

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1807 Burglary
SPONSOR(S): Public Safety & Crime Prevention
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) PUBLIC SAFETY AND CRIME PREVENTION	18 Y, 0 N	De La Paz	De La Paz
2) _____	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

Presently, section 810.015, F.S. provides legislative intent with respect to burglary offenses committed before July 1, 2001. This section, however, is currently being interpreted in a manner which gives the section no effect for cases where the crime occurred before February 1, 2000.

HB 1807 provides further clarification regarding legislative intent with respect to the interpretation of the burglary statute provided in the Delgado v. State, 776 So.2d 233 (Fla. 2000). The bill also provides special rules of statutory construction expressly providing that the intent language of s. 810.015, F.S., shall be construed to give the Delgado decision no effect.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1807.ps.doc
DATE: March 22, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

Increase Personal Responsibility: This bill, if it is successful in having the Florida Supreme Court apply the law of burglary as written by the Legislature, would restore the personal responsibility of persons who committed the crime of burglary as defined by the Legislature prior to the Delgado decision.

B. EFFECT OF PROPOSED CHANGES:

Legislative History Regarding Burglary and Chapter Law 2001-58, Laws of Florida

Prior to being amended in 2001, s. 810.02, F.S., defined the offense of “burglary” as follows:

810.02 Burglary.--

(1) "Burglary" means entering or remaining in a dwelling, 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*. (emphasis added).

This definition of burglary was enacted in 1975 and remained unchanged until the issuance of the Florida Supreme Court opinion of Delgado v. State, 776 So.2d 233 (Fla. 2000)¹ (Hereafter “Delgado”). Under the statute, as interpreted prior to the Delgado decision, in those instances where a defendant was “invited” or “licensed” by the occupant to enter the premises, a burglary occurred when two things happened: 1) the defendant remained on the property after his/her invitation or license to remain on the property had been *revoked* (i.e. the occupant withdrew consent for the defendant to stay on the property), and 2) the defendant *remained* on the property, despite the revocation, with the intent to commit an offense therein.

With respect to these “remaining in” type burglaries, the issue of whether or not a revocation occurred in order to establish a burglary had been well settled in Florida since 1983, and was reaffirmed by the Florida Supreme Court in three cases issued in 1997.² Prior to the Delgado decision, a “revocation” of the occupant’s consent for the defendant to be on the property could be established by circumstantial evidence that the defendant knew or should have known that the occupant no longer wanted the defendant to remain on the premises. A common sense approach had been taken to determine circumstances in which withdrawal of consent could be reasonably implied from the circumstances.³

¹ Initial definition found in Chapter Law 74-383, Laws of Florida.

² 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).

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

Acts of violence committed against the victim were among those circumstances from which one could infer withdrawal of the victim's consent for the defendant to remain on the property.⁴

When someone is murdered while the defendant is engaged in the commission of, or attempted commission of, a burglary, a charge of first degree murder can be established through a *felony murder* theory.⁵

In the Delgado decision, issued on February 3, 2000, the law with respect to "remaining in" burglaries was dramatically altered and substantially narrowed. First, the Court held that if a defendant can establish that he or she was invited onto the property, then the defendant has a "complete defense" to burglary. For example, if someone goes over to the victim's house fully intending to kill the victim, and the unsuspecting victim allows the defendant inside, the defendant could not be prosecuted under a felony murder theory for first degree murder based on burglary. Second, the Court judicially inserted a new requirement for "remaining in" burglaries limiting them to only those instances where the invited defendant remains on the property "surreptitiously." The effect of this change is to decriminalize all other forms of "remaining in" burglaries.

The Court in Delgado identified the question before it as follows:

"The question before this Court is whether the *Legislature* intended to criminalize the particular conduct in this case as burglary when it added the phrase "remaining in" to the burglary statute." (emphasis added) Delgado supra at 239 & 240.

