**NOT FOR PUBLICATION**

FILED

AUG 31 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| WILLIAM RANDOLPH HARLOFF,<br><br>Petitioner-Appellant,<br><br>v.<br><br>SHAWN HATTON, Warden,<br><br>Respondent-Appellee. | No. 16-56455<br><br>D.C. No.<br>2:15-cv-09281-RGK-AS<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted August 10, 2018
Pasadena, California

Before: CLIFTON and CHRISTEN, Circuit Judges, and RUFE,** District Judge.

Petitioner William Harloff appeals the district court's dismissal of his 28 U.S.C. § 2254 habeas corpus petition. Petitioner's trial for charges of corporal injury to a cohabitant, false imprisonment by violence, and criminal threats stemming from a violent attack on his girlfriend, Briana Ikeler, proceeded for

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Cynthia M. Rufe, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

approximately one hour in his absence—including the preliminary jury instructions, the prosecution's opening statement,[1] and part of Ikeler's direct testimony—after Petitioner twice failed to appear for trial by repeatedly claiming a need for medical treatment and refusing to leave his cell.[2] The California Court of Appeal determined that Petitioner had "not demonstrated prejudicial error with respect to his limited absence from trial[,]" without deciding whether the trial court erroneously found Petitioner to be voluntarily absent. He filed a habeas corpus petition under 28 U.S.C. § 2254, which the district court denied and dismissed. We have jurisdiction pursuant to 28 U.S.C. § 1291 and § 2253, and we affirm.

The district court properly concluded that the California Court of Appeal's harmlessness decision under *Chapman v. California*, 386 U.S. 18 (1967), was reasonable. When a state appellate court's "*Chapman* decision is reviewed under AEDPA, 'a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable.'" *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) (quoting *Fry v. Pliler*, 551 U.S. 112, 119 (2007)). Therefore, Petitioner bears the burden of showing that the state appellate court's determination under *Chapman* "was so lacking in justification that there was an

[1] Defense counsel deferred the opening statement to later in the trial.

[2] This Court granted a certificate of appealability with respect to the following issue: "whether appellant's constitutional rights were violated when the trial court found him to be voluntarily absent, and allowed the victim to testify outside of his presence."

error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* (citation omitted). That standard is not satisfied here.

First, there was strong evidence of Petitioner's guilt from Ikeler's testimony, plus the corroborating testimony of a neighbor and the responding police officer, as well as physical evidence collected from the apartment and photographs of her injuries. Second, despite Petitioner's attempt to isolate Ikeler's statement that it was easier for her to testify when he was not present, the California Court of Appeal explained that the statement, "when viewed in context and in the totality of the evidence does not demonstrate prejudice." Explaining the difference between her trial testimony and the testimony she gave at the preliminary hearing, Ikeler implied that, by the time of trial, she had moved out of the area where she had previously lived with Petitioner and was no longer fearful of Petitioner's threat that "if [she] ever put him in jail, . . . his homeboys would come after [her]." Additionally, although she was reluctant to testify at the preliminary hearing, she did answer questions and explained that she had been hit on her head and hands, and identified Petitioner as that person when police first responded to the incident. At trial, she identified Petitioner as the attacker. Moreover, at trial, Ikeler did not recant or alter her testimony after Petitioner did appear, including through the remainder of direct, cross, and redirect examinations. Finally, the trial court twice

instructed the jury not to consider Petitioner's absence for any purpose, and the jury is presumed to have followed its instructions. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow [the court's] instructions."). In sum, because we cannot say that the California Court of Appeal applied *Chapman*'s harmless error standard in an objectively unreasonable manner, we affirm the denial of habeas relief. *See Davis*, 135 S. Ct. at 2198.

**AFFIRMED.**

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION**

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|---|---|
| WILLIAM RANDOLPH HARLOFF,<br><br>Petitioner,<br><br>v.<br><br>SCOTT FRAUENHEIM, Warden,<br><br>Respondent. | NO. CV 15-09281-RGK (AS)<br><br>**ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE** |

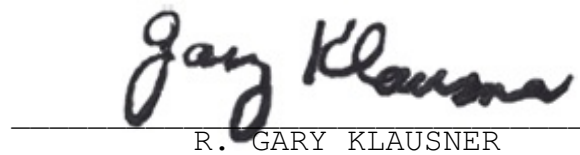
Pursuant to 28 U.S.C. section 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. The Court has engaged in a de novo determination of the portions of the Report and Recommendation to which Objections were directed and the Court accepts the findings and conclusions of the Magistrate Judge in the Report and Recommendation.

**IT IS ORDERED** that Judgment be entered denying and dismissing the Petition with prejudice.

**IT IS FURTHER ORDERED** that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein on counsel for Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: August 30, 2016.



R. GARY KLAUSNER
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION**

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|---|---|
| WILLIAM RANDOLPH HARLOFF,<br><br>Petitioner,<br><br>v.<br><br>SCOTT FRAUENHEIM, Warden,<br><br>Respondent. | NO. CV 15-09281-RGK (AS)<br><br><br><br>**JUDGMENT** |

Pursuant to the Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and dismissed with prejudice.

DATED: August 30, 2016.

R. GARY KLAUSNER
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION**

| | |
|---|---|
| WILLIAM RANDOLPH HARLOFF,<br>Petitioner,<br>v.<br>SCOTT FRAUENHEIM,<br>Respondent. | Case No. CV 15-09281-RGK (AS)<br>**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE** |

This Report and Recommendation is submitted to the Honorable R. Gary Klausner, Jr., United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

## I. INTRODUCTION

On December 1, 2015, William Randolph Harloff ("Petitioner"), a California state prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. §

2254 (Docket Entry No. 1). On April 22, 2016, Respondent filed an Answer to the Petition ("Return") (Docket Entry No. 16). On May 23, 2015, Petitioner filed a Traverse (Docket Entry No. 19).

For the reasons stated below, it is recommended that the Petition be DENIED and this action be DISMISSED with prejudice.

## II. PROCEDURAL HISTORY

On September 27, 2012, a Los Angeles County Superior Court jury found Petitioner guilty of one count of corporal injury to a cohabitant in violation of California Penal Code ("P.C.") § 273.5(a), one count of false imprisonment by violence in violation of P.C. § 236, and one count of criminal threats in violation of P.C. § 422, and also found the following special allegations to be true: as to the corporal injury to a cohabitant offense, Petitioner personally inflicted great bodily injury on the victim (P.C. § 12022.7(e)); and as to the corporal injury to a cohabitant and the false imprisonment by violence offenses, Petitioner personally used a deadly and dangerous weapon, i.e., a hammer (P.C. § 12022(b)(1)). (Clerk's Transcript ["CT"] 128-32; 2 Reporter's Transcript ["RT"] 308-09). On October 17, 2012, in a bifurcated bench trial,[1] the trial court found true the special allegations that Petitioner had served four prior prison terms (P.C. § 667.5(b)). (CT 77, 147; 2 RT 322-23). That same date, after denying Petitioner's motion for a new trial (2 RT 324-30), the trial court sentenced Petitioner to state prison for a total of 14 years. (CT 146-50; 2 RT

[1] Petitioner had waived his right to a jury trial on the prior conviction allegations. (See 1 RT 249-50; 2 RT 316).

335-39).[2]

Petitioner appealed his convictions and sentence to the California Court of Appeal. (See Respondent's Notice of Lodging ["Lodgment"] Nos. 3-5). On September 29, 2014, the California Court of Appeal reversed the Judgment as to the requirement that Petitioner register as a sex offender, and affirmed the Judgment in all other respects. (See Lodgment No. 6).

Petitioner filed a Petition for Review with the California Supreme Court, which was summarily denied on December 10, 2014. (See Lodgment Nos. 7-8).

## III. FACTUAL BACKGROUND

Since the testimony at the preliminary hearing and at the trial are relevant to the sole claim alleged in the Petition, the Court will summarize both the preliminary hearing testimony and the trial testimony.

### A. Preliminary Hearing

Brianna Ikeler testified that she had dated Petitioner (but she could not remember for how long), and that she had lived with Petitioner

[2] Petitioner's sentence consisted of 4 years for the corporal injury to a cohabitant offense and consecutive terms of 4 years on the personal infliction of great bodily injury finding, 1 year on the personal use of a deadly and dangerous weapon finding, and 1 year for each of the prior prison term findings; and concurrent terms for the other offenses.

(for probably longer than a month). When asked whether she saw Petitioner in the courtroom, she testified the person (who had a beard) did not look like Petitioner. She testified she was nervous about being in court and did not want to be there. (See CT 4-6, 9, 24, 31).

On December 28, 2011, she and Petitioner lived in an apartment in Long Beach. That day, she left her apartment and ran into her neighbor's apartment because she was scared. That day, an ambulance took her to the hospital where she was treated for injuries (but she could not remember her injuries, how she got them, who hit her, or where she was when she was injured). She had been hit in the head and the hands (but she did not remember if she was hit in the face). She denied being chased by or threatened by her boyfriend. She also denied injuring herself. She could not remember speaking to a police officer at the hospital, and she did not remember what she said to any police officer about the events that morning. She did not tell a police officer that she and her boyfriend had been dating for about 6 months, or that her boyfriend had stopped her when she got up and tried to go to the bathroom. At some point between Christmas and New Year's (after she was injured), she asked a police officer to get in touch with her mother. (See CT 6-16, 25, 29-39).

She did not know if she was the person in 12 photographs. (The court stated the person in the photographs looked like her.) (See CT 16-19).

