IN THE SUPREME COURT OF FLORIDA
TALLHASSEE, FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 84,783

SHANE D. HAMILTON,

Respondent.

_____/

CERTIFIED QUESTION FROM
THE DISTRICT COURT OF APPEALS
IN AND FOR THE SECOND DISTRICT
LAKELAND, FLORIDA

INITIAL BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538

WILLIAM I. MUNSEY, JR.
Assistant Attorney General
Florida Bar No. 0152141
Westwood Center
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO.

OTHER AUTHORITIES

STATEMENT OF THE CASE

Respondent, Shane D. Hamilton, was charged by the State Attorney in and for Collier County with the crimes of second degree felony murder; burglary of a structure, to wit: a dwelling; and, grand theft [in an amount exceeding $20,000.00]. (R 11)

The Honorable Ted Brousseau presided over this trial. This was a jury trial; and, the jury returned a verdict of guilty as charged to the second degree felony murder and burglary of a structure. (R 45-46) The jury returned a verdict of guilty to grand theft of property valued at more than $300.00, but less than $20,000.00. (R 47; Tr 64)

Judge Brousseau pronounced sentence on April 1, 1993. As to count I [the second degree felony murder], Respondent was sentenced to 17 years imprisonment followed by 5 years probation with jurisdiction reserved to impose restitution at a later date. (2nd Supp.Tr 83) To burglary of a structure, Respondent was sentenced to 15 years imprisonment. (2nd Supp.Tr 84) And to the grand theft, Respondent was sentenced to 5 years imprisonment to run concurrently with the second degree felony murder and burglary of a structure sentences.[1]

---

[1] Petitioner does not question that a written sentence must comport with an oral pronouncement; however, this claim was not reached as the Second District reversed both the second degree felony murder and burglary convictions. Additionally, the Second District has indicated that the trial court must correct the grand theft judgment to reflect a conviction for a third-degree felony.

Respondent prosecuted a direct appeal to the court below; and, the Second District found merit in Respondent's claim that Judge Brousseau committed reversible error in deviating from the standard jury instruction concerning the definition of what constitutes a "structure". The burglary and murder convictions stand reversed; and, the cause has been remanded for a new trial. See, Hamilton v. State, ___ So.2d ___, 19 Fla. L. Weekly D2441 (Fla. 2d DCA No. 93-01230)(Opinion filed 11/16/94). The Second District has certified a question to this Court as a matter of great public importance.

On November 21, 1994, Petitioner filed a notice to invoke the discretionary jurisdiction of this Court. On November 21, 1994, Petitioner filed in the court below a motion to stay mandate while prosecuting certified question in this Court. On November 30, 1994, the court below denied Petitioner's motion to stay proceedings.[2]

On December 2, 1994, Petitioner filed a motion to stay mandate of the court below in this Court. On December 5, 1994, this Court established a briefing calendar. On December 13, 1994, the court below issued its mandate. On December 20, 1994, Petitioner filed a motion to recall the mandate of the court

---

[2] The Second District is correct in its ruling. See, State v. McKinnon, 540 So.2d 111, 113 (Fla. 1989)(a party desiring a stay of mandate during the pendency of an application for review in the Supreme Court of Florida must apply to this Court for a stay).

below and/or stay the mandate in the trial court. This motion is pending before this Court.

This timely appeal ensues.[3]

---

[3] At this time, Petitioner would pause to acknowledge the skills and talents of Susan Catherine Gall, Esq., Florida Bar No. 0025909 who has volunteered her time to the Office of the Attorney General in the drafting of the argument section of this brief. Your undersigned expresses his appreciation to Ms. Gall for her invaluable help and assistance in the preparation of this brief.

