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 (Los Angeles County Superior Court No. TA130219)

REPLY BRIEF

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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,	)	(Los Angeles County Superior
	)	Court No. TA130219)
Defendant and Appellant.	)	
	)	

REPLY BRIEF

INTRODUCTION

Respondent makes a number of assertions regarding relevant precedents with which appellant disagrees. In this reply brief, appellant will clarify the discussions and holdings, pointing out where respondent's interpretations are erroneous. See, e. g., respondent's discussion of the breadth of *People v. Mosby* (2004) 33 Cal.4th 353 and the distinctions it draws; respondent' suggestion that *People v. Cross* (2015) 61 Cal.4th 164 overrruled *Mosby sub silentio*. (RB 16-17); respondent's attempts to distinguish *People v. Blackburn* (2015) 61 Cal.4th 1113 and *People v. Tran* (2015) 61 Cal.4th 1160, but failing to discuss the reliance of these cases on the California Constitution, article VI, section 13.

No opinion of this court and no California Court of Appeal's decision have

affirmed a judgment based on a stipulation or guilty plea where no explicit waivers were taken of any of the rights to a trial by jury, to avoid self-incrimination and to confront and cross-examine witnesses.

As the vast majority of criminal charges are resolved by guilty pleas, this court's opinion will have a significant effect on the future functioning of California's trial courts, appellate courts and this court, significant public policy considerations must be examined by this Court. Appellant will discuss these considerations in Argument III. Respondent gave these important policy concerns short shrift. (RB 21-22.)

This reply brief will discuss the most significant aspects of respondent's brief. As for any issues not discussed here, appellant relies on the Opening Brief On the Merits.

I.

THIS COURT'S DECISION IN *PEOPLE* v. *MOSBY* DISTINGUISHES BETWEEN CASES WHERE NO WAIVERS WERE TAKEN OF APPELLANT'S CONSTITUTIONAL RIGHTS AND WHERE "INCOMPLETE" WAIVERS WERE TAKEN; THE STIPULATION TO GUILT IN COUNT II FALLS INTO THE FORMER CATEGORY, AND MUST BE REVERSED.

A. There Is No Distinction in the *Boykin-Tahl-Howard* Analysis Between the Necessity of Waivers Required Before The Trial Court Takes a Guilty Plea or When It Accepts an Admission to a Sentencing Enhancement

Respondent attempts to distinguish and diminish the requirement in *People v. Mosby, supra,* that both guilty pleas and enhancement admissions require *Boykin-Tahl-Howard* warnings and waivers by arguing that an admission of an enhancement deserves more protection than a guilty plea to a charged criminal offense. (RB 19.) Aside from the logical and instinctive conclusion that this suggestion is incorrect, this court's opinion in *People v. Cross, supra,* specifically rejects this argument.

Both Mosby and Cross admitted two sentencing enhancements. The court held that because [Cross] admitted " 'every fact necessary to imposition of additional punishment...[*People v.] Adams*...he was entitled to *Boykin-Tahl* warnings before he made his admission.' " (61 Cal. 154, 174.) The *Cross* court also noted that "[W]hat mattered was that the defendant's admission of prior convictions automatically exposed him to " 'added penalties. (*Yurko*, at p. 863.)' " The court mentioned no appellate distinction between a guilty plea to a substantive offense and an admission to a sentencing

enhancement in regard to the constitutionally required warnings and waivers and reversed the trial court's judgment regarding the sentencing enhancements. Respondent misconstrues *Mosby* when it is cited for this proposition. (RB 20.)

The *Mosby* court stated that, in cases in which the trial court took no waivers of the three constitutional rights "...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." (33 Cal.4th 353, at p. 362.)

B. *Cross* Did Not Overrule *Mosby*

Respondent argues that *Cross* implicitly overruled *Mosby* because it conducted the "harmless error" analysis of *People v. Howard* (1992) 1 Cal.4th 1132. (RB 20.) *Mosby* drew the clear distinction between records with "inadequate" waivers which could be affirmed under the "totality" rule (one or two of the three waivers taken explicitly) and cases where no warnings were given or waivers taken. In the former, the "totality of circumstances" test can be applied; in the latter, that rule cannot be applied.

