IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

JOSHUA CROSS,

Defendant and Appellant.

S212157

Third Appellate District, No. C070271
Sacramento Superior Court, Nos. 09F06395, 11F03888
Honorable Greta C. Fall, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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Joshua Cross

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

CALIFORNIA CASES

STATE STATUTES

MISCELLANEOUS

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
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APPELLANT'S OPENING BRIEF ON THE MERITS

STATEMENT OF ISSUE ON REVIEW

Appellant hereby addresses the following issue, on review in this Court: Did the trial court err in failing to advise defendant in accordance with *In re Yurko* (1974) 10 Cal.3d 857 before accepting a defense stipulation that he had a prior conviction for an offense that exposed him to an increased sentence under Penal Code[1] section 273.5, subdivision (e)(1)?

[1] All statutory references are to the Penal Code unless otherwise stated.

INTRODUCTION

The Court of Appeal in this case found that a prior conviction for domestic violence under Penal Code section 273.5, subdivision (e)(1) is not an enhancement, but is a "sentencing factor" authorizing the trial court to impose an alternate sentencing scheme. (*People v. Cross* (2013) 216 Cal.App.4th 1403, 1408.) On that basis, the court concluded that a stipulation to a prior conviction under that section does not require a trial court to engage in the *Boykin-Tahl* advisement and waiver process. (*Id.* at p. 1410.)

However, the Court of Appeal's holding makes a distinction without a difference that would only serve to confuse trial courts on when to follow the true and tried approach of *Boykin-Tahl*. This Court can resolve the confusion and create a bright line for trial courts to follow. *Boykin-Tahl* should apply whenever a defendant enters into a stipulation or admission to a prior conviction that exposes him to a greater sentence–regardless of whether the prior conviction is classified as an enhancement or alternate sentencing scheme. Such a rule would be consistent with this Court's holding in *In re Yurko* (1974) 10 Cal.3d 857, mandating a trial court to undergo the advisement and waiver process whenever a defendant admits to prior allegations that subject him to increased punishment. As noted in that

case decades ago: "[T]he practical aspects of a finding of prior convictions may well impose upon a defendant additional penalties and sanctions which may be even more severe than those imposed upon a finding of guilty without the defendant having suffered the prior convictions." (*In re Yurko, supra*, 10 Cal.3d at p. 832.)

In this case, there can be no question that Mr. Cross' stipulation to section 273.5, subdivision (e) subjected him to a longer period in prison, through the enhanced triad prescribed in that section. There is no meaningful difference between his stipulation and Yurko's stipulation to a prior conviction under the habitual offender statute. (Cf. *In re Yurko, supra*, 10 Cal.3d at p. 862 [foreclosing the possibility of probation or extending the time before a defendant is eligible for parole].) Thus, *Yurko* must be read to apply equally in this case.

STATEMENT OF THE CASE

On July 1, 2011, the Sacramento County District Attorney filed a complaint alleging the following counts against appellant:

> (1) Infliction of corporal injury against the parent of petitioner's child within the meaning of section 273.5, subdivision (a), a felony;
>
> (2) First degree robbery within the meaning of sections 211 and 212.5, a felony;
>
> (3) Unjustifiable infliction of physical or mental suffering to a child within the meaning of section 273a, subdivision (b), a misdemeanor.

(1 CT 12-13.)

The complaint further alleged that appellant had suffered a previous conviction under section 273.5, subdivision (a), which enhances the potential sentence for count one under section 273.5, subdivision (e)(1). (1 CT 13.)

On August 3, 2011, following a preliminary hearing where appellant was held to answer the charges, the magistrate ordered the complaint to be deemed an information. (1 CT 14.)

A jury trial commenced, and during the proceedings the parties stipulated that appellant had been previously convicted under section 273.5, subdivision (a). (1 RT 85-86.) The record does not reflect any advisement or waiver of appellant's rights. (1 RT 85-86.)

On November 9, 2011, a jury convicted appellant on counts one and three, but was unable to reach a verdict on Count Two. (1 CT 10.) On November 10, the trial court dismissed count two on motion of the prosecution. (1 CT 10.)

