IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-KA-00352-COA

MARK KEE BROWN **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	02/02/2010
TRIAL JUDGE:	HON. ROGER T. CLARK
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	LISA D. COLLUMS LESLIE S. LEE HUNTER NOLAN AIKENS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JOHN R. HENRY JR.
DISTRICT ATTORNEY:	CONO A. CARANNA II
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTION OF FELONY ESCAPE AND SENTENCED AS A HABITUAL OFFENDER TO LIFE WITHOUT ELIGIBILITY FOR PROBATION OR PAROLE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS
DISPOSITION:	AFFIRMED: 06/21/2011
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

MYERS, J., FOR THE COURT:

¶1. Mark Kee Brown was convicted in the Harrison County Circuit Court of felony escape. The circuit court sentenced Brown as a habitual offender under Mississippi Code Annotated section 99-19-83 (Rev. 2007) to life in the custody of the Mississippi Department of Corrections (MDOC) without eligibility for probation or parole. Brown presents one issue

on appeal: whether a prior conviction for "burglary of a dwelling" constitutes a "crime of violence" within the meaning of section 99-19-83.

FACTS

¶2. In July 2005, Brown was arrested by the Harrison County Sheriff's Department pursuant to a felony arrest warrant and placed into the Harrison County Adult Detention Center. Brown remained confined in the detention center awaiting trial until the early morning hours of January 27, 2008, at which time he and three other inmates escaped from the facility. Sheriff's deputies apprehended Brown two days later inside a "FEMA trailer" located in the front yard of a residence in Gulfport, Mississippi. Brown was arrested and indicted for felony escape as a habitual offender under Mississippi Code Annotated section 99-19-81 (Rev. 2007).[1]

¶3. The State thereafter filed a motion in the circuit court seeking to amend the habitual-offender portion of Brown's indictment so as to charge Brown as a habitual offender under section 99-19-83 based on the claim that "burglary of a dwelling" constitutes a "crime of violence" for purposes of section 99-19-83. A hearing was held on the motion, after which

[1] The habitual-offender portion of Brown's indictment listed the following prior convictions, which we summarize: (1) *Burglary of a Dwelling* (two counts), convicted and sentenced on May 14, 1996, in the Harrison County Circuit Court–ten-year sentence for each count; (2) *Felony Possession of a Controlled Substance,* convicted and sentenced on May 14, 1996, in the Harrison County Circuit Court–three-year sentence; (3) *Grand Larceny,* convicted and sentenced on May 14, 1996, in the Harrison County Circuit Court–five-year sentence; (4) *Felony Possession of a Controlled Substance,* convicted and sentenced on June 29, 2001, in the Harrison County Circuit Court–three-year sentence; and (5) *Felony Escape,* convicted and sentenced on June 29, 2001, in the Harrison County Circuit Court–two-and-one-half-year sentence.

the circuit court entered an order amending the indictment to reflect Brown's habitual-offender status under section 99-19-83.

¶4. A jury later found Brown guilty of felony escape. At sentencing, the State presented Brown's "pen packs" from the MDOC as evidence of Brown's criminal history. The circuit court adjudged Brown a habitual offender under section 99-19-83 and sentenced Brown to life without eligibility for probation or parole. This appeal followed.

DISCUSSION

Whether "burglary of a dwelling" is considered a "crime of violence" for purposes of section 99-19-83.

¶5. Section 99-19-83 imposes a life sentence upon a habitual offender when one or more of at least two prior felony convictions is for a crime of violence. *McLamb v. State,* 456 So. 2d 743, 744 (Miss. 1984). Section 99-19-83 does not define the meaning of the term "crime of violence." *Davis v. State,* 680 So. 2d 848, 851 (Miss. 1996). Nor does it identify such crimes. *Koger v. State,* 919 So. 2d 1058, 1061 (¶20) (Miss. Ct. App. 2005). Thus, our courts have had to look elsewhere when determining whether a particular felony offense constitutes a crime of violence for purposes of section 99-19-83.

¶6. In *Koger,* this Court answered in the affirmative when asked whether manslaughter constitutes a crime of violence under section 99-19-83. *Koger,* 919 So. 2d at 1061 (¶¶20-22). In reaching our conclusion, we construed section 99-19-83 with Mississippi Code Annotated section 99-15-107 (Rev. 2007), which governs a person's eligibility in pretrial intervention programs. *Id.* at (¶20). We noted that section 99-15-107 defines manslaughter as a crime

of violence, and we found it appropriate to consider the crimes of violence designations identified in section 99-15-107 when applying section 99-19-83. *Id.* Section 99-15-107 states, in pertinent part, "intervention [shall not] be considered for those individuals charged with any crime of violence including, but not limited to murder, aggravated assault, rape, armed robbery, manslaughter or burglary of a dwelling house."[2]

¶7. In *Davis,* the Mississippi Supreme Court held that the offense "aggravated assault" constitutes a crime of violence under section 99-19-83, stating first that the court had already "tagged" it as a crime of violence in the consideration of whether bail should be allowed. *Davis,* 680 So. 2d at 851 (citing *Bumphis v. State,* 405 So. 2d 116, 118 (Miss. 1981)). The *Davis* court then pointed to the federal sentencing guidelines, noting that:

> Federal sentencing guidelines further define "crime of violence" as "any offense under federal or state law punishable by imprisonment for a term exceeding one year . . . [that] has as an element the use, attempted use, or threatened use of physical force against the person of another" and include within that definition "murder, manslaughter, kidnaping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and *burglary of a dwelling*."

Id. (quoting *United States v. Fry,* 51 F.3d 543, 546 (5th Cir. 1995)) (emphasis added). We point out that the *Fry* court was interpreting U.S.S.G. § 4B1.2(a)(2), which actually defines crime of violence in the federal sentencing guidelines as:

> any offense under federal or state law punishable by imprisonment for a term

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[2] Section 99-15-107 was enacted in 1983 with a repealer; the repealer was repealed in 1987. *See* Editor's Note Miss. Code Ann. § 99-15-107: "SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' effective July 1, 1987, is hereby repealed."

