

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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3
4 THE STATE OF NEVADA,)

5 Appellant,)

6 vs.)

7 TROY RICHARD WHITE,)

8 Respondent.)

9 NO. 62890) Electronically Filed
10) 08/01/11 2013 04:36 p.m.
11) Tracie K. Lindeman
12) Clerk of Supreme Court

13 **RESPONDENT'S ANSWERING BRIEF**

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THE STATE OF NEVADA,) NO. 62890
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Appellant,)
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vs.)
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1 Averman moved into the White residence during the week, but White
2 returned home on weekends to help care for the family children. ROA at 40-
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4 41. Although Joseph Averman, Mrs. Lucas' boyfriend, moved into the
5 residence during the week, Mr. White retained full title to the home. ROA at
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7 46. Mr. White also kept his keys to the home and continued to enter the
8 residence at any time he desired. ROA at 47.

9
10 On July 27, 2012, Mr. White went to the residence after several failed
11 attempts to reach Mrs. Lucas. ROA at 42. Mr. White left the residence but
12 returned later that day. ROA at 42. At the preliminary hearing, Mr. Averman
13
14 acknowledged that Mr. White still had the key for the purpose of entering the
15 house. ROA at 47. Furthermore, Mr. Averman acknowledged he was aware
16
17 Mr. White is the owner of the residence. ROA at 46. Mr. White came back
18 to the house and, as always, used his key to enter. ROA at 47. Mr. Averman
19 acknowledged that Mr. White made no threats to either him or Mrs. Lucas
20
21 and did not feel anything out of the ordinary or unusual that would prompt
22 him to call the police. ROA at 47-48.

23
24 A Conversation began between Mr. White and Mrs. Lucas. ROA at
25 48. Mr. Averman entered the room after several minutes when the
26 conversation escalated. ROA at 48. Prior to this time, Mr. Averman did not
27
28 feel frightened of Mr. White. ROA at 48. At this time, Mr. White's

1 demeanor changed and as Mr. Averman described, Mr. White became
2 irrational. ROA at 49. Mr. White is alleged to then have shot and killed Mrs.
3 Lucas as well as attempted to kill Mr. Averman. ROA at 44.

4
5 Following preliminary hearing, White was charged by way of
6 Information with Burglary While in Possession of a Firearm, Murder with
7 Use of a Deadly Weapon, Attempt Murder with Use of a Deadly Weapon,
8 Carrying a Concealed Firearm or Other Deadly Weapon and Child Abuse and
9 Neglect or Endangerment. ROA at 33-36.

10
11 White challenged the charge of burglary in District Court by way of a
12 Petition for Writ of Habeas Corpus. ROA at 72-113. The District Court
13 granted the Petition and the State appealed. ROA at 127-28.

14 ARGUMENT

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16 ...And the law of England has so particular and tender a regard
17 to the immunity of a man's house, that it stiles it his castle, and
18 will never suffer it to be violated with impunity: agreeing herein
19 with the sentiments of ancient Rome, as expressed in the words
20 of Tully; "quid enim sanctius, quid omni religione munitius
21 quam domus uniuscujusque cirium? ["For what is more sacred,
22 more inviolate than the house of every citizen?"]
23 --4 William Blackstone, Commentaries at 223.

24 Nevada embraces its kinship to this basic understanding of burglary:
25 "The common law of England, so far as it is not repugnant to or in conflict
26 with [...] the Constitution and laws of this State, shall be the rule of decision
27 in all the courts of this State." NRS 1.030. In cases attacking a common law
28

1 principle, a court must reexamine the purposes underlying the doctrine.
2 Rupert v. Stienne, 90 Nev. 397, 401 (1974). At common law, burglary was
3 the breaking and entering the dwelling house of another in the nighttime with
4 intent to commit a felony. Smith v. First Judicial District Court, 75 Nev. 526,
5 528 (1959).
6
7