The conduct in the Delgado case included an apparent invited entry into the home of the husband and wife victims, Mr. and Mrs. Rodriguez. Regardless of the entry, however, the evidence indicated that at some point in time after the entry, both victims retreated to the garage and closed the door between the kitchen and the garage. This door was broken down, Mr. Rodriguez's body was found just inside the door, and his wife's body was found wedged between a car and the garage wall. Mr. Rodriguez had been shot 5 to 6 times (3 in the chest), and sustained 5 stab wounds to his neck and chest. Mrs. Rodriguez sustained 10 blunt force trauma wounds (apparently from being "pistol whipped") that had resulted in multiple skull fractures, one of which was so severe that it pushed part of her skull bone into her brain. Mrs. Rodriguez was also stabbed 12 times (5 times in the chest, the remaining wounds were a result of her trying to defend herself against attack).⁶

In determining the Florida Legislature's intent, the Court receded from 17 years of Florida case precedent interpreting this long-standing statute. Instead, the Court looked to the definition of burglary in the Model Penal Code, Model Penal Code commentary, two New York cases, and "other scholars" to reach its ruling. After an analysis based on an evaluation of these external sources, the Court said: "[Delgado's] actions are not the type of conduct which the crime of burglary was intended to punish."⁷

The Court also made the following statement:

By our holding today, we recede from this Court's previous opinions in Robertson, Jimenez, and Raleigh, a decision which we do not undertake lightly. While we are aware of the importance of *stare decisis*, this principle must give way to common sense and logic. Delgado supra at 241.

⁴ See, Raleigh v. State, 705 So.2d 1324 (Fla. 1997); Robertson v. State, 699 So.2d 1343 (Fla. 1997); and Jimenez v. State, 703 So.2d 437 (Fla. 1997).

⁵ First degree murder can be proven under two theories: premeditated murder and felony murder. A single defendant can be tried under one theory or the other, or under both theories at the same time.

⁶ Brief of Attorney General, Case No. SC88638.

⁷ Delgado supra at 241.

The Florida Supreme Court relied on two New York cases to rationalize their judicial rewrite the burglary statute in the face of a caution against such action by the Third District Court of Appeal in the following excerpt from the Delgado decision:

The Third District Court pointed out that the word surreptitiously does not appear in the statute and that a court should not inject words into statutes that were not placed there by the Legislature. See id. at 967 ("[W]e are bound to construe our statute as written and not add to it a word--"surreptitiously"--not placed there by the Legislature."). *Of course, the New York statute does not contain the word surreptitiously, yet the New York courts have concluded that the statute should be limited to such situations.* (emphasis added). Delgado, *supra* at 240.

It turns out, however, that New York courts have made no such conclusion. There is no New York Court reported case, not even the two mentioned by the Florida Supreme Court in their Delgado decision, that judicially insert "surreptitiously" into the New York penal code.⁸ In New York, *remaining in* burglaries are not confined only to those which are "surreptitious" as the Florida Supreme Court represents they have been.⁹ To the contrary, one of the New York cases relied on by the Florida Supreme Court, which was handed down by the highest court in the state of New York, the New York Court of Appeals, said: "In order to be guilty of burglary for an unlawful remaining, a defendant must have entered legally, but remain for the purpose of committing a crime after authorization to be on the premises terminates."¹⁰

The double murder in the Delgado case took place over 13 years ago on August 30, 1990. There was no constitutional error and no deprivation of any of the defendant's rights. The defendant was granted a new trial based entirely on the judicial rewrite of the burglary statute.

⁸ People v. Gaines, 74 N.Y.2d 358 (N.Y. 1989); People v. Hutchinsin, 124 Misc.2d 487 (Sup. Ct. 1984) *appeal denied* 68 N.Y. 2d 770 (1986).

