IN THE SUPREME COURT OF FLORIDA

PATRICK ALAN SALGAT, :

Petitioner, :

v. : CASE NO. 83,216

STATE OF FLORIDA, :

Respondent. :

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

This case is before the court on discretionary review of the decision of the district court of appeal, on jurisdictional grounds of a certified question of great public importance. Petitioner raises six issues herein. Point I concerns the certified question, Points II and III issues addressed by the district court, and Points IV-VI issues raised below but not addressed, each bearing on the applicability of felony murder to the circumstances of this case.

In this brief, record references appear as (R[page number]).

STATEMENT OF THE CASE

Salgat was indicted on charges of grant theft, witness tampering, burglary of a dwelling while armed, shooting into a building, attempted first degree murder, first degree murder and use of a firearm in the commission of a felony. (R1905-1907) Judge Nancy Gilliam presided over a jury trial on the charges. (R1, 176-177) At the close of the state's case, defense counsel moved for judgment of acquittal on all counts. (R1005-1012) Among other arguments, counsel asserted that the state had

presented no proof of entry, an essential element of burglary. (R1007-1009) The court denied the motion at that time, and again when it was renewed at the close of all evidence. (R1013)

During the charge conference, the judge announced without objection that she would instruct the jury on transferred intent as part of the murder instructions. (R1210) The state proposed a special instruction defining curtilage as part of the burglary count. (R1227) Defense counsel opposed the instruction, and the judge decided to use an amended version of the state's proposed instruction which she perceived as closer to the standard instruction. (R1230) Defense counsel maintained his objection. (R1230) Defense counsel objected to an instruction on consciousness of guilt stemming from inconsistent exculpatory statements. (R1252) Counsel also expressed his distaste for the instruction on flight, but said he felt he could not object in good faith. (R1250)

The court instructed the jury in accord with its decisions in the charge conference. (R1381-1391) The jury eventually returned verdicts of guilty as charged of grand theft, witness tampering, armed burglary, shooting into a building, and use of a firearm in the commission of felony. (R1435, 2014-2107) On the remaining counts, the jury found Salgat guilty of first degree murder and attempted first degree murder, interlineating the word "felony" before murder and crossing out the words "as charged" on each count. (R1435, 2016) Given an opportunity, the state made no objection to the verdicts on these counts. (R1440)

At the conclusion of the penalty phase, the jury unanimously recommended life imprisonment without possibility of parole for 25 years. (R1858, 2026) At the sentencing hearing, the judge announced that she had prepared a departure order on the non-capital offenses the previous evening. (R1897) In the oral pronouncement and order, the court specified three reasons for departure: threats to a witness, commission of a capital offense which could not be scored, and escalating pattern of criminal conduct. (R1897-1899, 2033) The court imposed a mandatory life sentence for the murder, consecutive to two consecutive life sentences for the burglary and attempted murder, and consecutive to concurrent 15-year sentences on the crimes of shooting into a building and use of a firearm in the commission of a felony. (R1900, 2035-2044) The court also imposed concurrent five-year sentences for grand theft and witness tampering, concurrent to the 15-year terms, but consecutive to the life sentences. (R1900, 2035-2044)

Salgat raised eight points on direct appeal; the district court addressed four. It affirmed the conviction for attempted felony murder but vacated the accompanying sentence, ruling dual punishments unlawful because the attempt merged into the completed murder. The court rejected Salgat's claim that he was unlawfully convicted and sentenced both for felony murder and the underlying felony. Finally, it deemed unpreserved his argument asserting error in an instruction to the jury on inconsistent exculpatory statements. However, finding that the issue prompted an important question about the continued validity of the

instruction, the court certified the following question of great public importance:

> WHETHER A JURY INSTRUCTION CONCERNING A DEFENDANT'S INCONSISTENT EXCULPATORY STATEMENTS PREVIOUSLY HELD PROPER UNDER JOHNSON V. STATE CONSTITUTES AN IMPROPER COMMENT ON THE EVIDENCE IN LIGHT OF THE COURT'S DECISION IN FENELON V. STATE.

STATEMENT OF THE FACTS

The events resulting in this appeal arose from a relationship between the petitioner, Patrick "Sonny" Salgat, and Charlotte Blevins.

Blevins was the chief state witness. She testified that she met Salgat in December 1989 while she was in the midsts of a divorce. (R498) Blevins moved in with Salgat, and moved with him to a new residence. (R499) She eventually moved into her own house in Gulf Breeze on April 15, 1990, after her renters vacated it. (R499) Blevins testified that Salgat became abusive and violent, and that he wanted to move into her home. (R500) The relationship broke off. (R502) Blevins testified that on May 15, 1990, Salgat came to her house and said he wanted them to be friends. (R502) She allowed him to remain there while she jogged, and they made plans to go out together afterward. (R503) When Blevins returned from her run, Salgat was gone. (R503) Some of her jewelry was also missing. (R503) Salgat had given her some of the missing items, but Blevins estimated the value of the remainder of the missing jewelry at $5,500 to $6,000. (R504) She said Salgat called her on the telephone and said he'd taken the jewelry because she cared more about the items than him. (R505)

Blevins called police and filled out a theft complaint. (R505) She also had the locks to her house changed, and bought a gun. (R505) Salgat called several times to say he'd return the jewelry, but never followed through. (R506) When he learned of the theft complaint, he told her he would return the jewelry only after she dropped the charges. (R507) He told her that if he had to sit in jail one minute someone would pay for it. (R507) He also threatened to kill her, she said. (R507) In response to the threats, Blevins went to the state attorney's office to try to drop the charges. (R508) There she met an investigator, Steven Bolyard, who convinced her that the harassment would continue unless she stood firm. (R508) An additional charge of witness tampering was filed against Salgat. (R508)

Salgat was arrested on the theft and witness tampering charges on June 13, 1990. (R300, 317) An officer arranged his release from jail the next day in exchange for his promise to help in a narcotics investigation. (R788) As a condition of Salgat's release, he was to have no contact with Blevins. (R788, 791) Blevins left town for several days before Salgat's arrest, and learned upon her return that he had been released. (R517-519) She returned to her home Sunday, June 17. (R519) Bolyard arrived and stayed to drink a beer. (R527) Salgat called, and Bolyard listened to the message. (R526) Bolyard told Blevins that since Salgat made no threats, it would be better to let him remain free because returning him to jail would only make him angrier. (R526) Blevins gave Bolyard a tape of messages left by Salgat during Blevins' two-week absence. (R520) Salgat was angry and

threatening in some of the calls, resigned, frustrated and acquiescent in others. (R521-526) In one call he suggested Blevins was involved with someone else. (R521-526)

On Monday, June 18, Blevins agreed to meet Salgat at Pizza Hut so she could return some of his property from their time together. (R528) He was calm and nonthreatening when they made the arrangements, Blevins said. (R528) En route, Blevins spoke on the telephone to Bolyard. (R529) They made arrangements to meet that evening at her house. (R529) Bolyard said he would bring wine. (R529) At Pizza Hut, Salgat said he wanted to remain friends with Blevins. (R529) She accepted $300 for an outstanding phone bill at his insistence. (R530) They moved his property from her car to his. (R530) Salgat asked Blevins to meet him that evening for dinner. (R530) She testified that though he was insistent, she refused, making excuses. (R530) Later that afternoon, Salgat called Blevins, upset that his probation officer said his probation would be violated because he had contacted her. (R531) She said she calmed him down. (R531)

That evening, Blevins returned home from a dinner out with friends. (R531) Bolyard arrived at 8:30 p.m. in running shorts, a T-shirt and boat shoes. (R531) He brought wine coolers, which they drank over ice while watching television. (R532) Blevins declined to answer repeated phone calls, which she thought were from Salgat. (R533) In a tape of these calls, Salgat is heard complaining in one message, in which he said the time was 10:50, that he had been stood up. He said he had to know if she was seeing anyone else. (R567-568) In another message, Salgat is

heard saying that he would have gotten her if he'd wanted, and vowing "I will get you." (R566) The record does not reveal the sequence of these calls. A bartender at a lounge frequented by Salgat testified that Salgat was there from 9:00 until 10:30 p.m., and made at least one phone call during that time. (R779-780)

Blevins testified that as she sat in her living room with Bolyard, the doorbell rang. (R533) Blevins indicated she wasn't expecting anyone, and Bolyard directed her toward the door. (R533) Asked who was there, Salgat identified himself. (R533) Bolyard went toward the phone while Blevins went to her bedroom for her gun. (R533) Bolyard knew she had the gun, she said. (R533) Blevins testified that Salgat started banging on the door. (R534) Blevins returned to the living room with her gun and let Bolyard know she had it. (R535) He had the telephone in hand. (R535) Blevins heard shots. (R535) Bolyard yelled, "Oh my God," and ran toward the door. (R535) Blevins retreated to the shower of her bathroom. (R535-536) Thinking an empty chamber was beneath the hammer, she fired once toward the window. (R537) A shot rang out. (R537) Blevins went into the living room, where she noticed the knob lock was on but the deadbolt off. (R537) She hit the deadbolt, heard shots outside and ran back to her bedroom. (R537) She eventually dialed 911, and police arrived later. (R538) In her call to the emergency operator, she said Salgat "was going to shoot me. I know he shot Steve." (R544)

