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 REPLY BRIEF ON THE MERITS

CENTRAL CALIFORNIA APPELLATE PROGRAM

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ARGUMENT

Respondent asks this Court to apply the substantial evidence test to find that substantial evidence supported the trial court's finding of a voluntary absence in this case. Despite decades of case law, respondent's answering brief asks this Court to treat a voluntary absence not as a waiver, but rather as a forfeiture, without a requirement that the waiver is demonstrated to be knowing and voluntary. This distinction is without any legal basis, and drastically undermines the right to be present at trial, a right which has been called "scarcely less important to the accused than the right of trial itself." (*Diaz v. United States* (1912) 223 U.S. 442, 455 (*Diaz*).) Respondent asks this Court to give a waiver of the right to be present less protection than a waiver of other constitutional rights, not only in the standard of review to be applied, and the burden of proof to be shown, but also in the legal standard to be applied.

Appellant maintains that the proper standard for review of a waiver of presence is de novo. Additionally, it must be shown,

by clear and convincing evidence, that an absence was a knowing and voluntary waiver of presence. Since appellant's choice to go to the hospital cannot be shown to be a knowing and voluntary intentional relinquishment of the right to be present, appellant maintains that the trial court's finding of a voluntary absence was error. Appellant also contends that the error in this case was structural error, but in any case not harmless where the main issue at trial was identity and appellant could have testified on his own behalf. Appellant encourages this Court not to take the legal shortcuts offered by respondent.

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

Appellant will not reiterate the decades of case law which establish that the right to be present at trial is a constitutional right, ensconced in the Sixth and Fourteenth Amendments of the federal constitution and article I, section 15 of the state constitution. (*Opening Brief*, pp. 19-22, citing *Faretta v. California* (1975) 422 U.S. 806, 818; *People v. Cunningham* (2015) 61 Cal.4th 609, 633; see also *Illinois v. Allen* (1970) 397 U.S. 337, 338; *People v. Davis* (2005) 36 Cal.4th 510, 532.)

However, appellant will reiterate that all of the major United States Supreme Court cases addressing voluntary absence have properly framed it as a waiver of the constitutional right to be present. (*Opening Brief*, pp. 25-28, citing *Diaz* (1912) 223 U.S. 442, 455; *Crosby v. United States* (1993) 506 U.S. 255, 259 (*Crosby*); *Taylor v. United States* (1973) 414 U.S. 17 (*Taylor*).) The major cases from this Court have done the same. (*Opening Brief*, pp. 26, 28, citing *People v. Concepcion* (2004) 45 Cal.4th 77,

80 (*Concepcion*); *People v. Espinoza* (2016) 1 Cal.5th 61 (*Espinoza*).)

A. The Standard of Review Should Be De Novo.

First, respondent's brief argues that the standard of review for waivers generally does not apply to voluntary absences under Penal Code[1] section 1043. Respondent argues that a finding of voluntary absence should be reviewed under the "substantial evidence" test. (*Answer Brief,* p. 27-28, citing *Espinoza, supra,* 1 Cal.5th at p. 74.) However, appellant maintains that the correct standard of review is de novo. (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1201-1202 (*Gutierrez*).)

A deferential substantial evidence standard is applied to a trial court's conclusions regarding "'basic, primary, or historical facts: facts "in the sense of recital of external events and the credibility of their narrators . . . ."'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 402, quoting *Thompson v. Keohane* (1995) 516 U.S. 99, 110.) Some issues are "so fact-intensive and so dependent on first-hand observations made in open court" that the trial court is better positioned to decide the issue. (*People v. Cromer* (2001) 24 Cal.4th 889, 902.) To the extent that these outside events are disputed, the trial court's resolution of disputed factual issues, often by determining the credibility of witnesses, is reviewed deferentially on appeal under the substantial evidence standard. (*Ibid.*) Historically, when the issue of voluntary absence is in the context of a defendant who has fled the jurisdiction, this was

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[1] All further statutory references will be to the Penal Code unless otherwise indicated.

largely a fact-based inquiry: whether the defendant was, in fact, missing and what caused the absence. (*Taylor, supra,* 414 U.S. 17; *Espinoza, supra,* 1 Cal.5th 61; *People v. Connolly* (1973) 36 Cal.App.3d 379, 384-385 [under section 1043, subdivision (b)(2), "[a] crucial question must always be, 'Why is the defendant absent?'"])

