In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JAMAL YARBROUGH,

Defendant and Appellant.

Case No. S192751

Appellate District, Case No. B222399
Los Angeles County Superior Court, Case No. PA065170
The Honorable Ronald S. Coen, Judge

RESPONDENT'S REPLY BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
SUSAN SULLIVAN PITHEY
Supervising Deputy Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
DAVID ZARMI
Deputy Attorney General
State Bar No. 245636
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 576-1336
Fax: (213) 576-1300
Email: DocketingLAAWT@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

ARGUMENT

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* (2002) 28 Cal.4th 1, 11), and is reasonably viewed as part of the building's outer boundary (*id.* at fn. 5). The balcony in this case therefore falls within the burglary statute. The Court of Appeal's decision to the contrary should be reversed, and appellant's conviction reinstated.

I. *VALENCIA* DID NOT CATEGORICALLY EXCLUDE UNENCLOSED BALCONIES FROM BURGLARY

In his answer brief, appellant argues that the language in *Valencia* was meant to be categorical, such that no "lawn, courtyard, unenclosed patio, or unenclosed balcony" may ever be part of a building's outer boundary. (AAB 3-6.) However, *Valencia* stated that a feature is not within 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; ROB 11.) That is, this Court first gave a test for lower courts to apply--whether a feature is "an element of a building that reasonably can be viewed as part of *the building's* outer boundary"-- and then gave examples of possible candidates as an aid for the lower courts.

If this Court had meant the examples to be categorical, it could have explicitly removed them from purview of the lower courts by simply stating, "The test does not encompass a lawn, courtyard, unenclosed patio, or unenclosed balcony." This is exactly what the Court of Appeal accomplished through the use of ellipses by omitting the words "any feature that is not such an element, such as," thereby modifying *Valencia* to read: "[T]he outer boundary of a building for purposes of burglary . . . does

not encompass . . . [an] unenclosed balcony. (Opn. at 2, quoting, in part, *People v. Valencia, supra,* 28 Cal.4th at p. 11, fn. 5; ROB 10; see AAB 5-6, fn. 1.) "The unedited text belies the Court of Appeal's interpretation." (ROB 10.)

II. THE "FUNCTIONALLY INTERCONNECTED" AND "IMMEDIATELY CONTIGUOUS" STANDARDS ARE HELPFUL GUIDEPOSTS IN DETERMINING WHETHER A SPECIFIC STRUCTURE IS PART OF A BUILDING

Appellant asserts that the "functionally interconnected" and "immediately contiguous" factors should solely determine whether a structure is part of an inhabited dwelling and may only be applied once it has been determined that the area is within a building's outer boundary (i.e., that a burglary of some sort was committed). (See AAB 7-8.) However, the ultimate test is reasonableness, as described in *Valencia*, and whether a structure is functionally interconnected or immediately contiguous only assists this determination.

Valencia gave two reasonableness articulations. The first is whether the area is one in 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.) The second is whether the area is one that is "reasonably . . . viewed as part of the building's outer boundary." (*Id.* at fn. 5, italics omitted.)

Although the "functionally interconnected" and "immediately contiguous" factors predated *Valencia* (see *People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1107), subsequent courts have retained them as useful factors in determining whether an area is within a building's outer boundary. (See *People v. Jackson* (2010) 190 Cal.App.4th 918, 924-925; *People v. Thorn* (2009) 176 Cal.App.4th 255, 261-263.) Contrary to appellant's assertion (AAB 8-9), whether the structure itself was inhabited is an entirely separate issue for the jury.

Appellant uses *Thorn* to argue that separate tests govern whether a burglar entered a specific building or an inhabited dwelling. (See AAB 7-8, fn. 2, citing *People v. Thorn*, *supra*, 176 Cal.App.4th at pp. 261-265.) However, *Thorn* did not make such a distinction. Instead, *Thorn* addressed the defendant's two arguments as to why his entry was not an entry into an inhabited building. First, *Thorn* held that the carport in that case was part of "the *inhabited dwelling house*" because it was "contiguous to and functionally interconnected with the *inhabited apartment building*." (*Thorn*, at p. 263, italics added.) Second, it held that carports are "part of the *inhabited building* under the burglary statutes [in] that they . . . carry a reasonable expectation of protection from intrusion." (*Ibid.*, italics added) Thus, *Thorn* also recognized that both "tests" are ultimately just part of the reasonableness standards described in *Valencia*.

Here, the balcony was functionally interconnected and immediately contiguous with Deanda's apartment, being separated from his bedroom only by a sliding glass door. (See 2RT 315, 321-322; People's Exs. 4 & 5.) These two factors also support the trial court's finding that the balcony was within the outer boundary of the building.

