IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent v. ISAIAH HENDRIX, Defendant and Appellant.	Supreme Court No. S265668 Court of Appeal No. B298952 Superior Court Nos. 2018037331; 2017025915

Appeal from a Judgment of the
Ventura County Superior Court
Honorable Paul W. Baelly, Commissioner

APPELLANT'S REPLY BRIEF ON THE MERITS

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APPELLANT'S REPLY BRIEF ON THE MERITS

INTRODUCTION

The questions in this case are: 1) whether the *Watson*[1] or *Chapman*[2] standard should be used to analyze the trial court's error when it erroneously instructed the jury that in order for appellant's mistake of fact defense to apply, he had to both actually mistakenly believe he was at his cousin's house and that this belief also had to be reasonable (when in fact there was no reasonableness requirement); and 2) was this error prejudicial? (Order dated Jan. 27, 2021.)

[1] *People v. Watson* (1956) 46 Cal.2d 818.
[2] *Chapman v. California* (1967) 386 U.S. 18.

The Attorney General argues that the incorrect mistake of fact instruction given in this case is best characterized as a "pinpoint" instruction and that errors regarding pinpoint instructions are analyzed under the *Watson* standard. (Answer Brief on the Merits, pp. 10, 19-40.) This argument fails because mistake of fact is not a pinpoint instruction – it is a defense which statutorily exempts people from criminal culpability because it negates the requisite criminal intent. (*People v. Lawson* (2013) 215 Cal.App.4th 108, 111; Pen. Code § 26, class Three.) When properly raised, the prosecutor has the burden of disproving the mistake of fact defense. (*People v. Howard* (1996) 47 Cal.App.4th 1526, 1533 (disapproved of on another ground in *People v. Fuhrman* (1997) 16 Cal.4th 930, 947 fn. 11; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1159; *People v. Mayberry* (1975) 15 Cal.3d 143, 157.)

Here, the erroneous instruction reduced that prosecutorial burden. Appellant's defense that he mistakenly believed he was at his cousin's house was used to negate the required element for burglary that he specifically intended to commit theft upon entry. Because the defense was properly presented, the prosecutor then had the burden of disproving it. But here, due to the erroneous instruction, the prosecutor did not have to disprove that appellant actually believed he was at his cousin's house. Instead, the prosecutor only had to prove that this belief was

unreasonable. Thus, the erroneous instruction in this case amounted to a misinstruction on an element of burglary and relieved the prosecutor from proving each element of burglary beyond a reasonable doubt, which requires the error to be analyzed under *Chapman*. (*People v. Flood* (1998) 18 Cal.4th 470, 491; *People v. Wilkins* (2013) 56 Cal.4th 333, 350.)

A *Chapman* analysis is also required in this case because the misinstruction allowed the jury to convict appellant under the legally invalid theory that even though appellant actually believed he was at his cousin's house, he was still guilty because this belief was unreasonable. This "alternative-theory error" must also be analyzed under *Chapman*. (*People v. Aledamat* (2019) 8 Cal.5th 1, 13.)

Finally, even under the less stringent requirements of *Watson*, appellant's conviction must be reversed because there is a reasonable chance that the erroneous mistake of fact instruction affected the jury's verdict.

ARGUMENT

I. The *Chapman* Standard Applies to the Trial Court's Error in Misinstructing on the Mistake of Fact Defense.

A. The Cases Cited by the Attorney General Do Not Apply to This Case.

The Attorney General argues that the erroneous mistake of fact instruction in this case was merely an erroneous pinpoint instruction to be evaluated under the *Watson* standard. (Answer Brief, pp. 10, 19-40.) Three cases, *People v. Pearson* (2012) 53 Cal. 4th 306, *People v. Molano* (2019) 7 Cal.5th 620, and *People v. Jackson* (1989) 49 Cal.3d 1170, are cited to support this claim. (Answer Brief, pp. 31-34.) None of these cases are applicable here because, unlike this case, none reduced the prosecutor's burden of proving each element beyond a reasonable doubt and none allowed the jury to convict under a legally invalid theory.

