IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **STEPHEN DEBOUVER,** Defendant and Appellant.	Court of Appeal No. B262455 Los Angeles County Superior Court No. BA420698

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the
Superior Court of the State of California
for Los Angeles County

Honorable Norman Shapiro, Judge

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INTRODUCTION

Appellant Stephen Debouver was convicted of residential burglary following a jury trial in which he represented himself. He made a timely request for the appointment of advisory counsel to assist him, but the trial court erroneously denied the motion. The court ruled that it would not appoint advisory counsel in any case, thereby abusing its discretion by failing to exercise it, and violating Mr. Debouver's rights under the Sixth Amendment. (Argument I.)

At trial, the conviction was procured through the use of an involuntary confession, in contravention of the state and federal

constitutional rights to due process. At the hearing on Mr. Debouver's motion to suppress the confession, the prosecution failed it's burden to prove that the statement was voluntary. Indeed, the interrogating officer admitted that Mr. Debouver was noticeably drunk when he gave the confession, yet the trial court ruled that intoxication alone can never render a statement involuntary, which is incorrect as a matter of law. Moreover, the court failed to listen to the audio recording of the interrogation, which was the key evidence bearing on Mr. Debouver's level of intoxication and the presence of police coercion. The recording reveals that the officers took advantage of a man who was intoxicated, ill, and mentally unstable, promised him leniency if he cooperated, insisted that he write out a confession, told him what to write, and denied him mental health treatment and the ability to urinate until he did, which rendered the statement involuntary and inadmissible. (Argument II.)

The confession should also have been excluded because the prosecutor affirmatively stated that he would not use it at the trial but later committed misconduct by revoking that promise and

impeaching Mr. Debouver with it after he testified. The prosecutor knew that Mr. Debouver's defense had all along been that he was so intoxicated that he blacked out, did not remember the incident or the interrogation, and lacked the specific intent to steal. Yet the prosecutor said he would not use the confession, allowed Mr. Debouver to testify with that understanding, and then introduced the confession to portray Mr. Debouver as a liar. (Argument III.)

In addition, there was insufficient evidence to support the jury's true finding on the special allegation that a person was present in the residence during the commission of the burglary, which elevated the offense to a "violent felony," thereby increasing the punishment. The location of the incident was a parking garage beneath an apartment complex, which did not connect to any residential unit in the complex. As a matter of law, it was not part of a "residence" for purposes of the person-present allegation. (Argument IV.) Alternatively, to the extent that the residential nature of the location was a factual issue for the jury to decide, the trial court's instructions

erroneously foreclosed that factual issue, effectively directing a guilty verdict as to the allegation. (Argument V.)

It is respectfully requested that this Court reverse the burglary conviction and afford Mr. Debouver a new trial, free from constitutional and evidentiary error. The Court should also reverse the person-present finding for insufficient evidence or grant Mr. Debouver a new trial on that allegation as well, with a properly instructed jury.

STATEMENT OF APPELLATE JURISDICTION

This appeal is from a final judgment of conviction following a jury trial. It is authorized by Penal Code[1] section 1237, subdivision (a).

STATEMENT OF THE CASE

Mr. Debouver was charged by information with first degree burglary (§ 459), a felony. (CT 60.) The information additionally alleged that another person was present in the residence during the commission of the burglary (§ 667.5, subd. (c)(21)), and that Mr.

[1] Unspecified statutory references are to the Penal Code.

Debouver had suffered one prior strike (§§ 667, subds. (b)-(i), 1170.12), one prior serious felony (§ 667, subd. (a)), and six prior prison terms (§ 667.5, subd. (b)). (CT 61-62.)

On March 12, 2014, Mr. Debouver waived his right to counsel and elected to represent himself. (CT 70; 1 Augm. RT A16-A17.)[2] On April 1, the court heard and denied his motion for advisory counsel. (CT 80; 2 Augm. RT A3.) On June 2, the court heard and denied his motion to suppress his statement to the police (Evid. Code, §§ 402, 405). (CT 86; 2 Augm. RT B25.)

On September 17, 2014, the prosecution announced that it was unable to proceed, and the court ordered the case dismissed (§ 1382). (CT 97; 1 Augm. RT B2-B4.) The information was refiled the same day. (CT 97; 1 Augm. RT B2-B4.) Mr. Debouver was rearraigned, pled not guilty, and waived a preliminary hearing. (CT 97; 1 Augm. RT B3-B4.)

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[2] "1 Augm. RT" refers to the volume of the augmented reporter's transcript labeled "ONE VOLUME ONLY," which contains the hearings on March 12, September 17, November 6, and November 12, 2014. "2 Augm. RT" refers to the volume labeled "VOLUME TWO OF TWO." "3 Augm. RT" refers to the volume also labeled "ONE VOLUME ONLY," which contains the hearing on January 8, 2015.

On October 21, 2014, the court heard and denied Mr. Debouver's motion to dismiss (§ 1382). (CT 109; 2 Augm. RT 8.) On November 12, the court heard and denied his motion to set aside the information (§ 995). (1 Augm. RT D3-D4.)

On November 13, 2014, the court heard and denied Mr. Debouver's motion to remove the judge as prejudiced against a party (Code Civ. Proc. § 170.6). (CT 117; 1 RT 4-5.) The court heard and granted his motion to bifurcate the matter of the prior convictions. (CT 117; 1 RT 2-3.)

The trial began on November 13, 2014, with the taking of evidence beginning on November 17. (CT 117, 120.) On November 19, Mr. Debouver waived his right to a jury for the priors trial. (CT 137; 3 RT 473.)

On November 20, 2014, the jury found him guilty of first degree burglary and found true the allegation that there was another person present in the residence. (CT 185; 3 RT 480-481.)

On February 11, 2015, the court found the priors allegations to be true. (CT 207.)

On March 3, 2015, the court heard and denied Mr. Debouver's motion for a new trial (§ 1181). (CT 236; 3 RT 523.) The same day, the court sentenced him to a state prison term of 13 years, calculated as follows: the middle term of four years for the burglary, doubled to eight years because of the prior strike, five years for the prior serious felony, and one year for each of the six prior prison terms, the latter of which was stayed. (CT 235-236; 3 RT 531-532.)

Mr. Debouver filed a timely notice of appeal on March 3, 2015. (CT 239.)

STATEMENT OF FACTS

On January 22, 2014, the resident manager of a Los Angeles apartment complex awoke in the early morning hours to multiple car alarms sounding in the parking garage. (1 RT 144.) He went down to the garage, found Mr. Debouver leaning over into an open rear door of a jeep, and asked if he lived there. (1 RT 145-147.) Mr. Debouver said, "Yes," and slowly walked toward the far end of the garage. (1 RT 148, 160.) He was wearing a backpack and had some

kind of metal bar in his hand. (1 RT 148-149, 162.) The driver's window of the jeep was smashed. (1 RT 146.)

Mr. Debouver retrieved his bicycle and walked up a stairwell that led into the center courtyard of the apartment complex, but the door was locked. (1 RT 149-150, 155.) He cursed, came back down, and went through a hallway that led to an outside exit. (1 RT 150.) The manager called the police. (1 RT 152.) He then went out to the corner and watched Mr. Debouver try several times unsuccessfully to mount his bike. (1 RT 156.) At one point, Mr. Debouver nearly fell over. (1 RT 165.) He appeared intoxicated. (1 RT 165.) He ultimately succeeded and rode away. (1 RT 156.)

Three of the 15 vehicles in the garage were damaged. (1 RT 106-107, 176-177.) Each had a broken window; some had blood inside or on them; and some had assorted papers strewn around. (1 RT 108-110, 130-131, 136, 139, 158-159, 174, 176-177.)

Around 4:00 a.m., officers located and detained Mr. Debouver a few blocks away. (1 RT 200-201.) He was compliant. (1 RT 202-203.) The officers did not see Mr. Debouver with anything in his hands

and did not see him discard anything. (1 RT 203-204.) They found a screwdriver in a nearby front yard, but Mr. Debouver said it was not his. (1 RT 204; 2 RT 334, 343.) The apartment manager identified Mr. Debouver, and he was arrested. (1 RT 157-158.)

Mr. Debouver had 49 items in his backpack. (1 RT 209.) However, only one item, an iPhone charger, was alleged to be stolen. (1 RT 126, 129, 178-179; 2 RT 234-236, 245.)

A detective testified that he saw a cut on Mr. Debouver's finger at the police station. (2 RT 229.) Blood inside the cars matched a DNA sample later taken from Mr. Debouver. (2 RT 223, 280-281.)

Mr. Debouver testified that he could not remember much from that night because he mixed prescription medications with an excessive amount of beer and tequila. (2 RT 316, 322.) He was taking three medications,[3] for anxiety and depression, had several drinks, and lost track of how many pills he had taken. (2 RT 316.) He remembered riding his bike in Hollywood, but he could not recall

[3] The parties stipulated that, during his custody in county jail for this incident, Mr. Debouver was prescribed anti-anxiety medication. (2 RT 322-323.)

how he got to the apartment complex, nor how he got into the garage. (2 RT 316.) He had no memory of being in the garage at all. (2 RT 317.) He testified that all of the property in his backpack belonged to him. (2 RT 317-318, 320.)

Mr. Debouver remembered crashing his bike and scraping his face and elbow. (2 RT 316.) He also recalled the police shining their lights on him as they detained him. (2 RT 317.)

Mr. Debouver testified that he did not remember speaking with the police after his arrest. (2 RT 334.) The prosecution then played portions of an audiotaped interrogation at the police station. (2 RT 335.) In those excerpts, Mr. Debouver said he "jimmied" his way into the garage with a screwdriver. (CT 124.) He said he entered four or five parking garages that night and broke in to five or six cars. (CT 125, 128.) Subsequently, he said he only remembered breaking in to one van. (CT 126-127.)

Mr. Debouver told the police that he was unsure of whether he broke the vehicles' windows with a screwdriver or his hand. (CT 128-129.) He remembered a man asking him if he owned the vehicle

by which he was standing. (CT 127.) He said, "No," and left on his bike. (CT 127.)

At the trial, confronted with this recording, Mr. Debouver remained firm that he did not remember speaking with the police that morning. (2 RT 338.) He also noted that he did not sound coherent in the recording. (2 RT 336-337, 340.) And it sounded as though he was making up his answers as he went along. (2 RT 347.)

He suggested that the reason he remembered more details of the incident during the interrogation than he did afterward may have been because he was still under the influence of the alcohol and medications during that conversation and had not yet gone to sleep.[4] (2 RT 342.) When he later awoke in the police station, he did not remember why he was there. (3 RT 368.) He gave the analogy of a person who becomes intoxicated, drives home, tells someone about

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[4] In rebuttal, an officer opined that, at the time of the interrogation, Mr. Debouver appeared to be under the influence of alcohol, but did not appear "unconscious," and seemed more ill than intoxicated, like he had the flu. (3 RT 375-378.) At the preliminary hearing, the same officer had testified that Mr. Debouver was noticeably drunk. (2 Augm. RT B15.)

the evening he had, but then cannot remember the next morning how he got home because he was blacked out. (2 RT 358.)

After sobering up, Mr. Debouver could not explain why he broke in to cars that night. (2 RT 344.)

He acknowledged two prior felony convictions for theft-related crimes, in 1995 and 2008. (3 RT 370.)

ARGUMENT

I. THE BURGLARY CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED THE SIXTH AMENDMENT BY DENYING MR. DEBOUVER'S MOTION FOR THE APPOINTMENT OF ADVISORY COUNSEL.

A. Introduction and Background

On March 12, 2014, Mr. Debouver waived his right to counsel and chose to represent himself. (RT 6-17.) A short time later, on April 1, he moved for the appointment of advisory counsel to assist him. (2 Augm. RT A3.) The trial court summarily denied the motion, ruling:

> Mr. Debouver, the court does not appoint advisory counsel. . . . [¶] So I'm going to deny that. . . . [¶] There may be some counties in other states that do that, but we are not required to do that, and we don't do that. If you represent yourself, fine. If for some reason you can't,

> [your appointed standby counsel] will be able to step in on your behalf.

(2 Augm. RT A3.)

