IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 85,294

STATE OF FLORIDA,

Petitioner,

vs.

EUGENE C. BAIN,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

****

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Senior Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 339067

GEORGINA JIMENEZ-OROSA
Senior Assistant Attorney General
Florida Bar No. 441510
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
Telephone: (407) 688-7759

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

CONSTITUTION

STATUTES

OTHER

PRELIMINARY STATEMENT

Respondent was the Defendant and Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent was the Appellant and Petitioner was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Court except that Petitioner may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE

Respondent was charged in the Nineteenth Judicial Circuit with having committed a burglary of a "structure, the property of Dodgertown Elementary School" on or about the dates of October 27 and October 28, 1993 (R. 8). After a jury trial, the trial court adjudicated Respondent guilty as charged, in accordance with the jury verdict (R. 26, 33-34).

Respondent appealed the judgment and conviction to the District Court of Appeal, Fourth District, and argued that because the evidence established he did not enter the cafeteria, he could only be convicted of trespass. Finding that, "[t]here was no proof that the defendant entered the school cafeteria nor any curtilage, **the building not having been enclosed in any manner**," the District Court reversed the judgment and sentence for burglary, and remanded the cause with direction that Respondent be adjudicated and sentenced for trespass. (See A. 1). In support of its conclusion, the appellate court cited to Hamilton v. State, 645 So. 2d 555 (Fla. 2d DCA 1994), review granted, Case No. 84,783 (Fla. March 31, 1995).

Because Hamilton is pending review by this Court on a question certified to be of great public importance, under Jollie v. State, 405 So. 2d 418 (Fla. 1981), the State invoked the discretionary review jurisdiction of this Court. By order issued May 18, 1995, this Court accepted jurisdiction, dispensed with oral argument, and set a briefing schedule.

Petitioner's Brief on the Merits follows.

STATEMENT OF THE FACTS

Teacher's aide and security guard Thurston Johnson lived on the campus of Dodgertown Elementary (T. 25-26). Mr. Johnson encountered Respondent on the campus of the elementary school at about 6:00 p.m. October 27, 1993 (T. 26-27). Since it was after school hours, and Respondent was not allowed to be on the campus, Mr. Johnson asked Respondent what he was doing there. Respondent replied that he was going home from work and was taking a short cut through the campus (T. 27). Mr. Johnson warned Respondent he was not allowed to take short cuts through campus (T. 27).

Mr. Johnson testified he checked the cafeteria after 6:00 p.m. that night, and everything was normal (T. 28). However, when he checked the campus the next day, Mr. Johnson noticed the window pane on the high window was out, and the screen was off the window in the ground level (T. 28, 30-31). Mr. Johnson also found a book and a spoon on the top of the roof (T. 28).

The testimony of Dale Klaus, the Elementary School Principal, was consistent with Mr. Johnson's testimony that the plexiglass plate was missing from an upper level window (T. 19), and that the screen from the bottom window was on the ground and that the glass window from which it was removed was intact (T. 23-24). Both Mr. Klaus and Mr. Johnson testified that nothing was missing from inside the cafeteria (T. 21-22, 24), and that no evidence showed anyone had been inside the cafeteria (T. 33).

With reference to the layout of the campus or "enclosure" of the cafeteria, Mr. Klaus testified that there is a fence running

the entire north end of the campus (T. 20). The fence separates the school from an apartment complex on the north side (T. 20). Mr. Klaus described the fence as a chain link fence, and a partial privacy fence on the north side. The cafeteria is a building right behind, or south of, the administration building. Then to the south is the parking lot, to the east is the student education wing, to the west is the media center, and the cafeteria is in the middle on the south side of the campus (T. 20). The campus is only open "to those that should be there for school reasons" (T. 22). On October 27-28, 1993, the school was undergoing renovation/construction (T. 20). There was some construction fences around the two buildings that were being renovated (T. 21). The fenced area was next to the cafeteria (T. 24).

