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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

RANDOLPH D. FARWELL,

Defendant and Appellant.

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

APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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To the Honorable Chief Justice of the Supreme Court of the State of California

The Criminal Justice Legal Foundation (CJLF) respectfully applies for permission to file a brief amicus curiae in support of Respondent, the People of the State of California, pursuant to rule 8.520(f) of the California Rules of Court.[1]

Applicant's Interest

CJLF is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused

1. No party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, the defendant seeks to create a rule of automatic reversal, without regard for the justice of the case or actual prejudice to the defendant, in a defined class of cases. Such a rule would be contrary to the interests CJLF was formed to protect.

Need for Further Argument

Amicus is familiar with the arguments presented on both sides of this issue and believe that further argument is necessary.

The brief is submitted with this application and ready for immediate filing. The attached brief brings to the attention of the court additional United State Supreme Court precedent, not previously briefed, regarding the harmless-error procedure it permits that is consistent with the federal constitutional right of due process of law that underlies the admonition requirements of both federal and state law.

October 6, 2016

Respectfully Submitted,

KYMBERLEE C. STAPLETON

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

SUMMARY OF FACTS AND CASE

Petitioner, Randolph D. Farwell, was convicted by a jury of gross vehicular manslaughter (count 1) and driving with a suspended or revoked driver's license (count 2). (*People v. Farwell* (2015) 241 Cal.App.4th 1313, 1315.) Prior to trial, Farwell's attorney informed the trial court that Farwell was prepared to enter a no contest plea on count 2 to take the issue "out of the hands of the jury," or alternatively, bifurcate the trial on count 2. (*Id.* at pp. 1315-1316.) The prosecution was unwilling to accept the no contest plea and objected to the motion to bifurcate. (*Id.* at p. 1316.) Farwell's motion to bifurcate was denied. (*Ibid.*)

Extensive jury voir dire and pretrial proceedings were held. (*Ibid.*) A jury was empaneled, and trial on both counts commenced. (*Ibid.*) After a witness was called and cross-examined, Farwell and his attorney made

the decision to stipulate to the elements of count 2. (*Id.* at p. 1319.) Prior to reading the stipulation into the record, in open court and in Farwell's presence, the judge informed the jury that the parties agreed to a stipulation "instead of having to bring witnesses in to testify" about the elements charged in count 2. (*Id.* at p. 1316.) Farwell's attorney then read the following stipulation aloud to the jury: "on June 21st, 2013, [defendant] was driving a motor vehicle while his license was suspended for a failure to appear and that when he drove, he knew his license was suspended[.]" (*Ibid.*)

At the trial's conclusion, the jury found Farwell guilty on all counts. (*Ibid.*) In addition to counts 1 and 2, the District Attorney's information alleged that Farwell had a prior serious felony conviction. (*Ibid.*) Farwell admitted the prior conviction allegation and was sentenced to state prison for a term of 13 years. (*Ibid.*) The prison term consisted of four years on count 1, doubled pursuant to the Three Strikes law, plus five years enhancement for the prior conviction. (*Ibid.*) A concurrent term was imposed on count 2. (*Ibid.*)

Farwell filed a timely notice of appeal arguing that his conviction on count 2 must be reversed. (*Ibid.*) He claimed he was not explicitly advised of his constitutional trial rights before the court accepted his stipulation to the substantive crime of knowingly operating a motor vehicle with a suspended license. (*Id.* at p. 1315.)

A divided panel of the Court of Appeal affirmed the judgment concluding that on the basis of the entire record, Farwell's stipulation was voluntary and intelligent under the totality of the circumstances. (*Ibid.*)

This Court granted review on February 3, 2016.

SUMMARY OF ARGUMENT

The rule of *In re Tahl* and its progeny, that failure to strictly follow the *Boykin/Tahl* advisement procedure is ground for automatic reversal, was wrong as a matter of federal law. It was correctly overturned in *People v. Howard*, which adopted a "totality of the circumstances" test.

People v. Mosby, correctly understood, did not partially overrule *Howard* and restore automatic reversal for a newly defined class of cases. Nor could it. Article VI, section 13 of the California Constitution categorically forbids reversal without harmless-error analysis except when federal law requires it, and federal law does not required it here.

A reviewing court is not limited to the transcript of the plea hearing and is permitted review beyond the courtroom colloquy at the time the plea or stipulation is entered. The entire record is relevant and open to review when considering if a lack of advisements affected the defendant's substantial rights.

