IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,783

THE STATE OF FLORIDA,

Petitioner,

vs.

SHANE D. HAMILTON

Respondent.

On Certified Question from the District Court of Appeal of Florida, Second District

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RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

Petitioner, the State of Florida, was the appellee in the District Court of Appeal of Florida, Second District, and the prosecution in the Circuit Court. Respondent, SHANE D. HAMILTON, was the appellant in the Second District, and the defendant in the Circuit Court. In this brief, the parties will be referred to as the State and the defendant, respectively. The symbol "T" represents transcript of trial proceedings and the symbol "R" represents the record on appeal before the Second District. The symbol "A' represents the appendix accompanying the State's brief (hereinafter SB) and consists of the slip opinion of the Second District. All emphasis herein is added unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

The defendant accepts the State's procedural and factual recitations contained in its brief at SB1-5, however includes the following additional facts omitted from the State's presentation, but essential to a full and fair determination of this case.

As the Second District noted with respect to the Count II burglary charge: "The state's theory of prosecution as to the burglary was that Hamilton. . .entered the curtilage of Jenks' dwelling with the intent to steal motors. . .". (A.2). With respect to the Count I second degree felony murder charge, the Second District noted: "The State's theory as to the second-degree murder was that during the perpetration of this burglary, Jenks, the innocent homeowner, shot and killed [co-perpetrator] Thomas." (A.2).

The record reveals that the defendant was not charged with,

nor the jury instructed upon, the offense of burglary of a conveyance (a vessel), nor was any such burglary of a conveyance at any time the "theory of prosecution."[1],[2]

During one of several charge conferences on jury instructions, the State requested the trial court to "change the definition of structure" from that included in the Standard Jury Instructions in Criminal Cases. (T.152-5).[3] In requesting the change from the standard, the prosecutor asserted that the standard "talks about an enclosed area around the house. Makes it sound like a backyard with a fence around it. That's not the case in here." (T.153).[4]

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[1]The defendant was charged in Count III with grand theft and convicted on that Count; he did not challenge that conviction in the Second District and it is not at issue in the proceedings before this Court.

[2]Appearing, apparently, only in a footnote in the State's SUMMARY OF THE ARGUMENT, is the assertion, made for the first time in this case, that even if the burglary of the dwelling (as charged in Count II) 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." SB7 n.5. As will be discussed, infra, this theory of "burglary of the boat" cannot be raised for the first time in this discretionary review proceeding in this Court, and, in any event, is unsupported by the facts and the law.

[3]The Standard Jury Instruction states: "'Structure' means any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that structure." See Standard Jury Instructions, page 136.

[4]The prosecutor's concession that there was no enclosure of Jenks' house (T.153), is repeated, with commendable candor, by the State in its Initial Brief on the Merits before this Court. See SB22: "There is no enclosure surrounding the home in this case. . .".

The prosecutor noted that the definition of "structure" in the burglary statute includes the curtilage. (T.153).[5]

Defense counsel objected to the State's proposed jury instructions (see R. 42-3), and noted that the Standard Jury Instructions were "well reasoned and well matured." (T.154). Defense counsel argued that structure means any building "and the enclosed space and ground and buildings immediately surrounding that structure." Id. After the State rested (T.203), the charge conference continued. (T.204-11). The prosecutor asserted that the Standard Jury Instruction defining "structure" as including "the enclosed space of ground and outbuildings immediately surrounding that structure," is, in the view of the prosecutor, "a bad choice of word" because the definition "doesn't have to be enclosed." (T.207). The prosecutor argued that the definition that it had submitted to the court (R.42) from the statute "is more appropriate." (T.208). In response, defense counsel argued that the statutory definition of "structure" includes "curtilage," and the Standard Jury Instruction states "all that needs to be enclosed somehow by fence. . .". (T.208). Defense counsel asserted that he had never seen any definition of curtilage contrary to that which was stated in the standard instruction. (T.211). However, as the Second District noted in its opinion: "The trial court opted, without explanation, to give a modified instruction requested by

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[5]"Structure" is defined in the definitional portion of the burglary statutes, in pertinent part, as follows: "'Structure' means a building of any kind, either temporary or permanent, which has a roof over it, together with the curtilage thereof." Section 810.011(1), Florida Statutes.

the state. The instruction tracked the statutory definitions of 'structure' and 'dwelling' but then proceeded to define 'curtilage' as 'the ground and buildings immediately surrounding a structure and dwelling and customarily used in connection with it.' This definition was taken almost verbatim from A.E.R. v. State, 464 So.2d 152, 153 (Fla. 2d DCA), rev. denied, 472 So.2d 1180 (Fla.), cert. denied, 474 U.S. 1011, 106 S.Ct. 541, 88 L.Ed.2d 471 (1985)."[6] (A.3-4).

Thus, the trial judge granted the State's request and deviated from the Standard Jury Instruction which defines curtilage as the "enclosed ground surrounding the structure." See Standard Jury Instructions in Criminal Cases at 136.

At the close of the State's case (T.203), and again at the close of all the evidence (the defense not presenting any testimony) (T.204), the defendant moved for a judgment of acquittal, and on each occasion, the trial court denied the motions. (T.204).

The defendant appealed his judgment of conviction and sentence with respect to the second degree murder charge (Count I) and burglary of a structure (Count II). In his direct appeal, the defendant challenged, inter alia,[7] the trial court's deviation from

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[6]The A.E.R. case is a search and seizure case. See discussion, infra.

