PD-0787-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 3/27/2019 1:44 PM
Accepted 3/27/2019 3:26 PM
DEANA WILLIAMSON
CLERK

NO. PD-0787-18

FILED
COURT OF CRIMINAL APPEALS
3/27/2019
DEANA WILLIAMSON, CLERK

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

DEMOND FRANKLIN
Appellant-Petitioner

v.

STATE OF TEXAS
Appellee-Respondent

Appealed from:

The 290th Judicial District Court, Bexar County, Texas &

Fourth Court of Appeals, San Antonio, Texas;

Cause No(s).: [2015CR6149A] & [04-17-00139-CR], respectively.

APPELLANT'S AMENDED REPLY BRIEF

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ORAL ARGUMENT:
[REQUESTED].

IDENTITY OF JUDGE(S), PARTIES, & COUNSEL

Pursuant to TEX. R. APP. P. 68.4(a) (West 2017), the parties and representatives to this action are as follows:

(1) Appellant: DEMOND FRANKLIN, T.D.C.J. No.: 02119674, Telford Unit; 3899 Hwy. 98, New Boston, TX 75570.

(2) Appellee: STATE OF TEXAS, by and through the Bexar County District Attorney's Office; 101 W. Nueva St., Suite 710, San Antonio, TX 78205.

The trial attorneys are:

(3) For appellant: M'LISS CHRISTIAN, TBN: 13416550; 111 Soledad, Suite 358, San Antonio, TX 78205-2230; F. ALAN FUTRELL, TBN: 07562725; 319 Maverick St., San Antonio, TX 78212-4637; VINCENT D. CALLAHAN, TBN: 03651700; P.O. Box 12141, San Antonio, TX 78212-0141.

(4) For the State: WENDI K. WILSON, TBN: 24003241; KRISTINA A. ESCALONA, TBN: 24047443; JAMES H. ISHIMOTO, TBN: 24002339; DAVID MARTIN, TBN: 24048637; Bexar County District Attorney's Office, 101 W. Nueva St., San Antonio, TX 78205.

The appellate attorneys are:

(5) For appellant: DEAN A. DIACHIN, TBN: 00796464; Bexar County Public Defender, 101 W. Nueva St., Suite. 370, San Antonio, TX 78205.

(6) For the State: JAY R. BRANDON, TBN: 02880500, Bexar County District Attorney's Office; 101 W. Nueva St., Suite 710; San Antonio, TX 78205.

The trial court(s) are:

(7). The HON. LAURA L. SALINAS, 166th District Court, 100 Dolorosa St., San Antonio, TX 78205;

(8). The HON. MELISA CHARMAINE SKINNER, 290th District Court, 300 Dolorosa St., San Antonio, TX 78205; &

(9). The HON. KEVIN MICHAEL O'CONNELL, 227th District Court, 300 Dolorosa St., San Antonio, TX 78205.

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GROUND FOR REVIEW NO. 1

The court of appeals erred in ruling that appellant's *Miller v. Alabama* claim was forfeited by inaction. 4

A. STATE'S RESPONSE 4

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GROUND FOR REVIEW NO. 3

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STATEMENT ON RECORD CITATIONS

As in appellant's opening brief, the reporter's record will be cited as "RR" and the clerk's record will be cited as "CR." The reporter's record will be cited chronologically as follows:

