IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

REQUEST TO FILE BRIEF IN RESPONSE TO BRIEF OF *AMICUS CURIAE*; APPELLANT'S BRIEF IN RESPONSE

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

REQUEST TO FILE BRIEF IN RESPONSE TO BRIEF OF *AMICI CURIAE*; APPELLANT'S BRIEF IN RESPONSE

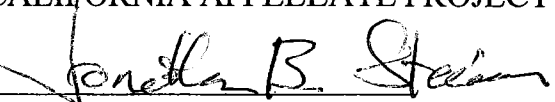
TO THE HONORABLE CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT:

Appellant respectfully requests this court's permission to file this brief in response to the Brief Amicus Curiae presented to the court by the Criminal Justice Legal Foundation. That brief presented a new argument under *People v. Howard* (1992) 1 Cal.4th 1154, discussed a United States Supreme Court case, *United States v. Vonn* (2002) 535 U.S. 55, [152 L.Ed.2d 90, 122 S.Ct. 1043], that has not been cited or briefed previously in this case and took several different positions than respondent.

Dated: November 9, 2016

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT



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I.

THIS CASE IS CONTROLLED BY THE COURT'S OPINIONS IN *PEOPLE v. BLACKBURN* AND *PEOPLE v. TRAN*; THE JUDGMENT ON COUNT II MUST BE REVERSED.

Neither amicus nor respondent has responded to the appellant's argument under *People v. Blackburn* (2015) 61 Cal.4th 1113 and *People v. Tran* (2015) 61 Cal.4th 1160. These cases held that the type of error occurring in count II of this case is a "miscarriage of justice" under the California Constitution, Article VI, section 13 and, therefore, requires reversal. (AOB 21-24; ARB 12-15)[1]

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[1] "AOB" will designate appellant's opening brief; "ARB" will designate appellant's reply brief; "RB" will designate respondent's brief; "AmBr" will designate Amicus' brief.

II.

THE "TOTALITY OF CIRCUMSTANCES" TEST OF *PEOPLE v. HOWARD* IS NOT APPLICABLE TO THIS TRUE "SILENT RECORD" CASE; IN INTERPRETING *HOWARD,* THIS COURT IN *PEOPLE v. MOSBY* DISTINGUISHED TRUE "SILENT RECORD" CASES FROM "INADEQUATE ADVISEMENT" CASES, APPROVING REVERSALS IN THE FORMER, DISAPPROVING THE ANALYSIS OF THE LATTER.

Amicus seems to be taking the position that this court's opinion in *People v. Howard* (1992) 1 Cal.4th 1154 controls the result of every future case raising issues under *Boykin v. Alabama* (1969) 395 US 238, 243-244 (22 L. Ed. 274, 89 S. Ct. 1709), *In re Tahl* (1969) 1 Cal.3d 122, 130, and *In re Yurko* (1974) 10 Cal.3d 857, 861-865. (AmBR 9-12.) Appellant has discussed in the Opening and Reply briefs the cases holding that this approach is not correct and why public policy considerations also favor appellant. (AOB 7-11; ARB16-20)

However, in response to the specific contentions of amicus, there is no indication in the *Howard* opinion that its test was intended to be applied to or to control the result of cases in which no admonitions were given and no waivers were taken. That possibility was never considered. An opinion is not authority for an issue not presented or decided. (See *People v. Banks* (1993) 6 Cal.4th 926, 945; *People v. Saunders* (1993) 5 Cal.4th 580. 592.)

Next, it is hugely important to point out a major agreement by Amicus with an argument made by appellant. Amicus states:

> "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. (AmBr 20.)

In other words, Amicus is saying that, if this court concludes that this case presents a "true" silent record, it must reverse rather than apply the "totality of circumstances" test. The term "silent record" has been used uniquely in judicial discussions of the *Boykin-Tahl-Yurko-Howard* line of cases to mean cases in which the trial court gave no warnings and took no waivers. Hence, this case involves a true "silent record."

Neither Amicus nor respondent has cited a single case or authority (other than the 2-1 majority opinion below that is under review) for distorting/augmenting the term "silent record" to include comments made by the trial judge to persons other than the defendant, or to any comments at all made by opposing counsel. Amicus' argument tries to alter the terminology to magnify the import of such prior comments to make them the equivalent of actual warnings and, thus, convert a true "silent record" case into a "inadequate advisement".