On December 16, 2011, the trial court sentenced appellant to prison. On count one, the court selected the upper term of four years, but pursuant to section 273.5, subdivision (e)(1), because of appellant's prior domestic violence conviction, the trial court elevated the upper term to five years. On count three, the trial court imposed six months in county jail, to be served consecutively upon appellant's release from prison. (1 CT 11, 167.)

STATEMENT OF FACTS

On May 20, 2011, early in the morning, appellant went to the apartment of Mya Welch. Appellant and Welch previously dated and have two children together. (1 RT 33-34.) Welch woke up to find appellant in her bedroom. (1 RT 38-39.) When appellant asked Welch for her cell phone, she refused because she thought appellant would become angry if he saw text messages and calls on the phone from her boyfriend. (1 RT 40-41.)

Appellant tried to wrestle the phone away from Welch. During the struggle he hit and slapped her in the face. (1 RT 41-43.) He choked her and threw her onto the floor–causing the phone to fly out her hands. (1 RT 43.) He then picked up the phone and read through the call log and text messages. When he saw the numbers of the people with whom she had been talking and texting, he became angy. He struck Welch again. (1 RT 43.)

Welch's children (son, 2 years old, and daughter, 4 months old) were in the bedroom during the incident involving the phone. (1 RT 43, 45.) Welch's son awoke and cried during the incident, and Welch believed her daughter woke up as well. (1 RT 45.)

Appellant walked into the kitchen and called the male who

exchanged texts with Welch, and challenged him to a fight. (1 RT 45.) After getting off the phone, appellant returned to Welch's bedroom, went through Welch's purse and took around $170. (1 RT 46.)

Welch asked appellant to return her phone and money. Appellant initially refused, but later said he would bring her things back to her. (1 RT 47.)

Welch switched her wireless service to her older cell phone and called appellant to demand the return of her phone and money. However, appellant refused. (1 RT 49.) The altercation left Welch with scratches, a bump on her forehead, and redness on the inside of her lip. (1 RT 49-51.)

The prosecution also presented evidence regarding several prior domestic violence incidents involving appellant and Welch. (1 RT 57, 68, 153.)

ARGUMENT

I

THE TRIAL COURT ERRED IN FAILING TO ADVISE MR. CROSS IN ACCORDANCE WITH *IN RE YURKO*, BEFORE ACCEPTING A DEFENSE STIPULATION THAT HE HAD A PRIOR CONVICTION UNDER PENAL CODE SECTION 273.5, SUBDIVISION (E)(1), IN VIOLATION OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Under *In re Yurko*, supra, 10 Cal.3d 857, the trial court was required to advise Mr. Cross of his "*Boykin-Tahl*"[2] rights, prior to accepting a defense stipulation that he had a prior conviction under Penal Code section 273.5, subdivision (e)(1). The trial court's failure to advise Mr. Cross amounted to reversible error and violated due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 7 of the California constitution.

A. The *Yurko* case

As this Court noted in *People v. Adams* (1993) 6 Cal.4th 570, *In re Yurko* "was the first case in which this court was called upon to consider

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Under *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122, when a trial court accepts a guilty plea the record must contain on its face direct evidence that the accused was aware, or made aware, of his right to confrontation, to a jury trial, and against self-incrimination. (*Boykin, supra,* 395 U.S. at p. 242; *Tahl, supra,* 1 Cal.3d at p. 132.)

the applicability of the *Boykin-Tahl* requirements to a defendant's plea to an allegation other than one charging commission of a criminal offense." (*Id.* at p. 576.) *Yurko* involved former section 644, the "habitual offender" statute (since repealed). In that case, the prosecution filed an amended information on the day of trial alleging the defendant had suffered three prior felony convictions. The defendant admitted the prior convictions upon the advice of his attorney. His case proceeded to trial and the jury convicted him of first degree burglary. At sentencing, because of his admission to the prior convictions, he was adjudged an habitual criminal and sentenced to imprisonment for life under former section 644. (*Yurko, supra,* 10 Cal.3d at p. 860; see also *Adams, supra,* 6 Cal.4th at pp. 576-577.)

