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SUPREME COURT COPY

April 21, 2016

Frank A. McGuire
Court Administrator and Clerk
Supreme Court of California
350 McAllister St.
San Francisco, CA 94102

S139103

Re: *People v. Bailey Jackson*, No. ~~S193103~~
Appellant's Second Supplemental Letter Brief, Pursuant to Rule 8.520(d)(1)

Dear Mr. McGuire:

Pursuant to California Rules of Court, rule 8.520(d)(1), appellant files this supplemental brief to call the court's attention to recent authorities which appellant believes must be discussed, beyond that which can be included in a simple letter setting forth the citations thereto.

It is in the form of a letter brief, rather than a bound brief, because of its extreme brevity.

The argument is this:

RECENT UNITED STATES SUPREME COURT OPINIONS MAKE CLEAR THAT AGGRAVATING FACTORS IN A DEATH PENALTY DETERMINATION MUST BE MADE BY A UNANIMOUS JURY AND MUST BE FOUND BEYOND A REASONABLE DOUBT

In his opening brief, appellant argued that this court's jurisprudence, which held that a penalty jury did not have find aggravating factors unanimously or beyond a reasonable doubt, was contrary to the Sixth and Eighth Amendments to the U.S.

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Constitution. (AOB 432-436.) More specifically, appellant argued that *Ring v. Arizona* (2002) 536 U.S. 584 and its progeny (listed at AOB 433, fn. 123) mandated that factors (b) and (c) be found both unanimously and beyond a reasonable doubt.

Appellant's Opening Brief was filed June 27, 2012. In subsequent Supreme Court cases, appellant's position has been confirmed.

First, in *Alleyne v. United States* (2013) ___U.S.___, 133 S.Ct. 2151, 186 L.Ed.2d 314, the court reversed a non-capital sentence on the basis of judge-made findings. The jury had found Alleyne guilty of, *inter alia*, carrying a firearm during and in relation to a crime a violence. The presentence report recommended an increased mandatory minimum sentence on the basis of Alleyne's having "brandished" the weapon, which the jury had not found. In response to Alleyne's objection, the district court judge overruled the objection on the grounds that under *Harris v. United States* (2002) 536 U.S. 545, brandishing was a sentencing factor that the court itself could find by a preponderance of the evidence. (133 S.Ct. at p. 2156.)

The Supreme Court overruled *Harris*, finding that its prior distinction between facts that increase the statutory maximum and facts that only increase the mandatory minimum was inconsistent with *Apprendi v. New Jersey* (2000) 530 U.S. 466. Rather, the court concluded, "Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt." (133 S.Ct. at p. 2155, 2163.)

As noted, *Alleyne* was a non-capital case. In two capital cases decided in January of this year, however, the same principal was applied. First, in *Kansas v. Carr* (2016) 136 S.Ct. 633, 642, the court held that a mitigating circumstance instruction that did not specify that mitigators need not be found beyond a reasonable doubt was constitutionally permissible. In doing so, however, and in contrasting mitigating from aggravating circumstances, the opinion stated that the "aggravating-factor determination . . . is a purely factual determination."

The *Carr* opinion also stated, in dictum, that "one *can* require the finding that they did exist to be made beyond a reasonable doubt." (*Ibid.*, emphasis added.) Any doubt that the constitution required that standard of proof was resolved, however, in a case decided a week earlier, *Hurst v. Florida* (2016) 136 S.Ct 616. In *Hurst*, the court held that under *Apprendi* and *Ring v. Arizona* (2002) 536 U.S. 584, only the jury, as opposed to a judge, can find the aggravating factors to determine death. In doing so, the Court said this:

> The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. ___, ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). In *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), this Court held that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury.
>
> (136 S.Ct. at p. 621.)

Accordingly, pursuant to *Alleyne*, *Carr*, *Hurst*, it is now clear that, as distinguished from mitigating circumstances, aggravating circumstances are (1) *factual findings*, (2) tantamount, because they increase the statutory maximum of the sentence, to *elements of the crime*, and therefore (3) must be required to be found *beyond a reasonable doubt*, which, in California, must be by a *unanimous jury* (Cal. Const., Art. I, § 16).

Because this is a constitutional matter, and for the reasons and additional sentencing errors set forth in appellant's opening brief, and especially in light of the mitigating evidence of the gruesome childhood suffered by appellant, respondent cannot show that the errors were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 584.)

Respectfully submitted,

RICHARD I. TARGOW
Attorney at Law

Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached APPELLANT'S SECOND SUPPLEMENTAL BRIEF uses 13-point Times New Roman font and contains 831 words, well below the limit for such briefs set forth in California Rule of Court 8.520(d)(2).

Dated: April 21, 2016

RICHARD I. TARGOW
Attorney at Law

DECLARATION OF SERVICE BY MAIL

Re: People v. Bailey Lamar Jackson No. S139103

I, RICHARD I. TARGOW, certify:

I am, and at all time mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Post Office Box 1143, Sebastopol, California 95473.

I served a true copy of the attached APPELLANT'S 2D SUPPLEMENTAL LETTER BRIEF on each of the following, by placing same in an envelope or envelopes addressed, respectively, as follows:

Tami F. Hennick, Dep. Atty. Gen.
Office of the Attorney General
P.O. Box 85266-5299
San Diego, CA 92186-5266

Valerie Hriciga, Staff Attorney
c/o CAP Docketing Clerk
California Appellate Project
101 2nd Street, Suite 600
San Francisco, CA 94105

Hon. Patrick F. Magers,
c/o Clerk of the Superior Court
P.O. Box 431,
Riverside, CA 92501

Bailey Jackson, Appellant

Each said envelope was then, on April 21, 2016, sealed and deposited in the United States Mail at Sebastopol, California, with postage fully prepaid. I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of April, 2016, at Sebastopol, California

RICHARD I. TARGOW
Attorney at Law