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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. _____ 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

PETITION FOR REVIEW

After the Published Decision of the Court of Appeal, Second Appellate District, Division Six, Affirming the Judgment of Conviction

Adrian Dresel-Velasquez
State Bar # 272556
P.O. Box 3443
Santa Barbara, CA 93130
916-215-3519
chardrian@hotmail.com

Attorney for Appellant

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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. _____ Court of Appeal No. B298952 Superior Court Nos. 2018037331; 2017025915

PETITION FOR REVIEW

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 8.500 of the California Rules of Court, petitioner, Isaiah Hendrix, respectfully requests this Court to review the published decision of the Court of Appeal, Second Appellate District, Division Six, which affirmed his conviction for first degree burglary (Pen. Code, § 459).

Review is necessary to resolve important questions of law likely to recur. (Cal. Rules of Court, rule 8.500(b)(1).)

A copy of the Court of Appeal's opinion, filed October 19, 2020, is attached hereto as "Opinion." No petition for rehearing was filed.

INTRODUCTION

Petitioner was convicted of residential burglary when he "jimmied" open a screen door in the backyard of a home in Oxnard. When petitioner was unable to enter the locked sliding glass door behind the screen door, he simply sat down on a bench in the backyard and waited until the police apprehended him shortly thereafter. Petitioner's defense was that he thought he was at his cousin Trevor's house. Both the Court of Appeal and the People acknowledge that the trial court erred when it included the bracketed "reasonable" language in the mistake of fact instruction requiring petitioner's mistaken belief that he was at his cousin's house to be both subjectively and objectively reasonable. Because burglary is a specific intent crime, the bracketed language requiring the belief to be reasonable should have been omitted. The dispute in this case is whether or not this error was harmless.

The majority opinion, applying the *Watson* standard, found that although the trial court erred when it included the bracketed "reasonable" language in the mistake of fact instruction, the error was harmless because it was clear that petitioner fabricated his account that he thought he was at his cousin's house. (Slip Opn.,

pp. 6-7.) The dissent, applying the *Chapman* standard, found the error was not harmless after noting petitioner's recent mental health history and his inexplicable actions of simply waiting in the backyard of a home he was allegedly trying to burglarize. (Slip Opn., pp. 1-2 (dis. opn. of Tangeman, J.).) Petitioner agrees with the dissent and emphasizes that the deliberations in this case were so close that at one point the jury was hung. The court's error in such a close case is magnified and increases the likelihood that at least one juror relied on the incorrect instruction to find that even though petitioner subjectively believed he was at his cousin's home he was still guilty because this belief was objectively unreasonable. Under either the *Watson* or *Chapman* standard, petitioner's burglary conviction must be reversed because there is a reasonable chance a juror made this legally invalid finding.

The appellate court also found that petitioner's ten-year sentence was appropriate given the "serious" crimes he was convicted of and his criminal history. (Slip Opn., pp. 7-10.) But this view blinds itself to the actual extremely low-level conduct involved in petitioner's crimes and to petitioner's youth, background, mental health history, and his lack of sophistication as a criminal. His crimes are serious in name only and are not deserving of the harsh sentencing enhancements found in Penal Code section 667. The crux of this argument is that a non-

violent, unsophisticated, mentally unstable, immature young man who had never before been sentenced to prison, should not be sentenced to ten years in prison when he simply opened a screen door at someone's home, made no further efforts to enter when he realized the sliding glass door behind it was locked, and then simply sat down at a table in the backyard and waited until police arrived and arrested him. The court abused its discretion by giving him such a lengthy sentence and a ten-year sentence for such conduct is cruel and unusual.

QUESTIONS PRESENTED FOR REVIEW

I. **What Test of Prejudice, *Chapman* or *Watson*, Applies When a Trial Court Errs in Instructing on the Mistake of Fact Defense?**

II. **Did the Court of Appeal Usurp the Jury's Factfinding Role When it Found That Petitioner Fabricated His Account That He Thought He Was at His Cousin's House?**

III. **Did the Trial Court Abuse its Discretion When it Declined to Strike Petitioner's Prior Robbery Conviction for Sentencing Purposes?**

IV. **Does Petitioner's Sentence Violate Both the U.S. and California Constitutions Because it Constitutes Cruel and Unusual Punishment?**

NECESSITY FOR REVIEW

The questions presented raise important legal issues that are likely to recur in criminal cases. (Cal. Rules of Court, rule

8.500(b)(1).) Review is necessary to settle these important questions of law and secure uniformity of decision. (*Ibid.*)

The first question presented requires review because the majority opinion analyzed whether the instructional error prejudiced petitioner under the *Watson* test, applicable to a state law error, when it found the error was harmless because "[t]here is no reasonable probability petitioner would have obtained a more favorable result had it not been made." (Slip Opn., p. 6; see *People v. Watson* (1956) 46 Cal.2d 818, 836 [reversal required only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."].) However, the dissent used the federal *Chapman* "harmless beyond a reasonable doubt" standard after equating the instructional error to a "misinstruction on an element of the offense." (Slip Opn., p. 1 (dis. opn. of Tangeman, J.); *Chapman v. California* (1967) 386 U.S. 18, 24.) The California Supreme Court has "not yet determined what test of prejudice applies to the failure to instruct on an affirmative defense." (*People v. Salas* (2006) 37 Cal.4th 967, 984.) Here, the court gave the mistake of fact instruction but erred in the instruction given. Review is necessary to determine which test of prejudice applies to this type of instructional error and secure uniformity of decision. (Cal. Rules of Court, rule 8.500(b)(1).)