This Court held that a defendant must be advised of his *Boykin-Tahl* rights before a court accepts the defendant's admission that he has suffered a prior felony conviction. "The accused must be told that an admission of the truth of an allegation of prior conviction waives, as to the finding that he has indeed suffered such convictions, the same constitutional rights waived as to a finding of guilt in case of a guilty plea." (*Yurko, supra*, 10 Cal.3d at p. 863.)

In so holding, this Court explained:

> Undoubtedly, the particular rights waived by an admission of the truth of the allegation of prior convictions are important. Although there is not at stake a question of guilt of a substantive crime, the practical aspects of a finding of prior convictions may well impose upon a defendant additional penalties and sanctions which may be even more severe than those imposed upon a finding of guilty without the defendant having suffered the prior convictions. Thus a finding of prior convictions may foreclose the possibility of probation (§ 1203), may extend the term for the basic crime to life imprisonment (§ 644), and may substantially extend the time served on such a life sentence before the defendant becomes eligible for parole (§§ 3046-3048.5).

(*In re Yurko, supra*, 10 Cal.3d at p. 862.)

In this case, just as former section 664 did in *Yurko*, section 273.5, subdivision (e) has the practical effect of additional penalties and sanctions. That section provides in pertinent part that "Any person convicted of violating this section for acts occurring within seven years of a previous conviction under subdivision (a)" is subject to a sentencing triad of two, four, or five years (as opposed to two, three or four years otherwise specified in subdivision (a) of the statute). (§ 273.5, subd. (e)(1).)[3] Thus, stipulating to the truth of a prior conviction under that section subjects the defendant to a longer period in prison. This effect falls well-within the type of

---

[3] Under amendments to section 273.5 that took effect on January 1, 2014, subdivision (f) was substituted for subdivision (e). Thus, the provision relevant to the issue is now found under section 273.5, subdivision (f)(1).

"additional penalties" contemplated by *Yurko* (e.g., foreclosing the possibility of probation or extending the time before a defendant is eligible for parole). (*In re Yurko, supra,* 10 Cal.3d at p. 862.)

"Because of the significant rights at stake in obtaining an admission of the truth of allegations of prior convictions, which rights are often of the same magnitude as in the case of a plea of guilty, courts must exercise a comparable solicitude in extracting an admission of the truth of alleged prior convictions." (*In re Yurko, supra*, 10 Cal.3d at p. 863.) Here, there is no meaningful difference between the effect of stipulating to a prior conviction under section 273.5, subdivision (e)(1), and stipulating to a prior conviction under the habitual offender statute (former § 644). Therefore, *Yurko* should be read to apply equally to section 273.5, subdivision (e)(1); as a result, *Boykin-Tahl* advisements and waivers must be required before a trial court accepts an admission under that section.

Furthermore, as will be addressed below, this Court's decisions in *People v. Adams, supra*, 6 Cal.4th 570, and *People v. Newman, supra*, 21 Cal.4th 413, do not change this result.

B. *Adams* and *Newman* are Distinguishable

Analyzing the issue in different contexts, this Court has found that stipulations to the truth of a prior conviction do not require *Boykin-Tahl*

advisements and waivers–namely, on bail enhancements (*People v. Adams, supra,* 6 Cal.4th at 574, and the felon in possession of a firearm offense (*People v. Newman* (1999) 21 Cal.4th 413, 420-422.) However, those situations are different from the circumstances in this case.

In *Adams*, the defendant stipulated that some of the alleged offenses were committed while he was on bail or his own recognizance, within the meaning of section 12022.1. At trial, a jury convicted him of various counts (burglary, vehicle theft, and receiving stolen property) and found allegations under section 12022.1 true. He also pleaded guilty to four severed counts pursuant to an agreement whereby he was sentenced to prison for a total of four years and eight months on all seven charges. (*People v. Adams, supra*, 6 Cal.4th at pp. 575-575.)

