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IN THE SUPREME COURT OF FLORIDA

THOMAS BAKER,

Petitioner

v. CASE NO. 82,539

STATE OF FLORIDA,

Respondent

_____________________________/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

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ANSWER BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

Petitioner, defendant and Appellant below, will be referred to herein by name or as "Petitioner" Respondent, the State of Florida, will be referred to herein as "the State." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s). References to the transcript of proceedings will be by the use of the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Petitioner has adopted the opinion below as his statement of the case and facts without providing transcript references as required by Fla. R. App. P. 9.210. Otherwise, the State accepts Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

The question certified as a matter of great public importance by the first district court is:

> IS PROOF OF A CRIMINAL MISCHIEF TO A DWELLING (A BROKEN WINDOW) COMMITTED WHILE ON THE CURTILAGE IN A STEALTHY MANNER A BURGLARY UNDER SECTION 810.02, FLORIDA STATUTES, GIVEN THE LEGISLATIVE INTENT OF SECTION 810.02 AND THE COMMON LAW OF BURGLARY COMMITTED ON THE CURTILAGE? (AS PHRASED BY THE DISTRICT COURT)

This Court should not exercise it's discretionary jurisdiction over the question. This is not a case of first impression. It is not even an unusual case. Rather, it is resolved correctly in the district court opinion below by application of the provisions of Chapter 810 (Burglary) and well settled Florida case law.

Correctly re-phrased, the question would ask whether it is burglary to enter the secluded back yard of a dwelling by stealth, seek entry into the dwelling by removing a window screen and break the glass. Clearly it is.

ARGUMENT

ISSUE I

IS PROOF OF A CRIMINAL MISCHIEF TO A DWELLING (A BROKEN WINDOW) COMMITTED WHILE ON THE CURTILAGE IN A STEALTHY MANNER A BURGLARY UNDER SECTION 810.02, FLORIDA STATUTES, GIVEN THE LEGISLATIVE INTENT OF SECTION 810.02 AND THE COMMON LAW OF BURGLARY COMMITTED ON THE CURTILAGE? (AS PHRASED BY THE DISTRICT COURT)

This Court should not exercise it's discretionary jurisdiction over the question certified as one of great public importance. This is not a case of first impression and is resolved correctly in the district court opinion below by application of the provisions of Chapter 810 (Burglary) and well settled Florida case law.[1]

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[1] Section 810.02(1) Fla. Stat. (1975) provides:

> "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein ..."

Section 810.011(2)Fla. Stat. (1975) provides:

> 810.011 Definitions. -- As used in this chapter:
>
> (2) "Dwelling" means a building or conveyance of any kind, either temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, *together with* the curtilage thereof." (emphasis added)

The essential elements of burglary as defined in section 810.102 are (1) entering or remaining in, (2) a structure or conveyance, (3) with intent to commit an offense therein. State v. Waters, 436 So. 2d 66 at 69 (Fla. 1983).

Correctly re-phrased, the question asks whether it is burglary to enter the secluded back yard of a dwelling by stealth, seek entry into the dwelling by removing a window screen and break the glass. Clearly, as the majority opinion below concludes, it is.

The district court below held:

> There was competent evidence establishing appellant's entry into the fenced yard. He was seen coming from the yard only seconds after the alarm had sounded, which alarm appeared to have been triggered by the breaking of a window with a block of wood ... the gate was left open, and . . . a window screen left lying next to the broken window.
>
> . . .
>
> Appellant's intent to commit an offense, which is an essential element of burglary, may be inferred from his stealthy entry. Thus, section 810.07(1) Florida Statutes (1989) provides that "proof of the entering of such structure or conveyance at any time stealthily and without consent of the owner or occupant thereof is prima facie evidence of entering with intent to commit an offense." The trial court correctly instructed the jury that intent could be inferred from stealthy entry. *See Fla. Std. Jury. Instr. (Crim) 135.*
>
> There was ample evidence of appellant's stealthy entry onto the curtilage which, by definition, was part of the "structure" or "dwelling."
>
> Appellant entered a fenced yard and sought entry into the house through a rear window
>
> Testimony established that the front of the house was hidden from the road by trees and shrubbery. The yard was secluded due to the presence of fencing and shrubs. Choosing a secluded location calculated to avoid discovery may constitute stealth. *See Irvin v. State, 590 So. 2d 9 (Fla. 3rd DCA 1991)* (in prosecution for attempted burglary of

conveyance, stealth instruction was proper under §810.07(2) where the defendant selected a van parked next to a wall in a deserted parking lot.)

