IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	No. S231009
	)	
v.	)	2d Crim. B257775
	)	
RANDOLPH FARWELL,	)	(Los Angeles County Superior
	)	Court No. TA130219)
Defendant and Appellant.	)	
	)	

OPENING BRIEF ON THE MERITS

JONATHAN B. STEINER
Executive Director
(State Bar No. 48734)

CALIFORNIA APPELLATE PROJECT
520 S. Grand Ave., 4th Floor
Los Angeles, CA 90071
Telephone: (213) 243-0300
Fax: (213) 243-0303
E-mail: Jon@lacap.com

Attorney for Defendant/Appellant

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OPENING BRIEF ON THE MERITS

QUESTIONS PRESENTED

1. If the record indicates that the trial court did not advise the defendant or obtain waivers of his constitutional rights at the time of the stipulation to his guilt of a charged offense, does the "totality of the circumstances" test apply in determining whether a defendant knowingly and intelligently waived his constitutional rights?

2. If the "totality" test is applied, are references to a defendant's constitutional rights during earlier stages of the proceedings and the defendant's criminal history sufficient to support the conclusion that the defendant knowingly and voluntarily waived those rights when entering into the stipulation?

INTRODUCTION

At no time prior to trial counsel's stipulation to appellant's guilt on count II did the trial court give direct admonitions to or get spoken waivers from the defendant regarding his federal constitutional rights to a jury trial, to the privilege against self-incrimination and to confront and cross-examine witnesses. Based on the federal and California Constitutions and case law, in this "silent record" case, the "totality of circumstances" test of *People v. Howard* (1992) 1 Cal.4th 1132 (*Howard I*)[1] should not and cannot be used to determine whether appellant Farwell knowingly and voluntarily waived said constitutional rights. *Boykin v. Alabama* (1969) 395 U.S. 238, 243-244 (22 L. Ed. 274, 89 S. Ct. 1709); *In re Tahl* (1969) 1 Cal.3d 122, 130 and *In re Yurko* (1974) 10 Cal.3d 857, 861-865.

Such a holding would be directly counter to this court's unanimous opinion in *People v. Mosby* (2004) 33 Cal.4th 353, 365. In *Mosby,* this court made a clear statement that the circumstantial evidence test is not applicable to silent record cases. The court held that, if the defendant received no warnings and gave no waivers of the constitutional rights involved, the court could not infer that in admitting the substantive offense or prior, he has knowingly and intelligently waived these rights. (33 Cal.4th at p. 362)

In re Tahl (1969) 1 Cal.4th 122, 130, stated "Clearly the judge's active participation "'in canvassing the matter with the accused' is essential, and *a fortiori* a

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[1]/ Two reporter's transcripts were prepared to cover this part of the trial. For purposes of simplicity, citations to the reporter's transcript will refer to the volume that reads, in the bottom left hand corner, "Vol. 1 of 1, Pages 1-150, incl." In this transcript, the reporter's certificate is dated September 1, 2015.

silent record is insufficient." Thus, a voluntary and intelligent waiver of these rights must be taken by the court addressing the defendant directly and giving the warnings and getting the waivers.

In *People v. Howard I, supra*, although the trial court failed to warn and obtain a waiver of the right to confront and cross-examine witnesses, there was direct evidence of the voluntary and intelligent waivers of the rights to a jury trial and the privilege against self-incrimination. *Mosby* later referred to this situation as an "inadequate advisement." The *Howard I* court created the "totality of the circumstances" test and affirmed the judgment. The court held that, although the warnings and waivers were inadequate under *Yurko*, the record was good enough to avoid reversal.

But the *Howard* court also specifically stated "'This does not mean that explicit admonitions and waivers are no longer an important part of the process of accepting a plea of guilty or the admission of a prior conviction.... We emphasize that explicit admonitions are still required in this state.'" (1 Cal.4th at pp. 1178, 1179.)

In *People v. Cross* (2015) 61 Cal.4th 164, 169, this court confronted a "silent record" case, cited and discussed *Howard* and *Mosby* and reversed. The majority in the case at bar held that *Cross* implicitly overruled *Mosby* on the key issue here. This interpretation of *Cross* is incorrect and will be discussed in greater detail below. (Slip Opn., pp. 4-5.)

