In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JAMMAL YARBROUGH,

Defendant and Appellant.

S192751

Case No. B222399

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

PETITION FOR REVIEW

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
DAVID ZARMI
Deputy Attorney General
State Bar No. 245636
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 576-1336
Fax: (213) 576-1300
Email: David.Zarmi@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Respondent, the People of the State of California, respectfully petition this Court to grant review, pursuant to rule 8.500 of the California Rules of Court, of the above-entitled matter, following the issuance of a published opinion on March 23, 2011, by the Court of Appeal, Second Appellate District, Division One, holding that entry into a fenced, second-story balcony of an apartment for the purpose of committing a felony does not constitute burglary. A copy of the Court of Appeal's opinion is attached as Appendix A.

Dated: May 2, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General

DAVID ZARMI
Deputy Attorney General
Attorneys for Respondent

LA2010501454

ISSUE PRESENTED

In *People v. Valencia* (2002) 28 Cal.4th 1, this Court established a "reasonable belief test" to determine whether an area satisfies the "building" element of burglary. According to this test, "a building's outer boundary includes any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization." (*Id.* at p. 11.) In footnote 5 of its opinion, this Court stated that "in defining the outer boundary of a building for purposes of burglary, the reasonable-belief test necessarily refers only to an element of a building that reasonably can be viewed as part of *the building's* outer boundary. The test does not encompass any feature that is not such an element, such as a lawn, courtyard, unenclosed patio, or unenclosed balcony that may be located in front of or behind a building . . . ." (*Id.* at p. 11, fn. 5, italics in original.) Applying the reasonable belief test of *Valencia*, the Court of Appeal in *People v. Jackson* (2010) 190 Cal.App.4th 918, held that a private apartment balcony is part of the building under the burglary statute. The Court of Appeal in this case, however, construed footnote 5 of *Jackson* as categorically excluding unenclosed balconies, and reversed appellant's burglary conviction.

The issue presented is:

Is a private balcony with a railing and roof that is attached to a second-story apartment a place "into which a reasonable person would believe that a member of the general public could not pass without authorization," and, if so, is it part of the building's outer boundary for purposes of burglary?

STATEMENT OF THE CASE

On August 5, 2009, appellant climbed into Salvador Deanda's second-story balcony. The balcony was accessible from the inside only through

Deanda's apartment living room, was surrounded by a waist-high railing, and was roofed by an overhang. Appellant had his feet solidly on the balcony under the railing, and his hands were wrapped around the railing when Deanda came out and pushed him off the second-story balcony into the ground-level balcony below. Appellant had previously been caught shoplifting in the area.

At trial, the trial court instructed the jury that appellant was guilty of burglary if he entered the balcony with the intent to commit theft. Following deliberations, the jury found appellant guilty of burglary: entry into "any house, room, apartment . . . or other building . . . with intent to commit . . . any felony." (Pen. Code, § 459.)

On appeal, appellant argued that the trial court improperly instructed the jury that the second-story balcony was part of the apartment building as a matter of law. On March 23, 2011, the Court of Appeal issued a published opinion finding that the apartment balcony was "unenclosed," and holding that under this Court's decision in *Valencia*, the balcony was not "the outer boundary of a building" as a matter of law. (Appen. A at p. 4, quoting *People v. Valencia*, *supra*, 28 Cal.4th at p. 11, fn. 5.) In doing so, the Court of Appeal disagreed with another Court of Appeal opinion, *People v. Jackson* (2010) 190 Cal.App.4th 918, that held that a similar balcony was part of "the outer boundary of a dwelling" under *Valencia*. (Appen. A at pp. 4-5.) Accordingly, the Court of Appeal reversed appellant's burglary conviction. (Appen. A at p. 6.)

REASONS FOR GRANTING REVIEW

I. THE COURT OF APPEAL'S OPINION CONFLICTS WITH ANOTHER COURT OF APPEAL OPINION ON WHETHER AN APARTMENT'S PRIVATE BALCONY CAN SATISFY THE "BUILDING" ELEMENT OF BURGLARY

The Court of Appeal panels in this case and *Jackson* reached contrary conclusions as to whether a private apartment balcony can be part of a building under the burglary statute. Specifically, the Court of Appeal here has found that this Court's language in a footnote in *Valencia* created a categorical exception to this Court's test in *Valencia* for, inter alia, unenclosed balconies, such that entry of any unenclosed balcony cannot support a burglary conviction. (Appen. A at pp. 2, 4.) *Jackson* came to a contrary conclusion, concluding that under certain circumstances, entry into such a balcony could support a burglary conviction. (*People v. Jackson*, *supra*, 190 Cal.App.4th at p. 925.)

