IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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APPELLANT'S REPLY BRIEF ON THE MERITS

INTRODUCTION

This court asked the parties to address the question of whether appellant committed a single burglary, or two separate burglaries, when he entered a commercial building and robbed a store clerk, and then took her to the store's bathroom and raped her. In the Appellant's Opening Brief on the Merits, Mr. Garcia discussed centuries of statutory and common law, and concluded there was no basis in the history of either from which to conclude multiple counts of burglary could arise from the circumstances in this case.

Respondent disagrees, and argues that Penal Code section 459 unambiguously allows for multiple convictions when multiple crimes are committed within a structure.

Appellant addresses the primary arguments raised by respondent, but any underlying issues not discussed in the Reply Brief on the Merits are submitted on the authorities and arguments previously raised. Appellant has thoroughly briefed the issue presented, and Mr. Garcia continues to rely primarily on that briefing. The absence of additional comment on all aspects of the Attorney General's brief in this reply should not be taken as a concession of any nature. The effort to keep the briefing as concise as possible should not be seen as a lack of confidence in the merits of any individual point not addressed.

ARGUMENT

I

NO STATUTE AS ENACTED BY THE LEGISLATURE OR AS INTERPRETED BY PREVIOUS JUDICIAL DECISIONS JUSTIFIES CONVICTING A DEFENDANT OF MULTIPLE BURGLARIES AFTER ENTERING A BUILDING OCCUPIED BY A SINGLE TENANT AND COMMITTING CRIMES AGAINST A SINGLE VICTIM

A. Except for two substantive changes to the definition of burglary, amendments by the California Legislature have been limited to broadening the definition of the types of structures in which a burglary may occur

Respondent's Answer Brief on the Merits (ABM) begins the argument section with the statement, "In California, the Legislature has increasingly expanded the common law crime of burglary." (ABM at p. 9.) In fact, while Penal Code section 459 has been amended nine times since its enactment in 1872, its most recent amendment was 24 years ago. (Stats 1991 ch 942 § 14 (AB 628) Cal Pen Code § 459.) More to the point, the Legislature has made very few substantive changes to the law of burglary, and none as dramatic as respondent proposes should be adopted here.

As discussed in the Appellant's Brief on the Merits (ABOM), the only serious substantive changes by the Legislature in the last 143 years have been the removal of the distinction between daytime and nighttime burglaries, and the creation of the distinction between

residential and commercial burglaries. (Amended Code 1875-76 ch 56 § 2; Stats 1982 ch 1290 § 1, ch 1297 § 1; *People v. Barnhart* (1881) 59 Cal. 381, 383.) Virtually all other amendments by the Legislature have "expanded" the definition of the offense only insofar as it attempted to ensure that the entry into another person's "space" with the requisite intent would indeed be treated as a burglary, by adding cars, boats, aircraft and storage containers to the qualifying structures. (Stats 1947 ch 1052 § 1; Stats 1977 ch 690 § 3; Stats 1984 ch 854 § 2; Stats 1991 ch 942 § 14 (AB 628).) Respondent's claim that the "Legislature has increasingly expanded" the definition of burglary, therefore, is perhaps overstated. The Legislature has never stated nor implied that a single entry into a solely occupied structure could result in multiple burglaries.

The second sentence in the Answer Brief fares no better. To exemplify the Legislature's "expansion" of the burglary statute, respondent claims that burglary was "[o]nce limited to actual break-ins of residences in the nighttime, to commit a theft . . ." and "now covers any unauthorized entry . . . with the intent to commit any felony or theft." (ABM at p. 9.) Contrary to respondent's assertion, the common law crime of burglary appears to have never been limited to intended theft crimes, so the California Legislature has never expanded the meaning to include other crimes, because they were already included:

> A Burglar (or the person that committeth burglary) is by the common law a felon, that in the night breaketh and entreth into a mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not.

(Coke, Sir Edward, The Third Part Of The Institutes Of The Laws Of England 63 (1644) (London, W. Clarke & Sons 1809).)

In fact, Sir Matthew Hale, Chief Justice of the King's Bench from 1671 to 1676 specifically referenced rape in connection to burglary, as committed in this case,:

> With regard to the offence of a rape, which was not a capital felony at Common Law, Hale states that it had been considered burglary to break and enter at night with intent to commit it, according to 'the more *warrantable* opinion.' In modern books Hale's opinion is stated without qualification as more or less warrantable.

(Amos, Ruins of Time: Exemplified in Sir Matthew Hale's History of the Pleas of the Crown (1856) p. 214, emphasis in original.)

