IN THE SUPREME COURT OF FLORIDA

ERIC MARCELL YOUNG,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC11-2151
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

PETITIONER'S BRIEF ON THE MERITS

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES CITED

OTHER AUTHORITIES:

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	)	
Respondent.	)	
_____	)	

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

The defendant was charged by information with the offenses of burglary of a dwelling with an assault or battery and with a firearm, robbery with a firearm, carjacking with a firearm, and possession of a firearm by a convicted felon. (R 8-10) The defendant proceeded to trial on the first three counts before the Honorable C. Jeffrey Arnold, Judge of the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida.

After the state's case, the defendant moved for judgments of acquittal on all counts, arguing particularly that the evidence was insufficient to prove a carjacking, where the force was used only to take the keys from the victim, who

was not in possession of the vehicle at the time of its taking. (V 1, T 96-99) The court denied the motion. (V 1, T 99)

The jury found the defendant guilty on Count I of the lesser offense of Burglary of a Dwelling with an assault or battery, with a dangerous weapon; on Count II of the lesser offense of Robbery with a Weapon; and on Count III of the lesser offense of Carjacking with a weapon. (R 28-30) The state entered a nolle prosequi on Count IV. (R 42) The court adjudicated the defendant guilty and sentenced him to twenty years on each of the three counts, to run concurrently with each other. (R 35-38, 45-47)

On appeal to the District Court of Appeal, Fifth District, the defendant argued that he could only be convicted of burglary of a structure since the building that he was convicted of burglarizing was being restored and had been completely gutted, thus causing the structure to lose its former status as a dwelling.[1] The defendant relied upon the holding in *Munoz v. State*, 937 So.2d 686 (Fla. 2nd DCA 2006), virtually identical to the instant case, wherein the Second District held that due to extensive renovations to the house in question, the property no longer met the definition of a dwelling under the burglary statute. In so ruling, the *Munoz*

[1] While the defense attorney did not make a specific motion for judgment on this ground, the district court was asked to find the error to be fundamental error. The district court ruled on

court had relied on language from this Court's case of Perkins v. State, 682 So.2d 1083, 1084 (Fla. 1996), wherein it noted that an empty house was still a dwelling, provided "its character is not substantially changed or modified to the extent that it becomes unsuitable for lodging by people." *Young v. State* 73 So. 3d 825 (Fla. 5th DCA 2011)*Munoz v. State*. *Young*, *supra*.

The defendant also argued in a separate point on appeal that the force used inside the building was separate from the taking of the vehicle outside of the building, hence he could only be convicted of grand theft of the vehicle. This issue was not addressed by the District Court in its opinion.

Notice to Invoke Discretionary Review was timely filed. This Court accepted jurisdiction on April 10, 2012. This brief on on the merits follows.

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the merits of the issue.

STATEMENT OF THE FACTS

On September 6, 2009, at approximately 8:15 p.m., Ari Stone, owner of his own drywall company, was finishing up some work at the construction site of an old unoccupied home (V 1, T 35-37). The old house, which had been purchased by a contractor, had been completely gutted and was being renovated by Stone and other contractors, with their construction equipment set up inside. (V 1, T 37-38) While working on cutting up some drywall, Stone heard someone approach him in the house. (V 1, T 36-38) He looked up to see a person he identified as the defendant pointing a revolver at him, telling him not to look at him and asking him, "Where is it at?" (V 1, T 38-39, 52) The robber told Stone to lie on the ground and went through Stone's pockets, retrieving his cell phone, keys, wallet, and nine dollars cash. (V 1, T 39, 41)

Stone saw another man with his shirt pulled up over his head enter the house, look around, then leave. (V 1, T 39) The defendant exited the house and left in Stone's truck. (V 1, T 39) After he heard the perpetrator leave in his truck, Stone went outside and ran to a neighbor's house to call the police. (V 1, T 44)

On September 8, 2009, at approximately 9:00 p.m., Orlando Police Officer Brandon Bottom, observed a single driver in the victim's truck run two stop signs and attempted him. (V 1, T 75-79) The defendant, who the officer identified in

court, sped off in the truck rapidly, but was eventually apprehended. (V 1, T 79-80)

Stone's truck was returned to him, with his wallet and its credit cards and checks in the back seat, along with all of his construction tools. (V 1, T 46) His cell phone was never recovered. (V 1, T 46) The victim was shown a photo lineup of six photos, selecting the defendant's picture as being 100% certain it was the robber. (V 1, T 47-50, 86-91) Stone also identified the defendant at trial as the perpetrator. (V 1, T 52)

