In the Supreme Court of the State of California

In re **WILLIAM MILTON,** on Habeas Corpus.	Case No. S259954

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

ANSWER BRIEF ON THE MERITS

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CONSTITUTIONAL PROVISIONS

COURT RULES

ISSUE PRESENTED

Do the limitations of *People v. Gallardo* (2017) 4 Cal.5th 120 on judicial fact-finding about the basis for a prior conviction apply retroactively to final judgments? (Compare *In re Milton* (2019) 42 Cal.App.5th 977 with *In re Brown* (2020) 45 Cal.App.5th 699.)

SUMMARY OF ARGUMENT

Gallardo does not apply retroactively to final judgments, as it established a new rule of criminal procedure intended to transfer the fact-finding responsibility from judge to jury, not to improve the reliability of criminal judgments. This Court has used two mutually-reinforcing tests to determine whether new rules apply retroactively. The federal *Teague*[1] test makes retroactive substantive rules or "watershed" procedural rules implicating the fundamental fairness and accuracy of a criminal proceeding, while this Court's *Johnson*[2] test limits full retroactivity to rules that vindicate rights essential to the reliability of the fact-determining process at trial. *Gallardo* is not retroactive under either test.

Gallardo was the culmination of a decades-long, incremental development of Sixth Amendment jurisprudence under *Apprendi v. New Jersey* (2000) 530 U.S. 466. *Apprendi* held that "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum

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[1] *Teague v. Lane* (1989) 489 U.S. 288 (plurality opn.).
[2] *In re Johnson* (1970) 3 Cal.3d 404.

must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490, italics added.) Interpreting that holding, this Court in *People v. McGee* (2006) 38 Cal.4th 682, held that *Apprendi* did not extend to recidivist sentencing findings, and permitted sentencing courts to make factual findings in determining if a prior conviction qualified to enhance a defendant's sentence. (*Id*. at p. 685.)

Gallardo overruled *McGee* in light of recent United States Supreme Court cases expanding *Apprendi*; it held that, under the Sixth Amendment, facts about a defendant's prior conviction that are used to enhance his sentence must be found by a jury—not a sentencing court—or be admitted as the basis for a plea. (*Gallardo*, *supra*, 4 Cal.5th at p. 124.) The sentencing court's role is now limited to identifying those facts that a jury necessarily found at trial or were admitted by the defendant in entering a plea.

Gallardo fails the *Teague* and *Johnson* tests, and thus is not retroactive, because it is: (1) a new rule; (2) a procedural rule, and; (3) a rule intended to transfer the fact-finding responsibility from judge to jury, not to improve the reliability of fact-finding.

Gallardo is unquestionably a new rule because it overruled established precedent (*McGee*) and was not compelled by prior precedent.

It is a procedural rule because it changed the process for determining if a prior conviction qualifies for enhanced punishment; specifically, it reassigned the role of fact-finder from the current sentencing judge to a jury. *Gallardo* repeatedly

stated it was vindicating the jury trial guarantee by ensuring a jury makes the relevant factual findings. The elements of a qualifying prior conviction for enhanced punishment and the class of persons subject to such enhancements remain unchanged post-*Gallardo*. This Court and the United States Supreme Court have consistently held that rules which vindicate the Sixth Amendment right to a jury trial are procedural.

Finally, as a new procedural rule, *Gallardo* is not retroactive because it was not intended to improve the accuracy of the fact-finding process. *Gallardo* repeatedly stated that its intent was to vindicate the jury trial right under the Sixth Amendment; it never evinced an intent to create a more accurate process. As this Court and the United States Supreme Court have found, rules that replace judicial fact-finding with jury determinations are typically not intended to enhance the reliability of fact-finding because factual findings by a judge are not less reliable than those by a jury.

To be sure, by holding that a jury must find the relevant facts, *Gallardo* limited the sentencing court's role in determining whether recidivist enhancements are available. But that ancillary consequence had nothing to do with preventing the consideration of evidence deemed unreliable, much less with remedying a defective, unreliable procedure. Indeed, the pre-*Gallardo* procedure in *McGee*, which was consistent with United States Supreme Court jurisprudence, required recidivist enhancements to be found beyond a reasonable doubt. This Court had previously recognized that trial courts were

particularly well suited to make such findings. In short, *Gallardo* never referred to the accuracy of fact-finding as motivating its holding, and nothing in the opinion suggests that the elimination of judicial fact-finding was essential, or even important, to an accurate fact-finding process.

Turning to the instant case, Milton was convicted of robbery in California in 1998 and admitted two prior Illinois robbery convictions. Illinois robberies do not automatically qualify as serious felonies because they lack California's element of specific intent to permanently deprive the victim of his or her property. (*People v. Guerra* (1985) 40 Cal.3d 377, 385.) However, a finding of personal firearm use in the commission of an underlying offense also qualifies the conviction as a serious felony and strike (Pen. Code, § 1192.7, subd. (c)(8)).[3] The trial court here reviewed evidence from the Illinois record of conviction, including stipulated facts from Milton's plea and the Illinois sentencing court's findings that the convictions warranted aggravated punishment, to find that Milton pointed a firearm at the victims in both robberies. It found beyond a reasonable doubt that both convictions were strikes.

Although the superior court's fact-finding procedure was authorized under this Court's prior precedent (*McGee*, *supra*, 38 Cal.4th at p. 685), that procedure is now inconsistent with *Gallardo*. However, contrary to Milton's assertions, *Gallardo* does not apply retroactively to his convictions. Pursuant to the

[3] Undesignated statutory references are to the Penal Code.

longstanding retroactivity jurisprudence under *Teague* and *Johnson*, new rules intended to extend the constitutional jury trial guarantee—as important as they are—do not qualify for retroactive application to already final judgments because they do not vindicate the kind of rights which are essential to a reliable determination of the facts.

STATEMENT OF THE CASE

In 1987, Milton pleaded guilty to an Illinois charge of robbery (former 720 Ill. Comp. Stat. Ann. 5/18-1(a); case no. 87CF241), and an Illinois jury found him guilty of armed robbery (former 720 Ill. Comp. Stat. Ann. 5/18-2; case no. 87CF242).[4] (1CT 21, 75.)[5] A decade later, the Los Angeles County District Attorney filed an information alleging that Milton committed second degree robbery (§ 211) and that his prior Illinois convictions qualified as strikes under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and as prior serious felony convictions (§ 667, subd. (a)(1)). (1CT 20-21.)

After the jury found Milton guilty of second degree robbery (1CT 72-73), Milton waived a jury trial on the two prior convictions. He admitted the prior convictions and that the

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[4] Former 720 Illinois Compiled Statutes 5/18-1(a), defined robbery as: "A person commits robbery when he or she takes property . . . from the person or presence of another by the use of force or by threatening the imminent use of force." Armed robbery, in violation of former 720 Illinois Compiled Statutes 5/18-2, required a showing that the defendant was armed with a firearm or a dangerous weapon while committing the robbery.

[5] Citations to the clerk's and reporter's transcripts refer to the record from Milton's direct appeal (B131757).

armed robbery conviction qualified as a strike, but did not admit that the "simple" robbery qualified as a strike or serious felony.[6] (1CT 75.)

For an out-of-state conviction to qualify as a prior serious or violent felony and strike in California, the crime must include all of the elements of a serious felony in this state. (*People v. Warner* (2006) 39 Cal.4th 548, 552-553.) Illinois's robbery statute is broader than California's. In Illinois, a defendant can be convicted of robbery without having a specific intent to permanently deprive the owner of property. (*People v. Banks* (1979) 75 Ill.2d 383, 391.) In California, a specific intent to permanently deprive must be established. (§ 211; *Guerra*, *supra*, 40 Cal.3d at p. 385.) As relevant here, an out-of-state felony will also qualify as a serious felony under California law if the defendant personally used a firearm in the offense; however, mere possession of the firearm would not support a "serious felony" finding. (§ 1192.7, subd. (c)(8).)

The People filed a sentencing brief arguing that certified documents from Illinois demonstrated that the simple robbery conviction qualified as a strike because Milton used a firearm in the offense. (1CT 78-81.) Milton filed a brief in opposition, arguing that the court could not look beyond the facts of the conviction itself, and that the proffered Illinois documents did not

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[6] As shown below (Arg. I(F)), Milton never retracted this admission to the armed robbery strike. Though the parties sometimes discussed both convictions, their analyses concentrated on the simple robbery.

establish firearm use. (1CT 82-83.) The People filed a reply, citing the sentencing transcript from the Illinois convictions, which indicated that Milton used a firearm to complete the robberies by pointing it at the victims. The People also argued that the trial court was permitted to look beyond the conviction to the underlying facts. (1CT 86-89.)

The People introduced exhibits to the sentencing court related to the Illinois convictions. People's Exhibits 7 and 8 included Illinois records, entitled "Judgment and Sentence," that showed appellant had been found guilty of robbery and armed robbery. (1CT 90-101.) People's Exhibit 11 included what appear to be the charging documents, which alleged that Milton had committed the armed robbery "while armed with [] a gun." (1CT 141.)[7] The simple robbery count alleged that Milton took property by "threatening the [] use of force," and included the following handwritten note, apparently by the Illinois judge: "[The victim] left Jewel after cashing his check. Stopped. Money demanded. [Milton] had a gun." (1CT 142.)

People's Exhibit 11 also included a transcript from Milton's Illinois sentencing hearing, in which the prosecutor described the facts of the convictions while arguing for an aggravated sentence. (1CT 110.) At the time, Illinois sentencing law allowed for aggravated sentences where "the defendant's conduct caused or threatened serious harm." (See *People v. Zemke* (1987) 159

[7] In an apparent oversight, the charging documents were inserted in the middle of the sentencing hearing transcript. (See 1CT 138-142.)

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)].) As to the armed robbery, the prosecutor argued that Milton "pointed a gun at [the victim]" to force the victim to give him money. (1CT 130.) As to the simple robbery, he argued that Milton "approache[d] [the victim] with a weapon" and "threatened [the victim]" to complete the robbery. (1CT 130-131.) He argued that in both robberies Milton "brandish[ed] a weapon" and that "when somebody takes a loaded gun and points it in somebody's face things can escalate." (1CT 133-134.) Defense counsel never contested that Milton used a firearm in the offenses in the manner the prosecutor described. (1CT 135-136.)

