IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CT-00352-SCT

MARK KEE BROWN

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	02/02/2010
TRIAL JUDGE:	HON. ROGER T. CLARK
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: HUNTER NOLAN AIKENS LESLIE S. LEE
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JOHN R. HENRY, JR. SCOTT STUART
DISTRICT ATTORNEY:	CONO A. CARANNA, II
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	THE JUDGMENT OF THE COURT OF APPEALS IS REVERSED. THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT IS AFFIRMED IN PART, VACATED AND REMANDED IN PART - 12/13/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

DICKINSON, PRESIDING JUSTICE, FOR THE COURT:

¶1. A trial judge held that a prior conviction for burglary satisfied the violent-crime requirement for habitual-offender status, even though the State had produced no evidence that the burglary involved violence. Because burglary is not – as the trial court held – a

crime against the person, and not – as the Court of Appeals ("COA") held – *per se* a crime of violence, we reverse.

BACKGROUND FACTS AND PROCEEDINGS

¶2. The Harrison County grand jury indicted Mark Kee Brown for felony escape, and as a habitual offender under Mississippi Code Section 99-19-81.[1] The State later moved the trial court to amend the grand jury's indictment to charge Brown as a habitual offender under Section 99-19-83 – a statute that requires a life sentence for defendants with two previous felony convictions, one of which was a "*crime of violence*."[2]

¶3. Although Brown did not challenge the trial judge's authority to amend the grand jury's indictment, he did object to the State's assertion that his burglary conviction was a crime of violence. The only evidence produced by the State to satisfy its burden of proving a crime of violence was Brown's burglary indictment and guilty plea, along with a document that appeared to present Brown's statement that he "entered [the house] and stole TVs, VCR and jewelry valued at approximately $1,500.00."

¶4. The trial judge granted the State's motion to amend the grand jury's indictment; the jury convicted him of felony escape; and the trial judge sentenced him to life in prison without probation, parole, or early release.

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[1]Miss. Code Ann. § 99-19-81 (Rev. 2007).

[2]Miss. Code Ann. § 99-19-83 (Rev. 2007) (emphasis added).

¶5. On appeal, Brown's only issue is whether the trial court erred by automatically considering the burglary conviction a violent crime, thus sentencing him under Section 99-19-83.[3] The COA affirmed the trial court, and we granted Brown's petition for a writ of certiorari.

ANALYSIS

¶6. Because the issue before us is a question of law, we employ a de novo standard of review,[4] and we interpret statutes according to their plain meaning.[5]

This Court's jurisprudence requires strict construction of criminal statutes in favor of the accused.

¶7. A principle deeply imbedded in our law requires us to construe criminal statutes strictly, resolving all doubts and ambiguities in favor of the accused.[6] Stated in the context of the habitual-offender statute before us today, we will not place a "violent crime" label on a crime where there was no proof of a violent act, unless the statute itself – or some other provision of law (such as the definitions within the chapter that include the statute) – clearly and unambiguously requires us to do so.

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[3] ***Brown v. State***, No. 2010-KA00352-COA, 2011 WL 2449291 (Miss. Ct. App. Mar. 27, 2012).

[4] ***Tipton v. State***, 41 So. 3d 679, 682 (Miss. 2010) (quoting ***Arceo v. Tolliver***, 19 So. 3d 67, 70 (Miss. 2009)).

[5] ***City of Natchez v. Sullivan***, 612 So. 2d 1087, 1089 (Miss. 1992).

[6] *See, e.g.*, ***Coleman v. State***, 947 So. 2d 878, 881 (Miss. 2006); ***Watts v. State***, 733 So. 2d 214, 240 (Miss. 1999); ***McLamb v. State***, 456 So. 2d 743, 745 (Miss. 1984); ***State v. Russell***, 358 So. 2d 409 (Miss. 1978); ***Carter v. State***, 334 So. 2d 376, 412 (Miss. 1976); ***Terry v. State***, 172 Miss. 303, 160 So. 574, 574 (1944).

