No. S259954

# In the Supreme Court of the State of California

IN RE WILLIAM MILTON,
ON HABEAS CORPUS.

Second Appellate District, Case No. B297354
Los Angeles Superior Court, Case No. TA039953
The Honorable Ronald Slick, Judge

## ANSWER TO OFFICE OF STATE PUBLIC DEFENDER'S AMICUS CURIAE BRIEF

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## INTRODUCTION

This Court's retroactivity jurisprudence seeks to identify those decisions that "vindicate[e] a right which is essential to a reliable determination of whether an accused should suffer a penal sanction" and implement rules that "relate[] to characteristics of the judicial system which are essential to minimizing convictions of the innocent." (*In re Johnson* (1970) 3 Cal.3d 404, 411, 413.) As Respondent has shown, *People v. Gallardo* (2017) 4 Cal.5th 120, is not one of those rules. (Respondent's Answer Brief ("RAB") 44-51, 53-58.)

Although the Office of the State Public Defender ("OSPD") raises important issues concerning implicit racial bias and disproportionate Three Strikes law sentences imposed on Black defendants, the *Gallardo* rule does not implicate those concerns. *Gallardo*'s "laser focus was on vindication of the jury trial right, without a further nod to any underlying motivation relating to reliability." (*In re Haden* (2020) 49 Cal.App.5th 1091, 1110 (con. opn. of Brown, J.).) Critically, the OSPD's cited studies do not purport to show that pre-*Gallardo* fact-finding was the cause of disparate sentences. Absent such a causal relationship, they provide no reasonable, empirical basis to conclude that applying *Gallardo* retroactively will help ameliorate that injustice.[1] Moreover, the OSPD's argument is premised on a misreading of *Johnson* that would turn this Court's retroactivity jurisprudence

[1] For purposes of this Answer, Respondent accepts the accuracy and reliability of the studies cited by the OSPD.

on its head by effectively requiring full retroactivity whenever a new decision extends procedural protections to a criminal defendant.

## ARGUMENT

### I. UNDER *JOHNSON*, *GALLARDO* IS NOT RETROACTIVE AS ITS PURPOSE WAS TO VINDICATE THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL, NOT TO IMPROVE ACCURACY OR REMEDY DISPARATE SENTENCING

Although the OSPD raises important concerns about racially disparate sentencing under the Three Strikes law (Brief of Amicus Curiae ("BAC") 14-22), it fails to show retroactive application of *Gallardo* would address those concerns. More fundamentally, the OSPD's arguments fail to acknowledge that *Gallardo* announced its intent to vindicate defendants' jury trial right without mentioning or implying any design to remediate discriminatory sentencing, implicit bias, or to improve the accuracy of fact-finding. That alone renders *Gallardo* non-retroactive under this Court's precedent. (*In re Johnson*, *supra*, 3 Cal.3d at pp. 411, 413.)

To avoid this result, the OSPD attempts to redefine the purpose of *Gallardo*, asserting that the rule was intended to improve the accuracy of judgments by disallowing judicial fact-finding tainted by implicit bias. (BAC 26-27.) That assertion not only ignores the plain language of *Gallardo*, but conflates fact-finding with the exercise of judicial discretion in sentencing. It also assumes that disparate sentencing outcomes must mean that the sentences themselves are inaccurate, and that pre-*Gallardo* fact-finding contributed to that supposed inaccuracy. Finally, under the OSPD's overly expansive understanding of accuracy-

enhancing rules, it would be all but impossible for any favorable defense ruling to fail its version of *Johnson*'s retroactivity test.

### A. *Gallardo* eliminated judicial fact-finding in favor of jury fact-finding because the Sixth Amendment demanded it, not because judges are inaccurate fact-finders

The OSPD's conclusion—that *Gallardo* was intended to improve the accuracy of judgments—is absent from *Gallardo*'s reasoning as well as from the constitutional concerns that informed the *Apprendi* line of cases culminating in *Gallardo*. (BAC 24-25.) Before turning to the OSPD's attempt to justify retroactivity as a means of addressing implicit racial bias and racially disproportionate sentencing, it is important to address the misconceptions underlying the portrayal of *Gallardo* as an accuracy-enhancing rule.

