IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. MARK ANTHONY COLBERT Defendant and Appellant.	No. S238954 (Sixth District Court of Appeal Case No. H042499)

APPELLANT'S REPLY BRIEF ON THE MERITS

ON APPEAL FROM AN ORDER AFTER JUDGMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
THE HONORABLE LINDA CLARK, JUDGE
CASE NO. 206805

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By Appointment of the California Supreme Court
Under the Sixth District Appellate Program

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INTRODUCTION

The present case focuses on whether entry into an area within a commercial establishment that is off-limits to the general public constitutes an "exit" from the commercial part of the establishment that precludes the reduction of a second degree burglary conviction to misdemeanor shoplifting under Penal Code section 459.5.[1] The Attorney General posits that entry into an area of a commercial establishment that is off-limits to the public does not constitute shoplifting because the area is not a commercial establishment. He does so by focusing on the discrete nature of the off-limits area whilst ignoring the significance of the overarching

[1] Unless otherwise indicated, all further unspecified statutory references are to the Penal Code.

establishment within which that area operates. However, the plain language of section 459.5, the voters' intent in enacting Proposition 47, and case law support petitioner's position that entry into an area of a commercial establishment—irrespective of whether it is off-limits to the public—is, indeed, entry into a commercial establishment for the purposes of section 459.5.

ARGUMENT

ENTRY INTO AN OFF-LIMITS OFFICE AREA OF A COMMERCIAL ESTABLISHMENT CONSTITUTES ENTRY INTO A COMMERCIAL ESTABLISHMENT UNDER SECTION 459.5.

In respondent's answer brief on the merits (hereinafter abbreviated as "RBM"), the Attorney General argues appellant's conduct did not constitute shoplifting under section 459.5 because entries into office areas of commercial establishments "are not entries into 'commercial establishments[.]' " (RBM, p. 12.) He claims an office area within a commercial establishment is not a commercial establishment because it is "not primarily engaged in the buying and selling of goods or services" but rather is "primarily engaged in managing and supporting the buying and selling of goods or services that occurs in areas open to invitees." (RBM, p. 16.) His argument, then, is that an office area within a commercial establishment that manages and supports the buying and selling of that commercial establishment's goods or services is so distinct and separate

from the overarching commercial establishment within which the office area operates that it becomes a non-commercial establishment. This interpretation strains credulity and contravenes current case law regarding the definition of commercial establishments.

The Attorney General finds support for his interpretation—an office area within a commercial establishment that manages the operation of that commercial establishment is not a commercial establishment—in the following language of section 459.5: "while the establishment is open during regular business hours." (RBM, p. 17.) He manipulates the clear meaning of this phrase—that the *establishment itself* must be open during its regular business hours—to mean that shoplifting cannot occur in *areas* of the commercial establishment that are off-limits to the public. This interpretation is a far cry from the plain meaning of the statute. The statute does not state the entry must occur in certain areas of the commercial establishment while it is open during regular business hours. Thus, the Attorney General's understanding of the statute adds an additional element to the statute—that the entry must occur in an area of the commercial establishment that is expressly dedicated to the buying and selling of goods.[2] The Attorney General's argument lacks merit, as this Court has

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[2] In a similar vein, the Attorney General argues that, even if office areas are considered part of the overarching commercial establishments, appellant's conduct did not constitute shoplifting because those areas were

rejected that type of narrow interpretation of shoplifting in *People v. Gonzales* (2017) 2 Cal.5th 858.

In *Gonzales*, this Court held entry into a commercial establishment during business hours within the intent to cash a stolen check for less than $950 constitutes shoplifting under section 459.5. (*Gonzales, supra,* 2 Cal.5th at p. 862.) In so holding, this Court recognized section 459.5 did not adopt the colloquial meaning of the term shoplifting, but rather created a "term of art, which must be understood as it is [specifically] defined." (*Id.* at p. 871.) This Court expressly rejected the Attorney General's interpretation that section 459.5 is limited to theft of openly displayed merchandise and his argument that it is absurd to allow a shoplifting conviction based on an entry into "a commercial establishment to commit a theft from an area of the store closed to the public." (*Id.* at pp. 873-874.) This Court reasoned the electorate could have limited the shoplifting statute to an entry with intent to steal retail merchandise by using language similar to that in section 490.5. (*Id.* at p. 874.)

Given the Attorney General's argument that theft in an area of a commercial establishment where merchandise is not openly displayed

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not "open." (RBM, p. 36.) This argument, again, misses the mark. The language is clear: shoplifting occurs where "the *establishment* is open during regular business hours." (§ 459.5, italics added.) It is irrelevant whether an office area is off-limits to the public; the entry just must occur "while the establishment is open during regular business hours." (*Ibid.*)

should not constitute shoplifting, this Court's ruling and reasoning in *Gonzales* is entirely on point with the issue here. Moreover, the reasoning in *Gonzales* regarding the term shoplifting undermines the Attorney General's argument that *People v. Hallam* (2016) 3 Cal.App.5th 905 was wrongly decided. Specifically, the Attorney General argues, contrary to the *Hallam* court's holding, the plain language of section 459.5 requires the discrete area of the establishment entered to be one in which the commercial activity actually takes place. (RBM, p. 23.) This argument is faulty and is a variation of the argument that, to constitute shoplifting, the theft must be of openly displayed merchandise—an argument this Court expressly rejected in *Gonzales*. (*Gonzales, supra,* 2 Cal.5th at p. 874.)

