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

SUPREME COURT
FILED

AUG 16 2016

Frank A. McGuire Clerk

Deputy

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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STATUTES

Evid. Code, § 402 4

ISSUES PRESENTED

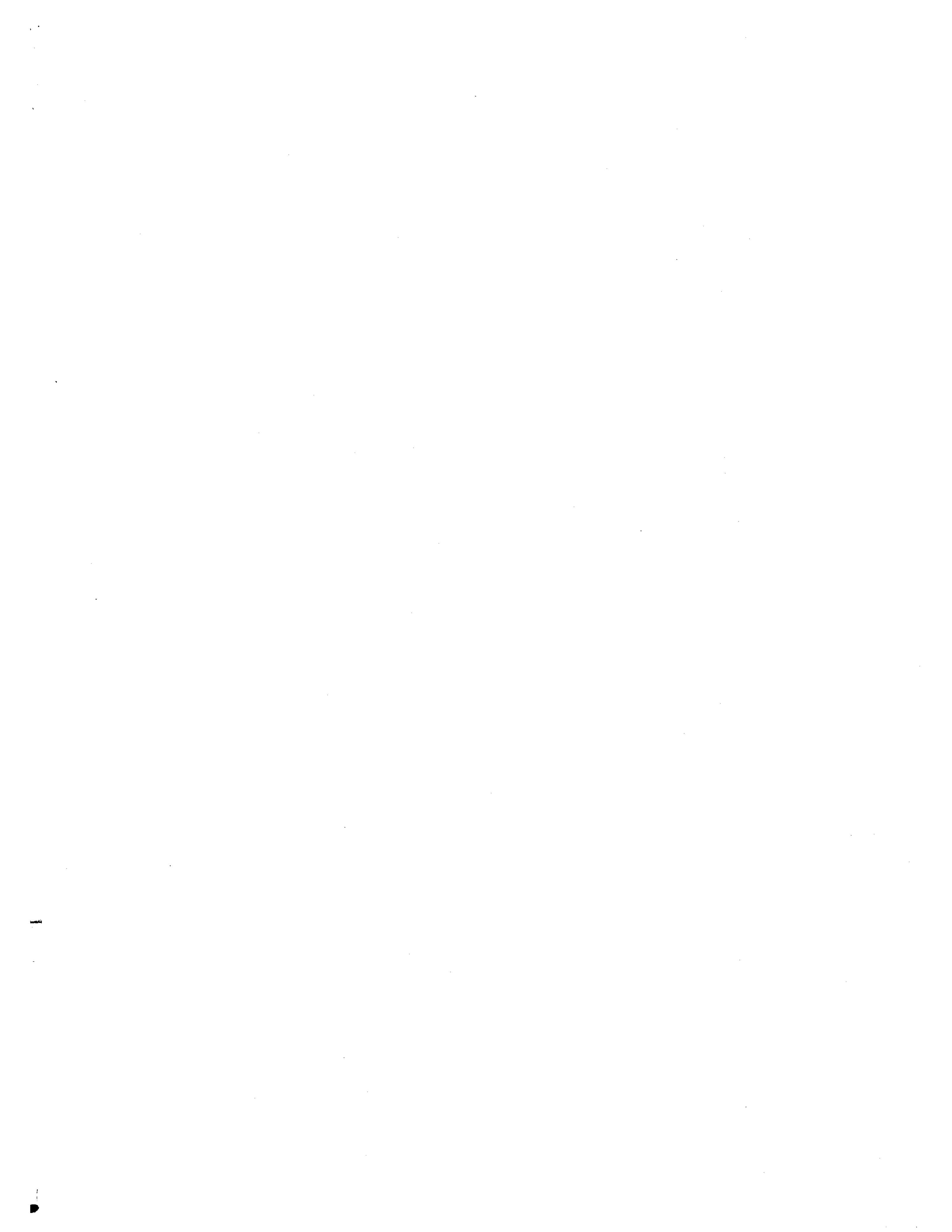
1. "Where a defendant is not advised of nor asked to waive his . . . constitutional rights in connection with a stipulation . . . admitting his guilt to a charge, can a reviewing court apply the 'totality of the circumstances' analysis to determine whether the defendant knowingly and voluntarily acquiesced 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