Eric Young testified at trial that he regularly sold drugs to Stone in exchange for Stone allowing him to use his truck, and that he had done so three or four days prior to being stopped by the police. (V 2, T 151-155) Young indicated that on this occasion, he exchanged $60 worth of cocaine for use of the truck for one or two days. (V 2, T 155, 160) However, when Eric lost his cell phone, he was unable to contact Stone and did not know where he could locate Stone to arrange the return of his truck. (V 2, T 155-156) When arrested, Young was too scared to tell the police about the exchange of drugs for the use of the truck, so instead he told them that he had purchased the truck from a drug dealer named T-boy. (V 2, T 156) Young denied robbing Stone. (V 2, T 151-152)

Kwmane Winger also testified for the defense that he knew that Young regularly sold drugs to people in exchange for use of their cars. (V 2, T 131-135)

He saw the defendant in May or June 2009 driving a work truck matching the description of Stone's, Young telling him that he had exchanged drugs for its use. (V 2, T 136-143)

Police Detective Joseph Gribble, who interrogated the defendant upon his arrest, confirmed that drug dealers regularly will "borrow" a vehicle from a customer (called a "jug") in exchange for drugs, but he indicated that the defendant instead had told him that he had purchased the truck for $40 from "T-Boy." (V 2, T 172-176) Defendant admitted to the detective that he knew the truck must have been "hot" but that T-Boy had told him just to keep it out of a certain area of town from where it had been stolen. (V 2, T 172-176)

In rebuttal, Stone denied trading his truck for drugs, in fact denying he ever used drugs. (V 2, T 165-166)

SUMMARY OF THE ARGUMENT

Point I. The opinion of the District Court of Appeal, Fifth District, in affirming the defendant's conviction for burglary of a dwelling, certified conflict with *Munoz v. State*, 937 So.2d 686 (Fla. 2nd DCA 2006), a case virtually identical to this case wherein the Second District Court of Appeal had reduced the conviction to burglary of a structure. The trial court here erroneously adjudicated the defendant guilty of burglary of a dwelling, when the building had been gutted, was undergoing extensive renovation, and, in its current state, was thus not suitable for occupancy. Under the correct analysis in *Munoz*, the defendant can only be found guilty of burglary of a structure.

Point II. The trial erred in denying the motion for judgment of acquittal on the carjacking charge, where the defendant allegedly obtained the property, including truck keys, by force from the victim inside a building, and later took the vehicle from outside, out of the presence of the victim. Under this factual scenario, the defendant can only be found guilty of grand theft for taking the truck.

ARGUMENT

POINT I.

THE DEFENDANT WAS ERRONEOUSLY ADJUDICATED GUILTY OF BURGLARY OF A DWELLING, WHEN THE BUILDING HAD BEEN GUTTED, WAS UNDERGOING EXTENSIVE RENOVATION, AND, IN ITS CURRENT STATE, WAS THUS NOT SUITABLE FOR OCCUPANCY.

The evidence presented to the trial court was insufficient here to convict the defendant of burglary of a dwelling, only of the lesser offense of burglary of a structure. It is fundamental error for a defendant to be convicted of an offense that did not take place. *See Atkins v. State*, 959 So.2d 1267, 1268 (Fla. 5th DCA 2007); *Nixon v. State*, 10 So.3d 212, 213 (Fla. 2nd DCA 2009)*; Harris v. State*, 647 So.2d 206, 208 (Fla. 1st DCA 1994) ("Conviction of a crime which did not take place is a fundamental error, which the appellate court should correct even when no timely objection or motion for acquittal was made below.").

This case is virtually identical to that of *Munoz v. State*, 937 So.2d 686 (Fla. 2nd DCA 2006), wherein the Second District held that due to extensive renovations to the house in question, the property no longer met the definition of a dwelling under the burglary statute. In so ruling, the court relied on language from the Florida Supreme Court case of *Perkins v. State*, 682 So.2d 1083, 1084 (Fla. 1996),

wherein it noted that an empty house was still a dwelling, provided "its character is not substantially changed or modified to the extent that it becomes unsuitable for lodging by people." *Munoz*, *supra* at 688. In *Munoz*, as here, the former residence had been undergoing extensive renovations and was not longer suitable for lodging by people. Here, the entire interior had been gutted and thus could not be lived in.[2]