In *Pearson*, the trial court instructed the jury that evidence of voluntary intoxication could be used to determine whether the defendant had the specific intent required for the crimes of murder, robbery, and kidnapping for rape. But the court mistakenly omitted the crime of torture from this list. (*People v. Pearson*, *supra*, 53 Cal.4th 306, 325.) This Court applied the *Watson* "reasonable probability" test "to the court's failure to give a legally correct pinpoint instruction." (*Ibid.*)

In *Molano*, the defendant never requested, and the trial court therefore failed, to instruct the jury that "a good faith but unreasonable belief that the victim consented to intercourse" negated the specific intent to commit rape required for a conviction of rape felony murder and the rape-murder special circumstance. (*People v. Molano*, *supra,* 7 Cal.5th 620, 667, 669.) This Court held that the defendant forfeited the issue because he never requested such an instruction at trial. (*Id*. at p. 669.) This Court further held that even if the trial court erred in failing to give this instruction, the error was harmless under *Watson*. (*Id*. at pp. 669-672.)

Finally, in *Jackson*, the trial court erred when it misinstructed the jury that evidence of defendant's voluntary intoxication under PCP could be used to determine if the defendant was "capable of forming" the specific intent required for murder. Instead, the court should have instructed the jury that voluntary intoxication could be used to determine if defendant actually formed such specific intent. (*People v. Jackson*, *supra*, 49 Cal.3d 1170, 1195.) This Court held the error was harmless under *Watson*. (*Id*. at pp. 1195-1196.)

There are significant differences between these three cases and this one which demonstrate why they do not apply here. In both *Pearson* and *Jackson*, the trial court erred in regards to a voluntary intoxication instruction. (*People v. Pearson*, *supra*, 53

Cal.4th 306, 325; *People v. Jackson*, *supra*, 49 Cal.3d 1170, 1195.) But voluntary intoxication is not a defense to a crime. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) It is a pinpoint instruction which is "relevant only to the extent that it bears on the question of whether the defendant actually had the requisite specific mental state." (*Ibid.*) Thus in a case where voluntary intoxication applies, the prosecutor does not have to prove that the defendant was not voluntarily intoxicated. Instead, the prosecutor must prove that even if the defendant was intoxicated, he still had the requisite intent or mental state.

The same is not true of mistake of fact. Mistake of fact is a defense to a crime. (Pen. Code § 26, class Three; *People v. Lawson, supra,* 215 Cal.App.4th 108, 111.) And when, as in this case, there is substantial evidence to support the defense, the prosecutor is then required to disprove it beyond a reasonable doubt. (*People v. Howard, supra,* 47 Cal.App.4th 1526, 1533; *People v. Frye, supra,* 7 Cal.App.4th 1148, 1159; *People v. Mayberry, supra,* 15 Cal.3d 143, 157.) Thus, in this case, the prosecutor was required to prove that appellant did not actually believe he was at his cousin's house and instead was entering the house to commit theft.

The Attorney General is correct when arguing that the mistake of fact instruction in this case related appellant's defense theory (that he mistakenly believed he was at his cousin's house)

to the intent element of burglary. (Answer Brief, p. 30.) The jury was instructed that to convict appellant of burglary he had to specifically intend to commit theft when he jimmied open the sliding screen door. (1 CT 162 [burglary instruction].) The jurors were then instructed that appellant did not have the requisite specific intent to commit theft if they found "that the defendant believed that that (sic) defendant's cousin Trevor resided at the home and if you find that belief was reasonable." (1 CT 165 [mistake of fact instruction].)