The court's ruling was error. Advisory attorneys play a vital role in guaranteeing the Sixth Amendment rights of defendants proceeding *in propria persona*. To the extent that the Constitution permits trial courts the discretion to grant or deny advisory counsel in the interests of justice, the court here abused that discretion by failing to exercise it. The California Supreme Court has long held that the erroneous denial of advisory counsel is reversible *per se*, due to courts' inability to accurately ascertain the effect of the deprivation on the resultant proceedings. Moreover, in the present case, there are clear indications that the denial of advisory counsel was prejudicial, as there were concrete ways in which the advice of counsel could have made a critical difference in the outcome. Mr. Debouver should be afforded a new trial.

B. The Trial Court Violated Mr. Debouver's Sixth Amendment Right to Appointment of Advisory Counsel.

A *pro per* defendant's right to the appointment of advisory counsel derives from two aspects of the Sixth Amendment. First, the Sixth Amendment establishes the defendant's right "to have the Assistance of Counsel for his defense." Denial of counsel at a critical stage of the proceedings violates that right and requires *per se* reversal. (See *United States v. Cronic* (1984) 466 U.S. 648, 659 (*Cronic*) [critical stage]; *Johnson v. United States* (1997) 520 U.S. 461, 468-469 (*Johnson*), citing *Gideon v. Wainwright* (1963) 372 U.S. 335 (*Gideon*) [*per se* reversal]; *Geders v. United States* (1976) 425 U.S. 80, 88 (*Geders*) [Sixth Amendment violation where defendant denied right to consult with counsel during overnight recess]; see also *Herring v. New York* (1975) 422 U.S. 853, 857 (*Herring*) [Sixth and Fourteenth Amendments do not permit restrictions on function of counsel].)

Second, the Sixth Amendment protects a defendant's right to represent himself, and appointment of advisory counsel effectuates that right. In *Faretta v. California* (1975) 422 U.S. 806, 819 (*Faretta*), the

Supreme Court held that "[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." The Constitution does not force a defendant to accept the appointment of counsel, but rather gives him the right to control his own defense. (*Ibid*.) "It is the defendant," after all, "who must be free personally to decide whether in his particular case counsel is to his advantage. And . . . his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' [Citation.]" (*Id*. at p. 834.)

In this regard, it is important to distinguish advisory counsel from standby counsel. Where the accused chooses professional representation, he gives up tactical control of the defense. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1165, fn. 14. (*Hamilton*).) On the other hand, if the defendant exercises his *Faretta* right, he assumes primary control. (*Ibid*.) In the latter situation, the court may appoint standby counsel to be available to step in and take over if the defendant no longer wishes to represent himself, but standby counsel does not participate unless it is necessary to terminate the self-representation.

(*Ibid*.) An additional option is for a *pro per* defendant to maintain strategic control over the representation but have advisory counsel appointed to assist him. (*Ibid*.) This necessarily supports and effectuates the *pro per* defendant's constitutional right to successfully present the defense of his choosing.

Despite the vital role of advisory counsel in implementing Sixth Amendment rights, the California Supreme Court has held that defendants do not have a constitutional right to advisory counsel. (*People v. Moore* (2011) 51 Cal.4th 1104, 1119-1120 (*Moore*).) In so holding, the Court relied on dictum in *McKaskle v. Wiggins* (1984) 465 U.S. 168 (*Wiggins*), which does not support that conclusion.

At issue in *Wiggins* was the defendant's claim that his standby counsel violated his *Faretta* right by participating in the defense over the defendant's objection. (*Wiggins*, *supra*, 465 U.S. at p. 170.) In the course of the opinion, the High Court observed that "*Faretta* does not require a trial judge to permit 'hybrid' representation of the type Wiggins was actually allowed." (*Id*. at p. 183.) This statement was dictum, as it played no part in the holding of the case. The Court was

addressing the unsolicited participation of standby counsel. It did not purport to pass on the issue of whether the Constitution requires the appointment of advisory counsel to effectuate the defendant's *Faretta* right in appropriate cases. Moreover, the quoted statement only points out that nothing in the Court's *Faretta* opinion itself requires a trial court to allow hybrid representation. Indeed, hybrid representation was not at issue in *Faretta*.

Thus, the California Supreme Court's decision in *Moore* misapplied *Wiggins* when it held that a defendant has no constitutional right to hybrid representation. (*Moore*, *supra*, 51 Cal.4th at pp. 1119-1120 [no abuse of discretion where trial court appointed advisory counsel instead of co-counsel].) This is not to say that the Constitution requires the appointment of advisory counsel in every case where the defendant represents himself. Analogously, the *Faretta* right is subject to reasonable restrictions. It must be asserted unequivocally and a reasonable time prior to trial. (*People v. Lynch* (2010) 50 Cal.4th 693, 721 (*Lynch*).)[5] But it violates the Sixth

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[5] Abrogated on another point by *People v. McKinnon* (2011) 52 Cal.4th 610, 637 (*McKinnon*).

Amendment to deny a properly presented motion for advisory counsel. (Cf. *ibid*.)

By denying Mr. Debouver's timely motion for advisory counsel, the trial court violated his rights under the Sixth Amendment.

C. The Trial Court Also Abused Any Discretion Conferred Upon It by Failing to Exercise It.

To the extent that the Constitution permits trial courts discretion in deciding whether to appoint advisory counsel, the court here abused that discretion by failing to exercise it. The court stated, "There may be some counties in other states that do that, but we are not required to do that, and we don't do that." (2 Augm. RT 3.) Whether the court was referring to the entire State of California, the County of Los Angeles, or merely that court's practice, its blanket statement that advisory counsel would not be appointed in any case was a failure to exercise its discretion. "'[A] ruling otherwise within the trial court's power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law.' [Citation.]" (*People v. Downey*

(2000) 82 Cal.App.4th 899, 912 (*Downey*).) "'Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal.' [Citation.]" (*Ibid*.)

Additionally, to the extent that the court's statement was a legal conclusion that, in California, *pro per* defendants are not afforded advisory counsel, the court abused its discretion by resting its decision on an error of law. (See *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 742.) While the California Supreme Court has found no constitutional right to advisory counsel, the Court has "long recognized that trial courts retain the discretion to permit the sharing of responsibilities between a defendant and a defense attorney when the interests of justice support such an arrangement" (*Moore*, *supra*, 51 Cal.4th at p. 1120), and that courts abuse this discretion where they fail to exercise it. (*People v. Bigelow* (1984) 37 Cal.3d 731, 742 (*Bigelow*).) Under the Court's precedent, appointment of advisory counsel is "'within the sound discretion of the trial judge, who is in a position to appraise the courtroom situation and

determine what procedure will best promote orderly, prompt and just disposition of the cause.'" (*Ibid*., quoting *People v. Mattson* (1954) 51 Cal.2d 777, 797 (*Mattson*).) "California courts have frequently exercised their discretion to appoint advisory counsel." (*Id*. at p. 742.)

A court's failure to exercise its discretion whether to appoint advisory counsel is "serious error." (*Bigelow*, *supra*, 37 Cal.3d at p. 743 [court abused its discretion by ruling that California law did not permit advisory counsel]; accord *People v. Crandell* (2002) 46 Cal.3d 833, 862 (*Crandell*)[6] [court's statements, "No, there is no such thing" and "I wouldn't appoint that kind of counsel anyway," were abuse of discretion].) The present case is indistinguishable from *Bigelow* and *Crandell* with respect to the trial court's erroneous failure to exercise its discretion. As explained below, this serious error mandates reversal.

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[6] Abrogated on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364 (*Crayton*).

D. The Denial of Advisory Counsel Is Reversible *Per Se*.

1. The violation of Mr. Debouver's Sixth Amendment rights is structural error requiring reversal.

Mr. Debouver has explained that the trial court's failure to appoint advisory counsel undermined his *Faretta* right to represent himself as well as his right to the assistance of counsel, both protected by the Sixth Amendment. The constitutional right to represent oneself is a fundamental, structural right, the erroneous deprivation of which is reversible *per se*. (*Wiggins*, *supra*, 465 U.S. at p. 177, fn. 8; *People v. Ruiz* (1983) 142 Cal.App.3d 780, 788 (*Ruiz*); *Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1534 (*Moon*) ["[T]he right of self-representation is rooted in the historical underpinnings of our adversarial system of criminal justice and is one of the few rights that compel automatic reversal when transgressed."].) The right to counsel is also a fundamental right, the denial of which is structural error requiring reversal. (*Johnson*, *supra*, 520 U.S. at pp. 468-469, citing *Gideon*, *supra*, 372 U.S. 335 [denial of counsel]; *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 149

(*Gonzalez-Lopez*) [denial of the right to counsel of choice].) While the United States Supreme Court has not yet specifically identified denial of advisory counsel as structural error, such a holding is a logical extension of the High Court's cases cited above. The denial of advisory counsel should be deemed constitutional, structural error demanding *per se* reversal without a particularized demonstration of prejudice.

At a minimum, because the court's ruling was a violation of the Sixth Amendment, it is subject to the *Chapman* standard for federal constitutional errors, which mandates reversal unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) "[F]or error under the United States Constitution . . . prejudice . . . is *presumed* unless the *government* shows that the defect was harmless beyond a reasonable doubt." (*People v. Roybal* (1998) 19 Cal.4th 481, 520 (*Roybal*), emphasis added.) Here, the state could not meet its burden to show that the error made "no difference in reaching the verdict obtained" (*Yates v.*

Evatt (1991) 500 U.S. 391, 407 (*Yates*)),[7] because there were critical ways in which the assistance of advisory counsel could have yielded a more favorable outcome for Mr. Debouver, as described in detail below.

2. The court's failure to exercise its discretion is also reversible *per se* under California law.

Apart from a constitutional violation, the California Supreme Court has held that a trial court's failure to exercise its discretion regarding whether to appoint advisory counsel is "serious error" requiring *per se* reversal in cases where it would have been an abuse of discretion to deny it. (*Crandell*, *supra*, 46 Cal.3d at p. 861; *Bigelow*, *supra*, 37 Cal.3d at pp. 744-746.) In *Bigelow*, the Court recognized that deprivations of the right to self-representation and the right to counsel have been held to be reversible without a particularized showing of prejudice, and that "the same rule of per se reversal should apply" to the erroneous failure to appoint advisory counsel. (*Id*. at p. 744.) "When the right to counsel is at stake courts generally do not attempt to assess prejudice by speculating as to what tactics

[7] Disapproved on another point in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4 (*Estelle*).

should have been employed, or what objections raised, by a better represented or advised defendant." (*Ibid*.) *Bigelow* further relied on "the impossibility of assessing the effect of the absence of counsel upon the presentation of the case." (*Id*. at p. 745.) Harmless error analysis "'would require an impossibly speculative comparison between the . . . *pro se* strategy and that of counsel.' [Citation.]." (*Ibid*.) "'[N]o realistic measure of prejudice resulting from counsel's nonparticipation can be made when, because of the very absence thereof, the record fails to reflect what different direction the proceedings might have taken and what different results might have obtained.' [Citation.]" (*Ibid*.)

Factors to be taken into account by a trial court in determining whether to appoint advisory counsel include "the defendant's demonstrated legal abilities and the reasons for seeking appointment of advisory counsel." (*Crandell*, *supra*, 46 Cal.3d at p. 863.) Advisory counsel should be denied if the defendant is engaged in a "manipulative endeavor" to obtain the appointment of private counsel instead of the public defender. (*Ibid*.)

In *Bigelow*, the Court held that reversal *per se* was required because the trial court abused its discretion, in light of the facts that the defendant had only a ninth-grade education, was Canadian, with no familiarity with California law, and had been charged with four special circumstances under the 1978 death penalty initiative, two of which had to yet to be judicially construed. (*Bigelow*, *supra*, 37 Cal.3d at p. 743.) Here, Mr. Debouver was not charged with a capital crime and special circumstances. However, *Bigelow* treated that as only one factor. The Supreme Court held that the trial court's failure to exercise its discretion was "in itself serious error," which "gain[e]d in significance" because of the particularly complex nature of the case. (*Ibid*.) *Bigelow* did not hold that a capital prosecution was a prerequisite to entitlement to advisory counsel.