¶8. In favorably addressing this principle, the United States Supreme Court stated that it "reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited."[7]

Burglary of a dwelling is not a crime of violence under Section 99-19-83.

¶9. This Court has already decided that breaking and entering is not a crime of violence. Twenty-eight years ago, in ***McLamb v. State***, this Court addressed the "crime of violence" requirement under Section 99-19-83, and refused to consider breaking and entering as a "crime of violence" under the same statute before us today.[8] The defendant, McLamb, was being sentenced for armed robbery. His two prior convictions were for larceny and breaking and entering. Despite McLamb's prior conviction for breaking and entering, this Court reversed McLamb's sentence as a habitual offender "[b]ecause McLamb had not been convicted of any prior violent felonies."[9]

¶10. While we do not view legislative acquiescence as an absolute indication of the Legislature's intent, we note that this Court's holding in ***McLamb*** has remained on the books for twenty-eight years without any legislative amendment to Section 99-19-83.

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[7] ***Dunn v. United States***, 442 U.S. 100, 112, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979) (citations omitted).

[8] ***McLamb v. State***, 456 So. 2d 743, 745 (Miss. 1984).

[9] ***Id.*** at 746.

¶11. In the case before us today, Brown argues that burglary of a dwelling is not a "crime of violence" within the meaning of Section 99-19-83, which provides:

> Every person convicted in this state of a felony who shall have been convicted ***twice previously*** of any felony . . . 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.[10]

¶12. No statute or case from this Court states that burglary of a dwelling satisfies the "crime of violence" requirement of this statute. At the time of Brown's burglary charge, Section 97-17-19 (which has since been repealed) set out the following elements for burglary of a dwelling:

> 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.[11]

¶13. As already stated above in our discussion of ***McLamb***, the "breaking and entering" requirement for burglary does not per se require an act of violence. In holding that Brown's burglary conviction was a crime of violence, the trial judge stated:

> [I]t is this court's opinion that burglary of a dwelling house does in fact constitute a violent crime because this is a crime against someone who is living in their castle, so to speak. And when somebody burglarizes that castle, I think that is an absolute threat to the inhabitants of the house, and I feel that it constitutes a crime of violence under [Section] 99-19-83.

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[10]Miss. Code Ann. § 99-19-83 (Rev. 2007) (emphasis added).

[11]Miss. Code Ann. § 97-17-19 (1996) (emphasis added), *repealed by* Laws 1996, Ch. 519, § 2 (Apr. 11, 1996).

¶14. This statement reflects the trial judge's view – and the view expressed by the dissent – that crimes of violence under Section 99-19-83 may include crimes that do not actually involve violence or violent acts, so long as the *potential* or *threat* of *possible* violence exists. Under this expansive view, using a credit card to slip a lock and commit a burglary would be a crime of violence, even if the inhabitants were in China and no violence took place. Any amendment of the law to bring crimes of *potential* violence under the statute must be accomplished by the Legislature, not by judicial legislation from this Court.

¶15. In affirming the trial court, the COA – after delving into what it considered to be the legislative history and intent of the burglary statute – held that burglary was a *per se* crime of violence. The COA reasoned that common-law burglary was an offense against habitation rather than against property.[12] But Section 97-17-19 (now repealed), and its successor, Section 97-17-23, were both codified under Chapter 17 of the Mississippi Code, a chapter that includes only crimes against property. Crimes against persons are codified under Chapter 3.

¶16. The State points to Section 99-15-107[13] – a statute that establishes the requirements for participation in an intervention program – and argues that, because that section expressly excludes defendants charged with what that statute defines as "crime[s] of violence" for

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[12] *See* ***Robinson v. State***, 364 So. 2d 1131, 1133 (Miss. 1978).