Under the *Johnson* test, the retroactive effect of a new rule of procedural law is determined by: "'(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.'" (*In re Johnson*, *supra*, 3 Cal.3d at p. 410.) "[I]f the rule relates to characteristics of the judicial system which are essential to minimizing convictions of the innocent, it will apply retroactively regardless" of the reliance of prosecutors or the burden it will place upon the judicial system. (*Id*. at p. 413.) In the sentencing context, a rule is related to accuracy if it is "essential to a reliable determination of whether an accused should suffer a penal sanction." (*Id.* at p. 411.)

As previously shown, *Gallardo* did not premise its holding on an intent to improve the reliability of Three Strikes law determinations, much less on any concerns as to racially disproportionate sentencing. (RAB 44-51, 53-58.)[2] *Gallardo* held that, under the Sixth Amendment's right to a jury trial, facts about defendants' prior convictions that are used to enhance their sentences must be found by a jury—not a sentencing court—or be admitted as the basis for their pleas. (*Gallardo*, *supra*, 4 Cal.5th at p. 124.) *Gallardo* expressly and repeatedly explained the motivating force behind its decision: To vindicate the defendant's right to a jury trial under the Sixth Amendment. (*Id.* at pp. 124, 134, 135-137, 138.)

Similarly, the United States Supreme Court cases on which *Gallardo* primarily relied—*Mathis* and *Descamps*—were cited for their analysis of the Sixth Amendment jury trial guarantee. (*Gallardo*, *supra*, 4 Cal.5th at p. 132-135; see *Mathis v. United States* (2016) 136 S.Ct. 2243; *Descamps v. United States* (2013) 570 U.S. 254.) Indeed, the doctrinal starting point for *Gallardo*'s holding was *Apprendi v. New Jersey* (2000) 530 U.S. 466, the seminal decision in the modern expansion of the constitutional

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[2] Since the filing of the RAB, another Court of Appeal has found *Gallardo* to be non-retroactive under this reasoning. (*In re Nelson* (2020) 56 Cal.App.5th 114 [270 Cal.Rptr.3d 154, 161] ["*Gallardo* did not impugn the accuracy of factfinding by trial courts, and the factfinding process may not be any less reliable when conducted by a sentencing judge rather than a jury. Moreover, the second and third factors weigh strongly against applying *Gallardo* retroactively," quotation marks and citations omitted].)

jury trial right, which was not justified as accuracy-enhancing and which has not been held to be retroactive (see *People v. Anderson* (2009) 47 Cal.4th 92, 118; see also *DeStefano v. Woods* (1968) 392 U.S. 631, 633-634 [cases extending Sixth Amendment jury trial right to states not retroactive]). (*Gallardo*, *supra*, at p. 128.) As the Ninth Circuit Court of Appeals points out, "Every circuit court to address whether *Apprendi* applies retroactively, including this court in *United States v. Sanchez-Cervantes,* 282 F.3d 664 (9th Cir. 2002), has held that it does not." (*Hughes v. United States* (9th Cir. 2014) 770 F.3d 814, 818 [footnote omitted].) Accordingly, "If *Apprendi* . . . does not apply retroactively, then a case extending *Apprendi* should not apply retroactively based on those same cases." (*Ibid.*)

Nevertheless, the OSPD attempts to derive *Gallardo*'s true meaning from a single paragraph in the remedy portion of the opinion. (BAC 24-25.) As Respondent has explained (RAB 57-58), the *Gallardo* majority rejected Justice Chin's proposed remedy of remanding the case to allow a jury to determine if the prior conduct qualified as a prior strike without voicing a concern that such determinations would be unreliable. Rather, the Court rejected that remedy because it raised "constitutional concerns under *Apprendi*" and the Sixth Amendment in line with *Gallardo*'s explicit goal to vindicate the jury trial right. (*Gallardo*, *supra*, 4 Cal.5th at p. 138.)