But the Attorney General's argument that this is a "pinpoint" instruction requiring analysis under *Watson* is incorrect. The Attorney General made a similar argument which this Court struck down in *People v. Wilkins* (2013) 56 Cal.4th 333, 348-349, when they argued that the trial court's error in refusing to instruct on the escape rule was a refusal to give a pinpoint instruction which was a state law error requiring only a *Watson* analysis. The same reasoning in *Wilkins* applies here. "The error in this case amounted to more than" an erroneous pinpoint instruction "because the instruction that the court gave … was … misleading." (*People v. Wilkins*, *supra*, 56 Cal.4th 333, 349.) Under the trial court's incorrect mistake of fact instruction, a juror who found that defendant actually believed his cousin resided at the home but that this belief was unreasonable "would have no reason to conclude that he or she must find the

defendant not guilty of [burglary]. The instructions given, therefore, amounted to misinstruction on an element of the offense" and the federal harmless error standard under *Chapman* applies. (*Id*. at pp. 349-350.)

Molano is also inapplicable to this case. In *Molano*, this Court questioned whether a genuine but unreasonable mistake of fact as to a victim's consent to intercourse was a viable defense to rape felony murder and the rape-murder special circumstance. (*People v. Molano*, *supra,* 7 Cal.5th 620, 667-669.) This Court never answered that question because it held that the defendant forfeited the issue because he never requested such an instruction at trial.[3] (*Id*. at p. 669.) But here, appellant specifically requested the mistake of fact defense (5 RT 210-211) and used it in his closing argument as his sole defense. (5 RT 259-264.) Because appellant appropriately raised and relied on his mistaken belief as a defense to his case, the "absence of [this] excuse or justification" is treated "as an element of [the] offense." (*People v. Frye*, *supra*, 7 Cal.App.4th 1148, 1159.)

It is this prosecutorial burden of disproving appellant's mistaken belief as an element of the underlying burglary offense which differentiates this case from the three cases cited by the

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[3] Likewise the cases of *People v. Brooks* (2017) 3 Cal.5th 1, 74 and *People v. Covarrubias* (2016) 1 Cal.5th 838, 874, cited in the Answer Brief both found that the trial court did not err in giving a defense instruction because the defendants failed to ask for it.

Attorney General. In all three of these cases, the prosecutor was still required to prove every element of the underlying offense, and the alleged error did not allow the jury to convict under a legally invalid theory. (*People v. Pearson*, *supra*, 53 Cal.4th 306, 325-326; *People v. Molano*, *supra*, 7 Cal.5th 620, 669-670; *People v. Jackson*, *supra*, 49 Cal. 3d 1170, 1195-1196.) Thus, the *Watson* "reasonable probability" analysis was utilized in all of these cases because none of the defendants' federal due process rights were implicated. In contrast, the *Chapman* analysis is required here because the erroneous instruction reduced the prosecutor's burden and allowed the jury to convict under a legally invalid theory.

B. The Erroneous Mistake of Fact Instruction Relieved the Prosecutor from Proving that Appellant Did Not Actually Believe He Was at His Cousin's House.

If the mistake of fact instruction had correctly followed the bench notes to CALCRIM No. 3406 and omitted the "bracketed language requiring the belief to be reasonable" then the prosecutor would have had to prove that appellant did not actually believe he was at his cousin's house. (See 1 CT 165.) Instead, as given, the prosecutor's burden was reduced and he only had to prove that even if appellant actually had this mistaken belief, the belief was not reasonable. (1 CT 165.)

Once a prosecutor has to disprove mistake of fact, it becomes an element of the charged crime. In this case, in order to prove that appellant committed burglary, the prosecutor was required to prove beyond a reasonable doubt that appellant did not actually have his mistaken belief. The prosecutor was required to prove that appellant was lying when he said he thought he was at his cousin's house. (*People v. Howard, supra,* 47 Cal.App.4th 1526, 1533; *People v. Frye, supra,* 7 Cal.App.4th 1148, 1159; *People v. Mayberry, supra,* 15 Cal.3d 143, 157.) Calling the instruction a pinpoint instruction does not change this prosecutorial burden. Because the erroneous instruction allowed the prosecutor to obtain a conviction based on an actual but unreasonable belief that appellant was at his cousin's house, the instruction relieved the prosecutor from proving an element of the charged crime.

