IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **DAVID PALMER,** Defendant and Appellant.	No. S204409 Court of Appeal Case No. H036979 Santa Clara County Superior Court Case No.:C1094540

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA

The Honorable Drew Takaichi

APPELLANT'S OPENING BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Is a claim that the trial court failed to establish a factual basis for defendant's plea within the meaning of Penal Code section 1192.5 not cognizable on appeal where defense counsel stipulated to a factual basis for the plea?

2. If the claim is cognizable, did defense counsel's bare stipulation to a factual basis without reference to any document describing the facts sufficiently establish a factual basis?

STATEMENT OF THE CASE

On December 9, 2010, a Complaint was filed in Santa Clara County Superior Court case number C1094540 charging appellant David Palmer with violation of Health and Safety Code sections 11378, felony possession of MDMA for sale (count 1), and 11359, felony possession of marijuana for sale (count 2). (CT 2.)

On January 6, 2011, appellant was arraigned and pled not guilty to the charges. (CT 6.)

On March 18, 2011, appellant pled no contest to count 1 in exchange for a grant of probation and dismissal of count 2. (CT 9.)

On May 20, 2011, the court suspended imposition of sentence, placed appellant on probation, and ordered him to serve 270 days in county jail. (CT 18-19.) In addition, the court ordered him to pay fines plus penalty assessments under Health and Safety Code sections 11372.5 and 11372.7. (CT 18-19.)

On May 26, 2011, appellant timely filed a Notice of Appeal. (CT 22.) The Notice of Appeal stated that the appeal was "based on the sentence or other matters occurring after the plea that do not affect the validity of the plea." (CT 22.) On September 7, 2011, appellant filed a Request for Permission to file a Request for a Certificate of Probable Cause under the Constructive Filing Doctrine. On October 20, 2011, the request was granted. (SCT 1.)

On October 8, 2011, appellant filed a Notice of Appeal and Request for a Certificate of Probable Cause in the superior court. (SCT 3-4.) On November 2, 2011, the superior court granted the request for a certificate. (SCT 4.) On November 9, 2011, appellant filed an Opening Brief in the Court of Appeal, Sixth Appellate District. On July 2, 2012, the Court of Appeal affirmed the judgment. (Pet. for Rev., Ex. A [hereafter "Ex. A"].) On August 1, 2012, appellant petitioned this Court for review. On October 10, 2012, this Court granted review.

STATEMENT OF APPEALABILITY

This appeal is from an order which finally disposes of all issues between the parties.

STATEMENT OF THE FACTS

The parties stipulated to a factual basis without reference to a police report or other factual document. (RT 8.) There was no preliminary hearing, and appellant waived a fully probation report. (RT 7-8; CT 10.) Therefore, the record does not supply a factual basis for the plea.

The Complaint charged appellant with possession of 3, 4-methylenedioxy methamphetamine (MDMA) for purposes of sale. (CT 2.)

ARGUMENT

I.

A CLAIM THAT THE TRIAL COURT FAILED TO ESTABLISH A FACTUAL BASIS FOR DEFENDANT'S PLEA WITHIN THE MEANING OF PENAL CODE SECTION 1192.5 IS COGNIZABLE ON APPEAL WHETHER OR NOT DEFENSE COUNSEL STIPULATED TO A FACTUAL BASIS

After a guilty or no contest plea, issues on appeal are limited to those going to the legality of the proceedings. (§ 1237.5.) The courts of appeal are split on whether the trial court's failure to establish a factual basis under section 1192.5 constitutes a claim going to the legality of the proceedings such that it is cognizable on appeal. (*People v. Marlin* (2004) 124 Cal.App.4th 559 [cognizable]; *People v. Voit* (2011) 200 Cal.App.4th 1353 [not cognizable].) Appellant contends that the issue is cognizable.

Whether the trial court properly established a factual basis under section 1192.5 goes to the process of the plea, the propriety of accepting the plea, and creating an adequate record for review. Therefore, it is cognizable on appeal as an issue relating to the legality of the proceedings.

A. Law

Section 1237.5 prohibits a defendant from appealing a conviction after a guilty plea unless he obtains a certificate of probable cause after stating "reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings."

> No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:
> (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.
> (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.

(§ 1237.5.) Thus, the defendant must state grounds going to the legality of the proceedings as well as seek and obtain a certificate of probable cause. (*People v. Gonzalez* (1993) 13 Cal.App.4th 707, 713.)