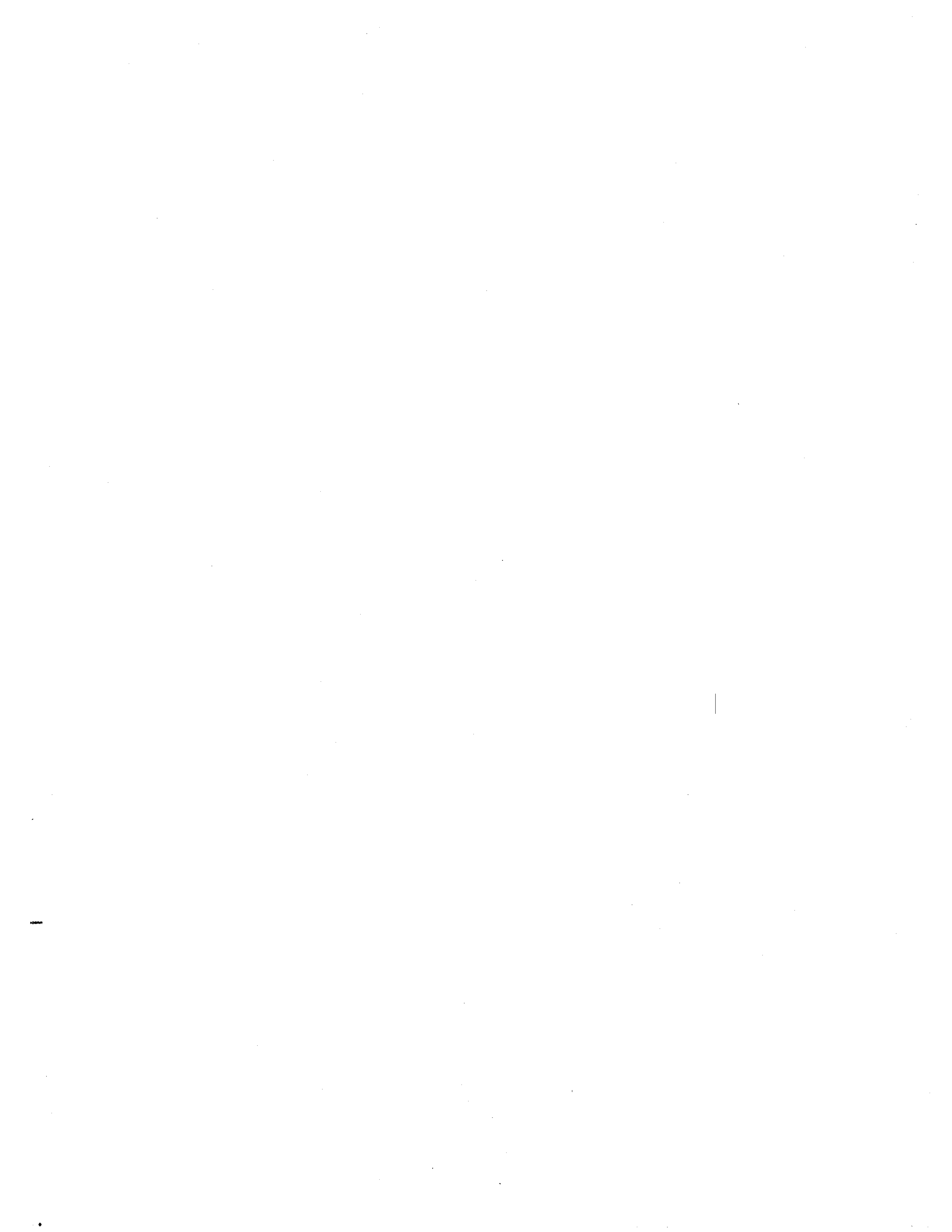


appellant's license suspension and knowledge thereof, and thus reduce the chance of that information negatively influencing the jury's decision on the vehicular manslaughter count.