At common law, therefore, it appears burglary originally required felonious intent, and the lesser crime of petty larceny is a more recent addition to the common law definition. Indeed, the original California burglary statute, enacted by the Legislature in 1850, cited a list of five enumerated felonies, as well as "or other felony," and it was not until the first statutory amendment in 1858 that "grand or petit larceny, or any felony" was enacted, thus ensuring that even the intent to commit a minor theft crime would

satisfy the intent element. (Stats. 1850, ch. 99, §58,; Stats. 1858, ch. 245, § 58.)

Respondent argues that that because section 459 has long included language that prohibits entry into "any room" with the requisite intent, that this court should discern the apparent intent of the Legislature to be in comportment with the interpretation by the lower court in the instant case. (ABM at pp. 13-14.) The problem with this argument, however, is that decisions by this court defining "room," have been for the purpose of determining that the timing of the necessary intent arose such that a single burglary conviction could be sustained as it related to a single victim or tenant. Thus, in *People v. Sparks* (2002) 28 Cal.4th 71, this court upheld a burglary conviction when the defendant entered a home, and then acquired the intent to commit a rape in the victim's bedroom. (See also *People v. Young* (1884) 65 Cal. 225, 226 [entry into a room in a house with burglarious intent is as entry into the house].)

Courts have also approved of multiple burglaries under a single roof when the burglar enters into the separately secured spaces of multiple individuals. (*People v. O'Keefe* (1990) 222 Cal.App.3d 517, 521 [student dormitory rooms within interconnected buildings]; *People v. Church* (1989) 215 Cal.App.3d 1151, 1159, disapproved on another ground in *People v. Bouzas* (1991) 53 Cal.3d 467, 477-480 [separately leased and locked offices in a

small office building]; *People v. Elsey* (2000) 81 Cal.App.4th 948, 954-963 [six separate rooms at a single school, assigned to different people, and locked to the outside].)

In the multiple burglary cases, it stands to reason that each individual burglary followed the previous burglary. In other words, the crime of burglary is complete upon leaving the structure, classroom, individual office or apartment, because burglary is confined to a "fixed locus." (*People v. Boss* (1930) 210 Cal. 245, 251; see also *People v. Wilkins* (2013) 56 Cal.4th 333, 341; *People v. Bodely* (1995) 32 Cal.App.4th 311.) As this court has held, "the commission of a burglary does not terminate . . . upon the perpetrator's entry into the structure, but rather continues until the perpetrator's departure from the structure." (*People v. Montoya* (1994) 7 Cal.4th 1027,1040, 1046.)

Applying the same logic, in the instant case, if appellant had robbed Jane Doe, left the store with the loot, and then returned later to commit the rape, a second burglary would have been committed. (See *In re William S.* (1989) 208 Cal.App.3d 313 [juvenile committed two separate burglaries when he entered a home and stole items, left, and returned to steal more items.) Appellant did not leave the Family Accessories store before committing the rape, however, so any crimes committed inside were pursuant to one act of burglary.

B. There is no justification for expanding the definition of burglary beyond that contemplated by the Legislature

Respondent concludes her opening proposition, that multiple burglary findings are appropriate in this case, by criticizing two aspects of the Court of Appeal opinion. (ABM at pp. 23-27.) Respondent first suggests that the opinion wrongly commented on the fact that the bathroom at the rear of the store was an area of the store where occupants could "reasonably expect significant additional privacy and security," as part of its justification for a second count of burglary. (ABM at p. 23.) As argued by respondent, by the court's definition, a separate room, would have to have "four walls surrounding it and a door" separating it from adjoining areas. (*Ibid.*) This would be unfair, argues respondent, who appears to be suggest that any number of burglaries should be found based almost entirely upon the number of crimes committed within the structure.

Respondent next argues the court's third finding, that appellant developed the intent to commit the rape in a different room after he entered the building, is both unsupported by the evidence and unnecessary. (ABM at pp. 25-26.) First, respondent argues that proving when such intent arose is nearly impossible, and points out that the prosecutor conceded as much in the instant case, and further that the determination of when the intent arose is unnecessary. According to respondent, "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." (ABM at p. 26.) It appears, therefore, that respondent is actually arguing multiple burglaries can be committed simultaneously, as long as there is the intent to commit multiple crimes.