Contrary to the Attorney General's argument, the misinstruction in this case is similar to what occurred in *People v. Hudson* (2006) 38 Cal.4th 1002. (Answer Brief, pp. 34-40.) In *Hudson*, the trial court erred when instructing on the term "distinctively marked" and instructed the jury that a police vehicle could be distinctively marked if it simply had a siren and red light. In fact, a police officer's vehicle must have, in addition to a siren and red light, one or more features distinguishing it from a vehicle not used for law enforcement. (*People v. Hudson*,

supra, 38 Cal.4th 1002, 1013.) This Court applied the *Chapman* harmless beyond a reasonable doubt standard to the error because it involved a misinstruction on an element of the offense. (*Ibid.*) Here too, the trial court misinstructed the jury regarding the applicability of the mistake of fact defense to negate the specific intent required for burglary. Thus, as in *Hudson*, the error here also involved a misinstruction on an element of the offense. Because the jury instructions in this case relieved the prosecutor from proving each element of burglary beyond a reasonable doubt, appellant's federal due process rights were implicated and the more stringent *Chapman* harmless error analysis is required when determining prejudice. (*People v. Flood* (1998) 18 Cal.4th 470, 491; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278.)

C. The Erroneous Mistake of Fact Instruction Allowed the Jury to Convict Under a Legally Invalid Theory.

Here, the jury was instructed that the mistake of fact defense only applied if appellant's mistaken belief that he was at his cousin's house was both actual and reasonable. (1 CT 165.) This instruction is legally invalid because burglary is a specific intent crime and appellant's mistaken belief must only be actual. Appellant's mistaken belief did not have to be reasonable. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1426; *People v. Lawson, supra,* 215 Cal.App.4th 108, 115.) The error here is thus

like that in *Aledamat*. The court, by misinstructing on the mistake of fact defense, provided the jury with a "legally inadequate theory" upon which it could convict appellant. (*People v. Aledamat, supra,* 8 Cal.5th 1, 7.) The erroneous instruction on the mistake of fact defense incorrectly described that appellant's mistaken belief that he was at his cousin's house must be reasonable in order for the jury to find that he did not have the specific intent to commit theft, an element of the charged burglary offense. This "alternative-theory error" involving the "misdescription[] of the elements of the charged offense" is reviewed under *Chapman*. (*Id.* at pp. 7, fn. 3, 9, 13.)

The recent case of *People v. Baratang* (2020) 56 Cal.App.5th 252 also involved alternative-theory error and is comparable to appellant's case. In *Baratang*, the trial court incorrectly modified the instructions on the elements of theft from an elder when it instructed the jury that if the property was obtained by identity theft (as opposed to theft by larceny) it did not have to be worth more than $950. (*People v. Baratang*, *supra*, 56 Cal.App.5th 252, 257-258, 262.) Thus, as instructed, the jury was provided with one legally correct theory upon which to convict (theft by larceny) and one legally incorrect theory (identity theft). As required by *Aledamat*, this alternative-theory error was analyzed under *Chapman*. (*Id.* at p. 263.)

The same reasoning applies here. In this case, the trial court incorrectly left the bracketed "reasonable" language in the mistake of fact instruction. (1 CT 165.) Thus, as instructed, the jury was provided with the legally correct theory that appellant committed burglary if he entered the home with the intent to commit theft. (1 CT 162 [elements of burglary].) But the incorrect mistake of fact instruction also allowed the jury to convict under the legally incorrect theory that appellant's mistaken belief that he was at his cousin's house was unreasonable. (1 CT 165.) This alternative-theory error should be analyzed under *Chapman*. (*People v. Aledamat*, *supra*, 8 Cal.5th 1, 13.)