The second question presented requires review because regardless if the *Watson* or *Chapman* standard is used, the reviewing court's role in determining whether an error is harmless is solely to determine whether the error prejudicially affected the decision-making process of the jury. The reviewing court may not substitute its view of the evidence for the jury. Here, the majority opinion usurped the jury's factfinding role when it found that petitioner's mistaken belief that he was at his cousin's house "was a fabrication." (Slip Opn., p. 6.) Review is necessary to provide guidance to reviewing courts to ensure they correctly walk the tightrope involved in harmless error analysis.

The third and fourth questions presented are interrelated and require review to provide further guidance as to what factors a court should weigh when determining whether to strike a five-year enhancement or to strike a strike for sentencing purposes. Here, the trial court abused its discretion when it declined to strike the five-year prior serious felony enhancement and/or to strike petitioner's strike for sentencing purposes. Both the trial court and the reviewing court focused on what petitioner was convicted of (current conviction of burglary and prior conviction of robbery) without putting any focus onto what petitioner actually did or his personal characteristics. While "jimmying" open a screen door and then attempting to open the sliding glass door behind it technically equates to the entrance of a residence

(*People v. McEntire* (2016) 247 Cal.App.4th 484, 491-492), it has to be one of the least serious, lowest level violations of residential burglary imaginable. Petitioner's prior robbery conviction was likewise low-level and involved an empty threat to "blast" a Costco employee when confronted after he stole a bottle of liquor. Petitioner is a young, unsophisticated, non-violent, low-level criminal with known mental health issues. The trial court's failure to factor in these considerations when imposing its ten-year sentence amounts to an abuse of discretion. Further, because a ten-year sentence is grossly disproportionate to petitioner's underlying conduct, his sentence is cruel and unusual and violates both the California and U.S. Constitutions.

STATEMENTS OF CASE AND FACTS

For purposes of the instant petition only, petitioner adopts the facts as presented by the Court of Appeal in its opinion.

ARGUMENT

I. The *Chapman* Standard Applies When a Trial Court Errs in Instructing on the Mistake of Fact Defense.

A. The Trial Court Erred by Including the Bracketed Reasonable Mistake Language in the Mistake of Fact Instruction.

There is no dispute that the trial court erred by including the bracketed reasonable mistake language in the mistake of fact

instruction. (Slip Opn., pp. 4, 6.) Burglary is a specific intent crime. It requires the act of unlawful entry accompanied by the specific intent to commit theft or any felony. (Pen. Code § 459; *People v. Wallace* (2008) 44 Cal.4th 1032, 1077.) Due to this specific intent, in order for petitioner to establish a mistake of fact defense, he needed only to show that he subjectively believed his cousin Trevor resided at the home – he did not need to show that this belief was also objectively reasonable. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1426-1427, disapproved of on another ground by *People v. Covarrubias* (2016) 1 Cal.5th 838, 874, fn. 14 [a trial court does not have a *sua sponte* duty to instruct on mistake of fact defense because it serves only to negate an element of the crime.]) The trial court erred by including the bracketed reasonable mistake language. (*Id.* at pp. 1425-1427.)

B. The Trial Court's Instructional Error Should be Reviewed Under the *Chapman* Standard.

There is also no dispute that in order for petitioner's burglary conviction to be reversed, he must show that the court's instructional error prejudiced him. (*People v. Flood* (1998) 18 Cal.4th 470, 489-490.) The dispute is what standard of prejudice applies to this error. (Slip Opn., pp. 6, p. 1 (dis. opn. of Tangeman, J.).) The majority opinion relied on Article 6, section 13 of the California Constitution and *People v. Zamani* (2010) 183

Cal.App.4th 854, 866 to find that the *Watson* "reasonable probability" test applies. (Slip Opn., p. 6.) This conclusion is supported by *People v. Molano* (2019) 7 Cal.5th 620, 670 ["Error in failing to instruct on the mistake-of-fact defense is subject to the harmless error test set forth in *People v. Watson*."] and *People v. Watt* (2014) 229 Cal.App.4th 1215, 1219-1220 [all published opinions have used the *Watson* test instead of *Chapman* when analyzing the failure to instruct on an affirmative defense or erring in the instruction given.].

