In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

HUGO GARCIA,

Defendant and Appellant.

Case No. S218233

Fourth Appellate District, Division One, Case No. D062659
San Diego County Superior Court, Case No. SCN291820
The Honorable Daniel B. Goldstein, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

In its order granting review, this Court limited review to the following question: Did defendant commit two burglaries, or only one burglary, when he entered a business with the intent to commit a robbery, then took the robbery victim to the bathroom in the back of the business with the intent to rape her?

INTRODUCTION

Defendant Hugo Garcia entered a business, held the sales clerk at gunpoint, and demanded money. When the clerk gave Garcia all the money she had, Garcia forced her to go into a rear bathroom, where he sexually assaulted her. A jury convicted Garcia of two counts of burglary, one based on his entry into the business with the intent to commit theft, the other based on his entry into the bathroom with the intent to commit rape.

The two burglary convictions were proper. Under the express language of Penal Code section 459, Garcia's entry into the store, standing alone, constituted a burglary. The entry into the bathroom also met the elements necessary for the offense. Thus, Garcia committed two distinct, completed crimes when he entered the structure, then the bathroom, and each entry was with the intent to commit a felony. This conclusion furthers the policies underlying the burglary laws, namely, protection of the public and the privacy interests of each individual against unauthorized intrusions by third parties.

Furthermore, such multiple convictions are otherwise authorized under Penal Code section 954, which grants prosecutors charging discretion to seek more than one conviction for crimes connected together in their commission. Neither of the exceptions to this section applies in Garcia's case.

The Court of Appeal, in upholding the two convictions, did not violate Garcia's due process right to notice. It was entirely foreseeable that he could suffer multiple convictions; thus, there was no improper retroactive application of a new rule of law. Finally, more than ample evidence supported the jury's conclusion that two burglaries were committed here.

Accordingly, this Court should rule that a burglary occurs every time there is an entry into a structure or room with the requisite felonious intent.

STATEMENT OF THE CASE

On May 8, 2012, a San Diego County Superior Court jury found Garcia guilty of burglary (counts 1 and 4, Pen. Code,[1] § 459); kidnap with the intent to commit rape (count 3, § 209, subd. (b)(1)); forcible rape (count 5, § 261, subd. (a)(2)); rape by a foreign or unknown object (count 6, § 289, subd. (a)); unlawful taking or driving of a vehicle (count 7, Veh. Code, § 10851, subd. (a)); and attempted robbery (counts 8 and 9, §§ 664/211). As to counts 2, 3, 8, and 9, the jury found that Garcia personally used a firearm (§ 12022.53, subd. (b)). As to counts 5 and 6, the jury found that Garcia kidnapped the victim with the movement substantially increasing the risk of harm to the victim (§ 667.61, subd. (d)(2)); that Garcia committed the offense during the commission of a burglary (§ 667.61, subd. (e)(2)); that Garcia engaged in the tying or binding of the victim (§ 667.61, subd. (e)(5)); and that Garcia personally used a firearm (§ 667.61, subd. (e)(3)). (7 RT 420-425; CT 112-122, 280-281.)

On August 27, 2012, the court sentenced Garcia to prison for a total term of 64 years and 4 months to life. (7 RT 439-440; CT 252-255; 280-281.)

Garcia appealed from the judgment. He argued, inter alia, that as a matter of law, he could only be convicted of one burglary, not two, for his

[1] Further unspecified statutory references are to the Penal Code.

separate acts of entering the victim's business with the intent to steal, then forcing her into the bathroom at the back of the business with the intent to sexually assault her. In an opinion certified for partial publication, the Court of Appeal, Fourth District, Division One, rejected the argument. Answering a question this Court left open in *People v. Sparks* (2002) 28 Cal.4th 71 (*Sparks*), and relying in large part on that decision, the Court of Appeal concluded that: (1) the bathroom provided significant additional privacy and security, and thus constituted a separate room for purposes of section 459, and (2) the evidence supported a finding that Garcia entered the bathroom with a new and distinct felonious intent. Accordingly, the dual convictions were proper. (Opn. at 8-29.)[2]

STATEMENT OF FACTS

A. Offenses Against M.

In May 2011, M. and her co-worker Guadalupe Catalan worked at the Family Accessories Women, Infants, and Children store on East Valley Parkway in Escondido. (1 RT 32, 98.) On May 11, M. arrived for work at around 4:00 p.m. (1 RT 33.) She drove to work in her white Ford Expedition and parked in the parking lot. (1 RT 76.) She placed her car keys in her purse and brought her purse with her into the store. (1 RT 77.)

When M. arrived, Catalan ran a quick errand and then left for the day. (1 RT 35, 98-99.) Shortly after Catalan left, M. looked out the window. Garcia was riding his bicycle slowly in front of the store. (1 RT 33.) Garcia came in. He walked to the middle of the store, looked around, and walked out. (1 RT 35.) A short time later, Garcia came back in and walked up to the counter. (1 RT 38.) Holding a cell phone in one hand and

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[2] The Court of Appeal ordered the trial court to stay sentence on count 4 (the second burglary) because Garcia was sentenced on the underlying sexual assault. (Opn. at 40-42.)

keeping his other hand in his jacket pocket, he asked M. questions about the store's welfare recipient voucher program. (1 RT 38-40.) M. found the questions odd because aid recipients are required to attend an orientation and would know the answers to those questions. (1 RT 38-39.) M. asked Garcia if he wanted to exchange vouchers. Garcia said he did not. (1 RT 40.) Becoming increasingly nervous, M. picked up her cell phone and sent Catalan a text message telling her there was a strange man inside the store, and she was afraid. (1 RT 45, 99, 102.)

Garcia then asked M. about a jar of candies, which was sitting on the counter. M. asked Garcia if he wanted some candy. Garcia said he did. As M. was opening the jar, Garcia pulled a gun out of his pocket. (1 RT 48.) Garcia pointed the gun at M. and ordered her to give him all the money in the register. (1 RT 48-49.) M. complied. She backed up and told Garcia not to hurt her. Garcia continued to point the gun at her. (1 RT 50, 54.) She asked Garcia if he wanted her to put the money inside a bag. Garcia said that he did. Garcia asked M. if she had any money. (1 RT 53.) M. gave Garcia $2.00 which she had in her pants pocket. (1 RT 54.)

Garcia directed M. to close the front door. As M. went to shut the door, Garcia followed her, gun pointed at her back. (1 RT 54.) Garcia asked M. if she had the keys to the store. M. said she did not, even though they were in her purse. (1 RT 56.) At Garcia's direction, M. removed the "open" sign from the door and turned off the lights. (1 RT 57, 58.)

M. asked Garcia to leave. (1 RT 60.) Garcia escorted M. at gunpoint to the refrigerators in the back of the store. (1 RT 61.) He asked M. for the key to the back office, but M. told Garcia she did not have the key. (1 RT 62.) Garcia then asked M. if the store had a bathroom. (1 RT 59.) When M. said yes, Garcia told M. to go into the bathroom. (1 RT 59, 62.) M. refused. (1 RT 62-63.) M. got on her knees and begged Garcia to leave her

alone, telling him she had a daughter at home. (1 RT 63-64.) Garcia pointed the gun at her and ordered her to go into the bathroom. (1 RT 64.)

Once they were in the bathroom, Garcia told M. to remove her clothes. (1 RT 63-64.) M. took off her outer clothing but left her bra and underwear on. Garcia ordered her to take everything off. After M. complied, Garcia told her to turn around and face him. (1 RT 65-66.) Garcia then walked out of the bathroom. When he returned, he had some hair bands in his hands. (1 RT 67.) Using one hand to hold the gun to M.'s chest, he used the other hand to tie M.'s hands in front of her. (1 RT 68.) Afraid that the gun would discharge accidentally, M. offered to tie her own hands. (1 RT 68, 69.) Garcia agreed. Once M.'s hands were bound, Garcia left again. He returned with more hair bands. (1 RT 69.) He ordered M. to tie up her feet. M. tried but the bands broke. (1 RT 70.)

