IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent,	)	No. S218233
v.	)	Court of Appeal No. D062659
HUGO GARCIA, Defendant and Appellant.	)	

Fourth Appellate District, Division One
San Diego County Case No. SCN291820
The Honorable Daniel B. Goldstein, Judge

APPELLANT'S BRIEF ON THE MERITS

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By Appointment of the Supreme
Court of the State of California

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The Honorable Daniel B. Goldstein, Judge

APPELLANT'S BRIEF ON THE MERITS

ISSUE PRESENTED

Did appellant commit a single burglary, or two separate burglaries, when he entered a commercial building and robbed a store clerk, and then took her to the store's bathroom and raped her?

STATEMENT OF THE CASE

On May 9, 2012, a jury convicted appellant Hugo Garcia of the following felony offenses:

Count 1: Burglary (Pen. Code,[1] § 459);

Count 2: Robbery (§ 211);

Count 3: Kidnaping with the intent to commit rape (§ 209, subd. (b)(1));

Count 4: Burglary (§ 459);

Count 5: Forcible Rape (§ 261, subd. (a)(2));

Count 6: Rape by foreign object (§ 289, subd. (a));

Count 7: Unlawful taking and driving of a vehicle (Veh. Code, § 10851, subd. (a));

Counts 8-9: Attempted robbery (§§ 664/211);

(1 C.T. 112-123, 276-277)

The jury also found that appellant personally used a firearm within the meaning of section 12022.53, subdivision (b), and that counts 5 and 6 were committed under circumstances bringing them within the meaning of section 667.61, subdivisions (b) through (e). (1 C.T. 112-123, 276-277.)

[1] All further statutory citations are to the California Penal Code unless otherwise noted

Appellant was sentenced on August 27, 2012 to an aggregate term of 74 years, 4 months to life. (3 R.T. 449-440; 1 C.T. 252-255, 280-281.)

In a published opinion, the Court of Appeal held that appellant was properly convicted of two burglaries (counts 1 and 4), based on a single entry into a building, but with multiple crimes committed against a single victim (counts 2, 3, 5, 6). In the unpublished portion, the court found that sentence on the second burglary count must be stayed, and ordered corrections to the abstract of judgment. The judgment was otherwise affirmed.

This court granted appellant's petition for review on July 9, 2014.

STATEMENT OF FACTS[2]

Jane Doe (Doe) arrived for work at the Family Accessories WIC store in Escondido on May 18, 2011. (1 R.T. 33-34.) Her co-worker had just left for the day and Doe was working by herself. (1 R.T. 33, 98-99.) At 4:02 p.m., video surveillance showed appellant riding his bicycle near store. (1 R.T. 116.) Approximately 20 minutes later, appellant entered the store, asked what time the store closed, and went back outside. (1 R.T. 35-38, 96.)

Appellant re-entered a short time later, and asked "weird" questions about the WIC vouchers. (1 R.T. 38-39.) He then pulled a gun out of his pocket and pointed it at Doe. (1 R.T. 48.) Appellant asked for the money out of the register, and then asked for Doe's personal money. (1 R.T. 49-50, 53-54.) Doe complied with his requests, giving him a total of less than $100. (1 R.T. 50.)

Appellant then instructed Doe to close the front door to the store, take down the open sign, and turn off the lights. (1 R.T. 53-58.) Still pointing the gun at Doe, appellant took her to the back of the store, toward the bathroom. (1 R.T. 59, 61-64.) Outside of the bathroom, appellant instructed Doe to take off all her clothes, but

[2] Counts 8 and 9 pertain to a separate incident, the facts of which are not recounted here.

she resisted and did not initially comply. (1 R.T. 63-64.) Once inside the bathroom, Doe took off her clothes. (1 R.T. 63-64.) After she was fully unclothed, appellant left the room and returned with hair bands to tie Doe's hands. (1 R.T. 67-68.) Fearing for her safety with the gun still in appellant's hand, Doe offered to tie herself up and did so with her hands. (1 R.T. 68-69.) Appellant left the room for a second time to get more hair bands for Doe's feet, but the hair bands broke. (1 R.T. 69-70.)

Appellant left the room for a third time. (1 R.T. 71.) When he returned, his penis was exposed, and he raped Doe. (1 R.T. 71-74.) Appellant then left the store, taking Doe's car to drive away. (1 R.T. 76-79.)

In a statement following his arrest, appellant admitted committing both robbery and sexual assault. (1 C.T. 136-150, 185-205.) Doe identified appellant in court as the man who assaulted her. (1 R.T. 80-83.)