Furthermore, Mr. Debouver's case was quite complicated to defend. He was caught "red-handed" in the parking garage, leaning into a smashed car window, and his DNA matched blood found in the vehicles. He confessed to the crime and, as explained further below, lacked knowledge of legal procedure and was caught by

surprise when the prosecutor impeached his testimony with the confession. Moreover, Mr. Debouver faced the serious allegation that the crime was a "violent felony" because there was a another person "present in the residence" during the commission of the burglary. (§ 667.5, subd. (c)(21).) The jury's true finding resulted in Mr. Debouver being required to serve 85 percent of an already long, second-strike sentence, instead of the usual 50 percent. (See *People v. Singleton* (2007) 155 Cal.App.4th 1332, 1336-1337 (*Singleton*).) This was a complex issue, requiring significant legal knowledge, and one that the trial court itself got wrong in its jury instruction. (See Argument V, *post*.) Yet Mr. Debouver entirely failed to raise the claim and effectively conceded one of the most prejudicial issues in the trial.

The record does not reveal how Mr. Debouver's education might compare to the ninth-grade education of the *Bigelow* defendant. To the extent that the appellate record is inadequate to fully analyze the totality of the circumstances, however, that is attributable to the trial court, not Mr. Debouver. The court

immediately and unequivocally denied the motion, preventing development of the record. This complication in assessing the trial court's error is an additional reason why *per se* reversal is warranted. (See *Bigelow*, *supra*, 37 Cal.3d at p. 745.)

Nothing in the record suggests that Mr. Debouver was being in any way manipulative when he requested advisory counsel. Rather, he sought to control his own defense but recognized that he was not a trained lawyer and would benefit from the advice of an advisory attorney. There were no compelling grounds for denying the request; it would have been an abuse of discretion to do so. Instead, the trial court erroneously failed to give the request proper consideration, to Mr. Debouver's great detriment.

3. *Crandell* is distinguishable.

In *Crandell*, the Supreme Court held that reversal *per se* was not required because, although the trial court failed to exercise its discretion, it would not have been an abuse of discretion to deny advisory counsel in that case. (*Crandell*, *supra*, 46 Cal.3d at pp. 863-864.) *Crandell* distinguished *Bigelow* on the bases that Crandell had

an eleventh-grade education, as opposed a ninth-grade education, and was charged with only one murder special circumstance, which had been judicially construed. (*Ibid*.) The Court acknowledged that "these distinctions are relatively slight . . . ." (*Id*. at p. 864.) However, it found most important that Crandell had "demonstrated substantial competence" in the pretrial proceedings, prior to his motion for advisory counsel, of which the trial judge was aware. (*Ibid*.) Most notably, at the preliminary hearing, Crandell had "engaged in skillful examination and cross-examination" and otherwise performed well. (*Ibid*.) The trial court remarked, "I am well aware how smart you are and how good you are [at] handling your case . . . ." (*Ibid*.)

Crandell is readily distinguishable from the present case. Unlike in *Crandell*, where the defendant performed well on his own at the preliminary hearing, Mr. Debouver was represented by counsel at his preliminary hearing. (CT 1.) The only substantive motion he prepared *pro per*, prior to the court's denial of advisory

counsel,[8] was a confusing "Motion to Exclude Evidence That Was Excluded as Evidence," filed the same day as the denial of advisory counsel. (CT 74.) The motion complained of "gross negligence" in the handling of Mr. Debouver's backpack because it was "driven all over Los Angeles." (CT 74.) Additionally, unlike in *Crandell*, the trial court did not make any finding, prior to denying Mr. Debouver's motion, that it was aware of how smart he was and that he was good at handling his case.[9]

Crandell therefore does not provide a basis to find that the trial court in the present case would not have abused its discretion by denying Mr. Debouver the assistance of advisory counsel, if the court had exercised that discretion.

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[8] Abuse of discretion is evaluated based on the facts and circumstances known to the trial judge at the time of the exercise of discretion. (*People v. Box* (2010) 23 Cal.4th 1153, 1195 (*Box*), disapproved on another point in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10 (*Martinez*).)

[9] In fact, after the trial, the court told Mr. Debouver that he had been "beyond [his] depth" in trying to represent himself. (3 RT 520.)

4. Even assuming *arguendo* that it would not have been an abuse of discretion to deny advisory counsel, reversal would still be required under *Watson*.

In cases where the trial court has failed to exercise its discretion, if the appellate court determines that it would not have been an abuse of discretion to deny advisory counsel, that does not end the inquiry. It only precludes *per se* reversal. (*Crandell*, *supra*, 28 Cal.4th at pp. 864-865.) The failure to exercise discretion remains serious error, and the appellate court must determine whether that error prejudiced the appellant under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), which requires reversal if it is reasonably probable that the defendant would have obtained a more favorable result in the absence of the error. (*Crandell*, *supra*, 28 Cal.4th at pp. 864-865.)

Watson does not require that it is more likely than not that the error affected the outcome. (*Woodford v. Visciotti* (2002) 537 U.S. 19, 22 (*Woodford*) [addressing reasonable probability under *Strickland*]; *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 (*College Hospital*) [reasonable probability has same meaning under *Strickland* and *Watson*].) Rather, there need only be "'a *reasonable chance*, more

than an *abstract possibility*.' [Citation.]" (*People v. Wilkins* (2013) 56 Cal.4th 333, 351 (*Wilkins*), emphasis in original.) Reversal is required if there is more than an abstract possibility that one juror would have harbored a reasonable doubt. (*Ibid*.; *Cone v. Bell* (2009) 556 U.S. 449, 452 (*Cone*).)

Here, there is far more than an abstract possibility that the assistance of advisory counsel in the defense would have created reasonable doubt for a least one juror. Mr. Debouver's two most critical points of failure prejudicing his defense were things that advisory counsel could easily have remedied. First, Mr. Debouver's defense was that severe intoxication from alcohol and pills rendered him in blacked-out state and prevented him from forming the specific intent to enter the garage for the purpose of theft. But he failed to successfully present relevant evidence of his intoxication and was caught by surprise when his testimony on this point was impeached with a taped confession he had never even heard. Second, he failed to recognize the error in the court's jury instructions defining the meaning of "residence" for purposes of the allegation

that a person was present in a residence during the burglary. That erroneous instruction effectively directed the verdict on the allegation, which greatly increased his sentence for the burglary.

With regard to the intoxication issue, Mr. Debouver testified that he took several prescription medications, which caused a bad reaction in combination with his overindulgence in alcohol, resulting in memory loss and a lack of specific intent. (2 RT 316-317, 322, 334, 344.) Indeed, he adamantly made this claim all along, including during pretrial proceedings, in which he observed that the pills were in his backpack when he was arrested. (2 Augm. RT B21.) However, he failed to present evidence that the pills were in fact in his backpack. Advisory counsel could easily have assisted him in obtaining the jail property records. Mr. Debouver also failed to present any expert testimony explaining the effects of excessive alcohol and prescription medications on one's ability to form the specific intent to commit a crime. (See, e.g., *People v. Stone* (1994) 27 Cal.App.4th 276, 282 (*Stone*) ["The expert testimony regarding methamphetamine intoxication suggested defendant may not have

formed the specific intents required for some of the charged offenses . . . ."].) And he failed to request an instruction that would have explained to the jurors that "[v]oluntary intoxication may cause a person to be unconscious of his or her actions," and "[a] very intoxicated person may still be capable of physical movement but may not be aware of his or her actions or the nature of those actions." (CALCRIM No. 626 [discussing the effect of unconsciousness on homicide crimes, but equally applicable here].)

Mr. Debouver was caught by surprise when the prosecution impeached his testimony, that he blacked out and did not remember the incident, with portions of an audiotaped confession. (2 RT 329-330; 3 RT 520.) The confession was the most damaging evidence because Mr. Debouver could remember details of the incident at that time. The prosecutor was able to argue that this showed that Mr. Debouver was not telling the truth about being so intoxicated that he had memory loss. (3 RT 439-440.) He painted Mr. Debouver as a liar. (3 RT 440.) Mr. Debouver had no idea that the prosecution could impeach him with the confession, when it had declined to use it in its

case in chief, which advisory counsel would have told him. (2 RT 329-330; 3 RT 520.)

It cannot be known precisely how Mr. Debouver's defense presentation would have changed if he had been properly informed of the law regarding impeachment (a factor that supports *per se* reversal).[10] He could have chosen to rely on witnesses' testimony that he appeared drunk, instead of testifying and exposing himself to impeachment.

Certainly, it was extremely ineffective defense practice for Mr. Debouver to be unaware of the possibility of impeachment, and with a confession that he had never even heard. He attempted to listen to the CD the prosecution provided, but the equipment was too poor to hear anything (3 RT 490) -- another point at which the assistance of advisory counsel would have been critical.

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[10] "The most we could do would be to identify points in the trial where competent counsel might have advised [defendant] to do something different, wonder whether [defendant] would follow the advice, and speculate about the impact of the advice on the outcome of the trial. Even that effort would not disclose the possibility that counsel might advise [defendant] to seek out evidence and witnesses which do not appear in the present record." (*Bigelow*, *supra*, 37 Cal.3d at pp. 745-746.)

In an attempt to salvage the situation, Mr. Debouver asked to play not just the prosecution's select portions of the confession, but the entire recording, to show the jury that he was indeed intoxicated. (3 RT 367-368.) But he never had a transcript prepared, something his advisory counsel would have told him to do and could have assisted him with, and so he was denied permission to play the audio for the jurors. (3 RT 367-368.)

In his testimony, Mr. Debouver averred that it is possible for a person to remember details of an incident while still under the effects of the intoxication but then forget them the next day. (2 RT 358.) Yet he failed to present any expert testimony to corroborate this argument. (See, e.g, *People v. Daniels* (2009) 176 Cal.App.4th 304, 318 (*Daniels*) [expert testified at pretrial hearing that "a person who had consumed a lot of alcohol and suffered a blackout could have a conversation during the blackout that the person would not remember afterwards due to his or her alcohol consumption," and that "a person who had a blackout might 'fill in the gaps' in his or her memory 'with confabulation;' though it was not abuse of discretion

to exclude this testimony at trial because there was insufficient foundation that the defendant blacked out].)

Moreover, Mr. Debouver's procedural inexperience led him to unintentionally forego evidence that could have undermined the inculpatory value of the confession. Mr. Debouver had retained a confessions expert who would have told the jury that the police used coercive tactics to extract information from a vulnerable, intoxicated arrestee. (3 RT 403-405, 520.) But due to inadequate efforts, as well as Mr. Debouver's erroneous belief that the confession could not be used for impeachment, the expert was not subpoenaed for the trial. (3 RT 403-405, 489, 520.)

With respect to the jury instruction regarding the allegation that a person was present in the "residence," as explained in detail in Argument V, the court erred by instructing the jury that the garage in the basement of the apartment complex counted as a residence for

this purpose, making the crime a "violent felony."[11] (§ 667.5, subd. (c)(21).) Advisory counsel would have recognized that a critical factual issue was being taken away from the jury and would have called the error to the court's attention. Instead, Mr. Debouver accepted the erroneous instruction and suffered a significant increase in his sentence.

There is more than an abstract possibility that the assistance of advisory counsel would have made a determinative improvement in Mr. Debouver's presentation of his defense. As the trial court explicitly recognized, Mr. Debouver was "beyond [his] depth." (3 RT 520.) The court further observed, in denying Mr. Debouver's motion for a new trial, "I'm hearing a number of complaints that you are making that would not have occurred and situations that would not have arisen had you been represented by counsel . . . ." (3 RT 521.)

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[11] In Argument *IV*, Mr. Debouver also explains that there was insufficient evidence as a matter of law that the garage was a "residence." But if this Court concludes it was a factual matter for a properly instructed jury to decide, then this is another instance where advisory counsel would have assisted appellant, by securing correct instruction.

In these ways, even assuming *arguendo* that the appointment of advisory counsel was not mandatory in this case, it was serious error for the court to fail to exercise its discretion, and that error significantly prejudiced Mr. Debouver's defense presentation, requiring reversal for a new trial.