The OSPD argues that "if this Court believed the only issue was the Sixth Amendment limit on judicial factfinding, it would have embraced the dissent's proposed remedy and shifted

factfinding to a sentencing jury." (BAC 25.) However, *Johnson* instructed that the mere presence of ancillary reliability concerns does not require retroactivity. "[D]ecisions which have been denied retroactive effect are seen as vindicating interests which are collateral to or relatively far removed from the reliability of the fact-finding process at trial." (*In re Johnson*, *supra*, 3 Cal.3d at pp. 411-12.) Consistent with that directive, *Johnson* found non-retroactivity in cases extending the right to a jury trial was proper because they "did not rest on any assumption that nonjury trials are more likely than jury trials to be unfair or unreliable." (*Id.* at p. 412.)

*Gallardo*'s insistence that all Sixth Amendment procedures must be followed when determining if prior conduct qualifies as a strike does not imply the pre-*Gallardo* process was unreliable; it only shows it was incompatible with the Sixth Amendment's demands. This analysis is similar to that concerning the retroactivity of *Crawford v. Washington* (2004) 541 U.S. 36. (See RAB 49-50.) *Crawford* vindicated the Sixth Amendment right to confrontation, but its rule did not necessarily improve accuracy, as it both prohibited previously admissible hearsay and removed Sixth Amendment protections from nontestimonial hearsay. (*Whorton v. Bockting* (2007) 549 U.S. 406, 419-420.) Similarly, *Gallardo* extended the Sixth Amendment's jury trial right, but it is far from clear that ensuring that defendants choose whether a jury or judge determines (beyond a reasonable doubt) that prior convictions qualify as strikes will increase the reliability of strike determinations. The OSPD offers no basis to think that

curtailing judges' ability to review even reliable evidence will increase the likelihood that the defendants' prior convictions are accurately identified as strikes. (RAB 49-50; *In re Brown* (2020) 45 Cal.App.5th 699, 730 (dis. opn. of Menetrez, J.) ["[I]t is possible that there are cases in which a prior conviction that is not found to be a strike under *Gallardo* would have erroneously been found to be a strike under *McGee*. But the opposite result would appear to be considerably more likely."].)

The OSPD analogizes this case to *Leary v. United States* (1969) 395 U.S. 6 (BAC 23-24), but *Leary* is distinguishable (see RAB 49). *Leary* applied a substantive rule which made certain prior conduct no longer eligible for additional punishment. (See *Johnson*, *supra*, 3 Cal.3d at pp. 409, 415-416.) Here, the same conduct remains eligible for punishment post-*Gallardo*; all that changed is that a jury must have found the evidence which establishes whether the defendant committed that conduct.

The OSPD also argues that *Gallardo* was intended to improve accuracy by analogizing it to two cases that were not raised in Milton's Opening Brief: *Berger v. California* (1969) 393 U.S. 314, and *Roberts v. Russell* (1968) 392 U.S. 293. (BAC 25-26.) Unlike *Gallardo*, the rules that those cases analyzed expressly announced their intention to address inaccurate fact-finding.

*Berger* "gave fully retroactive effect to *Barber v. Page* (1968) 390 U.S. 719 (a state cannot use preliminary hearing transcript of absent witness' testimony without showing good faith effort to secure his presence at trial), on the theory that precluding cross-

examination of a potentially critical witness may have had a significant effect on the integrity of the fact finding process at trial." (*In re Johnson*, *supra*, 3 Cal.3d at p. 411.) *Barber* expressly announced it was concerned with reliability. (*Barber*, *supra*, at p. 721.) The fact that *Barber* prohibited reference to the preliminary hearing transcript does not favor retroactivity. (See BAC 25-26.) *Gallardo* prohibited the trial court from resolving factual issues based on evidence including preliminary hearing transcripts because only *juries* could make the necessary findings, not because it found that such evidence was leading to unreliable determinations. (*Gallardo*, *supra*, 4 Cal.5th at p. 137; see RAB 45-46.)

