In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RANDOLPH D. FARWELL,

Defendant and Appellant.

No. S231009

Court of Appeal, Second Appellate District, Division Five, No. B257775
Los Angeles County Superior Court No. TA130219
The Honorable Paul A. Bacigalupo, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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1. "Where a defendant is not advised of nor asked to waive his . . . constitutional rights in connection with a stipulation . . . 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?" (Petn. for Review 1.)

2. "Under the 'totality of the circumstances' test, are . . . references to . . . 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?" (Petn. for Review 1-2.)

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant was charged and convicted of two counts, count 1 for gross vehicular manslaughter, and count 2 for driving with a suspended license. Before trial, in appellant's presence, defense counsel informed the court that appellant was "willing to plead no contest to" count 2, and "ask[ed] the court to allow him to do so so that can be an issue taken out of the hands of the jury." Alternatively, defense counsel requested that the trial on count 2 be bifurcated. The prosecutor objected to these requests, and the court denied bifurcation.

During trial, after defense counsel had cross-examined the People's first witness, defense counsel and the prosecutor entered into the following stipulation: "[O]n June 21st, 2013 [the date of the charged vehicular manslaughter], [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." Defense counsel had an obvious tactical reason for this stipulation – to minimize the jury's exposure to evidence about

appellant's license suspension and knowledge thereof, and thus reduce the chance of that information negatively influencing the jury's decision on the vehicular manslaughter count.

On appeal, appellant challenged only his conviction on count 2. He argued that defense counsel's stipulation to that count was invalid because appellant had not been advised of, and did not waive, his constitutional trial rights at the time the stipulation was entered. A majority of the Court of Appeal disagreed and affirmed the judgment, concluding that the record affirmatively shows the stipulation was voluntary and intelligent under the totality of the circumstances.

The Court of Appeal majority reached the correct result. Contrary to appellant's contention, the totality of the circumstances test is not limited to "incomplete advisement" cases. In *People v. Cross* (2015) 61 Cal.4th 164, this Court recently applied that test in a "silent record" case. Moreover, an inflexible categorical rule of reversal in silent record cases would not serve the interests of justice, since it may nevertheless be clear, as here, that the defendant knew well what rights he was giving up when he stipulated to an offense. Nor would drawing the distinction between a silent record and an incomplete advisement even be practicable in many cases, since it can be unclear, as in this case, whether the record should be construed as truly silent on the matter of advisements.

Applying the totality of the circumstances test, the Court of Appeal majority correctly concluded that appellant's stipulation to count 2 was voluntary and intelligent. The record amply demonstrates appellant's awareness of his trial rights, both from sitting through his current trial and his prior experience in the criminal justice system. In appellant's presence – on the day before and the day of defense counsel's entry into the stipulation – the court and counsel discussed or mentioned appellant's trial rights multiple times. Before the start of jury selection, the court explained

directly to appellant the concepts of a jury trial and confrontation of witnesses. Moreover, as the Court of Appeal majority found, appellant "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" that count. In addition, as stated by the Court of Appeal majority, appellant "was not a neophyte to the criminal justice system. He is a recidivist, who had sustained two prior convictions."[1]

Accordingly, the Court of Appeal's judgment should be affirmed.

STATEMENT OF THE CASE

A. Trial Court Proceedings

Appellant was charged in count 1 with gross vehicular manslaughter, and in count 2 with driving when his driver's license was suspended or revoked (a misdemeanor). It was also alleged that appellant had a prior serious felony conviction. (CT[2] 99-100.)

On June 10, 2014, before the start of jury selection, the trial court advised appellant:

> [T]he *jury has to determine* if the elements of vehicular manslaughter can be proven beyond a reasonable doubt. So the prosecutor will present her witnesses. [¶] . . . [W]hen it's all said and done, 12 people . . . , 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, . . . to confront those witnesses.* [¶] But at the end of the

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[1] Concurrently herewith, respondent has filed a request for judicial notice of the superior court dockets in those cases, which reflect that in both, appellant had been advised of his constitutional rights and then pled no contest.

[2] "CT" refers to the clerk's transcript, which consists of one volume.

day, the jury may well say the prosecutor has met her burden of proof beyond a reasonable doubt.

(ART[3] 1, 3, italics added.)

In appellant's presence (CT 116; ART 1), defense counsel later told the court:

> My first [Evidence Code section 402] issue is in regards to count 2, the driving on a suspended license. I'd ask the court to bifurcate that. I believe that [appellant] is *willing to plead no contest to that count*, so I'd ask the court to allow him to do so *so that can be an issue taken out of the hands of the jury*.

(ART 8, italics added). Appellant did not express any disagreement.

The prosecutor objected, stating:

> I think it goes to [appellant's] knowledge of the recklessness of his actions. [¶] He was not supposed to be driving at the time. . . . In addition, there are witnesses that . . . – if we just bifurcated it – I'd have to call at a separate time because there are witnesses in common. It's relevant to the case, and so it would be over the People's objection.

(ART 8.)

The court noted, "I heard two issues, actually: one, [appellant] is *prepared to enter a plea of no contest to count 2*, and, secondly, assuming that doesn't happen, then there's a request to bifurcate count 2 from the case-in-chief." Defense counsel responded in the affirmative. (ART 8-9, italics added.) Appellant did not express any disagreement. The prosecutor confirmed that she was not prepared to accept a no contest plea to count 2, and that she objected to bifurcation of the counts. (ART 9.) The court denied the bifurcation motion. (ART 40.)

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[3] "ART" refers to the one-volume augmented reporter's transcript that was filed with the Court of Appeal on October 20, 2015. (See Court of Appeal orders dated Sept. 28, 2015, and Oct. 20, 2015.) An earlier version of this transcript, to which appellant cites (see Opening Brief on the Merits ["OBM"] 3, fn. 1), does not include the jury voir dire proceedings.

