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 REPLY BRIEF

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

Honorable Norman Shapiro, Judge

DAVID L. ANNICCHIARICO
State Bar Number 247544
584 Castro Street, Suite 654
San Francisco, California 94114
Telephone: (415) 948-5576
Email: WriteToDavidA@gmail.com

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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

In the opening brief, Mr. Debouver explained that the trial court violated his Sixth Amendment right to the appointment of advisory counsel by erroneously denying his timely and proper motion. The Constitution grants a criminal defendant the paramount right to control the representation himself, while also guaranteeing the

assistance of counsel for his defense. (Appellant's Opening Brief (AOB) 12-18.)

To the extent that the trial court had discretion in the matter, it entirely failed to exercise it, which was itself an abuse of discretion. (AOB 18-20.) That abuse is reversible *per se* because of the inherent difficulty in determining the precise prejudice a defendant suffered, due to the ways a defense might have differed if the defendant had had the benefit of advisory counsel to assist his presentation. (AOB 21-29.) At a minimum, reversal is mandated in this case because of the concrete ways in which Mr. Debouver's defense was harmed by his inadequate knowledge of procedural law. (AOB 30-38.)

Respondent maintains that there is no constitutional right to advisory counsel; the court did exercise its discretion; courts never are required to appoint advisory counsel except in capital cases; and Mr. Debouver's case was so simple, and his legal knowledge so sufficient, that it could not have been an abuse of discretion to deny his request. None of these contentions has merit. There was no reason to deny Mr. Debouver's properly presented motion. The trial

court refused to exercise any discretion conferred upon it, and in doing so it denied Mr. Debouver critical legal assistance, rendering his defense ineffectual.

B. The Cases Respondent Cites in Opposition to the Constitutional Right Erroneously Interpreted Supreme Court Precedent.

Mr. Debouver has explained that the Sixth Amendment guarantees the right to advisory counsel because it both (1) affords the right to counsel at critical stages of the proceedings and (2) protects a defendant's fundamental right to represent himself, which the appointment of advisory counsel effectuates for a defendant who desires that assistance but wants to maintain tactical control over his defense. (AOB 14-16.) Respondent disputes that the right to advisory counsel is constitutional. (Respondent's Brief (RB) 14.) However, the cases on which it relies do not support its assertion.

Respondent cites *People v. Moore* (2011) 51 Cal.4th 1104 (*Moore*), which Mr. Debouver has explained does not aid respondent's claim. (AOB 16-18.) *Moore* relied on dictum in *McKaskle v. Wiggins* (1984) 465 U.S. 168, 183 (*Wiggins*) that "*Faretta* [*v. California* (1975) 422 U.S.

806] does not require a trial judge to permit 'hybrid' representation of the type Wiggins was actually allowed." *Wiggins* did not hold that hybrid representation is not protected by the Constitution, only that the *Faretta* decision itself does not require it. Moreover, the right to advisory counsel was not at issue in *Wiggins*, which addressed a defendant's complaint about the unsolicited participation of standby counsel interfering with this *Faretta* right to represent himself. (*Id*. at p. 170.)

Respondent additionally cites *People v. Garcia* (2000) 78 Cal.App.4th 1422 (*Garcia*) (RB 14), but *Garcia* does not support a lack of a Sixth Amendment right to advisory counsel for the same reason as *Moore*. The *Garcia* opinion, too, relies on *McKaskle* for the argument that there is no constitutional right to "hybrid" counsel. As described, *McKaskle* does not so hold.

The Sixth Amendment protects the right to advisory counsel for *pro per* defendants who timely and properly request it. (AOB 14-18.)

C. The Trial Court Explicitly Failed to Exercise Any Discretion Conferred Upon It.

To the extent that trial courts are vested with discretion in appointing advisory counsel, the trial court here explicitly failed to exercise that discretion. (AOB 18-20.) Respondent's assertion to the contrary misconstrues the factual record. (RB 15-16.)

Respondent contends that the trial court's ruling indicates that the court "was well aware of its discretion and exercised same to deny appellant's request." (RB 16.) In fact, the court plainly stated that it would not appoint advisory counsel in any case: "Mr. Debouver, the court does not appoint advisory counsel. . . . There may be some counties in other states that do that, but . . . we don't do that." (2 Augm. RT A3.) That language is unambiguous. Respondent is correct that the trial court "acknowledged that courts were permitted to do so." (RB 16.) But that does not alter the court's abdication of its discretion here. Recognizing legal authority is not the same as applying it to the facts and circumstances of the individual case before the court. In the present case, the court explicitly made clear that it would not appoint advisory counsel in

any case. That was a failure to exercise discretion and therefore an abuse of discretion.[1] (*People v. Downey* (2000) 82 Cal.App.4th 899, 912 (*Downey*); see *People v. Bigelow* (1984) 37 Cal.3d 731, 742 (*Bigelow*).)

The court's refusal to exercise its discretion whether to appoint advisory counsel was "serious error" under California Supreme Court precedent. (*Bigelow*, *supra*, 37 Cal.3d at p. 743.)

D. This Serious Error Requires Reversal Under Both Federal and California Law.

Mr. Debouver is entitled to a new trial. His opening brief explained that denial of the Sixth Amendment right to advisory counsel requires *per se* reversal because it is a fundamental, structural right under the federal Constitution. *Per se* reversal is a logical extension of United States Supreme Court jurisprudence holding that the denial of counsel at a critical stage of the proceedings and the denial of counsel of the defendant's choosing are structural errors.

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[1] Respondent fails to address Mr. Debouver's additional argument that, to the to the extent the court's statement was a legal conclusion that, in California, *pro per* defendants are not afforded advisory counsel, the court also abused its discretion by resting its decision on an error of law. (AOB 19-20; see *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 742 [abuse of discretion based on legal error]; *Moore*, *supra*, 51 Cal.4th at p. 1120 [California courts have discretion to appoint advisory counsel].)

(AOB 21-22.) At a minimum, the error in the present case requires reversal under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) because respondent has failed to meet its burden to prove that the unwarranted denial of advisory counsel was harmless beyond a reasonable doubt. (AOB 22-23.)