Similarly, *Roberts*, *supra*, 392 U.S. 293, gave full retroactivity to *Bruton v. United States*, (1968) 391 U.S. 123, which held that "the introduction of a jointly tried codefendant's extrajudicial statement implicating the defendant violates the confrontation clause," "because a codefendant's admissions might lead to an unreliable determination of guilt or innocence when untested by cross-examination." (*In re Johnson*, *supra*, 3 Cal.3d at p. 411.) Again, *Bruton* expressly identified its rule as critical to reliable fact-finding. *Bruton* described the prior rule as allowing "powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, [to be] deliberately spread before the jury in a joint trial." (*Bruton*, *supra*, 391 U.S. at p. 136 ["The *unreliability* of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify. . . ," italics added].) *Gallardo*'s

corresponding silence strongly supports a counter-inference about its reliability concerns.

Nor is the OSPD correct in contending that the fact-finding in the instant case was an example of pre-*Gallardo* unreliability. (BAC 27.) Milton's sentencing court relied upon the Illinois court's recitation of aggravating factors, namely, Milton's use of a handgun during the robberies. (1CT 147-148; RAB 17-18.) The Illinois prosecutor had alleged Milton used a handgun as an aggravating factor. (1CT 130-134.) At the time, firearm use was a legally relevant fact as it could be used to increase Milton's sentence. (See *People v. Zemke* (1987) 159 Ill.App.3d 624, 629; 730 Ill. Comp. Stat. Ann. 5/5-5-3.2(a)(1) [formerly Ill. Rev. Stat. 1987, ch. 38, par. 1005-5-3.2(a)(1)].)

Contrary to the OSPD's assertions (BAC 18-19, 30), the sentencing court's determination hardly rested on an "idle" or "stray" comment, and Milton had good reason to correct the Illinois court if handgun use was actually not established by the evidence. He never did so. The instant sentencing court measured that evidence against the beyond a reasonable doubt standard and found Milton's prior convictions were strikes (2RT 358). (See *People v. Frierson* (2017) 4 Cal.5th 225, 233; *People v. Tenner* (1993) 6 Cal.4th 559, 566.) This case thus exemplifies why the pre-*Gallardo* fact-finding method was approved as reliable and reasonable by this and many other courts. (See *People v. McGee* (2006) 38 Cal.4th 682, 686, 702-708; *People v. Guerrero* (1988) 44 Cal.3d 343, 355-356 [characterizing the pre-*Gallardo* method as "fair and reasonable"].)

The OSPD is similarly unconvincing in arguing that, as to the *Johnson* test's final two factors, the state did not detrimentally rely on pre-*Gallardo* procedures. (BAC 28.) Before *Gallardo*, prosecutors relied on *McGee*, which affirmed longstanding precedent, authorizing sentencing courts to examine the record of a prior conviction to determine if the defendant qualified for increased punishment. (*McGee*, *supra*, 38 Cal.4th at pp. 685, 702-708.) Their charging decisions and investigative efforts were necessarily predicated on the former procedure for proving prior strikes. (See *In re Thomas* (2018) 30 Cal.App.5th 744, 766, review denied Mar. 13, 2019, S253364) [finding a rule to be non-retroactive where, before the rule, "prosecutors reasonably relied on *Gardeley* and its predecessors in deciding how to present their cases to juries. The settled rule gave them no reason to expend scarce resources and expend scarce trial time developing and presenting additional witnesses. . . ."].) If *Gallardo* applies retroactively, courts and parties will need to utilize significant resources to find old documentation concerning long-final cases to determine if the facts established by the jury (or the plea admissions) supported additional punishment.

Further, the prosecutors in the proceedings that resulted in the prior conviction—at least those in California—also relied on the pre-*Gallardo* rule. Before *Gallardo* prosecutors could have made a strong record at trial that, for instance, a firearm was involved and be satisfied they laid the groundwork for a future strike. Now, equipped with the post-*Gallardo* knowledge that

firearm use not established by elements cannot support a strike, prosecutors will surely proceed differently. They will ensure strike-related facts are included in the basis for the plea or augment charges to ensure that relevant facts are included as elements or enhancements. These new steps highlight that the People have been relying on the pre-*Gallardo* procedure approved in *McGee*.

