In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **MARCOS ANTONIO RAMIREZ,** Defendant and Appellant.	Case No. S262010

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

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INTRODUCTION

On the night between the first and second day of defendant Marcos Ramirez's burglary trial, Ramirez ingested illegal drugs and stayed out late The following morning, emergency medical personnel responded to Ramirez's house after his mother had called to report a possible overdose. Ramirez, who was conscious and coherently answering questions asked by the medical personnel, refused treatment. It was only after Ramirez had been informed that he was expected to be in court for trial that he decided he wanted to go to the hospital instead. After Ramirez was seen by a doctor and released, he chose to go home instead of going to court, even though he knew his continued absence would mean he would not be able to testify in his own defense. The trial court found Ramirez had voluntarily absented himself within the meaning of Penal Code section 1043, subdivision (b)(2), and proceeded with the trial in his absence.

Ramirez now contends that the trial court prejudicially erred in proceeding with the trial in his absence because there was insufficient evidence of an express or implied waiver of his right to be present. Specifically, Ramirez now asks this Court to hold a "self-induced" absence cannot be a valid waiver of a defendant's federal constitutional right to presence unless it was done with the specific intent to effect his absence. The United States Supreme Court has never held that the federal Constitution requires such a finding, and neither should this Court.

Over a century ago, the United States Supreme Court adopted a three-part test to determine when a felony defendant's

absence from trial amounts to an implied waiver or forfeiture of his right to presence under the federal Constitution. Since its adoption, that standard has been consistently applied and remains substantially unchanged. Under the standard articulated by the United States Supreme Court, the trial court's finding that Ramirez was voluntarily absent was supported by substantial evidence because nothing in the record showed Ramirez had a sound reason for being absent. Further, the trial court did not abuse its discretion by proceeding with the trial in Ramirez's absence. Assuming, arguendo, there was error, it was harmless by both federal and state standards, because Ramirez's testimony would not have materially altered the state of the evidence.

STATEMENT OF THE CASE

In September 2016, the Tuolumne County District Attorney charged Ramirez with first degree residential burglary (Pen. Code[1], § 459). (CT 9-10.) Ramirez pled not guilty, and a jury trial was set. (CT 13.)

A. Ramirez Attempts to Gain Entry into the Victim's Home Through a Window

The following is a summary of the evidence presented at trial, and is taken from the opinion of the Court of Appeal below.

[1] All further undesignated statutory references are to the Penal Code.

In June 2016, Sonora resident Daniel D. noticed a bent window screen on his house. (Opinion 2.) Daniel[2] checked the video from his infrared security cameras and saw that sometime in the early morning hours, a man put his hand behind the screen, tried to push the window up, and then sneaked off. (*Ibid.*) Daniel, who did not recognize the man, made a copy of the video and took it to the Sonora Police Department. (*Ibid.*) The video was shown to the jury. (*Ibid.*)

After viewing the video twice, Officer John Bowly believed the man in the video was Ramirez. (Opn. 2.) This was based on Officer Bowly's prior contacts with Ramirez, who lived within walking distance of Daniel's house. (Opn. 2-3.)

Several days later, Officer Bowly made contact with Ramirez, who was wearing an Oakland Raiders hat that was consistent with the hat worn by the man in the security video. (Opn. 3.) An audio-video recording of the encounter was captured by Officer Bowly's body camera, and was played for the jury. (Opn. 3, fn. 5.) When Officer Bowly initially confronted Ramirez about the incident at Daniel's house, Ramirez denied any involvement. (Opn. 3.) Officer Bowly told Ramirez that he had identified him from the security video and that his thumbprint was on the window. (*Ibid.*) Officer Bowly asked Ramirez if he would have gone inside the house if the window had opened, and Ramirez said he was "probably just looking." (*Ibid.*) Officer Bowly asked Ramirez if he had seen something inside the house

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[2] Consistent with the Court of Appeal's opinion, Daniel will be referred to by his first name. No disrespect is intended.

that he wanted, and Ramirez said no. (*Ibid.*) Several times during the encounter, Ramirez admitted he had "just been looking," but he denied he had planned to enter the house. (*Ibid.*) Officer Bowly asked Ramirez if he was going to pay for the damage to Daniel's screen, and Ramirez said he would, if that is what "he" wanted. (*Ibid.*) Officer Bowly arrested Ramirez for burglary. (Opn. 4.) Officer Bowly then searched Ramirez and found a cell phone with a flashlight feature that was consistent with what was depicted in the security video. (*Ibid.*)

B. Ramirez Fails to Appear on the Original Trial Date

Trial was originally set for April 2017. (CT 18.) Ramirez failed to appear. (CT 19.) Defense counsel represented to the court that Ramirez's mother had called his office and informed him that Ramirez was ill and that she would be taking him to see a doctor as soon as he was able to get out of bed. (*Ibid.*) The trial court issued a bench warrant but stayed execution of the warrant until the following day. (*Ibid.*) The trial court also vacated the jury trial and ordered Ramirez to appear the following day. (*Ibid.*) The next day, Ramirez appeared in court and trial was reset for July 2017. (CT 20.)

C. Ramirez Appears for the First Day of the Rescheduled Trial but Fails to Appear on the Second Day

Ramirez appeared on the first day of trial and was present during jury selection, empaneling, and preliminary instruction. (CT 25-26.) Following preliminary instruction, the trial court released the jurors for the day and ordered that they return at

8:30 a.m. the following morning. (CT 26; RT 38.) Counsel were informed that trial would resume the following morning at 8:30 a.m. (RT 17, 38), and Ramirez was released on his previously signed promise to appear (CT 26).

On the morning of the second day of trial, Ramirez failed to appear. (CT 27; RT 43.) The court called the case at 9:30 a.m. and recapped the discussion that the court and counsel had had in chambers regarding Ramirez's absence. (RT 43-49.) The court stated that there had been a report that Ramirez had injected or ingested heroin and methamphetamine, resulting in an overdose, and that medical personnel had been sent to his home. (RT 43.) Ramirez's mother notified defense counsel of Ramirez's condition and defense counsel emailed the prosecutor to inform her of the situation. (RT 43-44.) The court summarized the situation:

> My understanding was that – again, that emergency personnel were at the scene and examined Mr. Ramirez who refused medical treatment.
>
> It's my understanding that Officer Norris, who was present at the scene, had observed the defendant at the time medical treatment was refused. The Court had Officer Bowly contact Officer Norris to explain the situation, and I had Officer Norris go to – I asked Officer Norris to go to the defendant's home and advise him that we were expecting him to show up for trial. And the first response from the defendant was that he would be here – he will be here for trial. And I advised him 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. Mr. Price, his counsel, then asked if he was going to go to the hospital, and the defendant then claimed he wanted to go to the hospital.

> And at that point I don't know if he's gone to the hospital or not.

(RT 44-45.)

At this point, defense counsel received a call Ramirez's mother. (RT 45.) After speaking to Ramirez's mother, defense counsel informed the court that Ramirez was currently in the hospital emergency room waiting to see a doctor. (RT 45.) Acknowledging this, the court continued,

> [T]his is the second time that Mr. Ramirez has been sick on the day of trial. The first time, which I believe was back in April when this case was set for trial, on the day of trial he requested his mother report to the Court that he was sick with the flu. Court continued his trial and issued a bench warrant and ordered him to appear the next day. The next day his mother appeared, not the defendant, and she had a note from a doctor that said he was seen at the Sonora Regional Medical Center.