Charles Kunze, a neighbor of Blevins, testified that on June 18, 1990, he noticed an orange-red, later model car parked on the

street. (R249) He described it as a well cared-for "muscle car" with someone inside. (R248) Several minutes later, he heard two shots close together. (R250) Twenty seconds later, he heard four more shots, staggered. (R250) Kunze went to the front door of his house, where he heard the voices of two men arguing. (R251) Shortly thereafter, he saw a man jogging down the middle of the street saying, "I'm shot, help me." (R251) The man slowed to a walk as he coughed and held his side. (R252) Kunze then heard a motor start, an engine rev loudly and tires squeal. (R252) The sound came from where Kunze had seen the car parked earlier. (R252) Kunze stepped back inside and closed the door until the car passed. (R252) When he looked out again, the man who had been in the street was at a neighbor's door, begging for help. (R253) The neighbor let him in. (R253)

Robin Koller, a guest in the house of the neighbors, Ron Frye and Debbie Collier, said she heard five shots. (R261) It sounded as if more than one gun was firing, she testified. (R261) Bolyard, who was shot, came to the house a short time later. (R262) Despite the assistance provided by the two women, who were nursing students, and paramedics who arrived, the man died. (R262-279)

Steven Bolyard died of a wound from a bullet that entered the left side of his back and came to rest near his chest. (R897) He also had two superficial head wounds. (R897) The bullet jackets from these wounds were removed from the fleshy part of his neck during the autopsy. (R896-898) The medical examiner testified that Bolyard was wearing a T-shirt and unlined shorts,

but no underwear. (R904-906) The shorts were not retained for testing. (R412, 905)

Bolyard's state vehicle was parked at Blevins' house at the time of the shooting. (R924) A colleague of Bolyard testified that, with the police radio antennae, the car looked like an unmarked police vehicle. (R924) The car was locked. (R490) Inside were Bolyard's police radio, badge and gun. (R490) A neighbor of Blevins who lived at 3349 Maplewood noticed damage to his car the next day. (R455) Laboratory analysts testified that a lead core removed from the vehicle matched the lead cores found in air conditioning housing inside Blevins' house. (R458, 968) The shot appeared to have come from the direction of Blevins' house, 3330 Maplewood. (R456) Inside Blevins' house, authorities found bullet holes in the kitchen and bathroom windows. The bathroom window had frosted glass. (R984-985) An expert concluded that the holes in the kitchen window were made by projectiles fired from the outside in. (R978) From findings of lead vapors, the expert estimated the distance of the gun muzzle to both windows at three to four feet when the shots were fired. (R976, 988) Another state witness testified that a gun shot through the kitchen window from five to six feet away necessarily would have been fired by someone on the deck outside the house. (R992) The deck runs behind the house, outside the kitchen and bathroom windows and sliding glass doors. (R347) Miniblinds inside the kitchen window were found partially open after the shooting. (R350) The analyst did not determine the gap between the blinds and windowsill in Blevins' bedroom. (R420) She did find two

partially filled wine glasses in the refrigerator with five unopened wine coolers, and five empty wine cooler bottles in the kitchen. (R421) A pair of deck shoes was found under the coffee table in the living room. (R354)

Keith Steely, the son of Charlotte Blevins' friends, testified that after her mother was called to comfort Blevins following the shooting, a man called and asked for Blevins. (R860-861) The man, who identified himself as Sonny, said Charlotte could not hide forever. (R861)

After the shooting, Salgat enlisted the help of a number of friends in an attempt to evade capture. (R637-680, 744-782) He gave them several different versions of events. He told one friend he had shot the other man in self-defense, but feared no one would believe him since he was not supposed to be at Blevins' house. (R648) Salgat was arrested the next day at the home of a friend. (R751) In the interim, he had hidden the gun, abandoned his car and identification, and shaved his mustache. (R466, 634, 761, 837) Jacqueline Steely, a friend of Blevins, testified that while Blevins was in protective custody at her home in Flomaton, Alabama on the morning after the shooting, Salgat called. (R874) According to Steely, Salgat said he meant to kill the "SOB" who arrested him, and that he wanted Blevins to see the killing. (R875) He said he'd found Blevins and Bolyard having sex on the couch. (R875) Steely was informed of Salgat's arrest within 20 minutes of the call. (R875)

Several witnesses testified for the defense. Michelle Deck stated that on the evening before the shooting, Salgat was upset

at Charlotte because she had "really screwed him over." (R1039) The next day, Salgat asked to come over, but called several times throughout the evening to say he was delayed because he was waiting for someone. (R1043) On the day of the shooting, a woman with whom Salgat was staying, Virginia Billing, said Salgat had lunch with Blevins. (R1060) Billing's daughter Christina said Salgat dressed to go out that evening, and left around 9:30 p.m. (R1066) His demeanor was comfortable and confident, she said. (R1067)

Salgat testified that he loved Charlotte Blevins very much. (R1129) He said they frequently argued during the course of their relationship, but at Blevins' urging, reconciled. (R1128) The reconciliations usually occurred during the first of the month, then the arguments resumed after he paid the bills. (R1128) During an argument on May 19, 1990, Salgat took jewelry he had given her, saying the jewelry meant more to her than he did. (R1129) He noticed later that he had also taken a ring she owned before they met. (R1131) A short time later, after returning from a trip to California, he returned the ring and money he owed her for a phone bill, he said. (R1135)

Blevins met him for lunch on the day of the shooting, Salgat said. (R1145) Their conversation was cordial, and she reluctantly agreed to take money for the cost of his calls to her car phone. (R1145) They transferred his property to his car. (R1146) He invited her out that evening. (R1147) She said she had plans, but Salgat remained hopeful that she would meet him for drinks at one of two spots they frequented. (R1148) That evening, he went

to each bar in hopes that she would show. (R1147, 1150) When she failed to appear, he called several times and left messages on her answering machine. (R1151) Concerned that something was wrong, he went by her house. (R1151) Salgat said he started carrying a gun after he had been threatened several days earlier. (R1151) A defense witness had testified to that incident, which occurred at a bar. (R1086-1091)

Salgat stopped his car on the street near Blevins' house after seeing a strange car in her driveway. (R1151) He tried to look in the living room window, but couldn't see anything through the drapes and the low light. (R1153) He looked through the kitchen window, but saw no one inside. (R1153) He noticed a light in Blevins' bedroom. (R1155) Looking through a space below the blinds in the bedroom window, Salgat saw Blevins and a man having sex in her bed. (R1155) The sight made him sick to his stomach, he said. (R1158) He could not identify the man. (R1155) After a few minutes, he rang the front doorbell, then went back to the kitchen window. (R1155) He saw Blevins go to the door naked and ask who it was. (R1155) She then said she thought it was Sonny and mentioned a gun. (R1155) Salgat moved to the bedroom window, where he saw the man pulling on shorts. (R1156) As Salgat moved toward the kitchen window, a shot came through the bathroom window, narrowly missing him. (R1156) Salgat stumbled back, then saw through the kitchen window a man with something in his hand. (R1157) Thinking the man had just shot at him, Salgat fired twice into the kitchen window. (R1157) He then took off running. As he rounded the corner outside the house,

the man confronted him. (R1157) Salgat thought the man had a gun, because of the shot from inside the house. (R1158) In the dark, Salgat fired twice more. (R1157) The man then started running down the road. (R1157) Salgat walked to his car, got in, and drove by the limping man. (R1157-1158) Salgat was still uncertain of the man's identity. (R1158) He said he did not think he had hit the man, and could have shot him again on the road with the bullet remaining in his gun. (R1159-1161)

Salgat testified that he was confused after the shooting. (R1162) He hid the gun in the utility room of a friend's home. (R1162) He hit a fence backing out of the driveway and lost his sense of direction. (R1162) He parked the car and started walking because he was too rattled to drive. (R1162, 1182) Salgat said he did not intend to assault or murder anyone when he approached Blevins' house. (R1164) He said he fired only after a shot was fired at him. (R1164) He recalled leaving a message on her machine after the shooting, but meant only that if he had intended to kill anyone, both Bolyard and Blevins would have been dead. (R1174) He did not recall saying he would get Blevins in that message. (R1174) He also said he did not learn Bolyard's identity until the next morning's news. (R1185)

SUMMARY OF THE ARGUMENT

I. An instruction on inconsistent exculpatory statements as evidence of consciousness of guilt and unlawful intent is improper, for the same reasons this court banned the flight instruction. Like the flight instruction, the charge on inconsistent

exculpatory statements calls special attention to one type of evidence and the inference flowing from it, an inference of guilt. As with flight, inconsistent exculpatory statements are not unfailing indicators of consciousness of guilt or unlawful intent. The statements may indicate fear of prosecution or consciousness of guilt of a crime other or lesser than the offense charged. Moreover, the use of inconsistent statements as evidence of unlawful intent contradicts case law holding that an accused's actions after the fact do not prove his or her intent during the alleged criminal act. Here, the instruction was an improper comment on the evidence which contaminated the jury's assessment of petitioner's mental state at the time of the offenses. Coupling this instruction with the recently disapproved flight instruction magnified the harm. Contrary to the conclusion of the district court, trial counsel's objection to the instruction preserved the issue as raised on direct appeal and discretionary review.