### B. The OSPD fails to show that pre-*Gallardo* fact-finding caused racially disproportionate sentences, or that applying *Gallardo* retroactively would help ameliorate those sentences

The OSPD contends that racial discrimination and implicit bias in the imposition of third-strike sentences justify retroactive application of *Gallardo* based on studies that purport to show that Black defendants are overrepresented in terms of third-strike sentences. (BAC 12, 20-21.) With little empirical support, the OSPD attributes that overrepresentation to racial bias in the justice system, most especially, to sentencing decisions arising out of prosecutorial and/or judicial discretion. (BAC 17-19.) Building on this shaky foundation, the OSPD assumes that pre-*Gallardo* fact-finding was tantamount to the exercise of judicial discretion (BAC 18-19), and asserts that *Gallardo* eliminated such fact-finding in order to enhance the reliability of third-strike sentences (BAC 26-27). Thus, the OSPD argues, *Gallardo* should be applied retroactively because the *Johnson* test makes retroactive rules that enhance reliability. (BAC 22.)

Racially disproportionate sentencing is a serious concern, but the OSPD fails to provide any compelling reason to believe

that retroactive application of *Gallardo* will meaningfully address it. The OSPD's argument relies on at least three erroneous or unsupported claims: First, that *Johnson*'s focus on ensuring reliable sentencing procedures extends to the separate and independent problem of racially disproportionate sentences; second, that empirical studies support applying *Gallardo* retroactively as a means of remedying such sentences; and, third, that pre-*Gallardo* fact-finding was equivalent to the exercise of judicial discretion.

Addressing the first claim, this Court's concern with identifying reliability-enhancing rules in its retroactivity jurisprudence refers "to the reliability of the truth-determining process at trial," which "is but a corollary to the ultimate test of the integrity of the judicial process: its capacity to ensure the acquittal of the innocent." (*In re Johnson*, *supra*, 3 Cal.3d at p. 416.) It follows that accuracy, as contemplated under the *Johnson* test, seeks to vindicate new rules that relate "to characteristics of the judicial system which are essential to minimizing convictions of the innocent." (*Id.* at p. 413.) That inquiry is not designed to identify or remedy cases of racially disproportionate sentencing. Overrepresentation of Black defendants serving third-strike sentences is a different kind of injustice from the punishment of factually innocent defendants.[3]

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[3] *People v. Wheeler* (1978) 22 Cal.3d 258, provides an instructive example of how retroactivity doctrine applies to concerns like those raised by the OSPD. *Wheeler* instituted a new rule of criminal procedure to curtail the use of preemptory

(continued…)

Further, the fact that overrepresentation exists does not logically entail that the sentences themselves were imposed inaccurately or were unsupported by reliable evidence.

The OSPD's conception of what rules are intended to improve the accuracy of fact-finding is too broad, encompassing all new procedural rules that favor criminal defendants. In essence, the OSPD argues that *Gallardo* satisfies *Johnson*'s reliability concerns because the rule's application will likely narrow the scope of those defendants eligible for Three Strikes law sentences. Not only would that likely be true of any new procedural rule, but it elides *Johnson*'s overarching concern of ensuring that innocent persons not suffer punishment.

*Johnson* wisely struck a balance to vindicate rules that are truly accuracy-enhancing, while protecting society's longstanding interest in the finality of criminal judgments: "the more directly the new rule in question serves to preclude the conviction of innocent persons, the more likely it is that the rule will be afforded retrospective application." (*In re Johnson*, *supra*, 3 Cal.3d at 413.) Expanding *Johnson* to apply to *Gallardo*, which included no reservation concerning the accuracy of the prior rule and which will not appreciably improve fact-finding, would vitiate the balance struck in *Johnson* and effectively require retroactive application for every new procedural rule.

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(…continued)

challenges to jurors based on group bias, but did not apply it retroactively. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 283 fn. 31; *People v. Cantu* (1984) 161 Cal.App.3d 259, 270 fn. 3.)

Addressing the second claim, even if *Johnson*'s reliability concerns could be extended to the effects of disproportionate sentencing, the OSPD provides no evidence to support its assertion that third-strike sentencing disparities were caused by the pre-*Gallardo* fact-finding procedure. Indeed, the OSPD candidly admits that none of the statistical analyses on which it relies identifies a causal connection between pre-*Gallardo* fact-finding and racial disparities. (BAC 19.) The few statistical analyses that attempted to control for nondiscriminatory factors (BAC 14, 20-21) did not provide any specific insight into whether pre-*Gallardo* fact-finding was either inaccurate or affected by racial bias.