(1 RR ___)	=	D. Jimenez, Vol. 1:	["Hearing"];
(2 RR ___)	=	E. Uviedo, Vol. 1:	["Motions"];
(3 RR ___)	=	A. Rivera, Vol. 1:	[Mt. for Continuance];
(4 RR ___)	=	M. Fatahi, Vol. 1:	["Pretrial Proceedings"];
(5 RR ___)	=	M.B. Sasala, Vol. 1:	[Master Index-Trial];
(6 RR ___)	=	M.B. Sasala, Vol. 2:	[Pretrial Motions];
(7 RR ___)	=	M.B. Sasala, Vol. 3:	[Voir Dire];
(8 RR ___)	=	M.B. Sasala, Vol. 4:	[Trial Evidence];
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(10 RR ___)	=	M.B. Sasala, Vol. 6:	[Trial Evidence];
(11 RR ___)	=	M.B. Sasala, Vol. 7:	[Trial, Closings, Verdict & Punishment];
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(13 RR ___)	=	M.B. Sasala, Vol. 9:	[Mt. New Trial];
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(17 RR ___)	=	N. Castillo, Vol. 3:	[Mt. Reconsider M.N.T.];
(18 RR ___)	=	N. Castillo, Vol. 4:	[Mt. Reconsider M.N.T.].

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS OF TEXAS:

Mr. Demond Franklin, appellant, files this reply brief by and through his appellate counsel of record, Mr. Dean A. Diachin, Bexar County Assistant Public Defender, and in support thereof would show this Honorable Court the following:

REPLY RE: ORAL ARGUMENT.

The State offers no statement on oral argument. Thus, nowhere in its response does the State dispute that the grounds presented here are necessary to resolve "an important question of state [and federal]…law that has not been, but should be, settled by the Court of Criminal Appeals." TEX. R. APP. P. 66.4(b) (West 2017). Nor has the State disputed that, if a defendant's age at the time of the offense is deemed to be a legally essential element of the instant offense, this case could alter how capital cases must be pled and proven in this state. Finally, given the rather severe mandatory-minimum sentences that apply to these cases in Texas, appellant would, once again, respectfully renew his request that oral argument be granted here.

REPLY RE: STATEMENT OF THE CASE.

In its response the State does say that: "[t]he State agrees with Appellant's statement of the case." State's Response, p. 5. Thus, the State apparently accepts that: (1) all counts alleged here required proof that appellant was the actual shooter, and (2) delivering a memorandum opinion was improper because this case involves: (a) constitutional issues important to the jurisprudence of Texas; and (b) application of existing rules to a novel fact situation likely to recur in future capital litigation.[1] *See* TEX. R. APP. P. 47.4(a),(b) (describing circumstances in which memorandum opinions are inappropriate).

REPLY RE:
STATEMENT OF FACTS.

According to the State: "[a] statement of facts is unnecessary to [resolve]… the issues presented on appeal." State's Response, p. 5. The Sate thus effectively admits "the appellate record is completely devoid of any evidence regarding Franklin's birthdate." *Franklin*, 2018 WL 3129464, at *5. The State also does not question whether the record *does* contain evidence to suggest that the hooded black man Rachel Areola saw searching her son and clicking a black revolver at her three [3] times was in fact Ryan Hardwick, and not appellant. *See, e.g.,* (9 RR 167, 169) (describing by Areola that she saw "a tattoo, a scar, a cut…[or] something [similar] on [the gunman's]

1. The existing rules of law are from: *Miller v. Alabama*, 567 U.S. 460 (2012); *Alleyne v. United States*, 133 S. Ct. 2151 (2013); & *Garza v. State*, 435 S.W.3d 258 (Tex. Crim. App. 2014).

left [cheek]…[and that he was] About 5’10 or 5’11...[and] slender built”); (1 CR 106) (depicting a sizable scar on left side of Ryan Hardwick’s face in same photo Daniel Martinez signed, dated, and identified as accurately depicting “Trae”); (8 RR 140, 193) (establishing Martinez first met Hardwick at appellant’s apartment where Hardwick introduced himself as “Trey”); (10 RR 208) (admitting Hardwick was also forty [40] pounds lighter on offense date than he was at trial); (10 RR 144, 172-173) (admitting Hardwick has also been shot in the face before).