More recently, in *People v. Blackburn* (2015) 61 Cal.4th 1113, there was a denial of a jury trial required by statute on a silent record in a mentally disordered defender (MDO) extension case. This Court held that the defendant must himself, and not counsel, articulate the waiver. It further held that, the failure to obtain such a waiver was a "miscarriage of justice" under Article VI, section 13, of the California Constitution requiring reversal of the judgment. In *People v. Tran* (2015) 61 Cal.4th 1160, 1168-1169, a "not guilty by reason of insanity" (NGI) extension case, this Court adopted the *Blackburn* approach. (61 Cal.4th at pp. 1168-1169)

This court should make it crystal clear that the *Howard I* test is not applicable to silent record cases by following the clear precedents discussed in this brief. Such a decision will set a floor below which the constitutionally required admonitions and waivers cannot descend.

However, should this court nonetheless decide to apply the *Howard I* test to silent record cases, the stipulation of guilt to the substantive offense here must still be set aside.

The real and underlying question is what permissible inferences can be drawn from the circumstantial evidence in this silent record case where there is no finding of fact by the trial court to which this court might defer. The Court must be convinced beyond a reasonable doubt that appellant voluntarily and intelligently waived his constitutional rights although the trial court did not give the required warnings and took the necessary waivers directly from him. (*Henderson v. Morgan.*)

STATEMENT OF THE CASE

Appellant, Randolph Farwell, was charged with gross vehicular manslaughter (Pen. Code section 192(c)(1)), count 1, and driving while his driver's license was suspended or revoked, count 2. He was also charged with a prior residential burglary conviction. (Pen. Code section 667(a)(1). (CT 99-101)

After the very brief testimony of one witness (three pages of direct and redirect examination and one transcript page of cross-examination, trial counsel stipulated to appellant's guilt on count 2. (CT pp. 74-78; pp. 74 and 78, partial pages) When taking the stipulation, the trial court never admonished him and never secured waivers of his right to a jury trial, his right against self-incrimination, and his right to cross-examine and confront witnesses against him. He was convicted of both counts and admitted the prior conviction. He was sentenced to 13 years in prison. (CT 167, 238-239.)

The Court of Appeal, Second Appellate District, Division Five, affirmed the judgment by a 2-1 majority by Kirschner, J. (pro tem), Judge of the Los Angeles Superior Court sitting by assignment with Turner, P. J. concurring. Mosk, J. (Richard) filed a dissenting opinion.

STATEMENT OF THE FACTS

As the specific facts of the two counts of which appellant was convicted are not relevant to the issue before the court, appellant will not repeat them here.

ARGUMENT

I.

THE "TOTALITY OF THE CIRCUMSTANCES" TEST CANNOT BE APPLIED TO THIS CASE AS THE TRIAL COURT DID NOT DIRECTLY ADVISE APPELLANT OR OBTAIN A PERSONAL WAIVER FROM HIM OF ANY OF HIS THREE CONSTITUTIONAL PRIOR TO THE TIME TRIAL COUNSEL, NOT APPELLANT, STIPULATED TO APPELLANT'S GUILT ON COUNT II

Howard is plainly distinguishable from the case at bar. There were proper admissions of two of the three constitutional rights taken while here there were none.

A. *Mosby* And Cases Cited Before And After Make It Clear That The *Howard* Test Is Not Applicable To This Silent Record Case; *Blackburn* and *Tran* Make This Point Even Clearer

A unanimous court in *People v. Mosby, supra,* made the clearest statement that the *Howard I* test is not applicable to silent record cases. In addition to the statement from the *Mosby* court quoted above, the *Mosby* court also noted that "...*if* the transcript does not reveal *complete advisements and waivers*, the reviewing court must examine the record of the 'entire proceeding'..." (33 Cal.4th at p. 361; emphasis added). In other words, if complete advisements are given and waivers taken, the *Howard I* test is not a part of the court's analysis. Thus, this test does not apply to silent record cases.