ARGUMENT

A DEFENDANT WHO ENTERS A BUILDING OCCUPIED BY A SINGLE TENANT AND COMMITS MULTIPLE CRIMES IN SEPARATE ROOMS WITHIN THE BUILDING HAS ONLY COMMITTED ONE BURGLARY

A. Introduction

On May 18, 2011, Mr. Garcia entered a store, robbed and sexually assaulted the lone clerk, and then stole the clerk's vehicle. He was convicted of two counts of burglary for his actions inside the store. In his appeal, Mr. Garcia argued the evidence was insufficient to support the second charge of burglary. No case had previously upheld multiple counts of burglary for multiple crimes committed against one victim following a single entry into a building.

In the published portion of the opinion, the Court of Appeal affirmed, finding that the evidence supported a second count of burglary because after robbing the victim at the checkout area near the front of the store, appellant took the woman to the bathroom at the rear of the building and sexually assaulted her. The opinion concluded appellant's entry with felonious intent into the bathroom constituted a separate burglary. (Slip Op. 9, 24-29.)

The ruling is an unprecedented and improper expansion of the Legislature's definition of burglary. Appellant demonstrates below that the ruling conflicts with the history and evolution of

burglary law, and accordingly, it violates appellant's rights to due process and fair notice.

B. The Evolution of the Law Regarding Burglary

In California, the crime of burglary is defined as entry into "any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, . . . with intent to commit grand or petit larceny or any felony . . . ." (Pen. Code, § 459.) The crime is complete upon entry into the structure – a concept that has been settled for well over a century: "The gravamen of a charge of burglary is the act of entry itself, and 'An entry may be made with intent to commit two or more felonies, but that would constitute only one burglary.'" (*People v. Failla* (1966) 64 Cal.2d 560, 568, quoting *People v. Hall* (1892) 94 Cal. 595, 597.)

Section 459 was enacted as part of California's first penal law, the Crimes and Punishment Act of 1850. (Stats 1850 ch 99 § 58.) Since then, section 459 has had few substantive amendments, most notably in 1913, which removed the requirement of a nighttime entry. (Stats 1913, ch 144, § 1.) The other nine amendments, including the most recent one in 1991, added various containers, vehicles, and vessels to the list of structures into which an unlawful entry would constitute a burglary.[3]

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[3] (Stats 1858 ch 245 § 1; Amended Code 1875-76 ch 56 § 1; Stats 1947 ch 1052 § 1; Stats 1977 ch 690 § 3; Stats 1978 ch 579 § 22; Stats 1984 ch

Before the enactment of section 459, burglary at common law was generally defined as a crime "against the habitation." (2 Witkin and Epstein, California Criminal Law (4th Ed. 2012) Crimes Against Property, § 128, p. 170.) Thus, "The offense was committed only if the structure was a dwelling or other building within the 'curtilage,' the defendant broke in, and the act took place at night." (*Id.* at pp. 170-171, citing 3 Warton, Crim. Law (15th ed.), § 316.) With the enactment of section 459, unlawful entry into a non-residential building came under the purview of burglary law for the first time. In upholding a defendant's conviction for entering a chicken coop to steal chickens almost 150 years ago, this court confirmed the Legislature's intent to include non-residential structures in the statute:

> While the language of the burglary statute, 1850 Cal. Stat. p. 235, § 58, might have been made more definite and certain by employing words in common use in its amendment at 1858 Cal. Stat. p. 206, it could not well be made more comprehensive. The absence of more particular terms of description indicates an intention, on the part of the California Legislature, to include every kind of buildings or structures "housed in" or roofed, regardless of the fact whether they are at the time, or ever have been, inhabited by members of the human family. A house, in the sense of the statute, is any

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854 § 2; Stats 1987 ch 344 § 1; Stats 1989 ch 357 § 2; Stats 1991 ch 942 § 14 (AB 628).)

> structure which has walls on all sides and is covered by a roof.

(*People v. Stickman* (1867) 34 Cal. 242, 245.)

Section 460, enacted in 1872, originally declared "that any burglary committed in the nighttime is burglary of the first degree, and any burglary committed in the daytime, is burglary of the second degree, with no distinction between commercial and residential burglary. (Enacted Stats 1872. Amended Code Amdts 1875-76 ch 56 § 2; *People v. Barnhart* (1881) 59 Cal. 381, 383.) In 1982, the Legislature closed the door on the "time of day" distinction, and amended section 460 to generally make any type of residential burglary to be of the first degree, and all other burglaries second degree. (Stats 1982 ch 1290 § 1, ch 1297 § 1.)

While it has broadened the definition of burglary to eliminate the distinction between nighttime burglaries and those committed during the day, and created a distinction between residential and commercial burglaries, the Legislature has never toyed with the basic actus reus and mens rea that establishes criminal liability, in that the offense is complete upon entry with the requisite intent.

