IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	No. S231009
	)	
v.	)	2d Crim. B257775
	)	
RANDOLPH FARWELL,	)	(Los Angeles County Superior
	)	Court No. TA130219)
Defendant and Appellant.	)	
	)	

APPELLANT'S REQUEST FOR PERMISSION TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

JONATHAN B. STEINER
Executive Director
(State Bar No. 48734)

CALIFORNIA APPELLATE PROJECT
520 S. Grand Ave., 4th Floor
Los Angeles, CA 90071
Telephone: (213) 243-0300
Fax: (213) 243-0303
E-mail: Jon@lacap.com

Attorney for Defendant/Appellant

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REQUEST

In *People v. Daniels* (2017) 2017 DJAR 8598, and *People v. Sivonxxay* (2017) 3 Cal.5th 1151, this court discussed at length the critical constitutional warnings that must be given by the trial court and the necessity of the express, voluntary and intelligent waivers that must be taken before a defendant can be permitted to waive a jury trial for a full and fair court trial. See also *People v. Merritt* (2017) 2 Cal.5th 819.

Based on the court's opinions in these cases, the need to discuss their relevance to the case at bar and elaborate on the constitutional issues raised therein and in the previous briefing, appellant requests permission from this court to file the Supplemental Brief attached hereto. Appellant has also done additional research on the issues presented in

this case and believes it necessary to submit new authorities.

In the first argument raised in appellant's Opening Brief, it was argued that, as the trial court gave no admonitions and took no express, voluntary and intelligent waivers, the "totality of circumstances" approach to the evaluation of prejudice articulated in *People v. Howard* (1992) 1 Cal.4th 1132 should not apply to this "silent record" case, and the error was reversible *per se*. The first argument in this supplemental brief concentrates specifically on the failure of the trial court here to admonish and secure an express, knowing and intelligent waiver from the defendant regarding his constitutional right to a jury trial, and that this failure itself requires a reversal.

No party disputes that the violation of constitutional rights is at issue here. In appellant's Opening Brief, Heading II(B)(2), p. 22, appellant raised the concern that, should the court not accept the *per se* argument above, the court would have to resolve the issue of the "standard of prejudice" to be applied here. When this court has used the *Howard* approach, it has not determined whether the "standard of prejudice" to be applied is the *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705-711, 87 S.Ct. 8241] "beyond a reasonable doubt" standard or the *People v. Watson* (1956) 46 Cal.2d 818, "preponderance" standard. This issue should be confronted. See *People v. Sapp* (2003) 31 Cal.4th 240, 268; *In re S. N.* (2016) 2 Cal.App.5th 665; *In re Monique T.* (1992) 2 Cal.App.4th 1372, 1377.

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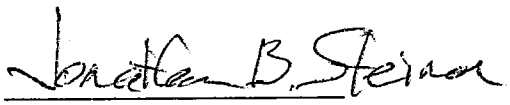
Dated: October 11, 2017

Respectfully submitted,



Jonathan B. Steiner
Executive Director

California Appellate Project/
Los Angeles

Attorney for Defendant/Appellant
Randolph Farwell

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APPELLANT'S SUPPLEMENTAL BRIEF

ARGUMENT

I.

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

Currently, the failure of the trial court to admonish the defendant regarding his right to a jury trial in order to have a full and fair court trial leads to a structural error that is reversible *per se*. See *People v. Daniels, supra* (lead opinion); *People v. Ernst* (1994) 8 Cal.4th 441. In *People v. Sivongxxay, supra*, at 169, this court acknowledged the critical

importance of adequate jury trial waivers and "the value of a robust oral colloquy in evincing a knowing, intelligent and voluntary waiver of a jury trial" and held that the warnings given and waivers obtained resulted in a constitutionally adequate waiver of the defendant's right to a jury trial there.