Hardwick, for his part, offered other details implicating appellant that simply do not match the descriptions provided by either Daniel Martinez or crime scene investigators. *Compare, e.g.,* (10 RR 133-134) (claiming by Hardwick that, when complainant’s front door first opened, Hardwick was “three or four feet” behind appellant and that appellant “wasn’t even close enough *to touch* the door yet”); (10 RR 170) (asking, “Q:…So if there's been testimony that the door was ‘kicked in’…would that be accurate? A: No”), *with, e.g.,* (8 RR 122) (noting by patrolman Martinez that wood surrounding front door frame was “separated” and appeared “forced open”); (8 RR 181-182, 203) (noting by Daniel that, as he exited complainant’s bathroom, Daniel heard front door “kicked in” and shots being fired, but he did not see the shooter). In the end, a reasonable probability remains that the State has managed to reward the actual shooter in this case with a plea-deal that will

render Ryan Hardwick eligible for parole in as little as fifteen [15] years. *See* TEX. GOV. CODE § 508.145(f) (West Supp. 2014) (stating, "[a]n inmate described by [TEX. CRIM. P CODE art. 42A.054]…is not eligible for release on parole until the inmate's actual calendar time served, without consideration of good conduct time, equals one-half of the sentence or 30 calendar years, *whichever is less*") (emphasis added). Appellant, meanwhile—absent a reformation—will die in prison.

ISSUES PRESENTED FOR REPLY

Ground for Review No. 1

THE COURT OF APPEALS ERRED IN RULING THAT APPELLANT'S *MILLER v. ALABAMA* CLAIM WAS FORFEITED BY INACTION.

A. State's Response.

The State concedes: "[t]he court of appeals did fail to follow this Court's holding in [*Garza I*]…that a failure to raise this type of claim in the trial court did not waive that claim on appeal." State's Response, p. 6. The State nevertheless argues this case should be dismissed because "[Franklin] was actually 28 years old [at the time of the offense]". Id. at 7. As proof, the State offers—for the first time ever—a "booking page" & "Bexar County information page" that purport to show appellant's birthdate, and which "I will attempt to supplement the record with… or this Court can order it so supplemented." State's Response, p.7 n.1.

A. Appellant's Reply.

The State cites no authority that would permit such supplementation of the record at this late stage. Appellant objects to any effort to introduce new evidence now that was not admitted at trial. Indeed, as this Court has observed:

> An appellate court may not consider factual assertions that are outside the record, and a party cannot circumvent this prohibition by submitting [evidence]…for the first time on appeal. While the record may be supplemented under the appellate rules if something has been omitted, the supplementation rules cannot be used to create new evidence… [A]n appellate court's review of the record…is generally limited to the evidence [that was] before the trial court at the time of the trial[.]

Whiteside v. Sate, 130 S.W.3d 866, 872 (Tex. Crim. App. 2004); *accord*, *Amador v. State*, 221 S.W.3d 666, 677 (Tex. Crim. App. 2007) (stating, "the record may be supplemented under the appellate rules if something has been omitted, [but] the supplementation rules cannot be used to create new evidence"). Here, no jury has ever considered the "new evidence" in question, nor has appellant received any opportunity to cross-examine the sole "sponsoring witness" for that proffer, i.e., the State's own appellate counsel. Generally, counsel may not be a witness in the same case.

The State's analysis is also flawed because it presumes appellant's complaint is grounded primarily in the Eighth Amendment prohibitions identified in *Miller v. Alabama*. However, appellant's claim is at least equally grounded in the Sixth Amendment principles set out in *Jackson v. Virginia* & *Alleyne v. United States*, which require that the State prove all legally essential elements of the

offense charged to a jury beyond reasonable doubt. Which is to say, the instant challenge is, as a matter of law, as much about whether a defendant's age is *an element* of a capital case in Texas as it about whether this appellant was in fact over the age of eighteen [18] on the date of the offense. A "legal sufficiency challenge" to the evidence below may be raised for the first time on appeal just as much as a *Miller* claim might be. *Cf. Wood v. State*, 486 S.W.3d 583, 591 (Tex. Crim. App. 2016) (Keller, P.J., dissenting) (noting, "sufficiency of the evidence [for an enhancement paragraph] *can* be used for the first time on appeal, and (except for venue) our law does not purport to allow presumptions to substitute for the introduction of evidence") (emphasis in original).

