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28 February 2022

S.C. Court of Appeals
ATTN: Clerk / Filings
P.O. Box 11629
Columbia, SC 29211

Re: State v. Kocsis, 2019-000687

Dear Clerk:

Pursuant to Rule 208(b)(7), SCACR, I submit the following supplemental authorities:

- *State v. Ferebee*, 273 S.C. 403, 406, 257 S.E.2d 154, __ (1979) (citing *Poff v. State*, 241 A.2d 898 (Md. 1968)).
- 4 William Blackstone, *Commentaries* 148-151 (Wilfrid Prest ed. 2016). (copy enclosed).
- Jens David Ohlin, *Wharton's Criminal Law* 19-26 (Thomson Reuters 2021). (copy enclosed)

These citations are relevant to Appellant's arguments I & II.

With Highest Regards,

Jason Scott Luck

/JSL
Enclosure
Cc: Julianna E. Battenfield, Esq.

The Oxford Edition of Blackstone

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COMMENTARIES ON
THE LAWS OF ENGLAND

BOOK IV: OF PUBLIC WRONGS

WILLIAM BLACKSTONE

WITH AN INTRODUCTION, NOTES,
AND TEXTUAL APPARATUS BY
RUTH PALEY

OXFORD
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II. Burglary, or nocturnal housebreaking, *burgi latrocinium* [robbery of the castle], which by our antient law was called *hamesecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offence: not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation, which every individual might acquire even in a state of nature; an invasion, which in such a state, would be sure to be punished with death, unless the assailant were the stronger. But in civil society, the laws also come in to the assistance of the weaker party: and, besides that they leave him this natural right of killing the aggressor, if he can, (as was shewn in a former chapter)[p] they also protect and avenge him, in case the might of the assailant is too powerful. And the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of antient Rome, as expressed in the words of Tully[q]; "*quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium?* [For what is more sacred, what more inviolable, than the house of every citizen?]"[2] For this reason ⟨5⟩ no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private. Hence also in part arises the animadversion of the law upon eaves-droppers, nusancers, and incendiaries: and to this principle it must be assigned, that a man may assemble people together lawfully (at least if they do not exceed eleven)[3] 224 without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house; which he is not permitted to do in any other case[r].

The definition of a burglar, as given us by sir Edward Coke[s], is, "he that by night breaketh and entreth into a mansion-house, with intent to commit a felony." In this definition there are four things to be considered; the *time*, the *place*, the *manner*, and the *intent*.

1. The *time* must be by night, and not by day; for in the day time there is no burglary. We have seen[t], in the case of justifiable homicide, how much more heinous all laws made an attack by night, rather than by day; allowing the party attacked by night to kill the assailant with impunity. As to what is reckoned night, and what day, for this purpose: antiently the day was accounted to begin only at sunrising, and to end immediately upon sunset; but the better opinion seems to be, that if there be daylight or *crepusculum* [twilight] enough, begun or left, to discern a man's face withal, it is no burglary[u].[4] But this does not extend to moonlight; for then many

[p] See pag. 180 [IV. 119].
[q] *pro domo*, 41.
[r] 1 Hal. P. C. 547.
[s] 3 Inst. 63.
[t] See pag. 180, 181 [IV. 119].
[u] 3 Inst. 63. 1 Hal. P. C. 550. 1 Hawk. P. C. 101.

[2] Cicero's speech was delivered in 57 BC.
[3] The Riot Act, 1 Geo. 1 st. 2. c. 5 (1714), enabled gatherings of twelve or more persons to be declared unlawful and hence subject to an order to disperse within an hour: see IV. 94–5.
[4] In subsequent editions the footnote reference to 1 Hal. P.C. 550 is erroneously altered to 1 Hal. P.C. 350.

midnight burglaries would go unpunished: and besides, the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night; when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless.

2. As to the *place*. It must be, according to sir Edward Coke's definition, in a *mansion* house; and therefore to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes that it is *domus mansionalis Dei*[v] [God's mansion house]. But it does not seem absolutely necessary, that it should in all cases be a mansion-house; for it may also be committed by breaking the gates 225 or walls of a *town* in the night[w], though that perhaps sir Edward Coke would have called the mansion-house of the garrison or corporation. Spelman defines burglary to be, "*nocturna diruptio alicujus habitaculi, vel ecclesiae, etiam murorum portarumve burgi, ad feloniam perpetrandam* [the nocturnal breaking open of any habitation or church, or even the walls or gates of a town, for the purpose of committing a felony]."[x] And therefore we may safely conclude, that the requisite of its being *domus mansionalis* [mansion house] is only in the burglary of a private house; which is the most frequent, and in which it is indispensably necessary to form its guilt, that it must be in a mansion or dwelling house. For no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defence: nor is a breaking open of houses wherein no man resides, and which therefore for the time being are not mansion-houses, attended with the same circumstances of midnight terror. A house however, wherein a man sometimes resides, and which the owner hath only left for a short season, *animo revertendi* [with the intention of returning], is the object of burglary; though no one be in it, at the time of the fact committed[y]. And if the barn, stable, or warehouse be parcel ⟨6⟩ of the mansion-house, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenants, if within the curtilage or homestall[z].[5] A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is, to all other purposes as well as this, the mansion-house of the owner[a]. So also is a room or lodging, in any private house, the mansion for the time being ⟨7⟩ of the lodger. The house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the mansion-house of the corporation, and not of the respective officers[b]. But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there; it is no dwellinghouse, nor can burglary be committed therein: for by the lease it is severed from the rest of the house, and therefore is not the dwellinghouse of him who occupies the other

