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

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 REQUEST FOR PERMISSION TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

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Respondent respectfully requests permission to file the attached supplemental brief in response to appellant's supplemental brief ("ASB") that was filed with permission of the Court on October 23, 2017.[1]

Respondent's supplemental brief addresses the following two arguments raised by appellant: (1) "this Court should interpret the 'due process' clause of the California Constitution to mandate that the trial court's failure to obtain an express, voluntary waiver of the right to a jury trial constitutes a structural error that is reversible per se" (ASB 9-14, capitalization and bold omitted); and (2) "should this Court decide it needs to follow the [*People v.*] *Howard* [(1992) 1 Cal.4th 1132] approach, the proper 'standard of prejudice' is the 'beyond a reasonable doubt' standard

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[1] Because respondent's supplemental brief discusses some authority that is not "new," as did appellant's, respondent requests permission to file this brief instead of proceeding by way of California Rule of Court 8.520(d).

of *Chapman v. California* [(1967) 386 U.S. 18]" (ASB 15-17, capitalization and bold omitted).

Dated: February 21, 2018

Respectfully submitted,

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Respondent respectfully submits this supplemental brief in response to appellant's supplemental brief ("ASB") that was filed with permission of the Court on October 23, 2017.

I. A HARMLESS ERROR ANALYSIS SHOULD BE APPLIED IN THIS CASE

Appellant contends that this Court should "interpret the 'due process' clause of the California Constitution to mandate that the trial court's failure to obtain an express, voluntary waiver of the right to a jury trial constitutes a structural error that is reversible per se." (ASB 9-14, capitalization and bold omitted.) In support of his contention, appellant cites the following decisions by this Court: *People v. Daniels* (2017) 3 Cal.5th 961, *People v. Sivongxxay* (2017) 3 Cal.5th 151, *People v. Merritt* (2017) 2 Cal.5th 819, and *People v. Ernst* (1994) 8 Cal.4th 441. Respondent will discuss each of these cases in turn, and then discuss their application to the instant case. In sum, such cases are plainly distinguishable, and reinforce respondent's position that a harmless error analysis should be applied here.

A. *Daniels*

Daniels represented himself, and was convicted of murder following a court trial and sentenced to death. (*Daniels*, 3 Cal.5th at pp. 966, 986.) He contended that the record did not reflect a valid waiver of his right to a jury trial in favor of a bench trial. Although Daniels had expressly waived a jury trial, he argued that his waiver "was infirm because the record d[id] not demonstrate he made his waiver with full awareness of the nature of the right being relinquished." He complained that the court did not inform him that a jury would be "comprised of 12 impartial members who must reach a unanimous verdict, nor did it explain the consequences of a hung jury." (*Id.* at pp. 986, 990.) This Court reversed Daniels's judgment of death but affirmed his judgment of guilt. (*Id.* at pp. 966-967, 1003.)

The lead opinion of Justice Cuéllar, joined by Justices Werdegar and Liu, concluded that the record failed to demonstrate a knowing and intelligent waiver of a jury trial as to both the guilt and penalty phases, and that the error was structural. (*Daniels*, 3 Cal.5th at pp. 967, 986, 1006.) Justice Cuéllar noted that this Court will "uphold the validity of a jury waiver if the record *affirmatively* shows that it is voluntary and intelligent under the totality of the circumstances." (*Id.* at p. 991, italics in original, internal quotation marks omitted.) This Court "examin[es] factors such as the nature of the colloquy prior to the [trial] court's acceptance of a waiver, the presence of counsel and references to discussions between the defendant and counsel regarding the jury right, and the existence and contents of a written waiver." (*Ibid.*) Justice Cuéllar found it to be "striking" that the trial court had "accepted Daniels's waiver without ever inquiring as to Daniels's understanding of *any* substantive aspect of what a jury is." (*Id.* at p. 995, italics in original.) Justice Cuéllar also observed that "[a] proper weighing of the totality of the circumstances forces us to take into account Daniels's lack of representation[.]" (*Id.* at p. 996.)

