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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **RANDOLPH FARWELL,** Defendant and Appellant.	S_____ Court of Appeal No. B257775 Los Angeles No. TA130219

PETITION FOR REVIEW

After Published Opinion and Dissent
Court of Appeal Second Appellate District, Division Five
Honorable Paul Bacigalupo, Trial Judge

SUPREME COURT
FILED

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By appointment of the Court of Appeal

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules

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PETITION FOR REVIEW

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

Appellant Randolph Farwell requests the Court grant review of the published opinion and dissent from Division Five of the Second District Court of Appeal in Appeal No. B257775, issued on November 5, 2015, affirming appellant's conviction. (Exhibit A.)

QUESTION PRESENTED FOR REVIEW

1. Where a defendant is not advised of nor asked to waive his federal and state constitutional rights in connection with a stipulation wholly admitting his guilt to a charge, can a reviewing court apply the "totality of the circumstances" analysis to determine whether the defendant knowingly and voluntarily acquiesced to his trial counsel's agreement to the stipulation?
2. Under the "totality of the circumstances" test, are unrelated

references to federal and state constitutional rights during earlier stages of the proceedings, coupled with a defendant's criminal history, sufficient to conclude that he knowingly and voluntarily acquiesced to a stipulation entered by his trial counsel?

NECESSITY FOR REVIEW

A stipulation wholly admitting guilt to all elements of a charge triggers a duty to advise a defendant of three constitutional rights -- the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers -- and to obtain his waiver of those rights. (*People v. Little* (2004) 115 Cal.App.4th 766, 788; see *Boykin v. Alabama* (1969) 395 U.S. 238, 243-244; U.S. Const., 5th, 6th, & 14th Amends.; Cal. Const., art. I, § 15.) This Court explained in *People v. Mosby* (2004) 33 Cal.4th 353, 362, that where such advisements and waivers are absent, i.e., a "silent record" case, a reviewing court cannot infer that the defendant knowingly and intelligently waived his constitutional rights. (See also *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1420; *People v. Campbell* (1999) 76 Cal.App.4th 305; slip opn. (dis. opn. of , J. at p. 4).) However, in the recent decision in *People v. Cross* (2015) 61 Cal.4th 164, 179, a "silent record" case, the Court applied the "totality of the circumstances" analysis without reference to *Mosby*, to determine whether a defendant's stipulation to a prior conviction was knowing and voluntary. (See slip opn., pp. 4, 8.) As reflected by the majority and dissent opinions in the present case, the differing treatment in *Mosby* and *Cross* raises a question in "silent record"

cases as to whether reversal is compelled or the "totality of the circumstances" analysis applies in determining whether a defendant knowingly and voluntarily acquiesced to a stipulation by his trial counsel. On this issue, the U.S. Supreme Court has explained that presuming waiver from a silent record is impermissible. (*Boykin v. Alabama, supra,* 395 U.S. at p. 242.)

A second question raised by this decision is whether, unrelated references to a defendant's constitutional rights, coupled with the defendant's criminal history, are sufficient under the "totality of the circumstances" test to find he would have knowingly and voluntarily acquiesced to a stipulation in a "silent record" case.

Thus this Court's review is necessary to secure uniformity of decision and to settle an important question of law. (Cal. Rules of Court, rule 8.500, subd. (b)(1).)

STATEMENT OF THE CASE AND FACTS

On December 19, 2013, appellant was charged with count one, felony gross vehicular manslaughter (Pen. Code, § 192, subd. (c)(1)); a prior conviction that qualified as a serious felony and a "strike" (Pen. Code, §§ 667, subds. (a), (b)-(i) & 1170.12, subds. (a)-(d)); and count two, misdemeanor driving with a suspended license (Veh. Code, §14601.1). (1CT 99-100.)

Prior to trial, defense counsel informed the court and the prosecutor that appellant was prepared to enter a no contest plea on count two and alternatively moved to bifurcate the trial on the count so that the issue could be taken out of the hands of the jury. (1RT

8-9.) The prosecutor objected to the plea as well as bifurcation because she believed proof of count two was relevant to appellant's knowledge of recklessness in count one and also because the prosecutor would have to call some of the same witnesses for both counts, resulting in an undue consumption of time. (1RT 8-9.) The prosecutor alleged that appellant had been given verbal notice by police about the license suspension two months before the accident. (1RT 9-10.) The trial court denied the defense motion, concluding it was part of the prosecution case. (1RT 40.)

At trial, the court informed the jury:

> [T]he lawyers are going agree to something, and it's called a stipulation, and they are agreeing to the information that will be read in a moment, and you are to consider that information as evidence. And it's agreed that this information is true and correct, instead of having to bring witnesses in to testify about that. So they're shortening the length of this trial already by this stipulation.
> (1RT 79.)

The parties stipulated that "on June 21st, 2013, [appellant] was driving a motor vehicle while his license was suspended for a failure to appear, and that when he drove, he knew his license was suspended." (1RT 79-80.)

In closing argument, the prosecutor told the jury that the stipulation met the elements of count two. (2RT 451-452.) Defense counsel argued in closing: "[B]y stipulation, he is guilty of driving on a suspended license. The fact that his license was suspended by the D.M.V. because he failed to appear is not evidence of recklessness. It

just means he wasn't supposed to drive because the D.M.V. for some reason suspended his license. That reason was because he failed to appear." (2RT 455.)

On June 17, 2014, appellant was found guilty of both counts. (1CT 160-167.)

In his appeal, appellant argued that count two must be reversed because the stipulation was invalid without appellant's waiver of his constitutional rights. (AOB 5.) Respondent requested judicial notice of minute orders of appellant's prior convictions to support the argument "that the stipulation [in the present case] was voluntary and intelligent under the totality of the circumstances." (Request For Judicial Notice, pp. 1-2.) Appellant opposed the request. (Opposition To Request For Judicial Notice, pp. 1-6.)

