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November 1, 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 REPLY BRIEF

Dear Chief Justice Tani Cantil-Sakauye and Associate Justices:

The Court has asked for a Supplemental Reply Brief addressing *Salinas v. Texas* (2013) – U.S. –, 133 S.Ct. 2174.

A. Appellant Tom's Interactions With Police Were Not Voluntary As In *Salinas*, But Rather Tom Repeatedly Invoked His Constitutional And Statutory Rights And Unambiguously Communicated That He Desired To End All Interaction With The Police.

In its Supplemental Brief, the Attorney General absurdly contends that "Appellant never affirmatively invoked his right to silence throughout the relevant period of his encounter with the police, either before or after his arrest." (Supp. Brief at pp. 5-6.) A review of the record makes clear, however, that (1) Appellant Tom affirmatively invoked his right to silence when finally given his *Miranda* warnings upon his formal arrest, (2) previously, Tom affirmatively invoked his right to counsel when he was finally asked to make a statement at the police station, and (3) throughout his encounter with police, Tom repeatedly invoked his right to be free of detention and custodial interrogation. At

essentially every opportunity to do so, Tom made clear that he wanted to terminate his interactions with the police.

As the *Salinas* Court reaffirmed, "no ritualistic formula is necessary in order to invoke the privilege." (*Salinas*, 133 S.Ct. at p. 2178, quoting *Quinn v. United States* (1955) 349 U.S. 155, 164.) Although mere silence will not suffice to invoke a right, an invocation of a constitutional right "does not require any special combination of words;" citizens "need not have the skill of a lawyer to invoke" their constitutional rights. (*Quinn*, 349 U.S. at p. 162.) The record thus reveals that:

(1) Officer Price was the second officer at the scene, arriving approximately five minutes after being dispatched at 8:20 p.m. Within ten minutes of arriving, Price was the first police officer to speak with Tom. (6PTRT[1] 325-329.)

(2) Within thirty minutes of arriving, Price contacted Tom in Peter Gamino's car. Tom asked Price if he was free to leave to go home. Price told Tom that he was not free to leave. (6PTRT 326-329; 4RT[2] 685-686.) Thus, after having contact with one officer, Tom explicitly invoked (in an ordinary citizen's terms) his Fourth Amendment right to be free from detention without cause, and was told he was being detained. Further, Tom's request to leave was, in non-lawyer language, an invocation of his Fifth Amendment right to be free of custodial interrogation; *Tom unambiguously stated that he wanted to end his interaction with police.*

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[1] Pretrial Reporter's Transcript.

[2] Reporter's Trial Transcript.

Further, the trial court found at this point, Tom was under *de facto* arrest and in custody for *Miranda* purposes, and that any statement thereafter was inadmissible. (1RT 14-16.) This "mixed question of law and fact" is reviewed under "a deferential substantial evidence standard." (*People v. Moore* (2011) 51 Cal.4th 386, 395.)

(3) At approximately 9:30 p.m., Sergeant Bailey ordered Officer Felker to place Tom in the back of Felker's locked patrol car. (5PTRT 160-164; 3RT 404-406; 4RT 728; Typed Opn. at pp. 6, 16-17.)

(4) While Tom was being held in custody in the back of the locked patrol car, Bailey and Price asked Tom questions without reading Tom his *Miranda* rights first. They asked Tom 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.) Again, in layman's terms, Tom asserted his Fourth and Fifth Amendment rights to be free from custody and custodial interrogation. Again, *Tom unambiguously stated his desire to end his interaction with police.*

(5) At 9:48 p.m., Bailey ordered Officer Felker to transport Tom to the station. (5PTRT 160-166; Typed Opn. at pp. 6, 17.)[3]

(6) Once at the station, at around 10 p.m., after the phlebotomist refused to take a blood sample, Bailey and Price questioned Tom without giving him *Miranda* warnings, asking if Tom would go to the hospital to give a blood test. Tom *again* asked if he was

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[3] The Court of Appeal found that Tom was in custody for *Miranda* purposes at this point. (Typed Opn. at p. 17.)

free to leave to go home. He also asked if he could refuse to give a blood sample. (6PTRT 346-348, 393-394.) Thus, *for the third time*, Tom *unambiguously indicated his desire to terminate entirely his encounter with police*. This was not only an invocation of his Fourth and Fifth Amendment rights, but also of his constitutional and statutory right to refuse to give a blood sample because the police had not arrested him for driving under the influence and had no cause to believe Tom was under the influence.