Thus, even accepting the OSPD's assertion that some indeterminate number of third-strike sentences is attributable to racial bias in the criminal justice system, the OSPD can only speculate that retroactive application of *Gallardo* would remedy an injustice that arose out of judicial fact-finding. By the same token, the OSPD offers no empirical basis to find that retroactive application of *Gallardo*—which transferred the fact-finding responsibility from judge to jury—would ameliorate the racial disparity in sentences.

To the contrary, the OSPD's own sources posit that jurors also suffer from implicit bias. (BAC 15-16, citing Kang et al., *Implicit Bias in the Courtroom* (2012) 59 UCLA L. Rev. 1124, 1146.) The United States Supreme Court has recognized that juries may be more influenced by emotion (and presumably, therefore, racial prejudice) than judges and less likely to correctly

apply legal standards—including legal standards intended to protect defendants. (See *Schriro v. Summerlin* (2004) 542 U.S. 348, 356.) The OSPD provides no reason to believe jury decision-making will ameliorate disparate sentencing, avoid the effect of implicit bias, or otherwise improve the accuracy of prior strike determinations. (See *ibid.* ["for every argument why juries are more accurate factfinders [than judges], there is another why they are less accurate"].) In contrast, far from holding that judges are unreliable fact-finders, this Court in *McGee* explained that interpreting the record of a prior criminal proceeding to determine whether the conviction qualifies for additional punishment was "a task for which a judge is particularly well suited." (*McGee*, *supra*, 38 Cal.4th at p. 686.) As the OSPD points out, judicial officers at least undergo implicit bias training—the same cannot necessarily be said for jurors. (BAC 17.)

Finally, the OSPD erroneously equates pre-*Gallardo* fact-finding with an exercise of unreliable judicial sentencing discretion. (See BAC 18-19 ["Pre-*Gallardo* determinations transform what is nominally a fact-finding process into a procedure encompassing wide judicial and prosecutorial discretion."].) Neither *Gallardo*, nor the *Apprendi* line of cases, was concerned with traditional sentencing discretion. *Apprendi*'s holding was premised on the distinction between a sentencing court's traditional and constitutionally permissible "discretion to operate within the limits of the legal penalties" prescribed by statute, and Sixth Amendment concerns raised by "the novelty of

a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." (*Apprendi*, *supra*, 530 U.S. at pp. 482-483, fn. omitted.)

Discretionary sentencing decisions and acts of fact-finding are legally distinct acts, subject to different levels of review. Unlike discretionary decisions, factual findings concerning prior serious felony convictions are subject to and enforced by the beyond a reasonable doubt standard under *Jackson v. Virginia* (1979) 443 U.S. 307, 316-318. (See *Frierson*, *supra*, 4 Cal.5th at p. 233; *Tenner*, *supra*, 6 Cal.4th at p. 566.)

Far from being an instance of sentencing discretion, "the Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts' discretion in sentencing repeat offenders." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 528.) "The Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court 'conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.'" (*People v. Strong* (2001) 87 Cal.App.4th 328, 337-338, fn. omitted.) Applying the OSPD's reasoning, since the Three Strikes law generally restricts judicial discretion and the judicial fact-finding

curtailed by *Gallardo* was non-discretionary, retroactive application of *Gallardo* would seem a particularly poor means of remediating racially disproportionate sentences. (See BAC 20 ["racial disparity [in Three Strikes sentencing] was highest when sentencing discretion was at its apex"].)

In conclusion, despite the undeniable importance of addressing racially disproportionate sentencing, *Johnson*'s overarching reliability concerns do not implicate that issue, and, more particularly, retroactive application of *Gallardo* would be a poor vehicle for addressing it.