E. Conclusion

The trial court's denial of Mr. Debouver's timely motion for the appointment of advisory counsel violated the Sixth Amendment, requiring reversal. If this Court finds that there is no constitutional right to the appointment of advisory counsel, the trial court's failure to exercise its discretion was nonetheless reversible *per se* under California Supreme Court precedent because there was no cause to deny the motion, and it would have been an abuse of discretion to do so. Even assuming for argument that the court would have been within its discretion to refuse the request, the failure to exercise its discretion requires reversal under *Watson* because there is more than an abstract chance that the lack of advisory counsel critically

undermined Mr. Debouver's defense and affected the outcome of the proceedings.

II. THE BURGLARY CONVICTION MUST BE REVERSED, AND THE CONFESSION MUST BE SUPPRESSED, BECAUSE IT WAS INVOLUNTARY, IN VIOLATION OF MR. DEBOUVER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS.

A. Introduction

The trial court's denial of Mr. Debouver's motion to suppress must be reversed, and the confession must be suppressed, for one or both of the following reasons: (1) based on the testimony at the hearing, the prosecution did not satisfy its burden to prove that Mr. Debouver gave his confession voluntarily; and (2) the court abused its discretion by failing to listen to the audio recording of the interrogation, which was the critical piece of evidence as to whether the confession was voluntary, and which showed that it was not. Admission of the involuntary confession violated Mr. Debouver's state and federal constitutional rights to due process.[12]

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[12] Mr. Debouver's motion to suppress argued both that the confession violated *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and that it was involuntary. The reason this brief challenges only the voluntariness determination is that the confession came into evidence through the prosecution's impeachment of Mr. Debouver's

First, the prosecution had the burden to prove that the statement was voluntary, and the evidence at the hearing failed that burden. The arresting officer testified that he could tell Mr. Debouver was drunk during the interrogation. Mr. Debouver testified that he was intoxicated to the point of blacking out and did not remember the incident or the interrogation, due to a combination of excessive alcohol and psychiatric medication. His testimony was uncontroverted. Yet the trial court ruled that intoxication alone could not render Mr. Debouver's statement involuntary, which was legally erroneous. Because the prosecution did not satisfy its burden to prove that Mr. Debouver was not so intoxicated that his confession was involuntary, the trial court's denial of the motion must be reversed and the evidence suppressed.

Second, the trial court also erred by failing to consider the crucial piece of evidence as to Mr. Debouver's condition and the presence of police coercion: the audio recording of the interrogation.

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testimony. A statement is admissible for impeachment if it violates *Miranda*, but not if it is "involuntary or coerced." (*Oregon v. Hass* (1975) 420 U.S. 714, 722 (*Hass*); see *People v. Nguyen* (2015) 61 Cal.4th 1015, 1075 (*Nguyen*) [citing *Hass* and noting inadmissibility for impeachment where there is coercion or duress].)

The recording would have shown that coercive police tactics in obtaining the confession, particularly in light of Mr. Debouver's weakened state due to intoxication, illness, and mental instability, violated his right to due process.

At trial, the prosecution's impeachment of Mr. Debouver's testimony with his confession fundamentally undermined his defense, necessitating reversal of his conviction.

B. Background

In his written motion to suppress, Mr. Debouver challenged the confession as involuntary and obtained in violation of *Miranda* because he was intoxicated. (CT 81-82.)

At the June 2, 2014 hearing, prior to testimony, Mr. Debouver told the court that he wanted the audio recording of the interrogation to be played. (2 Augm. RT B3.) The court replied, "One step at a time, sir." (2 Augm. RT B3.)

The prosecution called Officer Tony Im, one of the arresting officers, who testified that he responded to the location of a reported burglary, met with the apartment manager, and observed the

damaged vehicles. (2 Augm. RT B5-B6, B8.) The manager told the officer that he heard car alarms, and he later identified Mr. Debouver as the person he had seen in the garage. (2 Augm. RT B6-B8.) He reported that he had a short conversation with Mr. Debouver, who then walked away with his bicycle. (2 Augm. RT B7-B8.) The manager briefly followed Mr. Debouver down the street and then called the police. (2 Augm. RT B8.) Mr. Debouver was located, detained, arrested, and transported to the station. (2 Augm. RT B9.)

Officer Im further testified that he interviewed Mr. Debouver at the station. (2 Augm. RT B9.) He read the *Miranda* admonishments prior to the interview, and Mr. Debouver waived each of the rights. (2 Augm. RT B9-B10.) Officer Im started the interview on his own; Detective Raul Lopez joined them in the middle. (2 Augm. RT B10-B11.) The officer told the detecive that Mr. Debouver had waived his *Miranda* rights earlier in the interrogation. (2 Augm. RT B11.)

At this point in the hearing, the prosecutor asked if the court would like to the hear the recording. (2 Augm. RT B11.) The court

told the prosecutor to continue with her examination, "and we'll see if we need to play it." (2 Augm. RT B12.)

The People introduced an exhibit with an investigation report, stating that Mr. Debouver had said he understood each of the *Miranda* rights. (2 Augm. RT B12-B13.) Officer Im was the one who wrote "Yes" next to each right, however, not Mr. Debouver. (2 Augm. RT B13.) The police also had Mr. Debouver write and sign a handwritten statement, in which he admitted breaking in to vehicles. (2 Augm. RT B13-B14.)

On cross-examination, Officer Im acknowledged that he could tell Mr. Debouver was drunk during the interrogation. (2 Augm. RT B15.) When Mr. Debouver finished his questions, before the officer left the stand, the court said, "Mr. Debouver, [the prosecutor] has the C.D. I don't know that it's necessary to play. If you have a request, I'll certainly hear the request. I'm not sure I'd grant it. What's your request, if any?" (2 Augm. RT B16.) Mr. Debouver replied, "Well." (2 Augm. RT B16.) The court then interjected and reminded Mr. Debouver that the issue to be decided was "whether you freely and

voluntarily and intelligently waived your rights, and then the nature of the statement." (2 Augm. RT B17.) Mr. Debouver argued that he was under the influence and blacked out; therefore, he could not make a rational decision. (2 Augm. RT B17.) The court said that Officer Im's testimony demonstrated that Mr. Debouver was under the influence, at least in the officer's opinion. (2 Augm. RT B17.) The court elicited that Mr. Debouver had no more questions for the officer and excused him. (2 Augm. RT B17.) The court then invited Mr. Debouver to testify if he so chose. (2 Augm. RT B18.)

Mr. Debouver took the stand and testified that he blacked out due to intoxication and did not remember the incident or the interrogation. (2 Augm. RT B19.) He said that he remembered he was in Hollywood, he drank a lot of alcohol, and he took psychiatric medication he was prescribed, including Klonopin, Wellbutrin, and a third medication as to which the court reporter wrote "(inaudible)." (2 Augm. RT B19-B21.) He argued that his will was overborne and his statement was not voluntary. (2 Augm. RT B19.)

Mr. Debouver called the court's attention to handwritten documents he had submitted to the court in the course of the pretrial proceedings, in order to show that his handwriting in his written confession revealed that he was intoxicated. (2 Augm. RT B19-B20.) He said that he was not in the right state of mind to give a statement and moved to exclude it. (2 Augm. RT B20.)

Mr. Debouver then asked to play the audio recording. (2 Augm. RT B20.) The court replied, "Well, I don't think we need to hear the audio." (2 Augm. RT B20.) The court added, "Well, maybe that would shed some light on your sobriety that night." (2 Augm. RT B20.) But the court then proceeded to ask Mr. Debouver questions about his testimony instead. (2 Augm. RT B20.)

In argument, Mr. Debouver discussed case law in which a retrial was ordered because the defendant was under the influence at the time he gave his confession. (2 Augm. RT B23.) The prosecutor argued that Mr. Debouver "may not have been entirely sober," but that his intoxication "[did] not impact the voluntariness of the statement in such that he was overborne or coerced . . . to give the

statement." (2 Augm. RT B24.) She maintained that Mr. Debouver gave the statement willingly. (2 Augm. RT B24.)

The court ruled, in pertinent part:

> [T]he district attorney is required to prove . . . by a preponderance of evidence that the statement was taken appropriately and under the proper conditions. My finding is the district attorney sustained that burden.
>
> The evidence indicates that you were at the scene. You left the scene . . . on a bicycle. You were taken into custody. You spoke with the officer. The officer was very forthcoming in saying that he believed you were under the influence, but as the district attorney has observed, or argues, merely being under the influence does not mean that you don't have the ability to consent, to understand, and so forth.
>
> So I find that there was an adequate admonition and an adequate waiver, and your statement was given. Although under the influence, that does not necessarily, or, in this case, prevent that statement from being accepted by the court.
>
> Your request to suppress the statement is denied.

(2 Augm. RT B25.)

C. Standard of Review

The prosecution had the burden to prove that Mr. Debouver's statement was made voluntarily. (*People v. Jones* (1998) 17 Cal.4th

279, 296 (*Jones*).) Voluntariness of a confession is a mixed question of fact and law that is predominantly legal. (*Ibid*.) On appeal, the reviewing court determines the ultimate issue of voluntariness independently by examining the totality of the circumstances, including the characteristics of the accused and the details of the police encounter. (*Ibid*.; *People v. Coffman* (2004) 34 Cal.4th 1, 55 (*Coffman*).) The trial court's determinations of whether there was coercive police activity and whether the police made promises to the defendant to induce a confession are also reviewed *de novo*. (*Jones*, *supra*, 17 Cal.4th at p. 296.) The trial court's resolution of factual disputes, its choices between conflicting inferences, and its determination of witness credibility are reviewed for substantial evidence. (*Coffman*, *supra*, 34 Cal.4th at p. 55.) Where the evidence is not in conflict, there is no requirement that the reviewing court view it in the light most favorable to the ruling. (*People v. Duren* (1973) 9 Cal.3d 218, 238 (*Duren*).)

Here, the trial court did not resolve any factual disputes or make any credibility findings. This Court therefore reviews both the undisputed evidence and the trial court's legal determination *de novo*.

D. The Prosecution Did Not Satisfy Its Burden to Prove by a Preponderance of the Evidence That the Confession Was Voluntary; the Court's Ruling That Intoxication Could Not Render the Statement Involuntary Was Erroneous as a Matter of Law.

The use of an involuntary confession for any purpose violates the due process clauses of the state and federal Constitutions. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15; *Jackson v. Denno* (1964) 378 U.S. 368, 385-386 (*Denno*); *People v. Benson* (1990) 52 Cal.3d 754, 778 (*Benson*); *In re Elias V.* (2015) 237 Cal.App.4th 568, 576 (*Elias V.*).) "The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles." (*Lego v. Twomey* (1972) 404 U.S. 477, 485 (*Lego*).) "'The question is whether defendant's choice to confess was not 'essentially free' because his will was overborne.' [Citation.]" (*Jones*, *supra*, 17 Cal.4th at p. 296.) Among the factors considered in the totality of the circumstances are coercive tactics employed by the

police, the length of the interrogation, the location, and the continuity, as well as the defendant's maturity, education, physical condition, and mental health. (*People v. Haley* (2004) 34 Cal.4th 283, 298 (*Haley*).)

The United States and California Supreme Courts have long held that a confession may be deemed involuntary where the defendant was so intoxicated that his statement was not freely given. (*Townsend v. Sain* (1963) 372 U.S. 293, 307-308 (*Townsend*);[13] *In re Cameron* (1968) 68 Cal.2d 487, 502-503 (*Cameron*) [confession involuntary where defendant was under influence of alcohol and Thorazine].) "If by reason of mental illness, use of drugs, or extreme intoxication, the confession in fact could not be said to be the product of a rational intellect and a free will . . . it is not admissible and its reception in evidence constitutes a deprivation of due process." (*Gladden v. Unsworth* (9th Cir. 1968) 396 F.2d 373, 380-381 (*Gladden*).)[14]

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[13] Overruled on another point in *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1, 5 (*Keeney*).

[14] Federal circuit court opinions are "entitled to great weight" on constitutional questions. (*Elliot v. Albright* (1989) 209 Cal.App.3d 1028, 1034 (*Elliot*).)

Thus, it was plainly legal error for the trial court to hold that intoxication alone could not render Mr. Debouver's statement involuntary. (2 Augm. RT B25.)

