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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ZEFERINO ESPINOZA, Jr.,** **Defendant and Appellant.**

Case No. S224929

Sixth Appellate District, Case No. H039219
Santa Clara County Superior Court, Case No. CC954850
The Honorable Paul Bernal, Judge

OPENING BRIEF ON THE MERITS

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ISSUES

1. Whether a voluntary and intentional absence of a self-represented defendant forfeits trial rights otherwise afforded by the defendant's presence and authorizes continued trial, without a knowing and intelligent advanced waiver of the rights.

2. Whether granting defendant's motion for self-representation without continuing jury selection for one day was an abuse of discretion.

INTRODUCTION

Appellant was charged with multiple felonies. He sought and received numerous continuances of trial and substitutions of appointed counsel, resulting in over two years of delay. During jury selection, he knowingly and voluntarily waived his right to counsel after being expressly admonished by the court that further continuances would not be granted. He represented himself during the prosecution's case later that day. The next day, he failed to appear as ordered, causing a further delay of trial. Extensive efforts to contact appellant failed. Invoking Penal Code section 1043, the trial court found that appellant voluntarily and knowingly absented himself to avoid trial and punishment. Trial concluded in appellant's absence with the jury's return of mixed verdicts.

Before sentencing, appellant reappeared with new retained counsel and later filed a motion for a new trial to challenge the trial held in absentia. The court ultimately rejected his claim and sentenced him to prison.

The resumption of jury trial following appellant's voluntary and intentional abandonment of the trial was proper. Following a knowing and voluntary waiver of counsel, a pro se defendant's voluntary abandonment of trial forfeits constitutional trial rights of an accused to personal presence, confrontation of adverse witnesses, and the presentation of a defense through counsel, until such time as the defendant personally exercises those

rights in the trial itself. As a result, and contrary to the decision of the Court of Appeal below, a court's failure to admonish a pro se defendant sua sponte about the potential for trial in absentia, or its failure to sua sponte appoint a standby or former counsel, where a pro se defendant voluntarily absconds, affords the defendant no basis for a new trial.

Additionally, the trial court did not abuse its discretion by accepting appellant's voluntary and knowing waiver of counsel while refusing a midtrial continuance.

STATEMENT OF THE CASE

A. The Charges

A December 2009 information charged appellant with possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)), possession of a controlled substance without a prescription (Health & Saf. Code, § 11375, subd. (b)(2)), possession of marijuana (Health & Saf. Code, § 11357, subd. (b)), making a criminal threat (Pen. Code, § 422), possession of a firearm as a felon (two counts) (former Pen. Code, § 12021, subd. (a)(1)), possession of ammunition as a felon (former Pen. Code, § 12316, subd. (b)(1)), and attempting to dissuade a witness by use or threat of force (Pen. Code, § 136.1, subd. (c)(1)). (1 CT 83-86.)

B. Pretrial Proceedings

During pretrial proceedings that consumed over two years, the trial court appointed seven public defenders, who made some 65 appearances on appellant's behalf. (10 RT 322, 401.) According to the court, the case was set for trial "maybe 50 times." It granted the continuances to accommodate appellant personally, not his defense attorneys. (10 RT 399.)

Four different times, appellant moved for a substitution of appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). (1 CT 98, 229, 242, 247.) The court held hearings on appellant's *Marsden*

motions, and the transcripts of the hearings were unsealed by the trial court. (13 RT 1014-1015.) During the hearings, appellant exhibited obstreperous and unruly behavior, made unsubstantiated claims about a romantic relationship between the investigating officer and a witness, repeatedly called his attorney a liar, denied discovery in his possession had been received, and feigned ignorance of the proceedings. (See 10 RT 383-384, 389, 393-403, 416-417, 460-463.) To facilitate communications, the trial court ultimately ordered appellant and his attorney to confer daily. (10 RT 430-431.)

On April 17, 2012, about a week before trial, appellant moved to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). As part of his motion, appellant requested a minimum continuance of three weeks for trial preparation, asserting that he had been "kept in the dark for the past three years." (10 RT 319-322.) At a hearing, the trial court found appellant was attempting to "manipulate the court system" through the *Faretta* motion, admonishing him, "if you truly wanted to represent yourself you could have brought that motion any time in the last few years in this case." (10 RT 324.)

The following day, April 18, 2012, appellant's attorney, Mark Camperi, announced the defense's readiness for trial. (10 RT 358.) However, appellant again requested self-representation and a continuance. (10 RT 358.) The court denied the motions, stating that the case had been "rattling around the courthouse . . . and it's not for any lack of effort on the part of the D.A. or the public defender." (10 RT 358; see also 10 RT 427 [court characterizes the motions as a "delay tactic"].)

C. Appellant Waives Counsel, but Voluntarily and Intentionally Absconds When Ordered to Appear the Next Day for Further Trial

Jury selection began on April 23, 2012, and continued through the following day. On April 24, 2012, appellant again moved to dismiss his attorney under *Marsden* and to represent himself under *Faretta*. (10 RT 454-483.) At a hearing, the court found appellant was making false statements, and admonished him not to "make things up to justify your goal." (10 RT 469; see also 10 RT 471 [court orders: "don't be lying to me," "please stop lying"], 10 RT 473 [court finds appellant is "being obstreperous for the purpose of playing the system"].) The court denied appellant's *Marsden* motion. Appellant requested self-representation, and asked for cocounsel. (10 RT 476.) The court denied appellant's request for cocounsel, at which point appellant requested two additional weeks to prepare for trial on his own. (10 RT 476-477.) The court told appellant that the fact he would need such a continuance if he were granted self-representation was the reason why he was not being permitted to represent himself. (10 RT 476-477.)[1] Moments later, the court told appellant that it

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[1] The colloquy is as follows:

> THE DEFENDANT: I don't mean to disrespect the courts at all. I'm trying to get some questions here. How come I can't get another attorney or how come I cannot fire him so I can go pro per.
>
> THE COURT: You can, if you are ready to proceed to trial without him you can do it.
>
> THE DEFENDANT: Well, I need a co-counsel then.
>
> THE COURT: You are not permitted to have co-counsel.

(continued...)

would give him a fair trial and reiterated that it would permit him to represent himself only if he was "ready to go to trial now." (10 RT 480.) The court told appellant that he had two options: (1) trial with counsel, or (2) self-representation without a continuance. The court stressed, "I can't continue this case." (10 RT 480.)

Appellant stated, "I will represent myself, your Honor." (10 RT 480.) The court gave appellant a *Faretta* waiver form, and admonished him:

> THE COURT: Okay. Mr. Espinoza, I want to make it clear if you represent yourself you are not going to get any special treatment. You are not going to get any continuance unless they are reasonable requests, which given the time frame we've given to the jurors we need to move forward with the case. I'm not going to be extending it beyond that time limit I gave to the jurors. You need to get your own witnesses here without anybody's assistance. If you can't find them or locate them, if they don't agree to come in, if they're late because their bus didn't pick them up we're going without them. So I want to make sure you understand that.
>
> When you represent yourself you do it on your own. You don't get any assistance. You are not going to get co-counsel. You don't get any special favors. You are expected to be treated just as the D.A. is treated. You don't get any breaks because you don't know the law or how to proceed in a trial. You don't get to file an appeal saying that you had ineffective assistance of counsel because this is your choice.

