COURT OF APPEALS, STATE OF COLORADO 101 W. Colfax Avenue, Suite 800 Denver, CO 80202	
On Appeal from the Jefferson County District Court The Honorable Jane Tidball Case Number 10CR45	
Plaintiff-Appellee: **PEOPLE OF THE STATE OF COLORADO** **v.** **Defendant-Appellant:** **SAUL GUZMAN**	▲ COURT USE ONLY ▲
Eric K. Klein Johnson & Brennan, PLLC 1401 Walnut Street, Suite 201 Boulder, CO 80302 Telephone: (303) 444-1885 Fax: (866) 340-8286 eklein@johnson-brennan.com Atty. Reg. #42185 *Attorney for Saul Guzman*	Case No: 10CA1723
REPLY BRIEF	

COURT OF APPEALS, STATE OF COLORADO 101 W. Colfax Avenue, Suite 800 Denver, CO 80202	
On Appeal from the Jefferson County District Court The Honorable Jane Tidball Case Number 10CR45	
Plaintiff-Appellee: **PEOPLE OF THE STATE OF COLORADO** v. **Defendant-Appellant:** **SAUL GUZMAN**	▲ COURT USE ONLY ▲
Eric K. Klein, Reg. #42185 Johnson & Brennan, PLLC 1401 Walnut Street, Suite 201 Boulder, CO 80302 Telephone: (303) 444-1885 Fax: (866) 340-8286 eklein@johnson-brennan.com Atty. Reg. #42185 *Attorney for Saul Guzman*	Case No: 10CA1723
CERTIFICATE OF COMPLIANCE	

I hereby certify that this Reply Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g) because it contains 5,275words.

Eric K. Klein

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

ARGUMENT

In his opening brief, Mr. Guzman demonstrated that the evidence was insufficient to convict him of second degree burglary under the theory of unlawfully entering with the intent to steal. In response, the government now pursues a theory of prosecution that was never presented at trial and on which the jury was never instructed—that the evidence supports a conviction for unlawfully remaining on the premises with the intent to steal. Since Mr. Guzman was not convicted on such a legal theory, this Court cannot interpose its own judgment of the sufficiency under such a theory. Rather, the Court must determine whether the evidence was sufficient to support *the verdict returned by the jury*. The government's only argument for upholding the conviction under the theory presented to the jury—that Mr. Guzman possessed some shoes after leaving—at most is evidence of an after-acquired intent, not of an intent to steal at the moment of entry. Under either theory, the evidence was insufficient to convict Mr. Guzman of burglary, and this Court must vacate his conviction.

Mr. Guzman also demonstrated in his opening brief that it was plain error for the trial court to give the jury an outdated and inaccurate instruction on complicity. In light of clear instructions from the Colorado Supreme Court and the jury's sole question in this case, which focused on complicity liability, "a

reasonable possibility exists that the erroneous instruction contributed to [Mr. Guzman]'s conviction such that serious doubt is cast upon the reliability of the jury's verdict." *Auman v. People*, 109 P.3d 647, 665 (Colo. 2005). Therefore, the Court must reverse his convictions and remand for a new trial.

I. The Evidence Does Not Sufficiently Establish Second Degree Burglary.

The government argues that even if the evidence were insufficient to support a burglary conviction due to the lack of evidence of an intent to steal at the time of entry, the jury could have convicted Mr. Guzman on a theory of unlawfully remaining. The government argues that the 1999 amendment to the second degree burglary statute so fundamentally changed the law that an intent to commit a crime formed any time after a person's presence becomes unlawful is sufficient to support a burglary conviction. The government thus urges this Court to uphold Mr. Guzman's conviction on a theory that he unlawfully remained on the premises with an intent to steal. But this theory of liability was never presented to the jury. The instructions submitted by the prosecution, and used by the trial court, did not include such a theory, and the prosecution never argued such a theory.

Additionally, the government's argument is not accurate. Rather, the 1999 amendment addressed the concerns raised by the dissent in *Cooper v. People*, 973 P.2d 1234 (Colo. 1999), that a person could enter unlawfully with no intent to

commit a separate crime but then *change his mind* and decide to *remain* on the property with the intent to commit a crime. *Id.* at 1243 (Rice, J., dissenting). The statutory interpretation urged by the government would yield absurd results, and this Court thus must limit its interpretation to be consistent with the dissent in *Cooper*. Interpreting the statute in such a way, the Court will find that the evidence in this case is insufficient to establish that Mr. Guzman either (a) entered the dwelling with the intent to steal, or (b) entered the dwelling with no intent to steal and then changed his mind and decided to remain on the premises with such intent.

