POINTS AND AUTHORITIES

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Week Of	Topics	Guests	General 15 min
March 14, 2016	When Do Two Entries with Felonious Intent Result in Multiple Burglaries (*Peo. v. Garcia*); United States Supreme Court Reversal for *Brady* error (*Wearry v. Cain*)	Greg Dolge	Ethics 15 min

People v. Garcia **(2016)**

Issue: A defendant enters both a structure and a room *within* that structure with the intent to commit a felony. Has he committed one burglary or two?

The answer to that question depends on whether the defendant has entered two or more spaces that are separately protected from intrusion by Penal Code section 459. The California Supreme Court concludes that under the circumstances of this case, only one burglary was committed.

This P&A summarizes and analyzes the case, and concludes with a "take away" section on factors to consider in determining whether the defendant has committed one burglary or multiple burglaries in these circumstances.

A. Facts and Procedural Background

. 1. The victim was working behind the counter of a store that provided food and other services for pregnant women and young children. The victim was alone in the store. She noticed the defendant riding his bicycle in front of the store and looking inside. A short while later, the defendant entered, looked around, smiled at the victim and left.

2. The defendant entered the store again and kept one hand in his pocket while asking the victim questions about the store. The victim texted a co-worker, saying there was a man in the store who was making her afraid. The defendant asked the victim about a jar of candies on the store counter. As the victim reached into the jar to offer him one, he pointed a gun at her and asked if she had any money. The victim gave him a few dollars that she had in her pants pocket. The defendant continued to point the gun at the victim and directed her to close the front door of the store, remove the "open" sign and turn off the lights. The victim pleaded with the defendant to leave her alone.

3. Instead, the defendant pointed the gun at the victim's back and ordered her to walk to back of the store. He asked her if she had a key to the back office, but she did not. He then asked if the store had a bathroom. The victim said yes, and the defendant told her to go to bathroom, which was located down a hallway and behind the office in the back of the store, out of sight of the main part of the store. The victim refused and begged the defendant to leave her alone. The defendant waved the gun at her and directed her into the bathroom where he raped her.

4. The defendant was convicted of, among other things, two counts of burglary, aggravated kidnapping, forcible rape and rape with a foreign object, along with various enhancements. The verdict reflected the jury's determination that Garcia committed separate crimes of burglary when he entered the store and then when he later entered the bathroom.

5. On review, the Court of Appeal held that the defendant was properly convicted of two burglaries based on the entry into the store and the entry into the bathroom.

6. The California Supreme Court reversed, concluding that only one burglary was committed. There is a majority opinion, and a concurring opinion by Justice Kruger, with Justice Liu joining.

B. Supreme Court Majority Analysis

1. In a nutshell: The scenario addressed in this case is where the burglar enters a structure with felonious intent and enters at least one room inside that structure with felonious intent. The burglary statute, Penal Code section 459, lists the enumerated spaces that fall with scope of the burglary statute. One of those spaces is a "room," but a "room" for purposes of section 459 must have certain characteristics. A "room" must be one that "provides an objectively reasonable expectation of privacy and security, distinct from that provided by the enclosing structure itself, thus making the room similar to the stand-alone structures enumerated in section 459."

2. Multiple burglary convictions in these scenarios are possible only when, once the enclosing structure has been burgled, the "room" entered within the structure demonstrates a space similar in nature to the stand-alone structures listed in section 459. (* 3.)

3. The Supreme Court said that the list of enumerated spaces in section 459 "offers a clue" about the characteristics an interior space must have to permit a separate burglary conviction. "Virtually, all the places in section 459's list of covered locations, with the exception of 'room,' are by their nature separately occupied, stand-alone structures: apartments, warehouses, vehicles, 'sealed containers,' and so forth." (* 5.)

4. The Court stated that the context in which section 459 uses the term "room" suggests that not all rooms are created equal when it comes to burglary. Instead, if an entry into a room can trigger a burglary conviction after the enclosing structure has been burgled, then the room *contained*

within the enclosing structure must be similar to a stand-alone structure. Otherwise, if the interior room "provides no additional security, privacy or possessory right, as compared to the enclosing building," there is no basis to treat the interior room as distinct from the enclosing structure for purposes of successive burglaries. (* 5.)