II. The district court rejected Salgat's claim that he could not lawfully be convicted and sentenced both for felony murder and the burglary underlying the felony murder conviction, citing Enmund v. State, 476 So. 2d 165 (Fla. 1985). This court should reconsider Enmund in light of Cleveland v. State, 587 So. 2d 1145 (Fla. 1991), and Sirmons v. State, 19 Fla. L. Weekly S71 (Fla. Feb. 3, 1994). Here, Salgat was twice convicted and punished for a single act, a putative burglary which occurred when he fired into a house from an adjoining deck. Both the felony murder and burglary convictions punish this act,

contravening Cleveland, in which this court vacated a conviction punishing the same act already punished through another conviction. The same result obtains under the "core offense" analysis of Sirmons, in which this court vacated one of two convictions based on the same core offense. The core offense of felony murder is the underlying felony, just as the core offense of armed robbery is theft. To impose dual convictions and punishments for this one core offense contravenes Sirmons.

III. The district court vacated Salgat's sentence for attempted murder on double jeopardy grounds, but ruled that Salgat had waived this claim as to the conviction by failing to raise it in trial court. The court erred. No waiver of the double jeopardy claim against multiple convictions occurs when an offender whose guilt is determined at trial fails to raise the issue in the trial court. Any waiver arguably stemming from a plea of guilty or nolo contendere is limited to that context, and does not apply when an accused contests his guilt at trial.

IV. The felony murder conviction rests on a burglary that never occurred. There was insufficient evidence of entry into a dwelling. Although by statutory definition a dwelling encompasses the curtilage thereof, there was no evidence Salgat entered the curtilage, defined under common law as an enclosed area around a building. The common-law definition controls; the legislature has not altered or expanded its meaning to encompass petitioner's actions in this case. The evidence showed only that he may have shot into the house from an adjoining unroofed, open deck, which is not part of the curtilage under common law.

Therefore, the burglary conviction rests on legally insufficient evidence, as does the felony murder conviction for which the burglary is the predicate felony.

V. The trial judge erred in instructing the jury that curtilage includes the area immediately surrounding a structure. This was a misleading definition of curtilage, one contrary to the common law as reflected in the standard instructions. Consistent with the evidence, the jurors may have believed there was no entry into the "enclosed space of ground and outbuildings immediately surrounding the structure," yet returned a verdict of guilty of burglary because they found Salgat did enter the "area immediately surrounding those structures." Thus, the erroneous instruction may have affected the verdicts on the burglary and felony murder counts.

VI. Petitioner was wrongly convicted of felony murder because the underlying felony of burglary had ended by the time the killing took place. An essential element of first degree felony murder is that it be committed "by a person engaged in the perpetration or in the attempt to perpetrate" an enumerated felony. Even if the felony murder statute is construed as encompassing murders committed during flight from an enumerated felony -- improper judicial accretion to the plain words of the statute -- the state still failed to provide competent, substantial evidence that the killing occurred during flight. Consequently, the felony murder conviction in Count VI fails for lack of the essential element of contemporaneous commission of an enumerated felony.

ARGUMENT

I. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT INCONSISTENT EXCULPATORY STATEMENTS CAN BE USED TO AFFIRMATIVELY SHOW CONSCIOUSNESS OF GUILT AND UNLAWFUL INTENT.

At the request of the state and over defense objection, the court instructed the jury that inconsistent exculpatory statements can be used to affirmatively show consciousness of guilt and unlawful intent. (R1251, 1390) Defense counsel asserted that the instruction did not apply under these circumstances, when the statements were made at a time of stress following a killing which Salgat was not denying (at trial) that he committed. (R1252) The court coupled the instruction with a flight instruction to which counsel stated he "should object" but did not think he could "in good faith based upon the testimony". (R1246, 1253, 1390)

Petitioner argued on direct appeal that the trial court erred in giving the instruction because it was not justified by the evidence, and because it constituted improper judicial comment for the same reasons given by this court in banning the flight instruction in Fenelon v. State, 594 So. 2d 292 (Fla. 1992). The district court found that the argument on appeal was not preserved by trial counsel, but certified the following question of great public importance:

> WHETHER A JURY INSTRUCTION CONCERNING A DEFENDANT'S INCONSISTENT EXCULPATORY STATEMENTS PREVIOUSLY HELD PROPER UNDER JOHNSON V. STATE CONSTITUTES AN IMPROPER COMMENT ON THE EVIDENCE IN LIGHT OF THE COURT'S DECISION IN FENELON V. STATE.

This Court should direct that the instruction no longer be given in Florida criminal trials. Here, the instruction caused harmful error, preserved by trial counsel.

This court approved the instruction on inconsistent exculpatory statements in Johnson v. State, 465 So. 2d 499 (Fla.), cert. denied, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed. 2d 155 (1985). The court concluded that the instruction was a correct statement of the legal relevance of inconsistent pretrial statements. The viability of the instruction is ripe for re-examination in light of Fenelon v. State, 594 So.2d 292 (Fla. 1992). This court ruled in Fenelon that the jury instruction on flight, i.e., post-offense efforts to evade prosecution, should no longer be given. The court's reasons were several. First, it could "think of no valid policy reason why a trial judge should be permitted to comment on evidence of flight as opposed to any other evidence adduced at trial." Second, the court noted the difficulty in determining when flight actually indicates consciousness of guilt. Finally, the court pointed to confusion in determining what quantum and type of evidence support the instruction. Id. at 294-295.

The instruction on inconsistent exculpatory statements is improper for the same reasons. It is no less a judicial comment on the evidence than the flight instruction. This court observed in Fenelon that the flight instruction treats that evidence differently from other evidence, in derogation of the rule that the trial judge should not comment on the evidence or indicate what inferences may be drawn from it. Id. at 294. Like the

flight instruction, the charge on inconsistent exculpatory statements calls special attention to one type of evidence and inculpatory inferences flowing from it. At least one other jurisdiction has held that an instruction focusing on false, contradictory statements by the defendant is an improper comment on the evidence. State v. Bonner, 406 P.2d 160 (Or. 1965).

Also, as with flight, inconsistent exculpatory statements are not unfailing indicators of consciousness of guilt or unlawful intent. As with flight, the statements may indicate fear of prosecution or consciousness of guilt of a crime other or lesser than the offense charged. Moreover, the use of inconsistent statements as evidence of unlawful intent contradicts precedent holding that an accused's actions after the fact do not prove his or her intent during the alleged criminal act. See Smith v. State, 568 So. 2d 965, 968 (Fla. 1st DCA 1990) (efforts to conceal crime not inconsistent with killing committed in heat of passion); Dupree v. State, 615 So. 2d 713 (Fla. 1st DCA 1993) (Zehmer, J., concurring and dissenting) (defendant's denial he knew victim is as consistent with an effort to avoid prosecution for second degree murder as to avoid prosecution for first-degree murder; denial proved nothing on premeditation). In this respect, inconsistent statements tend to prove unlawful intent only for continuing offenses containing an element of fraud or deceit, not for offenses which require proof of a culpable mental accompanying a discrete, isolated act such as a battery. In short, false or inconsistent statements demonstrate a desire to avoid

being connected to the inculpatory event, but for myriad reasons other than "consciousness of guilt" or "unlawful intent."

While the Johnson instruction creates only a permissive inference, that inference goes solely toward guilt. In Fenelon, this court cited a number of cases from other jurisdictions in which courts have disapproved or strongly discouraged the use of a flight instruction. In several of these cases, the courts cautioned that any flight instruction should inform the jury that there may be reasons for flight fully consistent with innocence. See, e.g., State v. Bone, 429 N.W. 2d 123, 127 (Iowa 1988). The instruction approved in Johnson and given in the instant case contained no such caveat. If the instruction is to remain viable, it must include this addendum.