Obtaining a certificate of probable cause does not render cognizable issues which are waived by a guilty plea. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1178; *People v. Moore* (2003) 105 Cal.App.4th 94, 99.)

A guilty plea admits guilt and so waives the right to question the evidence, including its sufficiency and admissibility. (*Id.*, at p. 713, quoting *People v. Turner* (1985) 171 Cal.App.3d 116, 125-126.) A guilty plea also waives any irregularity which would not preclude a conviction. (*Id.*, at pp. 713-714.) A defendant may raise only those issues which go to the power of the state to try him despite his guilt. (*Id.*, at p. 714.) Claims relating to guilt are not cognizable on appeal.

The courts have analyzed what constitutes a claim going to the legality of the proceedings, as opposed to one relevant to guilt or innocence. (*People v. Meyer* (1986) 183 Cal.App.3d 1150, 1157.) Cognizable issues going to the legality of the proceedings include failure of the people to seek restitution in a welfare fraud case, collateral estoppel, and discriminatory prosecution. (*Ibid.*; *People v. Moore, supra,* 105 Cal.App.4th at p. 100-101.) Issues considered not cognizable on appeal following a guilty plea include sufficiency of the evidence, voluntariness of an extrajudicial statement, a trial court's refusal to disclose the identity of an informant and fairness of a pretrial lineup. (*People v. Hunter* (2002) 100 Cal.App.4th 37, 42.) Each of these claims relates to the sufficiency or admissibility of evidence.

Section 1192.5 mandates that the trial court perform certain tasks before taking a valid guilty plea. Among other things, the statute requires that the court inquire about a factual basis for the plea.

> The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.

(§ 1192.5.)

This Court has held that, although there is no federal constitutional requirement for an inquiry into the factual basis, "the statutory mandate of section 1192.5 helps ensure that the 'constitutional standards of voluntariness and intelligence are met.'" (*People v. Holmes* (2004) 32 Cal.4th 432, 438, quoting *People v. Hoffard* (1995) 10 Cal.4th 1170, 1182, fn. 11.) The inquiry protects innocent defendants and makes a record in the event of appellate or collateral attack on the plea. (*People v. Hoffard, surpa,* 10 Cal.4th at p. 1183.)

> Before accepting a guilty or no contest plea pursuant to a plea agreement in a felony case, the trial court is required to determine that a factual basis for the plea exists. (§ 1192.5; *People v. Holmes* (2004) 32 Cal.4th 432, 440–442, 9 Cal.Rptr.3d 678, 84 P.3d 366.) "The purpose of the requirement is to protect against the situation where the defendant, although he realizes what he has done, is not sufficiently skilled in law to recognize that his acts do not constitute the offense with which he is charged. [Citation.] Inquiry into the factual basis for the plea ensures that the defendant actually committed a crime at least as serious as the one to which he is willing to plead." (*People v. Watts* (1977) 67 Cal.App.3d 173, 178, 136 Cal.Rptr. 496.)

(*People v. French* (2008) 43 Cal.4th 36, 50-51.)

Due to these "significant policy considerations," the Court of Appeal, Third Appellate District, has held that a defendant's claim that the factual basis inquiry was insufficient is cognizable on appeal.

> Given these significant policy considerations, a failure to make a sufficient inquiry, while not a constitutional or jurisdictional requirement, is one of the "other" grounds going to the legality of the proceedings in the trial court. Even though a

> defendant may in fact be guilty of the offense to which he pleads guilty, given the policy considerations underlying the intent behind section 1192.5, an adequate inquiry into the factual basis for the plea addresses broader issues such as the voluntariness of the plea and a knowing decision to plead guilty. A sufficient factual inquiry must be considered a necessary component of the legality of the proceedings. To decide otherwise would preclude review of the factual basis for a plea of guilty or no contest thereby frustrating the policies the statute is intended to advance. Thus, defendant's claim that the factual inquiry undertaken here was insufficient is, after issuance of a certificate of probable cause, cognizable on appeal.

(*People v. Marlin, supra,* 124 Cal.App.4th at p. 571.)