The Illinois sentencing judge, who presided over Milton's trial (1CT 130, 147), stated that, "the stipulated facts in [the simple robbery] indicated" that Milton stopped a man and demanded money while he "possessed a handgun."[8] (1CT 143-144.) The court then listed aggravating factors, twice stating that Milton pointed a gun at the victims in each robbery. (1CT 147-148.) Again, defense counsel did not object or disagree with the court's characterization.

At the sentencing hearing in the present case, the prosecutor argued that the transcript and the handwritten notations established that Milton's simple robbery conviction was a strike. (2RT 355-357.) Defense counsel argued that the court could not look beyond the convictions themselves to show they were strikes,

[8] The transcript from the hearing where the stipulation was taken was not included in the People's Exhibits.

and the documents did not show actual firearm use. (2RT 357-358.) The court ruled that it saw "nothing wrong with going beyond the—beyond the court record to—to determine what really happened." It found Milton used a firearm in the robberies and that both convictions were strikes. (2RT 358.) The court sentenced Milton to a third-strike sentence of 25 years to life for the second degree robbery and five years for the prior serious felony enhancement. (1CT 163-164.)

On appeal (B131757), Milton argued, inter alia, that the trial court was not permitted to examine the record behind the simple robbery conviction, and thus it did not constitute a serious felony; he did not challenge that the armed robbery was a strike. The Court of Appeal affirmed the judgment, finding that the trial court was permitted to examine the hearing transcript and other documents, which provided substantial evidence that Milton used a firearm in the simple robbery. The court noted that Milton's counsel did not object to the assertions at the Illinois sentencing hearing that he used a firearm. (Slip Opn. 8-9.)[9]

Milton filed a petition for review (S089153), which asserted that the trial court improperly concluded that his Illinois simple robbery conviction constituted a strike. This Court denied review.

Milton filed numerous state and federal habeas petitions, including one in 2016 (S231762), which this Court denied without prejudice to any relief Milton might be entitled to after the resolution of *Gallardo*, *supra*, 4 Cal.5th 120. After *Gallardo* was

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[9] Respondent was unable to find a Westlaw or Lexis citation to the Court of Appeal's unpublished opinion.

decided, Milton filed another habeas petition (S246213). This Court directed respondent to file an informal response on whether Milton was entitled to relief under *Gallardo*. Upon reviewing the informal response, this Court ordered respondent to show cause returnable to the Court of Appeal.

Following briefing, the Court of Appeal denied the petition in a reasoned opinion. As the court recognized, under *Gallardo*, the trial court here erred because it resolved a disputed factual question that was reserved for the jury. (*Gallardo*, *supra*, 4 Cal.5th at pp. 124, 136.) Accordingly, if *Gallardo* applied retroactively, Milton would be entitled to relief. (*Milton*, *supra*, 42 Cal.App.5th at pp. 987-988.)

However, the *Milton* court found that under the state and federal tests for retroactivity, *Gallardo* was not retroactive to Milton's final judgment. (*Milton*, *supra*, 42 Cal.App.5th at pp. 989-999.) Under the federal *Teague* test, *Milton* held that the *Gallardo* rule was new, as it was not dictated by precedent at the time Milton's conviction became final. (*Milton*, *supra*, 42 Cal.App.5th at pp. 989-991.) *Gallardo*'s rule was also procedural, as it only prescribed the manner of finding facts that increase a defendant's sentence. It did not alter the class of persons eligible for punishment. (*Id*. at pp. 992-994.) Finally, the court held the *Gallardo* rule was not a watershed rule warranting retroactive application. The rule was enacted to protect the Sixth Amendment right to a jury trial, not because the prior method was unreliable. Furthermore, *Gallardo*, as an extension of the

longstanding *Apprendi* rule, did not alter bedrock procedural principles. (*Id*. at pp. 994-996.)

Under the *Johnson* test, the Court of Appeal also held that *Gallardo* established a new rule, as it disapproved *McGee*, *supra*, 38 Cal.4th 682. (*Milton*, *supra*, 42 Cal.App.5th at pp. 996-997.) The court found that *Gallardo* was not retroactive as it did not significantly affect the reliability of fact-finding by transferring the relevant findings from judge to jury. (*Id*. at pp. 998-999.) Furthermore, applying *Gallardo* retroactively would cause significant disruption—courts would have to reopen countless cases, conduct new sentencing hearings, and locate records from proceedings conducted long ago. (*Id*. at p. 999.)

This Court granted Milton's petition for review.

ARGUMENT

I. *GALLARDO* IS NOT RETROACTIVE TO MILTON'S FINAL JUDGMENT UNDER STATE OR FEDERAL LAW

Gallardo is not retroactive because it created a new, procedural rule, one that is not essential to the integrity of the fact-finding process. This Court and the United States Supreme Court have consistently found such rules, which eliminate judicial fact-finding to extend the constitutional jury trial guarantee, are non-retroactive.

Milton's numerous arguments for *Gallardo*'s retroactivity are unpersuasive because they derive from a misreading of *Gallardo*'s holding. Contrary to Milton's assertion, *Gallardo* did not "effectively alter[]" the factual elements required to prove that a defendant's prior conviction qualifies as a strike or serious

felony. (OBM 10.) *Gallardo* was singularly motivated by the Sixth Amendment jury trial right. It did not discuss, let alone alter, the elements or scope of strikes or serious felonies.

A. *Gallardo* overruled this Court's precedent to hold that, under the Sixth Amendment, only a jury may find facts underlying a prior conviction that enhance a sentence

When Milton was sentenced in 1999, California law permitted trial courts to examine "the entire record of the conviction to determine the substance of the prior foreign conviction." (*People v. Guerrero* (1988) 44 Cal.3d 343, 352, 355.) Just as today, due process required the prosecution to prove each element of a strike or enhancement beyond a reasonable doubt. (*People v. Frierson* (2017) 4 Cal.5th 225, 233; *People v. Tenner* (1993) 6 Cal.4th 559, 566.)

In 2000, *Apprendi*, *supra*, 530 U.S. 466, held that, under the Sixth Amendment and the due process clause of the Fourteenth Amendment, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at pp. 477, 490.) *Apprendi*, however, preserved the *Almendarez-Torres* exception, that "the fact of a prior conviction" used to enhance the maximum sentence for a later offense may be found by the sentencing court. (*Id.* at p. 490; see *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 239-247).

In 2006, this Court interpreted the *Apprendi* rule and the *Almendarez-Torres* exception in *McGee*, *supra*, 38 Cal.4th 682. *McGee* affirmed that defendants had no right to a jury

determination on whether a prior conviction qualified as a serious felony for purposes of sentencing. (*Id.* at p. 685.) *McGee* acknowledged that *Apprendi* itself noted the tension between the rationale of its decision and the established rule permitting a court, rather than a jury, to determine sentence enhancements based upon a prior conviction. But *McGee* declined to repudiate the *Almendarez-Torres* exception, as *Apprendi* "did not purport to overrule the prior case law pertaining to recidivist sentencing provisions." (*Id.* at p. 699, footnote omitted.) Accordingly, *McGee* would not "overturn the current California statutory provisions and judicial precedent" that permitted the trial courts to conduct such fact-finding. (*Id.* at p. 686.) In so holding, *McGee* noted that many other courts had also interpreted the *Almendarez-Torres* exception broadly. (*Id.* at pp. 702-708.) But the Court "recognize[d] the possibility" that ensuing federal Supreme Court rulings might call for reconsideration of *McGee*'s holding, and "requir[e] a state to assign this function to a jury." (*Ibid.*)

In the next decade, the United States Supreme Court published two decisions which described *Apprendi*'s wide scope. *Mathis v. United States* (2016) 136 S.Ct. 2243, and *Descamps v. United States* (2013) 570 U.S. 254, concerned whether a state conviction qualified as a violent felony for purposes of the Armed Career Criminal Act ("ACCA"; 18 U.S.C. § 924(e)), a federal recidivist sentencing statute. (*Mathis*, *supra*, at pp. 2249-2250; *Descamps*, *supra*, at pp. 257-258.) Both cases held that a trial court may not look beyond the elements that the jury necessarily found to establish that a past state conviction qualifies for

enhancement under the ACCA. (*Gallardo*, *supra*, 4 Cal.5th at pp. 132-133; *Mathis*, *supra*, at pp. 2251-2252; *Descamps*, *supra*, at pp. 269-270.) In each case, the Court—based on statutory interpretation of the ACCA in light of the Sixth Amendment right to a jury trial under *Apprendi*—reasoned that a jury, not a judge, must make the findings necessary to impose enhanced punishment. (*Gallardo*, *supra*, at p. 133; *Mathis*, *supra*, at pp. 2252-2253; *Descamps*, *supra*, at pp. 267-270.)

Based largely on the rationales in these cases, in 2017, *Gallardo* overruled *McGee*. (*Gallardo*, *supra*, 4 Cal.5th at pp. 125, 134.) In *Gallardo*, the issue was whether the defendant's prior conviction for assault with a deadly weapon or with force likely to cause great bodily injury (§ 245, subd. (a)) qualified as a serious felony, since the definition of that offense encompassed more conduct than the definition of a serious felony. (*Id.* at p. 123.) To resolve the issue, the trial court consulted the preliminary hearing transcript and found the defendant used a deadly weapon in committing the assault, which qualified the offense as a serious felony. (*Ibid.*)

Citing *Descamps* and *Mathis*, this Court reversed the trial court's ruling: "The cases make clear that when the criminal law imposes added punishment based on findings about the facts underlying a defendant's prior conviction, '[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt.'" (*Gallardo*, *supra*, 4 Cal.5th at p. 124.) Hence, the trial court violated the defendant's right to a jury trial by inferring

weapon use from the preliminary hearing transcript. (*Id.* at pp. 124-125.) After *Gallardo*, when enhancing a sentence with facts concerning a prior conviction, a "trial court's role is limited to determining the facts that were necessarily found in the course of entering the conviction," which include the facts the jury necessarily found and the facts a defendant admitted as the basis of her plea. (*Id.* at p. 134.)