In this case, respondent has argued that if the trial court fails to obtain an express, voluntary and intelligent waiver of a jury trial and pleads guilty, the "totality of circumstances" test under *People v. Howard* (1992) 1 Cal.4th 1132 should apply. The "anomaly" in law created by such a result was noted in *Ernst, supra.*

In *People v. Cross* (2015) 61 Cal.4th 164, 179, this court noted that it had not decided "the precise contours of the advisement" of the *Boykin-Tahl-Yurko*[1] rights that are required under the California Constitution, referring to these rights as "due process trial rights." The court left that decision "for another day." This is the time for the court to require full advisement and an express, voluntary and intelligent waiver of the due process right to a jury trial and protect that right in the context of a defendant who is about plead guilty.

In *People v. Cross, supra*, this court stated that "Our opinion in [*People v.*] *Vera* [(1997) 15 Cal.4th 269,] strongly implied that defendants have a due process right to receive a fair trial on the truth of prior convictions." (15 Cal 4th at 281). The *Cross* court

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[1]*Boykin v. Alabama* (1969) 395 US 238 (22 L. Ed. 274, 89 S. Ct. 1709); *In re Tahl* (1969) 1 Cal.3d 122, 130; *In re Yurko* (1974) 10 Cal.3d 857.

further stated that "The same constitutional standards of voluntariness and intelligence apply when a defendant forgoes a trial on a prior conviction allegation."] (15 Cal.4th at 280). *In re Yurko* (1974) 10 Cal.3d 857.

Ernst articulates a clear exception to the *Howard* "totality of circumstances" rule based on the court's interpretation of rights enshrined in the California Constitution. This court's determination that the "due process" clause requires an automatic reversal when there is no express, knowing and intelligent jury waiver as in the case at bar would resolve the disturbing anomaly noted in *Ernst*. As noted in *Ernst*,

> It has long been established that the denial of the right to a jury trial constitutes a " 'structural defect[]' in the judicial proceedings that, by its nature, results in a "miscarriage of justice." (8 Cal.4th at 449)

In *People v. Merritt* (2017) 2 Cal.5th 819, 830, the trial court failed to fully instruct the jury on the crime of robbery, this court held that "...the *total* deprivation of a jury trial would be structural, that would be reversible per se." There was a total deprivation of a jury trial in the case at bar that this court should hold to be reversible error *per se*.

In the context of a defendant who is about to plead guilty, *Howard* and its progeny have applied the "totality of circumstances" test only to the failure of the trial court to warn and obtain express waivers of the rights to avoid self-incrimination and to confront and cross-examine witnesses. That test has not been applied when the jury waiver was not express, voluntary and intelligent. Based on a careful, factual review of previous

precedents, the *Howard* test has not been applied to the most basic rights - the right to a jury trial.

In *Howard,* the defendant was warned about and adequately waived his right to a jury trial and to confront and cross-examine witnesses. The trial court only failed to warn the defendant against his right against self-incrimination. Thus, *Howard* did not apply the "totality of circumstances" rubric to facts involving a jury trial waiver while affirming the judgment.

In the silent record cases, as this case is, there are no warnings or express, voluntary and intelligent waivers of any of the requisite rights, including the right to a jury trial.

In *People v. Mosby* (2004) 33 Cal.4th 353, this court held that inadequate waivers of the right against self-incrimination and the right to confront and cross-examine can be reviewed via the "totality of circumstances" test. However, the *Mosby* court did not approve a single case in which the right to a jury trial was not express, knowing and intelligent. See *People v. Moore* (1992) 8 Cal.App.4th 411; *People v. Johnson* (1993) 15 Cal.App.4th 169; *People v. Stills* (1994) 29 Cal.App.4th 1766, 1771; *People v. Campbell* (1999) 76 Cal.App.4th 305, 310. See also *People v. Little* (2004) 115 Cal.App.4th 776, 779-780, and *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1421, for other silent record cases which relied on *Mosby* to reverse a judgment where there was a failure of the trial court to obtain an valid jury trial waiver. *People v. Cross, supra,* is the most recent

in this line of "silent record" cases.

In *Mosby* itself, there was a model waiver of a jury trial, one with an admonition and express waiver of the jury trial right. The defendant there argued that there had been no warnings or express waivers of either the right against self-incrimination or the right to confront and cross-examine witnesses. *Mosby* applied the *Howard* "totality of circumstances" test and affirmed the trial court's judgment on those facts.