The facts of this case well illustrate how the instruction emphasizes the connection between the statements and a culpable mental state, when other motivations for the statements may exist. Here, Salgat made the inconsistent statements within hours of killing a state attorney investigator outside his ex-girlfriend's residence after he had fired at the victim through the windows of the house. As noted by trial counsel, there was no claim at trial that Salgat did not fire the fatal shots. Defense counsel developed alternative theories of excusable or justifiable homicide, permissible inferences from the evidence. The jury found Salgat guilty of first degree felony murder, based on an underlying felony of burglary with intent to commit murder, assault or battery. The fact that Salgat gave inconsistent exculpatory statements to his friends in an attempt

to enlist their help as he attempted to elude capture in no way demonstrates his intent at the time he approached Charlotte Blevins' home earlier the same evening. After the fact, he may have realized he committed a manslaughter or second-degree murder, though he had no intent to premeditate a killing or to commit an assault at the time of the putative burglary. In at least one of the post-offense statements, he said he acted in self-defense, consistent with his trial testimony. Salgat may have realized he had shot a state attorney investigator, and feared for his safety. He may have believed he would be held responsible because his presence at Blevins' home violated the conditions of his release from jail. (R645) This knowledge may have led him to doubt his culpability would be fairly determined regardless of whether he considered himself guilty. The instruction is silent as to which crime or what intent the statements could be used to show.

Here, as is often the case, the inconsistent exculpatory statements indicated fear more than anything else. That the fear may have flowed partly from consciousness of guilt does not warrant a special instruction from the judge focusing on that particular motive, when other motives were also equally plausible. As noted above, the jury was not instructed that it could consider these other motives for the statements.

The trial court compounded the prejudice in coupling that instruction with an instruction on flight. Per Fenelon, the flight instruction itself is in error. The instructions on flight and on inconsistent exculpatory statements were given

together, and the prosecutor combined them in closing argument. (R1281-1282) Both are cut from the same cloth; they concern after-the-fact conduct relevant to an accused's state of mind. See State v. Grant, 594 S.E. 2d 169, 171 (S.C. 1980) (in banning flight instruction, court notes 1913 opinion lumping flight and false, conflicting statements together as evidence of guilty knowledge and intent). Thus, although trial in this case occurred before Fenelon, which is prospective only, and although counsel did not expressly object to the flight instruction, the combined instructions on flight and inconsistent statements greatly prejudiced Salgat in the jury evaluation of his intent. Neither the instructions nor the supporting evidence may be segregated. Thus, this court may consider the full context of the two instructions in determining the harm flowing from the preserved error. The prejudice caused reversible error, requiring a new trial on Counts III-VIII.

The district court found that Salgat's appellate argument on the instruction on inconsistent statements was not preserved by trial counsel. The court observed that, in accord with the approval of the instruction in Johnson, trial counsel argued that the instruction was unnecessary here because there was no dispute Salgat shot Bolyard. Slip op. at 6. Counsel's objection is reproduced below:

> Judge, I had looked at this earlier and then had to go talk to my client and put the case down and I was trying to remember, obviously I in general would object to that but it seemed to me that the facts of the Johnson case -- I'm trying to, there was no, there's no question in this particular case as to, in our case who shot the weapon, you know, what

> bullet killed the defendant (sic). There's never been a denial by Mr. Salgat or the defense in this case as to what, who shot or what caused the death and as such I think that can be distinguished from Johnson. The fact that there were inconsistent statements made at a time based on the testimony of confusion and stress, it's different then what, then that which was under the facts of Johnson and therefore, I think it can be distinguished and I object to the state's requested No. 3.

(R1252) (emphasis added). Counsel's objection should be read as (1) a recognition of Johnson as authority for the instruction combined with an argument that the instruction is, nonetheless, generally improper, and (2) an attempt to convince the court that approval of the instruction in Johnson did not require that it be given here, on different facts. In arguing before the district court and now before this court that the instruction is an improper comment on the evidence, Salgat has renewed a general complaint against the instruction (made in Johnson). Trial counsel preserved this argument with his general objection; to argue in greater detail would have been futile, given the rejection of the same argument in Johnson. Moreover, the argument against the instruction on these facts was preserved by counsel's attempt to distinguish Johnson. The Johnson opinion suggests that the identity of the killer was in dispute in that case. Johnson contains no indication of a defense of justifiable or excusable homicide, or an innocent explanation for the inconsistent statements. Johnson's inconsistent statements thus tended to establish that he had a murderer's guilty knowledge. Here, identity was not in question, while -- as argued above -- the evidence suggested inferences for the inconsistent statements

other than consciousness of guilt of first degree murder or intent to commit burglary, the offense underlying felony murder. Thus, the argument here, that the Johnson instruction is both generally improper and inappropriate on these facts, was presaged by trial counsel's objection.

For these reasons, the trial court committed reversible error in instructing the jury that inconsistent exculpatory statements can be used to show consciousness of guilt and unlawful intent. The error compels that Salgat receive a new trial.

II. DUAL PUNISHMENTS FOR FELONY MURDER AND THE UNDERLYING FELONY ARE UNAUTHORIZED.

The district court rejected Salgat's claim that he could not lawfully be convicted and sentenced both for felony murder and the burglary underlying the felony murder, citing Enmund v. State, 476 So. 2d 165 (Fla. 1985). This court should reconsider Enmund in light of Sirmons v. State, 19 Fla. L. Weekly S71 (Fla. Feb. 3, 1994), and Cleveland v. State, 587 So. 2d 1145 (Fla. 1991).

In Enmund this court held that an offender may be convicted and sentenced cumulatively for a felony murder and the underlying felony. The court grounded its holding in a finding of legislative authorization for cumulative punishments under different statutes. 476 So. 2d at 167. In concurrence, Justice Shaw pointed out that the elements of first degree murder and the predicate felonies listed therein each contain at least one unique element. Id. at 169. While the majority elevated

legislative intent over a strict Blockburger[1] analysis of identity of elements, Justice Shaw rested his conclusion solely on the Blockburger test, adopted in section 775.021(4), Florida Statutes (1983):

> Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

In Carawan v. State, 515 So. 2d 161 (Fla. 1987), this court applied the rule of lenity to ban cumulative punishments for offenses that punish the same evil. In response, the legislature amended section 775.021(4) as follows:

> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
> 1. Offenses which require identical elements of proof.
> 2. Offenses which are degrees of the same offense as provided by statute.
> 3. Offenses which are lesser offenses that statutory elements of which are subsumed by the greater offense.

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[1] Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Ch. 88-131, § 7, Laws of Fla. In State v. Smith, 547 So. 2d 613 (Fla. 1989), this court recognized that the amendment abrogated Carawan.

In Cleveland, supra, this court held that a defendant may not be separately convicted and sentenced both for a felony enhanced to a higher degree for use of a firearm and for the crime of use of a firearm in the commission of a felony. The court stated that upon enhancement of the felony for use of a firearm, the offender is "punished for all the elements contained in section 790.07(2) [the firearm offense] and appropriately sentenced." A separate conviction for use of a firearm in the commission of a felony constitutes "improper cumulative punishment for the same act." 587 So. 2d at 1146. In Sirmons, supra, this court held that dual convictions for robbery and grand theft of the same property cannot stand, because both crimes are aggravated forms of the same core offense, theft. In concurrence, Justice Kogan observed that this result is in accord with section 775.021(4)(b)3, Florida Statutes, which concerns permissive lesser included offenses. 19 Fla. L. Weekly at S72. Justice Kogan concluded that the provision prohibits conviction of an offense the elements of which are subsumed by the greater offense as charged.

The First DCA has construed Cleveland as focusing on whether there were two distinct and separate acts. Brown v. State, 617 So. 2d 744 (Fla. 1st DCA 1993). Petitioner suggests that the basis for this single-act analysis is the Double Jeopardy Clause of Article I, Section 9 of the Florida Constitution. This

perspective was prefigured in language from Carawan, in which this court included an excerpt from Ex parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873), to express its view of the constitutional ban on double jeopardy. The Lange passage concluded with these words: "[W]e do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." 21 L.Ed. at 878, cited in Carawan at 515 So. 2d at 164. In context, the word "offence" should be construed as criminal act, not as a contemporary statutory offense, for Lange speaks of being "put to actual punishment twice for the same thing." 21 L.Ed. at 878. Thus, in determining whether multiple convictions violate Article I, Section 9 of the state constitution, the focus is whether the convictions twice put an offender to punishment for the same act, not whether particular enhanced offenses contain congruent statutory elements.

Here, Salgat was twice convicted and cumulatively punished for a single act, a putative burglary which occurred when he fired into a house from the adjoining deck. Both the felony murder and burglary convictions punish this single act. The dual punishments violate the Florida Constitution, compelling reversal of the burglary conviction.