STATEMENT OF THE FACTS

For purposes of brevity and clarity, Petitioner adopts the factual presentation as published by the court below:

> Hamilton was charged in one count of an information with burglarizing the dwelling of Stephen Jenks. He was charged in a separate count with the second-degree felony murder of Brian Thomas. The state's theory of prosecution as to the burglary was that Hamilton and Thomas entered the curtilage of Jenks' dwelling with the intent to steal motors attached to a boat located next to the home. The state's theory as to second-degree murder was during the perpetration of this burglary, Jenks, the innocent homeowner, shot and killed Thomas. Such theories, if proven, would clearly support convictions for burglary of a dwelling under Baker v. State, 636 So.2d 1342 (Fla. 1994), and second-degree felony murder under State v. Dene, 533 So.2d 265 (Fla. 1988).
>
> At trial, the state presented evidence demonstrating that Hamilton and Thomas entered Jenks' backyard and proceeded to remove outboard motors from a boat parked on a trailer AGAINST the back wall of Jenks' home. When Jenks observed this activity from inside his home, he attempted to call the police but discovered his phone did not work. fn 2. He then secured a shotgun, went out the front door, and confronted Hamilton and Thomas in the backyard. During the confrontation, Jenks shot and killed Thomas and then fired at a truck in which Hamilton was fleeing the scene.
>
> The testimony was unrefuted that this home was Jenks' dwelling and that at the time of the incident he was occupying it as such. The state also introduced photographic evidence depicting the backyard of the home. It showed the boat in a semi-secluded area adjacent to the home surrounded by several unevenly spaced trees. This was the only evidence adduced tending to establish that the backyard was enclosed.

fn 2 Hamilton confessed that he and Thomas had cut the phone line.

(Slip Opinion at pp 2, 3)
(Emphasis supplied)

SUMMARY OF THE ARGUMENT

Under the common law, burglary was defined as the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony. See, 4 W. Blackstone, Commentaries on the laws of England 224 (1769). The elements of common law burglary have been, for the most part, transformed in all the states; wherein, Florida's burglary statute bears little resemblance to common-law burglary. See, Baker v. State, 636 So.2d 1342, 1344 (Fla. 1994)(the legislature has so thoroughly modified the burglary statute that the present statute must be said to completely abrogate and supercede the common law crime of burglary). For example, under the common-law a "breaking" was required. Then, the economically advantaged citizen's dwelling was protected by a fortress consisting of either a wall or moat; but, now the Florida burglary statute protects equally the rich and the poor.[4]

Mr. Jenks, as a boat owner, is advantaged. Mr. Jenks has been a responsible citizen and neighbor. Why? He did not allow his boat to become a visual nuisance to his neighbors. He did not leave his boat parked on the public street; nor, did he leave his boat parked in his driveway. He was considerate in parking his boat in his backyard against his house under his bedroom window. For privacy, Mr. Jenks did not have a wall; fence; pond;

---

[4] For example, Florida's burglary statute protects both the seasonal Winter resident of a Palm Beach estate as well as a seasonal Belle Glade migrant's dwelling.

or, formal landscaping. For privacy, Mr. Jenks property was secluded by a ditch and/ or swale; a scarce brace of trees along the street; and, random spaced trees in his backyard. In no way was Mr. Jenks property maintained in such a manner as to invite the trespass for the burglary at hand.[5]

This case is simple. Mr. Hamilton came onto the curtilage at nighttime while Mr. Jenks' slept. Mr. Jenks woke and attempted to telephone police. The telephone line was dead. There was violence to the sanctity of his home as Mr. Hamilton had cut the telephone lines.

In Baker v. State, 636 So.2d 1342 (Fla. 1994), this Court held that entry onto the curtilage is, for purposes of burglary, entry into either the dwelling or structure. In Baker, the victim's yard was protected by a fence and shrubbery where the owner had an expectation of privacy. Petitioner contends that every Floridian has an expectation of privacy in the backyard of a residence [whether shrubbed or fenced]. Florida's burglary statute does not require that the curtilage be enclosed. Thus, Petitioner asks this Court to answer the certified question in

---

[5] The prosecution has established two burglaries. There is the burglary of the dwelling underwhich Mr. Hamilton was prosecuted and convicted; and, there is the burglary of the boat. If the former burglary falls, then the burglary of the boat supports the felony murder conviction as only "burglary" is charged in Count One. Obviously, this record establishes the burglary of the boat. See, Greger v. State, 458 So.2d 858 (Fla. 3d DCA 1984)(the boat was entered when Appellant removed cowling and bolts from the protruding motor at stern of boat thereby violating the possessory interest of the boat's owner). Thus, a felony has been established to support the homicide conviction.

the negative and hold that, under the facts presented, Mr. Hamilton was properly convicted of felony murder, burglary, and grand theft. Alternatively, should this Court determine that Florida's burglary statute requires the "curtilage" be enclosed, then Petitioner asks that this Court decline to draft a "bright line" rule.