On its own motion, the Court of Appeal ordered augmentation of the voir dire proceedings at appellant's trial and ordered letter briefing on whether the record as a whole showed appellant's awareness of his trial rights. With regard to the Court of Appeal's question, the following facts pertain:

Trial commenced on June 10 and the stipulation regarding count two was entered at the end of the day on June 11. On June 10, the following events occurred. At a trial conference, the trial court summarized the facts at issue, and noted that the prosecutor would present witnesses and the defense would "point out the problems with the case...or at least attack some of the testimony...that's her job, is to confront those witnesses", and then the jury would determine whether the prosecutor had met her burden of proof. (Augmented

Reporter's Transcript ["ART"] 2-4.) The court briefly addressed appellant about the prosecution's plea offer and gave appellant time to discuss the offer with trial counsel. (ART 6.) Counsel informed the court that appellant was rejecting the offer. (ART 7.)

The court then heard the parties' pre-trial motions including defense counsel's request to plead guilty to count two or to bifurcate trial on that count. (ART 8-10, 39-40.) In discussing in limine motions, the prosecutor said she would not introduce appellant's blood alcohol tests (blood alcohol 0.0) unless it was to impeach appellant if he took the stand and that if appellant wanted to introduce his statements to the police, he could do so by testifying. (ART 11, 14.)

The trial court addressed the jury panel and voir dire commenced. (ART 40-54.) During voir dire, the court explained to the prospective jurors that both parties are entitled to a cross section of the community, which is "what jury duty is about.... and then they participate in the system wherein you are the triers of the facts." (ART 46.) The trial court described the functions of a juror and explained that the trial would have a jury selection phase, an evidence phase, and a jury deliberation phase. (ART 46, 50.) The court explained the burden of proof. (ART 51.) As voir dire continued, defense counsel and the trial court explained to the jurors that a defendant in a criminal case has the right not to testify and remain silent and not present witnesses and that the burden is on the prosecutor to prove her case beyond a reasonable doubt. (ART 106-107.)

The next morning voir dire continued. (ART 110-207.) The prosecutor explained that a defense attorney defends her client and defends his rights including the right to cross examine prosecution witnesses and that it is the prosecutor's job to present evidence against the defendant. (ART 115-116.) Defense counsel further noted that the prosecutor has to present evidence and the defense does not have to prove anything or present evidence and further asked newly drawn jurors if anyone would have a problem with appellant's right not to testify. (ART 149-150, 153, 190.)

Following jury selection and opening statements, the prosecutor called her first witness, who testified briefly. (ART 212-218.) Defense counsel and the prosecutor examined the witness. (ART 212-218.) The trial court then advised the jury about stipulations and the parties' stipulation regarding count two was presented to the jury. (ART 218-219.)

On November 5, 2015, the Court of Appeal issued its opinion affirming the conviction and denying respondent's motion for judicial notice. (Slip opn., pp. 8-9, fn. 3.)

ARGUMENT

I. WHERE THERE IS NO ADVISEMENT NOR WAIVER OF FEDERAL AND STATE CONSTITUTIONAL RIGHTS IN CONJUNCTION WITH A STIPULATION WHOLLY ADMITTING A CHARGE, REVERSAL IS REQUIRED BECAUSE IT CANNOT BE KNOWN WHETHER A DEFENDANT UNDERSTOOD THAT WITH THE STIPULATION HE WAS GIVING UP HIS RIGHTS AND ESSENTIALLY PLEADING GUILTY.

A stipulation that addresses all evidentiary facts needed to

prove guilt of a charge requires that the defendant first be advised of and knowingly and voluntarily give up his constitutional right to jury trial, right against compulsory self-incrimination, and right to confront and cross-examine his accusers. (*People v. Little, supra,* 115 Cal.App.4th at p. 773, fn. 4 [citing *Boykin v. Alabama, supra,* 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122]; U.S. Const., 5th, 6th, & 14th Amends.; Cal. Const., art. I, § 15.) The stipulation is "tantamount to a plea of guilty" and must be accompanied by *Boykin-Tahl* advice and waivers. (*In re Mosley* (1970) 1 Cal.3d 913, 924-926, fn. 10.)

An admission of guilt " 'cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.' " (*Boykin v. Alabama, supra,* 395 U.S. at p. 243, fn. 5, quoting *McCarthy v. U.S.* (1969) 394 U.S. 459, 466.) Thus a defendant is specifically canvassed on his understanding that he is giving up these rights when he pleads guilt. (*Id.* at pp. 243-244.) "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." (*Ibid.*)

Reversal should be required where a defendant is provided no advisement and does not waive his constitutional rights in conjunction with a stipulation. This is because it is not possible to know whether the defendant understood the consequences of the stipulation to his trial rights and that he was knowingly and voluntarily acquiescing to his trial counsel essentially admitting his guilt. This Court has implicitly rejected such assumptions from a

silent record. "The court did not ask whether Cross had discussed the stipulation with his lawyer; nor did it ask any questions of Cross personally or in any way inform him of his right to a fair determination of the prior conviction allegation." (*People v. Cross, supra,* 61 Cal.4th at p. 180.)

In *People v. Little, supra,* 115 Cal.App.4th 766, the defendant was convicted of being under the influence of a controlled substance following his stipulation in language that mirrored the language of the charge for the crime. (Slip opn. (dis. opn. of Mosk, J. at p. 2, discussing *Little*).) Reversing the conviction because the record did not establish that the stipulation was knowing and voluntary, *Little* explained that even though the stipulation was offered during the trial, "there were no advisements from which defendant could possibly and reasonably have inferred that by offering the stipulation, he was surrendering his privilege against self-incrimination and at least partially surrendering his right to confront and cross-examine witness concerning the charge.... Nor was he advised that as a consequence of the stipulation, the jury would, in effect, be required to enter a guilty verdict." (*People v. Little, supra,* 115 Cal.App.4th at p. 780.)