(...continued)

> THE DEFENDANT: I am requesting that when I go pro per because I won't be ready like tomorrow. It will take me two weeks.
>
> THE COURT: And that's why you can't have Mr. Camperi taken off the case.

(10 RT 476-477.)

So I know you are a little hot under the collar. You might want to take a few minutes to decide, reflect on it. Whatever you want is fine with me. Read over the *Faretta* form, take your time, let me know what you think. There is no shame in saying I want [counsel]. There is no shame in saying I want to represent myself. Okay?

THE DEFENDANT: Yes, your Honor.

THE COURT: So think about it, take your time and do what you think is best.

THE DEFENDANT: Okay. Thank you, your Honor.

(10 RT 481-482.)

The court provided 40 minutes for appellant to review the form concerning self-representation. (10 RT 485.) When proceedings resumed, appellant told the court that he had filled out the form "to the best of [his] knowledge." (10 RT 485.) The court responded: "You either understood the form or you didn't. Don't say to the best of my ability. I don't play games." (10 RT 485.) Appellant asked, "Can I read it a little bit more, your Honor?" The court agreed to the request: "So go ahead and look at it and I want to make sure you understand what you're doing." (10 RT 485.) This colloquy followed:

THE DEFENDANT: Okay. Your Honor, can I ask a question?

THE COURT: Of course, you can.

THE DEFENDANT: Me taking the case today can I at least get a continuance to tomorrow?

THE COURT: No.

THE DEFENDANT: Just to get everything, because he's going to hand over the files, your Honor. Is that how—or am I not entitled to it?

THE COURT: You have a copy of the file.

THE DEFENDANT: No, but I'm asking whatever else they may have that I don't have.

THE COURT: You are not entitled to internal memorandums about how difficult you are, you don't get that.

THE DEFENDANT: No, I'm asking about statements and videos, am I entitled to that stuff, your Honor?

THE COURT: Yes, you are. You will get a copy of all the discovery in this case which you already have.

MR. CAMPERI: And, your Honor, I can assure the court I will go back and look to see if there is anything that I am unaware of at this time and I'll bring it right over if there is something I am unaware of at this time.

THE COURT: Thank you.

(10 RT 485-486, italics added.)

The court discussed with appellant the potential penalties in the event that he was convicted on the charges. (10 RT 487.) The court answered affirmatively when appellant asked if he would be able to contact all witnesses and talk to the prosecutor. (10 RT 487.) Appellant told the court that he understood the *Faretta* waiver form. (10 RT 487.) The form stated that appellant had the right to confront the witnesses against him. (1 CT 251.) The court orally admonished appellant concerning the *Faretta* waiver of counsel, as follows:

THE COURT: Do you understand you may not be able to change your mind, or if you do change your mind the court doesn't have to accept your change of mind? Mr. Camperi is not going to be coming back. You are not going to get co-counsel, side counsel, assisted counsel or any kind of counsel. Mr. Camperi does not have to take your calls or answer any of your questions because there's no attorney/client relationship anymore. Do you understand all of that?

THE DEFENDANT: Yes.

THE COURT: And are you willing to go to trial representing yourself?

THE DEFENDANT: Yes.

THE COURT: Very good. So if you can lodge that with madam clerk.

(10 RT 487-488.)

The court returned the *Faretta* form to appellant. After an unreported discussion between the parties, the court made the following observations:

THE COURT: At times Mr. Espinoza has pretended not to know what's going on. And that he's unfamiliar with the case, but it's clear from his discussions with the court and counsel that he knows more about the case than everybody else.

He's been working on this case since September 3rd, 2009. He has been controlling the direction of the case by having the public defender's office do many things which they thought in their professional legal opinions was unnecessary, but they did them nonetheless.

The defendant has also been controlling the discovery associated with this case. The court believes that the defendant has been working the system as part of a delay tactic and/or his inability to accept reasonable tactical decisions of his various attorneys. And that he is not put into jeopardy by representing himself, because he is prepared to handle this case more so than his attorneys, according to Mr. Espinoza. And under the law even if he is not going to do as good a job as his attorney would have done, that is Mr. Espinoza's choice and he does so willingly.

(10 RT 492-493.)

The court and appellant then engaged in this colloquy:

[THE COURT:] I am now reviewing the petition to proceed in propria persona. On the parts which I put the little arrows in pencil you now put your initials in them, did you read and understand all of those sections?

THE DEFENDANT: Yes.

THE COURT: Are these your initials throughout the document?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions for me about this document, your rights, your obligations, the consequences, and your decision?

THE DEFENDANT: Do I have a question? No.

THE COURT: Very good. Then I will accept this and we will file it with madam clerk.

THE DEFENDANT: Thank you, your Honor.

(10 RT 493-494.)

Trial proceeded on April 24, 2012, with the completion of voir dire and the swearing of the jury. (10 RT 494.) The prosecutor gave an opening statement. Appellant declined to give one. (10 RT 510.) The prosecution called witness Gonzalez. Appellant made only one objection to the prosecutor's direct examination and declined cross-examination of the witness. (10 RT 517.) At the conclusion of Mr. Gonzalez's testimony, the court dismissed the jury for the day. (10 RT 529.) The trial court ordered appellant to appear in court at 8:45 a.m. the following morning. (10 RT 529; 11 RT 606.)

Appellant failed to appear in court when trial resumed the following morning on April 25, 2012. At 9:00 a.m., the court and prosecutor attempted to contact appellant. (11 RT 606.) At 10:00 a.m., the court dismissed the jury until the next morning and ordered a body attachment for appellant. (11 RT 606.)

The next day, April 26, 2012, the court reconvened at 8:50 a.m. Appellant again failed to appear. The court made the following statement:

[T]he court is making a finding under Penal Code section 1043 that the defendant has voluntarily absented himself from this trial. The court finds that he knowingly absented himself.

The court finds that he abandoned this trial purposefully and that the purpose for which he chose to not come to trial was evasion of the trial or avoiding penalty for the alleged crimes that he allegedly committed or another delay tactic with the defendant perhaps believing that if he didn't show up to trial that the court would terminate this jury trial, send the jurors home and then when he comes in in a month he would try to delay the trial again for another three years.

The court has read and considered *People v. Connolly* [(1973)] 36 Cal.App.3d 379 at 385 [(*Connolly*)]. The court finds that prior to the defendant disappearing every day that the court was scheduled, both for in limine proceedings, his *Marsden* proceedings, of which there were many, and for the trial schedule that Mr. Espinoza was always at court either before or at 8:45 a.m., that he always was accompanied with his girlfriend whose name is Anna Hernandez.

There were extensive conversations about the schedule. The defendant was present during those conversations. The defendant was present when we penciled out the schedule of witnesses and what days we were going to be in session . . . [a]nd that court would always be in session at 9:00 and that Mr. Espinoza, his attorney and the D.A. were expected to be here at 8:45 every morning.

There were also discussions about witness availability and the timing of witnesses. Mr. Espinoza was present when we talked about the need for a[n] [Evidence Code section] 402 hearing on some of the witnesses; in fact, it was on the record. And that as those witnesses appeared, we would have to do a 402 hearing before they testified in front of the jury.

Also, the defendant was given the rules of court, and he was given a written copy of the rules of court. The first page of the rules of court, the very first rule says, "you must be in court every day at 8:45" and that sentence is underlined in my written rules of court. He read it, he highlighted it, he retained a copy of that so he knew he had to be here at 8:45.

The defendant was aware that the trial was not going to end on Tuesday of this week but that it would be in session on Wednesday and thereafter until completed.