1. This Court Cannot Uphold Mr. Guzman's Conviction On A Theory Of Liability That Was Never Presented To The Jury.

The statute defining second degree burglary offers three ways that the offense can be committed, all requiring an intent to commit a crime:

(1) breaking an entrance into;

(2) entering unlawfully; or

(3) remaining unlawfully.

See C.R.S. § 18-4-203 (1999).

It cannot be argued that Mr. Guzman was tried and convicted on a theory that encompassed anything but the first two options under the statute. Yet the government urges this Court to uphold Mr. Guzman's conviction on the third

option, remaining unlawfully. The U.S. Supreme Court has clearly held that it would violate Mr. Guzman's due process rights for this Court to affirm his conviction based on a portion of the statute that did not form the basis of the jury's verdict. U.S. Const. amend XIV; *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *see also* Colo. Const. art. II, § 25. Furthermore, for the Court to interpose its determination of the sufficiency of evidence on a theory never submitted to the jury would violate Mr. Guzman's right to a fair trial by jury. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 25.

Everything presented to the jury in this case indicated a theory of liability based solely on breaking or unlawfully entering with the intent to steal. In opening statement, the prosecutor explained the basis for the burglary charge: "He's charged with burglary for breaking in with the intent to steal something[.]" (Tr. 6/8/10 at 20.) In closing argument, the prosecutor argued that the broken door was the evidence of burglary: "We know there was a burglary. You saw the photographs of the broken door." (Tr. 6/9/10 at 34.)

Most fundamentally, the jury could not have convicted on a theory of unlawfully remaining with the intent to steal because it was never instructed on such a theory. The prosecution tendered jury instructions to the trial court, including the elemental instruction for second degree burglary. (Tr. 6/8/10 at 151.)

With only minor exceptions that have no bearing here, the trial court issued the instructions as tendered. *Id.* The instruction for second degree burglary made reference *only* to unlawfully breaking or entering:

> The elements of the crime of Second Degree Burglary are:
>
> 1. That the defendant,
>
> 2. in the State of Colorado, at or about the date and place charged,
>
> 3. knowingly,
>
> 4. unlawfully *broke an entrance into or unlawfully entered*
>
> 5. a dwelling
>
> 6. with intent to commit therein the crime of theft, as defined in instruction 12.

(Jury Instruction 11, Sealed Envelope IV (emphasis added) (attached hereto as Appendix A).)

Now, however, the government asks this Court to base its sufficiency determination, not on the portion of the statute on which the jury convicted, but on another portion of the statute about which the jury received no instruction and on which the prosecution did not rely at trial. The Court's obligation, though, is to determine whether there was sufficient evidence for this jury, as instructed, to find proof beyond a reasonable doubt. It would be a violation of due process and the

right to a fair jury trial for this Court to affirm a conviction based on a provision of the burglary statute for which Mr. Guzman "[was] neither tried nor convicted." *Cole*, 333 U.S. at 201.

"It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Cole*, 333 U.S. at 201. "To conform to due process of law, [Mr. Guzman is] entitled to have the validity of [his] convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Id.* at 202.

In essence, the government now asks this Court to direct a verdict against Mr. Guzman for unlawfully remaining in the house with the intent to steal. The Colorado and U.S. constitutions, however, forbid this Court from doing so. "Courts are forbidden from directing verdicts against criminal defendants on any elements of a crime." *Beem v. McKune*, 278 F.3d 1108, 1113 (10th Cir. 2002), *on reh'g en banc*, 317 F.3d 1175 (10th Cir. 2003); *see also Sullivan v. Louisiana,* 508 U.S. 275, 277 (1993) ("[A]lthough a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence."). Consistent with the U.S. Supreme Court, the Colorado Supreme Court has clearly held that the Fifth

Amendment due process right to proof beyond a reasonable doubt and the Sixth Amendment right to a trial by jury "prohibit courts from entering a conviction for an offense other than that authorized by a jury's guilty verdict." *Medina v. People*, 163 P.3d 1136, 1140 (Colo. 2007).