⁹ An example of a New York case illustrating that remaining in burglaries need not be surreptitious is People v. DeLarosa, 568 N.Y.S. 47 (Sup. Ct. 1991). In this case the state's evidence was that the defendant forced his way into his estranged wife's apartment, beat her, tried to rape her and struck a female friend of hers over the head with a hammer. The defendant, however, testified that his wife gave him permission to enter and consented to his sexual advances. He claimed they later got into an argument and that her friend attacked him with a hammer which accidentally resulted in him hitting her with the hammer. In upholding the defendant's conviction for burglary the court said: "Even if the defendant's argument is credited that he was permitted entry, which the jury was free to reject, the evidence makes clear that the victim unequivocally withdrew any license to remain." (citations omitted) Id. at 49. In other words, they would uphold a remaining in burglary conviction under the defendant's version of events despite the fact that it wasn't a "surreptitious" remaining in burglary.

¹⁰ People v. Gaines, 74 N.Y.2d 358, at 363, 546 N. E. 913, 547 N.Y.S. 2d 620 (N.Y. 1989). The Florida Supreme took an excerpt of this opinion, without fully explaining the context as follows:

In People v. Gaines, 546 N.E. 2d 913, 915 (N.Y. 1989), the court addressed the addition of the "remains unlawfully" language in the New York statute, and stated that "the Legislature was plainly addressing a different factual situation--not one of unlawful entry but of unauthorized remaining in a building after lawful entry (as a shoplifter who remains on the store premises after closing)."

Contrary to the Florida's Supreme Court's representation, the New York Court of Appeals was simply using this as an example of one type of remaining in burglary the New York Legislature intended to cover with the statute. Delgado at 240. They were not saying it was the only type of remaining in burglary allowed by statute. The issue for the New York Court of Appeals was whether to convict someone for burglary, it was necessary that the suspect have the intent to commit a crime within the building at the time they entered the structure, or whether the unlawful remaining in part of the burglary statute meant that someone could be convicted of burglary if their intent to commit a crime was formed after they entered. The case before the Court involved a homeless man who was arrested for burglary after breaking into a building supply business. The defendant was found wearing a employee's coveralls and jacket. No items were found missing except for some company pens in the jacket pocket. The defendant testified at his trial that he had run out of money to remain at the homeless shelter and later broke into the building to get shelter from the cold and snow. The jury in the case had asked the trial judge for clarification on the intent issue. When the New York Court of Appeals took the case up for review, they used the example of the remaining shoplifter to illustrate a situation where someone's intent to remain on the property, after their permission or "license" to be there had ended, was for the purpose of committing a crime. In the case before them involving the homeless man, the Court of Appeals concluded that in order to convict him of burglary, it was necessary for the jury to find that he had the intent to commit a crime at the time he entered the building, because the defendant's entry was unlawful.

The Delgado case was a 4 to 3 decision in which Justices Pariente, Anstead, Shaw, and Harding formed the majority, and Justices Wells, Quince and Lewis dissented. Justice Wells urged the Legislature to “immediately review and plainly express whether it accepts the majority’s construction of the statute.”¹¹

As a result of the Delgado decision, both chambers of the Legislature unanimously passed HB 953 (Chapter Law 2001-58) creating s. 810.015, F.S., which provided legislative intent rejecting the interpretation of the burglary statute announced in Delgado retroactively to February 1, 2000, declaring intent that the burglary statute be construed in conformity with previous court interpretations, and amending the then existing burglary statute to preserve the status quo with respect to all offenses committed under the statute as written for all cases through July 1, 2001. Chapter Law 2001-58, Laws of Florida provides in part:

810.015 Legislative findings and intent; burglary.--

(1) The Legislature finds that the case of Delgado v. State, Slip Opinion No. SC88638 (Fla. 2000) was decided contrary to legislative intent and the case law of this state relating to burglary prior to Delgado v. State. The Legislature finds that in order for a burglary to occur, it is not necessary for the licensed or invited person to remain in the dwelling, structure, or conveyance surreptitiously.

(2) It is the intent of the Legislature that *the holding in Delgado v. State, Slip Opinion No. 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. 3rd DCA, 1988). This subsection shall operate *retroactively to February 1, 2000*. (emphasis added).

