In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JAMMAL YARBROUGH,** **Defendant and Appellant**	Case No. S192751

Los Angeles County Superior Court, Case No. PA065170
The Honorable Ronald S. Coen, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Did the Court of Appeal err in determining that an unenclosed second floor balcony "is not part of a building" such that entry onto the balcony could not constitute burglary?

INTRODUCTION

In *People v. Valencia* (2002) 28 Cal.4th 1, this Court established a "reasonable belief test" to determine whether an area satisfies the "building" element of burglary. According to this test, "a building's outer boundary includes any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization." (*Id.* at p. 11.) In footnote 5 of its opinion, this Court stated:

> [I]n defining the outer boundary of a building for purposes of burglary, the reasonable-belief test necessarily refers only to an element of a building that reasonably can be viewed as part of *the building's* outer boundary. The test does not encompass any feature that is not such an element, such as a lawn, courtyard, unenclosed patio, or unenclosed balcony that may be located in front of or behind a building. . . .

(*Id.* at p. 11, fn. 5, italics in original.) Applying the reasonable belief test of *Valencia*, the Court of Appeal in *People v. Jackson* (2010) 190 Cal.App.4th 918, held that a private apartment balcony is part of the building under the burglary statute. The Court of Appeal in this case, however, construed footnote 5 of *Valencia* as categorically excluding unenclosed balconies, and reversed appellant's burglary conviction.

Because a private balcony with a railing and roof that is attached to a second-story apartment is a place "into which a reasonable person would believe that a member of the general public could not pass without authorization" (*People v. Valencia*, *supra*, 28 Cal.4th at p. 11), and is reasonably viewed as part of the building's outer boundary (*id.* at fn. 5), this Court should reinstate appellant's conviction. The Court of Appeal's decision should be reversed.

STATEMENT OF THE CASE

On August 5, 2009, appellant climbed into Salvador Deanda's second-story balcony. (2RT 315, 320-321.) The balcony was accessible from the inside only through Deanda's apartment living room, was surrounded by a waist-high railing, and was roofed by an overhang. (2RT 314, 322-324; People's Exs. 4 & 5.) Appellant had his feet solidly on the balcony under the railing, and his hands were wrapped around the railing when Deanda came out and pushed him off the second-story balcony into the ground-level balcony below. (2RT 323, 326-329.) Appellant had previously been caught shoplifting in the area. (2RT 400-412.)

At trial, the trial court instructed the jury that appellant was guilty of burglary if he entered the balcony with the intent to commit theft. (3RT 979-980; CT 123.) Appellant did not object to the instructions when asked. (See 3RT 903.) Following deliberations, the jury found appellant guilty of first degree burglary: entry into "any house, room, apartment . . . or other

building . . . with intent to commit . . . any felony." (Pen. Code, § 459; CT 133.)

On appeal, appellant argued that the trial court improperly instructed the jury that the second-story balcony was part of the apartment building as a matter of law. On March 23, 2011, the Court of Appeal issued a published opinion finding that the apartment balcony was "unenclosed," and holding that under this Court's decision in *Valencia*, the balcony was not within "the outer boundary of a building" as a matter of law. (Opn. at p. 4, quoting *People v. Valencia*, *supra*, 28 Cal.4th at p. 11, fn. 5.) The Court of Appeal explicitly disagreed with the opinion in *Jackson* that held a similar balcony was part of "the outer boundary of a dwelling" under *Valencia*. (Opn. at pp. 4-5.) Accordingly, the Court of Appeal reversed appellant's burglary conviction. (Opn. at p. 6.) This Court granted respondent's petition for review.

SUMMARY OF ARGUMENT

The Court of Appeal erred when it found: (1) that a second-story balcony with a railing and a roof accessed only from its adjoining apartment was "unenclosed" under *Valencia*'s footnote 5 such that it could not reasonably be considered part of the apartment's building; and (2) that *Valencia*'s footnote 5 prohibits a trial court from ever finding that an "unenclosed balcony" is within a building's outer boundary.

As a preliminary matter, the "unenclosed balcony" mentioned in footnote 5 could not have been referring to the type of balcony in this case. Following the principle of *ejusdem generis*, "unenclosed balcony" appears to refer to an unfenced raised patio, akin to "the lawn, courtyard, [and] unenclosed patio." (*People v. Valencia*, *supra*, 28 Cal.4th at p. 12, fn. 5.)