Long Beach Police Department Officer Xavier Veloz testified that on December 28, 2011, at approximately 12:30 p.m., he responded to a Long

Beach address, and saw that Brianna Ikeler had lacerations on her hands, face and head and swelling to the nose and eye, and was very bloody. The photographs showing Brianna Ikeler and her injuries were taken by a responding lab unit. Officer Veloz spoke to Brianna Ikeler at the hospital. She told him about the events that morning, as follows. At 10:00 a.m., she woke up at the apartment with her boyfriend. She had an argument with her boyfriend -- her boyfriend accused her of cheating and wanted to argue about a vehicle he had purchased for her. She tried to get up to use the restroom, but her boyfriend blocked her and prevented her from going. Her boyfriend continued to argue with her, and proceeded to slap her several times on the chin. Her boyfriend then picked up what she described as a distributor from the living room floor, and hit her on the head with it. He boyfriend then picked up a coffee mug, and hit her with it. When she raised her arms to cover her head, she was hit on the arms. Her boyfriend then picked up a hammer, and hit her several times on the hands. The continuous beating lasted for several hours. During the incident, she had wanted to leave the apartment, but her boyfriend prevented her from leaving by hitting her and blocking her. (See CT 42-48, 50).[3]

Luana Ikeler, Brianna Ikeler's mother, testified that on December 28, 2011, she went to the hospital. She saw that her daughter had a laceration on the top of her head, which had required six staples. (See CT 51-52).

[3] During cross-examination, Officer Valez testified that at the hospital it was difficult getting information from Brianna Ikeler because she was a reluctant victim; her responses were vague and non-descriptive. (See CT 49-50).

Long Beach Police Department Officer Felipa Baccari testified that on December 28, 2011, she responded to a Long Beach address and spoke to Oshea Myles. Ms. Myles said that a neighbor (Ms. Myles did not know the neighbor's name; Ms. Myles pointed to Brianna Ikeler's apartment) had run out of her apartment into Ms. Myles' apartment, and a male (who the neighbor said was her boyfriend) ran behind the neighbor yelling "I'll kill you; I'll kill you." (See CT 54-57).

**B. Trial**

The Prosecution's Case

1. Brianna Ikeler (Testimony without Petitioner's Presence in the Courtroom)

Brianna Ikeler testified she met Petitioner in August 2011, and they dated for four months, the last of which (December) they lived together in an apartment in Long Beach. On the morning of December 28, 2011, she and Petitioner woke up, and they began to argue. Although she could not remember the details of the argument, she remembered Petitioner took out a pad a paper, told her to sign her name neatly, and wrote down her confession to something she did not do right (i..e, her handling of their property, her infidelity, a car) while he was incarcerated for 17 days (he got out of jail on December 25). (See 1 RT 61-65).

After Petitioner finished writing on the piece of paper, Petitioner began to hit her with his fist under the chin and on the chest. Several

times Petitioner made her fall to the ground, and then made her stand up. Petitioner hit her more than ten times. While hitting her, Petitioner continued to talk about whatever he was angry about. Petitioner then grabbed a pair of pliers off the table, and pierced her shirt in the chest area. Petitioner then said her was going to nail her foot to the floor; he put a pair of cosmetic scissors on her foot and with a hammer pretended to nail her foot to the floor. Petitioner then picked up a plugged-in power drill, pushed the button, and talked about how People use such drills. Petitioner then got a 10 to 15 pound metal car distributor. After she refused Petitioner's request to take another distributor for herself in order to fight him and after she called him crazy, Petitioner hit her with the distributor more than ten times on the top of the head. She sat down on the floor with her knees to her chest, her eyes closed, and her hands and arms over her face and head (to protect it). While she was curled up, Petitioner hit her with a hammer on the head several times, the knee, the elbow, and knee. Petitioner also hit her with a coffee mug on the foot, breaking the mug. Petitioner poured a large quantity of ice tea over her head. During the incident, Petitioner told her to leave 3 or 4 times, and then when she tried to leave he told her, "No your's not. See, you're not even that hurt." At the end of the incident, which lasted 2 to 4 hours, Petitioner hit her with a motorcycle kick stand. (See 1 RT 66-82).

When she had an opportunity, she ran out of the apartment, down the stairs, up the stairs, and into the open apartment of a neighbor she did not know. She did not remember what she told the neighbor. She did not see Petitioner again that day. She did not remember Petitioner outside the apartment yelling "I'll kill her. I'll kill her." The neighbor

called the police. The paramedics arrived, and then the police arrived. She was taken to the hospital. (See 1 RT 82-86).

While waiting to be admitted into the emergency room, she spoke with Officer Veloz. That day she was reluctant to talk to Officer Veloz because she was scared of the consequences of talking to the police (she was afraid that Petitioner might hurt her if she talked to the police), her mother had not arrived, and she did not know if she had made the right decision to run out of the apartment. She told Officer Veloz that Petitioner had hit her with a hammer and a distributor (but she could not remember saying anything about a coffee mug). (See 1 RT 86-89).

She also spoke with Detective Hubbard at the hospital that day. She did not want to speak with Detective Hubbard for the same reasons she did not want to speak with Officer Veloz. She eventually told Detective Hubbard what happened. She refused Detective Hubbard's request for her to sign a photograph of Petitioner because she was scared (Petitioner had told her that if she put him in jail she had better leave the area because his homeboys would come after her). (See 1 RT 89-91).

After her hospital stay, she did not return to the apartment because she feared Petitioner would be there. (See 1 RT 91-93).

She testified that she was the person in the 12 photographs. One photograph showed injuries to her hands, including swelling, bruising and scratches, which she suffered trying to protect her head. Another photograph shows an open gash in her head (prior to the staples).

Another photograph showed a hole in the chest area of her shirt caused by the pliers, and red marks on her arms. (See 1 RT 93-98).

2. Brianna Ikeler (Testimony with Petitioner's Presence in the Courtroom)

Brianna Ikeler identified Petitioner in court. (See 1 RT 100-101).[4]

A photograph showed her elbow and her knee following the incident. Another photograph showed the hammer with which Petitioner struck her. Another photograph showed a distributor in the apartment; it looked like the object Petitioner used to hit her. Another photograph showed the kick stand that Petitioner used to strike her. (See 1 RT 101-05).

Six staples were required to close the gash on the top of her head. Those staples were removed after 7 to 10 days. As a result of the incident, she suffered neck pain (for a couple of weeks) and knee pain (for a couple of days), bruises and swelling on the back of her neck, behind her ears, hairline, chin line, and arms, swelling on her face and nose, and "a lot of meat" missing from two fingers. (See 1 RT 101, 106-09).[5]

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[4] During cross-examination, she stated that at the preliminary hearing she had testified that she did not recognize Petitioner because she was scared of him retaliating and because it did not look like him. (See 1 RT 109-11).

[5] During cross-examination, she admitted that she had given the following testimony at the preliminary hearing: (a) "perhaps I don't have anything to say" and she did not remember when asked about whether there was a confrontation between her and Petitioner, (b) she did not remember her injuries, including a cut on the top of her head requiring (continued...)

3. Officer Xavier Veloz

Long Beach Police Department Officer Xavier Veloz testified that on December 28, 2011, at approximately 12:30 p.m., he responded to a Long Beach address based on a domestic violence call. When he arrived, two units (Officers Baccari and Magee) were already at the scene, and Brianna Ikeler was on a gurney being placed into an ambulance which was going to take her to the hospital. (See 1 RT 126-28).

Officer Veloz went into the apartment and saw that it was in disarray –- tools, doors, blood, no furniture. He saw the following: a broken coffee mug with blood stains on the wall; a hammer,; a side mirror for a vehicle or motorcycle with blood on the arm; car parts (that looked like distributors), one of which had blood on it; broken glass on the floor; and blood on the walls and floor. (See 1 RT 128-33).

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[5] (...continued)
staples, (c) she did not remember speaking to the police, including Officer Veloz, (d) she did not remember telling the police that her boyfriend hit her in the head with a distributor or a car part, her boyfriend hit her with a coffee mug, she tried to use her arms to block some of her boyfriend's blows, and her boyfriend hit her hand with a hammer several times, (e) she did not know or did not remember whether the incident occurred in the apartment, (f) she did not know or did not remember who hit her, and (g) she did not know or did not remember whether she was the person in the photographs or whether her body parts were in the photographs. (See 1 RT 111-19).

During redirect examination, she testified she had lied at the preliminary hearing because she was scared and Petitioner was sitting in the chair in front of her. She added, "And just earlier today when I was speaking about those things, and I did remember [Petitioner] was not present in that chair, and it made it a lot easier for me to talk about it and to say it because I wasn't -- and back then and I still am, like I said, he said that, if I ever put him in jail, I better move out of the area because his homeboys would come after me. . . . I was living in the area back then still, and that's why. And I was very scared." (See 1 RT 120-21).

Officer Veloz then went to the hospital. Brianna Ikeler was very bloody and looked like she had been severely beaten. He spoke to her for about two hours, but she was very reluctant to talk about the incident. She told him the following information. She and Petitioner had been dating for about 6 months. That morning, she had woken up at 10:00 a.m., and Petitioner was with her. Petitioner, who was in a bad mood, began to argue with her about a vehicle he had purchased for her (he did not approve of how she was using it), and Petitioner accused her of being unfaithful. She tried to get up and go to the restroom, but he blocked her from leaving the living room. Petitioner continued to argue with her, and at some point Petitioner slapped her in the chin area several times. At one point Petitioner picked up a distributor or motor part and struck her in the head one time. Petitioner then picked up a coffee mug and struck her numerous times until it broke. She had used her arms to protect herself, and he struck her in the arms. Petitioner then picked up a hammer and hit her in the hands several times. The beating lasted several hours, and Petitioner would not let her leave the apartment. She told Officer Veloz she did not want to press charges against Petitioner. (See 1 RT 133-38, 148-150).[6]

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[6] During cross-examination, Officer Veloz admitted that in his report he had not included information about Brianna Inkeler being struck by the coffee mug until it was broken or about Petitioner being in a bad mood. (See 1 RT 138-43). Officer Veloz testified that Brianna Inkeler had not told him the following: Petitioner wanted her to sign some paper involving a confession, she was in a hunched-over position on the floor, Petitioner repeatedly told her to stand up and would then hit her, Petitioner used pliers to make a hole in her shirt, used scissors, and used a hammer pretending to hit scissors in her foot, the possible use of a power drill, being struck by a hammer or distributor five to ten times, being struck on the elbow, or about how she left the apartment. (See 1 RT 143-46).

