IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **MARCOS ANTONIO RAMIREZ**, Defendant and Appellant.	**S262010**

Fifth Appellate District No. F076126
Tuolumne County Superior Court No. CRF50964
Honorable James A. Boscoe, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

This Court granted review on the following issues, as stated in the petition for review:

1. Did the majority err in affirming the trial court's finding that petitioner was voluntarily absent on the second day of trial without conducting an evidentiary hearing regarding the circumstances of petitioner's absence?
2. Was the violation of petitioner's constitutional right to be present for trial prejudicial error which requires reversal under both the *Watson* and *Chapman* standards?

INTRODUCTION

Appellant Marcos Antonio Ramirez, a 19-year-old with learning disabilities and no criminal history, was charged with burglary, a strike offense, and tried in absentia after defense counsel informed the trial court that appellant could not attend the second day of trial because he was seeking medical attention due to a drug overdose. The trial court denied a request for a mistrial and a request for a continuance. Trial – opening argument, testimony, closing arguments, and jury instructions – lasted less than one day. Appellant was unable to testify. The

next day, when appellant was again present, the jurors reached a verdict finding appellant guilty of attempted burglary (Pen. Code, §§ 664, 459), also a strike offense.

The Fifth District Court of Appeal affirmed the conviction, holding that the appellant had voluntarily absented himself, and that any error in refusing to grant the continuance was harmless beyond a reasonable doubt. This Court granted review.

Appellant contends that the trial court's decision to proceed with trial in his absence amounted to a violation of his right to be present under the state and federal constitutions. The right to be present may be waived by a voluntary absence, but in this case, there was no express or implicit waiver of appellant's right to be present. Moreover, this Court should find that merely terming an absence as "self-induced" is insufficient to find a voluntary absence. Instead, it must be clearly and affirmatively demonstrated on the record that a defendant has knowingly and voluntarily waived his right to be present. Without a hearing, this record does not establish appellant waived his right by intentionally creating a medical necessity for the purpose of effecting his absence from trial. Additionally, the trial court compounded this error by failing to grant a one-day continuance.

Finally, the trial court's decision to proceed with trial in appellant's absence, where it resulted in the complete deprivation of appellant's right to be present at trial, was prejudicial under any standard. The conviction must be reversed.

STATEMENT OF THE CASE

On September 28, 2016, appellant was charged in a one-count information with first degree residential burglary in violation of Penal Code section 459. (CT 10.)

On April 12, 2017, the matter was scheduled for trial. (CT 19.) Trial did not proceed after appellant did not appear, with defense counsel informing the court that the appellant was ill. (CT 19.) The next day, appellant appeared with counsel, and produced a note that he was seen at a local medical center; jury trial was reset for July 5, 2017. (CT 20; RT 46.)

Trial began on July 5, 2017, and a jury was selected and sworn. (CT 23.) On July 6, 2017, the trial court was informed by defense counsel that appellant was unable to attend that day. The trial court declared that appellant had voluntarily absented himself, pursuant to Penal Code section 1043, and, over the objections of defense counsel, proceeded with trial in appellant's absence. (CT 27.)[1] On July 7, 2017, the jurors found appellant not guilty of burglary, but guilty as to the lesser included offense of attempted burglary, under Penal Code sections 664 and 459. (CT 38, 39, 92.)

Appellant was sentenced to a five-year term of formal probation and a jail term of five months. (CT 95.)

On appeal, appellant argued that the trial court violated his constitutional rights by finding him voluntarily absent and proceeding with trial in his absence. On March 5, 2020, the Fifth

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[1] More detail as to this exchange will be presented in the Statement of Facts.

District affirmed his conviction, finding that the appellant was voluntarily absent and any error was harmless. (F076126, Opinion, pp. 12, 18.)

This Court granted review on June 17, 2020.

STATEMENT OF FACTS

Facts Relating To The Underlying Crime

Pursuant to rule 8.500(c)(2) of the California Rules of Court, this Court normally will accept the court of appeal opinion's statement of the facts. Appellant briefly presents the facts relating to the underlying crime because they are relevant to the issue of prejudice, discussed herein.

Prior to June 25, 2016, Daniel D. noticed that the screen on his dining room window was bent and there was a smeared handprint on the outside of his window. (RT 56.) Daniel reviewed surveillance tapes on his home security system, which used infrared technology, and saw that between 2:00 a.m. and 3:00 a.m., someone tried to pull the screen back. (RT 59.) The man on the video put his hand behind the screen and tried to push up the window, then left. Daniel, who did not recognize the person, copied the surveillance tape and gave it to the Sonora Police Department. (RT 56, 59.)

When Officer John Bowly of the Sonora Police Department first viewed the video, he had no suspects in mind. (RT 64.) However, when he viewed the tape a second time, he came to suspect the individual depicted in the video was possibly appellant Ramirez. (RT 65.)

On July 29, 2016, while Officer Bowly and another officer were conducting a traffic stop, Officer Bowly observed appellant

walking along the street. (RT 65.) Officer Bowly noticed appellant was wearing a distinctive Oakland Raiders hat which the officer believed was very similar to the one worn by the attempted intruder on the surveillance video. (RT 66.) Officer Bowly approached appellant, and the officer's contact with appellant was captured on the officer's body camera. (RT 74.)

According to Officer Bowly, appellant first denied any involvement. (RT 70.) Officer Bowly then used a ruse, stating he had appellant's thumbprint on the window, and identified appellant from the video. (RT 70.) Officer Bowly asked whether, if the window had opened, appellant would have gone inside, or what he was doing. Appellant said he was "probably just looking." (RT 71.) Officer Bowly asked whether appellant had seen anything inside he wanted, and appellant said no. (RT 71.) When Officer Bowly confronted him with the damages done to the screen and asked if he was going to pay, appellant agreed, "if that's what he wanted." (RT 72.) The officer warned appellant that residential burglaries can be very dangerous because many homeowners have firearms. (RT 72.) Officer Bowly asked why he would do it, and appellant told the officer he was "probably under the influence," drunk or high. (RT 72.) Officer Bowly asked him what he was looking for, and appellant said "nothing." (RT 72.)

Following appellant's arrest, Officer Bowly took appellant's hat to Daniel's residence and used the hat in a test video. (RT 67.) On cross-examination, Officer Bowly conceded that, although he searched Google for an Oakland Raiders hat which had the same emblems as the one worn by the individual on the video

surveillance tape, the officer did not go to the Oakland Raiders' online store to locate a comparable hat. (RT 81.) The officer further acknowledged that there are likely thousands of Raiders hats like the one appellant was wearing at the time of his arrest. (RT 81.)

Facts Relating to the Trial in Absentia

At his arraignment, appellant was released on his own recognizance. (CT 6.) He remained on that status until the jury returned its verdict. (RT 199.) Trial was originally set for February 1, 2017, and then continued at appellant's request to April 12, 2017. (CT 15.)

On April 12, 2017, defense counsel informed the court that appellant's mother had telephoned counsel's office and stated appellant was ill, and she was going to take him to "Prompt Care" as soon as appellant was able to get out of bed. (CT 19.) The court vacated the jury trial and ordered issuance of a bench warrant, but stayed execution of the warrant until the next day. The minute order reflects that the next day appellant appeared with counsel. (CT 20.) The trial court later stated that appellant's mother had a note from a doctor that said appellant was seen at the Sonora Regional Medical Center. (RT 46, 51.) Trial was reset for July 5, 2017.

Trial began on July 5, 2017, and the jury was selected and sworn. (CT 23.) Appellant was present. (CT 23.) Court recessed for the day shortly before noon. It was anticipated trial could be finished the next day, and the jurors and parties were instructed to return at 8:30 a.m. the next morning. (RT 17, 38.)

On July 6, 2017, the matter reconvened in open court, but outside the presence of the jury, at 9:30 a.m. (RT 43.) The trial court stated on the record that he had been informed by defense counsel that appellant had ingested heroin and methamphetamine, had overdosed, and medical personnel were sent to his home. (RT 43.) Emergency personnel examined appellant at appellant's house, and appellant refused medical treatment. (RT 43.) Over the phone, the trial court had requested Officer Norris to go to the appellant's home and "advise him that we were expecting him to show up for trial.… [and] if he failed to appear in 15 minutes, which is a reasonable time to arrive in court given the distance of his home from the courthouse, that I would proceed to try him in his absence." (RT 44.)