Little explained further,

> Given the fundamental importance attached to the right to have a jury determine guilt and given the impact of the stipulation here on the jury's function, which made a guilty verdict a foregone conclusion, if not a procedural formality, ...some advisement concerning the right to a jury trial is necessary to ensure that the defendant knows the stipulation will, as defense

> counsel here told the jury, require the jury to find him or her guilty and without the stipulation the jury would have to evaluate the evidence and from it determine beyond a reasonable doubt whether defendant was guilty.
> (*People v. Little, supra,* 115 Cal.App.4th at p. 779, fn. 7.)

In *Boykin v. Alabama, supra,* 395 U.S. at p. 239, the defendant pled guilty at his arraignment to five charges of robbery. The judge asked no questions of the defendant and the defendant did not address the court. In overturning the conviction, the U.S. Supreme Court explained, "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." (*Id.* at p. 242.) And a confession, the Court explained further, "must be based on a 'reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant.' " (*Ibid.*) Similarly, where a defendant wishes to waive his right to trial counsel, the record must show that an accused was offered counsel but intelligently and understandingly rejected the offer. (*Ibid.*) Accordingly, presuming waiver from a silent record case is impermissible given the several constitutional rights and the penal consequence at stake. (*Id.* at pp. 242-243.)

This Court rightly made a distinction in *People v. Mosby* between silent-record cases, where the defendant has been provided no advisements of his trial rights, and cases where the defendant was provided incomplete advisement of his trial rights. (*Mosby, supra,* 33 Cal.4th at p. 362.) In the former, the convictions have not been upheld. (*Ibid.*) *Mosby* explained that while a defendant in such

a case might have been aware of his trial rights, it could not be concluded from the record that the defendant was prepared to give up those rights. (*Ibid.* [discussing *People v. Johnson* (1993) 15 Cal.App.4th 169].)

Therefore, where there is no advisement or waiver of constitutional rights in conjunction with the entry of a stipulation wholly admitting guilt, reversal is required since it cannot be known that a defendant understood and voluntarily gave up his trial rights along with accepting guilt.

II. REFERENCES TO TRIAL RIGHTS MADE EARLIER IN THE PROCEEDINGS COUPLED WITH A DEFENDANT'S CRIMINAL RECORD ARE INSUFFICIENT FOR CONCLUDING THAT HE UNDERSTOOD THE CONSEQUENCES OF A STIPULATION AND THAT HE WAS KNOWINGLY AND VOLUNTARILY AGREEING TO HIS TRIAL COUNSEL'S ENTRY OF THE STIPULATION.

The majority opinion in this case concludes that unrelated references to a defendant's constitutional rights, coupled with the defendant's experience with the criminal justice system, are sufficient to conclude he understood the consequences of a stipulation and knowingly and voluntarily acquiesced to his trial counsel's entry of the stipulation. (Slip opn., pp. 6-8.)

However, even if it can be inferred that a defendant has some awareness of his trial rights generally, it is impossible to know whether the defendant would then understand that by his trial counsel's entry of the stipulation, he was thus giving up these rights and pleading guilt, if he was never personally addressed by the trial court regarding these rights. As the dissent explains, if a defendant's

experience with the criminal justice system were sufficient to infer a voluntary and intelligent waiver of trial rights, " 'courts would rarely be required to give *Boykin/Tahl* admonitions.' " (Slip opn. (dis. opn. of Mosk, J. at pp. 6-7, quoting *People v. Campbell, supra,* 76 Cal.App.4th at p. 310).) The dissent explains further that the same logic applies to earlier references to constitutional rights during a trial. There is "no way of knowing if the defendant actually heard or understood any such references during earlier proceedings." (Slip opn. (dis. opn. of Mosk, J. at p. 7.)

Moreover, even if a defendant's criminal history could suggest that he understood that a guilty plea involved a waiver of trial rights, this does not mean that he would then understand that a stipulation similarly equaled an admission of guilt and waiver of rights. A stipulation raises greater concerns because in a guilty plea, even if the defendant is not canvassed on his rights, the defendant is nonetheless heard to plead that he is guilty. At least it can be known that he understands he is pleading guilty. Whereas when a trial counsel enters a stipulation, the defendant is completely silent and he is never personally addressed by the court. So it cannot be known whether he understood that the stipulation was "tantamount to a plea of guilty." It is truly a silent record.

In *In re Tahl* (1969) 1 Cal.3d 122, 127-128 ("*Tahl*"), this Court noted a few cases, in which the defendant was personally addressed by the trial court, albeit not perfectly, regarding the circumstances of his decision to plead guilty. At the outset, the context of the stipulation here is similar to the circumstances in *Tahl,* where the

defendant pled guilty to the charges following empanelment of the jury and opening statements. (*Id.* at p. 125.) However, in *Tahl*, both the defendant and his counsel were nonetheless questioned at length by the trial court regarding his decision to plead guilty. (*Id.* at pp. 125, 131, fn. 1.) Tahl was asked whether he understood the nature of the charges, whether his counsel had discussed this with him, whether his attorney had explained his constitutional rights, and whether he was pleading freely and voluntarily and without inducement. (*Id.* at pp. 125, fn. 1.) *Tahl* also indicated that the trial counsel discussed the consequences of the stipulation with the defendant. (*Id.* at p. 131.) Significantly, the facts in *Tahl* included a stipulation in addition to the guilty plea, regarding which also, the defendant was personally addressed by the court. (*Id.* at pp. 125, fn. 1.) The prosecutor asked the trial court to inquire of Tahl whether his counsel had explained the stipulation to him and whether he fully understood it. (*Ibid.*) This Court accordingly upheld the validity of the plea.

In contrast to *Tahl*, nothing in the proceedings here would have remotely indicated to a defendant the import of the stipulation with respect to his trial rights. Even with a criminal record, a layperson would not have the sophistication to understand from earlier proceedings what was at stake with respect to a stipulation.

Therefore, in a silent record case, evidence of other references to trial rights coupled with a defendant's criminal history, is insufficient to conclude that he knowingly and understandingly agreed to his trial counsel's stipulation regarding the elements of a

charge.