Garcia exited the bathroom for a third time. He came back a short while later. (1 RT 71.) The zipper of his shorts was down and his erect penis was exposed. (1 RT 71-72.) He ordered M. to turn away from him. Garcia put his fingers and penis in her vagina. Garcia removed his fingers but continued to penetrate M. with his penis. (1 RT 73.) Garcia pushed M.'s head down and fondled her breasts. (1 RT 73, 74.) When M. started to cry, Garcia said, "shush." (1 RT 74.) Garcia ejaculated on M.'s legs. He wiped himself off with some paper towels or toilet paper. He told M. to stay in the bathroom and then he walked out. As M. started getting dressed, Garcia returned. (1 RT 75.) Garcia went back out to the main part of the store and opened some drawers. M. followed to see what Garcia was doing. Garcia told M. to return to the bathroom. (1 RT 76.) Garcia followed her, asked her a question, closed the door, and left the store. (1 RT 77-78.) When M. looked out the window, she saw Garcia driving her white Ford Expedition out of the parking lot. (1 RT 79; see 1 RT 28-29.)

M. went to a nearby business and asked a customer for assistance. (1 RT 24, 27.) An employee of the business dialed 911. (1 RT 27.)

B. Offenses Against S. and Y.

That same day, May 11, S. and Y. were working at the Check Center, a check cashing place located on East Valley Parkway in Escondido. (1 RT 118-119, 133-134.) Around 9:15 p.m., the two women left the business through the front door and headed towards the parking lot to go home. (1 RT 118-120.) A white Ford Expedition was parked in the lot. (1 RT 121, 135.) Garcia was standing next to it. (1 RT 121-122, 135.) He was carrying a bright orange backpack. (1 RT 127, 141.) Garcia walked up to Y. and said, "You got to stop." (1 RT 122, 135.)

Y. asked Garcia, "Can I help you?" (1 RT 136.) Garcia was holding a revolver. (1 RT 122, 136.) Garcia pointed the gun at the front door of the Check Center and said, "Open the door." (1 RT 123, 138.) S. and Y. responded, "What do you mean?" (1 RT 123, 139.) Garcia replied, "Open the door. Don't be stupid. Open the door." (1 RT 139.) Garcia kept waving the gun in the direction of the front door. (1 RT 139.) S. and Y. asked, "What are you talking about?" (1 RT 123, 139-140.) The women told Garcia they could not help him; they had to leave. (1 RT 123, 140.) They backed away from Garcia, then turned and ran towards a nearby Chevron station, where S. used a phone to dial 911. (1 RT 126-128, 140-141.) Garcia got into the Expedition and drove away. (1 RT 128, 143.)

C. Investigation

Edward Valle Mojica, an Immigration and Customs Agent working in Escondido, was on patrol with his partner Derrick Hester when he received a radio call regarding the sexual assault on M., along with a vehicle description. (1 RT 145-146.) Agent Mojica spotted the white Ford Expedition parked at the Grande Laundromat on Ash Street. (1 RT 147; 2

RT 247-248.) Garcia was standing outside the car, carrying his backpack and smoking a cigarette. (1 RT 148.) The agents placed Garcia under arrest. (1 RT 149.) He had a .22 caliber revolver in his right front pocket. (1 RT 149-150.) There were four rounds in the cylinder. One was behind the hammer, meaning that if someone pulled the trigger, the gun would fire. (1 RT 185.)

Escondido Police Detective John O'Donnell went to the Family Accessories store to look for evidence. (2 RT 237-237.) He found four hair ties in the bathroom. Two were broken. (2 RT 239.) In the main part of the store, there was an open package of hair ties on a shelf. (2 RT 241.)

Detective O'Donnell also assisted with a search of the white Ford Expedition. There was a bottle of Gatorade on the right front passenger floor board. (2 RT 243-244.) A backpack was next to the car. (2 RT 248.) It contained a roll of clear packing tape and a pair of scissors. (2 RT 250.) Bills in different denominations were near the backpack. (2 RT 251.) A DNA sample from Garcia matched sperm taken from M. during a sexual assault exam. (1 RT 110, 112; 2 RT 229, 234, 255, 268-269, 271-272.)

D. Garcia's Interview

On May 19, 2011, Escondido Police Detectives Miguel Ramirez and John O'Donnell interviewed Garcia. (2 RT 206-207.) Garcia waived his *Miranda*[3] rights and agreed to speak with the detectives. (2 RT 208-209, 127-128.) Detective Ramirez asked Garcia, "Why are you doing these things?" Garcia told Ramirez he needed money. Detective Ramirez asked Garcia what happened. (2 RT 209; CT 129.) Garcia said he rode his bike to the Family Accessories store. (CT 129, 131.) He went there to rob it because he needed money. At the time, he thought it was empty. When he

[3] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

got to the store, he saw M. He asked her what time the store closed. (CT 132.) She told him they closed at 8:00 p.m. Garcia stepped outside. (CT 133.) He came back in, holding a gun. (CT 133-134.) He showed the gun to M. and said, "Give me the money." (CT 134.) M. opened the register, removed all the cash (about $70), placed it in a bag, and handed the bag to Garcia. (CT 135-136.) Garcia asked M. if she had any more money. She took $3.00 out of her pocket and gave it to him. (CT 155.) She then told Garcia to leave. (CT 136.)

Garcia asked M., "Where's the bathroom?" M. told him where it was. (CT 194.) Garcia ordered M. to close the doors to the store, then took her back to the bathroom. (CT 137, 180, 199-200.) M. warned Garcia there were video cameras in the store. (CT 138.) Garcia put his hood on to cover his face. (CT 139.) When they got to the bathroom, Garcia directed M. to remove her clothes. M. refused. Garcia asked her three more times. He had his gun out at the time. Eventually, she complied. (CT 140.) Garcia went to the main part of the store and retrieved some hair bands. (CT 141.) At Garcia's request, M. tied herself up. (CT 141-142.) Garcia went back out, got a bottle of Gatorade, and returned to the bathroom. He touched M.'s back, breasts, and vagina. (CT 143-144.) He inserted his fingers into her vagina. (CT 145.) M. begged Garcia not to do anything because she had a daughter. (CT 150.) They were in the bathroom for 15 to 30 minutes. (CT 198.)

Garcia insisted that he did not rape M. and never ejaculated. (CT 144, 148, 190, 192.) Asked why M. said she saw his penis, Garcia claimed that his shorts fell down because he put the heavy bottle of Gatorade in his pocket. (CT 147.)

Garcia added that when he finished assaulting M., he returned to the front of the store. He saw M.'s car keys on a table near the cash register. (CT 151.) He took the keys, went out to the parking lot, and pressed the

key holder until he found the right car. When he located the Expedition, he placed his bike in the back and drove home. (CT 152.) Asked about the tape and scissors found in his backpack, Garcia claimed he had been using them to hang posters for work. (CT 160-161.)

Detective Ramirez asked Garcia if he would write a letter of apology to M. detailing what happened. (2 RT 217.) Garcia agreed and prepared a statement repeating the same information he gave in the interview. (2 RT 218-219.)

ARGUMENT

I. A BURGLARY IS COMMITTED EACH TIME A DEFENDANT ENTERS A STRUCTURE OR A SEPARATE ROOM THEREIN WITH THE INTENT TO COMMIT ONE OF THE ENUMERATED FELONIES

In California, the Legislature has increasingly expanded the common law crime of burglary. Once limited to actual break-ins of residences in the nighttime, to commit a theft, the offense now covers any unauthorized entry, into a variety of places, at any time, with the intent to commit any felony or theft. This evolution reflects the understanding that such unauthorized entries are invasive to personal security and increase the likelihood of harm to the victims of the crime.

