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October 17, 2013

ATTN Hon. Chief Justice Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *People v. Richard Tom,* No. S202107

SUPPLEMENTAL LETTER BRIEF

Dear Chief Justice Tani Cantil-Sakauye and Associate Justices:

The Court has asked for a supplemental brief addressing *Salinas v. Texas* (2013) – U.S. –, 133 S.Ct. 2174. *Salinas* is distinguishable, but on balance supports Appellant Tom's claims of error.

In *Salinas*, the defendant voluntarily agreed to go to the police station. He answered questions until the officer asked whether the shell casings from the crime scene would match Salinas's shotgun. At Salinas's murder trial, the prosecutor argued that his silent reaction to the one question proved his guilt. (*Id.* at pp. 2177-78.) A plurality concluded that Salinas's silence in the face of this question was not an invocation of his privilege. Thus, the constitution did not forbid an argument that his silence proved guilt. (*Id.* at pp. 2178-79.) Rather, the Court focused on the need to affirmatively invoke the privilege when not in custody. (*Id.* at pp. 2181-84.) Finally, the Court made clear that the privilege may be forfeited by conduct inconsistent with the privilege. (*Id.* at p. 2183.)

Salinas is distinguishable for two significant reasons. First, Tom's encounter with the police was not voluntary; rather, he was detained in the back of a locked police car and repeatedly refused permission to leave. Second, unlike *Salinas*, Tom did not decline to answer a specific question or protest a specific accusation. Thus, there is no forfeiture argument. Further, the Court's focus on the need to affirmatively invoke the privilege if not in custody, supports Appellant's claim that his inquiries and invocations of his constitutional rights cannot be penalized by argument that they prove guilt. It also supports Appellant's claim that clarification of whether a person is free to leave is an essential invocation of both his Fifth Amendment and Fourth Amendment rights.

A. *Salinas* Is Distinguishable Because Appellant Was Detained And His Encounter With The Police Was Not Voluntary.

The *Salinas* plurality's holding is distinguishable because Tom was detained and was repeatedly refused permission to leave. *Salinas* reaffirmed the principal that "[d]ue to the uniquely coercive nature of custodial interrogation a suspect in custody cannot be said to have voluntarily forgone the [Fifth Amendment] privilege [to remain silent], 'unless [he] fails to claim [it] after being suitably warned.'" (*Id.* at p. 2180, quoting *Minnesota v. Murphy* (1984) 465 U.S. 420, 429-430.) Moreover, where, as here, "assertion of the privilege would itself tend to incriminate, we have allowed witnesses to exercise the privilege through silence." (*Salinas*, 133 S.Ct. at p. 2180.) Salinas could not benefit from these principals "because it is undisputed that his interview with police was voluntary;" "he agreed to accompany the officers to the station and 'was free to leave at any time during the interview.'" (*Ibid.*)

Here, however, the record plainly demonstrates that Appellant was detained. Tom *asked* whether he was free to leave to go home, but the police refused him permission. (4RT 685-686.) The police *placed* Tom in the back of a *locked* patrol car. (3RT 404-406; 4RT 728.) When the police asked him to go the police station, Tom again *asked* if he could leave to go home, but was again *denied permission*; only after being *denied permission to leave*, did he agree to go the police station. (4RT 728-729.) Even at the station, Tom again *asked* if he was free to leave, but the police *again refused* permission to leave. (6PTRT 346-348, 393-394.) When the police finally asked if Tom would make a statement, he *explicitly* invoked his right to counsel. (6PTRT 351-353, 390-391.) When formally arrested and given his *Miranda* warnings, Tom *explicitly* invoked his right to remain silent. (6PTRT 401-402.) Tom asserted his constitutional rights at every reasonable opportunity.

The Attorney General's remarkable assertion that Tom's encounter with police was "voluntary" (Respondent's Opening Brief ["ROB"] at 39) is contradicted by the record and by the trial prosecutor's arguments that Tom resisted the police. (11RT 1904-06.) The *Salinas* plurality's holding is distinguishable.

