IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC01-1930
	)	
EUGENE MICHAEL BYARS,	)	
	)	
Respondent.	)	
	)	
_____	)	

RESPONDENT'S BRIEF ON THE MERITS

CAREY HAUGHWOUT
Public Defender

JEFFREY L. ANDERSON
Assistant Public Defender
15th Judicial Circuit of Florida
Florida Bar No. 374407
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

Attorney for Eugene Michael Byars

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PRELIMINARY STATEMENT

Respondent was the defendant and appellee the Petitioner in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For Indian River County, Florida. In this brief the parties will be referred to as they appear before this Court.

The symbol "R" will denote the Record on Appeal.

The symbol "T" will denote the Trial Transcript.

STATEMENT OF THE CASE AND FACTS

Respondent agrees with Petitioner's Statement of the Case and Facts with the following clarifications:

In addition to burglary, Mr. Byars was charged with the crime of violating an injunction by going to his wife's place of employment in violation of § 784.047(2) of the Florida Statutes.

The time of the entry into the store was around noon on September 17, 1996 T29-31. Store hours were 10:00 a.m. to 5:30 p.m. T20,29. It was agreed by the trial court and parties that the store was open to the public at the time Mr. Byars entered the store T39.

SUMMARY OF THE ARGUMENT

The Legislature made an "open to the public" exception to the burglary statute. That legislative exception should be adjusted only by the Legislature and not the courts.

Florida's burglary statute is based on the Model Penal Code, which makes it clear that one cannot be convicted of burglary if the premises are open to the public even if the owner prohibits the defendant's entrance to the premises.

Penal statutes must be strictly construed in favor of the accused. Either a place is open to the public or it is not open to the public.

Petitioner claims that a defendant must prove "he was a member of the public permitted entry." The Legislature never placed such a requirement in the statute. The Legislature simply wrote that the premises must be open to the public. The premises do not cease to be open to the public because there happens to be a restraining order placed against an individual.

This Court should not review the certified question. Any changes to the burglary statute are best left to the Legislature and not the courts. The Legislature has the ability to give a special definition to "open to the public" or to add language giving an exception to the "open to the public" clause.

The caselaw relied on by Petitioner is not relevant to the present issue regarding "open to the public" exception. The Oregon law, upon which Petitioner relies, gives

a specific definition of "open to the public" which the Florida Legislature decided not to use. If Petitioner wishes to have Florida's burglary statute have the same meaning as Oregon's, it should ask the Florida Legislature to amend the burglary statute to match Oregon's burglary statute.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DISMISSING THE BURGLARY CHARGE BECAUSE THE PREMISES ENTERED WERE OPEN TO THE PUBLIC.

This brief will discuss Florida's current burglary statute and why changes to the burglary statute should be enacted by the Legislature and not by the courts.

This case involves analysis of Florida's burglary statute which states that burglary involves entering with the intent to commit an offense unless the premises are open to the public:

> 810.02. Burglary
>
> > (1) Burglary means entering or remaining in a dwelling, 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.

The present issue boils down to whether there are exceptions (such as restraining orders) to the statutory law that a burglary does not occur when entry is at a time that the premises are open to the public.

A simple analysis of the burglary statute shows that the Legislature did not provide any exceptions to the "open to the public" clause of the burglary statute.

The Model Penal Code (upon which Florida's burglary statue is modeled) specifically makes it clear that one cannot be convicted of burglary if the premises are

open to the public even if the owner prohibits the defendant's entrance to the premises:

> The language referring to "premises . . . open to the public" makes it clear that entry into premises accessible to the public cannot be prosecuted as burglary even if the proprietor sought to restrict the implied license to enter, for example, by posting a notice at the door of a department store that loiterers and shoplifters are forbidden to enter.

Model Penal Code, § 221.1 at 61 (1980); see also State v. Schenck, 452 A.2d 223 (N.J. App. 1992) ("open to the public" restricts prosecution for burglary even if proprietor restricted those who could enter the premises).[1] This reasoning applies no matter the form of restriction – whether by restraining order or verbal order. It cannot legitimately be said that the trial court erred in dismissing the burglary charge.

In Section 775.021(1), Florida Statutes (1997), the Legislature mandated that courts use the following rule of construction in criminal cases:

> The provision of this [criminal] 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.

[1] New Jersey's burglary statute as discussed in Schenck is very similar to Florida's. The appellate court also stated that where a public place is involved the Code does not seek to punish entry, but punishes the criminal act which occurs after entry. 452 A.2d at 240.

Penal statutes must be strictly construed in favor of the accused. E.g. Rodriguez v. State, 25 Fla. L. Weekly D2830 (Fla. 3d DCA Dec. 13, 2000); State v. Huggins, 744 So. 2d 1215 (Fla. 4th DCA 1999).

