

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
10

11 JOSE LUIS MUNGUIA,

12 Petitioner,

13 v.

14 JIM ROBERTSON,

15 Respondent.

Case No. 1:18-cv-00743-AWI-SAB-HC

FINDINGS AND RECOMMENDATION
RECOMMENDING DENIAL OF FIRST
AMENDED PETITION FOR WRIT OF
HABEAS CORPUS

(ECF No. 19)

16
17 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus
18 pursuant to 28 U.S.C. § 2254.

19 **I.**

20 **BACKGROUND**

21 On August 18, 2014, Petitioner was convicted by a jury in the Kern County Superior
22 Court of first-degree burglary. The jury also found to be true that at the time of the commission
23 of the residential burglary another person, other than an accomplice, was present in the
24 residence. (2 CT¹ 342–43). Petitioner was sentenced to an imprisonment term of seven years and
25 eight months to run consecutive to a seventeen-year sentence he received in a separate case. (2
26 CT 391). On December 29, 2016, the California Court of Appeal, Fifth Appellate District
27 affirmed the judgment. People v. Munguia, 7 Cal. App. 5th 103, 107 (Cal. Ct. App. 2016). On

28 ¹ “CT” refers to the Clerk’s Transcript on Appeal lodged by Respondent on January 3, 2019. (ECF No. 21).

1 March 29, 2017, the California Supreme Court denied the petition for review. (LDs² 5, 6).

2 On May 31, 2018, Petitioner commenced the instant proceedings by filing a federal
3 habeas petition. (ECF No. 1). On November 5, 2018, the Court granted Respondent's motion to
4 dismiss the original petition for nonexhaustion and allowed Petitioner to proceed with the fully
5 exhausted first amended petition. (ECF No. 17). In the first amended petition, Petitioner asserts
6 that there was insufficient evidence to support his first-degree burglary conviction and the jury's
7 true finding on the person present allegation. (ECF No. 19). Respondent filed an answer. (ECF
8 No. 20).

9 **II.**

10 **STATEMENT OF FACTS³**

11 In 2011, the Bakersfield house Salvador Tejeda owned and lived in with his
12 family was damaged by a fire.⁴ Tejeda and his family moved into a different
13 house in Bakersfield and Tejeda, a general contractor, demolished their damaged
14 home and began rebuilding it. After the fire, Tejeda's damaged house and his
15 neighbors' houses were a target for thieves. Juanita Howard, who lived several
16 houses away from Tejeda, began patrolling the neighborhood once in the evening
17 before dark and once in the morning.

18 In May 2014, Tejeda's house was 95 percent complete and the only work left to
19 be done was in the kitchen. Although there was no electricity to the house, there
20 was running water and he had furniture worth approximately \$100,000 stored in
21 the kitchen and living room.⁵ By then, Tejeda and his wife had separated but he
22 intended to finish the house for his wife and children to live in. Tejeda did not
23 keep clothes or toiletries in the house, but there were mattresses and a comforter
24 inside. He testified that at the time of the burglary, he had been spending the night
25 at the house every other day to every three days for months, due to the numerous
break-in attempts, and he was continuing to stay there periodically.

26 On the latter point, Howard, who was a defense witness, testified she was aware
27 of Tejeda staying overnight only one or two times. However, she also testified she
28 was not "buddy buddies" with him and would not know if he stayed other times.
Additionally, his car was not visible even the one or two times she knew he was
staying overnight.

On May 4, 2014, Tejeda was at the house. After locking the windows and doors,
he left at approximately 10:30 that night. The next morning, Howard saw the gate
to Tejeda's property was down and she called him at approximately 8:00 a.m. to
let him know. He drove to the house and saw a window had been forced open. He

² "LD" refers to the documents lodged by Respondent on July 31, 2018. (ECF No. 13).

³ The Court relies on the California Court of Appeal's December 29, 2016 opinion for this summary of the facts of the crime. See Vasquez v. Kirkland, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009).

⁴ Tejeda testified the fire damaged the attic and the entire roof. His neighbor, Juanita Howard, testified the house was destroyed by the fire and nothing was salvageable.

⁵ Tejeda had a portable generator he used for electricity.

1 also noticed that while the deadbolt was locked, the door handle lock was not set.
2 As he always locked both, he concluded someone had unlocked the door handle
3 from the inside.

4 Tejedá entered the house and noticed the tools he had in the family room near the
5 rear of the house, including a portable table saw, were missing. He then located
6 the table saw and other tools in the living room, near the entrance to the house. He
7 also noticed a small coffee table had been moved from the kitchen to the family
8 room, the wall-to-wall carpet in one of the bedrooms had been pulled back from
9 the walls, the cover over one of the leather sofas had been removed, and
10 blueprints for the house and some miscellaneous items had been moved. Small
11 tools had also been gathered from around the house and placed in a tool bag.
12 Nothing was taken from the house, however.

13 As Tejedá was walking downstairs, he heard footsteps upstairs. He then exited the
14 house, locked the doors and called the Bakersfield Police Department. As he was
15 waiting outside for the police in front of the house, Howard arrived and watched
16 the back of the property by the alleyway for him.

17 A vehicle drove up and Munguia, who was driving, got out, approached Tejedá
18 and asked if Tejedá could let his friend, who had been left behind, out of the
19 house. Tejedá said no and told Munguia the police had been called. Munguia
20 started walking toward his vehicle looking worried. The police arrived and
21 Munguia drove away. Tejedá pointed out Munguia's departing vehicle to the
22 police, and Officer Juárez pulled it over several blocks away. Ribeiro was in the
23 back seat.

24 Police entered Tejedá's house, announced themselves and began checking rooms.
25 Arambula then called down and let police know she was upstairs. She came down
26 the stairs and was detained without incident.

27 Two sets of footprints were located inside the house. The footprints appeared to
28 have been left by Vans-style shoes and did not match the sandals Arambula was
wearing. After being notified of the footprints, Officer Juárez checked Munguia's
and Ribeiro's shoes; both were wearing Vans-style shoes. Juárez transported them
back to the house, compared their shoes to the footprints found in the house, and
determined the type and size matched Munguia's and Ribeiro's shoes.

Munguia told Officer Juárez that he drove Arambula and Ribeiro to the hospital
around 2:30 a.m. Ribeiro was released a couple of hours later and they drove
around for a while. He got tired and parked on Panorama Drive, where Tejedá's
house is located. Munguia admitted Ribeiro entered Tejedá's house through the
kitchen window and opened the door for him and Arambula.⁶ He also said he saw
Ribeiro and a male subject leave the house carrying tools. He said he did not
know the male subject's name, though, and he could not provide any description
of him to Officer Juárez.