[7]As noted earlier, the defendant did not challenge his grand theft conviction (Count III). Also, in his direct appeal, the defendant raised another jury instruction issue, as well as an issue concerning entry of written judgment not in conformance with the trial court's oral pronouncement or the jury's verdicts. These issues are not germane to the instant proceeding before this Court.

the Standard Jury Instructions as to the definition of "structure" by deleting the requirement that the space of ground surrounding a structure must be "enclosed" (Point I), and the trial court's denial of defendant's motion for judgment of acquittal in that there was no evidence that the yard entered was enclosed, thus precluding any conviction for the underlying felony of burglary and, thus, the second degree felony murder conviction predicated upon burglary. (Point II).[8]

The Second District expressly "reject[ed]. . .Hamilton's claim[] that the trial court erred. . .in denying his motion for judgment of acquittal." (A.2).[9]

However, the Second District agreed with the defendant's jury instruction issue (Point I), and held that "the trial court erred in giving [a] modified instruction in place of the standard instruction without stating 'on the record or in a separate order the respect in which [it found] the standard form erroneous or inadequate and the legal basis of [its] finding.' Fla.R.Crim.P.

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[8]Both parties fully briefed the merits of both of these issues raised in the Second District.

[9]The sufficiency attack raised by the defendant was predicated upon the argument that "[t]he evidence at bar is undisputed that the Jenks property at issue was not surrounded by any fence or enclosure." See defendant's Initial Brief in the Second District at 39 [original emphasis]. In a footnote at the same page of his brief, the defendant observed that the prosecutor at trial conceded the absence of evidence of an enclosure and "this is precisely why the prosecutor so vigorously sought to convince the trial judge to change the standard jury instruction." Id. n.26. In the Second District's decision, the Court referred to the State's "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." (A.3).

3.985.***[T]he trial court never gave a reason why the standard instruction was legally erroneous or inadequate such that there were 'extraordinary circumstances' requiring that it be modified to 'accurately and adequately state the relevant law.'" (A.4, 6). [Bracketed material in original, citation omitted].

In addition, the Second District, after a thorough analysis of the decisional law concerning the definition of "curtilage" within the meaning of Florida's burglary statute, held "the plain and ordinary meaning of curtilage necessarily encompasses the concept of enclosure," (A.10), and "the definition of 'structure' found in the Florida Standard Jury Instructions in Criminal Cases correctly states the relevant law that defines the curtilage as the '<u>enclosed</u> space of ground and outbuildings immediately surrounding [the] structure.'" (A.12). [Second District's emphasis]. Accordingly, the court held that it was reversible error for the trial judge to give the modified jury instruction eliminating the requirement of any enclosure, thus requiring a new trial on the burglary charge; since the burglary was the essential element of the felony murder charge, "the conviction for second degree murder must also be reversed and remanded for a new trial." (A.12).

The Second District also certified a question of great public importance to this Court to-wit:

> DOES FLORIDA'S BURGLARY STATUTE REQUIRE THAT THE "CURTILAGE" BE ENCLOSED AND, IF SO, TO WHAT EXTENT? (A.13).

QUESTIONS PRESENTED

POINT I

WHETHER FLORIDA'S BURGLARY STATUTE REQUIRES THAT THE "CURTILAGE" BE ENCLOSED.

POINT II

WHETHER THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE BURGLARY CONVICTION WHERE IT WAS UNDISPUTED THAT THERE WAS NO EVIDENCE OF AN ENCLOSURE SURROUNDING THE DWELLING IN QUESTION.

SUMMARY OF THE ARGUMENT

The District Court of Appeal of Florida, Second District, correctly held that the definition of "curtilage" within the meaning of Florida's burglary statute necessarily encompasses the concept of "enclosure," and that the Florida Standard Jury Instructions in Criminal Cases correctly states the relevant law of Florida defining curtilage as "the enclosed space of ground and outbuildings immediately surrounding [the] structure."

The Second District properly reversed the defendant's convictions for burglary of a dwelling and felony murder predicated upon that burglary where the trial judge's deviation from the Standard Jury Instruction, by deleting the requirement that the jury must find the homeowner's yard to be "enclosed," was tantamount to directing a verdict of guilt against the defendant. The trial judge's deviation from the standard without complying with Rule 3.985's mandate, that the court state on the record or in a separate order the basis upon which it found the standard to be erroneous or inadequate and the legal basis for the court's finding, was prejudicial and reversible error.

The Standard Jury Instruction from which the trial court deviated correctly codifies Florida law. There is no Florida decisional law approving a burglary conviction predicated upon entry onto an unenclosed yard. Recent decisional law of this Court confirms the application of the common law concept that the curtilage of a structure be enclosed. Absent the requirement for an enclosure of some sort, absurd results would obtain such as transforming a simple trespass onto unenclosed property to purloin

an apple into a serious felony. The laws proscribing criminal trespass and theft amply protect homeowners from unconsented intrusions onto their property.

Since the State's theory of prosecution was, at all times, that the underlying burglary involved the homeowner's dwelling, and not his boat, the State's first-time-on-discretionary-review argument that the defendant's burglary conviction can be upheld on the basis of burglary of a conveyance must fail. The jury was never instructed on such a theory, the State never argued it, either at trial or on direct appeal, and the record is bereft of evidence that the defendant ever entered the boat or had any intent to commit an offense therein.