Under California law, the court's failure to exercise its discretion, though not constitutional error, nonetheless requires *per se* reversal in cases where it would have been an abuse of discretion to deny it. (*People v. Crandell* (2002) 46 Cal.3d 833, 861 (*Crandell*)[2]; *Bigelow*, *supra*, 37 Cal.3d at pp. 744-746; AOB 25-27.) Respondent seeks to limit this rule to capital cases, with its citation to *Garcia*, *supra*, 78 Cal.App.4th at p. 1431, but its argument is unavailing. (RB 15.) The Court of Appeal in *Garcia* "decline[d] to extend" the Supreme Court's decision in *Bigelow* to capital cases; however, *Garcia* was incorrect, as *Bigelow*'s holding and reasoning were not restricted to death penalty cases, but rather applied to all cases in which the defendant moves for advisory counsel. (*Garcia*, *supra*, 78 Cal.App.4th

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

at pp. 1429-1431.) Nor did the Court of Appeal in *Garcia* have the authority to limit the Supreme Court's holding.

Bigelow treated the fact that the defendant there was charged with a capital crime 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 complex issues involved in the capital case. (*Bigelow*, *supra*, 37 Cal.3d at p. 743, emphasis added.) The failure to exercise discretion was serious error, apart from the particular issues in the case. Moreover, the *Bigelow* opinion drew support from United States Supreme Court cases endorsing the practice of appointing advisory counsel, none of which were capital cases. (*Id*. at p. 742, citing *Mayberry v. Pennsylvania* (1971) 400 U.S. 455, 467 (*Mayberry*) and *Faretta*, *supra*, 422 U.S. at p. 806.)

Additionally, the *Garcia* court was of course free to express its low opinion of appointing advisory counsel for self-representing defendants and "respectfully disagree with the portion of the *Bigelow* opinion . . . that a trial court can abuse its discretion [by] failing to do

so" (*Garcia*, *supra*, 78 Cal.App.4th at pp. 1429-1430), but the Supreme Court's opinion nonetheless remains the law in California. (See *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455 (*Auto Equity*).) Furthermore, *Garcia* is distinguishable from the present case because the defendant there *did not request advisory counsel*, yet argued an abuse of discretion on appeal. (*Garcia*, *supra*, 78 Cal.App.4th at p. 1429.) The Court of Appeal was concerned that a finding of error in such a case would result in a rule that courts always have a *sua sponte* duty to appoint advisory counsel. (*Ibid*.) Of course, that concern is not present here, where Mr. Debouver explicitly and unequivocally moved for such assistance, but the trial court refused to exercise any discretion conferred upon it.

Turning to the question of whether reversal is required under California law, that is the correct result here because, had the court exercised its discretion, it would have been an abuse of that discretion to deny the motion, based on the circumstances before the court. (*Crandell*, *supra*, 46 Cal.3d at p. 861; *Bigelow*, *supra*, 37 Cal.3d at

pp. 744-746.) At a minimum, reversal is required under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) because a court's failure to exercise its discretion, even where it would *not* have been an abuse of discretion to deny the motion, remains serious error that demands a new trial if there is a reasonable probability that the defendant would have obtained a more favorable result with the assistance of advisory counsel. (*Crandell*, *supra*, 28 Cal.4th at pp. 864-865.)[3]

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[3] Respondent is mistaken in its claim that Mr. Debouver has "misstated the law by representing that if this Court finds the trial court abused its discretion, such abuse constitutes 'serious error,' which is reversible per se." (RB 18.) Respondent's brief misapprehends both Mr. Debouver's claim and the applicable harmless error standard. Mr. Debouver's argument, based on Supreme Court precedent, is that, in cases like the one at bar, where the trial court has failed to exercise its discretion, that error requires reversal *if* it would have been an abuse of discretion to deny the motion. (*Crandell*, *supra*, 46 Cal.3d at p. 861; *Bigelow*, *supra*, 37 Cal.3d at pp. 744-746.) Mr. Debouver does not argue that all cases of abuse of discretion require *per se* reversal. If the Court *had* exercised its discretion, then *Watson* would apply. But where a court has *failed* to exercise its discretion, the abuse-of-discretion analysis is applied to determine whether *per se* reversal is appropriate. If the court would have abused its discretion, reversal is required. If not, the refusal to exercise discretion remains error, and the appellate court applies the *Watson* standard to determine whether reversal is warranted.

Moreover, contrary to respondent's claim (RB 18), the *Crandell/Bigelow* rule is not limited to capital cases, for the same reasons described above. Nor does the case respondent cites, *People v. Goodwillie* (2007) 147 Cal.App.4th 695 (*Goodwillie*) hold otherwise.

Respondent maintains that it would not have been an abuse of discretion to deny advisory counsel, and that Mr. Debouver was not prejudiced by the lack of legal advice. Respondent's contention lacks merit. First, its brief argues that Mr. Debouver's pretrial motions and request for discovery show that he did not need the assistance of counsel. (RB 16.) At the outset, Mr. Debouver disputes respondent's premise. What reason is there to deny counsel to a desiring defendant who wants to control the defense strategy but believes he cannot effectively present the defense on his own and seeks an advisor? Respondent offers none. The primary ill to be avoided is if the defendant is engaged in a "manipulative endeavor to obtain the appointment of private counsel without a showing of conflict or inadequacy sufficient to remove the public defender in the first

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(RB 18.) *Goodwillie* did not draw a distinction between capital and non-capital cases with regard to the applicable harmless error standard. Rather, it pointed out that, because the California Supreme Court has held that there is no federal constitutional right to advisory counsel, *Watson*, not *Chapman*, applies. (*Id*. at p. 716, citing *Crandell*, *supra*, 46 Cal.3d at p. 865.) The *Crandell*/*Bigelow* rule still holds: if it would have been an abuse of discretion to deny advisory counsel, *per se* reversal is required in cases where the trial court has committed serious error by refusing to exercise its discretion. (*Crandell*, *supra*, 46 Cal.3d at p. 861; *Bigelow*, *supra*, 37 Cal.3d at pp. 744-746.)

instance." (*Crandell*, *supra*, 46 Cal.3d at p. 863.) There was no evidence that Mr. Debouver had any such improper motive.

Moreover, nothing in Mr. Debouver's pretrial motions demonstrates that the advice of counsel would not have been of great use to his defense. Respondent correctly observes that Mr. Debouver made oral motions prior to his advisory counsel motion, including for *pro per* funds and an investigator. (RB 16; CT 72.) Mr. Debouver also made a motion to represent himself (as do all *pro per* defendants who then go on to request the appointment of advisory counsel). None of these basic requests shows that Mr. Debouver was not in need of advisory counsel in order to effectively present a defense.