On this point, in *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1421, where the defendant was alleged to have a Penal Code 667.5(b) prior. After the jury returned a guilty verdict on the substantive charge, the court took a silent record admission of the prior. The court stated that under *Mosby*, "[W]e may not infer the admissions were

voluntary and intelligent under the totality of the circumstances." The *Sifuentes* court continued,

> "*Mosby's* recognition that a defendant's prior experience with the criminal justice system is relevant to the question whether he knowingly waived constitutional rights comes into play *only in incomplete advisement cases*." (emphasis added; 33 Cal.4th at p. 362.)

Mosby and *Sifuentes* were both relied by Justice Mosk's dissenting opinion in the Court of Appeal in the case at bar. See also *People v. Little* (2004) 115 Cal.App.4th 776, 779-780.

The *Mosby* court examined eight cases involving the admission of priors, four with silent records and four with incomplete advisements all of which had been reversed by the Court of Appeal. The "inadequate advisement" cases were all reversed by this Court and disapproved in footnote 3 of the opinion. (33 Cal.4th. at 365.)[2] The silent record cases were all approved by this Court.

In *People v. Moore* (1992) 8 Cal.App.4th 411, a silent record case cited and relied on by the *Mosby* court is of particular interest. The defendant was charged with possession of cocaine base for sale with allegations of two prior convictions, an assault with a deadly weapon (ADW) and possession of a controlled substance for sale. After being found guilty, counsel stipulated to the court that appellant had been convicted of the ADW prior without warnings or waivers. Then the court directed the deputy DA to take

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[2]/ *People v. Van Buren* (2001) 93 Cal.App.4th 875; *People v. Carroll* (1996) 47 Cal.App.4th 892; *People v. Garcia* (1996) 45 Cal.App.4th 1242; *People v. Torres* (1996) 43 Cal.App.4th 1073; *People v. Howard* (1994) 23 Cal.App.4th 1660 (*Howard II*).

the waivers on the drug offense. He handled the admonitions and waivers properly, and the defendant admitted the drug prior. (8 Cal.App.4th at pp.415-416.)

In reversing the ADW stipulation but approving the drug case admission, the court distinguished *Howard I* by noting that the defendant there had properly been admonished and waived two of the three constitutional rights but that the court failed to get a waiver of the privilege against self-incrimination. This enabled the *Moore* Court to uphold the admission of the prior in the drug case. (8 Cal.App.4th at p. 417.)

In regard to the admission of the ADW prior, the *Moore* court stated,

> If this were sufficient, it is difficult to discern what would not be. It is the classic "silent record" situation condemned in *Boykin* (395 U.S. at p. 243, in language reiterated in *Howard.* (1 Cal.4th at p. 1176.)

Mosby also relied *on People v. Stills* (1994) 29 Cal.App.4th 1766, 1771. The defendant was charged with attempted murder and three other felony counts with an allegation that he had previously been convicted of a felony under section 667(a). Appellant admitted the prior after the trial, and the trial court gave no admonishments and took no waivers. The court stated "...we do not think the "harmless error" rule [of *Howard I*)...can be extended to the total absence of any admonitions, i.e., the circumstance[s] in this case."

In *People v. Johnson* (1993) 15 Cal.App.4th 169, a silent record decision also approved by *Mosby*, the defendant was charged with second degree murder and several

other substantive offenses, and it was also alleged that he had two prior convictions. After the jury convicted, Johnson admitted his priors with neither warnings nor waivers.

While the majority opinion in this case below looked to comments made at various points in the trial to infer that the admission was voluntary and intelligent, the *Johnson* court declined a similar invitation, distinguishing *Howard.* The court concluded,

> What is impossible to determine from this silent record is whether Johnson was not only was aware of these rights, but was also prepared to waive them...thus rendering the defendant's admission of the priors neither intelligent nor voluntary." (33 Cal.4th at p. 362; 15 Cal.App.4th at p. 178).)