CONCLUSION

Appellant respectfully requests that this petition be granted.

Dated: December 3, 2015

Respectfully submitted,

/s/JasminePatel/s/_____
JASMINE PATEL
Attorney for Appellant

CERTIFICATE OF WORD COUNT

Counsel hereby certifies that this brief consists of **3,263** words (excluding tables, proof of service, and this certificate), according to the word count of the computer word-processing program. (Cal. Rules of Court, rule 8.504(d).)

Dated: December 3, 2015

/s/JasminePatel/s/_____
JASMINE PATEL
Attorney for Appellant

Exhibit A

Filed 11/5/15

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RANDOLPH D. FARWELL, Defendant and Appellant.	B257775 (Los Angeles County Super. Ct. No. TA130219)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Paul A. Bacigalupo, Judge. Affirmed.

Jasmine Patel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael R. Johnsen, Supervising Deputy Attorney General, Gary A. Lieberman, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Randolph D. Farwell (defendant) was convicted of gross vehicular manslaughter (Pen. Code, § 192, subd. (c)(1)[1]) and driving when his driver's license was suspended or revoked (Veh. Code, § 14601.1, subd. (a)). On appeal, defendant contends that his conviction for driving while his license was suspended or revoked (count 2) must be reversed because the trial court did not explicitly advise him of his constitutional trial rights before accepting his stipulation to the substantive crime that he drove a vehicle while knowing his license was suspended.

We hold, in connection with the stipulation, the trial court did not commit reversible error. We review the entire record, not just the record of the stipulation colloquy, and under the totality of circumstances conclude the record affirmatively shows the stipulation was voluntary and intelligent. Therefore, we affirm the judgment.

BACKGROUND

A. Relevant Proceedings[2]

On February 18, 2014, defendant continued his trial and was explicitly advised by the court of his right to trial: "[y]ou have the right to have your trial within 60 days . . . Do you understand . . . and give up that right, . . ." to which the defendant responded, "yes."

Just before trial, defendant's counsel informed the trial court that defendant was prepared to enter a no contest plea on count 2 so that "issue [is] taken out of the hands of the jury," or alternatively, move to bifurcate the trial on count 2. The prosecutor stated that she was not willing to accept the no contest plea, and objected to defendant's motion

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1 All statutory citations are to the Penal Code unless otherwise noted.

2 Because the only claim on appeal is that the conviction on count 2 should be reversed, we do not include a statement of facts regarding the other charges.

to bifurcate on the ground that proof of count 2 was relevant to defendant's knowledge of recklessness in count 1. The trial court denied defendant's motion to bifurcate.

During the pretrial proceedings, and extensive jury voir dire, defendant became fully aware of his constitutional rights to trial, remain silent and confront and cross-examine witnesses well before he stipulated to the elements of count 2. No less than 45 times during jury voir dire defendant's right to trial, remain silent and cross-examine witnesses were discussed or mentioned. Before the stipulation was read the trial court informed the jury, "[T]he lawyers are going to agree to something, and it's called a stipulation . . . . And it's agreed that this information is true and correct, instead of having to bring witnesses in to testify about that." Defense counsel stipulated "on June 21st, 2013, [defendant] was driving a motor vehicle while his license was suspended for a failure to appear, and that when he drove, he knew his license was suspended[.]"

B. Procedural Background

The District Attorney filed an information charging defendant with gross vehicular manslaughter in violation of section 192, subdivision (c)(1) (count 1), and driving when his driver's license was suspended or revoked in violation of Vehicle Code section 14601.1, subdivision (a) (count 2). It was also alleged defendant had a prior serious felony conviction as defined by sections 667, subdivision (a)(1), 667, subdivision (d), and 1170.12, subdivision (b).

Following trial, the jury found defendant guilty on all counts. Defendant admitted the prior conviction allegation, and was sentenced to state prison for a term of 13 years, consisting of the midterm of four years on count 1, doubled pursuant to the Three Strikes law, plus five years pursuant to section 667, subdivision (a)(1). The trial court imposed a concurrent term on count 2; awarded custody credits, and ordered payments of various fees, fines and penalties. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends his conviction for driving when his driver's license was suspended or revoked (count 2) must be reversed. He argues the stipulation entered into on his behalf, which admitted all of the elements of count 2, was invalid because he was not advised of, and did not waive, his trial rights, at the time the stipulation was entered. The Attorney General correctly notes the trial court's failure to explicitly advise defendant of his constitutional rights is not reversible error because defendant's "stipulation was voluntary and intelligent under the totality of the circumstances."

A. Applicable Law

In *People v. Cross* (2015) 61 Cal.4th 164, 170 (*Cross*), our Supreme Court recently stated, "When a criminal defendant enters a guilty plea, the trial court is required to ensure that the plea is knowing and voluntary. (See *Boykin v. Alabama* (1969) 395 U.S. 238, 243-244 [23 L.Ed.2d 274, 89 S.Ct. 1709] (*Boykin*).)"

A stipulation admitting the elements of the substantive crime is tantamount to a guilty plea and requires the defendant be aware of and waive his constitutional rights to trial. (*In re Mosley* (1970) 1 Cal.3d 913, 924-926, fn. 10; *People v. Little* (2004) 115 Cal.App.4th 766, 778.)

In determining whether defendant, prior to entering such a stipulation understood his constitutional rights, the failure of the trial court to explicitly advise defendant of those rights at the time of the stipulation is not reversible error if it is shown the admission was voluntary and intelligent. In making that determination we review the entire record and not just the admission colloquy. *Cross, supra*, 61 Cal.4th at pp. 179-180 ["[t]he failure to properly advise a defendant of his or her trial rights is not reversible 'if the record affirmatively shows that [the admission] is voluntary and intelligent under the totality of the circumstances.' . . . a reviewing court must 'review[] the whole record, instead of just the record of the plea colloquy.']"

