statute. Consequently, it intruded into the province of the Legislature where it rewrote the substantive law. See e.g., *Johnson v. State*, 336 So. 2d 93, 95 (Fla. 1976). (power to enact substantive laws lies in the legislative branch, not the judicial branch). The Legislature clearly could nullify *Delgado* then, where the decision was in effect a legislative act.

Nevertheless, if the Third District was correct in finding that only this Court can nullify *Delgado*, this Court has already receded from *Delgado* in *Jimenez v. State*, [26 Fla. L. Weekly S625 (Fla. Sept. 26, 2001)].

B.

THIS COURT HAS ALREADY RECEDED FROM DELGADO
IN JIMENEZ V. STATE, 26 Fla. L. Weekly S625
(Fla. Sept. 26, 2001).

In *Jimenez v. State*, 703 So. 2d 437 (Fla. 1997), a pre-*Delgado* decision, this Court affirmed Jimenez's conviction for burglary based on pre-*Delgado* caselaw. Relying on *Robertson v. State, supra*, this Court held the evidence that Jimenez brutally attacked the victim was sufficient proof that the victim had withdrawn whatever consent she may have given for him to remain after the consensual entry. *Jimenez v. State*, 703 So. 2d at 441. In the *Delgado* decision, this Court expressly receded from *Jimenez*. *Delgado v. State*, 776 So. 2d at 241.

Jimenez thereafter filed a motion for postconviction relief contending that *Delgado* mandated the reversal of his burglary conviction. *Jimenez* 2001 WL 1130073 (Fla. Sept. 26, 2001). This Court however, rejected *Jimenez's* claim. First, this Court found that the decision in *Delgado* was not retroactive to convictions that were final before that opinion was released. *Id.* at *2.

As a alternative ground for denying relief to Jimenez, this Court stated:

Moreover, in its most recent session, the Legislature declared that Delgado was decided contrary to legislative intent and that this Court's interpretation of the burglary statute in Jimenez's direct appeal was in harmony with legislative intent. (Citations omitted).

Id. In the majority decision below, the Third District concluded that the above quoted sentence referred to an additional reason why the *Delgado* decision is not retroactive. (Opinion at p. 7). However, in her dissenting opinion, Judge Green was of the opinion that the sentence referred, not to the retroactivity, but was an additional reason why Jimenez was not entitled to relief. (Opinion at p. 15, J. Green, dissenting).

The State contends that Judge Green's interpretation of the sentence is correct. The "Moreover" sentence had nothing to do with the discussion of retroactivity because legislative enactments are not factors in the determination of whether a court decision has retroactive application.

In *Witt v. State*, 387 So. 2d 922 (Fla. 1980), this Court set forth the criteria for determining whether a decision has retroactive application. The decision "must: (1) emanate either from this Court or the United States Supreme Court; (2) be constitutional in nature; and (3) have fundamental significance." *Jimenez* 2001 WL at *2. (citing *Witt* at p. 929-30). Since legislative enactments are not mentioned as a criteria for determining retroactivity in *Witt*, this Court could not have intended it to be a consideration in determining whether *Delgado* has retroactive application. Consequently, the majority in the decision below was incorrect in concluding that

the "Moreover" sentence referred to the retroactivity discussion rather than as an additional reason why Jimenez was not entitled to relief.

It is the State's contention then, that Chapter 2001-58, § 1 expressly nullified *Delgado*. The State contends further that even if the Legislature did not nullify *Delgado*, this Court did so in *Jimenez*. Consequently, the Third District was incorrect in finding the it was bound by *Delgado*.

THIS COURT SHOULD RECEDE FROM THE DECISION
IN DELGADO V. STATE

Should this Court find, as did the decision below, that the Act did not in fact overrule *Delgado*, and that this Court did not implicitly overrule *Delgado* in *Jimenez*, this Court should now follow the Legislature's direction and nullify *Delgado ab initio*. As argued above, prior to *Delgado* the law with respect to the "remaining in" part of the burglary statute had been long settled by this Court. See e.g. *Routly v. State, supra*. Applying *Delgado* to any pending case would create havoc in the criminal justice system. A comparison between *Delgado* and *Jimenez* is illustrative of this point.