Mosby approved *People v. Campbell* (1999) 76 Cal.App.4th 305, 310, another silent case, where the court simply held that, " 'as *there were no admonitions*'...this record is inadequate to support a voluntary and intelligent waiver of rights..." The defendant was convicted of a violation of Penal Code section 273.5(a) and admitted four prior convictions (Penal Code section 1203(e)(4)), two prison priors under section 667.5(b), and a prior strike (sections 667(e)(1) and 1170.12 (c)(1)) The *Campbell* court specifically declined to infer from Campbell's experiences and familiarity with the criminal justice system that he intelligently and voluntarily waived his rights. See also *People v. Sifuentes, supra,* (195 Cal.App.4th at p. 1421.)

The *Campbell* court noted that six years after the decision in *People v. Johnson, supra,* "...we continue to be concerned by the frequency by which trial courts fail to provide the necessary admonitions." (76 Cal.App.4th at p. 311.) It is now 22 years after

Johnson and 46 years after *Tahl*, and the California appellate courts still must grapple case-by-case with the plethora of appeals caused by the repeated failures of the California trial courts to make sure the appellate record reflects that the three constitutionally required admonitions are given and the three constitutionally required waivers are taken.

One critical point from *Mosby* and these four cases is that, in each one, the defendant was convicted of from one to four priors and the appellate courts cited *Howard I*, but specifically held it inapplicable to silent record cases.

In *People v. Blackburn, supra,* and *People v. Tran*, supra, the Court made clear that a failure to get specific waivers of a jury trial from the defendant where such waiver was required by statute invalidated the trial court's extension order. Although these cases involved a statutory right to a jury trial rather than a constitutional right, the difference makes this case even stronger than *Blackburn* or *Tran*.

The *Blackburn* Court continued,

> If the case now before us were a criminal matter involving the invalid waiver of a state or federal constitutional trial right, there could be no doubt that the error would constitute a "miscarriage of justice" requiring reversal without regard to the strength of the evidence. (61 Cal.4th at p. 1133.)

The waivers not taken in the case at bar involve, in addition, to the right to a jury trial, the privilege against self-incrimination and the right the confront and cross-examine witnesses. In *Blackburn* and *Tran,* this Court was hearing an appeal from Blackburn's third extension hearing (61 Cal.4th at p. 1117), but the Court declined to infer from the

totality of the circumstances that a valid waiver occurred on a silent record because that would defeat the advisement and waiver requirements of the statute. The Court stated that,

> the requirement of an *affirmative* showing means that no valid waiver may be presumed from a silent record. (*Ante,* at pp. 1130-1131.) Ultimately, we emphasize that the most certain means of ensuring a valid waiver is careful compliance with the express advisement and waiver process..." (61 Cal.4th at pp. 1136-1137; emphasis in original.)

Finally, the Court held that the error involved a "miscarriage of justice" under article VI, section 13 of the California Constitution and had to be reversed.

B. While the Majority Opinion In *People v. Newman* (1999) 21 Cal.4th 413, 422, Indicated That The Issue of Whether The *Howard I* Test Can Be Applied To Silent Record Cases Was An Open Question, Two Members Of The *Newman* Court Believed The Issue Had Already Been Determined In The Negative

In *People v. Newman* (1999) 21 Cal.4th 413, 422, a pre-*Mosby* case, this court held that a stipulation to one evidentiary fact of a sentencing enhancement was not tantamount to a full admission if other facts had still to be proved for the prior to be found true. Thus, the *Boykin-Tahl* warnings and waivers were not necessary. In footnote 4, the 5-2 majority noted that the court had not yet determined "what rule should apply where the stipulation admits every element necessary to sustain conviction of an offense..."

Two members of the court concurred with the judgment but dissented from the inclusion of footnote 4. The concurring opinion stated,

> "It necessarily follows both from this court's reasoning in *People v. Adams* (1993) 6 Cal.4th 570 as well as the majority's reasoning today, that a defendant who stipulates

> to every element of a charged offense or enhancement must be advised of and waive his or her rights in accordance with *Boykin v. Alabama* (1969) 395 U.S.238 and *In re Tahl* (1969) 1 Cal.3d 122. Because the majority, in footnote 4, plants a seed of doubt as to this issue where no doubt previously existed, I cannot join it. (Concurring opinion by Werdegar, J.; Mosk, J., concurred.) (1 Cal.4th at p.423.)