(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.

810.02 Burglary.--

(1)(a) For offenses committed on or before July 1, 2001, "burglary" means entering or remaining in a dwelling, 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. (emphasis added).

For offenses committed after July 1, 2001, “burglary” means: . . .

After the passage of Chapter Law 2001-58, Laws of Florida, the Florida Supreme Court addressed another “remaining in” type of burglary in Floyd v. Florida, 850 So.2d 383 (Fla. 2002). In Floyd, the defendant was convicted of first degree murder under both a premeditated murder theory and a felony murder theory for killing his mother-in-law by shooting her in the face with a 357 handgun. He was also convicted of armed-burglary. When the Florida Supreme Court reviewed the case, they reversed the armed-burglary conviction and struck the felony murder theory for first-degree murder. They based their decision on the Delgado opinion, notwithstanding Chapter Law 2001-58, Laws of Florida, finding that: “. . . the jury could have convicted Floyd of burglary if it found that he formed an intent to commit murder while he remained in [the victim’s] home.”

Acknowledging in a footnote that the Legislature nullified the Delgado opinion in 2001, the Florida Supreme Court stated:

¹¹ Delgado at 242.

We are aware that in enacting s. 810.15(2), Florida Statutes (2001), the Legislature stated its intent "that the holding in Delgado v. State, . . . be nullified." However the Legislature also stated that subsection (2) of s. 810.15, would operate retroactively to February 1, 2000. *The events in Floyd's case occurred well before February 1, 2000.* (emphasis added).¹²

Essentially the Court construed the February 1, 2000 date of the intent section in s. 810.015(2), F.S., relating to the nullification of the holding of Delgado, as if it pertained to *when the offenses were committed*. This construction was inconsistent with the language of s. 810.02(1)(a), F.S., which provided for its application to all offenses committed on or before July 1, 2001. By the Court's construction, the February 1, 2000 date could be viewed as an arbitrary demarcation point without significance. In fact, February 1, 2000 marked a point in time two days prior to the issuance of the Delgado decision. For *all* offenses committed on or before July 1, 2001, the pre-Delgado case precedent, cited in the statute, as it was on February 1, 2000, was the intended interpretation. Only this way, would the Legislative intent to "nullify" the Delgado opinion be accomplished.

Justice Wells pointed out the error to the majority in his dissent:

In nullifying Delgado, the Legislature stated that section 810.015(2) "shall operate retroactively to February 1, 2000." This retroactivity provision was obviously included so that the original February 3, 2000, Delgado decision would be included in the nullification. . . .

. . .

. . . I would affirm Floyd's conviction for armed burglary and give force and effect to the undeniable legislative intent that the Delgado decision be nullified. Moreover, in view of the date that Floyd's crimes were committed, there is no logical reason to apply Delgado. Burglary is a statutory crime, the definition of which is within the prerogative of the Legislature. . . [Floyd] should not receive this windfall. Rather, this Court should give deference to the Legislature, which is here clearly appropriate.¹³

In addition to Justice Wells, the Third District Court of Appeal came to the same conclusion regarding the significance of the February 1, 2000 date:

. . . it is permissible to consider the legislative history of chapter 2001-58 to determine why the February 1, 2000 date was chosen. . . . It is evident the February 1 date was chosen in an effort to turn back the clock to the interpretation of the burglary statute as it existed two days prior to the original release of the Delgado opinion. As stated in the House of Representatives legislative history, "The purpose of this provision is to 'resettle' the law with respect to pending burglaries and leave them undisturbed by the Delgado decision."¹⁴

The Florida Supreme Court again addressed the matter in Fitzpatrick v. State, 859 So.2d 486 (Fla. 2002). Paul Fitzpatrick was charged and convicted of first-degree murder for the 1980 killing of Gerald Hollinger. Mr. Hollinger was found dead in his own house lying in a pool of blood. He had been stabbed forty-one times, including several wounds to his face and three to his neck. It appeared to law enforcement investigators that some stereo equipment had been stolen, the victim's wallet was found

¹² Floyd at 402 n.29.