The development of this standard is traceable to *People v. Howard* (1992) 1 Cal.4th 1132 (*Howard*). Before *Howard,* the failure to advise a defendant of his

constitutional rights or secure his waiver of them prior to accepting a guilty plea under Boykin, *supra*, 395 U.S. 238 and *In re* Tahl (1969) 1 Cal.3d 122, or admission of a prior conviction under *In re* Yurko (1974) 10 Cal.3d 857, made the plea or admission generally automatically reversible, regardless of prejudice. (*Howard, supra*, 1 Cal.4th at pp. 1174-1175.) The court in *Howard* stated, "We expressly based our decision in *Yurko* on the interpretations of federal law set out in *Boykin* and *Tahl*. [Citation.] However, the overwhelming weight of authority no longer supports the proposition that the federal Constitution requires reversal when the trial court has failed to give explicit admonitions on each of the so-called *Boykin* rights. Accordingly, we have no choice but to revisit our prior holdings. 'The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards.' [Citation.] [¶] [W]e now hold that *Yurko* error involving *Boykin/Tahl* admonitions should be reviewed under the test used to determine the validity of guilty pleas under the federal Constitution. Under that test, a plea is valid if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances. [Citations]" (*Howard, supra*, 1 Cal.4th at p. 1175.) Whether the record affirmatively shows that the plea is voluntary and intelligent under the totality of the circumstances is a harmless error analysis. (*People v.* Allen (1999) 21 Cal.4th 424, 438; *People v. Little, supra*, 115 Cal.App.4th at pp. 780, 781.)

Therefore, it is unmistakably clear in making that determination we review the entire record, and not just the portion relating to the stipulation colloquy. *Cross, supra*, 61 Cal.4th at pp. 179-180 [In applying the totality of the circumstances test a reviewing court must review the whole record instead of just the record of the plea colloquy, citing *People v.* Mosby (2004) 33 Cal.4th 353, 361.]

Moreover, our Supreme Court in *Cross, supra*, 61 Cal.4th at p. 179, reiterated this rule without any reference to other appellate court decisions that distinguish between silent record cases and incomplete advisement cases, "[t]he failure to properly advise a defendant of his or her trial rights is not reversible 'if the record affirmatively shows that [the admission] is voluntary and intelligent under the totality of the circumstances.'

[Citation.]"

B. Analysis

The Totality of Circumstances

In defendant's presence the jury was told by the court he was charged with a felony, gross vehicular manslaughter, and a misdemeanor, driving while his license was suspended, and,

> "Those are the two charges. . . . So Mr. Farwell has pleaded not guilty to all of the charges. The People, the prosecution, has the burden of proving each and every essential element of the charges beyond a reasonable doubt. The purpose of the trial is for the jury to determine whether the People have met the burden of proving the defendant's guilt beyond a reasonable doubt. . . . A defendant in a criminal case is presumed to be innocent until the contrary is proved. And in the case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to an acquittal."

The prosecutor told the jury,

> "The other legal concept that the court has alluded to is the presumption of innocence, which means that Mr. Farwell, as he sits here -- we've heard no evidence yet of what the charges allege. So the presumption is that he's innocent of these charges . . . . He has certain rights. . . . For example, when I call witnesses to the stand, she [defense counsel] has the right to cross-examine them. She doesn't have to. She could sit and just let me put on everything, but I'm sure that's not going to happen. I'm sure you'll see cross-examination. So she has her job, to protect her client's rights."

The defense counsel told the jury,

> "And the last issue I wanted to address . . . is the concept in the law that the defendant has a right not to testify. . . ."

The Court further explained,

"What she's saying is in our form of government, the constitution protects someone charged with a crime. They protect that person with the right to remain silent, and that right is when you talk to the police, when you go to court, he doesn't have to say a word. So if he chooses, and if his lawyer chooses, to not present any witnesses or to speak, that's their right, and we have to respect it. That's what they want to do. The obligation is for the prosecutor to prove her case beyond a reasonable doubt. She's got the job to prove up everything, so you cannot consider the fact, if he chooses not to testify. That's the rules. So can you follow the rules?

Then Defense Counsel stated: Just to put it the other way, is there anyone that would be unable to reach a verdict without hearing from Mr. Farwell? I see no hands."

On the day of trial, during pretrial hearings and jury voir dire defendant's right to trial, to remain silent, and confront and cross-examine witnesses was discussed or mentioned, no less than 45 times.

In addition, defendant unequivocally knew he had the right to a jury trial and cross-examination on count 2 because he was in the midst of that very jury trial, after a witness had been called and cross examined when he and his attorney made the strategic trial decision to stipulate to the elements of count 2.

Earlier in the morning on the day of trial, the court conducted Evidence Code section 402 hearings, reviewed the probation report, opined as to possible trial outcomes and told defendant:

"[W]hen it's all said and done, 12 people there, having heard all this testimony, and having also heard the strengths and weaknesses of the case—because defense counsel will point out the problems with the case, . . . or at least attack some of the testimony. That's her job,(sic) is to confront those witnesses. But at the end of the day, the jury may well say the prosecutor has met her burden of proof beyond a reasonable doubt."

Defendant was not a neophyte to the criminal justice system. He is a recidivist, who had sustained two prior convictions, including a burglary strike. *Cross, supra,* 61

Cal.4th at p. 180, [a defendant's "previous experience in the criminal justice system" is relevant to a recidivist's knowledge and sophistication regarding his [legal] rights.]

The probation report states that in July 2010, defendant was convicted of a residential burglary in violation of section 459, a strike, and in February of the same year, defendant was convicted of engaging in an illegal speed contest, in violation of Vehicle Code section 23109, subdivision (a).[3] In order to sustain these convictions, defendant either proceeded to trial and was convicted or plead guilty/no contest and was convicted. In either event, this previous experience in the criminal justice system is relevant to his knowledge regarding his legal rights.

The dissent concludes that in the absence of an express advisement of the right to trial *contemporaneous* with the stipulation and waiver at that very same time it is a "silent-record"[4] case and we look no further to determine if the stipulation is knowing and voluntary. In fact, we are mandated to "look further." *Cross, supra*, 61 Cal.4th at p. 180 directs that a reviewing court must review the whole record, instead of just the portion of the record reflecting the plea colloquy.