[13]Miss. Code Ann. § 99-15-107 (Rev. 2011).

purposes of the intervention program, burglary of a dwelling house must also be considered a crime of violence for purposes of Section 99-15-107.

¶17. But Section 99-15-107 is unrelated to today's case. We decline to hold that, because burglary of a dwelling house is considered a crime of violence for purposes of qualifying for the intervention program, it also qualifies as a crime of violence for purposes of the habitual-offender statutes. The Legislature, itself, has not always used the same list of crimes it considers to be violent. For instance, the statute setting out the requirements for parole eligibility includes several "violent" crimes that are not listed as violent crimes under the intervention-program statute, including arson.[14]

¶18. The Legislature has never enacted a general "violent-crime statute," but rather has used different lists of violent crimes for purposes of various statutes. So we must reject the State's argument on this point. And for the same reasons, we must reject the State's argument that we should look to federal law to determine which state crimes qualify as violent. The State bore the burden of proving beyond a reasonable doubt that Brown's prior convictions fell within Section 99-19-83,[15] and that his burglary conviction was a crime of violence.

Absent a legislative definition, crimes that involve violence are crimes of violence.

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[14]Miss. Code Ann. § 47-7-3(1)(h) (Rev. 2011).

[15]***Gilbert v. State***, 48 So. 3d 516, 524-25 (Miss. 2010).

¶19. The fact that the Legislature did not choose to provide a list of "crimes of violence" that apply under Section 99-19-83 does not render the statute ineffective. This Court has recognized many crimes that actually involve violence as "crimes of violence" under Section 99-19-83 – for instance, armed robbery,[16] robbery,[17] and attempted robbery.[18] Also, we have recognized rape as a violent crime under a different statute that addresses aggravating factors for death-penalty sentencing.[19] And we have recognized aggravated assault as a violent crime in the bail-amount context.[20]

¶20. But as Judge Roberts aptly noted in his dissent to the COA's majority opinion, the essential elements to these crimes necessarily involve violence – or at least the threat of imminent violence to another – to accomplish the crime.[21] The statutory language for robbery, for example, requires that the defendant take personal property "by violence" or "by putting such person in fear of some immediate injury to his person."[22] Thus, the statute's elements necessarily involve the "use of physical force . . . unlawfully exercised with the

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[16]***King v. State***, 527 So. 2d 641, 646 (Miss. 1988).

[17]***Magee v. State***, 542 So. 2d 228, 235 (Miss. 1989).

[18]***Ashley v. State***, 538 So. 2d 1181, 1184-85 (Miss. 1989).

[19]***Hughes v. State***, 892 So. 2d 203, 211 (Miss. 2004).

[20]***Bumphis v. State***, 405 So. 2d 116, 118 (Miss. 1981).

[21]***Brown***, 2011 WL 2449291, at *12 (Roberts, J., dissenting).

[22]Miss. Code Ann. § 97-3-73 (Rev. 2006).

intent to harm."[23] Here, the dissent's view would classify burglary as a crime of violence, even where the victim was unaware of the burglary. But burglary of a dwelling need not – and often does not – involve acts or threats of violence. Perpetrators often (understandably) choose to burglarize when no one is at home.

¶21. We hold that burglary of a dwelling is not a *per se* "crime of violence" under Section 99-19-83. The Legislature certainly is free to enact a statute that makes burglary of a dwelling a *per se* crime of violence. But it has not chosen to do so, and we decline to assume that it intended to do so. Absent such a statute, or proof of an actual act of violence during the commission of a burglary, we hold that burglary of a dwelling is not a violent crime for purposes of Section 99-19-83.

¶22. In its attempt to squeeze burglary into the definition of "crime of violence" under Section 99-19-83, the dissent turns to the dictionaries and concludes that "the common and ordinary meaning of crime of violence is a crime that involves the threatened use of, or risk of use of, *physical force* against a person or property of another so as to violate, damage, injure, or abuse."[24] And all can agree, according to the dissent, that burglary requires some measure of force. But one popular dictionary defines "force" as "[t]he capacity to do work

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[23]*See* Black's Law Dictionary 1705 (9th ed. 2009).