(RT 45-46.)[3]

The court then gave counsel an opportunity to place any additional facts on the record. (RT 46.) The prosecutor stated that she had received a text message earlier that morning from Officer Bowly informing her that the Sonora Police Department had responded to Ramirez's house at 7:00 a.m. in response to his mother's report of a potential heroin overdose. (RT 46.) When officers arrived, medical personnel were already at the scene. (RT 46.) Ramirez's mother said Ramirez had gone out the night

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[3] The court indicated that Ramirez was not present at this hearing, but the minute order from the date of the hearing indicates that Ramirez was present. (CT 20.)

before and did not return home until 2:00 a.m., and she believed he had ingested the drugs while he was out. [4] (RT 46.) The prosecutor had received another message at 7:24 a.m. informing her that Ramirez had declined medical attention and refused to be transported to the hospital by the ambulance. (RT 46.) The prosecutor further noted,

> When we met with the judge and the phone call was placed and Officer Norris responded back out to the house, it was at 9:00 – approximately 9:25 [a.m.] 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.

(RT 47.) The prosecutor stated that, according to Officer Norris, appellant coherently answered questions from medical personnel, he could walk unassisted, and he was conscious. (RT 47.)

Defense counsel stated that Officer Norris had indicated that Ramirez appeared to be under the influence of drugs. (RT 48.) Ramirez's mother told defense counsel that Ramirez was "nodding out and being conscious and nonresponsive" and that she was going to try to get him in the car so she could take him to the hospital. (RT 48.) Defense counsel claimed that Ramirez, who was 19 years old, had learning disabilities, and argued that the statements Ramirez had made on the phone should not be taken at face value. (RT 48.) Defense counsel further suggested

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[4] It is not clear from the record to whom Ramirez's mother told this information.

that, if Ramirez was under the influence of drugs, he would likely say anything to a police officer who was at his house. (RT 48-49.) Defense counsel then asked the court to continue the trial to 8:30 a.m. the following day or to declare a mistrial. (RT 49.)

D. The Trial Court Finds That Ramirez Is Voluntarily Absent, Denies His Continuance Motion, and Determines That Trial Will Proceed in His Absence

Presented with the available information, the trial court ruled that trial would proceed in Ramirez's absence, explaining:

> Penal Code Section 1043, Subdivision B, Subdivision 2, clearly provides or 1043 (a) and B provide, the defendant in a noncapital felony case has a right to be present during his trial, and these rights are guaranteed by the Constitution and the Constitution should be protected when appropriate. However, there's an exception to 1043, that is 1043 (b) (2), which provides that the absence of the defendant in a criminal felony case shouldn't prevent the conducting of the trial – continuing with the trial that's already been commenced, the record will reflect Mr. Ramirez was present during jury selection process and when the jury was sworn. And so, again, his absence should not necessarily prevent the continuance of the trial all the way through verdict if the defendant is voluntarily absent from the trial.
>
> So the issue before the Court is whether or not Mr. Ramirez is voluntarily absent from the trial. And clearly the obvious cases – some case law supports this where the defendant escapes and absents himself from the trial or when there is disruptive behavior, and the defendant is warned he will be removed from the courtroom because of disruptive behavior.
>
> But I think it's clear that in any case, criminal or civil, the law does not allow him to take advantage of his own wrongdoing to delay the process of the court.

> Mr. Ramirez voluntarily ingested controlled substances to the extent that it required emergency response by police and emergency medical care, emergency medical personnel. Apparently, he was not as seriously – in such a serious condition that he cannot refuse treatment and which in fact he did. And it was only when he was asked if he was going to the hospital after I advised him to be in court in 15 minutes, that Officer Norris will give him a ride, that he decides to go to the hospital.
>
> This is the second time on the day of trial or the first time on the day of trial before it commenced that he – his mother, again, reported that he had a medical condition, specifically the flu, I believe, and he could not be present; he was vomiting and could not be present. It wasn't until the next day she came in with a doctor's note that he was in fact seen at the hospital. We have no idea of the nature of his condition or what he was seen for or what the diagnosis was, just that he went to the hospital the next day.
>
> In this case the trial commenced. We get a call in the morning of the trial or the Court was advised the morning of the trial that he has engaged in some conduct voluntarily which made it – prevented him from attending the trial. Given these circumstances, I think Mr. Ramirez voluntarily engaged in conduct that resulted in him being absent from his own trial, and I am going to proceed with this trial in his absence, and Mr. Price's request for a mistrial is denied, request for a continuance is denied, but I think there's an adequate record here to preserve any issues that might arise on appeal.

(RT 49-52.)

Pursuant to the court's request, defense counsel called Ramirez's mother to inform her that the trial was going to proceed in Ramirez's absence. (RT 53-54.) Proceedings resumed in front of the jury at 9:55 a.m. (CT 28.) The court informed the

jury that the trial would be proceeding in Ramirez's absence, and instructed the jury "not to consider the reason for his absence or the fact that he was absent for a part of the trial at all in your deliberations in this case." (RT 54.)

E. The Trial Court Gives Ramirez Another Opportunity to Come to Court and Testify, but Ramirez Goes Home Instead

After the People rested, the court and counsel discussed, at sidebar, how to proceed. (RT 87-88.) Defense counsel told the court that he wanted to "move things along," so he suggested that they break, go over jury instructions, and then return around 1:15 or 1:30 p.m. (RT 87-88.) The court inquired if defense counsel had asked Ramirez's mother to come to court to testify. (RT 88.) Defense counsel responded that he had told Ramirez's mother to bring Ramirez to court once they were done at the hospital. (RT 88.) Counsel explained that he had told her that Ramirez would be testifying around 1:15 p.m. and that she had said that she would text him with an update. (RT 88.) The court dismissed the jurors for lunch at 11:16 p.m. and ordered them to return at 1:15 p.m. (RT 89-90.)

At the conclusion of the jury instruction conference, defense counsel informed the court that he had been texting with Ramirez's mother and that he had told her they were breaking for lunch and would be returning at 1:30 p.m. (RT 106.) Defense counsel had asked her if Ramirez would be able to return to court at that time to testify. (RT 106.) Ramirez's mother had replied, "Not sure. Possibly, we can definitely try." (RT 106.) Defense counsel told the court he would call Ramirez's mother during the

lunch hour and provide the court with an update as soon as he heard back. (RT 106.)

After the lunch recess, defense counsel renewed his request for a mistrial because of Ramirez's absence. (RT 124.) The trial court denied the request. (RT 124.) The court asked defense counsel for an update on Ramirez, and defense counsel stated that he was no longer at the hospital and had gone home. (RT 131-132.) The court noted that it was now 1:56 p.m., Ramirez was no longer at the hospital, and the court had given him the opportunity to appear. (RT 132.) Defense counsel responded, "[Ramirez's] [m]om says he's in no state to come to court and take the witness stand, whatever that means." (RT 132.) The defense rested without calling any witnesses. (RT 134.)

Following closing argument and final instruction, the court sent the jury back to start deliberations at 2:55 p.m. (CT 29; RT 181.) The jury did not reach a verdict before the end of the day, so the jury was released and ordered to appear the next day at 8:00 a.m. (CT 30.)

F. Ramirez Is Present in Court the Following Day When the Jury Returns a Guilty Verdict for Attempted First Degree Burglary

The following day, Ramirez appeared in court and the jury resumed deliberations at 8:00 a.m. (CT 91.) Ramirez offered no evidence to the court regarding his absence the previous day, nor did he move to reopen his case. (See RT 188-194.) At noon, the jury returned a verdict of not guilty of first degree residential burglary, but guilty of the lesser included offense of attempted first degree residential burglary. (CT 91-92; RT 194-195.) The

People moved to have Ramirez remanded into custody pending sentencing, and the court granted the motion. (RT 198-200.) The court indicated its concern that Ramirez would not appear for sentencing if not remanded into custody because he chose not to appear the day before even though he was at home and could have come to court. (RT 200.) The court suspended imposition of sentence and placed Ramirez on probation for five years. (CT 94-96; RT 209-214.)

