IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, v. TROY RICHARD WHITE, Respondent.	CASE NO: 62890

APPELLANT'S REPLY BRIEF

Appeal From Order Granting Pre-Trial Petition for Writ of Habeas Corpus Dismissing a Charge of Burglary Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUE

1. Whether a person may commit burglary against a house he owns, in which he has previously resided.

STATEMENT OF THE CASE

On December 12, 2012, Troy Richard White ("Defendant") was charged by way of Amended Criminal Complaint with Burglary While in Possession of a Firearm (Category B Felony – 205.060) ("Burglary") (Count 1); Murder with Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030) (Count 2); Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330) (Count 3); Carrying a Concealed Firearm or Other Deadly Weapon (Category C Felony – NRS 202.350(1)(d)(3)) (Count 4); and Child Abuse, Neglect, or Endangerment (Category B Felony – NRS 200.508(1)) (Counts 5-14). Record on Appeal ("ROA") 3-7. A preliminary hearing was also

held on December 12, 2012, in which testimony was given concerning the events alleged in the Information. ROA 36.

On December 27, 2012, the case was bound over to district court where Defendant was charged by way of Information with Burglary While in Possession of a Firearm (Category B Felony – 205.060) (Count 1); Murder with Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030) (Count 2); Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330) (Count 3); Carrying a Concealed Firearm or Other Deadly Weapon (Category C Felony – NRS 202.350(1)(d)(3)) (Count 4); and Child Abuse, Neglect, or Endangerment (Category B Felony – NRS 200.508(1)) (Counts 5-9). ROA 33-36.[1]

On February 4, 2013, Defendant filed a Petition for Writ of Habeas Corpus ("Petition") to have the charge of Burglary dismissed, as Defendant asserted there was insufficient probable cause for the State to have charged him with Burglary, based on the alleged reason that a person cannot commit burglary against their own house. ROA 72. On February 27, 2012, an Order issuing the Writ of Habeas Corpus was entered, ROA 114, and on March 19, 2013, the State filed a Return to

[1] This Reply will cite to the ROA throughout, pursuant to the Nevada Supreme Court's Order Setting Briefing Schedule for the instant matter, filed July 11, 2013, in which the Court stated "Because we have already received a copy of the record on appeal, the parties may cite to the record in their briefs and need not file an appendix."

Writ of Habeas Corpus in response. ROA 117. Oral argument was held on the Petition on March 27, 2013, and the District Court granted Defendant's Petition and dismissed the charge of Burglary. ROA 135, 148. The state filed a Notice of Appeal on March 27, 2013. ROA 127. The State filed its Opening Brief on August 12, 2013, and Defendant filed his Answering Brief on October 11, 2013; the State's Reply follows:

STATEMENT OF THE FACTS

In June of 2012, Defendant moved out of a house at 325 Altamira, in Las Vegas, NV, that he owned with his wife, Echo. ROA 40, 46-47, 54. Defendant, due to the logistical difficulties of taking care of the couple's five children, would come back to 325 Altamira around 2:00 p.m. or 3:00 p.m. on Fridays to take care of the children for the weekend while Echo and her boyfriend Joseph vacated the house. ROA 40-46. On July 27, 2012, after harassing Echo throughout the early morning by calling her and knocking on the house door or window, Defendant came into the house around noon with a firearm. ROA 42-43. Although Echo told him he was not supposed to be at the house yet, after a short conversation Defendant shot and killed Echo and wounded Joseph in sight of their children. ROA 43-44.