Adams noted that a waiver "may not be presumed from a silent record." (6 Cal.4th at p. 581.)

The *Newman* court stated,

> ...trial courts in the future would be well-advised to assure the record adequately reflects the fact that a defendant is advised of any constitutional rights waived [in admitting a prior conviction]...He should be informed as to the nature and the consequences of the stipulation. Such a requirement is already in use in cases which involve the of admission of prior felony convictions. (Cf. *In re Tahl,* 1 Cal.3d at p. 133, fn. 6.) *Therefore the practice endorsed today should not unduly burden the judicial process.* (21 Cal.4th at p. 419; emphasis added).

C. The Court of Appeal's Majority Opinion Below Misinterpreted The Law Applicable To The Facts In This Case When It Concluded That This Was Not A Silent Record Case

In *People v. Cross, supra,* in which this court reversed a silent record case, the court cited and distinguished the case from *Howard I.* (61 Cal.4th at 179-180.) The majority in the Court of Appeal in this case believed that *Cross* implicitly overruled *Mosby* by going through the *Howard I* analysis. Yet, a review of all the silent record cases cited above indicates that, they, too, went through a *Howard I* analysis as it was the only

existing test approved by this court on these issues at the time. Thus, looking at the facts and considering *Howard I* was the analysis precedent directed.

Cross and the other silent record cases reversed the trial court judgments because the record was completely silent as to any warnings and waivers of constitutional rights while the facts in *Howard I* showed two out of three properly taken warnings and waivers.

In his dissenting opinion in this case, Justice Mosk took on the majority's holding directly, stating,

> I do not infer that *Cross, supra,* 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 circumstances" test. (*People v. Cross, supra,* 61 Cal.4th at pp.179-180.)

The dissent was exactly right. The *Cross* court also distinguished *Howard I* and said nothing about overruling *Mosby, Johnson, Sifuentes, Little, Moore, Stills,* and *Campbell.* "It is well settled a case is not authority for an issue not decided." *People v. Parnell* (1993)16 Cal.App.4th 862, 873.

The majority opinion also mischaracterized the distinction between "silent records" and "inadequate advisement cases" blurring this clear distinction by stating that "this [case] is not a 'silent record' case" based on its analysis of the circumstantial evidence. (Slip opinion, p. 9.) In the cases cited above, the term "silent record" has been used in only one way, to wit, that none of the three constitutionality required admonitions were

given and none of the constitutionally required waivers were taken without considering circumstantial evidence.

The decisions in the *Boykin-Tahl-Yurko-Mosby* line of cases were intended to protect the constitutional right of defendants and, from the perspective of the judicial system, make certain that there was a clear record to protect the judgments from post-conviction attacks. *Howard I* has substantially cut back on both goals but cannot and must not be applied to silent record cases.

II.

EVEN APPLYING THE *HOWARD* TEST TO THE FACTS, THE COURT OF APPEAL ERRED IN RULING THAT APPELLANT VOLUNTARILY AND INTELLIGENTLY WAIVED HIS CONSTITUTIONAL RIGHTS

A. The Circumstantial Evidence At Trial Does Not Justify Affirming The Court Of Appeal Below; In Considering The Question Of Implied Waiver; A Court Must Focus On What The Defendant Understood Based On Circumstantial Evidence And Not Solely Words Said In A Different Trial Context

The Court of Appeal below pointed to comments to the jury in ruling that appellant did not pass the *Howard* test. It also alleged that the trial court noted the three constitutional rights were touched on "45" times (without actually pointing them out) in the process of voir dire and instructing the jury pre-trial. (Slip opn., pp. 3, 7-8.)

First, these pre-trial instructions to the jury have been given in virtually every criminal trial. They are part of the standard CALJIC and CALCRIM instructions, they are standard introductory instructions that a trial court would give anyway in introducing the jury to their task.