Munguia, 7 Cal. App. 5th at 107–09 (footnotes in original).

///
///

///

⁶ The window was not large but a smaller person could fit through it and Ribeiro was petite.

1 **III.**

2 **STANDARD OF REVIEW**

3 Relief by way of a petition for writ of habeas corpus extends to a person in custody
4 pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws
5 or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor,
6 529 U.S. 362, 375 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed
7 by the U.S. Constitution. The challenged conviction arises out of the Kern County Superior
8 Court, which is located within the Eastern District of California. 28 U.S.C. § 2241(d).

9 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
10 of 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its
11 enactment. Lindh v. Murphy, 521 U.S. 320 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th
12 Cir. 1997) (en banc). The instant petition was filed after the enactment of AEDPA and is
13 therefore governed by its provisions.

14 Under AEDPA, relitigation of any claim adjudicated on the merits in state court is barred
15 unless a petitioner can show that the state court’s adjudication of his claim:

16 (1) resulted in a decision that was contrary to, or involved an
17 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

18 (2) resulted in a decision that was based on an unreasonable
19 determination of the facts in light of the evidence presented in the
State court proceeding.

20 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 97–98 (2011); Lockyer v. Andrade, 538
21 U.S. 63, 70–71 (2003); Williams, 529 U.S. at 413.

22 As a threshold matter, this Court must “first decide what constitutes ‘clearly established
23 Federal law, as determined by the Supreme Court of the United States.’” Lockyer, 538 U.S. at 71
24 (quoting 28 U.S.C. § 2254(d)(1)). In ascertaining what is “clearly established Federal law,” this
25 Court must look to the “holdings, as opposed to the dicta, of [the Supreme Court’s] decisions as
26 of the time of the relevant state-court decision.” Williams, 529 U.S. at 412. “In other words,
27 ‘clearly established Federal law’ under § 2254(d)(1) is the governing legal principle or principles
28 set forth by the Supreme Court at the time the state court renders its decision.” Id. In addition,

1 the Supreme Court decision must “squarely address [] the issue in th[e] case’ or establish a legal
2 principle that ‘clearly extend[s]’ to a new context to the extent required by the Supreme Court in
3 . . . recent decisions”; otherwise, there is no clearly established Federal law for purposes of
4 review under AEDPA. Moses v. Payne, 555 F.3d 742, 754 (9th Cir. 2009) (quoting Wright v.
5 Van Patten, 552 U.S. 120, 125 (2008)); Panetti v. Quarterman, 551 U.S. 930 (2007); Carey v.
6 Musladin, 549 U.S. 70 (2006). If no clearly established Federal law exists, the inquiry is at an
7 end and the Court must defer to the state court’s decision. Musladin, 549 U.S. 70; Wright, 552
8 U.S. at 126; Moses, 555 F.3d at 760.

9 If the Court determines there is governing clearly established Federal law, the Court must
10 then consider whether the state court’s decision was “contrary to, or involved an unreasonable
11 application of, [the] clearly established Federal law.” Lockyer, 538 U.S. at 72 (quoting 28 U.S.C.
12 § 2254(d)(1)). “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the
13 state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question
14 of law or if the state court decides a case differently than [the] Court has on a set of materially
15 indistinguishable facts.” Williams, 529 U.S. at 412–13; see also Lockyer, 538 U.S. at 72. “The
16 word ‘contrary’ is commonly understood to mean ‘diametrically different,’ ‘opposite in character
17 or nature,’ or ‘mutually opposed.’” Williams, 529 U.S. at 405 (quoting Webster’s Third New
18 International Dictionary 495 (1976)). “A state-court decision will certainly be contrary to
19 [Supreme Court] clearly established precedent if the state court applies a rule that contradicts the
20 governing law set forth in [Supreme Court] cases.” Id. If the state court decision is “contrary to”
21 clearly established Supreme Court precedent, the state decision is reviewed under the pre-
22 AEDPA de novo standard. Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008) (en banc).

23 “Under the ‘reasonable application clause,’ a federal habeas court may grant the writ if
24 the state court identifies the correct governing legal principle from [the] Court’s decisions but
25 unreasonably applies that principle to the facts of the prisoner’s case.” Williams, 529 U.S. at 413.
26 “[A] federal court may not issue the writ simply because the court concludes in its independent
27 judgment that the relevant state court decision applied clearly established federal law erroneously
28 or incorrectly. Rather, that application must also be unreasonable.” Id. at 411; see also Lockyer,

1 538 U.S. at 75–76. The writ may issue only “where there is no possibility fair minded jurists
2 could disagree that the state court’s decision conflicts with [the Supreme Court’s] precedents.”
3 Richter, 562 U.S. at 102. In other words, so long as fair minded jurists could disagree on the
4 correctness of the state court’s decision, the decision cannot be considered unreasonable. Id. If
5 the Court determines that the state court decision is objectively unreasonable, and the error is not
6 structural, habeas relief is nonetheless unavailable unless the error had a substantial and injurious
7 effect on the verdict. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

8 The Court looks to the last reasoned state court decision as the basis for the state court
9 judgment. Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018); Stanley v. Cullen, 633 F.3d 852, 859
10 (9th Cir. 2011). If the last reasoned state court decision adopts or substantially incorporates the
11 reasoning from a previous state court decision, this Court may consider both decisions to
12 ascertain the reasoning of the last decision. Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir.
13 2007) (en banc). “When a federal claim has been presented to a state court and the state court has
14 denied relief, it may be presumed that the state court adjudicated the claim on the merits in the
15 absence of any indication or state-law procedural principles to the contrary.” Richter, 562 U.S. at
16 99. This presumption may be overcome by a showing “there is reason to think some other
17 explanation for the state court’s decision is more likely.” Id. at 99–100 (citing Ylst v.
18 Nunnemaker, 501 U.S. 797, 803 (1991)).