When the court asked how long appellant's license had been suspended, the prosecutor responded:

> I believe it had been suspended on two different occasions. He was given . . . verbal notice by the police two months prior to this accident happening. [¶] . . . [¶] It was during a stop in which the officer had contact with a number of people. When he ran [appellant], it came up as suspended. He then gave him one of the D.M.V. printouts indicating: "Here's notice that your license is suspended."

(ART 9-10.) Defense counsel did not dispute this account.

Asked if she planned to introduce appellant's statements, the prosecutor replied, "I have no intention of introducing [appellant's] statements. *If he wants them, he can take the stand.*" (ART 14, italics added.)

During argument about the introduction of evidence of a prior driving offense, the prosecutor stated, without dispute, that appellant had "*pled* to the exhibition of speed." (ART 38, italics added.) The probation officer's report reflects that in June 2010, appellant had been convicted of engaging in an illegal speed contest. (CT 222.)

During jury selection, the court informed the prospective jurors that appellant was charged with two counts: vehicular manslaughter, a felony, and driving with a suspended license, a misdemeanor. (ART 48-49.) The court subsequently stated:

> [Appellant] 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 [appellant's] guilt beyond a reasonable doubt.

(ART 51, italics added.)

Defense counsel told the prospective jurors that "the defendant in a criminal case has the *right not to testify* and has the right to rely upon the

evidence that's presented by the prosecution." (ART 106, italics added; see also ART 153, 190 [referring to right not to testify].) The court added:

> [T]he Constitution protects someone charged with a crime. They [*sic*] 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 . . . . [Y]ou cannot consider the fact, if he chooses not to testify.

(ART 107, italics added.)

On June 11, 2014, the second day of jury selection (CT 118; ART 109), the prosecutor told the prospective jurors that appellant "has certain rights. [¶] For example, when I call witnesses to the stand, [defense counsel] has the *right to cross-examine* them" (ART 115-116, italics added). A jury was empaneled on that day. (CT 118; ART 197-198.)

The same day, the prosecutor gave her opening statement, telling the jury, "[O]nce those facts have been proven beyond a reasonable doubt, the People are confident . . . that *you will vote to find [appellant] guilty of* both vehicular manslaughter and *driving on a suspended license*." (ART 210, italics added.)

Also the same day, *after defense counsel had cross-examined the People's first witness* (ART 216-217; CT 118), a discussion was held at sidebar at defense counsel's request (ART 218). The court subsequently 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." (ART 218.) The prosecutor asked defense counsel, "[D]o you stipulate 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?" (ART 218-219.) Defense counsel responded, "So stipulated." (ART 219.)

The court later instructed the jury regarding stipulated facts, "Because there is no dispute about those facts you must . . . accept them as true." (CT 131.) The jury was instructed that to prove guilt on count 2, the People must prove: "1. [Appellant] drove a motor vehicle while his driving privilege was suspended; [¶] AND [¶] 2. When [appellant] drove, he knew that his driving privilege was suspended." (CT 154.)

In closing argument, the prosecutor stated as to count 2, "At the beginning of the trial the defense and the People offered a stipulation, and that stipulation indicated that we were agreeing . . . that [appellant] drove a motor vehicle when his license was suspended, and that when he drove, he knew the privilege was suspended, and that meets elements 1 and 2 . . . ." (2RT[4] 451-452.) Defense counsel told the jury:

> [B]y stipulation, [appellant] 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.)

The jury found appellant guilty as charged. (CT 160-161.) Appellant admitted the prior serious felony conviction allegation (CT 236; 2RT 501), and the trial court sentenced him to state prison on count 1 (gross vehicular manslaughter) for a total term of 13 years. The court imposed a concurrent term on count 2. (CT 235-239; 2RT 535-540.)

B. The Court Of Appeal Opinion

On appeal, appellant challenged only his conviction on count 2. He argued that "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

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[4] "2RT" refers to volume two of the original reporter's transcript.

not waive, his trial rights, at the time the stipulation was entered." (Opn. 4.) In a two-to-one decision, the Court of Appeal affirmed the judgment, finding that the trial court did not reversibly err. The Court of Appeal "review[ed] the entire record, not just the record of the stipulation colloquy, and under the totality of circumstances conclude[d] the record affirmatively shows the stipulation was voluntary and intelligent." (Opn. 2.)

The Court of Appeal found that "[d]uring the pretrial proceedings, and extensive jury voir dire, [appellant] 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[, appellant's] right to trial, remain silent and cross-examine witnesses were discussed or mentioned." (Opn. 3.) In addition, appellant "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." (Opn. 7.)

The Court of Appeal further observed:

> [Appellant] was not a neophyte to the criminal justice system. He is a recidivist, who had sustained two prior convictions . . . . [Citation.] [¶] The probation report states that in July 2010, [appellant] was convicted of a residential burglary . . . , a strike, and in February of the same year, [appellant] was convicted of engaging in an illegal speed contest . . . .[5] In order to sustain these convictions, [appellant] either proceeded to trial and was convicted or plead[ed] guilty/no contest and was convicted. In either event, this

[5] It appears that the dates of February, 2010, and July, 2010, were the dates of appellant's arrests for those offenses. He was subsequently convicted. (CT 222-223.)

previous experience in the criminal justice system is relevant to his knowledge regarding his legal rights.[6]

(Opn. 7-8, fn. omitted.)

Citing this Court's decision in *Cross*, 61 Cal.4th 164, the Court of Appeal found it to be "unmistakably clear" that in determining whether a plea was voluntary and intelligent under the totality of the circumstances, an appellate court "review[s] the entire record, and not just the portion relating to the stipulation colloquy." The Court of Appeal noted that the *Cross* court "reiterated this rule without any reference to other appellate court decisions that distinguish between silent record cases and incomplete advisement cases[.]" (Opn. 5.)