Respondent also argues that, because in *People v. Cross, supra,* the court analyzed the facts using the *Howard* test, *Cross* overruled *Mosby sub silentio*. (RB 20.) The *Cross* opinion never states that it intended to overrule the *Mosby* distinction and, in this area of law, this court has not been hesitant to rethink, clarify and explicitly disapprove previous legal conclusions. (See, e. g., *In re Tahl, supra,* and *People v. Howard, supra.)* The idea that this court would overrule such a significant precedent without explicitly saying so is

not how California's appellate system functions.

Respondent also ignores the fact that in *Cross* and in each of the four appellate court cases cited by *Mosby* in which the trial court took no waivers, the courts also discussed the effect of the *People v. Howard* "totality" test before concluding that the trial court's failure to take waivers required reversal. No court has even raised the point that the decisions approved in *Mosby* were contrary to *Howard.*

Reviewing briefly the opinions in the four cases without waivers cited by *Mosby,* in *People v. Moore* (1992) 8 Cal.App.4th 411 at pp. 416-418, the court stated, "If this were sufficient [no warnings or waivers], it is difficult to discern what would not be....We decline to speculate what appellant may have thought. *All of the pertinent authorities, through and including Howard, require that the record demonstrate the waivers were voluntary and intelligent.* This record does not meet the test." (emphasis added.)

In *People v. Johnson* (1993) 15 Cal.App.4th 169, the court discussed the *Howard* analysis but concluded,

> We have no doubt that Johnson was aware of his...[three constitutional required rights], all of which he had just exercised in trial. *What is impossible to determine from this silent record is whether Johnson...was also prepared to waive them as a condition to admitting his prior offense.* The state of the record leaves us no alternative but to reverse the true findings...and remand for a new proceeding to determine the validity of these allegations.
> (15 Cal.App.4th at p. 178; emphasis added)

In *People v. Stills* (1994) 29 Cal.App.4th 1766, at p. 1761, the court stated, after

discussing *Howard*, "However, we do not think the "harmless error" rule...can be extended to the total absence of any admonition [or waiver]...the circumstance in this case...."

In *People v. Campbell* (1999) 76 Cal.App.4th 305, at p. 310, the defendant admitted *four* prior convictions. The court held that where the record showed no admonitions or waivers, it was "...not sufficient to support a voluntary and intelligent waiver..."

The same logic applies to respondent's attempt to distinguish *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1421. Further, the argument that *Sifuentes* should be ignored because *Cross* overruled *Mosby* has already been shown to be erroneous.

The cases relied on by *Mosby*, particularly *Moore* and *Johnson* raise another key point, not discussed in respondent's brief. Knowledge of the three constitutional rights at issue is only one part of the the *Boykin-Tahl-Howard* requirement. The critical question in these cases and others is whether the record reflects a knowing and intelligent waiver of these rights.

Respondent notes a number of times that appellant's constitutional rights were referred to by the court, the prosecutor and defense counsel. However, only two of these comments were made by the trial court and only one to appellant. (RB 2, 6-7.) The prosecutor and defense counsel speak as advocates for a particular position and cannot substitute for warnings from the trial court and cannot be used to substitute for the failure

of the trial court to take waivers of the defendant's constitutional rights. The trial court was duty-bound to make explicit.

It is also worth noting that, of the ten comments cited by respondent to show the defendant's knowledge of his right, respondent noted two comments, one by the prosecutor and one by defense counsel, which were made during final argument, long after the stipulation to appellant's guilt on count two was made by counsel. Respondent also noted one comment by the court when it instructed the jury before final argument. (RB 7.) This stretching of the facts cannot be permitted to be a part of this discussion.

This court should also note that the Court of Appeal's opinion below only cited two comments that the trial court made to the defendant before the stipulation, one when granting a continuance some time before trial, contrary to its assertion of a much larger number. The strength of respondent's case and the Court of Appeal's opinion cannot be judged on such a general allegation. And further, as noted above, the key point in this discussion is whether the waivers were knowing and intelligent, even granting for purposes of discussion, that there may be are some indications in the record in regard to appellant's alleged knowledge of his rights. (Slip opinion, 3, 7.)

