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/SBs 1080 & 950

SPONSOR: Criminal Justice Committee and Senators Villalobos and Smith

SUBJECT: Burglary

DATE: March 26, 2001 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Favorable/CS
2.			APJ	
3.			AP	
4.				
5.				
6.				

I. Summary:

Committee Substitute for Senate Bills 1080 and 950 rejects the construction of the burglary definition placed on it as a result of the opinion of the Florida Supreme Court in *Delgado v. State*, 2000 WL 1205960 (Fla. August 14, 2000), in which the court held that a licensed entry, if established, is a complete defense to burglary and that unlawfully "remaining in" a premises as prohibited in the burglary statute means only surreptitiously remaining in the premises. The CS explicitly affirms the Legislature's support for the Florida Supreme Court's pre-*Delgado* precedent with respect to burglaries in which the person is "remaining in" a premises with the intent to commit a criminal offense therein. This provision operates retroactively to February 1, 2001.

The new section also indicates legislative intent that consent remain an affirmative defense to burglary and that the lack of consent may be proven by circumstantial evidence.

The CS amends the burglary definition in s. 810.02, F.S. Insofar as burglaries committed on or before July 1, 2001, the CS is a legislative affirmation of the burglary definition, as interpreted by the Florida Supreme Court prior to the *Delgado* opinion.

The CS also creates a new burglary definition for burglaries committed after July 1, 2001. This new section rewrites the definition of burglary so as to specify the circumstances under which a person, while lawfully entering a premises, can commit a burglary by unlawfully "remaining in" the premises.

This CS substantially amends s. 810.02, F.S.; creates s. 810.015, F.S.; and reenacts s. 943.325, F.S., for the purpose of incorporating the amendment to s. 810.012, F.S., in reference thereto.

II. Present Situation:

Section 810.02(1), F.S., provides the following definition of burglary:

> "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.

Judicial Interpretation of the Burglary Definition Prior to *Delgado v. State*

In *State v. Hicks*, 421 So.2d 510 (Fla.1982), the Florida Supreme Court, interpreting the burglary statute, found 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, 301-02 (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 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 held 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 v. State*, the Third District Court of Appeal provided an analysis of the burglary statute that would subsequently be employed by the Florida Supreme Court in several cases until the court abrogated *Ray* in *Delgado v. State*, 2000 WL 1205960 (Fla. August 14, 2000):

> [o]nce 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.

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 965. The court stated that this implicit withdrawal of consent could be proven by circumstantial evidence, and in the case before it, found sufficient evidence that the victim withdrew her consent to Routly remaining in the premises based upon her struggle with the defendant. Because evidence supported "the jury's implicit finding that the victim withdrew here consent to the defendant's remaining in the premises," the court did not

> reach the State's broader, alternative argument that the defendant's conviction can be bottomed simply on his remaining in the premises while possessing the requisite criminal intent. But see *State v. Thibeault*, 402 A.2d 445 (Me.1979), in which the court rejected the state's invitation to construe the statute to mean that the mere existence of the requisite criminal intent after a lawful entry ipso facto constituted a withdrawal of the occupant's consent to remain. The court held that "the result would be, for all practical purposes, the expungement of the 'license' language from the statute. If [this] argument is accepted, a burglary defendant would have to prevail on the question of his intent to commit a crime in order to prevail on the 'license ...' issue." *Id.* at 449 (footnote omitted).

Id., at 967, footnote 5.

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, footnote 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 ("The jury reasonably could have concluded that [the victim] withdrew consent for Robertson to remain when he bound her, blindfolded her, and stuffed her brassiere down her throat with such force that according to the medical examiner she likely would have suffocated from the gag if she had not been strangled first.")

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 "when he brutally beat her and stabbed her multiple times in her neck, abdomen, side, and through her heart." *Id*.

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 trial court found that each murder
>
> > did occur during a burglary. The Defendant entered the locked trailer, at night, armed with a loaded pistol, with the intent to commit murder. Id Defendant initially gained entrance with the [the second victim's] permission it was through false pretense; any permission was certainly withdrawn when Defendant shot [the first victim] three times in the head and remained in the trailer to kill [the second victim].
>
> The court applied the right rule of law, and competent substantial evidence supports its finding. There is ample circumstantial evidence from which the jury could conclude that [the second victim] withdrew consent he may have given for Raleigh to remain when Raleigh shot him several times and beat him so viciously that his gun was left bent, broken, and bloody. We find no error (citing to *Robertson*).