Here, the jury's verdict can authorize no conviction other than for breaking or unlawfully entering with an intent to steal. As discussed in Mr. Guzman's Opening Brief (OB at 8-11), the evidence was insufficient to find that Mr. Guzman possessed the intent to steal at the time of entry, and that conviction must be overturned. *Auman*, 109 P.3d at 651 ("Second degree burglary requires that a defendant possess the intent to commit a crime when he or she breaks an entrance into a building or occupied structure.").

Even if this Court believes that the record contains evidence of unlawfully remaining with an intent to steal, this Court cannot merely take judicial notice of such fact. *Beem*, 278 F.3d at 1114. Rather, Mr. Guzman can be convicted only under the statutory theory presented to the jury. *Cole*, 333 U.S. at 201. The prosecution made clear through its tendered jury instruction, opening statement, and closing argument that it was proceeding solely on a theory of unlawful entry. *See Medina*, 163 P.3d at 1140 (holding that tendered jury instruction and manner in which prosecution tried its case supported finding that defendant was charged with

class 5 felony, not class 4 felony for which she was sentenced). Accordingly, this Court should reject the government's invitation to affirm the conviction on a theory of unlawfully remaining. Thus, the holding of *Cooper*—that a defendant must possess the intent to commit a crime at the moment of entry—applies. 973 P.2d at 1240.

2. The Evidence Was Insufficient To Support A Finding That Mr. Guzman Had The Requisite Intent At The Time Of Entry.

The evidence in this case demonstrated that four young men went to a house to get back twenty dollars for a defective game console. (OB at 2-3.) When the seller of the defective game console refused to open the door, someone forced the door open. (OB 4-5.) There was no evidence that anyone had an intent to steal anything at the time that the young men entered the house.

The government argues that the evidence was sufficient to establish burglary because there was evidence that Mr. Guzman left with a pair of sneakers that came from inside the house. (AB at 9-10.) The most this could establish is an after-acquired intent to steal.[1] Because the evidence does not support a finding beyond a

[1] Regarding the crime of burglary, this Court has previously held, "A verdict of guilt cannot rest entirely on the inference of defendant's participation in the crime charged which is drawn from recent unexplained, exclusive possession of stolen

(continued)

reasonable doubt that Mr. Guzman possessed the intent to steal at the moment he entered the home, this Court must vacate his conviction for second degree burglary.

3. The Evidence Does Not Support A Finding That Mr. Guzman *Remained* With The Intent To Steal.

Even if the Court were to consider the government's new theory, the evidence does not support a finding of guilt beyond a reasonable doubt that any decision to remain in the home was connected to the intent to steal. The crux of the government's argument is that if there is evidence that Mr. Guzman unlawfully entered the home, it does not matter when he acquired the intent to steal, even if the entry into the home or the decision to remain in the home were divorced from the intent to steal. Such a holding would run contrary to the Colorado Supreme Court's caution against "convert[ing] burglary into a sentence enhancer for any crime committed in tandem with a trespass." *Cooper*, 973 P.2d at 1236.

In support of its contention that the 1999 amendment to the burglary statute means that a defendant commits burglary if he acquires an intent to commit a crime any time after an unlawful entry, the government relies on *People v. Oram*,

---

property." *People v. Milligan*, 714 P.2d 493, 495 (Colo. App. 1985). Here, the possession of the shoes is neither unexplained nor exclusive.

217 P.2d 883, 892 (Colo. App. 2009), and *People v. Larkins*, 109 P.3d 1003, 1004-05 (Colo. App. 2004). (AB at 7-8.) As an initial matter, one division of this Court is not bound by the decision of another division. *E.g., People v. Thomas*, 195 P.3d 1162, 1164 (Colo. App. 2008). Additionally, this Court should not follow *Oram* and *Larkins* because the discussion in those cases overlooks the fact that the 1999 amendment was intended to adopt the position of the dissent in *Cooper*, which was not so broad as those cases would seem to suggest. Rather, the *Cooper* dissent suggested that a person could be guilty of burglary under a theory of remaining unlawfully whether the original entry was lawful or unlawful so long as the intent to commit a crime existed *at the time of the decision to remain*. *See Cooper*, 973 P.2d at 1243 (Rice, J., dissenting) (discussed, *infra*). As discussed, *infra*, it was not the intent of the dissent in *Cooper*, or of the statutory amendment codifying the dissent's position, to create a felony any time a trespasser formed an intent to commit a crime.