Regardless, *Valencia* did not categorically state that an unenclosed balcony may not reasonably be considered within the outer boundary of a building in the burglary context. Instead, footnote 5 explained that each of its nonexclusive examples does not constitute a building's outer boundary only if it "is not *such* an element," referring back to the previous sentence, which recounted the reasonable belief test as "an element of a building that reasonably can be viewed as part of *the building's* outer boundary." (*People v. Valencia, supra,* 28 Cal.4th at p. 11 & fn. 5, first italics added.) That is, according to footnote 5, an unenclosed balcony is simply an example of an area that *might* not meet the reasonable belief test. However, contrary to the Court of Appeal's opinion, the particular unenclosed balcony in this case may reasonably be viewed as part of a building's outer boundary in the burglary context. The Court of Appeal's decision should therefore be reversed.

ARGUMENT

I. APPELLANT'S ENTRY ONTO THE BALCONY IN THIS CASE CONSTITUTED BURGLARY

Entry onto a balcony would be considered burglary if the balcony may reasonably be considered part of the building's outer boundary and if "a reasonable person would believe that a member of the general public could not pass without authorization." (*People v. Valencia, supra,* 28 Cal.4th at p. 11.) Determination of whether a particular balcony meets this test is a case-by-case determination. Here, the trial court correctly found that the victim's partially enclosed second-floor balcony, accessed only through his apartment, satisfied the test.

A. Entry into a Building in the Context of Burglary

In California, burglary is committed when a person "enters any house . . . . ,apartment . . . ,or other building . . . , with intent to commit . . . larceny or any felony." (Pen. Code, § 459.) Whether the area a defendant entered is part of a building in the context of burglary is governed by a "reasonable belief test" set out by this Court in *Valencia*. (*People v. Valencia*, *supra*, 28 Cal.4th at p. 11.) This test is to be applied by the trial court and not by the jury, as it is a question of law, not fact. (*Id.* at p. 16.)

In *Valencia*, this Court found that a defendant was properly convicted of burglary when he penetrated the area between a house's window screen and a window. (*People v. Valencia*, *supra*, 28 Cal.4th at pp. 4, 6.) This

Court laid out a "reasonable belief test" to determine if entry into an area could be considered burglary. Under this test, "a building's outer boundary includes any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization." (*Id.* at p. 11.) This Court added in a footnote that, even if an area meets the "reasonable belief test," it still must actually be within the building's outer boundary. This Court gave examples of areas that may not be within a building's outer boundary, cautioning, "The test does not encompass any feature that is not such an element, such as a lawn, courtyard, unenclosed patio, or unenclosed balcony that may be located in front of or behind a building; nor does the test purport to define any such feature as part of a building's outer boundary." (*Id.* at p. 12, fn. 5.)

The Court of Appeal has further refined the test for whether a structure is within a building's outer boundary to include an inquiry as to whether the questionable structure is "functionally interconnected with and immediately contiguous to the" inhabited structure. (See, e.g., *People v. Thorn* (2009) 176 Cal.App.4th 255, 262.) In *Jackson*, the Court of Appeal found that under both the *Valencia* reasonable-belief test and the functionally-interconnected test, a private, second-story balcony with a fence or concrete barrier was part of the apartment to which it was attached. (*People v. Jackson*, *supra*, 190 Cal.App.4th at p. 925.)

Additionally this Court ruled in *Valencia* that application of the "reasonable belief" test is an issue for the trial court and not a jury. There, the defendant requested the trial court to instruct: "The test of whether an entry has occurred is whether a reasonable person would believe a window screen provides some protection against unauthorized intrusions." (*People v. Valencia*, *supra*, 28 Cal.4th at p. 5.) This Court found that the trial court correctly declined to issue the instruction. "Whether penetration into the area behind a window screen amounts to an entry of a building within the meaning of the burglary statute is a question of law and not a question of fact. A trial court's instructions must resolve such a legal issue for the jury, and may not invite the jury to resolve the question for itself." (*Id.* at p. 16.) Thus, this Court has clearly announced that the "reasonable belief test" is, like other reasonable person tests, not a question for the jury. (See *People v. Thorn*, *supra*, 176 Cal.App.4th at p. 268.)

B. The Trial Court Properly Found That Deanda's Balcony Was Part of the Apartment Building

Here, the trial court properly found that Deanda's balcony was part of his apartment building. As described above in the Statement of the Case, the balcony was accessible from the inside only through Deanda's apartment living room and was surrounded by a waist-high railing. (2RT 314, 322-323.) Thus, it was clearly "an area into which a reasonable person

would believe that a member of the general public could not pass without authorization." (*People v. Valencia*, *supra*, 28 Cal.4th at p. 11.)