Garcia entered a store and, at gunpoint, ordered the female victim to give him cash. This act, alone, created a dangerous situation, because the victim was at Garcia's mercy and was at risk of being shot. That danger was substantially increased, and the victim's privacy rights further violated, when, at gunpoint, Garcia directed her to a rear bathroom which was outside of public view in order to subject her to a sexual assault. Both the store and bathroom fell within the purview of the burglary statute's protection. The store was a "building or structure," and the bathroom was a "room." Each entry with the requisite felonious intent, therefore,

constituted a burglary in its own right. Since Garcia completed two burglaries, he was subject to two separate convictions.

A. Evolution of the Crime of Burglary

At common law, the crime of burglary was defined as breaking and entering the dwelling house of another in the nighttime with the intent to commit a felony. (*Sparks, supra*, 28 Cal.4th at p. 78, citing 2 Jones' Blackstone (1916) p. 2431.) The interest sought to be protected by the common law crime was "the sanctity of a person's home during the night hours when the resident was most vulnerable." (*People v. Davis* (1998) 18 Cal.4th 712, 720 (*Davis*).) "The predominant factor underlying common law burglary was the desire to protect the security of the home, and the person within his home. Burglary was not an offense against property, real or personal, but an offense against the habitation, for it could only be committed against the dwelling of another.... The dwelling was sacred, but a duty was imposed on the owner to protect himself as well as looking to the law for protection. The intruder had to break and enter; if the owner left the door open, his carelessness would allow the intruder to go unpunished. The offense had to occur at night; in the daytime home-owners were not asleep, and could detect the intruder and protect their homes. [Citation.]" (*Ibid.*, internal quotation marks omitted.)

In California, burglary was first defined by statute in 1850, when the Legislature adopted section 58 of the Act Concerning Crimes and Punishments. The original statute defined burglary as a nighttime entry, with the requisite intent, into "any dwelling house, or any other house whatever . . . ." (Stats. 1850, ch. 99, § 58, p. 235.)[4]

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[4] The original statute provided:

Every person who shall, in the night time, forcibly break and enter, or without force enter (the doors or windows being

(continued...)

In 1858, the existing phrase, "any house, room, apartment, or tenement" was substituted for "any dwelling house, or any house whatever." (Stats. 1858, ch. 245, § 58, p. 206.)[5] Upon codification of the Penal Code in 1872, the statute became section 459 and was essentially the same. (1872 Pen. Code, § 459.)[6] This Court explained in *People v. Stickman* (1867) 34 Cal. 242 (*Stickman*) that by replacing the words "any dwelling house, or any house whatever" with "any house, room, apartment or tenement, "the Legislature intended to broaden the definition of burglary, not constrict it." This Court went on to say that the language of the statute "could not well be made more comprehensive, and we think the absence of

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(...continued)

open) any dwelling house, or any other house whatever, or tent, or vessel, or other water craft, with intent to commit murder, robbery, rape, mayhem, larceny, or other felony, shall be deemed to be guilty of burglary, and upon conviction thereof, shall be punished by imprisonment in the state prison for a term not less than one nor more than ten years.

[5] The 1858 statute provided:

Every person who shall, in the night-time, forcibly break and enter, or without force enter (the doors or windows being open) any house, room, apartment or tenement, or any tent, vessel, or water-craft, with intent to commit grand or petit larceny, or any felony, shall be deemed to be guilty of burglary, and, on conviction thereof, shall be punished by imprisonment in the state prison for a term not less than one nor more than ten years.

[6] The 1872 statute provided:

Every person who, in the night-time, forcibly breaks and enters, or without force enters through any open door, window, or other aperture, any house, room, apartment, or tenement, or any tent, vessel, water craft, or railroad car, with intent to commit grand or petit larceny, or any felony, is guilty of burglary.

more particular terms of description indicates an intention, on the part of the 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." (*Id.* at p. 245.)

The protections afforded by the burglary laws have continued to evolve. There is no longer a requirement of a breaking; a mere entry will suffice. Also, the crime need not be committed at night. (*Davis, supra*, 18 Cal.4th at pp. 720-721.) Section 459, which was most recently amended in 1991, currently provides:

> 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.

Section 460 makes any burglary of an inhabited dwelling house, vessel, floating home, or trailer coach, or the inhabited portion of any other building, burglary of the first degree.

"Of all common law crimes, burglary today perhaps least resembles the prototype from which it sprang. In ancient times it was a crime of the most precise definition, under which only certain restricted acts were

criminal; today it has become one of the most generalized forms of crime, developed by judicial accretion and legislative revision. Most strikingly it is a creature of modern Anglo-American law only. The rationale of common law burglary, and of house-breaking provisions in foreign codes, is insufficient to explain it. [Citation.]" (*Davis, supra*, 18 Cal.4th at p. 722, internal quotation marks omitted.)

B. Entries Into Interior Rooms

Section 459 prohibits entry into "***any*** room," with the intent to commit theft or any felony. When faced with a question of statutory interpretation, the court first examines the language of the statute in question. (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) The words of the statute itself "generally provide the most reliable indicator of legislative intent. [Citation.]" (*People v. Leal* (2004) 33 Cal.4th 999, 1007, internal quotation marks omitted.) If possible, effect and significance will be given to every word and phrase in the statute. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.)

A statute will not be considered in isolation; rather, the court looks to the statutory scheme as a whole. The court examines the entire substance of the statutes in order to determine their scope and purposes. Various parts of the enactments must be harmonized by evaluating them in the context of the statutory framework as a whole. (*People v. Cole* (2006) 38 Cal.4th 964, 975.)

When the statutory language is ambiguous, the court uses a "variety of extrinsic aids" to ascertain its meaning. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1008.) These aids include the statute's placement in the statutory scheme, "the ostensible objects to be achieved, the evils to be remedied, the legislative history, and public policy." (*Ibid.*) In using these extrinsic aids, the court selects the construction which most closely comports with the Legislature's apparent intent, in an effort to promote,

rather than defeat, the general purpose of the statute, and avoids an interpretation that would produce absurd results. (*People v. Sinohui* (2002) 28 Cal.4th 205, 212.)

The first case to address an entry into a room for purposes of the burglary statutes was *People v. Young* (1884) 65 Cal. 225. There, the defendant was charged with burglary after he entered the ticket office of a railroad company and stole some items. The evidence showed that the station had an outer door, which led into a waiting room for passengers. This room, in turn, contained a ticket office with its own door. (*Id.* at p. 225.) Upholding the conviction, this Court rejected an argument that under section 459, the defendant must have formed the required intent before entering the railway station. This Court held it was sufficient if the intent preceded the entry into the interior room, i.e., the ticket office. This Court explained, "One who enters, with burglarious intent, a room of a house, enters the house with such intent. [Citations.] Here, where the room in a building was known as the ticket office, it was properly described as a 'building, to wit, the ticket office.' If the room was in the house, and the house was a building, a felonious entry into the room was a felonious entry into the building, since burglary consists not of entry alone but of felonious entry." (*Id.* at p. 226.)

More than a century later, the Court of Appeal in *People v. Mackabee* (1991) 214 Cal.App.3d 1250 concluded that the office space behind a counter in a public building qualified as a "room" under section 459. The court noted that it fell within the dictionary definition of the word "room," i.e., "a part of the inside of a building, shelter or dwelling usually set off by a partition. [Citation.]" (*Id.* at p. 1257, internal quotation marks omitted.) And, the court continued, its conclusion was also compelled by the policies behind the burglary statute, which were to afford "a reasonable person

protection from unauthorized intrusions[.]" (*Ibid.*, internal quotation marks omitted.)

People v. McCormack (1991) 234 Cal.App.3d 253 (*McCormack*) is in accord. There, the defendant entered a house through an unlocked door. The defendant walked into the kitchen and from there to the family room, where he asked the victim for a phone, a beer, and jumper cables. The victim asked the defendant to leave but the defendant refused. The victim left and called the police. When they arrived, the defendant was standing in the hallway with a sheet, which contained items taken from the bedroom. At the prosecutor's request, the trial court gave an instruction that 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 p. 255.)