8 While the statutory definition burglary has undergone some changes,
9 from yesteryear until today, burglary has retained its fundamental nature as
10 the crime of entry with a criminal intent. As our high court has often times
11 noted, burglary is complete upon entry and it is the entry itself that constitutes
12 the crime, independent of what other activity later takes place. Because it is
13 entry that remains the gravamen of the offense, burglary remains, as it always
14 has been, a crime against property and habitation.
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18 As the district court in its order granting White's Petition for Writ of
19 Habeas Corpus, for the same reason that a man cannot steal his own money,
20 he cannot burgle his own home. A man's home, absent some particular
21 encumbrance such as a restraining order or a lease to another person, is his
22 own to do with as he sees fit. Entry into one's own home does not create a
23 burglary because such an entry is the very essence of a person's ability to
24 possess and own a home.
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1 Currently, NRS 205.060 provides that:

2 A person who, by day or night, enters any house, room,
3 apartment, tenement, shop, warehouse, store, mill, barn, stable,
4 outhouse or other building, tent, vessel, vehicle, vehicle trailer,
5 semitrailer or house trailer, airplane, glider, boat or railroad car,
6 with the intent to commit grand or petit larceny, assault or battery
7 on any person or any felony, or to obtain money or property by
 false pretenses, is guilty of burglary.

8 As the State points out, besides grammatical changes, the relevant
9 portions of the statute are the same today as they were when it was enacted in
10 1911, amended in 1953, construed when Smith was decided in 1959, and in
11 subsequent years. Appellant's Opening Brief at 10. The State strangely
12 argues that because the legislature has never explicitly set forth that a person
13 cannot burgle his own property, it must be possible for him to do so. In
14 reality, the opposite is true. Under the common law, a person could not
15 burgle their own home, thus pursuant to NRS 1.030, that is the law of the
16 state of Nevada, "...so far as it is not repugnant to or in conflict with the law
17 of this state..."
18 In short, unless and until the legislature adopts a statute which makes
19 clear that a person can be convicted for burglary on the basis of entering his
20 own home, the common law controls and said charge will not stand. There
21 has been no such law adopted.

1 As noted, Nevada's statutory definition of burglary arose out of the
2 common law. Further, the legislature has the ultimate authority to deviate
3 from the common law and specifically designate crimes. Smith, 75 Nev. at
4 529; NRS 1.030. But, a statute repealing the common law must do so by its
5 express terms or by "the plainest and most necessary implication" in the law
6 itself. Cunningham v. Washoe County, 66 Nev. 60, 65 (1949). This is
7 particularly true when dealing with a crime like burglary whose definition has
8 been "so well and commonly understood," and a modification "will not be
9 presumed unless the intention is manifest." Smith, at 529 *adopting State v.*
10 *Petit*, 72 P. 1021, 1022 (Wash. 1903).

11 Accordingly, if there is doubt concerning the legislature's intent as to
12 whether a defendant can be charged with burglary for entering into his own
13 home, "the legislative act must be strictly construed." Smith, at 528.¹ The
14 foregoing refutes the State's argument that "any" and "person" in the statute
15 should be read broadly to encompass a homeowner's residence. Appellant's
16 Opening Brief at 8. Instead, the statute must be read narrowly and unless
17 specified by statute that a person can charged with burglary for entering their
18 own home, the charge must fail. While the State may argue that because the

19 ¹ This stance conforms with the established rule of lenity where criminal
20 statutes must be construed strictly and in the accused's favor. Haney v. State,
21 124 Nev. 408, 411 (2008); Ebeling v. State, 120 Nev. 401, 404 (2004).

1 statute does not include language requiring burglary be against the “building
2 of another,” it permits a charging a homeowner; but, such an interpretation is
3 clearly contrary to the common law and not expressly set forth by the statute.
4

