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 PETITION FOR REHEARING

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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By Appointment of the
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INTRODUCTION

Appellant Stephen Debouver respectfully requests that this Court grant rehearing of his appeal. (Cal. Rules of Court, rule 8.268.) The policy of the California Supreme Court is that the Court "normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing." (Cal. Rules of Court, rule 8.500(c)(2).) Appellant respectfully submits that this Court's opinion in the

present case includes the following omissions and misstatements of issues and facts, warranting rehearing.

ARGUMENT

I. DENIAL OF ADVISORY COUNSEL.

On page 4, in the discussion of prejudice, the opinion states: "Appellant claims that advisory counsel, if appointed, would have requested a jury instruction on voluntary intoxication. But those instructions were given. . . . (CALJIC 4.21 & 4.22.)" Rather, appellant argued that, if he had been granted the assistance of advisory counsel, counsel would likely have told him to request an instruction on unconsciousness. (Appellant's Opening Brief (AOB) 33.) An example of such an instruction can be found in CALCRIM No. 626, which states: "[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." This instruction would have been directly relevant to the evidence

presented and appellant's defense that he blacked out and was unconscious of his actions.

II. THE INVOLUNTARY CONFESSION.

On page 5, the opinion states that appellant forfeited his claim that his confession was involuntary by not raising it at trial. However, appellant did raise the issue in the trial court, in his motion to suppress the confession. (Appellant's Reply Brief (ARB) 22-24.)

On page 5, the opinion states: "Discrediting appellant's testimony, the trial court found that appellant was sober enough to flee on a bike and waive his *Miranda* rights." However, the trial court made no credibility determination. (ARB 28.) 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.

On page 5, footnote 3, the opinion finds that "[a]ppellant did not specifically ask the trial court to play the recording . . . ." Yet the footnote acknowledges that appellant told the trial court, "I'd like to hear the audio." The footnote states that appellant did not press for a ruling. However, in response to appellant's request, the trial court replied, "Well, I don't think we need to hear the audio." (2 Augm. RT B20.) Thus, when the court later asked appellant if there was any *other* evidence or witnesses he wanted to present (2 Augm. RT B22), he reasonably understood that as referring to evidence other than the recording.

Additionally, the opinion frames the issue as whether appellant validly waived his *Miranda* rights, whereas appellant's claims are under the Fourteenth Amendment and the doctrine that a confession violates the Due Process Clause where it is not voluntarily given. (Opinion 5-6 ["incompetence to waive *Miranda* rights;" "voluntarily and knowing waived his *Miranda* rights"].) Whether a

defendant validly waived his *Miranda* rights and whether the confession was involuntary under the Fourteenth Amendment are distinct questions. To satisfy the Fifth and Sixth Amendments, a *Miranda* waiver must be voluntary, intelligent, and knowledgeable. (*Miranda v. Arizona* (1966) 384 U.S. 436, 444 (*Miranda*).) But the ensuing interrogation can still result in a confession that violates the Fourteenth Amendment, including if the police use unlawful tactics during the interrogation. (See *Doody v. Ryan* (9th Cir. 2011) 649 F.3d 986, 1003, 1002-1008 & fn. 7 (*Doody*).) Here, appellant has not made a claim regarding the purported *Miranda* waiver on appeal; he has only raised the voluntariness issue because *Miranda*-defective statements are admissible to impeach, whereas involuntary statements are not. (See *Oregon v. Hass* (1975) 420 U.S. 714, 722 (*Hass*); *People v. Nguyen* (2015) 61 Cal.4th 1015, 1075 (*Nguyen*).)

Moreover, on page 6, the opinion states: "Appellant makes no showing that any false promises of leniency were made or that he suffered form a physical, mental or alcohol/drug impairment that was exploited by the police to coerce a confession." First, a promise

of leniency need not be false in order to render a confession involuntary. "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*);[1] *People v. Perez* (2016) 243 Cal.App.4th 863, 869-879 (*Perez*) [reversal due to promises of leniency].) Second, appellant made an extensive showing that the police repeatedly used express and implied promises to secure the confession. (AOB 57.) Furthermore, appellant also showed that the officers took advantage of his intoxicated, ill, and mentally unstable state, 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. (AOB 53-56, 58-59.)

Finally, as support for its conclusion that appellant was not overly intoxicated, the opinion states, on page 6, that "Detective Lopez . . . did not believe that appellant was under the influence of

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

drugs or alcohol." Detective Lopez made this statement at trial, however. (2 RT 230-231.) It was not part of the evidence that the court could have considered at the pretrial motion to suppress. It was also contradicted by the state's only witness at the suppression hearing, Officer Im, who said he could tell that appellant was drunk during the interrogation. (2 Augm. RT B15.)

III. PROSECUTORIAL MISCONDUCT.

On page 8, the opinion states: "When a confession is elicited in violation of *Miranda*, the confession may be used for impeachment purposes where the defendant's testimony conflicts with his earlier statements." However, here again the issue was involuntariness, not *Miranda*. A statement is admissible for impeachment if it violates *Miranda*, but not if it is "involuntary or coerced." (*Hass*, *supra*, 420 U.S. at p. 722; see *Nguyen*, *supra*, 61 Cal.4th at p. 1075 [citing *Hass* and noting inadmissibility for impeachment where there is coercion or duress].)

IV. INSUFFICIENT EVIDENCE THAT A PERSON WAS PRESENT IN THE "RESIDENCE."

On pages 9 to 10, the opinion conflates an "inhabited dwelling," burglary of which is of the first degree (Pen. Code, § 460), with "residence," as it is used for purposes of a violent-felony allegation (Pen. Code, § 667.5, subd. (c)(21)). *People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1107 (*Rodriguez*), cited on page 10, correctly states the definition that a structure is part of an "inhabited dwelling" if it is functionally interconnected and immediately contiguous with other parts of the house. But "residence" has a more restrictive definition. Specifically, where an apartment complex is at issue, only the individual residential units are considered residences, not common areas like a garage. (See *People v. Singleton* (2007) 155 Cal.App.4th 1332, 1337-1339 (*Singleton*).)

V. ERRONEOUS INSTRUCTION REGARDING WHETHER A PERSON WAS PRESENT IN THE "RESIDENCE."

Page 10 of the opinion incorrectly describes appellant's argument, when it states: "Appellant asserts that the special instruction on the person-present finding is defective because it does not require the jury to find that the garage is part of a residence or an inhabited dwelling." Rather, the problem with the trial court's instruction was that it eliminated the factual issue of whether the garage was part of a "residence." (AOB 91-97.) The phrase "apartment complex, resident structure" effectively told the jury that the entire apartment complex qualified as a "residence" for purposes of the person-present allegation. (3 RT 421-422.) Yet as described above and in appellant's briefing, there was a factual issue for the jury to determine as to whether the garage was part of the "residence." Moreover, the opinion's discussion, on pages 10 to 11, of "inhabited dwelling" again erroneously conflates an inhabited dwelling with a residence.

Finally, on page 11, the opinion states that appellant forfeited the claim by failing to object in the trial court. However, no objection was required. (AOB 93-94.)

CONCLUSION

For the foregoing reasons, appellant respectfully requests that the Court grant rehearing.

Dated: August 8, 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 **1,485** 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: August 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 PETITION FOR REHEARING**, by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

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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).)

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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 _____ _____

David L. Annicchiarico