After the parties put this information on the record, defense counsel received a telephone call from appellant's mother. Defense counsel reported that appellant and his mother were now at the emergency room, waiting to see a physician. (RT 45.) The prosecutor added that appellant's mom believed appellant had gone out with another individual. She thought he came home around 2:00 a.m. It was believed that he ingested the drugs sometime in the night. (RT 45.) The parties put the following on the record:

> "[PROSECUTOR]: I received a text message from Officer Bowly . . . at 7:00 a.m. . . . indicating that at 7:00 a.m. Sonora Police Department had responded to [defendant's] home for the mother reporting that there was a potential overdose on heroin. When the officers arrived medical was there, and at 7:24 a.m. I got a message that the defendant declined medical attention and refused to go in the ambulance to the

> hospital. . . . Our court hearing today was at 8:30 a.m. He did not show up at 8:30.
>
> "When we met with the judge and the phone call was placed and Officer Norris responded back out to the house, it was at . . . approximately 9:25. The defendant originally indicated over the phone — which we can all hear Officer Norris, that he was going to come at about 9:30 this morning. When the Court indicated that Officer Norris should give him a ride, he was then asked if he was going to the hospital. At that point he switched, instead of coming to court, that he would rather go to the hospital.
>
> "Apparently, he is waiting to see the doctor."

(RT 46-47.) Defense counsel added:

> "[DEFENSE COUNSEL]: When we spoke to Officer Norris, Officer Norris clearly indicated that the defendant was [Health and Safety Code section] 11550, being under the influence of drugs.
>
> "In speaking to the mother, she said that [defendant] was nodding out and being conscious and nonresponsive, and she said she was going to try to take him to the hospital. Then on the last call she said she was taking him out to the car to take him to the hospital. This latest phone call says that she was successful in getting him to the car.
>
> "[Defendant] is 19 years old. He does have some learning disabilities. So a lot of things he says on the phone . . . cannot be taken at face value.
>
> "And also if he's under the influence of drugs, I think he is likely to say anything to the policeman that was at his home."

(RT 48-49.)

Defense counsel requested the trial court to continue the case to the next day at 8:30 a.m., or declare a mistrial. (RT 49; CT 28.) The prosecutor stated that he had "plans to be out of town the next day that have been in place for some time now." (RT 49.)

The trial court then reviewed Penal Code section 1043, subdivision (b)(2), and determined that the question was whether appellant was voluntarily absent from trial. (RT 49-50.) The trial court found that appellant voluntarily ingested controlled substances to the extent that it required emergency response, but that the appellant was not in such a serious condition that he could not refuse treatment. (RT 50.) Additionally, this was the second time that appellant missed trial. (RT 51.) The trial court found no evidence that somebody forcibly injected or caused appellant to use controlled substances. (RT 52-53.) The trial court therefore denied the request for a mistrial, and summarily denied the request for a continuance. (RT 52.)

The trial in absentia commenced before 10:00 a.m. the same morning. (CT 28.) The proceedings before the jury—opening statement, evidence, and closing arguments—took about an hour and a half. At one point, a juror submitted a written question asking appellant's age. (CT 32, RT 77.) At a sidebar, the court commented that it assumed defense counsel would call appellant's mother to testify at trial, so she could answer that question. Defense counsel responded that he had told the mother that her testimony was going to be very limited and so he thought it was more important for her to stay with her son in the hospital. (RT 77.)

The court offered to take a recess if defense counsel wanted to have appellant's mother come in. Defense counsel suggested they break, go over jury instructions, return that afternoon, "and then if they're not here, then I will rest and then we will do

closing. [¶] . . . [¶] . . . I said if she's done at the hospital, bring him to the courtroom. His testimony should be around 11:15 or 1:15, depending upon how quickly we move. The mom said okay. She said she will text me…." (RT 88.) The court released the jury until 1:15 p.m. (RT 89.)

The court and counsel then reviewed the jury instructions. Defense counsel repeatedly suggested that appellant would still testify if he could attend. (RT 88, 92, 93, 95, 132.) When they finished discussing the instructions, the prosecutor asked if defense counsel had heard from appellant. Defense counsel responded that he and appellant's mother had been texting, and counsel had asked if she thought appellant could return at 1:30 and testify. Appellant's mother responded, "Not sure. Possibly, we can definitely try." Defense counsel stated he would call her during the lunch hour. (RT 106.)

After the lunch recess, defense counsel renewed his request for a mistrial in light of the fact appellant was not present and had to go to the emergency room. (RT 124; CT 29.) The renewed motion was denied. (RT 124; CT 29.) Defense counsel stated he received a text from the appellant's mother that appellant was not in the hospital any longer, that appellant went back home, and his mother said that he is "in no state to come to court and take the witness stand." (RT 132; CT 29.) The trial court stated that as of five minutes to 2:00 p.m., "I gave him certainly an opportunity to appear here at trial and put on any testimony or defense he may have." (RT 132.)

The defense subsequently rested without calling any witnesses. (RT 134.) After being instructed, the jury began deliberations a little before 3 p.m. (CT 29.)

Notwithstanding the quick trial, the jury deliberated for almost six hours, spread over two days, without the benefit of appellant's testimony. (CT 29, RT 29-30 [3 p.m. to 5 p.m.]; CT 91 [8 a.m. to noon].) Appellant was present the next day when the jury returned its verdict. (CT 91; RT 194.) The jury acquitted appellant of burglary, but convicted him of the lesser included offense of attempted burglary, a strike. (CT 38, 39, 91.)

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THE APPELLANT VOLUNTARILY ABSENT.

A defendant may waive his presence by voluntarily absenting himself after trial has begun. (*Diaz v. United States* (1912) 223 U.S. 442, 455; *People v. Concepcion* (2004) 45 Cal.4th 77; Pen. Code, § 1043.) But, as with all waivers of constitutional rights, it must be clearly and affirmatively demonstrated on the record, under the totality of the circumstances, that the defendant knowingly and voluntarily waived his right to be present. In this case, appellant did not expressly or impliedly waive his right to be present.

Moreover, a self-induced absence, when not done knowingly and voluntarily for the purpose of avoiding court, cannot be deemed a voluntary waiver of the right to be present. This Court should note the distinction between a mere finding that the defendant deliberately ingested drugs, thereby leading to an overdose and absence, and a finding that a defendant waived his

rights by deliberately ingesting drugs for the purpose of effecting his absence from trial. Only the latter should meet the high standard required to find a waiver of the constitutional right to be present.

A. Standard of Review

On appeal, the reviewing court must review the entire record to determine whether defendant's absence was knowing and voluntary. (*People v. Connolly* (1973) 36 Cal.App.3d 379, 385.) Insofar as the trial court's decision in excluding a criminal defendant from trial "entails a measurement of the facts against the law," an appellate court reviews the decision de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 741; see also *People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202; but see *People v. Espinoza* (2016) 1 Cal.5th 61, 74 [review of a finding of voluntary absence "is restricted to determining whether the finding is supported by substantial evidence"].)

The voluntariness of a waiver is a question of law which should be reviewed de novo. (*People v. Marshall* (1997) 15 Cal.4th 1, 24 [de novo standard to determine voluntariness of waiver of right to counsel]; *People v. Panizzon* (1996) 13 Cal.4th 68, 80 [de novo standard to determine voluntariness of waiver of right to appeal].) Appellant therefore encourages this Court to apply a de novo standard of review, given the important constitutional rights at issue.

B. The Constitutional Right to Be Present At Trial.

The constitutional right of a defendant to be present at his trial is rooted in both the Sixth and Fourteenth Amendments of

the United States Constitution. (*Waidla, supra,* 22 Cal.4th at p. 741.)

The Sixth Amendment includes a compact statement of the rights necessary to a full defense: "In all criminal prosecutions, the accused shall enjoy the right… to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." (U.S. Const., amend. VI.)

Because these rights are basic to our adversary system of criminal justice, they are part of the "due process of law" that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States. (*Faretta v. California* (1975) 422 U.S. 806, 818.) "The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice -- through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the [Fourteenth] Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it." (*Ibid.*)

Due process "clearly requires" that a defendant be allowed to be present "'to the extent that a fair and just hearing would be thwarted by his absence…'" (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745*,* quoting *Snyder v. Massachusetts* (1934) 291 U.S. 97, 108.) Thus, a defendant is guaranteed the right to be present at

any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. (*Ibid*.) This longstanding right reflects the "notion that a fair trial [can] take place only if the jurors me[e]t the defendant face-to-face and only if those testifying against the defendant [do] so in his presence." (*Fairey v. Tucker* (2012) 567 U.S. 924, 926-927, quoting *Crosby v. United States* (1993) 506 U.S. 255, 259.) "'It is well settled that ... at common law the personal presence of the defendant is essential to a valid trial and conviction on a charge of felony.'" (*Crosby*, *supra,* 506 U.S. at p. 259.) The right to be present is "scarcely less important to the accused than the right of trial itself." (*Diaz* v. *United States* (1912) 223 U.S. 442, 455.) Thus in general, "if [the defendant] is absent [from trial], . . . a conviction will be set aside." (*Crosby*, *supra*, 506 U.S. at p. 259.)