Because review of the entire proceeding is permitted, and reviewing courts can examine the defendant's understanding throughout the progression of the case, there can be no "contemporaneous" requirement. If the record shows that a defendant's constitutional trial rights were presented at some point or at multiple points during the progression of the case, it is all relevant to the defendant's knowledge and understanding of those rights and waiver of those rights when a plea or stipulation is finally entered. Any previously learned knowledge is not erased and is not any less intelligent when entered later on. It would be a waste of time and judicial resources to vacate and remand in these types of cases so that the defendant can get a "second chance" if he or she later decides the sentence was not satisfactory on the first go round.

ARGUMENT

I. A defendant's stipulation to the elements of a criminal offense is valid if a review of the entire record indicates it was entered into voluntarily and intelligently under the totality of the circumstances.

A defendant's decision to plead guilty to a substantive crime is itself a conviction of that crime. (*Boykin v. Alabama* (1969) 395 U.S. 238, 242.) Thus, a guilty plea must be entered into voluntarily and intelligently. (*Id.* at pp. 242-243.) The voluntary and intelligent requirements seek to ensure that a criminal defendant is aware of the constitutional trial rights being given up by pleading guilty. (See *People v. Adams* (1993) 6 Cal.4th 570, 581-582.)

A. Evolution of the Boykin/Tahl Admonitions in California.

In mid-1969, the United States Supreme Court decided two separate cases that examined the required course of action surrounding the judicial acceptance of guilty pleas in federal court and in state court. In *McCarthy v. United States* (1969) 394 U.S. 459, 460, the Court construed Federal Rule of Criminal Procedure 11 ("Rule 11") and the remedy on appeal for the trial court's failure to comply with the Rule as it then existed.[1] Rule 11 governs the procedure federal district courts must follow before accepting a defendant's guilty plea. The Court stated that even though Rule 11 is not constitutionally mandated, it was designed to assist the district court judge's determination of whether the defendant's guilty plea is truly knowing and voluntary, which is constitutionally required. (*McCarthy*, 394 U.S. at p. 465.) Rule 11 acts to assist the trial court with producing a complete court record of the factors relevant to a defendant's knowing and voluntary waiver of constitutional rights when entering a guilty plea. (See *ibid.*)

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1. At the time *McCarthy* was decided, Rule 11 was much shorter and simpler than the present version.

When a plea of guilty is entered, a defendant waives several constitutional rights, including the privilege against compulsory self-incrimination, the right to a jury trial, and the right to confront one's accusers. (*Id.* at p. 466.) "For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' " (*Ibid.*, quoting *Johnson v. Herbst* (1938) 304 U.S. 458, 464.) The Government asked that the case be remanded for further evidentiary hearings on that issue, but the Court refused. (*United States v. Vonn* (2002) 535 U.S. 55, 67.) The Court vacated the conviction and allowed the defendant to plead over again.[2] (*McCarthy*, 394 U.S. at pp. 471-472.) The Court's "holding was based solely on the application of Rule 11 and not upon constitutional grounds." (*Id.* at p. 464.)

In *Boykin v. Alabama* (1969) 395 U.S. 238, 239, the defendant pleaded guilty to a five-count indictment charging him with common law robbery, which at the time was punishable by death in Alabama. The trial

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2. In 1969, the *McCarthy* court refused to remand for further proceedings on whether the waiver was knowing and voluntary and held that when a guilty plea is accepted in violation of Rule 11, the defendant must be given the opportunity to plead anew. In 1975, six years after *McCarthy*, Rule 11 was amended to include many more detailed procedural requirements. *McCarthy* adopted a *per se* reversal rule under the pre-1975 version of Rule 11. In direct response to *McCarthy,* Rule 11 was amended again in 1983 to require courts to evaluate violations under a harmless error standard, instead of reversing outright *per se*. "The Advisory Committee reasoned that, although a rule of *per se* reversal might have been justified at the time *McCarthy* was decided, '[a]n inevitable consequence of the 1975 amendments was some increase in the risk that a trial judge, in a particular case, might inadvertently deviate to some degree from the procedure which a very literal reading of Rule 11 would appear to require.' [citation] After the amendments, 'it became more apparent than ever that Rule 11 should not be given such a crabbed interpretation that ceremony was exalted over substance.' " (*Vonn*, 535 U.S. at pp. 69-70.)

judge asked the defendant no questions about his plea and the defendant did not address the court. (*Ibid.*) State law mandated a jury to decide the penalty when a defendant pleaded guilty. (*Id.* at p. 240.) The jury sentenced the defendant to death on each of the five indictments. (*Ibid.*)

On appeal, because the record was devoid of evidence that the defendant understood the constitutional trial rights he was relinquishing by pleading guilty, the United States Supreme Court reversed the judgment, stating "[i]t was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." (*Id.* at p. 242.) The Court held that a waiver of constitutional trial rights is as important as the privilege against self-incrimination and trial by jury, and that confrontation could not be inferred from a silent record. (*Id.* at p. 243.)