[v] 3 Inst. 64.
[w] Spelm. *Gloss. t. Burglary.* 1 Hawk. P. C. 103.
[x] 1 Hal. P. C. 566. Post. 77.
[y] 1 Hal. P. C. 558. 1 Hawk. P. C. 104.
[z] 1 Hal. P. C. 556.
[a] [Sir John Wedderburn's case] Foster. 38, 39.

[5] 'Homestall' is an obsolete form of 'homestead'.

226 part; neither can I be said to dwell therein, when I neve[r] lie there[c]. Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge therein[d]: for the law regards thus highly nothing but permanent edifices; a house, or church, the wall, or gate of a town; ⟨8⟩ and it is the folly of the owner to lodge in so fragile a tenement: but his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted waggon in the same circumstances.

3. As to the *manner* of committing burglary: there must be both a breaking and an entry to complete it. But they need not be both done at once: for, if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars[e]. There ⟨9⟩ must be an actual breaking; not a mere legal *clausum fregit* [breach of the enclosure], (by leaping over invisible ideal boundaries, which may constitute a civil trespass) but a substantial and forcible irruption. As at least by breaking, or taking out the glass of, or otherwise opening, a window; picking a lock, or opening it with a key; nay, by lifting up the latch of a door, or unloosing any other fastening which the owner has provided. But if a person leaves his doors or windows open, it is his own folly and negligence; and if a man enters therein, it is no burglary: yet, if he afterwards unlocks an inner or chamber door, it is so[f]. But to come down a chimney is held a burglarious entry; for that is as much closed, as the nature of things will permit[g]. So also to knock at a door, and upon opening it to rush in; with a felonious intent; or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house; all these entries have been adjudged burglarious, though there was no actual breaking: for the law will not suffer itself to be trifled with by such evasions, especially under the cloke of legal process[h]. And so,
227 if a servant opens and enters his master's chamber door with a felonious design; or if any other person lodging in the same house, or in a public inn, opens and enters another's door, with such evil intent; it is burglary. Nay, if the servant conspires with a robber, and lets him into the house by night, this is burglary in both[i], for the servant is doing an unlawful act, and the opportunity afforded him, of doing it with greater ease, rather aggravates than extenuates the guilt. As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient: as, to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries[k]. The entry may be before the breaking, as well as after: for by statute 12 Ann. c. 7. if a person ⟨11⟩ enters into, or is within, the dwelling house of another, without breaking

[c] 1 Hal. P. C. 558.
[d] 1 Hawk. P. C. 104.
[e] 1 Hal. P. C. 551.
[f] *Ibid.* 553.
[g] 1 Hawk. P. C. 102. 1 Hal. P. C. 552.
[h] Hawk. P. C. 102.
[i] ⟨10⟩ 1 Hal. P. C. 553. 1 Hawk. P. C. 103.
[k] 1 Hal. P. C. 555. 1 Hawk. P. C. 103. [Case of George Gibbons] Fost. 108.

in, either by day or by night, with intent to commit felony, and shall in the night break out of the same, this is declared to be burglary; there having before been different opinions concerning it: lord Bacon[l] holding the affirmative, and sir Matthew Hale[m] the negative. But it is universally agreed, that there must be both a breaking, either in fact or by implication, and also an entry, in order to complete the burglary.

4. As to the *intent*; it is clear, that such breaking and entry must be with a felonious intent, otherwise it is only a trespass. And it is the same, whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary; whether the thing be actually perpetrated or not. Nor does it make any difference, whether the offence were felony at common law, or only created so by statute; since that statute, which makes an offence felony, gives it 228
incidentally all the properties of a felony at common law[n].

THUS much for the nature of burglary; ⟨12⟩ which is, as has been said, a felony at common law, but within the benefit of clergy. ⟨13⟩ The statute however of 18 Eliz. c. 7. takes away clergy from the principals, and that of 3 & 4 W. & M. c. 9. from all accessories before the fact. And, in like manner, the laws of Athens, which punished no simple theft with death, made burglary a capital crime[o].

