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: CS/SB 2856

SPONSOR: Criminal Justice Committee and Senator Smith

SUBJECT: Burglary

DATE: March 31, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Fav/CS
2.			JU	
3.			ACJ	
4.			AP	
5.				
6.				

I. Summary:

Section 810.015(1), F.S., provides a legislative finding that the case of *Delgado v. State*, 776 So.2d 233 (Fla. 2000), which interpreted the burglary statute, was decided contrary to legislative intent. Section 810.015(2), F.S., provides legislative intent to "nullify" *Delgado*. This subsection is to "operate retroactively to February 1, 2000," a date that is two days prior to the date *Delgado* originally issued. Recently, the Florida Supreme Court concluded that this statute "is not applicable to conduct that occurred prior to February 1, 2000." *State v. Ruiz*, 863 So.2d 233 (Fla. 2000).

Committee Substitute (CS) for Senate Bill 2856 provides legislative findings, intent, and special rules of construction to indicate that the Legislature intends the retroactivity provision to be construed so that no burglary case is subject to the interpretation of the burglary statute in *Delgado*.

This CS substantially amends s. 810.015, F.S., and republishes for informational purposes s. 810.02, F.S.

II. Present Situation:

In 2000, the Florida Supreme Court issued an opinion in the case of *Delgado v. State*, 776 So.2d 233 (Fla. 2000), which provided an interpretation of s. 810.02, F.S., the burglary statute, that substantially departed from its lengthy precedent interpreting that statute, and which resulted in the Legislature amending s. 810.02, F.S., and also creating s. 810.015, F.S., which indicated that the Legislature intended the burglary statute to be interpreted as it was in case law pre-*Delgado*

and intended to "nullify"[1] *Delgado*. ch. 2001-58, L.O.F. The Legislature indicated that s. 815.015(2), F.S, the provision nullifying *Delgado*, is retroactive to February 1, 2000.

The Legislature amended s. 810.02, F.S., to provide that the statutory burglary definition that the Court had reviewed in *Delgado* applies to offenses committed on or before July 1, 2001. s. 810.02(1)(a), F.S. The Legislature also created a new burglary definition, s. 810.02(1)(b), F.S, which is applicable to offenses committed after July 1, 2001.

Recently, in *State v. Ruiz*, 863 So.2d 1205 (Fla. 2003), the Court declined to recede from *Delgado* and concluded that the Legislature intended that s. 810.015(2), F.S., was not to apply to "conduct that occurred prior to February 1, 2000." *Id.* at 1212. The Court appears to have construed the February 1st date as indicating an offense commitment date. This is not indicated in the statute, which simply states that subsection (2) of s. 810.015, F.S., is to be applied retroactively. Further, the choice of the February 1, 2001, date was not an arbitrary one; the date is two days prior to the date that the original opinion in *Delgado* issued. Further, the Legislature indicated its disapproval of *Delgado* in s. 810.015(1), F.S., which was not qualified. In choosing the February 1st date the Legislature did not intend to "differentiate between crimes committed before February 1, 2000, and those committed on or after that date," *Foster v. State*, 861 So.2d 434, 445 (Fla. 1st DCA 2003) (Barfield, J, concurring), but rather 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." *Braggs v. Florida*, 815 So.2d 657, 660, (3rd DCA, 2002) (en banc).

The Interpretation of the Burglary Statute Before *Delgado v. State*

Section 810.02, F.S. (2000), reads 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.
(2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender:
(a) Makes an assault or battery upon any person; or
(b) Is or becomes armed within the dwelling, structure, or conveyance, with explosives or a dangerous weapon; or
(c) Enters an occupied or unoccupied dwelling or structure, and:
1. Uses a motor vehicle as an instrumentality, other than merely as a getaway vehicle, to assist in committing the offense, and thereby damages the dwelling or structure; or
2. Causes damage to the dwelling or structure, or to property within the dwelling or structure in excess of $1,000.
(3) Burglary is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender does not make an assault or

[1] The indication to "nullify" *Delgado* is a statement of intent, not an edict or mandate. The Legislature has indicated it wants this to happen, but the Legislature is also presumed to know the law, including the Constitution, and therefore, knows that only the Florida Supreme Court can recede from its decisions.

battery and is not and does not become armed with a dangerous weapon or explosive, and the offender enters or remains in a:
(a) Dwelling, and there is another person in the dwelling at the time the offender enters or remains;
(b) Dwelling, and there is not another person in the dwelling at the time the offender enters or remains;
(c) Structure, and there is another person in the structure at the time the offender enters or remains; or
(d) Conveyance, and there is another person in the conveyance at the time the offender enters or remains.
(4) Burglary is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender does not make an assault or battery and is not and does not become armed with a dangerous weapon or explosive, and the offender enters or remains in a:
(a) Structure, and there is not another person in the structure at the time the offender enters or remains; or
(b) Conveyance, and there is not another person in the conveyance at the time the offender enters or remains.[2]

In *State v. Hicks*, 421 So.2d 510 (Fla.1982), the Florida Supreme Court, interpreting the burglary statute, stated that the word "unless," as used in s. 810.02(1), F.S., was a qualifier to the primary sentence of the statute, separating the consent phrase from the enacting clause and making consent an affirmative defense to burglary. The effect of *Hicks* was that consent to entry was deemed an affirmative defense to burglary rather than an essential element of the offense. "A defendant has the initial burden of establishing the existence of such a defense, but thereafter the burden shifts to the state to disprove the defense beyond a reasonable doubt." *Coleman v. State*, 592 So.2d 300, 301-302 (Fla. 2d DCA 1991).