[24]Dis. Op. ¶ 37.

or cause *physical change*; energy, strength, or active power."[25] This dictionary definition would exclude little human activity.

¶23. Additionally, we find it would be inappropriate to read Sections 99-19-83 *in pari materia* with Sections 47-7-3(1)(h) and 99-15-107, Mississippi's parole-eligibility and intervention-program statutes. When the Legislature enacts multiple statutes *in pari materia* – that is, upon the same subject – this Court generally will read the statutes together to interpret them harmoniously.[26]

¶24. But the pretrial-intervention and parole-eligibility statutes are unrelated to Section 99-19-83, which addresses habitual-offender status. And we have declined to apply statutes *in pari materia* , even when they involve similar statutory schemes, but regulate separate areas within the criminal-justice system.[27] For instance, in ***James v. State***, we declined to read two statutes *in pari materia* where one statute limited the carrying of concealed weapons and the other the possession of firearms by convicted felons.[28] And the intervention-program statutes and the parole-eligibility statutes do not even use the same list of crimes when defining what constitutes a "crime of violence."

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[25] The American Heritage Dictionary of the English Language 686 (4th ed. 2000) (emphasis added).

[26] ***Leasy v. Zollicoffer***, 389 So. 2d 1378, 1380 (Miss. 1980).

[27] ***James v. State***, 731 So. 2d 1135, 1137-38 (Miss. 1999).

[28] ***Id***. at 1138.

¶25. We are not – as the dissent suggests – grafting an exception to the *in pari materia* rule of construction; we instead are following precedent. The statutes cited by the dissent are not *in pari materia* – as explained in ***James v. State***. And the cases the dissent cites do not suggest otherwise.[29]

¶26. In ***Roberts v. Mississippi Republican Party State Executive Committee***, for example, this Court compared Mississippi Code Section 25-61-7 with Section 45-1-21, as both sections prescribed the amount a public body could recover for furnishing records.[30] Because both statutes applied to the department from which the records were sought, and because the statues – most importantly – prescribed the same action, this Court appropriately construed the statutes together. Here, however, only Section 99-19-83 applies to Brown; and only Section 99-19-83 involves habitual-offender sentencing.

¶27. We must reject the dissent's view, which leads to an absurd result: that every crime that involves, or potentially involves, force – no matter how slight – necessarily constitutes a crime of violence for purposes of Section 99-19-83.[31] As discussed earlier, ***McLamb v. State*** already determined this definition insufficient. Instead, we apply the longstanding principle which requires us to construe penal statutes strictly against the State, and in favor of the accused. We therefore reverse and remand for sentencing consistent with this opinion.

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[29]Dis. Op. ¶ 3.

[30]***Roberts v. Miss. Republican Party State Executive Comm.***, 465 So. 2d 1050, 1052 (Miss. 1985).

[31]*E.g.*, ***Anderson v. State Farm Mut. Auto Ins. Co.***, 555 So. 2d 733, 735 (Miss. 1990); ***Miss. Ins. Guar. Ass'n v. Gandy***, 289 So. 2d 677, 682 (Miss. 1973).

CONCLUSION

¶28. Burglary of a dwelling is not per se a crime of violence for purposes of habitual-offender status under Section 99-19-83. In the absence of a legislative definition of "crime of violence" under Section 99-19-83, the State must present some proof that the crime involved violence. The State presented no evidence that Brown's burglary involved any violence. We therefore reverse the COA's decision, affirm the conviction of felony escape, vacate the sentence rendered by the Harrison County Circuit Court, and remand to the trial court for sentencing consistent with this opinion.