The apparent goal of the *Howard* court was to prevent *per se* reversals in cases where the trial court had given one or two of the admonitions and taken one or two of the waivers ("inadequate advisement" cases). It said nothing about cases where there were no explicit admonitions and, more importantly, no specific waivers (true "silent record" cases).

The position of amicus that the key issue in this case is whether *People v. Mosby*

(2004) 33 Cal.4th 353 overruled *People v. Howard, supra,* is simply not supported by any language in relevant case law. (AmBr 10-12)

This court in *Mosby* simply grouped and clarified the distinctions that had already been drawn by previous California appellate court opinions, approving the reversals in the "silent record" cases and disapproving those in the "incomplete advisement" cases. In other words, *Mosby* reinforced the specific *Howard* holding by applying it to cases with *Howard's* fact situation of "incomplete advisements", but not applying it to cases like the present one with no specific warnings or waivers.

See also *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1420, where the defendant was convicted of robbery and two Penal Code section 667.5(b) priors were found true. He was a Three Striker with vast experience in the criminal justice system. Nonetheless, the court held that it could not affirm the admissions of the priors on a true "silent record. This is a post-*Mosby case* in which the court adopted and relied on *Mosby's* analysis of *Howard.*

III.

SHOULD THE COURT REJECT EACH OF THE ABOVE TWO ARGUMENTS, APPELLANT SHOULD PREVAIL UNDER THE "TOTALITY OF CIRCUMSTANCES" TEST.

Amicus emphasized the fact of appellant's two prior convictions, one traffic offense and one residential burglary, and argues that these experiences and the various comments made pre-trial rendered appellant aware of the facts and dangers of pleading guilty. (AmBr 19-20.) However, there was no real argument that somehow this knowledge necessarily led to a voluntary and intelligent waiver of these rights. There was no factual basis for finding an explicit waiver and, at best, this court would have to infer the existence of a waiver. That inference is unprecedented and would stretch the fabric of the concept of a "voluntary and intelligent waiver" beyond recognition.

On the issue of the importance of the priors in assessing the "totality of circumstances," it is necessary to look carefully at the true "silent record"cases where *Mosby* approved reversals. In *People v. Campbell* (1999) 76 Cal.App.4th 305, the defendant admitted "the truth of the four prior conviction allegations, including one no-probation prior (section 1203, subd.(e)(4)), two prison priors (section 667.5,subd. (b) and a prior under the Three Strikes law (sections 667 subd. (e)(1), 1170.12 subd. (c)(1)." (76 Cal.App.4th at p. 309)

There was no dispute about the error, but the prosecution contended that "the court should infer from Campbell's experience and familiarity with the justice system that

he intelligently and voluntarily waived his rights." The court declined to do so, stating,

> If this experience were sufficient to constitute a voluntary and intelligent waiver of constitutional rights, courts would rarely be required to give *Boylin-Tahl* admonitions. Under *Howard*, we are not permitted to imply knowledge and a waiver of rights on a silent record.[2] (*Id.* at p. 310.)

See also *People v. Sifuentes, supra,* 195 Cal.App.4th at p. 1420.)

The implication is that trial courts would rarely be required to give admonitions and take waivers because most California defendants and virtually everyone alleged to have a prior conviction does have, in fact, some criminal record. Thus, if the fact of some experience with the justice system could be used to rehabilitate a plea without warnings or waivers, the failure to comply with the law regarding warnings and waivers may well, in actual practice, wipe out the necessity to give defendants the *Boykin-Tahl-Yurko* waivers in a very large number of cases. This court cannot allow this "after-the-error" analysis to undermine and implicitly overrule the long-standing and highly respected *Boykin-Tahl-Yurko* line of cases.

In *People v. Johnson* (1993) 15 Cal.App.4th 159, the defendant was charged with a number of offenses including second degree murder as well as two priors. The court

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[2] The court cited for this statement *People v. Johnson* (1993) 15 Cal.App.4th 159, 178, a true silent record case cited previously in appellant's briefing. This case was approved by *Mosby*. The court also cited *People v. Carroll* (1996) 47 Cal.App.4th 892, 896-897. This latter case was disapproved by *Mosby* as it, in fact, was an "incomplete advisement" case, not a "silent record" case.

distinguished *Howard* on its facts, as there were no warnings given or waivers received. In *People v. Moore* (2004) Cal.App.4th 411, the defendant had a current conviction and two priors. No warnings or waivers were given on the admission of those priors. The court reversed.

The *Johnson* court also said that it had no doubt that the defendant was aware of his rights.