After a review of the whole record, this is not a "silent record" case. Utilizing the totality of the circumstances, this record establishes the stipulation was voluntary and intelligent—that defendant knew of and waived his constitutional rights when he and his counsel made the strategic decision to enter the stipulation.

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[3] We deny the Attorney General's request that we take judicial notice of copies of the docket of two criminal cases concerning defendant because the documents were not before the trial court. (See *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379, fn. 2.)

[4] The four "truly silent-record" cases referred to in *Mosby*, *supra*, 33 Cal.4th at pp. 361-362 unlike our case, do not entail a stipulation to a substantive crime but rather entail a stipulation to a prior conviction as an enhancement or a factor in an alternative sentencing scheme which automatically exposed the defendant to increased punishment. In each of those cases, the defendants were not told on the record of their right to trial to determine the truth of the prior conviction allegation. Here, when defendant continued his case he was explicitly advised of his right to trial on the substantive charges. Moreover, nothing in *Mosby* imposes the requirement that the advisement be contemporaneous with a stipulation to one of multiple substantive crimes.

DISPOSITION

The judgment of conviction as to count 2, driving when defendant's driver's license was suspended or revoked under Vehicle Code section 14601.1, subdivision (a) is affirmed.

KIRSCHNER, J.*

I concur:

TURNER, P. J.

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

Mosk, J., Dissenting

I respectfully dissent because I believe that the stipulation entered into on defendant's behalf, which stipulation admitted all of the elements of count 2, was invalid because he was not advised of, and did not waive, his trial rights. In this case there was no express advisement to, or waiver by, defendant of his constitutional rights at the time of the stipulation—"a silent record" case as contrasted with an "incomplete advisement" case. Under these circumstances, a reversal is required.

A. *Boykin-Tahl Applies to Stipulation*

Our Supreme Court recently stated that, "When a criminal defendant enters a guilty plea, the trial court is required to ensure that the plea is knowing and voluntary. (See *Boykin* v. *Alabama* (1969) 395 U.S. 238, 243-244 [23 L.Ed.2d 274, 89 S.Ct. 1709] (*Boykin*).) As a prophylactic measure, the court must inform the defendant of three constitutional rights—the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers—and solicit a personal waiver of each. (*People v. Howard* (1992) 1 Cal.4th 1132, 1179 [5 Cal.Rptr.2d 268, 824 P.2d 1315] (*Howard*); see *Boykin*, at pp. 243-244; *In re Tahl* (1969) 1 Cal.3d 122, 130-133 [81 Cal.Rptr. 577, 460 P.2d 449] (*Tahl*).)[1] Proper advisement and waiver of these rights, conducted with 'the utmost solicitude of which courts are capable,' are necessary 'to make sure [the accused] has a full understanding of what the plea connotes and of its consequence.' (*Boykin*, at pp. 243-244.)" (*People v. Cross* (2015) 61 Cal.4th 164, 170 (*Cross*).)[2]

When a defendant's stipulation to submit a case for decision on the basis of the transcripts of the preliminary hearing, which stipulation under the circumstances could

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1 Sometimes referred to as the *Boykin-Tahl* requirements.

2 Our Supreme Court *In re Yurko* (1974) 10 Cal.3d 857, at pages 861 through 865, extended the *Boykin-Tahl* requirements to defendants who intend to admit prior convictions.

offer him no hope of acquittal, the stipulation is "tantamount to a plea of guilty" and must be accompanied by *Boykin-Tahl* advice and waivers. (*In re Mosley* (1970) 1 Cal.3d 913, 924-926, fn. 10; *People v. Levey* (1973) 8 Cal.3d 648, 653.) "The phrase '"tantamount to a plea of guilty"' [was used in *In re Mosley*, *supra*, 1 Cal.3d 913] 'to explain [the] extension of the *Boykin-Tahl* requirements to submissions in which the guilt of the defendant was apparent on the basis of the evidence presented at the preliminary hearing and in which conviction was a foregone conclusion if no defense was offered.' (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 602 [119 Cal.Rptr. 302, 531 P.2d 1086] (*Bunnell*).)" (*People v. Cunningham* (2015) 61 Cal.4th 609, 637-638.)

The Supreme Court has said, "[O]ur case law . . . has drawn a distinction between, on one hand, 'a defendant's admission of evidentiary facts which [does] not admit every element necessary to conviction of an offense or to imposition of punishment on a charged enhancement' and, on the other, 'an admission of guilt of a criminal charge or of the truth of an enhancing allegation where nothing more [is] prerequisite to imposition of punishment except conviction of the underlying offense.' (*People v. Adams* (1993) 6 Cal.4th 570, 577 [24 Cal.Rptr.2d 831, 862 P.2d 831] (*Adams*).) The requirements of *Boykin-Tahl* . . . apply to the latter type of admission but not the former. (*Adams*, at pp. 580-583.)" (*People v. Cross*, *supra*, 61 Cal.4th at p. 171; *People v. Epps* (1999) 74 Cal.App.4th 645, 652; *People v. Rodriguez* (1999) 73 Cal.App.4th 1324, 1329; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 746.) Citing *Adams, supra,* 6 Cal.4th 570, the Supreme Court has said "a defendant validly may 'stipulate to one or more, but not all, of the evidentiary facts necessary to a conviction of an offense . . . ,' without first having received such advisements." (*People v. Newman* (1999) 21 Cal.4th 413, 415, overruled on other grounds as stated in *Cross*, *supra*, 61 Cal.4th at p. 179.]

In *People v. Little* (2004) 115 Cal.App.4th 766, the defendant was convicted of being under the influence of methamphetamine following his stipulation in language that mirrored the language of the information for that crime. Concluding that the stipulation triggered a duty to give constitutional advisements and obtain waivers, the court said "the

Boykin-Tahl requirements . . . [are] applicable . . . when a defendant stipulates to each and every evidentiary fact or element of a charged offense necessary for a conviction and imposition of punishment or, . . . implicitly does so by stipulating, in language that mirrors the charges, that he or she violated a criminal statue." (*Id.* at p. 778.)