19 Where the state courts reach a decision on the merits but there is no reasoned decision, a
20 federal habeas court independently reviews the record to determine whether habeas corpus relief
21 is available under § 2254(d). Stanley, 633 F.3d at 860; Himes v. Thompson, 336 F.3d 848, 853
22 (9th Cir. 2003). “Independent review of the record is not de novo review of the constitutional
23 issue, but rather, the only method by which we can determine whether a silent state court
24 decision is objectively unreasonable.” Himes, 336 F.3d at 853. While the federal court cannot
25 analyze just what the state court did when it issued a summary denial, the federal court must
26 review the state court record to determine whether there was any “reasonable basis for the state
27 court to deny relief.” Richter, 562 U.S. at 98. This Court “must determine what arguments or
28 theories . . . could have supported, the state court’s decision; and then it must ask whether it is

1 possible fairminded jurists could disagree that those arguments or theories are inconsistent with
2 the holding in a prior decision of [the Supreme] Court.” Id. at 102.

3 IV.

4 REVIEW OF CLAIMS

5 A. Inhabited Dwelling

6 In his first claim for relief, Petitioner asserts that the evidence was insufficient to support
7 his conviction for first-degree burglary because the house where the offense occurred was a
8 construction site rather than an inhabited dwelling. (ECF No. 19 at 4).⁷ Respondent argues that
9 this claim is not cognizable in federal habeas corpus because it essentially challenges the state
10 court’s interpretation of state law and that the California Court of Appeal reasonably rejected
11 Petitioner’s challenge to the sufficiency of the evidence. (ECF No. 20 at 13).

12 This claim was raised on direct appeal to the California Court of Appeal, Fifth Appellate
13 District, which denied the claim in a reasoned opinion. The California Supreme Court summarily
14 denied Petitioner’s petition for review. As federal courts review the last reasoned state court
15 opinion, the Court will “look through” the California Supreme Court’s summary denial and
16 examine the decision of the California Court of Appeal. See Wilson, 138 S. Ct at 1192.

17 In denying Petitioner’s sufficiency of the evidence claim with respect to the inhabited
18 dwelling element, the California Court of Appeal stated:

19 I. Sufficiency of the Evidence

20 . . .

21 Further, Arambula and Munguia both argue Tejeda’s house was a construction
22 site and not an inhabited dwelling, and Tejeda did not intend to live there once he
finished rebuilding it.

23 The People contend the circumstances of the entry and the movement of items
24 inside the house, damage to the carpet and Munguia’s departure with a worried
25 look on his face constitute sufficient evidence of the intent to commit theft; and
26 the jury was not required to accept the alternate explanation offered by the
27 defense. Additionally, the circumstances under which Tejeda and his family
moved out of their home, the condition it was in at the time of the burglary,
Tejeda’s testimony he slept there overnight several times a week, and his intent to
move back in support the jury’s determination the house was an inhabited
dwelling at the time of the burglary.

28 ⁷ Page numbers refer to the ECF page numbers stamped at the top of the page.

1
2
3
4
5
6
7
8
9
10
A. Standard of Review

On appeal, the relevant inquiry governing a challenge to the sufficiency of the evidence “‘is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055, cert. den. (2016) ___ U.S. ___ [136 S.Ct. 1714].) “The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value— such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) “In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.” (*Ibid.*) “[I]t is the jury, not the appellate court which must be convinced of the defendant’s guilt” (*People v. Nguyen, supra*, at pp. 1055–1056.) “A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict.’” (*People v. Zamudio, supra*, at p. 357.)

11
12
13
14
15
16
B. First Degree Burglary

First degree burglary is the entry into an inhabited dwelling with the intent to commit larceny or any felony. (§§ 459, 460.) “[I]nhabited’ means currently being used for dwelling purposes, whether occupied or not. A house ... is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.” (§ 459; *People v. Harris* (2013) 57 Cal.4th 804, 842; *Magness v. Superior Court* (2012) 54 Cal.4th 270, 273.)

...

17
18
19
20
21
22
23
24
25
26
27
28
2. Inhabited Dwelling

What constitutes an “inhabited dwelling” is a question of fact. (*Vasquez, supra*, 239 Cal.App.4th at p. 1517; *People v. Burkett* (2013) 220 Cal.App.4th 572, 582 (*Burkett*)). No single factor, including use as sleeping quarters, is dispositive. (*People v. Hughes* (2002) 27 Cal.4th 287, 354–355; *Vasquez, supra*, at p. 1517.)

““Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence.” [Citation.] ‘In addition a burglary of an inhabited dwelling involves an invasion of perhaps the most secret zone of privacy, the place where trinkets, mementos, heirlooms, and the other stuff of personal history are kept. Society therefore has an important interest in seeing to it that burglars stay out of inhabited dwelling houses.’” (*People v. DeRouen* (1995) 38 Cal.App.4th 86, 91, disapproved on another ground by *People v. Allen* (1999) 21 Cal.4th 846, 865–866; *People v. Hughes, supra*, 27 Cal.4th at p. 355; *Burkett, supra*, 220 Cal.App.4th at p. 579; accord, *People v. Glazier* (2010) 186 Cal.App.4th 1151, 1158, 1161 (*Glazier*)).

“The “‘inhabited-uninhabited’ dichotomy turns not on the immediate presence or absence of some person but rather on the character of the use of the building.” [Citation.] ‘[T]he proper question is whether *the nature of a structure’s composition* is such that a reasonable person would expect some protection from

1 unauthorized intrusion.” (*People v. DeRouen, supra*, 38 Cal.App.4th at pp. 91–
2 92; *People v. Hughes, supra*, 27 Cal.4th at p. 355.)

3 “A structure or dwelling ‘is ‘inhabited’ if it is currently being used for residential
4 purposes, even if it is temporarily *unoccupied*, i.e., no person is currently present.
5 A formerly inhabited dwelling becomes *uninhabited only when its occupants have*
6 *moved out permanently and do not intend to return to continue or to resume using*
7 *the structure as a dwelling.... [¶] ... [¶] ... If the person is using the structure as a*
8 *habitation when the burglary or robbery occurs, his possible intent to abandon the*
9 *habitation in the future does not alter its character as an inhabited dwelling.”*
10 (*People v. Aguilar* (2010) 181 Cal.App.4th 966, 970–971 (*Aguilar*); *People v.*
11 *Tessman* (2014) 223 Cal.App.4th 1293, 1299–1300; *People v. Villalobos* (2006)
12 145 Cal.App.4th 310, 320.)