In *People v. Voit, supra,* 200 Cal.App.4th 1353, the Court of Appeal, Sixth Appellate District, took a contrary position. The court distinguished between claims attacking the trial court's process and challenges to its ultimate conclusion that there was a factual basis:

> On the other hand, when the trial court does make an inquiry on the record as to the factual basis for a plea, an appellate claim that the inquiry was not "sufficient" or "adequate" is often, as it was in *Marlin,* essentially a challenge not to the trial court's process but to its ultimate conclusion that there was a factual basis for the plea. In such a case, the defendant's position is concerned with the sufficiency of the evidence of his or her guilt. A defendant who belatedly disputes the existence of evidence of his or her guilt is making a substantive, not a procedural, claim.

(*People v. Voit, supra,* 200 Cal.App.4th at p. 1370.) The Court of Appeal held that the issue is not cognizable when the challenge is substantive rather than procedural.

> It is our position that an appellate court should not engage in a substantive review of whether there is an evidentiary or factual basis for a defendant's no contest plea simply because the defendant contradicts on appeal what he admitted in the trial court.

(*Id.*, at p. 1371.)

B. Facts

In this case, the trial court found a factual basis for the plea after a bare stipulation from defense counsel. (RT 8.) There was no preliminary hearing and appellant waived a probation report. (RT 7.) Therefore, the record contains no facts.

On appeal, appellant sought remand for a proper factual basis inquiry. (AOB 3.) Appellant argued that "the failure to reference and make part of the record a document supporting the stipulation to a factual basis renders the court's finding inadequate and requires remand for a proper inquiry." (ARB 1.)

The Court of Appeal, Sixth Appellate District, held that "defendant's contention that the factual basis inquiry was not sufficient is 'essentially a challenge not to the trial court's process but to its ultimate conclusion that there was a factual basis for the plea." (Ex. A, at p. 6, quoting *People v. Voit, supra,* 200 Cal.App.4th at p. 1370.) Thus, the court impliedly found that the issue was not cognizable on appeal.[1]

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[1] Nevertheless, the court appeared to address the merits, finding that defense counsel's stipulation constituted a binding admission by appellant supporting the discretionary finding of a factual basis. (Ex. A, pp. 5-6.)

C. Appellant's Challenge to the Sufficiency of the Court's Factual Basis Inquiry Is Cognizable on Appeal

Appellant contends that any challenge to the factual basis in support of a guilty plea goes to the legality of the proceedings and is cognizable on appeal. As the court in *Marlin* stated, significant policy considerations, such as the voluntariness of the plea, support review. (*People v. Marlin, supra,* 124 Cal.App.4th at p. 571; *People v. Holmes, supra,* 32 Cal.4th at p. 438.) The purpose is to protect defendants who are innocent or not sufficiently skilled in law to recognize that their acts do not constitute the offense charged. (*People v. French, supra,* 43 Cal.4th at p. 51; *People v. Hoffard, supra,* 10 Cal.4th at p. 1183.) It also creates the necessary record. (*People v. Hoffard, surpa,* 10 Cal.4th at p. 1183.) Concluding that the defendant's plea waives the issue would eviscerate the rule's purposes.

The purposes underlying section 1192.5 support and are analogous to advising a defendant of federal constitutional rights before a plea is taken, which requires an adequate record.

> 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. See *Kercheval v. United States,* 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009. Admissibility of a confession must be based on a 'reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant.' *Jackson v. Denno,* 378 U.S. 368, 387, 84 S.Ct. 1774, 1786, 12 L.Ed.2d 908. The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In *Carnley v. Cochran,* 369 U.S. 506, 516, 82 S.Ct. 884, 890, 8 L.Ed.2d 70, we dealt with

a problem of waiver of the right to counsel, a Sixth Amendment right. We held: 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.'

We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards. *Douglas v. Alabama,* 380 U.S. 415, 422, 85 S.Ct. 1074, 1078, 13 L.Ed.2d 934.

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653. Second, is the right to trial by jury. *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491. Third, is the right to confront one's accusers. *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923. We cannot presume a waiver of these three important federal rights from a silent record.

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. When the judge discharges that function, he leaves a record adequate for any review that may be later sought (*Garner v. Louisiana,* 368 U.S. 157, 173, 82 S.Ct. 248, 256, 7 L.Ed.2d 207; *Specht v. Patterson,* 386 U.S. 605, 610, 87

> S.Ct. 1209, 1212, 18 L.Ed.2d 326), and forestalls the spin-off of collateral proceedings that seek to probe murky memories.

(*Boykin v. Alabama* (1969) 395 U.S. 238, 242-244, 89 S.Ct. 1709, footnotes omitted.) The factual basis inquiry required by section 1192.5 similarly implicates the propriety of the plea, regardless of the defendant's actual guilt or innocence.