> exceeding one year that–(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Fry, 51 F.3d at 546.

¶8. On appeal, both parties agree that neither this Court nor the Mississippi Supreme Court has squarely addressed the question now before us. Brown acknowledges that section 99-15-107 and the federal sentencing guidelines consider burglary of a dwelling a crime of violence, but he reiterates that our courts have not held this to be the case for purposes of section 99-19-83. Brown contends that our courts have had the occasion to answer the question a number of times, yet they have declined to do so–implying this is because these courts did not view burglary of dwelling as a crime of violence.[3] Brown further contends that other Mississippi cases suggest that burglary of a dwelling is not a crime of violence.[4]

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[3] The following opinions are taken from Brown's brief on appeal: *Magee v. State,* 542 So. 2d 228, 235 (Miss. 1989) (prior convictions for "house burglary" and robbery–the Mississippi Supreme Court deemed robbery a crime of violence); *Ashley v. State,* 538 So. 2d 1181, 1184-85 (Miss. 1989) (prior convictions consisted of numerous burglaries and attempted robbery– the supreme court identified attempted robbery as a crime of violence); *Brown v. State,* 37 So. 3d 1205, 1217 (¶35) (Miss. Ct. App. 2009) (prior convictions for armed robbery and burglary of a dwelling–this Court found armed robbery a crime of violence); *Bradley v. State,* 934 So. 2d 1018, 1028 (¶37) (Miss. Ct. App. 2005) (prior convictions for aggravated assault and burglary–this Court deemed aggravated assault a crime of violence); *Cook v. State,* 910 So. 2d 745, 746 (¶3) (Miss. Ct. App. 2005) (priors included burglary of a dwelling and simple assault on a law-enforcement officer–this Court stated that simple assault on a law-enforcement officer was a crime of violence under section 99-19-83).

[4] According to Brown, the following statements and rulings from prior cases, although not definitive, suggest that burglary or burglary of a dwelling are not crimes of violence:

Brown submits that a definitive ruling by this Court holding that this particular offense is not crime of violence would be consistent with the Legislature's designation of the crime as a crime against property, as opposed to a crime against the person.

¶9. The State responds that while there have been cases where a reviewing court may have had the occasion to consider whether the subject offense constitutes a crime of violence for purposes of 99-19-83, the question was never reached because other prior convictions in the case made the issue vis-a-vis burglary of dwelling unnecessary to consider. The State further contends that to the extent any of the decisions cited by Brown might suggest that burglary of a dwelling is not a crime of violence (the State maintains that none actually do), their utility for Brown is undermined by *Koger*, as well as *Davis*.

¶10. At the outset, we draw no implication(s) whatever from the fact that prior courts, though they might have had the occasion to do so, did not address this particular question. Review of the cases cited by Brown where a sentence under section 99-19-83 was upheld on appeal do indeed show that it was unnecessary for the reviewing court to determine whether burglary of dwelling constituted a crime of violence. Thus, we agree with the State on this

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McLamb, 456 So. 2d at 746 ("breaking and entering" and larceny are not crimes of violence for purposes of section 99-19-83); *Kirkwood v. State,* 53 So. 3d 7, 23 (¶50) (Miss. Ct. App. 2010),*overruled in part on other grounds*, ("Kirkwood's crimes [burglary of a dwelling, fleeing or eluding a law enforcement officer in a motor vehicle, possession of a firearm by a convicted felon, and grand larceny] were not particularly grave–they were not crimes of violence against individuals."); *Rayborn v. State,* 961 So. 2d 70, 73 (¶11) (Miss. Ct. App. 2007) ("burglary is a crime against property and not a person"); *Jones v. State,* 878 So. 2d 254, 256 (¶11) (Miss. Ct. App. 2004) ("neither . . . grand larceny [nor] . . . auto burglary . . . are crimes of violence")).

point.

¶11. As to Brown's contention that other opinions have suggested that burglary of a dwelling is not a crime of violence, we find that none of these cases answer the question.

¶12. In *Kirkwood,* for example, the question was limited to whether the trial court had committed reversible error by allowing a criminal defendant to testify about his prior convictions; section 99-19-83 was not at issue. *Kirkwood,* 53 So. 3d at 16-23 (¶¶25-50). In *Rayborn,* the defendant appealed his conviction for burglary of dwelling; we responded to the defendant's assertion that since the homeowner who saw the defendant in her home at the time of the burglary did not immediately call the police, no burglary had been committed; section 99-19-83 was not at issue. *Rayborn,* 961 So. 2d at 73 (¶11). In *Jones,* this Court expressly held that auto burglary was not a crime of violence, but we did not speak to whether burglary of a dwelling was a crime of violence. *Jones,* 878 So. 2d at 256 (¶11). And in *McLamb,* the supreme court implicitly held that the crime "breaking and entering" did not constitute a crime of violence for purposes of section 99-19-83. But the *McLamb* court gave no indication at all that this particular prior offense constituted burglary of dwelling.[5] Accordingly, we consider the matter before us as one of first impression.