[l] Elem. 65.
[m] 1 Hal. P. C. 554.
[n] 1 Hawk. P. C. 105.
[o] Pott. Antiq. b. 1. c. 26.

the line of the threshold.[1]

IV. DWELLING HOUSE

§ 32:10 In general

At common law, only a dwelling house could be the subject of burglary. A dwelling house is a structure with walls on all sides and a roof over the top,[1] and the crawlspace underneath a house is considered part of the dwelling house,[2] It is by definition a place where humans live.[3] A person "lives" in a structure if the

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[Section 32:9]

[1]People v. Davenport, 122 Mich. App. 159, 332 N.W.2d 443 (1982). See also Alexander v. State, 279 Ga. 683, 620 S.E.2d 792 (2005); State v. Hunt, 451 S.W.3d 251 (Mo. 2014) (in order for the State to prove that a defendant knowingly entered the premises unlawfully, the analysis must focus on the defendant's subjective belief; in other words, the State had to present sufficient evidence that the defendant actually knew he had no authority to enter—not just that he merely had a mistaken belief or that he guessed wrong under the circumstances).

[Section 32:10]

[1]People v. Stickman, 34 Cal. 242, 1867 WL 809 (1867); People v. Franco, 79 Cal. App. 682, 250 P. 698 (1st Dist. 1926); People v. Buyle, 22 Cal. App. 2d 143, 70 P.2d 955 (1st Dist. 1937); People v. Burley, 26 Cal. App. 2d 213, 79 P.2d 148 (2d Dist. 1938); State v. Ebel, 92 Mont. 413, 15 P.2d 233 (1932).

[2]Grimes v. Commonwealth, 288 Va. 314, 764 S.E.2d 262 (2014) (crawl space located underneath house was part of "dwelling house," within meaning of burglary statute, even if crawl space did not provide for entry into house).

[3]See e.g., Del Code Ann, 11 § 829(b) ("dwelling" means "a building which is usually occupied by a person lodging therein at night"); Ky Rev Stats Ann, § 511.010(2).

Holtman v. State, 12 Md. App. 168, 278 A.2d 82 (1971) (although a church was regarded as the "mansion house of God," the court ruled that it was not a dwelling house within the meaning of the law of burglary); People v. Thorn, 176 Cal. App. 4th 255, 97 Cal. Rptr. 3d 605 (1st Dist. 2009) (the term "inhabited dwelling house" in first-degree burglary statute, means a structure where people ordinarily live and which is currently being used for dwelling purposes); State v. Scarberry, 187 W. Va. 251, 418 S.E.2d 361 (1992). State v. Wills, 696 N.W.2d 20 (Iowa 2005) (owner of residence and his family were present therein at time defendant entered garage attached thereto and hence supported finding that defendant entered occupied structure, as required to support conviction of second-degree burglary, despite defendant's contention that house and attached garage were separate and independent occupied structures, where garage and living quarters were single structure functioning as integral part of family residence); State v. Brooks, 24 So. 3d 917 (La. Ct. App. 2d Cir. 2009), writ granted, 36 So. 3d 220 (La. 2010) and rev'd on other grounds, 48 So. 3d 219 (La. 2010) (in order to constitute an "inhabited dwelling," for purposes of aggravated burglary statute, a person must live in the dwelling, but the person need not be present

person uses it regularly for the purpose of sleeping.[4] But it is not necessary that a person be sleeping in the house or even be present at the time of the break and entry.[5]

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in the inhabited dwelling at the time of the burglary); Giles v. Commonwealth, 51 Va. App. 449, 658 S.E.2d 703 (2008), judgment aff'd, 277 Va. 369, 672 S.E.2d 879 (2009) (A house must be "regularly used" to qualify as a dwelling under burglary statute; a dwelling house must have humans sleep in it and the house must be maintained to make it suitable for habitation, i.e., it should include the presence of power, water, food, furniture, beds, clothing, and other items normally associated with daily living).

[4]People v. Thorn, 176 Cal. App. 4th 255, 97 Cal. Rptr. 3d 605 (1st Dist. 2009); People v. Jones, 39 A.D.3d 312, 834 N.Y.S.2d 522 (1st Dep't 2007) (evidence that apartment was "usually occupied by a person lodging therein at night" was sufficient to support finding, in conviction for second-degree burglary, that the apartment was a "dwelling" for purposes of the burglary statute); State v. Hannah, 149 N.C. App. 713, 563 S.E.2d 1 (2002); Hitt v. Commonwealth, 43 Va. App. 473, 598 S.E.2d 783 (2004).

[5]See e.g., Conn Gen Stats Ann, § 53a-100(a)(2) ("dwelling" means "a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present"). Utah Code Ann, § 76-6-201(2).