Moreover, the particular facts of this case squarely go to the legality of the proceedings, as it challenges the court's procedure in soliciting facts rather than its discretionary evaluation of the facts. Section 1192.5 dictates a proper procedure for accepting a guilty plea. This Court has outlined specific "guidelines" for the trial court to follow to comply with section 1192.5. (*People v. Holmes, supra,* 32 Cal.4th at pp. 435-436.) Those guidelines dictate a proper procedure when the court looks to defense counsel for a factual basis.

> We conclude that in order for a court to accept a conditional plea, it must garner information regarding the factual basis for the plea from either defendant or defense counsel to comply with section 1192.5. . . . . If the trial court inquires of defense counsel regarding the factual basis, it should request that defense counsel stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea agreement. (*People v. Wilkerson* (1992) 6 Cal.App.4th 1571, 1576–1579, 8 Cal.Rptr.2d 392 (*Wilkerson*).)

(*People v. Holmes, supra,* 32 Cal.4th at p. 436.)

Appellant contends that the court failed to follow the proper procedure. The trial court did not obtain facts from appellant, the prosecutor or defense counsel. (RT 7-8.) There are no documents in the record reciting the alleged facts of the case, because there was n preliminary hearing and appellant waived a full probation report.

The procedures dictated in section 1192.5, and given substance in *Holmes*, are meant to ensure that innocent defendants are not convicted out of ignorance, and that all pleas are knowing and voluntary. (*People v. Marlin, supra,* 124 Cal.App.4th at p. 571; *People v. Holmes, supra,* 32 Cal.4th at p. 438; *People v. French, supra,* 43 Cal.4th at p. 51; *People v. Hoffard, supra,* 10 Cal.4th at p. 1183.)

The language of the statute is mandatory. "The court *shall* also cause an inquiry to be made of the defendant to satisfy itself . . . that there is a factual basis for the plea. (§ 1192.5, emphasis added.) This Court also used mandatory language in *Holmes*. (*People v. Holmes, supra,* 32 Cal.4th at p. 436 ["in order for a court to accept a conditional plea, it *must* garner information regarding the factual basis for the plea"] emphasis added.) Appellant's challenge to the factual basis procedure is a challenge to the legality of the proceedings and is therefore cognizable on appeal.

D. Conclusion

Appellant contends that his claim that the court failed its duty under section 1192.5 constitutes a challenge to the legality of the proceedings, which is cognizable on review despite his guilty plea.

II.

DEFENSE COUNSEL'S BARE STIPULATION TO A FACTUAL BASIS, WITHOUT REFERENCE TO ANY DOCUMENT DESCRIBING THE FACTS, FAILS TO ESTABLISH A FACTUAL BASIS WITHIN THE MEANING OF PENAL CODE SECTION 1192.5

During the plea, the parties entered into a bare stipulation that there was a factual basis. (RT 8.) The parties referred to no document containing facts supporting the plea, and the record contains none.

The courts of appeal are split on whether a bare stipulation may establish a factual basis under section 1192.5. (*People v. Willard* (2007) 154 Cal.App.4th 1329, 1334-1335 [insufficient]; *People v. McGuire* (1991) 1 Cal.App.4th 281, 282-283 [sufficient].) In this case, the Court of Appeal held that defense counsel's stipulation constituted and admission which supports the court's implied discretionary finding of a factual basis. (Ex. A at 5-6.) This Court has not yet determined the issue. (*People v. Holmes, supra*, 32 Cal.4th at p. 441, fn. 8.)

Appellant contends that a bare stipulation cannot establish a factual basis within the meaning of section 1192.5. Therefore, the case must be reversed.

A. Facts

On March 18, 2011, appellant purportedly pled guilty to violating Health and Safety Code section 11378. In taking the plea, the prosecutor initiated the following colloquy regarding a factual basis for the plea:

MS. TRAN: Do you stipulate, Ms. Randisi, there's a factual basis for the plea as the People do?

MS. RANDISI: Yes, I do stipulate.

MS. TRAN: And do you also waive your preliminary examination in which you have all the constitutional rights that the Court has previously stated that you would for a trial?

THE DEFENDANT: Yes.

(RT 8.) Appellant waived a full probation report. (RT 7.) The trial court never indicated that it found a factual basis for the plea. On May 20, 2011, the trial court suspended imposition of judgment, granted appellant probation, and sentenced him to serve 270 days in county jail. (RT 14.)