Accordingly, appellant's conviction and sentence are herewith affirmed.

The underlying logic of the certified question is contained in the dissenting opinion below. The certified question asks this court's advisory opinion about the correctness of the attempted resurrection and about a new theory of law expressed in the dissent.[2] Judge Ervin, writing the dissent, would reduce Petitioner's conviction from burglary to simple trespass in a clear attempt to resurrect Florida's old breaking and entering law.[3]

Judge Ervin posits a theory followed by no court in the state (including the one below) and contrary to the plain language of 810.011(2) Fla. Stat.. The underlying premise of the dissenting theory is that a dwelling is not "together with the curtilage thereof" but rather, the curtilage of a dwelling is

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2 At common law, burglary was considered an offense against the habitation rather than against property. In England, where a person's house was usually enclosed together with a cluster of outbuildings by a wall or fence, used primarily for purposes of protection from outsiders, it became common to refer to such an enclosure as the "curtilage". Blackstone's Commentaries, IV, Page 225. *See DeGeorge, v. State, 358 So. 2d 217 (Fla. 4th DCA 1978).*

3 In Irvin, (relied upon in the majority opinion), as in the instant case, the defendant concedes that his conduct constituted criminal mischief. 590 So. 2d at 10, n.1. Irvin "looked into two of the van's windows, then abruptly broke the window. At that point defendant was apprehended by the security guard.

If the theory of the dissent were applied to Irvin, no burglary conviction would lie since actual entry to the van was not achieved.

independent of the dwelling and the dwelling independent of the curtilage.[4]

Under this theory, when a defendant enters or remains upon the curtilage of a dwelling "with the intent to commit an offense therein", two things must be determined: (1) whether the offense is intended upon the curtilage or upon the dwelling itself and (2) the nature of the offense (misdemeanor/felony) the defendant intends to commit.[5]

The dissent posits that if a defendant enters or remains upon the curtilage with intent only to commit an offense within the curtilage, then conviction for burglary is proper. If on the other hand, the defendant enters the curtilage with intent to commit an offense upon the dwelling, he is immune from burglary conviction unless and until he enters the dwelling itself.

---

[4] The dissenting opinion holds:

> . . . if no evidence exists of an intent to commit a crime within that portion of the curtilage separate from the structure, in the absence of any entry or attempt to enter the structure, a defendant in my judgment, cannot be convicted of burglary of a dwelling.

[5] It was established in State v. Waters, 436 So. 2d 66 at 69 (Fla. 1983) that the indictment or information charging burglary need not specify the offense the accused is alleged to have intended to commit.

The holding of Waters, id. requires this court to answer the certified question in the affirmative, for if the criminal offense intended to be committed after entry need not be specified in the charging document, then any criminal offense is sufficient to maintain conviction of burglary, given requisite proof of the elements of 810.02 Fla. Stat.

It is established that a defendant may be convicted for burglary if he enters the curtilage intending to steal a bicycle on the driveway (See J.E.S. v. State, infra). Under the new hypothesis however, that same defendant may be convicted only for common law trespass if he vandalizes the outside of the dwelling, breaking every window and door and removing every shutter and tile unless and until he enters or attempts entry into the dwelling itself.

This imaginary line between the dwelling and the curtilage is a legal fiction and is contrary to the express language of §810,011(2) that the dwelling is a lodging "together with the curtilage thereof." When the 1974 statutory revisions were made, no other state had gone as far in expanding the coverage of burglary as Florida. A statute that expressly or by implication supercedes the common law and which does not do violence to organic provisions or principles of the state, becomes the controlling law within its proper sphere of operation. DeGeorge v. State, 358 So. 2d 217 and 220 (Fla. 4th DCA 1978) *citing Atlas Travel Service Inc. v. Morely, 98 So. 2d 816 (Fla. 1st DCA 1957).*

This court must follow the plain meaning of the statute without reference to the common law restriction to dwellings to preserve the plain meaning of Florida Statutes Section 810.011(2) and 810.02(1).

After declaring that the curtilage and structure are two separate entities, the dissent discounts the majority's conclusion that Petitioner in fact "sought entry into the house"

by removing the window screen, breaking the window and running when the alarm sounded and instead finds it "equally plausible that he intended simply to commit the offense of criminal mischief without entering the structure."[6]

Upon this rearranging of the facts, Judge Ervin admits that the Petitioner is guilty of at least criminal mischief, but opines that surely the legislature could not have intended to punish misdemeanor conduct as burglary of a dwelling. The certified question echoes this concern -- specifically that the burglary statute might permit prosecution for underlying offenses which were "lesser offenses" than burglary.