ARGUMENT

CERTIFIED QUESTION

DOES FLORIDA'S BURGLARY STATUTE REQUIRE THAT THE "CURTILAGE" BE ENCLOSED AND, IF SO, TO WHAT EXTENT?

(As Stated By The Second District)

This Court has for review Hamilton v. State, 19 Fla. L. Weekly D2441 (Fla. 2d DCA November 16, 1994), where the district court certified the above question. This Court has jurisdiction based on Article V, Section 3(b)(4) of the Florida Constitution.

Petitioner asks that this Court answer the certified question in the negative and disapprove the decision of the district court reversing Hamilton's convictions. Alternatively, should this Court answer the certified question in the affirmative and approve the decision of the district court reversing Hamilton's convictions, then Respondent would urge this Court to decline to announce a "bright line" rule defining the extent of enclosure for "curtilage".

In determining the meaning of curtilage for purposes of applying the burglary statute it is necessary to read the words of the Statute. Section 810.02 of the Florida Statutes (1975) provides:

> **"(1) 'Burglary' means entering and remaining in a structure or a conveyance with the intent to commit an offense therein .."**

Section 810.011, Florida Statutes (1975) provides:

> **"(1) 'Structure' means any building of any kind, either temporary or permanent which**

has a roof over it, together with the curtilage thereof."

The legislature to date has not provided a definition for "curtilage". However, it is important to note that the legislature did not insert the words "fenced", "enclosed", "secluded", or "protected" before the word "curtilage". Therefore, a plain reading of the statute, arguably, extends the meaning of curtilage to these areas around a structure which are not enclosed. Traditionally, in common law, the word "curtilage" was used to describe the area immediately surrounding a dwelling which was afforded the same protection under the law of burglary as the home itself. 4 W Blackstone, Commentaries 225. Because the words of the statute provide little insight into the definition or extent of curtilage it is necessary to study the cases which have examined the concept of curtilage.

In its decision, the Second District Court of Appeal focuses on Baker v. State, 636 So. 2d 1342 (Fla. 1994), in which this Court emphasizes that the property involved was a "private home, hidden from the road in front by trees and shrubs, ...separated from the neighbor's house by a six-foot privacy fence..." and surrounded in back by a "chain-link fence." Id. at 1343. The Second District Court of Appeal then concludes that the this Court "recognize(s) the necessity that the curtilage of a dwelling or structure somehow be enclosed before it can be considered an extension of the dwelling or structure and thus covered by the burglary statute." Hamilton v. State, 19 Fla. L.

Weekly D2441. Petitioner points out, however, that the definition of curtilage nor the factors which would help to determine the same were directly at issue in Baker. Petitioner is concerned that the court below, in referring to the facts of Baker, was attempting to set a precedent that the absence of a six-foot privacy fence, chain link fence or shrubbery would be insufficient to support the existence of curtilage for the purposes of a burglary conviction. This Court, it seems, was simply observing that the facts in Baker were sufficient to establish a curtilage, not that the Baker facts set up the minimum standard for defining curtilage. This Court in Baker does point out that "Baker entered (the owner's) backyard which was protected by a fence and shrubbery where the owner had an expectation of privacy". Id. at 1344. Surely, the victim in Baker could have an expectation of privacy in his backyard and thus curtilage under a different set of facts. At bar, for example, Mr. Jenks is a good neighbor. He does not park his boat on the street or in his driveway. He conceals his boat from neighborhood view by parking his boat in his backyard backed up against his house. Certainly, Mr. Jenks had an expectation of privacy in his backyard.

Reference to other Florida cases dealing with burglary reveal that the curtilage need not be fenced in or enclosed to be considered part of the dwelling or structure. For example, the First District Court of Appeal in J.E.S. v. State, 453 So. 2d 168 (Fla. 1st DCA 1984), held that the driveway of a dwelling is

within the curtilage of the dwelling, for purposes of the burglary statute. The J.E.S. opinion cites the search and seizure cases of State v. Musselwhite, 402 So.2d 1235 (Fla. 2d DCA 1981) and Joyner v. State, 303 So.2d 60 (Fla. 1st DCA 1974) in which the Second District Court of Appeal and the First District Court of Appeal respectively, also agreed "that a driveway to one's residence is within the curtilage of that property." Id. at 168. Unlike Baker there is no mention of a fence or enclosure in these three opinions.