B. This Court has approved two tests for retroactivity, both of which seek to preserve finality while making retroactive those rules that are essential to accurate fact-finding

To answer the issue presented—does *Gallardo* apply retroactively—the first question must be: What is the standard for assessing retroactivity? This Court has approved two tests, often referred to as the federal *Teague* test and the state *Johnson* test. This Court has approvingly cited and applied principles in *Teague*, but has never expressly adopted it or disavowed the earlier established *Johnson* test. (See *People v. Trujeque* (2015) 61 Cal.4th 227, 250-251; *In re Gomez* (2009) 45 Cal.4th 650, 655.) Although the *Teague* test is used in federal court, states are "free to give greater retroactive impact to a decision than the federal courts choose to give." (*Gomez*, *supra*, at p. 655; see also *Danforth v. Minnesota* (2008) 552 U.S. 264, 295 [states may provide broader retroactivity under their laws].) The two approaches often come to the same result and are mutually reinforcing in their ultimate purpose—to preserve the finality of judgments while ensuring that defendants benefit from new substantive rules of criminal law and new rules of procedure that

are critical to accurate findings of guilt. To further harmonize the tests, when this Court applies *Johnson*, it should do so in a way that recognizes the fundamental importance of preserving the finality of judgments under a rule that ensures consistent and predictable application, values expressed in *Teague* and implicit in *Johnson*.

"Both the federal and state retroactivity doctrines have their roots in *Linkletter v. Walker* (1965) 381 U.S. 618. . . ." (*In re Thomas* (2018) 30 Cal.App.5th 744, 754.) In establishing a new test for retroactivity, the *Linkletter* court created three factors that had to be weighed: (1) the purpose to be served by the new standards; (2) the extent of the reliance by law enforcement authorities on the old standards, and; (3) the effect on the administration of justice of a retroactive application of the new standards. (*Linkletter*, *supra*, at p. 636.)

In 1970, this Court adopted the *Linkletter* three-factor test in *In re Johnson*, *supra*, 3 Cal.3d at page 410. The *Johnson* approach, like *Linkletter*, looked primarily to "the purpose to be served by the new standards," giving full retroactive effect to rules that are "essential to a reliable determination of whether an accused should suffer a penal sanction." (*Id.* at pp. 411, 413.) In cases where this purpose inquiry is a close question, courts consider the secondary factors to consider the toll retroactivity will place on the administration of justice. (*Id.* at p. 410.)

In 1989, the *Teague* plurality[10] endorsed the reasoning of Justice Harlan, who had criticized *Linkletter*'s three-factor test on three primary grounds, the second and third of which are relevant here—that it led to an "unfortunate disparity in the treatment of similarly situated defendants on collateral review" and that it undermined the important interest in finality.[11] (*Teague*, *supra*, 489 U.S. at p. 305, 308-309; see *Desist v. United States* (1969) 394 U.S. 244, 258 (dis. opn. of Harlan, J.); *Mackey v. United States* (1971) 401 U.S. 667, 692-693 (conc. opn. of Harlan, J.).) The highly abstract language of the *Linkletter* standard provided inadequate guidance to lower courts, as shown by the numerous lower court rulings that granted retroactive relief under *Edwards v. Arizona* (1981) 451 U.S. 477 (all police questioning must cease after accused requests counsel), which the high court ultimately found non-retroactive, leading to many similarly situated defendants being treated differently. (*Teague*, *supra*, at p. 305.) *Teague* found this disparity was caused by the "failure to treat retroactivity as a threshold question and the *Linkletter* standard's inability to account for the nature and function of collateral review." (*Ibid.*) The remedy for the latter problem was to view *Linkletter* within the procedural context of habeas corpus review. (*Id.* at pp. 305-306.)

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[10] A majority of the Court adopted *Teague*'s holding in *Saffle v. Parks* (1990) 494 U.S. 484.

[11] The first failing was that the *Linkletter* standard "led to the disparate treatment of similarly situated defendants on direct review." (*Teague*, *supra*, 489 U.S. at pp. 302-305.)

As Justice Harlan had explained, "'the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.'" (*Teague*, *supra*, 489 U.S. at p. 306, quoting *Desist*, *supra*, 394 U.S. at pp. 262-263 (dis. opn. of Harlan, J.).) This required habeas courts to "'apply the constitutional standards that prevailed at the time the original proceedings took place.'" (*Ibid*.) In other words, the question of whether to apply a new rule retroactively "must be answered by reference to the underlying purposes of the habeas writ. Foremost among these is ensuring that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of the proceedings." (*Saffle*, *supra*, 494 U.S. at p. 488.)

Teague also emphasized that the "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." (*Teague*, *supra*, 489 U.S. at p. 309). Without finality, "the criminal law is deprived of much of its deterrent effect" and the state is continually forced "to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." (*Id*. at pp. 309-310.) With these considerations in mind, *Teague* adopted a revised approach to retroactivity, holding that a new rule applies retroactively only if the rule is substantive or is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of

the criminal proceeding. (*Whorton v. Bockting* (2007) 549 U.S. 406, 416.)

In the years after *Teague* and *Johnson*, this Court's jurisprudence on retroactivity has gone a long way toward harmonizing the two tests, such that practical application of both tests yields generally consistent results. Under both standards, the first step is to determine whether a potentially retroactive case presents a new or old rule. (*Woosley v. State of California* (1992) 3 Cal.4th 758, 794; *Saffle*, *supra*, 494 U.S. at p. 488.) To assess newness, *Teague* asks whether the rule was dictated by precedent at the time the defendant's conviction became final, but also acknowledges that the overruling of an earlier holding results in a new rule. (*Saffle*, *supra*, at p. 488.) *Johnson* asks whether the rule explicitly overrules a precedent of this Court, disapproves a practice impliedly sanctioned by prior decisions of this Court, or disapproves a longstanding and widespread practice expressly approved by a near-unanimous body of lower court authorities. (*People v. Guerra* (1984) 37 Cal.3d 385, 401, disapproved on another ground in *People v. Hedgecock* (1990) 51 Cal.3d 395, 409-410.) Despite the differing approaches, both are designed to identify the same types of rulings and it is difficult to imagine situations where they would come to different results.

Both approaches also must assess whether the new rule is substantive or procedural according to the same basic standard: "[A] change in the criminal law will be given retroactive effect when a rule is substantive rather than procedural (i.e., it alters the range of conduct or the class of persons that the law punishes,

or it modifies the elements of the offense). . . ." (*In re Martinez* (2017) 3 Cal.5th 1216, 1222; see *In re Scott* (2020) 49 Cal.App.5th 1003, 1016, review granted August 12, 2020, S262716.) And, "[a]s a matter of practical policy," this Court will find rules retroactive "if those claims would be granted in the federal courts" under *Teague* in order to avoid "duplicative litigation and greater delay in achieving finality of state court judgments." (*Gomez*, *supra*, 45 Cal.4th at p. 655.) Under that reasoning, a finding that a rule is substantive (or old) under *Teague* will generally support retroactive application in California.[12]

One consideration that is at least facially unique to *Teague* is that it gives retroactive effect to watershed procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding." (*Whorton*, *supra*, 549 U.S. at p. 414.) However, while *Johnson* does not refer to "watershed" rules, its overarching goal of reserving retroactivity to those rules that are "*essential* to a reliable determination of whether an accused should suffer a penal sanction" (*Johnson*, *supra*, 3 Cal.3d at pp. 410-413, italics added), reveals a fundamental affinity between the tests (see *Whorton*, *supra*, 549 U.S. at p. 414).

Similarly, while the *Johnson* test does not reflect Justice Harlan's concern for finality in terms of imposing what amounts

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[12] Some appellate courts have not expressly analyzed whether a case is procedural or substantive in conducting a *Johnson* analysis (see, e.g., *In re Ruedas* (2018) 23 Cal.App.5th 777, 799; *Milton*, *supra*, 42 Cal.App.5th at pp. 997-998), perhaps because they had already found the rule was procedural under a *Teague* analysis.

to a rebuttable presumption against retroactivity, California's test implicitly recognizes the fundamental importance of preserving the finality of judgments. Not only does its first factor recognize that only a specific subset of rules will be given retroactive effect, but *Johnson*'s last two factors implicitly recognize the benefits of finality—both factors consider the institutional costs of retroactivity and tacitly acknowledge that a defendant whose judgment conformed to the procedural rules at the time of trial will have generally been treated with fundamental fairness.

Based on the above analysis, as this Court applies the tests for retroactivity, it should do so in a way that recognizes the benefits of finality and consistent application that are reflected in *Johnson*'s overarching concerns and that *Teague* clearly espoused. Indeed, this Court has repeatedly found that California has a "powerful interest in the finality of its judgments. This interest is particularly strong in criminal cases, for '[w]ithout finality, the criminal law is deprived of much of its deterrent effect.'" (*In re Harris* (1993) 5 Cal.4th 813, 831, citing *Teague*, *supra*, 489 U.S. at p. 309; see *In re Reno* (2012) 55 Cal.4th 428, 451 [this Court has "long emphasized that habeas corpus is an extraordinary remedy and that the availability of the writ properly must be tempered by the necessity of giving due consideration to the interest of the public in the orderly and reasonably prompt implementation of its laws and to the important public interest in the finality of judgments"], quotation marks and citations omitted.) In any event, as shown below, *Gallardo* is not

retroactive under a straightforward application of the state and federal tests.

C. *Gallardo* is not retroactive under *Teague*, as it is a new procedural rule that does not announce a watershed change

As described above, under *Teague*, "A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a '"watershed rul[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."' (*Whorton*, *supra*, 549 U.S. at p. 416.) The question of retroactivity is reviewed de novo. (*In re Serrano* (1995) 10 Cal.4th 447, 457.) *Gallardo* is a new rule that does not meet either of these exceptions.