The Court of Appeal noted regarding silent record cases:

> The four "truly silent-record" cases referred to in [*People v.*] *Mosby*[(2004)] 33 Cal.4th [353,] 361-362 . . . do not entail a stipulation to a substantive crime but rather entail a stipulation to a prior conviction . . . . 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 [appellant] continued his case he was explicitly advised of his right to trial on the substantive charges.[7] Moreover, nothing in *Mosby* imposes the requirement that the advisement be contemporaneous with a stipulation to one of multiple substantive crimes.

(Opn. 8, fn. 4.)

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[6] The Court of Appeal denied respondent's request for judicial notice of the superior court dockets in those cases, because "the documents were not before the trial court." (Opn. 8, fn. 3.) As discussed in respondent's accompanying request for judicial notice, respondent submits that judicial notice by a reviewing court is proper in this instance.

[7] The Court of Appeal observed that on February 18, 2014, appellant had "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 [appellant] responded, 'yes.'" (Opn. 2.)

The Court of Appeal concluded, "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 [appellant] knew of and waived his constitutional rights when he and his counsel made the strategic decision to enter the stipulation." (Opn. 8.)

The dissenting justice argued that, because "there was no express advisement to, or waiver by, [appellant] of his constitutional rights at the time of the stipulation – 'a silent record' case . . . ," reversal was required without a harmless error analysis. (Dis. Opn. 1, 4.) The dissent "d[id] not infer that *Cross* . . . intended to overrule *Mosby* . . . as to there being a distinction between silent record cases and incomplete advisement cases." (Dis. Opn. 6.) The dissent also reasoned, "We have no way of knowing if [appellant] actually heard or understood any . . . references [to constitutional rights] during earlier proceedings." (Dis. Opn. 7.)

ARGUMENT

I. WHERE A TRIAL COURT FAILS TO ADVISE A DEFENDANT OF ANY TRIAL RIGHTS AT THE TIME DEFENSE COUNSEL STIPULATES ON THE DEFENDANT'S BEHALF TO GUILT ON A COUNT, THE ERROR MAY BE DEEMED HARMLESS UNDER THE TOTALITY OF THE CIRCUMSTANCES

Appellant contends that the totality of the circumstances test cannot be applied in this case, because the trial court failed to "directly advise appellant or obtain a personal waiver from him of any of his three constitutional [trial rights] prior to the time trial counsel . . . stipulated to appellant's guilt on count [2]." (OBM 8, capitalization and bold omitted.) However, this Court's decisions in *People v. Howard* (1992) 1 Cal.4th 1132, *Mosby*, 33 Cal.4th 353, and *Cross*, 61 Cal.4th 164, support the conclusion that where a trial court fails to advise a defendant of any trial rights at the time defense counsel stipulates on the defendant's behalf to guilt on a count, the error may be deemed harmless under the totality of the circumstances.

Moreover, applying the totality of the circumstances test in all cases would avoid potentially unjustified reversals – and the resulting unwarranted burden on the courts upon remand – where the record, despite the absence of express admonitions, nonetheless shows that the defendant knew well what rights he was giving up when he stipulated to an offense. The totality of the circumstances test would also make sense as a matter of practicability, since some stipulations may not be easily categorized as involving either a silent record or an incomplete advisement.

A. The *Howard*, *Mosby*, And *Cross* Decisions

1. *Howard*

In *Howard*, 1 Cal.4th 1132, this Court observed that, before *Boykin v. Alabama* (1969) 395 U.S. 238, it was "well established that a valid guilty plea presupposed a voluntary and intelligent waiver of the defendant's constitutional trial rights, which include the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers." (*Howard*, at p. 1175.) "The new question that the high court addressed in *Boykin*" – which it answered in the negative – "was whether it was permissible to infer such a waiver from a silent record." (*Howard*, at p. 1176.)[8]

The *Howard* court further observed:

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[8] In *Boykin*, the defendant pled guilty at his arraignment to all counts. "So far as the record show[ed], the judge asked no questions of [defendant] concerning his plea, and [defendant] did not address the court." (*Boykin*, 395 U.S. at p. 239.) The high court noted that "[t]rial strategy may . . . make a plea of guilty seem the desirable course," "[b]ut the record [wa]s wholly silent on that point . . . ." (*Id.* at p. 240.) The *Boykin* court held that "[i]t was error . . . for the trial judge to accept [defendant's] guilty plea without an affirmative showing that it was intelligent and voluntary" (*id.* at p. 242), and that a court "cannot presume a waiver of [the constitutional rights involved] from a silent record" (*id.* at p. 243).

> [T]he high court has never read *Boykin* as requiring explicit admonitions on each of the three constitutional rights. Instead, the court has said that the standard for determining the validity of a guilty plea "was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." [Citations.] "The new element added in *Boykin*" was not a requirement of explicit admonitions and waivers but rather "the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily."

(*Howard*, 1 Cal.4th at p. 1177, quoting *North Carolina v. Alford* (1971) 400 U.S. 25, 31, and *Brady v. United States* (1970) 397 U.S. 742, 747-748, fn. 4.)

