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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **JOSHUA CROSS,** Defendant and Petitioner.	**Court of Appeal** **No. C070271** **Sacramento County** **Superior Court** **Nos. 09F06395,** **11F03888**

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SACRAMENTO

Hon. Greta C. Fall, Judge

PETITION FOR REVIEW AFTER THE PARTIALLY PUBLISHED DECISION OF THE COURT OF APPEAL, THIRD APPELLATE DISTRICT, AFFIRMING THE JUDGMENT

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PETITION FOR REVIEW AFTER THE PARTIALLY PUBLISHED DECISION OF THE COURT OF APPEAL, THIRD APPELLATE DISTRICT, AFFIRMING THE JUDGMENT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

This petition for review follows the partially published decision of the Court of Appeal, Third Appellate District, filed on June 7, 2013. In the published portion of the opinion, the Court of Appeal affirmed the judgment. (*People v. Cross* (2013) 216 Cal.App.4th 1403, 1409 (*Cross*).) The court held that no *Boykin-Tahl* advisement was required prior to petitioner's trial counsel stipulating to the existence of a prior conviction within the meaning of Penal Code section 273.5, subdivision (e), which elevates the upper term sentence for a conviction of cohabitating partner abuse under Penal Code section 273.5, subdivision (a) from 4 years to 5 years in state prison. In the unpublished portion of the opinion, the Court of Appeal ordered the trial court to calculate and correct petitioner's pre-sentence custody credits.

QUESTION PRESENTED

Whether a stipulation to a prior conviction for purposes of the penalty-increasing allegation under Penal Code section 273.5, subdivision (e)[1] requires *Boykin-Tahl* advisement and waiver even if that allegation is classified as an "alternative sentencing scheme" rather than an "enhancement" or an element of the offense. (See *Boykin v. Alabama* (1969) 395 U.S. 238, 242 [89 S. Ct. 1709, 23 L. Ed. 2d 274]; *In re Tahl* (1969) 1 Cal.3d 122, 132.)

STATEMENT OF THE CASE

On July 1, 2011, a complaint was filed in Sacramento County Superior Court case number 11F03888 charging petitioner with the following violations:

(1) Count One: infliction of corporal injury against the parent of petitioner's child within the meaning of Penal Code section 273.5, subdivision (a), which is a felony;

(2) Count Two: first degree robbery within the meaning of Penal Code sections 211 and 212.5, which is a felony;

(3) Count Three: unjustifiable infliction of physical or mental suffering to a child within the meaning of Penal Code section 273a, subdivision (b), which is a misdemeanor. (1 CT 12-13.)

The complaint further alleged that petitioner had suffered a previous conviction under Penal Code section 273.5, subdivision (a), which enhances the potential sentence for Count One under Penal Code section 273.5, subdivision (e)(1). (1 CT 13.)

On August 3, 2011, petitioner was held to answer to the charges at a preliminary hearing, and preliminary hearing magistrate ordered the complaint to be deemed to be an

[1] Hereafter referred to as "section 273.5(e)."

information. (1 CT 14.)

On November 1, 2011, a jury was empanelled to try the case. (1 CT 10.) The court also held probation revocation hearings in Sacramento County Superior Court cases 09F06395 and 09F05116 based on the same evidence presented at the jury trial. (1 RT 5.)

During the trial, the counsels for both parties entered into a stipulation that petitioner had been previously convicted under Penal Code section 273.5, subdivision (a). (1 RT 85-86.) There was no advisement or waiver of petitioner's right on record. (1 RT 85-86.)

On November 9, 2011, the jury found petitioner guilty of Counts One and Three, but was unable to reach a verdict on Count Two. (1 CT 10.) The trial court found petitioner in violation of probation. (1 RT 295.) On November 10, 2011, the trial court ordered Count Two dismissed on the prosecution's motion. (1 CT 10.)

On December 16, 2011, the trial court imposed the following sentence:

(1) Upper term of 4 years for Count One - Penal Code section 273.5, subdivision (a)

a) Pursuant to Penal Code section 273.5, subdivision (e)(1), the upper term was elevated by petitioner's prior domestic conviction to 5 years;

(2) 6 months in county jail for Count Three - misdemeanor violation of Penal Code section 273a, subidivision (b) - to be served consecutively upon petitioner's release from prison; (1 CT 11, 167.)

STATEMENT OF FACTS

The prosecution presented evidence relating to an incident on May 20, 2011, for which petitioner was charged. The prosecution also presented testimony regarding several prior domestic violence incidents involving petitioner pursuant to Evidence Code section 1109. The defense did not call any additional witnesses. (1 RT 210,) and petitioner elected to exercise his right to not testify. (1 RT 212.)

On May 20, 2011 at 4:30 or 5:30 in the morning, petitioner went to the apartment of Mya Welch. (1 RT 33-40.) Petitioner and Welch previously dated and have two children together. (1 RT 33-34.) Welch woke up to find petitioner in her bedroom. (1 RT 38-39.) Petitioner asked for Welch's mobile phone. (1 RT 40.) Welch refused, because she believed petitioner would become angry if he saw text messages and calls that Welch's boyfriend had left on her phone. (1 RT 40-41.)

Petitioner tried to wrestle the phone away from Welch. (1 RT 41.) While struggling for the phone, petitioner slapped and hit Welch in the face. (1 RT 41-43.) Petitioner choked Welch, then threw her onto the floor. (1 RT 43.) The phone flew out of Welch's hands when she fell. (1 RT 43.) Petitioner picked up the phone. (1 RT 43.)

