IN THE SUPREME COURT OF FLORIDA

WALTER LEE RATLIFF,

Petitioner,

vs. CASE NO. 87,542

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

PHIL PATTERSON
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER
FLA. BAR NO. 444774

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Walter Lee Ratliff, was the defendant in the trial court, and the appellant in the First District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court, and the appellee in the district court.

The record on appeal will be referred to by use of the symbol "R," and the transcripts of court proceedings by use of the symbol "T," each followed by the appropriate page number.

All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Petitioner was charged by information with burglary of a dwelling (R-8).

He was tried by a jury, and found guilty as charged (R-42). Thereafter, the trial court declared petitioner to be a habitual felony offender (R 79-84), and sentenced him to 25 years imprisonment (R-76).

Petitioner appealed his conviction and sentence to the First District Court of Appeal (DCA), which affirmed both. The First DCA certified the following question to be one of great public importance:

> Do the 1982 amendments to Chapter 810, Florida Statutes, supersede the common-law definition of a dwelling, whereby a structure's design or suitability for habitation, rather than actual occupancy or intent to occupy, is controlling in determining whether a structure constitutes a dwelling.

Thereafter, petitioner filed a timely Notice To Invoke Discretionary Jurisdiction, which this Court acknowledged.

STATEMENT OF THE FACTS

The state charged that petitioner "did unlawfully enter or remain in a structure, to-wit: a dwelling, the property of Jay Alan (sic) Custom Homes, Inc., with the intent to commit" theft (R-8). Petitioner's theory of defense was that he burglarized a structure rather than a dwelling (T-63, 130-135).

To show the nature of the structure at issue, the state called Alan Fixell to the stand. Mr. Fixell was vice-president of J. Allen Custom Homes, the company that built and owned the structure (T-112). Although Mr. Fixell characterized the building as "occupiable," he admitted that it had not passed the final building inspection which was required before he could actually sell it (T 119-121). Furthermore, although the utilities had been turned on (T-113), there was no personal property, furniture, or major appliances (except a dishwasher) inside (T-118).

The building passed its final inspection the day after the instant burglary, and the construction company sold it "a few days" later (T-12).

After the state rested, petitioner moved for a judgment of acquittal and argued that the evidence proved the building in question was a structure, not a dwelling. He pointed out "that the building inspection had not been completed," and argued that "it would have been illegal for anyone to reside at that location" because it had never been declared fit for habitation (T 130-132). Petitioner noted that the information listed the construction company as owner of the structure, and argued:

> "The reason why we have (an) enhanced penalty for something greater than a building, making it a dwelling, is because it just makes sense that if someone has their own private space invaded, that that is more egregious. The fact is that the contractor, the builder of this home, the victim, as listed in the information never intended to live there, was not going to live there, in no way had his home invaded, and, therefore, this Court should hold that it is not a dwelling.

(T-132).

In response, the state argued that the proper "analysis lies... in the definition whether it was designed to be occupied, not what stage of completion it was in.... * * * It... has nothing to do with whether or not the last inspection had been done or anything to this effect. It's just what was this house intended to be used as. Does it have a roof over it and is it designed for people to sleep in at night?" (T-129).

The court concluded:

> "Well, let's -- as Mr. [Prosecutor] has ably pointed out, it says here occupancy is no longer a critical element under this definition, rather it is the design of the structure or conveyance which becomes paramount. If a structure or conveyance initially qualifies under this definition and its character is not substantially changed or modified to the extent that it becomes (un)suitable for lodging for people, it remains a dwelling irrespective of actual occupancy.
> * * *
> It occurs to me further that if they've built something that's built to look like a house to have bedrooms, dining rooms, bathrooms like a house or an apartment, designed for habitation by persons and not designed as a business, that that's what they're talking about.
> If they built it along that configuration they wanted to make the punishment greater....
> * * *
> And insofar as a corporation owning houses, that's not unusual for corporations to own thousands of houses to be occupied as dwellings by their employees in various plants, cities, factory cities.
> * * *
> So I deny the motion for judgment of acquittal.