In *Cooper*, the Colorado Supreme Court held that:

> to convict a defendant under section 18-4-203, 6 C.R.S. (1998), a jury must find that the defendant either: (1) broke and entered or unlawfully entered with the intent to commit a crime therein; or (2) entered lawfully but subsequently remained unlawfully with the intent to commit a crime therein.

973 P.2d at 1241.

The version of the statute at issue in *Cooper* stated,

> A person commits second degree burglary, if he knowingly breaks an entrance into, or enters, or remains unlawfully in a building or occupied structure with intent to commit therein a crime against a person or property.

C.R.S. § 18-4-203 (1998).

Three justices dissented in *Cooper*, arguing that a burglary can occur where a person "*enters unlawfully with no intent* to commit a crime, but who *later changes his mind* and *remains* on the premises *unlawfully with the intent* to commit a crime." 973 P.2d at 1243 (Rice, J., dissenting) (second emphasis added).

After the decision in *Cooper*, the second degree burglary statute was amended to read:

> A person commits second degree burglary, if the person knowingly breaks an entrance into, enters unlawfully in, or remains unlawfully after a lawful or unlawful entry in a building or occupied structure with intent to commit therein a crime against another person or property.

C.R.S. § 18-4-203 (1999).

The amendment to the statute did not purport to convert any trespass attendant to another crime into a burglary. Rather, the amendment was plainly intended to address the specific concern raised by the *Cooper* dissent of someone entering unlawfully without any intent to commit a separate crime but then "chang[ing] his mind" and deciding to remain with the intent to commit a crime.

"At its core, burglary is a form of trespass that is coupled with the intent to commit a crime in a building." *People v. Fuentes*, 258 P.3d 320, 323 (Colo. App. 2011). The *Cooper* dissent never disputed the majority's holding that it would be improper to interpret the burglary statute in a manner that would "transform every unlawful entry immediately into an unlawful remaining, during which a person could be convicted of burglary if he or she formed the intent to commit a crime at any time." *Cooper*, 973 P.2d at 1241. As the *Cooper* majority held,

> Such a rule would be inconsistent with the General Assembly's decision to enumerate three *different* means of achieving a trespass, because every unlawful entry would simultaneously become an unlawful remaining unless a defendant instantly left the premises. Such a rule would run contrary to the plain language of the statute by effectively nullifying the import of the first two means of achieving entry, and thus would fail to construe the statute as a whole, giving "consistent, harmonious, and sensible effect to all of its parts."

Id. at 1241.

The 1999 amendment to the second degree burglary statute did not change the basic structure of the statute addressed by the *Cooper* majority. Rather, the amendment merely clarified that a burglary could occur even if the original entry was unlawful and the defendant did not have the requisite intent at the moment of the initial entry. There is nothing, however, in the amendment to suggest that the intent to commit a crime need not be coupled with the decision to remain

unlawfully since that is the essence of the offense of burglary. *Fuentes*, 258 P.3d at 323.

If it was the legislature's intent to make it a burglary any time a trespasser decides to commit a crime, the legislature surely could have done so in far more straightforward terms. For instance, it could have changed the statute to read,

> A person commits second degree burglary, if the person knowingly breaks an entrance into, enters unlawfully in, or remains unlawfully after a lawful or unlawful entry in a building or occupied structure and at any point has the intent to commit therein a crime against another person or property.

The legislature chose not to do so. Rather, the legislature made clear that the decision to remain must be connected to the intent to commit a crime, consistent with the *Cooper* dissent.

Here, there is no evidence that Mr. Guzman ever changed his mind and decided to "remain" with the intent to steal. Rather, the evidence was that he went in and came out. The longest Mr. Guzman could have been inside was Mario Valles's estimate that Mr. Guzman was in the home for a minute. (Tr. 6/8/10 at 86.) If he grabbed something on the way out, that does not constitute sufficient evidence that he decided to "remain" in the house and that he had the intent to steal when he decided to remain.

The relevant definition of "remain" is: "to stay in the same place or with the same person or group." *Merriam Webster Dictionary*, available at http://www.merriam-webster.com/dictionary/remain; *see also* Dictionary.com, http://dictionary.reference.com/browse/remain?s=t ("2. to stay behind or in the same place").