Mosby could not be a plainer example of the critical and determining importance given to the question of whether there was a waiver of a jury trial. The same is true of *People v. Sivongxxay, supra, and People v. Daniels, supra.* Finally, in *Cross*, this court cited with approval *People v. Shippey* (1985) 168 Cal.App.3d 879, an earlier "silent record" case and disapproved *People v. Witcher* (1995) 41 Cal.App.4th 223, a case which reversed the trial court although there had been a jury trial waiver. (61 Cal.App.4th at 176)

In the cases disapproved by *Mosby*, the facts showed that there was a constitutionally adequate jury trial waiver in all of them. All involved an "incomplete *Boykin-Tahl* Advisement," which passed the *Howard test* because all involved the failure of the trial court to warn and obtain an express waiver of the right against self-incrimination and right to confront and cross-examine. (33 Cal 4th at 362-364). But all included an adequate waiver of the right to a jury trial. (See *People v. Howard* (1994) 25 Cal.App. 4th 1660 [defendant advised of right to jury trial but not rights against self-

incrimination or to confront and cross-examine witness]; *People v. Garcia* (1996) 45 Cal.App. 4th 1242 [same] *People v. Carroll* (1996) 47 Cal.App.4th 892 [same]; *People v. Torres* (1996) 43 Cal.App.4th 1073 [same].

Thus, this court should interpret the "due process" clause of the California Constitution to remove the illogical anomaly acknowledged in *Ernst* and require reversal in such guilty plea cases. The ultimate quality and equity of the administration of justice and a fair determination of guilt or innocence is required by the "due process" clause of the California Constitution.

This conclusion follows because the express, knowing and intelligent waiver of the right to a jury trial is at least as constitutionally significant to a defendant who is about to plead guilty and get no trial at all than it is to the defendant who waives jury to obtain a court trial. The latter at least gets a full and fair trial before the trial court. The former does not.

II.

SHOULD THIS COURT DECIDE IT NEEDS TO FOLLOW THE *HOWARD* APPROACH, THE PROPER "STANDARD OF PREJUDICE" IS THE "BEYOND A REASONABLE DOUBT" STANDARD OF *CHAPMAN V. CALIFORNIA*

If, for any reason, this court does not accept the arguments made in the Opening Brief and in this brief regarding whether there should be any analysis of whether the trial court's failure to get express, knowing and intelligent waivers requires reversal, the court needs to decide the applicable standard of prejudice. The opinions of this court do not discuss what the applicable "standard of prejudice" is: either the *Chapman v. California, supra,* "harmless beyond a reasonable doubt" standard or the *People v. Watson, supra* "preponderance of evidence" standard.

In appellant's Opening Brief, IIB2, p. 22, appellant argued that the "harmless beyond a reasonable doubt" standard is applicable. *People v. Sapp, supra,* is a case in which this court acknowledged that, were it not for the enactment of article I, section 28 of the California Constitution, the approach to determine the voluntariness of a confession was a factual determination of the "totality of the circumstances" with the "standard of prejudice" requiring the prosecution to prove voluntariness "beyond a reasonable doubt." (31 Cal.4th at 267.)

The application of article 1, section 28, "prohibits the exclusion in criminal cases of relevant evidence not required to be excluded under the federal Constitution." This case does not involve the exclusion of evidence or findings of facts by the trial judge. It

involves a determination by this court, using the "totality of circumstances" analysis of the deprivation of the right to trial by jury, confrontation and self-incrimination. Thus, there is no impediment to applying the "beyond a reasonable doubt" standard to determine whether a judgment must be reversed under the "due process" clause of the California Constitution.

In *In re S. N.* (2016) 2 Cal.App.5th 665, 672, the trial court did not follow the procedures required by the due process clause as outlined in the California Rules of Court in obtaining express waivers from a mother of a dependent child of her constitutional right to a contested jurisdictional hearing. Before allowing such a submission, the juvenile court must advise the mother that she has a right "to receive a hearing on the issues raised by the petition, to assert any privilege against self-incrimination, to confront and cross-examine, to compel witnesses' attendance, and to have the child returned to her if the court finds that the child does not come within the jurisdiction of the juvenile court..." (*Id.* at 671.)