A defendant's right to presence, however, is not absolute. A defendant's "privilege may be lost by consent or at times even by misconduct. [Citation.]" (*Snyder, supra,* 291 U.S. at p. 106.) First, a defendant may waive his right to be present "'if, after the trial has begun in his presence, he voluntarily absents himself.'" (*Crosby*, *supra*, 506 U.S. at p. 260.) Second, a defendant can lose his right to be present at trial if he continues in disruptive behavior such that his trial cannot be carried on with him in the courtroom. (*Illinois* v. *Allen* (1970) 397 U.S. 337.) This case only involves the first of the two exceptions.

The state constitutional right to be present at trial, and its exceptions, are generally coextensive with the federal right. (Cal. Const., art. I, § 15; *People v. Gonzales* (2012) 54 Cal.4th 1234,

1254; *People v. Cunningham* (2015) 61 Cal.4th 609, 633; *Waidla*, *supra*, 22 Cal.4th at p. 741.) This constitutional rule and its exceptions are codified at Penal Code section 1043, subdivisions (a) and (b).[2] The statute must be read to avoid constitutional defects.

C. The Record Does Not Clearly and Affirmatively Demonstrate Ramirez's Ingestion of Drugs Was a Knowing and Voluntary Waiver Of His Fundamental Constitutional Right to be Present at His Trial.

The court of appeal in this case found that ingesting drugs the night before trial, resulting in absence the next day due to the need for medical attention, was a voluntary absence resulting in a waiver of presence. This was error. A defendant may validly waive his or her right to be present during a critical stage of the trial, provided the waiver is knowing, intelligent, and voluntary. (*People v. Cunningham* (2015) 61 Cal.4th 609, 633.) As such,

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[2] Penal Code section 1043 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. …

voluntary absences may only be found through explicit or implicit waivers by the appellant. Appellant argues that there was no explicit waiver, and that the record does not clearly demonstrate an implicit waiver.

In determining whether a defendant is absent voluntarily, a court must look at the "totality of the facts." (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1205.)

A waiver of the constitutional right to be present will not be presumed or lightly inferred. (*People v. Vargas* (1975) 53 Cal.App.3d 516, 524, citing *Johnson v. Zerbst* (1938) 304 U.S. 458, 464; *In re Tahl* (1969) 1 Cal.3d 122, 127.) Rather, a court must "'indulge every reasonable presumption against waiver of fundamental constitutional rights.'" (*Fairey*, *supra*, 567 U.S. at p. 928, quoting *Carnley v. Cochran* (1962) 369 U.S. 506, 514, internal quotation marks omitted.)

1. There was No Express Waiver of the Right to Be Present.

An express waiver in front of the judge is "the surest way of ascertaining the defendant's choice." (*Gutierrez*, *supra*, 29 Cal.4th at p. 1205.) Courts have had no difficulty finding a voluntary absence with an express waiver of presence. (See *Diaz, supra,* 223 U.S. at p. 457 [permitting an express waiver of the right to be present]; *People v. Lewis* (1983) 144 Cal.App.3d 267, 279 ["It is enough the defendant is physically present in the courtroom where the trial is to be held, understands that the proceedings against him are underway, confronts the judge and voluntarily says he does not desire to participate any further in those proceedings."].)

In this case, the appellant's choice to go to the emergency room instead of court cannot be deemed an explicit voluntary waiver of presence. The appellant never stated that he was voluntarily choosing to have trial continue in his absence. Instead, he decided he needed to go to the hospital and see a doctor. (See, e.g., RT 47.)

Indeed, it is not clear from the record that appellant would have been able to explicitly, knowingly and voluntarily waive his right that morning, as he was under the influence of drugs. (RT 47.) A waiver of rights cannot be deemed knowing or voluntary if the defendant is intoxicated to the point where he does not understand the rights he is waiving. (*People v. Breaux* (1991) 1 Cal.4th 281, 301.) This case presented conflicting evidence; the trial court believed the appellant was "coherent," but the officer at the scene believed appellant was still under the influence of drugs, and appellant's mother stated that appellant was "nodding out" and at times "nonresponsive." (CT 27; RT 48.) If an accused's will is overborne because of impairment of his ability to exercise his rational intellect and free will, it is immaterial whether that impairment was caused by the police, third persons, the accused himself, or circumstances beyond anyone's control. (*In re Cameron* (1968) 68 Cal.2d 487, 498 [finding no waiver of the right to not self-incriminate when defendant was impaired by Thorazine].)[3]

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[3] Moreover, even if appellant complied and arrived at trial in that state, there would still be an argument that the trial court denied him the right to be present. The constitution requires that the defendant be mentally present during the course of his trial.

In any case, there can be no question that the appellant did not specifically state that he understood his right to be present and he was waiving that right. He decided to seek medical attention. (RT 47.) Defense counsel specifically requested on appellant's behalf that trial not go forward in appellant's absence, requesting a continuance or a mistrial. (RT 49.) Throughout the day, defense counsel expressed his intent for appellant to testify if appellant was able to appear. (RT 88, 92, 93, 95, 126, 132.) At the conclusion of the People's evidence, defense counsel again requested a mistrial. (RT 124.) The choice to go to the hospital was not an explicit waiver of the appellant's right to be present.

2. There Was No Implicit Waiver of the Right to be Present.

Courts have found an implicit waiver of presence if a defendant voluntarily stays away from trial. (*Crosby*, *supra*, 506 U.S. at p. 260; *People v. Espinoza* (2016) 1 Cal.5th 61; Pen. Code, § 1043.) "[I]f a defendant at liberty remains away during his trial the court may proceed provided it is *clearly established* that his absence is voluntary." (*Taylor v. United States* (1973) 414 U.S. 17, 19-20 n. 3, per curiam, emphasis added.) "Where the offense is not capital and the accused is not in custody, ... 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

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(*People v. Berling* (1953) 115 Cal.App.2d 255; *People v. Avila* (2004) 117 Cal.App.4th 771, 777.) In this case, the trial court did not appear to doubt that appellant was still under the influence of drugs, merely whether the appellant was physically capable of attending court. (RT 47, 48.)

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." (*Diaz, supra,* 223 U.S. at p. 455.)

(a) Historically, All Cases Finding an Implicit Waiver in this Court and the United States Supreme Court Involved a Voluntary Choice to Flee.

The trial court's finding of a voluntary absence in this case is unlike other cases by this Court and the United States Supreme Court finding an implicit waiver of presence by voluntary absence, because the trial court in this case knew appellant's location and status at all times.

Short of an express waiver, the United States Supreme Court and this Court have found a voluntary choice to not be present at trial in cases where the defendant has fled after the beginning of trial. (See *Diaz, supra,* 223 U.S. at p. 457.) In such cases, the court was left to assume a voluntary choice by the defendant to waive the right to be present at trial. (*Crosby, supra,* 506 U.S. 255; *Taylor, supra,* 414 U.S. 17; *People v. Concepcion* (2004) 45 Cal.4th 77, 80; *People v. Espinoza* (2016) 1 Cal.5th 61.) In these cases, after the trial court made good faith attempts to ascertain that the defendant did not have a reason to miss court, such as illness (see *Taylor, supra,* 414 U.S. at p. 17), the court concluded the defendant must have deliberately chosen not to attend trial. Accordingly, these cases found sufficient evidence from the record that the absence was a deliberate choice to delay or avoid trial. (*Crosby, supra,* 506 U.S. 255; *Taylor, supra,* 414 U.S. 17; *Concepcion, supra,* 45 Cal.4th 77; *Espinoza, supra,* 1 Cal.5th 61.) In other words, the record in these cases clearly

established that the absence was a knowing and voluntary waiver of presence.

In *Crosby*, *supra*, 506 U.S. 255, the right to be present was voluntarily waived where Crosby's house was "cleaned out," a neighbor had seen Crosby's car backed into the driveway as though he had been packing the trunk, and there had been several days of a fruitless search for the defendant. (*Id.* at p. 256.) Approximately six months later, Crosby was arrested in a different state. (*Id.* at p. 257.) The Court in *Crosby* found that a midtrial "flight" could be deemed a knowing and voluntary waiver of the right to be present at a trial that already commenced, noting that a rule that permits a trial to continue where a defendant "disappears" may dissuade a defendant from becoming a "fugitive" in the first place. (*Id.* at pp. 261-262.)

Similarly, in *Taylor, supra,* 414 U.S. 17, the petitioner failed to return for the afternoon session after the trial court announced that the lunch recess would last until 2 p.m. The judge recessed the trial until the following morning, but petitioner still did not appear. Petitioner's wife testified that she had left the courtroom the previous day with petitioner; that they had separated; that he had not appeared ill; and that she had not heard from him since. (*Id.* at p. 17.) There was no challenge to the trial court's conclusion that petitioner's absence from the trial was voluntary, and no claim that the continuation of the trial was not authorized by federal statute. (*Id.* at p. 17.) The only challenge was whether the petitioner's admittedly-voluntary absence could act as a waiver. The Court held that voluntary

"flight" from the trial court after the beginning of trial could be deemed a waiver of presence. (*Id.* at p. 20.)