¹³ Floyd, Wells dissenting at 412.

¹⁴ Braggs v. Florida, 815 So.2d 657, 660, (3rd DCA, 2002) citing House of Representatives Committee on Crime Prevention, Corrections & Safety Final Analysis, Bill No. HB953(PCB CPCS 01-03), June 26, 2001. For this case, the Third District Court of Appeal sat en banc, meaning that all eleven judges heard the matter and none of them voiced any views to the contrary on this point.

beside his body and his car had been stolen. Fitzpatrick managed to avoid detection for his crime until 1994 and was indicted for murder in 1996. His trial took place about a week and a half after the Delgado decision was released. The state put forward evidence establishing both that the murder was premeditated or alternatively that it was a felony murder with either robbery or burglary being the underlying felony. He was found guilty and later sentenced to death in September of 2000.

The defendant argued to the Florida Supreme Court that he should get a new trial because the evidence showed he was invited into his victim's home, but did not show that he remained there surreptitiously. The Court agreed, relying on Delgado, and ordered a new trial for Fitzpatrick because the jury may have relied on an "erroneous definition of burglary" in reaching their verdict. The "erroneous definition" was the one written by the Legislature.

Justice Wells dissented again, and joined by Justice Cantero, urged the Court to recede from the Delgado decision:

. . . This case demonstrates how disruptive this Court's decision in Delgado v. State, 776 So.2d 233 (Fla. 2000), is to the administration of justice in Florida. . . . "Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and undermines the integrity and credibility of the Court." Id. at 1096 (Ehrlich, J., concurring in part and dissenting in part). I believe this Court must recede from Delgado retroactively. Furthermore, it was Delgado that did not honor stare decisis. As I later set out in Delgado, this Court overturned seventeen years of precedent, beginning with Routly v. State, 440 So.2d 1257, 1262 (Fla.1983).

When the picture of what has occurred to the law of burglary crimes comes into sharp focus, as it does with the facts of this case, the conclusion that this Court must recede from Delgado is compelling. Although the crime in the instant case was committed in 1980, the facts which resulted in the defendant's conviction did not come to light until 1994. The indictment was issued in 1996, and the defendant's trial occurred on February 14 through 18, 2000. The defendant was tried and convicted of burglary under the burglary statute that was in effect in 1980, the language of which remained substantially the same in the Florida statutes through the defendant's trial in 2000. Compare § 810.02, Fla. Stat. (1979), with § 810.02, Fla. Stat. (1999). Throughout this time period, the burglary statute stated that burglary means "remaining in" a structure with the intent to commit an offense therein. See, e.g., § 810.02, Fla. Stat. (1979). The word "surreptitious" was never in the burglary statute during this time period.

. . .

. . . This defendant is not only rewarded by this Court's application of the burglary statute that is contrary to this Court's application of the statute in its cases issued prior to nine days before his trial began, this defendant is rewarded by an application of the statute which the Legislature has expressly stated was contrary to legislative intent.

. . .

This Court has the power and the obligation to correct this situation by receding from the four-to-three Delgado decision. See State v. Owen, 696 So.2d 715, 720 (Fla.1997) ("This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice...."). There is really no sound reason not to do so.¹⁵

Three months after the Fitzpatrick decision, the Florida Supreme Court issued another 4 to 3 opinion perpetuating the Delgado decision and potentially laying the groundwork to give s. 810.015 virtually no

¹⁵ Fitzpatrick, *supra*, Wells dissent at 492 - 495

effect.¹⁶ The decision was a consolidation of the two cases State v. Ruiz, Slip opinion No. SC02-389 (Fla. 2003) and State v. Braggs, Slip opinion No. SC02-524 (Fla. 2003). Both cases had appeals pending when the Delgado decision was issued. Both cases involved crimes that occurred prior to the February 1, 2000 date which the Florida Supreme Court previously said was the date before which the Legislature chose to apply Delgado.¹⁷

In State v. Curley Braggs, the defendant was a relative of his elderly victim, Ruby Stevenson. There was no evidence of a forced entry, but once inside her home, Braggs stabbed Ruby in back of the neck, slit her throat, left her bleeding on the bathroom floor, ransacked her bedroom, stole her jewelry and a bicycle, and then left. The jury convicted Braggs of second-degree murder, burglary, and armed robbery. The crime occurred on April 19, 1995.