13 Thus, a vacation house is an inhabited dwelling (*People v. DeRouen, supra*, 38
14 Cal.App.4th at p. 92), and a house vacated during extensive remodeling remains
15 an inhabited dwelling (*People v. Glazier, supra*, 186 Cal.App.4th at p. 1161), as
16 does a dwelling vacated due to fire or other disaster (*Aguilar, supra*, 181
17 Cal.App.4th at pp. 971–972). The house of an elderly owner residing in a skilled
18 nursing facility was found to be an inhabited dwelling, where the owner intended
19 to return, notwithstanding that he may have been taken off life support shortly
20 before his house was burglarized. (*People v. Meredith* (2009) 174 Cal.App.4th
21 1257, 1259–1260, 1268–1269.) In an analogous situation, this court found that a
22 vacant but furnished and maintained house remained an inhabited dwelling even
23 though the owner had been confined to a boarding residence for the past two and
24 one-half years and there was doubt she would return. (*People v. Marquez* (1983)
25 143 Cal.App.3d 797, 800–802.) These cases share in common evidence that while
26 the dwellings were unoccupied at the time of the crime, the owners or occupants
27 intended to return and did not abandon their dwellings or intend to leave them
28 permanently.

We take further note of the recent decisions in *Vasquez* and *Burkett*. In *Vasquez*,
the Court of Appeal affirmed the defendant’s first degree burglary conviction
where he broke into a house he had previously rented. (*Vasquez, supra*, 239
Cal.App.4th at p. 1514.) The house had been sold following his eviction (*id.* at pp.
1514–1515) and the new owner “was generally in or around the premises of her
new home” (*id.* at p. 1517). “She introduced herself to a neighbor, transferred the
utilities to her personal accounts, notified creditors of her new address, and began
painting and renovating the home.” (*Ibid.*) There were tools and some personal
belongings in the house, and she had added window locks to the house. (*Ibid.*)
The court found the evidence was sufficient to support the jury’s finding the
house was an inhabited dwelling, even though the new owner had not yet moved
in or started sleeping there. (*Id.* at pp. 1514, 1517.)

In contrast, the Court of Appeal reversed the defendant’s first degree burglary
conviction in *Burkett*, which also involved a soon to be fully occupied house.
(*Burkett, supra*, 220 Cal.App.4th at pp.574–575.) The owner had vacated the
house years before in what was intended to be a permanent relocation, and he kept
the house as a rental property. (*Id.* at pp. 580–581.) After the owner lost the house
he moved to in foreclosure proceedings, he gave his tenant notice that he needed
to move back into the house she was renting from him. (*Id.* at pp. 575, 580.) The
tenant vacated the house and turned off the utilities, but she still had the keys. (*Id.*
at p. 575.) The next day, the defendant broke into the empty house and did some
damage in the course of stealing various metal items, including sink pipes. (*Id.* at
p. 576.) The owner received the keys from his former tenant after the burglary,

1 there was no testimony regarding turning the utilities on, and he moved into the
2 house approximately one week after the burglary. (*Id.* at p. 575.)

3 In finding the house was not an inhabited dwelling at the time of the burglary, the
4 court concluded the circumstances best fit the rule that “a formerly inhabited
5 dwelling becomes uninhabited when its occupants have moved out permanently
6 and do not intend to return to continue or to resume using the structure as a
7 dwelling.” (*Burkett, supra*, 220 Cal.App.4th at p. 581, citing *People v. Guthrie*
8 (1983) 144 Cal.App.3d 832, 838–840.) The court considered cases involving
9 “when a current habitation ends” and “when habitation begins,” concluding that
10 “none of the indicia [of habitation were] present except for the self-declared intent
11 of the owner to occupy the house in the future.” (*Burkett, supra*, at pp. 581–582.)
12 Relevant to the decision in *Burkett* was evidence that the owner’s original
13 relocation was intended to be permanent and although plans were in place to
14 move back in at the time of the burglary, that was due to a reversal of fortune. (*Id.*
15 at pp. 580–581.) Further, the owner “was not resuming occupancy in a home
16 filled with his furnishings after an extended absence,” and “[h]e was not shifting
17 back and forth between two homes.”⁸ (*Burkett, supra*, at p. 581.)

18 Arambula and Munguia argue that Tejada’s house was merely a construction site,
19 not an inhabited dwelling. Further, Tejada was only using it as storage for
20 furniture and tools, and the fact Tejada spent some nights there to protect his
21 property is not enough to show it was his “home away from home.” (*People v.*
22 *Long* (2010) 189 Cal.App.4th 826, 837.) They point out that Tejada tore down the
23 house entirely and had not completed the rebuild at the time of the burglary.
24 Given the house’s demolition, they contend the fire was not the sole cause of the
25 Tejada family’s departure from the house and the natural disaster exception in
26 section 459 does not apply. Additionally, Tejada kept no toiletries or other
27 personal items at the house, there was running water but no electricity, his wife
28 and children never returned to the house and he did not intend to move in when
construction was completed.

We are not persuaded. The Tejada family moved out of their home solely because
it was damaged by the fire; they neither abandoned the house nor moved out
permanently with no intention of returning. (*Aguilar, supra*, 181 Cal.App.4th at p.
972.) That Tejada decided to demolish the house and rebuild it does not alter the
fact that the fire forced the family out of their home as an initial matter, and we do
not find Arambula’s and Munguia’s assertion that the disaster provision is
inapplicable compelling. (*Ibid.*)

Although the rebuilding process spanned a number of years, Tejada, a general
contractor, explained that he was rebuilding it himself and had other projects to
schedule around. It is also true that at some point after the fire, there was no
dwelling by virtue of its demolition. However, at the time of the burglary, the
house was 95 percent rebuilt, with only the kitchen left to finish. While the
electricity to the house was not turned on, there was running water, furnishings
for the house were present and Tejada was sleeping there two to three times a

⁸ We observe there is a dissenting opinion in *Burkett*. The majority opinion focused on the owner’s intent when he vacated the house years before and the degree to which he had executed his plan to reoccupy the then vacant house. The dissenting justice stated “that the house is an inhabited dwelling if, at the time of the burglary, the owner, who lived in the house before, intends to return and make it his home again,” and the owner’s past intent should not prevail over his present intent, which was to again occupy the house. (*Burkett, supra*, 220 Cal.App. at p. 584.) It is unnecessary for us to decide which path we would follow because the facts in this case differ from those in *Burkett*, with respect to both the owner’s intent at the time the dwelling was vacated and the extent of his reoccupancy at the time of the burglary.

1 week on one of the mattresses. Further, Tejada continued to receive his mail at the
2 house following the fire and that address remained his address of record with his
licensing board.