In *Concepcion, supra,* 45 Cal.4th 77, 80, this Court held that an escapee, who escaped from prison after trial had begun, may be considered voluntarily absent from the time he absconds until he can reasonably be returned to court. (*Id.* at p. 84.)

And in *Espinoza, supra,* 1 Cal.5th 61, the defendant failed to show for the second and third days of trial, despite representing himself the first day. The trial court and prosecutor attempted, without success, to contact defendant. When the defendant still failed to appear the third morning, and no one had located him despite a thorough search, the trial proceeded without him. (*Id.* at p. 70.) This Court held that a defendant may "implicitly" voluntarily waive his presence if it is "'*clearly established* that his absence is voluntary,'" and that this may be demonstrated where the defendant was aware of the proceedings taking place, knew his right and of his obligation to be present, and had no sound reason for remaining away. (*Id.* at p. 74, quoting *Taylor*, *supra*, 414 U.S. at p. 19, fn. 3., emphasis added) In *Espinoza*, given the defendant's involvement in the case, the defendant knew he had to be present. The trial court also found that defendant's purpose in failing to appear was delay, evasion of the trial, and avoidance of punishment. Thus, the court made the necessary factual findings for an "effective waiver of defendant's right to be present at trial." (*Ibid.*)

None of these cases are similar to the case here. Here, there was no "implicit" waiver of presence by voluntarily disappearing

without explanation. Instead, in this case, the trial court knew exactly where the appellant was at all times on July 6, 2017, and knew that the appellant did not wish to waive his right to attend trial. The trial court knew the appellant's location, and was informed that he was being seen to by medical personnel. (RT 47, 124, 132.) The trial court knew that trial counsel was not waiving appellant's presence, but instead requested a continuance or a mistrial. (RT 49.) And, as explained further below, the record does not demonstrate that this absence was because of the appellant's voluntary choice to stay away from trial.

The appellant did not simply fail to appear, leaving the court no option but to assume a knowing and voluntary choice not to attend trial. As such, this is not a similar case to any state or federal Supreme Court precedent finding that the record clearly established by a totality of the circumstances, that the defendant implicitly, but knowingly and voluntarily, waived his constitutional right to be present.

(b) A "Self-Induced" Absence Alone Does Not Necessarily Demonstrate a Voluntary Waiver Of the Right To Be Present, and Was Not a Voluntary Waiver Of the Right To Be Present In this Case.

The California appellate courts have found the right to be present impliedly waived in other situations where a defendant behaved in ways that the defendant knew would prevent him from attending trial, finding the absence to be "self-induced." (See, e.g., *People v. Rogers* (1957) 150 Cal.App.2d 403 (*Rogers*).) This is a less clear area of the waiver law, where the Fifth

District Court of Appeal incorrectly placed appellant. Here, without examining the record to determine whether the appellant knowingly and voluntarily chose not to attend trial, the trial court and the appellate court found the absence to be "self-induced," and thereby concluded the absence was a voluntary waiver of presence. (RT 53; F076126.)

This Court should find that merely finding an absence was "self-induced," alone, is insufficient to find a voluntary waiver of presence. Instead, it must be clearly and affirmatively demonstrated on the record that the defendant has knowingly and voluntarily waived his right to be present, with the purpose of effecting his absence from trial. This interpretation must be applied to Penal Code section 1043's definition of "voluntary absence" in order to avoid constitutional defects.

Requiring the waiver to be clearly and affirmatively demonstrated is the same standard used to determine when a defendant has waived his right to proceed to a jury trial pursuant to a plea agreement. As noted above, the Sixth Amendment and the Fourteenth Amendment guarantee the right to be present, which consists of the rights to notice, confrontation, and compulsory process. (*Faretta*, *supra,* 422 U.S. at p. 818.) The same constitutional rights are waived when a plea of guilty or no contest is entered in a state criminal proceeding. (*People v. Howard* (1992) 1 Cal.4th 1132, 1174; *Boykin v. Alabama* (1969) 395 U.S. 238 (*Boykin*); *In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*).) The *Boykin/Tahl* advisements are required to ensure that a defendant's waiver is knowingly and voluntarily made when the

defendant gives up those rights in order to plead guilty. (*Howard*, *supra,* 1 Cal.4th at pp. 1178-1179.) A plea of guilty remains valid, even in the absence of express waivers, if the record "clearly" and "affirmatively demonstrate[s]" that the waiver was knowing and voluntary under the totality of the circumstances. (*Id* at p. 1178.) "As with the waiver required of several other constitutional rights that long have been recognized as fundamental, a defendant's waiver of the right to jury trial may not be accepted by the court unless it is knowing and intelligent, that is, 'made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it,' as well as voluntary 'in the sense that it was the product of a free and deliberate choice ….'" (*People v. Collins* (2001) 26 Cal.4th 297, 305, quoting *Colorado v. Spring* (1987) 479 U.S. 564, 573, some internal quotations removed.) The same standard should apply here. California courts should be *at least* as careful in determining whether the record shows a knowing and voluntary waiver of the same rights when a defendant has in fact chosen to go to trial.

People v. Rogers, *supra,* 150 Cal.App.2d 403, is the seminal case regarding self-induced absences, and may be used to determine when the defendant's absence clearly and affirmatively demonstrates a knowing and voluntary waiver of presence. *Rogers* shows that a voluntary absence may be found when a defendant deliberately creates a medical necessity for the purpose of effecting his absence from trial. (*Ibid.*) In *Rogers,* the trial court granted the defendant thirteen trial continuances

between August 18, 1955, and March 12, 1956, all based on the claim of defendant's ill health. (*Id.* at p. 405.) In January 1956, the trial court heard testimony from a doctor that if the defendant followed the doctor's treatment, the defendant would be would be able to stand trial in 60 to 90 days. (*Id.* at p. 407.) The doctor stated that the defendant's physical condition was up to the defendant and his doctor, and that if the defendant cooperated in keeping the diabetes under control he could stand trial. On March 12, 1956, the doctor again appeared and testified that until March 9th, defendant "was getting along fairly well," but on the 10th, the defendant's diabetes was "uncontrolled again." (*Ibid.*) The defendant was not following the diet, and a failure to take insulin for his diabetes could have caused the defendant's physical condition. (*Id.* at p. 408.) The defendant was compelled to appear that morning, and a request for a further continuance was denied. Defendant, who was an attorney, chose to represent himself, and did so for three days.

On the fourth day of trial, the defendant in *Rogers* took a large dose of insulin, but failed to eat breakfast. (*Id.* at p. 409.) The defendant started feeling poorly. A doctor examined the defendant and determined that the defendant was not suffering from insulin shock, but gave the defendant orange juice and stated the defendant should eat a large lunch to help him recover from the insulin. The defendant refused to eat lunch. (*Id.* at p. 410.) That afternoon, the defendant stated he could not proceed to represent himself and submitted on the evidence. From the defendant's deliberate choice to take a large dose of insulin and

refusal to eat throughout the day, the court of appeal found that the defendant, "by his own actions, induced the condition existing in the afternoon of the fourth day of the trial." (*Id.* at p. 415.) Therefore, it was "a reasonable inference from the record that the state of affairs existing on that afternoon was *intentionally* brought on by defendant *for the purpose* of forcing a continuance." (*Id.* at p. 413, emphasis added.) This amounted to a waiver of the right to be present.

Rogers differs from this case, in that the circumstances in *Roger* indicate a knowing, informed, and voluntary choice not to attend the ongoing trial. First, the defendant in *Rogers* had a developed history showing that he was actively taking measures to avoid trial. (*Id.* at p. 405.) More importantly, the trial court in *Rogers* had testimony from a doctor that Rogers could be healthy by the time of trial if he took certain steps, which Rogers did not. (*Id.* at p. 407.) Additionally, the facts of the absence itself indicate a knowing and voluntary choice not to return to trial. The trial court had testimony from the doctor that the doctor had seen Rogers, and had informed him what steps he had to take to continue to attend trial that afternoon. It was only after Rogers refused to take those steps that he was determined to be voluntarily absent. (*Id.* at pp. 409-410.) This record therefore demonstrated that the refusal to follow the doctor's orders was a knowing and voluntary choice not to be capable of attending trial that afternoon.