The testimony at trial established that the window from where the plexiglass was removed, is about 12 feet high (T. 19, 35), and there is a walkway (or small roof) alongside the building (T. 35).

Deputy Joseph Parrish testified that he responded to Dodgertown Elementary School at about 8:00 a.m. October 28, 1993 (T. 38-39). He testified that he saw a vent-type window, located about 10 to 15 feet high from the sidewalk (T. 40), from which a thin plexiglass had been removed (T. 40). The removed plexiglass was found on the "roof" (or overhang) which covers the sidewalk (T. 42, 43). Deputy Parrish stated on the roof (or overhang, which covers the sidewalk T. 43) area he found caulking, aluminum framing that had been removed from the window, as well as a large silver kitchen spoon, and a thick paperback book, along with the plastic

piece that had been removed from the frame (T. 43). The actual plexiglass plate was found on the roof or overhang (T. 49). The screen from the lower window was found on the ground inside the air conditioning enclosure, right underneath the blue gate (T. 49). These items, along with photographs of the window areas were introduced into evidence (T. 41-49, 63-66). Deputy Parrish stated there were pry marks on the bottom window but no pry marks on the top window area (T. 52). The screen and frame and glass from the ground floor window were processed for prints (T. 54-55, 69). Deputy Parrish testified he found fingerprints on the glass of the window (T. 56). These prints could not have been left without removing the screen first (T. 57).

Deputy Parrish stated both the school principal and Mr. Johnson mentioned Respondent's name as a possible suspect (T. 72), so he checked the latent fingerprints against Respondent's known fingerprints (T. 72). The deputy pursuant to a warrant then arrested Respondent on November 10, 1993 (T. 73, 74).

After waiving his Miranda rights, Respondent told Deputy Parrish that he tried to break into the cafeteria around 11:00 p.m. on the 27th day of October (T. 78). Respondent said he used the kitchen spoon as a pry tool (T. 77). Respondent attempted to get into the vent type window from the roof area on the east side of the cafeteria. Once he removed a piece of plastic, Respondent looked down and saw a ten to fifteen foot drop, so Respondent stopped trying to enter at that location, and went down to the window located near the sidewalk on the same side of the school

cafeteria (T. 78, 79). Respondent stated he removed the screen from the window (T. 87), but when he was unable to pry the window open, Respondent ceased trying to get in, and left (T. 79).

Latent Print Examiner, Anthony Oliver, Jr., examined the fingerprints recovered from the windows against Respondent's known fingerprints (T. 94-95), and they matched (T. 96).

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, infra. Section 810.011 defines structure as "any building of any kind, ..., together with the **curtilage** thereof." While curtilage is not defined, this Court held entry into the curtilage is entry into the structure, Baker. In enacting the statute the legislature did not insert the words "fenced," "enclosed," "secluded," or "protected" before the word "curtilage." Therefore, a plain reading of the statute, would extend the meaning of curtilage to those areas around a structure which are not enclosed. Thus, Petitioner asks this Court to quash the District Court's holding below that a curtilage must be enclosed before it can be considered part of the structure for purposes of the burglary statute.

Alternatively, the State submits that because the cafeteria building, the structure at bar, was part of several buildings of the elementary school campus, and had a fence that separated the campus from an apartment complex on the north side, and was located behind other buildings, and was secluded and closed at this time of night, the structure in the case at bar was sufficiently "enclosed" to withstand the challenge herein. Thus, the State submits that

the District Court's opinion must be quashed, and the burglary conviction affirmed.

Should this Court agree with the District Court's decision regarding the "enclosure" issue and reversal of the burglary conviction, then the District Court's opinion must be quashed at least to the extent that it reduced the judgment to trespass. The State submits that under Sec. 924.34, the judgment should have been reduced to **attempted burglary**, as this is the lesser degree of the offense included in the offense charged, proved by the evidence presented at trial, and the lesser degree offense on which the jury was instructed by the trial court. The evidence was that Respondent broke the window to the cafeteria with the intent to commit a felony therein, but did not enter the structure only because he saw a ten foot drop (T. 78-79). Therefore, it is clear that if this Court agrees Respondent did not commit a burglary because the curtilage was not enclosed, then it is clear that Respondent did commit **attempted** burglary of the structure when he broke the window with the necessary intent, then stopped because of the ten foot drop. Id.