¶29. **THE JUDGMENT OF THE COURT OF APPEALS IS REVERSED. THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT OF CONVICTION OF FELONY ESCAPE IS AFFIRMED. THE SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AS A HABITUAL OFFENDER WITHOUT ELIGIBILITY FOR PROBATION OR PAROLE IS VACATED. THE CASE IS REMANDED TO THE HARRISON COUNTY CIRCUIT COURT FOR RESENTENCING.**

CARLSON, P.J., LAMAR, KITCHENS AND KING, JJ., CONCUR. RANDOLPH, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY CHANDLER AND PIERCE, JJ. WALLER, C.J., NOT PARTICIPATING.

RANDOLPH, JUSTICE, DISSENTING:

¶30. The right of individuals to a safe and secure home, free of interference and intrusions by the government, is recognized and protected by the federal and state Constitutions and state criminal statutes. The fourth amendment to the U.S. Constitution recognizes individuals' rights to be free of governmental interference in their own homes. U.S. Const. amend. IV ("[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."). Criminal

statutes – such as the burglary statute under which Brown was convicted – extend this protection to be free of intrusion and invasion by fellow citizens. Miss. Code Ann. § 97-17-19 (Rev. 1996). Today's decision rejecting home burglaries as crimes of violence for state sentence-enhancement purposes weakens this fundamental protection and flies in the face of all citizens' right to be safe and secure from intrusion and invasion by recidivists.[32]

¶31. The majority is correct that Section 99-19-83 does not define "crime of violence." Thus, we must look elsewhere. The majority suggests a new rule that the only other provisions of law that inform the meaning of a statute are those contained within the same chapter that includes the subject statute, while spurning all other statutes addressing the same subject or matter. (Maj. Op. at ¶ 7).

¶32. The majority finds it inappropriate to read Section 99-19-83 *in pari materia* with Sections 99-15-107 and 47-7-3(1)(h), espousing that these statutes are unrelated to the matter or subject of the case before us. (Maj. Op. at ¶ 24). *In pari materia* (the same matter or subject) is a common maxim; statutes *in pari materia* are to be construed together. This maxim has been applied in numerous cases by comparing statutes not in the same chapter (as the majority suggests should be the rule), or even in the same section. Our case law dictates that, "[i]n construing statutes, **all** statutes in pari materia are taken into consideration, and the legislative intent deduced from a consideration as a whole." ***Lamar Cty. School Bd. v. Saul***,

[32]Federal sentencing guidelines identify convictions based on burglary of a dwelling under state law as crimes of violence. *See* ***United States v. Fry***, 51 F. 3d 543, 546 (5th Cir. 1995) ("'crime of violence' is defined . . . as . . . burglary of a dwelling . . .").

359 So. 2d 350, 353 (Miss. 1978) (emphasis added) (citing ***Jackson Cty. v. Worth***, 127 Miss. 813, 90 So. 588 (1921)), *quoted in* ***Roberts v. Miss. Republican Party State Executive Comm.***, 465 So. 2d 1050, 1052 (Miss. 1985) (comparing Miss. Code Ann. § 25-61-7 to Miss. Code Ann. § 45-1-21). The majority grafts a heretofore unknown exception without citation of authority for such a constrained application of the maxim. (Maj. Op. at ¶ 7).