ARGUMENT

Defendant, throughout his Answering Brief, seeks to anchor this case in two principles tangential to Statutory Burglary under NRS 205.060: 1) the common law definition of burglary, and 2) his "right," allegedly unqualified, to enter 325 Altamira—which was no longer his home—where his wife lived with her boyfriend. Based on the plain meaning of the Burglary statute, a person may clearly commit burglary against a house he owns. Nevertheless, should this Court find ambiguity in the statute, the common law underpinnings of the Burglary statute qualified, and continue to qualify, burglary as a crime against habitation and specifically not ownership. Further, cases and commentators from around the country demonstrate the general movement toward criminalizing burglary notwithstanding home ownership, especially in cases that involve domestic violence. Accordingly, because sufficient evidence supported the determination that Defendant could have burglarized 325 Altamira, the district court substantially erred when it dismissed that charge, and this Court must reverse the district court's determination.

I
ACCORDING TO THE PLAIN MEANING OF NRS 205.060, A PERSON MAY BURGLARIZE THEIR OWN HOUSE

"In reviewing a district court's order granting a pretrial petition for writ of habeas corpus for lack of probable cause, this court determines whether all of the

evidence received at the grand jury proceeding establishes probable cause to believe that an offense has been committed and that the defendant committed it." Sheriff v. Burcham, 124 Nev. 1247, 1257, 198 P.3d 326, 332 (2008) (alterations and quotation marks omitted). This Court will overturn the district court's order if the district court committed substantial error, as it did in the instant case. Id. To that end, for all of the debate in the case at bar about common law burglary, this Court must first interpret the plain language of the statute de novo and determine whether such an interpretation even requires review of anything other than the statute itself. See Burcham, 124 Nev. at 1253, 198 P.3d at 329.

It does not. NRS 205.060(1) reads, in relevant part, that "A person who, by day or night, enters any house . . . with the intent to commit . . . any felony . . . is guilty of burglary." Moreover, "[i]f the intention of the legislature is in doubt as to defining as burglary the defendant's act as charged in the information, the legislative act must be strictly construed." Smith v. First Judicial District Court, 75 Nev. 526, 528, 347 P.2d 526, 527 (1959). "The disposition of courts to construe strictly their burglary statutes which deviate from the common law appears to be clearly evident." Smith, 75 Nev. at 529, 347 P.2d at 528. To be strict is to be "stringent in requirement or control," "severe," something that is "inflexibly maintained or adhered to," or "rigorously conforming to principle or a norm or condition." Merriam-Webster, 2013. Thus, the standard this Court has specifically

outlined as to whether or not an offense constitutes burglary is one that is stringent, severe, and inflexible—one which the district court was not permitted to depart from simply because it did not "understand" how a person could commit burglary against his "own house." ROA 144.

The State recognizes that this Court will not read statutes to reach absurd results. Burcham, 124 Nev. at 1253, 198 P.3d at 329. However, there are many situations in which a person may be convicted of Burglary against a home he owns. Additionally, public-policy interests support charges of Burglary against a homeowner-spouse who has recently vacated the home. See infra, Part II.B. Accordingly, a charge or conviction of Burglary against a person's own house does not constitute an absurd result. Moreover, while the State acknowledges that this Court will turn to other sources to determine the statute's true meaning if a statute is ambiguous or if its plain meaning is clearly not intended, see Burcham, 124 Nev. at 1253, 198 P.3d at 329, no ambiguity exists in the case at bar save that which Defendant seeks to introduce. To further reduce NRS 205.060 to its salient parts, it states: 1) a person; 2) any house. "[W]hen a statute contains broad, inclusive terms, such as 'any person' or 'whoever,' it is applicable to all perpetrators[.]" Cote H. v. Eighth Judicial District Court, 124 Nev. 36, 40, 175 P.3d 906, 908 (2008). Indeed, "by its ordinary meaning, the term 'person' is broad and all-encompassing." Id.

Furthermore, no ambiguity exists where the Nevada Legislature did not include the "of another" element from common law burglary when it created NRS 205.060. As the Legislature is presumed to have knowledge of the state of the law when it enacts and amends statutes, this Court will not assume the Legislature overlooked a fact or unintentionally omitted a term from a statute. See Clover Valley Land & Stock Co. v. Lamb, 43 Nev. 375, 187 P. 723, 725-27 (1920). Where a statute does not possess an element or term:

> Clearly this would be an intentional omission on the part of the Legislature, and a court would be making a wide departure in saying that such an omission was the result on the part of [multiple] legislative bodies, where a different plain construction of the statute is apparent, without indulging in the presumption that such an oversight was made.
> Id. at 725.