For the Court of Appeal below to take these instructions or comments made in voir dire as the centerpiece of the court's holding that the plea was knowingly and voluntarily given is neither reasonable nor logical. The underlying assumption is that the defendant was paying rapt attention to everything the court said and understanding all the information even partially related to the relevant constitutional rights. The additional

assumption made here is that the defendant is able to pull these pieces of information together and have them in mind when the waivers are taken.

There is also no acknowledgment that similar instructions were extremely likely to have been given at trial in all of the cases cited above which reversed judgments based on a silent record.

In order for this court to determine that appellant understood the comments as admonitions of his constitutional rights and consciously waived them, the court must focus on the defendant and what he was reasonably doing or thinking when the comments were made. Of course, the record reflects nothing of what appellant was doing or thinking. Nor can the record reflect appellant's mental state on the issue of whether he was voluntarily and intelligently waiving these rights. Nobody ever asked him. As the court appropriately stated in *People v. Moore, supra,* "[W]e decline to speculate as to what appellant may have thought." (8 Cal.App.4th at p. 418)

It is the prosecution's burden to prove to this court that the defendant understood that he was responsible for understanding these comments directed, not to him, but to individual jurors or the jury as a whole. It is also the prosecution's burden to point to facts which can support the conclusion that, after clearly understanding these rights as the result of comments that were not addressed to him, and although the trial court never actually spoke directly to him and received responses from him, the defendant waived these rights voluntarily and intelligently.

An additional concern is whether, due to the stress and anxiety of being on trial facing 15 years in state prison (or in other cases with "special circumstances" allegations, life in prison without the possibility of parole or death), appellant may have been trying to understand something the court or counsel had just said and unable to listen intently and process the next comments as the judge or lawyers spoke. He may have been doodling or drawing or fantasizing he was somewhere else. He may not have had enough education to truly be able to connect directly what he may or may not have heard or be able to transfer what he heard to any real comprehension of what he was giving up.

That is why all the decisions on a silent record have reversed the trial court's judgment, many commenting that the judge failed to address the defendant directly on these critical points. That is why only a direct dialogue with the court can truly accomplish this task and why putting this dialogue on the record will prevent future post-conviction litigation. One can fairly assume that there is even a script in a judge's manual that could simply be followed.

The real query being made under *Howard I* then is (1) not whether the appellant knew and understood what his constitutional rights were but whether the court thinks he should have known them based on the circumstantial evidence of what he heard, and (2) not whether he voluntarily and intelligently waived these constitutional rights but whether, if he really understood the rights from the court's comments to the jury, did he also

understand clearly, although no one asked him, that he was giving up these constitutional rights trial counsel's stipulation.

In this regard, Justice Mosk said in his dissent,

> "We have no way of knowing if the defendant actually heard or understood any such references during earlier proceedings." (Slip opn., dissent, p. 7.)

See also *People v. Johnson, supra*, where the court stated that it was "...impossible to determine from this silent record...whether Johnson not only was aware of these rights but was also prepared to waive them." (15 Cal.App.4th at 178.)

A defendant's criminal history, while relevant, is also not sufficient to establish that a voluntary and intelligent waiver of his rights occurred at the time his lawyer stipulated to his guilt to count II. In *People v. Campbell, supra*, 76 Cal.App.4th at 310, a silent record case in which the defendant had four prior convictions, the court stated that if experience with the criminal justice system "...were sufficient to constitute a voluntary and intelligent waiver of constitutional rights, courts would rarely be required to give *Boykin-Tahl* admonitions. Under *Howard I,* we are not permitted to imply knowledge and a waiver of rights on a silent record." See *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1421, and *People v. Johnson, supra,* 15 Cal.App.4th at 177, in which the defendant had two prior convictions. See also *People v. Blackburn, supra,* where the court noted that this was Blackburn's third extension hearing in one case. (41 Cal.4th at p. 1117.)