In *Routly v. State*, 440 So.2d 1257 (Fla.1983), cert. denied, 468 U.S. 1220 (1984), the Florida Supreme Court held as without merit Routly's argument that the findings of fact in the lower court did not support the conclusion that he committed a burglary because he legally entered the home from the outset. The Court stated that "[t]he burglary statute is satisfied when the defendant 'remains in' a structure with the intent to commit an offense therein. Hence, the unlawful entry is not a requisite element." *Id.* at 1262. *See Ray v. State*, 522 So.2d 963 (Fla. 3d DCA), review denied, 531 So.2d 168 (Fla. 1988).

In *Ray*, the Third District Court of Appeal interpreted the burglary statute to provide that "... once consensual entry is complete, a consensual 'remaining in' begins, and any burglary conviction must be bottomed on proof that consent to 'remaining in' has been withdrawn." *Id.* at 965 (footnote omitted). The *Ray* court stated that "[i]t is undeniably true that a person would not ordinarily tolerate a person remaining in the premises and committing a crime, and that when a victim becomes aware of the commission of a crime, the victim implicitly withdraws consent to the perpetrator's remaining in the premises." *Id.* at 966. The court indicated that this implicit withdrawal of consent could be proven by circumstantial evidence, and in the case before it,

[2] The relevant part of the 1989 burglary statute reviewed in *Delgado* is identical to the 2000 statute.

found sufficient evidence that the victim withdrew her consent to Ray remaining in the premises based upon her struggle with the defendant.

The *Ray* court was not unmindful of the fact that "... the victim's actions in terminating the offender's authority to remain in the premises places the offender at risk of having an otherwise minor charge against him elevated to burglary." *Id.* at 967. In a footnote, the court noted that the burglary statute precludes a burglary charge "where the premises are open to the public." *Id.* at 967 n. 6. The affirmative defense "that the premises are open to the public" is a "complete defense," the court stated. *Id.* (A "complete defense" is a defense that shields the defendant from any criminal liability.) The court further stated that while a noted authority

> argues that this unlawful remaining in ought not to be treated as a burglary and that "it is best to limit the remaining-in alternative to where that conduct is done surreptitiously," 2 W. LaFave & A. Scott, Substantive Criminal Law [section] 8.13, at 468 (1986) (footnote omitted), we are bound to construe our statute as written and not add to it a word -- "surreptitiously"-- not placed there by the Legislature. *See Chaffee v. Miami Transfer Co*., 288 So.2d 209 (Fla. 1974). Just as the consent defense must be given meaning, so must the "remaining in" alternative.... We thus agree with *State v. Mogenson*, 10 Kan.App.2d 470, 475, 701 P.2d 1339, 1344-45 (1985), where the court, confronted with our precise problem, stated:
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> > Assuming defendant was initially authorized to enter the house when his son unlocked the door, that authority was terminated when the defendant's wife demanded that he leave the house. By remaining in the house and committing aggravated battery on his wife, defendant was subject to being convicted of aggravated burglary. The unlawful act, remaining without authority, concurs with the criminal intent to commit aggravated battery and so satisfies the statute's elements.

Id.

In Robertson v. State, 699 So.2d 1343 (Fla. 1997), the Florida Supreme Court rejected Robertson's claim that the evidence did not support his conviction for capital murder, burglary and burglary with assault. On the burglary with assault conviction, the Court recited the elements of burglary, citing Routly and Ray; noted that consent was an affirmative defense, citing Hicks; and quoted the Ray analysis that a burglary conviction can only be sustained by proof that "remaining in" has been withdrawn. While the Court found from the record that Robertson had met his initial burden of proving his entry was with the victim's consent, the Court also found ample circumstantial evidence from which "the jury could conclude that the victim of this brutal strangulation-suffocation murder withdrew whatever consent she may have given Robertson to be in her apartment." Id. at 1346.

In Jimenez v. State, 703 So.2d 437 (Fla. 1997), the Florida Supreme Court rejected Jimenez's claim that the evidence did not support his capital murder and burglary convictions. Jimenez argued that "the burglary was not proven because there was no proof of forced entry, or that [the victim] refused entry, or that she demanded that he leave the apartment." Id. at 440. The Court responded that "[n]either forced entry nor entry without consent are requisite elements of the

burglary statute," id., and then quoted the recitation of the facts in Robertson upon which the jury relied to reasonably conclude that consent to remain had been withdrawn by the victim. Regarding Jimenez's conviction, the Court found ample evidence from which the jury could conclude that the victim had withdrawn whatever consent she may have given for him to remain.

In Raleigh v. State, 705 So.2d 1324 (Fla. 1997), the Florida Supreme Court rejected Raleigh's claim that the trial court had erred in finding that the murders for which he was convicted were committed during the course of a burglary. The court found that any permission Raleigh might have had from the victim to enter "was certainly withdrawn when Defendant shot [the first victim] three times in the head and remained in the trailer to kill [the second victim]." Id. at 1328.