At bottom, what's important here is that the parties agree that the court of appeals erred below.[2]

Ground for Review No. 2

THE COURT OF APPEALS ERRED BY RULING A DEFENDANT'S AGE AT THE TIME OF THE OFFENSE IS AN AFFIRMATIVE DEFENSE FOR WHICH THE DEFENDANT BEARS A BURDEN OF PROOF.

A. State's Responses.

2. Also noteworthy is that, before the reasoning below necessitated "cracking" the instant issue into three [3] separate "grounds for review" in this Court, that same issue was first placed squarely before the court of appeals in terms of a "legal sufficiency challenge" to the evidence at trial. *See* Appellant Amended Brief, p.43 (file-stamped 10-26-17 & stating: "The trial court erred by assessing penalty at life in prison without parole because the State neither alleged, nor supported with any evidence, that appellant was at least eighteen [18] years of age on the date of the offense").

The State offers three [3] relevant responses here.

First, the State argues this Court should adopt the "burden analysis" announced in *Garza II* because:

> [t]his Court refused [to] review [*Gaza II*]…and so [its] holding is settled law in the Fourth Court district...[And given] *Miller* was recent at the time of the [original] trial in *Garza [I]*…it was no surprise defense counsel…may not have known about it. But it is well-established now. Appellant's counsel very likely knew of the holding and would have raised that defense if he'd had any evidence to prove his client was underage at the time of the instant offense. He did not.

State's Response, p. 8.

Likewise, the State claims:

> [A defendant's age at the time of the offense] is not an issue in a [capital] trial, [so] no one should have a duty of proof on it, just as no one is required to prove the defendant was a "person" and the victim was an "individual," even though there are statutory definitions of such terms in the [Penal Code].

State's Response, p. 9-10.

Finally, the State complains:

> Appellant would have this Court impose on Texas trial judges in every capital murder trial an affirmative duty to inquire into every defendant's age at the time of the offense, even if it is apparent to everyone in the courtroom that the defendant is nowhere near his teen years… This Court should not require trial courts to go through an unnecessary procedure in every capital murder trial.

State's Response, p. 9-10.

B. Appellant's Replies.

As to its first argument, the State would have this Court adopt *Garza II*, statewide, for no other reason than it was "settled-law in the Fourth Court district" at the time this cased was tried. The government no doubt made similar "status quo" arguments in *Gideon v. Wainwright* (1963), *Miranda v. Arizona* (1966), & *Alleyne v. United States* (2013). However, as federal constitutional standards continue to evolve, so to do the obligations of the State. And, given *Alleyne* was also new when *Garza II* was decided in 2014, it would also not be surprising that the Fourth Court of Appeals may not have known about *that* binding federal precedent when that it first announced its decision in that case. "But [*Alleyne v. United States*] is well-established law now [as well]."

Moreover, the State cannot dispute that, by amending Penal Code § 12.31(a) in 2013, the Texas legislature expressly made different mandatory-minimum capital penalties contingent upon the defendant's age at the time of the offense. Thus, under *United States v. Booker* & *Alleyne v. United States*, that fact should now be recognized as an essential element of the instant charge that should've been pleaded in the State's indictment & proved to a jury beyond a reasonable doubt at trial. Here, because appellant's age was neither pleaded nor proven to a jury below, the State is only entitled to a penalty commensurate with § 12.31(a)(1).

Regarding its second claim, the State can point to no other Texas law that makes any similar ramifications turn on proof that the defendant is a "person" or that the complainant is an "individual". Thus, *those* facts aren't elements of any Texas offense.