3 We also find Arambula’s and Munguia’s focus on who was going to live in the
4 house in the future misplaced on these facts. Whether Tejada, he and his family,
5 or just his estranged wife and children ultimately moved in, the house was their
6 family home before the fire and at the time they vacated the house, they planned
7 to move back in once the house was rebuilt. While Tejada testified he and his wife
8 had since separated, he still owned the house, he was continuing to rebuild it, he
9 was staying there several times a week, and he planned to have his wife and
10 children move back in once it was finished.

11 Thus, although neither Tejada nor his family had yet resumed occupancy of the
12 house full time, other factors were present that indicated Tejada was inhabiting
13 the house at the time of the burglary. We have no difficulty concluding that a
14 reasonable person in Tejada’s shoes would have expected some protection from
15 the unauthorized intrusion that occurred, and we find the jury’s determination that
16 Arambula and Munguia burglarized an inhabited dwelling was supported by
17 substantial evidence. (*Vasquez, supra*, 239 Cal.App.4th at p. 1517; *Glazier, supra*,
18 186 Cal.App.4th at pp. 1160–1161; *Aguilar, supra*, 181 Cal.App.4th at p. 972.)

19 We note that consideration of the concerns underlying first degree burglary—
20 “protection of an occupant’s possessory interest in the safe habitation of a
21 building”—further supports our conclusion in this case. (*Glazier, supra*, 186
22 Cal.App.4th at p. 1158; accord, *Aguilar, supra*, 181 Cal.App.4th at p. 970.)
23 Tejada was sleeping there periodically and when he entered the house on the
24 morning of May 5, 2014, there was an intruder inside and that intruder’s two
25 companions returned to the house while he was outside waiting for police. Their
26 actions clearly violated Tejada’s possessory interest in his house and “increased
27 the danger of personal injury and the risk of “a violent confrontation during a
28 burglary.”” (*Vasquez, supra*, 239 Cal.App.4th at p. 1517; accord, *Glazier, supra*,
at pp. 1160–1161; *Aguilar, supra*, at pp. 970, 972.)

(LD 4 at 6–8, 11–16) (footnote in original).

19 The Supreme Court has held that when reviewing a sufficiency of the evidence claim, a
20 court must determine whether, viewing the evidence and the inferences to be drawn from it in the
21 light most favorable to the prosecution, any rational trier of fact could find the essential elements
22 of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). A
23 reviewing court “faced with a record of historical facts that supports conflicting inferences must
24 presume—even if it does not affirmatively appear in the record—that the trier of fact resolved
25 any such conflicts in favor of the prosecution, and must defer to that resolution.” *Id.* at 326. State
26 law provides “for ‘the substantive elements of the criminal offense,’ but the minimum amount of
27 evidence that the Due Process Clause requires to prove the offense is purely a matter of federal
28 law.” Coleman v. Johnson, 566 U.S. 650, 655 (2012) (quoting Jackson, 443 U.S. at 319).

1 As the Supreme Court has stated,

2 Jackson . . . makes clear that it is the responsibility of the jury—not the court—to
3 decide what conclusions should be drawn from evidence admitted at trial. A
4 reviewing court may set aside the jury’s verdict on the ground of insufficient
5 evidence only if no rational trier of fact could have agreed with the jury. What is
6 more, a federal court may not overturn a state court decision rejecting a
7 sufficiency of the evidence challenge simply because the federal court disagrees
8 with the state court. The federal court instead may do so only if the state court
9 decision was “objectively unreasonable.”

10 Cavazos v. Smith, 565 U.S. 1, 2 (2011) (per curiam) (quoting Renico v. Lett, 559 U.S. 766, 773
11 (2010)).

12 Here, the California Court of Appeal cited to California state cases that held: (1) a
13 formerly inhabited dwelling becomes uninhabited only when its occupants have moved out
14 permanently and do not intend to return to continue or to resume using the structure as a
15 dwelling; and (2) a house vacated during extensive remodeling or due to fire or other disaster
16 remains an inhabited dwelling. These determinations are binding on this Court. See Bradshaw v.
17 Richey, 546 U.S. 74, 76 (2005) (“[A] state court’s interpretation of state law, including one
18 announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas
19 corpus.”).

20 Viewing the record in the light most favorable to the prosecution, a rational trier of fact
21 could have found true beyond a reasonable doubt that the house where the offense occurred was
22 an inhabited dwelling. As noted by the California Court of Appeal, the Tejada family moved out
23 of their home due to a fire, and after demolishing and rebuilding the house, it was intended that
24 some configuration of their family was to move back in and use the house as a dwelling. (2 RT
25 280, 289, 335–37, 375–77). Moreover, at the time of the offense the house was ninety-five
26 percent rebuilt with running water and furnishings stored inside. (2 RT 278–82, 336–37). Mr.
27 Tejada was sleeping at the house two to three times a week, continued to receive his mail at the
28 house, and the house’s address remained Tejada’s address of record with his licensing board. (2
RT 278, 281, 378).

“When the deference to state court decisions required by § 2254(d) is applied to the state
court’s already deferential review,” Cavazos, 565 U.S. at 7, the Court finds that the state court’s

1 decision denying Petitioner’s sufficiency of evidence claim with respect to the inhabited
2 dwelling element was not contrary to, or an unreasonable application of, clearly established
3 federal law. The decision was not “so lacking in justification that there was an error well
4 understood and comprehended in existing law beyond any possibility for fairminded
5 disagreement.” Richter, 562 U.S. at 103. Accordingly, Petitioner is not entitled to habeas relief
6 on his first claim, and it should be denied.

7 **B. Person Present Allegation**

8 In his second claim for relief, Petitioner asserts that the evidence was insufficient as a
9 matter of law to support the jury’s true finding on the person present allegation because the
10 commission of a burglary is complete upon entry and no one, other than an accomplice, was
11 present at the time of entry. (ECF No. 19 at 4). Respondent argues that this claim is not
12 cognizable in federal habeas because it essentially challenges the state court’s interpretation of
13 state law and that the California Court of Appeal reasonably rejected Petitioner’s claim. (ECF
14 No. 20 at 20–21).

15 This claim challenging the jury’s person present finding was raised on direct appeal to
16 the California Court of Appeal, Fifth Appellate District, which denied the claim in a reasoned
17 opinion. The California Supreme Court summarily denied Petitioner’s petition for review. As
18 federal courts review the last reasoned state court opinion, the Court will “look through” the
19 California Supreme Court’s summary denial and examine the decision of the California Court of
20 Appeal. See Wilson, 138 S. Ct at 1192.