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[5] James McLamb was convicted in 1981 for armed robbery and sentenced to life as a habitual offender under section 99-19-83, based on two prior felony convictions for "larceny" and "breaking and entering." *McLamb,* 456 So. 2d at 744 (*McLamb II*); *see also McLamb v. State,* 974 So. 2d 935, 936 (¶2) (Miss. Ct. App. 2008) (*McLamb V*) (providing the date of McLamb's armed-robbery conviction). McLamb's armed-robbery conviction was upheld on direct appeal by the supreme court in *McLamb v. State,* 410 So. 2d 1318, 1319-20 (Miss. 1982) (*McLamb I*). McLamb thereafter filed a collateral action with the supreme court, in which he challenged his life sentence based on the claim that his sentence

¶13. In the early part of this state's history, only common-law burglary, with its narrowly defined elements,[6] was recognized, and it was treated as a capital crime.[7] As Professor Wayne LaFave explains, common-law burglary "was a heinous offense because of its invasion of [man's right of habitation], which each man could punish with death and which, in a civilized society, the law would punish similarly." 2 Wayne R. LaFave, Substantive Criminal Law § 21.1(c) at 212 (2d ed. 2003) (citing 4 W. Blackstone, Commentaries on the Laws of England *223).

¶14. In 1839, the Mississippi Legislature lessened the penalty for burglary from capital punishment to confinement in the penitentiary, "for a longer or shorter period, according to the degree [of burglary] committed." *Thomas v. State,* 6 Miss. (5 Howard) 20 (1840). What previously would have been regarded as common-law burglary, for the most part, became

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was illegal under section 99-19-83 because the only crime of violence in his record was his 1981 armed-robbery conviction. *McLamb,* 456 So. 2d at 744. A divided supreme court agreed with McLamb, and the majority held that for purposes of section 99-19-83, one of the prior felony convictions other than the immediate felony conviction had to be a crime of violence. *Id.* at 746. *Absent from the McLamb II court's holding is any mention as to what McLamb's "breaking and entering" conviction entailed.* Review of the record in *McLamb V*, which contains information pertaining to McLamb's convictions preceding his 1981 armed-robbery conviction, reveals only that McLamb was convicted in 1962 in the State of North Carolina for the crime "breaking and entering," for which he received a three-to five-year sentence.

[6] "Burglary was defined by the common law to be the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." 2 Wayne R. LaFave, Substantive Criminal Law § 21.1, at 205 (2d ed. 2003).

[7] *See* Poindexter's Code of 1822, ch. 54, § 15, p. 298: "Every person who shall commit the crime of burglary, and be thereof convicted, shall suffer death."

burglary in the second degree under the 1839 Act, and it carried a sentence of not more than ten years in the penitentiary. *See* Hutchinson's Mississippi Code 1798-1848, Ch. 64, p. 962-63.[8] It was considered first-degree burglary if a person was inside the dwelling at the time of the offense, and punishment for this aggravating factor was confinement in the state penitentiary for no less than ten years. *Id.* This was a departure from the common law's definition of burglary, as there was no requirement that the dwelling be occupied under the common law.[9] Burglary of a non-dwelling was considered burglary in the third degree, as was burglary of a non-occupied dwelling in the daytime; punishment for third-degree burglary was imprisonment for a term not to exceed five years. *Id.*

¶15. The 1839 statutory framework for burglary was carried forward to present day with some changes along the way, one of which was the cessation of classifying the different types of burglary in terms of degree(s). Another, was that burglary of a non-occupied dwelling in the daytime became treated as severely as burglary of a non-occupied dwelling in the nighttime. *See* Miss. Rev. Code Ch. 64, Art. 44, p. 580 (1857). A significant change occurred in 1996, when the Legislature repealed Mississippi Code Annotated section 97-17-19 (burglary of an unoccupied dwelling in the day or night); section 97-17-21 (burglary of

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[8] Note, the 1839 Act departed from the common law's definition of burglary by replacing the term "felony" with the term "crime" in its definition of burglary. The Act defined the term "crime" to mean, "any offense for which any criminal punishment may by law be inflicted." Hutchinson's Mississippi Code 1798-1848, Ch. 64, p. 983.

[9] *See Taylor v. United States,* 495 U.S. 575, 594 (1990) (where the United States Supreme Court noted that common-law burglary did "not require . . . that the dwelling be occupied at the time of the crime").

an occupied dwelling in the day or night); and section 97-17-27 (burglary of an inner door of a dwelling in the nighttime), and combined them into what is now Mississippi Code Annotated section 97-17-23 (Supp. 2010). 1996 Miss. Laws ch. 519, § 1. According to the record, Brown was convicted of burglary of a dwelling under former section 97-17-19.

¶16. Former section 97-17-23 covered the act of breaking and entering into an occupied dwelling of another, with a deadly weapon, in the nighttime, with the intent to commit a crime therein. Section 97-17-23 "now provides for penitentiary imprisonment of not less than three years, nor more than twenty-five years, for burglary of a dwelling [or inner door therein], regardless of whether the burglar is armed with a deadly weapon, whether the dwelling is inhabited or not, and whether the burglary occurred during the daytime or nighttime." *Johnson v. State,* 925 So. 2d 86, 98 n.8 (Miss. 2006).

¶17. Speaking to section 99-19-83, the Mississippi Supreme Court in *McQueen v. State,* 473 So. 2d 971, 972 (Miss. 1985), addressed whether the term "crime of violence" as used in that section was unconstitutionally vague. Dismissing the void-for-vagueness claim, the *McQueen* court cited language from numerous jurisdictions; we restate that discussion here in part:

> In *Robinson v. State,* 149 S.W. 186[, 187] (Tex. 1912), the Court of Criminal Appeals of Texas stated, "violence is a general term and includes all sorts of force."
>
> In *Anderson-Berney Bldg. v. Lowry,* 143 S.W.2d 401, 403 (Tex. Civ. App. 1940), the court stated:
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> > "Violence" is force, physical force; force unlawfully exercised. Bouvier in his Law Dictionary, 2 Bouvier Law Dictionary,

> Rawle's 3rd Rev., p. 3402, defines "violence" as: "The abuse of force. That force which is employed against common right, against the laws, and against public liberty."