(T 133-135).

At the charge conference, the state argued that the court should not give the standard jury instruction defining a dwelling. Rather, the state argued that the court should give a special instruction that tracked the language in Perkins v. State.[1] The

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[1]Perkins v. State, 630 So. 2d 1180 (Fla. 1st DCA 1994), which is now before this Court on a similar certified question, see, Perkins v. State, Case No. 86,248, although Perkins is based on a

state's proposed instruction read:

> "Dwelling means a building or conveyance of any kind either temporarily or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night together with the curtilage thereof."

(T-148).

Petitioner objected to the state's special jury instruction "for the same reasons" that he set out in his motion for judgment of acquittal (T-149).

The court announced, "I will not give the definition of a dwelling as set forth in the standard jury instructions. * * * I will give the definition of a dwelling as set forth in the Perkins case" (T 150-151). The court thereafter gave the above-cited instruction derived from the Perkins case (T-190).

During closing argument, the state requested the court to order petitioner to refrain from arguing that the structure at issue was not a dwelling. The state's concern was "that Mr. [defense counsel] is going to somehow try to argue to the jury that because it's owned by the company, that it's not a dwelling under the law, and that that's not the state of [the law] in Florida. And I don't want him to argue that to the jury improperly. The law is what I read them" (T 177-178).

Petitioner responded that "it's certainly proper to argue what is contained within the information," and that "it is a jury question as to whether or not J. Allen Custom Homes, Inc. ever intended to live in this" (T 178-179). The court, however, "sustain[ed] the objection" (T-179), and would not permit petitioner to argue that the evidence proved the building was a structure.

The jury deliberated 18 minutes before finding petitioner guilty as charged (T 198-199). As punishment for breaking into a house still under construction and

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materially different set of facts than the case at bar.

stealing a light fixture, the court sentenced petitioner to twenty-five (25) years in prison as a habitual felony offender (R-76).

This Court's jurisdiction was invoked in a timely manner, and this appeal follows.

SUMMARY OF ARGUMENT

First Issue: The building petitioner burglarized had not become a dwelling at the time of the instant offense. Therefore, his conviction for burglary of a dwelling must be reduced to burglary of a structure.

The structure at issue, which had not passed the final building inspection, was still owned by the builder/victim (R-8), who resided elsewhere. Consequently, the building, which had never been lived in, and in which the victim never intended to live, could not be sold for occupancy at the time of the offense (T 119-121). Furthermore, except for a dishwasher, the building contained no personal property or effects, furniture, appliances, or other household items. Petitioner maintains the building was either a construction site or a structure, and had not yet become a dwelling.

In Perkins v State, 630 So. 2d 1180 (Fla. 1st DCA 1994), the district court concluded that once a structure or conveyance "initially qualifies" as a dwelling, it remains one even if not occupied. The structure here had not passed the final building inspection at the time of the burglary, and thus, never "initially qualified" as a dwelling. Furthermore, as petitioner argued, the "victim," J. Allen Custom Homes, Inc. never lived there, never intended to live there, did not have any personal property or effects in the building and "in no way had his home invaded" (T-132).

Moreover, despite the district court's holding, there is no evidence the legislature intended to delete the common law element of occupancy from the definition of the term "dwelling" when it amended the burglary statute in 1982. See, e.g., L.C. v. State, 579 So. 2d 783 (Fla. 3d DCA 1991) (in amending section 810.02, the legislature did not intend to overrule the common-law definition of a dwelling for purposes of the burglary statute). As Judge Ervin pointed out in his well reasoned dissent in Perkins v. State 630 So. 2d 1180 (Fla. 1st DCA 1994), the legislature simply

expanded the definition of "dwelling" to include conveyances that were used as living quarters.