4. O'Shea Myles

O'Shea Myles testified that on December 28, 2011, she lived with her partner and son in an apartment across the courtyard and four apartments down from the apartment (where Petitioner and Brianna Ikeler were). Some date in late December, at approximately 12:30 p.m., she was in front of her own apartment when she heard yelling and loud banging for a little while, heard a woman scream, "Stop it," and then saw a woman (Brianna Ikeler) running out of the other apartment who was bloody and screaming, "He's going to kill me. Help. Help." The woman, wearing a tank top and sweat pants but no shoes, came into her apartment. The woman's head was covered in blood and dried blood, and her hair was scraggly, messy and sticky. The woman was shaking, so she offered the woman a jacket to cover herself. The police were called. About 5 to 10 minutes after the woman came out of the other apartment, a man walked out of the other apartment, and came down the steps yelling and screaming, "She can't have my house. She can't have my stuff. . . . She can't have my life. F her. I'm going to kill her."). The woman, who was inside her apartment, initially tried to run away, and while shaking and trembling said, "I'm scared he's going to kill me." The police arrived shortly after the man had left the apartment complex. When she was asked whether Petitioner in the courtroom was the man she had seen, she said, "It's hard to say" and added, "He looked like the guy. But he also looked different. The hair on the face is longer. And the hair on the top is shorter." . . . "The eyes look the same, and the bald head part looks the same." (See 1 RT 160-73).

The parties stipulated that Jeffrey Dayton, an emergency room

doctor at St. Mary's Medical Center, would testify that on December 28, 2011, he examined Brianna Ikeler and determined that she had multiple contusions and lacerations on her head, hands, arms, and knee, as well as a laceration on her scalp that required five to six staples. (See 1 RT 175).

The Defense Case

Tim Wright testified that in December 2011 he was at the apartment when he saw Petitioner's girlfriend, Brianna Ikeler, hit herself on the head with a distributor (he claimed he was a mechanic most of his life). He told Petitioner, "I have to go. You're coming, let's go. I'm on parole." Petitioner told him to take off and that Petitioner had to clean up this mess. He left because he did not want any police contact. (See 1 RT 152-54).[7]

Petitioner, who had suffered prior convictions for driving a vehicle without the owner's consent and possession for sale of methamphetamine (see 1 RT 192), testified that his relationship with Brianna Ikeler began in July or August 2011, they were engaged to be

[7] During cross-examination, Mr. Wright testified that he had been at the apartment three minutes before Brianna Ikeler hit herself with a distributor, and during that time, Brianna Ikeler and Petitioner were arguing (Petitioner, who had the distributor in his hands, said, "What is this doing here . . . if you had nothing to do with my vehicle?", then set the distributor down, she then grabbed the distributor and hit herself in the head and said, "Is this what you want?"), Petitioner did not hit Brianna Ikeler and Brianna Ikeler did not hit Petitioner, Brianna Ikeler did not have any other injuries (i.e., marks on her arms, chest, or legs), he did not ever tell the police what happened, he did not talk to Petitioner about what happened until he ran into Petitioner at County Jail about two weeks ago, and he had known Petitioner for 20 years (but he was really Petitioner's brother's friend). (See 1 RT 154-58).

married, and they lived together at the apartment for approximately 3 months. Their apartment was a mess and had no furniture because they had just rented it and were getting ready to put in carpeting and tile. There were car parts in the apartment because he is a mechanic, and he had to take the parts out of the cab of his truck so they did not get stolen. On December 28, 2011, he and Brianna Ikeler woke up at approximately 7:45 a.m. He was a little aggravated because somebody had knocked on the door at 3:00 a.m., and because he wanted to go pick up the puppy he had dropped off at a friend's house the day before. He and Brianna Ikeler were having an argument (about why there was a car distributor in the apartment - he wanted her to explain how it got into the apartment when his truck had been stripped in Compton - and about her not wanting to pick up the puppy and cleaning up the mess in the apartment), when he had a telephone conversation with Tim Wright about a car storage facility. Soon thereafter, during another telephone conversation, Tim Wright said he would be right over to the apartment. While arguing with Petitioner about the distributor in the apartment, Brianna Ikeler tried to knock the distributor out of his hands. While arguing with Petitioner about the 3:00 knocking at the door (he thought somebody was there for Brianna Ikeler), Brianna Ikeler "started pulling her hair and raging." At approximately 8:30 a.m., in the middle of their argument, when Brianna Ikeler was "raging" and mad about "questions about stuff she didn't want to answer," Tim Wright walked into the apartment. During the time Tim Wright was at the apartment, the injuries to Brianna Ikeler's hands, arms, legs and knee were not noticeable. After asking Brianna Ikeler about the distributor, he put the distributor down, and turned around to tell Tim Wright what was going on. Brianna Ikeler grabbed the distributor off the table, said,

"Why don't you just -- this is what you want to do" and then cracked herself in the head with the distributor. He told Tim Wright, "Hey, man, look. You see what's going on here?" Tim Wright responded, "Look, I got to go. I'm on parole. I can't have police contact," and then left. Petitioner then asked Brianna Ikeler what she was doing and she tried to reach for the hammer. He grabbed the hammer and his motorcycle's rear-view mirror so she could not hurt herself. She was a mess, so he grabbed iced tea to try to clean her up (because he could not go to the kitchen). Because Brianna Ikeler was "raging," pulling out her hair, and out of control, he slapped her once with his right hand on the side of her head, causing her to spin and to skin her elbow and knee on the plywood floor with nails sticking up. He poured iced tea on her head to clean it up and to stop the profuse bleeding. The blood on her arms was from her head wound, and the blood splattered on the wall was due to her whipping her head around. At 8:45 a.m., following his request, she left the apartment, with blood all over her hair and arms, looking distraught, crying and yelling at him. Approximately 15 minutes after she had left, he left the apartment with his wallet and keys, and was walking downstairs into the courtyard, when he was screamed at by a neighbor (although he believed Briana Ikeler had gone to the neighbor's apartment, he did not know for sure). He did not ever return to the apartment, and he had told Brianna Ikeler she could keep the apartment (so she would not be homeless). He denied causing any injuries to her arms or her head, using scissors, a hammer, pliers, a power drill or a kick stand against her, dictating or having her sign any document, preventing her from leaving the apartment, or yelling that

he wanted to kill her. (See 1 RT 180-210, 225-26, 231).[8]

## IV. PETITIONER'S CLAIMS

Petitioner's sole claim for federal habeas relief is that the trial court erred in finding that Petitioner voluntarily absented himself from trial, resulting in the violation of Petitioner's right to be present at trial and his right to confront witnesses. (Petition at 5, Attachment "A"; Traverse, Memorandum of Points and Authorities at 1-17).

## V. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may not grant habeas relief on a claim adjudicated on its merits in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The term "clearly established Federal law" means "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Lockyer v. Andrade, 538 U.S. 63,

[8] During cross-examination, Petitioner testified that the coffee mug broke when he threw it in the hallway after Brianna Ikeler left the apartment. (See 1 RT 235).

71-72 (2003); see also Cullen v. Pinholster, 563 U.S. 170, 182 (2011); Williams v. Taylor, 529 U.S. 362, 412 (2000)("clearly established Federal law" consists of holdings, not dicta, of Supreme Court decisions "as of the time of the relevant state-court decision"). However, federal circuit law may still be persuasive authority in identifying "clearly established" Supreme Court law or in deciding when a state court unreasonably applied Supreme Court law. See Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011); Tran v. Lindsey, 212 F.3d 1143, 1154 (9th Cir. 2000).

A state court decision is "contrary to" clearly established federal law established law if the decision applies a rule that contradicts the governing Supreme Court law or reaches a result that differs from a result the Supreme Court reached on "materially indistinguishable" facts. Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam); Williams, 529 U.S. at 405-06; see also Cullen v. Pinholster, supra ("To determine whether a particular decision is 'contrary to' then-established law, a federal court must consider whether the decision 'applies a rule that contradicts [such] law' and how the decision 'confronts [the] set of facts' that were before the state court."). When a state court decision adjudicating a claim is contrary to controlling Supreme Court law, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)." Williams, 529 U.S. at 406. However, the state court need not cite the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Early, supra.

A state court decision involves an "unreasonable application" of clearly established federal law "if the state court either unreasonably

extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams, 529 U.S. at 407; Cullen v. Pinholster, supra; Woodford v. Visciotti, 537 U.S. 19, 24-27 (2002) (per curiam); Moore v. Helling, 763 F.3d 1011, 1016 (9th Cir. 2014)(courts may extend Supreme Court rulings to new sets of facts on habeas review "only if it is 'beyond doubt' that the ruling apply to the new situation or set of facts."), cert. denied, 135 S.Ct. 2361 (2015). A federal habeas court may not overrule a state court decision based on the federal court's independent determination that the state court's application of governing law was incorrect, erroneous or even "clear error." Lockyer, 538 U.S. at 75; Harrington v. Richter, 562 U.S. 86, 101 (2011)("A state court's determination that a claim lacks merit precludes federal relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision."). Rather, a decision may be rejected only if the state court's application of Supreme Court law was "objectively unreasonable." Lockyer, supra; Woodford, supra; Williams, 529 U.S. at 409; see also Taylor v. Maddox, 366 F.3d 992, 999-1000 (9th Cir. 2004)("objectively unreasonable" standard also applies to state court factual determinations).

When a state court decision is found to be contrary to or an unreasonable application of clearly established Supreme Court law, a federal habeas court "must then resolve the [constitutional] claim without the deference AEDPA otherwise requires." Panetti v. Quarterman, 551 U.S. 930, 953 (2007); see also Williams, supra, 529 U.S. at 406 (when a state court decision is contrary to controlling Supreme Court law, a federal habeas court is "unconstrained by § 2254(d)(1)"). In

other words, if a § 2254(d)(1) error occurs, the constitutional claim raised must be considered *de novo*. Frantz v. Hazey, 513 F.3d 1002, 1012-15 (9th Cir. 2008); see also Rompilla v. Beard, 545 U.S. 374, 390 (2005).