But whether an absence effects a waiver of presence is a question that asks the Court to apply historical facts to the law of waiver. (*People v. Waidla* (2000) 22 Cal.4th 690, 741; *Gutierrez*, *supra*, 29 Cal.4th at p. 1202.) After a trial court made has findings regarding the historical facts, it is no better situated than an appellate court to make the predominantly *legal* determination whether those facts amount to a legally valid waiver. The voluntariness of a waiver is a question of law which should be reviewed de novo. (*Gutierrez*, *supra*, 29 Cal.4th at pp. 1201-1202 [de novo standard to determine whether defendant was voluntarily absent under section 1043, subdivision (b)(2)]; *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]; *People v. Williams* (2010) 49 Cal. 4th 405, 425 [de novo standard to determine voluntariness of waiver of *Miranda* rights]; *People v. Cole* (2004) 33 Cal.4th 1158, 1230 [de novo standard to review exclusion of a criminal defendant from trial proceedings under section 977 "insofar as the trial court's decision entails a measurement of the facts against the law"].) To the extent that *Espinoza, supra,* 1

Cal.5th 61, applied the "substantial evidence" standard to a measurement of the facts against the law in determining whether an absence was a voluntary waiver, it should be overruled, for the reasons stated above.

Respondent attempts to draw a line between an express waiver of the right to be present under section 977, and an implied waiver of the right to be present under section 1043, calling the latter a forfeiture. (*Answer Brief*, p. 27, n. 6.) Appellant both disagrees with this distinction, and disagrees that this distinction would be relevant to the correct standard of review. The question is whether the trial court or the appellate court is in a better position to determine whether an absence is a voluntary waiver of the right to be present. (*People v. Cromer*, *supra*, 24 Cal.4th at p. 902.) While deference should be given to the trial court on historical and factual conflicts, the appellate court must independently make the legal determination whether those facts amount to a valid waiver under the de novo standard.

B. The Record Does Not Clearly and Affirmatively Demonstrate Appellant's Absence Was a Knowing and Voluntary Waiver Of his Fundamental Constitutional Right to be Present at his Trial.

1. A Voluntary Absence Should Be Clearly Demonstrated to Be a Knowing And Voluntary Waiver of Presence.

Respondent takes issue with appellant's assertion that 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. (*Answer Brief*, pp. 39-41; *Opening Brief*, pp. 30-31.)

Respondent points to the language in *Taylor, supra,* 414 U.S. 17, that the court may proceed with trial "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." (*Id.* at p. 19, n.3, emphasis added.)

First, it is not clear that *Taylor* should be used as the definitive yardstick for voluntariness in cases involving a voluntary absence. (See *Answer Brief,* p. 42 [terming the rule the "*Taylor* test for voluntariness"].) In *Taylor,* "no issue of the voluntariness of [defendant's] disappearance was ever raised." (*Taylor, supra,* 414 U.S. at p. 20.) The sole issue in *Taylor* was whether the trial court was required to give appellant a warning that trial would continue in his absence before the trial could find a *knowing* waiver. (*Ibid.*) Therefore, the standard for the voluntariness of an absence is not directly addressed by *Taylor*. However, this Court must give, at a minimum, the same constitutional protections as those given in *Taylor*, including requiring the waiver to be clearly established. (*Id.* at p. 19 n.3.)[2]

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[2] On occasion, the Court has interpreted the state constitution's due process clause to be more protective than its federal counterpart. (*People v. Ramos* (1984) 37 Cal.3d 136, 152; see generally *Raven v. Deukmejian* (1990) 52 Cal.3d 336.) Appellant does not believe that requiring a clear demonstration of a voluntary and knowing waiver of the right to be present would necessitate a broader interpretation than that required for waiver of the federal right to be present. But in any case, the state Constitution cannot be construed by the courts to afford less rights to criminal defendants than those afforded by the Constitution of the United States.

Second, appellant would argue that *Taylor*'s standard is the same as the standard urged by appellant, in that it requires a clear and affirmative demonstration that the waiver is voluntary and knowing. This case demonstrates that this Court may need to clarify *Taylor*'s rule so that the wording is more in line with our state's common and well-known waiver law.

Respondent disputes that it must be clearly shown that the waiver here was knowing and voluntary, arguing that there is a material difference between "the express or implied waiver of a constitutional right by a physically present defendant," under section 977, and the finding of a voluntary absence under section 1043. (*Answer Brief*, p. 37.) Respondent notes that section 977 requires an express waiver, but argues that under section 1043, an implied waiver is actually more like a forfeiture. This distinction is important, respondent argues, "because a forfeiture, by its very nature, need not be knowing and voluntary in the same sense that an express or implied waiver must." (*Answer Brief*, p. 39, citing e.g., *People v. Williams* (1999) 21 Cal.4th 335, 340.)