III. IF FOOTNOTE 5 OF *VALENCIA* CATEGORICALLY EXCLUDED UNENCLOSED BALCONIES FROM BURGLARY, THIS COURT SHOULD OVERRULE THAT DICTUM

Citing respondent's opening brief at pages 13 and 14, appellant states, "Respondent [] 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*." (AAB 10.) Appellant is correct. Although the obiter dictum in footnote 5 properly describes the general test for whether a structure is within a building's outer boundary (reasonableness), any

categorical exclusion of structures attached to a building would be imprudent.

Appellant's contention that respondent would include entry into patios and lawns as burglary (AAB 10) is belied by respondent's argument that whether entry into a specific area is considered burglary is based on whether the area in question "reasonably can be viewed as part of the building's outer boundary." (*People v. Valencia*, *supra*, 28 Cal.4th at p. 11, fn. 5; see ROB 13.) This test given in footnote 5 is conceptually different from the inquiry of whether the area is one of which "a reasonable person [the alleged burglar] would believe that a member of the general public could not pass without authorization." (See *Valencia*, at p. 11; see also AAB 8 [where appellant recognizes that they are distinct tests].)[1]

As with the balcony here that the Court of Appeal wrongly found was unenclosed as a matter of law, it would be contrary to *Valencia* to categorically exclude from burglary the raised patios and decks attached to houses and fire escapes that appellant lists. (See AAB 10.) Appellant would eliminate elements such as fire escapes because appellant does not believe that such elements could ever be considered part of a building's outer boundary. (See AAB 11-12.) But a court should be authorized to analyze whether a structure is *reasonably* considered within a building's outer boundary in the specific case before that court.

"Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation -- the danger that the intruder will harm the occupants in attempting to perpetrate the

---

[1] Appellant quotes from page 5 of respondent's opening brief to support his allegation that respondent is asking this Court to rely solely on the "reasonable belief test," without citing the next paragraph where respondent set out the second reasonableness test that this Court described in footnote 5 of *Valencia*. (See AAB 10; ROB 5-6.)

intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence." (*People v. Davis* (1998) 18 Cal.4th 712, 721, quoting *People v. Gauze* (1975) 15 Cal.3d 709, 715.) Residents of an apartment with an attached private balcony treat the balcony as part of the apartment and are as likely to step onto the balcony as they are to step into their bedroom. "[T]he safety and privacy expectations surrounding an inhabited dwelling house are present in the [private balcony] of the apartment [appellant] burgled here. The evidence supports his first degree burglary conviction." (See *People v. Woods* (1998) 65 Cal.App.4th 345, 350.)

IV. A BALCONY WITH A ROOF AND A RAILING IS NOT "UNENCLOSED"

Following respondent's argument that a balcony with a roof *and* a railing is enclosed in keeping with the language used in *Valencia*, appellant counters with the proposition that a roof without a railing is not a structure. (AAB 14, citing *In re Amber S.* (1995) 33 Cal.App.4th 185, 186-187.) Not only was there a railing in this case, however, but appellant misses the point. Respondent is not arguing that the balcony constituted a freestanding structure, but that it was "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, italics in original.) Respondent does not argue that a gazebo standing alone on a lawn, for example, would be a "building" within the meaning of section 459. Similarly, respondent does not argue that an enclosed screen and window unit standing alone on a lawn would be a "building" within the meaning of section 459, even though *Valencia* found entry into that area to be burglary when it was attached to a building. (See *Valencia*, at p. 6.)

Appellant correctly points out that respondent should have cited the more accurate *noscitur a sociis*, rather than the *ejusdem generis* principle of

construction. (AAB 15; see ROB 9-10, fn. 1.) *Ejusdem generis* ("of the same kind") refers to the principle that the meaning of a general term in a list is known by the specific terms in that list. *Noscitur a sociis* ("it is known by its associates") refers to the principle of construction that the meaning of a word is known by the words surrounding it. However, *noscitur a sociis* is, in fact, "a close cousin of [] *ejusdem generis*." (*Cable Connection, Inc. v. DIRECTV, Inc.* (2009) 44 Cal.4th 1334, 1370-1371 (Moreno, J., dissenting); see *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 960.)

Using *noscitur a sociis*, *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.) "Thus, even the strictest construction of footnote 5 would still exclude a second-story balcony inaccessible from the outside." (ROB 9-10, fn. 1.)[2] Accordingly, even if this Court chooses to interpret the obiter dictum of footnote 5 in *Valencia* as a categorical exclusion of certain elements of a building from burglary as a matter of law, it does not include the enclosed balcony that appellant encountered in this case.