Including certain conveyances in the definition of "dwelling" is consistent with the legislative intent to authorizing enhanced punishment for an offender who burglarizes someone's living space. The increased punishment for burglary of a dwelling is due to the importance the law places on homes and the safety of the people who live there. In a nutshell, the law, rather than protecting buildings designed in a particular way, was enacted to protect a person's living space and personal belongings. Those concerns simply do not exist in this case.

Furthermore, to the extent the definition of "dwelling" is ambiguous, it must be construed in the manner most favorable to petitioner. Perkins v. State, 516 So. 2d 1310, 1312 (Fla. 1991). That construction of the word "dwelling" would include the common-law requirement of occupancy.

For all the reasons stated above, this Court should vacate petitioner's conviction for burglary of a dwelling, and enter a judgment for the lesser included offense of burglary of a structure.

Second Issue: When a trial judge gives a jury instruction that deviates from the standard jury instructions, he is required to state on the record or in a separate order the respect in which he found the standard form erroneous or inadequate and the legal basis of its finding. State v. Hamilton, infra. Although "a trial court's obligation in that regard is mandatory," Moody v. State, infra, Florida Rule of Criminal Procedure 3.985, failure to comply with this requirement is subject to harmless error analysis. State v. Hamilton, infra.

The following instruction was read to the jury: "I advise you that a dwelling means a building or a conveyance of any kind, either temporary or permanent, mobile

or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night" (T-190). The standard jury instruction, however, provides in pertinent part: "A dwelling is a house of any kind or a house trailer set in a foundation or any apartment or room actually used as a dwelling, home or place of abode, permanently or temporarily." Fla. Std. Jury Instr. (Crim.) Burglary - 810.02 F.S.

First, the court made no findings, either on the record or in a separate order, that the standard instruction was erroneous or inadequate. See, State v. Hamilton, infra. Furthermore, assuming the definition of "dwelling" contained in the standard jury instruction is a correct statement of the law, the special instruction failed to require the jury to find that the structure was "actually used" as a dwelling before they could return a verdict of guilty for burglary of a dwelling. Since the only issue in dispute was whether the building was a structure or a dwelling, the court's failure to explain why the standard instruction defining "dwelling" was erroneous or inadequate cannot be considered harmless error. Furthermore, failure to properly instruct the jury on the definition of "dwelling" violated petitioner's right to due process of law, and resulted in a verdict that is unreliable. As a result, petitioner is entitled to a new trial and to have the jury is properly instructed on the definition of a "dwelling."

Third Issue: The trial court, over objection, refused to allow petitioner to argue in closing that the structure was not a dwelling since it had never been occupied, the owner never intended to occupy it, and that until the structure passed the final building inspection it was illegal to reside there. Petitioner's argument was consistent with the standard jury instruction defining "dwelling," see, Florida Standard Jury Instruction (Criminal) - Burglary 810.02 Florida Statutes, and was fair comment on the evidence as it related to the law. L.C. v. State, infra. The trial court's refusal to allow this argument violated petitioner's right to due process of law, and the effective assistance

of counsel. Herring v. New York, infra.

ARGUMENT

FIRST ISSUE PRESENTED

THE TRIAL COURT ERRED BY DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE "DWELLING" ELEMENT OF THE BURGLARY CHARGE BECAUSE THE STRUCTURE AT ISSUE NOT YET BECOME A DWELLING.

The First District Court of Appeal (DCA) affirmed petitioner's conviction for burglary of a dwelling on the authority of Perkins v. State, 630 So. 2d 1180 (Fla. 1st DCA 1994). With all due respect, the lower court's reliance on the facts Perkins is misplaced since the facts there are materially different from those in the case at bar. Nevertheless, the law as set out in Perkins, supra, actually supports petitioner's argument because the structure at issue had not yet become a dwelling at the time of the instant burglary.

