IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

People of the State of California, Plaintiff and Respondent, v. Jammal Yarbrough, Defendant and Appellant.	No. S192751 Court of Appeal No. B222399 Superior Court No PA065170

APPELLANT'S ANSWER BRIEF ON THE MERITS

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Statement of the Case and Facts

An information charged Jammal Yarbrough with first-degree burglary with a person present. (CT 20-21.) After a jury trial, Yarbrough was found guilty, and the "person present" allegation was found true. (3RT 1202-1203.) Yarbrough was sentenced to six years in state prison. (3RT 1208.)

The trial evidence showed that around midnight on the night of August 5, 2009 (the morning of August 6), Yarbrough was found on the balcony outside Salvador Deanda's second-floor apartment. (2RT 313-314, 320-321.) Deanda was awakened by his dog barking; he got up and saw Yarbrough standing outside the railing of his balcony, with his feet between the balcony and the bottom of the railing. (2RT 320, 323-324.) Yarbrough was holding onto the railing. (2RT 327.) Deanda pushed Yarbrough down onto the balcony or patio below. (2RT 327-329.)

The trial court instructed the jury as follows:

> Under the law burglary [sic], a person enters a building if some part of his or her body, or some object under his or her control penetrates the area inside the building's outer boundary. A building's outer boundary includes the area inside a balcony.

(3RT 980; see CT 123.)

On appeal, Yarbrough argued that the trial court erroneously

instructed the jury that the balcony was part of the building. The Court of Appeal, relying on this Court's decision in *People v. Valencia* (2002) 28 Cal.4th 1, held that an unenclosed balcony is not part of a building for purposes of the burglary statute, and that the evidence in this case at most established an attempted burglary; it reversed the conviction.

This Court granted the Attorney General's petition for review.

Argument

I.

THE COURT OF APPEAL CORRECTLY HELD THAT AN UNENCLOSED BALCONY IS NOT PART OF A BUILDING FOR PURPOSES OF THE STATUTE DEFINING BURGLARY

Respondent contends that the Court of Appeal erred, misreading this Court's statement in *People v. Valencia, supra,* 28 Cal.4th 1, in concluding that an unenclosed balcony is not part of a building for purposes of California's burglary statute. (ROBM [Respondent's Opening Brief on the Merits] 4, 8-10.) To the contrary, the Court of Appeal correctly read and applied *Valencia*'s admonition, and correctly held that an unenclosed balcony is not part of a building under the burglary statute.

Penal Code section 459 provides that "[e]very person who enters any . . . building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary."

In *People v. Valencia, supra,* 28 Cal.4th 1, this Court addressed a burglary case in which the evidence showed that the defendant had penetrated the area behind a window screen, though the window itself was closed and not penetrated. (*Id.* at p. 3-4.) The *Valencia* trial court had instructed the jury that "Any kind of entry, partial or complete, will satisfy the element of entry. . . . In order for there to have been an entry, a part of

the defendant's body or some instrument, tool or other object under his control must have penetrated the area inside where the screen was normally affixed in the window frame in question." (*Id.* at p. 5.)

This Court noted that "[i]n most instances, of course, the outer boundary of a building for purposes of burglary is self-evident. Thus, in general, the roof, walls, doors, and windows constitute parts of a building's outer boundary, the penetration of which is sufficient for entry." (*Id.* at p. 11.) "In other instances, in which the outer boundary of a building for purposes of burglary is *not* self-evident," the Court held, "we believe that a reasonable belief test generally may be useful in defining the building's outer boundary. Under such a test, in dealing with items such as a window screen, 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." (*Ibid.*)

The Court went on to apply the reasonable belief test to the area behind the window screen and concluded that a window screen "is clearly part of the outer boundary of a building for purposes of burglary." (*Id.* at p. 12.)

The Court also noted, however:

> Furthermore, in 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; nor does the test purport to define any such feature as part of a building's outer boundary.

(*Id.* at p. 11, fn. 5 [emphasis in original].)