G. The Court of Appeal Affirms the Judgment, Holding That the Trial Court's Finding of Voluntary Absence and Decision to Proceed with Trial in Ramirez's Absence Did Not Amount to Prejudicial Error

The Fifth District Court of Appeal affirmed, concluding that substantial evidence supported the trial court's finding that Ramirez was voluntarily absent and that the trial court did not abuse its discretion in deciding to proceed in his absence. (Opn. 12.) The Court of Appeal specifically held that the record supported the trial court's implied findings that Ramirez was both aware of the process taking place and knew he had a right and obligation to be present. (*Ibid.*) The Court of Appeal further found that the record adequately supported the trial court's express finding that Ramirez was voluntarily absent from trial (*ibid.*) because Ramirez "engaged in conduct designed to alter his physical and mental states, despite knowing he was required to be in court in a matter of hours" (Opn. 15). There was no evidence that Ramirez was unable to control the amount or timing of his drug ingestion, and he presented no good reason for his actions. (*Ibid.*)

As to the trial court's decision to proceed with the trial in Ramirez's absence, the Court of Appeal determined the trial court had not abused its discretion by denying the defense's request for a mistrial. (Opn. 16.) The Court of Appeal noted that the trial court's decision to deny the defense's request for a one-day continuance raised a closer question. (*Ibid.*) However, the Court of Appeal declined to reach the merits of that issue. (*Ibid.*) Considering the evidence that supported Ramirez's guilt and the evidence that Ramirez could have provided if he had been present during the trial, the Court of Appeal concluded that any error in proceeding with trial in Ramirez's absence was harmless beyond a reasonable doubt and, thus, necessarily harmless under the less stringent state-law standard. (Opn. 16-18.)

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THAT RAMIREZ HAD VOLUNTARILY ABSENTED HIMSELF FROM THE SECOND DAY OF TRIAL AND PROPERLY PROCEEDED WITH THE TRIAL IN HIS ABSENCE

For over a century, the prevailing rule in noncapital cases, as articulated by the United States Supreme Court, has been that, if a defendant voluntarily absents himself from trial after it has begun in his presence, he has effectively waived his right to presence, and the trial may proceed in his absence. (*Diaz v. United States* (1912) 223 U.S. 442, 455.) California adopted this rule with the codification of section 1043, subdivision (b)(2). A defendant's absence operates as a knowing, intelligent, and voluntary waiver of his right to be present if he is (1) aware of the process taking place, (2) aware of his right and obligation to be

present, and (3) he has no sound reason for remaining away. (*Taylor v. United States* (1973) 414 U.S. 17, 20.) This is all that the constitution requires.

Ramirez now asks this Court to hold that a "self-induced" absence can be an implied waiver of a defendant's right to presence only if the defendant's deliberate actions were done with the specific intent of effecting his absence from trial. (OBM 30.) Ramirez claims that such an "interpretation must be applied to Penal Code section 1043's definition of 'voluntary absence' in order to avoid constitutional defects." (*Ibid.*) However, the standard adopted by the Supreme Court in *Taylor* includes no such requirement. Moreover, Ramirez's attempt to distinguish his case from those in which the defendant fled without explanation is unpersuasive. As is his attempt to equate a knowing a voluntary waiver under section 977 with voluntary absence under section 1043. Ramirez's focus on the voluntariness of his drug ingestion—as opposed to the voluntariness of his absence—is misplaced. Also misplaced is his reliance on the "self-induced" absence line of cases, which interpret a prior version of section 1043 that was materially different from the current version of the statute and which was decided before *Taylor*. For these reasons, the People ask this Court to reject Ramirez's argument and hold that the three-part test for voluntariness approved in *Taylor* applies to all determinations made under section 1043, subdivision (b)(2).

A. A Defendant's Right to Presence Is Not Absolute and Can Be Waived by the Defendant's Voluntary Absence from Trial; Voluntariness Is Determined by the Three-Factor Test in *Taylor*

A criminal defendant in a felony case has a right under the federal and state Constitutions to be present at his or her trial. (*People v. Espinoza* (2016) 1 Cal.5th 61, 72; *People v. Concepcion* (2008) 45 Cal.4th 77, 81-82.) This right is also established by California statutes. (§§ 977, 1043.) However, this right is not absolute, and it may be expressly or impliedly waived. (*Espinoza*, at p. 72; *Concepcion*, at p. 82.)

> As relevant here, the [United States Supreme Court] has stated that "where 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." (*Diaz v. United States* (1912) 223 U.S. 442, 455[].)

(*Espinoza*, *supra*, 1 Cal.5th at p. 72, italics omitted.) California adopted this rule with the codification of section 1043, subdivision (b)(2), which states:

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

(§ 1043, subd. (b)(2); *Espinoza*, at p. 72.) Section 1043, subdivision (b)(2) is the state counterpart to rule 43 of the Federal Rules of Criminal Procedure ("rule 43").[5] (*Espinoza*, at p. 72.) The United States Supreme Court has determined rule 43 is constitutional. (*Taylor*, *supra*, 414 U.S. at p. 18; *Espinoza*, at p. 72.)

Three years after California amended section 1043, subdivision (b)(2), to read as it presently does, the United States Supreme Court decided *Taylor*, *supra*, 414 U.S. 17. In *Taylor*, the Court was tasked with determining whether a defendant's voluntary absence operated as an effective waiver of his presence, that is, "an intentional relinquishment or abandonment of a known right or privilege." (*Id.* at pp. 18-19.) The defendant argued that such a finding could not operate as an effective waiver unless the record 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 confront personally the witnesses against him." (*Id.* at p. 19.) The Supreme Court disagreed, relying on rule 43 and *Diaz*, and held

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[5] Rule 43 reads, in relevant part:

(c) Waiving Continued Presence.

(1) *In General.* A defendant who was initially present at trial . . . 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

that no explicit warning of the consequences of a defendant's voluntary absence is required before such an absence can operate as an effective waiver of a defendant's right to presence. (*Id.* at p. 20.)

The Supreme Court further held that rule 43 was constitutional and reflected the longstanding rule previously recognized by the Court in *Diaz*: that a defendant's voluntary absence "'operates as a waiver of his right to be present and leaves the court free to proceed with the trial.'" (*Taylor*, *supra*, 414 U.S. at p. 18-19, quoting *Diaz*, *supra*, 223 U.S. at p. 455.) Focusing on the voluntary nature of the defendant's absence, the Court then cited with approval "the controlling rule" as articulated in *Cureton v. United States* (D.C. Cir. 1968) 396 F.2d 671, 676:

> If a defendant at liberty remains away during his trial the court may proceed provided it is clearly established that his absence 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.

(*Taylor*, *supra*, 414 U.S. at p. 19, fn. 3, internal quotation marks omitted.)

This Court recently applied the same voluntary absence test in *Espinoza*. The defendant in *Espinoza*, who was representing himself, failed to appear after trial had commenced. (*Espinoza*, *supra*, 1 Cal.5th at p. 69.) The court and prosecutor attempted to contact the defendant but were unsuccessful. (*Ibid.*) The court ordered a body attachment for the defendant and continued the trial until the following morning. (*Ibid.*) The following morning,

the defendant did not appear, and no one had been able to contact or locate him. (*Id*. at p. 70.) The trial court made a finding under section 1043 that the defendant was voluntarily absent and continued with the trial, up to and including the verdict, without the defendant or defense counsel. (*Ibid*.)