Petitioner picked up the phone and read through the text messages and call log on Welch's phone. (1 RT 43.) He became angry over the people Welch had been talking and texting with. (1 RT 43.) Petitioner struck Welch again. (1 RT 43.)

Petitioner and Welch's children were in the bedroom during the incident involving the phone. (1 RT 45.) Their son was two years old at the time of the incident. (1 RT 33.) Their daughter was approximately four months old. (1 RT 33.) Both were sleeping inside the bedroom at the start of the incident. (1 RT 33.) Their son was awake and cried during the incident. (1 RT 45.) Welch believed their daughter was up as well. (1 RT 45.)

Petitioner then left the bedroom for the kitchen. (1 RT 44.) In the kitchen, petitioner called the male Welch had been texting and challenged him to fight. (1 RT 45.) After getting off the phone, petitioner returned to Welch's bedroom. (1 RT 46.) Petitioner went through Welch's purse and took out approximately $170. (1 RT 46.)

Welch asked for her money and phone back. (1 RT 47.) Petitioner initially refused, but later told Welch he would bring her things back to her. (1 RT 47.) Petitioner left Welch's residence, getting into the rear seat of a car waiting in the parking lot outside. (1 RT 47.)

Welch had an older cell phone. (1 RT 48.) She switched her cellular service to the older phone. (1 RT 48.) She called petitioner and again demanded her phone and money back. (1 RT 48-49.) Petitioner refused. (1 RT 49.)

Welch received a "bump" to her forehead, scratches, and redness on the inside of her lip during the altercation. (1 RT 49-51.)

NECESSITY FOR REVIEW

I. INTRODUCTION

Review is necessary both to secure uniformity of decision among lower courts and to resolve an important questions of law (Cal. Rules of Court, rule 8.500(b)(1).) The Court of Appeal's holding here conflicts with the Fifth Appellate District's holding in *People v. Shippey* (1985) 168 Cal.App.3d 879, 888 (*Shippey*).

This disagreement among lower courts implicates an important issue of law: whether it is necessary for a trial court to advise a defendant and obtain a waiver prior to taking an admission to a prior conviction that elevates the penalty.

Under *Boykin*, *supra*, 395 U.S. 238 and *Tahl*, *supra*, 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 at p.242; *Tahl*, *supra*, 1 Cal.3d at p.132.) Furthermore, the court shall not presume a waiver based on a silent record. (*Tahl*, *supra*, 1 Cal.3d at p.132.)

In re Yurko (1974) 10 Cal.3d 857 (*Yurko*), recognized that "[u]ndoubtedly the particular rights waived by an admission of the truth of [an] allegation of prior convictions are important." (*Id.* at p.863.) Such an admission can carry serious " additional penalties and sanctions." (*Ibid.*) Therefore, "an accused must be advised of (1) specific constitutional protections waived by an admission of the truth of an allegation of prior felony convictions, and (2) those penalties and other sanctions imposed as a consequence of a finding of the truth of the allegation." (*Id.* at p.860.)

This process of advisement and waiver applies as well to stipulations that are "tantamount to a plea of guilty" where conviction is the inevitable result, such as submitting the issue of guilt on a preliminary hearing transcript lacking any defense to the charges. (*People v. Adams* (1993) 6 Cal.4th 570, 576 (*Adams*).) In contrast, advisement and waiver requirements are not applicable to "an evidentiary stipulation which does not admit the truth of the allegation itself or every fact necessary to imposition of the additional punishment other than conviction of the underlying offense." (*Id.* at p.580; see also (*People v. Newman* (1999) 21 Cal.4th 413, 417, 422-423 (*Newman*).)

Here, applying this line of cases, the Third Appellate District held that advisement and waiver is unnecessary when the prior allegation is pursuant to Penal Code section 273.5, subdivision (e), because such an allegation is not "an element of an offense" or an "enhancement" but is instead an "alternative sentencing scheme." (*Cross, supra*, 216 Cal.App.4th at pp.1409-1410.) This decision cites the Second Appellate District decision *People v. Witcher* (1995) 41 Cal.App.4th 223, which held that advisement and waiver was not necessary prior to a stipulation to a prior theft conviction for purposes of Penal

Code section 666. (*Id.* at p.228-229.) As explained below, the Court of Appeal's holding here is inconsistent with *Yurko* and the cases that follow it.

On the other hand, citing *In re Yurko* the Fifth Appellate District concluded in *Shippey*, *supra*, 168 Cal.App.3d 879, that *Boykin-Tahl* advisement is required for admitting a prior allegation under Penal Code section 666. (*Id.* at pp.882, 887-888.)

This case presents a new legal question. "The issue has not . . . been the subject of any holding under section 273.5(e)(1)." (*Cross*, *supra*, 216 Cal.App.4th at p.1409.) Moreover, because the Court of Appeal's opinion here creates a rule that conflict with *Shippey* as well *Yurko*'s line of cases, this court should grant review under rule 8.500(b)(1).

II. ARGUMENT

A. TRIAL COURT PROCEEDINGS

In Count One, petitioner was convicted for violating Penal Code section 273.5, subdivision (a) and was sentenced to the upper term of five years based on a true finding on the prior allegation that he had previously suffered a conviction under the same Penal Code section within the last seven years. (1 RT 298; Pen. Code, § 273.5, subds. (a), (e)(1).)