So we are in a situation now that it's obvious that he didn't sleep in, that he purposefully abandoned the trial.

(11 RT 608-610.)

The court described the efforts made to contact appellant. The court requested the prosecutor to contact all people who might know appellant's whereabouts, and to provide any information to the police department, the district attorney's office, and the court itself. (11 RT 610.) At the court's recommendation, the prosecutor contacted the border patrol. (11 RT 611.) The police dispatched a surveillance team to appellant's home, as well as to other addresses where appellant might be located. (11 RT 611-612.) Neither appellant nor his vehicle was located. (11 RT 612.)

The courtroom bailiff also attempted to locate appellant. On April 25, 2012, the bailiff had called appellant's phone number and left messages. (11 RT 615.) The bailiff also called appellant's father. (11 RT 613.) A Spanish-speaking interpreter left a message on appellant's father's voicemail telling him to inform appellant that he was required to appear in court. (11 RT 613.) The bailiff also contacted appellant's workplace. (11 RT 613-614.) Appellant left no message for the court clerk. (11 RT 615.)

In light of appellant's disappearance, the court ruled: "So for all those reasons, the court finds the defendant[] has knowingly and voluntarily absented himself from the trial. We are going to proceed in absentia pursuant to Penal Code 1043 [presence of defendant at trial] and *People versus Connolly*" [proceeding in absence of defendant]. (11 RT 615.)

Before resuming trial, the court informed the jury: "It is clear that the defendant has not chosen to continue with this trial and the law provides if the defendant disappears in the middle of a trial we proceed without him. So we are going to do that at this time." (11 RT 624.)

D. Evidence and Further Trial Proceedings

The prosecution introduced the following evidence. Augustine Gonzalez lived for about four months in a rented room in appellant's house. (10 RT 511-512.) When Mr. Gonzalez moved in, appellant had shown him a pistol, which appellant said he kept under his pillow. (10 RT 520.) In early September 2009, Mr. Gonzalez told appellant that he was moving out, which caused "tension" and "every day . . . a verbal confrontation." (10 RT 526.) On September 3, 2009, Mr. Gonzalez found appellant had replaced the lock on the front door of the house. (10 RT 513; 11 RT 625.) The new lock was improperly installed, allowing Mr. Gonzalez to enter by pushing the door open. (10 RT 513.) Mr. Gonzales found appellant and appellant's girlfriend in the kitchen, and asked why appellant changed the lock. Appellant screamed, "[Y]ou don't live here" and asserted that Mr. Gonzalez could not prove otherwise. (10 RT 514-515.) Mr. Gonzalez yelled back and threatened to call the police. (10 RT 515.) Appellant replied, "Don't you know I'm connected. I'll hurt you. I'll kill you. Go ahead." (10 RT 516-517.) Scared, Mr. Gonzales backed away, but appellant charged and kept yelling. Mr. Gonzalez called the police, who directed him to leave appellant and go outside. (10 RT 516.) Appellant followed Mr. Gonzalez across the street, screaming, "I'm going to get you. I'm going to kick your ass, you're dead." (10 RT 518-519.) Appellant repeated, "If you call the police I am going to kill you. When I go to jail I'm going to come back out and I'm still going to kill you. I have family." (10 RT 519.) Recalling appellant had a handgun, Mr. Gonzales reported it to the dispatcher, who conveyed that fact to police officers. (10 RT 527; 11 RT 631, 670.)

The police arrived while appellant was still following Mr. Gonzalez, who was several houses away from appellant's residence. (10 RT 519.) The officers spoke to appellant and handcuffed him. (10 RT 521.) An

officer asked if they could search appellant's room, and he responded, "Sure, go ahead." (11 RT 627, 680.) Appellant said he kept a shotgun in his closet and had a handgun under his mattress. (11 RT 671, 681-682.) The police found a 12-gauge shotgun and a "sidesaddle" holder of ammunition in appellant's bedroom closet, and a loaded pistol and digital scale under his mattress. (11 RT 636-637.) In appellant's bathroom were tin containers of marijuana, a box of ammunition, and morphine, Diazepam, and Lorazepam pills. (11 RT 640-643, 648, 688-689.)

After the prosecution rested its case, the trial court described on the record the efforts by the prosecution, the police, the FBI, the Border Patrol, and "12 other police agencies in the Bay Area" to locate appellant. (11 RT 696.) Since appellant's disappearance, the San Jose Police Department had maintained surveillance on his house, his father's house, and other locations associated with appellant. Appellant had not been located. (11 RT 696-697.)

The court instructed the jury: "During a portion of the trial, the defendant failed to appear for the court proceedings. Do not consider his absence for any purpose in your deliberations." (11 RT 709.) The court reiterated this admonition during the prosecutor's closing argument and elaborated on the instruction before the jury deliberated. (11 RT 718, 734-735, 754.) The prosecutor also told the jury to heed the court's instruction not to consider appellant's absence. (11 RT 731.)

The jury returned a mixed verdict, finding appellant guilty of possession of a controlled substance, possession of a controlled substance without a prescription, possession of marijuana, possession of a firearm as a felon (two counts), and possession of ammunition as a felon. The jury acquitted appellant of making criminal threats, and attempting to dissuade a witness through the threat of force. (2 CT 320-327.)

The court had bifurcated the felon-in-possession counts. After the jury returned verdicts on the other charges, it received evidence of appellant's prior convictions, and it was reinstructed not to consider appellant's absence for any purpose. (11 RT 744-756.) After brief deliberation, the jury returned guilty verdicts on the felon-in-possession counts. (11 RT 757-758.)

The court set a sentencing date. (11 RT 760-761.) The court also described for the record its process of crafting jury instructions in appellant's absence. (11 RT 761-762.)

E. Posttrial Proceedings

A month after trial, appellant returned to court. He had not been in custody and appeared of his own volition. (12 RT 903-904.) He had been hiding at his girlfriend's house and had retained a new attorney. (12 RT 904-905; 13 RT 1004, 1029.) At the attorney's request, the court continued sentencing for two months. (12 RT 906.)

In October 2012, appellant dismissed his retained counsel and requested an alternate public defender. (13 RT 1006-1007.) The court found appellant had engaged in a "pattern of delay, and a pattern of abusing the court process," but it nonetheless appointed an attorney for him. (13 RT 1007, 1009, 1011.) Appellant moved for a new trial, in part on the ground that the court erred in continuing trial in his absence. (13 RT 1014, 1022.) The trial court denied the motion for new trial, citing appellant's history of "delay tactics, unreasonable expectations, dishonest statements to the court, and manipulations of the process." (13 RT 1026, 1030.) The court added:

> In Mr. Espinoza's absence during the trial, I, as a court, voiced a defense position on behalf of the defendant as if he were here during the trial. I iterated what the defense would want on all substantial issues and motions. I basically sat in defense counsel's seat to protect the rights of the defendant, and

> I took all possible, reasonable defense positions into account before I ruled on any issues that were before the court in the defendant's absence. So the court did everything it could given the situation that defendant put the court in to make sure that the court was following the law, completing the trial, and making sure that the jurors were deciding the issue, on the right issues before them and not on inappropriate issues. So for all of those reasons the motion for new trial is denied.

(13 RT 1029-1030.)