Finally, the Fourth Amendment model, while germane to a consideration of privacy protections from governmental intrusions, has no bearing with respect to protection of property interests of homeowners from criminal intruders. The Supreme Court has cautioned that it is both unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures the distinctions developed and refined by the common law involving the body of private property law.

As for the "extent" that property need be enclosed in order to be deemed within the curtilage, the developed decisional law of this state sufficiently defines the curtilage to include such things as fences, hedges, adjoining buildings and other natural barriers separating property. Given the myriad arrangements that an owner can fashion in enclosing his property, this Court should

decline to attempt a bright line definition of curtilage, and a case by analysis should suffice as it has done in the past.

The Second District, while correctly answering the "curtilage" question, erred in failing to reverse the defendant's convictions on sufficiency grounds where it was undisputed, indeed, conceded by the State both at trial and in this Court, that there is no enclosure surrounding the homeowner's property in this case. The lack of any such enclosure was precisely the very reason that the State at trial so vigorously sought to remove from the jury's consideration the requirement that there be an enclosure before it could find the defendant guilty of burglary. This Court has discretionary review jurisdiction of the sufficiency attack predicated upon the Second District's certified question involving the "curtilage" instruction issue. The sufficiency of the evidence was thoroughly briefed and argued below, its determination by this Court would avoid piecemeal litigation both on any retrial, appeal, and subsequent discretionary review proceedings here, and the determination of the sufficiency issue would clearly be "dispositive of the case."

The photographic and testimonial evidence presented by the State itself reveals that there was no enclosure of the homeowner's yard, and since the nature and character of a structure is an essential element in any burglary prosecution, the lack of evidence of any enclosure requires a reversal of the defendant's convictions. Absent sufficient evidence of the underlying burglary, the defendant's conviction for felony murder predicated upon that very burglary, must also be reversed.

ARGUMENT

POINT I

FLORIDA'S BURGLARY STATUTE REQUIRES THAT THE "CURTILAGE" BE ENCLOSED.

The defendant submits that the Second District's comprehensive decision and analysis on this issue is correct and the defendant adopts the decision as his own argument in this Court. The defendant will not burden this Court with a repetition of the Second District's analysis, but does wish to address the individual arguments raised in the State's brief.

First, the defendant submits that, quite apart from the merits of the "curtilage" issue, the Second District has provided an independent basis for reversal of the defendant's conviction and sentence on Counts I and II. That independent basis for reversal is the trial court's deviation from the Standard Jury Instructions without compliance with Rule 3.985, Fla.R.Crim.P. That rule provides in pertinent part as follows:

> **RULE 3.985. THE STANDARD INSTRUCTIONS**
>
> The forms of Florida Standard Jury Instructions in Criminal Cases published by The Florida Bar pursuant to authority of the court may be used by the trial judges of this state in charging the jury in every criminal case to the extent that the forms are applicable, unless the trial judge shall determine that an applicable form of instruction is erroneous or inadequate, in which event the judge shall modify or amend the form or give such other instruction as the judge shall determine to be necessary to instruct the jury accurately and sufficiently on the circumstances of the case; and, in such event, the trial judge shall state on the record or in a separate order the respect in which the judge finds the standard form

> erroneous or inadequate and the legal basis of the judge's finding.

In deviating from the standard instruction defining "structure," the trial judge in the case at bar gave no reason whatsoever, either "on the record or in a separate order" setting forth the basis for which "the judge finds the standard form erroneous or inadequate and the legal basis of the judge's finding." While the standard instructions are not chiseled in granite, as is indicated in Rule 3.985, Fla.R.Crim.P., it has been observed in the notes accompanying the Standard Jury Instructions in Criminal Cases that the "instructions are intended as a definitive statement of the law on which a jury is required to be instructed." No principled reason was articulated by the trial judge in the case at bar for deviating from the standard instruction defining "structure" and, as the Second District ably demonstrated, that deviation deprived the defendant of a fair trial and due process of law.

This Court recently, albeit in the context of a death penalty case, cautioned trial courts against any deviation from the standard instructions without compliance with Rule 3.985, Fla.R.Crim.P. In Guzman v. State, 644 So.2d 996, 1000 (Fla. 1994), this Court stated:

> By this opinion, we direct that trial judges fully instruct death penalty juries on all applicable jury instructions set forth in the Florida Standard Jury Instructions unless a legal justification exists to modify an instruction. If a legal need to modify an instruction exists, that need should be fully reflected in the record in accordance with Florida Rule of Criminal Procedure 3.985.

Even in non-death penalty cases, the requirement to adhere to Rule 3.985's command that the trial judge state on the record or in a separate order the respect in which the judge finds the standards to be erroneous or inadequate, is "mandatory" and failure to comply with the rule can be reversible error. Moody v. State, 359 So.2d 557, 560 (Fla. 4th DCA 1978). This is especially so in the case at bar were deviation from the Standard Jury Instruction concerned an essential element of the crime charged, and by deleting the requirement that the jury must find the yard to be "enclosed," the trial judge effectively directed a verdict of guilt against the defendant. See Sarduy v. State, 540 So.2d 203, 204 (Fla. 3d DCA 1989)(instruction given violated defendant's due process rights "by excusing the state from its burden of proving beyond a reasonable doubt each element of the charged offense."). Thus, for this reason alone, the Second District correctly reversed the defendant's convictions.