However, the Fifth District refused to follow *Munoz* and instead affirmed the conviction and certified conflict to this Court. In addition to rejecting this argument in the instant case and in refusing to follow the *Munoz* decision here, the Fifth District Court had previously decided a case involving the same issue. *Michael v. State*, 51 So.3d 574 (Fla. 5th DCA 2010). There, the panel recognized that to follow *Munoz* would require a reduction of the conviction to burglary of a structure; however, the panel decided instead to adopt the dissenting opinion in *Munoz*, affirmed the conviction for burglary of a dwelling, and certified conflict with *Munoz*.[3]

Michael interpreted the *Munoz* opinion as "add[ing] an additional element to the plain language of the statute," requiring the State to prove that the structure was

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[2] *Contrast Jacobs v. State*, 41 So. 3d 1004, 1007 (Fla. 1st DCA 2010) ("In this case, there was no evidence that the fire substantially changed the character of the house to the extent that it was unsuitable for lodging by people, and no evidence that the interior of the house was in a state of ruin comparable to that described in *Munoz*.")

[3] Apparently, Michael did not pursue discretionary review in this Court from his DCA

habitable as a dwelling on the date of the offense. This interpretation is incorrect. The *Munoz* court was not adding an additional element; it was merely interpreting the definition of "dwelling" within the statute, relying on the language of this Court in *Perkins v. State*, *supra*, which noted that a structure previously considered a dwelling may lose that status if "its character is . . . substantially changed or modified to the extent that it becomes unsuitable for lodging by people . . . ." *Perkins*, *supra* at 1084. Hence, the *Perkins* Court ruled that an empty house, which is still suitable for lodging, is nevertheless extended the same protection as one presently occupied. Here, however, as in *Munoz*, the character of the building had been changed by the total gutting of its interior for major renovations; it was no longer suitable for dwelling in its present state.

As the majority in *Munoz* recognized, the legislature has specifically provided a single exception, extending the definition of a dwelling where a structure has become unsuitable for lodging because of substantial changes occurring during a state of emergency. §810.011(2), *Fla. Stat.*

> The state of emergency exception is the only one in the statute. . . . [T]he state of emergency exception is unnecessary for houses bereft of walls during a state of emergency because such houses are still designed for lodging. The state of emergency exception makes sense only if, as suggested by *Perkins*, the

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decision, hence this conflict has not yet been resolved.

> definition of dwelling requires that the structure is both designed for lodging by people and suitable for lodging by people. *See State v. Goode*, 830 So.2d 817, 824 (Fla. 2002) (noting that it is also a basic rule of statutory construction that "the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless"). The legislature specifically protected houses made unsuitable for lodging during states of emergency; it did not provide the same protection for houses unsuitable for lodging for other reasons, for instance because of reconstruction or renovation. According to section 810.011 and *Perkins*, if the character of the house is substantially changed to the extent that it becomes unsuitable for lodging for some reason other than during a state of emergency, there is no statutory exception and the house no longer qualifies as a dwelling.

Munoz v. State, 937 So.2d at 688. Since the legislature chose to extend dwelling status only for a "state-of-emergency" caused change in the character of a dwelling, but not one changed by other means, it therefore did not intend to maintain the dwelling definition to one changed by other means, such as reconstruction of the house under the canon of statutory construction of *expressio unius est exclusio alterius*. Had the legislature intended for a dwelling to remain a dwelling when under reconstruction, it would have said so, rather than only saying that it remained a dwelling when its character was changed due to damage during a state of emergency. Thus, the statutory definition of dwelling intended by the legislature does not include a former dwelling undergoing massive renovations, such as that here.

The *Munoz* court decided the issue correctly. This Court should quash the decision of the Fifth District and rule that the defendant's conviction for burglary of a dwelling must be reduced to burglary of a structure. The sentences for it and the remaining counts must also be vacated and remanded for recalculation under the sentencing guidelines, and resentencing.

POINT II.

THE TRIAL ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL ON THE CARJACKING CHARGE WHERE THE FORCE USED IN THE ROBBERY INSIDE THE BUILDING WAS SEPARATE FROM THE TAKING OF THE VEHICLE OUTSIDE THE BUILDING.

This second issue was raised in the direct appeal in the District Court of Appeal, Fifth District, but was not addressed in the opinion. Once accepting jurisdiction of this case from the certified conflict on Point I, this Court has jurisdiction to hear all issues raised in the direct appeal to the district court. *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982) (holding that "once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process"); *see also State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1078 (Fla. 2006). Thus, the petitioner asks this Court to also review and decide this issue.