5. The Supreme Court examined the common law origins of the burglary statute and noted that the common law likewise signals that a separate security or possessory interest is required to sustain multiple burglary convictions within a single space. The common law recognized that separately occupied structures, such as rooms " 'in a college or inn of court' " could be separately burgled because each occupant of the space had a distinct property interest. The Supreme Court said that permitting an intruder, following the initial entry, to be convicted of a burglary for a later felonious entry into the enclosed rooms would further the goals of protecting the occupant's expectations of safety and distinct possessory interests. (* 5.)

6. The Supreme Court said this approach is also consistent with the intended purpose of the burglary statute. The Supreme Court has construed section 459 as having two functions: 1) to protect against increased risk to personal safety that accompanies the commission of a felony inside one of the statute's enumerated locations, and 2) to prevent the occupant's possessory interest in the space against a person who has no right to be there. (* 5.)

7. So the Supreme Court announced this rule: "A burglary does not result from every felonious entry into a room preceded by a burglary of an enclosing structure. Rather, the subsequent entry will constitute a burglary only when the invaded room provides an objectively reasonable expectation of privacy and security, distinct from that the enclosing structure itself provides, which makes the room similar in nature to the stand-alone structures enumerated in section 459." (* 4.)

8. The Court said its rule avoids redundant burglary charges and convictions. "In many cases, an intruder's entry into a structure will invade an occupant's possessory interest and create a potentially dangerous situation for personal security and privacy at the moment the intruder enters—and subsequent entries into internal spaces will not heighten those risks. For instance, in the ordinary case in which a burglar enters a home, a warehouse, or a storefront, his subsequent movement throughout the structure will not meaningfully exacerbate the risk to personal security and privacy or to the occupant's possessory interest. . . . Charging the defendant with burglary for the initial entry alone adequately accounts for the increased risk of danger and personal harm that the defendant has created." (* 6.)

9. But the Court said in other cases, "the initial entry into the structure will not account for the possibility of harm to possessory or security interests that could arise if the intruder subsequently enters interior spaces. An interior space may be different in character from its enclosing structure. It may be owned or occupied by a different entity than that possessing the overarching structure, or it may be separately secured against outside entry. The internal space could provide a separate and objectively reasonable expectation of protection from intrusion, distinct from that provided by the security of the overarching structure. When an intruder enters that space with a felonious intent, we

believe it most consistent with the Legislature's intended purpose and a reasonable interpretation of the statute's text and history to permit him or her to be convicted of burglary -- notwithstanding whether he or she has already committed a burglary of the enclosing structure." (* 7.)

10. The Supreme Court provided examples of this latter category: "We have permitted a defendant to be separately charged, convicted, and punished for multiple burglaries when he broke into three rented office spaces leased to 'tenants who had no common interest other than the fortuitous circumstance that they happened to lease office suites in the same commercial building.' (*People v. James* (1977) 19 Cal.3d 99, 119.) We suggested in that case that the same rule would apply to a thief who broke into multiple stores in a shopping center, apartments in an apartment building, or rooms or suites in a hotel." (* 7.)

11. The Supreme Court noted that in these cases, "the invaded rooms had characteristics that a reasonable person would understand to signify a separate possessory interest or a heightened degree of protection against significant intrusions from outsiders. In some, the invaded rooms were leased, owned, or otherwise occupied by different entities, such that their entry would intrude upon separate possessory interests." (* 7.)

12. The Court also noted *People v. Elsey* (2000) 81 Cal.App.4th 948, 961 in which the Court of Appeal affirmed six burglary convictions based on six different locked classrooms, "located to a great extent in separate buildings on the school campus." In *Elsey*, the Court of Appeal stated, "The uncontradicted evidence was that teachers had a reasonable expectation against intrusion with respect to each individual classroom." (*Elsey*, *supra*, 81 Cal.App.4th at p. 961.) The Supreme Court here in *Garcia* found significant that by being locked to the outside, the rooms had enhanced protection against intrusion compared to the enclosing structure. (* 8.) Likewise, the Supreme Court noted that in *People v. Church (*1989) 215 Cal.App.3d 1151, in which the defendant was convicted of four counts of burglary based on the entry and ransacking of four separately leased and locked medical offices in one building, the Court of Appeal found it important that the burgled offices could be locked against intrusion from a common hallway. (* 8, citing *Church*, *supra*, 215 Cal.App.3d at pp. 1154-1155.)