The defendant appealed his conviction, challenging, among other things, the trial court's decision to try him in absentia without appointing counsel. (*Espinoza*, *supra*, 1 Cal.5th at p. 71.) The Court of Appeal reversed, finding that the "defendant did not absent himself on the record and that nothing in the record showed he knew or understood that the proceedings would continue without him." (*Ibid*.) The appellate court thus concluded that the record did not support the inference that the defendant knowingly waived his rights to confront witnesses, present a defense, present argument, and to assert his privilege against self-incrimination. (*Ibid*.)

This Court disagreed and reversed. Applying *Taylor*'s three-part test, this Court held that the record supported the trial court's finding that the defendant was "aware of the processes taking place," knew of "his right and obligation to be present," and had "no sound reason for remaining away." (*Espinoza*, *supra*, 1 Cal.5th at p. 74, internal quotation marks omitted.) As such, this Court concluded that the defendant had forfeited or "implicitly waived his right to be present," and that "[n]o more was constitutionally required." (*Ibid*, internal quotation marks omitted.)

B. Substantial Evidence Supported the Trial Court's Finding That Ramirez Had No Sound Reason for His Absence

Ramirez does not appear to dispute that he was aware that the trial was taking place and that he knew he had a right and obligation to be there. Nor could he, because the record clearly demonstrates that he was aware that the trial was taking place and that he was informed that the trial was going to proceed in his absence. (RT 53-54.) Thus, the only question is whether the record supported the trial court's finding that Ramirez had no sound reason for not being present and was therefore voluntarily absent. (*Espinoza*, *supra*, 1 Cal.5th at p. 74, quoting *Taylor*, *supra*, 414 U.S. at p. 19, fn. 3.) As will be fully explained below, the answer to that question is yes.

A trial court must look at the "totality of the facts" to determine whether a defendant's absence is voluntary. (*Espinoza*, *supra*, 1 Cal.5th at p. 72, internal quotation marks omitted.) This includes not only information presented to the trial court at the time it made its initial finding of voluntary absence but also any subsequent information that either affirms or refutes the court's initial decision. (*People v. Connelly* (1973) 36 Cal.App.3d 379, 385.) "The role of an appellate court in reviewing a finding of voluntary absence is a limited one. Review is restricted to determining whether the finding is supported by substantial evidence. [Citation.]" (*Espinoza*, at p. 74.)[6] Under

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[6] Ramirez argues that the applicable standard of review is de novo. (OBM 19.) He is incorrect. Ramirez cites to cases that (continued…)

the substantial evidence standard of review, this Court determines if there is any substantial evidence, whether contradicted or uncontradicted, to support the trial court's findings. (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681 ["'When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination'"], original italics.) "Substantial evidence" is evidence that is "reasonable, credible, and of solid value." (*People v. Ghobrial* (2018) 5 Cal.5th 250, 277.)

Here, in finding Ramirez voluntarily absent, the trial court necessarily found that he had no sound reason for not being present. In doing so, the trial court not only relied on his drug ingestion but also the surrounding circumstances. (RT 50-52.) Before making any determination about Ramirez's absence, the trial court attempted to gather as much information as possible about the situation. (RT 43-49.) Ramirez had reportedly gone out the night before and did not return home until 2:00 a.m. (RT 46.) While he was out, Ramirez allegedly ingested illegal drugs.

(…continued)
discuss a physically present defendant's express waiver of his right to be present from certain proceedings under section 977. Section 1043, on the other hand, evaluates whether a physically absent defendant has forfeited his right to be present by engaging in courtroom misconduct preventing the continuation of trial in his presence or by voluntarily absenting himself for no sound reason.

(RT 43, 46.) The next morning, Ramirez's mother suspected that he had overdosed and called 911. (RT 44, 46.) Emergency personnel responded to Ramirez's house around 7:00 a.m. (RT 46.) They examined Ramirez, and he refused to be transported to the hospital for medical treatment. (RT 46.) Officer Norris, who was present when Ramirez was examined by emergency personnel, stated that, while Ramirez had appeared to be under the influence, he had coherently answered questions from medical personnel, had walked unassisted, and had been conscious. (RT 47.) Even though Ramirez refused medical treatment around 7:24 a.m., he failed to appear in court at 8:30 a.m. for the start of the second day of trial. (RT 46-47.)

When Officer Norris went back to Ramirez's house around 9:25 a.m.—two hours after Ramirez had refused medical treatment—to inform him that he needed to be in court for his trial, Ramirez initially responded that he would go to court. (RT 47.) The court gave Ramirez 15 minutes to get to the courthouse and warned him that, if he did not appear, the trial would proceed without him. (*Ibid.*) However, after defense counsel had asked Ramirez if he was going to the hospital, Ramirez changed course and stated that he wanted to go to the hospital. (*Ibid.*) Ramirez's mother later informed defense counsel that she had taken Ramirez to the emergency room and that he was waiting to be seen by a doctor. (RT 45.)

The totality of the facts supports the trial court's implicit finding that Ramirez had no sound reason for being absent and, therefore, its explicit finding that Ramirez was voluntarily

absent. While Ramirez may have intentionally ingested illegal drugs in an amount sufficient to prompt his mother to call the paramedics, his condition was not serious enough to require medical intervention. This was evidenced by Ramirez refusing to be treated, while coherently responding to questions by emergency medical personnel (RT 46-47); agreeing, initially, to be in court within 15 minutes (RT 44); delaying two-and-a-half hours after medical personnel first responded before going to the hospital (RT 46-47); and, once at the hospital, left waiting in the emergency room instead of being immediately attended to (RT 45). Thus, the voluntariness of Ramirez's absence was demonstrated by his refusal to come to court when he was seemingly well enough to do so and had been informed that, if he did not appear, the trial would continue in his absence.

Whether Ramirez voluntarily ingested drugs is just one factor to consider in determining whether his absence from court was voluntary. The trial court properly considered Ramirez's voluntary ingestion of drugs in its analysis of the totality of the facts supporting the voluntary nature of Ramirez's absence. (RT 49-52.) Yet, it expressly found that Ramirez's condition was not so serious that he was unable to come to court, explaining, "Apparently, he was not as seriously – in such a serious condition that he cannot refuse treatment and which he in fact did. And it was only when he was asked if he was going to the hospital after I advised him to be in court in 15 minutes, that Officer Norris will give him a ride, that he decides to go the hospital." (RT 50-51.)

The court also properly considered Ramirez's subsequent conduct in its analysis, specifically that he chose not to appear on the second day of trial. The trial court took an extended lunch recess to give Ramirez the opportunity to come to court to testify (RT 87-88), but, even after he had been seen at the hospital and released, he chose to go home instead of coming to court (RT 131-132). Although Ramirez's mother told defense counsel that Ramirez was "in no state to come to court and take the witness stand," but not even defense counsel knew what that meant. (RT 132.) Moreover, when Ramirez appeared in court the following morning, he did not provide any further explanation for his absence. (RT 195; see *People v. Connolly*, *supra*, 36 Cal.App.3d at p. 385 [court's initial determination that defendant is voluntarily absent "is not conclusive in that, upon the subsequent appearance of the defendant, additional information may be presented which either affirms the initial decision or the court or demands that defendant be given a new trial"].) Nor did the defense ask the court to reconsider its ruling and allow the defense to reopen and call Ramirez to testify. (RT 195; see *Concepcion*, *supra*, 45 Cal.4th at p. 84 [holding it is defendant's burden to move for reconsideration and present evidence to undermine the trial court's finding of voluntary absence].) Finally, Ramirez did not file a motion for a new trial, supporting the inference that there was no evidence he could have presented that would have undermined the trial court's finding of voluntary absence. The record thus demonstrates that Ramirez had no

sound reason for not being present and, as a result, supports the trial court's finding of voluntary absence.