The same result may be achieved under the "core offense" analysis of Sirmons. As Justice Shaw explained in his Enmund concurrence, felony murder and the underlying felony share the element of intent. 476 So. 2d at 168. The felony murder rule acts as a deterrent to certain inherently dangerous felonies by

punishing their grievous though collateral consequences. Thus, the core offense of felony murder is the felony, just as the core offense of armed robbery is theft. To separately convict and cumulatively punish this core offense as both felony murder and an underlying felony contravenes Sirmons.

One last observation. In Enmund Justice Shaw stated that several cases including Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed. 2d 715 (1980), make clear that the Double Jeopardy Clause imposes no meaningful restriction on the legislative power to define offenses and to prescribe punishment. In Whalen, the Court invalidated cumulative punishments for felony murder and the underlying felony. The Court stated:

> In this case resort to the Blockburger rule leads to the conclusion that Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape, since it is plainly not the case that "each provision requires proof of a fact which the other does not."

445 U.S. at 725. The Court further observed that the underlying rape was a necessary element of the proof of felony murder, and that therefore the case should be treated no differently from other cases in which one offense "requires proof of of every element of another offense." Id. In the course of reaching this conclusion, the Court stated that a multiple punishments claim under the Double Jeopardy Clause of the Fifth Amendment "cannot be separated entirely from a resolution of the question of statutory construction." Id. at 688. Petitioner reads this as an expression of the same principle as in section 775.021(4)(b)1, which concerns necessarily lesser included offenses, and as proof

the U.S. Supreme Court deems the felony underlying a felony murder a necessarily lesser included offense for double jeopardy purposes. Consequently, both under the Fifth Amendment and rules of statutory construction arising therefrom, multiple punishments are unauthorized here.

For these reasons, dual conviction and punishment for felony murder and its underlying felony violate the Fifth Amendment to the U.S. Constitution, Article I, Section 9 of the Florida Constitution, and section 775.021(4)(b)1 & 2, Florida Statutes (1991). The conviction and sentence for armed burglary, Count III, must be reversed.[2]

III. AN APPELLANT DOES NOT WAIVE THE LEGALITY OF MULTIPLE CONVICTIONS IN VIOLATION OF THE CONSTITUTIONAL BAN ON DOUBLE JEOPARDY SOLELY BY FAILING TO RAISE THE ERROR IN THE TRIAL COURT.

The district court vacated Salgat's sentence for attempted murder on double jeopardy grounds, but ruled that Salgat had waived this claim as to the conviction by failing to raise it in trial court. The court erred; no waiver of the double jeopardy claim against multiple convictions arises when an offender whose guilt is determined at trial fails to raise the issue in the trial court. Any waiver which might flow from a plea of guilty or nolo contendere is limited to that context, and does not apply when an accused contests his guilt at trial.

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[2]For reasons explained in Point III, this result must obtain as to both the conviction and the sentence.

In Johnson v. State, 483 So. 2d 420, 423 (Fla. 1986), this court held that "the failure to timely raise a double jeopardy claim does not, in and of itself, serve as a waiver of the claim." The court vacated Johnson's convictions, finding no waiver of a double jeopardy claim solely by failing to raise it during trial which occurred after the trial court wrongly vacated misdemeanor convictions obtained via a plea. Id. at 422. The court stated that "there may be limited instances in which a defendant may be found to have waived his double jeopardy rights." Id. at 421. In the two federal cases cited for that proposition, both were resolved by pleas. United States v. Pratt, 657 F.2d 218 (8th Cir. 1981); United States v. Herzog, 644 F. 2d 713 (8th Cir.), cert. denied, 451 U.S. 1018, 101 S.Ct. 3008, 69 L.Ed. 2d 390 (1981).

Here, Salgat did no more than fail to raise his double jeopardy claim at trial, in which he contested his guilt. This conduct falls short of the "limited instances" of waiver contemplated in Johnson. The question whether a guilty or nolo contendere plea waives a double jeopardy challenge to multiple convictions is before this court in Novaton v. State, 610 So. 2d 726 (Fla. 3d DCA 1992), rev. pending, No. 81,183. In support of its disposition of this issue, the district court cited Perrin v. State, 599 So. 2d 1365 (Fla. 1st DCA 1992). Perrin does not indicate whether the defendant pled or went to trial. In a second case cited in the slip opinion, Wright v. State, 573 So. 2d 998 (Fla. 1st DCA 1991), the district court barred a double jeopardy challenge to multiple convictions obtained after trial,

ruling that it was waived solely by failure to raise it in the trial court.

Regardless of whether a guilty or no contest plea waives a challenge to multiple convictions, the mere failure to raise the issue while contesting guilt at trial constitutes no waiver. To the extent it holds otherwise, Wright, on which the district court relied, violates Johnson. As noted in Johnson, the double jeopardy protection is a fundamental constitutional right. 483 So.2d at 422 The law presumes against a waiver of constitutional claims:

> The standard to be applied in determining the question of waiver under federal constitutional law is that the government must prove "an intentional relinquishment or abandonment of a known right or privilege."

United States v. Brown, 569 F.2d 236, 238 (5th Cir. 1978), quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466 (1938).

No waiver of Salgat's state and federal constitutional rights against double jeopardy in regard to his conviction for attempted murder occurred below. The district court erred in concluding otherwise. The attempted murder conviction, Count V, must be reversed.

IV. PETITIONER'S BURGLARY AND FELONY MURDER CONVICTIONS REST ON INSUFFICIENT EVIDENCE OF ENTRY INTO A DWELLING.

The evidence showed that Salgat fired two shots through a window from outside a house, causing superficial wounds, then inflicted a fatal gunshot wound to the victim outside the

house. On these facts, the jury found Salgat guilty of burglary of a dwelling, attempted first degree felony murder and first degree felony murder. The jury specifically added the word "felony" to its murder verdicts, and the state waived any objection to the jury's action. (R1440)

The burglary and felony murder convictions fail for insufficient evidence on the essential element of entry into a dwelling, as the term is defined by statute. Although a dwelling encompasses the curtilage thereof by statutory definition, there was no evidence Salgat entered the curtilage, defined in the common law as an enclosed area around a building. The common-law definition controls; the legislature has not altered or expanded its meaning to encompass Salgat's actions in this case.

Section 810.011(2), Florida Statutes, includes "the curtilage thereof" within the definition of a dwelling. Black's Law Dictionary, 6th Edition, includes the following entry on curtilage:

> A word derived from the Latin cohors (a place enclosed around a yard) and the old French cortillage or courtillage which today has been corrupted into courtyard. Originally, it referred to the land and outbuildings immediately adjacent to a castle that were in turn surrounded by a high stone wall; today, its meaning has been extended to include any land or building immediately adjacent to a dwelling, and usually it is enclosed some way by a fence or shrubs.
>
> For search and seizure purposes, includes those outbuildings which are directly and intimately connected with the habitation and in proximity thereto and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment.

(citations omitted). The drafters of Florida's standard jury instructions did not employ the word curtilage, perhaps recognizing that it falls outside common usage. Instead, citing to section 810.011(1), Florida Statutes, which defines structure as including the curtilage, the instruction informs jurors that structure includes "the enclosed space of ground and outbuildings immediately surrounding that structure." Fla.Std. Jury Instr. (Crim.) Burglary F.S. 810.02. Thus, the common law definition of curtilage, in accord with the standard jury instructions, would not include within the definition of structure (or dwelling) an unenclosed area immediately surrounding the building or structure.

To petitioner's knowledge, this court has not determined whether a structure or dwelling encompasses an adjoining, unenclosed area under the burglary statute. However, in 1984 the First DCA held, contrary to the common law and the standard instructions, that a driveway, whether enclosed or not, is part of the curtilage for purposes of the burglary statute. J.E.S. v. State, 453 So.2d 168 (Fla. 1st DCA 1984). This was an incorrect, unwarranted conclusion, for a number of reasons. First, it was in derogation of the common law. In equating the term curtilage as used in search warrants with the term as used in the burglary statute, the court bypassed a primary principle of statutory construction: unless the legislature has dictated otherwise, statutes are to be construed in accord with the common law. Section 775.01, Florida Statutes (1991). The legislature left intact the common law definition of curtilage for purposes of the

burglary statute, expanding only the range of structures to which a curtilage attaches. Thus, the common law controls. The Fourth DCA commented on this question peripherally in holding that the legislature rendered the common law definition of curtilage applicable to commercial buildings under the burglary statute:

> At common law, burglary was considered an offense against 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".
>
> Florida adopted this common law version at the turn of the Twentieth Century by restricting the curtilage to that of a dwelling house. . . . The Florida Legislature thereafter enacted Section 810.01, which provided a distinguishable standard for breaking and entering a dwelling house and that of other buildings. With the enactment of the present Section 810.01, Florida Statutes (effective October 1, 1975), Section 810.01 was abolished and the common law definition of curtilage was expanded to apply to any building of any kind, either temporary or permanent, which had a roof over it.