Thus, based on the holding in *People v. Mosby, supra, People v, Campbell, supra, People v. Johnson, supra, and People v. Sifuentes, supra,* and the other cases cited above, following *Howard I* requires a reversal of the judgment in a silent record case. Otherwise, the law will be that these constitutional rights can be forfeited without warnings or waivers and without the trial court having to say anything about them to the defendant. If that is so, this court should stop giving lip service to the idea that the warnings must be given and waivers must be taken in all such cases.

This would require this court to acknowledgment that following the mandate of the *Boykin-Tahl-Yurko-Mosby* line of cases that silent record cases must be reversed has been overruled.

B. Applying The Appropriate Standards Of Review For Violations of the California or federal Constitutions Further Emphasizes The Necessity Of Reversing The Holding Of The Lower Court

1. Under *People v. Blackburn, supra,* and *People v. Tran, supra,* The Facts Of This Case Constitute A "Miscarriage of Justice" Under The California Constitution

In *Blackburn,* the Court cited *People v. O'Bryan* (1913) 165 Cal. 44 on the development of the "miscarriage of justice" rule, noting that since the California Constitution was adopted, that phrase meant more than simply determining guilt or innocence. The Court stated that "it was an essential part of justice" that the determination of guilt or innocence was based on an "orderly legal procedure" in which the rights of a defendant must be respected. It gave the example of a defendant who was denied the

constitutional right to a jury trial and was convicted by the court based on overwhelming evidence. Plainly, the conviction must be set aside regardless of that evidence because of the denial of the right to trial by jury.

The Court reasoned that depriving an individual of that right in other context was equally a "miscarriage of justice." Thus, as noted above, the facts of this case constitute a similar "miscarriage of justice," and must be reversed.

As California's Constitution is "a document of independent force....[and on] many occasions [this court] has concluded that the California Constitution accords greater protection to individual rights within our borders that federal law guarantees throughout the nation. (Citations.)" *People v. Bustamante* (1981) 30 Cal.3d 88, 97-98. "[W]e are not precluded from adopting for California a more exacting standard that is minimally required by the federal Constitution, whether to afford greater assurqance of the validity of convictions, to protect more fully defendants' rights nor to anticipate future constitutional devcelopments." (*In re Tahl*, *supra*, 1 Cal.3d at 132, fn. 5.)

2. The Appropriate Federal Standard of Review To Be Applied To This Case Is The *Chapman* Standard

Should the Court, for any reason, decide that the *Blackburn* definition of "miscarriage of justice" does not apply to this case, this court is being asked to make a factual determination regarding a mental state based on circumstantial evidence on a cold record without a finding of fact by the trial court to which this court might defer. In doing

the review, the issue becomes how convinced must the appellate court be of its decision to hold that the three constitutional rights have been waived.

This review is made considerably more difficult in a silent record case. In other words, in deciding whether the *Howard I* test applies to this case, this court has to determine the appropriate standard of review in silent record cases like the matter at bar.

As the stipulation here involves the trial court's failure to admonish and take waivers regarding three violations of federal constitutional rights as the issue revolves around the forfeiting of three essential federal constitutional rights, under *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705; 87 S. Ct. 824.] this court must be convinced beyond a reasonable doubt that the plea was intelligent or voluntary.

In *Henderson v. Morgan* (1976) 426 U.S. 637 [49 L.Ed.2d 108; 96 S. Ct. 2253.] the defendant pleaded guilty to second degree without being informed by either his lawyer or the court that intent to cause the death of the victim was an element of the offense. The District Court granted relief but was reversed by the Court of Appeal. Morgan argued that the trial court should have examined him to determine whether he was aware of that element of the offense. On the record, and taking into consideration that Morgan had a low mental capacity, the court reversed the Court of Appeal and set aside the plea because the defendant had not been informed of an element of the offense. The court held that the matter required at least the use of the "beyond a reasonable doubt" standard. (426 U. S. 637, 645.)

In addition, when a case presents violations of multiple federal constitutional protections, this court has adopted the "harmless beyond a reasonable doubt" standard of review. *(People v. Rodriguez* (1986) 42 Cal.3d 1005, 1012 [the right to an interpreter for a non-English speaking person]. See also *People v. Chavez* (1991) 231 Cal.App. 3d, 1471, 1477)) "Several federal rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial." *In re Tahl, supra,* 122 at p. 130, quoting from *Boykin*, *supra,* 395 U.S. at 243-244.