California courts have expanded the definition of entry to include rooms within buildings, allowing for the defendant's intent to arise after an initial entry into the structure. Thus, in 1884, this court held that one who enters, with burglarious intent, a room of a

house, "enters the house with such intent." (*People v. Young* (1884) 65 Cal. 225, 226, .)

This concept, of "after-acquired intent," was discussed in *People v. McCormack* (1992) 234 Cal.App.3d 253, when the appellate court approved of a jury instruction which stated: "'The intent [to steal the personal property of another] need not be in the mind of the person at the time of the initial entry into the structure, if he subsequently forms the intent and enters a room within the structure.'" (*Id.* at page 255.) The court found "the challenged instruction was proper because it is consistent with the literal language of the controlling code section," which "has included entry into a room with the requisite intent since the Penal Code was first adopted in 1872." (*Ibid.*)

The *Young* precedent was relied on most recently by this court in *People v. Sparks* (2002) 28 Cal.4th 71, where it considered whether a burglary occurred when the defendant entered a home, and then acquired the intent to commit a rape in the victim's bedroom. In answering the question affirmatively, this court commented that, "In this regard, *Young* reflected the prevailing common law understanding that entry from inside a structure into a room within that structure could constitute a burglary." (*Id.*, at p. 80, citing *People v. Young, supra,* 65 Cal. at p. 226.) This court then construed section 459 to find that a burglary was committed when the defendant

entered the victim's bedroom with the requisite intent. (*Id.* at pp. 86-88.)

While the question of after-acquired intent has been resolved for many years, and is consistent with the language of the statute, courts have affirmed multiple burglary convictions for entry into separate rooms in a single structure under certain circumstances, such as student dormitory rooms within interconnected buildings (*People v. O'Keefe* (1990) 222 Cal.App.3d 517, 521), separately leased and locked offices in a small office building (*People v. Church* (1989) 215 Cal.App.3d 1151, 1159, disapproved on another ground in *People v. Bouzas* (1991) 53 Cal.3d 467, 477-480), and six separate rooms at a single school, where the rooms were assigned to different people, locked to the outside, and largely located in separate buildings on the school campus (*People v. Elsey* (2000) 81 Cal.App.4th 948, 954-963.) (See also *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245-1252 [two burglary counts upheld when defendant entered the victim's residence to obtain an unauthorized copy of the house key, and then made a second entry nine days later and carried out an assault on the victim].)

Appellant is aware of only one case that previously considered an issue similar to that presented here, and the court in that case concluded there was only a single burglary. In *People v. Richardson* (2004) 117 Cal.App.4th 570, the defendant was given

permission to stay in an apartment shared by his sister and another woman, as long as he slept on the couch and did not use or take anything without permission. The women had separate bedrooms with no exterior locks, had access to each other's rooms, and shared the rest of the apartment. After a period of time, the women discovered several items missing from each of their rooms, and the defendant ultimately admitted to taking the items and selling them. (*Id.* at p. 572.) The court held that it was error to instruct the jury that the defendant's entry into separate rooms of a single-family residence constituted separate acts of burglary. (*Id.* at pp. 573-577.) The court relied in particular on the rule, as stated in *People v. Thomas* (1991) 235 Cal.App.3d 899: "[W]here a burglar enters several rooms in a single structure, each with felonious intent, and steals something from each, ordinarily he or she cannot be charged with multiple burglaries and punished separately for each room burgled *unless* each room constituted a separate, individual dwelling place within the meaning of section 459 and 460." (*Id.* at p. 906, fn. 2, emphasis in original.)

The *Richardson* court distinguished the facts in its case from those in *People v. Wilson* (1989) 208 Cal.App. 3d 611, 615, "where the Sixth District found that entry into a locked rented room in a house was entry of a separate residence within the meaning of sections 459 and 460 because each boarder in a rented house was given a

separate lock and key to his or her door. Rather, here, the women rented the apartment together as friends, and shared space in their rooms." (*People v. Richardson, supra,* 117 Cal.App.4th at p. 575.)

None of these decisions depart from the general rule, as stated in *People v. Thomas, supra,* that entry into several rooms in a structure with felonious intent constitutes a single burglary. In *Sparks,* this court expressly declined to reconsider the rule articulated in *Thomas*:

> In reaching this conclusion, we emphasize that our holding does not signify that a defendant who, with the requisite felonious intent, enters multiple unsecured rooms in a single-family house properly may be convicted of multiple counts of burglary. As noted above, some California decisions have questioned whether multiple convictions might be sustained on such facts (*Thomas, supra,* 235 Cal. App. 3d 899, 906, fn. 2; see also *Elsey, supra,* 81 Cal. App. 4th 948, 959), and have no occasion to consider that issue in this case, in which multiple burglary convictions are not involved.

(*People v. Sparks, supra,* 28 Cal.4th at p. 87, fn 21, citing *Thomas, supra,* 235 Cal. App. 3d at p. 906, fn. 2, and *People v. Elsey, supra,* 81 Cal.App.4th at p. 959.)