The California Supreme Court denied Petitioner's claim without comment or citation to authority. (See Lodgment Nos. 7-8). The Court "looks through" the California Supreme Court's silent denial to the last reasoned decision as the basis for the state court's judgment. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground."); Cannedy v. Adams, 706 F.3d 1148, 1159 (9th Cir. 2013) ("[W]e conclude that *Richter* does not change our practice of 'looking through' summary denials to the last reasoned decision – whether those denials are on the merits or denials of discretionary review." (footnote omitted)), as amended, 733 F.3d 794 (9th Cir. 2013), cert. denied, 134 S.Ct. 1001 (2014). Therefore, in addressing Petitioner's claim, the Court will consider the California Court of Appeal's reasoned opinion. See Berghuis v. Thompkins, 560 U.S. 370, 380 (2010).

## VI. DISCUSSION

### A. Right to Be Present

Petitioner contends that the trial court erroneously found that he had voluntarily himself from trial, in violation of his right to be present at trial and his right to confront witnesses under the

California Constitution and the federal Constitution. Petitioner claims that his absence from the trial prejudiced him because: (1) "the primary witness against [P]etitioner testified differently in his absence than she did during the preliminary hearing and admitted the difference in her testimony was the result of the [P]etitioner's absence during the first part of her trial testimony;" and (2) "[c]ases recognize the importance of a defendant's presence during all phases of a trial, including the jury instructions." (Petition at 5, Attachment "A"; Traverse, Memorandum of Points and Authorities at 1-17).[9]

**1. The Record Below**

On September 24, 2012, Petitioner was present when the jury was selected and sworn. Opening statements and testimony were scheduled to begin the next day at 10:30 a.m. The trial was scheduled to begin an hour later than usual in order to allow the Sheriff's Department sufficient time to transport Petitioner, who was in a wheelchair, to the courtroom. (See 1 RT 1-20).

The following afternoon, at approximately 1:30 p.m., the trial

[9] To the extent that Petitioner is alleging a violation of the California Constitution, his claim is not cognizable on federal habeas review. See 28 U.S.C. § 2254(a); Estelle v. McGuire, 502 U.S. 62, 67-68 1991)("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); Smith v. Phillips, 455 U.S. 209, 221, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)("A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution."); Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996)("We accept a state court's interpretation of state law, . . . and alleged errors in the application of state law are not cognizable in federal habeas corpus.").

court noted that Petitioner had not appeared in court that day. The trial court stated that it had received various explanations for Petitioner's non-appearance, but did not know why Petitioner had not appeared. Petitioner's counsel stated that during a phone conversation with Petitioner about an hour earlier, Petitioner said that early in the morning he was in line to go to court, he was taken out of line and taken to the doctor's office, he got a "full doctor workup", received more pain medication (he had earlier suffered an injury in his lumbar disc), and that (even though he was expecting to go back to the line to go to court) he was taken back to his cell. Petitioner's counsel stated he was not sure if the Sheriff's Department had a medical hold on Petitioner (who required a catheter and needed medication "because of irritations"). Although the trial court stated it was confused about why Petitioner did not appear in court that day, the trial court decided to dismiss the jurors until the following day. The trial court, hoping to start the trial the following day at 10:30 a.m., ordered two prosecution witnesses to return in the morning and two prosecution witnesses to return in the afternoon. The trial court then dismissed the jurors and ordered them to return the following day at 10:30 a.m. (See 1 RT 20-33).

That same afternoon, at 2:50 p.m., the trial court stated that it had been informed that Petitioner had arrived at the courthouse in the afternoon, but had complained of pains and was taken to the hospital. The trial court ordered the attorneys back at 4:00 p.m. for a status report about Petitioner's condition. The trial court stated, "Maybe he's just not physically able to go on with the trial. If so, I'll let this jury go, and we'll try it later or something else. But if he's

able, and we just as soon get going and do it now." (See 1 RT 33-35).

At 4:00 p.m., the trial court informed counsel that it had heard that after Petitioner arrived at the courthouse Petitioner had said that a "wheelchair witness who was riding in the same vehicle was in front of him and was moving his chair back or something, and it hurt his back somehow," Petitioner had requested to be taken to the hospital, and Petitioner had not been cleared. The trial court stated it was told by Sheriff's deputies that any other complaints by Petitioner would result in another trip to the hospital where he would "ha[ve] to be cleared by independent doctors." Although the trial court expressed optimism for continuing the trial the following day, the trial court stated, "But based on what we've heard now about these complaints, I expect we may have to go through this again." The trial court ordered the attorneys to return the next morning. (See 1 RT 35-37).

The following morning, at 8:40 a.m., the trial court informed counsel that it had received a report from the Sheriff's Department which stated that Petitioner had made the following statement: "I know a guy that got $10,000 in a settlement." The trial court stated that based on Petitioner's statement, the timing of the events, and the notifications that Petitioner was refusing to come out of his cell and that witness Wright also was refusing to come to court, the trial court found that Petitioner was voluntarily absenting himself from trial pursuant to P.C. § 1043(b)(2). The trial court noted that it had already drafted an order permitting the use of reasonable force to extract both men. The trial court stated that the prosecution was going to call witnesses and the trial was going to proceed in Petitioner's

absence. When the trial court asked Petitioner's counsel to convey the message to Petitioner that the trial was going to proceed in his absence, Petitioner's counsel stated he could only speak to Petitioner if Petitioner called him collect. Petitioner's counsel objected to the trial proceeding in Petitioner's absence. Petitioner's counsel stated that the statement in the Sheriff's Department report about Petitioner was not sufficient evidence to support the trial court's determination about Petitioner's actions. The trial court responded that its determination was based on more than just that statement, including Petitioner's refusal to leave his cell that morning. (See 1 RT 38-42).

Shortly prior to 10:30 a.m. (when the trial was scheduled to proceed), Petitioner's counsel expressed concern that there would be a mistrial if the trial proceeded in Petitioner's absence and it was determined that Petitioner was not at fault for his absence. Petitioner's counsel requested that the jurors be excused until 1:30 p.m. so that he could drive to the jail and speak with Petitioner (Petitioner's location precluded a video conference). (See 1 RT 42-43). The trial court denied that request, stating:

> . . . The problem is and this is what I suspected yesterday, this has now been a game that has developed, and I'm convinced well beyond any reasonable doubt it is a game being played by [Petitioner]. And I'll tell you even more information in just a moment. [¶] But it's becoming a game of attrition because we're running out of time. As you know, this jury was cleared through Friday. And while it may be possible, we haven't inquired, maybe they can go from Monday and Tuesday as well.

But this court has a very backed up scheduling, not in small part due to your cases that are lined up back to back behind this case. [¶] But in any event, if I felt it was worthwhile for you to go down there and talk to him, I would probably even allow it, even because of the hour and a half delay. But I am convinced this morning after we had the session at 8:30, I had my clerk fax to the sheriffs an extraction order as I indicated. I've been informed by the sheriffs now, as of five minutes ago, that upon that extraction order, sure enough, the defendant voluntarily came out of his cell. [¶] But also, as I suspected, as soon as he did that he made a request for medical evaluation. Which means that by law, or at least by policy of the Sheriff's Department, has to take him to another doctor or another medical facility. So he's on his way now to some medical facility or seeing a doctor, either downtown or at an independent station. So I am convinced that his refusal to come out is voluntary. His refusal now to come to court is voluntary, he's causing this directly. And we're all caught in the middle of this. [¶] So, again, if I thought the hour and a half delay would result in him being here at 1:30, I think it would be helpful if he knew we were going to go on in his absence. I would like to get that message to him. And I was trying desperately to get that message to him yesterday, either early or late. He doesn't know that we're going to do that. And I wish he did, because I think he would join us perhaps voluntarily. Then it becomes a 50/50 issue. [¶] But it's a game of attrition now and when we're going to start losing these jurors. So we are on Wednesday. And please keep

> that in mind. So that limits our options in my opinion. It's going to take at least a couple days to present evidence and argument and so forth to the jury. So at this point I'm not inclined to [grant the request to postpone the trial until 1:30 p.m.].

(1 RT 43-45).

The trial court ordered Petitioner's counsel to be at the courtroom at 10:30 a.m., thereby preventing Petitioner's counsel from trying to give Petitioner the message that the trial was proceeding without him (the trial court did not believe Petitioner was available for that message because he likely was being checked out at a medical facility). (See 1 RT 45).

Petitioner's counsel objected to the trial proceeding in Petitioner's absence, stating that he did not believe the trial court was properly interpreting the information. Petitioner's counsel stated that medical records he received that morning and a medical doctor (a psychiatrist who had evaluated Petitioner four days earlier) he spoke with yesterday confirmed that Petitioner was in a wheelchair for a L4 fracture and received medication. Petitioner's counsel argued that it was "a bit premature at this point to claim that it's a game," and repeated his request to postpone the trial so that he could possibly go and speak with Petitioner. (See 1 RT 45-46).

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The trial court responded as follows:

> . . . I'm not disputing that he has medical problems. I hope you don't misunderstand me. I know he's in a wheelchair. And I also know that he had, based on your representation, in regards to the urine bag. I accept that. I'm only concerned about his response to here in court. [¶] And I am convinced that based on what the Sheriffs officers are telling me –- you got to remember, he went to St. Mary's Hospital last night and no problems. I don't even think he told the doctor there was any problems or whatever. He may have complained of it. The doctor couldn't find anything wrong with him. He's been cleared several times. [¶] We sat here all day long and picked a jury on one day, and he made no complaints to you, or at least I never heard of any complaints through you of him being here or anything else. It was only the following day when we were going to have opening statement after we picked a jury that all of this has come up. [¶] And at first I was very suspicious. Now I'm convinced after reading the reports and hearing from the reports from the Sheriffs officer that are coming in to me, you know, moment by moment, hour by hour, that his refusal to come out of the cell was not an accident. He refused. And so that's why I faxed the order down. [¶] . . . [¶] . . . And I don't like the second guessing by your of reading these medical records of the court's interpretation of this. But maybe you have those true beliefs. I don't believe you do. You know and I know he's playing a game at this point, and it's pretty obvious to everyone. All the Sheriffs

> officers, they all think that. And the doctors think that now. [¶] So when someone says, you know, I understand you can get $10,000 for this claim, and then they start going through these motions, he's more interested in a different lawsuit, not this lawsuit. He doesn't want to be here in this courtroom for this lawsuit. He's more interested in what he's going to get out of that other lawsuit. That's what that points to. That's almost conclusive in my mind. [¶] But you can say what you want, [Petitioner's counsel]. But it's to no avail here. If I thought for a moment your hour and half down there would get him here by 1:30, I would do it. I guaranty [sic] you going down there would be a waste of your time. But, furthermore, it's a waste of the court's time. As soon as you see him, whatever, he's going to make another medical claim or whatever. And he does have medical issues but has nothing to do with him not wanting to be here at this trial. It's very conclusive.