The force used in the robbery of the victim here occurred inside the building and entirely separate from the taking of the truck outside the building and not in the presence of the victim. As such, a carjacking conviction cannot stand. The court should have granted the motion for judgment of acquittal, reducing the charge to grand theft instead. A ruling on a motion for judgment of acquittal is a

question of law and thus is reviewed *de novo*. *See State v. Williams*, 742 So.2d 509 (Fla. 1st DCA 1999); *State v. Smyly*, 646 So.2d 238 (Fla. 4th DCA 1994).

Three elements comprise carjacking: "[1] the taking of a motor vehicle which may be the subject of larceny from the person or custody of another, [2] with intent to either permanently or temporarily deprive the person or the owner of the motor vehicle, [3] when in the course of the taking there is the use of force, violence, assault, or putting in fear." § 812.133(1), *Fla. Stat.* Section 812.133(3)(b), *Florida Statutes*, further provides that "[a]n act shall be deemed 'in the course of the taking' [under element 3] if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property *and* if it and the act of taking constitute a continuous series of acts or events."

This case is similar to the facts in *Flores v. State*, 853 So.2d 566 (Fla. 3rd DCA 2003). There, the court held the evidence insufficient for carjacking where the defendant had, through the use of force, violence, assault, or putting in fear robbed the victim's purse which included the car keys inside a beauty salon and the victim was confined to the inside of the shop. The court ruled that the subsequent taking of the victim's car outside the building where the victim was not present was not the result of the force, violence, assault, or putting in fear which occurred inside. *Contrast Carter v. State*, 23 So.2d 1238 (Fla. 4th DCA 2009).

Here, the perpetrator entered the structure and demanded of the victim, "Where is it at?" He then proceeded to direct the victim to lie down and empty his pockets, obtaining from the victim's pocket his cell phone, wallet, cash, and keys. He did not demand simply keys so he could steal the vehicle or take the vehicle in the victim's presence or from his actual possession as occurred in *Carter*, *supra*. The taking of the truck from outside of the building was therefore disconnected from the force of the robbery.

The carjacking conviction must be vacated with directions to enter a conviction for the lesser offense of grand theft. The sentences on all counts must be vacated for rescoring under the guidelines with the corrected convictions.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court quash the decision of the District Court of Appeal, Fifth District, reverse the judgments and sentences, and remand with instructions to reduce the offenses to burglary of a structure (Point I) and grand theft (Point II).

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Pamela Jo Bondi, Attorney General, 444 Seabreeze Blvd, Fifth Floor, Daytona Beach, Florida, 32118; and mailed to Mr. Eric Young, Inmate # X70905, Hamilton Annex, 11419 S.W. County Road 249, Jasper, FL 32052, this 3rd day of May, 2012.

_____
JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is proportionally spaced Times New Roman, 14pt.

_____
JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

ERIC MARCELL YOUNG,	)	
	)	
Petitioner,	)	
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vs.	)	CASE NO. SC11-2151
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Respondent.)		
_____)		

APPENDICES

APPENDIX A	*Young v. State* 73 So. 3d 825 (Fla. 5th DCA October 21, 2011)
APPENDIX B	*Munoz v. State* 937 So.2d 686 (Fla. 2nd DCA 2006)

APPENDIX A

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida,

Fifth District.Eric Marcell YOUNG, Appellant,v.STATE of Florida, Appellee.No. 5D10–2450.

Oct. 21, 2011.

Appeal from the Circuit Court for Orange County, C. Jeffery Arnold, Judge.

James S. Purdy, Public Defender, and James R. Wulchak, Assistant Public Defender, Daytona Beach, for Appellant.Pamela Jo Bondi, Attorney General, Tallahassee, and Kristen L. Davenport, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

***1** We affirm the defendant's convictions for burglary of a dwelling with an assault or battery with a dangerous weapon and for carjacking with a weapon. We certify conflict with *Munoz v. State*, 937 So.2d 686 (Fla. 2d DCA 2006).

AFFIRMED; CONFLICT CERTIFIED.

SAWAYA, MONACO and TORPY, JJ., concur.

Fla.App. 5 Dist.,2011.

Young v. State--- So.3d ----, 2011 WL 5109533 (Fla.App. 5 Dist.)END OF DOCUMENT

APPENDIX B

District Court of Appeal of Florida,
Second District.George Ernest MUNOZ, Appellant,v.STATE of Florida, Appellee.No. 2D05-1297.
July 28, 2006.Rehearing Denied Sept. 28, 2006.