On appeal, Adams argued that his stipulation was void because the trial court had not complied with the *Boykin-Tahl* requirements of advisements and waivers. This Court disagreed, holding that in the context of a bail or recognizance allegation under section 12022.1, a stipulation to being on bail, alone, does not cover every fact necessary to the imposition of additional punishment. According to this Court:

> [B]ecause defendant's stipulation was a stipulation to evidentiary facts, not an admission that the enhancement allegation itself was true or an admission of every element necessary to imposition of punishment on the section 12022.1

> charge, the *Boykin-Tahl* and *Yurko* requirements are inapplicable.

(*People v. Adams, supra*, 6 Cal.4th at p. 573.)

In *Adams,* this Court contrasted the situation in that case, where the defendant stipulated to some, but not all evidentiary facts which eliminate every element necessary to the imposition of punishment on a charged enhancement–to the other situation constituting "an admission of guilt of a criminal charge or the truth of an enhancing allegation where nothing more was prerequisite to imposition of punishment except conviction of the underlying offense..." (*People v. Adams, supra*, 6 Cal.4th at p. 577.) This Court concluded that the former does not trigger *Boykin-Tahl* requirements. (*Ibid.*)

In *Newman,* the prosecution charged the defendant with possession of a firearm by a felon and alleged numerous prior felony convictions. Before trial, the defendant stipulated to his status as a felon. (*People v. Newman, supra*, 21 Cal.4th at pp. 416-417.) On appeal, he argued the stipulation was void because the trial court failed to provide constitutional advisements and obtain waivers. (*Id.* at p. 417.) This Court disagreed. Relying on *Adams*, this Court found that "no penal consequences flowed directly from the stipulation, and the prosecutor still was required to prove the remaining elements of the offense." (*Id.* at p. 422.) Thus, the defendant's stipulation to

status as a felon was not sufficiently similar to an admission of an enhancement allegation or guilty plea to require *Boykin-Tahl* advisements and waivers. (*People v. Newman, supra,* 21 Cal.4th at p. 422.)

Here, in contrast to *Adams* and *Newman,* all the facts necessary for a true finding of the allegation for enhanced punishment was contained within the stipulation. Mr. Cross stipulated to having suffered a convicted under section 273.5, subdivision (a) within seven years of the current offense–meeting all the elements of section 273.5, subdivision (e)(1). He therefore was immediately subject to the enhanced sentencing triad of two, four, or five years. (1 RT 85-85.) His stipulation to the fact of the prior conviction left no elements of the enhancement for the prosecution to prove, except conviction of the underlying offense as a prerequisite to imposition of punishment. (Cf. *People v. Adams, supra,* 6 Cal.4th at p. 577.) Because the fact of the prior conviction for domestic violence subjected him to the enhanced sentencing triad, the penal consequences flowed directly from his simple stipulation to that fact. (Cf. *People v. Newman, supra,* 21 Cal.4th at 422.) As a result, the principles enunciated in *Yurko* apply and the trial court was required to advise Mr. Cross of his *Boykin-Tahl* rights.

The difference between the stipulations in *Adams* and *Newman*, and a stipulation admitting all of the facts necessary for a true finding of an

enhancement was explained by the Sixth District in *People v. Little* (2004) 115 Cal.App.4th 766. In that case, the defendant was charged with child endangerment and various drug offenses, including being under the influence of a controlled substance under Health and Safety Code section 11550. (*Id.* at 769.) During trial, the defendant stipulated that he "was under the influence of a controlled substance, methamphetamine, in violation of Health and Safety Code section 11550, subdivision (a)." (*Id.* at p. 775.) On appeal, the defendant contended that the stipulation was tantamount to a guilty plea, triggering the trial court's duty to give *Boykin-Tahl* advisements. (*Id.* at p. 772.) The respondent disagreed, contending that while the defendant stipulated to being under the influence of a controlled substance, he did not expressly stipulate to the requisite mens rea of the crime–i.e., that he willfully and unlawfully was under the influence. (*Id.* at p. 775.)