Penal Code section 273.5, subdivision (e)(1) 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 the two, three, or four years otherwise specified in subd. (a).)

During the trial, the prosecutor read to the jury the following stipulation: "On January 15th, 2010, the Defendant was convicted of a felony violation of Penal Code Section 273.5, spousal abuse, in relation to the domestic violence incident on August 14th of 2009." (1 RT 85-86.) The trial court corrected the prosecutor that the charge should

not be read as "spousal abuse" but rather that of "a person with whom the defendant had a child in common." (1 RT 86.) The trial court otherwise accepted the stipulation. (1 RT 86.) The record does not show petitioner's trial counsel to have orally agreed to this stipulation, although trial counsel did not object to it or subsequent references to such a stipulation. (1 RT 85-86.) There is also a written stipulation. (1 CT 138.)

The trial court instructed the jury, "During the trial you were told that the People and the defense agreed or stipulated to certain facts. This means that they both accept those facts as true. Because there is no dispute about those facts, you must accept them as true." (1 RT 256.)

The trial court did not provide any advisement to petitioner regarding his rights or consequences to the stipulation, and did not obtain any waivers. (1 RT 85-86.)

B. THE COURT OF APPEAL'S HOLDING IN THIS CASE

On appeal, petitioner contended that, prior to accepting the stipulation, the trial court should have provided petitioner with *Boykin-Tahl* advisements and obtained relevant waivers from petitioner. (*Cross*, *supra*, 216 Cal.App.4th pp.1407-1408.) The stipulation to the existence of a prior conviction for Penal Code section 273.5, subdivision (e) purposes was tantamount to an admission that directly resulted in penal consequence results. (*See Adams*, *supra*, 6 Cal.4th at pp.576, 580 and *Newman*, *supra*,

The Court of Appeal held that advisement and waiver were not required for section 273.5, subdivision (e) prior because that allegation is not an "enhancement" but an "alternative sentencing scheme." (*Ibid.*) The implication being that advisement and waiver is required if a prior allegation is an "enhancement" but not for a prior allegation that constitutes an "alternative sentencing scheme," even if the latter elevates the defendant's penalty.

The Court of Appeal's reasoning is inconsistent with this court's prior cases nor

with the Fifth Appellate District's holding in. *Shippey, supra*, 168 Cal.App.3d at p.888.

C. THE COURT OF APPEAL'S OPINION IS INCONSISTENT WITH THIS COURT'S PRIOR CASES ON THE ISSUE

Although this court has not addressed the specific question of whether advisement and waiver is required for admitting or stipulating to a prior allegation under section 273.5(e), this court has developed a line of cases explaining the rationale behind requiring advisement and waiver prior to accepting an admission or stipulation to prior allegations.

1. *In re Yurko*

In re Yurko "was the first case in which this court was called upon to consider the applicability of the *Boykin-Tahl* requirements to a defendant's plea to an allegation other than one charging commission of a criminal offense." (*Adams, supra*, 6 Cal.4th at p.576.) In *Yurko*, a defendant charged with burglary admitted to three prior felony offenses. (*Yurko, supra*, 10 Cal.3th at p.860.) That admission led to an adjudication that he was an habitual criminal and to a sentence of life imprisonment under former Penal Code section 644, rather than to the imposition of sentence for the burglary of which the jury had convicted him. (*Ibid*; see also *Adams, supra*, 6 Cal.4th at pp.576-577.) This court found,

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

Yurko therefore held "that *Boykin* and *Tahl* require, before a court accepts an accused's admission that he has suffered prior felony convictions, express and specific admonitions as to the constitutional rights waived by an admission. The accused must be told that an admission of the truth of an allegation of prior convictions 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 found that what triggers the advisement and waiver requirement is not the specific type of allegations, but whether admitting to the allegation will carry penal consequences for the defendant. "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." (*Yurko, supra*, Cal.3d at p.862.)

Here, in contrast, the Court of Appeal draws the line similarly based on a categorical distinction. The court held because section 273.5(e) sets forth an "alternative sentencing scheme" rather than an "enhancement," there is no need for advisement and waiver. (*Cross, supra*, 216 Cal.App.4th pp.1407-1408.) In other words, *Boykin-Tahl* advisement and waiver is only necessary for a prior allegation if that prior allegation constitutes an "enhancement." This analysis is inconsistent with *Yurko*.

Yurko held *Boykin-Tahl* advisements were necessary for admissions to prior allegations because "the practical aspects of a finding of prior convictions 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." (*Yurko*, *supra*, 10 Cal.3d at p.862.)

The section 273.5(e) prior has such a practical effect. By entering into the stipulation, petitioner's trial counsel petitioner to risk of additional prison time. The "additional penalties" contemplated by the *Yurko* court included the risk of foreclosing the possibility of probation or extending the time before a defendant is eligible for parole. (*Yurko*, *supra*, 10 Cal.3d at p.862.) Risking an additional year in prison is consistent with the kind of additional penalties contemplated by the *Yurko* court. Following *Yurko*'s reasoning, *Boykin-Tahli* advisement and waiver should be required before a trial court accepts an admission under section 273.5(e).