Furthermore, this case presents "an important question of law" due to the number of apartment balconies in California and the likelihood that potential burglars will continue to use the balconies for their entry. Without review, there will be confusion among prosecutors and trial courts as to whether to follow the opinion in this case or in *Jackson*. This Court's resolution of the conflict would give needed guidance to prosecutors and trial courts.

Review is therefore warranted in this case "to secure uniformity of decision" and "to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).)

A. This Court Should Grant Review to Determine If an Apartment Balcony Can Be Part of a Building's "Outer Boundary" for the Purposes of Burglary

In *Valencia*, this Court established a "reasonable belief test" to aid in determining if entry into an area could be considered burglary. Where "the

outer boundary of a building for purposes of burglary is not self-evident . . . a building's outer boundary includes any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization." (*People v. Valencia*, *supra*, 28 Cal.4th at p. 11.) In a footnote, this Court stated that "in defining the outer boundary of a building for purposes of burglary, the reasonable-belief test necessarily refers only to an element of a building that reasonably can be viewed as part of *the building's* outer boundary. The test does not encompass any feature that is not such an element, such as a lawn, courtyard, unenclosed patio, or unenclosed balcony that may be located in front of or behind the building . . . ." (*Id.* at p. 11, fn. 5, italics in original.)

Subsequent cases have further refined the test for whether a structure is within a building's outer boundary to include an inquiry as to whether the questionable structure is "functionally interconnected with and immediately contiguous to the" inhabited structure. (See, e.g., *People v. Thorn* (2009) 176 Cal.App.4th 255, 262.) In *Jackson*, the Court of Appeal found that under both the *Valencia* reasonable-belief test and the functionally-interconnected test, a private, second-story balcony with a fence or concrete barrier was part of the apartment to which it was attached. (*People v. Jackson*, *supra*, 190 Cal.App.4th at p. 925.) In contrast, the Court of Appeal in this case interpreted footnote 5 in *Valencia* to prohibit a trial court from ever finding that an "unenclosed balcony" is within a building's outer boundary. (Appen. A at pp. 2, 4.)

Jackson has better reasoning. While *Valencia* mentioned an "unenclosed balcony" as a possible example of a feature that may not be part of a building's outer boundary, it did not remove a lower court's ability to find that a particular "unenclosed balcony" is "reasonably . . . viewed as part of the building's outer boundary" (*People v. Valencia*, *supra*, 28 Cal.4th at p. 11, fn. 5, italics omitted), or that a particular balcony was

enclosed.[1] Thus, a trial court could find that a private, partially unenclosed, second-floor balcony is an area that a reasonable person would believe a member of the public could not enter into without authorization. (See *id.* at p. 16.) Accordingly, this Court should grant review to determine whether a trial court may view a particular balcony as being within a building's outer boundary for the purposes of burglary.

B. The Court of Appeal's Interpretation of Footnote 5 of *Valencia* Takes This Court's Language out of Context and Leads to the Incorrect Result That a Private, Second-Story Balcony Cannot Be Part of the Apartment to Which It Is Attached

The balcony in this case was a private, second-story balcony with a railing and a roof overhang. It was attached to an apartment and its only ordinary access was through a sliding glass door from the apartment's living room. Instead of simply applying *Valencia*'s reasonable-belief test to determine if entry into this balcony was entry into an inhabited building, the Court of Appeal followed its interpretation of language in a footnote in *Valencia* indicating that an unenclosed balcony is not necessarily part of an inhabited building. (Appen. A at pp. 2, 4.)[2]

The Court of Appeal did not dispute that application of *Jackson*'s reasonable-belief test would have resulted in an affirmation of the trial court's finding that the balcony was part of the apartment. (Appen. A at p. 4.) Although *Jackson* did not directly address the footnote in *Valencia*, it

---

[1] Although the word "balcony" is used in different senses, it may be that this Court in *Valencia* used the word "balcony" to mean a type of raised patio. With this definition, "unenclosed balcony" would refer to an unfenced, raised patio, akin to "the lawn, courtyard, [and] unenclosed patio." (*People v. Valencia*, *supra*, 28 Cal.4th at p. 11, fn. 5.)

[2] As noted in the petition for rehearing (Petn. for Rehg. at pp. 4-6), respondent also disputes the Court of Appeal's decision that the balcony in this case was "unenclosed" as the term was used in *Valencia*.

found that the balcony in that case, which was surrounded by a fence or concrete barrier that one could climb over, "was an element of the building that enclosed an area into which a reasonable person would believe that 'a member of the general public could not pass without authorization.'" (*People v. Jackson*, *supra*, 190 Cal.App.4th at pp. 921, 925, quoting *People v. Valencia*, *supra*, 28 Cal.4th at p. 11.)