The Court of Appeal noted that while defendant did not expressly stipulate that he acted willfully and unlawfully, "the stipulation to a violation of the statute necessarily subsumed all elements and facts necessary for conviction and punishment, including the requisite mens rea." *(People v. Little, supra*, 115 Cal.App.4th at p. 775.) Under the circumstances, the stipulation was tantamount to a guilty plea or an admission to the truth of an

enhancement allegation. (*People v. Little, supra,* 115 Cal.App.4th at p. 775.)

Little distinguished *Adams* and *Newman.* According to the court: "In both *Adams* and *Newman*, the court concluded that a stipulation to some but not all of the evidence required for a conviction or enhancement and punishment does not require *Boykin-Tahl* advisements and waivers." (*Id.* at p. 773.) In *Little*, on the other hand, the stipulation "implicitly and necessarily covered all evidentiary facts required for a conviction and imposition of punishment. Thus, his conviction here was a foregone conclusion..." (*Id.* at p. 778.)

Here, appellant stipulated to all of the facts necessary to find the enhancement allegation true. Consequently, the trier of fact did not have to consider and evaluate the weight of evidence concerning the enhancement. Under these circumstances, the trial court was required to give appellant an advisement and take a personal waiver of his rights under *Boykin v. Alabama, supra,* 395 U.S. at 242 and *In re Tahl, supra,* 1 Cal.3d at 142. As the trial court did not do so, appellant's stipulation was invalid and could not be used to elevate his sentence under section 273.5, subdivision (e).

II

WITCHER AND OTHER CASES TREATING THE EXISTENCE OF A PRIOR CONVICTION UNDER SECTION 666 AS AN ALTERNATE SENTENCING SCHEME SHOULD NOT APPLY BY ANALOGY TO THIS CASE

The case of *People v. Witcher* (1995) 41 Cal.App.4th 223 should not apply by analogy to this case. It is anticipated that respondent will point to *Witcher* and argue, just as the Court of Appeal held in its opinion, that a court is not required to advise a defendant of his *Boykin-Tahl* rights before accepting a defendant's stipulation to a prior conviction under section 273.5, subdivision (e). (*People v. Cross, supra,* 216 Cal.App.4th at pp. 1407-1408.) As explained below, *Witcher* and other cases, each analyzing the section 666 offense (petty theft with a prior conviction), either were highly dependant on particular circumstances or pertained to a different issue. Significantly, those cases cannot relieve the trial court from following the broad requirement of *Yurko* in this case.

A. *Witcher* and Related Cases

In *Witcher,* the defendant was charged with two counts of petty theft with a prior conviction, under section 666. The complaint alleged two priors in connection with the section 666 offenses: a second degree robbery conviction and a second degree burglary conviction. *(People v. Witcher,*

supra, 41 Cal.App.4th at p. 226.) Before trial, defense counsel announced that his client was prepared to admit the prior convictions for purposes of section 666 in exchange for excluding them from the jury. (*Id.* at p. 227.) After the trial court advised Witcher that he had a right to a jury trial on the prior convictions, he personally waived that right, then admitted to the existence of the priors. (*Id.* at p. 228-229.)

On appeal, the First District Court of Appeal agreed with Witcher that the trial court had failed to advise him of his right against self-incrimination and right to confrontation, and that Witcher did not expressly waive those rights. (*People v. Witcher, supra,* 41 Cal.App.4th at p. 223.) Nonetheless, the court affirmed the section 666 convictions. The court's rationale was as follows:

> Appellant has cited no authority for the proposition that a defendant must be admonished about his constitutional rights when he enters into such a self-serving stipulation, and we decline to create such authority. He has received the benefit of his bargain. The prosecution was not allowed to prove his prior felony convictions and incarcerations before the jury. We will not now countenance an after-the-fact contention that his stipulation did not meet minimum constitutional standards.

(*People v. Witcher, supra*, 41 Cal.App.4th at p. 234.)