Pre-*McCarthy* (guilty pleas in federal court) and pre-*Boykin* (guilty pleas in state court) it was assumed without discussion that a criminal defendant voluntarily and intelligently waived his or her constitutional trial rights when entering a guilty plea. (*People v. Howard* (1992) 1 Cal.4th 1132, 1175, citing *Brady v. United States* (1970) 397 U.S. 742, 747, fn. 4.) *McCarthy* and *Boykin* changed that assumption and instead required an "affirmative showing" on the record of the waiver. (*Boykin*, 395 U.S. at p. 242.) Neither case, however, detailed what constituted an "affirmative showing." They simply mandated the trial courts to create a record of the proceedings and did not dictate the exact level of information the trial courts must engage the defendant in when he or she pleads guilty. (See *Boykin*, 395 U.S. at pp. 243-244; *McCarthy*, 394 U.S. at pp. 468-467, fn. 20.) In *Boykin*, Justice Harlan's dissent voiced concern that the Court "in effect fastens upon the States, as a matter of federal constitutional law, the rigid prophylactic requirements of Rule 11 . . . ." (*Boykin*, 395 U.S. at p. 245 (dis. opn. of Harlan, J.).)

Soon after the *McCarthy* and *Boykin* decisions, this court decided *In re Tahl* (1969) 1 Cal.3d 122. Just as Justice Harlan feared, *Tahl* expanded *Boykin*'s "affirmative showing" requirement in California. *Tahl* held that the three constitutional trial rights discussed in *Boykin*—self-incrimination, confrontation, and jury trial—"must be specifically and expressly enumerated for the benefit of and waived by the accused prior to acceptance of his guilty plea." (*Id.* at p. 132.) Furthermore, "mere inference, no matter how plausibly drawn from the evidence, was not sufficient to meet the constitutional mandate." (*People v. Levey* (1973) 8 Cal.3d 648, 653.) *Tahl*'s holding was based entirely on federal law, not on state law.[3] (*Howard*, 1 Cal.4th at pp. 1176-1177.) If the three admonitions were not "specifically and expressly enumerated," it was considered reversible error *per se*. (*Id.* at p. 1177.)

The express waiver requirement became known in California as the *Boykin/Tahl* admonitions. In California, a stipulation admitting to all of the elements of a substantive crime is tantamount to a guilty plea and is also subject to the *Boykin/Tahl* admonition requirement.[4] (*In re Mosley* (1969) 1 Cal.3d 913, 926, fn. 10.) For many years, if these admonitions were not expressly enumerated and waived by the defendant, the challenged guilty plea would be automatically reversed on appeal regardless of prejudice. (*Howard,* 1 Cal.4th at p. 1177.)

California's interpretation of federal law was unique. Federal appellate courts expressly rejected California's expansive interpretation of

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3. "Although we considered the argument that the state Constitution also required explicit waivers, we expressly declined to base our holding on state law. We chose to rely instead on federal law because 'it [was] our view that *Boykin* necessitate[d] a more precise showing.' " (*Howard*, 1 Cal.4th at p. 1176.)

4. The *Boykin/Tahl* admonitions are also required when a defendant admits the truth of a prior conviction that may result in a sentencing enhancement. (*In re Yurko* (1974) 10 Cal.3d 857, 863.)

Boykin.[5] (*Id.* at pp. 1177-1178 & fn. 18.) Because the overwhelming weight of federal authority did not require explicit admonitions and did not reverse *per se* for their absence, in 1992 this court took another look at the applicable standard of review in *Howard*. *Howard* noted that the widely accepted test was whether the record affirmatively demonstrates that "the plea was voluntary and intelligent under the totality of the circumstances." (*Id.* at p. 1178 & fn. 18, citing *North Carolina v. Alford* (1971) 400 U.S. 25, 31; *Brady v. United States* (1970) 397 U.S. 742, 747-748 & fn. 4.) Because *Tahl* was an interpretation of federal law, and federal standards govern the effectiveness of waived federal constitutional rights, this court adopted the federal totality of the circumstances harmless error test and rejected *Tahl*'s rule that required automatic reversal without a showing of prejudice. (*Howard*, 1 Cal.4th at p. 1178.)