As to its final complaint, which sounds merely in the manner of "*trial court* inconvenience," appellant submits that no trial court in Texas will be the least bit burdened by a ruling establishing that, in order to get life without parole, the State must plead and prove a defendant's age *to a jury* beyond a reasonable. Such a ruling would, at most, add a single line to the State's indictment and to the trial court's jury instructions. Their own Appendix shows just how easily the State might produce "some evidence" of a defendant's age at the time of the offense. But, if its untimely nature is not disqualification enough, the State's "new evidence" would still be inadequate because it's accompanied by nothing that suggests appellant was *the source* of any of the information contained therein. Thus, that "new evidence," alone, does in no way constitute an express waiver, admission, or finding of fact from the jury.

Indeed, as was observed in a similar Sixth Amendment context by the illustrious Justice Scalia: "Dispensing with [an essential element of an offense charged] simply because [it's obvious 'to everyone in the courtroom that the defendant is nowhere near his teen years'] is akin to dispensing with a jury trial [altogether] because

a defendant is obviously guilty. This is not what the Sixth Amendment prescribes". *Crawford v. Washington*, 124 S.Ct. 1354, 1371 (2004).

At bottom, appellant, like Clarence Gideon, Ernesto Mirada, & Allan Alleyne before him, should be the first capital appellant in Texas to whom the federal precedent cited herein ought to be applied. *See United States v Booker*, 543 U.S. 220, 226 (2005) (holding, "If a State makes an increase in a defendant's authorized punishment contingent on [a] finding of fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt"); *see also* State's Response, p. 6-7 (conceding: "[t]his Court seems to wish to further define how to deal with this type of claim…and such clarification is apparently needed").

Ground for Review No. 3

EVEN IF DEFENDANTS BEAR THE BURDEN TO PROVE WHEN THEY WERE BORN, THE COURT OF APPEALS ERRED IN AFFIRMING THE INSTANT JUDGMENT BECAUSE THE TRIAL COURT NEVER SECURED AN EXPRESS WAIVER FROM APPELLANT, ADMISSION FROM APPELLANT, OR FINDING OF FACT THAT APPELLANT WAS INDEED OVER THE AGE OF EIGHTEEN [18] ON OCTOBER 22, 2014.

A. State's Response.

The State makes no effort to identify the *Marin* category in which the right at issue here should be placed. Instead, the State describes appellant's critique of the court of appeals' decision below as "absurd," as the following illustrates:

> Appellant claims the burden of proving one's age is "virtually impossible to meet." This is absurd. The Fourth Court of Appeals…suggested this standard could be met by showing a driver's license or ID card.

State Response, p. 9.

B. Appellant's Reply.

The right at issue here is the right to have *a jury* decide appellant's age at the time of the offense. That right should be declared to be a *Marin* Category II right because (as appellant understands it)—due to their "absolute nature"—Category I rights may not be waived even if a defendant wants to do so. But in a capital context, if she finds it in her best interests, a defendant *should* be allowed to satisfy the evidentiary requirements for that element by simply admitting her age in open court, just as other defendants do when they plead "guilty" to each element of non-capital offenses in open court, or "true" to an enhancement paragraph.[3] This is especially true when, as here, the State also waives any corresponding right it might ultimately gain

3. *See, e.g., Hopkins v. State*, 487 S.W.3d 583, 587 (Tex. Crim. App. 2016) (holding that "true plea" to an enhancement paragraph is, by itself, sufficient to find enhancement paragraph true); *Helton v. State*, 886 S.W.2d 465, 466 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (stating, "[b]ecause appellant…pleaded guilty before a jury, article 1.15 does not apply [to this case]"). That said, admissions made *solely* to a judge may still require substantiation. *See Menefee v. State*, 287 S.W.3.2d 9, 13 (Tex. Crim. App. 2009) (stating, "By its plain terms [Art. 1.15] requires evidence in addition to, and independent of, a plea [to a court]…to establish the defendant's guilt"). But, this will still cause no undue burden because, "[b]y the time a capital murder case comes to trial, both the prosecution and the defense will certainly have ascertained the defendant's age at the time of the offense." State's Response p. 9; *see also* Id. at p. 13 (showing just how easily that "some evidence" of defendant's age might be produced by prosecutors at trial). And, if it really *is* that easy to prove, then there also really is no reason *not* to place the burden with the State, *and* in the process, remain on the right sides of the Sixth & Eighth Amendments.

to cause the death of the defendant. And, because such an "exchange of waivers" is likely to occur in every case in which the defendant wants to keep breathing, the rule of law sought here will cause no undue burden on either Texas trial courts or the State.