There are 2 clauses that exempt one from burglary – either the premises are open to the public or one is invited or licensed. Under the first clause, a place is open to the public or it is not. Thus, "open to the public" is a complete defense. The Legislature did not write "open to the public except for those who have restraining orders forbidding them to enter." The second clause is separate and has to do with whether one is licensed or invited. If the invitation or license is withdrawn, having been invited or licensed previously is not a defense. Such an analysis does not work with the clause "open to the public." As has been noted, either a place is open to the public or it is not. Miller v. State, 733 So. 2d 955, 957 (Fla. 1999) (quoting Collett v. State, 676 So. 2d 1046 (Fla. 1st DCA 1996)). Consent to enter or remain can be withdrawn, but the fact that the premises are open to the public is still a complete defense. Miller, supra (citing Collett: whether or not there is permission to enter is not relevant).

Petitioner claims that in addition to the structure being "open to the public" a defendant must prove "he was a member of the public permitted entry into the establishment." Petitioner's Brief at 7. This is rewriting of the statute at its finest. The Legislature wrote the clause "open to the public" and did not write "open to the

public and one must be a member of the public which is permitted to enter." As the Fourth District noted, words should not be added or distorted by the courts to reach a certain result. Also, again it must be kept in mind that penal statutes are to be construed in favor of the accused. Rodriguez; Huggins.

After thoroughly analyzing the language of the burglary statute in Miller this Court specifically held that a store being open to the public is a complete defense to a burglary charge regardless of whether consent has been withdrawn. The only issue is whether the premises were open to the public at the time the defendant entered or remained:

> ... we hold that if a defendant can establish that the premises were open to the public, then this is a complete defense. See Collett v. State, 676 So. 2d 1046, 1047 (Fla. 1st DCA 1996) ("But premises are either open to the public or they are not, and the fact that persons with criminal intent have not been given permission to enter has no effect on whether premises are open to the public. Otherwise, every time a person entered a structure that was open the public with the intent to commit a crime, the person would have committed a burglary – a result directly in conflict with the express language of section 810.02(1)."); Ray, 522 So. 2d at 967 n.6 ("That the premises are open to the public is a complete defense to a burglary charge . . . ."). Whether or not consent may have been withdrawn, either by direct or circumstantial evidence, is not an issue. The only relevant question is whether the premises were open to the public at the time the defendant entered or remained with the intent to commit an offense therein.

733 So. 2d at 957 (emphasis added). In the above quote, this Court cites to Collett v. State, 676 So. 2d 1046, 1047 (Fla. 1st DCA 1996) for the proposition that either the

premises are open to the public or they are not – whether permission to enter exists or not is of no consequence. See also Brown v. State, 731 So. 2d 773 (Fla. 3d DCA 1995). Likewise, other appellate courts since the Miller decision have recognized that being open to the public is the only relevant question and is a complete defense to burglary. See Harrell v. State, 765 So. 2d 962 (Fla. 3d DCA 2000) (complete defense); State v. Butler, 735 So. 2d 481 (Fla. 1999) (complete defense).

When presenting this issue to the Fourth District Court of Appeal in this case, Petitioner claimed, as here, that there was a withdrawal of consent exception to the "open to the public" clause. The District Court rejected such a claim, because in order to reach the result Petitioner requested the Court would have to add or alter the words of the statute which is a job of the Legislature and not the courts:

> While this may seem an untoward result in this case, to construe the statute in the way advocated by the state would require us to disregard some of the statutory language and add words to the statute that the legislature did not include. In construing a statute, courts must follow what the legislature has written and neither add, nor subtract, nor distort the words written. See 62 Cases More or Less, Each Containing Six Jars of Jam v. U.S., 340 U.S. 593, 596, 71 S.Ct. 515, 95 L.Ed.566 (1951); Donato v. American Tel. & Tel. Co., 767 So. 2d 1146, 1150-51 (Fla. 2000) (a court abrogates legislative power when it construes "an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications."); Johnson v. State, 25 Fla. L. weekly D2761, ___ So. 2d ___, 2000 WL 1760818 (Fla. 5th DCA Dec. 1, 2000), as clarified by, 26 Fla. L. Weekly D373 (Fla. 5th DCA Feb. 2, 2001). The state would be well advised to address this issue to the legislature.

Petitioner and Amicus argue that a store owner should be able to withdraw consent to enter prior to the entry, and that without applying the burglary statute to the instant situation, Mr. Byars gets off scot-free. There is no dispute that store owners should be able to prohibit entry into their stores. The true issue deals with the laws the Legislature wrote to cover unwarranted entry into a store that is open to the public.[2] The burglary statute does not fit because the store was open to the public. However, trespass might be available since it does not have an "open to the public" clause. Also, the perpetrator does not go scot-free due to the lack of a burglary conviction – he can be punished for the crime committed after the entry.