Even though the *Howard* court adopted the federal standard of review, it did not abandon the *Boykin/Tahl* admonitions requirement at the trial court level. (*Howard*, 1 Cal.4th at p. 1178.) Rather, this Court stated that the admonitions remain important and that "explicit admonitions and waivers still serve the purpose that originally led us to require them: They are the only realistic means of assuring that the judge leaves a record adequate for review." (*Id.* at pp. 1178-1179.) This Court recently reaffirmed "the judicially created rule of criminal procedure requiring full *Boykin-Tahl* advisements for all guilty pleas in criminal trials regardless of whether the defendant's rights are derived from statute or from the state or federal Constitution." (*People v. Cross* (2015) 61 Cal.4th 164, 179.) The judicially created rule of *Tahl* serves the same function in California courts that Rule 11 serves in federal courts. (See *Howard*, *supra*, at 1179.)

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5. "[T]he weight of authority today makes it abundantly clear that 'the California interpretation of *Boykin* announced in *Tahl* is not required by the federal Constitution . . . .' " (*Howard*, 1 Cal.4th at 1177, quoting *United States v. Pricepaul* (9th Cir. 1976) 540 F.2d 417, 424-425.)

Current law in California requires a reviewing court to determine if the guilty plea or stipulation was voluntary and intelligent under the totality of the circumstances. (*Howard,* 1 Cal.4th at p. 1178.) The best evidence in the record of this standard is a showing that the defendant was explicitly advised of the waived rights at the time of the plea or stipulation. (*Id.* at p. 1179.) However, a lack of express advisements is no longer reversible error without a showing of prejudice to the defendant. (*Id.* at p. 1178.)

In *Howard*, the defendant was expressly advised of and waived his right to a jury trial and his right to confront witnesses. (1 Cal.4th at p. 1179.) He was not, however, expressly advised of his privilege against self-incrimination and did not expressly waive that right. (*Id.* at p. 1180.) Pre-*Howard*, the incomplete advisement of all three trial rights would have been grounds for an automatic reversal. (See *People v. Mosby* (2004) 33 Cal.4th 353, 360.) However, because *Howard* adopted the federal standard of review, the court examined the entire record and determined that even though there was no express advisement, the defendant was aware of his right not to incriminate himself. (*Howard,* 1 Cal.4th at p. 1180.) "In replacing the old rule, the focus was shifted from whether the defendant received express rights and 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.) The federal requirement of voluntary and intelligent could be inferred from the evidence in the record and required no "talismanic phrase[.]" (*Howard*, 1 Cal.4th at p. 1180, quoting *United States v. Sherman* (9th Cir. 1973) 474 F.2d 303, 305-306.) Thus, there are no "magical words" that must be clearly stated on the record for a reviewing court to conclude that the defendant's waiver is voluntary and intelligent.

B. Mosby, Cross, and Section 13.

In *Mosby*, this court reviewed a number of prior conviction cases after *Howard* and categorized them as "silent record" cases and "incomplete

advisement" cases. "Truly silent record" cases in the prior conviction context are those in which there is no express advisement or waiver of the *Boykin/Tahl* admonitions. (33 Cal.4th at p. 361.) "Incomplete advisement" cases, on the other hand, are those in which the defendant is advised of some, but not all, of the three *Boykin/Tahl* admonitions. (*Id.* at pp. 362-364.)

The dissenting opinion in the Court of Appeal and the defendant read *Mosby* as creating a new rule of automatic reversal in a class of cases. (See *Farwell*, 241 Cal.App.4th at p. 1324 (dis. opn. of Mosk, J.).) The dissent contends that in "silent record" cases, "a reviewing court cannot infer that the defendant knowingly and intelligently waived his [*Boykin/Tahl* rights and] reversal is required . . . *without a harmless error analysis*." (*Ibid.*, italics added.) But, "[i]n incomplete advisement cases, reversal is not required if 'the totality of the circumstances surrounding the admission' supports the conclusion that the admission was voluntary and intelligent." (*Ibid.*)

In essence, the dissent contends that *Mosby* carved out a discrete class of cases, exempted them from the general rule of *Howard*, and reinstated the discredited automatic reversal rule of the *Tahl* line for these cases. The key question in this case is not whether *People v. Cross* (2015) 61 Cal.4th 164 subsequently overruled *Mosby*. (Cf. *Farwell*, 241 Cal.App.4th at p. 1325 (dis. opn.).) The key question is whether *Mosby* itself overruled *Howard* sub silento as to a newly defined class of cases. The defendant says, "The idea that this court would overrule such a significant precedent without explicitly saying so is not how California's appellate system functions." (Reply Brief 8-9.) Indeed.