Respondent misreads this statement in *Valencia*, suggesting that the Court "gave examples of areas that *may not be* within a building's outer boundary." (RB 6 [emphasis added].) This Court, however, clearly stated that the test "*does not encompass* any feature that is not" 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 emphasis in original; second emphasis added].) It then gave examples of features that are not elements of a building that reasonably can be viewed as part of the building's outer boundary — "a lawn, courtyard, unenclosed patio, or unenclosed balcony that may be located in front of or behind a building" — and it continued: "nor does the test purport to define any such feature as part of a building's outer boundary." An unenclosed balcony, thus, is not subject to the reasonable belief test.[1] (See also *People v. Thorn*

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[1] Respondent further suggests that the Court of Appeal, by the use of ellipses, altered the meaning of this Court's statement in *Valencia*. (ROBM 10.) Respondent does not explain how the omitted words ("any feature that

(2009) 176 Cal.App.4th 255, 265 fn. 5 [noting this Court's admonition in *Valencia* that the reasonable belief test does not encompass any feature that is not part of the building's outer boundary, such as a lawn or unenclosed balcony, and distinguishing a carport that "lies entirely within the plane of the apartment building structure"].)

The Court of Appeal correctly rejected *People v. Jackson* (2010) 190 Cal.App.4th 918, cited by respondent (ROBM 1, 6, 8, 10-11), noting that it ignored *Valencia*'s statement excluding an unenclosed balcony from the reasonable belief test. In addition, as the Court of Appeal noted, the *Jackson* court found that any error was harmless because undisputed evidence showed that the defendant was halfway inside the apartment and halfway on the balcony.

Respondent contends, citing *Jackson*, that "[t]he 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." (ROBM 6, citing *People v. Thorn, supra,* 176

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is not such an element, such as") alter the meaning. Indeed, the omitted words only make more clear that an unenclosed balcony is "not . . . an element" that reasonably can be viewed as part of the building's outer boundary.

Cal.App.4th at p. 262, and *People v. Jackson, supra,* 190 Cal.App.4th at p. 925.)

The "functionally interconnected" and "immediately contiguous" test Courts of Appeal have applied to determine whether a structure is part of an inhabited dwelling, however, should not come into play unless and until it has been determined that a burglary has been committed — i.e., that a building has been entered with intent to commit larceny or a felony therein. To hold otherwise, or to conflate the two tests, would lead to results that are plainly at odds with the law governing burglary in this state. Unenclosed porches and patios, for example, are structures that are functionally interconnected with and immediately contiguous to houses, yet entry onto them does not constitute burglary; a building has not been entered. (See, e.g., *People v. Brown* (1992) 6 Cal.App.4th 1489, 1497 [construing Pen. Code § 198.5, the "Home Protection Bill of Rights," similar to Pen. Code § 459]; *People v. Valencia, supra,* 28 Cal.4th at p. 11 & fn. 5.)[2]

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[2] Yarbrough respectfully contends that *In re Christopher J.,* in which the Court of Appeal stated that because "the minor was alleged to have entered a 'dwelling house,' . . . the issue is not . . . whether a carport is a 'building' within the statute, but rather, was the carport a part of the dwelling house," was wrong on this point. (*In re Christopher J.* (1980) 102 Cal.App.3d 76, 78.) Entry into a building is clearly an element of burglary under Penal Code section 459. That element is not eliminated when first-degree burglary of an inhabited dwelling house is alleged. Only after the jury determines that a burglary has been committed (i.e., that a building has

Thus, in cases in which a residential burglary is alleged, there are three potential inquiries that face the court. First, the building's outer boundary must be determined. In some cases, that will be self-evident, as this Court explained in *Valencia:* "in general, the roof, walls, doors, and windows constitute parts of a building's outer boundary, the penetration of which is sufficient for entry." (*People v. Valencia, supra,* 28 Cal.4th at p. 11.) More, this Court has made clear that features such as lawns, courtyards, and unenclosed patios and balconies are, as a matter of law, not a part of a building for purposes of the burglary statute. (*People v. Valencia, supra,* 28 Cal.4th at p. 11 & fn. 5.)

Second, if the building's outer boundary is not self-evident and the structure or feature in question is not among those excluded from the building's outer boundary as a matter of law, the court then applies the reasonable belief test. Third, the question then arises whether the burglary was of an inhabited dwelling; at that point, the question may be whether a

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been entered with intent to commit larceny or a felony therein) does it then determine the degree of burglary by determining whether a dwelling house has been entered.

People v. Thorn, supra, 176 Cal.App.4th 255, which also addressed a case in which the defendant was found in a carport, properly addressed both the question whether entry into a carport constituted entry into a building, and the question whether it constituted entry into an inhabited dwelling house. (*Id.* at pp. 261-265.)

structure that has been entered is functionally interconnected with and immediately contiguous to other portions of the house.

If it is self-evident that a building's outer boundary has not been entered, or if a feature or structure that has been entered is not, as a matter of law, encompassed within the building's outer boundary, then, contrary to respondent's argument, the second two questions do not come into play. A burglary has not occurred. As the Court of Appeal correctly held, in such a case, the evidence can establish only an attempted burglary.