Furthermore, the prior allegation that warranted advisement and waiver in *Yurko* was not an enhancement. Applying the Court of Appeal's analysis to the facts in *Yurko*, one would have to conclude that no advisement was necessary. This is inconsistent with *Yurko*'s holding.

The Court of Appeal here analogized the 273.5(e) prior to Penal Code section 666 in that neither is an "enhancement." (*Cross*, *supra*, 216 Cal.App.4th at pp.1408-1409.) The court cites *People v. Tardy* (2003) 112 Cal.App.4th 783 (*Tardy*) and *People v. Robinson* (2004) 122 Cal.App.4th 275 (*Robinson*) as support. (*Cross*, *supra*, 216 Cal.App.4th at pp.1408-1409.) Neither *Tardy* nor *Robinson* considered the present issue of *Boykin-Tahl* advisement and waiver. (*Tardy*, *supra*, 112 Cal.App.4th at p.787, fn.2; *Robinson*, *supra*, 122 Cal.App.4th at pp.281-282.) *Tardy* and *Robinson* addressed issues relating to pleading requirements on a complaint or information. (*Tardy*, *supra*, 112 Cal.App.4th at p.787, fn.2; *Robinson*, *supra*, 122 Cal.App.4th at pp.281-282.)

In this unrelated context, *Tardy* concluded, "Although section 666 has been referred to as a sentencing enhancement statute [Citations.] . . . it is not an 'enhancement'

because it does not add to the base term." (*Tardy*, *supra*, 112 Cal.App.4th at p.787, fn. 2.) *Tardy* cites Rules of Court, rule 4.405(c), which provides that an "enhancement" adds to the base term. (*Ibid.*) Under *Tardy* and the Court of Appeal's opinion here, other punishment-elevating allegations are "alternative sentencing schemes." (*Ibid*; *Cross*, *supra*, 216 Cal.App.4th at pp.1408-1409.)

Under this definition, former Penal Code section 644, which subjected the defendant to a life sentence in *Yurko*, would not be an enhancement but an alternative sentencing scheme because it replaces rather than add to the base term. (*Yurko*, *supra*, 10 Cal.3d at pp.862-863; *Adams*, *supra*, 6 Cal.4th at p.573.) The Court of Appeal here held that no advisement and waiver is required if the prior allegation is an alternative sentencing scheme rather than an enhancement. (*Cross*, *supra*, 216 Cal.App.4th at p.1410.) Applying the Court of Appeal's rule to *Yurko*'s facts would have yielded results that contradicted *Yurko*'s holding.

2. *Adams* and *Newman*

The Court of Appeal's holding is likewise inconsistent with this court's established rules in *Adams* and *Newman*. *Adams* and *Newman* clarified the requirement for advisement and waiver, but did not stray from the rationale set forth in *Yurko*. (See *Newman*, *supra*, 21 Cal.4th at pp.418, fn. 4, 422; *Adams*, *supra*, 6 Cal.4th at p.573.) In *Yurko*, the reason to require advisement and waiver was because of the penal consequences that an admission to the prior can trigger. (*Yurko*, *supra*, 10 Cal.3d at pp.862-863.)

In *Adams*, the court found that stipulating. (*Adams*, *supra*, 6 Cal.4th at p.577.) In the context of the bail/recognizance enhancement allegation, a stipulation to being on bail, standing alone, does not cover every fact necessary to the imposition of additional punishment. (*Id.* at p.580.) Rather, the trier of fact must also find the defendant guilty of

the underlying offense. (*Ibid.* at p.580.) There was therefore no need for *Boykin-Tahl* advisement and waiver.

Relying on *Adams*, this court held that a stipulation to felon status in the context of a prosecution for felon in possession of a firearm does not trigger the need for advisement and waiver. (*People v. Newman, supra*, 21 Cal.4th at pp.415, 420, 422.) The court reasoned that no penal consequences flowed directly from a simple stipulation to one's status as a felon and, therefore, the stipulation was not sufficiently similar to an admission of an enhancement allegation or a guilty plea to require constitutional advisements and waivers. (*Id.* at p. 422.)

Both *Newman* and *Adams* cited *Yurko*, and neither departed from *Yurko*'s reasoning. (*Adams, supra*, 6 Cal.4th at pp.573, 577; *Newman, supra*, 21 Cal.4th at pp.418, fn. 4, 422.) In both cases, this court's analysis on whether *Boykin-Tahl* advisement was required focused on whether the stipulation has attendant penal consequences. (*Adams, supra*, 6 Cal.4th at p.577; *Newman, supra*, p.422.) Neither case set forth reasoning that suggests the *Boykin-Tahl* advisement and waiver process is required only if an allegation constitutes an "enhancement." The Court of Appeal's opinion here is therefore both novel and a departure from this court's case law.

D. THE CONFLICTING HOLDING IN *PEOPLE v. SHIPPEY*

In *Shippey, supra*, 168 Cal.App.3d 879, the Fifth Appellate District concluded that *Boykin-Tahl* advisement was required for admitting a prior allegation under Penal Code section 666. (*Id.* at pp.882, 887-888.) During his trial on the charge of committing petty theft under Penal Code section 666, the defendant admitted on direct examination that he was convicted of petty theft in 1982. (*Id.* at p.883.) Relying on *In re Yurko* (1974) 10 Cal.3d 857, 864, the Court of Appeal found that *Boykin-Tahl* advisement and waiver

applies to admissions of prior conviction for Penal Code section 666 purposes. (*Shippey*, *supra*, 168 Cal.App.3d at pp.887-888.)