(7) Within twenty minutes of arriving at the station, Bailey directed Price and Officer Gomez to take a statement from Tom. At that point, Tom stated that he would not give a taped statement, and then said he would not give any statement without counsel present, *explicitly* invoking his Fifth and Sixth Amendment rights to silence and to counsel. (6PTRT 358-353, 390-391.)

(8) Shortly thereafter, Tom was formally arrested and given his *Miranda* warnings in which the state implicitly promised Tom that the state would *not* use his silence against him (*Doyle v. Ohio* (1976) 426 U.S. 610, 618-619); Tom *explicitly* invoked his right to remain silent, declaring he would not make a statement. (6PTRT 401-402.)

Thus, this case bears no resemblance to *Salinas*. There, the police visited Salinas *at his home* and asked Salinas to come to the police station and answer questions. Salinas voluntarily agreed to hand over his shotgun for ballistics testing and to accompany police to the station for questioning. The parties agreed that the one hour "interview was noncustodial." Salinas answered all the police questions until he was specifically asked

whether his shotgun "would match the shells recovered at the scene of the murder" at which point Salinas did not answer and acted nervous. (*Salinas*, 133 S.Ct. at p. 2178.)

To the extent Tom was required by *Salinas* to assert his constitutional rights, he did so repeatedly, and Tom was explicit about his rights each time he was specifically presented with an opportunity to do so. Tom's thrice repeated requests to be permitted to leave to go home were *unambiguous assertions of his desire to entirely end his interaction with the police*. Each time the police stated that they wanted to transport Tom to the police station, and to the hospital, Tom *further objected that he wanted to go home*. When the police asked Tom take a blood test despite the lack of arrest or suspicion of being under the influence, *he asked if he could refuse*. When eventually the police specifically asked Tom to make a statement, Tom declared that he *would not make a statement without counsel present.* When the police *finally* warned Tom per *Miranda* that he had the right to remain silent, Tom *unambiguously invoked his right to remain silent.*

Every time the police questioned Tom about taking a blood test, being transported to the station, being transported to the hospital or giving a statement, Tom consistently stated his desire "to terminate the interrogation and leave," the essence of a Fifth Amendment invocation. (*J.D.B. v. North Carolina* (2011) 131 S.Ct. 2394, 2402, quoting *Thompson v. Keohane* (1995) 516 U.S. 99, 112.)

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B. The Prosecutor's Questions And Arguments Asked The Jury To Find Tom Guilty Based Upon His Silence And Invocations Of His Rights *Throughout The Entire Night*, Including The Time After Tom Asked If He Could End His Encounter With The Police By Going Home, And The Time After He Expressly Invoked His Rights To Counsel And To Silence.

The Attorney General's attempts to characterize the prosecutor's improper comments on Tom's silence and invocations of his rights as applying only to the time period before he was detained is also absurd. The prosecutor asked Officer Price whether, during the entire evening, the "roughly three hours" from the time of the accident at "8:20 to 11:30," "did the defendant ever ask you about the condition of the occupants of the Nissan?" Price answered, "No." (4RT 706-707; *see* 4RT 688-689 [asking Price about Tom's reaction to being requested to be transported to police station]; 4RT 685[asking Price about Tom's request to leave when in Gamino's car, and whether Tom had asked about the Nissan's occupants].) Similarly, the prosecutor asked Sergeant Bailey whether during "any of this time" including after Tom refused to make a statement, did the "defendant ever ask you about the occupants of the other vehicle." (3RT 423-424.)