The occasion has now arrived where a defendant who entered only a single structure and committed crimes against a single victim was nevertheless convicted of multiple burglaries.

C. The Opinion of the Court of Appeal Should be Reversed

1. In determining the definition of burglary, this court must consider the legislative intent of section 459

Penal Code section 459, in full, provides as follows:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building 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.

In any case involving statutory interpretation, the court's "'fundamental task" is to "'determine the Legislature's intent so as to effectuate the law's purpose.'" (*People v. Scott* (2014) 58 Cal.4th 1415, 1422, quoting *People v. Harrison* (2013) 57 Cal.4th 1211, 1221–

1222.) The court should "'begin by examining the statute's words, giving them a plain and commonsense meaning. [Citation.]' [Citation.] ' 'When the language of a statute is clear, we need go no further.' [Citation.] But where a statute's terms are unclear or ambiguous, we may "look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.'" (*Ibid.*)

Statutory interpretation is a question of law that is reviewed de novo. (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724; *Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 531.)

2. The Legislature has never indicated an intention to allow for multiple burglaries when a defendant enters a singly occupied building and commits multiple crimes inside

Courts cannot create new crimes – all criminal liability must emanate from statutory language. (*People v. Chun* (2009) 45 Cal.4th 1174, 1183 [citing Pen. Code, § 6].) The Legislature's failure to act should not be construed by courts as an invitation to expand beyond the commonly understood meaning of a statute: "Legislative inaction is a 'slim reed upon which to lean' [citation]" (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1117), especially for penal liability "in

view of the Legislature's long-standing declaration that '[n]o act or omission . . . is criminal or punishable, except as prescribed or authorized by [the Penal Code]' (Pen. Code, § 6)." (*People v. Patterson* (1989) 49 Cal.3d 615, 641 [conc. and dis. opn. of Panelli, J.] [cited with approval in *Chun, supra*, 45 Cal.4th at p. 1183].)

""It is the prerogative, indeed the duty, of the Legislature to recognize degrees of culpability when drafting a Penal Code." (*Michael M. v. Superior Court* (1979) 25 Cal.3d 608, 613.) And, as stated in *People v. Flores* (1986) 178 Cal.App.3d 74, 88: "The Legislature is responsible for determining which class of crimes deserves certain punishments and which crimes should be distinguished from others. As long as the Legislature acts rationally, such determinations should not be disturbed."

The question for this court then, is to determine if there is any basis for finding that the Legislature has ever intended for multiple burglaries to arise from the circumstances presented here. The answer appears to be no. The Legislature has had over 150 years of opportunities to amend Penal Code section 459 to codify the concept embraced by the Court of Appeal in this case. It has been a dozen years since this court's dicta in *People v. Sparks*, which assumed there could be no multiple burglaries from a single entry, but acknowledged the question had been broached by lower courts. (*People v. Sparks, supra*, 28 Cal.4th at p. 87, fn 21.) Nevertheless, the

Legislature has made no changes, satisfied instead with the basic definition of burglary that has served society during at least three separate centuries.

In reference to burglary, this court has stated, "'The laws are primarily designed . . . not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germination of a situation dangerous to personal safety.'" (*People v. Gauze* (1975) 15 Cal.3d 709, 715, quoting *People v. Lewis* (1969) 274 Cal.App.2d 912, 920.) The situation arose in this case, as in all others, once the defendant crossed the threshold. Once inside the store, the Penal Code provided for prosecution and ample punishment for all of appellant's individual crimes, including robbery, kidnapping, and rape.

Until now, all cases deciding this issue have adhered to the statutory language and demonstrated legislative intent regarding the inclusion of the word, "room," in approving of a single burglary count for situations where a defendant's criminal intent arises after entry into a structure, or multiple counts in situations where individual rooms are separately occupied. Accepting the opinion's conclusion in this case would open the door to an unlimited and unnecessary expansion of burglary charges. A defendant could enter a store and rob the clerk for one burglary count, commit crimes in the bathroom, supply closet, and broom closet for three more counts,

and pick up a fifth count of burglary by taking a soda out of the cooler on the way out the door. Such a result cannot be based on any rational application of centuries of common law and statutory authority. This not only leads to absurd results, but also unnecessary ones, as any defendant is subject to prosecution for the specific crimes committed inside the structure in addition to the single act of burglary that precedes those crimes.

With no apparent interest by the Legislature in making changes to the long-held understanding that an entry with intent to commit two or more felonies constitutes only one burglary (*People v. Hall, supra*, 94 Cal. at p. 597) that change should not come from this court. To do so "would be incompatible with the broad discretion the Legislature traditionally has been understood to exercise in defining crimes and specifying punishment," and "'intrude too heavily on the police power and the Legislature's prerogative to set criminal justice policy.'" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838, quoting *People v. Bell* (1996) 45 Cal.App.4th 1030, 1049.)