In Perkins v. State, supra, the building at issue had been built in 1953, and its owner had lived there until just prior to the burglary. The house contained various items of personal property, such as a stove, refrigerator, washer, microwave, dining room chairs, and miscellaneous items in the closets and cabinets. The electricity was on, but the telephone had been disconnected. The water was turned off although well-water was available on the property. The owner had last visited the house three to four weeks before the burglary when he mowed the grass and picked up trash.

The district court rejected Perkins' argument that since no one dwelled in it, the structure was not a dwelling. Instead, the court focused on the design of the building. The court held:

> "Occupancy is no longer a critical element under this (statutory) definition. Rather, it is the design of the structure or conveyance which becomes paramount. If a structure or conveyance initially qualifies under this definition, and its character is not substantially changed or

> modified to the extent that it becomes unsuitable for lodging by people, it remains a dwelling irrespective of actual occupancy.

Id. at 1181-1182.

In the case at bar, and unlike in Perkins, the structure had never been lived in or actually used as a dwelling. The building contained no personal effects, furniture, or other trappings associated with a dwelling.[2] In fact, the building, which petitioner asserts could be considered a construction site, was owned by a ficititious person, J. Allen Custom Homes, Inc., had not passed the final building inspection, and could not have been sold to a prospective home-buyer at the time of the offense, (T 119-121).

In addition, the Florida Standard Jury Instructions (Criminal) define dwelling as "a house of any kind or a house trailer set in a foundation or any apartment or room actually used as a dwelling, home or place of abode, permanently or temporarily." See, Fla. Std, Jury Instr. (Crim.) - Burglary F.S. 810.02. F.S.

Petitioner maintains that under these circumstances, the structure in question had not "initially qualified" as a dwelling, Perkins v. State, supra, at 1181-1182, and for this Court to affirm his conviction for burglary of a dwelling would be contrary to the intent of the legislature.

At 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. 4 William Blackstone, Commentaries on the Laws of England, 223-228 (1769).

The present burglary statute, Section 810.011, Florida Statutes (1993), provides in pertinent part:

> (2) "Dwelling" means a building or conveyance of any kind, either temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by

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[2]The building did contain a dishwasher.

people lodging therein at night, together with the curtilage thereof.

In Baker v. State, 636 So. 2d 1342 (Fla. 1994), this Court, while discussing the definition of "curtilage," opined that "the legislature has so thoroughly modified the burglary statute that the present statute must be said to completely abrogate and supersede the common law crime of burglary." Id. at 1344. Nevertheless, this Court thereafter concluded that the common-law definition of curtilage applied to the present burglary statute. State v. Hamilton, 660 So. 2d 1038, 1044 (Fla. 1995). See also, L.C. v. State, supra (in amending section 810.011(2), the legislature did not intend to overrule the common-law definition of a dwelling for purposes of the burglary statute).

Petitioner asserts that by modifying the burglary statute in 1982 to include a limited group of conveyances in the definition of a dwelling, the legislature intended to extend the reach of the law, but did not intend to change the fundamental requirement that a dwelling be a living space. See, e.g., Judge Ervin's dissent in Perkins v. State, 630 So. 2d 1180, 1182-1184 (Fla. 1st DCA 1994) ("by employing the term `designed to be occupied by people lodging therein at night' and by including both buildings and conveyances in the definition of dwelling, the legislature intended to extend the same protection to owners of conveyances which were used as dwellings as had formerly been extended to owners of structures used as dwellings, but that it did not intend to abrogate the common-law rule precluding conviction for burglary of a dwelling if the place entered was unoccupied and its owner had no intention to return").

Petitioner would point out that the legislature never expressly stated that it intended to redefine "dwelling" by doing away with the occupancy requirement. The First District Court in effect recognized that the statute was ambiguous on that point and certified the question to this Court. See, Perkins v. State, 603 So. 2d 1180, 1182 (Fla. 1st DCA 1994).