Moreover, the prosecution failed its burden to prove that Mr. Debouver was not so intoxicated that his confession was not a product of his free will. The state's only witness conceded that Mr. Debouver was drunk during the interrogation. (2 Augm. RT B15.) The officer testified that he read Mr. Debouver the *Miranda* rights, and Mr. Debouver replied that he understood. (2 Augm. RT B12-B13.) But that said little about Mr. Debouver's level of intoxication and did not constitute a preponderance of the evidence that Mr. Debouver was not so intoxicated that his confession was freely given. In his testimony, Mr. Debouver stated that he was extremely intoxicated, to the point of blacking out, because of a mixture of pills and alcohol. (2 Augm. RT B19-B21.) The trial court made no finding that this testimony lacked credibility.

On the state of this evidence, examining the record independently, this Court should hold that the prosecution failed its

burden to prove that the confession was voluntary. The trial court's denial of Mr. Debouver's motion to suppress must be reversed for this reason alone.

E. The Trial Court Abused Its Discretion by Failing to Listen to the Recording, Which Was the Most Relevant Evidence and Demonstrated That the Confession Was Coerced.

An additional, independent reason for excluding the confession is that the trial court prejudicially abused its discretion by failing to listen to the audio recording of the interrogation. (See *People v. Vieira* (2005) 35 Cal.4th 264, 292 (*Vieira*) [decision whether to admit evidence is reviewed for abuse of discretion].) The prosecutor offered to play the recording, and Mr. Debouver requested that the court listen to it. (2 Augm. RT B3, B11, B20.) The court's failure to do so was plainly an abuse of discretion because the recording was the key evidence bearing on Mr. Debouver's level of intoxication and whether the police employed coercion in eliciting the confession. (Cf. *People v. Filson* (1994) 22 Cal.App.4th 1841, 1849-1850 (*Filson*)[15]

[15] Disapproved on another point in *People v. Martinez* (1995) 11 Cal.4th 434, 452 (*Martinez*).

["By ruling without knowing what was on the tape, the trial court could not make an intelligent evaluation of any probative value of the tape, could not assess any prejudice it might pose, and therefore could not undertake the weighing of these factors required for an informed exercise of the discretion granted by section 352."].)

The recording reveals that the officers took advantage of a man who was intoxicated, ill, and mentally unstable, promised him leniency if he cooperated, insisted that he write out a confession, told him what to write, and denied him mental health treatment and the ability to urinate until he did. (People's Exhibit 24.)[16] Reversal of the trial court's denial of the motion to suppress is required because,

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[16] Mr. Debouver is contemporaneously filing a request for the trial court to transmit People's Exhibit 24, the audio recording, to this Court for its review. The recording was admitted into evidence at the trial and is part of the record on appeal. (2 RT 335; 3 RT 390-391; Cal. Rules of Court, rule 8.320(e).) Citations in the form "Exh. 24, __:__" refer to approximate minute and second at which various statements can be heard in People's Exhibit 24, as shown on the audio software (VLC Media Player for Mac) that appellate counsel used to listen to the recording.

under *de novo* review, the recording demonstrates that the confession was involuntary within the meaning of the Fourteenth Amendment.

As noted above, the voluntariness inquiry examines "the totality of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226 (*Schneckloth*).) "[A] confession is considered voluntary 'if the accused's decision to speak is entirely 'self-motivated' [citation], i.e., if he freely and voluntarily chooses to speak without 'any form of compulsion or promise of rewards . . . .' [Citation.]" (*People v. Perez* (2016) 243 Cal.App.4th 863, 871 (*Perez*), quoting *People v. Tully* (2012) 54 Cal.4th 952, 985 (*Tully*).) "A statement is involuntary [citation] when, among other circumstances, it was extracted by any sort of threats . . . [or] obtained by any direct or implied promises, however slight . . . . [Citation.]" (*People v. Neal* (2003) 31 Cal.4th 63, 75 (*Neal*), quotation marks omitted.)

With respect to the characteristics of the accused, the court examines the defendant's physical and mental condition. (*Haley*,

supra, 34 Cal.4th at p. 298.) As noted above, intoxication and mental illness can both render a confession involuntary. (*Townsend*, *supra*, 372 U.S. at pp. 307-308; *Cameron*, *supra*, 68 Cal.2d at pp. 502-503; *Gladden*, *supra*, 396 F.2d at pp. 380-381.)

Here, Mr. Debouver was in a clearly weakened state, mentally and physically. To begin with, he was ill. In the recording, he has audible respiratory impairment. Officer Im later noted that he appeared to have the flu. (3 RT 378.)

The recording also reveals that Mr. Debouver was significantly intoxicated. His speech was slow and at times slurred, and he was slow to react to questioning. He commented at least six times that he was drunk. (Exh. A, 6:41-6:46, 6:54, 12:42, 24:44.) He divulged that he mixed excessive alcohol with Klonopin. (Exh. A, 6:53.)

Mr. Debouver's intoxication was also apparent in his responses to the officers' questions and his impaired memory. When the officers asked how many cars he burglarized and of what types, his responses continually changed and seemed to be influenced by the officers' suggestion. (Exh. A, 1:44 ["I'm trying to think. I don't

know."], 5:46, 8:48 ["I really don't remember."], 9:13-10:08, 15:46, 28:40-28:54.) It appears that, in truth, Mr. Debouver could only remember breaking in to one vehicle: a van. (Exh. A, 9:13-10:08.) He also did not recall how many garages he burglarized, nor where they were located, and his responses changed in this regard, too, and appeared influenced by suggestion. (Exh. A, 3:40-4:11, 4:48-5:04, 7:58-8:03, 9:13-10:08, 13:48-13:55.) The only clear image he had was that he had at one point been near a Ralph's store. (Exh. A, 7:50-7:58, 8:21-8:28.) Additionally, he could not remember how he got the cut on his hand. (Exh. A, 16:54-17:01, 27:08-27:30.)

On top of the illness and intoxication, Mr. Debouver was mentally unstable. He told the officers he was "going crazy." (Exh. A, 13:27-13:35.) He twice asked them to shoot him or shoot him in the heart. (Exh. A, 12:04, 17:39.) Mr. Debouver can be heard crying and in psychological distress. (Exh. A, 3:58-4:14, 16:09, 16:42.) He asked several times to be taken to the state hospital for psychiatric care. (Exh. A, 30:22, 30:25, 36:16.) He told the officers that he had a

dual diagnosis and that he received social security insurance payments for his mental disability. (Exh. A, 22:48, 33:00-33:04.)

With this backdrop of physical and mental impairment, the remaining analysis examines the "details of the interrogation." (*Schneckloth*, *supra*, 412 U.S. at p. 226.) Here, the police impermissibly used promises of leniency and coercive pressure in order to extract the confession, rendering it involuntary and unconstitutional.

"It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by *any* promise of benefit or leniency *whether express or implied*." (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 210 (*Shawn D.*), latter italics in original, quoting *People v. Jimenez* (1978) 21 Cal.3d 595, 611 (*Jimenez*);[17] *Perez*, *supra*, 243 Cal.App.4th at pp. 869-879 [reversal due to promises of leniency].) "'[W]here a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession is involuntary and

[17] Overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 494 (*Cahill*).

inadmissible as a matter of law.' [Citation.]" (*Perez*, *supra*, 243 Cal.App.4th at p. 871.)

Here, the officers repeatedly made both express and implied promises of benefits or leniency. The entire premise of the interrogation was that, if Mr. Debouver would confess, in the form of a written apology letter to the judge and the victims, things would go better for him. Officer Im told Mr. Debouver that, when the judge saw Mr. Debouver's apology, the judge would try to help him. (Exh. A, 22:30-22:34.) The officer said he would put in a good word for him. (Exh. A, 22:41-22:42.) He told Mr. Debouver that his honesty would result in him "get[ting] released . . . quicker" from his sentence. (Exh. 12:12-12:17.) He also said, "[T]he judge is gonna try to get you into a program," and "he's gonna help you . . . ." (Exh. A, 25:02, 25:08.) Officer Im also promised, "We're gonna get you [a] drug program; okay?" (Exh. A, 18:47.) These express and implied promises alone rendered the confession involuntary. (*Jimenez*, *supra*, 21 Cal.3d at p. 611.)

Finally, the confession also was not a product of Mr. Debouver's free will because the officers created a coercive atmosphere, pressured him, told him what to write, and denied him medical care and the ability to urinate until he complied. Initially, the recording reveals that Officer Im had already been interrogating Mr. Debouver prior to the recorded interview. Disconcertingly, the asserted *Miranda* waiver was elicited off-tape. The written *Miranda* waiver was penned by Officer Im, not Mr. Debouver. Officer Im told Detective Lopez that he read Mr. Debouver the *Miranda* warnings, and that Mr. Debouver understood them, but the officer's practice of taking the waiver in an unrecorded interrogation deprived the fact-finder of verifying the waiver and witnessing the level of Mr. Debouver's understanding. (Exh. A, 0:41, 1:20-1:23.)

The two officers then teamed up and repeatedly instructed Mr. Debouver to write out a confession. (Exh. A, 1:00 ["He's gonna write that he broke into the three cars"], 2:47 ["you're gonna give me a written statement"], 3:16-3:24, 3:27 ["I'm gonna have him write"].) They even went as far as to feed him the statements they wanted him

to write. (Exh. A, 2:47-2:57, 14:04 ["But I . . . want you to also write in here that you're sorry"], 14:45, 15:02 ["put in there"], 15:11 ["write that down"], 17:04, 17:12 ["put that down, too"], 17:45-17:57, 18:40, 25:32-25:47 ["write that down for me, so the judge can read it"].) As described above, Mr. Debouver said he truthfully only remembered one van, but the officers repeatedly directed him toward confessing to a greater number and other types of vehicles.

Moreover, when Mr. Debouver said he was going crazy, Officer Im said they would help him but made the help contingent upon Mr. Debouver writing out a confession: "We want you seen by a doctor, and you need medication. . . . But at the same time, the victims want to know that you are sorry for what you did." (Exh. A, 13:30-13:42.) When Mr. Debouver said, "I gotta pee, bad," instead of allowing him to urinate, Officer Im directed him back to writing out his confession. (Exh. A, 29:22-29:30.)

Under the totality of these circumstances, the confession was not the "product of a rational intellect and a free will." (*Gladden*, *supra*, 396 F.2d at pp. 380-381.) Had the trial court listened to the

audio recording, it would have been required to rule the statement involuntary and inadmissible.

F. Admission of the Confession Was Not Harmless Beyond a Reasonable Doubt Because the Prosecution's Impeachment With It Was Powerful Evidence Undermining Mr. Debouver's Defense That He Was So Intoxicated He Lacked Specific Intent.

As stated above, the use of an involuntary confession for any purpose violates the due process clauses of the state and federal Constitutions. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15; *Denno*, *supra*, 378 U.S. at pp. 385-386; *Benson*, *supra*, 52 Cal.3d at p. 778; *Elias V.*, *supra*, 237 Cal.App.4th at p. 576.) "[W]henever a confession admitted in a California trial has been obtained by means that render the confession inadmissible under the federal Constitution, the prejudicial effect of the confession must be determined under the federal standard [of *Chapman*, *supra*, 386 U.S. at p. 24]." (*People v. Cahill* (1993) 5 Cal.4th 478, 510 (*Cahill*); *Arizona v. Fulminante* (1991) 499 U.S. 279, 306-312 (*Fulminante*).) As noted above, under *Chapman* it is the government's burden to show that the

error made "no difference in reaching the verdict obtained." (*Yates*, *supra*, 500 U.S. at p. 407.)

Here, the state cannot satisfy its burden. "[A] a confession is no ordinary piece of evidence." (*United States v. Carrasco* (1st Cir. 2008) 540 F.3d 43, 53 (*Carrasco*).) "[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." (*Bruton v. United States* (1968) 391 U.S. 123, 139 (*Bruton*) (White, J., dissenting); see also *Fulminante*, *supra*, 499 U.S. at p. 296 ["A confession is like no other evidence."].)