In Miller v. State, 733 So.2d 955 (Fla. 1998), though Miller raised no guilt-phase issues, the Florida Supreme Court conducted an independent review of the entire record, and based on that review, reversed Miller's conviction for burglary within a grocery store. The Court construed the consent clause of the burglary statute to be an affirmative defense, in accordance with Hicks. The Court noted some confusion in applying Ray to the "open to the public" affirmative defense but held that "if a defendant can establish that the premises were open to the public, then this is a complete defense." Id. at 957. Noting that the state had conceded that the grocery store was open to the public, the Court found that Miller had met his burden of establishing the affirmative defense.

Delgado v. State

The Florida Supreme Court recently summarized the holding in Delgado: "... [t]he essence of Delgado is that evidence of a crime committed inside the dwelling, structure, or conveyance of another cannot, in and of itself, establish the crime of burglary. Stated differently, the State cannot use 'the criminal act to prove both intent and revocation' of the consent to enter. Id. at 238." Ruiz, 863 So.2d at 1211.

Delgado was convicted of two counts of first-degree murder and one count of armed burglary and was sentenced to death. Delgado raised numerous issues on appeal to the Court, one of which was that the state's theory of felony murder (burglary was the underlying felony) should not have been presented to the jury. The trial court had allowed the state "to argue both felony murder and premeditated murder in support of the first-degree murder charges." Id. at 235. "...The indictment stated that Delgado had "entered or remained in the victim's dwelling with the intent to commit murder." Id. The state prosecuted the case "on the premises that [Delgado's] entry into the victims' home was consensual (i.e., [Delgado] was invited to enter the victims' home) but then at some point, this consent was withdrawn." Id.

The Court began its legal analysis by discussing Miller and concluding that, "consistent" with that case, "... if a defendant can establish either that the premises are open to the public or that the defendant was an invitee or licensee, then the defendant has a complete defense to the charge of burglary." Id. at 236. The Court further concluded that "[a]fter examining the origins of the crime of burglary, we find that this conclusion is necessary to fulfill the purpose for which the crime of burglary was intended." Id. That "purpose" the Court found in a number of external sources (sources other than Florida case and statutory law). It noted commentary to a burglary

definition in the 1962 Model Penal Code, in which it was explained that the Code definition of burglary attempted to limit the crime to invasion of the premises under circumstances especially likely to terrorize the occupants. The commentators urged the states to limit the phrase "remaining in" to narrow circumstances that involves a suspect who "surreptitiously" remains in the premises after consensual entry. The rationale provided for this limiting interpretation was that it avoided situations in which the unlawful remaining should not be treated as a burglary.

The Court also looked to two New York court decisions and the dissenting opinion of an Alabama Supreme Court justice. The gist of the quoted passages from these sources was that the conversion of lawful entry into unlawful remaining based on commission of the crime erroneously merged "the trespassory element of entry or remaining without license or privilege with the intent to commit the crime"; unlawful entry had to remain separate and distinct from the intention to commit the crime; and the merging of the separate and independent elements would make "anyone a burglar who commits a crime on someone else's premises." [3]

The Court next identified the issue for consideration by the Court as "whether the phrase 'remaining in' found in Florida's burglary statute should be limited to situations where the suspect enters lawfully and subsequently secretes himself or herself from the host." Id. at 238. The Court noted that the Florida courts had not made such a limiting interpretation. It summarized the construction in Ray of the "remaining in" language, but found Ray lacking. It indicated that it agreed with much of the Third District Court of Appeal's reasoning in Ray, "particularly the statement that '[i]t 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 a crime, the victim implicitly withdraws consent to the perpetrator's remaining in the premises.' [Ray,] at 966." Id. at 238. However, it found fault with the appellate court's requirement that the state produce circumstantial evidence to establish that consent had been withdrawn. "[I]f we are certain that 'a person would not ordinarily tolerate another person remaining in the premises and committing a crime,' then it would not be logical to require the State to produce circumstantial evidence of this fact." Id. "More importantly, if we make the assumption that 'a person would not ordinarily tolerate another person remaining in the premises and committing a crime,' and assuming that this withdrawn consent can be established at trial, a number of crimes that would normally not qualify as felonies would suddenly be elevated to burglary. In other words, any crime, including misdemeanors, committed on another person's premises would become a burglary if the owner of the premises becomes aware that the suspect is committing a crime." Id. at 239. The Court believed this would lead to an absurd result, providing several hypothetical examples.

The Court also believed that the meaning given to the phrase "remaining in" in Ray "effectively wiped out" the consent clause because "[u]nder the Third District Court's reasoning, even if a defendant was licensed or invited to enter, the moment he or she commits an offense in the presence of an aware host, a burglary is committed." Id. at 240.

[3] *Id.* at 237-238, quoting *People v. Hutchinson*, 477 N.Y.S.2d 965, 968 (Sup.Ct. 1984), affirmed, 503 N.Y.S.2d 702 (App.Div. 1986), appeal denied, 506 N.Y.S.2d 156 (1986). See *id*. at 238, discussing *People v. Gaines*, 546 N.E.2d 913, 915 (1989), and *id.* at 239 n. 3, quoting *Davis v. State*, 737 So.2d 480, 484-486 (Ala. 1999) (Almon, J., dissenting).

The Court noted that the Ray court had "pointed out that the word surreptitiously does not appear in the [burglary] statute and that a court should not inject words into the statutes that were not placed there," but also noted that 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." Id.[4] (citation omitted). Further, the Court stated that New York's interpretation and the Ray court's interpretation demonstrated that the "remaining in" clause is subject to different interpretations, and therefore, applying the rule of lenity, interpreted the "remaining in" phrase to be limited to situations where the remaining in was surreptitious, an interpretation the Court deemed more favorable to the accused as well as more consistent with the original intention of the burglary statute. By its holding, the Court abrogated Ray and receded from Raleigh, Jimenez, and Robertson. The Court further held that Delgado would "not, however, apply retroactively to convictions that have become final." Id. at 241.

