

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: February 18, 1998 Revised: \_\_\_\_\_

Subject: Burglary and Trespass

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Gomez</u>	<u>Miller</u>	<u>CJ</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

**I. Summary:**

This CS amends the Burglary and Trespass Chapter by defining “curtilage” as the enclosed or unenclosed land or grounds and any outbuildings buildings that are “directly and intimately adjacent to and connected with the dwelling or structure and necessary, convenient, and habitually used in connection with that dwelling or structure.” In a 1995 case, the Florida Supreme Court held that curtilage required some form of enclosure. Because curtilage is referenced in the definitions of “structure” and “dwelling,” a definition of “curtilage” is crucial to comprehending the full scope of the burglary statute.

To conform the trespass and theft statutes to the new definition for curtilage, this CS deletes a definition and references to “the unenclosed curtilage of a dwelling.” The CS also clarifies that for purposes of the trespass statute, a law enforcement officer is authorized to order a trespasser off of property when the officer has either express or implied authorization from the owner or his or her agent.

This CS shall take effect on July 1, 1998.

This CS substantially amends the following sections of the Florida Statutes: 810.011, 810.09, and 812.014.

**II. Present Situation:**

**A. Burglary.**

Burglary means entering or remaining in a dwelling, structure, or conveyance with the intent to commit an offense therein. s. 810.02(1), F.S. “Structure” is defined as “a building of any kind,

either temporary or permanent, which has a roof over it, *together with the curtilage thereof.*” “Dwelling” is defined as “a building or conveyance of any kind, including any attached porch, whether such building or conveyance is temporary 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.*” s. 810.011(1) and (2), F.S. (Emphasis added) Consequently, curtilage may form an integral part of the elements of a burglary offense.

Historically, curtilage referred to the land and outbuildings immediately adjacent to a castle that were in turn surrounded by a high stone wall. *U.S. v. Romano*, 388 F. Supp. 101, 104 n. 4 (E.D.Pa. 1975). Moreover, “the common law notion of a mansion involved a common inclosure protected originally by a surrounding wall for purposes of defense, or, later, by some sort of fence for the purpose of excluding strangers and securing privacy.” 1 Emlin McClain, *McClain on Criminal Law* Sec. 497 (1897).

In *State v. Hamilton*, 660 So.2d 1038 (Fla. 1995), the Florida Supreme Court fairly recently stated that “[b]y the use of the phrase ‘together with the curtilage thereof,’ it is apparent that the legislature intended that the terms ‘structure’ and ‘dwelling’ also encompass the ‘curtilage,’ a description not limited to buildings or conveyances.” *Id.* at 1040. However, as the Court noted, curtilage is not statutorily defined, “though a definition is crucial to comprehending the full scope of the crime of burglary.” *Id.* Florida courts have used the Florida Criminal Standard Jury Instructions which define curtilage as the “*enclosed* space of ground and outbuildings immediately surrounding the structure.” Fla. Std. Jury Inst. (Crim.) 136; *Hamilton v. State*, 645 So. 2d 555, 562 (Fla. 2d DCA 1994).

After a comprehensive historical and legal analysis, the Florida Supreme Court in *Hamilton, supra*, ruled that “curtilage,” as referred to in the burglary statute, does require “some form of an enclosure in order for the area surrounding a residence to be considered part of the ‘curtilage’.” *Id.* at 1044.

In *Hamilton*, the defendant and his friend entered the yard of the victim’s home with the intent to steal motors attached to a boat located in the yard next to the home. The backyard was not enclosed by fencing or shrubs or in any other manner. During the unlawful entry, the victim homeowner shot and killed Hamilton’s friend. Hamilton was convicted of second degree grand theft, burglary of a dwelling, and second-degree felony murder (by virtue of being a principal to the burglary Hamilton was guilty of felony-murder). Because the victim’s yard was not enclosed in any manner other than by several unevenly spaced trees, the Court held that Hamilton’s conviction for burglary could not stand, nor could the second degree felony murder conviction because it was predicated on the burglary.

Subsequent to *Hamilton*, the district courts of appeal have had occasion to interpret what constitutes “some form of enclosure.” For example, in *Martinez v. State*, 700 So. 2d 142 (Fla 5th DCA 1997), the court rejected an argument that the enclosure requirement applied only to grounds, and not to outbuildings. In *Martinez*, the court held that a detached garage which was 10 feet from a dwelling, but not completely enclosed by a fence, was not part of the curtilage.

However, in *State v. Burston*, 693 so. 2d 600 (Fla. 2d DCA 1997), the court held that a carport, sharing a wall with the dwelling and having a roof that was flush with the roof of the dwelling, did constitute some form of an enclosure, and was thus part of the curtilage.

In *Hamilton, supra*, the Court stated: “the legislature is vested with full authority to amend the burglary statute and to give curtilage any definition believed appropriate, including eliminating the requirement of an enclosure for certain areas, as has been done in other jurisdictions.”

