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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*<sup>1</sup> 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*[<sup>2</sup>] 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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<sup>1</sup> *Teague v. Lane* (1989) 489 U.S. 288.

<sup>2</sup> *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)  
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Los Angeles, CA 90012

William Milton, P38650  
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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

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

Case Number: **S259954**

Lower Court Case Number: **B297354**

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/s/Brad Kaiserman

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Kaiserman, Brad (266220)

Last Name, First Name (PNum)

**Brad K. Kaiserman, Esq.**

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