The court noted that the rationale behind *Yurko* was to ensure that a defendant is aware of his rights he gives up and the consequences he subjects himself to when admitting a prior allegation. (*Shippey*, *supra*, 168 Cal.App.3d at p.888, citing *Yurko*, *supra*, 10 Cal.3d at p.862.) "Undoutedly 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." (*Yurko*, *supra,* 10 Cal.3d at p.863; see also *Shippey*, *supra*, 168 Cal.App.3d p.888-889.)

The court reasoned that "[p]roof of a prior under section 666 raises a misdemeanor crime punishable by a fine or county jail sentence to a felony punishable by imprisonment . . . [a]dmitting the prior petty theft ultimately resulted in the defendant's sentence to state prison for three years." (*Id.* at p.888.) The court "perceive[d] no logical reason why the *Yurko* rule would not be applicable[.]" (*Ibid.*)

Despite analogizing the Penal Code section 273.5, subdivision (e) prior allegation to Penal Code section 666, the Court of Appeal here nevertheless declined to apply *Shippey*. (*Cross*, *supra*, 216 Cal.App.4th at p.1410.) The court acknowledges that neither *Adams* nor *Newman* disapproved *Shippey*. (*Ibid.*) If *Shippey* remains sound law, and Penal Code section 666 and 273.5(e) are analogous for the purposes of the issue here, then the Court of Appeal's holding in this case contradicts that of *Shippey*.

E. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE LAW OF *BOYKIN-TAHL-YURKO* ADVISEMENT

The contradiction between *Shippey* and the Court of Appeal's holding here requires resolution by this court. Furthermore, the Court of Appeal's holding here has far-reaching and serious consequences. If only allegations that add to a base term are "enhancements," then statutes like "Three Strikes Law" (Pen. Code, § 667, subd.(e)) and "One Strike Law" (Pen. Code, § 667.61, subd. (a)) would not be "enhancements." Under the Court of Appeal's holding here, a defendant admitting or stipulating to such prior allegations would not be entitled to *Boykin-Tahl* advisement despite the severe potential consequences. Yet this runs contrary to this court's rationale, set forth in *Yurko*, for mandating that the court's shall undergo the advisement and waiver process for defendant's admitting to prior allegations that can elevate a defendant's punishment. This is therefore an area of law that requires this court's clarification.

CONCLUSION

Based on the foregoing reasons, petitioner respectfully requests that this court grant review.

Dated: July 17, 2013

Respectfully submitted,

William W. Lee
Attorney for Petitioner

CERTIFICATE OF LENGTH

I, William W. Lee, counsel for JOSHUA CROSS, certify pursuant to the California Rules of Court, that the word count for this document is 4419 words, excluding the tables, this certificate, and any attachment. This document was prepared in MICROSOFT WORD 2007 and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at Santa Rosa, CA, on July 17, 2013

William W. Lee
Attorney for Petitioner

ATTACHMENT A:

Opinion in *PEOPLE v. CROSS* (2013) 216 Cal.App.4th 1403

Court of Appeal Case No. C070271

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA CROSS, Defendant and Appellant.	C070271 (Super. Ct. Nos. 09F06395, 11F03888)

APPEAL from a judgment of the Superior Court of Sacramento County, Greta Curtis Fall, Judge. Affirmed with directions.

William W. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part II. of the Discussion.

A jury found defendant Joshua Cross guilty of felony infliction of corporal injury on the mother of his child, and misdemeanor infliction of abuse on the child (case No. 11F03888). It was unable to reach a verdict on a charge of robbery (which the trial court dismissed on the prosecutor's motion). The jury also sustained an allegation of a prior conviction in 2010 for inflicting corporal injury on the mother of defendant's child in 2009. The trial court sentenced defendant to a term in state prison for the felony, with a consecutive jail term for the misdemeanor. The trial court further found defendant in violation of the grants of probation in the 2009 incident (case No. 09F06395) and in another 2009 case (case No. 09F05116). It imposed a consecutive state prison term in case No. 09F06395, terminating probation in case No. 09F05116. It calculated conduct and custody credits only with respect to his current (May 2011) offense.

On appeal, defendant argues that trial counsel's stipulation that defendant was convicted in 2010 for the 2009 incident of domestic violence was "tantamount to an admission of a prior conviction," and thus required the trial court to advise defendant of his fundamental trial rights and solicit his waiver of them before it could give effect to the stipulation. In the published part of this decision, we conclude the stipulation to the existence of a prior conviction was not tantamount to admitting all the elements of an *enhancement*; rather, the existence of the prior conviction was instead a sentencing factor authorizing the trial court to impose a more severe *alternative sentencing scheme*. As a result, the trial court was not required to advise defendant of his fundamental trial rights and solicit waivers of them before giving effect to the stipulation. We shall therefore affirm the judgment in case No. 11F03888. Defendant also maintains he was not awarded presentence credits that he had accrued in connection with case No. 09F06395.[1]

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[1] Although his notice of appeal includes only the case number of his current offense, we deem it to embrace case No. 09F06395 as well, which was part of the judgment from which he was appealing. On the other hand, as he does not raise any arguments in connection with case No. 09F05116, we deem him to have abandoned any appeal in that

The People concede defendant is entitled to the credits. We shall affirm the sentence in case No. 09F06395, but as we explain in the unpublished part of the decision, we must remand for the trial court to calculate the conceded credits because the record on appeal is unclear.