The *Rodriguez* court stated,

> Normally, where violations of state constitutional rights are under consideration, the test is whether it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d [818], at p. 836.) However, here, numerous federal constitutional rights may be affected and we therefore adopt a *Chapman* approach under which a federal constitutional error maybe deemed harmless only if the appellate court is " 'able to declare a belief that it was harmless beyond a reasonable doubt.'" (*Chapman, supra,*386 U.S. at p. 24.)

CONCLUSION

In *People v. Adams, supra,* 6 Cal.4th at p. 581, this Court described the nature of a guilty plea as " 'a grave and solemn act to be accepted only with care and discernment...'" (*Brady v. United States* (1970) 397 U.S. 742, 748 [25 L.Ed.2d 747; 90 S.Ct. 1463].

The case law cited above makes clear that the Court of Appeal made significant errors in interpreting *People v. Cross,* supra, and *People v. Mosby, supra,* in its opinion below. This a silent record case, and this Court has never affirmed the application of the *Howard I* test to such a case. California case law indicates that no intermediate appellate court has either.

People v. Blackburn, supra, and *People v. Tran, supra,* approach the issue from the perspective of other involuntary confinement situations. They also indicate the inapplicability of harmless error analysis in a silent record situations and are apply the "miscarriage of justice" standard of the California Constitution.

If the *Howard I* test were applied to this case, the Court would still have to reverse the judgment. The focus of this inquiry must be on appellant, to wit, what he may have understood from trial court or counsel's comments in other trial contexts. There is no direct evidence and little circumstantial evidence on the question of whether he involuntarily or intelligently waived his federal and state constitutional rights to a jury trial, to his privilege against self incrimination and to confront and cross-examine witnesses.

The fact that his constitutional rights may have been referred to in jury instructions or voir dire simply does not mean that he was paying attention when the words were spoken, heard them or understood them. If he was listening, heard and understood the words, it is then another jump of logic to hold that he was able to infer that he was waiving them by pleading guilty. That is why virtually every court that has considered the issue has said that the only way to handle this issue is to make sure that the trial court admonishes appellant specifically and takes waivers from him personally. That was not done here.

For the reasons set forth in this brief, this Court should reverse the decision by a divided Court of Appeal.

Dated: May 31, 2016

Respectfully submitted

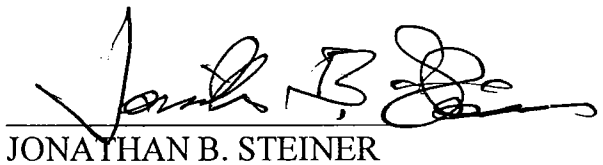
CALIFORNIA APPELLATE PROJECT

JONATHAN B. STEINER
Executive Director

Attorney for Defendant/Appellant

WORD COUNT CERTIFICATION
People v. Randolph Farwell

I certify that this document was prepared on a computer using Corel Wordperfect, and that, according to that program, this document contains 5,867 words.



JONATHAN B. STEINER

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is 520 S. Grand Avenue, 4th Floor, Los Angeles, California 90071. I am employed by a member of the bar of this court.

On May 31, 2016, I served the within

OPENING BRIEF ON THE MERITS

in said action, by emailing a true copy thereof to:

Kamala D. Harris, Attorney General
docketingLAawt@doj.ca.gov

and by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California.

Court of Appeal
Division Five
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013
(213) 830-7000
(e-filed)

Randolph Farwell
AU-1869
Tallahatchie County Correctional Facility
415 U.S. Highway 49 North
Tutwilwer, MS 38963

Clerk of the court
for delivery to:
The Honorable Paul Bacigalupo, Judge
Los Angeles County Superior Court
Dept. O
6230 Sylmar Avenue
Van Nuys, CA 90401

I declare under penalty of perjury that the foregoing is true and correct.

Executed May 31, 2016, at Los Angeles, California.

Jackie Gomez