ARGUMENT

DOES FLORIDA'S BURGLARY STATUTE REQUIRE THAT THE "CURTILAGE" BE ENCLOSED AND, IF SO, WAS THE CAFETERIA SUFFICIENTLY ENCLOSED UNDER THE FACTS OF THIS PARTICULAR CASE?

This Court has for review Bain v. State, 650 So. 2d 83 (Fla. 4th DCA 1995), where the district court cited as controlling authority Hamilton v. State, 645 So. 2d 555 (Fla. 2d DCA 1994), which is pending in this Court State v. Hamilton, Case No. 84,783 (Fla. March 31, 1995) on a certified question of great public importance. This Court has jurisdiction under article V, section 3(b)(3) of the Florida Constitution. See Jollie v. State, 405 So. 2d 418 (Fla. 1981).

The District Court reversed Petitioner's conviction holding

> We reverse the defendant's judgment and sentence for burglary, and remand with direction that he be adjudicated and sentenced for trespass, which is the relief expressly sought in appellant's initial brief. There was no proof that the defendant entered the school cafeteria nor any curtilage, the building not having been enclosed in any manner.

Petitioner asks this Court to quash the decision of the district court because Florida law does not require the building to be "enclosed" in any manner before the "curtilage" of the building can be established. In the alternative, should this Court find that enclosure is necessary, Petitioner maintains the evidence at trial sufficiently demonstrated enclosure under the facts of this particular case to support the jury verdict, that Respondent burglarized the curtilage of the cafeteria building which was enclosed or surrounded by the other school buildings in the

elementary school campus. In any event, Petitioner would urge this Court to decline to announce a "bright line" rule defining the extent of enclosure for "curtilage," leaving the determination to be made on a case by case basis.

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, Florida Statute (1991) provides:

> (1) "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

Section 810.011, Florida Statute (1991) provides:

> (1) "Structure" means a 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." Recently, however, in Baker v. State, 636 So. 2d 1342, 1343 (Fla. 1994), this Court held the language of the burglary statute was "unambiguous." In Baker the defendant was convicted of burglary of a dwelling. This Court recited the facts as follows:

> On October 15, 1990, Thomas S. Baker entered the yard of a home belonging to Robert Wilson. The property involved is a private home, 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. Baker removed a board from under a plastic tarp in the front yard and crept into the back yard. While hidden from view in the seclusion

> of the back yard, Baker removed a screen from a rear window and used the board to break a lower windowpane. An alarm sounded and Baker fled.

Id. at 1343. In affirming the conviction, this Court held:

> The legislature has defined "dwelling" such that the definition include **the curtilage.** § 810.011(2), Fla.Stat. (1989). Where the legislature has used particular words to define term, the courts do not have the authority to redefine it. *State v. Graydon*, 506 So. 2d 393, 395 (Fla. 1987). Therefore, for the purpose of the burglary statute, it would not matter whether Baker was in Wilson's **secluded** back yard or back bedroom; in either circumstance, the courts must consider him to have been within Wilson's dwelling.
>
> * * *
>
> The legislature added curtilage to the definitions of "structure" and "dwelling." There is no crime denominated burglary of a curtilage; the curtilage is not a separate location wherein a burglary can occur. Rather **it is an integral part of the structure or dwelling that it surrounds.** Entry onto the curtilage is, for the purposes of the burglary statute, entry into the structure or dwelling. Baker entered Wilson's yard which was protected by a fence and shrubbery where the owner had an expectation of privacy. Even though he did not enter Wilson's house, he did enter Wilson's "dwelling."
> (emphasis added.)

Id. 1343-1344.