The context of *Mosby* as a prior conviction case is important to understanding why knowing and intelligent waiver had not been established in the cases described as "truly silent record" cases, not because there is some different rule for enhancements as opposed to substantive

offenses. (Cf. Reply Brief 7-8.) The fact that there is a right to trial on the question of a prior conviction at all is not obvious to a layman. Without advisement, the defendant might well believe that the record of his prior conviction is conclusive. Thus, the record of the preceding jury trial on the substantive offense provides no indication that the defendant was aware that he had a right to trial on a prior conviction. (See *Mosby*, 33 Cal.4th at p. 362.) However, where the record does indicate that the defendant knew he had a right to trial on prior convictions, the record of the preceding trial on the substantive offense may establish his understanding of the subsidiary rights that are included in a right to trial. (See *id.* at p. 364.)

Rather than carving out a set of cases as being exempt from the *Howard* "totality of the circumstances" rule, *Mosby* is better understood as identifying a frequently occurring fact pattern that typically fails the rule. The defendant's awareness of his right to trial of substantive offenses, as well as enhancement allegations that are typically tried in the guilt phase (such as gun use or great bodily injury), may very well be inferable from the record of proceedings prior to the plea or stipulation in question. In rare cases, that may even be true for a prior conviction allegation, though it was not in the "silent record" cases reviewed in *Mosby*.

This is how *People v. Cross*, *supra*, understood and applied both *Howard* and *Mosby*. *Cross* notes *Howard*'s "totality of the circumstances" rule, cites *Mosby* with no hint that it created an exception to *Howard*, and reverses based on the fact that there is nothing in the record to support an inference "that Cross's stipulation was knowing and voluntary." (61 Cal.4th at p. 180.) This is the application of the *Howard* rule to the facts of the case before it, not an exception to *Howard* for discrete class of cases.

If federal law does not require a rule of automatic reversal, then California Constitution article VI, section 13 flatly forbids one.[6] "The plain meaning of this provision is that a reviewing court may not reverse a judgment without addressing harmless error." (*People v. Sandoval* (2015) 62 Cal.4th 394, 445.) That is, no doubt, why *Tahl* and its misguided progeny purported to rest their automatic reversal rule on a claim that it was required by *Boykin*. (See *supra* at p. 7, fn. 3.) With this error definitively corrected in *Howard*, section 13 prohibits its reintroduction on independent state grounds, even in part.

C. Courts are Permitted to Examine the Entire Record on Appellate Review.

In federal courts, pleas and plea agreements are covered by Rule 11, a rule that serves the same function as California's judicially created rule of *Tahl*. To help ensure a guilty plea is knowing and voluntary, Rule 11(b) dictates the steps a federal trial judge must take before accepting the guilty plea. (*United States v. Vonn* (2002) 535 U.S. 55, 62.) Rule 11(b)(1) contains the three *Boykin/Tahl* admonitions, plus 12 more admonitions.[7]

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6. Federal law does, of course, trump section 13 when it requires a stricter standard. (See *Chapman v. California* (1967) 386 U.S. 18, 20 & fns. 3, 24 (predecessor of § 13).)

7. Federal Rule of Criminal Procedure 11(b)(1) provides:

> (b) Considering and Accepting a Guilty or Nolo Contendere Plea.
>
> (1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:
>
> (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the

defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

One such requirement is the trial judge's duty to advise the defendant of his or her right to counsel. (Fed. Rules Crim. Proc., rule 11(b)(1)(D), 18 U.S.C.) In *Vonn*, the defendant was charged with armed bank robbery and use of a firearm during a crime of violence. (535 U.S. at p. 59.) The defendant was appointed counsel and advised by the magistrate at two separate court appearances of his constitutional rights. (*Ibid.*) The defendant eventually decided to plead guilty to both charges. (*Id.* at p. 60.) When entering his guilty plea, the defendant was advised by the trial court of all but one of the Rule 11 admonitions. The trial court did not inform the defendant of his right to counsel if he were to choose to try the case instead. (*Ibid.*)

On appeal, the defendant sought to set aside his convictions on the ground that he was not advised of his right to counsel as required by Rule 11. (*Id.* at p. 61.) The Ninth Circuit put the burden on the Government to show that the omission was harmless and had no effect on the defendant's substantial rights. (*Ibid.*) The Ninth Circuit further limited its review to the plea proceedings and refused to examine the entire record to determine if the defendant was aware of his continuing right to counsel at trial. (*Ibid.*) The Ninth Circuit held that the Government failed to meet its burden to show the trial court's error was harmless and it vacated the convictions. (*Ibid.*)

The United States Supreme Court granted certiorari and reversed on both issues. (*Id.* at pp. 61-62.) The *Vonn* Court explained that Rule 11 had "evolved" over the years from a "general scheme to detailed plan[.]" (*Id.* at p. 62.) Rule 11 is a "detailed formula for testing a defendant's readiness to proceed to enter a plea of guilty[.]" (*Id.* at p. 69.) If a trial judge does not precisely dictate each of the fifteen Rule 11 admonitions to the

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(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

defendant, Rule 11 includes a provision for "dealing with a slip-up by the judge in applying the Rule itself." (*Id.* at p. 62.) Rule 11(h) provides that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." (*Id.* at p. 62.) Section (h) to Rule 11 was added in 1983 because " 'Rule 11 should not be given such a crabbed interpretation that ceremony was exalted over substantce.' " (*Id.* at pp. 70, quoting Advisory Committee's Notes.)