It is well settled under Florida law: prosecution for burglary lies when an offender enters or remains in a dwelling with intent to commit an offense therein, regardless of the nature of the offense. This is the clear intent of the legislature.

That intent is manifest by the statutory changes to Chapter 810 on July 1, 1975. Since that time, courts no longer consider whether the offense underlying a burglary is a felony or a misdemeanor. Prior to 1975, Burglary was separated inter alia, into the categories of 'Breaking and entering with intent to commit a misdemeanor' (810.05,Fla. Stat.) and 'Breaking and entering with intent to commit a felony' (810.01(1) Fla. State.).

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6 Petitioner's hypothesis of innocence was that he was misidentified and was never on the grounds of the dwelling but if he was, he didn't break the window but if he did then he intended only criminal mischief.

Since the legislature specifically abolished the former distinction in favor of the present statutory enactment, one must conclude the legislature understood its actions.

On that point, the State invites the court's attention to the following cases where the offense underlying burglary convictions were "lesser" offenses than the burglary charge. In Greer v. State, 354 So. 2d 952 (Fla. 3d DCA 1978), the defendant simply climbed over a six-foot wall into an enclosed parking area or a car dealer and hid under a van. Although no damage was done and nothing stolen, the Greer court upheld the conviction of burglary with intent to commit the offense of larceny. The court makes no reference to where the larceny was to occur i.e., whether Greer intended to commit the crime on the curtilage or in the conveyance.

Likewise, in J.E.S. v. State, 458 So. 2d 168 (Fla. 1st DCA 1984), burglary was committed by stealing a bicycle from a driveway outside a residence. Under the Florida theft statute (§812.014 Fla. Stat.) theft of items valued at $300 or more but less than $20,000 is punishable as a felony of the third degree. Clearly, Greer and J.E.S. are indistinguishable from the instant case because all have underlying misdemeanor offenses, committed after entering or remaining in a building or conveyance, which are -- as phrased by the district court below -- "what might otherwise be deemed lesser offenses".

Clearly the intent of the legislature, as expressed in 775.021(4)(a) Fla. Stat. is to convict and sentence for each

separate criminal offense committed in the course of one criminal episode. Section 774.012(4)(a) Fla. Stat. provides that criminal offenses are separate if each offense requires proof of an element that the other does not.

It is evident when comparing the §810.08 Fla. Stat. trespass statute with the §810.02 burglary statute, that burglary requires the defendant to have a fully-formed conscious intent to commit an offense beyond mere trespass. Likewise, while one may be prosecuted for the crime of criminal mischief to <u>any</u> real or personal property belonging to another, a defendant may not be convicted for burglary of a dwelling relative to the offense of criminal mischief without first trespassing upon the "building or conveyance of any kind . . . . together with the curtilage thereof."

Section 810.02 Fla. Stat. makes no distinction between the dwelling and the curtilage. There is no legal basis upon which this court could determine that the legislature intended one set of rules to apply to the curtilage of the dwelling and another to apply to the dwelling itself.

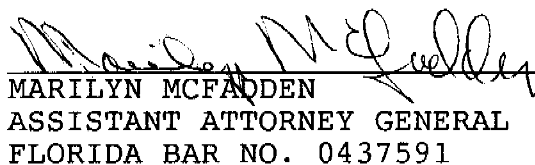
If this court accepts jurisdiction over the certified question, it must be rephrased under the facts of this case to ask whether it is burglary to enter the secluded back yard of a dwelling by stealth, seek entry into the dwelling by removing a window screen and break the glass. Clearly, as the majority opinion below concludes, it is.

CONCLUSION

Based upon the arguments contained herein and the authorities cited, the State requests this court to affirm the judgment and sentence below as affirmed by the First District.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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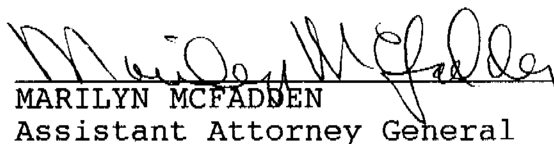
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JAMES T. MILLER, Assistant Public Defender, Fourth Judicial Circuit, 406 Duval County Courthouse, Jacksonville, Florida, 32203, this 2nd day of December, 1993.



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