People v. Singleton, 155 Cal. App. 4th 1332, 66 Cal. Rptr. 3d 738 (2d Dist. 2007) (Evidence that apartment resident was in hallway outside of apartment while defendant committed burglary in apartment was not sufficient to find resident was "present in the residence" for purposes of statute making burglary a committed while person was present in the residence a violent felony; plain meaning of statute required resident to be physically present inside residence, and not merely near residence.); People v. Meredith, 174 Cal. App. 4th 1257, 95 Cal. Rptr. 3d 297 (3d Dist. 2009) (For purposes of first-degree burglary, if someone uses a house as a dwelling it is "inhabited," even if no one is inside when the defendant enters; but it is not inhabited if the person who has used it as a dwelling has moved out without intending to return, even if his property remains inside.); Reidy v. State, 965 So. 2d 1177 (Fla. 5th DCA 2007) (defendant could be convicted of burglary of an "occupied" structure even though only occupants were law enforcement officers, who had established a stakeout after receiving information that a burglary would occur); People v. Rodriguez, 122 Cal. App. 4th 121, 18 Cal. Rptr. 3d 550 (2d Dist. 2004) (For purposes of first-degree burglary, a structure need not be occupied at the time; it is "inhabited" if someone lives there, even though the person is temporarily absent.); State v. Haley, 873 So. 2d 747 (La. Ct. App. 2d Cir. 2004), writ denied, 904 So. 2d 728 (La. 2005) (under aggravated burglary statute, being "inhabited" does not mean someone has to be present at the time of the burglary); State v. McFarland, 960 So. 2d 1142 (La. Ct. App. 5th Cir. 2007), writ denied, 973 So. 2d 731 (La. 2008) (aggravated burglary requires the dwelling to be "inhabited," but does not require the presence of a person at the time of the offense); State v. Brooks, 24 So. 3d 917 (La. Ct. App. 2d Cir. 2009), writ granted, 36 So. 3d 220 (La. 2010) and rev'd on other grounds, 48 So. 3d 219 (La. 2010) (in order to constitute an "inhabited dwelling," for purposes of aggravated burglary statute, a person must live in the dwelling, but the person need not be present in the inhabited dwelling at the time of the burglary); Washington v. State, 753 So. 2d 475 (Miss. Ct. App. 1999) (building where owner stayed for ten to fifteen weeks each year

In some jurisdictions, first-degree burglary, as an aggravated offense, requires that the dwelling be occupied at the time of the burglary.[6]

Burglary has always been regarded as a serious crime because of the ancient notion that a person's home is their castle. When the person closes their door, the person should be able to feel secure in their castle. This is particularly true at night because at that time an occupant is most vulnerable—they are usually asleep.[7]

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during her trips to Mississippi to visit her family was a dwelling, for purposes of burglary statute); State v. White, 349 S.C. 33, 562 S.E.2d 305 (2002) (motel room remained a "dwelling," within meaning of the burglary statutes, even if its occupants were not present at the time defendant entered room, where one occupant and children of occupant's boyfriend had been in and out of room all that day); Giles v. Commonwealth, 277 Va. 369, 672 S.E.2d 879 (2009) (under burglary statute, a dwelling house does not lose its character as such simply because a person is absent for a period of time); People v. Meredith, 174 Cal. App. 4th 1257, 95 Cal. Rptr. 3d 297 (3d Dist. 2009) (For purposes of the California first-degree burglary statute, a structure need not be occupied at the time it is unlawfully entered; it is "inhabited" if someone lives there, even though the person is temporarily absent.); Soto v. Com., 139 S.W.3d 827 (Ky. 2004) (the first-degree burglary statute applies to every structure that meets the definition of a "building," without regard to whether it is inhabited or inhabitable); State v. Riviere, 986 So. 2d 768 (La. Ct. App. 5th Cir. 2008), writ denied, 999 So. 2d 1146 (La. 2009) (It is not necessary that a person be present in the dwelling at the time of the unauthorized entry to satisfy the inhabitation requirement of offense of unauthorized entry of dwelling; however, it must be proved that someone was actually "living" in the dwelling at the time.).

[6]State v. Farrar, 179 N.C. App. 561, 634 S.E.2d 253 (2006), review allowed, writ allowed, 361 N.C. 361, 644 S.E.2d 364 (2007) and decision rev'd in part on other grounds, 361 N.C. 675, 651 S.E.2d 865 (2007) (first-degree burglary must involve an occupied dwelling house of another); State v. Andujar, 180 N.C. App. 305, 636 S.E.2d 584 (2006) (it is first-degree burglary only if the dwelling house is actually occupied at the time of the offense); State v. Lockhart, 115 Ohio App. 3d 370, 685 N.E.2d 564 (8th Dist. Cuyahoga County 1996) (State failed to prove that person was present or that there was likelihood of person being present within victim's home, as required to support aggravated burglary conviction); Com. v. Waters, 2009 PA Super 257, 988 A.2d 681 (2009) (Under the burglary statute, a defendant commits first-degree burglary if the structure unlawfully entered (1) is adapted for overnight accommodation but no individual is present, (2) is not adapted for overnight accommodation but an individual is present, or (3) is adapted for overnight accommodation and an individual is present.).

