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December 11, 2021

Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102-4797

Re: ***In re William Milton*, S259954**
Supplemental Letter Reply Brief
Court of Appeal case no. B297354
Los Angeles Superior Court case no. TA039953

To the Honorable Chief Justice Tani Gorre Cantil-Sakauye and the Associate Justices of the California Supreme Court:

Petitioner William Milton respectfully requests permission to file the instant supplemental letter reply brief to address respondent's supplemental letter brief. On October 21, 2021, petitioner submitted a supplemental letter brief to alert this Court to new relevant authority – *Edwards v. Vannoy* (2021) __ U.S. __ [141 S.Ct. 1547] (*Edwards*) – and to withdraw one argument in light of the new authority, while maintaining all other arguments. On November 15, 2021, respondent submitted a supplemental letter brief in which respondent addressed the application of the new authority to petitioner's case. This letter serves as a reply to respondent's letter brief.

In *Edwards*, the United States Supreme Court held that the rule announced in *Ramos v. Louisiana* (2020) __ U.S. __ [140 S.Ct. 1390] (*Ramos*) – that the Sixth Amendment requires jury verdicts to be unanimous for serious offenses – was not retroactive to final judgments. (*Edwards*, *supra*, __ U.S. __ [141 S.Ct. at p. 1554.].) *Edwards* explained that, by renouncing the former rule which permitted non-unanimous jury verdicts in state criminal trials, *Ramos* announced a new rule for retroactivity purposes. (*Id.* at p. __ [at p. 1556.]

Respondent argues that "*Edward*'s reasoning that the *Ramos* rule was new applies equally to the instant case." (Respondent's Letter Brief (RLB) 2.) As argued in appellant's opening brief on the merits, *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*) constituted a new rule under the state test for retroactivity because it expressly disapproved prior California Supreme Court law. (AOBM 23.)

As a separate basis for retroactive application, however, *Gallardo* was also derivative of prior United States Supreme Court law. (AOBM 40-46.)

Descamps v. United States (2013) 570 U.S. 254 (*Descamps*) – on which *Gallardo* was based – merely reaffirmed and applied previous United States Supreme Court decisions, specifically *Taylor v. United States* (1980) 495 U.S. 575 and *Apprendi v. New Jersey* (2000) 530 U.S. 466. (See AOBM 40-46.) Thus, unlike *Ramos*, which expressly overruled prior United States Supreme Court law, *Gallardo* was dictated by prior United States Supreme Court law.

Respondent also argues that *Edwards* supports a finding that *Gallardo* announced a procedural rule as opposed to a substantive rule under the federal *Teague*[1] test for retroactivity. (RLB 2.) Not so.

To support its argument that *Gallardo* announced a procedural rule, respondent again mistakenly asserts that *Gallardo* "transferr[ed] the fact-finding responsibility from judge to jury." (RLB 2.) Although Justice Chin advocated in his concurrence and dissent for merely transferring the fact-finding responsibility from judge to jury (*Gallardo*, *supra*, 4 Cal.5th at p. 140, conc. & dis. opn. of Chin, J.), the majority of this Court **expressly rejected** Justice Chin's view and explained that simply shifting the fact-finding to the jury would not solve the Sixth Amendment issues:

> Justice Chin's concurring and dissenting opinion takes the view that we can instead reconcile *Guerrero* with the Sixth Amendment right to a jury trial by simply reassigning the task of reviewing the record of conviction to a jury, as opposed to a judge. [Citation.] …. [But t]o permit a jury to make factual findings based solely on its review of hearsay statements made in a preliminary hearing would be to permit facts about the defendant's prior conviction to be proved in a way that no other elemental fact is proved – that is, without the procedural safeguards, such as the Sixth Amendment right to cross-examine one's accusers, that normally apply in criminal proceedings. This kind of proceeding might involve a jury, but it would not be much of a trial.

(*Gallardo*, *supra*, 4 Cal.5th at p. 139.)

Lastly, respondent argues that "*Edwards* supports Respondent's understanding of the *Johnson*[2] retroactivity test, especially its overarching concern with making retroactive only those procedural rules that are truly 'essential to a reliable determination' of innocence [citation], while preserving the benefits of finality. [Citations.]" (RLB 3.) As discussed in prior briefing, however, *Gallardo*'s change of law serves as a defense, both in fact and in

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[1] *Teague v. Lane* (1989) 489 U.S. 288.

[2] *In re Johnson* (1970) 3 Cal.3d 404.

law, in cases where the sentencing court had to resort to fact-finding in order to impose a greater sentence based on a prior conviction. (See OBM 27-32, 35-37; RBM 28-37.)

Thus, the *Gallardo* rule is "essential to a reliable determination of innocence" – that is, the rule is essential to a reliable determination of whether a prior conviction qualifies under current California law as a prior conviction justifying an increased punishment. Indeed, this Court found that the type of fact-finding previously conducted by sentencing courts with regards to prior convictions resulted in speculation, not reliable fact-finding. (*Gallardo*, *supra*, 4 Cal.5th at p. 137 ["A sentencing court reviewing the preliminary hearing transcript has no way of knowing whether a jury would have credited the victim's testimony had gone to trial. And at least in the absence o any pertinent admissions, the sentencing court can only guess at whether, by pleading guilty to a violation of [former] Penal Code section 245, subdivision (a)(1), defendant was also acknowledging the truth of the testimony indicating that she had committed the assault with a knife"].)

Accordingly, for the reasons set forth herein and in petitioner's prior briefing, *Gallardo* applies retroactively to final judgments and – with the exception of the "watershed rule" argument – *Edwards* does not change the analysis.

Sincerely,

/S/ BRAD KAISERMAN

BRAD KAISERMAN

Cc: Office of the Attorney General
The Honorable Ronald Slick
Los Angeles District Attorney's Office
William Milton

PROOF OF SERVICE

I, the undersigned, declare that I am a resident or employed in Los Angeles County, California; that I am over the age of eighteen years; that my business address is Brad K. Kaiserman, Esq., 5870 Melrose Ave., # 3396, Los Angeles, CA 90038, bradkaiserman@gmail.com, at whose discretion I served the document entitled **Supplemental Letter Reply Brief.**

On December 11, 2021, following ordinary business practice, service was completed by placing the above document in a sealed envelope for collection and mailing via United States Mail.

Sherri R. Carter, Clerk of the Court
Los Angeles County Superior Court
(For Retired Judge Ronald J. Slick)
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Los Angeles, CA 90012

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This proof of service is executed in Los Angeles, California, on December 11, 2021.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/S/ BRAD KAISERMAN
BRAD KAISERMAN

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S259954**
Lower Court Case Number: **B297354**

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/s/Brad Kaiserman
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