13. Summarizing this case review, the Supreme Court said that in any given space, the nature of the space and the reasonable expectations they engender will dictate whether multiple burglary convictions are appropriate. *The Supreme Court provides this guidance in determining whether a particular situation is conductive to multiple burglary charges and convictions*: "For instance, the evidence might show that the interior space was owned, occupied, or possessed by a different person or entity than the enclosing structure, or otherwise provided its occupants with an enhanced expectation of privacy and security similar to the stand-alone structures enumerated in section 459. Hotel rooms, offices in an office building, and storefronts in a mall would all be examples of such spaces. Alternatively, there may be other objective indications that a room provides its occupants with an enhanced expectation of privacy and security. A locked door to an external space, a sign conveying restricted access to those present in the external space, or the location of a room in relation to a public area may demonstrate objectively reasonable expectations of privacy and security. These attributes can show that a space is similar in nature to the stand-alone structures listed in

section 459." (* 8.)

14. The Supreme Court then proceeded to analyze the question of whether the defendant Garcia here was properly convicted of a second burglary for his entry into the bathroom of the store. The Court said it had to consider whether the bathroom provided an objectively reasonable expectation of privacy and safety once the security of the store itself was breached. It concluded the bathroom did not so. (* 10.)

a. The Court first stated the bathroom didn't reflect any separate possessory interest. There was no basis for believing that the bathroom was owned, possessed, or otherwise occupied by a different entity than the store itself. "The bathroom was contained within the walls of the store, and a reasonable factfinder would assume that Garcia invaded the same possessory interest when entering the store and the bathroom." (* 11.)

b. The Court said that whether the bathroom bore objective indications of enhanced privacy and security for its occupants was a more difficult question. On the one hand, the bathroom was located in a back hallway, behind a set of refrigerators and outside of the view of the public entering into the main part of the store. One could access the bathroom only by leaving the main part of the store and passing the store's office, which was locked and inaccessible to members of the public. "These attributes of the bathroom might convey to a reasonable onlooker that the back hallway, and rooms located off that hallway, were areas that members of the public could not enter without permission." (* 11.)

c. But the Court said, on the other hand, there was no evidence in the record suggesting that the bathroom was left locked to the public or other passersby. In fact, the record suggested that the bathroom, unlike the nearby office, could be accessed by anyone. "The absence of this evidence significantly diminishes the possibility that a factfinder could consider the bathroom to provide a heightened expectation of privacy and security beyond what the store itself provided." (* 11.)

d. The Supreme Court concluded: "The evidence does not demonstrate that a reasonable onlooker would perceive the bathroom as providing heightened privacy and security against intrusion, even though the bathroom was located outside the main view of the store. Nor is there any indication that the bathroom was kept locked, or that access to it was in any other way restricted relative to the rest of the store. On the facts of this case, the risks to a store occupant's personal safety occurred at the moment that Garcia entered the store with the intent to commit a felony; the bathroom itself did not provide a separate, reasonable expectation of additional protection. Convicting Garcia of a second burglary was redundant and unlikely to serve the purposes of the burglary statute. Garcia should have been charged with, and convicted of, only a single burglary offense." (* 11.)

[15. **Note**: The Supreme Court points out that Attorney General relied heavily on *People v. Sparks* (2002) 28 Cal.4th 71 to support the argument that the defendant committed two burglaries. The People pointed to language in *Sparks* suggesting the Legislature meant for the burglary statute in general, and the definition of "room" in particular, to be given broad effect.