Respondent is simply wrong in saying that in the above scenario a defendant can be "charged with only one offense." The defendant can be charged with burglary, robbery, and rape – three extremely serious offenses. And therein lies the crux of this matter – the crime of burglary exists to discourage entry into the private and/or personal space of another with the intent to commit a crime. It stands alone, and is complete upon entry. If a suspect breaks into a building with the intent to commit a robbery and a rape, then changes his mind and leaves, he is nevertheless guilty of burglary. He is not guilty of two burglaries.

The argument advanced here seeks to promote additional counts of conviction for their own sake, with no suggestion of authority or even a reasonable rationale for doing so. As this court has recognized, the law of burglary exists to prevent the unlawful entry, while prosecution of the crimes committed inside a structure are handled by other laws:

> '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 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. The laws are primarily designed, then, not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germination of a situation dangerous to personal safety.' Section 459, in short, is aimed at the danger caused by the unauthorized entry itself.

(*People v. Gauze* (1975) 15 Cal. 3d 709, 715, quoting *People v. Lewis* (1969) 274 Cal. App. 2d 912, 920; *People v. Montoya, supra,* 7 Cal. 4th at p. 1042.)

Here, the crime of burglary was committed when appellant walked through the door with felonious intent. At that point in time, as noted in *Gauze,* other portions of the Penal Code took over to effectively dispense punishment for the crimes committed inside the store. Appellant is serving a total of 65 years to life for his two sexual assault charges and the robbery. Respondent does not offer any suggestion for how the cause of justice is advanced in this case, or any other, by broadening the law of burglary as suggested.

II

MULTIPLE BURGLARY CONVICTIONS WOULD BE CONSISTENT WITH SECTION 954 ONLY IF THE LEGISLATURE INTENDED MULTIPLE BURGLARY CONVICTIONS TO ARISE FROM A SINGLE ENTRY

Respondent argues at length that allowing multiple burglary convictions is "consistent with, and furthers the policies underlying, section 954." (ABM at pp. 27-34.) Appellant does not dispute that if the Legislature intended to expand the law of burglary to cover the circumstances presented here, it could do so, and multiple convictions could ensue. Respondent, however, does not advance any reasonable argument that the Legislature has such intent.

The examples cited by respondent do not help the argument. In *People v. Whitmer* (2014) 59 Cal.4th 733 (ABM at p. 29), the defendant was convicted of 20 counts of grand theft for the fraudulent sale of 20 separate motorcycles to 20 separate victims. As it relates to the instant case, if appellant had left the store, walked across the street to another store and entered with felonious intent, section 954 would certainly allow for a second burglary count, even though the crimes were similar and occurred close together.

In *People v. Kirvin* (2014) 231 Cal.App.4th 1507 (ABM at p. 30), a defendant was properly convicted on six separate counts of dissuading a witness after he called the same person six times in the

same day. It is not difficult to see that each call was a separate crime, just as, in this case, appellant was convicted for two separate types of sexual assault against the victim in the bathroom. But, he only entered the store one time with felonious intent, and so only committed one burglary. He certainly did not receive a "felony discount," as the respondent expresses a concern about. (ABM, at p. 30.)

Mr. Garcia, according to respondent, "fails to point to any crime where, in the statute defining the offense, the Legislature has expressly authorized multiple convictions," and that "Garcia's argument would preclude more than one conviction for any offense, no matter how many times a person commits that crime." (ABM 31.) Appellant makes no such argument. If he had entered 100 structures with felonious intent on the same day, he could be convicted of 100 counts of burglary. He did not. He entered one, and a single count of burglary can be sustained.

Indeed, this court has expressly held that an information charging the defendant with entering a dwelling house with the intent to commit two or more felonies "charges but one offense." (*People v. Hall* (1892) 94 Cal 595, overruled on other grounds, *People v. Spriggs* (1964) 60 Cal 2d 868.)

III

THIS COURT SHOULD NOT DISAPPROVE *THOMAS* AND *RICHARDSON* BECAUSE THOSE CASES ARE CONSISTENT WITH CENTURIES OF STATUTORY AND COMMON LAW

In the Appellant's Brief on the Merits, Mr. Garcia discussed *People v. Richardson* (2004) 117 Cal.App.4th 570 and *People v. Thomas* (1991) 235 Cal.App.3d 899, both of which support appellant's position in this case. (ABOM at pp. 11-13.) Respondent argues this court should disapprove of the dicta in each of those cases. (ABM at pp. 34-36.)