In the case of State v. Black, 617 So. 2d 777 (Fla. 3d DCA 1993), in which the defendant was charged with burglary for entering curtilage of a house and taking new roofing paper, the Third District Court of Appeal noted that the officer's reasonable suspicions were confirmed when he placed the defendant in his patrol car, drove up the street, and "found a house which had several identical rolls of tar paper in the yard, along with a tarring machine." Id. at 778. The facts of the opinion do not indicate that the yard was enclosed. The fact that the police officer could see the rolls of paper in the yard from his patrol car indicated a clear view unimpeded by an enclosure.

Although the facts in DeGeorge v. State, 358 So. 2d 217 (Fla. 4th DCA 1978), involved a "paved area, partially enclosed by a fence, a brick wall and the structure itself," the court talks in detail about the expansion of the definition of curtilage. In doing so, the court cites Joyner v. State, 303 So. 2d 60 (Fla. 1st DCA 1974), in which the First District Court of

Appeal opined that the curtilage of a dwelling house "need not be separated from other lands by a fence, nor does the intersection of a divisional fence necessarily affect the relation of a building thus separated by it." 358 So. 2d at 219.(citing Joyner)

Another Florida case which supports the proposition that curtilage need not be enclosed under the burglary statute is State v. Spearman, 366 So. 2d 775 (Fla. 2nd DCA 1978). The court found that the defendant whose hand and arm entered the residence when he struck the resident constituted an entry of the enclosed structure, as required by the burglary statute. Furthermore, the court observed that the defendant's entire body had intruded into the curtilage of the residence, presumably because of his presence on the front porch.

Studying the curtilage issue within a fourth amendment analysis in search and seizure cases provides further support for the premise that the area immediately surrounding a dwelling does not need to be enclosed to constitute curtilage under the burglary statute. In Joyner, for example, the First District Court of Appeal focused on "the meaning of the term 'curtilage' as applied to present day circumstances and conditions" at 303 So. 2d at 62, holding that the curtilage to defendant's apartment did include defendant's automobile parked in parking area serving the entire multi-dwelling. In support of their holding, the court cited several authorities, one of which defined curtilage "....as such space as is necessary and convenient and is habitually used for family purposes, including an adequate yard

and garden and room for necessary outbuildings..." Id. at 63, (citing Collier v. King, 170 So. 2d 632 (Miss. 1965). Another source cited observed that "..(curtilage) need not necessarily be separated from other lands by a fence,..." Id. at 63, [citing Holland v. State, 65 So. 920 (Ala. 1914)]. See Stipp v. State, 355 So. 2d 1217 (Fla. 4th DCA 1978) (Court applies Joyner holding to a private residence, observing that "where a search warrant authorizes officer to search a described building together with the yard or curtilage on which the building is located parked automobiles found in the yard or within the curtilage are proper subjects of search under the warrant" Id. at 1218; State v. Musselwhite, 402 So. 2d 1235 (Fla. 2nd DCA 1981) (Second District Court of Appeal agreed with Joyner Court holding that driveway to one's residence is within the curtilage of that property.) The opinion does not make mention of nor center around the existence of "an enclosure".

The Second District Court of Appeal in Olivera v. State, 315 So. 2d 487 (Fla. 2nd DCA 1975) held that police officer who left sidewalk to stand on lawn next to window at the back of the apartment invaded privacy of apartment occupants and, therefore, went to a place where he had no right to be. In deciding that the officer entered the curtilage of the dwelling where the defendant had a reasonable expectation of privacy, the court observed that the backyard was not a common passageway normally used by others. Again, this decision is not centered around "an enclosure" of any kind. Similarly, there is no evidence that in

our case Jenks' backyard was used for ingress and egress by third parties.

In yet another case, Huffer v. State, 344 So. 2d 1332 (Fla. 2nd DCA 1977), the Second District Court of Appeal held that the hothouse situated in the defendant's backyard was within the curtilage of his dwelling and that the defendant had a reasonable expectation of privacy even though the clear plastic sheets making up the hothouse were transparent. The court noted that the officers reached the hothouse by walking through the defendant's sideyard into his backyard. In support of its holding the court reasoned, "the hothouse was no further than forty feet from the appellant's dwelling, and perhaps as close as ten feet. (It)...was not located on or near a public thoroughfare...Rather it was located behind the appellant's residence in a rural area and the plants growing therein were not plainly visible to the public. Moreover, it was not operated as a commercial venture. It was an adjunct to (defendant's) residence and was maintained for personal reasons." Id. at 1333. In the case at hand, the boat like the hothouse was close to the dwelling, not plainly visible to the public, and not operated as a commercial venture. Therefore, it meets the requirements of curtilage under this case.