In the case of *Boecker v. Aetna Casualty & Surety Co.,* 281 S.W.2d 561, 564 (Mo. Ct. App. 1955), the court stated:

> "Violence" is a relative term. No particular degree of force is required to constitute violence. Violence is broadly defined in Webster's New International Dictionary, 2nd ed., as "the exertion of any physical force considered with reference to its effect on another than the agent." It is not necessary that the impact be of sufficient force to inflict damage.

. . . .

In *Landry v. Daley,* 280 F. Supp. 938[, 954] (1968), the Court stated:

> The words "force" and "violence" are not so obscure as to fail to advise the public of the prohibitive conduct. In common parlance, force means "power, violence, compulsion, or constraint exerted upon or against a person or thing." The word "violence" imparts a similar meaning. It means "the exertion of any physical force so as to injury or abuse." "Force[,]" "violence[,]" "compulsion[,]" "constraint[,]" and "restraint" convey a similar idea of the exertion of power against the will, wish or consent of another. Given a reasonable and natural construction, these terms connote either physical attack upon person or property or physical aggression reasonably capable of inspiring fear or injury or harm to a person or property.

Id. at 972-93.

¶18. The act of breaking, by definition, connotes force, which, as stated above, is synonymous with violence. *See, e.g., Koger,* 919 So. 2d at 1061 (¶21) ("violence is synonymous with force"). *McLamb* and *Jones*, however, both imply that the force and/or violence generally associated with the act of burglarious breaking does not, in and of itself,

fall within the reach of section 99-19-83, at least not per se. This make sense from the standpoint that most burglaries typically are viewed as property crimes and that the contemplated purpose behind section 99-19-83, clearly, is the protection of public safety, not property.

¶19. But burglary of a dwelling, traditionally, is not regarded as a crime against property in Mississippi. In *Robinson v. State,* 364 So. 2d 1131, 1133 (Miss. 1978), the Mississippi Supreme Court distinguished between burglary of a dwelling and burglary of a non-dwelling, noting that: "At common law, burglary was considered to be an offense against habitation rather than against property[;] what was sought to be protected was the peace of mind and security of the residents, rather than the property." (Quoting 85 A.L.R. 428 (1933)). To constitute a dwelling, the building must be "a place of human abode." *Id.* The Mississippi Supreme Court reiterated this view in *Course v. State,* 469 So. 2d 80, 81 (Miss. 1985).

¶20. In *Taylor v. United States,* 495 U.S. 575, 598-99*,* the United States Supreme Court spoke to 18 U.S.C. § 924(e) (1986), which provides sentencing enhancement for violent felonies, and it defines the term as:

> any crime punishable by imprisonment for [more than] one year . . . that [] (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

The *Taylor* Court made the following observation with respect to the danger associated with burglary:

> Congress singled out burglary (as opposed to other frequently committed

> property crimes such as larceny and auto theft) . . . because of its inherent potential harm to persons. The fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate. And the offender's own awareness of this possibility may mean that he is prepared to use violence if necessary to carry out his plans or to escape.

Id. at 588.

¶21. *Taylor* makes no distinction between burglary of a dwelling and burglary of a non-dwelling. Mississippi does for the reasons expressed in *Robinson* and *Course*.

¶22. As mentioned, section 99-15-107 identifies burglary of a dwelling as a crime of violence, and we again find it appropriate to rely on this section in the application of section 99-19-83. Because a dwelling is a place of human abode, there is a significant prospect of violence presented by every burglary of a dwelling, which, in our opinion, makes this offense a per se crime of violence under section 99-19-83.

¶23. Accordingly, we find that burglary of a dwelling constitutes a crime of violence under section 99-19-83. And we affirm Brown's conviction and sentence as entered by the Harrison County Circuit Court.

¶24. **THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT OF CONVICTION OF FELONY ESCAPE AND SENTENCE AS A HABITUAL OFFENDER OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITHOUT ELIGIBILITY FOR PROBATION OR PAROLE IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO HARRISON COUNTY.**

LEE, C.J., IRVING, P.J., BARNES, ISHEE AND MAXWELL, JJ., CONCUR. CARLTON, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY LEE, C.J., BARNES AND ISHEE, JJ. ROBERTS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY GRIFFIS, P.J. RUSSELL, J., NOT

PARTICIPATING.

CARLTON, J., SPECIALLY CONCURRING:

¶25. I concur with the majority. I submit that the majority exercised great deliberative effort in fairly applying the law to the facts of this case. *See Davis v. State*, 680 So. 2d 848, 851 (Miss. 1996) (acknowledging burglary of a dwelling to constitute a crime of violence under federal sentencing guidelines); Miss. Code Ann. § 99-15-107 (Mississippi Legislature identified burglary as a crime of violence in this statute wherein the Legislature addressed ineligibility for intervention).

¶26. In applying legislatively enacted law to the facts of a case before us on appeal, courts are assisted in resolving the application of such legislation by rules of statutory construction. These rules provide that a statute or rule, if possible, is to be construed to give effect to its objective and purpose. The rule of construction *in pari materia* provides that sections of the law which relate to the same subject, or closely related subject, are to be construed together. *See Tunica County v. Hampton Co. Nat'l Sur., LLC*, 27 So.3d 1128, 1133 (¶¶15-16) (Miss. 2009).