However, respondent's argument presents a distinction without a difference. There is no reason for this Court to remove the requirement that a waiver of constitutional rights must be a knowing and voluntary choice based on this artificial distinction proposed by respondent. First, section 977 and section 1043 are often read together as forming the whole of a California defendant's right to be present at trial. (See, e.g., *People v. Wall* (2017) 3 Cal.5th 1048, 1059-1060; *People v. Cunningham*, *supra*,

61 Cal.4th at p. 635; *People v. Waidla*, *supra*, 22 Cal.4th at p. 742; *People v. Bradford* (1997) 15 Cal.4th 1229, 1357.) Although the statutory requirements for finding a waiver are not the same under these two sections (*ibid.* [section 977 requires an express written waiver, only applicable to some proceedings; section 1043 does not]), the constitutional rights protected are the same. Section 977's written requirements are in place before jury proceedings begin so that it is clear that the waiver of presence was a *knowing* waiver. In *Crosby, supra,* 506 U.S. 255, the Court found constitutional the Federal Rule of Criminal Procedure, Rule 43, which treats midtrial flight as a knowing and voluntary waiver of the right to be present, holding that it was proper for the rule to differentiate from other rules requiring a written waiver pretrial for absences, stating "the defendant's initial presence serves to assure that any waiver is indeed knowing." (*Id.* at p. 261.) In other words, *Crosby* noted that the two rules are different, because a defendant is in a different position as to whether he can properly be construed as having *knowingly* and voluntarily waived his right to be present. But this should not affect the requirement that any waiver of presence should be demonstrated to be a knowing and voluntary choice. (*Ibid.* [midtrial flight is treated as a "knowing and voluntary waiver of the right to be present"].)

No case that appellant has been able to find has referred to a voluntary absence as a forfeiture, as opposed to an implied waiver. As noted by the respondent's brief, forfeiture is the loss of a right by failing to assert it, while waiver is *intentionally*

relinquishing a known right. (*Answer Brief*, p. 39, quoting *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371, emphasis added.) According to traditional definitions of forfeiture, the right to be present was not forfeited in this case, where appellant's counsel objected to continuing trial in appellant's absence, requested a continuance, and requested a mistrial twice. (RT 49, 124.) A constitutional right may be forfeited in criminal cases by the failure to make timely assertion of the right before the trial court. (*Answer Brief,* p. 39, citing *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371; see also *United States v. Olano* (1993) 507 U.S. 725, 731.) In this case, there was a timely assertion by counsel of the right, and the trial court considered and ruled on the issue. (RT 49, 124.)

Instead, the United States Supreme Court and this Court have found an *intentional* relinquishment of the right to be present, i.e., a voluntary and implied waiver, in cases where the defendant has fled after the beginning of trial. (See *Diaz, supra,* 223 U.S. at p. 455.) In these cases, after a good faith attempt 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 made a knowing and deliberate choice to delay or avoid trial, i.e., an *intentional* relinquishment of the right to be present. (*Crosby, supra,* 506 U.S. at p. 257 ["knowing and deliberate"]; *Taylor, supra,* 414 U.S. 17 ["intentional relinquishment"]; *Concepcion, supra,* 45 Cal.4th 77 ["section 1043, subdivision (b)(2), was designed to prevent the

defendant from intentionally frustrating the orderly processes of his trial by voluntarily absenting himself"].)

There is no reason, other than expediency, *not* to require that it must be clearly and affirmatively demonstrated on the record that the defendant has knowingly and voluntarily waived his right to be present. This standard makes effective *Taylor*'s requirement the court may proceed with trial only if it is "clearly established" that the absence is voluntary. (*Taylor, supra,* 414 U.S. 17, 19 fn.3.) This standard does not change the findings or holdings of previous decisions addressing voluntary absences, but merely clarifies the standard put forward in those decisions. (*Diaz, supra,* 223 U.S. at p. 455; *Crosby, supra,* 506 U.S. at p. 259; *Taylor, supra,* 414 U.S. 17; *Concepcion, supra,* 45 Cal.4th at p. 80; *Espinoza, supra,* 1 Cal.5th 61.) The respondent's assertion – that a waiver of presence need not be a knowing and voluntary choice in the same sense as an express or implied waiver – also goes against the general rule that a waiver of a constitutional right 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; *Fairey v. Tucker* (2012) 567 U.S. 924, 928, dis. opn. of Sotomayor, J., citing *Carnley v. Cochran* (1962) 369 U.S. 506, 514.)

To require that it must be clearly and affirmatively demonstrated on the record that the defendant has knowingly and voluntarily waived his right to be present is consistent with case law on voluntary absences and the waiver of constitutional rights.