B. Tom's Repeated Queries And Assertions Of His Fourth And Fifth Amendment Rights Cannot Be Penalized.

Consistent with *Salinas*, Tom's repeated queries about whether he was free to leave, and the police officers' consistent refusal to permit Tom to leave, were both an assertion of his Fourth Amendment rights and of his related Fifth Amendment right to be free of custodial questioning.

The state argues that probable cause to arrest Tom somehow extinguished his Fourth Amendment rights and thus the prosecutor was free to exploit his invocation and inquiries about his rights as proof of guilt. (Respondent's Reply Brief ["RRB"] at 18-19, citing *People v. Farnam* (2002) 28 Cal.4th 107, 165 and *People v. Roberts* (1992) 2 Cal.4th 271, 311.)[1] But this argument is absurd. Whether a person is detained for Fourth and Fifth Amendment purposes turns on whether a reasonable person would believe that he was free to leave. (*See, e.g., California v. Hodari D.* (1991) 499 U.S. 621, 639 [Fourth Amendment]; *Berkemer v. McCarty* (1984) 468 U.S. 420, 436-440 [Fifth Amendment].) Certainly, one factor in deciding whether a person is detained is whether the person *asked* if he was free to leave, and whether the police refused permission. Yet, the state argues that asking the question is admissible evidence of guilt. Thus, the Attorney General suggests that a suspect cannot establish whether he has been legally detained without waiving his Fourth and Fifth Amendment rights, and permitting the state to use that inquiry to prove his guilt. An assertion of a right, however, is protected by the constitution and cannot be penalized. (*Wainwright v. Greenfield* (1986) 474 U.S. 284, 295, fn. 13; *see Simmons v. United States* (1968) 390 U.S. 377, 393-394 [It is "intolerable that one constitutional right should have to be surrendered in order to assert another."])

The Attorney General's position would also mean that whether a person's assertion

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[1] *Farnum* and *Roberts* do not support the Attorney General's position. The *Roberts* Court suggested that Roberts's claim would *have merit* if he had asserted a Fourth Amendment interest, as Tom did here. (2 Cal.4th at p. 311.) *Farnum* is inapposite, because Tom never refused to comply, but only made valid *inquiries* about his rights. (28 Cal.4th at p. 165.)

of his Fourth and Fifth Amendment rights is protected depends upon factors largely unknowable to the citizen at the time she must assert it. Yet, if the police come to search a home, the fact that the police have obtained a warrant cannot mean that the homeowner had no Fourth Amendment right and that her demand to see the warrant proves her guilt. (*Tompkins v. Superior Court* (1963) 59 Cal.2d 65, 68.)

Moreover, at a roadside, Fourth Amendment issues, there are no "bright line" rules, and factors such as the reason for the investigation, the length of detention, transportation and questioning can transform a consensual encounter into a detention and then a *de facto* arrest. (*See, e.g., United States v. Sharpe* (1985) 470 U.S. 675, 683-686.) Thus, the Supreme Court has repeatedly held that when confronted by the police on the street, a citizen has the right to refuse to cooperate or answer questions, and that such refusals cannot provide additional suspicion or evidence of guilt. (*Florida v. Bostick* (1991) 501 U.S. 429, 437; *Florida v. Royer* (1983) 460 U.S. 491, 497-498; *see Berkemer*, 468 U.S. at p. 439.)

Finally, even if probable cause to arrest could eliminate one's Fourth Amendment rights, it would not eliminate the Fifth Amendment right to be free of custodial questioning. (*See Salinas*, 133 S.Ct. at p. 2180 [no waiver of Fifth Amendment unless a detained defendant fails to claim the privilege after being suitably warned].) Because Tom was detained, there was no waiver of his Fifth Amendment privilege.