[7]State v. Bell, 153 Conn. 540, 219 A.2d 218 (1966); People v. Willard, 303 Ill. App. 3d 231, 236 Ill. Dec. 679, 707 N.E.2d 1249 (2d Dist. 1999) (Evidence that defendant entered building purchased by its owner with intent to convert it into dwelling, but which had not yet been completely converted into dwelling and in which no one lived at time of defendant's entry was sufficient to support conviction for burglary, rather than conviction for residential burglary;

Some courts have held that a newly built structure which has not yet been occupied is not a dwelling house; it becomes a dwelling house when a person occupies it and begins to use it regularly for the purpose of sleeping.[8]

If a person leaves their dwelling house for a particular or indefinite period of time, intending thereafter to return—as where they spend the summer months at the seashore or the winter months in the south—the dwelling house remains a dwelling house even during such absence.[9]

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defendant's entry into uninhabitable building did not implicate concerns for privacy, sanctity of home, and potential for serious harm addressed by residential burglary statute.).

[8]Santistevan v. People, 177 Colo. 329, 494 P.2d 75 (1972); Woods v. State, 186 Miss. 463, 191 So. 283 (1939). See also People v. Cardona, 142 Cal. App. 3d 481, 191 Cal. Rptr. 109 (4th Dist. 1983); Melton v. State, 477 So. 2d 942 (Miss. 1985) (house was not dwelling house under burglary statute because it was under construction and had never been occupied). But see State v. Matson, 3 Or. App. 518, 475 P.2d 436 (1970) (mere moving of some of tenant's belongings into house was sufficient to make it tenant's dwelling house).

Trotter v. State, 623 S.W.2d 504 (Tex. App. Fort Worth 1981).

[9]People v. Meredith, 174 Cal. App. 4th 1257, 95 Cal. Rptr. 3d 297 (3d Dist. 2009) (burglary victim's removal from life support, while being treated for dementia and age-related physical problems in a nursing facility, did not cause him to cease to use his house as a dwelling for purposes of burglary statute, and thus did not preclude the burglary of the house from being first-degree burglary, even if victim might not be able to return to his house); People v. Aguilar, 181 Cal. App. 4th 966, 104 Cal. Rptr. 3d 420 (4th Dist. 2010); Cochran v. Com., 114 S.W.3d 837 (Ky. 2003) (where an occupant is temporarily absent, a dwelling retains its character as such if the building was adapted for occupancy at the time of the wrongful entry, and the occupant intended to return); Sheffield v. State, 881 So. 2d 249 (Miss. Ct. App. 2003) (the house of a person who was confined to a nursing home is considered a dwelling, for the purposes of burglary, if the house remains furnished and there is an intent to return); People v. Ferguson, 285 A.D.2d 838, 727 N.Y.S.2d 790 (3d Dep't 2001) (Sorority house was dwelling house for purposes of burglary; sorority house was not inhabited by its members at time of burglary by reason of college summer vacation, but sorority members intended to return for fall semester and take up residence.); People v. Barney, 294 A.D.2d 811, 742 N.Y.S.2d 451 (4th Dep't 2002), order aff'd, 99 N.Y.2d 367, 756 N.Y.S.2d 132, 786 N.E.2d 31 (2003) (a building retains its character as a dwelling despite the death of the occupant, for purposes of burglary, when it has been used as a residence in the immediate past and has not been abandoned); People v. Henry, 64 A.D.3d 804, 881 N.Y.S.2d 701 (3d Dep't 2009) (a "dwelling," for purposes of burglary, does not lose its character as a dwelling based on the temporary absence of its occupant); State v. Kautz, 179 Or. App. 458, 39 P.3d 937 (2002) (building illegally entered by defendant, during short period of vacancy that followed long period of overnight occupancy as a residence, was a "dwelling" for purposes of the burglary statutes, where cessation of overnight occupancy was intermittent); State v. Evans, 376 S.C. 421, 656 S.E.2d 782 (Ct. App. 2008) (Evidence of occupants' intent to return to structure

If a person leaves their dwelling house, intending never to return, it ceases to be a dwelling house.[10] It does not become a dwelling house again until a new person begins to live in it; he begins to live in it when he starts to use it regularly for the

