

To: Law Clerk

From: Supervising Attorney – Prosecuting Office

Re: Determine Charges for Mr. Mayes

Date:

We must make a determination as to what crime to charge Mr. Mayes with for his recent alleged actions. Please read the attached statutes and *State v. Washington*, 92 S.W.3d 205 (Mo. App. W.D. 2002) and determine if we are able to charge him with Burglary in the First Degree. Since we only have a short time to make a decision, I have assigned several of you to this issue. I would like you to focus your attention on the structure (Mr./Mrs. Robinson's garage-like structure) and determine if it qualifies as "inhabitable."

Attachments:

- Section 569.160
- Section 569.010(2)
- *State v. Washington*, 92 S.W.3d 205 (Mo. App. W.D. 2002)

No outside research is required or permitted for this assignment.

Statement of Incident: Date August 16, 2007.

Mr. and Mrs. Robinson decided to take their grandchildren out to see the most recent Disney movie. Their son, daughter-in-law, Cindy, and their grandchildren had come up to visit Mr. Robinson on his sixtieth birthday. While they went to the movies, their son decided to go to the local hardware store, and Cindy decided to stay back at the house and take a well deserved nap.

Several hours later, as Mr. and Mrs. Robinson returned home, they saw a stranger exiting their garage with several items they recognized as their own. Too afraid to confront the stranger with the grandchildren in the car, they backed down the street and called the police from their cell phone.

The police arrived shortly and confronted the suspect who grabbed a pick-shovel. The suspect took several swipes at the officers and then threw it at one of the officers as the suspect tried to run. The sharp shovel cut one of the officer's arms as he tried to deflect it. The suspect was chased down and captured within a short period of time.

After returning to the scene and securing the house and garage, the police were able to determine that Cindy slept through the entire event. Everyone was safe.

Upon a more detailed investigation of the garage-like-space the police officers found the following information. The garage was added onto the house ten years after it was built. The space has been used over the years as a garage and storage space. The space was last used for this purpose almost 10 years ago. There is a door which connects the inside part of the house to the space. The door has been blocked with an entertainment center for the past fifteen years. The entertainment center is big but movable by an average sized person.

## **Burglary in the first degree.**

569.160. 1. A person commits the crime of burglary in the first degree if he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein, and when in effecting entry or while in the building or inhabitable structure or in immediate flight therefrom, he or another participant in the crime:

- (1) Is armed with explosives or a deadly weapon or;
  - (2) Causes or threatens immediate physical injury to any person who is not a participant in the crime; or
  - (3) There is present in the structure another person who is not a participant in the crime.
2. Burglary in the first degree is a class B felony.

## **Chapter definitions.**

569.010. As used in this chapter the following terms mean:

- (2) "Inhabitable structure" includes a ship, trailer, sleeping car, airplane, or other vehicle or structure:
  - (a) Where any person lives or carries on business or other calling; or
  - (b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation; or
  - (c) Which is used for overnight accommodation of persons. Any such vehicle or structure is "inhabitable" regardless of whether a person is actually present;

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92 S.W.3d 205

Missouri Court of Appeals,  
Western District.  
STATE of Missouri, Respondent,  
v.  
Antwone WASHINGTON, Appellant.  
No. WD 60354.  
Oct. 29, 2002.  
Motion for Rehearing and/or Transfer to  
Supreme Court Dec. 24, 2002.  
Application for Transfer Denied  
Jan. 28, 2003.

Before [HAROLD L. LOWENSTEIN](#), P.J., [JAMES M. SMART, JR.](#), and [THOMAS H. NEWTON](#), JJ.

[THOMAS H. NEWTON](#), Judge.

Mr. Antwone Washington appeals from a judgment convicting him of first degree burglary and stealing. We reverse Mr. Washington's conviction for first degree burglary, enter a conviction for second degree burglary, and remand the case for re-sentencing. In all other respects, we affirm.