In a dissenting opinion, Justice Wells, joined by Justice Lewis and Justice Quince, stated that he believed that the majority had seriously erred in "unsettling the law of burglary." Id. at 242. He noted that the law on the "remaining in" phrase had been settled since the 1983 decision in Routly, and the withdrawal of "remaining in" consent, since the 1988 decision in Ray.

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[4] Actually, the New York courts, in the cases cited, made no such conclusion. The New York court in *Gaines* stated that in the New York statute the Legislature was addressing the factual situation of "unauthorized remaining in a building after lawful entry (as a shoplifter who remains on store premises after closing)." *Gaines*, 74 N.Y.S. at 362. The instance of the shoplifter remaining in the closed store noted by the court was *an example* of the "unauthorized remaining." In the case of *People v. DeLarosa*, 568 N.Y.S. 47 (Sup. Ct. 1991), there was no indication that DeLarosa surreptitiously remained in the victim's house. According to the court

> Defendant was convicted for forcing his way into the apartment of his estranged wife, beating her, attempting to rape her, and beating a female friend of his wife's over the head with a hammer. During the incident, the wife persistently asked the friend to call police. A neighbor, who had seen defendant prowling around outside with a flashlight, and who saw defendant beat the wife's friend in the hallway, summoned the police. Responding police observed the wife crying hysterically, and a bloody lump on the head of the female friend. A hammer was found on the floor, and cocaine was recovered from defendant as he attempted to discard it. Medical evidence corroborated testimony concerning the assaults. Defendant's testimony sought to establish that his wife had permitted him entry, that they had conversed as man and wife, and that she had finally consented to his sexual advances. Defendant claimed that when they subsequently got into an argument, her friend responded with a hammer, and that defendant accidentally hit her on the head as he tried to disarm her.

Id. at 48.

The New York Supreme Court stated:

> Nor do we find error with the court's supplemental instruction on burglary in the second degree, in response to a jury note, that "if the defendant remained unlawfully ... and while so unlawfully and knowingly remained in the dwelling he had the intent to commit a crime, he can be found guilty of burglary in the second degree." Penal Law [sec.] 140.25 countenances a charge of burglary arising not only out of illegal entry, but also out of illegal remaining (*People v. Gaines*, 74 N.Y.2d 358, 363, 547 N.Y.S.2d 620, 546 N.E.2d 913) when the defendant forms the intent to commit a crime which is contemporaneous with the intent to remain unlawfully. Even if 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.

Id. at 49 (citation omitted).

Justice Wells contended that the majority, while recognizing the issue in the case was one of statutory interpretation, reached its result, not through the acceptance of the statute's plain language, but by "writing a change in the statute by inserting the word 'surreptitiously' into the statute." *Id*. The Justice was also persuaded that the Legislature had agreed with the Court's interpretation of the burglary statute pre-*Delgado*, and strongly urged the Legislature to indicate whether it embraced that interpretation, his rationale being:

> 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 185, 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.

Id.[5]

Justice Wells further noted that the majority had decided against the Court's precedent in favor of the precedent of the State of New York and a dissent by a member of the Supreme Court of Alabama. Justice Wells indicated that he would have followed what the majority of the Alabama Supreme Court had stated in *Davis*:

> In [*Ex parte Gentry*, 689 So.2d 916 (Ala. 1996)], this Court overruled a line of precedents holding that evidence of a struggle and a murder inside the victim's dwelling was sufficient to establish that any initial license to enter had been withdrawn. Gentry served a valid purpose in condemning a finding of burglary merely from the commission of a crime that could not be deemed to be within the scope of the privilege to enter. To hold otherwise would have converted every privileged entry followed by a crime into a burglary, thereby running afoul of the constitutional requirement of reserving capital punishment for only the most egregious crimes. However, in sweeping out mere evidence of the commission of a crime following privileged entry, this Court condemned the use of evidence of a struggle as indicium of revocation of the defendant's license or privilege to remain. In so doing the Court swept with too broad a broom.

Id. at 243, quoting *Davis*, 737 So.2d at 483.

[5] In the *Johnson* case cited by Justice Wells, the Florida Supreme Court stated that "...contemporaneous construction and long acquiescence in a particular construction are entitled to great weight." *Id.* at 187. There is no indication in the *Delgado* opinion that the majority gave "great weight" to the "long acquiescence" of the Legislature in the Florida Supreme Court's longstanding construction of the burglary statute pre-*Delgado* (the Legislature did not amend the burglary statute in reaction to the pre-*Delgado* construction of it).

The 2001 Legislative Changes to the Burglary Law

In response to the *Delgado* decision, the Legislature amended s. 810.02, F.S., the burglary statute, and created s. 810.015, F.S., which provided legislative findings and intent regarding the interpretation and construction of the burglary statute. ch. 2001-58, L.O.F. Provided is the current text of both statutes.