## II. *JOHNSON*, *TEAGUE*, AND THIS COURT'S JURISPRUDENCE HAVE ALL RECOGNIZED THAT, CONSISTENT WITH FUNDAMENTAL FAIRNESS, SOCIETY'S LEGITIMATE INTEREST IN THE FINALITY OF CRIMINAL JUDGMENTS LIMITS THE RETROACTIVE APPLICATION OF NEW RULES

The OSPD argues that the *Teague v. Lane*, (1989) 489 U.S. 288 (plurality opn.), retroactivity test should have no bearing on this Court's application of the *Johnson* test because the latter is unconcerned with preserving finality. (BAC 31-37.) A sound understanding of *Johnson* in light of this Court's developing retroactivity caselaw shows that the two tests are compatible and mutually reinforcing. Implicit in the very existence of the *Johnson* test is the recognition that fundamental fairness does not demand retroactive application of all new procedural rules to final judgments. Not only has this Court consistently recognized the importance of finality as a legitimate policy concern, but, as the United States Supreme Court has explained, the foremost purpose underlying habeas actions such as Milton's is "ensuring that state courts conduct criminal proceedings in accordance with

the Constitution as interpreted at the time of the proceedings." (*Saffle v. Parks* (1990) 494 U.S. 484, 488.) Milton's sentencing was conducted under the procedure authorized by this Court's interpretation of the constitutional jury trial right. The issuance of *Gallardo* did not render it unfair, much less expose it as being unreliable.

This Court's recent retroactivity jurisprudence has found the *Teague* test to be a useful lens through which to view retroactivity—it is just not the only lens. This Court used principles in *Teague* (namely, the distinction between procedural and substantive rules) in a retroactivity decision as recently as 2017. (*In re Martinez* (2017) 3 Cal.5th 1216, 1222.) In *In re Gomez* (2009) 45 Cal.4th 650, at page 656, this Court directly applied the *Teague* test. (See *Haden*, *supra*, 49 Cal.App.5th at p. 1106, con. opn. of Tucher J. ["The California Supreme Court has never adopted *Teague*, although it has supplemented *Johnson* with principles that parallel *Teague*."].) Many Courts of Appeal have also found *Teague* a useful lens through which to at least begin a retroactivity analysis. (See, e.g., *In re Nelson* (2020) 270 Cal.Rptr.3d at p. 161 [applying both tests]; *In re Rayford* (2020) 50 Cal.App.5th 754, 776, review denied (Sept. 23, 2020) [applying *Teague* and state-law retroactivity principles]; *In re Milton* (2019) 42 Cal.App.5th 977, 988 [reasoning that most appellate courts apply *Teague* to federal rules, but applying both tests]; *In re Ruedas* (2018) 23 Cal.App.5th 777, 793-798 [applying both tests].)

The OSPD argues *Teague* should be rejected because it elevated finality above all else. (BAC 31-32.) *Teague* did no such

thing. *Teague* makes retroactive all rules that are "old" and all rules that are substantive. (See *Beard v. Banks* (2004) 542 U.S. 406, 411; *Schriro*, *supra*, 542 U.S. at p. 353.) *Teague* and *Johnson* only differ on how they treat new procedural rules. But the *Teague* test remains useful in the context of new procedural rules to help orient retroactivity analyses toward identifying rules which are truly essential to improving accuracy, as demanded by *Johnson*, *supra*, 3 Cal.3d at pp. 410-412. (*Whorton*, *supra*, 549 U.S. at p. 418 [*Teague* asks in part whether new rules are necessary to prevent an "impermissibly large risk" of an inaccurate conviction].)

For example, as shown above (Arg. I(A)), *Whorton*'s analysis of whether *Crawford* applies retroactively identifies the kind of considerations which are relevant when determining if a rule increases accuracy, such as whether the rule decreases or increases the availability of evidence. (*Whorton*, *supra*, 549 U.S. at pp. 419-420.) To the extent the *Teague* standard is considered too stringent, this Court need not apply the analysis as strictly as the United State Supreme Court has done. (*Gomez*, *supra*, 45 Cal.4th at p. 655 [states are "free to give greater retroactive impact to a decision than the federal courts choose to give."].) Because California courts are free to apply *Johnson*, and because this Court and the California Courts of Appeal have consistently found *Teague* useful to begin a retroactivity analysis, there is simply no reason to completely jettison the *Teague* test as the OSPD advocates.

