SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 2330

SPONSOR: Senator Crist

SUBJECT: Burglary

DATE: February 28, 2002 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	Favorable
2.				
3.				
4.				
5.				
6.				

I. Summary:

This bill amends s. 810.02(1)(b)(1), F.S., to clarify the circumstances in which a person could commit the crime of burglary in a dwelling, structure or conveyance that is open to the public. Currently, entering such a public place with the intent to commit a crime does not constitute burglary. The bill specifies that a person commits burglary of a public place if he or she enters the premises with the intent to commit an offense and if consent to enter or remain has been withdrawn.

The bill provides an effective date of July 1, 2002. Its provisions would apply to crimes committed after July 1, 2001.

This bill substantially amends section 810.02 of the Florida Statutes.

II. Present Situation:

In *Delgado v. State*, 776 So.2d 233 (Fla. 2000), the Florida Supreme Court departed from prior precedent and held that lawful entry was a complete defense to a burglary charge and that the phrase "remaining in" in s. 810.02, F.S., was limited to situations where the remaining in was done surreptitiously.

In response to *Delgado*, the Legislature enacted ch. 2001-58, Laws of Florida, to make clear that the *Delgado* opinion did not follow legislative intent. Section 1 of ch. 2001-58, Laws of Florida, plainly expressed the Legislature's intent that a burglary could occur even if the licensed or invited person did not remain in the dwelling, structure or conveyance surreptitiously. Section 2 of the act created a new definition of burglary applicable to offenses committed after July 1, 2001. The new (and current) definition provides that it is a burglary to enter a dwelling, structure

or conveyance with intent to commit an offense therein, unless the premises are open to the public or the person was licensed or invited to enter. However, even if the entry was licensed or invited, remaining in a dwelling, structure or conveyance constitutes burglary if it is done: (1) surreptitiously, with intent to commit an offense; (2) after permission to remain has been withdrawn, with intent to commit an offense; or (3) for the purpose of committing or attempting to commit a forcible felony as defined in s. 776.08, F.S. The statute does not specify that these "remaining" offenses apply to places that are open to the public.

The terms "licensed" and "invited" are derived from tort law. A person who is on another's property is either an invitee, a licensee, or a trespasser. Whether a place is open to the public or is private is only one fact from which the person's legal status is determined. A person who enters premises that are open to the public is generally an invitee or licensee, while a person who enters a private dwelling is a trespasser unless he or she has permission to enter.

The legal status of a person and the nature of property are distinct concepts. Depending upon the circumstances, a person who enters public premises is either an invitee, a licensee, or a trespasser, but the premises are still public. Because s. 810.02, F.S., states that a person does not commit burglary by entering a place that is open to the public, the Florida Supreme Court has held that a defendant has a complete defense to a charge of burglary if he or she can establish that the premises were open to the public at the time of entry. *Miller v. State*, 733 So.2d 955 (Fla. 1998). In *Miller* (which was decided before *Delgado*), the Court considered whether consent to remain in a convenience store had been impliedly withdrawn when the defendant shot the owner of the store. The Court stated:

> "Whether or not consent may have been withdrawn, either by direct or circumstantial evidence, is not an issue. The only relevant question is whether the premises were open to the public at the time the defendant entered or remained with the intent to commit an offense therein." 733 So.2d 955 at 957

In *State v. Byars*, 2001 WL 770010 (Fla.App. 4 Dist. 2001), the Fourth District Court of Appeals took the strict interpretation of the statute to its logical extreme when it considered the state's appeal of a trial court's dismissal of a burglary charge. Byars was subject to a domestic violence injunction that prohibited him from entering a particular retail store where his victim worked. Despite the injunction, he entered the store and murdered the victim. Although the store was open to the public in general, Byars was clearly not entitled to enter. Nevertheless, the appellate court found that the *Miller* precedent compelled it to affirm the trial court's dismissal of the burglary charge. In dissent, Justice Hazouri asserted that *Miller* did not control the facts in the case and that, if its reasoning was carried to its logical conclusion, the court would not find a burglary even if the store owner had been standing at the door holding a sign stating that Byars was prohibited from entering.

The *Byars* decision was rendered just after the effective date of the 2001 amendments to s. 810.02, F.S., so the decision pertained to the statute as it existed at the time of the offense. Section 810.02(b)(1), F.S., still provides that it is not a burglary for a person to enter a place open to the public with the intent to commit a crime therein. However, the burglary statute now includes the "remaining" offenses defined in s. 810.02(b)(2), F.S. and discussed above. The definition sets forth the circumstances in which remaining in a structure, dwelling or conveyance

with intent to commit a crime constitutes a burglary even if the initial entry was licensed or invited. This should apply to persons who are invitees or licensees at premises that are open to the public, but it is not certain that the courts will interpret the statute favorably to the state. It is also possible that the courts may determine that a person who initially enters a public place as a trespasser would still be exempted from a burglary charge because the remaining offenses apply "notwithstanding a licensed or invited entry."

III. Effect of Proposed Changes:

This bill amends the definition of burglary in s. 810.02(1)(b), F.S., to clarify that entering a dwelling, structure or conveyance that is open to the public is a burglary if consent to enter or remain has been withdrawn. With the addition of this language, a burglary charge should be upheld in a factual situation similar to that presented in *Byars*.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

There are no constitutional issues with the bill as a whole. However, in individual cases it may be interpreted to criminalize conduct that is not criminal under the existing statutory language, and would not be applied to such actions committed prior to July 1, 2002.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

There would be an indeterminate impact if the bill results in conviction of some persons who would not be convicted under the current law.

VI. Technical Deficiencies:

In reference to places that are open to the public, s. 810.02(1)(b), F.S., currently states that it is a burglary for a person to enter a dwelling, structure or conveyance with the intent to commit a crime therein unless the premises are at the time open to the public. The bill would insert language that, even though the premises are open to the public at the time of entry, it is a burglary if consent to enter or remain has been withdrawn. It can be anticipated that a defendant will assert that he or she entered a public place lawfully and, even though consent to remain was later withdrawn, he did not commit burglary because the consent to remain could not logically have been withdrawn prior to entry into the building. It is possible that such a defense would be successful because Florida courts are bound to construe penal statutes strictly and, where susceptible to more than one meaning, in the light most favorable to the defendant.

Notwithstanding this concern, the courts should interpret s. 810.02(1)(b)2, F.S., to apply to persons who are invitees or licensees at premises that are open to the public, but who remain without permission. However, the bill could clarify the statute further by either removing all references to premises being "open to the public" and referring only to entry by invitation or license, or by making a reference in s. 810.02(1)(b)2, F.S., to remaining in places that are open to the public.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.