21 In denying Petitioner’s claim regarding California Penal Code section 667.5(c)(21)’s
22 “person present” allegation or occupied burglary enhancement, the California Court of Appeal
23 stated:

24 **II. Occupied Burglary Enhancement**

25 Arambula argues that the evidence is insufficient to support the jury’s occupied
26 burglary enhancement finding, and Munguia argues that under the plain language
27 of the statute, the evidence is insufficient to support the enhancement as a matter
28 of law. The premise underlying both parties’ arguments is that the commission of
burglary is complete upon entry and no one, other than an accomplice, was
present at that time.

1 The People contend it is well recognized that a burglary continues after the time
2 of entry with the intent to commit theft or another felony, and the burglary was
ongoing when Tejada entered the residence.

3 We review Arambula’s and Munguia’s challenges to the legal sufficiency of the
4 undisputed evidence supporting the occupied burglary enhancement de novo.⁹
5 (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136, 197 Cal.Rptr.3d 743; *People*
6 *v. Harris* (2014) 224 Cal.App.4th 86, 89, 168 Cal.Rptr.3d 305; *People v. Elder*
7 (2014) 227 Cal.App.4th 411, 421, 174 Cal.Rptr.3d 192; *People v. Villalobos*
8 (2006) 145 Cal.App.4th 310, 316, fn. 3, 51 Cal.Rptr.3d 678.)

9 **A. Section 667.5, Subdivision (c)(21)**

10 Pursuant to section 667.5, subdivision (a):

11 “Enhancement of prison terms for new offenses because of prior prison
12 terms shall be imposed as follows:

13 “(a) Where one of the new offenses is one of the violent felonies specified
14 in subdivision (c), in addition to and consecutive to any other prison terms
15 therefor, the court shall impose a three-year term for each prior separate
16 prison term served by the defendant where the prior offense was one of the
17 violent felonies specified in subdivision (c). However, no additional term
18 shall be imposed under this subdivision for any prison term served prior to
19 a period of 10 years in which the defendant remained free of both prison
20 custody and the commission of an offense which results in a felony
21 conviction.”

22 First degree burglary where a nonaccomplice third party is present was elevated to
23 a violent felony within the meaning of section 667.5, subdivision (c), in 2000 as
24 part of Proposition 21. (*People v. Singleton* (2007) 155 Cal.App.4th 1332, 1336,
25 66 Cal.Rptr.3d 738 (*Singleton*)). “Occupied burglary plainly presents a potential
26 for violence and consequently merits enhanced punishment.” (*Doe v. Saenz*,
27 *supra*, 140 Cal.App.4th at p. 988, 45 Cal.Rptr.3d 126; accord, *People v. Debouver*
28 (2016) 1 Cal.App.5th 972, 982, 205 Cal.Rptr.3d 318; accord, *People v. Harris*,
supra, 224 Cal.App.4th at p. 91, 168 Cal.Rptr.3d 305.) It “does not require the use
or threat of force. Indeed, the crime does not require any contact between the
defendant and the occupant. The mere presence of a nonaccomplice in the
dwelling is sufficient. Further, knowledge that a dwelling is occupied is not an
element of occupied burglary. Thus, a burglary may qualify as an occupied
burglary under ... section 667.5[, subdivision](c)(21) even though the defendant
had no contact with the occupant and thought no one was present in the home
during the burglary.” (*Doe v. Saenz, supra*, at p. 987, 45 Cal.Rptr.3d 126.)

⁹ Citing *In re K.F.* (2009) 173 Cal.App.4th 655, 92 Cal.Rptr.3d 784, Arambula contends this claim was not forfeited on appeal by her trial counsel’s failure to object because “[s]ufficiency of the evidence has always been viewed as a question necessarily and inherently raised in every contested trial of any issue of fact, and requiring no further steps by the aggrieved party to be preserved for appeal.” (*Id.* at p. 660, 92 Cal.Rptr.3d 784.) The People do not argue otherwise and we therefore assume without deciding that this claim was not forfeited. (See *People v. McCullough* (2013) 56 Cal.4th 589, 593, 155 Cal.Rptr.3d 365, 298 P.3d 860 [“neither forfeiture nor application of the forfeiture rule is automatic”]; see also *People v. Williams* (2013) 218 Cal.App.4th 1038, 1052–1053, 160 Cal.Rptr.3d 779 [reaching issues intertwined with statutory interpretation notwithstanding forfeiture objection because it “serves the interest of avoiding similar errors in future cases”].)

1 **B. Meaning of “[D]uring the [C]ommission of the [B]urglary”¹⁰**

2 “The canons of statutory interpretation are well settled.” (*Singleton, supra*, 155
3 Cal.App.4th at p. 1337, 66 Cal.Rptr.3d 738.) “If there is no ambiguity, then we
4 presume the lawmakers meant what they said, and the plain meaning of the
5 language governs.” (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272, 105
6 Cal.Rptr.2d 457, 19 P.3d 1196; see *In re Gilbert R.* (2012) 211 Cal.App.4th 514,
7 519, 149 Cal.Rptr.3d 608.)

8 In this case, it is undisputed that Tejada was not in the residence when Arambula,
9 Munguia and Ribeiro entered it. He later entered the residence while Arambula
10 was still upstairs. Munguia and Ribeiro returned to the residence shortly
11 thereafter, where they encountered Tejada waiting outside of the house for police
12 to arrive.

13 Arambula’s and Munguia’s arguments focus on the completion of the crime in
14 terms of the elements and the fact that Tejada was not present in the residence at
15 the time of entry. We agree that assuming the requisite intent is present, burglary
16 is technically complete upon entry, as the elements of the offense have been
17 satisfied. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041–1042, 31 Cal.Rptr.2d
18 128, 874 P.2d 903; *People v. McEntire* (2016) 247 Cal.App.4th 484, 491, 202
19 Cal.Rptr.3d 128.) However, there is a distinction between the point at which the
20 commission of a burglary is technically complete for the purpose of establishing
21 criminal liability and the point at which the commission of a burglary is complete
22 in that it has ended, and we reject Arambula’s and Munguia’s positions that the
23 former controls with respect to the occupied burglary enhancement. (*Montoya,*
24 *supra*, at pp. 1039–1043, 31 Cal.Rptr.2d 128, 874 P.2d 903.)