Indeed, if this Court were to delete the occupancy requirement and focus entirely on the design of the building, as the majority did in Perkins, the Court would expand the definition of the term "dwelling" to the point that it would encourage arbitrary and erratic arrests and convictions. For example, would a structure that once was used as a family home but which now, without being remodeled, is used as a law office, still be considered a dwelling simply because it was originally "designed" to be used as a home? Would "historic homes" that have not been modified in any way, but now serve as museums or visitors' centers still be considered dwellings for purposes of the burglary statute? Conversely, would a bed and breakfast that was originally designed to be a tobacco barn not be a dwelling?

Similarly, at what stage of construction does a structure designed to be occupied by people lodging therein at night, become an actual dwelling? If a construction crew has put the roof on a future house, but not installed wiring, plumbing, doors, or framed in the walls, does the building meet the statutory definition of a dwelling based solely on its design? Would a concerte foundation and a roof convert a construction site into a dwelling based simply on the design and intended future use of the property?

Such an expanded definition of "dwelling" would deny petitioner due process of law where such an expanded definition was not reasonably foreseeable by petitioner at the time of the act in question. See, Scull v. State, 569 So. 2d 1251 (Fla. 1990).

Furthermore, petitioner's position is consistent with the legislative intent that punishment be increased for those who burglarize a dwelling. The potential prison sentence for burglary of a dwelling is three times longer than for burglary of a structure. See, S. 810.02(3), Fla. Stat. (1994). The rationale for the enhanced sentence is because society recognizes, and places a great value on, the sanctity of the home where people live and keep their personal possessions, and because of the increased

potential for violence when a burglar enters a person's dwelling. In essence, the law was enacted to protect a person's living space and personal belongings. The statute was not modified to protect a building just because it was designed in a particular configuration.

In the case at bar, the structure at issue was still owned by a construction company and could not be sold until it passed a final building inspection (T 119-121). The "owner"/construction company did not reside there, had no intention of residing there, and did not have any personal property in the building. Consequently, as petitioner argued, "the victim listed in the information (Jay Allen Custom Homes, Inc.)... in no way had his home invaded, and, therefore, this Court should hold that it is not a dwelling" (T-132).

Furthermore, it has long been the law that, to the extent a criminal statute is capable of two constructions, it must be construed in the light most favorable to the accused. Perkins v. State, 516 So. 2d 1310, 1312 (Fla. 1991). See also, Section 775.021(1), Florida Statutes (the provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused). The rule of strict construction also rests on the doctrine that the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch. Perkins v. State, 516 So. 2d 1310 (Fla. 1991).

Therefore, to the extent that it is not clear whether the legislature intended to delete the occupancy requirement from the definition of "dwelling," the statute must be construed most favorably to petitioner. Id. That construction would be to include the occupancy requirement in the definition of "dwelling." Given that construction of the statute, and the fact the building had never been occupied, one must necessarily

conclude that petitioner did not burglarize a dwelling.

Under the facts of this case, the structure at issue, although designed to ultimately be occupied by people lodging therein at night, cannot be considered a dwelling for purposes of the burglary statute because it was uninhabitable. It had never been lived in; and no one had their personal property inside; it had not passed the final building inspection; and it could not have been sold at the time of the offense. In reality, it was still a construction site. Furthermore, the rationale for enhancing the punishment for burglary of a dwelling simply does not apply here.

For the reasons state above, this Court should vacate petitioner's conviction for burglary of a dwelling, and enter a judgment for the lesser included offense of burglary of a structure. Furthermore, this court should also hold that occupancy is still an essential element in the definition of "dwelling."

SECOND ISSUE PRESENTED

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO GIVE THE STANDARD JURY INSTRUCTION DEFINING "DWELLING," AND IN ITS PLACE GAVE A SPECIAL INSTRUCTION WITHOUT EXPLAINING WHY THE STANDARD INSTRUCTION WAS ERRONEOUS OR INADEQUATE.