A similar case is *People v. Guillory* (1960) 178 Cal.App.2d 854. There, the defendant, who was hard of hearing, appeared in

court for his felony trial without batteries for his hearing aid. (*Id.* at p. 862.) The court found no due process violation when trial proceeded, particularly where the trial court seated the defendant closer to the witness in order to help him hear, and received no further objection. (*Id.* at p. 858.) Notably, the court of appeal in this case did not find a voluntary waiver of the right to be present; merely that the defendant could not argue a due process violation over the failure to have batteries, when the failure was self-induced. But the pattern is similar: the defendant knew the inability to hear at trial would result from the failure to have batteries, the defendant knew how to avoid the issue by having batteries, and the defendant deliberately and intentionally failed to bring batteries. This indicates a knowing and voluntary choice to absent himself from trial proceedings.[4]

The federal district cases do not offer much guidance, as there appears to be a split between whether overdosing on drugs,

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[4] The Fifth District's opinion in this case also cited *People v. Cox* (1978) 81 Cal.App.3d Supp. 1 (*Cox*), which, on its face, is factually similar to the present case. However, *Cox* only involved a misdemeanor conviction, and, as the *Cox* opinion itself notes, "[i]t is well established that misdemeanor prosecutions do not require a defendant's presence at trial." (*Id.* at p. 5.) As the offense in this instance was a felony, this Court "may put out of view the decisions dealing with this right in cases of misdemeanor." (*Diaz*, *supra*, 223 U.S. at p. 455.) The constitutional considerations are simply not the same. In other words, "the balancing inquiry regarding voluntary absence works differently in misdemeanor cases as compared to felony cases, because the right to be present weighs far more heavily in felony cases (especially where the defendant is charged with a strike offense)." (*People v. Ramirez,* F076126, dissent.)

alone, demonstrates a voluntary waiver of the right to be present. (See *United States v. Latham* (1st Cir. 1989) 874 F.2d 852, 858 [overdose in a suicide attempt was not evidence of voluntary absence]; compare *United States v. Davis* (5th Cir. 1995) 61 F.3d 291, 302-303 [defendant's decision to seek medical attention for unsubstantiated overdose supported finding a voluntary absence]; *United States v. Crites* (8th Cir. 1999) 176 F.3d 1096, 1098 [attempted suicide by drug overdose supported finding a voluntary absence].) However, to summarize this federal authority, one state appellate court has stated: "a defendant's absence may be deemed voluntary where the record establishes that he or she created the medical necessity *in order to effect his or her absence from trial*." (*People v. Price* (Colo. 2010) 240 P.3d 557, 560-561, emphasis added.) Appellant contends the *Price* court correctly concluded that evidence of an overdose alone is insufficient to determine the defendant knowingly and voluntarily attempted to effect his absence from trial.

(c) Without a Hearing, The Record Does Not Affirmatively Demonstrate An Implied Waiver of Presence.

This record fails to indicate that ingesting drugs the night before was knowing and voluntary choice by appellant to not be capable of attending trial the next morning. It cannot be determined from the record that the appellant knowingly and deliberately induced a medical necessity, much less that he did so for the purpose of absenting himself from trial. The only information on the record was that appellant was out the night before with a friend and ingested drugs sometime during the

night, returning home at 2 a.m. (RT 46.) The next morning his mother called emergency medical personnel. (RT 46.) Indeed, the next morning the appellant indicated that he wanted and intended to attend court, but later stated he would rather go to the hospital. (RT 47.) An officer went to appellant's home and clearly indicated that the appellant was still under the influence of drugs. (RT 48.) His mother reported appellant was "nodding out" and "nonresponsive." (RT 48.)

While it was undisputedly an unwise decision, the record does not demonstrate that ingesting drugs was a knowing and intentional choice by appellant to induce a medical necessity. The appellant was 19 years old with learning disabilities. (RT 48.) The record did not show how much he ingested or when. The record before the trial court at the time of its decision to proceed with the trial in appellant's absence did not indicate if appellant had had prior experience with drugs; if he had previously been seen by a doctor because of ingesting drugs; if overdosing was a common or known occurrence to appellant; if appellant had received education or counseling regarding drug addiction; or if appellant had an unusual reaction to the drugs on this occasion.

It is also worth noting that "choosing" to ingest drugs is different than choosing to flee or choosing to skip lunch. (See generally *People v. Victor* (1965) 62 Cal.2d 280, 302-305 [defining addiction].) Our legislature and courts have long noted the devastating effects of drug addiction within the criminal justice

system.[5] The known effects of addiction should, at a minimum, weigh against a presumption that failing to arrive at court because of a drug overdose, alone, was a knowing and voluntary choice to waive the right to be present. There is a danger that the court of appeal's decision below will be used as a per se rule equating drug use as a waiver of presence, a rule which would fly in the face of this Court's rules on waivers and this state's acknowledgement that addiction is a disease that requires intervention, education and treatment to overcome.

Additionally, the record does not show that appellant overdosed for the purpose of absenting himself from trial. First, appellant had no background of acting, or refusing to act, in order to avoid court. He had been released on his own recognizance,

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[5] This includes multiple laws creating drug courts, decriminalizing controlled substance offenses, lessening punishments for controlled substance offenses, and pushing offenders toward treatment. (E.g., Pen. Code, § 1000.5 (1972); Proposition 64 (2016); Proposition 47 (2018).) For example, Proposition 47 in part reduced most possessory drug offenses to misdemeanors, and also formed a Safe Neighborhoods and Schools Fund to be spent on mental health and substance abuse treatment programs. (*People v. Tidwell* (2016) 246 Cal.App.4th 212, 217; Govt. Code, § 7599.2, subd. (a)(3).) Similarly, in 1972, the Legislature enacted Penal Code sections 1000 to 1000.4 to authorize drug diversion, in order to permit the courts "to identify the experimental or tentative user before he becomes deeply involved with drugs, to show him the error of his ways by prompt exposure to educational and counseling programs in his own community, and to restore him to productive citizenship without the lasting stigma of a criminal conviction …" (*People v. Superior Court (On Tai Ho*) (1974) 11 Cal.3d 59, 61-62.) California has recognized that education and treatment are necessary to combat drug addiction.

and remained so until the end of trial. (CT 6, RT 199.) Only one prior jury trial continuance had been granted for the defense. (CT 19.) This continuance was because appellant had the flu and was vomiting, which was corroborated by a doctor note that the appellant was seen at the hospital that day. (RT 45.) Before that, there had only been one continuance requested and granted, with no objection by the prosecutor. (CT 15.) This is entirely different from months of failing to follow a doctor's orders, with expert testimony that the defendant could be available for trial if he took the steps his doctor ordered. (*Rogers*, *supra,* 150 Cal.App.2d at p. 407; see also *People v. Espinoza*, *supra*, 1 Cal.5th at pp. 77, 78 [finding a "long history of lack of cooperation and dissatisfaction with appointed counsel" and a "history of delay tactics."])

The record does not indicate any motivation for ingesting the drugs. The dissent in this case below raised the possibility that the appellant may even have ingested drugs as an attempt to ensure that he *could* attend court the next day. (*People v. Ramirez,* F076126, dissent, p. 7.) The record suggests that appellant may have ingested methamphetamine (RT 43), a drug which is known to make people more alert. (See generally, *People v. Duenas* (2012) 55 Cal.4th 1, 7.) In the absence of evidence of a motive or reason for ingesting the drugs, the record fails to establish that it was done as a knowing and voluntary choice for the purpose of avoiding court. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464 [a waiver is "an *intentional* relinquishment or abandonment of a known right or privilege."])

The Fifth District Court of Appeal's decision in this case stated that "[t]here was no evidence [appellant] was unable to control the timing or amount of his drug ingestion" and therefore appellant did not produce a "good reason" for his actions. (*People v. Ramirez,* F076126, p. 15.) This flips the standard for a finding of a voluntary waiver on its head. It must be "clearly established" that the waiver was knowingly and voluntarily made. (*Taylor*, *supra,* 414 U.S. at pp. 19-20 n. 3; *People v. Wall* (2017) 3 Cal.5th 1048, 1059-1060.) The lack of evidence does not weigh against appellant.

Moreover, where there are facts suggesting inducing a medical necessity was done in order to delay trial, the trial court may hold a hearing to obtain further information, as it did in *Rogers*, *supra*, 150 Cal.App.2d 403. At a hearing, it may be established through testimony whether the defendant acted with the intent to delay trial or with the knowledge that his actions would absent himself from trial. As in *Rogers,* doctors, social workers, officers or percipient witnesses can opine as to whether the defendant knowingly acted in order to voluntarily waive his right to be present at trial. (*People v. Rogers*, *supra*, 150 Cal.App.2d 403.) No such record was made here.

This Court should draw a distinction between a mere finding that the defendant deliberately took drugs, and a finding that the defendant waived his rights by deliberately ingesting drugs in order to induce a medical necessity for the purpose of effecting his absence from trial. The Fifth Circuit's summary conclusion in this case, failing to draw this distinction, does not

uphold the direction that a court must indulge every reasonable presumption against waiver of fundamental constitutional rights. (See *Cochran, supra,* 369 U.S. at p. 514, internal quotation marks omitted.) While addiction is not an excuse for committing a crime, neither should it operate as an *automatic waiver* of the constitutional right to be present at trial.