The State is not asking this Court to read absent language into NRS 205.060; it is the Defendant who asks this Court to give NRS 205.060, which has stood fundamentally unchanged since 1911, a meaning found nowhere within its plain language. Based upon the plain, unambiguous meaning of the statute, a person may commit burglary against a house that he owns, and as the State presented slight or marginal evidence to establish that Defendant committed burglary at 325 Altamira, the district court substantially erred when it dismissed that charge.

II
SHOULD THIS COURT LOOK BEYOND THE PLAIN MEANING OF THE STATUTE, A PERSON MAY BURGLARIZE A HOUSE HE OWNSIF HE DOES NOT HAVE AN UNCONDITIONAL OR ABSOLUTE POSSESSORY INTEREST IN THAT HOUSE

Should interpreting burglary law become necessary, only one interpretation exists under which a person may not burglarize a house he owns: the archaic common-law definition. The Nevada legislature, as well as this Court and others, have repeatedly, specifically, and consistently moved away from the common-law definition of burglary, which neither controls our current interpretation of the law nor constitutes sound public policy.

A. The Nevada Revised Statutes Have Superseded the Common Law Definition of Burglary

NRS 1.030 reads, "[t]he common law of England, so far as it is not repugnant to or in conflict with the . . . laws of this State, shall be the rule of decision in all the courts of this State." While the common law states that a person may only commit burglary against the house "of another," see Smith, 75 Nev. at 528, 347 P.2d at 528, NRS 205.060 states that "a person" may commit burglary against "any house." Defendant contends the State relied on a number of cases in its Opening Brief to argue principles inapt to the case at hand. Respondent's Answering Brief 9-10. However, Defendant misunderstood the State's point, which was—as the State said in its Opening Brief—simply to show that "this Court has specifically, consistently, and repeatedly moved away from the common law

definition of burglary." Appellant's Opening Brief 7. As those cases and the plain language of NRS 205.060 show, because the common law now conflicts with statutory Burglary, the common law is no longer the rule of law in burglary cases in Nevada.

Moreover, NRS 1.030 "does not require this court to follow forever" outdated common law doctrines. Rupert v. Stienne, 90 Nev. 397, 399, 528 P.2d 1013, 1014 (1974). "Despite NRS 1.030, courts may reject the common law where it is not applicable to local conditions." Id. As this Court likewise opined: "Law must be stable, and yet it cannot stand still." Id. at 401, 528 P.2d at 1015. Nonetheless, should this Court elect to examine cases "involving an attack upon a common law principle, [it] must reexamine the reasons behind the doctrine[.]" Id.

B. As the Criminalization of Burglary Protects the Right of Habitation, Which Only Echo Could Claim, Defendant Is Not Immunized from the Charge of Burglary

While Defendant pointed to Blackstone's description of a man's home as his castle, he did not include the first part of the description of burglary:

> BURGLARY . . . has always been looked upon as a very heinous offence: not only becuase 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[.]

4 William Blackstone, Commentaries 223. Although Defendant indisputably owned 325 Altamira with Echo, home ownership is not dispositive of burglary,

habitation is. Only Echo White had an unqualified, undisputed right to call the 325 Altamira her home at all times.