C. The *Salinas* Plurality Reinforces The Close Relationship Between The Improper Comments On Tom's Silence And Queries About His Rights.

Because the Fourth Amendment right to be free of unreasonable detention and the

Fifth Amendment right to be free of custodial questioning are closely related, this Court should also review the improper comments on Tom's questions whether he was free to leave, whether he was required to be transported, and whether he was required to take a blood test. The Attorney General asserts that these other claims of error are not before this Court, because the grant of review was limited to the one issue the Attorney General raised–use of Appellant's silence to prove guilt. (RRB at 21.) Yet, Appellant raised these other issues in his Answer, and this Court's grant of review did not limit the issues. This Court "may decide any issues that are raised or fairly included in the petition *or answer*." (Rule 8.516(b)(1) [emphasis added].)

Further, these constitutional violations respond directly to the Attorney General's own arguments that the prejudice from comments on Tom's silence was weak compared to other "specific examples identified by the prosecutor as showing consciousness of guilt." (ROB 50, fn.12, citing 11RT 1904-06.) Yet, these "specific examples" are the other improper arguments penalizing Appellant's constitutionally protected invocations and inquiries. (11RT 1904-06.) The Attorney General thus remarkably argues that one instance of misconduct was harmless because it pales in comparison to other, more prejudicial misconduct, while arguing that this Court cannot address the latter.

Indeed, these other instances of misconduct offer the Court an alternative compelling reason to reverse. Ordinarily, the "principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." (*Santa Clara County Local Transportation Auth. v. Guardino* (1995) 11 Cal.4th

220, 230 [quotation omitted].) Here, the prosecutor plainly violated Tom's Fourth Amendment, Due Process and statutory rights by repeatedly making improper arguments that Tom's guilt was proven by his inquiries about his rights–whether he was free to leave the scene, whether he was required to be transported to the police station or hospital if he was not under arrest, and whether he was required to take a blood test. Thus, this Court may reverse solely on these grounds and defer ruling on the issue of the prosecutor's comments on Tom's silence, or reverse because all of these improper arguments were cumulatively prejudicial.

D. Because Silence Without An Accusation Lacks Relevance, This Court May Also Follow Other Courts And Find Prejudicial State Law Error.

Salinas is also distinguishable because Tom's silence was not in response to any specific accusation. In the absence of a specific question or accusation, a person's silence is substantially more ambiguous than it would otherwise be. (*See Doyle v. Ohio* (1976) 426 U.S. 610, 617 ["every post-arrest silence is insolubly ambiguous"]; *see also United States v. Hale* (1975) 422 U.S. 171, 177.) Indeed, the Attorney General argued the same point. (ROBM 49-50 ["[t]he probative force of appellant's failure to ask about the victims as showing consciousness of guilt was also weak"].)

Moreover, permitting an adverse inference is more unfair where there is no accusation, because it would require the person to *anticipate* every potential argument a prosecutor might make about what an innocent person should have stated in that situation. The unfairness is exacerbated by the *Salinas* Court's focus on the need of a suspect to affirmatively invoke the privilege if not in custody (133 S.Ct. at pp. 2181-84); it will

often be impossible for a person to anticipate the need to invoke the right to silence before a question is asked. Indeed, the state has insisted that the right to silence *cannot* be invoked prior to actual custodial questioning. (ROBM at 35, citing *McNeil v. Wisconsin* (1991) 501 U.S. 171, 182, fn. 3.)