3. The court's opinion in this case expanded the definition of burglary beyond any previous judicial decision or statutory language

The Court of Appeal began its discussion by noting, "In *People v. Sparks* (2002) 28 Cal.4th 71, 73 (*Sparks*), our Supreme Court in a unanimous opinion held that an entry into an unsecured bedroom within a single-family residence with the requisite intent (to commit

rape) was sufficient to support a burglary conviction under section 459, even if that intent was formed after the defendant initially entered the house with the permission of the owner." (Slip Op. at pp. 9-10.) The opinion then went on to quote at length from this court's opinion in *Sparks*. (Slip Op. at pp. 10-21, quoting *People v. Sparks, supra,* 28 Cal.4th at pp. 79-87.)

The *Sparks* analysis, and that of the opinion here, focuses on the *Young* line of cases as discussed at pages 10-11, above, which found the plain language of the statute and definition of the word, "room," allow for a single count of burglary when the intent to commit a crime arises after the initial entry into a structure, as well as allowing for multiple burglary counts for entry into separate rooms within a structure that are individually occupied, such as dorm rooms, hotel rooms, offices, and classrooms. (*People v. Sparks, supra,* 28 Cal.4th at pp. 79-87; Slip Op. at pp. 10-21.)

The opinion then discussed *People v. Richardson, supra,* 117 Cal.App.4th 570, the case that rejected a finding that multiple burglaries could evolve from entry into separate rooms in a single-family dwelling, and *In re M.A.* (2012) 209 Cal.App.4th 317, in which the court relied on *Sparks* to determine that the theft of guns from a closet was a burglary even though the minor's intent arose after he entered the home. (Slip Op. at pp. 22-24, citing also to *People v. Mackabee* (1989) 214 Cal.App.3d 1250 [entry into an enclosed 'office

area' set off by 'a waist-high counter about two-and-one-half feet wide' in the lobby of a building otherwise open to the public supported a burglary conviction].)

The court below then used the analysis regarding the definition of "room" in *Sparks*, *M.A.*, and *Mackabee* as a springboard to make the very finding this court emphasized should not be assumed, that one entry into a singly occupied structure can lead to multiple burglary charges if multiple crimes are committed within:

> [W]e conclude the bathroom Garcia entered to sexually assault M. constitutes a 'room' for purposes of section 459 based on the plain and ordinary meaning of the word. Second, we further conclude one of the main policies underlying the burglary statute—to prevent intrusion into an area in which the occupants 'reasonably could expect significant additional privacy and security' [citations] supports the conclusion that Garcia's entry with the requisite felonious intent into the bathroom in the back of the store constituted a separate burglary.

(Slip Op. at p. 25.)

The opinion attempted to distinguish *Richardson*, noting the court in that case "specifically recognized that there was 'no evidence in the record as to [Richardson's] intent: whether he intended to burglarize both rooms as he entered the apartment [shared by the two roommates], or whether he formed the intent to

burglarize a second bedroom after burglarizing the first.'" (Slip Op. at p. 27.) "In contrast," according to the opinion, "there is substantial evidence in the instant case supporting the finding that Garcia formed the felonious intent – for purposes of his entry into the bathroom to commit the sexual assault on M. – after he entered the store with the felonious intent to steal the money at gunpoint. The situation here is thus entirely distinguishable from the facts of Richardson . ... " (*Ibid.*)

The attempted distinction fails, however, as, the opinion does not provide any insight into what substantial evidence supported a finding in this case that appellant's intent to commit the sexual assault arose after he entered the building. (Slip Op. at pp. 24-26.) Not only was there no evidence presented on the issue, but the prosecutor acknowledged she could not prove when the intent arose, but only that he had the intent when he entered the bathroom. (3 R.T. 364.) The court here mistakenly described the two crimes in this case as "entirely distinguishable from the facts of *Richardson*, where the defendant simultaneously stole items from each of the unoccupied rooms of the two roommates that shared an apartment, which the court concluded was akin to a single-family dwelling." (Slip Op. at p. 27.) In fact, there was no evidence in *Richardson* as to when the thefts from the two rooms occurred, whether they

occurred at the same time or even on the same day. (See, *People v. Richardson, supra,* 117 Cal.App.4th at p. 572.)

The court found "this language from *Thomas*—which was also quoted in *Richardson* among other cases—is pure dictum, a view we conclude was also shared by our Supreme Court in *Sparks*. (See *Sparks, supra,* 28 Cal.4th at pp. 87-88, fn. 21 [citing *Thomas* and noting it and other cases 'have questioned whether multiple convictions *might* be sustained' when 'a defendant, who, with the requisite felonious intent, enters multiple unsecured rooms in a single-family house properly may be convicted of multiple counts of burglary.' In any event, as noted, the issue before us does not involve the simultaneous theft of items from multiple rooms from a structure/single-family dwelling." (Slip Op. at p. 28.)