¶27. The majority opinion properly evaluates the applicable legislation construing the relevant statutes *in pari materia* together and in context. I find particularly significant the language enacted into law in section 99-15-107 as to this issue, and I respectfully submit that the judiciary is not free to disregard this enacted voice of the Legislature. In contrast, the dissent suggests that the judiciary should determine on a case-by-case basis as to whether an offense constitutes a crime of violence instead of embracing the unambiguous language of

the Legislature set forth in section 99-15-107, wherein the Legislature recognized that burglary of a dwelling constituted a crime of violence. As Judge Southwick explained in *Alston v. State*, 841 So. 2d 215, 217 (¶8) (Miss. Ct. App. 2003), the severe punishment authorized in statute by the Legislature for the crime of burglary of a dwelling reflects the nature of this crime for high risk of injury to persons. Additionally, other relevant statutes recognize the high risk of injury to persons posed by this crime. For example, the Legislature enacted the "castle doctrine," allowing residents of a dwelling, being burglarized, to defend their family and themselves in that home with deadly force, and the law allows the residents the presumption that the burglar intends to kill them upon commission of the burglary. Miss. Code Ann. § 97-3-15(e) (Rev. 2006).[10]

¶28. The Legislature spoke and specifically identified burglary of a dwelling as a crime of violence in the intervention eligibility statute, section 99-15-107, referenced previously herein. The Legislature last amended this statute in 2008. The Mississippi Supreme Court provided its opinion in *Davis*, 680 So. 2d at 851, in 1996, wherein the court acknowledged that burglary of a dwelling constituted a crime of violence under the federal guidelines when it addressed the status of aggravated assault as a crime of violence. *See also United States v. Fry*, 51 F.3d 543 (5th Cir. 1995) (quoting U.S.S.G. § 4B1.2(1)). The Legislature allowed the 1996 judicial interpretation set forth in *Davis* to stand not only without any legislative correction, but with specific language in the statute unambiguously recognizing burglary of

[10] These statutes (sections 97-3-15 and 99-15-107) should be construed *in pari materia*.

a dwelling as a crime of violence. We are not faced with legislative silence in this case. Section 99-15-107, identifying burglary of a dwelling as a crime of violence, was first enacted in 1983 and reenacted in 1987, and last amended in 2008. I agree with the dissent that the judiciary should follow the law as enacted by the Legislature, and in so doing, the judiciary is not free to disregard the legislative determination that the nature of this crime constitutes a crime of violence.[11]

¶29. Again, policy rests soundly in the arms of the legislature, and if the punishment imposed falls within that punishment authorized by statute for the offense, we as the judiciary are not at liberty to ignore such authorized punishment.[12] The law requires no case-by-case basis proof of injury to establish burglary of a dwelling as a crimes of violence. However, as stated, in *Davis*, 680 So. 2d at 851, the supreme court recognized that:

> Federal sentencing guidelines . . . define "crime of violence" as "any offense under federal or state law punishable by imprisonment for a term exceeding one year that – (I) has as an element the use, attempted use, or threatened use of physical force against the person of another . . ." and include within that definition "murder, manslaughter, kidnaping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling."

The *Davis* court then embraced that federal definition in finding that aggravated assault fell within the purview of a crime of violence. *Id*.

¶30. Past precedents involving other offenses show that neither the judiciary nor the

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[11] *See* Miss. Code Ann. §§ 99-15-107; 97-17-23; 97-3-15.

[12] *Solem v. Helm*, 463 U.S. 277, 292 (1983); *Alston*, 841 So. 2d at 217 (¶8).

Legislature required an actual injury to occur before a crime is recognized as a crime of violence due to its high risk of injury. In *Trigg v. State*, 759 So. 2d 448, 450 (¶¶3-4) (Miss. Ct. App. 2000), Kyle Trigg drugged his wife, rendering her unconscious, and made a videotape of himself orally and digitally penetrating her vagina while she was unconscious. This Court explained that "the more serious offense of sexual battery does not include all of the elements of simple assault," and noted that the element of bodily injury is missing from the statutory definition of sexual battery. *Id*. at 452 (¶9). *See also Wallace v. State*, 10 So. 3d 913, 918 (¶12) (Miss. 2009) (Supreme court pointed to this Court's analysis in *Trigg*, finding that simple assault fails to constitute a lesser-included offense of sexual battery of a minor.). In *Holloway v. State*, 914 So. 2d 817, 820-21 (¶¶10-14) (Miss. Ct. App. 2005), this Court similarly held that the circuit court properly sentenced James Holloway as a habitual offender under Mississippi Code Annotated section 99-19-83 (Rev. 2000), which requires that any one of the prior felony convictions shall have been a crime of violence. In *Holloway*, the defendant possessed a prior conviction for oral sexual battery, a crime that involved no evidentiary requirement to show bodily injury as an element of the crime.[13]

¶31. Additionally, legislative enactments and judicial precedent clearly allow for the amendment of an indictment to include habitual-offender status for sentencing. In *Rayborn v. State*, 961 So. 2d 70, 72 (¶7) (Miss. Ct. App. 2007), this Court held that the State could

[13] To prove burglary of a dwelling, section 97-17-23(1) (Supp. 2010) requires that the dwelling must be "of another" and the person entering without consent must possess intent to commit a crime therein the burglarized dwelling. *See Bogard v. State*, 624 So. 2d 1313, 1319 (Miss. 1993).

properly amend an indictment two days prior to trial for burglary of a dwelling to charge the defendant, Jerry Rayborn, as a habitual offender. The *Rayborn* Court found that the amendment did not affect the substance of the crime charged, but only the sentencing; thus, Rayborn's defense to the burglary of a dwelling charge was unaffected by the amendment. *Id. See also* URCCC 7.09.

¶32. Thus, I specially concur with the majority opinion.

LEE, C.J., BARNES AND ISHEE, JJ., JOIN THIS OPINION.