The evidence at trial showed that Respondent removed the plexiglass plate from a window to the cafeteria building that was part of an elementary school. Dale Klaus, the Elementary School Principal, testified that there is a fence running the entire north end of the campus, which fence separates the school from an apartment complex on the north side (T. 20). Mr. Klaus explained

that the fence on the north side is a chain link fence, and a partial privacy fence (T. 20). The cafeteria is a building right behind, or south of, the administration building. Then to the south is the parking lot, to the east is the student education wing, to the west is the media center, and the cafeteria is in the middle on the south side of the campus (T. 20). The campus is only open "to those that should be there for school reasons" (T. 22). On October 27-28, 1993, the school was undergoing renovation/construction (T. 20). There were some construction fences around the two buildings that were being renovated (T. 21). The fenced area was next to the cafeteria (T. 24). Mr. Johnson told Respondent he was not allowed on campus (T. 27). Mr. Miles Martin testified that the window from which the plexiglass was removed, is about 12 feet high, and there is a walkway (or small roof) alongside the building (T. 35).

The evidence showed that Respondent's fingerprints were found on the plexiglass plate (T. 43-4, 94-96) and on the screen and bottom cafeteria window from which it had been removed (T. 50, 52, 57, 94-96). The plexiglass plate had been removed from a window up high. In his statement to the police, Respondent stated that he used the kitchen spoon found on the roof as a prying tool. Respondent said when he took the plexiglass plate off and looked into the building, he saw a ten to fifteen foot drop, so he decided to try and pry open the window on the ground floor. Respondent was unable to open that window (T. 78-79).

At bar, the testimony clearly demonstrates that the cafeteria

building was **secluded** and **protected** by the other buildings, and that there was a fence to the north separating the school from the apartment complex. Thus, the outcome in the case at bar is controlled by Baker. Here Respondent entered the campus of the elementary school. The cafeteria was in the back, hidden from view by the other school buildings. Respondent, like Baker, removed a plexiglass plate from the upper window, and upon seeing the ten foot drop did not enter the building. Respondent had been warned that he was not allowed in the campus after hours (T. 27); nor did he belong there because he had no business in the elementary school, when the school was closed or otherwise (T. 22, 27). The evidence established burglary of a structure. Baker. Respondent entered the curtilage of the cafeteria building. Entry onto the curtilage, for the purpose of burglary statute, is entry into the structure, Id. at 1344. Respondent entered the school campus, and the cafeteria curtilage in particular. The cafeteria building was protected by a fence and other building where Respondent was not allowed to enter or remain. Even though Respondent did not enter the cafeteria building, he did enter the "structure." Id. See also M.M. v. State, 610 So. 2d 55 (Fla. 3d DCA 1992) (The very act of entering the curtilage of the victim's home with intent to steal property in the home constitutes the crime of burglary of a dwelling); State v. Spearman, 366 So. 2d 775 (Fla. 2d DCA 1978) (Defendant's entire body intruded into the curtilage of residence); DeGeorge v. State, 358 So. 2d 217 (Fla. 4th DCA 1978) (like the case at bar, involved a "paved area, partially enclosed by a fence,

a brick wall and the structure itself.")

Because the District Court reversed the conviction finding the cafeteria was not enclosed, the opinion must be reversed, because it is clear that the cafeteria was "secluded," therefore burglary has been clearly established.

That argument notwithstanding, due to the language of the District Court's opinion, and the basis under which review was obtained, the State must go on and urge this Court to answer the certified question in Hamilton in the negative, i.e., the curtilage needs **not** be "enclosed" for purposes of the burglary statute.