In *Miller v. State*, 713 So.2d 1008 (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 the defendant's conviction for burglary. Miller was convicted of the burglary (including an assault while using a firearm) within a grocery store. The court found no evidence that the grocery store was not open and no evidence that consent was withdrawn, and therefore, concluded that Miller was "licensed or invited to enter," based upon *Robertson,* which relied on the *Ray* analysis of the burglary statute.

The State's argument for Miller's guilt and for imposition of the burglary aggravator (for murder) essentially relied on little more than the commission of a crime by Miller in the grocery store and the implication that the victim would never have consented to a crime in the grocery store. The court responded:

> This is not sufficient. It is improbable that there would ever be a victim who gave an assailant permission to come in, pull guns on the victim, shoot the victim, and take the victim's money. To allow a conviction of burglary based on the facts in this case would erode the consent section of the statute to a point where it was mere surplusage: every time there was a crime in a structure open to the public committed with the requisite intent upon an aware victim, the perpetrator would automatically be guilty of burglary. This is not an appropriate construction of the statute.
>
> Here the argument was geared towards showing that Miller did not have consent to enter the grocery store to commit a crime. Clearly the store was open, so Miller entered the store legally. There was no attempt to show--even through circumstantial evidence--that although Miller entered the store legally, consent was withdrawn. There must be some evidence the jury can rationally rely on to infer that consent was withdrawn beside the fact that a crime occurred. . . .

Id., at 1010-11. *See McCoy v. State*, 723 So.2d 869 (Fla. 1st DCA 1998).

Delgado v. State

In *Delgado v. State*, 2000 WL 1205960 (Fla. August 14, 2000), the Florida Supreme Court, addressed the question of "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." *Id.*, at 6. In a 4-3 decision, the majority abrogated *Ray* and receded from *Raleigh, Jimenez,* and *Robertson*. The majority held that if licensed entry is established, this constitutes a complete defense and that the phrase "remaining in" in the burglary definition was limited to situations in which the remaining in was done "surreptitiously."

The evidence in the case indicated that there was no forced entry. A bloodstained knife and a pistol were found in the premises. The kitchen, utility room, and garage did exhibit signs of a possible struggle. One of the victims had bullet and stab wounds. The other victim had blunt force trauma and stab wounds. A single drop of only Delgado's blood was found in the garage, and a mixture of Delgado's and the victims' blood was found in the garage, on the handgun, at the base of the kitchen phone that hung from a wall, and on the kitchen phone itself. Delgado's palm print was discovered on the kitchen phone. The last call on this phone was made to the home where Delgado resided at the time. In addition to the physical evidence, there was evidence that Delgado and the victims knew each other and had recently experienced difficulties as a result of a business transaction between the victims and the daughter of Delgado's girlfriend. In June of 1990, the victims sold their dry cleaning business to Delgado's girlfriend's daughter who ran the business with her mother and Delgado.

The underlying felony supporting the State's case for felony murder was burglary. The indictment stated that Delgado had entered or remained in the victim's dwelling with the intent to commit murder. Prosecution was premised on the victim's consent to Delgado's entry into her home.

The *Delgado* majority looked to a number of external sources (sources other than Florida case and statutory law) for its narrowing application of the burglary statute. The majority 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 limited application was that it avoided situations in which the unlawful remaining should not be treated as a burglary, in the opinion of the commentators.

The majority also looked to New York court decisions that supported the narrowing application and the dissenting opinion of an Alabama Supreme Court justice. In the opinion of these judicial authorities, the conversion of lawful entry into unlawful remaining based on commission of the crime merged the trespassory element of entry or remaining without license or privilege with the intent to commit the crime. These elements, the courts believed, had to remain separate and distinct from the intention to commit the crime. The courts believed that the commission of the crime itself in the premises was an insufficient basis for finding unlawful entry or unlawful remaining. (However, the pre-*Delgado* cases do not appear to indicate that it is the commission of the crime ipso facto within the premises from which the rational trier of fact reasonably concludes that consent of the perpetrator to remain in the premises has been withdrawn by the victim, but rather the particular facts of the crime as manifested by the circumstantial evidence submitted by the prosecution. For example, evidence of a struggle involving the victim, or evidence that the victim was bound or gagged, or bludgeoned, suffocated, or stabbed.)