However, the dissent found *Chapman's* "harmless beyond a reasonable doubt" applies to this case because the misinstruction amounted to an element of the burglary offense. (Slip Opn., p. 1 (dis. opn. of Tangeman, J.), citing *People v. Hudson* (2006) 38 Cal.4th 1002, 1013.) The dissent is correct. While it is true that instructional error is normally assessed under the *Watson* standard, jury instructions that relieve "the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense" must be analyzed under *Chapman* because such instructions "violate the defendant's due process rights under the federal Constitution." (*People v. Flood, supra,* 18 Cal.4th 470, 491.)

Here, the mistake of fact instruction relieved the prosecutor of proving petitioner's specific intent to commit theft beyond a reasonable doubt. Petitioner's subjective belief that he thought

he was at his cousin's house provided a reasonable doubt that he specifically intended to commit theft which is required for burglary. (*People v. Russell, supra,* 144 Cal.App.4th 1415, 1426-1427; 1 CT 165.) However, as erroneously instructed, this jury also had to find that petitioner's mistaken belief was objectively reasonable. This "amounted to misinstruction on an element of the offense" (*People v. Wilkins* (2013) 56 Cal.4th 333, 348) because a juror could have incorrectly convicted petitioner of burglary on the theory that he subjectively believed that he was at his cousin's house but that this belief was objectively unreasonable. The erroneous mistake of fact instruction resulted in misinstructing the jury regarding the required element that petitioner must have specifically intended to commit theft when he entered the residence. The federal *Chapman* standard therefore applies and petitioner's conviction must be reversed unless the mistake of fact instructional error was "harmless beyond a reasonable doubt." (*Ibid.*)

II. The Court of Appeal Usurped the Jury's Factfinding Role When it Found That Petitioner Fabricated His Account That He Thought He Was at His Cousin's House.

A. The Appellate Court's Role Was to Weigh How the Instructional Error Affected the Proceedings – Not to Replace the Jury as Finder of Fact.

"Because virtually all forms of harmless error review risk infringing on 'the jury's factfinding role and affect[ing] the jury's deliberative process in ways that are, strictly speaking, not readily calculable,' courts performing harmless error review are walking a tightrope—where they must weigh how an error affected the proceedings without displacing the jury as finder of fact." (*People v. Aledamat* (2019) 8 Cal.5th 1, 17 (dis. opn. of Cuéllar, J.), citing *Neder v. United States* (1999) 527 U.S. 1, 18.) "[W]hen an appellate court engages in harmless error inquiry, it risks invading the province of the jury. A court trying to determine what would have happened in a counterfactual proceeding in which the error at issue did not occur may end up, consciously or not, conducting an inquiry into a defendant's guilt or innocence, a question that our system of justice reserves for the jury. [Citations.] The risk of an appellate court usurping the jury's role becomes especially great when harmless error analysis focuses not on whether error might have affected the jury's decisionmaking, but on whether there was overwhelming

evidence to support the result." (*People v. Jackson* (2014) 58 Cal.4th 724, 790 (dis. opn. of Liu, J.).)

B. The Majority Opinion Usurped the Jury's Factfinding Role.

In this case, when analyzing whether the error was harmless, the majority opinion focused on the evidence supporting a burglary conviction rather than on whether the erroneous mistake of fact instruction affected the jury's decisionmaking. (Slip Opn. pp. 6-7.) The majority first focuses on petitioner's multiple attempts to force entry into the house to argue that no one who subjectively believed that his cousin lived at the house would also think he was allowed to forcibly enter the home. (Slip Opn., pp. 6-7.) Next the majority reviews petitioner's jail calls. (Slip Opn., p. 7.) They claim these calls demonstrate that petitioner never subjectively believed he was at his cousin's house because the calls prove he was trying to procure false testimony saying someone gave him the wrong address. The majority further contends the jail calls show that petitioner never contradicted his uncle when he was accused of breaking into people's homes. (*Ibid.*) The majority opines that they "do not believe that a friend told him cousin Trevor had moved to the victim's house. It seems much more likely, consistent with the prosecutor's theory, that appellant made up this excuse to avoid

arrest." (Slip Opn., p. 7, fn. 3.) They conclude "that the story appellant told the police was a fabrication." (Slip Opn., p. 6.)

But contrary to the majority's contentions, this evidence is not so overwhelming that it leads **only** to the conclusion that petitioner fabricated his mistake of fact defense. The majority made no mention of the substantial evidence in support of petitioner's mistake of fact defense. One of the first things petitioner told the officers on scene was that he was there looking for his cousin. (1 CT 264; Exh. 2.) Further, the facts that petitioner never attempted to flee the scene but simply waited outside in the backyard drinking his bottle of water after he was unable to enter the sliding glass door (4 RT 119; Exhs. 1 and 2); that he had no burglary tools or weapons on him (4 RT 177); and that his cousin lived in the area, only two to three blocks away (4 RT 169), lead to the reasonable conclusion that petitioner was looking for his cousin and not trying to break into the house. Thus, one reasonable interpretation of this evidence is that petitioner actually believed that he was at his cousin's house, but when no one answered the locked front door at 7 a.m. he then went to try and get in through the other doors of the house to wait either for his cousin to wake up or for him to get home. When he discovered that all the doors were locked, he simply sat in the backyard and waited. After being arrested and having to

wait in jail, petitioner then attempted to find someone to support his defense.

