

APPENDIX 5. SAMPLE OFFICE MEMOS AND ASSIGNMENT

Appendix 5.C. Sample Memo 2: 2dD Burglary, One Issue

PRIVILEGED AND CONFIDENTIAL MEMORANDUM

TO: Supervisor
FROM: Intern
RE: Anthony Cooper: Second-degree burglary charge for entering deli cellar
DATE: June 1, 2026

I. QUESTION PRESENTED

May Defendant Anthony Cooper be charged with second-degree burglary under New York law when he unlawfully entered a cellar beneath a deli located in a mixed-use apartment building, where the cellar was accessible only through exterior sidewalk doors and was inaccessible from either the deli or the building's residential areas.

II. BRIEF ANSWER

Probably not. To sustain a charge of second-degree burglary in New York, the prosecution must show that the burglarized premises constituted a "dwelling," meaning a building usually occupied by a person lodging therein at night. *People v. McCray*, 16 N.E.3d 533, 536 (N.Y. 2014). Although the cellar was located beneath a seven-story apartment building containing residences, it was physically separated from and entirely inaccessible to those residential areas. Because occupants could not enter the cellar from the apartments, the risks of fear, confrontation, and violence that justify enhanced penalties for dwelling burglaries were substantially diminished. Accordingly, the cellar

probably was not part of a dwelling, so a court would reject a second-degree burglary charge against Cooper. Instead, the facts more closely support the charge of third-degree burglary based on Cooper's unlawful entry into a non-dwelling structure.

III. STATEMENT OF FACTS

In the early evening of June 28, 2024, Defendant Anthony Cooper unlawfully entered the underground cellar of the Always Sunny Deli in Manhattan. Police Report:1. The deli, shown below, occupies the ground floor of a seven-story building, with residential apartments on the six upper floors. *Id.* The cellar, which the deli uses for storage, is accessible only through two doors on the public sidewalk. Hernandez:1. The cellar doors are "basically adjacent" to the deli's entrance, which is located about eight feet from the separate entrance for the building's residents. *Id.*



Police Report:2. There is no access or pathway from the cellar to any part of the residential units or to the deli itself. Hernandez:1. The cellar is off-limits to anyone except deli employees. *Id.*

A deli employee, while watching a surveillance monitor, saw Cooper, who did not work for the deli, enter the cellar. *Id.* The employee then closed and locked the cellar doors, trapping Cooper inside, and called the police. *Id.* When police arrived, they instructed Cooper to climb out of the cellar, which he did. *Id.* Cooper—a 24-year-old single parent of two young children who identified a shelter for unhoused families as his permanent address—stated that he was unemployed and had entered the cellar to “grab some food for [his] family.” Police Report:1. Cooper has no criminal record. *Id.*

IV. DISCUSSION

Because the deli’s cellar is likely not a dwelling, Cooper should not be charged with second-degree burglary. A person commits third-degree burglary by unlawfully entering a building with intent to commit a crime. Penal Law § 140.20. Third-degree burglary rises to second-degree burglary when the building is a dwelling: a building typically occupied at night by someone who resides there. Penal Law §§ 140.00(3), 140.25(2).

Burglary of a dwelling is a more serious crime because it is “both more frightening and more likely to end in violence.” *McCray*, 16 N.E.3d at 536.¹ Because those dual concerns arise when a person burglarizes a non-residential area “in close contiguity” to a dwelling, burglary of a non-residential area of a building generally qualifies as a dwelling burglary when the building contains a dwelling. *Id.* at 534, 536. For example, in *McCray*, the Court upheld the defendant’s second-degree burglary convictions, finding that a hotel

¹ *People v. McCray* is a real case; the other cases cited in this memo are based on real cases but have been edited for pedagogical purposes.

employees' locker room and a museum located in the same building as the hotel, both of which the defendant burglarized, were dwellings. *Id.* at 537. In that case, stairways connected the hotel's residential floors to both the locker room and the museum. *Id.* at 534-35. As to the locker room, which could be accessed only from a floor adjacent to the first floor of guestrooms, the court explained that defendant's burglary presented the same risks associated with a dwelling burglary because of his proximity to the guestrooms when he navigated the building's stairways. *Id.* at 537. And although the museum was "much less near to the sleeping rooms," in deeming it a dwelling the Court emphasized the "ease of access" from the museum to the hotel's guestrooms via the shared stairway. *Id.*