1. *Gallardo* constitutes a new rule under *Teague*

The threshold question under *Teague* is whether *Gallardo* announced a "new rule" or merely reiterated an "old rule." (*Beard v. Banks* (2004) 542 U.S. 406, 411.) "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. [Citations.] To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." (*Ibid.*, quoting *Teague*, *supra*, 489 U.S. at p. 301.) While it may be difficult to identify a new rule "when a decision extends the reasoning" of prior cases, "[t]he explicit overruling of an earlier holding no doubt creates a new rule." (*Saffle*, *supra*, 494 U.S. at p. 488.) In contrast, with an old rule,

"'no question of retroactivity arises' because there is no material change in the law." (*Guerra*, *supra*, 37 Cal.3d at p. 399.)

For the purposes of the *Teague* test, a case is final "when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." (*Caspari v. Bohlen* (1994) 510 U.S. 383, 390.) Here, this Court denied Milton's petition for review on July 19, 2000. His conviction, therefore, became final 90 days later on October 17, 2000. (28 U.S.C. § 2101, subd. (c).) Under *Teague*, the "legal landscape" in October 2000 is examined to determine whether the rule in *Gallardo* was dictated by then-existing precedent. (*Beard*, *supra*, 542 U.S. at p. 413.) At that time, *McGee* held that under *Apprendi* a sentencing court may examine the record of a prior conviction to determine if it qualified for increased punishment. (See *McGee*, *supra*, 38 Cal.4th at pp. 685, 702-708.)

There can be no serious question as to whether *Gallardo* announced a new rule; it expressly overruled *McGee* and eliminated the longstanding *Almendarez-Torres* exception. (*Gallardo*, *supra*, 4 Cal.5th at pp. 130-132, 136.)

Milton's assertion that *Gallardo* was not new, having been dictated by *Apprendi* and *Taylor v. United States* (1990) 495 U.S. 575, is mistaken. In contrast to *In re Gomez*, *supra*, 45 Cal.4th 650 (see OBM 40-46), which held that *Cunningham v. California* (2007) 549 U.S. 270, did not constitute a new rule under *Teague* because it "merely applied [*Blakely*] to the California sentencing scheme," (*Gomez*, *supra*, 45 Cal.4th at p. 657; see also *id.* at p.

660), *Gallardo* did not "merely apply" *Apprendi*. It repudiated a well-recognized, longstanding aspect of *Apprendi*'s holding. (*Apprendi*, *supra*, 530 U.S. at p. 490; *Gallardo*, *supra*, 4 Cal.5th at p. 134; see *In re Haden* (2020) 49 Cal.App.5th 1091, 1097-1098, review granted August 12, 2020, S263261; *Scott*, *supra*, 49 Cal.App.5th at p. 1016; *Milton*, *supra*, 42 Cal.App.5th at pp. 990-991.) For the same reasons, Milton's reliance on *Taylor* is unavailing. Not only was *Taylor* decided 10 years before *Apprendi* (which preserved the *Almendarez-Torres* exception), but *Taylor* turned on statutory interpretation, not the Sixth Amendment jury trial guarantee, and mentioned the right to a jury trial only once in a hypothetical question about the practical difficulties of a contrary approach. (*Taylor*, *supra*, 495 U.S. at pp. 578, 601-602.)

Appellant argues that, since *Apprendi* and *Taylor* dictated *Descamps*, which in turn dictated *Gallardo*, *Apprendi* and *Taylor* must have also dictated *Gallardo*. (See OBM 41-46.) But *Gallardo* itself rejected the notion that *Descamps* and *Mathis* dictated its holding: "*Descamps* did not squarely overrule existing California law; it discussed the relevant Sixth Amendment principles only en route to construing the federal statute at issue to avoid constitutional concerns." (*Gallardo*, *supra*, 4 Cal.5th at p. 128.) Far from finding that *Descamps* and *Mathis* dictated the *Gallardo* holding, this Court explained that "[t]he high court's discussions [in those decisions] are persuasive evidence that the *Almendarez-Torres* exception is narrower than *McGee* had supposed." (*Id.* at p. 132.)

2. *Gallardo* announced a procedural rule, eliminating judicial fact-finding in favor of jury fact-finding

Gallardo is a procedural rule—and thus does not meet the first *Teague* retroactivity exception for substantive rules—as it changed the manner of fact-finding by reassigning the role of fact-finder from the current sentencing judge to the jury on the prior conviction.

"A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes" (*Schriro v. Summerlin* (2004) 542 U.S. 348, 353) or "modifies the elements of an offense" (*id*. at p. 354). "In contrast, rules that regulate only the manner of *determining* the defendant's culpability are procedural." (*Id.* at p. 353, original italics.) Procedural rules alter the range of permissible methods for determining whether a defendant's conduct is punishable. (*Welch v. United States* (2016) 136 S.Ct. 1257, 1264-1265.) "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." (*Ibid*., quotation marks and citation omitted.)

Gallardo is a procedural rule because it reassigned the role of fact-finder from judge to jury. *Gallardo*'s language speaks for itself, indicating again and again it was motivated by the jury trial guarantee under the Sixth Amendment. (*Gallardo*, *supra*, 4 Cal.5th at p. 124 ["[*Descamps*'s and *Mathis*'s] discussions of background Sixth Amendment principles pointedly reveal the

limits of a judge's authority to make the findings necessary to characterize a prior conviction as a serious felony"], 134, 135 ["The jury trial right is violated when a court adds extra punishment based on fact-finding that goes 'beyond merely identifying a prior conviction'"], 136 [judicial fact-finding "invades the jury's province"], 137, 138 ["We today hold that defendant's *constitutional right to a jury trial sweeps more broadly than our case law previously recognized*," italics added].) Importantly, the opinion never suggested that it was altering the scope or definition of a prior serious felony.

The United States Supreme Court has made it clear that rules which reassign decision-making authority from a court to the jury are procedural. *Schriro*, *supra*, 542 U.S. 348, held that the rule announced in *Ring v. Arizona* (2002) 536 U.S. 584, did not apply retroactively. (*Schriro*, *supra*, at p. 351.) "*Ring* held that 'a sentencing judge, sitting without a jury, [may not] find an aggravating circumstance necessary for imposition of the death penalty.'" (*Id*. at p. 353.) The Court reasoned that rules that allocate decision-making authority between a judge and jury are "prototypical procedural rules." (*Ibid*.) By transferring the decision-making authority, *Ring* did not alter the range of conduct subject to the death penalty. "*It could not have*; it rested entirely on the Sixth Amendment's jury trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize." (*Ibid*., italics added.) The rule announced in *Gallardo*, like the rule announced in *Ring*, allocated decision-

making authority between a judge and jury. It too did not alter the underlying conduct eligible for punishment.

Similarly, this Court has recognized that *Apprendi*—which *Gallardo* extended—announced a procedural rule. (See *People v. Anderson* (2009) 47 Cal.4th 92, 118; see also *Jones v. Smith* (9th Cir. 2000) 231 F.3d 1227, 1237.) Milton does not argue that *Apprendi* was erroneously deemed a procedural rule, and fails to explain how the extension of a procedural rule can become a substantive rule.

Milton errs in asserting that *Gallardo*'s rule is substantive because it effectively altered the range of conduct that a law may punish and changed the elements for prior conviction enhancements or strikes. (OBM 23-26, 47-50.) He argues: "[P]reviously, the prosecution had to prove the defendant's conduct underlying a prior conviction qualified as a strike, now the prosecution has to prove that the defendant's conviction itself qualifies as a strike." (OBM 24, italics omitted.)

Milton's distinction between the underlying *conduct*, on the one hand, and the *conviction itself*, on the other, rests on a misunderstanding about what effect *Gallardo* had on conduct-based recidivist sentencing schemes like the Three Strikes law. It has always been the case that "[t]o qualify as a serious felony [or strike], a conviction from another jurisdiction must involve *conduct* that would qualify as a serious felony in California." (*McGee*, *supra*, 38 Cal.4th at p. 691, italics added, quoting *People v. Avery* (2002) 27 Cal.4th 49, 53; see also *Guerrero*, *supra*, 44

Cal.3d at p. 355 [the sentencing enhancement for "'burglary of a residence' . . . refers to *conduct*, not a specific *crime*"].)

Nothing in *Gallardo* altered that; to the contrary, *Gallardo* recognized that serious and violent felony determinations are still conduct based. *Gallardo* stated, "[I]n determining the truth of an alleged prior conviction when . . . the necessary elements of that conviction do not establish that it is a serious felony, and thus subject to California's Three Strikes law, the trier of fact must decide whether the *defendant's conduct*, as demonstrated in the record of the prior conviction, shows that the crime was a serious felony." (*Gallardo*, *supra*, 4 Cal.5th at p. 135, italics added, quoting *McGee*, *supra*, 38 Cal.4th at pp. 714-715 (dis. opn. of Kennard, J.).) "And when the sentencing court must rely on a finding regarding the *defendant's conduct*, but the jury did not necessarily make that finding (or the defendant did not admit to that fact), the defendant's Sixth Amendment rights are violated." (*Ibid.*, italics added.) *Gallardo* repeatedly asserted that a sentencing court may consult the "facts underlying" a defendant's prior conviction, as found by a jury (or as admitted as part of the plea). (See, e.g., *id.* at pp. 124, 136.)

Indeed, Milton's claim that *Gallardo* now requires prosecutors to prove that the "conviction itself" qualifies as a strike makes no sense given *Gallardo*'s holding that a sentencing court may consult facts "that the defendant admitted as the factual basis for a guilty plea." (*Gallardo*, *supra*, 4 Cal.5th at p. 136; see *id.* at p. 138.) It was and remains true that the facts admitted as the basis for a plea can be broader than the

minimum elements of an offense. In sum, it is unreasonable to believe *Gallardo* implicitly implemented a foundational change—eliminating *conduct*-based sentence enhancements—but failed to say so.[13]

Both pre- and post-*Gallardo*, the facts necessary to prove the conduct relevant for a sentencing enhancement remain the same—as does the "record of conviction" from which that determination is to be made. *Gallardo* authorized the current sentencing court to "review the record of conviction in order to determine what facts were necessarily found or admitted in the prior proceeding." (*Gallardo*, *supra*, 4 Cal.5th at p. 138; see also *id.* at p. 139 [authorizing the People on remand to "demonstrate to the trial court, based on the record of the prior plea proceedings, that defendant's guilty plea encompassed a relevant admission about the nature of her crime"].) What *Gallardo* changed is that sentencing courts may no longer resolve disputed facts within that record to find (beyond a reasonable doubt) that the defendant's conduct qualified for enhanced punishment. (*Id.* at pp. 124-125, 130-131, 133-136.)