The First District's reasoning highlights the most obvious difference between *Witcher* and appellant's situation: that Witcher benefitted from an arrangement whereby his admission to the prior convictions "was effective

to deny the prosecutor the opportunity to prove the priors before the jury." (*People v. Witcher, supra,* 41 Cal.App.4th at p. 234.) The court's concern was apparent–that Witcher reaped the benefit of keeping his prior convictions from the jury, but then later complained that he had not been properly advised. However, in appellant's case, the record reflects no such bargain or benefit. In fact, the existence of the appellant's prior was not kept from the jury. (1 RT 85, 210, 219.)

Furthermore, the *Witcher* court noted that the defendant had plenty of notice of the penal consequences of admitting the prior conviction. According to the court:

> Appellant can hardly claim that he was unaware of a conviction of the crime charged in this information carried the possibility of felony status. He was informed of such at his preliminary hearing, by the holding order and by the information filed in superior court, as well as by his actual trial in superior court.

(*People v. Witcher, supra*, 41 Cal.App.4th at p. 234.)

In contrast, the record does not reflect that Mr. Cross was apprised of the penal consequences of admitting the prior conviction under section 273.5, subdivision (e). The complaint did not specify what penal consequences attached to the section 273.5, subdivision (e) allegation. (1 CT 12-13.) Also, the holding order did not specify the penal consequences (1 CT 43), and there is no indication that he was so advised during the

preliminary hearing (1 CT 12-13).

Thus, the reasoning in *Witcher* should not apply by analogy to this case. Appellant entered into no such agreement and received no such benefit from the stipulation. And the record does not reflect that he was apprised of the penal consequences of the prior conviction. As a result, the trial court should have advised appellant of his *Boykin-Tahl* rights. Indeed, under the circumstances of his case, there was much more reason for the trial court to do so than in *Witcher.*

Respondent may also analogize from cases that state the prior conviction element of section 666 is not an enhancement. For example, in support of its holding that section 273.5 is an alternate sentencing scheme (as opposed to an enhancement), the Court of Appeal cited *People v. Tardy* (2003) 112 Cal.App.4th 783, *People v. Robinson* (2004) 122 Cal.App.4th 275, *People v. Murphy* (2001) 25 Cal.4th 136, and *Robert L. v. Superior Court* (2003) 30 Cal.4th 894. (*People v. Cross, supra,* 216 Cal.App.4th at p. 1408-1409.) However, none of these cases addressed the issue of *Boykin-Tahl* advisements and waiver.

Instead, *Tardy*, *Robinson,* and *Robert L.* each addressed issues relating to pleading requirements on a complaint or information. (*People v. Tardy, supra,* 112 Cal.App.4th at pp. 786, 787, fn. 2 [Whether the

defendant's due process rights were violated when the trial court imposed a felony sentence, where the information had not specifically charged him under section 666]; *People v. Robinson, supra,* 122 Cal.App.4th at pp. 280, 281-282 [Whether the prosecution could amend the information to include a section 666 allegation without first proving the offense at a preliminary hearing]; *Robert L. v. Superior Court, supra,* 30 Cal.4th at p. 898-899 [Whether the trial court erred in sustaining the defendant's demurrer as to a gang allegation under section 186.22, subdivision (d), depending on whether the allegation was an enhancement or alternate penalty provision].) In addition, the *Murphy* case addressed section 654 issues. *(People v. Murphy, supra,* 25 Cal.4th at p. 141, 155 [Whether section 654 applied to prior convictions falling under both the Habitual Sexual Offender Law and the Three Strikes Law].)

For example, in *People v. Tardy, supra,* 112 Cal.App.4th 783, a jury convicted the defendant of petty theft. The defendant had been previously convicted of a theft-related offense under section 666. On appeal, he contended that his due process rights were violated when the trial court imposed a felony sentence, because the information did not specifically charge him under section 666. (*Id.* at p. 786.)

The Second District, Division Seven held there was no due process

violation, because "section 666 does not establish a separate, substantive 'crime' . . . [r]ather, it is a sentencing statute, establishing an alternate and elevated penalty for a petty theft conviction upon a finding of a qualifying prior conviction." (*People v. Tardy*, *supra,* 112 Cal.App.4th at p. 783.) In a footnote, the court further explained: "Although section 666 has been referred to as a sentencing enhancing statute, [citation] in fact it is not an 'enhancement' because it does not add to the base term. (Cal. Rules of Court, rule 4.405(c).) Rather, it provides a wholly 'alternate and elevated penalty' upon a finding of a prior qualifying theft conviction." (*Id.* at p. 787, fn. 2.)