The Attorney General does not dispute that the mistake of fact instruction should have been given in this case because it was supported by substantial evidence. Nor do they dispute that since the defense applied in this case, then, the prosecutor was required to prove that appellant did not actually believe he was at his cousin's house beyond a reasonable doubt. (*People v. Howard, supra,* 47 Cal.App.4th 1526, 1533; *People v. Frye, supra,* 7 Cal.App.4th 1148, 1159; *People v. Mayberry, supra,* 15 Cal.3d 143, 157.) It is this burden of disproving the applicable mistake of fact defense and allowing the jury to convict under a legally incorrect theory which implicates appellant's due process rights and requires federal harmless error review. Appellant's mistake

of fact defense was so intertwined with the prosecutor's burden of proving he specifically intended to commit theft when he jimmied open the screen door, that it became a part of the burglary offense. In order to convict appellant for burglary, the prosecutor had to prove beyond a reasonable doubt that appellant did not believe he was at his cousin's house.

The jury instructions in this case relieved the prosecutor from meeting this burden and instead allowed for a legally invalid conviction based on a finding that even though appellant actually believed he was at his cousin's house, this belief was unreasonable. Because the jury instructions in this case relieved the prosecutor from proving each element of burglary beyond a reasonable doubt and allowed the jury to convict under a legally invalid theory, appellant's federal due process rights were implicated and the *Chapman* harmless error analysis is required to determine whether the error was prejudicial. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 319; *People v. Flood, supra,* 18 Cal.4th 470, 491; *Sullivan v. Louisiana, supra,* 508 U.S. 275, 277-278.)

This Court should hold that if a trial court misinstructs on a defense that the prosecution is required to disprove beyond a reasonable doubt allowing for the jury to convict upon a legally invalid theory, then the defendant's due process rights are implicated and the error must be analyzed under *Chapman*. This

federal harmless error analysis is required to protect "the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.)

II. The Instructional Error was Prejudicial Under Both *Chapman* and *Watson*.

The pertinent part of the mistake of fact instruction instructed the jury "If you find that the defendant believed that that (sic) defendant's cousin Trevor resided at the home **and if you find that belief was reasonable,** the defendant did not have the specific intent or mental state required for burglary." (1 CT 165 [mistake of fact instruction], error in bold.) The issue in this case is whether or not the error in instructing the jury that the mistaken belief had to be reasonable prejudiced appellant. Under either *Chapman* or *Watson* this error prejudiced appellant.

A. The Instructional Error Was Prejudicial Under *Chapman*.

Contrary to the Attorney General's assertions (Answer Brief, pp. 41-42), the language of the erroneous instruction clearly misled the jury that it had to evaluate whether appellant's mistaken belief was reasonable. The instruction explicitly states that the jury must find the mistaken belief to be reasonable in order to acquit. (1 CT 165.) There is no dispute this was error. Because burglary is a specific intent crime,

appellant just had to actually have the mistaken belief that he was at his cousin's house (and by implication was therefore not intending to steal when he opened the screen door) to be acquitted. The reasonableness of this belief was irrelevant and should not have been a part of the jury's instructions. (*People v. Lawson, supra,* 215 Cal.App.4th 108, 115.) The error in this case was thus not omitting an element, but adding an unnecessary requirement to appellant's defense. The jury's focus should have been solely on determining whether appellant actually believed he was at his cousin's house – not on whether this belief was reasonable.

Under *Chapman*, the burden is on the respondent to prove that this error was "harmless beyond a reasonable doubt." (*Chapman v. California, supra*, 386 U.S. 18, 24.) The Attorney General points to the evidence supporting appellant's burglary conviction to argue that the error was harmless. (Answer Brief, pp. 43-45.) But when determining prejudice, the reviewing court does not look at the evidence to see if it was sufficient to sustain a conviction. Instead, the court "asks whether the record contains evidence that could rationally lead to a contrary finding." (*Neder v. United States* (1999) 527 U.S. 1, 19.) The burden is on the Attorney General to show "beyond a reasonable doubt that the jury relied on a legally valid theory." (*People v. Baratang*, *supra*, 56 Cal.App.5th 252, 265.) Because the record in this case

contains evidence that could rationally lead a juror to incorrectly find that appellant actually believed he was at his cousin's house but that this belief was unreasonable, the error cannot be held harmless.