2. The Record Does Not Affirmatively Demonstrate that the Absence Was Voluntary, As Respondent Was Experiencing A Medical Necessity.

Whether the record must show substantial evidence supporting the trial court's finding (which appellant contests), or whether the record must clearly establish the absence was a knowing and voluntary waiver of the right to be present, the record in this case does not support the trial court's finding that the absence was voluntary.

Needing to see a doctor, and being ill to the point of not being physically or mentally capable to attend court, is a "sound reason" to be absent, as long as the medical necessity was not created in order to avoid court. (See *Taylor, supra,* 414 U.S. at p. 17 [the trial court found a voluntary absence after testimony demonstrating the defendant did not have a reason to miss court, such as illness]; *People v. Rogers* (1957) 150 Cal.App.2d 403 (*Rogers*) [court of appeal found a voluntary absence only after determining that the defendant had made himself ill *for the purpose* of delaying or avoiding court].)

Respondent argues that under the substantial evidence rule, appellant had no sound reason for remaining away, appearing to argue that appellant was not in fact suffering a medical necessity, regardless of what caused the medical necessity. (*Answer Brief*, pp. 29-32.) Respondent argues that the appellant's choice to go to the emergency room instead of court was not a "sound reason," but instead a voluntary choice to avoid court. This argument is based on the fact that appellant had earlier refused to be transported to the hospital for medical

treatment,[3] had coherently answered questions from medical personnel, had walked unassisted, and had been conscious. (*Answer Brief,* p. 29, citing RT 46, 47.) Therefore, respondent argues that appellant was "not incapable" of going to court. (*Answer Brief*, p. 34, summarizing *United States v. Davis* (5th Cir. 1995) 61 F.3d 291.)

Respondent's conclusion is not supported by the record, even under the substantial evidence rule. "Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence." (*People v. Brooks* (2017) 3 Cal.5th 1, 57; *In re Michael D.* (2002) 100 Cal.App.4th 115, 126.) However, "[a] reasonable inference … 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." (*People v. Davis* (2013) 57 Cal.4th 353, 360 (*Davis*).) ""'By definition, 'substantial evidence' requires evidence and not mere speculation.'"" (*People v. Thomas* (1992) 2 Cal.4th 489, 545, conc. & dis. opn. of Mosk, J., quoting *People v. Morris* (1988) 46 Cal.3d 1, 21.).

Instead, the evidence shows appellant had overdosed the night before (RT 48), a medical necessity which makes going to the hospital a sound reason to miss court. Two officers went to the appellant's house that morning: Officer Bowly and Officer Norris at 7 a.m. (RT 44, 46), and Officer Norris returned at 9:25 a.m. (RT 44, 47). Officer Bowly reported that police had

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[3] It should be reiterated that appellant was 19 years old, with a learning disability, and was under the influence of drugs. (RT 48, 49.)

responded for a report of overdose, but appellant had refused a ride to the hospital. (RT 46.) Officer Norris also clearly indicated that the appellant was under the influence of drugs; it was unclear whether this was at 7 a.m. or after 9:25 a.m. (RT 48.) Additionally, appellant's mother stated that appellant was "nodding out" and at times "nonresponsive," which was her impetus for deciding to try to take appellant to the hospital. (CT 27; RT 48.) Appellant spent several hours at the hospital. (RT 47 [appellant states he would prefer to go to the hospital around 9:30 a.m.], 131-132 [defense counsel informs court at 2:00 p.m. that appellant was released from the hospital].)[4] Afterwards, appellant's mother told defense counsel that appellant was "in no state to come to court and take the witness stand." (*Answer Brief*, p. 31, citing RT 132.)

Even taking all of the evidence in the light which supports the trial court's conclusion, the most that can be surmised is that the trial court believed that appellant *could have physically walked into court* that morning, despite still being under the influence of drugs. But it is speculation to conclude that because the appellant was conscious and able to walk, that he therefore was not experiencing a medical necessity and did not need to go to the hospital to be seen by doctors and then to rest at home. A trial court is not in a position to determine if a defendant who

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[4] Respondent takes the fact that appellant spent several hours at the hospital as evidence that appellant was not in need of immediate medical attention. (*Answer Brief*, p. 46.) Appellant would argue that this is not a reasonable inference. Instead, it shows that he was seen and not immediately discharged.

suffered a substantiated drug overdose needs to be seen by medical personnel; nor can the court evaluate the time needed to recover from an overdose.