In the present case, the confession was the prosecution's most powerful evidence undermining Mr. Debouver's testimony that he was so intoxicated he blacked out and did not remember the incident. Mr. Debouver's testimony otherwise might well have created a reasonable doubt as to whether he formed the specific intent to enter the garage for the purpose of theft. But in the portions of the confession played for the jury, Mr. Debouver was able to remember details of the incident, and the prosecutor used this to argue that his testimony about his lack of memory was a lie. (E.g.,

3 RT 439-440.) There was other evidence corroborating that Mr. Debouver was intoxicated at the time of the incident, including the apartment manager's testimony that Mr. Debouver appeared intoxicated, that he nearly fell over, and that it took him several tries before he could mount his bike. (1 RT 156, 165.) But Mr. Debouver's testimony was the strongest evidence that he may have lost control to the point that he did not know what he was doing. That testimony would have been uncontroverted were it not for the admission of the confession.

The confession struck a death blow to Mr. Debouver's defense. Its admission cannot be deemed harmless. Reversal is required.

III. THE BURGLARY CONVICTION MUST BE REVERSED FOR A NEW TRIAL BECAUSE THE PROSECUTOR COMMITTED MISCONDUCT BY REVOKING HIS PROMISE NOT TO USE THE CONFESSION, AND THE COURT ABUSED ITS DISCRETION BY ADMITTING IT.

A. Introduction

Reversal of the burglary conviction is required because the prosecutor committed misconduct when he affirmatively stated that he would not introduce Mr. Debouver's confession into evidence but then impeached him with it after he testified. The prosecutor knew

all along that Mr. Debouver planned to argue, as a key part of his defense, that he had no memory of the incident due to intoxication. Yet the prosecutor averred that he did not intend to use the statement and even secured an order directing Mr. Debouver not to refer to it. Mr. Debouver relied on that promise to his great detriment when he waived his Fifth Amendment privilege and testified to a lack of memory, only to be painted as a liar when the jury heard his prior statement to the police describing the incident. In fact, the confession was not proper impeachment evidence in the first place because Mr. Debouver testified that he did not remember, so his confession was not a prior inconsistent statement. Moreover, principles of prosecutorial misconduct, due process, freedom from self-incrimination, and equitable estoppel required exclusion of the confession.

B. Background

In his opening argument, Mr. Debouver said that he mixed too much alcohol with prescription medications and had no memory of

entering or being inside the garage. (1 RT 94-95, 98.) This had been his defense all along. (E.g., 2 Augm. RT B3, B21.)

At the end of the first day of testimony, the parties discussed the unavailability of a potential defense witness, Gary Steiner, a confessions expert. (1 RT 222.) When contacted the day before, Mr. Steiner reported that he never received a subpoena and would not be available until the following week. (1 RT 222-223.) The court asked the prosecutor whether he intended to elicit anything about the confession from the upcoming detective witness, and the prosecutor said he did not. (1 RT 223.)

The next day, the prosecutor again averred that the People would not be using Mr. Debouver's statement to the police. (2 RT 226.) In light of this, he asked that the court instruct Mr. Debouver not to refer to it. (2 RT 226.) The court so ordered. (2 RT 226.)

After Mr. Debouver testified in accordance with what he had propounded all along, that he could not remember the incident (e.g., 2 RT 316-317), the prosecutor asked the court permission to impeach Mr. Debouver with portions of his statement to the police that night.

(2 RT 327-328.) The prosecutor argued that impeachment was appropriate because Mr. Debouver had a "greater recall for what happened that night" than he did in his in-court testimony. (2 RT 329.) Mr. Debouver objected that (1) the statement was taken in violation of *Miranda*, and (2) the court had excluded it from evidence. (2 RT 329.) The prosecutor argued that the statement was admissible for impeachment because it was a prior inconsistent statement. (2 RT 329.) The court ruled, "The law permits statements that you made on a prior occasion which are contrary to your current testimony to be used for impeachment purposes, even in violation of Miranda." (2 RT 329.)

Mr. Debouver additionally objected that he was not told before he took the stand that the prosecution could impeach him with the statement it said it was not going to use and which the court had ordered him not to discuss. (2 RT 329-330.) The court responded that Mr. Debouver had chosen to represent himself, despite the court's discouragement, and it was his responsibility to know the law. (2 RT

330.) The prosecution was then permitted to play the portions of the recorded statement described in the Statement of Facts, *ante*.

C. The Trial Court Abused Its Discretion in Admitting Mr. Debouver's Statement Because It Was Not Proper Impeachment Evidence.

First, the trial court's ruling allowing Mr. Debouver's statement as impeachment evidence was error. This decision is reviewed for abuse of discretion. (See *Vieira*, *supra*, 35 Cal.4th at p. 292.) Here, the court abused its discretion because the rule that a witness may be impeached with a prior inconsistent statement did not apply, since Mr. Debouver's in-court testimony was that he did not remember the interrogation at all. (See *Humberto S.*, *supra*, 43 Cal.4th at p. 742 [court abuses discretion where decision rests on error of law].)

In a case directly on point, our Supreme Court held that a witness who testified that he did not remember giving a report to a police officer because he was intoxicated could not be impeached with his statements in the report. (*People v. Sam* (1969) 71 Cal.2d 194, 209 (*Sam*).) "'The right of impeachment does not exist where the

witness states he has no recollection of the fact concerning which he is examined.' [Citation.]" (*Id*. at p. 210.) The witness's prior statement describing the incident is not "'*inconsistent* with his testimony at the hearing'" that he does not remember the event or his prior statements about it. (*Ibid*., quoting Evid. Code, § 1235, emphasis *Sam*'s.)

Here, as in *Sam*, the "fundamental requirement" of inconsistency was lacking because there was "nothing necessarily inconsistent" between Mr. Debouver's prior statement describing the incident and his in-court testimony that he remembered neither the incident nor the interrogation that followed. (*Sam*, *supra*, 71 Cal.2d at pp. 209-210.) This is particularly so where alcohol is involved. (*Id*. at p. 209.) The trial court's admission of the confession for impeachment was an abuse of discretion.

D. Principles of Prosecutorial Misconduct, Due Process, Freedom from Self-Incrimination, and Equitable Estoppel Also Required the Trial Court to Exclude the Confession.

Even assuming solely for argument that Mr. Debouver's statement to the police was legitimate impeachment evidence, the

trial court erred by admitting it over Mr. Debouver's objection, that it was unfair to allow it after the state had explicitly said it was not going to use it, and after the court had excluded any mention of it. This conclusion is compelled by principles of prosecutorial misconduct, due process, freedom from self-incrimination, and equitable estoppel.

"'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Hoyos* (2007) 41 Cal.4th 872, 923 (*Hoyos*),[18] quoting *People v. Morales* (2001) 25 Cal.4th 34, 44 (*Morales*).) "'Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.'" (*Ibid*.)

A prosecutor violates a defendant's constitutional right to due process where he gives assurances that the defendant's statement

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[18] Abrogated on other grounds by *McKinnon*, *supra*, 52 Cal.4th at p. 641.

will not be used at trial but then impeaches him with it after he testifies. In the analogous case of *People v. Quartermain* (1997) 16 Cal.4th 600, 616-617 (*Quartermain*), the prosecutor told the defendant, before he gave a statement, that the statement would not later be used in court. The defendant proceeded to give an account of the victim's death and the events surrounding it. (*Id*. at p. 617.) At trial, the defendant testified concerning the same events. (*Ibid*.) The prosecutor then successfully moved to impeach the defendant's testimony with statements he made during the pretrial interview. (*Ibid*.)

The California Supreme Court found that the prosecutor's use of the statement breached its agreement with the defendant and violated his Fourteenth Amendment right to due process. (*Quartermain*, *supra*, 16 Cal.4th at pp. 617-619.) The Court relied on the facts that nothing in the prosecutor's assurance that it would not use the statement at trial included any express exception for impeachment, nor did the prosecutor condition the promise on the truthfulness of the defendant's statement. (*Id*. at pp. 617-618.) And

the Court would not read such qualifications into the agreement. (*Id*. at p. 618.) The Court drew support from United States Supreme Court precedent holding that, "when a prosecutor makes a promise that induces a defendant to waive a constitutional protection and act to his or her detriment in reliance on that promise, the promise must be enforced." (*Ibid*., citing *Santobello v. New York* (1971) 404 U.S. 257, 262 (*Santobello*) and *Mabry v. Johnson* (1984) 467 U.S. 504, 509-510 (*Mabry*).) By inducing the defendant to waive his constitutional right to freedom from self-incrimination and then going back on his promise, the prosecutor violated fundamental fairness and the defendant's right to due process. (*Id*. at p. 620.)

In the present case, admission of Mr. Debouver's statement for impeachment likewise infected the trial with unfairness and violated his Fourteenth Amendment right to due process. Mr. Debouver waived his Fifth Amendment privilege and testified based on a false promise: the prosecutor's express, unqualified assurance that it would not use the confession at trial. Mr. Debouver relied on that promise to his detriment when he elected to testify and the

prosecutor subsequently used the statement to portray him as a liar. This was prosecutorial misconduct and a due process violation.

The doctrine of equitable estoppel also barred the prosecutor from going back on his promise. "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." (Evid. Code, § 623.) Equitable estoppel involves four elements as here applied: (1) the prosecutor was apprised of the facts; (2) the prosecutor intended that his conduct would be acted upon, or the defendant had a right to believe that the prosecutor so intended; (3) the defendant was ignorant of the true facts; and (4) the defendant relied on the prosecutor's conduct to his detriment. (See *Hair v. State of California* (1991) 2 Cal.App.4th 321, 328 (*Hair*).)

Here, these elements are satisfied. The prosecutor was apprised of the fact that Mr. Debouver had given a statement to the police that he burglarized the garage, and that, notwithstanding the statement, Mr. Debouver intended to argue in his defense that he was

highly intoxicated and did not remember the incident. Nonetheless, the prosecutor averred that he would not use Mr. Debouver's statement trial, and he intended that this conduct would be acted upon. Indeed, he sought an order from the court that Mr. Debouver would not be allowed to refer to the confession either. Mr. Debouver certainly had a right to believe that the prosecutor intended to keep his word. Ignorant of the prosecutor's willingness to use the statement despite his assurance to the contrary, Mr. Debouver waived his Fifth Amendment privilege, took the stand, and testified to his lack of memory. In doing so, he relied on the prosecutor's promise to his detriment. (Cf. *Carrasco*, *supra*, 540 F.3d at pp. 51-54 [trial court's reversal of its ruling excluding defendant's confession, after defendant testified, "seriously affect[ed] the fairness, integrity, or public reputation of [the] judicial proceedings" and required that the conviction be vacated]; see also *Quartermain*, *supra*, 16 Cal.4th at p. 618 [detrimental reliance on prosecutor's promise].)

In addition, it is misconduct for a prosecutor to withhold damaging, material evidence until rebuttal in order to gain strategic

advantage. (*Hoyos*, *supra*, 41 Cal.4th at pp. 923-924 & fn. 36 [but no misconduct where withholding was unintentional].)

It is also error for a trial court to allow material evidence as rebuttal that could have been introduced in the prosecution's case in chief. In the foundational case of *People v. Carter* (1957) 48 Cal.2d 737 (*Carter*), the prosecutor waited until rebuttal, after the defendant had testified, to introduce a hat on which the defendant's hair had been discovered. (*Id*. at pp. 743, 753.) The hat was found under a bridge not far from the defendant's house, along with the murder victim's wallet. (*Ibid*.) The Supreme Court held that this was improper rebuttal evidence. (*Id*. at pp. 753-754.)

The *Carter* Court explained that, "[i]n a sense, all evidence that tends to establish the defendant's guilt over his protestations of innocence rebuts the defendant's case, but it is not all rebuttal evidence within the purpose of [Penal Code] section 1093." (*Carter*, *supra*, 48 Cal.2d at p. 753.) Rebuttal evidence "is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were *not*

implicit in his denial of guilt." (*Id*. at pp. 753-754, emphasis added.) Proper rebuttal does not include material evidence in the prosecution's possession that tends to prove the defendant's guilt. (*Id*. at p. 753.) Key purposes of this restriction are "to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial; and to avoid any unfair surprise that may result when a party who thinks he has met his opponent's case is suddenly confronted at the end of trial with an additional piece of crucial evidence." (*Ibid*.) In *Carter*, the defendant's plea of not guilty made it apparent that he would not admit having gone to the location where his hat and the victim's wallet were found, and his denial on the stand did not provide any new matter for rebuttal. (*Id*. at p. 754.) The prosecution's evidence therefore had to be put on as part of its case in chief. (*Ibid*.)[19]

The same is true in the present case, where the claim is in fact stronger than in *Carter*. It was not just Mr. Debouver's not-guilty

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[19] *Carter* remains good law. (See, e.g, *People v. Nunez* (2013) 57 Cal.4th 1, 30 (*Nunez*) [applying the *Carter* rule, but finding the evidence at issue not material].)

plea, but also his explicit statements in his opening argument, that made clear that he intended to testify to a lack of memory of the events. His taped confession was material evidence that tended to establish his commission of the burglary. The recording should have been introduced as part of the prosecution's case in chief. Nothing in Mr. Debouver's testimony created new material for rebuttal.[20] Instead, the improper rebuttal evidence was an unfair surprise, which also had the effect of magnifying the evidence late in the trial.