The requirement that one "remain" with the intent to commit a crime is not satisfied by a fleeting or short period of time after the presence becomes unlawful. Rather, a person must actually stay at a location with the intent of committing a crime. The *Cooper* court cited the example given by the New York legislature in adopting its burglary statute:

> The word 'remain' in the phrase 'enter or remain' is designed to be applicable to cases in which a person enters with 'license or privilege' but remains on the premises after the termination of such license or privilege. Thus a person who enters a department store during regular business hours and secretes himself in a public washroom until after the store is closed, "remains unlawfully" within the meaning of [the New York statute].

973 P.2d at 1241 (emphases, alteration in original).

The Court is required to adopt a construction of the statute that is constitutional. The interpretation urged by the government, however, would yield unconstitutional results. First, in construing a statute, this Court must avoid an interpretation that would yield absurd results. *Frazier v. People*, 90 P.3d 807, 811

(Colo. 2004). Second, the interpretation that the government asks this Court to adopt would raise due process issues of fair notice of what is and is not prohibited.

> A statute that forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess as to its meaning and differ as to its application violates due process protections afforded by the United States and Colorado Constitutions.

Watso v. Colorado Dept. of Soc. Services, 841 P.2d 299, 309 (Colo. 1992).

The *Cooper* dissent had no quarrels with the majority's caution against "convert[ing] burglary into a sentence enhancer for any crime committed in tandem with a trespass[,]" *Cooper*, 973 P.2d at 1236, and the statutory amendment was in no way intended to be so broad. But that will be the result if this Court interprets the current second degree burglary statute consistent with the government's argument. Indeed, the government's interpretation would create a felony any time a trespasser merely formed an intent to commit a crime—regardless of whether the crime was carried out or whether the intent was linked to the decision to trespass.

Below are some examples of the absurd results that would follow if the Court were to adopt the government's interpretation of the statute:

1. A group of inebriated college students decides to explore a closed construction site, committing a trespass. While there, one pulls out some dice, and they decide to stop and play a game of craps for money (the class 1 petty offense of gambling). Because they were already trespassers, the craps game converts the trespass into a burglary.

2. A homeless person enters an abandoned house to seek shelter during a snowstorm (trespass). While there, she breaks a wooden kitchen chair to build a fire in the fireplace (criminal mischief, class two misdemeanor). The trespass would become a class 3 felony burglary.

3. Upon invitation, Man A goes to Man B's house for the Broncos game. Man A says that Peyton Manning will be remembered as a better quarterback than John Elway. Man B says, "I cannot abide such talk! You are no longer welcome here. Get out of my house!" Man A resists leaving, insisting on arguing his point (and becoming a trespasser). Just before he leaves, Man A punches Man B saying, "That was for dating my wife when we were in high school!" and committing the class 1 misdemeanor of third degree assault. Although the assault had nothing to do with his reason for remaining (to argue football), because the intent to commit the assault was formed while he was a trespasser, the man would be guilty of the class three felony of second degree burglary.

4. Two teenage lovers, AA and BB, sneak into the latest romantic movie without paying. While in there, AA decides to take out a ballpoint pen and write on the back of a seat, "AA + BB = love." While this would normally be a class two misdemeanor of defacing property, AA is now facing 2-6 years in prison for second degree burglary.

5. In the previous scenario, AA takes out his pen and tells BB that he is going to prove his love by writing, "AA + BB = love" on the theater seat. Before he can do so, however, BB tells AA that she is breaking up with him. AA thus writes nothing. Because AA formed the intent to deface property while he was a trespasser, he is nonetheless guilty of second degree burglary.[2]

As the Court can see, if a burglary occurs any time a trespasser forms an intent to commit a crime, this will lead to absurd results. The Court thus must

[2] "[T]he trespasser is guilty of burglary even if the trespasser does not commit the intended crime." *Fuentes*, 258 P.3d at 323.

interpret the second degree burglary statute in a limiting manner so as to avoid such results. The only sensible way to do so is that suggested by the *Cooper* dissent, to require that the intent to commit a crime is linked to the decision to trespass or to remain unlawfully.