Clearly, the majority did not believe this view of the evidence. But determining how credible petitioner was and whether or not he fabricated his story were decisions for the jury to make. By making these findings of fact and credibility determinations the majority usurped the jury's role of determining whether petitioner subjectively believed he was at his cousin's house and became "in effect a second jury to determine whether the defendant is guilty." (*Neder v. United States, supra,* 527 U.S. 1, 19.)

C. The Erroneous Mistake of Fact Instruction Prejudiced Petitioner and His Burglary Conviction Must be Reversed.

If the majority had focused on whether the instructional error affected the jury's decisionmaking process (*People v. Jackson, supra,* 58 Cal.4th 724, 790 (dis. opn. of Liu, J.).), it would have found that petitioner was prejudiced by the error. 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 petitioner based on the theory that petitioner 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 majority completely omits the facts indicating how close this case was for the jury. This case was so close that at one point the jury informed the court that they were deadlocked and could not make a unanimous decision – at least one juror was unwilling to convict at that point. (1 CT 175; 5 RT 282.) The prejudicial impact of a court's error is heightened in close, deadlocked cases. (*People v. Diaz* (2014) 227 Cal.App.4th 362, 384-385.) The jury's requests for the transcripts of the jail calls (1 CT 174, 5 RT 281) and for Officer Aldrete's testimony (1 CT 192, 6 RT 304) are also "indications the deliberations were close." (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295.) The only issue in this case was whether petitioner opened the screen door with the intent to steal from the home or with the intent to enter

his cousin's house. Thus, it is clear that the impasse in the deliberations must have revolved around that issue.

Jurors are presumed to understand and follow the court's instructions. (*People v. Homick* (2012) 55 Cal.4th 816, 867.) In this case, the jury was erroneously instructed that petitioner's mistaken belief that his cousin Trevor resided at the home must be reasonable. (1 CT 165.) Further, comments from the "prosecutor, as the People's official representative, carry with the jury." (*People v. Thomas* (1992) 2 Cal.4th 489, 529.) Here, the prosecutor repeatedly argued that **petitioner's mistaken belief was unreasonable** because his cousin's house was in a different neighborhood on the other side of a nearby high school. (5 RT 246, 255.) Petitioner's counsel further emphasized the error in the instruction when he argued: "If you find that the defendant believed that his cousin Trevor resided at the home **and if you find that belief is reasonable**, you must find him not guilty." (5 RT 263.) These arguments combined with the erroneous instruction conveyed to the jury that even if petitioner actually believed he was at his cousin's house but that this belief was unreasonable then he still must be found guilty. But this theory of conviction is legally incorrect – petitioner's mistaken belief that he was at his cousin Trevor's house did not need to be objectively reasonable. An acquittal was required if petitioner actually believed he was at his cousin's house, no matter how

reasonable this belief was. (*People v. Russell, supra,* 144 Cal.App.4th 1415, 1425-1427.)

Given that at least one juror at one point was not persuaded that petitioner opened the screen door with the intent to steal from the home, and because the prejudicial impact of a court's error is heightened in close, deadlocked cases (*People v. Diaz, supra,* 227 Cal.App.4th 362, 384-385), there is a reasonable chance, and not just an abstract possibility (*People v. Wilkins, supra,* 56 Cal.4th 333, 351), that at least one juror relied on the erroneous instruction and found that even though petitioner subjectively believed he was at his cousin Trevor's house he was still guilty because this mistaken belief was objectively unreasonable.

In this case the majority opinion usurped the jury's role by focusing on the evidence that supported a guilty conviction. Instead, they should have focused on whether the instructional "error might have affected the jury's decisionmaking." (*People v. Jackson, supra,* 58 Cal.4th 724, 790 (dis. opn. of Liu, J.).) Their role in determining if petitioner was prejudiced by the erroneous instruction was to check "whether the record contains evidence that could rationally lead to a contrary finding." (*Neder v. United States, supra,* 527 U.S. 1, 19.) Here, the record contains evidence that could rationally lead a juror to conclude that petitioner subjectively believed he was at his cousin's house but that this

belief was unreasonable. Petitioner was therefore prejudiced by the instructional error and his burglary conviction must be overturned.

III. The Trial Court Abused its Discretion When it Declined to Strike Petitioner's Prior Robbery Conviction for Sentencing Purposes.