Respondent additionally points to Mr. Debouver's "Motion to Exclude Evidence That Was Excluded as Evidence," filed the same day as the denial of advisory counsel. (CT 74.) This is the same motion that the opening brief cited as evidence that Mr. Debouver was not adequately prepared to represent himself without assistance. The motion confusingly complained of "gross negligence" in the handling of his backpack because it was "driven all over Los

Angeles." (CT 74.) Here again, respondent's assertion that Mr. Debouver did not need advisory counsel misses the mark.

Mr. Debouver's discovery request appears largely copied from a book. (CT 77-79.) More importantly, it was made *after* his motion for advisory counsel. As respondent acknowledges, the abuse of discretion determination is made only based on what the trial court would have known at the time of the hearing on the advisory counsel motion. (RB 17.)

Indeed, the trial court's refusal to exercise its discretion regarding Mr. Debouver's advisory counsel request, and failure to hold a proper hearing on it, is what led to the relative lack of information in the record as to Mr. Debouver's then-existing need for advisory counsel. Respondent's arguments are thus largely speculative. Respondent claims that Mr. Debouver's criminal record dating back to 1986 shows that he was "well-versed in the criminal justice system." (RB 16.) Yet respondent merely points to a list of Mr. Debouver's prior convictions. (RB 16, citing CT 62.) The court failed to hold a hearing that could have developed the relevant

information. Nothing was elicited regarding the nature of Mr. Debouver's prior proceedings. For instance, it is unknown whether these cases were as factually or legally complex as the present case, whether Mr. Debouver pled guilty in all of the prior matters, or whether he had ever been to trial. The mere fact that Mr. Debouver was previously convicted of several crimes does not show that he was well-equipped to represent himself and lacked a need for advisory counsel.

Respondent additionally contends that Mr. Debouver was only charged with "simple burglary," and he therefore did not need the assistance of counsel. (RB 17.) "Simple burglary" is not a crime, nor was there anything simple about this case of first degree burglary, with a person-present allegation that elevated the offense to a violent felony. In fact, the very things that respondent highlights -- the eyewitness who identified Mr. Debouver leaning into a broken window, his blood in the vehicles, and the stolen item found in his backpack -- support Mr. Debouver's argument, not respondent's. (RB 17.) The case against Mr. Debouver was strong in several

respects; he needed the assistance of experienced counsel if he was going to succeed in creating reasonable doubt as to specific intent.

Indeed, advisory counsel would have been invaluable in procedural matters as to which Mr. Debouver's self-representation was inadequate. As explained, Mr. Debouver's most critical deficiencies were in failing to present evidence of the prescription medications in his backpack, failing to present expert testimony explaining the effects of excessive alcohol and pills on one's ability to form the specific intent to commit a crime, and failing to request an unconsciousness instruction. He was caught by surprise with his audiotaped confession, failed to prepare a transcript that would have allowed him to play exculpatory portions of the audio instead of just the prosecution's incriminating excerpts, and failed to secure the expert in coercive confessions. With counsel's assistance, there is a reasonable probability -- more than an abstract chance -- that at least one juror would have had a reasonable doubt that Mr. Debouver had the required mental state for the crime, in light of his intoxication to

the point of blackout. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351 (*Wilkins*); *Cone v. Bell* (2009) 556 U.S. 449, 452 (*Cone*); AOB 31-36.)

Respondent asserts that Mr. Debouver's failures in representing himself at trial cannot be considered because they occurred after the trial court decided his motion for advisory counsel. (RB 17.) Here again, respondent misapprehends the standard. Mr. Debouver raises his ineffective trial performance in support of his *Watson* prejudice claim. The present question is whether there is a reasonable probability that he would have achieved a better result with the assistance of advisory counsel. His self-representation failures are the relevant evidence.

Respondent further claims that Mr. Debouver's testimony that he blacked out was sufficient to establish his defense. (RB 18.) On the contrary, the prosecution was able to convince the jury that Mr. Debouver's memory of events during his interrogation meant that he was lying. Mr. Debouver should have played the portions of the audio showing deficiencies in his memory, put on an expert to explain how intoxication affects memory and specific intent, and

requested an unconsciousness instruction. Moreover, respondent misses the mark with its observation that the court did instruct on voluntary intoxication. (RB 19.) Rather, the crucial additional instruction supporting Mr. Debouver's defense was CALCRIM No. 626, which would have told the jury, in pertinent part, that a highly intoxicated person may become unconscious, though physically moving, and not be aware of the nature of his actions. The basic voluntary intoxication instruction, CALCRIM No. 404, does not explain that relevant point to the jury.

Respondent additionally maintains that nothing would have changed if Mr. Debouver had counsel's advice; he would still have been impeached and would still have faced the same overwhelming evidence. According to respondent, at best counsel would have advised Mr. Debouver not to testify. (RB 19.) This is a misunderstanding of the nature of the case. The evidence was overwhelming as to Mr. Debouver's actions but not his intent. The entire case came down to specific intent. Counsel likely would have advised Mr. Debouver to testify because, as Mr. Debouver

recognized, his testimony was the key evidence supporting his specific-intent defense. Where counsel's advice, experience, and procedural knowledge of the law would have been critical is in helping Mr. Debouver to present crucial corroboration of that testimony. As explained, if Mr. Debouver had had the benefit of advisory counsel, he could have produced evidence of the pills he was taking as well as expert testimony supporting that his severe intoxication could have prevented specific intent. Counsel also would have helped to weaken the prosecution's case by putting on an expert to explain that the fact that Mr. Debouver was able to recount details of the incident during the interrogation did not mean that he was lying about blacking out. And if Mr. Debouver had been able to play other portions of the audio recording, the jury would have seen that he did in fact have memory loss due to intoxication, even at the time of the interrogation. Moreover, respondent's suggestion that nothing would have changed should be rejected because, as our Supreme Court has instructed, it is improper to evaluate the potential for prejudice solely based how the trial actually

went. (*Biglow*, *supra*, 37 Cal.3d at p. 745.) Counsel could have helped Mr. Debouver investigate and produce additional evidence supporting the defense (*ibid*.), including *inter alia*, putting on a coercive interrogations expert to weaken the impeachment value of the taped statement.

As to Mr. Debouver's additional point -- that advisory counsel would have prevented the trial court from removing from the jury's consideration the factual issue of whether the garage was part of a "residence" (AOB 36-37) -- respondent only contends that there was no error in the instruction. (RB 19.) For the reasons described in Arguments IV and V, however, respondent is mistaken, and Mr. Debouver was harmed by the lack of advisory counsel's assistance in this respect as well.