While *Tardy* stated that section 666 was not a sentencing enhancement, and instead was an "alternate and elevated penalty," the context of the court's observation was in the context of pleading requirements. (*People v. Tardy, supra*, 112 Cal.app.4th at p. 787 ["Unlike many other sentencing statutes directed to recidivists, *section 666* by its terms does not require the statute to be specifically pleaded in the information or indictment [Citations.]."] Indeed, the *Tardy* court compared and contrasted section 666 to recidivist statutes like the Three Strikes Law (§§ 1170.12, subd. (a); 667, subd. (e)), and the One Strike Law (§ 667.61, subds. (f) & (i)) – *as to the pleading requirements* of the various statutes.

(*Ibid.*)

Thus, *Tardy* (like the other cases cited by the Court of Appeal in support of its holding), did not consider *Boykin-Tahl* rights at issue in appellant's case. That case addressed whether principles of due process required section 666 to be pled on the information. (*People v. Tardy, supra*, 112 Cal.App.4th at p. 783.) Cases do not stand for propositions not considered by the court. (*People v. Frazier* (2005) 128 Cal.App.4th 807, 825.)

Therefore, the pleading cases are not instructive on the question of whether the trial court in this case should have given *Boykin-Tahl* advisements to appellant before he stipulated to the prior conviction under section 273.5.

B. This Court Should Adopt the Reasoning in the *Shippey* Case

The Fifth Appellate District in *People v. Shippey* (1985) 168 Cal.App.3d 879, also involved petty theft with a prior conviction under section 666. However, in that case, the Fifth Appellate District addressed *Boykin-Tahl* requirements, and held that the trial court was required to give the advisements and waivers prior to accepting an admission of a prior conviction under that section. (*Id.* at pp. 887-888.)

In *Shippey,* the defendant admitted a prior allegation under Penal

Code section 666 out of the presence of the jury, and the case proceeded to trial. He was found guilty and sentenced to the upper term of three years. (*People v. Shippey, supra,* 168 Cal.App.3d at p. 882.) On appeal, the defendant contended that the trial court failed to advise him of his rights before accepting his admission of the prior misdemeanor conviction. (*Id.* at p. 887.)

In addressing *Shippey's* contention, the Court of Appeal noted that the rationale behind *Yurko* was to ensure that a defendant is aware of the rights he relinguishes and the consequences he subjects himself to when admitting a prior allegation. (*People v. Shippey, supra,* 168 Cal.App.3d at p. 888.) The court quoted from *Yurko,* the following:

> Undoubtedly the particular rights waived by an admission of the truth of the allegation of prior convictions are important. Although there is not at stake a question of guilt of a substantive crime, the practical aspects of a finding of prior convictions may well impose upon a defendant additional penalties and sanctions which may be even more severe than those imposed upon a finding of guilt without the defendant having suffered the prior convictions.

(*In re Yurko, supra,* 10 Cal.3d at p. 863; *Shippey, supra,* 168 Cal.App.3d at pp. 888-889.)

The Court of Appeal found the reasoning in *Yurko* equally applicable, reasoning that proof of a prior conviction under section 666 raises a misdemeanor crime punishable by a fine or county jail time, to a felony

punishable by imprisonment. The court pointed out that the defendant's admission of the prior petty theft ultimately resulted in a state prison sentence of three years. Thus, the trial court was required to provide *Boykin-Tahl* advisements, and its failure to do so was error. (*People v. Shippey, supra*, 168 Cal.App.3d at p. 888-889.)

To the extent section 273.5 can be analogized to section 666, this Court should adopt the reasoning in *Shippey* to this case. The *Shippey* court correctly noted that *Boykin-Tahl* advisements were required because the prior convictions subjected the defendant to penalties even more severe than the underlying offense. (*People v. Shippey, supra*, 168 Cal.App.3d at p. 889, citing *In re Yurko, supra*, 10 Cal.3d at p. 862.) That rationale is equally applicable to this case.

