

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE OF THE STATE OF  
CALIFORNIA,  
Plaintiff and Respondent,

vs.

JOHN SMITH,  
Defendant and Appellant.

Court of Appeal  
No. D000000

Superior Court  
No. SCD00000

**APPELLANT’S MOTION TO RECALL THE REMITTITUR  
AND FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF  
IN LIGHT OF *PEOPLE v. HOWARD* (2005) 34 Cal.4th 1129**

TO THE COURT OF APPEAL:

Appellant moves pursuant to Rules of Court, rule 26(c) for an order recalling the remittitur and permitting the filing of supplemental briefing on the effect of the recent decision in *People v. Howard* (2005) 34 Cal.4th 1129 on appellant’s conviction of second degree felony murder. This motion is based on the attached memorandum of points and authorities.

Dated: \_\_\_\_\_, 2005

Respectfully submitted,  
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## POINTS AND AUTHORITIES

**Appellant’s second degree felony murder conviction must be reversed because it was based on the predicate offense of reckless evasion of a peace officer, which, as recently found in *People v. Howard*,<sup>1</sup> is not a valid predicate for second degree felony murder.**

### **A. Procedural Background**

Appellant was convicted of second degree felony murder in this case based on the underlying felony of reckless evasion of a peace officer in violation of Vehicle Code section 2800.2. On appeal, appellant argued for reversal of his conviction on the ground reckless evasion of a peace officer was not an “inherently dangerous felony” and thus was not a proper predicate for second degree felony murder. This court rejected this argument and affirmed the conviction. [*If the Howard issue was not raised in the client’s appeal, modify the previous two sentences accordingly.*]  
[*Detail any further proceedings, including the issuance of the remittitur.*]

On January 27, 2005, the California Supreme Court decided *People v. Howard*, holding that reckless evasion of a peace officer was not an “inherently dangerous felony” and thus would not qualify as the predicate for second degree felony murder. (*Id.*, 34 Cal.4th at pp. 1136-1139, expressly disapproving the contrary holding in *People v. Sewell* (2000) 80

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<sup>1</sup> *People v. Howard* (2005) 34 Cal.4th 1129

Cal.App.4th 690, 694.) *People v. Howard* resolves favorably to appellant the exact issue he raised unsuccessfully on appeal. [*If the issue was not raised in the client's appeal, delete the preceding sentence and see section "C" below.*]

**B. Recall of the remittitur is appropriate to implement appellant's habeas corpus right to assert under *People v. Howard* that he was convicted for conduct that does not constitute second degree felony murder.**

Rules of Court, rule 26(c) authorizes this court to recall the remittitur and reinstate the appeal for good cause. Recall of the remittitur is appropriate where an error has occurred which would entitle a defendant to habeas corpus relief. (*People v. Mutch* (1971) 4 Cal.3d 389, 396-397.)

*People v. Mutch, supra*, involved proceedings fundamentally similar to the present case. In *Mutch*, the defendant was convicted of kidnap for the purpose of robbery based on his forcibly moving two robbery victims from one room to another in a building. (*Id.*, 4 Cal.3d at p. 397.) The decisional law at the time of the conviction was that any forcible movement of an intended robbery victim, no matter how slight, constituted kidnap for robbery. (*Id.* at p. 393.) Three years after the conviction, however, the California Supreme Court decided *People v. Daniels* (1969) 71 Cal.2d 1119, holding that kidnap for the purpose of robbery required movement substantially increasing the risk of harm to the victim. (*Id.* at p. 394.)

Following the decision in *Daniels*, the defendant in *Mutch* petitioned the Court of Appeal for recall of the remittitur to reopen his appeal in light of *Daniels*. (*Id.* at p. 393.)

The Supreme Court in *Mutch* held that the defendant was entitled to a recall of the remittitur and to reopen the appeal. The court explained:

As a general rule, an error of law does not authorize the recalling of a remittitur. An exception is made, however, when the error is of such dimensions as to entitle the defendant to a writ of habeas corpus. The remedy of recall of the remittitur may then be deemed an adjunct to the writ, and will be granted when appropriate to implement the defendant's right to habeas corpus.