ROBERTS, J., DISSENTING:

¶33. The majority affirms the decision of the Harrison County Circuit Court based on the majority's judicial declaration that burglary of a dwelling in Mississippi, be it inhabited or uninhabited, is "per se" a crime of violence as a matter of law under all circumstances. With the utmost respect for the majority, I believe that this is an issue best left to the Legislature. I find myself unable to take such a giant step absent legislative determination or supreme court guidance on the subject. The outcome is the difference between serving five years in prison versus dying there.[14] I agree with the majority that this is an issue of first impression in Mississippi jurisprudence. In this dissent, I propose a procedure that I believe protects the State's interest in sentencing a habitual offender to life in prison because he or she has a true history of committing prior "violent" felonies, yet also protects a defendant's interest in

[14] I acknowledge that our decision may have little or no effect on Brown himself. Brown has been sentenced to life without parole in the custody of the Mississippi Department of Corrections for a capital murder committed in the Second Judicial District of Harrison County, Mississippi which is unrelated to his present appeal.

avoiding a life sentence when the State has failed to demonstrate that a defendant has such a history.

¶34. The majority relies on this Court's finding in *Kroger v. State*, 919 So. 2d 1058, 1061 (¶22) (Miss. Ct. App. 2005), for the proposition that Mississippi Code Annotated section 99-19-83 (Rev. 2007), which establishes enhanced sentencing for habitual offenders, should be construed in conjunction with Mississippi Code Annotated section 99-15-107 (Rev. 2007), which lists felony offenses that disqualify an accused from participation in the pretrial diversion program and includes burglary of a dwelling as a disqualifying violent felony. "Under the doctrine of *in pari materia*, each section of the Code dealing with the same or similar subject matter must be read together so that the legislative intent can be determined." *James v. State*, 731 So. 2d 1135, 1138 (¶11) (Miss. 1999). "*In pari materia* is to be invoked when the statute is ambiguous or doubtful and not where language of the statute is clear." *Id*. Respectfully, I do not agree that section 99-15-107 and section 99-19-83 fall under the doctrine of *in pari materia*. Section 99-15-107 appears as part of the "pretrial intervention program" discussed in the Pretrial Intervention Act as set forth in Mississippi Code Annotated section 99-15-101 through section 99-15-127. Section 99-15-107 states that certain people are ineligible to participate in a pretrial intervention program. Upon successful completion of a pretrial intervention program, an accused may receive a "noncriminal disposition of the charge or charges pending against the offender." Miss. Code Ann. § 99-15-123(1) (Supp. 2010). "'Noncriminal disposition' means the dismissal of a criminal charge without prejudice to the [S]tate to reinstate criminal proceedings on motion

of the district attorney." Miss. Code Ann. § 99-15-103(b) (Rev. 2007). On the other hand, section 99-19-83 appears under the chapter title "sentencing of habitual offenders." Miss. Code Ann. § 99-19-81 to -87 (Rev. 2007). Section 99-19-83 involves sentencing of a convicted felony offender who served at least one year for two prior felonies arising from separate incidents – one of which must be classified as a "violent" offense. A statute on a pretrial diversion program that results in an offender having a charge dismissed without prejudice does not pertain to the same subject matter as a statute that addresses the sentencing of violent recidivists. Furthermore, section 99-19-83 is not ambiguous as to whether burglary is a per se violent offense. Section 99-19-83 is simply silent as to whether burglary qualifies as a per se violent offense. Silence does not equate to ambiguity. Because section 99-15-107 does not pertain to the same or similar subject matter as section 99-19-83, and section 99-19-83 is silent rather than ambiguous as to whether burglary is a per se violent offense, the doctrine of *in pari materia* does not apply.

¶35. The majority also finds that the burglary of a dwelling raises a significant possibility of violence, making burglary of a dwelling a per se crime of violence. I believe that a burglary of a dwelling may well involve "violence," use of force, or the threat of the use of force toward another. Likewise, I believe it may not. It is a fact-sensitive inquiry incapable, I submit, of easy or convenient classification. Resolution of the conundrum requires a fact-finding process.

¶36. I believe an example is the best illustrator of this conflict. Assume that defendants A and B are both charged as section 99-19-83 violent habitual offenders. In both cases, the

State relied on prior felony burglary convictions to support the "crime of violence" element of 99-19-83. Defendant A had previously pled guilty to burglary of a dwelling. The underlying facts reveal that, at the time of the crime, A was a nineteen-year-old drug addict. A's grandmother, who lived alone in her apartment at the time, left home on a two-week vacation, making certain to lock her door because of her concern about her grandson's propensity for theft. Knowing of his grandmother's absence, and making certain that no one was in his grandmother's apartment, A used his secret duplicate key to open the door, went inside, and took some of his grandmother's jewelry. He later pled guilty to burglary of a dwelling based on these undisputed facts.

¶37. Defendant B, however, was convicted by a jury of burglary of a building *other than a dwelling* in violation of Mississippi Code Annotated section 97-17-33 (Rev. 2006). The underlying facts also established B to be a nineteen-year-old drug addict. B had planned to burglarize the local "Stop and Shop" convenience store. He carried a pistol in his pocket "just in case." Around midnight, he arrived at the store and found the front glass door locked for the night. The cashier was standing behind the cash register counting the day's receipts. After observing the cashier walking into the restroom, B kicked in the glass door, entered the store, stole the cash box, and made his getaway before the cashier could take any action.

¶38. The majority would classify Defendant A as a violent habitual offender and affirm A's sentence of life without parole. At the same time, the majority would, presumptively, not classify Defendant B as a violent habitual offender because B did not burglarize a dwelling. I detect no logic in such a classification scheme.

¶39. The facts at issue in this case are simple and undisputed. Brown was found guilty of felony escape. The maximum punishment for felony escape is five years' imprisonment. Brown was initially charged as a section 99-19-81 non-violent habitual offender. The State moved to amend the indictment to charge Brown as a section 99-19-83 violent habitual. Resolution of the issue troubled the trial judge since no determination by the Legislature or our supreme court had ever classified burglary of a dwelling as a violent crime. He even granted the parties time to petition the supreme court for interlocutory appeal to resolve the issue. The record provides no resolution of this concern.