Where, as here, the prosecution has withheld evidence to gain a tactical advantage, it is appropriate to exclude the withheld evidence. (Cf. *People v. Jackson* (1993) 15 Cal.App.4th 1197, 1203 (*Jackson*) ["If a[] [discovery] omission is willful in hope of obtaining a tactical advantage, the court may exclude the witness's testimony."], citing *Taylor v. Illinois* (1988) 484 U.S. 400, 413 (*Taylor*); *Byrom v. Epps* (N.D.Miss. 2011) 817 F.Supp.2d 868, 885-887 (*Byrom*) [exclusion of

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[20] That is especially so when it is remembered that the taped confession was not even properly a prior inconsistent statement, as explained above, since Mr. Debouver only testified that he lacked memory of the incident.

defense evidence where defense counsel deliberately withheld evidence in order to surprise state at trial].)

For the foregoing reasons, the prosecutor committed misconduct and violated Mr. Debouver's Fourteenth Amendment right to due process, by infecting the trial with unfairness, when he expressly stated that he would not introduce Mr. Debouver's confession at trial and then unfairly surprising him with it after he testified. (See *Hoyos*, *supra*, 41 Cal.4th at p. 923.) At a minimum, the prosecutor committed misconduct under state law by employing deceptive or reprehensible methods to obtain a conviction. (*Ibid*.) Because Mr. Debouver relied on the prosecutor's promise to his detriment, the state was estopped from using the confession. (See *Hair*, *supra*, 2 Cal.App.4th at p. 328.) The trial court abused its discretion by disregarding the misconduct and allowing impeachment with evidence that did not even properly qualify as a prior inconsistent statement or rebuttal evidence. (*Sam*, *supra*, 71 Cal.2d at p. 210; *Carter*, *supra*, 48 Cal.2d at pp. 753-754.)

E. Each of Mr. Debouver's Claims Is Cognizable.

Mr. Debouver's claims were each preserved by his objections. He objected that his statement to the police should not be admissible for impeachment because the prosecutor said it was not going to use the statement, and the court had excluded any mention of it. (2 RT 329-330.) The court ruled that the confession was a prior inconsistent statement that could be used for impeachment despite the prosecutor's assurance that he would not use it at trial. (2 RT 329-330.)

The California Supreme Court's decision in *People v. Partida* (2005) 37 Cal.4th 428 (*Partida*) demonstrates that Mr. Debouver's objections were sufficient to make his claims cognizable on appeal. There, the Court held that the defendant's objection that the evidence was more prejudicial than probative, under Evidence Code section 352, was sufficient to preserve his argument on appeal that admission of the evidence violated his federal constitutional right to due process. (*Id*. at pp. 433-438.) The Court recognized the important purposes of requiring timely and specific objections,

including that they provide the trial court with a concrete legal argument to pass on and give the prosecutor an opportunity to withdraw or reframe his request. (*Id*. at p. 434.) "But, to further these purposes, the requirement must be interpreted reasonably, not formalistically." (*Ibid*.) A claim is cognizable on appeal where it is a restatement of the same objection "under alternative legal principles." (*Id*. at p. 436.) Thus, in *Partida*, the defendant's due process claim was fairly encompassed in his objection that the evidence was more prejudicial than probative because it "'merely invites us to draw an alternative legal conclusion . . . from the same information he presented to the trial court . . . .' [Citation.]" (*Ibid*.; see also *People v. Scott* (1978) 21 Cal.3d 284, 290 (*Scott*) [sufficient if the wording fairly advised the trial court of the substance of the objection].) Here, all of Mr. Debouver's claims were preserved because each derives from the same information and the same unfairness to which he called the trial court's attention.

With respect to the first claim, that the confession was not properly a prior inconsistent statement, Mr. Debouver did not

specifically cite the *Sam* rule, but the issue was squarely before the trial court. The court ruled that it was a prior inconsistent statement admissible for impeachment. (2 RT 329.)

The remaining claims are alternative legal arguments deriving from the same factual basis on which Mr. Debouver objected: that it was unfair for the prosecutor to go back on his assurance that he was not going to use the statement, despite Mr. Debouver having relied on that promise when he took the stand, and despite the court having excluded any mention of it. (2 RT 329.) Mr. Debouver's arguments that this was prosecutorial misconduct and unfair surprise, as to which the prosecutor should be estopped, are adequately encompassed in his objections to the trial court. The court rejected the basis for these arguments when it ruled that the evidence was admissible for impeachment despite the prosecutor's previous claim that he would not seek to use the statement, even though the prosecutor was aware of Mr. Debouver's intention to argue that he did not remember the incident.

Moreover, even assuming solely for argument that Mr. Debouver's objections did not cover all of his legal claims, equity justifies review, and this Court's inherent authority allows it to address any unpreserved claims. It is a "well-established principle" that an appellate court "may consider a claim raising a pure question of law on undisputed facts." (*People v. Yeoman* (2003) 31 Cal.4th 93, 118 (*Yeoman*).) Here, there were no new facts to be developed. The trial court was well apprised of the prosecutor's assurance that he would not seek to admit Mr. Debouver's confession, or its own ruling instructing Mr. Debouver not to refer to it, and or Mr. Debouver's testimony that he did not remember the incident. The admissibility of the statement for impeachment and the issue of whether the prosecution's promise precluded it from now seeking admission were pure questions of law based on undisputed facts.

An appellate court also has the inherent authority to reach a question that a party has not preserved for review. (*People v. Williams*

(1998) 17 Cal.4th 148, 161, fn. 6 (*Williams*).)[21] Appellate courts most frequently invoke this discretion "where a forfeited claim involves an important issue of constitutional law or a substantial right [citations] . . . [or] where the applicability of the forfeiture rule is uncertain . . . . [Citations]." (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7 (*Sheena K.*); *People v. Bruner* (1995) 9 Cal.4th 1178, 1183, fn. 5 (*Bruner*) [reaching the merits where the question of preservation was close].) Mr. Debouver raises important issues of constitutional and substantial rights, implicating the fundamental fairness of the proceedings. This Court should therefore exercise its authority to address his claims.

F. The Erroneous Admission of Mr. Debouver's Confession Was Not Harmless Under Any Standard.

Above, Mr. Debouver explained that the prosecutor's conduct "infect[ed] the trial with such unfairness as to make the conviction a violation of due process," when he promised not to use the

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[21] Footnote 6 in *Williams* observes that Evidence Code sections 353 and 354 deprive the court of its otherwise-inherent authority if the issue is the admission or exclusion of evidence, but as Mr. Debouver has explained, this is not a mere evidentiary question because it raises constitutional issues.

confession at trial, knowing that Mr. Debouver intended to testify that he did not remember the incident, and inducing him to do so based on false pretenses. (*Hoyos*, *supra*, 41 Cal.4th at p. 923, quotation omitted.) This was a violation of the Fourteenth Amendment. (See *Quartermain*, *supra*, 16 Cal.4th at pp. 617-620.) The misconduct also infringed Mr. Debouver's Fifth Amendment privilege against self-incrimination. (See *id*. at pp. 618-619 [prosecutor inducing defendant to waive constitutional protection in reliance on promise].) As such, these errors mandate reversal unless the state proves it harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

Other aspects of the claim, such as whether Mr. Debouver's statement was improper impeachment evidence or improper rebuttal evidence, raise evidentiary admissibility questions that are normally reviewed under the reasonable-probability standard of *Watson*, *supra*. (See *People v. Clark* (1980) 109 Cal.App.3d 88, 90 (*Clark*).) Here, however, it is appropriate to review the combined effect of the several types of error under *Chapman*, because if any errors to be considered in aggregation presents a federal constitutional question,

then the collective-error argument also presents a federal question. (*United States v. Rivera* (10th Cir. 1990) 900 F.2d 1462, 1470, fn. 6 ["Any lesser standard would potentially denigrate the protection against constitutional error announced in *Chapman*"]; see *People v. Woods* (2006) 146 Cal.App.4th 106, 117; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 470.)

Even if only reviewed under *Watson*, however, reversal is necessary because there is more than an abstract chance that, were it not for the erroneously admitted confession, at least one juror would have found that Mr. Debouver was in a blackout state of intoxication, which created a reasonable doubt as to whether he formed the specific intent to enter the garage for the purpose of theft. (See *Wilkins*, *supra*, 56 Cal.4th at p. 351; *Cone*, *supra*, 556 U.S. at p. 452.) Confessions are the most damaging evidence against a criminal defendant, and for all of the reasons described in Argument II.F., *ante*, impeachment with the confession struck a death blow to Mr. Debouver's defense. He is entitled to a new trial, free from the taint of prosecutorial misconduct and evidentiary error.

IV. THE PERSON-PRESENT FINDING MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT IT, IN VIOLATION OF MR. DEBOUVER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Introduction and Background

The person-present finding violates due process, and must be reversed, because a garage beneath an apartment complex is not a "residence" for purposes of section 667.5, subdivision (c)(21). That section elevates a first degree burglary to a "violent felony"[22] where it is charged and proven "that another person, other than an accomplice, was present in the residence during the commission of the burglary."

Here, a person, the apartment manager, was present in the garage during the commission of the burglary, but the garage was not a "residence" within the meaning of section 667.5, subdivision (c)(21). Indeed, a garage of this type, beneath an apartment complex, is not a residence as a matter of law.

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[22] As noted above, this designation results in Mr. Debouver serving 85 percent of his sentence, instead of the usual 50 percent. (See *Singleton*, *supra*, 155 Cal.App.4th at pp. 1336-1337.)

The trial testimony established that the apartment complex was relatively large, with a garage that held approximately 15 vehicles. (1 RT 106.) The garage encompassed the entire basement of the complex. (1 RT 151.) There was set of stairs leading to a door that opened into the center courtyard of the complex, which was kept locked. (1 RT 149-150, 155-156.) The other exit door in the garage was to a hallway that led to the exit to the street. (1 RT 150, 156, 170.) There was also a gate, which opened by remote, through which the cars drove from outside into the garage. (1 RT 170.) There were no doors from the garage into any individual apartment residences, only the common courtyard area.

As explained below, a garage beneath an apartment complex, which does not share a wall with a residential apartment unit, nor has a door that opens directly into an apartment, is not a residence for purposes of a person-present allegation. The jury's verdict violated the Fourteenth Amendment.

B. Standard of Review

A sentence enhancement violates a defendant's federal constitutional right to due process of law, and must be reversed, if the evidence was insufficient to "convince a trier of fact beyond a reasonable doubt of the existence of every element" of the enhancement. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 316 (*Jackson*), citing *In re Winship* (1970) 397 U.S. 358 (*Winship*); U.S. Const., 14th Amend.) The appellate court determines "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the [enhancement] beyond a reasonable doubt." (*Jackson*, *supra*, 443 U.S. at p. 319, emphasis in original; see *People v. Johnson* (1980) 26 Cal.3d 557, 576 (*Johnson*).)

The question of whether a garage beneath an apartment complex can constitute a "residence" for purposes of section 667.5, subdivision (c)(21) is an issue of statutory interpretation reviewed *de novo*. (*Singleton*, *supra*, 155 Cal.App.4th at p. 1337.)