The court then held, "Given the substantial factual differences between the instant case, on the one hand, and *Richardson* and *Thomas* and similar authorities, as discussed in *Sparks*, on the other hand, and given the language from *Thomas* on which Garcia relies is, in any event, dictum and inapplicable under the facts of this case, we affirm his conviction on count 4 and reject his contention that he could only be convicted of a single count of burglary on count 1 because the 'room' (i.e., bathroom) he separately entered with the requisite felonious intent to commit the sexual assault of M. also happened to be located inside the store." (Slip Op. at p. 29.)

The distinctions relied upon in the opinion are either non-existent, as in the finding that the thefts in *Richardson* occurred simultaneously, or are distinctions without an articulated difference, as in noting that its decision does not decide whether multiple burglary convictions could be sustained for entry into multiple rooms in a single-family dwelling. (Slip Op. at p. 28, fn 9.) Moreover, the Court of Appeal failed to consider the fact that the limiting language in *Sparks*, *Thomas*, and *Richardson* gave the Legislature notice of this issue as far back as 1991, and yet, to date, the Legislature has been content with the long-held premise that an entry into a structure (defined as a discrete and separately occupied building or room within a building) with felonious intent constitutes but one burglary.

4. The Court of Appeal's expansion of the burglary statute violates The Rule Of Lenity

Even if the Legislature's intent is not clear from the language and history of section 459, the lower court's decision must still be reversed. Ambiguities in penal statutes must be resolved in favor of the defendant. The rule, called the rule of lenity, controls in both the U.S. Supreme Court and this court. (See, e.g. *Bifulco v. U.S.* (1980) 447 U.S. 381, 387 [100 S.Ct. 2247, 65 L.Ed.2d 205]; *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631["It is the policy of this state to construe a penal statute as favorably to the defendant as its language and the

circumstances of its application may reasonably permit; just as in the case of a question of fact, the defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language used in a statute."].)

The rule has "constitutional underpinnings." (*Keeler v. Superior Court , supra,* 2 Cal.3d at p. 631.) "Under the separation of powers doctrine, the rule serves to protect the legislature's exclusive authority to define crimes from judicial encroachment. As a matter of fundamental due process, the rule helps to ensure that citizens are given fair warning of conduct punishable as a crime." (*Ibid.*) Thus, "'The courts may not speculate that the legislature meant something other than what was said. Nor may they rewrite a statute to make it express an intention not expressed therein.'" (*Mutual Life Ins. Co. v. City of Los Angeles* (1990) 50 Cal.3d 402, 412, quoting *Hennigan v. United Pacific Ins. Co.* (1975) 53 Cal.App.3d 1, 7.)

In this case, the rule of lenity precludes this court from interpreting any ambiguity in the legislative language of section 459 to allow for convictions of multiple burglaries against a defendant, who upon entry into a structure, committed multiple crimes against a single victim. In the nearly 165 years since the enactment of section 459, the California Legislature has not given the slightest hint through amendments that it intends for a defendant to be convicted of multiple burglaries in circumstances such as presented here. This

is true even though the commission of multiple crimes is hardly an unusual or isolated occurrence. (See, for example, *People v. Banks* (2014) 59 Cal.4th 1113, 1124-1125 [one count of burglary after murder, attempted murder, robbery, and rape committed in at least four separate rooms in a single-family dwelling]; *People v. Garcia* (2011) 52 Cal.4th 706 [one count of burglary following murder, rape, and robberies occurring in several rooms in a house]; *People v. Alvarado* (2001) 87 Cal.App.4th 178 [same].)

With no action by the Legislature on this issue, and nothing in the statute indicating allowance for multiple burglaries within a singly occupied space, the language of the statute is at best ambiguous. As such, the judgment of the Court of Appeal should be reversed.

D. Imposition Of Liability On An Expanded Interpretation That Conflicts With The Statute And The Authoritative Precedent Of This Court Violated Mr. Garcia's Right To Fair Notice And Due Process Of Law

The U.S. Supreme Court has long recognized the basic principle that a criminal statute must give fair warning of the conduct that it makes a crime. "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he

could not reasonably understand to be proscribed." (*Bouie v. Columbia* (1964) 378 U.S. 347, 351 [84 S.Ct. 1697, 12 L.Ed.2d 894].) A novel judicial construction of an existing statute, as occurred in this case, deprives a defendant of his federal and state constitutional right to due process.