Additionally, if the government's interpretation is accurate, issues of fair notice are created. The language of the second degree burglary statute does not provide sufficient notice that any crime committed, or even intended, after an entry becomes unlawful is a burglary. Thus, the Court must interpret the amendment consistent with the *Cooper* dissent to require an intent to commit a crime *at the time that the decision to remain is made.*

4. The Evidence Does Not Support A Finding That Mr. Guzman Knew His Presence To Be Unlawful Instead Of Lawful Self-Help.

Furthermore, even under the government's interpretation, there is insufficient evidence that Mr. Guzman knowingly remained unlawfully with the intent to steal. In *Oram*, a division of this Court held that for a defendant to be convicted of burglary there must be sufficient evidence to prove that he knew his initial entry was unlawful or knew his remaining on the premises was unlawful. 217 P.3d at 897. Here, the evidence is that Mr. Guzman entered the home to assist in obtaining a refund for a defective game console. A reasonable interpretation of

the evidence is that Mr. Guzman believed his initial entry to return the game console and get a refund was lawful self-help. Thus, the jury would have had to find that he knew that his initial entry was unlawful and that he remained with the intent to steal and with knowledge that his remaining was unlawful. *Id.* at 897.

5. Conclusion.

This Court should find that the evidence is insufficient to prove beyond a reasonable doubt (1) that Mr. Guzman possessed the intent to steal at the time of entry, or (2) that he "remained" with the intent to steal, or (3) that, if he did remain, at the time that he decided to remain he did so knowing that his remaining was unlawful and with the intent to steal. Accordingly, the Court should vacate Mr. Guzman's conviction for burglary and remand for the entry of a judgment of acquittal on that count.

II. The Trial Court Plainly Erred In Giving An Erroneous Complicity Instruction.

The jury that convicted Mr. Guzman made clear that complicity was critical to its decision. Nevertheless, the jury was never properly instructed on the law of complicity. Due to the centrality of the error in this case, the error was plain and reversal is required.

The government first argues that the holding in *Bogdanov v. People*, 941 P.2d 247, 253 (Colo. 1997), supports its position. (AB at 14-15.) To be clear, Mr.

Guzman is not arguing that the faulty instruction amounted to structural error as the defendant argued in *Bogdanov*. *Id.* at 252. Rather, Mr. Guzman argues that in light of the Colorado Supreme Court's clear instruction in *Bogdanov* and its progeny, and in light of the importance of complicity to the jury's decision in this case, the error in giving the defective complicity instruction was plain. (OB at 17-18 (citing cases).)

As shown in Mr. Guzman's Opening Brief (OB at 17-18), there can be no question that by the time of Mr. Guzman's 2010 trial, the requirement to instruct consistent with *Bogdanov* was obvious. The government's reliance on *People v. Close*, 22 P.3d 933 (Colo. App. 2000), is misplaced because that case concerned a trial that took place years before *Bogdanov* was decided.

The failure to instruct properly on complicity is of constitutional magnitude since it lessened the prosecution's burden. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 25; *Kaufman v. People*, 202 P.3d 542, 550 (Colo. 2009) (finding plain error where erroneous instruction lessened prosecution's burden); *People v. Weinreich*, 119 P.3d 1073, 1076 (Colo. 2005) (finding plain error where trial court gave "obsolete," previously disapproved instruction).

The only question is whether "a reasonable possibility exists that the erroneous instruction contributed to [Mr. Guzman]'s conviction such that serious

doubt is cast upon the reliability of the jury's verdict." *Auman*, 109 P.3d at 665. As discussed in Mr. Guzman's Opening Brief (OB at 19-22), that reasonable possibility is borne out by (1) the prosecutor's closing argument, which urged the jury to convict on a theory of complicity liability and misstated the law consistent with the erroneous instruction, and (2) the question sent out by the deliberating jury, which demonstrated that complicity likely factored into its decision. *See People v. Fell*, 832 P.2d 1015, 1019 (Colo. App. 1991) ("The fact of [the jury's] inquiry itself demonstrates that they were confused by the definitional instruction.").

Here, the jury could have found that Mr. Guzman was aware of what the others were doing and that he assisted them, but the jury still could have had reasonable doubt that he did so with the intent that his own conduct promote or facilitate the commission of the crime by the principal(s). *See People v. Duran*, 272 P.3d 1084, 1090-91 (Colo. App. 2011) ("To be a complicitor, the person must have knowledge that the principal intends to commit the crime, must intend to promote or facilitate the commission of the offense, and must aid, abet, advise, or encourage the principal in the commission or planning of the crime."). Indeed, the deliberating jury's question indicated that it was grappling with complicity liability.