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burglarized by defendant, characterized by occupants as secondary home, was sufficient to establish that building constituted "dwelling" for purposes of statute defining first-degree burglary; occupants, husband and wife, visited home about once every two weeks, utilities were all on in home, and home was always ready to be lived in); Ryan v. State, 865 So. 2d 1239 (Ala. Crim. App. 2003) (Hunting house satisfied definition of "dwelling," even though house was not used on daily basis; house was used regularly for lodging during hunting trips, it had hot water, heat, electricity, furnishings, including bed, and stocked refrigerator.); People v. Barney, 99 N.Y.2d 367, 756 N.Y.S.2d 132, 786 N.E.2d 31 (2003) (For burglary purposes, a house does not lose its character as a "dwelling" immediately on the death of its sole occupant merely because there is no evidence that any other person intended to reside there; such a result would reduce the criminality of a burglar who, having knowledge of a homeowner's death, would seek to exploit the situation, when the potential harm to persons such as grieving friends and relatives would still be present.); Com. v. Nixon, 2002 PA Super 191, 801 A.2d 1241 (2002) (Burglary of uninhabited house by defendant was properly deemed a first-degree felony, even though house with without electricity and water, where house was intended to be used as a residential property and was adapted for overnight accommodation; house was occupied by owner's daughter and grandson until a few months prior to burglary, and house was still furnished.); Giles v. Commonwealth, 51 Va. App. 449, 658 S.E.2d 703 (2008), judgment aff'd, 277 Va. 369, 672 S.E.2d 879 (2009) (With regard to how a house must be "regularly used" to qualify as a dwelling under burglary statute, a person must inhabit the house on a usual or periodic basis; infrequent or very occasional use will not suffice, and when the occupant is absent, he must intend to return to the house within a usual or periodic time.).

[10]People v. Hughes, 27 Cal. 4th 287, 27 Cal. 4th 825a, 116 Cal. Rptr. 2d 401, 39 P.3d 432 (2002), as modified, (Apr. 10, 2002) (when a tenant moves out of an apartment without intending to return and continue living there, the premises become "uninhabited" for purposes of the first-degree burglary statute, even if tenant leaves some property behind with intent of retrieving it later); People v. Meredith, 174 Cal. App. 4th 1257, 95 Cal. Rptr. 3d 297 (3d Dist. 2009) (For purposes of first-degree burglary, if someone uses a house as a dwelling it is "inhabited," even if no one is inside when the defendant enters; but it is not inhabited if the person who has used it as a dwelling has moved out without intending to return, even if his property remains inside.); Pool v. State, 764 So. 2d 440 (Miss. 2000) (farmhouse where burglary occurred did not qualify as "dwelling," as there was no evidence that victim, who lived in apartment, ever intended to return to farm house to make it his dwelling); Carr v. State, 770 So. 2d 1025 (Miss. Ct. App. 2000) (owners of home permanently cease to live in the structure and were living in temporary quarters awaiting the construction of a new home, and though their daughter briefly used the home, there was no evidence that owners or daughter intended to return and use it as their residence); State v. J.P., 130 Wash. App. 887, 125 P.3d 215 (Div. 3 2005) (unoccupied repossessed residence that was being prepared for sale, which juvenile unlawfully entered, was not "abandoned" for purpose of abandonment defense to burglary, even though officers characterized the house as "abandoned").

purpose of sleeping.

A structure qualifies in its entirety as a dwelling house even though a portion of it is used for business purposes, as where an occupant operates a store in the front of the structure and maintains living quarters in the rear.[11]

A structure qualifies as a dwelling house even though it is a makeshift home, so long as it is used regularly for the purpose of sleeping.[12] Thus, a dwelling house may be a cabin,[13] house trailer,[14] jail,[15] massage parlor,[16] fishing vessel,[17] or railroad car.[18]

There may be several dwelling units in a single structure, as the rooms of an inn, hotel, or lodging house. In such case, each room is regarded as the "dwelling house" of its respective occupant.[19]

Only the dwelling house "of another" can be the subject of

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[11]People v. Paul, 204 A.D.2d 205, 612 N.Y.S.2d 133 (1st Dep't 1994) (defendant's claim that evidence was insufficient to prove burglary in second degree since premises he was accused of entering was warehouse, not dwelling, was without merit, where families used at least two floors of building in which warehouse was located for overnight lodging); People v. Ryan, 168 Misc. 2d 317, 644 N.Y.S.2d 118 (Sup 1996) (church, which defendant unlawfully entered, was a "dwelling" for purposes of second-degree burglary statute, where priest, church's sexton, sexton's wife, and four children occupied church as their permanent residence, and storage room which defendant burglarized was part of main building that was used for dwelling purposes).

[12]Young v. State, 74 Neb. 346, 104 N.W. 867 (1905); State v. Jake, 60 N.C. 471, 2 Win. 80, 1864 WL 1070 (1864).

[13]State v. Charette, 98 N.H. 477, 103 A.2d 192, 43 A.L.R.2d 827 (1954).