V. EVEN IF THIS COURT REJECTS THE DICTUM IN *VALENCIA*, THERE ARE NO CONSTITUTIONAL CONCERNS

Respondent's primary argument is that the correct test for whether entry into an area constitutes burglary is, and has been (at least since *Valencia* was decided), reasonableness: first, whether the burgled area is one in which "a reasonable person would believe that a member of the

---

[2] As another possibility, in speaking of an "unenclosed balcony," this Court may have been referring to the scenario in which a staircase leads up to the balcony, leaving it accessible to the outside. Accordingly, balconies of the type here, solely accessible from the inside of the building, would be deemed "enclosed."

general public could not pass without authorization" (*People v. Valencia*, *supra*, 28 Cal.4th at p. 11); and second, whether the burgled area is one that is "reasonably . . . viewed as part of the building's outer boundary" (*id.* at fn. 5, italics omitted). (See ROB 5-11; Argument II, above.) Alternately, respondent argues that even if this Court finds that *Valencia* intended the obiter dictum in footnote 5 to be a categorical exclusion of unenclosed balconies, the balcony in question here was "enclosed" by a railing *and* a roof. (See ROB 11-13; Argument IV, above.)

However, should this Court find that *Valencia* intended for the dictum in footnote 5 to be a categorical exclusion of unenclosed balconies, and that the balcony here was "unenclosed," this Court should reject that part of footnote 5. (See ROB 13-14.) At the same time, doing so would not raise due process or ex post facto concerns.

Constitutional due process applies "to bar retroactive [ex post facto] criminal prohibitions emanating from courts as well as from legislatures." (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 354 [84 S.Ct. 1697, 12 L.Ed.2d 894].) "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.*, quotation marks omitted.) Where it is unforeseeable that a judicial holding will be overturned, due process prohibits retroactive application of the new holding. (*People v. Farley* (2009) 46 Cal.4th 1053, 1121.)

"Not all judicial interpretations of statutes having a retroactive effect are prohibited, however." (*People v. Wharton* (1991) 53 Cal.3d 522, 586.)

> In the case of judicial construction, due process is not violated merely because the language of the statute is being applied to a particular situation for the first time. . . . Nor do due process concerns of fair warning 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 application.

(*People v. Taylor* (1992) 7 Cal.App.4th 677, 693, quotation marks omitted.)

As to *Valencia*, the language of footnote 5, as the Court of Appeal acknowledged, was dictum, not a holding of this Court, because it did not resolve the case at hand. (See Opn. at 5.) Thus, this Court would not now be overturning a prior holding. (Contrast with *People v. Farley*, *supra*, 46 Cal.4th at p. 1121 [overruling prior *holding* that burglary to commit an assault is not a basis for second degree felony murder].)

Additionally, a judicial decision finding that a balcony with a rail and a roof, inaccessible from the outside, is within the attached building's outer boundary for the purposes of burglary, is not unforeseeable. (See *People v. James* (1998) 62 Cal.App.4th 244, 276 [holding for first time that manufacturing methamphetamine is inherently dangerous not unforeseeable or unexpected]; *People v. Page* (1980) 104 Cal.App.3d 569, 576 [holding for first time that forcible tattooing is mayhem not unforeseeable].) Indeed, relying solely on post-*Valencia* case law, the Court of Appeal in *Jackson* found that entry onto a balcony constituted burglary, without even mentioning a roof. (See *People v. Jackson*, *supra*, 190 Cal.App.4th at pp. 923-926.)[3] The fact that the case could have been decided another way

---

[3] Appellant cites the Court of Appeal in this case as stating that "the *Jackson* court found that any error was harmless because undisputed evidence showed that the defendant was halfway inside the apartment." (AAB 6; see Opn. at 4-5.) To the extent that appellant is implying that the main ruling in *Jackson* was dictum rather than an alternative holding, it was not. (See *People v. Vang* (2011) 52 Cal.4th 1038, 1047, fn. 3 [a comment made in response to a defendant's argument is considered "necessary to fully explain why that argument lacked merit" and is not dictum].) The Court of Appeal did, by contrast, find that footnote 5 in *Valencia* was merely dictum, even though it chose to follow it. (See Opn. at 5.)

does not make the decision unforeseeable. Therefore, a holding that entry onto the balcony in this case constituted burglary can be applied retroactively to appellant's conduct without in any way violating due process. (See *People v. James*, *supra*, at p. 276.)

CONCLUSION

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

Dated: January 5, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
SUSAN SULLIVAN PITHEY
Supervising Deputy Attorney General

DAVID ZARMI
Deputy Attorney General
Attorneys for Respondent

LA2011502065

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 2,460 words.

Dated: January 5, 2012

KAMALA D. HARRIS
Attorney General of California

DAVID ZARMI
Deputy Attorney General
Attorneys for Respondent

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 January 5, 2012, I served the attached **RESPONDENT'S REPLY 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:

Laura S. Kelly
Attorney at Law
4521 Campus Drive, #175
Irvine, CA 92612

Carolyn Yeh
Deputy District Attorney
L. A. County District Attorney's Office
23747 W. Valencia Boulevard
Santa Claria, CA 91355

Clerk of the Court
Court of Appeal of the State of California
300 South Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

John A. Clarke
Clerk of the Court
Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, CA 90012
For Delivery to Hon. Ronald S. Coen, Judge

The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

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 January 5, 2012, at Los Angeles, California.

J.R. Familo
Declarant

Signature

LA2011502065
51068732.doc