The articulation of these rights were based on *In re Tahl, supra.* The *In re S. N.* court held that, as parent's fundamental right to care for and have custody of the child was at stake here, the error of the trial court was of "constitutional dimension." Thus, the appellate court could affirm the trial court's judgment "only if the error is harmless beyond a reasonable doubt." (*Id.,* at 672.) See also *In re Monique T.* (1992) 2 Cal.App.4th 1372, 1376-1377, the first case which adopted the "standard of prejudice" in

this type of case to be the *Chapman* standard.[2]

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[2]/ In *In re Patricia T.* (2001) 91 Cal.App.4th 400, 404, a case decided 9 years after *In re Monique T.*, the court incorrectly noted that there was no case authority on the issue determined in *Monique T.* That court noted the relevance of *In re Tahl, supra,* and adopted the *Howard* approach without discussing the appropriate "standard of prejudice" and simply affirmed.

CONCLUSION

There is one other very important point made in *In re S. N.* That court stated that in addition to obtaining the requisite express, knowing and intelligent waivers, the trial court must find and state on the record that "it is satisfied that the parent understands the nature of the allegations and the direct consequences of the admission, and understands and knowingly and intelligently waives the rights" at issue. (*Id.*)

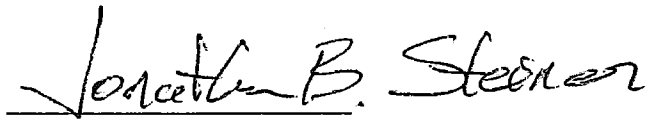
It would be salutary for this court to adopt this requirement in guilty plea situations, either as required by due process or through its powers to set standards for the procedures applied in all California courts. Adopting such a rule would very likely require trial courts to be more responsive to and conscious of the requirements of *In re Tahl, supra.*

If trial courts were required to make such factual findings, it is hard to imagine that they would fail to give the constitutionally required admonitions and to obtain the constitutionally required express, voluntary and intelligent waivers that have caused this court and the intermediate appellate courts of California to have to resolve numerous appeals based on *In re Tahl, supra,* and *In re Yurko, supra,* arguments. Such a rule might, thus, cut down on the appellate caseload in California.

Ultimately, this court should hold the trial court's error here to be reversible *per se*. Otherwise, the court should hold that the *Chapman* "standard of prejudice" should apply when courts utilize the *Howard* approach.

Dated: October 11, 2017

Respectfully submitted,



Jonathan B. Steiner
Executive Director

California Appellate Project/
Los Angeles

Attorney for Defendant/Appellant
Randolph Farwell

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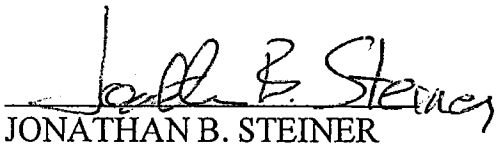

JONATHAN B. STEINER

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is 520 S. Grand Avenue, 4th Floor, Los Angeles, California 90071. I am employed by a member of the bar of this court.

On October 19, 2017, I served the within

APPELLANT'S REQUEST FOR PERMISSION TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

in said action, by emailing a true copy thereof to:

Xavier Becerra, Attorney General
docketingLAawt@doj.ca.gov

and by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California.:

Court of Appeal
Division Five
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013
(213) 830-7000
(e-filed)

Clerk of the court
for delivery to:
The Honorable Paul Bacigalupo, Judge
Los Angeles County Superior Court
Dept. O
6230 Sylmar Avenue
Van Nuys, CA 90401

Randolph Farwell
AU-1869
Tallahatchie County Correctional Facility
415 U.S. Highway 49 North
Tutwilwer, MS 38963

Kent S. Scheidegger
Kymberlee C. Stapleton
Criminal Justice Legal Foundation
2131 L Street
Sacramento, CA 95816

I declare under penalty of perjury that the foregoing is true and correct.

Executed October 19, 2017, at Los Angeles, California.

Jackie Gomez