[14]Lower Merion Tp. v. Gallup, 158 Pa. Super. 572, 46 A.2d 35 (1946).

[15]Simmons v. State, 40 Ala. App. 98, 108 So. 2d 184 (1959); State v. Abbott, 16 N.H. 507, 1845 WL 2042 (1845).

[16]People v. Wright, 157 A.D.2d 534, 549 N.Y.S.2d 724 (1st Dep't 1990) (site of burglary, a massage parlor and house of prostitution, met statutory definition of dwelling, in view of evidence that women lodged in premises at night).

[17]Shoemaker v. State, 716 P.2d 391 (Alaska Ct. App. 1986).

[18]Gibbs v. State, 8 Ga. App. 107, 68 S.E. 742 (1910).

[19]Wesolic v. State, 837 P.2d 130 (Alaska Ct. App. 1992) (locked bedrooms and garage to which roomer did not have access were "buildings" for purposes of prosecution for burglary arising from roomer's breaking into and stealing property from bedrooms and garage); State v. Cochran, 191 Conn. 180, 463 A.2d 618 (1983) (Bedroom located in single-family home was "building" within meaning of statute prohibiting third-degree burglary and defining separate units in home as separate buildings. Thus defendant, who was invited guest in one portion of home, could nonetheless be found guilty of burglary of bedroom, where his invitation was never expressly or impliedly extended to locked bedroom.); State v. Jackson, 23 Conn. App. 151, 579 A.2d 139 (1990), republished as corrected at 585 A.2d 694 (Instruction that entire building, as well as one unit, could be considered a "building" for purposes of third-degree burglary was not an

burglary.[20] But occupancy, rather than ownership, is the test.[21] It is enough merely that the occupant have a possession which is "rightful as against the burglar."[22] Thus, a landlord can be guilty of burglary by breaking and entering into the dwelling house of his tenant;[23] but the tenant or occupant cannot be guilty of burglary by breaking and entering into their own dwelling house,

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improper enlargement of the crime; instruction was merely an explanation to jury that crime could have been committed if only one apartment, rather than entire building, had been unlawfully entered.); People v. Smith, 144 A.D.2d 600, 534 N.Y.S.2d 1021 (2d Dep't 1988) (in prosecution for burglary after defendant entered bedroom of cotenant and removed some of her belongings, bedroom of cotenant was independent of rest of house and would be considered separate "dwelling" within "building," as well as part of main building); People v. Shackett, 159 A.D.2d 963, 552 N.Y.S.2d 775 (4th Dep't 1990) (victim's private hospital room was a dwelling for purposes of burglary prosecution, because it was a unit the victim occupied for lodging at night); People v. Torres, 162 A.D.2d 385, 556 N.Y.S.2d 920 (1st Dep't 1990) (hallway in six-story apartment building, whose front door was locked and equipped with a buzzer and intercom system, and which had "no trespassing" sign in both English and Spanish posted at the entrance, was part of "dwelling" for purposes of burglary prosecution, rather than a public place); People v. Zabala, 290 A.D.2d 578, 735 N.Y.S.2d 244 (3d Dep't 2002) (although defendant's entering into apartment building was lawful, his entry into the victims' apartments was not); State v. Contreras-Cruz, 765 A.2d 849 (R.I. 2001) (the victim's bedroom was a "dwelling" within the meaning of the law of burglary, since the room had a lock on the doorknob and an additional dead-bolt lock, and thus was entitled to the same level of security and protection as that afforded room or a private apartment within a bed-and-breakfast).

See also Conn Gen Stats Ann, § 53a-100(a)(1).

[20]People v. Gauze, 15 Cal. 3d 709, 125 Cal. Rptr. 773, 542 P.2d 1365 (1975) (In ruling that defendant, who shared an apartment with two roommates, could not be guilty of burglarizing his own apartment, the court observed: "His entry into the apartment, even for a felonious purpose, invaded no possessory right of habitation; only the entry of an intruder could have done so. More importantly defendant had an absolute right to enter the apartment. This right, unlike that of the store thief in Barry, did not derive from an implied invitation to the public to enter for legal purposes. It was a personal right that could not be conditioned on the consent of defendant's roommates. Defendant could not be 'refused admission at the threshold' of his apartment, or be 'ejected from the premises after the entry was accomplished'. . . . He could not, accordingly, commit a burglary in his own home."); Vazquez v. State, 350 So. 2d 1094 (Fla. 3d DCA 1977) (disapproved of by, Cladd v. State, 398 So. 2d 442 (Fla. 1981)) (each spouse has right to occupy or enter home).

[21]State v. Brown, 953 N.W.2d 374 (Iowa Ct. App. 2020) (purpose of the burglary statute is to protect the security of occupancy, rather than ownership rights); State v. Hagedorn, 679 N.W.2d 666, 670 (Iowa 2004).