DeGeorge v. State, 358 So.2d 217, 219 (Fla. 4th DCA 1978) (emphasis added). While the legislature expanded the common law definition of curtilage to include commercial structures, as held in DeGeorge, it did nothing to alter the common law definition of a curtilage as an enclosed area. Recently, the Third DCA held that in adding a definition of dwelling to the burglary statute in 1982, the legislature "did not intend to overrule the common law definition of a dwelling for purposes of the burglary statute." L.C. v. State, 579 So.2d 783, 784 (Fla. 3d DCA 1991).

The DeGeorge court reviewed a series of search-and-seizure cases gradually dispensing with the requirement of an enclosure for warrant purposes. One of those cases, Joyner v. State, 303 So.2d 60 (Fla. 1st DCA 1974), was relied on by the First DCA in transferring the broadened definition to the burglary statute in J.E.S. Thus, J.E.S. concluded a process by which a statutory term with a fixed common-law meaning became supplanted by judicial interpretations of the same term as used in a different, non-statutory context. This the courts cannot do to a common-law term in a criminal statute. § 775.01, Fla. Stat. (1991). That power belongs to elected lawmakers alone, and as demonstrated above, the legislature has been silent on this matter. See Harold Silver, P.A. v. Farmers Bank and Trust, 498 So.2d 984, 985 (Fla. 1st DCA 1986) (statutes ordinarily should be construed to harmonize with existing common law, and statutes designed to alter the common law "must speak in unequivocal terms"). Absent judicial gloss, the use of curtilage in the statute without an accompanying definition is ambiguous at worst. As it is part of a penal statute, it must be construed strictly and any ambiguity must be construed in the manner most favorable to the accused. Sec. 775.021(1), Fla. Stat. (1991); Trotter v. State, 576 So.2d 691, 694 (Fla. 1990).

This First DCA's action of grafting a modern definition of curtilage into the burglary statute transgresses not just several statutes, but the state constitution as well. Article II, Section 3, Florida Constitution, prohibits members of the judicial branch from exercising powers of the legislative branch.

Under Article III, Section 1, lawmaking is exclusively a legislative function. The legislature incorporated the common-law definition of curtilage in enacting section 775.011. Courts may not thereafter, in the interest of articulating legislation, expand statutory terms already defined by lawmakers.

Finally, the interpretation of curtilage adopted in J.E.S. renders the burglary statute unconstitutionally vague under Article I, Section 9 of the Florida Constitution and the Fourteenth Amendment to the U.S. Constitution. See Falco v. State, 407 So.2d 203 (Fla. 1981) (setting out the due process test of unconstitutional vagueness). A statute is unconstitutionally vague if it fails to give fair notice what is required or proscribed, or if it encourages arbitrary and erratic enforcement. State v. Moo Young, 566 So.2d 1380, 1381 (Fla. 1st DCA 1990). The statute as interpreted in J.E.S. fails both tests.[3] Assuming the requisite intent, persons of reasonable intelligence are given no notice by the burglary statute that entry into a driveway, yard or other area surrounding a dwelling will subject them to prosecution for burglary.[4] The restriction of burglary to

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[3]Petitioner could find no Florida precedent in which a burglary was charged on facts showing the accused shot into a house. This case, involving the killing of a state attorney investigator, evidently is the first instance in which the state has pressed this theory.

[4]One may envision the following scenario under an expansive interpretation of curtilage: during an argument across the shared border of their respective yards, one neighbor becomes incensed and crosses the other's driveway, intending to commit a battery. The first neighbor will have committed a burglary, regardless of whether cooler heads prevail.

entries into structures, dwellings, conveyances and the enclosed areas surrounding them eliminates this trenchant Fifth Amendment due process concern, for it gives potential offenders clear notice when they have crossed the line into culpable conduct.

For these reasons, this court must construe curtilage consistently with the standard jury instructions and the common law. Under that construction, the state presented legally insufficient evidence that Salgat entered a dwelling, as defined in the burglary statute. At most, the state can show he shot from a deck. There was no testimony whether the deck was enclosed. State exhibits 3 and 10 show the deck in relation to the house. It is L-shaped and open on two sides. The portion bordering the house sits at ground level; a second section, away from the house, rests several inches higher. A bench, planter and latticework sit to the rear The deck is open to the sky, aside from a few inches of overhanging eaves from the roof of the house. The deck lacks even those minimal characteristics which might make an enclosed porch or driveway, its closest analogues, part of the structure or curtilage thereof. Compare State v. Gatewood, 221 P.2d 392 (Kan. 1950) (a screened porch in which a washing machine and toys were customarily kept and which had door opening onto yard by roofing was part of dwelling); and In re Christopher J., 102 Cal. App.3d 76, 162 Cal. Rptr. 147 (Cal. App. 4th Dist. 1980) (attached carport, roofed and walled on one side, is part of "dwelling" under state's burglary statute, which was held to abolish common law in favor of broad construction of

term.) The dispositive factual distinctions of Christopher aside, the dissenting opinion there is worth quoting:

> If we were to accept the majority's contention that just because a carport is attached to a house it becomes such an integral part of the house as to come within the burglary statute, then why not a covered porch, a covered attached patio, an attached pergola or an attached arbor? I have a covered porch. On it are some potted plants. On the uncovered steps to the porch are some other potted plants. Under the majority's opinion, the thief who steals the potted plants off the steps is a petty thief. But when he breaks the plane by sticking his arm under the overhang to get a plant on the porch he commits a felony. Unhappy though I may be with the thief who steals my potted plants, he is still only a petit thief whether he steals them off the steps or off the covered porch.

162 Cal. Rptr. at 150 (Gardner, J., dissenting). By extension, one who shoots from a yard at a person inside a house but does not kill the person commits an attempted murder. That person does not commit an attempted felony murder if he steps onto a low, uncovered, unenclosed deck to fire the shot.

Consequently, the burglary conviction in Count III must be reversed, and with it the attempted felony murder and felony murder convictions in Counts V and VI. As the trial court recognized, the jury was specifically instructed that the felony underlying the verdict choice of felony murder was burglary. (R1375, R1463) Therefore, while the burglary conviction must be reversed for acquittal, Salgat may be retried for the homicide on a charge of second degree (depraved mind) murder.

Though the district court did not address this issue, it is cognizable on appeal. In his motion for judgment of acquittal,

defense counsel noted that the state would focus on curtilage, and argued that the evidence of entry was legally insufficient. (R1007-1009). Moreover, because it bears on an essential element of the crime, the error is properly before this court regardless of the precise argument made at trial. A conviction in the absence of a prima facie showing of the crime charged is fundamental error that may be addressed by the appellate court even though not urged below. K.A.N. v. State, 582 So.2d 57 (Fla. 1st DCA 1991). Thus, the state's failure to provide prima facie evidence that Salgat entered a dwelling (or structure), an essential element of the crime, is reviewable.

V. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT STRUCTURE INCLUDES THE IMMEDIATELY SURROUNDING AREA.

During the charge conference, the state requested a special instruction on the term "curtilage" as used in the burglary statute. (R1227) Over defense objection, the court agreed to give a modified version of the state's proposed instruction, which the court considered closer to the standard instruction. (R1230) During closing argument, the prosecutor read the instruction the court had decided to give, then added:

> . . . I used a word in voir dire called curtilage, but the Judge in interest of clarity didn't want to inflict that word on you. So the Judge has defined structure so as to conclude (sic) what we legally think of as curtilage. That is the area immediately surrounding the buildings, in this case, the home of Charlotte Blevins.
>
> It will be for you to determine whether the defendant who was standing with the muzzle of a firearm three to four feet away from the window is within the areas

> immediately surrounding that building. I submit to you that he in fact did. If you are three to four feet away on the deck or walkway immediately outside somebody's dwelling, I don't think there is any question that that is within the area immediately surrounding that dwelling.

(R1281-1282) In its charge to the jury the court gave the same curtilage instruction previewed by the state: "Structure means any building of any kind either temporary or permanent that has a roof over it, outbuilding in[5] (sic) the area immediately surrounding those structures." (R1383)

For the same reasons provided in Point IV, infra, the instruction was in error. It gave the jury a misleading definition of curtilage, one contrary to the common law as reflected in the standard instructions. The instruction unconstitutionally presumed existence of an essential element of the crime, violating due process of law under Article I, Section 9 of the Florida Constitution and the Fourteenth Amendment to the U.S. Constitution. See generally, Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979) (instruction which informed jurors that law presumes person intends ordinary consequences of actions creates unconstitutional presumption). This point is presented independently of Point IV in recognition that the court may conclude that the state presented legally sufficient evidence on a correct definition of curtilage, yet find that the

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[5]Based on the charge conference and prosecutor's closing argument, petitioner suggests the court reporter mistook "in" for "and" here.

definition of curtilage given to the jury incorrectly stated the law. Consistent with the evidence, the jurors may have believed there was no entry into the "enclosed space of ground and outbuildings immediately surrounding the structure," yet returned a guilty verdict of because they found Salgat did enter the "area immediately surrounding those structures." Thus, the erroneous instruction may have affected the verdicts on the burglary, murder and attempted murder counts. Consequently, these convictions must be reversed and the case remanded for retrial on these counts.

