

BRAD K. KAISERMAN, ESQ. FILED WITH PERMISSION
5870 MELROSE AVE., # 3396, LOS ANGELES, CA 90038
PHONE: (310) 367-7632 ♦ FAX: (310) 870-1384
BRADKAISERMAN@GMAIL.COM

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

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 of 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)
111 North Hill St.
Los Angeles, CA 90012

William Milton, P38650
Correctional Training Facility (CTF)
Facility C, CXW3001L
PO Box 689
Soledad, CA 93960

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

Case Name: **MILTON (WILLIAM) ON H.C.**

Case Number: **S259954**

Lower Court Case Number: **B297354**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **bradkaiserman@gmail.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
LETTER	Milton Supplemental Letter Reply Brief

Service Recipients:

Person Served	Email Address	Type	Date / Time
Eric Kohm Office of the Attorney General 232314	eric.kohm@doj.ca.gov	e-Serve	12/11/2021 1:04:54 PM
Erik Levin Office of the State Public Defender 208274	erik.levin@ospd.ca.gov	e-Serve	12/11/2021 1:04:54 PM
Nicholas Webster Office of the Attorney General 307415	nicholas.webster@doj.ca.gov	e-Serve	12/11/2021 1:04:54 PM
Brad Kaiserman Law Offices of Brad Kaiserman 266220	bradkaiserman@gmail.com	e-Serve	12/11/2021 1:04:54 PM
Office of the Attorney General	docketinglaawt@doj.ca.gov	e-Serve	12/11/2021 1:04:54 PM
Los Angeles District Attorney's Office	truefiling@da.lacounty.gov	e-Serve	12/11/2021 1:04:54 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

12/11/2021

Date

/s/Brad Kaiserman

Signature

Kaiserman, Brad (266220)

Last Name, First Name (PNum)

Brad K. Kaiserman, Esq.

Law Firm