This Court has observed that although there is no expectation of privacy on a "front porch where salesmen or visitors may appear at anytime, the backyard of a dwelling is more private because passersby cannot generally view this area."

State v. Morsman, 394 So. 2d 408 (Fla. 1981). In Morsman, this Court held that the officer had no right to be in the defendant's backyard or to seize the Marijuana plants because although the yard was not fenced in, it appears from the record that the plants could not be seen from the street or the frontyard. Id. at 409. Likewise, as Petitioner's photographic exhibits before this Court establish, the motors in Jenks' backyard were not readily visible from the front yard or the street. Nor, does the record establish that Mr. Jenks had posted a sign directing: "Deliveries at Rear".

In its decision, the Second District Court of Appeal, points out that the United States district court in U.S. v. Romano, 388 F. Supp. 101, 104 n.4 (E.D. Pa. 1975), observed that the modern meaning of curtilage "has been extended to include any land or building adjacent to a dwelling...enclosed some way by a fence or shrubs." In a footnote, the United States district court goes on to state that this definition of curtilage was quoted with approval in Black's Law Dictionary 384 (6th ed. 1990). The court below, however, in quoting Romano and subsequently, Black's Law Dictionary leaves out the words "and usually it is" before the word "enclosed". These words are important because they are evidence that the court in Romano was not advocating a "bright line" test to determine curtilage. By stating that "usually (curtilage) is enclosed some way by a fence or shrubs", the court in Romano leaves room for those fact situations where a curtilage may exist despite the absence of an enclosure consisting of a fence or shrubs.

While Black's Law Dictionary is no doubt important to the study and understanding of the law, its definitions need to be cited carefully and used, as the publisher cautions, only as a "starting point" because "....the type of legal issue, dispute, or transaction involved can affect a given definition usage." Black's Law Dictionary, p. iv (6th ed. 1991). For example, while many homeowners today do not enclose the property behind their houses, they still refer to that property as "their yard". According to Black's dictionary, however, a "yard" is a "piece of land inclosed for the use and accommodation of the inhabitants of a house." Id. at 1615. Therefore, under the definition in Black's Law Dictionary if your property is not enclosed then it is not a "yard".[6]

It seems a hollow distinction to say that a fence gives you enhanced property rights or that one must enclose one's yard by a using a fence or shrubs in order to have curtilage around one's dwelling. Just as a yard can exist without being enclosed, it seems clear that curtilage as well as an expectation of privacy can exist without being enclosed by fence or shrubs. More and more families are moving into restricted developments where no fences are permitted or feasible. Does curtilage extend the dwelling to the area surrounding the home only for those who have the opportunity and financial capacity to erect fences or hire landscape artists to plant trees? It is obvious that requiring

---

[6] Petitioner would suggest that this might come as a shock to Floridians who pay annual real property taxes.

"an enclosure" before recognizing a curtilage is an easy rule to use, but can such a "bright line" test do justice when applied to a multitude of fact situations?

It is important to define curtilage in such a way to further the purpose of the burglary statutes. The Court in Com. v. Goldoff, 510 N.E. 2d 277, 280 (Mass.App.Ct. 1987) observes that the purpose of burglary statutes is "to prohibit that conduct which violates a person's right of security in a place universally associated with refuge and safety, the dwelling house." This purpose is further illustrated by 810.02(3) of the Florida Statutes which enhances the penalty for burglary if the structure entered is a dwelling. The court in Goldoff cites People v. Nunley, 154 Cal.App.3d 868, 203 Cal.Rptr. 153, 162 (Cal. 1st DCA 1984) which reads, "the legislative determination to treat residential burglaries more severely than others is predicated upon the statistically greater probability that an occupant will be present and confronted by the intruder." This reasoning supports a broad definition of curtilage in explaining the meaning of a dwelling house. The burglary statute is designed to prohibit the very conduct that occurred in the case at hand. Here, Mr. Jenks was in the safety and sanctuary of his home sleeping during the night hours when he was awakened by the noise of two men detaching motors from his boat located just inches from his bedroom window. By cutting the telephone lines,

Hamilton and Thomas passively confronted the occupant.[7] This confrontation became actively violent and deadly once Mr. Jenks responded to the noise and telephonic terrorism.

