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

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

Application of Chapter 2001-58, § 58 to the instant case does not violate the ex post facto prohibition. The statute does not effectuate any substantive change in the law it merely corrects an erroneous decision. The Act affects no change to Respondent's position from the time he committed his offense. At that time, *Delgado* was not decided and there was not dispute that Respondent's conduct was in fact a burglary.

The evidence adduced at trial was sufficient to sustain Respondent's convictions. The State presented evidence that Respondent was in possession of the victim's property the same afternoon that the victim was killed. The State also presented evidence that the victim's jewelry was stolen. Respondent's explanation of how he came in possession of the victim's property was proven false by the State's evidence. Consequently, Respondent's false explanation is considered a tacit admission of guilt. Further, Respondent's hypothesis of innocence did not if fact establish his innocence. Consequently, the evidence was sufficient to sustain Respondent's convictions.

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

Respondent's burglary conviction. This Court should also affirm Defendant's murder and robbery convictions.

ARGUMENT

I

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

Respondent contends that application of Chapter 2001-58, § 1, Laws of Florida to his case would violate the ex post facto prohibition because the statute affected a substantive change in the law. According to Respondent, this Court's decision in *Delgado v. State,* 776 So.2d 233 (Fla. 2000), settled the law with respect to the "remaining in" portion of the burglary statute such that his conduct did not amount to a burglary. Thus, Respondent argues, the legislative amendment to the statute nullifying *Delgado* such that his conduct now amounts to a burglary, affected a substantive change in the law which cannot retroactively apply to his case without violating the ex post facto prohibition.

Petitioner counters that the Chapter 2001-58, § 1, Laws of Florida, did not affect a substantive change in the law. Indeed, it was the decision in *Delgado* which affected a substantive change in the law. Prior to *Delgado*, the law with respect to the "remaining in" portion of the burglary statute had been well settled. *See e.g., Routly v. State,* 440 So. 2d

1257 (Fla. 1983). Since the decision in *Routly*, this Court had affirmed and reaffirmed *Routly.* The Legislature has had numerous opportunities to amend the statute if the *Routly* decision was contrary to legislative intent. Since the Legislature made no change to the statute in response to *Routly*, the legislature is presumed to have adopted *Routly*'s interpretation of the statute. *See e.g., Burdick v. State,* 594 So. 2d 267 (Fla. 1992). Once the Legislature adopted *Routly's* interpretation of the statute, that interpretation became the law. *See e.g., Grimes v. State,* 64 So. 2d 920 (Fla. 1953). Because *Routly* was the law, the decision in *Delgado* must have affected a substantive change in the law since it completely receded from *Routly.* However, because only the Legislature has the power to enact substantive laws, Chapter 2001-58, § 1, cannot be considered a substantive change in the law since it merely rejected *Delgado.*

Nevertheless, Respondent argues that disposition of his case is controlled by the decision in *Smith v. State,* 547 So. 2d 613 (Fla. 1989). Respondent argues that the situation in *Smith* wherein this Court held that the legislative enactment in response to the decision in *Carawan v. State,* 515 So. 2d 161 (Fla. 1987), could not be retroactively applied is similar to

the instant case. However, the situation in *Smith* is not similar to the instant case.

This Court decided *Carawan* in 1987. In response, the Legislature enacted Chapter 88-131, § 7, Laws of Florida, effectively overruling *Carawan. Smith v. State,* 547 So. 2d at 615. Chapter 88-131, § 7 became effective July 1, 1988. The defendant in *Smith* committed his offenses in 1986. *Smith v. State,* 547 So. 2d at 618 (Shaw, J., dissenting). On April 13, 1988, relying on *Carawan,* the district court issued its opinion reversing the defendant's conviction. Before this Court, the State argued for the retroactive application of Chapter 88-131, § 7 to affirm the defendant's conviction. This Court held that the retroactive application of the Chapter 88-131 would violate the ex post facto prohibition.

Smith does not control this case because the district court did not decide the instant case before Chapter 2001-58 became effective. Indeed, as argued in Petitioner's initial brief, this Court implicitly receded form *Delgado* in *Jiminez v. State,* 810 So. 2d 511 (Fla. 2001). *Jiminez* was decided before the district court issued it's opinion below. Consequently, the situation in *Smith* is not similar to the instant case. Instead, as argued in Petitioner's initial brief, this case is controlled

by the decisions in *Trotter v. State,* 690 So. 2d 1234 (Fla. 1996), and *State v. Lanier,* 464 So. 2d 1192 (Fla. 1985).

II

THE EVIDENCE ADDUCED AT TRIAL WAS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTIONS.

Respondent argues that the evidence adduced at trial was insufficient to support his convictions. Defendant complains that there was insufficient evidence linking him to the homicide where there was evidence that an unknown male was present at the scene. The evidence adduced at trial amply supports Defendant's convictions.