The Supreme Court here stated: "Despite the People's arguments to the contrary, *Sparks* does not compel us to adopt a broader rule that eschews the significance of locks, possessory interests, or objectively reasonable expectations of privacy and security. True: in *Sparks* we suggested that the Legislature's likely purpose in including the term "room" in the burglary statute was to expand the statute's coverage to include entries into "diverse types" of spaces that, on first glance, appear dissimilar from the "dwelling house" protected by the common law offense of burglary. And we observed in *Sparks* that the offense of burglary in California is, in many ways, broader than the offense the Model Penal Code defines and which many other jurisdictions have adopted. But we made these observations in a very different context from the facts before us. *Sparks* presented the question of whether a defendant who enters a 'room' within a single-family house with the intent to perpetrate a felony inside commits a burglary, even if he lacked that felonious intent when he entered the house itself. The defendant in that case had entered the house under false pretenses before raping an occupant in one of the home's bedrooms. The prosecution argued to the jury that the defendant could be found guilty of burglary if he formed the intent to rape either (1) prior to entering the house, or (2) after entering the house, but before entering the room where the sexual assault occurred. We construed the term 'room' to embrace the entry into the bedroom in affirming the legitimacy of the prosecution's second, alternative theory of the case. Our holding did not expand the burglary statute's reach, but instead only ensured that a burglary prosecution, in peculiar circumstances like those present in *Sparks*, would not founder on the potential difficulty of proving exactly when the defendant formed a felonious intent."

"It is for this reason that we have relied on *Sparks* in holding that where a defendant is subject to a single burglary charge based on his or her entry into a home followed by entry into a room in that home, the jury need not agree on when he or she formed the requisite intent. The Courts of Appeal have likewise generally applied *Sparks* in this manner. *Sparks* is thus addressed primarily to the unusual circumstance where a defendant may have committed one or more entries within section 459's meaning, but is charged with a " 'single discrete crime.' " Here, by contrast, Garcia is charged with multiple burglaries based on what the prosecution characterized as separate entries into a commercial structure and an enclosed room with separate specific intents." (* 8-9, internal citations omitted.)]

C. Take Aways

Keep in mind the scenario addressed in this case: a defendant who enters a structure with felonious intent and enters a room *within* that structure with a separate felonious intent.

In such circumstance, when can the defendant be charged and convicted of two separate burglaries? Answer: The burglar has entered two (or more) separate spaces that are separately protected from intrusion under Penal Code section 459.

When is the internal "room" separately protected from intrusion under Penal Code section 459? Answer: When the space is similar to the stand-alone structures listed in section 459, i.e. functionally similar to a separate house, apartment, shop or store.

To make this determination, look for such features as whether the internal room demonstrates possessory, safety or privacy expectations beyond those provided by the enclosing structure:

- Is the interior space owned, occupied, or possessed by a different person or entity than the enclosing structure? (e.g., hotel rooms, offices in an office building, storefronts in a mall)

- Does the internal space provide a separate and objectively reasonable expectation of protection from intrusion, distinct from that provided by the enclosing structure?

    * are doors locked to the external space;

    * is there a sign restricting access to those in the external space;

    * does the location of the room in relation to the public area demonstrate reasonable expectations of privacy and security, i.e. the public cannot enter without permission

II. *Wearry v. Cain* __ S.Ct. __ [2016 WL 854158]

On March 7, 2016, the United States Supreme Court issued *Wearry v. Cain*, a per curiam opinion reversing the defendant's death penalty appeal on the basis of *Brady v*iolations by the prosecution.

Per curiam decisions from the Supreme Court are issued without an oral argument or briefing from the parties on the merits and typically signal a case that the justices believe does not require a substantial opinion. Although these opinions are often unanimous, occasionally justices will dissent from per curiam rulings, as Justice Alito and Justice Thomas did here.

Justice Alito wrote the dissenting opinion, with Justice Thomas joining. Because per curiam opinions are not signed, we do not know who authored the majority opinion. We also do not know if Justice Scalia joined in the majority opinion.

A. Factual and Procedural Background

1. A high school student and part-time delivery boy was brutally murdered. Nearly two years after the murder, Sam Scott, who was in prison at the time, contacted authorities and implicated the defendant Michael Wearry. He told police that Wearry and the four other men confessed to shooting and driving over the victim before leaving his body at a particular location. In fact, the victim had not been shot, and his body was found at a different location.