II.

UNDER *BLACKBURN* AND *TRAN,* THE FAILURE OF THE TRIAL COURT TO TAKE EXPLICIT WAIVERS FROM APPELLANT WHEN HE STIPULATED TO HIS GUILT ON COUNT II LEADS TO A VIOLATION OF ARTICLE VI, SECTION 13, OF THE CALIFORNIA CONSTITUTION AND BECOMES A "MISCARRIAGE JUSTICE" ALSO REQUIRING THE REVERSAL OF COUNT II.

This court's opinions in *People v. Blackburn, supra,* and *People v. Tran, supra,* also require the reversal of the trial court. Blackburn was convicted by a jury of first degree burglary, was found to be a mentally disordered offender (MDO) and was committed to Atascadero State Hospital. In order for a two year commitment extension to be granted, Blackburn was statutorily entitled to a jury trial. After his initial commitment, the state had sought and obtained two commitment extensions. In the third extension hearing, Blackburn's counsel told the trial court he wanted a trial. Counsel then requested a bench trial, and the prosecutor agreed. There was no factual showing that Blackburn was so affected by his mental issues that he was unable to understand the extension process or potential trial. (61 Cal.4th at pp. 1117-1118.)

The *Blackburn* court noted that, although a civil commitment proceeding was not a criminal trial, it does involve a loss of liberty for the appellant, and "some constitutional protections available in the criminal context apply "as a matter of due process to defendants..." (61 Cal. 4th at p. 1119) The court then held that, under the controlling statutes, "a [trial] court must obtain a personal waiver of the defendant's right to a jury trial before holding a bench trial." (*Id.,* at p. 1125.) Thus, even though it was his third

time through the process and the record did not suggest that the defendant was unaware of counsel's action, this court held that it was a violation of the applicable statutes for the trial court not to get a specific waiver. (*Id.*, at p. 1130; 61 Cal.4th at p. 1167.)

This court declined to speculate from these circumstances that "...Blackburn knowingly and voluntarily waived his right to a jury trial...a jury trial is the default procedure absent a personal waiver. In sum, the trial court must elicit the waiver decision from the defendant in a court proceeding unless it finds substantial evidence of incompetence..." (*Id.*, at pp. 1130-1131.)

In *People v. Tran, supra,* defendant pleaded NGI to one count of lewd and lascivious conduct with a child under 14. (Penal Code section 288(b)(1).) The relevant statutes required a waiver of a jury trial from "the person" involved. (Penal Code section 1026.5(b)(4).) In regard to this case, this court noted that Tran was facing his fourth two year NGI extension after a commitment to Napa State Hospital for treatment. (61 Cal.4th at p. 1164.) (Penal Code section 1026.5) At the time of trial, defense counsel only stipulated to a bench trial, and Tran testified at trial. The Court of Appeal found that Tran was likely aware of his right to a jury trial and there was no indication that Tran disagreed with counsel's decision to waive jury trial. The court reversed. (61 Cal.4th at pp. 1163-1165.)

In *People v. Blackburn, supra,* and *People v. Tran, supra,* this court specifically declined to rely on the fact that this was Blackburn's third time through the MDO

extension process and Tran's fourth time through the NGI extension process to immunize the trial court's failure to take a knowing waiver. (61 Cal.4th at pp. 1130-1131; 61 Cal.4th at pp. 1168-1169.)

As noted in the AOB, *Blackburn* court then stated,

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

Thus, respondent's discussion of *Blackburn* and *Tran* misses the mark. (RB 21-22.) While noting that these cases did not involve a criminal prosecution, this court held that the admitted failures of the trial court to obtain waivers of appellant's right to a jury trial constituted a "miscarriage of justice" under the California Constitution, article VI, section 13. The errors involved here are not susceptible to the normal "harmless error" analysis of *People v. Watson* (1956) 46 Cal.2d 818. (61 Cal.4th at p. 1136; 61 Cal.4th at p. 1169.) The only situation in which trial counsel can make the waiver decision for the person involved is if the facts at trial make it apparent that the person involved cannot make the decision due to the effects of the mental disease which caused the confinement.