"The possible impact of the erroneous instruction ... cannot be overlooked." *Kaufman*, 202 P.3d at 550. The government does not dispute that the deliberating jury's one note made clear that complicity played a central role in its deliberations. During deliberations, the only thing the jury asked was, "What is the definition of complicity [and] how it relates to accusing or the charges?" (Sealed Envelope IV.) Were there any doubt that the complicity instruction was important to the jury's decision, the jury's note eliminated it. *See Ray v. American National Red Cross*, 696 A.2d 399, 407 (D.C. 1997) ("It is apparent that the initial instructions generated substantial confusion among the jurors for they asked for clarification. We may consider such requests from the jury in evaluating for harmless error."); *United States v. Petersen*, 513 F.2d 1133, 1136 (9th Cir. 1975) ("[T]he jury, by its requests for additional instructions had shown itself to be confused by the intent issue."). The significance of the question can be seen by the fact that it was the only question the jury asked during the entirety of deliberations.

The jury's confusion over the intent requirement for complicity liability is understandable in light of the prosecutor's closing argument, which exploited the inaccurate instruction to argue—contrary to the law—that Mr. Guzman was guilty simply if "he knew that others were doing it and he helped them do it[.]" (Tr.

6/9/10 at 35.) This argument focused on only one aspect of the dual mental state required and simply highlighted the need for a proper complicity instruction.

Instead of being properly instructed, however, the jury was left with the erroneous belief, with the faulty instruction and the misleading argument reinforcing one another, that mere knowledge and assistance, regardless of intent to promote or facilitate the commission of the crime, was sufficient to convict on a complicity theory. The effect of the erroneous instruction was essentially to lessen the prosecution's burden, requiring the prosecution to prove only half of the dual mental state required for complicity liability.

The trial court had years of case law from the Colorado Supreme Court and this Court to guide it as well as the statutory definition of complicity. In light of the evidence and argument in this case as well as the jury's question, "it is likely that [Mr. Guzman's] substantial rights were affected, and a reasonable possibility exists that the improper instruction contributed to [his] conviction." *Auman*, 109 P.3d at 665. As a result, the Court must find that the erroneous instruction amounted to plain error and reverse Mr. Guzman's convictions.

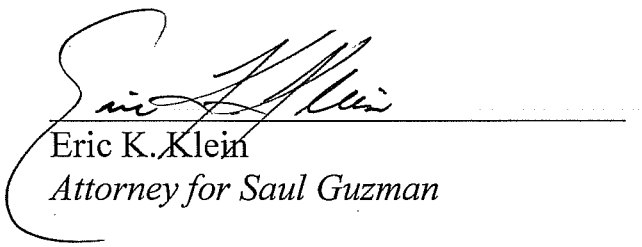
CONCLUSION

For all the reasons stated herein and in Mr. Guzman's Opening Brief, this Court should reverse Mr. Guzman's conviction for second degree burglary and

remand for entry of judgment of acquittal thereon. If the Court does not also reverse based on the erroneous complicity instruction, the Court should order entry of judgment on the lesser included offense of criminal trespass. If the Court reverses based on the erroneous complicity instruction, the Court should remand for a new trial on the offenses of criminal trespass, theft, and criminal mischief.

Respectfully submitted this 8th day of August 2012.

JOHNSON & BRENNAN, PLLC

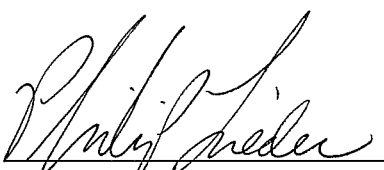


Eric K. Klein
Attorney for Saul Guzman

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF** was served by U.S. mail, postage prepaid this 8th day of August 2012, to the following:

Elizabeth Rohrbough
Senior Assistant Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203



Philip Lieder

APPENDIX A

Jury Instruction 11

JURY INSTRUCTION 11

The elements of the crime of Second Degree Burglary are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. unlawfully broke an entrance into or unlawfully entered
5. a dwelling
6. with intent to commit therein the crime of theft, as defined in instruction 12.

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of Second Degree Burglary.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of Second Degree Burglary.