While dismissing the relevance of this Court's shoplifting jurisprudence, the Attorney General relies on this Court's holding in *People v. Garcia* (2016) 62 Cal.4th 1116 to support his position that an off-limits office area is not a commercial establishment. (RBM, pp. 17-20.) His reliance is misplaced. In *Garcia*, this Court considered whether the defendant could be subject to two burglary convictions—one based on his initial entry into a shop with the intent to commit robbery, and another based on a subsequent entry into a bathroom with the intent to commit rape. (*Id.* at p. 1119.) This Court held, while a defendant could be subject to an additional burglary conviction for a subsequent entry into an interior room

within a structure, the defendant in that case could not be subject to an additional burglary conviction based on his subsequent entry into the bathroom because the bathroom did not "provide[] a separate and objectively reasonable expectation of protection from intrusion relative to the larger structure." (*Ibid.*) *Garcia* concerned a situation where a defendant had the intent to commit robbery upon his initial entry into a commercial establishment, and later formed the intent to commit rape upon his subsequent entry into a bathroom within that commercial establishment. While *Garcia* stands for the proposition that an entry into a discrete area of an establishment can be considered a separate entry for the purpose of supporting an additional burglary (or, ostensibly, shoplifting) conviction, *Garcia* did not concern whether treating a discrete area within a commercial establishment as a separate structure would necessarily mean the discrete area was no longer part of the overarching commercial establishment. That is, *Garcia* did not address whether a separate area within a commercial establishment can be considered a non-commercial establishment—or a non-commercial structure separate from that commercial establishment—where the distinct area functions as an integral part of the overarching commercial establishment.

As noted in appellant's opening brief on the merits, *People v. Stylz* (2016) 2 Cal.App.5th 530 addressed whether a separate area within a

commercial establishment can be considered a non-commercial establishment or non-commercial structure separate from the overarching commercial establishment for the purpose of a burglary conviction. (*Id.* at pp. 532-535.) The appellate court in *Stylz* held the privately-leased and locked storage unit within the commercial storage facility in that case was a separate, non-commercial structure within the commercial establishment and not part of the commercial establishment for the purposes of section 459.5. (*Id.* at p. 535.) Despite the Attorney General's argument to the contrary, the reasoning of *Stylz* supports the conclusion that an entry into an off-limits office area within a commercial establishment satisfies the commercial establishment element of section 459.5, as discussed in appellant's opening brief on the merits.

Furthermore, *Stylz* highlights a distinction that supports appellant's position and that the Attorney General misunderstands. Specifically, the Attorney General misstates appellant's position by implying appellant believes an absurd result would occur if section 459.5 were to apply to "entries into a commercial establishment located inside a non-commercial structure or facility." (RBM, p. 29.) However, the Attorney General misrepresents appellant's position. That is, appellant agrees *a separate* commercial establishment that operates within an overarching non-commercial establishment can be considered a commercial

establishment for the purpose of section 459.5. However, it *is* absurd to distinguish non-commercial areas of a commercial establishment as being *separate from* the overarching commercial establishment merely because the discrete area *of the commercial establishment* is off-limits to the public. Similarly, it would be absurd to allow a shoplifting conviction based on entry into a commercial area of a non-commercial establishment where that commercial area is not inherently separate and distinct from the overarching non-commercial establishment within which it operates. For example, entry into a discrete area on public school grounds where a bake sale drive occurs cannot be considered entry into a commercial establishment, even if the bake sale drive is considered commercial activity that occurs in a distinct area within the non-commercial establishment. This is so because, under section 459.5, there is no *commercial establishment*, but rather a discrete area where commercial activity is occurring. On the other hand, entry into a commercial establishment, such as a Starbucks, housed within a larger non-commercial establishment, such as a hospital, should be considered entry into a commercial establishment for the purposes of section 459.5 because that is what it is: entry into a commercial establishment, albeit one operating within a non-commercial establishment. As previously mentioned, the appellate court in *Stylz* addressed this very kind of situation in holding entry into a non-

commercial, privately-leased and locked storage unit that is separate from the overarching commercial establishment does not constitute entry into a commercial establishment under section 459.5. This distinction is in complete harmony with petitioner's position that section 459.5 does not allow the sectioning off of a commercial establishment into its non-commercial and commercial parts.

In sum, the Attorney General's argument that entry into a discrete area of a commercial establishment where no commercial activity takes places does not constitute shoplifting under section 459.5 is in conflict with the plain language of the statute, the electorate's intent in enacting Proposition 47, and this Court's shoplifting jurisprudence. Instead, the plain language of section 459.5 makes clear that appellant's conduct constituted shoplifting, as the challenged offenses were based on entries into commercial establishments. This is so regardless of whether those entries were into discrete areas of the commercial establishment where no commercial activity, in the colloquial sense, occurred.

CONCLUSION

For these reasons provided above as well as those in the opening brief, this Court should reverse the trial court's denial of appellant's petition for redesignation because his conduct constituted misdemeanor shoplifting under section 459.5.

DATED: May 31, 2017

Respectfully submitted,

By: _____
Kimberly Taylor
Attorney for Appellant
Mark Anthony Colbert

CERTIFICATE OF WORD COUNT

I certify that, according to my word processing software, this petition contains 1,902 words excluding the cover page, tables and the case caption on page 1.

I declare under penalty under the laws of the state of California that this declaration is true and correct. Executed at Alameda, California on May 31, 2017.

KIMBERLY TAYLOR
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PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 1600 Broadway, Suite 300, Oakland, CA 94612. On the date shown below, I served the within ***APPELLANT'S BRIEF ON THE MERITS*** to the following parties hereinafter named by:

X **BY ELECTRONIC TRANSMISSION** – I transmitted a PDF version of this document by electronic mail to the party(s) identified on the attached service list under the e-mail address(es) indicated.

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X **BY MAIL** – Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Alameda, California, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct. Executed this 1st day of June, 2017, at Alameda, California.

JONATHAN TAYLOR