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:

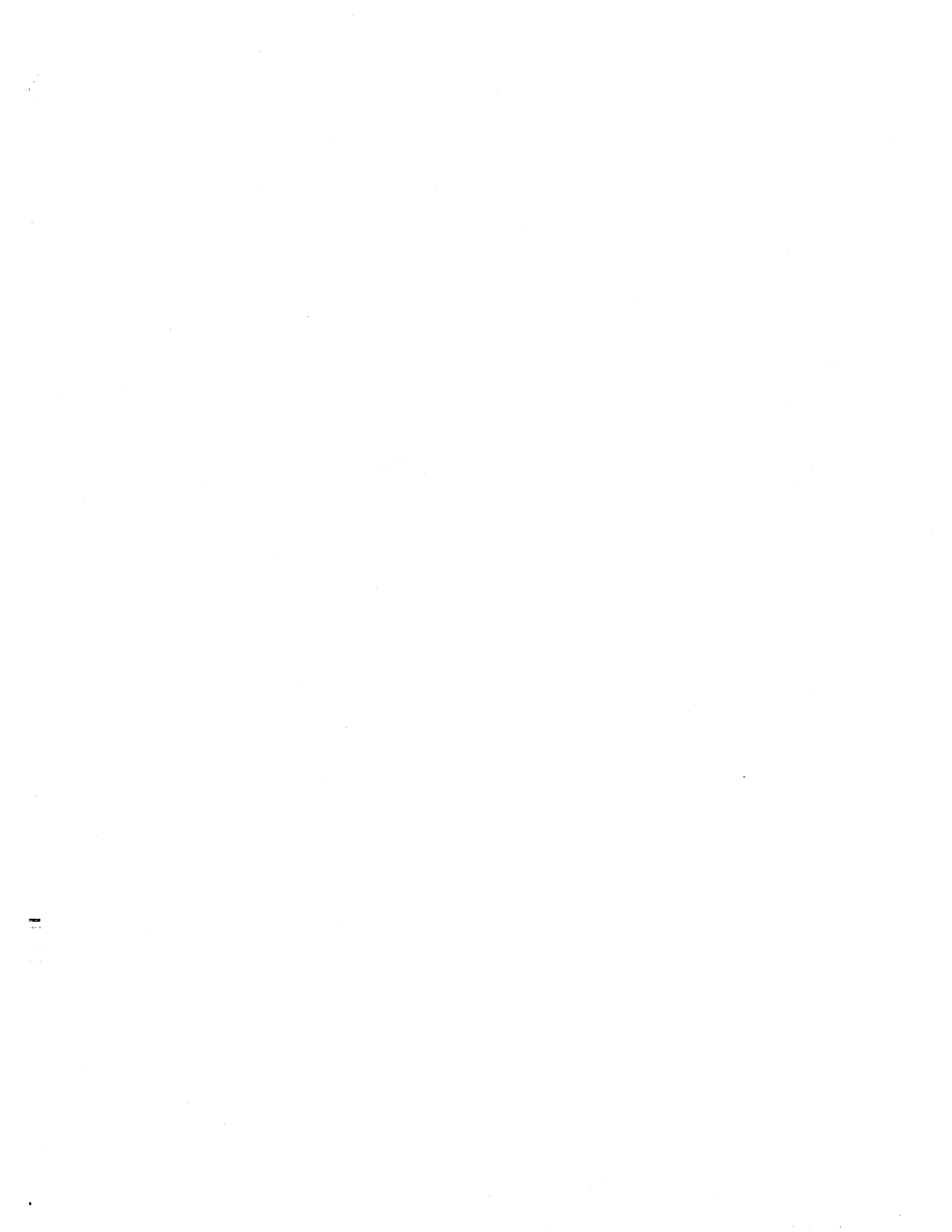
> [T]he Constitution protects someone charged with a crime. They [*sic*] protect that person with the *right to remain silent*, and that right is when you talk to the police, when you go to court, he doesn't have to say a word. So if he chooses, and if his lawyer chooses, to not present any witnesses 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.