Background: Defendant was convicted in the Circuit Court, Hillsborough County, Ronald N. Ficarrotta, J., of burglary of a dwelling, a second-degree felony, and was sentenced as a habitual felony offender to 15 years. Defendant appealed.

Holding: The District Court of Appeal, Villanti, J., held that house under construction, which defendant was accused of burglarizing, did not qualify as a dwelling, and thus, evidence was insufficient to sustain conviction.

Reversed and remanded.Canady, J., filed dissenting opinion.

West Headnotes

Burglary 67 ⚿4

67 Burglary

67I Offenses and Responsibility Therefor 67k1 Nature and Elements of Offenses 67k4 k. Character of Building. Most Cited CasesHouse under construction, which defendant was accused of burglarizing, did not qualify as a "dwelling," and thus, evidence was insufficient to sustain conviction for burglary of a dwelling; since house was missing interior walls, sheetrock, and insulation, was undergoing total restoration, and inspections of it were not yet completed, house no longer met definition of a dwelling under burglary statute, and house did not meet statutory exception for houses made unsuitable for lodging during a state of emergency. West's F.S.A. §§ 810.02, 810.011.

***687** James Marion Moorman, Public Defender, and Steven L. Bolotin, Assistant Public Defender, Bartow, for Appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, and Donna S. Koch, Assistant Attorney General, Tampa, for Appellee.

VILLANTI, Judge.

George Munoz appeals his judgment and sentence as a habitual felony offender to fifteen years' prison for burglary of a dwelling, a second-degree felony. *See* § 810.02(3), Fla. Stat. (2004). He argues that the house under construction which he is accused of burglarizing cannot qualify as a dwelling and that his conviction should therefore be reduced to burglary of an unoccupied structure, a third-degree felony. *See* § 810.02(4)(a). We agree and reverse.Ishmauel Dudley testified that he purchased the late nineteenth-century house burglarized by Munoz from its previous occupants to restore and resell. It was unoccupied at the time of the burglary. Dudley and his construction crew were reworking the house "from the ground up"-"adding two bedrooms, two bathrooms ... totally restoring [the] house" and adding a second-floor loft. They had removed a couple of the "anterior [FN1] walls" and all of the plaster in order to insulate the house. A back door was removed and replaced with a "piece of plywood." And, at the time of the burglary, the phases of construction and inspections were incomplete. The pictures of the house entered into evidence show a house that had been gutted-no insulation or sheetrock, unfinished flooring, debris everywhere, stacks of plywood, exposed walls, and wires dangling from the ceiling. The pictures also show garbage, buckets, and work supplies on the floor. The house had a roof over it, a bathtub, a minirefrigerator, a microwave, and miscellaneous items left behind by construction workers including clothes, tools, and tool boxes. The house also had plumbing and electricity, but the power system was temporary and "for construction purposes" only and the indoor plumbing was not in use; the workers used the Port-O-Let prominently standing in the front yard.

FN1. We believe that Dudley meant that the interior walls had been removed to install insulation, as is suggested by the pictures of the house.

***688** It is undisputed that this house previously qualified as a dwelling under section 810.011. Section 810.011(2) defines a "dwelling" as "a building or conveyance of any kind, including any attached porch, whether such building or conveyance is temporary or permanent, mobile or immobile, *which has a roof over it and is designed to be occupied by people lodging therein at night,* together with the curtilage thereof." (Emphasis added.)

The house here had a roof over it, was designed to be occupied by people lodging therein at night, and in fact had been occupied for decades. The issue is whether it still qualifies as a dwelling even though it was undergoing massive reconstruction at the time of the burglary. In *Gonzalez v. State*, 724 So.2d 126, 127 n. 1 (Fla. 3d DCA 1998), the Third District noted that a home under construction but nearing completion qualified as a dwelling. However, this statement was dicta because the question of whether a home under construction was a dwelling was not at issue.[FN2] Further, *Gonzalez* did not address the language of the most recent Florida Supreme Court case on the

issue, *Perkins v. State*, 682 So.2d 1083 (Fla.1996), discussing suitability for lodging. In *Anderson v. State*, 831 So.2d 702, 703 (Fla. 4th DCA 2002), the Fourth District correctly noted that the language in *Gonzalez* was dicta but refrained from commenting on whether a home under construction could qualify as a dwelling under the burglary statute. Therefore, this issue has apparently not been previously addressed in Florida.

> FN2. In *Gonzalez*, 724 So.2d 126, the defendant had removed air compressors from concrete pads adjacent to houses under construction. The Third District reversed because the compressors were not located within the houses or within the curtilage of the houses.