Defendant contends he was entitled to be advised of and waive his constitutional rights in connection with his stipulation. The stipulation admitted the elements of the offense charged as count 2, and the jury was instructed to accept the stipulated facts as true. The Attorney General agrees, conceding that the stipulation, which stipulation admitted both elements of the offense, "was tantamount to a guilty plea."

B. Silent Record Compels Reversal

The parties agree the record does not reflect that defendant was advised of any of his constitutional rights in connection with his stipulation, or, of course, that he waived those rights. The Attorney General argues, however, that the trial court's failure properly to advise defendant of his constitutional rights is not reversible error because defendant's "stipulation was voluntary and intelligent under the totality of the circumstances."

Prior to *Howard, supra*, 1 Cal.4th 1132, the failure to advise a defendant of his constitutional rights or secure his waiver of them prior to accepting a guilty plea under *Boykin, supra*, 395 U.S. 238 and *Tahl, supra*, 1 Cal.3d 122, or admission of a prior conviction under *In re Yurko, supra,* 10 Cal.3d 857, made the plea or admission generally automatically reversible, regardless of prejudice. (*Howard, supra*, 1 Cal.4th at pp. 1174-1175.) In *Howard supra*, 1 Cal.4th 1132, before trial, the defendant admitted that he had served a *prior prison term* (*id.* at p. 1174), and the court stated "the overwhelming weight of authority no longer supports the proposition" that "reversal when the trial court has failed to give explicit admonitions on each of the so-called *Boykin* rights. . . . [W]e now hold that *Yurko* error involving *Boykin/Tahl* admonitions should be reviewed under the test used to determine the validity of guilty pleas under the federal Constitution. Under that test, a plea is valid if the record affirmatively shows that it is voluntary and

intelligent under the totality of the circumstances. [Citations]" (*Id.* at p. 1175.) The court concluded, "On this record, considering the totality of the relevant circumstances, we conclude that defendant's admission of the *prior conviction* was voluntary and intelligent despite the absence of an explicit admonition on the privilege against self-incrimination. Accordingly, we affirm the *special finding*." (*Id.* at p. 1180; italics added.)

About 12 years subsequent to *Howard*, *supra*, 1 Cal.4th 1132, the California Supreme Court in *People v. Mosby* (2004) 33 Cal.4th 353 (*Mosby*) explained, "After our 1992 decision in *Howard*, *supra*, 1 Cal.4th 1132, our Courts of Appeal have applied its 'totality of the circumstances' harmless error test to a variety of cases ranging from no advisements or waivers to incomplete advisements and waivers." (*Mosby*, *supra*, 33 Cal.4th at p. 361.) In determining whether defective advisements require reversal, the court in *Mosby* drew a distinction between silent record cases—those cases that show no express advisement and waiver of constitutional rights at the plea colloquy (see *id.* at pp. 361-364), such as in the instant case—silent record cases—and those cases in which a defendant waives his constitutional rights after being advised of his right to trial on the prior conviction allegation, but not of the associated rights to remain silent and to confront witnesses (*ibid.*)—incomplete advisement cases. In silent record cases, a reviewing court cannot infer that the defendant knowingly and intelligently waived his rights to trial, to remain silent, and to confront witnesses. (*Id.* at p. 362.) In incomplete advisement cases, reversal is not required if "the totality of circumstances surrounding the admission" supports the conclusion that the admission was voluntary and intelligent. (*Id.* at p. 356.) That is, reversal is required in silent record cases without a harmless error analysis.

In *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, the defendant admitted to prior conviction allegations. (*Id.* at p. 1420.) In reversing the defendant's admissions and remanding the allegations for retrial, the court stated that it was a "silent-record case" because there was no express advisement or waiver of the *Boykin-Tahl* rights before

defendant made his admissions. (*Id.* at p. 1421.) The court held, "Under *Mosby*, we may not infer the admissions were voluntary and intelligent under the totality of the circumstances. . . . The error compels reversal of the prior conviction findings. (*Mosby*, *supra*, 33 Cal.4th at p. 362; *People v. Little*[, *supra*,] 115 Cal.App.4th [at pp.] 779-780 [].)" (*People v. Sifuentes*, *supra*, Cal.App.4th at p. 1421.)

Similarly, in *People v. Campbell* (1999) 76 Cal.App.4th 305, the defendant admitted to the truth of four prior conviction allegations. (*Id.* at p. 309.) The court reversed the defendant's admissions and remanded the allegations for retrial, stating, [*T*]*here were no admonitions* with respect to any of the three constitutional rights. . . . This record is inadequate to support a voluntary and intelligent waiver of rights . . . . [¶] Under *Howard*, we are not permitted to imply knowledge and a waiver of rights on a silent record. [Citations.]"[3] (*Id.* at p. 310.) Because the record here is silent regarding an express advisement to defendant and his waiver of his constitutional rights, the error compels reversal of the conviction on count 2.

The Supreme Court in *Cross*, *supra*, 61 Cal.4th 164 recently said, without any reference to *Mosby*, *supra*, 33 Cal.4th 353 and other appellate court decisions that distinguish between silent record cases and incomplete advisement cases, "The failure to properly advise a defendant of his or her trial rights is not reversible 'if the record affirmatively shows that [the admission] is voluntary and intelligent under the totality of the circumstances.' (*Howard*, *supra*, 1 Cal.4th at p. 1175.)" (*Cross*, *supra*, 61 Cal.4th at p. 179.) In *Howard*, *supra*, 1 Cal.4th 1132, the case relied on by the court, some but not all advisements were given—i.e., it was not a silent record case. In *People v. Cross*, *supra*, 61 Cal.4th 164, the defendant "stipulated to [a] prior conviction, and the trial court

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[3] *Howard*, *supra*, 1 Cal.4th 1132, did not expressly hold this. It merely recognized that *Boykin*, *supra*, 395 U.S. at p. 243 supported this proposition. *Boykin* was later interpreted in *Tahl*, *supra*, 1 Cal.3d at p. 132 as requiring that "'each of the three rights []—self-incrimination, confrontation, and jury trial—must be specifically and expressly enumerated for the benefit of and waived by the accused prior to acceptance of his guilty plea.' [Citation.]" (*Howard*, *supra*, 1 Cal.4th 1176.)

accepted the stipulation without advising [the defendant] of *any* trial rights or eliciting his waiver of those rights." (*Id.* at p. 168, italics added.) That is, it was a silent record case.