As a preliminary matter, Defendant's defense at trial was that an unknown male committed the crimes and that the victim's family made him a scapegoat because they did not like him. During closing argument, defense counsel argued to the jury that the State presented no evidence connecting Defendant to the crimes. Defense counsel argued that the DNA evidence established that an unknown male could have committed the crimes. (T. Vol. 9, p. 1717). 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). Thus, according to defense counsel's argument to the jury, the jury would have to convict him of the murder and the robbery if it found him guilty of the burglary.

Nevertheless, even if Defendant's burglary conviction cannot stand, the evidence of the burglary should be considered in connection with the murder and robbery convictions. Consequently, the State's argument below, discussed the evidence of the burglary in connecting Defendant to the other crimes.

> A special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. *Jaramillo v. State*, 417 So.2d 257 (Fla.1982). Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. *McArthur v. State*, 351 So.2d 972 (Fla.1977); *Mayo v. State*, 71 So.2d 899 (Fla.1954). The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse. *Heiney v. State*, 447 So.2d 210 (Fla.), *cert. denied*, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984); *Rose v. State*, 425 So.2d 521 (Fla.1982), *cert. denied*, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983), disapproved on other grounds, *Williams v. State*, 488 So.2d 62 (Fla.1986).

State v. Law, 559 So.2d 187,188 (Fla.1989).

> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. *Spinkellink v. State*, 313 So.2d 666, 670 (Fla.1975), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). The state is not required to "rebut conclusively every possible variation" (Fo) of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. See *Toole v. State*, 472 So.2d 1174, 1176 (Fla.1985). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

State v. Law, 559 So.2d at 189. Appellate courts should not retry a case or reweigh conflicting evidence submitted to the trier of facts. Instead, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. *See e.g.*, Heiney v. State, 447 So.2d 210 (Fla.), *cert. denied*, 469 U.S. 920 (1984).

In the instant case, the State presented competent substantial evidence to support the jury’s verdict. The State presented evidence that Ms. Stevenson was alive around eight

o'clock in the morning and was found dead at approximately four-thirty in the afternoon. (T. Vol. 5, p. 963-969). She was killed as she stood at the bathroom sink. (T. Vol. 7, 1254-1257). Her bedroom had been ransacked. (T. Vol. 5, p. 965-966). Her jewelry box was lying empty on the floor beside her bed. (T. Vol. 6, p. 1010-1011). There were drops of Ms. Stevenson's blood beside her bed. (T. Vol. 8, p. 1589-1590). Omni's bicycle was missing. (T. Vol. 5, p. 961-962, 969-970). Ms. Stevenson's calendar reflecting that she had loaned Defendant one hundred dollars on March 27, 1995 was lying on her bed. (T. Vol. 6, p. 1014).

Ms. Stevenson was very security conscious. She had security bars around all the windows, including the sliding glass doors. (T. Vol. 5, p. 980, 987-988). She always kept the gated door in the front of the house locked. (T. Vol. 5, p. 980). That door was locked when Omni returned from school. (T. Vol. 5, 964). 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). Ms. Stevenson's house keys were found under her body. (T. Vol. 6, p. 1021).

Defendant was seen riding from the direction of Ms.

Stevenson's home that same afternoon. At that time Defendant was riding a girl's bicycle. (T. Vol. 7, p. 1300-1302). The bicycle was stolen from Ms. Stevenson's home. (T. Vol. 5, p. 961-962, 969-970). At that time, Defendant was shirtless, sweaty and looked "nervous" and "stressed out." (T. Vol. 7, p. 1300, 1303-1304). Defendant had in his possession a brown bag, the contents of which could be heard jingling. (T. Vol. 7, p. 1306-1307).

On that same afternoon Defendant offered his ex-girlfriend a pair of Ms. Stevenson's earrings. (T. Vol. 7, p. 1336-1337). That same evening Defendant showed the same earrings to his ex-girlfriend's brother and complained to him that she had refused them. (T. Vol. 7, p. 1366-1368). About eight o'clock the following morning Defendant offered to sell one of Ms. Stevenson's rings. (T. Vol. 8, p. 1405-1407).

Defendant was apprehended on the Friday, two days after Ms. Stevenson was killed. At the time of his arrest Defendant had Ms. Stevenson's jewelry in his possession. (T. Vol. Vol. 9, p. 1625-1627). In explaining his possession of Ms. Stevenson's jewelry, Defendant stated that he obtained the jewelry when he burglarized a house in the Liberty City area the night before, Thursday. (T. Vol. 9, p. 1640-1641). Defendant also provided an alibi for his whereabouts on the day Ms. Stevenson was

killed. He claimed that he spent much of the day with Eddie Williams. (T. Vol. 9, p. 1641-1642). Mr. Williams did not corroborate Defendant's alibi. (T. Vol. 9, p. 1642).

When viewed in light most favorable to the State, this evidence amply supports Defendant's convictions.