The *Howard* court "emphasize[d] that explicit admonitions and waivers are still required in this state" (*Howard*, 1 Cal.4th at p. 1179), but "[b]ecause the effectiveness of a waiver of federal constitutional rights is governed by federal standards," it "adopt[ed] the federal test in place of the rule that the absence of express admonitions and waivers requires reversal regardless of prejudice" (*id.* at p. 1178).[9] Under the applicable test, "[t]he record must affirmatively demonstrate that the plea was voluntary and intelligent under the totality of the circumstances." (*Ibid.*)

Before trial, the defendant in *Howard* admitted a prior conviction allegation. The trial court advised him of the rights to jury trial and

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[9] The *Howard* court noted that in *In re Tahl* (1969) 1 Cal.3d 122, this Court had "interpreted [*Boykin*] as requiring that 'each of the three rights . . . must be . . . expressly enumerated for the benefit of and waived by the accused prior to acceptance of his guilty plea.'" (*Howard*, 1 Cal.4th at p. 1176, quoting *Tahl*, at p. 132.) Neither *Tahl* nor *In re Yurko* (1974) 10 Cal.3d 857 – which extended *Tahl*'s requirement to admissions of prior conviction allegations – "announced the [reversible per se] rule in so many words. To the contrary, in each decision [this Court] noted that 'there may be other circumstances in particular cases which may warrant the finding of a proper waiver. . . .'" (*Howard*, at p. 1177, quoting *Yurko*, at p. 863, fn. 6, and citing *Tahl*, at p. 133, fn. 6.)

confrontation, but failed to advise him of the privilege against self-incrimination. (*Howard*, 1 Cal.4th at pp. 1174, 1179-1180.) "[C]onsidering the totality of the relevant circumstances," this Court "conclude[d] that defendant's admission . . . was voluntary and intelligent despite the absence of an explicit admonition on the privilege against self-incrimination." (*Id.* at p. 1180.) "The record . . . affirmatively demonstrate[d] that defendant knew he had a right not to admit the prior conviction and, thus, not to incriminate himself." (*Ibid.*) The *Howard* court also noted that there was a "strong factual basis for the plea." (*Ibid.*)

2. *Mosby*

In *Mosby*, 33 Cal.4th 353, this Court considered the following question: "When, immediately after a jury verdict of guilty, a defendant admits a prior conviction after being advised of and waiving only the right to trial, can that admission be voluntary and intelligent even though the defendant was not told of, and thus did not expressly waive, the concomitant rights to remain silent and to confront adverse witnesses?" The *Mosby* court held that "[t]he answer is 'yes,' if the totality of circumstances surrounding the admission supports such a conclusion." (*Id.* at p. 356.)

The *Mosby* court observed:

> By adopting in *Howard* the federal constitutional test of whether under the totality of circumstances the defendant's admission is intelligent and voluntary, we rejected the rule that "the absence of express admonitions and waivers requires reversal regardless of prejudice." [Citation.] In replacing the old rule, the focus was shifted from whether the defendant received express rights advisements, and expressly waived them, to whether the defendant's admission was intelligent and voluntary because it was given with an understanding of the rights waived. After . . . *Howard* . . . , an appellate court must go beyond the courtroom colloquy to assess a claim of . . . error. [Citation.] Now, if the transcript does not reveal complete advisements and waivers, the reviewing court must examine the

> record of "the entire proceeding" to assess whether the defendant's admission . . . was intelligent and voluntary in light of the totality of circumstances.

(*Mosby*, 33 Cal.4th at p. 361, quoting *Howard*, 1 Cal.4th at p. 1178, and *People v. Allen* (1999) 21 Cal.4th 424, 438.)

The *Mosby* court also observed that, after *Howard*, the Courts of Appeal had "applied [*Howard*'s] 'totality of the circumstances' harmless error test to a variety of cases ranging from no advisements or waivers to incomplete advisements and waivers." (*Mosby*, 33 Cal.4th at p. 361.) The *Mosby* court described "[t]ruly silent-record cases" as being those that "show no express advisement and waiver of the *Boykin-Tahl* rights before a defendant's admission . . . ." (*Ibid.*) It cited three such cases: *People v. Stills* (1994) 29 Cal.App.4th 1766, *People v. Campbell* (1999) 76 Cal.App.4th 305, and *People v. Moore* (1992) 8 Cal.App.4th 411. (*Mosby*, at pp. 361-362.) It also cited *People v. Johnson* (1993) 15 Cal.App.4th 169, where the record was "so nearly silent as to be indistinguishable from" the above cases. (*Mosby*, at p. 362.) As to those four cases, the *Mosby* court stated:

> In all of the cases just discussed a jury trial on a substantive offense preceded the defendants' admissions of prior convictions. These defendants were not told on the record of their right to trial to determine the truth of a prior conviction allegation. . . . In such cases, in which the defendant was not advised of the right to have a trial on an alleged prior conviction, we cannot infer that in admitting the prior the defendant has knowingly and intelligently waived that right as well as the associated rights to silence and confrontation of witnesses.

(*Mosby*, at p. 362.)

The *Mosby* court next discussed four incomplete advisement cases – *People v. Carroll* (1996) 47 Cal.App.4th 892, *People v. Howard* (1994) 25 Cal.App.4th 1660, *People v. Torres* (1996) 43 Cal.App.4th 1073, and *People v. Garcia* (1996) 45 Cal.App.4th 1242 – where the Courts of Appeal

had reversed admissions of prior conviction allegations after the defendant had been advised only of the right to jury trial. (*Mosby*, 33 Cal.4th at pp. 362-364.) In *Carroll*, the Court of Appeal "acknowledged, but did not apply, the totality of the circumstances test[.]" (*Mosby*, at p. 363, citing *Carroll*, at p. 897.) In *Howard*, the Court of Appeal concluded that the defendant had not been "'admonished as to his rights to confrontation and self-incrimination explicitly, or in terms amounting to a reasonable substitute for explicit admonition,' thus requiring reversal[.]" (*Mosby*, at p. 363, quoting *Howard*, at p. 1665.) In *Torres*, the Court of Appeal found that "without express advisements and waivers in the record, 'it is not possible . . . to find defendant's admissions' were voluntary and intelligent." (*Mosby*, at p. 363, quoting *Torres*, at p. 1082.) And in *Garcia*, the Court of Appeal stated that "'nothing in the record suggests defendant's prior exposure to the criminal justice system afforded him notice of his right to confrontation and privilege against self-incrimination' nor was he given any 'advice from which [he] could infer' that his right to confrontation, which he had experienced 'in the trial-in-chief' also applied to the trial of his priors." (*Mosby*, at p. 364, quoting *Garcia*, at p. 1248.) The *Mosby* court disapproved these cases. (*Mosby*, at p. 365, fn. 3.)