Similarly, in argument, the prosecutor made clear that the jury *should and can absolutely consider*" how Tom acted during the entire evening. (11RT 1904 [emphasis added].) The prosecutor expressly asked the jury to consider conduct which she found "*particularly offensive*" that Tom "*never, ever* asked, hey how are the people in the other car doing? *Not once. . . . Not once*. Do you know how many officers that he had contact with that evening? *Not a single one* said that, hey, the defendant asked me how those people were doing." (11RT 1905-06 [emphasis added].) The prosecutor also repeatedly

told the jury to consider as proof of guilt, Tom's inquiries about his constitutional and statutory rights–whether he was free to end his encounter with the police and leave to go home, whether he was required to be transported to the station, and whether he could refuse a blood test. The prosecutor repeatedly and improperly argued that Tom's silence and assertions of these rights proved his consciousness of guilt, that he knew "he had done a very, very, very bad thing," and that he was "too drunk to care." (11RT 1905-06.)

Having argued that the jury should "absolutely consider" Tom's silence and assertions of his rights throughout the entire evening, a period extending beyond his express invocations of his right to counsel and to silence at the police station, "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.)

C. The Evidence And Arguments About Tom's Silence And Assertions Of His Rights Resulted In Multiple Prejudicial Constitutional Errors.

The prosecutor's elicitation of evidence of Tom's assertions and queries about his rights thus undeniably violated numerous constitutional and statutory rights.

(1) The state committed plain *Doyle* error by eliciting evidence and arguing that Tom's guilt was proven by his silence about the welfare of the Nissan occupants throughout the entire evening–thus, including the time *after* Tom had been given his *Miranda* warnings and was implicitly promised that his silence would not be used against

him. Plainly, Tom's declaration that he would not make a statement, invoked his right to remain silent and the state could not use this silence as proof of guilt. (*Doyle*, 426 U.S. at pp. 618-619.)

(2) The state also clearly committed constitutional error per *Griffin v. California* (1965) 380 U.S. 609, 614 and *In re Banks* (1971) 4 Cal.3d 337, 351-352, by penalizing Tom's silence after he was detained in custody, but before he was read his *Miranda* rights. The evidence and argument that Tom's silence about the welfare of the Nissan occupants referred to Tom's silence:

(A) At the police the station. Yet, shortly after arriving at the station, Tom invoked his Fifth and Sixth Amendment rights by declaring that he would not make a statement without counsel present. His silence thereafter could not be penalized. (*Wainwright v. Greenfield* (1986) 474 U.S. 284, 295, fn. 13 ["silence . . . includes the statement of a desire to remain silent as well as of a desire to remain silent until an attorney has been consulted"]; *Griffin*, 380 U.S. at p. 614; *Banks*, 4 Cal.3d at pp. 351-352.)

(B) While detained in the locked patrol car. Yet, when the police questioned Tom about going to the station for a blood test, Tom stated his desire "to terminate the interrogation and leave," the essence of a Fifth Amendment invocation, but was held in custody. His silence after this invocation could not be penalized. (*J.D.B.*, 131 S.Ct. at p. 2402; *see Griffin*, 380 U.S. at p. 614; *Banks*, 4 Cal.3d at pp. 351-352.)

(C) While detained at the scene in Peter Gamino's car. Within thirty minutes of the accident, Tom stated his desire to Officer Price "to terminate the interrogation and leave," but was detained at the scene. Having invoked his rights, his silence thereafter could not be penalized. (*J.D.B.*, 131 S.Ct. at p. 2402; *see Griffin*, 380 U.S. at p. 614; *Banks*, 4 Cal.3d at pp. 351-352.)

(3) Further, in light of *Salinas's* requirement that suspects affirmatively assert their constitutional rights, it was improper to penalize Tom's repeated affirmative assertions of his right to end his encounter with the police and his questions whether he was free to leave, by arguing that these *assertions* and *inquiries* of his Fourth Amendment and Fifth Amendment rights proved his guilt. (*Tompkins v. Superior Court* (1963) 59 Cal.2d 65, 68; *see Greenfield*, 474 U.S. at p. 295, fn. 13; *Griffin*, 380 U.S. at p. 614.)