This issue was cognizable in the direct appeal, and thus is properly before this court. Entry into a dwelling or the curtilage thereof is an essential element of burglary. The instruction given by the trial court included a materially incorrect definition of curtilage. It therefore misled the jury on an essential element of the crime, a matter the jury necessarily considered in finding Salgat guilty of burglary, felony murder and attempted felony murder. A misleading instruction on a matter the jury must consider in order to convict constitutes both fundamental and reversible error. Stewart v. State, 420 So.2d 862 (Fla. 1982); Doyle v. State, 482 So.2d 89 (Fla. 4th DCA 1986). See also, Steele v. State, 561 So.2d 638 (Fla. 1st DCA 1991).

This was a critical issue at trial on a core element of the burglary underlying the felony murder counts. At best, it was a very close question whether the burglary occurred at all. Defense counsel objected to the instruction, more because it was

not included within the standard instructions than for the reasons more fully fleshed out on appeal. His concerns proved valid, illustrating the perils of accepting an invitation to depart from the standard instructions. Had counsel's objection been sustained, no error would have occurred.

The erroneous jury instruction was sufficiently preserved by counsel below, and in any event constitutes fundamental error.

VI. APPELLANT'S FELONY MURDER CONVICTION RESTS ON INSUFFICIENT EVIDENCE THAT THE KILLING WAS COMMITTED DURING THE PERPETRATION OF A FELONY.

In Count VI, Salgat was convicted of first degree felony murder on a predicate felony of burglary. The judge instructed the jury that the crimes underlying the intent element of burglary were murder, assault or battery. An essential element of first degree felony murder is that it is committed "by a person engaged in the perpetration or in the attempt to perpetrate" an enumerated felony. Sec. 782.04(1)(a)(2), Fla. Stat. (1991). Here, by the state's own view of the evidence, the underlying felony of burglary was complete by the time the killing took place. Even if the felony murder statute is construed as encompassing murders committed during flight from an enumerated felony -- improper judicial accretion to the plain words of the statute -- the state still failed to provide competent substantial evidence that the killing occurred during flight. Consequently, the felony murder conviction in Count VI fails for lack of the essential element of contemporaneous commission of an enumerated felony.

At trial, the judge instructed the jury that burglary was the only felony applicable to the felony murder charge. Here, as argued in Point IV, any burglary was de minimus, proved only by application of the facts to a strained definition of the curtilage of a dwelling. The state asserted in closing argument that Salgat entered and remained in the curtilage when he fired shots into the house from four to five feet outside the window. Assuming this amounted to competent, substantial evidence of entry into the curtilage, there was no evidence of Salgat's location at the time he fired the fatal shot at Bolyard outside the house. By the state's own theory, these shots could not have been fired "in the area immediately surrounding the house," the definition of curtilage supporting the burglary conviction. From the prosecutor's closing argument:

> They go down the street with Mr. Salgat pursuing Mr. Bolyard shooting at him, three more shots. Three more shots are fired. We know where one of them winds up even without the jacket in this Blazer, about two-thirds of the way down the street toward Shady Lane. It hits the side of that Blazer parked in that driveway. Now that troubled Mr. Salgat some on cross-examination, because all of a sudden this bullet and this Blazer doesn't fit what he was trying to tell you about all the shooting taking place in the front yard with him shooting toward the street because that's not what happened. He ran behind investigator Bolyard going down the street. Take a look from the inside of that vehicle back at 3300 Maplewood. You can see in this picture right here, you can see investigator Bolyard's car still sitting there on the driveway. There is no way, no way that the defendant correctly told you what he did. He chased investigator Bolyard down that street shooting at him and firing that shot that punched through investigator Bolyard's back, through his lungs, lodging up under the front side of his chest.

(R1291-1293) As the prosecutor claimed, the evidence suggested that the shots were fired while Salgat chased Bolyard down the street. Apart from the bullet that struck the Blazer parked several houses away, the evidence also showed that Salgat went to his car parked along the street after the shooting and that Bolyard continued to run up the street until he reached a neighboring house. The testimony of the accused cannot contribute to a sufficiency review. State v. Pennington, 534 So.2d 393 (Fla. 1988). Thus, the competent and substantial evidence, even viewed in the light most favorable to the verdict, shows that the fatal shot was not fired while Salgat was in a dwelling or structure. Consequently, at the time of the shot, he was not engaged in the perpetration or attempt to perpetrate the burglary. The burglary was over, if it ever occurred.

Florida appellate courts have held that the term "in the perpetration of" includes the period of time when a felon is attempting to escape from the scene of the crime. Parker v. State, 570 So.2d 1048, 1051 (Fla. 1st DCA 1990). Accord, Johnson v. State, 486 So.2d 657, 659 (Fla. 4th DCA 1986) (term in felony murder statute "obviously" refers to the entire criminal episode). Parker is first, wrong, and second, inapplicable here. It is wrong because it expands the statutory elements of a crime beyond the expressed legislative intent and beyond the plain meaning of the term "in the perpetration of" a felony. Section 775.021(1), Florida Statutes, requires that the provisions of Florida's criminal code, the homicide statute included, be strictly construed, and when susceptible of differing

constructions, construed most favorably to the accused. Application of either rule bars flight as being within "perpetration of a felony". A felony is perpetrated when all the statutory elements exist at the same time. When one of the elements no longer exists -- particularly a core element such as entering or remaining in a dwelling or structure -- the crime has concluded.

The Florida Legislature knows how to define crimes to encompass flight after perpetration. It has done so in the robbery and burglary statutes. Secs. 810.011(4); sec. 812.13(3)(a), Fla. Stat. (1989). It has not done so in the felony murder statute, and the courts cannot act in its place without violating section 775.021(1), as well as Article II, Section 3 of the Florida Constitution, which prohibits judges from exercising power granted to the legislature. Article II, Section 3 "requires a certain precision defined by the legislature, not legislation articulated by the judiciary." Brown v. State, 358 So.2d 16, 18 (Fla. 1978). Therefore, either strictly construed or construed most favorably to the accused, "in the perpetration of" cannot be expansively interpreted to encompass flight, or even the entire criminal episode (also a dangerously vague standard).

Even if the felony murder statute encompasses flight, the substantial, competent evidence viewed most favorably to the verdict shows no flight at the time the fatal shot was fired. Again, evidence consistent with the closing argument reproduced above shows that Salgat headed the victim off and shot him as the two men were in the street. The case presented by the state

admits of no other theory. Accordingly, even under Parker, the killing did not occur during flight following the perpetration of the felony. Cf. Carver v. State, 560 So.2d 258 (Fla. 1st DCA 1990) (kidnapping complete when assault of same victim occurred, so defendant may be convicted of both crimes).

The analysis provided above is consistent with the policy behind the felony murder statute, and demonstrates the poor fit of the state's convoluted burglary theory to these facts. Felony murder punishes a killing committed during an enumerated felony because the felony is inherently dangerous. LaFave and Scott, Substantive Criminal Law, § 7.5(b)(1986). The specific intent essential to the enumerated felony supplants the intent to kill. In Robles v. State, 188 So.2d 789 (Fla. 1966), this court rejected an argument that felony murder did not apply to one who burglarized an apartment with intent to commit aggravated assault, then committed a murder therein. The court noted that the felonies specified in the Florida felony murder statute do not include assault "in any of its forms." Id. at 793. Here, however, Salgat's crime was first and foremost an assault in its most lethal form and then, ephemerally if at all, a burglary. These facts stand in contrast to Robles, in which the perpetrator broke a window to gain entry, then committed a killing. Despite the jury's express rejection of the claim that Salgat premeditated the killing, use of the felony murder statute enabled the state to bootstrap his intent to kill, assault or batter to the level of premeditation because of the near or total fiction that it occurred during a burglary. The state could not prove

premeditated murder. When the jury rejected that theory, the seams in its patchwork felony murder theory started to show. While the attempted felony murder conviction may yet hold together, as that killing occurred during a burglary (if a burglary was committed), the felony murder resting on acts committed after the putative burglary must fall. This conviction rests on facts from which no reasonable jury could find guilt beyond a reasonable doubt, violating the Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 9 of the Florida Constitution.