II.

THIS COURT SHOULD REAFFIRM ITS STATEMENT IN *VALENCIA* THAT UNENCLOSED BALCONIES AND OTHER SIMILAR STRUCTURES ARE NOT ENCOMPASSED BY THE REASONABLE BELIEF TEST

Respondent also contends that "[u]ltimately, it should be the reasonable-belief test for burglary that controls, not the dicta of footnote 5" and that "whether the Court of Appeal misinterpreted the footnote in *Valencia* or not, the Court of Appeal's ruling should be reversed." (ROBM 13, 14.) Respondent thus appears to argue that even if the Court of Appeal was correct that *Valencia* states that unenclosed balconies are not part of buildings for purposes of the burglary statute, this Court should overrule its statement in *Valencia.*

This Court should not hold, as respondent appears to contend, that whether an area the defendant entered is a building or part of a building for purposes of the burglary statute "is governed by [the] 'reasonable belief test' . . ." (ROBM 5.) Any number of features and structures may be among those a trial court would believe a member of the general public could not enter without authorization — porches, patios, lawns, decks, fire escapes, roof decks, courtyards, and balconies, to name a few. Yet California's burglary statute prohibits only entry into buildings.

"Building" has traditionally been defined as a structure with four

walls and a roof. In *People v. Gibbons* (1928) 206 Cal. 112, this Court, adopting the Court of Appeal opinion in the case, held that entry into a bin with three sides and a roof, with the roof formed by the floor of a building, did not constitute burglary. (*Id.* at p. 114; see also, e.g., *People v. Brooks* (1982) 133 Cal.App.3d 200, 204; *In re Amber S.* (1995) 33 Cal.App.4th 185, 186-187; Witkin, California Criminal Law, 3d Ed., Crimes Against Property, § 117.)

Other cases have described a building as "a structure which has capacity to contain, and is designed for the habitation of, man or animals, or the sheltering of property. [Citation.]" (*People v. Buyle* (1937) 22 Cal.App.2d 143, 148-149.)

Shedding the requirement that the structure entered be a "building," and relying solely on the reasonable belief test — defining a building's outer boundary as including 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 — would allow for inconsistent results across the state, and results that stray from the language of the statute. Suppose, for example, a defendant has entered the back patio of a house through a latched gate, or is found on a second-story deck accessible by an outdoor staircase, or on an exterior fire escape. Some judges might

conclude that a reasonable person would believe that a member of the general public could not enter the back yard, deck, or fire escape without authorization; some may not. More to the point, in none of these cases has a building been entered.

This Court was correct, in *Valencia*, in admonishing that 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." (*People v. Valencia, supra,* 28 Cal.4th at p. 11, fn. 5 [emphasis in original].) "[T]he building," of course, refers to the structure enclosed by walls and a roof. An unenclosed balcony or patio is not part of a building, i.e., it is not part of what is enclosed by walls and a roof.

Ad hoc determinations under the reasonable belief test would lead to findings that a burglary has been committed when there has been no entry into a *building*. Such a rule would take criminal liability beyond the plain language of Penal Code section 459 requiring entry into a building, and the longstanding judicial interpretation of the term "building" as defined by four walls and a roof.

As the Court of Appeal noted, holding that entry onto an unenclosed balcony does not constitute entry of a building for burglary purposes does not mean that individuals who climb onto other people's balconies or are

found on other people's patios or lawns with the intent to enter the adjoining house or apartment to commit theft will escape criminal liability. Such individuals would be guilty of attempted first-degree burglary, a serious felony under the Three Strikes law, which is punishable by a sentence in state prison of one, two, or three years. (Pen. Code §§ 461, 664, 1192.7, subd. (c)(18), (39).)

Indeed, this is consistent with how the law has been applied in earlier cases. (See *People v. Gilbert* (1927) 86 Cal.App. 8, 9 [defendant charged with and convicted of attempted burglary where he climbed onto a second-floor balcony and approached the doors which led into the bedroom, and fled when the occupants were aroused]; see also, e.g., *People v. Martone* (1940) 38 Cal.App.2d 392, 393 [reiterating that in Gilbert defendant was guilty of attempted burglary where he climbed over a second-story balcony but did not enter the attached residence]; *People v. Vizcarra* (1980) 110 Cal.App.3d 858, 862 [same]; *People v. Read* (1990) 221 Cal.App.3d 685, 686-687 [defendant convicted of attempted burglary where he was identified as having been on a balcony].)