2. Scott changed his account of the crime over the course of four later statements, each of which differed from the others in material ways. By the time Scott testified as the prosecution's star witness at Wearry's trial, his story bore little resemblance to his original account. According to the version Scott told the jury, he had been playing dice with Wearry and others when the victim drove past. Wearry, who had been losing, decided to rob the victim. After Wearry and an acquaintance, Randy Hutchinson, stopped the victim's car, Hutchinson shoved the victim into the cargo area. Five men, including Scott, Hutchinson, and Wearry, proceeded to drive around, at one point encountering Eric Brown—the prosecution's other main witness—and pausing intermittently to assault the victim. Finally, Scott testified that that Wearry and two others killed the victim by running him over. On cross-examination, Scott admitted that he had changed his account several times.

3. Consistent with Scott's testimony, Brown testified that on the night of the murder he had seen Wearry and others with a man who looked like the victim. At the time of Wearry's trial, Brown was in prison on unrelated charges. Brown acknowledged that he had made a prior inconsistent statement to the police, but had recanted and agreed to testify against Wearry, not for any prosecutorial favor, but solely because his sister knew the victim's sister. The State commented during its opening statement that Brown "is doing 15 years on a drug charge right now, [but] hasn't asked for a thing." During closing argument, the State reiterated that Brown "has no deal on the table"

and was testifying because the victim's "family deserves to know."

4. Although the State presented no physical evidence at trial, it did offer additional circumstantial evidence linking Wearry to the victim. One witness testified that he saw Wearry in the victim's car on the night of the murder and, later, saw Wearry holding the victim's class ring. Another witness said he saw Wearry throwing away the victim's cologne.

5. Wearry presented an alibi defense at trial. He claimed that, at the time of the murder, he had been at a wedding reception 40 miles away. Wearry's girlfriend, her sister, and her aunt corroborated Wearry's account. In closing argument, the prosecution stressed that all three witnesses had personal relationships with Wearry. The prosecution also presented two rebuttal witnesses who testified when the reception ended, thus potentially leaving sufficient time for Wearry to have committed the crime.

6. The jury convicted Wearry of capital murder and sentenced him to death. His conviction and sentence were affirmed on direct appeal.

B. *Brady* Background

1. After Wearry's conviction became final, it emerged that the prosecution had withheld relevant information the Supreme Court majority concluded "could have advanced Wearry's plea." Wearry argued during state postconviction proceedings that three categories of belatedly revealed information would have undermined the prosecution and materially aided Wearry's defense at trial. (* 2.)

2. First, previously undisclosed police records showed that two of Scott's fellow inmates had made statements that cast doubt on Scott's credibility. One of them suggested that Scott may have had a vendetta against Wearry, and other inmate testified that Scott asked the inmate to lie about seeing the murder because testifying against Wearry could help that inmate in his efforts to get out of prison. (*Ibid*.)

3. Second, the prosecution had failed to disclose that, contrary to the prosecution's assertions at trial, Brown had twice sought a deal to reduce his existing sentence in exchange for testifying against Wearry. (*Ibid.)*

4. Third, the prosecution had failed to turn over medical records on Randy Hutchinson. According to Scott, on the night of the murder, Hutchinson had run into the street to flag down the victim, pulled the victim out of his car, shoved him into the cargo space, and crawled into the cargo space himself. But Hutchinson's medical records revealed that, nine days before the murder, Hutchinson had undergone knee surgery to repair a ruptured patellar tendon. An expert medical witness testified at the state collateral-review hearing that Hutchinson's surgically repaired knee could

not have withstood running, bending, or lifting substantial weight. The prosecution presented an expert witness who disagreed with that appraisal of Hutchinson's physical fitness. (*Ibid*.)

Justice Alito notes in his dissent that a prosecution witness testified at trial that he had seen records showing that Hutchinson had knee surgery about nine days before the murder. (* 7.)