Additionally, the trial court properly found that the balcony was part of apartment building. The balcony was surrounded by a railing and covered by an overhang of the building's roof. (2RT 322-324; People's Exs. 4 & 5.) On those facts, the trial court properly determined that the balcony was part of the building and not analogous to the examples of areas outside of a building's outer boundary given by this Court in *Valencia*. (See *People v. Valencia*, *supra*, 28 Cal.4th at p. 11, fn. 5.)

In this manner, the trial court applied the same reasoning as the appellate court in *Jackson*, albeit with even stronger facts. The *Jackson* court found that the balcony in that case, which was surrounded by a fence or concrete barrier that one could climb over, "was an element of the building that enclosed an area into which a reasonable person would believe that 'a member of the general public could not pass without authorization.'" (*People v. Jackson*, *supra*, 190 Cal.App.4th at pp. 921, 925, quoting *People v. Valencia*, *supra*, 28 Cal.4th at p. 11.)

C. The Court of Appeal Misinterpreted *Valencia*

The Court of Appeal in this case found that the trial court erred when it instructed the jury that the outer boundary of a building "includes the area inside a balcony." (Opn. at p. 2.) The Court of Appeal reasoned that an unenclosed balcony, such as the one in this case, "is not part of a building

for the purposes of the burglary statute." (Opn. at pp. 3-4.) Specifically, the Court of Appeal found that under *Valencia*, the ordinary reasonable belief test for finding if an entry constituted burglary "does not encompass an unenclosed balcony." (Opn. at p. 4.)

Additionally, the Court of Appeal disagreed with the conclusion in *Jackson* that entry onto a balcony with a "wooden lattice piece" on one side could constitute burglary under *Valencia*. (Opn. at pp. 4-5.) The opinion described the relevant balcony in this case as "bordered by a waist-high wrought iron railing, with a space between the railing and the floor" and "separated from [the] living quarters by a sliding glass door." (Opn. at p. 2.) The Court of Appeal's interpretation of *Valencia* is insupportable.

Although *Valencia* mentioned an "unenclosed balcony" as a possible example of a feature that is not part of a building's outer boundary, it did not take away a lower court's ability to find that a particular "unenclosed balcony" is "reasonably . . . viewed as part of the building's outer boundary" (*People v. Valencia*, *supra*, 28 Cal.4th at p. 12, fn. 5, italics omitted), or that a balcony was enclosed.[1] Thus, a trial court could find that

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[1] Although the word "balcony" is used in different senses, it appears that *Valencia* used the word "balcony" to mean a type of raised patio. (See, e.g., 2RT 324-325, 329 [where both the prosecutor and victim Deanda refer to second-floor and first-floor balconies as top and bottom balconies, respectively].) With this definition, *Valencia*'s "unenclosed balcony" would refer to an unfenced raised patio, akin to "the lawn, courtyard, [and] unenclosed patio." (*People v. Valencia*, *supra*, 28 Cal.4th at p. 12, fn. 5;

(continued...)

entry onto a particular balcony with felonious intent would constitute burglary, as it did here. (See *id.* at p. 16.)

Through the use of ellipses, the Court of Appeal changed the meaning of *Valencia*'s language: "[T]he outer boundary of a building for purposes of burglary . . . does not encompass . . . [an] unenclosed balcony. . . ." (See Opn. at 2, quoting, in part, *People v. Valencia*, *supra*, 28 Cal.4th at p. 12, fn. 5.) The Court of Appeal omitted the crucial words: "does not encompass *any feature that is not such an element, such as* . . . [an] unenclosed balcony." (See *Valencia*, at p. 12, fn. 5, italics added.) The unedited text belies the Court of Appeal's interpretation.

The Court of Appeal explicitly rejected *Jackson*'s reasonable-belief test in favor of its rigid interpretation of *Valencia* as completely excluding an unenclosed balcony from burglary. (Opn. at 2, 4.) The Court of Appeal did not dispute that application of *Jackson*'s reasonable-belief test would have resulted in an affirmation of the trial court's finding that the balcony was part of the apartment. (Opn. at 4.) Although *Jackson* did not directly address the footnote in *Valencia*, it found that the balcony in that case, which was surrounded by a fence or concrete barrier that one could climb

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(...continued)
see *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 743 [using *ejusdem generis* principle of construction].) Thus, even the strictest construction of footnote 5 would still exclude a second-story balcony inaccessible from the outside.

over, "was an element of the building that enclosed an area into which a reasonable person would believe that 'a member of the general public could not pass without authorization.'" (*People v. Jackson*, *supra*, 190 Cal.App.4th at pp. 921, 925, quoting *People v. Valencia*, *supra*, 28 Cal.4th at p. 11.)