In *State v. Bennett*, this court concluded that as long as a structure is " 'designed' for eventual human habitation," it qualifies as a dwelling. 565 So.2d 803, 805 (Fla. 2d DCA 1990) (finding that a mobile home unconnected to utilities and sitting on a sales lot qualified as a dwelling under section 810.011). However, in *Perkins*, 682 So.2d 1083, the Florida Supreme Court suggested that a house designed for lodging by people but unsuitable for lodging may not qualify as a dwelling.[FN3] In *Perkins*, the court noted that "the legislature has extended broad protection to buildings or conveyances of any kind that are designed for human habitation. Hence, an empty house in a neighborhood is extended the same protection as one presently occupied." *Id.* at 1085. The court further stated:

> FN3. *Bennett*, decided before *Perkins*, did not address whether a mobile home on a sales lot was suitable for lodging.

> "Occupancy is no longer a critical element under this [statutory] definition. Rather, it is the design of the structure or conveyance which becomes paramount. *If a structure or conveyance initially qualifies under this definition, and its character is not substantially changed or modified to the extent that it becomes unsuitable for lodging by people, it remains a dwelling irrespective of actual occupancy*. It is, therefore, immaterial whether the owner of an unoccupied dwelling has any intent to return to it."

Id. at 1084 (alteration in original; emphasis added) (quoting *Perkins v. State*, 630 So.2d 1180, 1181-82 (Fla. 1st DCA 1994)). Thus, *Perkins* recognized that to qualify as a dwelling, the structure must not only be designed to be occupied by people for lodging therein at night, but also that it must not be substantially changed to the extent that it becomes unsuitable for lodging by ***689** people. The only exception would be that created by the legislature in section 810.011-if a structure became unsuitable for lodging because of substantial changes occurring during a state of emergency.[FN4] For instance, if a hurricane caused a wall of a house to collapse, the remaining portions or remnants of the house would still qualify as a dwelling despite the fact that the character of the house had substantially changed to the extent that the house was unsuitable for lodging.

> FN4. The exception in section 810.011(2) states, "However, during the time of a state of emergency declared by executive order or proclamation of the Governor under chapter 252 and within the area covered by such executive order or proclamation and for purposes of ss. 810.02 and 810.08 only, the term [dwelling] includes such portions or remnants thereof as exist at the original site, regardless of absence of a wall or roof."

The state of emergency exception is the only one in the statute. Under the analysis in *Bennett*, the state of emergency exception is unnecessary for houses bereft of walls during a state of emergency because such houses are still designed for lodging. The state of emergency exception makes sense only if, as suggested by *Perkins*, the definition of dwelling requires that the structure is both designed for lodging by people and suitable for lodging by people. *See State v. Goode*, 830 So.2d 817, 824 (Fla.2002) (noting that it is also a basic rule of statutory construction that "the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless"). The legislature specifically protected houses made unsuitable for lodging during states of emergency; it did not provide the same protection for houses unsuitable for lodging for other reasons, for instance because of reconstruction or renovation. According to section 810.011 and *Perkins*, if the character of the house is substantially changed to the extent that it becomes unsuitable for lodging for some reason other than during a state of emergency, there is no statutory exception and the house no longer qualifies as a dwelling.

The house owned by Dudley stands in stark contrast to the one discussed in *Perkins*, which was clearly suitable for lodging. *See* 682 So.2d at 1084 (discussing the house's electricity, available well water, stove, refrigerator, washer, microwave, and assorted items in the closets and cabinets). Dudley's house was missing interior walls, sheetrock, and insulation. It was undergoing a total restoration, and the inspections of it were not yet completed. The facts that the construction workers used a temporary power pole, a minifridge, and an old microwave, shown in the pictures surrounded by stacks of garbage, buckets, and work supplies, did not make this construction site suitable for

lodging by any stretch of the imagination.

Applying *Perkins*, the house here no longer met the definition of a dwelling under the burglary statute. *See Perkins,* 682 So.2d 1083 (concluding that a house that was unoccupied but suitable for lodging qualified as a dwelling). Additionally, it did not meet the statutory exception for houses made unsuitable for lodging during a state of emergency.

The evidence that Munoz entered the house under construction with intent to commit a theft was insufficient to sustain a conviction for burglary of a dwelling. As Munoz concedes, the evidence could have sustained a conviction for burglary of an unoccupied structure, *see* § 810.02(4)(a), which was submitted to the jury as a lesser-included offense. Therefore, we reverse Munoz's conviction and sentence for burglary of a dwelling and remand to the trial court with directions to enter a judgment of guilty of the lesser charge of ***690** burglary of an unoccupied structure and to resentence Munoz.