These factors suggest that rather than defining the limits of the Due Process right to be free from prosecutorial arguments that silence and inquiries regarding constitutional rights prove guilt, judicial restraint requires the Court to decide the case on narrower grounds and avoid the constitutional questions. (*Santa Clara County Local Transp.*, 11 Cal.4th at p. 230.) Given the state's concession that Tom's silence was not probative of guilt, this Court can follow other courts in holding such evidence inadmissible under state law, because of its potential for prejudice and lack of relevance. (*See, e.g., Hale*, 422 U.S. at pp. 180-181 ["significant potential for prejudice" outweighs probative value]; *Weitzel v. State* (2004) 384 Md. 451, 863 A.2d 999, 1003-05; *Ex parte Marek* (Ala. 1989) 556 So.2d 375, 382; *People v. DeGeorge* (1989) 73 N.Y.2d 614, 543 N.Y.S.2d 11, 13, 541 N.E.2d 11.)

The adoptive admission rule permits a party's silence to be used against her, only where the party is confronted with an accusation that would reasonably call for a response or denial. When there is no such accusation or imputation of wrongdoing, there is "nothing for defendant to deny." (*People v. Carter* (2003) 30 Cal.4th 1166, 1197-98; Evid. Code, § 1221.) It also well-settled that the rule does not apply where "circumstances . . . lend themselves to an inference that [the person] was relying on the right of silence

guaranteed by the Fifth Amendment to the United States Constitution." (*People v. Preston* (1973) 9 Cal.3d 308, 313-314.) Certainly, Tom's repeated questions about whether he was free to leave, repeated warnings by police that he was not free to leave, and progressively more restrictive detention by the police, lend themselves to an inference that Tom was relying on the Fifth Amendment right of silence. Additionally, Tom could not have asserted the privilege to remain silent about the welfare of the Nissan occupants, without tending to incriminate himself, further indicating that the privilege could be "exercise[d] . . . through silence." (*Salinas*, 133 S.Ct. at p. 2180.) This also permits at least an inference that Tom was relying upon the Fifth Amendment privilege, and that the evidence was thus inadmissible under state law.

Nor can the evidence here be deemed harmless. The use of silence to prove guilt poses a grave threat of prejudice. Further, the trial prosecutor below argued forcefully and in emotional terms that the jury *"should and can absolutely consider"* that Tom's silence about the welfare of the Nissan occupants "points to one thing; his consciousness of his own guilt." (11RT 1904 [emphasis added].) The prosecutor argued that the failure to inquire was "particularly offensive." The prosecutor stressed repeatedly that Tom "never, ever . . . Not once. . . Not once" made that inquiry despite all the officers who had contact with Tom. (11RT 1905-06.) The prosecutor argued this all pointed to the fact that Tom was "scared . . . or too drunk to care" and obsessed with "saving his own skin." (*Ibid.*) Having obtained the conviction herein by stressing that this was important evidence that the jury should "absolutely consider" (11RT 1904), "the State cannot now argue with a

straight face that the evidence upon which it relied so heavily at trial was, in fact, not probative," that the jury likely disregarded the prosecutor's pleas, or that the argument did not reasonably affect the verdict. (*Aguilar v. Woodford* (9th Cir. 2013) 725 F.3d 970, 985.) Further, as set forth in the merits brief, this argument was also prejudicial because it was a bad character, criminal propensity argument. (*People v. Homick* (2012) 55 Cal.4th 816, 865 [bad character evidence is ordinarily prejudicial]).[2]

Notably, the appellate court held that evidence of guilt of grossly negligent homicide was in "equipoise;" indeed, it objectively favored acquittal. Although there was evidence that Tom was speeding, his speed was hotly debated and ranged from ex-police officer Gamino's estimate of 35 mph,[3] to the defense expert's opinion of 49 to 52.5 mph, to the prosecution experts' opinions of 52 to 67 mph. It was uncontested that speeds up to 50 mph were not unsafe.

Even if Tom was speeding, moreover, Ms. Wong was stopped at a stop sign on a small side street and was required by statute to yield to Tom's vehicle on Route 84, unless she assured herself she could enter the intersection safely. (Veh. Code, § 21802a.) Yet, Wong conceded that she was talking on her hand-held cell phone, and that she entered the intersection without seeing Tom's vehicle. Regardless of Tom's speed, because Wong *never saw* Tom's car (which was visible to her had she looked), she never assured herself

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[2] Tom does not claim error under Evidence Code § 1101–"his reference to . . . 'bad character' evidence relates to his argument that its admission was prejudicial." (*See People v. Page* (2008) 44 Cal.4th 1, 48, fn. 21.)