The *Vonn* Court compared Rule 11(h) to Federal Rule of Criminal Procedure 52(a), which allows the Government to prove that a timely error raised on appeal by the defendant is "harmless" and thus has no effect on the defendant's substantial rights. (*Id.* at p. 62.) The flip side of Rule 52(a), is Federal Rule of Criminal Procedure 52(b). The "plain error" rule allows a defendant an opportunity to prove an error, not timely raised in the trial court, affected his or her substantial rights and can be reviewed on appeal. (*Ibid.*) Under Rule 52(b), "the defendant who sat silent at trial has the burden to show that his 'substantial rights' were affected." (*Id.* at p. 63.) Rule 11(h) is similar to Rule 52(a), but does not contain a plain-error provision comparable to Rule 52(b).

The *Vonn* Court first addressed whether Rule 11's harmless error standard eliminated a silent defendant's burden under a plain error review like that of Rule 52(b). If so, it would allow a defendant and his counsel to sit silent at trial then give the defendant the right to require the Government to prove the Rule 11 error was harmless. The Court refused to endorse such a result.

> "[A] defendant could choose to say nothing about a judge's plain lapse under Rule 11 until the moment of taking a direct appeal, at which time the burden would always fall on the Government to prove harmlessness. A defendant could simply relax and wait to see if the sentence later struck him as satisfactory; if not, his Rule 11 silence would have left him with clear but uncorrected Rule 11 error to place on the Government's shoulders. . . . [T]he value of finality requires defense counsel to be on his toes, not just the judge, and the defendant

who just sits there when a mistake can be fixed cannot just sit there when he speaks up later on." (*Id.* at p. 73.)

Congress did not intend Rule 11(h) to trump Rule 52(b) in all Rule 11 cases. (*Id.* at p. 74.)

Thus, the defendant and his lawyer have an obligation to bring a Rule 11 violation to the court's attention at trial. (*Id.* at p. 73, fn. 10.) "A defendant's right to counsel on entering a guilty plea is expressly recognized in Rule 11(c)(2), and counsel is obliged to understand the Rule 11 requirements. It is fair to burden the defendant with his lawyer's obligation to do what is reasonably necessary to render the guilty plea effectual and to refrain from trifling with the court. It therefore makes sense to require counsel to call a Rule 11 failing to the court's attention." (*Ibid.*) The same is true for a defendant choosing to represent himself.[8] (*Ibid.*)

The *Vonn* Court then addressed the scope of an appellate court's inquiry into Rule 11 violations. (*Id.* at p. 74.) The Ninth Circuit confined itself to only the record of the plea proceeding. (*Ibid.*) The Supreme Court disagreed and held that Congress intended otherwise. (*Ibid.*) Although it is true that prior to the addition of section (h), under *McCarthy*, if the defendant alleged on appeal that he or she was not fully advised of the panoply of admonitions, the reviewing court was to only examine "*the record at the time the plea is entered*[.]" (*Id.* at p. 75, quoting *McCarthy*,

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8. "It is perfectly true that an uncounseled defendant may not, in fact, know enough to spot a Rule 11 error, but when a defendant chooses self-representation after a warning from the court of the perils this entails, see *Faretta v. California*, 422 U.S. 806, 835 (1975), Rule 11 silence is one of the perils he assumes. Any other approach is at odds with Congress's object in adopting Rule 11, recognized in *McCarthy* [citation], to combat defendants' 'often frivolous' attacks on the validity of their guilty pleas, by aiding the district judge in determining whether the defendant's plea was knowing and voluntary and creating a record at the time of the plea supporting that decision." (*Vonn*, 535 U.S. at p. 73, fn. 10.)

394 U.S. at p. 470, italics in original.) If not contemporaneous, the courts were reversing *per se* and allowing defendants to plead again anew. (*McCarthy*, 394 U.S. at p. 472.)