Therefore, a summary conclusion that appellant's absence was "self-induced," alone, is not sufficient to support a finding that appellant made a knowing and voluntary waiver of the right to be present, either under Penal Code section 1043 or under the state and federal constitutions

Appellant instead encourages this Court to hold that the record must clearly and affirmatively demonstrate that that the waiver of presence was knowing and voluntary under the totality of the circumstances. (See *Howard, supra,* 1 Cal.4th at p. 1178.) In this case, in order to have found a knowing and voluntary relinquishment of the right to be present, the record must have demonstrated that the appellant knowingly chose to create the medical necessity for the purpose of effecting his absence from trial.

Since the record is devoid of information demonstrating this, the trial court erred in concluding that appellant knowingly and voluntarily waived his right to be present. Unlike *Rogers,* the record does not indicate that appellant was informed or otherwise knew that his incapacitation would be a likely result, and that appellant chose to ingest drugs anyway in order to delay or avoid

trial. Without an evidentiary hearing to support this conclusion, the trial court's finding of voluntary absence was error.

D. A Finding In Appellant's Favor Does Not Provide Defendants An Incentive To Delay or Manipulate Trial by Overdosing.

A finding in appellant's favor in this case does not provide an incentive for defendants to overdose as a tactic to delay trial. First, such a concern implies that most defendants do not value their right to be present at trial, an implication which cannot be lightly assumed by this Court given the rights secured to all defendants under the federal and state constitutions. (U.S. Const., amends. VI and XIV; Cal. Const., art. I, § 15.) This is particularly true in this case, where the appellant was likely going to testify on his own behalf, and where appellant was facing the possibility of a conviction for a serious felony strike offense.

Second, unlike cases concerning flight from the jurisdiction, this is not a case where the trial court has to be concerned about dissuading defendants from fleeing. (See *Crosby*, *supra*, 506 U.S. at p. 262; *People v. Vargas* (1975) 53 Cal.App.3d 516, 524.) Appellant's whereabouts were not unknown at any time during the proceedings. Indeed, the trial court had an officer at the scene. (RT 45.) In flight cases, a defendant is not only attempting to avoid trial, but is also attempting to avoid incarceration after trial, by getting away from the reach and the consequences of the law. (See, generally, *Crosby*, *supra*, 506 U.S. 255.) On the other hand, overdosing on drugs is incredibly dangerous, and common sense indicates that most defendants will not intentionally risk

death in order to merely *delay* trial. (See *United States v. Latham* (1st Cir. 1989) 874 F.2d 852, 858 ["It defies common sense to maintain that a sane defendant would attempt suicide to avoid a trial on drug charges."])

Finally, in cases like this, where it is not clear that an overdose was committed for the purpose of effecting the defendant's absence, the trial court is not without options. In this case, the appellant had access to drugs because he had previously been released on his own recognizance. (CT 6, RT 199.) The trial court would have been justified in remanding the appellant into custody or requiring bail, as the appellant was expected to abstain from controlled substances and to appear in court. (Pen. Code, §§ 1270 [release on own recognizance dependent upon a court finding that the release will reasonably assure the appearance of the defendant]; 1275 [release on bail dependent upon a court finding that the release will reasonably assure the appearance of the defendant].) In other cases, the court may issue a bench warrant (Pen. Code, § 978.5), or revoke bail. (Pen. Code, § 1275.) The prosecutor can bring separate charges for failing to appear (Pen. Code, § 1320), or being under the influence of drugs (Health & Saf. Code, §11550). Finally, in some cases, a simple brief continuance (Pen. Code, § 1050) may be sufficient to obtain the appellant's presence, if it will not prejudice the parties.

Requiring that it must be clearly and affirmatively established on the record that the appellant made a knowing and voluntary waiver of presence does not rob the trial court of its ability to function. The trial court has options when a defendant

fails to appear in court; assuming that the defendant has waived his basic constitutional right to be present at trial should not be the first option.

Because it was not clearly established in this case that the appellant made a knowing and voluntary waiver of his presence, either explicitly or implicitly, the conviction must be reversed.

E. The Summary Rejection of an Overnight Continuance to Permit Appellant to Exercise his Constitutional Right to be Present and to Testify Was Error.

If this Court finds that the appellant was voluntarily absent, then the trial court's refusal to grant a one-day continuance was an abuse of discretion, and violated appellant's due process rights.

"Section 1043[, subdivision](b)[] states that a defendant's voluntary absence 'shall not prevent' the trial from continuing, but it does not require it. Accordingly, the decision whether to continue with a trial in absentia under the statute or to declare a mistrial rests within the discretion of the trial court. [Citation.]" (*Espinoza, supra*, 1 Cal.5th at pp. 75-76.)

"'There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.'" (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118, quoting *Ungar v. Sarafite* (1964) 376 U.S. 575, 589.)

In deciding whether to grant a continuance, the trial judge must consider "the benefit which the moving party anticipates" and "also the likelihood that such benefit will result, the burden

on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion." (*People v. Panah* (2008) 35 Cal.4th 395, 423.)

Here, all factors weighed in favor of granting the appellant's request for a continuance, making the denial an abuse of discretion. (See *United States v. Beltran-Nunez* (5th Cir. 1983) 716 F.2d 287, 291 [if an inquiry reveals there is a reasonable probability that the absent defendant can be located shortly, and no argument has been made that the government's witnesses will be jeopardized, the trial court abuses its discretion by proceeding with the trial in defendant's absence]; *Latham, supra*, 874 F.2d at p. 857 [proceeding with the trial when the defendant is voluntarily absent "is within the discretion of the trial judge," to be utilized only in "extraordinary" circumstances].)

Here, the request was for a one-day continuance so that appellant could be seen by medical personnel. (RT 49.) The evidence before the trial court was that an officer believed appellant was under the influence of drugs, and appellant was "nodding out" and at times "nonresponsive." (RT 48.) Appellant went to the hospital, and was waiting to be seen by doctors at the time of the court's decision to proceed with trial without the appellant present. (RT 47.)

The benefit to the appellant of a brief continuance would have been substantial, and the failure to grant the continuance was prejudicial. As discussed above, a defendant's right to be present is "scarcely less important to the accused than the right of trial itself." (*Diaz*, *supra*, 223 U.S. at p. 455.) The United

States Supreme Court has signaled that the weight of the right to be present at trial is significant, and cannot be lightly waived. (*Stincer*, *supra*, 482 U.S. at p. 745.) As explained further below, appellant was prejudiced, as he could have testified on his own behalf, in addition to participating with his attorney in the trial, and confronting his accusers.

It was likely that appellant could attend the next day. The evidence was that appellant was still under the influence on the morning of July 6, 2017, as the result of ingesting controlled substances the night before. (RT 48.) There was no suggestion of any permanent illness, and the trial court believed appellant was not in a particularly serious condition. (RT 50.) Trial counsel did not request an open-ended continuance, but a specific one-day continuance. (RT 49.) And indeed, appellant did appear the next day. (RT 194.)

The trial court did not inquire whether an overnight or other brief continuance would prejudice the People; however, the record shows no evidence of prejudice to the parties. The prosecution stated on the morning of the appellant's absence that it had "plans to be out of town the next day that have been in place for some time now," but the prosecution did not state what those plans were or whether the plans would have been properly considered by the trial court. (RT 49.) Moreover, the prosecution was in attendance the next day in the morning and early afternoon to take the jury verdict. (RT 188.)

Additionally, the expectation of the parties and the court was that this was a one-day trial. (RT 17-18.) Indeed, trial began

at 10 a.m. and the jury began to deliberate at 3 p.m. the same day. (CT 28, 29.) There were no codefendants. The prosecution had two witnesses: the victim, a young man who lived in Sonora, California (RT 56), and a local Sonora City Police Officer (RT 61). The trial was held in superior court in Sonora, California. There was no evidence on the record suggesting that it would be a burden for the witnesses to wait one day to testify. Similarly, there was no indication on the record that the jurors could not convene one additional day. There is no reason on the record that the trial could not have taken place the morning of the July 7, 2017, and gone to the next weekday if necessary.

Finally, by granting the request for continuance and affording the jury the ability to assess the appellant at trial, the ends of substantial justice would have been furthered. The right to be present reflects the "'notion that a fair trial [can] take place only if the jurors me[e]t the defendant face-to-face and only if those testifying against the defendant [do] so in his presence.'" (*Fairey, supra,* 567 U.S. at pp. 926-927, quoting *Crosby*, *supra,* 506 U.S. at p. 259.) Courts have an "independent interest" in ensuring that criminal trials are fair and accurate, and this interest is "clearly implicated when continuing an ongoing trial in a defendant's absence will result in an empty defense table." (*Espinoza*, *supra*, 1 Cal.5th 61, 78.) In this case, the trial court had an interest to ensure defense's presence. For example, substantial justice would have been served if the jury had been able to compare the appellant to the person depicted on the surveillance video. Additionally, it would have been beneficial to

the jury to assess the appellant's credibility for themselves. The jury in this case had questions, including regarding the officer's use of a ruse in order to gain appellant's out-of-court statement. (CT 33-34.) The appellant could have testified about the circumstances leading to his statement to Officer Bowly. Whether or not the jury chose to believe appellant, substantial justice would have been served from permitting the jury to obtain more evidence about the alleged serious crime.