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.
(b) For offenses committed after July 1, 2001, "burglary" means:
1. Entering 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
2. Notwithstanding a licensed or invited entry, remaining in a dwelling, structure, or conveyance:
a. Surreptitiously, with the intent to commit an offense therein;
b. After permission to remain therein has been withdrawn, with the intent to commit an offense therein; or
c. To commit or attempt to commit a forcible felony, as defined in s. 776.08.
(2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender:
(a) Makes an assault or battery upon any person; or
(b) Is or becomes armed within the dwelling, structure, or conveyance, with explosives or a dangerous weapon; or
(c) Enters an occupied or unoccupied dwelling or structure, and:
1. Uses a motor vehicle as an instrumentality, other than merely as a getaway vehicle, to assist in committing the offense, and thereby damages the dwelling or structure; or
2. Causes damage to the dwelling or structure, or to property within the dwelling or structure in excess of $1,000.
(3) Burglary is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender does not make an assault or battery and is not and does not become armed with a dangerous weapon or explosive, and the offender enters or remains in a:
(a) Dwelling, and there is another person in the dwelling at the time the offender enters or remains;
(b) Dwelling, and there is not another person in the dwelling at the time the offender enters or remains;
(c) Structure, and there is another person in the structure at the time the offender enters or remains; or
(d) Conveyance, and there is another person in the conveyance at the time the offender enters or remains.
(4) Burglary is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender does not make an assault or

battery and is not and does not become armed with a dangerous weapon or explosive, and the offender enters or remains in a:
(a) Structure, and there is not another person in the structure at the time the offender enters or remains; or
(b) Conveyance, and there is not another person in the conveyance at the time the offender enters or remains.

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.
(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.

Jimenez v. State

In *Jimenez v. State*, 810 So.2d 511 (Fla. 2001), which will be referred to here as *Jimenez II*, the Florida Supreme Court held that *Delgado* did not apply retroactively to Jimenez's conviction. Jimenez had been found guilty of first-degree murder and burglary of an occupied dwelling with an assault and battery and was sentenced to death. The burglary statute that applied to Jimenez at the time that he committed the murder was the 1991 version of the statute, which predated the *Delgado* decision. In an earlier case involving the direct appeal of Jimenez's conviction and sentence (703 So.2d 437 (Fla. 1997)), which will be referred to here as *Jimenez I*, the Court held that

> ... "[n]either forced entry nor entry without consent are requisite elements of the burglary statute" and that circumstantial proof could establish that the occupant withdrew his or her consent. *Jimenez*, 703 So.2d at 441. In affirming Jimenez's convictions and sentences, we concluded that the trier of fact could reasonably have found beyond a reasonable doubt that [the victim] withdrew consent for Jimenez to remain in her home when he brutally beat and stabbed her numerous times. *Id.*

Id. at 512.

In *Jimenez II*, which arose from a denial of post-conviction relief in which Jimenez had asserted that *Delgado* should be retroactively applied to him, the Court held that, because Jimenez's conviction was final prior to the release of *Delgado*, the issue of retroactivity was controlled by the Court's prior decision in *Witt v. State*, 387 So.2d 922 (Fla.1980). Under the *Witt* test, retroactive application occurs only if the decision (1) emanates from the Florida Supreme Court

or the U.S. Supreme Court, (2) is "constitutional in nature," and (3) has "fundamental significance." *Id.* at 929-930. The Court found that *Delgado* did "not meet the second or third prongs of the *Witt* test; hence it is not subject to retroactive application." *Id.* at 513. "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. Ch. 2001-58, [sec.] 1, 2001 Fla. Sess. Law Serv. 282, 283 (West)." *Id.*

Floyd v. State

In *Floyd v. State*, 850 So.2d 383 (Fla. 2002), cert. denied, 124 S.Ct. 1040 (2004), the Florida Supreme Court addressed on appeal a number of issues raised by Floyd in relation to his convictions for premeditated murder or felony murder, armed burglary of a dwelling and aggravated assault, and also his sentence of death. The issue of relevancy to this analysis was whether a jury instruction, which suggested that the jury could convict Floyd of burglary if it found that he formed an intent to commit murder while he remained in the victim's home, was erroneous and required reversal of his armed burglary conviction, felony murder conviction, and use of murder in the course of a felony aggravating factor.

Floyd asserted that he was entitled to relief under *Valentine v. State*, 774 So.2d 934 (Fla. 5th DCA 2001), review dismissed, 790 So.2d 1111 (Fla. 2001), in which the appellate court had found that the jury instruction suggested to "the jury it could convict Valentine ... if it found that he formed the requisite intent while he remained in the [victim's] vehicle." *Id.* at 937. Since the case did not involve Valentine surreptitiously remaining in the vehicle, the appellate court granted relief on the basis of *Delgado*. The Florida Supreme Court found the instruction in Floyd's case was substantially similar to the instruction in *Valentine,* and overturned Floyd's armed burglary conviction. The Court also struck the finding of the murder in the course of a felony aggravating circumstance, but found that Floyd's guilt was also based on the theory of premeditated murder and evidence was sufficient to support the conviction on that theory.

In a footnote to the opinion, the Court remarked:

> We are aware that in enacting section 810.015(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 [sec.] 810.015 would "operate retroactively to February 1, 2000." The events in Floyd's case occurred well before February 1, 2000. Therefore, because the events in Floyd's case do not fall within the window established by the Legislature for retroactive application of section 810.015(2), we need not address the issue of the retroactive effect of the statute. *See R.C. v. State*, 793 So.2d 1078, 1079 n. 1 (Fla. 2d DCA 2001) (reversing defendant's conviction for burglary of a dwelling, based on *Delgado v. State*, and noting that the Legislature's language in section 810.015(2) regarding the nullification of *Delgado* did not apply because the defendant's actions took place prior to February 1, 2000).