(1 RT 47-49).

When Petitioner's counsel asked the trial court whether it had anything from St. Mary's Hospital supporting his statements about claims he thought Petitioner made and about nothing wrong being found, the trial court responded, "I'm sure he made claims to the doctor, yes. All I'm saying to you, there's nothing found. And we cleared very quickly by medical personnel at St. Mary's. Timing wise, that's the information. I'm sure he made claims." (See 1 RT 49).

Trial started slightly before 10:30 a.m., in Petitioner's absence. Pursuant to Petitioner's counsel's request, the trial court instructed the jurors as follows:

> I did want to indicate to you one thing, ladies and gentlemen, and that is, it's obvious that [Petitioner] is not here. His lack of presence is not to be taken by you either positively or negatively. It's a nonissue. You're not to be concerned about it. You're not to speculate as to why he's not here and so forth. And he may be present later on. [¶] But in any event, it's, again, not to be taken by you as a negative factor, and you can't, in any way, use bias against him because of his lack of presence. You can't have sympathy for him in a positive way in any way because he's not here. It's just a nonissue, and you're not to consider that in anyway [sic], shape, or form."

(See 1 RT 49-51).

The trial court proceeded to give preliminary instructions to the jurors. (See 1 RT 51-56). The prosecutor then gave a brief opening statement. (See 1 RT 56-59). The prosecution then called Brianna Ikeler, the victim, to testify. Ms. Ikeler testified on direct examination until approximately 11:25, when a recess was taken. (See 1 RT 51-99).

Petitioner appeared in the courtroom at 11:30 a.m. (See CT 96). At 11:45 a.m., with Petitioner present, Ms. Ikeler resumed her direct

examination testimony. Ms. Ikeler testified on direct examination, cross-examination, and redirect examination, until a lunch break was taken. (See 1 RT 99-121).

After the jurors had left the courtroom, Petitioner's counsel informed the trial court that he had spoken briefly with Petitioner, who had informed him that the incident that had prompted him to go to the hospital the day before involved an accident on the bus during which a wheelchair fell on him. Petitioner's counsel stated he had not yet had an opportunity to speak with Petitioner about today's events. The trial court stated that Petitioner's counsel could speak to Petitioner, but the jurors were returning at 1:30 p.m. When the trial court asked Petitioner's counsel what time he wanted to come back to put things on the record, Petitioner's counsel argued that the trial court had handled the case too quickly, Petitioner had suffered a legitimate injury the day before, and the trial court should have waited so that Petitioner did not miss the one hour of trial. Petitioner moved for a mistrial on the grounds that his absence from the trial (based on the trial court's finding that Petitioner was responsible for his own absence) violated his state and federal constitutional rights. The trial court denied the motion for a mistrial. (See 1 RT 122-23).

Soon thereafter, the trial court directly addressed Petitioner as follows:

> I want you here. It's my desire that you be here. If it wasn't for my efforts, you wouldn't have been here at 11:30, because it's my understanding you asked for a full medical evaluation this morning after you refused to come out of your

> cell initially. [¶] But in any event, [Petitioner] let me just make a statement. And then you can do whatever you want. You can say whatever to your attorney, and your attorney can put whatever he wants on the record. But I've got to get my staff a break. We're now into 12:15 in the afternoon. And we've been waiting for a full 24 hours for you to be here. [¶] All I'm saying to you, sir, I want you here, and I would like to have you here each time. And I will do everything I can on the court's behalf to make sure you are here. But I want you to know that if you aren't here, we're going to go forward with this trial with or without you."

(1 RT 124).

That afternoon, following the presentation of evidence in both the prosecution's and the defense cases, Petitioner renewed the motion for a mistrial. Petitioner's counsel informed the trial court of what he had learned from Petitioner about the events during the past two days. According to Petitioner, on the first day of trial, at approximately 6:00 a.m. (after waking up at approximately 4:00 a.m.), when Petitioner was waiting in a room to be transported to the courthouse, Sheriff's deputies approached him and told him he had a doctor's line (which meant he had the option to go or not to go to the doctor); Petitioner went to the doctor, believing the doctor's line was in response to a court order for pain (the day before Petitioner told his counsel that he had some pain, and his counsel told him he could ask for a doctor to evaluate him to see about more pain medication); at approximately 9:00 a.m., Petitioner saw a doctor for 15 to 20 minutes about pain medication and

the need for a back brace, and the doctor gave him mild pain medication and told him he was okay to go to court; after seeing the doctor, Petitioner returned to his dorm, thinking he was going to be put in the court line for transportation; at some point between 11:00 to 11:30, Petitioner called his counsel and told him that he was in his dorm room and asked why he was not in court (Petitioner's counsel stated he called the trial court's bailiff to say that Petitioner had called, and the bailiff said he or she knew Petitioner was in the dorm); that afternoon, a bus or van brought Petitioner (strapped in a seat belt) and Mr. Wright to the court; when the vehicle accelerated, Mr. Wright's wheelchair fell in a backward motion toward Petitioner and Mr. Wright's head landed on Petitioner's lap; Petitioner strained his back when he tried to hold up Mr. Wright's wheelchair; at that point in time Mr. Wright made a comment, in a joking manner, that he had heard that somebody had received $10,000 for some kind of settlement; Petitioner responded, "No, man. This is serious. I got pain. I hurt myself holding you up. This is -- more serious than a joke;" as they continued driving to court, the Sheriffs asked Petitioner what he had experienced with the way Mr. Wright had fallen and Petitioner responded that he had experienced a lot of pain and maybe should see the doctor; soon after coming to the court, Petitioner was put into an ambulance and taken to the hospital where he was given two shots in the arms for pain (which helped his headache) and a third shot (morphine) which apparently did not help his back pain; the hospital released Petitioner; and although Petitioner was going to be taken to the jail's medical area, he was taken back to his dorm because of the medical release. According to Petitioner, this morning (after waking up at approximately 4:00 a.m.) he was in his dorm room where he experienced continued pain, so he asked to go to the doctor; one senior

Sheriff's deputy threatened him, telling him he needed to come out and go to court; he said, "I'm not refusing to come out. I'm wanting to go and see a doctor;" he spoke to two other Sheriff's deputies, telling them that it was early and he just wanted to get some medical attention and then go to court; he was taken to a County doctor at the jail, x-rays were taken, and then he was brought to court a little before 11:30 a.m. Petitioner's counsel argued that Petitioner's absence from the court was not Petitioner's fault, the trial court had reacted too quickly in assuming Petitioner was totally at fault, and that the jury was given the impression that Petitioner was at fault. (See 1 RT 239-44).

The trial court denied the renewed request for a mistrial, stating, "But for this court's action – which you, [Petitioner's counsel] are aware of –- this morning at 8:30 ordering an extraction order, it is my belief that the defendant still would not be here today," and adding, "He has made multiple requests for medical evaluation, both yesterday, several different times, both before and after his arrival here in Long Beach. He made several requests this morning of the Sheriffs Department of medical evaluation." (See 1 RT 244-45). The trial court, noting that the statement made by Petitioner's counsel had "several misstatements," gave the following recitation of the facts:

> But the facts do speak otherwise. This court was informed that approximately 8:30 this morning that the defendant was refusing to come out of his cell. Now, that may or may not be a miscommunication between the defendant and the Sheriffs. But that's what the court was informed of. . . . And I

ordered an extraction order, and the Clerk made a minute order, and we faxed it downtown. Then and only then was the Sheriff able to act. [¶] And sure enough, as soon as the defendant was notified of that, I was informed as you were and [the prosecutor] was, that he was then requesting a medical evaluation after the extraction order. No force was used, by the way, at least none was brought to our attention. But they are required by policy to do another medical evaluation. One was done after that medical request was made by the defendant. [¶] Now that in and of itself takes us well past 10:30. . . . There's no way physically we can get somebody here by 10:30 with traffic and everything else in Los Angeles County. So I was hoping that he would be here sometime today. We had no idea what day or time he would be released and brought into court. I'm glad he was here at 11:30. But for the court's actions he wouldn't have been here by 11:30. [¶] . . . [¶] Now what I want to put on the record is that we were in session most of the day on the 24th of September. And on the 24th there was no indication by [Petitioner] of any pain, of any discomfort or any request for a continuance because of pain or discomfort. And, in fact, the indication that this trial was going to go forward. And so everyone was aware . . . that we were going to start September 25th at 10:30 in the morning. [¶] And if as you say the defendant was making requests to be evaluated by a doctor, again, any time after 8:00 in the morning, there's no way that he could expect to be here at 10:30 in the morning in front of a jury for opening statements. This court made no mention of the jury all day on

the 25th, and we made numerous attempts to get here. In fact, I ordered the jury back initially at 11:00 o'clock. At 11:00 o'clock it became apparent he wasn't going to be here. So I had ordered them back at 1:30. At 1:30 it became apparent he wasn't going to be here. [¶] But I think we waited until like 2:00 o'clock finally, and then I released the jurors for the day and told them to come back the following day at 10:30. Now, sure enough, the defendant arrived here. But it was, again, well after 4:00 o'clock in the afternoon, because we were meeting here, as you may recall, and you –- I'm sure you believe it, that you were here at 4:00 o'clock p.m. in the afternoon, and we had no defendant here. [¶] It was then he asked for another medical evaluation upon his release. We were informed later. They appeared, and then whatever happened in the van happened, and then he made a request, because of pain, to go to St. Mary's. So you didn't have an opportunity to, I don't believe, to talk to him directly, which was the court's hope. Even after excusing the jury, I was hoping [Petitioner] would be here to be able to talk to you directly and so forth. [¶] It wasn't until this court was informed at 8:30 the next day, today on the 26th of September, that the defendant was refusing to come out of his cell. Then and only then did I inform counsel that it was my intent to go forward with this trial, because of what I had been informed of at that time, which turned out to be true, and what I already had known had happened on the 25th, that there was no way he was physically going to be here at 10:30. [¶] And so he was voluntarily absenting himself, and so the court invoked,

> reluctantly, 1043 of the Penal Code, because I feel his refusal to come out of his cell and his constant requests for medical evaluation is what caused the delay. It wasn't the court. It wasn't counsel. It was [Petitioner] and his decision to constantly request medical evaluation.