The Court of Appeal found the instruction proper, noting that "it is consistent with the literal language of the controlling code section." (*McCormack, supra*, 234 Cal.App.3d at p. 255.) The court continued, "We have found no published decisions by a court of this state holding, on facts similar to those present here, that burglary is not committed when the intent to steal is formed after entry to a building but before entering a room therein from which the defendant intends to steal property. This is undoubtedly due to the fact the definition of burglary has included entry into a room with the requisite intent since the Penal Code was first adopted in 1872. [Citation.]" (*Ibid.*) The court further noted that section 459 specifically prohibited entry into a "room," and, "[i]f this wording did not serve the policy intended by the Legislature it need not have been included in the statute and it could have been removed or modified at any time in the more than 100 years since this code section was first adopted." (*Id.* at p. 257.) Finally, the court explained, the purpose behind the burglary laws

was to "forestall the germination of a situation dangerous to personal safety. [Citation.]" (*Ibid.*, internal quotation marks omitted.) "Just as the initial entry into a home carries with it a certain degree of danger, subsequent entries into successive rooms of the home raise the level of risk that the burglar will come into contact with the home's occupants with the resultant threat of violence and harm. Applying the plain language of the statute therefore serves rather than frustrates the policy of the law." (*Ibid.*)

C. The *Sparks* Decision

This Court revisited the meaning of the word "room" in *Sparks*. There, the defendant knocked on the victim's door and told her he was selling magazines. The victim said she was not interested. The defendant asked the victim for a glass of water. She gave the defendant some water, and he came inside the house. Once there, the defendant talked to the victim about a variety of subjects, becoming increasingly personal as he went on. (*Sparks, supra*, 28 Cal.4th at p. 73.) Nervous, the victim asked the defendant to leave. He refused and kept talking. When the victim walked into her bedroom, the defendant followed her and raped her. (*Id.* at p. 74.) The jury was instructed that any person who entered a building or any room within a building with the specific intent to commit a rape, a felony, was guilty of burglary. The prosecutor argued that the jury could find the defendant guilty if he formed the intent to rape the victim either before entering the house, or after entering the house but before entering the bedroom. The jury convicted the defendant of first degree burglary, among other crimes. The Court of Appeal reversed the burglary conviction for instructional error. (*Id.* at p. 75.)

This Court reinstated the conviction. In doing so, this Court rejected the defendant's contention, as unsupported by the language of section 459, that a "room" only referred to a locked room where entry is generally unauthorized, even for other legal occupants of the house. This Court

explained that while several other jurisdictions included the qualifiers "private" or "separately occupied" before the word "room," no such limitation appeared in section 459. (*Sparks, supra*, 28 Cal.4th at pp. 76-78.) This Court then traced the history surrounding section 459, including its ever-expanding scope. (*Id.* at pp. 78-80.) This Court noted that a number of appellate decisions had upheld one or more burglary convictions based upon entry into private rooms in public or commercial buildings. (*Id.* at pp. 80-86.)

Applying all of these principles, this Court stated that California courts had allowed burglary convictions involving a variety of rooms. Despite frequent amendments to section 459, the Legislature has never disapproved of any of these decisions. (*Sparks, supra*, 28 Cal.4th at p. 86.) Further, although many state legislatures had statutorily narrowed and confined the type of rooms which will qualify for burglary purposes, the California Legislature has declined to do so, even when presented with similar amendments. (*Id.* at pp. 86-87.) Finally, the policy behind section 459 was served by construing the bedroom as a "room" because the victim "reasonably could expect significant additional privacy and security when she retreated into her own bedroom." (*Id.* at p. 88.) Accordingly, this Court held, "the unadorned word 'room' in section 459 must be given its ordinary meaning." (*Ibid.*)

The policies underlying the burglary statutes detailed in *Sparks*, specifically, privacy, security, and safety, support multiple convictions when entry into several rooms is involved. *In re M.A.* (2012) 209 Cal.App.4th 317 illustrates the point. There, the minor entered a home with the occupant's permission. He then opened a closet and stole some guns. A juvenile court sustained a petition alleging that he committed a residential burglary when he went into the closet. On appeal, the minor argued that as a matter of law, the closet did not qualify as a room for

purposes of the burglary law. (*Id.* at p. 319.) The Court of Appeal disagreed. The court noted: (1) when the minor, without permission, entered a closet inside the home, he increased the risk he would come into contact with occupants who might object to his presence and that violence would result; (2) treating the closet as a "room" was consistent with the policy behind the burglary statutes, i.e., to prevent intrusion into a place where the occupant "reasonably could expect privacy and security;" and (3) a closet fit the common definition of the word "room." (*Id.* at pp. 322-323.)

These same considerations apply to multiple rooms within a single structure, whether it is a house or a business. Any time separate rooms are involved, the danger increases with each entry. For example, if the defendant enters a person's house, goes into the kitchen, steals something, and leaves, the risk is far less than if he also enters the homeowner's bedroom to steal something else. The occupant of the bedroom may have a weapon, making in more likely a violent confrontation will occur. Moreover, there is an increasing invasion of privacy as the defendant goes from room to room.

Furthermore, the two convictions were clearly appropriate under the facts of Garcia's case. Garcia's initial entry into the Family Accessories store to rob M. constituted a burglary of the business. "Under section 459 . . . burglary is committed if a person enters a store with the intent to commit theft therein. [Citation.]" (*People v. Michaels* (1961) 193 Cal.App.2d 194, 198.)

Garcia's entry into rear bathroom was also a burglary. There is no logical distinction between the bathroom here and the bedroom in *Sparks*, or the closet in *M.A.* Each has four walls, its own door, and is "housed in" the larger structure. (*Stickman, supra*, 34 Cal. at p. 245.) The Legislature has not narrowed the definition of "room" to exclude bathrooms. Additionally, as was true of the bedroom in *Sparks*, there was a greater

expectation of privacy in the bathroom and the danger of harm was increased by crimes committed therein. The Family Accessories store was open to the public. The bathroom, however, was remote and inaccessible. The remoteness and lack of visibility of the bathroom increased the likelihood that once M. was back there, she would be assaulted or even killed.

D. Case Law Supports the Two Convictions

As this Court has explained, the gist of the felony of burglary is entry with the proscribed intent. The crime is completed once the entry is made, "regardless of whether ... any felony or theft actually is committed." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042 (*Montoya*).) In both the burglary context and in other analogous situations, courts have upheld convictions for more than one crime when the offenses are separated, even if only marginally, in time and place, and the danger to the victim is increased by the defendant's escalating misconduct.

In *People v. Washington* (1996) 50 Cal.App.4th 576 (*Washington*), the Court of Appeal found proper two burglary convictions[7] when the defendant tried to enter the victim's apartment by breaking the window, was interrupted, waited in the vicinity for a short while, and then successfully entered through the front door. The court declined to adopt the rule proposed by the defendant, which would require a single conviction when "multiple entries are made pursuant to one intention, one general impulse, and one plan." (*Id.* at p. 576.) The court explained:

> [T]he conduct described and proscribed by section 459 is a single act: entry. Designating a series of separate and factually distinct entries as one single entry is no less an unreasonable

[7] The court reversed one of the convictions for unrelated reasons. (See *Washington, supra*, 50 Cal.App.4th at pp. 574, 579.)

> fiction than designating a series of forgeries one forgery or a series of penetrations a single rape.

(*Washington, supra*, 50 Cal.App.4th at p. 576.) The court concluded that because a burglary is complete "upon entry with the requisite intent . . . every entry with the requisite intent supports a separate conviction." (*Id.* at pp. 578-479.)