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 on the Laws of England* 225 (1988). Accord, Baker, at 1344, curtilage "is an integral part of the structure or dwelling it surrounds." and United States v. Dunn, 480 U.S. 294, 300, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987) (The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself.) The definition of curtilage at common law, "as the area within close proximity to the dwelling house." 3 *Wharton's Criminal Law* § 336 (C. Torcia 14th ed. 1980) did not allege the need for the area to be **fenced in.**

The Second District Court of Appeal in Hamilton used the facts in Baker to conclude that this Court requires the curtilage to be

enclosed before it can be considered an extension of the structure and thus covered by the burglary statute. Hamilton, 645 So. 2d at 559. Petitioner is concerned that the Hamilton court took the facts in Baker to define curtilage, wherein it is clear that this Court in Baker was simply observing that the defendant had entered the curtilage of the dwelling, not that the facts set up the minimum standard for defining curtilage. Surely, the victim in Baker could have an expectation of privacy in his backyard and thus burglary of the dwelling was established under a different set of facts. For example, in Hamilton, Mr. Jenks too had an expectation of privacy in his backyard, and a burglary occurred when Hamilton entered the curtilage of the dwelling to steal the boat which was backed up against the house, in the backyard, the view of which was obstructed "in a semi-secluded area adjacent to the home surrounded by several unevenly spaced trees." Id. at 557.

In deciding the question, it is important to note that the legislature did **not** insert the words "fenced," "enclosed," "secluded," or "protected" before the word "curtilage" in the statute. Therefore, a plain reading of the statute extends the meaning of curtilage to the area around a structure, even if not enclosed. See 3 Wharton's Criminal Law, supra; 4 W. Blackstone, Commentaries *225; Foreman v. State, 546 So. 2d 977 (Ala.Cr.App. 1986); State v. Fields, 337 S.E. 2d 518 (N.C. 1985).

Further, 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 respective District Courts agreed "that a driveway to one's residence is within the curtilage of that property." Id. at 168.

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 the curtilage of a house and taking new roofing paper, the appellate court 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 opinion does not indicate that the yard was enclosed.

Although the facts in DeGeorge v. State, supra, 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 District Court 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.

Another Florida case which supports the proposition that curtilage need not be enclosed under the burglary statute is State v. Spearman, supra. 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, supra, for example, the appellate court focused on "the meaning of the term 'curtilage' as applied to present day circumstances and conditions," 303 So. 2d at 62, holding that the curtilage to defendant's apartment did include defendant's automobile parked in the 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. Another source cited observed that curtilage "need not necessarily be separated from other lands by a fence" Holland v. State, 65 So. 920 (Ala. 1914). See Stipp v. State, 355 So. 2d 1217, 1218 (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"); State v. Musselwhite, supra, agreeing with Joyner 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."

In Olivera v. State, 315 So. 2d 487 (Fla. 2d DCA 1975), the court observed that the officer entered the curtilage of the dwelling, where the defendant had a reasonable expectation of privacy, when the officer left the sidewalk and stood on the lawn next to the window in the back of the apartment. The court pointed out 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, it is clear that, at bar, the area around the cafeteria invaded by Respondent was not open to the public, specially at eleven o'clock at night, when the school is closed, and Respondent had specifically been asked to leave at six o'clock earlier that evening.

In United States v. Romano, 388 F. Supp. 101, 104 n. 4 (E.D. Pa. 1975), the court observed that the modern meaning of curtilage "has been extended to include any land or building adjacent to a dwelling, and **usually** it is enclosed some way by a fence or shrubs." In a footnote, the Romano court stated that this definition was quoted with approval in Black's Law Dictionary. The

word *usually* as used in this definition is important because it evidence that the court was not advocating a "bright line" test to determine the curtilage. By stating that "usually [the curtilage] is enclosed some way by a fence or shrubs," the court left room for those fact situations, as the case at bar, where a curtilage may exist despite the absence of an enclosure consisting of a fence or shrubs - around the cafeteria building proper.

It seems a hollow distinction to say that a fence gives you enhanced property rights or that one must enclose one's yard by 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 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 "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?