When a trial judge gives an instruction to a jury that deviates from the standard jury instructions, he or she is required to state on the record or in a separate order the respect in which it found the standard form erroneous or inadequate and the legal basis for its finding. State v. Hamilton, 660 So. 2d 1038, 1045 (Fla. 1995); Hamilton v. State, 645 So. 2d 555 (Fla. 2d DCA 1994); Moody v. State, 359 So. 2d 557 (Fla. 4th DCA 1978). "A trial court's obligation in that regard is mandatory," Moody v. State, supra, but subject to harmless error analysis. State v. Hamilton, supra.

Indeed, Florida Rule of Criminal Procedure 3.985 provides in pertinent part:

> The forms of Florida Standard Jury Instructions in Criminal Cases...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 trial 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 for the judge's finding.

Fla. R. Cr. P. 3.985.

Below, at the beginning of the charge conference, the court began reading the standard instruction on the definition of "dwelling" (T-147). The prosecutor then proposed that the court give a different instruction based on the First District Court's opinion in Perkins v. State, 630 So. 2d 1180 (Fla. 1st DCA 1994), and assured the

judge, "I know (the special instruction) has been affirmed by the first district once already" (T 148-149).

After the court opined that the language in the requested instruction dealing with curtilage was confusing, petitioner requested that the instruction not be given "for the same reasons [he] argued in [his] motion for judgment of acquittal" (T-149).[3]

The trial judge concluded, "I will not give the definition of a dwelling as set forth in the standard jury instructions. * * * I will give the definition of a dwelling as set forth in the Perkins case" (T 150-151).

The standard jury instruction defines dwelling as follows: "A `dwelling' is a house of any kind or a house trailer set in a foundation or any apartment or room actually used as a dwelling, home or place of abode, permanently or temporarily." Fla. Std. Jury Instr. (Crim.) - Burglary F.S. 810.02. F.S.

The court below, however, instructed the jury as follows: "I advise you that a dwelling means a building or a conveyance of any kind, either temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night" (T-190).

First, the lower court gave no explanation, either on the record or in a separate order, for "the respect in which the judge (found) the standard [instruction] erroneous or inadequate and the legal basis of the judge's finding." Fla. R. Cr. P. 3.985.

Second, the error cannot be considered harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The instruction that was given failed to inform the jury that, in order

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[3]Petitioner based his motion for judgment of acquittal on the fact that the structure was a "nascent dwelling where it is not completed yet," and therefore "it would have been illegal for anyone to live at that location" (T-130). Petitioner continued, "the victim listed in the information (Jay Allen Custom Homes, Inc.) never intended to live there, in no way had his home invaded, and, therefore, this Court should hold that it is not a dwelling" (T-132).

to return a guilty verdict for burglary of a dwelling, they had to find that the structure was "actually used as a dwelling." Thus, the trial court failed to instruct the jury on an essential element of the offense. Furthermore, this was the only contested issue at trial, i.e., petitioner's theory of defense was that since the building was uninhabited, and uninhabitable at the time, it was not a dwelling.

The state can make no more than a naked claim unsupported by reason or logic, that the failure to properly define "dwelling" did not contribute to the verdict. State v. DiGuilio, supra. Consequently, and in the alternative to the remedy sought in the first issue, petitioner is entitled to a new trial.

THIRD ISSUE PRESENTED

THE TRIAL COURT ERRED BY HOLDING THAT PETITIONER COULD NOT ARGUE IN CLOSING THAT THE STRUCTURE AT ISSUE WAS NOT A DWELLING.

Petitioner was charged with burglary of a dwelling. He defended himself on the theory that he burglarized a structure, not a dwelling.