In *People v. O'Keefe* (1990) 222 Cal.App.3d 517 (*O'Keefe*), the defendant broke into four separate individual dormitory rooms within a single building. The students in the building shared kitchen, restroom, and lounge facilities. However, each dormitory room had its own lock. Each had desks, beds, and telephones. The defendant stole items from all four rooms. He returned to one of the rooms later and raped its occupant. The defendant was convicted of five counts of burglary. (*Id.* at p. 520.) On appeal, he argued that the rooms did not constitute separate dwellings within the meaning of section 459. (*Id.* at pp. 521-522.) The Court of Appeal rejected the claim, stating:

> [E]ach student lives and enjoys separate privacy in each of their individual dormitory rooms. These rooms are their homes while attending school. Unauthorized entry into each dormitory room presents a new and separate danger to each of the occupants. Accordingly, individual dormitory rooms and the students who occupy them are entitled to protection under the meaning of section 459.

(*O'Keefe, supra*, 222 Cal.App.3d at p. 521.)

The court in *People v. Elsey* (2000) 81 Cal.App.4th 948 (*Elsey*) held that separate locked classrooms on a school campus constituted different rooms. Thus, defendant's unauthorized entry into, and theft of items from, each one, constituted a different burglary under section 459. (*Id.* at p. 963.) The court noted that in general, a defendant may be charged and convicted of multiple violations based on different acts. However, the defendant was

not without a remedy – punishment for multiple entries into a single structure would be barred by application of section 654. (*Id.* at p. 952.)

Further, the *Elsey* court stated, section 459 precludes unauthorized entries into "other building[s]." Each of the classrooms upon an open campus constitutes another building under the clear statutory language. (*Elsey, supra*, 81 Cal.App.4th at pp. 958-959.) Finally, the persons authorized to use each classroom would have a reasonable expectation the area would not be invaded by a stranger. (*Id.* at p. 960.) The court explained:

> [T]he burglary statute is designed to protect against unauthorized entry and its attendant dangers, the ultimate test of whether a burglarious entry has occurred must focus on the protection that the owners or inhabitants of a structure reasonably expect. The proper question is whether the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusions. A structure with a locked door or window clearly affords a reasonable protection from invasion.

(*Elsey, supra*, 81 Cal.App.4th at p. 960.)

In *People v. Harrison* (1989) 48 Cal.3d 321 (*Harrison*), the defendant digitally penetrated the victim three times within a seven to ten minute time period. Each penetration was interrupted by the victim's struggle. (*Id.* at pp. 325-326.) The defendant was convicted of three counts of forcible sexual penetration. (*Id.* at p. 326.) The defendant argued that multiple penetrations, committed during a continuous sexual assault on the victim, constituted a single violation of section 289. (*Id.* at p. 327.) This Court declined to adopt the defendant's position. This Court stated that under the express language of section 289, any penetration, however slight, was sufficient to complete the crime. (*Id.* at p. 329.) In the case before it, "each penetration was accomplished with the statutorily prescribed intent . . . the requisite degree of force or fear preceded, and was used to accomplish,

each penetration; [and] . . . a finger is a foreign object within the meaning of the statute. [Citations.] Accordingly, all the elements of three 'completed' violations of section 289 were present." (*Ibid.*, emphasis in original.)

The defendant in *People v. Johnson* (2007) 150 Cal.App.4th 1467, struck the victim in the face and head, held her by her throat against a wall, beat her on her back, hips, and legs, and stabbed her in her upper arm. A jury convicted him of three counts of multiple injury on a co-habitant. (*Id.* at p. 1473.) He argued on appeal that the "multiple convictions were improper because the incident was a 'single continuous assault' albeit involving 'multiple blows.'" (*Id.* at p. 1474.) The appellate court disagreed. Relying on *Harrison* and *Washington*, the Court of Appeal held that "the proper analysis involves a determination of when the crime is completed." (*Ibid.*) A violation of section 273.5 was complete upon the willful application of physical force on the victim, resulting in a wound or injury. Therefore, "[i]t follows that where multiple applications of physical force result in separate injuries, the perpetrator has completed multiple violations of section 273.5." (*Id.* at p. 1477.)

The rationale underlying *Harrison* and *Johnson* applies equally in the burglary context when there are entries into separate rooms rather than a single one. Like the penetrations in *Harrison* or the beatings in *Johnson*, each entry with the requisite intent completes the crime. (See *People v. Failla* (1966) 64 Cal.2d 560, 568 ["[t]he gravamen of the charge of burglary is the entry itself[.]"). Here, as previously discussed, shortly after Garcia entered the Family Accessories store, he pointed a gun at M., insisted she give him all the money in the cash register, and ordered her to hand over cash which she had in her own possession. (1 RT 48-49; 53-54.) A separate entry began once Garcia forced M. to lock the store, turn off the lights, and go to the back bathroom so he could sexually assault her. (1 RT

58-64.) As the elements of one crime were completed before the second one began, Garcia was appropriately convicted of two counts of burglary.

E. Multiple Convictions Are Appropriate Even When the Intent Is Not After-Acquired and Even When the Target Crimes Are Not Separate and Distinct

Upholding Garcia's convictions, the Court of Appeal reached three conclusions. The Court of Appeal stated, in part: "First, in light of *Sparks*, *M.A.*, and *Mackabee* among other authorities (as discussed in *Sparks*), we 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' (see *M.A., supra*, 209 Cal.App.4th at p. 322, quoting *Sparks, supra*, 28 Cal.4th at p. 87) – 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 inside the store. ¶ Third, th[e] evidence and the inferences drawn from it also support the finding of the jury that Garcia formed the separate felonious intent to sexually assault M. in the bathroom after he had taken the money from the store cash register and from M.'s person." (Opn. at 24-26, emphasis added.)

The Court of Appeal's first conclusion is absolutely correct. The Court of Appeal's second conclusion confuses evidence *sufficient* to support a conviction with evidence *required* to sustain it. If a room is defined as an area where the victim expects "additional" privacy and security, then presumably, it must have four walls surrounding it and a door which separates it from adjoining areas. No such limiting language appears in section 459. As this Court stated in *Sparks*, "the unadorned word 'room'

in section 459 reasonably must be given its ordinary meaning." (*Sparks, supra*, 28 Cal.4th at p. 87.)

While the Legislature may well have been concerned with the security and privacy of persons inside a structure, it already accommodated these concerns by use of the word "room"— a word that is commonly used and understood in the English language. The Legislature did not further limit the types of rooms to only those that can be locked, closed, or otherwise secured. While there is no doubt the average person would feel a greater sense of privacy in, say, a bathroom as opposed to a living room or an open showroom in a commercial building, the language of section 459 reveals the Legislature chose not to engage in such line drawing. A burglar who advances from room to room increases the risk to potential occupants, regardless of whether that room can be separately secured or closed. With each successive room, the burglar increases the risk of encountering someone and also intrudes further into the privacy of the occupants.

For instance, assume the victim in *Sparks* had gone from the entryway into the kitchen to get the defendant a glass of water. If the defendant had followed behind her and raped her in the kitchen, a burglary would still have been committed regardless of whether the kitchen had a separate door. In our society, it is well recognized that allowing someone to step into the entry way of a home does not give that person license to wander anywhere throughout the home. As a social convention, it is understood that "rooms" establish boundaries, even if those rooms are not separately secured.

The Court of Appeal's second rule also creates unneeded anomalies. If a homeowner puts up a partition between the dining room and the kitchen, then entry into each with a felonious intent constitutes a separate burglary. If there is no adjoining wall, only one count can be charged under the Court of Appeal's second rule. Since there would be no "additional" expectation of privacy in a kitchen as opposed to a dining room, for

instance, a defendant who steals something from the dining room and rapes the victim in the kitchen could be convicted of only one burglary, while the defendant who steals something from the dining room and rapes the victim in a bedroom would be subject to two convictions. In each example cited above, there is an entry, a room, a privacy interest, and an increasing risk of harm. Dual convictions are therefore proper in all of these circumstances.