For these reasons, it is clear that a structure need not be enclosed before it can be said to have a curtilage. This fact is clearly established under the circumstances of the case at bar. While there was no fence around the cafeteria building itself, the cafeteria building was in the middle of other buildings that make

up the campus of the elementary school, which itself did have a fence on the north side, separating it from an apartment complex. It is clear that Respondent entered the curtilage of the cafeteria. As this Court's Baker opinion makes clear, even though Respondent did not enter the cafeteria, he did enter the structure, when he stepped onto the walkway, took off the screen of the window below, and the plexiglass off the high vent window.

The opinion below must be quashed. The trial court's modification of the standard jury instructions was consistent with the common law definition of curtilage. The statute does not include the word "enclosed" to qualify curtilage, thus clearly demonstrating that the legislature did not intend to require "enclosure." The opinion below was wrong in relying on Hamilton. Thus, this Court should answer the certified question in Hamilton in the negative, and quash the opinion below consistent therewith.

Even should this Court agreed with the Hamilton opinion, and the opinion here under review, that the curtilage must be enclosed, the Fourth District's opinion *sub judice* must still be quashed in part as to the remedy granted Respondent.

The District Court below reversed and remanded with directions that Respondent be adjudicated and sentenced for trespass, "which is the relief expressly sought in appellant's initial brief." The State would point out that Respondent was charged with Burglary of a **Structure** (R. 8). Although the evidence showed that Respondent was warned by school officials that he was not allowed to be in the campus of the property of Dodgertown Elementary School, Respondent

was not charged, and the State did not present its case with the view of obtaining a conviction for trespass of the school land under Section 810.09, Florida Statute (1991).[1]

Section 924.34, Florida Statute, provides:

> **924.34 When evidence sustains only conviction of lesser offense.**--When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish his guilt for a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgment and direct the trial court to enter judgment for the lesser degree of the offense or for the lesser included offense.
> (Emphasis added.)

Since Respondent was charged with Burglary of a **Structure**, i.e. the school cafeteria, and the District Court reversed because "[t]here was no proof that the defendant **entered** the school cafeteria nor any **curtilage**," the judgment cannot be reduced to trespass under Section 810.08, Florida Statute, because under the holding, Respondent did not enter the structure at all. The judgment cannot be reduced to trespass under Section 810.09, Florida Statute, because he was **not** charged with trespass on property, other than structure.

---

[1]Respondent could have been, **but was not**, charged with two offenses: trespass on the school grounds under Sec. 810.09, and burglary of a structure, i.e. the school cafeteria, under Sec. 810.02. See Tobler v. State, 371 So. 2d 1043, 1045 (Fla. 1st DCA 1979) (Tobler committed two separate breakings and enterings and, therefore two separate offenses. Tobler's forced entry into the fenced area was one burglary, and his later forced entry into the enclosed trailer park within the fenced area was a second burglary.)

The State submits that should this Court agree with the District Court's decision regarding the "enclosure" issue and reversal of the burglary conviction, then the District Court's opinion must be quashed at least to the extent that it reduced the judgment to trespass. The State submits that under Sec. 924.34, the judgment should have been reduced to **attempted burglary**, as this is the lesser degree of the offense included in the offense charged, proved by the evidence presented at trial, and which the jury was instructed on by the trial court. The evidence was that Respondent broke the window to the cafeteria with the intent to commit a felony therein, but did not enter the structure only because he saw a ten foot drop (T. 78-79). See Foster v. State, 220 So. 2d 406 (Fla. 3d DCA 1969). Therefore, it is clear that if this Court agrees Respondent did not commit a burglary because the curtilage was not enclosed, then it is clear that Respondent did commit **attempted** burglary of the structure when he broke the window with the necessary intent, then stopped because of the ten foot drop. Id.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully submits that the decision of the district court should be **QUASHED** and the judgment and sentence imposed by the trial court should be **AFFIRMED.**

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 339067

GEORGINA JIMENEZ-OROSA
Assistant Attorney General
Florida Bar No. 441510
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Appellee" has been furnished by Courier to: ELLEN MORRIS, Assistant Public Defender, Counsel for Respondent, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 9th day of June, 1995.

Georgina Jiménez Cruz
Of Counsel