In connection with sentencing, appellant informed the probation officer that he had "stopped attending the Court proceedings because he was advised by an attorney to stop going so that there would be cause for a mistrial." (5 CT 984.) Appellant said that he did not understand "how the proceedings continued without being present in Court and he would like this case to be considered a mistrial." (5 CT 984.)

The trial court sentenced appellant to prison for two years and eight months. (5 CT 1038-1040.)

F. Appeal

The Court of Appeal reversed the judgment. It held the trial court erred in proceeding with trial in the absence of appellant or defense counsel because appellant did not knowingly waive his fundamental trial rights, including the right to be present and the right to confrontation. (Typed Opn. at pp. 2, 15-19.)

The Court of Appeal reasoned that the trial court had three options from which to choose apart from proceeding in appellant's absence or declaring a mistrial: (1) the court could have appointed standby counsel solely to observe the proceedings, then could have appointed standby counsel to represent appellant after he failed to appear; (2) the court could have simply reappointed the discharged counsel for appellant after he failed to appear; or (3) the court could have warned appellant during the *Faretta* warnings process that the trial would continue without him if he voluntarily

absented himself and that his doing so would result in a waiver of his trial rights. (Typed Opn. at pp. 18-19.) The appellate court held the trial court's failure to select among these options, as opposed to ordering a trial of appellant in absentia or a mistrial, was structural error, requiring automatic reversal. (Typed Opn. at pp. 2, 19.)

The Court of Appeal also held, as a separate ground of reversal, that the court abused its discretion in denying appellant's motion for a one-day continuance when granting appellant's *Faretta* motion to waive counsel. (Typed Opn. at pp. 2, 20-23.) The court stated that the trial court had engaged "in a 'sudden about-face'" when it granted appellant's *Faretta* motion after denying other *Faretta* motions on the ground appellant was not prepared to proceed to trial. (Typed Opn. at p. 21.) Recognizing a trial court may deny an untimely *Faretta* motion on the ground that granting the motion would involve a continuance for preparation, the court held the rationale of that doctrine requires that if the trial court grants the untimely motion, it must then grant a reasonable continuance for preparation by the defendant. (Typed Opn. at p. 22.)

SUMMARY OF ARGUMENT

Jury trial properly resumed following appellant's midtrial failure to appear. The court's finding under Penal Code section 1043 that appellant voluntarily and knowingly absented himself with the intent to avoid trial and punishment was sufficient legal authorization for trial in his absence.

Appellant absented himself with requisite knowledge because he was ordered by the court to appear and knew his failure to appear breached that order. The trial court had no obligation to admonish him sua sponte that nonattendance at trial waived rights like personal presence, confrontation, and the right to present a defense—any more than the court is obliged to admonish a pro per defendant that taking the stand waives the privilege

against self-incrimination to the extent of relevant cross-examination or that a failure to offer relevant evidence waives the right to present a defense.

Nor was there an obligation to appoint counsel when appellant disappeared. Criminal defendants have both the right to be represented by counsel at critical stages of the prosecution and the right, based on the Sixth Amendment to the United States Constitution as interpreted in *Faretta* to represent themselves. (*People v. Lewis* (2006) 39 Cal.4th 970, 1001 (*Lewis*).) Appellant made a voluntary and knowing waiver of the right to counsel and never retracted his waiver until long after trial. Assuming, and it is a large assumption, that the Sixth Amendment would allow a court to terminate a pro se defendant's right to self-representation when he or she voluntarily fails to appear for trial, nothing in the Constitution compels a court to do so. Appellant still acted as his own attorney when he absconded rather than attend trial as he was ordered to do.

The "core" *Faretta* right is that a pro se defendant is constitutionally empowered to exert actual control over the case he or she chooses to present to the jury. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 178.) Consistent with the dignitary and autonomy interests protected by *Faretta* (see *id.* at pp. 176-177), self-representation necessitates the accused's entitlement to select his or her defense or to make no defense. Appellant voluntarily absconded during the prosecution's case. As a result, he deliberately made no defense to the jury. A pro se defendant, who, for whatever reason, makes that decision has exercised complete control of the case he chooses to present, namely, none. As respects the *Faretta* right, a pro se defendant who hides for the balance of trial exerts as much control of what is presented to the jury as the pro se defendant who inserts earplugs and reads a book at counsel table.

To acknowledge that pro se defendants act as their own attorney by abandoning trial is to recognize the reason a court lacks a constitutional

obligation to protect trial rights necessarily forfeited by defendant's action as his own counsel. Here, the trial court found appellant absconded in hopes of further delaying the proceedings. A sua sponte appointment of standby or former counsel to continue trial could result in much less delay than appellant hoped. A long delay resulting in a loss or diminution of prosecution evidence might have provided him a better defense in the future than an attorney *sans* client could provide at a trial in progress. Alternatively or additionally, appellant might have absconded out of awareness (conceivably, gleaned from an attorney's volunteered advice) that the constitutional protection against double jeopardy would preclude retrial were the court provoked into declaring a mistrial without his express consent, thereby depriving him "of his constitutionally protected freedom of choice in the name of a paternalistic concern for his welfare." (*Curry v. Superior Court* (1970) 2 Cal.3d 707, 717.) Whatever the true reason for his decision, appellant selected nonappearance as his best (and perhaps from his perspective his only viable) means of exercising control over his case. Since appellant's *Faretta* rights subsisted until the jury was discharged, his nonpresence and the resulting forfeiture of his constitutional trial rights represent, in the Sixth Amendment sense intended by *Faretta*, his decision as his own attorney.

Regardless of a court's policy preferences in this regard, the trial court validly exercised its statutory power under Penal Code section 1043 to continue trial in appellant's absence. There is no established Supreme Court authority for a rule, like the one embraced by the Court of Appeal, that trial courts must select among a set of nonstatutory procedural "options" to address the voluntary absence of a self-represented defendant. A pro se defendant does not, contrary to the Court of Appeal's seeming view, reassert the right to counsel, or otherwise trigger a prophylactic abrogation of the *Faretta* waiver of representation by counsel, by

voluntarily absconding. That view is inconsistent with the established principle that a defendant may forfeit the rights to presence, confrontation, and counsel, by choosing to abscond after voluntarily and knowingly waiving counsel.

It is irrelevant whether or not the defendant absconded after being admonished that the trial could continue in his absence. Of course, constitutional rights like the right to attend trial personally are necessarily lost based on a defendant's misconduct in the courtroom only after the court has admonished the defendant of the consequences of continued disruption of proceedings. (See *People v. Hayes* (1991) 229 Cal.App.3d 1226, 1233.) But admonitions of the potential consequences to the defendant's trial rights are beside the point when the defendant absconds. No disruptive misbehavior occurs in the courtroom. The defendant simply is gone, and forfeiture of trial rights follows from that fact. "[O]ne cannot logically assert the right to be present during trial at the same time he is absconding . . . ." (*People v. Traugott* (2010) 184 Cal.App.4th 492, 504, citing *Taylor v. United States* (1973) 414 U.S. 17, 20 (*Taylor*) [defendant who flees courtroom in midst of trial knows that the trial will proceed in his absence].) Here, appellant's concerted effort to obstruct further trial "constituted volitional conduct for which he may properly be deemed to have absented himself from the proceedings, and to have waived any right to be present." (*Lewis*, *supra*, 39 Cal.4th at p. 1043.) With or without a sua sponte admonition about the consequences of abandoning trial, appellant's waiver of counsel was voluntary and intelligent. *Faretta* requires his choice not to exercise trial rights to be respected. The forfeiture of those trial rights is the cost that appellant pays for his control of the defense and his dignitary and autonomy interests to be accorded the respect required by *Faretta*.