People v. Davis (5th Cir. 1995) 61 F.3d 291 (*Davis*) came to a similar conclusion on similar facts. In *Davis*, defendant McBride attended the first week of trial but failed to appear at the start of the second week. (*Id.* at p. 300.) McBride's counsel informed the court that McBride had checked herself into the emergency room on Sunday night, but he had been unable to contact her physician. (*Ibid.*) The government confirmed that McBride had checked into the hospital on Sunday after allegedly ingesting 50 antidepressant pills. (*Ibid.*) The government asked the court to find McBride voluntarily absent under rule 43. (*Ibid.*)

Following a brief recess, McBride's counsel told the court that he had talked with McBride's physician who had informed him that McBride would receive a routine mental evaluation on Tuesday and be released on Wednesday. (*Davis*, *supra*, 61 F.3d at p. 300.) The court found that McBride's voluntary ingestion of the antidepressants constituted an implied waiver of her right to presence under rule 43 and proceeded with the trial in her absence. (*Ibid.*) However, out of an abundance of caution, the court heard evidence relating only to McBride's codefendants for the remainder of the day, and then granted a one-day continuance to give McBride the opportunity to appear. (*Ibid.*) The court strongly advised McBride's counsel to inform her of her right to be present and that trial would proceed in her absence if she did not appear in court on Wednesday. (*Id.* at pp. 300-301.)

After McBride failed to appear on Wednesday, the court contacted her physician who said that McBride was still hospitalized and was making vague complaints that he had been unable to verify. (*Davis*, *supra*, 61 F.3d at p. 301.) The court reaffirmed its finding of voluntary absence and its decision to proceed with trial. (*Ibid*.) Following her conviction, McBride filed a motion for new trial but did not present any new evidence regarding her absence. (*Ibid*.) The court denied the motion, relying on it prior reasons for proceeding with trial in McBride's absence. (*Ibid*.)

The Fifth Circuit Court of Appeals affirmed. (*Davis*, *supra*, 61 F.3d at p. 303.) The Court of Appeals noted that hospital records had indicated McBride had been "drowsy but conscious" when she had checked into the hospital, "showed no indicia of a serious drug overdose," had taken the pills because she was concerned about her trial, was not suicidal, and had stated she would return to court. (*Id*. at p. 302.) The court further noted, "Despite several opportunities to do so, McBride presented no evidence that she was physically or mentally incapable of attending the trial." (*Id*. at p. 303.) Thus, the Fifth Circuit concluded the district court did not err in finding McBride voluntarily absent. (*Ibid*.)

Here, as in *Davis*, Ramirez presented no evidence that he was physically or mentally incapable of attending trial. Indeed, the evidence supported the opposite conclusion. Like *Davis*, the evidence here showed that Ramirez was conscious and could coherently answer questions and walk unassisted, showed no

indicia of a serious drug overdose, and initially confirmed that he would return to court. (RT 47-48, 50-51.) Further, although the district court in *Davis* relied, at least in part, on the voluntariness of McBride's alleged drug ingestion in finding her voluntarily absent, the appellate court affirmed on the separate ground that the evidence did not establish that McBride was incapable of attending trial despite ingesting antidepressants. (See *Davis*, *supra*, 61 F.3d at pp. 300, 302-303.) The same result should obtain here.

Two other federal circuit courts and several courts in other states have considered whether the voluntary ingestion of drugs resulting in a defendant's physical absence from trial supported a finding of voluntary absence. The majority of these courts have found that it does. (See *United States v. Crites* (8th Cir. 1999) 176 F.3d 1096, 1097-1098 [defendant's attempted suicide via drug overdose, which left him unconscious and hospitalized, constituted voluntary conduct that rendered him voluntarily absent]; *State v. Finnegan* (Minn.S.Ct. 2010) 784 N.W.2d 243, 251-252 [defendant's absence caused by drug overdose was "voluntary and unjustifiable"]; *Yancey v. State* (Ga.Ct.App.1995) 464 S.E.2d 245, 245-246 [holding defendant's voluntary overdose on Tylenol, which caused him to be hospitalized, supported finding of voluntary absence]; *Bottom v. State* (Tex.Ct.App. 1993) 860 S.W.2d 266, 267 [defendant's absence from trial due to deliberate ingestion of large quantities of aspirin and arthritis medication was voluntary].)

In *United States v. Latham* (1st Cir. 1989) 874 F.2d 852, 858, the First Circuit Court of Appeals held that voluntary ingestion of a large amount of cocaine in an apparent suicide attempt is not "ipso facto" a voluntary absence. Instead, the court considered the defendant's voluntary overdose on cocaine along with the circumstance that he was in the hospital with only a 25 percent chance of survival. (*Ibid.*) The voluntary nature of Latham's ingestion of drugs was simply part of the court's analysis in determining whether Latham had a sound reason for failing to appear: he was incapacitated in the hospital. In contrast, here, there was no evidence at all to suggest Ramirez's life was threatened or that he was seriously ill to such an extent that he could not have been in court. His presence at the hospital was a voluntary choice made more than two hours after he had consciously refused medical treatment at his home and he was sent home after being seen by a physician at the hospital. Finally, the trial court did not find Ramirez's ingestion of drugs to be "ipso facto" a voluntary absence but, instead, made a decision based on the totality of the facts and circumstances.

C. Ramirez Provides No Persuasive Reason Why the Test for Voluntary Absence Adopted in *Taylor* and Applied by *Espinoza* Should Not Apply to Him

1. Ramirez's Attempt to Distinguish His Case from Those in Which a Defendant Fled Without Explanation Is Unpersuasive

Ramirez contends that his absence from trial is distinguishable from the majority of voluntary absence cases in

which the defendant fled without explanation because, "the trial court knew exactly where [Ramirez] was at all times . . . and knew that [Ramirez] did not wish to waive his right to attend trial." (OBM 29.) This contention is without merit.

First, the trial court's knowledge of Ramirez's whereabouts actually assisted the court in making a more informed decision about the nature of Ramirez's absence. Because a trial court is required to look to the totality of the facts in determining whether a defendant's absence is voluntary under section 1043 (*Espinoza*, *supra*, 1 Cal.5th at p. 72), then it would certainly be better to have more information about the defendant's absence rather than less. The court's awareness of the defendant's whereabouts is only one factor in the analysis. If the reason for a defendant's absence is not a sound one, he cannot turn an otherwise voluntary absence into an involuntary absence by simply informing the court of his whereabouts. (See *Davis*, *supra*, 61 F.3d at pp. 302-303 [court knew defendant's whereabouts when it found defendant voluntarily absent]; see also *Concepcion*, *supra*, 45 Cal.4th 77, 84 [defendant who escapes from jail and is later apprehended considered voluntarily absent until he can reasonably be returned to court].)