The majority opinion makes two basic responses to petitioner's argument that the trial court abused its discretion when it declined to strike petitioner's robbery conviction for sentencing purposes. First, they argue that petitioner's criminal history and his failure to successfully complete probation warranted his ten-year sentence. Second, they argue that because the home was occupied, petitioner's crime of burglary was a "serious felony" and thus petitioner's case was not "deemed outside the … spirit" of the enhanced sentencing laws. (Slip Opn., p. 8.)

The problem with this conclusion, is that it fails to actually look at the nature and circumstances regarding petitioner's crimes or at petitioner's background and character. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) When these required factors are looked at, it is clear that petitioner falls outside of the spirit of the enhanced sentencing schemes in Penal Code section 667. (*Ibid.*)

At the time petitioner committed his burglary he was just 20 years old and had never been sentenced to prison before. Petitioner had previously been found to be mentally incompetent to stand trial. (1 Supp. CT 28-29; 1 Supp. RT 4-5.) None of his crimes involved weapons or violence. Further, his criminal history demonstrates a clear lack of criminal sophistication – his petty thefts were for shoplifting (Probation Report, 12-13), his robbery was for stealing a bottle of tequila while threatening to "blast" a store employee if she tried to stop him (Probation Report, 14), and his burglary was due to opening a sliding screen door without ever opening the glass door behind it. (4 RT 126-128.) While this record demonstrates a young man who continued to make poor choices, his "serious" offenses of robbery and burglary are so trivial and so low level that this is still the extraordinary case "where the relevant factors described in *Williams, supra,* 17 Cal.4th 148, manifestly support the striking of" petitioner's prior robbery conviction. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.)

Petitioner was appropriately granted probation after he pled guilty to his robbery charge. (1 Supp. CT 76-80; 1 Supp. 4 RT 154-161.) It is unfathomable how opening a screen door to someone's house and then making absolutely no further efforts to enter the home once petitioner discovered the glass door behind it was locked, suddenly made petitioner go from someone deserving

of probation to someone deserving a 10-year prison sentence. When the relevant factors described in *Williams* are actually looked at, "no reasonable minds could differ," that the failure to strike petitioner's prior robbery conviction constitutes "an abuse of discretion." (*People v. Carmony, supra,* 33 Cal.4th 367, 378.) Petitioner's case must be remanded for resentencing with directions to strike petitioner's robbery conviction for sentencing purposes.

IV. Petitioner's Sentence Violates both the U.S. and California Constitutions Because it Constitutes Cruel and Unusual Punishment.

"The Eighth Amendment" of the U.S. Constitution "forbids cruel and unusual punishments." (*Ewing v. California* (2003) 538 U.S. 11, 20.) "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." (*Id.* at p. 23.) The California Constitution is similarly violated if the punishment is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

As in section III, above, the fault with the majority's conclusion is that it looks solely at what petitioner was convicted of rather than looking at the conduct underlying his previous

offenses. The majority contends that petitioner's prior criminal record and his current serious burglary offense represent "a recidivist whose offenses are growing more serious." (Slip Opn., p. 10.) This narrow view represents everything that is wrong with the sentence that petitioner received. Petitioner is a young, unsophisticated, non-violent, low-level criminal with mental health issues. He is not a person deserving a significant period of incarceration. A ten-year sentence is "grossly disproportionate" to the conduct of stealing a bottle of tequila and opening a screen door and "offends fundamental notions of human dignity." As such, the sentence violates the cruel and unusual provisions of both the federal and California Constitutions. (*Ewing v. California, supra,* 538 U.S. 11, 23; *In re Lynch, supra,* 8 Cal.3d 410, 424.) Petitioner's sentence should be overturned and his case remanded for resentencing.

CONCLUSION

Petitioner urges this Court to review his case to settle important questions of law and secure uniformity of decision. (Cal. Rules of Court, rule 8.500(b)(1).) The proper test to determine whether the erroneous mistake of fact instruction prejudiced petitioner is the "harmless beyond a reasonable doubt" standard of *Chapman*. The majority usurped the jury's factfinding role when it found that petitioner fabricated his mistaken belief that he was at his cousin's house. If the majority

had correctly focused on how the instructional error affected the jury's decisionmaking process it would have found the instructional error was prejudicial. Even under *Watson,* petitioner's burglary conviction must be overturned because there is a reasonable chance and not just an abstract possibility that due to the mistake of fact instructional error at least one juror incorrectly convicted petitioner by finding that he actually believed his cousin resided at the home but that this mistaken belief was unreasonable.

Alternatively, petitioner's burglary case must be reversed and remanded for resentencing because a ten-year sentence is manifestly unjust and grossly disproportionate to the crimes he committed. At resentencing, the trial court should be instructed to strike his robbery conviction for sentencing purposes.

CERTIFICATE OF WORD COUNT COMPLIANCE

Pursuant to rule 8.504(d)(1) of the California Rules of Court, I hereby certify that this brief contains 5667 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: November 20, 2020

PROOF OF SERVICE

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

Re: People v. Hendrix; Court of Appeal No. B298952

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 November 20, 2020, I caused the attached Petition for Review 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 the petition constitutes service on the clerk/executive officer of the Court of Appeal. (Cal. Rules of Court, rule 8.500(f)(1).)