The circumstances underlying defendant's present or prior convictions are not relevant to his contentions. We therefore omit any factual summary and proceed to the Discussion.

DISCUSSION

I. Advisements and Waivers Were Not Necessary to Effect Stipulation

Before trial, the prosecutor successfully moved to admit defendant's prior acts of domestic violence against the victim, including the August 2009 incident that resulted in his conviction in case No. 09F06395. At trial, the prosecutor submitted a stipulation with the defense, which recited that defendant had been convicted in January 2010 for an incident of domestic violence in August 2009 with the same victim as the current offense. The court later instructed the jury that it must accept the facts in a stipulation as true, and that the People had the burden of proving a prior conviction for domestic violence beyond a reasonable doubt (but reminding the jury that the fact of the prior conviction had been the subject of a stipulation). Defendant argues on appeal that before accepting the stipulation, the trial court should have advised him of his fundamental trial rights and solicited his waiver of them.

Because courts will not presume on a silent record that a defendant pleading guilty—an act that constitutes a conviction of itself—knowingly and intelligently waived the right to a jury, the right of confrontation, and the right against compulsory self-

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case. (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 544, fn. 8; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 732, p. 798 & § 739, p. 806.)

incrimination, a trial court in accepting a guilty plea must expressly advise the defendant of these rights and solicit a waiver of them on the record. (*In re Tahl* (1969) 1 Cal.3d 122, 132-133, applying *Boykin v. Alabama* (1969) 395 U.S. 238, 242 [23 L.Ed.2d 274].) This process of advisement and waiver applies as well in circumstances "tantamount to a plea of guilty" where conviction is the inevitable result, such as submitting the issue of guilt on a preliminary hearing transcript lacking any defense to the charges. (*People v. Adams* (1993) 6 Cal.4th 570, 576 (*Adams*).) This rule applies to both substantive offenses and enhancements. (*Id.* at pp. 576-577.) However, a defendant's admission of "evidentiary facts" that do not embrace *every* element of an offense or an enhancement, and which therefore leaves something "prerequisite to imposition of punishment,"[2] is not subject to the need for advisements and waivers. (*Adams*, at pp. 577-578, 581.) To understand defendant's argument that advisements and waivers were necessary in the present context, we quickly explain a pair of Supreme Court decisions (*People v. Newman* (1999) 21 Cal.4th 413 (*Newman*) and *Adams*, *supra*, 6 Cal.4th at p. 580) and *People v. Little* (2004) 115 Cal.App.4th 766 (*Little*), which distinguished the Supreme Court decisions.

Regarding the enhancement for committing secondary offenses while on bail for a primary offense, *Adams* concluded a stipulation to the fact of being on bail does not admit *all* the elements of the enhancement, because conviction of the primary offense is *also* an element of the enhancement (*Adams*, *supra*, 6 Cal.4th at pp. 580, 582), in contrast with the mere "prerequisite" of a conviction for the secondary offense to which the enhancement was attached (*id.* at p. 580, fn. 6). Returning to the issue in the context of a stipulation to felon status in a prosecution for unlawful possession of a firearm, *Newman*

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[2] The mere possibility of jury nullification despite admission of all facts necessary for a conviction or finding is an insufficient prerequisite to conviction to obviate the need for advisements and waivers. (*Adams*, *supra*, 6 Cal.4th at p. 580, fn. 7.)

concluded prior Supreme Court dicta regarding the need for advisements and waivers before accepting stipulations to felon status were no longer viable because this admitted only *one* of the elements of the offense. (*Newman, supra*, 21 Cal.4th at pp. 417, 422-423 & fn. 6.) In *Little*, the defendant stipulated that he was under the influence of a controlled substance in violation of Health and Safety Code section 11550. (*Little, supra*, 115 Cal.App.4th at p. 772.) *Little* rejected the People's argument that this stipulation did not embrace the mens rea of the offense (and thus did not require the process of advisement and waiver), concluding that the stipulation was not merely to being under the influence, but being under the influence *within the meaning of the statute* and thus was a complete admission of guilt. (*Id.* at p. 775.) It then held that a stipulation to all of the elements of an offense must include advisements and waivers to be effective (*id.* at pp. 776-778), explaining this was in fact the necessary implication of *Adams* and *Newton* both focusing on whether the stipulations at issue were tantamount to a guilty plea.

Penal Code section 273.5, subdivision (e)(1) (hereafter § 273.5(e)(1))[3] 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 the two, three, or four years otherwise specified in subdivision (a) of the statute). Based on the principles we have just outlined, defendant therefore claims that his stipulation admitted the only element of what he terms is a recidivist "enhancement" of his current offense, because conviction of the underlying present offense is a mere prerequisite under *Adams*. The People, other than adverting to the possibility of nullification (a point that *Adams* rejected, as we noted) and attempting to argue defendant somehow retained his fundamental constitutional rights with respect to the fact of his prior conviction for domestic violence, do not

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[3] Undesignated statutory references are to the Penal Code.

identify any element of this "enhancement" that the stipulation did not admit. They also suggest (at length) that *Little* was wrongly decided and we should not follow it. Based on analogous precedent, which we asked the parties to address in supplemental briefing, we conclude section 273.5(e)(1) is *not* an enhancement but is simply a sentencing factor authorizing the trial court to impose an *alternate* sentencing scheme, and therefore the principles of *Adams*, *Newman*, and *Little* do not have any application to defendant's stipulation.