E. Conclusion

Mr. Debouver was "beyond [his] depth." (3 RT 520.) He was manifestly prejudiced by being wrongfully denied the assistance of advisory counsel. Briefly summarized, the trial court's denial of his timely and proper 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 Mr. Debouver would have garnered a better outcome if he had had the assistance of counsel.

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 opening brief explained that the trial court's denial of Mr. Debouver's motion to suppress was error for two reasons, either one of which requires reversal: (1) based on the testimony at the hearing, the prosecution did not satisfy its burden to prove that Mr. Debouver

gave his confession voluntarily (AOB 40-51); 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 (AOB 51-60). The admission of the confession was federal constitutional error demanding reversal because, under *Chapman*, the state cannot prove the error harmless beyond a reasonable doubt, since the confession was the key evidence undermining Mr. Debouver's specific-intent defense.

Respondent mistakenly argues that Mr. Debouver has forfeited his claim. On the contrary, both parties recognized that voluntariness was one of the issues raised in the motion to suppress. Respondent's erroneous belief that only the *Miranda* waiver was at issue also leads it to incorrectly urge this Court to review the recorded interrogation only for that purpose, rather than determining the pertinent question of whether Mr. Debouver's weakened mental state and the officers' coercive pressure rendered the statement involuntary under the Fourteenth Amendment. Respondent also

focuses only on intoxication and entirely fails to address Mr. Debouver's demonstration that the police used unlawful coercive tactics to garner a confession. Moreover, respondent overlooks that it was the prosecution's burden to prove voluntariness, not Mr. Debouver's burden to prove *in*voluntariness. This Court should reverse the conviction and exclude the tainted statement.

B. The Issue Was Properly Raised in the Trial Court.

Respondent's claim that Mr. Debouver has forfeited his voluntariness challenge is perplexing. (RB 21-22.) Its brief asserts that "[a]ppellant plainly concedes that his motion to suppress his confession was made on the ground *that it was involuntary and* obtained in violation of *Miranda* . . . ." (RB 21, emphasis added.) Mr. Debouver's written motion in the trial court argued both that his *Miranda* waiver was invalid *and* that the confession was involuntary in violation of the Fourteenth Amendment. (CT 81-82.) Indeed, the motion explicitly argues that the "confession was involuntary . . . ." (CT 81.) And three of the four cases that Mr. Debouver cites in the motion dealt with voluntariness. (CT 82, citing *People v. Fowler* (1980)

109 Cal.App.3d 557, 563 (*Fowler*), *In re Cameron* (1968) 68 Cal.2d 487, 503 (*Cameron*), and *Crane v. Kentucky* (1986) 476 U.S. 683, 687 (*Crane*).)

Respondent's brief additionally misapprehends the claim when it maintains that Mr. Debouver "never objected . . . in the trial court on the ground that his statements were coerced." (RB 21.) The voluntariness inquiry examines "*both* the characteristics of the accused and the details of the interrogation." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226 (*Schneckloth*), emphasis added.) Mr. Debouver clearly argued that, because of his severe intoxication, he "was not in the right state of mind to give the confession," and also that his "will was overborne" by the police interrogation. (2 Augm. RT B19-B20.) He explicitly complained that the confession lacked "voluntariness." (2 Augm. RT B19.)

Furthermore, the issue was squarely before the trial court, as shown by the statements of the prosecutor. The prosecutor argued that Mr. Debouver was not "overborne or coerced . . . to give the statement" and that he gave it willingly. (2 Augm. RT B24.) Finally, as respondent acknowledges, the court ruled "that appellant could

not have been [so highly] under the influence so as to render his confession involuntary . . . ." (RB 21.) The issue of voluntariness was properly preserved.

C. The Prosecution Failed Its Burden to Prove That the Statement Was Freely Given.

In the opening brief, Mr. Debouver explained that a confession may be deemed involuntary where the defendant was so intoxicated that his statement was not freely given. The trial court legally erred by holding that intoxication alone could not render a confession involuntary. And the prosecution's evidence at the hearing did not satisfy its burden to prove that Mr. Debouver was not so intoxicated that his confession was involuntary. (AOB 49-51.)

Respondent does not directly address Mr. Debouver's point that the trial court made a legal error in finding that intoxication alone could not invalidate a *Miranda* waiver or render a statement involuntary. (2 Augm. RT B25.) But respondent echoes the same erroneous conclusion with its assertion that voluntary consumption of drugs and alcohol cannot establish an impairment of capacity that would render a confession inadmissible. (RB 22.) In fact, intoxication

can be so severe as to make a resulting confession involuntary under the Fourteenth Amendment. (*Townsend v. Sain* (1963) 372 U.S. 293, 307-308 (*Townsend*)[4]; *Cameron*, *supra*, 68 Cal.2d at pp. 502-503; *Gladden v. Unsworth* (9th Cir. 1968) 396 F.2d 373, 380-381 (*Gladden*).) The cases respondent cites do not support its position. (RB 22.)

In *People v. Hendricks* (1987) 43 Cal.3d 584, 591 (*Hendricks*), the Court held that the mere *consumption* of alcohol does not make a confession involuntary. That is true; the question is whether the alcohol so *impaired* the defendant as to make his statement involuntary. (*Ibid*.) In *Hendricks*, the defendant testified that he drank more whiskey than the officer claimed he did, felt "dizzy," and was "talking kind of crazy." (*Id*. at p. 590.) But the officer testified that he drank only about two ounces of whiskey in 90 minutes, and the trial court expressly determined that the defendant's confession was unaffected by the alcohol. (*Id*. at p. 591.)

Thus, not only did *Hendricks* not hold that self-induced intoxication can never render a statement involuntary, but it is also

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

factually distinguishable from the present case. Here, the prosecution did not meet its burden to prove that Mr. Debouver's confession was voluntary because its only witness conceded that Mr. Debouver was drunk during the interrogation (2 Augm. RT B15), Mr. Debouver testified that he was extremely intoxicated, to the point of blacking out (2 Augm. RT B19-B21), and the trial court made no finding that Mr. Debouver lacked credibility, nor that he was unaffected by the alcohol and pills. Deputy Im testified that Mr. Debouver said he understood his *Miranda* rights, but that could not prove by a preponderance of the evidence that Mr. Debouver was not highly intoxicated. It was not Mr. Debouver's burden to prove that he was so intoxicated that he did not freely provide his statement; it was the prosecution's burden to prove the contrary. Plainly, the prosecution's evidence did not meet that burden.[5]