When the trial court accepted appellant's waiver of counsel, it did so only after admonishing appellant that he would not receive any continuance of the jury trial already in progress—even a delay of one day's duration. The trial court did not abuse its discretion and properly denied appellant's motion for a one-day continuance after granting his *Faretta* motion. The court did not rule unreasonably in only accepting appellant's waiver of counsel after appellant understood he would receive no continuance given the delays appellant had already forced this case to undergo.

ARGUMENT

I. TRIAL OF A VOLUNTARILY ABSENT PRO SE DEFENDANT MAY PROCEED UNDER PENAL CODE SECTION 1043 WITHOUT THE DEFENDANT'S KNOWING AND INTELLIGENT WAIVER OF TRIAL RIGHTS OR AN APPOINTMENT OF COUNSEL

Conducting a trial when a defendant is voluntarily absent knowing that he is obligated to appear satisfies constitutional guarantees. The rule is not different for a self-represented defendant. Such a defendant has not only waived his right to counsel, but his voluntary and knowing absence acts as a forfeiture. In particular, it forfeits a claim that the pro per defendant was deprived of trial rights like presence, confrontation of witnesses, or presenting a defense in his absence. The trial court has no constitutional or statutory obligation to advise the pro per defendant, in advance, of the consequences of absconding or to appoint counsel when and if the defendant absconds.

A. Applicable Legal Principles

Three areas of law are relevant to this case: (1) the trial rights afforded to all criminal defendants; (2) the principles that govern self-representation; and (3) trial in absentia.

1. Trial Rights

The confrontation clause of the Sixth Amendment of the United States Constitution affords an accused the right to be present at all stages of the proceedings "where fundamental fairness might be thwarted by the defendant's absence." (*Faretta, supra*, 422 U.S. at p. 816.) The California Constitution also provides the right to presence in criminal proceedings. (Cal. Const., art. I, § 15; *People v. Concepcion* (2008) 45 Cal.4th 77, 81 (*Concepcion*).)

In addition to providing a right to confront opposing witnesses, the Sixth Amendment provides an accused with the right to effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 664.) Moreover, the constitutional right to due process requires "'a meaningful opportunity to present a complete defense.' [Citation.]" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) This opportunity includes the rights to call witnesses and to present argument. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Herring v. New York* (1975) 422 U.S. 853, 858.)

2. Self-Representation

The Sixth Amendment counsel clause guarantees criminal defendants (1) the right to be represented by an attorney at critical stages of the prosecution, and (2) the right to represent themselves if they so elect. (*Faretta, supra*, 422 U.S. at p. 819; *People v. Koontz* (2002) 27 Cal.4th 1041, 1069 (*Koontz*).)

A valid waiver of the right to counsel encompasses (1) a determination by the trial court that the defendant has the mental capacity to understand the proceedings and (2) a finding that the waiver is knowing and voluntary, which requires that the defendant understand the consequences of the decision and is not being coerced. (*Godinez v. Moran* (1993) 509 U.S. 389, 400-401 & fn. 12; *Koontz, supra*, 27 Cal.4th at pp. 1069-1070.)

"In order to make a valid waiver of the right to counsel, a defendant 'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." [Citation.]' (*Faretta*, *supra*, 422 U.S. at p. 835.) No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation; the test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case. [Citation.]" (*Koontz*, *supra*, 27 Cal.4th at p. 1070.)

Appellant's waiver of counsel was voluntary and intelligent under that standard. He has never contended otherwise.

3. Trial in Absentia

In *Diaz v. United States* (1912) 223 U.S. 442 (*Diaz*), the court upheld the conviction of a defendant who twice verbally waived his right to be present during his trial. The court made clear that the prevailing rule allows continued trial upon the voluntary absence of a felony defendant not held in custody and not charged with a capital crime: "[W]here the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present." (*Id.* at p. 455.) Penal Code section 1043 encapsulates this principle. It provides in relevant part:

> (a) Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial.
>
> (b) The absence of the defendant in a felony case after the trial has commenced in his presence shall not prevent continuing

the trial to, and including, the return of the verdict in any of the following cases:

(1) Any case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom.

(2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent.

(c) Any defendant who is absent from a trial pursuant to paragraph (1) of subdivision (b) may reclaim his right to be present at the trial as soon as he is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

(d) Subdivisions (a) and (b) shall not limit the right of a defendant to waive his right to be present in accordance with Section 977.

(Pen. Code, § 1043, subds. (a)-(d).)

The Legislature enacted this statute "to prevent the defendant from intentionally frustrating the orderly processes of his trial by voluntarily absenting himself. A crucial question must always be, 'Why is the defendant absent?' . . . It is the totality of the record that must be reviewed in determining whether the absence was voluntary." (*Connolly, supra,* 36 Cal.App.3d at pp. 384-385.) *Connolly* adopted the test set forth in *Cureton v. United States* (D.C. Cir. 1968) 396 F.2d 671 (*Cureton*), for determining whether a defendant's absence from trial is voluntary: "'He must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away.'" (*Connolly*, *supra*, 36 Cal.App.3d at p. 384, quoting *Cureton*, *supra*, 396 F.2d at p. 676.)

Here, the trial court found that appellant "abandoned his trial purposefully and that the purpose for which he chose to not come to trial was evasion of the trial or avoiding penalty for the alleged crimes." (11 RT 608.) Appellant did not challenge this factual finding in his motion for new trial or on appeal. Appellant clearly knew the proceedings were taking place as he was at trial through the beginning of the presentation of evidence; he clearly knew of his right and obligation to be present; and he had no sound reason for staying away.

B. Penal Code section 1043 Applies to Absconding Pro Se Defendants

In *Taylor*, *supra*, 414 U.S. 17, the defendant, who was represented by counsel, attended only the beginning of his trial before failing to appear for its remainder. The district court nonetheless conducted the trial without him pursuant to rule 43 of the Federal Rules of Criminal Procedure, which provides that a defendant's voluntary absence should not prevent continuing the trial.[2] The jury convicted defendant on all counts. Defendant claimed on appeal that "his mere voluntary absence from his trial cannot be construed as an effective waiver, that is, 'an intentional relinquishment or abandonment of a known right or privilege,' unless it is demonstrated that he knew or had been expressly warned by the trial court not only that he had a right to be present but also that the trial would continue in his absence and thereby effectively foreclose his right to testify and to confront personally the witnesses against him." (*Id.* at p. 19.)

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[2] At present, rule 43(c) provides in part: "A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances: [¶] (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial."

Taylor rejected that argument. The high court held that the lack of a warning was not problematic, finding it "wholly incredible" to believe suggest that the defendant, who was at liberty on bail, had attended the opening session of his trial, and had a duty to be present at the trial, had any doubt about his right to be present at every stage of his trial. (*Taylor*, *supra*, 414 U.S. at p. 20.) The defendant had no right to interrupt the trial by his voluntary absence, as he implicitly conceded by arguing only that he should have been warned that no such right existed and that the trial would proceed in his absence. "The right at issue is the right to be present, and the question becomes whether that right was effectively waived by his voluntary absence." (*Ibid.*) Consistent with rule 43 and *Diaz*, *supra*, 223 U.S. 422, the court found that that it was. (*Taylor*, *supra*, 414 U.S. at p. 20.)