25 In *Montoya*, the California Supreme Court addressed the duration of the crime of
26 burglary. (*Montoya, supra*, 7 Cal.4th at p. 1038, 31 Cal.Rptr.2d 128, 874 P.2d
27 903.) Although it did so in the context of aider and abettor liability rather than the
28 occupied burglary enhancement, we find the analysis instructive. (*Ibid.*)

 As in this case, the defendant in *Montoya* argued that because the crime of
 burglary is complete with respect to the elements of the offense upon entry, aider
 and abettor liability was dependent upon forming “the requisite intent to commit,
 encourage, or facilitate the offense *prior to or during entry by the perpetrator.*”
 (*Montoya, supra*, 7 Cal.4th at pp. 1039–1040, 31 Cal.Rptr.2d 128, 874 P.2d 903.)
 The court had previously concluded in a robbery case that “the temporal threshold
 for establishing guilt—a fixed point in time at which all elements of the
 substantive offense are satisfied so that the offense itself may be considered to
 have been ‘initially committed’ rather than simply attempted—is *not* synonymous
 with the ‘commission’ of that crime for the purpose of determining aider and
 abettor liability.” (*Id.* at p. 1040, 31 Cal.Rptr.2d 128, 874 P.2d 903.) Applying
 that analysis to the crime of burglary, the court determined “that the duration of a
 burglary ... extends until the perpetrator’s [final] departure from the structure.”
 (*Id.* at pp. 1046–1047, 31 Cal.Rptr.2d 128, 874 P.2d 903.)

 In reaching this conclusion, the court considered the elements of burglary and the
 interests the law sought to protect, observing, “It is manifest that the increased
 danger to the personal safety of the occupant, and the increased risk of loss or
 damage to his or her property contemplated by the statutory proscription, do not
 terminate at the moment entry is accomplished, but rather continue while the
 perpetrator remains inside the structure. Certainly, an absent occupant could

¹⁰ Section 667.5, subdivision (c)(21).

1 return at any moment and be faced with the danger created by the prior entry.”
2 (*Montoya, supra*, 7 Cal.4th at p. 1043, 31 Cal.Rptr.2d 128, 874 P.2d 903.)
3 “Moreover, as long as the perpetrator remains inside the structure, the increased
4 danger to the personal safety of the occupant and the increased risk of loss or
5 damage to his or her property continues, whether the perpetrator commits a felony
6 or theft different from that intended at the time of entry, or even if no felony or
7 theft is completed.” (*Ibid.*)

8 The court drew additional support from comparing burglary to sex offenses,
9 stating, “[T]he victim of a rape would not agree the offense was completed simply
10 because all legal elements of the offense were established by the initial forcible
11 penetration. [Citation.] Similarly, one who happens to be at home during a
12 burglary and becomes aware not only of the entry itself, but of the burglar’s
13 continued presence, would not agree the offense was completed once the entry
14 was accomplished, but rather would conclude the burglary ceased only when the
15 burglar departed from the structure and the danger was past. One happening to
16 arrive home after the burglar’s entry but while he or she still is present in the
17 residence would reach the same conclusion. It also is apparent that, even if the
18 occupant is not present, the risk to property would continue during the entire
19 period the burglar remains in the structure and is not diminished simply because
20 the entry itself has been accomplished.” (*Montoya, supra*, 7 Cal.4th at p. 1045, 31
21 Cal.Rptr.2d 128, 874 P.2d 903, fn. omitted.)

22 The considerations underlying the court’s conclusion in *Montoya* apply with equal
23 force to the occupied burglary enhancement, which by its plain language applies
24 to the presence of a nonaccomplice *during the commission of a burglary*.
25 Occupied burglary was elevated to a violent felony because of the recognized
26 dangers inherent in burglarizing an occupied residence. The briefest of overlaps
27 between entry and the presence of a nonaccomplice suffices for the enhancement
28 (*People v. McEntire, supra*, 247 Cal.App.4th at p. 492, 202 Cal.Rptr.3d 128;
People v. Garcia (2004) 121 Cal.App.4th 271, 280–281, 16 Cal.Rptr.3d 833), and
it matters not whether a nonaccomplice is present at the time of entry or interrupts
the burglary in progress; in either circumstance, the nonaccomplice is present
during the commission of the burglary, thereby creating the very situation of
danger at which the enhancement is directed.

Munguia urges us to focus on the plain language of the statute and we have done
so. While criminal liability attached at the time of entry and Tejada was not then
present, Arambula had not yet departed the residence for the final time when
Tejada entered it.¹¹ He was, therefore, present “during the commission of the
burglary” and the enhancement, by its plain language, applies.¹² (§ 667.5, subd.
(c)(21).)

¹¹ Munguia returned to the house in a vehicle and asked if Tejada would let his friend out who had been left behind. Although Munguia does not argue otherwise, we note this evidence is sufficient to support a reasonable inference that Munguia had not departed the residence for the final time. (*Montoya, supra*, 7 Cal.4th at pp. 1046–1047, 31 Cal.Rptr.2d 128, 874 P.2d 903.)

¹² Although we do not find reliance on dictionary definitions necessary here, given Munguia’s stated view of the ordinary, commonplace meaning of “commission,” we observe that Black’s Law Dictionary (9th ed. 2009) at page 306 defines “commission” as “[t]he act of doing or perpetrating (as a crime).” (See *Ross v. Blake* (2016) — U.S. — —, —, 136 S.Ct. 1850, 1858–1859, 195 L.Ed.2d 117 [considering ordinary meaning of statutory language by reference to dictionaries]; see *People v. Castillolopez* (2016) 63 Cal.4th 322, 327, 202 Cal.Rptr.3d 703, 371 P.3d 216 [same]; see also *People v. Casarez* (2012) 203 Cal.App.4th 1173, 1185, 138 Cal.Rptr.3d 178 [same].) Webster’s New World Dictionary (2d college ed. 1982) at page 285 defines “commission” as “the act of committing or doing; perpetration, as of a crime.” Reliance on the ordinary, commonplace meaning of commission offers no support for

1 The *Singleton* decision, which is cited by all parties, interpreted the meaning of
2 “present in the residence” under section 667.5, subdivision (c)(21). The Court of
3 Appeal found that “[s]ection 667.5, subdivision (c)(21) is plain on its face, and it
4 requires a person, other than an accomplice, be ‘*present in the residence* during
5 the commission of the burglary.’ (Italics added.) The plain meaning of ‘present in
6 the residence’ is that a person, other than the burglar or an accomplice, has
7 crossed the threshold or otherwise passed within the outer walls of the house,
8 apartment, or other dwelling place being burglarized.” (*Singleton, supra*, 155
9 Cal.App.4th at p. 1337, 66 Cal.Rptr.3d 738.)