Jimenez committed his crime on October 2, 1992. *Jimenez v. State*, 703 So. 2d at 438. On appeal, this Court affirmed Jimenez's conviction based on the pre-*Delgado* interpretation of the burglary statute. *Id* at 441. *Delgado* committed his crime in August 1990, approximately two years before Jimenez committed his crime. *Delgado v. State*, 776 So. 2d at 234. However, he was not arrested until more than two years after the crimes. *Id.* at 235. On appeal, this Court reversed *Delgado's* conviction finding that *Delgado's* conduct did not amount to a burglary.

Id. at 241. According to this Court then, Delgado's conduct was not a burglary in 1990, yet the same conduct was a burglary in 1992 when committed by Jimenez.

The injustice of such a result is quite obvious. Jimenez, because he was promptly prosecuted, gets convicted. Yet, Delgado, because he was successful in evading prosecution gets rewarded by having his conviction vacated.

CHAPTER 2001-58, § 1 LAWS OF FLORIDA APPLIES
TO THIS CASE.

Chapter 2001-58, § 1, provides that the nullification of *Delgado* is retroactive to February 1, 2000, two days before the initial *Delgado* decision of February 3, 2000. As argued above, the Legislature chose this date because it intended to “‘resettle’ the law with respect to pending burglaries and leave them undisturbed by the *Delgado* decision.” Final Staff Analysis on HB953, Committee on Crimes Prevention, Corrections & Safety, at 1, 4 (Jun. 26, 2001). Since the legislative intent was to nullify *Delgado*, the Legislature did not need to make Chapter 2001-58 retroactive to any date prior to February 1, 2000, because prior to that date, *Delgado* was not in effect.

In the decision below, the Third District agreed with the above argument that the significance of the February 1, 2000 date was to return the interpretation of the burglary statute to what it was before *Delgado*. (Opinion at p. 5). On this issue, the decision below conflicts with other district courts of appeal which have held that the significance of the February 1 date is to limit the application of the statute to offenses committed on or after that date. See e.g., *Schrack v. State*, 793 So. 2d 1102, Fn 1 (Fla. 4th DCA 2001) (noting that ch. 2001-

58 nullified *Delgado*, but refusing to discuss statute because offenses occurred prior to February 1, 2000).

However, as argued above, the legislative intent in enacting the statute was to resettle the law to what it was before *Delgado*. Any date earlier than February 1, 2000 would make no sense because prior to February 3, 2000, the interpretation of the burglary statute was settled -- the *Delgado* decision unsettled the law. Further, any date other than February 1, 2000 or February 2, 2000, would be arbitrary with no logical connection to the expressed legislative intent of the statute.

In the instant case, the information alleged that Respondent committed the burglary on or about April 19, 1995. (R. 2). *Delgado* was decided on February 3, 2000. Since Respondent's conviction was not final on February 3, 2000, it was in the pipeline when *Delgado* was decided. Generally, a decision of this Court announcing a new rule of law is given retrospective application to every case pending on direct review or not yet final. See e.g., *Smith v. State*, 598 So.2d 1063, 1066 (Fla.1992). Since Respondent's conviction was not final prior to the *Delgado* decision, but for Chapter 2001-58, § 1, Respondent would have gotten the benefit of *Delgado*. Chapter 2001-58, § 1 therefore applies to the instant case.

E

APPLICATION OF CHAPTER 2001-58, § 1, LAWS OF
FLORIDA TO THIS CASE DOES NOT VIOLATE THE EX
POST FACTO CLAUSE.

The application of Chapter 2001-58, § 1, Laws of Florida to this case does not violate the ex post facto clause.

It is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute 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 crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto. The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.

Beazell v. Ohio, 269 U.S. 167, 169-170 (1925). See also, *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (ex post facto law must apply to conduct occurring before its enactment and must disadvantage offender by altering definition of criminal conduct or increasing punishment for crime).