In response to this decision, the 1996 Legislature amended the burglary, trespass, and theft statutes, although it did not provide a definition for curtilage. §§ 47- 49, ch. 96-388, Laws of Fla. These changes include the following:

- ▶ Redefined “dwelling” to include “any attached porch”;
- ▶ Defined trespass to include an uninvited entry when “the property is the *unenclosed curtilage* of a dwelling and the offender enters or remains with the intent to commit an offense thereon...”;
- ▶ Defined the term “unenclosed curtilage,” for purposes of the trespass statute to mean “the unenclosed land or grounds, and any outbuildings, that are directly and intimately adjacent to and connected with the dwelling and necessary, convenient, and habitually used in connection with that dwelling.”;
- ▶ Created a new offense of “grand theft of the third degree and a felony of the third degree” if an intruder enters the dwelling or the *unenclosed curtilage* surrounding a dwelling and steals property valued at \$100 - \$300; and
- ▶ Created a new offense of a “petit theft of the first degree and a misdemeanor of the first degree” if, without entering a dwelling, an offender steals property valued at \$100 - \$300.

## **B. Trespass.**

Trespass is the unauthorized entry or remaining on the property of another. Trespass in a structure or conveyance is a second degree misdemeanor, while trespass on property other than a structure or conveyance is a first degree misdemeanor. §§ 810.08, 810.09, F.S. There are several factors which may enhance trespass, for example, if an offender is armed with a firearm or other dangerous weapon, the offender has committed a third degree felony. §§ 810.08(1)(c), 810.09(2)(c), F.S.

Also, an offender commits a first degree misdemeanor when the offender “defies an order to leave, personally communicated to the offender by the owner of the premises or by an *authorized person*.” § 810.09(2)(b), F.S. (emphasis supplied). In *State v. Dye*, 346 So. 2d 538 (Fla. 1977), the Court held that the term “authorized person” must be “read in light of the preceding phrase,

‘owner of the premises’ and in pari materia with other statutes controlling the delegation of authority to limit or withdraw access to specific types of public land. In regard to private land, an ‘authorized person’ is one who received either express or implied authorization from the owner.” *Id.* at 541-2.

In a 1990 Opinion, the Attorney General stated: “On-duty police officers may not be pre-authorized to act as the agents of a private landowner for the purpose of communicating to an alleged trespasser an order to leave the private property pursuant to s. 810.09(2)(b), F.S.” Op. Att’y Gen. Fla. 90-8 (1990). The Attorney General noted that there was no “statutory provision which specifically authorized local law enforcement officers to be designated as the agents of private persons.” *Id.* Also, the Attorney General expressed constitutional concerns over an on-duty officer performing a largely private function since “s.10, Art. VII, State Const., prohibits the use of public funds for a private purpose.” The Attorney General concluded: “Accordingly, until legislatively or judicially determined to the contrary, I am of the opinion that on-duty police officers may not be pre-authorized to act as the agent of a private landowner....”

### III. Effect of Proposed Changes:

This CS defines the “curtilage” to mean the land or grounds and any outbuildings buildings that are “directly and intimately adjacent to and connected with the dwelling or structure and necessary, convenient, and habitually used in connection with that dwelling or structure.” It specifies that “[i]t is not necessary for the curtilage to be enclosed.” Some form of enclosure was previously required by the Florida Supreme Court in *Hamilton, supra*. By providing a statutory definition, the Legislature is addressing the *Hamilton* Court’s comment that a definition of “curtilage” is crucial to comprehend the full scope of the burglary statute.

To conform the trespass and theft statutes to the new definition for curtilage, this CS deletes a definition and references to “the unenclosed curtilage of a dwelling.” The definition and reference to “unenclosed curtilage” currently found in the trespass and theft statutes were part of the initial legislative response, in 1996, to *Hamilton, supra*. The CS definition of curtilage is substantially similar to the deleted “unenclosed curtilage” statutory reference.

The CS also clarifies that for purposes of the trespass statute, a law enforcement officer is authorized to order a trespasser off of property when the officer has either express or implied authorization from the owner or his or her agent. This provision responds to an Attorney General’s opinion which stated: “until legislatively or judicially determined to the contrary, I am of the opinion that on-duty police officers may not be pre-authorized to act as the agents of a private landowner for the purpose of communicating an order to leave private property to an alleged trespasser pursuant to s. 810.09(2)(b), F.S.” Att’y Gen. Fla. 90-8 (1990).

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

## D. Other Constitutional Issues:

The CS provides that the term “authorized person” in the trespass statute “includes a law enforcement officer who receives either express or implied authorization from the owner or his or her agent.” To the extent that this provision is used to perform a primarily private purpose, with only an incidental public benefit, the CS provision will be unconstitutionally applied. As stated by the Attorney General, a state constitutional provision “prohibits the state or any county or municipality or agency thereof from using its taxing power or credit to aid any private interest or individual.” § 10, Art. VII, Fla. Const; Att’y Gen. Fla. 90-8 (1990). However, as the Attorney General stated: “there may be instances where, in light of an immediate threat to the public safety and welfare, it is in the public’s interest to permit a law enforcement officer to order, on behalf of a landowner, an alleged trespasser to leave the property.” *Id.*

**V. Economic Impact and Fiscal Note:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

None.

## C. Government Sector Impact:

The Criminal Justice Estimating Conference considered the prison bed impact of SB 590 on February 13, 1997. The Conference determined that SB 590 would have an indeterminate but potentially significant impact.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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