(4) The prosecutor's repeated elicitation of evidence about Tom's inquiries about whether he could refuse a blood test and transportion to the station and the hospital, also unquestionably violated his constitutional and statutory rights, because Tom was not arrested for driving under the influence and the police had no suspicion he was under the influence. (*See, e.g., Schmerber v. California* (1966) 384 U.S. 757, 769-770 [Due Process violation to take blood test without probable cause]; Veh. Code, § 23612, subd. (a)(1)(A) [permitting blood draw only if "lawfully arrested" for DUI offense]; *People v. Jackson* (2010) 189 Cal.App.4th 1461, 1466-70 [error to admit evidence of refusal of PAS test where statute permits refusal]; *Dunaway v. New York* (1979) 442 U.S. 200, 206-216 [Fourth Amendment prohibits transporting suspect who is not under arrest].)

(5) Further, Tom's statements about whether he could go home, whether he was required to go to the police station and the hospital, and whether he could refuse a test were all in response to police questions while Tom was detained and before Tom was given his *Miranda* warnings. Thus, as the trial court ruled, all these statements Tom made after Price first told him that he could not leave the scene, were inadmissible under *Miranda*. (1RT 14-16.) Because this mixed fact and law finding is supported by substantial evidence, this Court must uphold the trial court's finding. (*Moore*, 51 Cal.4th at p. 395.)

(6) Because the state now concedes that there was little or no probative value to the evidence and argument regarding Tom's failure to inquire about the welfare of the Nissan's occupants and his failure to anticipate that the state would consider this silence as proof of guilt, it was statutory error to admit the evidence and permit this argument.

Finally, whether considered alone or together, given the weak evidence of guilt, and the prosecutor's repeated emphasis on the importance of this evidence to prove Tom's consciousness of guilt, his state of intoxication, and his reckless disregard of others, the state cannot demonstrate that these errors were harmless under either the constitutional or statutory standard. (*See Dow v. Virga* (9th Cir. 2013) 729 F.3d 1041, 1050 [where evidence of guilt was weak, the prosecutor's improper argument that defendant's invocation of right to fair line-up proved consciousness of guilt was prejudicial because it gave jury a "new reason for the jury to convict him.")

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CONCLUSION

The state's continued assertion that Tom's interactions with the police were voluntary is disproven by the trial court's finding that Tom was under *de facto* arrest, and by the record of Tom's repeated assertions of his constitutional and statutory rights. The prosecutor's use of Tom's silence and his repeated assertions of his rights as proof of guilt violated numerous constitutional and statutory rights.

The state's arguments, moreover, beg the question of what can citizens–unschooled in the law and perhaps lacking English proficiency–do when confronted at an accident scene to protect their rights, without having their questions, attempted invocation of rights, or silence being used as proof of guilt? The Attorney General's position would permit prosecutors to urge that essentially every reaction to an encounter with police–a statement or failure to make a statement, an invocation of a right or a question about a right–proves guilt.

Where, as here, the evidence of guilt was weak and the prosecutor emphasized the constitutional and statutory errors as proof of guilt in her argument, the convictions cannot stand.

Dated: November 1, 2013

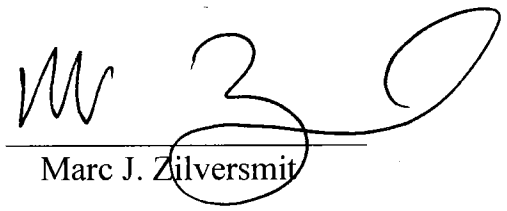
Respectfully submitted,

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 2,797 words.

Dated: November 1, 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
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Clerk of the Superior Court
County of San Mateo
400 County Center
Redwood City, CA 94063

San Mateo District Attorney's Office
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First District Court of Appeal*
350 McAllister Street
San Francisco, CA 94102

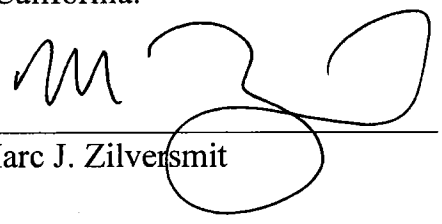
Richard Tom
(Appellant)

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 November 1, 2013 at San Francisco, California.



Marc J. Zilversmit