(1 RT 245-48)

Following Petitioner's conviction, Petitioner filed a motion for a new trial on the grounds that his absence from trial violated his right to a fair trial and his right to confront witnesses under the California Constitution and the Fifth and Sixth Amendments of the United States Constitution. Attached to the motion, inter alia, was a two-page Los Angeles County Sheriff's Department, Inmate Injury/Illness Report dated September 25, 2012 [describing the incident in the transport vehicle the afternoon of September 25, 2012], a one-page Los Angeles County Sheriff's Department, Transportation Bureau, Watch Commander Summary dated September 25, 2012 [describing Plaintiff's statement about the incident in the transport vehicle on September 25, 2012], and a one and one-half page statement by Plaintiff and other inmates dated September 28 (presumably 2012) [describing the events of September 26 (presumably 2012)]. (See CT 133-45; 2 RT 323-24).

On October 17, 2012, immediately following the trial court's true findings on the allegations that Petitioner had suffered four prior prison terms, the trial court heard the motion for a new trial. The trial court ruled on the motion for a new trial, after addressing at length incorrect statements or overlooked facts in Petitioner's

Statement of Facts:

> First of all, this jury was not excused before noon on the 25th. Excusing of the jury took place after or at or near 2:00 o'clock on the 25th. And that's after they were extended and put over at least two times before. . . . [The Statement of Facts] implies that somehow this jury was excused before noon on the 25th. It was not. [¶] We never did see the defendant on the 25th. When the van finally did arrive at 4:00 o'clock, that's when this, as the defendant say, he was injured and taken to St. Mary's Hospital. This court with counsel inquired on the nature of that incident. And although [Petitioner's counsel] has attached a Sheriffs' report to his motion for new trial, there are other communications that were given both to counsel and to the court in regards to that incident and other that are not contained in here. Again, I believe everything was documented at the time. [¶] But the information the court received is that that accident, or incident was not of major concern. It was a trivial stopping of the van in which no other individuals other than the defendant supposedly and [Mr. Wright] were majorly injured. That's the allegation of the defendant but only the defendant. And in the court's conclusion in this matter, that was a scam. It's not true. In fact, he was cleared by St. Mary's and, there's been no other instances since that time here in court that the court observed on the 26th. On the 27th, he was again here in court. And there's been no injuries to this defendant. In fact, he's doing better today. He's got a

walker instead of a wheelchair, so he's made a dramatic improvement before. So there was no major injury in that incident on the 25th. We know that. [¶] Now after he was cleared by St. Mary's, sent back downtown, in fact, what happened on the 26th is the defendant refused to come out of his cell. Now in his letter, he states that's because the doctor told him to get bed rest. Well, [Petitioner], you're in the middle of a felony trial. We picked a jury. Jeopardy's attached. And it's up to you whether or not you want to go to court or not or whether or not you want to have bed rest. Okay. It's no one else's decision whether the doctor suggested it or anyone else suggested it. It's up to you. [¶] When you told the Sheriffs Department that you were not coming out, that's a voluntary absence from the court proceedings that you made. It's not anyone else. The doctor didn't order it. The doctor didn't say you must miss court. You must do this or anything else. No one ordered that. You're the one that conveyed it to the Sheriffs Department and asked to stay in your cell and refused to come out. [¶] Now we'd already missed one day, so that court had a couple of choices. I couldn't even get you here to take a waiver like, well, let's put it over for a week. And in fact, in [Petitioner's counsel's] Statement of Facts, it's very telling because he didn't know if I'd ever see you again. No one knew if we'd see you again. [Petitioner's counsel] asked the court for permission to go downtown and to talk to you and try to convince you to come back to court. That's what the state of the evidence was when we started this trial at 10:30.

[Petitioner's counsel] was asking for permission to go downtown. [¶] Now oddly enough, if I had granted that, you would have been here an hour late. I would have had [Petitioner's counsel] here. But that just goes to show you that no one knew when or if we would ever see [Petitioner] again. [¶] It wasn't a bad idea. The only problem is we'd already missed one day, and this jury, by letting him go downtown, would miss at least another half a day, maybe another full day. And there wouldn't be enough time for this jury to hear this case and decide this case. So the court made a decision because I did not know and because the information I was receiving at the time that you were refusing to come out of your cell that to invoke the voluntary absence of yourself from the courtroom. I didn't want to do that. In fact, I had worked everything I could the day before to get you here. And I did everything the morning on the 26th to get you here. [¶] But for the court's action to send a faxed minute order to forcibly remove you from the cell, you would still be in your cell. But because the court faxed that order the Sheriffs Department, they conveyed that to you, and they you, all at once you said, I'll come out voluntarily, and I'll go to court. And that's exactly what happened, [Petitioner]. [¶] . . . [¶] Now because the Court had faxed that early in the morning, it was around 9:00 o'clock, I think that we had just received the information at 8:30. But by 9:00 o'clock we had faxed that information downtown. But again, they had policies, and because of your refusal, they then had to take you to medical to clear you. They did that very, very quickly

> only because of the court order (illegible) because I emphasized to the Sheriff here, the Sergeant here, that your presence was necessary for the jury trial. So you did arrive at approximately 11:30 on the 26th. [¶] Now some testimony was taken, but that first witness was still on the stand by the time you made it into the courtroom. So it's my feeling that, even though you cause this incident of being absent, that you were still able to exercise all constitutional rights in confronting and cross-examining all witnesses including the victim who was that first witness. [¶] What you really missed was opening statements by counsel on both sides. . . . [¶] . . . [¶] But what you did is you missed an hour of testimony. But that first witness was still on the stand when finally did arrive, and we went forward. . . . The Court did it reluctantly, but I'm satisfied that the direct cause of the delay was the defendant's action . . . . [¶] So with that supplement to the Statement of Facts, I'm going to deny the motion for a new trial.

(2 RT 325-30).

**2. Legal Authority**

"[T]he right to personal presence at all critical stages of the trial . . . [is a] fundamental right[] of each criminal defendant[,]" Rushen v. Spain, 464 U.S. 114, 117 (1983); see also Kentucky v. Stincer, 482 U.S. 730, 745 (1987) ("[D]ue process clearly requires that a defendant be allowed to be present 'to the extent that a fair and just

hearing would be thwarted by his absence[.]'") (citation omitted); United States v. Gagnon, 470 U.S. 522, 526 (1985) (per curiam) ("The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, but . . . is [also] protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him." (citation omitted)); Illinois v. Allen, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."). The Confrontation Clause guarantees a defendant the right to be present when his or her absence would interfere with the opportunity for effective cross-examination, while the Due Process Clause guarantees a defendant "the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." Stincer, 482 U.S. at 740, 745; see also Faretta v. California, 422 U.S. 806, 819-20 & n.15 (1975) ("[A]n accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings."); Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934) (A criminal defendant has a Due Process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."), overruled on other grounds by, Malloy v. Hogan, 378 U.S. 1 (1964). Nevertheless, the "privilege of presence is not guaranteed 'when presence would be useless, or the benefit but a shadow[.]'" Stincer, 482 U.S. at 745 (quoting Snyder, supra), Petitioner "bears the burden of showing 'how th[e] hearing was unfair or that his presence at the hearing would conceivably have changed the result.'" Hovey v. Ayers, 458 F.3d 892,

902-03 (9th Cir. 2006) (citation omitted); Siripongs v. Calderon, 35 F.3d 1308, 1321-22 (9th Cir. 1994).

**3. California Court of Appeal's Opinion**

The California Court of Appeal rejected Petitioner's claim as follows:

> We need not address the claimed substantive violation because the matter can be resolved by a prejudice analysis. [Petitioner] contends that his limited absence from trial prejudiced his case because he was not present for the reading of jury instructions at the outset of the case and part of the victim's direct examination. We disagree that [Petitioner] has demonstrated prejudice, whether error is judged under the federal standard for constitutional error (*People v. Hovey* (1988) 44 Cal.3d 543, 585 [purported violation of constitutional right to be present at trial assessed under harmless beyond a reasonable doubt standard in *Chapman v. California* (1967) 386 U.S. 18, 24]) or the state standard for statutory error (*People v. Jackson* (1996) 13 Cal.4th 1164, 1211 [violation of statutory right to be present at trial evaluated for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836 standard requiring a showing that it is reasonably probable that a result more favorable to the defendant would have resulted absent the error]).
>
> As to the jury instructions given in [Petitioner's]

absence, they consisted only of preliminary instructions on procedural matters prior to the People's opening statement. The preliminary instructions were admonishments not to discuss the case, do independent research or speak to any party, witness or lawyer involved in the case and directions to follow the court's definitions of terms, be open minded and use note taking in a proper way. As relevant, these preliminary instructions were repeated in the full set of instructions before deliberations when [Petitioner] was present. [Petitioner's] absence for these preliminary instructions was harmless.