> It is well settled in Florida that a person's unexplained possession of recently stolen property gives rise to a permissible factual inference that the person in possession of such property is guilty of larceny or theft of the subject property, *see Cone v. State*, 69 So.2d 175 (Fla.1953); *Byrd v. State*, 146 Fla. 686, 689, 1 So.2d 624, 626 (1941); *Bargesser v. State*, 95 Fla. 401, 116 So. 11 (1928); *Burroughs v. State*, 221 So.2d 159, 160 (Fla. 2d DCA 1969); moreover, if the recently stolen property was taken in a burglary, it may also be inferred, in absence of a reasonable explanation, that the exclusive possessor of said stolen property is guilty of the burglary. See *State v. Young*, 217 So.2d 567, 570 (Fla.1968), *cert. denied*, 396 U.S. 853, 90 S.Ct. 112, 24 L.Ed.2d 101 (1969); *Glisson v. State*, 85 Fla. 493, 96 So. 840 (1923); *N.C. v. State*, 478 So.2d 1142, 1144 (Fla. 1st DCA 1985); *Ridley v. State*, 407 So.2d 1000, 1001 (Fla. 5th DCA 1981); *Estevez v. State*, 290 So.2d 138, 139 (Fla. 3d DCA 1974).

D.G. v. State, 547 So. 2d 295, 296 (Fla. 3d DCA 1989).

In the instant case, Defendant was seen with Ms. Stevenson's jewelry on the same afternoon that Ms. Stevenson was killed. He offered his ex-girlfriend a pair of Ms. Stevenson's earrings.

(T. Vol. 7, p. 1336-1337). Defendant showed the same earrings to Eddie Williams that same evening. (T. Vol. 7, p. 1366-1368). Early the following morning, Defendant tried to sell Willie Peterson one of Ms. Stevenson's rings. (T. Vol. 8, p. 1405-1406). Several witnesses saw Defendant riding a girl's bicycle that was also stolen from Ms. Stevenson's home. (T. Vol. 7, p. 1300, 1302; p. 1366; Vol. 8, p. 1405). Defendant also claimed that he spent much of the day of Ms. Stevenson's murder with Eddie Williams. (T. Vol. 9, p. 1641-1642). Mr. Williams however did not corroborate Defendant's alibi. (T. Vol. 9, p. 1642).

Defendant had Ms. Stevenson's jewelry in his possession at the time of his arrest two days after Ms. Stevenson was killed. (T. Vol. 9, p. 1624). In his post-arrest statement, Defendant said that he got the jewelry the night before when he burglarized a home in the Liberty City area. (T. Vol. 9, p. 1640-1641).

Although Defendant claimed that he obtained the jewelry the Thursday night, two witnesses testified that they saw Defendant with the jewelry the same day of the murder and one witness testified that he saw Defendant with the jewelry early Thursday morning. Additionally, although Defendant stated that he spent much of the day that Ms. Stevenson was killed with Eddie

Williams, Mr. Williams did not confirm Defendant's alibi.

An exculpatory statement proved false shows a guilty state of mind and has the same evidentiary effect as an admission. *United States ex rel. Royster v. McMann,* 292 F.Supp. 116 (E.D.N.Y. 1968), *aff'd* 433 F.2d 1013 (2nd Cir. 1970). *See also, Brown v. State,* 391 So. 2d 729 (Fla. 3d DCA 1980) (evidence that the defendant lied about his whereabouts on day of crime admissible as substantive evidence tending to prove the defendant's guilt); *Andreasen v. State,* 439 So. 2d 226 (Fla. 3d DCA 1983)(defendant's false exculpatory statements when considered as substantive evidence established guilt by overwhelming evidence); *Walker v. State,* 495 So. 2d 1240 (Fla. 5th DCA 1986) (evidence that defendant lied about his whereabouts at time of crimes admissible as substantive evidence tending to affirmatively show consciousness of guilt). Thus, Defendant's exculpatory statement was tantamount to an admission of guilt since it has been proven false. *Royster v. McMann,*, supra.

Defendant, however, argues that the evidence did not rebut his reasonably hypothesis of innocence that an unknown male committed the crimes. Defendant argues that the presence of the unidentified fingerprint on the toilet seat coupled with the evidence of the presence of the unidentified male DNA found in

the drop of blood is evidence that an unidentified male was present at the scene. However, even if an unidentified male was at the scene, it does not prove Defendant's innocence. It does not explain Defendant's possession of Ms. Stevenson's jewelry so soon after she was killed. And, as argued above, Defendant's explanation as to how he came in possession of the jewelry was proven false. Further, as the lower court's opinion points out, police officers and the fire rescue team had been through the crime scene before it was cordoned off. Consequently, Defendant did not present a viable theory of defense. Defendant's reliance on *Long v. State,* 689 So. 2d 1055 (Fla. 1997) and *Cox v. State,* 555 So. 2d 352 (Fla. 1989), is misplaced. In those cases, the defendants did not make tacit admissions to the crimes as Defendant did in this case. Further, the defendants in those cases were not found in possession of the victims' property, as Defendant was in this case. Consequently, the facts of the instant case are distinguishable from the facts in cases relied upon by Defendant.

CONCLUSION

Based upon the foregoing argument and cited authorities, this Court should affirm Respondent's convictions and 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 Appellee was furnished by mail to, Manuel Alvarez, Esq., Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125 on this 3rd day of June 2002.

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CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that this brief is composed in 12 point Courier New type.

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