B. Law

As discussed above, section 1192.5 requires that the trial court "cause an inquiry to be made . . . to satisfy itself . . . that there is a factual basis for the plea." (§ 1192.5.) A trial court's determination that there is a factual basis is reviewed for abuse of discretion. (*People v. Holmes, supra,* 32 Cal.4th at p. 443.) A finding of error is harmless where the contents of the record support a finding of a factual basis for the plea. (*Ibid.*)

In *People v. McGuire, supra,* 1 Cal.App.4th 281, the defendant moved to withdraw his plea on the basis that the parties' bare stipulation to a factual basis failed to discharge the court's duty under section 1192.5. (*Id.*, at p. 282.) The Court of Appeal held that the trial court properly denied the defendant's motion to withdraw his plea because a bare stipulation to a factual basis was sufficient to satisfy section 1192.5. (*Id.*, at pp. 282-283.)

Justice Poché dissented, opining that a bare stipulation was inadequate. (*People v. McGuire, supra,* 1 Cal.App.4th at p. 284, dis. opn. of Poché, J.) Justice Poché summarized the relevant case law and found a bare stipulation "no more helpful in establishing a factual basis" than a summary recitation that a factual basis exists:

> In summary, to comply with section 1192.5, the trial court must develop on the record specific facts supporting the plea. This allows the reviewing court to determine whether the factual basis relied upon by the trial court was sufficient. In *Watts* [*Peole v. Watts* (1977) 67 Cal.App.3d 173], the statement by the defense counsel was inadequate to serve this purpose because it was merely a general statement that he had discussed the facts with the defendant. Thus, there was nothing in the record that could establish a factual basis for the plea. In *Tigner* [*People v. Tigner* (1982) 133 Cal.App.3d 430], the mere conclusory statement by the trial court that a factual basis existed clearly failed to establish specific facts on the record; in fact, it could hardly be considered an inquiry. In contrast, the stipulation in *Enright* [*People v. Enright* (1982) 132 Cal.App.3d 631] was adequate because it specified that the factual basis could be found in a particular place (the police reports), as part of the record, and as such, the reviewing court could determine whether the factual basis itself was adequate to accept the defendant's plea.
>
> In the case at bar, the prosecutor and the defense counsel stipulated that a factual basis for the plea existed. This general agreement is no more helpful in establishing a factual basis than were the statements which were rejected in *Watts* and *Tigner* as being statutorily inadequate. Such a stipulation reveals no more of a factual basis supporting the plea than the plea itself. Nor is this case analogous to the situation where the parties stipulate that certain documentary evidence in the record can serve as the factual basis for the plea. There is a significant distinction between a stipulation that a specific

> document can be considered as containing the factual basis, as in *Enright*, and a general stipulation that a factual basis simply exists, as we have here. The former provides a concrete set of facts in the record, which can be reviewed by the appellate court to determine its adequacy. The latter provides nothing to assure the appellate court or the trial court of the adequacy of the factual basis supporting the plea.

(*People v. McGuire, supra,* 1 Cal.App.4th at p. 286, dis. opn. of Poché, J.)

Thirteen years later, this Court decided *People v. Holmes, supra,* 32 Cal.4th 432. In *Holmes*, the plea agreement included a section, initialed by the defendant, which stated "there is a factual basis for the plea." (*Id.*, at p. 437.) The defendant assented to the trial court's question, "Did you do what is says you did in Count 1 on March 24th, 2000 in Riverside County?" (*Ibid.*) This Court upheld the plea because the complaint contained a brief description of the factual basis for the charged offense. (*Id.*, at p. 443.)

However, this Court warned that "a bare statement by the judge that a factual basis exists, without the [proper] inquiry, is inadequate." (*Id.*, at p. 436.) It directed that the trial court "must garner information" regarding the factual basis. (*Ibid.*) The court may inquire of the defendant or defense counsel; however, if the court obtains facts from defense counsel, it should require a stipulation to a document in the record:

> If the trial court inquires of defense counsel regarding the factual basis, it should request that defense counsel stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing

> transcript, probation report, grand jury transcript, or written plea agreement.