The Attorney General concedes that "appellant's behavior in some respects could be seen as consistent with the mistake-of-fact theory." (Answer Brief, p. 44.) But they argue that the evidence pointing to appellant's guilt was so overwhelming that there can be no reasonable doubt that the error was harmless. (Answer Brief, pp. 43-47.) This argument fails because it was the jury's job to determine whether appellant believed he was at his cousin's house or whether this account was a fabrication. These are "truth-finding task[s] assigned solely to juries in criminal cases." (*Carella v. California* (1989) 491 U.S. 263, 265.)

The record in this case contains evidence that could rationally lead a juror to find that appellant actually believed that he was at his cousin's house. Appellant approached a house, within blocks of his cousin's house, at 7:00 a.m. and loudly knocked on the front door and rang the doorbell. He had only a bottle of water with him and had no burglary tools. When no one answered, he then went to try and get in through the other doors. When he discovered that all the doors were locked, he simply sat in the backyard and waited for his cousin. After being arrested and having to wait in jail, appellant then attempted to find

someone to support his defense. (*People v. Hendrix* (2020) 55 Cal.App.5th 1092, 1101 (dis. opn. of Tangeman, J.)) This view that appellant mistakenly believed he was at his cousin's house should have led to an acquittal. But the instructional error in this case could have led a rational juror to convict based on the finding that even though appellant actually believed he was at his cousin's house, this belief was unreasonable because his cousin actually lived on the other side of the high school. (See 5 RT 246, 255 [prosecutor's closing argument].)

The dissent in this case was correct. "Undeterred by these troubling facts and the stringent requirement that we reverse unless convinced that any error was 'harmless beyond a reasonable doubt,' the majority substitutes its own judgment, based on a cold record, about appellant's credibility and true intentions. Given appellant's recent mental health history and inexplicable conduct on the day in question, I cannot in good conscience conclude that no reasonable juror might have reached a different result if properly instructed." (*People v. Hendrix*, *supra*, 55 Cal.App.5th 1092, 1101 (dis. opn. of Tangeman, J.)) Because the record contains evidence that could rationally lead a juror to convict appellant under this invalid theory, the error was prejudicial. (*Neder v. United States, supra,* 527 U.S. 1, 19.) Appellant's burglary conviction must be reversed.

B. The Instructional Error Was Prejudicial Even Under *Watson*.

Even under the less stringent *Watson* standard, prejudicial error requiring reversal is shown if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson*, *supra*, 46 Cal.2d 818, 836.) "[A] 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." (*People v. Wilkins*, *supra*, 56 Cal.4th 333, 351, italics in original.)

In this case that means that if there is a reasonable chance that just one juror convicted appellant based on the theory that appellant actually had the mistaken belief that he was at his cousin Trevor's house, but that this belief was unreasonable, then his burglary conviction must be overturned. There is such a "*reasonable chance*" in this case, "more than an *abstract possibility,*" because this was obviously a close case for the jury and the evidence supports such a view. (*People v. Wilkins*, *supra*, 56 Cal.4th 333, 351, italics in original.)

The Attorney General attempts to diminish the significance of appellant's history of mental illness by arguing that evidence of that history was not before the jury. (Answer Brief, p. 46.) But just as the majority opinion found it obvious that appellant "has some mental impairment" (*People v. Hendrix*, *supra*, 55 Cal.App.5th 1092, 1098), so too was it likely the jury also made

this finding based on the evidence, appellant's mannerisms at trial, and defense counsel's closing argument implying that appellant was not on his medications and that he might have done things that "don't make sense." (5 RT 262-263.) The jury's query regarding whether appellant was under the influence of drugs or alcohol, which they then later crossed out (1 CT 174) also demonstrates that the jury was looking at evidence of mental impairment to understand what appellant was actually thinking when he jimmied open the screen door. Such evidence of mental impairment was relevant to the jury because it helps to explain how and why appellant could have the mistaken belief that he was at his cousin's house.