On the other hand, burglary of a building's non-residential area does not constitute a dwelling burglary when that area is "so remote and inaccessible from the living quarters that the special dangers inherent in the burglary of a dwelling do not exist." *Id.* at 534. Thus, *McCray* recognized an exception to the general dwelling-burglary rule when a burglary "occur[s] in an area of a large building that is completely severed from its residential spaces." *Id.* at 536 (observing that hypothetical burglar who breaks into commercial space of skyscraper that is remote and inaccessible from building's residential apartments "create[s] virtually no risk that the people living in the apartments will even be conscious of his presence"). Later, in *People v. Brass*, the court invoked that exception in holding that a non-residential campus building was not a dwelling because it was a "considerable distance" from the residential buildings and lacked "ready access via

connecting elevators, stairwells, or corridors.” 1464 N.Y.S.3d 621, 622 (N.Y. App. Div. 2022).

A building’s non-residential area may nevertheless qualify as a dwelling even if it is removed from and inaccessible to the residential portion, so long as the non-residential area shares common space with the residential portion. In *People v. Carto*, the court held that office space in a 57-story mixed-use building constituted a dwelling, despite being inaccessible from the residential floors. 1642 N.Y.S.3d 785, 785 (N.Y. App. Div. 2021). Although the office was located five floors below the residential area and the two were not connected by elevator, they shared a common lobby. *Id.* The court rejected the argument that the non-residential space must be “instantly accessible” to qualify as a dwelling, emphasizing that a resident might have encountered the defendant in the lobby, thereby increasing the risk posed by the crime. *Id.*; *see also People v. Quinn*, 71 N.Y. 561, 563 (1878) (affirming second-degree burglary conviction where defendant burglarized shop on first floor of apartment building, despite no internal access between shop and residential units, because shop was “within the same four outer walls, and under the same roof” as residences, and building’s private yard was accessible from both shop and living quarters).

Here, the cellar is likely not a dwelling because it is completely severed and inaccessible from the building’s residences. The only entry to the cellar, which is off-limits to building residents, is through doors located on a public sidewalk, eight feet from the building’s residential entrance. Nor do any stairways or emergency escape routes connect the cellar to either the deli or the six residential floors above. Thus, once Cooper

entered the cellar, the only space he could access was the public sidewalk and neither the deli nor the apartments. This lack of access mirrors the circumstances in *Brass*, where a non-residential area did not qualify as a dwelling because it was a “considerable distance” from residential spaces and lacked “ready access” to them “via connecting elevators, stairwells, or corridors.” 1464 N.Y.S.3d at 622.

For these same reasons, this case is distinguishable from *McCray*, where non-residential areas were deemed dwellings because stairways connected them to residential areas. Likewise, it is distinguishable from *Quinn* because the cellar was not “within the same four outer walls” or “under the same roof” as the building’s residences. *Quinn*, 71 N.Y. at 563. Here, the cellar is completely disconnected from residential areas and not under the same roof or within the same walls as the building’s residences. That said, both cases implicitly recognized that non-residential areas could qualify as dwellings even when access to residential ones is difficult or unlikely. But in this case, access from the cellar to the residents is not just difficult—it is impossible.

A prosecutor could argue that the cellar qualified as a dwelling because it shared common space with the building’s residences. After all, the cellar entrance was only eight feet away from the residential entrance, and a resident might have encountered Cooper entering or exiting the cellar. But unlike the shop in *Quinn*, which shared a private yard with residences, and the office in *Carto*, which shared an internal lobby with residences, the cellar here shares no space with the building’s residences except a public sidewalk that is outside the building and accessible to the public. A resident seeing Cooper near the cellar would have no reason to suspect he was committing a crime, as he could have been

a deli employee, a delivery worker, or simply a passerby. Even if his presence raised suspicion, the potential threat to residential areas was far less here than in *Carto*, where the defendant's presence in a shared interior lobby heightened the risk to residents. Accordingly, the "risk [to residents] posed by the crime" was significantly more attenuated here. *Carto*, 1642 N.Y.S.3d at 785.

V. CONCLUSION

For the reasons discussed above, the cellar was likely not a dwelling. But even if it could be considered one, Cooper should not be charged with second-degree burglary. He is an unemployed single parent of two young children who entered the cellar to get food for his family, which is currently living in a homeless shelter. He has no prior criminal record and showed no intent to access the building's residential areas. Although he broke the law, the circumstances do not justify a charge carrying a mandatory minimum prison sentence of three and a half years—an outcome that would cause significant harm to his family. A lesser felony, such as third-degree burglary, is more appropriate in this case.