And significantly, the *Valencia* footnote did not list categorical exceptions to the controlling test that the Court was announcing. Instead, the footnote explained that each of its nonexclusive examples does not constitute a building's outer boundary only if it "is not *such* an element," referring back to the previous sentence, which recounted the reasonable belief test as "an element of a building that reasonably can be viewed as part of *the building's* outer boundary." (*People v. Valencia, supra,* 28 Cal.4th at p. 11, fn. 5, first italics added.) That is, according to the footnote, a particular unenclosed balcony is simply an example of an area that *might* not meet the reasonable belief test. Under these circumstances, trial courts should not be bound by the Court of Appeal's incorrect interpretation of the *Valencia* language.

In sum, review of this case is necessary "to secure uniformity of decision" and "to settle an important question of law" regarding how trial courts should treat entry into an apartment's private balcony for the purposes of burglary. (Cal. Rules of Court, rule 8.500(b)(1).)

CONCLUSION

For the reasons stated, respondent respectfully requests that this Court grant review.

Dated: May 2, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General

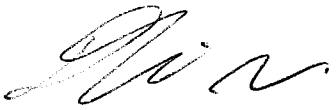
DAVID ZARMI
Deputy Attorney General
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 1,705 words.

Dated: May 2, 2011

KAMALA D. HARRIS
Attorney General of California



DAVID ZARMI
Deputy Attorney General
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 1,705 words.

Dated: May 2, 2011

KAMALA D. HARRIS
Attorney General of California

DAVID ZARMI
Deputy Attorney General
Attorneys for Respondent

APPENDIX A

Filed 3/23/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAMMAL HANEEF YARBROUGH, Defendant and Appellant.	B222399 (Los Angeles County Super. Ct. No. PA065170)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald S. Coen, Judge. Reversed.

Linda Charman Hayes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Blythe J. Leszkay and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jammal Yarbrough appeals from a judgment entered following a jury trial in which he was convicted of first degree burglary for having entered a second-floor unenclosed balcony of an apartment with intent to commit a theft. He contends the court erroneously instructed the jury that an unenclosed balcony is part of a building for purposes of the burglary statute and that the facts disclosed only an attempted burglary. We agree because the Supreme Court in *People v. Valencia* (2002) 28 Cal.4th 1 (*Valencia*) stated "the outer boundary of a building for purposes of burglary . . . does not encompass . . . [an] unenclosed balcony . . . ." (*Valencia*, at p. 12, fn. 5.)

BACKGROUND

On the night of August 5, 2007, defendant climbed to the second-floor balcony of the residence of Salvador Deanda. The balcony was bordered by a waist-high wrought iron railing, with a space between the railing and the floor. It was separated from Deanda's living quarters by a sliding glass door that was open. Awakened by the barking of his dog, Deanda saw defendant standing on the balcony outside the railing, holding onto the railing. When Deanda tried to push defendant off the balcony, defendant held onto the railing. He then fell or jumped down, and fled. Though Deanda's bicycles were on the balcony, nothing was stolen.

Defendant was convicted of first degree burglary.

DISCUSSION

The trial court instructed the jury on the elements of burglary using CALCRIM No. 1700, which states that burglary is committed when a person enters a "building" with the intent to commit a felony. The instruction informs the jury that a person "enters" a building if some part of his or her body "penetrates the area inside the building's outer boundary." But the trial court modified an optional paragraph of the instruction to read, "A building's outer boundary includes the area inside a *balcony*." (Italics added.)

The trial court also instructed the jury using CALCRIM No. 1701, which explains that first degree burglary is the burglary of an inhabited house, which "includes any (structure/garage/office/_____) that is attached to the house and functionally connected with it." When it read the instruction to the jury the trial court inserted the word

"balcony" into the blank, so that the instruction read: "A house includes any balcony that is attached to the house and functionally connected with it." During closing argument, the prosecutor told the jury, "The entry is complete as soon as some part of his body crosses into that area inside the outer boundary, which we know is the area inside of the balcony. As soon as a piece of his body crosses into that area, the entry is complete."

Defendant contends the trial court effectively compelled the jury to find him guilty by erroneously instructing that a balcony constitutes the outer boundary of a house. He argues that a balcony is not necessarily part of an inhabited residence as a matter of law, and that the facts disclosed, at most, an attempted burglary. We agree because an unenclosed balcony is not part of a building for the purposes of the burglary statute.

Preliminarily, the People contend defendant has waived this issue by failing to object to the instruction in the trial court. We disagree. Failure to object to an instruction does not waive a claim on appeal that the instruction was an incorrect statement of the law. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011–1012.)

"'[A] jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof . . . .'" (*People v. Figueroa* (1986) 41 Cal.3d 714, 726.)

"The crime of burglary is committed when a person '*enters* any . . . *building*,' including a 'house,' 'with intent to commit . . . larceny or any felony.' (§ 459 . . . .) Burglary may be of the first or second degree, but in either event involves an entry into a building or other specified structure." (*Valencia*, *supra*, 28 Cal.4th at p. 6, fns. omitted.)