To be sure, by prohibiting consideration of facts that were not necessarily found by the jury or admitted by the defendant, *Gallardo* effectively narrowed the scope of relevant evidence from within the record of conviction that could support an enhanced

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[13] An example of an elements-based sentencing scheme is the ACCA, which was at issue in *Descamps* and *Mathis*, *supra*, 136 S.Ct. at page 2251 ("All that counts under the [ACCA] . . . are 'the elements of the statute of conviction'").

sentence. But as the dissenting justice in *In re Brown* aptly wrote, that prohibition "does not alter the elements of any offense or the range of conduct or class of persons that the law punishes. Rather, it alters the procedure by which sentencing judges determine which persons are in which classes." (*Brown*, *supra*, 45 Cal.App.5th at p. 729 (dis. opn. of Menetrez, J.).) The evidentiary limitations on the sentencing court are mere ancillary consequences of ensuring that a jury has made the relevant factual findings.

Indeed, it is technically imprecise to view *Gallardo* as imposing a rule regulating what evidence is available to sentencing courts, as the *Milton* court sometimes suggested. (See *Milton*, *supra*, 42 Cal.App.5th at p. 994.) Under *Gallardo*, trial courts are not permitted to do *any* fact-finding; they may only identify which facts a jury found or the defendant admitted. (*Gallardo*, *supra*, 4 Cal.5th at pp. 134, 136, 138.) But even considering the *Gallardo* rule from that perspective would not convert it into a substantive rule, as it only regulated the manner in which a fact is determined. *Whorton*, *supra*, 549 U.S. at page 417, is instructive. There, the high court found it "clear and undisputed" that *Crawford v. Washington*, (2004) 541 U.S. 36, was a procedural rule despite its Sixth Amendment holding that proscribed admission of all testimonial hearsay. This was true despite the fact that applying *Crawford* would narrow the "class" of persons subject to criminal punishment, effectively immunizing those whose guilt was premised on testimonial

hearsay. Like *Gallardo*, the new rule was procedural because the definition and scope of criminal conduct remained the same.

Finally, the three cases Milton relies upon to show *Gallardo* is substantive are inapposite. In *Trujeque*, *supra*, 61 Cal.4th 227, this Court considered whether the decision in *Breed v. Jones* (1975) 421 U.S. 519, was retroactive. *Breed* held that trying a defendant as an adult for the same offense for which adjudication had commenced in juvenile court violated double jeopardy. (*Trujeque*, *supra*, at p. 248.) The rule was substantive, as the result was to prevent certain defendants from ever facing trial. (*Id*. at pp. 250-251.)

In other words, *Trujeque* found that *Breed* redefined the class of people who could be punished—those who had received a juvenile adjudication were no longer eligible for adult adjudication. In contrast, the class of persons who can be punished after *Gallardo* remains the same: those whose prior felony convictions included conduct that qualified the felonies as serious or violent. (*Milton*, *supra*, 42 Cal.App.5th at p. 994 [distinguishing *Trujeque*]; *Scott*, *supra*, 49 Cal.App.5th at p. 1016 fn. 3.)

Milton claims *Gallardo* is like *Breed* because he and others would receive relief under the rule, thus creating a "class" of individuals who could no longer be punished. (OBM 24, 49.) But that kind of "class" creation is inherent in almost all procedural rules. (*Welch*, *supra*, 136 S.Ct. at pp. 1264-1265 [procedural rules "do not produce a class of persons convicted of conduct the law does not make criminal, *but merely raise the possibility that*

someone convicted with use of the invalidated procedure might have been acquitted otherwise," italics added].) For example, those convicted pre-*Ring* could argue that the jury never made findings which aggravated their sentences, thus creating a "class" of individuals who could not be punished. But that did not render the rule substantive. (See *Schriro*, *supra*, 542 U.S. at p. 353.) "[A] procedural rule does not become substantive merely by being rewritten as a rule about the class of persons to whom the procedural rule applies." (*Brown*, *supra*, 45 Cal.App.5th at p. 729 (dis. opn. of Menetrez, J.); see *Milton*, *supra*, 42 Cal.App.5th at p. 993.)

Milton's reliance on *Montgomery v. Louisiana* (2016) 136 S.Ct. 718 (OBM 48-50) is misplaced because *Montgomery* considered the retroactivity of *Miller v. Alabama* (2012) 567 U.S. 460, which plainly and overtly exempted a class of persons—almost all juveniles—from a specific punishment—life in prison without parole. (*Montgomery*, *supra*, at p. 734.) In contrast, Milton cannot define the *Gallardo*-created class except in a circular fashion as those persons whose record of prior conviction now fails to satisfy the newly-recognized procedure under the Sixth Amendment's jury trial guarantee.

Finally, Milton relies on *Allen v. Ives* (9th Cir. 2020) 950 F.3d 1184, at page 1191, which found *Descamps* and *Mathis* applied retroactively because the rules were substantive. (OBM 24-25, 48.) The People respectfully submit that *Allen* was wrongly decided. *Allen*'s holding is conclusory; in a single paragraph that did not include a thorough *Teague*-based analysis,

Allen found that those cases announced substantive rules because they altered the "range of conduct" that the law punished. (*Allen*, *supra*, 950 F.3d at p. 1192.) As dissenting Circuit Judge Callahan recognized, *Descamps* and *Mathis* "regulate[d] only the manner of determining a defendant's qualification for a sentencing enhancement." (*Allen*, *supra*, 950 F.3d at p. 1192 (dis. opn. of Callahan, J.), quotation marks omitted; see *Muhammad v. Wilson* (4th Cir. 2017) 715 Fed. Appx. 251, 252-253 (unpub. opn.) [finding *Descamps* and *Mathis* are procedural as they clarified earlier approaches to the ACCA].)[14]

Indeed, as the dissenting judge explained, the majority's primary authority, *Welch*, *supra*, 136 S.Ct. 1257, decisively undercut the majority's reasoning. *Welch* concerned whether *Johnson v. U.S.* (2015) 135 S.Ct. 2551—which ruled that the residual clause of the ACCA was unconstitutionally vague—announced a new substantive rule. (*Allen*, *supra*, 950 F.3d at p. 1198 (dis. opn. of Callahan, J.) [citing *Welch*, *supra*, at p. 1268].) *Johnson* changed the substantive reach of the ACCA by "altering the range of conduct or the class of persons that the [Act] punishes." (*Welch*, *supra*, at p. 1265, quotation marks omitted.) "*Johnson* had nothing to do with the range of permissible methods a court might use to determine [eligibility for an enhanced sentence]. It did not, for example, *allocate*

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[14] The *Allen* holding is also extremely difficult to square with the Ninth Circuit's holding that neither *Apprendi* nor *Ring* satisfy *Teague*'s requirements for retroactive application. (See *United States v. Sanchez–Cervantes* (9th Cir. 2002) 282 F.3d 664, 669; *Ybarra v. Filson* (9th Cir. 2017) 869 F.3d 1016, 1032.)

decisionmaking authority between judge and jury, or regulate the evidence that the court could consider in making its decision." (*Ibid.*, italics added, citations omitted.) In stark contrast, *Descamps*, *Mathis*, and *Gallardo did* reallocate decision-making between judge and jury.

3. *Gallardo* is not a watershed rule of criminal procedure

Teague's second exception—that "watershed rules of criminal procedure" apply retroactively—also does not apply here. To qualify as a "watershed rule," a new rule must (1) be necessary to prevent an "impermissibly large risk" of an inaccurate conviction, and (2) must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." (*Whorton*, *supra*, 549 U.S. at p. 418, quoting *Schriro*, *supra*, 542 U.S. at p. 356.) The exception only applies "to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." (*Graham v. Collins* (1993) 506 U.S. 461, 478, quotation marks and citations omitted.) The exception for watershed rules is therefore "extremely narrow," and post-*Teague*, the United States Supreme Court has rejected every claim that a new rule qualified as a watershed rule. (*Whorton*, *supra*, at pp. 417-418.)

a. *Gallardo* replaced a fair and reliable sentencing procedure to vindicate defendants' right to a jury trial

The plain language of *Gallardo* demonstrates it is not a rule that is necessary to prevent an impermissibly large risk of inaccurate conviction or unmerited punishment. This is

especially clear as the procedure *Gallardo* replaced not only demanded proof beyond a reasonable doubt, but was sanctioned by this and other courts, without any reservation as to reliability.

Starting again with the opinion's text: *Gallardo* made clear its rule was required by the Sixth Amendment jury trial guarantee. (*Gallardo*, *supra*, 4 Cal.5th at pp. 124, 134, 135-138; see Arg. I(C)(2).) It never stated it was motivated by concerns for increased reliability. (See *Haden*, *supra*, 49 Cal.App.5th at p. 1110 (con. opn. of Brown, J.) ["*Gallardo*'s laser focus was on vindication of the jury trial right, without a further nod to any underlying motivation relating to reliability"].) Milton does not explain why, if the *Gallardo* opinion was motivated by reliability, it never discussed reliability. (*Ibid.* (con. opn. of Brown, J.) ["the word 'reliability' and its cognates appear nowhere in the majority opinion"].)

Nor does Justice Toucher's concurrence *In re Haden* provide a convincing interpretation of *Gallardo* as being implicitly motivated by reliability concerns. Justice Toucher cited to *Gallardo*'s discussion of the sentencing court's reliance on the preliminary hearing transcript to support its finding that the defendant committed the prior felony by using a knife. But when *Gallardo* pointed out that "'[a] sentencing court reviewing that preliminary [hearing] transcript has no way of knowing whether a jury would have credited the victim's testimony had the case gone to trial'" and "'can only guess at whether the defendant's guilty plea had acknowledged the relevant conduct,'" it was *not* identifying any inherent lack of reliability in judicial fact-finding.