In State v. Roberto Ruiz, the defendant and the victim had a prior relationship. Ruiz and her had lived together from October 1997 through December 1997. On January 3, 1998 the victim allowed Ruiz into her apartment so he could pick up some of his belongings. At one point they both entered the bedroom and Ruiz closed the door and locked it. He then began hitting her and sexually assaulted her. Ruiz was convicted of kidnapping, burglary and battery.

Writing for the majority, Justice Pariente stated:

The threshold issue decided by the Third District is whether the expression of legislative intent to nullify Delgado retroactive to February 1, 2000, contained in section 810.015(2) applies to Braggs and Ruiz, whose conduct occurred in 1995 and 1998, respectively. The Third District determined that section 810.015(2) was intended to apply to cases such as Braggs' and Ruiz's, which were in the "pipeline" at the time Delgado was decided, based on the legislative history of chapter 2001-58. See Braggs, 815 So. 2d at 660. We conclude that the Third District erred in going beyond the plain meaning of section 810.015(2), . . . (emphasis added).

In other words, in a statute in which the Legislature is providing a statement of its intent, the Florida Supreme Court found that the Third District "erred" in trying to ascertain the Legislature's intent. The Court continued:

"[T]he plain meaning of statutory language is the first consideration of statutory construction." State v. Bradford, 787 So. 2d 811, 817 (Fla. 2001) (quoting Capers v. State, 678 So. 2d 330, 332 (Fla. 1996)). "Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." (Citations omitted).

Compare the statement above with the statement below in another Florida Supreme Court case involving interpretation of a criminal statute, issued just two weeks before the Ruiz/Braggs decision:

Our purpose in construing a statutory provision is to give effect to legislative intent. Legislative intent is the polestar that guides a court's statutory construction analysis. State v. J.M., 824 So.2d 105, 109 (Fla.2002). In attempting to discern legislative intent, we first look to the actual language used in the statute. Joshua v. City of Gainesville, 768 So.2d 432, 435 (Fla.2000). If the statutory language is unclear, we apply rules of statutory construction and explore legislative history to determine legislative intent. Id.;

¹⁶ The Florida Supreme Court phrased the question to be decided to ask "Whether Section 1 of Chapter Law 2001-58.. Laws of Florida, which is codified at section 810.015, Florida Statutes (2002), applies to conduct that occurred prior to February 1, 2000." Ruiz/Braggs at 2. The rationale applied by the Court in Ruiz/Braggs could be easily extended to conduct occurring on or after February 1, 2000. See, Effects of Proposed Changes under "Present Situation" and the "Other Comments" section.

¹⁷ Floyd, *supra*.

Weber v. Dobbins, 616 So.2d 956, 958 (Fla.1993). "To discern legislative intent, courts must consider the statute as a whole, including the evil to be corrected, the language, title, and history of its enactment, and the state of law already in existence on the statute." (Citations omitted).

The Court in Ruiz/Braggs did not explain why with respect to burglary, the "polestar" of legislative intent was not used to cure the "evil to be corrected."