Second, the record does not support Ramirez's contention that the trial court knew he did not want to waive his right to presence. Ramirez never explicitly told the court that he did not want to waive his right to presence, and, when he returned to court the following day, his actions—failing to provide any explanation, offer a doctor's note, or request to reopen the case so

that he could testify on his own behalf—demonstrated otherwise. In addition, Ramirez did not file a motion for new trial on these grounds. Even assuming, arguendo, that Ramirez had told the court that he did not want to waive his right to presence, his actions told a different story. Thus, Ramirez's conduct in failing to appear when the record demonstrated no sound reason for his absence amounted to a voluntary absence, as discussed *ante*.

2. Ramirez's Reliance on Physically Present Defendants Who Have Expressly Waived Their Right to Presence Under Section 977 or Waived Constitutional Rights in Other Contexts Is Misplaced

Ramirez urges this Court to find that the definition of "voluntary absence" under section 1043, subdivision (b)(2), must be read to include a requirement that a defendant "knowingly and voluntarily waived his right to be present." (OBM 30.) To support this argument, he cites to cases involving violations of the requirement for express waivers by physically present defendants of their right to presence under section 977 as well as cases involving waivers of the right to a jury trial, right to counsel, and right against self-incrimination. (See OBM 19-20, 22-23, 30-31, 38, 50-51, 53, citing various cases.) Ramirez, however, fails to recognize the material difference between the express or implied waiver of a constitutional right by a by a physically present defendant, and the finding of voluntary absence under section 1043.

It is the absence of the defendant that renders a trial court's finding of voluntary absence under section 1043, subdivision (b)(2), distinguishable from a physically present defendant's

waiver of constitutional rights. To illustrate this point, under section 977,[7] a physically present defendant personally and expressly waives his presence by signing a written waiver. In contrast, a defendant under section 1043 is more appropriately described as having *forfeited* his right to presence by engaging in consistent misconduct during trial that prevents the trial from continuing in his presence (§ 1043, subd. (b)(1))[8] or by failing to appear (§ 1043, subd. (b)(2)). In a section 1043, subdivision (b)(1), situation, the trial court determines that the defendant's persistent courtroom misconduct resulted in a forfeiture, or an implied waiver, of his right to be present during trial. Similarly, in a section 1043, subdivision (b)(2) situation, if the trial court determines that the defendant had no sound reason for his failure to appear, the absence is voluntary. In both instances, it

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[7] Section 977, subdivision (b)(1) reads, in part, "Except as provided in subdivision (c), in all cases in which a felony is charged, the accused shall be personally present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, as provided in paragraph (2)."

[8] Section 1043, subdivision (b)(1), states that a trial may proceed in the defendant's absence in "[a]ny 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 do disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom."

is the judge, and not the defendant, who determines whether the right has been forfeited.

Although courts have sometimes used the term "implied waiver" when discussing a defendant's voluntary absence under section 1043, this phrase is consistent only with absences under subdivision (b)(1), where the trial court determines that the physically present defendant has impliedly waived his presence by his persistent in-court misconduct during trial. More importantly, this Court has recognized, "Over the years, cases have used the word [waiver] loosely to describe two related, but distinct concepts: (1) losing a right by failing to assert it, more precisely called forfeiture; and (2) intentionally relinquishing a known right." (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.) Forfeiture more appropriately describes voluntary absences under section 1043, subdivision (b)(2), because the defendant's non-appearance is more akin to a failure to assert a right than an intentional relinquishment of a right. (See, e.g., *In re Stier* (2007) 152 Cal.App.4th 63, 74-75 [Attorney General's failure to appear and present objections found to be a forfeiture, not a waiver].)

This distinction is important because a forfeiture, by its very nature, need not be knowing and voluntary in the same sense that an express or implied waiver must. (See e.g., *People v. Williams* (1999) 21 Cal.4th 335, 340 [distinguishing between "forfeiture" an "*knowing* waiver"], italics added.) Ramirez appears to incorrectly conflate voluntary absences under section 1043, subdivision (b)(2), with an express waiver of the right to presence under section 977, which must be knowing and

voluntary, and with implied waivers, or forfeiture of, the right to be present under section 1043, subdivision (b)(1). However, a voluntary absence under section 1043, subdivision (b)(2), is entirely different because it concerns a defendant who is not physically present in court, and, by virtue of his absence, does not have the chance, in the court's presence, to make an express or implied waiver. This distinction is highlighted by section 1043's express language that it "shall not limit the right of a defendant to waive his right to be present in accordance with Section 977," without reference "waiver" in the voluntary absence context. (§ 1043, subd. (d), italics added.) The distinction is further emphasized by the application of two different standards of review in evaluating alleged violations of the right to presence under the two statutes. (Compare *Espinoza*, *supra*, 1 Cal.5th at p. 74 [finding of voluntary absence under section 1043 reviewed under substantial evidence standard] with *People v. Waidla* (2000) 22 Cal.4th 690, 741 [trial court's exclusion of defendant in violation of section 977 reviewed de novo].) The absence of any mention of "waiver" in section 1043—except in reference to a section 977 waiver—and the differing standards of review reflect the distinct factual situations addressed by sections 977 and 1043, subdivision (b)(1)—where the defendant is physically present—versus those addressed by section 1043, subdivision (b)(2)—where the defendant is physically absent. Similarly, a physically present defendant's waiver of his right to presence under section 977 is comparable to a physically present defendant's waiver of other constitutional rights, such as the right to jury trial, the

right to counsel, and the right against self-incrimination. Yet, a physically absent defendant's failure to appear in court after trial has commenced is defined by the voluntary absence standard of section 1043, subdivision (b)(2). Thus, Ramirez's attempt to use waiver cases to equate a voluntary absence under section 1043, subdivision (b)(2), with a knowing, intelligent, and voluntary waiver of other constitutional rights by a physically present defendant is misplaced and unpersuasive.

3. The "Self-Induced" Absence Cases Are Inapposite

Ramirez also attempts to distinguish this case from those in which a defendant's "self-induced" absence was found to be voluntary. (OBM 31-34, citing *People v. Rogers* (1957) 150 Cal.App.2d 403 (*Rogers*) and *People v. Guillory* (1960) 178 Cal.App.2d 854 (*Guillory*).) Ramirez's reliance on those cases is misplaced. The "self-induced" absence cases cited by Ramirez are irrelevant to the issues before this Court because they interpreted a prior and noticeably distinct version of section 1043 and were decided before *Taylor*.

Initially, the term "self-induced" is somewhat of a misnomer, in that all voluntary absences, even those in which the defendant flees, are self-induced, because the defendant necessarily chooses not to appear. (See Merriam-Webster <https://www.merriam-webster.com/dictionary/self-induced> [as of Nov. 3, 2020] [Defining "self-induced" as "induced by oneself or itself[;] brought on or brought about by oneself or itself"].) Thus, labeling an absence "self-induced" is not a helpful or meaningful way of distinguishing one type of voluntary absence from another. Nor

is it necessary to make such a distinction, because, as argued *ante*, the same *Taylor* test for voluntariness applies whenever a defendant is physically absent after trial has commenced. If a defendant who fled did so for some reason other than specifically to absent himself from trial, *Taylor* still would require an inquiry into the totality of the facts in the record to determine whether the defendant's failure to appear was supported by a sound reason for staying away.

In any event, *Rogers* and *Guillory* are irrelevant to the issue of voluntariness under section 1043, subdivision (b)(2). The version of section 1043 in effect at the time of the trials in *Rogers* and *Guillory* read as follows:

> The defendant must be personally present at the trial; provided, that . . . . [i]f the defendant in a felony case fails to appear at any time during the course of the trial and before the jury has retired for its deliberations or the case has been finally submitted to the judge, and after the exercise of reasonable diligence his presence cannot be procured, *the court shall declare a mistrial* and the cause may be again tried.