First, Defendant's asserted possession of title and key to 325 Altamira is of no moment. RAB 15. For example, a landlord typically possesses these articles for house that he owns but cannot unconditionally enter. See NRS 118A.330. Moreover, a person under a protective order may nevertheless be excluded from a house he owns. See generally NRS 33.020-030. Additionally, Defendant's claim that he may dispose of his property as he sees fit is objectively incorrect. RAB 15. NRS 205.050 specifically states that a defendant can commit the crime of arson, burglary's kindred crime-against-property, against a building or structure he owns. See NRS 205.050. Defendant, of course, points to NRS 205.060 to argue that this kind of legislative intent is necessary to expressly abrogate the common law and find that a person can commit burglary against his own property. RAB 7. However, the reason for this specific codification is very clear, and for a reason that is inapplicable to burglary: the prevalence of the intentional commission of arson against buildings or structures by those who owned the property for the purposes of collecting insurance money. See generally The Metamorphisis of the Law of Arson, 51 Mo. L. Rev. 295 (Spring, 1986). Legislators around the country undoubtedly felt it necessary to codify this requirement to forestall the types of arguments Defendant attempts to make here. However, in arguing that it is

"impossible" to commit burglary against your own property, both Defendant and the district court conflated "impossible" with "unlikely." It may be unlikely that a person will commit burglary against his own property; it is not legally or factually impossible.

The Nevada Legislature also criminalized invasion of the home in 1989, specifying in that statute that such a home must be owned by someone other than the person committing the offense:

> A person who, by day or night, forcibly enters an inhabited dwelling without permission of the owner, resident or lawful occupant, whether or not a person is present at the time of the entry, is guilty of invasion of the home.

NRS 205.067(1). The legislative intent demonstrated here in ensuring that a person could only commit invasion of the home against a house he did not own or was not a resident or lawful occupant of highlights the utter lack of any commensurate change to the Burglary statute. Clearly, the Legislature was aware when NRS 205.067 was first enacted in 1989, and amended in 1995, of the potential consequences and public policy concerns of charging owners with crimes against their own property. Yet they chose to take no action with respect to NRS 205.060, leaving unmodified in that statute the critical, all-encompassing terms "a person" and "any house."

Second, Defendant avers that he retained the right to enter 325 Altamira at all times. RAB 15. This is wholly untrue and a fact very much in dispute. While

Defendant stayed at 325 Altamira on the weekends to take care of the children, his assertion that he retained the absolute right to enter the premises at all times finds no support in the record or evidence adduced at the preliminary hearing. RAB 15. In fact, testimony elicited from Joseph on cross-examination by Defendant's counsel, demonstrates that 325 Altamira was no longer Defendant's "home":

> **Defendant's Counsel**: Same thing with the home, the home was actually in [Defendant's] name, correct?
> **Joesph**: Yes.
> **Defendant's Counsel**: And you said that he would come ***visit***, he would stay there on the weekends to take care of the children; is that a fair charactization?
> **Joseph**: Yes.
> . . . .
> **Defendant's Counsel**: In fact, [Defendant] ***moved out of the home*** that was in his name, left the car that was in his name with Echo, so she could help provide for those children; is that fair?
> **Joesph**: Yes.
> . . . .
> **Defendant's Counsel**: How soon after [Defendant] left the house did you move in, if I might ask?
> **Joseph**: ***He moved out toward the beginning of June***, and I started staying there towards the end of June.
> . . . .
> **Defendant's Counsel**: I want to move forward to the day of the shooting, if I might.
>
> You said there was a ***knock on the door or a knock on the window*** at two in the morning?
> **Joesph**: Yes.

ROA 46-47 (emphasis added).

These facts militate against Defendant's claim that he had an absolute right of habitation in 325 Altamira sufficient to immunize him from a claim of burglary. Joseph testified that Defendant came to "visit," that he "moved out of the home,"

and that he "knocked" on the window in the early morning of July 27, 2012. As the State noted in its Opening Brief, "[i]t defies common sense to call this house—a house in which Defendant's recently-separated wife and her lover lived, against whom Defendant had expressed extremely angry, threatening behavior—Defendant's 'home.'" AOB 11.