The Attorney General asked the Court to recede from the Delgado decision pointing out that in another case, Jimenez v. State, 810 So.2d 511, 513 (Fla. 2001), the Court acknowledged that the Legislature "declared that Delgado was decided contrary to legislative intent." The Court responded that the statement was "out of context because the effect of chapter 2001-58 was not at issue in Jimenez." The Court later stated:

We also decline to recede from Delgado. As the Supreme Court of the State of Florida, "one of our primary judicial functions is to interpret statutes and constitutional provisions." Locke v. Hawkes, 595 So. 2d 32, 36 (Fla. 1992). In Delgado, we interpreted the burglary statute and concluded that the "remaining in" language applied only in cases where the "remaining in" was done surreptitiously. See 776 So. 2d at 240. This decision was based on our conclusion that *the Third District's reasoning in Ray v. State, 522 So. 2d 963 (Fla. 3d DCA 1988), which was previously accepted by this Court, "leads to an absurd result."* Delgado v. State, 776 So.2d 233(Fla. 2000). (emphasis added)

Justice Wells, in his dissenting opinion stated:

It is increasingly apparent that in the interest of the proper administration of justice in Florida, this Court should confront the problems created by this Court's decision in Delgado v. State, 776 So. 2d 233 (Fla. 2000), and recede from Delgado. I am committed to the doctrine of stare decisis, but what occurred in this instance is that Delgado failed to adhere to the doctrine of stare decisis by not following this Court's seventeen-year old precedent in Routly v. State, 440 So. 2d 1257 (Fla. 1983). Rather, Delgado rewrote the burglary statute, which was adopted by the Legislature in 1979, resulting in confusing and disparate applications.

As to the majority's analysis in this case, I find it to be a patent misreading of this 2001 statute to state that the plain meaning of that statute "does not apply to those defendants whose conduct occurred prior to February 1, 2000." A plain meaning analysis does not properly disregard the plain intent of the Legislature in enacting a statute.

. . . Rather, it is clear beyond peradventure that the Legislature intended that the 1979 burglary statute be construed as it had been from the date of the burglary statute's adoption in 1979 until the issuance of the Delgado opinion on February 3, 2000. To accomplish this, the Legislature adopted this statute to nullify this Court's Delgado rewrite of the burglary statute. . .

. . .

Because of the need to remove from our law the problems which the Delgado change of law has created, and in recognition that this is the Legislature's will in respect to the construction of this statutory crime, I would give effect to the plain intent of the 2001 statute and recede from Delgado. . .

Present Situation

As it stands now, section 810.015, F.S. has been applied to give the Legislative intent to nullify Delgado no effect for nonfinal cases where the crime occurred *before* February 1, 2000. Days after the release of the Ruiz/Braggs decision, the First District Court of Appeal certified the question of whether Delgado

should also continue to apply to cases where the crime was committed *on or after* February 1, 2000.¹⁸ If the Florida Supreme Court reviews the case and decides that Delgado should continue to apply to nonfinal cases occurring on or after February 1, 2000, then the Florida Supreme Court would have interpreted s. 810.15, F.S. to be a virtual nullity, with its only potential application being for cases occurring within the five week period between the date it became effective (May 25,2001), and July 1, 2001.

Effect of HB 1807

HB 1807 provides further clarification regarding legislative intent with respect to the interpretation of the burglary statute provided in the Delgado decision. The bill also provides special rules of statutory construction expressly providing that the intent language of s. 810.015, F.S., shall be construed to give the Delgado decision no effect.

C. SECTION DIRECTORY:

Section 1. Amending s. 810.015, F.S. regarding legislative intent.

Section 2. Providing an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

¹⁸ The case is Foster v. State, Slip opinion 1D00-4334. (1st DCA, 2003). The question certified is “Has section one of Chapter Law 2001-58, Laws of Florida Legislatively overruled Delgado v. State, 776 So.2d 233 (Fla. 2000), as to cases not final at the time of such decision in which the offenses were committed on or after February 1, 2000, thereby permitting a trial court to instruct a jury that it may find a defendant guilty of burglary, despite evidence showing a legal entry into the premises and that an offense was committed therein while the defendant remained within non-surreptitiously?”

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

N/A.