The *Taylor* court further held that it lacked credibility to believe the defendant would not know that the trial could continue in his absence:

> It seems equally incredible to us, as it did to the Court of Appeals, "that a defendant who flees from a courtroom in the midst of a trial—where judge, jury, witnesses and lawyers are present and ready to continue—would not know that as a consequence the trial could continue in his absence." [Citation.] Here the Court of Appeals noted that when petitioner was questioned at sentencing regarding his flight, he never contended that he was unaware that a consequence of his flight would be a continuation of the trial without him. Moreover, no issue of the voluntariness of his disappearance was ever raised. As was recently noted, "there can be no doubt whatever that the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward." *Illinois v. Allen*, 397 U.S. 337, 349 (1970) [(*Allen*)] (BRENNAN, J., concurring). Under the circumstances present here, the Court of Appeals properly applied Rule 43 and affirmed the judgment of conviction.

(*Taylor*, *supra*, 414 U.S. at p. 20.)

The high court in *Taylor* adopted as the "controlling rule" the *Cureton* test for determining whether a defendant's absence from trial is voluntary—

that defendant be aware (1) of the processes taking place; (2) of his or her right and obligation to be present; and (3) that defendant has no sound reason for remaining away. (*Taylor*, *supra*, 414 U.S. at p. 19, fn. 3.) The court in *Taylor* did not apply the *Cureton* requirements to the facts because defendant did not allege that his absence was involuntary. (See *id.* at p. 20.)

The self-represented status of a voluntarily absent defendant does not change this rule. The point was recognized by the Court of Appeal in *People v. Parento* (1991) 235 Cal.App.3d 1378 (*Parento*). There, a defendant who had previously chosen to represent himself, requested the appointment of counsel and a continuance on the day of trial. (*Id.* at p. 1380.) The trial court denied those requests, and the defendant refused to participate further in the proceedings and voluntarily absented himself from the trial. (*Id.* at pp. 1380-1381.) The trial court did not stop the trial, however, and the jury convicted the defendant. (*Id.* at p. 1380.) On appeal, defendant argued error in trying a self-represented accused in his absence and without the appointment of other counsel. (*Ibid.*) The Court of Appeal rejected this claim. (*Id.* at pp. 1381-1382.)

The *Parento* court recognized that a noncapital, self-represented defendant not only has the right to conduct his defense by nonparticipation, but also has the right to absent himself from the proceedings. (*Parento*, *supra*, 235 Cal.App.3d at p. 1381.) The court noted that it is "well settled" that the right of a pro se defendant to represent himself or herself includes the right to decline to conduct any defense whatsoever. (*Id.* at p. 1381.) The court noted next that in *People v. Teron* (1979) 23 Cal.3d 103 (*Teron*), 115, and in *People v. McKenzie* (1983) 34 Cal.3d 616 (*McKenzie*), this court found no error in rulings which allowed the defendant to represent himself even though he asked no questions of witnesses, presented no evidence, and made only a single objection in the course of the trial.

(*Parento*, *supra*, 235 Cal.App.3d at p. 1381, citing *Teron, supra,* 23 Cal.3d at pp. 110-111, 114-115; *McKenzie*, *supra*, 34 Cal.3d at p. 628-629.) "'The choice of self-representation preserves for the defendant the option of conducting his defense by nonparticipation. A competent defendant has a right to choose 'simply not to oppose the prosecution's case.'" (*Parento*, *supra*, 235 Cal.App.3d at p. 1381, quoting *Teron, supra*, 23 Cal.3d at p. 108.) "'If the defendant chooses to defend himself by not participating in the trial, he, unlike his attorney, is free to do so, but once this choice is made he cannot thereafter claim ineffective assistance of counsel as a basis for reversal on appeal.'" (*Parento*, *supra*, 235 Cal.App.3d at pp. 1381-1382, quoting *McKenzie*, *supra*, 34 Cal.3d at pp. 628-626; accord, *Faretta*, *supra*, 422 U.S. at p. 835, fn. 46.)

Parento concluded:

> We see no reason to distinguish between the situation, occurring in *McKenzie*, where a defendant exercises his right of self-representation by being physically present but conducting no defense, and the situation occurring here, where the defendant chooses to exercise that right by physically absenting himself from the proceedings. The issue is not physical presence, but choice. There is no question but that a defendant's right to effective counsel is violated if his attorney fails to attend the proceedings. Where a defendant has chosen to represent himself, however, he is entitled to conduct that defense in any manner he wishes short of disrupting the proceedings, and thus is free to absent himself physically from trial. If, as here, that choice was voluntary, it will be respected. It follows that a defendant who has exercised his right of self-representation by absenting himself from the proceedings, may not later claim error resulting from that exercise.

(*People v. Parento*, *supra*, 235 Cal.App.3d at pp. 1381-1382.)

Numerous other courts agree that when a pro se defendant voluntarily absents himself from trial the court may proceed without appointing counsel for the absent defendant. (See *Clark v. Perez* (2d Cir. 2008) 510 F.3d 382, 397 [if defendant "faced trial without advantages guaranteed by

the Sixth Amendment, that was not by the trial judge's imposition, but by her own informed choice, which the trial judge was bound to respect"]; *Torres v. United States* (2d Cir. 1998) 140 F.3d 392, 403 [finding no error when the trial court failed to appoint an attorney to represent a pro se defendant who had voluntarily absented herself from the proceedings in order to conduct a political protest defense, because "the district court properly respected Torres'[s] decision and her right to choose that course"]; *United States v. Lawrence* (4th Cir. 1998) 161 F.3d 250, 255 ["Because Lawrence was present at the beginning of his trial and voluntarily absented himself, there is no error in this case"]; *State v. Eddy* (R.I. 2013) 68 A.3d 1089, 1106 ["defendant voluntarily chose not to attend his trial, and, as such, we do not believe that the trial justice was required to appoint counsel to represent him"]; *State v. Worthy* (Minn. 1998) 583 N.W.2d 270, 280 ["The trial court did not abuse its discretion in not reappointing the dismissed attorneys as lead counsel when [defendants] voluntarily left the courtroom"]; *People v. Brante* (Colo. App. 2009) 232 P.3d 204, 208-209 ["the trial court did not violate the defendant's Sixth Amendment right to counsel by declining sua sponte to appoint advisory counsel to take over the defense in his absence"].)

C. Any Claim that Appellant Did Not Know Trial Could Continue and, Thus, Did Not Knowingly and Intelligently Waive Trial Rights Is Forfeited and Incorrect

The Court of Appeal distinguished *Parento*, *supra*, 235 Cal.App.3d 1378, and other cases cited above holding that trial may continue without appointing counsel after a pro se defendant voluntary absconds, based upon a "common critical fact: The defendants absented themselves on the record with the knowledge that the trial was proceeding without them." (Typed Opn. at p. 15.) The Court of Appeal held that appellant did not knowingly and intelligently waive his right to presence because the record did not

show he absented himself knowing that trial was going to proceed without him. As a result, the Court of Appeal continued, the record fails to support an inference that appellant made a voluntary and knowing waiver of the rest of "his trial rights, e.g., his confrontation rights." (Typed Opn. at pp. 15-17 & fn. 7.)