**I. Factual and Procedural Background**

Mr. Washington's conviction stems from an incident at the residence of Ms. Mary Vannice. On August 18, 1999, Ms. Vannice's neighbor, Mr. Steve Nelson, observed an unfamiliar man walking toward the Vannices' open garage. Moments later, Mr. Nelson observed the same man walking away from the garage carrying a leaf blower and a weed trimmer. Mr. Nelson later identified that man as Mr. Washington. \*207 Police subsequently arrested Mr. Washington as a suspect in the Vannice case. Among other things, the State charged him with first degree burglary based upon the allegation that he entered the Vannice garage and removed the yard tools while Ms. Vannice and her teenage son were home. Mr. Washington denied being the burglar, attributing his arrest to a case of mistaken identification by Mr. Nelson.

At trial, Mr. Washington argued, among other things, that there was insufficient evidence to place him at the residence and that the State had not satisfied the elements for first degree burglary. He moved for judgment of acquittal at the close of the State's evidence and at the close of all evidence. The trial court denied these motions.

The jury convicted Mr. Washington of first-degree burglary and stealing, but acquitted him of first-degree tampering with a motor vehicle. Mr. Washington stipulated that he had a prior conviction and was a prior offender. The trial court sentenced him to five years in the Missouri Department of Corrections on the burglary conviction and to thirty-days in the Jackson County Department of Corrections on the stealing conviction, to run concurrently with time served in the Regimented Discipline Program under § 217.378.

In his first point, Mr. Washington argues that the trial court erred in overruling his motions for judgment of acquittal because the State did not establish that he burglarized an inhabitable structure while anyone else was present. ...

\* \* \*

### III. Legal Analysis


#### \* 208 A. The Garage Is Not Part of An Inhabitable Structure

Mr. Washington's first point requires us to consider the meaning of the term "inhabitable structure" as defined in [§ 569.010\(2\) \[FN1\]](#) and as used in § 569.160.1. To get at the meaning of this term in the context of our case, we must assess the General Assembly's intent "from the words used in the statute and give effect to that intent ..." [Goddard, 34 S.W.3d at 438](#). In so doing, we examine the language used, according to its plain and ordinary meaning. [State v. Williams, 24 S.W.3d 101, 115 \(Mo.App. W.D.2000\)](#). Where the meaning is ambiguous or will lead to an illogical result, we look beyond the plain and ordinary meaning of the statute. [Goddard, 34 S.W.3d at 438](#). In such a case, we construe the statute strictly against the State, "keeping in mind common sense and the evident statutory purpose." [Id. at 438-39](#). See also [State v. Northcutt, 598 S.W.2d 130, 132 \(Mo. banc 1980\)](#) (when interpreting statutory provision, the court must consider purpose and object of that provision). With these principles to guide us, we turn to the contested terminology.

A person commits the crime of first degree burglary if he "knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein" and does so while "[t]here is present in the structure another person who is not a participant in the crime." [§ 569.160.1\(3\)](#). [Section 569.010\(2\)](#) helpfully defines the term "inhabitable structure":

"Inhabitable structure" includes a ship, trailer, sleeping car, airplane, or other vehicle or structure: (a) Where any person lives or carries on business or other calling; or (b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation; or (c) Which is used for overnight accommodation of persons. Any such vehicle or structure is "inhabitable" regardless of whether a person is actually present [.] [\[FN2\]](#) *Id.*

[Section 569.010](#) does not define the term "building."

 [\[1\]](#) Although a person may commit first degree burglary in either a building or an inhabitable structure, the first-degree burglary charge submitted to the jury in this case did not refer to the burglary of a building. It referred only to the burglary of an inhabitable structure. By charging Mr. Washington with entering an inhabitable structure, the State assumed the burden of proving that the Vannice garage was such a structure. See [State v. Yacub, 976 S.W.2d 452, 453 \(Mo. banc 1998\)](#).


Mr. Washington argues that the State failed to meet its burden. He argues that the victim's garage by itself does not fall within the definition of an inhabitable structure because the State presented no evidence that anyone lived or slept in the garage, that

anyone carried on a business there, or that anyone assembled there for any purpose, let alone those purposes set out in [§ 569.010\(2\)](#). He further argues \*209 that the garage in this case is not part of the home to which it is attached because the garage and the living space in the home are not connected by an interior door.