In *Mosby*, this Court concluded that, under the totality of the circumstances, the defendant had "voluntarily and intelligently admitted his prior conviction despite being advised of and having waived only his right to jury trial." (*Mosby*, 33 Cal.4th at p. 365.) The *Mosby* court explained:

> [D]efendant, who was represented by counsel, had *just* undergone a jury trial at which he did not testify . . . . Thus, he not only would have known of, but had just exercised, his right to remain silent . . . . And, because he had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right of confrontation. [¶] A review of the entire record also sheds light on defendant's understanding. For instance, "a defendant's prior

> experience with the criminal justice system" is . . . "relevant to the question of whether he knowingly waived constitutional rights." [Citation.] That is so because previous experience in the criminal justice system is relevant to a recidivist's "'knowledge and sophistication regarding his [legal] rights.'"

(*Mosby*, at pp. 364-365, quoting *Parke v. Raley* (1992) 506 U.S. 20, 36-37, italics in original.) The *Mosby* court noted that the defendant's prior conviction was "based on a plea of guilty, at which he would have received *Boykin-Tahl* advisements." (*Mosby*, at p. 365.)

3. *Cross*

Recently, in *Cross*, 61 Cal.4th 164, this Court reiterated that "[w]hen a criminal defendant enters a guilty plea, the trial court is required to ensure that the plea is knowing and voluntary. [Citation.] 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." (*Id.* at p. 170, citing *Boykin*, 395 U.S. at pp. 243-244, *Tahl*, 1 Cal.3d at pp. 130-133, and *Howard*, 1 Cal.4th at p. 1179.)

In addition, the *Cross* court noted that case law had "drawn a distinction between, on [the] one hand, 'a defendant's admission of evidentiary facts which [does] not admit every element necessary to conviction of an offense . . .' and, on the other, 'an admission of guilt of a criminal charge . . . .' [Citation.] The requirements of *Boykin-Tahl* . . . apply to the latter type of admission but not the former." (*Cross*, 61 Cal.4th at p. 171, citing *People v. Adams* (1993) 6 Cal.4th 570, 577, 580-583; see also *People v. Newman* (1999) 21 Cal.4th 413, 415 [defendant "validly may stipulate to one or more, but not all, of the evidentiary facts necessary to a conviction . . . , without first having received [*Boykin-Tahl*] advisements" (internal quotation marks omitted)].)

However, "[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.'" (*Cross*, 61 Cal.4th at p. 179, quoting *Howard*, 1 Cal.4th at p. 1175.) "[I]n applying the totality of the circumstances test, a reviewing court must 'review[ ] the whole record, instead of just the record of the plea colloquy,' and . . . 'previous experience in the criminal justice system is relevant to a recidivist's 'knowledge and sophistication regarding his [legal] rights[.]'" (*Cross*, at pp. 179-180, quoting *Mosby*, 33 Cal.4th at pp. 361, 365, some internal quotation marks omitted.)

In *Cross*, defense counsel stipulated during trial to a prior conviction allegation, and the trial court accepted the stipulation without advising the defendant of any trial rights. (*Cross*, 61 Cal.4th at pp. 168-169.) This Court set aside the stipulation, stating:

> [T]he record contains no indication that [defendant's] stipulation was knowing and voluntary . . . . After counsel read the stipulation in open court, the trial court immediately accepted it. The court did not ask whether [defendant] had discussed the stipulation with his lawyer; nor did it ask any questions of [defendant] personally or in any way inform him of his right to a fair determination of the prior conviction allegation. The stipulation occurred during the prosecutor's examination of the first witness in the trial; the defense had not cross-examined any witness at that point. Further, we have no information on how the alleged prior conviction was obtained.

(*Id.* at p. 180, citations omitted.)

B. The Totality Of The Circumstances Test May Be Applied In This Case

Appellant contends that "*Mosby* and cases cited before and after make it clear that the [totality of the circumstances] test is not applicable to this silent record case; [*People v.*] *Blackburn* [(2015) 61 Cal.4th 1113] and

[*People v.*] *Tran* [(2015) 61 Cal.4th 1160] make this point even clearer." (OBM 8, capitalization omitted.)

Initially, contrary to appellant's contention, the Court of Appeal majority did not "misinterpret[] the law . . . when it concluded that this was not a silent record case." (OBM 14, capitalization omitted; see Opn. 8 ["After a review of the whole record, this is not a 'silent record' case"].) "[N]othing in *Mosby* imposes the requirement that the advisement [of trial rights] be *contemporaneous* with a stipulation to one of multiple substantive crimes." (Opn. 8, fn. 4, italics added.) The *Mosby* court stated that "silent-record cases are those that show no express advisement and waiver of . . . rights *before* a defendant's admission." (*Mosby*, 33 Cal.4th at p. 361, italics added.) Since appellant did receive advisements about his trial rights before the stipulation at issue here, albeit not contemporaneously with the stipulation, this is not truly a silent record case. For example, the trial court told appellant that "the jury has to determine if the elements of" an offense "can be proven beyond a reasonable doubt," and that defense counsel's "job" was "to confront . . . witnesses." (ART 3.) The court also stated that "the Constitution protects someone charged with a crime. They [*sic*] protect that person with the right to remain silent[.]" (ART 107.)