For all the reasons above, this Court should decline the Attorney General's invitation to overrule its admonition in *Valencia*.

III.

THE BALCONY AT ISSUE HERE WAS AN UNENCLOSED BALCONY; IT THEREFORE WAS NOT PART OF THE APARTMENT BUILDING

The Court of Appeal also correctly found that the balcony in question in this case was unenclosed. While the balcony had a railing, a balcony, by definition, "is surrounded by a railing, balustrade, or parapet." (American Heritage Dictionary of the English Language (4th ed. 2006) pp. 135-136.) Indeed, as Yarbrough noted in the Court of Appeal, it is likely that a second-story balcony without a railing would violate building safety codes. An enclosed balcony, thus, by definition, is enclosed by something more than a railing, balustrade, or parapet — perhaps by glass, or by a screen.

Respondent suggests that the balcony is enclosed because the building's roof extends over it, citing a dictionary definition stating that a balcony is "usually unroofed." (ROBM 13 fn. 3.) First, it is not at all clear that the roof or overhang in this case extended as far as the balcony. (See Exhs. 3, 5, & 6.) In any event, a roof does not serve to enclose a balcony. While a roof or overhang may provide some shelter, a roof alone does not serve to convert a structure into a building. (See *In re Amber S., supra,* 33 Cal.App.4th at pp. 186-187 ["pole barn" consisting of a roof and overhang

held up by poles was not a building within the meaning of Pen. Code § 459].)

Respondent's additional suggestion that a balcony is nothing more than a raised patio — and that therefore, presumably, second-story balconies like the balcony here are not balconies within the meaning of this Court's statement in *Valencia* (ROBM 9-10, fn. 1) — is supported neither by a dictionary definition (as respondent concedes [see ROBM 13 fn. 3]), nor by respondent's invocation of the *ejusdem generis* principle of statutory construction. Indeed, the dictionary definition respondent invokes defines balcony as "a usually unroofed platform projecting from the wall of a building." (ROBM 13, fn. 3.) And the *ejusdem generis* principle does not apply here. It applies when general terms follow a list of specific items or categories, or vice versa; the general term is "restricted to those things that are similar to those which are enumerated specifically." (*People v. Arias* (2008) 45 Cal.4th 169, 180.) "Unenclosed balcony" is not a general term; it is part of the list of specific items. The *ejusdem generis* principle thus offers no reason to interpret "unenclosed balcony" as something that is on the ground level of a building, like a lawn, courtyard, or patio.

In any event, interpreting "unenclosed balcony" to mean "unenclosed raised patio" would render another item in the list — "unenclosed patio" —

at least partly superfluous. (See *People v. Arias, supra,* 45 Cal.4th at p. 180 [in statutory interpretation, a construction that renders a word surplusage should be avoided].)

The balcony in this case was clearly a balcony within the meaning of this Court's use of the term in *Valencia*, and it was unenclosed in any meaningful sense of that term. Thus, the Court of Appeal's finding that the balcony in this case was unenclosed should not be disturbed.

Because Yarbrough was found on an unenclosed balcony and there was no evidence he entered the building, he could be found guilty, at most, of attempted burglary. This Court should therefore affirm the Court of Appeal's decision reversing Yarbrough's conviction.

IV.

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN MR. YARBROUGH'S CONVICTION FOR BURGLARY

Because, as set forth above, presence on an unenclosed balcony, as a matter of law, does not constitute the entry of a building necessary to sustain a burglary conviction, the evidence in this case — which concededly established no more than Yarbrough's presence on Deanda's balcony — was insufficient to sustain the conviction. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 575-576; see also *In re Winship* (1970) 397 U.S. 358, 361-363; U.S. Const., 14th Amend.) The Court of Appeal was thus correct in holding that the evidence established, at most, an attempted burglary.

Thus, this Court should affirm the Court of Appeal's decision reversing Yarbrough's burglary conviction.

V.

EVEN IF THIS COURT SHOULD DECIDE TO OVERRULE *PEOPLE V. VALENCIA*, ITS DECISION CAN APPLY PROSPECTIVELY ONLY, AND AFFIRMANCE OF MR. YARBROUGH'S CONVICTION WOULD VIOLATE THE PROSCRIPTION ON EX POST FACTO LAWS AND MR. YARBROUGH'S RIGHT TO DUE PROCESS OF LAW

An ex post facto law has been defined by the Supreme Court as one "'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' or 'that aggravates a crime, or makes it greater than it was, when committed.' *Calder v. Bull* [1798] 3 Dall. 386, 390, 1 L.Ed. 648. [Footnote omitted.] 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. City of Columbia* (1964) 378 U.S. 347, 353-354; U.S. Const., 14th Amend.)