As to part of the victim's direct examination, [Petitioner] contends that his absence was prejudicial because the victim testified in more detail about the attack at trial in the short time he was not there than she did in his presence at the preliminary hearing. On cross-examination, when asked about her reluctance to identify [Petitioner] at the preliminary hearing, the victim stated that she had been scared of retaliation.[10] Later, on redirect examination, the victim admitted that, because she "was scared," she had lied during the preliminary hearing by saying she could not remember certain details of the attack. The victim said, "[Petitioner] was right there. And in the same chair he's sitting now. And just earlier today when I was speaking about those things, and I did remember [Petitioner] was not present

[10] [See 1 RT 109-11].

in that chair, and it made it a lot easier for me to talk about it and to say it because . . . back then and I still am, like I said, he said that, if I ever put him in jail, I better move out of the area because his homeboys would come after me. And . . . I was living in the area back then still, and that's why. And I was very scared."[11]

[Petitioner] isolates the victim's statement that it was easier for her to testify when he was not present to claim that his absence was prejudicial. But that statement when viewed in context and in the totality of the evidence does not demonstrate prejudice. Although the victim was reluctant to answer questions at the preliminary hearing and said she could not remember many details, she did admit that she was hit in the head and on her hands and that another person caused her to suffer those injuries[12]—statements that were consistent with her trial testimony and her injuries. Her trial testimony about the attack, given in [Petitioner's] absence, was consistent with her statements to her neighbor and to a police officer after the attack, and both the neighbor and the police officer testified at trial about her appearance and reports to them after the attack. [Petitioner] was present for the latter part of her direct examination, cross-examination and redirect examination, and at no point when he was there did she recant or alter any of the trial

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[11] [See 1 RT 120-21].

[12] [See CT 4-19, 24-25, 29-39].

testimony she had given in his absence. Moreover, [Petitioner's] defense, presented through his own testimony and that of his friend's brother, was that the victim had hit herself repeatedly, including with a car distributor, which caused the injury to her head, and that he had slapped her across the face only once because she was out of control. [Petitioner's] account of the incident was inconsistent with the nature and extent of the victim's injuries, which, as stipulated by the parties, were multiple contusions and lacerations on her head, hands, arms and knee, as well as a laceration on her scalp requiring five to six staples. In any case, even assuming [Petitioner] were not absent from trial and the victim testified in his presence just as she had at the preliminary hearing, that testimony in conjunction with the testimony of the neighbor and the police officer and the nature and extent of the victim's injuries, whether [Petitioner] put on a defense or not, is overwhelming such that it establishes that any error from proceeding in his absence was not prejudicial under either the federal or state standard.

In addition, before the trial court began trial in [Petitioner] absence, it directed the jury, "It's obvious that [Petitioner] is not here. His lack of presence is not to be taken by you either positively or negatively. It's a nonissue. You're not to be concerned about it. You're not to speculate as to why he's not here and so forth. And he may be present later on. But in any event, it's, again, not to be

taken by you as a negative factor, and you can't, in any way, use bias against him because of his lack of presence. You can't have sympathy for him in a positive way in any way because he's not here. It's just a nonissue, and you're not to consider that in any way, shape, or form."[13] Later, in instructing before deliberations, the court told the jury, "The fact that [the] defendant was absent for a portion of the trial is not evidence. Do not speculate about the reason. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations."[14] It is presumed the jury followed these instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)[15]

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[13] [See 1 RT 51].

[14] [See 2 RT 281].

[15] Contrary to [Petitioner's] argument, *People v. Murphy* (2003) 107 Cal.App.4th 1150, is inapposite to the result her. There, the trial court allowed a victim in a sexual assault case to testify behind one-way glass so that she did not have to see the defendant. Reversing the judgment, the appellate court concluded that, "[e]ven assuming that, in an appropriate case, the court might allow a testifying adult victim, who would otherwise be traumatized, to use a one-way screen to avoid seeing a defendant without violating the right of confrontation, we do not think a court may do so without making the necessary factual findings based upon evidence. In other words, a court may not, as the court did in this case, dispense with complete face-to-face confrontation merely upon a prosecutor's unsworn representation that defendant's presence was part of a distraught adult witness's problem. In our view, the court's ruling was not based upon an adequate 'case-specific finding of necessity.' [Citation.] We are unable to say that the error was harmless beyond a reasonable doubt [citation], especially since the pivotal issue was the alleged victim's credibility. (*Id.* at p. 1158.) This case is different. Although [Petitioner] missed a portion of the victim's direct examination, he did confront her and her testimony was consistent with her admissions at the preliminary hearing, the accounts of other witnesses who saw and spoke to her after the attack and the nature and extent of her injuries.

(Lodgment No. 6 at 4-6, unbracketed footnote in original, bracketed footnotes added).

**4. Analysis**

The California Court of Appeal found that any error from proceeding in Petitioner's absence was not prejudicial under the federal or state standard for harmless error. Thus, the sole determination for the Court is whether the California Court of Appeal "applied harmless-error review in an 'objectively unreasonable' manner."[16] See Mitchell v. Esparza, 540 U.S. 12, 18 (2003); see also Davis v. Ayala, 135 S.Ct. 2187, 2198 (2015) ("Because the highly deferential AEDPA standard applies, we may not overturn the California Supreme Court's decision unless that court applied *Chapman [v. California,* supra*]* in an objectively unreasonable manner.") (citation and internal quotation marks omitted). The Court finds that it did not.

Petitioner was absent for one hour of trial, during which time he missed the trial court's reading of the preliminary instructions (see 1 RT 51-56), the prosecutor's opening statement (see 1 RT 56-59), and a portion of Brianna Ikeler's direct examination testimony (see 1 RT 61-98).

[16] See Brecht v. Abrahamson, 507 U.S. 619, 629 (1993); Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (a Confrontation Clause violation is subject to harmless error analysis); Rushen v. Spain, 464 U.S. 114, 119 (1983); Hovey v. Ayers, 458 F.3d at 903 ("[A] violation of the right to be present is trial error, subject to harmless error review") (citing Campbell v. Rice, 408 F.3d 1166, 1172 (9th Cir. 2005)).

As the California Court of Appeal found, the instructions for which Petitioner was not present were simply preliminary instructions on procedural matters, and those jury instructions were mostly repeated prior to jury deliberations (see 1 RT 279-83, 299-300).

In addition, the California Court of Appeal also made the following factual findings: (a) While Brianna Ikeler was reluctant to answer questions at the preliminary hearing and did not disclose many details of the incident (see CT 5-41), she did testify that another person had hit her on the head and hands and caused her to suffer injuries (see CT 8, 16, 37-39), which was consistent with her trial testimony that Petitioner had hit her in the head and hands and caused her to suffer injuries (see 1 RT 66-78, 93-98, 101-09); (b) the portion of Brianna Ikeler's trial testimony about Petitioner attacking her and causing her injuries -- was given in Petitioner's absence (see 1 RT 66-82) -- was consistent with the testimony provided by her neighbor (Ms. O'Shea) and Officer Veloz regarding her appearance and her statements about Petitioner attacking her and causing her injuries (see 1 RT 133-38, 149-50, 160-70); (c) even though Petitioner was present during the latter portion of Brianna Inkler's direct examination and during the cross-examination and redirect examination, she did not recant or alter any of the trial testimony she had given in Petitioner's absence. (See 1 RT 100-21); (d) the testimony by Petitioner and Tim Wright that Brianna Inkeler had hit herself on the head with a car distributor, and Petitioner's testimony that he had slapped Brianna Inkeler across the face only once because she was out of control (see 1 RT 152-54, 180-210, 225, 231), were inconsistent with the nature and extent of Brianna Inkeler's injuries, which consisted of multiple contusions and

lacerations on her head, hands, arms and knee, as well as a laceration on her scalp requiring five to six staples (see 1 RT 175); and (e) overwhelming evidence of Petitioner's guilt was presented at trial, including Brianna Inkeler's testimony about Petitioner attacking her and causing her injuries (see 1 RT 61-98, 100-09), Brianna Inkeler's testimony that she had lied at the preliminary hearing based on her fear of Petitioner's "homeboys" retaliating against her (see 1 RT 110-11, 120-21), Officer Valdez's and O'Shea Myles's testimony about Brianna Inkeler's appearance and her statements about Petitioner attacking her and causing her injuries (see 1 RT 133-38, 149-50, 160-70), and the nature and extent of Petitioner's injuries (see 1 RT 175).

Based on the these findings, the California Court of Appeal determined that Petitioner had failed to demonstrate prejudice from his absence at trial. Because these findings are supported by the record, the Court concurs with the California Court of Appeal's conclusion that any error in proceeding with trial in Petitioner's absence did not have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). Therefore, the California Court of Appeal's harmless error review was not objectively unreasonable.

Moreover, the California Court of Appeal also noted that the trial court twice instructed the jury –- once before Brianna Inkeler testified, and once before deliberations began –- not to consider Petitioner's absence at trial for any purpose. (See 1 RT 51; 2 RT 281). The jury is presumed to have followed the trial court's instructions. Weeks v. Angelone, 528 U.S. 225, 234 (2000). Petitioner has failed to

rebut this presumption.

Accordingly, the California Supreme Court's rejection of Petitioner's claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law.

## VII. RECOMMENDATION

For the reasons discussed above, it is recommended that the district court issue an Order: (1) approving and accepting this Report and Recommendation; (2) denying the Petition for Writ of Habeas Corpus; and (3) directing that Judgment be entered dismissing the action with prejudice.

DATED: June 29, 2016

/s/
ALKA SAGAR
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file Objections as provided in the Local Rules Governing the Duties of the Magistrate Judges and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

Filed 9/29/14 P. v. Harloff CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>WILLIAM RANDOLPH HARLOFF,<br><br>Defendant and Appellant. | B244649<br>(Los Angeles County<br>Super. Ct. No. NA091217) |

APPEAL from a judgment of the Superior Court of Los Angeles County. James B. Pierce, Judge. Affirmed in part and reversed in part.

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Dawn Schock, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

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An information, filed on May 10, 2012, charged William Randolph Harloff with willful infliction of corporal injury on a cohabitant (Pen. Code, §273.5, subd. (a)[1]), false imprisonment (§ 236) and criminal threats (§ 422, subd. (a)). On the corporal injury count, the information specially alleged a great-bodily-injury enhancement (§ 12022.7, subd. (e)). On the corporal injury and false imprisonment counts, it specially alleged a deadly-or-dangerous-weapon enhancement for personal use of a hammer (§ 12022, subd. (b)(1)). It also specially alleged prior prison terms under section 667.5, subdivision (b).