In addition, the Legislature has specifically created laws for the instant situation. Under Section 741.31(4)(b)2, Florida Statutes (1997), one who violates the injunction by going to the spouse's "place of employment" is guilty of a first-degree misdemeanor punishable as provided in § 775.082 or § 775.083. Also, Section 784.047(2), Florida Statutes (1997), protects a spouse against violence by going to her "residence, school, or place of employment" in violation of an injunction, and this again is a crime with which Mr. Byars is actually charged R2. The burglary statute

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[2] Judge Hazouri was troubled by the fact that a shop owner could have held a sign prohibiting Mr. Byars from entering his shop and Byars would not be held responsible for ignoring the prohibition and entering the store. The problem is not that the owner's hands are tied in prohibiting entry. However, Mr. Byars can only be found guilty of the crimes clearly articulated by the Legislature. Burglary does not fit because the store was open to the public. Other laws, like trespass, fit this situation. Also, the person would be punished for any crime occurring after the entry.

need not be distorted to cover the instant situation. The Legislature was capable of specifically covering entry of the workplace when there is an injunction.

The Legislature could have created a restraining order exception to the "open to the public" clause, but it did not.[3]

In this case, there was no dispute below that when Mr. Byars entered the store it was "open to the public." Petitioner and Amicus try to negate the "open to the public" clause by claiming that Mr. Byars was not a member of the "general public." First, the term "general public" does not appear anywhere in the burglary statute. Putting aside the irrelevant term "general public," Petitioner seems to be claiming that, by virtue of a restraining order, Mr. Byars ceased to become a member of the public. Such a claim is specious. There is no authority in Florida stating that people who are restrained by order cease to be members of the public.

Assuming arguendo, that due to a restraining order Mr. Byars ceased to be a member of the public, this fact does not matter. Regardless of whether the owner or an injunction, prohibited Mr. Byars from entering the store, the store was still "open to the public" as the term is commonly used. "Open to the public" defines the status of the store. It is either open to the public or not open to the public. To construe the

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[3] The Legislature could have created a provision in the statue that the "open to the public" clause does not extend to those who have been specifically prohibited from entering the store by injunction or other means. In other words, an exception to the "open to the public" clause. The Legislature does this frequently. See e.g. § 826.1 Bigamy and § 826.02 exceptions, but did not in the burglary statute.

statute in a way that the store would not be "open to the public" because a restraining order prohibited one person from entering the store would lead to absurd results. Many people would be surprised to learn that the store they were about to enter (Publix, Winn-Dixie, Walmart, K-Mart, etc.) was not open to the public because, unknown to them, and almost everyone else, a lone cashier had a restraining order against her husband. It is absurd to conclude that a restraining order against someone changes the status of a store from being open to the public to not open to the public.

In arguing that the burglary statute should be interpreted in a certain manner due to the domestic injunction, Amicus has been brought in and eloquently points out how special and important the workplace is in domestic cases and how it deserves special protection. The Legislature has provided punishment for violation of a restraining order from the spouse's workplace in § 741.31(4)(a)2. If the Legislature decides that further protection or punishment is required, the Legislature should make the changes and not the courts by distorting statutes. In its opinion the District Court indicated "The State would be well advised to address this issue to the Legislature" – while noting that it is a legislative and not judicial function to add or subtract words from the statute. In its motion for certification, Petitioner indicated that the Legislature would be asked to change the statute, but noted a fear that the Legislature would be unable to make the appropriate change to the statute:

> "While it intends to heed this Court's advice in seeking a legislative remedy, Appellant fears that a mere change in

> the statutory language to something like "unprivileged" entry would not serve to resolve this issue..."

Petitioner's Motion for Certified Question at paragraph 4. Thus, while admitting that a legislative remedy is appropriate, Petitioner is seeking to have this Supreme Court (instead of the Legislature) effectively make the changes in the statute. This is a matter best left to the Legislature. If the Legislature cannot properly write the statute, who can? It is not the function of the courts. This Court should not entertain the certified question.

Petitioner claims that the trial court's decision should have been controlled by State v. Woods, 624 So. 2d 739 (Fla. 5th DCA 1993) and Corn v. State, 332 So. 2d 4 (Fla. 1976). First, both of these cases were decided before Miller. More importantly, neither Woods nor Corn involve the burglary statute. They involve the trespass statute which does not have the "open to the public" exception. The legislature could have written the term "open to the public" within the trespass statute, but chose not to do so. See State v. Huggins, 744 So. 2d 1215 (Fla. 4th DCA 1999) (legislature could have used certain words in burglary statute if it intended to do so). The phrase "open to the public" must be given meaning. See Vocelle v. Knight Bros. Paper Co., 118 So. 2d 664, 667 (Fla. 1st DCA 1960) (a statute should be construed so as to give meaning to

every word and phrase in it).[4] Again, the burglary statute should be interpreted strictly in favor of the accused as in Miller.