This case presents an even more egregious situation. There are three constitutional rights here, not just one statutory right. Further, the violation here is one of constitutional magnitude rather than statutory construction. It also involves a failure of the trial court to obtain any waivers on a stipulation to guilt on a substantive criminal

charge. *Blackburn* and *Tran* only involved an extension of a civil commitment.

Looking to the applicable standard of review, the *Tran* court stated the truism that "Ultimately, we emphasize that the most certain means of ensuring a valid waiver is careful compliance with the express advisement and waiver process explained in this opinion and in *Blackburn.* Both courts concluded that the failure to take an express waiver of a jury trial from the person on trial constituted statutory violations in *Blackburn* and *Tran* which were not susceptible to the normal 'harmless error' standard of *People v. Watson* (1956) 46 Cal.2d 818 and constituted a 'miscarriage of justice' under the California Constitution, article VI, section 13." (61 Cal.4th at p. 1170.) It is time for this court to apply those holdings to the type of case at bar. (See *People v. Cross*, *supra,* 61 Cal.4th at p. 179.)

III.

THE EFFECTS THAT THE DECISION IN THIS CASE WILL HAVE ON ALL THREE LEVELS OF CALIFORNIA COURTS AND THE POLICIES OF JUDICIAL EFFICIENCY AND ECONOMY MAKE EVEN CLEARER THAT A REVERSAL OF APPELLANT'S STIPULATION ADMITTING GUILT ON COUNT II IS REQUIRED HERE.

Although *Boykin v. Alabama* (1969) 395 U.S. 238, 28 L.Ed.2d 274 and *In reTahl* (1969) 1 Cal.3d. 122, were decided in 1969 and made plain that trial courts have certain constitutional obligations when taking guilty pleas, innumerable cases have reached California's appellate tribunals in which appellants have challenged the adequacy of the warnings and waivers required of the trial court when taking guilty pleas. (See *People v. Campbell* (1999) 76 Cal.App.4th 305, 311, written 17 years ago in an opinion cited, discussed and approved by *People v. Mosby,* "...we continue to be concerned by the frequency which trial courts fail to provide the necessary admonitions. We are aware of the heavy caseload before the trial courts but urge the trial courts to comply with the well-known, easily followed rules set forth in *In re Yurko* (1974) 10 Cal.3d 857.)"

In *People v. Howard, supra*, although grafting a "harmless error rule" to *Boykin-Tahl* violations, the court stated that:

> This does not mean that explicit admonitions and waivers are no longer an important part of the process of accepting a plea of guilty or an admission of a prior conviction. Despite the rejection of *Tahl* as a matter of federal law, 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. (*Tahl, supra,* 1 Cal.3d at p. 132.) Moreover, *the essential wisdom* of explicit waivers remains beyond question.

(1 Cal.4th at pp. 1178-1179.)

Today, in order to satisfy the "totality of circumstances" rule promulgated by *Howard,* Courts of Appeal are required to perform the time-consuming task of reviewing the "totality of circumstances" in each case in which the adequacy of the waivers taken is questioned and then determine whether the defendant voluntarily and intelligently waived his critical constitutional rights based on circumstantial evidence although the waivers were "inadequate" but included one or two of the three.

More significantly, this court has had to revisit many times its own decisions and those of the Courts of Appeal to correct or clarify holdings. This disapproving of previous case law takes a toll on the judicial efficiency and economy of California's courts at each level.

The case at bar is the one type of case where a clean rule has developed in the case law. Where there were no explicit waivers taken from defendants who, for a variety of possible reasons, wished to plead guilty to a charged offense or admit a sentencing enhancement. ("Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." (*Boykin v. Alabama, supra*, 395 U.S. at pp. 242-243, 23 L.Ed. at p. 279.) Respondent has argued that these cases should be added to the *Howard* "totality of circumstances" universe which will make still more time-consuming the tasks of California's appellate tribunals. Appellant suggests that this court should not remove this small oasis of clarity in appellate review of

guilty plea cases and the adequacy of waivers.