The claim that appellant lacked such knowledge was itself forfeited. Appellant never argued that he lacked personal knowledge that trial could continue in his absence. He anecdotally remarked to the probation officer that he "stopped attending the Court proceedings because he was advised by an attorney to stop going so that there would be cause for a mistrial." (5 CT 984.) Tellingly, "cause" implies justified reason for a mistrial, not legal compulsion mandating it. Appellant also told the probation officer that he did not understand "how the proceedings continued without him being present in Court and he would like this case to be considered a mistrial." (5 CT 984.) That is not the same as claiming he was unaware the trial could resume in his absence.

In any event, the validity of a resumption of trial when a pro se defendant absconds is not an issue of express waiver—i.e., whether appellant knowingly and voluntarily waived fundamental trial rights, including the right to be present. It is a matter of implied waiver or forfeiture. While express waiver "is ordinarily an intentional relinquishment or abandonment of a known right or privilege" (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464 (*Zerbst*), forfeiture is the failure to make the timely assertion of a right (*United States v. Olano* (1993) 507 U.S. 725, 731). "No procedural principle is more familiar to this Court than a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it." (*Ibid.*) It is well established that the rationale for forfeiture is that in the hurly burly of

trial "many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal." (*People v. Saunders* (1993) 5 Cal.4th 580, 590.) It thus follows that defendants can forfeit rights, including constitutional rights, without ever making a knowing and intelligent decision to relinquish them.

In *Allen, supra*, 397 U.S. 337, which held that a disruptive defendant may be excluded from trial, the United States Supreme Court did not conclude that Allen had expressly waived his right to be present; rather, he "lost his right" by reason of his behavior "of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint." (*Id.* at p. 346.) In *Concepcion, supra*, 45 Cal.4th 77, 82-86, this court called *Allen* an implied waiver case, and relied on that concept in upholding the judgment in the case before it, where trial was held in the defendant's absence after he escaped. This court also quoted the following language from *Diaz, supra*, 223 U.S. 442, 458, and *Falk v. United States* (D.C. Cir. 1899) 15 App.D.C. 446, 460-461: "'Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield.'" (*Concepcion, supra*, 45 Cal.4th at p. 82.) Put differently, the defendant in Concepcion forfeited his right to be present through wrongdoing. As did appellant here.

Likewise, *Parento* properly analyzed the voluntary absence of a pro se defendant as a forfeiture. As the court stated: "It follows that a defendant who has exercised his right of self-representation by absenting himself from the proceedings, may not later claim error resulting from that exercise." (*Parento*, *supra*, 235 Cal.App.3d at pp. 1381-1382.) By not permitting defendant "to claim error" after voluntarily absconding from trial, the *Parento* court applied the forfeiture doctrine. That ruling is correct and in compliance with the dignitary and self-determination principles underlying *Faretta*.

No decision from the United States Supreme Court, or from this court, holds that a court may not proceed with trial of a voluntarily absent pro se defendant unless the defendant knew the trial would continue in his absence. The Court of Appeal below mistakenly stated that in *Parento* the defendant absented himself on the record with knowledge that the trial was taking place without him. (Typed Opn. at p. 15, citing *Parento*, *supra*, 235 Cal.App.3d at p. 1380, fn. 2.) In *Parento*, after the trial court denied the defendant's requests for a continuance and appointment of counsel, the defendant told the court this: "Just do it without me then. That's what you do. . . . You just write me a letter when it's over. That's what you do." (*Ibid.*) The defendant's statement did not establish that he knowingly waived particularized trial rights like confrontation of witnesses or even an awareness that the trial likely would proceed in his absence. It showed only that the defendant dared the court to proceed without him. *Parento* simply cannot be read as requiring an affirmative admonition of rights subject to waiver and an express awareness by a self-represented defendant that trial will proceed before the court *can* proceed when the accused elects absence.

The United States Supreme Court has decided that courts are entitled to impute knowledge to the represented absconding accused that the proceeding will continue in his or her absence: "midtrial flight" implies a

"knowing and voluntary waiver of the right to be present." (*Crosby v. United States* (1993) 506 U.S. 255, 261.) "It is unlikely . . . 'that a defendant who flees from a courtroom in the midst of a trial—where judge, jury, witnesses and lawyers are present and ready to continue—would not know that as a consequence the trial could continue in his absence.' [Citations.]" (*Id.* at p. 262.) It is similarly unlikely that a self-represented defendant, who has been given full and proper admonitions before choosing self-representation, which here included admonitions that there was not going to be another counsel present to provide assistance to appellant at trial and that the court was not obliged to provide any other counsel even if requested, would not know that trial could continue in his absence.

In all events, because appellant was a self-represented defendant, he had an obligation to know and follow the law. It is undisputed that appellant made a voluntary and intelligent waiver of counsel at trial. The court provided appellant with ample time to review the *Faretta* waiver form. This form not only told appellant that he had the right to confront and cross-examine all the witnesses who would be called to testify against him, but that it was necessary for him "to follow all of the many technical rules of criminal procedure, law, and evidence." (1 CT 251, 253.) The court expressly told appellant: "You don't get to file an appeal saying you had ineffective assistance of counsel because this is your choice." (10 RT 482.)

The court conducted a lengthy discussion with appellant regarding self-representation. After appellant read the waiver form and discussed the waiver with the court, he acknowledged both that he understood the hazards of self-representation and that he chose to proceed despite those hazards. He knew that there was no cocounsel and no standby counsel. He signed the *Faretta* waiver freely and knowingly. (1 CT 251; 10 RT 480-487, 492-494.) As stated, by choosing to represent himself, appellant was obligated

to follow all court rules and procedures as his own attorney. As a self-represented defendant, he necessarily had to be present for trial to represent himself at the trial. By claiming that he did not know trial could take place in his absence and thus the trial court erred in conducting the trial in his absence, appellant, as a self-represented defendant, essentially asks for relief for failing to know the law. Put another way, appellant is improperly claiming that he provided himself ineffective assistance of counsel.

A pro se defendant who voluntarily absents himself from trial with the purpose of disrupting the proceedings forfeits the right to claim error in conducting the trial in absentia. That rule properly allocates the risk of the defendant's misbehavior, and it protects society's interest in the proper administration of criminal justice.

D. When the Pro Se Defendant Voluntarily Absconds the Trial Court Is Not Constitutionally Obligated to Appoint Counsel

The record establishes that appellant manipulated the trial court into a quandary. By virtue of appellant's abandonment of trial, the court had to choose between: (1) overriding appellant's recent, strongly-expressed exercise of his right to self-representation and hazard reversal per se by appointing counsel when appellant had not retracted his *Faretta* waiver; or (2) rewarding appellant's efforts to delay the proceedings by declaring a mistrial, and ensuring a claim of double jeopardy when he had not consented to the jury's discharge; or (3) conducting the trial in absentia and subjecting that decision to appellate challenge. The Court of Appeal stated that although it sympathized with the trial court in this case, and "recognize[d] the difficulties of trying obstreperous defendants, the benefit of hindsight shows the court had options apart from mistrial" or proceeding in appellant's absence. (Typed Opn. at p. 18.) The Court of Appeal identified three options other than trial in absentia from which it said the

court should have chosen: (1) the court could have appointed standby counsel solely to observe the proceedings, then could have appointed standby counsel to represent appellant after he failed to appear; (2) the court could have simply reappointed the discharged counsel for appellant after he failed to appear; or (3) the court could have warned appellant during the *Faretta* hearing that the trial would continue without him if he voluntarily absented himself and that his doing so would result in a waiver of his trial rights. (Typed Opn. at pp. 18-19.)