3. Other:

Ex Post Facto Clause

Because this bill is retroactive, it may be challenged on the grounds that it violates the Ex Post Facto clause of the State or Federal Constitution.¹⁹ An ex post facto law is one which criminalizes or punishes more severely, conduct which occurred before the existence of the law.

The Florida Supreme Court and the United States Supreme Court both use a two prong test to determine if there is an ex post facto violation:

- (1) whether the law is retrospective in its effect; and
- (2) whether the law alters the definition of criminal conduct or increases the penalty by which a crime is punishable.²⁰

Although this bill does apply retroactively, it merely clarifies legislative intent on the Legislature's previous attempt to restore the law of burglary to what it was before being altered by the Delgado opinion. The "decriminalization" of conduct occurred as a result of Court action, not the passage of legislation. A legislative restoration of the law of burglary *to what it was at the time the defendant committed his crime* could not reasonably be construed as a legislative change in law that criminalizes lawful conduct. The Delgado decision itself was "ex post facto in reverse" for lack of a better description. Likewise, it could not be reasonably construed as an increase in punishment for the conduct proscribed. In short, the ex post facto clause should be inapplicable because the Legislature would be "recriminalizing" what the Delgado majority retroactively "decriminalized." A Court opinion finding s. 810.15, F.S., an ex post facto violation would have the effect of empowering the judicial branch to rewrite substantive criminal law, and then deprive the Legislature of the ability of correcting judicial misconstructions of the statute even in the most unjust of circumstances, i.e. when the defendant had violated the law as written by the Legislature, but a Court subsequently legalizes his illegal conduct.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Court also reached its ruling in Braggs/ Ruiz ruling relying on Smith v. State, 598 So.2d 1063 (Fla. 1992) which provides that "any decision of [the Florida Supreme Court] announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review not yet final."²¹ The Court in Ruiz/Braggs concluded that ". . .this result was mandated by principles of fairness

¹⁹ See, Article I, Section 10 of the Florida Constitution; and Article I, Section 9 of the United States Constitution.

²⁰ See, Gwong v. Singletary, 683 So. 2d 112 (Fla. 1996); and California Dep't of Corrections v. Morales, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995).

²¹ It is uncertain how persons receiving the benefits of the Delgado decriminalization effect in the cases occurring before February 1, 2000, would satisfy the requirements of Smith v. State, *supra*, because the defendant would not have been on notice that the Court would be retroactively legalizing conduct which was illegal (in terms of burglary) at the time it was committed. The Court in Smith

ands equal treatment . . . which are embodied in the due process and equal protection provisions of . . . the Florida Constitution.”

In dissent, Justice Wells pointed out “[t]he majority's stated concern that ‘[i]f we were to now recede from Delgado, defendants like Braggs and Ruiz would be treated differently than other similarly situated defendants whose appeals were pending at the time Delgado was decided and who have already received relief,’ majority op. at 11-12, is misdirected.”²²

The Court has the authority to change the law, even within a particular criminal case, based on an intervening act of the Legislature. In Trotter v. State, 690 So.2d 1234 (Fla. 1996) the Florida Supreme Court held that a intervening act of the Legislature was sufficiently exceptional to warrant modification of the law of a case, and to permit the Florida Supreme Court to recede from prior holding in a defendant's appeal.²³

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

also stated: “[t]o benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review (citation omitted).” The Court's change in law in Delgado was not to cure a fundamental error and therefore, would require defendants to have objected at trial (before the Delgado decision was issued) to receive retrospective application under Smith. See, Grossman v. State, 525 So.2d 833, at 842 (Fla.1988); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

²² Ruiz/Braggs, *supra*, Wells dissenting at 19.

²³ Trotter, *supra*, Intervening act of the legislature refining Florida's death penalty statute was sufficiently exceptional to warrant modification of law of case, and to permit Florida Supreme Court to recede from its holding in connection with defendant's prior appeal, that the fact that murder was committed while defendant was on community control was not permissible aggravator under death penalty statute.