The United State Court of Appeals analyzed the problem of determining the extent of curtilage in W.H. Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968) in which it held a 1,000 red fir Christmas tree stockpile located 20 to 35 feet from Wattenburg's abode at the Hideaway Lodge and about five feet from parking area used by Lodge patrons to be within the curtilage. In making its decision, the court referred to two different tests in deciding whether the search took place in a protected curtilage. The first test as put forth in Care v. United States, 231 F.2d 22 (10th Cir. 1956), states: "Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family" (231 F.2d at 25). The court then turned its attention to what it called the more appropriate test: "whether the search and seizure constitutes an intrusion upon what the resident seeks to preserve as private even in an area which, although adjacent to his home, is accessible to the public." 388 F.2d at 857. See Katz v. United States, 389 U.S. 347, 88 S.Ct.

---

[7] Petitioner would suggest that the cutting of the residential telephone line was the functional equivalent of breaking into the residence.

507, 19 L.Ed. 2d 576 (1967). The Wattenburg panel found the Christmas trees to be within the curtilage under both tests noting that the trees were located in the defendant's backyard not far from the lodge. The court added that the Defendant "sought to protect the stockpile from ...governmental intrusion" by "placing (the trees)... this close to his place of residence." 388 F.2d at 858. Is the same not exactly true in the case at hand? As the court below recognizes, Mr. Jenks' boat was parked on a trailer against the back wall of his home. Mr. Jenks wished to maintain his boat at his residence. What more could Mr. Jenks' do? Does the burglary statute require Mr. Jenks to build a boathouse in his backyard? Does Mr. Jenks need to have his ditches dug deeper with an enlarged swale? Does Mr. Jenks need to have an electrified fence or a wall with broken glass on the top? Would Mr. Jenks need an alarm system installed on the fencing along with video cameras? Does Mr. Jenks need to purchase or lease attack dogs to patrol his curtilage?

Significantly, the United States Supreme Court in United States v. Dunn, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987) determines the extent of curtilage under the search and seizure provisions of the fourth amendment. There, the Court recognized curtilage as the area which "harbors the intimate activities associated with the sanctity of a (person's) home and the privacies of life." Id. at 300.(quoting Boyd v. United States, 116 US 630, 6 S.Ct. 524, 29 L Ed 746,(1886)). The Court went on to establish a four factor test to determine the extent

of a home's curtilage: "(1) the proximity of the area claimed to be curtilage to the home, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, (4) and the steps taken by the resident to protect the area from observation by people passing by." Id. at 301. The Court stresses, however, that these four factors combined do not necessarily "yield a correct answer to all extent -of -curtilage questions." Id. at 301.

Applying the factors to the case at hand, Petitioner has determined that at least two and perhaps three of the tests are satisfied with the fourth not at all relevant to our fact situation. First, the evidence discloses that the boat was backed up to the rear of the house with the motors almost touching the back concrete wall of the house. Because the motors were the target of the theft, the ground beneath them is that area which Petitioner argues is within the curtilage of the dwelling and hence protected by Florida's burglary statute. The location of the boat is evident by referencing the trial transcript in which Mr. Jenks, the owner of the home testified: " ... I backed it up as close to the concrete wall as possible. Someone spots me. I try to just about make the propellers touch the concrete wall so nobody can get behind there and steal them." (Tr 42) The photographic exhibits admitted into evidence also depict the close proximity of the boat not only to the back wall of the house but also the screened-in porch to its side. For example, State's exhibits # 1, 8, 10, 51, 52, and 53 in the form

of pictures and a diagram show the boat to be only several feet from the house and the motors to be only inches from the back wall of the dwelling. In addition, Mr. Jenks testified that the picture doesn't depict how close boat was to house because when tongue (of boat) was lowered (the boat) rolls down hill. (Tr 43, L 1-4)(the blocks supporting tongue of trailer had been removed by defendant). According to the evidence then, the motors were even closer to the dwelling than the photographic exhibits reveal. (Tr 43) Unlike the barn in Dunn, which was "standing in isolation, ...(a) substantial distance" from the dwelling, the boat motors in this case were practically touching the dwelling with the trailer against the backwall of Mr. Jenks' home.