5 Our legislature is capable of expressly abrogating the common law and
6 has done so in the past. For example, regarding arson—another property
7 crime like burglary—the statute specifies that “it shall not be necessary that
8 another person than the defendant should have had ownership in the building
9 or structure set on fire.” NRS 205.050. This abandoned the common law
10 understanding that because arson was an offense against an owner’s
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14 possessory rights, burning one’s own home did not constitute arson. *See* 17
15 A.L.R. 1168. Against this backdrop, our legislature rejected the common law
16 approach and—in 1911, the same year it adopted the burglary statute—
17 unequivocally stated that an owner could be charged with arson for burning
18 his own home. NRS 205.050. Departing from the common law with regard
19 to burglary requires the same express abrogation. The fact that our
20 legislature has not shows that it never intended a person could be charged
21 with burgling his own home.
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25 That burglary is an entry which violates the property right of another is
26 actually implicit in the term burglary itself. One need only look to legal
27 analysis of the time to realize that this understanding was integral to the
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1 common law definition. A Massachusetts court's explanation of why
2 "building of another" was absent from its statute is illustrative: "The reason
3 is, that the terms, burglary, breaking and entering, and stealing, from their
4 nature, imply that the crime designated thereby can only be committed upon
5 the property of another." Com. v. Perris, 108 Mass. 1, 4, 1871 WL 8736, 2
6 (1871). This common law understanding of burglary carried over to
7 Nevada's statute and endures today. Because the illegal entry to another's
8 property is an implicit and essential element of the crime, the legislature may
9 depart from it only if it does so expressly by design.
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14 Rather than rejecting the common law, our high court has noted that
15 courts' disposition to "construe strictly their burglary statutes which deviate
16 from the common law appears to be clearly evident." Smith, at 529. Indeed,
17 the common law elements of "breaking" and "entry at night time" are no
18 longer necessary under Nevada law precisely because the legislature
19 *expressly* altered the statute accordingly. See State v. Watkins, 11 Nev. 30
20 (1876); Page v. State, 88 Nev. 336 (1972). Changes like these, however, do
21 not eviscerate the purpose behind common law burglary. Our high court
22 acknowledged that despite an enlargement of the definition of burglary, "the
23 central idea which has obtained for hundreds of years, the unlawful breaking
24 and entering of some kind of an enclosed structure, has been retained."
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1 Smith at 528 (finding State v. Petit, 72 P. 1021, 1022 (Wash. 1903) directly
2 on point and approving of its reasoning). As a general proposition, a person
3 cannot unlawfully enter their own property. While there may be exceptions
4 to this proposition, such as when a court order is in place or when the
5 property has been leased/rented to another, none of those exceptions ally to
6 the case bar—White had a full and complete right to access his home and
7 even retained a key. ROA at 46-47.

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11 Simply put, while the legislative intent in adopting the current burglary
12 statute broadened the definition of a structure, it did not abandon in its
13 entirety the common law underpinnings of the charge. Smith, at 528. And as
14 noted, an essential common law underpinning of burglary was that a
15 “building of another” was the target of the charge. In the absence of clear
16 legislative intent to abandon the common law on the specific point of whether
17 a person may burgle his own residence, it is improper to do so.

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21 Interestingly, despite this statute having been in place for decades, the
22 issue of whether one may burgle one’s own home appears to be one of first
23 impression for Nevada.² The State cites several cases³ for the proposition

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26 ² Perhaps this indicates the State seldom seeks to stretch the definition of
27 burglary to such strained lengths.

28 ³ State v. Adams, 94 Nev. 503 (1979), Hernandez v. State, 118 Nev. 513
(2002); McNeely v. State, 81 Nev. 663 (1966); Barrett v. State, 105 Nev. 361
(1989); Chappell v. State, 114 Nev. 1403 (1998).

1 that consent and/or permission to enter is not a defense to burglary, but this is
2 simply a necessary corollary to the removal of the breaking requirement by
3 the legislature. This has nothing to do with whether a person can burgle his
4 own home. The concepts of consent to enter and/or permission to enter are
5 fundamentally different from a person's right to access and enjoy property
6 which he owns.
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8
9 In particular, the state attempts to rely upon Chappell, 114 Nev. 1403
10 (1998), claiming the facts therein are on point. They are not. Chappell, upon
11 being released from incarceration, broke into the trailer of an ex-girlfriend,
12 raped and killed her. Id. at 1405, 1409. The entry was through a window
13 because Chappell had no key. Id. at 1405. Unlike the current case, there was
14 no evidence that Chappell actually lived at the trailer in question, or owned
15 it—the claim it was somehow Chappell's home was based entirely upon
16 Chappell's self-serving testimony that he "considered" the trailer his home.
17
18 Id. Chappell's claims were rebutted by the fact that he broke into the trailer
19 and had not lived there for months, having been incarcerated for battering the
20 very woman he killed. Id. In fact, the Court referred to it as "Panos' [the
21 victim's] trailer." Id. Further, it is clear the jury rejected Chappell's
22 testimony because he also claimed to have had consensual sex with the victim
23 and that the killing was a result of a fight which started after the consensual
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1 sex. Id. at 1409. The jury rejected this, convicting Chappell of sexual assault
2 as well as murder. Id. In short, Chappell is factually nothing like the current
3 case and to claim, as the State now does, that Chappell supports the position
4 that a person can burgle their own home is to ignore the facts of Chappell.
5