¶33. Whether the subject or matter at issue is (1) the extent or degree of penalty or punishment for this latest crime or (2) what is a crime of violence, sections of chapters 99 and 47 resolve the issue. These sections include the penalty or punishment to be imposed for crimes of violence, of which the Legislature clearly and unequivocally has published a list including burglary of an inhabited dwelling. The Legislature has enacted laws defining crimes and, through numerous statutes, has established a broad range of penalties for their commission – ranging from no incarceration to death or life in prison without the possibility of parole. *See*, *e.g.*, Miss. Code Ann. §§ 47-7-1 to 47-7-83 (probation and parole), 99-19-1 to 99-19-401 (judgment, sentence, and execution). This range of penalties includes enhanced punishment for career criminals. *See* Miss. Code Ann. §§ 99-19-81 (maximum allowable sentence to be imposed for habitual offenders), 99-19-83 (life imprisonment for habitual offenders previously convicted of a violent crime). Within these sections, Section 99-15-107 clearly and unambiguously states that burglary of a dwelling is a crime of violence. Miss. Code Ann. § 99-15-107 (Rev. 2007) (addressing eligibility for pretrial intervention). Another section, 47-7-3, specifically excludes burglary of a dwelling from being a nonviolent crime. Miss. Code Ann. § 47-7-3(1)(h) (Rev. 2011) (addressing parole eligibility and defining

"nonviolent crime" as "a felony other than . . . burglary of an occupied dwelling . . ."). These sections – sentencing options regarding punishment – are *in pari materia* with Section 99-19-83, addressing the same subject or matter. They clearly and unequivocally relate to sentencing options within the Legislature's prerogative.[33] The analysis should end here: the Legislature unambiguously has declared that burglary of a dwelling is a crime of violence. This Court "is not free to disregard the legislative determination that the nature of this crime constitutes a crime of violence." ***Brown***, 2011 WL 2449291, at ¶ 28 (Carlton, J., specially concurring). Accordingly, the majority errs by resorting to the rule of lenity,[34] then creating another rule of construction, and, finally, declaring the Court's own definition of a crime of violence.

¶34. The rule of lenity only applies after all other attempts to determine the Legislature's intent have failed. The United States Supreme Court explained in 1820 that:

> The rule that penal laws are to be construed strictly . . . is founded on the tenderness of the law for the rights of individuals; and on the plain principle that *the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.*

United States v. Wiltberger, 18 U.S. 76, 95, 5 L. Ed. 37 (1820) (emphasis added). The U.S. Supreme Court further expounded as follows:

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[33]Appellate courts of this state have referenced other code sections to determine whether a crime is a crime of violence under Section 99-19-83. *See* ***Koger v. State***, 919 So. 2d 1058, 1061 (Miss. Ct. App. 2005) ("We . . . find it appropriate to consider those designations [of crimes of violence in Section 99-15-107] in the application of Section 99-19-83").

[34]The principle of statutory construction relied upon by the majority, clothed with the term strict construction, is the rule of lenity.

> [The rule of lenity,] as is true of any guide to statutory construction, *only serves as an aid for resolving an ambiguity; it is not to be used to beget one*. . . . The rule comes into operation at the *end* of the process of construing what Congress has expressed, *not at the beginning as an overriding consideration of being lenient to wrongdoers*. *That is not the function of the judiciary*.

Callanan v. United States, 364 U.S. 587, 596, 81 S. Ct. 321, 326, 5 L. Ed. 2d 312 (1961) (emphasis added). Put another way, the rule of lenity is applicable only where, <u>*after*</u> *the other rules of statutory interpretation have been applied*, reasonable doubt remains. ***Moskal v. United States***, 498 U.S. 103, 108, 111 S. Ct. 461, 462, 112 L. Ed. 2d 449 (1990) ("[t]he doctrine applies only to those situations in which a reasonable doubt persists . . . even after resort to [the other rules of statutory interpretation]"); *see* ***Johnson v. United States***, 529 U.S. 694, 713, 120 S. Ct. 1795, 1807, 146 L. Ed. 2d 727 (2000) ("[l]enity applies only when the equipoise of competing reasons cannot otherwise be resolved").