During closing argument, the state made a preemptive objection to petitioner's summation. The following discussion was heard:

> PETITIONER: Basically, there are two ways to charge somebody with a crime in the State of Florida. You can either indict them using a grand jury or a state attorney for some offenses.
> PROSECUTOR: Judge, I'm going to object. May we approach the side bar?
> COURT: All right. Step to side bar. Bring the machine.
> (Side bar with reporter.)
> PROSECUTOR: Judge I'm sorry. My concern is that Mr. Soberay is going to somehow try to argue to the jury that because it's owned by the company, that it's not a dwelling under the law, and that that's not the state of Florida (sic) in Florida. And I don't want him to argue that to the jury improperly. The law is what I read them.
> * * *
> COURT: What say you?
> PETITIONER: Well, Your Honor, I think it's an -- it's certainly proper to argue what is contained within the information.
> COURT: Well, that's right, as long as I don't draw some conclusion that's not legally correct.
> * * *
> PETITIONER: * * * However, it is a jury question as to whether or not J. Allen Custom Homes, Inc. ever intended to live in this.
> PROSECUTOR: It doesn't say you have to live in it.
> PETITIONER: No. What the thing is is they can draw an inference based on what is charged a dwelling. The property of J. Allen Custom Homes, Inc. whether or not anyone from J. Allen Homes ever intended to live there or not.

(T 178-179).

The court instructed petitioner, "You cannot argue that" (T-179). Petitioner

then unsuccessfully moved for mistrial (T-179).

The trial court deprived petitioner due process of law and the effective assistance of counsel by restricting his ability to argue his theory of the case to the jury. Whether the building was a structure or a dwelling was a jury question.

Furthermore, given the argument in Issue I, above, and the district court's opinion in Perkins v. State, 630 So. 2d 1130 (Fla. 1st DCA 1994), petitioner's argument was not an incorrect statement of the law. In Perkins, the DCA held that the structure must "initially qualify" as a dwelling to thereafter remain a dwelling. Id. Petitioner attempted to argue that the construction company still owned the property, and that no one from the company intended to live there. That argument is a legitimate attack on the state's contention that the building was a dwelling. Petitioner simply tried to argue all the circumstances that distinguished this structure from a dwelling. Among those circumstances were the facts that the construction company still owned the property, and did not intend to live there. That is part and parcel of the greater argument that the building was also not licensed for occupancy; that it was unfurnished, and without appliances; that no one had ever lived there, and no personal property was stored inside. As petitioner asserted in the first issue, the structure at issue was not legally a dwelling yet. That is, the structure had not "initially qualified" as a dwelling. Petitioner was entitled to make that argument to the jury. See, e.g., Billeaud v. State, 578 So. 2d 343 (Fla. 1st DCA 1991).

In Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975), the United States Supreme Court noted: "There can be no doubt that closing argument for the defense is a basic element of the adversary fact-finding process in a criminal trial." The court went to hold:

> "The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his

> counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem... unless the argument is not within the issues in the case, and the trial court has no discretion to deny the accused such right.
> * * *
>
> It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.
> * * *
>
> In a criminal trial, which is in the end basically a fact finding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment."

Id.

Petitioner was entitled to cross-examine witnesses to develop his theory of defense. Thereafter, he was entitled to argue that theory of defense to the jury. The trial court abrogated petitioner's right to try to persuade the jury that the building in question was not a dwelling. Consequently, the validity of the conviction obtained below is in question, and this Court must vacate it and order that petitioner be given a new trial.

CONCLUSION

Based on the foregoing arguments, reasoning, and citation of authority, this Court must vacate petitioner's conviction for burglary of a dwelling and either enter a conviction for the lesser included offense of burglary to a structure, or remand to the trial court for a new trial.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

PHIL PATTERSON
Assistant Public Defender
Fla. Bar No. 444774
Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Douglas Gurnic, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to petitioner, WALTER LEE RATLIFF, #290550, Tomoka Correctional Institution, 3950 Tiger Bay Road, Daytona Beach, Florida, on this 8th day of April, 1996.

PHIL PATTERSON