The Attorney General likewise attempts to diminish the significance of the jury declaring a deadlock because it came only two and a half hours after they began deliberating. (Answer Brief, p. 46.) But the declaration of the deadlock shows that there was at least one juror who initially wanted to acquit appellant. And the only defense appellant argued to the jury was that he mistakenly believed he was at his cousin's house. (5 RT 259-264.) It is thus very significant that the jury declared a deadlock because it means that at that point, at least one juror gave credence to appellant's defense and found that his claim of a mistaken belief was reasonable.

Under *Watson* review, the question in this case is: was there a reasonable chance that at least one juror convicted appellant under the invalid theory that appellant actually believed he was at his cousin Trevor's house, but that this belief was unreasonable? The answer is yes. There is a reasonable chance that at least one juror found that appellant actually believed he was at his cousin's house because the evidence supports this view. The fact that appellant had nothing on him except for a bottle of water combined with the facts that appellant's cousin lived just blocks away and appellant's actions of: ringing the front door, checking the side and back doors, just sitting at the table in the backyard and waiting for seven minutes after he found all the doors were locked, and then acting surprised and making absolutely no attempts to flee or resist when the officers arrived support his claim that he was intending to go to his cousin's house and was not intending to break into the house to commit theft.

There is also a reasonable chance that this juror or jurors who found that appellant believed he was at his cousin's house also found that this mistaken belief was unreasonable. The mistake of fact instruction explicitly instructed the jurors that for the defense to apply they must find his mistaken "belief was reasonable." (1 CT 165.) Appellant's own counsel reiterated this point when he argued "and if you find that belief is reasonable,

you must find him not guilty." (5 RT 263.) Finally, the prosecutor's argument also could have led the jury down this incorrect path when he argued that appellant's mistaken belief was unreasonable because his cousin lived on the other side of the high school. (5 RT 246, 255; compare *People v. Pearson*, *supra*, 53 Cal.4th 306, 326 [this Court found it was not reasonably likely that the jury would have determined that defendant's voluntary intoxication prevented him from forming the specific intent to cause the victim extreme pain even had that "doorway been fully opened."].)

There is a reasonable chance, and not just an abstract possibility, that the erroneous mistake of fact instruction caused at least one juror (especially the juror(s) who initially claimed a deadlock) to improperly convict on the theory that appellant actually mistakenly believed he was at his cousin's house but that this belief was unreasonable. Appellant was thus prejudiced by this error and his burglary conviction must be reversed. (*People v. Wilkins*, *supra*, 56 Cal.4th 333, 351.)

CONCLUSION

In determining the proper test for prejudice, the most important factors to consider are whether the error reduced the prosecutor's burden of proving every element of the crime beyond a reasonable doubt and whether the error allowed the jury to convict upon a legally invalid theory. Whether the instruction is

labeled a pinpoint instruction or an affirmative defense should not be the focal point. Here, because the mistake of fact defense applied, and appellant requested it, the prosecutor had the burden of proving beyond a reasonable doubt that appellant did not believe he was at his cousin's house to convict him of burglary. Disproving the mistake of fact thus became an element of the offense. This Court should hold that the *Chapman* "harmless beyond a reasonable doubt" standard to determine prejudicial error applies when the prosecutor has the burden of disproving a properly presented defense and the trial court errs when instructing on that defense. In such a case the error is equivalent to "misinstruction on an element of the offense." (*People v. Wilkins*, *supra*, 56 Cal.4th 333, 348.) Further, because the error here allowed the jury to convict under a legally invalid theory, the error in this case should be deemed an "alternative-theory error" which also requires analysis under *Chapman.* (*People v. Aledamat*, *supra*, 8 Cal.5th 1, 13.)