¶35. In Part I, paragraph 7, the majority reveals that the roots of the rule of lenity are related to notice of a crime, not punishment, for Brown should not "be forced to speculate . . . whether his conduct is prohibited. (Maj. Op. at ¶ 8). Can there be any doubt that Brown, a career criminal, knew that his conduct was prohibited, and was not forced to speculate, given that he previously had been imprisoned for the same offense, among others? In 1996, Brown was convicted of possession of a controlled substance, grand larceny, receiving stolen property, and burglaries of two separate dwellings. He was sentenced to a total of twenty-eight years. In 2001, he was convicted of jail escape and possession of a controlled substance, and was sentenced to an additional five years and six months. In 2008, Brown *again* escaped from jail. Before sentencing in this case, the trial court was informed that he

had been convicted of capital murder.[35] Brown was convicted of jail escape and received the habitual-offender sentence of which the majority relieves him today.

¶36. I turn next to Part II, paragraph 9, where the majority errs by looking to this Court's treatment of a separate crime – breaking and entering – to inform its analysis. The majority tells us that *breaking and entering* is not a crime of violence. I agree. The Legislature has not declared otherwise. Breaking and entering and burglary of a dwelling are horses of different colors, and an analysis of ***McLamb*** does nothing to enlighten the issue before us: has the Legislature declared that *burglary of a dwelling* is a crime of violence? The majority readily recognizes the Legislature had that right. (Maj. Op. at ¶ 21).

¶37. The majority then casts aside the plain meaning of the words "crime of violence," mischaracterizing the view that the term includes acts involving the potential or threat of violence as "expansive." (Maj. Op. at ¶ 14). However, such a view is firmly rooted in the ordinary meaning of the words. Webster's Dictionary defines "violence" as "[p]hysical force employed so as to violate, damage, or abuse." Webster's II New College Dictionary 1233 (2001). To "violate" is "[t]o break intentionally or unintentionally" or "[t]o injure the person or property of . . . ." *Id.* (emphasis added). Black's Law Dictionary defines "violent crime"

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[35]It is unclear why the State did not seek to amend the indictment to include Mitchell's conviction for capital murder. During sentencing, the State asserted the following:

> As the Court is aware we do not intend to offer the order of conviction into evidence at this point, but we would ask the Court to take into consideration that the defendant has also since the escape been convicted of capital murder here in Harrison County in the Second Judicial District.

as "[a] crime that has as an element the use, attempted use, *threatened use*, *or substantial risk of use of physical force* against the person or property of another." Black's Law Dictionary 429 (9th ed. 2009) (emphasis added). The common and ordinary meaning of crime of violence is a crime that involves the threatened use of, or risk of use of, physical force against a person or property of another so as to violate, damage, injure, or abuse. Crimes of violence involve not only actual use of force, but also include threatened use or risk of use of force, against the person or property or another – described by the trial judge as "an absolute threat to the inhabitants of the house," and by Judge Roberts in his dissent in the Court of Appeals as the "threat of imminent violence."[36] ***Brown v. State***, __ So. 3d ___, 2011 WL 2449291, at *12 (Miss. Ct. App. Mar. 27, 2012) (Roberts, J., dissenting).

¶38. All can agree that burglary requires some measure of force. At the time of Brown's conviction for burglary of a dwelling, his crime was defined as "*breaking* and entering any dwelling house, in the day or night, with *intent to commit a crime* . . . ." Miss. Code Ann. § 97-17-19 (Rev. 1996) (emphasis added), *repealed by* Laws 1996, Ch. 519, § 2 (Apr. 11, 1996). It is impossible to *break* into a dwelling house without some measure of force, and to break into and enter another's dwelling – a person's castle – with the intent to commit a

[36]The imminent threat of violence is present in every burglary of a dwelling – even when the dwelling is unoccupied – as a resident may enter the previously unoccupied dwelling while the burglar is present, exposing himself or herself to violence. Common experience dictates the conclusion that burglaries of dwellings mentally and emotionally affect the victims. Such crimes can and do generate the same feelings of victimization, insecurity, fear, and apprehension that plague victims of robberies, assaults, and rapes. Many victims of home burglaries (home or away) justifiably are left in fear and feel unsafe in their own castles, upon their return from Canton (Mississippi or China).

crime is, by nature, violative of that person's right to be secure from intrusion and invasion. Applying the ordinary meaning of the words reveals that burglary of a dwelling is a crime of violence.