The concurring and dissenting opinion of Justice Corrigan, joined by Chief Justice Cantil-Sakauye and Justice Chin, concluded that under the totality of the circumstances, Daniels knowingly and intelligently waived a jury trial as to both the guilt and penalty phases. (*Daniels*, 3 Cal.5th at pp. 967, 1010, 1028.) Justice Corrigan observed that Daniels had received "repeated admonitions" stressing that court and jury trials are different (*id.* at pp. 1019-1020), and that the trial court was not constitutionally required to "go further and enumerate specifics" (*id.* at p. 1020). Daniels's prior experience with the criminal justice system also supported a conclusion of a knowing and intelligent waiver. (*Id.* at p. 1023.) In addition, Justice Corrigan noted that this Court has "never imposed a higher standard for a

knowing and intelligent waiver under the state Constitution than that established by the United States Supreme Court." (*Id.* at p. 1020)

In her concurring and dissenting opinion, Justice Kruger concluded that as to the guilt phase, but not the penalty phase, the record "sufficiently demonstrate[d] that [Daniels's] choice to waive his right to jury trial . . . was made with eyes open." (*Daniels*, 3 Cal.5th at p. 1029, internal quotation marks omitted.)

B. *Sivongxxay*

Following a court trial, Sivongxxay was convicted of murder and sentenced to death. (*Sivongxxay*, 3 Cal.5th at p. 157.) He had expressly waived a jury trial, but contended his waiver was not knowing and intelligent. (*Id.* at pp. 164, 166.) In finding that Sivongxxay had made a valid waiver, this Court observed that its precedent "has not mandated any specific method for determining whether a defendant has made a knowing and intelligent waiver of a jury trial in favor of a bench trial. We instead examine the totality of the circumstances." (*Id.* at p. 167.) This Court held that the trial court's failure to mention certain characteristics of a jury trial (juror impartiality and unanimity) did not render Sivongxxay's waiver constitutionally infirm. (*Id.* at pp. 168-169.)

At the same time, this Court "emphasize[d] the value of a robust oral colloquy in evincing a knowing, intelligent, and voluntary waiver of a jury trial." (*Sivongxxay*, 3 Cal.5th at p. 169.) Its guidance, however, "pertain[ed] only to waiver of a jury trial in favor of a bench trial." (*Id.* at p. 170.) This Court also cited with approval language in *United States v. Rodriguez* (7th Cir. 1989) 888 F.2d 519, 527, that "'[l]esser (*even no*) warnings do not call into question the sufficiency of the waiver so far as the Constitution is concerned.'" (*Sivongxxay*, at p. 170, italics added.) "Reviewing courts must continue to consider all relevant circumstances in

determining whether a jury trial waiver was knowing, intelligent, and voluntary." (*Ibid.*)

Sivongxxay also raised a claim of state-law error under *People v. Memro* (1985) 38 Cal.3d 658, contending that his "general juror waiver [could not] be understood as incorporating a knowing and intelligent surrender of his right to a jury trial concerning the [special circumstance] allegation."[1] (*Sivongxxay*, 3 Cal.5th at p. 170.) For errors of state law, the California Constitution "imposes upon [a] court an obligation to conduct 'an examination of the entire cause' and reverse a judgment below for error only upon determining that a 'miscarriage of justice' has occurred." (*Id.* at p. 178, quoting Cal. Const., art. VI, § 13.) As a general rule, a defendant "must demonstrate that it is 'reasonably probable that a result more favorable to [the defendant] would have been reached in the absence of the error.'" (*Ibid.*, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836.) "Categorization of an error as structural represents 'the exception and not the rule.'" (*Ibid.*, quoting *Rose v. Clark* (1986) 478 U.S. 570, 578.) The *Sivongxxay* court cited with approval language in *People v. Marshall* (1996) 13 Cal.4th 799, 851, that "'[t]here is a strong presumption any error' is susceptible to harmless error analysis." (*Sivongxxay*, at p. 178.) "The fact that an error implicates important constitutional rights does not necessarily make it structural." (*Ibid.*)

In finding that the *Memro* error was not structural, the *Sivongxxay* court stated:

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[1] In *Memro*, this Court construed Penal Code sections 190.1 and 190.4 as requiring a "'separate, personal waiver' of the right to a jury for a special circumstance allegation, above and beyond the standard guilt phase and penalty phase waiver." (*Sivongxxay*, 3 Cal.5th at p. 176, citing *Memro*, 38 Cal.3d at p. 704.)

> This error did "not *necessarily* render [defendant's] criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." [Citation.] Nor are the effects of this lapse "necessarily unquantifiable and indeterminate." [Citation.] On the contrary, we are more than capable of scrutinizing the record to ascertain whether it reveals a reasonable probability that defendant would have demanded a jury trial for the special circumstance allegation, had no *Memro* error occurred.

(*Sivongxxay*, 3 Cal.5th at p. 180, quoting *Neder v. United States* (1999) 527 U.S. 1, 9, and *Sullivan v. Louisiana* (1993) 508 U.S. 275, 282, italics in original.)