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[5] *Gaddy*, the other case respondent cites, likewise did not hold that intoxication alone cannot render a statement involuntary, and it, too, is factually distinguishable. The Eighth Circuit simply observed that "'[i]ntoxication and fatigue do not *automatically* render a confession involuntary.' [Citation.]" (*United States v. Gaddy* (8th Cir. 2008) 532 F.3d 783, 788 (*Gaddy*), emphasis added.) Rather, the test is whether these impairments were severe enough that the defendant's will was overborne. (*Ibid*.) *Gaddy* is also distinguishable because the trial

In an attempt to rehabilitate the insufficient evidence, respondent asserts facts that were not adduced at the motion to suppress hearing. Respondent acknowledges that "Deputy Im admitted he believed Mr. Debouver was drunk," but respondent alleges that the deputy "did not believe Mr. Debouver was too heavily under the influence to waive his rights and participate in the interview." (RB 22, citing 2 Augm. RT B9-B10.) Neither the cited pages nor any other part of the hearing supports respondent's assertion. Deputy Im never testified to Mr. Debouver's level of drunkenness, nor the affect it had on his ability to provide a voluntary confession.

Respondent additionally cites testimony of the other officer, Detective Lopez, who claimed *at trial* that Mr. Debouver did not appear to be intoxicated during the interview. (RB 22, citing 2 RT 230-231.) Of course, trial testimony was not part of the evidence at the motion to suppress hearing and could not have supported the People's burden.

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court expressly found credible the officers' testimony that the defendant was alert and coherent and never said he was intoxicated, which is not the case here. (*Ibid*.)

Finally, respondent's brief misconstrues the record when it alleges that the trial court "found that Mr. Debouver's testimony that he was too heavily under the influence . . . lacked credibility." (RB 21.) The court made no credibility determination. It merely summarized the evidence adduced at the hearing and then stated its legally incorrect ruling that intoxication alone cannot make a statement involuntary:

> 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 . . . merely being under the influence does not mean that you don't have the ability to consent, to understand, and so forth.

(2 Augm. RT B25.) This was not a credibility or factual determination; it was a statement of the court's view of the law. Contrary to respondent's assertion, the court never made findings that Mr. Debouver "was *able* to ride a bicycle" and "*able* to communicate with the police and be forthcoming," and thus his statement was voluntary. (RB 21, emphasis added.)

In sum, the trial court legally erred by finding that intoxication alone could not render Mr. Debouver's statement involuntary, and the prosecution failed its burden to prove voluntariness because it introduced insufficient evidence to rebut Mr. Debouver's testimony that his severe intoxication yielded a confession that was not freely given. Each of these errors requires a holding that the confession was wrongfully admitted into evidence.

D. 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.

As Mr. Debouver has explained, an additional, independent reason the confession was improperly admitted is that the trial court prejudicially abused its discretion by failing to listen to the audio recording of the interrogation -- the most relevant evidence of whether Mr. Debouver had adequate presence of mind to freely give a confession. (AOB 51-60.) Respondent makes no claim that the trial court acted correctly when it failed to listen to the recording, effectively conceding the abuse of discretion.

Respondent only argues, in a single sentence, that "Mr. Debouver's responses to questions showed that he was not too intoxicated to understand what he was being asked and provide appropriate answers." (RB 22.) On the contrary, as Mr. Debouver described in detail in his opening brief, and as this Court will hear in its review of the recording, Mr. Debouver's speech was slow and sometimes slurred, he was under the influence of alcohol and drugs, he was sick with what appeared to be the flu, he struggled with his memory in answering certain questions, and he was in serious psychological distress, even asking the police to shoot him. (AOB 53-56.) The police were aware and took advantage of Mr. Debouver's weakened state to coerce a confession.

Respondent also entirely fails to address the second half of the analysis: police coercion. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226 (*Schneckloth*).) Respondent does not dispute that the officers rendered the confession unconstitutional and inadmissible by using express and implied promises of leniency and coercive pressure to extract the confession. They promised and implied that he would

receive more lenient treatment if he wrote out a confession, pressured him, told him what to write, and denied him medical care and the ability to urinate until he complied. (AOB 56-60.) Respondent makes no claim to the contrary.

Finally, this Court should reject respondent's confusing insistence that the Court should only review the recording "for the limited purpose of considering . . . whether appellant was too intoxicated to waive his *Miranda* rights . . . ." (RB 23.) Mr. Debouver has not challenged the *Miranda* waiver itself. It, too, may well have been invalidated by Mr. Debouver's physical and mental state and the officers' conduct in this case, but that issue is moot because the law allows a *Miranda*-defective statement to be used to impeach. (*Oregon v. Hass* (1975) 420 U.S. 714, 722 (*Hass*); see *People v. Nguyen* (2015) 61 Cal.4th 1015, 1075 (*Nguyen*).) Involuntary statements are not admissible for impeachment, however, and that is the question we are addressing here. (*Ibid*.) The voluntariness issue was properly presented in the trial court, and this Court should listen to the recording, which demonstrates the prejudicial effect of the trial

court's failure to review the most relevant evidence that the confession was involuntary within the meaning of the Fourteenth Amendment.

E. Respondent Has Failed Its Burden Under *Chapman* to Prove That the Confession Made No Difference in the Verdict.

The error in admitting Mr. Debouver's statement requires reversal because respondent has failed to meet its burden to show that the confession made "no difference in reaching the verdict obtained." (*Yates v. Evatt* (1991) 500 U.S. 391, 407 (*Yates*)[6]; *Chapman*, *supra*, 386 U.S. at p. 24; AOB 60-62.) Confessions are the most powerful form of evidence against the accused. (*Bruton v. United States* (1968) 391 U.S. 123, 139 (*Bruton*) (White, J., dissenting); see also *Arizona v. Fulminante* (1991) 499 U.S. 279, 296 (*Fulminante*).)

Respondent's only rebuttal is an immaterial point that Mr. Debouver himself concedes: the evidence was overwhelming that he was the person who broke into the cars and took the iPhone charger. (RB 24.) The entire case, however, came down to the question of

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

intent, and whether Mr. Debouver was so intoxicated that he did not form the specific intent to enter the garage for the purpose of theft.[7] (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 . . . ."].) The prosecution was able to use the confession to argue that Mr. Debouver's otherwise-uncontested testimony, that he was so intoxicated that he blacked out and did not have control of his actions, was a lie because he remembered details of the incident during the interrogation. Without the confession, the jury could well have had a reasonable doubt that Mr. Debouver formed specific intent in his highly intoxicated state. The confession struck the death blow to his defense. It was unquestionably prejudicial under *Chapman*.