In direct contrast to this case, no abuse of discretion was found in *People v. Espinoza* (2016) 1 Cal.5th 61. (*Id.* at p. 76) There, this Court determined the defendant had a "history of delay tactics" (*id.* at p. 78), where the defendant had worked his way through seven defense counsel over nearly two and a half years, before deciding to proceed pro se. At trial, the defendant only minimally participated the first day of trial. "Defendant then disappeared without notice or explanation." (*Ibid.*) The trial court had no reason to believe that the defendant would return or that he would not further attempt to delay trial. Therefore, there was no likelihood that the benefit which the moving party anticipated would result. Moreover, the jury had been empaneled with the understanding that trial was anticipated to last two weeks. Delaying the trial further, without any knowledge of the defendant's plans or whereabouts, would have posed a risk of hardship to the jurors, inconvenience to the witnesses, and disruption to orderly court processes. (*Ibid.*)

None of these concerns were present here, where the trial court knew where the appellant was, where the appellant had

only been absent once before because of the flu, where the request was only for a one-day continuance, and where there was no evidence of hardship to the parties, the jurors or witnesses.

Given the inherent reasonableness of the one-day continuance request, the substantial rights of the appellant at stake, the lack of evidence of prejudice to the parties, and the benefit to the jury, the failure to grant the continuance was an abuse of discretion, violating appellant's due process rights.

II. THE TRIAL COURT'S ERRONEOUS DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS MUST BE REVERSED UNDER ANY STANDARD.

The court of appeal erred in finding that the decision to proceed to trial in the appellant's absence was harmless error. The trial court's complete denial of the appellant's right to be present at his entire trial was structural error, which should be reversed regardless of the prejudice shown. In the alternative, if this Court requires a demonstration of prejudice, the error was not harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 23 (*Chapman*) and also would require reversal under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Davis* (2005) 36 Cal.4th 510, 532.)

A. The Error Was Structural Error.

The court of appeal's holding in this case must be reversed, as the trial court's complete denial of the appellant's right to be present at his entire trial was a structural error.

1. This Court Should Consider Whether the Error Was Structural Error.

Appellant acknowledges that he only argued in the court of appeal that the trial court's error required reversal under

Chapman, supra, 386 U.S. 18, 23, or *Watson*, *supra,* 46 Cal.2d 818, and that he did not raise in the alternative that the trial court's decision was structural error. As a policy matter, the California Supreme Court does not "consider an issue that the petitioner failed to timely raise in the court of appeal." (Cal. Rules of Court, rule 8.500(c)(1).)

However this Court is empowered, upon review, to "decide any or all issues in the cause" and has decided issues raised for the first time where those issues were pure questions of law, not turning upon disputed facts, and were pertinent to a proper disposition of the cause, or involved matters of particular public importance. (See *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 901 fn. 5; *People v. Cross* (2015) 61 Cal.4th 164, 172.) This Court may also reach any issue that is fairly included in the issue raised in the petition for review. (Cal. Rules of Court, rules 8.516(b)(1) & 8.520(b)(3).)

The petition in this case fairly raises the question of the correct standard of prejudice to be applied. The correct standard of prejudice in this case is integral to the issue raised, is a significant issue of widespread importance, and should be reached so that this Court may provide guidance in this case and in others. (See, generally *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 662; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 6.)

Appellant therefore requests this Court to reach this issue in its review.

2. The Error Requires Reversal Regardless of a Showing of Prejudice.

"In rare instances involving 'fundamental structural defects' in a criminal proceeding (for example, the complete denial of the right to a jury, or to an impartial judge), it may be impossible, or beside the point, to evaluate the resulting harm by resort to the trial record, and a miscarriage of justice may arise regardless of the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 174 [internal citation removed].)

In *Arizona v. Fulminante* (1991) 499 U.S. 279 (*Fulminante*), the United States Supreme Court distinguished between "trial errors," which are subject to the general rule that a constitutional error does not require automatic reversal, and "structural" errors, which "defy analysis by harmless-error standards" and require reversal without regard to the strength of the evidence or other circumstances. (*Id*. at pp. 306-310; see *People v. Flood* (1998) 18 Cal.4th 470, 493.) *Fulminante* characterized trial errors as those that occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [the error] was harmless beyond a reasonable doubt." (*Fulminante, supra,* 499 U.S. at pp. 307-308.) Structural errors, on the other hand, are "structural defects in the constitution of the trial mechanism … affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Id*. at pp. 309-310.) The *Fulminante* court noted examples of trial errors, including erroneous jury instructions (*id*. at pp. 306-307), and also noted examples of structural errors, which include the

total deprivation of the right to counsel at trial, a biased judge, unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial. (*Id*. at pp. 309-310.) With regard to such structural errors, *Fulminante* explained: "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." (*Id*. at p. 310, internal quotations removed.)

Similarly, under the California constitution, some errors resulting in the miscarriage of justice may require reversal "notwithstanding the strength of the evidence contained in the record," because they operate to deny a criminal defendant the constitutionally required "orderly legal procedure…" (*People v. Lightsey* (2012) 54 Cal.4th 668, 699.) All such errors involve fundamental "structural defects" in the judicial proceedings, analogous to those to referred to in *Fulminante*, *supra*, 499 U.S. 279. (*Ibid.*; see also *People v. Alexander* (2010) 49 Cal.4th 846, 896.)

"Although the question whether a constitutional violation is structural or trial error is generally thought to be categorical, the harmless error status of certain constitutional violations is neither binary nor fixed. Certain errors can shift between being structural or subject to harmless error review depending on the nature and extent of the violation." (*People v. Reese* (2017) 2 Cal.5th 660, 669.) For example, the complete absence of counsel is structural error, but absence of counsel at a critical stage of

trial can be subject to harmless error review. (*Ibid.*) "So what matters in determining whether certain violations of law in the adjudicatory process are fully structural or subject to appropriate harmless error review is not only the fact an error occurred, but the nature and extent of the error. (*Ibid.*)

No case from this Court appears to address so complete a denial of the right to be present as the case at hand. This case presents one of those rare situations where the appellant was denied the complete right to be present for the entirety of the trial – opening argument, presentation of evidence, jury instructions, and closing arguments – and not merely one critical stage. (Compare *People v. Mendoza* (2016) 62 Cal.4th 856, 901 [absence, on the purported waiver by counsel, from testimony of two witnesses required review of prejudice under *Chapman v. California* (1967) 386 U.S. 18, 23]; with *People v. Blackburn* (2015) 61 Cal.4th 1113, 1117 [when a trial court errs in completely denying an mentally disordered defendant his statutory right to a jury trial, the error constitutes a miscarriage of justice and automatically requires reversal].)

As noted above and below, the right to be present at trial is "scarcely less important to the accused than the right of trial itself." (*Diaz*, *supra*, 223 U.S. at p. 455.) Thus in general, "if [the defendant] is absent [from trial], … a conviction will be set aside." (*Crosby*, *supra*, 506 U.S. at p. 259.) Only with a finding of the two exceptions, codified under Penal Code section 1043 [voluntary absence or disruption], should the conviction stand.

Here, where the error resulted in the complete deprivation of the fundamental right to be present – a right which encapsulates many rights basic to the defendant's right to a fair adversarial hearing – the error constitutes a structural defect in the constitution of the trial mechanism affecting the framework within which the trial proceeded. The appellant's absence meant he could not confront his accusers, cross-examine witnesses, play a part in the structure of his defense arguments, see his jurors, have the jurors see him, raise affirmative defenses, or testify. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. (See *Fulminante*, *supra*, 499 U.S. at p. 310.) The error operated to deny the appellant his constitutionally required orderly legal procedure. (*See Lightsey*, *supra*, 54 Cal.4th at p. 699.) Because of this, the only meaningful remedy is dismissal, regardless of a showing of prejudice.

The complete deprivation of the appellant's right to be present at trial should be considered a structural error, and the case should be reversed.

B. The Error Was Prejudicial Error.

In the alternative, "[u]nder the federal Constitution, error pertaining to a defendant's presence is evaluated under the harmless-beyond-a-reasonable-doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 23.)" (*People v. Cutting* (2019) 42 Cal.App.5th 344, 348, citing *People v. Davis* (2005) 36 Cal.4th 510, 532.) Error under Penal Code section 1043 is state law error, and therefore is reversible 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. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)' [Citations.]" (*Davis*, *supra*, 36 Cal.4th at pp. 532-533.)

Because the errors in this case denied appellant his constitutional rights, the error must be analyzed under *Chapman, supra,* 386 U.S. 18.