(*Haden*, *supra*, 49 Cal.App.5th at p. 1104 (con. opn. of Toucher, J.), quoting *Gallardo*, *supra*, 4 Cal.5th at p. 137.)

Rather, *Gallardo* was recognizing that the preliminary hearing transcript could not establish what the Sixth Amendment required—that the jury's findings (or the defendant's admissions) established the factual predicate for enhanced, recidivist sentencing. (*Gallardo*, *supra*, at p. 137 ["By relying on the preliminary hearing . . . the sentencing court engaged in an impermissible inquiry. . . . Because the relevant facts *were neither found by a jury nor admitted by defendant* when entering her guilty plea, they could not serve as the basis for defendant's increased sentence here"], italics added; see *Haden*, *supra*, at p. 1115 (conc. opn. of Brown, J.).)

Milton fails to identify any authority for the proposition that the pre-*Gallardo* procedure was replaced because it was unreliable, rather than because it was incompatible with the Sixth Amendment. Both before and after *Gallardo*, the prosecution had to plead and prove serious or violent felony convictions and establish them beyond a reasonable doubt. (*Frierson*, *supra*, 4 Cal.5th at p. 233.) This ensured the reliability of judicial fact-finding under *McGee*. (*Milton*, *supra*, 42 Cal.App.5th at pp. 995-996.) As *McGee* reasoned, 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.) *McGee* was not alone in sanctioning that procedure; numerous other courts also embraced the broad

Almendarez-Torres exception. (*McGee*, *supra*, 38 Cal.4th at pp. 702-708.) And even this case exemplifies that the pre-*Gallardo* fact-finding method was reliable. Here, the court found Milton used a firearm based on the prior sentencing court's uncontested finding in aggravation as to that same fact. Such a procedure can hardly be called unreliable or arbitrary.

Indeed, *Schriro*, *supra*, 542 U.S. 348, makes it clear that the Sixth Amendment justification for eliminating judicial fact-finding is independent of reliability concerns. *Schriro* concluded that the Sixth Amendment-based *Ring* rule—which held that a sentencing judge sitting without a jury may not find an aggravating circumstance to impose death—was not necessary to prevent inaccurate convictions. (*Id*. at p. 355.) The Court was not persuaded that juries are more reliable factfinders than judges. (*Id.* at p. 356.) The Court noted that a jury's accuracy may suffer from confusion over legal standards, emotional influence, or a lack of experience. Thus, "for every argument why juries are more accurate factfinders, there is another why they are less accurate." (*Ibid*.)

Similarly, *DeStefano v. Woods* (1968) 392 U.S. 631, analyzed the retroactivity of rules that expanded the jury trial guarantee to serious felonies, and found they should be applied prospectively. (*Id*. at pp. 633-635, overruled on another ground in *Griffith v. Kentucky* (1987) 479 U.S. 314, 321.) *DeStefano* reasoned that while jury trials valuably "prevent arbitrariness and repression" by ensuring the public a part in the judicial process, it found nothing inherently unfair to defendants in bench

trials as compared to jury trials. (*Id.* at pp. 633-634; see *Blakely v. Washington* (2004) 542 U.S. 296, 305-306.) Tellingly, in *Johnson*, this Court concluded that *DeStefano* discussed the kind of new procedural rules that did not require full retroactivity. (*Johnson*, *supra*, 3 Cal.3d at p. 412.) "If under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be." (*Schriro*, *supra*, 542 U.S. at pp. 356-357.)

Milton contends that the pre-*Gallardo* method was unreliable because defendants had no incentive in the proceedings leading to a prior conviction to contest facts that were not part of the prior conviction's elements, and was unfair because it punished defendants after they pleaded to lesser offenses. (OBM 28-29.) But this Court rejected those concerns as to the prior method of fact-finding, reasoning that defendants are regularly subject to increased punishment for current convictions based on facts from prior convictions; "the law regularly requires persons to suffer the consequences of their actions, even though they had not or could not foresee those consequences." (*Guerrero*, *supra*, 44 Cal.3d at pp. 355-356 [calling the prior method "fair and reasonable"].) Indeed, *Gallardo* does not even address these alleged deficiencies in reliability. A sentencing court may still consider all the facts a defendant admitted as a basis for his plea when enhancing a sentence with conduct from a prior conviction. (*Gallardo*, *supra*, 4 Cal.5th at pp. 136-139.)

Milton also argues that *Gallardo* is critical to accuracy because it creates a complete defense to his conviction. (OBM 30.)

Not so. *Johnson*, *supra*, 3 Cal.3d at pages 415 through 416, explained what is meant by a decision that provides a new and complete defense. *Johnson* found *Leary v. United States* (1969) 395 U.S. 6, was retroactive because *Leary* held a defendant's assertion of the Fifth Amendment privilege against self-incrimination was a complete defense to a prosecution under a federal criminal statute which had been used to enhance a defendant's sentence. (*Johnson*, *supra*, at pp. 415-416.) In essence, *Leary* invalidated a statute that required persons to identify themselves as illegally possessing marijuana in order to comply with the statute. (*Id.* at p. 409.) That is, *Leary* eliminated an entire class of criminal conduct: "[E]ven though Congress may have the power to punish mere possession of marijuana, its lack of power to do so under the statutory scheme involved in *Leary* renders Leary just as innocent as a person convicted under a constitutionally overbroad statute in the First Amendment area, and just as innocent . . . as a person convicted by evidence which is insufficient as a matter of law." (*Id.* at p. 416.)

Unlike *Leary*, post-*Gallardo*, a California felon who previously committed a felony by personally using a firearm is still subject to enhanced punishment. The mere absence of a prior jury verdict or admission establishing such conduct would not render that defendant "innocent" in the sense *Johnson* meant, as the same conduct remains subject to enhanced punishment.

Finally, the mere fact that *Gallardo*'s elimination of judicial fact-finding might result in fewer recidivist sentencing

enhancements does not mean that it conduces to increased reliability, much less that the rule was necessary to cure an impermissibly large risk of inaccurate conviction. *Whorton*, *supra*, 549 U.S. 406, is again instructive. *Whorton* found *Crawford*, *supra*, 541 U.S. 36, was not necessary to cure an impermissible risk of improper conviction. *Whorton* explained that *Crawford* overruled old methods of admitting hearsay because they violated the confrontation clause, not because the *Crawford* rule was necessary to improve the accuracy of fact-finding. (*Whorton*, *supra*, at pp. 419-420.) Indeed, under the new *Crawford* rule, while testimonial hearsay was now excluded, nontestimonial hearsay no longer had any Sixth Amendment protection. *Whorton* concluded that "it is thus unclear whether *Crawford*, on the whole, decreased or increased the number of reliable out-of-court statements." (*Id.* at p. 420.)

Similarly, *Gallardo* was intended to satisfy the Sixth Amendment, not to address the accuracy of fact-finding. And like *Crawford*, *Gallardo* makes changes that will not necessarily improve accuracy. For instance, under *McGee*, the sentencing court was permitted to review sworn testimony, or, as in this case, uncontested findings in aggravation. Under *Gallardo*, a sentencing court cannot look to this evidence—or any evidence, no matter how reliable—unless it was found by the jury or admitted by the defendant. It is far from clear that *Gallardo* will significantly and consistently improve the accuracy of fact-finding. (See *Brown*, *supra*, 45 Cal.App.5th at p. 729 (dis. opn. of Menetrez, J.) ["[T]he effect of *Gallardo*'s limitation on the

evidence available to sentencing judges might actually be to increase the risk of erroneous factfinding at sentencing, because a sentencing judge might be prevented from determining that a prior conviction was a strike when, in fact, it was"].)

b. *Gallardo* does not alter bedrock criminal procedure

The rule announced in *Gallardo* also did not alter bedrock procedural elements essential to the fairness of criminal proceedings. To qualify as a bedrock procedural rule, "a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding. In applying this requirement, we . . . have looked to the example of [*Gideon v. Wainwright* (1963) 372 U.S. 335] and 'we have not hesitated to hold that less sweeping and fundamental rules' do not qualify." (*Whorton*, *supra*, 549 U.S. at p. 421.)

Relevant here, multiple courts have found that *Apprendi* is not a bedrock principle of criminal procedure. (*United States v. Sanchez-Cervantes*, *supra*, 282 F.3d at p. 669; *United States v. Sanders* (4th Cir. 2001) 247 F.3d 139, 150; *United States v. Mos*s (8th Cir. 2001) 252 F.3d 993, 999-1000; *McCoy v. United States* (11th Cir. 2001) 266 F.3d 1245, 1258.) *Sanchez-Cervantes* noted that *Apprendi* did not apply to most defendants and reasoned that the convictions themselves were found beyond a reasonable doubt. (*Sanchez-Cervantes*, *supra*, at p. 669.) Those statements are equally true about *Gallardo*. Another court recognized *Apprendi* is not a bedrock principle because "one can easily envision a system of 'ordered liberty' in which certain elements of

a crime can or must be proved to a judge, not to the jury." (*Mos*s, *supra*, at p. 999.) So too with *Gallardo*—in fact, this Court did envision such a system when it approved *McGee*.

If *Apprendi* was not a bedrock principle, then a fortiori, the less expansive rule in *Gallardo* must also not be a bedrock principle. (*Milton*, *supra*, 42 Cal.App.5th at p. 996; see also *Haden*, *supra*, 49 Cal.App.5th at p. 1098; *Scott*, *supra*, 49 Cal.App.5th at p. 1017.)

Even when *Gallardo* is imprecisely viewed as an evidentiary rule, it too is not a bedrock principle. Rules that severely alter what evidence is admissible to the fact-finder have not been found to be bedrock principles of criminal procedure. (*Whorton*, *supra*, 549 U.S. at p. 420 [the *Crawford* rule did not alter the understanding of bedrock procedural elements as it did not have the "primacy" and "centrality" of the *Gideon* rule].)