(*Ibid.*)

This Court left open the question whether a bare stipulation by the parties was sufficient. (*Id.*, at p. 441, fn. 8.) However, this Court quoted Justice Poché's dissenting opinion with apparent approval and stated a better approach is for the stipulation to be accompanied by a reference to a document containing sufficient facts. (*Ibid.*)

In *People v. Willard* (2007) 154 Cal.App.4th 1329, the Court of Appeal acknowledged that this Court "referred positively" to Justice Poché's dissenting opinion and held that a bare stipulation by the parties was insufficient to satisfy section 1192.5. (*Id.*, at p. 1334.) In *Willard*, the defendant stipulated that there was a factual basis and that the court could take the facts from the reports. (*Id.*, at p. 1332.) However, there were no such reports in the record. (*Id.*, at p. 1334.) As a result, the Court of Appeal found that the court's finding of a factual basis was insufficient and reversed. The error was not harmless because the record did not contain any documents which provided a sufficient factual basis. (*Id.*, at pp. 1334-1335.)

C. The Court of Appeal Decision in This Case

In the instant case, the Court of Appeal held the bare stipulation was sufficient to satisfy section 1192.5. The court held that defense counsel's stipulation constituted an admission by appellant, which supported the trial court's exercise of discretion:

> In this case, in response to the prosecutor's inquiry, defendant stated on the record in open court that he had reviewed the charges against him and his possible defenses with his counsel, and that he was satisfied with his counsel's advice. His counsel and the prosecutor then stipulated that there was a factual basis for defendant's no contest plea. The court found that defendant's answers to the prosecutor's inquiry and the stipulations were knowingly and intelligently entered into. On this record, defense counsel's stipulation that there was a factual basis for the plea "must be regarded as an admission by defendant [as it was] made in [open court in] defendant's presence with defendant's apparent assent." (*Voit, supra,* 200 Cal.App.4th at p. 1372, fn. 14.) . . . . [T]he trial court's acceptance of the guilty plea after an inquiry into the factual basis for the plea can only be reversed for an abuse of discretion. (*Marlin, supra,* 124 Cal.App.4th at p. 572.) Given defendant's and the prosecutor's stipulation to a factual basis, we see no reason to reverse the judgment and remand the matter to allow another inquiry into the factual basis for defendant's plea.

(Ex. A at 5-6.) Appellant disagrees and contends that the decision in *Willard* and the dissenting opinion in *McGuire* are correct.

D. A Bare Stipulation to a Factual Basis Is Insufficient to Establish a Factual Basis for the Plea

A bare stipulation to a factual basis fails to satisfy the requirement of section 1192.5. The statute requires the trial court to "cause an inquiry to be made . . . to satisfy itself . . . that there is a factual basis for the plea." (§ 1192.5.) The trial court "must garner information regarding the factual basis . . . ." (*People v. Holmes, supra,* 32 Cal.4th at p. 442.) The information must support a prima facie case of the charge. (*Id.*, at p. 441,

citing *People v. Calderon* (1991) 232 Cal.App.3d 930, 935.) A reference to a complaint which contains a factual basis for "each essential element of the crime" is also sufficient. (*Id.*, at pp. 440-441, citing *United States v. Corporan-Cuevas* (1st Cir. 2001) 244 F.3d 199, 203.) Each of these principles suggests that the court must elicit facts, either orally or by way of a document, rather than a bare stipulation.

Justice Poché recognized that requiring the trial court to develop specific facts on the record satisfied one important purpose behind section 1192.5, i.e., creating an adequate record for review. (*People v. McGuire, supra,* 1 Cal.App.4th at p. 286, dis. opn. of Poché, J.) "[T]he mere conclusory statement by the trial court that a factual basis existed clearly failed to establish specific facts on the record" and hardly qualified as an inquiry. (*Ibid.*) Justice Poché made the astute observation that a bare stipulation to a factual basis "reveals no more of a factual basis supporting the plea than the plea itself." (*Ibid.*) It "provides nothing to assure the appellate court or the trial court of the adequacy of the factual basis supporting the plea." (*Ibid.*)

This Court cited Justice Poché's remarks with apparent agreement:

> A closer question is raised when counsel stipulates to a factual basis for the plea under section 1192.5, absent reference to a particular document that provides an adequate factual basis. (*People v. McGuire* (1991) 1 Cal.App.4th 281, 286, 1 Cal.Rptr.2d 846 (dis. opn. of Poché, J.) ["Such a stipulation reveals no more of a factual basis supporting the plea than the plea itself."].) While we have no occasion to decide whether *McGuire* is correct, we agree with the court in *Wilkerson, supra,*