The Supreme Court noted that "[a]fter counsel read the stipulation in open court, the trial court immediately accepted it. The court did not ask whether [the defendant] had discussed the stipulation with his lawyer; nor did it ask any questions of [the defendant] personally or in any way to inform him of his right to a fair determination of the prior conviction allegation. [Citation.]" (*Cross, supra*, 61 Cal.4th at p. 180.) Although the record was silent as to an express advisement and waiver of constitutional rights, the Supreme Court continued, however, by what appears to be an examination of the record under the totality of the circumstances to determine whether the stipulation was voluntary and intelligent. Immediately after the quoted language above, it stated, "The stipulation occurred during the prosecutor's examination of the first witness in the trial; the defense had not cross-examined any witnesses at that point. [Citation.] Further, we have no information on how the alleged prior conviction was obtained. [Citation.]" (*Ibid.*) The court held that the unwarned stipulation was invalid and the trial court's failure to advise the defendant of his rights required reversal of the conviction found on the stipulation.[4]

I do not infer that *Cross*, *supra*, 61 Cal.4th 164 intended to overrule *Mosby*, *supra*, 33 Cal.4th 353, as to there being a distinction between silent record cases and incomplete advisement cases, for there was no mention in *Cross* of the distinction made in *Mosby*. It may well be that the issue of the distinction was never raised before the court. The court simply said *Mosby* applied the "totality of the circumstances" test. (*People v. Cross*, *supra*, 61 Cal.4th at pp. 179-180.) *Cross* reversed the conviction. So any suggestions that the court disagreed with *Mosby*, is at best dictum.

As stated in *People v. Campbell*, *supra*, 76 Cal.App.4th at page 310, "The Attorney General . . . contends we should infer from (defendant's) experience and

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[4] The court also overruled *People v. Witcher* (1995) 41 Cal.App.4th 223, holding that a stipulation as to the existence of a prior conviction was tantamount to admitting all of the elements of an enhancement requiring that defendant be advised of and waive his constitutional rights. (*People v. Cross*, *supra*, 61 Cal.4th at pp. 175, 178-179.)

familiarity with the criminal justice system that he intelligently and voluntarily waived his rights. We decline to do so. If this experience were sufficient to constitute a voluntary and intelligent waiver of constitutional rights, courts would rarely be required to give *Boykin/Tahl* admonitions." The same logic applies to references to constitutional rights at earlier stages of the proceeding. We have no way of knowing if the defendant actually heard or understood any such references during earlier proceedings.

I would reverse the conviction for driving when defendant's driver's license was suspended or revoked under Vehicle Code section 14601.1, subdivision (a), and remand the matter to the trial court for possible retrial of that charge.

MOSK, J.

PROOF OF SERVICE BY MAIL

Re: Randolph Farwell, Court Of Appeal Case: B257775, Superior Court Case: TA130219

I the undersigned, declare that I am employed in the County of Sonoma, California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 4968 Snark Ave, Santa Rosa CA. On December 3, 2015, I served a copy of the attached Petition for Review (CA Supreme Court) on each of the parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in United States mail at Sonoma, California, addressed as follows:

California Appellate Project
Los Angeles Office
520 S. Grand Avenue
4th Floor
Los Angeles, CA 90071

Office of the Attorney General
Respondent
300 South Spring Street
Fifth Floor, North Tower
Los Angeles, CA 90013

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415 U.S. Highway 49 North
Tutwiler, MS 38963
(Appellant)

Compton Courthouse
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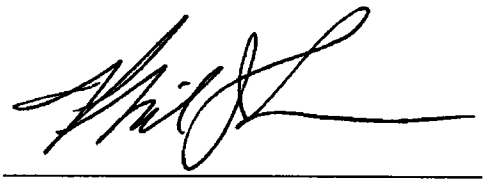
Compton, CA 90220

Los Angeles District Attorney
18000 Foltz Crim Justice Cntr
210 W. Temple, 18th Floor
Los Angeles, CA 90012

Malika Djafar, Alternate Dep. PD
320 West Temple Street
Hall of Records, Room 35
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 3rd day of December, 2015.

Phil Lane
(Name of Declarant)



(Signature of Declarant)

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: Randolph Farwell, Court Of Appeal Case: B257775, Superior Court Case: TA130219

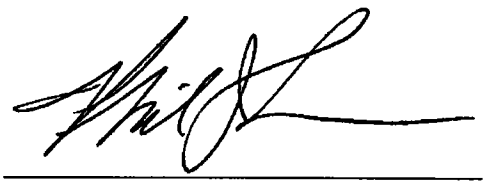
I the undersigned, am over the age of eighteen years and not a party to the within entitled cause. My business address is 4968 Snark Ave, Santa Rosa CA. On December 3, 2015 a PDF version of the Petition for Review (CA Supreme Court) described herein was transmitted to each of the following using the email address indicated and/or direct upload. The email address from which the intended recipients were notified is Service@GreenPathSoftware.com.

Court of Appeal, 2nd District
Clerk of Court
Los Angeles, CA 90013

State of California Supreme Court
Supreme Court
San Francisco, CA 94102-4797

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 3rd day of December, 2015 at 13:01 Pacific Time hour.

Phil Lane
(Name of Declarant)



(Signature of Declarant)