In *People v. Whitmer, supra,* 59 Cal.4th 733, this court recently discussed the rule of *People v. Bailey* (1961) 55 Cal.2d 514, which had been followed for decades in appellate decisions as limiting the number of theft offenses that could arise out of a series of thefts connected in their implementation. (*Id.* at p. 736-737.) This court, in *Whitmer*, properly distinguished the facts from *Bailey*, and found that many courts had construed *Bailey* too broadly through the years. Justice Liu, in a concurring opinion, commented that to the extent the *Bailey* rule as reconfigured in *Whitmer* still offered a "discount" to defendants taking property "pursuant to 'one intention, one general impulse, and one plan,' . . . " it is up to the

Legislature to determine whether the rule should be otherwise." (*People v. Whitmer, supra,* 59 Cal.4th at p. 747 (Liu, J. conc.).)

Thomas and *Richardson* were decided 24 and 11 years ago, respectively, and have been relied upon in appellate decisions and charging decisions. More importantly, the so-called dicta in each is based upon the understanding by courts, legal experts, and lawmakers dating back centuries. It is up to the Legislature to determine if it wants to expand the law of burglary.

IV

ANY EXPANSION OF THE BURGLARY STATUTE SHOULD NOT BE APPLIED RETROACTIVELY

Mr. Garcia argued in his brief that any broadening of the long-held understanding of the burglary law should not be applied to him, citing the rule of lenity and due process concerns involving retroactive application. (ABOM at pp. 23-30.) Respondent claims that appellant may properly be convicted of the second count of burglary because there is no ambiguity in the statute, and appellant was "on notice" that he could be convicted for multiple counts of burglary. (ABM at pp. 36-38.) Appellant disagrees, and submits on the arguments and authorities cited earlier in this brief and in Opening Brief on the Merits.

CONCLUSION

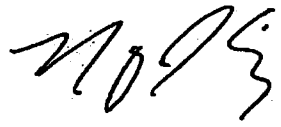
Respondent suggests that not only should the Court of Appeal's decision in this case be affirmed, but that this court should go even further and throw centuries of common law jurisprudence to the wind, essentially finding that a separate felony offense of burglary can be sustained with every separate crime committed within a structure. At common law, burglary was defined as entry into "a mansion house of another." (Eden, Lord Auckland, Principles of Penal Law (1775, 3d Ed.) p. 250.) Through the years, the Legislature of this state has broadened the definition of a structure to guarantee that the family living in a broken down car on a vacant lot is entitled to the same protection from a burglar, as is the man in his mansion house. To adopt respondent's reasoning would be ironic indeed, as it would represent taking a step backward to a time where the greater crime is the one committed against the owner of a multi-room estate over the occupant of a studio apartment, or the multi-level department store over the food truck parked on the street. That would be an unjust result.

Burglary has never been tied to the type or number of crimes committed within the sanctity of a home or commercial building, but rather, to the intent of the perpetrator upon entry. No

jurisdiction, including California, has ever suggested otherwise. Until, that is, the decision of the lower court in this case. Absent any indication from California's Legislature of its intent to create simultaneously occurring violations of Penal Code section 459, the opinion of the Court of Appeal must be reversed.

Dated: April 1, 2015

Respectfully submitted,



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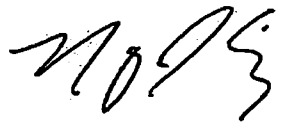
CERTIFICATE OF WORD COUNT

I certify that the word count of this computer-produced document, calculated pursuant to rule 8.520 (c) of the rules of court, does not exceed 25,5000 words, and that the actual count is: 3,188 words.

Dated: April 1, 2015



Nancy J. King

PROOF OF SERVICE BY MAIL

Re: Hugo Garcia, Court Of Appeal Case: D062659, Superior Court Case: SCN291820

I the undersigned, declare that I am employed in the County of Sonoma, California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 1235 Eleanor Ave., Rohnert Park CA. On April 1, 2015, I served a copy of the attached Reply Brief on the Merits (CA Supreme Court) on each of the parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in United States mail at Sonoma, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 1st day of April, 2015.

Teresa C. Martinez
(Name of Declarant)

(Signature of Declarant)

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: Hugo Garcia, Court Of Appeal Case: D062659, Superior Court Case: SCN291820

I the undersigned, am over the age of eighteen years and not a party to the within entitled cause. My business address is 1235 Eleanor Ave., Rohnert Park CA. On April 1, 2015 a PDF version of the Reply Brief on the Merits (CA Supreme Court) described herein was transmitted to each of the following using the email address indicated or direct upload. The email address from which the intended recipients were notified is Service@GreenPathSoftware.com.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 1st day of April, 2015 at 15:22 Pacific Time hour.

Teresa C. Martinez
(Name of Declarant)

(Signature of Declarant)