As for its third rule, the Court of Appeal did not provide any authority to support its requirements of an after-acquired or separate felonious intent.[8] Once again, while those factors are certainly sufficient to support multiple burglaries and are supported by the evidence here, they are not necessary. Contrary to the Court of Appeal's conclusion (Opn. at 24-25), the prosecutor did not argue that Garcia necessarily formed the separate intent to commit a sexual assault once he entered the store. The prosecutor merely told the jury that Garcia need not have intended to rape M. before the initial entry, as long as he formed that intent before he entered the locked rear bathroom. (3 RT 364 ["I can't prove he entered [the store] with the intent to commit the rape, I can prove he entered into that store with the intent to commit the robbery, however. Now, how do we know what his intent was when he entered that bathroom . . . ."].) Likewise, the prosecutor did not insist that the jury find Garcia abandoned his intent to steal and formed a new intent to commit a separate and distinct felony once he was inside the store. Instead, the prosecutor told jurors that it did not matter what felony Garcia intended to commit. (3 RT 366 ["You will have to agree when he entered the bathroom that he entered into the bathroom with

[8] It is unclear why the Court of Appeal concluded there was a "finding" by the jury that Garcia had an after acquired intent. (Opn. at 26.) The jury did not return a special verdict form.

the intent to either *steal*, rape, or do the forcible penetration, but you don't have to agree to which one." (Emphasis added.)].)

As is true with the Court of Appeal's second rule, the statutory language does not support requiring a jury make these additional findings. Requiring an after-acquired intent does not serve the policies underlying section 459 of protecting individuals against invasions of their privacy interests and avoiding increasingly dangerous situations. For example, in *Sparks* the parties assumed the defendant was at the victim's house to sell magazines that he decided to rape her after he was inside and they had talked for awhile. (See *Sparks, supra*, 28 Cal.4th at pp. 73-74.) As a practical matter, it is nearly impossible to prove that the defendant formed such after-acquired intent, as opposed to deciding in advance that he would commit a crime. And the intrusion is as great, and the risk to the victim equally substantial, whether the defendant was a legitimate salesperson or whether he looked in a window, saw the victim alone, and used the magazine sales as a cover story so he could get inside the house. The Court of Appeal's rule would apparently reward the burglar who had the foresight to form the intents to rape and steal *before* entering the structure making him chargeable with only one offense.

Likewise, the prosecution should not be required to show separate and distinct felonious intents. If the defendant enters a home, steals a painting which is hanging by the door, enters the kitchen and steals the silverware, then enters the living room and steals the stereo, three burglaries have occurred. Each entry is into a "room" as defined by the statute. Each was with felonious intent. And, every time another room is entered, there is an additional invasion of privacy and more of a chance someone will encounter the burglar and a violent confrontation will result. It does not matter that the defendant's intent in entering the room was the same, i.e., to steal. As discussed further below, whether the defendant's intent was

divisible is solely a question of punishment under section 654, and not a question of whether multiple convictions are permissible.

II. ALLOWING THE TWO BURGLARY CONVICTIONS IS CONSISTENT WITH PENAL CODE SECTION 954, WHICH AUTHORIZES PROSECUTORS TO SEPARATELY CHARGE OFFENSES WHICH ARE CONNECTED TOGETHER IN THEIR COMMISSION

Allowing multiple convictions is also consistent with, and furthers the policies underlying, section 954. This statute vests prosecutors with discretion to charge, as separate counts, crimes which are connected together in their commission. Any concerns about multiplicity are addressed at sentencing under section 654.

Exceptions to section 954 exist for cases involving lesser-included offenses and for theft-receiving cases. As neither of these exceptions applies, and section 459 does not expressly prohibit dual convictions, both convictions were appropriate here.

A. Section 954 Permits Multiple Convictions

The Legislature has expressed a preference for multiple convictions through section 954. This statute sets forth the general rule that defendants may be charged with, and convicted of, more than one offense. Section 954 provides, in part:

> An accusatory pleading may charge two or more *different offenses connected together in their commission*, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but *the defendant may be convicted of any number of the offenses charged*, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court[.]

(Emphasis added.)

Like the burglary laws, section 954 has expanded in its scope, as multiple convictions were not previously allowed. Under the former version of section 954, a prosecutor could charge the defendant with several counts based on a single act, but the defendant could only be "convicted of but *one* of the offenses charged." (Stats. 1905, ch. 1024, § 1, emphasis added.) A 1915 amendment changed the language to its present version, providing that the defendant "may be convicted of *any* of the offenses charged." (Stats. 1915, ch. 452, § 1, emphasis added.)

Section 954 now permits multiple charges and convictions in three different situations. First, an accusatory pleading may charge different offenses in separate counts, as long as the different offenses are connected together in their commission. Second, the pleading may charge different statements of the same offense in separate counts. Third, the pleading may charge different offenses (not connected in their commission) if the offenses are of the same class of crimes. In any of these situations, the defendant "may be convicted of any number of the offenses charged." (§ 954.)

"Unless one offense is necessarily included in the other [citation], multiple convictions can be based upon *a single criminal act* or an indivisible course of criminal conduct. [Citations.]" (*People v. Gonzalez* (2014) 60 Cal.4th 533, 537, emphasis added, internal quotation marks omitted.)

"In general, a person may be convicted of, although not punished for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a defendant can lead to convictions "of any number of the offenses charged. [Citations]." (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227, internal quotation marks omitted (*Reed*).) "Section 954 generally permits multiple convictions. Section 654 is its counterpart concerning punishment. It prohibits multiple

punishment for the same 'act or omission.' When section 954 permits multiple convictions, but section 654 prohibits multiple punishment, the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited. [Citations.]" (*People v. Sloan* (2007) 42 Cal.4th 110, 116 (*Sloan*).) Further, where the convictions are based on a single act, they cannot both be used as "strikes" for purposes of the Three Strikes Law. (*People v. Vargas* (2014) 59 Cal.4th 635, 645-649.)

Courts have upheld convictions for crimes against a single victim occurring within a short period of time. For instance, in *People v. Whitmer* (2014) 59 Cal.4th 733 (*Whitmer*), defendant, who was the manager of a motorcycle dealership, arranged for the fraudulent sale of 20 motorcycles, motorized dirt bikes, and all-terrain vehicles. The transactions involved separate vehicles and occurred on 13 different dates. Each was sold to a different fictitious buyer. The victim of all of the fraudulent sales was the dealership, which lost a total of over $250,000. A jury convicted the defendant of 20 counts of grand theft. (*Id.* at p. 735.)

The defendant appealed, arguing that he could only be convicted of one count of grand theft. Agreeing with the decision of the Court of Appeal, this Court held that multiple convictions were appropriate under such facts.[9] This Court noted that the defendant committed "a series of separate and distinct, although similar, fraudulent acts[.]" (*Whitmer, supra*, 59 Cal.4th at p. 740.) "Each fraudulent act was accompanied by a new and separate intent to commit that fraud." (*Ibid.*) This Court stated that as a matter of policy, a "serial thief should not receive a 'felony discount' if the thefts are separate and distinct even if they are similar." (*Id.* at pp. 740-

[9] This Court declined to apply the rule to the defendant's case because in announcing it, this Court disapproved a long line of Court of Appeal decisions which, in the theft context, had held to the contrary. (*Whitmer, supra*, 59 Cal.4th at p. 742; see Argument V, *infra*.)

741.) This Court thus concluded that "a defendant may be convicted of multiple counts of grand theft based on separate and distinct acts of theft, even if committed pursuant to a single overarching scheme." (*Id.* at p. 741.)

In *People v. Kirvin* (2014) 231 Cal.App.4th 1507, the Court of Appeal, applying the reasoning in *Whitmer*, upheld convictions for six separate counts of dissuading a witness, based on six calls the defendant made from jail to the victim's sister on a single day. The Court of Appeal noted that requiring consolidation of the offenses into one count "would effectively grant wrongdoers a 'felony discount' by assuring them only one conviction for a potentially limitless number of related offenses [citation], and it effectively displaces the legislative definitions of what constitutes a completed crime with a new constellation of judicially created 'continuous crimes' that come into being should all related burglaries, sex crimes or identity thefts be aggregated into a single 'continuous crime.' [Citation.]" (*Id.* at p. 1519.) Moreover, a "chief benefit" of the defendant's proposed rule, "making sure defendants who engage in conduct that technically constitutes two crimes but practically constitutes one (such as two immediately successive entries into the same home being treated as separated burglaries) – can be just as effectively achieved by the already existing rule prohibiting double *punishment*, and without all the attendant disadvantages of prohibiting multiple *convictions*." (*Ibid.*, emphasis in original.)