This step suggested by appellant will be a step toward the prevention of guilty pleas where there are no waivers of constitutional rights and in the protection of the constitutional rights and the very tangible liberty interests of defendants in this situation. California courts are required under the United States Constitution to protect these rights "with the utmost solicitude of which court's are capable." (*Id.*, 395 U.S. at pp. 243-244, 23 L.Ed. at p. 279.) The reversal of the trial court's judgment on count II will reinforce that important principle.

It is true that the result of the position appellant is taking will be to send back to the trial courts cases in which no waivers were properly taken and where the requirements of *Boykin* and *Tahl* and even *Howard* were not followed. Yet, once the court's decision becomes known to the trial courts, this concern should hopefully be short-lived. Further, from the standpoint of public policy, the exchange is well worth it, particularly if it renders trial and appellate courts more protective of the constitutional rights of the defendants whose cases come before them.

This court should make these requirements mandatory and not permit strained interpretations of a "harmless error" rule that would countenance constitutional violations. This is perhaps the only way for this court to gain compliance with the long-standing precedents at issue in this case, a surprising and unfortunate fact in light of the length of time they have been part of California's jurisprudence.

The alternative is to endorse the trial court's failure to comply with these constitutional requirements, "inducing rather than discouraging" the continuation of these errors. (See the concurring and dissenting opinion in *People v. Howard* (1994) 25 Cal.App.4th 1660, 1666.)

As guilty pleas resolve the vast majority of criminal prosecutions in California, the public policy supporting appellant's arguments and their effects on judicial economy and efficiency effects of the decision in this case are extremely significant. Any defendant pleading guilty must receive warnings directly from the trial judge in order to make sure that the waivers of the constitutional rights to a jury trial, to confront and cross-examine witnesses and to maintain silence and not incriminate him or herself will be clean and beyond interpretation. This court has the right, duty and power to protect the rights of individuals charged with a crime in California courts.

Finally, adopting the rule advocated by appellant would shrink the number of conflicting opinions and lessen the need for this court to take yet another *Boykin-Tahl-Howard* case.

No appellate decision in California has excused the complete failure of the trial court to take any of the requisite waivers. To do so would expand the ambit of the "totality of circumstances" test. If this court is not willing to reverse trial courts where no waivers are taken, it should no longer continue to articulate that it is essential for the trial court to obtain the three voluntary and intelligent waivers before accepting a guilty plea.

Experience has shown that there is no other way to gain compliance.

IV.

EVEN IF MEASURED BY THE "TOTALITY OF CIRCUMSTANCES" TEST, COUNT II MUST BE REVERSED.

Appellant has made this argument in the Opening Brief on the Merits.

The key question here is waiver. As noted above, no California appellate court has held that the "harmless error" analysis can or should be applied to a case where there were no explicit waivers of appellant's constitutional rights. To find waivers here would involve the kind of speculation that *People v. Johnson, supra,* and *People v. Moore, supra,* held were inappropriate. Those cases have presented the best analysis by the Court of Appeal of this type of problem and should not be overruled, explicitly or implicitly.

CONCLUSION

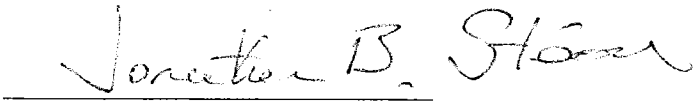
Mosby and *Cross* require the reversal of count II. *Blackburn* and *Tran* require the reversal of count II. Public policy reasons join with those cases in supporting the reversal of count II.

For the foregoing reasons and those expressed in Appellant's Opening Brief On The Merits, appellant prays that this court reverse the trial court's judgment and the Court of Appeal's affirmation of count II.

Dated: September 2, 2016

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT



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WORD COUNT CERTIFICATION
People v. Randolph Farwell

I certify that this document was prepared on a computer using Corel Wordperfect, and that, according to that program, this document contains 3,710 words.

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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.

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

Executed September 2, 2016, at Los Angeles, California.

Jackie Gomez