On November 20, 2020, I also served the attached Petition for Review 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 (Petitioner's trial counsel).

On November 20, 2020, 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 Petition for Review 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 November 20, 2020, at Santa Barbara, California.

By: _____
Adrian Dresel-Velasquez
DECLARANT
SBN 272556

OPINION

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ISAIAH HENDRIX, Defendant and Appellant.	2d Crim. No. B298952 (Super. Ct. Nos. 2018037331, 2017025915) (Ventura County)

Isaiah Hendrix appeals his conviction, by jury, of first degree burglary. (Pen. Code, §§ 459, 460.)[1] The trial court sentenced appellant, a second strike offender, to nine years in state prison.[2] Appellant was also sentenced on a separate probation violation matter to a consecutive term of one year. He contends the trial court erred when it instructed the jury on

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[1] All further statutory references are to the Penal Code, unless otherwise stated.

[2] The sentence is comprised of the low term of two years, doubled under the Three Strikes law (§§ 667, subd. (e)(1), 1170.12, subd. (b), (c)(1)), plus a five year enhancement for a prior serious felony conviction. (§ 667, subd. (a)(1).)

mistake of fact. He further contends the trial court abused its discretion when it "failed" to strike his prior robbery conviction in the interest of justice (§ 1385) and that his sentence constitutes cruel and unusual punishment under both the state and federal constitutions. We affirm.

Facts and Proceedings

July 2017 Robbery (case no. 2017025915). Appellant was stopped by a Costco employee after he tried to enter the Oxnard store without a membership card. He said his mother was inside and asked to be escorted to her. The employee went with him as he walked through the store, supposedly looking for his mother. When they reached the alcohol section, appellant put a bottle of tequila into his shorts. He left the store with the bottle in his shorts and without paying for it. When confronted, appellant threatened to harm the Costco employee. He was arrested for robbery.

In October 2017, appellant's attorney declared a doubt as to his competency to stand trial. After evaluation, he was committed to the Department of State Hospitals for treatment. In August 2018, appellant was found competent. He pleaded guilty to one count of second degree robbery. On September 24, 2018, the trial court granted appellant 36 months' formal probation on the condition that he serve one year in county jail with credit for time served. He was then released from custody.

October 2018 Burglary (case no. 2018037331). At 7 a.m. on October 28, 2018, appellant knocked loudly on the front door and rang the doorbell of a house on Indiana Drive in Oxnard. Artrose Tuano, who lived in the house with his parents was at home and watched the video being recorded by his home security system. He saw appellant walk through a side gate and into the back

yard. Appellant tried to open a side door that led to the garage. He also opened a screen door and then tried to force open a sliding glass door leading into the house. When he could not get in the house, appellant sat down on a bench in the backyard. Tuano called the police.

Police officers arrived and found appellant sitting in the backyard. Appellant said that he was there to visit his cousin Trevor who lived in the house, but nobody answered the door. He said a friend told him that Trevor had moved to this new house. As luck would have it, Oxnard Police Officer Vines knew Trevor because they went to high school together and, Officer Vines also knew that Trevor had not moved recently. He was still living several blocks away. Appellant was arrested for residential burglary.

While appellant was in custody awaiting trial, he had recorded telephone conversations with his mother and one of his uncles. In a November 2018 call, appellant told his mother that he needed a witness who could "speak up for me or something and say I gave him the wrong address . . . [a]nd then that's why he knocked on the door and did what he did because he thought it was his cousin Trevor's house." Two days later, he asked his mother if she had the situation "under control or do I need somebody – do I need to call one my friends to do it for me?" She replied, "To do what?" Appellant said he needed the person "to say that they gave me the wrong address and everything." Appellant's mother refused to get involved. "Oh. No. You need to do – one of your friends [to] do that crap. I ain't getting nobody caught up or doing any type of drama or lying."

About a week later, appellant spoke with his Uncle John on a recorded telephone call. John reminded appellant that

authorities recorded every call. Appellant said he knew, but "it's not like they really listen." Uncle John disagreed, "Yeah, they listen, dude. They record everything you say." He also chided appellant for "all that crazy shit you be talking and doing and then you're running around breaking in people's house." He asked what appellant was doing, and appellant answered, "I don't know."

Appellant did not testify at trial. The defense rested without presenting evidence.

Discussion

Instructional Error

Appellant requested that the trial court instruct the jury on mistake of fact as outlined in CALCRIM No. 3406. The prosecutor requested that "all the 'reasonably' brackets get included" in the instruction given to the jury. Appellant's counsel "submitted" on that issue. The trial court erroneously included the bracketed language in the instruction based upon the erroneous advice of the prosecutor. Everyone should have read the "Bench Notes" which says to not use "reasonable" for a specific intent crime.

