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**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME PREVENTION, CORRECTIONS & SAFETY
ANALYSIS**

BILL #: HB 953 (PCB CPCS 01-03)

RELATING TO: Burglary

SPONSOR(S): Committee on Crime Prevention, Corrections & Safety and Representative Bilirakis

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME PREVENTION, CORRECTIONS & SAFETY YEAS 8 NAYS 0
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I. SUMMARY:

In a recent ruling of the Florida Supreme Court, Delgado v. State, the law with respect to certain types of burglary 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. This defense would apply to those instances in which the defendant enters the property with consent of the occupant, but then remains on the property for the purpose of committing a crime, without the occupant's consent. 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 these types of "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 eliminate all other forms of "remaining in" burglaries. In reaching its ruling the Court 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)

In determining the Florida Legislature's intent, the Court receded from Florida case precedent interpreting the long-standing and undisturbed burglary statute. Instead, the Court looked to the definition of burglary in the Model Penal Code, Model Penal Code commentary, a New York case, and "other scholars" to reach its ruling.

House Bill 953 clearly rejects the construction of the statute placed on it as a result of the Delgado opinion, and reasserts the seventeen year case precedent with respect to "remaining in" burglaries. Insofar as burglaries committed on or before July 1, 2001, the bill is a legislative restoration of the law of "remaining in" burglaries to what it was prior to the Delgado opinion.

House Bill 953 also creates a new section of law to apply to burglaries committed after July 1, 2001. This new section rewrites the definition of burglary in such a way as to specify the circumstances under which an invited entry can turn into a "remaining in" burglary.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

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

B. PRESENT SITUATION:

Florida Statutes defines 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 has remained unchanged to the present date. The penalty for burglary varies from a first degree felony punishable by life imprisonment, to a third degree felony punishable by up to five years imprisonment, depending on the circumstances surrounding the burglary.¹

In those instances where a defendant has been "invited" or "licensed" by the occupant to enter the premises, a burglary occurs when two things happen: 1) the defendant remains on the property after his/her invitation or license to remain on the property has been **revoked** (i.e. the occupant withdraws consent for the defendant to stay on the property), and 2) the defendant **remains** on the property, despite the revocation, with the intent to commit an offense therein.

With respect to these "remaining" type burglaries, the issue of whether or not a revocation occurred in order to establish a burglary has been well settled in Florida since 1983, and has been reaffirmed in Florida Supreme Court cases as recently as 1997. A "revocation" of the occupant's consent for the defendant to be on the property can be established by circumstantial evidence that the defendant knew or should have known that the occupant no longer wanted the defendant to remain. A common sense approach has been taken to access circumstances in which withdrawal of consent could be reasonably implied from the circumstances. For example, in a case involving a "remaining in" burglary the Third District Court Appeals said:

¹ Burglary of an unoccupied business would be an example of a third degree felony, while burglary of a residence while armed with a dangerous weapon would be an example of a first degree felony punishable by life.

It is undeniably true that a person would not ordinarily tolerate another person remaining in the premises and committing a crime, and that when a victim becomes aware of the commission of crime, the victim implicitly withdraws consent to the perpetrator's remaining in the premises. Ray v. State, 522 So.2d 963 (Fla. 3rd DCA. 1988).

Acts of violence committed against the victim are also circumstances from which one can infer withdrawal of the victim's consent for the defendant to remain on the property. 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).

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.²

In a recent ruling of the Florida Supreme Court, Delgado v. State, slip opinion SC88638 (Fla. 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 eliminate 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 17.

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 times 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") which 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).

In determining the Florida Legislature's intent, the Court receded from Florida case precedent interpreting this long-standing and undisturbed statute. Instead, the Court looked to the definition of burglary in the Model Penal Code, Model Penal Code commentary, a New York case, and "other scholars" to reach its ruling. After an analysis based on an evaluation of these external sources,

² 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.

the Court said: “[Delgado’s] actions are not the type of conduct which the crime of burglary was intended to punish.”

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 20.

This double murder took place over ten years ago on August 30, 1990. As a result of this opinion, the defendant has been granted a new trial.

C. EFFECT OF PROPOSED CHANGES:

House Bill 953 clearly rejects the construction of the statute placed on it as a result of the Delgado opinion, and reasserts the seventeen year case precedent with respect to “remaining in” burglaries. Insofar as burglaries committed on or before July 1, 2001, the 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.

In addition, House Bill 953 expresses Legislative intent that consent remain a defense to burglary which must be raised by the defendant, and that the lack of consent may be proven by circumstantial evidence.