Courts are not required to check common sense at the door when deciding cases; indeed, "common sense often makes good law." Peak v. United States, 353 U.S. 43, 46 (1957). Here, the common-sense determination is that Defendant had no right of habitation, and no absolute right to enter, 325 Altamira at noon on July 27, 2012: one does not usually "visit" one's current place of habitation, or claim as a home a house from which one recently moved. For that matter, if Defendant had a key and an unqualified right to enter 325 Altamira, why knock at all early that morning? Why not simply enter the house and wake Echo up? Furthermore, Defendant was not supposed to be at 325 Altamira until 2:00 or 3:00 p.m. on Fridays; when he arrived at noon on July 27, 2012, Echo specifically told him he was not supposed to be there yet. ROA 41-43.

This determination is critical. Courts and commentators around the country have recognized that the right of habitation supersedes home ownership or other attendant concerns in burglary cases—especially when domestic violence is concerned—and deciding whether the person had custody and control of the

dwelling at the time the burglary was alleged is pivotal. State v. Hagedorn, 679 N.W.2d 666 (Iowa 2004), cited by the State in its Opening Brief and unaddressed by Defendant in his Answering Brief, is particularly instructive. There, a husband moved out of a duplex where he had previously lived with his wife and their children; he then became upset about a relationship his wife started with a mutual acquaintance who moved in with her. Id. at 667-68. However, the wife instituted no legal proceedings against the husband otherwise restricting him from the premises. See Id. at 669.

The Iowa Supreme Court rejected the estranged defendant-husband's argument that he was immunized from a Burglary charge because "he had an absolute right to enter the home unless prohibited from doing so by court order." Id. at 670. "Neither the fact the defendant had *previously* resided in the duplex with his family nor the fact his children were still in the home gave him an irrevocable license to enter against the wishes of his wife, the current occupant." Id. Moreover, "a spouse who stays in the marital residence after the other spouse has moved out should be able to enjoy the security and sanctity of his or her home without the necessity of obtaining a restraining order." Id. at 671. And although the husband in Hagedorn did not co-own the property, the law supra demonstrates that bare ownership is irrelevant—only possession and habitation matter.

Notably, the Burglary statute from which the Iowa Supreme Court drew its analysis had as a requirement that the person committing the burglary have "no right, license or privilege to" be present in the structure burglarized. Iowa Code Ann. 713.1. Despite this express requirement (absent in NRS 205.060), the Iowa Supreme Court nevertheless upheld the defendant-husband's conviction of Burglary. Hagedorn, 679 N.W.2d at 667.

In another case cited by the State in its Opening Brief, and unaddressed by Defendant in his Answering Brief, the Supreme Court of South Carolina held that a person cannot commit burglary against his own "home," but the concept of "one's 'own home' must be examined in light of the very purpose behind the law of burglary." State v. Singley, 392 S.C. 270, 276, 709 S.E.2d 603, 606 (S.C. 2011). Moreover, that decision provides guidance for perhaps murkier issues of dominion: "the proper test is whether, under the totality of the circumstances, a burglary defendant had custody and control of . . . the dwelling burglarized." Id. at 277, 606. The court's analysis here likewise hinged on the requirement, found in South Carolina's burglary statute, S.C. Code 16-11-311, that any such felonious entry be "without consent." Singley, 392 S.C. at 277, 709 S.E.2d at 607. Again, no such element requiring lack of consent is found in NRS 205.060 (or its implied alternative: a right of possession in the dwelling, which negates the requirement of consent).

In Singley, the defendant co-owned a house with his mother, who told him to move out; he returned six months later to commit the burglary in question. Id. at 272. Defendant did not have custody and control of 325 Altamira here. See ROA 43-44. Nevertheless, as the Supreme Court of South Carolina held, if it became necessary to determine lawful possession, that was a question of fact for the jury. Singley, 392 S.C. at 277, 709 S.E.2d at 606. Under this test, a determination of home ownership would not have been appropriate for the district court here in its preliminary hearing, but rather should have, at the very least, been a question of fact presented to the jury.