The trial court instructed the jury as follows: "The defendant is not guilty of burglary if he did not have the intent or mental state required to commit the crime because he [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact. [¶] If the defendant's conduct would have been lawful under the facts as he [reasonably] believed them to be, he did not commit burglary. [¶] If you find that the defendant believed that defendant's cousin Trevor resided at the home [and if you find that belief was reasonable], he did not have the specific intent or mental state required for burglary. [¶] If you

have a reasonable doubt about whether the defendant had the specific intent or mental state required for burglary, you must find him not guilty of that crime." (CALCRIM No. 3406.)

A good faith mistake of fact "'is a defense when it negates a required mental element of the crime . . . .'" (*People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 10 (*Navarro*).) The mistake of fact need not be objectively reasonable. It need only be subjectively believed.

In *Navarro,* for example, the defendant was charged with grand theft for taking four wooden beams from a construction site. There was, however, evidence that the defendant believed the site had been abandoned and that the owner had no objection to his taking the beams. The trial court instructed the jury that the defendant's mistake of fact was a defense to theft only if it was both honest and objectively reasonable. *Navarro* concluded the trial court erred. "It is true that if the jury thought the defendant's belief to be unreasonable, it might infer that he did not in good faith hold such belief. If, however, it concluded that defendant in good faith believed he had the right to take the beams, even though such belief was unreasonable as measured by the objective standard of a hypothetical reasonable man, defendant was entitled to an acquittal since the specific intent required to be proved as an element of the offense had not been established." (*Id*. at p. 11, fns. omitted; see also *People v Russell* (2006) 144 Cal.App.4th 1415, 1426-1427 (*Russell*), disapproved on other grounds in *People v. Covarrubias* (2016) 1 Cal.5th 838, 874, fn. 14.)

Here, appellant told police that he entered the Tuano backyard and tried to force entries believing this to be his cousin Trevor's house. If appellant subjectively believed that he was at

Trevor's house, the jury could, in theory, have found that he did not have the mental state required for burglary. The trial court erred when it instructed the jury that such a belief had to be objectively reasonable.

Harmless Error

The instructional error was harmless. There is no reasonable probability appellant would have obtained a more favorable result had it not been made. (Cal. Const. Art. 6, § 13; *People v. Zamani* (2010) 183 Cal.App.4th 854, 866; see also *Russell*, *supra*, 144 Cal.App.4th 1415.) Appellant told the responding officers that he believed Trevor lived at the Tuano house because a friend told him Trevor had moved. That was it. There was no other evidence from which the jury could have concluded appellant subjectively believed that statement.

In conducting a harmless error analysis, we look to the entire record. Based upon the paucity of evidence, appellant's "mistake" did not make sense to the jury. It does not cohere on appeal either. Officer Vines testified Trevor had not moved to the house. Appellant was the only person who said that he thought that Trevor had moved to the victim's residence.

We must observe that the story appellant told the police was a fabrication. No cousin who wanted to visit a relative would make multiple forcible attempts to enter the house and a garage. This is the method of operation for a residential burglar. It is not the method of operation for a family visit. It must be emphasized that appellant did not testify that he subjectively believed cousin Trevor lived at the scene of the burglary. He did not call as a witness the person who allegedly told him that cousin Trevor moved to the house. His name is unknown. His description is unknown. His whereabouts are unknown. There is a disconnect

here. Even if appellant subjectively believed that cousin Trevor lived at the house, that did not give him the right to attempt entry, multiple times, by force. Would a person who subjectively believes that a cousin lives at a residence also think that the cousin would allow forcible entry for a social visit?

Appellant actively solicited his mother to procure a witness who would so testify that he told appellant that cousin Trevor had moved to the house. She flatly refused. When Uncle John accused him of committing the residential burglary and asked him what he was doing, appellant replied, "I don't know." This is not the comment of a person who subjectively believed that cousin Trevor lived in the house. There is no miscarriage of justice in this case.[3]

Claimed
Sentencing Error

The trial court used appellant's July 2017 robbery conviction as a first "strike" and as a five-year prior serious

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[3] We opine that appellant, obviously, has some mental impairment. There is no evidence of what he was thinking while sitting in the backyard. He could have been pondering on the whereabouts of cousin Trevor. Or maybe he was pondering on his next attempted point of entry. But we do not believe that a friend told him the cousin Trevor had moved to the victim's house. It seems much more likely, consistent with the prosecutor's theory, that appellant made up this excuse to avoid arrest. Even his own mother would not help secure a corroborating witness. She did not want to help him in his "lying." (Ante, p. 3.)

So, the police did not believe him. The prosecutor did not believe him. His mother did not believe him. The jury did not believe him. The trial court did not believe him.

felony conviction for purposes of sentencing. Appellant contends the trial court abused its discretion. We disagree.