[22]Bagnara v. State, 189 So. 3d 167, 173 (Fla. 4th DCA 2016).

[23]State v. Machan, 2013 UT 72, 322 P.3d 655 (Utah 2013) (For purposes of a burglary prosecution, the title owner of a dwelling is not always privileged to enter the premises; for example, a landlord may burglarize the dwelling of a

even though the tenant or occupant intends to commit a felony therein.[24]

§ 32:11 Buildings within the curtilage

For the purpose of common-law burglary, a "dwelling house" includes not only the house regularly used for the purpose of sleeping but also out-buildings within the curtilage.[1] The

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tenant because the landlord conveys the right of possession to the tenant.).

[24]Ex parte Vincent, 26 Ala. 145, 1855 WL 297 (1855); Clarke v. Commonwealth, 66 Va. 908, 25 Gratt. 908, 1874 WL 5648 (1874). But see People v. Bowser, 287 A.D.2d 647, 732 N.Y.S.2d 28 (2d Dep't 2001) (burglary defendant had no claim of lawful entry to the property based on a rental agreement of unstated duration, where he had abandoned the property three months earlier).

[Section 32:11]

[1]People v. Sparks, 28 Cal. 4th 71, 120 Cal. Rptr. 2d 508, 47 P.3d 289 (2002), as modified, (June 19, 2002) (area of an "inhabited dwelling house," within scope of residential burglary statute, includes an attached garage); Weber v. State, 776 So. 2d 1001 (Fla. 5th DCA 2001) (cement slab onto which sliding glass doors opened, affording a rear exit for victim's apartment, was an "attached porch" as contemplated by definition of a "dwelling," for purpose of offense of burglary); Anderson v. State, 831 So. 2d 702 (Fla. 4th DCA 2002) (incomplete addition to victim's home was part of the cartilage, and thus constituted a dwelling within meaning of burglary statute); McAllister v. State, 859 So. 2d 611 (Fla. 1st DCA 2003) (evidence that defendant entered garage, which was neither attached to house nor enclosed substantially along with house, with intent to commit theft, was insufficient to sustain a conviction for burglary of a dwelling). Smalls v. State, 973 So. 2d 630 (Fla. 1st DCA 2008) (a detached garage may qualify as part of a dwelling for purposes of burglary of a dwelling if the yard is substantially enclosed); Smith v. State, 249 Ga. App. 427, 548 S.E.2d 21 (2001); Edwards v. State, 800 So. 2d 454 (Miss. 2001) (a utility shed was part of a "dwelling," for purposes of the crime of burglary of a dwelling, even though there was a breezeway between the house and the shed, where the shed and the house were connected by a common roof and ceiling); Wrenn v. State, 802 So. 2d 177 (Miss. Ct. App. 2001) (whether a garage is a part of the dwelling depends upon how it is connected with or adjoined to the area of the house where the owner resides); Jefferson v. State, 977 So. 2d 431 (Miss. Ct. App. 2008) (evidence was insufficient to support a conviction for burglary of a dwelling house, where items were taken from a three-sided open car-port that did not show signs of a breaking, even though items were also taken from a nearby locked shed, where both the shed and the car-port were freestanding and not connected to a house); People v. Jennis, 299 A.D.2d 921, 750 N.Y.S.2d 381 (4th Dep't 2002) (fact that the rest of the building in which the basement was located was occupied by tenants residing there at night established that the basement was part of a "dwelling" within the meaning of burglary statute); People v. Rivera, 301 A.D.2d 787, 754 N.Y.S.2d 74 (3d Dep't 2003) (attached, screened-in and enclosed porch was part of the "dwelling" for purposes of second-degree burglary, even though hook latch on porch's outside screen door was typically left unlocked); State v. Otto, 529 N.W.2d 193 (S.D. 1995) (attached garage fell within statutory definition of "occupied dwelling" for purpose of first-degree burglary statute); State v.

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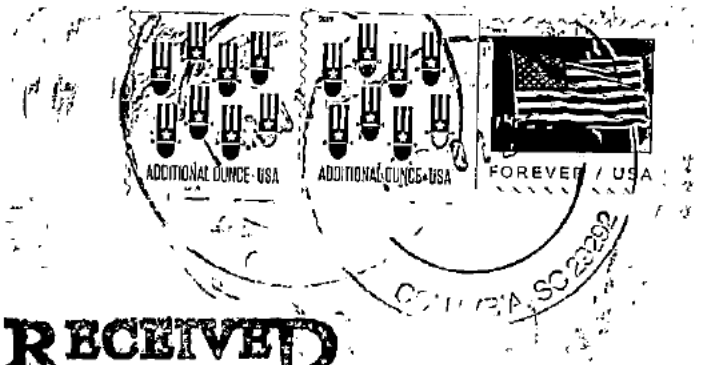

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