IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 85,294

STATE OF FLORIDA,

Petitioner,

vs.

EUGENE C. BAIN,

Respondent.

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ON PETITION FOR CERTIORARI REVIEW

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PETITIONER'S REPLY BRIEF ON THE MERITS

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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. 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. 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 opinion below, and hold that a curtilage **need not** be enclosed before it can be considered part of the structure for purposes of §810.02, Fla. Stat.

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 the judgment should have been reduced to **attempted burglary**, as this is the lesser included offense of 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 ENCLOSED UNDER THE FACTS OF THIS PARTICULAR CASE?

In reply to Respondent's arguments, Petitioner hereby reasserts the arguments made in the initial brief.[1]

Further, Petitioner would point out that the District Court's opinion must be quashed because to accept the District Court and Respondent's position is to say that if a dwelling or a structure is not enclosed, then it does not have a curtilage. This cannot be. At common law, curtilage was defined as "the area within close proximity to the dwelling house." 3 *Wharton's Criminal Law* § 336 (C. Torcia 14th ed. 1980). Therefore, every building has a curtilage, whether it is enclosed to fully define it with the property boundary is another question, which is not necessary for the purposes of the burglary statute.

For example, if you have two structures next to each other. Structure A has a chain link fence (no shrubbery) 20 feet all around it; structure B is not enclosed in any manner. Mr. A walks, through the open gate of the chain link fence, up to structure A

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[1]Both the Initial Brief of Petitioner (p. 10) and Answer Brief of Respondent (p. 6) cite to Sec. 810.02, Florida Statute **(1991)** as the applicable statute in the case at bar. However, counsel jointly would inform this Court that upon review of the applicable dates, Respondent was charged with committing the burglary between the dates of October 27 and October 28, 1993. The reenactment of Sec. 810.02, Florida Statute, having become effective upon publication on June 3, 1993, (see Sec. 11.2421, F.S.A., 1995 Pocket Part), the correct citation should have been to the 1993 statute. The Initial and Answer Briefs should be considered corrected accordingly.

and removes the glass pane from the window ten feet high, with the intent to enter and steal from within. Upon seeing the drop down to the floor, Mr. A leaves. Mr. A then notices structure B right next door and he walks to structure B, which has no fence around it. Since he could not steal from structure A, he decides to try and steal from structure B, and removes the plexiglass pane from the window which also is ten feet high. Again upon seeing the drop, Mr. A decides to go steal from a structure easier to enter and leaves these two buildings. Under Respondent's position, if Mr. A were caught, he would be convicted of burglary for the acts against structure A, because there was a fence around the structure. However, under identical circumstances, **except for the fence**, Mr. A would be acquitted of burglary for the acts against structure B, even though he never entered either structure, and neither structure was secluded, nor their view obstructed by any means. The State maintains both buildings have a curtilage, Structure A's being enclosed, and Structure B's not.

As can be seen, it is 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 or structure. Just as a yard can exist without being enclosed, it seems clear that curtilage must 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?

The State maintains that consistent with the modern view,[2] curtilage needs not be enclosed to be recognized. To give *every* property owner protection against burglars, this must be so.

At page 9 of his answer brief, Respondent asserts that this Court in Kelly v. State, 145 Fla. 491, 199 So. 764 (1941), provided a definition of "curtilage". The State points out that any language dealing with curtilage and the use of a fence to mark same was purely *dicta*. The issue in Kelly was whether in that murder conviction case, the defendant was entitled to a specially requested jury instruction on the defendant's lack of need to retreat when faced with imminent danger while in his own "dwelling house premises". In Kelly this Court was not trying to define curtilage for purposes of the burglary statute, or for any other purpose. Thus Kelly is not controlling; nor did Kelly put the legislature on notice that this Court was defining curtilage for the purpose of the burglary statute. Thus, this Court is not bound by Kelly, but is free to adopt the modern definition of curtilage, which does not require enclosure for curtilage to exist around a dwelling or structure.

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[2]Charch v. Pennsylvania Public Utility Commission, 132 A. 2d 894 (Pa. 1957).

Second, faced with the facts in this particular case, it is also difficult to comprehend, how Respondent (see page 14) and the District Court can state that the cafeteria building - the structure at bar - which was part of several buildings in a school **campus** was not enclosed. 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 campus 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 State thus maintains that 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. Under these facts, the curtilage at bar was enclosed. Not only was the cafeteria building, within the curtilage of the Administration Building (which can be liken to the main dwelling house), in the campus, which had the fence on the north end, and parking lots, but the cafeteria building was in the mist of buildings of a school whereby a fence around this particular structure would be highly inappropriate. The evidence clearly showed that Respondent entered the "land" immediately around the cafeteria building in order to remove the plexiglass pane from the window. Clearly Respondent entered the curtilage, and was accordingly properly convicted of burglary of a structure.

Lastly, although attempted burglary is neither a lesser degree offense, nor a "necessarily" included offense of burglary of a structure; attempted burglary is a "category two" offense; the evidence supported the giving of the instruction; and this was one of the alternatives considered by the jury (R. 26, T. 108, 145). A reduction of the conviction to attempted burglary would be appropriate under the particular circumstances of this case.

In conclusion, the State submits that 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 require "enclosure." The State asks this Court to quash the opinion below, and hold that a curtilage **need not** be enclosed before it can be considered part of the structure for purposes of §810.02, Fla. Stat.

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 affirmed.

Respectfully submitted,

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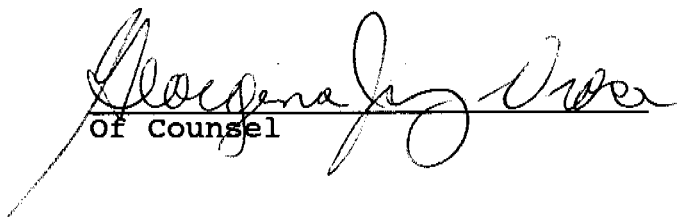
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Reply Brief on the Merits" has been furnished by courier to: DAVID McPHERRIN, Assistant Public Defender, The Criminal Justice Bldg./6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 18th day of July, 1995.



Of Counsel