Id. at 402 n. 29.

While concurring specially in the "majority's reasoning and determination ... to affirm the conviction and sentence for first-degree murder (based on the premeditated murder theory) and to affirm the conviction and sentence for aggravated assault," Justice Lewis, with "reluctance," concurred with "the majority's decision to reverse Floyd's conviction for armed burglary and the striking of the aggravating factor related thereto." *Id.* at 410. The Justice indicated that he believed that, based on the rule of stare decisis, *Delgado* controlled on the burglary issue, but also indicated that he continued "to hold the view that *Delgado* was wrongly decided and that the dissent in *Delgado*, with which I concurred, expressed the proper interpretation of the burglary statute as applied to the events both in that case and in the instant case." *Id.*

Justice Wells, in a partial concurrence and partial dissent, indicated that he concurred in "affirming Floyd's conviction for first-degree murder and his sentence of death" but dissented "from the majority's reversing of Floyd's conviction for armed robbery." *Id.* He argued that *Delgado* was not applicable to Floyd. Among the several reasons offered by the Justice as to why *Delgado* was not applicable to Floyd were the interpretation of the retroactivity provision in the legislative analysis of the bill creating it, the opinion of the Third District Court of Appeal in *Braggs*, and a statement made by the Court in *Jimenez* regarding legislative action taken regarding the burglary laws.

Regarding the retroactivity provision, Justice Wells contended that "[t]his retroactivity provision was obviously included so that the original February 3, 2000, *Delgado* decision would be included in the nullification." *Id.* at 410. The Justice quoted this statement in *Braggs*:

> [I]t is permissible to consider the legislative history of chapter 2001-58 to determine why the February 1, 2000 date was chosen. It turns out that the *Delgado* opinion was first released by the Florida Supreme Court on February 3, 2000. 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...." House of Representatives Committee on Crime Prevention, Corrections & Safety Final Analysis, Bill No. HB953(PCB CPCS 01-03), June 26, 2001.
>
> It is therefore clear that the statement of intent in chapter 2001-58 is meant to apply to pending cases, which would include the appeal now before us.

Id. at. 410-411, quoting *Braggs*, 815 So. 2d at 660 (citations and footnotes omitted).

Relying on this quoted passage, the Justice concluded: "Thus, contrary to the majority's determination, *see* majority op. at 402, note 29, the retroactivity provision was not included to make section 810.015(2) only applicable to crimes occurring on or after February 1, 2000." *Id*. at 411. (In a footnote to this remark the Justice noted that "[t]he *Braggs* court subsequently reversed the burglary conviction, determining that it was bound to follow *Delgado* until this Court explicitly recedes from *Delgado*" and that "[t]he court certified the following question of great public importance to this Court: 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." *Id.* at 411 n. 39.)

The Justice further noted the legislative analysis relevant to the interpretation of the retroactivity provision:

> Another reference in the legislative staff analysis prepared for House Bill 953 supports the conclusion that the retroactivity language in section 810.015(2) was included to completely nullify the *Delgado* decision. In discussing what would occur to the defendant in *Delgado* after the enactment of section 810.015, the analysis states:
>
> > 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 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. Fla. H.R. Comm. on Crime Prev., Correct. & Saf., HB 953 (2001) Staff Analysis 7 (final June 26, 2001) (on file with comm.) (emphasis added). Thus, the Legislature clearly intended to nullify *Delgado* so that *Delgado* would not be applicable to defendants convicted of burglary under this Court's precedent prior to *Delgado*.

Id. at 411.

Justice Wells also found support for his conclusion in his reading of *Jimenez*, which he read as denying Jimenez relief because *Delgado* did not meet the *Witt* criteria for retroactive application of *Delgado* and stating that "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." *Id.* at 412, quoting from *Jimenez II*, 810 So.2d at 513. The Justice concluded that "[t]he intent of section 810.015 is to validate all burglary convictions which were properly based on the law as established prior to *Delgado*." *Id.* at 412.

State v. Ruiz

In *Ruiz,* the Florida Supreme Court was asked to considered the certified question presented by the Third District Court of Appeal in *Braggs*, which was also certified by that court in *Ruiz v. State*, 841 So.2d 468 (Fla. 3d DCA 2002). However, the Court determined that the question certified by the appellate court raised "constitutional issues regarding separation of powers that the Court "need not reach to resolve these cases" and rephrased the question as follows: "WHETHER SECTION 1 OF CHAPTER 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." *Id.* at 1207.

After reciting the facts and procedural history of the *Ruiz* and *Braggs* cases, including a summary of its holding in *Delgado* and the Legislature's action in reaction to *Delgado*, the Court turned to its legal analysis. It identified the following as the "threshold issue" decided by the Third District Court of Appeal: "... 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." *Id.* at 1209.