(*Id.* at pp. 396-397, citations omitted.) The court specifically noted that the defendant was not barred by "finality for purposes of appeal" because the right to habeas corpus exists to rectify an error when the trial court has acted "in excess of its jurisdiction." (*Id.* at p. 396.) A trial court acts in excess of its jurisdiction when it convicts a defendant for conduct not prohibited by statute. (*Ibid.*; accord, *In re Harris* (1993) 5 Cal.4th 813, 829-841 [general rule barring use of habeas corpus to raise an issue previously raised and rejected on appeal does not apply where claim asserts a fundamental constitutional error, an act in excess of the trial court's jurisdiction, or a post-appeal change in the law].)

The court in *Mutch* further noted that the defendant's right to relief

was not dependent on the concept of “retroactivity.” (*Id.* at pp. 395-396.) Retroactivity, the court explained, is primarily concerned with the application of changes in evidentiary and procedural law. By contrast, a decision that confirms the substantive definition of a crime in a manner excluding the prior conduct of a defendant amounts to a finding that the defendant “was convicted under a statute which did not prohibit his acts at the time he committed them.” (*Ibid.*)

Appellant’s posture in the resent case is indistinguishable from that of the defendant in *Mutch*. As in *Mutch*, appellant was convicted based on conduct plainly falling outside the definition of the crime with which he was charged. And as in *Mutch*, a subsequent decision of the California Supreme Court brought this error to light by correctly defining the crime in question, disapproving previous decisional law to the contrary. Accordingly, as in *Mutch*, appellant here is entitled to a recall of the remittitur and to reopen his appeal for reconsideration in light of the new decision.

Based on the above authorities, the remittitur should be recalled and the appeal reinstated to allow supplemental briefing, and reconsideration by this court, in light of the decision in *People v. Howard*. Appellant has filed a proposed supplemental brief along with this motion.

Dated: \_\_\_\_\_, 2005

Respectfully submitted,

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*[The following section can inserted in the P&A's if the client's previous appeal did **not** raise the Howard issue. It can be omitted if the issue was raised on appeal since that is what occurred in Mutch, (id. at p. 394, fn. 2) putting such a client's case on all fours with Mutch.]*

**C. Appellant is entitled to relief even though he did not raise the “Howard issue” on appeal.**

Appellant's appellate counsel did not raise on appeal the claim of error ultimately vindicated in *People v. Howard*. Appellant is nonetheless entitled to recall of the remittitur. As detailed below, the right to assert new decisional law establishing a defendant was convicted for conduct outside the definition of the crime is not dependent of having previously raised the issue on appeal.

In *Mutch, supra*, the Supreme Court noted that appellate counsel, “[w]ith commendable foresight” raised unsuccessfully on appeal the claim of error later vindicated by *People v. Daniels*. (*Mutch supra*, 4 Cal.3d at p. 394, fn. 2.) Yet the court in *Mutch* in no way suggested the defendant's right to habeas corpus relief rested on his having raised the issue on appeal. In fact, as detailed below, the California Supreme Court has expressly

resolved this question in favor of the defendant.

As a general rule, habeas corpus is not available to raise an issue that could have been, but was not, raised on appeal. (*In re Dixon* (1953) 41 Cal.2d 756, 759.) But an exception to this general rule exists where there is a “satisfactory excuse” for the failure to raise the issue on appeal. (*Id.* at p. 760.) A new state supreme court decision changing the complexion of the decisional law is exactly such a satisfactory excuse, warranting habeas relief. The emergence of an appellate claim based on a decision “rendered subsequent to [a defendant’s] conviction [] presents ‘special circumstances’ constituting an excuse for failure to employ the remedy of appeal,” justifying habeas corpus. (*In re King* (1970) 3 Cal.3d 226, 229, citing *In re Dixon, supra*, 41 Cal.2d at pp. 762-763; accord, *In re Smith* (1970) 3 Cal.3d 192, 203-204 [recall of the remittitur appropriate to remedy appellate counsel’s omission of essential claim of error on appeal].)

Based on the above authorities, appellant is entitled to recall of the remittitur despite the failure of his appellate counsel to raise the “*Howard* issue” on appeal.]