But even if this is deemed a silent record case, *Mosby* did not hold that the totality of the circumstances harmless error test can never be applied in such a case. To the contrary, the *Mosby* court stated:

> By adopting . . . the federal constitutional test of whether under the totality of circumstances the defendant's admission is intelligent and voluntary, *we rejected the rule that the absence of express admonitions and waivers requires reversal regardless of prejudice*. . . . [T]he focus was shifted from whether the defendant received express rights advisements, and expressly waived them, to whether the defendant's admission was intelligent and voluntary because it was given with an understanding of the rights waived.

(*Mosby*, 33 Cal.4th at p. 361, italics added, internal quotation marks and citation omitted.)

Appellant emphasizes the following language in *Mosby*, "*[I]f* the transcript does not reveal *complete advisements and waivers*, the reviewing court must examine the record of 'the entire proceeding' . . . ." (*Mosby*, 33 Cal.4th at p. 361; see OBM 8, italics added by appellant.) However, this language is likely a reflection of the fact that *Mosby* itself was an incomplete advisement case. (See *Mosby*, at p. 356 [defendant admitted prior conviction after being advised of and waiving only right to trial].) It was not an unequivocal statement that the totality of the circumstances test can only be applied in such cases.

Appellant also seizes upon *Mosby*'s "examin[ation of] eight cases involving the admission of *prior[conviction allegations]*, 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 . . . disapproved in footnote 3 of the opinion. The silent record cases were all approved by this Court." (OBM 9, italics added, citation and footnote omitted.) But unlike those cases, this case involves a mid-trial stipulation to one of the *substantive counts*.

In discussing the silent record cases, the *Mosby* court stated:

> [A] jury trial on a substantive offense preceded the defendants' admissions of prior convictions. These defendants were not told on the record of their right to trial to determine the truth of a prior conviction allegation. . . . *In such cases, in which the defendant was not advised of the right to have a trial on an alleged prior conviction, we cannot infer that in admitting the prior the defendant has knowingly and intelligently waived that right* as well as the associated rights to silence and confrontation of witnesses.

(*Mosby*, 33 Cal.4th at p. 362, italics added.)

The situation here is materially different from an admission of a prior conviction allegation. A defendant may not be aware that the right to jury trial applies to proof of a prior conviction, as it does to a charged offense. As noted in *Mosby*, "[U]nlike a trial on a criminal charge, trial on a prior conviction is simple and straightforward, often involving only a presentation by the prosecution of a certified copy of the prior conviction along with defendant's photograph [or] fingerprints and no defense evidence at all." (*Mosby*, 33 Cal.4th at p. 364, internal quotation marks omitted.)

Furthermore, in *Cross*, this Court recently applied the totality of the circumstances test, notwithstanding that the trial court had "accepted [defense counsel's] stipulation [to a prior conviction allegation] without advising [the defendant] of *any* trial rights." (*Cross*, 61 Cal.4th at p. 168, italics added; see also *id.* at p. 169.) In finding that the stipulation must be set aside, the *Cross* court noted that the stipulation had "occurred during the prosecutor's examination of the first witness in the trial; the defense had not cross-examined any witness at that point. Further, we have no information on how the alleged prior conviction was obtained." (*Id.* at p. 180.)

In *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, cited by appellant (OBM 8-9), defense counsel stated before trial that the defendant intended to admit the prior conviction allegations. After the jury returned its verdict, the trial court solicited defendant's admissions of those allegations, without advising him of his constitutional rights. (*Id.* at p. 1420.) The Court of Appeal held that this was a silent record case, and that "[u]nder *Mosby*, [it] may not infer the admissions were voluntary and intelligent under the totality of the circumstances." (*Id.* at p. 1421.) The *Sifuentes* court also noted, "*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." (*Ibid.*) But as discussed above, a case involving the admission of prior conviction allegations is distinguishable. Further, *Sifuentes* predated *Cross*, which applied the totality of the circumstances test in a silent record case.

In *People v. Little* (2004) 115 Cal.App.4th 766, which appellant cites without discussion (OBM 9), defense counsel stipulated to a violation of one of several counts (*Little*, at pp. 769, 772). The record did not reflect an advisement of constitutional rights. (*Id.* at p. 773.) The Court of Appeal found that "*Howard* [wa]s distinguishable," because "defendant's stipulation was offered during trial and before defendant had exercised his right to remain silent or cross-examine any witnesses. Moreover, 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[es.]" (*Id.* at p. 780.) *Little* does not assist appellant. There, as in *Cross*, the appellate court applied the totality of the circumstances test in a silent record case.

This Court's recent decisions in *Blackburn*, 61 Cal.4th 1113, and *Tran*, 61 Cal.4th 1160, cited by appellant (OBM 12-13) – involving mentally disordered offender and not guilty by reason of insanity commitment proceedings – are inapposite. The *Tran* court summarized the companion case of *Blackburn*, as follows:

> In . . . *Blackburn* . . . , we addressed the meaning of provisions in the statutory scheme for extending the commitment of a mentally disordered offender (MDO) that require the trial court to "advise the person . . . of the right to a jury trial" and to hold a jury trial "unless waived by both the person and the district attorney." [Citation.] We held that the trial court must personally advise the MDO defendant of his or her right to a jury trial. In addition, before conducting a bench trial, the court must obtain the defendant's personal waiver of his or her right to a jury trial unless the court finds substantial

> evidence . . . that the defendant lacks the capacity to make a knowing and voluntary waiver, in which case defense counsel controls the waiver decision.

(*Tran*, 61 Cal.4th at pp. 1162-1163.) The *Blackburn* court held that "when a trial court errs in *completely denying* an MDO defendant the right to a jury trial . . . , the error requires automatic reversal." (*Blackburn*, 61 Cal.4th at p. 1136, italics added.)