In *Valencia*, the Supreme Court was called upon to decide whether "penetration into the area behind a window screen amounts to an entry of a building within the meaning of the burglary statute when the window itself is closed and is not penetrated." (*Valencia*, *supra*, 28 Cal.4th at pp. 3–4.) In concluding it does, the high court adopted a "reasonable belief test" in defining the outer boundary of a building for purposes of burglary. "Under such a test, . . . a building's outer boundary includes any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization." (*Valencia*, at p. 11.)

"Furthermore, in defining the outer boundary of a building for purposes of burglary, the reasonable belief test necessarily refers only to an element of a building that reasonably can be viewed as part of *the building's* outer boundary. The test does not encompass any feature that is not such an element, such as a lawn, courtyard, unenclosed patio, or **unenclosed balcony** that may be located in front of or behind a building; nor does the test purport to define any such feature as part of a building's outer boundary." (*Valencia*, *supra*, 28 Cal.4th at p. 12, fn. 5, boldface added.)

Here, defendant entered an unenclosed balcony. According to *Valencia*, the reasonable belief test does not encompass an unenclosed balcony, and the trial court erred in instructing otherwise.

We are mindful that our colleagues in Division Four of this district have reached a contrary conclusion in *People v. Jackson* (2010) 190 Cal.App.4th 918 (*Jackson*). There, the defendant was seen halfway inside the victim's apartment and halfway on the balcony adjacent to a living/dining room which was separated by a sliding glass door and screen. The balcony was "private" to the victim's apartment and contained a wooden lattice piece against one side of the balcony. The balcony contained a few plants, a coffee table, and a larger table. The jury was instructed that the defendant could be guilty of burglary if the prosecution proved that he entered a building or attached balcony with the intent to commit theft. The *Jackson* court held that the instruction was proper and that "the balcony satisfies the reasonable person test discussed by the California Supreme Court in *Valencia*. Under this test, the question is 'whether a reasonable person would believe that the element of the building in question enclosed an area into which a member of the general public could not pass without authorization.' (*Valencia*, *supra*, 28 Cal.4th at p. 12.)" (*Jackson*, *supra*, 190 Cal.App.4th at p. 925.) The *Jackson* court did not mention the language in *Valencia* excluding an unenclosed balcony from the reasonable belief test. Finally, the *Jackson* court went on to state that "even had the trial court erred by including the term 'balcony' in the definition of burglary, the undisputed evidence is that [the defendant] was halfway inside [the victim's] apartment and halfway on the balcony when [the witness] saw him. . . . Because the evidence established that [the defendant]

entered [the victim's] apartment, any instructional error would not have been prejudicial." (*Jackson*, at p. 926.) Here, defendant did not enter the victim's apartment.

We disagree with *Jackson* and follow the dictum in *Valencia*. In doing so, we acknowledge the seriousness of a residential burglary. "'[T]he interest sought to be protected by the common law crime of burglary was clear. At common law, burglary was the breaking and entering of a dwelling in the nighttime. The law was intended to protect the sanctity of a person's home during the night hours when the resident was most vulnerable. As one commentator observed: "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. . . ."' [Citation.]" (*Valencia*, *supra*, 28 Cal.4th at p. 7.)

In keeping with the gravity of the offense of burglary, we observe that anyone who climbs onto another's balcony with the intent to enter the adjoining residence to commit theft is guilty of an attempted burglary punishable by a sentence to state prison for one, two, or three years (Pen. Code, §§ 461, 664), which is a serious felony under California's "Three Strikes" law (*id.*, § 1192.7, subd. (c)(18), (39)).

Defendant's final argument here is that the facts disclose only an attempted burglary. First, defendant argues that the evidence established that he gained access to only the outside of the balcony, clinging to the rail, but that he did not "get into" the balcony itself. To commit an entry of the balcony, he did not have to "get into" the balcony; he had to enter the balcony and he did so by clinging to the rail; his fingers were inside the balcony and that was a sufficient entry of the balcony. (See discussion of *Valencia*, *ante*.) Nevertheless, inasmuch as we have determined that the unenclosed balcony was not part of the building's outer boundary, defendant is correct in further contending that given his failure to enter the apartment, the evidence would establish only

an attempted burglary (were the jury to find, at retrial, that defendant intended to enter the apartment to commit a theft when he climbed onto the balcony).

DISPOSITION

The judgment is reversed.

CERTIFIED FOR PUBLICATION.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***The People of the State of California v. Jammal Yarbrough***

No.: **B222399**

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 May 2, 2011, I served the attached **PETITION FOR REVIEW** 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 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Lindy C. Hayes
Attorney at Law
65 Washington St. PMB 244
Santa Clara, CA 95050

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

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

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

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 2, 2011, at Los Angeles, California.

J.R. Familo
Declarant

Signature

LA2010501454
50897192.doc