Try as it might, the State can point to no Florida decision holding that entry onto an unenclosed yard constitutes burglary. J.E.S. v. State, 453 So.2d 168 (Fla. 1st DCA 1984), cited by the State at SB11-12, is not such a case for, as the Second District expressly observed, the "opinion does not indicated whether [the] driveway [was] enclosed." (A.8). Moreover, neither J.E.S., nor any other Florida decision, apart from the instant case, expressly addresses the enclosure issue within the context of the appropriate jury instructions defining "structure." The closest case is DeGeorge v. State, 358 So.2d 217 (Fla. 4th DCA 1978), where the evidence clearly revealed that "[t]he premises were composed of a

structure, and an immediately adjacent paved area, partially enclosed by a fence, a brick wall, and the structure itself." 358 So.2d at 218. And, unlike the case at bar, the information in DeGeorge expressly charged the defendant with "having unlawfully entered or remained on the curtilage of a structure. . .". Id. The issue there was whether the term "curtilage" should be expanded beyond its common law definition by applying it to commercial structures. In holding that such an expansion was proper, the Fourth District noted that at common law "where a person's house was usually enclosed. . .by a wall or a fence. . .it became common to refer to such an enclosure as 'curtilage.'" Id. at 219. The court further observed that in Phillips v. State, 177 So.2d 243 (Fla. 1st DCA 1965), the court noted the common law meaning of curtilage as "'the yard, courtyard, or piece of ground lying around or near to a dwelling house, included within the same fence.'" The DeGeorge court looked to decisions from other states each of which revealed that the commercial yards in question were "surrounded by a fence," or constituted a "fenced-in area." Id. at 220. The court thus concluded that without "seek[ing] to determine by this decision the varied geographical arrangements which may constitute the 'curtilage' of a 'single structure[,]'" the evidence before it was sufficient to support the verdict of burglary of the curtilage of a structure. Id.

More recently, in the only other Florida decision close to the case at bar, this Court in Baker v. State, 636 So.2d 1342 (Fla. 1994), held that entry onto the fully enclosed backyard of a homeowner constituted entry onto the curtilage for purposes of the

burglary statute. Id. at 1344. This Court repeatedly observed that the property in question, a private home, was "hidden from the road in front by trees and shrubs and separated from the neighbor's house by a six-foot privacy fence. A chain-link fence surrounds the backyard of the victim's residence. In addition to the fences, this area is secluded by shrubs." Id. at 1343. Moreover, this Court stressed the fact that the defendant "entered Wilson's yard which was protected by a fence and shrubbery. . .". Id. at 1344. In addition, the Court observed that the trial judge "gave the standard jury instructions that include within the definition of structure 'the enclosed space of ground and outbuildings immediately surrounding that structure'. . .". Id. at 1343. Thus, this Court's holding that the defendant in Baker was properly convicted of burglary of a dwelling is fully consistent with the Second District's decision in the case at bar holding that the Florida Standard Jury Instructions in Criminal Cases correctly states the law in Florida defining curtilage as the enclosed space of ground and outbuildings immediately surrounding the structure. (A.12).

Two decisions relied upon by the State in its brief are clearly inapposite. First, in State v. Black, 617 So.2d 777 (Fla. 3d DCA 1993), the issue before the court had nothing at all to do with whether, for purposes of the burglary statute, the curtilage of a house included the unenclosed yard. Rather, the Black case is a search and seizure case in which the Third District simply held that police had probable cause to stop the defendant on the street blocks away from a house suspected of being burglarized, where the

defendant was found on a bicycle carrying new roofing paper; the defendant was subsequently charged with burglary of the nearby house which police found with several identical rolls of tar paper in the yard. As the State correctly notes, "[t]he facts of the [Black] opinion do not indicated that the yard was enclosed." SB12. Nor, of course, do the facts indicated that the yard was unenclosed. Moreover, the State's assertion that the fact that the police officer in Black could see the rolls of paper in the yard "indicated a clear view unimpeded by an enclosure" (SB12), ignores the likelihood, as in Baker, that the yard was indeed enclosed by a chain link fence through which police could have obviously seen the rolls of tar paper.

The only other Florida decision upon which the State appears to rely, State v. Spearman, 366 So.2d 775 (Fla. 2d DCA 1978), is also clearly inapposite. See SB13. First, Spearman did not deal with the definition of curtilage within the meaning of the burglary statute, nor with any jury instruction on that issue. Second, Spearman simply held that the act of the defendant in reaching his arm into the residence to strike the owner constituted an "entry" of the structure, and thus burglary. As for the State's surmising that the defendant's entire body had intruded into the curtilage of the residence "presumably because of his presence on the front porch," (SB13), any indication in Spearman that this was so would be pure dicta, given the undisputed fact that the defendant clearly entered the structure itself by reaching his arm into the residence to strike the victim.

Next, the State appears to rely upon the location of the boat

in close proximity to the Jenks dwelling itself, and argues that since neither the boat nor its motors were "readily visible from the front yard or the street," somehow "the ground beneath them [the motors] is that area which Petitioner argues is within the curtilage of the dwelling and hence protected by Florida's burglary statute." SB15-16, 21. Apparently, the boat's location in proximity to the actual dwelling house "meets the requirements of curtilage under this case." SB15.