Tran "address[ed] the meaning of nearly identical language in the statutory scheme for extending the involuntary commitment of a person originally committed after pleading not guilty by reason of insanity," and "h[e]ld that this language has the same meaning as the parallel language in the MDO statute." (*Tran*, 61 Cal.4th at p. 1163.) "As to whether a trial court's acceptance of an invalid jury trial waiver . . . may be deemed harmless, [the *Tran* court] h[e]ld . . . that such error – resulting in a *complete denial* of the defendant's right to a jury trial on the *entire cause* in a commitment proceeding – is not susceptible to ordinary harmless error analysis and automatically requires reversal." (*Id.* at p. 1169, italics added.) Here, in contrast, appellant *had a jury trial*, but for strategic reasons his counsel stipulated to a violation of one of the charged offenses.

Not only would application of a totality of the circumstances test in all cases accord with this Court's and the United States Supreme Court's precedent, it would further the fair and efficient administration of justice. As this case shows (see Argument II, *post*), it will undoubtedly be true in some cases that the record as a whole demonstrates a defendant's knowing, intelligent, and voluntary admission of a crime even in the absence of an express, contemporaneous advisement of rights. An inflexible categorical rule of reversal in such a situation would advance no appreciable interest in protecting a defendant's constitutional rights beyond that already advanced

by a totality test, and instead would burden the trial courts upon remand with unwarranted additional litigation.

Moreover, a totality of the circumstances test would have a practical advantage over a per se reversal rule for silent record cases. An attempt to make a division between "silent record" and "incomplete advisement" cases would in some cases run up against problems of trying to determine, for example, how contemporaneous or how clear an advisement of rights would have to be to avoid automatic reversal. On the other hand, a totality of the circumstances test would not depend on any attempt at drawing a bright line in a gray area; it would, by definition, simply consider all the circumstances of the admission.

In sum, where a trial court fails to advise a defendant of any trial rights at the time defense counsel stipulates on the defendant's behalf to guilt on a count, the error may be deemed harmless under the totality of the circumstances.

II. APPLYING THE TOTALITY OF THE CIRCUMSTANCES TEST, THE COURT OF APPEAL MAJORITY CORRECTLY CONCLUDED THAT APPELLANT'S STIPULATION TO COUNT 2 WAS VOLUNTARY AND INTELLIGENT

Appellant contends that, "even applying the [totality of the circumstances] test to the facts [of this case], the Court of Appeal erred in ruling that [he] voluntarily and intelligently waived his constitutional rights." (OBM 17, capitalization and bold omitted.) To the contrary, the record amply demonstrates appellant's awareness of his trial rights, both from sitting through his current trial and from his prior experience in the criminal justice system.

Before trial, in appellant's presence, defense counsel informed the court that appellant was "willing to plead no contest to" count 2 for driving with a suspended license, and "ask[ed] the court to allow him to do so so that can be an issue taken out of the hands of the jury." (ART 8.)

Alternatively, defense counsel requested that the trial on count 2 be bifurcated from that on count 1 for gross vehicular manslaughter. (ART 8-9.)

After the prosecutor objected to these requests (ART 8-9) and the court denied bifurcation (ART 40), defense counsel secured the now challenged stipulation (ART 218-219), which was the next best thing strategically. Defense counsel had an obvious tactical reason for the stipulation – to minimize the jury's exposure to evidence about appellant's license suspension and knowledge thereof, and thus reduce the chance of that information negatively influencing the jury's decision on the vehicular manslaughter count. It can be presumed that defense counsel discussed the stipulation with appellant before entering into it. (See *People v. Barrett* (2012) 54 Cal.4th 1081, 1105 ["Counsel is presumed competent and informed as to applicable constitutional . . . law. . . . Counsel also can be expected, where necessary or advisable, to consult with the client about jury trial concerns"].)

The record also reflects a strong factual basis for the stipulation. The prosecutor represented, without dispute, that two months before the charged vehicular manslaughter, a police officer had given appellant a DMV printout indicating that his license had been suspended. (ART 9-10.) (See *Howard*, 1 Cal.4th at p. 1180 [noting strong factual basis for plea in totality of circumstances analysis].)

In addition, the record reflects appellant's awareness of his right to remain silent (ART 106 [defense counsel telling prospective jurors that "the defendant in a criminal case has the right not to testify"]; ART 107 [court adding, "[T]he Constitution protects someone charged with a crime. They [*sic*] protect that person with the right to remain silent"]; see also ART 153, 190 [referring to right not to testify]); his right to a jury trial on count 2 (ART 8 [defense counsel telling court that appellant "is willing to plead no

contest to that count, so I'd ask the court to allow him to do so so that can be an issue taken out of the hands of the jury"]; ART 51 [court informing prospective jurors that appellant had "pleaded not guilty to all of the charges. . . . The purpose of the trial is for the jury to determine whether the People have met the burden of proving [appellant's] guilt beyond a reasonable doubt"]; ART 210 [prosecutor telling jury in opening statement, "[O]nce those facts have been proven beyond a reasonable doubt, . . . you will vote to find [appellant] guilty of . . . driving on a suspended license"]); and his right to confrontation (ART 3 [court advising appellant, "That's [defense counsel's] job, . . . to confront those witnesses"]; ART 116 [prosecutor telling prospective jurors, "[W]hen I call witnesses to the stand, [defense counsel] has the right to cross-examine them"]).

There is no indication that appellant failed to pay attention to what was said during his criminal proceedings. (See OBM 19 [appellant "may have been doodling or drawing or fantasizing he was somewhere else"].) Indeed, before the start of jury selection, the court *explained directly to appellant* the concepts of a jury trial and confrontation of witnesses. (ART 3.)

Moreover, as the Court of Appeal majority found, appellant "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" that count. (Opn. 7; see ART 216-219.)