The OSPD is similarly mistaken suggesting that the *Johnson* test is unconcerned with finality. (BAC 31.) The *Johnson* test recognizes the benefits of finality in multiple ways. Indeed, *the fact that there is a test at all* demonstrates the consensus that there must be some limit on retroactivity.

As this Court explained as recently as 2012, the "limited nature of the writ of habeas corpus is appropriate because use of the writ tends to undermine society's legitimate interest in the finality of its criminal judgments, a point this court has emphasized many times." (*In re Reno* (2012) 55 Cal.4th 428, 451.) This Court has raised the benefit of finality in other contexts related to habeas corpus: "For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended." (*In re Lawley* (2008) 42 Cal.4th 1231, 1240, quotation marks omitted, quoting *People v. Duvall* (1995) 9 Cal.4th 464, 474.)

*Johnson*'s language reflects the importance of limiting retroactivity. It held that "[f]ully retroactive decisions are seen as vindicating a right which is *essential* to a reliable determination of whether an accused should suffer a penal sanction. . . ." (*Johnson*, *supra*, 3 Cal.3d at pp. 410-412, italics added), and reiterated that principle, again using the word, "essential": "[I]f the rule relates to characteristics of the judicial system which are essential to minimizing convictions of the

innocent, it will apply retroactively regardless" of the reliance of prosecutors or the burden it will place upon the judicial system (*id*. at p. 413). *Johnson* also listed multiple cases that failed that stringent standard, thereby recognizing that finality—as exemplified in the relative importance of "burdens place[d] on the justice system"—was preferable to retroactivity in all of those cases. (*Id*. at pp. 411-412.)

Finally, *Johnson*'s last two factors consider the institutional cost of retroactive application of rules and tacitly acknowledge that a defendant whose judgment conformed to the procedural rules of the time of trial will have been treated fairly. (See *In re Thomas*, *supra*, 30 Cal.App.5th at p. 767 ["The bottom line is the purpose of the new rule in *Sanchez* is to improve the integrity of criminal trials involving gang experts, but its effect is neither so fundamental nor so far-reaching as to justify applying it to cases that are already final. . . . Our conclusion results from the fact that *the retroactivity rule gives importance to finality as well as factuality*," italics added].)

*Johnson*'s and *Teague*'s consideration of finality is not arbitrary or a matter of mere convenience; having a limit on retroactivity is good policy. Without a limit on retroactivity, criminal law loses much of its deterrent effect, the state is repeatedly forced to marshal resources to defend judgments that conformed to the existing constitutional standards, and cases are in perpetual limbo for the defendant, the attorneys, and the victims. (See *Teague*, *supra*, 489 U.S. at p. 309-310; see also *In re Reno*, *supra*, 55 Cal.4th at p. 451; *In re Harris* (1993) 5 Cal.4th

813, 831.) "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation." (*In re Harris*, *supra*, at p. 831, citation and quotation marks omitted.)

As this Court continues to apply principles in *Teague* and *Johnson*, it should do so in a way that recognizes the fundamental importance of preserving the finality of judgments while making retroactive those rules that are truly critical to accurate fact-finding.

## CONCLUSION

The issues raised by the OSPD pose important legal, social, and policy concerns, but *Gallardo* was not intended to, and does not in fact, address them. The OSPD has failed to show that retroactive application of *Gallardo* would have any likelihood of ameliorating those concerns. Based upon the foregoing and for the reasons set forth in Respondent's Answer Brief, *Gallardo* should not apply retroactively to final judgments.

Respectfully submitted,

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December 30, 2020

## CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER TO OFFICE OF STATE PUBLIC DEFENDER'S AMICUS BRIEF** uses a 13-point Century Schoolbook font and contains 5,186 words.

XAVIER BECERRA
*Attorney General of California*

/s/ Nicholas J. Webster

NICHOLAS J. WEBSTER
*Deputy Attorney General*
*Attorneys for Respondent*

December 30, 2020

NJW:mfh
LA2020600995

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Case Name: ***In re William Milton*** No.: **S259954**

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I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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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 December 30, 2020, at Los Angeles, California.

| M. Hunglau | /s/ M. Hunglau |
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| Declarant | Signature |

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**STATE OF CALIFORNIA**
Supreme Court of California

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