> 6 Cal.App.4th at page 1577, 8 Cal.Rptr.2d 392, that the better approach under section 1192.5 is for a stipulation by counsel to a factual basis to be accompanied by reference to a police report (*Wilkerson*, at p. 1577, 8 Cal.Rptr.2d 392 ["So stipulated, your Honor, based on the police reports included in the complaint."]), reference to the probation report or preliminary hearing transcript (*People v. Gonzalez* (1993) 13 Cal.App.4th 707, 714–715, 16 Cal.Rptr.2d 635), or reference to grand jury testimony (*People v. Mickens* (1995) 38 Cal.App.4th 1557, 1563–1565, 45 Cal.Rptr.2d 633 (*Mickens*)).

(*People v. Holmes, supra*, 32 Cal.4th at p. 441, fn. 8.) The decision in *McGuire* predates this Court's decision in *Holmes*. Therefore, the majority justices did not have the benefit of this Court's guidelines. As the Court of Appeal found in *Willard*, Justice Poché's dissenting opinion better reflects the purposes of section 1192.5 and this Court's preferred approach to the factual basis inquiry requirement. (*Id.*, at pp. 1334-1335.)

A bare stipulation to a factual basis provides no more of a factual basis than the plea itself. Permitting a bare stipulation to satisfy section 1192.5 would eviscerate the purpose of the statute and render it moot. Thus, more is required. There must be some reference to a factual source to support the essential elements of the crime. (*People v. Willard, supra*, 154 Cal.App.4th at p. 1334.) Under this Court's guidelines in *Holmes*, a stipulation should refer to some document which states facts demonstrating a prima facie case of the crime.

E. The Court Failed to Elicit a Sufficient Factual Basis for the Plea

In this case, the parties gave a bare stipulation that there was a factual basis for the plea. (RT 8.) A bare stipulation is insufficient to satisfy the requirements of section 1192.5. (*People v. Willard, supra,* 154 Cal.App.4th at pp. 1334-1335.) Therefore, the trial court erred. There is no document (police report, preliminary hearing transcript, or probation report) which provides any facts at all. Therefore, the error is not harmless, and the conviction must be reversed. (*People v. Willard, supra,* 154 Cal.App.4th at p. 1335.)

F. Conclusion

The conviction should be reversed. The case may be remanded for the court to give the prosecutor the opportunity to supply a sufficient factual basis for the plea. (*People v. Willard, supra,* 154 Cal.App.4th at p. 1335.)

CONCLUSION

Appellant requests that this Court reverse and remand because (1) the claim challenging the factual basis of the plea cognizable; and (2) a bare stipulation to a factual basis is insufficient to satisfy section 1192.5.

Dated: November 24, 2012

Respectfully submitted,

Jean M. Marinovich
Attorney at Law
Attorney for Appellant

CERTIFICATE OF COMPLIANCE
(Cal.Rules of Ct., rule 8.520(c)(1))

Case Name: David Palmer No.: S204409

I, Jean M. Marinovich, certify pursuant to rule 8.520(c)(1) of the California Rules of Court that this brief was produced on a computer and contains 5,490 words, as calculated by the word count of the Word program. This brief therefore complies with the rule, which limits a brief produced on a computer to 14,000 words.

Dated: November 24, 2012

_____

Jean M. Marinovich
Attorney for Appellant
David Palmer

DECLARATION OF SERVICE

Case Name: *People v. David Palmer* No.: S204409

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is P.O. Box 2079 Aptos, California, 95001-2079.

On November 26, 2012, I served the attached

APPELLANT'S OPENING BRIEF ON THE MERITS

By placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing the envelope in the United States Mail at Aptos, California, with postage thereon fully prepaid.

Sixth District Appellate Program 100 N. Winchester Blvd. Suite 310 Santa Clara, CA 95050	Office of the State Attorney General 455 Golden Gate Ave. #11000 San Francisco, CA 94102
Office of the Clerk Court of Appeal Sixth Appellate District 333 W. Santa Clara Street Suite 1060 San Jose, CA 95113	Santa Clara County Superior Court 191 N. First Street San Jose, CA 95113
David E. Palmer 512 Coralwood Road Modesto, CA 95357	California Supreme Court Office of the Clerk 350 McAllister Street San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 26, 2012, at Aptos, California.

_____ _____

Declarant Signature