Appellant asserts that he "may not have had enough education to . . . be able to transfer what he heard to any real comprehension of what he was giving up." (OBM 19.) However, the record reflects that he graduated from high school. (CT 183.) In addition, as stated by the Court of Appeal majority, appellant "was not a neophyte to the criminal justice system. He

is a recidivist, who had sustained two prior convictions." (Opn. 7.) "In order to sustain th[o]se convictions, [appellant] either proceeded to trial and was convicted or plead[ed] guilty/no contest . . . . In either event, this previous experience in the criminal justice system is relevant to his knowledge regarding his legal rights." (Opn. 8.)

Under separate cover, respondent has requested judicial notice of the superior court dockets in appellant's prior cases. The attached certified dockets reflect that on June 23, 2010, and September 17, 2010, respectively, appellant was advised of, and personally waived, the rights to trial by jury, to confrontation of witnesses, and against self-incrimination. He then pled no contest to a charged offense. (See Request for Judicial Notice, Exh. A at pp. 1-3, and Exh. B at p. 2.) Appellant's prior experience with no contest pleas and the *Boykin-Tahl* advisements is relevant to a harmless error determination. (See *Mosby*, 33 Cal.4th at p. 365 ["defendant's prior conviction was based on a plea of guilty, at which he would have received *Boykin-Tahl* advisements"]; *Cross*, 61 Cal.4th at p. 180 [noting that this Court had "no information on how the alleged prior conviction was obtained"].)

Finally, appellant contends that, because "the stipulation . . . involves the trial court's failure to admonish and take waivers regarding . . . federal constitutional rights . . . , under *Chapman v. California* (1967) 386 U.S. 18 . . . [,] this [C]ourt must be convinced beyond a reasonable doubt that the [stipulation] was intelligent [and] voluntary." In support of this contention, appellant cites *Henderson v. Morgan* (1976) 426 U.S. 637 (OBM 23), but that case is inapposite. In *Morgan*, the question presented was "whether a defendant may enter a voluntary plea of guilty to a charge of second-degree murder without being informed that intent to cause the death of his victim was an element of the offense." (*Morgan*, at p. 638.) The high court concluded that the defendant "did not receive adequate

notice of the offense to which he pleaded guilty," and that his plea was therefore involuntary. (*Id.* at p. 647.) Appellant here does not contend that he lacked adequate notice of the nature of count 2, a relatively simple charge of driving with a suspended license.

The *Morgan* court referred to the harmless beyond a reasonable doubt standard in the following context: "[T]he element of intent was not explained to [defendant]. Moreover, [defendant's] unusually low mental capacity . . . forecloses the conclusion that the error was harmless beyond a reasonable doubt, for it lends at least a modicum of credibility to defense counsel's appraisal of the homicide as a manslaughter rather than a murder." (*Morgan*, 426 U.S. at p. 647.) This language does not purport to describe the level of certainty that a court must have in order to make a factual finding that a plea was voluntary and intelligent. Rather, having found that defendant's plea was involuntary (see *id.* at p. 646 ["it is impossible to conclude that his plea to the unexplained charge of second-degree murder was voluntary"]), the *Morgan* court could not conclude that the error was harmless beyond a reasonable doubt (*id.* at p. 647).

In determining whether a plea or stipulation was voluntary and intelligent under the totality of the circumstances, the proper standard of proof is by a preponderance of the evidence. For example, with respect to establishing the voluntariness of a confession, this Court has stated, "The prosecution has the burden of establishing by a preponderance of the evidence that a defendant's confession was voluntarily made. Whether a confession was voluntary depends upon the totality of the circumstances." (*People v. Linton* (2013) 56 Cal.4th 1146, 1176, internal quotation marks and citation omitted; see also *id.* at p. 1171 [to establish a valid waiver under *Miranda v. Arizona* (1966) 384 U.S. 436, "the prosecution bears the burden of establishing by a preponderance of the evidence that the waiver

was knowing, intelligent, and voluntary under the totality of the circumstances"].)

In sum, the record here demonstrates the following: appellant was willing to plead no contest to count 2, in order to take that issue "out of the hands of the jury"; after the prosecutor objected to a no contest plea or, alternatively, to bifurcation, defense counsel secured the now challenged stipulation, which was the next best thing strategically; there was a strong factual basis for the stipulation; and appellant was aware of his trial rights, both from sitting through his current trial and from his prior experience in the criminal justice system. Appellant's stipulation to count 2 was therefore voluntary and intelligent under the totality of the circumstances.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the decision of the Court of Appeal be affirmed.

Dated: August 15, 2016

Respectfully submitted,

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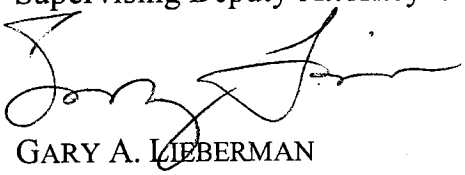

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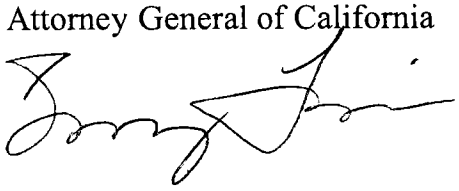
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13-point Times New Roman font, and contains 8,425 words.

Dated: August 15, 2016

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE

Case Name: ***People v. Randolph D. Farwell***

No.: **S231009**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On August 15, 2016, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS,** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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For delivery to Hon. Paul A. Bacigalupo
Judge

On August 15, 2016, I caused eight (8) copies of the **RESPONDENT'S ANSWER BRIEF ON THE MERITS**, in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **FEDEX OVERNIGHT CARRIER, Tracking # 8094 5925 3207**.

On August 15, 2016, I caused one electronic copy of the **RESPONDENT'S ANSWER BRIEF ON THE MERITS**, in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

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 August 15, 2016, at Los Angeles, California.

C. Esparza
Declarant

Signature

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