The defendant submits that the State's conclusion that the location of the boat and its proximity to the house itself meets the curtilage requirements is a non sequitur. The location of the object of a trespasser's theft simply cannot define whether a defendant has entered the "curtilage" of a structure or dwelling. The location of the object of the theft, without regard to the requirement of an enclosure, as constituting burglary, lends itself to the "absurd consequences" discussed by the Second District in the very case at bar. The State's ipse dixit that the mere location of the object of a thief's trespass, without regard to any requirement of enclosure "would mean that a person who entered an open yard surrounding a dwelling in broad daylight, without the homeowner's consent, with the intent to take a piece of fruit from a tree located in the yard, would be guilty of a second-degree felony." (A.11). To be sure, a homeowner in such circumstances is not without protection from the law: Statutes prohibiting trespass and (depending on the value of the property in question) grand or petty theft clearly protect the homeowner.

To the extent that the State's arguments concerning the boat

or its motors could be deemed to support an alternative theory of prosecution in this case, namely that the defendant committed a "burglary of the boat," the State's argument must fail. This argument, while not fully developed at any point in the State's brief, is hinted at in a footnote in the State's SUMMARY OF THE ARGUMENT. See SB7 n.5. As alluded to earlier, and as the Second District in the case at bar correctly noted, the State's "theory of prosecution as to burglary was that Hamilton. . .entered the curtilage of Jenks' dwelling with the intent to steal motors attached to a boat. . .". (A.12). As for the State's "theory as to second-degree murder," the Second District correctly observed that said theory was that "during the perpetration of this burglary [of Jenks' dwelling] Jenks, the innocent homeowner, shot and killed [the victim]." (A.12). It was never the State's theory of prosecution as to either the Count I second degree felony murder, or the Count II burglary of dwelling, that the "burglary" was of a conveyance (vessel). The jury was never instructed on such a theory, the State never argued such an alternative theory either at trial or on direct appeal, and such a theory is not even valid, were it expressly charged, instructed upon, and argued by the State. Contrary to the State's argument that "this record establishes the burglary of the boat," (SB7 n.5), the record is bereft of any evidence that the defendant (or his accomplice) entered the boat in their efforts to remove its motors. Further, decisional law rejects the notion that the removal of the motors from the exterior of the boat constitutes burglary of the boat. In State v. Hankins, 376 So.2d 285, 286 (Fla. 5th DCA 1979), then-

Associate Judge McDonald, writing for the unanimous Fifth District, held that "[c]learly, the theft of the hubcaps from an automobile wholly fails to establish a prima facie case of intent 'to commit an offense therein,' within the meaning of Section 810.02(1), Florida Statutes."[10] This Court subsequently approved Hankins in State v. Stephens, 601 So.2d 1195, 1196 (Fla. 1992)("The Hankins court was addressing the question of whether a burglary of a conveyance occurs simply by stealing a vehicle's hubcaps. Obviously, there was no 'entering or remaining in' the conveyance in that instance."). Moreover, in R.E.S. v. State, 396 So.2d 1219, 1220 (Fla. 1st DCA 1981), the court held that the act of siphoning gasoline from automobiles did not support charging or convicting the defendants for burglary of an automobile. And in Kirkland v. State, 142 Fla. 73, 194 So. 624, 625 (Fla. 1940), this Court reversed a burglary conviction for siphoning gasoline out of a large gasoline storage tank, observing that "[t]he same offense would have been committed if the gasoline had been so drawn out of an automobile gasoline tank. The most that could have been warranted under the facts would have been a charge and conviction of petit larceny."[11]

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[10]The cited statute defines burglary as "entering or remaining in a. . .conveyance with the intent to commit an offense therein. . .".

[11]The State's reliance upon Greger v. State, 458 So.2d 858 (Fla. 3d DCA 1984), is misplaced for in that case, a police officer observed the defendant "laboring to remove bolts from the transom of the boat," and from the officer's subsequent inspection of the boat, he testified that the defendant must have "reach[ed] inside of the boat to hold the nut, either with [his] hand or with a pair of pliers." Id. at 859. No such evidence was developed in the case at bar that either the defendant or his accomplice ever

Clearly, the State's alternative, and first-time-on-discretionary-review theory must be rejected both factually and legally, even if the State has not (as the defendant strongly submits) waived any such argument here. As in Kirkland, the most that could be said is that the defendant's act of removing or attempting to remove the motors from the boat in this case constituted grand theft, for which he was properly convicted (Count III).

This brings us to the State's pervasive reliance upon search and seizure case law defining "curtilage" within the context of Fourth Amendment protections against reasonable intrusions into a citizen's expectation of privacy. See SB12-15, 19-23, 25. The State concludes from its Fourth Amendment analysis that "the area immediately surrounding a dwelling does not need to be enclosed to constitute curtilage under the burglary statute." SB13. Ironically, the Second District in the very case at bar also relies, to a limited extent, upon Fourth Amendment decisional law, and "find[s] support for the proposition that the concept of curtilage includes enclosure from cases construing the meaning of curtilage within the context of the Fourth Amendment." (A.8). See, e.g., Phillips v.State, 177 So.2d 243, 244 (Fla. 1st DCA 1965) (describing curtilage as the "piece of ground lying around or near to a dwelling house, included within the same fence."); United States v. Romano, 388 F.Supp. 101, 104 n.4 (E.D. Pa. 1975) (observing that curtilage is "a place enclosed around a yard," and

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reached inside of Mr. Jenks' boat while attempting to remove the engines.