"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.'" (*Bouie v. City of Columbia, supra,* 378 U.S. at p. 354.)

Should this Court decide to overrule *Valencia* and hold that presence on an unenclosed balcony constitutes the entry of a building required in the

burglary statute, its holding would be unexpected and indefensible by reference to the law which has been expressed. That law consists not merely of *Valencia* itself, but the longstanding law that a building is defined by four walls and a roof (see, e.g., *People v. Gibbons, supra,* 206 Cal. 112), and by cases suggesting that presence on a balcony without entry into the building itself constitutes attempted burglary (see, e.g., *People v. Gilbert, supra,* 86 Cal.App. 8).

Indeed, as far as appellate counsel has been able to determine, no reported case prior to the incident in which Yarbrough was found on Deanda's balcony would have provided notice that presence on an unenclosed balcony was punishable as burglary.[3] (See *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 636 ["[W]e find no reported decision of the California courts which should have given petitioner notice that the killing of an unborn but viable fetus was prohibited by section 187."].)

To be sure, Court of Appeal cases have stated that "due process concerns of fair warning [do not] arise where the language of the statute is not being expanded in an unforeseeable manner even though the case is one of first impression and even if dicta in prior decisions suggested a narrower

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[3] *People v. Jackson, supra,* 190 Cal.App.4th 918, which in any event ignored this court's admonition in *Valencia*, was decided in December, 2010, after the incident that led to Yarbrough's conviction.

application . . . ." (*People v. James* (1998) 62 Cal.App.4th 244, 275; see also, e.g., *People v. Sobiek* (1973) 30 Cal.App.3d 458, 473-475.)[4]

The crux of the constitutional issue, however, remains foreseeability. (See, e.g., *People v. Farley* (2009) 46 Cal.4th 1053, 1121-1122; *People v. Wharton* (1991) 53 Cal.3d 522, 586; *In re Baert*, *supra,* 205 Cal.App.3d at pp. 520-522; *Bouie v. City of Columbia, supra,* 378 U.S. at p. 354.) Because of the clarity of *Valencia*'s admonition, and because it is well-grounded in the law as it has existed for many years, defining a building as constituted by four walls and a roof, any expansion of the statutory language to encompass entry onto balconies, patios, lawns, decks, or the like, would be unforeseeable, and cannot constitutionally be applied to Yarbrough's case.

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[4] *Sobiek* also erroneously reasoned that because the judicial construction at issue did not criminalize acts which were previously innocent, due process did not apply. (*People v. Sobiek, supra,* 30 Cal.App.3d at pp. 474-475.) "This contention . . . has been repeatedly rejected." (*People v. James*, *supra,* 62 Cal.App.4th at pp. 275-276 [bar against retroactivity "applies equally to judicial decisions, whose effect is also to increase punishment for criminal conduct after its commission"]; see, e.g., *People v. Weidert* (1985) 39 Cal.3d 836, 851-852; *Keeler v. Superior Court, supra,* 2 Cal.3d at p. 635 ["In the case at bar the conduct with which petitioner is charged is certainly 'improper' and 'immoral,' and it is not contended that he was exercising a constitutionally favored right. But the matter is simply one of degree, and it cannot be denied that the guarantee of due process extends to violent as well as peaceful men."]; *In re Baert* (1988) 205 Cal.App.3d 514, 521-522.)

Conclusion

For the reasons stated above, this Court should affirm the decision of the Court of Appeal reversing Jammal Yarbrough's conviction for burglary.

Dated: October 14, 2011

Respectfully submitted,

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Word Count Certification

I, Laura S. Kelly, counsel for Jammal Yarbrough, certify pursuant to the California Rules of Court, that the word count for this document is 4,194 words, excluding the cover, the tables, and this certificate. This document was prepared in Corel Word Perfect, and this is the word count generated by the program for this document.

Executed, at Irvine, California, on October 14, 2011.

Laura S. Kelly
Attorney for Jammal Yarbrough

DECLARATION OF SERVICE

Re: People v. Jammal Yarbrough, No. S192751
(Court of Appeal No. B222399/Superior Court No. PA065170)

On October 15, 2011, I served the within
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I declare under penalty of perjury that the foregoing is true and correct.

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_____
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