Reversed and remanded.

DAVIS, J., Concurs.

CANADY, J., Dissents with opinion.CANADY, Judge, Dissenting.

The majority correctly determines that the house which was burglarized by Munoz "had a roof over it, was *designed to be occupied by people lodging therein at night,* and in fact had been occupied for decades." (Emphasis added.) Despite this determination, the majority goes on to hold that because the renovation project had rendered the house "unsuitable for lodging," the burglarized house was not a "dwelling" under chapter 810. The majority criticizes the analysis employed by this court in *Bennett* and rejects it in favor of a line of analysis the majority believes is "suggested" by the supreme court in *Perkins.* I dissent because I conclude that the rationale of *Bennett* should control the disposition of the instant case. For the reasons I will explain, I conclude that the majority has misread *Perkins.*In *Bennett,* 565 So.2d at 804, we considered whether a "mobile home which was located on a sales lot" and which "was fully furnished but unoccupied and not connected to utilities" could be considered a dwelling under chapter 810. We held that "in order to establish that the structure is a 'dwelling' within the purview of the burglary statute, we believe the state must introduce some evidence that it is actually to be used for habitation." *Id.* at 805. In reaching this conclusion, the *Bennett* court stated that "the plain meaning of the word 'designed' supports the state's argument" that the statutory definition of "dwelling" is "broad enough to cover a mobile home on a sales lot, because it is 'designed' for *eventual* human habitation." *Id.* (emphasis added).

The *Bennett* court thus focused on "the plain meaning of the word 'designed' " in the statutory definition of dwelling. The court understood that the designed use of a structure denotes the purpose for which the structure is eventually intended to be used. The court's analysis on this point is cogent. *Design* means "to plan or have in mind as a purpose" or "to devise or propose for a specific function." *Webster's Third New International Dictionary* 611 (1993).

Under the rationale employed in *Bennett,* the structure burglarized by Munoz in the instant case falls within the meaning of "dwelling" because the structure was " 'designed' for eventual human habitation." 565 So.2d at 805. The structure falls within the statutory definition because it undisputedly both (a) "has a roof over it" and (b) "is designed to be occupied by people lodging therein at night." § 810.01(2). The designed use of the structure is not changed by transitory circumstances-such as a major renovation project-that render the premises temporarily uninhabitable.

A mobile home located on a sales lot and unconnected to utilities would not be suitable for current habitation. But under *Bennett's* reading of the plain language of the statute, even though such a structure is temporarily unsuitable for habitation, it will be considered a "dwelling" if it is intended for "eventual human habitation." The current habitability test utilized by the majority therefore is inconsistent with the plain language of the statute and cannot be reconciled with the rationale utilized by the *Bennett* court.

The majority apparently recognizes that its decision is in tension with the holding in *Bennett* but concludes that the supreme court's decision in *Perkins* provides the ***691** appropriate basis for deciding this case. In my view, the majority's understanding of *Perkins* is not supportable.

In *Perkins,* the court considered whether an unoccupied structure qualified as a dwelling under chapter 810. Recognizing that under the common law there was a "requirement that the house be occupied or that the owner intend to return," the court concluded that the adoption of the statutory definition of "dwelling" had effected a change in the substance of the law. 682 So.2d at 1084. The court-following the analysis of the First District-held that actual or intended occupancy was not necessary for a structure to be a dwelling under the statutory definition. Quoting the opinion of the First District, the court explained the significance of the statutory definition:

> "Occupancy is no longer a critical element under this [statutory] definition. Rather, it is the design of the structure or conveyance which becomes paramount. If a structure or conveyance initially qualifies under this definition, and its character is not substantially changed or modified to the extent that it becomes unsuitable for lodging by

people, it remains a dwelling irrespective of actual occupancy. It is, therefore, immaterial whether the owner of an unoccupied dwelling has any intent to return to it."

Id. (alteration in original) (quoting *Perkins v. State*, 630 So.2d 1180, 1181-82 (Fla. 1st DCA 1994)).

From this statement, the majority in this case reasons that to maintain the status of a dwelling, a structure "must not be substantially changed to the extent that it becomes unsuitable for lodging by people." The majority thus concludes that when a renovation project-such as the one involved in this case-is undertaken on a house, the house loses its status as a dwelling because the ongoing renovation project makes the house unsuitable for lodging.