Under *Chapman*, appellant was prejudiced because the record contains evidence that rationally leads to a finding that appellant actually believed he was at his cousin Trevor's house even though this belief was objectively unreasonable. (*Neder v. United States, supra,* 527 U.S. 1, 19.) But even under *Watson*, the Court of Appeal erred because there is a reasonable chance that one of the jurors made this incorrect finding. Appellant was

an immature, mentally ill, young man who arrived around 7 a.m. at a house just blocks away from his cousin's home. After loudly ringing the front door, he tried to enter the remaining doors and then simply sat at a table in the backyard. Appellant had only a bottle of water, and no burglary tools or weapons on him when the police arrived seven minutes later. Appellant was surprised when he saw the police arrive and made no attempts to flee or resist. He immediately told the officers he thought he was at his cousin's house. There was thus more than an "abstract possibility" (*People v. Wilkins*, *supra*, 56 Cal.4th 333, 351) that at least one juror found that appellant mistakenly believed he was at his cousin's house. There is also a "reasonable chance" (*ibid.*) that at least one juror found this mistaken belief was unreasonable because, as the prosecutor argued, a different family actually lived there and his cousin lived on the other side of the high school. (5 RT 246, 255.) Because there was a reasonable chance the error affected the verdict in this case, appellant's burglary conviction must be reversed. (*People v. Wilkins*, *supra*, 56 Cal.4th 333, 351-352.)

CERTIFICATE OF WORD COUNT COMPLIANCE

Pursuant to rule 8.520(c)(1) of the California Rules of Court, I hereby certify that this brief contains 6186 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By _____
Adrian Dresel-Velasquez
Dated: September 8, 2021

PROOF OF SERVICE

ATTORNEY'S CERTIFICATE OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Re: People v. Hendrix; California Supreme Court Case No. S265668

I, Adrian Dresel-Velasquez, certify:

I am an active member of the State Bar of California and am not a party to this cause. My business address is P.O. Box 3443, Santa Barbara, CA, 93130. On September 8, 2021, I caused the attached Appellant's Reply Brief on the Merits to be electronically served by transmitting a true copy via this Court's TrueFiling system to:

Office of the Attorney General, docketinglaawt@doj.ca.gov;

John Yang, John.Yang@doj.ca.gov (Attorneys for Respondent).

The electronic filing of this brief constitutes service on the clerk/executive officer of the Court of Appeal. (Cal. Rules of Court, rule 8.500(f)(1).)

On September 8, 2021, I also served the attached Appellant's Reply Brief on the Merits by transmitting a true PDF copy via electronic mail to:

California Appellate Project at capdocs@lacap.com.

Ventura County District Attorney's Office at appellateda@ventura.org.

Damon Jenkins, Damon.Jenkins@ventura.org (Appellant's trial counsel).

On September 8, 2021, I further deposited in a Post Office regularly maintained by the United States Postal Service at 3345 State St., Santa Barbara, CA, 93105, a copy of the attached Appellant's Reply Brief on the Merits in a sealed envelope with postage fully prepaid, addressed to each of the following:

Isaiah Hendrix
#BJ7405
Centinela State Prison
P.O. Box 911
Imperial, CA 92251-0911

Clerk, Ventura County Superior Court
Criminal Division
c/o Honorable Paul Baelly
Hall of Justice
800 S. Victoria Ave.
Ventura, CA 93009

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 8, 2021, at Santa Barbara, California.

By: _____
Adrian Dresel-Velasquez
DECLARANT
SBN 272556

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Case Name: **PEOPLE v. HENDRIX**
Case Number: **S265668**
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9/8/2021
Date

/s/Adrian Dresel-Velasquez
Signature

Dresel-Velasquez, Adrian (272556)
Last Name, First Name (PNum)

Adrian Dresel-Velasquez, Attorney at Law
Law Firm