(*Rogers*, *supra*, 150 Cal.App.2d at p. 411, internal quotation marks omitted, italics added.)

The current version of section 1043, subdivision (b) was not added until 1970. (*People v. White* (1971) 18 Cal.App.3d 44, 49, fn. 3.) The prior version of section 1043 is materially different from the current version in that the current version explicitly provides a trial court with the option to proceed with the trial in a defendant's absence, whereas the prior version required that a mistrial be declared. As such, neither *Rogers* nor *Guillory* addressed the question of what constitutes substantial evidence

of voluntary absence where mistrial is not the only option before the court. (*Guillory*, *supra*, 178 Cal.App.2d at p. 862 [concluding the "defendant had a fair and considerate trial"]; *Rogers*, *supra*, 150 Cal.App.2d at p. 415 [holding "the trial court did not commit prejudicial error in refusing a further continuance].) Furthermore, both *Rogers* and *Guillory* were decided before the Supreme Court issued its opinion in *Taylor*. Thus, any discussion of voluntary absence in *Rogers* and *Guillory* did not consider the meaning of voluntary absence under the current version of section 1043, subdivision (b)(2), as explained by the three-part test for voluntariness adopted by the Supreme Court in *Taylor*.

4. Ramirez's Focus on the Voluntariness of His Drug Ingestion Is Misplaced

Lastly, Ramirez's emphasis on the voluntariness of his drug ingestion is misplaced. The question here is not whether the drug ingestion itself was voluntary but whether the resulting absence was voluntary. (See *Davis*, *supra*, 61 F.3d at pp. 300, 302-303 [affirming finding of voluntary absence because defendant presented no evidence she was physically or mentally incapable of attending trial, despite district court's consideration of whether defendant's drug ingestion was voluntary].) Whether a defendant's *absence* is voluntary is answered by applying the three-part test from *Taylor*. The test, also adopted by this Court in *Espinoza*, *supra* 1 Cal.5th at p. 74, necessarily focuses on the present——i.e., when the defendant is to be in court—in deciding whether the totality of the facts demonstrate the defendant was aware of the proceedings taking place, was aware of his right to be present, and had no sound reason for remaining away.

The heart of this case concerns the third part of that test, which asks whether the defendant had a sound reason for not appearing for trial and not whether the defendant had a sound reason for one or more of the decisions he made that resulted in the absence at the time of trial. Thus, "voluntary" and "voluntarily," as used in section 1043 and rule 43, respectively, refer to the voluntariness of the absence and not the voluntariness of the circumstances leading to the absence. Whether a defendant was acting voluntarily prior to his absence in court, if known by the court, may be relevant as one factor to be considered in applying the *Taylor* test. But, if relevant at all to the "no sound reason for remaining away" it is but one fact to consider in deciding whether a defendant had a sound reason for not being in court when called to appear. The appropriate focus is on the defendant's condition when he did not appear for trial and not what his intentions were when he acted prior to when his trial was to continue.

D. The Trial Court's Decision to Proceed with the Trial in Ramirez's Absence Was Not an Abuse of Discretion

A finding of voluntary absence under section 1043 permits but does not require the court to proceed with the trial in the defendant's absence. (§ 1043, subd. (b)(2); *Espinoza*, *supra*, 1 Cal.5th at p. 75 [voluntary absence "shall not prevent" the trial from continuing].) "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." (*Espinoza*, at p. 75.) An abuse of discretion occurs when the "ruling in question 'falls

outside the bounds of reason' under the applicable law and relevant facts." (*People v. Williams* (1998) 17 Cal.4th 148, 162.)

In *Espinoza*, this Court recognized that the inquiry under section 1043, subdivision (b)(2), does not end with a finding of voluntary absence. (*Espinoza*, *supra*, 1 Cal.5th at p. 75.) The trial court must still decide whether to proceed with the trial in the defendant's absence. (*Ibid*.) This Court has recognized the disruptive nature of delays in trial proceedings. (*Concepcion*, *supra*, 45 Cal.4th at p. 83.)

> "By the time the oath is administered to the jurors selected in a criminal case, significant resources (both fiscal and human) have been tapped. A courtroom and its personnel have been set aside for the trial, precluding their use for the trial of any other case. Prospective jurors have been summoned, at great cost and inconvenience to many of them. The prosecutor and defense counsel have arranged their schedules accordingly and may have had to continue other cases they are handling. Subpoenaed witnesses have taken the steps necessary to ensure that they are available to testify. The court and counsel may have invested time, energy, and resources to prepare for and address motions *in limine*. During voir dire, prospective jurors have been subjected to personal, probing questions. And, if another matter had to be reset because the criminal trial made the courtroom and its personnel unavailable to try the other case, the administration of justice has been affected, and other parties have been inconvenienced, often at great personal expense."

(*Id*. at pp. 83-84, quoting *People v. Granderson* (1998) 67 Cal.App.4th 703, 708.)

This Court in *Espinoza* concluded that it was reasonable for the trial court to consider that "[Espinoza's] failure to appear was a continuation of his efforts to manipulate the court and delay his

criminal trial." (*Espinoza*, *supra*, 1 Cal.5th at p. 77.) Here, the record established that, despite having ingested drugs and staying out until 2:00 a.m., Ramirez was physically and mentally capable of refusing medical treatment. (RT 46-47.) Two-and-a-half hours later, he initially told an officer willing to transport him that he would come to court and then, after speaking to his counsel, changed his mind and went to the hospital instead. (RT 46.) He waited at the hospital several hours before seeing a doctor (RT 47 [around 9:30 a.m., Ramirez decides to go to the hospital], 131-132 [at 2:00 p.m., defense counsel informs court that Ramirez was released from the hospital and went home], supporting an inference that he was not in need of immediate medical attention. After being seen by a doctor, he went home instead of coming to court. (RT 131-132.) All of Ramirez's actions objectively demonstrated an intent to frustrate the trial process and weighed in favor of proceeding with the trial in his absence. At the very least, appellant's actions reflected a flagrant disregard for the court proceedings. (See *Connolly*, *supra*, 36 Cal.App.3d at p. 387 [describing defendant's conduct as "an example of flagrant disregard of the duty to appear in court" in finding him voluntarily absent].)

Another factor the trial court can consider in deciding whether to proceed with trial is the current stage of the trial proceedings. (*Espinoza*, *supra*, 1 Cal.5th at p. 78.) In *Espinoza*, the jury had been selected and sworn, the prosecution's first witness had testified, and the jury was told the trial would last no more than two weeks. (*Ibid.*) Under these circumstances, this

Court concluded that the trial court acted within its discretion in deciding to proceed with the trial in the defendant's absence. (*Id.* at p. 79.) Similarly here, the jurors had been selected and sworn. They had also made the effort to show up to court, unlike Ramirez, on the morning of the second day of trial ready to proceed. The witnesses had been subpoenaed and were prepared to testify that day. The court and counsel had already discussed pretrial motions, and were prepared to proceed with opening statements and the presentation of evidence. Thus, this factor also weighed in favor of proceeding with the trial in Ramirez's absence.

Moreover, defense counsel was unable to provide any assurances that Ramirez would appear the following day or at any date certain. He was not even aware of the specifics of Ramirez's condition, as evidenced by his statement to the court, "whatever that means," in relation to Ramirez's mother saying Ramirez was in no condition to come to court. Indeed, as the trial court noted (RT 51), Ramirez had failed to appear at an earlier set trial date and had just demonstrated a willful disregard for the trial process by engaging in conduct that was, at best, ambivalent in securing his presence at trial. Even the trial court itself expressed its concern that, based on Ramirez's conduct the day before, he would not appear for sentencing if he was not remanded into custody. (RT 200.) And, as more fully explained in Argument II below, any assistance Ramirez could have provided to his defense by testifying was minimal.