In determining whether a prior serious felony should be dismissed for sentencing purposes, "the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).) We review the trial court's refusal to strike a prior conviction for abuse of discretion. "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

Appellant's adult criminal history includes six prior theft and robbery convictions. He has never successfully completed probation. The current offense is the serious felony of residential burglary, which appellant committed while a resident was inside the home. Appellant appears to have some mental impairment but presents no other mitigating circumstances. This is not an extraordinary case where appellant must be "deemed outside the . . . spirit" of the Three Strikes law. (*Williams, supra,* 17 Cal.4th at p. 161.) There was no abuse of discretion.

Claimed

Cruel and Unusual Punishment.

Appellant contends his 10-year sentence violates the federal and state constitutional prohibitions against cruel and unusual punishment. We disagree.

In non-capital cases, the Eighth Amendment to the federal Constitution contains a "narrow proportionality principle," which prohibits the imposition of a sentence that is "'grossly disproportionate to the severity of the crime.'" (*Ewing v. California* (2003) 538 U.S. 11, 20-21.) In determining whether a lengthy sentence imposed under a recidivist sentencing statute is unconstitutionally excessive or disproportionate, a reviewing court determines whether the challenged sentence constitutes cruel and unusual punishment "*as applied to the specific circumstances involved in the case at issue*." (*In re Coley* (2012) 55 Cal.4th 524, 553 [emphasis original].)

Appellant's current felony is first degree burglary, a serious felony under section 1192.7. The sentencing range for this offense is two, four or six years, reflecting our Legislature's assessment of its severity. (§ 461, subd. (a).) He committed the burglary about one month after his release from custody for his prior robbery conviction. The trial court imposed a term of nine years in state prison by selecting the low term of two years for the burglary, doubling that term based on appellant's prior "strike," and then adding a five-year enhancement term for his prior serious felony conviction. This sentence is well within the maximum statutorily authorized term for a second-strike burglary and it bears a rational relationship to the anti-recidivist purposes of the Three Strikes law. We conclude the sentence does not violate the Eighth Amendment. (*In re Coley*, *supra*, 55 Cal.4th at pp. 558, 561-562.)

Our state constitution also prohibits cruel or unusual punishments. A sentence that is within the statutorily authorized term for an offense may be said to violate the California Constitution only where the punishment is so

disproportionate "that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) Here, appellant has a history of committing theft and robbery. His current offense is even a more serious offense because he intruded into a family home while a resident was inside. He committed this offense only about one month after being released from custody. Given appellant's status as a recidivist whose offenses are growing more serious, the sentence imposed does not shock the conscience or offend fundamental notions of human dignity. (See, e.g., *People v. Cooper* (1996) 43 Cal.App.4th 815, 825-826.)

CONCLUSION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

YEGAN, Acting P. J.

I concur:

PERREN, J.

TANGEMAN, J., Dissenting:

I respectfully dissent. The majority conclude that the trial court erred in instructing the jury that appellant's mistaken belief that he was at his cousin's house had to be "reasonable" to constitute a defense, but also conclude that the legal error was "harmless." Given the facts of this case, that second conclusion is unwarranted.

The proper test for determining whether misinstruction on an element of the offense is prejudicial is the "harmless beyond a reasonable doubt" standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1013.) The *Chapman* test has been described as a "stricter" test than the reasonable probability test of *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1160.)

Appellant has a history of mental illness. Indeed, he was found not competent to stand trial in a prior case and was committed to the Department of State Hospitals for almost one full year for mental health treatment. He was released from that commitment only two months before this incident occurred. This is not an insignificant fact, although it is glossed over in the majority opinion.

Moreover, the underlying facts of this case readily show that appellant was not of 'sound mind' on October 28, 2018. After loudly knocking and ringing the doorbell, appellant walked around the house, tried to force open a door and, when unsuccessful, simply sat down in the backyard, and waited. Waited for what? His cousin? Or, as the majority apparently posits, for the police to arrive to arrest him (which conclusion is inconsistent with his surprise at seeing the police). He had no

burglary tools when arrested and made no further efforts to enter the house. He simply sat down and waited.

The majority disregards this evidence because appellant's cousin lived several blocks away, on the "opposite side of Pacifica High School." Apparently this proves that appellant was not mistaken at all, because he couldn't have been confused or lost. This logic fails me.

The majority also seizes upon appellant's post-arrest call to his mother, while in custody once again soon after his discharge from the Department of State Hospitals, pleading with her to lie for him. Again, apparently this proves (beyond a reasonable doubt) that appellant knew all along that he was not at his cousin's house. Or does it? Maybe it shows only how desperate he was to get out of custody.

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.

CERTIFIED FOR PUBLICATION.

TANGEMAN, J.

Paul W. Baelly, Judge

Superior Court County of Ventura

Adrian Dresel-Velasquez, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Idan Ivri, Acting Supervising Deputy Attorney General, John Yang, Deputy Attorney General, for Plaintiff and Respondent.

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Adrian Dresel-Velasquez, Attorney at Law
Law Firm