C. *Boykin-Tahl* Requirements Should Apply Even If Section 273.5 is an Alternative Sentencing Statute

The *Shippey* case shows that even if section 273.5 is an alternative sentencing statute, or "sentencing factor," *Boykin-Tahl* requirements should nonetheless apply. However the allegation is classified, the essence of *Yurko* stands: to ensure that a defendant knows of his rights and the increased penal consequences before admitting a prior conviction allegation. (*In re Yurko, supra,* 10 Cal.3d at p. 599.)

The Court of Appeal in this case expressly declined to follow *Shippey*

because that case did not consider the distinction between an alternative scheme and an enhancement. (*People v. Cross, supra,* 216 Cal.App.4th at p. 1410.) However, the Court of Appeal's analysis runs directly contrary to *Yurko,* which rejected distinctions based on nomenclature of the allegation. As explained by this Court:

> The admission of the truth of the allegation of prior convictions has been differentiated from a plea of guilty through a characterization of the former as merely allowing a determination of a "status" which can subject an accused to increased punishment. [Citations.] Although this may be technically correct, the distinction is meaningless if, as in the case of a plea of guilty, the accused nevertheless will be held to have waived, without proper protections, important rights by such an admission.

(*In re Yurko, supra*, 10 Cal.3d at p. 863, citing *In re Vickers* (1946) 29 Cal.2d 264; *People v. Franco* (1970) 4 Cal.App.3d 535.)

Furthermore, if the trial court's duty was dependent on whether the allegation was an enhancement or alternative sentencing statute, then even the defendant in *Yurko* would not be entitled to advisements because section 664 was arguably just an alternative sentencing statute. This cannot be true.[4]

Consequently, the nomenclature of the prior conviction allegation should not matter on this issue. If the admission carries increased penal

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[4] The *Yurko* court even cited section 666 as an example. (*In re Yurko, supra*, 10 Cal.3d 857, 864.)

consequences, the trial court should be required to advise the defendant of his rights and obtain a waiver of those rights before accepting an admission. (*In re Yurko, supra,* 10 Cal.3d at p. 862; *People v. Shippey, supra,* 168 Cal.App.3d at p. 899.) In this case, there can be no question that Mr. Cross' stipulation to section 273.5, subdivision (e)(1) subjected him to an increased penal consequence. Under the enhanced triad prescribed under that section, the trial court imposed the upper term of five years. As a result, the trial court was required to advise him in accordance with *Yurko.* As it did not, the judgment must be reversed.

CONCLUSION

Appellant respectfully requests that the Court of Appeal's opinion be reversed.

Dated: February 3, 2014.

Respectfully submitted,
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CERTIFICATE OF WORD COUNT

I, John Hargreaves, appointed counsel for appellant, certify that I prepared this opening brief on behalf of my client, Joshua Cross, and that the word count for this opening brief is 5644.

This brief complies with Rule 8.516(c), California Rules of Court. I certify that I prepared this document in WordPerfect 15 and that this is the word count WordPerfect generated for this document.

Dated: February 3, 2014

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DECLARATION OF SERVICE

People v. Joshua Cross - S212157

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 2407 J Street, Suite 301, Sacramento, CA 95816.

On February 3, 2014, I served the attached

APPELLANT'S OPENING BRIEF ON THE MERITS

by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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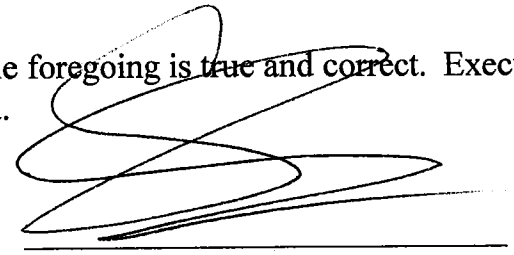
I declare under penalty of perjury that the foregoing is true and correct. Executed on February 3, 2014, at Sacramento, California.



Sheila Brown