C. *Merritt*

In *Merritt*, the trial court failed to give the standard jury instruction on the elements of robbery, and instead instructed only on the required mental state. (*Merritt*, 2 Cal.5th at p. 824.) This was "very serious constitutional error because it threaten[ed] the right to a jury trial that both the United States and California Constitutions guarantee." (*Ibid.*) It was nevertheless amenable to harmless error analysis. (*Id.* at p. 831.) The United States Supreme Court has "'recognized that "most constitutional errors can be harmless." [Citation.] "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis."'" (*Id.* at p. 826, quoting *Neder*, 527 U.S. at p. 8.) The *Merritt* court held: "[S]o long as the error does not vitiate *all* of the jury's findings, it is amenable to harmless error analysis." The error there "vitiated some of the jury's findings, but not all of them. . . . Perhaps crucially, it did not vitiate the finding on the only *contested* issue at trial: defendant's identity as the perpetrator." (*Merritt*, at p. 829, italics in original.) On the other hand, "an instructional error or omission that amounts to the *total*

deprivation of a jury trial would be structural error[.]" (*Id.* at p. 830, italics in original.)

D. *Ernst*

In *Ernst*, this Court held that its decision in *People v. Howard* (1992) 1 Cal.4th 1132, "did not alter the long-established rule that, by virtue of the explicit language of the California Constitution, a judgment in a criminal case resulting from a *court trial* must be reversed if the defendant did not expressly waive the right to a trial by jury."[2] (*Ernst*, 8 Cal.4th at p. 443, italics added.) The state Constitution "permits the defendant and the prosecution to waive their right to a jury and elect a court trial, but specifies the following manner for doing so: 'A jury may be waived in a criminal cause by the consent of both parties *expressed in open court by the defendant and the defendant's counsel.*'" (*Id.* at p. 445, quoting Cal. Const., art. I, § 16, italics in original.) Thus, "the precise terms of the California Constitution refute[d] the People's suggestion that this court should apply a totality-of-the-circumstances test" in such a case. (*Id.* at p. 448.)

In so holding, this Court was "mindful of the People's contention that requiring reversal of the judgment in [that] case would create 'an anomaly in the law,' because 'an omission of an express waiver of a jury trial by a defendant who pleads guilty . . . would be reviewed under the federal

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[2] *Howard* considered the validity of a defendant's admission of a prior prison term allegation, and held "the requirement under federal law set forth in *Boykin v. Alabama* (1969) 395 U.S. 238 . . . – that the record of the taking of a plea of guilty affirmatively establish that the plea was intelligent and voluntary – may be satisfied despite the trial court's failure to elicit from the defendant explicit waivers of the defendant's rights to confrontation and trial by jury, and of the privilege against self-incrimination." (*Ernst*, 8 Cal.4th at p. 445, citing *Howard*, 1 Cal.4th at p. 1178.)

totality of the circumstances test, while a similar omission involving a defendant who gives up *only* his right to a jury, and proceeds to a court trial with all other rights intact, would be reversible per se.'" (*Ernst*, 8 Cal.4th at p. 446, italics in original.) "[W]hether or not such a result is anomalous," this Court concluded that "reversal of a conviction resulting from a court trial not preceded by an express waiver of the right to jury trial is required by the terms of our state Constitution." (*Ibid.*)

E. Application To This Case

The instant case is plainly distinguishable from the above cases. Unlike the defendants in *Daniels*, *Sivongxxay*, and *Ernst*, appellant *had a jury trial* on the vehicular manslaughter count (CT 160) – the sole contested charge against him. Further, unlike the defendant in *Daniels*, appellant was represented by counsel. (CT 116.) Unlike the defendant's jury in *Merritt*, appellant's jury was properly instructed. And aside from *Ernst* – where the terms of the California Constitution explicitly dictated otherwise – each of these cases applied a harmless error analysis.

Appellant asserts, "This court's determination that the [California Constitution's] 'due process' clause requires an automatic reversal when there is no express . . . jury waiver . . . would resolve the disturbing anomaly noted in *Ernst*." (ASB 11.) Respondent disagrees. A rational reason may exist for the state Constitution's requirement of an express waiver of a jury trial in favor of a court trial – both sides must agree to it. However, in the guilty plea context, by definition, no trial is necessary. Moreover, the position advanced by appellant could result in unjustified reversals where, as here, the record shows the defendant knew what rights he was giving up despite the absence of an express waiver. Appellant's further rhetoric that there was a "total deprivation of a jury trial in the case at bar" (ASB 11) ignores the fact that he had a jury trial.