The Supreme Court of Ohio has held similarly, stating that "[b]ecause the purpose of burglary law is to protect the dweller, we hold that custody and control, rather than legal title, is dispositive." State v. Lilly, 87 Ohio St. 3d 97, 102, 717 N.E.2d 322, 327 (1999). Although the facts of Lilly are not on all fours with the facts of the case at bar (as the defendant-husband there committed burglary against the apartment where his estranged wife lived alone) the court nevertheless specifically acknowledged that "one can commit a trespass and burglary against property of which one is the legal owner if another has control or custody of that property." The court based this ruling off of the Ohio Revised Code's definition of trespass and burglary, which require that "land or premises" be "controlled by, or

in custody of another." Ohio Rev. Code 2911.21(F)(2). See also Ohio Rev. Code 2911.12 "Burglary; trespass in a habitation[.] Id.

Additionally, the Court of Appeals of Indiana upheld a Burglary conviction for an unauthorized entry by the defendant-husband into a dwelling co-owned by both spouses where his wife still lived, "even though the accused may have had a right to possession of the house co-equal with his wife at the time of the breaking." Ellyson v. State, 603 N.E.2d 1369, 1373 (Ind. Ct. App. 1992). The Court of Appeals' decision was based on the requirement in Indiana's Burglary statute that "the dwelling be that 'of another person.'" Ellyson, 603 N.E.2d at 1373. The trial court determined, and court of appeals upheld, this decision where the husband had moved out, notwithstanding the fact that the husband had a possessory interest in the home.

As the Court of Appeals of Maryland noted, the "common thread" running through these defendant-spouse burglary cases "is that the mere existence of the marriage relationship does not put a spouse's separate property beyond the protection of the law and subject to the depredation of the other spouse." Parham v. State, 79 Md. App. 152, 163, 556 A.2d 280, 285 (1989). Moreover, in none of the aforementioned cases did any legal device, such as a protective order, restrict the defendant-husband from returning to the property. He had simply moved out of the home, and whether he had previously resided there, whether his wife still lived

there, or whether he had some current ownership interest in it, his return and re-entry with felonious intent was sufficient to constitute burglary.

Even courts that have declined to uphold convictions against defendant-husbands who allegedly committed burglary against their own homes have done so on the basis of the defendant's *unconditional* or *absolute* right to enter the premises. The Court of Appeals of Arizona, while declining to uphold a Burglary conviction against a man who sexually assaulted his daughter in their undisputed home, nevertheless noted "that there are a number of cases from other jurisdictions which . . . have upheld convictions for burglary where the defendant had some legal or possessory interest in the residence." State v. Altamirano, 166 Ariz. 432, 437, 803 P.2d 425, 430 (Az. Ct. App. 1990). The court further implied that it would have reached a different result had the defendant not had "an absolute and unconditional right to enter and remain on the property where he committed the crime." Id. at 437, 803 P.2d at 430. Again, the court's ruling here was based on its analysis of the Arizona Revised Statutes 13-1501(1) which read in relevant part: "'Enter or remain unlawfully' means an act of a person who enters or remains on premises when such person's intent for so entering or remaining is not licensed, authorized or otherwise privileged." Altamirano, 166 Ariz. at 434, 803 P.2d at 427.

Finally, in People v. Gauze, upon which Defendant relies so heavily, the Supreme Court of California made this absolute or unconditional right of

possession critical to its analysis. There, a co-resident defendant (not a spouse but a roommate) lived in the apartment where the crime was committed. People v. Gauze, 15 Cal. 3d 709, 714, 542 P.2d 1365 (1975). The defendant's entry there invaded no right of habitation, because—and most important to the court's analysis—the "defendant had an absolute right to enter the apartment." Id. The court distinguished its decision with a previous decision, People v. Sears, 2 Cal.3d 180, 465 P.2d 847 (1970), in which it had upheld a burglary where:

> [A] defendant had moved out of the family home three weeks prior to the crime, [and] could claim no right to enter the residence of another without permission. Even if we assume that defendant could properly enter the house for a lawful purpose such an entry still constitutes burglary if accomplished with the intent to commit a felonious assault within it.