The same reasoning applies here. Multiple convictions promote the policies behind section 954, preserve prosecutorial charging discretion, and preclude defendants such as Garcia from receiving a "felony discount." They also serve an important and legitimate function at sentencing. Because it cannot be known which convictions will survive appeal,

allowing multiple convictions preserves each conviction in case it is needed at a later date:

> Where one of two multiple convictions valid under section 954 is overturned on appeal or habeas corpus, the remaining and intact conviction, even though it arose from the same facts or indivisible course of conduct as the conviction that is being reversed, may be substituted in its stead, with the stay of execution of sentence lifted at resentencing, so that punishment on the valid conviction can be imposed in the interests of justice.

(*Sloan, supra*, 42 Cal.4th at p. 122.)

Garcia argues that since section 459 does not expressly authorize multiple burglaries in a situation like this one, it should be assumed that the Legislature intended to permit but one conviction. (ABOM 15-18.) Courts "do not construe statutes in isolation, but rather read every statute with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and gain effectiveness. [Citation.]" (*People v. Skiles* (2011) 51 Cal.4th 1178, 1187, internal quotation marks omitted.) Garcia fails to point to any crime where, in the statute defining the offense, the Legislature has expressly authorized multiple convictions. This is no doubt because the matter is covered by sections 654 and 954. Accepting Garcia's argument would preclude more than one conviction for any offense, no matter how many times a person commits that crime. Garcia's argument thus reads into section 459 additional elements the Legislature would never place there. Such absurd results are to be avoided. (*People v. Leiva* (2013) 56 Cal.4th 498, 506-507.)

B. The Exceptions to Section 954 Do Not Apply

There are two exceptions to section 954. These exceptions are: (1) cases involving a greater and lesser-included offense and (2) theft-receiving cases. Neither exception applies here.

1. Cases involving greater and lesser-included offenses

A judicially created exception to section 954 exists which prohibits conviction on necessarily-included offenses. (*Reed, supra*, 38 Cal.4th at p. 1227.) The reason for this rule is that since "a defendant cannot commit the greater offense without committing the lesser, conviction of the greater is also conviction of the lesser. To permit conviction of both the greater and the lesser offense would be to convict twice of the lesser. [Citation.]" (*People v. Medina* (2007) 41 Cal.4th 685, 702, internal quotation marks omitted.) "There is no reason to permit two convictions for the lesser offense. [Citation.]" (*Ibid.*, internal quotation marks omitted.) Otherwise, it is appropriate to hold a defendant accountable for each crime he commits. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211.)

In *People v. Eid* (2014) 59 Cal.4th 650, this Court held that the lesser-included offense rule did not preclude a jury which acquitted the defendants of the greater offense from convicting them of two separate offenses that were included therein. This Court stated that such a rule allowed the jury "to tailor its verdict to reflect its determination of the full extent of defendants' criminal acts." (*Id.* at p. 657.) Such a verdict, this Court continued, "enabled the jury to calibrate defendants' culpability properly." (*Id.* at p. 658.)

Similar considerations exist here. M. testified that before Garcia demanded money at gunpoint, he walked into the store, looked around, and walked out. (1 RT 35.) He returned, looked around the counter, and asked some questions. (1 RT 38-40, 48.) A jury could have conceivably concluded from this testimony that Garcia did not decide to rob the store until after he went inside. Under such a view of the facts, the verdict on count 1 would be an acquittal. (See *People v. Waidla* (2000) 22 Cal.4th 690, 734 ["burglary based on larceny requires intent to steal upon entry"].)

However, the jury could still convict him of count 4 with regard to his entry into the hidden rear bathroom with the separate intent to commit rape. (*Sparks, supra*, 28 Cal.4th at p. 87.) The two counts allowed the jury to reach a verdict commensurate with Garcia's culpability, and with the danger he posed by his behavior. (See *Montoya, supra*, 7 Cal.4th at p. 1042 [burglary statute meant to protect against heightened risk to persons and property interests created by unauthorized intrusions].)

2. Theft-receiving cases

Section 496, subdivision (a), governing the receipt of stolen property, allows a principal in the theft to be convicted of receiving under that section. Subdivision (a) further provides, "[N]o person may be convicted both pursuant to this section and of the theft of the same property." This section codified a rule that long existed at common law. (*People v. Ceja* (2010) 49 Cal.4th 1, 4-6.) This rule evolved from the premise that "a thief cannot receive from himself. [Citations.]" (*Id.* at p. 6, internal quotation marks omitted.) "By this logic, commission of the theft *excludes* the possibility of a receiving conviction. [Citations.]" (*Ibid.*, emphasis in original.) Here, by contrast, commission of one burglary did not factually or legally preclude the other.

Furthermore, the Legislature amended section 496 because, in the peculiar case of receiving stolen property and theft, it wished to recognize an exception to the general rule. If section 954 did not otherwise permit the dual convictions, there would be no need for a statute setting forth that principle. That portion of section 496, subdivision (a), would be entirely unnecessary. "It is a settled principle of statutory construction [] that courts should strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous. [Citations.]" (*In re C.H.* (2011) 53 Cal.47 94, 103, internal quotation marks omitted.)

In *People v. Allen* (1999) 21 Cal.4th 846, this Court held that the prohibition in section 496 did not cover convictions for *burglary* and receiving stolen property. The defendant in *Allen* entered three separate homes, stealing jewelry from two of them and coins from a third. He argued that he could not be convicted of burglary and receiving the property he stole in the burglary, because both were theft-related crimes. This Court noted that because a defendant could complete a burglary without committing a theft, and therefore the gravamen of the burglary offense was the entry, the bar to dual convictions was inapplicable. (*Id.* at 864-866.) Further, section 954 "by its terms" authorized convictions for the multiple crimes. (*Id.* at pp. 866-867.) Thus, this Court "s[aw] no need to carve out an additional exception for burglary and receiving stolen property." (*Id.* at p. 866, fn. 2.) Instead, the remedy was to "permit conviction of both crimes and apply Penal Code section 654 to avoid multiple punishment. [Citation.]" (*Id.* at p. 865, internal quotation marks omitted.)

Here, unlike section 496, the language of section 459 does not prohibit more than one conviction for that crime. Courts should not "read into a statute a limitation that is not there. [Citation.]" (*People v. Oakley* (2013) 216 Cal.App.4th 1241, 1246, internal quotation marks omitted.)

III. THE DICTA IN *THOMAS* AND THE OPINION IN *RICHARDSON* SHOULD BE DISAPPROVED

Garcia relies primarily upon *People v. Richardson* (2004) 117 Cal.App.4th 570 (*Richardson*). (ABOM 11-13.) There, two women shared a two-bedroom apartment: one occupied one bedroom, the second occupied the other. Neither bedroom was locked. While both women were away, the defendant went into the two bedrooms. He stole personal items from one, and jewelry and personal items from the other. (*Id.* at p. 573.) A jury convicted him of two counts of burglary, one for each bedroom. (*Id.* at p.