6
7 Other Nevada cases such as State v. Adams, 94 Nev. 503 (1978), and
8 Thomas v. State, 94 Nev. 605 (1978), hold that consent to entry is no defense
9 to a charge of burglary; but, again, these are not on point to the issue at hand.
10 Both cases are premised on the idea that the authority to enter a building open
11 to the public is limited to those persons entering for a purpose consistent with
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14 the reason the building is open. Thus, entry with the intent to commit larceny
15 (or some other felony), cannot be said to be within the authority to enter
16 which is granted to customers. If anything, the reasoning behind Adams and
17 Thompson buttresses the position that Nevada's burglary statute maintains
18 the common law requirement of unlawful entry because none of the cases
19 adopt the blanket "anytime, anyplace, any owner" approach suggested by the
20 State. The State's approach would have been a much simpler basis for
21 deciding the consent issue if it were indeed the law, but it is not.
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24
25 Although Nevada has not directly decided the issue at hand, other
26 jurisdictions have. The most exhaustive discussion of the issue probably
27 occurs in the California case of People v. Gauze, 15 Cal.3d 709 (1975). At
28

1 the onset, it is important to note that the language of California's burglary
2 statute mirrors that of Nevada in that it too has broadened the definition of
3 structure well beyond the common law.⁴ California and Nevada are also in
4 agreement with the several points raised by the prosecution in the instant
5 case, to wit: neither recognizes permission or authority to enter as a defense
6 to burglary and both have legislatively abandoned the common law burglary
7 elements of breaking and night time entry. Gauze takes a position opposite to
8 that suggested by the State.

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12 Gauze recognized that the common law notion of unlawful entry is
13 implied even in the revised burglary statute, and that, therefore, a person

14
15 ⁴ In Bedard v. State, 118 Nev. 410, 413 (2002), our high court noted:
16 "California Penal Code § 459, the California burglary statute, is very similar
17 to NRS 205.060."

18 CPC § 459 reads: Every person who enters any house, room,
19 apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or
20 other building, tent, vessel, as defined in Section 21 of the Harbors and
21 Navigation Code, floating home, as defined in subdivision (d) of Section
22 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo
23 container, whether or not mounted on a vehicle, trailer coach, as defined in
24 Section 635 of the Vehicle Code, any house car, as defined in Section 362 of
25 the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle
26 Code, vehicle as defined by the Vehicle Code, when the doors are locked,
27 aircraft as defined by Section 21012 of the Public Utilities Code, or mine or
28 any underground portion thereof, with intent to commit grand or petit
larceny or any felony is guilty of burglary. As used in this chapter,
"inhabited" means currently being used for dwelling purposes, whether
occupied or not. A house, Trailer, vessel designed for habitation, or portion
of a building is currently being used for dwelling purposes if, at the time of
the burglary, it was not occupied solely because a natural or other disaster
caused the occupants to leave the premises.

1 cannot be convicted of burgling their own home. In Gauze, the defendant
2 shared an apartment with his roommate and had the right to enter the
3 premises at all times. Id. at 714. After a heated argument, defendant shot his
4 roommate in their apartment. Id. The court held that defendant could not be
5 charged with burglary “because his entry into the home, even for a felonious
6 purpose, invaded no possessory right of habitation, only the entry of an
7 intruder could have done so.” Id.