Although the law of burglary, until Delgado, had been firmly established and well settled, the four member majority in the Delgado opinion found that the current “remaining in” clause in s. 810.02, F.S., is subject to different interpretations. Under s. 775.021(1), F.S., when language in a criminal statute is subject to different interpretations, the statute must be construed most favorably to the accused. In order to avoid different interpretations in the future with respect to “remaining in” burglaries, House Bill 953 creates a new section to apply to burglaries committed after July 1, 2001. This new section rewrites the definition of burglary in such a way as to specify the circumstances under which an invited entry can turn into a “remaining in” burglary.

D. SECTION-BY-SECTION ANALYSIS:

See Effects of Proposed Changes.

III. 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:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Because this bill is partially retroactive, it may be challenged on the grounds that it violates the Ex Post Facto clause of the State or Federal Constitution. An ex post facto law is one which criminalizes or punishes more severely, conduct which occurred before the existence of the law. See, Article I, Section 10 of the Florida Constitution; and Article I, Section 9 of the United States Constitution. Both of these clauses specifically prohibit the **passage** of ex post facto laws. 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.

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).

Although this bill does have a component which applies retroactively, it does nothing more than 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 could **not** be reasonably construed as a legislative change in law which criminalizes lawful conduct. Likewise, it could not be reasonably construed as an increase in punishment for the conduct proscribed. In short, the ex post facto clause should be inapplicable because the Legislature would be "recriminalizing" what the Delgado majority "decriminalized."

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

In his dissenting opinion, Justice Wells (with Justices Lewis and Quince concurring) stated:

I write to explain that I believe the majority seriously errs in unsettling the law of burglary. Though the majority pays a passing tribute to stare decisis, it does what the doctrine of stare decisis is intended to prevent—it destabilizes the law. The law in respect to the "remaining in" part of the burglary statute has been settled in Florida since 1983 by this Court's decision in Routly v. State, 440 So. 2d 1257 (Fla. 1983), and, in respect to the withdrawal of the "remaining in" consent, since 1988 by the decision in Ray v. State, 522 So. 2d 963, 965 (Fla. 3d DCA 1988). This Court plainly accepted this as settled law by affirming it in Raleigh v. State, 705 So. 2d 1324, 1329 (Fla. 1997); Jimenez v. State, 703 So. 2d 437, 440 (Fla. 1997); and Robertson v. State, 699 So. 2d 1343, 1346-47 (Fla. 1997). Unsettling well-settled legal principles is extremely disruptive in the criminal justice system, a lesson we learned again and again from this Court's about-face in State v. Gray, 654 So. 2d 552 (Fla. 1995).

The majority recognizes that this issue is one of statutory interpretation. Since the majority cannot reach its result through the acceptance of the plain language of the burglary statute, the majority resorts to writing a change in the statute by inserting the word "surreptitiously" into the statute. As pointed out earlier, this Court and the appellate courts of this state have interpreted this statute contrary to the present interpretation since 1984 and 1988. Since those dates, there have been yearly legislative sessions. The Legislature has not evidenced any doubt that these long-standing statutory interpretations are in accord with legislative intent. The fact that the Legislature has not acted in so many sessions according to this Court's precedent indicates that the Legislature approved or accepted the construction placed upon the statute. See Johnson v. State, 91 So. 2d 815, 187 (Fla. 1956); White v. Johnson, 59 So. 2d 532, 533 (Fla. 1952). I must conclude that this precedent is now also cast aside. **In view of this decision by the majority, I believe the Legislature needs to immediately review and plainly express whether it accepts the majority's construction of this statute.**

As of the date of this writing, the defendant in the Delgado case has not been reset for trial. Since this defendant has been granted a new trial based on a construction of the statute which would be expressly rejected by the Legislature, and it would be the intent of the Legislature that the law be

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returned to what it was before he was granted a new trial, it is unclear how the courts will resolve the matter of the Delgado retrial. On one hand, the restoration of the law back to the same posture it was when he was tried initially would indicate that the basis for the new trial has been nullified as a matter of law. On the other hand, the law as applied to this particular case is that he receive a new trial. If he is retried, he will either get a retrial based on the very same law under which he was initially convicted, or be the only person in Florida to get a retrial based on the Court's erroneous interpretation of burglary.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON CRIME PREVENTION, CORRECTIONS & SAFETY:

Prepared by:

Staff Director:

David De La Paz

David De La Paz