Section 666 gives a trial court discretion to treat a conviction for petty theft as a felony upon proof that a defendant has prior convictions for petty theft or other theft-related offenses that resulted in imprisonment. *People v. Witcher* (1995) 41 Cal.App.4th 223 (*Witcher*), cited with approval in *Newman*, *supra*, 21 Cal.4th at page 423, involved a defendant's stipulation to the existence of previous theft-related convictions resulting in imprisonment in order to prevent the jury from receiving evidence about them at trial. (*Witcher*, *supra*, 41 Cal.App.4th. at pp. 226, 228-229.) Based on precedent that the recidivist factor in section 666 was *not* an element of any offense and thus properly subject to a stipulation to keep the fact out of evidence, *Witcher* concluded the requirement of advisements and waivers (that we have described above) did not apply to such a stipulation, particularly where the stipulation had resulted in a benefit to the defendant of excluding otherwise admissible evidence about his prior offenses and an offsetting detriment to the prosecution of denying it the opportunity of proving the prior offenses to the jury. (*Witcher*, at pp. 233-234.) *People v. Robinson* (2004) 122 Cal.App.4th 275 reiterated this theme. It held that not only did section 666 *not* establish a substantive offense, it also did *not* establish an enhancement; rather, it established an alternate sentencing scheme with an elevated punishment for recidivist thieves. (*Robinson*, at p. 281.) As a result, an information can be amended to allege the applicability of section 666 even if the prosecution had not introduced evidence of the

prior convictions at the preliminary hearing. (*Robinson, supra,* 122 Cal.App.4th at pp. 281-282.) *People v. Murphy* (2001) 25 Cal.4th 136, 155, in drawing an analogy to section 666 in the context of section 654, also unequivocally held that section 666 "does not establish an enhancement, but establishes an alternate and elevated penalty." (Accord, *People v. Tardy* (2003) 112 Cal.App.4th 783, 787, fn. 2 (*Tardy*) [holding as a result the defendant could be punished under section 666 even if statute not itself alleged in the information]; cf. *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 899 [§ 186.22, subd. (d) is not an enhancement "because it does not add an additional term of imprisonment to the base term" and is instead an alternate sentence].)

The issue has not, as far as we can determine, been the subject of any holding under section 273.5(e)(1).[4] However, the nature of section 273.5(e)(1)'s provision for an alternate sentencing scheme with elevated punishment for repeat offenders convicted of domestic violence convinces us that the authority decided under section 666 is properly analogous.

In defendant's supplemental response, he first attempts to distinguish *Witcher* (and section 666) on the ground that section 666's alternative sentencing scheme requires proof of both a conviction *and* a term of incarceration. This simply begs the question: If neither section 666 nor section 273.5(e)(1) is an offense or an enhancement, then it does not matter whether a stipulation admits fewer than all of the criteria for the imposition of the alternative sentencing scheme. Similarly, that his stipulation to a prior conviction has "penal consequences" ignores the *actual* distinction drawn in the case between admitting

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[4] Interpreting an ambiguous record in the course of concluding that the trial court imposed an unauthorized sentence, *People v. Price* (2004) 120 Cal.App.4th 224, 242, described section 273.5(e)(1) as an "offense" that "include[es] the element of a prior conviction" (italics omitted). As this was dicta without any thorough analysis of the proposition announced or compelling logic in its support, we do not find it persuasive. (*People v. Smith* (2002) 95 Cal.App.4th 283, 300.)

a prior conviction for purposes of an alternative sentencing scheme and for the *enhancement* in section 667. (*Witcher, supra*, 41 Cal.App.4th at p. 234.) It is true that, unlike in *Witcher*, defendant's stipulation did not result in the benefit of keeping the facts of the prior conviction out of evidence. But "benefit" does not play any part in the analysis of *Adams*, *Newman*, and *Little*, and thus its apparent absence in the present case is irrelevant for our present purposes. By the same token, the fact that Witcher received *some* advisements does not play any part in the holding (because the opinion nevertheless found these to be manifestly inadequate (*Witcher, supra*, 41 Cal.App.4th at pp. 232-233)) and thus the *complete* absence of advisements in the present case is irrelevant. Finally, *Witcher* does not in any sense "suggest[]" that express advisements of penal consequences are required, since the opinion found sufficient notice of these consequences from the inclusion of a reference to section 666 and the facts of prior convictions in the allegations of the information (*Witcher*, at pp. 226, 234), *as is true here* with respect to section 273.5 and the prior conviction.

Defendant next argues we should follow the reasoning of the Fifth Appellate District in *People v. Shippey* (1985) 168 Cal.App.3d 879, which required advisements and waivers before a defendant could be allowed to testify to the existence of a prior conviction for petty theft. (*Id.* at pp. 888-889.) However, *Shippey* did not consider the distinction at issue *here* between an alternative sentencing scheme and an enhancement. It simply cited to precedent that involved the admission of a prior conviction for purpose of an enhancement and concluded, "This reasoning appears equally applicable to the instant case." (*Id.* at p. 888.) It therefore does not have any significance to us that neither *Adams* nor *Newman* disapproved *Shippey* (as defendant points out).