"has been extended to include any land or building adjacent to a dwelling. . .enclosed some way by a fence or shrubs."); United States v. Dunn, 480 U.S. 294, 107 S.Ct. 1134 (1987)(fashioning four-prong test to resolve curtilage questions including whether the area in issue was within an enclosure surrounding the home); State v. Sarantopoulos, 629 So.2d 121 (Fla. 1993)(agreeing that the area of defendant's "fenced backyard was within the curtilage of his home and, as such, that Sarantopoulos was afforded Fourth Amendment protection as to that area" but finding no Fourth Amendment violation since the fence protected the yard from view only as to those remaining on the ground and unable to see over the six-foot fence).

The defendant submits that the Fourth Amendment model, while germane to a consideration of privacy protections from governmental intrusions, has no bearing with respect to the property interests protected from criminal intruders within the context of a burglary statute. Morseman v. State, 360 So.2d 137 (Fla. 2d DCA 1978), cert. discharged, 394 So.2d 408 (Fla. 1981), a Fourth Amendment case, reveals the distinction between the privacy interests involved in the search and seizure area, and the property interests involved in burglary cases. Morseman spoke of the yard adjacent to a residential dwelling as being "clothed with a reasonable expectation from unreasonable governmental intrusion." 360 So.2d at 139. Clearly, the privacy interests protected by the Fourth Amendment are not the same as the property interests involved in burglary cases. As Morseman acknowledged, "a back yard which is used for commercial purposes and subjected to a constant stream of

visitors or customers, even if surrounded by a high, opaque enclosure, would not satisfy the standard of privacy." Id. Yet, we know from the burglary cases that the enclosed area surrounding business premises are protected and deemed within the "curtilage" notwithstanding a constant stream of customers. Greer v. State, 354 So.2d 952 (Fla. 3d DCA 1978); DeGeorge v. State, 358 So.2d 217 (Fla. 4th DCA 1978); Tobler v. State, 371 So.2d 1043 (Fla. 1st DCA), cert. denied, 376 So.2d 76 (Fla. 1979).

Perhaps the best illustration of the distinction between search and seizure cases on the one hand, and burglary cases on the other, appears in a case ironically cited and relied upon by the State in its brief at SB19. In W. H. Wattenburg v. United States, 388 F.2d 853, 858 (9th Cir. 1968), the court had this to say:

> The "curtilage" test is predicated upon a common law concept which has no historical relevancy to the Fourth Amendment guaranty.[5] In Jones v. United States, 362 U.S. 257, 266, 80 S.Ct. 725, 733, 4 L.Ed.2d 697 [1960], the Supreme Court warned, in connection with another search and seizure problem, that:
>
> > "[I]t is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law.
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> [5]In Blackstone's Commentaries, the concept of curtilage is discussed in connection with an exposition of common law burglary. See 4 W. Blackstone, Commentaries * 225.

The Wattenburg court further cited Camara v. Municipal Court, 387 U.S. 523, 528, 87 S.Ct. 1727 (1967), wherein the Supreme Court

recognized that the purpose of the Fourth Amendment is "'to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" 388 F.2d at 858, quoting Camara, supra, 87 S.Ct. at 1730.

Clearly, the Fourth Amendment privacy interests against "governmental intrusion" are not the same as the property rights protected by burglary statutes. Constitutional protections of privacy rights are simply not to be equated with statutory protections of property rights.

Several of the State's search and seizure cases are either distinguishable for reasons set forth above, or serve to support the Second District's analysis in the case at bar. Thus, Care v. United States, 231 F.2d 22, 25 (10th Cir. 1956), expressly held: "Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, [and] its inclusion within the general enclosure surrounding the dwelling. . .". In Care, a searched cave was located "across the road and more than a long city block from the home" and thus clearly was not within the curtilage which the court defined as just quoted.

The State's reliance upon numerous Second District search and seizure cases is, for the above reasons, clearly misplaced.[12] As the State itself notes with respect to some of these search and

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[12]Certainly, the Second District in the instant case was aware of the no less than four previous Second District cases cited by the State when it issued its decision in the case at bar. It should be noted that the State never sought en banc review on the basis on intra-district conflict. See Rule 9.331(c)(1), Fla.R.App.P.

seizure cases, "there is no mention of a fence or enclosure in these. . .opinions." SB12. The point is that the curtilage issue involved in this burglary case was simply not at issue in the search and seizure cases upon which the State relies.

The State's remaining arguments can be handled with dispatch. The State rhetorically asks: "What more could Mr. Jenks do?" and the State sarcastically suggests that he erect an electrified fence, purchase attack dogs, or dig deep ditches around his property. See SB20. Certainly, the decisional law affirming burglary convictions where a defendant has entered the curtilage of a victim's property do not require such ludicrous extremes. Fences, hedges, and adjoining buildings providing barriers separating property and other less draconian measures will suffice to protect a property owner from criminal intruders. See, e.g., Baker v. State, supra.

The State asserts as SB25 that the facts here "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." Again, the State argues the proximity of the boat to the house. Id. However, precisely the same argument could be made in the example of the trespasser stealing an apple from a tree located immediately adjacent to a wall in a backyard. Simply stated, if the yard is unenclosed, it does not constitute the "curtilage" of the structure or dwelling. This result is not changed because of the precise location of the tree within the unenclosed yard. And, again, the property owner is not without protection from the invasion of his property interests.