Petitioner also cites to the foreign jurisdictions of Oregon and Washington to support its claim that the trial court erred in following Miller. The case primarily relied upon by Petitioner, that the store was not "open to the public" is State v. Ocean, 546 P.2d 150 (Ore. App. 1976). As explained earlier, it makes no sense under Florida law that merely because there is a restraining order against an individual a store ceases to become open to the public. However, under Oregon law it makes sense. Unlike in Florida, the Oregon Legislature gave "open to the public" a specific and unique meaning – that under the circumstances no reasonable person would believe permission to enter or remain was required:

> "Open to the public" means premises which by their physical nature, function, custom, usage, notice or lack thereof or other circumstances at the time would cause a reasonable person to believe that no permission to enter or remain is required.

546 P.2d at 152. Florida has no such definition. It should be left to the Legislature rather than the courts to provide a definition which narrows or eliminates a defense. The burglary statutes of Oregon and Washington are different from Florida's burglary

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[4] Thus, Petitioner's claim that the phrase "open to the public" is surplusage and has no significance apart from the public being "invited" into the store (as in the second clause (licensed or invited)) is without merit. "Open to the public" is a complete defense to burglary regardless of the withdrawal of consent.

statute.[5] Neither Washington's nor Oregon's burglary statute is modeled after the Model Penal Code. It hardly helps to analyze caselaw from foreign jurisdictions that have differently worded statutes and different legislative history. Washington's burglary statute does not contain any clause or exception about the premises being "open to the public." RCWA 9A.52.010(3); 9A.52.030(1). Thus, analysis of Washington's caselaw is not relevant to Florida's burglary statute. Again, Florida's burglary statute and legislative history have been analyzed by the Florida Supreme Court. "Open to the public" is a complete defense to burglary.

Petitioner also cites to a number of cases applying restraining orders to private residences – i.e. places not open to the public. These cases are simply irrelevant to this case. However, for academic purposes, Respondent would point out that Petitioner's and Amicus' discussion of restraining orders and private places is less than fully accurate. For example, State v. Suarez-Mesa, 662 So. 2d 735 (Fla. 2d DCA 1995) is cited to show that a husband is guilty of burglary of his home when there is a restraining order against him. However, a later opinion held that the issue involving

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[5] Based on a specific legislative history, in Oregon one will be guilty of burglary if at the time of entry the premises were not open to the public or one is not privileged or licensed. State v. Ocean, 546 P.2d 150, 151 (Ore. App. 1976). Whereas, Florida delineates exceptions to what constitutes burglary – unless open to the public (without mention of whether one is invited or uninvited) or when one is invited or licensed. Thus, in Oregon one is guilty if not privileged (regardless of whether the premises are opened or closed) and in Florida one is not guilty if the premises are open to the public (regardless of whether one is invited or not invited).

a restraining order is not so simple and held that under its facts the husband did not commit a burglary in entering the home in violation of the restraining order. Whetstone v. State, 778 So. 2d 338 (Fla. 1st DCA 2000) (unrelated issue involving standard of review receded from in Jones v. State, 790 So. 2d 1194 (Fla. 1st DCA 2001)). The cases of Suarez-Mesa and Whetstone are not in conflict. Entering a residence in violation of a restraining order may (Suarez-Mesa) or may not (Whetstone) be a burglary depending on the circumstances. Again, these cases along with the other out-of-state cases, do not involve the present "open to the public" issue.

CONCLUSION

This Court should affirm the rulings of the trial court and the Fourth District Court of Appeal.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender

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JEFFREY L. ANDERSON
Assistant Public Defender
15th Judicial Circuit of Florida
Florida Bar No. 374407
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Melynda Melear, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier, and to Bethann Walz, Legal Program Manager, Florida Coalition Against Domestic Violence, 425 Office Plaza, Tallahassee, Florida 32301 by First-Class U.S. Mail, this _____ day of November, 2001.

_____

Attorney for Eugene Michael Byars

CERTIFICATION OF FONT

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel Respondent hereby certifies that the instant brief has been prepared with 14-point Times New Roman type.

_____

Jeffrey L. Anderson
Assistant Public Defender
Florida Bar No. 374407
Attorney for Eugene Michael Byars

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RESPONDENT'S APPENDIX TO BRIEF ON THE MERITS

CAREY HAUGHWOUT
Public Defender

JEFFREY L. ANDERSON
Assistant Public Defender
15th Judicial Circuit of Florida
Florida Bar No. 374407
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

Attorney for Eugene Michael Byars