In reaching this conclusion, the majority fails to give due weight to the importance the *Perkins* court assigns to the word "designed" in the statutory definition. *Perkins* makes clear beyond any doubt that in determining whether a structure is a dwelling, " 'it is the design of the structure' " which is " 'paramount.' " *Id.* (quoting *Perkins*, 630 So.2d at 1181). *Perkins* also acknowledges that the statute extends "broad protection to buildings ... of any kind that are designed for human habitation." *Id.* at 1085. And the supreme court in *Perkins* specifically focuses on the fact that "the owner [of the structure] intended it be used" as a structure for lodging people at night. *Id.*

In context, the reference in *Perkins* to the requirement that a structure's " '*character* ... not [be] substantially changed or modified to the extent that it becomes unsuitable for lodging,' " 682 So.2d at 1084 (quoting *Perkins*, 630 So.2d at 1181) (emphasis added), must be understood as a requirement that the use for which the structure is designed not be altered. What is in view is the possibility that a residential structure will be converted to a commercial or other nonresidential use. The change in "character" that the court envisions is a change in the designed purpose of the structure. Such a change in character does not include circumstances which may temporarily render a structure uninhabitable but which do not alter the purpose for which the structure is intended to be used. In the instant case, the character or the designed use of the structure remained unchanged even though the renovation project may have rendered the property temporarily unsuitable for habitation.

The tension which the majority apparently finds between *Bennett* and *Perkins* is ***692** illusory. The lack of any inconsistency between *Bennett* and *Perkins* is highlighted by the fact that in the First District's *Perkins* opinion, the court discussed and relied on *Bennett's* interpretation of "the plain meaning of the word 'designed' contained in the statute." *Perkins v. State*, 630 So.2d 1180, 1182 (Fla. 1st DCA 1994). The First District expressly "adopt[ed] the[ ] rationale" of *Bennett. Id.* The supreme court in turn in its *Perkins* opinion approved the First District's decision.

As I mentioned earlier, the majority acknowledges that the structure at issue here was "designed to be occupied by people lodging therein at night." Given the text of the statutory definition, that characterization of the structure should be of crucial importance. But the majority brushes aside its own characterization of the design of the structure, overlooks the "paramount" importance that *Perkins* assigns to the "design of the structure," and then deploys a test-current habitability-that is inconsistent with the plain language of the statute and cannot be reconciled with the rationale of our decision in *Bennett.*

The majority is unjustified in relying on the second sentence of the definition of dwelling in section 810.011(2) to transform the meaning of the first sentence of that definitional provision. The majority reasons that the "state of emergency exception" in the second sentence of the statutory definition "makes sense only if ... the definition of dwelling requires both that the structure is *designed* for lodging by people and *suitable* for lodging by people." (Emphasis supplied.)

While the definition of dwelling was added to the statute in 1982, *see* ch. 82-87, § 1, Laws of Fla., the second sentence of section 810.011(2) was added effective June 1, 1993, to the definitional provision, *see* ch. 92-351, § 1, Laws of Fla. The latter addition to the statute is designed to ensure that dwellings damaged during a state of emergency do not lose the protection of the penalties for burglary of a dwelling. Under this provision, a house that has lost its roof or has collapsed during a state of emergency would continue to be considered a dwelling. The provision was necessary because under the definition in the first sentence of section 810.011(2), a structure is a not a dwelling unless it has a roof over it. Furthermore, a collapsed structure might fall outside the definition of dwelling because it would not be considered "a building."

Accordingly, it is by no means necessary to accept the interpretation of dwelling adopted by the majority to make sense of the state of emergency provision. That provision deals with circumstances where a dwelling suffers such extensive structural damage during a state of emergency that it would no longer be covered by the definition of dwelling in the first sentence of section 810.011(2). There is no inconsistency between the state of emergency provision and the interpretation adopted by this court in *Bennett. Bennett's* understanding of the meaning of "dwelling" clearly does not encompass the range of circumstances covered by the state of emergency provision. Furthermore, given the statutory history-which evidences a legislative purpose to expand the coverage of the statute-the majority is unjustified in using the second sentence of section 810.011(2) as a basis for jettisoning the plain meaning of the first sentence of that subsection and thereby contracting the coverage of the statute. In doing so, the

majority allows the statutory tail to wag the dog.
Fla.App. 2 Dist.,2006.
Munoz v. State937 So.2d 686, 31 Fla. L. Weekly D2007END OF DOCUMENT