¶40. Brown was sentenced as a habitual offender under section 99-19-83 to life in the custody of the Mississippi Department of Corrections without eligibility for probation or parole. In finding Brown a habitual offender under section 99-19-83, the trial court relied upon Brown's previous conviction for two counts of burglary of a dwelling, which the trial court found to be a violent crime under the meaning of section 99-19-83. The only factual evidence in the record shedding light on the nature of Brown's previous burglaries is a brief statement by Brown that was included in Brown's "pen-pack" in which Brown stated that he sat in a car while his associate performed the burglary. It appears that the dwelling was mostly likely an uninhabited one.

¶41. The precise issue before this Court is whether burglary of an unoccupied or occupied dwelling is, as a matter of law, a crime of violence under section 99-19-83. As the majority discusses, there is no definition of the term "crime of violence" found in section 99-19-83, and neither this Court nor the Mississippi Supreme Court have addressed this issue. There

is no definitive indication from the Legislature that burglary of a dwelling is a crime of violence for habitual-status sentencing purposes.

¶42. Section 99-19-83 provides as follows:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

This statute requires that the State prove certain facts beyond a reasonable doubt at a bifurcated hearing. The procedural vehicle utilized is Rule 11.03 of the Uniform Rules of Circuit and County Court. As indicated above, to justify a life-without-parole sentencing enhancement, section 99-19-83 requires that the State prove the following beyond a reasonable doubt during the sentencing hearing:

> 1. Brown had been convicted twice previously of any felonies or federal crimes;
>
> 2. The prior crimes were separately brought and arose out of separate incidents at different times;
>
> 3. Brown had been sentenced to and actually served one year or more for each of the two previous felonies; and
>
> 4. That at least one of the prior felonies was a crime of "violence."

¶43. To meet the last element, the State relied upon Brown's "pen pack" showing convictions of two counts of burglary of a dwelling. Such documentary proof is the norm in this type of hearing. Brown pled guilty to both counts and was sentenced on May 14,

1996, under Mississippi Code Annotated section 97-17-19 (Repealed 1996), which did not require any form of force or violence against a person as an element of the offense. The repealed burglary-of-a-dwelling statute appeared under Chapter 17 of our criminal code entitled "Crimes Against Property," not Chapter 3 – "Crimes Against Persons." Section 97-17-19 stated at the time: "Every person who shall be convicted of breaking and entering any dwelling house, in the day or night, with intent to commit a crime, shall be guilty of burglary, and be imprisoned in the penitentiary not more than ten years."

¶44. The majority reached its conclusion that Brown's burglary of a dwelling was a violent crime without any review of the facts of Brown's previous act. In considering whether Brown's previous conviction included the use of force or an element of violence, or threat thereof, to another, I submit the underlying facts simply must be considered. The same is true of innumerable other felonies that can be committed both with or without force or violence, or threat thereof, to another, including as examples: abuse of a vulnerable adult in violation of Mississippi Code Annotated section 43-47-19 (Rev. 2009), extortion in violation of Mississippi Code Annotated section 97-3-82 (Rev. 2006), prohibited sexual activity between a law enforcement or correctional personnel and prisoners in violation of Mississippi Code Annotated section 97-3-104 (Rev. 2006), felony exploitation of children in violation of Mississippi Code Annotated section 97-5-33 (Rev. 2006), attempting to intimidate a witness, juror, judge or attorney in violation of Mississippi Code Annotated section 97-9-55 (Rev. 2006), and felony fleeing or eluding a law-enforcement officer in violation of Mississippi Code Annotated section 97-9-72 (Rev. 2006), to name a few.

Without a determination of the involvement of, threat of, or prospect of violence to another as a factual matter, a conclusion that a crime is a "crime of violence" is, in my opinion, quite arbitrary.

¶45. There is precedent that supports distinguishing violent from non-violent instances of a crime. *United States v. Fry*, 51 F.3d 543, 546 (5th Cir. 1995), cited by the majority, refers to the definition of "crime of violence" in the federal sentencing guidelines:

> any offense under federal or state law . . . that has as an element the use, attempted use, or threatened use of physical force against the person of another, or is burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

I believe federal statutory law on sentencing guidelines is helpful, but it is not controlling. The clear implication is that the federal sentencing guidelines presume that physical force, the threat of physical force, or actions presenting a serious risk of physical injury to another accompany any burglary of a dwelling. But if there is no such use of force or risk of physical injury, then whether or not an act constitutes a crime of violence is open to question. The majority contends that the act of breaking by definition connotes force, which is synonymous with violence. But our supreme court found to the contrary in *McLamb v. State*, 456 So. 2d 743, 746 (Miss. 1984) when it declared that felonious "breaking and entering" is not a crime of violence for the purposes of section 99-19-83. The majority notes in its discussion of *McLamb* that the supreme court did not consider the underlying facts of the subject offense in reaching its decision. Similarly, the majority does not consider the underlying facts of the subject offense here. The majority also includes a discussion by the Mississippi Supreme

Court addressing the definition of the term "crime of violence" taken from *McQueen v. State*, 473 So. 2d 971, 972 (Miss. 1985). Each treatment of the term "violence" included by the majority includes the use of force. Furthermore, the *McQueen* court noted that, in *People v. Flummerfelt*, 313 P.2d 912, 913 (Cal. Dist. Ct. App. 1957), the California District Court of Appeals had held that: "The intent to commit a violent injury on the person of another may be implied from the act; it is a question for the trier of fact." *McQueen*, 473 So. 2d at 973. The *McQueen* court also quoted *Hunter v. Allen*, 286 F. Supp. 830, 836 (D. Ga. 1968) (reversed on other grounds by *Embry v. Allen*, 401 U.S. 989 (1971)), in which the United States District Court for the Northern District of Georgia held that: "if particular conduct is disputed as violent, it is a proper matter to raise for determination in a trial in that case." *McQueen*, 473 So. 2d at 973. There has been no showing in the record of any force or violence exercised by Brown in the course of his previous burglary of a dwelling. As noted above, the only evidence in the record addressing the underlying facts of that crime indicates that he did not engage in any use of force.