With the enactment of Rule 11(h), the *Vonn* Court held that a reviewing court is not limited to only the transcript of the plea hearing and Rule 11 colloquy. (*Vonn*, 535 U. S. at p. 75.) Rather, the entire record is relevant and open to review when considering if a Rule 11 error affected the defendant's substantial rights. (*Ibid.*)

Vonn's interpretation of the Federal Rules of Criminal Procedure is, of course, not binding on state courts interpreting their own rules and state-law precedents. *Vonn* is important, though, because of its implicit holding that the harmless-error procedure it permits is consistent with the federal constitutional right of due process of law that underlies the admonition requirements of both Rule 11 and *Tahl*. (See *id.* at p. 74, n. 10 (rejecting argument that plain-error rule would "leave some 'unconstitutional pleas' uncorrected").)

California soon followed *Vonn*'s lead and also permitted review beyond the courtroom colloquy at the time the plea or stipulation is entered. (*Mosby*, 33 Cal.4th at p. 361, citing *Vonn*, 535 U.S. at p. 76; *People v. Cross* (2015) 61 Cal.4th 164, 180.) "[I]f the transcript does not reveal complete advisements and waivers, the reviewing court *must examine* the record of 'the *entire proceeding*' " to determine if under the totality of the circumstances, the waivers were intelligent and voluntary. (*Mosby*, 33 Cal.4th at p. 361, italics added.)

Because review of the entire proceeding is permitted, and reviewing courts can examine the defendant's understanding throughout the progression of the case, there can be no "contemporaneous" requirement. When a defendant is made aware of his or her trial rights at a preliminary hearing or jury voir dire, then at a later proceeding chooses to plead guilty or enter into a stipulation, any previously learned knowledge is not erased

and the plea is not any less intelligent when entered later on. In this case, the defendant was represented by counsel and in the middle of a jury trial upon which witnesses were called and cross-examined. He and his attorney then made the strategic decision to stipulate to the charge of driving with a suspended or revoked driver's license to take the issue "out of the hands of the jury" and to avoid "having to bring witnesses in to testify." (*Farwell*, 241 Cal.App.4th at pp. 1315-1316.) Trial on the count of vehicular manslaughter continued. The defendant chose not to testify either before or after the stipulation. Thus, his right to a jury trial, his right to confront witnesses, and his right to remain silent were all afforded to him and he was well aware of those rights when the stipulation was entered.

Requiring the admonitions to be contemporaneous with the guilty plea or stipulation is contrary to established federal and state law, and is a waste of judicial time and resources. Some criminal cases span several months before going to trial. Some last several months and never get to trial. All of the proceedings leading up to the trial or decision not to go to trial are relevant to the defendant's knowledge and understanding of the criminal justice system and the rights afforded to criminal defendants. At each of those proceedings where the defendant is present, he or she is observing, listening, and taking in the criminal process. If the record shows a defendant's constitutional trial rights were presented at some point or at multiple points during the progression of the case, it is all relevant to the defendant's knowledge and understanding of those rights and waiver of those rights when a plea or stipulation is finally entered. It would be a waste of time for all involved to vacate and remand in these types of cases so that the defendant can get a "second chance" if he or she later decides the sentence was not satisfactory on the first go-round.

II. Recidivists' knowledge of constitutional trial rights.

When reviewing the entire record " 'a defendant's prior experience with the criminal justice system' is . . . 'relevant to the question [of] whether he knowingly waived constitutional rights.' " (*Mosby*, 33 Cal.4th at p. 365, quoting *Parke v. Raley* (1992) 506 U.S. 20, 37.) A defendant with a criminal history is not naive to the legal process afforded to criminals. He or she has presumably been arrested and jailed, read the *Miranda* rights, advised by an attorney, and proceeded to trial or entered into a plea agreement. At a previous trial or plea agreement, the defendant was presumably advised of the *Boykin/Tahl* admonitions. As a result, the defendant either served a jail sentence, was released on parole, or was placed on probation. This prior experience indicates a defendant's " 'knowledge and sophistication regarding his [legal] rights.' " (*Ibid.*, quoting *Parke*, 506 U.S. at pp. 36-37.)

When a person continues to commit crimes, even after being caught and punished, he or she is armed with the legal knowledge gained during those past experiences. In this case, the defendant was convicted of engaging in an illegal speed contest in February 2010, and convicted again of a residential burglary in July 2010 (a strike). (*Farwell*, 241 Cal.App.4th at p. 1320.) Unfortunately, the illegal speed contest conviction was not enough to keep him from driving with a suspended license and thus killing a person while driving.

In both of the defendant's prior convictions, he either pled guilty or no contest to the charges or proceeded to trial. Thus, he was fully aware of the constitutional trial rights afforded to him when he stipulated to driving with a revoked or suspended driver's license on the advice of counsel during his trial.