D. *Gallardo* is not retroactive under *Johnson*, as it is a new procedural rule that does not significantly impact fact-finding reliability

1. *Gallardo* created a new procedural rule

The *Johnson* standard requires a similar threshold inquiry—does the decision establish a new rule of law? (*Guerra*, *supra*, 37 Cal.3d at p. 399.) If it does not create a new rule, no question of retroactivity arises. (*Ibid.*) A decision establishes a "new rule" when it "(1) explicitly overrules a precedent of this court [citation], or (2) disapproves a practice impliedly sanctioned by prior decisions of this court [citation], or (3) disapproves a longstanding and widespread practice expressly approved by a near-unanimous body of lower-court authorities." (*Id.* at p. 401.)

As Milton concedes, *Gallardo* is a new rule under *Johnson* because it specifically overruled *McGee* insofar as it suggested that a trial court was permitted to enhance a sentence by finding facts underlying a prior conviction. (OBM 23; *Gallardo*, *supra*, 4 Cal.5th at pp. 125, 136; see *Haden*, *supra*, 49 Cal.App.5th at p. 1099; *Scott*, *supra*, 49 Cal.App.5th at p. 1016; *Brown*, *supra*, 45 Cal.App.5th at p. 716; *Milton*, *supra*, 42 Cal.App.5th at p. 997.)

California courts must next ask whether the new rule is procedural or substantive. Substantive new rules will generally be given retroactive effect. (See *Martinez*, *supra*, 3 Cal.5th at pp. 1222-1223; *Scott*, *supra*, 49 Cal.App.5th at p. 1016; *Brown*, *supra*, 45 Cal.App.5th at p. 716.) Accordingly, a rule only reaches the three-factor test under *Johnson* when the rule is both new and procedural. (*In re Lopez* (2016) 246 Cal.App.4th 350, 359 fn. 2; see *Martinez*, *supra*, 3 Cal.5th at pp. 1222-1223 [citing *Lopez* approvingly]; *Trujeque*, *supra*, 61 Cal.4th at pp. 249-251.)

For the same reasons provided in the above *Teague* analysis (Arg. I(C)(2)), *Gallardo* is a procedural rule because it reallocated the fact-finding responsibility from the judge to the jury; thus, it only changed the procedure for determining guilt. (See *Schriro*, *supra*, 542 U.S. at p. 353 [rule that only a jury may make an aggravating factual finding was procedural].)

2. *Gallardo*'s purpose was to extend defendants' constitutional jury trial rights, not to improve fact-finding

Under *Johnson*, 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.'" (*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 on former law, and regardless of the burden which retroactivity will place upon the judicial system." (*Id*. at p. 413; see also *Guerra*, *supra*, 37 Cal.3d at p. 402.) The final two factors are typically considered only when it is a "close" question whether retroactivity applies after considering the first factor. (*Johnson*, *supra*, at p. 410.) As discussed above, although this formulation might suggest that the values of preserving finality and promoting consistent judgments are secondary, due respect for those values is inherent in *Johnson* and this Court's habeas jurisprudence. (See Arg. I(B).)

The first, most critical factor in the *Johnson* test militates toward non-retroactivity. For the reasons discussed under the *Teague* analysis (Arg. I(C)(3)(a)), *Gallardo* was not intended to increase the reliability of fact-finding. To briefly summarize: *Gallardo* repeatedly announced its intention was to protect the Sixth Amendment right to a jury trial by reassigning the fact-finding responsibility from the judge to the jury. (*Gallardo*, *supra*, 4 Cal.5th at pp. 124, 134, 135-138.) Rules that reallocate fact-finding from the judge to jury have not been found to be essential to an accurate determination. (*See DeStefano*, *supra*, 392 U.S. at pp. 633-635; *Schriro*, *supra*, 542 U.S. at p. 358; see

also *Haden*, *supra*, 49 Cal.App.5th at p. 1099; *Scott*, *supra*, 49 Cal.App.5th at p. 1017; *Milton*, *supra*, 42 Cal.App.5th at p. 998.) Moreover, the prior method of determining qualifying convictions was approved by this Court in *McGee* because it was a fair and reliable procedure that required a finding beyond a reasonable doubt. *Gallardo* did not overrule the *McGee* procedure because it was unreliable, but because the Sixth Amendment demands a jury make those determinations.

Even *Brown*, *supra*, 45 Cal.App.5th 699, agreed with *Milton*'s conclusion that *Gallardo* established a new procedural rule. (*Id.* at p. 721.) But the court found that, under *Johnson*, the primary purpose of the *Gallardo* rule was to promote reliable determinations by precluding sentencing courts "from making disputed factual findings regarding the defendant's conduct underlying a prior conviction, based on facts outside the record of conviction or facts that were not admitted by the defendant during his plea or found true by the jury." (*Id.* at p. 718.) It "goes to the integrity of the factfinding process when the court determines whether a prior conviction qualifies as a strike," and shows that *Gallardo*'s "primary purpose is to promote reliable determinations." (*Ibid.*)

As shown above, this reasoning is mistaken on several grounds. First, under pre-*Gallardo* precedent, sentencing courts were also limited to the record of conviction. (*McGee*, *supra*, 38 Cal.4th at p. 691.) Second, and more fundamentally, *Brown* does not acknowledge that sentencing judges made their findings pre-*Gallardo* under a beyond a reasonable doubt standard. Indeed,

Gallardo only found error with the sentencing court's reliance on the record of conviction in that case because that record did not show what the jury found or the defendant admitted, as required by the Sixth Amendment. As this case exemplifies, the pre-*Gallardo* fact-finding method could hardly be characterized as inherently unreliable: Here, the court found Milton used a firearm based on the prior sentencing court's uncontested finding in aggravation as to that same fact. On the other hand, application of *Gallardo* results in accepting a prior jury's verdict at face value, without any inquiry as to reliability.

Brown also misapplied the *Johnson* three-factor test. *Brown* stated as follows when distinguishing *Milton*: "The court in *Milton* reasoned (1) *Gallardo* did not vindicate a right essential to the reliability of the factfinding process and (2) applying *Gallardo* retroactively would be disruptive. *We are not persuaded that these two grounds justify depriving defendants of retroactive application of Gallardo.*" (*Brown*, *supra*, 45 Cal.App.5th at pp. 721-722, italics added.) But those grounds encompassed all three factors under *Johnson*; since they both militate toward non-retroactivity, that ends the debate. *Brown* further misapplied the *Johnson* factors when it agreed that *Milton*'s two grounds are likely correct, but reasoned that "these factors do not outweigh a defendant's constitutional right to a jury determination of facts upon which a strike is based." (*Ibid*.) But the involvement of an important constitutional right in a new procedural rule *does not* make the rule retroactive—take *Crawford* or *DeStefano* for

example—and does not override *Johnson*'s three factors when they militate toward non-retroactivity.

The Justice Toucher concurrence in *In re Haden* provides an interesting, though ultimately unpersuasive, argument that *Gallardo* vindicated a right that is essential to fact-finding. (*Haden*, *supra*, 49 Cal.App.5th at p. 1104 (con. opn. of Toucher, J.).) Justice Toucher referred to Justice Chin's concurring and dissenting position in *Gallardo* that any Sixth Amendment error could be cured by remanding the case to allow a jury to determine if the conduct qualified as a serious or violent felony based on the record of conviction. (*Ibid.*; see *Gallardo*, *supra*, 4 Cal.5th at pp. 138-139.) The majority rejected that remedy, finding it did not include "the procedural safeguards, such as the Sixth Amendment right to cross-examine one's accusers, that normally apply in criminal proceedings." (*Gallardo*, *supra*, at pp. 138-139.) From this reasoning, Justice Toucher inferred that *Gallardo*'s holding must have been intended to make proceedings more accurate. (*Haden*, *supra*, at p. 1104 (con. opn. of Toucher, J.).)

Justice Toucher's inference is mistaken. Far from evincing a concern with enhancing reliability, *Gallardo* justified its rejection of Justice Chin's remedy because it raised "constitutional concerns under *Apprendi*," in line with *Gallardo*'s explicit goal to vindicate the jury trial right. (*Gallardo*, *supra*, 4 Cal.5th at p. 138.) That is, the majority's disagreement with Justice Chin concerned whether his proposed remedy would result in other Sixth Amendment violations, not with whether the proposed remedy would insure or promote reliability. In any event, it does

not follow that, because a particular remedy might raise reliability concerns, *Gallardo*'s core holding must also concern reliability.

Milton compares this case to *In re Lucero* (2011) 200 Cal.App.4th 38 (OBM 29), where a new rule overruled a theory of murder on which the jury was instructed (*id*. at p. 41). But that rule was clearly substantive as it altered the very definition of murder. (See *Milton*, *supra*, 42 Cal.App.5th at p. 999, fn. 11.) Milton's reliance on *Mutch* (OBM 29) is also unhelpful. *Mutch* considered the retroactivity of a rule that reinterpreted a statutory element of kidnapping. (*People v. Mutch* (1971) 4 Cal.3d 389, 395-396.) *Mutch* therefore announced an *old* rule (see *Woosley*, *supra*, 3 Cal.4th at p. 794), or at least a substantive rule, as it altered kidnapping's definition (*Mutch*, *supra*, at pp. 395-396).

3. Applying *Gallardo* retroactively would cause significant disruption

The other two *Johnson* factors—the extent of the reliance by law enforcement authorities on the old standards, and the effect on the administration of justice—also weigh in favor of finding that *Gallardo* is not retroactive. (*Johnson*, *supra*, 3 Cal.3d at p. 410.) Before *Gallardo*, prosecutors and courts typically and reasonably relied on *Guerrero* and *McGee* to justify having the trial court determine whether a prior conviction qualified for increased punishment under a sentencing statute. (See *Gallardo*, *supra*, 4 Cal.5th at pp. 129-130.) If this Court finds *Gallardo* to be retroactive, any criminal whose sentence was increased based on out-of-state convictions that did not conform to the elements of

a California strike (like Milton), or any criminal who was convicted of a California crime whose statutory definition swept more broadly than the definition of "serious felony" (like *Gallardo*), would be entitled to a new hearing on the prior conviction allegations. (See *Gallardo*, *supra*, 4 Cal.5th at p. 137; *Brown*, *supra*, 45 Cal.App.5th at p. 731 (dis. opn. of Menetrez, J.) ["In the 11 years from *McGee* to *Gallardo*, California lawyers and lower courts universally and reasonably relied on *McGee*"].)