The Court stated that the appellate court had determined that s. 810.015(2), F.S., "was intended to apply to cases such as Braggs' and Ruiz's, which were in the 'pipeline' ["cases pending on direct appellate review or are otherwise not yet final at the time of a pertinent change in the law," *id.* at 1209 n. 6] at the time *Delgado* was decided, based on the legislative history of chapter 2001-58." *Id.* at 1209 (citation omitted). However, the Court concluded that the appellate court had "erred in going beyond the plain meaning of section 810.015(2), which, as the Third District acknowledged, by its own terms does not apply to those defendants whose conduct occurred prior to February 1, 2000." *Id.*

As support for its conclusion, the Court first turned to the statutory construction rule that the "plain meaning" of a statute should be the first consideration. It stated that "the Legislature specified that section 810.015(2), which states an intent to nullify *Delgado*, was to apply retroactively to February 1, 2000." *Id.* It also noted that, in its decision in *Floyd*, it had explained that the "express language of section 810.015(2) makes it inapplicable to cases where the conduct occurred before February 1, 2000...." *Id.* The Court concluded that "section 810.015(2) is inapplicable to Braggs' and Ruiz's cases because their conduct occurred before February 1, 2000," basing this conclusion on *Floyd*. *Id*. at *1210.*

The Court next turned to the state's argument that the Court had receded from *Delgado* in *Jimenez II*. The Court disagreed, stating that, in *Jimenez*, the only issue concerned the retroactive application of *Delgado*. It also disagreed with the state's assertion that its statement in *Jimenez* "acknowledging that the Legislature 'declared that *Delgado* was decided contrary to legislative intent,' indicates that this Court has receded from *Delgado*." *Id*., citing *Jimenez II*, 810 So.2d at 513. It stated that the state had taken the "statement out of context because the effect of chapter 2001-58 was not at issue in *Jimenez*," *id.*, and agreed with the Third District Court of Appeal's explanation in *Braggs* that the statement "was a discussion of why the *Delgado* decision did not meet the test for retroactivity: *Delgado* was not constitutional in nature and did not have fundamental significance." *Id.*, quoting *Braggs*, 815 So.2d at 661. The Court also stated that it "does not intentionally overrule itself sub silentio." *Id.* at 1210.

The Court also declined to recede from *Delgado*. It noted that one of its primary functions is to review statutes and the Constitution. It further reiterated its reasoning and holding in *Delgado*. The Court then noted:

> In *Smith v. State*, 598 So.2d 1063, 1066 (Fla.1992), we held that "any decision of this 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 or not yet final." We concluded that this result was mandated by "the principles of fairness and equal treatment ... which are

> embodied in the due process and equal protection provisions of article I, sections 9 and 16 of the Florida Constitution." *Id*. Thus, under *Smith* this Court's interpretation of the burglary statute in *Delgado* became applicable to any pending cases on review and not yet final when *Delgado* was decided. If 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.... Such disparate treatment cannot be reconciled with the constitutional principles on which our decision in *Smith* rests. *Id.*

Id. at 1211 (citations omitted).

In a footnote to this statement, the Court further noted:

> As noted by Justice Wells in his dissenting opinion, there will be individuals who were convicted of burglary before *Delgado* who will not benefit from that decision even if they committed the exact same acts as Ruiz. *See* dissenting op. at 1215. However, as also explained by Justice Wells in his dissenting opinion in *Fitzpatrick v. State*, 859 So.2d 486, 494 (Fla. 2003), "it can be argued that you always have this kind of disparate treatment when a *Witt* analysis leads to a determination that a change in the decisional law will not be applied retroactively." (Wells, J., dissenting). This consequence of our decision that *Delgado* should not be applied retroactively cannot be used as a basis to alter Braggs' and Ruiz's rights under *Smith*, in which this Court made a clear distinction between cases on collateral review and those in the "pipeline." *See* 598 So.2d at 1066 n. 5.

Id. at 1211 n. 8.

The Court concluded that, based on its analysis, "section 810.015, Florida Statutes (2002) is not applicable to conduct that occurred prior to February 1, 2000." *Id.* at 1212.[6]

In a dissent by Justice Wells, joined by Justice Cantero and Justice Bell, he remarked that "[i]n 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*." *Id.* at 1213. The Justice stated that while he was committed to the doctrine of stare decisis, *Delgado* had failed to adhere to that doctrine when the Court departed from its 17-year-old precedent in *Routly*, and "rewrote the burglary statute, which was adopted by the Legislature in 1979, resulting in confusing and disparate applications." *Id.*

The Justice contended that the majority had misread the "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.'" *Id*. at 1214. He further contended that "[a] plain-meaning analysis does not properly disregard the plain intent of the Legislature in enacting a statute." *Id.* This plain intent,

[6] In *Foster v. State*, 861 So.2d 434 (Fla. 1st DCA 2002), 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. If the Florida Supreme Court reviews this case and decides that *Delgado* should continue to apply to nonfinal cases occurring on or after February 1, 2000, then the only potential application of s. 810.15, F.S., would appear to be cases occurring within the five week period between the date the law became effective (May 25,2001), and July 1, 2001.

he argued, was evident from the date chosen. In support of his contentions, he relied on many of the same sources he had relied on in *Floyd* in indicating why the retroactivity provision date was chosen.

Regarding the majority's stated concern about receding from *Delgado* because "'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," the Justice felt this concern was "misdirected." *Id.* He contended that "the *Delgado* decision itself is what results in the disparate treatment of many defendants who committed the very same crime on the very same day," *id.*, and cited as a hypothetical example a person convicted in the Third Circuit of the same crime involving the same act, committed on the same date as Ruiz's. If that person's conviction, unlike Ruiz's conviction, had become final before the decision in *Delgado*, "[t]hat person would remain convicted of the crime because of a violation of the same statute, which contains the same words, based on the same conduct as Ruiz, whose conviction the majority here overturns." *Id.* at 1215.