III. Under the totality of the circumstances, the defendant's stipulation was entered into knowingly and voluntarily.

The Court of Appeal majority reviewed the entire record and found that it affirmatively showed the defendant's stipulation was intelligent and voluntary. (*Farwell*, 241 Cal.App.4th at p. 1321.) The court found that the defendant's right to trial, to remain silent, and to confront and cross-examine witnesses was mentioned or discussed at least 45 times. (*Id.* at p. 1316.)

Prior to trial, the Court explicitly advised the defendant of his right to trial within 60 days and was asked if he understood that right. (*Id.* at p. 1315.) The defendant responded affirmatively and expressly waived that right. (*Ibid.*) Also prior to trial, the defendant's attorney informed the court that the defendant wanted count 2 "taken out of the hands of the jury" and was prepared to enter no contest on that count. (*Id.* at pp. 1315-1316.)

At trial and in the defendant's presence, the jury was informed of the defendant's right to trial, the purpose of a jury trial, the defendant's rights to confront and cross-examine the prosecution's witnesses, the defendant's right not to testify and his right to remain silent. (*Id.* at pp. 1318-1320.)

Trial commenced on both count 1 and count 2. (*Id.* at p. 1318.) The state called a witness and defendant's counsel cross-examined that witness. (*Id.* at p. 1319.) The defendant and his attorney made the decision to stipulate to the elements of count 2 *during* the very *jury* trial that he claims he was inadequately advised of.

Criminal defendants make the decision to plead guilty or to stipulate to the elements of a crime for many different reasons. (*Brady v. United States* (1970) 397 U.S. 742, 756-757.) "The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." (*Id.* at p. 757.)

The defendant was represented and advised by competent counsel at trial.[9] He was made aware by the court of the charges brought against him and of his associated trial rights. Further, there is no claim that the defendant is incompetent. (See *id.* at p. 756.)

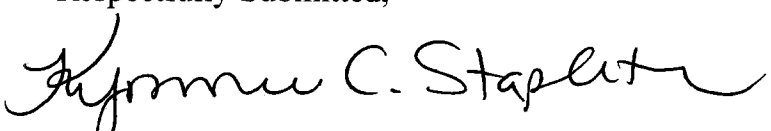
Under the applicable standard of review, if a record is truly "silent," a reviewing court will be unable to conclude that a defendant's waiver was voluntary and intelligent. (See *Mosby*, 33 Cal.4th at p. 362.) This record is not silent. The defendant is a recidivist. He has been previously convicted of felony burglary and for engaging in an illegal speed contest. (*Farwell*, 241 Cal.App.4th at p. 1320.) Even though the plea colloquy does not show a direct dialog between the judge and the defendant regarding the three *Boykin/Tahl* admonitions, the record is replete with evidence that the defendant was advised or informed of his constitutional rights throughout the stages of this case. Therefore, the Court of Appeal correctly concluded that under the totality of the circumstances, the defendant voluntarily, knowingly, and intelligently waived his constitutional rights when he and his attorney made the decision during trial to stipulate to count 2 of knowingly driving with a suspended or revoked driver's license.

CONCLUSION

The judgment of the Court of Appeal for the Second District should be affirmed.

October 6, 2016

Respectfully Submitted,



KYMBERLEE C. STAPLETON
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Criminal Justice Legal Foundation

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9. Defendant has made no ineffective assistance of counsel claim.

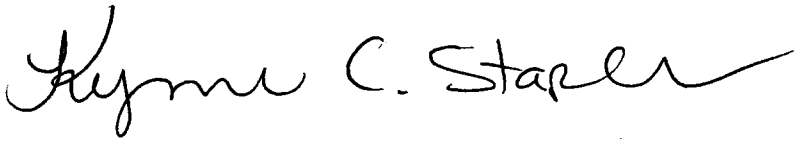
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court,
Rule 8.520, subd. (c)(1)

I, Kymberlee Stapleton, hereby certify that the attached brief amici curiae contains 6592 words, as indicated by the computer program used to prepare the brief.

Date: October 6, 2016

Respectfully Submitted,



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DECLARATION OF SERVICE BY U.S. MAIL

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816. On the date below I served the attached document by depositing true copies of it enclosed in sealed envelopes with postage fully prepaid, in the United States mail in the County of Sacramento, California, addressed as follows:

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On the date below I submitted one electronic copy of the attached document to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

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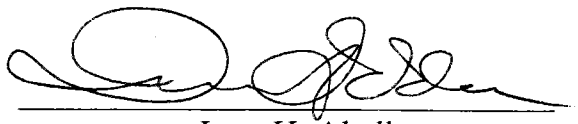

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