C. As a Matter of Law, a Garage Beneath an Apartment Complex Is Not a "Residence."

In *Singleton*, Division Five of this Court addressed a factually similar case and reversed the person-present finding for insufficient evidence. (*Singleton*, *supra*, 155 Cal.App.4th at p. 1334.) There, the victim lived in an apartment on the third floor of an apartment building. (*Id*. at p. 1335.) Stairs led up to the third floor, and there was a locked gate on the stairs that restricted access to the hallway that ran along the outside of the building and led to the residential units. (*Ibid*.) The victim watched from a position in the third-floor hallway as the defendant, his ex-roommate, exited the victim's apartment carrying a duffel bag. (*Id*. at 1336.) The defendant walked past the victim to reach the stairs. (*Ibid*.) As he passed, the victim questioned him about the duffel bag's contents. (*Ibid*.) The defendant lied about the fact that the bag contained the victim's possessions and kept walking. (*Ibid*.)

The appellate court held that the victim was not "present in the residence" for purposes of a violent felony allegation under section 667.5, subdivision (c)(21) because the victim was not inside the

threshold or outer walls of the residential unit itself. (*Singleton*, *supra*, 155 Cal.App.4th at p. 1337.) This was so even though the victim was in the hallway that was immediately outside his apartment. For a "residence" in an apartment building, "'[t]he threshold . . . is located at the doorway[] into the apartment[].' [Citation.]" (*Id*. at pp. 1337-1338.)

In reaching this holding, *Singleton* looked first to the plain meaning of "present in the residence," which is that the other person must be present within the walls of the residential unit. (*Singleton*, *supra*, 155 Cal.App.4th at pp. 1337-1338.) "[T]he nonaccomplice cannot merely be near, at, or around the residence, but must be *in* the residence for the purposes of the statute." (*Id*. at p. 1338, emphasis in original.) Moreover, the drafters of the initiative that enacted this statutory provision deliberately chose the term "residence," distinguishing it from the "inhabited dwelling" language used elsewhere in the burglary laws. (*Id*. at pp. 1338-1339) A burglary is elevated to a first degree burglary where the place burglarized is an "inhabited dwelling," which is interpreted broadly and can include

an attached garage that is an integral part of the house. (*Id*. at p. 1338; see *People v. Moreno* (1984) 158 Cal.App.3d 109, 112 (*Moreno*).) But in order for a first degree burglary to become a violent felony, another person must be present *in* the *residence*. "It would be unreasonable to find the voters understood 'present in the residence' to apply when a person was standing in the hallway, outside an apartment unit." (*Id*. at p. 1339.) By the same token, a garage beneath an apartment complex -- particularly one that does not share a door or a wall with a residential unit -- cannot qualify as a residence for purposes of a violent-felony allegation.

This conclusion is unaltered by the Fourth District's decision in *People v. Harris* (2014) 224 Cal.App.4th 86 (*Harris*). The court there held that the victims were present in their residence (a single-family home), within the meaning of section 667.5, subdivision (c)(21), where the defendant burglarized a converted garage, variously described as a guest room or a guest house, which shared a roof and an internal wall with the main house but did not have an internal door connecting them. (*Id*. at pp. 89-91.)

It could be argued that *Harris* was wrongly decided because the defendant was not inside the four walls of the residence in which the victims were present. And no internal door connected the guest house with the main house.[23] But this Court need not decide that question because *Harris* is consistent with *Singleton* as applied to the facts of the case at bar. *Harris* distinguished *Singleton* on the basis that, in *Singleton*, the victim was in the hallway outside the threshold of his residential unit, "in a common area, not within the area of his exclusive tenancy and control." (*Harris*, *supra*, 224 Cal.App.4th at p. 90.) By contrast, for the *Harris* victims, "[t]he existence of an interior separating wall [did] not place them 'outside' of their home." (*Id*. at p. 91.) According to *Harris*, where a converted garage shares a roof and an interior wall with a residence, it is part of that residence. (*Id*. at pp. 90-91.) In the present case, because the garage was in the basement of an apartment complex, did not share a wall with the residential units, and was not within any of the tenants' exclusive

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[23] It should also be noted that some of the language of the *Harris* opinion blurs the line between "inhabited dwelling" and "residence," which have distinct definitions, the former being considerably broader in scope. (*Harris*, *supra*, 224 Cal.App.4th at pp. 90-91; see *Singleton*, *supra*, 155 Cal.App.4th at pp. 1338-1339.)

control, it was not part of the residence within the meaning of section 667.5, subdivision (c)(21), under either *Singleton* or *Harris*.

For these reasons, there was insufficient evidence to support the person-present finding, and reversal is required.

V. THE PERSON-PRESENT FINDING MUST BE REVERSED FOR A NEW TRIAL BECAUSE THE COURT'S INSTRUCTION REDUCED THE PROSECUTION'S BURDEN TO PROVE THAT THE PLACE BURGLARIZED WAS A RESIDENCE AND EFFECTIVELY DIRECTED A VERDICT ON THAT ISSUE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

A. Introduction and Background

If this Court were to disagree with Mr. Debouver's argument, that a garage beneath an apartment complex is not a "residence" as a matter of law, and were to instead find that whether the garage was part of a residence was a factual issue for the jury to decide, reversal is nonetheless required because the trial court's instruction as to the person-present finding was defective. The court's instruction eliminated the factual issue of whether the garage was part of a residence for purposes of section 667.5, subdivision (c)(21). The instruction effectively directed a verdict on this issue and reduced the prosecution's burden to prove every element of the offense beyond a

reasonable doubt, in violation of the Sixth and Fourteenth Amendments.

The court instructed, in pertinent part:

> It is alleged in Count 1 that at the time of the offense, a person or persons were present at or in *the apartment complex, resident structure*. If you find the defendant guilty of burglary, and you find that the burglary was of the first degree, you must determine if a person or persons was or were present at the time of the commission of the offense.

(3 RT 421-422, emphasis added.) By describing the issue as whether a person was present in "the apartment complex, resident structure," the court effectively directed a verdict that the burglarized garage was part of the "residence," reducing the prosecution's burden on that element of the person-present charge. Mr. Debouver is entitled to a new trial.

B. Standard of Review

Errors in jury instructions are questions of law reviewed *de novo*. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569 (*Guiuan*).)

C. The Incorrect Instruction Violated the Constitution and the Trial Court's *Sua Sponte* Duty to Correctly Instruct the Jury on the Elements.

Jury instructions that relieve the prosecution of its burden to prove each element beyond a reasonable doubt violate a defendant's federal constitutional right to due process. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 (*Sullivan*); *Carella v. California* (1989) 491 U.S. 263, 265 (*Carella*); *People v. Flood* (1998) 18 Cal.4th 470, 491 (*Flood*); U.S. Const., 5th & 14th Amends.) "Such erroneous instructions also implicate Sixth Amendment principles preserving the exclusive domain of the trier of fact." (*Flood*, *supra*, 18 Cal.4th at p. 491; *Carella*, *supra*, 491 U.S. at p. 265.) "The prohibition against directed verdicts for the prosecution extends to instructions that effectively prevent the jury from finding that the prosecution failed to prove a particular element of the crime beyond a reasonable doubt." (*Flood*, *supra*, 18 Cal.4th at p. 49.) Here, the instruction violated these constitutional rights because, "[i]n essence, the trial court directed a finding, or a 'partial verdict,' for the prosecution on [the] particular aspect of the

crime" that the garage was part of a "residence" under section 667.5, subdivision (c)(21).

Moreover, the trial court violated its *sua sponte* duty to correctly instruct the jury on the elements of the charged offenses. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311 (*Cummings*).) "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*), quotation marks omitted.) "The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. [Citation.]" (*Ibid*.) No objection in the trial court was required because the instruction violated Mr. Debouver's substantial rights, including under the Sixth and Fourteenth Amendments. (§ 1259.)

D. The Error Is Reversible *Per Se*; Alternatively, It Was Not Harmless Beyond a Reasonable Doubt.

The United States Supreme Court has indicated that "harmless-error analysis presumably would not apply if a court

directed a verdict for the prosecution in a criminal trial by jury." (*Rose v. Clark* (1986) 478 U.S. 570, 578 (*Rose*).) Numerous lower courts have followed this instruction and applied a rule of *per se* reversal to errors of this type. (E.g., *People v. Kimble* (1988) 44 Cal.3d 480, 522-523 (*Kimble*) (conc. & dis. opn. of Mosk, J.); *People v. Lawson* (1987) 189 Cal.App.3d 741, 753-754 (*Lawson*); *United States v. Pizarro* (1st Cir. 2014) 772 F.3d 284, 309-310 (*Pizarro*); *United States v. Ramirez-Castillo* (4th Cir. 2014) 748 F.3d 205, 215-216 (*Ramirez*)).

At a minimum, this constitutional violation is subject to the prejudice standard of *Chapman*, *supra*, 386 U.S. at p. 24, which mandates reversal unless the state proves that the error was harmless beyond a reasonable doubt. In this case, there can be no doubt whatsoever, let alone a reasonable one, that the instructional error was prejudicial. If this Court finds that the issue of whether a garage beneath an apartment complex is part of the "residence" is a factual issue for the jury to decide, then the challenged instruction necessarily prejudiced the verdict by removing that factual issue from the jury's consideration. Indeed, there was ample evidence

from which a properly instructed jury could have concluded that the garage was not part of the "residence," including that it did not connect to any individual residential units in the building.

Moreover, the California Supreme Court has long recognized that prejudice is compounded when a prosecutor exploits an error during closing argument. (E.g., *People v. Minifie* (1996) 13 Cal.4th 1055, 1071-1072 (*Minifie*); *People v. Woodard* (1979) 23 Cal.3d 329, 341 (*Woodard*)[24].) Here, the prosecutor told the jurors that they should find the person-present allegation true if "someone who lived in the building was there at the time that the crime was committed . . . ." (3 RT 468.) The prosecutor also said, "Even though he's not going into the apartments, even though he's not opening people's doors and going inside, it's still entering the building, those peoples' homes for the purposes of this crime."[25] These comments could well have

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[24] Superseded by statute on unrelated point in *People v. Castro* (1985) 38 Cal.3d 301 (*Castro*).

[25] The prosecutor made this latter comment primarily in the context of arguing that this burglary was of the first degree, but it nonetheless could have affected the jury's understanding, particularly given that the court's instruction blurred the line between an inhabited dwelling and a residence. (3 RT 421-422.)

reinforced the notion that the only issue for the jurors to decide was whether a resident of the building was present in the garage, or anywhere else in the complex, during the incident.

The government cannot meet its burden under *Chapman* to prove that the error made "no difference in reaching the verdict obtained." (*Yates*, *supra*, 500 U.S. at p. 407.) Reversal is therefore required.

CONCLUSION

For the foregoing reasons, Mr. Debouver respectfully requests that this Court reverse the burglary conviction and the person-present finding.

Dated: March 8, 2016

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Counsel for Mr. Debouver hereby certifies that this brief consists of 17,973 words (excluding tables, proof of service, and this certificate), according to the word count of the computer word-processing program, and employs a 13-point font. (Cal. Rules of Court, rules 8.204(b)(4), 8.360(b)(1).)

Dated: March 8, 2016

_____
DAVID L. ANNICCHIARICO

PROOF OF SERVICE BY MAIL

(Cal. Rules of Court, rules 1.21, 8.50.)

I, DAVID ANNICCHIARICO, declare that: I am over the age of 18 years and not a party to the case; I am employed in, and am a resident of, the County of San Francisco, California, where the mailing occurs; and my business address is 584 Castro St., Ste. 654, San Francisco, CA 94114. I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business. I caused to be served **APPELLANT'S OPENING BRIEF**, by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

SUPERIOR COURT, 210 West Temple St., Los Angeles, CA 90012
DISTRICT ATTORNEY, 211 West Temple St., Ste. 1200, Los Angeles, CA 90012
STEPHEN DEBOUVER (copy sent as directed by Mr. Debouver)
CAL. APPELLATE PROJECT, 520 S. Grand Ave., 4th Fl., Los Angeles, CA 90071

PROOF OF SERVICE BY ELECTRONIC SERVICE

(Cal. Rules of Court, rules 2.251(i)(1)(A)-(D) & 8.71(f)(1)(A)-(D).)

Furthermore, I declare I electronically served from my electronic service address, dannicchiarico@msn.com, the above document on March 9, 2016, by the end of business, to the following entities:

ATTORNEY GENERAL'S OFFICE, docketingLAawt@doj.ca.gov
COURT OF APPEAL, via e-submission.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 9, 2016

_____

David L. Annicchiarico