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11 In Gauze, the issue presented was the question at bar here: “Can a
12 person burgle his own home?” The facts of the case were as follows:
13

14 Defendant shared an apartment with Richard Miller and a third
15 person and thus had the right to enter the premises at all times.
16 While visiting a friend one afternoon, defendant and Miller
17 engaged in a furious quarrel. Defendant directed Miller to ‘Get
18 your gun because I am going to get mine.’ While Miller went to
19 their mutual home, defendant borrowed a shotgun from a
20 neighbor. He returned to his apartment, walked into the living
21 room, pointed the gun at Miller and fired, hitting him in the side
22 and arm. Gauze, at 710.

23 It is thus evident that the Gauze court was presented with a set of facts, a
24 statute and a legislative history similar to the case at bar. In reading
25 California’s burglary statute the court noted:

26 Facially the statute is susceptible to two rational interpretations.
27 On the one hand, it could be argued that the Legislature
28 deliberately revoked the common law rule that burglary requires
entry into the building of another. On the other hand, the
Legislature may have impliedly incorporated the common law

1 requirement by failing to enumerate one's own home as a possible
2 object of burglary. Gauze, at 712.

3 Finding no cases directly on point, the California high court examined
4 the purposes underlying common law burglary and how those purposes may
5 have been affected by the enactment of the California Penal Code.
6 Interestingly, the history and timing of California's burglary scheme appears
7 to mirror Nevada's. The court found that while the legislature had
8 substantially changed the common law burglary, two important aspects had
9 remained: 1) burglary was an entry which invades a possessory right in a
10 building; and 2) it still must be committed by a person who has no absolute
11 right to be in the building.
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15 Ultimately, the Gauze court ruled that a person could not be guilty of
16 burgling his own home because "his entry into the apartment, even for a
17 felonious purpose, invaded no possessory right of habitation; only the entry
18 of an intruder could have done so. More importantly, defendant had an
19 absolute right to enter the apartment." Id. at 716.
20
21

22 The Gauze court went on to point out that holding otherwise could lead
23 to potentially absurd results and disproportionate punishment for a person
24 who commits a minor felony in their own home. The same is true in Nevada.
25 For example, if a person were able to burgle their own home, then entering
26 said home with the intent to ingest narcotics therein would morph a simple
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1 drug possession into a burglary and convert a mandatory probation offense
2 into a 1 to 10 year felony. It seems highly unlikely that our legislature ever
3 intended such a result.
4

5 Burglary is, at its most basic, a crime against property and habitation.
6
7 The Statute defining burglary, NRS 205.060, is found in the “crimes against
8 property” chapter of the NRS. It is not possible to commit a property crime
9 against your own property. Indeed, the very notion of private property
10 implies an absolute right upon the owner, absent an encumbrance, to do with
11 that property as he sees fit. A burglary is an entry that invades a possessory
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14 right in a structure; hence, it must be committed by a person who has no
15 absolute right to enter that structure. Gauze, at 714. A defendant cannot be
16 charged with burglary of his own home because the defendant does not
17 invade a possessory right of another. Id.
18

19 Here, White had title to the home. ROA at 46. He retained the right to
20 enter the premises at all times and stayed at the house on weekends. ROA at
21 41, 46. The day of the shooting was actually a day in which White normally
22 stayed at the home. ROA at 41-42. White never gave up his keys to the
23 home. ROA at 47. The house was, as the factual finding by the District
24 Court indicates, White’s home to do with as he saw fit. ROA at 143-44, 149-
25 50, 154. Further, as the District Court also found and the State conceded,
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1 there is no indication that there was some sort of legal prohibition, such as a
2 restraining order or lease agreement, which interfered with White's absolute
3 right to enter and enjoy his property. ROA at 143-44, 149-50, 154. Based
4 upon the foregoing, White cannot be charged with burgling his own home.
5

6
7 **CONCLUSION**

8 Based on the foregoing, the District Court did not err in granting
9 Defendant's Petition for Writ of Habeas Corpus. Defendant respectfully
10 requests this Honorable Court deny the State's appeal and affirm the District
11 Court.
12
13

14 Respectfully submitted,

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1 accompanying brief is not in conformity with the requirements of the Nevada
2 Rules of Appellate Procedure.
3

4 DATED 11th day of October, 2013.

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