572.) On appeal, the defendant argued that the trial court erred in instructing the jury that each entry constituted a separate count. (*Id.* at p. 574.) The appellate court reversed the conviction on one of the counts, and struck the sentence associated with that count. (*Id.* at p. 577.) The court reasoned that since the two women shared the apartment without locks on their doors, they could not each have had a separate, reasonable expectation of protection against unauthorized entry. In fact, the court noted, one of the victims had testified she shared closet space with the other. (*Id.* at p. 575.) Therefore, the court concluded, allowing two convictions would not advance the policy behind section 459, which was to protect individuals with reasonable expectations of privacy against unauthorized intrusions. (*Ibid.*)

The reasoning in *Richardson* is flawed. Although the two victims there may not have expected that they would be protected against an unauthorized entry by the other roommate, they certainly each had a separate, reasonable expectation of privacy from unwanted, uninvited entries by *third parties*, particularly those whose goal was to commit a felony. (See *People v. Fond* (1999) 71 Cal.App.4th 127, 131 [court concluded hospital room in which patient stayed overnight was "inhabited dwelling house," thus, nurse who entered with intent to rape her was guilty of first degree burglary despite fact that staff might be permitted to enter room for other reasons; court noted that patient had "reasonable expectation of privacy" against "unauthorized intrusions" by staff or by others].) Furthermore, there was a completed crime as to each entry. Finally, each entry increased the danger to the potential victims as the defendant went into each victim's separate bedroom, because the victim's presence in the room would have given him the opportunity to commit additional crimes.

For similar reasons, the dictum in *People v. Thomas* (1991) 235 Cal.App.3d 899 (*Thomas*), should not be followed. There, the Court of

Appeal upheld a burglary conviction based upon an entry into the living quarters of a house from an exterior garage. (*Id.* at pp. 903-907.) In a footnote, the court stated in dictum, without analysis, "[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.)

Thomas conflates multiple punishments with multiple convictions. (See Argument II, supra.) While multiple punishment may be precluded in a situation such as the hypothetical presented in *Thomas*, the convictions are not. This Court should thus disapprove of the dicta in *Thomas* and overrule *Richardson*.

IV. THE RULE OF LENITY IS INAPPLICABLE

Garcia argues that the "rule of lenity" requires this Court to interpret section 459 to permit only one burglary in cases such as his. (ABOM 23-25.) Garcia is mistaken.

The rule of lenity "generally requires that ambiguity in a criminal statute should be resolved in favor of lenity, giving the defendant the benefit of every reasonable doubt on questions of [statutory] interpretation." (*People v. Nuckles* (2013) 56 Cal.4th 601, 611, internal quotation marks omitted.) "The rule applies only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule. [Citation.]" (*People v. Manzo* (2012) 53 Cal.4th 880, 889, internal quotation marks omitted.) "[A]lthough true ambiguities are resolved in a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent." (*People v. Avery* (2002) 27 Cal.4th 49, 58.)

Here, there is no ambiguity in the language of section 459; it clearly covers both structures and rooms. Moreover, the policy purposes behind the statute, i.e., protection against unauthorized intrusions, and personal and public safety, would be thwarted by allowing only a single conviction when there are entries into different rooms with distinct criminal intents. Accordingly, the rule of lenity does not apply here.

V. ALLOWING BOTH CONVICTIONS IN THIS CASE IS NOT AN IMPROPER RETROACTIVE APPLICATION OF THE LAW

Garcia argues that in the event this Court finds that two convictions are authorized under facts such as those presented here, under principles of due process and his right to adequate notice, the rule must be prospective only and cannot apply to his case. (ABOM 25-30.) Garcia is mistaken. This Court's holding would not be "unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue." (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 354 [84 S.Ct. 1697, 12 L.Ed.2d 894]; see also *People v. Escobar* (1992) 3 Cal.4th 740, 752.)

Courts violate constitutional guarantees of due process "when they impose unexpected criminal penalties by construing existing laws in a manner that the accused could not have foreseen at the time of the alleged criminal conduct." (*People v. Blakely* (2000) 23 Cal.4th 83, 91 (*Blakely*).) In *Blakely*, this Court held that an unintentional killing in unreasonable self-defense was voluntary manslaughter. (*Id.* at pp. 91-92.) The three previous Court of Appeal decisions on the issue, however, had found the crime to be involuntary manslaughter. This Court therefore declined to apply the new rule retroactively to the defendant, explaining that under the circumstances, its decision was "an unforeseeable judicial enlargement of the crime of voluntary manslaughter[.]" (*Id.* at p. 92.) This Court reached the same conclusion in *Whitmer*, noting the "numerous, and uncontradicted, Court of

Appeal decisions over a long period of time that reach a conclusion contrary to ours[.]" (*Whitmer, supra*, 59 Cal.4th at p. 742.)

Whitmer pointed out that the decision was not "mean[t] to suggest that every time we resolve a conflict between Court of Appeal decisions in favor of the rule less favorable to the defendant, we may not apply that rule to that defendant." (*Whitmer, supra*, 59 Cal.4th at p. 742.) When this Court's conclusion is not unforeseeable, its retroactive application does not implicate due process concerns. (*People v. Gray* (2014) 58 Cal.4th 901, 910.)

Here, the language of section 459 and this Court's decision in *Sparks* advised Garcia that if he entered a room with felonious intent, he could be convicted of burglary. The law regarding entry of structures with the intent to commit theft offenses was longstanding and well established. Several Court of Appeal decisions, including *Washington, O'Keefe*, and *Elsey*, held that in comparable circumstances, multiple convictions would be allowed. Moreover, section 954 has existed in in current form for nearly a century. "These principles rendered it entirely foreseeable" that Garcia could be found guilty of two burglaries for his conduct in this case. (*People v. Fiore* (2014) 227 Cal.App.4th 1362, 1382-1383.) Thus, the two convictions did not violate his due process rights.

VI. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY'S VERDICTS

Garcia argues that even if the Court of Appeal's ruling is correct, there was insufficient evidence to support the two convictions. (ABOM 30-33.) This claim should be summarily rejected as it is outside the Court's grant of review. Moreover, there was ample evidence in support of the jury's verdicts.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the

judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value, such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Tully* (2012) 54 Cal.4th 952, 1006, internal quotation marks omitted.) When the prosecution relies mainly upon circumstantial evidence, the standard of review is the same. "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]" (*People v. Story* (2009) 45 Cal.4th 1282, 1296, internal quotation marks omitted.) Intent is usually proven by circumstantial evidence. (See *People v. Abilez* (2007) 41 Cal.4th 472, 509.)

Here, as to count 1, Garcia went into the Family Accessories Store, asked M. "weird" questions, pulled out a gun from his jacket pocket, pointed a gun at M., and demanded that she hand over the money from the store's cash register. While still pointing the gun at M., he next demanded that she hand over any money she had on her person. (Opn. at 24.) As to count 4, once M. had the money, Garcia forced M. at gunpoint to close the front doors of the store, remove the 'open' sign hanging by the doors, and turn off the store lights. He then motioned with the gun for M. to walk down the hallway, toward the back of the store. When they stopped at the refrigerators, he asked M. if she had a key to the locked office. M. said no. He asked M. whether there was a bathroom inside the store. M. said yes. Garcia then forced M. into the bathroom and sexually assaulted her. As the Court of Appeal explained, once Garcia took the money he could have

simply left the store. Instead, he made M. close the store, turn off the lights, and go to a separate rear room. (Opn. at 25-26.) There was thus ample evidence of two entries, each with the requisite felonious intent. The verdicts should be upheld.

CONCLUSION

Garcia committed two burglaries when he entered a business with the intent to commit a robbery, then took the robbery victim to an isolated back bathroom with the intent to rape her. Accordingly, respondent respectfully requests that this Court affirm the judgment of the Court of Appeal.

Dated: February 5, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 12,361 words.

Dated: February 5, 2015

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **PEOPLE v. HUGO GARCIA** No.: **S218233**

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 that same day in the ordinary course of business.

On **February 6, 2015**, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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For delivery to:
The Honorable Daniel Goldstein, Judge

and, furthermore I declare, in compliance with California Rules of Court, rules 2.25(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document from Office of the Attorney General's electronic service address ADIEService@doj.ca.gov on **February 6, 2015** to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and to Nancy J. King, Appellant's attorney's electronic service address by 5:00 p.m. on the close of business day at njking51@gmail.com.

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 **February 6, 2015**, at San Diego, California.

Jena Ray
Declarant

Jena Ray
Signature

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