Second, there is no enclosure surrounding the home in this case; whereby, the area in question is neither inside nor outside "an enclosure". While a fence if it exists "serves to demark a specific area of land immediately adjacent to the house that is readily identifiable as part and parcel of the house," Id. at 302, the absence of such a fence does not negate the existence of curtilage. For example, the Court in Dunn explicitly declines the Government's invitation to adopt such "bright line" rules. Id. at 301, fn 4, observing that, "in those cases where a house is situated on a large parcel of property and has no nearby - enclosing fence, the Government's 'first fence' rule would serve no utility; a court would still be required to assess the various factors outlined above to define the extent of curtilage". In short, if there is a fence, then this second factor may be useful

in determining the curtilage issue. Otherwise, this factor is useless, and the other factors must still be examined.

Third, there is no evidence that the area in question was being used for anything other than the "activities and privacies of domestic life" or other "intimate activities of the home". As a matter of fact, the evidence in the form of exhibits and testimony reveals that the area was used for the parking of the resident's boat.

Fourth, the resident took precautions not only to protect the motors from observation by people passing by but also to prevent the theft of the motors by making it difficult to remove them from the boat itself. Mr. Jenks manifested an expectation of privacy by backing his boat "up as close to the concrete wall as possible." He also testified, "someone spots me. I try to just about make the propellers touch the concrete walls so nobody can get behind there and steal them." (Tr 42) Petitioner's Exhibit # 8, a picture of the boat in close proximity to the back of the house and screened-in porch shows that the motors attached to the back of the boat could not be seen from the front yard, from the other side of the screened in porch, or from the front of the boat. Petitioner's Exhibit # 2, #4, #13, and #14, pictures of the backyard towards the house reveal that the motors were not visible from most places in the backyard because the various trees and the boat itself blocked any view of the motor. Petitioner's Exhibit #1, a diagram of the house, porch and boat also depict how protected the motors were from onlookers. It is

important to note that this diagram does not include drawings of the fruit tree separating the boat and its motors from the road nor does the diagram show other trees and bushes in the backyard. Petitioner's Exhibit #2 and #14 show how the fruit tree and other trees shield the boat and its motors from the plain view of a passersby. Also, Petitioner's Exhibit #19 and Respondent Exhibit #3, photographs taken from the area of the boat towards the road where Hamilton and Thomas parked and entered the property reveal that a row of pine trees separated the road from the property in question, acting as a natural boundary of the property. Furthermore, the transcript informs us that a ditch or swale also separated the property from the road used by Hamilton and Thomas to park the car. (Tr 38) In addition, Petitioner's Exhibit #13 and #12, pictures from the area of the body back towards the house, show how difficult it is to see the house and boat at night, when the incident occurred. Mr. Jenks, the homeowner in residence, does testify that there is no lighting at all outside his house but that the full moon provided some light. (Tr 16) Other Exhibits also support the premise that the motors of the boat were within the curtilage of the dwelling. For example, Petitioner's Exhibit #53 shows how the roof and eve of the house cover and protect part of the motors attached to the back of the boat. One can only assume from the evidence that Hamilton and Thomas had to enter this area under the eve in order to remove the motors. Petitioner's Exhibits #9, #51 and #54 are pictures of a removed motor and a blue bag of tools establishing how close

Hamilton and Thomas were to the house when removing the motors. Respondent's Exhibit #1 and Petitioner's Exhibit #10 are pictures of the motors of the boat next to the master bedroom window, where Mr. Jenks slept reveal several things. First, the resident manifested a subjective expectation of privacy by backing the motors up next to his bedroom windows. Second, society is most likely willing to accept the reasonableness of an expectation of privacy outside bedroom windows. See Olivera v. State, 315 So.2d 487 (Fla. 2nd DCA 1975); Brock v. United States, 223 F.2d 681 (5th Cir. 1955); and, State of Texas v. Gonzales, 388 F.2d 145 (5th Cir. 1968). Third, Hamilton and Thomas had to be on notice that they were intruding upon what Dunn refers to as "the area to which extends the intimate activity associated with the sanctity of a person's home and the privacies of life." 480 U.S. 294, 300. The facts of this case do not equate themselves with the simple trespass where one enters the property and plucks a piece of fruit off a tree in the backyard. Hamilton and Thomas wedged themselves between a person's house and his boat for the sole purpose of removing the motors. They knew they were inches from a window and might be heard and subsequently, come in contact with the occupant therein. After all, Hamilton confessed that he and Thomas cut the phone line. Mr. Jenks' testimony provides further support that the area entered into by Hamilton and Thomas was an area associated with the sanctity of his home and thus within the curtilage of the dwelling. The relevant part of the transcript of the proceedings reads as follows:

Q Did there come a point in time on the night of December 8th, 1992 that you were awakened from your sleep?

A Yeah. Yes, there was.

Q Approximately what time was that?

A 11:30

Q How do you know that?

A I looked at the clock right next to my bed.

Q What woke you up?

A I kept hearing a series of noises outside my bedroom window.

(Tr 13-14)

Q Can you describe these sounds?

A The first--the first sounds I heard, I think it was what woke me up. I kept hearing some thuds outside the bedroom window like somebody was dropping a weight on the grass out there.

(Tr 15)

The opinion below must be disapproved. Under these facts, the trial court was correct in deviating from the standard jury instruction concerning the definition of what constitutes a "structure." Here, the sounds of the burglary were heard by the victim. The trial court could either instruct as requested by Petitioner or Respondent. The trial court adopted and modified Petitioner's requested jury instructions (R 42; 43) and rejected Respondent's. Nothing needed to be said as it would appear the trial court has adopted the argument of Petitioner which

requested that the instruction track the statutory definitions of "structure" and "dwelling". (Tr 207-213) The trial court, after recess, determined to instruct the jury as to the meaning of "curtilage" as expressed in A.E.R. v. State, 464 So.2d 152, 153 (Fla. 2d DCA 1985), review denied, 472 So.2d 1180 (Fla. 1985), cert. denied, 474 U.S. 1011, 106 S.Ct. 541, 88 L.Ed.2d 471 (1985). (Tr 222) The jury instructions given read:

> **Structure means a building of any kind, either temporary or permanent, which has a roof over it together with the curtilage thereof.**
>
> **Dwelling means a building or conveyance of any kind either temporary or permanent, which has a roof over it together with the curtilage thereof.**
>
> **Curtilage means the ground and buildings immediately surrounding a structure and dwelling and customarily used in connection with it.**
>
> **(Supp.Tr 32)**

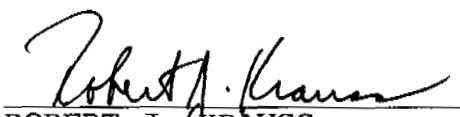
The trial court has not erred as a matter of law in giving the modified instruction which embraces the definition of "curtilage".

CONCLUSION

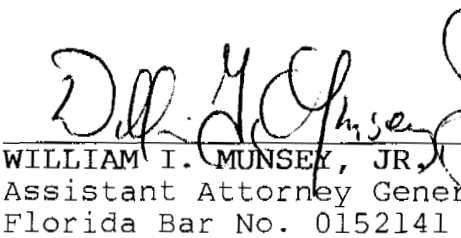
WHEREFORE, based upon the foregoing facts, arguments and authorities, Petitioner would pray that this Court would make and render an opinion answering the Certified Question in the negative and decline to announce a "bright line" rule for curtilage determinations and remand the case to the court below for an opinion consistent with this Court's answer; wherein, Petitioner would ask this Court to hold that under the facts presented, Respondent was properly convicted of felony murder; burglary; and, grand theft.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538



WILLIAM I. MUNSEY, JR.
Assistant Attorney General
Florida Bar No. 0152141
Westwood Center, Suite 7000
2002 N. Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mark King Leban, Esq., 2920 First Union Financial Center, 200 South Biscayne Boulevard, Miami, FL 33131-5302; Terrence J. McWilliams, Esq., Coconut Grove Bank Building, Suite 402, 2701 South Bayshore Drive, Coconut Grove, FL 33133; Lee Hollander, Assistant State Attorney, Office of the State Attorney, P.O. Drawer 2007, Naples, FL 33939, on this 29th day of December, 1994.

COUNSEL FOR PETITIONER