¶39. The majority next points out that burglary of a dwelling was codified in a property-crime chapter of the Mississippi Code. The majority seemingly accepts that common-law burglary was an offense against habitation, rather than against property, but suggests that we should ignore the common law, because the law was codified as a crime against property. (Maj. Op. at ¶ 15). But arbitrarily defining burglary of a dwelling as nonviolent based on its codification in a chapter labeled "Crimes Against Property" is without support. Our statutes do not change the common law unless the Legislature clearly indicates that it intended to effect such a change. *See* ***Clark v. Luvel Dairy Prods., Inc.***, 731 So. 2d 1098, 1104 (Miss. 1998) ("Statutes are not to be understood as affecting any change in the common law beyond that which is clearly indicated . . . ." (citations omitted)). The majority fails to identify where or when the Legislature stated its intent to change the common law. The truth is that such a legislative declaration does not exist. Burglary of a dwelling appears in Title 97 ("Crimes"), Chapter 17 (labeled *by the publisher* as "Crimes Against Property"). *See* "User's Guide," Miss. Code Ann. at xii ("[h]eadings or 'catchlines' for Code sections and subsections are generally *created and maintained by the publisher*. They are mere catchwords and are not to be deemed or taken as the official title of a section or as a part of the section") (emphasis

added). Furthermore, not all crimes against property are found in chapter 17.[37] *See*, *e.g.*, Miss. Code Ann. §§ 97-7-9 (Rev. 2006) (defacing capitol building), 97-9-3 (tampering with court records), 97-9-77 (willfully altering or destroying a will). The truth is that burglary of a dwelling possesses characteristics of *both* a crime against property *and* a crime against the person. It involves a criminal act affecting one's property. As the trial court astutely found, it is also "a crime against someone who is living in their castle . . . [a]nd when somebody burglarizes that castle, . . . that is an absolute threat to the inhabitants of the house . . . ." The publisher's chapter label is not a clear and convincing indication that the Legislature intended to strip the offense of its crime-against-the-person characteristics recognized at common law. I cannot accept that the Legislature intended, by codifying burglary, to declare that it abandoned the common law and its declarations elsewhere that burglary of a dwelling is a violent crime.

¶40. Finally, in Part III, the majority instructs the Legislature that it is permitted to declare that burglary of a dwelling is a crime of violence (blind to the fact that the Legislature already has done so). Thus, the majority offers an unsupported and unnecessarily complicated analysis, stemming from its refusal to read Section 99-19-83 *in pari materia* with other statutes on the same subject or matter and accept the plain words enacted by the Legislature according to their common and ordinary meaning.

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[37]Likewise, not all crimes against persons are codified in chapter 3, labeled "Crimes Against the Person" by the publisher. *See*, *e.g.*, Miss. Code Ann. §§ 97-5-1 (abandoning a child under six), 97-5-3 (deserting, neglecting, or refusing to support child under eighteen), 97-9-55 (threatening or influencing judges), 97-27-14 (endangerment by bodily substance), 97-29-61 (voyeurism).

¶41. This new law, requiring proof of a violent act, is without foundation. It is our solemn duty to give **all** statutes their ordinary meaning – a meaning that is in harmony with the Legislature's clear statement of intent that burglary of a dwelling is a crime of violence. Today's opinion is an unwarranted intrusion upon legislative decision-making power. Legislating from the bench is not only unwise; it is unconstitutional. The majority's repudiation of the Legislature's explicit words is an act of judicial activism that I cannot join. I would vacate the opinion of the Court of Appeals and affirm the trial court's sentence of Brown as a habitual offender to life imprisonment without eligibility for probation or parole.

CHANDLER AND PIERCE, JJ., JOIN THIS OPINION.