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[7] One of respondent's factual assertions requires correction. Contrary to respondent's suggestion, the metal tool the apartment manager saw Mr. Debouver carrying was not the screwdriver the police found in a nearby front yard (and which they never saw him holding). (1 RT 149, 203-204.)

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

In the opening brief, Mr. Debouver explained that the prosecutor committed misconduct by affirmatively stating that he would not use Mr. Debouver's confession at the trial and then going back on the promise to impeach him with it, well knowing at the time of the prior assurance that Mr. Debouver's defense was that he blacked out and did not remember the incident. The confession was not even properly a prior inconsistent statement admissible to impeach because a witness's testimony that he cannot remember an incident is not inconsistent with a prior statement about it. The prosecutor's promise not to use the confession unjustly induced Mr. Debouver to waive his Fifth Amendment privilege and testify under a false premise. The rules of prosecutorial misconduct, due process, freedom from self-incrimination, and equitable estoppel all bar such an unfair tactic to gain a conviction. (AOB 66-76.)

Respondent first maintains that the prosecutorial misconduct claim is forfeited because Mr. Debouver did not object on that ground in the trial court and did not request a jury admonition. (RB 25.) Respondent is incorrect because Mr. Debouver did make a proper objection, and the rule respondent cites only applies to prosecutorial misconduct in argument to the jury in any event. As to the substantive claims, respondent largely only contends that there was no promise not use the confession. It further submits that any error was harmless because admission of the confession did not prejudice Mr. Debouver. None of these assertions has merit.

B. Mr. Debouver's Claims Were Properly Preserved for Appeal.

Respondent initially maintains that Mr. Debouver's prosecutorial misconduct argument is forfeited because he did not say the words "prosecutorial misconduct" in his objection and did not request that the court admonish the jury to disregard the impropriety. (RB 25, citing *People v. Berryman* (1993) 6 Cal.4th 1048,

1072 (*Berryman*).[8]) Respondent's argument misses the mark. Mr. Debouver properly raised the issue of prosecutorial misconduct when he objected to the unfairness of the prosecutor saying he was not going to use the statement at trial and then impeaching Mr. Debouver with it. (2 RT 329-330.) The specific words "prosecutorial misconduct" were not required; it was sufficient that the objection fairly advised the trial court of the substance of the objection. (*People v. Scott* (1978) 21 Cal.3d 284, 290 (*Scott*).) Moreover, the *Berryman* rule requiring a request that the trial court give an admonishment to the jury is specific to the situation in which the prosecutor's misconduct is in the form of improper *argument* made to the jury. That was the context in which it arose in *Berryman*, as well as the cases on which *Berryman* relied. (See *Berryman*, *supra*, 6 Cal.4th at p. 1072; *People v. Ashmus* (1991) 54 Cal.3d 932, 975-976 (*Ashmus*)[9]; *People v. Benson* (1990) 52 Cal.3d 754, 793-794 (*Benson*).) Here, where the misconduct related to evidentiary matters litigated outside the presence of the

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[8] Overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn.1 (*Hill*).

[9] Abrogated on other grounds as recognized in *People v. Yeoman* (2003) 31 Cal.4th 93, 117 (*Yeoman*).

jury, there was no need for a jury admonition; the issue was the trial court's erroneous legal ruling allowing admission of the confession despite the prosecutorial misconduct.

Furthermore, respondent does not argue that any of Mr. Debouver's other claims relating to the impropriety of the impeachment raised herein was forfeited for failure to object. Each claim is cognizable on appeal for the reasons described in the opening brief. (AOB 77-81.)

C. The Prosecutor Explicitly Stated That He Did Not Intend to Introduce the Confession, Fully Knowing the Nature of Mr. Debouver's Defense, and His Promise Was Not Limited to the Testimony of Detective Lopez.

Respondent's only response to most of Mr. Debouver's assignments of error is that the prosecutor merely assured Mr. Debouver and the court that he would not ask *Detective Lopez* about the confession. According to respondent, the prosecutor did not promise he would not use the confession to impeach Mr. Debouver, and therefore he did not break a promise. (RB 26-27.) This misconstrues the factual record.

The prosecutor made his assurance in the context of a discussion about the defense's problems in securing potential defense witness Gary Steiner, a confessions expert. (1 RT 222-223.) The trial judge sought to determine whether Mr. Steiner's testimony might not be necessary and asked the prosecutor whether he intended to elicit anything about the confession from the upcoming witness, Detective Lopez. (1 RT 223.) Detective Lopez was one of the two officers who had interrogated Mr. Debouver (along with Officer Im) and the only one of the two that the prosecution intended to call in its case in chief.[10] Thus, the question was whether the prosecutor was going to introduce the confession at all, not just whether he was going to ask Detective Lopez about it. The prosecutor plainly said, "No." (1 RT 223.) This objectively indicated the prosecution's intent not to use the confession in the trial.

This assurance was unequivocally reinforced the following day when the prosecutor affirmatively raised the issue again on his own:

> . . . [W]hat I wanted to discuss with the Court is the fact that though Detective Lopez is going to be testifying, I'm not going to be eliciting anything from him

[10] Officer Im was later called only as a rebuttal witness. (3 RT 371.)

> regarding the statement that was made by the defendant. . . . [¶] And I would ask the Court to direct the defendant, *because the fact that the People are not seeking to have that statement admitted*, that he not refer to it.

(2 RT 226, emphasis added.) The court then ordered Mr. Debouver not to mention the confession, in light of the fact that it would not be part of the prosecution evidence in the trial. (2 RT 226.)

The record could not be more clear. The prosecutor assured Mr. Debouver and the court that the People did not intend to use the confession. Contrary to respondent's suggestion, the promise was not limited to merely not asking Detective Lopez about it. It was objectively reasonable for Mr. Debouver to take the prosecutor at his word, particularly given that the prosecutor was well aware that Mr. Debouver's defense was that he did not remember the incident. When Mr. Debouver later testified accordingly, it was not a surprise to the prosecutor and did not create any change in circumstances. The prosecution was not justified in withholding the confession for impeachment and rebuttal to unfairly surprise Mr. Debouver and undermine his defense.

D. Respondent Does Not Dispute That Promising Not to Use a Defendant's Statement, Inducing Him to Testify on False Pretenses, and Then Going Back on That Promise Is Prosecutorial Misconduct, Barred by Principles of Due Process, Freedom from Self-Incrimination, and Equitable Estoppel.