[3] Attorney General's Habeas Opposition at 42.

that she could safely enter the intersection without interfering with Tom's right of way. Her failure to see Tom's vehicle before entering the intersection was either due to looking in the wrong direction (as she told the police), or because she was distracted by her cell phone call–which interferes with the ability to drive safely more than alcohol.

Given that the equivocal evidence of Tom's guilt, the prejudicial nature of the evidence and the prosecutor's emphasis on the evidence in closing argument, it is reasonably probable that absent the error, at least one juror would have voted to acquit Tom. Therefore, the Court may choose to hold that the evidence was prejudicial state law error and reverse on that basis, without reaching the constitutional issues.

The prejudice is even clearer if the Court considers the cumulative prejudice of the prosecutor's improper comments on Tom's questions about his Fourth Amendment rights. Alone or cumulatively, as state law or constitutional error, these errors require reversal.

Finally, the prosecutor also committed egregious misconduct by falsely arguing that there was absolutely no evidence that Tom's headlights were on. The Ninth Circuit confirmed–in another San Mateo case–that this is "textbook prosecutorial misconduct" of federal constitutional dimension. (*Dow v. Virga* (9th Cir. Sept. 5, 2013) --- F.3d ----, 2013 WL 4750062, at *1.)

For all these reasons, this Court should reverse the convictions.

Dated: October 17, 2013

Respectfully submitted,

Marc J. Zilversmit CSBN 132057
Attorney for Appellant Richard Tom

CERTIFICATE OF COMPLIANCE

I, Marc J. Zilversmit, hereby certify that the attached Appellant's Answer to Petition for Review is proportionately spaced, has a typeface of 13 points, and contains 2,799 words.

Dated: October 17, 2013

Marc J. Zilversmit

PROOF OF SERVICE BY MAIL -- 1013(a), 2015.5 C.C.P.

Re: *People v. Richard Tom,* No. S202107

I am a citizen of the United States; my business address is 523 Octavia Street, San Francisco, California 94102. I am employed in the City and County of San Francisco, where this mailing occurs; I am over the age of eighteen years and not a party to the within cause. I served the within:

APPELLANT'S SUPPLEMENTAL LETTER BRIEF

on the following person(s) on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at San Francisco, California, addressed as follows:

ATTN Jeffrey M. Laurence, Esq.*
Attorney General's Office
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

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County of San Mateo
400 County Center
Redwood City, CA 94063

San Mateo District Attorney's Office
400 County Center, 3rd Floor
Redwood City, CA 94063

First District Court of Appeal*
350 McAllister Street
San Francisco, CA 94102

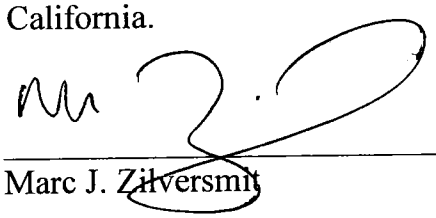
Richard Tom
(Appellant)

ATTN Michael Risher, Esq.
ACLU
39 Drumm Street
San Francisco, CA 94111

[x] BY MAIL: By depositing said envelope, with postage thereon fully prepaid, in the United States mail in San Francisco, California, addressed to said party(ies); **and**

[*] BY PERSONAL SERVICE: By causing said envelope to be personally served on said party(ies), as follows: **[ ] FEDEX [*] HAND DELIVERY [ ] BY FAX**

I certify or declare under penalty of perjury that the foregoing is true and correct. Executed on October 17, 2013 at San Francisco, California.



Marc J. Zilversmit