Nullifying *Delgado* retroactively to February 2, 2000, would not create an ex post facto issue because the such act would merely correct an erroneous decision. In fact, this Court has on other occasions retroactively corrected its erroneous interpretation of legislative intent. In *Trotter v. State*, 576 So. 2d 691 (Fla. 1990), this Court held that community control could not be considered as "under sentence of imprisonment" for purposes of a death penalty aggravator. *Id.* at 694. This Court remanded for resentencing. While the resentencing remained pending, the Legislature amended the applicable statute to include community control as "under sentence of imprisonment." At resentencing the trial court again considered community control as an aggravator. On appeal, Trotter argued that application of the newly created aggravator to him was an ex post facto violation because he committed his crime and was initially sentenced before the statute was amended. *Trotter v. State*, 690 So. 2d 1234, 1237 (Fla. 1996). This Court found no ex post facto violation. Instead, this Court noted that the amendment affected only a refinement in the law and was not a substantive change. *Id.* This Court noted also that it's initial interpretation was incorrect and that to give Trotter the benefit of that erroneous decision would "result in manifest injustice to the people of Florida by perpetuating an anomalous

and incorrect application of the capital sentencing statute.”
Id.

Similarly in *Lanier v. State*, 443 So. 2d 178 (Fla. 3d DCA 1983), the legislature amended a statute to correct a district court’s incorrect interpretation of the statute. In that case, the defendant was convicted of engaging in sexual intercourse with a child under fourteen years of age. *Id.* at 180. The district court dismissed the charges finding that the child’s consent was a complete defense to the charge. *Id.* at 183. After that decision the Legislature promptly amended the statute to provide that the child’s consent was in fact no defense. This Court found that the amendment merely clarified existing law and that the defendant could properly be convicted of the offense. *State v. Lanier*, 464 So. 2d 1192, 1193 (Fla. 1985).

In the instant case, as with *Trotter* and *Lanier*, by immediately acting to correct this Court’s incorrect interpretation of the burglary statute, the Legislature merely clarified existing law. Application of that clarification retrospectively does not implicate the Ex Post Facto Clause because it is not a substantive change in the law. To apply *Delgado* to any pending case would result in manifest injustice to the people of Florida by perpetuating a clearly anomalous and incorrect decision.

In the instant case, the information alleged that Defendant committed the burglary on or about April 19, 1995. (R. 2). At that time, Defendant's conduct of killing the victim after he was invited to enter the dwelling, constituted a burglary. See *e.g.*, *Raleigh v. State, supra*; *Robertson v. State, supra*; *Jimenez v. State, supra*. Defendant was tried and convicted in 1999. Defendant filed his Notice of Appeal in 1999. (R. 469). During all that time, from the commission of the crime through trial, conviction and Notice of Appeal, Defendant's conduct continued to constitute a burglary. Defendant's conduct constituted a burglary until the Court decided *Delgado* on February 3, 2000. Clearly, applying Chapter 2001-58, § 1 to this case does not violate the ex post facto clause since it merely returns the law to what it was at the time Defendant committed his offense.

CONCLUSION

Based upon the foregoing argument and cited authorities, this Court should answer the certified question in the affirmative and quash the district court's decision and remand the cause to the district court with directions to reinstate Respondent's burglary conviction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to Manuel Alvarez, Esq., Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125 on this 23rd day of April 2002.

PAULETTE R. TAYLOR
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CERTIFICATE OF TYPE SIZE AND STYLE

I hereby certify that the foregoing brief is composed in 12 point Courier New type.

PAULETTE R. TAYLOR
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-524
LOWER CASE NO.: 3D99-
2201

THE STATE OF FLORIDA,
Petitioner/Appellee,

vs.

CURLEY BRAGGS,
Respondent/Appellant.

_____/

APPENDIX

Braggs v. State, Case No.: 3D99-2201 (Fla. 3d DCA February 13, 2002).