In *Bouie*, for example, the defendants were two black civil rights protesters staging a "sit-in" at a "whites only" restaurant in South Carolina in 1960. (*Bouie, supra,* 378 U.S. at p. 349.) After they sat down, management put up a "no trespassing" sign and called the police. (*Ibid.*) The South Carolina Supreme Court affirmed criminal trespass convictions on the basis of an expanded construction of the statute first announced the year after the sit-in. (*Bouie, supra,* 378 U.S. at p. 350.) The U.S. Supreme Court held that conviction on the expanded theory violated the defendants' rights to due process. The language of the statute "did not give them fair warning, at the time of their conduct in Eckerd's Drug Store in 1960, that the act for which they now stand convicted was rendered criminal by the statute. By its terms, the statute prohibited only 'entry upon the lands of another . . . after notice from the owner . . . prohibiting such entry . . . .' There was nothing in the statute to indicate that it also prohibited the different act of remaining on the premises after being asked to leave." (*Id.* at p. 355.)

The *Bouie* court explained that the Due Process clause of the U.S. Constitution bars retroactive application of judicially expanded definitions of crimes for the same reason that retrospective application of newly passed laws is forbidden: because "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a state Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." (*Bouie v. Columbia, supra,* 378 U.S. at pp. 353-354.) Thus the fundamental principle that the required criminal law must have existed when the conduct at issue occurred "must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect.'" (*Ibid.*)

California law is in accord: a defendant may not be found liable for a crime that was not clearly defined by statute or authoritative judicial interpretation at the time it was committed. In *Keeler v. Superior Court, supra,* 2 Cal.3d 619, 633-635, for example, this court refused to expand the murder statute to punish a defendant whose acts had caused the death of an unborn fetus. It held that the

result was compelled by principles of due process: "Since the judicial enlargement of the statute being urged by the People would not have been foreseeable to this petitioner, . . . its adoption at this time would deny him due process of law." (*Id.* at p. 633.).

This court has applied the *Bouie* doctrine in other, more recent, cases. In *People v. Martinez* (1999) 20 Cal.4th 225, for example, this court refused to apply an expanded definition of asportation to a kidnaping conviction. Previous decisions of the court had held a finding of asportation to be exclusively dependent on the distance involved, and a longer distance than the one at issue had been held insufficient to establish asportation as a matter of law. In *Martinez*, this court established a new standard for determining asportation, under which distance alone was not dispositive, and additional factors such as increased vulnerability and risk of harm to the victim were to be considered. (*Id.* at pp. 235-238.) It refused, however, to apply the expanded definition to the defendant, because "judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." (*Id.* at p. 238.) As the defendant's conduct had not "crossed the line" laid down by previous decisions, he had not had fair warning of the expanded interpretation. (*Id.* at p. 241.) Accordingly, he could not be held liable on the new interpretation of the law, as "[i]t is settled that a state

Supreme Court, no less than a state Legislature, is barred from making conduct criminal which was innocent when it occurred, through the process of judicial interpretation." (*Id.* at p. 238; see also *People v. Blakely* (2000) 23 Cal.4th 82, 91 [application of expanded definition of voluntary manslaughter to the defendant "would be unconstitutional... [because] an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates in the same manner as an ex post facto law."])

Like the defendants in *Bouie, Keeler, Martinez,* and *Blakely,* appellant had no fair warning of the expanded theory of liability encompassed by the pleadings and the court's interpretation of section 459. Indeed, he had no warning from the pleadings at all, as both burglary charges alleged entry "with the intent to commit a theft." (1 C.T. 22-24.) Even apart from that, he could not possibly have known an additional burglary offense would arise from his actions inside the building.

At the time of Mr. Garcia's offenses, no appellate court had endorsed such a basis for liability, which conflicts with the language of the statute and with prior decisions. The only decision to expand the definition of burglary in such a way is in this case, and at least since 1892 courts have assumed otherwise. (*People v. Hall, supra,* 94 Cal. 595, 597.) It would have been impossible for Mr. Garcia to discern that he could be found liable for an additional felony offense

by committing the sexual assault against his robbery victim in another area of the store. The judicial enlargement of 459, therefore, to create liability for a second burglary deprived appellant of his right to fair notice and due process of law under the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution and Article I, Section 7 of the California Constitution.

E. Appellant's Conviction on Less Than Substantial Evidence Deprived Him of His Fourteenth Amendment Right to Due Process

Even if section 459 is found to encompass the interpretation of the Court of Appeal in this case, the evidence presented was insufficient to sustain appellant's conviction. The opinion emphasizes and relies on the assumption that appellant committed his first burglary when he entered the store to commit the robbery, and only formed the intent to commit a second crime after entering the building. (Slip Op. at pp. 27-29.)