Moreover, as argued in the opening brief, even if the appellant had physically made his way into the superior court building, the constitution requires that the defendant be *mentally* present during the course of his trial. (*Opening Brief*, p. 24, n.3, citing *People v. Berling* (1953) 115 Cal.App.2d 255; *People v. Avila* (2004) 117 Cal.App.4th 771, 777.) When coupled with the evidence that he was still showing effects of being under the influence the morning after an overdose (RT 48), being able to answer questions from medical personnel alone does not support the conclusion that appellant would have been mentally present.

Therefore, *Davis, supra,* 61 F.3d 291, relied on heavily by respondent, is also distinguishable from this case. In *Davis*, the federal court found that the defendant's decision to seek medical attention for an *unsubstantiated* overdose supported finding a voluntary absence. (*Id.* at pp. 302-303.) There, the defendant's doctor reported that Davis had indicated she took pills because of the trial, but her "typical functioning appear[ed] to be adequate" and her physical health was fine. (*Ibid.*) In contrast, in the current case, appellant's drug overdose was substantiated by Officer Norris. There is no evidence here that appellant was fine and fit to go to trial that day. Instead, the last information received by the court was that "Officer Norris clearly indicated that the defendant was [Health and Safety Code section] 11550, being under the influence of drugs." (RT 48.)

Additionally, in *Davis,* there was evidence that the defendant purposely overdosed on drugs because she was concerned about having to attend trial the next day. The record here does not establish that appellant created the medical necessity in order to effect his absence from trial. (*Opening Brief,* pp. 35-39.)

Respondent also argues that the fact that appellant did not file a motion for a new trial, supports an inference that appellant had no additional evidence to present. (*Answer Brief*, p. 31, 33-34.) Again, this flips the burden of finding a waiver on its head. The lack of evidence does not weigh against appellant. This is not substantial evidence that it was not medically necessary for the appellant to go to the hospital. And indeed, this falls far short of "clearly establishing" that any waiver was a knowingly and voluntarily choice, as urged by appellant. (See *Taylor*, *supra,* 414 U.S. at pp. 19, n. 3; *People v. Wall, supra,* 3 Cal.5th at pp. 1059-1060.)

The record indicates that appellant had suffered an overdose, to the point that he was still under the influence of drugs the next morning, demonstrating a medical necessity to go to the hospital. The record simply does not support the trial court's finding that the appellant was *not* experiencing a medical necessity.

3. Even Assuming, Arguendo, the Trial Court's Factual Conclusions Were Supported, This Court Should Still Measure the Facts Against the Law and Find that this was Not a Knowing and

Voluntary Waiver of the Right to be Present.

Assuming, arguendo, that the appellant was not physically incapable of going to court but chose instead to go to the hospital, as suggested by respondent, this Court should still determine whether this was legally sufficient to show a valid waiver of appellant's constitutional right to be present.

In this case, this Court should find that the choice to go to the hospital, alone, particularly after confirmed substance abuse, is not a voluntary absence unless there is evidence on the record showing it was an *intentional* abandonment of the right to be present, done purposefully to avoid trial and to voluntarily absent oneself.

This Court must weigh the facts against the law to determine whether the absence was voluntary. (*Gutierrez*, *supra*, 29 Cal.4th at pp. 1201-1202.) A waiver is voluntary if there are no circumstances that undermine a defendant's ability to exercise his free will. (See generally, *People v. Rundle* (2008) 43 Cal.4th 76, 114, citing *Mincey v. Arizona* (1978) 437 U.S. 385, 398 [holding a statement is involuntary in the *Miranda* context if it is not the product of a rational intellect and a free will.]) In this context, courts have found that a defendant's absence may be deemed voluntary where it was an intentional abandonment of the right to be present (see *Fairey v. Tucker*, *supra,* 567 U.S. at p. 928, dis. opn. of Sotomayor, J.), or the defendant created the circumstances leading to his absence "*in order to effect his or her absence from trial*." (*People v. Price* (Colo. 2010) 240 P.3d 557, 560-561, emphasis added [summarizing federal cases, including

Davis, *supra*, 61 F.3d 291].) The California appellate courts have found the right to be present voluntarily waived where a defendant behaved in ways that the defendant knew would prevent him from attending trial. (See, e.g., *Gutierrez, supra*, 29 Cal.4th at pp. 1204-1205 ["[u]nquestionably section 1043, subdivision (b)(2), was designed to prevent the defendant from *intentionally* frustrating the orderly processes of his trial by voluntarily absenting himself"]; *Concepcion*, *supra*, 45 Cal.4th at p. 83 [same]; *Rogers, supra,* 150 Cal.App.2d 403.)