Respondent merely relies on its faulty premise that the prosecutor never averred that he was not going to use the statement at trial. It does *not* argue that promising not to use a confession, inducing the defendant to testify with that false understanding, and then going back on that promise is *lawful*. As explained in the opening brief, both the Fourteenth Amendment and California law bar such deceptive methods of gaining a conviction. (*People v. Hoyos* (2007) 41 Cal.4th 872, 923 (*Hoyos*)[11].) When a prosecutor induces a defendant to waive his constitutional protection against self-incrimination in reliance on a promise, that promise must be enforced. (*People v. Quartermain* (1997) 16 Cal.4th 600, 618 (*Quartermain*).) Equitable estoppel prevents a party from going back on a promise on which the other party has detrimentally relied. (Evid. Code, § 623; *Hair v. State of California* (1991) 2 Cal.App.4th 321,

[11] Abrogated on other grounds by *People v. McKinnon* (2011) 52 Cal.4th 610, 641 (*McKinnon*).

328 (*Hair*).) And it is improper to withhold material evidence for rebuttal that could have been introduced in the case in chief. (*People v. Carter* (1957) 48 Cal.2d 737, 753-754 (*Carter*).) (AOB 67-76.) Respondent makes no arguments to the contrary.

E. The Statement Was Not Admissible to Impeach.

Mr. Debouver has also explained that the confession was not even legitimate impeachment evidence because it was not a prior inconsistent statement, since Mr. Debouver did not testify in contradiction to anything he said before, but rather that he could not remember. (*People v. Sam* (1969) 71 Cal.2d 194, 210 (*Sam*); AOB 66-67.) Respondent maintains that any relevant evidence pertaining to witness credibility is admissible to impeach, and that *Sam* only applies where a prior inconsistent statement is sought to be introduced under an exception to the hearsay rule. (RB 27-30.)

First, it should be noted that, whether or not this Court finds the confession to be generally proper impeachment material, it was nonetheless serious error for the trial court to allow the prosecutor to use it for impeachment after averring that he did not intend to

introduce it as evidence at the trial. That misconduct requires reversal irrespective of whether the confession was otherwise relevant impeachment evidence.

But respondent is incorrect in any event. Respondent maintains that *Sam* is distinguishable from the present case because the prior statement there was introduced to impeach a witness, rather than the defendant, and no hearsay exception for prior inconsistent statements is necessary where there already exists the hearsay exception for the defendant's own statements. (RB 29-30.) However, *Sam*'s holding was not limited to the hearsay exception context; the Supreme Court also discussed the right of impeachment in general: "'The right of impeachment does not exist where the witness states he has no recollection of the fact concerning which he is examined.' [Citation.]" (*Sam*, *supra*, 71 Cal.2d at p. 210.) As *Sam* explained, "[t]here is nothing necessarily inconsistent between the fact that [the witness] gave a statement to the officer over two years earlier -- or the substance of that statement -- and his present claim of lack of recollection." (*Id*. at p. 209.) Thus, the lack of admissibility to

impeach was an additional reason why the confession should have been excluded.

F. The Erroneous Admission of the Confession Was Highly Prejudicial and Demands Reversal.

Respondent's claim that any error in admitting the recorded statements was harmless fails for the same reasons discussed in Argument II. (RB 30.) Confessions are the most powerful kind of evidence, and Mr. Debouver's statements to the police were the key prosecution evidence undermining his defense that he was so intoxicated he became unconscious of his actions and lacked specific intent. Reversal is required under any standard.

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.

Mr. Debouver explained in his opening brief that the person-present finding must be reversed due to insufficient evidence because a garage beneath an apartment complex is not a "residence"

for purposes of Penal Code section 667.5, subdivision (c)(21). (AOB 84-91.)

In respondent's Arguments IV and V, it seeks to eliminate the difference between an "inhabited dwelling" and a "residence." This it cannot do because the two concepts have distinct meanings within the law, which carry distinct consequences. A burglary is of the first degree where the place burglarized is an "inhabited dwelling," which includes any structure that is functionally interconnected with, and immediately contiguous to, other portions of the dwelling space. (*People v. Harris* (2014) 224 Cal.App.4th 86, 90 (*Harris*).) A first degree burglary is only elevated to a "violent felony" where another person is "present *in* the *residence* during the commission of the burglary." (Pen. Code, § 667.5, subd. (c)(21), emphasis added.) As Division Five of this Court stated in *People v. Singleton* (2007) 155 Cal.App.4th 1332, 1338-1339 (*Singleton*), 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 burglary law, and singled out such burglary for harsher punishment.

Respondent and Mr. Debouver debate the meaning of *Singleton* and *Harris*. Mr. Debouver's reading is the correct one. As described in the opening brief, *Singleton* held that the hallway outside of an apartment unit did not count as part of the residence because, for purposes of subdivision (c)(21), "'[t]he threshold . . . is located at the doorway[] into the apartment[].' [Citation.]" (*Singleton*, *supra*, 155 Cal.App.4th at pp. 1337-1338.) The hallway was contiguous and functionally interconnected to the apartment unit, and thus part of the inhabited dwelling, but it was not part of the "residence." Following *Singleton*, this Court should hold that Mr. Debouver did not burglarize a residence because he did not cross the threshold into any residential apartment unit.

Respondent contends that the instant case is more like *Harris*, where the Fourth District held that a garage attached to a single-family home, which had been converted to a guest room and shared a roof and internal wall with the main house, but did not have an

internal door connecting them, was part of a residence. (RB 33; *Harris*, *supra*, 224 Cal.App.4th at pp. 89-91.) Respondent focuses on language in *Harris* and *Singleton* about the "outer walls," while missing the point that what counts is the outer walls *of a residential unit*. (*Harris*, *supra*, 224 Cal.App.4th at p. 90; *Singleton*, *supra*, 155 Cal.App.4th at p. 1337.)

Harris distinguished *Singleton* on the basis that the hallway outside the *Singleton* victim's apartment was not within the victim's "*exclusive tenancy and control*," whereas the attached guest house in *Harris* was. (*Harris*, *supra*, 224 Cal.App.4th at p. 90, emphasis added.) The critical difference was that the victim in *Singleton* was outside his residential unit, in a common area, whereas the guestroom in *Harris* was part of the victims' house to which they had exclusive tenancy and control. (*Singleton*, *supra*, 155 Cal.App.4th at pp. 1335-1336; *Harris*, *supra*, 224 Cal.App.4th at p. 90.) The law gives special protection to the place where a person sleeps, not an entire apartment complex.