Gallardo's retroactivity would therefore have a costly and disruptive effect on the administration of justice. Courts and parties would have to reopen numerous cases, conduct new hearings, and utilize significant resources on finding old documentation concerning already completed cases. (See *Gallardo*, *supra*, 4 Cal.5th at pp. 137-138 [courts may consider plea stipulations and documents to determine what facts the jury necessarily found].) As this Court explained, "A rule providing for the postappeal review of legal issues that requires an appellate court to reopen factual issues already sifted, evaluated, and decided at trial both poses a significant threat to the legal repose of such judgments, and threatens to consume scarce judicial resources needlessly. In such cases, the state's interest in the finality of its judgments is strong." (*Harris*, *supra*, 5 Cal.4th at pp. 840-841.) Indeed, in this context, it is highly likely that many sentences would be invalidated due to the inability to locate the necessary conviction-related records (many of which will have been destroyed in the normal course of business), and without any reason to believe the prisoner was actually innocent

of the criminal conduct that qualified him for an enhanced sentence.

For these reasons, *Johnson* does not compel retroactive application of *Gallardo* to Milton's final judgment.

E. *Gallardo* is not retroactive under the unauthorized sentence exception to procedural default

Finally, Milton, supported by the majority in *In re Brown*, asserts that *Gallardo* applies retroactively because an unauthorized sentence may be corrected at any time. (OBM 38-40; *Brown*, *supra*, 45 Cal.App.5th at p. 715.) That argument misunderstands the purpose of the "unauthorized sentence" line of precedent, which applies to determine whether a defendant can overcome a procedural bar; it is not a stand-alone, alternative retroactivity doctrine to *Teague* or *Johnson*.

As relevant to collateral review, *People v. Scott* (1994) 9 Cal.4th 331, at page 354, explained: "The 'unauthorized sentence' principle . . . has been invoked to determine whether claims previously rejected or never raised are procedurally barred on habeas corpus. (*In re Harris* (1993) 5 Cal.4th 813, 839. . . .)" As this Court has recognized, "where a habeas corpus petitioner raises a legitimate claim that the trial court acted in excess of its jurisdiction, the *Waltreus* rule[15] will not operate as a bar to a full airing of the grievance in a collateral proceeding." (*Harris*, *supra*, 5 Cal.4th p. 840.) Although a change in the law affecting the petitioner is one of the potential bases for excusing a procedural

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[15] *In re Waltreus* (1965) 62 Cal.2d 218, 225.

default, this Court has made it clear that establishing full retroactivity is a prerequisite to obtaining collateral review under the unauthorized sentence doctrine. (*Martinez*, *supra*, 3 Cal.5th at p. 1222; see *Brown*, *supra*, 45 Cal.App.5th at p. 731 (dis. opn. of Menetrez, J.) ["We cannot apply *Gallardo* retroactively to render the sentence legally unauthorized *and then infer from that lack of legal authorization that Gallardo must be retroactive*," italics in original].) And, of course, that stands to reason. Milton's sentence is only unauthorized if *Gallardo* is fully retroactive.

F. If this Court finds that *Gallardo* is retroactive, the remedy is to remand to permit the trial court to determine whether Milton admitted personal firearm use

If this Court determines *Gallardo* is retroactive, "the appropriate course is to remand to permit the trial court to make the relevant determinations about what facts defendant admitted in entering h[is] plea" and what facts were necessarily found by the jury. (*Gallardo*, *supra*, 4 Cal.5th at p. 138.) "Such a procedure fully reconciles existing precedent with the requirements of the Sixth Amendment." (*Ibid.*)

The reviewable record of conviction includes the factual basis for a guilty plea (*Gallardo*, *supra*, 4 Cal.5th at pp. 136, 138) and documents that help identify what facts a jury necessarily found, such as the indictment and jury instructions (*id.* at pp. 137, 138). A sentencing court is not constrained to solely consider the elements; it "may identify those facts it is 'sure the jury . . . found' in rendering its guilty verdict." (*Id.* at p. 134.)

Remand under these *Gallardo* principles would be warranted here. First, Milton pleaded guilty to the simple robbery conviction, but it is not clear what facts he stipulated to, as the transcript of the stipulation was not in the record below. (1CT 143-144.) Although the sentencing court recounted some of the stipulated facts, we do not know if these statements were a summary or incomplete. It is possible that those stipulated facts will demonstrate firearm use or some other fact that qualifies his conviction as serious or violent. (*Gallardo*, *supra*, 4 Cal.5th at p. 136.)

Second, to the extent the armed robbery strike is at issue, it is proper to examine the record of conviction for documents that demonstrate what facts the jury necessarily found. (*Gallardo*, *supra*, 4 Cal.5th at p. 138.) These documents include the information, jury instructions, verdict forms, and judgment of conviction. Because many of these documents, including the jury instructions and verdict forms, were not in the record below, remand would be warranted to allow the trial court to examine them.

Milton's arguments against remand depend on an unestablished assumption—that he did not admit any facts in his plea that would qualify him for a strike, and that the prior jury did not find any such facts. (OBM 53-56.) As shown above, the Illinois sentencing hearing transcript strongly suggests that Milton admitted personal firearm use as part of his plea agreement. Indeed, the Illinois sentencing court twice found that Milton threatened his victims with a gun in committing both

robberies. (1CT 147-148.) *Gallardo* permits a sentencing court to identify facts that the fact-finder must have found in convicting Milton. (*Gallardo*, *supra*, 4 Cal.5th at p. 134.)

As a separate matter from retroactivity, Milton actually admitted the armed robbery conviction was a strike, such that, even if *Gallardo* was retroactive, it would not apply to that strike.[16] A guilty plea admits every element of the offense charged and is a conclusive admission of guilt. It waives any right to raise questions about the evidence, including its sufficiency. (*People v. Turner* (1985) 171 Cal.App.3d 116, 125.) Milton thus waived any argument that the evidence did not establish the armed robbery was a strike.

When admitting the truth of the armed robbery (87CF242) and the simple robbery (87CF241), Milton also admitted that the armed robbery conviction was a strike. He only reserved the right to argue that the *simple robbery* conviction did not qualify as a strike. (1CT 75; 2RT 335-337.) After that hearing, the

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[16] The *Milton* court noted that Milton "admitted the armed robbery conviction was a serious felony under section 667, subdivision (a)(1)." (*Milton*, *supra*, 42 Cal.App.5th at p. 984, fn. 3.) The issue did not arise on direct appeal, as there Milton only argued his simple robbery conviction was not a strike.

While the People did not identify this fact below, the issue is properly before this Court under California Rules of Court, rule 8.516(b). (See also *People v. Wright* (2006) 40 Cal.4th 81, 99, fn. 10 [discussing former rule 29(b)(1)].) In the Opening Brief, Milton argues that the sentencing court erred under *Gallardo* by finding his armed robbery was a strike. (OBM 56.) Whether that is true is thus "raised or fairly included" in this case. (Cal. Rules of Court, rule 8.516(b).)

parties sometimes conflated the two convictions, referring to the need to prove both of them were strikes. But, as demonstrated below, both parties and the trial court understood that the only issue was whether the *simple robbery* was a strike.

At a hearing after Milton admitted the convictions, the People mentioned that the court only needed to decide if one of the convictions was a strike. Defense counsel did not disagree. (2RT 343.)

The People's sentencing brief asked the court to find both convictions were strikes (1CT 78), but also concluded by asking the court to only find the simple robbery conviction was a strike (1CT 81). In defense counsel's sentencing brief, he alleged both convictions were not strikes, but concentrated his argument only on the simple robbery.[17] (1CT 82-83.) The People's reply brief exclusively discussed the simple robbery, however, it ended with a request that both convictions be found to be strikes. (1CT 86-89.)

At the hearing on the priors, the court stated that it had read all the provided materials "as to the one—one of the robbery priors that is alleged or it's argued by the People that the defendant was armed, thus, making that a strike." (2RT 350.) The parties' arguments exclusively concerned whether the simple robbery offense was a strike. (2RT 351-358.) The trial court

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[17] In the brief, defense counsel identified the simple robbery (87CF241) offense by the wrong case number (87CF242). However, it is clear he was discussing the simple robbery. (1CT 82-83.)

found that Milton used a gun in both robberies and found them to be strikes. (2RT 358.) To the extent the court found the armed robbery was a strike based on the Illinois documents, that finding was unnecessary and duplicative, since Milton had already admitted that the prior conviction qualified as a strike and it does not appear that Milton ever recanted that admission. Milton therefore waived his right to contest the armed robbery strike. And, in any event, even if *Gallardo* is retroactive, it does not apply to the armed robbery strike as the strike was supported by an admission, not by pre-*Gallardo* fact-finding.

CONCLUSION

Gallardo does not apply retroactively to final judgments. It is a new, procedural rule that was intended to ensure a defendant's Sixth Amendment right to a jury trial by transferring the fact-finding responsibility from the judge to the jury. The opinion never intimated any concern with improving the accuracy of the fact-finding process. And, as a practical matter, it is far from clear that the rule will result in substantially more accurate fact-finding; juries are not appreciably better fact-finders than judges and the prior method was already reliable and demanded proof beyond a reasonable doubt.

Dated: August 28, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Answer Brief of Merits uses a 13-point Century Schoolbook font and contains 13,908 words.

Dated: August 28, 2020

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

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

I declare:

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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Sherri R. Carter, Clerk of the Court
Los Angeles County Superior Court
Case Records Manager
111 North Hill Street
Los Angeles, CA 90012

Service via U.S. Mail

On August 28, 2020, I served the attached ANSWER BRIEF ON THE MERITS by transmitting a true copy via electronic mail to

Brad K. Kaiserman, Esq., Attorney for Petitioner — Service via Truefiling

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 August 28, 2020, at Los Angeles, California.

D. Arciniega
Declarant

Signature

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STATE OF CALIFORNIA
Supreme Court of California

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