A jury found Harloff guilty of all three counts and the special allegations of great bodily injury and personal use of a deadly or dangerous weapon true. After Harloff had waived his right to a jury trial on the prior-prison-term allegations, the trial court found that Harloff had served four prior prison terms within the meaning of section 667.5, subdivision (b). The court sentenced Harloff to 14 years in state prison, consisting of the high term of four years for willful infliction of corporal injury on a cohabitant, plus the high term of five years for the great-bodily-injury enhancement, one year for the deadly-or-dangerous-weapon enhancement and one year for each of the four prior prison terms. The court imposed sentence on the false imprisonment and criminal threats counts but stayed execution under section 654.

Harloff contends that the judgment must be reversed because the trial court committed prejudicial federal and state error by allowing approximately an hour of the trial to proceed in his absence without affording his counsel the opportunity to communicate with him to determine why he was not in court. He also contends the court erred by requiring him to register as a sex offender pursuant to section 290, subdivision (c). We agree that the registration requirement was erroneous and thus reverse that part of the judgment. We, however, conclude that Harloff has not demonstrated prejudicial error with respect to his limited absence from trial and thus affirm the judgment in all other respects.

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[1] Statutory references are to the Penal Code.

## DISCUSSION

1. *Harloff Did Not Demonstrate Prejudicial Error Based on His Absence from Trial*

"A criminal defendant's right to be present at trial is protected under both the federal and state Constitutions. [Citations.] 'The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, [citation], but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him.' [Citation.] Our state Constitution guarantees that '[t]he defendant in a criminal cause has the right . . . to be personally present with counsel, and to be confronted with the witnesses against the defendant.' [Citation.] [¶] Sections 977 and 1043 implement the state constitutional protection. [Citations.]" (*People v. Guiterrez* (2003) 29 Cal.4th 1196, 1202.)

In this case, Harloff, who as of the time of trial was in a wheelchair due to back pain, was present on the first day of trial when the jury was selected and sworn. On the second day, Harloff was not present. He went to the doctor in the morning and afterward was returned to jail instead of being taken to court. Because of Harloff's absence, the trial court did not hold trial that day and dismissed the jury until the following day. Later that afternoon, Harloff arrived in court, complained of pain and was taken to the hospital. Harloff and the brother of his friend, whom Harloff had seen in jail and now was to be a witness at trial, reported that they had been traveling to court together in a van, as both were in wheelchairs, and the wheelchair of the brother of his friend had run into Harloff, which caused Harloff further injury. The following day, Harloff did not appear in court as scheduled. The court received reports that Harloff and the brother of his friend were refusing to leave their cell and that Harloff was stating that the doctors had directed bed rest for him. The court, believing that Harloff was malingering, issued an extraction order. Harloff came out of his cell and requested a medical evaluation. The court then found Harloff voluntarily absent from trial and began the proceedings. Harloff was cleared by medical personnel and arrived at court about an hour after the proceedings had commenced. Harloff missed preliminary jury instructions, the prosecution's opening

statement and a portion of the victim's direct examination. According to Harloff, his absence from trial for approximately an hour constituted a violation of his federal and state rights.

We need not address the claimed substantive violation because the matter can be resolved by a prejudice analysis. Harloff contends that his limited absence from trial prejudiced his case because he was not present for the reading of jury instructions at the outset of the case and part of the victim's direct examination. We disagree that Harloff has demonstrated prejudice, whether error is judged under the federal standard for constitutional error (*People v. Hovey* (1988) 44 Cal.3d 543, 585 [purported violation of constitutional right to be present at trial assessed under harmless beyond a reasonable doubt standard in *Chapman v. California* (1967) 386 U.S. 18, 24]) or the state standard for statutory error (*People v. Jackson* (1996) 13 Cal.4th 1164, 1211 [violation of statutory right to be present at trial evaluated for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836 standard requiring a showing that it is reasonably probable that a result more favorable to the defendant would have resulted absent the error]).

As to the jury instructions given in Harloff's absence, they consisted only of preliminary instructions on procedural matters prior to the People's opening statement. The preliminary instructions were admonishments not to discuss the case, do independent research or speak to any party, witness or lawyer involved in the case and directions to follow the court's definitions of terms, be open minded and use note taking in a proper way. As relevant, these preliminary instructions were repeated in the full set of instructions before deliberations when Harloff was present. Harloff's absence for these preliminary instructions was harmless.

As to part of the victim's direct examination, Harloff contends that his absence was prejudicial because the victim testified in more detail about the attack at trial in the short time he was not there than she did in his presence at the preliminary hearing. On cross-examination, when asked about her reluctance to identify Harloff at the preliminary hearing, the victim stated that she had been scared of retaliation. Later, on redirect examination, the victim admitted that, because she "was scared," she had lied

during the preliminary hearing by saying she could not remember certain details of the attack. The victim said, "Mr. Harloff was right there. And in the same chair he's sitting now. And just earlier today when I was speaking about those things, and I did remember Mr. Harloff was not present in that chair, and it made it a lot easier for me to talk about it and to say it because . . . back then and I still am, like I said, he said that, if I ever put him in jail, I better move out of the area because his homeboys would come after me. And . . . I was living in the area back then still, and that's why. And I was very scared."

Harloff isolates the victim's statement that it was easier for her to testify when he was not present to claim that his absence was prejudicial. But that statement when viewed in context and in the totality of the evidence does not demonstrate prejudice. Although the victim was reluctant to answer questions at the preliminary hearing and said she could not remember many details, she did admit that she was hit in the head and on her hands and that another person caused her to suffer those injuries—statements that were consistent with her trial testimony and her injuries. Her trial testimony about the attack, given in Harloff's absence, was consistent with her statements to her neighbor and to a police officer after the attack, and both the neighbor and the police officer testified at trial about her appearance and reports to them after the attack. Harloff was present for the latter part of her direct examination, cross-examination and redirect examination, and at no point when he was there did she recant or alter any of the trial testimony she had given in his absence. Moreover, Harloff's defense, presented through his own testimony and that of his friend's brother, was that the victim had hit herself repeatedly, including with a car distributor, which caused the injury to her head, and that he had slapped her across the face only once because she was out of control. Harloff's account of the incident was inconsistent with the nature and extent of the victim's injuries, which, as stipulated by the parties, were multiple contusions and lacerations on her head, hands, arms and knee, as well as a laceration on her scalp requiring five to six staples. In any case, even assuming Harloff were not absent from trial and the victim testified in his presence just as she had at the preliminary hearing, that testimony in conjunction with the testimony of the neighbor and the police officer and the nature and extent of the victim's

injuries, whether Harloff put on a defense or not, is overwhelming such that it establishes that any error from proceeding in his absence was not prejudicial under either the federal or state standard.

In addition, before the trial court began trial in Harloff's absence, it directed the jury, "It's obvious that Mr. Harloff is not here. His lack of presence is not to be taken by you either positively or negatively. It's a nonissue. You're not to be concerned about it. You're not to speculate as to why he's not here and so forth. And he may be present later on. But in any event, it's, again, not to be taken by you as a negative factor, and you can't, in any way, use bias against him because of his lack of presence. You can't have sympathy for him in a positive way in any way because he's not here. It's just a nonissue, and you're not to consider that in any way, shape, or form." Later, in instructing before deliberations, the court told the jury, "The fact that [the] defendant was absent for a portion of the trial is not evidence. Do not speculate about the reason. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations." It is presumed the jury followed these instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)[2]

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[2] Contrary to Harloff's argument, *People v. Murphy* (2003) 107 Cal.App.4th 1150, is inapposite to the result here. There, the trial court allowed a victim in a sexual assault case to testify behind one-way glass so that she did not have to see the defendant. Reversing the judgment, the appellate court concluded that, "[e]ven assuming that, in an appropriate case, the court might allow a testifying adult victim, who would otherwise be traumatized, to use a one-way screen to avoid seeing a defendant without violating the right of confrontation, we do not think a court may do so without making the necessary factual findings based upon evidence. In other words, a court may not, as the court did in this case, dispense with complete face-to-face confrontation merely upon a prosecutor's unsworn representation that defendant's presence was part of a distraught adult witness's problem. In our view, the court's ruling was not based upon an adequate 'case-specific finding of necessity.' [Citation.] We are unable to say that the error was harmless beyond a reasonable doubt [citation], especially since the pivotal issue was the alleged victim's credibility." (*Id*. at p. 1158.) This case is different. Although Harloff missed a portion of the victim's direct examination, he did confront her and her testimony was consistent with her admissions at the preliminary hearing, the accounts of other witnesses who saw and spoke to her after the attack and the nature and extent of her injuries.

2. *The Sex Offender Registration Requirement Is Erroneous*

The information alleged the charged crimes as serious felonies, violent felonies or offenses requiring sex offender registration pursuant to section 290, subdivision (c). At sentencing, the trial court imposed a registration requirement. None of the offenses of which the jury convicted Harloff, however, is listed in section 290, subdivision (c), as a crime requiring registration. Accordingly, the registration requirement is erroneous.[3]

**DISPOSITION**

The judgment is reversed to the extent that it requires Harloff to register as a sex offender pursuant to section 290, subdivision (c). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

MILLER, J.*

[3] The abstract of judgment does not reference the registration requirement. It nevertheless was ordered by the trial court at sentencing and is unenforceable.

* Judge of the Los Angeles Superior Court, Assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

BLYTHE LESKAY

CV 15-09281-RGK (AS)
Lodged Doc. No. 8

Court of Appeal, Second Appellate District, Division One - No. B244649

**S222419**

# IN THE SUPREME COURT OF CALIFORNIA

**En Banc**

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THE PEOPLE, Plaintiff and Respondent,

v.

WILLIAM RANDOLPH HARLOFF, Defendant and Appellant.

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The petition for review is denied.

SUPREME COURT
FILED

DEC 10 2014

Frank A. McGuire Clerk

Deputy

Docketed
Los Angeles

DEC 12 2014

By: T. Salas
No. LA2015CR06568

CANTIL-SAKAUYE

*Chief Justice*