Significantly, however, the *Valencia* footnote did not list categorical exceptions to the controlling test that the Court was announcing. Instead, the footnote explained that each of its nonexclusive examples does not constitute a building's outer boundary only if it "is not *such* an element," referring back to the previous sentence, which recounted the reasonable belief test as "an element of a building that reasonably can be viewed as part of *the building's* outer boundary." (*People v. Valencia, supra,* 28 Cal.4th at p. 11, fn. 5, first italics added.) That is, according to the footnote, a particular unenclosed balcony is simply an example of an area that *might* not meet the reasonable belief test. Under these circumstances, this Court should reject the Court of Appeal's interpretation of the *Valencia* language.

D. Even under the Court of Appeal's Reading of *Valencia*, the Balcony in This Case Was Enclosed

Even if this Court intended in *Valencia* that no "unenclosed balcony" should be part of a building for purposes of burglary, the balcony in this case was not "unenclosed." Whether the balcony was "enclosed" or

"partially enclosed," the existence of a railing *and roof* took the balcony out of the "unenclosed" category.

As discussed above in Argument B, the balcony here was surrounded by a waist-high railing. (2RT 314, 322-323; see Opn. at 2.) However, the balcony was also enclosed by a roof, apparent in People's Exhibits 4 and 5. Exhibits 4 and 5 were identified in court and entered into evidence on January 25, 2010. (1RT 3; 2RT 324-325, 413.) As Deanda described at trial, Exhibits 4 and 5 are photographs of his second-story balcony. (2RT 324-325.) The photographs show the building's roof extending over the balcony. (RB 13; see *Dep't of Soc. Welfare v. Wingo* (1946) 77 Cal.App.2d 316, 318 [where exhibit introduced in evidence at trial and referred to in brief on appeal had not been transmitted to appellate court, appellate court relied on statement in brief as to content of exhibit].)[2] As all trial court exhibits are automatically included in the appellate record pursuant to California Rules of Court, rule 8.122(a)(3), this Court should take the

[2] Respondent has requested transfer of People's Exhibits 4 and 5 to this Court pursuant to California Rules of Court, rule 8.224. The balcony may still be viewed on the Google Maps website under the Street View feature at http://maps.google.com for the building's address recorded in the reporter's transcript. (See 2RT 313; see also 1RT 3 [prosecutor used Google Maps to create photographic exhibits].)

balcony roof into account in its analysis of the enclosed nature of the balcony.[3]

E. Under the Court of Appeal's Reading of Footnote 5 in *Valencia*, This Court Should Reject That Passage as Inconsistent Dicta

Ultimately, it should be the reasonable-belief test for burglary that controls, not the dicta of footnote 5. In the text of *Valencia*, this Court already charged the trial courts with determining if an enclosed area is one of which "a reasonable person would believe that a member of the general public could not pass without authorization." (*People v. Valencia*, *supra*, 28 Cal.4th at pp. 5, 11.) There is no reason why a trial court should not also be able to determine if the same area is reasonably considered part of a building to begin with, the issue raised in footnote 5.

Thus, this Court should clarify that although there are enclosed areas that a trial court might find are beyond a building's outer boundary, such determinations are up to the trial courts on a case-by-case basis. Structures attached to a building, such as balconies, should not be categorically excluded. Any ruling that categorically finds a burglar's entry onto a

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[3] Webster's Third New International Dictionary (2002) at page 165, column 3, defines a "balcony" as "a usually unroofed platform projecting from the wall of a building." As a balcony is usually unroofed, the trial court properly found that a roofed balcony was not "unenclosed" per *Valencia*. (But see footnote 1, above [*Valencia*'s "unenclosed balcony" appears to refer to a raised patio rather than the traditional dictionary definition].)

balcony with a rail and a roof, inaccessible from a public area, is not burglary, would be contrary to this Court's test in *Valencia*. Accordingly, whether the Court of Appeal misinterpreted the footnote in *Valencia* or not, the Court of Appeal's ruling should be reversed.

CONCLUSION

The Court of Appeal's decision runs afoul of this Court's precedent and common sense. It finds a categorical "balcony" exception of burglary where there is none. It specifically finds that a burglar's entry onto a private balcony attached to an apartment bedroom is not burglary. This Court should reverse the Court of Appeal's decision excluding railed and roofed balconies as a matter of law from the crime of burglary and reinstate appellant's conviction.

Dated: October 12, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 3,086 words.

Dated: October 12, 2011

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **The People of the State of California v. Jammal Yarbrough**

Case No.: **S192751**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On October 13, 2011, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 13, 2011, at Los Angeles, California.

Jennifer Familo
Declarant

Signature

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