Based upon the comprehensive analysis set forth in the Second District's decision, as well as the arguments presented herein, the defendant respectfully requests this Court to answer the certified question in the affirmative, and to approve the Second District's decision. As for the second part of the question, concerning "what extent" need property be enclosed in order to be deemed within the curtilage, the defendant agrees (on this point only) with the State that this Court should decline to announce a "bright line" rule defining the extent of an enclosure for curtilage purposes. See SB9. See also DeGeorge v. State, 358 So.2d 217, 220 (Fla. 4th DCA 1978)(declining "to determine by [its] decision, the varied geographical arrangements which may constitute the 'curtilage' of a 'structure.'"). As the Second District itself observed, there are "myriad arrangements an owner can fashion in enclosing 'the space of ground and outbuildings immediately surrounding [a] structure.'" (A.13). Given this fact, a case by case analysis should suffice.

POINT II

THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE BURGLARY CONVICTION WHERE IT WAS UNDISPUTED THAT THERE WAS NO EVIDENCE OF AN ENCLOSURE SURROUNDING THE DWELLING IN QUESTION.

The defendant submits that the Second District erred in rejecting his challenge to the sufficiency of the evidence to support his conviction for burglary and, consequently, second degree murder predicated upon that burglary. See A.2. The evidence in the case at bar is undisputed that Mr. Jenks' backyard was not "enclosed" and thus, the backyard did not constitute the "curtilage" of Mr. Jenks' dwelling as is required under Florida law in order to support a burglary conviction. Baker v. State, 636 So.2d 1342, 1344 (Fla. 1994); Bain v. State, 20 Fla.L.Weekly D118, 118 (Fla. 4th DCA Jan. 4, 1995); DeGeorge v. State, 358 So.2d 217, 218-19 (Fla. 4th DCA 1978).

Before discussing the merits of this sufficiency attack, the defendant first submits that this Court has jurisdiction over this challenge to the sufficiency of the evidence, notwithstanding the fact that the Second District's certified question involves only the "curtilage" instruction issue. This Court has long held that once its jurisdiction is invoked by a certified question (or otherwise) from a district court of appeal, the Court has discretionary review jurisdiction not merely over the question certified to be of great public interest, but of the entire decision of the district court of appeal that certified the question itself. Zirin v. Charles Pfizer & Co., Inc., 128 So.2d 594, 596 (Fla. 1961). More recently, this Court expounded upon its

discretionary review jurisdiction once that jurisdiction has attached on any of the constitutional bases triggering its review jurisdiction ab initio. In Savoie v. State, 422 So.2d 308, 312 (Fla. 1982), the Court stated:

> We have jurisdiction, and, once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal. This authority to consider issues other than those upon which jurisdiction is based is discretionary with this Court and should be exercised only when these other issues have been properly briefed and argued and are dispositive of the case.

Citing Zirin, this Court in Savoie explained "why, once it has jurisdiction, this Court should exercise its jurisdiction and depose of the entire cause when the issues are properly before it." 422 So.2d at 312. Amongst the factors favoring the exercise of jurisdiction to review other issues are the avoidance of piecemeal determination of a case, the fact that the other issues have been briefed and argued in the court below, and the issue sought to be reached would be "dispositive of the case." 422 So.2d at 312. It is submitted that all of these factors are present in the case at bar. Should this Court not exercise its discretion to review the sufficiency attack, and should it approve the Second District's decision on the curtilage instruction issue, the relief afforded the defendant would be a new trial; in the event of yet another conviction, there would necessarily be yet another appeal to the Second District (and possible further discretionary review proceedings in this Court). On the other hand, were this Court to accept review of the sufficiency challenge, and resolve it

favorably to the defendant, all judicial labor (at each of the three levels) would be at an end: if the evidence was insufficient to support a conviction, there would be no new trial, subsequent direct appeal, or possible discretionary review proceedings. A decision on the merits of the sufficiency issue would clearly be "dispositive of the case." Further, that issue was briefed and argued below, and is relatively uncomplicated, indeed, simplified by the State's concession both at the trial level[13] and even here[14] that there is no evidence of an enclosure of the homeowner's dwelling and yard.

In the case at bar, it is undisputed, indeed, admitted by the State, that there is no evidence of any enclosure surrounding the Jenks property. Apart from the prosecutor's concession at trial (T.153), the sum and substance of the State's evidence of any enclosure is, as noted by the Second District, photographic evidence depicting the backyard, showing the yard "surrounded by several unevenly spaced trees. This was the only evidence adduced tending to establish that the backyard was enclosed." (A.3). These photographs reveal that there was indeed no enclosure of the yard; all of the photographs were either taken from adjacent property clearly revealing no impediment of any kind to Mr. Jenks'

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[13]At trial, the prosecutor, in strongly urging the trial judge to deviate from the Standard Jury Instructions (defining structure as "the enclosed space of ground. . .immediately surrounding [the] structure"), argued that the instruction "[m]akes it sound like a backyard with a fence around it. That's not the case. . .here." (T.153).