Respondent and appellant agree that labeling an absence as "self-induced" is not a helpful or meaningful way of distinguishing whether an absence is voluntary. (*Answer Brief*, p. 41.) However, *Rogers, supra,* 150 Cal.App.2d 403, is not irrelevant to the question of when a medical necessity rises to the level of a voluntary waiver of presence. (See *Opening Brief,* pp. 31-33; contra, *Answer Brief*, p. 41.) The 1970 change in section 1043 – giving the trial court the option to proceed with the trial, as opposed to declaring a mistrial – does not affect the voluntariness standard, as suggested by respondent. (See *Answer Brief*, pp. 42-43.) Nor is *Roger*'s relevancy impacted by the fact that *Rogers* was decided before *Taylor*; as noted above, *Taylor* did not analyze the issue of voluntariness, and as early as 1912 the United States Supreme Court had acknowledged that a defendant may voluntarily waive his right to be present. (See *Diaz, supra*, 223 U.S. at p. 455.) Therefore, it is relevant that *Rogers*, *supra,* 150 Cal.App.2d 403, found a voluntary absence only after finding "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.)

Appellant would argue that this Court must find that choosing to go to the hospital after being ill from an overdose does not legally amount to a voluntary waiver of the right to be present. The record does not show that this was a state of affairs that was *intentionally* brought on by defendant *for the purpose* of missing court or forcing a continuance. (*Opening Brief,* pp. 35-39; see also *United States v. Latham* (1st Cir. 1989) 874 F.2d 852, 858.) Appellant was a 19 years old,[5] with a learning disability, and had overdosed; the record does not demonstrate that the overdose or the absence was voluntarily chosen for the purpose of avoiding court. (RT 48, 49.)

As outlined in the opening brief, appellant had no background of acting, or refusing to act, in order to avoid court. (*Opening Brief*, p. 27-38.) 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

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[5] Since this Court must examine the totality of the circumstances, it is also worth noting that both the California courts and the state legislature have acknowledged "[r]ecent neurological research show[ing] that cognitive brain development continues well beyond age 18 and into early adulthood." (*In re Williams* (2020) 57 Cal.App.5th 427, 432, citing Assem. Com. on Appropriations, Analysis of Sen. Bill No. 261 (2015–2016 Reg. Sess.) as amended June 1, 2015, p. 2; see also Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1308 (2017–2018 Reg. Sess.) as amended Mar. 30, 2017.)

continuance requested and granted, with no objection by the prosecutor. (CT 15.) Respondent argues that this is sufficient to show delay tactics, but *Rogers, supra,* 150 Cal.App.2d 403, and *Espinoza*, *supra*, 1 Cal.5th 61, indicate that more is necessary to assume a voluntary waiver of presence from an absence. (*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."])

Instead, the record shows that appellant had been out on his own recognizance before trial, and remained so until the end of trial. (CT 6, RT 199.) Defense counsel tried throughout the day to attempt to get the trial court to delay trial to secure the appellant's presence. (RT 49, 124.) The appellant was also in attendance the next day. (RT 194.)

Respondent's interpretation of the law, requiring anyone experiencing a medical necessity to come into court if they are conscious and able to walk, would not be sound policy. It would not be good policy to require a defendant who was legitimately experiencing a medical necessity to have to make the decision whether to seek medical help and risk unwillingly waiving their right to trial, or to push through a medical necessity in hopes that they would not get any worse in order to secure their right to be present. This is true whether the medical necessity is the flu, or an overdose, or a novel virus. Moreover, it is not good public safety policy, for the safety of all who are in the courtroom, to

require a defendant who has overdosed to come into court.[6] The best place for a defendant experiencing a medical necessity is the hospital.

Appellant encourages this Court to find that the record here fails to clearly and affirmatively demonstrate that the appellant's absence was a voluntary waiver of presence. Neither the facts of the absence itself, nor appellant's actions throughout the day, nor appellant's history with the court, nor the attempts by appellant's counsel to secure a delay, indicate that appellant voluntarily chose to stay away from court "for no sound reason," much less as an intentional choice to avoid, delay, or force a continuance of trial.

Since the record demonstrates that appellant was experiencing a medical necessity, and since the record is devoid of information demonstrating it was a knowing and voluntary choice to relinquish his right to be present at trial, the trial court erred in concluding that appellant waived his right to be present. Because it was not clearly established in this case that the

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[6] Again, it is worth reiterating that the trial court could have remanded the appellant into custody or required bail. (*Opening Brief,* p. 42, citing §§ 1270, 1275.) The prosecution could have brought additional charges. (*Opening Brief,* p. 42, citing § 1320; Health & Saf. Code, § 11550.) And, as also discussed below, a continuance also would have secured appellant's presence. (*Opening Brief,* p. 42, citing § 1050.) A finding of a waiver of the right to be present at trial should not have been the first option resorted to by the trial court, particularly given that appellant's mother was staying in close contact with the court throughout the day of his absence.

appellant made a knowing and voluntary waiver of his presence, the conviction must be reversed.