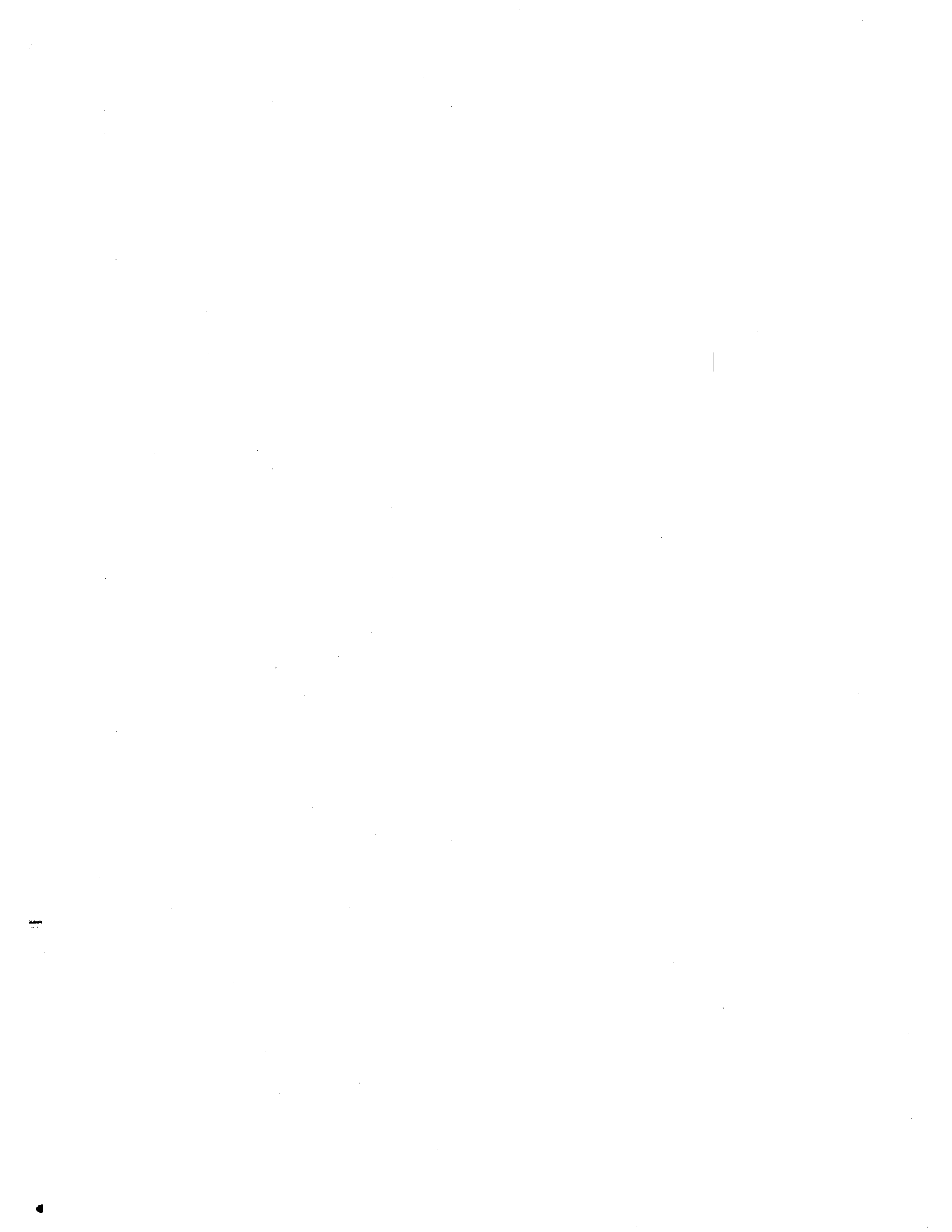
not waive, his trial rights, at the time the stipulation was entered." (Opn. 4.) In a two-to-one decision, the Court of Appeal affirmed the judgment, finding that the trial court did not reversibly err. The Court of Appeal "review[ed] the entire record, not just the record of the stipulation colloquy, 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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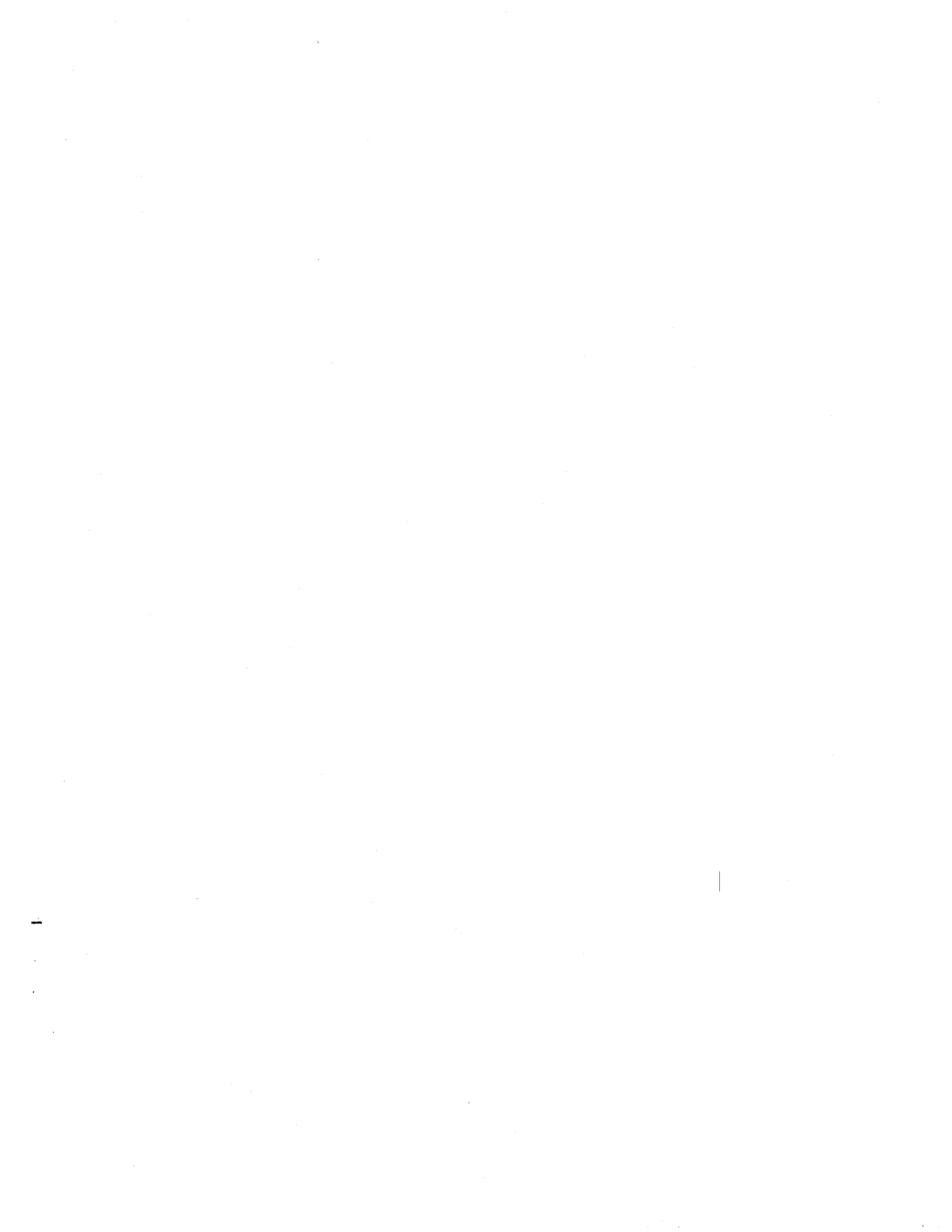
[6] The Court of Appeal denied respondent's request for judicial notice of the superior court dockets in those cases, because "the documents were not before the trial court." (Opn. 8, fn. 3.) As discussed in respondent's accompanying request for judicial notice, respondent submits that judicial notice 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:

[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