Indeed, even if the hallway in *Singleton* had been walled in, instead of open to the air, the court would have held that it was outside the victim's residence. Walls are not determinative; the residential nature of the specific area burglarized is. The *Singleton* victim was present in the hallway that was immediately outside and connected to his apartment, but that was insufficient. (*Singleton*, *supra*, 155 Cal.App.4th at p. 1338.)

Another hypothetical illustrates this point. Assume that a large apartment building has ten apartments per floor, and a defendant burglarizes apartment #1, in which no one is home, but far down the hall a resident is home in apartment #10. In respondent's view, the defendant would be guilty of a violent felony because a person was present somewhere within the four walls of the building, even though no one was present in the residential unit the defendant actually entered and burglarized. Neither *Singleton* nor *Harris* indicates such a result. In an apartment building, a person must be present within the particular burglarized residential unit in order for the defendant to be guilty of a violent felony. The presence of a

person in another part of the apartment complex, in a common area or in another apartment that does not belong to the victim, does not qualify. (See *Singleton*, *supra*, 155 Cal.App.4th at p. 1338.)

Moreover, respondent is off-base with its contention that the evidence in the present case was stronger than in *Harris* because Mr. Debouver was present in the same physical location as the apartment manager, whereas the *Harris* defendant was in a different room than the homeowners. (RB 33.) Here again, *Singleton* dispels such argument. In *Singleton*, the defendant and the victim physically encountered each other down the hall from the victim's apartment and had a verbal confrontation. (*Singleton*, *supra*, 155 Cal.App.4th at p. 1336.) This direct physical proximity did not change the result. The key question is *where* the victim was present. In neither *Singleton* nor the instant case was the victim present in a residential unit.

Finally, at a minimum, *Harris* does not dictate a finding that a person was present in a residence in Mr. Debouver's case because *Harris* is factually distinguishable. The attached guesthouse there was considerably more a part of the residential unit than the garage

beneath the large apartment complex was in the present case. The burglarized guestroom in *Harris* directly shared a wall with the victims' bedroom, and the defendant entered their home just feet from where they slept. (*Harris*, *supra*, 224 Cal.App.4th at pp. 89-91.) They had used the room for their own sleeping as well. (*Id*. at p. 89.) And it was part of their single-family home. (*Ibid*.) By contrast, in the case at bar, the apartment complex was large, the garage shared no walls with any residential units, the door from the garage opened into a center courtyard common area, not connected to any residential units, and that door was kept locked. (1 RT 106, 149-151, 155-156, 170.) Thus, *Harris* is distinguishable, and respondent's reliance on it is misplaced. *Harris* does not apply to a garage that shares no walls with residential quarters and is not within the victim's "exclusive tenancy and control." (*Id*. at p. 90.)

For these reasons, there was insufficient evidence to support the person-present finding. It violates due process and must be reversed. (*Jackson v. Virginia* (1979) 443 U.S. 307, 316 (*Jackson*); U.S. Const., 14th Amend.)

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.

Even if this Court were to disagree that the garage was not a residence as a matter of law, the person-present finding must nonetheless be reversed because the trial court's instruction removed that factual issue from the jury. (AOB 91-97.)

Respondent again attempts to eliminate the distinction between an inhabited dwelling and a residence. Respondent claims that the court had already instructed the jury on the "same question." (RB 34.) Its brief maintains that a finding that the place burglarized is an inhabited dwelling is "tantamount" to a find that it is part of a residence. (RB 35.) And it asserts that there was no need to give the jury a "second opportunity" to determine the same issue. (RB 35.) This line of argument is unavailing for the same reasons as before.

Moreover, crucially, respondent does not dispute that the specific instruction the court gave in fact eliminated from the jury's consideration the factual issue of whether the garage was a

"residence" for purposes of subdivision (c)(21). The instruction, asking the jury to decide whether "a person or persons were present at or in *the apartment complex, resident structure*" (3 RT 421-422, emphasis added), 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. (AOB 93-94.)

In a footnote, respondent maintains that, assuming there is indeed a difference in burglary law between an inhabited dwelling and a residence, "the two terms . . . necessarily had the same meaning in this case involving an apartment building." (RB 35, fn. 8.) This argument is directly contradicted by *Singleton*. The inhabited dwelling in *Singleton* was an apartment building, too. (*Singleton*, *supra*, 155 Cal.App.4th at p. 1335.) But as in the case at bar, the areas outside of the residential unit did not count as a residence. (*Singleton*, *supra*, 155 Cal.App.4th at p. 1338.)

Respondent further contends that, "to the extent that appellant argues the instruction on the person-present allegation was confusing or required clarification, it was incumbent upon him to raise the issue

at trial." (RB 35, fn. 8.) On the contrary, the trial court had a *sua sponte* duty to correctly instruct the jury on the elements of the charges. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311 (*Cummings*); *People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) Mr. Debouver's claim is not that the instruction required clarification, but rather that it incorrectly stated the elements by directing a partial verdict as to the person-present allegation, in violation of his constitutional rights to due process and trial by jury. (*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, 491-492 (*Flood*); U.S. Const., 5th, 6th & 14th Amends.) Additionally, by statute, no objection in the trial court was required because the instruction violated Mr. Debouver's substantial rights. (Pen. Code, § 1259.)

Finally, as the United States Supreme Court has indicated, "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*).) This Court should

follow numerous lower courts that have deemed this kind of error reversible *per se*. (AOB 95.) At a minimum, *Chapman* applies, and it is respondent's burden to prove the error harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

Respondent does not address the issue of reversal *per se* and does not dispute that this type of error violates the federal Constitution, at least triggering application of the *Chapman* standard. Instead, its brief maintains that the error is harmless under any standard. (RB 36.) Here again, respondent relies on its same erroneous view of the law, arguing that because the jurors found that the garage was part of an inhabited dwelling it is "inconceivable" that they would not have found it was a residence as well. (RB 36.) On the contrary, for all of the reasons described in Argument IV, the jury would have been well supported in finding that the garage of the apartment complex was not residential in nature. Respondent has failed to meet its burden to prove harmlessness beyond a reasonable doubt.

CONCLUSION

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

Dated: June 16, 2016

Respectfully submitted,

_____

DAVID L. ANNICCHIARICO
Counsel for Mr. Debouver

CERTIFICATE OF WORD COUNT

Counsel for Mr. Debouver hereby certifies that this brief consists of **9,920** 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: June 16, 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 REPLY 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 June 17, 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 June 17, 2016

_____

David L. Annicchiarico