Having identified the rationale and sources for a narrowing application, the *Delgado* majority proceeded to explain why it was rejecting the *Ray* analysis. The majority indicated that it agreed with much of the Third District Court's reasoning, "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 5.

The majority found fault, however, with the Third District 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*., at 5. "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." *Id*., at 6. The majority believed this would lead to absurd results.

The majority also believed that the meaning given to the phrase "remaining in" "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 6.

While the majority noted that the word "surreptitiously" does not appear in the burglary definition, they believed the burglary definition was susceptible 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.

In his dissenting opinion, Chief Justice Wells, joined by Justice Lewis and Justice Quince, stated that he believed the majority had seriously erred in unsettling the law on burglary. 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*.

Justice Wells went on to state that the majority recognized the issue in the case was one of statutory interpretation, but 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.*, at 9. 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 this construction of the statute, 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. (emphasis supplied by analyst)

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 in *Davis v. State*, 737 So.2d 480 (Ala. 1999). Justice Wells indicated that he would have followed what the majority 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.

III. Effect of Proposed Changes:

Committee Substitute for Senate Bills 1080 and 950 rejects the construction of the burglary definition placed on it as a result of the opinion of the Florida Supreme Court in *Delgado v. State*, 2000 WL 1205960 (Fla. August 14, 2000), in which the court held that a licensed entry, if established, is a complete defense to burglary and that unlawfully "remaining in" a premises as prohibited in the burglary statute means only surreptitiously remaining in the premises.

Section 810.015, F.S., is created to provide legislative findings and intent indicating the Legislature's rejection of the construction of the burglary statute in *Delgado* and the Legislature's intent that the burglary definition be construed in conformity with the Florida Supreme Court's pre-*Delgado* precedent, which shall operate retroactively to February 1, 2001.

The new section also indicates legislative intent that consent remain an affirmative defense to burglary and that the lack of consent may be proven by circumstantial evidence.

The CS amends the burglary definition in s. 810.02, F.S. Insofar as burglaries committed on or before July 1, 2001, the CS is a legislative affirmation of the burglary definition, as interpreted by the Florida Supreme Court prior to the *Delgado* opinion.

The CS also creates a new burglary definition for burglaries committed after July 1, 2001. This new section rewrites the definition of burglary so as to specify the circumstances under which a person, while lawfully entering a premises, can commit a burglary by unlawfully "remaining in" the premises, to wit:

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:

   - Surreptitiously, with the intent to commit an offense therein;
   - After permission to remain therein has been withdrawn, with the intent to commit an offense therein; or
   - to commit or attempt to commit a forcible felony.

Section 943.325(1)(a), F.S., is amended to incorporate the amendment to the burglary statute in reference thereto.

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:

Because this CS 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 that 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.

S*ee Gwong v. Singletary*, 683 So. 2d 112 (Fla. 1996) and *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995).

Although some provisions of this CS apply retroactively, those provisions explicitly affirm a judicial interpretation of the burglary statute that was as followed by the Florida Supreme Court since the early 1980's and up until the *Delgado* opinion. This pre-*Delgado* interpretation was obviously endorsed by the Legislature since it never amended the burglary definition to indicate that an alternative interpretation was intended (even though the Legislature and the Florida Supreme Court were apprised of this alternative as early as 1988, when this interpretation was discussed in the *Ray* decision). Consequently, regarding this provision the Legislature is not making a substantive change in the statutory law relating to the definition of burglary.

In *Lowry v. Parole and Probation Commission*, 473 So.2d 1248, 1250 (Fla. 1985), the Florida Supreme Court stated:

> When, as occurred here, 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. *United States ex rel. Guest v. Perkins*, 17 F.Supp. 177 (D.D.C.1936); *Hambel v. Lowry*, 264 Mo. 168, 174 S.W. 405 (1915). This Court has recognized the propriety of considering subsequent legislation in arriving at the proper interpretation of the prior statute. *Gay v. Canada Dry Bottling Co*., 59 So.2d 788 (Fla.1952).

But see State v. Smith, 547 So.2d 613 (Fla. 1989).

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

An impact analysis on this legislation was requested from the Criminal Justice Estimating Conference but was not received when this analysis was completed.

VI. Technical Deficiencies:

None.

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.