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

Respondent agrees that a finding of voluntary absence under section 1043 did not require the trial court to proceed with the trial in the defendant's absence, and that the trial court had the discretion to grant a continuance. (*Answer Brief*, p. 44, citing § 1043, subd. (b)(2); *Espinoza*, *supra*, 1 Cal.5th at p. 75.)

However, to argue that the trial court did not abuse its discretion in denying the continuance, respondent only examines two factors: 1) whether the failure to appear was a continuation of efforts to manipulate and delay the criminal trial; and 2) the then-current stage of the trial proceedings. (*Answer Brief*, p. 45-46, 47, citing *Espinoza, supra*, 1 Cal.5th at pp. 77, 78.)

First, as argued above and in the opening brief, this case is distinguishable from *Espinoza, supra*, 1 Cal.5th 61. (*Opening Brief,* p. 47-48.) The respondent only points to the appellant's delays in being seen by a doctor on the day of trial, and then returning home, after an overdose on narcotics. (*Answer Brief*, p. 46.) This is distinctly different from *Espinoza*, featuring two and a half years of delay tactics, burning through seven defense counsel, minimal participation pro se on the day of trial, and then disappearing without explanation two days into a two week trial. (*Id.* at p. 76, 78.) Similarly, in *Espinoza,* the court found it unlikely the appellant would reappear, and that a delay would pose a risk of hardship to the jurors, inconvenience to the

witnesses, and disruption to orderly court processes. (*Id.* at p. 78.) Notably, even under these circumstances, this Court in *Espinoza* credited the trial court for "not rush[ing] to proceed with trial," but instead recessing for a day while multiple attempts were made to locate defendant. (*Ibid.*)

Here, appellant had only been absent once before because of the flu, and the trial court knew the appellant was going to the hospital. Additionally the request was only for a one-day continuance, and there was no evidence of hardship to the parties, the jurors or witnesses, particularly since it was only estimated to be a one-day trial. (*Opening Brief,* pp. 45-46.)

Additionally, the respondent's brief also does not give any weight to the last factor mentioned by the Court in *Espinoza, supra*, 1 Cal.5th 61, which is the court's "independent interest" in ensuring that criminal trials are fair and accurate. (*Id.* at p. 78; see *Opening Brief,* pp. 46-47.) Nor did the respondent note "the benefit which the moving party anticipates" or "the likelihood that such benefit will result," the lack of hardship to the 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; see *Opening Brief,* pp. 44-46.)

Given the reasonableness of the one-day continuance request, the substantial rights of the appellant at stake, and the lack of prejudice to the parties, the witnesses and the jury, it was an abuse of discretion to fail to grant the continuance, and a violation of appellant's due process rights.

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

Appellant maintains that the total denial of the appellant's right to be present at his entire trial was structural error. In the alternative, if this Court requires a demonstration of prejudice, the error requires reversal under *Chapman v. California* (1967) 386 U.S. 18, 23 (*Chapman*) and under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).

A. The Error Was Structural.

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 structural error.

Respondent points to the language in *People v. Mendoza* (2016) 62 Cal.4th 856, stating that an improper absence has never been held to be structural error. (*Answer Brief*, pp. 49-50, citing *People v. Mendoza, supra*, 62 Cal.4th at p. 901.) Instead, a defendant's absence has been listed in the "broad class of errors" that may be harmless. (*Ibid.*)

However, as argued in the opening brief, this Court has more recently held that "[a]lthough the question whether a constitutional violation is structural or trial error is generally thought to be categorical … [c]ertain 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.)

As argued in the opening brief, the nature and extent of the violation here was extreme, and no case from this Court,

including *People v. Mendoza, supra,* 62 Cal.4th 856, has addressed so complete a denial of the right to be present, where the appellant was improperly absented for the entire the trial – opening argument, presentation of evidence, jury instructions, and closing arguments – and not merely one critical stage. Because the error resulted in the complete deprivation of the fundamental right to be present – a right which included the right to confront his accusers, cross-examine witnesses, play a part in the structure of his defense, see his jurors, have the jurors see him, raise affirmative defenses, and testify – the error constitutes a structural defect in the constitution of the trial mechanism affecting the framework within which the trial proceeded. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 310; *People v. Lightsey* (2012) 54 Cal.4th 668, 699.) Because of this, the only meaningful remedy is dismissal, regardless of a showing of prejudice.