5. Based on this new evidence, Wearry alleged violations of his due process rights under *Brady v. Maryland* (1963) 373 U.S. 83, and of his Sixth Amendment right to effective assistance of counsel. Wearry's trial attorney admitted at the state collateral review hearing that he had conducted no independent investigation into Wearry's innocence and had relied solely on evidence provided by the prosecution and Wearry. Wearry's postconviction claims were denied. (* 3.)

6. The United States Supreme Court granted Wearry's petition for a writ of certiorari and reversed the judgment because his due process rights were violated, and remanded the matter for a new trial.

C. Supreme Court's Majority Analysis

1. The majority stated that because a new trial is required based on Wearry's denial of due process rights, it need not address his claim of ineffective assistance of counsel. (* 3.)

2. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady*, *supra*, at p. 87.). (*Ibid.)*

3. The Supreme Court majority stated: "Beyond doubt, the newly revealed evidence suffices to undermine confidence in Wearry's conviction. The State's trial evidence resembles a house of cards, built on the jury crediting Scott's account rather than Wearry's alibi." It noted the dissent here maintains that, apart from the testimony of Scott and Brown, there was independent evidence pointing to Wearry as the murderer. The majority responded, "But all of the evidence the dissent cites suggests, at most, that someone in Wearry's group of friends may have committed the crime, and that Wearry may have been involved in events related to the murder after it occurred. Perhaps, on the basis of this evidence, Louisiana might have charged Wearry as an accessory after the fact. [Citation omitted.] But Louisiana instead charged Wearry with capital murder, and the only evidence directly tying him to that crime was Scott's dubious testimony, corroborated by the similarly suspect testimony of Brown." (*Ibid*.)

4. The majority continued: "As the dissent recognizes, 'Scott did not have an exemplary record of veracity.' Scott's credibility, already impugned by his many inconsistent stories, would have been further diminished had the jury learned that Hutchinson may have been physically incapable of

performing the role Scott ascribed to him, that Scott had coached another inmate to lie about the murder and thereby enhance his chances to get out of jail, or that Scott may have implicated Wearry to settle a personal score. Moreover, any juror who found Scott more credible in light of Brown's testimony might have thought differently had she learned that Brown may have been motivated to come forward not by his sister's relationship with the victim's sister -- as the prosecution had insisted in its closing argument -- but by the possibility of a reduced sentence on an existing conviction. Even if the jury -- armed with all of this new evidence -- could have voted to convict Wearry, we have " 'no confidence that it would have done so.' " (* 4.)

D. The Dissent

1. Justice Alito did not disagree that the prosecution should have turned over the information discussed by the majority, stating, "There is no question in my mind that the prosecution should have disclosed the information." Justice Alito also stated that it was "troubling" that "the prosecutor claimed in her opening statement that Brown had not sought favorable treatment" in exchange for testifying against Wearry. (*6)

2. But Justice Alito did not believe that the *Brady* issue was "open and shut." He noted that a *Brady* question is an intensely factual question. Justice Alito believed the summary reversal was "highly inappropriate" and that the usual procedures should govern, with Wearry raising his claims in a federal habeas proceeding. By complying with this procedure, Wearry's claims would not reach the United States Supreme Court until a district court and the court of appeals "had studied the record and evaluated the likely impact of the information in question." (* 9.)

3. In response, the Supreme Court majority stated: "This Court, of course, has jurisdiction over the final judgments of state postconviction courts and exercises that jurisdiction in appropriate circumstances." It stated: "Reviewing the Louisiana courts' denial of postconviction relief is thus hardly the bold departure the dissent paints it to be. The alternative to granting review, after all, is forcing Wearry to endure yet more time on Louisiana's death row in service of a conviction that is constitutionally flawed." (* 5-6.)

NOTE: Jeff Rubin of the Santa Clara County District Attorney's Office has prepared a "*Basic Brady, Statutory and Ethical Discovery Obligation Outline*." (1/12/2006.) It is available on the CDAA website under "Prosecutor's Resources." Scroll down to "Inquisitive Prosecutor's Guides."

If you are in the Alameda County District Attorney's Office, contact me and I will send you the Outline: marypat.dooley@acgov.org

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