We have no doubt that the home *by itself* qualifies as an inhabitable structure [\[FN3\]](#) under the plain meaning of [§ 569.010\(2\)\(a\) and \(c\)](#), both as a place where people live and as a place used for overnight accommodation. *See also* [Yacub, 976 S.W.2d at 453](#) (rental home deemed an inhabitable structure); [State v. Pulis, 822 S.W.2d 541, 544-45 \(Mo.App. S.D.1992\)](#) (generally discussing the meaning of the term "building" and the term "inhabitable structure" and holding that a commercial greenhouse was an inhabitable structure).

[FN3](#). A home also would qualify as a "building" but, as noted, the first-degree burglary instruction submitted to the jury (number 5) in this case used the term "inhabitable structure."

Conversely, we also have no doubt that the garage *by itself* fails to qualify as an inhabitable structure under the plain meaning of [§ 569.010\(2\)](#). As Mr. Washington observes, there is no evidence that any of the defining activities set forth in [§ 569.010\(2\)](#)--activities that make a structure inhabitable--ever occurred in the garage. The question, then, is whether the garage qualifies *as a part* of the home's inhabitable structure under [§ 569.010\(2\)](#). In this case, we think not.

 [\[2\]](#) [Section 569.010\(2\)](#) does not tell us whether a garage is part of a home's overall inhabitable structure. As applied to this case, the statute is ambiguous. However, it appears that one of the evident purposes behind the first-degree burglary statute is to increase the penalty for someone who puts an innocent in harm's way during a burglary. *Cf. Northcutt, 598 S.W.2d at 132* (recognizing generally that burglary is not merely an offense against property, but an offense against the security of habitation). Thus, the General Assembly has raised what otherwise would be second degree burglary to first degree burglary in cases where "[t]here is present in the structure another person who is not a participant in the crime." [§ 569.160.1\(3\)](#).

Given this apparent purpose, the garage does not qualify as part of the home's inhabitable structure in this case. As the State's photographic exhibits undoubtedly demonstrate, the home and the garage are attached. They share a common roof and common walls. A covered porch leads from the home to the garage. But what undermines inclusion of the garage within the home's inhabitable structure is the lack of any connection between the inside of the garage and the inside of the home's living quarters.

The absence of a common doorway connecting the garage and the home substantially alleviates the danger that [§ 569.160.1\(3\)](#) seeks to deter. Because the door leading into the home is different from the door leading into the garage, there is relatively less danger here compared to a case in which a homeowner must enter and exit the home's living quarters through the garage. *Cf. State v. Walker, 693 S.W.2d 237, 238-39 (Mo.App. S.D.1985)* (holding that flower shop and attached living quarters were "integral parts of the same structure" and affirming first degree burglary conviction

under [§ 569.160.1\(3\)](#) where homeowners had to enter and exit living quarters via flower shop); [State v. Allen, 944 S.W.2d 580, 582, 583 \(Mo.App. W.D.1997\)](#) (without addressing definition of inhabitable structure as it applies to first degree burglary statute, court held that reasonable jurors could have found that defendant "knowingly entered \*210 unlawfully" into garage for purposes of first degree burglary conviction in a case where it appeared that the home's residents could access the garage directly from inside of the home).

Given the purpose behind [§ 569.160.1\(3\)](#), and the relative inapplicability of that purpose here, we find Mr. Washington's conviction of first-degree burglary to be inappropriate. Because the garage is not a part of the home's "inhabitable structure" here, the State failed to prove that Mr. Washington and another person were present in such a structure, as required for a first degree burglary conviction under [§ 569.160.1\(3\)](#).

\* \* \*

#### **IV. Conclusion**

Because the State failed to establish that Mr. Washington burglarized an inhabitable structure while a non-participant was present under [§ 569.160.1\(3\)](#), we reduce his burglary conviction to second degree burglary under Rule 84.14 and remand the case for re-sentencing in light of this reduction. In all other respects, we affirm.

[HAROLD L. LOWENSTEIN](#), P.J., and [JAMES M. SMART, JR.](#), J. concur.

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