Under the *Chapman* harmless error standard, the error "may be deemed harmless only if [the court] can conclude beyond a reasonable doubt that the deprivation did not affect the outcome of the proceeding." (*Ibid.*) Under this standard, the burden is on the People, not the defendant, to demonstrate that the violation of the defendant's federal constitutional right was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24; *People v. Mower* (2002) 28 Cal.4th 457, 484 [*Chapman* standard "requires the People, in order to avoid reversal of the judgment, to 'prove beyond a reasonable doubt that the error … did not contribute to the verdict obtained'"]; *People v. Stritzinger* (1983) 34 Cal.3d 505, 520 ["The burden is on the beneficiary of the error 'either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment'"].)

Appellant was absent during the entirety of the presentation of argument and evidence to the jury. (CT 27-30.) The trial, including opening argument, testimony, closing arguments, and jury instructions, lasted less than the full day that appellant was absent. (CT 27-30.)

There are many ways that the deprivation of appellant's right to be present may have affected the outcome of the

proceeding. First, throughout the day that the appellant was absent, trial counsel left open the possibility that the appellant would testify, and counsel stated he intended to have appellant testify if appellant appeared. (RT 88, 92, 93, 95, 106, 126, 132.) Since appellant had no prior convictions with which the prosecution could impeach his testimony (see Supp. CT 7 [probation report]), and since the appellant was charged with a serious felony offense, it is likely appellant would have chosen to testify in his defense.

A reviewing court will only find denial of the right to testify harmless if the facts to which a defendant offered to testify would not have affected the verdict. (*People v. Allen* (2008) 44 Cal.4th 843, 872.) In this case, appellant's testimony could have been exculpatory.

Defense counsel made an offer of proof that appellant's mother would testify that appellant worked an 8:00 to 5:00 job, and that appellant was home at night; the trial court did not permit this testimony, as it did not go to the specific date in June 2017 when the crime was committed. (RT 14.) Appellant could have testified to the same evidence and to the specific date when the crime was committed.

Moreover, the evidence against the appellant could have been contradicted by appellant's direct testimony. For example, appellant could have explained the recorded conversation between appellant and Officer Bowly. As noted by defense counsel, appellant was 19 years old, with a learning disability, and was likely to say what officers want to hear. (RT 49, 167.)

The statements to Officer Bowly were ambiguous, and appellant did not directly admit to the crime. (See RT 71-72.) The officer admitted that appellant mumbled a lot and there were things the jury could not hear on the recording. (RT 80.) The officer could not recall, but the prosecutor conceded, that the appellant appeared confused on the recording. (RT 82, 169.) Moreover, when the officer crossed his arms, it covered the camera and the jury could not see the appellant's face on the recording. (RT 80, 84.)

Appellant's testimony could have explained or contradicted Officer Bowly's conclusions regarding the conversation, including whether appellant felt confused or pressured to tell the officer what the officer wanted to hear. Defense counsel noted in closing arguments that in the recorded conversation, the appellant never admits the crime, but attempts to appease an officer who continually interrupts him and uses a ruse to attempt to gain a confession. (RT 167.) The appellant remained "adamant" that he was not guilty even after the verdict. (See Supp. CT 8 [probation report].) Such adamancy may have convinced the jurors to accept defense counsel's argument. At least one juror was very concerned about the reliability of the recorded statement, and notes were sent to the trial court asking whether the appellant was properly *Mirandized,* whether he was entrapped into making the statement, and whether there was more to the video. (RT 33, 34, 36.) The Court of Appeal stated that the ambiguity of the appellant's statements was clear on the video, and that defense counsel argued to the jury that the statements were ambiguous.

(F076126.) However, "[i]ssues of credibility are for the jury to resolve. For this reason, it is only the most extraordinary of trials in which a denial of the defendant's right to testify can be said to be harmless beyond a reasonable doubt." (*Allen*, *supra*, 44 Cal.4th at p. 872 [internal quotations removed].) A jury could have found defense counsel's argument more compelling if it could have evaluated the credibility of the appellant on the stand.

Additionally, appellant could have stated when and where he obtained the hat that was comparable to the hat in the surveillance video. It was likely a mass-produced Raiders hat and did not conclusively tie appellant to the incident. Had appellant been afforded the opportunity to testify, he could potentially have explained that he obtained his hat well after the date of the charged burglary, or provided other exonerating details.

Second, although there was a surveillance video of the incident, the person on the video was not easily identified. (See RT 64.) It may have been exculpatory for the jury to compare the appellant sitting in front of them to the person on the surveillance video. Although the jury saw the appellant the day before at voir dire (CT 25), the jurors did not know that they would be asked to compare appellant's build to an indistinct person on a surveillance video. Such a viewing the day before could only have left an impression on the jurors of the appellant's features, and could not have resulted in a reliable comparison.

The People cannot carry their burden of showing that the appellant's absence was harmless beyond a reasonable doubt. It cannot be concluded beyond a reasonable doubt that the trial

court's determination to proceed in the appellant's absence, without the benefit of his person and his potentially exculpatory testimony, did not affect the outcome of the proceeding.

Moreover, reversal is still required even under the more lenient standard under *People v. Watson*, *supra*, 46 Cal.2d at p. 836. In this case, there exists a reasonable chance of a more favorable result, i.e., that one single juror would have harbored a reasonable doubt, but for the error. Where there exists "at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result…," the case must be remanded under *Watson*, *supra*, 46 Cal.2d 818. (*People v. Mower* (2002) 28 Cal.4th 457, 484.)

The jury did not find that this was an open and shut case. The jury deliberated for approximately six hours -- longer than the entire trial. (CT 29, RT 29-30 [jury retired at 3 p.m., and deliberated until after 4 p.m., assumedly until 5 p.m.]; CT 91 [jury deliberated from 8 a.m. until the verdict was reached at noon].) It is impossible to say that the appellant's presence and his testimony would not have swayed at least one juror.

"In short, remand is necessary to ensure proceedings that are just under the circumstances, namely, a hearing at which both the People and defendant may be present and advocate for their positions." (*Cutting*, *supra*, 42 Cal.App.5th at p. 348 [internal quotations removed].)

CONCLUSION

For the foregoing reasons, appellant respectfully requests that this Court reverse the judgment of the court of appeal.

First, the trial court erred in finding appellant was voluntarily absent, as there was no express or implied waiver of his right to be present. Moreover, this Court should find that it must be clearly and affirmatively demonstrated on the record that a defendant has knowingly and voluntarily waived his right to be present in order to find that a defendant was "voluntarily absent," including in cases where there is a finding that the absence was "self-induced." If this Court finds the appellant was voluntarily absent, the trial court's failure to grant a continuance denied appellant his due process rights.

Finally, the trial court's decision to proceed with trial in appellant's absence was prejudicial under any standard. Since it resulted in the complete deprivation of appellant's right to be present at trial, the error was structural, and the judgement should be reversed regardless of a finding of prejudice. But even under *Chapman* or *Watson*, the error was prejudicial, and the conviction must be reversed.

Dated: September 1, 2020

Respectfully submitted,

/s/Jacquelyn Larson
Jacquelyn Larson

CERTIFICATE OF APPELLATE COUNSEL PURSUANT TO RULE 8.204(C)(1) AND RULE 8.360(B) OF THE CALIFORNIA RULES OF COURT

I, Jacquelyn Larson, appointed counsel for appellant, certify pursuant to rule 8.204 of the California Rules of Court, that I prepared this Opening Brief on the Merits on behalf of my client, and that the word count for this brief is 13,975 words.

I certify that I prepared this document in Microsoft Word and that this is the word count generated for this document.

Dated: September 1, 2020 Respectfully submitted,

/s/Jacquelyn Larson
Jacquelyn Larson
Attorney for Appellant

Re: *The People v. Ramirez,* Case No. S262010

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I, *Sebastion Lowe*, declare as follows:

I am, and was at the time of the service mentioned in this declaration, over the age of 18 years and am not a party to this cause. My electronic service address is eservice@capcentral.org and my business address is 2150 River Plaza Dr., Ste. 300, Sacramento, CA 95833 in Sacramento County, California.

On **September 1, 2020**, I served the persons and/or entities listed below by the method checked. For those marked "Served Electronically," I transmitted a PDF version of **APPELLANT'S OPENING BRIEF ON THE MERITS** by TrueFiling electronic service or by e-mail to the e-mail service address(es) provided below. Transmission occurred at approximately **3:20 p.m.** For those marked "Served by Mail," I enclosed a copy of the document identified above in an envelope or envelopes, addressed as provided below, and placed the envelope(s) for collection and mailing on the date and at the place shown below, following the Central California Appellate Program's ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in sealed envelope(s) with postage fully prepaid.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **September 1, 2020**, at Sacramento, California.

/s/ *Sebastion Lowe*
Sebastion Lowe

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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