> What is impossible to determine from this silent record is whether *Johnson* was not only aware of these rights, but was also prepared to waive them as a condition to admitting his prior offenses. (15 Cal.App.4th at p. 178)

The same is true in the case at bar.

Thus, it is crystal clear that California case law has dealt with situations where the defendant's records were more aggravated than *Howard*, but reversed due to the lack of warnings and waivers. (See AOB, section 1A, pp. 7-13.)

IV.

VONN RECEIVED ALL BUT ONE OF HIS CONSTITUTIONALLY REQUIRED WARNINGS AT THE TIME OF HIS PLEA AND HE RECEIVED THAT WARNING FOUR TIMES IN PRE-TRIAL PROCEEDINGS; THUS, IF *VONN* LOOKED ONLY AT THE COLLOQUY JUST PRIOR TO THE PLEA, THERE IS AN "INCOMPLETE ADVISEMENT" AFFIRMANCE AND, IF IT LOOKED AT THE ENTIRE RECORD, IT IS A CASE WITH FULL ADVISEMENTS.

Amicus tries to apply the analysis of *United States v. Vonn* (2002) 535 U.S. 55, [152 L.Ed.2d 90, 122 S.Ct. 1043] to this case, again without bothering to take into consideration the very significant factual discrepancies between the two cases.

In *Vonn, supra,* the defendant argued that he had not been informed of his right to counsel immediately pre-plea in violation of Federal Rules Criminal of Procedure, rule 52.

Yet, a day after his arrest, Vonn appeared before a magistrate and was informed of his right to counsel at "each and every stage of the proceedings." Counsel was appointed to represent him. (535 U.S. at p. 59; 152 L.Ed.2d at 100)

Then, three days after being indicted and represented by his previously appointed counsel, Vonn appeared before the magistrate for arraignment. Again, Vonn was told of "his right to counsel at all stages of the proceedings." (*Id.*)

At that time, appointed counsel gave Vonn a "Statement of Defendant's Constitutional Rights" in which Vonn acknowledged that he understood his right to counsel. Counsel representing Vonn also signed "a separate statement that he was

satisfied that Vonn had read and understood the statement of his rights. The Clerk of [the] Court then asked Vonn whether he had heard and understood the court's explanation of his rights and whether he had read and signed the statement, and Vonn said yes to each question. (535 U.S. at p. 60; 152 L.Ed.2d at 100.)

Vonn's argument was based on the facts that, when he indicated he wanted to plead guilty to the armed bank robbery charge against him and when he actually pleaded guilty, the judge who recited his rights under Federal Rules of Criminal Procedure skipped the right to counsel. (*Id.*, see (Federal Rules of Criminal Procedure, rules 11(c)(3) and 52(b))

The Supreme Court looked at the earlier proceedings and saw the admonitions given by the magistrate and that trial counsel affirmed that Vonn had "heard or read a statement of his rights and understood what they were." (535 U.S. at p. 75; 152 L.Ed.2d at 110.)

These facts bear little resemblance to the facts at bar. Vonn received four specific statements of the right missing from the dialogue immediately before the plea. The defendant here never received either warning and the court never took any waivers. That should be a dispositive distinction on this critical issue.

Finally, the question of voluntary and intelligent waivers of Vonn's constitutional rights was never discussed. Therefore, *Vonn* is not authority for looking back to the "totality of circumstances" in a case where no warnings were given nor waivers taken.

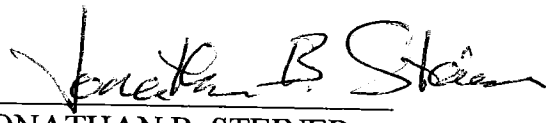
CONCLUSION

Based on the arguments made in appellant's Opening Brief, Reply Brief and this Response to Brief of *Amicus Curiae* the judgment on count two must be reversed.

Dated: November 9, 2016

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT



JONATHAN B. STEINER
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WORD COUNT CERTIFICATION
People v. Randolph Farwell

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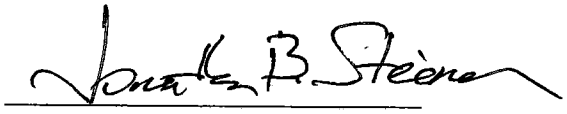

JONATHAN B. STEINER

PROOF OF SERVICE

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

On November 9, 2016, I served the within

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

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

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

Executed November 9, 2016, at Los Angeles, California.

Jackie Gomez