III. Effect of Proposed Changes:

Section 1 amends s. 810.015, F.S., to create subsections (4) , (5), and (6). Subsection (4) provides that "[t]he Legislature finds that the cases of *Floyd v. State*, 850 So. 2d 383 (Fla. 2002); *Fitzpatrick v. State*, 859 So. 2d 486 (Fla. 2002); and *State v. Ruiz*/*State v. Braggs*, Slip Opinion Nos. SC02-389/SC02-524 were decided contrary to the legislative intent expressed in this section."

Subsection (4) also provides a legislative finding that

> ... these cases were decided in such a manner as to give subsection (1) no effect. The February 1, 2000 date in subsection (2) does not refer to an arbitrary date relating to the date offenses were committed, but to a date before which the law relating to burglary was untainted by *Delgado v. State*, 776 So. 2d 233 (Fla. 2000).

As previously noted (see "Present Situation" section of this analysis), s. 810.015(1), F.S., provides a legislative finding that the case of *Delgado v. State*, 776 So.2d 233 (Fla. 2000), which interpreted the burglary statute, was decided contrary to legislative intent. Section 810.015(2), F.S., provides legislative intent to "nullify" *Delgado*. This subsection is to "operate retroactively to February 1, 2000," a date two days prior to the date that *Delgado* originally issued. Recently, the Florida Supreme Court held that this statute "is not applicable to conduct that occurred prior to February 1, 2000." *State v. Ruiz*, 863 So.2d 233 (Fla. 2000).

Subsection (5) provides that the following special rules of construction apply to s. 810.015, F.S.:

- "All subsections of this section shall be construed to give effect to subsection (1);
- "Notwithstanding s. 775.021(1), this section shall be construed to give the interpretation of s. 810.02(1)(a) announced in *Delgado v. State*, 776 So. 2d 233 (Fla. 2000), and its progeny, no effect; and

► "If any provision of this section is susceptible to differing constructions, it shall be construed in such manner as to approximate the law relating to burglary as if *Delgado v. State*, 776 So. 2d (Fla. 2000) was never issued."

Subsection (6) provides that s. 810.015, F.S., applies retroactively.

Section 2 republishes s. 810.02, F.S., the burglary statute, for informational purposes.

Section 3 provides that the CS takes effect upon becoming a law.

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:

In *State v. Ruiz*, 863 So.2d 233 (Fla. 2000), the Florida Supreme Court indicated that the certified question presented to the Court raised constitutional issues regarding separation of powers. The following question was certified to the Court: "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." The Court indicated that it did not need to reach these issues to resolve the cases before it. It is uncertain precisely what those issues would have entailed, but were this bill to become law, it is possible that those issues could arise in the context of a challenge to the law.

It is also possible that an ex post facto issue could arise in the context of a challenge to the law by defendants in the "pipeline" when *Delgado* was decided, if they were denied application of *Delgado*. Chief Judge Schwartz, in a special concurrence in *Braggs v. State*, 815 So.2d 657 (Fla. 3d DCA 2002) (en banc), was of the opinion that there would be an ex post facto violation in this circumstance.

> ... *Delgado* would constitutionally have to be applied to a case such as this one, which was in the "pipeline" when *Delgado* was decided. *Smith v. State*, 598 So.2d 1063 (Fla.1992); *State v. Gray*, 654 So.2d 552 (Fla.1995). To do otherwise as a result of the later statute (no matter how the overruling opinion may be phrased), is simply to give that statute an adverse retroactive effect which, in turn, is

> directly forbidden by the ex post facto clause. U.S. Const. art. I, [sec.] 10, cl.1; *Dugger v. Williams*, 593 So.2d 180 (Fla.1991)....

Id. at 662.

Conversely, Judge Ervin, in a concurrence in *Foster v. State*, 861 So.2d 434 (Fla. 1st DCA 2002), was of the opinion that there was no ex post facto violation.

> In deciding *Delgado*, the court based its limiting construction of the burglary statute upon what it perceived to be the legislative intent, rather than any constitutional provision. *See Delgado*, 776 So.2d at 241 n. 7; *Jimenez*, 810 So.2d at 512-13 (observing that *Delgado* need not be given retroactive application, because the decision is not constitutional in nature nor does it have fundamental significance). Because *Delgado* is based purely on the court's interpretation of the statute, I would ordinarily have considered that the nullification amendment, enacted during the year following the decision, should have ended any controversy over the legislature's intent in adding the "remaining in" language to the burglary statute. It has long been recognized that when "an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof." *Lowry v. Parole & Prob. Comm'n*, 473 So.2d 1248, 1250 (Fla.1985). *See, e.g., Barns v. State*, 768 So.2d 529, 530- 33 (Fla. 4th DCA 2000); *Matthews v. State*, 760 So.2d 1148, 1150 (Fla. 5th DCA 2000); *State v. Nuckolls*, 606 So.2d 1205, 1207 (Fla. 5th DCA 1992). Consequently, such laws do not violate the constitutional prohibition against ex post facto laws. See *Skeens v. State*, 556 So.2d 1113 (Fla.1990).

Id. at 444-445

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

An estimate of the prison bed impact of the CS was not available at the time this analysis was completed, but it appears unlikely that an impact could be estimated because the full force and effect of the CS (were it to become law) would appear to be contingent on the Florida Supreme Court deciding whether or not it will recede from *Delgado v. State*, 776 So.2d 233 (Fla. 2000) (and if it will do so, to what extent it will recede from that decision).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.