Thus, this Court's decisions in *Daniels*, *Sivongxxay*, *Merritt*, and *Ernst* reinforce respondent's position that a harmless error analysis should be applied in the instant case.

II. THE PROPER STANDARD OF PROOF IS BY A PREPONDERANCE OF THE EVIDENCE

Appellant alternatively contends, "should this Court decide it needs to follow the *Howard* [totality of the circumstances] approach, the proper 'standard of prejudice' is the 'beyond a reasonable doubt' standard of *Chapman v. California* [(1967) 386 U.S. 18]." (ASB 15-17, capitalization and bold omitted.) In support of this contention, appellant cites the cases of *People v. Sapp* (2003) 31 Cal.4th 240, and *In re S.N.* (2016) 2 Cal.App.5th 665. His reliance on those cases is unavailing. The proper standard of proof here is by a preponderance of the evidence.

In *Sapp*, this Court observed that the "[v]oluntariness [of a confession] does not turn on any one fact . . . but rather on the totality of [the] circumstances." "Under federal standards, the prosecution must demonstrate the voluntariness of a confession by a preponderance of the evidence. California courts use this standard for crimes committed after the June 8, 1982, enactment of article I, section 28 of the California Constitution, which . . . prohibits the exclusion in criminal cases of relevant evidence not required to be excluded under the federal Constitution. But for crimes committed before article I, section 28's . . . enactment, the prosecution must prove voluntariness beyond a reasonable doubt." (*Sapp*, 31 Cal.4th at p. 267, internal quotation marks, citations, and italics omitted.)

In *S.N.*, the Court of Appeal held that the juvenile court violated a mother's due process rights when it failed to obtain a valid waiver of her right to a contested jurisdictional hearing. (*S.N.*, 2 Cal.App.5th at p. 671.) Even if a parent does not contest the allegations in a Welfare and

Institutions Code section 300 petition, the court "must advise the parent of the parent's rights to receive a hearing on the issues raised by the petition, to assert any privilege against self-incrimination, to confront and cross-examine witnesses, to compel witnesses' attendance, and to have the child returned if the court finds that the child does not come within the jurisdiction of the juvenile court[.]" (*S.N.*, at p. 671, citing Cal. Rules of Court, rule 5.682(b).) "Because the due process rights protected by these rules implicate a parent's fundamental right to care for and have custody of his or her child," the *S.N.* court held "it is error of constitutional dimension to accept a waiver of the right to a contested jurisdictional hearing based only on counsel's representations. Where such error occurred, [an appellate court] may affirm only if the error is harmless beyond a reasonable doubt." (*Id.* at p. 672, citations omitted.)

The above cases do not assist appellant. It is well established that in a criminal proceeding, "explicit waivers of the defendant's rights to confrontation and trial by jury, and of the privilege against self-incrimination . . . are required under state law," not federal law. (*Ernst*, 8 Cal.4th at p. 445.) The *Chapman* beyond a reasonable doubt standard does not apply to errors of state law. Because the question here is whether the record shows appellant's stipulation was voluntary and intelligent under the totality of the circumstances (see *Daniels*, 3 Cal.5th at p. 991), the proper standard of proof is by a preponderance of the evidence (see Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"]).

CONCLUSION

For the foregoing reasons, and those set forth in respondent's Answer Brief on the Merits, the decision of the Court of Appeal should be affirmed.

Dated: February 21, 2018

Respectfully submitted,

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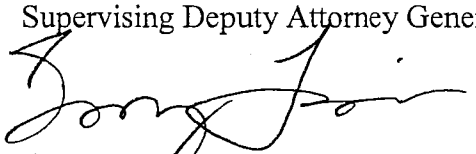

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL RESPONDENT'S uses a 13-point Times New Roman font, and contains 2,672 words.

Dated: February 21, 2018

XAVIER BECERRA
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DECLARATION OF SERVICE

Case Name: *People v. Randolph D. Farwell*

No.: **S231009**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 21, 2018, I served the attached **RESPONDENT'S REQUEST FOR PERMISSION TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF,** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On February 21, 2018, I caused the original and eight (8) copies of the **RESPONDENT'S REQUEST FOR PERMISSION TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF,** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by GOLDEN STATE OVERNIGHT **CARRIER, Tracking # GSOAB108733442.**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 21, 2018, at Los Angeles, California.

C. Esparza
Declarant

Signature

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