Respondent also suggests that the Court has necessarily determined that a defendant's absence from trial does not render a trial fundamentally unfair. (*Answer Brief*, p. 50.) Respondent asserts this relying on the fact that section 1043 was amended to allow the trial court the discretion to proceed without a defendant, rather than an automatic mistrial, and because the United States Supreme Court found rule 43 of the Federal Rules of Criminal Procedure to be constitutional and adopted a test to determine when an absence is voluntary. (*Answer Brief*, p. 50, citing § 1043; *Taylor, supra,* 414 U.S. 17.) But this does not mean that a defendant's absence from trial, when done in violation of

section 1043 and rule 43, can *never* render a trial fundamentally unfair. In this case, where the trial court *erred* in its application of section 1043, and erroneously caused the complete deprivation of the right to be present at trial, not merely a part of trial, the result was fundamentally unfair, and requires reversal.

Appellant therefore requests this Court to find structural error, and reverse.

B. The Error Was Not Harmless.

In the alternative, even if the harmless error standard applies, the People cannot prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*People v. Mower* (2002) 28 Cal.4th 457, 484, citing *Chapman, supra,* 386 U.S. at p. 23.)

Respondent acknowledges that the perpetrator's identity was the main issue in this case. (*Answer Brief,* p. 51.) Respondent does not appear to contest that appellant could have testified and his testimony could have been exculpatory. (*Opening Brief*, p. 55.) This should be the end of the analysis. 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.) Here, appellant could have testified that he was not the perpetrator. It is the jury's job to determine issues of credibility. (*Ibid.*) Respondent only argues that there were other options for the defense in proving identity, since the defense could have called appellant's mother to testify to identity, but chose not to. (But see RT 77 [defense counsel told appellant's 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].)

Respondent also notes the surveillance video was grainy and never showed the perpetrator's full face. (*Answer Brief*, p. 51, citing Opinion, p. 17, n. 16.) However, instead of conceding that this makes the issue of identity, and therefore the absence of appellant's testimony and presence, even more critical, respondent argues that the jury must therefore have based their conclusion of identity on appellant's hat. (*Answer Brief*, p. 51.) But the evidence was not conclusive that the hat was unique (RT 81), and as noted in the dissent in this case below, if appellant had been able to testify, he could potentially have explained that he obtained his hat after the date of the charged burglary, or provided other exonerating details. (Opinion, p. 20, dissent.)

Respondent also states that jurors were able to see appellant in person on the first day of trial and compare him to the individual depicted in the surveillance video. (*Answer Brief*, p. 51.) Respondent does not respond to appellant's argument that seeing the appellant at voir dire the day before the presentation of evidence, when the jurors did not know that they would be asked to compare appellant's build to an indistinct person on a surveillance video, could not have resulted in a reliable comparison. (*Opening Brief,* p. 57.)

Finally, respondent says that while appellant could "have tried to explain his statements" to Officer Bowly, he could not have denied making them. (*Answer Brief*, p. 52-53.) But explaining his statements is exactly what the harmless error

analysis should permit appellant to do: if there is a reasonable doubt whether his absence contributed to the verdict, appellant should have the opportunity to explain his statements, including that he felt pressured or confused in making his ambiguous statements to the officer. A jury could have found defense counsel's argument about the ambiguity of appellant's statement far more compelling if it could have evaluated the credibility of appellant on the stand.

Finally, it is irrelevant that the jury was instructed not to consider the reason for appellant's absence in their deliberations. (*Answer Brief*, p. 52, citing RT 54.) In this situation, the question under *Chapman* should be not whether the jury erroneously faulted him for being absent, but whether his presence could have been exculpatory.

The People cannot prove beyond a reasonable doubt that appellant's absence was harmless. Moreover, reversal is required even under the more lenient standard under *Watson*, *supra*, 46 Cal.2d at p. 836. (*Opening Brief*, p. 58.) It is impossible to say that the appellant's presence and his testimony would not have swayed at least one juror.

CONCLUSION

For the foregoing reasons, appellant respectfully requests that this Court reverse appellant's conviction.

Dated: December 16, 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 Reply Brief on the Merits on behalf of my client, and that the word count for this brief is 7,114 words.

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

Dated: December 16, 2020 Respectfully submitted,

/s/Jacquelyn Larson
Jacquelyn Larson
Attorney for Appellant

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

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY PLACEMENT AT PLACE OF BUSINESS FOR COLLECTION AND DEPOSIT IN MAIL

(Code Civ. Proc., § 1013a, subd. (3); Cal. Rules of Court, rule 8.78(f))

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 **December 16, 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 REPLY 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 **3:00 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 **December 16, 2020**, at Sacramento, California.

/s/ *Sebastion Lowe*
Sebastion Lowe

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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