As to its "absurdity" argument, the State misconstrues the critique appellant offers in his opening brief. Nowhere therein does appellant suggest the "burden analysis" advanced below would make it impossible to prove a defendant's age at the time of the offense. Rather, appellant's critique is that the standard announced below makes it virtually impossible to show that a defendant's age is *an element* of the offense the State charged here. Now, with that clarification in mind, there can also be no question that the court of appeals did hold that a defendant's age at the time of the offense is *not* an element of the instant charge "[because] the absence of [that fact] does not increase the penalty of the crime *beyond* the statutory maximum". *Franklin*, 2018 WL 3129464 at *4 (emphasis added). This enunciation is, at best, an inartful way of summarizing the court of appeals' own prior holding in *Garza II*, as no fact that reduces culpability will ever "increase the penalty of the crime *beyond* the statutory maximum." Appellant thus stands by his assertion that, "even in the context of mental retardation, the reasoning advanced below would seem to have either misconstrued or misapplied the rules announced in *Apprendi v. New Jersey* &

United States v. Booker," [Appellant's Brief, p. 14], for identifying the essential elements of a given charge.

Moreover, even if we assumed, for the sake of argument, that the problems associated with *Alleyne* & *Booker* could be set aside, the next logical questions are: (1) could the reasoning advanced below ever be extended to a case in which the death penalty was not waived?; and (2) if that reasoning were so extended, how effectively might the defense challenge the constitutionality of a rule that holds that a person who cannot prove her age *to a Judge* by a preponderance should still be executed in the exact same manner as a defendant who was in fact proven to be over age of eighteen [18] at the time of the offense? Appellant submits the Eighth Amendment defects with such a ruling would be anything but "absurd". If the reasoning advanced below would be unconstitutional in a case in which the death penalty was not waived, then it is equally unconstitutional here as well.

PRAYER

WHEREFORE, PREMISES CONSIDERED, appellant respectfully prays the Honorable Court of Criminal Appeals of Texas grants appellant either: (1) a *Thornton* reformation of his sentence, to life with a possibility of parole after forty [40] calendar years; or, as a distant alternative, (2) another punishment hearing before a new jury.

Respectfully submitted,

/s/ *Dean A. Diachin*

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CERTIFICATE OF COMPLIANCE

Appellant hereby certifies this reply brief was generated by computer, and thus is limited to seventy-five-hundred (7,500) words. The "word count" function within Microsoft Word 10.0 indicates this reply brief consists, in relevant part, of no more than 3,279 words. The brief therefore complies with TEX. R. APP. P. 9.4(i)(2)(C) (West 2018).

/s/ *Dean A. Diachin*

DEAN A. DIACHIN
Bexar County Assistant Public Defender.

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Reply Brief has, as always, been delivered by "e-service" to Ms. Shameka Roberts; Office Assistant II; Bexar County District Attorney's Office, Appellate Section, on this 27th day of March, 2019.

Likewise, on this same date—and out of an abundance of caution—a file-stamped copy of the instant pleading was also sent by certified mailed, with a return receipt requested, in care of: Mr. Jay R. Brandon, Esq.; Bexar County Dist. Attorney's Office; 101 W. Nueva, Suite 710; San Antonio, TX 78205. Included in that mailing are "Texas E-file envelope receipts" for *all seven* [7] motions & briefs appellant has ever filed in this Court in: PD-0787-18. They all show that Ms. Shameka A. Roberts "opened" each of those instruments shortly after they were served on the Bexar County District Attorney's Office.

/s/ *Dean A. Diachin*
DEAN A. DIACHIN
Bexar County Assistant Public Defender.