Gauze, 15 Cal. 3d at 714-15.

The California Penal Code's Burglary statute was similar to NRS 205.060 in that it eliminated the common law consent from the face of the statute. Id. However, the California Supreme Court's analysis was predicated upon a long line of California cases which held that burglary must nevertheless invade some possessory right of habitation. Id. at 15. Moreover, California's Burglary statute specifically required habitation as an element of the offense.

Yet People v. Pendleton, decided en banc by the California Supreme Court after Gauze, clarified that its holding in Gauze was based on "the ground that one has an unconditional right to enter his own home, even for a felonious purpose."

People v. Pendleton, 25 Cal. 3d 371, 382, 599 P.2d 649, 655-56 (1979). Accordingly, "[t]he law after Gauze is that one may be convicted of burglary even if he enters with consent, provided he does not have an unconditional possessory right to enter." Id. As such, even Gauze stands for the proposition that a person may be convicted of Burglary against a house in which he has an ownership interest if he does not have an *unconditional* possessory right to the premises, as Defendant did not here.

Commentators have also weighed in on this specific issue. The following article was written in 2006 but its hypothetical scenario could have been solely from the facts of the instant tragedy:

> Loneliness, jealousy, and revenge, as well as a sense of entitlement, are often the motive to enter a former intimate's residence. The intent to burglarize an estranged spouse's habitation is more apt to include a plan to assault, terrorize, or kill the other spouse. Unlike the burglary of a stranger's domicile where the motive and intent is to steal property undetected, a "burglar spouse" is more likely to desire that the estranged spouse be at home.
>
> It makes no sense for an estranged spouse or former partner to have less protection under the burglary laws when we have a more vulnerable, targeted victim. If anything, more security is warranted. To insulate an offending spouse-owner or leaseholder from criminal liability likewise offends the public policy and purpose of the common law and modern statutory law that burglary is a crime against habitation, possession, and occupancy, and not against ownership.

John M. Leventhal, Spousal Rights or Spousal Crimes: Where and When Are the Lines to Be Drawn?, 2006 Utah L. Rev. 351, 377-78 (2006). Justice Leventhal's

all-to-familiar scenario illustrates why it is in the interests of public policy that burglary laws protect those partners still residing in the former home.

Defendant's right to enter 325 Altamira was neither unconditional nor absolute. He stayed there on the weekends to take care of the children, arriving after 2:00 or 3:00 p.m. Coming at noon on July 27, 2012, as he did, at a time when he had no custody or control over the house, with the intent to kill his wife, was sufficient for a finding of slight or marginal evidence that he committed the crime of burglary.

In accordance with the foregoing law, Defendant would have likewise committed statutory burglary in any of these respective jurisdictions. However, these courts analyzed their respective defendants' possessory or habitation interests under a statutory Burglary requirement absent from NRS 205.060: some lack of right of habitation, possession, or license in the home burglarized. Notably, these cases are neither controlling in Nevada nor disposivite of the issue at hand: as no lack of possessory or habitation requirement is even necessary under the plain language of Nevada's Burglary statute, the State presented sufficient evidence that Defendant committed burglary under the plain language analysis set forth in Part I. As such, the district court substantially erred in dismissing Defendant's charge of burglary, and this Court must reverse.

CONCLUSION

Based on the foregoing arguments as set forth above, the State respectfully requests this Honorable Court REVERSE the decision of the district court.

Dated this 6th day of November, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 5,053 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of November, 2013.

Respectfully submitted,

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BY */s/ Steven S. Owens*
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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 6, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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