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November 15, 2021

Honorable Chief Justice Tani G. Cantil-Sakauye
Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102

RE: *In re William Milton, on Habeas Corpus*
Supreme Court California S.F., San Francisco Branch Case No. S259954
Second Appellate District, Division Seven, Case No. B297354
Los Angeles County Superior Court, Case No. TA039953

Dear Honorable Chief Justice Cantil-Sakauye and Honorable Associate Justices:

Pursuant to California Rules of Court rule 8.520(d), Respondent submits this Supplemental Letter Brief to discuss the application of the new authority raised in Milton's Supplemental Letter Brief. The United States Supreme Court decided *Edwards v. Vannoy* (2021) 141 S.Ct. 1547, on May 17, 2021, seven months after Milton's Reply Brief was filed. *Edwards* held that the recent decision in *Ramos v. Louisiana* (2020) 140 S.Ct. 1390 (Sixth Amendment requires unanimous verdict for serious offenses), does not apply to final judgments under the federal test for retroactivity, *Teague v. Lane* (1989) 489 U.S. 288. (*Edwards*, *supra*, at pp. 1551-1552.) Most significantly, *Edwards* eliminated the non-retroactivity exception for "watershed" rules of criminal procedure. (*Id.* at p. 1560.) Now, under the new, simplified *Teague* test, "new procedural rules apply to cases pending in trial courts and on direct review," but "do not apply retroactively on federal collateral review." (*Id.* at p. 1562.)

Milton's Opening Brief on the Merits argued that if *People v. Gallardo* (2017) 4 Cal.5th 120, is a new rule of criminal procedure, then it applies retroactively under *Teague*'s watershed exception. (OBM 50-52.) On October 21, 2021, Milton filed a Supplemental Letter Brief, narrowly acknowledging that *Edwards* foreclosed that argument, but maintaining that *Gallardo* was retroactive under the federal test because it did not qualify as a "new rule" and amounted to a substantive—rather than procedural—rule. Respondent agrees that Milton's "watershed" argument is no longer tenable, but respectfully submits that the implications of *Edwards* are broader. Not only does *Edwards* prohibit retroactive application of new procedural rules to final judgments under

the federal test, it also supports the conclusion that the *Gallardo* rule is both new and procedural. Additionally, *Edwards* bolsters Respondent's argument as to the critical importance of finality concerns in conducting the retroactivity analysis under California's test, *In re Johnson* (1970) 3 Cal.3d 404. (See Answer Brief on the Merits (ABM) 25-32; Answer to the Office of the State Public Defender's Amicus Curiae Brief (AACB) 23-28.)

To begin, *Edwards*'s reasoning that the *Ramos* rule was new applies equally to the instant case. The defendant in *Edwards* claimed that the unanimity requirement under *Ramos* was not a new rule because it effected a return to the original meaning of the Sixth Amendment by overruling *Apodaca v. Oregon* (1972) 406 U.S. 404, which had permitted non-unanimous juries in state criminal trials. (*Edwards*, *supra*, 141 S.Ct. at p. 1556.) The Court rejected that argument, explaining that the argument "conflates the merits question presented in *Ramos* with the retroactivity question." (*Ibid*.) "By renouncing *Apodaca* and expressly requiring unanimous jury verdicts in state criminal trials, *Ramos* plainly announced a new rule for purposes of this Court's retroactivity doctrine." (*Ibid*.)

Similarly, Milton argued that *Gallardo* was not new because it was dictated by, or derived from, *Taylor v. United States*, (1990) 495 U.S. 575, and/or *Apprendi v. New Jersey*, (2000) 530 U.S. 466. Prior to *Gallardo*, however, reasonable jurists followed *People v. McGee*, (2006) 38 Cal.4th 682, which permitted trial courts to make factual findings about prior convictions in order to enhance a defendant's sentence. Thus, under *Edwards*, by "renouncing" *McGee* and expressly holding that only a jury could make such factual findings, *Gallardo* "plainly announced a new rule." (*Edwards*, *supra*, 141 S.Ct. at p. 1556; *id*. at p. 1555 ["The starkest example of a decision announcing a new rule is a decision that overrules an earlier case."].)

With regard to the distinction between substantive and procedural rules, *Edwards* reaffirms Respondent's analysis (see ABM 35):

> New substantive rules alter "the range of conduct or the class of persons that the law punishes." [Citation.] Those new substantive rules apply to cases pending in trial courts and on direct review, and they also apply retroactively on federal collateral review. New procedural rules alter "only the manner of determining the defendant's culpability." [Citation].

(*Edwards*, *supra*, 141 S.Ct. at p. 1562.) *Gallardo*, in transferring the fact-finding responsibility from judge to jury, was clearly a procedural rule.

Finally, *Edwards* supports Respondent's understanding of the *Johnson* retroactivity test, especially its overarching concern with making retroactive only those

procedural rules that are truly "essential to a reliable determination" of innocence (*Johnson*, *supra*, 3 Cal.3d at p. 411), while preserving the benefits of finality. (ABM 25-32; AACB 23-28.) *Edwards* acknowledged that state courts are free to apply their own retroactivity tests and strike a different balance. (See *Edwards*, *supra*, 141 S.Ct. at p. 1555 fn. 6; ABM 25.) At the same time, *Edwards* emphasized the fundamental importance of finality in bringing closure to victims, alleviating an over-burdened justice system, and encouraging public confidence in the law. (See *Edwards*, *supra*, at pp. 1554-1555.) *Johnson* not only recognized the importance of those concerns, but its respect for finality is implicit in its recognition that only a special subset of procedural rules will be given full retroactive effect, those which are critical to the truth-finding process. (*Johnson*, *supra*, at pp. 410-411, 413; ABM 25-32; AACB 23-28.) Because *Gallardo* did not overrule *McGee* in order to increase the reliability of fact-finding, the finality concerns expressed in *Edwards* prevail.

Sincerely,

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W. Richard Such
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Los Angeles District Attorney's Office
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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on November 15, 2021, at Los Angeles, California.

Silvia Feigin	
Declarant	Signature

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Supreme Court of California

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