The court's "options," particularized though they are to absconding *Faretta* defendants, place new and unnecessary burdens on trial courts conducting criminal trials of self-represented defendants, and are neither constitutionally nor statutorily required.

Indeed, any form of nonstatutory "options" like those envisioned by the Court of Appeal is unworkable. Trial courts with the foresight to anticipate that a pro se defendant might abscond could, in theory, admonish the defendant anticipatorily that numerous constitutional rights such as presence and confrontation would be "waived" or "forfeited" if the defendant failed to appear at trial. But that would certainly guarantee weighty claims that the proceedings wherein the accused sought pro se status had been infected by coercive circumstances and misunderstandings about what, precisely, the accused thought he was waiving aside from representation by counsel.

In theory, the court might appoint standby counsel. But a *Faretta* waiver, by definition, means the right to counsel is waived, and, thus, standby counsel is discretionary. There is, of course, no guarantee that a particular pro se defendant would cooperate with standby counsel—even one simply observing—assuming any counsel is available. The present record does not establish that any counsel was ready and willing to act as standby counsel.

And if the court elected neither of those options, it would have to find and appoint new counsel willing to undertake representation of the absent pro se defendant midtrial. If no attorney were available (or willing to take over a case midtrial with little or no preparation), that might well result in a mistrial—causing the delay and, perhaps, the termination of jeopardy the pro se meant to procure by abandoning trial.

Here, had the trial court reappointed appellant's discharged counsel, Mr. Camperi, after appellant failed to appear, appellant surely would have challenged that ruling on appeal with the claim that that action violated his right to self-representation. The state may not "force a lawyer upon [a defendant], even when he insists that he wants to conduct his own defense." (*Faretta, supra*, 422 U.S. at p. 834.) A trial court's erroneous decision to revoke self-representation is reversible per se. Revoking appellant's pro per status would have contradicted appellant's recently expressed desire for self-representation, made with the knowledge he likely would not receive another attorney. The trial court also would have been required to make this decision without consulting appellant, further heightening the possibility for error. (*Id.* at p. 820 ["The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally"].)

The Court of Appeal concluded that, since appellant never waived his constitutional trial rights to presence and confrontation before he absconded, and the trial court neither appointed a standby counsel to take over, nor appointed substitute counsel after appellant absconded, the trial court's jurisdiction to proceed with trial, in effect, lapsed. The appellate court's finding of structural error in proceeding to judgment is a holding

that notwithstanding appellant's valid *Faretta* waiver, trial in absentia resulted in a complete denial of the right to counsel.

That ruling conflicts with *Zerbst*, *supra*, 304 U.S. 458. There the Supreme Court held a valid waiver of the assistance of counsel removes the constitutional right to an attorney as a jurisdictional barrier to judgment in criminal cases: "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence." (*Id.* at pp. 467-468.) No barrier to trial existed below in this case, structural or otherwise, because the jurisdictional barrier of the Sixth Amendment right to counsel was removed by appellant's *Faretta* waiver.

The trial court in this case did not err in invoking Penal Code section 1043, subdivision (b) and conducting appellant's trial in absentia.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONDITIONING THE GRANT OF APPELLANT'S *FARETTA* MOTION ON APPELLANT RECEIVING NO CONTINUANCE

The trial court refused appellant a one-day continuance before, as opposed to after, granting his *Faretta* motion. Indeed, the trial court did not grant appellant's *Faretta* motion until appellant was fully admonished, had executed a waiver form, and had decided to waive the right to counsel notwithstanding the court's denial of a continuance of the jury trial in progress, specifically a request for a one-day continuance, during the colloquy in the *Faretta* hearing itself. (See *ante*, at pp. 4-9.)

The Court of Appeal stated that the trial court had engaged "in a 'sudden about-face'" when it granted appellant's *Faretta* motion after denying other *Faretta* motions on the ground appellant was not prepared to

proceed to trial. (Typed Opn. at p. 21.) Actually, the trial court consistently ruled that it would not grant appellant's untimely *Faretta* motions if appellant required a continuance to represent himself. The court granted appellant's *Faretta* motion while trial was in progress and only after the court explicitly conditioned the grant of the motion on appellant's readiness to resume the trial in progress since the previous day. (10 RT 480-487, 492-494.)

The Court of Appeal also stated that it was settled law that although a trial court may deny an untimely *Faretta* motion on the ground that granting the motion would involve a continuance for preparation, the rationale of that doctrine requires that if the trial court grants the untimely motion, it must then grant a reasonable continuance for preparation by the defendant. (Typed Opn. at p. 22.) The Court of Appeal relied on language in *People v. Maddox* (1967) 67 Cal.2d 647 (*Maddox*), *People v. Fulton* (1979) 92 Cal.App.3d 972 (*Fulton*), and *People v. Bigelow* (1984) 37 Cal.3d 731 (*Bigelow*). Those decisions hold or suggest the grant of an untimely motion for self-representation obligates a court to grant a reasonable continuance for preparation by the defendant. (Typed Opn. at pp. 19-23.)

In *People v. Clark* (1993) 3 Cal.4th 99, 110 (*Clark*), and *People v Jenkins* (2000) 22 Cal.4th 900, 1039-1040 (*Jenkins*), this court explained that a trial court has discretion to condition the grant of a late *Faretta* motion on the defendant's agreement that there will be no delay in the proceedings. *Maddox*, *Fulton*, and *Bigelow* predate this court's decisions in *Clark* and *Jenkins*. This court in *Clark* acknowledged the earlier *Bigelow* and *Maddox* decisions required a continuance whenever a court grants an untimely *Faretta* motion, but it held those cases are not controlling where, as here, the trial court makes clear its intent to deny a *Faretta* motion if a continuance would be necessary. (*Clark*, *supra*, 3 Cal.4th at p. 110.)

More recently, in *People v. Valdez* (2004) 32 Cal.4th 73 (*Valdez*), this court held that the trial court acted within its discretion by conditioning the granting of a *Faretta* motion, made "moments before jury selection was set to begin," on the defendant's agreement that the trial would not be delayed. (*Id.* at pp. pp. 102-103.) This court reasoned that a trial court's authority to deny a *Faretta* motion on the ground that it is untimely necessarily includes the authority to condition the grant of the motion on the defendant's agreement that a grant of the motion would not result in delay. (*Id.* at p. 103.)

Again, that is this case. The trial court reasonably refused to grant appellant's *Faretta* motions when he stated he wanted a "one-day" continuance before he would proceed without counsel. The trial court did not grant appellant's *Faretta* motion until after appellant clearly understood he would not obtain a continuance by reason of self-representation. (10 RT 480-487, 492-494.)

Given the extensive pretrial delay in the case, appellant's documented history of manipulation, and the fact that jury selection was in progress, the trial court plainly did not abuse its discretion—that is, rule unreasonably—in conditioning the grant of appellant's *Faretta* motion on there being no further delay as a result of its granting the motion. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 103.)

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: June 23, 2015

Respectfully submitted,

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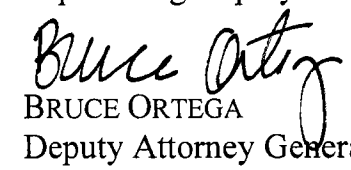

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 11,852 words.

Dated: June 23, 2015

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Espinoza, Jr.*** No.: **S224929**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 23, 2015, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 23, 2015, at San Francisco, California.

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Declarant

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Signature

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