We recognize, as defendant argues, that the issue in *Tardy* arose in a different context than in the present case. However, it was *necessary* to *Tardy*'s holding to conclude that section 666 did not create a substantive *offense* of "petty theft with a prior"

but was instead a sentencing factor authorizing the imposition of an alternative sentence (and therefore only the prior theft-related convictions needed to be alleged) *because otherwise the failure to allege section 666 in the information would have precluded punishment pursuant to it.* (*Tardy, supra*, 112 Cal.App.4th at pp. 787-788 & fn. 2.) *Tardy* thus properly stands for that proposition (as does *Robinson* for the same reason). As for the statement in *Robinson* that section 666 "operates in the same manner" as recidivist enhancements, this again does not "suggest[]" that the need for advisements and waivers should apply, as defendant claims. Merely because an alternative sentencing scheme has the same *effect* as an enhancement does not mean it must be treated the same way, and *Robinson* in fact did *not* treat section 666 as if it were an enhancement (for which evidence must be introduced at a preliminary hearing in order to allow amendment of an information to include it).

We therefore conclude a stipulation to a prior conviction for domestic violence for purposes of section 273.5(e)(1) does not require a trial court to engage in the advisement and waiver process, as defendant asserts. Having rejected the underlying premise of his argument, we do not find any error.

II. Presentence Custody Credits*

Defendant entered his plea of no contest in case No. 09F06395 in December 2009; the trial court granted probation in January 2010. In March 2011, the trial court found that defendant had violated probation based on an incident of domestic violence the previous month; it reinstated defendant on probation, conditioned on a 60-day jail term. Against the jail term, the trial court credited defendant with 25 days of custody he had served in connection with the August 2009 incident and 24 days of conduct credit. As

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* See footnote, *ante*, page 1.

noted above, the trial court in sentencing defendant to state prison did not calculate any presentence credits for case No. 09F06395.

Defendant maintains he is entitled to have the 25 days of custody credit and 24 days of conduct credit that the trial court identified in March 2011 credited against his consecutive term for case No. 09F06395. The People concede the issue. While we agree in theory, the present record does not allow us either to accept the 49 days to which the parties have stipulated or to determine the correct amount of custody credit, so we must remand for the trial court to make the proper calculation.

In the first place, the record does not identify the *dates* of defendant's custody. If it occurred in 2009 (close in time to the incident), he would have accrued conduct credits at the lower rate of two days for every four-day period of custody. (Former § 4019, subds. (b) & (c) [see Stats. 1982, ch. 1234, § 7, p. 4553]; *People v. Brown* (2012) 54 Cal.4th 314, 318, 322 [regardless of time of sentencing, conduct credits accrue at rate in effect at time of custody].) If it occurred after January 25, 2010, but before September 28, 2010, defendant would have accrued conduct credit at the rate of one day for every two-day period, as the trial court apparently calculated. (Former § 4019, subds. (b)(1) & (c)(1) [see Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50].) And if it occurred between September 28, 2010, and the March 2011 hearing, he would have accrued conduct credit at the rate of one day for every day of custody. (Former § 2933, subd. (e)(1) [see Stats. 2010, ch. 426, § 1].) We cannot resolve this question on appeal.

In addition, a defendant is ordinarily entitled to credit against a subordinate term resulting from a probation violation for any period of custody imposed as a condition of that probation. (*People v. Riolo* (1983) 33 Cal.3d 223, 226, 228-229; *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1414.) It would appear from the record that defendant was supposed to be in custody for an additional 11 days before the present May 2011 incident as a condition of reinstatement on probation (after his accrued credits were deducted from

the 60-day jail term). He would thus *appear* to be entitled to an additional 11 days of custody credit with conduct credit at a rate again of one day for every one day of custody (former § 2933, subd. (e)(1) [see Stats. 2010, ch. 426, § 1]), unless there is some fact not disclosed in the record for denying him this credit for the ordered 11 days of custody.

Given the uncertainties in the record and the unexplained omission of the other 11 days of custody from the calculation of the parties, we cannot give defendant the remedy he requests. The better course of action is to remand the matter to the trial court for a proper determination of the facts that are relevant to the calculation of the presentence credits to which defendant is entitled for his subordinate term in case No. 09F06395. [END OF NONPUB. PT. II.]

DISPOSITION

The judgment in case No. 11F03888 is affirmed. The sentence is affirmed and the matter is remanded in case No. 09F06395 for a calculation of the proper amount of custody and conduct credits. The trial court shall thereafter prepare an amended abstract of judgment and forward a certified copy to the California Department of Corrections and Rehabilitation. ***(CERTIFIED FOR PARTIAL PUBLICATION)***

BUTZ, Acting P. J.

We concur:

MAURO, J.

HOCH, J.

PEOPLE v. JOSHUA CROSS Court of Appeal No. **C070271**

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party within the action; my business address is 2777 Yulupa Avenue, #142, Santa Rosa, CA 95405.

On July 17, 2013, I served the attached

PETITION FOR REVIEW

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 Santa Rosa, 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 between the place of mailing and each of the places so addressed.

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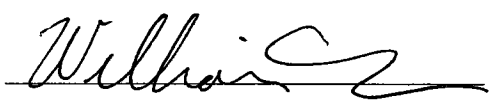
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 17, 2013, at Santa Rosa, California.



WILLIAM W. LEE
DECLARANT