¶46. While determining whether Brown's previous burglary of a dwelling is a violent crime is an issue that should be properly determined by a trier of fact, it is settled law that a defendant is not entitled to a trial-by-jury on the question of whether he is a habitual offender. *Keyes v. State*, 549 So. 2d 949, 951 (Miss. 1989). Such is consistent with Rule 11.03(3) which declares: "If the defendant is convicted or enters a plea of guilty on the principal charge, a hearing before the court *without a jury* will then be conducted on the previous convictions." (Emphasis added). URCCC Rule 11.03(3). However, after *Keyes*

was decided and after the adoption of the Uniform Rules of Circuit and County Court on May 1, 1995, the United States Supreme Court in discussing the parameters of the 6th Amendment's right to trial-by-jury held that "other than the fact of a prior conviction, any fact increasing the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Charles C. Apprendi Jr. pled guilty, but his sentence was enhanced beyond the maximum possible punishment for the offense that he pled to by a fact-finding trial judge in a bifurcated proceeding, in which a trial judge found that Apprendi's crime was motivated by racial hatred. *Id*. at 470-471. Similar to the racial motivation of Apprendi's act, the factual nature of Brown's particular burglary of a dwelling as violent or non-violent is a separate question from the fact of whether or not Brown has previous felony convictions. Brown confessed that he had two prior felony convictions. The 6th Amendment trial-by-jury issue addressed in *Apprendi* is not, however, ripe in Brown's case. Therefore, I see no need to address it today. Such questions are best left for future resolution in a controversy directly speaking to those issues.

¶47. I cannot find sufficient statutory guidance or legal precedent in this case to empower this Court to hold that burglary of a dwelling is per se a crime of violence. Further, I cannot support the majority's finding that the reference to burglary of a dwelling as a crime of violence in section 99-15-107 is sufficient to authorize this Court to find that Brown's previous crime was a crime of violence with no evidence of such in the record. I certainly recognize and accept that our supreme court has declared certain felonies to categorically be

crimes of violence for the purposes of section 99-19-83, including: *Magee v. State*, 542 So. 2d 228, 235 (Miss. 1989) (holding that robbery is a crime of violence); *Ashley v. State*, 538 So. 2d 1181, 1184-85 (Miss. 1989) (holding that attempted robbery is a crime of violence); *Hughes v. State*, 892 So. 2d 203, 211 (¶19) (Miss. 2004) (holding that rape, other than statutory rape, i.e., nonforcible, nonviolent sex, is a crime of violence); *King v. State*, 527 So. 2d 641, 646 (Miss. 1988) (holding that armed robbery is a crime of violence). The statutory definitions and essential elements of those crimes necessarily include force, violence, or the threat thereof to another person. Where a crime can be committed both with or without the involvement of violence, absent definitive guidance from the Legislature, a trier of fact should determine whether or not a previous conviction involved violence in a separate hearing following conviction.

¶48. With utmost respect for the author of the specially concurring opinion, the appeal in *Holloway v. State*, 914 So. 2d 817 (Miss. Ct. App. 2005) did not address the issue of whether oral sexual battery sufficiently qualified as a violent offense. James Holloway had been convicted of armed robbery and sentenced to life in prison as a habitual offender pursuant to section 99-19-83. *Id*. at 818-19 (¶3). On appeal, Holloway argued that his counsel was ineffective because he did not object to the sufficiency of the proof of past convictions in the habitual-offender hearing. *Id*. at 820 (¶10). According to Holloway, "his trial counsel should have objected to the evidence presented by the State as insufficient to prove beyond a reasonable doubt that he had been convicted of oral sexual battery *and served a sentence of greater than one year*." *Id*. at (¶11) (emphasis added). This Court held that a "certified copy

of Holloway's conviction in Louisiana and the testimony provided by [his probation officer] proved beyond a reasonable doubt that Holloway was convicted of a crime in Louisiana and served a term of greater than one year." *Id*. at 821 (¶14). Whether his underlying offense qualified as a "crime of violence" was *never* at issue in *Holloway*.

¶49. What I propose is not an "Earth shattering" new requirement. A bifurcated sentencing hearing is already required whenever the State seeks to have a convicted felon sentenced as a habitual offender under 99-19-81 or 99-19-83. Often, the State presents sworn testimony from witnesses as well as documentary evidence to prove the four requirements of 99-19-83 life sentencing. When a prior felony has not been declared by the supreme court to be per se violent and no definitive legislative determination exists, I would simply require that evidence of the use, attempted use, or threatened use of force against the person of another be presented by the State. By way of example, if the State could prove a defendant's prior conviction for burglary of a building other than a dwelling involved the attempted, threatened, or actual use of force against another person, then it may proceed under section 99-19-83.

¶50. As to Brown, because a new sentencing hearing on the same merits speaking to section 99-19-83 would give the State a "second bite at the apple" at a life sentence and would constitute double jeopardy, I would reverse and remand this case for the trial court to give Brown a five-year sentence without hope of probation or parole in accordance with section 99-19-81. *See Ellis v. State*, 520 So. 2d 495, 495 (Miss. 1988). In future habitual-offender sentencing proceedings that may include prior felonies with an element of violence,

but are not per se crimes of violence, I would require a post-conviction factual determination by a fact-finder as to whether a defendant's previous crime constitutes a crime of violence, providing the State and the defense with an opportunity to present evidence on the issue before the trier of fact. Then, and only then, can we truly say that a defendant is a prior violent habitual offender and justify his placement in prison for the remainder of his or her life. Because the majority affirms Brown's sentence, I respectfully dissent.

GRIFFIS, P.J., JOINS THIS OPINION.