10 Our decision here presents no departure from any principles articulated by the
11 Court of Appeal in *Singleton*. The focus in that case was the presence of a
12 nonaccomplice *in* the residence, however, and the court held the tenant’s presence
13 outside of the apartment in an exterior common hallway was not presence *in* the
14 residence as required under the statute. (*Singleton, supra*, 155 Cal.App.4th at pp.
15 1337–1338, 66 Cal.Rptr.3d 738; but see *People v. Debouver, supra*, 1
16 Cal.App.5th at pp. 981–982, 205 Cal.Rptr.3d 318 [enhancement applied where
17 apartment manager caught the defendant burglarizing vehicles in secured garage
18 that shared roof with and was integrated part of apartment complex].) There is no
19 question Tejada was *in* the residence prior to the completion of the burglary, and
20 on the issue presented here, *Singleton* is inapposite.

21 Our conclusion also draws support from the decision in *People v. Alvarado*
22 (2001) 87 Cal.App.4th 178, 104 Cal.Rptr.2d 624 (*Alvarado*), cited by the People.
23 In that case, the Court of Appeal considered the defendant’s substantial evidence
24 challenge to the jury’s finding he committed rape “ ‘during the commission of a
25 burglary’ ” within the meaning of section 667.61, subdivision (e)(2) (the “One
26 Strike” law) (*Alvarado, supra*, at pp. 183, 185, 104 Cal.Rptr.2d 624), and held
27 “that the phrase ‘during the commission of a burglary’ includes the period of time
28 that a burglar remains on the premises after entry and extends until the burglar has
reached a place of temporary safety” (*id.* at p. 183, 104 Cal.Rptr.2d 624).

Although *Alvarado* concerned rape during the commission of a burglary, as
Arambula points out, it nonetheless addressed the statutory meaning of “ ‘during
the commission of a burglary’ ” in response to the defendant’s argument that
“under section 667.61[, subdivision](e)(2), a rape ‘during the commission of a
burglary’ does not include a rape after the burglary has been *initially* committed.”
(*Alvarado, supra*, 87 Cal.App.4th at p. 185, 104 Cal.Rptr.2d 624.) The issue in
Alvarado and the issue here share the same completion of the crime argument
directed at the same statutory phrase, and both statutes are intended to enhance the
punishment for certain crimes based on recognition of the increased danger, or
potential danger, to victims of residential burglary. (*People v. Debouver, supra*, 1
Cal.App.5th at p. 982, 205 Cal.Rptr.3d 318; *People v. Harris, supra*, 224
Cal.App.4th at p. 91, 168 Cal.Rptr.3d 305; *Doe v. Saenz, supra*, 140 Cal.App.4th
at p. 988, 45 Cal.Rptr.3d 126; *Alvarado, supra*, at pp. 186–187, 104 Cal.Rptr.2d
624.)

We are not persuaded by Arambula’s contention that the analysis in *Alvarado* has
no application here and we agree with the court in *Alvarado*, which stated: “We

the view that “commission” as contemplated by section 667.5, subdivision (c)(21), equates to “the temporal
threshold for establishing guilt” relevant to determining criminal liability. (*Montoya, supra*, 7 Cal.4th at p. 1040, 31
Cal.Rptr.2d 128, 874 P.2d 903.) Arambula was clearly still engaged in “the act of committing or doing” the burglary
when Tejada entered the residence. (Webster’s New World Dict., *supra*, at p. 285.)

1 find [the] defendant’s technical view of ‘during the commission of a burglary’ to
2 be unreasonably narrow and believe it would substantially frustrate the purpose of
[the statute].”¹³ (*Alvarado, supra*, 87 Cal.App.4th at p. 187, 104 Cal.Rptr.2d 624.)

3 Accordingly, we find no merit to Arambula’s and Munguia’s arguments that
4 because Tejada was not present in the residence at the time of entry, he was not
present during the commission of the burglary.

5 Munguia, 7 Cal. App. 5th at 109–14 (footnotes in original).

6 Here, Petitioner asserts that the true finding on the person present allegation was
7 insufficient *as a matter of law* because the commission of a burglary is complete upon entry and
8 no one other than an accomplice was present at that time. (ECF No. 19 at 4). Petitioner’s claim
9 that the person present enhancement under California Penal Code section 667.5(c)(21) requires
10 another person, other than an accomplice, to be present in the residence at the time of entry is not
11 cognizable in federal habeas corpus. See Bradshaw, 546 U.S. at 76 (“[A] state court’s
12 interpretation of state law, including one announced on direct appeal of the challenged
13 conviction, binds a federal court sitting in habeas corpus.”); Estelle v. McGuire, 502 U.S. 62, 68
14 (1991) (“[I]t is not the province of a federal habeas court to reexamine state-court determinations
15 on state-law questions.”). Accordingly, Petitioner is not entitled to habeas relief on his second
16 claim, and it should be denied.

17 **V.**

18 **RECOMMENDATION**

19 Based on the foregoing, the undersigned HEREBY RECOMMENDS that the first
20 amended petition for writ of habeas corpus (ECF No. 19) be DENIED.

21 This Findings and Recommendation is submitted to the assigned United States District
22 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
23 Rules of Practice for the United States District Court, Eastern District of California. Within
24 **THIRTY (30) days** after service of the Findings and Recommendation, any party may file
25 written objections with the court and serve a copy on all parties. Such a document should be

26 _____
27 ¹³ The People’s citations to *People v. Elder, supra*, 227 Cal.App.4th at page 423, 174 Cal.Rptr.3d 192 and *People v.*
28 *Walls* (1978) 85 Cal.App.3d 447 at pages 452–453, 149 Cal.Rptr. 460 also support our conclusion that application of
section 667.5, subdivision (c)(21), is not limited to circumstances where the nonaccomplice is present in the
residence at the time of entry and Arambula’s criticism of those authorities is equally unpersuasive.

1 captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the
2 objections shall be served and filed within fourteen (14) days after service of the objections. The
3 assigned District Judge will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. §
4 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may
5 waive the right to appeal the District Court’s order. Wilkerson v. Wheeler, 772 F.3d 834, 839
6 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

7
8 IT IS SO ORDERED.

9 Dated: March 5, 2019


UNITED STATES MAGISTRATE JUDGE

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28