Considering Ramirez's actions evidencing an intentional attempt to frustrate the trial process, the potential disruption a delay would have on the jurors, witnesses, court, and counsel, and the lack of any assurance that Ramirez would actually appear the following day, the trial court's decision to proceed with the trial was well within the bounds of reason.[9]

II. ASSUMING, ARGUENDO, THE TRIAL COURT ERRED IN FINDING RAMIREZ VOLUNTARILY ABSENT OR IN PROCEEDING WITH THE TRIAL IN HIS ABSENCE, ANY ERROR WAS HARMLESS

Ramirez argues here for the first time that the trial court's decision to proceed with the trial in his absence was structural error requiring reversal without a showing of prejudice. (OBM 48-53.) Alternatively, he argues that the alleged error was prejudicial under both federal and state standards. (OBM 53-58.) Because Ramirez did not raise the issue of structural error in the Court of Appeal or in his petition for review, this Court should not consider that argument now. Furthermore, the alleged error in this case is not one that falls within the very narrow category of structural error. Nor was the alleged error prejudicial under the federal or state standard for harmless error.

[9] If this Court finds that the trial court's decision to proceed with the trial in Ramirez's absence was a proper exercise of discretion, then the court's denial of the one-day continuance was necessarily proper as well.

A. This Court Should Not Consider Ramirez's Newly-Raised Structural Error Claim; the Erroneous Denial of the Right to Presence Is Not Structural Error

Initially, this Court should not consider Ramirez's argument that the alleged error in this case was structural, because he failed to raise it in the Court of Appeal or in his petition for review. As a policy matter, this Court normally will not consider an issue that the petitioner did not raise in the Court of Appeal. (Cal. Rules of Court, rule 8.500(c)(1); see *In re J.G.* (2019) 6 Cal.5th 867, 878, fn. 3 [declining to consider argument not raised in the Court of Appeal].) Not only did Ramirez fail to raise the issue of structural error in the Court of Appeal, he specifically petitioned this Court to grant review on the following issue: "Was the violation of petitioner's constitutional right to be present for trial prejudicial error which required reversal under both the *Watson* and *Chapman* standards?" (OBM 8.) Thus, the question before this Court is not whether the alleged error was structural, but whether it was prejudicial under both *Watson*[10] and *Chapman*[11].

In any event, the erroneous denial of the right to presence does not constitute structural error. As this Court has recognized:

> The high court has never suggested a defendant's improper absence from any critical stage of the proceedings constitutes structural error requiring reversal without regard to prejudice. On the contrary,

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[10] *People v. Watson* (1956) 46 Cal.2d 818.

[11] *Chapman v. California* (1967) 386 U.S. 18.

> it has listed such constitutional error as belonging to the broad class of errors that may be harmless. [Citations.]

(*People v. Mendoza* (2016) 62 Cal.4th 856, 901.)

Moreover, "[b]y their very nature, structural errors render a trial fundamentally unfair or an unreliable determinant of a defendant's guilt or innocence." (*People v. Reese* (2017) 2 Cal.5th 660, 668.) In finding rule 43 constitutional and adopting the three-part approach in *Taylor*, the United States Supreme Court has necessarily determined that a defendant's absence from trial, whether in whole or in part, does not render a trial fundamentally unfair. The California Legislature impliedly agreed by amending section 1043 to allow for voluntary absences rather than automatic mistrial. Thus, Ramirez's argument that his case should be treated differently because he was not present for "the entirety of the trial" does not hold water. (OBM 53.)

Instead, this Court has held that "[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. Davis* (2005) 36 Cal.4th 510, 532.) Additionally, error under section 1043 "is state law error only, 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.)" (*People v. Davis*, *supra*, 36 Cal.4th at pp. 532-533, internal quotation marks omitted.)

B. Any Error in Proceeding with the Trial in Ramirez's Absence Was Harmless under Both State and Federal Standards

Ramirez's absence during the second day of trial was harmless because his presence would not have materially contributed to his defense. The perpetrator's identity was the main issue in this case. Defense counsel could have called Ramirez's mother to testify that Ramirez was not the person in the surveillance video, but he chose not to. Additionally, jurors were able to see Ramirez in person on the first day of trial and compare him to the individual depicted in the surveillance video. Defense counsel acknowledged as much in his closing argument. (RT 164 ["[F]ortunately everyone got to see [Ramirez] here Wednesday morning. You got to see him in person. You also got to see him on the interview with the police officer. You know what he looks like"].) Moreover, it does not appear that being able to observe appellant in court on the second day of trial would have made any difference, because the surveillance video was grainy and never showed the perpetrator's full face. (Opn. 17, fn. 16.) Thus, it appears that the jury's conclusion that appellant was the person in the surveillance video was based more on the perpetrator's unique hat matching the hat that Ramirez was later seen wearing than on the perpetrator's facial features. The surveillance video evidence spoke for itself and could not have been discredited by appellant's testimony in the event he was present and testified on his own behalf.

With regard to Ramirez's statements to Officer Bowly, Ramirez may have tried to explain his statements but he could

not have denied making them because the entire conversation was recorded by Officer Bowly's body camera. The jurors viewed the body camera footage, "which was of good quality" (Opn. 17), and could adequately assess Ramirez's statements in the context of the questions asked. Defense counsel emphasized this point to the jury during closing argument. (RT 166 [urging the jury to watch the body camera video at least twice in order to analyze Ramirez's statements in context with his body language].) In the context of all of the evidence, the jury could have reasonably interpreted Ramirez's statements to Officer Bowly as implied admissions.

Finally, the jury was instructed not to consider the reason for appellant's absence at all in their deliberations. (RT 54.) The jury is presumed to have understood and followed this instruction. (*People v. Prince* (2007) 40 Cal.4th 1179, 1295; see also *Weeks v. Angelone* (2000) 528 U.S. 225, 234.)

Accordingly, Ramirez's absence from trial did not affect the outcome, and any federal Constitutional error was harmless beyond a reasonable doubt. (See *People v. Davis*, *supra*, 36 Cal.4th at pp. 533-534 [defendant's absence harmless under *Chapman* where his presence would not have assisted his defense].) As for any state law error under section 1043, "because the *Watson* standard is less demanding than the harmless-beyond-a-reasonable-doubt standard" (*People v. Cahill* (1993) 5 Cal.4th 478, 510), "[i]t follows that it is not reasonably probable that a result more favorable to [Ramirez] would have been

reached had he been present" (*Davis*, *supra*, 36 Cal.4th at p. 534, internal quotation marks omitted).

CONCLUSION

The People respectfully request that the judgment be affirmed.

Dated: November 30, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWERING BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 11,387 words.

Dated: November 30, 2020

XAVIER BECERRA
Attorney General of California

/s/ Amanda D. Cary
AMANDA D. CARY
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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Ramirez**
No.: **S262010**

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 collecting and processing electronic and physical correspondence. 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. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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(via e-service only)

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on November 30, 2020, at Fresno, California.

Jacquelyn Bennett	***/s/ Jacquelyn Bennett***
Declarant	Signature
Wendy Garber	***/s/ Wendy Garber***
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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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.

11/30/2020
Date

/s/Jacquelyn Bennett
Signature

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