Contrary to the appellate court's conclusory assumption, there was no evidence presented as to when appellant developed the intention to commit a second crime. Appellant entered the store and, after asking some strange questions, pulled out a gun and robbed the clerk. After taking money from the register and from the clerk personally, he had her take down the open sign, turn off the lights, and walk to the back of the store, where he had her undress and then assaulted her in the bathroom. (1 R.T. 38-39, 48-50, 53-59, 61-64,

71-75.) There is no way for any finder of fact to determine when, or in what order, appellant's felonious intent arose as to either crime.

Appellant's conviction on count 4 can be upheld only if any rational trier of fact could have found each element of the crime beyond a reasonable doubt. (*People v. Towler* (1982) 31 Cal.3d 105, 117-118.) "Whether a particular inference can be drawn from the evidence is a question of law." (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1604.) "A reasonable inference, however, may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. A finding of fact must be an inference drawn from the evidence rather than a mere speculation as to probabilities without evidence." (*People v. Morris* (1988) 46 Cal.3d 1, 21, overruled on other grounds in (*In re Sassounian* (1995) 9 Cal. 4th 535.)

As noted by this court many years ago in *Estate of Bristol* (1943) 23 Cal.2d 221, 223, "The critical word in the definition is 'substantial'; it is a door which can lead as readily to abuse as to practical or enlightened justice." Thus, substantial evidence "must be of solid value and must consist of more than a mere possibility that something happened." (*People v. Houts* (1978) 86 Cal.App.3d 1012, 1019.)

The record here lacks evidence sufficient to allow a rational factfinder to assume that appellant developed the intent to commit

his crimes at any particular time or in any particular order. Without additional evidence, the fact that he committed his crimes in the order he did is of no significance, as they were not crimes that could have been committed simultaneously. Indeed, the prosecutor's own theory was that it did not matter whether appellant had the intent to commit the assault simultaneous with the robbery, or developed the intent separately after entering the store. (3 R.T. 364.) There is no substantial evidence from which to conclude that appellant formed the requisite felonious intent after entering the store but before entering the bathroom within the store.

In re Winship (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368] found as an essential component of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. (See also, *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed 2d 560] [holding that a defendant is entitled to federal habeas corpus relief if it is found that upon the evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt]; *Sandstrom v. Montana* (1978) 442 U.S. 510, 520 [99 S.Ct. 2450, 61 L.Ed.2d 39]; *Tot v. United States* (1943) 319 U.S. 463, 466 [63 S.Ct. 1241, 87 L.Ed. 1519].)

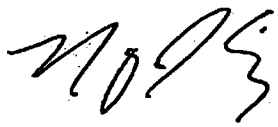
The evidence in this case only shows the commission of a single burglary, when Mr. Garcia entered the Family Accessories store with felonious intent, and committed crimes once inside the store. One of his two burglary convictions must be reversed.

CONCLUSION

The burglary law has always existed to deter an initial entry into a structure for the purpose of committing crimes. A burglary is complete upon entry into a building, and the Penal Code is well equipped to ensure a defendant is further prosecuted and punished for the specific substantive crimes committed within. This general rule is consistent with the plain language of the statute and consistent with the will of the Legislature since before the enactment of the Penal Code. The opinion unreasonably and unpredictably enlarges the definition of burglary beyond the limits created by the Legislature and affirmed throughout the decades by California courts. The opinion of the Court of Appeal should be reversed.

Dated: November 13, 2014

Respectfully submitted,



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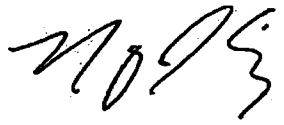

Nancy J. King

PROOF OF SERVICE BY MAIL

Re: Hugo Garcia, Court Of Appeal Case: S218233, Superior Court Case: SCN291820

I the undersigned, declare that I am employed in the County of Sonoma, California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 1235 Eleanor Ave., Rohnert Park CA. On November 13, 2014, I served a copy of the attached Appellant's Opening Brief (CA Supreme Court) on each of the parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in United States mail at Sonoma, California, addressed as follows:

Court of Appeal, 4th District, Division 1
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 13th day of November, 2014.

Teresa C. Martinez

Teresa C. Martinez
(Name of Declarant)

(Signature of Declarant)

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: Hugo Garcia, Court Of Appeal Case: S218233, Superior Court Case: SCN291820

I the undersigned, am over the age of eighteen years and not a party to the within entitled cause. My business address is 1235 Eleanor Ave., Rohnert Park CA. On November 13, 2014 a PDF version of the Appellant's Opening Brief (CA Supreme Court) described herein was transmitted to each of the following using the email address indicated or direct upload. The email address from which the intended recipients were notified is Service@GreenPathSoftware.com.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 13th day of November, 2014 at 11:11 Pacific Time hour.

Teresa C. Martinez

(Name of Declarant)

(Signature of Declarant)