For these reasons, Salgat's conviction of first degree murder in Count VI must be reversed and remanded for a new trial. This issue is cognizable on appeal, because it concerns the failure to establish a prima facie case on an essential element of felony murder -- a killing committed during perpetration of an enumerated felony. Therefore, it constitutes fundamental error which goes to the foundations of the felony murder count, and is reviewable regardless of whether it was raised at the trial level. K.A.N. v. State, 582 So.2d 57 (Fla. 1st DCA 1991). As stated by the court in Dydek v. State, 400 So.2d 1255, 1258 (Fla. 2d DCA 1981), "[w]e can think of no error more fundamental than the conviction of a defendant in the absence of a prima facie showing of the essential elements of the crime charged." Moreover, the conviction on evidence on which no rational trier of fact could find guilt beyond a reasonable doubt violates the Fifth and Fourteenth Amendment guarantees of due process of law. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979).

CONCLUSION

Petitioner's convictions should be reversed and the case remanded for a new trial or other relief consistent with this court's disposition of the arguments made herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Carolyn J. Mosley, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, on this 15th day of March, 1994.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

PATRICK ALAN SALGAT,	)	NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND
Appellant,	)	DISPOSITION THEREOF IF FILED.
vs.	)	CASE NO. 91-02552
STATE OF FLORIDA,	)	
Appellee.	)	
	)	

Opinion filed November 17, 1993.

An Appeal from the Circuit Court for Santa Rosa County.
Nancy Gilliam, Judge.

Nancy A. Daniels, Public Defender, and Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Carolyn J. Mosley, Assistant Attorney General, Department of Legal Affairs, Tallahassee, for Appellee.

PER CURIAM.

This cause is before us on Patrick "Sonny" Salgat's appeal of his conviction and sentences on the following charges: grand theft, tampering with a witness, burglary of a dwelling while armed, shooting into a building, attempted first-degree felony murder, first-degree felony murder, and possession of a firearm in the commission of a felony. Salgat raises nine issues on appeal. We find only four of those issues merit discussion.

The facts pertinent to this appeal are as follows. In the spring of 1990, Patrick "Sonny" Salgat began harassing his former girlfriend Charlotte Blevins in an effort to rekindle their past relationship. After several weeks of phone calls, Blevins agreed to meet Salgat at her home to talk. When Salgat left her house, Blevins noticed that Salgat had stolen some of Blevins' diamond jewelry. Blevins called the police and reported the theft. In spite of police involvement, Salgat's harassment continued, his calls becoming increasingly violent. When Blevins decided to drop the theft charges to appease Salgat, she was placed in contact with state attorney investigator Steve Bolyard. Bolyard convinced Blevins to continue to pursue the pending charges against Salgat. When Salgat found out about the warrant issued for his arrest, he repeatedly threatened to kill Blevins. Bolyard became more concerned about Blevins' safety and, as a result, often called Blevins or followed her home from work. On June 13, 1990, Salgat was arrested by police with Bolyard's help. Salgat was released the following day after he provided other police officers with information concerning illegal drug deals and agreed that he would no longer bother Blevins.

On the evening of June 17, 1990, Bolyard stopped by Blevins' home to check on her. Bolyard parked his unmarked police vehicle in her driveway, leaving his gun and radio in the car. At approximately 11:15 p.m., Salgat announced himself and pounded on

Blevins' front door. According to Blevins, she became frightened and ran from the living room into the bedroom. Bolyard went to the kitchen to call police. While Bolyard was on the phone, Salgat fired two shots at him from the back porch. Both bullets entered the house through the kitchen window, with fragments striking Bolyard in the back of the head and neck. Wounded, Bolyard dropped the phone and ran out the front door. Salgat ran around the house and met Bolyard in the front yard, where he fired at least two more shots at Bolyard. One bullet struck Bolyard in the back, piercing his lung. Bolyard struggled to a neighboring house, where he later died.

Salgat ran to his car and drove away. He eluded police for several hours, hiding at the homes of several friends. While a fugitive, Salgat told friends several versions of the events occurring the night before. Police arrested Salgat the next day. Salgat was subsequently charged by a grand jury with grand theft, tampering with a witness, burglary of a dwelling while armed, shooting into a building, attempted first-degree murder, first-degree murder, and use of a firearm in the commission of a felony. A jury trial was held, and Salgat was convicted as charged of all counts except attempted first-degree murder and first-degree murder. On those counts, the jury crossed out the phrase "as charged" on the verdict form and wrote in "felony." The jury recommended life in prison without the possibility of parole for 25

years.

Salgat received concurrent five-year sentences for grand theft and tampering with a witness. Those sentences were concurrent to fifteen years' imprisonment for shooting into a building and possession of a firearm in the commission of a felony, which were also concurrent with each other. Those sentences were consecutive to concurrent life sentences for attempted felony murder enhanced under section 775.087, Florida Statutes, and burglary of a dwelling while armed. Finally, Salgat received a consecutive sentence of life imprisonment without parole for twenty-five years for felony murder. In short, Salgat received one life sentence without the possibility of parole for twenty-five years, followed by two concurrent life sentences followed by fifteen years.

First, Salgat argues that he cannot be convicted and sentenced for murder and attempted murder of the same victim. Since Salgat failed to raise this issue before the trial court, he has waived any double jeopardy claim as to multiple convictions. Perrin v. State, 599 So. 2d 1365 (Fla. 1st DCA 1992). However, the legality of multiple sentences may be raised for the first time on appeal. Id. at 1366, citing Wright v. State, 573 So. 2d 998 (Fla. 1st DCA 1991). Salgat's argument requires us to apply section 775.021, Florida Statutes (1989), which states in part:

> (4)(b) The intent of the Legislature is to convict and sentence for each criminal offense

committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:

....

3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

According to the sentencing guidelines, attempts to commit crimes are generally classified as included offenses. In re Standard Jury Instructions in Criminal Cases, 543 So. 2d 1205, 1233 (Fla. 1989). This is because once the target crime is committed, the actor's prior conduct is deemed merged into the completed crime. There are cases in which a defendant may be convicted of murder and attempted murder of the same victim where there are two separate episodes of criminal conduct. However, that is not the case here. Salgat's first two shots at Bolyard and the final fatal shot were all part of the same criminal episode. Thus, Salgat's attempt merged into the completed act of killing Bolyard. We hold that under the facts of this case, it was improper for Salgat to be sentenced for attempted felony murder and felony murder of the same victim.

Second, Salgat argues that the trial court erred in enhancing the attempted first-degree murder conviction into a life felony under section 775.087(1)(a), Florida Statutes, where the jury failed to make a specific finding that he possessed a firearm during the offense. Since we have determined that Salgat was

improperly sentenced for the attempted felony murder, any claim of improper enhancement is moot.

Third, Salgat argues that the trial court improperly convicted Salgat of felony murder and the underlying felony. We simply cite to the case of State v. Enmund, 476 So. 2d 165 (Fla. 1985). In Enmund, the Supreme Court held that the underlying felony is not necessarily a lesser-included offense of felony murder and that a defendant can be convicted of and sentenced for both felony murder and the underlying felony. Id. at 166.

Finally, Salgat asserts that the trial court erred in instructing the jury that Salgat's inconsistent exculpatory statements may be used to affirmatively show consciousness of guilt and unlawful intent and cites Fenelon v. State, 594 So. 2d 292 (Fla. 1992) (Supreme Court held that the jury instruction on flight was an improper judicial comment on the evidence and should no longer be given). The Florida Supreme Court has already decided that such an instruction is not an improper judicial comment on the evidence. Johnson v. State, 465 So. 2d 499 (Fla. 1985) cert. denied, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed 2d 155. Accordingly, Salgat's counsel at trial argued that the present case was distinguishable from Johnson because there was no dispute that Salgat shot Bolyard, and therefore the instruction was unnecessary. We find that Salgat's argument on appeal was not properly preserved for appellate review. See Graves v. State, 548 So. 2d 801 (Fla. 1st

DCA 1989). Therefore, we decline to address its merits and affirm the giving of the instruction based on Johnson, supra.

We do find that Salgat's appellate counsel raises an important question about whether Johnson may be reconciled under the Supreme Court's recent decision of Fenelon v. State, 594 So. 2d 292 (Fla. 1992). Accordingly, we certify the following question to the Supreme Court as a question of great public importance:

> WHETHER A JURY INSTRUCTION CONCERNING A DEFENDANT'S INCONSISTENT EXCULPATORY STATEMENTS PREVIOUSLY HELD PROPER UNDER JOHNSON V. STATE CONSTITUTES AN IMPROPER COMMENT UPON THE EVIDENCE IN LIGHT OF THE COURT'S DECISION IN FENELON V. STATE.

For the foregoing reasons, the sentence for attempted felony murder is reversed. All other aspects of the judgment and sentences appealed from are affirmed.

BOOTH, BARFIELD, AND ALLEN, JJ., CONCUR.