[14]In its brief before this Court, the State admits that "there is no enclosure surrounding the home in this case. . .". SB22.

yard, or from the back of Jenks' house outward, also revealing no enclosure. This is no doubt precisely why the prosecutor at trial so vigorously fought to convince the trial judge to deviate from the Standard Jury Instruction that would have required the jury to find that the defendant entered "the enclosed space of ground and outbuildings immediately surrounding [the] structure." Standard Jury Instructions in Criminal Cases, page 136.

It is the established law of Florida that "the nature and character of the building allegedly burglarized is a material element" in any burglary prosecution. Jackson v. State, 259 So.2d 739, 741 (Fla. 2d DCA 1972), affirmed & modified on other grounds, 281 So.2d 353 (Fla. 1973)[original emphasis]; see also Kirkland v. State, 142 Fla. 73, 194 So. 624 (1940). As is discussed in the Second District's decision in the case at bar, "structure" or "dwelling" includes "the curtilage thereof." Section 810.011(1) & (2), Florida Statutes. And, as is fully discussed above, the term "curtilage" is further defined in the Standard Jury Instructions as "the enclosed space of ground. . .surrounding" the structure. Case after case defines curtilage as the enclosed or fenced area surrounding a structure or building. Baker v. State, 636 So.2d 1342, 1344 (Fla. 1994); Greer v. State, 354 So.2d 952, 953 (Fla. 3d DCA 1978). Here, as noted above, there was no evidence whatsoever that the defendant broke into any gate or fence, or that any such enclosure surrounded the Jenks' property. In these circumstances, this material element, Jackson v. State, supra at 741, was not established as a matter of law. The mere discovery of an individual in the unenclosed yard of another, even without consent

of the landowner, does not constitute breaking and entering into the "structure" or "dwelling" of the owner. Bain v. State, 20 Fla.L.Weekly D118, 118 (Fla. 4th DCA Jan. 4, 1995); Owen v. State, 432 So.2d 579, 581 (Fla. 2d DCA 1983).

In Bain, the Fourth District recently reversed a burglary conviction where "[t]here was no proof that the defendant entered the school cafeteria nor any curtilage, the building not having been enclosed in any manner." Bain at D118. [Original emphasis]. The court expressly noted the Florida Standard Jury Instruction defining structure as "'any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that structure.'" Bain, quoting Standard Jury Instruction (Crim.) [Fourth District's emphasis].

In Owen, the defendant was charged with burglary of a "dwelling" with intent to commit sexual battery, and the defendant successfully contended on appeal "that there was no evidence to establish that he entered the dwelling in question." Id. at 580. The evidence revealed that a 15 year old female was awakened when a man (whom she could not identify) entered her bedroom and started removing his clothing; after he removed her clothing and attempted to have sex with her, she was able to escape from the house. Moments later, neighbors saw the defendant running from the side yard of the house down the side of the house and to the street. Subsequently, these neighbors positively identified the defendant

as the person they saw running from the yard of the house.[15] The defendant was never identified as the person who was inside the victim's bedroom. Reversing the defendant's conviction for burglary of a dwelling, the Second District held:

> [T]he offense of burglary requires an "entering or remaining in a structure. . .with the intent to commit an offense therein." §810.02(1), Fla.Stat. (1979). No one saw the defendant enter the victim's home, remain in the house, or leave the house.***The evidence did establish that he was in the yard, but no one offered testimony to indicate any more than that he was a prowler.
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> We hold that there was insufficient evidence produced by the state for the jury to infer that the defendant committed the offenses charged. 432 So.2d at 581.

Thus, the fact that "[t]he evidence did establish that [defendant] was in the yard," was insufficient to prove the material element of burglary that he entered or remained "in a structure" or a "dwelling." Similarly, the fact that the defendant in the case at bar was discovered in the unenclosed yard of a home, absent any evidence whatsoever that he entered or remained in the home itself, is insufficient to establish that he committed a burglary of the dwelling, as charged in Count II of the information.

The defendant thus submits that there was insufficient proof as a matter of law that he committed the burglary offense charged in Count II of the information. It is axiomatic that if the underlying felony in a felony murder case is not proven, or if it is reversed on appeal, the felony murder conviction itself (Count

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[15]The decision in Owen does not reveal any evidence of an enclosure, fencing, or shrubbery surrounding the house in question.

I) must be reversed. Mahaun v. State, 377 So.2d 1158, 1161 (Fla. 1979). Clearly, any conviction for second degree felony murder "must stand or fall in conjunction with the underlying felony." Redondo v. State, 403 So.2d 954, 956 (Fla. 1981). Accordingly, the defendant requests this Court to reverse his convictions and sentences for Count I, second degree felony murder, and Count II, burglary of a dwelling.

CONCLUSION

Based upon the above and foregoing argument and authority, the defendant/respondent respectfully requests this Court to render an opinion answering the certified question in the affirmative, but declining to attempt to define the "extent" of the necessary enclosure, and to reverse the judgment of conviction and sentence entered below with directions that the defendant be discharged therefrom; alternatively, defendant/respondent requests this Court to reverse his judgment of conviction and sentence with directions that he be granted a new trial at which the jury will properly instructed in accordance with the Standard Jury Instructions in Criminal Cases, page 136.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Robert J. Krauss, Assistant Attorney General, and William I. Munsey, Jr., Assistant Attorney General, Westwood Center, Suite 700, 2001 N. Lois Avenue, Tampa, Florida 33607, this 23rd day of January, 1995.